The Geography of Sexuality

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THE GEOGRAPHY OF SEXUALITY

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Who regulates sexuality in America? Given the high salience of federal laws and policies such as the Defense of Marriage Act (DOMA) and 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 a 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 pertaining to 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. The localization of sexuality, we further argue, explains the residential patterns of gays and lesbians, who continue to concentrate in a relatively small number of cities and within them in certain neighborhoods. This “territorialization of sexuality” we contend, is a result of the attempt made by gays and lesbians to overcome their status as a permanent minority in both the federal and state levels. While these processes have gone almost unnoticed by scholars and courts, they have far reaching consequences which we describe and evaluate: 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 they bear, such as fragmentation and radicalization, the localization of sexuality is a desirable legal structure. It should, however, be accom-

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panied by more comprehensive federal protections of gays and lesbians that would counter the Madisonian risk of too powerful localities.

TABLE OF CONTENTS

INTRODUCTION ........................................................................................................3

I.THE LOCALIZATION OF SEXUALITY ..............................................................7

A. The Lack of Comprehensive Federal Protection of Gays and Lesbians ..............8
   1. The Lack of Comprehensive Federal Constitutional Protection of Gays and Lesbians ..................................................8
   2. The Lack of Federal Legislative Protection of Gays and Lesbians .................................................................9

B. Limited State Protection of Gays and Lesbians ...........................................11

C. The Power of Local Governments to Regulate Sexuality ...........................13
   1. Recognition of Same-Sex Partnerships ..............................................14
   2. Local Antidiscrimination Ordinances .............................................18
   3. Antigay Hate Crimes .................................................................21
   5. Districting ....................................................................................28
   6. Education ...................................................................................30

II.THE TERRITORIALIZATION OF SEXUALITY ........................................32

A. Gay and Lesbian Residential Patterns .................................................33

B. The Explanations for Gay and Lesbian Residential Patterns ................36

C. The Hidden Connection between Legal Rules and Gay and Lesbian Residential Patterns ...................................................39
   1. The Impact of Legal Rules on Gay and Lesbian Residential Patterns .................................................................39
   2. The Impact of Gay and Lesbian Residential Patterns on the Legal Rules .................................................................41

III.THE PROMISE AND PERILS OF THE LOCALIZATION OF SEXUALITY ....42

A. Cities of Refuge v. Dangerous Cities .................................................43

B. Community Empowerment v. Gay Isolationism ........................................45

C. Pluralism v. Fragmentation .................................................................47

D. Federalized Localism: A New Agenda for Regulating Sexuality ............51
   1. Bolstering Local Governments ....................................................51
   2. Extending Federal Protections to Gays and Lesbians ..................54
   3. The Multilevel Governance of Sexuality .....................................57

IV.CONCLUSION ..........................................................................................58
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 them 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 and they are still at the forefront of the most contentious issues pertaining to gays and lesbians.

Already in the 1970s, during which not even a single state had antidiscrimination laws prohibiting discrimination on the basis of sexual orientation, sixteen cities—including Los Angeles, Austin, Minneapolis, San Francisco, Iowa City, Detroit, and Hartford—enacted local antidiscrimination ordinances.3 In 1984, long before any state even contemplated to marry same-sex couples, the City of Berkeley invented the institution of “domestic partnership,” establishing a registry where such couples could formalize their relationship.4 And when San Francisco decided in 2003 to issue marriage licenses to gay and lesbian couples, rebelling against California’s refusal to do so, it provoked a political and legal upheaval which changed the landscape of same-sex marriages in America.

These are mere examples of a much broader phenomenon which we term the localization of sexuality: local governments have increasingly become the major locus where a multitude of issues that particularly impact the lives of gays and lesbians are being regulated. This process was enabled by a three-pronged legal structure: first, the lack of comprehensive federal legal protection of gays and lesbians; second, the limited and bifurcated legal protection which states extend to them; third, the traditional powers of cities (mostly “home rule” and police powers), which enable them—sometimes even force them—to deal with matters pertaining to gays and lesbians.

The lack of comprehensive constitutional protection of gays and lesbians is a result of the Supreme Court’s continued refusal to recognize sexual

2 See infra Ch. 2.A.
3 See infra Ch. 1.C.2.
4 See infra Ch. 1.C.1.
minorities as a “protected class” as well as its insistence to protect them through the privacy doctrine, thus limiting it to the privacy of their homes.\(^5\) Congress has been even more reluctant—if not outright averse—to protect gays and lesbians. This is evident in the ongoing failure to pass bills that would add sexual orientation to existing antidiscrimination laws (such as Title VII of the Civil Rights Act of 1964)\(^6\) or to legislate new such laws (the Employment Non Discrimination Act). The Defense of Marriage Act (DOMA) is another case in point as it prevents the federal government from recognizing the validity of same-sex marriages performed by a state and exempts other states from their constitutional obligation to honor such marriages.\(^7\) Despite the fact that the Obama administration announced that it would not defend DOMA in courts, and in spite of two important legislative acts that recently passed—the annulment of the military’s “don’t ask don’t tell” policy and the Matthew Shepard Act\(^8\)—federal involvement in the regulation of sexuality remains rather minimal, leaving gays and lesbians exposed, by and large, to public and private discrimination.

The constitutional and legislative failure to protect gays and lesbians at the federal level has left ample room for states to regulate sexuality, especially given the broad powers which they enjoy in our federal legal structure. States, however, were very slow in responding to the changing landscape of sexuality in the United States, and when they did, their responses were confined to very few high profile issues, such as same-sex marriage, antidiscrimination, hate crimes and anti-bullying. While some states legalized same-sex marriage and adopted antidiscrimination laws and policies, the vast majority of states banned such marriages and refused to prohibit sexual orientation-based discrimination. And apart from these nationally salient issues states remained rather inactive in regulating sexuality, leaving cities at the center stage.

Given the near absence of federal protection of gays and lesbians and their limited protection by states, local governments were left with the formidable task of regulating sexuality. The traditional powers of cities indeed enabled them to respond to growing numbers of conflict and challenges surrounding sexual minorities and their unique needs and interests. Cities therefore engage in setting local antidiscrimination ordinances and policies, but also in discriminatory practices. They make attempts to issue marriage licenses to same-sex couples or to grant them recognition that would approximate marriage (such as establishing domestic partnership re-

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\(^6\) Civil Rights Act of 1964, 42 U.S.C.


\(^8\) Matthew Shepard Hate Crimes Prevention Act, S. 909, 111th Cong. (1st Sess. 2009), was signed into law by President Obama on October 28, 2009 as part of the Defense Authorization Act (hereinafter: the Matthew Shepard Act).
They provide spousal benefits for same-sex couples, or withhold them. They enforce state hate crime laws that include crimes based on sexual orientation, or fail to do so. But localities have many more legal powers that impact the daily lives of gays and lesbians, including the ability to influence residential patterns. These local powers include districting, zoning, land use, business licensing, public health, education, spending, and law enforcement, and they influence the nature as well as the variety of local amenities that are extremely important in attracting or warding off gays and lesbians.

These powers that cities possess and apply, we argue in this Article, can 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 New York City, Los Angeles, and San Francisco), and same-sex couples, especially with kids, are moving to the suburbs and even to rural areas,9 one thing remains the same: gays are still concentrated in large urban areas and within them they tend to be highly concentrated in a small number of neighborhoods. 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 ones. 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.10 Economically, 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.11 What is patently missing from these explanations is the role played by law in enabling both the creation of a gay community and the provision of the particular amenities. We argue that the legal structure which we have earlier described—namely the localization of sexuality—is a driving force for the territorialization of sexuality: enabling community-building and facilitating the supply of amenities as well as significantly incentivizing gays and lesbians to congregate in certain cities and neighborhoods. As a result, cities can use their legal powers to either attract gays and lesbians or repel them thus influencing the choices of gays and lesbians and shaping their residential patterns.

The localization and territorialization of sexuality have gone nearly

unnoticed, and have taken place with no public deliberation, no comprehensive theoretical analysis, and no overarching guiding principles. Indeed, these processes happened almost haphazardly, through an amalgamation of federal doctrines and inactions, state legislation and omission to act, and local initiatives and oversight. This theoretical oversight 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. Unlike race and religion, which shaped, to a large extent, the political and legal structure of the American republic from its inception, sexual orientation has appeared as a “problem” in the second half of the twentieth century, and became one of the major issues that divide the nation only since the 1990s.

The significance of the localization and territorialization of sexuality cannot be underestimated. The delegation—by explicit act or by refraining to do so on the national level—of so many issues pertaining to sexuality to localities not only impacts residential patterns of gays and lesbians, nor does it only bring about specific local legal reforms. It has brought about the creation of safe havens for gays and lesbians in which they are protected from discrimination and harassment and 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 their dissenting views, but also to act upon them, drawing state and national attention to their plight; it facilitates the visibilization of a previously invisible minority; and it enhances the pluralism of the society as a whole due since it allows radically different communities to exist side by side.

But the localization and territorialization of sexuality have a dark side, too. The withdrawal of gays and lesbians from the national and even state level into the local one might possibly lead to giving up on achieving changes at these extended spheres; it might entrench and even enhance discrimination and violence towards gays and lesbians who live outside of the cities which serve as safe havens; it radicalizes the discourse and actions concerning the regulation of sexuality, and might provoke backlash, retaliation and restrictive legal measures by states as well as by other localities; and it increase the fragmentation of the body politic.

Despite the risks posed by the decentralization of the power to regulate sexuality to localities, we argue 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 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. Lacking sufficient federal limitations, however, localities can abuse their power, by not only expressing disapproval of gays and lesbians but also 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. We therefore propose several broad-
brush suggestions for, what we call, “federalized localism,” in which cities are bolstered, on the one hand, and mechanisms are developed at the federal and state levels in order to curb the abuse of local power, on the other hand. Indeed, 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 all share power and collaborate with each other.

In Part I we describe the localization of sexuality: the ways in which American law caused cities to become the major locus in which sexuality was regulated. We describe the lack of comprehensive federal constitutional protection and the absence of federal legislation that would protect gays and lesbians from discrimination. We then analyze the limited protection provided by the states for gays and lesbians and the ample room left for cities to act on such matters. We demonstrate our claim regarding cities’ power to regulate sexuality by describing six areas where some cities have been extremely active: recognition of same-sex partnerships; legislation of local antidiscrimination ordinances; enforcing antigay hate crimes; using their local police powers (zoning, land use, business licensing and protecting public health; districting; and controlling the public education system.

In Part II we move on to describe the territorialization of sexuality: the unique residential patterns of gays and lesbians, which, despite various changes, remains singular and is characterized by a high concentration in large cities and within them, in certain neighborhoods. We argue that, contrary to most explanations in the literature, what in fact accounts for these residential patterns is the legal regime described in Part I. By settling in these areas, gays and lesbians overcome their status as a permanent minority. Even if unable to form a local majority, the 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.

We then continue, in Part III, to discuss 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, of radicalization and of isolationism—we conclude 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 put local power under control. Some closing remarks conclude the Article.

I. THE LOCALIZATION OF SEXUALITY

In this Part we explore the ways in which American law has signifi-
cantly contributed to the localization of sexuality: local governments have increasingly become the major locus where a multitude of issues that particularly impact the lives of gays and lesbians are being regulated. Cities determine whether gays and lesbians would be able to reside in their jurisdiction; whether they 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. The localization of sexuality was enabled by a three legged legal structure: first, the lack of federal legal protection of gays and lesbians; second, the limited and bifurcated legal protection which states extend to them; third, the traditional powers of cities, which enable them to respond to growing numbers of conflict and challenges surrounding sexual minorities and their unique needs and interests.

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

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

One of the building blocks of the localization of sexuality is the continued refusal of the Supreme Court to grant gays and lesbians the status of a federally protected group under the equal protection clause. When faced with challenges against states’ and federal legislation discriminating gays and lesbians, the Court rejected the notion that sexual minorities are “politically powerless” (according to the “discrete and insular” minorities test set in Carolene Products’ footnote four). This refusal allows all levels of government to classify and discriminate people based on their sexual orientation without triggering strict scrutiny.

Even Romer v. Evans, 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 constitutional amendment that prohibited all levels of government from adopting pro-gay antidiscrimination legislation and regulation, it did so only since the amendment was founded on “animus” towards gays and lesbians, thus failing the “rational basis” test. The Court refused, however, to grant gays and lesbians the status of a

12 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.” 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. Gays are not considered by the Court to be politically powerless and therefore do not receive strict scrutiny. See Kenji Yoshino, The Gay Tipping Point, 57 UCLA L. Rev. 1537 (2010). Other scholars also continually lament the refusal of the Court to extend strict scrutiny to gays and lesbians. See infra [---] for further discussion.

