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A HISTORY OF SAME-SEX MARRIAGE

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INTRODUCTION

WE'WHA was a key cultural and political leader in the Zuni community in the late nineteenth century, at one point serving as an emissary from that southwestern Native American nation to Washington, D.C.¹ He was the strongest, wisest, and most esteemed member of his community. And he was a *berdache*, a male who dressed in female garb. Such men were revered in Zuni circles for their supposed connection to the supernatural, the most gifted of them called *lhamana*, spiritual leader. We'wha was the most celebrated Zuni *lhamana* of the nineteenth century. He was married to a man.

Ifeyinwa Olinke lived in the nineteenth century as well.² She was a wealthy woman of the Igbo tribe, situated in what is now Eastern Nigeria. She was an industrious woman in a community where most of the entrepreneurial opportunities were seized by women, who thereby came to control much of the Igbo tribe's wealth. Ifeyinwa socially overshadowed her less prosperous male husband. As a sign of

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This Article originated with work I did in connection with my ongoing representation of a gay couple suing the District of Columbia for a marriage license. *Dean v. District of Columbia*, No. CA 90-13892 (D.C. Super. Ct. Dec. 30, 1991), appeal docketed, No. 92-737 (D.C. Ct. App. June 2, 1992). Critically useful primary source leads were provided by Professors William Leap and Geoffrey Burkhart, both anthropologists at American University, and by Father Alexei Michalenko, the Chaplain at the Georgetown University Law Center.

I received very helpful comments on earlier drafts of this Article from Marc Arkin, Yair Chamudot, Sylvia Law, Bill Nelson, Mitt Regan, David Richards, and numerous participants at presentations of this Article to the Sexual Orientation and the Law Reading Group of the Gay and Lesbian Attorneys of Washington, D.C. (GAYLAW), the student-sponsored Frontiers of Legal Thought Conference at the Duke Law School, the Georgetown University Law Center, the Fordham University School of Law, the New York University School of Law, and the Symposium on Sexual Orientation and the Law sponsored by the *Virginia Law Review*.

¹ For an account of We'wha's life, see Will Roscoe, *The Zuni Man-Woman* 29-52 (1991).

² For a description of Ifeyinwa's life, see Ifi Amadiume, *Male Daughters, Female Husbands: Gender and Sex in an African Society* 48-49 (1987).

her prosperity and social standing, Ifeyinwa herself became a female husband to other women. Her epithet "Olinke" referred to the fact that she had nine wives.

Sergius and Bacchus were Roman soldiers who lived in the fourth century.³ They were male lovers. Yet it was for their Christian faith that they were persecuted by the Romans. Ultimately, Bacchus was tortured to death by the intolerant Romans. According to Christian tradition, Sergius' faith faltered with the death of his lover, only to return when Bacchus appeared to him in a vision and implored, "Your reward will be me," meaning that the couple would be reunited in heaven should Sergius maintain his faith. Sergius kept faith and, like his mate, died a martyr. During the Middle Ages, the relationship of Sergius and Bacchus was considered an exemplar of companionate marriage, or marriage based upon agapic love and mutual respect.

The stories of We'wha, Ifeyinwa Olinke, and Sergius and Bacchus resonate strangely in modern American ears. Culturally, most twentieth-century Americans consider marriage to be an institution that intrinsically involves different—rather than same-sex—partners. Although some Americans are willing to tolerate same-sex relationships, and even to give them some euphemistic sanction, few consider them to be "real" marriages. The law reflects these cultural attitudes. For example, the most recent edition of *Black's Law Dictionary* defines "marriage" as the "legal status, condition, or relation of one man and one woman united in law for life, or until divorced, for the discharge to each other and the community of the duties legally incumbent on those whose association is founded on the distinction of sex."⁴

This cultural and legal consensus denying the legitimacy of same-sex marriages has been under siege for over twenty years. Since the Stonewall riots of June 1969,⁵ gay men, lesbians, and bisexuals have

³ Their story will be told in John Boswell, *What God Has Joined Together: Same-Sex Unions in the Christian Tradition* (forthcoming 1994) (on file with Virginia Law Review Association).

⁴ *Black's Law Dictionary* 972 (6th ed. 1990) (emphasis added); accord 3A Norman J. Singer, *Sutherland Statutory Construction* § 68.02 (5th ed. 1992); 52 Am. Jur. 2d Marriage § 1 (1970).

⁵ The Stonewall Riots occurred on the nights of June 27 and 28, 1969, when the gay and lesbian patrons of the Stonewall Bar fought back against a routine police raid of the bar. See Toby Marotta, *The Politics of Homosexuality* 71-99 (1981).

come out of the closet and claimed our identity in great numbers. Many of these individuals have formed same-sex relationships, which members of the gaylesbian community have long referred to as "marriages." A number of these couples have insisted that the state recognize these marriages on the same terms that it recognizes different-sex marriages. At present, however, states have refused to recognize same-sex marriages, and none of the publicized lawsuits seeking such recognition has yet succeeded, nor have similar legislative efforts.

Opponents of same-sex marriage argue that the concept is oxymoronic. Marriage, they say, must involve a man and a woman because (1) that is the definitional essence of marriage, (2) the Judeo-Christian tradition requires it, and/or (3) the modern Western nation-state has structured society around the assumption that only different-sex marital unions are allowed. Proponents of same-sex marriage dispute and often ridicule these assertions. Thus far, neither side has analyzed these arguments in the context of the history of marriage itself. That is the project of this Article.

Part II, the heart of this Article, recounts the history of same-sex marriage, synthesizing scholarship in the fields of social anthropology, ethnography, mythology, comparative literature, sociology, and ecclesiastical history. Most of the scholarship is of recent vintage, reflecting the post-Stonewall interest in the topic.⁶ This contemporary literature tends to be sympathetic to gaylesbian concerns, and much of it is written by openly bisexual, lesbian, and gay scholars. The same can be said of this Article, for I also share the methodological perspective of this new scholarship—social constructionism—which I explain in Part I.

A social constructionist history emphasizes the ways in which marriage is "constructed" by society over time, with "exclusions" from

⁶ Social anthropologists became interested in this phenomenon earlier than historians, legal scholars, and others. Consider the following findings:

In 49 (64 percent) of the 76 societies other than our own for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community.

... In many cases this [same-sex] behavior occurs within the framework of courtship and marriage, the man who takes the part of the female being recognized as a *berdache* and treated as a woman. In other words, a genuine mateship is involved.

Clellan S. Ford & Frank A. Beach, *Patterns of Sexual Behavior* 130-31 (1951) (surveying the sexual practices, mores, and institutions of 76 societies) (footnote omitted).

the institution being viewed as reflecting larger social power relations. Thus, the exclusion of same-sex couples from marriage in America is an expression of our society's persecution of sexual orientation minorities—lesbians, gay men, and bisexuals. Our insistence that marriage be an option available to us is part of an historical process by which the victims of society's dividing practice (sexual deviation) have come to resist and defy the power of that stigma. This Article situates that resistance in the larger history of Western culture's shifting attitudes toward same-sex intimacy, and in the even larger context of other cultures' more favorable attitudes toward same-sex intimacy.

Part III explores the implications of this history, initially addressing debates within the gay, lesbian, and bisexual community about whether we even should be seeking the right to marry (I argue that we should), and then turning to the legal arguments developed in Part I. The history has both "defensive" and "offensive" argumentative power. It reveals the traditional arguments against same-sex marriage to be seriously defective: the definitional argument essentializing marriage around male-female intimacy is factually wrong; the argument from Judeo-Christian tradition is hypocritical, given early Christianity's tolerance of same-sex intimacy; and the pragmatic argument is revealed to rest upon a normatively questionable status quo.

The history of same-sex marriage also has offensive, or affirmative, persuasive power. I offer it to the lesbian, bisexual, and gay community as part of a collective effort to retrieve *our* history, which has been suppressed and denied. And I offer it to the legal community as part of our larger narrative: same-sex unions have been a valuable institution for most of human history and in most known cultures. Social and religious mores in most cultures, including Western culture at certain times, have valorized same-sex unions for most of the same reasons they have valorized different-sex unions. Cultures, such as that of the recent West, that deny same-sex unions do so to suppress and persecute a homosocial minority. The process of suppression is an ugly one. For the same reasons that law ended its prohibition of interracial marriages in 1967, it should end its prohibition of same-sex marriages now.

I. THE LEGAL ARGUMENTS FOR AND AGAINST SAME-SEX MARRIAGE

The intellectual debate over same-sex marriage in American law has been a twenty-year conversation largely conducted within the framework of liberal theory. The post-Stonewall period of gay rights activism thrust the issue onto the nation's policy agenda, as gay and lesbian couples came out and began to insist on legal recognition of their relationships. These couples and their advocates relied on rights-oriented arguments, asserting that same-sex couples are not materially different from different-sex couples and should therefore be given the same legal treatment as a matter of constitutional or statutory right.

These arguments have recently succeeded in gaining same-sex couples some of the same benefits regularly bestowed upon different-sex couples in the private sector and under local domestic partnership ordinances. They have thus far been unsuccessful, however, in gaining state-wide recognition of same-sex unions as marriages. The reasons given by opponents of same-sex marriage are also grounded in liberal rhetoric. With respect to the institution of marriage, these opponents argue, same-sex couples are simply not similar to different-sex couples. Because marriage definitionally, morally, and practically requires a man and a woman, there is no constitutional or statutory "right" for same-sex couples to marry.

Why have liberal arguments been so unavailing for those advocating same-sex marriage? Social constructionist thought suggests that liberal theory's hostility to same-sex marriage derives not from any internal logic but instead from cultural attitudes—specifically, the way American society has constructed both marriage and homosexuality. Just as interracial marriage was portrayed in such a way as to isolate African Americans from mainstream society, so prohibitions against same-sex marriage help to preserve the subordination of gays, lesbians, and bisexuals within society. Nonetheless, just as there was no neutral way for liberal theory to justify prohibiting interracial marriage yesterday, so there is no neutral way to justify prohibiting same-sex marriage today.

A. Liberal Arguments for Same-Sex Marriage

Before 1969, the notion of a same-sex couple entering into state-sanctioned marriage seemed culturally and legally implausible in this

country. Even though many same-sex couples in American history entered into the functional equivalent of marriage or, surprisingly enough, were legally married, these traditions were suppressed or ignored. The Stonewall riots changed all that, however, as gay men, lesbians, and bisexuals came out of the closet in substantial numbers. Many of these newly-liberated couples formed openly committed relationships functionally similar to different-sex marriages. As part of this demand for acknowledgment or acceptance, many activists sought legal recognition of same-sex marriages on the same terms as different-sex marriages, as part of a general movement to end all forms of state discrimination against lesbians, gay men, and bisexuals.

For twenty years, gay activists have confronted the legal system—mainly the courts—demanding that it end its discrimination against same-sex marriages. Three types of arguments have been made in support of these demands.⁷ First, state refusal to recognize same-sex marriages violates the right to marry, which the Supreme Court inferred from the Due Process Clause in *Loving v. Virginia*.⁸ *Loving* invalidated state laws prohibiting different-race marriages in response to arguments that they violated African Americans' right to equal protection and interracial couples' due process right to marry. Subsequent cases have emphasized that the freedom to marry the person of one's choosing stands as a fundamental due process right recognized for poor people and even prisoners and that this right can only be abridged to further an important or compelling state interest.⁹ Gay activists and friendly commentators argue that by refusing to allow same-sex couples to add a legal sanction to their relationships, states violate same-sex couples' constitutional right to marry, a position

⁷ For sources presenting the rights-oriented arguments, see Nan D. Hunter, Sherryll E. Michaelson & Thomas B. Stoddard, *The Rights of Lesbians and Gay Men: The Basic ACLU Guide to a Gay Person's Rights* 75-78 (3d ed. 1992); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 *Berkeley Women's L.J.* 134 (1987-88); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *Hastings L.J.* 799, 874-78 (1979); Editors of the *Harv. L. Rev.*, *Sexual Orientation and the Law* 95-101 (1990).

⁸ 388 U.S. 1 (1967).

⁹ See *Turner v. Safley*, 482 U.S. 78 (1987) (holding that the state cannot, without compelling reason, forbid prison inmates from marrying while in prison); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (finding that the state cannot forbid a person with outstanding support obligations from remarrying); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (declaring that the state cannot condition divorce upon payment of fees that poor people cannot afford).

which is just as irrational as previous state action prohibiting different-race marriages.¹⁰

In addition, gaylegal theorists and feminists have argued that by prohibiting same-sex marriage, states engage in sex discrimination, thereby violating the federal Equal Protection Clause and/or state equal rights amendments.¹¹ Although the state will give a marriage license to virtually any woman-man couple, no license will be dispensed to any woman-woman couple. As a consequence, the state is discriminating against the latter couple simply because the second partner is a woman and not a man. That, the argument goes, is de jure sex discrimination, which is unconstitutional unless justified by a compelling state interest. A deeper form of the sex discrimination argument, developed by Sylvia Law, is that any effort by the state to hardwire sex differences into the concept of marriage perpetuates traditional sex-based stereotypes of man-as-breadwinner and woman-as-housekeeper.¹² Same-sex marriage is required by a genderless Constitution precisely because it unlinks functional roles from sex stereotypes.

Finally, under a gayliberal analysis, prohibiting same-sex marriages is invalid precisely because it discriminates against lesbian and gay couples. Many scholars¹³ and some judges¹⁴ have argued that statutes

¹⁰ See Friedman, *supra* note 7, at 155-57; Herma H. Kay, *Private Choices and Public Policy: Confronting the Limitations of Marriage*, 5 *Austl. J. Fam. L.* 69 (1991); Editors of the *Harvard Law Review*, *supra* note 7, at 95-98.

¹¹ See Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 *Wis. L. Rev.* 187, 218-21, 230-33; Claudia A. Lewis, Note, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 *Yale L.J.* 1783 (1988).

¹² Law, *supra* note 11, at 232.

¹³ The most sustained case for strict scrutiny is made in Carol S. Steiker, Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *Harv. L. Rev.* 1285 (1985). For other scholarly works on this issue, see John H. Ely, *Democracy and Distrust* 162-63 (1980); Bruce A. Ackerman, *Beyond Carolene Products*, 98 *Harv. L. Rev.* 713 (1985); Elvia R. Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 *Women's Rts. L. Rep.* 143 (1988); Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 *U. Dayton L. Rev.* 575 (1985); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 *U. Chi. L. Rev.* 1161 (1988). For an excellent cautionary piece, see Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 *UCLA L. Rev.* 915 (1989).

¹⁴ The leading judicial decision applying strict scrutiny to sexual orientation classifications is Judge William A. Norris' panel opinion in *Watkins v. United States Army*, 847 F.2d 1329, 1345-49 (9th Cir. 1988), *aff'd* on other grounds, 875 F.2d 699 (9th Cir. 1989) (en banc) (affirming the panel decision on the ground of equitable estoppel, declining to reach the

classifying individuals on the basis of their sexual orientation should trigger heightened equal protection scrutiny. Under such scrutiny, state prohibitions of same-sex marriage ought to be invalidated because no compelling state interest justifies treating gay couples differently from heterosexual couples. Like the sex discrimination argument, this claim can sometimes be asserted on the basis of statutory as well as constitutional rights. A number of jurisdictions have enacted human rights statutes that broadly prohibit discriminating against lesbians, gay men, and bisexuals on the basis of their sexual orientation.¹⁵ In the District of Columbia, for example, the Human Rights Act prohibits the government from discriminating on the basis of sexual orientation or from adopting policies that have a discriminatory effect upon sexual orientation minorities.¹⁶ Because denying marriage licenses has such an effect on lesbian and gay couples, the District's refusal to issue licenses is arguably unlawful sexual orientation, as well as sex, discrimination.

Although such rights-based arguments are naturally raised in litigation contexts, lesbian and gay advocates have relied on similar pitches in lobbying for support in the executive and legislative branches. Activists have brought these constitutional and statutory arguments to state attorneys general, in addition to petitioning state legislatures to adopt statutes allowing same-sex marriages.

constitutional issues, and withdrawing the district court and panel opinions). Judge Norris' views were favorably cited in *Commonwealth v. Wasson*, 842 S.W.2d 487, 499 (Ky. 1992). For dicta supporting Judge Norris' views, see *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 36 (D.C. Ct. App. 1987) (opinion of Mack, J.) (en banc).

¹⁵ California, Connecticut, the District of Columbia, Hawaii, Massachusetts, New Jersey, Vermont, and Wisconsin have statutes prohibiting job discrimination on the basis of sexual orientation. See Cal. Lab. Code § 1102.1 (West Supp. 1993); Conn. Gen. Stat. Ann. §§ 46a-81c (West Supp. 1993); D.C. Code Ann. §§ 1-2501, -2512 (1981); Haw. Rev. Stat. §§ 368-1, 378-2 (Supp. 1992); Mass. Gen. Laws Ann. ch. 151B, § 4 (West Supp. 1993); N.J. Stat. Ann. §§ 10:5-4, -12 (West Supp. 1993); Vt. Stat. Ann. tit. 3, § 961(6) (Supp. 1992); id. tit. 21 §§ 495(a), 1726(a)(7); Wis. Stat. Ann. § 101.22 (West 1988 & Supp. 1991). The District of Columbia, Massachusetts, New Jersey, Vermont, and Wisconsin also prohibit businesses from engaging in such discrimination when providing services in places of "public accommodation." See D.C. Code § 1-2519 (1981); Mass. Gen. Laws Ann. ch. 272, §§ 92A, 98 (West 1990); N.J. Stat. Ann. §§ 10:5-4, -12f (West 1993); Vt. Stat. Ann. tit. 9, § 4502(a) (Supp. 1992); Wis. Stat. Ann. § 101.22(9) (West Supp. 1990).

