

MARRIAGE MAKES CENTS: HOW LAW & ECONOMICS JUSTIFIES SAME-SEX MARRIAGE

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THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW. By Andrew Koppelman. Chicago and London: the University of Chicago Press 2002. Pp. 154.

Abstract: Andrew Koppelman's book presents the legal and moral case for gay equality. He contends that various arguments, such as privacy and sex discrimination, justify the equal treatment of gay men and lesbians. By analogizing the struggle for equality to the debate surrounding same-sex marriage, Koppelman suggests that although change will come, the courts are presently too far ahead of public opinion to recognize same-sex marriage. This Book Review examines how law and economics removes the debate to a pragmatic theater, compelling recognition of same-sex marriage.

Disputes about homosexuality evoke visceral emotions.¹ Religious views, stereotypes, and social pressures all contribute to the negative preconceptions of gay men and lesbians, and the public discourse on homosexuality has long been dominated by disgust, confusion, and ignorance.² Thus, efforts of gay men and lesbians to seek legal recognition and validation for their relationships have been faced with hostility, largely derived from these negative cultural attitudes, rather than from any internal logic.³

Andrew Koppelman confronts this prejudice in his book, *The Gay Rights Question in Contemporary American Law*.⁴ Historically, the United States Supreme Court has been hesitant to identify gay men and lesbians as a suspect class; therefore it has not applied heightened scru-

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¹ Gary Chartier, *Natural Law, Same-Sex Marriage, and the Politics of Virtue*, 48 UCLA L. REV. 1593, 1599 (2001).

² See Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 204 (1999); Timothy E. Lin, *Social Norms and Judicial Decisionmaking: Examining the Role of Narratives in Same-Sex Adoption Cases*, 99 COLUM. L. REV. 739, 741 (1999).

³ William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1423 (1993).

⁴ ANDREW KOPPELMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* 35 (2002).

tiny to laws that discriminate against them.⁵ Koppelman attacks the constitutionality of such discriminatory laws on the basis of privacy and sex discrimination.⁶

Koppelman next debunks the defenses made in support of laws that discriminate against gay men and lesbians.⁷ To do this, he observes that the general question of legal equality for homosexuals is a paradigm of the specific issue of same-sex marriage.⁸ That is, if heterosexual marriage (and by implication, heterosexuality) is able to achieve a distinctive good that same-sex marriage (or homosexuality) cannot achieve, then Koppelman suggests that the traditional definition of marriage as strictly heterosexual may be defensible.⁹ On the other hand, if same-sex marriage could achieve ends that are equally valued as those achieved by heterosexual couples, then the legal discriminations against same-sex couples are arbitrary and indefensible.¹⁰ Koppelman quickly disposes of the bulk of common objections to homosexuality, arguing that the claims rest on faulty logic or false empirical claims.¹¹

Unfortunately, Koppelman does not devote more of this chapter to criticizing the tendency of same-sex marriage critics to dwell in moral arguments and ignore the pragmatic.¹² Koppelman structures a

⁵ See Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471, 483 (2001). Strict scrutiny is applied to legislation that affects race, which requires that the legislation be narrowly tailored to serve a compelling state interest. KOPPELMAN, *supra* note 4, at 9–10. Minimal scrutiny is applied to most other legislation, which asks whether legislation is rationally related to a legitimate state interest. *Id.* at 10. Intermediate scrutiny requires legislation to be substantially related to a legitimate state interest. *Id.* The Supreme Court has not directly addressed whether homosexuals constitute a “discrete and insular minority” so as to trigger heightened or intermediate scrutiny. Stein, *supra*, at 482–83.

⁶ KOPPELMAN, *supra* note 4, at 35, 53. The right to privacy is not an enumerated right, but can nonetheless trigger heightened review of legislation if it affects the right to marry or divorce, the right of married and unmarried persons to use contraceptives, the right of extended families to live together, or the right to abortion. *Id.* at 35 (citing *Loving v. Virginia*, 388 U.S. 1 (1967) (right to marry); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (right to marry); *Turner v. Safley*, 482 U.S. 78 (1987) (right to marry); *Boddie v. Connecticut*, 401 U.S. 371 (1971) (right to divorce); *Griswold v. Connecticut*, 381 U.S. 479 (1975) (right to use contraceptives); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives); *Carey v. Population Servs.*, 431 U.S. 678 (1977) (right to use contraceptives); *Moore v. E. Cleveland*, 431 U.S. 494 (1977) (right to live together); *Roe v. Wade*, 410 U.S. 113 (1973) (right to abortion)).

⁷ See *id.* at 73.

⁸ *Id.*

⁹ *Id.*

¹⁰ KOPPELMAN, *supra* note 4, at 73.

¹¹ See *id.*

¹² See *id.* at 72–93.

coherent moral defense to the traditional moral arguments posited by new natural law theorists, concluding that the gender of one's partner is a morally insignificant factor in evaluating sexual conduct.¹³ However, he stops short of advocating a full recognition of same-sex marriage, deferring to the emotional concerns of critics.¹⁴ This Book Review will extend Koppelman's defense of same-sex marriage by demonstrating how a cost-benefit perspective fully justifies its recognition.

Part I will explain how to escape the emotionally-charged morality arguments of same-sex marriage by using law and economics, which provides a pragmatic and rational approach toward the justification of same-sex marriage. Part II will describe how same-sex couples can gain some of the legal benefits of marriage by contracting their relationships, but ultimately rejects this "solution" as costly and insufficient. Part III will explore the legal alternatives that same-sex couples have in becoming domestic partnerships or civil unions. Such efforts are insufficient, however, because limiting same-sex relationships to these terms and refusing to recognize the couple as "married" sends a message that these unions are second-class units and not to be mistaken for marriages. By contrast, this section will also weigh society's transactional cost in recognizing same-sex unions as "marriages."

I. LAW, ECONOMICS, AND SAME-SEX MARRIAGE: A PRAGMATIC APPROACH TO AN EMOTIONAL DEBATE

A majority of Americans presently oppose same-sex marriage.¹⁵ These attitudes are strongly motivated by religious beliefs and an emotional response to deeply-held and preconceived notions against homosexuality.¹⁶ Critics of same-sex marriage commonly make moral

¹³ *Id.* at 73, 93.

¹⁴ *Id.* at 72-93.

¹⁵ See Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 B.Y.U. L. REV. 1, 57 (stating that two-thirds of Americans oppose same-sex marriage).

