

William & Mary Journal of Race, Gender, and Social Justice

Volume 14 (2007-2008)
Issue 3 *William & Mary Journal of Women and
the Law*

Article 7

April 2008

Virginia is for (Lovers) Business Owners who Feel the Human Rights Commission Poses a Threat to Their Religious Liberties

Sarah Miller

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Sarah Miller, *Virginia is for (Lovers) Business Owners who Feel the Human Rights Commission Poses a Threat to Their Religious Liberties*, 14 Wm. & Mary J. Women & L. 659 (2008), <https://scholarship.law.wm.edu/wmjowl/vol14/iss3/7>

Copyright c 2008 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmjowl>

VIRGINIA IS FOR ~~LOVERS~~ BUSINESS OWNERS WHO FEEL THE HUMAN RIGHTS COMMISSION POSES A THREAT TO THEIR RELIGIOUS LIBERTIES

ABSTRACT

In November 1992, the Arlington County Board voted to add “sexual orientation” to the group of classes protected under its anti-discrimination policy. When a store owner was sued for violating this policy in 2006, he countersued, claiming that Arlington did not have the power to enact such a policy. His claim was based on the existence of a strongly state-centered power hierarchy unique to a very small minority of states, including Virginia, laid out in the Dillon Rule. Virginia’s use of the Dillon Rule basically cripples its municipal corporations by injecting uncertainty into the process of enacting local legislation and by making local leaders reticent to enact progressive measures lest they be challenged or overruled outright. In effect, this seemingly innocuous and outdated power hierarchy has stunted civil rights movements, specifically the gay rights movement, in Virginia and should be eradicated.

INTRODUCTION

- I. THE HISTORY OF THE DILLON RULE IN VIRGINIA
 - II. HUMAN RIGHTS IN ARLINGTON
 - III. CASE STUDY: *BONO V. ARLINGTON HUMAN RIGHTS COMMISSION*
 - IV. THE DILLON RULE AND CIVIL RIGHTS STAGNATION IN VIRGINIA
 - V. VIRGINIA: THE LAST HOLDOUT?
- ## CONCLUSION

INTRODUCTION

In November 1992, the Arlington County Board voted to add “sexual orientation” to the group of classes protected under its anti-discrimination policy.¹ This measure garnered startlingly little attention — despite the traditionally conservative political leanings of Virginians and the increasingly homophobic policies of social conservatives in the United States — that is, until May 2006.² At that

1. See Charles W. Hall, *Sexual Orientation Gains Protection in Arlington Law*, WASH. POST, Nov. 15, 1992, at B3.

2. See *Bono v. Arlington County Human Rights Comm’n*, 72 Va. Cir. 256 (2006) (challenging Arlington’s power to create an antidiscrimination policy protecting sexual orientation).

time, the Arlington Human Rights Commission sued a movie store owner for discriminating against a homosexual woman who wanted him to duplicate a video of a gay rights rally.³ The store owner countersued, claiming that Arlington did not have the power to enact this law.⁴

His claim was based on the existence of a strongly state-centered power hierarchy unique to a very small minority of states, including Virginia, laid out in the Dillon Rule.⁵ The Dillon Rule states that "a municipal corporation possesses and can exercise" powers from only three sources.⁶ Of course, municipalities have any powers granted expressly by the state legislature.⁷ The Dillon Rule also allows for the assumption of powers "necessarily or fairly implied in or incident to the powers expressly granted,"⁸ through a kind of parallel to the Necessary and Proper Clause in the enumerated powers listed the United States Constitution.⁹ Finally, the Dillon Rule states that municipalities have all powers that are deemed "*essential* to the declared objects and purposes of the corporation, — not simply convenient, but indispensable."¹⁰ Any "reasonable doubt" as to whether a municipality has a power should be "resolved by the courts against the corporation,"¹¹ effectively denying debatable powers.

3. *Id.* at 257-58.

4. *Id.* at 258.

5. See Appendix: *Home Rule Across the Fifty States*, in HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 471, 476-77 (Dale Krane et al. eds., 2001). While other states claim to utilize the Dillon Rule (including Alabama, Connecticut, Idaho, Nebraska, Nevada, North Carolina, and West Virginia), in practice, all of these states, except for Nevada, have some form of the Home Rule, meaning that they are either more lax than Virginia in their interpretation of the Dillon Rule (like in Idaho, where localities have considerable discretion in creating ordinances) or that they are inconsistent in their application (as in Alabama, where city governments are allowed considerable power, but county governments are not). See the following chapters in HOME RULE IN AMERICA: Charles J. Spindler, *Alabama*, at 23, 24-25; Richard C. Kearney, *Connecticut*, at 78, 79-80; James B. Weatherby, *Idaho*, at 120, 121; Dale Krane, *Nebraska*, at 258, 258; Robert P. Morin & Eric B. Herzik, *Nevada*, at 269, 270; James H. Svara, *North Carolina*, at 312, 313; Kenneth A. Klase, *West Virginia*, at 445, 445-60. Although the Dillon Rule was initially widely adopted, shortly afterwards, states began rapidly abandoning it. *Introduction to HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK* 1, 9-12 (Dale Krane et al. eds., 2001).

6. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 145 (4th ed., Little, Brown, & Co. 1881) (emphasis omitted).

7. *Id.*

8. *Id.* (emphasis omitted).

9. U.S. CONST. art. I, § 8 (giving Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof").

10. 1 DILLON, *supra* note 6, at 145.

11. *Id.*

Though initially characterized by its creator as a legally “undisputed” proposition,¹² a claim unsupported even when it was made, the Dillon Rule is now an anachronism. It sprang from a theory first proffered by its namesake, Iowa Supreme Court Judge John Forest Dillon,¹³ in *Clark v. City of Des Moines*.¹⁴ Judge Dillon later incorporated the Rule into his treatise on municipal corporations.¹⁵ Adopted to address the problems of overreaching by local government leaders in mid-nineteenth century America including issues such as corruption in dealings between the railroad industry and municipal corporations,¹⁶ the rule was viewed with increasing suspicion shortly after its inception and is seen today as outdated and widely unpopular.¹⁷

As an alternative to following Dillon’s Rule, almost every jurisdiction has adopted some form of the Home Rule.¹⁸ The Home Rule is a more equitable separation of state and local power, which results from the grant by state governments of varying degrees of power to their municipalities.¹⁹ These grants of power range from a state merely enabling its municipalities to create a town charter (as in Nebraska’s illusory Home Rule²⁰) to a broad grant of power allowing municipalities to enact any legislation that does not directly conflict with state legislation.²¹

The Home Rule is thought to have first emerged in 1875 when Missouri adopted a constitutional Home Rule provision.²² Similar

12. *Id.*

13. *Glossary*, in *HOME RULE IN AMERICA*, *supra* note 5, at 493, 494.

14. 19 Iowa 199, 212 (1865).

15. See 1 DILLON, *supra* note 6, at 145.

16. *E.g.*, *City of Clinton v. Cedar Rapids & Mo. R.R. Co.*, 24 Iowa 455, 464-65 (1868).

17. Terrence P. Haas, Note, *Constitutional Home Rule in Rhode Island*, 11 ROGER WILLIAMS U. L. REV. 677, 681 (2006) (“Not surprisingly, Dillon’s Rule was viewed with unhappy suspicion by local politicians and citizens who viewed the interference with local decision-making as an invitation for distant state legislatures to pass self-serving regulations.”); G. Roth Kehoe II, Case Note, *City of New Orleans v. Board of Commissioners: The Louisiana Supreme Court Frees New Orleans from the Shackles of Dillon’s Rule*, 69 TUL. L. REV. 809, 813 (1995).

18. *Introduction*, *supra* note 5, at 14.

19. Richard Briffault posits that “[t]he home rule movement had two goals: to undo Dillon’s Rule by giving localities broad lawmaking authority and to provide local governments freedom from state interference in areas of local concern.” Richard Briffault, *Our Localism: Part I — The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) [hereinafter Briffault, *Our Localism: Part I — The Structure of Local Government Law*].