¹⁶ The District's anti-discrimination rules were applied to District government agencies in *Dickerson v. D.C. Dep't of Human Servs.*, No. 89-465-PA(N) (D.C. Comm'n on Human Rights, 1991).

B. Liberal Arguments Against Same-Sex Marriage

As of October 1993, none of the legal efforts to gain statewide recognition of same-sex marriage in the United States has been successful,¹⁷ though several efforts are still pending and one (in Hawaii) has obtained a ruling that the state must show a compelling interest for its exclusion of same-sex couples from marriage. Same-sex marriage opponents—primarily state attorneys general defending state statutes, state court judges interpreting and upholding those statutes, and interest group opponents (the Catholic Church and fundamentalist Protestant denominations)—have argued that the concept is a contradiction in terms. Marriage must involve a man and a woman, they contend: a relationship between people of the same sex simply cannot be a marriage, as a matter of definition, morality, and Western practice.

The main argument against same-sex marriage is definitional: marriage is necessarily different-sex and therefore cannot include same-sex couples. Hence, the authors of any statute that talks of "marriage" could have only contemplated different-sex couples, even if the statute is not gendered, i.e., does not use the specific terms "husband"

¹⁷ For leading judicial decisions rejecting arguments for same-sex marriage, see *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Cal. 1980), aff'd on other grounds, 673 F.2d 1036 (9th Cir. 1982); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); see also *Baehr v. Lewin*, No. 91-1394-05 (Haw. Cir. Ct. Sept. 3, 1991) (rejecting plaintiffs' equal protection claim), vacated and remanded, 852 P.2d 44 (Haw. 1993); *Succession of Bacot*, 502 So. 2d 1118, 1127-30 (La. Ct. App.) (holding that a man cannot be a "concubine" of another man), writ denied, 503 So. 2d 466 (La. 1987); *Jennings v. Jennings*, 315 A.2d 816, 820 n.7 (Md. Spec. Ct. App. 1974) (explaining that "Maryland does not recognize a marriage between persons of the same sex"); *In re Estate of Cooper*, 564 N.Y.S.2d 684, 687 (N.Y. Sup. Ct. 1990) (refusing to "elevate [] homosexual unions to the same level achieved by the marriage of two people of the opposite sex"); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971) (stating that "[m]arriage is and always has been a contract between a man and a woman"); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (holding that persons of the same sex cannot contract a common law marriage); *Slayton v. Texas*, 633 S.W.2d 934, 937 (Tex. Ct. App. 1982) (stating that same-sex marriage is impossible in Texas).

The attorneys general of at least six states have issued opinions that their states' marriage laws prohibit same-sex marriages and can constitutionally do so. They are 190 Op. Att'y Gen. Ala. 30 (1983); 1975 Colo. AG LEXIS 38; 77 Op. Att'y Gen. Kan. 248 (1977); 1978 Miss. AG LEXIS 684; 1976 S.C. AG LEXIS 423; 88 Op. Att'y Gen. Tenn. 43 (1988).

and "wife." Typical is the Kentucky Court of Appeals' discussion in *Jones v. Hallahan*.¹⁸

Kentucky statutes do not specifically prohibit marriage between persons of the same sex nor do they authorize the issuance of a marriage license to such persons.

Marriage was a custom long before the state commenced to issue licenses for that purpose. For a time the records of marriage were kept by the church. . . . [M]arriage has always been considered as the union of a man and a woman and we have been presented with no authority to the contrary.

It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined.¹⁹

Any argument focusing on statutory interpretation is naturally dispatched by this definitional approach, because all of the state marriage statutes—whether gendered or not—employ the term "marriage."²⁰ Although the Kentucky court relied on history and tradition to define marriage, other courts have approached the issue as a functional matter, but with the same result: same-sex unions are not "marriages" because the purpose of marriage is procreation, which same-sex couples cannot accomplish.²¹

Courts have also invoked the definitional argument as a basis for rejecting constitutional challenges founded upon *Loving's* right to marry. The leading case is the Washington Court of Appeals' decision in *Singer v. Hara*,²² which not only rejected a federal due process argument based upon *Loving*, but also an argument based upon the state equal rights amendment:

Given the definition of marriage which we have enunciated; the distinction between the case presented by appellants [two men] and

¹⁸ 501 S.W.2d 588 (Ky. 1973).

¹⁹ *Id.* at 589 (emphasis added and footnote omitted).

²⁰ See *id.* at 590 (stating that "the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage"); *Bacot*, 502 So. 2d at 1130; *Baker*, 191 N.W.2d at 185-86; *Singer*, 522 P.2d at 1191.

²¹ See *Baker*, 191 N.W.2d at 186. On this view, procreation at least must be a potential purpose. Because same-sex couples cannot create children by themselves (a third different-sex person must be introduced, e.g., a sperm donor or a surrogate), defining marriage in this way also excludes different-sex couples who are unable to bear children.

²² 522 P.2d 1187 (Wash. Ct. App. 1974).

[that] presented in *Loving* . . . is apparent. In *Loving* . . . the parties were barred from entering into the marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case because appellants are not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship because of the recognized definition of that relationship as one which may be entered into only by two persons who are members of the opposite sex.²³

By defining marriage as essentially different-sex, the court thus was able to avoid the charge that the state was creating an invidious discrimination by denying licenses to same-sex couples.²⁴

The opponents of same-sex marriage have also attempted to show that defining marriage to include only different-sex couples is justified morally, to preserve family values and traditional ethical notions. Accordingly, the second type of oppositionist argument invokes community values, including the antihomosexual teachings of the Old Testament. The federal court in *Adams v. Howerton*²⁵ made just such a definitional argument by linking it to traditional Judeo-Christian morality:

The definition of marriage, the rights and responsibilities implicit in that relationship, and the protections and preferences afforded to marriage, are now governed by the civil law. The English civil law took its attitudes and basic principles from canon law, which, in early times, was administered in the ecclesiastical courts. Canon law in both Judaism and Christianity could not possibly sanction any marriage between persons of the same sex because of the vehement condemnation in the scriptures of both religions of all homosexual relationships. Thus there has been for centuries a combination of scriptural and canonical teaching under which a "marriage" between persons of the same sex was unthinkable and, by definition, impossible.²⁶

²³ *Id.* at 1192.

²⁴ See also *Baker*, 191 N.W.2d at 186-87, in which the court distinguished *Loving* from the right to privacy cases on the ground that the latter emphasized procreation's essential link to marriage. For this reason, "in common sense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex." *Id.* at 187.

²⁵ 486 F. Supp. 1119 (C.D. Cal. 1980), *aff'd* on other grounds, 673 F.2d 1036 (9th Cir. 1982).

²⁶ *Id.* at 1123 (footnotes omitted).

More dramatically, the District of Columbia Superior Court's decision in *Dean v. District of Columbia*²⁷ invoked passages from Genesis, Deuteronomy, Matthew, and Ephesians to support its holding that "societal recognition that it takes a man and a woman to form a marital relationship is older than Christianity itself,"²⁸ an apparent reference to Adam and Eve. Although these decisions rest upon a suspiciously sectarian vision of morality, they could have invoked general "family values" to the same effect, as other courts and commentators have done.²⁹

Traditional Judeo-Christian morality works against same-sex marriage in another way. Its sexual mores are reflected in state sodomy laws—currently found in more than twenty states—which are invoked in their relevant jurisdictions as a basis for opposing same-sex marriages. The District of Columbia Superior Court in *Dean* believed that allowing same-sex marriages would contradict expressed public policy where the sexual conduct at the heart of those marriages was criminalized.³⁰ The Supreme Court in *Bowers v. Hardwick*³¹ suggested that "millennia of moral teaching"³² can protect sodomy laws against due process attack. The same idea is potentially applicable to marriage rights.

A third argument against same-sex marriage appeals to pragmatism. Even if unconstrained by formal definitions and traditional

²⁷ No. CA 90-13892 (D.C. Super. Ct. Dec. 30, 1991), appeal docketed, No. 92-737 (D.C. Ct. App. June 2, 1992).

²⁸ *Id.*, slip op. at 18-21. A similar trope was deployed in *Baker*, 191 N.W.2d at 186 ("The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis.").

²⁹ See G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. Dayton L. Rev. 541, 567 (1985) ("The majority [of society], therefore, may reasonably believe that legal recognition of same-sex marriage . . . would impair the ability of opposite-sex marriage to advance the individual and community values that it has traditionally promoted."); see also *id.* at 559-60 (arguing that the state ought to be able to implement community moral standards by discouraging conduct inconsistent with those standards).

³⁰ See *Dean*, slip op. at 9 ("[L]egislative authorization of homosexual, same-sex marriages would constitute tacit state approval or endorsement of the sexual conduct, to wit, sodomy, commonly associated with homosexual status—conduct deemed by society to be so morally reprehensible as to be a criminal offense in the District of Columbia and many other jurisdictions.") (footnotes omitted). The District subsequently repealed its sodomy law in 1993, however.

³¹ 478 U.S. 186 (1986).

³² *Id.* at 197 (Burger, C.J., concurring). Though the Chief Justice's phrasing is more quotable, the majority opinion relied on a similar argument. See *id.* at 192-94.

morality, the pragmatist might still be reluctant to allow same-sex marriages if such marriages would prove impractical or unjustified under a social cost-benefit analysis. Judge Richard Posner's *Sex and Reason* presents just such a pragmatic case against permitting same-sex marriage at this time.³³ Recognizing same-sex relationships as marriage would be problematic, he suggests, because it would "be widely interpreted as placing a stamp of approval on homosexuality."³⁴ Moreover, such recognition would carry an "information cost" in that the social value of knowing someone is married would be somewhat reduced as the term is broadened.³⁵ Finally, acknowledging same-sex marriages would have a variety of "collateral effects, simply because marriage is a status rich in entitlements," many of which were not designed with same-sex couples in mind.³⁶

This last point is the most important. If the state suddenly recognized same-sex marriages, employers would have to rethink whether to provide fringe benefits once many of their newly married gay and lesbian employees claimed spousal coverage. Legislatures would become embroiled in a spate of controversies about which (if any) marriage entitlements they would deny to same-sex couples. If any entitlements were denied, state attorneys general would then be faced with the prospect of litigating the constitutionality of such discrimination. Finally, state agencies and private employers would have to perform new cost-benefit analyses to recalibrate the health care, spousal leave, and other benefits now accorded married couples.

For the Posnerian pragmatist, even if the moral objections to same-sex marriage have become attenuated after Stonewall, the concept of different-sex marriage is so culturally embedded in our society—and interwoven throughout its social and economic institutions—that policymakers (especially unelected judges) cannot simply legalize same-sex marriages and expect that society will acquiesce without

³³ Richard A. Posner, *Sex and Reason* 311-13 (1992).

³⁴ *Id.* at 311. Judge Posner does not discuss the argument that, by permitting convicted rapists, spouse abusers, and misogynists to marry their victims, the state might be widely interpreted as placing a stamp of approval on rape, spouse abuse, and misogyny.

³⁵ *Id.* at 312. Judge Posner concedes that denying same-sex marriages carries what I consider to be even more severe "information costs" for those in a same-sex union: the parties cannot signal their level of commitment by getting married or deliberating the issue.

³⁶ *Id.* at 313. This point is reviewed critically in William N. Eskridge, Jr., *A Social Constructionist Critique of Posner's Sex and Reason: Steps Toward a Gaylegal Agenda*, 102 Yale L.J. 333, 352-59 (1992).

experiencing turmoil and disruption. On the other hand, pragmatic concerns such as those articulated above might be viewed less as arguments against same-sex marriage simpliciter, and more as arguments that this new institution cannot be thrust upon society abruptly by unelected judges. Instead, advocates should advance the idea incrementally, starting with domestic partnership ordinances and working up to same-sex marriages over time.

C. Toward a Gaylegal Response: Social Constructionism

In response to the definitional, moral, and pragmatic arguments discussed above, the gaylegal community and its allies have developed liberal meta-arguments. The main pitch has been libertarian: the state should allow people to marry whomever they desire so long as there are no grave third-party effects of a tangible and significant nature. Under a libertarian view, the definitional argument is circular—the state cannot defend its prohibition of same-sex marriages simply because it does not believe them to be marriages. Cases upholding the right to marry require the state to provide an independent reason, one grounded upon third-party harms and not just moral disapproval³⁷ or a sectarian understanding of marriage.³⁸ Also, as a practical matter, state prohibition of same-sex marriage serves none of the family values trumpeted by those who resist the institution. By denying gay and lesbian couples the legal protections and household stability facilitated by marriage laws, the state only impedes our ability to create “families we choose.”³⁹

These libertarian counterarguments have been uniformly unsuccessful, for reasons having to do with precedent (the *Bowers* problem with any argument based on the Due Process Clause), the doctrinal weakness of the right-to-marry line of cases,⁴⁰ and cultural resistance

³⁷ This is supported not only by *Loving v. Virginia*, 388 U.S. 1 (1966), whose validation of different-race marriages came in the face of widespread social disapproval, but also by *Palmore v. Sidoti*, 466 U.S. 429 (1984), which held that majority “prejudice” generally could not be the basis for state penalties. *Id.* at 434. Both cases expressly disapproved of state acts imposing punishment as a means by which to accommodate racial prejudice.

³⁸ See Sherryl E. Michaelson, Note, Religion and Morality Legislation: A Reexamination of Establishment Clause Analysis, 59 N.Y.U. L. Rev. 301, 307-11 (1984).

³⁹ See Friedman, *supra* note 7, at 160-69; see also Kath Weston, Families We Choose: Lesbians, Gays, Kinship (1991) (coining the phrase).

⁴⁰ See Earl M. Maltz, Constitutional Protection for the Right to Marry: A Dissenting View, 60 Geo. Wash. L. Rev. 949 (1992).

to the very idea of same-sex marriage generally and “homosexuals” in particular. Perhaps a better line of liberal meta-argument is the egalitarian pitch: it is discrimination, pure and simple, to deny same-sex couples the same marriage rights as different-sex couples. Denying same-sex couples marriage licenses is a clear case of discrimination, therefore directly implicating the Equal Protection Clause, which renders any gendered state policy suspect (or quasi-suspect). The policy of the Equal Protection Clause is also strongly implicated, because such discrimination is animated by the sorts of irrational prejudices and gender stereotypes that have been cleared away in other contexts. *Bowers* by its terms does not apply to equal protection claims. The Hawaii Supreme Court recently accepted a version of the egalitarian argument, while decisively rejecting the libertarian pitch, and has required the state to justify its exclusion of same-sex couples.⁴¹

Except for the Hawaii decision, egalitarian claims have suffered the same fate as libertarian ones. A difficulty they share is that both operate under a faith that our liberal polity will assure bisexuals, gay men, and lesbians the same “neutral” protection of our autonomy (the libertarian point) and the same “neutral” protection against arbitrary classifications (the egalitarian point) that are assured all citizens in a liberal polity. Yet liberalism has had no bite for us: our liberty has been defined away by denying our capacity for making a marital “choice,” and our equality has been compromised by making homosexuality a suspect “group” rather than a suspect “classification.” This poses a challenge for the gaylegal community—to escape confining liberal conceptualizations of our position. Social constructionist theory has provided a different way to conceptualize the case for same-sex marriage.

At the same time the gaylegal community was struggling to obtain equal rights, we were also engaged in an intellectual struggle to understand why American society has been so hysterically hostile to us.⁴² What emerged from this struggle was widespread agreement among gaylesbian intellectuals that sexual orientation as a category is socially constructed, and that the modern West’s obsession with that category

⁴¹ See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993).

⁴² This latter struggle has many parallels with feminist and critical race theory and, indeed, was influenced heavily by feminist thought in particular. See, e.g., Gayle Rubin, Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality, in *Pleasure and Danger* 267 (Carole S. Vance ed., 1984).

is part of a complex web of attitudes and institutions that work to subordinate whole groups of people, including straight, bisexual, and lesbian women as well as bisexual and gay men.⁴³ There is now a substantial literature, grounded in philosophy, history, anthropology, and sociology, that develops social constructionist theory as a way of thinking about culture generally, and sexuality and marriage in particular.

Social constructionism provides a framework for evaluating same-sex marriages that differs from traditional liberal thought. This framework can be expressed as three hypotheses. First, marriage is not a naturally generated institution with certain essential elements. Instead, it is a construction that is linked with other cultural and social institutions, so that the old-fashioned boundaries between the public and private life melt away. Second, the social construction of institutions like marriage is not and cannot be neutral, for it involves the playing out of a society's power relationships. Categorically denying same-sex marriage relates not only to the notion that procreation is essential to marriage, but more deeply to Americans' fears of homosexuality (itself an historically recent construct), just as denying different-race marriage was related to Americans' racial anxieties (also an historical construct). Third, the social construction of marriage is dynamic. Linked as it is to other institutions and attitudes, marriage will change as they change. Conceptualized around certain practices dividing society's constituents, marriage should change as the subordinated groups identify their own oppression and decide to resist it.

These social constructionist hypotheses have many implications for the legal debate over same-sex marriage, but I can hardly explore those implications without offering some evidence supporting the hypotheses themselves. As evidence, I offer the following history of same-sex unions.

⁴³ For the leading sources, see 1 Michel Foucault, *The History of Sexuality* (Robert Hurley trans., Pantheon Books 1978) (1976); Mary McIntosh, *The Homosexual Role*, 16 Soc. Probs. 182 (1968), reprinted in *The Making of the Modern Homosexual* 30-49 (Kenneth Plummer ed., 1981); see also *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (Edward Stein ed., 1990) (exploring social constructionism); *Sexual Meanings: The Cultural Construction of Gender and Sexuality* (Sherry B. Ortner & Harriet Whitehead eds., 1981) (same).

