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Civil Rights for Gays and Lesbians and Domestic Partner Benefits: How Far Could an Ohio Municipality Go

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CIVIL RIGHTS FOR GAYS AND LESBIANS AND DOMESTIC PARTNER BENEFITS: HOW FAR COULD AN OHIO MUNICIPALITY GO?

MARK A. TUMEO¹

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Few issues in the United States today stir up as much public fervor and debate as the issue of Domestic Partnership (hereinafter DP) benefits. In January of 2000, Lakewood, Ohio was embroiled in a contentious debate over a proposed ordinance to provide domestic partnership benefits to its municipal employees.² In April of 2002, Cleveland Heights introduced similar legislation, and is now the first city in Ohio to have enacted such legislation.³ It is anticipated that the state legislature will respond with a law declaring such city ordinances illegal.⁴ This Article explores the domestic partnership issue with respect to how far an Ohio municipality can go in granting DP benefits.

This Article is divided into five sections. In the first section, the economic, social and political factors surrounding gay and lesbian rights, especially with respect to DP benefits, are discussed. These factors revolve around the complex issue of the “right to marry” and the economic and legal benefits that derive therefrom. The second section deals with possible legal challenges under Ohio law should a municipality decide to pass a DP benefits ordinance. This section has two parts—an analysis of whether an ordinance is in conflict with Ohio law, and if it is, whether it supersedes or is superseded by the conflicting state statute. Because this issue has been such a high-profile issue over the last decade, Congress has weighed in. Therefore, questions under federal law and the United States Constitution arise; they are discussed in the third section. Section four focuses on an examination of challenges that might arise should the state legislature intervene after a municipality has acted. This section explores hypothetical state laws that might be passed should opponents of gay and lesbian civil rights move the fight to the state house and the potential arguments protecting municipal ordinances from such attack. The last section summarizes the analyses of the Article.

I. INTRODUCTION

It can be argued that the composition and view of “family” in the United States has been undergoing radical change since World War II. While the traditional view was one of a male breadwinner with a stay-at-home wife who tended to the children, the current composition of family is much more complicated. In 1995, almost 25% of families in the United States were single parent households⁵ and approximately one-third of all children are born to unmarried

²Denny Sampson, *Lakewood Council Kills Partner Bill*, GAY PEOPLES CHRON., Jan. 21, 2000, at 1. One of the leading opponents of the ordinance was quoted as saying he was concerned about the costs of future litigation if the ordinance passed. “[S]tate and federal courts are going to have the last word on this issue.” *Id.*

³CH Studies Domestic Partner Bill, THE SUN PRESS, Apr. 4, 2002 at A1.

⁴As of April 2003, two companion bills have been introduced in the Ohio legislature that would attempt to declare the Cleveland Heights ordinance and any like it in Ohio invalid. Anthony Glassman, *Ohio ‘Super Doma’ Would Cancel Benefits*, GAY PEOPLES CHRON., Mar. 28, 2003 at 1.

⁵Dore Hollander, *U.S. Families Post-Brady Bunch*, in 29 FAMILY PLANNING PERSPECTIVES, Mar-Apr. 1997, at 50-51.

parents.⁶ Unmarried cohabiting couples, both straight and gay, are also an increasing fixture as an American family. Data shows that by 1997, unmarried heterosexual couples living together in the United States had increased from 523,000 in 1970 to over 4.1 million in 1997.⁷ It is estimated that an additional four million same-sex couples live together in the U.S., but the failure to attempt to document such couples in the U.S. census makes determining an accurate number difficult.⁸

A. *Benefits of Right to Marry*

What constitutes a “family” is a critical issue in a legal sense. When the law recognizes the familial relationship through the mechanism of marriage, numerous legal and economic benefits accrue. A complete and thorough history of marriage is well beyond the scope of this Article. For a legal review, however, the reader is referred to the detailed development provided by J. H. Baker in *An Introduction to English Legal History*.⁹

The contract aspect of the marriage required that witnesses be present at the ceremony.¹⁰ These original common law requirements remain in today’s civil contract of marriage.¹¹ Because common law marriage was originally a religious issue by custom,¹² it became entwined in the concept of procreation and continuation of the church. As a consequence, there is wide public belief in the United States that marriage is a religious ceremony requiring the approval of a church, as opposed to a civil contract between two people.¹³

The ability to marry confers major legal benefits under both state and federal law, including legal protections in recognition of the relationship and significant economic benefits in terms of property and benefits. Table 1 provides a brief summary of the types of rights and benefits that accompany the right to marry.¹⁴

⁶Dominick Vetri, *Almost Everything You Always Wanted To Know About Lesbians And Gay Men, Their Families, And The Law*, 26 S.U. L. REV. 1 (1998).

⁷*Id.* at 25.

⁸*Id.* at 25.

⁹J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY*, (3d ed., 1990). This work traces the legal development and consequences of marriage law from the 9th century through to the late 20th century.

¹⁰*Id.* at 550.

¹¹See OHIO REVISED CODE ANN. § 3101.10 (West 2000).

¹²BAKER, *supra* note 10, at 545.

¹³JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* (1994), Introduction, pg .xxii.

¹⁴See Vetri, *supra* note 7, at 46. Most of the rights, privileges, benefits, and responsibilities in Table 1 relate to state laws. During the debate on Defense of Marriage Act [hereinafter “DOMA”], the federal General Accounting Office (GAO) did an electronic search of all U.S. statutes in which marital status is relevant. 1,221 such statutes were found. They classified such statutes into the following thirteen categories: (1) Social Security and Related Programs, (2) Housing, and Food Stamps, (3) Veterans’ Benefits, (4) Taxation, (5) Federal Civilian and Military Service Benefits, (6) Immigration, Naturalization, and Aliens, (7) Indians, (8) Trade, Commerce, and Intellectual Property, (9) Financial Disclosure and Conflict of Interest, (10) Crimes and Family Violence, (11) Loans, Guarantees, and Payments in Agriculture, (12) Federal Natural Resources and Related Laws, and (13) Miscellaneous Laws. See *Defense of Marriage Act*, Letter Report, GAO/OGC-97-16 (Jan. 31, 1997).

B. Marriage Versus Domestic Partnership Benefits

As can be seen from Table 1, unmarried couples face a significant economic and legal disadvantage. Of course, heterosexual couples are free to obtain the benefits associated with marriage by entering into the marriage contract. For gay and lesbian couples, however, there are few, if any, mechanisms to overcome the disadvantages.

TABLE 1: EXAMPLES OF RIGHTS AND BENEFITS ASSOCIATED WITH MARRIAGE

<u>Legal Recognition of Relationship</u>	<u>Property and Money Concerns</u>
<ul style="list-style-type: none"> • the right to make medical decisions for an incapacitated partner • the right to visit a partner in hospitals and other public and private facilities • domestic violence protections • right of action for wrongful death and/or loss of consortium and ability to recover emotional distress losses as a bystander witness when one's partner is seriously injured or killed through negligence¹⁵ • the marital communication privilege • child custody and visitation rights • immigration rights • use of step-parent adoption laws • divorce protections 	<ul style="list-style-type: none"> • the right to employment fringe benefits for the non-employed spouse, including health insurance and pension benefits • automatic inheritance rights under intestacy laws • assumption of a deceased spouse's pension • spousal benefits under universal government programs such as social security, Medicare, unemployment, and welfare • the right not to be taxed for employer health insurance benefits extended to one's partner • exemption from inheritance taxes on partner's death • income tax benefits including joint returns and deductions and exemptions • automatic transfer of housing lease • eligibility for joint automobile and homeowner's insurance coverage

The disparity in rights afforded to gay and lesbian couples has led to a significant push on two fronts: a fight for the right to marry and a fight for DP benefits. While the fight for the right to marry is not the focus of this Article, it is a critical background against which to place the issues associated with domestic partnership rights. A brief summary of the situation with respect to gay and lesbian marriage rights demonstrates why DP benefit issues are now coming to the forefront nationally.

¹⁵On August 9, 2001, a San Francisco Superior Court held that Sharon Smith could proceed to trial in her lawsuit for the wrongful death of her same-sex partner, Diane Alexis Whipple. This ruling marks the first time in the country a court has held that excluding all same-sex partners from the right to bring a wrongful death suit violates the constitutional principle of equal protection. *See* Smith v. Knoller, *National Center for Lesbian Rights*, at <http://www.nclrights.org/cases/smithknoller.html> (last visited November 10, 2002).