20. Krane, *supra* note 5, at 258.

21. Illinois is one example. See *City of Urbana v. Houser*, 367 N.E.2d 692, 694 (Ill. 1977) (“Home rule units thus have the same powers as the sovereign except where such powers are limited by the General Assembly.”).

22. MO. CONST. art. VI, § 19(a); see Jill Welch, *Local Government — Home Rule Doctrine and State Preemption — The Iowa Supreme Court Resurrects Dillon’s Rule and Blurs the Line Between Implied Preemption and Inconsistency*. Goodell v. Humboldt County, 575 N.W.2d 486 (Iowa 1998), 30 RUTGERS L.J. 1548, 1550 (1999).

regimes dividing local and state power are now prevalent across the country.²³ Even Iowa, the state from whose judiciary the Dillon Rule emerged, no longer strictly interprets the Dillon Rule.²⁴ Iowa now uses a moderate version of the Home Rule.²⁵ In 1978, Iowa passed an amendment to its constitution that states:

A city may, *except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly*, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.²⁶

Virginia, however, still strictly interprets the Dillon Rule under its judicial theory on the autonomy (or lack thereof) of municipal corporations.²⁷ Although other states purport to follow the Dillon Rule, in practice they do so only to the extent that the Rule expresses pre-eminence of the state when state law and local law conflict,²⁸ which is the default rule for state and local law conflicts even outside of the Dillon Rule.²⁹ Conversely, Virginia's use of the rule basically cripples its municipal corporations by injecting uncertainty into the process

23. For a more thorough explanation of the history of the Home Rule in America, see Briffault, *Our Localism: Part I — The Structure of Local Government Law*, *supra* note 19.

24. See *City of Asbury v. Iowa City Dev. Bd.*, 723 N.W.2d 188, 198 (Iowa 2006) (explaining that with Iowa Constitution article III, section 38A, an amendment added in 1968, Iowa gave municipalities Home Rule authority).

25. Paul Coates et al., *Iowa*, in *HOME RULE IN AMERICA*, *supra* note 5, at 148, 150.

26. IOWA CODE § 364.1 (2007) (emphasis added).

27. See *City Council of Alexandria v. Lindsey Trusts*, 520 S.E.2d 181, 182 (Va. 1999) (“[The Dillon Rule] provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable. When a local ordinance exceeds the scope of this authority, the ordinance is invalid.” (citations omitted)).

28. See *generally* *HOME RULE IN AMERICA*, *supra* note 5 (discussing the various formulations of the Home Rule on a state-by-state basis). Although, at one time, most of the country followed the Dillon rule, a large majority of states have, to varying extent, adopted the Home Rule, which provides that municipalities may enact laws that do not conflict in any way with their state's laws. *Glossary*, *supra* note 13, at 495; *Introduction*, *supra* note 5, at 9-12. For an example of application of the Dillon Rule primarily as a method of resolving state and local law conflicts, see *City of Trenton v. New Jersey*, 262 U.S. 182, 188-89 (1923) (affirming the supremacy of state legislatures over local government in holding that Trenton could not invoke the contract or Fourteenth Amendment provisions of the federal Constitution against the imposition of the fee for the diversion of water), and Iowa Code section 364.1 (“A city may, *except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly*, exercise any power and perform any function it deems appropriate.” (emphasis added)).

29. See *Introduction*, *supra* note 5, at 1.

of enacting local legislation and by making local leaders reticent to enact progressive measures lest they be challenged or overruled outright.³⁰

Virginia's narrow interpretation of municipal authority practically renders its city and county governments ineffective.³¹ This note will explore how the Dillon Rule, in combination with what has historically been a very conservative state government, effectively stymies the civil rights process in Virginia. Specifically, this note will focus on the current debate in Virginia over gay rights in the case of *Bono v. Arlington Human Rights Commission*.³² That Virginia law has been hostile to gay rights is self-evident. The question is: does the state's strict adherence to the Dillon Rule foster intolerance for gay rights, or is the animus toward homosexuals already present in Virginia and, therefore, feeding the continued allegiance of the Commonwealth's judiciary to the Dillon Rule in specific opinions?

I. THE HISTORY OF THE DILLON RULE IN VIRGINIA

In Virginia, local governments can exercise only those powers that are expressly granted to them by the state through the constitution, general laws, special legislative acts, or charters.³³ "This strict application of Dillon's Rule is codified neither in the constitution nor in the statutes but is acknowledged by the courts through statutory

30. See Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, 67 CHI.-KENT L. REV. 1011, 1023-24 (1991) [hereinafter Briffault, *Home Rule, Majority Rule, and Dillon's Rule*].

[T]he [Dillon] Rule's lack of clarity results in inconsistent outcomes and permits decisions based on the substantive biases of state judges rather than on an informed appraisal of the proper scope of local power. Dillon's Rule chills local autonomy in practice, by causing the invalidation of local measures and by inducing local residents (and local governments) to seek state political solutions to local problems out of a concern that a local ordinance might not withstand judicial scrutiny. And Dillon's Rule is hostile to local autonomy in theory because it embodies a view of local governments as limited agents of the state rather than plenary representatives of local people.

Id.

31. See, e.g., Patrick J. Skelley II, Comment, *Finding the Pearl in the Oyster: Strategies for a More Effective Implementation of Virginia's Chesapeake Bay Preservation Act*, 31 U. RICH. L. REV. 417, 433 (exploring how the Dillon Rule acts as an impediment to implementation of the Chesapeake Bay Preservation Act).

32. 72 Va. Cir. 256 (2006).

33. Examples of Virginia enabling legislation include section 36-106(c) of the Virginia Code (passed in 2000), which authorizes Virginia municipalities to establish civil penalties for violations of lead-based paint hazard Code provisions that are not immediately remedied by landlords, and article X, section 6 of the state constitution, which was amended in 2007 by a ballot measure in a general election to authorize localities to provide partial exemptions from real property taxes for real estate improvements in conservation, redevelopment, or rehabilitation areas.

interpretation and by the customary usage of state and local officials."³⁴ The Commonwealth legislature never enacted the Dillon Rule; it is simply a common-law holdover from another time.³⁵ However, even though it has a strong tradition in the judiciary, Virginia's restrictive viewpoint has not been universally popular with residents or policymakers in Virginia.³⁶

Before the adoption of the current state constitution in 1971, the Virginia Constitutional Revision Commission convened and completed a report for the General Assembly.³⁷ The council considered the views of the citizen advisors to the "Local Government" subcommittee with members from Richmond, Gloucester, Charlottesville, and Norfolk.³⁸ The advisors recommended that the Assembly include in article VII, Section 3 of the Virginia Constitution a clause giving to cities and charter counties "all powers not denied them by the Constitution, their charter, or laws enacted by the General Assembly."³⁹

This language would have effectively overturned the Dillon Rule.⁴⁰ Had the state government signed the clause into law, barring an explicit conflict with the Virginia Code, powers would be assumed by Virginia's municipal governments instead of being reserved for the Commonwealth.⁴¹ The Commission explained that this measure would have the effect of initially granting "broad powers to each locality and leav[ing] it to the General Assembly to say whether decision-making in a particular subject area should be on a statewide or local basis."⁴² In this way, the Commonwealth could effectively police local governments that became corrupt and, by narrowly tailoring their restrictions in this effort, still allow municipalities to efficiently self-govern until such time as their actions became harmful to citizens.

34. Keeok Park, *Virginia*, in *HOME RULE IN AMERICA*, *supra* note 5, at 427, 428.

35. *See id.*

36. *Id.* at 433 ("[I]t is not surprising that many city and county officials, the Virginia Municipal League, and the Virginia Association of Counties endorse the abolition of Dillon's Rule and the establishment of home rule.").

37. COMM'N ON CONSTITUTIONAL REVISION, *THE VIRGINIA CONSTITUTION: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION TO HIS EXCELLENCY, MILLS E. GODWIN, JR., GOVERNOR OF VIRGINIA, THE GENERAL ASSEMBLY OF VIRGINIA AND THE PEOPLE OF VIRGINIA*, H. 1969-1, Extra Sess. (1969).

