Domestic Partnership and Same-Sex Relationships: a Marketplace Innovation and a Less Than Perfect Institutional Choice

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by Nancy J. Knauer*

INTRODUCTION

The struggle for the recognition and protection of same-sex relationships is at the forefront of the contemporary gay and lesbian civil rights agenda. Whereas the push for same-sex marriage and parenting rights has been met with mixed results in the courts and the legislatures, an impressive array of organizations, including Fortune 500 companies, colleges, nonprofit corporations, and municipalities, now extend benefits to the same-sex partners of their employees.1 As Urvashi Vaid states in the book Virtual Equality, “[s]ome of the biggest successes in the gay rights movement came in the 1990’s through changes in corporate policies that covered thousands of employees.”2

This relative level of success is particularly remarkable because domestic partnership benefits are a creature of the marketplace.3 The term “domestic partnership” describes a type of relationship that an employer chooses to

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1. For a discussion of the firms, organizations, and municipalities that offer domestic partnership benefits, see infra notes 15-25, 43-44 and accompanying text.

2. Urvashi Vaid, Virtual Equality 10 (1996). For example, the domestic partnership policies adopted by Xerox Corporation and Levi Strauss & Company cover 47,000 and 23,000 employees, respectively. See Thomas F. Coleman, City of Philadelphia Domestic Partnership Proposals: Informational Briefing for City Council Members and Staff, 20 (May 13, 1997) (unpublished manuscript available from Spectrum Institute, P.O. Box 65756, Los Angeles, CA 90065). Even these numbers seem small in comparison to the 497,210 employees (and retirees) covered by the New York City domestic partnership policy and the 320,000 employees (and retirees) covered by the New York State policy. See id.

3. It is counterintuitive to find the marketplace so clearly in the vanguard on matters of sexual orientation. Since Brown v. Board of Education, 347 U.S. 483 (1954), civil rights advocates have looked to the courts to champion minority rights and provide countermajoritarian balance, whereas the marketplace was more often the object of judicial and legislative regulation on behalf of minority rights. See Martha M. Ertman, Contractual Purgatory for Sexual Marginalities: Not Heaven, But Not Hell Either, 73 Den. U. L. Rev. 1107, 1115 (1997) (explaining that courts are not the countermajoritarian force they are believed to be and noting “judicial reluctance to create social change”).

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recognize as equivalent to marriage for the purposes of extending employee benefits otherwise reserved for the spouses of employees.4 Even when municipalities pass domestic partnership ordinances, they do so primarily in their capacity as employers.5 As a result, the debate over domestic partnership benefits is taking place in the strange surroundings of the corporate board room, the union hall, and the personnel manager’s office.6

Market-based rights such as domestic partnership benefits are limited both with regard to the types of benefits conferred and those eligible to participate in such benefits.7 These same limitations would not apply to same-sex marriage or a public-regarding form of domestic partnership mandated by judicial decision or legislative action. Given the inherent limitations in market-based rights, it is curious that the broader movement for the recognition and protection of same-sex relationships has placed so much stock in the attainment of benefits that are restricted to those gay men and lesbians who can purchase them.8

Comparative institutional analysis can help clarify the nature of the competing costs and benefits associated with the different options for the recognition and protection of same-sex relationships and the alternative institutional

4. "Domestic partnership" does not describe a relationship based on a fundamental right, such as the right to marry or the right to freedom of intimate association. Compare Loving v. Virginia, 388 U.S. 1, 11, 12 (1967) (invalidating state antimiscegenation law as violative of the Fourteenth Amendment and holding that marriage is a fundamental right). Further, domestic partnership benefits are extended to employees, not to general members of society.

5. Only recently have legislative bodies begun to propose a more public-regarding form of domestic partnership which would require third parties to recognize the partnership, such as the Hawaiian Reciprocal Beneficiaries Act, HAW. REV. STAT. § 88-1 (1997). See Bettina Boxall, A New Era Set to Begin in Benefits for Gay Couples; Domestic Partnership: Hawaii Law, Which Takes Effect Tuesday, Will Allow Unmarried People to Qualify for Many Things Typically Reserved for Wedded Couples, L.A. TIMES, July 7, 1997, at A3 (describing Hawaiian legislation as "the most dramatic far-reaching example of a steadily building national trend"). In such cases, legislators are clearly taking a nod from the marketplace and constructing an alternative to marriage around a concept borrowed from employee handbooks and personnel manuals. United States representative Barney Frank recently introduced the first proposed domestic partnership policy for federal employees. See Mike Causey, Domestic Partner Benefits Gain Momentum in Tight Labor Market, Despite Risk of Offending Conservative Customers, WASH. POST, July 6, 1997, at H04.


7. One criticism of domestic partnership policies is that they focus too much on "benefits" and not enough on mutual responsibility and obligation. See Raymond C. O’Brien, Domestic Partnership: Recognition and Responsibility, 32 SAN DIEGO L. REV. 163, 171 (1995) (arguing for need to extend responsibility as well as benefits to domestic partners).

8. The division that this can create within the lesbian and gay community is analogous to a similar division in the case of gay consumers. Amy Gluckman & Betsy Reed explained that "the sword of the market is slicing off every segment of the gay community that is not upper-middle class, (mostly) white, and (mostly) male" and that gay people "who do not see themselves in IKEA TV spots or Dewar’s ads feel alienated." Amy Gluckman & Betsy Reed, The Gay Marketing Moment, in Homo Economics: Capitalism, Community, and Lesbian and Gay Life 3, 7 (Amy Gluckman & Betsy Reed eds., 1997).
settings of the marketplace, the courts, and the legislature. It also offers an explanation for the continued emphasis on domestic partnership benefits despite their limited scope. Finally, it raises a provocative question regarding the potential role of institutional employers in the larger agenda for progressive social change.

After a brief description of domestic partnership benefits, this Essay examines the different ways members of the lesbian and gay community articulate the overriding goal of securing the recognition and protection of same-sex relationships, including short-term objectives such as the legalization of same-sex marriage and longer-term aims such as the normalization of homosexuality. In this case, it is possible that the “best” institutional alternative may not be politically feasible because the recognition and protection of same-sex relationships remains a hotly contested social goal. Accordingly, this Essay provides a strategic assessment of the relief available in the alternative institutional settings and then uses efficiency and equity concerns to evaluate the competing institutional choices.

I. DISCUSSION

A recent KPMG Peat Marwick survey reports that although only thirteen percent of all United States employers offer domestic partnership benefits, one in four companies with over 5,000 employees offer such benefits.


10. A similar question is raised with respect to the role of institutional investors in the response to apartheid in this country and the movement for divestiture. As an openly-gay former high-ranking Ford executive explained, The final issue for corporations is social justice. Some companies will want to be leaders in eliminating homophobia and in providing fully equal treatment for gays and lesbians. The last acceptable prejudice is one too many. Yes, companies are in business to succeed and prosper, but discrimination and intolerance are never good business.

Alex Taylor III, My Life as a Gay Executive; When He Was a Top Candidate to be CEO of Ford, Allan Gilmour Kept his Private Life Secret. Now he Tells How Being Gay Affected his Career—and Why he Believes Corporations Should Treat Gays Better, FORTUNE, Sept. 8, 1997, at 106; see also Liz Stevens, Conscientious Investors; A New Breed of the Stockholders Demands that Companies be Principled as well a [sic] Profitable, FORT WORTH STAR-TELEGRAM, June 12, 1996, L&A at 1 (describing corporate activism of group of Benedictine nuns).

11. See Rubin, supra note 9, at 1429 (calling for “new synthesis of legal discourse” considering mix of concerns of efficiency and social justice).

12. See John Hendren, Study Shows 13% of All Businesses Offer Domestic Partnership Benefits, PITTSBURGH POST-GAZETTE, June 27, 1997, at B1 (discussing trend among employers to extend domestic partnership benefits in order to remain competitive). Because of the fast rate of change and the growing number of smaller employers adopting domestic partnership benefits, every compilation of domestic partnership policies and ordinances is out-of-date by the time it is published. It is exceedingly difficult to determine the exact number of employers offering domestic partnership benefits because the employers cut across the various sectors of the economy.
The quantum of the employee benefits varies from the relatively inexpensive grant of bereavement leave to a full benefits package, including health insurance and retirement benefits. Some firms have also begun to consider domestic partners as "spouses" for purposes of family rates or other consumer-orientated promotional offers. Beyond the business world, domestic partnership benefits are widespread in the nonprofit sector, particularly among colleges and universities. In addition, forty-eight municipalities and two states have some form of domestic partnership law or ordinance extending domestic partnership benefits to their employees. Of this group, thirty-four of the municipalities and both of the states extend full employee benefits to the same-sex domestic partners of their employees.

