

THE DENIAL OF BENEFITS TO THE SAME-SEX DOMESTIC PARTNERS OF STATE EMPLOYEES: HOW DO CLAIMS OF DISCRIMINATION FARE OUTSIDE THE SHADOW OF ERISA PREEMPTION?

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[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.¹

Discrimination in employment on the basis of sexuality continues to impact a significant portion of our nation's workforce.² Surveys indicate that between sixteen percent and forty-four percent of gays and lesbians have experienced employment discrimination on the basis of their sexuality.³ This discrimination takes many forms, including harrasment, wrongful termination, pay discrepancy, and the refusal to extend employment benefits to domestic partners. The latter form of discrimination is particularly pervasive because employee benefits are a significant portion of an employee's compensation.⁴

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1. Letter from Thomas Jefferson to Samuel Kercheval, Monticello, July 12, 1816, available at <http://memory.loc.gov/cgi-bin/query/P?mtg:/temp/~ammem-NQDh.html>.

2. See Alan W. Richardson, *Sexual Orientation Rights in the Workplace: A Proposal for Revising and Reconsidering California's Assembly Bill 101*, 26 U.C. DAVIS L. REV. 425, 437 n.69 (1993) (citing studies approximating that between one percent and ten percent of the population are gay or lesbian); Kenneth Sherrill, *The Political Power of Lesbians, Gays, and Bisexuals (Vote for Me: Politics in America)*, PS: POL. SCI. & POL., Sept. 1, 1996, available at 1996 WL 13538092, at *2 (citing more recent surveys that place the figure closer to three percent).

3. Shawn M. Filippi & Edward J. Reeves, *Equality or Further Discrimination? Sexual Orientation Nondiscrimination in Oregon Statutory Employment Law After Tanner V. OHSU*, 3 J. SMALL & EMERGING BUS. L. 269, 277 n.41 (1999) (citing twenty studies conducted between 1980 and 1991).

4. Filippi & Reeves, *supra* note 3, at 285 ("For same-sex domestic partners, the lack of

Contrary to popular belief,⁵ gays and lesbians employed in the United States do not have adequate legal remedies against discrimination in employee benefits. Because there is no effective federal protection against discrimination on the basis of sexuality, and because the Employee Retirement Income Security Act (“ERISA”) preempts state and local prohibitions against such discrimination,⁶ most same-sex partners have no legal remedy when they are denied the fringe benefits that married couples enjoy.

For this reason, most discussions regarding the effective use of these remedies in benefits discrimination focus primarily on the obstacle of ERISA preemption.⁷ However, because ERISA does not apply to “governmental plans,”⁸ a different analysis applies to the fifteen million state employees.⁹ Where ERISA does not apply, employees who seek domestic partner benefits for their same-sex partners have state and local remedies available to them. This comment concerns itself with the applicability and effectiveness of these remedies in regard to state administered, ERISA-style benefit plans,¹⁰ since state employees participating in such plans are in a unique position to employ the various legal claims made possible by state and local law. Part one provides

these benefits can be significant because employee benefits usually comprise between 30% and 40% of total employee compensation.”).

5. See Jane T. Monahan et al., *Gay & Lesbian Civil Rights: Marriage is not Enough*, 15 DEL. LAW. 10, 10 (1997) (“[S]urveys of the American public show that a majority of Americans believe that gay and lesbian individuals already have or are entitled to equal protection of the law and freedom from discrimination.”).

6. 29 U.S.C. § 1144(a) (2002). ERISA’s preemption of state and local prohibitions against discrimination in employment benefits has been extensively discussed by many commentators. See, e.g., Catherine L. Fisk, *ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment*, 8 UCLA WOMEN’S L.J. 267 (1998); Susan Katz Hoffman, *ERISA Basics: A Primer on ERISA Issues: Discrimination Litigation Relating to Employee Benefits*, 1997 A.B.A. CTR. FOR CONTINUING LEGAL EDUC. N-1 (1997).

7. See Paul R. Lynd, *Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. WOMEN & L. 561, 575 (2000) (“As a result of its broad preemptive effect, ERISA preemption should be the starting point in any analysis of domestic partnership benefits.”); see also *Lukus v. Westinghouse Elec. Corp.*, 419 A.2d 431, 440 (Pa. Super. Ct. 1980) (discussing whether the Pennsylvania Human Relations Act is preempted by ERISA).

8. 29 U.S.C. § 1003(b)(1) (1999). “Governmental plan” is defined in 29 U.S.C. §1002(3)(32)(1999) as “a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.”

9. U.S. Census Bureau, *Federal Government Employment and Payroll Data* (Apr. 2000), at <http://www.census.gov/govs/www/apesfed.htm> (last modified Jan. 2, 2002).

10. I use the term “ERISA-style benefit plans,” to mean plans modeled after those regulated by ERISA but excluded from such regulation due to its status as a “governmental plan.”

background on federal law, which highlights the importance of state and local anti-discrimination remedies, as well as ERISA's government plan exception, which makes these remedies available to employees. Part two surveys the effectiveness of these remedies in challenging the denial of domestic partner benefits to same-sex partners and draws conclusions regarding successful strategies.

I. THE SIGNIFICANCE OF STATE AND LOCAL ORDINANCES FOR STATE EMPLOYEES CONTESTING THE DENIAL OF DOMESTIC PARTNER BENEFITS TO SAME-SEX PARTNERS

ERISA does not preempt federal law prohibiting discrimination in employment. Therefore, both public and private employees seeking to obtain benefits for their same-sex partner have access to federal remedies. However, because these federal constitutional and statutory claims are largely ineffective regarding discrimination on the basis of sexuality, state and local statutes provide the only means of addressing such discrimination. This section discusses the lack of federal remedies for sexuality-based discrimination and the consequential importance of the governmental plan exception to state employees.

A. *Federal Remedies for Discrimination on the Basis of Sexual Orientation*

Prohibitions against discrimination in employment exist as a result of executive orders issued by the President, as well as constitutional and statutory federal law.¹¹ The former, while addressing discrimination against gays and lesbians directly, applies only to federal employees.¹² As a result, this discussion will focus on the remedies available through constitutional and statutory law.

1. Federal Constitutional Law

There are no effective federal constitutional protections against discrimination on the basis of sexuality. The Supreme Court has held that gays and lesbians are not a protected class, and thus distinctions made by

11. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (amending Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (1969)).

12. *Id.* Congressional attempts to limit the effectiveness of this order have so far been unsuccessful. However, it remains to be seen whether subsequent administrations will support the order. See Rhonda R. Rivera, *Our Straight-Laced Judges: Twenty Years Later*, 50 HASTINGS L.J. 1179, 1193 (1999) ("The general understanding is that an executive order can be rescinded by the next executive.").

the state on the basis of sexuality are subject to the “toothless”¹³ rational basis test.¹⁴ Furthermore, the Supreme Court has held that gays and lesbians do not have the same due process fundamental right to privacy in their intimate relations that heterosexual couples enjoy.¹⁵ As a result, the federal Constitution offers little relief to employees seeking the same partner benefits extended to married couples.

2. Federal Statutory Law

Title VII prevents private employers from discriminating “against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”¹⁶ The statute does not list sexual orientation as a protected classification. However, the denial of benefits to a same-sex partner is arguably discrimination on the basis of sex because, but for the partner’s sex, they would be eligible for benefits. Courts applying Title VII have been uniformly unconvinced by this argument, finding that Title VII does not offer protections against discrimination on the basis of sexuality.¹⁷

ERISA preempts only state law.¹⁸ Employees who experience discrimination in the terms of their benefits plan do have access to federal remedies. However, as the above discussion demonstrates, federal law is not applicable to discrimination on the basis of sexuality.¹⁹ Therefore, gays

13. Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 357 (1999) (“In the past twenty-five years, the Court has decided ten [successful claims under the rational basis standard], while during the same time period, it has rejected rational basis arguments on one hundred occasions.”).

14. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) (“[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.”); but see Raffi S. Baroutjian, Note, *The Advent of the Multifactor, Sliding-Scale Standard of Equal Protection Review: Out with the Traditional Three-Tier Method of Analysis, in with Romer v. Evans*, 30 LOY. L.A. L. REV. 1277 (1997) (arguing that the Court actually employed heightened scrutiny).

15. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

16. 42 U.S.C. § 2000e-2 (a)(1) (2002).

17. See Lynd, *supra* note 7, at 591; see also *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996) (“Title VII does not afford a cause of action for discrimination based upon sexual orientation.”); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”), *cert. denied*, 493 U.S. 1089 (1990); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979) (“Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.”) (citations ommitted).

18. 29 U.S.C. § 1144 (a) (2002).

19. But see the Employment Non-Discrimination Act of 2001 [hereinafter ENDA], H.R. 2692, 107th Cong. (2001) (prohibiting discrimination in employment on the basis of sexual orientation). Although the ENDA, if passed, would offer important employment

and lesbians must turn to state and local protections against discrimination, available only where ERISA does not apply; hence the importance of the governmental plan exception.

B. The Governmental Plan Exception

Section 1003 (b) of ERISA states that its provisions “shall not apply to any employee benefit plan if . . . such plan is a governmental plan.”²⁰ ERISA defines “governmental plan” as “a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of any of the foregoing.”²¹ Because governmental plans are subject to more state regulation regarding employment discrimination,²² and because ERISA applicability can determine federal jurisdiction, a plan’s status as “governmental” is often an issue of litigation. Courts interpret the exception narrowly, applying it to “organizations traditionally characterized as governmental organizations” but not “to include organizations having some significant relationship with a government but not themselves viewed as governmental.”²³ ERISA does not define the terms “political subdivision,” “agency,” or “instrumentality.” Courts have therefore analogized from definitions in other areas of law. In *Rose v. Long Island Rail Road Pension Plan*,²⁴ the Circuit Court applied a test developed by the Supreme Court in *NLRB v. Natural Gas Utility District*.²⁵ Under this test, an organization is a “political subdivision” if it is “either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or the general electorate.”²⁶ In *Culpepper v. Protective Life Insurance Co.*,²⁷ the court looked to the factors which the IRS utilizes in determining whether an entity is an agency or instrumentality under 26

discrimination protections to gays and lesbians, it explicitly excludes benefit plans from its application.

20. 29 U.S.C. § 1003 (b) (2002).

21. 29 U.S.C. § 1002 (32) (2002).

22. Although these plans are subject to state law regarding employment discrimination, they are arguably underregulated in terms of the evils which ERISA sought to eliminate. See Jon G. Miller, *Is Your Client's Government Pension Safe?: Making the Case for Federal Regulation*, 2 ELDER L.J. 121 (1994) (arguing that the pension plans of state employees do not enjoy adequate protection under state regulation).

23. *Poitier v. Sun Life of Canada*, No. Civ.A. 98-3056, 1998 WL 754980, at *1 (E.D. Pa. Oct. 28, 1998), quoting *Krupp v. Lincoln Univ.*, 663 F. Supp. 289, 292 (E.D. Pa. 1987).

24. 828 F.2d 910, 916 (2d Cir. 1987). See also *Shannon v. United Servs. Auto. Ass'n*, 965 F.2d 542, 548 (7th Cir. 1992) (applying the NLRB standard as well).

25. 402 U.S. 600, 604-05 (1971).

26. *Id.*

27. 938 F. Supp. 794, 798 (M.D. Ala. 1996).

U.S.C. § 414(d) (2001).²⁸ Those factors are:

(1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interests of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses.²⁹

In *Culpepper*, the court held that the National Guard Association and the National Guard Association of Alabama Insurance Trust were not government plans because they “receive[d] no funding from the National Guard of Alabama or the United States National Guard for insurance or otherwise” and were “separate from . . . not maintained by, and . . . not established by the National Guard of Alabama.”³⁰ Employee organizations “whose members just happen to be employees of a governmental entity”³¹ are, therefore, not government plans.

A government plan must be “created directly by the state” or administered by those responsible to the state.³² Although plans that do not meet these criteria are subject to ERISA, plans that *do* meet the criteria cannot evoke ERISA simply because they are modeled after ERISA employee benefit plans.³³ In *Triplett v. United Behavioral Health System Inc.*,³⁴ the defendant sought to defeat a motion to dismiss for lack of subject matter jurisdiction by establishing that the Pennsylvania Employee Benefit Trust Fund (“PEBTF”) was not subject to ERISA’s governmental exception. Defendant argued that because the PEBTF was “‘created as a jointly trusted health and welfare benefits fund’ rather than by statute,”³⁵ because PEBTF trustees do not act as “employees of the Commonwealth

28. *Id.*; see also *Harbor Ins. Co. v. Blackwelder*, 554 So. 2d 329 (Ala. 1989) (applying the IRS factors as well).

29. *Culpepper*, 938 F. Supp. at 798 (citing Rev. Rul. 57-128, 1957-1 C.B. 311).

30. *Id.* at 799.

31. *Id.* at 800.

32. *Triplett v. United Behavioral Health Sys., Inc.*, No. CIV.A. 98-3065, 1999 WL 238944 (E.D. Pa. Mar. 29, 1999).

33. *Id.* at *1; see also *Fellion v. Ill. State Toll Highway Auth.*, No. 91 C 7887 1992 WL 159437 (N.D. Ill. July 1, 1992) (finding that the plan was governmental even though it directly referred to ERISA in its summary plan description).

34. 1999 WL 238944.

35. *Id.* at *2. The PEBTF was established as a result of collective bargaining between the Commonwealth of Pennsylvania and AFSCME Council 13. *Id.*

subject to review by more senior governmental employees,³⁶ and because the PEBTF has described itself as “an ERISA plan,”³⁷ it is not a “governmental plan” under ERISA.³⁸ The court disagreed, finding none of these arguments relevant to whether the plan was “established or maintained for its employees by . . . the government of any State.”³⁹ The holding suggests that a plan can adopt many of the characteristics of an ERISA-style plan and remain exempt from ERISA.⁴⁰

The state employee who seeks to challenge the denial of benefits to her same-sex domestic partner must qualify for the governmental plan exception of ERISA in order to access state and local remedies. Although plan administrators would likely argue ERISA applicability in order to preempt potentially broader state anti-discrimination law, their argument would likely fail if the state participated in its creation. Thus, the great majority of state employees would have access to non-federal remedies in challenging benefits discrimination.⁴¹

II. THE EFFECTIVENESS OF STATE AND LOCAL REMEDIES IN CHALLENGING THE DENIAL OF EMPLOYEE BENEFITS TO SAME-SEX DOMESTIC PARTNERS

Before discussing the effectiveness of the remedies available to state employees seeking benefits for their same-sex domestic partners, it is important to understand the nature of the claim being made. Most plans that deny benefits to same-sex partners do so, not on the basis of sexuality, but on the basis of marital status.⁴² If state law prohibits discrimination on the basis of marital status, then unmarried partners, both homosexual and heterosexual alike, can challenge an employer’s policy of distinguishing on the basis of marital status. However, the law is rife with distinctions based on marital status, and courts are hesitant to find such determinations invalid.⁴³

36. *Id.*

37. *Id.* at *3.

38. *Id.* at *2-4.

39. 29 U.S.C.S. § 1002 (32) (1999)

40. Triplett, 1999 WL 238944, at *2-4 (holding that plans can be established through trust agreements with unions, administered through an independent board of trustees, and “work[] to meet the obligations that it believes itself to have under ERISA,” and still be considered a governmental plan).

41. The exception would be state employees covered by plans created by employee organizations which have no connection to the state. See *Culpepper v. Protective Life Ins. Co.*, 938 F. Supp. 794, 798 (M.D. Ala. 1996).

42. See Thomas H. Barnard & Timothy J. Downing, *Emerging Law on Sexual Orientation and Employment*, 29 U. MEM. L. REV. 555, 574 (1999); Fisk, *supra* note 6, at 279.