13 See Bruce A. Ackerman, Beyond Carolene Products, 98 Harv. L. Rev. 713 (1985).
protect group, depriving them of the heightened protection given to racial and other minorities. 14

The protection granted to gays and lesbians through the privacy doctrine has also proved to be very limited in its scope. In Lawrence v. Texas, the Supreme Court ruled that Texas’ sodomy law was unconstitutional since it violated the constitutional right to privacy. 15 As pointed by many scholars, however, this protection is far from being satisfactory or inclusive since it is limited to instances of “intimate associations” thus leaving gays and lesbians exposed to discrimination by states and local governments in every place save for their private homes. 16

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. The denial of such federal protection from gays and lesbians is achieved by the lack of explicit mention of sexual orientation as prohibited grounds for discrimination under Title VII as well as Title IX. 17 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 met fierce opposition and failed. 18 Furthermore, federal courts were unwilling to interpret the prohibition to discriminate on the basis of “sex” as including sexual orientation. 19 Even when the Supreme Court extended Title VII’s protection against sexual harassment to include violence among men, it did so under the explicit disclaimer that by no means was discrimination based on sexual orientation included in the protections provided by Title VII. 20

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16 Thus, in Lawrence the Court de-localized (homo)sexuality in the sense that it prevented states (or localities) from criminalizing sodomy in the private sphere. As numerous scholars have argued, the limited scope of this principle.
19 See, e.g., Robert DeSantis v. Pacific Telephone and Telegraph Co., Inc., 608 F.2d 327 (9th Cir. 1979).
Furthermore, Congress enacted legislation that prevents states from conferring rights on gays and lesbians that would apply at the federal level and that would have forced other states to recognize such rights under the Full Faith and Credit clause of the federal constitution. The Defense of Marriage Act (hereinafter: “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 to honor such marriages.\(^{21}\) DOMA’s definition of “recognition” is extremely broad and includes direct as well as indirect consequences of marriage, such as enforcing judicial orders pertaining to custody, alimony and other matters.\(^{22}\) Thus DOMA works to further entrench the localization of sexuality by delineating states’ power to recognize same-sex partnerships, preventing the “spillover” of local decisions to other states and to the federal sphere.\(^{23}\)

Despite the general lack of protection of gays and lesbians at the federal level (or, some might argue, their overt discrimination), recently, pushed by Obama’s administration and the Democratic Congress, two important legislative changes have been made. First, the “don’t ask don’t tell” policy of the military was abolished;\(^{24}\) second, and more pertinent to our discussion, Congress enacted the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, expanding the federal hate crime law to include sexual orientation.\(^{25}\)


\(^{22}\) DOMA § 2 and § 3.

\(^{23}\) Recently, the Obama administration announced that it will not defend DOMA’s constitutionality, as it views it unconstitutional, in two federal cases challenging Section 3 of DOMA (Pedersen v. OPM and Windsor v. United States). See http://www.sfgate.com/cgi-bin/blogs/nov05election/detail?entry_id=83628#ixzz1W3tiOA6k.

\(^{24}\) 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 United States federal law Pub.L. 103-160 (10 U.S.C. § 654). See JANET E. HALLEY, DON’T: A READER’S GUIDE TO THE MILITARY’S ANTI-GAY POLICY (1999). In September 2011 this policy was repealed by an act of Congress.

\(^{25}\) The Matthew Shepard, supra note 8. Prior to the enactment of this law, crimes motivated by hatred towards gays and lesbians were not considered as hate crimes at the federal level, leaving the decision to each and every state whether to criminalize it or not. By the time the Matthew Shepard Act was enacted, 31 states included animus towards certain sexual orientations as a motivation that merits a crimes a “hate crime.” The Matthew Shepard Act federalized, at least to a certain degree, hate crimes against gays and lesbians by introducing the following principles: giving federal authorities greater ability to engage in hate crimes investigations that local authorities choose not to pursue; providing federal funding to help state and local agencies pay for investigating and prosecuting hate crimes; requiring the FBI to track statistics on hate crimes based on sexual orientation. Note that although the Act federalizes such hate crimes, it does so in a limited fashion, leaving the primary control to the state and local levels. Federal authorities only step in when lower levels of government fail to take action against anti-gay hate crimes, and the budgetary assistance to state and local enforcement of these hate crimes is extremely limited. Thus, we shall later see, crimes directed at gays and lesbians remain mostly at the control of sub-federal levels, both in their definition—whether they are considered “regular” crimes or are given special status as “hate crimes”—and in their degree of enforcement.
The result of this described lack of a comprehensive federal protection of gays and lesbians is that ample room has been left for states and local governments to regulate sexuality.

B. Limited State Protection of Gays and Lesbians

Given the near absence of a federal constitutional protection of gays and lesbians, and the broad powers enjoyed by states in general (especially under the current revival of federalism\(^{26}\)), 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 sexual minorities. While some states used those powers to legalize same-sex marriage, adopt antidiscrimination laws and policies, and enact hate crime laws against homophobic acts, the majority of states bans such marriages\(^{27}\) and refuses to prohibit sexual orientation-based discrimination or to enact such hate crime laws.

States’ courts vary on whether, and to what extent, their constitutions as well as the federal constitution protect gays and lesbians from discrimination. The constitutional status of gay men and lesbians was debated in states’ courts in the past decade mostly a-propos same-sex marriage. While four state Supreme Courts prohibited their states from excluding same-sex couples from the institution of marriage, they did so on different constitutional grounds. The determination of the degree of protection given to gays and lesbians hinges upon the interpretation of the equal protection clause within each state’s constitution. The only state Supreme Court that was willing to extend strict scrutiny to gays and lesbians was California’s.\(^{28}\) Connecticut’s and Iowa’s Supreme Courts held that sexual orientation was a “quasi” suspect classification which merits “intermediate” or “heightened” scrutiny.\(^{29}\) 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.\(^{30}\) The vast majority of states’ courts, however, deny gays and lesbians of any special constitutional protection.\(^{31}\)

\(^{26}\) See David J. Barron, A Localist Critique of the New Federalism, 51 DUKE L.J. 377 (2001). For a discussion of the implications of the “federalism revival” see infra [---].

\(^{27}\) Thirty states have amended their constitutions to include explicit prohibitions on same-sex marriages. See DOMA Watch at http://www.domawatch.org/stateissues/index.html.

\(^{28}\) In re Marriage Cases, 183 P.3d 384 (Cal. 2008). Same sex marriages were later prohibited in California following a constitutional amendment (known as “Proposition 8”).


\(^{31}\) Two other states’ 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 can cure this violation by instituting civil unions for same-sex couples. See Baker v. Vermont, 744 A.2d 864 (Vt. 1999); Lewis v. Harris, 188 N.J. 415 (N.J. 2006). It should be noted that cur-
The failure of states to provide constitutional protections to gays and lesbians is even more conspicuous given states’ zeal to ban 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, Oregon, Michigan and Wisconsin.32 Other states, even some which have same-sex marriages and civil unions (Iowa and Illinois, for instance) are also contemplating amending their constitutions to ban same-sex marriage.33 States demonstrated similar constitutional activism on the antidiscrimination front. Prior to the emergence of the same-sex marriage debate as the emblem of the gay rights struggle, antidiscrimination constituted the main battlefield. Following decades in which localities (as well as various state agents) adopted antidiscrimination ordinances that protect gays and lesbians, numerous states have attempted to constitutionally prohibit all legislative, executive or judicial action at any level of government (state or local) to protect gays and lesbians from any kind of discrimination. Colorado’s constitutional Amendment 2 was precisely this type of initiative which propelled the famous Romer v. Evans.34

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.”35 The Romer decision has the effect of re-localizing the issue of sexual orientation-based discrimination. While Amendment 2 constituted an attempt to centralize this issue at the state level—albeit by prohibiting it—Romer forbids the state from so doing, thus empowering local governments to make decisions about whether

34 Colorado’s Amendment 2 followed several municipalities’ local ordinances (for example, Aspen’s, Boulder’s and Denver’s) 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 Denver Rev. Municipal Code, Art. IV, §§ 28-91 to 28-116 (1991); Aspen Municipal Code, § 13-98 (1977); Boulder Rev. Code §§ 12-1-1 to 12-1-11 (1987).
35 Romer 517 U.S. 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.” Romer 517 U.S. at 634.
or not to protect gays and lesbians from discrimination, unbound by federal and state constitutional law.\textsuperscript{36}

As compared with the constitutional under-protection, states fare better on the legislative front, 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 “sexual orientation” as prohibited grounds for discrimination (for both state agents and private actors).\textsuperscript{37} Nine additional states have executive orders or personnel regulations prohibiting discrimination against public employees based on sexual orientation.\textsuperscript{38} In addition, thirty one states and the District of Columbia have enacted hate crime laws that include crimes based on sexual orientation.\textsuperscript{39} Seventeen states and the District of Columbia passed laws that address discrimination, harassment or bullying of students based on their sexual orientation.\textsuperscript{40} It is noteworthy that much of this legislative activity took place in the late 1990s and 2000s.

In sum, as compared to the federal level, states are more active in regulating matters pertaining to sexual orientation. Yet states, much like the federation as a whole, are too diverse and pluralistic to be able to form a coherent stance regarding sexuality. We now address the location where the bulk of the regulation of sexuality is taking place: local governments.

C. The Power of Local Governments to Regulate Sexuality

Given the near absence of federal protection of gays and lesbians and

\textsuperscript{36} In fact, The Court in \textit{Romer} created an asymmetry between the regulation of discrimination and that of antidiscrimination. Although states are prohibited from amending their constitution 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 affect. For an elaborate discussion of \textit{Romer} see infra text accompanying notes.


\textsuperscript{38} \textsc{HRC, Equality 2010, supra} note 37, at 15. These states are: Arizona, Delaware, Indiana, Kansas, Michigan, Missouri, Montana, Ohio, and Pennsylvania.

\textsuperscript{39} \textsc{HRC, Equality 2010, supra} note 37, at 16. These states are: Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, Nevada, New Hampshire, New York, Oregon, Rhode Island, Tennessee, Texas, Vermont, Washington, and Wisconsin.

\textsuperscript{40} \textsc{See} \textsc{HRC, Equality 2010, supra} note 37, at 18. These states are: California, Colorado, Connecticut, District of Columbia, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, North Carolina, Oregon, Vermont, Washington, and Wisconsin.
their limited protection by states, local governments are left with the daunting duty of regulating sexuality. Localities in America vary dramatically in their powers and competences, depending on the state in which they are located. While in some states they enjoy broad authorization (for example, a constitutional “home rule”), in others they are given limited and enumerated powers. And while in some legal matters they are given wide discretion and are able to express local preferences and values, in others they are compelled to abide by state mandates. Thus they have become the focal point for the regulation of sexuality, and a prominent site where such matters are disputed and adjudicated.

Hence, localities regularly address the most pertinent issues that matter to gays and lesbians as well to those who oppose their full acceptance and inclusion. They engage in setting local antidiscrimination ordinances and policies, but also in discriminatory practices. They 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). They provide or withhold spousal benefits for same-sex couples. And they enforce state hate crime laws that include crimes based on sexual orientation, or fail to do so. But localities have many more legal powers that impact the daily lives of gays and lesbians, including the ability to influence residential patterns. These local powers include districting, zoning, land use, business licensing, public health, education, spending, and law enforcement, and they influence 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 entitle 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. Other cities and counties which decided to issue marriage certificates to same-sex couples were New Paltz, NY; Nyack, NY; Sandoval County, NM; Multnomah County, OR; and Asbury Park, NJ. In addition, the Benton County commissioners decided to stop issuing marriage li-
quick and decisive legal response by state officials and courts, they pro-
voked a political and legal upheaval which changed the landscape of same-
sex marriage in America. It is clear to most commentators that such ac-
tions are well beyond local power, even when they were broadly authorized
by home rule provisions. City officials were also aware of that. It 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 ar-
gued, it was dissent, made powerful by cities’ ability to decide—albeit
briefly—according to its residents’ beliefs and values, however marginal
these beliefs were at the state level. It was also a way for cities to signal
that gays and lesbians were accepted and welcomed in their jurisdiction.
Regardless of its failure to prove long-lasting, it provides a clear example
of the localization of sexuality.

