

THE ECONOMIC VALUE OF MARRIAGE FOR SAME-SEX COUPLES

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I. INTRODUCTION

Courts and legislatures are increasingly taking up the issue of giving same-sex couples the right to marry. Same-sex couples won the right to marry through high court decisions in Connecticut, Iowa, and Massachusetts.¹ Same-sex couples in the District of Columbia, New Hampshire, and Vermont gained the right to marry through legislative

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1. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

action.² The court in California³ and the legislature in Maine gave same-sex couples the right to marry, but that right was later taken away through voter initiatives.⁴ However, a federal court in California has subsequently held Proposition 8 violative of the federal Constitution, perhaps reinstituting the right to marry—the decision has been stayed pending appeal.⁵ While many issues arise in the course of debates and lawsuits, several important issues usefully tap into economic research and reasoning. Economic theory and empirical evidence have been used in several ways that I address in this Article.

First, as I argue in the next section, same-sex couples are deprived of important economic support for their families because they cannot marry. Both legislatures and courts have been interested in determining whether denying same-sex couples the right to marry imposes economic harms on those couples and their families. One figure commonly mentioned in the debate is the 1,138 benefits of marriage said to be present in federal law. The United States General Accounting Office reported in 2004 it had “identified a total of 1,138 federal statutory provisions classified to the United States Code in which marital status is a factor in determining or receiving benefits, rights, and privileges.”⁶ Not all of those provisions constitute “benefits” per se, and some specific provisions might disadvantage married couples. In addition, not all of the benefits of marriage are derived from federal law. Therefore, I focus on the benefits of marriage in state and federal law and by custom that have been most commonly discussed in the debate about marriage rights.

In particular, I discuss how the economic rights granted by the state to married couples, particularly with respect to taxation, state employee benefits, and dissolution, provide an important and valuable economic

2. D.C. CODE ANN. § 46-401 (LexisNexis 2001 & Supp. 2010); N.H. REV. STAT. ANN. § 457:1-a (Supp. 2009); VT. STAT. ANN. tit. 15, § 8 (2002 & Supp. 2009).

3. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (striking down a statute prohibiting same-sex marriage).

4. CAL. CONST. art. 1, § 7.5, *invalidated by* *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010); Maine Bureau of Corporations, Elections & Commissions, November 3, 2009 Referendum Tabulations, <http://www.maine.gov/sos/cec/elec/2009/referendumbycounty.html> (last visited Sept. 26, 2010).

5. *Perry*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

6. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), *available at* <http://www.gao.gov/new.items/d04353r.pdf>.

framework within which families make economic decisions. Third parties, especially private employers, also provide valuable economic benefits conditioned on marriage. Importantly, marriage also provides a legal framework that provides “indirect” economic benefits—not a direct financial benefit—on both a social and private level. Those private and public economic aspects of marriage provide support for the claim that being deprived of the right to marry constitutes economic deprivation for same-sex couples.

Second, the economic value of marriage to same-sex couples is evident in their decisions to get married when that option is available. The “demand for marriage” provides evidence of the value of marriage to same-sex couples. Various sources of data suggest same-sex couples are similarly situated to opposite-sex couples in their desire to marry and in the economic circumstances that make marriage an important economic institution. In Part III, I review these studies. In addition to demonstrating likely reasons for the demand for marriage among same-sex couples, these studies provide strong evidence that concerns about the harmful effects of same-sex marriage on heterosexual marriage are unwarranted.

The third source of evidence for the value of marriage concerns whether an alternative status with some or all of the legal rights and responsibilities of marriage—civil unions, civil partnerships, domestic partnerships, or registered partnerships—is an adequate substitute for marriage. In Part IV, I review the data on decisions by same-sex couples in the United States and other countries and show the data supports the view that same-sex couples value marriage much more highly than any existing alternative status. Thus, I conclude marriage has an added “value” to couples over marriage-like alternatives, giving the choice of marriage over an alternative an economic interpretation. An economic analogy might be the situation in which consumers see added economic value from purchasing a brand-name product over a less prestigious brand or generic version.

II. THE ECONOMIC VALUE OF MARRIAGE: THE PRACTICAL SIDE

On a very practical level, marriage provides economic benefits for married couples and their families in many direct and indirect ways. On a direct level, third parties, such as the state and employers, often provide benefits for the beneficial treatment of married couples. On an indirect level, marriage provides a legal framework for family life that promotes

interdependence and enhances economic efficiency for couples and families.⁷ Taken as a whole, the legal and economic benefits of marriage support the economic goals of efficiency and security for families. Same-sex couples who are not allowed to marry are deprived of these direct and indirect benefits of marriage.

A. Direct Benefits of Marriage

Married couples are often treated in an advantageous way by employers, the state, and sometimes other private sector entities, such as insurance companies. These institutional benefits derive from the recognition of marriage as a status that entitles—or even necessitates—benefits for a primary recipient's spouse. The lack of access to such benefits creates a substantial economic harm for same-sex couples.

1. Health Insurance Benefits

In the United States, employer-provided health insurance is one benefit of marriage often raised by proponents of same-sex marriage as well as proponents of domestic partner benefits. A 2008 poll found 73% of Americans “approve of extending health insurance and other employee benefits to [gay and lesbian domestic partners].”⁸ The importance of access to these health benefits is clear: the most common source of insurance for Americans is through employment.⁹

Some gay, lesbian, and bisexual people with same-sex partners are able to enroll their unmarried partners into their employer's healthcare plans as domestic partners, perhaps reducing their economic losses from not being allowed to marry. However, coverage for same-sex domestic partners is still relatively rare. In a 2009 survey of a random sample of employers, only 21% of firms offering health benefits to employees also reported covering same-sex domestic partners of employees.¹⁰ In contrast,

7. M.V. LEE BADGETT, WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE 178–80 (2009).

8. *A Gay Marriage Surge*, NEWSWEEK, Dec. 5, 2008, <http://www.newsweek.com/2008/12/04/a-gay-marriage-surge.html>.

9. CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & JESSICA C. SMITH, U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 23 (2009), available at <http://www.census.gov/prod/2009pubs/p60-236.pdf> (showing 58.5% of people “were covered by an employment-based health insurance plan for some or all of 2008”).

10. THE HENRY J. KAISER FAMILY FOUND. & HEALTH RESEARCH & EDUC. TRUST, EMPLOYER HEALTH BENEFITS: 2009 ANNUAL SURVEY 43 (2009), available at

almost all employers that provide coverage to employees are likely to offer benefits to employees' different-sex spouses. While surveys of employer benefits rarely ask about the number of employers offering spousal coverage, the rate of coverage is likely to be quite high based on informal discussions with health researchers and benefits consultants. One recent study in Massachusetts documents this clearly, finding that 93% of employers offering benefits to employees also cover different-sex spouses.¹¹ However, as noted above, rates of coverage of same-sex spouses are notably lower.

With less access through one partner's employer-provided coverage, a same-sex couple has two basic options for a partner who does not have access to his or her own coverage.¹² They can purchase coverage for the

<http://ehbs.kff.org/pdf/2009/7936.pdf>. Another 35% of firms surveyed said they did not offer such benefits to same-sex partners, and 44% reported such benefits were "Not Encountered/Not Applicable," a response included "to better capture the number of firms that report not having a policy on the issue." *Id.* The latter response was much more common for small employers—46%—than for large employers—6%. *Id.* The fact small employers were much less likely to offer benefits to same-sex partners than large firms—20% versus 36%—might reflect the fact most small firms are unlikely to have employees with same-sex partners at all, much less those who would seek benefits. *See id.* To see this, I first note firms were much more likely to offer benefits to different-sex unmarried partners, with 31% offering them—versus 21% offering benefits to same-sex partners. *Id.* at 42–43. The rates of "do not offer" were comparable for different-sex and same-sex partners—34% and 35%, respectively—but the "Not Encountered/Not Applicable" rate was much lower for different-sex partners than same-sex partners—36% versus 44%. *Id.* Furthermore, large employers had virtually identical rates of offering, not offering, and not applicable for same-sex and different-sex partners. *Id.* Therefore, it is possible the difference in offer rates for same-sex and different-sex partners seen in this data is simply the result of smaller firms not being asked for such benefits from same-sex partners as often as from different-sex partners, so the rate of *possible* coverage for same-sex partners—if coverage were requested—could be closer to 31%.

11. DIV. OF HEALTH CARE FIN. & POLICY, RESULTS FROM THE 2009 MASSACHUSETTS EMPLOYER SURVEY 6 (2010), *available at* http://www.mass.gov/Eeohhs2/docs/dhcfp/r/pubs/10/mes_results_2009.ppt. This study reports results from survey responses of 793 Massachusetts employers, excluding federal and state government employers and firms with fewer than three employees. *Id.* at 3. The rate of coverage of spouses was high even before recent healthcare reforms, ranging from 87% to 90% in biennial surveys from 2001–2007. *Id.* at 6.

12. Even if the uncovered partner qualifies for coverage through his or her own employer, the family might still have higher insurance costs, less coverage, or both, such as when the second spouse's employer coverage requires a higher premium from the employee than would be available with an employee-plus-one or employee-plus-family plan through the first partner's employer coverage.

partner on the private market or go without health insurance.

