POWER STRUGGLES AND PREEMPTION

As North Carolina's HB2 has grabbed national attention in recent months, it has resurrected a conversation about how much power cities do have—or should have—to pass non-discrimination ordinances that prohibit discrimination against the LGBTQ community. It has also demonstrated the struggle that can ensue when a state legislature interferes with the work of local government.

The question of how much power cities have is not a simple question to answer. Because cities are delegated their power to govern by the states, the legal authority of a city to legislate around issues of discrimination varies greatly from one state to the next, and sometimes even from city to city. Essentially, a state has the ability to reserve the power to legislate on a certain subject to itself (known in some states as "Dillon's Rule"), to explicitly grant the city the power to legislate on the subject, to allow the city the power to legislate on a certain subject without an explicit grant of authority, or to revoke the power to legislate on a certain subject after the city has been previously given the power to do so. This last is known as "preemption", and HB2 is an example of this type of legislation.

Preemption laws have been used to challenge a slate of progressive issues in the last few years, including municipal bans on firearms, plastic shopping bags, smoking in public, and even fracking. It has also been used to challenge labor-related ordinances that govern paid sick leave or set a living wage. And, in the last five years, three states have passed laws eradicating the authority of cities to pass non-discrimination ordinances that protect LGBTQ people.

None of these three states have language explicitly calling out protections for sexual orientation or gender identity as being specifically forbidden, but rather the laws are framed as the state reserving to itself the authority to govern in matters of discrimination. However, in all three instances a city that had passed an LGBTQ-inclusive ordinance was the primary target of the legislation: Nashville, Tennessee passed such an ordinance that was preempted by the state legislature in 2011; Fayetteville, Arkansas did the same in 2014 followed by nearly immediate passage of a preemption law in 2015; and earlier this year in North Carolina HB2 was passed in a special session made necessary, according to its proponents, to prevent Charlotte's newly enacted non-discrimination law from going into effect before the regular legislative session began.

It is important to point out that HB2 made history as one of the worst anti-LGBTQ bills ever due to a provision in the law that mandates discriminatory treatment of transgender people in publicly-owned facilities, among other provisions. The anti-LGBTQ and especially anti-transgender rhetoric surrounding the opposition to the Charlotte ordinance and adopted by proponents of HB2 make quite clear the intent of HB2: to undo Charlotte's extension of its existing non-discrimination ordinance to include LGBTQ people, and implement in its place a legal scheme that mandates anti-transgender discrimination. The context and legislative history in the other jurisdictions bears out the same message: that these ordinances were not allowed to stand because they offered non-discrimination protections specifically for LGBTQ people.

This underlying truth—that these preemption laws are nothing but thinly veiled anti-LGBTQ legislation—sets these bills up to be challenged for violating the United States Constitution. In *Romer v. Evans*, a case decided in 1996, the United States Supreme Court held that if "the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

One of the several cases currently pending against the State of North Carolina in relation to HB2 makes this argument, and it may well be that the logic behind the laws in Arkansas and Tennessee gets struck down alongside HB2.

The national spotlight on HB2 may serve to expose the discriminatory underbelly of these wonky, innocuous-sounding laws. Those who are attracted to the skin-deep messaging that praises uniformity, traffics in transphobia, and critiques cities that pass ordinances as "extreme" simply miss the point.

Cities are laboratories for democracy that are even closer to the people than state legislatures, and as such they are accustomed to putting partisanship aside to solve real problems that are facing their communities.

Discrimination against LGBTQ people is a real problem, and city leaders look to their communities as well as to best practices vetted by other cities in order to solve those problems.

More than 200 cities (as well as 20 states) have laws prohibiting discrimination in employment on the basis of sexual orientation and gender identity, and more than 100 cities (and 19 states) have such laws prohibiting discrimination in places of public accommodation, some of which go back several decades.

As tested in hundreds of municipalities with populations of totaling in the tens of millions of Americans, in red states and blue, and subject also to decades of experience, non-discrimination ordinances including sexual orientation and gender identity have proven themselves over and over to be good public policy. They're good for LGBTQ people. They're good for economic development. They're good for a city's competitiveness. And they're so good that nearly every major American city has adopted them. That's why it is so remarkable when a state legislature overrides a non-discrimination ordinance—it shows that to some, policy making is about taking power to solve problems away.

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