43. See Barnard & Downing, *supra* note 42, at 574.

Where state law prohibits discrimination on the basis of sexual orientation, employees seeking same-sex domestic partner benefits must argue that a policy that distinguishes on the basis of marital status discriminates against gays and lesbians because they cannot marry. Employers commonly counter that a distinction based on marital status is not discrimination on the basis of sexual orientation. Same-sex couples are not covered because they are biologically unable to meet the state's definition of "married," not because the plan declares homosexual partners ineligible.⁴⁴ Thus, any claim seeking benefits for a gay or lesbian partner must address this counterargument.

Where state law lacks protections against discrimination on the basis of sexual orientation, employees can argue that the denial of benefits is on the basis of sex. That is, but for the partner's gender, they would be eligible for benefits. This is a weaker argument, because the policies do not differentiate on the basis of sex. Rather, they differentiate on the basis of marital status. If the employee's partner were a different sex, they would still be ineligible as an unmarried heterosexual couple. A claim based on sex discrimination must surpass these obstacles.

Not only must the anti-discrimination law bear upon sexual orientation, it must also apply to employee benefits plans. A statute that prohibits discrimination in employment may only cover hiring and promotion or, if it is broader, it may explicitly omit benefits plans from its scope. In order to prevail, plaintiffs must argue that the anti-discrimination law they rely upon applies to discrimination in benefits.

Finally, state employees must be able to bring a claim against the party denying benefits to their same-sex partners. Often, this party will not be the state itself but rather a trust administering an employee benefits plan. To successfully employ a law prohibiting employment discrimination on the basis of sexual orientation, the employee must argue that liability exists for the trust itself.

Employees have four areas of law on the state and local level to challenge state employers who discriminate in benefits: state executive orders, state constitutional law, state statutory law, and local ordinances.

A. *State Executive Orders*

State governors have issued executive orders banning discrimination in public employment on the basis of sexual orientation.⁴⁵ As of 1999,

44. Indeed, under such plans a gay male would be covered so long as he were legally married to a woman.

45. Pennsylvania's Exec. Order No. 1996-9 reads: "No agency under the jurisdiction of the Governor may discriminate against any employee or applicant for employment because of race, color, religious creed, ancestry, union membership, age, sex, sexual orientation,

eight states have such orders: Colorado, Louisiana, Maryland, New Mexico, New York, Ohio, Pennsylvania, and Washington.⁴⁶ In *Rutgers Council of AAUP Chapters v. Rutgers*, the court refused to apply such an order to a state employee, instead holding that the denial of benefits to a same-sex domestic partner was not discrimination on the basis of sexuality, but rather on the basis of marital status.⁴⁷ Although this argument does not survive closer scrutiny, litigants in many states will not be able to challenge it in regard to an executive order, because a private right of action likely does not exist.

The right to enforce an executive order vests in the executive branch. The federal executive order signed by President Clinton is enforced by the Department of Labor.⁴⁸ Most state executive orders are likely enforced by state administrative agencies. A private right of action need not exist.

Several cases have held that private citizens may have no right of action against a state employer that violates an executive order. In *Shapp v. Butera*,⁴⁹ the Pennsylvania Commonwealth Court held that where an executive order “serve[s] to implement or supplement the Constitution or statutes” and “is based upon the presence of some constitutional or statutory provision, which authorizes the executive order either specifically or by way of necessary implication,” it is legally enforceable.⁵⁰ Since an executive order is only enforceable when it is supported by a constitutional or statutory right, it is difficult to imagine when a litigant would base a claim on the order rather than the pertinent constitutional or statutory provisions. Where such provisions do not exist in state law, executive orders do not provide a remedy.

*Holt v. Northwest Pennsylvania Training Partnership Consortium*⁵¹ further narrows the effectiveness of executive orders in Pennsylvania. *Holt* holds that where an executive order is “intended for communication with subordinate officials in the nature of . . . suggested directions for the execution of the duties of the Executive Branch,” it is not legally enforceable.⁵² Thus a private right of action does not exist where the

national origin, AIDS or HIV status, or disability.” 4 PA. CODE § 1.161(a) (2000).

46. Barnard & Downing, *supra* note 42, at 557-58 (citing Exec. Order No. 90-13-98 (Colo. 1990); Exec. Order No. Ewe 92-7 (La. 1992) (expired 1996); Exec. Order No. 01.01.1993.16 (Md. 1993); Exec. Order No. 85-15 (N.M. 1985); Exec. Order No. 28.1 (N.Y. 1993); Exec. Order No. 83-64 (Ohio 1983); Exec. Order No. 1988-1 (Pa. 1988); Exec. Order No. 85-09 (Wash. 1985)).

47. *Rutgers Council of AAUP Chapters v. Rutgers*, 689 A.2d 828, 838 (N.J. Super. Ct. App. Div. 1997).

48. Barnard & Downing, *supra* note 42, at 564.

49. 348 A.2d 910 (Pa. Commw. Ct. 1975).

50. *Id.* at 913.

51. 694 A.2d 1134 (Pa. Commw. Ct. 1997).

52. *Id.* at 1138. (“The executive order would carry only the implication of a penalty for noncompliance, such as a possible removal from office, an official demotion, restrictions on

executive order does not explicitly create one.

B. State Constitutions

Claims of discrimination on the basis of sexual orientation have fared better under state constitutions than under the Federal Constitution. Arguably, this is due in part to the jurisprudential diversity produced by a federalist system.⁵³ However, of particular significance is the fact that eighteen states have adopted an equal rights amendment (“ERA”).⁵⁴ If same-sex couples seeking benefits can argue that the state is making a distinction on the basis of sex, an ERA will bring strict scrutiny to bear rather than intermediate scrutiny.⁵⁵ In some cases, this difference can be decisive.

In *Baehr v. Lewin*,⁵⁶ the Hawaii Supreme Court held that a statute that denies the benefits of marriage to same-sex couples runs afoul of Hawaii’s equal protection clause where it does not further compelling state interests and is not too narrowly drawn to avoid unnecessary abridgements of constitutional rights.⁵⁷ The court reached this conclusion in three elegant steps.⁵⁸ First, the court cited *Loving v. Virginia*⁵⁹ for the principle that a

responsibilities, a reprimand, or a loss of favor.”) (quoting trial court).

53. See THE FEDERALIST No. 46 (James Madison) (discussing the multiplicity of rights and responsibilities under a federalist system); see also Melanie D. Price, *The Privacy Paradox: The Divergent Paths of the United States Supreme Court and State Courts on Issues of Sexuality*, 33 IND. L. REV. 863 (2000) (contrasting federal constitutional jurisprudence regarding the privacy rights of gays and lesbians with that of the states).

54. See Paul Benjamin Linton, *State Equal Rights Amendments: Making a Difference or Making a Statement?*, 70 TEMP. L. REV. 907, 941-44 (1997). The states that have adopted equal rights amendments are: Alaska, ALASKA CONST. art. I, § 3 (1972); California, CAL. CONST. art. I, § 8 (1879); Colorado, COLO. CONST. art. II, § 29 (1973); Connecticut, CONN. CONST. art. 1, § 20 (1974); Hawaii, HAW. CONST. art. 1, § 3 (1972); Illinois, ILL. CONST. art. I, § 17 (1971); Louisiana, LA. CONST. art. I, § 3 (1974); Maryland, MD. CONST., art. 46 (1972); Massachusetts, MASS. CONST. pt. I, art. 1 (1976); Montana, MONT. CONST. art. II, § 4 (1973); New Hampshire, N.H. CONST. pt. 1, art. 2 (1974); New Mexico, N.M. CONST. art. II, § 18 (1973); Pennsylvania, PA. CONST. art. I, § 28 (1971); Texas, TEX. CONST. art. I, § 3a (1972); Utah, UTAH CONST. art. IV, § 1 (1896); Virginia, VA. CONST. art. I, § 11 (1971); Washington, WASH. CONST. art. XXXI, § 1 (1972); and Wyoming, WYO. CONST. art. 1, § 2 (1890).

