Anti-Lesbian and -Gay Right Wing Initiatives: A Strategy for Response

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The increasing visibility and political activism of the lesbian and gay community in this country has sparked a vicious backlash intended to reinforce restrictive notions of social morality and to stifle expressions of lesbian and gay identity. While this backlash has flourished in mainstream institutions, as in the U.S. Senate’s hearings on lifting the military’s ban against lesbians and gay men, it has also been incited on a grassroots level across the country by the Christian right wing, which has involved itself intimately in exploiting popular inclinations and reinforcing discrimination at the federal and local levels.

Local Christian right wing coalitions have circulated petitions to place grassroots initiatives on municipal and state ballots that seek to bar the adoption of anti-discrimination legislation that would protect lesbians and gay men. In many instances, the initiatives seek to go even further, as in Oregon, where the Oregon Citizens Alliance (“OCA”), through the use of state and local initiatives, has sought to mandate that public schools disparage homosexuality and to prohibit the use of public funds for programs that portray lesbians and gay men in a positive light.

To date, more than 40 local and nine statewide initiatives have been proposed to accomplish this goal, predominantly in Western states which have a political tradition of citizen-sponsored initiatives. Both locally and nationally, the lesbian and gay movement has mobilized to defeat these initiatives at the ballot box or to impose political sanctions upon passage. The boycott in Colorado, which was initiated to deter other states from adopting similar legislation and to educate the electorate about the scope of these initiatives, has resulted in a revenue loss to the state of more than $50 million. Even where measures have been defeated at the ballot box, no community has escaped a divisive and traumatic pre-election campaign in which gays, lesbians, and their supporters have been targeted with vitriol and violence.

Legal strategies have deterred and challenged the proliferation of these initiatives. Indeed, every legal challenge to these initiatives to date has succeeded. This article will lay out the strategies and legal arguments relied upon in these cases. Plainly, until the courts solidify the law that these initiatives are unconstitutional, the resources of the lesbian and gay community and its allies in the struggle for civil rights will be sorely strapped.

The critical component of every initiative in this class is a provision intended to repeal existing laws that bar discrimination against lesbians and gay men, and to prohibit governmental entities within the jurisdiction from adopting any similar policy, law, or regulation in the future. While other provisions of an initiative may be legally suspect, this article will focus on the constitutional arguments that may be raised against this central provision. Typically, provisions that restrict expression or require adherence to a particular belief may be easily challenged under the First Amendment or state constitutional counterparts. It is
more difficult to challenge the proponents' argument that the courts should defer to majoritarian legislative will. At the same time, the majoritarian argument is insidious because it rests on disempowerment of lesbians and gays as a class.

**Political and Strategic Considerations**

Any challenge to an antigay initiative must have roots in the lesbian and gay communities. While local communities may not be well organized and may lack certain resources, non-gay allies should recognize that the local and national lesbian and gay communities will suffer directly from failed or poorly considered challenges. Collaboration with these affected communities is imperative.

The message adopted by the anti-initiative movement must also incorporate a gay-positive perspective. Attempts to hide the fact that gay and lesbian people are the targets of these initiatives will inevitably backfire. The right wing has adopted a platform designed to appeal to moderate and swing voters that opposes "special rights" for lesbians and gay men. Every effort must be made to expose the extremist positions of the initiative's proponents and to promote instead a message of fairness and "equal rights." At the same time, organizers must recognize the core connection between the current flood of antigay initiatives and the broader agenda of the right. This agenda, as reflected in the anti-choice and pro-prayer in schools movements, seeks to promote divisions among all minority groups and ultimately replace the separation of church and state with a fundamentalist Christian-driven government structure.

In planning a legal strategy to challenge an antigay initiative, counsel should first focus on the state or local election laws to determine if an initiative has been prepared properly and, in fact, is qualified for the ballot. Many initiatives, particularly in municipalities, are vulnerable because of defects in preparation. Even where a pre-election constitutional challenge may be barred, courts have been willing to strike a defective initiative from the ballot. Concurrently, challengers should evaluate whether the initiative complies with other election law strictures, e.g., the single subject rule or the allocation of powers within a government. Generally, consultation with a local governmental law expert will assist this analysis.