¹⁶ See John G. Culhane, "Clanging Silence": *Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 938 (2000-01); Eskridge, *supra* note 3, at 1423 (suggesting that hostility to same-sex marriage stems not from logic, but rather from negative cultural attitudes); Michael Wald, *Same-Sex Couple Marriage: A Family Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 292 (2001); see also Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 14 WOMEN'S RTS. L. REP. 263, 285 (1992) (finding that discrimination against homosexuals is closely related to deeply held gender-specific social and sexual roles within a culture); Battaglia, *supra* note 2, at 203-04 (stating that religious beliefs are historically used to justify discrimination against homosexuals); Lin, *supra* note 2, at 758 (observing that fear, hatred, and stigmatization have defined attitudes toward gay and lesbian Americans, who have been derided as "faggots," "monsters," "fairies," "bull dykes," "per-

arguments, alleging that the immorality of same-sex conduct or relationships justifies the traditional definition of marriage as exclusively heterosexual.¹⁷ Because marriage is closely related to morality and values, it is often difficult to convince people to make objective assessments of the data and enter into a reasonable debate.¹⁸ Unfortunately, this emotional approach occludes the economic realities faced by same-sex couples.¹⁹ A rational choice model, on the other hand, addresses the costs that the couple and society incur through contin-

verts," "freaks," and "queers" and whose relationships have been labeled "abominations," "crimes against nature," and "sins not fit to be named among the Christians"); 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, 549 (1990) (recognizing that many people think homosexuality immoral because of religious beliefs).

¹⁷ David B. Cruz, *"Just Don't Call it Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 1008 (2001). Morality arguments were routine during the debates of the Federal Defense of Marriage Act, where congressional leaders decried same-sex marriage as "trendy moral relativism" and decried its advocates as "bent on forcing a tortured view of morality on the rest of the country." *Id.* at 1008 (citing 142 CONG. REC. S4947 (1996) (statement of Sen. Coats) and 142 CONG. REC. H7482 (1996) (statement of Rep. Barr), respectively). Other representatives thought it improper for government to "treat homosexual relationships as morally equivalent to heterosexual relationships" and that doing so would "legitimize unnatural and immoral behavior." *Id.* (citing 142 CONG. REC. H7491 (1996) (statement of Rep. Canady); citing 142 CONG. REC. H7494 (1996) (statement of Rep. Smith)).

¹⁸ See KOPPELMAN, *supra* note 4, at 72; Carlos A. Ball, *Sexual Ethics and Postmodernism in Gay Rights Philosophy*, 80 N.C. L. REV. 371, 373 (2002) [hereinafter Ball, *Sexual Ethics*]; Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1878 (1997) [hereinafter Ball, *Moral Foundations*]; Wald, *supra* note 16, at 339. After questioning the prejudice against gay and lesbians, Koppelman also posits that the central claim of gay liberation is based in morality. KOPPELMAN, *supra* note 4, at 72. Thus, he realizes that he is put in the "awkward position" of having to prove that "there is no good reason to regard the sex of one's partner as a morally significant factor in evaluating sexual conduct." *Id.* at 72-73.

¹⁹ See Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 749-51 (1995) (implying that questions surrounding the morality of same-sex marriage are distinct from, and fail to account for, economic concerns); Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 WOMEN'S RTS. L. REP. 115, 116-17, 126 (2001) (criticizing law and economics theorists who justify non-intervention in heterosexual marriage on economic terms but who accept prohibitions on same-sex marriage because of the moral considerations); Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 LAW & SEXUALITY 187, 197 (2001) (stating that judges and lawmakers have a duty to look beyond moral and religious principles when addressing same-sex marriage); Wald, *supra* note 16, at 339 (lamenting that failure to make assessments of objective data influences politicians and scholars alike to ignore evidence and oppose same-sex couple marriage).

ued prohibition of same-sex marriage.²⁰ Such a model can be found in the school of thought known as law and economics.²¹

A. *Background of Law and Economics*

Law and economics proposes legal rules which are to be established and reviewed in light of fundamental economic principles.²² Underlying these economic principles is the assumption that people strive to maximize their utility from a set of preferences.²³ These preferences are chosen by accumulating an optimal amount of information from a variety of sources.²⁴ Simply defined, economics can be understood as rational choice, in which resources are limited in relation to human desires.²⁵ Rational choice, however, need not be conscious; it merely predicts that one will choose means to achieve ends at the least possible cost.²⁶

Law and economics theorists conclude that that government intervention in most transactions inevitably produces negative outcomes because such intervention is inherently flawed.²⁷ Rather than submitting to government regulation, private parties are better situated to make their own decisions, with very specific and limited exceptions.²⁸ In general, government intervention produces inefficiencies.²⁹ At best, government tampering with the marketplace

²⁰ Bush, *supra* note 19, at 116–17; Wald, *supra* note 16, at 339; Jeremy Waldron, *Ego-Bloated Hovel*, 94 NW. U. L. REV. 597, 611 (2000); *see also* Ball, *Moral Foundations*, *supra* note 18, at 1942 (arguing that societal acceptance of same-sex marriage is dependent upon “communal recognition” that such unions are “normatively good”).

²¹ *See* Bush, *supra* note 19, at 116.

²² *See* ROBERT COOTER & THOMAS ULEN, *LAW & ECON.* 1, 12–13 (1988).

²³ *Id.* at 22–23.

²⁴ *Id.* at 23.

²⁵ *See* RICHARD POSNER, *AN ECONOMIC ANALYSIS OF LAW* 3 (Little, Brown & Co. 2d ed. 1992).

²⁶ Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998).

²⁷ Bush, *supra* note 19, at 115–16.

