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A CASE AGAINST THE FEDERAL PROTECTION OF MARRIAGE AMENDMENT

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I. Introduction

The social meanings associated with marriage vary widely by culture, community, and individual. Despite the myriad subjective meanings attached to marriage, however, the marriage contract in the United States represents a legal and economic relationship sanctioned and enforced by federal and state governments, private institutions, and society more broadly. To become married is to enter a legally binding relationship that

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increases earnings and wealth accumulation and provides insurance against economic risk over the life course. In fact, the right to marry offers one access to a variety of monetary and non-monetary benefits, including higher levels of earnings and household wealth, Social Security benefits, tax relief and insurance of various kinds. Those without such rights are necessarily barred from the economic benefits offered by the legally enforceable contract.

Traditionally, despite Constitutional provisions that guarantee equal protection under the law, same-sex couples have been denied access to the rights attached to marriage. However, beginning in the 1970s, same-sex couples began taking small steps toward gaining the legal right to participate in marital unions, both in this country and in other nations. While progress in this country has been slow, the rights of same-sex couples have been fully recognized now in a growing number of other countries.¹

However, just as progress in the movement for equality for same-sex couples started to be made in this country as courts and legislatures began to provide some rights to same-sex couples, a well-organized backlash occurred. Opponents of same-sex marriage began to obtain passage of both federal and state laws making it difficult for same-sex couples to continue to expand their access to the rights and benefits that accompany marriage. The strength of this opposition group can be seen by their securing passage of The Defense of Marriage Act (DOMA) in 1996,² as well as thirty-four state versions of DOMA, which prohibit same-sex marriage.³ Yet, in the wake of

1. For example, same-sex marital relationships have been recognized in Canada since July of 2005 under The Civil Marriage Act, 2005 S.C., ch.33 (Can.); in Spain since 2005; in Belgium since 2003; and in the Netherlands, the first nation to recognize same-sex marriages, since 2001. France, Hungary, and Portugal all have laws recognizing civil partnerships, which grant most if not all of the rights associated with marriage to same-sex partners. Raf Casert, *Belgian Lawmakers Pass Law Approving Gay Marriages*, ASSOCIATED PRESS WORLDSTREAM, Jan. 30, 2003.

2. The Defense of Marriage Act, signed in 1996 by President Clinton, has two provisions. The first defines marriage, for federal purposes, as only heterosexual: 1 U.S.C. § 7. "In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife and the word 'spouse' refers only to a person of the opposite-sex who is a husband or a wife." The second provision states that, "No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between person of the same-sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship." 28 U.S.C. § 1738C.

3. The thirty-four states that passed laws denying same-sex marriage are: Alabama (1998), Alaska (1998), Arizona (1996), Arkansas (1997), California (2000), Colorado (2000), Delaware (1996), Florida (1997), Georgia (1996), Hawaii (1998), Idaho (1996), Illinois (1996), Indiana (1997), Kansas (1996), Louisiana (1999), Maine (1997), Michigan (1996), Minnesota (1997), Mississippi (1997), Montana (1997), Nebraska (2000), New Jersey (2001),

state supreme court decisions in Massachusetts⁴ and Vermont⁵ that recognized significant problems with treating same and opposite sex couples differently, DOMAs are now viewed by some as too weak a protection for maintaining the status quo in state recognition of marriage as a union available only to one man and one woman. Fearful of more courts granting marriage rights to same-sex couples and of sister states recognizing same-sex unions,⁶ opponents of same-sex marriage have turned their attention to amending both state and federal constitutions.

The most potentially powerful of these approaches is the attempt to amend the United States Constitution with the Marriage Protection Amendment.⁷ The Amendment would not only end the debate about whether same-sex couples would be allowed to marry, but may also lead some states to revoke benefits they had given to same-sex couples under the belief that to deny equal benefits would violate their state constitution,⁸ thereby taking away benefits presently conferred on domestic partners in some locations.⁹ Many commentators claim that the administration is not seriously interested in passing this amendment and that it is merely an attempt by conservative politicians to shore up their political base for upcoming elections.¹⁰ Other groups are committed to passing this amendment eventually. They believe that even if passage is not presently possible, forcing Congresspersons to vote on this amendment may eventually allow advocates of the amendment to elect enough members to Congress to some day secure passage of the Amendment.¹¹

New York (2001), North Carolina (1996), North Dakota (1997), Oklahoma (1996), Pennsylvania (1996), South Carolina (1996), South Dakota (1997), Tennessee (1996), Utah (1995), Virginia (1997), Washington (1998), and West Virginia (2000).

4. *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

5. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

6. Most recently, Connecticut became the first state to grant civil unions to same-sex couples without a judicial mandate. See William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, April 21, 2005 at B5.

7. Initially introduced, but not as vigorously pursued as the Federal Marriage Act.

8. Vermont, for example, passed its civil union statute only after a ruling by its state supreme court in *Baker v. State*, 744 A.2d 864 (1999) that the constitution required the state to extend to same-sex couples the same benefits and protections provided to opposite-sex couples.

9. The relevant portion of the Amendment reads as follows: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman." H.J. Res. 106, 108th Cong. (2004).

10. See, e.g., David Lightman, *A Gay Rights Debate Begins; Some Seek Ban on Marriages*, HARTFORD COURANT, June 5, 2006, at A1.

11. As Amanda Izsak, federal issues analyst at Focus on the Family Action, said, "All of the members of the U.S. House are up for election on November 2, and I'm confident that voters are going to remember this vote. Now they know where each member of Congress stands — and they know whether their representatives did, in fact, represent them." Pete

This article will attempt to present a compelling case for opposition to the Marriage Protection Amendment (MPA). The background section will provide a brief history of the evolution of legal and economic rights for same-sex couples. The next section will provide an overview of the MPA. While there are many reasons to oppose the MPA, this article focuses on three of the most compelling ones. Section four argues that the amendment violates basic tenets of federalism by attempting to regulate marriage, an area that has been regulated by the states since the inception of this nation. Section five argues that the MPA threatens freedom of religion, an interest enshrined in the First Amendment of our Constitution, and thus would create a significant internal contradiction between two amendments.

Section six argues that the amendment discriminates against a distinct minority of the population in violation of their right to equal protection, whereas many regard one of the most important functions of the United States Constitution to be its protection of minorities. To bolster this argument, this section will provide a review of the social science literature on the economic consequences of marriage and demonstrate that significant economic benefits are currently available only to those able to legally marry.¹² The section considers three general categories of marriage-related economic benefits: earnings premiums, wealth and property accumulation, and insurance against risk over the life course. In other words, married people earn more, save more, own more, and are better shielded from economic risks, including poverty, than are non-married individuals. As will be discussed throughout this section, these findings do not imply that married individuals are somehow different in kind than non-married individuals. Rather, marriage itself provides a level of economic security that motivates married individuals to pursue mutually beneficial investments and exchanges that in turn increase earnings, savings and wealth, and that decrease economic risk over the long-term. Indeed, as an abundance of research has demonstrated, the economic benefits produced by marriage itself are substantial and far surpass the *predicted* long-term financial returns to individuals who chose to marry.¹³ In the absence of insurance against

Winn, *Marriage Protection Amendment Fails in House Vote*, FOCUS ON THE FAMILY CITIZENLINK.COM, Sept. 30, 2004, <http://www.family.org/cforum/feature/a0033978.cfm>.

12. This paper does not consider the rich literature on the economic benefits for children of married parents and the economic disadvantages of children living outside of marriage. To review research on that topic, see PAUL AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997); Elaine Kamarck & William Galston, *Putting Children First: A Progressive Family Policy for the 1990s* (Progressive Policy Inst. Whitepaper 1990); SUSAN MAYER, WHAT MONEY CAN'T BUY: FAMILY INCOME AND CHILDREN'S LIFE CHANCES (1997); SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); Jane McLeod & Michael Shanahan, *Poverty, Parenting, and Children's Mental Health*, 58 AM. SOC. REV. 351 (1993).

13. Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women's Economic*

risk, non-married and cohabitating individuals are substantially less likely to benefit from the economic advantages of pooling resources and pursuing financial independence. Furthermore, non-married individuals lack access to a variety of public and private benefits available only to married individuals. Given the range of benefits and protections exclusively available to married individuals, this section concludes that those without access to marriage contracts face significant economic disadvantage as a result, meaning that permanent denial of marriage rights under this amendment would constitute federal and state-sponsored enforcement of economic discrimination in violation of the right to equal protection. The article finally concludes that in light of the foregoing arguments, the MPA should be opposed. Passage of the amendment would not only result in a violation of long-standing constitutional principles, but would also further the social instability that the MPA was allegedly intended to prevent.

II. Background: A History of the Treatment of Same-Sex Relationships in the United States

A. Domestic Partnership Ordinances and Statutes

Since the 1970s activists have been striving to gain marital rights for same-sex couples. There has been significant progress,¹⁴ along with a number of setbacks. Perhaps in recognition of the difficulty of attaining the right to marry, some advocates initially focused on attaining as many of the traditional marital rights as possible through the enactment of domestic partnership ordinances and statutes. Some of these ordinances merely provide same-sex partners the opportunity to register their relationship, which offers a way to publicly recognize their relationship.¹⁵ Others provide more substantive rights and obligations, such as setting out a non-discrimination policy for the city¹⁶ or providing that each partner will be

Well-Being, 64 AM. SOC. REV. 794 (1999).

14. In addition to gaining legal rights to some benefits comparable to those of married couples, progress has also been made in securing benefits from private sector employers. As of the summer of 2004, approximately 6,800 employers, 211 of them Fortune 500 companies, offered benefits to same-sex partners. American Bar Association of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 30 FAM. L. Q. 339, 348 (2004). Of course, while every additional employer who provides such benefits is important, these benefits are not guaranteed in the same way as legal benefits, and so are not quite as significant in the overall quest for equality between same-sex and opposite-sex couples. Firms may be generous when economic times are good, but are most likely to cut back on these benefits when they are needed most, in times of economic downturns.

15. American Civil Liberties Union, Model Policy A – Basic Registration Systems, <http://www.aclu.org/getequal/rela/domestic8.html> (last visited Oct. 21, 2006).

16. American Civil Liberties Union, Model Policy D Special Sections,

responsible for the other's basic necessities when one is unable to provide for himself or herself.¹⁷

The very first domestic partnership ordinance was that of Berkeley, California, adopted in December 1984.¹⁸ Additional benefits for city employees were added in 1987.¹⁹ This policy is significant in that it was the first such ordinance; however, it was extraordinarily limited in that it provided benefits to only municipal employees.²⁰ In June 1991, the City Council extended the policy recognizing domestic partnerships beyond city employees to provide the general public the opportunity to register as Domestic Partners.²¹ Under Berkeley's Domestic Partnership Policy, unmarried domestic partners file an Affidavit of Domestic Partnership (ADP),²² in which they attest that they have lived together at least six months and "share the common necessities of life."²³ Both parties must be over eighteen years of age and must declare that they are each the other's sole domestic partner and are responsible for their common welfare.²⁴ Should the partnership dissolve, the partners must file a statement of termination, and the employee would not be able to register another domestic partnership during the next six months.²⁵ However, the city's domestic partnership ordinance does not provide any legal rights to partners, but rather recognizes their relationship and provides evidence of the existence of a domestic partnership in the event that an employer or business wishes to treat domestic partners the same as marital partners.

State domestic partnership statutes increased the number of same-sex

<http://www.aclu.org/getequal/rela/domestic11.html> (last visited Oct. 21, 2006).

17. American Civil Liberties Union, Model Policy B Basic Benefits or Recognition System, <http://www.aclu.org/getequal/rela/domestic9.html> (last visited Oct. 21, 2006).

18. City of Berkeley Affidavit of Domestic Partnership, http://www.ci.berkeley.ca.us/clerk/forms/dp_affidavit.pdf. (last visited Oct. 21, 2006).

19. City of Berkeley Domestic Partnership Information Sheets, <http://www.hrc.org/Template.cfm?Section=Home&Template=/ContentManagement/ContentDisplay.cfm&ContentID=11104> (last visited Oct. 21, 2006).

20. The benefits were limited. Once a couple files an ADP, they were then eligible for the same health care and dental insurance policies as married couples, but at the time, that change was significant. City Clerk, Domestic Partnership Information, <http://www.ci.berkeley.ca.us/clerk/dom-pol.htm> (last visited Oct. 21, 2006). Under Berkeley's plan, premiums for both the city employee and his or her domestic partner are paid for by the city. Perhaps surprisingly, four years after the ordinance was passed, the city found that the costs of their premiums had increased only minimally. *S.F. Supervisors OK 'Domestic Partners' Law*, L.A. TIMES, May 23, 1989, at 28.

21. City Clerk, Domestic Partnership Information, <http://www.ci.berkeley.ca.us/clerk/dom-pol.htm> (last visited Oct. 21, 2006).

22. The affidavit can be downloaded from http://www.ci.berkeley.ca.us/clerk/forms/dp_affidavit.pdf (last visited Oct. 21, 2006).