Domestic partnership in the United States is a private arrangement that, by and large, does not vest the domestic partners with rights vis-à-vis third parties. Although twenty-nine municipalities have domestic partnership registries, the effect of such registration is largely symbolic. Registration can

In 1982, the Village Voice was one of the first private employers to offer domestic partnership benefits. See Jennifer Steinhauer, Increasingly, Employers Offer Benefits to All Partners, N.Y. Times, Aug. 20, 1994, at 25. As the first municipality to adopt a domestic partnership ordinance, Berkeley California began offering such benefits in 1984. See Coleman, supra note 2, at 2.

13. See Coleman, supra note 2, at 3-5.
14. See O'Brien, supra note 7, at 178-79 (describing fight by same-sex couples to qualify for family discount at health club and with American Automobile Association). Extending "family rates" to same-sex couples is consistent with the recent trend in niche marketing geared towards lesbian and gay consumers. See, e.g., Dan Baker, A History in Ads: The Growth of the Gay and Lesbian Market, in HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 11, 12 (Amy Gluckman & Betsy Reed eds., 1997) (describing infatuation of Madison Avenue with gay consumers starting with first Absolut vodka ads created by Keith Haring which ran in The Advocate in 1979); Gluckman & Reed, supra note 8, at 3 (noting that "it has become useful to business to cultivate a narrow (and widely acceptable) definition of gay identity as a marketing tool").
15. Numerous colleges and universities offer domestic partnership benefits to faculty, administrators, and staff, including every member of the Ivy League. Some educational organizations even extend benefits to students, such as allowing same-sex partners to qualify for housing on the same basis as married students or allowing students to include their partners on the health insurance. See Marsha King, UW Regents Allow Benefits for Same-sex Partners—Election Also Seen as Victory for Diversity, Seattle Times, May 17, 1997, at A1.
16. See Coleman, supra note 2, at 19, 21.
17. See id. at 21. Tom Coleman writes,
18. For example, when New York City instituted its domestic partnership registry in 1993, domestic partners were entitled to spousal visitation rights at city hospitals and jails and were entitled "to the same standing as married couples in qualifying for apartments and in inheriting a lease in residential buildings owned or overseen by city housing agencies, including rent controlled and rent stabilized apartments." Jonathan P. Hicks, A Legal Threshold is Crossed By Gay Couples in N.Y., N.Y. Times, Mar. 2, 1993, at A1. Several months after the opening of the
be used as indicia of the existence of a domestic partnership, but it is usually not sufficient to satisfy the relationship test imposed by most domestic partnership policies.\textsuperscript{19} The decision to create a registry is often independent of any grant of domestic partnership benefits.\textsuperscript{20} In fact, fourteen of the municipalities with registries do not extend health benefits to domestic partners, while a number of municipalities which do extend health benefits to domestic partners do not have registries.\textsuperscript{21} Although qualified domestic partners may be considered "spouses" for certain municipal benefits or rights, such as city housing and visitation rights for city hospitals and jails, virtually every domestic partnership ordinance falls short of providing full equality between married couples and domestic partners with regard to access to city services.\textsuperscript{22} Moreover, San Francisco is the only municipality that requires city contractors to provide domestic partnership benefits for their employees.\textsuperscript{23} Although this newly enacted requirement prompted both the San Francisco Catholic Archdiocese and the Bank of America to adopt domestic partnership policies,\textsuperscript{24} it is currently being challenged in federal court by a consortium of airlines under the leadership of United Airlines.\textsuperscript{25}

registry, the \textit{New York Times} reported that registered partners had used (or tried to use) their registered status to get a bereavement fare from an airline, a family rate from a health club and a car rental agency, and the respect of a funeral home that refused to consider the surviving partner as a close family member. \textit{See Lynda Richardson, Proud, Official Partners, N.Y. Times, Aug. 1, 1993, at 37.}

\textsuperscript{19} Unlike opposite-sex married couples who only need show a certificate of marriage, domestic partners cannot rely on a certificate or affidavit of domestic partnership. The relationship tests are designed to avoid fraud, and they typically require the partners to show proof that they actually "share the common necessities of life." \textit{See infra} text accompanying notes 47-50.

\textsuperscript{20} \textit{See} Coleman, \textit{supra} note 2, at 3.

\textsuperscript{21} \textit{See id.} at 19, 21.

\textsuperscript{22} After years of expanding their domestic partnership ordinances, San Francisco and West Hollywood are the closest to providing formal equality in all municipal services. \textit{See id.} at 4.

\textsuperscript{23} \textit{See id.} at 14 (citing San Francisco, Cal., Ordinance 97-96-33.1 (1996)). The effective date of the ordinance was June 1, 1997. \textit{See Coleman, supra note 2, at 14.} San Francisco already had provisions requiring nondiscrimination on the part of city contractors on the basis of "race, color, creed, national origin, ancestry, age, sex, sexual orientation, gender identity, disability or Acquired Immune Deficiency Syndrome or AIDS Related Condition." Coleman, \textit{supra} note 2, at 14, 28 (citing to and setting forth Non-Discrimination in Contracts provisions). The requirement of nondiscrimination on the basis of benefits under Chapter 12B, section 12B.1(b) provides that city contractors cannot discriminate "in the provision of benefits between employees with domestic partners and employees with spouses, and/or between the domestic partners and spouses of such employees, where the domestic partnership has been registered with a governmental entity pursuant to state or local law authorizing such registration . . . ." Coleman, \textit{supra} note 2, at 28 (quoting Chapter 12B § 12B.1.(b)).

\textsuperscript{24} \textit{See} Harriet Chiang, \textit{Airlines Challenge Partners' Law, Industry Group Says Measure is Illegal Regulation, S. F. Chron.,} Oct. 10, 1997, at A19 (reporting that "roughly 2000 companies have complied with the ordinance, including Pacific Bell, Bank of America, and Hewlett Packard"); \textit{see also} Torri Minton, \textit{S. F. Archbishop Agrees to Discuss Partners Policy, S. F. Chron.,} Feb. 7, 1997, at A21 (noting willingness of Catholic Charities to extend benefits to any household member designated by employee).

\textsuperscript{25} \textit{See} Chiang, \textit{supra} note 24 (announcing that Air Transport Association was challenging ordinance in federal court on grounds that it is pre-empted by federal law); \textit{see also} Rachel Gordon, \textit{City Partners-law Battle Heads for U.S. District Court, at Hearing Friday, Airlines Begin}
Despite their limitations, domestic partnership policies can provide considerable financial benefits for covered employees, in addition to a morale boost.\textsuperscript{26} Employee benefits comprise an increasing percentage of the compensation packages of full-time workers, due in large part to the tax-favored treatment of certain employer-provided fringe benefits.\textsuperscript{27} In particular, employer-provided health insurance is destined to remain an extremely valuable benefit, as long as health insurance in this country remains linked to employment. For these reasons, employees seeking domestic partnership benefits have characterized the question as one of "equal pay for equal work."\textsuperscript{28} Even the extension of full spousal benefits to an employee's same-sex partner, however, will not place the employee on an equal footing with his or her married colleagues. This is due to the federal income tax treatment of the employer-provided benefits for the domestic partner.\textsuperscript{29} The fair market

\textit{to Fight to Duck S.F.'s Equal-benefits Rule}, S. F. \textsc{Examiner}, Oct. 9, 1997, A15 (reporting start of "legal showdown over San Francisco's domestic partners law" and assistance offered to city by ACLU, Lambda Legal Defense and Education Fund, and National Center for Lesbian Rights); Vincent J. Schodolski, \textit{United Up In the Air Over Domestic Partner Push}, \textsc{Chi. Trib.}, Aug. 10, 1997, at C1 (reporting that Air Transport Association, an industry trade association comprised of 22 carriers, would challenge ordinance on grounds that it overstepped city's authority).

26. \textit{See} Hendren, \textit{supra} note 12 (quoting community relations officer for Kaiser Permanente explaining that he could not work somewhere that did not offer domestic partnership benefits because of how important it is for him to "have an employer that respects [his] family").

27. Numerous employer-provided fringe benefits are excluded from gross income, including employer-provided health insurance for the employee, the employee's spouse, and the employee's dependants. \textit{See} I.R.C. \textsuperscript{\textsection} 104 (1997).