55. See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (“Accordingly, we hold that sex is a ‘suspect category’ for purposes of equal protection analysis under article I, section 5 of the Hawaii Constitution and that HRS § 572-1 is subject to the ‘strict scrutiny’ test.”) (citations omitted); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (defining the burden a party seeking to uphold a statute that classifies individuals on the basis of their gender must satisfy).

56. 852 P.2d 44, *reconsideration granted in part*, 875 P.2d 225 (Haw. 1993).

57. *Id.* at 59 (itemizing fourteen “salient marital rights and benefits . . . of note”).

58. *Id.* at 57-68.

59. 388 U.S. 1 (1967).

statute prohibiting miscegenation fails strict scrutiny even where (1) the traditional notions of marriage did not encompass a union between members of different races, and (2) the statute burdens both races the same.⁶⁰ Second, the court found that Hawaii's ERA necessitated that state distinctions based on sex be evaluated with strict scrutiny.⁶¹ Third, the court merely substituted sex for race in *Loving's* strict scrutiny analysis to hold that the denial of the benefits of marriage to same-sex partners is discrimination on the basis of sex, even though (1) the denial of marriage licenses to same-sex partners burden men and women the same, and (2) marriage has traditionally been held to mean a union between a man and woman.⁶²

The *Baehr* court employed this reasoning to address two popular arguments used to deny marriage benefits to same-sex partners. The first argument is adopted by Judge Heen in his dissent to the *Baehr* opinion. Judge Heen states that a statute restricting marriage to opposite-sex partners "does not establish a 'suspect' classification based on gender because all males and females are treated alike."⁶³ The plurality counters by substituting sex for race in the *Loving* analysis, holding that "equal application does not immunize the statute from the very heavy burden of [strict scrutiny equal protection analysis]."⁶⁴ The second argument is expressed most succinctly in *Jones v. Hallahan*.⁶⁵ In *Jones*, the Kentucky Court of Appeals affirmed a ruling denying a marriage license to a same-sex couple.⁶⁶ The court held that because marriage had always been considered the union of a man and woman, it was the very definition of marriage, and not the laws of Kentucky, which prevented them from

60. *Baehr*, 852 P.2d at 61-63 ("[T]he Virginia courts declared that interracial marriage simply could not exist because the Deity had deemed such a union intrinsically unnatural."); *id.* at 63, quoting *Loving*, 388 U.S. at 8 ("[W]e reject the notion that the mere "equal application" of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscriptions of all invidious racial discriminations . . .").

61. *Id.* at 66-67 (reasoning that since Justice Powell's concurrence in *Frontiero v. Richardson*, 411 U.S. 677 (1973), joined by Chief Justice Renquist and Justice Blackmun, indicated that the adoption of the federal ERA would subject classifications on the basis of sex to strict scrutiny, and since Hawaii has adopted its own ERA, the Hawaii constitution applies strict scrutiny to statutory sex-based distinctions).

62. *Id.* at 68 ("Substitution of "sex" for "race" and article I, section 5 [of the Hawaii Constitution] for the fourteenth amendment yields [from *Loving*] the precise case before us together with the conclusion that we have reached."). See John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1171-1180 (1999) (analyzing in depth this analogy to the *Loving* Court's argument).

63. *Baehr*, 852 P.2d at 71 (citation omitted).

64. *Id.* at 67-68.

65. 501 S.W.2d 588 (Ky. 1973).

66. *Id.*

receiving a marriage license.⁶⁷ The *Loving* analogy used by the *Baehr* court unravels this argument, as it corrects the faulty assumption that equal protection analysis does not bear upon classifications rooted in traditional notions.⁶⁸

It is ironic that the *Baehr* court makes such good use of the Federal Constitution, a document that has been for the most part unhelpful in the movement for gay and lesbian civil rights.⁶⁹ This highlights the importance of a state ERA in establishing remedies for those seeking same-sex domestic partner benefits. The Hawaii court's use of *Loving* is predicated on its application of Hawaii's ERA. Without it, the reasoning of *Loving* remains inapplicable. The great majority of cases following *Baehr* that litigated the issue of same-sex marriage or same-sex domestic partner benefits under state constitutions found that those constitutions offered little or no remedy.⁷⁰ Some of these cases are distinguishable from *Baehr*, while others reject its reasoning as unpersuasive without much justification. A survey of two such cases is instructive in assessing the qualities of a successful state constitutional argument.

In *Lilly v. Minneapolis*,⁷¹ a Minnesota district court rejected the same argument made by the plaintiffs in *Baehr*, finding that Minnesota law did not support the Hawaii Supreme Court's interpretation of *Loving* in this context. The court distinguished the case before it by stating that "marriage does not require racial similarity" but does require gender dissimilarity.⁷² This reading of *Loving* demonstrates that the court failed to recognize its essential holding that traditional conceptions of what a marriage is must yield when they interfere with the equal protection of law. Thus, where the court claims to distinguish the case before it from *Loving*, it actually signals its intent to reject *Loving* as a precedent altogether. When the court cites "commonsense" as an authority supporting their refusal to apply equal protection analysis to traditional notions of who should be married, they mirror eerily the sentiments of the Virginia trial judge who presided over the Lovings' claim more than thirty years prior.⁷³

67. *Id.* at 589-90.

68. *Baehr*, 852 P.2d at 63 ("[A]s *Loving* amply demonstrates, constitutional law may mandate, like it or not, that customs change with an evolving social order.").

69. See Culhane, *supra* note 62, at 1154-64.

70. See Littleton v. Prange, 9 S.W.3d 223, 225-26 (Tex. App. 1999) (citing *Baehr* as the only authority holding in favor of same-sex marriages and listing four other authorities rejecting same-sex marriage).

71. No. MC 93-21375, 1994 WL 315620, at *1 (June 3, 1994) *aff'd on different grounds*, 527 N.W.2d 107 (Minn. Ct. App. 1994).

72. *Id.* at *12.

73. *Id.* at *13. The trial judge in *Loving* stated:

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his

In *Rutgers Council of AAUP Chapters v. Rutgers*,⁷⁴ appellants sought health benefits for their same-sex partners.⁷⁵ The New Jersey Superior Court affirmed the lower court's denial of these benefits. It refused to follow the *Baehr* court's interpretation of *Loving* because, among other reasons, there was no evidence of invidious intent on the part of the legislature.⁷⁶ Although the *Rutgers* court's reasoning for not following *Loving* is certainly more lucid than that of the *Lilly* court, it still fails to distinguish the facts of the case at hand from those of *Loving*.

One cannot distinguish *Loving* from *Rutgers* on the basis of the presence or absence of legislative invidious intent. There is no evidence of explicit invidious intent in either case. If we are inclined to infer animus in the racially restrictive manner that Virginia chose to limit marriage, we must also infer such animus in the manner that New Jersey chooses to limit it.

The Virginia legislature enacted a miscegenation law with the stated intent of preserving the integrity of the white race.⁷⁷ The preservation of racial integrity as a state goal is in itself no more invidious than the preservation of traditional notions of marriage. Both seek to preserve an established norm and both equally burden individuals on either side of the distinction they draw: white and non-white in the former case, male and female in the latter. We rightly perceive miscegenation laws as invidious by placing them in the historical context of racial animus. We rightly perceive them as discriminatory by noting who is shut out by the state's determination of what is worth preserving. Our perception regarding the intent of the miscegenation laws enjoys the benefit of hindsight. Laws that shut gays and lesbians out from the benefits of marriage are no less invidious, no less discriminatory.⁷⁸ Invidious intent is no basis for

arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.

388 U.S., 3 (1962). The trial judge in *Lilly* stated: "[W]omen whose partners are women cannot marry those partners." 1994 WL 315620, at *12. Both statements represent the "commonsense" reasoning of their respective eras, but neither has anything to do with the application of the equal protection clause.

