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The Geography of Sexuality

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THE GEOGRAPHY OF SEXUALITY*

YISHAI BLANK & ISSI ROSEN-ZVI**

Who regulates sexuality in America? Given the high salience of federal laws and policies such as the Defense of Marriage Act (“DOMA”), the military’s “Don’t Ask, Don’t Tell” policy, and states’ legal activism regarding same-sex marriage, it would seem that sexuality is mostly a federal and state matter, and that cities play a secondary, if not insignificant role. This Article argues that in fact the opposite is true: the regulation of sexuality has been decentralized, with cities being the main locus where the most important issues affecting the lives of gays and lesbians are decided. This “localization of sexuality” happened as a result of a lack of comprehensive federal protection of gays and lesbians, the limited protection given to them by states, and the powers which cities regularly possess. These powers, which include zoning, business licensing, districting, education, and other police powers, are used by cities in ways that either benefit or harm sexual minorities. This legal structure can partly explain, notwithstanding other social and historical factors, the residential patterns of gays and lesbians who continue to concentrate in a relatively small number of cities. This “territorialization of sexuality,” this Article contends, is a result of the attempt made by gays and lesbians to overcome their status as a permanent minority at both the federal and state levels. While these processes have gone almost unnoticed by scholars and courts, they have far-reaching consequences that this Article describes and evaluates: they enable the creation of safe havens for gays and lesbians, they allow these sexual minorities to “dissent by deciding,” and they promote a pluralism of governmental practices concerning sexuality. Despite the risks that these two processes bear, such as fragmentation and radicalization, the localization of sexuality is a desirable legal structure. It should,

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however, be accompanied by more comprehensive federal protections of gays and lesbians that would counter the Madisonian risk of extremely powerful localities.

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INTRODUCTION

“We are everywhere” reads the famous slogan of the gay liberation movement, and recent data confirms that gays and lesbians are indeed present in over ninety-nine percent of counties in America.¹ The vast majority of gays and lesbians, however, reside in a limited—although growing—number of large urban areas, and within these localities they are concentrated in certain neighborhoods.² Sexuality in America, in other words, is localized in specific territories. But sexuality is also localized as a matter of law. The management of the multitude of issues arising from the ever-growing sexual orientation diversity is predominantly the legal business of American cities. Cities have been the engine of legal developments and innovations concerning sexual orientation since the advent of the gay rights struggle during the 1970s, and they are still at the forefront of the most contentious issues pertaining to gays and lesbians.

By the 1970s, when no states had laws prohibiting discrimination on the basis of sexual orientation, sixteen cities—including Austin,³ Detroit, Hartford, Iowa City, Los Angeles, Minneapolis, and San Francisco—enacted local antidiscrimination ordinances.⁴ In 1984, long before any state even contemplated marrying same-sex couples, the City of Berkeley invented the institution of “domestic partnership,” establishing a registry where such couples could formalize their relationships. And when San Francisco decided in 2003 to issue marriage licenses to gay and lesbian couples, rebelling

1. GARY J. GATES & JASON OST, *THE GAY & LESBIAN ATLAS 2* (2004).

2. See *infra* Part II.A. In this Article we use the term “gays” and “lesbians” to denote persons who self-identify as having, exclusively or not exclusively, same-sex desires, attractions, or intimate affiliations.

3. See CARLOS BALL, *FROM THE CLOSET TO THE COURTROOM: FIVE LGBT RIGHTS LAWSUITS THAT HAVE CHANGED OUR NATION 4–12* (2010) (describing in some detail the legal battles that took place in 1978, following the enactment of an antidiscrimination ordinance in Austin, Texas).

4. See *infra* notes 266–67 and accompanying text.

against California's refusal to do so, it provoked a political and legal upheaval, which changed the landscape of same-sex marriages in America.⁵

These are mere examples of a much broader phenomenon, which is termed in this Article as the *localization of sexuality*: local governments have increasingly become the major loci where a multitude of issues that particularly impact the lives of gays and lesbians are decided. This empowerment of localities to regulate sexuality was a result of the lack of comprehensive federal legal protection for gays and lesbians, the limited and bifurcated legal protection which states extend to them, and the traditional powers of cities (mostly "home rule" and police powers) which enable them to deal with matters pertaining to gays and lesbians, albeit conditionally, under states' authority to preempt and limit such powers.

Cities act in many ways to regulate sexuality. Some cities choose to set antidiscrimination ordinances, while others engage in discriminatory practices. Some cities make attempts to issue marriage licenses to same-sex couples or to grant them recognition that would approximate marriage (such as establishing domestic partnership registries). Numerous cities provide spousal benefits for same-sex couples, while others withhold them. Some enforce state hate crime laws that include crimes based on sexual orientation, while other cities fail to do so. But localities also impact the daily lives of gays and lesbians by using their districting, zoning, land use, business licensing, public health, education, spending, and law enforcement powers. Localities influence a variety of local amenities that are extremely important for gays and lesbians, such as bars, clubs, and other community-creating institutions.

This local activity is surprising in light of the many legal limitations on local power, including the private law exception, state preemption potential, and the feebleness of home rule authority.⁶ Indeed, the jurisprudential weakness of American cities and their legal submission to state and federal power all too often curtail their ability to effectively combat public and private discrimination, even within a city's limits.⁷ But, despite this doctrinal weakness, this Article shows that cities across the nation have been making a real difference for their gay and lesbian residents by using their powers, limited as

5. See *infra* Part I.C.1.

6. See *infra* Part I.C.

7. See GERALD E. FRUG & DAVID J. BARRON, CITY BOUND: HOW STATES STIFLE URBAN INNOVATION 61 (2009).

they may be. The traditional powers of cities have enabled cities to respond to growing numbers of conflicts and challenges surrounding sexual minorities and their unique needs and interests. And despite the power possessed by states to preempt various local actions, most states have refrained from doing so in the realm of sexuality.

The powers that cities possess and apply, this Article argues, together with historical, social, and economical developments, account for gay and lesbian residential patterns. Over the past fifty years, residential patterns of gays and lesbians throughout the nation have significantly changed. Yet, while gays and lesbians no longer reside in only a few cities (such as Los Angeles, New York City, and San Francisco), and while same-sex couples, especially those with kids, are moving to the suburbs and even to rural areas,⁸ one thing remains the same: gays are still concentrated in large urban areas and tend to be highly concentrated in a small number of neighborhoods within these urban areas. Thus, sexuality has been *territorialized*, with gays and lesbians being territorially dispersed in uneven patterns throughout the country.

Current studies explain these residential patterns by focusing on two main factors: social factors and economic factors. Socially, gays and lesbians seek community. They wish to live in areas where they can express their identity free of harassment, persecution, and intimidation, and where they can socialize with people who share their identity and culture.⁹ Economically, like any other group, gays and lesbians search for various local amenities, such as restaurants, cultural establishments, clean and healthy environments, parks, and other services that depend on one's place of residence.¹⁰ What is patently missing from these explanations is the role played by law in enabling both the creation of a gay and lesbian community and the provision of the particular amenities. This Article argues that the legal structure described earlier—the localization of sexuality—is a driving force for the territorialization of sexuality. Legal rules and principles take part in enabling community-building and in facilitating

8. GARY J. GATES, THE WILLIAMS INST., GEOGRAPHIC TRENDS AMONG SAME-SEX COUPLES IN THE U.S. CENSUS AND THE AMERICAN COMMUNITY SURVEY 6 (2007), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Geographic-Trends-ACS-Brief-Nov-2007.pdf>.

9. See generally ROBERT W. BAILEY, GAY POLITICS, URBAN POLITICS: IDENTITY AND ECONOMICS IN THE URBAN SETTING 4 (1999) (assessing the "political impact of the lesbian and gay movement on urban politics in the United States").

10. See generally Dan Black et al., *Why Do Gay Men Live in San Francisco?*, 51 J. URB. ECON. 54 (2002) (explaining why gay men disproportionately seek high amenity locales).

the supply of various local amenities and city services, thereby significantly incentivizing gays and lesbians to congregate in certain cities and neighborhoods. Cities use their legal powers to either attract gays and lesbians or repel them, thus influencing, to a certain degree, the choices of gays and lesbians and shaping their residential patterns.¹¹ At the same time, the territorialization of sexuality, namely the geographical concentration of gays and lesbians in certain localities and urban areas, is an important factor in the creation of the very legal structure that localizes sexuality. In this way, these two processes reinforce each other.

The localization and territorialization of sexuality have gone nearly unnoticed in legal analysis, and have taken place with no public deliberation, no comprehensive theoretical analysis, and no overarching guiding legal principles. Indeed, these processes happened almost haphazardly, through an amalgamation of federal doctrines and inactions, states' legislation and collective failure to act, and local initiatives and oversight. This theoretical lapse can be attributed to the relative novelty of gay and lesbian identity and the newness of the social, political, moral, and legal dilemmas that it spurred.¹² Unlike race and religion, which shaped, to a large extent, the political and legal structure of the American republic since its inception, sexual orientation has appeared as a social, political, and legal challenge in the second half of the twentieth century, only becoming one of the major issues dividing the nation in the 1990s.¹³

The significance of the localization and territorialization of sexuality cannot be underestimated. The delegation of many issues regarding sexuality to localities, either by explicit legislation or by states refraining to intervene with such local action, not only impacts residential patterns of gays and lesbians, but has also brought about a

11. It should be noted that such municipal legal measures are by no means a decisive factor, since sexual minorities also make such decisions based on social, cultural, and economic considerations. *See infra* Part II.C.

12. *See* MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: VOLUME I: AN INTRODUCTION* 43 (Robert Hurley trans., Vintage Books ed. 1990) (1976) ("As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage Nothing that went into his total composition was unaffected by his sexuality."). *See generally* DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* 8 (1990) (discussing same-sex sexual relations in ancient Greece, and why the current conception of homosexuality as an identity does not apply to those acts).

13. *See* URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 8 (1996) ("But a new legislative trend seems to have grown in the 1990s: affirmatively antigay legislation.").

plethora of positive consequences to sexual minorities: it has driven the creation of safe havens for gays and lesbians in which they are protected from discrimination and harassment and in which they may lead public lives according to their shared identity; it has enabled the building and flourishing of communities; it has allowed marginalized sexual minorities to not only *speak out* concerning their dissenting views, but also to *act upon* their views, drawing state and national attention to their plight; it has facilitated the visualization of a previously invisible minority; and it has enhanced the pluralism of society as a whole by allowing radically different communities to exist side by side.

But the localization and territorialization of sexuality has a dark side, too. It might entrench and even enhance discrimination and violence toward gays and lesbians who live outside of the cities that serve as safe havens; they radicalize the discourse and actions concerning the regulation of sexuality, possibly provoking backlash, retaliation, and restrictive legal measures by states as well as by other localities; they increase the fragmentation of the body politic; and they might weaken the struggle for gay equality at the national and state levels. Moreover, local power is a double-edged sword, as it can be used not only to benefit gays and lesbians, but also to disenfranchise and otherwise harm them.

Despite the risks posed by the decentralization of the power to regulate sexuality, this Article argues that in the present day United States, decentralization's merits outweigh its disadvantages. Indeed, cities need to be empowered even further in order to be able to dissent from their states as well as from the federal government, to weaken the dominance of heterosexuality over all other sexualities, and to express their particular vision of the common good of supporting sexual minorities. Lacking sufficient federal limitations, however, localities can abuse their power by not only expressing disapproval of gays and lesbians but also by targeting and persecuting them. Hence, any system that wishes to empower localities must also create institutional mechanisms to check local power and restrain its excessive application. This Article offers several broad-brush suggestions for a *federalized localism*, in which cities are bolstered, on the one hand, and legal mechanisms are developed at the federal and state levels in order to curb the abuse of local power, on the other.

Part I introduces the concept of the *localization of sexuality*: the ways in which American law caused cities to become the major locus in which sexuality was regulated. It describes the lack of comprehensive federal constitutional protection and the absence of

federal legislation that would protect gays and lesbians from discrimination. The Article then moves on to analyze the limited protection provided by the states for gays and lesbians and the ample room left for cities to act on such matters. The claim regarding cities' de facto regulation of sexuality is substantiated by analyzing six areas where some cities have been extremely active: recognizing same-sex partnerships; legislating local antidiscrimination ordinances; enforcing anti-gay hate crimes; using local police powers (zoning, land use, business licensing, and public health); redrawing electoral districts; and controlling the public education system.

Part II introduces the concept of the *territorialization of sexuality*: the unique residential patterns of gays and lesbians, which, despite various changes, remain singular and are characterized by a high concentration in large cities, and within them, in certain neighborhoods. It argues that, contrary to most explanations in the literature, the legal regime described in Part I accounts for these residential patterns. By settling in these areas, gays and lesbians overcome their status as a permanent minority. Even if unable to form a local majority, concentration enables them to become politically powerful in the localities where they congregate and thus create "safe havens" where their communities can flourish and where the amenities they seek can be supplied.

Part III discusses the promises and perils of the localization and territorialization of sexuality. While acknowledging the dangers of empowering cities to deal with sexuality—the risks of fragmentation, radicalization, and isolationism—the Article concludes that, given the chronic minority status of gays and lesbians in America, the advantages of decentralization outweigh its risks. Yet, empowering localities to regulate sexuality must be accompanied by mechanisms that would keep local power at bay.

I. THE LOCALIZATION OF SEXUALITY

This Part explores the ways in which American law has significantly contributed to the localization of sexuality. Localities have been empowered to regulate many issues that impact the lives of gays and lesbians. Cities determine whether gays and lesbians will enjoy equal treatment from their employers; whether they will be protected from violence and harassment; and whether gay-friendly establishments will be allowed to flourish. A three-legged legal structure enables the localization of sexuality: first, the lack of federal legal protection of gays and lesbians; second, the limited and bifurcated legal protection which states extend to them; and third, the

traditional powers of cities, which enable them—albeit conditionally and limitedly—to respond to increasing conflict and challenges surrounding sexual minorities and their unique needs and interests.

A. *The Lack of Comprehensive Federal Protection of Gays and Lesbians*

The lack of comprehensive protection of gays and lesbians at the federal level can be divided into two types of omissions: omissions on the constitutional level and omissions on the legislative level.

1. The Lack of Comprehensive Federal Constitutional Protection of Gays and Lesbians

The Supreme Court has never granted gays and lesbians protected-class status under the Equal Protection Clause.¹⁴ Even *Romer v. Evans*,¹⁵ a decision which is considered to be a major advancement in the protection given to gays and lesbians, establishes an extremely narrow constitutional safeguard against discrimination. Although *Romer* invalidated Colorado's state constitutional amendment that prohibited all levels of government from adopting sexual orientation antidiscrimination legislation and regulation, it did so only because the amendment was founded on "animus" toward gays and lesbians, thus failing the "rational basis" test.¹⁶ The Court did not, however, grant gays and lesbians the status of a protected group or the heightened protection given to racial and other discrete and insular minorities.¹⁷ This state of affairs allows all levels of government to classify and discriminate against people based on their sexual orientation without triggering heightened levels of scrutiny.

The protection granted to gays and lesbians through the rights to privacy and liberty has also proved to be limited. In *Lawrence v. Texas*,¹⁸ the Supreme Court ruled that a Texas sodomy law was unconstitutional, since it infringed not only on the right to privacy,

14. Kenji Yoshino describes how "[u]nder its equal protection jurisprudence, the United States Supreme Court has extended judicial solicitude to five classifications—race, national origin, alienage, sex, and nonmarital parentage." See Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537, 1537 (2010). As Yoshino then explains, the Court often seeks to define a group as "politically powerless" in order to award it equal protection jurisprudence following an examination of heightened scrutiny. *Id.* Gays are not considered by the Court to be politically powerless and therefore do not receive strict scrutiny. *Id.*

15. 517 U.S. 620 (1996).

16. *Id.* at 632.

17. *Id.* at 630–31.

18. 539 U.S. 558 (2003).

but also on the right to liberty.¹⁹ Extending liberty rights to sexual conduct, however, is still an unsatisfactory safeguard against sexual orientation-based public and private discrimination. As pointed out by scholars, the Court's constitutional protection is limited, even after *Lawrence*, to instances of "intimate associations," leaving gays and lesbians exposed to discrimination by states and local governments in every place, save for their private homes.²⁰ Thus, in *Lawrence*, the Court de-localized homosexuality in the sense that it prevented states or localities from criminalizing sodomy in the private sphere.

2. The Lack of Federal Legislative Protection of Gays and Lesbians

In addition to the aforementioned constitutional deficiency, the regulation of sexuality is localized by the absence of broad and inclusive federal antidiscrimination laws protecting gays and lesbians.²¹ Neither Title VII of the Civil Rights Act of 1964 nor the Fair Housing Act ("Title VIII") designates sexual orientation as prohibited grounds for discrimination.²² Attempts to amend Title VII to include sexual orientation or to enact a separate antidiscrimination law that would protect gays and lesbians such as the Employment Non-Discrimination Act ("ENDA") have so far been met with fierce opposition and failed.²³ Furthermore, federal courts were unwilling to interpret the prohibition to discriminate on the basis of "sex" as including sexual orientation.²⁴ Even when the Supreme Court in *Oncale v. Sundowner Offshore Services*²⁵ extended Title VII's protection against sexual harassment to include violence among men,

19. *Id.* at 564–71.

20. See Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1400 (2004) (arguing that in *Lawrence*, the Court "relies on a narrow version of liberty that is both geographized and domesticated—not a robust conception of sexual freedom or liberty").

21. Federal government employees are protected from discrimination based on sexual orientation. See Exec. Order No. 13,087, 3 C.F.R. 191 (1998) (amending Exec. Order No. 11,478, 3 C.F.R. 803 (1969)).

22. See Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e–2000e-17 (2006); Fair Housing Act, 42 U.S.C. §§ 3601–3619, 3631 (2006).

23. William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 69–72 (2001) (discussing the many attempts to pass laws that would expand federal protections to ban discrimination on the basis of sexual orientation). The latest attempts to pass ENDA were made in April 2011. Senator Jeff Merkley introduced S. 811 in the Senate and Representative Barney Frank introduced H.R. 1397 in the House of Representatives. S. 811, 112th Cong. (2011); H.R. 1397, 112th Cong. (2011).

24. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329 (9th Cir. 1979).

25. 523 U.S. 75 (1998).

it did not interpret Title VII as including a general prohibition against sexual-orientation based discrimination.²⁶

Furthermore, the Defense of Marriage Act (“DOMA”) prevents the federal government from recognizing the validity of same-sex marriages performed by a state and exempts other states from their constitutional obligation under the Full Faith and Credit Clause to honor such marriages.²⁷ DOMA’s impact extends to both direct and indirect consequences of marriage, such as enforcing judicial orders pertaining to custody, alimony, and other matters.²⁸ Thus DOMA delineates states’ power to recognize same-sex partnerships by preventing the “spillover” of a state’s decisions into other states and the federal sphere.²⁹

Despite the general lack of protection of gays and lesbians at the federal level (or, some might argue, their overt discrimination), the Obama Administration and the 2009–2011 Democratic Congress recently made two important legislative changes. First, the “Don’t Ask, Don’t Tell” policy of the military was abolished;³⁰ second, and more pertinent to this discussion, Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (“Matthew

26. *Id.* at 79–82. For a brilliant analysis of the *Oncale* decision, see Janet Halley, *Sexuality Harassment*, in LEFT LEGALISM/LEFT CRITIQUE 80, 94–98 (Janet Halley & Wendy Brown eds., 2002).

27. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006)). Recently, the Senate Judiciary Committee approved a bill to repeal DOMA. It is unclear, however, whether the bill will pass both houses. See Larry Margasak, *DOMA Repeal Bill Clears Senate Judiciary Committee Vote*, HUFFINGTON POST (Nov. 10, 2011, 1:31 PM), http://www.huffingtonpost.com/2011/11/10/defense-of-marriage-act-repeal-bill-democrats-_n_1086237.html.

28. See Defense of Marriage Act §§ 2, 3.

29. In February 2011, the Obama Administration announced that it would not defend DOMA in two federal cases (*Pedersen v. Office of Personal Management*, No. 3:10-cv-01750-VLB (D. Conn. Filed Nov. 9, 2010) and *Windsor v. United States*, 797 F.Supp. 2d 320 (S.D.N.Y. 2011)) challenging the constitutionality of section 3. See Carolyn Lochhead, *Obama Drops Defense of Defense of Marriage Act*, S.F. CHRON. (Feb. 23, 2011, 9:28 AM), http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?entry_id=83628#ixzz1W3tiOA6k.