Pursuing the private market route to find comparable coverage for a partner would cost thousands of dollars since the family would pay the full premium. In 2009, the average annual premium for single-person coverage for a private employer was \$4,669, with the employee contributing, on average, only \$957—about 20% of the total—for that coverage.¹³ However, an employee's total out-of-pocket payments for individual coverage, including insurance premiums and other payments on the open market, is likely to be much higher than his or her employee share, and possibly even higher than the total premium for the employer.¹⁴

The individual policy premium average of \$2,985 for single coverage in 2009 was 36% less than the \$4,669 average premium for single coverage at a private employer.¹⁵ The fact that the individual policy premium was lower than the average premium paid by an employer suggests the coverage in individual plans was very likely to be inferior to employer-provided coverage. The individual policies come with higher deductibles than employer coverage, with an average of \$2,456 for the most common kind of single coverage—Preferred Provider Organization (PPO) or Point-of-Service (POS)¹⁶—compared to a much lower average of \$634 for employer-provided PPO and \$1,061 for employer-provided POS single coverage.¹⁷ Limits on out-of-pocket costs were also high, with an average of \$4,506 for single coverage for a PPO or POS,¹⁸ whereas 75% of workers enrolled in an employer-provided, PPO-single-coverage plan and 77% of workers enrolled in an employer-provided, POS-single-coverage plan have out-of-pocket costs less than \$3,000.¹⁹ Finally, in some cases, individuals might not be able to find coverage at all because only 87.3% of nonelderly applicants are offered coverage.²⁰

13. AGENCY FOR HEALTHCARE RESEARCH & QUALITY, 2009 MEDICAL EXPENDITURE PANEL SURVEY (2009), *available at* http://www.meps.ahrq.gov/mepsweb/data_stats/summ_tables/insr/national/series_1/2009/ic09_ia_g.pdf.

14. *See* CTR. FOR POLICY & RESEARCH, AMERICA'S HEALTH INSURANCE PLANS, INDIVIDUAL HEALTH INSURANCE 2009: A COMPREHENSIVE SURVEY OF PREMIUMS, AVAILABILITY, AND BENEFITS 5 (2009), *available at* <http://www.ahipresearch.org/pdfs/2009IndividualMarketSurveyFinalReport.pdf> (citing average annual premiums of \$2,985 for single coverage for nonelderly persons).

15. *Id.*

16. *Id.* at 16–17.

17. THE HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 100.

18. *See* CTR. FOR POLICY & RESEARCH, *supra* note 14, at 21.

19. THE HENRY J. KAISER FAMILY FOUND., *supra* note 10, at 118.

20. *See* CTR. FOR POLICY & RESEARCH, *supra* note 14, at 10. However, this

High premiums and out-of-pocket costs for those who could get individual coverage are likely to mean at least some individuals without employment-based insurance are unable to purchase it. Moreover, on the individual market, insurance that is provided often excludes preexisting conditions.²¹ Overall, few individuals who do not have offers of group insurance opt for individual coverage.²²

The seriousness of these disadvantages in accessing health insurance is evident in studies finding that people in same-sex couples are more likely to be uninsured than people in married different-sex couples. National data from 1996 to 2003 showed 20% of people in same-sex couples were uninsured, compared to only 11.5% of married individuals.²³ Anywhere from 30% to 43% of that gap can be accounted for by differential treatment of same-sex partners by employers.²⁴ A study analyzing the National Health Interview Survey also found that women in same-sex relationships were less likely to have health insurance than women in different-sex relationships, a difference that was statistically significant.²⁵ Men in same-sex relationships were less likely to have health insurance than men in different-sex relationships, but the difference “was of

figure does not account for the applicants who were turned down for nonmedical reasons or withdrew their applications for some reason. *Id.* at 9. Taking into account all applications for individual coverage shows about 73% are offered coverage. *Id.* at 9–10 (showing 83.9% of policies received went through the medical underwriting process, and 87.3% of those policies were offered). Also, offer rates drop considerably as the age of applicants rises. *Id.* at 11.

21. See generally THE HENRY J. KAISER FAMILY FOUND., HOW PRIVATE HEALTH COVERAGE WORKS: A PRIMER 2008 UPDATE (2008), available at <http://kff.org/insurance/upload/7766.pdf> (discussing how many private insurance plans exclude certain preexisting conditions for some period of time).

22. See THE HENRY J. KAISER FAMILY FOUND., HOW NON-GROUP HEALTH COVERAGE VARIES WITH INCOME 3–4 (2008), available at <http://www.kff.org/insurance/upload/7737.pdf> (showing coverage rates for nongroup adults by income levels).

23. Michael A. Ash & M.V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL’Y 582, 587–88 (2006).

24. *Id.* at 596.

25. Julia E. Heck, Randall L. Sell & Sherri Sheinfeld Gorin, *Health Care Access Among Individuals Involved in Same-Sex Relationships*, 96 AM. J. PUB. HEALTH 1111, 1111 (2006). This study combined married and unmarried different-sex couples. *Id.* at 1112. Because the rates of being insured are likely higher for married couples for the reasons discussed above, a comparison between men in same-sex couples and men in married different-sex couples might have revealed a larger and statistically significant gap between coverage for the two groups in the National Health Interview Survey.

borderline significance.”²⁶

Finally, attempts to equalize employer-provided benefits for same-sex couples through alternative legal statuses, such as civil unions or domestic partnerships, are likely to be limited. These limitations occur because states may only regulate some employers’ healthcare plans since federal law—ERISA—applies to self-insured employers. For instance, recent data show almost half of California employers do not provide coverage for unmarried same-sex partners. In a 2008 survey of California employers by the California HealthCare Foundation, only 56% of employers reported they offered healthcare benefits to unmarried same-sex couples who are domestic partners,²⁷ even though California law requires state-regulated health insurance plans offer equal benefits to domestic partners and spouses.²⁸

The important role of federal law in limiting benefits even for married same-sex couples is apparent in Massachusetts. In 2009, 93% of employers who offered health coverage to employees also covered different-sex spouses, but only 71% of those employers also covered same-sex spouses.²⁹ According to the Massachusetts Division of Health Care Finance and Policy, the most likely reason for differential-offer rates to same-sex spouses is the fact that some employers are self-insured and are therefore regulated by federal law rather than state insurance law.³⁰

2. *Federal Taxes*

The federal tax code disadvantages same-sex couples—both married and unmarried—with respect to income taxes, estate taxes, and gift taxes. In most family situations, those differences in treatment will increase the amount of taxes a same-sex couple will pay relative to otherwise identical married different-sex couples.

a. *Effect on federal income tax.* The first disadvantage in the federal income tax code comes from the treatment of employer-provided healthcare benefits for same-sex partners or spouses. The Defense of Marriage Act (DOMA) prevents the federal government from treating

26. *Id.* at 1113.

27. CAL. HEALTHCARE FOUND., CALIFORNIA EMPLOYER HEALTH BENEFITS SURVEY 7 (2008), *available at* <http://www.chcf.org/~media/Files/PDF/E/PDF%20EmployerBenefitsSurvey08.pdf>.

28. CAL. INS. CODE § 381.5 (West 2005 & Supp. 2010).

29. DIV. OF HEALTH CARE FIN. & POLICY, *supra* note 11, at 6.

30. *Id.*

same-sex married couples and same-sex unmarried couples the same as different-sex married couples in the federal tax code.³¹ In particular, the federal government does not tax employer contributions to a different-sex spouse's healthcare benefits.³² However, the federal government taxes the employer contribution to a same-sex spouse's or same-sex partner's benefits as if the contribution were cash income to the employee whose spouse is covered.³³ In addition, employees cannot pay for healthcare coverage of a same-sex spouse with pretax dollars.³⁴ A 2007 study shows the average person receiving benefits for a domestic partner or same-sex spouse is taxed \$1,069 in additional federal income and payroll taxes as a result of DOMA.³⁵ In most states, additional state income taxes would be due on the imputed income as well.

The second disadvantage for same-sex couples is that they cannot file taxes jointly. Many same-sex couples will pay higher federal income taxes because their marriages are not recognized. Using 2005–2007 American Community Survey data on same-sex couples in Massachusetts and 2009 federal income tax forms, schedules, and data provided by the IRS, I estimated taxes for same-sex couples in Massachusetts under two scenarios: if they filed jointly as a married couple and if they filed as two separate individuals. Comparing the two tax scenarios shows 66% of the same-sex couples in Massachusetts would pay, on average, \$2,325 less in federal taxes if they could avail themselves of the married-filing-jointly status. Another 11% of same-sex couples in Massachusetts would see no change in their federal income taxes if filing as married, and the remaining 23% would see an average increase in taxes of \$502.³⁶

31. See Defense of Marriage Act, 1 U.S.C. § 7 (2006) (defining marriage as “only a legal union between one man and one woman” and spouse as “a person of the opposite sex who is a husband or a wife”).

32. 26 U.S.C. §§ 106, 6013 (2006).

33. See M.V. LEE BADGETT, CTR. FOR AM. PROGRESS & THE WILLIAMS INST., *UNEQUAL TAXES ON EQUAL BENEFITS: THE TAXATION OF DOMESTIC PARTNER BENEFITS* 4 (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/UnequalTaxesOnEqualBenefits.pdf>. Under DOMA, the IRS will treat same-sex marriages as partnerships for tax purposes. See 1 U.S.C. § 7.

34. BADGETT, *supra* note 33, at 5.

35. See *id.* at 1 (stating the difference in insurance costs between married and unmarried individuals).

36. These simulations use total personal income in the American Community Survey as adjusted gross income for individuals and couples, and all income values are adjusted to 2009 dollars. I used 2007 IRS data for Massachusetts to estimate itemized deductions based on homeownership status, and I applied the higher of the estimated itemized deductions—adjusted 2009 dollars—or the standard deduction. The

This finding about the net effect of same-sex marriage on taxes appears to contradict other evidence in the literature. Some early studies found the income tax payments due from same-sex couples would rise if they filed jointly; in other words, marriage itself would increase income taxes, not the inability to marry.³⁷ That outcome of earlier studies echoed research on the so-called “marriage penalty” embedded in the United States income tax code, in which two individuals with similar incomes pay less in total taxes as single filers than they would if filing as married. Reconciling the findings in those two studies and in the previous paragraph requires examining the methods used in the other studies. The Alm et al. Study employed several scenarios for couples’ incomes rather than actual data on same-sex couples, finding higher taxes if filing jointly, and in most of the scenarios the incomes of the members of the couple were similar.³⁸

Likewise, the Congressional Budget Office (CBO) analysis of the fiscal impact of allowing same-sex couples to marry also found same-sex couples would pay more in taxes if they could marry. Unfortunately, the methods for making those tax calculations are not described in the CBO report, so it is difficult to know how the methods might have differed from the ones used in this Article. However, the similarity of the CBO and Alm Study findings suggests the CBO might have also used similar scenarios rather than data on individual couples.³⁹

The difference in methods is quite important since the income gap within couples is the primary driver of the marriage penalty—couples in which spouses have similar incomes are more likely to pay a marriage

householder of the couple in the American Community Survey was assigned “head of household” status and took the child exemptions and tax credits if children were living in the home; otherwise, both individuals in the couple were assigned a single status for the nonmarital simulations.