28. For example, an employee with a domestic partner is paid less than her married colleagues for the same job because the spouses of her married colleagues either receive, or are eligible to receive, health insurance coverage, and other miscellaneous benefits. Even if the employee's partner did not need the health insurance benefits, knowing that such benefits are available in case of an emergency provides a welcome safety net.

29. IRS private letter ruling 9603011 determined that domestic partners do not qualify as spouses for purposes of the exclusion from gross income of employer-provided health insurance under I.R.C. \textsuperscript{\textsection} 105. \textit{See} Priv. Ltr. Rul. 9603011 (Jan. 19, 1996). Therefore, the fair market value of the health insurance coverage provided for the nonemployee partner by the employer is included in the gross income of the employee partner unless the nonemployee partner qualifies as the employee partner's dependent within the meaning of I.R.C. \textsuperscript{\textsection} 152(a). \textit{See} I.R.C. \textsuperscript{\textsection} 152(a). The employee partner is taxed only on the fair market value of the employer-provided insurance and not on any reimbursements made to the nonemployee partner. The amount included in gross income is subject to income tax withholding under I.R.C. \textsuperscript{\textsection} 3402. \textit{See} I.R.C. \textsuperscript{\textsection} 3402 (1997). It also constitutes "wages" under \textsuperscript{\textsection} 3121(a) for purposes of FICA and under \textsuperscript{\textsection} 3306(b) for purposes of FUTA. \textit{See} I.R.C. \textsuperscript{\textsection} 3121(a) (1997); I.R.C. \textsuperscript{\textsection} 3306(b) (1997).

This is further evidence of the limitations of market-based rights. The employee with a domestic partner who is eligible to receive domestic partnership benefits does not make as much (after-tax) as her married colleagues because she must pay income tax on the fair market value of the employee benefit—something that is otherwise excluded from gross income in the case of payments made by an employer for health insurance for an opposite-sex spouse. If the fair market value of the benefit is $2,500, then the employee has $2,500 of additional gross income. If the employee's top marginal rate of tax is 31\%, then she will owe an additional $775 of income tax. Thus, the employee with a same-sex partner still makes less than her married colleagues.
value of the benefits is included in the employee partner’s gross income unless the other partner qualifies as a “dependent.”

The specifics of employee benefits, their tax treatment, and potential costs, require employers and employees to be conversant in a highly technical and specialized area. A cottage industry has emerged to meet the demand for information surrounding these complex issues. Books and consultants stand ready to guide employers and employees through the process of draft-

30. To qualify as a “dependent,” an individual must satisfy one of the nine different categories of relationship provided under I.R.C. § 152. See I.R.C. § 152 (1997). In the absence of a relationship by blood, marriage, or adoption, the only option is to qualify as a member of the taxpayer’s household. See id. § 152(a)(9). Under § 152(a)(9), an individual other than the taxpayer’s spouse whose principle place of residence is the taxpayer’s home can qualify as a dependent provided the taxpayer is responsible for more than one half of the individual’s support. See id.

However, § 152(b)(5) provides that “[a]n individual is not a member of the taxpayer’s household if at any time during the taxable year the relationship between the taxpayer and the individual is in violation of local law.” I.R.C. § 152(b)(5) (1997). Arguably, same-sex domestic partners who reside in any of the states with criminal sodomy statutes could potentially be “in violation of local law.” Although there are no reported instances where the IRS challenged dependency on this basis, every IRS private letter ruling regarding domestic partnership benefits refers to this provision. Some surprisingly recent cases have disallowed the personal exemption on the basis of fornication and cohabitation statutes. See Turgeon v. United States, No. 4-81-Civ. 55, 1982 WL 1641 (D. Minn. 1982) (fornication); Nicholas v. Commissioner, 62 T.C.M. (CCH) 467 (1991) (unmarried sexual intercourse or fornication); Ochs v. Commissioner, 52 T.C.M. (CCH) 1218 (1986) (adulterous relationship); Peacock v. Commissioner, 37 T.C.M. (CCH) 177 (1978) (“open and notorious cohabitation”); Martin v. Commissioner, 32 T.C.M. (CCH) 656 (1973) (“illegal cohabitation”); Eichbauer v. Commissioner, 30 T.C.M. (CCH) 581 (1971) (illicit and vicious cohabitation); Wondsel v. Commissioner, 23 T.C.M. (CCH) 1278 (1964) (adultery); Turner v. Commissioner, 27 T.C. 758 (1957) (prior to enactment of § 152(b)(5) finding general public policy exception for “unlawful intimacy”). This case law seems to call into question the argument that sodomy statutes should not affect dependent status because they outlaw sexual conduct and not cohabitation. See Patricia Cain, Same Sex Couples and the Federal Tax Law, 1 LAW & SEXUALITY 97, 121, n. 117 (1991).

31. For example, employers often object to the potentially high cost of same-sex domestic partner benefits, citing the increased incidence of HIV infection among gay men. All reports are clear that same-sex benefits cost much less than initially thought, and very few employees actually sign up for them. See Elizabeth Neus, Report: Domestic Partner Benefits Cost Same as Heterosexual Married Couples, GANNETT NEWS SERV., July 22, 1997, available in 1997 WL 8852662.

32. This is true of diversity in general. For example, WORKFORCE 2000 forecasts the radical changes that will take place in the composition of the workforce by the year 2000, and the need for industry to be able to respond to these changing demographics. See JOHNSTON & PACKER, WORKFORCE 2000 (1997). Numerous books involving human resources and diversity management stress that it is in the best interests of industry to learn to accommodate a more diverse workforce. See V. ROBERT HAYLES & ARMIDA M. RUSSELL, THE DIVERSITY DIRECTIVE: WHY SOME INITIATIVES FAIL & WHAT TO DO ABOUT IT 6-7, 64 (1997) (reporting on benefits of diversity among employees and consumers and recommending separate diversity training on sexual orientation because it is “large topic with a wide range of issues”); GEORGE HENDERSON, CULTURAL DIVERSITY IN THE WORKPLACE: ISSUES AND STRATEGIES 3 (1994) [after quoting from WORKFORCE 2000, author states “managing diversity” is fast becoming the corporate watchword of the decade—not because corporations are becoming kinder and gentler towards culturally diverse groups but because they want to survive”).
ing, adopting, and implementing domestic partnership policies. Internet listservs share information immediately and keep the employer/employee up-to-date on the latest domestic partnership policy, cost projections, court challenges, and the like. The terms “domestic partner” and “domestic partnership” are beginning to enter the vocabulary of enlightened supervisors and managers, and an increasing number of lesbian and gay executives (as well as rank and file employees) are speaking openly about their sexual orientation. The growing consensus among employers is that domestic partnership benefits are a “low cost way to draw top talent.”

The wide proliferation of domestic partnership policies has not been without conflict. In some cases, employers adopted domestic partnership policies only after years of negotiations. In other cases, years of conflict have still not produced any result. Some of these cases have resulted in litigation designed to compel the employer to offer such benefits in accordance with its

33. Three relatively well-known consultants are Tom Coleman of Spectrum Institute, Sharon Silverstein, an educational consultant in Boston, and Liz Winfield of Common Ground, also in Boston. Both Silverstein and Winfield have written books on the subject: Sharon Silverstein & Annette Friskopp, Straight Jobs, Gay Lives (1996) (studying more than 100 lesbian and gay graduates of Harvard Business School); Liz Winfield, Straight Talk for Gays in the Workplace (1995). In addition, a growing number of publications are designed to be used by both managers and employees. See Amy J. Zuckerman & George F. Simons, Sexual Orientation in the Workplace: Gay Men, Lesbians, Bisexuals & Heterosexuals Working Together (1994). The Preface of Sexual Orientation in the Workplace states, “[i]f you are a manager or supervisor, you already know that no company can afford to waste the talents and energy of any of its employees, whatever their sexual orientation.” Id. at iii. It goes on to urge that “[l]esbian, gay, bisexual and straight people need to find ways to work together creatively, productively and without bias to minimize conflicts and job turnover.” Id.

34. The listserv on matters of domestic partnership is called “domestics” and can be reached at domestic@cs.cmu.com. All three of the consultants mentioned supra in note 33, are regular contributors to the list.

35. One workforce training text urges managers to be sensitive to their word choice when describing the lives of gay and lesbian employees. See Zuckerman & Simons, supra note 33, at 5. It notes that “domestic partner” is an “appropriate” term, and it provides the following definition: “Anyone who lives with his or her lover. Domestic Partner benefits, such as health care and retirement options, can be extended to live-in partners of gays and lesbians, and also unmarried heterosexual couples.” Id. at 5.