23. *Id.*

24. *Id.*

25. *Id.*

couples receiving some of the benefits provided to marital partners, as well as increased the kinds of benefits, but like the municipal ordinances, the benefits they provide are still limited.²⁶ States that have adopted such legislation include California, Maine, Hawaii and most recently, New Jersey.²⁷ California's state law is one of the more expansive domestic partner statutes, and provides registered domestic partners the "rights protections and benefits" given to married couples under the state's "statutes, administrative regulations, court rules, government, common law or other sources of law as are granted to and imposed against spouses."²⁸ Again, of course, no reference is made to the significant number of benefits provided by federal law, which are not available to same-sex partners.

Compared to California's law, Maine's domestic partnership statute is much more limited, creating a state-wide registry for domestic partners and

26. Primarily, they cannot provide the benefits offered by federal law based on marital status, such as Social Security benefits and federal income tax benefits.

27. Joanna Grossman, *The New Jersey Domestic Partnership Law: Its Formal Recognition of Same-Sex Couples , and How It Differs From Other States' Approaches*, FINDLAW'S WRIT, Jan. 13, 2004, <http://writ.news.findlaw.com/grossman/20040113.html>.

28. CAL. FAM. CODE § 297.5. The statute provides in full:

"(a) Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses."

(b) Former registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon former spouses.

(c) A surviving registered domestic partner, following the death of the other partner, shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon a widow or a widower.

(d) The rights and obligations of registered domestic partners with respect to a child of either of them shall be the same as those of spouses. The rights and obligations of former or surviving registered domestic partners with respect to a child of either of them shall be the same as those of former or surviving spouses.

(e) To the extent that provisions of California law adopt, refer to, or rely upon, provisions of federal law in a way that otherwise would cause registered domestic partners to be treated differently than spouses, registered domestic partners shall be treated by California law as if federal law recognized a domestic partnership in the same manner as California law.

(f) Registered domestic partners shall have the same rights regarding nondiscrimination as those provided to spouses."

allowing registered domestic partners to inherit a deceased partner's property if he or she dies without a will, and to make funeral and burial arrangements.²⁹ The statute also entitles a registered partner to be named a guardian or conservator if their partner becomes incapacitated, in the same manner as a spouse who would have been so designated.³⁰

Hawaii also offers very limited benefits to same-sex couples.³¹ Hawaii's Reciprocal Beneficiaries Statute, enacted in 1997,³² allows registered reciprocal beneficiaries to be treated the same as spouses for purposes of protection under Hawaiian domestic violence laws, tort liability, cases of wrongful death and loan eligibility.³³ It also allows registered partners to inherit from their partner without a will, consent to post-mortem examinations, and have the same rights as spouses to hospital visitation and making health care decisions.³⁴ Registered domestic partners may also own property as joint tenants.³⁵

On January 8, 2006, New Jersey joined the slowly growing list of states providing formal recognition and some benefits to same-sex couples when its senate passed the partnership law.³⁶ Benefits under the law are fairly limited, however. Registered domestic partners are entitled to the same inheritance rights as a surviving spouse, as well as authority to make funeral arrangements.³⁷ The law also gives domestic partners of New Jersey state employees the right to receive certain health care and retirement benefits, and allows domestic partners of private employees, as well as partners of other public employees including employees of such entities as counties, municipalities and boards of education to receive such benefits if the employer chooses to provide for such coverage.³⁸ New Jersey also recognizes domestic partnerships and civil unions entered into in other states that have domestic partnership or civil union statutes.³⁹

Civil union statutes provide more significant rights than most domestic

29. ME. REV. STAT. ANN. tit. 19 § 701.

30. *Id.*

31. Partners Task Force for Gay and Lesbian Couples, Reciprocal Beneficiaries: The Hawaiian Approach, <http://www.buddybuddy.com/d-p-hawa.html> (last visited Oct. 21, 2006). Arguably, the low number of registrants is evidence of the ineffectiveness of this law. During the first four years after the law's enactment, only 578 reciprocal beneficiary relationships were registered. Since that time, some additional couple have registered, but not a significant number. *Id.*

32. 1997 HAW. SESS. LAWS 383.

33. Partners Task Force for Gay and Lesbian Couples, *supra* note 31.

34. *Id.*

35. *Id.*

36. Grossman, *supra* note 27.

37. Ramon Johnson, *New Jersey Domestic Partnership Law*, ABOUT, <http://gaylife.about.com/cs/mentalhealth1/a/newjersey.htm> (last visited Oct. 21, 2006).

38. *Id.*

39. Grossman, *supra* note 27.

partnership statutes because they generally provide all the state rights afforded married couples to those who enter into a civil union. For example, the Vermont statute⁴⁰ provides that “[p]arties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.”⁴¹ The state’s civil union law further enumerates some of the more significant benefits and responsibilities same-sex couples who register their civil union in the state are entitled to, including: a requirement of mutual financial support;⁴² the application of the state laws of domestic relations, including annulment, separation and divorce, child custody and support, property division and maintenance, adoption, and spouse abuse to the relationship;⁴³ the same application of laws regarding child custody and support as apply to marital partners;⁴⁴ similar application of property law and laws relating to decedents estates and probate;⁴⁵ equal treatment of marital and domestic partners under tort law;⁴⁶ the same application of tax laws and provision of

40. Among other legal rights and responsibilities for same-sex partners, the Vermont statute provides that Vermont’s Civil Union statute provides that a party to a civil union is included, by law, in any definition or use of the terms “spouse,” “family,” “immediate family,” “dependent,” “next of kin,” and other terms that denote the spousal relationship, as those terms are used throughout Vermont law.

41. VT. STAT. ANN. tit. 15, § 1204(a) (2005).

42. VT. STAT. ANN. tit. 15, § 1204(c) (2005). Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons.

43. VT. STAT. ANN. tit. 15, § 1204(d) (2005). The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.

44. “The rights of parties to a civil union, with respect to a child who either party has become a natural parent to during the term of the civil union, shall be the same as those of a married couple, with respect to a child who either spouse has become the natural parent to during the marriage.” Office of the Secretary of State, *The Vermont Guide to Civil Unions*, Aug. 2006, <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html#faq6>.

45.

“The following is a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union:

(1) laws relating to title, tenure, descent and distribution, intestate succession, waiver of will, survivorship, or other incidents of the acquisition, ownership, or transfer, inter vivos or at death, of real or personal property, including eligibility to hold real and personal property as tenants by the entirety (parties to a civil union meet the common law unity of person qualification for purposes of a tenancy by the entirety); ...

(3) probate law and procedure, including nonprobate transfer”

VT. STAT. ANN. tit. 15, § 1204 (e)(1) and (3) (2005).

46. See VT. STAT. ANN. tit. 15, § 1204 (e) (2) (2005).

public assistance;⁴⁷ the same statutory spousal benefits related to group insurance for state employees, victims' compensation, workers compensation, family leave benefits, and state pay for military service;⁴⁸ and treatment equal to that of a spouse under laws relating to emergency and non-emergency medical care and treatment, hospital visitation and other health care related legal benefits.⁴⁹ Unlike some civil union laws, the Vermont statute also provides that the rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, are the same as those of a married couple, with respect to a child of whom either spouse becomes the natural parent during the marriage.⁵⁰

Between July 2000, when Vermont's Civil Union Statute became effective, and August 2006, 1,286 Vermont couples have registered their civil unions, thereby giving a large number of couples the state benefits of civil unions.⁵¹ While these benefits do not include all the federal benefits of marriage, they are nonetheless significant, and could potentially be taken away if the MPA were to pass.⁵²

On April 20, 2005, Connecticut passed its civil union statute, allowing two persons of the same sex who are at least eighteen years old and are not currently partners in a marriage nor another civil union nor more closely related than first cousins to be joined in a civil union.⁵³ Parties must register for a license and be joined in a formal ceremony by an official who would

47. The laws relating to taxes imposed by the state or a municipality other than estate taxes; to public assistance benefits under state law; the homestead rights of a surviving spouse under VT. STAT. ANN. tit. 27, § 105 and homestead property tax allowance under VT. STAT. ANN. tit. 32, § 6062 apply to parties to a civil union. See VT. STAT. ANN. tit. 15, § 1204 (e) (13), (16) (2005).

48. The laws relating to group insurance for state employees under VT. STAT. ANN. tit. 3, § 631, and continuing care contracts under VT. STAT. ANN. tit. 8, § 8005; victim's compensation rights under VT. STAT. ANN. tit. 13, § 5351; workers' compensation benefits; state pay for military service under VT. STAT. ANN. tit. 20, § 1544; and family leave benefits under VT. STAT. ANN. tit. 21, §§ 470-474 apply to parties to a civil union. VT. STAT. ANN. tit. 15, § 1204 (e) (5), (12), (17), (20) (2005).

49. Laws relating to emergency and non-emergency medical care and treatment, hospital visitation and notification, including the Patient's Bill of Rights under VT. STAT. ANN. tit. 18, §§ 1851-1853 and the Nursing Home Residents' Bill of Rights under VT. STAT. ANN. tit. 33, § 7301-7306; laws relating to the making, revoking and objecting to anatomical gifts by others under VT. STAT. ANN. tit. 18, § 5240 apply to parties to a civil union. VT. STAT. ANN. tit. 15, § 1204 (e) (11) & (15) (2005).

50. 15 V.S.A. § 1204 (f) (2005) (Added 1999, No. 91 (Adj. Sess.), § 3; amended 2001, No. 6, § 12(a), eff. April 10, 2001; 2001, No. 140 (Adj. Sess.), § 19, eff. June 21, 2002.).

51. Office of the Secretary of State, *The Vermont Guide to Civil Unions*, Aug. 2006, <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html#faq6>.

52. *Id.*

53. Kim Knox Beckius, *Civil Union Law Passes in Connecticut*, Apr. 21, 2005, ABOUT, <http://hartford.about.com/od/government/a/aactcivilunions.htm>.

be recognized as eligible to perform a wedding ceremony.⁵⁴ Similar to Vermont's civil union statute, the Connecticut law offers couples joined in civil unions all the same benefits, protections and responsibilities under law that are granted to spouses in a marriage in categories such as state and municipal taxation, family leave benefits, hospital visitation and notification, state public assistance benefits and court privileges.⁵⁵ While the law provides that all state and municipal employees will receive insurance benefits comparable to those provided to spouses, the law does not require private employers to treat civil partners the same as spouses for purposes of such benefits.⁵⁶

B. The Courts and Same-Sex Marriage

While domestic partnerships and civil unions can provide some benefits for same-sex couples, what those interested in equality are really seeking is to establish the right of same-sex couples to marry. Advocates of equality for same-sex couples have made the most significant gain toward attaining that goal through the court system,⁵⁷ specifically through the decision of the Massachusetts Supreme Court in *Goodridge v. Department of Public Health*, on November 18, 2003, that the state's statute barring same-sex couples from marrying was unconstitutional, and its order to the state legislature to remedy the violation within six months.⁵⁸ Less than a year later, in February of 2004, the high court ruled that the violation could not be remedied by passage of a civil union statute, thereby finally granting couples in at least one state the ability to marry.⁵⁹

Yet the treatment of same-sex partners by the courts has not been uniformly favorable. In the first major attempt to secure the right to same-

54. *Id.*

55. *Id.*

56. *Id.*

57. Of course, this victory is not necessarily a permanent one. "Gay marriage opponents in Massachusetts are seeking to end same-sex weddings there through the citizen initiative process, but the soonest the state could vote to repeal gay marriage would be in 2008. In December 2005, opponents of same-sex marriage collected enough signatures to force the state legislature to consider a constitutional ban on same-sex marriage. The amendment . . . must be approved by just one-quarter of the state Legislature in two consecutive years before it could go before voters. Massachusetts Gov. Mitt Romney, a Republican considering a presidential bid in 2008, has been a vocal supporter of the proposed amendment." Kavan Peterson, *Wash., New York Say No to Gay Marriage*, STATELINE.ORG, Aug. 3, 2006. <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695>.

58. 798 N.E.2d 941, 960 (Mass. 2003).

59. *In re Opinions of the Justices to the Senate*, 802 N.E.2d 565, 572 (Mass. 2004). Of course, because of the federal DOMA, the Constitutionality of which has not yet been determined by the U.S. Supreme Court, even same-sex couples lawfully married in Massachusetts are not entitled to the federal benefits of marriage.

sex marriage, the 1971 case of *Baker v. Nelson*,⁶⁰ the gay male couple lost on both statutory construction and constitutional arguments. They had argued first that the fact that the Minnesota marriage law did not specify that marriage was between a man and a woman indicated legislative intent to authorize marriage between any two persons, not just persons of the opposite sex.⁶¹ The court found sufficient evidence to the contrary, however, by the statute's use of terms such as "bride" and "groom," and "husband" and "wife" to infer that the legislature intended for the relationship to be one between persons of the opposite sex.⁶² The couple also argued that prohibiting them from marrying denied them a fundamental right guaranteed by the Constitution, and also violated their right to equal protection under the United States Constitution.⁶³ Without really providing much of a justification for their decision, the justices on Minnesota's highest court found no basis for these arguments in any United States Supreme Court decision.