37. James Alm, M.V. Lee Badgett & Leslie A. Whittington, *Wedding Bell Blues: The Income Tax Consequences of Legalizing Same-Sex Marriage*, 53 NAT’L TAX J. 201, 201 (2000); see also CONG. BUDGET OFFICE, THE POTENTIAL BUDGETARY IMPACT OF RECOGNIZING SAME-SEX MARRIAGES 3 (2004), available at <http://www.cbo.gov/ftpdocs/55xx/doc5559/06-21-SameSexMarriage.pdf>.

38. Alm, Badgett & Whittington, *supra* note 37, at 203.

39. The CBO study found additional tax revenues would range from \$200 million to \$700 million, depending largely on which set of tax rates and brackets would be used over a ten-year period. CONG. BUDGET OFFICE, *supra* note 37, at 3. The Alm Study calculated additional taxes of \$261 million to \$1.3 billion, depending on the couple-income scenarios. Alm, Badgett & Whittington, *supra* note 37, at 210. The CBO report also cites the Alm Study, perhaps implying a similar methodology. CONG. BUDGET OFFICE, *supra* note 37, at 2 n.3.

penalty. Studies of Census data conducted since the other two studies were published show the income gap between same-sex partners is very close to the income gap seen in married different-sex couples. For instance, in the United States as a whole, Census 2000 shows an income gap between partners in same-sex couples of \$26,131, while between spouses in married different-sex couples there was a slightly larger gap of \$29,626.⁴⁰ In Massachusetts, the gap for same-sex couples was \$46,545—and \$55,648 for married different-sex couples—in more recent data from the American Community Survey.⁴¹ Therefore, it is not surprising that using the individual, couple-level data could lead to a very different conclusion from the earlier studies. Given the importance of the relative income of the two partners in a couple for the tax effect of marriage, the calculations given here are a more reliable prediction of the direction and magnitude of change, at least in Massachusetts.

b. *Estate tax.* The lack of federal recognition for same-sex marriages also has federal estate tax implications upon the death of a spouse. Transfers of unlimited assets from the estate of a deceased person to that person's spouse are tax-free, while transfers to a same-sex partner are taxed if the transfers exceed the current estate-tax-exclusion limit—\$3.5 million in 2009.⁴² In 2009, an estimated 73 same-sex couples nationwide would have been in this position and paid, on average, an additional \$3.3 million in estate taxes that would not have been due were those couples married.⁴³ Married same-sex couples with large estates will either be taxed more than comparable different-sex married couples, or the same-sex couples might be adversely affected by the need to purchase expensive estate-planning services to avoid incurring the additional estate taxes.

c. *Effect on other taxes and credits.* There are likely to be many other disadvantageous effects of the federal tax code on same-sex couples. For example, some married same-sex couples were not entitled to the \$8,000 first-time home buyer tax credit because these couples cannot use the higher modified, adjusted gross income limit allowed for married couples

40. ADAM P. ROMERO ET AL., THE WILLIAMS INST., CENSUS SNAPSHOT: UNITED STATES 3 (2007), *available at* <http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf>.

41. These numbers are the author's calculations.

42. MICHAEL D. STEINBERGER, THE WILLIAMS INST., FEDERAL ESTATE TAX DISADVANTAGES FOR SAME-SEX COUPLES 1 (2009), *available at* http://www.law.ucla.edu/williamsinstitute/pdf/EstateTax_FINAL_Nov2009.pdf.

43. *Id.* at 10.

that file jointly.⁴⁴

Gifts between partners might be subject to the federal gift tax. Situations that might lead to gift tax consequences include transferring property owned by only one partner—as when putting a partner or same-sex spouse on the deed to the family home—or making alimony payments after a divorce. Those gifts would not be taxable to a spouse but might count against the lifetime unified credit for the gift and estate tax, currently at \$345,800 and exempting up to \$1 million of gifts from the federal gift tax.⁴⁵ The federal gift tax also creates a planning burden for same-sex couples. The need to understand and minimize gift tax consequences is likely to create a need for hiring attorneys and accountants, creating a financial burden different-sex married couples would not have to bear.

3. *Social Security and other federal benefits.*

a. *Social Security.* The Social Security system provides a variety of benefits to spouses and surviving spouses of covered workers for retirement, disability, and survivor benefits. Same-sex couples—either married or unmarried—are deprived of these benefits, which are designed to assist couples in old age or in the event of death or disability because their marriages are not recognized under federal law. Notably, same-sex couples are deprived of these benefits even though individuals in these couples must pay into the Social Security program at the same rates as individuals in married different-sex couples.

According to the 2000 Census, 28% of same-sex couples in the United States had at least one partner with a disability.⁴⁶ In addition, 7% of same-sex couples had one partner 65 or older.⁴⁷ Because same-sex couples cannot marry—or because their marriages are not recognized at the federal level—some of these older, married, same-sex couples, or couples with a disabled partner, will be put at a considerable financial disadvantage when one partner retires, dies, or becomes disabled.

Upon retirement, a married Social Security recipient is entitled to the

44. See, e.g., IRS.gov, Topic 611—First-Time Homebuyer Credit—Purchases Made in 2008, <http://www.irs.gov/taxtopics/tc611.html> (last visited Sept. 24, 2010) (illustrating the modified adjusted gross income (MAGI) phaseout is \$75,000 to \$95,000 for individual filers and \$150,000 to \$170,000 for joint filers).

45. IRS, U.S. DEP'T OF THE TREASURY, INTRODUCTION TO ESTATE AND GIFT TAXES 4–5 (2009), available at <http://www.irs.gov/pub/irs-pdf/p950.pdf>.

46. ROMERO ET AL., *supra* note 40, at 2.

47. *Id.*

larger of either his or her own retirement benefit or one-half of his or her covered spouse's retirement benefit.⁴⁸ In the United States, the average monthly spousal retirement benefit was \$568.50 in December 2008, or \$6,822 per year.⁴⁹ Same-sex couples—married or not—are not eligible to receive this spousal benefit at all, and some would instead receive a lower payment based only on their own earnings record.

On the death of a retired spouse, the surviving spouse receives the deceased spouse's benefit if it is greater than the survivor's own Social Security retirement benefit. In same-sex-couple households in which both same-sex partners are over 65 and receive Social Security benefits, the average difference between the two partners' benefits alone is \$5,700 per year.⁵⁰ If the higher earning partner were to die, the surviving same-sex spouse or partner would lose the higher earner's entire Social Security payment and continue to receive only his or her own lower payment.⁵¹ Thus, the failure to recognize the marriages of same-sex couples could cost approximately half of the surviving members of such couples thousands of dollars a year in lost Social Security payments.

Social Security also provides a survivor benefit to some widows and widowers whose spouses have paid into the system but have not yet retired. According to the Social Security Administration, a surviving spouse is eligible not only for a \$255 lump-sum benefit on the death of a covered worker,⁵² but he or she is also provided with survivor benefits that can be

48. See Social Security Online, Retirement Planner: Benefits for Your Spouse, <http://www.ssa.gov/retire2/yourspouse.htm> (last visited Sept. 24, 2010) (noting if a person is eligible to receive both his or her own retirement benefits and his or her spouse's benefits, the recipient "will get a combination of benefits that equals that higher amount").

49. See Office of Retirement and Disability Policy, U.S. Social Security Administration, Annual Statistical Supplement, 2009: Old-Age, Survivors, and Disability Insurance, <http://www.ssa.gov/policy/docs/statcomps/supplement/2009/5j.html> (last visited Sept. 26, 2010) (calculating amounts using data from Tables 5.J2 and 5.J4).

50. NAOMI G. GOLDBERG, THE WILLIAMS INST., THE IMPACT OF INEQUALITY FOR SAME-SEX PARTNERS IN EMPLOYER-SPONSORED RETIREMENT PLANS 9 (2009), available at http://www.law.ucla.edu/williamsinstitute/pdf/RetirementAnalysis_Final.pdf (stating the difference between female same-sex couples is \$5,700, and it is \$5,767 between male same-sex couples).

51. *Id.*

52. U.S. SOC. SEC. ADMIN., SURVIVORS BENEFITS 7 (2009), available at <http://www.socialsecurity.gov/pubs/10084.pdf> (stating there is a one-time, lump-sum death benefit of \$255 available to a spouse or child provided the deceased worked long enough).

worth as much as a \$433,000 life insurance policy to a young family.⁵³ Because their marriages are not recognized, members of married same-sex couples are not allowed this survivor benefit at all, nor are they eligible for the lump-sum benefit.