1. The Fight for the Right to Marry

Until 1993, it was a common assumption that marriage would remain a *sanctum sanctorum* on the American legal landscape.¹⁶ In that year, however, the Supreme Court of Hawaii handed down its landmark decision in *Baehr v. Lewin*.¹⁷ In this decision, the court reversed the lower courts' decisions to grant a judgment against Baehr's request for a marriage license based solely on the pleadings.¹⁸ Hawaii's Supreme Court held that Hawaii's Constitution provided the basis for the argument that Hawaii's denial of marriage licenses to same-sex couples was a violation of equal protection principles.¹⁹ The State would therefore have to "in accordance with the 'strict scrutiny' standard . . . overcome the presumption that Hawaii Revised Statutes § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgments of constitutional rights."²⁰ On remand, the court found no rational basis for denying same-sex couples the right to marry.²¹ Before the supreme court could rule, however, on the State's appeal, an amendment to the Hawaii Constitution was passed via initiative, to allow the legislature of Hawaii to restrict marriage to same sex couples.²² Subsequently, the Hawaii Supreme Court found that the amendment made prohibition against same-sex marriage in section 572-1 of the Hawaii Revised Statutes constitutional.²³

The initial success in Hawaii led to a similar filing in Alaska.²⁴ Concern about the application of the U.S. Constitution's "Full Faith and Credit" Clause being used to force other states to accept same-sex marriage as legal caused an uproar in conservative religious groups around the country.²⁵ In 1996, the United States Congress capitulated to political pressure from the conservative religious right and passed the Defense of Marriage Act (hereinafter DOMA).²⁶ The impact of DOMA on municipal powers to pass domestic partnership benefit ordinances is extremely limited and is not discussed in this Article. Simultaneously, a nationwide effort was launched to have states pass laws or amend their constitution to prevent

¹⁶See *Dean v. Dist. of Columbia*, 653 A.2d 307 (D.C., 1995) (upholding the case for failure to state a claim upheld); *Storrs v. Holcomb*, 245 A.2d 479 (N.Y. App. Div. 1997) (failing to join the state agency responsible for marriage registration as a necessary party).

¹⁷*Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹⁸*Id.* at 68.

¹⁹*Id.* at 68.

²⁰*Id.* at 583.

²¹*Baehr v. Miike*, CIV No. 91-1394, 1996 WL 694235, at *1 (Haw. Cir. Ct. Dec. 3, 1996). Subsequent litigation was named *Baehr v. Miike* because the newly appointed State Director of Health was substituted as a party defendant.

²²See *Human Rights Campaign Quarterly* at 4 (Spring 1999). The state legislature in 1997 passed a bill placing a referendum on the November 1998 ballot which purportedly would give the state legislature the constitutional power to elect to restrict marriage to opposite-sex couples. The Hawaii referendum was passed 69 percent to 29 percent on November 2, 1998.

²³*Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

²⁴*Brause v. Bureau of Vital Statistics*, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998)

²⁵Lambda Legal Defense and Education Fund, *Marriage Project Fact Sheet* (last modified, September, 1997) <<http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=49>>.

²⁶28 U.S.C. §1738C (1996).

gay marriages from being recognized.²⁷ As of January of 2000, thirty states had passed such laws or amendments, including Hawaii.²⁸ In 2000, Nevada also passed similar legislation. Ohio has not yet passed such legislation.²⁹

2. The Domestic Partnership Benefits Approach

Simultaneously with the push for marriage rights, a second avenue was being pursued within the gay and lesbian community to try and address at least the economic rights associated with marriage.³⁰ This effort is the domestic partnership effort. This approach, criticized by some as a “separate but equal” situation, allows same-sex (and sometimes opposite-sex) couples to receive at least health and some retirement benefits equal to married couples. Even though the domestic partnership approach does not provide equality for same-sex couples, it is significantly easier to successfully argue for some of the rights gays and lesbians are currently denied. Unlike marriage, it can be enacted through governmental units below the state level (such as municipalities) and by private companies. In addition, even though there has been successful litigation forcing entities to provide domestic partnership benefits on a range of equal protection and non-discrimination arguments,³¹ this approach is significantly less litigious. The success of this approach is best demonstrated by the fact that currently, ten states, over seventy municipalities, and three hundred private companies (including 100 of the Fortune 500) offer some type of domestic partnership benefits to their employees.³²

3. The Shift to Partnership Versus Marriage

While there is a tension between the concept of domestic partnership and the right to marry, the right-to-marry litigation seems to produce a strong movement towards the partnership option. Starting with *Baehr*, some politicians have argued that the need to treat all

²⁷Cf. Stanly Kurtz, *The Right Balance*, NATIONAL REVIEW ONLINE (August 1, 2001) available at <<http://www.nationalreview.com/contributors/kurtz080101.shtml>> (last visited April 9, 2003).

²⁸1999 *Anti-Marriage Bills Status Report*, Lambda Legal Defense and Education Fund, (last modified, Dec. 1999), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=319> (hereinafter Lambda Legal Defense Fund). The states are Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Washington. *Id.*

²⁹Anti-Gay marriage legislation was introduced in the Ohio House during both the 1996-97 and 1998-99 sessions (HB 160). Both times the bill was blocked and died in committee. The legislation was reintroduced in the 2000-2001 session in both the House (HB 234) and the Senate (SB 240). In October 2001, HB 234 was passed by the State House of Representatives by a vote of 43 to 23 and referred to the Senate. See Glassman, *supra* note 4, at 1.

³⁰Cf. Carnegie Mellon University, *Domestic Partnerships and Same Sex Marriages*, (last modified March, 1997) at <http://www-2.cs.smu.edu/afs/cs/user/scotts/domestic-partners/manpage.html>.

³¹See *University of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

³²*Partners Task Force for Gay and Lesbian Couples, Domestic Partners Benefits Section*, available at <<http://www.buddybuddy.com/toc.html>> (last visited March 2001) (hereinafter *Partners Task Force for Gay and Lesbian Couples*).

people equally requires some type of partnership recognition short of marriage.³³ This concept reached an important turning point in *Baker v. Vermont*.³⁴ In *Baker*, the Supreme Court of Vermont declared:

We hold that the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel “domestic partnership” system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.³⁵

After this decision, the Vermont Legislature passed civil union legislation in 1999 that created the first legal recognition of gay and lesbian partners on a statewide level.³⁶ Because partnership “status” can be afforded without arguing the sanctity of marriage or entering the debate on the religious and moral dimensions of marriage, it is a much more palatable political option. For example, Connecticut is now exploring the civil union approach pioneered in Vermont.³⁷ Therefore, it is highly possible that domestic partnership and civil union issues will now move to the forefront of the legal fight for gay and lesbian civil rights.

II. CHALLENGES TO GAY AND LESBIAN RIGHTS ORDINANCES UNDER EXISTING OHIO LAW

Recent examples show that gay and lesbian rights activists have the most success acting on a local level. As this seems to be the most effective political approach for the time being, it is critical for those both for and against such legislation to know just how far an Ohio municipality can go in passing such ordinances. This section explores this question with respect to Ohio law using a three-step process. First, it is necessary to know what options exist in terms of such ordinances (e.g. exactly what rights are being granted). Second, the options must be compared to existing state law to determine if it is within the power of the municipality to enact. Third, even if current state law allows an option to be exercised, it is not unreasonable to expect that the action of a municipality may provoke a response at the level of the state legislature, or even in the U.S. Congress, as demonstrated by the Hawaii situation. This section deals with the first two prongs of the analysis. The third prong, state reaction and federal issues, is addressed in sections three and four of this Article.

³³See Vetri, *supra* note 7, at 55-56. At the time the Hawaii Legislature referred the constitutional amendment to the people in 1997, Hawaii legislators adopted limited domestic partner benefits to justify their anti-gay marriage amendment proposal. *Id.* It was their view that the creation of such limited domestic partner benefits would be viewed by the courts as an appropriate compromise to justify a prohibition on same-sex marriages. *Id.* The domestic partner benefits include provisions for (1) hospital visitation and medical decisions; (2) ability to sue for wrongful death; (3) inheritance rights, in case one of the partners dies intestate; and (4) holding property by tenancy in the entirety. *Id.* The Governor of Hawaii after the referendum vote suggested that the statutory benefits be broadened to cover “everything but” marriage.” *Id.*

³⁴*Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

³⁵*Id.* at 867.

