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Grassroots Gay Rights: Legal Advocacy at the Local Level

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GRASSROOTS GAY RIGHTS: LEGAL ADVOCACY AT THE LOCAL LEVEL

LYDIA E. LAVELLE*

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I. INTRODUCTION

This is a most perplexing time for gay rights advocates.¹ On the one hand, people can be encouraged by any number of recent legal advancements that allow gay and lesbian citizens to participate fully in American life—from getting married, to adopting and raising children, to being employed without fear of discrimination or of being fired for being gay. On the other hand, however, there have been a number of recent legal setbacks for the gay community, including so-called “marriage amendments” to state constitutions that prohibit same-sex marriage, court decisions that have gone against same-sex partners attempting to adopt their children, and failures in efforts to add anti-discrimination clauses to existing laws.

This myriad of results stems from our system of governance, which has its roots in the United States Constitution. In keeping with the Tenth Amendment, which states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people[.]”² the evolution of law regarding gay citizens has largely occurred in the states, not at the federal level.³ The advancements and setbacks referenced above are largely statewide and leave local governments in the position of dealing with the consequences of these decisions. From another perspective, however, local governments have a great deal of autonomy in creating or advocating for laws and ordinances that speak to the concerns of gay constituents, despite statewide setbacks or inaction regarding issues of importance to gay citizens. As the government closest to the people, and arguably the government most in touch with the people, it is appropriate that municipal governments examine how they can lawfully fill in the gaps where state law neglects its gay citizens.⁴ However, doing so also requires an understanding of the

1. For a recent essay on trying to determine how many people in the United States are gay, see Gary J. Gates, *LGBT Identity: A Demographer's Perspective*, 45 LOY. L.A. L. REV. 693, 694 (2012). Gates is a Williams Distinguished Scholar at the Williams Institute at the UCLA School of Law, a sexual orientation and gender identity law and public policy think-tank. Gary J. Gates, *Williams Distinguished Scholar*, WILLIAMS INST., <http://williamsinstitute.law.ucla.edu/experts/gary-gates/gary-gates/> (last visited Oct. 25, 2012).

2. U.S. CONST. amend. X.

3. Cases where parties have challenged the Equal Protection and Due Process Clauses of the United States Constitution have appropriately been brought in federal court; for example, *Lawrence v. Texas*, 539 U.S. 558 (2003). However, many challenges regarding the legal rights of gay persons, for example, are in the fields of family law and employment law, fields traditionally under the purview of state law.

4. This Article focuses on municipal rather than county or other forms of local government. Although the issues discussed herein are universally important, municipalities are the focus because, in the author's opinion, the persons elected to lead municipalities are the officials that have the most intimate contact with regular citizens.

political realities of these initiatives within the framework of state law.

This Article explores the prospects for local government implementation of legal protections for gay persons in the absence of state or federal protections. Part II of this Article gives an overview of how municipal government legal authority is determined state-by-state; this is largely based on their state constitution, specific laws passed by their state's legislature, and court decisions. Part III provides a general summary of the current status of legal rights for gay citizens in the states, thus categorizing the states in a way that showcases those states that are not providing for their gay citizens at the state level, and are particularly ripe for local legal advocacy. Part IV examines various mechanisms local governments can initiate to protect and advocate for the legal rights of their gay citizens in states (and a nation) where such rights protection is not yet the norm, while balancing community and political expectations.⁵ Part IV also includes case studies that represent these types of undertakings. This Article concludes by emphasizing once again that local government can, indeed should, be the catalyst for change in the legal rights arena for gay citizens.

II. LOCAL LEGAL AUTHORITY

Upon taking office, a local official often has grand ideas about specific local laws he or she wishes to urge his fellow council or board members to pass. Unfortunately, discovering how challenging this can be is often a harsh reality for the new officeholder. Setting aside for the moment the further task of getting buy-in for the idea from the other members, the official has to make certain that what he or she proposes is allowed by law. This Part explores concepts related to the legal authority of local governments to pass laws.

A. *Hunter v. Pittsburgh*

One might think that cities or towns are sovereign entities of great power. Not so! The Tenth Amendment gives the states the authority to create municipalities; once created, the state still has much authority over the municipality.⁶ The landmark case emphasizing this principle is the United States Supreme Court case of *Hunter v. City of Pittsburgh*,⁷ where Justice Moody said:

5. This Article primarily focuses on the gay and lesbian population, although the discussion herein is often also applicable to the transgender population. The use of the term "gay" citizens throughout the text is meant to include gays and lesbians.

6. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

7. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 179 (1907) (rejecting the attempt to impose constitutional limits on state power over cities).

Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them. . . . The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. . . . The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason, they have no right, by contract or otherwise, in the unaltered or continued existence of the corporation or its powers, and there is nothing in the Federal Constitution which protects them from these injurious consequences. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.⁸

Hunter dealt with an issue of annexation and spoke primarily to geographic boundaries and the existence of municipalities. However, its threshold statement is startling: essentially, municipalities can be banished by the state with no recourse. To that end, the statement that “[t]he power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it” seems to be an acknowledgement by the Court that certain decisions by the state, while unjust, are definitively without recourse in the federal courts.⁹

B. Dillon’s Rule and Home Rule

Ascertaining the breadth of local legal authority is not an easy process and varies by state.¹⁰ At a minimum, it involves the study of a state’s constitution, laws, and court decisions. There are no “model rules” for local governance, but there are principles which heavily influence the

8. *Id.* at 178-79.

9. *Id.* at 179 (determining that, despite the inconveniences suffered by the inhabitants of and property owners in municipalities, nothing in the Constitution protects them from annoyances, such as increased taxation).

10. For a general overview of local legal authority, see the home page for the National League of Cities at *Cities 101*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101> (last visited Oct. 25, 2012).

degree of authority of local governments. Over the past century and a half, the authority of many municipalities was determined by a legal analysis, which involved the use of “Dillon’s Rule.”¹¹ As stated by Professor Briffault, “[u]nder Dillon’s Rule, local governments may exercise only those powers ‘granted in *express words*,’ or ‘those *necessarily or fairly implied* in or *incident* to, the powers expressly granted,’ or ‘those *essential* to the declared objects and purpose of the [municipal] corporation—not simply convenient, but indispensable.’”¹² Briffault notes that the rule “operates as a standard of delegation, a canon of construction and a rule of limited power.”¹³ By requiring all local powers be traceable to a specific delegation, Dillon’s Rule reflects the view of local governments as agents of the state. Therefore, if uncertainty exists as to whether a locality possesses a particular power, the court assumes that the locality *lacks* that particular power.¹⁴ Although formally denounced by many states, the rule remains a canon of construction, still making an occasional appearance in case law, particularly when courts are looking to construe a power narrowly.¹⁵

In many states, the concept of localized power, or “home rule,”¹⁶ is given to the municipality by way of a constitutional grant. Other states grant “home rule” specifically by statute. In still others, this grant of power is not called “home rule” but can mirror home rule to a degree.¹⁷ In all states, however, the notion of “preemption” or “occupation of the field” by federal or state law reins in home rule.

In his article *Reclaiming Home Rule*, Professor Barron describes the tension that courts wrestle with as they balance the home rule doctrine with the perceived need to limit local control.¹⁸ Professor Barron suggests that:

[t]here is a broad, if overlooked, middle space within which one can

11. Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) (noting that Dillon’s Rule is the traditional measure for determining the scope of local power).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 6 nn.4 & 8 (describing the contention of Professor Frug that “the Dillon’s Rule tradition” causes many state courts to construe local powers narrowly, and this opinion has been repeatedly cited by courts).

16. Home rule has its origins with the “crown”; for a brief review of the history of home rule in the state of New York, see *People ex rel. Metro. St. Ry. Co. v. State Bd. of Tax Comm’rs*, 67 N.E. 69, 70-72 (N.Y. 1903).

17. See Frayda S. Bluestein, *Do North Carolina Governments Need Home Rule?* 84 N.C. L. REV. 1983, 1986 (2006) (suggesting that North Carolina municipalities may have more definitive authority under various general statutes than they would if municipalities were expressly granted “home rule”).

18. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2261-63 (2003).

challenge the substance of the particular mix of grants of, and limits on, local power that now constitute what reformers and defenders of the legal status quo both generally describe as “home rule.” Meaningful change need not, therefore, consolidate local governments into enormous regional ones, nor need it strictly limit local powers to a narrow sphere. Instead, it could alter the current mix of state law grants and limits that gives substance to local legal power.¹⁹

“Preemption” or “occupation of the field” occurs when certain issues take on a national importance and, as such, are regulated by federal law to the exclusion of state law, therefore prohibiting a state from passing a law incompatible with federal law.²⁰ Similarly, there may be a state regulatory scheme that preempts the ability of local government to legislate in a given area of the law.²¹

C. Local Legal Authority in the States

A survey of the state of local governance throughout the United States suggests that nearly all of the states have or allow for some form of home rule. Professor Barron observes that “all but two states now have express constitutional or statutory home rule provisions.”²² The extent of those home rule provisions varies, depending on their form. Some apply to all municipalities, and some apply to towns or cities of a certain size.²³ Some

19. *Id.* at 2263.

20. BLACK’S LAW DICTIONARY 1177 (6th ed. 1990); *see also* *Pennsylvania v. Nelson*, 350 U.S. 497, 502-05 (1956) (explaining the test for federal preemption of a field: “First, [t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”[;] . . . Second, the federal statutes ‘touch a field in which the federal interest is so dominant that the federal system (must) be assumed to preclude enforcement of state laws on the same subject’[;] . . . Third, enforcement of [the state] acts presents a serious danger of conflict with the administration of the federal program.”).

21. *See* *Hutchcraft Van Serv., Inc. v. City of Urbana Human Relations Comm’n*, 433 N.E.2d 329, 333 (Ill. App. Ct. 1982) (“Preemption is a judicially created doctrine and is more commonly found in decisions grappling with the problem of a federal statute versus a state enactment. As applied to state action versus local action, preemption means that where the legislature has adopted a scheme for regulation of a given subject, local legislative control over such phases of the subject as are covered by state regulation ceases.”).

22. Barron, *supra* note 18, at 2260 (citing WILLIAM VALENTE ET AL., *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 254 (5th ed. 2001)).

23. For example, in its constitution, the state of Colorado grants broad home-rule to all municipalities: “It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.” COLO. CONST. art. XX, § 6. The constitution for the state of Alaska provides that “[t]he qualified voters of any borough of the first class or city of the first class may adopt, amend, or repeal a home rule charter in a manner provided by law. . . . A home rule borough or city may exercise all legislative powers not prohibited by law or by charter.” ALASKA CONST. art. X, §§ 9, 11.

are self-executing and some require enabling legislation.²⁴ Some home rules are found in constitutions, and some in statutes.²⁵ Some grant very broad home rule, and some grant what is known as “partial” home rule.²⁶ In some states, in fact, there is argument as to whether there has even been a grant of “home rule” to municipalities.²⁷

A hybrid, of sorts, now exists in the state of North Carolina, once strictly a Dillon’s Rule state.²⁸ North Carolina establishes local government powers through specific, statutory delegations and not broad constitutional or statutory grants of authority. “This is to say, North Carolina is not a home rule state. And although North Carolina is often described as a Dillon’s Rule state, that designation is probably not accurate, at least according to the most recent North Carolina appellate court opinions on the subject.”²⁹ This is evidenced by the fact that the scope of authority delegated to local governments by statute is broader than the authority granted local governments in home rule states.

In North Carolina, these statutes include the “general welfare clause,” a

24. Colorado is the former; Alaska is the latter. *See* COLO. CONST. art. XX, § 6; ALASKA CONST. art. X, §§ 9, 11.

25. The authority for home rule in Colorado and Alaska is found in their constitutions, *supra* notes 23, 24, while this authority can be found for other states in statutes, such as in Delaware, where “[e]very municipal corporation in this State containing a population of at least 1,000 persons as shown by the last official federal decennial census may proceed as set forth in this chapter to amend its municipal charter and may, subject to the conditions and limitations imposed by this chapter, amend its charter so as to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute.” 22 DEL. CODE ANN. tit. 22, § 802 (2012).

26. While Colorado grants very broad home rule, *supra* note 23, other states such as Illinois are more limited: “Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare; to license; to tax; and to incur debt.” ILL. CONST. art. 7, § 6.

27. Idaho only grants home rule to municipalities as to “police power”; in all other respects, they are a Dillon’s Rule state. *See* *Caesar v. State*, 610 P.2d 517, 520 (Idaho 1980) (“Article 12, § 2 of the Idaho Constitution has been viewed as a grant of local police powers to Idaho cities. . . . It provides that ‘Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws’ Municipal corporations which enjoy a direct grant of power from the Idaho Constitution are, however, limited in certain respects.”); *see also* *Sun Valley Co. v. City of Sun Valley*, 708 P.2d 147, 167 (Idaho 1985) (“This position, . . . known as ‘Dillon’s rule,’ has been generally recognized as the prevailing view in Idaho.”).

28. *See, e.g.,* *Durham Land Owners Ass’n v. Cnty. of Durham*, 630 S.E.2d 200, 203-04 (N.C. Ct. App. 2006) (“The narrow Dillon’s Rule of statutory construction used when interpreting municipal powers has been replaced by N.C. Gen. Stat. § 160A-4’s mandate that the language of Chapter 160A be construed in favor of extending powers to a municipality where there is an ambiguity in the authorizing language, or the powers clearly authorized reasonably necessitate ‘additional and supplementary powers’ ‘to carry them into execution and effect[.]’ N.C. Gen. Stat. § 160A-4.”).

29. Bluestein, *supra* note 17, at 1985-86.

statute which gives municipalities a broad grant of regulatory authority,³⁰ as well as statutes that authorize regulation to local governments in specific areas, permit the operation of public enterprises and facilities, and provide broad authority with regard to land use planning.³¹ Municipalities also have the authority to enter into various forms of inter-local agreements and establish separate entities for certain purposes.³² Municipalities can seek a local act via special legislation to make the local authority clear in certain circumstances.³³ In short, identifying a state as one that does not authorize home rule does not necessarily mean local governments in that state are powerless.