Although cities are unable to issue marriage certificates, they find oth-
er ways to recognize same-sex relationships. In 2008, the city of Cleveland
enacted an ordinance which established a domestic partnership registry,
enabling non-married couples in committed relationships and who share a
common residence to register with the city. The ordinance was enacted in
spite—and perhaps in defiance—of Ohio’s 2004 constitutional “Marriage
Amendment” which states: “only a union between one man and one woman
may be a marriage valid in or recognized by this state and its political sub-
divisions. This state and its political subdivisions shall not create or recog-
nize a legal status for relationships of unmarried individuals that intends to
approximate the design, qualities, significance or effect of marriage.”

Cleveland was not alone in enacting such measures. In the face of
fierce opposition to granting same-sex couples the full status of marriage
and in light of the fact that marrying them is, as we have earlier seen, rather
clearly beyond their powers, many localities have turned to the option of
establishing local registries for same-sex couples. In some cities this is

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45 Cleveland Ordinance No. 1745-08. The Ordinance became effective on May 7, 2009.

46 Ohio Const. Art. XV, § 11.

47 Some such cities include: Ann Arbor, MI; Atlanta, GA; Boulder, CO; Broward County,
FL; Carrboro, NC; Chapel Hill, NC; Cleveland Heights, OH; Cook County, IL; Denver, CO; Eu-
reka Springs, AR; Fulton County, GA; Hartford, CT; Iowa City, IA; Kansas City, MO; Key West,
FL; Ithaca, NY; Kansas City, MO; Key West, FL; Lacey, WA; Laguna Beach, CA; Long Beach,
CA; Los Angeles County, CA; Madison, WI; Marin County, CA; Miami Beach, FL; Milwaukee,
done against the backdrop of state constitutional and legislative silence as regards same-sex marriage, while in others there is explicit state ban on same-sex marriage. These municipal actions have reached courts throughout the nation, after being challenged for numerous reasons. At the heart of the matter usually lie three distinct questions, which are emblematic of the unique legal status of American cities: first, the extent of the home rule authority granted to cities by the state’s constitution; second, the nature of the state ban on same-sex marriage (or its lack thereof); third, the specific arrangement that the city employs to recognize same-sex partnerships. The broader the home rule authority is, the narrower the constitutional ban and the modest the city measure is – the better are the chances that courts will upheld such municipal action, and vice versa.

Cleveland Taxpayers for Ohio Constitution were quick to file a petition against the City of Cleveland, requesting an injunction enjoying the operation of the registry, for violating Ohio’s constitution’s Marriage Amendment and home rule. The trial court granted Cleveland’s motion to dismiss. On appeal, the court upheld Cleveland’s domestic partnership registry, on the basis that it was within its home rule authority and did not violate Ohio’s ban on marriage.

Rejecting the appellants’ claim that the registry approximates marriage and therefore violates Ohio’s Marriage Amendment, the court ruled that “the legal status of marriage is exceptional.” 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.” 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’.” 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.” Therefore, the court concluded, the ordi-

WI; Minneapolis, MN; Nantucket, MA; New York, NY; Oak Park, IL; Oakland, CA; Olympia, WA; Palo Alto, CA; Palm Springs, CA; Petaluma, CA; Philadelphia, PA; Portland, ME; Rockland County, NY; Rochester, NY; Sacramento, CA; Seattle, WA; St. Louis, MO; Travis County, TX; Tucson, AR; Tumwater, WA; and Urbana, IL. See Human Rights Campaign, “Search by City and State for Domestic Partner Registries” http://www.hrc.org/issues/marriage/domestic_partners/9133.html.

48 Ohio Const. Art. XVIII, § 3.
49 Civil Appeal from the Cuyahoga County Court of Common Pleas. Case No. CV-701308.
50 Cleveland Taxpayers for Ohio Constitution v. Cleveland, 2010 Ohio 4685.
51 Id., at 11.
52 Ibid.
53 Id., at 14.
54 Id., at 24.
nance was clearly within the power of local self-government.

While many domestic partnership registries indeed confer no formal and direct rights or benefits—rather 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 care. Moreover, some localities go even further and enumerate, within the municipal ordinance itself, the different rights and benefits which registered couples are entitled to receive. Until now, both types of registries were upheld by state courts. What enabled courts to so decide were three legal determinations: first, a radical distinction drawn between marriage and any other form of partnership; second, a generous interpretation of home rule authorities; third, a conclusion that domestic partnership is a “local matter,” territorially confined within city boundaries and thus within the power or local self-government.

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 (we will address this later), or through specific ordinances that confer benefits on the same-sex domestic partners of its employees. In fact, some cities did so long before any state recognized in any way same-sex partnerships. Such measures, too, have been challenged in courts, which varied in their responses to them. Much like same-sex partnership registries, the legality of these practices depends on the breadth of the localities’ home rule authority and the existence of a conflicting state law.

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55 See Ralph v. The City of New Orleans and the New Orleans City Council, 4 So.3d 146 (2009).
56 See Appling v. Doyle Case No. 10-CV-4434 (State Of Wisconsin, Circuit Court Branch 11, Dane County).
59 See 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); 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 v. City of New York, 686 N.Y.S.2d 683 (N.Y. App. Div. 1999) (upholding New York City’s domestic partnership law which extended benefits to domestic partners of municipal employees); Connors v. City of Boston, 714 N.E.2d 335 (Ma. 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 inconsistent with certain provisions of State law thus required legislative action rather than executive one).
Thus we see the localization of sexuality at work: lacking the power to confer on same-sex couples the full status of marriage but vested with general competences to deal with local matters, localities find innovative and creative ways to translate their views towards 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 localities do not have domestic partnership registries nor do they grant same-sex couples the same rights given to married couples. Even in states that legalize same-sex marriage, some city officials revolted against their state, refusing to sign marriage certificates of same-sex couples.\footnote{Barbara MacEwen, a town clerk of Volney, NY, stated that she refuses to sign marriage certificates for same sex couples, citing her moral and religious beliefs. \textit{See} \url{http://www.dailykos.com/story/2011/06/29/989821/-NY-Clerk-refuses-to-sign-same-sex-marriage-certificates}. Indeed, such 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. \textit{See} \url{http://manicsquirrel.com/2011/03/31/mike-huckabee-lose-your-job-for-christ/}.} Indeed, in the face of the growing number of states that legalize same-sex marriage, conservative religious groups try to push for the adoption of “religious/conscience exemptions” that would enable entire cities to be exempt from marrying same-sex couples.\footnote{During the battle over New York’s Marriage Equality Act, the legislator reached an impasse due to the fierce opposition of Republican representatives. The compromise was proposed by Senator Ball, who introduced the religious/conscience exemption, which reads as follows: “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.” It is obvious that such exemption would allow city officials to refuse to marry gays and lesbians. Although the amendment was rejected by the New York State legislator, it is possible that future battles over same-sex marriage will revolve around such exemptions. \textit{See} \url{http://www.religioustolerance.org/hommarrny15.htm}.} Furthermore, some cities express hostility towards 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 we shall now discuss.

2. \textit{Local Antidiscrimination Ordinances}

Another important way in which sexuality is localized in America is through the ability of localities to adopt antidiscrimination ordinances and policies, sometimes applicable only to local public entities (as employer and service provider) and sometimes applicable to private ones as well, which include sexual orientation as forbidden grounds for discrimination. These ordinances—often called civil- rights ordinances—usually apply to employment, housing, and public accommodations.\footnote{Paul A. Diller, \textit{The City and the Private Right of Action}, 64 STAN. L. REV. (2011); Available at SSRN: \url{http://ssrn.com/abstract=1829788}.} Given the breadth and scope of these antidiscrimination ordinances, they have the potential to impact the most important and the most mundane aspects of the lives of
gays and lesbians. Cities’ power to enact such ordinances produces a huge divergence among cities as regards the degree of protection they grant gays and lesbians. Thus, while some cities have become safe havens for sexual minorities, in others they are left exposed to discrimination both by the local government as well as by private actors. In light of the stalemate between conservatives and progressives in the federal and state level, cities have become the frontline of pro-gay legal reform. And while only little progress had been made, over the past decade, at the state level as regards antidiscrimination laws protecting gays and lesbians, “local governments provided a true bright spot.” Indeed, to date, hundreds of cities have adopted such measures.

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, it would be extremely hard to challenge the city’s authority. And indeed, there is almost no case law dealing with such matters. Localities that enact ordinances regulating private actors tread a shakier legal ground, although here too, case law is minimal. On one hand, given that the vast majority of states grant local governments broad home rule powers, cities seem to be authorized to prohibit discrimination in the private sphere, as long as its application is confined to their jurisdiction. On the other hand, cities are limited in their actions by the “private law exception,” which prevents them from creating civil liability between private parties.

Local antidiscrimination initiatives invoke the private law exception since potentially they give rise to private causes of action, either directly or indirectly. Some such measures explicitly give discriminated parties the right to sue the individual or entity that discriminated them. Other ordinances, however, though limiting their enforcement to the city, still might give rise to private causes of action through general tort law doctrine such

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63 HRC, EQUALITY 2010, supra note 37.
as negligence \textit{per se}.\textsuperscript{67} In other words, since local civil rights ordinances set standards of behavior for private actors within the 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. As Paul Diller demonstrates, however, the application of this exception is fraught with contradictions and inconsistencies. While courts in few states refused to allow private right of action through negligence \textit{per se},\textsuperscript{68} courts in other states had no trouble granting such right of action using the standard set by municipal ordinances.\textsuperscript{69}

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. Due to these inherent limitations, civil rights ordinances are often left unenforced, and have very little impact on the ground. Aware of this problem and frustrated with the difficulty in combating anti-gay discrimination, cities seek new and creative ways to advance their vision. The frontier of legal developments in this area has hence shifted to new types of ordinances, called “equal benefit/opportunity” ordinances. These new 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. Equal benefits ordinance requires all firms who contract with the government to offer equal benefits to their employees. Localities that adopt such a policy are barred from doing business with firms who fail to meet this standard. San Francisco spearheading this development in 1996, some twenty-one localities and counties have enacted this kind of ordinances, thus far.\textsuperscript{70}

Perhaps not surprisingly, these measures are beginning to attract the attention—and opposition—of state officials. Recently, Tennessee Governor Bill Haslam signed a bill prohibiting local municipalities from enacting antidiscrimination statues, forcing them to rely on state law.\textsuperscript{71} This bill di-

\textsuperscript{67} Diller, \textit{Supra} note 62, 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.”


\textsuperscript{69} See Diller, \textit{Supra} note 62.

\textsuperscript{70} Cities and counties with equal benefits ordinances are: Berkeley, CA; King County, WA; Long Beach, CA; Los Angeles, CA; Miami Beach, FL; Minneapolis, MN; Oakland, CA; Olympia, WA; Sacramento, CA; San Francisco, CA; San Mateo County, CA; Seattle, WA; Tumwater, WA; Salt Lake City, UT; Portland, ME; Broward County, FL; Sacramento, CA; Atlanta, GA. Cities with equal opportunity ordinances are: Bloomington, IN; St. Louis, MO; Tucson, AZ; Austin, TX. The only State with such laws is California. See: http://www.hrc.org/issues/workplace/benefits/equal_benefits_ordinances.htm.

\textsuperscript{71} See TN HB600/SB632.
rectly followed a Nashville ordinance, passed in April 2011, which barred the city from doing business with companies that do not adopt equal opportunity policy towards gays and lesbians.72 While the city already had anti-discrimination protections for its own workers, the ordinance prohibited discrimination against gay and lesbian workers by any private employer that contracts with the city. This state legislation, although not yet challenged in courts, raises various legal questions, which we can only briefly mention. Most importantly, it brings to sharp relief the tension between cities’ home rule authority and state preemption powers, which could prohibit localities from enacting laws that vary from state law or that are more stringent than them. Regardless of the specific balance between these competing forces, what is evident is that sexuality is constantly debated and regulated at local levels, inducing localities to find new avenues for action and reshaping the relationship between states and localities.

3. Antigay Hate Crimes73

Antigay violence is prevalent throughout the United States. Unsurprisingly, the larger the gay and lesbian population is the more prevalent the hate crimes against it.74 Although criminal law is a state matter, local governments have significant powers in relation to it, as the dominant enforcers of criminal offences are local police forces. It is a basic legal principle that policing and law enforcement are delegated primarily to local governments.75 Therefore, cities can influence the safety of their gay and lesbian residents by investing resources on preventing, investigating, and prosecuting hate crimes directed at them.76 In this respect it matters less


73 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 NATIONAL COALITION OF ANTI-VIOLENCE PROGRAMS, VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED COMMUNITIES IN THE UNITED STATES IN 2010 (2011) (hereinafter: “NCAVP, VIOLENCE AGAINST LGBTQH”).

