

## PROGRESSIVE FEDERALISM? A GAY LIBERATIONIST PERSPECTIVE

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The notion that one man in ten is gay may be a Kinsey-inspired myth, but it is not an urban myth.<sup>1</sup> Researchers have documented a striking concentration of gay men in the country's largest urban centers.<sup>2</sup> There, nearly one man in ten identifies himself as gay or bisexual while the figure is less than three percent nationally.<sup>3</sup> Although the concentration is less dramatic among lesbians, the gay presence in urban centers is far greater than in other parts of the country.<sup>4</sup>

This concentration is a result of several synergistic forces including a perpetual Great Migration that brings lesbians and gay men to places where more tolerant attitudes make for a better quality of life and where greater numbers allow for the development of vibrant gay-identified communities— not to mention increased

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<sup>1</sup> See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 287–91 (1994) (criticizing the research method of Alfred Kinsey, a well-known human sexuality research scientist, on a variety of grounds including the lack of random selection as well as his heavy sampling from institutionalized people).

<sup>2</sup> See *id.* at 306 (noting that the areas considered central cities are limited to the twelve largest metropolitan areas in the United States). These urban centers include New York City, Los Angeles, Chicago, Washington, D.C. and Baltimore, San Francisco and Oakland, Philadelphia, Boston, Detroit, Dallas and Ft. Worth, Houston, Miami and Ft. Lauderdale, and Seattle. See BUREAU OF THE CENSUS, U.S. DEP'T OF COM., *STATE AND METROPOLITAN AREA DATA BOOK: 1997–98* 60–65 tbl.B–1 (1998) (listing metropolitan cities by population).

<sup>3</sup> See LAUMANN, *supra* note 1, at 305 tbl.8.2 (reporting the percentages of men who identify themselves as gay or bisexual according to their place of residence); see also ROBERT W. BAILEY, *OUT AND VOTING II: THE GAY, LESBIAN, AND BISEXUAL VOTE IN CONGRESSIONAL ELECTIONS, 1990–1998* 17 Fig.5 (2000) (illustrating that the proportion of voters in the 1996 and 1998 federal elections who self-identified as gay, lesbian, or bisexual varied from a high of 8.8 percent in cities with populations greater than 500,000 to 2.3 percent in rural areas), at <http://www.nglrf.org/downloads/outvote2.pdf> (last visited Feb. 18, 2003).

<sup>4</sup> See LAUMANN, *supra* note 1, at 305 tbl.8.2, 308–09 (noting that the “degree of urbanization of residence” correlates with the percentage of people who identify themselves as gay); see also Carol Ness, *S.F. Upstaged as Gay Mecca: West Hollywood Has Higher Ratio of Same-Sex Couples*, *SAN. FRAN. CHRONICLE*, Aug. 8, 2001, at A1 (referring to the results of the 2000 Census in reporting that gay men tend to settle in big cities while lesbians tend to settle in the suburbs), available at 2001 WL 3410944.

chances of finding a mate.<sup>5</sup> At the same time, lesbians and gay men who grow up in these progressive destinations tend to live more open lives than those who grow up in less hospitable locales.<sup>6</sup> In short, tolerant communities induce both immigration by outsider gays and greater openness among native ones.

From these dynamics have emerged gay havens, discrete places where a progressive climate and strong gay presence give lesbians and gay men an unparalleled opportunity to exercise a measure of social, economic, and political influence over the atmosphere of our communities and, hence, the conditions in which we live. Symbolized most notably by San Francisco and New York City, these havens are potential sites of meaningful gay liberation. For instance, fifteen states, the District of Columbia,<sup>7</sup> and more than 140 municipalities have prohibited private-sector employment

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<sup>5</sup> See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES: 1940-1970* 23-39 (1983) (describing the emergence of urban gay subcultures as a result of displacement caused by mobilization for World War II); Stephen O. Murray, *Components of Gay Community in San Francisco*, in *GAY CULTURE IN AMERICA: ESSAYS FROM THE FIELD* 107, 125-31 (Gilbert Herdt ed., 1992) (studying the migration of gay men to San Francisco since World War II).

<sup>6</sup> See LAUMANN, *supra* note 1, at 308-09 (theorizing that growing up in a more gay-friendly environment allows for the freer expression of same-sex interests).

<sup>7</sup> Cal. Gov't Code § 12940 (West Supp. 2003); Conn. Gen. Stat. Ann. § 46a-81c (West 1995); D.C. Code Ann. § 2-1402.11 (2001); Haw. Rev. Stat. § 378-2 (Supp. 2001); Mass. Ann. Laws ch. 151B, § 4 (LexisNexis Supp. 2002); Md. Code Ann. Lab. & Empl., art. 49B, § 16 (Michie Supp. 2002); Minn. Stat. Ann. § 363.03 (West Supp. 2003); Nev. Rev. Stat. Ann. 613.330 (Michie Supp. 2000); N.H. Rev. Stat. Ann. § 354-A:7 (West Supp. 2002); N.J. Stat. Ann. § 10:5-12 (West 2002); N.Y. Exec. Law § 296 (McKinney Supp. 2003); R.I. Gen. Laws § 28-5-7 (Supp. 2002); Vt. Stat. Ann. tit. 21, § 495 (Supp. 2002); Wis. Stat. Ann. § 111.321, -.322, -.36(d)(1) (West 2001); *see also* H.B. 314, § 2, 46th Leg., 1st Sess. (N.M. 2003) (adding "sexual orientation" and "gender identity" to N.M. Stat. Ann. § 28-1-7(A), which prohibits private-sector employment discrimination); Or. Rev. Stat. § 659A.030(1)(b) (2001). Based on the passage of H.B. 314 by the New Mexico legislature New Mexico is included as a state that prohibits sexual orientation discrimination in employment. *See* Susan Montoya Bryan, *Gay Rights Bill Goes to Governor*, *Albuq. J.*, Mar. 22, 2003, <http://www.abqjournal.com/xgr/apgay03-22-03.htm> (noting governor's support of the measure) (last visited Mar. 22, 2003). Based on the decision in *Tanner v. Oregon Health Sciences University*, 971 P.2d 435, 442 (Or. Ct. App. 1998), which construed the Oregon sex discrimination statute to prohibit discrimination on the basis of sexual orientation, Oregon is included as a state that prohibits sexual orientation discrimination in employment. For further confirmation that employment discrimination based on sexual orientation is unlawful in Oregon, see Oregon Bureau of Labor and Industries, *Civil Rights: Fact Sheets, Sex Discrimination, Sexual Orientation*, at <http://www.boli.state.or.us/civil/sex.html> (last updated Jan. 26, 2003) ("Based on the December 9, 1998 Oregon Court of Appeals decision in *Tanner vs. Oregon Health Sciences University*, et al., BOLI's Civil Rights Division is no longer rejecting claims of sexual orientation discrimination from employees throughout Oregon."). Neither Montana nor Colorado is included as a state that prohibits sexual orientation discrimination in employment, despite the availability of non-frivolous, good-faith arguments that generally applicable statutes in those states do, at least partially, prohibit such discrimination. *See* Colo. Rev. Stat. § 24-34-402.5(1) (2002) ("It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours . . . ."); Mont. Code Ann. § 39-2-904 (1) (b) (2001) ("A discharge is wrongful only if . . . the discharge was not for *good cause* and the employee had completed the employer's probationary period of employment . . . ." (emphasis added)).

discrimination on the basis of sexual orientation.<sup>8</sup> Not surprisingly, the list of municipalities includes most of the largest cities in the country along with smaller, traditionally progressive places, such as *college towns*. While these havens do not seem geographically imposing, they actually encompass more than forty percent of the country's population and jobs.<sup>9</sup>

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<sup>8</sup> The number cited in the text refers to local laws that prohibit private-sector employment discrimination on the basis of sexual orientation, which appears to be the most common provision of these laws. Many of the laws also prohibit discrimination in other matters, such as public accommodations and housing. See Human Rights Campaign Foundation, *States and Local Governments With Civil Rights Laws That Prohibit Discrimination Based on Sexual Orientation*, (listing employment discrimination laws only) at <http://www.hrc.org/worknet/nd/index.asp> (last visited Feb. 20, 2003); Lambda Legal Defense and Education Fund, *Summary of States Which Prohibit Discrimination Based on Sexual Orientation* at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=185> (last visited Feb. 20, 2003); WAYNE VAN DER MEIDE, *LEGISLATING EQUALITY: A REVIEW OF LAWS AFFECTING GAY, LESBIAN, BISEXUAL, AND TRANSGENDERED PEOPLE IN THE UNITED STATES* (2000), at <http://www.nglftf.org/library/index.cfm> (last visited Feb. 20, 2003); see also *infra*, fig.1 (illustrating the states, counties, and cities that prohibit sexual orientation discrimination in private-sector employment).

<sup>9</sup> The 15 states that ban sexual orientation discrimination by private-sector employers, together with the District of Columbia, were home to 98,511,987 of the 281,421,906 people counted in the 2000 Census, a figure that alone represents thirty-five percent of the population. Cf. U.S. CENSUS BUREAU, *UNITED STATES CENSUS 2000, RESIDENT POPULATION OF THE 50 STATES, THE DISTRICT OF COLUMBIA, AND PUERTO RICO: APRIL 1, 2000* (CENSUS 2000) AND APRIL 1, 1990 (1990 CENSUS) AND STATE RANK AS OF 2000 AND STATE RANK AS OF 1990, tbl.4. (reporting the populations of California, Connecticut, the District of Columbia, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Wisconsin), at <http://www.census.gov/population/cen2000/tab04.pdf> (last visited Mar. 3, 2003). Those same jurisdictions were the sites of roughly 35,500,000 of the approximately 101,136,000 jobs counted in the 1997 Economic Census. See U.S. CENSUS BUREAU, *1997 ECONOMIC CENSUS: SUMMARY STATISTICS FOR UNITED STATES, 1997 NAIC BASIS* (listing the number of paid employees in various industries in each state as well as in the United States overall), at <http://www.census.gov/epcd/ec97/us/US000.htm> (last visited Mar. 3, 2003). Although the state laws do not necessarily extend to all those jobs, the statistics provide a rough figure of thirty-five percent.

At least 80 unique municipalities in other states also prohibit sexual orientation discrimination by private-sector employers. See *supra* note 8. These municipalities were home to 26,969,621, or 9.6 percent, of the people counted in the 2000 Census. Cf. U.S. CENSUS BUREAU, *UNITED STATES CENSUS 2000* (reporting the populations of such places as Cook County, Ill. (Chicago); Miami-Dade County, Fla.; King County, Wash. (Seattle); Broward County, Fla. (Ft. Lauderdale); Philadelphia; Dallas; Detroit; Columbus; Jefferson County, Ky. (Louisville); Denver; Tucson; New Orleans; Kansas City; Atlanta; St. Louis; and Pittsburgh, among others), at <http://www.census.gov/main/www/cen2000.html> (last visited Mar. 4, 2003). Together, then, the states and municipalities that prohibit sexual orientation discrimination in private-sector employment comprise roughly forty-five percent of the U.S. population.

The same 80 municipalities are the sites of roughly 8,500,000, or 8.5 percent, of the jobs counted in the 1997 Economic Census data. Cf. See U.S. CENSUS BUREAU, *1997 ECONOMIC CENSUS: SUMMARY STATISTICS FOR UNITED STATES, 1997 NAIC BASIS* (reporting employment statistics for same jurisdictions), at <http://www.census.gov/epcd/www/econ97.html> (last visited Mar. 4, 2003). Combined, state and local laws prohibiting sexual orientation discrimination in private-sector employment cover at least forty-four percent of the country's workforce. The



*Note: Open circles represent municipalities that prohibit discrimination only by municipal contractors.*

**Figure 1.** States, Counties, and Cities that Prohibit Sexual Orientation Discrimination in Private-Sector Employment.

Significantly, these gay havens are not randomly distributed across the country. Gay-friendly states and municipalities tend to be clustered in the Northeast, upper Midwest, and far West, while the South, Great Plains, and Rocky Mountains remain relatively hostile regions. For instance, although a number of municipalities in such states as Washington, Illinois, and Pennsylvania have enacted gay civil rights laws, similar laws are nonexistent in places like Wyoming, Oklahoma, and South Carolina. Far from random, this distribution evinces a significant cultural and political divergence within the United States.