38. For example, workers at Chrysler formed the Campaign for Equal Rights at Chrysler and worked for almost six years to document evidence of the hostile work environment for lesbian and gay employees. See Theo Emery, U.S. Labor: Gay Auto Workers Fight Bias, Inter Press Serv., May 29, 1997, available in LEXIS, News Library, Curries file (stating that “[t]he glacial movement at Chrysler highlights how difficult it can be to win protection for gay and lesbians and to change a corporate climate in which harassment and bias are tolerated”). After placing considerable pressure on top management, including picket lines at dealerships, Chrysler included “sexual orientation” in its nondiscrimination policy. See id. The electrician who started the movement is now on medical leave. See id.
own nondiscrimination policy, city ordinance, or state law.\textsuperscript{39} The Alaska courts held that the failure of the University of Alaska to extend domestic partnership benefits violated the state Human Rights Act,\textsuperscript{40} whereas the New Jersey courts rejected a similar claim brought by professors at Rutgers University.\textsuperscript{41} Once granted, domestic partnership benefits have raised the ire of anti-gay consumers and other constituent groups, such as alumni/ae and local politicians.\textsuperscript{42} For example, when the Walt Disney Company recently adopted a domestic partnership policy, there was a considerable outcry from various conservative "pro-family" organizations, including a well-publicized boycott orchestrated by the Southern Baptist Convention.\textsuperscript{43} Despite this


\textsuperscript{41} \textit{See} Rutgers Council of AAUP Chapters et al. v. Rutgers, The State University et al., 689 A.2d 828 (N.J. Super. 1997) (rejecting claim that denial of health benefits under State Health Benefits Plan to domestic partners violates right to equal protection under the New Jersey Constitution). In 1993 professors at Rutgers University sued for health benefits for same-sex and unmarried couples on the grounds that the refusal of the state university to extend such benefits violated the Equal Protection Clause of the New Jersey Constitution and a 1991 executive order signed by then governor, Jim Florio. \textit{See} Terry Pristin, \textit{New Jersey Daily Briefing; Suit on Partnership Benefits}, \textit{N. Y. Times}, Feb. 20, 1997, at B1. In 1997 a unanimous three-judge panel of the state appellate court ruled that the benefits plan for state workers extends only to those defined as "dependents" under the state law and that the definition only included opposite-sex spouses. \textit{See} Abby Goodnough, \textit{New Jersey Court Rejects Domestic Partner Benefits}, \textit{N.Y. Times}, Mar. 13, 1997, at B4. Two of the judges stated that the state law should be reexamined in light of the changing face of the American family. \textit{See} Ralph Siegel, 2 Judges Regret Ruling; Gay Educators Lose Benefits Case, \textit{The Record}, Mar. 13, 1997, at A03.

\textsuperscript{43} Beyond simple consumer disapproval, Apple was initially denied certain local tax start-up benefits when it sought to locate a facility in Texas. \textit{See} \textit{Apple Denied a Tax Break}, \textit{N.Y. Times}, Dec. 1, 1993, at D7 (quoting county commissioner as saying, "I cannot in good conscience extend that benefit to them because of the conviction I have that same-sex partnership is wrong"); Sam H. Verhovek, \textit{County in Texas Snubs Apple Over Unwed-Partner Policies}, \textit{N.Y. Times}, Dec. 2, 1993, at A1. The reason given for this decision was that the company's domestic partnership policy was contrary to the moral values of the community. \textit{See id.}

\textsuperscript{43} The boycott of the Walt Disney Company by the nearly 16 million members of the Southern Baptist Convention was actually long in coming. The Convention threatened the boycott at its 1996 annual convention when it approved a resolution to censure Disney that alluded
backlash, employers have continued to extend benefits to same-sex couples at an ever-increasing speed. 44

Some domestic partnership policies are restricted to same-sex couples, whereas others are not. The rationale for the same-sex restriction is that unmarried opposite-sex couples could choose to marry. Only five municipalities restrict health benefits to same-sex couples, and only two of the registries are restricted to same-sex couples. 45 Typically, domestic partnership policies require a couple to satisfy certain requirements designed to restrict eligibility to bona fide relationships, namely those relationships that approximate marriage. 46 Unlike a married couple for whom a marriage certificate is proof of status, a same-sex couple must prove their status as a couple. 47 Employers

to a later "boycott [of] Disney Company stores and theme parks if they continue this anti-Christian and anti-family trend." Gustav Niebuhr, Baptists Censure Disney For Gay-Spouse Benefits, N.Y. TIMES, June 13, 1996, at A14. The 12,000 delegates to the 1997 convention overwhelmingly approved a resolution that called for "every Southern Baptist to take the stewardship of their time, money and resources so seriously that they refrain from patronizing The Disney Co. and any of its related entities." Marc Fisher & Paul Farhi, Baptists Vote To Boycott Disney Fare; 'Ellen,' Gay Policies Ignite Church Protest, WASH. POST, June 19, 1997, at A01; see also Allen R. Myerson, Southern Baptist Convention Calls for Boycott of Disney, N.Y. TIMES, June 19, 1997, at A18.

The "Official Disney Boycott Site" is located at <http://falcon.laker.net/webpage/Boycott.htm>. It summarizes the extremely well-organized response to Disney's domestic partnership policy as well as Disney's stand on other social issues.

44. For example, Shell, the largest employer in Houston, extended domestic partner benefits despite the 1993 Apple controversy. See Pamela Yip, Shell to Give Benefits to Domestic Partners; Policy Includes Same-sex Relationships, HOUST. CHRON., July 9, 1997, available in 1997 WL 6566347 (specifically mentioning precedent of Apple controversy).

45. See Coleman, supra note 2, at 19. Tom Coleman describes this as a relatively new phenomenon. See id. A same-sex only policy is expressly written to counteract the fact that same-sex couples cannot marry.

46. See infra text accompanying notes 49-50.

47. The International Foundation of Employee Benefit Plans suggests that employers use the following criteria:

* Individuals must be in an intimate, committed relationship and intend to remain in the relationship indefinitely;
* Individuals must be financially interdependent, responsible for each other's common welfare and share the same residence;
* Individuals must be jointly responsible for debts to third parties;
* Individuals must be of legal age;
* Neither individual can be related by blood closer than would bar marriage in the state of their residence;
* Individuals must have lived together for a specified length of time before seeking domestic partner benefits;
* Neither individual can be married to anyone else nor have another domestic partner.

See Marc A. Savasta, Into the Mainstream? Employers Examine Domestic Partnership Benefits, 44 RISK MGMT. 70 (1997). Savasta explains that employers may augment these requirements with additional factors such as "documentation of joint ownership of significant assets (e.g., a car, a mortgage or bank accounts), or where applicable, enrollment in a city registry of domestic partners." Id. For Chicago's implementation of similar requirements, see infra text accompanying note 50.
justify the additional requirements as necessary to prevent individuals from feigning a same-sex relationship solely to obtain valuable benefits.\textsuperscript{48}

Domestic partnership policies generally impose several different types of requirements: (i) minimum age of partners, (ii) prohibited degrees of consanguinity, (iii) length of relationship, (iv) exclusivity of relationship, and (v) economic interdependence.\textsuperscript{49} The newly enacted Chicago domestic partnership policy is representative, with the exception that it is restricted to same-sex couples. It defines a "qualified domestic partner" as follows:

A qualified domestic partner, as defined in this section, of an individual employed by the City of Chicago shall be eligible for the same benefits, including but not limited to health coverage, as are available to the spouse of an individual employed by the City of Chicago.

To be eligible for coverage as a qualified domestic partner, the City employee and the domestic partner must complete and file with the department of personnel an "Affidavit of Domestic Partnership" in which they attest that:

(A) They are each other's sole domestic partner, responsible for each other's common welfare, and

(B) Neither party is married, and

(C) The partners are not related by blood closer than would bar marriage in the State of Illinois, and

(D) Each partner is at least 18 years of age, and the partners are the same sex, and the partners reside at the same residence, and

(E) Two of the following four conditions exist for the partners:

1. The partners have been residing together for at least twelve (12) months prior to filing the Affidavit of Domestic Partnership.

2. The partners have common or joint ownership of a residence.

\textsuperscript{48} For example, an article directed towards private sector risk managers cautions: Employers do have to guard against the possibility that an employee might falsify the existence of a domestic partnership. Individuals unable to obtain insurance on their own might seek coverage by feigning a domestic partnership, and the proof necessary to substantiate a claim of dependency could be difficult to track.

Savasta, supra note 47, at 70. This concern seems terribly misplaced given the relatively high costs involved in what will be perceived as a declaration of homosexuality.