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

75 See Donald P. Haider-Markel, Regulating Hate: State and Local Influences on Hate Crime Law Enforcement, 2 STATE POLIT. POLICY. Q. 126 (2002). (“Although criminal law is a State matter, local governments have significant powers in relation to it, as the dominant enforcers of criminal offences are local police forces. It is indeed a basic tenet of American law, specifically of local government law, that policing is delegated primarily to local governments (cities and counties”). 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).

76 See Haider-Markel, id (empirically finding that local police and prosecution do play a major role in the enforcement of hate crimes).
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 anyway prohibit battery, assault, or even murder—in order to protect its gay and lesbian community from hate-based violence.\textsuperscript{77} 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 their enforcement powers. For example, some cities form partnerships with community-based antigay violence prevention programs.\textsuperscript{78} Additionally, local governments can use other powers in their possession, such as spending and regular police powers to finance programs directed at lowering antigay crime rates.

But local policing can be used in ways that target and harm gays and lesbians. Local police can decide—often a result of mayoral policy as in the case of Giuliani’s anti-sex policy—to crack down on gay men for cruising or for having sex in public, charging them with public lewdness.\textsuperscript{79} Although heterosexuals are also prohibited from having sex in public, it is far more common for gay men to do so.\textsuperscript{80} Hence, such police actions disparately impact gays, diminishing their ability to use city spaces, possibly even pushing them out of the city. Police can also use selectively their search and seizure powers to raid gay establishments, using even misdemeanors as pretext to shut them down.\textsuperscript{81} Police brutality is another way in which local police can target sexual minorities, thus diminishing their safety within the local jurisdiction rather than enhancing it.\textsuperscript{82} Even if targeting gays and lesbians is never an official policy emanating from the city’s legal powers, cities can still be more—or less—tolerant towards such incidents by firing and punishing rogue cops, or by turning a blind eye towards them. Furthermore, local police can treat gay and lesbian victims with indifference and suspicion if not outright hostility.\textsuperscript{83}

\textsuperscript{77} See Dwight Greene, \textit{Hate Crimes}, 48 U. MIAMI L. REV. 905, 906-07, 911 (1994) (criticizing the focusing on the punitive measures, rendering them more stringent and harsh instead on enforcers (local police and prosecutors), as awareness should be raised).

\textsuperscript{78} See NCAVP, \textit{VIOLENCE AGAINST LGBTQH}, supra note 73, at 49 (reporting a partnership of the Buckeye Region Anti-Violence Organization with the City of Columbus Human Relations Commission that began in 2010).


\textsuperscript{80} This is the case for numerous reasons: many gays are closeted and have to engage in sexual acts in public areas; it has become socially acceptable within the gay community to be more sexually promiscuous...

\textsuperscript{81} See Warner, \textit{supra} note 79, at 153.

\textsuperscript{82} For example, reported cases of police brutality in Denver have increased 25% in 2010. See NCAVP, \textit{VIOLENCE AGAINST LGBTQH}, \textit{supra} note 73, at 54.

\textsuperscript{83} Indeed, a majority of victims “experienced indifferent, abusive or deterrent police attitudes.” Among the 61% of victims which reported such police attitude 38.4% described police attitudes as “indifferent, 17.1% as abusive (including verbal and physical abuse), and 5% as deterrent. 39.5% of survivors experienced courteous police attitudes.” NCAVP, \textit{VIOLENCE AGAINST LGBTQH}, \textit{supra} note 73, at 31.
4. **Local Police Powers: Zoning, Land Use, Business Licensing and Public Health**

Municipal police powers (including zoning and land use, business licensing and public health maintenance)—aimed at protecting the health, safety, morals, and welfare of the people—have an immense impact on the daily lives of cities’ residents. The ways in which they are used make localities more or less attractive to gays and lesbians and through them localities reflect their attitude towards 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. They do so by deciding, for example, whether only single family homes can be built in their jurisdiction or whether apartment buildings can also be constructed; whether to allow only traditional “families” to occupy houses or whether “unrelated” people—for example, unmarried same-sex partners—can also share a house; whether to enable the opening of adult businesses, restrict them to specific areas in town, or prohibit them altogether; and whether to grant leniencies and exceptions or to strictly enforce zoning laws.

Hence, many American localities—usually suburbs and townships—have zoning and land use ordinances that severely 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 in fact designed to prevent fraternity houses and boarding houses in single-family neighborhoods, laws that prevent “unrelated” individuals from sharing a household can seriously curtail the ability of gays and lesbians to reside in various localities.

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84 Police powers are given to States in the Tenth Amendment. Cities obtain their police powers through various delegation methods which their States can use. Sometimes the delegation is achieved through home rule provisions in State constitution, while at other times there are specific enabling acts, such as standard zoning enabling acts.

85 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” as up to 6 related persons; it may place restrictions on the legality of group homes (for the elderly or disabled) which indirectly affect same sex partners; it may define single family as a unit where the parents (one man, one woman) are married; it may define a single family as a unit containing no more than 3/4/5 unrelated persons; these restrictions may be to certain zones, streets, or all-inclusive.

86 In Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) the Supreme Court ruled that a residential zoning ordinance that limited the number of unrelated individuals who may inhabit a dwelling is constitutional. Many localities, especially suburbs adopt similar measures.

87 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.

88 See, e.g., City of Edmonds Municipal Code Section 21.30.010 (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...
it can sometimes exclude only roommates while allowing different kinds of domestic partners, including same-sex couples. At other times it excludes all unmarried people, thus having the effect of disparately impacting gays and lesbians who, in the majority of states, cannot get married. Such exclusionary zoning practices are much more prevalent in suburbs and small towns, as large cities are legally prohibited from enacting them or politically unable to do so.

Zoning laws can also be used in a more overt and discriminatory manner, since various illegal uses are given leniencies and exceptions by zoning boards. In addition, they can be enforced selectively, which leaves ample room for local officials to either curtail or allow the operation of various gay and gay-friendly establishments. Many instances of antigay 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 often require and involve discretion which can be justified on ad-hoc and legally sound grounds. An example of a case of supposed discrimination can be seen in the refusal to grant an HIV treatment center in Ashbury Park, NJ (treating both homosexual and heterosexual patients) the right to construct emergency housing units for 25 of its clients. Moreover, the zoning board exhibited continuous resistance to the very existence of such a center, and it took years to overcome its reluctance. Another reported instance of supposed discriminatory zoning policies took place in Greenville, NC, where the Greenville MCC 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 antigay sentiments.

More salient and noticeable uses of zoning laws involve the regulation of adult theaters, adult book stores, massage parlors, saunas, bars and clubs by American cities. Although the regulation of sexually-oriented establishment (or “sexually oriented businesses”) is not limited to gay venues but is almost always directed at heterosexual ones as well, it disparately

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.

89 The affluent suburb of Ladue, MO, denied residency permit from 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 relations and raised their children together did not matter to the locality. See Nancy Larson, Gay Families, Keep Out!, THE ADVOCATE 34 (July 18, 2006).


91 See: http://www.thebody.com/content/art11983.html. See also: http://www.actupny.org/indexfolder/actupap.html.

impacts gays. Martha Nussbaum recently suggested that disgust is a crucial factor in the hostile political and legal attitudes towards gays. 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.\footnote{See Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law (2010).} This explains why cities often treat gay establishments differently than they treat heterosexual ones and why courts are willing to accept such differential treatment.

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. 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.\footnote{L’Hote v. City of New Orleans, 177 U.S. 587 (1900) (rejecting the plaintiff’s claim that reduced property values stemming from the creation of a red lights district in New Orleans was a deprivation of property without due process). For a discussion of this decision and of the regulation of red lights districts see Nicole Stelle Garnett, Relocating Disorder, 91 VA. L. REV. 1076, 1104-1106 (2005).} Later, the Court upheld various municipal ordinances regulating the location of adult businesses, through concentrating in one area of town or dispersing them throughout the city. For example, in \textit{Young v. American Mini Theatres}, 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.\footnote{427 U.S. 50 (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. In \textit{City of Renton v. Playtime Theatres}, 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.”\footnote{475 U.S. 41 (1985).} Courts across the country regularly uphold zoning restriction placed on sexually oriented businesses.\footnote{See, e.g., \textit{Recreational Developments of Phoenix, Inc., v. City of Phoenix}, 220 F. Supp. 2d 1054 (2002) (In this case, owners of SOBs in Phoenix motioned to cancel a new city ordinance prohibiting engaging or viewing live sex acts, thus pragmatically rendering the SOB license more stringent. Plaintiffs also claimed it is not feasible to enforce this ordinance in gay establishments, due to their nature. The court rejects this claim (signaling that this ordinance will be enforced in gay establishments in the future);}

These broad zoning authorities have been used by cities to permit, restrict or exclude altogether gay related establishments. Indeed, the concentration of gay venues—bars, clubs, saunas, adult bookstores, adult cinemas,
etc.—in cities such as San Francisco and New York would not have been possible without these cities’ explicit permission and favorable zoning ordinances. Hence, while in many large cities, gay bars are regularly permitted, in other localities, zoning laws serve to restrict their operation. In L C & S, Inc. v. Warren County Area Plan Commission, for example, a town council amended its zoning ordinance to make taverns special exceptions to the uses permitted in the commercial zoning district. The city did so as a result of rumors that a gay bar was about to open at that location. The owners applied for a special exception for their proposed bar but were denied. A legal challenge against the city’s decision was unsuccessful. This case demonstrates the wide discretion that localities enjoy in deciding what type of businesses and establishments operate in their jurisdiction, thus enabling them to attract or repel gay businesses and their patrons.

Cities’ regulation of gay establishments within their jurisdiction is also achieved through other police powers which they possess, 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.” In many cases, these ordinances constrain the discretion of local public health officers, by defining sex businesses as creating a “public health nuisance per se.” 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 powers to monitor and deal with public health nuisances in order to regulate sexually-oriented businesses. Already in 1984, San Francisco’s Mayor Feinstein, using her public health authorities, tried to close down gay bathhouses reasoning that they contributed to the spread of the virus. Although the court rejected her full closure edict, ruling that such closure was too harsh a measure, it ordered that gay bathhouses should close private rooms, monitor patrons’ activities, survey the premises regularly, and act against “unsafe” sexual behavior. This heavy burden resulted in the outcome desired by the Mayor: the complete shut-down of all gay bathhouses in the city.

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

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98 244 F.3d 601.
99 NUSSBAUM, supra note 93, at 175.
100 For example, the Phoenix city code states that “The 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.” Phoenix City Code 223-54LA [1] [1998]. Other examples include: Norfolk, VA (1999); Ord. No. 39,649 - Norfolk city code; Poway, CA (2011): Poway Municipal Code, Chapter 8.16 – Disease Control, Article I. General Provisions – Nuisances (Ord. 29 §1, 1981); Council Bluff, IA (1992-93): Title 4: Health and Sanitation, Chapter 4.70 – High Risk Sexual Conduct (Ord. 5120 § 1, 1993). See also NUSSBAUM, supra note 93, at 175.
posed a risk to public health. New York fared better in the court than San Francisco. The New York Supreme Court upheld the closure affirming the power of the city to shut down the place on the grounds that it created a public nuisance. 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. These actions resulted in the radical transformation of several neighborhoods throughout the city, primarily Times Square and the West Village. Although Giuliani’s policies were not intended to harm gays in particular, but rather to “beautify” the city, make it “safer” and more hospitable to tourists and commerce, it had a unique effect on the gay community. This was due to the fact that for years the community had been organized around these establishments, which served not only as places for sexual activity but as areas for socializing and community building.