For example, in one of the first challenges to a local antigay initiative, the challengers used relatively arcane municipal law principles to place the burden on the initiative proponents to defend their initiative. In that case, a group known as "Citizens for Responsible Behavior" qualified an antigay initiative for the Riverside, California municipal ballot. State election law required the group to petition the City Council to adopt the initiative outright or to place the initiative on the ballot for the next election. Several cases had held, however, that a court would not force a city council to comply with this obligation, and, as a result, the proponents were forced to seek a writ of mandate when the City Council declined to place the measure on the ballot. In the resulting lawsuit, the challengers were able to intervene on the side of the City, placing the initiative proponents in the disadvantageous posture of attacking the political and legal judgment of the City Council. See Citizens for Responsible Behavior v. City of Riverside. In Colorado, the individual challengers aligned themselves with local municipalities whose ordinances would be repealed by Amendment Two, thereby augmenting the stature of their challenge. The combination of individual and governmental plaintiffs not only enhanced the legal challenge but also demonstrated publicly that the initiative threatened the very structure of government as well as gay and lesbian persons.
Another strategic consideration in bringing an initiative challenge is timing: Should the measure be struck from the ballot or should a challenge be brought only if the measure succeeds? Politically, pre-election challenges may be unpopular and seen as an attempt to thwart the will (or first amendment rights) of the electorate. Additionally, campaigns against such initiatives have been hailed for successfully mobilizing previously dormant communities. On the other hand, such campaigns have exacerbated antigay violence, drained community resources, and polarized voters. Moreover, striking an initiative after it has received a majority vote may appear ultimately to thwart the popular will even more than a pre-election challenge. Again, a decision about timing must be made with the lesbian and gay community, as it is a political as well as a legal decision. Pre-election challenge to antigay ballot measures may be the only practical response to initiative campaigns in many states.

In Oregon, for example, over 32 ballot initiatives have been filed throughout the state to amend city and county charters to prohibit passage of anti-discrimination ordinances based on sexual orientation and to bar expenditure of state or local funds on programs that address homosexuality in a positive light. Given that the majority of these initiatives will pass, despite the overwhelming efforts of political organizers, practical as well as constitutional considerations merit challenging these hostile initiatives before they reach the ballot. These factors, as well as the political and financial cost to plaintiffs' attorneys and the state, are contributing to efforts by litigation teams in Florida, Idaho and other states to challenge antigay initiatives before they come to a popular vote.

A pre-election challenge may not seem possible under the laws of the particular state. Many states, including Colorado, have a rigorous procedure to qualify initiatives for the ballot and defer constitutional considerations until the initiative actually passes. In the Riverside case, a pre-election challenge was allowed under a narrow exemption for "patently invalid" initiatives. Check the law of your state in evaluating your chances of securing a pre-election ruling. A loss, even where it is procedural in nature, can be demoralizing. However, given the fundamentally unconstitutional nature of these initiatives, all avenues for a pre-election challenge should be given serious consideration.

An additional issue is choice of parties and forum. Standing will always be a difficult issue in some states; in states like California, however, standing is available to all taxpayers. Parties ordinarily should be chosen based on the harm that they can allege. In the Riverside case, the challengers named a local coalition formed to combat the initiative as well as two individual community leaders. In Colorado, a number of lesbian and gay individuals who came from a variety of backgrounds and alleged specific harm were joined by three municipalities whose local anti-discrimination ordinances would be repealed by the initiative.8

To date, all challenges have been filed in state court and have alleged claims under state constitutions as well as the federal constitution, based on pragmatic concerns about the hospitality of the federal courts. While a federal decision would have more precedential value in other jurisdictions, and a federal court would seem an appropriate forum for challenges to a state law, pendent state claims may be dismissed or lightly considered. Again, this is a judgment that must be made based on local experience.