If a covered worker becomes disabled, his or her spouse—if 62 or older—receives a benefit of one-half the disabled recipient's Social Security benefit. In December 2008, the average spousal disability benefit in Massachusetts was \$265 per month, or \$3,180 per year.⁵⁴ Again, members of same-sex couples are not allowed this spousal disability benefit at all.

b. *Benefits for federal employees.* Active and retired federal employees who cannot marry a same-sex partner—and have that marriage recognized by the federal government—are deprived of valuable employment benefits. A recent analysis of data from the 2005–2006 American Community Survey shows there are more than 34,000 active federal employees who are members of same-sex couples.⁵⁵ Most of them—approximately 88.5%—have same-sex partners who are not federal employees, thus making them ineligible for federal benefits unless federal law is changed.⁵⁶ Thus, overall, more than 30,000 federal employees could benefit from being allowed to marry and gain access to the same benefits granted to federal employees married to a different-sex spouse.

The Federal Employee Health Benefits Program (FEHBP) provides healthcare coverage to federal employees, retirees, and their different-sex spouses, but not to same-sex spouses.⁵⁷ The federal government subsidizes

53. See NAT'L ACAD. OF SOC. INS., *SOCIAL SECURITY: AN ESSENTIAL ASSET AND INSURANCE PROTECTION FOR ALL* 5–6 (2008) (calculating benefits provided upon the death of a 30-year-old worker with a 28-year-old spouse, a 2-year-old child, an infant, and a salary of \$25,000 to \$30,000 per year); U.S. SOC. SEC. ADMIN., *supra* note 52, at 7.

54. Office of Retirement and Disability Policy, U.S. Social Security Administration, OASDI Beneficiaries by State and County, 2008—Massachusetts, http://www.ssa.gov/policy/docs/statcomps/oasdi_sc/2008/ma.html (last visited Sept. 24, 2010) (calculating amounts using data from Tables 4 and 5).

55. NAOMI G. GOLDBERG, CHRISTOPHER RAMOS & M.V. LEE BADGETT, *THE WILLIAMS INST., THE FISCAL IMPACT OF EXTENDING FEDERAL BENEFITS TO SAME-SEX DOMESTIC PARTNERS* 3 (2008), available at http://www.law.ucla.edu/Williamsinstitute/publications/S2521FiscalAnalysis_WilliamsInst.pdf.

56. See *id.*

57. See *id.* at 4 (“[T]he federal government does not currently recognize the same-sex partners of federal employees . . .”). Under current federal law, same-sex spouses are not recognized as spouses.

coverage for federal employees and their families.⁵⁸ For the employee-plus-family level of benefits, the federal government contributed an average of \$4,600 for nonpostal employees and \$5,400 for postal employees in 2008.⁵⁹ Federal employees with same-sex partners may spend thousands of dollars for the coverage they would have received through the FEHBP. As noted earlier, actual healthcare costs might be even higher in comparison to FEHBP coverage because the coverage available through other sources may have lower levels of coverage, such as higher copayments or deductibles.

A lesbian, gay, or bisexual federal employee cannot enroll same-sex partners or spouses in the Federal Employee Dental and Vision Insurance Program. This program is not subsidized for employees or spouses, but might still be valuable for employees' family members, especially because premiums can be paid with pretax dollars, reducing the cost of the insurance.⁶⁰

Federal employees' retirement benefits in the Federal Employees Retirement System (FERS) include a defined-benefit plan that allows retirees who are married to a different-sex partner—but not to a same-sex partner—to opt for a survivor annuity option.⁶¹ In that case, the retiree takes a smaller retirement-benefit payment while alive so his or her spouse can continue to receive an annuity payment after the retiree dies. However, an employee cannot designate a same-sex partner or spouse as a survivor in this plan.

In addition, FERS includes death and survivor benefits for system members if the employee dies before retirement and has at least 18 months of service, payable to a qualifying current or former spouse.⁶² A surviving different-sex spouse, but not a same-sex spouse or partner, would receive a lump-sum payment—currently more than \$28,000—plus the higher of one-half the employee's annual pay rate at death or one-half of the highest

58. *Id.*

59. *See id.* at 5 (citing data from Table 2 concerning additional healthcare costs for adding same-sex partners and children).

60. *See* U.S. OFFICE OF PERS. MGMT., 2010 GUIDE TO FEDERAL EMPLOYEES DENTAL AND VISION INSURANCE PROGRAM FOR UNITED STATES POSTAL SERVICE EMPLOYEES (INCLUDING LAW ENFORCEMENT) 3 (2009), *available at* <http://www.opm.gov/insure/health/planinfo/2010/guides/FEDVIP%20BK-1.pdf>.

61. *See* U.S. Office of Personnel Management, Deceased Employee/Former (CSRS/FERS Employees), <http://www.opm.gov/retire/pre/death/index.asp> (last visited Sept. 24, 2010) (discussing benefits payable under FERS).

62. *Id.*

annual pay, averaged over 3 consecutive years of service.⁶³ Qualifying different-sex spouses of deceased employees with at least 10 years of service are also eligible for monthly survivor benefits.⁶⁴

Federal, state, and local public safety officers are covered by the federal Public Safety Officers' Benefits Program.⁶⁵ If a married public safety officer dies from an injury sustained on duty, his or her different-sex spouse receives a lump-sum death benefit and may be eligible for education benefits.⁶⁶ However, a same-sex spouse would not receive that benefit, which is currently \$311,810.⁶⁷ A public safety officer with a same-sex partner or spouse would need to purchase extra life insurance to provide the same level of benefit, an expense that would not be necessary for a similarly situated public safety officer with a different-sex spouse.

c. *Retirement plan treatment.* When people in same-sex couples retire from their jobs, they are treated differently than married different-sex spouses. Since defined-benefit retirement plans are regulated by federal law,⁶⁸ those plans are not required to recognize the rights of a same-sex spouse or partner to a qualified preretirement survivor annuity (QPSA) or to a qualified joint and survivor annuity (QJSA).⁶⁹ Defined-contribution plans and IRAs also treat same-sex partners differently. When one spouse dies, a surviving different-sex spouse can roll over the deceased spouse's IRA or 401(k) plan into his or her own account and defer taking withdrawals until he or she reaches 70.5 years of age.⁷⁰ In contrast, a

63. *Id.*

64. *Id.*

65. See Bureau of Justice Assistance, Public Safety Officers' Benefits Program: Death Benefits, http://www.ojp.usdoj.gov/BJA/grant/psob/psob_death.html (last visited Sept. 24, 2010).

66. *Id.* (follow "Educational Assistance Benefits" hyperlink).

67. See BUREAU OF JUSTICE ASSISTANCE, AMOUNT OF PSOB DEATH AND DISABILITY BENEFITS, <http://www.ojp.usdoj.gov/BJA/grant/psob/PSOBPaymentAmounts.pdf>.

68. See, e.g., Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2006).

69. See PRUDENTIAL INS. CO. OF AM., PENSION ANALYST: SAME-SEX MARRIAGE LAWS PRESENT CHALLENGES FOR RETIREMENT PLAN SPONSORS 3 (2009), <http://www.prudential.com/media/managed/SameSex2009-PruPA-0909.pdf> ("Sponsors of retirement programs that are subject to ERISA are technically only required to comply with federal DOMA rules when identifying participants' spouses for various plan purposes.").

70. See LAMBDA LEGAL, TAX CONSIDERATIONS FOR SAME-SEX COUPLES (2010), available at http://data.lamdalegal.org/publications/downloads/fs_tax-considerations-for-same-sex-couples.pdf.

surviving same-sex spouse or partner is allowed to set up a “non-spousal roll-over” into an inherited IRA, but he or she must start taking distributions right away, regardless of the age of that surviving partner.⁷¹ Thus, planning for the financial health of a surviving same-sex spouse will be constrained in ways not faced by different-sex spouses.

d. *Lower transaction costs.* If same-sex couples could marry, they could reduce transaction costs when they own or purchase property together because third parties, such as mortgage brokers, may be confused about the relationship. In some situations, same-sex couples might need to hire an estate-planning attorney to assess the best way to take title to jointly purchased property given the lack of recognition of the marriage in estate tax law.

And as noted earlier, income tax planning may also be more complicated for some same-sex couples because they cannot marry. Same-sex couples who are married are also likely to incur additional transaction costs because the federal government does not recognize their marriage, particularly with respect to federal taxation. Married same-sex couples might have to seek the advice of attorneys and accountants to understand the inconsistencies in state and federal tax law, to avoid making mistakes on tax forms, and to avoid making financial decisions that will create costly federal tax disadvantages. At the very least, married same-sex couples must fill out two separate federal tax returns, one as a married couple to use for filling out their state income tax forms and two as single individuals to file officially. As a result, some couples spend many extra hours on their tax preparation. Some same-sex couples may spend hundreds or thousands of dollars in legal fees and accounting services. If the federal government recognized same-sex marriages, many of these transaction costs would be reduced or eliminated.

4. *Citizenship Preferences*

In almost 36,000 same-sex couples, only one of the partners is a United States citizen.⁷² If those binational couples were married and their marriages were federally recognized, the partner who is not a citizen would become eligible for conditional permanent residence status if he or she

71. *Id.*

72. See GARY J. GATES, THE WILLIAMS PROJECT ON SEXUAL ORIENTATION LAW & PUB. POLICY, BI-NATIONAL SAME-SEX UNMARRIED PARTNERS IN CENSUS 2000: A DEMOGRAPHIC PORTRAIT 17 (2000), available at http://www.law.ucla.edu/WilliamsInstitute/publications/Binational_Report.pdf.

does not already have such status.⁷³ In addition, they would not be subject to numerical limitations on immigration under federal law.⁷⁴ Furthermore, spouses are eligible for citizenship after three years, compared to five for other immigrants.⁷⁵

The inability to receive the favored immigration status causes economic harm in several ways. Noncitizen partners without lawful permanent residence status may need to return to their home countries for extended periods of time, requiring costly travel expenses. These extended visits may hinder the occupational advancement of either or both individuals, reducing earnings over the course of a lifetime. Couples may decide to relocate to countries that will legally recognize their status for immigration purposes. Relocation can be costly in direct moving costs, as well as in loss of earnings. Finally, those mixed-citizenship couples may require expensive legal counsel to understand and enhance their legal options.