To date, gay saunas, bathhouses, adult bookstores, and adult theaters are regulated through a combination of zoning laws, public health powers and nuisance laws – all enacted and enforced by local authorities. Although often the language of such laws is sexual-orientation neutral, supposedly addressing both gay and straight establishments, their effect on the two groups is far from being neutral. 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. Furthermore, the prevalence of antigay sentiments in many American cities

103 See The Zoning Text Amendment (N 950384 ZRY).
104 See Kristine Miller, Condemning the Public: Design and New York’s New 42nd Street, 58 GEOJOURNAL 139 (2002). The zoning saga, initiated by mayor Giuliani, continues as new amendments introduced in 2001 placed terse 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 40% adult material are to be considered adult establishments, and are subject to measures such as relocation into the outer boroughs. Many of these establishments applied “sham compliance” and were investigated by city officials. This gave way to suits filed by these establishments requesting injunctive relief (evoking First Amendment rights) with respect to the city’s enforcement of the ordinance. The injunction was cancelled by the New York State Supreme Court, but holds to this day as the legal quandary is still being settled in the courts. See For the People Theatres of NY, Inc. v. City of New York, 897 N.Y.S.2d 618 (Sup.Ct., N.Y. Co., March 29, 2010).
105 See WARNER, supra note 79, at 149-171. Another example is in Doe v. City of Minneapolis, 898 F.2d 612 (1990). The city of Minneapolis amended Section 219 of the Minneapolis Code of 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. The city’s justification was its desire to prevent spread of HIV. The ordinance was upheld. The specific ordinance empowering the city was § 219.530 (powers of the commissioner of health).
106 See WARNER, supra note 79, at 149-171. Nussbaum also describes the often unfounded statements of public health official and courts regarding the high risk of gay sex. NUSSBAUM, supra note 93, at 167-185.
raises the concern that gay establishments will fall victim to selective enforcement of these laws. Lastly, the application of these laws—even if done neutrally and equally—disparately impacts gays. As Martha Nussbaum explains:

“[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.”

5. Districting

Given the vast powers of local governments and their ability to attract and repel gays and lesbians and make their jurisdiction more—or less—gay-friendly, 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 was a local council member, the late Harvey Milk, and that it was San Francisco in which he assumed office. And it should come as no surprise that there has never been an openly gay or lesbian U.S. Senator, but that currently there are hundreds of gay and lesbian local elected officials. Perhaps most telling is that while Texas, North Carolina and Florida have constitutional or legislative ban on same-sex marriage and have no state antidiscrimination law protecting gays and lesbians, Houston, Franklinton, Key West, Gainesville, and Wilton Manors—all cities located in these states—have elected openly gay mayors.

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 dis-

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107 NUSBAUM, supra note 93, at 170.
109 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 judges, mayors, local council members, school board members and more. Of these, 297 are local officials, divided as follows: 29 mayors, 236 council members and other elected city officials and 32 school board members. See http://www.glli.org/out_officials/search.
110 See http://www.glli.org/out_officials/search.
Districts are drawn are probably the core reasons for the dilution of gay and lesbian voters in the ballots. 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 they are still too few considering the large size of federal and state electoral districts. No matter how district lines are drawn, their sheer size—and the fact that gays and lesbians are a small minority by definition—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. The Act, as interpreted by the Supreme Court in Thornburg v. Gingles, provides special protection to designated minority groups that satisfy a three prong test: first, that they are geographically concentrated and are sufficiently numerous to form a district majority; second, that they are politically cohesive; third, that their electoral success is prevented by majority block voting. Where these conditions are met, there is a duty to form majority-minority district(s) that will enable the fair representation of the minority group. Gays and lesbians, however, are not recognized 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.

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 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, for historical reasons or due to the goodwill of the city election board. A third possibility is seen 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.” 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

113 See Rosenblum, supra note 42, at 132-135.
114 CHARTER OF THE CITY OF NEW YORK § 52(1)(c) (as amended Dec. 31, 1989).
district in Manhattan.\textsuperscript{115}

Gearing towards 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 have become pivotal in many cities.\textsuperscript{116} “Gaymandering,” a term coined to describe the manipulation of district line drawing in order to increase—or decrease—gay and lesbian representation, is hotly debated and receives the attention of media and voters across the nation.\textsuperscript{117} Examples abound; in Sacramento 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 the districts. 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).\textsuperscript{118} Such a decision will force every redistricting authority throughout the state to take the interests of this community into account when redrawing district boundaries.\textsuperscript{119}

6. \textit{Education}

Public schools are operated, funded and governed by local governments and local school districts.\textsuperscript{120} While the state maintains significant powers to set the curriculum and other pedagogical and educational matters of its schooling system, a large portion of the responsibility and the daily operation of the public school system are kept with local entities. These powers are used in ways that 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 reference

\textsuperscript{115} See Rosenblum, \textit{supra} note 42, at 137.


\textsuperscript{117} 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, \textit{Managing Gerrymandering}, 83 Tex. L. Rev. 781, 785-786 (2005).

\textsuperscript{118} The California Citizens Redistricting Commission is comprised of five democrats, five republicans and four unaffiliated members.

\textsuperscript{119} See \url{http://www.newsreview.com/sacramento/district/content?oid=1973968}. See also \url{http://www.eqca.org/site/apps/nlnet/content2.aspx?c=kuLRJ9MRKrH&b=6493233&ct=10891837}.

\textsuperscript{120} 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 to schooling is maintained throughout the nation.
to gay and lesbian issues in their curriculum or refrain from so doing. Thus, sexuality is localized also 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 gay and lesbians through their public school system. The 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.\textsuperscript{121} Up until now, attempts to challenge the city’s authority to run the school have failed in courts.\textsuperscript{122} Opposition to the school came from conservative politicians as well as from hard-line liberals. 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 were concerned that the school created a segregated environment which secludes and eventually excludes gay students from the regular education system.\textsuperscript{123} Most important for our discussion, however, is the fact that the authority of the locality to establish a school protective of gays was never challenged; on the contrary, it was clear that New York had the legal powers to do so, and the only thing which seemed controversial was the “separate but equal” policy which the school was said to have advanced.\textsuperscript{124} Other cities, too, are now beginning to follow the footsteps of New York, and establishing gay schools.\textsuperscript{125}

Additionally, local authorities and school boards may choose to create safer, bullying-protected environments for gay and lesbian students within their regular public schools by addressing the individual needs of gay students, encouraging gay straight alliances, funding programs to combat sexually motivated harassment, to name a few. Unfortunately, they can also neglect gay and lesbian students, leaving them exposed to homophobic at-


\textsuperscript{123} See Ludwig, supra note 121.

\textsuperscript{124} 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. See Ludwig, supra note 121, at 516.

\textsuperscript{125} Milwaukee’s Alliance School is a public charter middle school and high school. According to the Milwaukee Public Schools website describes, it is “a safe place for students regardless of sexuality, identity, appearance, ability or beliefs.” See http://mpsportal.milwaukee.k12.wi.us/portal/server.pt?open=512&objID=328&PageID=38481&cached=true&mode=2. 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 http://archive.chicagobreakingnews.com/2008/11/gay-lesbian-high-school-chicago.html.
attacks and harassment. In recent years, however, the local nature of such schools-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 courts’ rulings is evolving, “federalizing” the treatment of gay students, at least to a certain extent, leaving local entities with less discretion over such matters. The federal Equal Access Act,126 Title IX of the Educational Amendments of 1972,127 the Equal Protection Clause, court cases placing liability on school districts that failed to protect students from bullying,128 court cases forbidding discrimination against gay straight alliances129—are all examples of the federalization of anti-bullying. It is important to notice, however, that localities and school boards still possess crucial powers to influence the safety of schools for gay and lesbian students, as stated earlier.

Lastly, localities and local boards of education can determine how favorable the curriculum is to homosexuality. While states retain the power to set the curriculum for their public schooling system, in many cases this authority is delegated—at least in part—to local boards of education.130 Several states have laws barring class discussions concerning homosexuality in a positive manner, thus limiting the discretion of local boards of education.131 In many other instances, however, the state is silent about these topics, leaving room for local authorities to express their values and beliefs regarding homosexuality.

II. THE TERRITORIALIZATION OF SEXUALITY

“We are everywhere” reads the famous slogan of the gay liberation movement, and recent data confirms that gays and lesbians are indeed pre-

130 See Nabozny, supra note 128.
sent in over ninety nine percent of counties in America. The vast majority of gays and lesbians, however, are residing in a limited number of large urban areas and within them they are concentrated in certain neighborhoods. Sexuality in America, in other words, is localized in specific territories. But what accounts for these residential patterns? Attempts to explain these residential patterns 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. Second, gays and lesbians seek various local amenities, such as restaurants, cultural establishments, clean and healthy environments, parks, and other services that depend on one’s place of residence. Underlying both explanations is an emphasis of the power of individual preferences, market forces and social dynamics in determining residential patterns.

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. Moreover, we argue, the legal structure which we have earlier described—namely the localization of sexuality—is a driving force for some of these 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 impossibility for gays and lesbians of exerting a meaningful political influence in national and state politics, and the legal structure which enables localities to become “safe havens” for 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 New York City, Los Angeles, San Francisco and Chicago are still among the ten most gay-populated cities, other cities—often moderate size cities such as San An-

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133 BAILEY, supra note 10.
134 Black et al., supra note 11; MURRAY, supra note 101.
135 Some researchers point to the fact that there is only little positive correlation between a gay friendly legal environment and gay populated areas. We will address this issue later.
tonio, TX, Santa Fe, NM and Portland, OR—have taken their place as the fastest growing in gay population. Over 40 metropolitan areas in the United States now have a sizable gay community. Gay and lesbian couples, especially with kids, are moving to the suburbs and even to rural areas. However, 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. Five major metropolitan statistical areas (MSAs)—New York, Los Angeles, San Francisco, Washington, DC, and Chicago—include more than one quarter of all same-sex households reporting on the 2000 Census. Five additional MSAs—Boston, Philadelphia, Dallas, Atlanta and Miami—are home to more than ten percent of gay and lesbian households. 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). Unsurprisingly, these neighborhoods include the West Village and Chelsea in New York City, Boystown in Chicago, South End and Jamaica Plain in Boston, Atlanta’s Downtown and Little Five Point, the Castro and the Mission in San Francisco, Dupont Circle in Washington DC, Capitol Hill in Seattle, Dallas’s Boyztown, and Los Angeles’s West Hollywood. And although these neighborhoods are by no means exclusively gay they contain, to varying degrees, a disproportionately high percentage of gay and lesbian residents. Many of these neighborhoods suffered from urban decline following the flight of upper-middle white population (“white flight”) during the 1960s and 1970s. Thus, prior to the migration of gays and lesbians into these neighborhoods, they were mostly populated by poorer racial and ethnic minorities. The

137 GATES, supra note 9, at 1-6 (2007); BRADFORD ET AL., supra note 136, at 6.
138 BRADFORD ET AL., supra note 136, at 6; BAILEY, supra note 10.
139 GATES, supra note 9, at 6.
140 GATES, supra note 9, at 4.
141 New York contains 8.9 percent of all same-sex households, Los Angeles 6.6 percent, San Francisco 4.9 percent, Washington, DC 3.3 percent and Chicago 3.1 percent. BRADFORD ET AL., supra note at 5-6.
142 BRADFORD ET AL., supra note 136, at 5-6.
143 BAILEY, supra note 10, at 62-63.
144 For detailed maps showing the concentration of gay and lesbian couples in these cities see BRADFORD ET AL., supra note 136, at 138-142.
145 Thus, although the term “gay ghetto” is sometimes used colloquially and in several studies, it seems inappropriate to describe gay neighborhoods. See Gary J. Gates, The Guys Next Door, THE ECONOMIST (2008) (describing the process of gays moving out of “the ghettos”). See also Gordon Brent Ingram et al., Queer Zones and Enclaves: Political Economies of Community Formation in QUEERS IN SPACE: COMMUNITIES, PUBLIC PLACES, SITES OF RESISTANCE 171 (Gordon Brent Ingram et al. eds., 1997) (analyzing the historical development of “gay ghettos”).
migration of gays and lesbians into these areas often resulted in their gentrification.\textsuperscript{146}

The concentration of gays and lesbians within specific cities and neighborhoods is in all likelihood much higher than the official data suggest. This is due to the limitations of the census data and the American community survey. Most importantly, official census and survey only collect data about same-sex couples. The census questionnaire does not include questions about sexual orientation, sexual behavior or sexual attraction, but only contains various relationship categories that are aimed at understanding how people within a household are related to each other.\textsuperscript{147} Thus, single gays and lesbians are completely missing from the data collected by census and official surveys.\textsuperscript{148} 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.\textsuperscript{149}

There are more caveats that one should bear in mind when discussing gay and lesbian residential patterns. Up until 1990, researchers had no way to gather reliable and comprehensive information regarding location patterns of gays and lesbians.\textsuperscript{150} Indeed, they had no way to accurately measure the total number of gays and lesbians in the nation (other than the general assumption that gays and lesbians constitute a minority of 3 to 10 percent of the population), let alone knowing where they lived. Only when the census questionnaires were amended in 1990 to include the relationship categories that we earlier mentioned, it became 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 gay couples between 1990 and 2006 (the last American Community Survey on which

\begin{footnotesize}
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  \item[147] Gates & Ost, supra note 1, at 11.
  \item[149] Janice Compton and Robert A. Pollak, Why are Power Couples Increasingly Concentrated in Large Metropolitan Areas?, 25(3) J. LABOR ECON. 475 (2007) (arguing that fewer couples in which both spouses possess a college degree migrate to large cities, whereas college educated singles still do); See also Sabrina Tavernise, New Numbers, and Geography, for Gay Couples, THE NEW YORK TIMES (Aug. 25, 2011) (suggesting that the new census data ignores single gay men who congregate in large numbers in large metropolitan areas).
  \item[150] 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 74, at 281-286.
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most reports rely) cannot be attributed solely or even primarily to changes in residential patterns but 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 cohabit and “come out.” Therefore, although it is clear that some gay and lesbian couples indeed migrate to suburban and rural areas, as some studies suggest, the 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 keep concentrating in a limited number of new towns, thus forming large local minorities, simply adding more localities that are crowded with gays and lesbians, rather than be distributed homogeneously throughout the country.