II. SAME-SEX UNIONS IN OTHER TIMES AND OTHER CULTURES

If one read only legal materials, one would think same-sex marriage an historical and cultural oddity, if not freakish and perverse. Yet historians, social anthropologists, and scholars of comparative literature have been writing about same-sex marriage for most of this century, with a boomlet in the last two decades. Same-sex unions grounded upon affection, sexual attraction, or a mixture thereof are commonplace in human history, and the following account is my effort to introduce this scholarship to a legal audience.

Several general points should be made at the outset. The story I am going to tell is episodic and fragmentary. A thorough history of marriage itself has yet to be written,⁴⁴ and may never be written, because the records of people's everyday lives no longer exist or exist in hard-to-decipher form.⁴⁵ A history of same-sex unions will be even more fragmentary, because same-sex relationships have not comprised the predominant form of mateship in most cultures and have been systematically suppressed in the West for several centuries.

Another complication involves terminology. Human relationships and companionships assume as many different forms as there are societies, and generalizing about institutions across cultures is perilous. Nonetheless, employing some categories may help to make sense of the data. I shall thus use the term "same-sex unions" to refer to any kind of culturally or legally recognized institution whereby people of the same sex are bonded together in relationships for sexual or other reasons of affinity. Included within the general category of same-sex unions will be same-sex "relationships," which are culturally but not legally recognized in the society, and same-sex "marriages," which are given some kind of legal recognition.⁴⁶

⁴⁴ However, there have been many excellent monographs. E.g., James A. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (1987); John R. Gillis, *For Better, For Worse: British Marriages, 1600 to the Present* (1985); David Herlihy, *Medieval Households* (1985); Sarah B. Pomeroy, *Goddesses, Whores, Wives, and Slaves* (1975); Tamara K. Hareven, *The History of the Family and the Complexity of Social Change*, 96 Am. Hist. Rev. 95 (1991).

⁴⁵ Thus we do not know when marriage became institutionalized in most societies, or even the extent to which historical marriage-like institutions resemble marriages taking place today in current Western society.

⁴⁶ Compare my approach with the more liberal approach taken by John Boswell in *Christianity, Social Tolerance, and Homosexuality* 26 (1980):

No marriages in ancient societies closely match their modern equivalents. Most were vastly more informal; some were more rigid. . . . No precise criteria could be specified

12% focused on "the self-actualization of both people within the relationship."²³⁸

The Mendola Report's anecdotal conclusions are borne out by more rigorously conducted empirical surveys conceived during the 1970s. One important work studying gay and lesbian couples found that they developed a variety of relationships, with those attaining "close-coupled" (marriage-like) stability considered the happiest by the study's authors.²³⁹ Academic and empirical examinations of same-sex relationships conducted in the 1960s and 1970s found them functional in and of themselves but terminally shackled by social prejudice, legal disadvantages, and economic discrimination.²⁴⁰ One study summarized the evidence in this way:

The gay relationship does not receive the financial subsidies that the heterosexual marriage enjoys, in the forms of reduced taxes and discounts given to married couples by many private associations and businesses. . . . It would seem the lack of institutional and financial supports to gay marriages, intentionally withheld by the dominant heterosexual culture, is a potential contributor to the often-mentioned instability and ephemerality of gay relationships. Since it has been found in a variety of cultures that economic and institutional supports contribute to the stability and longevity of heterosexual liaisons, it would seem somewhat arbitrary to argue that such supports have little relevance to the case of gay marriages.²⁴¹

As gay and lesbian couples have come to form more lasting relationships, many of them viewing their unions as not materially different from heterosexual marriages, gaylaw has insisted that the state not only tolerate same-sex unions, but recognize them as marriages, or at least as something marriage-like through domestic partnership laws. This brings our story back to its starting point: the various arguments for and against recognizing same-sex marriage.

²³⁸ *Id.* at 53.

²³⁹ See Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* 199 (1978).

²⁴⁰ See Joseph Harry & William B. DeVall, *The Social Organization of Gay Males* 80-100 (1978) (encompassing a section entitled "Marriages Between Gay Males").

²⁴¹ *Id.* at 80-81 (citations omitted).

III. IMPLICATIONS OF THIS HISTORY OF SAME-SEX MARRIAGE

The historical evidence strongly confirms the social constructionist hypotheses about marriage. It cannot be seriously disputed that marriage is an institution that is constructed, not discovered, by societies. The social construction of marriage in any given society is fluid and mobile, and most societies we know anything about—including the West—have recognized same-sex unions, usually including same-sex marriages, at various points in their history.

This Part explores the implications of social constructionism for the same-sex marriage debate. The first implication is that the gaylesbian community should think carefully about whether same-sex marriage should be on the gaylegal agenda. If marriage is socially constructed and tied in with other institutions and practices, my history suggests a further inquiry: Does the gay, lesbian, and bisexual community want to participate in this particular institution as constructed today? Pursuing the liberal arguments for same-sex marriage, advocates assert that we ought to have the same rights, duties, and obligations as other citizens. But social constructionism poses deeper inquiries: Is marriage itself a subordinating institution? Will it contribute to our long-term happiness and well-being? What effects might same-sex marriage have on our community, our movement, and our lives? I admit to substantial ambivalence on all these issues but on the whole believe that gaylesbian doubts about same-sex marriage are overstated and that having the marriage option is useful and productive for us.

If the gaylesbian community continues to press for same-sex marriage, social constructionism undermines the traditional essentialist arguments posed against same-sex marriage. For example, my history can be offered as proof against most definitional arguments: How can the law deny the existence—indeed the pervasiveness—of same-sex marriage as a human institution when history is replete with examples? Moreover, the history of same-sex marriage rebuts some aspects of the moral and pragmatic arguments as well. Morality, like marriage, is socially constructed. Just as there is no essential definition of marriage as different-sex, so there is no essential reading of the Bible that is anti-homosexual. For centuries, the Roman Catholic and Greek Orthodox Churches read the Bible in ways that tolerated same-sex couples, and that early reading has seen a revival.

Perhaps the most useful lesson of social constructionism is strategic. Because anti-homosexual attitudes are deeply embedded in

American culture, they are exceedingly hard to change. Because they also pervade the law, the law is also hard to change, not because of logic but because of experience. African Americans, however, fought a similar battle a generation ago and made progress against similarly ingrained attitudes. The concluding Section of this Article explores the parallels between the case for same-sex marriage and the case for mixed-race marriage that underlay the Court's constitutional decision in *Loving v. Virginia*.

A. Should Gaylaw Be Seeking Same-Sex Marriage?

Once marriage is viewed as a constructed institution with a certain history, the important issue for us becomes the following question: Why should we expend scarce resources to expand marriage to include us? The arguments in favor of such an effort strike me as compelling: we should have the same rights and obligations as other citizens. Particular couples desire to be married, and marriage can serve useful functions for such couples, including protection against unsympathetic blood relatives and a still-hostile society.²⁴² Nancy Polikoff's comment makes several weighty arguments against our making such efforts.²⁴³ I am sympathetic but unpersuaded.

1. The Marriage-Is-Rotten Argument

Marriage is a rotten institution, say many feminist and gaylesbian scholars.²⁴⁴ As constructed in the West, marriage involves hierarchies that have systematically subordinated women's personal, economic and social interests to those of men. The Ozzie-and-Harriet marriage

²⁴² For several of the different arguments, see Mary C. Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 *Law & Sexuality* 63 (1991); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, reprinted in *Lesbian and Gay Marriage*, supra note 236, at 20; Ruthann Robson & S.E. Valentine, *Lov(h)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 *Temp. L. Rev.* 511, 528-40 (1990); see also Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 *Geo. L.J.* 459 (1990) (discussing the question of child-rearing in same-sex relationships).

²⁴³ See 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 (1993).

²⁴⁴ See Michèle Barrett & Mary McIntosh, *The Anti-Social Family* 57-65 (2d ed. 1991); Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* 141-42 (rev. ed. 1971); Sylvia A. Law, supra note 11, at 197-206; Robson & Valentine, supra note 242.

of 1950s bourgeois America—man as breadwinner, woman as housekeeper²⁴⁵—cabins women into constraining roles. Moreover, the legal structure of marriage has been the last haven for malignant social practices, including racism (the prohibition of different-race marriages), contempt for the poor (filing fees and other bureaucratic obstacles to marriage and divorce), and abuse of women (the rule that rape could not occur within marriage) and children (the reluctance of the social welfare system to intervene when children are abused by their middle-class parents).

One constructionist response to the marriage-is-rotten argument is that same-sex marriage would itself change the institution. As Nan Hunter has argued, same-sex marriages cannot recreate the hierarchy (man as breadwinner, woman as housekeeper) to which feminists object in traditional different-sex marriages.²⁴⁶ Even if one partner does the breadwinning and the other partner does the housekeeping, same-sex marriage undermines the invariable linkage of men to the first role and women to the second,²⁴⁷ and there is some evidence that same-sex couples in America are less likely to follow the traditional breadwinner-housekeeper division in any event.²⁴⁸

The history of same-sex marriage told in this Article persuades Nancy Polikoff against Hunter's argument, because most of the examples of same-sex marriage in other times and other places seem to replicate gender hierarchies.²⁴⁹ Same-sex spouses of Roman and Chinese emperors, boy wives of the Japanese samurai and Azande warriors, female husbands in Africa, and the unions formed by women passing as men strike Polikoff (and me) as not only replicating but aping the subordination of "wife" to "husband" in their respective cultures. Even the *berdache* tradition, the so-called "third sex,"

²⁴⁵ But did Ozzie have a job? You never saw him working, nor did you ever see Harriet keep house. Maybe this show was quietly subversive.

²⁴⁶ See Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 *Law & Sexuality* 9, 17 (1991).

²⁴⁷ See id.; see also Law, supra note 244, at 206-12 (describing how the gay rights movement has transformed societal notions of gender); Lewis, supra note 11, at 1785 n.12 (asserting that lesbian mothers, in order to prevail in child-custody hearings, are often forced to define themselves as conforming to sexual stereotypes).

²⁴⁸ See The Mendola Report, supra note 237; sources cited supra note 247.

²⁴⁹ See Polikoff, supra note 243, at 1538-40; see also Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *Law & Sexuality* 31, 47 (1991) (observing that legal recognition of same-sex marriages "may contribute to the entrenchment of mutually exclusive and immutable categories of sexual orientation").

with legislative motivations. Judges may find it difficult to understand how denying two gay men the right to marry is driven by an ideology that oppresses straight women.

That is why Sylvia Law's formulation of the argument is particularly important, for she argues that what undergirds the prohibitions against same-sex marriage is an ideology of "heterosexism."³¹⁵ The ideology is an essentialism of gender, in which women are naturally heterosexual and naturally desirous of marrying men, which naturally results in their bearing children. By defining marriage as "essentially" and necessarily different-sex, the state is essentializing marriage in a way that reinforces traditional gender roles. Law argues, and I agree, that the Equal Protection Clause's prohibition of unjustified gender discrimination implicates state exclusions of same-sex couples.

The history of same-sex marriage provides some support for this reading, though the matter is complicated. Ancient cultures (Egypt, Mesopotamia, Greece, and Rome) maintained strict patriarchal lines of authority over women yet also tolerated same-sex unions among men, which fit into the prevailing patriarchy. More recent experience reveals a connection between intolerance of same-sex unions and suppression of women—witch hunts of inverts as well as spinsters in early modern Europe, the colonial attacks on women's economic opportunities and female husbands in Africa, and even recent lesbian-baiting addressed to feminist leaders—and between tolerance of same-sex unions and increasing opportunities for women—including *berdache* unions among Native Americans, woman marriage in Africa, and the marriage resistance movement in China.

Based on this evidence, I would not argue that there is an "inherent" connection between same-sex marriage and women's equality because recognizing male-male unions and even "harmless" female friendships can contribute to gender hierarchy. But under the particular circumstances of our culture, I would suggest that there is a direct link between tying women to the kitchen and ostracizing same-sex couples from the bedroom.

CONCLUSION: GAYLESBIAN HISTORY AND LAW

History is one of the ways a dominant group perpetuates its subordination of other groups. By telling the story of its triumph as though

it were natural, inevitable, and good, the dominant group can induce the rest of us to accept its domination. When a suppressed group becomes conscious of its unfair subordination, one response is to write its own version of history. This Article is an exercise in such counterhistory, from a gaylesbian perspective.

Counterhistory is a way for a suppressed community to claim our own identity. By reinterpreting tradition, we are constructing our present situation and inviting the formation of community. By linking our present experiences of intimacy with those of other cultures as well as those of Western culture, we gain a more profound sense of rootedness—and greater confidence in our defiance of dividing practices that seek to exclude us as God's children. By examining the many different ways human culture has constructed same-sex unions, we can better decide which constructions best serve our purposes.

Mainstream culture and law should also be attentive to counterhistory. When a group like gay men and lesbians recognizes the injustice of its exclusion and mobilizes against it, the smart thing for mainstream society to do is accommodate the group. Admittedly, the process of accommodation suppresses the interests of those for whom the exclusion of some helps constitute their vision of a good society. As to them, I would say that a mature constitution is one that depends on commitment and cooperation, and not exclusion and persecution. Rethink your views in light of our history, so replete with examples of intimacy and sharing. The greatest value of counterhistory is to suggest ways in which minority practices—like same-sex marriage—have been valuable and productive across times and cultures.

³¹⁵ See Law, *supra* note 11, at 232; Lewis, *supra* note 11.

NOTES

A MORE PERFECT UNION: A LEGAL AND SOCIAL ANALYSIS OF DOMESTIC PARTNERSHIP ORDINANCES

INTRODUCTION

The past three decades have seen an explosion in the number of committed couples living together without the benefit of state-recognized marriage. These relationships have challenged traditional family law and generated a number of novel legal issues, often between the two parties upon dissolution of their relationship or with other family members upon the death or disability of a partner. Other disputes involve the couple's relationship with third parties, such as when partners seek benefits traditionally accorded to married couples or when a creditor seeks to hold both partners liable for one partner's debts.

The increasing number of nontraditional families¹ has forced the government at least to acknowledge the existence of these families.² Largely at the behest of gay-rights advocates, a number of municipalities are creating domestic partnership³ ordinances, conferring certain benefits on domestic partners that are within the authority of the local government to grant.⁴

This Note argues that domestic relations law has failed to keep

1. The term "family" can refer to a broad range of relationships. In this Note "family" is used broadly to refer to any household of people in a mutually interdependent relationship. "Traditional family" refers to people who are related by blood, marriage, or adoption, which are the relationships traditionally recognized by American family law, and "nontraditional family" refers to all other mutually interdependent households not so recognized. These terms are meant to reflect legal traditions and do not imply that "nontraditional" families have not long existed.

2. For example, the Census Bureau attempted in its 1990 survey to count for the first time the number of people who consider themselves to be "unmarried partners." Victor F. Zonana, *Census Will Count 'Unmarried Partners' for First Time*, L.A. Times, Feb. 15, 1990, at A38. Results of this count are expected by early 1993. Telephone Interview with Robert Grimes, Marriage and Family Statistics Branch, U.S. Bureau of the Census (Apr. 9, 1992).

3. Domestic partnership generally refers to two people living together in a committed, mutually interdependent relationship. Specific criteria for qualifying as domestic partners vary. See *infra* notes 139-151 and accompanying text.

4. Despite the fact that the ordinances largely result from activism of gay men and lesbians, they apply uniformly to all couples, homosexual and heterosexual. In fact the majority of those who have availed themselves of the benefits of the ordinance are not gay. See Cynthia Gorney, *Making It Official: The Law & Live-Ins*, San Francisco Recognizes the Domestic Partner, Wash. Post, July 5, 1989, at C1, C8 (17 of 108 registered domestic partners in Berkeley, California identified as gay). For a discussion of these ordinances, see *infra* part II.B.

pace with changing social realities. This failure to recognize and support relationships other than traditional marriage has created substantial uncertainty regarding the rights and obligations of individuals in nontraditional relationships. The lack of legally recognized alternatives to marriage and the exclusion of lesbians and gay men from marriage has left many couples unable to define their relationships as they choose, and has led to disparate and unfair treatment of similarly situated couples. Domestic partnership laws can help to mitigate the existing defects in domestic relations law.

Part I of this Note examines the current regulation of domestic relations. Many couples find marriage to be inappropriate or unavailable to them, but nonetheless need some state protection and recognition of their relationship. Current domestic relations law often fails to account for and support growing numbers of domestic partners and forces non-traditional couples to attempt to protect their relationships by using creative, but often inadequate, legal devices.

Part II examines changes in marriage and family law in order to discern the state and individual interests that should be served by domestic relations law. This analysis suggests that new institutions might further those interests that are not well served by the current legal framework.

Several American cities have passed or proposed domestic partnership ordinances in an attempt to fill the gaps in domestic relations law and to recognize these relationships. Part III analyzes these ordinances. Existing ordinances are early steps in creating a new institution that will recognize and validate committed nonmarital relationships.

Part IV builds on and refines existing domestic partnership ordinances at the municipal level in an attempt to develop a structure that more fully reflects the needs of many modern relationships and thus better meets state interests in domestic relations. To this end, this Part proposes model language for a more comprehensive domestic partnership ordinance.