This regional clustering of gay havens raises questions from a gay liberationist perspective about the soundness of conventionally progressive opposition to federalism and local control. The success of the gay rights movement in certain regions, and serious vulnerability at the national level, suggests that support for a strong central government and opposition to federalism or local

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specific calculations supporting the numbers reported in this footnote are contained in a spreadsheet on file with author.

control might be contrary to the cause. The Supreme Court's decisions in cases like *United States v. Morrison*<sup>10</sup> and *Kimel v. Florida Board of Regents*<sup>11</sup> contradict broad, conventionally progressive interpretations of Congress' power to regulate interstate commerce and enforce the Fourteenth Amendment, and they undoubtedly frustrate important progressive interests. Nevertheless, given the demographic and the political realities of lesbian and gay life, decisions like *Morrison* and *Kimel* may be progressive from a gay liberationist perspective.

### I. CONTEXTUALIZING PROGRESSIVE FEDERALISM

There are progressives for whom the idea of federalism—or even states' rights—is not anathema. One need look no further than the overwhelmingly progressive citizenry of the District of Columbia, many of whom recognize the value in local autonomy precisely because they do not have it. As a federal enclave, the District is subject to plenary congressional control and financial coercion. Congress has power to “exercise exclusive Legislation in all Cases whatsoever, over [the] District.”<sup>12</sup> Despite granting the District home rule,<sup>13</sup> Congress has retained authority to both veto District laws<sup>14</sup>

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<sup>10</sup> 529 U.S. 598 (2000).

<sup>11</sup> 528 U.S. 62 (2000).

<sup>12</sup> U.S. CONST. art. I, § 8. Congress' power over the District is analogous to a state's police power except that it is unconstrained by either a state constitution or popular sovereignty. While Congress is bound by the federal Bill of Rights when legislating for the District, for example see *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the Bill of Rights was designed to restrain a federal government comprised of enumerated powers— not to possess a general police power. Indeed, in order to avoid the embarrassment of the continuing racial segregation in District schools after *Brown v. Board of Education*, 347 U.S. 483 (1954), the Court in *Bolling* had to reverse-incorporate the Fourteenth Amendment's equal protection clause into the Fifth Amendment's due process clause. 347 U.S. at 500. Furthermore, the District has no legally binding constitution to restrain either Congress or the District government in the exercise of District police powers. Although District residents ratified a Constitution of the State of New Columbia” in 1982, that instrument was designed to organize an eventual state government in the District and currently has no legal effect. If District progressives want to answer Justice Brennan's call for invigorating state constitutional law, they presently have no way of doing so. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (calling for the development of independent state constitutional jurisprudence of individual rights). *But cf.*, Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421–29 (1996) (questioning the centrality of Brennan's call in resurgence of state constitutionalism). Even voter-ratified amendments to the District charter are subject to screening and a potential veto by Congress. See D.C. CODE ANN. § 1-203.03 (2001) (providing that either house may pass a resolution “disapproving such amendments”). *But see infra* note 24 (discussing the constitutionality of such legislative veto).

<sup>13</sup> District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 776 (1973) (codified at D.C. CODE ANN. § 1-201.01 *et seq.* (2001)) [hereinafter the Home Rule Act].

and legislate directly.<sup>15</sup> Because the District may not tax federal property or the income of non-residents,<sup>16</sup> it also relies heavily on federal appropriations in lieu of taxes, which gives Congress another powerful mechanism of control.<sup>17</sup> If strong national power is a progressive ideal, the District stands as a utopia of national prerogative.

District progressives, however, do not see it that way. For many of them the idea of states' rights has come to symbolize empowerment. By 2002, two-thirds of District residents supported outright statehood for the enclave,<sup>18</sup> and the most assertive advocates in that quest are not neo-segregationists but leaders of the leftist D.C. Statehood Green Party.<sup>19</sup> The progressive citizenry of that polity bristles at subjugation to the whims of a national government that is far more conservative. District lesbians and gay men have particularly felt that frustration.

For more than a decade, Congress blocked the decriminalization of gay sex in the District. In 1981, the District passed a measure<sup>20</sup> to repeal its sodomy law,<sup>21</sup> something half the states had already done.<sup>22</sup> After Jerry Falwell attacked the repeal measure as "a perverted act about perverted acts,"<sup>23</sup> the House of Representatives overwhelmingly passed a resolution, sponsored by conservative

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<sup>14</sup> D.C. CODE ANN. § 1-206.02 (2001) (requiring the District to submit approved bills to Congress for review before they take effect).

<sup>15</sup> D.C. CODE ANN. § 1-206.01 (2001).

<sup>16</sup> D.C. CODE ANN. § 1-206.02(a)(1), (5) (2001).

<sup>17</sup> See, e.g., District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96, §§ 117, 125, 127, 128, 115 Stat. 923, 950, 953 (2001) (prohibiting the District from reducing penalties for marijuana possession, supporting needle-exchange programs, or subsidizing abortions where the pregnant woman's life is not endangered, as well as expressing intent of Congress that any District law requiring health insurance coverage for contraceptives include a "conscience clause").

<sup>18</sup> Spencer S. Hsu, *D.C. Takes Fight for Vote to the Hill; Senate Panel Hears Congressional Case*, WASH. POST, May 24, 2002, at B1, available at 2002 WL 21746649.

<sup>19</sup> See D.C. Statehood Green Party, *Guiding Principles and Key Values*, at <http://www.dcstatehoodgreen.org/misc/princip.htm> (last visited Feb. 16, 2003); see also Sewell Chan & Stephen C. Fehr, *District Notebook; Nader Waves the Flag for Statehood*, WASH. POST, Sept. 21, 2000, at J2, available at 2000 WL 25417228.

<sup>20</sup> Sexual Assault Reform Act, Act No. 4-69, 28 D.C. Reg. 3409 (1981).

<sup>21</sup> Pub. L. No. 615-428, 62 Stat. 346, 347 (1948) (making oral sex, anal sex, bestiality, and "carnal copulation in an opening of the body except sexual parts" a felony punishable by up to ten years in prison).

<sup>22</sup> Yao Apasu-Gbotsu, et al., *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 524 n.9 (1986).

<sup>23</sup> William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 850 n.132 (1997) (quoting Larry Bush, *House Kills D.C. Sex Law as Gay Prospects Dim*, ADVOCATE, Nov. 12, 1981, at 8 (quoting Falwell)).

Illinois Congressman Phil Crane, to legislatively veto the Act.<sup>24</sup> It was not until 1993, twelve years later, that the District finally managed to repeal its sodomy law.<sup>25</sup>

Congress also blocked for a decade the District's implementation of a modest domestic partnership measure. In 1992, the District passed a measure<sup>26</sup> to create a domestic partnership registry,<sup>27</sup> extend health benefits to the domestic partners of District employees,<sup>28</sup> and protect the right to visit one's domestic partner in the hospital.<sup>29</sup> At the urging of conservative Mississippi Senator Trent Lott, however, Congress repeatedly forbade implementation of the measure through annual appropriations riders.<sup>30</sup> Only in 2001 did Congress relent and allow implementation of the measure.<sup>31</sup>

Congress nearly passed a similar rider prohibiting same-sex joint adoption in the District. In 1995, the D.C. Court of Appeals interpreted District law to allow joint adoption by same-sex couples.<sup>32</sup> Seeking to overturn that decision, conservative Oklahoma

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<sup>24</sup> H. Res. 208, 97th Cong. (1981); 127 CONG. REC. 22778-79 (Oct. 1, 1981). At the time, the D.C. Home Rule Act authorized a one-house legislative veto of District enactments modifying criminal laws. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, § 602(c)(2), 87 Stat. 774, 813 (1973) (codified as amended at D.C. CODE ANN. § 1-206.02 (1984)). Congress later ratified the legislative veto through ordinary legislation. See H.J. Res. 648, 98th Cong., Pub. L. No. 98-473, § 131, 98 Stat. 1837, 1974-75 (1984) (retroactively validating prior legislative vetoes). The Supreme Court's decision invalidating a legislative veto in *INS v. Chadha*, 462 U.S. 919 (1983), called into question the validity of legislative vetoes of District legislation. See *Gary v. United States*, 499 A.2d 815 (D.C. 1985) (invalidating one-house legislative veto of D.C. laws but making ruling applicable only prospectively). *But see* *United States v. Langley*, 112 Daily Wash. L. Rptr. 801 (D.C. Sup. Ct. Mar. 30, 1984) (upholding legislative veto of sodomy law repeal).

<sup>25</sup> Right to Privacy Amendment Act of 1993, Act No. 10-23, 40 D.C. Reg. 3007 (1993).

<sup>26</sup> Health Care Benefits Expansion Act of 1992, D.C. CODE ANN. §§ 32-701-32-710 (2001).

<sup>27</sup> D.C. CODE ANN. § 32-702 (2001).

<sup>28</sup> D.C. CODE ANN. § 32-705 (2001).

<sup>29</sup> D.C. CODE ANN. § 32-704 (2001).

<sup>30</sup> S. Amend. 2799 to H.R. 5517, 102d Cong. (1992) (vetoed); 138 CONG. REC. S20457-62 (daily ed. July 30, 1992) (adopting the amendment by voice vote after rejecting motion to table it by a vote of 41-51); *accord* District of Columbia Appropriations Act, 1993, Pub. L. No. 102-382, 106 Stat. 1422 (1992) (including same language). Similar language was included in the District appropriations bill in each subsequent year. See, e.g., District of Columbia Appropriations Act, 1998, Pub. L. No. 105-100, § 133, 111 Stat. 2160, 2175 (1997) (including similar language).

<sup>31</sup> District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96, § 118, 115 Stat. 923, 950 (2001) (prohibiting the use of federal funds but allowing the use of District funds to implement the measure). *But cf.* 147 CONG. REC. H6002-H6004 (Sept. 25, 2001) (reprinting Senator Weldon's proposed amendment to the District of Columbia Appropriations Act that encouraged the continued ban on implementation, which was later rejected by a vote of 194-226); see also Spencer S. Hsu, *Senate Backs Funding For D.C. Partners Law; Vote Ends Nine-Year Stall on Measure*, WASH. POST, Nov. 8, 2001, at B4, available at 2001 WL 29760681.

<sup>32</sup> See *In re M.M.D.*, 662 A.2d 837 (D.C. 1995).

Congressman Steve Largent proposed an appropriations rider to forbid the District "to carry out any joint adoption of a child between individuals who are not related by blood or marriage."<sup>33</sup> Although the House adopted the rider in 1998, it was omitted from the final version of the appropriations bill that year.<sup>34</sup> The following year the House rejected the rider by the narrowest of margins.<sup>35</sup>

On two occasions Congress has interfered with the protection of lesbians and gay men from discrimination. Since 1977, the D.C. Human Rights Act has prohibited sexual orientation discrimination in various endeavors.<sup>36</sup> In a 1987 decision that consciously sought an accommodation between the Act and religious freedom, the D.C. Court of Appeals held that Georgetown University could lawfully withhold official recognition from a gay student group but violated the Act by denying the group such tangible benefits as access to university facilities.<sup>37</sup> At the insistence of conservative Colorado Senator Bill Armstrong, Congress passed the Nation's Capital Religious Liberty and Academic Freedom Act, which overrode the decision by directly rewriting the D.C. Human Rights Act so as to allow religiously affiliated schools to discriminate against groups "promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief."<sup>38</sup>

More recently, Congress blocked the District from enforcing the D.C. Human Rights Act against the Boy Scouts of America. In 2001, the D.C. Human Rights Commission held that the Boy Scouts unlawfully discriminated against two gay men by terminating their membership on the basis of sexual orientation.<sup>39</sup> The Commission

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<sup>33</sup> H. Amend. No. 871 to H.R. 4380, 105th Cong. (1998) [hereinafter Largent Amendment], reprinted at 144 CONG. REC. H7428 (daily ed. Aug. 7, 1998) (addendum to previous day's edition of *Congressional Record*); 144 CONG. REC. H7381-85, H7399 (daily ed. Aug. 6, 1998) (debating and approving Largent Amendment by a vote of 227 to 192).

<sup>34</sup> District of Columbia Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681-121 (1998).

<sup>35</sup> See 145 CONG. REC. H6633-37, H6647 (daily ed. July 29, 1999) (debating and rejecting Largent Amendment by a vote of 213-215).

<sup>36</sup> D.C. CODE ANN. § 2-1401.01 *et seq.* (Supp. 2001). The legislative history note indicates that the bill was first adopted on July 26, 1977 and was originally codified at D.C. CODE ANN. § 1-2501.

<sup>37</sup> *Gay Rights Coalition v. Georgetown University*, 536 A.2d 1, 39 (D.C. 1987).

<sup>38</sup> District of Columbia Appropriations Act, 1990, Pub. L. No. 101-168, § 141, 103 Stat. 1267, 1284 (1989) (codified as amended at D.C. CODE ANN. § 2-1402.41(3) (2001)). *But cf.* *Clarke v. United States*, 886 F.2d 404, 417 (D.C. Cir. 1989) (invalidating an earlier version of the Armstrong Amendment that effectively required the D.C. City Council to amend the Human Rights Act).