30. The “Don’t Ask, Don’t Tell” policy prohibited people who demonstrated a “propensity or intent to engage in homosexual acts” from serving in the military of the United States. See Act of Nov. 30, 1993, Pub. L. 103-160, § 571, 107 Stat. 1547, 1670, *repealed by* Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515 (codified as amended at 10 U.S.C. § 654 note (Supp. I 2010)). See generally JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY (1999) (providing an “archaeology” of the 1993 revisions to military policy underlying “Don’t Ask, Don’t Tell”). In September 2011, this policy was repealed by an act of Congress. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. 111-321, 124 Stat. 3515 (codified as amended at 10 U.S.C. § 654 note (Supp. I 2010)).

Shepard Act”), expanding the federal hate crime law to include sexual orientation.³¹

Prior to the enactment of the Matthew Shepard Act, crimes motivated by hatred toward gays and lesbians were not considered hate crimes at the federal level, leaving the decision whether to criminalize hate-motivated acts to the states. By the time the Act was enacted, thirty-one states included animus toward certain sexual orientations as a motivation that renders a crime a “hate crime.”³² The Act federalized, at least to a certain degree, hate crimes against gays and lesbians by: giving federal authorities greater ability to engage in hate crimes investigations by assisting local authorities in their cases; providing federal funding to help state and local agencies pay for the investigation and prosecution of hate crimes; and requiring the FBI to track statistics on hate crimes based on sexual orientation.³³ Note that although the Act federalizes such hate crimes, it does so in a limited fashion, leaving primary control to the state and local levels. Federal authorities step in when lower levels of government fail to take action against anti-gay hate crimes,³⁴ but the budgetary assistance to state and local enforcement against these hate crimes is extremely limited.³⁵ Thus, crimes directed at gays and lesbians remain predominantly controlled at sub-federal levels of government, as will be discussed later. State and local governments determine how these crimes are defined—whether they are considered “regular” crimes or “hate” crimes—and are in charge of enforcement.

The lack of a comprehensive federal protection of gays and lesbians has left ample room for states and local governments to regulate sexuality. This lack of protection was augmented by federalist concerns, namely the hesitation to regulate, at the federal

31. Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–44 (2009) (codified as amended at 18 U.S.C. § 249 note (Supp. I 2010)).

32. HUMAN RIGHTS CAMPAIGN FOUND., EQUALITY FROM STATE TO STATE 2010, at 16 (2011), available at http://sites.hrc.org/documents/HRC_States_Report_2010.pdf.

33. Matthew Shepard Act §§ 4701–4713.

34. § 4704 (“Attorney General may provide technical, forensic, prosecutorial, or any other form of assistance in the criminal investigation or prosecution of any crime that [is a hate crime].”).

35. *Id.* (“A grant under this subsection shall not exceed \$100,000 for any single jurisdiction in any 1-year period.”).

level, various matters relating to the family and issues that are considered to be within the scope of states' "police powers."³⁶

B. *Limited State Protection of Gays and Lesbians*

Given the near absence of federal constitutional and legislative protection of gays and lesbians, and the broad powers enjoyed by states in general (especially under the current revival of federalism),³⁷ states are rather free to determine the degree of protection given to sexual minorities within their jurisdiction. Over the past thirty years, states have sought different legal measures to either protect or discriminate against sexual minorities. While some states use these powers to legalize same-sex marriage, adopt antidiscrimination laws and policies, and enact hate crime laws against homophobic acts, the majority of states fail to do so.³⁸ States also vary on the extent to which they recognize, protect, and confer rights on same-sex relationships and families when dealing with issues such as inheritance, estates, adoption, alimony, and child custody.³⁹

1. The Limited State Constitutional Protection of Gays and Lesbians

On the constitutional front, state courts vary on whether, and to what extent, their constitutions and the federal Constitution protect gays and lesbians from discrimination. The constitutional status of gays and lesbians has been debated in state courts over the past decade mostly apropos same-sex marriage. While four state supreme courts (California, Connecticut, Iowa, and Massachusetts) prohibited their states from excluding same-sex couples from the institution of marriage, they did so on different constitutional grounds. The degree of protection given to gays and lesbians hinges upon the interpretation of the equal protection clause within each state's constitution. Only California's Supreme Court has been willing to extend strict scrutiny to gays and lesbians.⁴⁰ High courts in Iowa and

36. See MARKUS DIRK DUBBER, *THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT* 44 (2005).

37. See generally David J. Barron, Commentary, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377 (2001) (discussing increased commitment to localized political decision making).

38. Thirty states have amended their constitutions to include explicit prohibitions on same-sex marriages. See *Issues by State*, DOMAWATCH, <http://www.domawatch.org/stateissues/index.html> (last visited Apr. 6, 2012).

39. See WILLIAM B. RUBENSTEIN, CARLOS A. BALL & JANE S. SCHACHTER, *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 716–868 (3d ed. 2008).

40. *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) (“[S]tatutes that treat persons differently because of their sexual orientation should be subjected to strict scrutiny . . .”).

Connecticut held that sexual orientation was a “quasi” suspect classification, which merits “intermediate” or “heightened” scrutiny.⁴¹ And Massachusetts’s Supreme Judicial Court, although being the first to recognize the right of gays and lesbians to marry, based its ruling on the grounds that there was no “rational basis” to deny them this fundamental right.⁴² The vast majority of state courts, however, have denied gays and lesbians any specific constitutional protection.⁴³

The failure of states to provide constitutional protections to gays and lesbians is even more conspicuous given states’ zeal in banning same-sex marriage through constitutional amendments. Thus far, thirty states have adopted such constitutional marriage amendments, including liberal and liberal-leaning states such as California, Michigan, Oregon, and Wisconsin.⁴⁴ Legislatures in other states, such as Iowa and North Carolina, are also seriously contemplating amending their constitutions to ban same-sex marriage.⁴⁵

States have demonstrated similar constitutional activism on the antidiscrimination front. Prior to the emergence of the same-sex

In response, California passed a constitutional amendment, “Proposition 8,” which defines marriage as between a man and a woman, thus prohibiting same-sex marriage. CAL. CONST. art. 1, § 7.5. Recently, the Ninth Circuit ruled that the amendment was unconstitutional since it “serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples.” *See Perry v. Brown, Jr.*, No. 10-16696, slip op. at 5 (9th Cir. Feb. 7, 2012).

41. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 431–32 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009).

42. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

43. Two other state supreme courts decided that their states violated their equal protection clauses by prohibiting same-sex couples from marrying. Both courts, however, held that the state could cure this violation by instituting civil unions for same-sex couples. *See Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006); *Baker v. Vermont*, 744 A.2d 864, 886 (Vt. 1999). It should be noted that currently there is a wide spectrum of state recognition of same-sex relationships. Some states recognize same-sex marriage (Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont). HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 13. Other states have broad relationship recognition laws, making same-sex couples almost identical to married couples. These states fall into two categories: the first recognizes “civil unions” (Delaware, Hawaii, Illinois, and New Jersey) and the second recognizes “domestic partnerships” (California, Nevada, Oregon, and Washington). *Id.* Yet, other states have limited relationship recognition laws for same-sex couples (Colorado, Maine, Maryland, Rhode Island, and Wisconsin). *Id.* Lastly, there are states that merely recognize same-sex marriage performed in other states (Maryland and Rhode Island). *Id.*

44. *See Issues by State, supra* note 38.

45. *See Kim Severson, North Carolina Voters To Decide on Same-Sex Marriage*, N.Y. TIMES, Sept. 14, 2011, at A16; Paul Schindler, *Iowa House Endorses Anti-Gay Constitutional Amendment*, GAY CITY NEWS (Feb. 2, 2011, 1:31 PM), http://gaycitynews.com/articles/2011/02/08/gay_city_news/news_in_brief/today/doc4d49aea3416d0477706164.txt.

marriage debate as the emblem of the gay rights struggle, antidiscrimination constituted the main battlefield. Following decades in which localities (as well as various other state agents) adopted antidiscrimination ordinances that protect gays and lesbians, some states have contemplated constitutionally prohibiting all legislative, executive, or judicial action that protects gays and lesbians from any kind of discrimination at state or local levels of government.⁴⁶ Colorado's Constitutional Amendment 2 was precisely this type of initiative, and ultimately led to the famous case of *Romer v. Evans*.⁴⁷

Amendment 2 was an attempt to centralize at the state level the regulation of sexual orientation-based discrimination by prohibiting local antidiscrimination initiatives. This statewide constitutional ban was invalidated by the Supreme Court based on the fact that it unduly burdened gays and lesbians, singling them out as "unequal to everyone else."⁴⁸ *Romer* forbid the State from such curtailment of local authority, thus empowering cities to make decisions about whether to protect gays and lesbians from discrimination.⁴⁹ Therefore, the *Romer* decision had the effect of localizing the issue of sexual orientation-based discrimination.

2. The Limited State Legislative Protection of Gays and Lesbians

As compared with their constitutional under-protection, states fare better on the legislative front by enacting antidiscrimination laws, hate crime laws, and anti-bullying laws, all aimed at protecting gays and lesbians. To date, twenty-one states and the District of Columbia have adopted statewide antidiscrimination legislation that includes

46. Stephen Zamansky, Note, *Colorado's Amendment 2 and Homosexuals' Right to Equal Protection of the Law*, 35 B.C. L. REV. 221, 221–23 (1993).

47. Colorado's Amendment 2 followed several municipalities' local ordinances (including ordinances from Aspen, Boulder, and Denver), which banned discrimination on the basis of sexual orientation in various transactions and activities such as employment, housing, public accommodation, education, health, and welfare services. See *Romer v. Evans*, 517 U.S. 620, 625 (1996).

48. *Id.* at 635. Although finding a rational basis to Amendment 2 would have been enough to pass constitutional muster, no such basis was found by the Court, which concluded that "laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

49. In fact, the Court in *Romer* created an asymmetry between the regulation of discrimination and that of antidiscrimination. Although states are prohibited from amending their constitutions to ban antidiscrimination, they are permitted to protect gays and lesbians from discrimination by local governments and private actors. They can do so through the legislation of statewide antidiscrimination laws or by amending their constitutions to that effect.

“sexual orientation” as prohibited grounds for discrimination (for both state agents and private actors).⁵⁰ Nine additional states have executive orders or personnel regulations prohibiting discrimination against public employees based on sexual orientation.⁵¹ In addition, thirty-one states and the District of Columbia have enacted hate crime laws that include crimes based on sexual orientation.⁵² Seventeen states and the District of Columbia passed laws that address harassment, bullying, or discrimination against students based on their sexual orientation.⁵³ Eighteen states and the District of Columbia have laws that enable second-parent adoption for same-sex couples.⁵⁴ It is noteworthy that much of this state legislative activity took place in the late 1990s and 2000s,⁵⁵ lagging behind local governments’ initiatives that this Article documents.

In sum, as compared to the federal level, states are more active in regulating matters pertaining to sexual orientation. Yet states, too, perhaps surprisingly, are fairly inactive in regulating sexuality, especially when compared to localities. The next Section addresses the location where the bulk of the regulation of sexuality is taking place: local governments.

C. *The Power of Local Governments To Regulate Sexuality*

Localities in America vary dramatically in their powers and competencies, depending on the state in which they are located. The

50. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 15. These states are: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. *Id.*

51. *Id.* These states are: Arizona, Delaware, Indiana, Kansas, Michigan, Missouri, Montana, Ohio, and Pennsylvania. *Id.*

52. *Id.* at 16. These states are: Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan (data collection law only), Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin. *Id.*

53. *See id.* at 18. These states are: California, Colorado, Connecticut, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Oregon, Vermont, Washington, and Wisconsin. *Id.*

54. *Id.* at 17. These states are: California, Colorado, Connecticut, Delaware, Florida, Illinois, Indiana, Iowa, Maine, Massachusetts, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Vermont, and Washington. *Id.* Inheritance rights of same-sex partners is a far more complicated issue. *See* Christine A. Hammerle, Note, *Free Will To Will? A Case for the Recognition of Intestacy Rights for Survivors to a Same-Sex Marriage or Civil Union*, 104 MICH. L. REV. 1763, 1768 (2006). For a discussion of adoption as well as other family law matters, see Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 28 (2010).

55. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 14–16, 18.

two most common legal mechanisms that set local power are the “Dillon Rule” and the “home rule.” The former views local power with suspicion, thus narrowly authorizing localities. In Dillon Rule states, local governments are endowed with enumerated powers, which are strictly defined.⁵⁶ Conversely, home rule embraces local power and generally allows local governments to act in a wider array of matters that are “local” in nature.⁵⁷ In states that adopt constitutional home rule provisions, localities usually enjoy broader powers as compared with Dillon Rule states, although these authorizations are often limited by various provisions and doctrines. For example, even home rule states often reserve the power of the state to preempt local action and include various ad hoc limitations on local power.⁵⁸

In most states, cities are given limited and enumerated powers, either because they are governed by a Dillon Rule, where a city can do only what its state explicitly authorized, or because of internal limitations on their home rule authority. In Massachusetts, for example, the “Home Rule Amendment makes clear that the state’s power of preemption is virtually unlimited.”⁵⁹ And while cities are given wide discretion in some legal matters and are able to express local preferences and values, on the majority of issues they are compelled to abide by state mandates and are exposed to state preemptive actions.⁶⁰ Yet despite their precarious legal status, cities have become the focal point for the regulation of sexuality and a prominent site where such matters are disputed and adjudicated.

Localities regularly address the most pertinent issues that matter to gays and lesbians, either favorably or unfavorably. The subsequent subsections discuss local activity in the following areas: marriage

56. Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1109–13 (1980).

57. David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2260 (2003).

58. See GERALD E. FRUG & DAVID J. BARRON, *BOSTON BOUND: A COMPARISON OF BOSTON’S LEGAL POWERS WITH THOSE OF SIX OTHER MAJOR AMERICAN CITIES* 24 (2007).

59. *Id.* at 21–22.

60. See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 165–218 (1999); Barron, *supra* note 57, at 2263; Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) [hereinafter Briffault, *Our Localism: Part I*]; Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 354 (1990). For detailed analyses of local power in the United States, see generally GERALD E. FRUG, RICHARD T. FORD & DAVID J. BARRON, *LOCAL GOVERNMENT LAW* (5th ed. 2008) (discussing the relationship between cities and states, the federal government, the world, neighboring cities, and their citizens).

licenses and spousal benefits; antidiscrimination ordinances and policies; hate crime laws; local police powers; education; and districting. This local activity influences the nature as well as the variety of local amenities that are extremely important in attracting or warding off gays and lesbians.

1. Recognition of Same-Sex Partnerships

Frustrated by the inability to convince Congress or states to grant gays and lesbians the right to marry, a few cities and counties, most notably San Francisco, issued marriage licenses to same-sex couples for a brief period during 2004.⁶¹ Although these initiatives were short-lived due to the quick and decisive legal response by state officials and courts, they provoked a political and legal upheaval that impacted the struggle for same-sex marriage in America. It is clear to most commentators that such actions were well beyond local power, even when they were broadly authorized.⁶² City officials were also aware of this legal limitation. Issuing marriage licenses to same-sex couples was a measure taken in defiance of state authority, aimed at putting gay marriage on the nation's agenda in the most salient manner. As Heather Gerken argued, it was dissent, made powerful by cities' ability to act—albeit briefly—according to its residents' beliefs and values, however marginal these beliefs were at the state level.⁶³ It was also a way for cities to signal that gays and lesbians were accepted and welcomed in their jurisdictions. Regardless of these initiatives' ultimate failures, they provide a clear example of the localization of sexuality.

Although cities are unable to issue marriage certificates, they find other ways to recognize same-sex relationships. In the face of fierce opposition to granting same-sex couples the full status of

61. Other cities and counties that decided to issue marriage certificates to same-sex couples were Asbury Park, New Jersey; Multnomah County, Oregon; New Paltz, New York; Nyack, New York; and Sandoval County, New Mexico. In addition, Benton County commissioners in Oregon decided to stop issuing marriage licenses altogether, rather than issue only opposite-sex marriage certificates. For a detailed discussion of these measures, see Richard C. Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 J.L. & POL. 147, 149 (2005).

62. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005); Richard Thompson Ford, *Civic Disobedience: San Francisco Chooses the Wrong Way To Flout the State*, SLATE MAG. (Feb. 24, 2004, 7:03 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2004/02/civic_disobedience.html (“[T]here’s a more fundamental problem for [San Francisco’s] position: Ultimately it’s the *state* and not the city that has the power to marry—the city performs marriages as an agent of the state.”).

63. See Gerken, *supra* note 62, at 1764–65.

marriage, and in light of the fact that marrying them is clearly beyond cities' powers, many localities have turned to the option of establishing local registries for same-sex couples.⁶⁴ In some cities, this is done against the backdrop of state constitutional and legislative silence regarding same-sex marriage, while in others there are explicit state bans on same-sex marriage. These municipal actions have reached courts throughout the nation. At the heart of the matter usually lie three distinct questions, which are emblematic of the unique legal status of American cities: (1) the extent of the home rule authority granted to cities by the state's constitution; (2) the nature of the state ban on same-sex marriage (or its lack thereof); and (3) the specific arrangement that the city employs to recognize same-sex partnerships. The broader the home rule authority, the more narrow the constitutional ban, and the more modest the city measure—the better the chances are that courts will uphold such municipal action, and vice versa.

For example, in 2008, the city of Cleveland enacted an ordinance that established a domestic partnership registry, enabling non-married couples in committed relationships who share a common residence to register with the city.⁶⁵ The ordinance was enacted in

64. Some such cities and counties include: Ann Arbor, Michigan; Atlanta, Georgia; Boulder, Colorado; Broward County, Florida; Carrboro, North Carolina; Chapel Hill, North Carolina; Cleveland Heights, Ohio; Cook County, Illinois; Denver, Colorado; Eureka Springs, Arkansas; Fulton County, Georgia; Hartford, Connecticut; Iowa City, Iowa; Ithaca, New York; Kansas City, Missouri; Key West, Florida; Lacey, Washington; Laguna Beach, California; Long Beach, California; Los Angeles County, California; Madison, Wisconsin; Marin County, California; Miami Beach, Florida; Milwaukee, Wisconsin; Minneapolis, Minnesota; Nantucket, Massachusetts; New York, New York; Oak Park, Illinois; Oakland, California; Olympia, Washington; Palm Springs, California; Palo Alto, California; Petaluma, California; Philadelphia, Pennsylvania; Portland, Maine; Rochester, New York; Rockland County, New York; Sacramento, California; Seattle, Washington; St. Louis, Missouri; Travis County, Texas; Tucson, Arizona; Tumwater, Washington; and Urbana, Illinois. See *City and County Domestic Partner Registries*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries> (last visited Apr. 6, 2012). The City of Berkeley was the first city to institute a domestic partnership registry in 1984. ELLEN LEWIN, *RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT* 10 (1998).

65. CLEVELAND, OHIO, MUN. CODE § 109.06 (2009), [http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland_oh/codifiedordinancesofthecityofcleveland?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:cleveland_oh](http://www.amlegal.com/nxt/gateway.dll/Ohio/cleveland_oh/codifiedordinancesofthecityofcleveland?f=templates$fn=default.htm$3.0$vid=amlegal:cleveland_oh). The Ordinance became effective on May 7, 2009. *Cleveland Taxpayers for Ohio Constitution v. Cleveland*, No. CV-701308, 2010 WL 3816393, ¶ 3 (Ohio Ct. App. Sept. 30, 2010).

Pursuant to the ordinance, couples may file a declaration of domestic partnership and be placed in a registry provided they (1) pay a fee, (2) share a common residence, (3) agree to be in a relationship of mutual interdependence, (4) are not married to another individual, (5) neither individual is part of an existing domestic

spite—perhaps in defiance—of Ohio’s 2004 constitutional “Marriage Amendment” which states:

[o]nly a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.⁶⁶

Cleveland Taxpayers for Ohio Constitution was quick to file a petition against Cleveland, requesting an injunction enjoining the operation of the registry for violating Ohio’s constitutional Marriage Amendment and home rule.⁶⁷ The trial court granted Cleveland’s motion to dismiss.⁶⁸ On appeal, Cleveland’s domestic partnership registry was upheld on the basis that it was within Cleveland’s home rule authority and did not violate Ohio’s ban on marriage.⁶⁹ Rejecting the appellants’ claim that the registry approximates marriage and therefore violates Ohio’s Marriage Amendment, the court ruled that “[t]he legal status of marriage is exceptional.”⁷⁰ While marriage automatically confers rights and benefits and incurs duties on the couple, the domestic partnership registry is much more limited in its scope and bears almost none of the attributes of marriage: it “does not create any causes of action nor does it confer any legal benefits.”⁷¹ And although the legal recognition granted by the registry is “meaningful to the domestic partners. . . . [it] lacks the social and emotive resonance of ‘husband’ and ‘wife.’ ”⁷² Considering the home rule claim, the court found that the registry had no “extra-territorial effects”; it “conveys no rights, is open to residents and nonresidents, is completely paid for by the applicants’ fees so the City bears no cost, and no public or private entity is obligated to recognize it.”⁷³

partnership with another person, (6) are 18 years of age or older, and (7) are not related by blood in a way that would prevent them from being married in Ohio. The ordinance also prescribes the filing, terminating, and registering of domestic partnerships.