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. And the puzzling thing is that they keep doing so. Unlike with racial and ethnic minorities, whose continued segregation is often explained by the structural difficulty to escape the areas in which they are born, the opposite is true for gays and lesbians, who seem to persistently move into and concentrate in a limited number of urban locations. Contemporary literature on gay and lesbian residential patterns explains them as resulting from a quest for community and a search for better local amenities. 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 and lesbians can be spatially institutionalized. The hostile social environment, harassment, and sometimes even violence towards gays and lesbians pushed them, according to these explanations, to urban areas, often characterized by greater tolerance for difference and a more progressive politics. Hence, these urban enclaves provided safe havens where gay identity was affirmed and a sense of community has evolved. The continued migration into these urban enclaves

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151 GATES, supra note 9, at 8.
152 See Tavernise, supra note 149 (analyzing new data that suggests that gay and lesbian couples are moving to smaller, less traditionally “gay” cities).
156 BAILEY, supra note 10, at 4.
is often understood to result from path-dependence, social networking, the persistence of hostility towards gays and lesbians in many areas throughout the nation and by the ongoing need of gays and lesbians to socialize with their peers. 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, sometimes even constituting a vetoing bloc.\textsuperscript{157}

Economic explanations for gay and lesbian residential patterns focus on market forces and economic incentives that impact and constrain choices made by the 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 have fewer children, on average.\textsuperscript{158} 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 since they are less likely to have children. Although the definition of these amenities is rather vague in most of these studies, is roughly denotes a clean, safe and healthy environment, cultural institutions, good restaurants, better weather, and higher levels of educated population. The concentration of many such amenities in large cities attracts gays and lesbians into them.\textsuperscript{159}

Since, according to the economic literature, 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. But why would cities want 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.”\textsuperscript{160} According to Florida, today’s American economy is based on human creativity, therefore the best explanation for the economic success—or failure—of cities is their ability

\textsuperscript{157} See Rosenblum, supra note 42, at 128-130.
\textsuperscript{158} See Black et al., supra note 11, at 55-56, 61.
\textsuperscript{159} 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, called by Tiebout consumers-voters, choose where to live based on their preference of the local government that offers them the optimal level of amenities and price. See Charles Tiebout, A Pure Theory of Local Expenditures, 64 J. Pol. Econ. 416 (1956). Various empirical studies find positive correlation between the existence of such amenities and migration of gays into cities that have high level of them. See Black et al., supra note 11; GATES & OST, supra note 132; Cooke & Rapino, supra note 148.
to attract creative people. 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. Furthermore, 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 higher creativity rate. The cities in which the creative class chooses to reside are therefore characterized, he 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.

Surprisingly, 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. Florida makes it very clear that it is not the presence of gays which makes cities successful nor does he argue that gays are more creative than straights. It is rather that their presence is an indicator for openness, tolerance and diversity — all city traits that are conducive to creativity and thus attract the creative class. Although Florida is careful not to draw such conclusions from his empirical findings, it can be inferred from his argument that cities that wish to foster economic growth will attempt to attract the creative class, by signaling tolerance, openness and diversity. One way to do that is to appeal to gays and lesbians. Furthermore, some researchers suggest that gays actually tend to be over-represented in professions which are considered to be “creative” and are therefore a target for cities that wish to be economically successful.

To sum up, 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,

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161 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 160, at 30-35.
166 Bailey, supra note 10, at 3-4 (arguing that gays and lesbians moved into cities “partly because their skills had become more valued in the new economy”).
167 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. See, e.g., Terry Nichols Clark, Urban Amenities: Lakes, Opera, and Juice Bars – Do They Drive Development?, 9 Research in Urban Policy (2003).
which provide them with safety, community and good city services, and amenities. They also explain why some cities continue to adopt policies which are appealing to gays and lesbians.

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

The sociological, political and economic explanations emphasize extra-legal reasons for the existing gay and lesbian residential patterns. In fact, some of these studies emphatically deny the influence of legal rules on residential choices made by gays and lesbians. Against these law-skeptics, we argue that the law is crucial for the understanding of 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 both tangible and symbolic incentives (both positive and negative) regarding which city and which neighborhood they should live in. 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. Localities that are heavily populated by gays and lesbians will 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, a 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 we have demonstrated, sexuality has been localized in the sense that many crucial decisions pertaining to gays and lesbians have been delegated—explicitly or by omission—to local governments. This localization is a result of the near absence of federal protection and the limited protection granted to them by states. Thus cities are left with broad discretionary powers in areas such as the recognition of same-sex partnerships, enactment of local antidiscrimination ordinances, enforcement of antigay hate crimes, zoning, business licensing and protecting public health, districting and running local public schools. Cities can decide to use these powers in ways that benefit gays and lesbians or harm them. And these decisions most likely have the effect of attracting gays and lesbians into their jurisdiction or repelling them.

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168 Black, for instance, argues that there is no positive correlation between favorable or unfavorable legal environment and the decisions of gays and lesbians where to live. See Black et al., supra note 11, at 13-14; GATES & OST, supra note 1; Cooke & Rapino, supra note 148, at 294.
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 we have shown earlier, the result of a multitude of legal decisions made by the city. While some of the outcomes of these decisions are easily understood to be a result of specific legal principles (such as same-sex partnerships 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 result from a city’s application of its zoning, licensing, districting and other powers. This confusion drives some scholars, such as Black, Gates and Florida to mistakenly conclude that the legal environment is immaterial for gay and lesbian residential patterns. Indeed, the parameters which the empirical studies find as positively correlated with gay and lesbian residential patterns—high amenities, diversity and urbanization—\(^{169}\)—are themselves a consequence of the legal powers which cities possess and apply.

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 in which pro- and antigay legislation and policies are made. For example, Gates and Ost measure the “tolerance” of cities, finding only mixed correlation between such tolerance and the location of gays and lesbians.\(^ {170}\) This measure is used in many other empirical studies, reaching similar conclusions.\(^ {171}\) However, Gates and Ost’s 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, we have argued, are at least as important in effecting 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 towards sexual minorities. Such states often have a significant gay and lesbian population that concentrates in large and medium sized cities. And while these states do not recognize—or even ban—same-sex marriage and have no sexual-orientation-based antidiscrimination laws, the cities in them where gays and lesbians concentrate have enacted local antidiscrimination laws and adopted other pro-gay policies. Examples are abound: Aspen, Boulder and Denver in Colorado; Atlanta in Georgia; Nashville in Tennessee; Austin, Dallas and Houston in Texas; Columbus, Kansas City and St. Louis in Missouri; New Orleans in Louisiana; Charlottesville in Virginia; Gainesville, Broward County, Key West and Miami.

\(^{169}\) 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. See, e.g., Cooke & Rapino, supra note 148, at 294-296.

\(^{170}\) GATES & OST, supra note 1.

\(^{171}\) Black et al., supra note 11, at 14-15, 23; GATES & OST, supra note 1; Cooke & Rapino, supra note 148, at 294.
Beach in Florida; Philadelphia in Pennsylvania. In fact, almost all such states have pro-gay local ordinances and policies, and these cities are where gays and lesbians reside in relatively larger numbers.

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 for individual 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 existing political connection, its ability to organize and its geographic dispersal. While there is an ongoing debate regarding the political and economic power of gays and lesbians, here we focus on the relative size and the geographic contiguity of the gay and lesbian community as parameters that determine their ability to influence the enactment of legal rules.

The relative size of a group that shares common interests affects its ability to influence the political and legislative processes by electing city officials that would represent its interest in city hall as well 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 in 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. Since then these findings have been further confirmed, with more cities banning sexual orientation-based discrimination. These cities were by and large cities with a growing gay and les-

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172 See Woods, supra note 64, at 554-555.
173 Alabama: Birmingham, Mobile; Alaska: Anchorage, Juneau; Arkansas: Fayetteville, Little Rock; Idaho: Boise City; Indiana: Bloomington, West Lafayette; Kentucky: Covington, Louisville; Michigan: Ann Arbor, Detroit; Mississippi: Natchez, Pearl, Jackson; Montana: Missoula, Billings, Great Falls; Nebraska: Omaha, Lincoln; North Carolina: Asheville, Monroe, Durham; North Dakota: Fargo, Bismarck; Ohio: Cleveland, Columbus; Oklahoma: Oklahoma City, Tulsa; South Carolina: Myrtle Beach, Charleston; South Dakota: Sioux Falls, Rapid City; Utah: Salt Lake City; West Virginia: Charleston, Huntington; Wyoming: Casper, Cheyenne. This list is by no means exhaustive. For the residential patterns of gays and lesbians in these cities see Gates & Ost, supra note 1.
174 Mancur Olson, The Logic of Collective Action (1971) (comparing the ability of social groups to influence the political process according to their size and ability to organize); Albert O. Hirschman, Exit, Voice and Loyalty.
175 While some argue that this group is powerless and oppressed, others claim that it is, in fact, powerful and well connected beyond its population share.
bian population.\footnote{177} However, in a district-based electoral system, which typifies most American cities, the sheer size of a group alone is insufficient to make it politically powerful.\footnote{178} The group’s geographic compactness—or dispersal—as well as the ways in which electoral districts are drawn, determines whether the group’s interests are adequately represented, overrepresented or even diluted. Hence, the rules of districting and their concrete applications in a city greatly impact the ability of gays and lesbians to have effective political clout and thus influence the substance of the laws governing their locality. As we earlier demonstrated, sexuality-based districting (“gaymandering”) has thus become a hotly debated issue, with gays and lesbians attempting to remedy their underrepresentation in city hall by lobbying for a redrawing of districts. On the other hand, various other social and political groups 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.\footnote{179}

III. THE PROMISE AND PERILS OF THE LOCALIZATION OF SEXUALITY

The significance of the localization and territorialization of sexuality cannot be underestimated. The delegation—by explicit act or by refraining to do so on the national level—of so many issues pertaining to sexuality to states and even more so to localities not only impacts residential patterns of gays and lesbians, nor does it only bring about specific local legal reforms. It has brought about the creation of safe havens for gays and lesbians in which they are protected from discrimination and harassment and 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 their dissenting views, but also to act upon them, drawing state and national attention to their plight; it facilitates the visualization of a previously invisible minority; and it enhances the pluralism of the society as a whole due since it allows radically different communities to exist side by side.

But the localization and territorialization of sexuality have a dark side, too. The withdrawal of gays and lesbians from the national and even state level into the local one might possibly lead to giving up on achieving changes at these extended spheres; it might entrench and even enhance dis-

\footnote{177} Some of these cities include: Dallas and Houston, TX, St. Louis, MO, Louisville, KY, Cleveland, OH.
\footnote{179} 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 http://articles.sfgate.com/2001-10-17/news/17624287_1_gay-voters-mayor-willie-brown-senate-seat2.}
crimination and violence towards gays and lesbians who live outside of the cities which serve as safe havens; it radicalizes the discourse and actions concerning the regulation of sexuality, and might provoke backlash, retaliation and restrictive legal measures by states as well as by other localities; and it increase the fragmentation of the body politic.

We evaluate the normative implications of the localization and territorialization processes by examining them through three prisms, each having a distinct focal point: first, we focus on the individual level, emphasizing the benefits that stem to individual gays and lesbians from these processes and the harms caused to them by it; second, we move to examine the implications of localization and territorialization at the community level; third, we evaluate the consequences of the said processes at the societal level.