<sup>39</sup> *Boy Scouts of Am. v. District of Columbia Comm'n on Human Rights*, 809 A.2d 1192, 1193 (D.C. 2002).

cautiously distinguished the U.S. Supreme Court's decision in *Boy Scouts of America v. Dale*<sup>40</sup> on the ground that neither of the plaintiffs in the new case was a "gay activist," as James Dale supposedly had been, and there was no evidence that the plaintiffs "would advocate homosexuality as a [Boy Scouts] . . . adult leader."<sup>41</sup> Although the Boy Scouts had filed an appeal in the matter— an appeal the organization ultimately won<sup>42</sup>— Congress preemptively intervened.<sup>43</sup> While the case was pending, Congress approved an appropriations rider, initially sponsored by conservative Indiana Congressman John Hostettler, that forbade the District "to issue, administer, or enforce any order" in the case.<sup>44</sup>

These experiences powerfully illustrate the progressive frustration with the lack of local control in the District. Congress has been at best a hovering threat and, at worst, an omnipotent obstructionist. Conservative politicians from other parts of the country have repeatedly induced Congress to interfere with gay liberation and other progressive policies in the District. For many District progressives, states' rights represent self-determination. Their experience presents a stark counter-narrative to the conventional progressive justification for nationalization of power. In particular, it demonstrates that the question whether federalism benefits progressive interests or burdens them is highly dependent on the context. When the context is gay liberation in a gay haven like the District of Columbia, federalism is progressive.

## II. *DISTRICTIZATION* OF STATES AND MUNICIPALITIES

Even though the District of Columbia is something of a special case, the idea that federalism may benefit progressive interests carries beyond the Capital Beltway. States, and by extension municipalities, enjoy a measure of independence from federal control as a matter of constitutional restraint and congressional prudence. The progressive view challenges that independence in a way that can result in the *districtization* of states and municipalities— subjecting them to a degree of congressional control

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<sup>40</sup> 530 U.S. 640 (2000).

<sup>41</sup> *Boy Scouts*, 809 A.2d at 1196.

<sup>42</sup> *Id.* at 1194.

<sup>43</sup> See, e.g., 147 CONG. REC. H6007 (daily ed. Sept. 25, 2001) (statement of Rep. Hostettler) ("I rise today to offer an amendment that will protect the Boy Scouts of America from the latest political attack on its constitutionally protected rights.")

<sup>44</sup> District of Columbia Appropriations Act, 2002, Pub. L. No. 107-96, § 139, 115 Stat. 923, 958 (2002).

similar to that exercised over the District of Columbia. The prospect of districtization of gay havens and the brand of progressive philosophy that encourages it ought to be distressing to lesbians and gay men who are beginning to achieve significant liberation in gay havens around the country.

Under the conventionally progressive view of Congress' power to regulate interstate commerce, for example, Congress could interfere with virtually any facet of gay rights. Under the progressive Commerce Clause doctrine inherited from the New Deal era, Congress may regulate anything that has a substantial effect on interstate commerce, even if that thing is not itself commerce or does not transcend the boundaries of any state.<sup>45</sup> Moreover, this power extends to things, that considered separately, would have only an insubstantial effect on interstate commerce as long as their aggregate effect is substantial.<sup>46</sup> Interpreted in this way the commerce power is difficult, if not impossible, to analytically circumscribe. As Judge Learned Hand observed, American "society is an elastic medium which transmits all tremors throughout its territory."<sup>47</sup>

Although the Rehnquist Court recently sought to limit the substantial effects principle in *United States v. Lopez*<sup>48</sup> and *United States v. Morrison*,<sup>49</sup> the progressive dissenters in those decisions have all but conceded that the substantial effects doctrine renders the federal commerce power limitless— at least in any principled or judicially manageable way. While the formalistic limiting principles that the Rehnquist majority has adopted— for example, requiring that the regulated subject itself be economic— may not be amenable to principled application, the progressive dissenters have expressly abandoned judicial responsibility for limiting the federal commerce power. In their view it is subject to only one constraint: "politics, not judicial review."<sup>50</sup> As long as Congress can rationally

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<sup>45</sup> See, e.g., *Maryland v. Wirtz*, 392 U.S. 183, 188–93 (1968); *Wickard v. Filburn*, 317 U.S. 111, 124 (1942).

<sup>46</sup> See, e.g., *Wickard*, 317 U.S. at 124–25; *Wirtz*, 392 U.S. at 189–99.

<sup>47</sup> *United States v. A.L.A. Schechter Poultry Corp.*, 76 F.2d 617, 624 (2d Cir. 1935) (Hand, J., concurring).

<sup>48</sup> 514 U.S. 549 (1995) (holding that section 922(q) of the Gun-Free School Zones Act of 1990 was unconstitutional as mere possession of a gun in a local school zone was not an economic activity that had substantial effects on interstate commerce).

<sup>49</sup> 529 U.S. 598 (2000) (holding that Congress had no authority to regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce).

<sup>50</sup> See *id.* at 647 (Souter, J., dissenting) (indicating that "legislative jurisdiction of the National Government inevitably increased through the expected growth of the national

hypothesize a connection between its regulation and the economy, the conventionally progressive view would hold the regulation to be within Congress' commerce power.

This broad, deferential interpretation opens the door to congressional regulation of virtually every gay rights issue. If Congress can outlaw violence against women based on a causal chain from domestic violence to health care costs to the economy, or from domestic violence to employee productivity to the economy, then Congress could likely outlaw consensual gay sex under similar reasoning. Indeed, Congress might simply aggregate the effects of sexual activity on the demand for pornography, prophylactics, or lubricants— all of which move in interstate commerce and the sale of which comprises a portion of the gross domestic product. Obviously, local and discrete acts of sexual orientation discrimination may, in the aggregate, affect employment, housing, or other commercial markets which, under the progressive interpretation, would presumably support congressional action either to prohibit such discrimination or to *protect* it. Congress could also override much of family law since, as the Rehnquist majority pointed out in *Morrison*, “the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”<sup>51</sup> According to that view, Congress could presumably regulate interstate commerce by voiding Vermont civil unions, New York second-parent adoptions, or Minnesota transgender birth certificates. Indeed, Congress has already offered a preview of federal family law with the Defense of Marriage Act.<sup>52</sup>

Under the conventionally progressive approach to federalism, Congress could also make destructive use of its power to enforce the Fourteenth Amendment. The Rehnquist Court has significantly limited that power in recent years by requiring that “[t]here must be a congruence and proportionality between” the enforcement measures and the underlying Fourteenth Amendment violation that Congress is seeking to remedy or prevent.<sup>53</sup> As articulated most

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economy”).

<sup>51</sup> *Id.* at 615–16.

<sup>52</sup> See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2001), 28 U.S.C. § 1738C(2001)) (prohibiting federal recognition of same-sex marriages and authorizing states to disregard them if recognized by any other state).

<sup>53</sup> *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997) (plurality opinion) (holding Congress could not exempt individuals from compliance with state or local laws that arguably interfered with their religious beliefs in order to prevent religious discrimination); see also *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81 (2000) (citing *Flores*) (holding that the Age Discrimination in Employment Act of 1967 could not rest on the enforcement power because

recently by Justice Breyer in *Board of Trustees v. Garrett*,<sup>54</sup> however, the conventionally progressive interpretation of the enforcement power would grant Congress sweeping regulatory authority. A putative enforcement measure would exceed federal authority, according to Justice Breyer, only if the measure “has no tend[ency]” to remedy or prevent any Fourteenth Amendment violation or “is an irrational way” to do so.<sup>55</sup> Any rationally conceivable tendency, no matter how attenuated, would presumably support congressional action.

This broad interpretation of the enforcement power could conceivably give Congress almost plenary authority over state and local measures affecting gay rights. The Court’s recognition in *Boy Scouts v. Dale*<sup>56</sup> of an apparent First Amendment right to shun lesbians and gay men might provide a constitutional basis for incursions upon state and local gay rights laws not unlike the surgical strikes Congress has made upon the D.C. Human Rights Act. Likewise, the constitutional right to free exercise of religion might well provide an additional foundation for enforcement measures designed to erect a broad, prophylactic shield around individuals with faith-based objections to all things considered gay,<sup>57</sup> as might the equal protection clause, under which religious classifications are regarded as inherently suspect.<sup>58</sup>

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its substantive limitations on state and local governments were disproportionate to the age discrimination prohibited by the Equal Protection Clause);

<sup>54</sup> 531 U.S. 356, 376–77, 385–86 (2001) (Breyer, J., dissenting).

<sup>55</sup> *Id.* at 386 (citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)).

<sup>56</sup> 530 U.S. 640, 644 (2000) (stating that the Boy Scouts’ revocation of Dale’s position in the organization because of his sexual orientation was protected by the Boy Scouts’ First Amendment freedom of expressive association).

<sup>57</sup> Although under the Court’s current free exercise jurisprudence a state or local government violates the free exercise clause only by purposefully targeting religious practices for suppression, see generally Stephen Clark, *Judicially Straight? Boy Scouts v. Dale and the Missing Scalia Dissent*, 76 S. CAL. L.R. (forthcoming 2003), a law generally removing burdens on religious practices would presumably satisfy the progressive standard that demands only that the law have some tendency to protect Fourteenth Amendment rights. See *Employment Div. v. Smith*, 494 U.S. 872, 874–75 (1990) (holding that the Constitution does not prohibit a state from banning sacramental use of peyote, even for religious purposes, as long as the prohibition is not aimed at the religious practice and is otherwise constitutional as applied to those engaged in the specified act for non-religious purposes); see also *Flores*, 521 U.S. at 566 (Breyer, J., dissenting) (declining to join the portion of Justice O’Connor’s dissenting opinion that endorsed a narrow view of the enforcement power and leaving open the possibility that the religious exemption law at issue might be constitutional as a measure designed to enforce *Smith*).

<sup>58</sup> *Larson v. Valente*, 456 U.S. 228, 246 (1982) (applying strict scrutiny to a state statute that imposed registration and reporting requirements on some religious organizations).

Indeed, Congress has already flirted with this possibility. The Religious Freedom Restoration Act of 1993 (RFRA) purported to prevent violations of the Fourteenth Amendment by requiring strict scrutiny of all governmental actions that substantially burdened an individual's religious practices. The Court invalidated that measure, at least as applied to state and local governments, in *City of Boerne v. Flores*,<sup>59</sup> but it did so only by imposing the more conservative congruence and proportionality standard now applicable to the enforcement power. The Act would arguably survive under the broader, progressive interpretation requiring only a rational connection to the prevention of Fourteenth Amendment violations. Had RFRA been upheld as a valid exercise of Congress' enforcement power, state and local gay rights laws could in many instances be subject to a religion-based immunity of uncertain scope.

The progressive interpretation in fact may be so deferential to Congress that it would support federal legislation that prohibited states and municipalities from extending legal recognition or marriage-like benefits to same-sex couples. After all, opposite-sex marriage is a fundamental right<sup>60</sup> that, in Congress's established view, requires federal defense against the supposed threat posed by same-sex marriage.<sup>61</sup>

Lastly, under the conventionally progressive interpretation of the spending power, Congress could also undermine state efforts to protect gay rights. In *South Dakota v. Dole*,<sup>62</sup> the Court more or less adopted a progressive view that gives Congress broad authority to condition the receipt of federal funds. The receipt of federal funds may serve as a type of jurisdictional hook that, as with Title IX's ban on sex discrimination in federally supported educational programs,<sup>63</sup> allows Congress to regulate "all of the operations" of a state entity that directly or indirectly receives federal funds.<sup>64</sup> The widespread receipt of federal funds by state and local governments gives Congress myriad opportunities to foist an antigay agenda upon recalcitrant gay havens. For example, every state but

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<sup>59</sup> 521 U.S. 507, 520 (1997).

<sup>60</sup> See *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>61</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C (2000)).

<sup>62</sup> 483 U.S. 203, 206 (1987).

<sup>63</sup> 20 U.S.C. § 1681(a) (2000).

<sup>64</sup> 20 U.S.C. § 1687 (2000).