If the initiative passes, challengers should immediately seek a preliminary injunction barring enforcement of the initiative pending review. Based on the drastic effects of these initiatives and the potential deprivation of constitutional
rights, most courts should be inclined to grant the injunction in order to maintain the status quo and prevent irreparable harm. Although challengers should attempt to identify specific harm that flows from enforcement of the initiative, injunctive relief is generally mandated whenever a constitutional right is infringed. In many cases, the fight for a preliminary injunction will set the stage for the rest of the case. The appeal of the injunction, in fact, may be dispositive of the case.

While a facial challenge to an initiative should not require an extensive evidentiary showing, challengers may choose to request a hearing for the purpose of offering live testimony. Courts are susceptible to the same stereotypes and prejudices of society. Live testimony by plaintiffs and experts who can demystify the nature of sexual orientation may be extremely useful in educating a trial judge and, later, an appellate court. The Colorado challenge featured an extensive hearing which the trial judge appeared to find unnecessary, but which generated an extremely helpful record that will be difficult to refute on appeal. Where court proceedings are televised or otherwise widely publicized, as in Colorado, the hearing may have the additional effect of being a compelling educational tool. This again is an issue for local consideration.

Constitutional Arguments

This article focuses on federal constitutional arguments, because state constitutions vary widely in language and interpretation. Although state constitutional claims should be pursued vigorously, challengers in this area should first become familiar with recent federal constitutional litigation affecting lesbians and gay men.

A. Equal Protection: A Statute May not Be Motivated by Intent to Harm an Identifiable Class.

Since the United States Supreme Court's decision in Bowers v. Hardwick, where the Court upheld the Georgia sodomy statute and declared that there is no fundamental right to engage in consensual homosexual sodomy between adults, lesbian and gay litigants have struggled for federal constitutional legitimacy on grounds other than the First Amendment. Only recently in Puerto v. Cheney, have we won a decision that gives us a framework for future equal protection challenges. Applying the principle enunciated in such cases as Palmore v. Sidoti, that prejudice is an illegitimate basis for governmental action, the Puerto court remanded a challenge to the military policy excluding gays and lesbians from service to require the government to demonstrate, on the record, a legitimate basis for its regulation.

In the context of voter initiatives, this same principle prompted the United States Supreme Court's decision in Reitman v. Mulkey, where the court invalidated a California constitutional initiative designed to repeal and prevent future passage of state laws prohibiting racial discrimination in housing. Although the initiative was silent regarding such repeal on its face -- it merely affirmed the right of any person to sell, lease, or rent to any person he [sic] chose -- the Court accepted the finding of the California Supreme Court that the initiative's "immediate design and intent" was "to overturn state laws that bore on the right of private sellers and lessors to discriminate." Such an inference was plain in light of the initiative's "immediate objective," its "ultimate effect," and its "historical context and the conditions existing prior to its enactment."

As the Court recognized, adoption of the initiative established "a purported constitutional right to privately discriminate on grounds which admittedly would
be unavailable under the Fourteenth Amendment should state action be involved."

While the Court stopped short of deciding that anti-discrimination legislation may not be repealed by the electorate, it found that this initiative went far beyond simple repeal and gave those who would discriminate a license to "invoke express constitutional authority, free from censure or interference of any kind from official sources." As a result of the initiative's passage, the state was no longer in a neutral position with respect to private discrimination. Instead, the state's encouragement and protection of conduct that would be illegal under the Fourteenth Amendment led the court to agree that the initiative involved state action and could be struck under the federal constitution. 

Reitman was first applied to invalidate a local antigay initiative in the Riverside case, Citizens for Responsible Behavior. The proposed initiative in Citizens would have stripped the Riverside city council of authority, and instead required a majority vote of the electorate, to enact any laws that banned discrimination on the basis of sexual orientation or HIV infection. The initiative also would have repealed an existing city ordinance protecting persons with AIDS from discrimination, and contained other provisions barring any action that would "promote" or "encourage" homosexuality, or the expenditure of city funds in any manner that would "promote" or "encourage" homosexuality.

