Non-Discrimination Ordinances

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Panel on Hot Topics in First Amendment Law

1. Need for Non-Discrimination Ordinances
2. North Carolina's Bathroom Bill
3. Durham's Approach to a NDO
4. Administration & Enforcement
5. The Effect of *Fulton* on NDOs

Need for Non-Discrimination Ordinances: A Look at Federal and State Protections

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Existing Federal Anti-Discrimination Laws

- Civil Rights Act of 1964
- Fair Housing Act of 1968
- Pregnancy Discrimination Act of 1978
- Equal Pay Act of 1963
- Equal Credit Opportunity Act of 1974
- Age Discrimination in Employment Act of 1967
- Americans with Disabilities Act of 1990
- Immigration Reform and Control Act of 1986
- Voting Rights Act of 1965



Proposed Federal Legislation & Existing Case Law

- **Employment Non-Discrimination Act (ENDA):** proposed from 1994 to 2015—limited to sexual orientation and gender identity discrimination in hiring and employment practices
- **Equality Act:** proposed from 2015 to current 117th Congress—broader than ENDA and *Bostock* ruling—prohibits discrimination in employment based on sexual orientation and gender identity, but also in housing, public accommodations, public education, federal funding, credit, and jury service
- ***Bostock v. Clayton County, Georgia:*** The Supreme Court's ruling in June 2020 protects against employment discrimination on basis of sexual orientation and gender identity

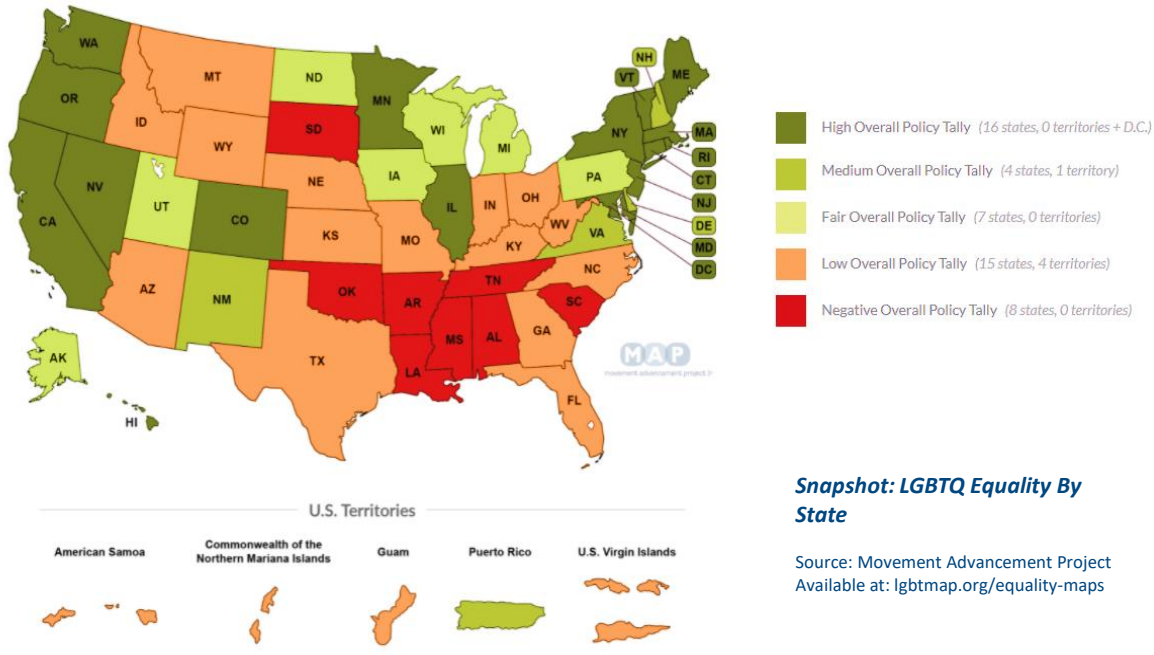
It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

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State Anti-Discrimination Statutes

- Housing
- Public accommodations
- Employment
- Anti-bullying in school
- Anti-conversion therapy
- Transgender healthcare
- Education
- Child welfare services
- Parental recognition
- Use of legal marijuana use
- AIDS/HIV status
- Credit history
- Criminal history
- Hate Crimes
- Hairstyles



Snapshot: LGBTQ Equality By State

Source: Movement Advancement Project
Available at: lgbtmap.org/equality-maps

Why Local Non-Discrimination Ordinances?