\textsuperscript{49} Both the minimum age requirement and the consanguinity provision are designed to approximate the restrictions imposed for obtaining a marriage license. Only recently have fully "inclusive" policies, such as those enacted by the San Francisco Archdiocese and Bank of America, allowed the employee to designate any adult household member. See Rachel Gordon, B of A to Offer Partners Benefits: S.F. Law Pushed Giant Bank to Act, S. F. CHRON., Mar. 11, 1997; Toni Minton, S.F. Archbishop Agrees To Discuss Partners Policy, S. F. CHRON., Feb. 7, 1997. The exclusivity requirement is usually expressed as a condition that the domestic partners cannot be married to, or the registered domestic partner of, another individual. This appears to be a direct corollary to the prohibition of bigamy, rather than the requirement of monogamy. The economic interdependence requirement is similar to a spouse's duty of support. Finally, the time requirement does not have a corresponding provision in the case of legal marriage.
3. The partners have at least two of the following arrangements:
   a. Joint ownership of a motor vehicle;
   b. A joint credit account;
   c. A joint checking account;
   d. A lease for a residence identifying both domestic partners as tenants.

4. The City employee declares that the domestic partner is identified as a primary beneficiary in the employee’s will.\footnote{Chicago, Ill. Code § 2-152-072 (1996). The employee is further responsible for notifying “the department of personnel of any changes” in the facts recited in the Affidavit. \textit{Id.} When a domestic partnership terminates, the employee must wait twelve months before he or she can file a new Affidavit of Domestic Partnership. \textit{See id.}}

Domestic partnership policies also may include the biological or adoptive children of an employee’s domestic partner that the employee is co-parenting. Depending upon the breadth of benefits offered, this permits the employee to cover the child on his or her health insurance. It also may include tuition remission and maternity/paternity leave. This is particularly important if the employee is co-parenting a child in a state (or county) where second-parent adoption is not available.\footnote{The National Adoption Center in Philadelphia reports that second-parent adoptions have been granted in 10 states. \textit{See} Carole Paquette, \textit{Couples Wary on Same-Sex Adoptions}, \textit{N.Y. Times}, Nov. 17, 1996, 13LI at 1 (noting that availability of second-parent adoption can vary on county by county basis). Both Florida and New Hampshire have statutes that prohibit lesbians and gay men from adopting. \textit{See id.; see also} Donna Leinwand, \textit{Gay Adoption Ban Upheld}, \textit{Miami Herald}, July 29, 1997, at 1B (reporting case from Broward Circuit Court upholding constitutionality of Florida ban on adoptions by gay men and lesbians).}

Domestic partnership benefits represent a positive step towards the recognition and protection of same-sex relationships. Instead of focusing on this broader aim, some members of the gay and lesbian communities articulate their goal in terms of attaining formal equality with opposite-sex couples.\footnote{See, e.g., \textit{Andrew Sullivan, Virtually Normal: An Argument About Homosexuality} 181 (1996) (discussing idea that “identical relationships” should be afforded “equal legal standing”).} This articulation has the effect of foreclosing other institutional choices because for these individuals, nothing short of legal recognition of same-sex marriage will suffice.\footnote{The concern is that a public-regarding domestic partnership status will create a type of second-class marriage reserved for same-sex couples. \textit{See} William N. Eskridge, Jr., \textit{The Case for Same-Sex Marriage} 79 (1996) (asserting that lesbians and gay men prefer marriage to domestic partnership because “they [do not] want to be domestic partners whose relationship can end at the drop of a termination statement”). Even the progressive domestic partnership statutes in the Scandinavian countries create something less than marriage, something created especially for same-sex couples, with real marriage reserved for opposite-sex couples. \textit{See} Deborah M. Henson, \textit{A Comparative Analysis of Same-sex Partnership Protections, in Same-sex Marriage: Pro and Con} 42 (Andrew Sullivan ed., 1997) (describing Danish and Swedish laws regarding domestic partnership protections for same-sex couples). Denmark specifically forbids the adoption of a child by same-sex partners. \textit{See id.} Eskridge rejects what he refers to as a “Danish-style compromise” because it sacrifices formal equality. \textit{See Eskridge, supra} at 122.}
terms, such as the recognition and protection of same-sex relationships, then configurations other than marriage may offer acceptable alternatives, particularly where these configurations require third parties to recognize and respect the partnership. It is also possible to view both marriage and domestic partnership policies as simply interim steps in larger long-term projects such as the normalization of homosexuality or transformative social change regarding gender expectations and sexual autonomy.

Goal articulation is of the utmost importance because the alternative institutional settings offer differing levels of relief depending upon the stated goal or goals. For example, market-based domestic partnership benefits are necessarily limited to benefits that an employer can provide and, except in the case of a few incidental municipal benefits, they do not vest the domestic

54. Marriage is not a universal goal in the gay and lesbian community. The debate over whether marriage should be a goal of the lesbian and gay community is traced to a 1989 exchange that took place between Paula Ettlebrick and the late Tom Stoddard in the pages of the now defunct OUT Magazine. See Paula Ettlebrick, Since When is Marriage a Path to Liberation? in LESBIANS, GAY MEN, AND THE LAW 401-05 (William B. Rubenstein ed., 1993); Thomas Stoddard, Why Gay People Should Seek the Right to Marry, in LESBIANS, GAY MEN, AND THE LAW 398-401 (William B. Rubenstein ed., 1993). The debate continues today as evidenced by the Fall issue of The Harvard Gay & Lesbian Review which sports a title page with the question “Shall We Wed?” This issue includes pieces by Andrew Sullivan, Chai Feldblum, Paula Ettlebrick, and Evan Wolfson. Sullivan argues for the right to choose to marry and, referring to the arguments from within the gay community against same-sex marriage declares,

[the old gay left is grasping at straws. They're just sort of over. That part of the conversation is not relevant. I include them in the book [SAME-SEX MARRIAGE: PRO AND CON] because I feel like that's part of the debate. But it's over. Except in a few nooks and crannies in academia, it's not really part of the national conversation, especially when it comes to something as basic as this.

Andrew Sullivan, We're Talking About the Right to Choose, 4 HARV. GAY & LESBIAN REV. 25, 27 (Fall 1997). Ettlebrick makes a two-pronged argument that marriage “entrenches sexual hierarchies, which in turn obliterate individual sexual expression” and “reinforces a single form of family relationship that excludes many of our own families.” Paula L. Ettlebrick, Legal Marriage Is Not the Answer, 4 HARV. GAY & LESBIAN REV. 34, 34 (Fall 1997).

55. Some form of a public-regarding domestic partnership status would presumably require the partners to respect the relationship. Raymond O'Brien makes this point when he discusses the desirability of including an element of responsibility along with the benefits or rights commonly associated with a domestic partnership. See O'Brien, supra note 7, at 171.

56. For example, some same-sex marriage advocates make it very clear that their ultimate goal is to incorporate same-sex couples into the mainstream and marriage is seen as an end in and of itself. This has been criticized as leading to a “domestication” of same-sex relationships. See Ruthann Robson, Lesbian (Out)-LAW: Survival Under the Rule of Law 18 (1992) (describing certain contractual strategies used to gain protection for lesbian relations as fostering “the unthinking assimilation of domestication”). A constant refrain within the lesbian and gay community is whether the struggle for lesbian and gay rights is (or should be) inextricably linked to a broader transformative vision of radical social change, perhaps organized around gender expectations and sexual autonomy. See Vaid, supra note 2, at 209, 274-306. There is a potential for considerable overlap because many have argued that simply normalizing homosexuality can have considerable transformative power provided that it is not done to the exclusion or further marginalization of other groups or subgroups. See Nan Hunter, Marriage, Law, & Gender: A Feminist Inquiry, 1 LAW & SEXUALITY 9, 16-19 (1991). But see Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not “Dismantle the Legal Structure of Gender in Every Marriage,” 79 VA. L. REV. 1535, 1540-41, 1549 (1993).
partners with any rights vis à vis third parties.57 This notwithstanding, domestic partnership benefits can provide a real financial advantage to certain employees.58 In addition, domestic partnership policies have symbolic importance. They signify that an employer values its gay or lesbian employees and their partners.59 The existence of such policies can make gay and lesbian employees more comfortable regarding their sexual orientation and, therefore, more loyal and productive.60 For many lesbian and gay employees, it is very important that their employer and co-workers are aware of their sexual orientation. The alternative is to be “closeted” and to try to conceal one’s sexual orientation on a daily basis.61 A growing body of research identifies the considerable costs of the closet to both the employee and the employer. These costs stem from the constant strain of intense information management that is necessary to conceal one’s sexual orientation.62

57. The San Francisco ordinance is unique in that it covers city contractors and requires them to offer domestic partnership benefits. See Coleman, supra note 2, at 4. The Philadelphia proposed domestic partnership ordinances would require all city contractors to provide full benefits to their employees’ domestic partners. See id. Coleman notes that Seattle, West Hollywood, and New York City are considering expanding their ordinances to include such provisions for city contractors. See id.