Relying on a California case that struck down a facially neutral municipal ordinance intended to discriminate against an "undesirable" social group—hippies—the court observed that "all citizens are entitled to equal protection." Examining the initiative's plain language and the proponents' campaign literature, the court concluded that "the proposed ordinance is designed to encourage discrimination and promote bias against a selected class of citizens."

Therefore, where an initiative is motivated by hostile intent which can be inferred from the language and historical context of the initiative, the initiative cannot stand, regardless of whether a rational or compelling justification can be found. Although the Citizens court concluded that the initiative challenged there was wholly irrational, it could have rested its decision on the measure's motivation to harm an unpopular group. A statute's intent to discriminate will condemn the statute whereas it might otherwise survive a test of minimal scrutiny under the rational basis test of equal protection. Nevertheless, rationality review should not be conceded. The Citizens court, for example, found no rational justification to treat gay and lesbian persons, or persons with HIV, any differently from straight or uninfected persons.

In Colorado, the court likewise premised its decision on the principle that governmental action may not endorse or give effect to private biases against a discrete group. Both the Colorado and California courts seemed genuinely disturbed by the targeting of lesbians and gay men for such hostility. The Riverside initiative's proponents claimed that, inter alia, homosexuality is not normal and is anathema to the "normal" sexual practices of the majority; homosexuals could change if they wanted to; and protection of homosexuality will lead to the legalization of homosexual contacts with minors, homosexual prostitution, and child pornography. As the court explained, "All that is lacking is a sack of stones for throwing."

B. Equal Protection: A Law may not Unduly Burden a Minority's Participation in the Political Process
A second equal protection argument focuses on the initiative's restructuring of the political process to disadvantage the class of lesbians and gay men. By depriving lesbians and gay men of the right to secure protective legislation or regulation in their favor, these initiatives run afoul of the Supreme Court's consistent rejection of legislation that disadvantages a particular identifiable group. Moreover, because the right to equal participation in the political process is essential to effective representative government, measures that restrict any identifiable group's ability to bring about change through the ordinary political processes are highly suspect under the Equal Protection Clause.

In Hunter v. Erickson, the Supreme Court struck down an Akron, Ohio charter amendment adopted pursuant to initiative that repealed existing anti-discrimination legislation and prohibited the adoption of future anti-discrimination legislation without a majority vote of the electorate. The Court reasoned that, "although the law on its face treated Negro and white, Jew and gentile in an identical manner, the reality was that the law's impact fell on the minority," for it was minorities who would obviously benefit from laws barring racial, religious, or ancestral discrimination, and thus it was minorities whom the amendment deliberately disadvantaged. The Court explained that a state may not disadvantage a group by making it more difficult to enact legislation in their interest, just as it may not dilute a person's vote or give a group smaller representation than another group of comparable size.

Years later, the Court affirmed this principle in Washington v. Seattle School District No. 1. There, the Court relied on Hunter to strike down an initiative that prohibited the use of mandatory busing to achieve racial integration in the schools. The initiative contained several broad exceptions which permitted local school districts to assign students away from their neighborhood schools for virtually all objectives (e.g., to meet special educational needs or to avert overcrowding) except racial integration. Just as the charter amendment in Hunter had selectively removed the power to eliminate housing discrimination from the Akron city council and placed it in the hands of the electorate, so the Washington initiative stripped the Seattle school district of the authority to remedy de facto racial segregation and gave it to the voters of the entire State of Washington. Since the Washington law was riddled with exceptions to allow almost every other conceivable purpose for busing, "the initiative expressly require[d] those championing school integration to surmount a considerably higher hurdle than those seeking comparable legislative action."