Ascertaining the degree of legal authority that a local government has is key to figuring out how to proceed when attempting to implement gay legal rights initiatives. In sum, this involves first understanding the legal authority that one's particular state grants to its localities. This authority is generally found in the state's constitution or in the state's general laws. It may be express, or implied, and case law likely refines it. This legal authority may be found in a clear statement of home rule, or in a delegation of limited power, such as a general welfare clause. After ascertaining the scope of legal authority held by a local government, the next step is to review any laws passed by the state that may preempt further legislation in the specific field the locality is trying to regulate. Again, what is subject to preemption may be express or implied, and further identified by case law.

III. LEGAL RIGHTS FOR GAY CITIZENS IN THE STATES

How does one quantify the current extent of legal rights in a state with regard to gay citizens? A starting point might be to identify those areas of the law where gay citizens are not treated equally statewide. Foremost among these areas of inequality are marriage (or relationship recognition) rights and adoption rights, followed by a variety of situations where discrimination legally takes place.³⁴ This analysis will examine how state law has developed in these areas, with the supposition that more progressive states are those in which the most strides have been made with regard to these areas of legal rights.

30. N.C. GEN. STAT. § 160A-4 (2012).

31. Bluestein, *supra* note 17, at 2005-06; *see also* N.C. GEN. STAT. §§ 159-43(b), 153A-275, 160A-361 (2012).

32. Bluestein, *supra* note 17, at 2006; *see also* N.C. GEN. STAT. §§ 158-7.4, 160A-462 (2012).

33. Bluestein, *supra* note 17, at 2009; *see also* N.C. CONST. art. II, § 22(6).

34. These situations include employment, public accommodations, education, and specific state programs.

A. Relationship Recognition

Clearly, the most progressive states in this context are those that offer marriage equality between citizens of the same sex. Marriage equality is a state matter. Although the federal government passed the Defense of Marriage Act (DOMA) in 1996, which defines marriage as “only a legal union between one man and one woman as husband and wife,” this definition of marriage is only applied to federal laws and statutes;³⁵ otherwise, each state determines its own definition of marriage.³⁶ The states that offer marriage equality include Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, New York, Maine, Maryland, and Washington, as well as the District of Columbia.³⁷ The legality of same-sex marriage in California is making its way through the federal courts. The Ninth Circuit Court of Appeals ruled in February 2012 that the Proposition 8 ban on same-sex marriage was unconstitutional; the United

35. 1 U.S.C. § 7 (2006). This section reads as follows: “In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.” *Id.*

36. DOMA also included a section that made it clear that no state must recognize a marriage performed in another state: “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.” 28 U.S.C. § 1738C (2006).

37. Same-sex marriage in Massachusetts was approved by the State Supreme Judicial Court in Massachusetts on November 18, 2003. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). In 2008, the Connecticut Supreme Court found that the state’s civil unions statute was unconstitutional in that it discriminated against gay citizens. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008). On April 3, 2009, the Iowa Supreme Court, in *Varnum v. Brien*, 763 N.W.2d 862, 872 (Iowa 2009), approved same-sex marriage. Vermont legalized same-sex marriage through legislation in 2009, becoming the first state to do so. See S. 115, 2009 Gen. Assemb., Reg. Sess. (Vt. 2009), available at <http://www.leg.state.vt.us/docs/2010/Acts/ACT003.pdf>. New Hampshire followed less than two months later. H.B. 437-FN, 2011 Leg., Reg. Sess. (N.H. 2011), available at <http://www.gencourt.state.nh.us/legislation/2012/hb0437.html>. The November 2012 elections resulted in same-sex marriage becoming legal in Maine, Maryland, and Washington. Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES (Nov. 7, 2012), <http://www.nytimes.com/2012/11/07/us/politics/same-sex-marriage-voting-election.html>; *Same-Sex Marriage Rivals Concede in Washington*, N.Y. TIMES (Nov. 8, 2012), <http://www.nytimes.com/2012/11/09/us/washington-state-gay-marriage-opponents-concede.html>. In the District of Columbia, a law was passed in 2009 that went into effect in 2010 allowing same-sex marriage: “Marriage is the legally recognized union of 2 persons. Any person may enter into a marriage in the District of Columbia with another person, regardless of gender[.]” D.C. CODE § 46-401 (2012). In 2011, the hugely populous state of New York passed a law allowing same-sex marriage. S. A8354-2011, 2011 Leg. (N.Y. 2011), available at <http://open.nysenate.gov/legislation/bill/A8354-2011>.

State Supreme Court granted certiorari on December 7, 2012.³⁸

Not in the same category, but still affirming of relationship recognition for gay citizens, are those states that allow civil unions or domestic partnerships for same-sex couples. States that offer these “broad” relationship recognitions include Delaware, Hawaii, Illinois, New Jersey, and Rhode Island, which allow civil unions, and Nevada and Oregon, which allow domestic partnerships.³⁹ Finally, there are states that currently offer some type of limited relationship recognition laws; these states are Colorado and Wisconsin.⁴⁰

On the opposite side of the spectrum from the above-referenced jurisdictions are states that have gone in the other direction. These states, in the aftermath of the passage of the federal DOMA, set about memorializing their own definition of marriage as being between one man and one woman; many of these states enacted this definition of marriage not only by law but also by state constitution.⁴¹ As of July 2012, thirty-one states had amended their constitutions to include this definition.⁴² North

38. *Perry v. Brown*, 671 F.3d 1052, 1063 (9th Cir. 2012), cert. granted, 2012 WL 3134429, 81 U.S.L.W. 3075 (Dec. 7, 2012). Speculation abounds as to what direction the United States Supreme Court will take with the case; the Court could settle the matter jurisdictionally, limit the holding to California, issue a decision with broader implications, or do some combination of these. Adam Liptak, *Same-Sex Issue Pushes Justices into Overdrive*, N.Y. TIMES (Dec. 9, 2012), <http://www.nytimes.com/2012/12/10/us/supreme-court-enters-same-sex-fray-with-uncharacteristic-speed.html>. California is in the odd position of having legalized same-sex marriage for a short time period. Although the California Supreme Court upheld the legality of Proposition 8 in *Strauss v. Horton*, it determined that the same-sex marriages that were performed between the ruling in *In re Marriage Cases* (allowing same-sex marriage) and the passage of Proposition 8 were valid. *Strauss v. Horton*, 207 P.3d 48, 119 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008).

39. DEL. CODE ANN. tit. 13, § 202 (2012); Act of July 6, 2012, 2012 Haw. Sess. Laws Act 267; 750 ILL. COMP. STAT. 75 (2012); N.J. STAT. ANN. § 37:1-28 (West 2012); NEV. REV. STAT. ANN. § 122A.100 (2010); OR. REV. STAT. ANN. § 106.325 (West 2012); R.I. GEN. LAWS ANN. § 15-3.1-6 (West 2012). California is also currently in this group. CAL. FAM. CODE § 297 (West 2012).

40. See COLO. REV. STAT. ANN. § 15-22-104 (West 2012); WIS. STAT. ANN. § 853.12 (West 2012).

41. Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1422 n.1, 1423 n.6 (2012) (citing *Same-Sex Marriage, Civil Unions and Domestic Partnerships*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated June 2012)).

A stunning interactive map can be found at *Gay Marriage Chronology*, L.A. TIMES (July 5, 2012, 5:05 PM), <http://graphics.latimes.com/usmap-gay-marriage-chronology/>, which shows a yearly breakdown of the rights afforded to same-sex couples (fewest and most) since 2000. While the map has not been intimately verified by the author, it appears to be generally correct based on anecdotal knowledge of the various states.

42. One finds reference in the literature to either thirty or thirty-one states having passed “marriage” amendments, defining marriage as between one man and one woman. The reason for the disparity is the varied classification of Hawaii’s amendment, which reads, “The legislature shall have the power to reserve marriage to opposite-sex couples.” HAW. CONST. art. I, § 23. Some include it as one of the

Carolina was the most recent to pass such an amendment on May 8, 2012.⁴³ As one might expect, persons legally married to members of the same sex in other states have difficulty attempting to get divorced in these states.⁴⁴

B. Second-Parent Adoption Rights

Reviewing a history of adoption laws throughout the years is like looking at a snapshot of American culture.⁴⁵ Once containing disdainful references to bastards, requirements that a prospective parent be married (always to a person of the opposite sex), or affirmations that the adopters were active “churchgoers,” adoption laws have evolved through the decades to reflect our changing society.⁴⁶ Influences such as the advent of international adoption, the emergence of stepparents as prospective adopters, the ability to have a child through artificial insemination, and the relaxation of the requirement that two persons are needed to adopt—all of these requirements, and more, have influenced revisions to adoption laws.

Historically, adoption laws allowed for a birth parent to: (1) give up his or her child for adoption by terminating the parent’s legal rights, or (2) allow the child to be adopted by the birth parent’s new spouse, but preserving the birth parent’s legal right to the child. There was no provision for a birth parent to allow another person to adopt the child jointly without the two marrying.⁴⁷

In recent years, however, some states have allowed a process known as

marriage amendment states, some do not.

43. Campbell Robertson, *North Carolina Voters Pass Same-Sex Marriage Ban*, N.Y. TIMES (May 8, 2012), <http://www.nytimes.com/2012/05/09/us/north-carolina-voters-pass-same-sex-marriage-ban.html>. Minnesota, however, successfully turned away a constitutional same-sex marriage ban on November 6, 2012. Debbi Wilgoren, *Minnesota Rejects Same-Sex Marriage Ban*, POST POL. (Nov. 7, 2012, 10:23 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/11/07/minnesota-voters-reject-same-sex-marriage-ban/>.

44. *Compare Chambers v. Ormiston*, 935 A.2d 956, 967 (R.I. 2007) (state does not recognize same-sex marriage or same-sex divorce), *with Christiansen v. Christiansen*, 253 P.3d 153, 154 (Wyo. 2011) (state does not recognize same-sex marriage but has jurisdiction to allow same-sex divorce). For a discussion of this problem and a possible solution, see Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 226-27 (2010).

45. A timeline of adoption history is found in The Adoption History Project (through the History Department at the University of Oregon) and can be found at *Timeline of Adoption History*, ADOPTION HIST. PROJECT, <http://pages.uoregon.edu/adoption/timeline.html> (last updated Feb. 24, 2012).

46. See *Adoption History in Brief*, ADOPTION HIST. PROJECT, <http://darkwing.uoregon.edu/~adoption/topics/adoptionhistbrief.htm> (last updated Feb. 24, 2012).

47. NAT’L CTR. FOR LESBIAN RIGHTS, LEGAL RECOGNITION OF LGBT FAMILIES 1 (2012), available at http://www.nclrights.org/site/DocServer/Legal_Recognition_of_LGBT_Families.pdf?docID=2861.

“second parent” adoption, a process by which a birth parent can retain his or her legal rights to a child but can legally allow another adult to adopt the child, creating two legal parents, even if the two do not marry.⁴⁸ This common sense interpretation (and in some states, revision) of the adoption laws makes sense in a society with an emerging group of couples who cannot procreate in the traditional way. At least twenty states, and the District of Columbia, allow second parent adoption through either statutory or case law.⁴⁹ There are five states that have specifically declined to allow second-parent adoption.⁵⁰ However, as a court order pursuant to the Full Faith and Credit Clause of the United States Constitution, all states are required to recognize second parent adoptions performed in other states.⁵¹

C. Anti-discrimination Laws

Anti-discrimination laws arise in a variety of contexts in the public sector and most commonly address employment, housing, and public accommodation. Workplace nondiscrimination laws are intended to protect persons throughout the interview process and beyond; once hired, these protections continue in the workplace and while the employee is being evaluated for promotion, retention, or dismissal.⁵² Additionally, application of these laws includes considering whether benefits are being offered equally to all employees.⁵³ Polls taken in recent years show that an

48. *Id.* at 2.

49. These are California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont and Washington. *Id.* Maryland should also be added to this list now that civil marriage is available in the state for same-sex couples. John Wagner et al., *Maryland Approves Same-Sex Marriage Law*, WASH. POST (Nov. 7, 2012), http://articles.washingtonpost.com/2012-11-07/local/35505987_1_marriage-law-marriage-measure-maryland-and-maine.

50. NAT’L CTR. FOR LESBIAN RIGHTS, *supra* note 47, at 3. These states are Kentucky, North Carolina, Nebraska, Ohio, and Wisconsin. Note further that Mississippi expressly prohibits adoption by same-sex couples. Utah does not allow a co-habiting partner to adopt, and Utah and Alabama give preference to a married couple over a single person. *Id.*

51. “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.” U.S. CONST. art. IV, § 1. *But see* *Adar v. Smith*, 639 F.3d 146, 149-50 (5th Cir. 2011) (en banc) (holding that Louisiana’s refusal to issue a new birth certificate pursuant to a valid New York adoption did not violate the Full Faith and Credit Clause).

52. *E.g.* N.Y. EXEC. LAW § 296 (McKinney 2012).

53. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 761 (2012). This analysis can involve a review of a vast array of benefits, and may differ by jurisdiction (for example, the availability of certain programs for family members of employees).

overwhelming number of persons in the United States believe gay people should have equal rights in terms of job opportunities.⁵⁴

Certain classifications, such as race and gender, are already extended workplace protection under Title VII of the Civil Rights Act of 1964.⁵⁵ Sexual orientation is not listed as a classification under this law. However, there appears to be growing support for the federal Employment Nondiscrimination Act (ENDA), which, with several caveats, would prohibit workplace discrimination with regard to gay persons.⁵⁶ Although ENDA has been introduced repeatedly in Congress every term since 1973, it has never made its way to the floor for a vote.⁵⁷ Supporters are optimistic that its passage will come in the near future.⁵⁸

Notwithstanding the lack of protections at the federal level, there are at present twenty-one states, plus the District of Columbia, that prohibit discrimination on the basis of sexual orientation by virtue of state law.⁵⁹ Of the twenty-nine remaining states, discrimination against state employees on the basis of sexual orientation is banned in eleven states by executive order, although these have shortcomings when compared to other laws because they can be, and have been, rescinded when there is a gubernatorial change.⁶⁰ Over two hundred cities and counties have passed nondiscrimination employment laws with regard to sexual orientation.⁶¹ Depending on the authority of the local government, these may apply only to public employees; in other instances, they may apply to any business, public or private, employing persons in the jurisdiction.⁶² Despite these efforts, the authors of one article have noted that “[s]everal academic studies demonstrate that state and local administrative agencies often lack the resources, knowledge, enforcement mechanisms, or willingness to

54. A 2008 Gallup poll showed that eighty-nine percent of persons surveyed think that homosexuals should have equal rights in terms of job opportunities, as compared to fifty-six percent in 1978. See *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx#1> (last visited Nov. 5, 2012).