I. CURRENT DOMESTIC RELATIONS LAW

Many types of nonmarital family relationships exist. The majority consists of heterosexual couples who could marry, but for one reason or another choose not to.⁵ Many such couples view their relationships as trial marriages and will eventually marry, while others have decided

5. The number of unmarried heterosexual couples living together increased from 523,000 in 1970 to 2,856,000 in 1990. See Bureau of the Census, U.S. Dep't of Commerce, *Current Population Reports, Series P-20, No. 450, Marital Status and Living Arrangements*, March 1990, at 14 (1990). In 1988 Census officials estimated that there were 1.6 million unmarried couples of the same sex. See Zonana, *supra* note 2, at A39. The "traditional family" of a working husband, a housewife, and children is no longer the norm in the United States. The husband is the sole breadwinner in only ten percent of American families today. See District of Columbia Commission on Domestic

for philosophical or other reasons that marriage is not appropriate for them.⁶ Economic disincentives and "marriage penalties" discourage many senior citizens and disabled adults from marrying.⁷ Other couples, most notably gay men and lesbians, are unable to marry under current marriage law.⁸ Increasingly, people in these situations are seeking the legal benefits of marriage. This Part reviews the legal status of marriage, examines how courts have applied benefits and burdens normally associated with marriage to unmarried cohabitants, and describes methods currently used by unmarried couples to define and protect their relationships.

Partnership Benefits for D.C. Government Employees, 1 Final Report and Recommendations 7 (1990) [hereinafter D.C. Commission Final Report].

6. See, e.g., Gerda Lerner, *The Creation of the Patriarchy* 110-11, 214 (1986); Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, *Out/Look*, Fall 1989, at 9.

7. See Task Force on Family Diversity, City of Los Angeles, Final Report: *Strengthening Families: A Model for Community Action* 84, (1988) [hereinafter *Strengthening Families*] (noting for example that Social Security and pension fund survivor benefits end upon remarriage); see also Patricia A. Cain, *Same-Sex Couples and the Federal Tax Laws*, 1 *Law & Sexuality* 97, 98-99 & n.6 (1991) (noting tax disincentives of marriage for some couples).

8. Recent studies suggest that about half of the gay and lesbian population have life-mates. See *Strengthening Families*, supra note 7, at 79. In the early 1970s, courts in several states held that same-sex couples had no right to state-sanctioned marriage. See *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971), appeal dismissed, 409 U.S. 810 (1972); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499, 501 (Sup. Ct. 1971); *Singer v. Hara*, 522 P.2d 1187, 1192 (Wash. Ct. App. 1974), cert. denied, 84 Wash. 2d 1008 (1974); see also *Adams v. Howerton*, 486 F. Supp. 1119, 1123 (C.D. Cal. 1980) (rejecting validity of marriage between two males for immigration purposes), aff'd, 673 F.2d 1036 (9th Cir. 1982), cert. denied, 458 U.S. 1111 (1982); *De Santo v. Barnsley*, 476 A.2d 952, 954 (Pa. Super. Ct. 1984) (rejecting common-law marriage between two males). See generally Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 *Wm. Mitchell L. Rev.* 539 (1991).

There has been a recent revival of the issue. Two District of Columbia men lost their appeal of a ruling that a same-sex couple is not entitled to a marriage license. See *Dean v. District of Columbia*, No. 90-13892 (D.C. Super. Ct. June 2, 1992). In November of 1991, a Hawaii circuit court dismissed on the pleadings a complaint by three same-sex couples seeking to marry under Hawaii state law. See *Baehr v. Lewin*, Civil No. 91-1394-05 (Haw. Cir. Ct. 1991). In September 1989, the annual convention of the California Bar Association urged the recognition of marriage between gay couples and considered suggesting—pending approval by the board of governors of the organization—a change to the California civil code to define marriage as a "personal relation arising out of a civil contract between two people." See Philip S. Gutis, *Small Steps Toward Acceptance Renew Debate on Gay Marriage*, *N.Y. Times*, Nov. 5, 1989, § 4, at 24. Nonetheless, state governments have so far shied away from the issue, and have shown no indication of changing positions in the near future. A bill to legalize same-sex marriages was introduced in the California legislature in 1991, but stalled in committee. See Ken Hoover, *Same-Sex Marriage Bill Stalls*, *UPI*, Apr. 24, 1991, available in LEXIS, Nexis Library, Wires File.

A. Legal Consequences of Marriage

While the number of people in committed nonmarital relationships has increased dramatically, marriage law remains the primary means for regulating domestic relations. Marriage in the first instance consists of a contract between the partners, the terms of which are increasingly subject to control by the parties (for example through prenuptial agreements and wills). The state, however, still controls important aspects of the contract. For example, the marriage contract must include support obligations, and these obligations may continue after divorce.⁹ Since legal controversies over rights between parties typically arise only upon dissolution of the marriage,¹⁰ the state's role in defining rights between parties is largely confined to regulating the ability of the parties to dissolve the relationship and to establishing the terms of dissolution.

Marriage also affects relations between the partners and third parties. Married status legally affects taxes,¹¹ social security benefits,¹² workers' compensation,¹³ unemployment compensation,¹⁴ the right to bring tort actions for wrongful death¹⁵ or for loss of consortium,¹⁶ legal presumptions in inheritance,¹⁷ and communications privileges.¹⁸ Private institutions also provide a variety of benefits to married couples, such as health benefits for spouses, family memberships in health clubs, and access to frequent flyer miles accumulated by one's spouse.

Obligations to third parties imposed by marriage are limited. Generally, one spouse is not liable for the obligations of the other.¹⁹ In limited cases, however, a spouse may be liable for certain debts of the

9. Traditionally, husbands had the duty of supporting their wives, and wives had the duty of providing services in the home. In recent years, statutes in many states have been changed to place support obligations equally on both spouses. See 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 7.1, at 423-25 (2d ed. 1987) (citing statutes).

10. Interesting exceptions exist. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336, 337, 342 (Neb. 1953) (while continuing to live with husband, wife unsuccessfully sued husband of "more than ordinary frugality" for suitable maintenance and support).

11. For example, under the federal tax code married couples can file joint tax returns, see 26 U.S.C. § 6013 (1988), and qualify for estate tax deductions, see 26 U.S.C. § 2056 (1988).

12. See 42 U.S.C. § 426(e) (1990).

13. See, e.g., Cal. Lab. Code § 3503 (West 1989).

14. See, e.g., Cal. Unemp. Ins. Code § 1256 (West 1986 & Supp. 1992) (defining leaving work with good cause to include accompanying spouse to a place from where commuting is impractical).

15. See, e.g., Haw. Rev. Stat. § 663-3 (1988).

16. See, e.g., *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988) (loss of consortium cannot be extended to unmarried cohabiting couples whose relationship parallels marriage).

17. See, e.g., N.Y. Est. Powers & Trusts Law § 4-1.1 (Consol. 1979) (spousal right of election).

18. See, e.g., Cal. Evid. Code §§ 970, 980-987 (West 1966 & Supp. 1992).

19. See *Huntington v. Saunders*, 120 U.S. 78, 79-82 (1887); *Jersey Shore Medical Ctr. v. Estate of Baum*, 417 A.2d 1003 (N.J. 1980) (construing New Jersey Married

other spouse, particularly for necessities.²⁰ With the duty of support now resting equally on husband and wife, the common law doctrine of necessities generally applies equally to both spouses, according to their ability to perform.²¹ Family expense statutes, which vary from state to state, impose additional obligations on marital partners.²²

B. Judicial Recognition of Nonmarital Relationships

The increasing number of people living in committed relationships other than marriage has led to a large number of claims by cohabitants to protect their interests upon dissolution of the relationship. Unmarried cohabitants are also seeking to obtain benefits that were previously granted to married couples by third parties, including governments.

Courts have long faced disputes arising out of informal relationships. Traditionally, courts approached these cases formalistically, recognizing rights of those who were legally married, and not recognizing similar rights for those who were not.²³ When equity demanded different results, legal fictions were devised that allowed the courts to pretend that certain nonformal relationships were marriages and to attribute to these relationships all of the incidents and benefits of marriage. This response is reflected in such traditional legal creations as common-law marriage²⁴ and putative marriage.²⁵ If the relationship

Woman's Property Act); 41 Am. Jur. 2d Husband and Wife §§ 323-328 (1968 & Supp. 1991).

20. Necessaries are those items reasonably appropriate for living, taking into account financial means available, such as food, clothing, a residence, and medical attention. See Homer H. Clark, Jr. & Carol Glowinsky, *Domestic Relations: Cases and Problems* 545 (4th ed. 1990).

21. See 1 Clark, *supra* note 9, § 7.3, at 444; Karol Williams, Note, *The Doctrine of Necessaries: Contemporary Application as a Support Remedy*, 19 Stetson L. Rev. 661, 666 (1990).

22. Some statutes impose liability on both husband and wife for any item if it is used by the family, regardless of whether or not it may be considered a necessary. See 1 Clark, *supra* note 9, § 7.1, at 433. Some states can recover welfare payments to an indigent spouse from the other spouse in a derivative action, if support was due the indigent spouse. See *id.* at 430 (citing statutes).

23. See cases cited *infra* note 32.

24. Common-law marriage is a nonceremonial relationship that requires "a positive mutual agreement, permanent and exclusive of all others, to enter into a marriage relationship, cohabitation sufficient to warrant a fulfillment of necessary relationship of man and wife, and an assumption of marital duties and obligations." Black's Law Dictionary 277 (6th ed. 1990). Common-law marriages were recognized in some of the colonies prior to independence, and in many states after independence. See 1 Clark, *supra* note 9, § 2.4, at 101.

25. Putative marriage is "[a] marriage contracted in good faith and in ignorance (on one or both sides) that impediments exist which render it unlawful." Black's Law Dictionary 1237 (6th ed. 1990). The putative marriage doctrine evolved in the civil law states, but some common law states later passed putative marriage statutes, and courts in other states recognized the doctrine to varying degrees. See 1 Clark, *supra* note 9, § 2.4, at 114-16. Putative marriage still exists in many jurisdictions, but is not important

did not meet one of these exceptions, the parties were denied protection by the courts.²⁶

Beginning in the late nineteenth century, most states abandoned common-law marriage, either by statute or court decision.²⁷ With the disappearance of common-law marriage, courts had one less tool at their disposal to define the rights of cohabitants at a time when the number of nonformalized relationships began to soar and social mores were undergoing profound changes. The abolition of common-law marriage created a major gap between social reality and the Victorian idea that family existed only with formal marriage.

In the last twenty years, however, courts in most states have returned to a more functional approach in which they examine the characteristics of the particular relationship and attempt, with limited success, to protect the reasonable expectations of the parties regarding their relationship.²⁸ Despite this functional approach, many benefits available to married people are still not available to unmarried cohabitants.²⁹

1. *Relationship Between the Parties.* — With the failure of domestic relations law to allow or encourage cohabitants to define and protect their expectations, courts have been forced to adjudicate disputes about property and support arrangements upon dissolution of the relationship,³⁰ and increasingly, visitation rights or custody of children jointly raised by the couple.³¹ Despite creative application of existing

for the purposes of this Note, which deals primarily with relationships in which the parties are both knowingly unmarried.

26. See, e.g., *Vallera v. Vallera*, 134 P.2d 761 (Cal. 1943) (refusing to uphold claim of community property where parties had lived together but were not married, except to the extent the female cohabitant had contributed funds to obtain property).

27. Currently, only 13 states and the District of Columbia recognize common-law marriages contracted within their borders. See 1 Clark, *supra* note 9, § 2.4, at 101. Common-law marriage was seen as encouraging fraud and condoning vice, debasing conventional marriage, and as no longer necessary with increased access to clergy and justices of the peace. See, e.g., Cal. Civ. Code § 4100 (West 1983); N.Y. Dom. Rel. Law § 11 (McKinney 1988 & Supp. 1992); *Furth v. Furth*, 133 S.W. 1037, 1038-39 (Ark. 1911); *Owens v. Bentley*, 14 A.2d 391, 393 (Del. Super. Ct. 1940); *Milford v. Worcester*, 7 Mass. 48 (1910); *Ira M. Ellman et al., Family Law: Cases, Text, and Problems* 21 (1986).

28. See *infra* notes 39-62 and accompanying text.

29. See *infra* notes 53-76 and accompanying text.

30. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

31. See, e.g., *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991) (nonbiological co-parent denied right to seek custody or visitation of children she raised with former partner, based on statutory definition of "parent" as either a natural or adoptive parent); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (denying nonbiological co-parent standing to seek visitation); *Sporleder v. Hermes*, 471 N.W.2d 202 (Wis. 1991) (co-parenting contract between two lesbians providing that upon separation, custody of child would be determined by mediation and nonplacement party would have visitation rights held unenforceable); *New Mexico Appeals Court Gives Lesbian Co-Parent Her Day in Court*, 1992 *Lesbian/Gay Law Notes* 17 (describing A.C.

prohibition of same-sex marriage is one for the legislature, not the courts.⁶⁶ Prohibitions on marital status discrimination are often narrowly construed to prohibit discrimination based solely on an individual's marital status, which would uniformly burden every individual in the class.⁶⁷

C. Individuals Struggle to Protect Rights

Given the lack of consistent protection by legislatures and courts, individuals involved in nontraditional relationships—particularly same-sex couples—have used several creative methods to achieve some degree of social recognition of their relationships. Courts have occasionally permitted one adult partner to adopt the other adult partner to create a legal relationship between the two.⁶⁸ Cohabitants may protect inheritance rights through the use of reciprocal wills. Partners may exchange powers of attorney for health care purposes, allowing a designated agent such rights as access to medical records, privileged hospital visitation, and preference to be appointed as a conservator.⁶⁹ Many of the arrangements that are automatic between married couples, such as division of accumulated property, may also be secured through the use of contracts.⁷⁰

66. See, e.g., *Hinman*, 213 Cal. Rptr. at 419; *Phillips*, slip op. at 12-13.

67. See *Manhattan Pizza Hut, Inc. v. New York State Human Rights App. Bd.*, 415 N.E.2d 950, 952-53 (N.Y. 1980); *Beattie*, supra note 65, at 1419-24.

68. Adoption has long had a secondary function of selecting an heir for the adopter, but the availability of this device to adults involved in sexual relationships is unclear. California permits adult adoption if it is in the best interest of the parties and the public. See Cal. Civ. Code § 230.10 (West Supp. 1992). Practitioners estimate that 200 to 300 adult adoptions are approved annually in California and that gay and lesbian adoptions account for 30 to 40% of the total. See Peter N. Fowler, Comment, Adult Adoption, 14 Golden Gate U.L. Rev. 667, 702 (1984). But courts in other states have generally not permitted adoption when aware of a sexual relationship between the parties. See *In re Adoption of Robert Paul P.*, 471 N.E.2d 424, 427 (N.Y. 1984) (denying petition of man to adopt adult male lover as policy of legitimizing sexual relationship between unmarried partners must come from the legislature); *In re Jones*, 411 A.2d 910, 911 (R.I. 1980) (preventing married man from adopting adult girlfriend on basis of public policy); Russell G. Donaldson, Annotation, Marital or Sexual Relationship Between Parties as Affecting Right to Adopt, 42 A.L.R.4th 776 (1985).

69. The power granted by a power of attorney is revoked upon death of the principal. Additionally, some states have durable power of attorney statutes, which is a power of attorney that becomes effective upon the incapacity of the principal. See, e.g., Cal. Civ. Code §§ 2430-2444 (West Supp. 1992); see also National Lawyers Guild Anti-Sexism Committee of San Francisco Bay Area Chapter, Sexual Orientation and the Law § 4.07[2] (release 3, Oct. 1990) [hereinafter *Sexual Orientation and the Law*] (discussing ambiguities in many states of using durable powers of attorney for health care and other personal decisions). The importance of having such a mechanism for securing interests such as visitation rights was illustrated in *In re Guardianship of Kowalski*, 478 N.W.2d 790 (Minn. Ct. App. 1991), in which the court gave Kowalski's lesbian lover, Karen Thompson, guardianship after an eight-year legal battle, including three and a half year period when Thompson was denied all visitation rights.

70. See supra notes 32-40 and accompanying text; see also Marjorie Maguire

A recent innovation is the use by unmarried couples of existing corporations code sections providing for the registration of unincorporated, nonprofit associations to register themselves as associations with "family" in the title.⁷¹ Such creative uses, while sometimes effective, clearly extend existing legal institutions into areas for which they were not intended.

Resorting to private arrangement has significant disadvantages, however. Courts must ultimately decide what level of recognition to extend to each of these devices, and the parties cannot predict in advance whether their arrangement will be enforced.⁷² Furthermore, only those with the sophistication, foresight, and resources to seek legal assistance are likely to receive protection. A legislative approach to the legal status of unmarried partners would provide more security to the individuals, fairer treatment of unmarried couples, and would allow society a greater role in formulating a rational policy to address the needs of the changing American family.

II. STATE INTERESTS IN REGULATING DOMESTIC RELATIONS

The increasing recognition for unmarried cohabitants of rights normally associated with marriage has forced courts and society to examine the reasons for marriage and for the state's involvement in it.⁷³ Changing laws and social mores have undone traditional conceptions of marriage, approaching the point that "the present legal regulation of marriage in the United States is already just a matter of licensing and registration."⁷⁴ Professor Clark in his treatise on domestic relations has catalogued the changed legal status of marriage and concluded:

Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Cal. L. Rev. 204, 286-88 (1982) (noting increased recognition by courts of private contractual ordering of nonmarital cohabitation relationships). Some feminist legal theorists have criticized contractual ordering of relationships as being inherently patriarchal. See, e.g., Carole Pateman, *The Sexual Contract* 154 (1988).

71. See Family Diversity Project, Official Registration of Families with the Secretary of State (1990). So far, this has only occurred in California, where such registration has been accepted by the Secretary of State. The benefits of such registration are uncertain, but at least one Los Angeles hospital honors the certificates as proof of immediate family for visitation rights. See Elizabeth Groat, *Unmarried Couples Use Law to Put Relationships on Record*, L.A. Daily J., Dec. 19, 1990, at 18.