74. 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997).

75. *Id.*

76. *Id.* at 837 ("We see no intent by the Legislature, in enacting [the State Health Benefits Plan], to discriminate against lesbian or gay male persons.").

77. *Loving*, 388 U.S. at 11 n.11 ("[T]he State's concern in these statutes, as expressed in the words of the 1924 Act's title, 'An Act to Preserve Racial Integrity,' extends only to the integrity of the white race.").

78. See Michael Mello, *For Today, I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 229 (2000) (comparing Take it to the People, a Vermont advocacy group opposed to gay marriage, with the "respectable" segregationist White Citizens Councils of the Jim Crow South). "Substitute 'race' for 'homosexuals' in their position," Mello asserts, "and their bigotry becomes clear." *Id.*

distinguishing *Loving* from *Rutgers* or any other case in which the legislature employs traditional notions of what comprises a marriage to deny equal protection of the laws to same-sex partners.

Neither the Minnesota nor the New Jersey Constitution contains an ERA. Thus, even if the courts in *Lilly* and *Rutgers* had found *Loving* applicable, they would be under no obligation to apply a strict scrutiny analysis to the sex-based distinction that the *Loving* analogy makes plain. Where a court is not compelled to apply heightened scrutiny to a statutory distinction, it is unlikely to invalidate it on constitutional grounds.⁷⁹ However, an ERA is not the only path to heightened scrutiny for distinctions that deny benefits enjoyed by married couples to same-sex partners. Two recent cases overturned the denial of benefits to same-sex partners on the basis of state constitutions, which did not have an ERA.

In *Tanner v. Oregon Health Sciences University*,⁸⁰ an Oregon appellate court⁸¹ found that denial of benefits to same-sex partners violated the state constitution even in the absence of an equal rights amendment.⁸² The plaintiff in *Tanner* succeeded where so many others have failed⁸³ for two reasons: (1) the court found same-sex domestic partners to be members of a "suspect class,"⁸⁴ and (2) the court found that the plan's discrimination on the basis of marital status had an impermissible disparate impact on same-sex domestic partners.⁸⁵ The court's argument in *Tanner* is qualitatively different from that in *Baehr*. Although the Oregon Supreme Court had previously held sex to be a suspect class, disparate treatment

79. See Farrell, *supra* note 13, at 357.

80. 971 P.2d 435 (Or. Ct. App. 1998)

81. Neither party appealed to the Oregon Supreme Court because, among other reasons, the employer had voluntarily extended benefits to same-sex partners by the time the appellate court had ruled. See Filippi & Reeves, *supra* note 3, at 295.

82. *Tanner*, 971 P.2d at 448 ("We conclude that OHSU's denial of insurance benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20 of the Oregon Constitution . . ."). Article I, section 20 reads: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens." OR. CONST. art. I, § 20.

83. See Barnard & Downing, *supra* note 42, at 573 ("To date, courts have rejected this argument.").

84. *Tanner*, 971 P.2d at 447 ("[W]e have no difficulty concluding that plaintiffs are members of a suspect class.").

85. *Id.* at 447-48 ("OHSU's intentions in this case are not relevant. What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms. . . . Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility."). For another successful claim of disparate impact discrimination on the basis of sexual orientation, see *Levin v. Yeshiva Univ.*, 754 N.E.2d 1099 (N.Y. 2001) (holding that the university's denial of housing to a lesbian couple violated a city ordinance that prohibited discrimination in housing on the basis of sexual orientation).

thereof, is subject to strict scrutiny,⁸⁶ the *Tanner* court did not evaluate the discrimination on the basis of sex. Rather, it held that gays and lesbians themselves constitute a suspect class.⁸⁷ The court addressed this issue as a matter of first impression and arrived at its finding on the grounds that “[s]exual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been, and continue to be, the subject of adverse social and political stereotyping and prejudice.”⁸⁸

In *Baehr*, the Hawaii court used its *Loving* analogy to address the argument that a statute that prohibits same-sex partners from enjoying the benefits of marriage is facially neutral. The *Tanner* court relied on another approach, finding that such prohibitions have a disparate impact on same-sex partners and are discriminatory even where facially neutral.⁸⁹

The success of *Tanner* can be traced in part to the idiosyncratic jurisprudence surrounding Oregon’s Privileges and Immunities clause. The favorable outcome in *Baker v. Vermont*⁹⁰ is likewise related to some unique provisions of Vermont’s constitution. In *Baker*, the claim was analogous to that in *Baehr*. The plaintiffs, a number of same-sex couples, sought a declaratory judgement against the state for refusing to issue them marriage licenses. The Vermont Supreme Court reversed the lower court’s dismissal of the claim, but relied upon a very different analysis than that present in *Baehr* or *Tanner*. The court held that denying marriage licenses to same-sex partners violated the Common Benefits Clause of the Vermont Constitution.⁹¹ The clause reads: “[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community; and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community”⁹²

The court applied this clause to hold that the “legal benefits and protections” derived from marriage are so substantial that any legal restrictions on who may marry must be “grounded on public concerns of

86. *Hewitt v. SAIF*, 653 P.2d 970, 976 (Or. 1982).

87. *Tanner*, 971 P.2d at 447. The term “suspect class” relates to Article I, section 20 of Oregon’s constitution, and although its usage here is similar to its usage in federal Equal Protection analysis, Article I, section 20 is not an equal protection clause. Rather, Article I, section 20 guarantees that “no law shall be passed granting to any citizen or class of citizens privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” OR. CONST. art I, § 20.

88. *Tanner*, 971 P.2d at 447.

89. *Id.* Oregon caselaw applies Article I, section 20 even where the discrimination is not intentional. See *Zockert v. Fanning*, 800 P.2d 773 (Or. 1990).

90. 744 A.2d 864 (Vt. 1999).

91. *Id.* at 886.

92. VT. CONST. ch. I, art. 7.

sufficient weight, cogency, and authority that the justice of the deprivation cannot seriously be questioned.”⁹³ It further found that denying same-sex couples the right to marry does not reasonably promote the stated government concern of “promoting a commitment between married couples to promote the security of their children and the community as a whole,” because same-sex couples and opposite-sexed couples are identically situated regarding this concern.⁹⁴

In focusing on the validity of the means employed to promote the legislature’s stated goal, rather than focusing on the existence of a special class, the reasoning in *Baker* resembles a rational basis analysis more than a heightened scrutiny analysis.⁹⁵ *Baker* draws out the hit or miss nature of state constitutional litigation: whereas many claims fail even when supported by constitutional amendments granting heightened scrutiny to distinctions made on the basis of sex,⁹⁶ some claims succeed under nothing more than a flavor of the rational basis test.⁹⁷ For state employees seeking benefits for a same-sex partner, state constitutional claims are a crap shoot.⁹⁸ Unfortunately, this “crap shoot” is often the best chance same-sex

93. *Baker*, 744 A.2d at 884.

94. *Id.* Of significance, the court takes note that the number of children being raised by same-sex couples is rising, and that the state legislature has eliminated barriers to adoption by same-sex couples. *Id.* at 881.

95. *But see id.* at 889-97 (Dooley, J., concurring) (suggesting that the court should have followed the persuasive authority of *Tanner* and employed a more tiered analysis for violations of Chapter I, Article 7 of the Vermont Constitution).

96. *See, e.g., Hinman v. Dep’t of Pers. Admin.*, 213 Cal. Rptr. 410, 416 (Cal. Ct. App. 1985) (“[P]laintiffs are not similarly situated to heterosexual . . . employees with spouses. They are similarly situated to other *unmarried* . . . employees. Unmarried employees are all given the same benefits; plaintiffs have not shown that unmarried homosexual employees are treated differently than unmarried heterosexual employees.”). But note that California’s ERA is somewhat limited, stating merely that “[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex” CAL. CONST. art. I, § 8.