Two years later, a Kentucky court likewise rejected arguments that Kentucky's refusal to grant a marriage license to a lesbian couple denied them their right to marry, right to free association, and right to free exercise of religion, as well as constituted cruel and unusual punishment.⁶⁴ Despite the fact that the state's marriage statute did not specifically limit marriage to a man and a woman, the court, citing *The Century Dictionary and Encyclopedia*, *Webster's Dictionary*, and *Black's Law Dictionary*, all of which defined marriage as between a man and a woman, said that they had to use the common meaning of the term, and by the common definition, what they proposed was not a marriage.⁶⁵ Because what they wanted to do was not, by definition, a marriage, the court found that there could be no constitutional violations.⁶⁶

In 1974, a male couple in the state of Washington filed suit against the county auditor for refusal to issue them a marriage license, and obtained the same result. In the Washington case the couple had argued that the denial of a marriage license violated the Equal Rights Amendment of the state's constitution.⁶⁷ The appellate court found no such violation, noting that the

60. 191 N.W.2d 185 (Minn. 1971).

61. *Id.* at 185.

62. *Id.* at 186.

63. *Id.*

64. *Jones v. Hallahan*, 501 S.W.2d 588, 590 (Ky., 1973).

65. *Id.* at 589.

66. *Id.* at 590. The court noted that the case before it was a case of first impression in the state of Kentucky, but referred to the only other cases it could find on the matter in other states: *Baker v. Nelson*, 191 N.W.2d 185 (1971), appeal dismissed, 409 U.S. 810 (1972), and *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (N.Y. Sup. Ct. 1971). In both cases, the court noted, judges came to the same conclusion as the Kentucky court.

67. *Singer v. Hara*, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974). The court found that

purpose of the law was to ensure that both sexes were treated equally, primarily for economic purposes, not to legalize homosexual marriage.⁶⁸ And in the instant case, both male and female same-sex couples were prohibited from marrying, so members of both sexes are being treated equally.⁶⁹ The Washington State Supreme Court denied the couple's appeal without comment.⁷⁰

In 1975, in a federal case of statutory construction, a federal court of appeals refused to find that same-sex partners could be considered spouses. The case involved a determination that the term "spouse" means someone of the opposite sex for purposes of a foreign citizen's obtaining residency as the spouse of an American citizen under Section 201(b) of the Immigration and Nationality Act of 1952.⁷¹ The United States Supreme Court refused to grant certiorari in the case.⁷²

Nine years later, a Pennsylvania court refused to recognize a common law marriage when a same-sex couple split up and one of the partners sued for divorce, claiming they had a common law marriage. In refusing to recognize the union, the court said that before they would recognize same-sex common law marriage, the legislature would have to amend the common law marriage statute to explicitly include same-sex couples.⁷³ The court further noted that while the law in Pennsylvania did not explicitly define marriage as between a man and a woman, "the inference that marriage is so limited is strong."⁷⁴

In 1990, a New York court refused to recognize same-sex couples for purposes of the surviving spouse provision of New York's inheritance laws. In dicta in that case, the court stated that only a lawfully recognized husband or wife qualified as a spouse under that law and that, "persons of the same sex have no constitutional rights to enter into a marriage with each other."⁷⁵ That decision was upheld by a New York appellate court, quoting the Minnesota Supreme Court as saying, "The equal protection clause of the Fourteenth Amendment, like the due process clause, is not offended by the state's classification of persons authorized to marry. There is no irrational

the purpose of the ERA was to prohibit discriminatory legal treatment between men and women on account of sex.

68. *Id.*

69. *Id.* at 1196.

70. *Singer v. Hara*, 84 Wash.2d 1008 (1974).

71. *Adams v. Howerton*, 673 F.2d 1036, 1038 (9th Cir. 1975).

72. *Adams v. Howerton*, 458 U.S. 1111 (1982).

73. *De Santo v. Barnsley*, 476 A.2d 952, 956 (Pa. 1984).

74. *Id.* at 954.

75. *Matter of Estate of Cooper*, 564 N.Y.S.2d 684 (N.Y. Sur. 1990). This case arose when the decedent left most of his estate to a former lover, and his same-sex partner at the time of his death sued to inherit as a surviving spouse under New York's inheritance law.

or invidious discrimination.”⁷⁶

The case that really set off a significant amount of national debate over same-sex marriage was the case of *Baehr v. Miike*,⁷⁷ in which the trial court initially agreed with the plaintiffs’ argument that Hawaii’s requirement that marital partners be members of the opposite sex was violative of equal protection under the state’s constitution. That decision was upheld by the First Circuit Court of Appeals, and in response, the electorate voted to amend Hawaii’s constitution to invest in the legislature the power to reserve marriage to opposite sex couples, similar to what advocates of the MPA wish to do on a federal level.⁷⁸ In light of the change in Hawaii’s constitution, the Hawaii Supreme Court overturned the decision of the appellate court.⁷⁹ The case had spent nine years in the court system before ending in the Hawaii Supreme Court’s dismissal in 1999,⁸⁰ but between the time of the initial ruling and the dismissal, significant discussion was generated over the issue of what would happen if Hawaii began to issue marriage licenses to gay couples, and whether other states would have to recognize such marriages.

Just eleven days after the *Baehr* dismissal, advocates of same-sex marriage received their most significant victory prior to *Goodridge* when the Vermont Supreme Court ruled that under Vermont’s constitution, same-sex couples must be entitled to the same benefits as opposite sex couples. Rather than changing the marriage statute to allow same-sex couples to marry, as many advocates of same-sex marriage had hoped, the state legislature instead passed the Vermont Civil Union Law (described in the previous section), giving same-sex partners all the rights and benefits given by the state to opposite sex partners.⁸¹

In 2004, in the case of *Li v. State*,⁸² an Oregon trial judge found the state’s marriage law discriminatory on the basis of sexual orientation. However, similarly to what happened in Hawaii, in November of 2005, the electorate voted to amend their constitution to define marriage as a relationship between a man and a woman.⁸³ On appeal, the Supreme Court of Oregon ruled that because of the amendment, marriage in the state of Oregon is limited to opposite-sex couples.⁸⁴ Shortly after the initial ruling

76. *Matter of Estate of Cooper*, 592 N.Y.S.2d 797, 800 (N.Y. App. Div. 1993) (citing *Baker v. Nelson*, 191 N.W. 2d at 187).

77. CIV No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

78. Partners Task Force for Gay and Lesbian Couples, Hawaii Court Finding, <http://www.buddybuddy.com/finding1.html> (last visited Oct. 21, 2006).

79. *Id.*

80. *Id.*

81. *Baker v. State*, 744 A.2d 864 (Vt. 1999).

82. No. 0403-03057, 2004 WL 1258167 (Or. Cir. Apr. 20, 2004).

83. *Li v. State*, 110 P.3d 91, 97 (Or. 2005).

84. *Id.* at 102.

in *Li*, the Washington Superior Court⁸⁵ likewise found that the state of Washington's denial of marriage licenses to same-sex couples unconstitutionally deprived the plaintiffs of guaranteed privileges and unconstitutionally restricted their liberty in violation of due process guarantees.⁸⁶ In terms of a remedy, the court said that if the finding of a due process violation were to stand, the logical remedy would be to direct the issuance of marriage licenses to the plaintiff-applicants so that they could become civilly married. However, in light of the importance of the issue, and the certitude of an appeal, the court did not immediately make such an order, but instead certified the case for appeal.⁸⁷

On February 4, 2005, a New York trial court held that New York's denial of marriage licenses to same-sex couples was a denial of their right to due process and equal protection, and granted plaintiffs an injunction prohibiting the denial of marriage licenses to same-sex couples.⁸⁸ The case was joined with four other New York lower court decisions and all were appealed to the New York Supreme Court.⁸⁹ On July 5, 2006, New York's highest court found that New York State's constitution did not compel the recognition of same-sex marriage.⁹⁰ The decision was not unanimous; three judges signed the majority opinion, while one drafted a concurring opinion and the other two wrote a strongly worded dissent.⁹¹ The author of the majority opinion wrote that limiting marriage to opposite-sex couples could be based on rational social goals such as the protection and welfare of children, while the Chief Justice, who wrote the dissenting opinion, opined that the barring of gay marriage would someday be recognized as an injustice akin to the laws that once barred interracial marriage.⁹²

The highest state courts of New Jersey and California have recently become involved in the issue of relationship equality. In the New Jersey case of *Lewis v. Harris*,⁹³ a lower court reached a conclusion adverse to

85. *Anderson v. King County*, 2004 WL 1738447 (Wash. Super. 2004).

86. *Id.* at 11.

87. *Id.* at 9.

88. *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609-610 (N.Y. Sup. Ct. 2005). Ironically, thirty-eight years earlier, the parents of one of the plaintiffs in this suit had been one of the plaintiffs in the first state case to successfully challenge a state's anti-miscegenation statute. In that case, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), California's Supreme Court became the first state court to declare its state's anti-miscegenation statute unconstitutional.

89. The other cases appealed were: *Samuels v. New York State Dep't of Pub. Health*, 811 N.Y.S.2d 136 (N.Y. App. Div. 2006); *Seymour v. Holcomb*, 811 N.Y.S.2d 134 (N.Y. App. Div. 2006); *Kane v. Marsolais*, 808 N.Y.S.2d 566 (N.Y. App. Div. 2006).

90. *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006).

91. Anemona Hartocollis, *New York Judges Reject Any Right to Gay Marriage*, N.Y. TIMES, July 7, 2006, at A1.

92. *Id.*

93. 875 A.2d 250 (N.J. Super. Ct. App. Div., 2005). This case was brought by Lambda Legal Defense. More informatin about Lambad and about the Lewis case can be accessed at

same-sex couples. In October of 2006, however, the Supreme Court of New Jersey reversed the lower court's decision. The Court gave the legislature 180 days to remedy the current inequality in the system. In short, the New Jersey Supreme Court ruled that the state must provide the same protections, rights and benefits to same-sex couples as are afforded to heterosexual couples.

On the other side of the country, on March 14, 2005, a trial judge issued a tentative decision holding that excluding same-sex couples from marriage violates the California constitution by discriminating on the basis of sex and by violating the fundamental right to marry, and rejected the State's argument that the creation of a domestic partnership law remedied the constitutional infirmity. The defendant, who opposes marriage legislation for same-sex couples, brought an appeal to the first appellate district court. This court reversed the lower court's decision, arguing that the state's domestic partnership law did in fact provide constitutional equality for same-sex couples. On December 20, 2006, following a petition from the plaintiffs, the Supreme Court of California decided to review the lower court's decision. As of the publication of this article, the California Supreme Court has not calendared oral arguments.⁹⁴

Thus, it can be seen that the courts in various states are gradually addressing the issue of same-sex marriage. The path this issue is taking is reminiscent of the path followed by the various courts when confronted earlier with the issue of whether interracial marriages should be prohibited. Given the recognition of same-sex couples' right to marry by some courts, it is easy to see why opponents of same-sex marriage are now working to amend the federal and state constitutions. As the arguments that same-sex couples are entitled to marry become increasingly recognized as valid, and as state constitutional amendments seem to be the primary way to stop the recognition of same-sex partners' rights to marry, it is understandable that opponents of same-sex marriage need to find the strongest weapon to fight this growing trend, and the greatest possible weapon would be an amendment to the United States Constitution.

<http://www.lambdalegal.org>.

94. This case originated in two separate cases: *Lockyer v. City of San Francisco*, 33 Cal. 4th 1055, 1133, 17 Cal. Rptr. 225, 284 (Cal. 2004), which were consolidated as Tentative Decision on Application for Writ of Mandate and Mot. For Summ. J.; *In re Marriage Cases*, No. 4365, 2005 WL 583129, at *1 (Cal. Super. Ct. Mar. 14, 2005). *See also* "Legal, Lambda Legal Statement in Response to California Supreme Court's Decision to Review *In re Marriage Cases*" at <http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=2110>.

C. The Initial Backlash

The early success same-sex marriage advocates were finding in the legislature and the courts was bound to create a backlash, and opponents of extending equal rights to same-sex couples have responded in two primary ways: Defense of Marriage statutes and constitutional amendments. As noted in the introduction, in 1996,⁹⁵ the federal government passed the Defense of Marriage Act, which denied federal recognition of same-sex marriages performed in any state.⁹⁶

The United States Supreme Court has not yet determined the constitutionality of either the federal⁹⁷ or any state DOMA, but at least one district court has upheld the federal law.⁹⁸ Three challenges to the federal DOMA were filed in January of 2005.⁹⁹ Two were dismissed by a federal judge in Tampa, and a third was pending before a federal court in Miami, but the couples bringing the suits ended up dropping them.¹⁰⁰

In November 2004, voters in thirteen states passed state constitutional amendments prohibiting the recognition of same-sex marriages.¹⁰¹ By November 2006, twenty-seven states had adopted such constitutional amendments.¹⁰² In some cases, these amendments were in direct response to court actions finding protection for same-sex partner rights under the existing state constitution.¹⁰³ As of June 1, 2006, forty-five states had acted by some method to define traditional marriage in ways that would ban same-sex marriage—nineteen with constitutional amendments and twenty-six with statutes.¹⁰⁴

95. This was the same year the Welfare Reform Act was passed. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-710. In addition to moving welfare recipients from welfare to work, a stated objective of the welfare reform bill was to “encourage the formation and maintenance of two-parent families,” based on the premise that, “marriage is the foundation of a successful society.”