²⁸ *See* POSNER, *supra* note 25, at 15; *see, e.g.*, Elaine A. Welle, *Freedom of Contract and the Securities Laws: Opting Out of Securities Laws by Private Agreement*, 56 WASH. & LEE L. REV. 519, 539 (1999). Government regulation is typically disfavored, although some limited intervention is welcomed to enforce contracts, protect private property, and address imperfections in the marketplace. *Id.*

²⁹ *See* POSNER, *supra* note 25, at 335–36; *see, e.g.*, Schwartz, *What do I do for the Economists?*, 50 CASE W. RES. L. REV. 347, 348 (1999) (identifying inefficiencies in areas such as the former antitrust regulations with respect to mergers, government price fixing in transportation, and restriction on competition among law firms).

does nothing; far too often, however, it aggravates the problem it attempted to fix in the first place.³⁰

B. *Law and Economics as Applied to Marriage*

Marriage, as a contractual relationship, falls within law and economics analysis.³¹ Like the marketplace, marriage allows for parties to contract for maximum utility.³² Hence, proponents of law and economics regularly view marriage through the economic lens.³³ Unfortunately, with same-sex marriage, law and economics theorists have been unjustifiably reluctant to make the application.³⁴ Yet, if same-sex marriage creates benefits that outweigh its externalities, then law and economics must advocate its recognition.³⁵ Although such an analysis is not the only one that can or should be made in defense of same-sex marriage, there is ample room for an argument that defends same-sex marriage as a policy that promotes economic efficiency.³⁶ By focusing on the pragmatics of same-sex marriage, law and economics avoids the emotionally-laden morality defenses that have dominated the debate.³⁷ Such an argument may prove instrumental in winning over public sentiment.³⁸

II. ECONOMIC COST-BENEFIT ANALYSIS OF SAME-SEX MARRIAGE

Because American society grants significant financial benefits to married couples, withholding of this status denies important benefits to same-sex couples.³⁹ U.S. law reflects the belief that economic sharing and investment in a marriage are beneficial to the partners and to the larger society.⁴⁰ Society expects married couples to make financial

³⁰ Bush, *supra* note 19, at 116; see POSNER, *supra* note 25, at 335–36.

³¹ Bush, *supra* note 19, at 116.

³² *Id.*

³³ *Id.*

³⁴ See *id.*; see, e.g., RICHARD POSNER, SEX AND REASON 313 (1992) (concluding that, even though the benefits of same-sex marriage may outweigh the costs, hostile public opinion is too prevalent to justify recognition of homosexual marriage).

³⁵ See Bush, *supra* note 19, at 116–17.

³⁶ See KOPPELMAN, *supra* note 4, at 71; Ball, *Moral Foundations*, *supra* note 18, at 1878; Ball, *Sexual Ethics*, *supra* note 18, at 373; Sparling, *supra* note 19, at 197; Wald, *supra* note 16, at 339.

³⁷ See Bush, *supra* note 19, at 116–17; Wald, *supra* note 16, at 339.

³⁸ See Waldron, *supra* note 20, at 611; see also Ball, *Moral Foundations*, *supra* note 18, at 1942 (arguing that societal acceptance of same-sex marriage is dependent upon “communal recognition” that such unions are “normatively good”).

³⁹ See POSNER, *supra* note 34, at 311.

⁴⁰ See Wald, *supra* note 16, at 305.

decisions as a team.⁴¹ Therefore, American law protects marital partners who contribute economically to the relationship, while simultaneously imposing significant economic penalties on partners who contribute to the dissolution of the relationship.⁴² These laws have a significantly beneficial impact on the married couple's economic well-being, enabling the couple to make decisions to optimize their financial condition.⁴³ In this way, the law assists the married couple and endorses the continuation of their relationship through financial incentives.⁴⁴

Same-sex couples can also create a more economically efficient partnership by using existing contract law to gain the legal benefits awarded to married couples.⁴⁵ For example, same-sex couples can draft wills to ensure care for the surviving partner upon the other partner's death.⁴⁶ They can seek powers of attorney to gain legal decision-making rights should one partner require medical intervention.⁴⁷ Couples can draft ante-nuptial agreements for division of property, thereby gaining some of the rights granted married partners in the event of divorce.⁴⁸ There are, however, two problems with reliance on contracts to form a "legal marriage."⁴⁹ First, because marriage is a complex, long-term relationship, such contracts create substantial transaction costs.⁵⁰ Any ambiguities in the contract do not have the benefit of developed case law.⁵¹ Without recognition of status, courts may not enforce contracts for short-term relationships because they may resemble contracts for sex. Likewise, the courts may refuse to enforce contracts for long-term "covenant" marriage because of the

⁴¹ See *id.*

⁴² See F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 579; Wald, *supra* note 16, at 305, 307; see, e.g., Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENV. U. L. REV. 359, 367 (1995) (observing that married couples have many state-inherited rights that activate upon dissolution of the relationship that same-sex couples do not have).

⁴³ See Wald, *supra* note 16, at 308.

⁴⁴ See *id.* at 305.

⁴⁵ Lisa M. Farabee, *Marriage, Equal Protection, and New Judicial Federalism: A View from the States*, 14 YALE L. & POL'Y REV. 237, 239 (1996).

⁴⁶ Brown, *supra* note 19, at 785.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at 785–86.

⁵⁰ *Id.* at 785. Through contract, same-sex couples can approximate marriage, though at higher cost because fringe benefits and social insurance are often more generous for married than for single people. POSNER, *supra* note 34, at 292.

⁵¹ Buckley & Ribstein, *supra* note 42, at 595.

problem of "over-optimism" at the time of marriage.⁵² Second, many benefits of marriage, such as employer medical benefits and tax deductions, simply cannot be gained by private contract.⁵³ Such costs make private contract a poor substitute for state recognition of same-sex marriage.⁵⁴

A. *Private Contracts Incur Significant Transaction Costs*

Because contracting the many benefits of a long-term committed relationship exacts heavy transaction costs, many gay men and lesbians are deterred from investing the time needed to draft such documents.⁵⁵ Even if the couple enters into a contract, courts may choose not to uphold the terms, or the benefit may be dependent upon a third party recognizing the union of the same-sex couple.⁵⁶ Two areas are particularly costly to gay men and lesbians: intestate succession of property and adoption and custody of children.⁵⁷

1. Intestate Succession

In 2000, the Washington Court of Appeals held that Frank Vasquez, a gay man, was not entitled to inherit his life partner's assets because members of the same sex cannot enter into a qualifying marital or quasi-marital relationship.⁵⁸ Although the Washington Supreme Court later reversed the decision, remanding the case to the trial court for a trial on the merits, the case underscores the heavy transaction costs inflicted on gay men and lesbians whose life partners die intestate or who make an invalid will.⁵⁹ If an individual fails to make a valid will, the laws of intestate succession are triggered, which are

⁵² *Id.* at 595–96.

⁵³ Brown, *supra* note 19, at 786.

⁵⁴ *Id.*

⁵⁵ See Buckley & Ribstein, *supra* note 42, at 585; Cruz, *supra* note 17, at 1019; Wald, *supra* note 16, at 336.