97. Although the court in *Baker* makes clear that Vermont’s Common Benefits Clause sets a higher burden than, and is not analogous to, rational basis under the United States Constitution, the wording of the two doctrines is similar. *See Baker*, 744 A.2d at 871 (1999) (“Article 7 . . . require[s] a ‘more stringent’ reasonableness inquiry than was generally associated with rational basis review under the federal constitution.”); *but see id.* at 878-79 (stating the issue under the Common Benefits Clause as “whether the omission of a part of the community from the benefit, protection and security of the challenged law bears a reasonable and just relation to the governmental purpose”).

98. To complicate matters more, successful claims may provoke legislative action. Some such legislation, such as the Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996), seeks to reign in advancements made in court. Other legislation can have a neutral or even positive impact. Vermont, for example, responded to the *Baker* ruling by passing a civil union regime. H.R. Journ., 65th Gen. Assemb., Adjourned Sess., at 1079 (Vt. Apr. 25, 2000). The legislation represents a middle ground between recognition of gay marriage and prohibition through constitutional amendment. *See Recent Legislation: Vermont Creates System of Civil Unions*, 114 HARV. L. REV. 1421 (2001).

partners have available to them in their pursuit of domestic partner benefits.

C. State Statutes

Several states have statutes prohibiting discrimination in employment on the basis of sexual orientation.⁹⁹ The remaining states have statutes prohibiting discrimination on the basis of sex and/or marital status. To date, no claim for same-sex domestic partner benefits has succeeded under any such statute.¹⁰⁰ The fact that even the *Tanner* court rejected the plaintiff's claim under Oregon's employment discrimination statute illustrates the difficulty of obtaining a remedy under state statutes.

The difficulties that employees have encountered when they sue for benefits for their same-sex partners under state statutes arise from two obstacles: (1) the court must find the denial of benefits to be discrimination on the same basis as that prohibited by the statute, i.e. sex, sexuality, or marital status; and (2) the statute must apply to employment benefits. Arguments that the denial of benefits constitutes discrimination on the basis of sex or sexuality are weakened by the state's contention that eligibility standards are not established with invidious intent. The state furthermore contends that the basis of the distinction is actually marital status, since all unmarried partners are treated alike regardless of sexuality. Arguments that a statute concerning the terms and conditions of employment covers discrimination in benefits often fail because many such statutes explicitly exclude benefit plans from the statutes' scope of application.¹⁰¹ Several cases illustrate the imposing nature of these obstacles.

99. Twelve states and the District of Columbia have statutes which prohibit discrimination in employment on the basis of sexual orientation. Lynd, *supra* note 7, at 581. See CAL. GOV'T CODE § 12940(a) (Deering 2001); CONN. GEN. STAT. ANN. § 46a-81c (West 1993); D.C. CODE ANN. § 1-2512(a) (recodified § 2-1402-11 (2001)); HAW. REV. STAT. § 378-2 (1993); MASS. GEN. ANN. LAWS ch. 151B, § 4 (West 1996); MINN. STAT. ANN. § 363.03 (West Supp. 2000); NEV. REV. STAT. ANN. § 613.330 (Michie Supp. 1999); N.H. REV. STAT. ANN. § 354-A:1 (Supp. 1999); N.J. STAT. ANN. § 10:5-12 (West 1993); R.I. GEN. LAWS § 28-5-7 (1995); 21 VT. STAT. ANN. § 495 (Supp. 1999); WIS. STAT. ANN. § 111.36(1)(d) (West 1997). See also OR. REV. STAT. § 659.030(1) (1999) (prohibiting discrimination in employment on the basis of the sex of an individual with whom one associates).

100. See Fisk, *supra* note 6, at 277-78 ("To date, no state or city has attempted to enforce a general nondiscrimination law against a private sector employer's benefit plan that provides benefits only to spouses or dependents . . ."). Suits against public employers on such a basis have also been unsuccessful. See, e.g., *Tanner v. Oregon Health Scis. Univ.*, 971 P.2d 435, 442 (Or. Ct. App. 1998) (holding that statute which prohibited discrimination on the basis of the sex of an individual with whom one associates not violated where state denies benefits to same-sex partner of employee).

101. See Lynd, *supra* note 7, at 581-82 ("[E]ven if a statute prohibits sexual orientation discrimination, employee benefits may be exempt from the statute.").

Tanner offers a pointed example of the difficulties in suing for same-sex domestic partner benefits under a state employment discrimination statute, because the court was relatively sympathetic to the plaintiffs' claims.¹⁰² Oregon's statute does not refer directly to sexuality. However, plaintiffs argued that since the statute prohibits discrimination "because of an individual's . . . sex, . . . or because of the . . . sex of any other person with whom the individual associates",¹⁰³ and because the denial of benefits in effect discriminated against the employee because of the sex of her partner, the statute applied. The court agreed, rejecting the state's counterarguments that the denial of benefits was on the basis of marital status because it found that the denial had a disparate impact on same-sex couples.¹⁰⁴

Although the *Tanner* court concluded that Oregon Statute § 659.030 did apply to the state's rejection of same-sex domestic partner benefits, the court ultimately rejected the plaintiff's statutory claim. Another Statute, Oregon Statute § 659.028, restricted the application.

employment discrimination law with regard to "the terms of a bona fide employee benefit plan."¹⁰⁵ This statute provided that discrimination with regard to benefits is only actionable when it is the result of "subterfuge to evade the purposes of [the fair employment statutes.]"¹⁰⁶ Thus the plaintiffs were required to demonstrate invidious intent. Since there was no evidence that the state sought to discriminate against same-sex partners when it established its eligibility standards, the plaintiffs lost on the statutory claim.¹⁰⁷

The plaintiffs in *Tanner* ultimately lost their statutory claim due to qualifications of the state's employment discrimination law. States have limited the applicability of their employment discrimination statutes in two ways: (1) by excluding their application to employee benefits, and (2) by precluding their application such that the state appears to endorse or validate same-sex partnerships. There is little dispute that employee benefits constitute a "compensation, terms, conditions, or privileges of

102. See discussion *supra* 25-27.

103. OR. REV. STAT. ANN. § 659.030(1)(a)-(b).

104. *Tanner*, 971 P.2d at 441-42. Despite the court's rejection of defendant OSHU's argument, challenges to benefit policy discrimination at the state and local level are more often than not unsuccessful. See *Lynd*, *supra* note 7, at 563 n.5 (listing unsuccessful challenges).

105. OR. REV. STAT. ANN. § 659.028 (1999).

106. *Id.*; *Tanner*, 971 P.2d at 443.

107. *Tanner*, 971 P.2d at 444. When the state makes marital status its basis for benefits eligibility, it does so without any explicit animus towards gays and lesbians since it is a "commonsense" basis for determining who should be covered. See *Lilly v. Minneapolis*, No. MC 93-21275, 1994 WL 315620, at *13 (Minn. Super. Ct. June 3, 1994). However, just as the facially neutral miscegenation laws in *Loving* represented deep seated racial animus, the use of marital status as a basis represents deep seated heterosexist notions.

employment” and thus employment discrimination statutes containing this or similar language pertain to discrimination in benefits.¹⁰⁸ However, several states explicitly exclude benefits plans from the coverage of their employment discrimination statutes.¹⁰⁹ In many cases, this is to reduce the overlap of law regulating employment and insurance.¹¹⁰

Such qualifications do not always foreclose the use of employment discrimination statutes. In *Lukus v. Westinghouse Electronic Corp.*, the Superior Court of Pennsylvania found that the Pennsylvania Human Relations Act applied to Westinghouse’s denial of disability compensation to pregnant women in spite of 43 P.S. § 955(a), which held that it would not apply to the “operation of the terms or conditions of any bona fide group or employe insurance plan.”¹¹¹ The court stated that the denial of coverage “has nothing to do with the underwriting or rate-making practices of insurance companies, or the operation of the terms or conditions of the plan,” and characterized it as “Westinghouse’s decision to compensate its employees for all disabilities but pregnancy, a decision that is not qualitatively different from other decisions Westinghouse makes regarding other forms of employment compensation.”¹¹² Thus, if the decision to deny benefits can be characterized as a case of arbitrary compensation rather than the “operation of the terms and conditions” of a plan, this qualification of the PCRA can be circumvented. The plaintiffs in *Lukus* succeeded with their claim. Plaintiffs seeking benefits for their same-sex partners have not been so lucky. In *Rutgers*, the plaintiffs’ statutory claims were rejected because New Jersey employment discrimination law does not reach discrimination in benefits.¹¹³

Other states limit the applicability of their employment discrimination statutes to ensure that the state does not effectively endorse same-sex

108. See Stephen T. Kaminski, *Must Employers Pay for Viagra? An Americans with Disabilities Act Analysis Post-Bragdon and Sutton*, 4 DEPAUL J. HEALTH CARE L. 73, 85 (2000) (“Statutory terminology, legislative history, implementing regulations, and case law interpretation all undeniably indicate that an employee’s fringe benefits, including employer-provided health benefits, are among the ‘terms, conditions, and privileges of employment.’”); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (holding that employee benefits are “compensation, terms, conditions, or privileges of employment” under Title VII).

