US Supreme Court lets anti-gay measure stand

David Walsh
16 October 1998

The US Supreme Court unanimously refused Tuesday to hear a challenge to a Cincinnati charter amendment, adopted in 1993, barring legislation to protect the civil rights of homosexuals. A federal appeals court found the measure constitutional last year.

In May 1996 the high court overturned a similar Colorado measure on the grounds that it deprived gay people of anti-discrimination protection available to every citizen. The court ruled that the state's Amendment 2 amounted to 'a denial of equal protection in the most literal sense.'

Although Tuesday's decision not to hear the challenge was apparently unanimous, three of the justices took the unusual step of explaining their decision. Justices John Paul Stevens, David H. Souter and Ruth Bader Ginzburg argued that since the Cincinnati measure only barred special treatment for gays, not equal treatment, it was not identical to the Colorado amendment and did not amount to the denial of 'the protection of general laws.'

This is largely sophistry. While its advocates presented the Cincinnati amendment simply as an effort to block demands for special privileges, the result of the campaign for the measure's passage was to stigmatize gays, paint them as aggressively pursuing special status and incite hostility toward them.

The battle over what is known as Issue 3 in Cincinnati began in November 1992, when the city council passed a Human Rights Ordinance banning discrimination in employment, housing or public accommodation because of sexual orientation. A coalition of religious fundamentalists and right-wing politicians, Equal Rights Not Special Rights, managed to place Issue 3 on the November 1993 ballot. Voters approved it by 62 percent to 38 percent.

Issue 3 prohibits the local government and its various bodies from enacting any ordinance that 'provides that homosexual, lesbian or bisexual orientation, status, conduct, or relationship constitutes, entitles, or otherwise provides a person with the basis to have any claim of minority or protected status, quota preference or other preferential treatment.'

A group of supporters of gay rights, the Equality Foundation, sued the city within a week following the election. US District Judge Arthur Spiegel first barred the city from enforcing the measure and in 1994 ruled that the amendment was unconstitutionally vague and violated free speech and equal protection rights of homosexuals. In May 1995 the US 6th Circuit Court of Appeals in Cincinnati overturned Spiegel's ruling, declaring that gays were not entitled to specific protection and the measure violated no constitutional rights. Following its ruling against the similar Colorado amendment in 1996, the Supreme Court sent the Cincinnati case back to the 6th Circuit for reconsideration. In 1997 that court again upheld the measure, the decision the high court refused to reverse on Tuesday.

Lawyers for gay rights groups had asserted, 'The consequences of Issue 3 for individual lesbian, gay and bisexual citizens are devastating,' warning that gays would lack protection against discrimination and its costs.

Justice Stevens noted in his comments, 'Sometimes such an order [refusing to hear the appeal] reflects nothing more than a conclusion that a particular case may not constitute an appropriate forum in which to decide a significant issue.'

The opponents of rights for gays, however, had their own interpretation of the decision. Michael Carvin, a lawyer for the anti-gay group, commented that the Colorado amendment had been overturned simply

because it was a state measure. 'I think it sends a clear message to other municipalities and cities that they may enact laws like Issue 3,' he said. 'This was a local decision by a local community. The problem in Romer [the Colorado case] was the state imposing its will on local communities.'

The dissent written by Justice Antonin Scalia, on behalf of William Rehnquist and Clarence Thomas, from the June 1996 decision to send the Cincinnati case to the 6th Circuit lends support to this argument. Scalia wrote that the Cincinnati case differed from the Colorado controversy because it 'involves a determination by what appears to be lowest electoral subunit that it does not wish to accord homosexuals special protection.' He added: 'The consequence of holding this provision [Issue 3] unconstitutional would be that nowhere in the country may the people decide, in democratic fashion, not to accord special protection to homosexuals.'

Following Tuesday's decision the director of the right-wing American Family Association of Kentucky announced plans to introduce a similar measure in Louisville. 'It'll be a big help to Louisville and across the nation,' he said.