38. *Id.* at iii.

39. *Id.* at 229.

40. *Id.*

41. Similar language has been used in other state constitutions as a way of adopting the Home Rule. *See, e.g.*, MO. CONST. art. VI, § 19(a).

42. COMM'N ON CONSTITUTIONAL REVISION, *THE VIRGINIA CONSTITUTION: REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION TO HIS EXCELLENCY, MILLS E. GODWIN, JR., GOVERNOR OF VIRGINIA, THE GENERAL ASSEMBLY OF VIRGINIA AND THE PEOPLE OF VIRGINIA*, H. 1969-1, Extra Sess., at 229 (1969).

"The General Assembly, however, declined to accept this commission proposal and continues to reject similar constitutional amendment proposals."⁴³ Its failure to amend the current state of affairs is not entirely surprising, as the Dillon Rule gives the most power possible to Virginia's General Assembly. And, because the Assembly has clearly failed to amend it, the Supreme Court of Virginia continues to enforce the Dillon Rule.⁴⁴ It seems the Rule, which sprang out of the concerns of a mid-nineteenth century Iowan judge regarding corrupt railroad-building practices,⁴⁵ will continue to govern Virginia until it is expressly overturned by the General Assembly.⁴⁶

II. HUMAN RIGHTS IN ARLINGTON

Family Policy Network is working to organize a lawsuit on behalf of a group of Arlington County business owners who feel the "Human Rights Commission" poses a threat to their religious liberties. . . . Please pray for this effort. Virginia localities must not be allowed to force Christians to promote sin against their will.⁴⁷

The Virginia Code's Human Rights Act prohibits discrimination on the basis of "race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability."⁴⁸ The Code includes an additional provision that authorizes localities to create their own human rights ordinances and local human rights commissions.⁴⁹ The local commissions are statutorily granted with the "powers and duties"⁵⁰ to

(1) Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions,

43. Park, *supra* note 34, at 428.

44. *E.g.*, *Arlington County v. White*, 528 S.E.2d 706, 708 (Va. 2000).

45. *See City of Clinton v. Cedar Rapids & Mo. R.R. Co.*, 24 Iowa 455, 464-69 (1868).

46. Presumably, any change of this doctrine would have to occur in the legislature, as the current Supreme Court of Virginia has unwaveringly supported it. *E.g.*, *Bd. of Supervisors of Augusta County v. Countryside Inv. Co.*, 522 S.E.2d 610, 613 (Va. 1999); *Ticonderoga Farms, Inc. v. County of Loudoun*, 409 S.E.2d 446, 449 (Va. 1991).

47. Family Policy Network, *Wanted: Christian Business Owners in Arlington County, VA*, <http://www.familypolicy.net/arlington> (last visited Mar. 20, 2008). This message was posted following argument of *Vincenz v. Bono Video*, 72 Va. Cir. 256 (2006), before the Human Rights Commission in a public hearing. The quote illustrates the emotional and inaccurate portrayal by the Christian right of the issues in *Bono*.

48. Virginia Human Rights Act, VA. CODE ANN. § 2.2-3900 (2005).

49. VA. CODE ANN. § 15.2-965 (2003).

50. *Id.*

age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health and general welfare; and further the interests, rights and privileges of individuals within the Commonwealth; and

(2) Protect citizens of the Commonwealth against unfounded charges of unlawful discrimination.⁵¹

Under the authority of enabling legislation in the Virginia Code,⁵² Arlington has developed a comprehensive human rights ordinance.⁵³ Arlington's ordinance includes provisions for nondiscriminatory treatment in the housing, employment, credit, education, commercial real estate, and public accommodations contexts.⁵⁴ With the exception of credit requirements, all of these protections are expressly cited in the Virginia Human Rights Statute.⁵⁵

In fact, only three notable differences exist between the statutes. First, the Arlington statute goes into much greater detail than the Virginia statute in describing situations in which discrimination is illegal.⁵⁶ The second difference is that the Arlington statute uses the phrase "familial status"⁵⁷ instead of the language used (presumably to identify the same classification) by the Virginia statute: "pregnancy, childbirth or related medical conditions."⁵⁸ Finally, the most controversial distinction is that the Arlington statute identifies "sexual orientation" in its list of protected classifications.⁵⁹

That the Virginia Code does not include a sexual orientation provision in its antidiscrimination policy⁶⁰ should come as no surprise to those even casually acquainted with Virginia politics.⁶¹ This

51. Virginia Human Rights Act § 2.2-3900.

52. § 15.2-965.

53. See ARLINGTON, VA., COUNTY CODE ch. 31 (2008).

54. *Id.* at ch. 31, § 31-3.

55. See § 15.2-965.

56. See ARLINGTON, VA., COUNTY CODE ch. 31, § 31-3 (2008). In line with the general theory that local governments may provide more, but not fewer, rights for their citizens than does the state, the Arlington Code describes particular discrimination offenses under the topics covered in the state statute. See *id.* For example, in the housing context, the Code specifically makes it illegal

To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise to make unavailable or deny, a dwelling to any person because of race, color, sex, sexual orientation, elderliness, marital status, familial status, religion, handicap or national origin.

Id. at 31-3(a)(1)(a).

57. *Id.*

58. Virginia Human Rights Act, VA. CODE ANN. § 2.2-3900 (2005).

59. ARLINGTON, VA., COUNTY CODE ch. 31, § 31-3 (2008).

60. Virginia Human Rights Act § 2.2-3900.

61. For more information about the codification of hostility toward gays in Virginia, see the Equality Virginia website, which includes information on Virginia's sodomy laws,

omission seems especially obvious in light of the 2006 passage of the Marshall/Newman Amendment, which specifically disclaims all non-marital relationships and relationships not between “one man and one woman.”⁶² Interestingly, it is the Dillon Rule, and not the Marshall/Newman Amendment, that effectively prohibits individual localities in Virginia from legalizing gay marriage or civil unions because there is no enabling legislation in the Virginia Code to support such a law.⁶³ The Virginia judiciary’s adherence to the Dillon Rule would make it impossible for any municipality to enact an ordinance recognizing gay marriage, domestic partnership, or common law marriage.⁶⁴

Because they have more politically liberal constituents than those of the rural areas of Virginia,⁶⁵ municipal governments in Northern Virginia are more likely to seek greater discretion in formulating local policies. As a result, the progressive policies of areas like Arlington have been at tension with Virginia state law under the Dillon Rule for some time.⁶⁶ In one example of this tension, *Arlington County v.*

the 2004 Affirmation of Marriage Act, and adoption barriers for gays in Virginia. Equality Virginia, Amendment Watch: Issues in Virginia, <http://www.equalityvirginia.org> (follow “The Issues in Virginia” hyperlink) (last visited Mar. 20, 2008).

62. VA. CONST. art. I, § 15-A.

63. Even before the passage of the Marshall/Newman Amendment, the Dillon Rule would have foreclosed the possibility of a local government recognizing gay marriage because, not only did no provision of the Virginia Code authorize such action, a provision of the code enacted in 1975 specifically voids same-sex marriage. VA. CODE ANN. § 20-45.2 (2004) (“A marriage between persons of the same sex is prohibited. Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”).

64. See *Arlington County v. White*, 528 S.E.2d 706, 708 (Va. 2000) (holding that appellant county’s coverage for domestic partners in its self-funded health benefit plan for county employees violated the Dillon Rule).

The County’s expanded definition of the word ‘dependents’ clearly and unequivocally violates the Dillon Rule . . . [and] is nothing more than a disguised effort to confer health benefits upon persons who are involved in either common law marriages or same-sex unions, which are not recognized in this Commonwealth and are violative of the public policy of this Commonwealth.

Id. at 713 (Hassell, J., dissenting in part and concurring in judgment).