58. See supra notes 13-18 and text accompanying notes 13-14.

59. For example, Zuckerman and Simons state “[b]y offering domestic partner benefits, these organizations let gay, lesbian, bisexual, and heterosexual employees know that all employees’ home lives and work lives are important. These benefits go far in attracting and retaining the best workers, regardless of sexual orientation.” ZUCKERMAN & SIMONS, supra note 33, at 59.

60. Books rating the climate of organizations towards gay and lesbian employees routinely list the adoption of a domestic partnership policy as a good indication of a “gay-friendly” atmosphere. See id. at 15 (noting that domestic partnership policy is indication that organization is “warm and receptive”). An openly gay former Ford executive summed up the benefits of a domestic partnership policy as follows:

A key—and important—issue right now is domestic-partner benefits. Many gay and lesbian people take the availability of these benefits as a signal that an employer values diversity, that the employer in fact wants all its people treated fairly and equitably. And the cost of partner benefits is not high. First of all, a large number of gays and lesbians are not going to self-identify. In addition, most of those partners are working and are covered elsewhere. Finally, despite the cost of AIDS, the costs of other medical events—complicated pregnancies, for example—are higher in the traditional family.

Taylor, supra note 10, at 106.

61. As John Elliot explains, “[t]he decision on whether or not to pass as a heterosexual is a major life task.” John E. Elliot, Lesbian and Gay Concerns in Career Development, in HOMOSEXUAL ISSUES IN THE WORKPLACE 34 (Louis Diamant ed., 1993). He goes on to state that “passing is a realistic adaptation” in light of homophobia. Id. For a discussion of the choices that face gay men in corporate America as seen through a series of case studies, see JAMES D. WOODS (with JAY J. LUCAS), THE CORPORATE CLOSET: THE PROFESSIONAL LIVES OF GAY MEN IN AMERICA (1993).

62. For example, a closeted employee must deal with the following: the stress of information management, loss of comradery with co-workers, loss of morale, reinforced internalized homophobia. The employer bears the cost of reduced productivity, increased sick time, loss of morale, and decreased loyalty. See ZUCKERMAN & SIMONS, supra note 33, at 11-14 (providing series of hypotheticals designed to help “count the costs” of homophobia in workplace); see also Marc Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protection for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511, 595-96 (1992) (detailing costs of closet).
Just because your employer recognizes your relationship, however, does not mean that your doctor, or hospital, or funeral home, or your partner's family, or the federal government will recognize your relationship. Opposite-sex married couples enjoy numerous benefits solely because of their marital status. A judicial decision recognizing same-sex marriage would make same-sex couples eligible for the full range of benefits regardless of employment status. These benefits would act as a default setting, and couples who want to opt out would have to contract around these benefits through a pre-nuptial agreement. A legislatively created public form of domestic partnership could make available all of the benefits extended to opposite-sex married couples, or it could carve out some subset of these benefits, thereby reserving certain benefits to married couples.

63. Same-sex partners are considered strangers and do not enjoy the rights extended to spouses or even those extended to relatives. Thus, doctors and the hospital will not consider a same-sex partner as next of kin. This has kept partners outside the hospital room of their sick and dying partners and given them no say in the decision to forego life sustaining treatment or consent to surgery. Funeral homes and cemeteries have refused to honor the requests of a surviving partner regarding the disposition of the body or even the inscription on the tombstone. See William C. Smith, Dispute Over Epitaph on Lesbian's Gravestone Lands Local Jewish Cemetery in Federal Court, LEGAL INTELLIGENCE, Apr. 16, 1997, at 5. A will leaving everything to a surviving partner can be easily challenged by family members. Finally, the federal government only considers opposite-sex spouses as legal spouses for purposes of social security survivor benefits, estate and gift tax deductions, and other federal tax purposes. See infra notes 91-92 and accompanying text (describing Defense of Marriage Act [hereinafter DOMA] (codified at 1 U.S.C.A. § 7 (West 1997))).

64. In the area of property considerations, these benefits include the right to the following: spousal support, an intestate share in the estate of the deceased spouse, elect against the will that does not provide for at least a minimum spousal share, and equitable distribution upon divorce. These rights arise at the moment of marriage, unless the parties have previously waived their rights through a contractual arrangement. Perhaps the shortest marriage on record was reported in the Pennsylvania case, Estate of Neiderhiser, where the bridegroom dropped dead immediately after the exchange of vows. See Estate of Neiderhiser, 2 Pa. D. & C.3d 302, 310 (1977) (holding marriage valid and bride entitled to elective share). The Hawaiian Supreme Court catalogued 14 of “the most salient marital rights and benefits.” Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993). William Eskridge has identified 15 broadly defined “practical benefits” of marriage, including inheritance rights succession, spousal support, priority in claiming human remains, being appointed guardian, or personal representative, and the right to bring a wrongful death action for the intentional infliction of emotional distress. See Eskridge, supra note 53, at 66-67. In addition, there are numerous federal benefits attached to marriage, including the unlimited marital deduction for transfer tax purposes. See, e.g., I.R.C. §§ 2056, 2523 (West 1997). The report of the General Accounting Office occasioned by the debate over DOMA catalogued 1049 federal statutes where marital status was considered. See General Accounting Office, Defense of Marriage Act, Letter Report GAO/OGC-97-16 (Jan. 31, 1997).


66. This would be a menu approach advocated by Judge Posner. See Richard Posner, OVERCOMING LAW (1996). The flip side of this approach is the push for an optional status of a “coverture marriage” that would be very difficult to dissolve. See Kevin Sack, Louisiana Approves Measure to Tighten Marriage Bonds, ORANGE COUNTY (CAL.) REG., June 24, 1997, at A13 (explaining that divorce would be available "only in narrow circumstances such as adultery, abuse, abandonment, lengthy marital separation, or imprisonment on a felony").
Market-based domestic partnership benefits, same-sex marriage, and a public form of domestic partnership, all have potential negatives and associated costs.\(^67\) Comparative institutional analysis provides a framework to evaluate the different costs and benefits associated with the various institutional options. Assuming a goal to secure the recognition and protection of same-sex relationships, a standard analysis would evaluate the competence of a given institution to satisfy the stated goal against a measure of equity and efficiency.\(^68\) However, society has not reached a consensus regarding the desirability of the recognition and protection of same-sex relationships.\(^69\) There remains a deep division within certain quarters of society and even within the lesbian and gay community concerning same-sex marriage and relationships.\(^70\) Accordingly, any consideration of equity and efficiency must be tempered by the very pragmatic concern of whether the varying institutions of the marketplace (as expressed by institutional employers), the courts, and the legislature, will actually be responsive to the demand for the recognition and protection of same-sex relationships.\(^71\)

On a firm by firm basis, the marketplace has responded to the demand for innovation in the case of same-sex relationships. More flexible than the legislature, and unhampered by concerns of majoritarian morality, the marketplace is now setting the terms of the debate. The marketplace, of course,  

67. Of course, "same-sex marriage" in this Essay refers to state-sanctioned legalized marriage. It does not refer to ceremonial marriage. Cultural representations of ceremonial same-sex marriage have become so common that for the past several years some students in my first year Property class are under the mistaken belief that same-sex marriage is legal in certain states. They are just not sure where.

68. This approach, however, assumes consensus regarding a specific goal and that the only point of controversy is where to locate the delivery of the goods, services, rights, and/or responsibilities required to satisfy the goal. For a discussion of an instance where the goal is clear, but the method of delivery is contested, see Nancy J. Knaur, \textit{Reinventing Government: The Government-\textit{Community} Charitable Organization and the Promise of Institutional Choice}, 41 N.Y.L. SCH. L. REV. 945 (1997). In addition, it is difficult to discuss domestic partnership benefits and same-sex marriage in terms of efficiency because of the disputed nature of the goal and the contested nature of the externalities. For example, the goal of attaining recognition and protection of same-sex relationships is entirely consistent with a loss of welfare to others who oppose such moves.