55. See 42 U.S.C. § 2000e-2 (2006).

56. See Pizer et al., *supra* note 53, at 719.

57. *Id.*

58. See *The Rights of Gay Employees*, N.Y. TIMES (Sept. 13, 2009), <http://www.nytimes.com/2009/09/13/opinion/13sun2.html>.

59. See Pizer et al., *supra* note 53, at 755 (listing all states that prohibit discrimination).

60. *Id.* at 756.

61. *Id.* at 757.

62. See Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515, 527 (2012) (“[A]t the time of this writing, 136 cities and counties prohibit employment discrimination on the basis of sexual orientation by private employers, and an additional 106 city and county governments prohibit discrimination in public employment.”).

accept and investigate sexual orientation . . . discrimination complaints.”⁶³ The data has shown that these policies, while well-intended, have limitations in terms of scope of coverage, enforcement, remedies, and resources; further, they sometimes operate under the fear of repeal.⁶⁴ There are ten states with no such state or municipal laws.⁶⁵

This concern of “limitations in terms of scope of coverage” is a major one. When one thinks of nondiscrimination policies, one thinks of not being berated in the workplace or not being fired just because one is gay. But this notion can be carried further; while not “categorically” workplace discrimination, the absence of domestic partner benefits in states where same-sex couples cannot get married conflicts with this notion that all employees should be given equal access to benefits.⁶⁶ Reformers also often overlook other benefits, such as leave time if one’s family members are sick, or access to retirement and pension plans, when attempting to equalize workplace benefits for gay employees.⁶⁷

Antidiscrimination clauses that address housing range in scope and coverage. At the federal level, in early 2012, the Department of Housing and Urban Development (HUD) promulgated a comprehensive rule addressing discrimination against gay persons intending to use their core programs, noting “through this final rule, HUD implements policy to ensure that its core programs are open to all eligible individuals and families regardless of sexual orientation, gender identity, or marital status.”⁶⁸ The rule affirmatively states that “housing assisted or insured by HUD must be made available without regard to actual or perceived sexual orientation, gender identity, or marital status.”⁶⁹ It also includes “the prohibition of inquiries regarding sexual orientation or gender identity for

63. Pizer et al., *supra* note 53, at 757.

64. *Id.* at 759.

65. *Id.* at 757 (noting the states are Alaska, Arkansas, Idaho, Mississippi, Montana, Nebraska, North Dakota, South Carolina, Tennessee, and Wyoming).

66. In fact, many employers, recognizing that even domestic partner benefits are not the equivalent of health insurance coverage for one’s spouse (because of tax implications), have started reimbursing their gay employees who have domestic partner benefits a “tax offset” in an attempt to equalize this disparity. See Tara Siegel Bernard, *A Progress Report on Gay Employee Health Benefits*, N.Y. TIMES (Dec. 14, 2010), <http://bucks.blogs.nytimes.com/2010/12/14/a-progress-report-on-gay-employee-health-benefits/> [hereinafter Bernard, *A Progress Report*].

67. See Pizer et al., *supra* note 53, at 768.

68. Equal Access to Housing in HUD Programs Regardless of Sexual Orientation or Gender Identity, 77 Fed. Reg. 5662 (Feb. 3, 2012) (to be codified at 24 C.F.R. pts. 5, 200, 203, 236, 400, 570, 574, 882, 891, 982), available at <http://portal.hud.gov/hudportal/documents/huddoc?id=12lgbtfinalrule.pdf>. The rule was passed following “a January 24, 2011, proposed rule, which noted evidence suggesting that lesbian, gay, bisexual, and transgender (LGBT) individuals and families are being arbitrarily excluded from housing opportunities in the private sector.” *Id.*

69. *Id.* at 5663.

the purpose of determining eligibility or otherwise making housing available[.]”⁷⁰ The regulation also reorganizes the term “family” so that the definition properly cross-references with other programs to cover LGBT persons.⁷¹ There is no other federal law or regulation against this type of discrimination.

The housing laws of over twenty states, plus the District of Columbia, prohibit discrimination against gay persons.⁷² Two hundred and twenty localities prohibit this type of housing discrimination.⁷³ These laws vary a bit in scope and application. For example, the state of Washington’s housing non-discrimination law, which also contains an exemption, states:

- (1) It is an unfair practice for any person, whether acting for himself, herself, or another, because of . . . sexual orientation . . . :
 - (a) To refuse to engage in a real estate transaction with a person; [or]
 - (b) To discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith; . . .
- (7) Nothing in this chapter shall apply to real estate transactions involving the sharing of a dwelling unit, or rental or sublease of a portion of a dwelling unit, when the dwelling unit is to be occupied by the owner or sublesor.⁷⁴

This law exempts owner-occupiers from the law. These housing law exemptions apply to many categories, not just sexual orientation.⁷⁵ Some

70. *Id.*

71. These specific programs are the Housing Opportunities for Persons With AIDS (HOPWA) program and the HUD’s Section 202 Supportive Housing for the Elderly and Section 811 Supportive Housing for Persons with Disabilities programs. *Id.*

72. These states are California, Colorado, Connecticut, Delaware, Hawaii, New Hampshire, Illinois, Iowa, New Hampshire, New Jersey, New Mexico, New York, Maine, Maryland, Massachusetts, Minnesota, Nevada, Oregon, Rhode Island, Vermont, Washington and Wisconsin. *See In Your State*, LAMBDA LEGAL, <http://lambdalegal.org/states-regions> (last visited Nov. 7, 2012); *see also* CAL. GOV’T CODE § 12955 (West 2012); COLO. REV. STAT. ANN. § 24-34-502 (West 2012); CONN. GEN. STAT. ANN. § 46a-64c (West 2012); DEL. CODE ANN. tit. 6, § 4603 (West 2009), HAW. REV. STAT. § 515-3 (West 2012); 775 ILL. COMP. STAT. ANN. § 5/1-102 (West 2010); IOWA CODE ANN. § 216.8 (West 2009); ME. REV. STAT. ANN. tit. 5, § 4581 (West 2012); MD. CODE ANN., STATE GOV’T § 20-705 (West 2012); MASS. GEN. ANN. LAWS ch. 151B, § 4 (West 2012); MINN. STAT. ANN. § 363A.09 (West 2012); NEV. REV. STAT. ANN. § 118.020 (West 2011); N.H. REV. STAT. ANN. § 354-A:8 (2012); N.J. STAT. ANN. § 10:5-4 (West 2007); N.M. STAT. ANN. § 28-1-7 (West 2012); N.Y. N.Y. EXEC. LAW § 296 (McKinney 2012); OR. REV. STAT. ANN. § 659A.421 (West 2012); R.I. GEN. LAWS ANN. § 34-37-4 (West 2012); VT. STAT. ANN. tit. 9, § 4503 (2012).

73. *See* Yishai Blank et al., *The Geography of Sexuality*, 90 N.C. L. REV. 955, 978 (2012).

74. WASH. REV. CODE ANN. § 49.60.222 (West 2012).

75. The law covers “sex, marital status, sexual orientation, race, creed, color, national origin, families with children status, honorably discharged veteran or military status, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability[.]” *Id.*

anti-discrimination laws that address housing are part of a larger set of laws that cover a variety of areas. One example is New York City's comprehensive Human Rights Law, which covers employment, housing, public accommodations, and bias-related harassment.⁷⁶

A sometimes overlooked but growing body of law is public accommodations with respect to discrimination and sexual orientation. By its very name, this law deals with some degree of inclusion of the public, but how these laws are written and interpreted, in many instances, requires a careful balancing with the Free Exercise Clause and other liberties.⁷⁷ Depending on the liberties at issue, the United State Supreme Court has applied varying degrees of scrutiny in cases involving public accommodation law that might burden religious exercise.⁷⁸

At present, there is no federal law prohibiting discrimination on the basis of sexual orientation in places of public accommodation, but twenty-one states, plus the District of Columbia, have such laws, often as part of a comprehensive set of nondiscrimination laws.⁷⁹ States have generally followed the lead of the United States Supreme Court in granting exemptions to these laws, but the application of this reasoning to a sexual orientation classification is still evolving. One commentator notes

[the] exemptions [include] . . . actual places of religious worship, the organizations they operate, and certain private organizations. As gay-marriage laws gain traction, public accommodations statutes are uniquely positioned as a point of contention because marriage-related public accommodations contexts are those in which the conflict appears so commonly. Countless gray areas exist in which religious liberty and gay rights conflicts extend beyond churches, mosques, or synagogues, including: "[r]eligiously affiliated marriage-counseling services, day-care centers, retreat centers, summer family camps, or family community

76. See N.Y.C. ADMIN. CODE § 8-101 (2011); see also *Levin v. Yeshiva University*, 754 N.E.2d 1099, 1099 (N.Y. 2001) (discussing where under New York City's Human Rights Law, the plaintiffs stated a prima facie case of housing discrimination based on sexual orientation).

77. The Free Exercise Clause and the Establishment Clause are included in the First Amendment to the United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" U.S. CONST. amend. 1.

78. See Kelly Catherine Chapman, *Gay Rights, the Bible, and Public Accommodations: An Empirical Approach to Religious Exemptions for Holdout States*, 100 GEO. L.J. 1783, 1789 (2012).

79. See *Patient Non-discrimination and State Public Accommodation Law*, HUMAN RTS. CAMPAIGN, <http://preview.hrc.org/issues/12641.htm> (last visited Nov. 7, 2012) (listing these states as California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Massachusetts, Maine, Maryland, Minnesota, Nevada, New Hampshire, New York, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, Washington and Wisconsin); see also *Non-discrimination Laws: State by State Information—Map*, AM. CIV. LIBERTIES UNION (Sept. 21, 2011), <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>.

centers,” and businesses owned or operated by religious individuals.⁸⁰

Many cities have public accommodation non-discrimination laws that cover sexual orientation regardless of whether their state’s law covers such conduct. For example, the city of Tampa, Florida, states on its website that “rights to equal access and the full enjoyment of the goods, services, facilities, privileges, advantages or accommodations of any place of public accommodation are protected by federal and state laws, and the City of Tampa’s Human Rights Ordinance”⁸¹ Therefore, in this city, a person cannot be denied equal access if the person has a characteristic that makes them a member of a protected class.⁸²

One of the classes listed on the webpage is that of sexual orientation.⁸³ Examples subject to the law include (but are not limited to): places or resorts of amusement, inns, hotels, motels, restaurants, cafeterias, retail establishments, gasoline stations, theaters, skating rinks, amusement parks, bowling alleys, golf courses, concert halls, gymnasiums, sports arenas, stadiums, places of exhibition or entertainment, library or educational facilities supported in part or whole by public funds, taxis, limousines, buses, barber and beauty shops, hospitals, laundries, swimming pools, nurseries, kindergartens, and day-care centers.⁸⁴ In these places, it is unlawful to “[r]efuse, withhold from, deny or deprive, or attempt to withhold from, deny or deprive any person of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.”⁸⁵

80. Chapman, *supra* note 78, at 1790. Discussing the conflict, Chapman notes, “Academia is filled with a spectrum of views on the debate [between religious liberty and gay rights] and until one side abdicates or the Supreme Court takes up any decisions, the conflict will remain unresolved.” *Id.* at 1793-94.

81. City of Tampa’s Human Rights Ordinance Chapter 12, §§ 12-61 to 12-68.

82. *Public Accommodation*, CITY OF TAMPA, http://www.tampagov.net/dept_community_affairs/programs_and_services/Public_accommodation.asp (last visited Nov. 7, 2012).

83. *Id.*

84. *Id.*

85. Further, one may not:

Publish, circulate, issue, display, post, or mail any written or printed communication, notice or advertisement, to the effect that any of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation shall be refused, withheld from, or denied to any person, or that the patronage of any such person is unwelcome, objectionable, or not acceptable, desired, or solicited.

Segregate any person at a place of public accommodation, or to segregate any person in regards to the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

Intimidate, threaten, coerce or interfere, or attempt to intimidate, threaten, coerce or interfere with any person in the exercise or enjoyment of, or on account of such person having aided or encouraged any other person in the

D. Gay "Climate" by State: A Survey

1. Explanation of Chart

Each state has been categorized below with a grade of A through F in the areas of law discussed above in an effort to gauge its general statewide legal climate toward gay citizens.⁸⁶ Following is the standard by which the states were graded in each area and the ensuing chart (all letters were converted to a 4.0 scale for averaging):

Marriage or relationship recognition: A (state allows same-sex marriage); B (state enacted same-sex marriage but in flux, or state allows civil unions/domestic partnerships); B- (state allows limited domestic partnership laws); F (state grants no relationship rights).

Amendments to state constitutions or state-wide laws banning marriage: A (no constitutional amendment or state law ban); C- (state law ban on same-sex marriage); D (constitutional ban on same-sex marriage); D- (constitutional ban on same-sex marriage and civil unions); F (constitutional ban on same-sex marriage, civil unions, and other contracts).

Second parent adoption and custody/visitation rights: A (state allows second-parent adoption); B (state passed law allowing second parent adoption, but in flux); C (state law allows custody/visitation, and second parent adoptions are allowed in some counties); C- (state does not allow or has not addressed second-parent adoption, but state law allows custody/visitation); D (state does not allow or has not addressed second-parent adoption, and state law has not addressed custody/visitation); F (state expressly does not allow second-parent adoption, adoption by same-sex couples, or has recent negative law regarding adoption/custody/visitation).

Anti-discrimination laws (includes housing, employment and public accommodation): A (state has discrimination laws protecting gay citizens in the public sector and the private sector); C (state has discrimination laws

exercise or enjoyment of, any right granted or protected by law.

Id.