5. *Summing It Up*

Being deprived of these direct financial advantages of marriage can be quite expensive for same-sex couples. A recent study by two *New York Times* reporters illustrates the potentially large losses same-sex couples experience because they cannot marry.⁷⁶ With the help of social scientists and financial professionals, the journalists carefully calculated the lifetime added expenses related to healthcare, taxes, and transaction costs—such as attorney and accountant fees—for two people in a same-sex couple in New York who are 30 to 40 years old, college-educated, have \$140,000 in income, and have children.⁷⁷ The reporters posed two detailed scenarios, which they termed a “best case”—in which each member earned \$70,000 per year—and a “worst case”—in which one earned \$110,000 and the other \$30,000—from the perspective of the financial impact of *not* being married.⁷⁸ Over a 46-year relationship, their worst-case couple lost

73. 8 U.S.C. § 1186a (2006).

74. § 1151(b)(2).

75. See U.S. Citizenship and Immigration Services, Citizenship through Naturalization, <http://www.uscis.gov/portal/site/uscis/> (follow “Citizenship Through Naturalization” hyperlink) (last visited Sept. 24, 2010).

76. Tara Siegel Bernard & Ron Lieber, *The High Price of Being a Gay Couple*, N.Y. TIMES, Oct. 3, 2009, at A1, available at <http://www.nytimes.com/2009/10/03/your-money/03money.html>.

77. *Id.*

78. *Id.*

\$467,562 worth of financial benefits of marriage, and the best-case couple lost \$41,196.⁷⁹

Of course, these two scenarios of high-income couples might not be representative of the costs borne by the average same-sex couple—although the range is plausible for higher income couples who can afford to try to replace lost benefits. In other cases, less fortunate same-sex couples might instead face more serious disadvantages. For instance, a worse financial situation would be faced by low-income couples who could not afford to purchase individual health insurance for an uninsured partner. A serious illness that is expensive to treat could send that family into a financial tailspin, leading to large amounts of debt or bankruptcy. The scenarios also do not take into account the less common expenses incurred by binational couples or federal employees that could be substantial over a lifetime.

A recent survey of people married to a same-sex spouse provides some sense of the importance of the economic protections of marriage—and of the noneconomic value of marriage for these couples.⁸⁰ This survey of 558 individual members of same-sex couples who had married in Massachusetts before May 2009 revealed many benefited from the legal aspects of marriage.⁸¹ Almost one-half—48%—said they worried less about legal problems as a result of being married.⁸²

However, married same-sex couples still experience significant economic harm as a result of the lack of access to federal benefits and, in particular, the lack of recognition of their marriages for tax purposes. Although the survey did not specifically ask questions about federal benefits, several respondents volunteered information in open-ended responses to a question about the effect of marriage on the individual and his or her spouse. The actual responses below—which were edited to remove typographical errors and other comments not related to federal benefits—demonstrate the incomplete nature of the legal protections afforded same-sex couples by marriage:

79. *Id.*

80. CHRISTOPHER RAMOS, NAOMI G. GOLDBERG & M.V. LEE BADGETT, THE WILLIAMS INST., THE EFFECTS OF MARRIAGE EQUALITY IN MASSACHUSETTS: A SURVEY OF THE EXPERIENCES AND IMPACT OF MARRIAGE ON SAME-SEX COUPLES 1 (2009), available at http://www.law.ucla.edu/Williamsinstitute/publications/Effects_FINAL.pdf.

81. *Id.* at 2, 6.

82. *Id.* at 6.

- We worry more about federal legal and federal financial issues.
- More financially entangled. Taxes changed—having to do extra tax forms because the federal government does not recognize the marriage.
- In terms of wills and inheritance tax, it made things a bit easier, but only on the state level, but you take what you can get.
- My biggest concerns on a legal level were the protections offered for inheritance to my spouse. We still have issues with name change (my husband took my last name) when it comes to federal taxes and documentation like passports.
- We are glad to be married in Massachusetts, but it is confusing as to when and where this applies . . . i.e., federal situations, when my retirement plan is regulated by a company in another state, etc.
- I wish I could say we are more legally secure, but since there is no federal recognition of our relationship, we are forced to commit perjury every time we file taxes—single for federal and married for state, or, so as not to raise flags, single for both.
- We already considered ourselves married and never thought we would see same-sex marriage in our lifetimes. Both of us are federal employees and so we still cannot receive each other's benefits.⁸³

The exercise of summing up the financial disadvantages of being unable to marry, and to have that marriage recognized at the federal level, illustrates the buildup of economic losses over time. The tens or hundreds of thousands of dollars lost could have funded a retirement account, a home purchase, or higher education for a couple's children. Instead, same-sex couples must pay a hefty financial penalty for the fact they cannot marry in forty-five states and cannot have marriages from the other five and the District of Columbia recognized at the federal level.

B. *Indirect Benefits of Marriage Within the Family*

Calculating only the most direct and obvious financial benefits of marriage, as in the last section, would leave out some of the most important economic purposes of marriage. In general, marriage provides a legal framework for living an interdependent economic life, although that

83. Unpublished survey responses are on file with the author.

framework might not necessarily register as “economic” in the minds of couples who marry.⁸⁴ The importance of that framework to a couple’s economic life is clear to economists, however. Through marriage, couples can buy property together and other household goods knowing each member of the couple has ownership rights. If the worst should happen, that is, if one spouse dies or the relationship dissolves, the ownership rights would be clear. Thus, the contractual nature of marriage facilitates a more efficient use of time and money resources for families than is available to unmarried couples.

More specifically, marriage can enhance a couple’s economic efficiency in several ways:

Promoting Specialization of Labor: Nobel Prize-winning economist Gary Becker has argued the marriage contract allows for increasing household efficiency.⁸⁵ Partners pool time and money and then divide their labor in ways that increases the family’s productivity in producing goods and services for family members. Without the presumed long-term nature of the relationship that marriage implies, as well as the division of marital property and the possibility of alimony if a marriage ends, specialization by either party would not necessarily be efficient for individuals in the long-term. For instance, marriage gives couples the economic security to make decisions about education and labor force participation knowing one spouse can provide the primary economic support if the other can contribute less cash income to the family. If the relationship ends, a spouse who has sacrificed some earning potential may be eligible for alimony and a share of marital or community property to compensate him or her for those financial losses.

Reducing Transaction Costs: As noted earlier in some of the specific examples, marriage also promotes economic efficiency by reducing transaction costs for couples, mainly by removing the need to renegotiate the terms of the legal relationship as couples experience changed circumstances.⁸⁶ Marriage acts as a standard contract that is particularly

84. Many same-sex couples I interviewed in the Netherlands explicitly characterized their marriage decision as having nothing to do with economics, even though some of the practical concerns they raised would be seen as economic by an economist.

85. See GARY S. BECKER, *A TREATISE ON THE FAMILY* 14–18 (1981) (discussing how the long-term nature of the marriage contract encourages specialization by household members in order to optimize efficiency).

86. See generally Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 J. ECON. LITERATURE 581 (1985) (advocating the use of the

important in specifying the distribution of marital property and custody of children if the marriage ends by death or divorce. For instance, because marriage is a long-term relationship, spouses need not renegotiate the terms of the legal relationship if their economic situation or health changes.

Providing Social Insurance: Marriage also facilitates wealth and income pooling across individuals and within families, which provides insurance against bad times such as a disability, death, or the loss of a job.

Taking Advantage of Economies of Scale: By encouraging larger household sizes, marriage helps families take advantage of economies of scale. In other words, doubling the number of people in a household does not double the amount of work needed to operate that household.⁸⁷

Signaling Commitment: In addition, the willingness to marry is an important signal of commitment to a relationship. Through the decision to marry, each partner signals greater effort to maintain the relationship, a greater likelihood the relationship will endure, and an agreement to make a fair settlement if, despite the good intentions of the parties, the relationship should end. The commitment to a long-term relationship, and the rules for distribution of assets and income should the relationship end, underlie the specialization, transaction costs, and social insurance functions of marriage.

Promoting the Provision of Caring Labor: The long-term nature of the marital commitment promotes reciprocity and altruism, as partners take care of one another and any children they might be raising together.⁸⁸ The unpaid work done in families is essential for the survival of healthy human beings.

Same-sex couples who are denied the right to marry are deprived of the enhanced economic efficiency and security that might result from the institution of marriage. The inability to access those benefits constrains the options available to married same-sex couples when they make important life decisions related to child-rearing, labor force participation, retirement savings, and education. Those constraints may make same-sex married couples economically worse off than different-sex married couples, either because: (1) same-sex married couples purchase costly and imperfect

transaction cost approach when studying families and households).

87. See Julie A. Nelson, *Household Economies of Scale in Consumption: Theory and Evidence*, 56 *ECONOMETRICA* 1301, 1301–02 (1988).

88. See Nancy Folbre, “*Holding Hands at Midnight*”: *The Paradox of Caring Labor*, 1 *FEMINIST ECON.* 73, 74 (1995).

substitutes for lost benefits; (2) the constraints lead them to make choices that make their families economically worse off than they would be if their marriages were recognized; or (3) they make similar choices as would married different-sex couples but are placed in an economically vulnerable position because they are deprived of economic protections from marriage. Putting a dollar value to those benefits of marriage is impossible, but the long-run value to particular families could be substantial, as the earlier discussion of more detailed practical benefits of marriage makes clear.