California has accepted federal funds on the condition that public schools provide abstinence-only sex education, instructing both straight and gay high school students to abstain from sexual intercourse until *opposite-sex* marriage.<sup>65</sup>

The congressional reaction to a San Francisco domestic partnership ordinance provides another illuminating example of the potential for districtization through the spending power. In 1998, the House of Representatives approved an appropriations rider to forbid the city of San Francisco from using federal funds to enforce its landmark Equal Benefits Ordinance.<sup>66</sup> That ordinance required employers with city contracts to provide domestic partner benefits to their employees and has had a tremendous impact.<sup>67</sup> While the rider restricted the use only of federal funds in enforcing the ordinance,<sup>68</sup> it might have gone considerably further, consistent with a progressive interpretation of the spending power, and attempted to forbid enforcement of the ordinance in connection with all of the operations of any San Francisco agency receiving or distributing the funds in question.<sup>69</sup> Although the decision in *Dole* limits the ability of the federal government to place conditions on the receipt of federal funds, the standard is quite lenient.<sup>70</sup>

Progressives might take solace in the fact that the federal government has not yet vigorously moved to override many gay

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<sup>65</sup> See Associated Press, *The Nation Report Says 'Abstinence-Only' Programs Met with Resistance*, L.A. TIMES, Apr. 24, 2002, at A16, available at 2002 WL 2470832.

<sup>66</sup> SAN FRANCISCO, CAL., ADMIN. CODE § 12B.2(b) (1986), available at [http://www.amlegal.com/nxt/gateway.dll/California/San%20Francisco/Admin/chapter00024.htm?f=templates\\$fn=altmain-nf.htm\\$3.0#JD\\_12B.2](http://www.amlegal.com/nxt/gateway.dll/California/San%20Francisco/Admin/chapter00024.htm?f=templates$fn=altmain-nf.htm$3.0#JD_12B.2) (last visited Feb. 20, 2003).

<sup>67</sup> See Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans* 18–21 (2001) (emphasizing that such ordinances in San Francisco and several other localities have induced over 3,000 employers to provide to provide domestic partner benefits), at [http://www.hrc.org/worknet/publications/state\\_workplace/2001/sow2001.pdf](http://www.hrc.org/worknet/publications/state_workplace/2001/sow2001.pdf) (last visited Feb. 20, 2003).

<sup>68</sup> 144 Cong. Rec. H6578–88 (daily ed. July 29, 1998) (reporting proposed language of the amendment, “None of the funds appropriated by this Act may be used to implement section 12B.2(b) of the Administrative Code of San Francisco, California.”). *Id.* at H6578. The bill was passed without the rider as the Senate rejected the proposal. See Department of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1999, Pub. L. No. 105-276, 112 Stat. 2461 (1998) (omitting the rider).

<sup>69</sup> *Cf.* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 3(a), § 908(1), 102 Stat. 28 (1988) (intending to expand the scope of coverage under Title IX, 20 U.S.C. § 1687, in light of Supreme Court decisions that had narrowed the scope); see, e.g., *Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding the “gag rule” that prohibited entities receiving federal family planning funds from discussing abortion as a family planning alternative).

<sup>70</sup> See 483 U.S. at 207–08 (requiring merely that the exercise of congressional spending power be limited to the pursuit of the welfare of the country, that any condition on the receipt of funds be unambiguous, that the condition be related to some governmental interest in the program, and that the condition not compel a recipient state to violate the Constitution).

rights victories at the state or local levels. Although there have been isolated instances of such interference,<sup>71</sup> the danger has remained largely theoretical. Congress has from time to time considered measures that raise the prospect of undermining state and local gay rights laws, but so far, successful efforts of this kind have been rare.

The fact that such measures have not yet succeeded does not necessarily mean they never will. Since the birth of the modern gay rights movement, with the exception of five months in early 2001, the federal government has never been under the unified control of a socially conservative Republican Party, as it has been since January 2003. In recent years, measures with the potential to disrupt enforcement of state and local gay rights laws, such as the proposed Religious Liberty Protection Act of 1999,<sup>72</sup> and the Community Solutions Act of 2001,<sup>73</sup> have progressed too far for comfort in the federal legislative process. The measures were ultimately stopped primarily by Democratic opposition in a divided federal government.<sup>74</sup> But past may not be prologue, as far as the

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<sup>71</sup> See, e.g., Boy Scouts of America Equal Access Act, 20 U.S.C.A. § 7905 (b) (1) (West Supp. 2002) (limiting the authority of public schools to deny access to the Boy Scouts and other groups).

<sup>72</sup> Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999) (subjecting to strict judicial scrutiny any substantial burden placed on an individual's exercise of religion in any way that interferes with interstate commerce or if done by a program or activity receiving federal funds). Opposition to the bill developed when sponsors and supporters began suggesting that the bill could pre-empt state and local gay rights laws. See Deb Price, *Beware Religious Liberty Protection Act*, NEW ORLEANS TIMES-PICAYUNE, Aug. 23, 1999, at B5, 1999 WL 19761596 (describing the controversy over the effect of the measure on state and local civil rights laws as allowing opponents of gay rights to avoid charges of discrimination by invoking a defense that gay rights violate their religious beliefs under the proposed statute); see also David G. Savage & Richard Simon, *Which Laws Must Bend for Free Worship?*, SEATTLE TIMES, Aug. 2, 1999, at A2, 1999 WL 6285878 (quoting a conservative Christian supporter of the bill as posing two competing alternatives: "the right of homosexuals to practice sodomy without inconvenience, or the right of free religious exercise").

<sup>73</sup> Community Solutions Act of 2001, H.R. 7, 107th Cong. § 201 (2001), available at WL 2001 CONG US HR 7 (popularly known as part of President George W. Bush's Faith-Based and Community Initiatives program) (expanding opportunities for faith-based organizations to obtain federal grants to carry out social service programs). Controversy erupted when the media reported that the Salvation Army had been engaged in discussions with the White House about including a provision that would exempt grant-recipients from compliance with state and local gay rights laws. See, e.g., Juliet Eilperin, *Faith Initiative Hits Snag In House; GOP Moderates' Bias Concerns Postpone Vote*, WASH. POST, July 19, 2001, at A1, 2001 WL 23181435; see also Dana Milbank, *Charity Cites Bush Help in Fight Against Hiring Gays; Salvation Army Wants Exemption From Laws*, WASH. POST, July 10, 2001, at A1, 2001 WL 23179423.

<sup>74</sup>In 1999 the House of Representatives passed H.R. 1691, the Religious Liberty Protection Act, by a vote of 306 to 118. 145 CONG. REC. H5608 (daily ed. July 15, 1999). By a vote of 190 to 234, the House defeated an amendment designed to bar religious challenges to state and local civil rights laws. 145 CONG. REC. H5607 (daily ed. July 15, 1999); Because of opposition

failure of these types of measures is concerned.<sup>75</sup> Indeed, progressive pressure to expand federal power into new areas has arguably undermined even further a prudential ethic against federal intervention in areas historically left to state or local regulation. Now that conservative Republicans find themselves in charge of a unified federal government for the first time in modern memory, their own traditional support for federalism may significantly wane.<sup>76</sup> Battles over preemption of state and local gay-rights laws underscore the continuing seriousness of this danger.

Countless gay-rights victories could be on the line since gay liberation has achieved significant success in certain states and municipalities around the country. Three-quarters of the states have decriminalized private, consensual gay sex.<sup>77</sup> Over half the states, including the District of Columbia, have enacted hate crimes laws that include sexual orientation.<sup>78</sup> Approximately one quarter

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in the Senate and pressure from the Clinton White House, a scaled-down version of the bill was enacted. It applied narrowly to land-use decisions and burdens on religious practices of institutionalized persons). See Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803, 804 (codified at 42 U.S.C. § 2000cc et seq. (2001)); see also David G. Savage & Richard Simon, *U.S. Restores Special Protections for Religious Groups*, L.A. TIMES, Sept. 23, 2000, at A18, 2000 WL 25899418. In 2001, the House of Representatives passed H.R. 7, the Community Solutions Act of 2001— a Faith-Based and Community Initiative bill— by a vote of 233 to 198. 147 CONG. REC. H4281 (daily ed. July 19, 2001). By a vote of 195 to 234, the House rejected a motion to recommit the bill to the Judiciary Committee with instructions to report it back with additional language providing that the bill would not “preempt or supersede State or local civil rights laws.” 147 CONG. REC. H4278 (daily ed. July 19, 2001) (printing the motion in the record); 147 CONG. REC. H4280-81 (daily ed. July 19, 2001) (rejecting the motion). The provision apparently doomed the bill in the Democrat-controlled Senate. See Dana Milbank, *House to Take Up Faith Initiative*, WASH. POST, July 18, 2001, A4, 2001 WL 23181236.

<sup>75</sup> Following the 2002 election, in which conservative Republicans regained control of the Senate, a Republican leader announced his intent to pass the faith-based initiative bill with language preempting state and local gay rights laws. See Jim VandeHei, *GOP Looks To Move Its Social Agenda; Hill Push to Include Abortion Curbs, 'Faith-Based' Programs*, WASH. POST, Nov. 25, 2002, A1, 2002 WL 103571811 (“[Conservative Senator Rick] Santorum has told the White House that . . . he will fight for a provision to allow religious groups to discriminate against certain people— gays, for instance— when hiring if they don’t share their religious beliefs.”).

<sup>76</sup> See, e.g., *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1079–80 (D. Or. 2002) (invalidating the attempt by the U.S. Attorney General to prohibit physicians from assisting suicides of terminally ill people as permitted under state law).

<sup>77</sup> See Lambda Legal, *State-by-State Sodomy Law Update*, at <http://www.lambdalegal.org/cgi-bin/iowa/documents/record?record=275> (last visited Feb. 10, 2003) (providing a list of states that are “free states”).

<sup>78</sup> See Human Rights Campaign, *Does Your State's Hate Crimes Law Include Sexual Orientation and Gender Identity?*, at [http://www.hrc.org/issues/hate\\_crimes/background/statelaws.asp](http://www.hrc.org/issues/hate_crimes/background/statelaws.asp) (last visited Feb. 10, 2003) (providing a list of states that have laws that include sexual orientation in hate crime legislation).

of the states have enacted gay-inclusive civil rights laws that ban private-sector employment discrimination, as have more than 140 municipalities.<sup>79</sup> Furthermore, a small but growing number of states has even recognized same-sex domestic partners for at least some purposes.<sup>80</sup> The gains at the state and local levels over the past fifteen years, particularly in gay havens, have been substantial and are continuing.

This progress stands in stark contrast to the record of the federal government, which has not managed to accomplish one of these

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<sup>79</sup> See *supra* note 9 and accompanying text.

<sup>80</sup> California, Vermont, and Hawaii have statewide registration systems and provide a number of legal benefits. See CAL. PROB. CODE §§ 6401, 6402 (West 1991, West Supp. 2003) (providing inheritance rights for domestic partners); Cal. Assemb. B. 25, 2001 Assemb., Reg. Sess. (Cal. 2001), at WL 2001 CA AB 25 (codified as amended in scattered sections of CAL. CODE (West 2001)); Cal. Assemb. B. 26, 1999 Assemb., Reg. Sess. (Cal. 1999), at WL CA LEGIS S88 (1999) (codified as amended in scattered sections of CAL. FAM. CODE, CAL. GOV'T CODE, AND CAL. HEALTH & SAFETY CODE (West 1999)) (creating statewide domestic partner registry and providing for a limited set of legal benefits); VT. STAT. ANN. tit. 15, §§ 1201–1207 (Supp. 2002) (providing for same-sex civil unions); Haw. B. 1468, 21st Leg. (2001), at WL 2001 HI HB 1468; Haw. B. 1024, 22nd Leg. (2003), at WL 2003 HI HB 1024 (providing for same-sex civil unions). Connecticut has effectively recognized domestic partners for very limited purposes. See Pub. Act No. 02-105, 2002 Conn. Legis. Serv. 424, Reg. Sess. (codified as amended in CONN. GEN. STAT. § 14-16) (allowing individuals to designate a domestic partner to inherit an automobile, make health-care decisions, and visit the designator in the hospital or nursing home). New York has recognized domestic partners for the limited purpose of compensating relatives of victims of the September 11th terrorist attacks. See S.7685, 225th Sess., Reg. Sess. (N.Y. 2002), 2002 N.Y. Laws 1227 (codified as amended at N.Y. WORKERS' COMP. LAW § 4 (McKinney Supp. 2003) (allowing domestic partners of September 11th victims to receive workers' compensation benefits); see also S.7716, 225th Sess., Reg. Sess. (N.Y. 2002), 2002 N.Y. Laws 1228 (codified as amended at N.Y. GEN. MUN. LAW § 208(f) (McKinney Supp. 2003) (making domestic partners of firefighters killed in the September 11th attacks eligible for public accidental death benefits); see also A.11012, S.6780, 225th Sess., Reg. Sess. (N.Y. 2002), 2002 N.Y. Laws 1250 (codified as amended at NEW YORK, N.Y. CODES § 12–126 (Supp. 2002)) (making domestic partners of firefighters killed in the September 11th attacks eligible for public accidental death benefits and health insurance coverage); September 11th Victims and Families Relief Act, S.7356, 225th Sess. Reg. Sess. (N.Y. 2002), 2002 N.Y. Laws 346 (codified as amended at N.Y. WORKERS' COMP. LAW § 29 (McKinney Supp. 2003); N.Y. EST. POWERS & TRUSTS LAW § 11–4.7 (McKinney Supp. 2003); N.Y. SURR. CT. PROC. ACT §§ 205, 2307 (McKinney Supp. 2003)) (“[T]he legislature hereby finds and declares . . . that domestic partners of victims of the terrorist attacks are eligible for distributions from the federal victim compensation fund, and the requirements for awards under the New York State World Trade Center Relief Fund and other existing state laws, regulations, and executive orders should guide the federal special master in determining awards and ensuring that the distribution plan compensates such domestic partners for the losses they sustained.”). In addition, California, Connecticut, Iowa, Maine, Minnesota, New York, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia provide health insurance benefits to the domestic partners of state employees. See Human Rights Campaign Foundation, *State Governments That Offer Domestic Partner Health Benefits*, at [http://www.hrc.org/worknet/asp\\_search/results.asp?sKey=List&List=IVa&t=DP](http://www.hrc.org/worknet/asp_search/results.asp?sKey=List&List=IVa&t=DP) (last visited Mar. 4, 2003). A number of municipalities have also created domestic partnership regimes. See, e.g., NEW YORK, N.Y., LOCAL LAW No. 27 (1998), available at [http://www.council.nyc.ny.u.s/pdf\\_files/bills/int0303a.htm](http://www.council.nyc.ny.u.s/pdf_files/bills/int0303a.htm) (last visited Feb. 20, 2003).