65. Tim Craig, *Senate’s Blunt Majority Leader Walks a Tricky Path*, WASH. POST, Feb. 7, 2008, at VA04.

66. See *White*, 528 S.E.2d at 708 (holding that appellant county’s coverage for domestic partners in its self-funded health benefit plan for county employees violated the Dillon rule); *Commonwealth v. County Bd. of Arlington County*, 232 S.E.2d 30, 43-44 (Va. 1997) (holding that under the Dillon Rule, the county board’s powers were limited to those fixed by statute and, as such, it lacked authority to lease county-owned property to private parties for retail and office use); *Kansas-Lincoln, L.C. v. Arlington County Bd.*, 66 Va. Cir. 274, 283 (2004) (holding that the county’s requirement that site plan applicants make affordable housing contributions either by cash or by contributing affordable housing units was illegal because the Virginia General Assembly had not granted the county the authority to enact such guidelines).

White, Arlington's policies on civil unions collided with Virginia's adherence to the Dillon Rule.⁶⁷

In *White*, Arlington residents sued for declaratory judgment that Arlington's practice of extending its self-funded health insurance benefits plan to unmarried domestic partners of its employees violated the Dillon Rule.⁶⁸ The plaintiffs sought an injunction to keep Arlington County from extending benefits to domestic partners, claiming that they had standing to sue because extra funds required for such a policy would cause them injury as municipal taxpayers.⁶⁹

The Supreme Court of Virginia upheld the lower court's decision for the plaintiffs on the grounds that the Arlington plan defined "dependent" differently (and therefore without legal basis under the Dillon Rule) than the interpretation of "dependent" as defined by the Virginia Attorney General.⁷⁰ Justice Hassell, in his dissenting opinion, stated the conflict more forthrightly.⁷¹ His dissent was much less politicized and addressed the issue that, at least he felt, the court was *actually* deciding with their ruling: "I dissent because the majority ignores the fundamental issue raised in this appeal: Does Arlington County have the legal authority to recognize common law marriages or 'same-sex unions' by conferring certain health insurance benefits upon domestic partners of County employees who are engaged in these relationships?"⁷² Justice Hassell went on to answer that he believed Arlington County does not have the power to even peripherally recognize any domestic partnership or civil union by granting health benefits to unmarried partners of state workers.⁷³ The Dillon Rule was initially formulated to control corrupt municipal corporations,⁷⁴ but Hassell's concern with what political statement the government was making in overturning Arlington's ordinance (ostensibly disapproving of homosexuality) was far afield of that purpose.

67. 528 S.E.2d. at 708.

68. *Id.* at 707.

69. *Id.* at 707-08.

70. *Id.* at 708-09. The court cited 1997 Op. Va. Att'y Gen. 131, 131-32 (1997) for the proposition that "in the absence of any statutory authority indicating an intent to permit a local governing body to extend health insurance coverage provided employees to persons other than the spouse, children or dependants of the employee . . . a county lacks the power to provide such coverage." The reliance of the court on the Attorney General's opinion is misplaced — the Dillon Rule supports the power of a state assembly, not merely the opinion of a state official.

71. *Id.* at 710-11 (Hassell, J., dissenting in part and concurring in judgment).

72. *Id.*

73. *See id.* at 713.

74. Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959, 964 (1991).

State self-insured health benefit plans might logically fall under the employment provision of Arlington's human rights ordinance.⁷⁵ The Supreme Court of Virginia, however, neglected to discuss this, and thereby neglected to address the legality of including "sexual orientation" as a protected classification in that ordinance in *White*.⁷⁶ In fact, but for Justice Hassell's dissent, *White* might be considered, apart from a case about the controversial issue of gay rights in Virginia, to belong to the set of cases establishing an economic policy — that Arlington, as a more fiscally liberal entity than Virginia, does not have the power under the Dillon Rule to provide extra benefits for its residents.⁷⁷

In formulating its human rights statute, Virginia established that ensuring certain classes of people were protected against discrimination in a wide variety of contexts was an important state objective.⁷⁸ In neglecting to include sexual orientation in the list of protected classes, the Commonwealth effectively denied homosexuals the protection granted to other groups that were historically objects of discrimination.⁷⁹ Virginia policy-makers thereby either purposefully or unintentionally encouraged continued discrimination against homosexuals within the borders of Virginia, in all contexts.

75. See ARLINGTON, VA., COUNTY CODE ch. 31, § 31-3(b)(1) (2008).

It shall be unlawful for any employer, on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, handicap or age: . . . [t]o deny an employee any opportunity with respect to hiring, promotion, tenure, apprenticeship, compensation, terms, upgrading, training programs, or other conditions, benefits or privileges of employment.

Id. (emphasis added). Following *White*, a state employee could bring a case claiming his or her domestic partner should be covered on the state insurance plan and that in failing to cover him or her, the state violated its own human rights statute. See *Arlington County v. White*, 528 S.E.2d 706, 708-09 (Va. 2000).

76. *White*, 528 S.E.2d at 708-09.

77. See, e.g., *Commonwealth v. County Bd. of Arlington County*, 232 S.E.2d 30, 43-44 (Va. 1977) (collective bargaining agreements made by a Virginia local government and school board with labor unions were void because the power to make such agreements had to be expressly given by statute and such power had never been conferred.); *Kansas-Lincoln L.C. v. Arlington County Bd.*, 66 Va. Cir. 274, 283 (2004) (holding that Arlington County could not require applications to a General Land Use Plan site to make affordable housing contributions under the Dillon Rule because the Virginia General Assembly had not granted the county the authority to require such mandatory contributions); see also *U.S. Patent Model Found. v. City of Alexandria*, 40 Va. Cir. 48, 49 (1995) (holding that the Human Rights Commission lacked authority to award back pay as a form of relief when there was no adequate history of agency interpretation of the statutes giving the Commission its powers).

78. See VA. CODE ANN. § 2.2-3900 (2005).

79. See *id.*

Arlington expressly included the classification.⁸⁰ Considering the hostility of Virginia towards gay rights and municipal activism⁸¹ and Arlington's desire to protect its citizens from discrimination, as evidenced by its thorough and inclusive human rights ordinance,⁸² it was inevitable that this conflict would be addressed in the courts. In *White*, the judiciary sidestepped the issue. But in a more recent case, the Circuit Court of Arlington was presented with the question of the legality of the county's human rights ordinance under the Dillon Rule.⁸³

III. CASE STUDY: *BONO V. ARLINGTON HUMAN RIGHTS COMMISSION*⁸⁴

When the ongoing conflict between the religious right and supporters of civil rights for gays and lesbians clash in Virginia courts, both sides must utilize legal definitions. Outside of the courtroom, however, the debate is widely viewed by members of the two conflicting groups, including the parties and their supporters, as an ideological struggle.⁸⁵ As a result, the Dillon Rule, which was formulated as a means of differentiating state and local powers,⁸⁶ has become, at least in this context, a tool of religious conservatives to deny rights to citizens of whom they do not approve.⁸⁷ This method for the manipulation of local laws by a minority contingent will remain effective until Virginia rejects the Dillon Rule, which, as discussed above, is far from imminent. The struggle for gay rights will not be the impetus for such a change; Virginia has frequently attempted to remove whatever protections might be in place for gays and lesbians living in the Commonwealth.⁸⁸ In other words, *Bono v. Arlington* is not an anomaly.

80. ARLINGTON, VA., COUNTY CODE ch. 31, § 31-3 (2008).

81. See Equality Virginia, *supra* note 61.

82. See ARLINGTON, VA., COUNTY CODE ch. 31, § 31-3 (2008).

83. *Bono v. Arlington County Human Rights Comm'n*, 72 Va. Cir. 256 (2006).

84. *Id.*

85. Both parties in *Bono* have discussed the case in terms of their respective ideologies. See Annie Gowen, *Gay Activist, Va. Firm Spar Over Protest Films: Christian Groups Back Refusal to Make Copies*, WASH. POST, May 27, 2006, at B1 (identifying Tim Bono and Lilli Vincenz as "a businessman . . . with . . . Christian values" and a "gay activist," respectively). In the same article, Vincenz is quoted as saying, "[t]his struggle is dear to my heart," and Bono referred to the video she wanted him to recreate as "run[ning] counter to our Christian and ethical values."