³⁶VT. STAT. ANN. tit. 15. §§ 1201-1207 (1999).

³⁷*Connecticut May Recognize Same-Sex Couples*, GAY PEOPLE’S CHRON., Mar. 16, 2001, at 1.

A. *The Range of Options for Ohio Municipal Ordinances*

It is clear that an issue such as the right to marry is a state issue beyond the scope of a municipality. Other issues of rights, however, are much less certain. In general, based on the experience and example of the over seventy municipalities that have already passed domestic partnership ordinances,³⁸ the range of options theoretically open to Ohio municipalities can be loosely grouped into three categories:

- (a) prohibitions on discrimination in housing, employment or other public accommodations within the municipality on the basis of sexual orientation;
- (b) grants of benefits to the domestic partners of municipal employees commensurate with those offered the spouses of married employees; and
- (c) requirements that public entities and private entities contracting with the municipality provide benefits to employees with domestic partners commensurate with those offered to married employees.³⁹

Each one of these options will be explored under existing state law.

B. *Authority of Ohio Municipalities*

In Ohio, municipalities have been given extensive authority through the “Home Rule” amendment to the state constitution.⁴⁰ Under Article XVIII, section 3 of the Ohio Constitution, a municipality is vested with “all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”⁴¹ Section 7 provides that “any municipality may frame or adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self government.”⁴² These two sections, combined and separately, set up the scope of authority for municipalities, and have been the subject of significant litigation in the state. Through a series of cases, starting with the seminal case *Fitzgerald v. Cleveland*,⁴³ the courts have defined the spheres of power for both the state and municipalities. The authority of municipalities may be summarized as follows:

- 1) In matters of substantive local self-government, all municipalities, whether chartered under Article XVIII, section 7, have ultimate authority, subject only to Constitutional limitations.⁴⁴ In these matters, ordinances that conflict with state law supercede the state law.⁴⁵

³⁸See *Partners Task Force for Gay and Lesbian Couples*, *supra* note 35.

³⁹S.F. ADMIN. CODE § 12B.1(b) (1997). This type of ordinance was passed in 1997 by the City of San Francisco. Specifically, the ordinance prohibits the City from contracting with companies that do not provide benefits to their employees’ domestic partners to the same extent they provide benefits to employees’ spouses. *Id.*

⁴⁰OHIO CONST. art. XVIII, § 7.

⁴¹OHIO CONST. art. XVIII, § 3

⁴²OHIO CONST. art. XVIII, § 7.

⁴³*Fitzgerald v. Cleveland*, 103 N.E.512 (Ohio 1913).

⁴⁴The Supreme Court of Ohio clarified any doubt about the construction of Article 18, Section 3 in its per curiam decision in *State ex rel. Paluf v. Feneli*, 630 N.E.2d 708 (Ohio

- 2) In procedural matters associated with local self-government, those municipalities that are chartered under Article XVIII, section 7 have ultimate authority. Non-chartered municipalities, however, must follow state laws on procedural issues.⁴⁶
- 3) Any municipality may pass ordinances dealing with issues of “police, sanitary and other similar regulations,” commonly called police powers. In these areas, however, the ordinances must not conflict with state law. If a conflict between state law and an ordinance on this subject arises, the state law will prevail.⁴⁷

C. Challenges Under Existing Ohio Law

Given the broad grant of power to Ohio municipalities, there are only two avenues of attack against an ordinance. First, if the ordinance is in conflict with State law, the plaintiff can argue that State law preempts the municipal ordinance by arguing that: (1) the ordinance is an exercise of police power, and therefore subject to general state law; and/or (2) that the ordinance has significant effects outside the municipality and therefore an area of general state interest and subject to state legislative control. If there is no conflict with state law, the argument becomes much more difficult for the plaintiff. The only available attack in this latter situation is to argue that the ordinance is not an exercise of local self-government at all, and therefore is beyond the power granted to the municipality to enact. These two attacks will be analyzed separately from each of the three types of ordinances previously described in section two of this Article.

1. Ordinances Prohibiting Discrimination Based on Sexual Orientation

Is there a conflict with existing state law? There are numerous provisions in State laws that prohibit discrimination on the basis of any of a number of listed characteristics.⁴⁸

1994), when it stated, “The phrase ‘not in conflict with general laws’ does not modify the ‘powers of local government’ language of the Constitution.” *Id.* at 711.

⁴⁵It is important to note that just because the subject of an ordinance has local impacts does not mean it is an exercise of local self-government. The court has set forth the following test:

To determine whether legislation is such as falls within the area of local self-government, the result of such legislation or the result of the proceedings thereunder must be considered. If the result affects only the municipality itself, with no extraterritorial effects, the subject is clearly within the power of local self-government and is a matter for the determination of the municipality. However, if the result is not so confined it becomes a matter for the General Assembly.

Beechwood v. Cuyahoga Cty. Bd. of Elections, 148 N.E.2d 921 (Ohio 1958); *see also State ex rel. v. Tablack*, 714 N.E.2d 917 (Ohio 1999).

⁴⁶*Cf. Treska v. Trumble*, 447 N.E.2d 1283 (Ohio 1983). *See also State ex rel. Zeigler v. Hamilton Cty. Bd. of Elections*, 621 N.E.2d 391 (Ohio 1993).

⁴⁷*Cf. Vill. of Sheffield v. Rowland*, 716 N.E.2d 1121 (Ohio 1999).

⁴⁸*Cf. Vill. of Sheffield v. Rowland*, 716 N.E.2d 1121 (Ohio 1999). The following is a brief review of the sections of the Ohio Revised Code with such prohibitions:

§ 125.111: Requires every contract with the state to contain a prohibition against discrimination based on race, color, religion, sex, age, disability, national origin, or ancestry (*see also* § 153.59); to have a clause prohibiting intimidation or retaliation against employees on account of race, color, religion, sex, age, disability, national origin, or ancestry; and requiring an Affirmative Action plan.

However, nowhere in state law is there a protection against discrimination on the basis of sexual orientation. The Supreme Court of Ohio has explicitly indicated that Ohio law does not protect gays and lesbians in *Greenwood v. Taft, Stettinius & Hollister*.⁴⁹ However, there is no

§ 153.59 Requiring that every contract for or on behalf of the state, or any township, county, or municipal corporation of the state, for the construction, alteration, or repair of any public building or public work in the state shall contain provisions by which the contractor agrees not to discriminate in hiring on the basis of race, creed, sex, disability or color, and to ensure that no contractor, subcontractor, or any person on a contractor's or subcontractor's behalf shall so discriminate.

§ 340.12 Prohibiting any board of alcohol, drug addiction, and mental health services or any agency, corporation, or association under contract with such a board from discriminating in the provision of services, in employment, or contract on the basis of race, color, sex, creed, disability, national origin, or the inability to pay.

§ 3911.16 Prohibiting discrimination in the provision of life insurance on the basis of color or African descent.

§ 3911.18 Prohibiting life insurance companies from discriminating between any insured persons of the same class and of equal expectation of life.

§ 3999.16 Prohibiting insurance companies, from knowingly using underwriting standards or rates that to discriminate against any handicapped person. (Does not prevent reasonable classifications of handicapped person for determining insurance rates.)

§ 4111.17 Prohibiting discrimination in the payment of wages on the basis of race, color, religion, sex, age, national origin, or ancestry.

§ 4112.022 Prohibiting any educational institution from discriminating on the basis of disability.

§ 4112.02 Prohibiting any employer from discriminating on the basis of race, color, religion, sex, national origin, handicap, age, or ancestry and

§ 4112.14 Prohibits discrimination in employment based on age for individuals aged forty or older (Note, a change to this law passed in 1996 was struck down as unconstitutional in toto in *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999) on grounds not related to these provisions. The proposed new version of the law also contained similar prohibitions)

§ 4757.07 Prohibiting Discrimination by the counselor and social worker board and its professional standards committees on the basis if race, color, religion, sex, national origin, disability, or age.