goals. Aside from hate crimes and private-sector employment discrimination, about which the federal government has done little and nothing, respectively,<sup>81</sup> Congress has not repealed the one criminal sodomy law over which it has undivided control— article 125 of the Uniform Code of Military Justice.<sup>82</sup> At the same time, it has bitterly resisted progress in the District of Columbia and has, during President Clinton's term, nationally codified the disparagement of same-sex couples with the Defense of Marriage Act<sup>83</sup> and the so-called "Don't Ask, Don't Tell" military policy.<sup>84</sup> Although the federal government has moved to eliminate much of its own antigay discrimination in the civilian workforce,<sup>85</sup> the tremendous progress of the past fifteen years in some states and municipalities has come in spite of a strong federal government, not as the result of one.

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<sup>81</sup> About the only affirmative effort of the federal government to prevent discrimination against lesbians and gay men has involved the collection and reporting of hate-crime statistics and the promulgation of a federal sentencing guideline providing for a hate-crime sentence enhancement. See Hate Crimes Statistics Act, Pub. L. No. 101-275, 104 Stat. 140 (1990) (noted, but not codified, at 28 U.S.C. § 534 (2000)); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796, 2096 (noted, but not codified, at 28 U.S.C. § 994 (2000)) (directing U.S. Sentencing Commission to promulgate a sentencing guideline to provide for a hate-crime sentence enhancement, including antigay hate crimes); Sentencing Guidelines for the U.S. Courts, 18 U.S.C.S. app. § 3A1.1(a) (2002) ("If the finder of fact at trial or, in the case of a plea of guilty or *nolo contendere*, the court at sentencing determines beyond a reasonable doubt that the defendant intentionally selected any victim or any property as the object of the offense of conviction because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person, increase by 3 levels."); Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f)(1)(F) (2000) (requiring the collection and reporting of statistics on hate crimes occurring on or near college campuses, including antigay hate crimes).

<sup>82</sup> 10 U.S.C. § 925(a) (2000) ("Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy.").

<sup>83</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000) and 28 U.S.C. § 1738C (2000)).

<sup>84</sup> 10 U.S.C. § 654 (2000).

<sup>85</sup> See Exec. Order No. 12,968, 3 C.F.R. 391 (1995), *reprinted as amended in* 50 U.S.C. § 435 (2000) (ending policy of denying federal security clearances to lesbians and gay men); see also Exec. Order No. 13,087, 3 C.F.R. 191 (1998), *reprinted as amended in* 42 U.S.C. § 2000e (2000) (amending Executive Order No. 11,478, banning discrimination in federal civilian employment, to include "sexual orientation" as a protected trait). By a vote of 176 to 252, the House of Representatives rejected an appropriations rider (the Hefley Amendment) that would have forbidden enforcement of the executive order prohibiting sexual orientation discrimination in federal civilian employment. See 144 CONG. REC. H7263 (daily ed. Aug. 5, 1998).

### III. METANARRATIVES AND THE BACKLASH

Despite the manifest risk that strong federal power may pose to gay liberation, adherents of the conventional progressive faith in centralization would urge patience and point to the trends in public opinion that are moving toward greater toleration of lesbians and gay men.<sup>86</sup> The sweep of American history demonstrates that strong federal power has been crucial in the protection of civil rights. Conservative domination of the federal government, they might say, is merely a temporary backlash that will pass. Even in the District of Columbia, Congress only managed to delay gay liberation, not defeat it. The potential short-term costs, they would argue, are justified by the potential long-term benefits of advocating for a powerful national government.

Although these arguments are far from weak, they rest on assumptions that may not hold true. In particular, they seem to exhibit a faith in an inevitable march of social progress toward greater enlightenment, equality, and justice. Whether that faith reflects the lingering influences of Enlightenment liberalism, orthodox Marxism, or nationalistic American storytelling, it seems to dull progressive perceptions of the recent political reality. Progressives often describe the dramatic shift to the right in all branches of the federal government over the last two generations as a mere setback, or part of a backlash, with a confidence that the trend will almost inevitably reverse. While that may happen, it also may not, and progressives should take care not to be overly influenced by optimistic assumptions in their thoughts about federalism.

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<sup>86</sup> See, e.g., Frank Newport, THE GALLUP ORGANIZATION IN-DEPTH ANALYSES: HOMOSEXUALITY, (Sept. 2002) (“[T]here is still significant ambivalence about the overall acceptability of homosexual relations in American society today. . . . Gallup has recorded a gradual increase in the belief that homosexuality is an acceptable orientation or lifestyle, but this perception has only risen from 34% in 1977 to 51% today. At the same time, there has been even less long term change in attitudes about the legality of homosexuality, with Americans continuing to be closely divided on the question; 52% think it should be legal today compared to 43% in 1977. . . . But, perhaps paradoxically, over eighty-five percent of Americans accept the idea of including homosexuals under the protection of equal opportunity provisions in the workplace, and almost as many favor the inclusion of gays and lesbians as protected categories under hate laws. A majority support gays and lesbians serving in the military, even openly, and a majority think that being gay should not be a disqualifier for an individual to serve as an ambassador. And, although the public agrees with a Supreme Court decision allowing the Boy Scout organization to prohibit gays from becoming Scout leaders, they disagree with removing from their posts ‘model Boy Scout leaders’ who happen to be gay.”), at <http://www.gallup.com/poll/analysis/ia020911ii.asp> (last visited Feb. 20, 2003).

To a certain extent, this sense of inevitability may represent the dominating influence among progressives of great metanarratives that tell stories of a glorious, progressive federal government vanquishing parochial enemies of progress and liberating masses of African Americans and workers. Although those two metanarratives— involving the civil rights and labor movements— obviously tell an important part of their respective stories, upon inspection, even those metanarratives may conceal competing perspectives that offer stories that should unsettle the progressive faith in national power.

Consider the race metanarrative as an example. Although the federal-government-as-savior metanarrative may fairly describe the movement of history from the Civil War in the 1860s to the Civil Rights Movement of the 1960s, it seems far less persuasive as a way of understanding historical events when applied to time periods either before or after that century-long span. A fugitive slave who was forcibly returned to bondage in the antebellum South would not find the metanarrative of federal-government-as-savior to be particularly accurate. If there were governmental saviors to be found in that era, they were the states in what we presently call the Northeast, which had abolished slavery and resisted federal attempts to protect it.<sup>87</sup> Nor today are African Americans likely to find national power particularly liberating should it turn resolutely toward wholesale dismantling of affirmative action and other race-conscious attempts at mitigating centuries of racial oppression and discrimination.<sup>88</sup> Even during the era of the Civil Rights Movement when some states and municipalities were clearly villainous from the perspective of racial equality, a large number of states outside the South enacted measures that banned race discrimination in various endeavors, such as employment, housing, and public

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<sup>87</sup> See, e.g., *Prigg v. Pennsylvania*, 41 U.S. (1 Pet.) 539, 625–26 (1842) (striking down, as a violation of the fugitive slave clause of the federal Constitution, a state law making seizure of fugitive slaves a criminal offense).

<sup>88</sup> See, e.g., *Grutter v. Bollinger*, 288 F.3d 732 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 617 (2002) (considering constitutionality of affirmative action in university admissions); see also *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995) (holding federal affirmative action plans subject to strict scrutiny); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that state and local affirmative action plans are subject to strict scrutiny); *Taxman v. Bd. of Educ. of the Township of Piscataway*, 91 F.3d 1547, 1567 (3d Cir. 1996) (holding that voluntary, non-remedial affirmative action plans violate Title VII), *cert. dismissed*, 522 U.S. 1010 (1997).

accommodations. Some states did so more than a decade before the federal government.<sup>89</sup>

The same general point applies to the metanarrative of a progressive federal government empowering organized labor. Although the enactment of the National Labor Relations Act (NLRA) was a watershed event for the labor movement, the federal government has a mixed history when it comes to labor rights—both before and since the NLRA's enactment.<sup>90</sup> Although state interference with labor organizations had long been a problem for the movement,<sup>91</sup> it was the federal Sherman Act,<sup>92</sup> as interpreted by the Supreme Court in *Loewe v. Lawlor*,<sup>93</sup> that posed perhaps the greatest threat to the labor movement in the early twentieth century.<sup>94</sup> The NLRA itself is not without contemporary critics who blame the Act, as construed, for being at least partly responsible for the decline of the labor movement in recent decades.<sup>95</sup> With the exception of its delegation to states of policymaking autonomy over so-called right-to-work issues,<sup>96</sup> however, the Act's sweeping ouster of state and local governments from much influence over private-sector labor rights precludes resort to those jurisdictions for labor law reform.<sup>97</sup> So, for instance, a ban on the hiring of permanent striker-replacements cannot be enacted by any state or local government in the country.<sup>98</sup> In some parts of the country, the labor

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<sup>89</sup> *Bell v. Maryland*, 378 U.S. 226, 284–85 (1964) (Douglas, J., concurring) (enumerating states and municipalities that had enacted laws banning race discrimination in various endeavors before enactment of the federal Civil Rights Act of 1964).

<sup>90</sup> 29 U.S.C. §§ 151–69 (2000).

<sup>91</sup> *See, e.g.,* *Vegeahn v. Guntner*, 44 N.E. 1077 (Mass. 1896) (holding that a strike and picket by disgruntled employees was an infringement on the employer's right to hire, and fire, anyone willing to work at any wage set by him).

<sup>92</sup> 15 U.S.C. §§ 1–7 (2000).

<sup>93</sup> 208 U.S. 274 (1908) (holding that the Sherman Act applied to labor combinations).

<sup>94</sup> *See generally* FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 7–11 (1930) (discussing early interpretations of the Sherman Act, including the *Loewe* decision).

<sup>95</sup> *See, e.g.,* JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

<sup>96</sup> *See* 29 U.S.C. § 164(b) (2000) (saving state right-to-work laws from federal preemption).

<sup>97</sup> *See, e.g.,* *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959) (holding that state law is pre-empted if the subject matter is arguably regulated by the NLRA); *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448, 456 (1957) (holding that the interpretation of collective bargaining agreements should be governed by special federal common law, not state contract law).

<sup>98</sup> *See NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (construing NLRA to permit employers to permanently replace economic strikers).

movement might benefit from less preemption of state and local authority.<sup>99</sup>

Nevertheless, great progressive metanarratives continue to dominate the way many progressives think about federal power and, to some extent, cause them to underestimate the progressive plight at present. If one dates it from the election of President Nixon in 1968, the backlash— as progressives like to optimistically call it— has now endured for thirty-five years. Since then, conservative Republicans have won six of the nine presidential elections, and the Democrats who won during that period were more conservative than their partisan forbearers. As a result, the federal courts have shifted further toward the right, bringing the federal law with them and even diminishing many progressives' perceptions of the law's realistic potential for social transformation. Congress, too, has fallen definitively into conservative hands. Conservative Republicans will soon celebrate ten years of controlling the legislative agenda. For the first time since the 1950s, Republican control of the federal government is undivided and one could even argue that the mainline Republicans of the 1950s were more progressive than some of their conservative, modern-day counterparts. Is it useful or realistic for progressives to label these developments a mere backlash, considering the transience that word implies?