III. THE DEMAND FOR MARRIAGE BY SAME-SEX COUPLES

From an economic perspective, another way of measuring the value of marriage is to look at the demand for marriage by same-sex couples in the rare situations in which gay couples *can* marry. Some opponents of giving same-sex couples the right to marry have claimed the demand for marriage is generated by a small fraction of the lesbian and gay population.⁸⁹ However, that study's only data point in the United States was from one year of marriage for same-sex couples in Massachusetts.⁹⁰ Now that we have more data from Massachusetts and additional states, it is clear that study dramatically underestimated the demand for marriage by same-sex couples. More recent data suggest a very strong demand for marriage by same-sex couples.

The most direct evidence is tens of thousands of same-sex couples have married. One relatively recent study documented the marriage of more than 31,000 same-sex couples across the United States.⁹¹ Since that study, Iowa, Vermont, New Hampshire, and the District of Columbia have opened up marriage to same-sex couples, making 31,000 a conservative estimate. Furthermore, that total does not include marriages formalized in other countries.

As a proportion of couples, those figures are also high, at least to the extent it is possible to compare data for various states.⁹² In Massachusetts,

89. See Maggie Gallagher & Joshua K. Baker, *Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe*, 3 INST. FOR MARRIAGE & PUB. POL'Y 1, 7 (2006) (citing survey results from various countries showing between 1% and 5% of gays and lesbians have entered into same-sex unions).

90. *Id.* at 5–6.

91. GARY J. GATES, THE WILLIAMS INST., SAME-SEX SPOUSES AND UNMARRIED PARTNERS IN THE AMERICAN COMMUNITY SURVEY, 2008, at app. tbl.2 (2009), available at <http://www.law.ucla.edu/WilliamsInstitute/pdf/ACS2008FullReport.pdf>.

92. Looking at the proportion of couples who have married is a more reliable

from 2004 to 2009, the number of married same-sex couples accounted for 67% of that state's same-sex couples in 2008.⁹³ In Connecticut, 2,109 same-sex couples had entered civil unions by June 2009—after a dramatic drop-off into the single digits when same-sex couples could marry beginning in November 2008.⁹⁴ From November 2008 to June 2009, 753 in-state couples married.⁹⁵ Because Connecticut's civil unions can be converted into marriages beginning October 1, 2010,⁹⁶ there are, in effect, 2,862 married same-sex couples—or 42% of that state's 6,865 same-sex couples counted in 2008⁹⁷—after only seven months of the right to marry.⁹⁸ Finally, in a six-month window between the California Supreme Court decision allowing same-sex couples to marry and the rescission of that right by voters approving Proposition 8, approximately 18,000 same-sex couples married in California.⁹⁹ An estimated 3,746 of these couples were nonresidents, meaning 14,384 couples¹⁰⁰—or 17% of the 84,397 same-sex couples in California in 2008¹⁰¹—got married in only six months.

statistic to use for comparisons with the heterosexual demand for marriage. We have much better data on the number of same-sex couples by state than we do for the number of lesbian and gay people by state. Also, differences in the estimates of the proportion of lesbians and gay men who are married compared to heterosexuals who are married would conflate potential differences in partnership rates with differences in marriage rates.

93. The Massachusetts Department of Public Health recorded 15,214 marriages by same-sex couples by October 2009, and 2,063 of those marriages were of two nonresidents of Massachusetts, implying 13,151 marriages of intrastate couples. *See* Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 239 (D. Mass. 2010); E-mail from Jonathan Miller, Attorney Gen., Massachusetts, to M.V. Lee Badgett, Dir., Ctr. for Pub. Policy & Admin., Univ. of Mass. Amherst (Feb. 12, 2010) (on file with author). I divided 13,151 by the 19,550 same-sex couples counted in Massachusetts in 2008. *See* GATES, *supra* note 91, at app. tbl.2.

94. E-mail from David Antolini, Health Program Supervisor, Conn. Dep't of Pub. Health, to Christopher Ramos, Research Assistant, The Williams Inst. (Sept. 29, 2009) (on file with author); E-mail from David Antolini, Health Program Supervisor, Conn. Dep't of Pub. Health, to Christopher Ramos, Research Assistant, The Williams Inst. (Sept. 15, 2009) (on file with author).

95. *Id.*

96. CONN. GEN. STAT. ANN. § 46b-38qq(a) (West Supp. 2010).

97. GATES, *supra* note 91, at app. tbl.2.

98. On October 1, 2010, the law allowing civil unions was repealed. *See* CONN. GEN. STAT. ANN. §§ 46b-38aa to -38oo (West Supp. 2010).

99. These figures are from an unpublished update to THE WILLIAMS INST., RESEARCH NOTE: SAME-SEX MARRIAGES IN CALIFORNIA (2008), *available at* <http://www.policyarchive.org/handle/10207/bitstreams/10872.pdf>.

100. *Id.*

101. GATES, *supra* note 91, at app. tbl.2.

Surveys assessing lesbian, gay, and bisexual (LGB) individuals' interest in marriage confirm that interest is widespread in the LGB community. An online survey of 748 LGB adults in 2003 conducted by Harris Interactive and Witeck-Combs Communications asked about the marriage intentions of respondents, regardless of partnership status.¹⁰² That survey found 78% said they would want to get legally married if they were in a committed relationship.¹⁰³ A multivariate analysis of the data showed the likelihood of wanting to marry was significantly higher for younger and less educated people than for the average lesbian, gay, bisexual, and transgender (LGBT) respondent.¹⁰⁴ An earlier 2001 survey of 405 self-identified American LGB respondents from 15 major urban areas found almost three-quarters—74%—would like to marry someday.¹⁰⁵ Finally, a survey of LGB teens in the New York area also found enthusiasm for marriage.¹⁰⁶ In that more geographically and age-limited survey, the proportion of individuals reporting they are at least somewhat likely to marry a same-sex partner was quite high: 79% of the young men and 96% of the young women.¹⁰⁷

A high level of demand for marriage by same-sex couples is not surprising given the characteristics of those couples. The available evidence, available below, indicates, like different-sex couples, same-sex couples wish to marry for reasons having to do with establishing a long-term commitment to one another, demonstrating commitment to families and communities, and establishing a legal bond that helps solve the practical issues related to living a joint economic life together.

Many same-sex couples are raising children, and marriage equality opponents say children are important for marriage. The legal and social

102. See Patrick J. Egan & Kenneth Sherrill, *Marriage and the Shifting Priorities of a New Generation of Lesbians and Gays*, 38 PS: POL. SCI. & POL. 229, 230–31 (2005).

103. *Id.* at 230.

104. *Id.* at 231.

105. THE HENRY J. KAISER FAMILY FOUND., *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* 4, 11–12 (2001), available at <http://www.kff.org/Kaiserpolls/upload/New-Surveys-on-Experiences-of-Lesbians-Gays-and-Bisexuals-and-the-Public-s-Views-Related-to-Sexual-Orientation-Report.pdf>.

106. See Anthony R. D'Augelli et al., *Lesbian and Gay Youth's Aspirations for Marriage and Raising Children*, 1 J. LGBT ISSUES IN COUNSELING 77, 82–83, 90 (2008).

107. *Id.* at 90. Possible responses were: extremely likely, very likely, somewhat likely, and unlikely. *Id.*

aspects of marriage provide more security for couples raising children together, and same-sex couples with children—or who want or plan to have children—would also benefit from the added security provided by marriage. According to the most recent American Community Survey, 20.5% of same-sex couples were raising children.¹⁰⁸ Census 2000 data for California showed 18% of same-sex couples were raising children under the age of 18.¹⁰⁹ The 2008 American Community Survey also allows us to distinguish same-sex couples who report being unmarried partners from those who report being spouses.¹¹⁰ Of the same-sex couples who think of themselves as married, 30.5% are raising children, compared to 17% of same-sex unmarried partners.¹¹¹ That finding suggests a clear link between marriage and raising children in the minds of same-sex couples. Other data shows many more lesbians and gay men would like to raise children: 41% of lesbians and 52% of gay men report wanting to have children, compared to 54% of heterosexual women and 67% of heterosexual men.¹¹² Data from Massachusetts suggest some married same-sex couples decided to have children only because they could marry.¹¹³ Many other lesbians and gay men say they would like to have children someday.¹¹⁴

Other evidence suggests same-sex couples are economically interdependent in ways and to an extent similar to different-sex couples. For example, average income disparities within couples in California are substantially the same for same-sex couples—\$34,293—and married different-sex couples—\$33,190.¹¹⁵ Such disparities within couples reflect (at least in part) economic decisions such as hours worked, the degree of labor force participation, and time spent with children. The proportion of couples raising children who have just one partner working in the paid labor force is almost the same proportion for same-sex couples—36.2%—

108. See GATES, *supra* note 91, at app. tbl.1.

109. ADAM P. ROMERO ET AL., THE WILLIAMS INST., CENSUS SNAPSHOT: CALIFORNIA 2 (2008), available at <http://www.law.ucla.edu/williamsinstitute/publications/CaliforniaCensusSnapshot.pdf>.

110. See GATES, *supra* note 91, at 8, app. tbl.1.

111. See *id.*

112. GARY J. GATES ET AL., THE WILLIAMS INST. & THE URBAN INST., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5 (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf>.

113. See RAMOS, GOLDBERG & BADGETT, *supra* note 80, at 5–6 (citing impact of marriage on same-sex couples and decisions regarding their children).