72. See *Sexual Orientation and the Law*, supra note 69, § 2.02, 2-6-2-7 (release 2, May 1989) (noting that parties' conduct may give rise to implied contract completely at odds with the intent of one or more parties); supra notes 30-52 and accompanying text.

73. See generally *Glendon*, supra note 55, at 698 ("[A]s various interest groups in society have become more and more vocal the law has had to respond by adapting more and more to the diversity of the American population in pursuit of . . . the 'ideology of tolerance.'") (citation omitted).

74. *Id.* at 681. Some state restrictions on marriage have been struck down as unconstitutional infringements on the right to marry. See *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down Wisconsin statute requiring payment of child support before gaining permission to marry). Other restrictions, such as a prohibition of same-sex marriage, remain. See supra note 8.

[C]ontemporary marriage cannot be legally defined any more precisely than as some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, a relationship which may be formed by consent of both parties and dissolved at the will of either.⁷⁵

Despite the difficulty of deriving a single conceptual understanding of marriage that encompasses variations between states, an analysis of the changes in marriage laws suggests the interests the state and individuals are seeking to protect through domestic relations law. Understanding these interests is important in developing domestic partnership ordinances that will protect and promote these interests and in refuting the objection that domestic partnership legislation would weaken marriage. This Part analyzes, in light of changing domestic relations law, the interests in marriage the state and the individual are seeking to protect. It then examines whether domestic relations law promotes these interests as fully as it might. This Part concludes that the core interests to be served by domestic relations law are protecting rights and expectations of individuals in relationships and promoting happiness and social productivity. These interests are at stake in both marital and nonmarital committed relationships.

While it appears well settled that the state has legitimate interests in promoting and regulating marriage,⁷⁶ these interests have been neither clearly elaborated nor agreed upon.⁷⁷ State involvement in marriage has been justified by the need to provide an appropriate unit for procreation and rearing of children, avoid public charges (unsupported children or displaced spouses), prevent juvenile or incestuous marriages, support public morals, provide stability and its consequent benefits, protect the rights of the parties, and maintain vital records.⁷⁸ Increasingly, however, the state's principal concern with marriage is seen as simply providing emotional satisfaction to the people involved.⁷⁹ Marriage (or the lack of it) is a powerful form of self-identifi-

75. 1 Clark, *supra* note 9, at 81.

76. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) ("[Marriage] is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.").

77. See, e.g., David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-Law Marriage*, 49 Tenn. L. Rev. 537, 558 (1982) ("[P]ositing marriage as the 'foundation of society' does little to elucidate the state's true interests.").

78. See, e.g., Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 Cal. L. Rev. 1169, 1241-45 (1974); *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1198-1208 (1980) [hereinafter *Developments in the Law*].

79. See 1 Clark, *supra* note 9, at 74 (function of marriage itself has changed, "from the days when it was an economic producing unit of society with responsibilities for child rearing and training to the present, when its chief functions seem to be furnishing

cation and self-expression,⁸⁰ and is recognized as a "fundamental freedom" deserving constitutional protection.⁸¹

Providing an appropriate family unit for procreation and the rearing of children is perhaps the most frequently cited justification for protecting marriage as an institution.⁸² The importance of procreation to the state's willingness to sanction marriage is evident in the granting of annulments because of procreative failure and fraud, regulation of extramarital sexual relations, and prohibition of same-sex marriage.⁸³ Protecting and promoting children's welfare is without question a legitimate state interest. However, the conflicts between the best-interests-of-the-child standard⁸⁴ and the rights of the adults involved in custody disputes suggest that the interests of the adults are also important. The best interests of the child do not justify limiting parental rights absent a showing of unfitness.⁸⁵ While the traditional nuclear family is, certainly

opportunities for affection, companionship and sexual satisfaction"); Caudill, *supra* note 77, at 542-43 (state's primary role is "to promote personal fulfillment and social productivity by promoting marriage").

80. See Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 Geo. L.J. 1829, 1833 (1987); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 Yale L.J. 624, 635 (1980); cf. *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting) ("The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.").

81. See *Turner v. Safley*, 482 U.S. 78, 94-96 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 383-86 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

82. See *Zablocki*, 434 U.S. at 384 (marriage is "fundamental to the very existence and survival of the race," (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)); *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974) ("[M]arriage is . . . clearly related to the public interest in affording a favorable environment for the growth of children."), *reh'g denied*, 84 Wash. 2d 1008 (1974); Edward Veitch, *The Essence of Marriage—A Comment on the Homosexual Challenge*, 5 Anglo-Am. L. Rev. 41, 43 (1976); Weitzman, *supra* note 78, at 1211.

83. See Weitzman, *supra* note 78, at 1211.

84. For a discussion of the best-interests-of-the-child standard, see 2 Clark, *supra* note 9, at 479-80, 494-96, 527, 532-35, 628-29, 647.

85. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness for the sole reason that to do so was thought to be in the children's best interest.'" (quoting *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring)), *reh'g denied*, 435 U.S. 918 (1978). Visitation rights are also viewed not only in terms of the child's best interest but also in terms of the rights and preferences of the adults involved. See *Uniform Marriage and Divorce Act* § 402, 9A U.L.A. 561 (1987) (listing wishes of child's parent(s) as first of five enumerated factors a court shall consider in determining custody); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1858 (1985) (discussing grandparent visitation rights).

an appropriate unit for raising children, other family units may be equally appropriate⁸⁶ and deserving of protection.⁸⁷ The institution of marriage is important in protecting the interests of children, but children and marriage are not inextricably linked. Many children live in households headed by other than a married couple, and measures to enhance the stability of such households would protect and promote children's welfare.

Reducing dependency on state services is also a legitimate state interest, although it is not clear that current domestic relations laws are well tailored to meet this goal. In fact, differential state treatment of support obligations for married and unmarried couples appears to frustrate this interest. In general, states have refused to recognize any support obligations among unmarried cohabitants; they have only divided property.⁸⁸ Divorce reform has reduced the extent of support provided to former spouses by the wealthier spouses.⁸⁹ The current trend seems to be away from a conception of marriage as incurring life-long support obligations to one of providing transitional support upon the dissolution of a marriage.

Preventing juvenile and incestuous marriages would seem to be legitimate state goals derived both from *parens patriae* and the police power.⁹⁰ Children cannot be expected to be capable of making informed decisions about marriage, and the potential for exploitation in a marriage between an adult and a child would be very high. The prohibition on incest is more controversial, but may find support in a con-

86. Estimates suggest that 60% of children born today will spend at least part of their childhood in a single parent home. See Bureau of the Census, U.S. Dep't of Commerce, *Changes in American Family Life, Current Population Reports Special Studies Series P-23*, No. 163, at 14 (1989). A number of studies have found no difference in the psychological development of children raised by heterosexual parents and those raised by gay or lesbian parents. See, e.g., Julie S. Gotman, *Children of Gay and Lesbian Parents*, 14 *Marriage and Fam. Rev.* No. 3/4, at 177 (1989) (finding similarities in gender identity, gender role, sexual orientation, and social adjustment between daughters of lesbian and heterosexual mothers); Richard Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 *Am. J. Psychiatry* 692 (1978) (describing typical sexual behavior for older children in sexually atypical households); Martha Kirkpatrick et al., *Lesbian Mothers and Their Children: A Comparative Survey*, 51 *Am. J. Orthopsychiatry* 545 (July 1981) (finding no correlation between children's gender development or disturbance and the sexual object choice of their mothers).

87. The Supreme Court has extended some protections to nontraditional families. See *Stanley v. Illinois*, 405 U.S. 645, 651-55 (1972) (recognizing that the Due Process and Equal Protection Clauses protect the "integrity of the family" of a father and his illegitimate child); cf. *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 838-47 (1977) (suggesting foster families may have a liberty interest in the foster family unit).

88. See *supra* notes 30-52 and accompanying text.

89. See, e.g., Martha A. Fineman, *The Illusion of Equality* 38 (1991); Mary Ann Glendon, *The Transformation of Family Law* 227-32 (1989).

90. See *Developments in the Law, supra* note 78, at 1198.

cern for promoting social integration by encouraging marriage across family lines and by a concern for preserving nonsexual intimacy within the family.⁹¹

Supporting public morals is less clearly related to the public welfare⁹² but is a state goal that many courts readily accept.⁹³ Even if one accepts the legitimacy of the state imposing a particular moral choice in consensual relations, one must ask whose morality is being imposed, for what reasons, and whether the regulations are achieving their aims. While premarital and extramarital sex were once considered immoral, a majority of Americans no longer considers sex outside of marriage inherently immoral.⁹⁴ It is questionable whether favoring marriage over other forms of relationships advances public morals.

Promoting stability and its consequent benefits are legitimate state goals under the broad police power.⁹⁵ Stability in a relationship allows a couple to invest in each other with less concern about protecting their individual interests. Stability may provide a healthier environment for children. It is not clear, however, that current domestic relations laws promote stability. About half of all marriages end in divorce,⁹⁶ and divorce is increasingly easy to obtain in many jurisdictions.⁹⁷ At the same time, a perception of a life-long commitment may discourage some

91. See Karst, *supra* note 80, at 672-73; Margaret Mead, *Anomalies in American Post-Divorce Relationships*, excerpted in Judith Areen, *Cases and Materials on Family Law* 6, 6-9 (2d ed., 1985).

92. The state's role in enforcing morals has long been the subject of legal and philosophical debate, perhaps best exemplified by the famous Hart-Devlin debate. See H.L.A. Hart, *Law, Liberty and Morality* 70-71, 75-78 (1963) (arguing that individual liberty is the core value that society must preserve, and that moral condemnation alone can not be a sufficient justification for state intervention); Patrick Devlin, *The Enforcement of Morals* 9-14 (1965) (arguing that every society is based on shared political, moral, and ethical ideals, and the state can and should use the law to preserve those fundamental values in order to safeguard its very existence).

93. See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ("The law . . . is constantly based on notions of morality."). But see *id.* at 211 (Blackmun, J., dissenting) ("The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine.").

94. The number of Americans who consider premarital sex wrong declined from 68% in 1973 to 39% in 1985. See Larry Hugick & Jennifer Leonard, *'Free Love' Generation is Changing Its Tune*, S.F. Chron., Oct. 9, 1991, at B3. Without saying so, the Supreme Court came close to recognizing a right to sex outside of marriage by securing the right of access to contraceptives to unmarried people in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

95. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 211 (1888) (describing marriage as "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society").

96. See Teresa C. Martin & Larry L. Bumpass, *Recent Trends in Marital Disruption*, 26 *Demography* 37, 37-52 (1989).

97. See, e.g., 1 Clark, *supra* note 9, at 75; see also *Uniform Marriage and Divorce*

people from making any sort of commitment, thus encouraging less rather than more stability.

Protecting the reasonable expectations of the parties is also a legitimate state goal. For married people, the state has well-developed mechanisms to determine parties' rights, although these mechanisms do not work perfectly.⁹⁸ Greater difficulties occur when the parties have not defined their relationship and, upon death or dissolution, the court must determine their rights,⁹⁹ which suggests that the state has a strong interest in encouraging marriage or other mechanisms for defining relationships.

The state also has an interest in maintaining vital records. While this interest is clearly legitimate, it does not support any particular requirements for forming a marriage. In addition, the state has a similar interest in maintaining similar records about unmarried individuals.¹⁰⁰

Thus, the state clearly has legitimate reasons to support familial units. What is far less clear is whether current domestic relationship laws are serving these interests, or whether all appropriate familial units are being well served. As one commentator has said, "the long-standing legal structure of marriage may now be anachronistic. The state's interest in preserving the traditional family may not be important enough to offset new societal and individual needs which require more flexibility and choice in family forms."¹⁰¹

Changes in regulating domestic relations suggest that the underlying state interests may be changing. Significant changes in the last 100 years include permitting women to have legal rights separate from their husbands, most notably through the Married Women's Property Acts;¹⁰² increasing the ease of divorce;¹⁰³ recognizing the enforceability of prenuptial agreements;¹⁰⁴ and reducing or eliminating sanctions for sexual relations outside of marriage.¹⁰⁵ These changes suggest that

Act §§ 302, 305, 9A U.L.A. 181, 211 (1987) (authorizing marital termination whenever the relationship is "irretrievably broken").

98. For a recent critique of divorce law and its reform, see Fineman, *supra* note 89.

99. See *supra* Part I.B.

100. For example, the Census Bureau has begun to collect data on unmarried partners. See *supra* note 2.

101. Weitzman, *supra* note 78, at 1170.

102. At common law, the husband had extensive rights in his wife's property, and she lacked the power to contract or engage in litigation except through her husband. See 1 Clark, *supra* note 9, at 499. By 1900, all states had passed statutes known generically as the Married Women's Property Acts, to eliminate or reduce these legal limitations. See *id.* at 502-03 & n.4 (listing statutes).

103. See, e.g., Mary Ann Glendon, *Abortion and Divorce in Western Law* 63-69, 76-81 (1987); Herma H. Kay, *Beyond No Fault: New Directions in Divorce Reform*, in *Divorce Reform at the Crossroads* 6, 6-8 (Stephen D. Sugarman & Herma H. Kay eds., 1990).

104. See, e.g., J. Thomas Oldham, *Premarital Contracts Are Now Enforceable*, *Unless . . .* 21 *Hous. L. Rev.* 757, 758-59 (1984).

105. No fault divorce laws eliminate adultery as grounds for ending a marriage.

the state has a substantially diminished interest in regulating private interpersonal relationships and that such relationships are best left to a system of private ordering.¹⁰⁶ These changes also reflect changing conceptions of what individuals and society need from domestic relations law.

Contrasted with these areas of change are areas of relative continuity¹⁰⁷ such as sanctioning marriage, limiting entry into marriage, and protecting economically dependent spouses and children through inheritance and divorce laws. To protect vulnerable parties in marriage, the state prevents child marriages, in which the potential for exploitation is quite high. It also protects (with varying degrees of success) the economically dependent spouse and children. Such parties are protected by laws requiring support during marriage¹⁰⁸ and by divorce proceedings, inheritance laws, and various public benefits provided to spouses and children of veterans and social security contributors.

One of the most fundamental interests retained by the state in sanctioning marriages is to promote the happiness of its citizens. If marriage conferred no legal rights or obligations, it seems likely that the state would continue to solemnize marriages because that is what people want—a public commitment and a right to hold themselves out as something different than they were before the marriage.

The areas of change in domestic relations law compared with areas of relative continuity suggest the core interests that domestic relations law is designed to promote. Increasing ease of divorce, enforcement of prenuptial agreements, and reduced legal definition of obligations in marriage by gender roles, for example, suggest the relinquishment of a single, ideal type of relationship worthy of state sanction. At the same time, the state's continuing role in determining property divisions and support obligations indicates a continuing state interest in protecting the expectations of economically vulnerable parties. Similarly, the continuing role of the state in solemnizing marriage suggests the intrinsic utility of recognizing and validating relationships. These fundamental interests of the state in promoting marriage—that is, protecting eco-

See Model Penal Code § 213.6 note on adultery and fornication (1980) (describing status of criminal statutes on adultery); 1 Clark, *supra* note 9, at 75-76 ("Looking at the present situation realistically, it seems clear that there is no legal prohibition upon the sexual conduct of married persons outside their marriage."); Donal E.J. MacNamara & Edward Sagarin, *Sex, Crime, and the Law* 187 (1977) ("The law against fornication, when it has not been repealed, has fallen into decline, withering away under the impact of mass open defiance, lack of prosecution and enforcement, [and] a complete absence of public support. . .").

106. Cf. Richard Posner, *Economic Analysis of Law* 130-34 (3d ed. 1986) (discussing "marriage market" and efficiency aspects of marriage and divorce).

107. The emphasis here is on relative continuity, for each of these areas has also experienced important changes.

108. See *supra* note 9 and accompanying text.

nomically dependent individuals and fostering happiness by recognizing relationships—are equally important to individuals in other committed relationships.

III. LEGISLATIVE RESPONSES: DOMESTIC PARTNERSHIP ORDINANCES

A variety of mechanisms for recognizing unmarried cohabitants' relationships has been proposed, ranging from resurrecting the common-law marriage doctrine¹⁰⁹ to a variety of contractual or partnership arrangements.¹¹⁰ Commentators and politicians are increasingly looking to legislative solutions.¹¹¹ The most frequently discussed legislative solution is some form of domestic partnership arrangement. This Part presents a list of goals for domestic partnership ordinances. It evaluates existing ordinances in light of these goals and analyzes the potential legal effects of such ordinances. Lastly, it discusses how state and federal preemption constrain municipalities in formulating domestic partnership ordinances.

The increasing numbers of cohabiting individuals and increased visibility and political clout of lesbians and gay men have brought domestic partnership to a prominent place on the political agenda. Thus far, domestic partnership legislation is quite limited and exists only at the municipal level. But municipal ordinances could be designed to accomplish much more than has been attempted thus far, and statewide legislation has been proposed in two states.¹¹²

A. Identifying the Goals of Domestic Partnership Ordinances

The state's most fundamental interest in regulating marriage is

109. See, e.g., Caudill, *supra* note 77.

110. See, e.g., Kandoian, *supra* note 80, at 1870–72 (arguing for approach to definition of marriage similar to de facto-based approach to definition of business partnership); Shultz, *supra* note 70 (arguing for contractual ordering of marriage); Weitzman, *supra* note 78, at 1249–75 (proposing individual contracts in lieu of marriage). While contractual ordering of personal relationships has certain advantages, no state is likely to recognize unbridled freedom to contract in domestic relations. Prohibiting contracts for sexual services is the most obvious limitation states place on such contracts. Other areas, such as support obligations, are also of concern. Given the unequal bargaining power that often exists in domestic relations, see Kandoian, *supra* note 80, at 1857–59; Weitzman, *supra* note 78, at 1275–76, the state may properly find some contracts to be unconscionable. Defining what would be unconscionable is unnecessary for present purposes of drafting a domestic partnership ordinance. The point here is simply that the state does have legitimate reasons for scrutinizing contracts in this arena more closely than in purely economic transactions.