⁵⁶ See *Raum v. Rest. Assocs.*, 675 N.Y.S.2d 343, 344 (App. Div. 1998) (denying unmarried partners the right to bring wrongful death actions); *Rutgers Chapter of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828, 829, 837 (N.J. Super. Ct. App. Div. 1997) (refusing to extend coverage of school employees to their same-sex domestic partners because they were not considered "spouses" or "dependents").

⁵⁷ See Gary Spitko, *Judge Not: In Defense of Minority-Culture Arbitration*, 77 WASH. U. L.Q. 1065, 1080 (1999); Wald, *supra* note 16, at 808.

⁵⁸ *Vasquez v. Hawthorne*, 994 P.2d 240, 243 (Wash. Ct. App. 2000).

⁵⁹ *Vasquez v. Hawthorne*, 145 Wash.2d 103, 104–05 (2001); see Marissa J. Holob, Note, *Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals*, 85 CORNELL L. REV. 1492, 1495 (2000) (citation omitted).

heavily biased toward traditional families.⁶⁰ Under the *Uniform Probate Code*, in accord with all but two United States jurisdictions, surviving non-marital partners do not receive intestate inheritance rights.⁶¹ The surviving partner of a same-sex union is therefore forced to litigate his or her rightful inheritance in the courts.⁶²

Eventually, the surviving partner may win some or all of the estate.⁶³ Even if the couple had established the proper combination of testamentary documents, lifetime transfers, and beneficiary designations, however, winning possession is a difficult and lengthy process; without formal documentation, the process becomes even more difficult.⁶⁴ Without the legal right to a partner's assets, the survivor is often placed at the mercy of the deceased partner's relatives who are considered the legal heirs.⁶⁵ In order to win possession, the survivor would have to litigate his or her claim and demonstrate to the court the level of commitment to the deceased partner.⁶⁶ Admittedly, same-sex couples could contract to avoid the state's intestate succession laws.⁶⁷ Many couples are reluctant or unable to do this, however, and inevitably, some same-sex couples will fail to execute wills before one of the partners dies.⁶⁸

⁶⁰ See Holob, *supra* note 59, at 1495 (citation omitted).

⁶¹ E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1066 (1999). The UNIFORM PROBATE CODE grants all or most of the decedent's intestate estate to a surviving spouse, or, if there is none, to the decedent's descendants and then to members of his or her biological or adoptive family. UNIFORM PROBATE CODE §§ 2-101 to -103 (1993).

⁶² See UNIF. PROBATE CODE §§ 2-101 to -103 (1993); Spitko, *supra* note 61, at 1066.

⁶³ See Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 40 (2002).

⁶⁴ See *id.*

⁶⁵ See *id.* at 44. "The closet, homophobia, and the pressures of grief can greatly complicate the relationship between a surviving partner and the next of kin, who may seek to justify dispossessing the surviving partner on the grounds that the couple were not really a couple or that the absence of a will is a clear statement of the decedent's intent to prefer family over a 'roommate.'" *Id.*

⁶⁶ See Spitko, *supra* note 61, at 1080.

⁶⁷ See Brown, *supra* note 19, at 784-85.

⁶⁸ See Merrienne E. Dean, *Estate Planning for Non-Traditional Families*, 309 PRACTISING LAW INSTITUTE (PLI)/EST. 1087, 1095 (2001) (observing that many gay and lesbian couples delay estate planning assistance because they are reluctant or afraid to disclose the nature of their relationships to a stranger); Knauer, *supra* note 63, at 37-38.

2. Adoption and Custody

Same-sex couples also incur heavy transaction costs when adopting or seeking custody of children.⁶⁹ When a same-sex couple has a child, only one partner can be the biological parent of the child.⁷⁰ Without legal recognition of same-sex marriage, it is therefore difficult for the non-biological same-sex partner to establish a legal relationship with the child.⁷¹ Thus, the same-sex couple must rely on the legal system to gain joint parental rights.⁷²

Unlike marriages where one of the adults is a step-parent, however, the same-sex partner of a person who has a child is not eligible for a step-parent adoption.⁷³ Instead, the same-sex couple must secure a "second-parent adoption" from a court.⁷⁴ This is a costly and lengthy process, the outcome of which depends on large part on the judge's feelings toward homosexuality.⁷⁵ Unlike heterosexual step-parents, who are automatically eligible to adopt their partner's child, a petitioning gay or lesbian parent faces extensive social work assessment to establish suitability, a process that is lengthy as well as being emotionally and financially costly.⁷⁶ Moreover, many states simply do not permit such adoptions.⁷⁷ Thus, even if the parents overcome the lengthy,

⁶⁹ Wald, *supra* note 16, at 308. Although the associated substantive costs to both the child and couple are beyond the scope of this paper, several authors have highlighted the restriction's negative impact. *See id.* at 310 (observing that the un-adopted child is not entitled to financial support, nor may the non-biological parent file for custody or visitation rights, nor sign medical consent forms, thereby impacting the emotional bond between the child and the couple).

⁷⁰ Pamela Gatos, Note, *Third-Parent Adoption in Lesbian and Gay Families*, 26 VT. L. REV. 195, 205 (2001).

⁷¹ Wald, *supra* note 16, at 308.

⁷² Gatos, *supra* note 70, at 206.

⁷³ Wald, *supra* note 16, at 309.

⁷⁴ *Id.*

⁷⁵ *See* Gatos, *supra* note 70, at 205; *see, e.g., In re Adoption of Tammy*, 619 N.E.2d 315, 321-22 (Mass. 1993) (Nolan, J., dissenting) (refusing to agree that the couple's sexual orientation should not determine the outcome of the case).

⁷⁶ Wald, *supra* note 16, at 309 (citation omitted). *See, e.g., In re Adoption of Tammy*, 619 N.E.2d at 317 (noting that over a dozen witnesses testified as to the suitability of the same-sex couple as parents, including mental health professionals, teachers, colleagues, neighbors, blood relatives, and a priest and nun; the Department of Social Services conducted a thorough home study; and a court-appointed guardian ad litem conducted a thorough clinical assessment of the couple and the child).