96. 1 U.S.C. § 7; 28 U.S.C. § 1738C.

97. Arguably, if the MPA is not adopted, the federal Defense of Marriage will ultimately be found to be unconstitutional, so advocates of the MPA hope to secure passage of the Amendment before the United States Supreme Court has the opportunity to make such a ruling.

98. *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005).

99. Vicki Chachere, *Gay Couples Drop Challenge to Defense of Marriage Act*, MIAMI HERALD, Jan. 26, 2005, at B5.

100. *Id.*

101. Gregory B. Lewis, *Same-Sex Marriage and the 2004 Presidential Election*, 38 POLITICAL SCI. & POLITICS 195, 195 (2005).

102. Bill Glauber, *A Vote for Moderation; Both Sides Win, Lose in Cultural Clash*, MILWAUKEE JOURNAL-SENTINEL, Nov. 10, 2006, at A1.

103. As might be expected, once the Massachusetts Supreme Court ruling led to the legalization of the marriage of same-sex partners, a movement to amend the state constitution began.

104. Laurie Kellman, *Senate Rejects Gay Marriage Ban*, S.F. CHRONICLE, June 7, 2006.

Challenges to many of these state constitutional amendments are now under way and the outcome of most of these challenges is uncertain.¹⁰⁵ Any successful challenges to these state amendments will most likely have the effect of fueling support for a federal amendment prohibiting same-sex marriage. In 2005, a federal district court found that Nebraska's constitutional amendment banning same-sex marriage violated the Fourteenth Amendment's equal protection guarantees and the First Amendment's right to participate equally in the political process.¹⁰⁶ However, in July of 2006, the Eighth Circuit Court of Appeals overturned the District Court decision, finding that the District Court improperly applied a heightened level of scrutiny, when only a rational basis for the state's action was required.¹⁰⁷ The court then went on to find that the state's definition of marriage as being between a man and a woman was rationally related to the legitimate goal of steering procreation into marriage and that "affording legal recognition and a basket of rights and benefits to married heterosexual couples, encourages procreation to take place within the socially recognized unit that is best situated for raising children."¹⁰⁸

With such mixed signals coming from the state legislatures and from the courts, opponents of same-sex marriage are now pressing forward to secure a federal amendment. This would not only define marriage as limited to different-sex couples, but would also provide that states do not have to confer upon any same-sex couple the incidents ordinarily ascribed to the marital relationship.¹⁰⁹

105. One state's DOMA, however, was recently upheld by its state supreme court, and that state was Washington. The trial court had initially ruled that the state's 1998 Defense of Marriage Act that prohibited same-sex marriages was facially unconstitutional under the privileges and immunities and due process clauses of the state constitution. On appeal, the Supreme Court of Washington, in *Anderson v. King County*, overruled the lower court and held that the legislature has the power to limit marriage to same-sex couples. 183 P.3d 963, 968 (Wash. 2006). The highest court did not believe that same-sex couples were members of a suspect class, and therefore strict scrutiny did not apply to their claims, but rather the law must meet the rational basis test, which the court felt it met. *Id.* at 976, 985.

106. *Citizens for Equal Prot. v. Bruning*, 368 F. Supp. 2d 980, 997 (D. Neb. 2005).

107. *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866-67 (8th Cir. 2006). The court pointed out that the Supreme Court has never found sexual orientation to be the basis for strict scrutiny in an equal protection case. *Id.* at 866.

108. *Id.* at 867. Internal quotes omitted.

109. Because laws such as Vermont's Civil Union Statute were passed to satisfy a court mandate that same-sex partners be given comparable benefits to those of marital partners, the obvious hope of advocates of the Marriage Protection Act is that given the freedom to ignore the court mandate, states would revoke the laws that provided such benefits to same-sex couples.

III. The Federal Marriage Protection Act

On June 7, 2006, the U.S. Senate rejected Senate Joint Resolution 1,¹¹⁰ a constitutional amendment to ban same-sex marriage. The Amendment is straightforward, providing that marriage in the United States shall consist only of the union of a man and a woman, and that neither the United States Constitution nor the constitution of any state shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.¹¹¹ The Amendment is clearly very powerful, as it has the potential to effectively overturn numerous decisions of a number of state courts, and could cause a number of state legislatures to reconsider legislation that had been passed because of judicial interpretations of state constitutions.¹¹²

When the amendment came to a vote in the Senate in 2006, supporters had known they would not receive the two-thirds vote necessary for passage, but they were somewhat disappointed that the vote was forty-nine to forty-eight, giving them only one more vote than opponents.¹¹³ Supporters, however, plan to continue their efforts to eventually gain passage of the amendment, thus, necessitating consideration of the implications of this proposal by the public.¹¹⁴

A version of this amendment was initially introduced as The Federal Marriage Amendment in 2002 by Rep. Marilyn Musgrave (R-CO) and Sen. Wayne Allard (R-CO).¹¹⁵ But no real progress was made with respect to this proposed amendment during 2002 or 2003.

In 2004, the marriage amendment was defeated in both the House and Senate. There was no direct vote on the amendment

110. 109th Cong. (2005).

111. The joint resolution reads as follows:

“SECTION 1. This article may be cited as the ‘Marriage Protection Amendment’.

SECTION 2. Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.”

112. Connecticut was actually the first state to grant civil unions to same-sex couples without a judicial mandate. See William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, Apr. 21, 2005 at B5.

113. Kellman, *supra* note 104.

114. “We’re making progress, and we’re not going to stop until marriage between a man and a woman is protected...protected in the courts, protected in the Constitution, but most of all, protected for the people and for the future of our children in this society,” said Sen. Sam Brownback (R-Kan.) after the 2006 Senate vote. Shailagh Washington Post, June 8, 2006, page A01.

115. Clergy for Fairness, Marriage Amendment Legislative History, <http://clergyforfairness.org/legislative-history/> (last visited Oct. 21, 2006).

in the Senate, but rather a cloture vote, which would end debate and require a straight up or down vote on the amendment. Cloture requires 60 votes to end the debate. In a bi-partisan vote of 48-50, the Senate rejected the cloture motion, thus blocking the amendment. In the House, by a bipartisan vote of 227-186, the amendment was also defeated, falling 46 votes short of the required two-thirds majority."¹¹⁶

The most recent version of the Amendment, renamed The Marriage Protection Amendment, and commonly referred to as the Same-Sex Marriage Resolution, was introduced in the Senate by Senator Wayne Allard, of Colorado, and twenty-nine co-sponsors on January 24, 2005, where it was read twice and then referred to the Senate Judiciary Committee. No significant action was taken on the measure until May 18, 2006, when it was approved by the Senate Judiciary Committee.¹¹⁷

The related House Joint Resolution 39 was initially introduced in the House on March 17, 2005, by Representative Daniel E. Lungren, of California. The House resolution had twenty-four co-sponsors.¹¹⁸ Despite

116. *Id.*

117. S.J. Res. 1, 109th Cong. (2005). The official title of the proposed amendment is A Joint Resolution Proposing an Amendment to the Constitution of the United States Relating to Marriage. Co-sponsors of the legislation included Senators Lamar Alexander, of Tennessee; Sam Brownback, of Kansas; Tom Coburn, of Oklahoma; John Cornyn, of Texas; Jim DeMint, of South Carolina; Elizabeth Dole, of North Carolina; William H. Frist, of Tennessee; Kay Bailey Hutchison, of Texas; Johnny Isakson, of Georgia; Trent Lott, of Mississippi; Mitch McConnell, of Kentucky; Rick Santorum, of Pennsylvania; Richard C. Shelby, of Alabama; Jim Talent, of Missouri; David Vitter, of Louisiana; George Allen, of Alabama; Richard Burr, of North Carolina; Thad Cochran, of Mississippi; Mike Crapo, of Idaho; Mike DeWine, of Ohio; Michael B. Enzi, of Wyoming; Orrin G. Hatch, of Utah; James M. Inhofe, of Oklahoma; Jon Kyl, of Arizona; Mel Martinez, of Florida; Pat Roberts, of Kansas; Jeff Sessions, of Alabama; Ted Stevens, of Arkansas; and John Thune, of South Dakota. The Library of Congress, <http://thomas.loc.gov> (last visited Sept. 26, 2006).

118. H.J. Res. 39, 109th Cong. (2005). The text is as follows:

"SECTION 1. Marriage in the United States shall consist only of a legal union of one man and one woman.

SECTION 2. No court of the United States or of any State shall have jurisdiction to determine whether this Constitution or the constitution of any State requires that the legal incidents of marriage be conferred upon any union other than a legal union between one man and one woman.

SECTION 3. No State shall be required to give effect to any public act, record, or judicial proceeding of any other State concerning a union between persons of the same sex that is treated as a marriage, or as having the legal incidents of marriage, under the laws of such other State."

This version of the bill was potentially of greater concern to those pressing for equal treatment of same-sex partners, as it explicitly attempts to remove from the courts constitutional questions related to the definition of partners in a marriage.

the abysmal showing of this amendment in 2006, its advocates vow to continue to press for its adoption. As the next three sections will demonstrate, passage of this amendment would be a grave mistake.

IV. The FMPA Violates Long-Standing Principles of Federalism

The United States Constitution enshrines basic principles of federalism and allocates only limited power to the federal government. All other areas of regulation are left to the states. Any amendment that attempts to interfere with traditional state powers without significant justification¹¹⁹ is interfering with the basic principles of federalism on which our nation was founded and is infringing on state sovereignty.¹²⁰ And while we have seen an expansion of the definition of interstate commerce which has led to an increase in the federal regulation of business during the twentieth century, the United States Supreme Court has been very clear, especially since 1996, that the powers of the federal government are not unlimited.¹²¹ When Congress has attempted to use a broad interpretation of the Commerce Clause to justify regulating public safety¹²² or violence against women,¹²³ areas of traditional state regulation, the United States Supreme Court has been quick to step in and clarify that certain areas are clearly reserved to the states, and Congress will not be allowed to regulate those areas.¹²⁴ Perhaps the clearest illustration of an area that has been left to the states to regulate is that of domestic

Co-sponsors included: Rodney Alexander, of Louisiana; John Barrow, of Georgia; Geoff Davis, of Kentucky; Lincoln Davis, of Tennessee; Trent Franks, of Arizona; Virgil H. Goode, Jr., of Virginia; Sam Johnson, of Texas; Steve King, of Iowa; Ron Lewis, of Kentucky; Charlie Norwood, of Georgia; Mike D. Rogers, of Alabama; Gene Taylor, of Mississippi; and Spencer Bachus, of Alabama.

119. Significant justification could be found in enforcing some other fundamental Constitutional principle such as liberty or equality.

120. This same argument can also be applied to support the claim that the federal DOMA is unconstitutional.

121. See *United States v. Morrison*, 529 U.S. 598, 619 n.8 (2000) ("With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate.").

122. See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (striking down the federal Gun-Free Safety Zone Act, a law that banned the possession of guns within 1,000 feet of any school.).

123. See *United States v. Morrison*, 529 U.S. at 617-19 (striking down the Violence Against Women Act, a federal statute that provided a cause of action for anyone who was the victim of a crime of violence motivated by gender).

124. *United States v. Lopez*, 514 U.S. at 577 (Kennedy, J., concurring) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

relations.¹²⁵ As the United States Supreme Court stated in 1975, “[D]omestic relations, [is] an area that has long been regarded as a virtually exclusive province of the States. Cases decided by the Court over a period of more than a century bear witness to this historical fact.”¹²⁶ Nothing could be more central to the regulation of domestic relations than determining the definition of marriage. The Constitution gives no authority to the federal government to grant marriage licenses. This authority has always been vested in the state governments.¹²⁷ Each state has the authority to grant civil marriages, which are then recognized by the federal government for a number of federal purposes.¹²⁸ And while there are separate institutions for religious marriage, the legal civil institution of marriage should not be affected by religious tenets.¹²⁹

Clearly then, the Marriage Protection Act, if adopted, would be an illegitimate infringement on one of the states’ most fundamental powers, the power to establish the criteria for the marital relationship, the relationship that is at the base of most domestic relations laws. The argument is not that the federal government cannot under any circumstances interfere with this power of the state. As the United States Supreme Court said, in *Zablocki v. Redhail*, “state power over domestic relations is not without constitutional limits.”¹³⁰ However, the cases in which the high court has restricted state regulation of marriage have generally been cases in which the state has interfered with some other important Constitutional right, or principle. In the case of the Marriage Protection Act, the Amendment would not be furthering an existing Constitutional principle,¹³¹ but would in fact be creating a conflict by denying same-sex couples their fundamental right to equal protection.

125. See *Ex parte Burrus*, 136 U.S. 586, 593-94 (1890) (“The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”); see also Scott Ruskay-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1467 (1997).