§ 5126.07 Prohibiting Discrimination by any county board of mental retardation and developmental disabilities or any agency, corporation, or association under contract with a county board of mental retardation and developmental disabilities based on race, color, sex, creed, disability, national origin, or the inability to pay.

Greenwood v. Taft, Stettinius & Hollister, 663 N.E.2d 1030 (Ohio Ct. App. 1995).

⁴⁹In *Greenwood*, the plaintiff alleged he had been discharged from his job as an attorney in Taft's law firm because of his sexual orientation and in retaliation for working on the defeat of "Issue 3," the Cincinnati ant-gay rights Charter amendment. *Greenwood*, 663 N.E.2d at 1031. In upholding the lower court's dismissal of the case, the Court stated the "Ohio civil rights statutes, R.C. Chapter 4112, do not include sexual orientation among their protections. In fact, while R.C. 4112.02 prohibits discrimination based on "handicap," that term is defined specifically to exclude homosexuality, bisexuality, and other sexual disorders or dysfunctions." *Id.*, citing OHIO REV. CODE ANN. §§ 4112.01(A)(13) and (16)(b) (Anderson 2002).

state law or regulation denying protections based on sexual orientation. While this is a subtle distinction, it is critical in determining if a conflict exists.

The Supreme Court of Ohio has declared that “[i]n determining if a municipal ordinance is in conflict with the general state statute, ‘the test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.’”⁵⁰ Following this rule, one could argue that because there is no law allowing discrimination based on sexual orientation, an ordinance prohibiting such discrimination would not be in conflict with state law.

While there is no case law from Ohio on the issue of a municipal non-discrimination ordinance containing protections for gays and lesbians, there are both public proceedings and case law that indicate that the courts would uphold such an action. For example, the Public Utilities Commission of Ohio (hereinafter PUCO), acting under the requirements of Ohio Revised Code section 123.111 and section 153.59 has included in contracts with the state the required non-discrimination statement with a prohibition against discrimination on the basis of sexual orientation added.⁵¹ Similarly, the PUCO allows the inclusion of a similar statement in contracts between municipalities and private companies.⁵²

More to the point, Cuyahoga and Summit Counties⁵³ and thirteen cities currently have non-discrimination ordinances that protect gays and lesbians that have not been challenged by opponents in court.⁵⁴ The most well known Ohio city to deal with this issue is Cincinnati. In March of 1991, Cincinnati passed an ordinance commonly known as the Equal Employment Opportunity Ordinance, which mandated that the city could not discriminate in its own hiring practices on the basis of a list of factors, including sexual orientation.⁵⁵ This was followed by a Human Rights Ordinance that prohibited private discrimination in employment, housing or

⁵⁰Fondessy Enters., Inc. v. Oregon, 492 N.E.2d 797 Syllabus (Ohio 1986) (quoting Struthers v. Sokol, 140 N.E.2d 519 (Ohio 1923)).

⁵¹See e.g., In the Matter of the Commission Investigation and Establishment of Programs for Ohioans with Communication Impairments Public Utilities Commission of Ohio, 1991 Ohio PUC LEXIS 1180.

⁵²An example of a non-discrimination clause from a contract from the City of Vermillion reads:

shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, sexual orientation, national origin, handicap, age, or Vietnam-era veteran status. The Contractor will ensure that applicants are hired and that employees are treated during employment without regard to their race, religion, color, sex sexual orientation, national origin, handicap, age, or Vietnam era veteran status.

In the Matter of the Corridor Project for the Modernization of a Grade Crossing and a Closure to Vehicles at Grade Crossings, Public Utilities Commission of Ohio, 1996 Ohio PUC LEXIS 50 at 15.

⁵³On May 7, 2001, the Summit County Council voted unanimously to prohibit discrimination based on sexual orientation in its public work force.

⁵⁴Athens (1998); Cleveland (March 23, 1994), Ordinance No. 77-94, a law signed December 24, 1996 also makes discrimination a misdemeanor crime; Cleveland Heights (January 1995); Columbus (August 1984), City Code Ch. 2325 (pub. acc. & housing), June 1992 employment, Dayton (Executive Order); Lakewood (1997); Oberlin (date not provided); North Olmstead (1996); Toledo (12/8/98); Westlake (1997); Yellow Springs (November 1979); Town Charter, §29; and Youngstown (early 90s). *Lambda Legal Defense Fund, supra* note 29.

⁵⁵The Ordinance was also repealed by local ballot issue (Issue 3). Equal. Found. of Cincinnati, Inc. v. City of Cincinnati, 128 F.3d 289 (6th Cir. 1997) (repealing Cincinnati Ordinance No. 79-1991).

public accommodation based on sexual orientation.⁵⁶ None of these ordinances were challenged in the courts under state law. In fact, because the validity of the ordinance was never in question, opponents to the ordinance introduced a proposed amendment to the city charter via initiative to prohibit the city from designating gays and lesbians as a protected class.⁵⁷

Based on past practice in the state, since the existence of several municipal non-discrimination ordinances and since the issue was litigated without a challenge to the validity of an ordinance ever being raised, an ordinance prohibiting discrimination on the basis of sexual orientation is not in conflict with Ohio general law. Hence, whether the action is a matter of substantive local self-government or a police power is not an issue. The question of what the situation would be should a state law be passed to prohibit such local ordinances is discussed in Section four.

Is an ordinance an issue of local self government? Since no conflict with general state law exists, any remaining challenge to a municipality's non-discrimination ordinance would have to rest on the grounds that the issue did not involve any local interests. However, these ordinances prohibit discrimination in housing and employment *within* the municipality. Given the fact that several of these ordinances currently exist in Ohio, an argument appears unrealistic.

2. Ordinances Granting Benefits to the Domestic Partners of Municipal Employees

Is there a conflict with existing state law? There is one municipality that currently offer domestic partner benefits to municipal employees: Cleveland Heights.⁵⁸ While there are existing Ohio laws regarding minimum wage and various other aspects of wages, there is no state law dealing with benefits to municipal employees that determines which non-employee partners can be covered by an employer. Consequently, there does not appear to be a conflict with existing state law. This type of ordinance, however, may be subject to challenges under federal law as discussed in Section three. In addition, this type of ordinance and the potential political machinations that it could produce are further explored in Section four.

Is ordinance within power of municipality? The issue of whether the scope of municipal authority with respect to wages for municipal employees was litigated from several different angles. The most pertinent case to the issue of an ordinance providing domestic partnership benefits to municipal employees is *Northern Ohio Patrolmen's Benevolent Assn. v. Parma*.⁵⁹ In this case, the court held that Parma's ordinance allowing pay to city workers on military leave, which conflicted with a state law on the topic, was valid and superceded the state law because it pertained to "a matter of substantive local self government."⁶⁰ Further, the court stated that "the state's concern in this matter is not sufficient to interfere with the municipality's fiscal decision concerning wages paid its employees."⁶¹ Hence, it is very likely that the Supreme Court of Ohio would uphold an ordinance granting benefits to the domestic

⁵⁶Cincinnati Ordinance No. 490 (1992). On March 8, 1995, after the passage of Issue 3, the city council, by a vote of five to four, removed the sexual orientation clause from the Human Rights Ordinance.

⁵⁷This initiative, known as "Issue 3," was passed by over 60% of the voters in November 1993, and held to be constitutional even in the light of *Romer v. Evans*, 517 U.S. 620 (1996) (striking down a similar amendment to the Colorado Constitution as in violation of the U.S. Constitution's Equal Protection Clause). See *Equal. Found. of Cincinnati, Inc. v. Cincinnati*, 54 F. 3d 261 (6th Cir. 1995), *vacated by* 518 U.S. 1001 (1996).

⁵⁸See *Lambda Legal Defense Fund*, *supra* note 29.

⁵⁹402 N.E.2d 519 (Ohio 198).

⁶⁰*Id.* at 520.

⁶¹*Id.* at 525.

partners of municipal employees as a proper exercise of municipal authority under the Ohio Constitution.