⁷⁷ Wald, *supra* note 16, at 309. Florida has prohibited lesbian and gay second-parent adoptions through legislation. *See* FLA. STAT. ANN. § 63.042(3) (West 1997). Wisconsin has prohibited it through strict interpretation of statutory language found in sections 48.81-.82. *See In The Interest of Angel Lace M.*, 516 N.W.2d 678, 686 (Wis. 1994) (reasoning that second-parent adoption would cause the biological parent to terminate parental rights).

costly obstacles in their path, a judge may simply choose not to authorize the adoption.⁷⁸

The high transaction cost of adoption, including the stress of entering the legal system, submitting the family to standards rooted in homophobia, and the uncertainty of testing legal theories, deters many gay or lesbian non-biological parents from seeking legal adoption of a child.⁷⁹ Those that choose not to adopt face legal rules that consider one partner a parent and the other a legal stranger to the child.⁸⁰ Should the relationship dissolve, a costly custody battle often ensues, with the non-legal parent at a distinct disadvantage.⁸¹ In some jurisdictions, the non-legal parent is without standing to seek custody or even visitation rights in relation to the child he or she has helped to raise.⁸² In others, the parent would be at the same legal disadvantage as a third party attempting to establish legal parent status.⁸³

Even though same-sex couples can contract many terms of their relationship, the associated costs are often prohibitive.⁸⁴ Furthermore, contracting a family does not require just money but also access to the legal profession.⁸⁵ The legal language alone is a deterrent from drafting and filing declarations.⁸⁶ As a result, many people who feel excluded from the legal system fail to claim the benefits and the rights

States that do not provide for second-parent adoptions in their adoption statutes include: Arizona, ARIZ. REV. STAT. ANN. § 8-103 (West 1999), Arkansas, ARK. CODE ANN. § 9-9-204 (Michie 2002), Idaho, IDAHO CODE § 16-1501 (Michie 2001), Kansas, KAN. STAT. ANN. § 59-2113 (1994), Kentucky, KY. REV. STAT. ANN. § 199.470 (Michie 1998), Louisiana, LA. CHILDREN'S CODE ANN. arts. 1198, 1202 (West 1995), Maine, ME. REV. STAT. ANN. tit. 18-A § 9-103 (West 1964), Mississippi, MISS. CODE ANN. § 93-17-3 (1972), Missouri, MO. ANN. STAT. § 453.010 (West 1997), Montana, MONT. CODE ANN. § 42-1-106 (2001), North Carolina, N.C. GEN. STAT. § 48-2-301 (2001), South Carolina, S.C. CODE ANN. § 20-7-1670 (Law. Co-op. 1976), South Dakota, S.D. CODIFIED LAWS § 25-6-2 (Michie 1999), Tennessee, TENN. CODE ANN. § 36-1-115 (2001), Utah, UTAH CODE ANN. § 78-30-1 (1953), Virginia, VA. CODE ANN. § 63.1-219.9 (Michie 2001), West Virginia, W. VA. CODE ANN. § 48-22-201 (Michie 2001), and Wyoming, WYO. STAT. ANN. § 1-22-103 (Michie 2001).

⁷⁸ Wald, *supra* note 16, at 309.

⁷⁹ See Polikoff, *supra* note 16, at 526.

⁸⁰ *Id.* at 526-27.

⁸¹ See *id.* at 309; see, e.g., T.B. v. L.R.M., 786 A.2d 913, 914 (Penn. 2001) (dispute regarding the rights of a former lesbian partner who did not legally adopt the child she and her partner agreed to raise from birth); V.C. v. M.J.B., 748 A.2d 539, 541-42 (N.J. 2000).

⁸² Spitko, *supra* note 57, at 1080.

⁸³ *Id.*

⁸⁴ See Buckley & Ribstein, *supra* note 42, at 595.

⁸⁵ See Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less Than Perfect Institutional Choice*, 7 TEMP. POL. & CIV. RTS. L. REV. 337, 360 (1998).

⁸⁶ Kris Franklin, Note, "A Family Like Any Other Family": *Alternative Methods of Defining Family Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027, 1071 (1990-91).

to which they are due.⁸⁷ Furthermore, costly transactions are merely one inefficient market aspect of same-sex marriage; many legal rights common to married couples lie out of reach of private contract.⁸⁸

B. Private Contract Is Insufficient to Gain the Full Benefits of Marriage

Despite the power of private contract, it is impossible for same-sex couples to gain all of the benefits afforded married couples by contracting their relationships.⁸⁹ Same-sex partners are excluded from insurance awards, social security benefits, public pensions, worker's compensation, income tax benefits, and estate tax benefits.⁹⁰ They cannot contract to sue for wrongful death of a spouse, to receive compensation given to families of crime victims, or to be appointed conservator or guardian of an invalid family member.⁹¹ Nor can they contract the right to make health care decisions for a family member or even to visit a loved one in a hospital or prison.⁹² Furthermore, exclusionary zoning laws, restrictive statutory provisions, and narrow judicial constructions of the meaning of "family" discriminate against same-sex couples in their efforts to secure housing.⁹³ Housing becomes further problematic for same-sex couples when applying for rent control, right of successorship, homeowner associations, and mortgages.⁹⁴

Moreover, same-sex couples are excluded from employee family health care, group insurance, discounted "family rates" in assorted organizations, and the ability to hold real estate by the entirety.⁹⁵ This is particularly evident in the area of personal insurance benefits that employers extend to the families of employees.⁹⁶ Gay and lesbian employees are often denied coverage of their same-sex partner because, being unable to marry, their partners are not considered "spouses" or

⁸⁷ *Id.*

⁸⁸ Brown, *supra* note 19, at 786.

⁸⁹ *Id.*

⁹⁰ Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L.Q. 1531, 1542 (1995).

⁹¹ *Id.* at 1542-43 (citations omitted).

⁹² *Id.* (citations omitted).

⁹³ Chase, *supra* note 42, at 366.

⁹⁴ *Id.* at 366-67.

⁹⁵ Guzman, *supra* note 90, at 1543.

⁹⁶ Nancy K. Kubasek et al., *Fashioning a Tolerable Domestic Partners Statute is an Environment Hostile to Same-Sex Marriages*, 7 LAW & SEXUALITY 55, 82 (1997).