86. This data was compiled using the following sources: *LGBT Basic Rights and Liberties*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/lgbt-rights/lgbt-basic-rights-and-liberties> (last visited Nov. 7, 2012); *Non-discrimination Laws: State by State Information—Map*, AM. CIV. LIBERTIES UNION (Sept. 21, 2011), <http://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>; NAT'L CTR. FOR LESBIAN RIGHTS, LGBT RECOGNITION OF LGBT FAMILIES 1, 3-5 (2012), available at http://www.nclrights.org/site/DocServer/Legal_Recognition_of_LGBT_Families.pdf?docID=2861; NAT'L CTR. FOR LESBIAN RIGHTS, SUMMARY OF LAWS REGARDING SAME-SEX COUPLES (2012), available at http://www.nclrights.org/site/DocServer/Relationship_Recognition_State_Laws_Summary.pdf?docID=6841; *In Your State*, LAMBDA LEGAL, <http://lambdalegal.org/states-regions> (last visited Nov. 7, 2012).

protecting gay citizens in the public sector but not the private sector); F (state has no discrimination laws protecting gay citizens). Note the use of three grades rather than five for this category because of the complexity of evaluating anti-discrimination laws.

State	Marriage or Relationship Recognition	Amendment or Law Banning Same-Sex Marriage	Second Parent Adoption, Custody & Visitation	Anti-discrimination Laws	Overall Score
Alabama	F	D-	C	F	F
Alaska	F	D	C	F	D-
Arizona	F	D	C-	C	D
Arkansas	F	D-	C-	F	F
California	B	D	A	A	B
Colorado	B-	D	A	A	B-
Connecticut	A	A	A	A	A
Delaware	B	C-	A	A	B+
Florida	F	D-	C ⁸⁷	F	F
Georgia	F	D-	C	F	D-
Hawaii	B	D	A	A	B
Idaho	F	D-	D	F	C-
Illinois	B	C-	A	A	B+
Indiana	F	C-	A	C	C-
Iowa	A	A	A	A	A
Kansas	F	D-	D	C	D-
Kentucky	F	D-	F	C	D-
Louisiana	F	D-	C	F	D-
Maine	A	A	A	A	A
Maryland	A	A	A	A	A
Massachusetts	A	A	A	A	A
Michigan	F	F	C	C	D
Minnesota	F	C-	C	F	D
Mississippi	F	D	F	A	D
Missouri	F	A	C	C	C
Montana	F	D	C-	C	D
Nebraska	F	D-	C-	F	F
Nevada	B	D	A	A	B

87. Until recently, Florida was the only state in the nation that, by law, did not permit adoption by homosexuals: "No person eligible to adopt under this statute [the Florida Adoption Act] may adopt if that person is a homosexual." FLA. STAT. ANN. § 63.042 (LexisNexis 2012). A Florida court of appeals court has declared the law unconstitutional. See Fla. Dep't of Children & Families v. *In re* Adoption of X.X.G., 45 So.3d 79 (Fla. Dist. Ct. App. 2010), although the law still appears on the books.

State	Marriage or Relationship Recognition	Amendment or Law Banning Same-Sex Marriage	Second Parent Adoption, Custody & Visitation	Anti-discrimination Laws	Overall Score
New Hampshire	A	A	A	A	A
New Jersey	B	A	A	A	A-
New Mexico	F	A	C	A	B-
New York	A	A	A	A	A
North Carolina	F	D-	C-	F	F
North Dakota	F	D-	D	F	F
Ohio	F	D-	F	C	D-
Oklahoma	F	D-	D	F	F
Oregon	B	D	A	A	B
Pennsylvania	F	C-	A	C	C-
Rhode Island	B-	A	A	A	A-
South Carolina	F	D-	C-	F	F
South Dakota	F	D-	D	F	F
Tennessee	F	D	D	F	F
Texas	F	D-	C	F	D-
Utah	F	D-	F	F	F
Vermont	A	A	A	A	A
Virginia	F	F	F	C	F
Washington	A	A	A	A	A
West Virginia	F	C-	C	F	D-
Wisconsin	B-	D-	C-	A	C
Wyoming	F	C-	D	F	D-

2. Analysis of Chart

Several observations can be made about these overall scores. First, and perhaps most obviously, those states where same-sex marriage is allowed clearly have the best legal climate for gay citizens. With marriage comes an umbrella of state rights, including the ability to take advantage of state tax benefits, inheritance and intestacy laws, wrongful death claims, property laws, and a litany of parental rights, to name a few.⁸⁸ Even states that attempt to emulate marriage with civil unions and domestic partnership benefits often fall short of doing so, despite their best attempts, because of

88. See *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 942 (Mass. 2003), for a detailed and illustrative list. “The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.” *Id.* at 955.

the enormity of the comparison.⁸⁹ Those states, however, are still to be lauded for their efforts toward the marriage dimension and the climate they have created in which other legal initiatives can perhaps move more easily forward.

Interestingly, the area where most states have approved of state-wide gay rights initiatives seems to be in the parental rights realm, where courts, even in states such as North Carolina, have recognized the rights of same-sex couples to share custody, albeit not as legal parents.⁹⁰ This suggests that when courts are considering “the best interests of the child,” they are no longer viewing gay parents as a detriment in those states.⁹¹ One could hope that as more gay individuals have children, and as these children grow up to become adults, numbers will dictate that this particular climate will only continue to get better for gay citizens over time.

Finally, as is reflected in the chart above, most Americans do agree that gay people should not be subject to “discrimination,” even though many Americans do not “agree” with same-sex marriage. For example, after California passed Proposition 8 in 2008, outlawing same-sex marriage, the Mormon Church was criticized for its support of the measure.⁹² Yet, a year later, the church openly supported a Salt Lake City local ordinance banning

89. See *In re Marriage Cases*, 183 P.3d 384, 422 (Cal. 2008). The argument was made that domestic partners had the same rights as those who could marry; the court noted, “Although the governing statutes provide that registered domestic partners have the same substantive legal rights and are subject to the same obligations as married spouses, in response to a request for supplemental briefing by this court the parties have identified various differences (nine in number) that exist in the corresponding provisions of the domestic partnership and marriage statutes and in a few other statutory and constitutional provisions.” *Id.* at 416 n.24. The court then went on to discuss those differences.

90. See *Boseman v. Jarrell*, 704 S.E.2d 494, 504-05 (N.C. 2010) (dismissing second-parent adoption but affirming the court of appeals case law finding that the non-biological parent could be granted custody rights, noting “[biological mother] shared parental responsibilities with [non-biological mother] and, when occurring in the family unit [biological mother] created without any expectation of termination, acted inconsistently with her paramount parental status . . . [B]ecause defendant has acted inconsistently with her paramount parental status, the trial court did not err by employing the ‘best interest of the child’ standard to reach its custody decision.”).

91. In North Carolina, for example, the “best interest of the child” standard is codified by statute: “An order for custody of a minor child entered pursuant to this section shall award the custody of such child to such person, agency, organization or institution as will best promote the interest and welfare of the child. In making the determination, the court shall consider all relevant factors including acts of domestic violence between the parties, the safety of the child, and the safety of either party from domestic violence by the other party and shall make findings accordingly. An order for custody must include findings of fact which support the determination of what is in the best interest of the child.” N.C. GEN. STAT. § 50-13.2(a) (West 2012).

92. See *supra* note 41 and accompanying text; Jesse McKinley & Kirk Johnson, *Mormons Tipped Scale in Ban on Gay Marriage*, N.Y. TIMES (Nov. 14, 2008), http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all&_r=0.

discrimination against gay men and lesbians in housing and employment.⁹³ According to *The New York Times*, “[i]n its statement backing the ordinance, the Church of Jesus Christ of Latter-Day Saints said that while it remained ‘unequivocally committed to defending the bedrock foundation of marriage between a man and a woman,’ the question of how people were treated on the job and in finding places to live were matters of fairness that did not have anything to do with marriage.”⁹⁴ Polling shows that an overwhelming majority of Americans support these types of antidiscrimination policies in the workplace.⁹⁵ However, specific polling as to housing discrimination or places of public accommodation are often lumped into questions asking about “discrimination” in general, and as a result, conclusions cannot be made about the view of the public as to these specific areas.

IV. LOCAL GOVERNMENTAL INITIATIVES

Having examined the workings of local legal authority in Part II and gay legal rights (further compared with a state’s “gay legal climate”) in Part III, this Part explores ways that elected officials wishing to effectuate change in their local jurisdictions can balance their degree of local authority with the climate of gay legal rights in the particular state in which they are located. For example, if one lives in a state that prohibits same-sex marriage in its constitution, has no case law on second parent adoption, and has no state-wide public accommodation laws covering sexual orientation, one would normally surmise that trying to pass a local law addressing an area of gay rights might not be successful. However, if the town is located in a home rule state, a high degree of legal authority might still be available to implement such initiatives. If the town is not located in a home rule state, its authority is more limited, but there are still ways to effectuate change while balancing political realities.

Communities run the gamut from localities that already have substantial gay rights laws in place (usually larger cities) to those that have none at all. In considering local initiatives that are permissible by operation of law, elected officials need to weigh a number of factors, including support from fellow council members, buy-ins from the town manager and staff, as well as the climate of the community. In many towns across the United States, there are no local laws or policies addressing gay legal issues simply because no one on the council or board has addressed the issue.

Generally, these laws or policies are considered at the local level

93. See Kirk Johnson, *Mormon Support of Gay Rights Statute Draws Praise*, N.Y. TIMES (Nov. 11, 2009), <http://www.nytimes.com/2009/11/12/us/12utah.html>.

94. *Id.*

95. *Gay and Lesbian Rights*, *supra* note 54.

because: a gay citizen or group of citizens come forward with a self-initiated proposal for the council or board to consider; there are employers or businesses in the town that have initiated gay-friendly legal policies, and someone wants the council or board to consider these for the town; someone moves to town and is astounded that there are no such policies in place and asks the town to consider such policies or laws; town staff or elected officials go to conferences where they learn about various initiatives that the town could undertake to address legal issues facing gay persons; or a gay person gets elected and takes a look at proposed ordinances and policies with a “new eye.”⁹⁶

This section discusses the following areas of local governmental gay legal rights initiatives in the context of local authority: discrimination laws, domestic partner benefits, local contractor laws, and the passage of resolutions by a governing body. Examples of each illustrate the challenges of implementing these policies at the local level.

A. Local Discrimination Laws

A majority of the United States population supports anti-discrimination laws that include gay people; thus, this is a fairly straightforward initiative that most towns can take with a high degree of success.⁹⁷ These initiatives can be undertaken in towns or cities that have proper local legal authority and where there is not already a state law in place. Indeed, if enough towns or cities in a state pass such laws, it gives greater support with which to urge state lawmakers to follow a similar course at a state level. This is what is happening in the state of Utah, where municipalities have some

96. Electing openly gay officials is a proven method of getting these types of laws and policies passed. The Gay & Lesbian Victory Fund, which works to elect LGBT leaders to public office, exists solely to support such efforts: “Lesbian, gay, bisexual and transgender office holders are our clearest and most convincing champions for true equality. As leaders in government, they become the face and voice of a community. They challenge the lies of extremists and speak authentically about themselves, their families and their community.” *Mission*, THE GAY & LESBIAN VICTORY FUND, http://www.victoryfund.org/our_story/mission (last visited Oct. 21, 2012).

97. The most high profile case regarding such an initiative is *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, several municipalities in Colorado had passed ordinances giving protection to persons discriminated against by reason of their sexual orientation, resulting in “Amendment 2” to the Colorado Constitution prohibiting such laws. *Id.* at 623-24. Upon challenge, the United States Supreme Court ruled that such action was unconstitutional, holding in this landmark case that “[f]irst, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and . . . invalid form of legislation. Second, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.” *Id.* at 632. The Court continued: “Amendment 2 . . . is at once too narrow and too broad. It identifies persons by a single trait and then denies them protection across the board. The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence.” *Id.* at 633.

limited degree of autonomy.⁹⁸ In April 2012, the city council in Springdale, Utah (population 529) passed an anti-discrimination ordinance addressing employment and housing based on sexual orientation, becoming the fifteenth locality in Utah to do so; business leaders in Utah would like state legislators to follow suit and have made their position known publicly.⁹⁹ Passing these types of laws typically means simply adding the new protected category to already existing discrimination laws, thus requiring a minimum of drafting effort. These existing laws should already outline basic conduct that constitutes discrimination, how to report complaints, and other procedural details.

One can run into a roadblock, however, if one is not found to have the proper legal authority to pass such an ordinance. This can happen for various reasons, such as the entity's authority not being covered under limited-home rule, preemption, or other constitutional grounds. Such was the result in the North Carolina case of *Williams v. Blue Cross Blue Shield of North Carolina*.¹⁰⁰

1. *Williams v. Blue Cross Blue Shield of North Carolina*

Although the *Williams* case dealt with a county (not a city or town) that tried to implement an antidiscrimination ordinance, it is instructive just the same. As background to the *Williams* case, the Orange County (North Carolina) Board of Commissioners (BOCC), in 1987, established a Human Relations Committee (HRC) pursuant to North Carolina General Statutes § 160A-492, which stated, "The governing body of any city, town, or county is hereby authorized to undertake . . . human relations, community action and manpower development programs . . . [and] may appoint such human relations, community action and manpower development committees or boards and citizens' committees, as it may deem necessary in carrying out such programs and activities."¹⁰¹ The charge from the BOCC to the HRC was that it:

- (1) study and make recommendations concerning problems in the field of

98. Cities and towns in Utah are granted home rule in many, but not all, areas of lawmaking. UTAH CONST. art. IX § V.

99. See *Non-discrimination Ordinance Passes in Springdale*, NEWS UTAH (Apr. 19, 2012), <http://www.newsutah.org/utah/non-discrimination-ordinance-passes-springdale-14924/>; Denis Romboy, *Top Utah Business Executives Call for Statewide Nondiscrimination Law*, DESERET NEWS (Jan. 26 2012, 8:04 PM), <http://www.deseretnews.com/article/705398160/Top-Utah-business-executives-call-for-statewide-nondiscrimination-law.html?pg=all>; see also *Nondiscrimination Ordinances*, EQUALITY UTAH, <http://www.equalityutah.org/nondiscrimination> (last visited Oct. 22, 2012) (listing all of the towns and cities).