3. Ordinances Requiring Benefits to the Domestic Partners of Employees of Contractors with the Municipality

Is there a conflict with existing state law? This issue represents a slightly more complicated fact pattern for analysis under existing law. Two sections of the Ohio Revised Code contain provisions requiring that non-discrimination clauses be included in municipal contracts. As noted above, the Ohio Revised Code section 125.111 requires “every contract for or on behalf of the state or any of its political subdivisions for any purchase” to include a clause that states the contractor will not discriminate on the basis of race, color, religion, sex, age, disability, national origin, or ancestry.⁶² Similarly, Ohio Revised Code section 153.59 requires that “every contract for or on behalf of the state, or any township, county, or municipal corporation of the state, for the construction, alteration, or repair of any public building or public work in the state” must contain a similar provision.⁶³ Therefore, the question arises as to whether a municipal ordinance that adds the requirement that the contractor provide benefits for the domestic partners of employees equivalent to those for married employees is in conflict with either of these laws. Since there is an issue of potential conflict, the argument over the ordinance enters issues not yet discussed in detail. These issues are: how to determine whether the ordinance conflicts with the state statute(s), and if a conflict exists, does state law or the ordinance have ultimate authority.

The standard rule for determining whether a state statute and municipal ordinance conflicts was set forth in *Struthers*⁶⁴ and was reaffirmed in 1986 in *Fondessy Enterprises*.⁶⁵ The rule asks “whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.”⁶⁶ In applying this standard, adding an additional requirement to the contract should not be viewed as a conflict.

The opponents of the ordinance, however, argue that the list of protected classes set forth in both the Ohio Revised Code sections 125.111 and 153.59 explicitly exclude sexual orientation through the legislature’s definition of “disability.” The pertinent sections of the Ohio Revised Code are:

§ 4112.01(A)(13). “Disability” means a physical or mental impairment that substantially limits one or more major life activities . . .⁶⁷

§ 4112.01(A)(16)(b). “Physical or mental impairment” does not include any of the following: (i) Homosexuality and bisexuality . . .⁶⁸

In *Greenwood v. Taft, Stettinius & Hollister*,⁶⁹ the court seized upon this language to dismiss a claim of discrimination based on sexual orientation.⁷⁰ The plaintiff alleged he was

⁶²OHIO REV. CODE ANN. § 125.111 (Anderson 2002).

⁶³OHIO REV. CODE ANN. § 153.59 (Anderson 2002).

⁶⁴*Struthers*, 140 N.E. at 519.

⁶⁵*Fondessy Enterprises*, 492 N.E.2d at 797.

⁶⁶*Id.* at 213.

⁶⁷OHIO REV. CODE ANN. § 4112.01(A)(13) (Anderson 2002).

⁶⁸OHIO REV. CODE ANN. § 4112.01(A)(16)(b) (Anderson 2002).

⁶⁹*Greenwood*, 663 N.E.2d at 1030.

⁷⁰*Id.*

discharged from his job because he was (1) gay and, (2) in retaliation for working on the defeat of “Issue 3,” the anti-gay civil rights ordinance in Cincinnati.⁷¹ In upholding the dismissal of the case, the Ohio Supreme Court stated that “the Ohio civil rights statutes, Ohio Revised Code chapter 4112, do not include sexual orientation among their protections.”⁷² In fact, while R.C. 4112.02 prohibits discrimination based on ‘handicap,’ that term is defined specifically to exclude homosexuality.⁷³

Contrary to *Greenwood*, opponents say that the legislature’s clear intent was to exclude sexual orientation *as a disability*.⁷⁴ However, this is significantly different than stating that the legislature intended to explicitly prevent gays and lesbians from being included. Furthermore, there is significant precedent of including additional terms in state contracts, including protections based on sexual orientation.⁷⁵ If in fact, the legislature had intended to explicitly block the inclusion of sexual orientation in non-discrimination clauses in contracts, the common practice by the Ohio Public Utilities Commission of including such clauses would have already been held invalid. Finally, the *Greenwood* case can be distinguished because it did not deal with a conflict between a state law and an ordinance. Instead, it pertained only with the question of whether there were protections in state law for gays and lesbians.⁷⁶ Hence, it could be argued that there could be no conflict with an ordinance requiring equal treatment because the court has already held no such coverage is present in state law.⁷⁷

The opponents of the ordinance may argue that the list of protected categories in Ohio Revised Code sections 125.111 and 153.59 is actually an exclusive list and therefore, adding to that list represents a conflict. To support this argument, the opponents can cite *Zeigler* in which the court held that Ohio Revised Code section 731.12, which sets forth a list of qualifications for village council members, represents an exclusive list.⁷⁸ Therefore, a Fairfax ordinance *adding* to that list was in conflict with state law.⁷⁹ While this approach might be initially appealing, there are strong arguments against it.

First, this line of reasoning distorts the court’s established standards in construing a statute. As stated in *State ex rel. Purdy v. Clermont County Bd. of Elections*.

⁷¹*Id.*

⁷²*Id.* at 1032.

⁷³*Id.* at 1032, (citing OHIO REV. CODE § 4112.01(A)(13), (16)(b) (Anderson 2002)).

⁷⁴*Greenwood*, 663 N.E.2d at 1030.

⁷⁵An example of a non-discrimination clause from a contract from the City of Vermillion reads:

[S]hall not discriminate against any employee or applicant for employment because of race, religion, color, sex, *sexual orientation*, national origin, handicap, age, or Vietnam-era veteran status.

In the Matter of the Corridor Project for the Modernization of a Grade Crossing and a Closure to Vehicles at Grade Crossings, Public Utilities Commission of Ohio, 1996 Ohio PUC LEXIS 50 at 15 (emphasis added). See also In the Matter of the Commission Investigation and Establishment of Programs for Ohioans with Communication Impairments Public Utilities Commission of Ohio, 1991 Ohio PUC LEXIS 1180 (in which a similar non-discrimination clause covering sexual orientation is included in a state contract).

⁷⁶*Greenwood*, 665 N.E.2d at 1032.

⁷⁷*Id.*

⁷⁸*Zeigler*, 621 N.E.2d at 1199.

⁷⁹*Id.*

The paramount consideration in construing a statute is legislative intent. 'In determining legislative intent, the court first looks to the language in the statute and the purpose to be accomplished. If the meaning of a statute is unambiguous and definite, then it must be applied as written and no further interpretation is appropriate.'⁸⁰

The plain language of Ohio Revised Code sections 125.111 and 153.59 is unambiguous. The statutes require a clause in all contracts that the contractor does not discriminate.⁸¹ This unambiguous language means that any attempt to extend the meaning as a prohibition against including other contract clauses would be inappropriate. Further, the attempt to construe a requirement in Ohio law prohibiting discrimination against specific groups as a prohibition against including others would conflict with the entire purpose of civil rights legislation: to prevent discrimination. By making the list exclusive as opposed to a minimum, the court would be, in essence, advocating discrimination against all groups *not* listed.

If the ordinance conflicts, does state law or the ordinance prevail? Even if it is assumed that there is a conflict between the ordinance and state law, it does not mean that the ordinance is automatically invalid. In those instances where an ordinance is found in conflict with state law, a further inquiry is necessary. Once the conflict is identified, the issue turns to the basis for municipal authority.

Is this ordinance a local self-government procedural or substantive issue? It seems clear from the fact that the ordinance in question deals with contracting with the municipality that such an ordinance does deal with an issue of local government. Uncharted municipalities, however, cannot pass ordinances in conflict with state law on procedural issues.⁸² At its heart, this issue deals with the contractual powers of the municipality. At first glance, this would seem to be a substantive issue of local self-government.

There is Ohio case law that supports the contention that issues of pay for contractors employed by a municipality are covered in the sphere of substantive local self-government. In *Dies Electric Co. v. City of Akron*,⁸³ the Supreme Court of Ohio dealt with a conflict between a city ordinance and a state law specifying conditions of a contract. In finding that the municipal ordinance prevailed over state law the court stated:

It is our conclusion that the retainage of funds to guarantee work executed on a contract for the improvement of municipal property is a matter embraced within the field of local self-government. Moreover, it is well established that this charter city had the power to contract and that the terms of its ordinance should be considered a part of that contract. Therefore, a charter municipality, in the exercise of its powers of local self-government under Section 3 of Article XVIII of the Constitution of Ohio, may, pursuant to its charter, enact retainage provisions for a contract for improvements to municipal property which differ from the retainage provisions of R.C. §153.13.⁸⁴

Yet, even if it is established that the ordinance is a substantive issue of local self-government, it does not *automatically* mean the ordinance will prevail. As noted above, an ordinance that

⁸⁰*Purdy*, 673 N.E.2d 1351, 1353 (Ohio 1996) (*quoting* *State ex rel. Zonders v. Del. Cty. Bd. of Elections*, 630 N.E.2d 313, 315 (Ohio 1994); *State ex rel. Herman v. Klopffleisch*, 651 N.E.2d 995, 997 (Ohio 1995)).