- Provide safeguards for protected groups where they may not exist
- Additional means for enforcement as a deterrent for discrimination
- Political momentum and economic pressure to advance LGBTQ and other rights

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North Carolina's Bathroom Bill



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North Carolina's Bathroom Bill

March 2016:
HB 2 and Pat McCrory

March 2017:
HB 142 and Roy Cooper



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Durham's Approach to a NDO



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The City of Durham's Approach

- **Existing enforcement of fair housing regulations**
- **Sources of authority in a Dillon's Rule jurisdiction**
- **Consideration of *Employment Division v. Smith* regarding exceptions**



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Contents of Ordinance

Newly Created Definitions

- Employer
- Employee
- Gender
- Gender Identity
- Military Status
- National Origin
- Protected Hairstyle
- Public Accommodation
- Sexual Orientation

The **CROWN** Act

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Contents of Ordinance

Statements of Interpretation and Effect

- Not to be interpreted or applied in conflict with any existing federal or state law
- Not to be construed to prohibit diversity and inclusion efforts
- Does not create a private cause of action under the Employment and Public Accommodations Ordinance

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Contents of Ordinance

General Prohibitions

- Discrimination in housing, places of public accommodations, and employment
- Interfering with evidence during an investigation of a discrimination complaint
- Coercion, intimidation, threatening a person for exercising rights under the NDO or aiding someone else in exercising their rights

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Exceptions to Ordinance—Fair Housing

- Single-family house sold or rented by owner, provided the owner does not own more than three single-family homes
- A duplex or triplex where the owner lives in one of the units
- Single-sex dormitory properties
- Private clubs that provide lodging as an incidental purpose that limit lodging to members or give preference to members
- Religious organizations that restrict use of its non-commercial dwelling to members of the same religion

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Exceptions to Ordinance—Employment and Public Accommodation

- Religious organization that employs individuals of same religion
- Religious educational institution that limits admission or gives preference for admission to applicant of same religion
- Religious organization that limits non-commercial accommodations, facilities, membership, or privileges to persons of the same religion
- Private club, which is not open to the public, that limits services or amenities to members or gives preference to members

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Exceptions to Ordinance— Employment and Public Accommodation

- Giving preferential treatment to veterans and their families
- Using a person's unfavorable discharge as an employment criterion where authorized by federal or state law or due to a business necessity
- Bona fide seniority system or affirmative action plan

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Catchall Statement in NDO

Nothing in this article shall require any individual, business, club, institution, or membership organization to take action in violation of the rights granted by the Constitutions of the United States and the State of North Carolina.

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Administration & Enforcement of the NDO

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Fair Housing Enforcement Generally

- Fair Housing Assistance Program (FHAP) is an intergovernmental enforcement partnership between HUD and the state or local agencies
- Requires **substantial equivalence** to the Fair Housing Act of substantive rights, procedures, remedies and judicial review provisions
- HUD provides FHAPs annual funding on a noncompetitive basis
- 6 agencies in North Carolina, approximately 77 FHAPs nationwide

Fair Housing Enforcement in Durham

- Human Relations Commission (HRC); HRC delegates investigative powers to City staff
- City staff makes a report and the Director determines whether to issue a "charge," meaning whether reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur
- Conciliation is permissible from period of filing of complaint and before charge is issued
- Upon charge, respondent can elect to have a hearing before the HRC or elect to proceed with the case in Durham's trial court, and the City Attorney's Office will file a complaint

Employment and Accommodations Enforcement Generally

- Fair Employment Practices Agency (FEPA)
- Only 1 in North Carolina at State level, approximately 90 FEPAs nationwide
- Worksharing agreement is required; Durham is starting this process
- Enforcement language needs to be evaluated by regional EEOC office
- Worksharing agreement is a lengthy process and has to the go before *THE* EEOC

Pro tip: Engage HUD and the EEOC before amending your ordinance!

Employment and Accommodations Enforcement in Durham

- Class 3 misdemeanor, fine of five hundred dollars ($500.00)
- Enforcement action brought under state law for an appropriate equitable remedy, including for a mandatory or prohibitory injunction commanding the defendant to correct the discrimination prohibited under the NDO
- Each day's continuing violation of any provisions of NDO are a separate and distinct offense for purposes of all remedies, including civil and criminal



The Effect of *Fulton* on NDOs

Fulton v. Philadelphia

Did the city violate free exercise? (Yes, 9-0)



Should the court refrain from re-evaluating *Employment Division v. Smith* in this case? (Yes, 6-3)



Additional Resources

- United States Department of Housing and Urban Development, Fair Housing Assistance Program (link)
- United States Equal Employment Opportunity Commission, Fair Employment Practices Agencies (link)
- Durham Non-Discrimination Ordinance (link)
- Congressional Research Service, "Fulton v. City of Philadelphia: religious Exemptions from Generally Applicable Laws" (link)

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Questions?

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