86. See Gillette, *supra* note 74, at 961.

87. See Gowen, *supra* note 85 (quoting Joseph Price, general counsel for Equality Virginia, as calling the case "another example of the effort to remove whatever protections might be in place for gays and lesbians living in Virginia").

88. See VA. CONST. art. I, § 15-A; Gowen, *supra* note 85.

In May of 2006, Arlington resident Lilli Vincenz asked Tim Bono, who owns a production company in Arlington, to duplicate two videos she shot in 1968 and 1970.⁸⁹ Although he initially agreed to perform this task, Bono refused when he discovered the video's titles, saying that he felt such action would go against his Christian values and align him with a "gay agenda."⁹⁰ Ms. Vincenz then filed a complaint with the Arlington Human Rights Commission, alleging that Bono and Bono Video had violated the "public accommodations" provision of the Arlington human rights ordinance by refusing to duplicate her films because she was a lesbian.⁹¹ She alleged that Bono illegally discriminated against her by denying her service based on a classification protected by Arlington law — sexual orientation.⁹² She won her claim in April 2006 after a public hearing.⁹³

Mr. Bono was ordered to duplicate the films or pay the small cost of their duplication.⁹⁴ Obviously, this minor monetary cost was not the primary reason for his involvement in this case. Additionally, it seems that his central legal theory of the case — that the court should restrict Arlington, as a Virginia municipality, from overstepping its power in regulating its citizenry — was also not the driving force for his involvement in the case.⁹⁵ Instead, his primary motivations were his belief that Arlington law should not prohibit discrimination

89. Gowen, *supra* note 85.

90. Bono v. Arlington County Human Rights Comm'n, 72 Va. Cir. 256, 257 (2006).

91. *Id.*

92. *Id.*

93. *Id.* at 258; Press Release, Arlington County, Arlington County Human Rights Commission Dismisses Discrimination Case Against Video Store Owner (June 10, 2006) (available at <http://www.arlingtonva.us/departments/communications/pressreleases/5445.aspx>).

94. Gowen, *supra* note 85.

95. The core legal issue of the case has been misrepresented by Bono's counsel in the media in an effort to keep the plaintiff's sexual orientation at the forefront of the debate. *See id.* For example, the Liberty Counsel quoted Erik Stanley, their chief counsel for Mr. Bono, as stating: "Although we [Liberty Counsel and Tim Bono] are pleased the Commission dismissed the frivolous complaint against Mr. Bono, we will continue to challenge Arlington County's attempt to recognize 'sexual orientation' as a civil right." Press Release, Liberty Counsel, Human Rights Commission Dismisses Complaint Against Christian Businessman After Liberty Counsel Files Suit (June 13, 2006) (available at <http://www.lc.org/index.cfm?PID=14102&AlertID=205>). This statement implies the Arlington Human Rights Commission has, in enacting their anti-discrimination policy, made sexual activity between homosexuals a civil right. In fact, sodomy between heterosexuals or homosexuals is illegal in Virginia, and the Arlington ordinance does not even address sexual acts. VA. CODE ANN. § 18.2-361 (2007); ARLINGTON, VA., COUNTY CODE ch. 31, § 31-3(c)(1) (2008). Instead, it makes sexual orientation, like race, a protected classification — a characteristic on which providers of public accommodation, among others, may not predicate their refusal to serve individuals.

against homosexuals because he viewed homosexuality as a sin and his intent to deny homosexuals service in the future.⁹⁶

Mr. Bono filed a claim in Arlington Circuit Court for declaratory judgment that the Arlington human rights legislation overstepped the authority of Arlington County by including sexual orientation as a protected classification, and thus violated the Dillon Rule.⁹⁷ Realizing what was at stake,⁹⁸ the Arlington Human Rights Commission reconsidered its judgment and dismissed the case the following June.⁹⁹ The Commission explained its choice in a press release: “[i]n taking [sic] its decision, the Human Rights Commission said that the Human Rights Ordinance protects individuals from discrimination based on sexual orientation, but does not prohibit discrimination based on the content of materials.”¹⁰⁰

The Commission emphasized that it reconsidered its decision on the grounds that Mr. Bono’s decision to refuse to reproduce the film was based on his disapproval of the nature of the film, as he asserted in his claim, and not based solely on the sexual orientation of Ms. Vincenz.¹⁰¹ No law requires him to reproduce material with which he disagrees; the public accommodations clause requires only that citizens not discriminate against *individuals*, but they may still discriminate against *material*.¹⁰² By reframing the issue in this way, the Commission ensured that it did not foreclose opportunities for other claimants to bring sexual orientation discrimination suits based on similar public accommodations grounds.¹⁰³ The Commission’s revamped theory of the case limited only the scope of its “public accommodations” clause and did not endanger the status of “sexual orientation” as a protected classification under the ordinance.¹⁰⁴ This analysis is arguably more rational than the Commission’s initial

96. See Gowen, *supra* note 85.

97. Bono v. Arlington County Human Rights Comm’n, 72 Va. Cir. 256, 256 (2006).

98. Bono put the entire sexual orientation provision of Arlington’s anti-discrimination policy in jeopardy. See *id.*

99. See Press Release, Arlington County, *supra* note 93.

100. *Id.*

101. Gowen, *supra* note 85. In the release, the Human Rights Commission was also careful to note that the reconsideration did not arise merely because they were being challenged in court. See Press Release, Arlington County, *supra* note 93. But see Press Release, Liberty Counsel, *supra* note 95.

102. See Press Release, Arlington County, *supra* note 93.

103. Had the Commission lost a case based on the legality of Arlington’s classification of “sexual orientation” as a protected characteristic, no suits could be brought against people who discriminated in *any* of the arenas covered by the Arlington Human Rights Ordinance, not just in the public accommodations context. See Gowen, *supra* note 85 (quoting a state official saying if municipalities go against or beyond state enabling legislation they risk having a court strike the entire ordinance).

104. *Id.*

decision, that Mr. Bono violated the Arlington Human Rights Ordinance.¹⁰⁵ When one considers that Ms. Vincenz's cause of action was under the "public accommodations" clause of the human rights ordinance,¹⁰⁶ her standing under the human rights statute is extremely questionable.

The Supreme Court of Virginia has never heard a case under the "public accommodations" clause of Virginia's Human Rights Statute,¹⁰⁷ but to help predict what the outcome of such a case would be, Virginia's "public accommodations" clause can be analogized to its federal corollary: the section of the United States Code that prohibits discrimination in public accommodations.¹⁰⁸ Section 2000a was enacted as part of the Civil Rights Act of 1964,¹⁰⁹ amid concerns about the effect of racist owners of hospitality services on interstate transportation and commerce.¹¹⁰ Section 2000a offers broad protection for individuals of traditionally persecuted groups from being denied service in places like restaurants, motels, theaters, stadiums, and other places that provide entertainment or hospitality services.¹¹¹ A business that reproduces videos hardly falls into any of these categories, and, therefore, would likely not be protected under the federal human rights "public accommodations" clause.

The Arlington ordinance, however, has a much more expansive definition of "public accommodations," in keeping with Arlington's desire to protect the rights of groups that have often been the objects of discrimination in the past.

Public accommodation shall mean and includes every business, professional or commercial enterprise, hospital or nursing home, place of lodging, refreshment, entertainment, sports, recreation or transportation facility located in the county, whether licensed or not, public or private, or transportation facility located in the county, whether licensed or not, public or private, whose goods, services, facilities, privileges, advantages or accommodations are

105. Press Release, Arlington County, *supra* note 93.

106. *Bono v. Arlington County Human Rights Comm'n*, 72 Va. Cir. 256, 257-58 (2006).

107. Gowen, *supra* note 85 (quoting Arlington County attorney as saying the ordinance has never before been tested in court).

108. 42 U.S.C. § 2000a (2000).