100. *Williams v. Blue Cross Blue Shield of N.C.*, 581 S.E.2d. 415, 431-32 (N.C. 2003).

101. *Id.* at 419.

human relationships; (2) anticipate and discover practices and customs most likely to create animosity and unrest and to seek solutions to problems as they arise; (3) make recommendations designed to promote goodwill and harmony among groups in the County irrespective of their race, color, creed, religion, ancestry, national origin, sex, affectional preference, disability, age, marital status, or status with regard to public assistance; (4) monitor complaints involving discrimination; (5) address and attempt to remedy the violence, tensions, polarization, and other harm created through the practices of discrimination, bias, hatred, and civil inequality; and (6) promote harmonious relations within the county through hearings and due process of law¹⁰²

After the HRC conducted several public hearings, it recommended to the BOCC that Orange County establish a comprehensive civil rights ordinance, and include sexual orientation as a protected category.¹⁰³ The North Carolina General Assembly passed legislation in 1991 allowing Orange County to do this.¹⁰⁴ Two years later, the Orange County legislative delegation asked the North Carolina General Assembly to pass enabling legislation that modified what had passed previously, and which more closely mirrored federal and state law by dropping sexual orientation from the list of protected groups.¹⁰⁵ This was passed, and a year later the BOCC adopted the ordinance.¹⁰⁶ The next year, more laws were passed authorizing transfer by the Equal Employment Opportunity Commission (for employment discrimination complaints) and the Department of Housing and Urban Development (for housing discrimination complaints) to Orange County for complaints that arose in the county.¹⁰⁷

When plaintiff Mary Williams brought an employment discrimination action under the Orange County Civil Rights Ordinance, the HRC found that there was reasonable cause to believe that discrimination had occurred due to her race and gender, and the HRC issued a “right to sue” letter.¹⁰⁸ After the suit commenced, however, defendant Blue Cross Blue Shield of North Carolina (BCBS) asked for a declaratory judgment that the enabling legislation and the ordinance violated Article II, Section 24 of the North Carolina Constitution.¹⁰⁹ The applicable provision is titled “Limitations on local, private, and special legislation” and reads as follows: “(1) Prohibited subjects. The General Assembly shall not enact any local, private, or

102. *Id.*

103. *Id.* at 420.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 421.

109. *Id.* at 421-22.

special act or resolution: . . . (j) Regulating labor, trade, mining, or manufacturing[.] . . . (3) Prohibited acts void. Any local, private, or special act or resolution enacted in violation of the provisions of this Section shall be void.”¹¹⁰ Orange County and the HRC (counterclaim defendants) argued that neither the enabling legislation nor the ordinance was a local act under Article II, Section 24 but that even if the court determined that the enabling legislation and the ordinance were local acts, they were not prohibited local acts because they sought to regulate discrimination, rather than labor or trade.¹¹¹

The Supreme Court of North Carolina rejected these arguments, holding, upon application of the reasonable classification test, that the ordinance was a local act and, thus, prohibited.¹¹² The court noted that there was nothing special about employment rights in Orange County that made it necessary for employees who lived there to have their own scheme for recompense, one which differed from that covering everyone else in the state.¹¹³ The court also noted that the ordinance contained two categories of protection not found elsewhere in the state: familial status and veteran’s status.¹¹⁴ In discussing its reasoning, the court went through the history behind the drafting of the “special act” provision of the North Carolina Constitution.¹¹⁵

The court found that the Article II Section 24 process was not followed. It refused to uphold the particularized laws in the present case, fearing that they would lead to the creation of “a patchwork of standards varying from

110. N.C. CONST. art. II, §§ 24(1)(j), (3).

111. *Williams*, 581 S.E.2d at 425.

112. *Id.* at 426 (“Under a reasonable classification analysis, ‘the distinguishing factors between a valid general law and a prohibited local act are the related elements of reasonable classification and uniform application.’ Legislative classification of conditions, persons, places, or things is reasonable when it is ‘based on [a] rational difference of situation or condition.’”); *id.* at 430 (explaining that the court expressed no opinion as to whether Orange County had the authority to address the housing and public accommodation issues under the Ordinance).

113. *Id.* at 427-28 (noting that the statute of limitations period was different for these type of discrimination claims in Orange County than it was in other counties).

114. *Id.* at 427.

115. “The organic law of the State was originally drafted and promulgated by a convention which met at Halifax in December, 1776. During the ensuing 140 years, the Legislature of North Carolina possessed virtually unlimited constitutional power to enact local, private, and special statutes. This legislative power was exercised with much liberality, and produced a plethora of local, private, and special enactments. As an inevitable consequence, the law of the State was frequently one thing in one locality, and quite different things in other localities. To minimize the resultant confusion, the people of North Carolina amended their Constitution at the general election of 1916 so as to deprive their Legislature of the power to enact local, private, or special acts or resolutions relating to many of the most common subjects of legislation.” *Id.* at 426-27.

county to county.”¹¹⁶

As to counterclaim defendants’ argument that the action being regulated was discrimination, not labor, the court stated that by covering employment discrimination, the ordinance had the “practical effect” of regulating labor, and trade as well.¹¹⁷ Counterclaim defendants tried a final argument that the passage of the ordinance fell under authority given to them under the county “general welfare” clause of the North Carolina General Statutes, but this argument failed.¹¹⁸ The court emphasized throughout the opinion that they were “addressing only the employment discrimination provisions” of the ordinance, not housing or public accommodation, and that they expressed “no opinion as to whether Orange County possessed inherent authority to address these areas.”¹¹⁹

Analyzing *Williams*, one can surmise that the county thought that it had the authority to pass the ordinance and that they may even have modified it in 1993 by eliminating “sexual orientation” as a protected category to make it more defensible if it was challenged. In a non home-rule state, the county must have believed its authority to pass the ordinance derived from the “general welfare” clause of the North Carolina General Statutes. However, this case underscores the importance of carefully examining one’s state constitution to determine if there are any roadblocks to local legislation. In this case, it appears that even the North Carolina General Assembly (where presumably the legal staff studied the proposed legislation) did not view the ordinance as a “special act.” Although this case ultimately did not include sexual orientation as one of the categories that the ordinance would protect, it still serves as an example of how local government should carefully proceed when considering such legislation. In this case, a ruling that could perhaps have been anticipated by a constructionist court nullified years of effort.

Another reality of implementing laws at the local level is obtaining the necessary buy-in from one’s local legislative delegation if it is one that requires enabling authority; an illustration of this occurred in the *Williams*

116. *Id.* at 428.

117. *Id.* at 429.

118. *Id.* at 430 & n.4. Counterclaim defendants cited § 153A-121(a) in support of this argument, which gives a county the power to enact ordinances that “define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county.” N.C. GEN. STAT. § 153A-121(a)(2001). Defendants also unsuccessfully argued that the following statutes gave them authority to pass the ordinance: N.C. GEN. STAT. § 160A-174 (2001) (“The fact that a State or federal law, standing alone, makes a given act, omission, or condition unlawful shall not preclude city ordinances requiring a higher standard of conduct or condition.”), N.C. GEN. STAT. § 153A-4 (2001) (“Broad construction”), N.C. GEN. STAT. § 153A-123 (2001) (“Enforcement of ordinances”), and N.C. GEN. STAT. § 153A-134 (2001) (“Regulating and licensing businesses, trades, etc.”).

119. *Williams*, 581 S.E.2d. at 430.

case. In limited or non-home rule states, a local legislator can introduce local bills to a statewide legislature to accomplish local goals. One North Carolina commentator has noted the pros and cons of this approach: “Where the authority of a particular act is not clear, local governments may seek special legislation passed by the state legislature—a local act—to provide clear authority. Local governments also regularly seek special legislation in order to modify specific constitutional limitations contained in the general law.”¹²⁰ Despite constitutional limitations, it is easy to obtain local acts, especially those that have the support of the local legislation. Under a courtesy system, the general assembly usually approves local acts unanimously.¹²¹

The local act system provides for the creation of a pilot program, allowing local jurisdictions to authorize new programs or activities before statewide acceptance. “On the other hand, the legislative landscape that shapes local authority is made somewhat more complicated by the presence of local legislation that modifies authority for one or more units through uncodified provisions.”¹²² Local acts create the fear that a particular power does not exist in general law.

While this courtesy system usually works as explained above, with “controversial” issues this is often not the case. An attempt by the Carrboro (North Carolina) Board of Aldermen to amend its town charter housing antidiscrimination authority to include sexual orientation was killed in committee at the North Carolina General Assembly, despite the support of the local delegation.¹²³

B. Domestic Partner Benefits

Once heralded as the most progressive way a local government could demonstrate its forward thinking with regard to benefits for gay employees, domestic partner benefits (specifically in this discussion, health insurance benefits), while still better than nothing, remain problematic for a number of reasons. First and foremost, one of the many problems with domestic partner benefits is that without the benefit of marriage the “imputed value” of any benefit is fully taxed to the employee.¹²⁴ After running the numbers, employees who wish to provide insurance coverage for their partners

120. Bluestein, *supra* note 17, at 2009-10.

121. *Id.*

122. *Id.*

123. This occurred after a tirade of fear mongering by the co-chair of the committee, who was also the House minority chair at the time. See Lydia Lavelle, *Not in This House*, CARRBORO CITIZEN (May 7, 2009), <http://www.carrborocitizen.com/main/2009/05/07/not-in-this-house> (giving an editorial about this local bill).

124. See 26 C.F.R. § 1.61–21(b)(1) (specifying how “fringe benefits” are to be valued for purposes of calculating an employee’s gross income).

through domestic partner benefits often find that it simply does not make financial sense.¹²⁵ Just as forward-thinking companies have looked to create tax offsets to address this domestic partner benefit disparity,¹²⁶ forward-thinking local governments should follow suit, and at least one has done so.¹²⁷

Two areas of concern that need to be discussed with regard to domestic partner benefits are: (1) initially offering domestic partner benefits and, (2) once obtained, how to retain these benefits. Concentrating on the first question, there are many local jurisdictions that offer these types of benefits, even in states that have “marriage amendments” and/or limited home rule.¹²⁸ Therefore, the presence of a marriage amendment or the absence of total home rule authority should not dissuade an eager councilperson from proposing these benefits. There are many models around the country available for reference. Note, however, as the next case shows, that there is at least one jurisdiction (a county) where domestic partner benefits in a non-home rule and later “marriage amendment” state did not pass muster once legally challenged.

I. Arlington County v. White

In the 1997 case of *Arlington County v. White*,¹²⁹ the county decided to expand the list of persons eligible for coverage under the county’s self-funded health insurance benefits plan to include adult, dependent domestic partners of employees. When legally challenged by taxpayers, the Supreme Court of Virginia first noted that “[t]he General Assembly specifically authorizes a local government to provide self-funded health

125. See Tara Siegel Bernard, *Cambridge, Mass., Equalizes Cost of Health Insurance for Gay Workers*, N.Y. TIMES (June 15, 2011, 3:30 PM), <http://bucks.blogs.nytimes.com/2011/06/15/cambridge-mass-equalizes-cost-of-health-insurance-for-gay-workers/> [hereinafter Bernard, *Cost of Health Insurance*]; see also Tax Parity for Health Beneficiaries Act of 2011, H.R. 2088, 112th Cong. (2012); Tax Parity for Health Plan Beneficiaries Act of 2011, S. 1117, 112th Cong. (2012) (introducing a bill in both the House and the Senate that would address this tax disparity).

126. Bernard, *A Progress Report*, *supra* note 66, at 1-2.

127. See Bernard, *Cost of Health Insurance*, *supra* note 125.

128. For example, Florida (which has a marriage amendment and limited home rule) has several cities that provide domestic partner benefits, including Orlando, St. Cloud, and Kissimmee. See John Busdeker, *St. Cloud Makes Domestic-Partner Health Benefits Available to City Employees*, ORLANDO SENTINEL (Sept. 9, 2011), http://articles.orlandosentinel.com/2011-09-09/health/os-domestic-partner-benefits-st-cloud-20110909_1_domestic-partner-domestic-partners-city-employees; see also Jeremy Pittman, *Domestic Partner Benefits on Both Sides of the Ohio River*, HRC BLOG (May 14, 2011), <http://www.hrc.org/blog/entry/domestic-partner-benefits-on-both-sides-of-the-ohio-river>. Ohio has a marriage amendment and home rule; Cincinnati, Cleveland, and Columbus are among Ohio cities offering domestic partner benefits.

129. *Arlington Cnty. v. White*, 528 S.E.2d 706, 707 (Va. 2000).

benefit programs for its employees and their dependents.”¹³⁰ Lacking a statutory definition for the term “dependent,” the court further noted the lack of an express statutory provision allowing employee dependents to participate in a locality’s self-funded health benefits plans.¹³¹

Under these circumstances, the County correctly maintains, “[t]he power to determine who is an employee’s dependent . . . is fairly and necessarily implied.” Furthermore, the County asserts, “the locality must make [the] determination itself”; indeed, it “could not carry out its authority without exercising its discretion.” In the process, the County submits, the term “dependent” should be given its plain and ordinary meaning as one “[r]elying on . . . the aid of another for support.”¹³²

The court, however, determined that by enacting the ordinance, the county had violated Dillon’s Rule.¹³³ In determining that the ordinance violated the Dillon Rule, the court cited a 1997 attorney general opinion that stated “the statutory scheme which permits local governments ‘to provide for their officers and employees [self-funded] group life, accident, and health insurance programs . . . [does not] contain any language from which a general legislative intent to extend insurance coverage to persons within the definition of ‘domestic partner’ may be inferred.”¹³⁴

After discussing Dillon’s rule, the attorney general opined that “[i]n the absence of any statutory authority indicating an intent to permit a local governing body to extend health insurance coverage provided employees to persons other than the spouse, children or dependents of the employee . . . a county lacks the power to provide such coverage.”¹³⁵ Specifically, the established definition of “dependant” is contradicted by the requirement that the employee be “financially interdependent” with the domestic partner.¹³⁶

The court concluded that the offering of the benefits to domestic partners was an *ultra vires* act.¹³⁷ The dissent argued that the real issue in the case was whether “Arlington County [had] the legal authority to recognize common law marriages or ‘same-sex unions’ by conferring certain health

130. *Id.* at 708 (citing VA CODE ANN. §§ 15.2-1517(A), 51.1-801).