114. GATES ET AL., *supra* note 112, at 3.

115. See ROMERO ET AL., *supra* note 109, at 2.

and married different-sex couples—38.8%.¹¹⁶

National-level data show similar patterns for same-sex and different-sex couples, supporting the idea that same-sex couples will have the same incentives to marry as different-sex couples. Jepsen and Jepsen also show same-sex and different-sex couples have similar patterns of positive assortative mating—or people pairing off with partners who have similar characteristics—in wages, education, age, and investment income.¹¹⁷ The same study found “same-sex couples are indistinguishable from opposite-sex couples with respect to the labor-market trait of hourly earnings” when assessing assortative mating on that characteristic.¹¹⁸

Enormous changes in women’s economic lives have contributed to the similarities between different-sex and same-sex couples’ household situations. Men’s and women’s labor force participation and wages have been steadily converging over time, and women earn more than men in roughly a quarter of marriages.¹¹⁹ Both spouses work in the labor market in most married different-sex couples, just as in most same-sex couples.¹²⁰ The evidence of significant variation around, and departure from, the traditional male breadwinner–female stay-at-home mother form of marriage makes clear that an assumption of a traditional ideal is a weak basis for any conclusion about which groups should and should not be permitted to marry. The evidence suggests similarities between same-sex and different-sex couples extend to both the intention and, whenever possible, the reality of marrying.

Finally, it is worth noting that this evidence of the similarity in structure, goals, and needs of same-sex and different-sex couples provides strong evidence against the claims of critics of same-sex marriage, such as Douglas Allen.¹²¹ Indeed, the studies summarized above suggest the critics

116. *Id.* at 3.

117. Lisa K. Jepsen & Christopher A. Jepsen, *An Empirical Analysis of the Matching Patterns of Same-Sex and Opposite-Sex Couples*, 39 DEMOGRAPHY 435, 451 (2002).

118. *Id.* at 448.

119. Shelly Lundberg & Robert A. Pollak, *The American Family and Family Economics*, 21 J. ECON. PERSP. 3, 7 (2007).

120. See Dan A. Black, Seth G. Sanders & Lowell J. Taylor, *The Economics of Lesbian and Gay Families*, 21 J. ECON. PERSP. 53, 62–63 (2007) (indicating both partners work in 80.6% of relationships classified as “gay partners,” 80.5% in those classified as “lesbian partners,” and 68.1% of those classified as “heterosexual couples”).

121. See generally Douglas W. Allen, *An Economic Assessment of Same-Sex*

are wrong in their assertions about vast differences between same-sex and different-sex couples. Allen's argument against allowing same-sex couples to marry, for instance, hinges on his claim of high "inclusion costs" that derive from the fact marriage would need to evolve or change in order to meet the very different needs of same-sex couples, thus creating an institution that is not efficient for different-sex couples.¹²² However, he offers no citations to support his claims that (1) vast differences exist and (2) such differences will inevitably lead—and have, in fact, led—to the need to change the rules and laws structuring marriage in places that same-sex couples can marry. Indeed, the only examples of changes in legal structure he cites relate not to marriage at all, but to alternative statuses and adaptations of laws related to parenting when either marriage is not an option for same-sex couples or when different parenting rules have been prescribed for married same-sex couples.¹²³ In sum, there is no evidence that giving the right to marry to same-sex couples has any harmful effect on marriage as an institution, most likely because same-sex couples who marry are so similar to different-sex couples who marry.¹²⁴

Marriage Laws, 29 HARV. J.L. & PUB. POL'Y 949 (2006) (explaining how gay, lesbian, and heterosexual marriages are unique and covering all three with one type of marriage law will be "sub-optimal").

122. See Douglas W. Allen, *Who Should Be Allowed into the Marriage Franchise?*, 58 DRAKE L. REV. 1043 (2010); Allen, *supra* note 121, at 959–65.

123. The other argument Allen makes is that other changes in marriage, namely the shift to no-fault divorce, had unexpected effects that raised the divorce rate. See Allen, *supra* 121, at 967–68. This analogy is inappropriate for at least two reasons. First, by changing the cost of exiting a marriage, no-fault divorce laws arguably changed the incentives for staying in the marriage, whereas the same-sex marriage issue relates to entry, not a change in the incentives within existing different-sex marriages. Second, there is still a lively debate about whether no-fault divorce laws did, in fact, lead to a permanent increase in the divorce rate, as Allen claims. See, e.g., Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results*, 96 AM. ECON. REV. 1802 (2006) (analyzing the conclusions of Leora Friedberg that divorce reform increased divorce rates by one-sixth and suggesting instead that after an initial rise, the divorce rate returned to pre-reform levels and may, in fact, have lowered somewhat).

124. See, e.g., BADGETT, *supra* note 7, at 64–85 (discussing the impact of gay marriage on heterosexuals). Also, by taking quotes from my book out of context, Allen implies I agree with him about changes in heterosexual perspectives on marriage. Douglas W. Allen, *Who Should Be Allowed into the Marriage Franchise*, 58 DRAKE L. REV. 1043 (2010). However, even a quick look at the text of the book reveals the passage cited lays out a hypothesis my analysis will explore, not a conclusion I reach. Likewise, his claim about the changing meaning of marriage and terms is also a misreading of my findings because my point about terms such as "wife" and "husband" was they did not change for heterosexuals. For same-sex couples, the terms require

IV. THE INFERIOR VALUE OF ALTERNATIVE LEGAL STATUSES

Offering same-sex couples a status such as civil unions or domestic partnerships has become a common compromise position in the debate over marriage equality for same-sex couples.¹²⁵ The alternatives generally attempt to create a legal status that provides some package of rights, obligations, and benefits that can contribute to the financial security of same-sex couples and their families.¹²⁶ As such, the package generally includes at least some of the direct and indirect benefits of marriage described earlier in this Article. However, as also noted earlier, states cannot create alternatives that will be recognized by other states with certainty, nor can states create a status that would be recognized by the federal government or third parties regulated at the federal level, such as self-insured employers. Therefore, alternatives to marriage necessarily provide only an incomplete and imperfect set of economic benefits compared to marriage, leaving same-sex couples and their families vulnerable to economic harm from the missing rights, benefits, or obligations.

A secondary effect that widens the gap between marriage and alternatives occurs when many same-sex couples decline to register for a domestic partnership or civil union when marriage is unavailable. Overall, the evidence suggests same-sex couples view those alternatives as inferior to marriage, and that inferiority implies a lesser value for alternative statuses.¹²⁷ Marriage not only comes with more legal and economic substance than the alternatives, but the social and cultural substance associated with marriage appears to attract many more couples to marry than to enter alternative statuses. Thus, as discussed in this section, the economic costs of being denied the right to marry are not fully mitigated by the existence of domestic partnerships.

Experience in both the United States and the Netherlands demonstrates couples—both same-sex and different-sex—view alternative statuses, such as domestic partnerships, civil unions, or registered

more complicated choices about visibility, so they are not used by same-sex couples all of the time. BADGETT, *supra* note 7, at 109–11.

125. *See id.* at 156–59.

126. *See* GARY J. GATES, M.V. LEE BADGETT & DEBORAH HO, THE WILLIAMS INST., MARRIAGE, REGISTRATION AND DISSOLUTION BY SAME-SEX COUPLES IN THE U.S. 26–31 (2008), *available at* <http://www.law.ucla.edu/williamsinstitute/publications/Couples%20Marr%20Regis%20Diss.pdf>.

127. *See id.* at 11.

partnerships, as less desirable than marriage. Demographic and qualitative data generate two findings that support this point. First, when same-sex couples do not have the option of marriage, some will opt for domestic partnership, but many others will choose to remain legally single.¹²⁸ Second, when couples have a choice between marriage and domestic partnership, more couples will choose to marry than to register as domestic partners.¹²⁹

Many same-sex couples choose to remain legally single when denied the right to marry but offered an alternative status. Demographic data show same-sex couples are much less likely to enter an alternative status than to enter marriage in the first year the status is offered.¹³⁰ Collectively, only 12% of same-sex couples entered into civil unions in the first year their states—Vermont, New Jersey, and Connecticut—offered that status, and only 10% entered domestic partnerships in the first year their states—California, Washington, New Jersey, Maine, and the District of Columbia—offered that status.¹³¹ In sharp contrast, same-sex couples in Massachusetts married at a much more rapid pace, with 37% of couples marrying in the first year marriage was available.¹³² This large gap between alternative statuses and the marriage rate suggests that in the absence of the right to marry, a significant number of same-sex couples choose to remain single, even though entering into domestic partnerships or civil unions might provide some economic benefits.

A similar conclusion emerges in looking at data from a longer time period. As noted in the previous section, from 2004 to 2009, the number of married same-sex couples in Massachusetts was 67% of the count of same-sex couples in Massachusetts in 2008.¹³³ In contrast, from 2000 to 2008, a period almost twice as long, 51,407 couples entered domestic partnerships in California.¹³⁴ Subtracting the 5% of domestic partners who likely were different-sex couples and the 5% of domestic partners who are from

128. See *id.* at 11 (“States with domestic partnership registries show initial take-up rates averaging only 10%.”).

129. See *id.* at 12 (“[T]he take-up rate for non-marital forms of recognition during the first year has been less than half the take-up rate for marriage by same-sex couples in Massachusetts [where same-sex marriage is allowed].”).

130. *Id.*

131. *Id.* at 11.

132. *Id.*

133. See *supra* note 93 and accompanying text.

134. For an explanation of calculation using these updated figures, see GATES, BADGETT & HO, *supra* note 126, at 5, 23.

outside California leaves 46,266 same-sex couples in California that registered for a domestic partnership,¹³⁵ or 55% of the state's total of 84,397 same-sex couples.¹³⁶ Even with a four-year head start, same-sex couples in California were much less likely to register a domestic partnership than Massachusetts couples were to marry.