Predicting the future is always a dubious undertaking, but there is some reason to question whether progressive trends of the past will continue or re-emerge. If, as some have proclaimed, a new Postmodern epoch has begun to supplant the Enlightenment tradition in Western civilization,<sup>100</sup> then the dynamic of social change may itself be evolving in ways that remain ill-perceived by the current generation— including its progressives. For instance, the alleged commoditization of knowledge and the related exposure of knowledge as an artifact of power<sup>101</sup> challenge the Enlightenment tradition of "reason as the source of progress"<sup>102</sup> and repudiate "modern assumptions of social coherence and notions of causality in

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<sup>99</sup>See WILLIAM B. GOULD IV, *AGENDA FOR REFORM: THE FUTURE OF EMPLOYMENT RELATIONSHIPS AND THE LAW* 153–57 (1993) (noting the repeated suggestions of a former AFL-CIO leader that organized labor might benefit from the outright repeal of the NLRA).

<sup>100</sup> See generally, e.g., JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984) (1979) (describing the supposed emergence of a postmodern epoch).

<sup>101</sup> *Id.*

<sup>102</sup> STEVEN BEST & DOUGLAS KELLNER, *POSTMODERN THEORY: CRITICAL INTERROGATIONS* 2 (1991).

favour of multiplicity, plurality, fragmentation, and indeterminacy.”<sup>103</sup> If descriptions of this transformation are accurate, the emerging postmodern condition will likely not support the same old mechanisms of social change.<sup>104</sup> These theories suggest that the backlash may actually be a symptom of more fundamental and enduring social evolution.

The continued march of gay liberation is not pre-ordained. In his influential study of western history from a gay perspective, historian John Boswell described a vibrant urban gay life:

The revival of urban economies and city life . . . was accompanied by the reappearance of gay literature and other evidence of a substantial gay minority. Gay people were prominent, influential, and respected at many levels of society . . . and left a permanent mark on the cultural monuments of the age . . . . Homosexual passions became matters of public discussion and were celebrated in spiritual as well as carnal contexts. Opposition to gay sexuality appeared rarely and more as aesthetic partisanship than as moral censure; exceptions to this were ignored by religious and civic leaders.<sup>105</sup>

Although his description sounds strikingly like gay urban life in the United States at the start of the twenty-first century, he was describing gay urban life in western Europe during the eleventh century. It could also describe vibrant gay urban life in Germany in the 1920s.<sup>106</sup> In both the eleventh and the early twentieth centuries, however, a surging intolerance sparked a persecution that obliterated this vibrant gay life.<sup>107</sup> Whether one chooses to call those developments backlashes, history should caution strongly against a sense that the gay liberation of the last thirty years is

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<sup>103</sup> *Id.* at 4.

<sup>104</sup> See, e.g., Nancy Fraser & Linda J. Nicholson, *Social Criticism without Philosophy: An Encounter between Feminism and Postmodernism*, in *FEMINISM/POSTMODERNISM* 19–35 (Linda Nicholson ed., 1990) (attempting to mediate radical feminist criticism and postmodern theory).

<sup>105</sup> JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY* 333–34 (1980).

<sup>106</sup> See generally BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (rev. ed. 1995).

<sup>107</sup> See BOSWELL, *supra* note 105, at 334; see also ADAM, *supra* note 106, at 53–59 (“The Holocaust . . . effectively wiped away most of the early gay culture and its movement through systematic extermination and ideological control.”); see also RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* (1986).

necessarily irreversible or that further liberation is somehow inevitable.

#### IV. RISKING IT ALL

The uncertain permanence of amassed progressive victories, or of renewed progressive reform, should affect how progressives think about federalism, yet it may well lead progressives to different conclusions. The question whether the fear of counter-progressive impositions by the federal government is sufficient to justify a progressive embrace of federalism depends to some extent on one's degree of risk aversion. A gambler may view the risk posed by broad national power as sufficiently minimal, and the potential benefits of progressive federal legislation so great, that the risk is justified. The more cautious progressive, or the progressive who is more dubious of the progressive metanarratives, may in good faith conclude that the risk of strong national power wielded by conservative activists in Congress, the Executive Branch, or the Judiciary is too great a threat to progress nationwide to justify further concentration of power in those institutions, particularly at the expense of state or local concurrent power.

To some extent, however, this risk calculus may depend less on the degree to which one is risk-averse and more on the ranking of one's progressive priorities. Not all progressive values are equally at risk of conservative domination of the federal government. It is possible that a rough distinction may be made between what might be called *establishment progressive interests* and *dissident progressive interests*. While conservative domination of the federal government poses a serious threat to all progressive values, it may pose a particularly serious threat to the latter set of values—the dissident interests.

The distinction between establishment and dissident progressive interests centers on the degree to which the respective interests or their associated values have achieved national success, whether by embodiment in comprehensive federal legislation or protection as federal constitutional principles. On this view racial equality and, to a lesser extent, gender equality qualify as establishment progressive interests. By no means has the federal government brought about an end to race or sex discrimination, but that is not the point of the distinction. Race and sex equality have been enshrined in both federal legislation and constitutional law. That achievement makes those values somewhat more difficult for a

conservative federal government to challenge. Doing so first requires it to dismantle years, if not decades of legal evolution and judicial precedent. That task is not impossible, but it may not be quickly or easily done.

The same is not true of dissident progressive interests: Values that are dissident within the framework of existing national law and politics. These progressive values have not achieved significant embodiment in federal statutory or constitutional law. Lesbian and gay equality represent one set of these dissident progressive interests; death with dignity is another. Existing federal law offers little protection for these values, and perhaps more crucially, existing federal constitutional law places few restraints on the power of a conservative-dominated federal government to undermine them nationally. While some measures that would undermine establishment progressive values cannot be immediately put on the federal agenda because they require affirmative dismantling of existing fundamental law, few such prohibitions exist with respect to dissident progressive values, so virtually anything goes. Relying on a constitutional safety net constructed of *Roe v. Wade*<sup>108</sup> and *United States v. Virginia*<sup>109</sup> is quite different from relying on one constructed of *Bowers v. Hardwick*<sup>110</sup> and *Romer v. Evans*<sup>111</sup> or *Washington v. Glucksberg*<sup>112</sup> and *Vacco v. Quill*.<sup>113</sup>

The difference, in part, reflects a progressive ambivalence toward governmental power. Since progressive thought questions both public and private forms of subordination, progressives must balance the risk of subordination by the government against the potential benefit of governmental action that challenges private subordination.<sup>114</sup> For establishment progressive values, one may focus greater attention on the latter— the potentially beneficial use

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<sup>108</sup> 410 U.S. 113 (1973) (holding that the Due Process Clause of the Fourteenth Amendment protects a woman's qualified right to terminate her pregnancy).

<sup>109</sup> 518 U.S. 515 (1996) (finding that Virginia Military Institute's exclusion of women violated the Equal Protection Clause of the Fourteenth Amendment).

<sup>110</sup> 478 U.S. 186 (1986) (explaining that the Constitution does not confer a fundamental right to engage in same-sex intimacy).

<sup>111</sup> 517 U.S. 620 (1996) (declaring unconstitutional a voter supported amendment to the Colorado Constitution that would preclude government action designed to protect gays from discrimination).

<sup>112</sup> 521 U.S. 702 (1997) (holding that Washington state's ban on assisted suicide does not violate the Due Process Clause).

<sup>113</sup> 521 U.S. 793 (1997) (holding that New York's ban on assisted suicide does not violate the Equal Protection Clause).

<sup>114</sup> See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 678–86 (1990) (providing a useful summary of progressive political thought).

of governmental power to challenge private abuses— because a certain level of established federal law already provides some security against the risk of governmental abuses. In contrast, for dissident progressive values, security against governmental abuses is substantially lacking, which means one should not too readily disregard the risk of potential governmental abuse and focus exclusively on the potentially beneficial use of governmental power.

Indeed, perhaps the greatest risk to dissident progressive interests is the possibility of national action precipitously and uniformly repudiating those interests on a preemptive, nationwide basis. American history seems to indicate that progressive reform movements tend to build momentum by gaining success at state or local levels before ultimately generating sufficient strength to prevail nationally. Rare has been the progressive reform that succeeded in performing the political equivalent of a standing high-jump, surmounting a looming, counter-progressive national policy in a single bound with no running start among state and local governments. In part this seems to be because dissident progressive interests benefit from the gradual introduction provided by states and local governments serving as “laboratories where many lessons in regulation may be learned by trial and error on a small scale without involving” the country as a whole “in every experiment.”<sup>115</sup> Progressive advocacy of same-sex marriage or death with dignity is greatly enhanced by the recognition of civil unions in Vermont<sup>116</sup> and physician-assisted suicide in Oregon,<sup>117</sup> which demonstrate that such existing law reforms do not cause the stars to fall from the sky. It is for that reason that nascent progressive movements are vulnerable to the threat of nationally prohibitory legislation that maintains and reinforces the marginalizing sense of taboo, exoticism, or absurdity that may often envelop newly emerging progressive interests.<sup>118</sup>

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<sup>115</sup> *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 530 (1945).

<sup>116</sup> VT. STAT. ANN. tit. 15 §§ 1201–1207 (Supp. 2002).

<sup>117</sup> Death with Dignity Act, OR. REV. STAT. § 127.800–127.995 (2001).

<sup>118</sup> See, e.g., Federal Marriage Amendment, H.R.J. Res. 93, 107th Cong. (2002) (proposing an amendment to the U.S. Constitution to prohibit same-sex marriage and prohibit state or federal courts from construing any provision of the U.S. Constitution, state constitutions, federal laws, or state laws to require extension of marital benefits to same-sex couples); Dispensing of Controlled Substances To Assist Suicide, 66 Fed. Reg. 56,607 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306) (directive of U.S. Attorney General Ashcroft articulating new policy interpretation that compliance with Oregon's Death with Dignity Act was a violation of federal drug control laws); *but cf.* *Oregon v. Ashcroft*, 192 F. Supp. 2d 1077, 1079 (D. Or. 2002) (declaring that Attorney General Ashcroft's directive that Oregon's Death with Dignity Act violated federal law exceeded the authority delegated to him by the Controlled Substances

This distinction may explain why some progressives view federalism differently from other progressives, regardless of their respective degrees of risk-aversion. It is perfectly reasonable to expect progressives who give greater priority to establishment progressive interests to oppose federalism-based limitations on the power of the federal government to respond to private abuses. Strong national power is a source of beneficial remediation of private abuses. It is no less reasonable for progressives who place greater priority on dissident progressive interests to support federalism-based limitations given the decades-long backlash that shows little sign of abating and that has achieved at least momentary domination of the federal government. It is the dissident progressive values, after all, that are at the frontline. Establishment progressives should not be surprised to find dissident progressives resisting the expectation that they compliantly serve as cannon fodder in what may fairly be called the great progressive lost cause: the restoration of the Kennedy Administration, the Warren Court, and the *Great Society* Congress.

As the last point implies, the differentiation of establishment from dissident progressive interests provides a foundation for a progressive critique of the conventionally progressive endorsement of a strong national government. If opposition to federalism holds greater promise and lesser risk for establishment progressive interests than for dissident progressive interests, why should the position more congenial to establishment progressive interests be entitled to hold sway as *the* progressive position? If, as Robin West describes, at least one strand of progressive thought places value on viewing matters “by reference to a set of ideals that derive from the experiences and aspirations of the relatively disempowered,”<sup>119</sup> progressives might deconstruct their own general preference for broad national power and consider whether, in fact, it privileges more empowered progressive interests over more marginalized ones. Should the progressive position on federalism be formulated from the perspective, for example, of white suburban women or inner-city transgender people? The alternative, of course, is to dispense altogether with the idea that there can be any universal progressive position on federalism divorced from context and perspective.

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Act, and was therefore invalid).

<sup>119</sup> West, *supra* note 114, at 679.

## V. COMPROMISE AND ASSIMILATION

While the risk of reactionary national legislation is real enough, even seemingly progressive national legislation is risky because of the compromises and coalition-building that are necessary for enactment. According to pluralist democratic theory,<sup>120</sup> the legislative process typically functions as a system in which “myriad pressure groups, each typically representing a fraction of the population, bargain with one another for mutual support.”<sup>121</sup> This model suggests that the weaker a group is, the tougher it will be to build an effective coalition to enact legislation.<sup>122</sup> For lesbians and gay men, this political dynamic raises a question about the effect of compromise and coalition-building on the progressive interests at stake.