111. See, e.g., William A. Reppy, Jr., Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status, 44 La. L. Rev. 1677 (1984); Arthur H. Gottlieb, Note, Living Together: The Need for a Uniform Nonmarital Cohabitation Act, 2 *Adelphia L.J.* 79 (1983); Note, Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution, 128 U. Pa. L. Rev. 193 (1979).

112. Bills have been proposed in New York and Illinois. See *infra* note 134 and accompanying text.

promoting personal fulfillment and social productivity.¹¹³ It achieves this principally by solemnizing marriage and providing some assurance that the rights and expectations of the parties will be protected.¹¹⁴ Domestic partnership legislation should be considered with this goal in mind.

To meet this goal, domestic partnership legislation should (1) promote personal choice within stable intimate relations; (2) assist the parties in defining their relationship, thus making them better aware of their rights and obligations; and (3) assist the courts, when necessary, to define relationships and equitably resolve disputes between the parties and with third parties.

Providing for personal choice within domestic relations will promote family stability by allowing individuals to choose relationships that are suitable for them. Some individuals may simply not feel ready to assume what they perceive to be the life-long commitment of marriage but would be willing to assume the obligations of domestic partnership. Others may have philosophical objections to marriage, given its history of rigidly defining roles for husband and wife. In addition, domestic partnership currently provides the only option for legal recognition of same-sex relationships.¹¹⁵

State sanction of relationships would encourage couples to define their relationships. Better definition of the relationship should limit misunderstandings and misconceptions that can undermine the stability of a relationship, or cause a false sense of security when life-long support cannot be expected. While domestic partnership may or may not enhance stability to the same extent that marriage does, it is likely to enhance stability for those who, for whatever reason, are unable or unwilling to marry. It can also help assure that parties who enter domestic partnerships have an improved understanding of their rights and obligations, and can plan accordingly.¹¹⁶ Domestic partnership ordinances can also help to assure that similarly situated people are treated fairly.¹¹⁷

113. See *supra* part II.

114. See *supra* notes 95–99, 107–108 and accompanying text.

115. Even if states were to recognize same-sex marriage, many lesbians and gay men would still find domestic partnership a more appropriate alternative, as domestic partnership would provide more freedom to individuals in structuring the terms of their relationships. Cf. Ettelbrick, *supra* note 6, at 17 (discussing importance of recognizing a range of different relationships).

116. Even the best designed domestic partnership bill could not anticipate or provide for every contingency in the constellation of human relationships, so the courts will continue to be asked to make a variety of ad hoc judgments. But proper legislation can give the courts more guidance in making such determinations, and make parties better aware of how to protect their expectations. Cf. Lenore J. Weitzman, *The Marriage Contract xv–xix* (1981) (few people embarking on marriage have much sense of the legal effects of their decision).

117. This goal is partially reflected in the policies adopted in many jurisdictions of prohibiting discrimination based on marital status, though in general similarly situated

tive Procedure Memorandum, all unmarried employees, for purposes of bereavement and sick leave, may designate a single family partner. The only requirement placed on the partner is residence at the same address as the employee; no restrictions based on blood relationship are mentioned.¹⁴⁹

All of the ordinances provide a means to terminate the domestic partnership, although waiting periods vary. Seattle, for example, provides that a partnership terminates upon death of a domestic partner or on the ninetieth day after notice of termination was provided to the city.¹⁵⁰ Others have no waiting period for termination, but have a waiting period (usually six months) between termination and eligibility to enter a new partnership.¹⁵¹

2. *Benefits Provided by Existing Ordinances.* — The benefits extended by the existing ordinances can be grouped roughly into two broad categories: benefits for partners of municipal employees and registration of the relationship with city hall. Most domestic partnership ordinances extend certain benefits normally available to spouses to the domestic partners of municipal employees.¹⁵² These ordinances provide benefits such as illness, disability, or bereavement leave for municipal employees with domestic partners, or health insurance for the domestic partner.

Employee benefits are a driving force for domestic partnership recognition. Up to forty percent of an employee's compensation comes in the form of fringe benefits,¹⁵³ and many benefits, particularly health insurance for spouses, are provided based on familial relationships rather than job performance. While such benefits originally were designed for families with an employed husband and a homemaker wife, these families constitute just ten percent of American families to-

149. See Madison, Wis., Administrative Procedure Memorandum No. 2-37 (Nov. 15, 1988), reprinted in *Lambda*, supra note 120, at 165. The New York City Executive Order also does not require that the two persons not be related. See Exec. Order No. 123 (Aug. 7, 1989), reprinted in *Lambda*, supra note 120, at 189-90. However, the local domestic partnership bill introduced in the New York City Council would prohibit domestic partnerships between individuals in the relationship of parent to child, sibling to sibling, uncle to niece or nephew, and aunt to niece or nephew. See New York City Council Int. No. 573, Nov. 20, 1990.

150. See Seattle, Wash., Mun. Code § 4.30.030 (1989).

151. Berkeley permits termination with no waiting period, but neither partner may enter into another partnership for six months. See Berkeley, Cal., Domestic Partnership Information Sheet (Jan. 1, 1987), reprinted in *Lambda*, supra note 120, at 81.

152. Originally, a ruling by the Seattle Human Rights Department that the Seattle Fair Employment Practices Act, which forbids discrimination on several grounds including sexual orientation and marital status, required private employers as well as the City to extend health insurance benefits offered to married employees to the domestic partners of employees. This requirement was later dropped after the city attorney determined that it would likely be preempted by the Employee Retirement Security Act, 29 U.S.C. §§ 1001-1461 (1988). See Kevin Gudridge, *Seattle Suspends Live-In Health Benefit Rule*, Life & Health, Fin. Servs. Edition, June 5, 1989, at 5.

153. See 1 D.C. Commission Final Report, supra note 5, at 7.

day.¹⁵⁴ Thus many people are poorly served by typical employee benefit plans. Domestic partnership provides one means to distribute benefits more equitably.

The other benefit offered by many domestic partnership ordinances is registration of the relationship with municipal authorities. While several of the ordinances provide only for registration of the relationships of municipal employees, others provide for registration of all domestic partnerships at city hall.¹⁵⁵ Public registration provides few direct benefits for nonmunicipal employees, but it offers the psychic benefit of state recognition of the relationship, and it may prove useful in obtaining hospital visitation rights for an ill partner and other instances where evidence of the relationship is needed.

C. Potential Legal Consequences of Domestic Partnership Ordinances

As most existing ordinances provide only for registration of the partnerships of municipal employees and certain employment benefits to their partners, the direct legal effect of these ordinances is limited. Several of the ordinances in fact contain specific provisions intended to limit the legal effect of declaration of domestic partnership.¹⁵⁶ Despite the limited scope of the existing ordinances, they are an important first step in recognizing these relationships, and they may have legal effects beyond those specifically contemplated in the ordinance.

1. *Potential Contract Between Parties.* — Most ordinances contain declarations that the partners are responsible for each other's support. These declarations, if enforced, would create a contractual liability that is similar to the liabilities of marriage, but would likely not require support after termination of the domestic partnership.¹⁵⁷ As state contract law would govern the interpretation of a domestic partnership agreement, the parties' objective intent in registering the partnership would

154. See *id.*

155. West Hollywood, Ithaca, San Francisco, and Minneapolis limit registration to partnerships in which at least one of the partners is a city resident or works in the city. See, e.g., San Francisco, Cal., Admin. Code § 62.3(c) (1991). Berkeley allows non-residents to register as well, but they must register in person. See Berkeley, Cal., Policy Establishing Domestic Partnership Registration 7 (on file with Columbia Law Review); Gay Couples to Be Allowed to Register, S.F. Chron., Oct. 10, 1991, at A20.

156. See, e.g., San Francisco, Cal., Admin. Code § 62.6 (1991); West Hollywood, Cal., Mun. Code § 4225 (1985) (reprinted in *Lambda*, supra note 120, at 103); New York City Council Int. No. 573, § 8.411 (Nov. 20, 1990).

157. As partnerships can generally be terminated with little or no notice, not much in the way of support obligations after a couple has separated would be due, so this question may not soon be litigated. However, Minneapolis provides that a domestic partnership terminates upon the death of one of the partners or 45 days after notification by one partner or the City Clerk that a notice of termination has been filed. See Minneapolis, Minn., Code of Ordinances, tit. 7, ch. 142, § 142.60(b) (1991). In addition, a domestic partnership registration might be used as evidence in a cohabitation case of the type discussed in part I. See supra notes 30-52; *infra* notes 159-61, and accompanying text.

benefits is much more limited. The Employee Retirement Income Security Act has been held to preempt much state and local authority to require or alter in any way employee benefits.²²¹ Since it appears that any city ordinance mandating that private employers provide employment benefits to domestic partners would be largely preempted by federal law, municipalities might explore other options to encourage employers to comply with the spirit of this provision, such as refusal to award city contracts to companies who do not provide such benefits, some sort of provision in the local tax code offering abatements for employers providing such benefits, or a clause in the ordinance simply exhorting private employers to offer the same benefits offered by the city.²²² Congress has in the past granted exemptions from ERISA for specific state programs.²²³ Cities may wish to lobby Congress for an exemption covering fair employment measures.

Parental Rights: Registration of this domestic partnership has no direct legal effect on the parental rights of either partner, which rights are governed by state law. Any partner concerned about his or her parental rights should seek specific legal advice.

Commentary: Controversies over custody, visitation, and support of children are often the most difficult and destructive aspects of the dissolution of a marriage or a domestic partnership. Regulating parental

221. See *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983); *supra* notes 204-205 and accompanying text.

222. There are tax implications for providing additional benefits. In a private letter ruling responding to a request from a county that had amended its self-insured medical plan to cover an employee's "Principal Domestic Partner," the IRS ruled that if the domestic partner qualifies as a "spouse" or "dependent" under I.R.C. § 152 (1988), extension of the benefit would impose no extra tax consequences on the employee or employer; the value of the benefit would be excludable from the employee's gross income and not subject to FICA withholding for social security or reportable as income on the W-2 form. If the domestic partner does not qualify as a spouse or dependent, the extent to which the fair market value of the benefit exceeded any amount the employee might pay to secure the group benefit would be considered part of the employee's gross income, and be subject to FICA withholding and income tax. See Priv. Ltr. Rul. 91-90-060 (Mar. 4, 1991). The Ruling makes clear that coverage of domestic partners will not otherwise affect excludability under I.R.C. § 106 (1988) of the amounts paid by the employer for eligible employees, their spouses and dependents. See Priv. Ltr. Rul. 91-90-060, *supra*. This had been a major concern prior to the ruling, since if a plan were held not to qualify, all employees would have to pay tax on benefits received even for a spouse. Since the status of an individual as a spouse is a matter of state law, it is unclear what the effect of a statewide domestic partnership act would be. It must be noted that the ruling is directed only to the taxpayer requesting it, and is not to be used as a precedent. Other employers would probably wish to obtain a similar ruling. See IRS Rules on Tax Effects of Domestic Partner Benefits, *Lesbian/Gay Law Notes*, May 1991, at 33.

223. Congress specifically exempted the Hawaii Prepaid Health Act, see 29 U.S.C. § 1144(b)(5)(A) (1988), and certain domestic relations laws, primarily related to community property, see *id.* § 1144(b)(7).1.

rights is clearly beyond the authority of municipalities. Individuals registering as domestic partners should not mistakenly assume that they have achieved any rights regarding children that they may jointly support.

Termination: The domestic partnership agreement terminates on the ninetieth day following written notice given by either party to the other party and to the city clerk; or ninety days following the time when both partners become aware or should become aware that one or both partners no longer meet one or more of the requirements for domestic partnership; or upon the death of either partner. The notice of termination may be revoked with the consent of both parties at any time up to its effective date. If either partner collects benefits from a third party based on the domestic partnership after its termination, that partner shall be liable for the value of the benefits received plus reasonable attorney fees.

Commentary: Writing is required to limit any potential for fraudulent alterations of the domestic partnership agreement. The city should be notified so it can maintain accurate records about partnerships and ensure that individuals do not continue to collect any benefits of the partnership after its dissolution. The time requirement is included to give parties, particularly if a partner is at all economically dependent on the other, some reasonable transition time during which support obligations and health benefits, if any, would continue. Additionally, the potential of some post-separation support requirement will help to limit domestic partnerships to those who anticipate a committed relationship of indefinite duration.

CONCLUSION

Domestic relations law has failed to keep pace with the changing realities of modern relationships. Many couples find themselves excluded from the legal protections and other benefits of marriage, and often courts must make ad hoc determinations about the status of a couple's relationship. Such a legal regime undermines rather than enhances the fundamental interests domestic relations laws are designed to protect.

Government cannot continue to overlook the needs of millions of people who, for one reason or another, cannot or will not assume marriage vows. Domestic partnership ordinances provide an attractive opportunity for cities to provide more equal treatment to their citizens, afford greater protection to parties in non-marital relationships, and provide greater stability and support to such relationships.

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ARTICLES

COMPETITIVE FEDERALISM AND THE LEGISLATIVE INCENTIVES TO RECOGNIZE SAME-SEX MARRIAGE

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I. INTRODUCTION

In *Baehr v. Lewin*, the Supreme Court of Hawaii held that Hawaii's marriage statute discriminates on the basis of gender and may therefore violate the state constitution's equal protection clause.¹ The statute allows marriage only between a man and a woman; same-sex couples are excluded.² The trial court in *Baehr* must now decide

1. 852 P.2d 44 (Haw. 1993).

2. HAW. REV. STAT. § 572-1 (1985). The statute does not explicitly prevent same-sex marriages; rather it contemplates only heterosexual marriages. Initially, the plaintiffs in *Baehr* did not allege that any of them were gay. Although the defendant's motion for judgment on the pleadings sought to raise the question of sexual orientation, the plaintiffs' initial complaint asserted rights to "same-sex" rather than specifically "homosexual," "bisexual," "gay," or "lesbian" marriage. Following the lead of the *Baehr* plaintiffs and Justice Levinson, of the Hawaii Supreme Court, this Article will use the terms "same-sex marriage" and "different-sex marriage" without making assumptions about the sexual orientation of those who engage in either. Sexual

whether the law serves a compelling state interest.³ Some predict that the state will be unable to justify the law and that Hawaii will become the first state to solemnize marriages between people of the same sex.⁴

While *Baehr* and cases like it allow state courts to legalize same-sex marriage on constitutional grounds, this Article argues that certain states may have independent legislative incentives to be the first to recognize same-sex marriage.⁵ States might compete for a "first-mover" advantage;⁶ the first state to solemnize same-sex marriages could draw visitors from every state in the union.

The tourism revenue from same-sex marriages could exceed \$4 billion.⁷ This estimate is based on conservative assumptions about (1) the number of same-sex couples who would travel to a first-mover state for weddings and honeymoons, and (2) the spending that the average wedding would generate.

This increased tourism revenue could in turn redound to the benefit of all the state's citizens. Tourism does not just increase retail spending in a state. It also creates jobs, increases average household wealth, and benefits the state directly through taxes and license fees.

orientation and historic discrimination against lesbians and gay men are certainly important elements of this Article's analysis; indeed, the estimates about the demand for same-sex marriage rest on certain assumptions about the number of lesbians and gay men in the United States. Nonetheless, with occasional exceptions, this Article will use the phrases "same-sex marriage" and "different-sex marriage" to signal that sexual orientation is often too fluid to define with precision, and that the current legality of marriage is determined by the sex of the partners, rather than their actual sexual or affectional orientations.

3. *Baehr*, 852 P.2d at 68 ("On remand, in accordance with the 'strict scrutiny' standard, the burden will rest on Lewin to overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights.").

4. However, state legislators have enacted legislation designed to avoid this result. 1994 Haw. Sess. Laws 217 (enacted June 1994) (marriage statute "intended to foster and protect the propagation of the human race through male-female marriages").

5. This thesis is at odds with other scholars' arguments that courts are much more likely than legislatures to move toward the legalization of same-sex marriage. See Michael L. Closen & Carol R. Heise, *HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages*, 16 NOVA L. REV. 809, 824 (1992) (stating that legislatures take the "politically safe and expedient course of action (or inaction)," but "judges cannot dodge issues quite so readily once they have been presented in the form of a litigation").

6. In a certain class of games (such as chess), the first player to move has an advantage in producing a higher payoff.

7. See *infra* parts II.A.2, II.A.3. These figures represent estimates of the present value of changing the law to allow same-sex marriage—that is, the present value of expected enhanced (but declining) tourism over a number of years.

Hawaii's Department of Business, Economic Development and Tourism estimates that \$4 billion in direct spending by tourists generates \$440 million in state and county tax revenues, thousands of jobs, and \$2.4 billion in household wealth for the state's residents. This increased revenue could have a particularly dramatic effect in a small state like Hawaii, where it could raise the average family's wealth by more than \$6700.⁸

Just as competitive federalism leads states to compete for charter revenues and other types of interest-group rents,⁹ it could also lead states to compete for the tourism revenue from solemnizing same-sex marriages. As Connecticut is to insurance, Delaware is to corporate law, and Nevada is to gambling, marriage, and divorce, so Hawaii (or some similarly situated state) could become to same-sex marriage.¹⁰ States have competed for the sorts of individual and collective benefits sketched here, and same-sex marriage could provide another opportunity for such competition.