Id. ¶ 2.

66. OHIO CONST. art. XV, § 11.

67. OHIO CONST. art. XVIII, § 3; *Cleveland Taxpayers for Ohio Constitution*, 2010 WL 3816393, ¶ 1.

68. *Cleveland Taxpayers for Ohio Constitution*, 2010 WL 3816393, ¶ 4.

69. *Id.* ¶ 24.

70. *Id.* ¶ 11.

71. *Id.*

72. *Id.* ¶ 14.

73. *Id.* ¶ 24.

Therefore, the court concluded, the ordinance was clearly within the power of local self-government.⁷⁴

While many domestic partnership registries confer no formal and direct rights or benefits—only symbolic ones—private and public parties can and in fact do use them in order to provide registered same-sex couples with various benefits, such as health insurance.⁷⁵ Moreover, some localities go even further and enumerate, within the municipal ordinance itself, the different rights and benefits that registered couples are entitled to receive.⁷⁶ State courts have upheld both types of registries⁷⁷ on the basis of three legal determinations: a radical distinction drawn between marriage and any other form of partnership; a generous interpretation of home rule authorities; and a conclusion that registering domestic partnerships—rather than attaching to them expanded legal consequences—is a “local matter,” territorially confined within city boundaries and thus within the power of local self-government.⁷⁸

Some cities recognize same-sex couples without establishing any formal registry. They do so either by broadly prohibiting discrimination on the basis of family status, or through specific ordinances and policies that confer benefits on the same-sex partners of its employees. These municipal measures have been challenged in courts, and much like local registries, their legality depends on the breadth of the localities’ home rule authority and the existence of a conflicting or preemptive state law.⁷⁹ As is the case with many other

74. *Id.*

75. See *Ralph v. City of New Orleans*, 4 So. 3d 146, 152 (La. Ct. App. 2009).

76. See *Appling v. Doyle*, No. 10-CV-4434 (Wis. Cir. Ct. June 20, 2011), available at <http://oldsite.alliancedefensefund.org/Userdocs/ApplingSJorder.pdf>.

77. E.g., *Ralph*, 4 So. 3d at 152 (upholding ordinance concerning health insurance coverage); *Slattery v. City of New York*, 686 N.Y.S.2d 683, 685–86 (Sup. Ct. 1999), *aff’d*, 697 N.Y.S.2d 603 (App. Div. 1999) (challenging a New York City ordinance which extended child care, health and retirement benefits, visitation rights in juvenile detention centers and hospitals, and family occupancy rights).

78. See *Schaefer v. City & Cnty. of Denver*, 973 P.2d 717, 717–21 (Colo. App. 1998); *Lowe v. Broward Cnty.*, 766 So. 2d 1199, 1205–06 (Fla. Dist. Ct. App. 2000) (upholding portions of a county ordinance that extended limited health insurance benefits); *City of Atlanta v. Morgan*, 492 S.E.2d 193, 195–96 (Ga. 1997) (upholding a statute extending insurance benefits for employees’ dependents who are in a domestic partnership); *Crawford v. City of Chicago*, 710 N.E.2d 91, 98 (Ill. App. Ct. 1999); *Tyma v. Montgomery Cnty.*, 801 A.2d 148, 158 (Md. 2002); *Slattery*, 686 N.Y.S.2d at 686–88.

79. See generally *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995) (invalidating an Atlanta ordinance conferring benefits on same-sex domestic partners of municipal employees due to its inconsistency with state law); *Connors v. City of Boston*, 714 N.E.2d 335 (Mass. 1999) (invalidating Boston’s mayor’s executive order extending group health insurance benefits to the domestic partners of city employees due to the fact that it was

pro-gay initiatives, local governments started recognizing same-sex couples long before any state recognized same-sex partnerships in any meaningful way.⁸⁰

Thus, the localization of sexuality is at work: lacking the power to confer on same-sex couples the full status of marriage, but vested with various authorities that enable them to deal with “local matters,” localities find innovative and creative ways to translate their views toward homosexuality and their value systems into symbolic and material measures.

Lest it be thought, however, that most cities use their powers in a manner favorable to gays and lesbians; the reverse is in fact true. The majority of local governments do not have domestic partnership registries, nor do they grant same-sex couples the same rights given to married couples. Even in states that have legalized same-sex marriage, some city officials defy their state, refusing to sign marriage certificates of same-sex couples. For example, a town clerk of Volney, New York, stated that she refuses to sign marriage certificates for same-sex couples, citing her moral and religious beliefs.⁸¹ Indeed, in the face of the growing number of states that are legalizing or have legalized same-sex marriage, conservative religious groups are pushing for the adoption of religious/conscience exemptions that would enable cities to be exempt from marrying same-sex couples. During the battle over New York’s Marriage Equality Act, the legislature reached an impasse due to the fierce opposition of

inconsistent with certain provisions of state law, thus requiring legislative action rather than executive action); *Lilly v. City of Minneapolis*, 527 N.W.2d 107 (Minn. Ct. App. 1995) (invalidating Minneapolis ordinance conferring health care benefits on same-sex domestic partners of municipal employees due to conflict with state law which permitted local government to provide benefits to their employees and their “dependents,” which the court narrowly construed to exclude same-sex partners); *Slattery*, 686 N.Y.S.2d at 693 (upholding New York City’s domestic partnership law which extended benefits to domestic partners of municipal employees).

80. See Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV. 1164, 1188–91 (1992).

81. See *NY Clerk Refuses To Sign Same-Sex Marriage Certificates*, DAILY KOS (June 29, 2011, 10:10 AM), <http://dailykos.com/story/2011/06/29/989821/-NY-Clerk-refuses-to-sign-same-sex-marriage-certificates>. Indeed, these actions are advocated by prominent figures such as former Arkansas Governor Mike Huckabee who called upon city officials in Iowa to refuse to marry gay couples, in light of their religious beliefs. See *Mike Huckabee: Lose Your Job for Christ*, MANICSQUIRREL (Mar. 31, 2011), <http://manicsquirrel.com/2011/03/31/mike-huckabee-lose-your-job-for-christ/>.

Republican representatives.⁸² Senator Greg Ball proposed a compromise: “No clergy or other person authorized to conduct marriage ceremonies shall be required to do so against their beliefs or desire, whether religious or not.”⁸³ It is obvious that this type of exemption would allow city officials to refuse to marry gays and lesbians. Although the amendment was deadlocked in the New York legislature,⁸⁴ it is possible that future battles over same-sex marriage will revolve around such exemptions. Furthermore, some cities express hostility toward gays and lesbians by refusing to grant any benefits to same-sex spouses and by discriminating against such couples in the provision of various city services, as the next Section discusses.

2. Local Antidiscrimination Ordinances⁸⁵

While only little progress had been made over the past few years at the state level in regard to antidiscrimination laws protecting gays and lesbians, gay rights groups have declared that “local governments provide[] a true bright spot.”⁸⁶ To date over 600 cities and counties, in which about 100,000,000 Americans live, have adopted such measures.⁸⁷ Even more crucial is the fact that more than one third of

82. See B.A. Robinson, *Marriage Equality Law: The Religious Exemptions, and the Strange Case of Ethical Culture Societies*, RELIGIOUSTOLERANCE.ORG (June 29, 2011), <http://www.religioustolerance.org/hommarrny15.htm>.

83. *Official Statement*, BALL: GETTIN’ IT DONE (June 15, 2011), <http://ball4ny.com/press-releases/official-statement>.

84. See Robinson, *supra* note 82.

85. The numbers provided in this Section are based on research we conducted in August 2011. We searched all fifty states in three databases that include municipal ordinances: (1) MUNICODE, <http://www.municode.com/Library//Library.aspx>; (2) GENERALCODE, <http://www.generalcode.com/webcode2.html#conn>; and (3) AM. LEGAL, <http://www.amlegal.com/library/>. We searched the term “sexual orientation” in all databases, and included in our list any bylaw that prohibits discrimination on the basis of sexual orientation. Some major cities are not included in these databases as they have their own special website for their code, so we also searched the specific websites of these cities (such as Chicago, New York City, Philadelphia, and Portland). Obviously, as these databases are not all inclusive, we could not examine every single city in the United States. It is our rough estimation that we have covered approximately sixty to seventy percent of American cities. Either way, it means that it is highly probable that the actual number of cities that have enacted antidiscrimination policies is larger than the one reported in this Article.

86. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 7.

87. Previous estimations were significantly lower due to the fact that they had been made before the existence of internet-based databases. According to a survey taken in 2003, 242 cities and counties enacted such ordinances. See Michael A. Woods, *The Propriety of Local Government Protections of Gays and Lesbians from Discriminatory Employment Practices*, 52 EMORY L.J. 515, 527 (2003). An estimation done a year later, in 2004, reported that this number rose to 255. See Am. Bar Ass’n Section of Family Law, A

gays and lesbians reside in states that do not have sexual orientation-based antidiscrimination legislation, and thus the only protection is provided by their localities.

Indeed, another important way in which sexuality is localized in America is through the ability of localities to adopt antidiscrimination ordinances and policies that include sexual orientation as forbidden grounds for discrimination, sometimes applicable only to local public entities (as employer and service provider) and sometimes applicable to private ones as well. These ordinances—often called civil rights ordinances—usually apply to employment, housing, and public accommodations. One-hundred-twenty-seven local governments have ordinances that prohibit discrimination in all three areas. The most prevalent prohibition is on employment discrimination, with 335 cities and counties barring employment discrimination (out of which 200 prohibit only discrimination by public entities). The second most prevalent prohibition is in the area of housing, with 220 localities prohibiting housing discrimination. Finally, the third most prevalent prohibition is in public accommodation, with 137 cities and counties that prohibit discrimination in public accommodations.⁸⁸ Some municipal ordinances and policies are more specific, prohibiting discrimination only in the provision of one particular service, such as cable TV, taxis, massage businesses, admission to parks, special events permits, and affordable housing.⁸⁹ Given the scope of these antidiscrimination ordinances, they have the potential to impact the most important as well as the most mundane aspects of the lives of gays and lesbians.

White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships, 38 FAM. L.Q. 339, 358 (2004).

88. See Appendix A (on file with the North Carolina Law Review).

89. JEFFERSON DAVIS PARISH, LA., MUN. CODE § 19-15 (2008), <http://library.municode.com/index.aspx?clientId=11047> (stating that cable service providers shall not discriminate due to sexual orientation); CHAMPLIN, MINN., MUN. CODE § 30-255(11) (1977), <http://library.municode.com/index.aspx?clientId=14283> (stating that massage business shall not discriminate on the basis of sexual orientation); JOPLIN, MO., MUN. CODE § 126-12 (1977), <http://library.municode.com/index.aspx?clientId=11060&stateID=25&statename=Missouri> (prohibiting taxi cabs from refusing passengers based on sexual orientation); EASTAMPTON, N.J., MUN. CODE § 130-5(b) (2009), <http://www.ecode360.com/EA0462> (stating that the affordable housing plan shall be fulfilled regardless of sexual orientation); MOREHEAD CITY, N.C., MUN. CODE § 15-82 (1998), http://library1.municode.com/default-test/home.htm?infobase=10015&doc_action=whatsnew (providing that special events permits will be considered regardless of sexual orientation); SPRINGETTSBURY, PA., MUN. CODE § 213-4(A)(1) (2003), <http://www.ecode360.com/base> (mandating that admission to parks not be prevented on the basis of sexual orientation).

Cities' power to enact such ordinances produces a huge divergence among localities regarding the degree of protection they grant gays and lesbians. Thus, while some cities have become safe havens for sexual minorities, other cities have left sexual minorities exposed to discrimination both by the local government and by private actors.

A central factor in determining a city's power to protect gays and lesbians from discrimination is whether the antidiscrimination regulation applies only to municipal entities, or to the private sector as well. In cases where cities prohibit only public actors from discriminating on the basis of sexual orientation, the city's authority is less disputed; there is almost no case law dealing with such matters. Localities that enact ordinances regulating *private* actors tread on shakier legal ground, although case law regarding this is also minimal.⁹⁰ There are two crucial legal constraints on cities' power to enact such bylaws: the existence and scope of home rule authority or its lack thereof, and the limitation imposed on cities' actions by the "private law exception" doctrine, which prevents municipalities from creating civil liability among private parties.⁹¹

While some scholars argue that home rule stands for local legal autonomy and for the power of localities to regulate their internal affairs as they see fit, it is in fact, as David Barron argues, "a mix of state law grants of, and limitations on, local power that powerfully influences the substantive ways in which cities and suburbs act."⁹² Hence, a city's ability to legislate antidiscrimination ordinances depends on a variety of factors, including whether the city is governed by a home rule or a Dillon Rule, whether its authorization is narrowly or broadly construed by courts, whether the state retains preemptive powers over the city's actions, and the extent of such preemptive powers.

Local antidiscrimination initiatives invoke the private law exception since they potentially give rise to private causes of action, either directly or indirectly. Some such measures explicitly give

90. See generally *Bono Film & Video, Inc. v. Arlington Cnty. Human Rights Comm'n*, No. 06-812, 2006 WL 3334994 (Va. Cir. Ct. Nov. 16, 2006) (challenging Arlington's power to create an antidiscrimination policy protecting sexual orientation). The court declined to decide issues of county authority due to lack of standing by the plaintiff. *Id.* For a critical discussion of this case, see Sarah Miller, *Virginia is for Lovers Business Owners Who Feel the Human Rights Commission Poses a Threat to Their Religious Liberties*, 14 WM. & MARY J. WOMEN & L. 659, 670 (2008).

91. See Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 687-88 (1973).

92. See Barron, *supra* note 57, at 2263.

discriminated parties the right to sue the individual or entity that discriminated against them.⁹³ Even ordinances that limit enforcement power to the city still might give rise to private causes of action through general tort law doctrines such as negligence per se.⁹⁴ In other words, since local civil rights ordinances set standards of behavior for private actors within the city's jurisdiction, the breach of such standards could invoke a private tort claim. Thus, such ordinances could potentially be invalidated on the basis of the private law exception. In practice, in most cases such municipal ordinances have not been struck down by courts on the basis of the private law exception.⁹⁵

One of the main problems with the localization of antidiscrimination is that American localities possess rather minimal enforcement mechanisms of such ordinances. They are often limited in the sanctions available to them, in the fines they can impose, and in the financial resources available to them.⁹⁶ Aware of this problem and frustrated by the difficulty in combating anti-gay discrimination, cities seek new and creative ways to advance their vision. What seems to be the frontier of legal developments in this area are new types of codes, called "equal benefit/opportunity" ordinances. These novel forms of regulation use the city's power to purchase and procure goods and services from private parties in order to induce them to adopt and implement sexual orientation-based antidiscrimination measures.⁹⁷ Equal benefits ordinances require all firms who contract with the local government to offer equal benefits to their employees.⁹⁸ Localities that adopt such a policy are barred from doing business with firms who fail to meet this standard. Since San Francisco

93. Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. (forthcoming 2012) (manuscript at 25–38), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1829788.

94. *Id.* at 29. Diller explains: "In some states, ordinances are treated like statutes in that a violation of their terms may—but does not automatically—demonstrate a violation of the standard of care." *Id.* at 29 n.177.

95. Paul Diller demonstrates that the application of the private law exception is fraught with contradictions and inconsistencies. While courts in few states refused to allow a private right of action through negligence per se, courts in other states had no trouble granting such right of action using the standard set by municipal ordinances. *See id.* at 29–30.

96. Diller explains that many cities create private causes of action in order to strengthen their public enforcement mechanisms. *See id.* at 64.

97. *See, e.g., How To Comply with the Equal Benefits Ordinance*, S.F. HUMAN RIGHTS COMM'N, <http://sf-hrc.org/index.aspx?page=96> (last visited Apr. 6, 2012).

98. *Id.*

spearheaded this development in 1996, about twenty-one localities and counties have enacted these kinds of ordinances.⁹⁹

Perhaps not surprisingly, these measures are beginning to attract the attention—and opposition—of state officials. In May 2011, Tennessee Governor Bill Haslam signed a bill prohibiting local municipalities from enacting antidiscrimination statutes, forcing them to rely on state law.¹⁰⁰ This bill directly followed a Nashville ordinance, passed in April 2011, which barred the city from doing business with companies that do not adopt an equal opportunity policy toward gays and lesbians.¹⁰¹ While the city already had antidiscrimination protections for its own employees, the ordinance prohibited discrimination against gay and lesbian workers by many private employers that contract with the city.¹⁰² This state legislation, although not yet challenged in courts, demonstrates the fragility of local power. Indeed, in most cases, if a state wishes to overrule a city's decision on such matters it can do so quite easily, as long as it refrains from doing it through a *Romer*-style constitutional ban. The precariousness of local power in the United States puts such pro-gay achievements at a permanent risk of being overturned by state majorities.

99. Cities and counties with equal benefits ordinances are: Atlanta, Georgia; Berkeley, California; Broward County, Florida; King County, Washington; Long Beach, California; Los Angeles, California; Miami Beach, Florida; Minneapolis, Minnesota; Oakland, California; Olympia, Washington; Portland, Maine; Sacramento, California; Salt Lake City, Utah; San Francisco, California; San Mateo County, California; Seattle, Washington; and Tumwater, Washington. Cities with equal opportunity ordinances are: Austin, Texas; Bloomington, Indiana; St. Louis, Missouri; and Tucson, Arizona. *See Equal Benefits Ordinances*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/equal-benefits-ordinances> (last visited Apr. 6, 2012). The only state with such laws is California. *Id.*

100. *See* H.B. 600, Gen. Assemb. (Tenn. 2011).

101. Dave Bohon, *Nashville Passes Controversial "Sexual Orientation" Ordinance*, NEW AM. (Apr. 6, 2011, 5:45 PM), <http://www.thenewamerican.com/culture/family/7045-nashville-passes-controversial-sexual-orientation-ordinance>.

102. *Id.*

3. Anti-Gay Hate Crimes¹⁰³

Anti-gay violence is prevalent throughout the United States.¹⁰⁴ Unsurprisingly, the larger the gay and lesbian population is, the more prevalent the hate crimes are against it.¹⁰⁵ Although criminal law is a state matter, local governments have significant powers in relation to state laws since the dominant enforcers of criminal laws are local police forces. It is a basic legal principle that policing and law enforcement are delegated primarily to local governments.¹⁰⁶ Therefore, cities can influence the safety of their gay and lesbian residents by investing resources in preventing, investigating, and prosecuting hate crimes directed at these groups.¹⁰⁷ In this respect, it matters less whether the state has enacted a hate crime law that includes sexual orientation-based offenses, since the city can utilize its state's regular criminal laws—which prohibit battery, assault, and murder—in order to protect its gay and lesbian community from hate-based violence.¹⁰⁸ Hence, even if the state has not provided sexual minorities with the enhanced protection of hate crimes laws, localities are left with vast discretion to do so, using their police agents and enforcement powers. For example, some cities form partnerships with

103. We use the definition provided by the National Coalition of Anti-Violence Programs. According to it, a “hate crime” is “a term that describes an act against a person or property that is motivated by hatred for someone’s actual or perceived identity including sexual orientation, gender identity, gender expression, and/or HIV status” and is not limited to “criminal acts that [are] motivated by hatred for a legally protected identity group.” See NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2010, at 11 (2011), available at <http://www.avp.org/documents/NCAVPHateViolenceReport2011Final.pdf>.

104. According to a 2010 FBI report, almost twenty percent of all hate crimes were perpetrated on the basis of sexual orientation. See *Hate Crime Statistics*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/cjis/ucr/hate-crime/2010> (last visited Apr. 6, 2012).

105. See Donald P. Green et al., *Measuring Gay Populations and Antigay Hate Crime*, 82 SOC. SCI. Q. 281, 288–89 (2001) (demonstrating strong correlation between gay population density and hate crimes against them).

106. See, e.g., Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 562–91 (1997); see also Taron K. Murakami, *Hate Crimes*, 5 GEO. J. GENDER & L. 63, 72–76 (2004) (discussing the omission of gender and sexual orientation from federal hate crime protection, as well as from a few of the states’ hate crime protection schemes).