69. According to a \textit{Newsweek} poll only 33\% of those surveyed approve of same-sex marriage, while 58\% are opposed. See \textit{Same-Sex Marriage: Pro and Con} xxii (Andrew Sullivan ed., 1997) (citing \textit{Newsweek} poll). The level of approval for same-sex relationships increases the farther the questions get from same-sex marriage. For example, 48\% are in favor of social security benefits for same-sex partners, and 43\% are not. \textit{See id.} A considerably larger percentage of 61\% approve of inheritance rights for same-sex partners, and only 29\% disapprove of such rights. \textit{See id.} Eighty percent believe that lesbians and gay men should be protected from discrimination in housing on account of their sexual orientation, and 84\% believe that such protections should apply in matters of employment. \textit{See id.} at xxi-ii.

70. For a discussion of the marriage debate within the lesbian and gay community, see \textit{ supra} note 53. William Eskridge devotes a chapter of his book on same-sex marriage to the debate and the people whom he calls the "marriage-skeptics." \textit{ See Eskridge, supra} note 53, at 51-85.

71. \textit{See Richard A. Posner, Sex and Reason} 313 (1992) (noting that "authorizing homosexual marriage would have many collateral effects" whereas decriminalizing sodomy would have "few collateral effects").
is not entirely immune from majoritarian bias. For example, it is subject to market forces expressed through certain stakeholder constituency groups, such as consumers, stockholders, and local governments. This majoritarian bias is also evident in the anti-gay voter initiatives popularized in the early 1990's.

Outside the marketplace, Hawaiian marriage decisions of *Baehr v. Lewin* and *Baehr v. Mike* stand out as the signal victory in the push for the recognition and protection of same-sex relationships. This notwithstanding, the recognition of same-sex marriage in Hawaii remains far from a foregone conclusion. Immediately following the publication of the opinions, anti-marriage forces mobilized to curtail their impact. In addition to a

72. Neil Komesar criticizes the interest group theory of politics on the basis that it underestimates the “overrepresentation of the many over the few (majoritarian bias).” *Komesar, supra* note 9, at 57. For Komesar's description of “bias,” see id. at 76 (noting that “bias is a normative or prescriptive issue”). Komesar notes that “the severity of majoritarian bias—its total impact on society—may rival that of minoritarian bias.” Id. at 81. He furthers notes that the mistreatment of minorities is the most visible form of majoritarian bias. See id.

73. Boycotts are the most obvious example of such organized pressure. It can also be exerted indirectly, such as consumer complaints prompting advertisers to pull their ads from the episode of *Ellen* when DeGeneres surprised no one and finally came out. See Dana Carey, *As the Main Character in Ellen Comes Out, Some Companies See an Opportunity Others Steer Clear*, N.Y. Times, Apr. 30, 1997, at D8. An interesting irony to the *Ellen* coming out hype was that ABC refused to air an advertisement for the lesbian-owned and lesbian-operated Olivia Cruises citing that the content of the ad was inappropriate. See *President of Olivia Cruise Discusses Being Denied “Ellen” Advertising Time* (CNNFN, Biz Buzz, Apr. 30, 1997) (transcript #97043011FN-104). Eight local ABC affiliates did agree to air the ad. See id.

74. For a discussion of the difficulty Apple encountered with certain county commissioners in Texas see *supra* note 42. San Francisco represents the opposite pressure—a local government which requires city contractors to adopt a domestic partnership policy. See *supra* note 23.

75. The anti-gay voter initiatives were presented in the form of a state-wide referendum invalidating any attempt to secure protections on account of sexual orientation because such protections were seen as “special rights” which privileged homosexuality. For a discussion of such voter initiatives, see Jane S. Schacter, *Romer v. Evans and Democracy’s Domain*, 50 VAND. L. REV. 361 (1997). *Romer v. Evans* invalidated Colorado’s Amendment 2. See *Romer v. Evans*, 517 U.S. 620 (1996). Similar referendums were held in Maine, Oregon, and on the local level. A new trend appears to be the use of the referendum to invalidate judicial decisions, such as the Hawaiian call for a constitutional convention and the voter referendum in Maine to override a legislatively enacted nondiscrimination statute. See Paul Carrier, *Petitions Validated, Clearing the Way for Gay-Right Vote: Two Christian Groups Succeed in Forcing a Referendum on Maine’s New Law by April 1998*, PORTLAND PRESS HERALD, Oct. 21, 1997, at 1A. The Maine referendum struck down the nondiscrimination statute. See *Carey Goldberg, Maine Votes Repeal Law on Gay Rights*, N.Y. Times, Feb. 12, 1998, at A1 (noting referendum was “landmark victory for Christian conservatives”).

76. 852 P.2d 44 (Haw. 1993).


seemingly endless series of appeals, the court of public opinion quickly convened to criticize the decisions as judicial activism that steps too far ahead of the will of the people.\textsuperscript{80} The Hawaiian legislature promptly enacted the Reciprocal Beneficiaries Act to try to avoid issuing marriage licences to same-sex couples.\textsuperscript{81} The Act creates a kind of second-class marriage and extends many rights to unmarried couples that were previously reserved for married couples.\textsuperscript{82} The scope of the Act has been severely limited by a recent opinion of the state attorney general, and it remains to be seen whether it will have any independent viability.\textsuperscript{83}

The ultimate response came in the call for a constitutional convention to rewrite the state constitution and reserve to the legislature the power to define marriage. After much political and legal maneuvering, a federal court cleared the way for a constitutional convention to be held in 1998.\textsuperscript{84} The marriage activists plan to follow the measured success of Hawaii with court challenges in a few strategic states with favorable state constitutions and other encouraging factors.\textsuperscript{85} The first of these subsequent marriage cases was filed in Vermont in July of 1997.\textsuperscript{86}

\textit{of Form or Substance: Monogamy, Polygamy and Same-sex Marriage}, 75 N.C. L. REV. 1501 (1997) (addressing directly argument that same-sex marriage is moral equivalent of polygamy).

80. An example of this sentiment was expressed by Andrea Sheldon of the Traditional Values Coalition. Referring to the 1996 Hawaiian Supreme Court decision of \textit{Baehr v. Miike}, Ms. Sheldon stated "[t]his is another example of judicial tyranny. We are seeing this time and time again, where courts and judges are going against the will of the people." \textit{The Battle Continues In Hawaiian Courts Over Same-Sex Marriage}, (CNN television broadcast, Dec. 4, 1996) (Transcript # 96120402V07).

81. See \textit{Haw. Rev. Stat.} § 88-1 (1997); see also Boxall, supra note 5. The governor permitted the Act to become law without his signature.

82. For a description of the benefits included, see Carlsmith, Ball, Wichman, Case & Ichiki, \textit{Hawaii State Legislature Passes Bills That May Create Administrative Burdens}, 1 PACIFIC EMPLOYMENT LAW LETTER, June 1997.

83. The federal District Court agreed with the decision of the state attorney general and ruled that private employers could not be required to provide health insurance benefits to reciprocal beneficiaries. See Linda Hosek, \textit{Draft Bill Will Try to Extend Health Benefits}, HONOLULU STAR-BULLETIN, Sept. 27, 1997, at A1 (reporting that "U.S. District Judge David Ezra yesterday agreed with seven companies that sued the state in July over a new law, saying it can’t require most private employers to extend health benefits to so-called reciprocal beneficiaries").


85. There has been a concerted attempt by marriage activists to limit or stop challenges in the states considered unlikely to grant the right to marry. The theory is that such challenges will produce negative precedent. See, e.g., David W. Dunlap, \textit{Ithaca Denies Gay Men a Marriage License}, N.Y. TIMES, Dec. 4, 1995, at B4 (noting that "paradoxically . . . some of the most outspoken opponents of granting a marriage license to the Storres . . . were leading gay organizations like the Lambda Legal Defense and Education Fund and the Empire State Pride Agenda"). Instead, the marriage movement has focused on states with a variety of favorable factors. See Deb Price, \textit{Climate in Vermont is Right for Gay Marriages}, DET. NEWS, Aug. 29, 1997, at C2.

86. See Peter S. Canellas, \textit{Vermont Gays Sue for Right to Marry: Cite Guarantee of State
The ability of the will of the people to override acts of the judiciary illustrates the danger inherent in majoritarian politics when dealing with same-sex relationships. The Hawaiian marriage decisions created a chain reaction throughout the states. Twenty-five states adopted anti-marriage laws which restrict marriage to opposite-sex couples and refuse to recognize same-sex unions performed in other states—all despite the fact that no state currently recognizes same-sex marriage. Anti-marriage bills were defeated in twenty-four states. Congress joined the anti-marriage camp when it passed the Defense of Marriage Act in 1996. DOMA provides that for all federal purposes, marriage is restricted to opposite-sex couples, and it also pur-

Charter, Boston Globe, July 22, 1997, at B1 (reporting that Vermont attorney general will defend suit brought by three same-sex couples).