This Article also analyzes which states have the strongest incentives to seize this first-mover advantage. Powerful interest groups within every state are almost certain to oppose legislation that authorizes same-sex marriage.¹¹ But in some states there may be a sufficient coalition of supporters to pass such legislation. A state with a small population will enjoy more dramatic per capita benefits from the increased tourism revenue. A state that has relied heavily upon tourism but currently suffers excess capacity in that industry could welcome the influx of new customers. A state that is politically progressive is more likely to welcome tourists who are same-sex

8. See *infra* table 6.
 9. Jon Macey and Geoff Miller have pointed out that in commercial contexts states compete not just for franchise taxes, but also for other jurisdictional rents (such as increased litigation and transactional business for members of the state bar). See Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).
 10. A possible critique of this argument is that it assumes wealth among gay men and lesbians. This seems to leave out poorer people, or at least conditions the right of marriage upon a couple's ability to travel. This Article's economic argument, therefore, should be read as an important part—but only a part—of the debate. Poorer gay men and lesbians might take solace from the hope that the benefits a first-mover state collects from legalizing same-sex marriage may lead other states to compete. See *infra* part II.C.3.b. Thus, over time the celebration of same-sex marriages could become more widespread. Competition from other states is a risk from the first-mover state's perspective, but it is a desirable result for gay men and lesbians.
 11. Indeed, Hawaii provides a case study in the ways in which conservative religious groups have been especially vocal in opposing a legal change. See *infra* notes 252-59 and accompanying text.

couples.¹² In light of these factors, I argue that Hawaii, New Mexico, and Vermont are three states that might seriously consider legalizing same-sex marriage.

Same-sex marriage clearly raises serious questions about discrimination, tradition, and morality.¹³ But economic concerns are also at stake.¹⁴ Because certain states could reap substantial economic benefits by being the first to solemnize same-sex marriage, the debates about the issue to date have been incomplete.

12. Political conditions that might serve as standards to measure this "progressiveness" are gay rights ordinances and statutes, sodomy statutes, an equal rights amendment in the state constitution, or domestic partnership statutes within the state. See *infra* part III.A.
 13. Indeed, most discussion about same-sex marriage to date has focused on these constitutional and equity-based arguments. See Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134, 169-70 (1987-88) ("Several individual rights doctrines would seem to require invalidation of these state marriage laws: equal protection on the basis of sex, equal protection on the basis of sexual orientation, equal rights under state equal rights amendments, and substantive due process. Of these doctrines, substantive due process is best suited to resolve this issue . . ."); Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347, 380-84 (1993) (due process right to privacy is stronger basis than the Equal Protection Clause for recognizing same-sex marriage "because the marriage and family rights embodied in the due process guarantee are equally applicable to homosexuals' interest in marriage"); Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193, 193 (1979) ("[H]omosexual couples involved in exclusive, long-term relationships are similarly situated to committed heterosexual couples" and, accordingly, "the states must afford homosexuals the opportunity to make a marriage commitment."); John D. Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33, 40 (1984) ("When the camouflage of centuries of religious and 'moral' taboos and teaching is swept aside, and the alleged bases for the restrictions are exposed to the full light of modern knowledge and lifestyles, the state may find [constitutional] justification for its restriction difficult or impossible." (footnote omitted)); David Link, Comment, *The Tie That Binds: Recognizing Privacy and the Family Commitments of Same-Sex Couples*, 23 LOY. L.A. L. REV. 1055, 1141-45 (1990) (discriminatory marriage laws could be successfully challenged through arguments based on equal protection, substantive and procedural due process, and freedom of association); William M. Hohengarten, Note, *Same-Sex Marriage and the Right of Privacy*, 103 YALE L.J. 1495, 1495-96 (1994) ("The constitutional right of privacy requires states to sanction and recognize same-sex marriage."). This Article offers an alternative approach not to denigrate, but rather to complement, this earlier analysis.
 14. Apple Computer's corporate policies extend benefits to its employees' domestic partners—including gay and lesbian partners. When Apple sought to build an \$80 million customer support center in Williamson County, Texas, the county commission initially voted 3 to 2 to deny Apple's request for a tax abatement, motivated by opposition to Apple's benefits policy. This decision placed in jeopardy the 1500 high-wage jobs and \$300 million in local economic benefits that Apple could bring to the county. Commissioner David Hays reversed his vote a week later and the commission approved an alternative tax package that contained the financial inducements Apple wanted most. "The bottom line is, jobs triumphed over prejudice," stated David M. Smith, Director of Public Education for the National Gay and Lesbian Task Force. See Sam Howe Verhovek, *Texas County Retreats over Apple's Gay Policy*, N.Y. TIMES, Dec. 8, 1993, at A18.

Currently, no state allows same-sex couples to wed. Some marriage statutes use gender-neutral language, and thus do not facially require that the marrying couple consist of one man and one woman.¹⁵ Most jurisdictions, however, do refer to gender in their marriage statutes, if only incidentally.¹⁶ Same-sex couples in several states have sought the right to marry, and some have even obtained marriage licenses from their local county clerks.¹⁷ These attempts to marry and subsequently gain recognition of the marriage, however,

15. See ALA. CODE § 30-1-9 (1994); ARIZ. REV. STAT. ANN. § 25-121 (1994); D.C. CODE ANN. § 30 (1993); ME. REV. STAT. ANN. tit. 19, § 1 (West 1993); MASS. GEN. LAWS ANN. ch. 207, § 1 (West 1987); N.J. REV. STAT. § 37 (1973 & Supp. 1994); N.M. STAT. ANN. § 40.1.1 (Michie 1978); N.Y. DOM. REL. LAW § 1 (McKinney 1988).

16. The following state marriage statutes use gender-related terms: ALASKA STAT. § 25.05.021 (1991); ARK. CODE ANN. § 9.11.102 (Michie 1987); CAL. CIV. CODE § 4100 (West Supp. 1990); FLA. STAT. ch. 741.04 (1993); GA. CODE ANN. § 19-3-30 (1994); HAW. REV. STAT. § 572.1 (1985); IDAHO CODE § 32.202 (1983); ILL. REV. STAT. ch. 40, para. 201 (1989); IND. CODE ANN. § 31.7.1.2 (Burns 1987); IOWA CODE ANN. § 595.2 (West 1981); KAN. STAT. ANN. § 23.104(a) (1988); KY. REV. STAT. ANN. § 402.020 (Michie/Bobbs-Merrill 1984 & Supp. 1994); LA. CIV. CODE ANN. art. 86 (West 1993); MD. CODE ANN., FAM. LAW § 2.201 (1991); MINN. STAT. ANN. § 517.01 (West 1990); MISS. CODE ANN. § 93.1.5 (1972); MO. ANN. STAT. § 451.090 (Vernon 1986); MONT. CODE ANN. § 40.1.103 (1993); NEB. REV. STAT. § 42-102 (1988); NEV. REV. STAT. § 122.020 (1987); N.H. REV. STAT. ANN. § 457.4 (1992); N.C. GEN. STAT. § 51.1 (1984); N.D. CENT. CODE § 14.03.01 (1981); OHIO REV. CODE ANN. § 3101.01 (Anderson 1989); OKLA. STAT. ANN. tit. 43, § 3 (West 1990); OR. REV. STAT. § 106.010 (1991); R.I. GEN. LAWS §§ 15.1.6, 2.3, 2.5 (1988); S.C. CODE ANN. §§ 20.1.10, 1.300 (Law. Co-op. 1976 & Supp. 1993); TENN. CODE ANN. § 36.3.104 (1991); TEX. FAM. CODE ANN. § 1.01 (West 1993); UTAH CODE ANN. § 30.1.2 (1989); VT. STAT. ANN. tit. 18, § 5131 (1987); VA. CODE ANN. § 20.14 (Michie 1990); WASH. REV. CODE ANN. § 26.04.020 (West 1986); W. VA. CODE § 48.1.1 (1992); WIS. STAT. ANN. § 765.13 (West 1981); WYO. STAT. § 20.1.101 (1994).

17. See, e.g., *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (Boulder clerk issued marriage license to a gay couple composed of one Australian and one American citizen; the men participated in a marriage ceremony, but the court refused to recognize their marriage for the purpose of granting the Australian residency as the immediate relative of an American); *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976) (dismissing gay couple's petition to the Veterans' Administration for an increase in educational benefits to a veteran on grounds that his same-sex partner was a dependent spouse (following the marriage ceremony at issue in *Baker v. Nelson*, *infra*); *Dean v. District of Columbia*, 653 A.2d 307 (D.C. Ct. App. 1995) (no constitutional basis for claim of two gay men seeking right to marry); Complaint For Declaratory and Injunctive Relief, Underwood v. Florida, No. CI 93-4656 (Cir. Ct. Orange County, Fla. July 8, 1993) (lesbian couple suing to gain a marriage license and have the Florida ban on same-sex marriage ruled unconstitutional); *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky. Ct. App. 1973) (rejecting lesbian couple's argument that the failure of the clerk to issue a marriage license deprived the couple of their constitutional rights of marriage, association, and free exercise of religion); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971) (clerk not required to issue a marriage license to same-sex couple because the statute did not authorize marriage between persons of the same sex); *De Santo v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) (rejecting gay male's claim that he had entered into a common-law marriage with another male and was entitled to a decree of divorce); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974) (rejecting same-sex couple's request for a marriage license; the court stated, "the state's refusal to grant a license allowing the appellants to marry one another is not based upon appellants' status as males, but rather it is based upon the

have failed. In some cases, the decision to marry has been costly; recently one lesbian unsuccessfully petitioned a federal court not for legal recognition of her marriage (a religious ceremony she had shared with her partner, friends, and family), but to regain the job she lost when her employer learned of the marriage.¹⁸ American gay men and lesbians have been denied state recognition and protection for their unions.

Even though they cannot marry with state certification, gay and lesbian couples can and do form life-long commitments.¹⁹ Increasingly, scholars have focused on these unions between same-sex couples, often finding that in fundamental ways they resemble companionate marriages between people of different sexes. William Eskridge has chronicled a history of same-sex marriage,²⁰ and he argues that in many cultures and eras, same-sex couples have wed, often with societal or state approval.²¹ John Boswell has similarly documented same-sex unions celebrated within the early Christian church.²² Denmark permits same-sex couples to register their "partnerships" officially and to cohabit as married couples,²³ and several American cities

state's recognition that our society as a whole views marriage as the appropriate and desirable forum for procreation and the rearing of children.").

18. *Shahar v. Bowers*, 836 F. Supp. 859 (N.D. Ga. 1993) (concluding that retaining Shahar at the Georgia Attorney General's office after she married another woman in a religious ceremony would undermine public credibility and the internal efficiency of the office—specifically the need to employ attorneys who act with discretion, good judgment, and in a manner that does not conflict with the work of other department attorneys). See also *McConnell v. Anderson*, 457 F.2d 193, 196 (8th Cir. 1971) (ruling that university's withdrawal of employment offer was not arbitrary, unreasonable, or capricious because applicant had applied for license to marry another man and had therefore exhibited an intention to "foist tacit approval of this socially repugnant concept upon his employer").

19. These commitments have been documented by authors interested in the long-term relationships of same-sex couples. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* (1983); BECKY BUTLER, *CEREMONIES OF THE HEART: CELEBRATING LESBIAN UNIONS* (1990); LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES (Suzanne Sherman ed., 1992) [hereinafter *LESBIAN AND GAY MARRIAGE*].

20. William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

21. *Id.* at 1422.

22. JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

23. The Danish Registered Partnership Act, No. 372 (Denmark 1989), cited in Closen & Heise, *supra* note 5, at 811 n.6. In 1987, Sweden expanded the property rights of unmarried cohabitants, including same-sex couples. The Swedish law, however, is much narrower than the Danish Registered Partnership Act. See Closen & Heise, *supra* note 5, at 811-12 n.6. See also Alan Cowell, *Pope Deplores Gay Marriage*, N.Y. TIMES, Feb. 23, 1994, at A2 ("Several cities in Italy permit local officials to perform public marriages uniting gay and lesbian couples. Some legislators have proposed a national law legalizing such weddings, even though opinion surveys show most Italians oppose the idea.").

and states grant "domestic partnership" status.²⁴ Still, many gay and lesbian couples seek the full status and protection available only in marriage.²⁵

This Article examines the economic incentives to recognize same-sex marriage, detailing the "first-mover" advantage that might inure to a state that breaks ground in this area. Part II sets forth three assumptions about the number of gay men and lesbian women in the United States, the probability that they would marry if permitted, and the amount of money they might spend on their weddings and honeymoons. Part II then introduces two distinct approaches to calculating the potential revenue to a first-mover state. This section also justifies the assumptions and the bottom line tourism estimates. I present both quantitative estimations of potential benefits and qualitative analysis of some offsetting risks, such as boycotts, tipping, or competition from other states. Finally, Part III analyzes Hawaii, Nevada, New Mexico, and Vermont—their interest groups, political circumstances, and economic conditions—and identifies the factors that might make a state more or less likely to enter the race to recognize same-sex marriage.

II. THE ECONOMIC INCENTIVES TO RECOGNIZE SAME-SEX MARRIAGE

A. ESTIMATING THE POTENTIAL FOR ENHANCED TOURISM

This section estimates the enhanced tourism that could be enjoyed by the first state to solemnize same-sex marriage. These estimates rest on three crucial assumptions:

24. These benefits are varied. For example, some cities and states provide bereavement and/or sick leave for domestic partners (for example, Berkeley, California; Laguna Beach, California; Los Angeles, California; Delaware; Washington, D.C.; West Palm Beach, Florida; Takoma Park, Maryland; Cambridge, Massachusetts; Ann Arbor, Michigan; East Lansing, Michigan; Minneapolis, Minnesota; Ithaca, New York; New York, New York; Travis County, Texas; Seattle, Washington). Some cities offer health benefits for the domestic partners of employees (for example, Berkeley, California; Laguna Beach, California; Oakland, California; San Francisco, California; Santa Cruz, California; West Hollywood, California; Washington, D.C.; East Lansing, Michigan; Seattle, Washington). Some cities offer a domestic partner registry (for example, Berkeley, California; Laguna Beach, California; San Francisco, California; West Hollywood, California; Washington, D.C.; Ann Arbor, Michigan; East Lansing, Michigan; Minneapolis, Minnesota; Ithaca, New York; Morgantown, West Virginia; Madison, Wisconsin). See NAT'L GAY & LESBIAN TASK FORCE POLICY INST., DOMESTIC PARTNER PACKET (1992) [hereinafter DOMESTIC PARTNER PACKET] (analyzing these and other domestic partnership programs).

25. See *infra* part II.B.3 (in the debate about marriage within the gay community, some argue that gay men and lesbians can gain full civil rights only if they gain the right to marry).

1. Same-sex marriages, on average, will generate \$6000 of in-state spending.
2. The number of gay men and lesbians in the United States is somewhere between one and three percent of the general population.
3. Gay men and lesbians will marry at a rate that is at least one-third the rate for the general population. The next section explicitly defends these assumptions and argues that they produce conservative estimates of expected revenues. The goals of the present section are to show both the potentially dramatic impact that same-sex marriage could have on a state's tourism and how alternative assumptions affect the estimates.

Using these assumptions, this section explores two models based upon extreme premises about the extent to which gay and lesbian people have formed enduring relationships prior to legalization of same-sex marriage. The first—a "Pent-up Demand" model—assumes that even though same-sex marriage is not legally recognized, some gay men and lesbians have already formed enduring unions and would be ready to solemnize them shortly after legalization. By assuming that substantial prelegalization matching has taken place, we find a "stock" of couples with an immediate pent-up demand for same-sex marriage. This initial flood of demand should be followed by a continuing demand (or "flow") as additional same-sex unions are formed.

The second—a "Post-Legalization Matching" model—assumes that the same-sex marriage ban has prevented gay men and lesbians not only from marrying, but also from searching for mates and forming enduring unions. This assumption leads us to find no immediate pent-up demand for same-sex marriage. Instead, under this model, when same-sex marriage becomes legal, unmarried gay people simply will begin to form unions and marry at a rate that is some fraction of the marriage rate for the general population. The assumption that no pent-up demand exists is particularly conservative. It leads us to predict that many older gay and lesbian people would have a relatively low probability of marrying before dying, despite the fact that many "real world" gay men and lesbians already enjoy long-term, committed relationships that could well result in marriage soon after legalization.

Finally, some benefits of first-mover status may persist even when other states begin to compete. Travel companies might specialize in same-sex marriage packages. Many of these firms would develop state-specific expertise. To protect their capital, they might encourage clients to go to the first-mover state even after competing states enter the market. In addition, some couples might prefer to marry and honeymoon in a place where they are assured many other people have been and are doing the same thing (on the safety-in-numbers theory). This would strengthen the first mover's advantage even after additional states begin to celebrate same-sex marriages.

Sympathy tourism, or loyalty to the first-mover state because it was the first to make the legal change, could lead many travellers—both same-sex couples travelling for weddings and honeymoons, and other tourists who support gay rights—to prefer the first-mover state even when other states present alternative wedding venues.

Therefore, although it is theoretically coherent to argue that a decision-maker would decline to be the *first* because it fears others would follow, same-sex marriage would seem to be the only example of this theory. At the very least, any concern about competition from other states could come only from those who were persuaded that legalizing same-sex marriage would produce substantial tourism. Not all states are equally likely to compete. Political, economic, and social conditions will determine whether legalizing same-sex marriage would be attractive to the various states. A first-mover state might determine that it is unlikely to face any competition from other states in its region, and so can capture greater revenue for a longer period of time. The next section analyzes whether particular states would be likely to legalize same-sex marriage.