131. *Id.*

132. *Id.* (footnotes and citation omitted).

133. *See id.* (“For the reasons that follow and giving the County the benefit of any doubt, we conclude that the County’s definition of dependent is not reasonable and, therefore, violates the Dillon Rule.”).

134. *Id.* at 708-09.

135. *Id.* at 709.

136. *See id.* (noting that the established definition of “dependent” is one in which the individual “receive[s] from the taxpayer over half of his or her support for the calendar year”).

137. *See id.* An *ultra vires* act is “an act performed without any authority to act on the subject.” BLACK’S LAW DICTIONARY 1522 (6th ed. 1990).

insurance benefits upon domestic partners of County employees who are engaged in these relationships.”¹³⁸ While this argument in *Arlington v. White* seems off-base, it unfortunately laid the groundwork for future litigation elsewhere involving the continued existence of domestic partner benefits. Recent cases challenging domestic partner benefits have taken place in Michigan and Arizona, and are worthy of examination.

2. National Pride at Work, Inc. v. Governor of Michigan

In 2004, Michigan passed a marriage amendment.¹³⁹ When the amendment was passed, “several public employers, including state universities and various city and county governments, had policies or agreements in effect that extended health-insurance benefits to their employees’ qualified same-sex domestic partners.”¹⁴⁰ After the attorney general’s office issued a formal opinion that the amendment barred the offering of such benefits, plaintiffs (National Pride at Work, Inc., a nonprofit organization of the American Federation of Labor—Congress of Industrial Organizations, as well as employees of the city of Kalamazoo, Michigan, and other educational, state, and county public entities) filed a declaratory judgment action against the Governor in *National Pride at Work, Inc. v. Governor of Michigan*, asking if the marriage amendment “bar[red] public employers from providing health-insurance benefits to their employees’ qualified same-sex domestic partners.”¹⁴¹

In *National Pride at Work, Inc.*, the trial court held for the plaintiffs, reasoning that the provision of health benefits did not “constitute one of the ‘benefits of marriage.’”¹⁴² The court reasoned that the “criteria [used by the public employers] also do not recognize a union ‘similar to marriage’” because the “criteria, even when taken together, pale in comparison to the myriad of legal rights and responsibilities accorded to those with marital status.”¹⁴³

The Court of Appeals reversed, holding that the amendment “precludes recognition of a ‘similar union for any purpose,’” and, therefore, a domestic partnership will still violate the amendment even though it does not mirror every aspect of marriage.¹⁴⁴ First, the relationship between the

138. *White*, 528 S.E.2d at 710-11 (Hassell, J., dissenting in part and concurring in part).

139. *Nat’l Pride at Work, Inc. v. Governor of Mich.*, 748 N.W.2d 524, 529 (Mich. 2008).

140. *Id.*

141. *Id.* at 529-30.

142. *Id.* at 530.

143. *Id.*

144. *See id.*

employee and domestic partner still creates a union the employer would be legally obligated to recognize and for which an employer must provide benefits. Second, the employee is required to provide proof of the domestic partnership in order to receive benefits from their employers.¹⁴⁵

The Michigan Supreme Court affirmed the decision of the Michigan Court of Appeals, examining domestic partner benefits policies from Kalamazoo and other entities, including a domestic partner registry from Ann Arbor, Michigan.¹⁴⁶ In its reasoning, the court focused on the words of the amendment: “To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose.”¹⁴⁷ The court then went about asking “whether the public employers are recognizing a domestic partnership as a union similar to a marriage.”¹⁴⁸ Examining the definition of a “union,” the court declared that a domestic partnership was “most certainly a union.”¹⁴⁹ It also determined that a domestic partnership was similar to a marriage and that the court was recognizing a domestic partnership as a union similar to marriage because of the provision of “health-insurance benefits on the basis of the partnership.”¹⁵⁰ Finally, the court examined the “for any purpose” amendment language to resolve any “residual doubt” about whether a public entity could offer domestic partner benefits, noting that “the people of this state could hardly have made their intentions clearer.”¹⁵¹ The majority justices made it clear that the amendment language in the Michigan statute served as the basis for their decision and that it was, therefore, not helpful to look at case law from other states because other amendments would be worded differently.¹⁵²

Justice Kelly disagreed with the majority, stating in her dissent that the amendment merely prohibits the recognition of same-sex marriages or similar unions. “It is a perversion of the amendment’s language to conclude that, by voluntarily offering the benefits at issue, a public

145. *See id.* at 533 (“The requirement that an employee either of a written domestic-partnership agreement or an agreement between the employee and the dependent to be jointly responsible for basic living and household expenses, in order to establish by the partner or dependent for insurance coverage, constitutes recognition by the public employer of a ‘similar union for any purpose.’”).

146. *Id.* at 532 n.2.

147. MICH. CONST. art. I, § 25.

148. *Nat’l Pride at Work*, 748 N.W.2d at 533.

149. *Id.* at 534.

150. *Id.* at 533, 537.

151. *Id.* at 538.

152. *Id.* at 542-43.

employer recognizes a union similar to marriage.”¹⁵³ She went on to study the circumstances surrounding the adoption of the amendment, noting that Michigan voters clearly had not meant to prevent public employers from offering healthcare benefits to the “same-sex partners” of their employees.¹⁵⁴ Justice Kelly was referencing the fact (undisputed, and in the record) that Citizens for the Protection of Marriage, the organization primarily responsible for supporting the passage of the amendment, had widely publicized that the amendment’s passage would not affect the offering of domestic partner benefits for public employees.¹⁵⁵ She further emphasized that the amendment was “*only* about marriage.”¹⁵⁶ And, as the majority did, Justice Kelly examined the precise language of the amendment, drawing a different conclusion.¹⁵⁷

The Michigan case is the direst example to date of the effect that a marriage amendment can have on a local government’s ability to offer domestic partner benefits, but the governor of Arizona is currently seeking a similar outcome in her state.

3. *Diaz v. Brewer*

On July 2, 2012, Arizona’s attorney general filed a petition for a writ of certiorari in *Diaz v. Brewer* on behalf of the governor in the United States Supreme Court, asking the Court to overturn a ruling by the Ninth Circuit Court of Appeals that, despite the passage of a marriage amendment, the state of Arizona must continue to offer domestic partner benefits to its employees who wish to cover same-sex partners.¹⁵⁸

At the district court level, the trial judge denied defendants’ motion to dismiss and granted a preliminary injunction which kept the benefits in place while the case continued.¹⁵⁹ In denying the motion to dismiss, the

153. *Id.* at 544 (Kelly, J., dissenting).

154. *Id.* (“The majority decision does not represent ‘the law which the people have made, [but rather] some other law which the words of the constitution may possible be made to express.’”).

155. *Id.* at 546; *see also* Tom Szczesny, *Controversial Gay Marriage Ban on Ballot*, MICH. DAILY (Sept. 27, 2004), <http://www.michigandaily.com/content/controversial-gay-marriage-ban-ballot> (noting that the proposed amendment to the Michigan constitution did not affect existing benefits packages and contracts).

156. *Nat’l Pride at Work*, 748 N.W.2d at 547 (Kelley, J., dissenting).

157. *Id.* at 549-51.

158. *See* Yvonne Wingett Sanchez & D.S. Woodfill, *Gov. Jan Brewer Asks Supreme Court to Hear Benefits’ Case*, THE REPUBLIC (July 9, 2012, 09:07 PM), <http://www.azcentral.com/news/politics/articles/2012/07/09/20120709gov-jan-brewer-asks-supreme-court-hear-benefits-case.html> (discussing Governor Brewer’s opposition to healthcare benefits for same-sex partners of state employees and her appeal to the United States Supreme Court); *see also* *Diaz v. Brewer*, 656 F.3d 1008, 1010 (9th Cir. 2011), *reh’g en banc denied*, 676 F.3d 823 (9th Cir.), *petition for cert. filed*, No. 12-23, 2012 WL 2645111 (U.S. July 2, 2012).

159. *Diaz*, 656 F.3d at 1012.

court found that the statute had a discriminatory effect as it allowed different-sex couples to maintain their health coverage while denying the same benefit to same-sex couples.¹⁶⁰ Because of the discriminatory effect of the amendment, the district court granted the plaintiffs' request for a preliminary injunction.¹⁶¹

At the Circuit Court of Appeals, Governor Brewer advanced three arguments for why the granting of a preliminary injunction by the district court was not proper; these arguments were rejected.¹⁶² When determining that the granting of the preliminary injunction was proper, the Court of Appeals noted that the district court "applied the appropriate standards, looking first at the likelihood of success on the merits. It reviewed each of the justifications for the law in light of the evidence in the record."¹⁶³ Furthermore, the court focused on the fact that the amendment furthered the state's economic interests through the reduction in expenditures. However, the attorney general argued that the evidence presented at the district level did not bear this out.¹⁶⁴

The defendants, on appeal, also contended "that the district court's order impermissibly recognized a constitutional right to healthcare."¹⁶⁵ However, the court found that this contention rests on a misconception of the district court's decision because, although employees are not constitutionally entitled to health benefits, the state may not provide health benefits in an arbitrary or discriminatory manner against "groups that may be unpopular."¹⁶⁶

A final argument Governor Brewer advanced was that "the statute promotes marriage by eliminating benefits for domestic partners."¹⁶⁷ Instead, the court agreed with the plaintiffs that denying benefits to same-sex partners cannot promote marriage since these persons cannot get married.¹⁶⁸

160. *Id.*

161. *See id.* (granting the injunction on equal protection grounds).

162. *Id.* at 1012-13.

163. *Id.* at 1013 (citation omitted).

164. *Id.*

165. *Id.*

166. *Id.* The court went on to discuss *U.S. Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), which it said also involved an "arbitrary restriction of benefits for a particular group perceived as unpopular." *Id.* The court noted that *Moreno* involved "so-called 'hippies.'" *Id.*

167. *Id.* at 1014.

168. *Id.* Thankfully, the court did not opine, as members of the judiciary have in other opinions, that gay people can get married—they just need to marry someone of the opposite sex. *See, e.g., Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting) ("[T]he marriage statutes do not discriminate on the basis of sexual orientation. . . . The marriage statutes do not disqualify individuals on the basis of sexual orientation from entering into marriage. All individuals, with

The unanimous ruling by the Circuit Court of Appeals, affirming the United States District Court of Arizona's granting of a preliminary injunction while the underlying case goes to trial, provides a bit of encouragement to advocates of these types of governmental benefits. Arizona, a state that is not particularly "legal-friendly" to gay rights, was able to provide these state domestic partner benefits by virtue of an executive order issued by the former governor Janet Napolitano.¹⁶⁹ Depending on the ultimate outcome of the case, same-sex couples may feel the positive effects of the case throughout Arizona's state and local government once the case reaches its conclusion.

Due, in particular, to the *National Pride at Work, Inc.*, case in Michigan, public officials and legal rights advocates in North Carolina have been concerned as to whether the recent passage of that state's marriage amendment will affect domestic partner benefits currently offered to employees by several local and county governments in the state.¹⁷⁰ Indeed, the morning after the May 8, 2012, primary election passed the amendment, a commissioner in Mecklenburg County (where Charlotte, the largest city in North Carolina is located) was asking staff for clarification of the issue, with the intent of taking away the current benefits.¹⁷¹

The official North Carolina amendment (also known as "Amendment One") is actually longer than what voters read on their ballots on Election Day.¹⁷² In its entirety, it reads:

certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.").

169. See Sanchez & Woodfill, *supra* note 158.

170. See Diane M. Juffras, *Amendment One, North Carolina Public Employers, and Domestic Partner Benefits*, PUB. EMP. LAW BULL. (Univ. N.C. School of Gov't, Chapel Hill, N.C.), June 2012, at 1, 18 (discussing the potential impact of Amendment One and concluding that the Michigan case will not be persuasive in North Carolina); see also Mary C. Curtis, *North Carolina Same-Sex Marriage Amendment: Confusion Over Domestic Partnership Benefits*, WASH. POST (May 18, 2012, 4:47 PM), http://www.washingtonpost.com/blogs/she-the-people/post/north-carolina-same-sex-marriage-amendment-confusion-over-domestic-partner-benefits/2012/05/18/gIQAkJhGZU_blog.html (posting the day after Amendment One was passed in North Carolina on the confusion caused by the language of the amendment); Robertson, *supra* note 43 (noting the vague and untested nature of the language of the amendment).

171. Specifically, Commissioner James asked, "Since Amendment One has passed, when will we get a memo or something that outlines what changes we need to make to our health plan to be in compliance? I recall when the Democrats on the Commission forced the issue and added these benefits for homosexuals that a number of legal experts said it was illegal then—including the city attorney. Now that Amendment One has passed, it obviously is illegal to offer this benefit as there is now only one 'domestic legal union' recognized in the state." Curtis, *supra* note 170. James added, "Prior to the vote, most scholars (left and right) said that Amendment One would eliminate local faux 'marriage' benefits for homosexual employees." *Id.*

172. Juffras, *supra* note 170, at 18 (claiming only the first sentence of Amendment One was printed on the North Carolina ballots).

Marriage between one man and one woman is the only domestic legal union that shall be valid or recognized in this State. This section does not prohibit a private party from entering into contracts with another private party; nor does this section prohibit courts from adjudicating the rights of private parties pursuant to such contracts.¹⁷³

One commentator, Diane Juffras, has recently written on the issue of whether the amendment should affect the ability of local governments to offer domestic partner benefits to its employees.¹⁷⁴ In her view, these public entities should still be able to offer these benefits because the primary effect of Amendment One is that it invalidates any general statute amending the marriage laws within North Carolina to include same-sex marriage. However, Juffras notes a secondary effect as well.¹⁷⁵ Juffras states that Amendment One prohibits the General Assembly and local governing boards from granting legal recognition to relationships between same-sex couples, despite the fact that the phrase “domestic legal union” is not defined in the amendment text.¹⁷⁶

Because of the authority given to local governments in North Carolina under various statutes, Juffras explains that the offering of domestic partner benefits should still be under the purview of local officials. Juffras outlined the following reasons to bolster her opinion:

1. The North Carolina General Statutes give local government employers the authority to purchase insurance and other benefits for their employees and, in the case of municipalities, their dependents.
2. The General Statutes also give local governments the authority to develop policies that will foster the hiring and retention of a capable and diligent workforce.
3. Because the General Statutes themselves contain a rule of construction instructing that the authority given to local governments is to be construed broadly, it is reasonable to conclude that cities, counties, and other local government entities could have chosen to offer domestic partner benefits as a recruiting and retention tool.
4. Arguments that offering public employees domestic partner benefits are contrary to state or federal law or to North Carolina public policy are not supported by either North Carolina case law or case law from other states.¹⁷⁷

173. *Id.* at 1.