109. *Id.*

110. President John F. Kennedy, Radio and Television Report to American People on Civil Rights (June 11, 1963) (transcript available at <http://www.jfklibrary.org/Historical+Resources/Archives/Reference+Desk/Speeches/JFK/003POF03CivilRights06111963.htm>).

111. 42 U.S.C. § 2000a(b)(1-4) (2000).

*extended, offered, sold or otherwise made available in any manner to the public.*¹¹²

Bono Video, as a commercial business that sells goods and services to the public, certainly falls under this definition of “public accommodations.”

The Arlington ordinance states that an owner of such a public accommodation may not “discriminate against any person, on the basis of race, color, religion, sex, sexual orientation, marital status, national origin, age or handicap.”¹¹³ A close examination of the facts underlying *Vincenz v. Bono Video* makes it clear that at no point in time did Tim Bono tell Lilli Vincenz that he would not allow her into his store, nor did he state that he would not reproduce videos for her under any circumstances.¹¹⁴ He refused, specifically, to copy her videos of gay rights protests, and only after he ascertained the nature of their content from the titles.¹¹⁵ His actions constitute a refusal to perform services not because of Ms. Vincenz’s personal sexual orientation, but rather on the basis of the *content* of the material to be reproduced, which is not a justiciable issue.¹¹⁶ As distasteful as his refusal of public services based on an irrational prejudice may be, in this form, it was not prohibited by law.

Even after the Human Rights Commission overturned their earlier ruling, Bono continued to pursue his claim challenging the Arlington human rights law.¹¹⁷ This case, at first glance, seems to be one of misinterpretation of a municipal ordinance. However, after Bono instigated a suit for declaratory judgment, the legal issues before the court became potentially determinative of much more than interpretation of the Arlington County ordinance.¹¹⁸ Had the Arlington Circuit Court ruled for Bono, as Virginia’s adherence to the Dillon

112. ARLINGTON, VA., COUNTY CODE ch. 31, § 31-2(31) (2008) (emphasis added).

113. *Id.*

114. *Bono v. Arlington County Human Rights Comm’n*, 72 Va. Cir. 256, 257 (2006).

115. Gowen, *supra* note 85.

116. *Bono*, 72 Va. Cir. at 259-60. In *Bono*, the court stated:

Because the Arlington Human Rights Commission reversed its decision it has, in effect, taken no enforcement action against either Plaintiff, and, therefore, no actual case or controversy exists between the parties. In this case, the mere threat that the Arlington Human Rights Commission might at some future time pursue investigatory action against some resident or business in Arlington County for content based sexual orientation discrimination is too speculative and is not ripe for judicial action. Furthermore, all the parties agree that the Arlington County Human Rights Ordinance does not allow the County to prohibit content based discrimination.

Id.

117. Press Release, Liberty Counsel, *supra* note 95.

118. *Bono*, 72 Va. Cir. at 256.

Rule suggested it would, store owners, employers, credit card companies, educational institutions, and real estate brokers and agencies would be legally allowed to discriminate on the basis of sexual orientation. They could not only choose to discriminate against certain "materials" or "ideologies," but also to refuse to provide services to an entire category of people on a wholly arbitrary classification. Bono could refuse to reproduce Lilli Vincenz's film of a family gathering purely on the basis of her sexual orientation with no legal repercussions.

The court did not decide this issue.¹¹⁹ *Bono v. Arlington* was thrown out of court for a lack of standing.¹²⁰ The Arlington Circuit Court ruled that, because the Arlington Human Rights Commission reversed their initial decision and took no further action against the plaintiffs, "no actual case or controversy exists between the parties."¹²¹ Significantly, the court neither explicitly nor implicitly endorsed Arlington's human rights ordinance.¹²² The decision states only that the question of the ordinance's legality was not properly before the court, and therefore would not be ruled on by the court.¹²³ However, the last sentences of the decision read:

To the extent that the Arlington County Human Rights Commission is threatening enforcement of the Ordinance, without the County Board's approval, then they are enjoined as it is outside the scope of Va. Code § 15.2-725 (2006).

We do not reach the issue of whether the Arlington County Human Rights Commission has acted *ultra vires* and exceed[ed] the scope of their authority under Dillon's Rule when investigating alleged incidents of sexual orientation discrimination.¹²⁴

This language suggests that the court would view any challenge to the Arlington ordinance as directly implicating the Dillon Rule, which would be a death knell for the antidiscrimination policy.

Bono leaves Arlington's antidiscrimination laws intact, but it does so at the expense of the underlying claim.¹²⁵ The Arlington court only found a lack of standing because the Arlington Human Rights

119. *Id.* at 260.

120. *Id.* at 259.

121. *Id.* This is an appropriate outcome, as a matter of law, but not entirely foreseeable, considering the Virginia Supreme Court's finding of standing for Arlington citizens in *White*. See *Arlington County v. White*, 528 S.E.2d. 706, 707 (Va. 2000).

122. See *Bono*, 72 Va. Cir. at 259-60.

123. *Id.*

124. *Id.* at 260.

125. *Id.* at 259-60.

Commission dropped their claim against the plaintiff.¹²⁶ Thus, *Bono*, in conjunction with *White*, illustrates the Catch-22 faced by proponents of civil rights for gays in Virginia. If a Virginia court hears a case based on a municipality giving equal protection to homosexuals, any protection Arlington gives will be overturned.¹²⁷ Government agencies in Arlington can keep these policies intact, but they may only be sure their policies and laws will stand by neglecting to enforce them. Either way, the Dillon Rule precludes the advancement of civil rights for gays in Virginia municipalities.¹²⁸

IV. THE DILLON RULE AND CIVIL RIGHTS STAGNATION IN VIRGINIA

As *Bono* illustrates, the Dillon Rule ties the hands of local governments who want to experiment and who understand the peculiarities of their jurisdictions better than the state government.¹²⁹ Moreover, political agendas often seem to motivate the Virginia Supreme Court's strict adherence to the Dillon Rule. *White* is one example in which the court's holding — that a municipal organization that self-insures cannot even define "dependent" in its insurance policy without specific authorization from the General Assembly¹³⁰ — seems to be a holding of false pretenses. Such a housekeeping measure as defining whom the state may insure on its health plan would seem to be an indispensable power of the locality, unless the court were to assert that municipalities may do nothing at all without express enabling legislation from the Virginia Code.¹³¹

126. *Id.* at 259.

127. See Gowen, *supra* note 85; Press Release, Liberty Counsel, *supra* note 95.

128. *White*, 528 S.E.2d at 713 (Hassell, J., dissenting in part and concurring in judgment) (stating the General Assembly has not given Arlington authority to grant same sex unions and any attempt would violate the public policy of Virginia).

129. See, e.g., Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 30, at 1019. Briffault critiques Gillette's article, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, by saying that

Despite his commitment to local government in principle, Gillette's modern public choice account of Dillon's Rule, by subjecting decisions enjoying local majority support to intrusive judicial review, is in the end as antithetical to local autonomy as the traditional justification of Dillon's Rule in terms of the hierarchical inferiority of local governments.

Id. at 1019. Gillette posits that the Dillon Rule "can best be understood and justified as a judicial check on local tendencies to cater to special interests at the expense of other groups within the locality." Gillette, *supra* note 74, at 960. This supposition ignores the fact that Dillon's Rule is more of a state check on local government than a judicial check on anyone, and the fact that state officials are just as susceptible to special interests as local government officials. Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 30, at 1012, 1024. But see Gillette, *supra* note 74, at 960.

130. *White*, 528 S.E.2d at 709.

131. The court has never made this assertion, and it never will, unless the General Assembly decides it wants to oversee all minutiae of the administration of a locality.