A. Cities of Refuge v. Dangerous Cities

One of the major advantages of the localization of sexuality is that it creates “cities of refuge”\(^{180}\) in which individual gays and lesbians can lead their lives free of discrimination, harassment and fear of violence.\(^{181}\) As we have shown, cities can do that by using various mechanisms such as combating hate crimes, promulgating antidiscrimination laws (some of which apply only to public employers and service providers and some to private ones, as well), instituting same-sex partnership registries, adopting antibullying policies and encouraging gay-straight alliances in their schools, and funding tolerance programs. Some of these measures are directed at regulating private actions while others are intended to regulate the behavior of public entities, mainly the city itself when it acts as employer, procurer and provider of public services such as housing and education.

Although these local initiatives indeed provide a significant and invaluable protection to gays and lesbians, the jurisprudential weakness of American cities and their legal submission to state and federal power curtail their ability to effectively combat public and private discrimination, even within the city’s limits. As many friends of local government law repeatedly argue, the lack of federal constitutional recognition of cities’ rights, the longstanding Court’s jurisprudence which views cities as mere

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\(^{180}\) Localities can serve as cities of refuge not only in the context of 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 Cuisin Villazor, “Sanctuary Cities” and Local Citizenship, 37 FORDHAM URB. L.J. 573 (2010). While for gays and lesbians the disparity between state and federal law on the one hand and local ordinances on the other hand might not seem as extreme, since gays and lesbians as a group do not face the risk of deportation, often there still exists a significant tension between the policies of the locality and those of the federal and state’s governments.

\(^{181}\) See Haylotte & Kane, supra note, at 151 (arguing “the generalized hostility in the U.S. culture encourages clustering as a protective mechanism”).
“subdivisions of the state” and therefore subsumed under state power, the often strict interpretation of “home rule” authority, and the ensuing limitations imposed on cities such as the “private law exception”, the limited ability to levy taxes and the inability to impose criminal sanctions. Therefore, even cities of refuge are unable to marry same-sex couples nor can they grant the alien same-sex partner of a citizen legal status; and the extent to which they can confer real benefits on same-sex couples through local registries (and other measures) is potentially—and sometimes de facto—limited by their state’s constitutional home rule powers and their interpretation by courts. Furthermore, cities’ ability to benefit same-sex partners and to protect gays and lesbians from discrimination is also constrained by specific state legislation which might preempt local actions. Due to their limited taxing powers, cities have at their disposal only limited funds to spend on various gay-friendly activities such as tolerance programs and enforcement of antigay hate crimes.

Not only is city power to regulate sexuality limited; it can also prove to be a double edged sword. As we have seen above, while some cities use their discretion to benefit gays and lesbians, other cities use it to express their condemnation and disapproval of gays and lesbians. In most cases they simply abstain from taking any action to protect them, e.g., not amending their city codes to include sexual orientation as prohibited grounds for discrimination, not provide same-sex spousal benefits, not funding enforcement of antigay hate crimes. This local inaction, combined with the oft hostile societal attitudes leaves gays and lesbians exposed to discrimination, harassment and sometimes even violence. Some cities go even further, trying to zone out gays and lesbians or seriously curtail their ability to socialize and act upon their identity in public. They do so using their zoning powers in an exclusionary manner and by targeting gay and gay-friendly establishments when applying their licensing and public health authorities.

While cities of refuge are often characterized by large gay and lesbian communities—being attracted to the gay-friendly environment but also

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183 See Barron, Reclaiming Home Rule, supra note 41 (discussing the ambiguities and inconsistencies of home rule doctrine); Diller, supra note 62, and Schwartz, supra note 66(discussing the private law exception).
185 Immigration is but one example of numerous powers that rest solely with the federal government, such as international affairs and national security. See Yishai Blank, The City and the World, 44 COLUM. J. TRANSN’L. L. 875, 924-925 (2006); Sarah H. Cleveland, Symposium: Crosby and the “One Voice” Myth in U.S. Foreign Relations, 46 VILL. L. REV. 975 (2001).
186 See supra.
187 See supra.
188 See supra.
propelling this legal and social environment—the opposite is true for “dangerous cities.” The latter usually have a smaller visible gay and lesbian population, in part due to the existence of such gay magnets as the cities of refuge. The result is a vicious circle: the smaller and less visible the gay community is, the less likely is the city to adopt gay protective measures, and the more likely gays are to migrate out of the city. As we argue later, this vicious circle might result in a growing social animosity, fragmentation and separatism.

B. Community Empowerment v. 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. And where local background legal norms allow, protect, incentivize and even finance gay and lesbian establishments and associations their communities can thrive and flourish. Indeed, gay bars and saunas are the places where the gay and lesbian liberation movement fermented and came to life. These often hidden spaces allowed to budding of an active and empowered community. To these days, gay and lesbian communities—like other ones—depend on places and institutions where they can socialize, interact, support each other and form a communal common good.

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 Frug defines it: “the ability to participate actively in the basic societal decisions that affect one’s life.” Harnessing local governments’ powers to positively advance the goals, ideas and desires of gay and lesbian communities and not merely to protect individuals from discrimination and violence goes beyond negative liberty, affording them with the capability to advance their shared worldview.

Moreover, in cities where gays and lesbians constitute a locally significant constituency that can exert meaningful political clout they are further empowered and might be thought of as exercising, to a certain extent,

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189 See Murray, supra note 101.
190 See Warner, supra note 79.
192 See Frug, supra note 90, at 1068 (Frug attributes the concept of “public freedom” to philosopher Hannah Arendt).
self-rule. This point lies at the heart of a compelling argument made by Heather Gerken. Permanent minorities—those that could never become a majority of the votes at the federal level—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. They can “speak truth to power” but they can never be powerful. And if they want to act, they need to modify and de-radicalize their views and positions. But in fact, Gerken argues, our structure of government enables such minorities to “dissent by deciding” thus act radically, and “speak truth with power.” Such permanent minorities can do so since they are enabled to form local majorities, which the law grants with decision making powers. San Francisco’s Mayor’s decision to marry same-sex couples is a prime example for such dissenting by deciding. Although it was clear that the city’s position on gay marriage was a minority view in both California and the federation, by extending their authority to issue marriage licenses to same-sex couples San Franciscans did more than voice their dissent; they acted upon it.

The strength of dissenting by deciding lies not 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 beyond his authority. What is more crucial is that through such local “disobedience” minorities are 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.” The nationwide ripple effects caused by such governmental action were also felt at the local level as other communities with similar views followed suit. The same ripple effect also took place when already in the 1970s cities started legislating antidiscrimination ordinances that included sexual orientation as prohibited grounds for discrimination.

The localization and territorialization that we have described causes gays and lesbians to take part in government. Since gays and lesbians only very rarely form solid a local majority, they must share this decision making power with other social groups. Such governmental power-sharing enhances mutual understanding among often previously hostile communities. It forces 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 lesbi-

194 See Gerken, supra note 44.
195 Id. at 1750.
196 Id. at 1748.
198 Gerken, supra note 44, at 1754.
199 Id.
ans 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 be less adamant about their opposition to gay and lesbian rights.

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. As various studies have shown, city politics is often characterized by pitting minorities against each other, causing inter-group conflict and rivalry. Implied in this process is the accentuation of identity politics—and of the radical “difference” between social groups—which might result in strengthening of stereotypes and animosity.

Furthermore, gay and lesbian empowerment at the local sphere 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. 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 rather than its mitigation.

C. Pluralism v. Fragmentation

One of the greatest advantages of the decentralization to localities of decision making powers in general and as regards sexuality in particular is the pluralism that it fosters. 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. In Madisonian terms, the localization of sexuality promises that no one view about such matters gain complete dominance throughout the entire federation.

In this vein, it could be argued that the decentralization of power to localities to determine whether straights receive priority over gays and lesbians

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200 Castells, supra note 154.
202 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, 70-71 (2000) (arguing that for Madison, federalism was an institutional arrangement that ensured the flourishing of religious pluralism). See also The Federalist No. 50 (James Madison).
or whether gays and lesbians receive equal—or even superior—treatment is a better mechanism of 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 federation was dominated—perhaps even captured—by a strong preference for heterosexual sexuality, if not by outright anti-gay views. Cities were the first to break away with the hegemony of heterosexuality, enabling the emergence of a more pluralistic vision of sexuality. Thus, already in the 1970s, during which not even a single state had antidiscrimination laws prohibiting discrimination on the basis of sexual orientation, twenty-six cities enacted such local antidiscrimination ordinances. In the following decade, twenty-four cities and counties added sexual orientation to their antidiscrimination codes, while only two states followed these cities’ footsteps and did the same. The cities that were spearheading this process, it should be noted, were not necessarily located in liberal states. In fact, some of them lie in the heartland of the most conservative ones. Thus, while Texas was still enforcing its sodomy laws in 2003, Austin enacted its antidiscrimination ordinance already in 1975. To date, cities are still at the forefront of pro-gay legal innovations, even though national politics rather dominantly endorses 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 “plu-

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203 An exception is the District of Columbia which prohibited discrimination based on sexual orientation already in 1977. However, the District of Columbia resembles more a city than a state in this regard.

204 These cities are: Berkley, CA (1978); Los Angeles, CA (1979); San Francisco, CA (1978) Aspen, CO (1977), Hartford, CT (1977); Champaign, IL (1977); Urbana, IL (1979); Iowa City, IA (1977); Amherst, MA (1976), Ann Arbor, MI (1978); Detroit, MI (1979); Minneapolis, MN (1974); Village of Alfred, NY (1974); Yellow Springs, OH (1979); Austin TX (1975); Madison, WI (1979). See Woods, supra note 64, 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 was the first locality to enact such protection. See James W. Button et al., Private Lives, Public Conflicts – Battles Over Gay Rights in American Communities 65 (1997).

205 These cities are: Cathedral, CA (1987); Davis, CA (1987); Laguna Beach, CA (1984); Long Beach, CA (1989); Los Angeles County, CA (1989), Oakland, CA (1984); Santa Monica, CA (1984); West Hollywood, CA (1984); Boulder, CO (1987); Chicago, IL (1988); Baltimore, MD (1988); Howard County, MD (1983); Montgomery County, MD (1984); Boston, MA (1984); Brookline, MA (1988); Cambridge, MA (1984); Malden, MA (1984); Worcester, MA (1986); East Lansing, MI (1986); Ithaca, NY (1984); Harrisburg, PA (1983); King County, WA (1988); Seattle, WA (1980). See Woods, supra note 64, at 554-55.


208 See Woods, supra note 64, at 554.
nalism as diversity.” Since localities can use their powers to express their disapproval of gays and lesbians, the range of attitudes towards homosexuality and heterosexuality is broad, reflecting the real plurality that exists among the American people. Since our 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.”209 And even if we disagree with their particular view, it demonstrates the profound diversity that vibrant localism fosters.

But where there’s hope, there lies danger, too. Local innovation and community self-expression might deteriorate into a full-fledged balkanization and fragmentation of the body politic. Lacking constitutional constraints, localities might express—and enact into law—the most radical and violent views, often targeting weak and vulnerable minorities. Instead of Madison’s “positive pluralism” we might in fact face what he termed the “violence of faction.”210 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 increased zeal. In his view, a structure of weak federal institutions and too strong states (and localities) could bring about the deprivation of individual rights within states and localities, and the radicalization of the entire federation.211 Madison’s cure—“extending 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.212

The debate among local government scholars concerning San Francisco’s decision to marry same-sex couples exemplifies the tension between the advantages of localism and its dangers in the context of sexuality. As against the optimism of localists such as Richard Schragger who celebrates 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 their reduced susceptibility for capture, the easy ability of individu-

209 Barron, supra note 193.
210 THE FEDERALIST NO. 10 (James Madison).
211 Madison argues: “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”. THE FEDERALIST NO. 10 (James Madison).
212 THE FEDERALIST NO. 10 (James Madison).
als to exit them, and the local nature of the issue—Ford is worried “about the type of constitutional revelations we might expect in other cities with different political constituencies.” In other words, the risk is that cities will adopt radical measures concerning gays and lesbians as against the more moderate federal ones, and that this radicalization will create an 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 explicit anti-gay policies. For example, they could decide to repeal their local antidiscrimination ordinances (if they had such), 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 cause a positive ripple effect, with other cities (and even states) joining in 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.