174. *Id.* The UNC School of Government is “the largest university-based local government training, advisory, and research organization in the United States,” offering “up to 200 courses, seminars, and specialized conferences for more than 12,000 public officials each year.” *Mission and History*, UNC SCHOOL OF GOV'T, <http://www.sog.unc.edu/node/257> (last visited July 25, 2012). Members of the faculty serve as resources for state and local governments across the state and beyond. *Id.*

175. Juffras, *supra* note 170, at 1.

176. *Id.*

177. *Id.* at 2.

Further arguments advanced by Juffras include the following: (1) the amendment has a plain meaning on its face; (2) there is not a “legal precedent in North Carolina or elsewhere for the proposition that a government employer’s coverage of its employees’ domestic partners under benefits plans makes valid or constitutes legal recognition of any union or confers rights and responsibilities to any union under the law” (i.e., that to “extend benefits is not to ‘recognize’ any kind of union”); and (3) not allowing localities to offer domestic partner benefits could result in federal or state equal protection violations.¹⁷⁸ It remains to be seen if and when someone might choose to challenge the offering of domestic partner benefits by a local government in North Carolina in a court of law.¹⁷⁹

4. “Dependent” Challenges

Assuming a locality is able to offer domestic partner benefits, another challenge has arisen in the context of employees who choose to cover a child with health insurance.¹⁸⁰ Specifically, this can occur when places of employment offer domestic partner benefits that initially cover both a non-employee partner and the couple’s child but then the couple separates, leaving the child without coverage. This problem can present under two different scenarios.

The first scenario involves an examination of children “intended” of the relationship. Depending on the state, without the benefit of marriage or second-parent adoption, a child “intended” of the relationship can lose coverage if the child is not a legal dependent of the employee. Here is how this happens: town employee and partner (both female) decide to apply for domestic partner benefits through the town’s insurance provider because their state does not allow same-sex marriage; in doing so, they affirm, by affidavit, that they meet the required criteria. Employee and partner decide

178. *Id.* at 2-3.

179. An official explanation of the amendment when it was put on the ballot was prepared by the Constitutional Amendments Publication Commission (comprised of the North Carolina Secretary of State and Attorney General and the General Assembly’s Legislative Services Director) pursuant to law. See N.C. GEN. STAT. §§ 147-54.8-54.10 (2012). The Commission report noted that “[t]he term ‘domestic legal union’ used in the amendment is not defined in North Carolina law. There is debate among legal experts about how this proposed constitutional amendment may impact North Carolina law as it relates to unmarried couples of same or opposite sex and same sex couples legally married in another state, particularly in regard to employment-related benefits for domestic partners; domestic violence laws; child custody and visitation rights; and end-of-life arrangements. The courts will ultimately make those decisions.” Juffras, *supra* note 170, at 2.

180. Juffras, *supra* note 170, at 12 (noting concerns regarding the effect of Amendment One on unmarried partners’ ability to provide healthcare to their children, especially for those who are civil employees (citing Laura Leslie, *NC Marriage Amendment: What It Does*, WRAL NEWS (May 3, 2012), <http://www.wral.com/news/state/nccapitol/story/11060038>)).

to have a child and mutually agree that the non-employee partner will carry the child, using an anonymous donor. Once born, the employee is unable to adopt the child, because the two live in a state that does not allow second-parent adoption. A few years later, the two break off their relationship, and the partnership dissolves. In most cases, if the state is one in which the two women could not marry or adopt through second-parent adoption, the town employee can no longer carry the child on her town insurance policy unless the child becomes her dependent.¹⁸¹ Just as forward-thinking companies have looked to create tax off-sets to address the domestic partner benefit disparity,¹⁸² forward-thinking local governments should identify ways to cover the non-biological child in this situation, one which is extremely compelling as the town employee is still a parent to the child. This might mean negotiating these specific terms with the town's insurance provider and legitimizing coverage by having a town employee and his/her partner sign an affidavit indicating that a child was "intended" of the relationship.¹⁸³

The second scenario is the consideration of situations in which children come with the relationship. This is akin to stepchildren coming with a marriage. When a marriage dissolves, the ability of a town employee stepparent to cover his/her former stepchildren is usually no longer available. However, the town employee stepparent, while married, at least has the legal right to adopt the stepchild; therefore, if he/she and the biological parent do get divorced, he/she can still carry the child on his/her insurance. The domestic partner in a similar situation does not have the option of adoption. As such, a longstanding relationship of *in loco parentis* with a child might exist, but the stepparent would not be able to continue to care for or support the child after a breakup with the child's biological parent.¹⁸⁴ This discord is not as readily apparent as the earlier example

181. It is important to note that an employee who is married, has a child, and then divorces can still carry his/her child on his/her health insurance, regardless of whether the child is his/her "dependent."

182. See *supra* note 66 (discussing employers who reimburse gay employees a tax off-set to equalize the disparity between domestic partner benefits and health insurance coverage).

183. Such an affirmation might be more easily done at this stage than during a "break-up" stage, where revisionist history can result in differing viewpoints of whether the child was "intended" to be of the relationship. See *Boseman v. Jarrell*, 704 S.E.2d 494, 504-05 (N.C. 2010) (holding that a non-biological parent could be granted custody rights as a result of her paramount parental status since the former couple intentionally and voluntarily created a family unit into which they jointly decided to bring a child).

184. See *Shook v. Peavy*, 23 N.C. App. 230, 232 (Ct. App. 1974) (defining *in loco parentis* as one who stands in the place of a parent and who assumes "the status and obligations of a parent without a formal adoption"); see also *Duffey v. Duffey*, 113 N.C. App. 382, 385 (Ct. App. 1994) (stating that typically the status of *in loco parentis* terminates upon divorce or the completion of the couple's relationship).

where the child was “intended” by the relationship, but such a situation still might be a place where local government can seek to negotiate terms with the town’s insurance company to allow stepparent domestic partners to continue to cover their former stepchildren. The type of affidavit drafted here might require a minimum period of time that the parental relationship has existed (similar to most domestic partnership applications, which require a minimum period of time of the relationship),¹⁸⁵ the agreement of the biological parent (the ex-partner) for the town employee to provide benefits, and other terms that would protect the town’s long-term interest.¹⁸⁶

This “child benefits” problem is created, essentially, in states that do not allow second-parent adoption.¹⁸⁷ One might ask, is it really local government’s duty to “fill in the gaps” in these states in the absence of second-parent adoption, which is a state issue? Working to provide coverage for children of domestic partners whose relationships dissolve is a prime example of how local government can at least address the health care needs of children of same-sex couples.

C. Local Contractor Laws

One way that local governments can work to eradicate discrimination against gay people is by way of contract. Governing bodies allocate and spend a large amount of public money on projects, big and small. To get the best deal for the public, when the project is over a certain amount of money, these bodies typically solicit requests for proposals (RFPs) from prospective vendors, based on specifications detailed in the bid solicitation.¹⁸⁸ Many state governments have, in recent decades, sought to increase participation by several underrepresented classifications of people

185. *Domestic Partner Benefit Eligibility: Defining Domestic Partners and Dependents*, HUMAN RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/domestic-partner-benefit-eligibility-defining-domestic-partners-and-dependents> (last visited Feb. 20, 2013) (finding domestic partner affidavits require some proof that an “intimate, committed relationship” existed for at least six months).

186. One example is if the biological parent entered into a new relationship or got married and there was another partner/parent who could provide coverage, the option to provide benefits might not be available.

187. *Cf.* HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: SECOND PARENT ADOPTION (2011), available at http://www.hrc.org/files/assets/resources/parenting_laws_maps%281%29.pdf (listing ten states plus the District of Columbia that allow second-parent adoption statewide, including Arkansas, California, Colorado, Connecticut, Illinois, Massachusetts, New Jersey, New York, Pennsylvania, and Vermont). Only sixteen states have successfully allowed same-sex couples to petition for second-parent adoption. *See id.*

188. *See* N.C. GEN. STAT. § 143-52 (2012) (requiring that bids are accepted based on the best value for the public and conformity with the specifications and conditions in the RFPs).

in their bid process by the passage of special laws.¹⁸⁹ Similarly, some local governments have sought to increase protections for gay people by reviewing the discrimination policies of vendors who contract for work with the town or city.¹⁹⁰ When legally able, these local governments are requiring as part of their RFP process that prospective vendors either have or commit to adopting discrimination policies that include gay persons.¹⁹¹

Several jurisdictions have successfully required that vendors contracting with their city offer domestic partner benefits as part of their insurance package to employees.¹⁹² These requirements can apply to all of a city's contracts, or to contracts of a certain amount; in specified cases, there are exceptions.¹⁹³ Some require a pre-approval process before contracting with a local government.¹⁹⁴ There are many advantages to having these types of local contractor laws. These include the "proactive enforcement mechanism" of these ordinances;¹⁹⁵ the vendors' willingness to comply, given possible drastic consequences;¹⁹⁶ the added benefit that in many cases the ordinance can reach outside of the geographic boundaries of the local government that enacted the protections;¹⁹⁷ and the reality that "it may be legally, politically, and procedurally more feasible to pass these ordinances than provisions that apply more broadly."¹⁹⁸ A disadvantage is that the ordinances apply only to vendors that contract with the city, rather than the private sector at large; additionally, the ordinances are most often directed at contractors, rather than at providing individuals with rights and remedies for violations of an ordinance.¹⁹⁹

As with other ways that local governments can implement policies and

189. For example, North Carolina has such a statute, the policy being "to encourage and promote the use of small contractors, minority contractors, physically handicapped contractors, and women contractors in State purchasing of goods and services." N.C. GEN. STAT. § 143-48 (2012).

190. At least sixty-eight localities have adopted contractor requirements relating to discrimination on the basis sexual orientation. See Christy Mallory & Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors to Adopt LGBT-Related Workplace Policies*, 5 ALB. GOV'T L. REV. 478, 481 (2012).

191. See *id.*

192. Seventeen localities, as well as the State of California, have adopted an "Equal Benefits Ordinance" (referred to as an EBO). See *id.* at 499. For a list of jurisdictions that require their contractors to adopt "LGBT-related workplace policies," see *id.* at 483 n.14.

193. See *id.* at 487-92.

194. *Id.* at 492.

195. See *id.* at 506-08.

196. See *id.* at 508-09.

197. See *id.* at 509-10 (citing *Air Transp. Ass'n v. City & Cnty. of S.F.*, 992 F. Supp. 1149, 1161-65 (N.D. Cal. 1998), *aff'd*, 266 F.3d 1064 (9th Cir. 2001) (holding that the reach of a EBO could go outside of the boundary of the locality)).

198. See *id.* at 511-12.

199. See *id.* at 514-15.

laws that consider legal protections for gay people, these ordinances, if challenged, may be preempted if states have already spoken on the subject, even in home rule states. An example occurred in *Council of New York v. Bloomberg*.²⁰⁰

1. Council of New York v. Bloomberg

The New York Court of Appeals held in *Council of New York v. Bloomberg* that New York City's Equal Benefits Law was preempted by state and federal statutes.²⁰¹ The Equal Benefits Law

provides, in substance, that no city agency may enter into contracts having a value of \$100,000 or more annually with any person or firm that fails to provide to its employees' domestic partners employment benefits equal to those provided to spouses. "Domestic partners," as defined in the Equal Benefits Law, means people who are registered as having that status under Administrative Code § 3-240(a), or who register with a contractor pursuant to the Equal Benefits Law itself (Administrative Code § 6-126[b][5]). "Employment benefits," as used in the Equal Benefits Law, "means benefits including, but not limited to, health insurance, pension, retirement, disability and life insurance, family, medical, parental, bereavement and other leave policies, tuition reimbursement, legal assistance, adoption assistance, dependent care insurance, moving and other relocation expenses, membership or membership discounts, and travel benefits provided by a contractor to its employees" (Administrative Code § 6-126[b][7]).²⁰²

The court noted in *Bloomberg* that under General Municipal Law § 103, "all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded . . . to the lowest responsible bidder . . ." ²⁰³ The court held that the Equal Benefits Law violated the "lowest responsible bidder" requirement because it excluded bidders that failed to provide benefits to domestic partners.²⁰⁴ Despite the desirability of ensuring equal benefits for domestic partners, the court stated that New York City could not violate the bidding statute to achieve this end.²⁰⁵ Alluding to the state legislature, the court found that whether the bidder's benefits plan meets the municipality's concept of fairness is irrelevant under the competitive bidding statute, which requires municipalities give business to the lowest responsible bidder—a

200. See generally *Council of N.Y.C. v. Bloomberg*, 846 N.E.2d 433 (N.Y. 2006).

201. *Id.* at 435.

202. *Id.*

203. *Id.* at 438.

204. *Id.*

205. *Id.*

requirement designed to avoid favoritism.²⁰⁶ The court also found that the Employee Retirement Income Security Act (ERISA), a federal statute that regulates employee benefit plans, largely preempted the ordinance.²⁰⁷

Laws and ordinances aside, local councils and boards can also work to eradicate discrimination against gay persons by examining various agenda items where contracts will be implemented and establishing policy decisions to include nondiscrimination clauses where possible. One example relates to grants awarded by the town of Carrboro, North Carolina, to various human services agencies. The Board of Aldermen requires applicants to include LGBT nondiscrimination policies in their governing documents.²⁰⁸ The Board has a similar requirement for applicants seeking monies from the Town's revolving loan fund.²⁰⁹

D. Resolutions

A resolution is, typically, a non-binding, official statement passed by a majority of a board or council that declares a position or agreed upon decision.²¹⁰ This method of advocacy, while often seen as toothless, can be effective in some instances. In at least one case, a board passing a resolution on an issue involving gay rights landed the governing city and county in court, albeit briefly.