"dependents," as required by employers' benefit plans.⁹⁷ Because same-sex partners generally do not fit the state definition of either spouses or dependents, insurance is not extended to cover both partners.⁹⁸

Studies estimate that although marital partners automatically qualify as financial dependents, a lesbian or gay man in a same-sex relationship receives employer-paid medical benefits of several thousand dollars less per year than a similarly situated married person.⁹⁹ Some gay men and lesbians have attempted to litigate this inequality but have been met with limited success.¹⁰⁰ Courts are reluctant to extend benefits to same-sex partners, all the while denying assertions of discrimination on the basis of sexual orientation or marital status.¹⁰¹

This dissimilar treatment puts the same-sex couple at a strong disadvantage.¹⁰² Unlike their heterosexual counterparts, the same-sex couple is not as flexible to make financial decisions, such as allowing one partner to stay at home to raise the children.¹⁰³ If one partner in a same-sex couple chooses to sacrifice a career for the sake of the family and the working partner is injured or killed, the other partner is left without compensation.¹⁰⁴ Recognition of same-sex marriage would address this economic inefficiency by entitling same-sex partners to legal protections such as life insurance, adoption, intestate inheritance, social security payments, income tax reductions, welfare payments, and property division, should the relationship dissolve.¹⁰⁵

⁹⁷ James P. Baker, *Equal Benefits at Work? The Law of Domestic Partner Benefits*, 14 LAB. LAW. 23, 25 (1998).

⁹⁸ See Dominick Vetri, *Almost Everything You Always Wanted to Know About Lesbians and Gay Men, Their Families, and the Law*, 26 S.U. L. REV. 1, 68 (1998).

⁹⁹ Jean Reith Schroedel & Pamela Fiber, *Lesbian and Gay Policy Priorities: Commonality and Difference*, in THE POLITICS OF GAY RIGHTS 113, 115 (Craig A. Rimmerman et al. eds., 2000).

¹⁰⁰ See Sue Nussbaum Averill, Note, *Desperately Seeking Status: Same-Sex Couples Battle for Employment-Linked Benefits*, 27 AKRON L. REV. 253, 256 (1993); see, e.g., *Tanner v. Oregon Health Servs. Univ.*, 971 P.2d 435, 505-06 (Or. Ct. App. 1998) (holding that employer's denial of insurance benefits to domestic partners of homosexual employees violated the state constitution but did not violate a state sex discrimination statute); *Rutgers Council of AAUP Chapters v. Rutgers, the State Univ.*, 689 A.2d 828, 831 (N.J. Super. App. Div. 1997) (holding that denial of health care insurance coverage to same-sex partners was justified because such partners are not considered to be spouses).

¹⁰¹ See Kate Latimer, *Domestic Partners and Discrimination: The Need for Fair Employment Compensation*, 12 HAMLINE J. PUB. L. & POL'Y 329, 339 (1991); see, e.g., *Tanner*, 971 P.2d at 505-06; *Rutgers*, 689 A.2d at 831.

¹⁰² See Wald, *supra* note 16, at 306.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ POSNER, *supra* note 34, at 313.

Critics fear that recognition of same-sex marriage will lead to abuses of the benefits that marriage provides, such as immigration privileges and health care packages.¹⁰⁶ This concern, however, applies equally well to heterosexual marriage and hence, this argument is not a problem presented by recognition of same-sex marriage.¹⁰⁷ The solution to this concern, therefore, lies not with the prohibition of same-sex marriage; rather, the problem must be handled by addressing the fraud.¹⁰⁸ For example, the potential of immigrants fabricating a marriage to avoid deportation is not addressed by a prohibition of marriages between American citizens and foreigners, but by penalties for fraudulent marriage.¹⁰⁹ There is no reason why such penalties could not be enforced effectively against fraudulent same-sex marriages in the same way.¹¹⁰

With regard to employer health insurance packages, the fear of fraudulent marriage is also unjustified.¹¹¹ This concern exists largely because companies feared substantial costs associated with the medical expenses of gay men and lesbians, specifically the increase in AIDS cases.¹¹² These concerns, however, have proven unjustified by the experience of companies providing insurance to domestic partners.¹¹³ Municipalities that led the way in extending domestic partnership health benefits have been surprised at how minimal the additional costs have been.¹¹⁴ Studies demonstrate that companies experienced a negligible rise in cost after offering same-sex domestic partner

¹⁰⁶ See *id.* at 313 (questioning whether a homosexual might marry a succession of AIDS patients in order to entitle them to spouse's medical benefits); Lindsay Brooke King, *Enforcing Conventional Morality Through Taxation?: Determining the Excludability of Employer-Provided Domestic Partner Health Benefits Under Sections 105(b) and 106 of the Internal Revenue Code*, 53 WASH. & LEE L. REV. 301, 313-14 (1996).

¹⁰⁷ Bush, *supra* note 19, at 129.

¹⁰⁸ See *id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ See King, *supra* note 106, at 314.

¹¹² See *id.* at 315; see also Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 179 (1995).

¹¹³ See O'Brien, *supra* note 112, at 179. At least two health insurance companies have extended health benefits to same-sex domestic partners: Blue Cross and Blue Shield of Massachusetts and Kaiser Permanente of Northern California. *Id.*

¹¹⁴ See Kubasek et al., *supra* note 96, at 82; Jarrett Tomas Barrios, Note, *Growing Pains in the Workplace: Tax Consequences of Health Plans for Domestic Partners*, 47 TAX LAW. 845, 847 (1994). For example, the increased cost of providing health insurance to the domestic partners of city employees in Seattle, Washington increased the city's total costs for medical and dental coverage only 1.1% between May through December, 1990. Kubasek et al., *supra*, note 96, at 82. In Berkeley, California, the extension of dental benefits raised its premiums by only 2%. *Id.*

benefits, in part because the cost of AIDS treatment for an individual is typically less than the cost of covering other, more common health conditions, such as premature or multiple births, complications due to smoking or overeating, and cardiovascular problems.¹¹⁵ Given the small number of gays and lesbians who have enrolled for domestic partner benefits, the externalities imposed on society are minimal.¹¹⁶

III. INFORMATIONAL COST-BENEFIT ANALYSIS OF SAME-SEX MARRIAGE

The increase in benefits to domestic partners and the recent recognition of civil unions in Vermont have caused some to argue that same-sex couples have a legal alternative to marriage, eliminating the need for the "marriage" label.¹¹⁷ This argument forgets, however, that a separate institution, such as a domestic partnership or a civil union, is not necessarily equal to the revered institution of marriage.¹¹⁸

When a couple communicates that they are "married," they establish that they are in a particular type of human relationship, characterized by a mutual long-term commitment to one another.¹¹⁹ While couples may admittedly have differing goals in marriage, marital partners are still generally assumed to exchange intimacy, love, and commitment that are uniquely valuable to them.¹²⁰ Marriage conveys a unified relationship, commonly characterized by the sharing of affection and individual energies and efforts.¹²¹ To deny recognition of

¹¹⁵ King, *supra* note 106, at 315–16 (citations omitted).