Initiative proponents argue that this principle only protects racial minorities. The argument is specious. The right to vote and to participate in the political decision-making process is fundamental regardless of one's race, ethnicity, or sexual orientation. In Gordon v. Lance, the Supreme Court held that the application of strict scrutiny depends not on the scheme used to restructure the process but on whether an identifiable group is disadvantaged by the scheme.

Without deciding what level of scrutiny to apply, the Citizens court also relied on Hunter in striking down the Riverside initiative. As the court observed, "It is obvious that this provision raises obstacles in the path of persons seeking to have such ordinances enacted." The court concluded that "no rational basis justifies the distinction drawn by the proposed ordinance with respect to the limitations placed on the City's legislative power to enact protective or corrective legislation regarding homosexuals, bisexuals, or those suffering from AIDS. The classification results in a 'real, substantial, and invidious denial of the equal protection of the laws.'
C. First Amendment Freedom of Speech and Expression

The arguments under Reitman and Hunter have proved successful in three of the four courts that have considered antigay initiatives. In a fourth case in Oregon, an anti-gay initiative that successfully repealed the governor's executive order banning discrimination on the basis of sexual orientation in state government was invalidated under Oregon's state constitutional guarantee of free speech. Merrick v. Board of Higher Education. In Merrick, the Oregon Court of Appeals ruled that the statute codifying the initiative unconstitutionally restricted the free expression rights of public employees based on the content of their speech. Although the statute did not explicitly prohibit speech about sexual orientation, the court reasoned that it nonetheless restrained expression by exposing state employees to adverse personnel action if they spoke out on lesbian and gay-related issues or joined groups advocating lesbian and gay rights. Moreover, the court recognized that absent speech or communicative expression, an employer would be unlikely to know an employee's sexual orientation.

Conclusion

The fact that every court to consider these antigay initiatives has found them unconstitutional has not stemmed their spread around the country. As antigay initiative campaigns continue and become increasingly nasty and violent against lesbians and gay men, it is clear that the repeal of current lesbian and gay rights ordinances and the prohibition against future anti-discrimination legislation represents only part of the religious right's motivation for conducting these initiative campaigns. Another goal — to exploit divisions between socially vulnerable communities and find a platform for spreading a fundamentalist worldview — is realized each time the right conducts a campaign, regardless of whether an initiative survives in the ballot box or in court.

Thus, engaging in the initiative process is itself part of the religious right's victory because at bottom, these initiatives subject to popular vote the civil rights of a minority group of whom the right wing disapproves. Both fundamental equal protection principles discussed above as well as the constitutional guarantee to a republican form of government, however, provide a solid base from which to argue that such initiatives are simply ineligible for placement on a ballot and subject to popular vote.

As the Constitution's framers acknowledged, tyranny of the majority can endanger democracy. Even by holding a popular vote on the degree of political participation to be allowed lesbians and gay men, the state allows consideration of the possibility of two classes of citizenship — one for the majority and another for lesbians and gay men, who would be barred by these initiatives from petitioning their government in a meaningful fashion. If such a vote is held and an antigay initiative obtains majority approval, the state can hardly distance itself from its role in allowing the majority's will to overwhelm fundamental rights of a minority group.

Given their grave constitutional flaws, these measures not only encourage hostility toward lesbians and gay men but also threaten the foundation of civil rights for all people. At best, by pre-election challenges and, at latest, by suits for preliminary injunctive relief, these assaults via the initiative process on lesbians and gay men and the community at large cannot be tolerated and must be stopped.

APPENDIX
COLORADO ANTI-GAY AMENDMENT

(Passed by voters November 3, 1993)

Be it enacted by the People of the State of Colorado:

Article 2, of the Colorado Constitution is amended by the addition of Section 30, which shall state as follows:

NO PROTECTED STATUS BASED ON HOMOSEXUAL, LESBIAN, OR BISEXUAL ORIENTATION. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian, or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self executing.

1. For example, to whip up political resistance to President Clinton's promise to lift the military ban, staff members at the Pentagon circulated a video entitled "The Gay Agenda" to members of Congress, produced by a small fundamentalist church in Lancaster, California. See Colker, "Anti-Gay Video Highlights Church Agenda," Los Angeles Times, February 22, 1993, at A1.