126. *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

127. As early as 1884, however, an attempt was made to give Congress the power to make uniform marriage and divorce laws, which was subsequently followed by fifty-nine proposed amendments seeking the same transfer of power. Edwin Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 637, 666 (2004). None of these attempts were successful, as they were viewed as unjustifiable attempts to usurp the states’ powers. *Id.* at 638, 664-65.

128. See generally Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419 (1999).

129. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d at 954 (distinguishing civil and religious marriages).

130. 434 U.S. 374, 398 (1978).

131. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (wherein the United States Supreme Court established the right to marry as a fundamental right protected under the Constitution and invalidated Virginia’s miscegenation statute).

The harm that comes from such an infringement on state sovereignty becomes apparent when we think about why our current system was established with the existing division of power between the state and federal governments. One advantage of that division is that it allows the states to serve as laboratories of experimentation.¹³² When various social problems arise, different states attempt to respond to the problem in different ways; states can learn from one another and modify ways of responding to their state's own unique circumstances.

What we are seeing today seems to be precisely what the founders of our nation had in mind. As can be seen from the history of the treatment of same-sex relationships detailed in Section II, the states are currently in the process of experimenting with different treatments of same-sex relationships, ranging from broadly recognizing marriage as a committed relationship between two individuals regardless of sex¹³³ to preserving marriage as a relationship between individuals of the opposite sex, while granting same-sex couple similar legal rights under a broad range of domestic partnership statutes,¹³⁴ to not recognizing same-sex relationships. Regardless of which approach one prefers, this process was the means by which such local matters were ultimately to be resolved. The federal government, with its Marriage Protection Amendment, is attempting to circumvent this process, which has served our nation well for over 200 years, and appeared to be working, albeit slowly, to address this problem. The citizens of this nation deserve the opportunity to work out this problem themselves on a state-by-state basis, and not have a federal solution imposed on them.

V. The Impact of the Amendment on First Amendment Freedoms

As noted previously, there is a distinction between government sanctioned civil marriage and religious marriage. To maintain the separation of church and State, the government must not allow the requirements for civil marriage to be influenced by the requirements of religious marriage.¹³⁵

132. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932)(Brandeis, J., dissenting)("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

133. Currently Massachusetts is the only state to have gone this far. And opponents are pressing to in effect overturn this decision by passage of a state constitutional amendment that would define marriage as between a man and a woman. For a discussion of this proposed amendment, see Pam Belluck, *Proposal to Ban Same-Sex Marriage Renews Old Battles*, N.Y. TIMES, July 11, 2006, at A12.

134. Vermont and Connecticut are prime examples with their civil union statutes.

135. See generally Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1872 (1997).

This distinction between the two kinds of marriage leads to a major concern about the Amendment by the Clergy for Fairness, a non-denominational group of clergy opposed to the amendment.¹³⁶ They are fearful of its effect on the First Amendment, believing that it violates both the Establishment Clause and the Free Exercise of Religion Clause.¹³⁷ As they wrote in their letter to Congress in opposition to the Amendment: “the nation’s founders adopted the First Amendment precisely because they foresaw the dangers posed by allowing government to have control over religious decisions. The religious freedom protected by the First Amendment has allowed religious practice and pluralism to flourish. Respecting the rights of those in the faith community who deem sacred text consistent with the blessing of same-sex relationships protects and ensures that freedom.”¹³⁸

The establishment clause of the First Amendment states that “Congress shall make no law respecting an establishment of religion.”¹³⁹ Defining marriage as between a man and a woman, thereby enshrining the Christian definition of marriage into the Constitution is clearly movement toward the establishment of religion.¹⁴⁰ This intent to violate the establishment clause is clear from Bush’s statements in support of the amendment that “[m]arriage cannot be cut off from its cultural, religious and natural roots....”¹⁴¹

As the court in *Goodridge* stated, “civil marriage is, and since pre-Colonial days has been, precisely what its name implies: a wholly secular institution.”¹⁴² and no religious ceremony had ever been required to validate

136. Clergy for Fairness, Joint Letter from National Religious Groups, <http://clergyforfairness.org/joint-letter/> (last visited Oct. 21, 2006).

137. *Id.*

138. *Id.* Signatories to the letter represented the following denominations: Alliance of Baptists, American Friends Service Committee (Quaker), American Jewish Committee, Anti-Defamation League, Association of Humanistic Rabbis, Central Conference of American Rabbis, Christians for Justice Action, Disciples Justice Action Network, Episcopal Church USA, Friends Committee on National Legislation (Quaker), Guru Gobind Singh Foundation (Sikh), Jewish Reconstructionist Federation, National Council of Jewish Women, National Sikh Center, Metropolitan Community Churches, Protestant Justice Action, Reconstructionist Rabbinical Association, Sikh American Legal Defense and Education Fund (SALDEF), Sikh Council on Religion and Education (SCORE), The Interfaith Alliance, Union for Reform Judaism, Unitarian Universalist Association of Congregations, United Church of Christ Justice & Witness Ministries, and Women of Reform Judaism.

139. U.S. CONST. amend. I.

140. Unfortunately, some of those supporting the amendment may not even recognize the impact this amendment would have on religious freedom. See generally S. Mark Pancer, et al., *Religious Orthodoxy and the Complexity of Thought about Religious and Nonreligious Issues*, 63 J. PERSONALITY 213 (1995) (presenting data suggesting that those with orthodox religious beliefs have a tendency to think less complexly about religious issues).

141. Scott Shepard, *Bush Priority: Gay Marriage Ban*, ATLANTA JOURNAL & CONSTITUTION, June 5, 2006, at 1A.

142. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d at 954.

it.¹⁴³ It is not the role of the government to determine that one denomination's definition of marriage should be codified in the Constitution and forced on all Americans, regardless of whether their interpretations of their sacred texts recognize the sanctity of same-sex unions.

And the right to the free exercise of religion, again provided for by the First Amendment, has always included the right of different religions to determine their own sacred rites. The marital rite is one of the most important in many religious traditions, and therefore has one of the strongest claims to protection under the First Amendment. Each religious denomination should decide, based on its own doctrines and teachings, whether to sanctify marriages of same-sex couples. The State's civil requirement for marriage need not, and should not be based on the standards for religious marriage.

VI. The Equal Protection Problem

The denial of the right to marriage to same-sex couples is a violation of their right to equal protection, analogous to the denial of the right to marriage to interracial couples prior to *Loving v. Virginia*.¹⁴⁴ In that 1967 case, the ban on interracial marriages in Virginia and fifteen other states was struck down as denying the equal protection which is afforded by the Fourteenth Amendment.¹⁴⁵

The treatment and condition of interracial couples wishing to marry is clearly analogous to that of the treatment and condition of same-sex couples wishing to marry today. In both cases, there is no legitimate justification for such an arbitrary and invidious discriminatory treatment of a distinct group. As the court stated in *Loving*, "[M]arriage is one of the 'basic civil rights of man,' fundamental to our survival and existence. The right to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."¹⁴⁶ Just as it was a violation of equal protection to deny couples of different races the right to marry, it is also a violation of equal protection to deny same-sex couples that right.

Similar arguments have been raised in both situations. For example, in *Loving*, the state of Virginia argued that its prohibition of mixed-race marriages did not violate equal protection because it provided similar punishments for both blacks and whites attempting to enter into such

143. As the U.S. Supreme Court stated in *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888), "[M]arriage is often termed . . . a civil contract . . . and does not require any religious ceremony for its solemnization The relation once formed, the law steps in and holds the parties to various obligations and liabilities."

144. 388 U.S. 1 (1967).

145. *Id.* at 12.

146. *Id.*

marriages.¹⁴⁷ This argument is analogous to the claim that the Marriage Protection Act does not violate the equal protection rights of those seeking to enter into same-sex marriages because it prohibits both same-sex male and same-sex female couples from marrying.

Another argument in favor of not allowing mixed-race marriages was that we had a long tradition of limiting marriage to same-race partners. Today we hear similar arguments that same-sex couples have traditionally not been allowed to marry in the United States. Just as a history of limiting marriage to same-race couples was not a justification to allow the continued prohibition against mixed-race couples, it is not a justification for the continued denial of marital benefits to same-sex couples today. As Judge Doris Ling-Cohan wrote in *Hernandez v. Robles*, “The challenges to laws banning whites and non-whites from marriage demonstrate that the fundamental right to marry the person of one’s choice may not be denied based on longstanding and deeply held traditional beliefs about appropriate marital partners.”¹⁴⁸

Some might argue that those discriminated against on the basis of race have a history of protection under the Fourteenth Amendment that individuals seeking to enter into same-sex marriages do not have. While the long history may not exist, the United States Supreme Court has already found homosexuals to be a cognizable group under the Equal Protection Clause. In *Romer v. Evans*, the Supreme Court declared an amendment to the Colorado Constitution to be a violation of the Equal Protection Clause of the Fourteenth Amendment in part because it imposed a “broad and undifferentiated disability on a single named group.”¹⁴⁹ The Colorado amendment had “prohibit[ed] all legislative, executive or judicial action at any level of state or local government designed to protect...gays and lesbians.”¹⁵⁰ The Court found the law to be a violation because it denied to that distinct group equal access to benefits provided by the state,¹⁵¹ which is exactly what a prohibition against same-sex marriage does.

Violation of the Equal Protection Clause was one of the main reasons that the Massachusetts Supreme Court, in *Goodridge*, ruled that the state could not prohibit same-sex couples from marrying, stating that “Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community’s most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality

147. *Id.* at 8.

148. *Hernandez v. Robles*, 7 Misc.3d 459, 794 N.Y.S.2d 579, N.Y.Sup., 2005, at 461.

149. 517 U.S. 620, 632-36 (1996).

150. *Id.* at 624.

151. *Id.* at 633-34.

under law.”¹⁵² That ruling was based on a violation of the state constitution’s equal protection clause, but the state’s clause is modeled on the federal Equal Protection Clause, so the same reasoning would be applicable.

Relying heavily on *Loving* and *Romer*, the Massachusetts Supreme Court also concluded that the statute violated the state constitution’s guarantees of equality and liberty.¹⁵³ The court went through a general list of the benefits conferred by marital status, concluding that the right to marry was an important civil right and as such could not be denied to any individuals.

While the court in *Goodridge* provided a general list of benefits denied to those prohibited from marriage, the remainder of this section will provide the social science data to further strengthen the case that denial of the right to marry is unconstitutional. As the court noted in *Goodridge*, the Constitution provides both “freedom from” unwarranted government intrusion into protected spheres of life and “freedom to” partake in benefits created by the State for the common good.¹⁵⁴ It is these “freedoms to” that this article will highlight.

A. Earnings Premiums

Ceteris paribus, married individuals earn significantly more than non-married individuals. Indeed, one of the most robust findings in the study of earnings differentials is that, regardless of race, education, religion, age, work experience, occupation, or industry, married men earn more than non-married men.¹⁵⁵ How large is this earnings premium? Estimates range from as low as ten percent to as high as fifty percent.¹⁵⁶ In fact, Waite and

152. *Goodridge v. Dep’t of Pub Health*, 798 N.E.2d at 949.

153. *Id.* at 959-60.

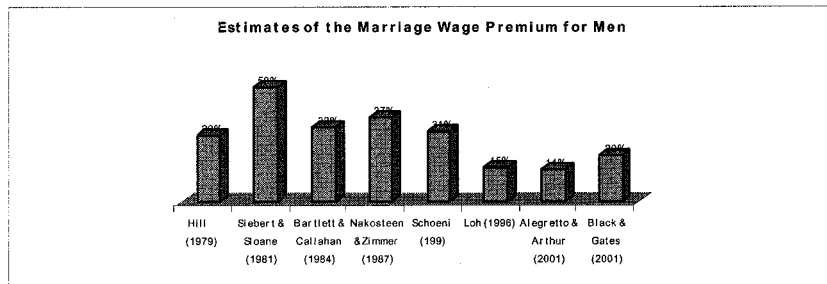
154. *Id.*

155. Sylvia A. Allegretto & Michelle M. Arthur, *An Empirical Analysis of Heterosexual/Homosexual Male Earnings Differentials: Unmarried and Unequal?*, 54 INDUS. & LAB. REL. REV. 631, 631 (2001); Kermit Daniel, *The Marriage Premium*, in THE NEW ECONOMICS OF HUMAN BEHAVIOR 113-25 (Mariano Tommasi & Kathryn Ierulli eds., 1995); CLAUDIA GOLDIN, UNDERSTANDING THE GENDER GAP: AN ECONOMIC HISTORY OF AMERICAN WOMEN (1990); Jeffrey Gray, *The Fall in Men’s Return to Marriage: Declining Productivity Effects or Changing Selection?*, 32 J. HUM. RES. 481, 481 (1997); Jeffrey Gray & Michael Vanderhart, *The Determinants of Wages: Does Marriage Matter?*, in TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 356, 356 (Linda Waite et al. eds., 2001); Sanders Korenman & David Neumark, *Does Marriage Really Make Men More Productive?*, 26 J. HUM. RES. 282, 282 (1991); Eng Seng Loh, *Productivity Differences and the Marriage Wage Premium for White Males*, 31 J. HUM. RES. 566, 566 (1996); Robert Schoeni, *Marital Status and Earnings in Developed Countries*, 8 J. POPULATION ECON. 351, 351 (1995); LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2001).