⁸¹OHIO REV. CODE ANN. §§ 125.111, 153.59 (Anderson 2002).

⁸²*Benevolent Ass'n*, 402 N.E.2d at 519.

⁸³*Dies Electric Co. v. City of Akron*, 405 N.E.2d 1026 (Ohio 1980).

⁸⁴*Id.* at 1029. *See also* *LaPolla v. Davis*, 89 N.E.2d 706 (Common Pleas Ct., Mahoning Co., 1948).

has local impacts beyond its borders is invalidated by a conflicting state law under the statewide concern doctrine even if it concerns a local self-governance issue.⁸⁵

When dealing with an ordinance forcing contractors to provide domestic partnership benefits, it is very possible that the court would hold government contracting requirements to be an issue of statewide concern. There is precedent to support this argument. In *State ex rel. Evans v. Moore*,⁸⁶ the Court invalidated an Upper Arlington ordinance that exempted the city from the state's prevailing wage law.⁸⁷ The court reasoned that the General Assembly, in enacting the prevailing wage law, had "manifested a statewide concern for the integrity of the collective bargaining process in the building and construction trades."⁸⁸ It can be argued that the state manifested a similar statewide concern with non-discrimination issues in contracts by enacting Ohio Revised Code sections 125.111 and 153.59. Attempting to require additional benefits for employees of private contractors would have effects outside the municipality similarly to refusing to follow state laws dealing with compensation of employees of private contractors.

While such an ordinance has not been before the court in Ohio, there has been litigation over this exact type of ordinance in California. In *Air Transport Association of America v. City and County of San Francisco*,⁸⁹ the airline industry, which contracted with the city for service at the San Francisco Airport, challenged the ordinance.⁹⁰ The ordinance was challenged on the grounds that it had impermissible extraterritorial effects, and therefore it was beyond the power of the city to enact and preempted by state law.⁹¹

In finding that the ordinance was within the power of the city to enact, the U.S. District Court stated:

Because the Ordinance reaches beyond the boundaries of San Francisco only by placing conditions on who may enter into airport-related contracts with the City, it falls within the City's proprietary powers. Although Plaintiffs clearly anticipate that the Ordinance will have extraterritorial effects, for example, by inducing an airline to offer domestic partner benefits nationwide, these possible effects do not establish that the City has acted beyond its powers under the California Constitution.⁹²

The similarities between this case and the hypothetical ordinance passed by an Ohio municipality indicate that there is precedent for holding that the municipality has the power to legislate in this arena and is not preempted by state law.

Even if an Ohio court, however, followed *Air Transport* and found that the ordinance dealt sufficiently with local issues and did not violate the state interest doctrine, there remains an avenue by which the ordinance could be struck down in favor of the competing state law. In

⁸⁵*Cf.* *Beechwood v. Cuyahoga Cty. Bd. of Elections*, 148 N.E.2d 921 (Ohio 1958).

⁸⁶431 N.E.2d 311 (Ohio 1982).

⁸⁷*Id.*

⁸⁸*Id.* at 313.

⁸⁹*Air Transport Assoc. of Am. v. City and County of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998), *affirmed on other grounds*, *Air. Transport*, 1999 LEXIS 8747 (N.D. Cal. May 27, 1999).

⁹⁰*Id.*

⁹¹The pertinent part of the ordinance reads "[t]he requirements of this Chapter shall apply to: . . . (iv) any of a contractor's operations elsewhere in the United States." S.F. ADMIN. CODE § 12B.1(d) (1997).

⁹²*Id.* at 1159.

*Rocky River v. State Emp. Relations Bd.*⁹³, a sharply divided court held that the State's collective bargaining law preempted Rocky River's home rule authority to avoid mandatory arbitration and settlement under state law.⁹⁴ The majority held that the collective bargaining law was an exercise of the state legislature's power to pass laws "fixing and regulating the hours of labor, establishing a minimum wage, and providing for the health, safety and general welfare of all employees" under Article II, section 34 of the Ohio Constitution.⁹⁵ This Article also provides that "no other provision of the constitution shall impair or limit this power."⁹⁶ Hence, if the court found that Ohio Revised Code sections 125.111 and 153.59 conflicted with an ordinance requiring domestic partner benefits for employee of contractors, and that the legislature was acting under its Article II, section 34 powers when it passed these laws, the ordinance would be invalidated in spite of home rule powers under Article XVIII, section 3.

Is the ordinance an exercise of police power? Language from the arguments cited in the concurring opinion of Justice Clifford Brown in *State ex rel. Evans*, supports the view that contract stipulations are in fact an exercise of police power as opposed to an exercise of powers of local self-government. In pleading their case, Upper Arlington argued that:

[U]nder Section 3, Article XVIII of the Ohio Constitution, the Upper Arlington Ordinance is an exercise of the power to adopt "local police, sanitary and other similar regulations." Appellants further contend that the ordinance is a valid police regulation "not in conflict with general laws" because the prevailing wage law is not a "general law."⁹⁷

If in fact the enactment of the ordinance on DP benefits for contractors were held to be an exercise of police power, a state law that conflicted with the ordinance would invalidate the ordinance. Therefore, if the argument that Ohio Revised Code sections 125.111 and 153.59 conflict with such an ordinance prevails, a municipal ordinance requiring contractors to provide benefits to the domestic partners of their employees would be struck down by the court.⁹⁸

III. LEGAL ARGUMENTS UNDER EXISTING FEDERAL LAW

A. Challenges to the Validity of a DP Benefits Ordinance

Local ordinances dealing with non-discrimination are not subject to challenges under federal law. Opponents of domestic partnership benefits, however, may be able to attack the validity of such ordinances under federal law. There are three possible avenues of attack. First, if an ordinance impacts retirement or pension programs that fall under the Employee Retirement Income Security Act (hereinafter ERISA) of 1974, it may be held invalid under federal preemption. Because municipal governments are exempt from regulation under ERISA, the only ordinance that might be susceptible to such a challenge would be one requiring private contractors to offer DP benefits to employees as a condition of contracting with the municipality.⁹⁹ Second, if the ordinance is found to have impacts on interstate

⁹³*Rocky River v. State Emp. Relations Bd.*, 539 N.E.2d 103 (Ohio 1989).

⁹⁴*Id.*

⁹⁵OHIO CONST. art. II, § 34.

⁹⁶*Id.* at 13.

⁹⁷*State ex rel. Evans*, 431 N.E.2d at 314-15.

⁹⁸*See* OHIO REV. CODE ANN. §§ 125.111, 13.59 (Anderson 2002).

⁹⁹Municipalities are exempted as part of the general exemption for governmental units in ERISA provided in 29 U.S.C.A. § 1003(b)(1) (2002). In fact, while many municipalities and a few states have granted domestic partnership benefits, there has been a reluctance to attempt to

commerce because of the *nature and size* of the contractors effected, there is an argument that the law is preempted by federal sovereignty in the area even if there is no federal law currently; this is a Dormant Commerce Clause argument. Finally, if an ordinance granting or mandating benefits is for same-sex couples only, there may be a challenge that the ordinance discriminates on the basis of sex in violation of Title VII of the Civil Rights Act. The basic issues and arguments of these three avenues of attack are described below.

1. Challenges Under ERISA

When Congress passed ERISA in 1974, the goal was to ensure that workers were ensured that pension and retirement benefits would be available in their old age.¹⁰⁰ Consequently, Congress included numerous provisions in the law that prevents states, courts, or private entities from evading the strong protections the law was meant to provide. The preemption clause is extremely broad:

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.¹⁰¹

The exception provided under subsection (b) is for the regulation of banking and securities. “[N]othing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities.”¹⁰² Therefore, if an ordinance requires that a private employer does effect that employer’s ERISA-qualified plan, there is a strong argument that the ordinance is preempted.