2. The challengers submitted a legal opinion demonstrating the infirmity of the proposed initiative and convinced the City Council not to place the initiative on the ballot. This kind of strategy may depend upon political alliances and the willingness of local officials to take a potentially controversial position.


5. In each case, the challengers claimed that the initiatives violated state laws governing municipal powers. The Citizens court upheld the City Council's decision not to place the initiative on the ballot based on these claims as well as on the constitutional claims.

6. Although any lesbian or gay man may state a claim for denial of equal protection of first amendment rights, people who have participated in the political process to obtain civil rights protections barring sexual orientation discrimination can more directly demonstrate the harm caused by these initiatives.

7. State courts have been far more receptive to gay challenges under state laws and constitutions than have their federal counterparts. Compare Bowers v. Hardwick, 478 U.S. 186 (1986) with Wasson v. Kentucky, 842 S.W.2d 487 (1992, Ky.); and with Texas v. Morales, 826 S.W.2d 201 (Tex. 1992)

8. See, e.g., Eldred v. Burns, 427 U.S. 347, 373 (1976) (the loss of first amendment rights, even for minimal periods of time, constitutes irreparable injury); Goldie's Bookstore v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984) (citing Wright & Miller, 11 Federal Practice and Procedure, Section 2948 (1973)).

9. See n.7.


12. Although the Pruitt court was required by prior decisions to apply a standard of "rationality" rather than strict scrutiny, the court held that the government's justification for a discriminatory statute could not be based upon social prejudice or stereotypes. The rationale of Pruitt is discussed at length in the Gilberd article, ante.
Until Pruitt, lesbian and gay litigants had lost several major federal equal protection decisions. See, e.g., High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990) (upholding regulations requiring expanded investigations of lesbian and gay security clearance applicants); BenShalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (upholding military's regulation excluding gays and lesbians from service), cert. denied, 494 U.S. 1004 (1990). These courts tautologically reasoned that, under Bowers, gays and lesbians were not entitled to equal protection because the conduct (sodomy) that defines the class (lesbians and gay men) may be criminalized constitutionally, and, therefore, there can be no heightened protection for the class. (See the Valdes article, ante). These courts affirmed discriminatory regulations upon minimal rationales offered by the government. (See the Gilberd article, ante)

15. The Court's willingness to examine the political context of such initiatives is helpful in demonstrating the malevolent intent and target of antigay initiatives. While most initiatives target lesbians and gay men on their face, campaign materials distributed by initiative proponents generally go even further to demonstrate the underlying invidious intent.
16. Internal cites, 387 U.S. at 373, 374, 376-377, 381.
17. Parr v. Municipal Court, 3 Cal.3d 861 (1971); see also U.S. Dept. of Agriculture v. Moreno, 413 U.S. 528 (1969) (striking down food stamp legislation intended to exclude hippies)
22. 393 U.S. at 391, 393.
24. 458 U.S. at 474.
25. There are two strands of equal protection analysis. Laws burdening a fundamental right, such as the rights to free speech and privacy, or the right to electoral participation, are subjected to strict scrutiny, and require the government to demonstrate a compelling interest to justify any infringement. The other strand of equal protection analysis accords strict or heightened scrutiny to suspect classifications made on the basis of race, national origin, alienage, legitimacy, and gender. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-42 (1985).
26. 403 U.S. 1 (1971)
27. 1 Cal.App. 4th at 1026, 1027 (quoting Hunter, 393 U.S. at 393).
29. 116 Or.App. 258 (1992)
30. The Citizens court also ruled that the Riverside initiative was unconstitutionally vague and chilled the First Amendment rights of those who held a particular viewpoint about homosexuality. 1 Cal.App.4th at 1031-33.
33. The text of some other initiatives, known to be pending in Idaho, Michigan, Florida and Oregon, are available from the authors of this article.