¹¹⁶ See *id.* at 316; Richard Posner, *Should There Be Homosexual Marriage? And if so, Who Should Decide?*, 95 MICH. L. REV. 1578, 1581 (1997) (realizing that, because there are substantially more heterosexuals than homosexuals, and because a much smaller fraction of homosexuals than of heterosexuals will marry, the costs of same-sex marriage to society, on a per capita basis, would be small). Other commentators have noted that same-sex marriages will never amount to more than a very small proportion of American marriages because there are fewer homosexuals than heterosexuals. Wald, *supra* note 16, at 333. One of the most comprehensive national studies on sexual behavior found that approximately 2.8% of men and 1.4% of women identify themselves as homosexual. Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 284 (1998) (citing EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 297 (1994)).

¹¹⁷ See Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 19 (2000).

¹¹⁸ See Cruz, *supra* note 17, at 1019; Michael Mello, *For Today I'm Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 251 (2000); Wald, *supra* note 16, at 338.

¹¹⁹ Ball, *Moral Foundations*, *supra* note 18, at 1939–40.

¹²⁰ Wald, *supra* note 16, at 302.

¹²¹ See Vetri, *supra* note 98, at 45.

same-sex marriage is to deprive the couple of this highly exalted form of human association.¹²²

According to societal expectations, marriage also communicates to the married couple a sense of permanence and exclusivity.¹²³ Such conditions offer the marriage partners security, self-confidence, and freedom from a sense of alienation or isolation.¹²⁴ A society that cares about its members will want them to experience the liberating and empowering gifts of marital love because such people will be more fulfilled, and thus more willing and able to contribute to their communities.¹²⁵ If marriage is taken seriously, the marital habits of constancy, trust, honesty, fairness, and compassion will be more prevalent in society.¹²⁶ Marriage provides each partner with a sense of dignity and value; through this awareness of his or her own worth, a person can participate more effectively in society.¹²⁷ Public acceptance of a married couple through legal recognition and ceremonial services helps to strengthen the couple's commitment to the relationship.¹²⁸

Conversely, same-sex unions have been limited to alternative labels, such as "domestic partnerships" and "civil unions," which fail to convey the same powerful societal message underlying the term "marriage."¹²⁹ Even if a state, like Vermont, were to pass a statute that paralleled marriage in its legal provisions, it would be sending a message that these unions are essentially "second class units" and somehow unworthy of the marriage title.¹³⁰ Societal attitudes are critical in helping couples remain committed to one another.¹³¹ As long as lesbians and gay men are not fully accepted, their unions will "suffer from pressures to which the marriages and dating relationships of straight couples are never subjected."¹³²

Critics of same-sex marriage contend that its recognition would bring an information cost by diluting or obscuring the meaning of marriage.¹³³ Under the conventional definition of marriage, a woman

¹²² Ball, *Moral Foundations*, *supra* note 18, at 1940.

¹²³ Chartier, *supra* note 1, at 1620.

¹²⁴ *Id.* at 1621.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Chartier, *supra* note 1, at 1622.

¹²⁹ See Cruz, *supra* note 17, at 1019.

¹³⁰ Wald, *supra* note 16, at 338.

¹³¹ *Id.*

¹³² Chartier, *supra* note 1, at 1622.

¹³³ POSNER, *supra* note 34, at 312.

referring to her "spouse" clearly communicates her marriage to a man (as opposed to a woman).¹³⁴ According to critics, if same-sex marriages were recognized, this assumption no longer holds, thereby imposing an information cost.¹³⁵ Although admittedly valid, such costs are slight when weighed against the benefit that same-sex couples would receive from being able to use the term "marriage" to signal the extent of their mutual commitment.¹³⁶

Non-recognition of same-sex marriage is a form of social control of gay men and lesbians.¹³⁷ It enforces the cultural belief that same-sex relationships are not the equivalent of heterosexual marriages and, therefore, not deserving of equal respect.¹³⁸ This creates obstacles for the same-sex couple in its efforts to remain committed to one another for life.¹³⁹ Thus, same-sex couples are less likely to set down roots in local communities or to invest time and energy in making those communities thrive.¹⁴⁰ Civil society depends on an array of intertwined communities, marriage being among the most important.¹⁴¹ Strong marriages assist in the growth and flourishing of healthy communities, and prohibiting marriage on the basis of sexual orientation harms both the couple and society.¹⁴²

CONCLUSION

In his book, *The Gay Rights Question in Contemporary American Law*, Andrew Koppelman demonstrates the powerful legal and moral case for the equal treatment of gay men and lesbians.¹⁴³ He supports his position by suggesting that the issue of gay rights closely resembles the dispute over same-sex marriage.¹⁴⁴ The right to privacy, the problem of sex discrimination, the constitutional requirement of interstate consistency, and fallacies within the new natural law theory work to-

¹³⁴ See *id.*

¹³⁵ See *id.*

¹³⁶ *Id.* at 311. Posner points out that recognition of same-sex marriage would raise the self-esteem of lesbians and gay men. *Id.*

¹³⁷ Vetri, *supra* note 98, at 47.

¹³⁸ See *id.*

¹³⁹ See Wald, *supra* note 16, at 338.

¹⁴⁰ Chartier, *supra* note 1, at 1621.

¹⁴¹ *Id.* at 1622.

¹⁴² See *id.*; Wald, *supra* note 16, at 339.

¹⁴³ KOPPELMAN, *supra* note 4, at 35, 53, 72, 94.