206. *Id.* The Council argued that the ordinance should be treated similarly to "project labor agreements" (PLA), the subject of an earlier New York case. *See generally In re N.Y. State Chapter, Inc., Assoc. Gen. Contractors of Am. v. N.Y. State Thruway Auth.*, 666 N.E.2d 185 (N.Y. 1996). PLAs provide "that bidders for public construction contracts must sign pre-negotiated labor agreements or be barred from bidding." *Bloomberg*, 846 N.E.2d at 439. The *Bloomberg* court distinguished the ruling in *New York State Chapter*, noting that there, they "held that the resulting 'efficiencies to be gained' might justify a PLA under the competitive bidding laws . . . only if it 'had as its purpose and likely effect the advancement of the interests embodied in the competitive bidding statutes,' which [the court] identified as 'prudent use of public moneys and . . . the acquisition of high quality goods and services at the lowest possible cost.'" *Id.* (citations omitted).

207. *Id.* at 440.

208. *See* JUNE 5, 2012 MINUTES, CARRBORO BD. OF ALDERMEN (2012), available at http://www.ci.carrboro.nc.us/boa/Minutes/2012/06_05_2012.pdf (noting that "all future Human Services Advisory Commission budget allocated contracts will include the Town's nondiscrimination clause," specifically the language for LGBT protection).

209. *See* FEB. 21, 2012 MINUTES, CARRBORO BD. OF ALDERMEN (2012), http://www.townofcarrboro.org/boa/Minutes/2012/02_21_2012.pdf.

210. *See* *Catholic League for Religious & Civil Rights v. City & Cnty. of S.F.*, 567 F.3d 595, 606-08 (9th Cir. 2008) (noting that the Board of Supervisors has passed numerous non-binding resolutions "denouncing discrimination against gays and lesbians," which enact no policy or regulations, but, instead, simply state the Board's position).

I. Catholic League for Religious & Civil Rights v. City of San Francisco

In *Catholic League for Religious & Civil Rights*,²¹¹ the Board of Supervisors adopted a resolution which dealt with the adoption of children by same-sex couples and the position of the Catholic Church, which was against such adoptions.²¹² The Catholic League argued that the passage of the resolution violated the Establishment Clause of the United States Constitution.²¹³ In reviewing *de novo* and then granting the board's Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief could be granted, the court reasoned that the resolution passed

211. *See generally id.*

212. *Id.* at 597. The full text of the resolution, Res. No. 168-06, titled "Resolution urging Cardinal Levada to withdraw his directive to Catholic Charities forbidding the placement of children in need of adoption with same-sex couples," is the following:

Resolution urging Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican, to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

WHEREAS, It is an insult to all San Franciscans when a foreign country, like the Vatican, meddles with and attempts to negatively influence this great City's existing and established customs and traditions such as the right of same-sex couples to adopt and care for children in need; and

WHEREAS, The statements of Cardinal Levada and the Vatican that "Catholic agencies should not place children for adoption in homosexual households," and "Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children" are absolutely unacceptable to the citizenry of San Francisco; and

WHEREAS, Such hateful and discriminatory rhetoric is both insulting and callous, and shows a level of insensitivity and ignorance which has seldom been encountered by this Board of Supervisors; and

WHEREAS, Same-sex couples are just as qualified to be parents as are heterosexual couples; and

WHEREAS, Cardinal Levada is a decidedly unqualified representative of his former home city, and of the people of San Francisco and the values they hold dear; and

WHEREAS, The Board of Supervisors urges Archbishop Niederauer and the Catholic Charities of the Archdiocese of San Francisco to defy all discriminatory directives of Cardinal Levada; now, therefore, be it

RESOLVED, That the Board of Supervisors urges Cardinal William Levada, in his capacity as head of the Congregation for the Doctrine of the Faith at the Vatican (formerly known as Holy Office of the Inquisition), to withdraw his discriminatory and defamatory directive that Catholic Charities of the Archdiocese of San Francisco stop placing children in need of adoption with homosexual households.

Id. at 597-98.

213. *Id.* at 598. Specifically, the Catholic League filed a 42 U.S.C. § 1983 suit in the Northern District of California, "alleging that the Resolution violates the Establishment Clause by expressing disapproval of and hostility towards the Catholic Church and Catholic religious tenets. Catholic League sought 'nominal damages, a declaration that this anti-Catholic resolution is unconstitutional, and a permanent injunction enjoining this and other official resolutions, pronouncements, or declarations against Catholics and their religious beliefs.'" *Id.*

constitutional scrutiny, applying the three-part *Lemon* test and comparing a similar case, *American Family Ass'n, Inc. v. City & County of San Francisco*.²¹⁴ The court ultimately held, after an extended discussion, that “[p]roperly contextualized, the Resolution does not have the purpose or primary effect of expressing hostility towards Catholic religious beliefs, and it does not foster excessive government entanglement with the Catholic Church.”²¹⁵

Recognizing a consistent theme in certain resolutions, the court observed that “[t]he Board’s extensive and persistent practice of passing non-binding resolutions denouncing discrimination against gays and lesbians also shapes the message the Resolution conveys. The Board’s secular defense of same-sex couples in all aspects of life is the dominant theme of the Board’s actions.”²¹⁶

These types of resolutions, while non-binding, are often passed in hopes of gathering community or political support around a position urged by the governing body. An example is a resolution passed in Carrboro, North Carolina, in response to a local YMCA’s consideration of merging with a regional YMCA that had a less-inclusive sexual orientation policy.²¹⁷ The

214. See *id.* at 599-600, 608; see generally *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Am. Family Ass’n, Inc. v. City & Cnty. of S.F.*, 277 F.3d 1114 (9th Cir. 2002). The three-part *Lemon* test examines the government’s action by asking if it has a secular legislative purpose, looking at whether it has the primary effect of either advancing or inhibiting religion, and determining whether it results in an “excessive government entanglement” with religion. *Am. Family Ass’n, Inc.*, 277 F.3d at 1121.

215. *Catholic League*, 567 F.3d at 608.

216. The court noted numerous instances where, through resolutions, the Board sought to defend same-sex couples:

See Resolution No. 73-05 (“Resolution urging the Supreme Court of the United States to rescind their refusal and to accept the hearing of a legal challenge to Florida’s prohibition of adoption of children by gays and lesbians”); Resolution No. 129-06 (“Resolution urging the IRS to reconsider their ruling on Domestic Partners and Community Property”); Resolution No. 166-06 (“Resolution urging Governor Schwarzenegger to submit amicus brief to New York Supreme Court of Appeals in support of the right of same-sex civil marriage”); Resolution No. 364-06 (“Resolution condemning the government sanctioned violence and chaos which took place during Moscow’s first Gay Pride march”); Resolution No. 127-05 (“Resolution urging . . . Secretary of Education to publicly apologize to gay, lesbian, bisexual, and transgender community”); Resolution No. 454-05 (“Resolution condemning the offensive and discriminatory training video shown to San Francisco 49er players”); Resolution No. 308-03 (“Resolution urging Senator Rick Santorum to step down from his leadership position in the Republican Party and to apologize for his comments [comparing homosexuality to polygamy, incest, and adultery]”); Resolution No. 199-00 (“Resolution urging Dr. Laura Schlessinger to refrain from making inaccurate statements about gays and lesbians that incite violence and hate)

Id. at 606-07.

217. See Lisa Sorg, *LGTB Policy Divides Chapel Hill-Carrboro YMCA and YMCA of the Triangle*, INDY WEEK (Jan. 11, 2012), <http://www.indyweek.com/indyweek/lgbt->

local YMCA responded by stating publicly that the group would seek to protect the gay community during the merger discussions.²¹⁸

policy-divides-chapel-hill-carrboro-ymca-and-ymca-of-the-triangle (reporting on the controversy regarding the lack of an explicit statement in the regional YMCA's employment handbook prohibiting discrimination on the basis of sexual orientation in contrast to the local YMCA's handbook); *see also* JUNE 14, 2011 MINUTES, CARRBORO BD. OF ALDERMEN (2011), *available at* http://www.townofcarrboro.org/boa/Minutes/2011/06_14_2011.pdf. The resolution reads:

Resolution Regarding the Possible Merger of the Chapel Hill-Carrboro YMCA and the YMCA of the Triangle

With Regard to Sexual Orientation Non-Discrimination Policies

Resolution No. 146/2010-11:

WHEREAS, the Carrboro Board of Aldermen supports all efforts to afford equal protection under the law to Carrboro citizens regardless of sexual orientation, identity or expression, and has done everything possible under the law to make this a reality in Carrboro; and

WHEREAS, the Board of Aldermen notes that the Town of Chapel Hill, the Chapel Hill-Carrboro School System and Orange County have also supported efforts over the years to eradicate discrimination based on sexual orientation; and

WHEREAS, there are many citizens in Carrboro and Chapel Hill who are members of the Chapel Hill-Carrboro YMCA, and the Chapel Hill-Carrboro YMCA has received or receives funding on occasion from the Town of Chapel Hill and Orange County for various programs; and

WHEREAS, it has come to the attention of the Aldermen that the Chapel Hill-Carrboro YMCA is in discussions with the YMCA of the Triangle about a possible merger, and the Aldermen understand that this will be further discussed by the YMCA Board on June 22, 2011 with a decision to be made at a later date; and

WHEREAS, the Board of Aldermen is aware that the Chapel Hill-Carrboro YMCA has anti-discrimination policies based on sexual orientation; for example, their job application states that "[i]t is the policy of the Chapel Hill-Carrboro YMCA to ensure equal employment opportunity as to all terms, conditions, & privileges of employment without discrimination or harassment on the basis of . . . sexual orientation;" further, registered domestic partners are allowed to register as families or couples; and

WHEREAS, the Board of Aldermen applauds the Chapel Hill-Carrboro YMCA for these progressive and fair policies, as they are a reflection of our communities; and

WHEREAS, the Board of Aldermen is concerned because the YMCA of the Triangle does not have anti-discrimination policies with regard to sexual orientation; and

WHEREAS, the Board of Aldermen is concerned that if the Chapel Hill-Carrboro YMCA proceeds with this merger and is required to drop or modify its non-discrimination policies with regard to sexual orientation that this will be a terrible regression on this issue and the progressive policies of our Town and County; and

THEREFORE, WE RESOLVE to urge the Chapel Hill-Carrboro YMCA to not merge with the YMCA of the Triangle unless the YMCA of the Triangle passes a non-discrimination policy which includes sexual orientation, and implements a new appropriate membership policy.

Id.

218. Mark Schultz, *Chapel Hill-Carrboro YMCA Will Seek Protections for Gay Community in Possible Merger*, NEWS & OBSERVER (June 28, 2011, 6:02 PM), <http://blogs.newsobserver.com/bullseye/chapel-hill-carrboro-ymca-will-seek-protections-for-gay-community-in-possible-merger> (noting the local YMCA's

A rather extreme example involving the use of resolutions took place as various councils and boards in North Carolina passed resolutions urging support or disapproval of the marriage amendment vote which took place in May of 2012. The attorney for Durham County advised his Board of County Commissioners that taking a position regarding the marriage amendment would be a violation of a law that the North Carolina General Assembly recently enacted.²¹⁹ The law, entitled “Limitation on the use of public funds,” states that “[a] county shall not use public funds to endorse or oppose a referendum, election or a particular candidate for elective office.”²²⁰ Setting aside the argument that it is questionable at best to say that passing a resolution of this sort constituted the use of public funds,²²¹ the board was criticized by many for lacking “courage” in failing to support a resolution that would have disapproved of the amendment, particularly because the county’s own domestic partner benefits were at stake.²²²

V. CONCLUSION

Living in a nation that does not yet treat its gay citizens as legally equal, it is incumbent upon state and local governments to step forward and act. This article has focused on how local government can fill this void. Our cities and towns have long been viewed as special places of community; it stands to reason, then, that the governing bodies of these places should feel entrusted with a momentous task. As articulated by President Lyndon Johnson:

The American city should be a collection of communities where every member has a right to belong. . . . It should be a place where each individual’s dignity and self-respect is strengthened by the respect and affection of his neighbors. It should be a place where each of us can find the satisfaction and warmth which comes from being a member of the community of man. This is what man sought at the dawn of civilization.

statement in a press release that it has stressed the importance of offering protections to the LGBT community in its merger talks with the regional YMCA).

219. Ray Gronberg, *Commissioners Scrap Resolution on Amendment One*, HERALD SUN (Apr. 23, 2012), <http://heraldsun.com/bookmark/18334919> (reporting that the County Attorney had sided with a GOP activist who previously informed county officials that a formal vote by commissioners opposing the amendment would violate state law).

220. N.C. GEN. STAT. § 153A-456 (2012).

221. See, e.g., *Dollar v. Town of Cary*, 569 S.E.2d 731, 733-34 (N.C. App. 2002) (granting a preliminary injunction in favor of the plaintiff after finding that the primary purpose of advertisements was to influence voters, where the defendant Town promoted “smart growth” and “managed growth” policies by spending \$200,000 on advertising during a campaign season where smart growth was a contested issue).

222. See Gronberg, *supra* note 219 (providing the views of critics of the board’s decision).

It is what we seek today.²²³

Local governments must seek to become educated about the tools available to them, in the context of their local authority and their gay climate, so that they can work to attain legal rights for their gay citizens. It is apparent in this day and age that this is the way that legal progress is made with regard to these rights.

Because our founding fathers chose for us a dual legal system, one where power was shared, the process of nationwide change, while appropriately checked and balanced in many areas, can be excruciating in the context that is the subject of this article. Yet, it is obvious that change is slowly taking place with regard to legal rights for our gay citizens. Advocacy from the elected officials who are on the ground level with this community can and should progress in a “bottom-up” manner until the day this is no longer necessary.

223. 1 LYNDON B. JOHNSON, *Special Message to the Congress on the Nation's Cities*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: LYNDON B. JOHNSON 231, 240 (1965).