109. See, e.g., PA. STAT. ANN. tit. 43, § 955(a) (West 2002) (“The provision of this paragraph shall not apply, to . . . operation of the terms or conditions of any bona fide group or employe insurance plan.”); N.J. STAT. ANN. § 10:5-2.1 (West 2002) (stating that the New Jersey Law Against Discrimination does not apply to employee benefit plans).

110. See, e.g., *Lukus v. Westinghouse Elec. Corp.*, 419 A.2d 431, 449 (1980) (“We therefore conclude that section 955(a)(3) was enacted as a jurisdictional device separating the regulatory realms of the PHRC and the Insurance Commissioner.”).

111. *Id.* at 449-50.

112. *Id.* at 450.

113. *Rutgers Council of AAUP Chapter v. Rutgers*, 689 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1997).

relationships or the concept of “gay marriage.” Massachusetts law prohibiting discrimination against gays and lesbians states: “Nothing in this act shall be construed so as to legitimize or validate a ‘homosexual marriage,’ so-called, or to provide health insurance or related employee benefits to a ‘homosexual spouse,’ so-called.”¹¹⁴ Similarly, Alaska employment discrimination law provides: “[n]otwithstanding the prohibition against employment discrimination on the basis of marital status or parenthood under (a) of this section, (1) an employer may, without violating this chapter, provide greater health and retirement benefits to employees who have a spouse or dependent children than are provided to other employees.”¹¹⁵ Thus, Alaskan employment discrimination law will not reach discrimination in domestic partner benefits if the recipient does not meet the state’s definition of a “spouse.”

Statutes which prohibit discrimination in employment are not the only state laws which offer the potential of remedies to employees seeking same-sex domestic partner benefits. Suits may also be brought under statutes which regulate insurance practices. The main drawback with such statutes is that they do not prohibit discrimination on the basis of sexuality, and those which prohibit discrimination on the basis of sex are vulnerable to the often successful arguments, illustrated above, that the denial of benefits to same-sex partners is not sex discrimination.

D. Local Ordinances

Local ordinances prohibiting discrimination in employment on the basis of sexual orientation provide a potential remedy to the greatest number of state employees seeking benefits for their same-sex spouse.¹¹⁶ However, several commentators have noted that these local ordinances have been of little help in the movement to obtain such benefits.¹¹⁷ Their

114. MASS. GEN. LAWS. ANN. ch. 151B, § 4 (notes) (West 2001).

115. ALASKA STAT. § 18.80.220(c)(1) (Michie 2001).

116. Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 192 n.2 (1999) (citing a study by the National Gay and Lesbian Task Force that one out of four Americans is covered by local laws prohibiting discrimination on the basis of sexuality and a survey by the LeGal Foundation of the Lesbian & Gay Law Association of Greater New York finding that seventy percent of New Yorkers are covered by local ordinances prohibiting discrimination against gays and lesbians); NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON’S RIGHTS* 204-08 (3d ed. 1992) (listing over 100 local municipalities which prohibit discrimination on the basis of sexuality).

117. See, e.g., Barbara Case, *Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays*, 7 LAW & INEQ. 441, 445, 456 (1989); Pat P. Putignano, Note, *Why DOMA and Not ENDA?: A Review of Recent Federal Hostility to Expand Employment Rights and Protection Beyond Traditional Notions*, 15 HOFSTRA LAB. & EMP. L.J. 177, 188-

ineffectiveness derives from their vulnerability. Not only must claims under such statutes overcome all the obstacles discussed in the previous section,¹¹⁸ but they must also circumvent several new pitfalls. Local anti-discrimination ordinances are often found to be invalid, either because state statutes preempt them or because the municipality is found to lack the authority to enact them.¹¹⁹

States differ in the amount of authority granted to local municipalities to enact ordinances.¹²⁰ This results in a striking diversity in the approaches to local prohibitions against discrimination as well as in the challenges to them.¹²¹ We can, however, draw some general conclusions. Most local ordinances have the authority to enact local ordinance through the provision of home rule.¹²² The authority granted by home rule varies from state to state: some municipalities are granted a high degree of autonomy over local affairs, others retain the authority to legislate some areas of local concern.¹²³ Regardless of the degree of authority granted, no municipality may enact an ordinance that concerns matters beyond local affairs or that conflicts with state law.¹²⁴ Thus, although local ordinances will have varying vulnerability to challenge based on the individual state's provisions for municipal control, any can be challenged on the basis that they concern something that is or should be regulated on a state level and are therefore preempted by a state statute or invalidated by the state constitution.¹²⁵

Pennsylvania law regarding municipal authority illustrates the need for a nuanced approach in bringing claims based on local ordinances. The Pennsylvania constitution provides that “[a] municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.”¹²⁶ Thus, the legislature can expressly limit the authority of a

89 (1997); Chad A. Readler, Note, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777 (1998).

118. Like constitutional and statutory provisions, ordinances which prohibit discrimination according to sexual orientation must still reach employee benefit plans to be of use to state employees suing for benefits for their same-sex domestic partners. Some ordinances extend benefits to same-sex domestic partners explicitly, avoiding this complication but raising others. *See* S.D. Myers, Inc. v. City of San Francisco, 253 F.3d 461 (9th Cir. 2001) (holding that a law preferencing city contractors who extended benefits to same-sex domestic partners did not violate the commerce clause or exceed the city's authority to pass local ordinances).

119. *Id.*

120. Readler, *supra* note 117, at 796.

121. *Id.*

122. *Id.* at 785.

123. *Id.*

124. *Id.* at 785-86.

125. *Id.* at 793-94

126. PA. CONST. art. 9, § 2.

municipality to enact ordinances. Furthermore, Pennsylvania courts have held that statutes regarding substantive matters of statewide concern can preempt or invalidate local ordinances.¹²⁷ If Pennsylvania were to defend a policy of prohibiting gay marriage in violation of a local ordinance, it would likely argue that marriage is an area of statewide concern. However, such a defense would be vulnerable to the argument that state regulation of marriage is not inconsistent with a local ordinance extending the benefits of marriage to gays and lesbians.¹²⁸ More to the point, if Pennsylvania were to defend a policy of employment discrimination against gays and lesbians in violation of a local ordinance, it would have to argue that employment discrimination is a matter of statewide concern and that statutes prohibiting employment discrimination, albeit not discrimination on the basis of sexual orientation, preempt the local ordinances. This argument might not prevail, since the Pennsylvania Supreme Court has held that “municipalities in the exercise of the police power may regulate certain occupations by imposing restrictions which are in addition to, and not in conflict with, statutory regulations.”¹²⁹

Thus, successfully arguing that a local anti-discrimination ordinance does not represent a use of local authority explicitly prohibited by state statute or constitution and is not inconsistent with state legislation regarding matters of statewide concern is the first step in bringing such an ordinance to bear on an employer. Unfortunately, claims premised on such ordinances often do not make it past this step.¹³⁰

1. Collective Bargaining Agreements

A final remedy for state employees seeking benefits for their same-sex

127. *Ortiz v. Commonwealth*, 681 A.2d 152, 156 (Pa. 1996) (invalidating local ordinances which regulated assault weapons because the state assembly had explicitly denied municipalities the power to regulate arms).