107. See Donald P. Haider-Markel, *Regulating Hate: State and Local Influences on Hate Crime Law Enforcement*, 2 ST. POL. & POL’Y Q. 126, 138–48 (2002) (empirically finding that local police and prosecution do play a major role in the enforcement of hate crimes).

108. See Dwight Greene, *Hate Crimes*, 48 U. MIAMI L. REV. 905, 906–07, 911 (1994) (criticizing the focus on “enhancing penalties” for crimes, and instead suggesting that the issue lies with the strength of local “enforcement mechanisms”).

community-based anti-gay violence prevention programs.¹⁰⁹ Additionally, local governments can use other powers, such as spending, to finance programs directed at lowering anti-gay crime rates.

But local policing can be used in ways that target and harm gays and lesbians, sometimes intentionally and at other times unintentionally. Local police can crack down—often as a result of a mayoral decision, as in the case of former New York City Mayor Rudy Giuliani’s anti-sex policy—on gay men for cruising for sex or for having sex in public, charging them with public lewdness.¹¹⁰ Although heterosexuals are also prohibited from having sex in public, it is more common for gay men to do so.¹¹¹ Hence, such police actions—even if they result from a general anti-sex ideology, and even if unintentional—disparately impact gays, diminishing their ability to use municipal spaces, possibly even pushing them out of the municipality. Police can also selectively use their search and seizure powers to raid gay establishments, using even misdemeanors as pretext to shut them down.¹¹² Police brutality is another way in which local police can target sexual minorities, thus diminishing minorities’ safety within the local jurisdiction rather than enhancing it.¹¹³ Even if targeting gays and lesbians is not an official city policy, cities can be more or less tolerant of such incidents, either by turning a blind eye to them or by firing and punishing rogue officers. Furthermore, local police can treat gay and lesbian victims with indifference and suspicion, if not outright hostility.¹¹⁴

109. See NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 103, at 49 (reporting a partnership of the Buckeye Region Anti-Violence Organization with the City of Columbus Human Relations Commission that began in 2010).

110. See MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 155–59 (1999).

111. This is the case for numerous reasons, among them that many gays are closeted and have resorted to engaging in sexual acts in public establishments because of stigma and discrimination. See MARTHA C. NUSSBAUM, *FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW* 170 (2010).

112. See WARNER, *supra* note 110, at 153.

113. For example, reported cases of police brutality in Denver have increased twenty-five percent in 2010. See NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 103, at 54 (“[T]wo police officers brutally beat up two gay men of color in Denver.”).

114. For example, a majority of victims experienced indifferent, abusive, or deterrent police attitudes. Among the 61% of victims that reported such police attitude, 38.4% described police attitudes as indifferent, 17.1% as abusive (including verbal and physical abuse), and 5% as deterrent. Only 39.5% of survivors experienced courteous police attitudes. NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, *supra* note 103, at 31.

4. Local Police Powers: Zoning, Land Use, Business Licensing, and Public Health

Municipal police powers aimed at protecting the health, safety, morals, and welfare of the people have an immense impact on the daily lives of city residents.¹¹⁵ The ways in which these powers are used make localities more or less attractive to gays and lesbians, and these powers can be used by localities to reflect their attitude toward sexual minorities. Zoning and land use laws, including the power to appropriate land, condemn property, and regulate the built environment, enable local governments to determine the physical appearance of the locality, the nature of the businesses that operate within it, who will be able to reside within its jurisdiction, and how its public spaces will be used. Local governments can do this by deciding, for example, whether only single-family homes can be built in their jurisdictions or whether apartment buildings can also be constructed;¹¹⁶ whether to allow only traditional “families” to occupy houses or whether “unrelated” people—for example, heterosexual retirees, students in fraternities, or unmarried same-sex partners—can also share a house;¹¹⁷ whether to enable the opening of adult businesses, restrict them to specific areas in town, or prohibit them

115. The United States Supreme Court has found that the Tenth Amendment grants the states, not the federal government, police power. *See* *United States v. Morrison*, 529 U.S. 598, 618 (2000). In discussing the Tenth Amendment the Court said, “[i]ndeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims.” *Id.* Cities obtain their police powers through various delegation methods, which their states can use. *See infra* notes 116–43 and accompanying text. Sometimes the delegation is achieved through home rule provisions in a state constitution, while at other times there are specific enabling acts, such as standard zoning enabling acts. *See* FRUG & BARRON, *supra* note 7, at 99–105.

116. These zoning restrictions are not binary, as there are many different limitations a city may include in its zoning ordinances: an ordinance may define “family” in many different ways, including restrictive definitions, and still be upheld by the courts. *See* ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 710–16 (3d ed. 2005).

117. In *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8–9 (1974), the Supreme Court ruled that a residential zoning ordinance that limited the number of unrelated individuals who may inhabit a dwelling is constitutional. The Supreme Court later distinguished *Belle Terre* in *Moore v. East Cleveland*, 431 U.S. 494 (1977). In *Moore*, the Court found a city housing ordinance, which “limit[ed] occupancy of a dwelling unit to members of a single family,” unconstitutional. *Moore*, 431 U.S. at 496–97. The ordinance made it a crime for Moore, a grandmother who already lived with her son and grandson, to provide a home for an additional grandson whose mother has passed away. *Id.* at 497. The Court distinguished *Belle Terre* on the grounds that the Belle Terre ordinance “bore a rational relationship to permissible objectives.” *Id.* at 498.

altogether;¹¹⁸ and whether to grant leniencies and exceptions or strictly enforce zoning laws.

Hence, some American localities—usually suburbs and townships—have zoning and land use ordinances that de facto restrict, or even prevent, gay families from residing within them. Although these ordinances do not explicitly prohibit gays and lesbians from living in the locality, and are sometimes designed to prevent fraternity houses and boarding houses in single-family neighborhoods, laws that prevent “unrelated” or unmarried individuals from sharing a household might have the unintended consequence of curtailing the ability of gays and lesbians to reside in various localities.¹¹⁹ Such exclusionary zoning practices are more prevalent in suburbs and small towns, as large cities are less inclined to do so because they are more likely to be the subject of state intervention.¹²⁰

Cities’ zoning authorities have also had the effect of permitting, restricting or excluding altogether gay-related establishments. Much like housing, this impact on gay venues has sometimes occurred inadvertently, resulting from the city’s general policy regarding bars and clubs.¹²¹ The concentration of gay venues—bars, clubs, etc.—in cities such as San Francisco and New York would not have been possible without these cities’ explicit permission or silent acceptance of such land uses. Zoning laws might also be used in a more overtly discriminatory manner, due to the wide discretion given to local zoning boards when granting leniencies and exceptions for illegal uses and enforcing zoning codes. This discretion leaves ample room for local officials to either curtail or allow the operation of various gay

118. The regulation of businesses is often achieved through the combination of zoning laws and business licensing, as both can determine the proper usage of property within the jurisdiction. See ELLICKSON & BEEN, *supra* note 116, at 220–31.

119. See, e.g., EDMONDS, WASH., MUN. CODE § 21.30.010 (2011), http://www.mrsc.org/wa/edmonds/index_dtsearch.html (defining “families” as “individuals consisting of two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all of the members of such group living in a dwelling unit”). Many localities across the country have similar restrictive/exclusionary zoning ordinances. The affluent suburb of Ladue, Missouri, denied a residency permit to a lesbian couple since Ladue had an ordinance preventing two “unrelated” people from living together. The fact that the women were in a long-term relationship and raised their children together did not matter to the locality. See Nancy Larson, *Gay Families, Keep Out!*, *ADVOCATE*, July 18, 2006, at 34, 34.

120. See FRUG, *supra* note 60, at 56–61.

121. See WARNER, *supra* note 110, at 152–53.

and gay-friendly establishments. Often, such instances of anti-gay zoning are hard to monitor and challenge in courts due to the lack of evidence of discriminatory intent, and due to the fact that zoning decisions can often be justified on ad hoc and supposedly sound legal grounds.¹²² In *L C & S, Inc. v. Warren County Area Plan Commission*,¹²³ for example, a town council amended its zoning ordinance to make taverns special exceptions to the uses permitted in the commercial zoning district.¹²⁴ The city did so as a result of rumors that a gay bar was about to open at that location.¹²⁵ The owners applied for a special exception for their proposed bar but were denied and a legal challenge against the city's decision was unsuccessful.¹²⁶ The court ruled that even though *the rumors were unfounded, the city was acting within its authority to put a special burden on gay bars since*

[g]ay bars can require increased law enforcement . . . ; they may become sites of male prostitution and arouse the hostility of 'straights.' . . . [T]he flaunting of homosexual preference may be far from the most serious, yet these exotic venues for the sale of alcoholic beverages may have stimulated a sharp if belated awareness of the problematic character of adding to the number of local taverns. There is as yet no constitutional right to operate or patronize either type of bar [topless or gay]; and the plaintiffs do not challenge the amendment as a denial of equal protection on the theory that the defendants singled out

122. An example of a case of supposed discrimination can be seen in the refusal to grant an HIV treatment center in Asbury Park, New Jersey (treating both homosexual and heterosexual patients) the right to construct emergency housing units for twenty-five of its clients. In fact, the zoning board exhibited continuous resistance to the very existence of such a center, and it took years to overcome the board's reluctance. See Henry J. Kaiser Family Found., *New Jersey AIDS Group Files Complaint Against Asbury Park Zoning Board over HIV Discrimination*, THE BODY (Aug. 22, 2003), <http://www.thebody.com/conTent/art11983.html>; see also *Act Up/Asbury Park Update*, ACT UP (Jan. 2007), <http://www.actupny.org/indexfolder/actupap.html> (informing the public that the HIV/AIDS center is in operation as of January 2007). Another reported instance of supposed discriminatory zoning policies took place in Greenville, North Carolina, where the Greenville Metropolitan Community Church congregation, the only one in the region with LGBT outreach programs, purchased a building for its church. The city refused to give the congregation a permit to occupy the building, citing a breach of the city's ordinances requiring a minimal number of parking spaces. The fact that other churches in the past were usually given leniencies or exceptions from similar zoning ordinances raised suspicion that this case was motivated by anti-gay sentiments. See Candace Chellew, *The Devil Went Down to Greenville: The Trials, Tribulations, and Triumph of Greenville MCC*, WHOSOEVER, <http://www.whosoever.org/I2Greenville.html> (last visited Apr. 6, 2012).

123. 244 F.3d 601 (7th Cir. 2001).

124. *Id.* at 603.

125. *Id.*

126. *Id.* at 604-05.

the plaintiffs for adverse treatment out of unreasoned hostility.¹²⁷

Zoning laws are also used by cities to prohibit, limit, and otherwise regulate the operation of sexually oriented businesses, both gay and straight, including adult theaters and book stores, massage parlors, saunas, bars, and clubs. The regulation of sexually oriented businesses has a long history in the United States, characterized by general deference to local governments' discretion regarding the mere existence, full exclusion, or specific location of such businesses.¹²⁸ Indeed, to this day courts across the country uphold zoning restrictions placed on sexually oriented businesses.¹²⁹ Nonetheless, such regulation disparately impacts gays, due to the fact that for many gays—mostly closeted or married to women—such venues are the primary outlet for social and sexual activity and are thus viewed by the gay community as socially acceptable.¹³⁰ As Martha Nussbaum explains:

127. *Id.* at 604.

128. Already in the early twentieth century, the Supreme Court ruled that cities can use their zoning powers to concentrate brothels, rejecting the claim that such actions are tantamount to a taking of property. *See L'Hote v. New Orleans*, 177 U.S. 587, 597–98 (1900) (rejecting the plaintiff's claim that reduced property values stemming from the creation of a red light district in New Orleans was a deprivation of property without due process). Later, the Court upheld various municipal ordinances regulating the location of adult businesses, through concentrating them in one area of town or dispersing them throughout the city. For example, in *Young v. American Mini Theatres, Inc.*, the Supreme Court upheld a Detroit zoning law that prohibited adult businesses from being located "within 1,000 feet of any two other 'regulated uses' or within 500 feet of a residential area," thus effectively mandating the dispersal of such establishments throughout the city. *See* 427 U.S. 50, 52 (1976). The city, ruled the Court, had a compelling interest in protecting the quality of life of its residents by disseminating such businesses throughout its jurisdiction. *See id.* at 71–73. In *City of Renton v. Playtime Theatres, Inc.*, on the other hand, the Supreme Court upheld a zoning ordinance that had the effect of concentrating adult motion picture theaters by prohibiting them from "locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." *See* 475 U.S. 41, 41 (1985). For a discussion of the regulation of red light districts, see Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1104–06 (2005).

129. *See, e.g., Recreational Devs. of Phx., Inc., v. City of Phoenix*, 220 F. Supp. 2d 1054, 1069 (D. Ariz. 2002). In this case, owners of swinger clubs in Phoenix motioned to cancel a new city ordinance that prohibited engaging in or viewing live sex acts, thus pragmatically rendering the owner's licenses more stringent. *See id.* at 1056. Plaintiffs also claimed it was not feasible to enforce this ordinance in gay establishments, due to "the heightened sensitivity appropriate to [the gay club] context." *Id.* at 1059. The court rejected this claim (signaling that this ordinance will be enforced in gay establishments in the future). *See id.* at 1069.

130. Martha Nussbaum recently suggested that disgust is a crucial factor in the hostile political and legal attitudes toward gays. *See* NUSSBAUM, *supra* note 111, at 170. And while in the domain of marriage and antidiscrimination this "politics of disgust" is submerged and mostly underground; where sex is concerned, this type of politics is overt and explicit.

[B]ecause of the history of stigma, sex clubs and adult businesses have assumed considerable importance for both gays and lesbians as sites of protected social activity. Because until very recently gays who openly looked for sex and expressed desire in the wide range of places where heterosexuals may openly do so would be persecuted or even arrested, gay bars and other gay-friendly businesses became pivotal in the social self-definition of both gays and lesbians, and in the evolution of the gay rights movement itself. Because of this history, attacks on sex clubs and adult businesses have a centrality for gays and lesbians that they do not have for straights.¹³¹

Cities' regulation of sexually oriented businesses within their jurisdiction is also achieved through other police powers, such as their duty to protect the public from health risks and public nuisances. The majority of American cities have local ordinances prohibiting establishments that are deemed to be a "public health nuisance."¹³² In many cases, these ordinances constrain the discretion of local public health officers by defining sex businesses as creating a "public nuisance per se."¹³³ The developments which followed the AIDS epidemic in the 1980s and Mayor Giuliani's "clean-up" policies of the 1990s demonstrate the ways in which cities use their police powers to regulate sexually oriented businesses. In 1984, San Francisco's Mayor Dianne Feinstein, using the city's public health authorities, tried to close down gay bathhouses, reasoning that they contributed to the spread of the HIV virus.¹³⁴ Although the San Francisco Superior Court rejected her full-closure edict, ruling that such closure was too harsh a measure, it ordered gay bathhouses to close private rooms, monitor patrons' activities, survey the premises regularly, and act

This explains why cities often treat gay establishments differently than they treat heterosexual establishments and why courts are willing to accept such differential treatment. *Id.*

131. *Id.* at 170.

132. *Id.* at 175.

133. For example, the Phoenix city code states that "[t]he operation of a business for purposes of providing the opportunity to engage in, or the opportunity to view, live sex acts is declared to be a disorderly house and a public nuisance per se which should be prohibited." PHX., ARIZ., MUN. CODE § 23-54(A)(1) (2011), <http://www.codepublishing.com/az/phoenix/>. For other examples, see POWAY, CAL., MUN. CODE § 8.16.030 (2011), <http://www.codepublishing.com/CA/poway/frameless/index.pl?path=../html/Poway08/poway0816.html#8.16.030>; COUNCIL BLUFFS, IOWA, MUN. CODE § 4.70.030 (2010), <http://library.municode.com/index.aspx?clientId=16299>; see also NUSSBAUM, *supra* note 111, at 175 (discussing city ordinances in Phoenix and New York that classify sex businesses as public nuisances).

134. STEPHEN O. MURRAY, *AMERICAN GAY* 114-15 (1996).

against “unsafe” sexual behavior.¹³⁵ This heavy burden resulted in the outcome desired by the mayor: the complete shutdown of all gay bathhouses in the city.¹³⁶

New York City followed suit. In 1985, the city’s public health office ordered the closing of the famous St. Mark’s gay bathhouse, arguing that it posed a risk to public health.¹³⁷ New York fared better in court than San Francisco. The New York state supreme court upheld the closure, affirming the power of the city to shut down the bathhouse on the grounds that it created a public nuisance.¹³⁸ In the mid-1990s, under Mayor Giuliani, New York City enacted new zoning laws, broadly defining adult businesses, severely restricting their location to non-residential and remote areas, and dispersing them throughout the city.¹³⁹ These actions resulted in the radical transformation of several neighborhoods throughout the city, primarily Times Square and the West Village.¹⁴⁰ Although Giuliani’s policies were not intended to harm gays in particular, but rather to “beautify” the city and to make it “safer” and more hospitable to tourists and commerce, the policies had a unique effect on the gay community, especially surrounding the West Village.¹⁴¹ This was due to the fact that for years the gay community had been organized around these establishments, which served not only as places for sexual activity but also as areas for socializing and community building.¹⁴²

135. *Id.* at 117.

136. *Id.*

137. *Id.* at 117–18.

138. *City of New York v. New Saint Mark’s Baths*, 497 N.Y.S.2d 979, 979 (Sup. Ct. 1986).

139. *See WARNER, supra* note 110, at 157–58.

140. *See* Kristine Miller, *Condemning the Public: Design and New York’s New 42nd Street*, 58 *GEOJOURNAL* 139, 139 (2002). The zoning saga, initiated by Mayor Giuliani, continued as new amendments introduced in 2001 placed restrictions upon adult businesses, most of which are affiliated with the LGBT community. This amendment introduced the “60/40 rule,” by which establishments containing more than forty percent adult material are to be considered adult establishments, and are subject to measures such as relocation into the outer boroughs. *See For the People Theatres, Inc. v. City of New York*, 897 N.Y.S.2d 618, 620–21 (Sup. Ct. N.Y. Cnty. 2010), *rev’d by, vacated by, in part, remanded by* 923 N.Y.S.2d 11 (App. Div. 2011). Many of these establishments applied “sham compliance” and were investigated by city officials. *Id.* at 621. This gave way to suits filed by these establishments requesting injunctive relief (invoking First Amendment rights) with respect to the city’s enforcement of the ordinance. *Id.* The injunction was cancelled by the New York State Supreme Court, but the issue remains a legal quandary still being settled in the courts. *See id.* at 622.

141. *See WARNER, supra* note 110, at 149–71.

142. *See id.* Another example is in *Doe v. City of Minneapolis*, 898 F.2d 612 (8th Cir. 1990). The city of Minneapolis amended section 219 of the Minneapolis Code of

To date, gay saunas, bathhouses, adult bookstores, and adult theaters are regulated through a combination of zoning laws, public health codes, and nuisance laws. All are enacted and enforced by local authorities. Although often the language of such laws is sexual-orientation neutral, supposedly addressing both gay and straight establishments, its effect on the two groups is far from identical. First, the prevalence of anti-gay sentiments in many American cities raises the concern that gay establishments will fall victim to selective enforcement of these laws. Furthermore, due to the prevalent belief that gay sex is riskier for transmitting sexually transmitted diseases, gay establishments are exposed to a higher risk of being declared a public nuisance.¹⁴³ Lastly, the application of these laws—even if done neutrally and equally—disparately impacts gays.

5. Education

Public schools are operated, funded, and governed by local governments and local school districts.¹⁴⁴ While states maintain significant powers to set the curriculum for its schooling system, a large portion of this responsibility, as well as the daily operation of the public school system, is left to local entities. These powers are used in ways that can benefit or harm gays and lesbians. Thus, school districts can decide to establish schools for gay and lesbian students, they can encourage or discourage gay-straight alliances, they can design programs and policies to protect gay youth from harassment and bullying in schools or refrain from doing so, and they can include favorable references to gay and lesbian issues in their curriculum or refrain from so doing.¹⁴⁵ Although states can act in many of these

Ordinances relating to contagious diseases to require adult book stores to remove doors (with locks) from their viewing rooms, as these were frequently utilized by gay men for sporadic intercourse. *Id.* at 614. The city's justification was its desire to prevent spread of HIV. *Id.* The ordinance was upheld. *Id.* at 622. The specific ordinance empowering the city was § 219.530, an ordinance conferring powers to the commissioner of health. *See id.* at 623–24 (citing MINNEAPOLIS, MINN., MUN. CODE § 219.530 (1988)).

143. *See* WARNER, *supra* note 110, at 149–71. Nussbaum also describes the often unfounded statements of public health officials and courts regarding the high risk of gay sex. NUSSBAUM, *supra* note 111, at 167–85.