156. Allegretto & Arthur, *supra* note 155; Gray, *supra* note 155; Shoshana Grossbard-

Gallagher argue that, at least according to some estimates, marriage increases a man's earnings even more than a college education.¹⁵⁷ Furthermore, the earnings premium that married men enjoy grows over the life course, increasing for every year the marriage lasts.¹⁵⁸

Figure 1



When faced with these data, one might argue that men with greater earnings potential are more likely to get married and stay married. Alternatively, employers may be more likely to see married men as stable, reliable and responsible employees and may therefore positively discriminate in married men's favor in terms of wage setting and job allocation. Both of these explanations suggest that it is not marriage *per se* but the types of individuals who marry and the discriminatory behavior of employers that produce a marriage premium for men. However, selectivity and discrimination explain only a very small proportion of married men's earnings premium. In fact, marriage-related income premiums begin during the engagement or marriage planning stages, increase each year the individual remains married and decline as divorce approaches, suggesting that neither selection nor positive employer discrimination fully explain the

Shechtman & Shoshana Neuman, *Cross Productivity Effects of Education and Origin on Earnings; Are They Really Reflecting Productivity?*, in HANDBOOK OF BEHAVIORAL ECONOMICS 125 (Roge Frantz et al. eds., vol. 2A, 1991) [hereinafter *Cross Productivity*]; Shoshana Grossbard-Shechtman & Shoshana Neuman, *Marriage and Work for Pay*, in MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES 234 (Shoshana Grossbard-Shechtman ed., 2003) [hereinafter *Marriage and Work*]; Loh, *supra* note 155 at 569 (arguing the size of the marriage wage premium has historically varied by race. While the earnings premium of white men has remained large, significant and relatively constant over the past five to six decades, the marriage premium for black men has grown considerably during this period from eight per cent in 1939 to as high as thirty-eight per cent by the early 1980s, which is nearly four times the size of the white male premium); WAITE & GALLAGHER, *supra* note 155.

157. WAITE AND GALLAGHER, *supra* note 155 at 100.

158. Grossbard-Shechtman & Neuman, *Cross Productivity*, *supra* note 156; Grossbard-Shechtman & Neuman, *Marriage and Work*, *supra* note 156.

earnings boost married men enjoy.¹⁵⁹

Contrary to the selection and discrimination-based explanations, empirical evidence points to both the indirect and direct role of the spouse in increasing the productivity and earnings potential of husbands. Married couples are more likely than cohabitating couples to specialize in a way that potentially increases men's productivity in paid work.¹⁶⁰ The gender gap in the amount of housework performed is the greatest for married as compared to cohabitating or single men and women.¹⁶¹ While married women do substantially more housework than their non-married or cohabitating counterparts, married men perform the relatively same amount of housework whether they are married, single, cohabitating or divorced.¹⁶² Even when married women work full-time, they are more likely to perform the majority of housework and childcare.¹⁶³

This evidence suggests that this type of household specialization by women potentially increases the earnings of married men by allowing them to specialize in and focus on market work and thereby increase their productivity in wage-earning jobs. Considering the legal enforcement of the marriage contract that motivates pooled earnings and other wealth-maximizing behaviors (described in more detail below), a spouse's investment in the earnings of her partner becomes ultimately rational in that it increases the collective earnings of the household overall.¹⁶⁴ Interestingly, married women often take on a disproportionate share of household labor even at the cost of their own earnings potential. In other words, the amount of time spent on housework and childcare has a direct negative impact on married women's wages in that it potentially reduces the time they spend in paid work, reduces their market-based productivity and limits investments in human capital more broadly.¹⁶⁵

159. Daniel, *supra* note 155; Grossbard-Shechtman & Neuman, *Marriage and Work*, *supra* note 156.

160. Scott South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 *Am. Sociological Rev.* 327 (1993).

161. *Id.*

162. Joni Hersch & Leslie Stratton, *Housework and Wages*, in *J. HUM. RES.*, Discussion Paper No. 300, 4-5 (2000).

163. *Id.*; F. Thomas Juster & Frank Stafford, *The Allocation of Time: Empirical Findings, Behavioral Models, and Problems of Measurement*, 29 *J. ECON. LITERATURE* 471 (1991); H. Presser, *Employment Schedules and the Division of Household Labor of Gender*, 59 *AM. SOC. REV.* 348, 353 (1994); J. ROBINSON & G. GODBEY, *TIME FOR LIFE: THE SURPRISING WAYS AMERICANS USE THEIR TIME* (1997) (finding that differences in the mean time spent on housework and childcare between employed husbands and wives range from about ten to fifteen hours per week. For non-working wives, the difference is estimated to be as high as thirty to forty hours).

164. SHOSHANA GROSSBARD-SHECHTMAN, *ON THE ECONOMICS OF MARRIAGE: A THEORY OF MARRIAGE, LABOR AND DIVORCE* (1993).

165. Hersch & Stratton, *supra* note 162..

Alternatively, when the relationship is less secure, as with cohabitation, women are less willing to invest in the earnings capability of their partners and consequently unmarried cohabitating men do not enjoy an earnings premium.¹⁶⁶ An unequal division of labor arguably frees married men to invest more time and energy into income-enhancing activities. Women's specialization in housework—what Grossbard-Shechtman calls “spousal labor”¹⁶⁷—indirectly increases the productivity and the earnings potential of men.

Women may also have a direct effect on their husbands' earnings. The earnings premium for married men is positively correlated with the educational credentials of their spouse; *ceteris paribus*, men married to women with higher levels of education have higher earnings compared to men with wives with lower levels of education.¹⁶⁸ In other words, the more educated their wives, the more men earn in comparison to other men with the same educational and professional credentials. This suggests that wives' human capital can increase the returns on their investments in their own *and* their husbands' productivity. This relationship does not hold for cohabitating couples. One hypothesis suggests that the financial and legal protection offered by the marriage contract and the joint-investment behaviors it encourages motivates women to invest time and energy into increasing the earnings and human capital of their husbands. Again, sacrificing individual earnings to increase joint earnings becomes rational only when the marital contract is protected and enforced by the State. Highly educated women may help increase their husbands' earnings by providing a variety of professional assistance, including searching for job opportunities for their husbands, helping their husbands develop and improve their resumes, copy-editing their work, assisting them in interviewing skills, providing professional guidance or advice, or introducing their husbands to members of their professional and social networks. Understandably, women with higher educational credentials are more likely to be skilled at these tasks and as a result their efforts have a greater pay-off for their husbands.¹⁶⁹

The earnings boost that married women receive is considerably smaller and less robust than for married men and varies considerably by race.¹⁷⁰ The positive empirical relationship between marriage and women's earnings is somewhat obscured by the reduction in earnings women experience following the birth of a child.¹⁷¹ Due to the sexual division of labor in

166. Gray & Vanderhart, *supra* note 155.

167. GROSSBARD-SHECHTMAN, *supra* note 164.

168. Daniel, *supra* note 155; Loh, *supra* note 155.

169. Daniel, *supra* note 155; WAITE & GALLAGHER, *supra* note 155.

170. Schoeni, *supra* note 155; Smock et al., *supra* note 13; WAITE & GALLAGHER, *supra* note 155.

171. Smock et al., *supra* note 13.

which women are often the primary caretakers of children, married women with young children are less likely to be employed. When they *are* employed they earn less than women without children.¹⁷² However, after controlling for the presence of children, some studies find that married women—particularly married African American women—tend to earn slightly more than non-married women. More specifically, Daniel found that after controlling for the presence of children, white women earned a small and delayed wage premium; their earnings increased only after having been married for a few years.¹⁷³ African American women, on the other hand, earned a marriage-related wage premium of about three percent, regardless of the presence of children.¹⁷⁴

Overall these findings suggest that while children reduce the earnings capabilities of women, marriage does not. Why do men enjoy earnings premiums that married women do not? First, married women are less likely to benefit from housework and childcare of husbands and second, married men are less likely to invest time and energy into their wives earnings potential.¹⁷⁵ Regardless of the size or existence of a marriage wage premium, married women are far better-off financially than single, divorced, or widowed women due to their ability to pool resources with a second wage-earner and access their husbands' earnings.¹⁷⁶ Indeed, married women enjoy a “marriage premium” above and beyond their own earnings; single and divorced women are much more likely to experience lower standards of living than married women. In fact, significant economic risks exist for unmarried women (particularly those with children) that are much less likely to exist for married women, including poverty and economic downward mobility.¹⁷⁷

172. Daniel, *supra* note 155; Grossbard-Shechtman & Neuman, *supra* note 156; ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT* (1989); McLANAHAN & SANDEFUR, *supra* note 12.

173. Daniel, *supra* note 155.

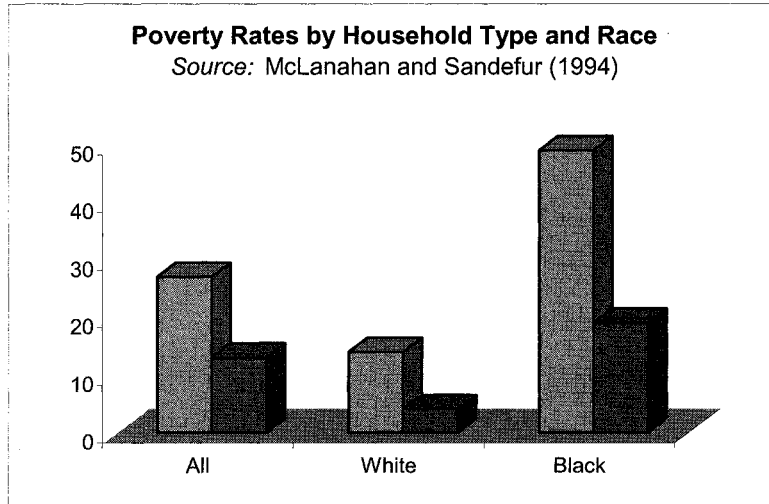
174. *Id.*

175. HOCHSCHILD & MACHUNG, *supra* note 172.

176. WAITE & GALLAGHER, *supra* note 155. There is growing evidence that divorce or separation leads to economic decline for women *and* men. *See, e.g.*, Patricia McManus & Thomas Diprete, *Losers and Winners: The Financial Consequences of Separation and Divorce for Men*, 66 AM. SOC. REV. 246, at 246-47 (2001) (finding evidence of growing economic *interdependence* among married couples in the United States whereby men as well as women experience decline due to the loss of spouse's income following divorce. Men are also more likely than women to provide payments to their formers spouses and children in the form of voluntary and compulsory payments).

177. Sara McLanahan & Lynne Casper, *Growing Diversity and Inequality in the American Family*, in, STATE OF THE UNION: AMERICA IN THE 1990S, 2, (R. Farley ed., vol. 2, 1995); DAPHNE SPAIN & SUZANNE M. BIANCHI, *BALANCING ACT: MOTHERHOOD, MARRIAGE, AND EMPLOYMENT AMONG AMERICAN WOMEN* (1996).

Figure 2



Importantly, cohabitation—even long term-cohabitation—does not produce the same earnings premium as marriage.¹⁷⁸ In fact, cohabitating individuals earn a premium less than half the size of married individuals.¹⁷⁹ It must be noted however that not all cohabitating couples are alike. While the rates of cohabitation have gone up dramatically for all groups over the past several decades,¹⁸⁰ there are sharp demographic differences among couples that determine the longevity and likelihood of marital transitions for cohabitators. For instance, while overall cohabitation is less stable than marriage and significantly more likely to end in dissolution, the durability of non-marital partnerships is determined in part by the class status of partnered individuals. In particular, older individuals with higher levels of education are more likely to enjoy longer and more stable cohabitating relationships than are younger individuals with relatively low levels of education.¹⁸¹ Furthermore, Smock and Manning found that the economic resources of male partners, including earnings, education and employment status, are particularly important in predicting the stability of the

178. Dan Black, et al., *Demographics of the Gay and Lesbian Population in the United States*, 37 DEMOGRAPHY 139, 152 (2000).

179. *Id.*

180. M. Bramlett & W. Mosher, *Cohabitation, Marriage, Divorce and Remarriage in the United States*, 2002 NATIONAL CENTER FOR HEALTH STATISTICS 22 (arguing that between 1960 and 2000, cohabitation rates have increased ten-fold. In the 1990s alone, cohabitation increased seventy-two per cent); Larry Bumpass & James Sweet, *Cohabitation, Marriage, and Union Stability: Preliminary Findings*, 7, (NSFH WORKING PAPER NO. 65, 1995) (stating currently fifty per cent of the American population under age forty has lived with an unmarried partner).

181. Bumpass & Sweet, *supra* note 180.

cohabitating partnership and the likelihood of the relationship leading to marriage.¹⁸² When cohabitating men have few economic resources to offer, relationships tend to be short-lived and are significantly less likely to end in marriage.¹⁸³ Though there are few data that disaggregate earnings premiums of cohabitating couples by class, a sound hypothesis would predict that earnings premiums are higher for middle- and upper-class cohabitating couples than for lower- or working-class couples.