The lesser value of domestic partnerships is corroborated by the fact different-sex couples resoundingly reject alternative statuses. In California and New Jersey, older different-sex couples are permitted to register as domestic partners as well as to marry.¹³⁷ At least one partner must be 62 or older for a different-sex couple to register in California.¹³⁸ Approximately 5–6% of registered domestic partners in California are different-sex partners.¹³⁹ My analysis of the 2000 Census data for California suggests this figure accounts for only about 6% of unmarried, eligible different-sex couples in that age group.¹⁴⁰ However, 98% of all older different-sex couples eligible for domestic partnership registration are legally married.¹⁴¹ In New Jersey, both members of the different-sex couple must be over 62 to be eligible for a domestic partnership.¹⁴²

[O]nly 90 of the 4,111 couples that registered as domestic partners from July 2004 to May 2006 were different-sex couples. Comparing that figure to the estimated 3400 age-eligible different-sex unmarried couples in New Jersey gives a very low take-up rate of 2.7%. Elsewhere in the United States, another study found that only about 10% of partners registering in domestic partner registries in college towns were different-sex couples, which also implies a very low level of interest among different-sex couples in something other than marriage.¹⁴³

Data from the Netherlands support a similar conclusion. In that country both same-sex and different-sex couples have the option of marriage or a registered partnership, but the evidence demonstrates a

135. *Id.* at 5.

136. *See id.* at 21.

137. BADGETT, *supra* note 7, at 62.

138. CAL. FAM. CODE § 297(b)(5)(B) (West 2004 & Supp. 2010).

139. BADGETT, *supra* note 7, at 62.

140. *Id.*

141. *See id.*

142. N.J. STAT. ANN. § 26:8A-4(b)(5) (West 2007).

143. BADGETT, *supra* note 7, at 62–63 (footnotes omitted).

strong preference for marriage among both groups.¹⁴⁴ For each year both marriage and registered partnership were available, more same-sex and different-sex couples married than entered registered partnerships.¹⁴⁵ The number of registered partnerships by same-sex couples dropped dramatically from 1,500–3,000 per year to around 400–500 per year once same-sex couples were allowed to marry in 2001, while the annual number of marriages of same-sex couples was twice that number.¹⁴⁶ Different-sex Dutch couples are also much more likely to marry than to have a registered partnership.¹⁴⁷ By 2007, only 37,500 Dutch different-sex couples had registered a new partnership in 7 years, a fairly small number compared to 70,000–80,000 marriages per year.¹⁴⁸

One of the many reasons the legal alternatives to marriage are less attractive than marriage is that the alternatives generally lack ceremony or involve distinct ceremonies that are not embedded in cultural or social life in Europe or North America. Like other alternative statuses, for example, a domestic partnership does not have cultural rituals or understandings to enhance its meaning, other than in relation to marriage. To register as domestic partners in California, for example, the two parties sign a form, get it notarized, and mail it to the California Secretary of State's office with a check for \$33.¹⁴⁹ If a couple prefers to hand deliver the document to an office of the Secretary of State—much like a married couple must appear at a county clerk's office—the registering couple must pay an additional \$15.¹⁵⁰ In contrast, both members of the couple must appear together in person to apply for a marriage license.¹⁵¹ The marriage ceremony must take place in front of a witness and be solemnized by a legally authorized person.¹⁵²

While gay couples have been resourceful in creating their own

144. *Id.* at 60–61.

145. *Id.* at 61.

146. *Id.* at 62.

147. *Id.* at 61.

148. *Id.*

149. *See* California Secretary of State Debra Brown, Forms & Fees, <http://www.sos.ca.gov/dpregistry/forms.htm> (last visited Sept. 26, 2010).

150. *Id.* (stating in-person processing mandates this additional special handling fee).

151. *See* California Department of Public Health, California Marriage License—General Information, <http://www.cdph.ca.gov/certlic/birthdeathmar/Pages/MarriageLicenseceremonygeneralinfo.aspx> (last visited Sept. 25, 2010).

152. *See id.*

ceremonies to honor commitment, the inequality of marriage and informal or lesser legal commitments remains clear to same-sex couples.¹⁵³ Data from same-sex couples in the Chicago area find very similar perceptions—an alternative status would be a second-class status.¹⁵⁴

Qualitative data from the Netherlands also support the that idea alternative statuses are viewed as inferior and as a marginalized status.¹⁵⁵ Most of the thirty-four individuals in nineteen same-sex couples whom I interviewed in the Netherlands—regardless of their legal status—viewed registered domestic partnerships as socially and culturally second-rate when compared to marriage.¹⁵⁶ While getting married sends a message that is recognized by almost all individuals in a culture, the same-sex couples suggested an alternative status is often understood to have a different meaning than marriage, including an indication same-sex couples are second-class citizens.¹⁵⁷ Several couples saw registered partnerships as lacking the deep emotional meaning of marriage, and they tended to see registered partnerships as dry and businesslike.¹⁵⁸ In contrast to registered partnerships, part of the value of marriage is the clearly recognized signal it sends.¹⁵⁹ According to one former Californian who was living in the Netherlands with her partner, a Dutch citizen, “[o]ne of the amazing things about marriage is people understand it, you know’ ‘Two year olds understand it. It’s a social context, and everyone knows what it means.’”¹⁶⁰ Her partner noted marriage “had substance” that registered partnerships lacked—the ability to show “[t]his is the woman that I’ve chosen to be with for the rest of my life.”¹⁶¹

The 2009 study of people married to same-sex spouses in Massachusetts identified some of the unique cultural components of

153. See ELLEN LEWIN, *RECOGNIZING OURSELVES: CEREMONIES OF LESBIAN AND GAY COMMITMENT* 250 (1998); see also GRETCHEN A. STIERS, *FROM THIS DAY FORWARD: COMMITMENT, MARRIAGE, AND FAMILY IN LESBIAN AND GAY RELATIONSHIPS* 107–09 (St. Martin’s Griffin 2000) (1998).

154. See KATHLEEN E. HULL, *SAME-SEX MARRIAGE: THE CULTURAL POLITICS OF LOVE AND LAW* 116–20 (2006).

155. See BADGETT, *supra* note 7, at 57.

156. *Id.*

157. *Id.* at 57–58.

158. See *id.* at 203.

159. See *id.* at 57–58.

160. *Id.* at 58.

161. *Id.*

marriage that are unlikely to be present with alternative statuses.¹⁶² Those couples reported positive effects of marriage on their interactions with their spouses, families, and communities that are not closely linked to the practical benefits of marriage.¹⁶³ Almost three-quarters—72%—agreed their marriage had led to an increased commitment to their spouses.¹⁶⁴ The changing social acceptance of these individuals as a result of being married is also likely to have drawn on the broad social understanding of marriage. Almost seven out of ten respondents reported feeling more accepted in their own community as a result of being married.¹⁶⁵ Finally, 62% agreed their families have become more accepting of their partner because they married.¹⁶⁶

Overall, providing some other form of legal relationship for same-sex couples does not eliminate the economic harms from not being allowed to marry for at least three reasons. First, the alternative statuses might not have an equivalent set of rights, benefits, and obligations to marriage. Second, some same-sex couples who would otherwise marry will not seek to register as domestic partners.

Third, and perhaps most importantly, the greater and faster take-up of marriage by same-sex couples suggests a significant part of the *value* of marriage is not that marriage is economically practical, but that marriage also has enormous additional value in a symbolic, social, or other nonpractical sense. Rational-choice theory suggests consumers make choices among options with similar attributes to pick one that has the bundle of qualities that is valued most highly by consumers.¹⁶⁷ To the extent civil unions or domestic partnerships are designed to reproduce state-level rights and obligations of marriage, but are chosen less often than marriage, such evidence suggests potential “consumers” of marriage are viewing the alternatives as of lesser value—a value that is, in this context of choice, also clearly an economic value.¹⁶⁸ The added nonpecuniary value

162. See RAMOS, GOLDBERG & BADGETT, *supra* note 80, at 5.

163. *Id.*

164. *See id.*

165. *See id.*

166. *Id.*

167. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060–66 (2000) (explaining rational-choice theory and its variations).

168. Of course, the distinctions between marriage and its alternatives might be even greater than that described here because alternatives are not recognized by the federal government and are rarely recognized by other states. Those concerns might

might come in the form of the personal feelings of commitment or the social recognition of a spouse generated by marriage but not by a domestic partnership or civil union. This perspective is consistent with the view of demographers and some legal scholars who argue marriage has value either as a “status good” or a good that provides value in the form of social prestige, rather than a more practical value.¹⁶⁹

V. CONCLUSION

Overall, the evidence for the economic value of marriage is strong, suggesting same-sex couples are harmed economically when not allowed to marry. Survey data, economic theory, and state and federal law provide strong evidence that marriage provides important economic support for families.

Furthermore, same-sex couples “vote with their feet” for marriage when they take advantage of that opportunity, as tens of thousands have done across the United States, even though only five states and the District of Columbia allow same-sex couples to marry. The demand for marriage shows same-sex couples find marriage to be a valuable status, and studies of same-sex couples suggest they are quite similar to different-sex couples in both the economic and social needs that lead them to seek the ability to marry.

The evidence of a much greater demand by same-sex couples for marriage than for any alternative substitutes demonstrates that the value of marriage goes beyond the practical set of benefits. Marriage also involves emotional, cultural, and social elements that newly constructed alternatives simply would not have. Therefore, policymakers and courts should take evidence of the full value of marriage into account when making decisions about whether to extend marriage to same-sex couples or to continue to exclude them from an economically and culturally valuable status. Same-sex couples who cannot marry are deprived of the economic efficiencies, cost savings, and added cultural and social value associated with entering a

be particularly relevant and important for different-sex couples, although that perspective simply strengthens my argument the alternatives are legally and practically inferior. I mostly ignore that issue for same-sex couples because even same-sex marriages are not recognized by the federal government or most states.

169. See, e.g., Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 885 (2004); Adam Candeub & Mae Kuykendall, *E-marriage: Breaking the Marriage Monopoly* 21, 23–24 (Mich. State Univ. Coll. of Law, Research Paper No. 07-25, 2010), available at <http://ssrn.com/abstract=1491704> (follow “One-Click Download” hyperlink).

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legally recognized relationship as compared to remaining single.