144. The exact allocation of powers and responsibilities between local governments and school districts changes from state to state and from county to county. However, the principle of local responsibility for schooling is maintained throughout the nation. *See* FRUG & BARRON, *supra* note 7, at 121–40.

145. *See generally* Amy Lai, Comment, *Tango or More? From California's Lesson 9 to the Constitutionality of a Gay-Friendly Curriculum in Public Elementary Schools*, 17 MICH. J. GENDER & L. 315 (2011) (discussing the various legal steps school districts can take to foster an atmosphere conducive to benefiting gay and lesbian students).

areas in ways that preempt local actions, it often refrains from doing so, leaving the de facto power at the hands of local authorities.¹⁴⁶ Thus, sexuality is also localized through the education system.

The controversy surrounding the Harvey Milk High School based in New York City demonstrates the degree to which localities can manifest their support for gays and lesbians through their public school system. The Harvey Milk School, the first and largest public school in the nation that caters to gay and lesbian youth (though not exclusively), receives generous funding from the city's board of education.¹⁴⁷ There have been attempts to challenge the city's authority to run the school.¹⁴⁸ Opposition to the school came from conservative politicians and hard-line liberals alike. While the former based their challenge on equal protection claims, arguing that the school's public funding violates the constitutional rights of heterosexual students under the Equal Protection Clause of the Fourteenth Amendment, the latter worried that the school created a segregated environment that secludes and eventually excludes gay students from the regular education system.¹⁴⁹ Crucial for our discussion, however, is the fact that the locality established a school protective of gays and that this school remains open to date. Indeed, it seems that there exists a consensus that New York had the legal powers to open a gay-friendly school, and the only thing seemingly controversial was the "separate but equal" policy that the school was said to have advanced.¹⁵⁰ At least two more cities have followed in the footsteps of New York and have established or attempted to establish gay schools.¹⁵¹

146. For a chart of states' policies concerning sexuality education and other gay-related issues, see *Sexuality and HIV/STD Education Policies*, SEXUALITY INFO. & EDUC. COUNCIL U.S., http://www.siecus.org/_data/global/images/10%20Sexuality%20and%20HIV-STD%20Education%20Policies%20Chart.pdf (last visited Apr. 6, 2012).

147. Maurice R. Dyson, *Safe Rules or Gays' Schools? The Dilemma of Sexual Orientation Segregation in Public Education*, 7 U. PA. J. CONST. L. 183, 183-84 (2004); Erik K. Ludwig, Comment, *Protecting Laws Designed To Remedy Anti-Gay Discrimination from Equal Protection Challenges: The Desirability of Rational Basis Scrutiny*, 8 U. PA. J. CONST. L. 513, 513-16 (2006).

148. *Diaz v. Bloomberg*, No. 114533 (N.Y. Sup. Ct. filed Aug. 13, 2003) (as cited in Ludwig, *supra* note 147, at 516).

149. See Ludwig, *supra* note 147, at 548-49.

150. It is unclear that this argument was valid, since the Harvey Milk School was technically open to straight students as well. In addition, although some tried to make the argument that the school discriminates against black and Hispanic students, approximately eighty percent of the school's students were black and Hispanic. *Id.* at 516.

151. Milwaukee's Alliance School is a public charter middle school and high school. According to the Milwaukee Public Schools website, it is "a safe place for students

Alternatively, local authorities and school boards may choose to create safer, bullying-protected environments for gay and lesbian students within their traditional public schools by addressing the individual needs of gay students, encouraging gay-straight alliances, and funding programs to combat sexually motivated harassment (sometimes called tolerance programs), to name a few. Unfortunately, local educational authorities can also neglect gay and lesbian students, leaving them exposed to homophobic attacks and harassment.¹⁵² In recent years, however, the local nature of such school-based protective measures has changed, with increased federal regulation and requirements being put on schools and local boards of education. A growing body of federal laws and federal and state court rulings are evolving, “federalizing” the treatment of gay students and leaving local entities with less discretion. The federal Equal Access Act,¹⁵³ Title IX of the Educational Amendments of 1972,¹⁵⁴ court cases placing liability on school districts that failed to protect students from bullying,¹⁵⁵ and court cases forbidding discrimination against gay-straight alliances¹⁵⁶ are all examples of the federalization of the anti-bullying movement. Many states are also active in this area, mandating their schools to promote the safety of gay students.¹⁵⁷

Finally, localities and local boards of education can influence how favorable or hostile the curriculum is to homosexuality,

regardless of sexuality, identity, appearance, ability or beliefs.” See *The Alliance School*, MILWAUKEE PUB. SCH., <http://mpportal.milwaukee.k12.wi.us/portal/server.pt?open=512&objID=328&PageID=38481&cached=true&mode=2> (last visited Apr. 6, 2012). Over the past several years, educational figures in Chicago have been attempting to open a gay school, following the model of New York and Milwaukee. Until now, these plans have not materialized due to political opposition. See Carlos Sadovi, *Gay-Oriented High School Plan Dropped*, CHI. BREAKING NEWS (Nov. 18, 2010, 10:47 PM), http://articles.chicagobreakingnews.com/2008-11-18/news/28512128_1_social-justice-pride-campus-gay-youths-gay-issues.

152. See Susan Hanley Kosse & Robert H. Wright, *How Best To Confront the Bully: Should Title IX or Anti-Bullying Statutes Be the Answer?*, 12 DUKE J. GENDER L. & POL’Y 53, 55–57 (2005).

153. 20 U.S.C. § 4071(a) (2006).

154. *Id.* § 1681(a).

155. See, e.g., *Nabozny v. Podlesny*, 92 F.3d 446, 456 (7th Cir. 1996); see also *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 450 (6th Cir. 2009) (reversing the trial court and allowing an alleged Title IX case to proceed past summary judgment, where the plaintiff alleged the school acted unreasonably in light of persistent harassment); *Seiwert v. Spencer-Owen Cmty. Sch. Corp.*, 497 F. Supp. 2d 942, 952–54 (S.D. Ind. 2007) (refusing to grant defendant’s summary judgment motion, where plaintiff successfully alleged a Title IX and equal protection claim from the school’s failure to stop bullying).

156. See, e.g., *E. High Gay/Straight Alliance v. Bd. of Educ.*, 81 F. Supp. 2d 1166, 1184 (D. Utah 1999).

157. HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 18.

depending on the degree of their state's involvement in this matter, through direct mandates, state-established testing, and funding schemes.¹⁵⁸ While states retain the power to set the curriculum for their public school systems, in some cases this authority is delegated—at least in part—to local boards of education. Several states have laws barring class discussions concerning homosexuality in a positive manner,¹⁵⁹ while other states have pro-gay curriculums,¹⁶⁰ thus limiting the discretion of local boards of education. In other instances, however, the state is silent about these topics, leaving room for local authorities to express their values and beliefs regarding homosexuality, or, at a minimum, to start the discussion, which the state could respond to if it disagreed.

6. Districting

Given the various powers of local governments and their ability to influence the lives of gays and lesbians, political representation in municipal bodies is of immense significance for gay rights advocates as well as their opponents. It is no coincidence that the first ever openly gay politician in the United States, Harvey Milk, was a local council member elected in San Francisco.¹⁶¹ And it should come as no surprise that there has never been an openly gay or lesbian U.S. senator and only very few openly gay U.S. congressional representatives, but that currently there are hundreds of gay and lesbian local elected officials.¹⁶² Perhaps most telling is that while

158. FRUG & BARRON, *supra* note 7, at 127–28.

159. Alabama, Arizona, Florida, Louisiana, Mississippi, North Carolina, South Carolina, and Utah all impose severe restrictions and prohibitions on the manner in which homosexuality can be mentioned in the classroom. See Rob DeKoven, *State Laws Require School To Ignore GLBTs*, GAY & LESBIAN TIMES (Aug. 21, 2003), <http://www.gaylesbianimes.com/?id=793>; see also *Sexuality and HIV/STD Education Policies*, *supra* note 146 (charting the differing sexuality-related educational policies among the states). Recently, Tennessee voted to ban the mentioning of homosexuality in its public schooling system (the so-called “don’t say gay in schools” bill). See Steve Williams, *TN Senate Committee Advances “Don’t Say Gay” Schools Bill*, CARE2 (Apr. 22, 2011), <http://www.care2.com/causes/tennessee-senate-committee-advances-dont-say-gay-in-schools-bill.html>.

160. See Lai, *supra* note 145, at 332–34.

161. See generally RANDY SHILTS, *THE MAYOR OF CASTRO STREET: THE LIFE AND TIMES OF HARVEY MILK* (1982) (discussing the emergence of San Francisco as the epicenter of the gay movement); MIKE WEISS, *DOUBLE PLAY: THE SAN FRANCISCO CITY HALL KILLINGS* (1984) (chronicling, in part, the ascendance of Harvey Milk and his subsequent assassination by Dan White in San Francisco).

162. Out of half a million elected officials throughout the nation, there are currently only 477 openly gay and lesbian elected officials in all levels of government in the United States, including federal congresspersons, state senators and house representatives, state

Texas, North Carolina, and Florida have constitutional or legislative bans on same-sex marriage and have no state antidiscrimination laws protecting gays and lesbians, Houston, Texas; Franklinton, North Carolina; and Key West, Florida have elected openly gay mayors.¹⁶³

Although there are many possible reasons that could explain the underrepresentation of gays and lesbians in politics, the structure of election law and districting is probably one of its primary causes. The prevalence of the district-based electoral system and the ways in which electoral districts are drawn are likely part of the reason for the dilution of gay and lesbian voters.¹⁶⁴ It is rare that gays and lesbians form majorities that are large enough to win over federal and state voting districts. This is a result of the fact that even in areas where gays and lesbians concentrate, their presence is still too small considering the large size of those electoral districts. No matter how district lines are drawn, their sheer size—and the fact that gays and lesbians make up a small minority of the population—almost always prevents them from forming district-wide majorities.

The Voting Rights Act, although designed to address the issue of minority vote dilution, does not ameliorate gays' and lesbians' chronic minority status.¹⁶⁵ That Act, as interpreted by the Supreme Court in *Thornburg v. Gingles*,¹⁶⁶ provides special protection to designated minority groups that satisfy a three-prong test: (1) that they are geographically concentrated and are sufficiently numerous to form a district majority; (2) that they are politically cohesive; and (3) that their electoral success is prevented by majority block voting.¹⁶⁷ Where these conditions are met, there is a duty to form majority-minority district(s) that will enable the fair representation of the minority

judges, mayors, local council members, school board members and more. *See Out Officials Search*, GAY & LESBIAN VICTORY INST., http://www.gli.org/out_officials/search (last visited Apr. 6, 2012) (select relevant search criteria boxes and follow the "search" hyperlink). Of these, 297 are local officials, divided as follows: 29 mayors, 236 council members and other elected city officials, and 32 school board members. *Id.*

163. *See id.*

164. Other reasons might include, for example, lack of gay and lesbian candidates and divergence in the preferences of gay and lesbian voters.

165. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006).

166. 478 U.S. 30 (1986).

167. *Id.* at 50–51; *see also* Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1844–45 (1994) (arguing that the rules concerning districting severely curtail black political representation); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographical Compactness in the Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 174–75 (1989) (discussing the problematic impact that the condition regarding geographical compactness has on racial vote dilution).

group.¹⁶⁸ Gays and lesbians, however, are not designated by the Act as a protected group. Therefore, even in the rare cases in which they could meet the requirements of the *Gingles* test, it would not apply to them.¹⁶⁹

In local governments, on the other hand, gays and lesbians can more easily form district majorities. There are several scenarios in which this could happen. In the extraordinary cases where gays and lesbians form a city-wide majority—which can take place only in very small localities—no matter how district lines are drawn, gays and lesbians will be able to elect their representatives. A more common set-up consists of the concentration of gays or lesbians in a neighborhood, which also happens to be an electoral district because of historical reasons or the goodwill of the city election board.¹⁷⁰ A third possibility exists when the city charter enables or even mandates the creation of gay electoral districts. The New York City Charter exemplifies this option. The charter was amended in 1989 to include the following criteria for redistricting: “District lines shall keep intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, religious or other.”¹⁷¹ As Darren Rosenblum argues, the term “other” was in fact “a subtle reference to sexual orientation,” and it was indeed interpreted as such by New York’s districting commission, which created a gay and lesbian district in Manhattan.¹⁷²

During the 2011 nationwide redistricting process following the 2010 census, the question of gay electoral districts and the problems of the underrepresentation of gays and lesbians was pivotal in many

168. *Gingles*, 478 U.S. at 47–51.

169. See Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 132–35 (1996).

170. The Castro in San Francisco is a prominent example, where the neighborhood was a coherent municipal electoral district for decades. See Paul Hogarth, *San Francisco Redistricting: Improving the Draft Proposal*, BEYONDCHRON (Jan. 17, 2012), <http://www.beyondchron.org/news/index.php?itemid=9810>; see also Robert Salladay, *Senate Redistricting Splits Castro: Gays Accuse Burton of Smoothing Political Path For Willie Brown*, S.F. CHRON., Oct. 17, 2001, at A1 (discussing how a newly divided Castro district may benefit the mayor but cost an incumbent lesbian lawmaker her job).

171. N.Y.C., N.Y., CHARTER ch. 2, § 52(1)(c) (as amended July 2004).

172. Rosenblum, *supra* note 169, at 137; see Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 757–58 (2004). See generally Frank J. Macchiarola & Joseph G. Diaz, *The 1990 New York City Districting Commission: Renewed Opportunity for Participation in Local Government or Race-Based Gerrymandering?*, 14 CARDOZO L. REV. 1175 (1993) (discussing the effects of the 1990 redistricting plan).

cities. “Gaymandering”¹⁷³ is hotly debated and receives the attention of media and voters across the nation, demonstrating the centrality of local politics and political representation in the lives of gays and lesbians.¹⁷⁴

II. THE TERRITORIALIZATION OF SEXUALITY

The vast majority of gays and lesbians reside in a fairly limited number of large metropolitan areas, and even within these areas they congregate in a rather small number of enclaves. Put differently, sexuality in America is localized. But what accounts for these residential patterns? Attempts to explain them focus on two main factors. First, the search for community: gays and lesbians are seeking to live in areas where they can express their identity free of harassment, persecution, and intimidation; and where they can build communities with people who share their identity and culture.¹⁷⁵ Second, gays and lesbians—like everyone else—seek various local amenities, such as restaurants, cultural establishments, clean and healthy environments, parks, and other services that are determined by one’s place of residence.¹⁷⁶ Underlying both explanations is the power of individual preferences, market forces, and social dynamics to determine residential patterns.

173. “Gaymandering” is a term coined to describe the manipulation of district line drawing in order to increase—or decrease—gay and lesbian representation. The term refers to the infamous practice of gerrymandering, performed in order to dilute the votes of opponents through various tactics of line drawing. See Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 785–86 (2005).

174. In Sacramento, for example, the gay and lesbian community is concentrated in an area called “the grid.” This area, however, is currently divided into three electoral districts, significantly diluting gay and lesbian representation in city hall since they do not form a majority in any of them. What could bring about a change in the redistricting plan of 2011 is either the goodwill of the Sacramento City Council, the body authorized to redraw the lines for its municipal elections, or a decision by the statewide California Citizens Redistricting Commission to recognize the gay and lesbian community as a “community of interest” (“COI”). The California Citizens Redistricting Commission is comprised of five democrats, five republicans, and four unaffiliated members. Such a decision will force every redistricting authority throughout the state to take the interests of this community into account when redrawing district boundaries. See Cosmo Garvin, *The District: GLBT and Business Groups Want Downtown and Midtown To Have Just One City Council Member*, SACRAMENTO NEWS & REV. (May 5, 2011), <http://www.newsreview.com/sacramento/district/content?oid=1973968>; Press Release, Equal. Cal., State Redistricting Commission Factors LGBT Community in Redistricting Process (July 1, 2011), available at <http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=6493233&ct=10891837>.

175. BAILEY, *supra* note 9, at 4.

176. MURRAY, *supra* note 134 at 191; Black et al., *supra* note 10, at 55–56.

What is patently missing from the various studies that try to account for gay residential patterns is the role played by law in enabling both the creation of a gay community and the provision of the particular amenities sought by gays and lesbians. Although this Article does not suggest that the law is the only, or even the most important, factor in the creation of communities and amenities, it wishes to correct this oversight by highlighting the role played by the law in producing them. Moreover, the Article argues, the legal structure which we have earlier described—namely the localization of sexuality—is a driving force behind these residential patterns: not merely enabling community building and facilitating the supply of amenities, but also significantly incentivizing gays and lesbians to congregate in certain cities and neighborhoods. The deficient federal and state legal protections for gays and lesbians, the inability of homosexuals to exert a meaningful political influence in national and state politics, and the legal structure which enables localities to become “safe havens” for, or conversely, extremely unfriendly to gays and lesbians, all heavily influence the choices of gays and lesbians and shape their location patterns.

A. *Gay and Lesbian Residential Patterns*

Over the past fifty years, residential patterns of gays and lesbians throughout the nation have significantly changed. While Chicago, Los Angeles, New York City, and San Francisco are still among the ten most gay-populated cities,¹⁷⁷ other cities—often medium-size cities such as San Antonio, Santa Fe, and Portland—have taken their place as the fastest growing in gay populations.¹⁷⁸ Over forty metropolitan

177. JUDITH BRADFORD, KIRSTEN BARRETT & JULIE A. HONNOLD, NAT'L GAY & LESBIAN TASK FORCE POLICY INST., *THE 2000 CENSUS AND SAME-SEX HOUSEHOLDS: A USER'S GUIDE* 5 (2002); see Richard Florida, *America's Top 20 Gayest Cities*, DAILY BEAST (July 19, 2010, 8:01 PM), <http://www.thedailybeast.com/articles/2010/07/20/the-20-gayest-cities-in-america.html>.

178. BRADFORD ET AL., *supra* note 177, at 5; GATES, *supra* note 8, at 1, 5–6. It should be noted that despite similarities, there is also a divergence in the residential patterns of gay men and lesbian couples. While gay men tend to concentrate in large cities, lesbian couples concentrate more in medium-sized cities. There is also a disparity between gays and lesbians in the recent changes that have been documented in these two communities' residential patterns. See Thomas J. Cooke & Melanie Rapino, *The Migration of Partnered Gays and Lesbians Between 1995 and 2000*, 59 PROF. GEOGRAPHER 285, 294–96 (2007); Karen L. Hayslett & Melinda D. Kane, “Out” in Columbus: A Geospatial Analysis of the Neighborhood-Level Distribution of Gay and Lesbian Households, 10 CITY & COMMUNITY 131, 133–35 (2011). Nonetheless, for the purpose of this Article, these differences are less important because in both communities, there are high levels of concentration in certain localities, and within them in certain neighborhoods.

areas in the United States now have a sizable gay community.¹⁷⁹ Gay and lesbian couples, especially those with children, are moving to the suburbs and even to rural areas.¹⁸⁰ But, despite these changes, one thing remains the same: gays are still concentrated in large urban areas. In fact, the concentration of same-sex couples in states and cities has remained consistent throughout the years.¹⁸¹ Five major metropolitan statistical areas (“MSAs”)—Chicago, Los Angeles, New York, San Francisco, and Washington, D.C.—are home to more than one quarter of all same-sex households polled in the 2000 Census.¹⁸² Five additional MSAs—Atlanta, Boston, Dallas, Miami, and Philadelphia—are home to more than ten percent of gay and lesbian households.¹⁸³ Together, ten metropolitan areas are home to almost forty percent of all gay and lesbian couples in the nation.

Furthermore, analysis of census data and community surveys suggests that within each metropolitan area, gays and lesbians tend to be highly concentrated in a small number of neighborhoods within the city itself (rather than its adjacent localities and suburbs).¹⁸⁴ And although these neighborhoods are by no means exclusively gay,¹⁸⁵ they contain, to varying degrees, a disproportionately high percentage of gay and lesbian residents.¹⁸⁶

179. BAILEY, *supra* note 9 at 65; BRADFORD ET AL., *supra* note 177, at 6.

180. See GATES, *supra* note 8, at 6.

181. *Id.* at 4.

182. New York contains 8.9% of all same-sex households, Los Angeles 6.6%, San Francisco 4.9%, Washington, D.C. 3.3%, and Chicago 3.1%. BRADFORD ET AL., *supra* note 177, at 5–6.

183. *Id.* at 5.