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Despite their enormous importance and far reaching consequences, the localization and territorialization of sexuality have not only gone nearly unnoticed; they have 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 theoretical oversight 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. Unlike race and religion, which shaped, to a large extent, the political and legal structure of the American republic from its inception, sexual orientation has appeared as a “problem” only in the second half of the twentieth century. And it became one of the major is-

213 See Schragger, supra note 197, at 154-155, 164. Schragger argues that localities have a strong interest in the types of families that reside in them and in their stability and are thus best fit to determine who can marry within their jurisdiction.
215 John Murph, Moral Values Push Bush to Victory: Same-Sex Marriage Was a Wedge Issue for Some Blacks (Nov. 19, 2004). See http://www.msnbc.msn.com/id/6531772/ns/us_news-life/moral-values-push-bush-victory. See also Paul Freedman, The Gay Marriage Myth: Terrorism, Not Values, Drove Bush’s Re-election, SLATE (Nov. 5, 2004) (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).
2011] THE GEOGRAPHY OF SEXUALITY 51

sues that divide the nation since the 1990s. This Article is an attempt to correct this oversight by focusing on the institutional design of the regulation of sexual orientation. After describing and analyzing the current legal structure (which we have termed “the localization of sexuality”), and evaluating its normative implications, we now offer 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 a century, American cities provided gays and lesbians—a permanent minority—refuge from nationwide hostility and discrimination and allowed for the gradual erosion of the hegemony of heteronormativity. Sexual minorities were able to congregate, socialize and empower themselves in several 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 publically express their shared culture and values. Thus, despite the risks posed by the decentralization of the power to regulate sexuality to localities, we argue 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 expressing disapproval of gays and lesbians but 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 what follows we discuss, albeit briefly, the ways in which cities need to be bolstered and which federal and state mechanisms should be developed in order to curb abuse of local power. We conclude by arguing that it would be a mistake to think that decentralization entails lack of central control or supervision. Indeed, 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. Sexuality, like many other areas of human action, depends upon a multilevel governance system in which localities, states and the federal government all share power and collaborate with each other. Any attempt to allocate and fix decision making powers to one level is doomed to failure.

1. Bolstering Local Governments

Local governments are major and indispensable actors in the regulation of sexuality. And it’s a good thing, too. As we already noted, their role in the regulation of sexuality resulted in numerous beneficial outcomes and promoted several important values: it promoted individual safety and liberty from private and public discrimination and harassment; it allowed
the creation of vibrant gay and lesbian communities; it facilitated democratic values such as self-rule and participation in government; and 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” which is pertinent to these matters: 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? Indeed, conflicts surrounding sexuality involve, and 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. By conceptualizing local governments as “subdivisions of the state” and thus subject to its authority, courts enable states to amend city charters and curb city powers at will.\(^\text{217}\) Thus cities find themselves under a constant threat of having their decisions annulled, resulting in a chilling effect on localities that consider adopting policies that run counter to their states’. Although home rule provisions—where they exist—supposedly protect cities from such overt interventions by their states, their indeterminate and sometimes narrow interpretation by courts puts city’s actual powers to act in constant doubt and often strips them of their ability to regulate sexuality.\(^\text{218}\) This is so since courts interpret home rule authority as being negated where city’s action have “external” effects, and, as many scholars have demonstrated, such externalities can be found in almost any city action. 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.\(^\text{219}\)

These dangers are heightened in recent years by the Rehnquist and Roberts Courts’ “states’ rights” doctrine.\(^\text{220}\) Although 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 gov-

\(^\text{217}\) Frug, supra note 90; Frug, Ford & Barron, supra note 41.
\(^\text{218}\) Barron, supra note 41.
\(^\text{219}\) Ralph, supra note 55.
ernmental powers, they 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. Justice Scalia’s dissent in *Romer v. Evans* can be construed to be stating this position in the context of the regulation of sexuality. 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.221 Even though Scalia is left in dissent, his position regarding state-local relationship is far from being a minority view.

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 brush strokes. First, it is crucial that American law departs from the notion that cities are “administrative conveniences,” mere “subdivisions of their states.” 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 that our nation faces.222 Second, considering their immense duties and unique role in the regulation of the lives of their residents, cities need to be vested with the corresponding powers without them being subject to retaliation and usurpation of power by their states. This can be achieved through judicially-imposed 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—need to be safeguarded against their state’s attempts to abolish them. And the majority opinion in *Romer*, he claims, should be read as safeguarding cities’ rights no less than as protecting the individual rights of gays and lesbians.223 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.224 Such novel understanding means that cities’ interpretation of the constitution 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.

221 *Romer*, supra note 14, at 644-653.
222 FRUG, supra note 41, at 71-112.
223 Barron, supra note 193, at 586-594.
224 See Schargger, supra note 197.
2. Extending Federal Protections to Gays and Lesbians

The more we empower cities, the more we need to worry about abuse of this power and need to develop structural checks against the negative consequences of too powerful cities. But cities’ excessive power is not the only danger that needs to be addressed. Even if our suggestion to bolster local power is adopted, states and the federal government would still possess significant authorities in the regulation of sexuality, thus be able not only to discriminate against gays and lesbians but also persecute them. At the core of these problems lies the lack of any significant constitutional protection of gays and lesbians.

This lack is particularly conspicuous when sexual minorities are compared to racial and religious ones. While the Supreme Court interpreted the Bill of Rights as including extremely important provisions that ensure the protection of racial and religious minorities from improper governmental discrimination and use of power, the Court has refused so far to extend this protection to sexual minorities. Each group is protected in a different manner: racial minorities are given protection through the Equal Protection and the Due Process clauses; religious ones are shielded by the Establishment and Free Exercise clauses. The former mode of constitutional protection as currently interpreted by the Court practically prohibits race-based classification made by the government by subjecting it to the strict scrutiny test. The latter mode protects not the identity or the class of certain religious minorities, but their norms and practices. Sexual minorities are protected by neither of these constitutional modes. Therefore, neither the identity nor the practices of gays and lesbians are constitutionally protected from federal, state and local discriminatory acts.

Our constitution’s design has been deeply influenced by slavery and racial discrimination and even prior to that, by the dangers of religious persecution. Thus, two classifications—race and religion—gained dominance in American constitutional thinking and doctrine. Despite the obvious differences between sexual, racial and religious minorities, the decentralized structure of the American government puts all of them in danger of being persecuted by local majorities. The antidote to this risk given to racial and religious minorities is constitutional protection at the federal level. It is

\[ \text{\textsuperscript{225}} \text{See Yoshino, supra note 12.} \]
\[ \text{\textsuperscript{226}} \text{See Reva Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 Harv. L. Rev. 1470 (2004).} \]
\[ \text{\textsuperscript{228}} \text{See Janet E. Halley, Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick, 79 Va. L. Rev. 1721 (1993) (criticizing the dichotomy between act and identity as untenable).} \]
therefore necessary to adopt similar protective measures as regards sexual minorities. While the most obvious mechanism would be for the Court to define sexual minorities as protected class under its Equal Protection jurisprudence, we choose not to take a position in the debate whether to protect gays and lesbians as a protected class worthy of strict scrutiny or to suffice with defending them via the regular rational basis test, as the Court ruled in Romer.\textsuperscript{229} It is indeed possible that regular rational basis test, when applied carefully, will suffice in the majority of cases where sheer animosity towards gays and lesbians seems to motivate governmental action.\textsuperscript{230}

We argue that 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 (hetero)sexuality and the free exercise of (homo)sexuality. A “disestablishment of sexuality” interpretive principle will ensure that no government—federal, state or local—will be allowed to establish one preferred sexuality over the other. For example, under this proposed interpretive principle, local governments will not be allowed to zone out homosexual—or other non-heterosexual—families, or to endorse one preferred sexuality over the other in its school curriculum. Additionally, 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,\textsuperscript{231} the free exercise principle will protect them also in public, similarly to the protection given to religious practices. Such disestablishment and free exercise of sexuality principles do not require constitutional amendments, but rather a novel interpretation of already existing ones. Various scholars already suggested, the privacy principle as interpreted by the Court is too narrow and should be construed more broadly. Instead of protecting privacy in a limited and property-based manner—that is, only in the privacy of one’s home—it should be read as aimed at enhancing a person’s autonomy, her capacity to express her full humanity, positively understood.\textsuperscript{232} Realizing that sexuality has been localized requires such interpretation of the privacy principle since its free exercise is

\textsuperscript{229} Romer, supra note 14; See also Ludwig, supra note 121, at 517-518 (supporting the Court’s adherence to the rational basis scrutiny). Yoshino, on the other hand, argues that the present tests used by the Court when determining whether a minority group is “politically powerless” are insufficient. According to his proposed test, gays should be considered politically powerless. This might prove to be the “tipping point” for gays as they will be protected as the sixth classification. See Yoshino, supra note 12.

\textsuperscript{230} See Ludwig, supra note 121 (arguing that gays and lesbians will be better served if courts adopt a stringent “rational basis” test rather than a strict scrutiny when examining governmental schemes that impact them).

\textsuperscript{231} Lawrence v. Texas; See Thomas, supra note 191.

\textsuperscript{232} See Thomas, supra note 191, at 1446-1448, 1509-1513.
threatened by local majorities that might otherwise push gays and lesbians into the private sphere. Thus, instead of merely defending sexuality in the privacy of one’s home, a more robust protection of privacy-as-autonomy would require governments to enable and advance the flourishing of a multitude of personalities and sexualities. A shift from privacy-as-property to privacy-as-autonomy would mean that marginalized sexualities will receive protection even in more public settings, not just when performed in private. Such principle would therefore mandate all levels of government to protect individuals from sexuality-based harassment and bullying in public schools and institutions, and from discrimination in other public institutions such as marriage.

Second, 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—comparing sexuality to race—as well as to the problematic nature of arguments “from immutability” that are often given as reasons for the need to treat gays and lesbians equally.²³³ 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. The attempt to define sexuality as an “identity” similar to race or other immutable identities risks the protection of sexuality only in its most narrow and private aspects, leaving various practices and cultural aspects 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—perhaps it would be better to protect it through a First Amendment-like institutional arrangement. Such an arrangement will accept the plurality of sexual orientations but will ensure that not one single sexuality receives dominance over the others and obtains governmental endorsement.

However important these protective constitutional principles might be, it is no less crucial to promote federal laws and programs aimed at protecting gays and lesbians given the reality in which one type of sexuality—the heterosexual one—became too dominant. It is pertinent that gays and lesbians would be able to make their decisions regarding where to live, work and travel without the risk of these being unduly influenced by fear of discrimination and persecution. Thus, it is important that federal antidiscrimination laws be legislated in the realm of work and public accommodation.

Such federal constitutional and legislative protections will not, however, exhaust the role of governments in the regulation of sexuality and will still leave ample room for localities to shape and influence their local sphere. Cities will still be able to reflect the values and cultures of their 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—religious or sexual—faction over the rest. For instance, cities will still be able to decide on the extent to which gay establishment 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.

3. The Multilevel Governance of Sexuality

Like most federal arrangements, it would be a mistake to view the existing division of labor between the various levels of government regarding sexuality as fixed and determinate. Recent literature regarding federalism, called by different names such as "polyphonic federalism," "interactive federalism," "dynamic federalism," point to the fact that all attempts to allocate clear and unique spheres of competence among the different levels of government have failed. They show that in reality the realms of responsibilities of the federal, state and local levels are always muddled and overlapping and argue that this is normatively desirable. Christina Rodriguez, for instance, recently showed 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. While passports and border control are indeed—and should be—at 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 immigrant live, are made in smaller scale governments. It is the nature of multi-tiered governmental structures that instead of giving exclusive authority to certain governmental level over certain issues, there exists a fluid and functional division of powers between them. Thus, while during some period the federal level might enjoy dominance in the regulation of foreign affairs, at other times it might also become the business of states and even

localities. Such division of labor between different governmental levels depends on the institutional capacities of each level, on their relative advantages and disadvantages, and on contingent parameters such as the national salience of the issue at hand.

Sexuality, we argue, should be understood and therefore regulated according to this more fluid conception of federalism. Instead of viewing sexuality as one single matter that needs to be dealt with by either the national government or by the state or by localities, it should be disaggregated into its various components, with each delegated to a different level of government. 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” affects that implicate other jurisdictions. It is for this reason that states are the regulators of marriage, and why DOMA is probably an undesirable encroachment into their domain. On the other hand, the decision whether or not to adopt governmental procurement policies that would extend antidiscrimination protection to private employers, is confined to the local sphere, can be easily administered by it and has no significant externalities, and should thus remain within its powers.

IV. CONCLUSION

Sexuality, like pornography, is a matter of geography. It changes 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 to form communities on its basis. These rules, we argued in this Article, play a significant role in shaping individual and collective choices regarding where to reside, and where to stay away from. The residential patterns of gays and lesbians are thus 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, but gave no in depth thought to the overarching legal structure that came to be. It is therefore imperative to re-consider the current legal structure and doctrines concerning sexuality. This Article provided an analysis of the current situation and offers a new path to move forward.

238 See Cleveland, supra note 185.