While this question arises at all levels of government, it seems most significant at the national level for lesbians and gay men. Pluralist democratic theory suggests by extension that enacting legislation in a state or local jurisdiction in which an interest group has greater strength and needs fewer coalition-partners should be easier than enacting legislation at the highly distilled national level at which the group is weaker and will need more coalition-partners.<sup>123</sup> As even James Madison put it, “[t]he 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.”<sup>124</sup> Given the concentration of lesbians and gay men in gay havens, we should be able to enact state or local legislation there with less compromise than at the national level, where we must make significantly greater concessions to the straight mainstream. The government level at which these gay legal issues are resolved may significantly affect the manner in which they are resolved. Put in stark terms, it is the difference between enacting a pro-gay law in San Francisco and enacting one in Congress.

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<sup>120</sup> ROBERT A. DAHL, *DILEMMAS OF PLURALIST DEMOCRACY* 1–7 (1982) (setting forth the main ideals of democratic pluralism).

<sup>121</sup> Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 720 (1985).

<sup>122</sup> See *id.* at 721 (presenting the idea that in a population consisting of twelve percent African-Americans and one-half percent Jehovah's Witnesses, “the Witnesses could not reasonably expect to win substantive victories nearly as often as [African-Americans].”).

<sup>123</sup> History seems to validate this expectation. For just two of many possible examples, see JOHN A. GARRATY, *THE NEW COMMONWEALTH: 1877–1890*, at 52–57 (1968) (describing regional influence of the Grangers in the 1870's and the Populists in the 1890's).

<sup>124</sup> FEDERALIST NO. 10 (James Madison).

Among lesbians and gay men, these political dynamics have the potential to privilege certain voices within the community—specifically, those of gay assimilationists. For them, ultimate victory in the gay rights movement would be the melting of lesbians and gay men into the straight mainstream with minimal adjustment (or disruption) of existing social norms. Professor Bill Eskridge, for example, has endorsed the view that the path to gay equality lies in mimicry of straight people and that gay men—whom he has slurred as being “promiscuous”—need to be married off so as to be sexually civilized and domesticated.<sup>125</sup> Journalist Andrew Sullivan has gone further in arguing that social conservatives ought to seek a divide-and-conquer “alliance with conservative trends among homosexuals.”<sup>126</sup> As these views illustrate, gay assimilationists exhibit both a willingness to compromise competing gay views and an obsequious attitude toward the straight mainstream,<sup>127</sup> both of which are likely to assist them immeasurably in coalition-building.<sup>128</sup>

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<sup>125</sup> See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8–9 (1996). Professor Eskridge may be brilliant in terms of statutory interpretation. See, e.g., WILLIAM N. ESKRIDGE, JR., ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* (3d ed. 2001); WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* (1994); see also Richard A. Posner, *Should There Be Homosexual Marriage? And if So, Who Should Decide?*, 95 MICH. L. REV. 1578, 1578 (1997) (reviewing WILLIAM N. ESKRIDGE JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* (1996)) (“Professor Eskridge has established a well-deserved reputation as our leading legal academic specialist on statutory interpretation.”). Eskridge has also made invaluable contributions to lesbian and gay legal scholarship. See, e.g., WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999). He may even be our best hope for an openly gay Supreme Court Justice any time soon. But he is not the Gay Pope. Lesbians and gay men are capable of forming their own ethical standards without condescending instruction as to what he thinks a properly “self-reflective gay community” should want. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE*, *supra* note 125, at 10. Nor are our attitudes as identical to his own as he has rather arrogantly suggested. See William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 662 (2000) (“Progressive objections to using marriage as a vehicle for gay rights are equally futile in the short term, for the simple reason that marriage has long been a focal point for desire and aspiration in our culture, and apparently for reasons that remain popular. That . . . makes it an attractive aspiration for many same-sex couples.”).

<sup>126</sup> ANDREW SULLIVAN, *VIRTUALLY NORMAL* 132 (1995).

<sup>127</sup> Gay commentators who may be fairly described as assimilationists are not monolithic in their views; they offer a range of perspectives. Professor Eskridge writes from a liberal-legal perspective, see, e.g., William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001), while Andrew Sullivan has built a reputation as a gay conservative, see, e.g., SULLIVAN, *supra* note 126. Among the most extreme (and tragic) of the openly gay assimilationist commentators is Chandler Burr, a writer who has described himself as “a Colin Powell Republican and a gay person who is an ardent assimilationist.” Chandler Burr, *Why Conservatives Should Embrace the Gay Gene*, WKLY STANDARD, Dec. 16, 1996, at 22, available at LEXISNEXIS, WEEKLY STANDARD file. His

Indeed, the assimilationist work of yet another gay commentator, Gabriel Rotello,<sup>129</sup> has recently intrigued former Oklahoma Congressman Tom Coburn, the conservative chair of President Bush's advisory council on HIV/AIDS.<sup>130</sup> Taking up only a part of Rotello's argument, Coburn has shown some interest in the idea of using federal power to attack so-called multi-partnerism among gay men. In what would amount to a bizarre mutation of the Bush administration's abstinence-only policy, the suggestion appears to be that in addition to condemning all gay relationships, federal policy could especially condemn gay sexual activity (however safe) that occurs outside of committed relationships.<sup>131</sup> In other words, we would be damned if we do, but even more damned if we don't. Whether Coburn is conceiving of some kind of special sub-hell<sup>132</sup> for people who are not just gay but also *promiscuous*, the starkly assimilationist potential is apparent. More to the point, the willingness of a conservative political appointee to consider implementing the most assimilationist features of an assimilationist work by a gay commentator reinforces the point that compromise and coalition-building may be easier for gay assimilationists, who often seem eager to "gamble away our freedom to gain [their] own authority."<sup>133</sup>

Gay liberationists are likely to be more marginalized in the pluralistic democratic process. For them, victory in the gay rights movement does not consist of winning permission to melt into the straight mainstream and mimic existing social norms with little or

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use of the word *ardent* was no exaggeration. After studying biological and genetic theories of homosexuality, Burr announced in a conservative news weekly that he "would not be opposed to" the ultimate assimilation: having putative "genetic surgery" to make himself straight. *Id.* Oddly enough, he attempted to rationalize his feelings by arguing that homosexuality is as politically irrelevant as left-handedness, though he failed to explain why well-adjusted gay people, particularly those with partners, should feel any inclination to undertake "genetic surgery" in order to rid ourselves of a trait that is, in his view, irrelevant. *See id.*

<sup>128</sup> Cf. RICHARD GOLDSTEIN, *THE ATTACK QUEERS: LIBERAL SOCIETY AND THE GAY RIGHT* 1–12 (2002) (criticizing the mainstream media's embrace of gay conservatives and its tendency to portray them as representative spokespeople for all lesbians and gay men).

<sup>129</sup> *See generally* GABRIEL ROTELLO, *SEXUAL ECOLOGY: AIDS AND THE DESTINY OF GAY MEN* (1997).

<sup>130</sup> *See* Lou Chibbaro Jr., *Bush AIDS Advisors to Study Gay Male 'Multi-Partnerism': Conservative Chair Puts Focus on Book That Cites Gay Male 'Multi-Partnerism' as Epidemic Source*, WASH. BLADE ONLINE, Dec. 27, 2002, available at <http://www.aegis.com/news/wb/2002/WB021203.html> (describing the controversy) (last visited Feb. 20, 2003).

<sup>131</sup> *Id.*

<sup>132</sup> *See id.* (describing Coburn's apparent view that he could not endorse proposals to support even monogamous same-sex relationships because of his conservative Christian beliefs).

<sup>133</sup> INDIGO GIRLS, *Strange Fire*, on *STRANGE FIRE* (Epic Records 1989).

no modification. Rather, for gay liberationists, victory means empowering lesbians and gay men as *such*, insisting upon respect for the ways in which we are or have become different, and even recognizing that the straight mainstream, far from perfect, can learn from and be improved by insights we have gained. Our experience as involuntary social exiles has required us to question prevailing norms and develop alternative conceptions of matters long taken for granted by the straight majority.<sup>134</sup> Against assimilation, gay liberationists see a largely Pyrrhic victory in the kind of formal equality that takes the norms of the straight mainstream as “the measure of all things” and the benchmark against which the value of lesbian and gay lives should be judged.<sup>135</sup> But if one refuses to be satisfied with a mere invitation to attend someone else’s party and insists upon an equal role in planning and co-hosting the event, compromise and coalition-building are likely to be more difficult.

Such is the plight of gay liberationists in the political process, a plight likely to be particularly aggravated at the national level. While liberationist voices within the lesbian and gay community may receive a more fair hearing and accommodation in gay havens, they may well be altogether absent from the debate at the highly distilled national level. Federalism, then, may offer gay liberation greater hope for resisting assimilation than does the conventionally progressive preference for centralization.

## VI. CULTURAL RELATIVISM AND FEDERALISM

Resolution of gay-rights issues at the national level also risks imposing a uniform solution on a national population with significantly divergent perspectives, experiences, cultural norms, and values. While a number of arguments justifying a theory of progressive federalism are strategic, this potential superimposition

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<sup>134</sup> The arguments have been made with particular clarity in the context of same-sex marriage. See, e.g., Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, 6 OUT/LOOK, NAT’L GAY & LESBIAN Q. (Fall 1989), reprinted in LESBIAN AND GAY MARRIAGE 20–26 (Suzanne Sherman ed., 1992); Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993). Given the dominance of lesbian voices on this side of the debate, I advisedly describe it as *gay liberationist*.

<sup>135</sup> CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 32, 34 (1987).

of uniformity upon cultural divergence suggests a more substantive, philosophical justification for federalism— one grounded in progressive respect for multiculturalism and acknowledgment of at least some measure of cultural relativism.

After the contentious 2000 presidential election— and continuing at least until the September 11th attacks— it became fashionable to describe political disagreements in terms of red states and blue states. The allusion was to television coverage of the election night in which the networks depicted the states voting for George W. Bush or Al Gore as either red or blue. What struck many observers was the manifest absence of randomness in the distribution of red and blue on the national map that evening. After a campaign that had focused significant attention on social values and generated an unusually high voter turnout, candidate Bush sported a broad swath of states across the South, the Great Plains, and the Rocky Mountains, while candidate Gore had prevailed in almost the entire Northeast, much of the upper Midwest, and up and down the West Coast. Only a handful of states— notably, New Mexico for Gore and New Hampshire for Bush— disrupted this pattern of geographic regionalism.

This red state—blue state metaphor captured the attention of commentators because it seemed to describe more than simply the electoral outcome of the 2000 presidential election. It seemed to reflect a deeper political and cultural divergence and, by doing so, validate claims that observers had been making for at least a decade about a so-called “culture war.”<sup>136</sup> Interestingly, the electoral-college division in the 2000 presidential election correlated strongly with the distribution of state and local gay civil rights laws around the country.<sup>137</sup>

A broader look at gay rights issues around the nation tends to substantiate the notion that the red state—blue state metaphor does indeed reflect, if imprecisely, a broader cultural or political division in the United States. On these questions, which sociologist Alan Wolfe has described as “the ultimate test” of American political

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<sup>136</sup> See, e.g., GERTRUDE HIMMELFARB, ONE NATION, TWO CULTURES 118–36 (2001) (explaining that a culture war exists between differing subcultures, each drawing commonality in their moral views, religions, institutions, and interests); JAMES DAVISON HUNTER, CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA 50–51 (1991) (describing the various cultural disputes that coalesce to form a culture war over how Americans define their society).

<sup>137</sup> See *supra* Fig. 1.

principles, that metaphor has significant descriptive power.<sup>138</sup> For example, of the roughly thirteen states that still criminalize consensual gay sex in private, every single one was in the Bush column in 2000.<sup>139</sup> Positive measures reveal the same pattern. Only one-third of Bush states have enacted gay-inclusive hate-crimes laws, while the overwhelming majority of Gore states have done so.<sup>140</sup> The same pattern holds for same-sex marriage— of the thirty-six states that have specifically disallowed recognition of same-sex marriage in the wake of *Baehr v. Lewin*,<sup>141</sup> nearly three-quarters were in the Bush column in 2000.<sup>142</sup> Although that means nine out of ten of the Bush states have enacted such measures, barely half of the Gore states have enacted them.<sup>143</sup> Similarly, all ten states that recognize same-sex domestic partnerships for at least some purposes<sup>144</sup> were in the Gore column on Election Day, as were all but two of the fifteen states that now prohibit private-sector employment discrimination on the basis of sexual orientation.<sup>145</sup> Indeed, employment discrimination law provides one of the most striking illustrations. Although state and local laws forbid sexual orientation discrimination in employment in jurisdictions encompassing roughly forty-four percent of the country's jobs, those jurisdictions encompass roughly seventy-six percent of the jobs in the Gore states but only twelve percent of the jobs in the Bush states.<sup>146</sup> Whether using a positive or a negative measure, gay-rights advances correlate significantly with a red state–blue state division based on the 2000 presidential election results.<sup>147</sup>

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<sup>138</sup> ALAN WOLFE, ONE NATION, AFTER ALL: WHAT MIDDLE-CLASS AMERICANS REALLY THINK ABOUT: GOD, COUNTRY, FAMILY, RACISM, WELFARE, IMMIGRATION, HOMOSEXUALITY, WORK, THE RIGHT, THE LEFT, AND EACH OTHER 72 (1998).