III. WHICH STATES ARE MOST LIKELY TO MOVE FIRST?

Same-sex marriage would benefit some states more than others. By first identifying the theoretical factors that determine this benefit and then applying those factors to three states, this section predicts which states would be the most likely to legalize same-sex marriage.

A. THEORETICAL FACTORS

Ideally, the first-mover state should have a relatively small population. This is to maximize the benefit of the legal change to each

citizen of the state. Legislators are most likely to vote in favor of recognizing same-sex marriage if they can persuade skeptical constituents that the legal change means money in their pockets.²⁸⁵ An additional \$4 billion in tourism revenue obviously has greater per capita impact in a state with three million residents than it has in one with twenty-three million residents. Therefore, a small population is one factor that will weigh in favor of a state moving first to legalize same-sex marriage. This is consistent with the pattern of competitive federalism, in which smaller states have been the leaders in other areas of the law (such as Delaware with corporate law, South Dakota with banking, and Nevada with gambling).²⁸⁶

The political climate within a state will also help to determine whether it is likely to legalize same-sex marriage. If a state tends to be more "liberal" or "progressive" on social issues, same-sex marriage is more likely to get serious consideration. For indicia of such a liberal tradition, we could look to the people in power or the laws currently in place. A governor or attorney general who is a left-leaning democrat might bring greater enthusiasm to the task of proposing or defending same-sex marriage legislation. A state may be more likely to embrace same-sex marriage legislation if it already has any of the following: 1) an equal rights amendment in the state constitution, 2) a state-wide gay rights statute, 3) major cities with human-rights ordinances covering sexual orientation, or 4) a strong tradition of diversity and tolerance. States that lack sodomy statutes would also be more likely to legalize same-sex marriage, though a sodomy statute would not be an insurmountable barrier. We might consider not only the status of progressive legislation—in other words, whether or not it has been enacted in any given state—but also the history of the legislation, noting particularly the speed with which the bills became law.

Finally, some potential for increased tourism will be an important factor. Tourism potential is important both in generating demand for travel to the state and in supplying the increased demand. The first-mover state should have the sorts of scenery, activities, and attractions

285. For example, the county commissioner in East Texas who voted to grant certain tax benefits to Apple Computer justified his actions in part on economic grounds. See *supra* note 14.

286. See, e.g., Macey & Miller, *supra* note 9, at 471 (complete theory of Delaware corporate law requires analysis of internal as well as external interest groups); Thomas E. Wilson, *Separation Between Banking and Commerce Under the Bank Holding Company Act—A Statutory Objective Under Attack*, 33 CATH. U. L. REV. 163, 165 (1983) (South Dakota competed for affiliations with national banks by permitting its banks to engage directly or through subsidiaries in the insurance business).

should be given serious consideration

that would lead same-sex couples to stay in the state for their honeymoons, spending the money that the first mover hopes to secure. The first-mover state should also have the capacity to satisfy the increased demand that same-sex marriage is likely to create. If the state has some excess capacity in its tourism industry (for example, vacant hotel rooms, empty airline seats, tourist attractions that could accommodate more visitors), the promise of additional visitors will be especially appealing. Even if the state enjoys generally high hotel occupancy rates, same-sex marriage could nonetheless be attractive if it would supply greater numbers of "high end" tourists who might support increases in hotel room rates.

With these basic considerations in mind, then, let us turn to some specific examples, applying these theoretical factors to see whether particular states would have a compelling incentive to legalize same-sex marriage.

B. AN ANALYSIS OF HAWAII AND OTHER LEADING CONTENDERS

The three major factors—size, political climate, and tourism potential—all indicate a strong first-mover incentive for the state of Hawaii. Hawaii is not, however, the only state that has the size or tourism potential to benefit economically from legalizing same-sex marriage. Among these additional states, some, but not all, have the political climate to bring such a change within the realm of possibility.

1. *Hawaii: Small, Liberal, With Attractive Excess Tourism Capacity*

Hawaii's population of only 1.1 million people makes it one of the smallest states in the country. Because of this small size, increases in state revenue can have a greater impact on each resident of the state than the same revenue would have in a larger state.²⁸⁷ Table 5 estimated how \$4 billion in enhanced tourism revenue would affect a state's total income, taxes, and employment.²⁸⁸ Table 6 shows the per capita impact of these effects on three small states (Hawaii, Nevada, and Vermont) and one large state (California).²⁸⁹ Dividing the \$2.4

287. See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, Press Release, 1990 *Census Showed Gain of 14 Million Housing Units Since 1980*, Table (Population and Housing Counts by Region, Division, and State: 1990 Census) (1991) [hereinafter BUREAU OF THE CENSUS, Press Release].

288. See *supra* table 5. These amounts, as explained above, are discounted to present value.

289. The "multipliers" for other states could raise or lower these numbers. Table 6 combines Hawaii's multipliers with population figures from other states. Other states might garner even greater benefits than Table 6 suggests if their economies are less "leaky" than Hawaii's.

billion in additional household wealth among Hawaii's 1.1 million people produces a per capita wealth increase of \$2166, as shown in Table 6. In a larger state, such as California, the same amount of money produces a much smaller benefit for each resident—only \$80. The per capita impact is thus twenty-five times larger in Hawaii than in California. Similarly, the present value of increased wealth is much greater per household in Hawaii (\$6742) than in California (\$231). Hawaii's state tax revenue could grow by .96% as a result of the increased tourism, and unemployment in the state could decrease by almost 13.5%. In California, the increased tourism revenue would affect state tax revenues and unemployment rates much less dramatically.²⁹⁰ Table 6 thus illustrates the importance of small size, and suggests the benefits available to individual state residents.

Table 6: Per Capita Impact of Single-Sex Marriage
Tourism in Particular States

State	Present Value of Wealth Per Capita ^a	Present Value of Wealth Per Household ^a	% Increase In State Tax Revenues ^b	% Decrease In State Unemployment ^c
Hawaii	\$2166	\$6742	.96%	13.5%
Nevada	1998	5150	1.60	8.0%
Vermont	4263	11,429	2.70	16.7%
California	80	231	.04	.3%

^a Calculated assuming that present value of private wealth from legalization of same-sex marriage equals \$2.4 billion. See *supra* table 5. State population and household figures are taken from BUREAU OF THE CENSUS, Press Release, *supra* note 287.

^b Calculated assuming the present value of state tax revenues from legalization of same-sex marriage equals \$440 million. See *supra* table 5. The present value of prelegalization revenues is calculated by capitalizing the 1992 general revenues at a 10% rate. See BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATE GOVERNMENT FINANCES: 1992, Table 3.

^c Calculated assuming that legalization creates 3500 permanent jobs. See *supra* table 5. Unemployment statistics were taken from U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT: 1992 (1993).

Because it is highly unlikely that increased household wealth would be evenly divided among residents of Hawaii, some residents have even more to gain from legalizing same-sex marriage than

Hawaii must import most goods it uses—from furniture to food—and its remoteness can add substantial shipping costs. See Robert Reinhold, *Hawaii Is Rethinking Its Dependency on Tourism*, N.Y. TIMES, Jan. 2, 1993, at A6.

290. California state taxes would increase by only .04%, and unemployment would be reduced by only .3%. See *supra* table 6.

Remoteness is not a factor in Vermont's favor. Because Vermont and the other five states of New England³⁵⁷ are quite concentrated (together they occupy an area smaller than the state of Missouri), the compactness makes it possible for tourists who visit Vermont also to travel to some of the other states. This could result in less concentration of revenue in Vermont. Same-sex couples travelling to Vermont to be married might be less likely to remain in the state for their honeymoons than they would be if the state were more remote. On the other hand, Vermont's proximity to major urban areas (such as Boston, New York, and Philadelphia) could lead larger groups of people to come to the state for weddings. Increasing the size of the entourage might compensate for the shorter stay.³⁵⁸ Moreover, a sense of loyalty to the first-mover state could lead many couples to remain in Vermont for the honeymoon, foregoing other nearby options in New England.

Vermont might welcome an influx of new travellers to the state: The past few years have been "relatively flat" for the state's tourism industry.³⁵⁹ During the winter season of 1990-91, the ski industry showed a sharp decline in revenue. Hotel occupancy rates in 1991 were only 51.2%. Although tourism improved in 1992, the average hotel occupancy rate was only 56.2%.³⁶⁰ Same-sex marriage could be especially good for a state like Vermont, where tourism suffers slow periods in the off-season (spring), because it could produce a steadier stream of tourists to maintain more consistent hotel occupancy rates.³⁶¹

Vermont capitalized on the Colorado boycott of 1992 and 1993, luring skiers who wanted to avoid western ski destinations. As one travel writer noted in *Out and About*, a gay travel magazine, "[i]f you were to choose a ski destination based solely on its politics, Vermont would win with ski poles down."³⁶² *Out and About's* editor claims

357. These states are Maine, New Hampshire, Massachusetts, Connecticut, and Rhode Island.

358. Thus, the assumption that couples would spend \$6000 per wedding could still be satisfied in Vermont.

359. THE BIG PICTURE 1993, *supra* note 94, at 20.

360. *Id.*

361. Some of Vermont's off-season phenomenon may be unavoidable, as spring brings mud and black flies to the state.

362. Wilson Ring, *Vermont Gains as 'Gay Friendly' Vacation Spot*, TORONTO STAR, Jan. 15, 1994, at F20 (quoting Billy Kolber, editor of *Out and About*).

"[i]f you really want to be politically correct, forget Colorado and Utah, come to Vermont."³⁶³

It is not only the gay press outside the state that sees Vermont's potential draw for gay travellers. Innkeepers and spokespersons for Vermont ski associations have embraced the "gay-friendly" label, arguing that "'Vermont has taken on a liberal feel'" and "'Vermont is a gay-friendly state.'"³⁶⁴ In West Dover, Vermont, the Mount Snow ski resort has offered gay ski weekends for the past four years.³⁶⁵ Vermont has already displayed a willingness to market itself to gay travellers.

Some evidence suggests that the state is "gay friendly" in other ways as well. In 1992, the Vermont legislature enacted a comprehensive gay rights law. The act outlaws discrimination on the basis of sexual orientation in employment, banking, insurance, public accommodations, housing, and other areas.³⁶⁶ In 1994, Vermont enacted a state-wide domestic partnership law. Vermont might have a stronger incentive to extend anti-discrimination coverage to the marriage context, because a same-sex marriage statute could directly generate monetary benefits for the state and its citizens.

IV. CONCLUSION

As same-sex marriage has become the subject of public debate, courts have considered constitutional arguments: Same-sex couples have claimed rights to equal protection, free exercise, and freedom of association; states have asserted interests in procreation, morality, and tradition. Legislatures will hear similar arguments. But legislators can consider additional arguments that would not ordinarily enter a court's analysis.

These additional arguments are fundamentally economic. So long as it behaves constitutionally, a legislature is entitled to consider

363. *Id.*

364. Ring, *supra* note 245, at A2 (quoting spokespersons for Vermont ski-related businesses).

365. *Id.*

366. See An Act Relating to Discrimination on the Basis of Sexual Orientation, 1992 Vt. Laws 135 (1992). The Act passed in the state senate in 1988, but was defeated in the house at that time. Sally Johnson, *Gay Rights Bill Cheered in Vermont*, N.Y. TIMES, Mar. 20, 1988, at 44. After four years of debate, however, the law was finally enacted. Perhaps the state's struggle to enact this law suggests that legislative action legalizing same-sex marriage would be even more difficult. On the other hand, the debate about gay rights may have activated many supporters of gay rights.

the impact of legal change on the fiscal health of the state. This Article has demonstrated that if a legislature were to consider this factor, it would find that the case for legalizing same-sex marriage grows even stronger.

This Article has adopted and defended three primary assumptions: 1) same-sex couples would spend an average of \$6000 on their wedding and honeymoon in the first-mover state; 2) three percent of the United States population is gay or lesbian; and 3) gay men and lesbians would marry at roughly one-third the marriage rate for the general population. Using two different approaches—the Pent-up Demand and the Post-Legalization Matching models—these assumptions reveal that the present value of the revenue to be generated by the first state that legalizes same-sex marriage is at least \$3 billion to \$4 billion.

The value of the legal change could increase if legalizing same-sex marriage stimulates travel to the state from additional categories of tourists: people supportive of gay rights (who bring "sympathy tourism") and couples of mixed nationality seeking immigration advantages. The value of the change could decline if the state suffers tipping or boycotts from politically or religiously conservative groups. But history suggests that the revenue from sympathy tourism is likely to outweigh the risk of tipping and boycotts. The first-mover state also runs the risk of reduced revenue if the federal government preempts the field or if other states compete with the first mover by also recognizing same-sex marriages. Because the demand for same-sex marriage will be elevated in the first several years following legalization, however, the first-mover state can capture many of the benefits of the legal change before other states start to compete or the federal government preempts the field. Moreover, by discounting enhanced revenue to present value using a ten percent interest rate, this Article's analysis has already factored in some risk of reduced revenue streams in later years. Therefore, the potential benefits of legalizing same-sex marriage appear to outweigh its risks.

Some states have more to gain from the legal change than others. Acknowledging this, this Article has identified the factors that are most helpful in determining whether recognizing same-sex marriage would be in a state's economic self-interest. The most important factors seem to be size (small states will receive a greater per capita benefit from the increased revenue), tourism potential (demand and

supply factors enhance some states' ability to generate same-sex tourism), and political progressivity (a state with more liberal politicians may be more likely to make the change than a more conservative state). State equal rights amendments, domestic partnership laws, or gay rights statutes could illustrate the necessary progressivity. Applying these factors, this Article has demonstrated that Hawaii may be the most likely state to legalize same-sex marriage. Other states with strong incentives and some likelihood of change are New Mexico and Vermont.

If these states have so much to gain from legalizing same-sex marriage, why have they not already made the change?³⁶⁷ Several answers to this question are possible. The gay and lesbian community has become a vocal political force only in the last twenty years or so, and has understandably focussed on outlawing discrimination in employment, housing, and banking. Marriage was viewed with ambivalence by some, or as an unattainable goal by others. As the community has taken stock of the symbolic and legal impact marriage has on people's lives, however, the right to marry has increasingly been included in the gay rights agenda. Most of this advocacy has been played out in the courts, which are perceived to be more likely than legislatures to protect minority groups.³⁶⁸ Courts have granted some protections for gay and lesbian families, and these decisions may be changing public perceptions of the gay community.³⁶⁹ As legislatures increasingly acknowledge that gay men and lesbians can and do form family units, the notion that such unions merit state certification

367. Scholars must confront this question whenever they propose an innovation from which private actors could benefit but have not yet chosen to implement. See John J. Donohue III, *Opting for the British Rule, Or If Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1093 (1991) (arguing that litigants have not considered contracting for British Rule); Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863, 905 (1991) ("If the agenda were as good as it sounded, our colleague rhetorically asked, why had institutional investors not already begun to implement it? We responded that we could not think of a reason.").

368. See *supra* note 5 and accompanying text.

369. See, e.g., *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (permitting gay life partner to assume lease in rent-controlled apartment upon death of tenant); *Stewart v. Schwartz Bros. Jeffer Memorial Chapel, Inc.*, No. 1588093 (N.Y. Sup. Ct., Queens Cty., Aug. 23, 1993) (allowing decedent's gay partner to intervene in funeral arrangements: "Plaintiff here is not merely a stranger or officious intermeddler, but was a lover and companion of the decedent for over five years. He is not acting to further his own interests, but attempting to carry out the final wishes of the person with whom he was building a future."). The courts' functional analysis in these opinions sees the people involved functioning as a family and entitled to some protection as such.

may seem less and less far-fetched. Moreover, as gay men and lesbians make their sexual identities known, legislatures may appreciate the economic and political power of this group of people and those who support them. Thus, although the fight for marriage rights in legislatures is fairly new, gay rights advocates may increasingly turn to legislatures in coming years.

The gay community is not the only interest group with something at stake in the debate. The hotel and restaurant industries also stand to gain from legalization of same-sex marriage. But even those who might benefit from change do not always choose to lobby for it. Fear of alienating existing customers might prevent some businesses from trying to gain new ones. After all, Hilton Hotels must operate nationally, not just in Hawaii. In the 1950s when the Jim Crow laws came under attack in the south, many hotels and restaurants stood to gain if public accommodations were integrated.³⁷⁰ Many hoteliers and restaurateurs may have secretly wished for integration, but dared not make known these secret hopes in fear that they would lose many of their only—exclusively white—customers.³⁷¹ Perhaps the situation is similar in Hawaii. The Hawaii Visitors Bureau maintains a neutral stance about same-sex marriage, but knows that legalization would bring new visitors to the state. When a Hilton employee speaks publicly against same-sex marriage, the president of the corporation scrambles to mollify gay travel organizations, insisting that Hilton supports civil rights. The tourist industry may know that it will benefit from legalization, but may prefer that someone else be held accountable for the change.

Meanwhile, tens of thousands of gay and lesbian couples want to marry. They are ready to hold ceremonies, host receptions, and steal away to hotels and resorts for honeymoons. They will spend money—lots of it—in the first state that legalizes same-sex marriage. Four billion dollars may rest on the table, waiting for one of the players to seize the prize.

370. See POSNER, *supra* note 110, at 657.

371. See, e.g., RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS 127 (1992) ("National firms were eager to shed local restrictions that were an embarrassment to them in their wider markets.").

Appendix

This appendix provides underlying information for some of the estimates of enhanced tourism made in Tables 1, 2 and 3. Table 7 provides an example with explicit annual cash flows showing how the present value estimates in Tables 1 and 3 were calculated. Table 8 shows how the different assumptions about the homosexual percentage of the population and about the proportion of homosexuals who will marry affect the estimates of (1) the expected annual demand flow in equilibrium and (2) the expected present value. Table 8 complements the sensitivity analysis in Table 2.