¹⁴⁴ See *id.* at 73.

gether to provide a strong argument in favor of same-sex marriage recognition.¹⁴⁵

Unfortunately, Koppelman does not provide a pragmatic analysis of same-sex marriage.¹⁴⁶ In focusing on legal and moral issues, he fails to address the "condition of legal inferiority" imposed on same-sex couples in a society that denies them the legal benefits of marriage.¹⁴⁷ Although his analyses are sound, they fail to compel the conclusion that same-sex marriage should be imposed by the courts.¹⁴⁸ Instead, he states that "[civil unions are] the most that gays can possibly hope for, at least in the next few years."¹⁴⁹

The value of law and economics lies not in proving that same-sex marriage is a constitutional imperative, but in educating Americans that non-recognition is costly and unjustified.¹⁵⁰ This economic approach could have been the final missing step that Koppelman implied was necessary for the judiciary to be able to act in a politically hostile environment.¹⁵¹ The courts are aware, and even admit, that a sudden change in marriage laws could have disruptive and unforeseen consequences.¹⁵² These consequences, however, are due in large part to the unwillingness of Americans to grant equal status to same-sex couples.¹⁵³ The unwillingness stems from decades of misinformation, confusion, and disgust.¹⁵⁴ By demonstrating the overwhelming benefits that same-sex marriage would bring to gay men, lesbians, and society, law and economics provides courts with the needed "good reason" that Koppelman deems necessary for the judiciary to be armed with entering the debate.¹⁵⁵

¹⁴⁵ *Id.* at 35, 53, 72, 94.

¹⁴⁶ *See id.* at 72–93.

¹⁴⁷ *See* Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont's Civil Union Law, Same-Sex Marriage, and Separate But (Un)equal*, 25 VT. L. REV. 113, 135 (2000).

¹⁴⁸ *See* KOPPELMAN, *supra* note 4, at 145.

¹⁴⁹ *Id.*

¹⁵⁰ *See* POSNER, *supra* note 34, at 308 (arguing that even if a gay man is likely to be less happy than a heterosexual man, this is, in itself, a reason to remove obstacles such as marriage prohibition "in order to alleviate gratuitous suffering").

¹⁵¹ KOPPELMAN, *supra* note 4, at 145.

¹⁵² *Id.* at 141; *see* Baker v. State, 744 A.2d 864, 887 (Vt. 1999).

¹⁵³ *See* Battaglia, *supra* note 2, at 206–07; Lin, *supra* note 2, at 741–42; Wald, *supra* note 16, at 339.

¹⁵⁴ *See* Battaglia, *supra* note 2, at 206–07; Lin, *supra* note 2, at 741–42; Wald, *supra* note 16, at 339.

¹⁵⁵ *See* KOPPELMAN, *supra* note 4, at 145.

The courts, remarkably ahead of public opinion on the issue of same-sex marriage, presently exercise caution when addressing it.¹⁵⁶ Same-sex marriage recognition would be a dramatic change to a well-established social tradition, and history has shown that sudden acceptance by the courts is likely to trigger political backlash.¹⁵⁷ Marriage, as a settled and fundamental social institution, is not prone to welcoming radical changes.¹⁵⁸ As noted by Edmund Burke, "it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society."¹⁵⁹

Even though settled tradition may strengthen the case for traditional marriage, however, it does not serve as an independent reason to reject change.¹⁶⁰ Society's particular definition of the institution does not therefore make the definition correct, and if the case for same-sex marriage is persuasive in other respects, then change must be made, despite the longstanding definition.¹⁶¹

¹⁵⁶ KOPPELMAN, *supra* note 4, at 141, 144. Koppelman supports this assertion with Posner's comment that public opinion may change, but at present, it is too firmly against same-sex marriage for the courts to act. *Id.* at 144-45. Posner's suggestion is to "[allow] the matter to simmer for a while before the heavy artillery of constitutional rightsmaking is trundled out." *Id.* at 145; *see, e.g.,* *Romer v. Evans*, 517 U.S. 620, 632 (1996) (striking down Colorado's Amendment 2, which prohibited government-backed preferential treatment of homosexuals, because it was motivated by animus); *Baker v. State*, 744 A.2d 864, 911 (Vt. 1999) (holding that same-sex couples are entitled, under the state constitution, to the same legal benefits as heterosexual married couples); *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993) (holding that denial of same-sex marriage is gender discrimination); *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562CI, 1998 WL 88743, at *6 (Alaska Feb. 27, 1998) (holding that denial of marriage license to same-sex couples violates state constitution).

¹⁵⁷ *See Baehr*, 852 P.2d at 67. After Hawaii's Supreme Court ruled that the state constitution required recognition of same-sex marriage, voters overruled the decision by passing a constitutional amendment. *See id.*; KOPPELMAN, *supra* note 4, at 142. A similar amendment passed in Alaska after a district court ordered recognition of a same-sex marriage. *See Brause*, 1998 WL 88743, at *6; KOPPELMAN, *supra* note 4, at 142; Buckley & Ribstein, *supra* note 42, at 580.

¹⁵⁸ Buckley & Ribstein, *supra* note 42, at 580.

¹⁵⁹ EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION OF FRANCE* 31 (Oxford 1993) (1790), *quoted in* Buckley & Ribstein, *supra* note 42, at 580.

¹⁶⁰ Buckley & Ribstein, *supra* note 42, at 581; *see also* Mark Tanney, *The Defense of Marriage Act: A "Bare Desire to Harm" an Unpopular Minority Cannot Constitute a Legitimate Government Interest*, 19 T. JEFFERSON L. REV. 99, 119 (1997) (stating that defending marriage as strictly heterosexual "because 'it has always been that way' is simply wrong"); Desiree Alonso, Note, *Immigration Sponsorship Rights for Gay and Lesbian Couples: Defining Partnerships*, 8 CARDOZO WOMEN'S L.J. 207, 230 (2002) (observing that change related to sexual identity is particularly threatening, which makes "tradition" a natural and easy argument for conservatives to make).

¹⁶¹ Buckley & Ribstein, *supra* note 42, at 581.

Marriage is a loving, caring relationship that provides intimacy and security.¹⁶² It is a legal status and a social institution that simplifies and organizes crucial matters for the partners.¹⁶³ Denial of this status to an already disadvantaged group of people creates market inefficiency.¹⁶⁴ Thus, the evidence demonstrates that same-sex marriage would empower gay men and lesbians to be able to participate more fully in society.¹⁶⁵ Continued non-recognition, on the other hand, perpetuates the disdain that society harbors against gay men and lesbians and flies in the face of economic efficiency.¹⁶⁶ Gay men, lesbians, their children, and Americans as a whole will all be better off when we recognize the case for same-sex marriage.¹⁶⁷

¹⁶² Vetri, *supra* note 98, at 45.

¹⁶³ *Id.*

¹⁶⁴ See POSNER, *supra* note 34, at 308.

¹⁶⁵ See Wald, *supra* note 16, at 339.

¹⁶⁶ See Bush, *supra* note 19, at 137; Wald, *supra* note 16, at 338.

¹⁶⁷ See Wald, *supra* note 16, at 344.