184. BAILEY, *supra* note 9, at 63. Unsurprisingly, these neighborhoods include the West Village and Chelsea in New York City, Boystown in Chicago, South End and Jamaica Plain in Boston, Downtown and Little Five Points in Atlanta, the Castro and the Mission in San Francisco, Dupont Circle in Washington D.C., Capital Hill in Seattle, Boyz Town in Dallas, and West Hollywood in Los Angeles. For detailed maps showing the concentration of gay and lesbian couples in these cities, see BRADFORD ET AL., *supra* note 177, at 138–42.

185. Thus, although the term “gay ghetto” is sometimes used colloquially and in several studies, it seems inappropriate to describe gay neighborhoods this way. See *The Guys Next Door*, ECONOMIST, May 24, 2008, at 44, 44 (describing the increase of gays in states outside “traditional magnets”). See generally Gordon Brent Ingram, Anne-Marie Bouthillette & Yolanda Retter, *Queer Zones and Enclaves: Political Economies of Community Formation*, in QUEERS IN SPACE: COMMUNITIES/PUBLIC PLACES/SITES OF RESISTANCE 171 (Gordon Brent Ingram, Anne-Marie Bouthillette & Yolanda Retter eds., 1997) (analyzing the historical development of “gay ghettos”).

186. Many of these neighborhoods suffered from urban decline following the flight of the upper-middle class white population (“white flight”) during the 1960’s and 1970’s. Thus, prior to the migration of gays and lesbians into these neighborhoods, they were mostly populated by poorer racial and ethnic minorities. The migration of gays and lesbians into these areas often resulted in their gentrification. Ironically, gays who serve as

The concentration of gays and lesbians within specific cities and neighborhoods is in all likelihood much higher than the official data suggests. This is due to the limitations of the census data and the American community survey. Most importantly, the official census and surveys only collect data about same-sex *couples*,¹⁸⁷ and “[t]he census does not ask any questions about sexual orientation, sexual behavior or sexual attraction, three common ways used to identify gay men and lesbians in surveys. . . . Rather, census forms include a number of relationship categories to define how individuals in a household are related to the householder.”¹⁸⁸ Thus, single gays and lesbians are completely missing from the data collected by census and official surveys.¹⁸⁹ Since research suggests that non-partnered gays and lesbians tend to congregate in urban areas even more so than same-sex couples, it is fair to conclude that the rates of concentrations of *all* gay men and lesbians—not just those who cohabit—*are even higher than the census-based studies find.*¹⁹⁰

There are more caveats that one should bear in mind when discussing gay and lesbian residential patterns. Up until 1990, researchers could not gather reliable and comprehensive information regarding location patterns of gays and lesbians.¹⁹¹ Indeed, they had no way to accurately measure the total number of gays and lesbians in the nation, let alone know where they lived. Only when the census questionnaires were amended in 1990 to include the relationship categories mentioned earlier did it become possible to collect data on and analyze residential patterns of gay and lesbian couples in a systematic fashion. Thus, as most studies admit, the rise in the number of same-sex couples between 1990 and 2006 (the last

agents of gentrification often find themselves being “pushed out” of their neighborhoods due to market forces. See BAILEY, *supra* note 9, at 68–73; Lawrence Knopp, *Gentrification and Gay Neighborhood Formation in New Orleans: A Case Study*, in HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 45, 50 (Amy Gluckman & Betsy Reed eds., 1997); LORETTA LEES, TOM SLATER & ELVIN WYLY, GENTRIFICATION 103–08, 212–14 (2008).

187. GATES & OST, *supra* note 1, at 11.

188. *Id.*

189. BRADFORD ET AL., *supra* note 177, at 7; see also Cooke & Rapino, *supra* note 178, at 286 (analyzing the limitations of existing research in identifying single gays and lesbians).

190. See Sabrina Tavernise, *New Numbers, and Geography, for Gay Couples*, N.Y. TIMES, Aug. 25, 2011, at A1 (suggesting that the new census data ignores single gay men who congregate in large numbers in large metropolitan areas).

191. Studies on these issues had to rely on sporadic and extremely partial data, based on gay establishments and associations’ mailing lists, community services, and commercial lists. See Green et al., *supra* note 105, at 281–85.

American Community Survey on which most reports rely) cannot be attributed solely or even primarily to changes in residential patterns, but rather to a rise in the willingness of gays and lesbians to self-identify as such in the census and possibly to their growing tendency to cohabitate and “come out.”¹⁹² Therefore, although it is clear that some gay and lesbian couples indeed migrate to suburban and rural areas, as some studies suggest, the true extent of this phenomenon is unclear. Either way, even when gays and lesbians move into smaller towns or to suburban areas, recent studies show that they concentrate in a limited number of new towns.¹⁹³ The result is that there are more towns that are populated with a relatively large percentage of gays and lesbians, yet the geographical dispersal of same-sex couples throughout the country is far from homogeneous.¹⁹⁴

B. The Explanations for Gay and Lesbian Residential Patterns

These unique residential patterns demand explanation. Why the concentration and why in cities? After all, gays and lesbians are not born only in cities; they migrate into them. Unlike racial and ethnic minorities, whose continued segregation is often explained by the structural difficulty of escaping the areas in which they are born,¹⁹⁵ the opposite is true for gays and lesbians, who seem to persistently concentrate in a limited number of urban locations. Contemporary literature on gay and lesbian residential patterns explains them as resulting from a quest for community¹⁹⁶ and a search for better local amenities.¹⁹⁷ These explanations predominantly focus on social and market dynamics.

Social explanations describe the process of the formation and maintenance of gay neighborhoods as resulting from a need for a defined space in which community can be built for an extended period, and in which the unique and alternative lifestyle of gays can be spatially institutionalized.¹⁹⁸ The hostile social environment, harassment, and sometimes even violence toward gays and lesbians

192. GATES, *supra* note 8, at 8.

193. See GATES & OST, *supra* note 1, at 39.

194. See Tavernise, *supra* note 190 (analyzing new data that suggests that gay and lesbian couples are moving to smaller, less traditionally “gay” cities).

195. DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* 168 (1993); Ford, *supra* note 167, at 1847–57.

196. BAILEY, *supra* note 9, at 3–4.

197. Black et al., *supra* note 10, at 55–56.

198. See MANUEL CASTELLS, *THE CASTELLS READER ON CITIES AND SOCIAL THEORY* 183 (Ida Susser ed., 2002).

pushed them, according to these explanations, to urban areas, which are often characterized by greater tolerance and more progressive politics.¹⁹⁹ Hence, these urban enclaves provided safe havens where gay identity was affirmed, and a sense of community evolved.²⁰⁰ Further migration into these urban areas is often understood to result from path dependence, social networking, the persistence of hostility toward gays and lesbians in many areas throughout the nation, and by the ongoing need of gays and lesbians to socialize with their peers.²⁰¹ Additionally, historians and sociologists describe the ascendance of gay centers such as New York and San Francisco as resulting from a quest for anonymity, the desire to escape one's family, the ability to form non-traditional family formats far from the scrutinizing eyes that exist in small towns and rural settings, and the search for a cosmopolitan and progressive political environment.²⁰² Political theorists emphasize the fact that the concentration of a large number of gays and lesbians in these cities also enables them to influence local politics since they form a large interest group.²⁰³

Economic explanations for gay and lesbian residential patterns focus on market forces and economic incentives that impact and constrain choices made by individuals. Cities that offer high and adult-related amenities, some argue, are especially attractive for gays since they have a larger disposable income due to the fact that they tend to have fewer children, on average.²⁰⁴ According to this line of argument, gays are no more or less interested in such amenities than any other group; they simply have more disposable income to spend on them.²⁰⁵ Although amenities are rather vaguely defined in most of these studies, they roughly denote a clean, safe, and healthy environment, cultural institutions, good restaurants, better weather, and higher levels of education.²⁰⁶ The concentration of many such amenities in large cities attracts gays and lesbians.²⁰⁷

199. See FRUG, *supra* note 60, at 117; IRIS M. YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 237–38 (1990).

200. BAILEY, *supra* note 9, at 4.

201. *Id.* at 3–4.

202. See GEORGE CHAUNCEY, GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940, at 9–10 (1994); JOHN D'EMILIO, SEXUAL POLITICS, SEXUAL COMMUNITIES 11, 22 (1998).

203. See Rosenblum, *supra* note 169, at 128–30.

204. See Black et al., *supra* note 10, at 55–56, 61.

205. *Id.* at 56.

206. *Id.* at 55.

207. This line of argument tracks the classic model developed by Charles Tiebout, according to which local governments are viewed as commodities with certain qualities (roughly the amenities described above) and a “price” which is the local taxes. Individuals,

According to the economic literature, since individuals choose their place of residence based on these considerations, cities are expected to offer services and amenities that would cater to the preferences of the population they wish to attract. What would be the motivation for cities to attract gays and lesbians? An appealing although controversial explanation was recently given by urban theorist Richard Florida in a series of books dedicated to what he describes as the “rise of the creative class.”²⁰⁸ According to Florida, today’s American economy is based on human creativity, and therefore the best explanation for the economic success—or failure—of cities is their ability to attract creative people.²⁰⁹ Creative people seek a unique environment that fits their characteristics as innovative, often non-conformist, highly educated, and talented, with sophisticated taste in culture and arts. Such an environment enables the creative class—“scientists, engineers, artists, musicians, designers and knowledge-based professionals”—to flourish.²¹⁰ Furthermore, social tolerance lowers the barriers for entry for all people into the job market, thus enabling firms and businesses to recruit their employees from a wider selection of people, resulting in a higher creativity rate.²¹¹ The cities in which the creative class chooses to

called “consumers-voters” by Tiebout, choose where to live based on their preference of the local government that offers them the optimal level of amenities and price. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 471 (1956). Various empirical studies find a positive correlation between the existence of such amenities and migration of gays into cities that have a high level of them. See Black et al., *supra* note 10, at 54; Cooke & Rapino, *supra* note 178, at 287.

208. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS: AND HOW IT’S TRANSFORMING WORK, LEISURE, COMMUNITY, AND EVERYDAY LIFE* 9 (2002) [hereinafter FLORIDA, *THE RISE OF THE CREATIVE CLASS*]. See generally RICHARD FLORIDA, *CITIES AND THE CREATIVE CLASS* (2005) (arguing how cities can attract the creative class); RICHARD FLORIDA, *THE FLIGHT OF THE CREATIVE CLASS* (2005) (describing the types of cities that draw creative workers); RICHARD FLORIDA, *WHO’S YOUR CITY?: HOW THE CREATIVE ECONOMY IS MAKING WHERE TO LIVE THE MOST IMPORTANT DECISION OF YOUR LIFE* (2008) (explaining economic geography). Although Florida’s theory has been criticized for its methodology, ideology, and conclusions, it has become canonical in the sense that most contemporary explanations of gay residential patterns refer to it and use it as a point of departure, either approvingly or disapprovingly. For a disapproving account see, for example, Terry Nichols Clark, *Urban Amenities: Lakes, Opera, and Juice Bars: Do They Drive Development?*, 9 RES. URB. POL’Y 103, 112 (2004).

209. According to Florida, “creativity” is a complicated and multidimensional human trait, involving, among others, the combination of illumination, experimentalism, and synthesis. See FLORIDA, *THE RISE OF THE CREATIVE CLASS*, *supra* note 208, at 30–35.

210. *Id.* at xiii.

211. See RICHARD FLORIDA & GARY GATES, *THE BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, TECHNOLOGY AND TOLERANCE: THE IMPORTANCE OF DIVERSITY TO HIGH-TECHNOLOGY GROWTH* 6 (2001), available at <http://www.urban.org>

reside are therefore characterized, Florida argues, by high levels of diversity, tolerance, openness, amenities that cater to the taste of the creative class, and job opportunities that fit their unique talents and skills.²¹²

Interestingly, the cities which rank highly in Florida's list of "creative-class cities" are also the ones that scored high in his "gay index," developed in order to rank cities according to the presence of gays and lesbians in them.²¹³ Florida makes it very clear that it is not the presence of gays that makes cities successful, nor does he argue that gays are more creative than straights.²¹⁴ It is rather that their presence is an indicator for openness, tolerance, and diversity, which are traits that are conducive to creativity and thus attract the creative class.²¹⁵ Although Florida is careful not to draw such conclusions from his empirical findings, it can be inferred from his overall argument that cities that wish to foster economic growth will attempt to attract the creative class by signaling openness, tolerance, and diversity. One way to do that is to appeal to gays and lesbians. Furthermore, some researchers suggest that gays actually tend to be overrepresented in professions that are considered to be "creative"²¹⁶ and are therefore a target for cities that wish to be economically successful.

In sum, both sociological and economic explanations try to account for the persistence of gay neighborhoods in large metropolitan areas. Together, they argue that while gays and lesbians also live in rural and suburban areas, they continue to dwell in large and medium-sized cities, which provide them with safety, community, good city services, and amenities. They also explain why some cities continue to adopt policies that are appealing to gays and lesbians.

C. *The Hidden Connection Between Legal Rules and Gay and Lesbian Residential Patterns*

Sociological, political, and economic explanations emphasize extra-legal reasons for existing gay and lesbian residential patterns. In fact, some of these studies deny the influence of legal rules on

/UploadedPDF/1000492_tech_and_tolerance.pdf ("We are convinced that tolerance and low entry barriers to human capital helps to attract talent and that talent is in turn associated with high-technology industry and regional growth.").

212. FLORIDA, *THE RISE OF THE CREATIVE CLASS*, *supra* note 208, at 250.

213. *Id.* at 255–58.

214. *Id.* at xvii.

215. *Id.*

216. BAILEY, *supra* note 9, at 3–4 (arguing that gays and lesbians moved into cities "partly because their skills had become more valued in this new economy").

residential choices made by gays and lesbians.²¹⁷ Against these legal skeptics, this Article argues that the law is crucial for understanding gay and lesbian residential patterns. In light of the central role cities play in regulating sexuality, local laws constrain the choices of gays and lesbians by giving them tangible and symbolic incentives (both positive and negative) regarding the cities and neighborhoods in which they should live. But the law does not merely impact residential patterns of gays and lesbians; it is also *a product* of these patterns. Indeed, cities enact laws and ordinances that respond to the preferences of their residents, under the caveat that self-serving interest groups and rent-seeking agents sometimes capture and distort the political process.²¹⁸ Localities that are heavily populated by gays and lesbians therefore tend to develop a gay-friendly legal environment, while cities in which they are underrepresented might do the opposite and adopt rules and policies that will further exclude them. Thus, positive feedback is often created between residential patterns and the legal environment, resulting in the perpetuation, and sometimes, even entrenchment, of these patterns.

1. The Impact of Legal Rules on Gay and Lesbian Residential Patterns

As demonstrated above, sexuality has been localized in the sense that many crucial decisions pertaining to gays and lesbians are being handled and determined at the local level. These decisions include issues such as recognition of same-sex partnerships, enactment of local antidiscrimination ordinances, enforcement of sexual-orientation hate crimes, zoning, business licensing, protecting public

217. Black, for instance, argues that there is no positive correlation between favorable or unfavorable legal environments and the decisions of gays and lesbians over where to live. See Black et al., *supra* note 10, at 74; see also GATES & OST, *supra* note 1, at 8 (noting that “same-sex couples with children frequently live in areas of the country known for more conservative political and cultural views”); Cooke & Rapino, *supra* note 178, at 296 (“Partnered gay migration is directed toward moderate-sized urban regions rich in natural amenities without regard for tolerance toward gay life-styles or the absolute or relative size of the partnered gay community.”).

218. See, e.g., Anne O. Krueger, *The Political Economy of the Rent-Seeking Society*, AM. ECON. REV., June 1974, at 291, 292; Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 231 (1967). Other distortions arise from the structure of representative democracy, such as a small number of politicians representing a large number of people with diverse preferences; the ensuing deficiency in the accountability of the political branch; the large number of issues on the political agenda that prevents people from expressing their real preferences on all important issues; and the inability of voters to gather the necessary and accurate data regarding the issues at stake. See EDWARD L. RUBIN, BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE 180–81 (2005).

health, electoral districting, and running local public schools.²¹⁹ Depending on how they use these powers, cities can sometimes negatively or positively affect gays and lesbians. Such decisions can affect whether gays and lesbians are drawn to or repelled from these cities.

Indeed, the things which most scholars agree attract gays and lesbians to a specific city—a vibrant gay and lesbian community and high amenities—are in fact, as shown earlier, the result of a multitude of legal decisions made by the city.²²⁰ While some of the outcomes of these decisions are easily understood to be a result of specific legal principles (such as same-sex partnership registries and local antidiscrimination ordinances), local amenities and a vibrant community are mistakenly thought to be extra- or pre-legal, despite the fact that they also result from a city's application of its zoning, licensing, districting, and other powers.²²¹ This confusion has led various scholars to mistakenly conclude that the legal environment is immaterial for gay and lesbian residential patterns.²²² Indeed, the parameters that the empirical studies find as positively correlated with gay residential patterns—high and expensive amenities, diversity, and urbanization²²³—are themselves a consequence of the legal powers cities possess and apply. And since the application of these powers is itself dependent on residential patterns, a virtuous circle is created between these two parameters.

What has also escaped the attention of the law-skeptics, causing them to underestimate the importance of legal rules in determining gay and lesbian residential patterns, is the *local* level at which pro- and anti-gay legislation and policies are made. For example, Gary Gates and Jason Ost measure the tolerance of cities, finding only a mixed correlation between such tolerance and the location of gays and lesbians.²²⁴ This measure is used in many other empirical studies

219. See *supra* Part I.C.

220. See *supra* Part II.B–C.

221. The discussion concerning the various legal powers that cities possess exemplifies this argument. As this Article shows, zoning, planning, business licensing, and education decision-making powers affect the existence and dispersal of bars, clubs, sex-related businesses, schools, and other services which are termed “amenities” by the writers criticized by this Article. These powers, this Article explains, also impact the flourishing of gay communities. See *supra* Part I.C.4.

222. See *supra* Part II.B.

223. Studies have found a difference between residential patterns of gays and those of lesbians. While gays tend to concentrate in larger urban areas, lesbians seem to prefer medium-sized cities with fewer high amenities. See, e.g., Cooke & Rapino, *supra* note 178, at 294–96.

224. GATES & OST, *supra* note 1, at 35–36.

reaching similar conclusions.²²⁵ However, Gates and Ost measure “tolerance” based on an analysis of gay-friendly and -unfriendly laws at the *state* level, completely ignoring *local* gay-friendly and -unfriendly ordinances, which, this Article argues, are just as important—if not more important—in affecting the lives of sexual minorities.

The correlation between *local* legal decision making and gay residential patterns is accentuated in conservative states that have a hostile legal environment toward sexual minorities. Such states often have a significant gay and lesbian population that concentrates in large and medium-sized cities.²²⁶ And while these states do not recognize—and may even ban—same-sex marriage and have no sexual orientation-based antidiscrimination laws, the cities in them where gays and lesbians concentrate have often enacted local antidiscrimination laws. Examples abound: Boulder and Denver in Colorado; Raleigh and Chapel Hill in North Carolina; Atlanta in Georgia; Nashville in Tennessee; Austin, Dallas, and Houston in Texas; Kansas City and St. Louis in Missouri; New Orleans in Louisiana; Charlottesville in Virginia; Gainesville, Key West, and Miami Beach in Florida; Philadelphia in Pennsylvania.²²⁷

2. The Impact of Gay and Lesbian Residential Patterns on the Legal Rules

Individuals and groups try to influence local lawmakers and policymakers to enact and enforce laws that will advance and preserve their interests, lifestyle, culture, and normative vision. This is true for gays and lesbians as well as individuals and groups who oppose gay rights. The ability of a group to influence the political process depends on numerous factors: its relative size in the population, its economic power, its political clout, its ability to

225. See, e.g., *id.* at 8; Black et al., *supra* note 10, at 74 (“We find that gays do disproportionately locate in cities that have less hostile attitudes toward gays. Having conditioned on metropolitan housing cost, however, we find that none of the measures we use are significantly correlated with the concentration of gay couples in metropolitan areas.”); Cooke & Rapino, *supra* note 178, at 294 (“There is little support . . . that partnered gay migration is dominated by movement from less populous, less tolerant regions with small gay populations toward more populous, more tolerant regions with large gay populations.”).