128. This is notwithstanding the presence of a statutory definition of marriage as the union of a man and a woman. *See, e.g.*, Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (defining marriage as “a legal union between one man and one woman as husband and wife”).

129. *W. Pa. Rest. Ass’n v. City of Pittsburgh*, 77 A.2d 616, 620 (Pa. 1951).

130. *See, e.g.*, *Delaney v. Superior Fast Freight*, 18 Cal. Rptr. 2d 33, 36-38 (Ca. 1993) (finding that state law preempts a local ordinance); *McCrorry Corp. v. Fowler*, 570 A.2d 834 (Md. 1990) (finding that an ordinance sought to legislate in an area reserved for the state); *Hutchcraft Van Serv., Inc. v. City of Urbana Human Relations Comm’n*, 433 N.E.2d 329, 333-34 (Ill. App. Ct. 1982) (finding that state law preempted a local ordinance); *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 111 (Minn. Ct. App. 1995) (finding that same-sex partnerships are an issue of statewide concern and thus invalidating an ordinance). *But see*, *S.D. Myers, Inc. v. City of San Francisco*, 253 F.3d 461 (9th Cir. 2001) (upholding a local ordinance banning discrimination on the basis of sexual orientation); *City of Atlanta v. McKinney*, 454 S.E.2d 517, 522 (Ga. 1995) (same).

partner is the collective bargaining agreement between their union and the state. Unions that bargain for a clause in the agreement which prohibits the employer from discriminating on the basis of sexual orientation can theoretically bind the employer to that clause. Bringing a clause that merely prohibited discrimination in the terms of employment on the basis of sexual orientation to bear on the denial of benefits, however, would raise many of the same obstacles encountered with statutory claims. Successful claims resting on collective bargaining agreements are rare. In *Tumeo v. University of Alaska*, the judge considered the agreement in addressing a claim brought by university employees after the university refused to extend benefits to same-sex domestic partners.¹³¹ It is not clear how great a role the agreement played in the court's favorable holding, but the judge did discuss the agreement and cite contract law in the decision.¹³² Although the collective bargaining agreement can serve as a resource to those seeking same-sex domestic partner benefits, its effectiveness as a legal claim against the employer remains relatively untested.

2. Issues Regarding Employee Benefit Trusts

Most of the claims discussed above seek to hold employers liable for discrimination regarding the terms and conditions of employment on the basis of sexual orientation. However, in many cases the employee's direct employer does not make decisions regarding benefit eligibility. Rather, these decisions are made by the trustees who administer the benefits plan for the employer. Often, these trustees include union representatives as well as management from a number of different employers. Consequently, finding an employee benefits trust fund liable under statutory prohibitions against employment discrimination can be complicated.

Several federal circuits have heard cases regarding whether employee benefits trust funds are liable as employers under federal employment discrimination law. The most frequently cited case¹³³ on this issue is *Carparts Distribution Center, Inc. v. Automotive Wholesaler's Ass'n of New England, Inc.*¹³⁴ *Carparts* involves the administering trust of an employee benefits fund capping the lifetime benefits available for AIDS-related illnesses following the diagnosis of an employee as HIV positive. The employee sued the trust under the Americans with Disability Act ("ADA").¹³⁵ The First Circuit held that an administering trust for a health

131. No. 4FA-94-43 Civ., 1995 WL 238359, at *3 (Alaska Super. Jan. 11, 1995).

132. *Id.*

133. A Westlaw keycite search restricted to the related headnote brought up 114 citing references.

134. 37 F.3d 12 (1st Cir. 1994).

135. 42 U.S.C. §12101, *et seq.* (2002).

benefit plan is liable as an employer under the ADA if it, (1) “exercised control over an important aspect of [the employee’s] employment,” including health benefits, or, (2) acted as the employer’s agent “in the matter of providing and administering employee health benefits.”¹³⁶

Other courts have similarly held that the definition of employer under Title VII¹³⁷ is sufficiently broad as to include benefit program administrators.¹³⁸ Thus, by analogy, a state employee might argue that the trust that administers her employee health benefits is liable under state and local statutes prohibiting discrimination by employers.

Such an argument is not likely to prevail elsewhere. The Fifth Circuit, for example, has chosen not to follow *Carparts*.¹³⁹ In *Bloom v. Bexar County*, the Court of Appeals held that the chief consideration in determining liability under the ADA is whether a party has “control [of] an employee’s conduct.”¹⁴⁰ Since employee benefit trusts do not control employee conduct, they are not employers under the ADA and cannot be held liable. As a consequence of the ambiguity caused by this circuit split, state employees who attempt to hold their employee benefits trust liable for a denial of benefits to their same-sex domestic partner may find their claim dismissed because the trust is not considered an employer under the statutory language of the state or local law prohibiting employment discrimination.

Exploring the potential elements of a state employee’s claim to same-sex domestic partner benefits offers some insight into the status of gay and lesbian rights outside the shadow of ERISA preemption. Because constitutions, statutes, and ordinances prohibiting discrimination vary in their substantive protections from state to state, and because the scope of these protections is often ambiguous, plaintiffs must weave a claim out of a multitude of disjointed arguments. Although the tapestry of arguments created by this process reflects a valid assertion of the rights which all should by law enjoy, the litigant knows that each thread remains vulnerable to judicial discretion. Certainly, an alternative strategy exists. A judicial or legislative recognition of gay marriage would sweep away the numerous obstacles present in a claim for the extension of benefits to same-sex

136. *Carparts*, 37 F.3d at 17. See also *U.S. v. Ill.*, No. 93 C 7741, 1994 WL 562180 (N.D. Ill. 1994) (finding the Board of Trustees of the City of Aurora Police Pension Fund liable under the ADA for disqualifying police and firefighters with certain disabilities from the pension fund). The *Carparts* court also cites Title VII caselaw from other circuits that suggests that liability may attach to parties who are not the direct employer. *Carparts*, 37 F.3d at 18.

137. 42 U.S.C. §2000e-2(a)(1) (2002).

138. See *Spirit v. Teachers Ins. & Annuity Ass’n*, 691 F.2d 1054, 1063 (2d Cir. 1982); *Barone v. Hackett*, 602 F. Supp. 481, 483 (D.R.I. 1984).

139. See *Bloom v. Bexar County*, 130 F.3d 722 (5th Cir. 1997).

140. *Id.* at 725.

domestic partners. Although this approach has the virtue of simplicity, it is unclear whether it would be more successful. To date, only Vermont has enacted legislation recognizing civil unions, a legal relationship providing gay and lesbian couples with the same rights and benefits as married heterosexual couples.¹⁴¹ Furthermore, this strategy involves de-emphasizing specific employment rights and validating an institution that many find problematic.¹⁴²

Success on a large scale still eludes gays and lesbians seeking to secure the same kind of employee benefits that their co-workers' spouses enjoy. However, the diversity of responses by different jurisdictions to the claims presented suggests that the jurisprudence is shifting. Hopefully soon, laws which discriminate on the basis of the sexual makeup of a committed relationship will be considered as backwards as Virginia's miscegenation laws of forty years ago.

141. H.R. Journ., 65th Gen. Assemb., Adjourned Sess., at 1079 (Vt. Apr. 25, 2000).

142. See, e.g., Nancy Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536 (1993) ("[T]he desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism."); Lynn D. Wardle, *Legal Claims For Same-Sex Marriage: Efforts to Legitimate a Retreat From Marriage by Redefining Marriage* 39 S. TEX. L. REV. 735, 757 ("[T]here is an "intra-community" debate over whether gays and lesbians should seek legalization of same-sex marriage.").