It seems much more likely, if also more cynical, that the decision was motivated more by the personal biases of members of the court than by a desire to limit the regulatory power of Virginia municipalities, especially when one compares the holding of *White* with that of *City of Virginia Beach v. Hay*.¹³² In *Hay*, the Supreme Court of Virginia stated:

Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, *the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable.*¹³³

In the facts of both *Hay* and *White*, the Commonwealth had granted power to municipalities via the Virginia Code for administrative tasks involving hiring and maintaining government employees.¹³⁴ The Supreme Court of Virginia determined in *Hay* that Virginia Beach was empowered to enact a code allowing the appointment of assistant city attorneys by city officials.¹³⁵ The decision reasoned that, because the "General Assembly created the department of law and expressly authorized the city council to provide for assistant city attorneys," and even though "the power to hire the employees for the department of law is not expressly granted, it is fairly and necessarily implied from these charter provisions."¹³⁶

When considered alongside its decision in *White*, the decision of the Supreme Court of Virginia in *Hay* seems as though it must have come from a jurisdiction other than Virginia.¹³⁷ The court in *White*

Even in *White*, the Supreme Court of Virginia states that municipalities also have "powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable." *Id.* at 708. The Court then comes to the preposterous conclusion that an act as necessary as defining "dependent" in a self-insured health benefit policy does not fall into either of these categories. *Id.*

132. 518 S.E.2d 314, 316 (Va. 1999) (holding that, although under Dillon's Rule, appellants were required to show that the method used to implement an express or implied power was reasonable, appellants had lawfully enacted Virginia Beach, Va. Code § 2-166 allowing appellants to appoint assistant city attorneys as a reasonable method of implementing appellant's power to hire).

133. *Id.* at 316 (emphasis added).

134. *White*, 528 S.E.2d at 708; *Hay*, 518 S.E.2d at 316.

135. *Hay*, 518 S.E.2d at 316.

136. *Id.*

137. The decision in *Hay* is incompatible with the Dillon Rule as it is applied in *White*. See 1 DILLON, *supra* note 6, at 145. The Dillon Rule says that "[a]ny . . . reasonable doubt . . . is resolved by the courts against the corporation, and the power is denied." *Id.* at 145. In *White*, not even the ability to define the actual terms used in an express grant of power is granted as "implied." *White*, 528 S.E.2d at 708. *Hay*, however, seems to state that, in cases of doubt, the municipality is granted the power. *Hay*, 518 S.E.2d at 316.

recognized that specific Virginia Code provisions allowed municipalities to provide health insurance programs for their employees and the dependents of their employees through a self-funded insurance program.¹³⁸ It also acknowledged that no Virginia Code provision defined "dependent."¹³⁹ Nonetheless, the court ruled that Arlington did not have the power to include the domestic partners of its employees as "dependents" on its insurance plan.¹⁴⁰ These two cases, when looked at together, leave municipalities with the somewhat incongruous rule that they are allowed to decide what officials they may appoint in order to effectively run their governments,¹⁴¹ but they may not decide what benefits to give those appointees.¹⁴²

One possible explanation for the Court's erratic interpretations of the Dillon Rule is that the actions of those municipalities ruled against have incorporated political beliefs that are at odds with the conservative beliefs embraced by a majority of Virginia's voters.¹⁴³ This theory seems especially likely in cases concerning gay rights. The only case the Virginia Supreme Court has decided in which a municipal ordinance granted rights to homosexuals and, in so doing, implicated the Dillon Rule, was decided against the municipality.¹⁴⁴

V. VIRGINIA: THE LAST HOLDOUT?

At last count, though a few states purport to follow the Dillon Rule, only one state other than Virginia follows the Dillon Rule as strictly as Virginia.¹⁴⁵ Not all of these states are unreceptive to civil rights.¹⁴⁶ However, Virginia is not the *only* state that uses the Dillon Rule to deny civil rights to its citizens.¹⁴⁷

138. *White*, 528 S.E.2d. at 708.

139. *Id.*

140. *Id.*

141. *Hay*, 518 S.E.2d at 316.

142. *White*, 528 S.E.2d at 709.

143. See Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 30, at 1023-24 ("[T]he [Dillon] Rule's lack of clarity results in inconsistent outcomes and permits decisions based on the substantive biases of state judges rather than on an informed appraisal of the proper scope of local power.").

144. See *White*, 528 S.E.2d. at 709.

145. See *Appendix: Home Rule in America*, *supra* note 5, at 476-77; *Introduction*, *supra* note 5, at 18-19; Krane, *supra* note 5, at 258.

146. *Appendix: Home Rule in America*, *supra* note 5, at 476-77 (charting states with the Dillon Rule and those that have amended the rule).

147. *Introduction*, *supra* note 5, at 18-19 (stating Virginia is an example of why the Home Rule should exist in all states and as an example of strict adherence to the Rule).

Currently, seventeen states and the District of Columbia include sexual orientation as a protected classification in their anti-discrimination policies.¹⁴⁸ Included in this list is Nevada, which, like Virginia, strictly follows the Dillon Rule.¹⁴⁹ Alabama, a state historically unresponsive to the gay rights movement,¹⁵⁰ recently passed the Sanctity of Marriage Amendment to its state constitution, which explicitly disclaims same-sex relationships as unrecognized by the state.¹⁵¹ North Carolina and West Virginia have similar laws.¹⁵² The gay rights situation in Nebraska is no better: a recent decision in the Court of Appeals for the Eighth Circuit overturned a lower court to find that Nebraska Constitution article I, section 29 (limiting state recognized "marriage" to heterosexual couples) did not violate the Equal Protection Clause because laws that discriminate on the basis of sexual orientation only merit rational basis review.¹⁵³

148. These states include California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, Washington, and Wisconsin, as well as the District of Columbia. Center for Policy Alternatives, GLBT Anti-Discrimination, <http://www.stateaction.org/issues/issue.cfm/issue/GLBTAntiDiscrimination.xml> (last visited Mar. 20, 2008).

149. *Appendix: Home Rule in America*, *supra* note 5, at 476-77. Other states purporting to follow the Dillon Rule are also receptive to the gay rights movement. Connecticut allows gays to have "civil unions" that grant some state benefits. CONN. GEN. STAT. § 46b-38bb (2007). In Idaho, a bill was introduced in the state senate in January 2008 that would make discrimination against homosexuals illegal statewide. Phil Davidson, *Bill Would Outlaw Gay Discrimination*, IDAHO FALLS POST REG., Jan. 25, 2008, at A1.

150. See Equality Alabama, Issues: Marriage, available at <http://www.equalityalabama.org/informed/marriage.html> (last visited Mar. 20, 2008).

151. ALA. CONST. art. I, § 36.03 (2007). The drafters of this amendment, in a laudable show of diligence, included provisions to the effect that "[n]o marriage license shall be issued in the State of Alabama to parties of the same sex"; "[t]he State of Alabama shall not recognize as valid any marriage of parties of the same sex that occurred or was alleged to have occurred as a result of the law of any jurisdiction regardless of whether a marriage license was issued"; and that "[a] union . . . between persons of the same sex in . . . Alabama or in any other jurisdiction shall . . . hav[e] no legal force or effect in this state and shall not be recognized by this state as a marriage or other union." *Id.*

152. See N.C. GEN. STAT. § 51-1.2 (2007); W. VA. CODE § 48-2-603 (2007).

153. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 863, 871 (8th Cir. 2006). This case was heard in federal court, and it must be noted that current jurisdictional differences in gay rights standards would be resolved if the federal government would acknowledge that gay rights are important and classify "sexual orientation" as a protected characteristic. See *id.* at 871. No marriage amendment could pass in a state constitution if the Supreme Court of the United States reviewed sexual orientation laws with the same scrutiny they employ for race laws (strict scrutiny) or even gender laws (intermediate scrutiny). See, e.g., *United States v. Virginia*, 518 U.S. 515, 531 (1996) (requiring "exceedingly pervasive justification" by the government actor for gender classifications); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (holding that strict scrutiny is the appropriate standard of review for classifications based on race); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (holding heightened scrutiny for gender is controlling in a case of discrimination brought by a man). This result is highly unlikely, however, given the current makeup of the Supreme Court. See *Nina Totenberg, Supreme Court More Conservative, Fragmented*

Although all of these states have denied civil rights to homosexuals through state laws and each has a power structure strongly centered in their respective state governments, none appear to have used the Dillon Rule to allow for the legal discrimination against homosexuals in places of public accommodation. If Virginia is faced with a ripe case addressing this question, the Commonwealth may be the first state to do so. However, even the state "marriage" acts of Alabama, North Carolina, West Virginia, and, of course Virginia, effectively deny some civil rights to homosexuals by harnessing the political rhetoric of the majority. In this respect, unfortunately, Virginia is not unique.