226. See GATES & OST, *supra* note 1, *passim*.

227. See Appendix A (on file with the North Carolina Law Review); see also Woods, *supra* note 87, at 554–55 (listing local governments that, as of March 2001, have “enacted employment discrimination measures that protect gays and lesbians”).

organize and act collectively, and its geographic dispersal.²²⁸ While there is an ongoing debate regarding the political and economic power of gays and lesbians, this Section focuses on the relative size and the geographic contiguity of the gay and lesbian community as parameters that approximate their ability to influence the enactment of legal rules.²²⁹

The relative size of a group that shares common interests affects its ability to influence the political and legislative processes by affecting its ability to elect city officials that would represent its interests in city hall by exerting pressure on city officials. Hence, residential patterns of gays and lesbians—namely their concentration in a limited number of cities and within them in a small number of neighborhoods—enables them to impact lawmaking and policy-making at the local level much more so than at the state and federal levels. Indeed, according to a 1996 study, cities with a large gay and lesbian population and higher levels of education were found to be much more likely to adopt antidiscrimination ordinances prohibiting discrimination on the basis of sexual orientation.²³⁰

However, in a district-based electoral system, which typifies most American cities, the size of a group alone is insufficient to make it politically powerful.²³¹ The group's geographic compactness—or dispersal—and the shape of electoral districts affect whether its interests are adequately represented, overrepresented, or diluted. Hence, the districting rules may impact the ability of gays and lesbians to have effective political clout, and this could influence the substance of the laws governing their locality. As mentioned earlier, sexuality-based districting (“gaymandering”) has become a hotly debated issue, with gays and lesbians attempting to remedy their underrepresentation in city hall by lobbying for a redrawing of district

228. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE AND LOYALTY* (1970) (discussing societal dysfunction and assessing how societal forces correct for these inefficiencies); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1970) (comparing the ability of social groups to influence the political process according to their size and ability to organize).

229. While some argue that this group is powerless and oppressed, see, for example, Yoshino, *supra* note 14, at 1543, others claim that the group is, in fact, powerful and well-connected beyond its population share, see, for example, *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (calling homosexuals a “politically powerful minority”).

230. Steven H. Haeberle, *Gay Men and Lesbians at City Hall*, *SOC. SCI. Q.*, Mar. 1996, at 190, 195.

231. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 596–638 (3d ed. 2007).

lines.²³² On the other hand, various other social and political groups also make attempts to increase their own political power (or even to intentionally decrease the representation of gays and lesbians) through redistricting schemes that would dilute the gay and lesbian voice.²³³

III. THE PROMISE AND PERILS OF THE LOCALIZATION OF SEXUALITY

The significance of the localization and territorialization of sexuality cannot be underestimated. The regulation of sexuality by localities not only impacts residential patterns of gays and lesbians, it has brought about a plethora of positive consequences to sexual minorities. But the localization and territorialization of sexuality have a dark side as well. The following Part evaluates the normative implications of the localization and territorialization processes by examining them through three prisms, each having a distinct focal point. The first Section focuses on the *individual* level, emphasizing the benefits individual gays and lesbians garner from these processes, as well as the harms these same processes cause them. The second Section examines the implications of localization and territorialization at the *community* level. The third Section evaluates the consequences of the said processes at the *societal* level.

A. *Cities of Refuge Versus Dangerous Cities*

One of the major advantages of the localization of sexuality is that it creates “cities of refuge”²³⁴ in which individual gays and lesbians can lead their lives free of discrimination, harassment, and fear of violence.²³⁵ As this Article has shown, cities can accomplish this by using various mechanisms such as combating hate crimes, promulgating antidiscrimination laws, instituting same-sex partnerships registries, adopting anti-bullying policies and

232. See *supra* notes 173–74 and accompanying text.

233. In 2001, the Castro—the gayest neighborhood in San Francisco—was split during redistricting, resulting in the dilution of the predominantly gay voting community. See Salladay, *supra* note 170.

234. Localities can serve as cities of refuge not only for sexual minorities. Especially in the context of illegal immigration, cities throughout the United States adopt various measures, aimed at protecting those immigrants from persecution and deportation. These policies often conflict with state and federal policies. See Rose Cuison Villazor, “*Sanctuary Cities*” and *Local Citizenship*, 37 *FORDHAM URB. L.J.* 573, 579 (2010).

235. See Hayslett & Kane, *supra* note 178, at 151 (arguing that “the generalized hostility in the U.S. culture encourages clustering as a protective mechanism”).

encouraging gay-straight alliances in their schools, and funding tolerance programs.

Although these local initiatives provide significant and invaluable protection to gays and lesbians, the weakness of American cities and their legal submission to state and federal power curtails their ability to effectively combat public and private discrimination, even within the city's limits. As many supporters of local government autonomy repeatedly argue, several factors render cities rather powerless and hinder their ability to influence the lives of their inhabitants. Among these factors are the following: (1) the lack of federal constitutional recognition of cities' rights;²³⁶ (2) the longstanding Supreme Court jurisprudence which views cities as mere "subdivisions of the state" and therefore subsumed under state power;²³⁷ (3) the often strict interpretation of home rule authority;²³⁸ (4) the limitations imposed on cities such as the private law exception;²³⁹ and (5) the limited ability to levy taxes and the inability to impose criminal sanctions.²⁴⁰ Therefore, even cities of refuge are unable to marry same-sex couples, or grant legal status to a foreign same-sex partner of a U.S. citizen.²⁴¹ Moreover, the extent to which they can confer real benefits on same-sex couples through local registries (and other measures) is often limited by their state's constitutional home rule powers.²⁴² Furthermore, cities' ability to benefit same-sex partners and to protect gays and lesbians from discrimination is also constrained by specific state legislation that

236. While the federal Constitution explicitly recognizes states and their rights, there is no such mention of cities in the Constitution. See generally U.S. CONST. (providing no mention of "cities").

237. See, e.g., *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (1907).

238. See Barron, *supra* note 57, at 2347–48 (discussing the ambiguities and inconsistencies of home rule doctrine).

239. See Schwartz, *supra* note 91, at 697 (discussing the private law exception).

240. See FRUG, *supra* note 60, at 145, 474; Frug, *supra* note 56, at 1064. But see Briffault, *Our Localism: Part I*, *supra* note 60, at 15 (arguing that contrary to common notions, cities and municipalities "have wielded substantial lawmaking power" in the postwar era).

241. See generally Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (noting that immigration is but one example of numerous powers that rest solely with the federal government). See Yishai Blank, *The City and the World*, 44 COLUM. J. TRANSNAT'L L. 875, 924 n.163 (2006) (discussing the ability of local governments to become involved in "matters pertaining to foreign affairs"); Sarah H. Cleveland, *Crosby and the "One-Voice" Myth in U.S. Foreign Relations*, 46 VILL. L. REV. 975, 980 (2001) (discussing the Constitution's exclusive reservation of foreign affairs authority to the federal government).

242. See *supra* Part I.C.1.

might preempt local actions.²⁴³ Therefore, cities' actions carry with them a degree of uncertainty. Due to their limited taxing powers, cities have only limited funds to spend on various gay-friendly activities such as tolerance programs and enforcement of measures against anti-gay hate crimes.

Not only is a city's power to regulate sexuality limited; it can also prove to be a double-edged sword. As this Article has shown above, while some cities use their discretion to benefit gays and lesbians, "dangerous" cities use it to express their condemnation and disapproval of gays and lesbians. Such cities try to zone out gays and lesbians or curtail their ability to socialize and act upon their identity in public. They do so by using their zoning powers in an exclusionary manner and by targeting gay- and gay-friendly establishments when applying their licensing and public health authorities.²⁴⁴ Most localities—located on the spectrum between refuge cities and dangerous cities—simply abstain from taking any action to protect them, such as *not* amending their city codes to include sexual orientation as prohibited grounds for discrimination, *not* providing same-sex spousal benefits, and *not* funding the enforcement of measures against anti-gay hate crimes. This local inaction, combined with the often hostile societal attitudes might leave gays and lesbians exposed to discrimination, harassment, and sometimes even violence.

While cities of refuge are often characterized by large gay and lesbian communities, the opposite is true for "dangerous cities," which usually have a smaller visible gay and lesbian population. The result is a vicious circle: the smaller and less visible the gay community is, the less likely the city is to adopt gay protective measures, and the more likely gays are to migrate out of the city. As this Article argues, this vicious circle might result in growing social animosity, fragmentation, and separatism.

B. Community Empowerment Versus Gay Isolationism

The concentration of large numbers of gays and lesbians in geographically contiguous areas and the ensuing legal protections and benefits granted to them are conducive to the formation of vibrant and empowered communities. Unafraid of persecution and harassment, individuals are able to socialize, congregate, and form communities of shared identities and interests. Gay and lesbian communities—like other communities—depend on places and

243. *Id.*

244. *See supra* Part I.C.4.

institutions where they can socialize, interact, support each other, and form a common bond.²⁴⁵

In these communities, individuals can step out of the privacy of their homes—where they are protected by the privacy principle—into a public sphere which they can shape according to their shared values and culture.²⁴⁶ Empowering gay and lesbian communities through the institutions of local governments thus fosters “public freedom,” based on a positive rather than a negative conception of liberty, or as local government law scholar Gerald Frug defines it: “the ability to participate actively in the basic societal decisions that affect one’s life.”²⁴⁷ Harnessing local governments’ powers to not only protect individuals from discrimination and violence, but to also positively advance the goals, ideas, and desires of the gay and lesbian community, goes beyond negative liberty, providing gays and lesbians with the capability to advance their shared worldview.²⁴⁸

Moreover, in cities where gays and lesbians constitute a locally significant constituency with meaningful political clout, they are further empowered and might be thought of as exercising, to a certain extent, self-rule. This point lies at the heart of a compelling argument made by Heather Gerken.²⁴⁹ Permanent minorities—those who could never become a majority of the votes at the federal level and who radically differ from the majority, she claims—are thought to be able to do nothing more than voice their dissent or compromise their radical disagreement.²⁵⁰ They can “speak truth *to* power,” but they can never actually be powerful.²⁵¹ If they want to act, they need to modify and de-radicalize their views and positions.²⁵² But in fact, Gerken argues, the American structure of government enables such minorities to “dissent[] by deciding,” thus acting radically, and “speak[ing] truth *with* power.”²⁵³ Such permanent minorities can do

245. See WARNER, *supra* note 110, at 191–93.

246. Cf. Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1452 (1992) (“Although some commentators have contended that the opportunity for self-expression in intimate private relationships is the ‘foundation’ for civic expression in the public sphere, the asserted connection between these two forms of association is in point of fact neither logically nor historically necessary.”).

247. See Frug, *supra* note 56, at 1068 (attributing the concept of “public freedom” to philosopher Hannah Arendt).

248. See David J. Barron, *The Promise of Cooley’s City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 588 (1999).

249. See Gerken, *supra* note 62, at 1775.

250. *Id.* at 1750.

251. *Id.*

252. *Id.*

253. *Id.*

so since they are enabled to form local majorities, which the law grants decision-making powers. San Francisco's mayor's decision to marry same-sex couples is a prime example of such dissent by deciding. Although it was clear that the city's position on gay marriage was a minority view in both California and the United States, by extending their local authority to issue marriage licenses to same-sex couples, San Franciscoans did more than *voice* their dissent; they acted upon it.²⁵⁴

The strength of dissenting by deciding does not lie solely with the immediate benefits and consequences to gays and lesbians who were able to marry in San Francisco. Indeed, the decision of the mayor was very quickly halted by courts and later declared to be beyond his authority.²⁵⁵ What is more crucial is that through such local "disobedience," minorities were able to give their dissenting viewpoint salience on the national plane. When San Francisco began marrying same-sex couples, gay marriage entered every living room in America as "a concrete practice, not just an abstract issue."²⁵⁶ The nationwide ripple effects caused by such governmental action were also felt at the local level as other communities with similar views followed suit.²⁵⁷

The localization and territorialization that this Article has described fosters the participation of gays and lesbians in government. Since gays and lesbians only very rarely form a solid local majority, they must share this decision-making power with other social groups. Such governmental power sharing might enhance mutual understanding among often previously hostile communities. It could also possibly force groups' representatives to familiarize themselves with the particular problems that other groups experience, to get to know their fears and needs, and to compromise and form coalitions. As a result, gays and lesbians might be forced to part with the partiality and alienation that sometimes characterizes them as a marginalized social group. At the same time, people who view gays and lesbians with fear and even hostility might get to know them better through such power sharing and become less adamant about their opposition to gay and lesbian rights.

254. *Id.* at 1748.

255. *See Lockyer v. City & Cnty. of San Francisco*, 95 P.3d 459, 471 (Cal. 2004); *see also* Schragger, *supra* note 61, at 148 n.1 (noting that in *Lockyer* the "California Supreme Court voided the same-sex marriages authorized by the mayor").

256. Gerken, *supra* note 62, at 1754.

257. *See* Schragger, *supra* note 61, at 148-49.

But there is a danger to this territorially based community empowerment. The risk is that instead of the rosy and hopeful picture just described, power sharing and participation in government will actually cause more social friction and strife. One of the major reasons for this is that gays and lesbians find themselves in competition with other minority groups—in particular blacks and Latinos—over the allocation of resources and recognition.²⁵⁸ As various studies have shown, city politics are often characterized by pitting minorities against each other, causing inter-group conflict and rivalry.²⁵⁹ Implied in this process is the accentuation of identity politics—and of the radical “difference” between social groups—which might result in a strengthening of stereotypes and animosity.²⁶⁰

Furthermore, gay and lesbian empowerment at the local level, coupled with its ongoing weakness at the state and federal levels, might result in strengthening gay isolationist tendencies. The “high return” of gay and lesbian investment in local politics—as compared with its low return at the state and federal levels—could possibly lead to the partial secession of sexual minorities from national politics.²⁶¹ Indeed, the growing disparity between the successes gays and lesbians have had in cities and the failures they have been experiencing at the federal level might therefore provoke a heightened sense of alienation.

C. *Pluralism Versus Fragmentation*

One of the greatest advantages of the decentralization of decision-making powers to localities in general and as regards sexuality in particular is the pluralism that it fosters. The fact that every local government can, at least to a certain degree, decide on the extent to which it favors or disfavors the interests of gays and lesbians, ensures that a plurality of views about the proper role of government in the regulation of sexuality exists.²⁶² In accordance with the Madisonian view, the localization of sexuality promises that no one view about such matters gains complete dominance throughout

258. See CASTELLS, *supra* note 198, at 181–82.

259. *Id.* at 179.

260. RICHARD THOMPSON FORD, *THE RACE CARD: HOW BLUFFING ABOUT BIAS MAKES RACE RELATIONS WORSE* 104–05 (2008).

261. See Gerken, *supra* note 62, at 1797.

262. See John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 492 (2002).

the entire federation.²⁶³ In this vein, it could be argued that the decentralization of power to localities to determine whether straights receive priority over gays and lesbians or whether gays and lesbians receive equal—or even superior—treatment is a better mechanism for ensuring equality than judicially enforced protection against discrimination. Thus pluralism becomes a safeguard against state-sanctioned inequality: *pluralism as equality*.

Indeed, until the advent of gay-friendly *local* politics, the entire country was dominated—perhaps even captured—by a strong preference for heterosexual sexuality, if not by outright anti-gay views, manifested, for instance, by the prevalence of sodomy laws.²⁶⁴ Cities were the first to break with the hegemony of heterosexuality, enabling the emergence of a more pluralistic vision of sexuality.²⁶⁵ Thus, in the 1970s, when not a single state had antidiscrimination laws prohibiting discrimination on the basis of sexual orientation,²⁶⁶ sixteen cities enacted such local antidiscrimination ordinances.²⁶⁷ In the following decade, twenty-three cities and counties added sexual orientation to their antidiscrimination codes,²⁶⁸ while only two states

263. Steven Smith refers to it as Madison's "positive pluralism." See Steven D. Smith, *Blooming Confusion: Madison's Mixed Legacy*, 75 IND. L.J. 61, 70 (2000) (arguing that for Madison, federalism was an institutional arrangement that ensured the flourishing of religious pluralism); see also THE FEDERALIST NO. 10, at 60 (James Madison) (E.H. Scott ed., Albert, Scott & Co. 1894) ("A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source.").

264. See, e.g., Evan Wolfson & Robert S. Mower, *When the Police Are in Our Bedrooms, Shouldn't the Courts Go in After Them?: An Update on the Fight Against "Sodomy" Laws*, 21 FORDHAM URB. L.J. 997, 997-1001 (1994) (discussing the negative effects of sodomy laws on the gay community).

265. See *infra* note 280 and accompanying text.

266. It should be noted that the District of Columbia prohibited discrimination based on sexual orientation in 1977. See HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 15.

267. These cities are: Amherst, Massachusetts (1976); Ann Arbor, Michigan (1978); Aspen, Colorado (1977); Austin, Texas (1975); Berkeley, California (1978); Champaign, Illinois (1977); Detroit, Michigan (1979); Hartford, Connecticut (1977); Iowa City, Iowa (1977); Los Angeles, California (1979); Madison, Wisconsin (1979); Minneapolis, Minnesota (1974); San Francisco, California (1978); Urbana, Illinois (1979); Village of Alfred, New York (1974); and Yellow Springs, Ohio (1979). See Woods, *supra* note 87, at 554-55. Even prior to the enactment of such general antidiscrimination ordinances, some localities prohibited sexual orientation-based antidiscrimination but limited the prohibition's scope to public employment. East Lansing, Michigan was the first locality to enact such protection. See JAMES W. BUTTON, BARBARA A. RIENZO & KENNETH D. WALD, PRIVATE LIVES, PUBLIC CONFLICTS—BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES 65 (1997).

268. These cities are: Baltimore, Maryland (1988); Boston, Massachusetts (1984); Boulder, Colorado (1987); Brookline, Massachusetts (1988); Cambridge, Massachusetts

did the same.²⁶⁹ The cities that were spearheading this process, it should be noted, are not necessarily located in liberal states. In fact, some of them lie in the heartland of the most conservative states. For example, even though Texas was still enforcing its sodomy laws in 2003,²⁷⁰ Austin had enacted its antidiscrimination ordinance in the mid-1970s.²⁷¹ To date, cities are still at the forefront of pro-gay legal innovations, even though national politics dominantly endorse heterosexuality as the preferred sexual orientation.

The pluralism guaranteed by the localization of sexuality is not confined to *pluralism as equality* (i.e., an institutional protection against discrimination or hegemony of one preferred type of sexuality); it is also *pluralism as diversity*. Since localities can use their powers to express their disapproval of gays and lesbians, the range of attitudes toward homosexuality and heterosexuality is broad, reflecting the real plurality that exists among the American people. Since towns and cities are “important political institutions that are directly responsible for shaping the contours of ‘ordinary civic life in a free society,’ ” it could be argued that cities that express condemnation of homosexuality, too, are expressing “local constitutionalism.”²⁷² And even if one disagrees with their particular view, it demonstrates the profound diversity that vibrant localism fosters.

But where there is hope, there also lies danger. Local innovation and community self expression might deteriorate into a full-fledged balkanization and fragmentation of the body politic. Lacking legal and political constraints, localities might express—and enact into law—the most radical and violent views, often targeting weak and

(1984); Cathedral, California (1987); Chicago, Illinois (1988); Davis, California (1987); East Lansing, Michigan (1986); Harrisburg, Pennsylvania (1983); Howard County, Maryland (1983); Ithaca, New York (1984); King County, Washington (1988); Laguna Beach, California (1984); Long Beach, California (1989); Los Angeles County, California (1989); Malden, Massachusetts (1984); Montgomery County, Maryland (1984); Oakland, California (1984); Santa Monica, California (1984); Seattle, Washington (1980); West Hollywood, California (1984); and Worcester, Massachusetts (1986). See Woods, *supra* note 87, at 554–55.

269. These states are Massachusetts (1989) and Wisconsin (1982). See HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 32, at 15.

270. See *Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (“The two petitioners were arrested, held in custody overnight, and charged and convicted before a Justice of the Peace. The complaints described their crime as ‘deviate sexual intercourse, namely anal sex, with a member of the same sex (man).’”).

271. See Woods, *supra* note 87, at 554.

272. Barron, *supra* note 248, at 490; see also *id.* at 491 (“[L]ocal governments are often uniquely well positioned to give content to the substantive constitutional principles that should inform the consideration of such public questions.”).

vulnerable minorities. Instead of Madison's "positive pluralism," we might in fact face what he termed the "violence of faction."²⁷³ Indeed, Madison was mostly concerned with the risk that the federation would deteriorate into a multitude of radical religious factions combating each other with ever-increasing zeal. In his view, a structure of weak federal institutions and overly strong states (and localities) could bring about the deprivation of individual rights within states and localities and the radicalization of the entire federation.²⁷⁴ Madison's cure—"extend[ing] the sphere"—will potentially de-radicalize the local zeal and result in the moderation of extreme politics, in light of the large number of people with opposing views throughout the federation that will balance each other and the restraining effect of federal elites.²⁷⁵

The debate among local government scholars concerning San Francisco's decision to marry same-sex couples exemplifies this tension. In contrast to the optimism of localists such as Richard Schragger, who celebrate the constitutional role that cities can and should play in the issue of marriage, Richard Ford is far more pessimistic. While Schragger finds merit in delegating to localities the power to decide who can marry—in light of localities' reduced susceptibility for capture, the easy ability of individuals to exit them, and the local nature of the issue²⁷⁶—Ford is worried "about the types of constitutional revelations we might expect in other cities with different political constituencies."²⁷⁷ In other words, the risk is that cities will adopt radical measures concerning gays and lesbians in opposition to the more moderate federal ones and that this radicalization will create extremist feedback. Thus, whereas some cities legalize same-sex marriage, other cities might respond aggressively to such legal successes of gays and lesbians by adopting

273. THE FEDERALIST NO. 10, *supra* note 263, at 53.

274. *Id.* at 60 ("The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States. A religious sect may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it must secure the national councils against any danger from that source. A rage for paper money, for an abolition of debts, for an equal division of property, or for any other improper or wicked project, will be less apt to pervade the whole body of the Union, than a particular member of it; in the same proportion as such a malady is more likely to taint a particular county or district, than an entire State.").