The Supreme Court has traditionally given an expansive meaning to the ERISA preemption clause.¹⁰³ Recently, however, a Supreme Court supportive of states’ rights has placed some limits on this aspect of the law. In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,¹⁰⁴ Travelers argued that a state law that treated HMO’s differentially depending on the insurance company covering the plan was invalid under the preemption clause because it “related to” an employee benefit plan.¹⁰⁵ Even though the Supreme Court struck down similar laws in previous cases, in upholding the differential treatment, the Court stated that the purpose of the preemption clause “was to avoid a multiplicity of regulations in order to permit the nationally uniform administration of

enforce such laws against the private sector because of an assumption that ERISA would preempt the action. See Catherine L. Frisk, *Queer Matters: Emerging Issues in Sexual Orientation Law: ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination In Employment* (Symposium) 8 UCLA WOMEN’S L.J. 267 (1998).

¹⁰⁰STAFF OF SPECIAL SENATE COMM. ON AGING, 94th CONG., EMPLOYER RETIREMENT INCOME SECURITY ACT OF 1974: THE FIRST DECADE, at 625 (1984).

¹⁰¹29 U.S.C.A. § 1144(a)(2002).

¹⁰²29 U.S.C.A. § 1144(b) (2002).

¹⁰³Richard W. Helms, *Case Notes and Comments, Air Transport Association of America v. City and County of San Francisco: Domestic Partner Benefits Upheld, Except Where Preempted by ERISA*, 27 W. ST. U.L. REV. 323 (1999-2000).

¹⁰⁴*New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995).

¹⁰⁵*Id.*

employee benefit plans” and that the preemption clause, specifically the term “relate to,” should not be extended “the furthest stretch of its indeterminacy.”¹⁰⁶

One case is on point to this issue. In *Air Transport Association v. San Francisco*,¹⁰⁷ the airline industry challenged the San Francisco ordinance requiring contractors to provide domestic partnership benefits on ERISA and Dormant Commerce Clause grounds.¹⁰⁸ After a lengthy analysis of preemption law, the court held:

Plaintiffs are entitled to prevail on summary adjudication of their claim that the ordinance is preempted by ERISA except as follows. With respect to benefits that are not covered by ERISA, such as moving expenses, memberships and membership discounts and travel benefits, and with respect to ERISA-covered benefits that are offered through non-ERISA plans, such as family medical and bereavement leave that are paid out of general assets, the ordinance is not in any way preempted by ERISA. With respect to benefits that are covered by ERISA and provided through ERISA plans, such as family medical and bereavement leave paid from accumulated funds and health and pension benefits, the ordinance is preempted as applied to ERISA plans if the city is exercising more economic power than an ordinary consumer could exercise. Because the city always exercises such power in its role as proprietor of the airport, the ordinance as applied to Airport contracts is entirely preempted insofar as it affects ERISA plans providing ERISA benefits.¹⁰⁹

While this decision prompted a series of articles on how the Court had erred,¹¹⁰ this case remains the precedent on which to base an assessment.

2. Challenges Under the Dormant Commerce Clause

Because an ordinance that attempts to place restrictions on contractors within the municipality may have effects on a company outside the city, it is possible that such an action is precluded by the U.S. Constitution. The Commerce Clause of the United States gives Congress the power to “regulate Commerce with foreign Nations, and among the several States.”¹¹¹ This has been interpreted by the Court to not only empower Congress to pass legislation, but as reserving the right to regulate interstate commerce to Congress alone.¹¹²

As with the ERISA preemption argument, the only case law on this subject comes from *Air Transport*. As with the ERISA preemption issue, the court struck down the ordinance in so far as it related to out-of state conduct:

Plaintiffs are entitled to prevail on summary adjudication of their claim that the Ordinance is impermissibly extraterritorial to the extent the Ordinance is applied

¹⁰⁶*Id.* at 655-56.

¹⁰⁷*Air Transp. Ass’n v. City of San Francisco*, 992 F. Supp. 1149 (N.D. Cal. 1998).

¹⁰⁸*Id.* The airline industry also argued that the ordinance was preempted under the Airline Deregulation Act (hereinafter ADA), Railway Labor Act (hereinafter RLA) and the National Labor Relations Act on grounds related to the airline industry. These issues are not discussed in this Article.

¹⁰⁹*Id.* at 1179.

¹¹⁰*See* Frisk, *supra* note 99.

¹¹¹U.S. CONST. art. I, § 8, cl. 3.

¹¹²*Cf. West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994).

to out-of-State conduct that is not related to the purposes of the City contract.¹¹³ With respect to all other applications of the Ordinance, Defendants are entitled to prevail on summary adjudication of Plaintiffs' claim that the Ordinance violates the dormant Commerce Clause of the United States Constitution.¹¹⁴

Therefore, *Air Transport* suggests that any attempt to force the company to provide general domestic partnership benefits to its employees would not be acceptable. This should not, however, preclude creating a situation where a special fund is set up to provide domestic partner benefits *during* the duration of the contract and *only for employees working* on that contract.

3. Challenges Under Title VII of the Civil Rights Act

By an interesting twist, an ordinance that provides domestic partnership benefits to same-sex couples who cannot marry, but which excludes opposite-sex couples who can marry, may be invalidated on the basis of illegal discrimination based on sex. Two U.S. district court cases have been decided on this issue, although in both instances the argument was not successful.

In *Cleaves v. City of Chicago*,¹¹⁵ a male employee of the City of Chicago wanted to take family leave to attend the funeral of his female domestic partner. The Chicago ordinance provided family leave to spouses and bona fide same-sex couples, hence, Mr. Cleaves' request was denied.¹¹⁶ In response, Cleaves argued that the ordinance was illegally discriminatory.¹¹⁷ In dismissing the claim for failure to state a valid cause of action, the court found that the ordinance discriminated on the basis of marital status, not sex, and because marital status is not protected in Title VII, the claim failed.¹¹⁸

A different approach was taken by the court in *Foray v. Bell Atlantic*.¹¹⁹ Paul Foray was an employee of the New York subsidiary of Bell Atlantic. He applied for benefits for his female domestic partner.¹²⁰ In denying the request, Atlantic Bell indicated the policy was limited to same-sex partners only because opposite-sex couples could marry and obtain the same benefits.¹²¹ The court rejected Foray's claim under the theory that the Title VII standard questioned whether an individual is treated differently than "similarly situated" people of the opposite sex.¹²² However, a female in Foray's position (with a female domestic partner) could not marry, and hence, was not "similarly situated."¹²³ In essence, the inherent sex discrimination in current marriage laws defeated the claim.¹²⁴

¹¹³See S.F. ADMIN. CODE § 12B.1(d)(iv) (1997). Note that San Francisco Administrative Code § 12B.1(d)(iv) applied the ordinance to "any of a contractor's operations elsewhere in the United States."

¹¹⁴*Id.* at 1165.

¹¹⁵*Cleaves v. City of Chicago*, 21 F. Supp. 2d 858 (N.D. Ill. 1998).

¹¹⁶*Id.* at 967.

¹¹⁷*Id.* at 967.

¹¹⁸*Id.* at 967.

¹¹⁹*Foray v. Bell Atl.*, 56 F. Supp. 2d 327 (S.D.N.Y. 1999).

¹²⁰*Id.*

¹²¹*Id.* at 328.

¹²²*Id.*

¹²³*Id.* at 329-30.

¹²⁴*Id.*

These two cases indicate that this approach would not result in an ordinance providing domestic partnership benefits to only same-sex partners being invalidated.¹²⁵

IV. POTENTIAL STATE LEGISLATIVE INTERVENTION AND SUBSEQUENT LEGAL CHALLENGES

Potential legal challenges under existing state and federal laws notwithstanding, it is not unreasonable to assume that the State legislature might react should a municipality pass a gay and lesbian civil rights or a DP benefits ordinance, especially one requiring private contractors to provide such benefits. DP benefits for same-sex couples remain a divisive and politically loaded subject. Evidence of the tendency for conservative groups to request state legislative intervention or force a vote on the issue by initiative can be demonstrated in several recent cases. In February 1998, conservative groups in Maine successfully passed a referendum repealing civil right laws protecting gays and lesbians from discrimination.¹²⁶ Likewise, when the Supreme Court of Alaska was on the verge of holding that state law required provision of benefits to domestic partners equivalent to those for married couples, the legislature amended the state's civil rights law to explicitly allow for discrimination.¹²⁷ In Ohio, Issue 3 successfully repealed Cincinnati's civil rights ordinances protecting gays and lesbians.¹²⁸

Should the legislature pass a law opposing a local ordinance, the analyses of challenges under existing Ohio law presented in Section two of this Article would have direct application. The effect of intervention on each of these types of ordinances is discussed below.