With the current Supreme Court make-up and the prevalence of religious rhetoric in current civil rights debates, gay legal rights will likely not be achieved through the kind of landmark Supreme Court decisions through which Americans of African descent won their civil rights. Instead, this process will likely be a more piecemeal, grassroots legislative battle fought in the states. However, the issue being debated is now, as then, the struggle for rights by an historically persecuted and insular minority group.

To ensure that residents of distinct cities and localities may democratically decide which rights to give and which groups should be protected, all states should enact some form of the Home Rule. In other states which allow municipalities more autonomy under one or more Home Rule exceptions, policy-makers in local governments, who have more of a personal connection with their individual constituents than state law-makers, might be able to determine whether including "sexual orientation" in their local anti-discrimination policies is appropriate.

Minorities, including homosexuals, are at a disadvantage in Virginia as a result of the Dillon Rule because, in such a conservative state that has proved reluctant to change, it is unlikely that either: (1) the state will enact legislation promoting minority rights or (2) the state legislature will voluntarily lessen its power and abandon the Dillon Rule.¹⁵⁴ Mindful of the majority whose votes will ensure their next terms, state legislators rarely propose legislation promoting minority rights, especially when the rights in question are as unpopular as gay rights are in Virginia.¹⁵⁵ Although pockets of Virginia

(National Public Radio broadcast July 4, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5531678>. Thus, gay rights battles fought at the local level continue to be of the utmost importance.

154. See Park, *supra* note 34, at 427 (citing Virginia as conservative and uncooperative to change).

155. See *Arlington County v. White*, 528 S.E.2d 706, 713 (Va. 2000) (Hassell, J., dissenting in part and concurring in judgment) (stating that gay relationships violate

have constituencies who are relatively more friendly toward civil rights, such as Arlington, the Dillon Rule renders them voiceless against the conservative majority of the state. Therefore, all innovative legislation must be approved by a majority of Virginia voters. As the passage of the Marshall/Newman Amendment has shown, by some not insignificant margin, Virginia voters do not support gay rights.¹⁵⁶ As a result, Virginia state government politicians do not support gay rights,¹⁵⁷ and individual city constituencies may not be able to vote to protect rights.¹⁵⁸

Virginia courts have implied that, if the disenfranchisement perpetuated by the Dillon Rule is to be remedied, the legislature should speak about it.¹⁵⁹ It seems very unlikely, however, that a disproportionately powerful state government will cede authority to Commonwealth municipalities of its own volition. Simply because the legislature does not support a local government authority policy change (resulting from indifference on the subject by the voting population combined with the knowledge that such a decision would decrease the legislature's power) does not mean that policy is not ultimately the best for Virginia residents.

Moreover, if, in fact, the political conservative tendencies that a majority of Virginia voters embrace influence the Virginia judiciary, its adherence to the Dillon Rule not only fails to empower local governments, but it also actually has the somewhat undemocratic effect of strengthening the state government.¹⁶⁰ In this way, residents who vote with the majority control all three branches of the government, even the judiciary, which the constitutional framers created to safeguard the rights of the minority against the tyranny of the majority, because of the common law Dillon Rule tradition.¹⁶¹

Virginia public policy). A Westlaw search I conducted revealed that, of eight anti-discrimination bills and orders that have been introduced in the Virginia legislature to protect "sexual orientation" as a classification, all have died in committee except those that were only introduced this year and are "committee referral pending."

156. VA. CONST. art. I, § 15-A.

157. At least, they do not support them past the introduction of bills. See sources cited *supra* note 155 (Westlaw search).

158. See Gowen, *supra* note 85.

159. See *Commonwealth v. County Bd. of Arlington County*, 232 S.E.2d 30, 40 (Va. 1977); *U.S. Patent Model Found. v. City of Alexandria*, 40 Va. Cir. 48, 49 (1995).

160. See Gillette, *supra* note 74, at 963.

161. *Id.* at 960-61. Both executives and state congresspersons are voted into office. If the judiciary continues to cede all control to them, it renders the check on majority rule ineffective. See *id.* at 966. This analysis does not even broach the topic of special interests, which may again be able to control all three branches of government. *Id.* at 981-82. But see Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, *supra* note 30, at 1019.

CONCLUSION

A case this politically and legally controversial will certainly be repeated. In the future, if the Arlington Human Rights Commission attempts to charge a citizen with illegally discriminating on the basis of sexual orientation, it will certainly be sued for declaratory judgment finding the law violates the Dillon Rule. If *Arlington County v. White* is any indicator, that is, if the appellate court follows the precedent of the Supreme Court of Virginia of allowing standing at a very low threshold of injury in gay rights cases, standing will be established and the anti-discrimination ordinance will ultimately be ruled violative of the Dillon Rule.¹⁶² This outcome seems even more likely when one considers Virginia's allegiance to the Dillon Rule, described above, and the hostility of Virginia citizens to statutory civil rights provisions for gays, as evidenced by the passage of the Marshall/Newman Amendment last year.¹⁶³

If the Human Rights Commission in Arlington continues to enforce the sexual orientation classification in the Arlington human rights statute, the issue of whether the clause violates the Dillon Rule will come up again.¹⁶⁴ If the Supreme Court of Virginia holds that Arlington does not have the authority to protect its citizens from

162. *Arlington County v. White*, 528 S.E.2d 706, 707 (Va. 2000). In *White*, the Supreme Court of Virginia affirmed summary judgment to appellee taxpayers who challenged Arlington's coverage of domestic partners under its "self-funded health insurance benefits plan." *Id.* at 707, 709. Because the municipality provides these benefits, the "direct and immediate" economic repercussions on taxpayers may be observable. *Goldman v. Landside*, 552 S.E.2d 67, 71 (Va. 2001). In effect, however, they are so diluted as to render taxpayers incapable of establishing actual injury required to have standing under the federal and state standards. *See id.* *Goldman* enunciated different standards for citizens suing the local government (rather than the federal government) under taxpayer standing:

For purposes of this standing inquiry, we treat the words 'citizen' and 'taxpayer' as being synonymous. We have addressed this type of standing in various suits brought by taxpayers to restrain local, rather than state, government officials from allegedly exceeding their powers in a manner that would cause injury to the locality's taxpayers.

Id. It seems farfetched that the inclusion of domestic partners of government workers on the city's self-funded health benefits plan would raise the taxes of individual taxpayers such that it would "cause injury" to them. *See id.* at 72; *White*, 528 S.E.2d at 707. If the court continues to strain the definition of "injury" in this way, perhaps *Bono* would be considered to have established standing by virtue of being a taxpayer in a municipality with ordinances that put a burden on his business.

163. *See* Chris L. Jenkins, *Ban on Same-Sex Unions Added to Va. Constitution*, WASH. POST, Nov. 8, 2006, at A46.

164. Of course, an equal harm would result if the Human Rights Commission decided *not* to pursue such claims when they occurred.

discrimination on the basis of sexual orientation, effects of such a ruling would be widespread. Arlington would have to take the “sexual orientation” language out of its human rights statute. Similar language would be ruled illegal in other Commonwealth municipalities and in other state-run institutions, like public schools and colleges. Such a decision would basically amount to a state-sanctioned and -led policy of indifference to discrimination on the basis of sexual orientation, enabled by the anachronistic Dillon Rule.

SARAH MILLER*

* J.D., William & Mary, 2008; B.A., UNC-Chapel Hill, 2004. Thank you to my mother, father, and brother, all of whom helped instill in me a commitment to equality and justice. Thanks also to Gene R. Nichol, who fought for diversity and acceptance at William & Mary during his tenure here.