<sup>139</sup> See *infra* tbl.1.

<sup>140</sup> See *infra* tbl.1.

<sup>141</sup> See 852 P.2d 44, 74 (Haw. 1993) (holding that failure to recognize same-sex marriage presumptively violated the state equal protection clause).

<sup>142</sup> See *infra* tbl.1; see also Lambda Legal, *State-by-State*, at <http://www.lambdalegal.org/cgi-bin/iowa/states> (providing a description of legislative action in each state) (last visited Feb. 20, 2003).

<sup>143</sup> See Human Rights Campaign, *U.S. States with Anti-Marriage Laws Targeting Same-Sex Couples*, at <http://www.hrc.org/issues/marriage/background/statelaws.asp> (last visited Feb. 20, 2003); see also *infra* tbl.1.

<sup>144</sup> See *supra* note 80 and accompanying text.

<sup>145</sup> See *supra* note 7 and accompanying text.

<sup>146</sup> These figures are based on the 1997 Economic Census data. See *supra* note 9 and accompanying text.

<sup>147</sup> See *infra* tbl.1.

	BUSH STATES (30)	GORE STATES (20+1 <sup>a</sup> )
NEGATIVE MEASURES . . .		
continues to criminalize same-sex sexual activity	13 (43%)	0
has enacted a state "Defense of Marriage Act"	26 (87%)	10 (48%)
POSITIVE MEASURES . . .		
has gay-inclusive hate- crimes law	10 (33%)	18+1 (90%)
recognizes same-sex partners for some purposes	0	10+1 (52%)
bans private employment discrimination by state law	2 (7%)	13+1 (67%)
portion of workforce covered by state and local laws	12%	76%

<sup>a</sup> "+1" refers to the District of Columbia

**Table 1.** Correlation of Gay Rights and 2000 Presidential Vote.

Public opinion polling data reinforces the unremarkable point that attitudes about gay-rights issues vary around the country. In a 1996 study involving the Gallup Organization, the University of Virginia's Post-Modernity Project found significant regional variation with respect to a number of gay-rights issues. On some issues, the respondents in the South stood out from the crowd. For instance, although respondents in all regions disagreed with the statement "[h]omosexual behavior should be against the law, even if it occurs between consenting adults," two-thirds or more of the respondents outside the South disagreed with the statement while just fifty-five percent of the respondents in the South did.<sup>148</sup> Likewise, while small majorities of respondents outside the South supported the view that gays "should be allowed to serve openly in the armed forces," only forty percent of respondents in the South

<sup>148</sup> 2 CARL BOWMAN & JAMES DAVISON HUNTER, THE STATE OF DISUNION: 1996 SURVEY OF AMERICAN POLITICAL CULTURE tbl.42.F (1996).

agreed.<sup>149</sup> On other issues, however, it was respondents in the Northeast that bucked the trend. For instance, while large majorities of respondents outside the Northeast opposed both same-sex marriage and adoption, substantially weaker majorities in the Northeast had the same opposing stance.<sup>150</sup> Likewise, a plurality of Northeasterners agreed that “[h]omosexuality should be considered an acceptable alternative lifestyle,” while healthy majorities in the other regions disagreed.<sup>151</sup> Combining a number of the responses into one index shows the Northeast and West to be significantly more gay-friendly regions than the Midwest, and all were far more gay-friendly than the South. This result, again, correlates strikingly with the distribution of state and local gay-rights laws around the country.<sup>152</sup>

These regional differences, though perhaps not as stark as differences among nations of the world, implicate a debate that has raged in the field of international human rights law for several years between so-called universalists and cultural relativists.<sup>153</sup> That debate centers on objections that a number of non-Western nations, particularly in Asia, have raised to what they call the inherent privileging of Western concepts of individualism and justice in international human rights law and, particularly, in the Universal Declaration of Human Rights. This privileging, they argue, poses a threat in some instances to non-Western value systems and cultural practices.

It is a charge that progressive Westerners should and do have a hard time dismissing, for the very kind of postmodern critiques employed by many progressive academics in recent years support the charge. To the extent alleged universal human rights rest on some sort of Kantian worldview about human dignity, it is difficult for the progressive to argue that they are not, in fact, Western

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<sup>149</sup> *Id.* at tbl.42.D.

<sup>150</sup> *Id.* at tbl.42.B.

<sup>151</sup> *Id.* at tbl.42.H.

<sup>152</sup> *See supra* fig.1.

<sup>153</sup> *See, e.g.,* Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 BUFF. HUM. RTS. L. REV. 211 (1999); Yash Ghai, *Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims*, 21 CARDOZO L. REV. 1095 (2000); Dianne Otto, *Rethinking the “Universality” of Human Rights Law*, 29 COLUM. HUM. RTS. L. REV. 1 (1997); Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1 (2000); Michel Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism? A Pluralist Assessment Based on the Rights of Minorities*, 30 COLUM. HUM. RTS. L. REV. 249 (1998); Robert D. Sloane, *Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights*, 34 VAND. J. TRANSNAT’L L. 527 (2001).

cultural constructs, perceived as universal as an artifact of the superior power of the West. Even though this cultural relativist critique has, not surprisingly, been pressed by nations in defense of policies or practices that Western progressives find substantively objectionable, if not abhorrent, within their own worldviews, the cultural relativist critique nevertheless has undeniable merit. To the extent Western progressives have not taken the critique seriously, they may be guilty of deconstructing everyone's belief system but their own.<sup>154</sup>

The same sort of cultural relativist critique that has arisen internationally may be made domestically in the structurally similar context of federal–state relations. Indeed, it historically has been raised, generation after generation, by Southern aristocrats and their less aristocratic successors who have been hell-bent on subordinating African Americans.<sup>155</sup> Whether because of the horror and uncomfortable proximity of the South's relentless mistreatment of African Americans or because of an attitude of moral or cultural superiority— if not both— American progressives have traditionally dismissed those intra-national appeals to cultural relativism with perfunctory disdain. That reaction was more legitimate, however, before progressive intellectuals generally embraced postmodern modes of criticism and began the project of deconstructing knowledge and unmasking power relations. The fact is progressive non-Southerners have used the power of the federal government to impose their value preferences as dominant. While the imposition has vastly improved the lives of many people, particularly African Americans, it is also true that progressives who have initiated the postmodern critique of power relations and universalizing belief systems cannot simply turn off those critiques when it is progressively convenient to do so.<sup>156</sup> Those critiques support a theory of progressive federalism. The same philosophical problems that have recently vexed progressive Westerners in the context of international human rights law apply with equal force to

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<sup>154</sup> See STANLEY FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 225–42 (1989) (criticizing progressives for not applying their critiques to their own views).

<sup>155</sup> The classic critique, of course, was offered in the mid-nineteenth century by John C. Calhoun. See, e.g., JOHN C. CALHOUN, *A DISQUISITION ON GOVERNMENT AND A DISCOURSE ON THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES* (Lawbook Exch. 2002) (1851).

<sup>156</sup> For an explicit attempt to do precisely that, see Fraser & Nicholson, *supra* note 104, at 34 (“[P]ostmodern critique need forswear neither large historical narratives nor analyses of societal macrostructures. . . . [P]ostmodern feminists need not abandon the large theoretical tools needed to address large political problems.”).

progressives who would use broad national power to impose a progressive belief system on a culturally divergent country, a problem not solved merely because one agrees with that belief system.

It is interesting to note, however, that in thinking about the applicability of the cultural relativist critique domestically, the almost natural inclination for progressives is to view the debate in terms of a progressive national government imposing progressive values upon a recalcitrant and retrograde South. That such a presumed arrangement seems natural is a sign that progressives have not come to grips with the potentially enduring nature of what they dismissively label a backlash. In fact, what makes the possibility of a cultural relativist defense of federalism so intriguing today is that the power relations at this moment seem arranged in precisely the opposite direction. What progressives increasingly face today is the problem of a retrograde national government imposing reactionary values on a progressive Northeast, upper Midwest, and West Coast. The question now is less whether the country can or should tolerate a culturally divergent South but whether it can or should tolerate culturally divergent progressive regions. The irony is that by treating the cultural relativism argument so disdainfully and dismissively when articulated by ill-intentioned Southerners, progressives have done much to delegitimize the claim when it is the progressive regions of the country that now need it. Why, for instance, should the federal government not outlaw same-sex civil unions and send the Eighty-Second Airborne into Vermont to eradicate the practice there?<sup>157</sup> Is the only progressive answer substantive and universalist— that same-sex civil unions are a positive good and a fundamental right— or are progressives free as well to offer a federalism version of cultural relativism— that the people of Vermont may freely equate same-sex unions with opposite-sex marriages if they value diversity more than other Americans or interpret equality differently from them?

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<sup>157</sup> Cf. EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954 TO 1965, FIGHTING BACK (1957–1962) (Time-Life Video 1987) (including footage of members of the Eighty-Second Airborne escorting African-American teenagers into Little Rock High School in a desegregation effort).

## VII. CONCLUSION

Fundamentally the question of federalism raises an anterior question of community. At which level of government should progressives expect to collectivize their interests and seek to establish binding norms? The decision to grant the federal government broad preemptive power is a decision to collectivize at the national level. It is a decision to cast one's lot with a national community. Like any decision to collectivize, it relies on the strength of some— such as progressives in places like California and New York— to lift the bottom— such as embattled progressives in places like Utah and Alabama. But a risk is that the collectivization will not only lift the bottom but pull down the top. Assuming federal power would be used preemptively, the question is whether national leveling would be preferable to regional pockets of progressive and conservative public policy. Why think of community at precisely the country's borders? Why not think of it in either broader or narrower terms? Why do progressives perceive the nation's frontiers as establishing the bounds of legitimate imposition of norms or the most effective extent of collectivism? These are the aspects of the question of community that underlies the federalism issue.

One answer, from a sober, gay liberationist perspective, is that lifting up places like Utah and Alabama is not worth the potential risk to California, New York, and gay havens around the country and that regulating those places from afar is hardly different from imposing Western norms on Asian nations. It is in gay havens that lesbians and gay men may find the best chance for meaningful liberation and a community that more nearly shares their cultural values. We can hardly expect to be a numerical majority anywhere. We have no gay Israel. Nor should we realistically expect strong and sustained support from a large proportion of the American people in the immediate future. As sociologist Alan Wolfe concluded in his 1998 study of public attitudes concerning lesbians and gay men, "[t]he best that can be said is that support for public acceptance of homosexuality is negative rather than positive, rooted more in a libertarian appreciation of privacy than in active acceptance of homosexuality per se."<sup>158</sup> Consistent with that conclusion, the Post-Modernity Project found that although antigay

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<sup>158</sup> WOLFE, *supra* note 138, at 76–77.

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public attitudes tend to be strongly expressed, pro-gay attitudes were significantly weaker and more ambivalent. Lesbians and gay men should reasonably anticipate, at best, toleration, and often grudging toleration at that, in many parts of the country as well as at the highly distilled national level.

Yet thousands of us— myself included— have followed yellow-brick highways to gay havens where we can find a critical mass of gay and supportive neighbors to achieve a decent sense of community and inclusion and, increasingly, sufficient strength in numbers to advance our interests locally and regionally. From the perspective of gay dissident progressives seeking safe harbor amid alternating national impulses toward tolerant indifference and pointed hostility, a conventionally progressive call for broad national power and increased centralization of public policy may have little appeal. A theory of progressive federalism may suit our need for havens where we can organize a life around our own values and beliefs, however dissident.

It is from those crucial sites, moreover, that we can create concrete examples that provide potentially transformative challenges to the preconceived notions of our opponents elsewhere. It is by providing these living, breathing, successful, and vibrant counterexamples that we may hope to continue breaking cycles of antigay socialization. But we must have the spaces and the autonomy to construct our counter-exemplary communities. Protecting these gay havens is crucial, and for that reason federalism is sometimes a progressive value.