A. State Intervention Opposing a Civil Rights Ordinance

If the state legislature felt that gays and lesbians were making too much headway at the local level in gaining civil rights protections, they could conceivably pass a law forbidding municipalities to enact such ordinances and invalidating existing ones. Even if such a state law were passed, however, there are strong arguments that an issue of how citizens of a municipality are treated within a municipality is purely a matter of substantive local self-government. As such, the conflicting state law would probably not invalidate the ordinance.¹²⁹

In addition, the state may also be barred from passing a Constitutional Amendment to prohibit municipalities from passing such laws. In *Romer v. Evans*,¹³⁰ the U.S. Supreme Court

¹²⁵However, not everyone agrees with this analysis. A commentator remarked on the *Cleaves* and *Foray* decisions that:

Although the courts in the two cases dismissed such a claim, Title VII authority not considered by those courts supports the claim and undermines the analysis in those cases and their conclusions that same-sex-only policies comply with Title VII. A clear, but little-noticed, line of Title VII cases holds that disparate treatment based on the race of a person with whom an individual associates constitutes discrimination because of the individual's race. Other Title VII authority supports recognition of an analogous rule under Title VII's prohibition of sex discrimination. Applying such a rule and applicable Title VII sex discrimination case law, this Article concludes that domestic partnership benefits policies limited to employees in same-sex domestic partner-ships discriminate on the basis of sex in violation of Title VII.

Paul R. Lynd, *Domestic Partner Benefits Limited To Same-Sex Couples: Sex Discrimination Under Title VII*, 6 WM. & MARY J. OF WOMEN & L. 561, 566 (2000).

¹²⁶John Gallagher, *Are We Really Asking for Special Rights*, ADVOCATE MAG., April 14, 1998, at 24-37.

¹²⁷*See Univ. of Alaska v. Tumeo*, 933 P.2d 1147 (Alaska 1997).

¹²⁸*See Equal. Found. of Cincinnati, Inc. v. Cincinnati*, 128 F. 3d 289 (6th Cir. 1997).

¹²⁹*See Benevolent Ass'n*, 402 N.E.2d at 519.

¹³⁰*Romer v. Evans*, 517 U.S. 620 (1996).

invalidated a Colorado constitutional amendment that prohibited any state or local governmental entity from enacting any law providing protection to individuals on the basis of sexual orientation.¹³¹ The Court reasoned that the ordinance had no rationale basis or relationship to a valid state purpose, and therefore, under rational scrutiny, failed to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment.¹³² This decision was widely hailed as a major victory for gay and lesbian civil rights.

Romer, however, does not prevent municipalities from passing anti-gay ordinances. This issue was addressed by the Sixth Circuit Court of Appeals in *Equality Foundation of Cincinnati, Inc. v. City of Cincinnati*.¹³³ In this case, the constitutionality of a municipal charter amendment passed by the voters of Cincinnati (Issue 3) was challenged on the grounds that it violated the Equal Protection Clause of the U.S. Constitution.¹³⁴ In holding that the charter amendment was valid, the court distinguished the case from *Romer* by identifying two important differences:

(1) it applied only at the lowest (municipal) level of government and thus could not dispossess gay Cincinnatians of any rights derived from any higher level of state law and enforced by a superior apparatus of state government, and (2) its narrow, restrictive language could not be construed to deprive homosexuals of all legal protections even under municipal law, but instead eliminated only “special class status” and “preferential treatment” for gays as gays under Cincinnati ordinances and policies, leaving untouched the application, to gay citizens, of any and all legal rights generally accorded by the municipal government to all persons as persons.¹³⁵

Hence, while *Romer* may mean that the state cannot stop municipalities from passing civil rights for gays and lesbians, it does not prevent individual municipalities from denying them.

B. State Intervention Opposing Granting of DP Benefits to Municipal Employees

The recent experience in the city of Lakewood, Ohio indicates that if a major city in Ohio decided to grant domestic partnership benefits to its employees, there would almost certainly be a legislative reaction at the state level. In general, the bill would probably take the form of an act specifically requiring that no state government subdivision could provide benefits to unmarried partners of employees. Because governmental units are exempted from ERISA, this law would not face a federal preemption challenge. Hence, the question would become one of whether the city ordinance granting the benefits would supercede the state law.

¹³¹Colorado Amendment 2 stated:

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

CO. CONST. art. 2, § 306 (repealed 1996).

¹³²*Id.* at 1629.

¹³³*Equality Found. of Cincinnati, Inc. v. Cincinnati*, 128 F. 3d 289 (6th Cir. 1997).

¹³⁴*Id.*

¹³⁵*Id.* at 296-97.

A convincing argument is to be made that *Benevolent Association v. Parma*,¹³⁶ is the controlling authority on this matter. In that decision, the court emphatically stated that “[i]t has been firmly established that the ability to determine the salaries paid to city employees is a fundamental power of local self government.”¹³⁷ The approach of the court in *Rocky River* casts doubt on this certainty. Using *Rocky River State Employment Relations Bd.*,¹³⁸ however, it could be argued that the legislature’s decision to regulate benefits was made under its powers granted under Article II, section 34 of the Ohio Constitution. As such, it is not subject to the municipal powers granted under Article XVIII, section 3. One counter to this argument is dicta found in *State ex rel. Paluf v. Feneli*,¹³⁹ a *per curiam* decision delivered five years after *Rocky River*. In *Paluf*, the majority opined, “[t]he phrase ‘not in conflict with general laws’ does not modify the ‘powers of local government’ language of the Constitution; therefore, Section 3, Article XVIII of the Ohio Constitution empowers municipalities to enact requirements for employees which differ from those set forth in the Revised Code.”¹⁴⁰ In reality, should such a case ever reach the Supreme Court of Ohio, the arguments would sound much like they did in *Rocky River*. Just as in that case, the ultimate outcome would depend on the political make-up of the court, not on the strength or weakness of any particular legal argument.

C. State Intervention Opposing Ordinance Requiring DP Benefits from Contractors

In this case, the state is probably barred from passing laws regarding benefits because of ERISA preemption. The state, however, could pass a law forbidding contract stipulations associated with benefits. Because the law itself would be dealing with contracts, not benefits, it would probably not be subject to ERISA preemption. Because it seems likely that any ordinance of this type would be invalidated under ERISA preemption; however, the impact of potential state intervention in this area is probably a moot point.

V. SUMMARY AND CONCLUSIONS

It can be seen from the analyses in this Article that ordinances which grant domestic partnership benefits and/or civil rights to gays and lesbians will probably face a complex gambit of legal challenges under state law, federal law, and both State and U.S. Constitutions. Current law and current common practice in the State, however, indicates that municipalities probably have almost unfettered power to pass ordinances that either grant protection or deny protection to gays and lesbians in the area of employment and housing discrimination within the municipalities jurisdiction.

The situation is not as clear when it comes to domestic partnership benefits. It is likely that under current law, an ordinance granting domestic partnership benefits to employees of a municipality would be upheld in court. The challenge would be whether the ordinance could withstand the political pressure to which it would most certainly endure. The recent failure of Lakewood to pass just such an ordinance is an example of how divisive and problematic such an issue is. If in fact, a municipality did pass such an ordinance, there would be significant pressure placed on the state legislature to preempt that ordinance and others like it. While recent Ohio Supreme Court decisions seem to indicate that the ordinance may withstand such a challenge the experience of the litigation in *Rocky River* demonstrates that the politics of the issue may well be more important than any legal analysis.

¹³⁶402 N.E.2d at 519.

¹³⁷*Equality Found. of Cincinnati*, 128 F.3d at 383.

¹³⁸539 N.E.2d 103 (Ohio 1989).

¹³⁹*State ex rel. Paluf v. Feneli*, 630 N.E.2d 708 (Ohio 1994).

¹⁴⁰*Id.* at 709.

Finally, it is relatively clear that ordinances requiring contractors to provide domestic partnership benefits to their employees as a condition of contracting with the municipality have limited validity under federal law. The ordinance in San Francisco, while still standing, has limited impact.