Overall it seems clear that a marriage contract matters a great deal in terms of how individuals invest in their partners' or spouses' earnings potential. If spousal investment explains increased productivity and earnings for married individuals, the absence of a binding contract, enforced by the State, reduces the willingness of a spouse or partner to make similar investments. When a relationship can be ended at will, as with cohabitation, individuals are less likely to invest in the relationship and in their partners' earnings, making cohabitation more unstable and less financially fruitful than marriage.

In addition to wage premiums, married individuals also have access to a variety of tax benefits and subsidies denied to non-married couples and individuals that potentially augment overall household income. Federal and state tax law treat married individuals as an economic unit and treat cohabitating individuals as strangers, economically speaking. By doing so, tax law provides a variety of tax advantages and subsidies to married couples, including the ability to pool itemized deductions and to file jointly.¹⁸⁴ Furthermore, any earnings used to pay for one's own or one's spouse's health insurance are not included in taxable income.¹⁸⁵

182. The economic resources of women have mixed effects on relationship stability and marital transition for cohabitators. On the one hand, high education, full employment, and high earnings make women more attractive marital partners; on the other hand, economic independence potentially makes marriage less attractive to women. Both outcomes, however, are rooted in the fact that marriage is, among other things, an economic relationship mediated by the expected financial returns of the union. Smock et. al, *supra* note 13.

183. *Id.*

184. In the past, jointly filing taxes has been somewhat of a mixed blessing for married couples in that, depending on the differences between spouses' incomes, joint filing can mean a tax subsidy *or* penalty. Indeed, there are approximately fifty-nine provisions in the federal income tax code that potentially contribute to a marriage premium or subsidy. James Alm et al., *The Marriage Penalty*, 13 J. ECON. PERSPECTIVES 193 (1999); James Alm & Leslie Whittington, *For Love or Money? The Impact of Income Taxes on Marriage*, 66 *ECONOMICA* 297 (1999); Defense of Marriage Act, GAO/OGC-97-16, Jan. 31, 1997 [hereinafter GAO]. If both married individuals earn similar incomes, then filing jointly with a standard deduction brings both individuals into a higher tax bracket than they would be if they filed individually. However, if one of the individuals makes significantly more than the other then the higher-earning individual is brought into a lower tax bracket and thus receives a tax subsidy. In other words, the so-called marriage penalty has been somewhat overstated and, in any case, is currently being phased out through changes in federal tax law.

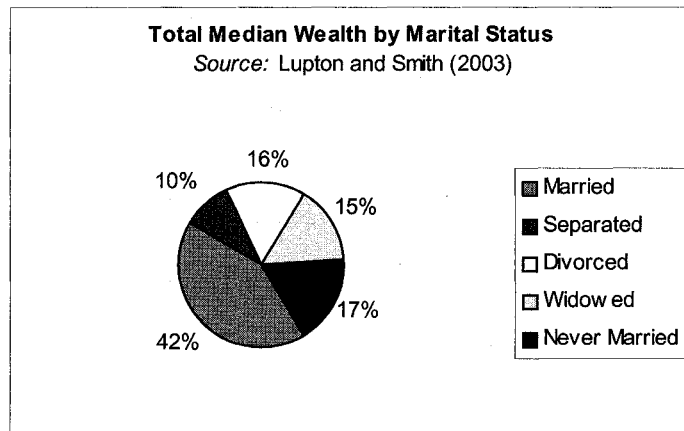
185. If and when an employer provides health insurance to domestic partners of

Above and beyond individual wage premiums and tax benefits, married couples have access to a variety of private benefits denied to non-married individuals that increase their overall household income. For instance, many private employers have family insurance policies that provide free or highly subsidized health care to employees' spouses. Many private employers also provide paid leave for employees with family-related emergencies, potentially reducing the costs associated with work leaves.¹⁸⁶

B. Wealth and Property Accumulation

Married individuals accumulate more wealth than non-married individuals.¹⁸⁷ Indeed, marriage is a major institution of wealth accumulation.¹⁸⁸ Figure 3 illustrates median wealth by marital status.

Figure 3



The wealth gap between married and non-married individuals is large, statistically significant and grows over time; the longer a marriage lasts, the

employees, the earnings spent for one's partner's health insurance are treated as taxable income.

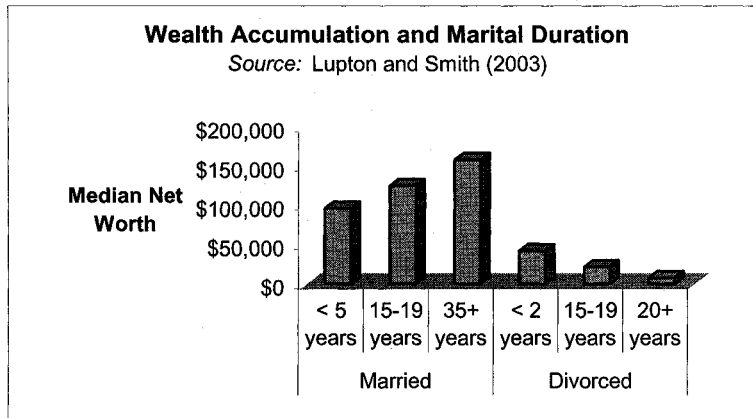
186. Some employers provide paid leave to employees for non-married domestic partners as well, though this is somewhat new and is by no means universal.

187. Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-being of Families with Children*, 75 SOC. FORCES 269, 269 (1996); Joseph Lupton & James Smith, *Marriage, Assets, and Savings*, in MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES [hereinafter MARRIAGE AND THE ECONOMY] 129, 134 (Shoshana Grossbard-Shechtman ed., 2003); Judith Treas, *Money in the Bank: Transaction Costs and the Economic Organization of Marriage*, 58 AM. SOCIOLOGICAL REV. 723 (1993); WAITE & GALLAGHER, *supra* note 155.

188. Gary Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LABOR ECON. S33, S55 (1985); Shirley Burggraf, *Marriage, Parental Investment, and the Macroeconomy*, in MARRIAGE AND THE ECONOMY, *supra* note 187 at 34.

more wealth a family accumulates, as shown in Figure 4.¹⁸⁹

Figure 4



To what extent do class-based differences between married and non-married individuals explain this finding? As discussed above, education and earnings are both positively correlated with marriage and marriage duration. Therefore it seems reasonable that those who marry and stay married are likely to have more wealth than others regardless of their marital status simply due to higher levels of education and earnings potential. However, to dismiss the degree of wealth inequality between married and unmarried individuals on these grounds would be incorrect. In fact, only about one third of the difference between the wealth of married households and non-married households is due to selection or to the fact that those with higher levels of education and earnings are more likely to get married and stay married.¹⁹⁰

While there is some evidence that cohabitating couples enjoy small earnings premiums as a result of their union, there is no equivalent wealth accumulation among cohabitating couples irrespective of the duration of their cohabitation.¹⁹¹ Furthermore, there is no relationship between wealth accumulation and length of relationship for cohabitating couples. There are a variety of reasons that married individuals accumulate more wealth than non-married individuals. Married households save significantly more than other households.¹⁹² In fact, economists Lupton and Smith speculate that recent declines in U.S. private savings rates may be explained by the

189. Lupton & Smith, *supra* note 187.

190. WAITE & GALLAGHER, *supra* note 155.

191. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES (1983).

192. Lupton & Smith, *supra* note 187.

concomitant decline in marriage rates.¹⁹³

While a portion of savings premium of married couples is explained by higher incomes and pooled earnings, the savings premium married households enjoy is greater than the combination of two individuals' wealth.¹⁹⁴ In other words, even after controlling for income and higher individual wealth, married people still save significantly more than non-married individuals. Part of this savings premium derives from the benefit from economies of scale; it is less expensive to enjoy a particular standard of living together than each living alone. This finding suggests that there is something about marriage itself that increases one's likelihood to save.

Some of the differences in wealth accumulation of married individuals can be explained by access to a spouse's current *and* future income, including pensions, private investments, and Social Security.¹⁹⁵ In fact, married individuals have legal access to their partners' future and current financial assets in a way that non-married individuals do not. Because of the state-sanctioned and enforced legal assurances that come with the marriage contract, spouses are also more likely to pursue joint investments and financial interdependence.¹⁹⁶ In other words, a variety of behaviors that increase wealth—including investments, home ownership, financial responsibility and frugality, and financial accountability—are encouraged by the marriage contract. The following graph breaks down the differences in median wealth by marital status and sources of wealth. These data show married households have a larger share of total wealth than non-married households and a larger share of wealth from all sources, including pensions, Social Security, and private assets, as illustrated in Figure 5.

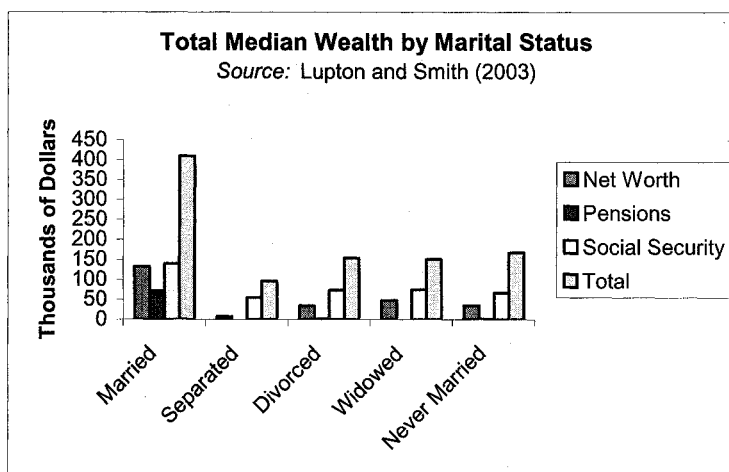
193. *Id.* at 151.

194. *Id.*

195. Social Security and survivors' pensions will be discussed at length below as a key factor that protects married couples from economic risk. I mention these here to flag their wealth-increasing potential.

196. BLUMSTEIN & SCHWARTZ, *supra* note 191, at 96-100; Julie Brines & Kara Joyner, *The Ties that Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOCIOLOGICAL REV. 333, 334 (1999). For instance, tort law imposes duties on married individuals to support their spouses financially, and divorce law imposes financial liability in the form of child support, alimony, and property settlement in the case of marital dissolution. The empirical evidence on the earnings and wealth accumulation of married individuals supports the argument put forth here, namely, that these duties and responsibilities insure married individuals against risk and therefore motivate earnings and wealth-generating behaviors.

Figure 5



In the absence of a marriage contract governing property distribution, cohabitating and non-married couples are more likely to pursue greater financial autonomy and independence, avoiding joint investment and financial interdependence.¹⁹⁷ Thus, despite the fact that cohabitating couples ought to benefit from economies of scale and specialization similar to married couples, in practice the lack of legal insurance against risk and property reduces incentives to pool resources, accumulate property jointly, and to pursue joint investments.¹⁹⁸ As mentioned above, when a relationship can be dissolved at will—as with cohabitation—individuals are less likely to risk financial interdependence and therefore are less likely to accumulate wealth in the short or long run. Indeed, as noted above, the duration of cohabitation does not change this lack of wealth generation; there is no evidence that even long-term cohabitating households enjoy a wealth premium.

Furthermore, intra-familial investments also increase the wealth of married households. Extended families are more likely to invest in married couples than in non-married couples or single individuals, and there is some evidence that these types of intra-familial wealth transfers increase over time. Explanations for the increase in such transfers—or the amount of such transfers—over time are rather straightforward. Just as married couples increase their financial interdependence over time, members of the extended family are likely to increase their own investments in the household the more stable and long-term the marriage appears. Extended family may also increase investments following the birth of a child. Furthermore, the death

197. BLUMSTEIN & SCHWARTZ, *supra* note 191, at 97-100; Brines & Joyner, *supra* note 196.

198. Brines & Joyner, *id.*; WAITE & GALLAGHER, *supra* note 155.

of parents and grandparents is also likely to increase the rate of transfers over time. The total wealth accumulated by married couples in this form is hard to measure. However, there is strong evidence that these types of inter-generational transfers significantly increase wealth of married individuals compared to non-married individuals.

Finally, access to a variety of public and private resources that enable wealth accumulation is often restricted to married couples. For instance, married individuals have easier access to joint credit, joint loans, better mortgage rates, and better insurance premiums than non-married individuals, all of which enable married couples to more easily pursue joint ownership of property. For instance, when applying for a mortgage loan, married partners' incomes are considered jointly when determining mortgage rates, making it easier for married couples to secure loans and purchase property. Because same-sex couples can be legally discriminated against in the housing market and heterosexual married couples cannot, married individuals arguably have access to better investments in the housing market than do non-married—particularly same-sex—couples. Access to rental and public housing can also depend on marital status, providing superior access to premium and low-cost housing to married couples.