275. *See id.* at 58.

276. *See* Schragger, *supra* note 61, at 154–55, 164 (arguing that localities have a strong interest in the types of families that reside in them and in their stability, and are therefore best fit to determine who can marry within their jurisdiction).

277. Ford, *supra* note 62.

explicit anti-gay policies.²⁷⁸ For example, they could decide to repeal their local antidiscrimination ordinances, to crack down on gay establishments, to zone out gay and lesbian families, and withdraw funding from gay-friendly programs.

It is impossible to know in advance whether pro-gay local initiatives will result in a positive ripple effect with other cities (and even states) joining in the movement as the optimist scenario predicts, or in backlash and retaliation, as the pessimists fear. Madison's concern does not seem implausible when considering the possible impact that cities' and states' decisions to marry same-sex couples have had on national politics and national elections.²⁷⁹

Despite their enormous importance and far-reaching consequences, the localization and territorialization of sexuality has not only gone nearly unnoticed, it has taken place with no public deliberation, no comprehensive theoretical analysis, and no overarching guiding principles. Indeed, the localization and territorialization of sexuality happened almost haphazardly, through an amalgamation of federal doctrines and inactions, state legislation and omission to act, and local initiatives and activism. This Article is an attempt to correct this oversight by focusing on the institutional design of the regulation of sexual orientation. Having described and analyzed the current legal structure ("the localization of sexuality"), and evaluated its normative implications, the Article now offers a better and more coherent institutional design for the regulation of sexuality.

D. Federalized Localism: A New Agenda for Regulating Sexuality

Over the past half century, American cities have provided gays and lesbians—likely a permanent minority—some refuge from nationwide hostility and discrimination and have allowed for the gradual erosion of the hegemony of heterosexuality. Sexual minorities were able to congregate, socialize, cruise for sex, live in non-nuclear family structures, and empower themselves in several

278. See Gerken, *supra* note 62, at 1764–65.

279. See John Murph, *Moral Values Push Bush To Victory: Same-Sex Marriage Was a Wedge Issue for Some Blacks*, MSNBC.COM (Nov. 19, 2004, 3:14 PM), http://www.msnbc.msn.com/id/6531772/ns/us_news-life/t/moral-values-push-bush-victory/#.TxeydhzU_YE; see also Paul Freedman, *The Gay Marriage Myth: Terrorism, Not Values, Drove Bush's Re-election*, SLATE MAG. (Nov. 5, 2004, 4:16 PM), http://www.slate.com/articles/news_and_politics/politics/2004/11/the_gay_marriage_myth.html (discussing the debate between those who argue that opposition to gay marriage was the reason George W. Bush was re-elected and those who think he was re-elected for other reasons).

cities of refuge owing to these cities' legal powers that both protected them (at least partially) from external animosity and also provided them with the institutional infrastructure to publicly express their shared culture and values.²⁸⁰ Thus, despite the risks posed by the decentralization of the power to regulate sexuality to localities, this Article argues that in present-day America, its merits outweigh its disadvantages. Indeed, cities need to be empowered even further in order to be able to dissent from their states and from the federal government and to express their particular vision of the common good. However, lacking any federal limitations, localities can abuse their power, not only by expressing disapproval of gays and lesbians, but also by targeting and persecuting them. Hence, any system that wishes to empower localities must also create institutional mechanisms to check local power and restrain its excessive application.

In the subsequent sections, this Article briefly discusses ways in which cities need to be bolstered and federal and state mechanisms should be developed in order to curb abuse of local power. It would be a mistake to think that decentralization entails lack of central control or supervision: centralization and decentralization often go hand in hand, and a well-functioning decentralized structure requires both active and empowered localities as well as strong and well-funded central organs. The regulation of sexuality, like many other areas of human action, depends upon a multilevel governance system in which localities, states, and the federal government share power and collaborate with each other. Any attempt to allocate and fix decision-making powers to one level is doomed to fail.

1. Bolstering Local Governments

Local governments are major and indispensable actors in the regulation of sexuality. As already noted, their role in the regulation of sexuality resulted in numerous beneficial outcomes and promoted several important values. First, it advanced individual safety and liberty. Second, it allowed the creation of vibrant gay and lesbian communities. Third, it facilitated democratic values such as self-rule and participation in government. Fourth, it enhanced nationwide pluralism and the weakening of the hegemony of the heterosexual model. Furthermore, localities are particularly apt to regulate sexuality as they possess "local knowledge" that is pertinent to these

280. *See supra* Part II.B.

matters.²⁸¹ Indeed, conflicts surrounding sexuality involve, for good reasons, the traditional authorities of local governments.

Yet, contemporary local government jurisprudence deprives cities of the adequate protections against federal and state encroachment, risking the loss of the relative advantage that localities have vis-à-vis states and the federal government.²⁸² By conceptualizing local governments as “subdivisions of the state” that are subject to its authority, courts enable states to amend city charters and curb city powers at will.²⁸³ Thus, cities find themselves under constant threat of having their decisions annulled (such as the case of Tennessee’s actions against Nashville),²⁸⁴ possibly resulting in a chilling effect on localities that consider adopting policies that run counter to their state’s. Although some home rule provisions supposedly protect cities from such overt interventions by their states, their indeterminate and sometimes narrow interpretation by courts puts cities’ actual powers to act in constant doubt and often strips them of their ability to regulate sexuality.²⁸⁵ This is so since courts interpret home rule authority as being negated where a city’s actions have “external” effects and, as many scholars have demonstrated, such externalities can be found in almost any city action.²⁸⁶ In the case of sexuality, this general observation is all the more true since familial status, discrimination, and violence are commonly understood to have extra-local impact. Thus, notwithstanding the relative success that various pro-gay measures (such as same-sex registries and spousal benefits) have had in courts, these and other pro-gay policies are continuously endangered.²⁸⁷

These dangers have been augmented in recent years by the Rehnquist and Roberts Courts’ “states’ rights” doctrine.²⁸⁸ Although

281. We refer to questions such as the following: Is school bullying a major problem in a particular locality? Is there a need to limit sexually oriented businesses due to harmful secondary effects? Are private businesses discriminating against gays and lesbians and what kind of measures would be effective in a particular context?

282. See *supra* Part I.C.

283. See FRUG & BARRON, *supra* note 7, at 61; FRUG ET AL., *supra* note 60, at 107–69 (examining the relationship between federal and state governments).

284. See *supra* notes 100–102 and accompanying text.

285. See Barron, *supra* note 57, at 2349 (“That home rule provisions sometimes expressly confine home rule initiatory powers to matters of “local” concern provides courts with yet another basis for limiting [home rule].”).

286. See *id.*

287. See *Ralph v. City of New Orleans*, 4 So. 3d 146, 148 (La. Ct. App. 2009) (involving a challenge to New Orleans’s registry of domestic partnerships, which was used to extend health insurance coverage and other benefits to domestic partners).

288. See, e.g., Barron, *supra* note 37, at 385 n.17; McGinnis, *supra* note 262, at 571.

this doctrine is commonly understood to be about protecting the rights of states against *federal* encroachment, this doctrine also has another aspect, more covert but no less important: the growing submission of *cities* to states. Since states are, according to the new federalism, vested with the primary governmental powers, states are free to decide what powers cities in their jurisdiction possess and are free to bestow and withdraw authorities from them as they see fit.²⁸⁹ Justice Scalia's dissent in *Romer v. Evans* can be construed as stating this position in the context of the regulation of sexuality.²⁹⁰ Although Justice Scalia does not refer explicitly to the relationship between states and localities, his refusal to intervene with Colorado's constitutional amendment can be interpreted as establishing the state's right to disregard the city's unique institutional position as the representative of a local community.²⁹¹ Even though Scalia is left in dissent, his position regarding state-local relationship is far from being a minority view among local government law jurists.

Any attempt to better regulate sexuality (as well as other issues) requires the reconfiguration of the relationship between cities, states, and the federal government. While a full exploration of these complicated relationships is beyond the scope of this Article, some fundamental principles can still be articulated in broad strokes. First, it is crucial that American law depart from the notion that cities are administrative conveniences, mere "subdivisions of their states."²⁹² As is evident from the practice of cities in the regulation of sexuality, cities are full partners, if not the leaders, in the democratic negotiation (sometimes called governing) over the most important challenges facing the United States.²⁹³ Second, considering their immense duties and unique role in the regulation of the lives of their residents, cities need to be vested with corresponding powers without being subject to retaliation and usurpation of power by their states. This can be achieved through a different judicial interpretation of federal and state constitutional provisions in a way that imposes limitations on states' power vis-à-vis cities. As David Barron convincingly argues, cities' power—e.g., to enact antidiscrimination ordinances that protect gays and lesbians—needs to be safeguarded against their state's attempts to abolish them. And the majority

289. Barron, *supra* note 37, at 390–91.

290. See 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).

291. See *id.* at 644–53.

292. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178 (1907). For a discussion of *Hunter's* implications and meaning, see Frug, *supra* note 56, at 1119–20.

293. See FRUG, *supra* note 60, at 71–112.

opinion in *Romer*, he claims, should be read as safeguarding *cities'* rights no less than as protecting the individual rights of gays and lesbians.²⁹⁴ Third, cities need to be understood as crucial constitutional actors that interpret the constitution and infuse it with their own particular understanding and ideas about the public good.²⁹⁵ Such novel understanding means that cities' interpretation of both state and federal constitutions should be taken seriously by federal courts. Thus, the fact that cities are adding sexual orientation to their antidiscrimination laws should play a role in courts' interpretation of the Equal Protection Clause, pointing to the conclusion that gays and lesbians should be a protected class.

2. Extending Federal Protections to Gays and Lesbians

Although the institutional power given to cities to regulate sexuality addresses the risk of central monopolization and hegemony, it does not curb the dangers posed by too-powerful cities. In fact, as this Article has shown, it exacerbates it. Indeed, the more cities are empowered, the greater the danger they will abuse this power. This is why it is necessary to develop structural checks against the negative consequences of too-powerful cities. These checks cannot be left in the hands of the states alone and need to be vested with both the federal government and federal courts. A traditional and dominant way to check local power is to extend significant constitutional protection to gays and lesbians, similar to the protection given to other protected minorities.²⁹⁶ Our suggestion, therefore, should not be understood as a call for granting "autonomy" to cities in regulating sexuality. Local autonomy is not only theoretically impossible; it will also necessarily result in misuses, abuses, and otherwise undesirable consequences, which this Article has described above.²⁹⁷ This Article therefore joins the literature which calls for the adoption of heightened constitutional protection for gays and lesbians,²⁹⁸ not only

294. See Barron, *supra* note 248, at 586–94 (discussing the Supreme Court's ruling in *Romer v. Evans*).

295. See Schragger, *supra* note 61, at 185 ("Cities like San Francisco and Boulder have begun to recognize themselves as constitutional actors. Perhaps it is time for constitutional doctrine to do so as well.").

296. See *supra* text accompanying notes 16–17.

297. See *supra* Part III.A.

298. For a recent defense of the need to adopt such protection, see Yoshino, *supra* note 14, at 1543 (arguing that the present tests for determining whether a group is "politically powerless" are insufficient, and that gays should be considered politically powerless, which might prove to be the "tipping point" for gays to become the sixth protected classification).

in order to shield them from federal and state action, but also to protect them from the possible perils of the empowered cities which are envisioned here.²⁹⁹

Such constitutional reform will not, however, obliterate the role of local governments in the regulation of sexuality and will still leave ample room for localities to shape and influence their local spheres. Cities will still be able to reflect the values and cultures of their

299. Another way to protect sexual minorities is through the Establishment Clause. U.S. CONST. amend. I, cl. 1. Although it would probably be a departure from current doctrine, analyzing sexuality like religion would open a new avenue to protect gays and lesbians from governmental power. A sexual orientation equivalent of the principle behind the Religion Clause is much needed and has the potential to counter the Madisonian risk of *sexual* factions that seem to plague present-day America. What is required, in other words, is both the disestablishment of heterosexuality and the free exercise of homosexuality. See generally JANET R. JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE* (New York Univ. Press 2003) (arguing for a new set of social values). A *disestablishment of sexuality* interpretive principle will ensure that no government—federal, state, or local—will be allowed to prefer one sexuality over the other. The *free exercise of sexuality* principle will prohibit governmental action aimed at limiting various gay-related activities in the public sphere. While current constitutional doctrine protects gays and lesbians in the private sphere through the privacy principle, the free exercise principle will also protect them in public, similar to the protection given to religious practices. Such disestablishment and free exercise of sexuality principles do not necessarily require constitutional amendments, but rather a novel interpretation of the Religion Clause. If we view sexuality less like race and more like religion, it might justify a generous interpretation of the First Amendment, so that it would include sexual orientation within its ambit. Janet Halley already pointed to the various problems that arise from “like race” arguments—those comparing sexuality to race—as well as to the problematic nature of immutability arguments that are often given as reasons for the need to treat gays and lesbians equally. See generally Janet E. Halley, *Gay Rights and Identity Imitation: Issues in the Ethics of Representation*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 115 (David Kairys ed., 3d ed. Basic Books 1998) (1982) (stating that the “imitations of identity present problems”). Race has a unique history in the United States that sexuality does not share. And although race, too, cannot be reduced to its biological aspects, sexuality is even more clearly a hybrid of biological tendencies, cultural construction, and changing acts and practices. See generally Janet E. Halley, “Like Race” Arguments, in *WHAT’S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY* 40 (Judith Butler et al. eds., 2000) (discussing the differences between the civil rights movement and gay and lesbian rights movement). The attempt to define sexuality as an “identity” similar to race or other immutable characteristics opens up the risk that sexuality will be protected only in its most narrow and private aspects, leaving various practices unprotected and exposed to prohibitions and discrimination. If sexuality is indeed more like religion—an amalgamation of immutable traits, deep-seated tendencies, cultural habits, and voluntary practices—we argue that it would be better to protect it through a First Amendment-like institutional arrangement. Such an arrangement will provide for acceptance of a plurality of sexual orientations, and will also ensure that a single sexuality will not be dominant over the others and obtain governmental endorsement. For an analogical argument regarding religion and local governments, see Richard C. Schragger, *The Role of the Local in the Doctrine and Discourse of Religious Liberty*, 117 HARV. L. REV. 1810, 1813–15 (2004).

residents, but in a manner that will take into account the Madisonian position that condones local pluralism but limits it in order to avoid radicalization, fragmentation, and hegemony of one sexual faction over the rest. For instance, cities will still be able to decide on the extent to which gay establishments will be allowed within their jurisdiction, but not if this zoning plan is designed to target gays and lesbians and exclude them or prevent them from a meaningful social and communal life. Another example is equal benefits ordinances. As described above, some localities choose to enact bylaws that limit their power to contract with parties who do not institute pro-gay antidiscrimination policies. According to our proposal, it would be an overreach of central power to curb the ability of localities to either enact equal benefits ordinances or to refrain from so doing. The reasons for that are that extending antidiscrimination protection to private employers is confined to the local sphere, can be easily administered by localities, and has no significant externalities. It should thus remain within city powers.

3. The Multilevel Governance of Sexuality

Like most federal arrangements, it would be a mistake to view the existing division of responsibilities between the various levels of government regarding sexuality as fixed. Recent literature regarding federalism, called by different names such as “polyphonic federalism,”³⁰⁰ “interactive federalism,”³⁰¹ and “dynamic federalism,”³⁰² point to the fact that all attempts to allocate clear and unique spheres of competence among the different levels of government have failed. This literature shows that in reality the realms of responsibilities at the federal, state, and local levels are always muddled and overlapping, and argues that this is normatively desirable.³⁰³ Cristina Rodríguez, for instance, recently pointed out

300. See generally Robert A. Schapiro, *Polyphonic Federalism: State Constitutions in the Federal Courts*, 87 CALIF. L. REV. 1409 (1999) (highlighting the difficulties that arise when plaintiffs bring claims arising under both state and federal constitutions in federal court).

301. See generally Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133 (2006) (characterizing “interactive federalism” as an approach that seeks to promote self-government and prevent tyranny while avoiding the practical problems associated by complete dualistic governments).

302. See generally Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004) (discussing some ways in which federal securities law and state corporate law interact).

303. See, e.g., Schapiro, *supra* note 301, at 2133 (“Dual federalism, the idea that the national government and the states enjoy exclusive and nonoverlapping spheres of

that even immigration, which is viewed by most as the exclusive business of the federal government, is in fact managed on a daily basis by states and local governments.³⁰⁴ While passports and border control are in the hands of the federal government, other matters pertaining to the management of immigration, such as education, welfare, and integration into the communities in which immigrants live, are made by smaller-scale governments.³⁰⁵ It is the essence of multi-tiered governmental structures that instead of giving exclusive authority over certain issues to certain governmental levels, there exists a fluid and functional division of powers between them.³⁰⁶ Thus, while during some period the federal government might enjoy dominance in the regulation of foreign affairs, at other times it might also become the business of states and even localities.³⁰⁷ Such division of labor between different governmental levels depends on the institutional capacities of each level, efficiency considerations, the external effects (both negative and positive) of each government's actions, the relative ability of ordinary citizens to participate in the decision-making process that impacts their lives, and contingent parameters such as the national salience of the issue at hand.

Sexuality, this Article contends, should be understood and therefore regulated according to this more fluid conception of federalism. Instead of viewing it as a single matter that needs to be dealt with by *either* the national government *or* by states *or* localities, it should be disaggregated into its various components, with each delegated to a different level of government according to the various parameters mentioned above. Thus, marriage, for instance, seems to be outside of the proper scope of localities. It requires larger-scale cooperation and is understood as having “external” effects that implicate other jurisdictions. It is for this reason that states are the regulators of marriage, why the federal government is required to manage at least some aspects of marriage, and why DOMA is probably an excessive decentralization, causing problems of cooperation and coordination among the states of the union. Yet, as Janet Halley demonstrates, marriage, too, is in fact a bundle of rights,

authority, does not describe the actual operation of the government in the United States today. On the contrary, the overlap of national and state activities is ubiquitous.”).

304. See Rodríguez, *supra* note 241, at 567 (explaining the reality that most local governments deal with immigration daily, and proposing a system where federal and local governments cooperate to deal with immigration issues).

305. See *id.* at 582–609 (surveying how various state and local governments have dealt with various immigration issues, such as education, health care, and human services).

306. See *supra* notes 300–302 and accompanying text.

307. See Cleveland, *supra* note 241, at 975.

duties, and obligations, each of which involves different scales and varying spheres of influence. Thus, it requires regulation by different levels of government and also demands multi-tiered cooperation.³⁰⁸

CONCLUSION

Sexuality is a matter of geography. It varies across states and cities and between the private and the public sphere. Sexuality is also a matter of law. Legal rules draw boundaries, which define, demarcate, constrain, and limit the contours of our sexuality, our ability to act upon it, and our ability to form communities on its basis. These rules, this Article argues, play a significant role in shaping individual and collective choices regarding where to reside, and where to stay away. The residential patterns of gays and lesbians are thus partially a result of—and a cause for—these legal rules.

The localization and territorialization of sexuality in the United States have created safe havens for gays and lesbians and enabled radically different points of view to coexist, but they might result in fragmentation of the national body politic, radicalization of the discourse and treatment of gays and lesbians, and increased isolationist tendencies of both sides. Furthermore, these processes have taken place haphazardly, with no public discussion and very little scholarly attention. Courts and legislatures have merely responded to urgent and pressing needs and have given little in-depth thought to the overarching legal structure that came to be. It is therefore imperative to reconsider the current legal structure and doctrines concerning sexuality. This Article provides an analysis of the current situation and offers a new path to move forward.

308. See Halley, *supra* note 54, at 45–46.