C. Insurance against Economic Risk

People living in married households—particularly women and children—are significantly less likely to fall into poverty or to experience downward economic mobility than those living in non-married households.¹⁹⁹ Indeed, the United States provides citizens with a variety of protections against economic risk in the form of unemployment and disability benefits, Social Security and survivor pensions. As the above poverty trends partially demonstrate, federal benefits are not available to everybody, and one's access to such protections is often dependent on and determined by one's marital status. In fact, a report from the General Accounting Office found over 1,138 federal benefits and protections available only to legally married couples.²⁰⁰ Importantly, marital status does not only mediate eligibility; the amount of insurance one receives from the government is higher, and the insurance lasts longer if one is or was formerly married.²⁰¹ In other words, the state protects and supports the economic security of married individuals in a variety of ways. The private

199. MARY JO BANE & DAVID T. ELLWOOD, WELFARE REALITIES: FROM RHETORIC TO REFORM, 43-45, 48-50 (1994); CHRISTOPHER JENCKS, RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UNDERCLASS, 135-136 (1992); McLANAHAN & SANDEFUR, *supra* note 12.

200. GAO, *supra* note 184

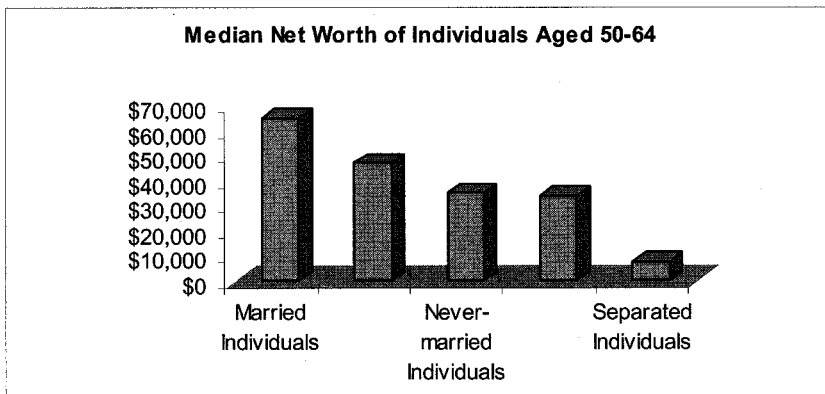
201. *Id.*

market in risk protection, including life, health, and property insurance also distinguishes among recipients by marital status both in terms of eligibility, coverage and premium cost. In fact, access to a wide variety of private insurance is contingent on marital status, with married individuals having access to a wider variety of insurance and superior insurance premiums compared to their non-married counterparts.

As discussed above, marriage itself motivates individuals to pool risks, to pursue joint property, and to increase savings—all of which potentially shield both partners from economic risk in both the short and long run. However, above and beyond these endogenous consequences of marriage, the state intervenes in direct and indirect ways to further insulate and insure married couples from risk. One way the state protects married individuals from economic risk is by granting spouses legal access to their partners' current *and* future income and wealth, including private pensions, investments, property and Social Security.

The need for protection against economic risk grows over the life course as partners age, retire and die. It is at the point of these transitions that the federal government often steps in to protect individuals against poverty and loss of property. Importantly, it is also later in life that the economic benefits of marriage outlined above have created the largest gaps in the median net worth of married and non-married individuals, as illustrated by Figure 6.²⁰²

Figure 6



One critical form of intervention is through Social Security, which provides the primary income for many retired and elderly individuals. Eligibility and the amount of benefits available are highly dependent on marital status. First, married individuals can use their own *and* their spouses'

202. Note these figures show the median net worth of individuals.

earning history as a basis for which to claim benefits.²⁰³ If a person's monthly Social Security income is less than half of his or her spouse's monthly Social Security income, that person can receive additional benefits up to half of his or her spouse's income.²⁰⁴ This benefit is wholly unavailable to non-married individuals.

Furthermore, in many instances, individuals are eligible to receive Social Security benefits based on their divorced spouses' income, as well as survivor benefits if their spouse is deceased. If a divorced individual is sixty-two or over, was married at least ten years, and has not remarried, he or she can claim eligibility on the former spouse's income.²⁰⁵ In other words, spousal benefits are available not only to currently married individuals but to formerly married individuals as well. Finally, widows or widowers are eligible to receive benefits based on the earnings history of their deceased spouses.²⁰⁶ An individual is eligible for survivor benefits whether they were married at the time of death or had been married for at least ten years.²⁰⁷

Inheritance rights and estate transfers represent another arena in which both state and federal law protect and support the economic security of married individuals. Here again the economic security of married individuals is protected in part because the tax code recognizes a married couple as a single economic unit. When a married individual grants his or her spouse property or financial gifts, he or she can do so tax-free.²⁰⁸ For unmarried individuals, such transfers entail significant tax penalties. Upon the death of a spouse, the surviving individual is eligible to sizeable reductions in tax liability for the remaining estate.²⁰⁹ In fact, the transfer of property to a surviving spouse is tax-free, while non-married individuals are subject to heavy tax penalties.²¹⁰

Another way in which married couples are protected from economic risk is through federal immigration law. In fact, in many instances citizenship rights are strongly dependent on marital status, denying foreign nationals in unmarried partnerships many of the economic protections of citizenship. Marriage to a U.S. citizen provides significant legal and economic protections for non-U.S. citizens. For instance, non-citizens married to U.S. citizens have a level of access to paid work, education and healthcare denied their non-married counterparts.²¹¹ Furthermore, the

203. GAO *supra* note 184, at 5.

204. 42 U.S.C. § 402 (2000).

205. *Id.*

206. *Id.*

207. *Id.*

208. GAO *supra* note 184, at 8.

209. *Id.*

210. *Id.*

211. GAO *supra* note 184, at 10.

difficulties associated with obtaining citizenship for non-married individuals potentially impose severe economic burdens and disruptions on unmarried couples. For instance, if a non-U.S. citizen is denied residency or visa status, the couple may have to move to the country of citizenship, incurring high costs of international relocation and, potentially, professional dislocation.²¹² For non-citizens able to legally marry citizens, however, the risk of relocation does not exist.

The economic benefits of legal marriage for transnational couples also extend to the pursuit of joint ownership. Economic discrimination against unmarried foreign nationals and their partners is not limited to federal immigration law. Private mortgage companies are less likely to allow joint ownership of homes and other types of domestic property if one of the partners is a foreign national.²¹³ By discriminating on this basis, both private practices and federal laws create significant financial barriers to unmarried couples. In other words, not only does the federal government impose high barriers to gaining citizenship if one is unmarried, but unmarried transnational couples face potentially high financial costs as well.

In addition to the variety of state-sponsored benefits and protections for married individuals, there are also several private mechanisms that protect married individuals against economic risk. Health insurance, life insurance, property insurance and general liability insurance all provide joint financial insurance against risk for married couples.

Reduced health care costs for married couples certainly increase the savings of married individuals. Substantial demographic data also suggest that married individuals—regardless of race—tend to be significantly healthier than non-married individuals and are less likely to die from all leading causes of death, including heart disease, stroke, many kinds of cancer, auto accidents, murder and suicide.²¹⁴ There is some evidence that marriage provides a form of social control over married individuals. For instance, married men and women report that they are less likely to engage in risk-taking and unhealthy behaviors, including drinking and driving, substance abuse, violence and other self-reported forms of risky behavior.²¹⁵ Possibly due to the social support provided by marriage, married individuals are also substantially less likely to suffer from mental illnesses such as depression and anxiety.²¹⁶ Thus, not only do married couples enjoy access to less expensive health coverage than non-married couples, they are also

212. *Id.*

213. *Id.*

214. George Akerlof, *Men Without Children*, 108 *ECON. J.* 287, 296-98 (1998); Y. Hu & Noreen Goldman, *Morality Differentials by Marital Status: An International Comparison*, 27 *DEMOGRAPHY* 233, 233 (1990); WAITE & GALLAGHER, *supra* note 155 at 48.

215. Linda Waite, *Does Marriage Matter?*, 32 *DEMOGRAPHY* 483, 486-88 (1995).

216. JOHN MIROWSKY & CATHERINE ROSS, *SOCIAL CAUSES OF PSYCHOLOGICAL DISTRESS*, 90-92 (1989); WAITE & GALLAGHER, *supra* note 155.

less likely to require costly health-based interventions than non-married individuals. Both of these factors lead to greater protection against economic risk, higher savings and increased wealth accumulation for married households.

Though little systematic data show the extent of the financial protection married couples receive in the private insurance market, it is likely that private companies treat non-married, cohabitating couples—including same-sex couples—with a high degree of subjectivity and arbitrariness. Indeed, without any legal protection from discrimination, it is likely that same-sex couples face a sizeable barrier to gaining the types of economic protections and resources to which married couples regularly have access. Thus, it is clear that by being denied the right to marry same-sex couples are being significantly disadvantaged.

In fact, as a response to the observed relationship between marriage and economic well-being in the U.S., policy makers have sought to promote and protect marriage as a way of reducing growing income inequality in the U.S. at this time of declining marriage and remarriage rates.²¹⁷ Thus, while scholars continue to debate whether declines in marriage are a cause or consequence of rising inequality, politicians have decried the decline of the traditional American family and have sought to encourage marriage—particularly among the economically disadvantaged—through social policy measures such as marriage bonuses, counseling and education for welfare recipients and tax premiums for married couples. In 2002, President Bush proposed spending up to 1.5 million dollars to educate low-income couples on conflict resolution, an effort aimed specifically at encouraging marriage and discouraging divorce among the poor.²¹⁸ Thus, at a time when the economic returns to marriage are increasing, and the governmental policies are being established to promote marriage for poor heterosexual couples as a way of increasing financial stability,²¹⁹ denial of access to marriage is clearly a denial of equal protection.

As explained in Section II above, neither state-recognized civil union

217. Americans of all races and socioeconomic backgrounds have increasingly delayed marriage. Cohabitation rates have increased, and men and women are more likely than ever before to remain unmarried. ANDREW CHERLIN, *MARRIAGE, DIVORCE, REMARRIAGE*, 8-18 (1992); Daniel T. Lichter et al., *Economic Restructuring and the Retreat from Marriage*, 31 *SOC. SCI. RES.* 230 (2002).

218. Indeed, in 2002, President Bush declared “stable families” as “the central goal of American welfare policy” and promised “unprecedented support to strengthening marriages” *Bush Welfare Plan Promotes Marriage, Work*, CNN.COM, Feb. 27, 2002, <http://archives.cnn.com/2002/ALLPOLITICS/02/26/welfare.reform/index.html>. The same year, his administration proposed \$300 million to be dedicated to the promotion of healthy marriages for welfare recipients.

219. Lynn A. Karoly, *Anatomy of the U.S. Income Distribution: Two Decades of Change*, 12 *OXFORD REV. ECON. POL’Y* 76, 89-91 (1996).

benefits nor employer-provided domestic partnership benefits provide access to the over one thousand federal subsidies and protections granted to married individuals, including Social Security retirement and survivor benefits and federal income tax subsidies.²²⁰ Second, because the legal enforcement of civil union and domestic partnership contracts is limited geographically and otherwise, they are not likely to generate the kind of interdependent financial behavior that marriage contracts do. Finally, these benefits are not portable; individuals cannot take their employer-sponsored domestic partnership benefits when they change employers, nor can they take their civil union benefits with them when they change their state of residence. Therefore, cohabitating couples remain economically disadvantaged relative to married couples, despite civil union and domestic partner benefits.

While there are many moral and ethical arguments that can be made about unequal access to marriage rights, what is not debatable is that marriage bans represent a distinct form of state-sponsored economic discrimination. When individuals are permitted to marry, they earn more, save more, own more, and are better insured against economic risk. Married individuals have access to a host of benefits and protections from the state and the market that non-married individuals do not. Furthermore, the economic benefits associated with marriage are not static, one-time benefits. The financial benefits of having the right to marry are significant and grow over the course of life. In other words, the benefits associated with marriage accumulate, increasing the gap between married and non-married individuals over time.

VII. Conclusion

It is clear from the foregoing that the prohibition of same-sex marriage denies individuals in same-sex relationships the equal protection of the law and also interferes with the First Amendment's Establishment and Free Exercise Clauses. When the federal government endeavors to establish this prohibition, it is clearly violating long-standing principles of federalism by attempting to regulate in an area that has traditionally been left to the states. Given such problems associated with denying the right to marry to same-sex couples, this denial should not be enshrined in the Constitution of the United States. Therefore, the Protection of Marriage Amendment should not be passed.

But preventing the passage of the Protection of Marriage Amendment is only one essential step in securing equal treatment for same-sex couples. Even if a number of states follow Massachusetts's lead and recognize the

220. See the report prepared by the General Accounting Office, identifying all of the federal laws in which marital status is a factor. GAO, *supra* note 184.

right of same-sex couples to marry, these couples are still not entitled to have their status recognized under federal law, which precludes many of the significant economic benefits from marriage. Same-sex couples will receive the equal treatment to which they are entitled only after the United States Supreme Court rules that DOMA is unconstitutional and finds that prohibiting same-sex couples from marrying is just as unconstitutional as prohibiting mixed-race couples from marrying. However, if the amendment were to pass, it would place an extremely formidable obstacle in the path of those seeking to obtain equality for same-sex couples. Therefore, an essential step on the path to securing equal protection for same-sex couples is preventing the passage of this ill-conceived amendment.