87. Although not nearly as chilling, the use of constitutional reform in Hawaii bears some similarity to the plot of Derrick Bell's story, The Space Traders. See Derrick Bell, Faces at the Bottom of the Well: the Permanence of Racism 158-94 (1992). Bell illustrates how the legal process of constitutional reform can be expedited to approve even the most reprehensible moral decisionmaking when the United States electorate ultimately accepts a deal to send all African-Americans with the "Space Traders" in order to receive "treasure of which the United States was in most desperate need." Id. at 159.


89. Much had been written about the challenge that the anti-marriage laws present to Full Faith and Credit Clause of U.S. Constitution. See, e.g., Larry Kramer, Same-sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965 (1997).


91. DOMA adds a definition of "marriage" and "spouse" to the United States Code. Specifically, it adds the following § 7 to Chapter 1 of Title 1:

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.

1 U.S.C.A. § 7 (West 1997). This is very different from the approach taken in Canada. See, e.g., Barry Brown, Ontario Court Upholds Benefits in Death of Same-sex Partner, Buff. News, Oct. 5, 1997, at 7A (reporting on ruling that insurance company must pay survivor benefits to same-sex
ports to grant states the right not to recognize same-sex marriages performed in other states.92

In addition to the marriage cases, there have been a number of recent decisions which respect same-sex relationships and that seek to expand the definition of family. These include defining a family for purposes of rent-control laws,93 allowing second-parent adoption,94 and granting a nonbiological lesbian co-parent standing to sue for custody.95 Of course, each decision has its anti-gay counterpart, at times resulting in county by county distinctions within a single state96 or seemingly contradictory public policy positions within a single jurisdiction.97 Many courts still consider sexual orientation a disqualifying factor in parenting decisions, whether it be a question of custody, visitation, or adoption. This persistent view has led courts to grant a grandmother custody over the biological mother98 and a father custody over

partner and noting that “the move to include such partners in all spousal benefits, which failed in the Ontario Legislature, is being won in the courts, statute by statute”); Steve Payne, Same-sex Fight’s About Dignity: CUPE, TORONTO SUN, Oct. 21, 1997, at 22 (noting that Canada’s largest union, Canadian Union of Public Employees, is pursuing case before Ontario Court of Appeals in order to get approval to include same-sex partners in pension plan).

92. DOMA adds the following language to § 1738C of Chapter 115 of Title 28 of the United States Code:

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 persons 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.


93. See Braschi v. Stahl Assocs. Co., 543 N.E.2d 49 (N.Y. 1989) (holding that surviving same-sex partner was “family member” for purposes of rent control regulations and that such “family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence”).

94. See Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993) (approving adoption of child by lesbian partner of biological mother).


96. For example, in Pennsylvania the ability to adopt is determined on a county by county basis. See Theresa Glennon, Binding the Family Ties: A Child Advocacy Perspective on Second-Parent Adoptions, 7 TEMP. POL. & CIV. RTS. L. REV. 255 (Spring 1998).

97. In 1992, the Georgia Supreme Court enforced a partnership contract between two women while excluding evidence of the sexual nature of their relationship under the parol evidence rule. See Crocke v. Gilden, 414 S.E.2d 645 (Ga. 1992). For a discussion of this case see Erman, supra note 3, at 1107; see also Nancy Ehrenreich, The Progressive Potential in Privatization, 73 DENV. L. REV. 1235, 1249 (1997) (noting that use of contract in context of same-sex relationship can have both reinforcing and subversive effect). A Florida appellate court upheld a partnership contract between two lesbians despite the prohibition on same-sex marriage. See John D. McKinnon, Ruling OKs Nuptial Pact For Gays, WALL ST. J., June 12, 1997, at F1 (quoting Miami Beach attorney as stating that ruling is “about as close as you can get to state recognition of same-sex marriage”).

98. The case of Sharon Bottoms and her fight with her mother over custody of her child received considerable media attention and quickly became a made-for-TV movie starring Vanessa Redgrave and Valerie Bertinelli. See Douglas Durden, Richmond Case Aired on TV’s ‘Two Mothers,’ THE RICHMOND TIMES DISPATCH, Sept. 22, 1996, at 11; Tom Shales, ‘Two Mothers': A Wrenching True Life Story, WASH. POST, Sept. 21, 1996, at C01. The Virginia Supreme Court awarded custody to the grandmother reversing the decision of the appellate
the biological mother even though the father had been earlier convicted of killing his first wife. 99 The Eleventh Circuit upheld the firing by then attorney general of Georgia, Michael Bowers, of a newly hired lawyer, Robin Shahar, because she planned to marry her lesbian partner in a religious ceremony. 100 Beyond the cases dealing with the definition of the family, as of October 1997, only ten states and the District of Columbia had statutes prohibiting discrimination based on sexual orientation. 101 This was reduced by one as a result of a February 1998 voter referendum in Maine that repealed the antidiscrimination legislation. 102

Given the anti-gay voter initiatives, the mixed record in the courts, and the efforts to circumvent judicial decision-making authority, the marketplace with its recent wave of domestic partnership successes appears decidedly welcoming. The severe limitations on the quantum of rights available through the marketplace and the terms of such availability, however, make the marketplace an unattractive institution for the attainment of broad-based recognition and the protection of same-sex relationships. On the other hand, it is possible that the proliferation of domestic partnership policies might help normalize homosexuality and thereby diffuse the anti-gay majoritarian bias.

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100. See Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997), cert. denied, 118 S. Ct. 69 (1998) (holding that public interest in efficient operation of Law Department outweighs any personal associational interests that may be held by Shahar). The Eleventh Circuit denied a request for rehearing after Michael Bowers resigned from the Air National Guard on account of his admitted adultery. See Shahar v. Bowers, 120 F.3d 211 (11th Cir. 1997); see also Kevin Sack, Georgia Candidate for Governor Admits Adultery and Resigns Commission in Guard, N.Y. TIMES, June 6, 1997, at A29 (explaining that West Point graduate resigned his commission as major general in Air National Guard on account of his revelation that he "had carried on an adulterous affair for more than a decade with a woman who once worked in his office").

101. Sheila Foster has observed that the focus on relationship issues such as same-sex marriage and domestic partnership policies maybe for naught if gay men and lesbian are not secure in exercising these rights. See Sheila Foster, The Symbolism of Rights and the Costs of Symbolism: Some Thoughts on the Campaign for Same-sex Marriage, 7 TEMP. POL. & CIV. RTS. L. REV. 319 (Spring 1998). It is arguable that action on the civil rights front was constrained by the need to mount opposition to the various anti-gay voter initiatives, such as Colorado’s Amendment 2.

102. See Carrier, supra note 75; Steven G. Veigh, Gay-rights Advocates Challenge Petitions: Three People File a Lawsuit in an Effort to Stop a Referendum on the State's Gay-rights Law, PORTLAND HERALD PRESS, Oct. 28, 1997, at 1A.
evident in legislative and citizen initiatives. Accordingly, the prevalence of domestic partnership policies may make the push for state-sanctioned unions and partnerships more likely to succeed.

The extreme limitations inherent in market-based rights and the continued emphasis on domestic partnership benefits runs the risk of creating a division within the gay and lesbian communities between those members who are employed by employers who offer domestic partnership benefits and those who are not. Making the benefits contingent on employment precludes wide participation by those who need the benefits and who would otherwise qualify for them. Same-sex marriage, on the other hand, would be available to all those who adhere to a certain normative view and meet certain requirements of consanguinity and fidelity. Accordingly, if institutional choice is guided by the desire to achieve the maximum level of participation, the choice would not be in favor of market-based rights.

In order to receive domestic partnership benefits, an individual must be employed at a level where benefits are even an issue. This leaves out the unemployed and the underemployed. An employee must work for an employer who is willing to offer domestic partnership benefits. If the employee has to ask for domestic partnership benefits, the employee will need to gather considerable information regarding benefits, the practices of comparable employers, prospective costs, etc.

Even if the benefits are available, the employee may feel unable to affirmatively claim them because of his or her status in the organization, the perceived views of the employee's supervisor or co-workers, or internalized homophobia. Particularly those employees in lower level jobs with intersect-

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103. In many instances attempts at normalization of homosexuality have provoked a backlash. For example, the increased interest in the "gay market" was prompted in part by marketing research that characterized the lesbian and gay market as a very affluent population with considerable levels of disposable income. See Dan Baker, supra note 14, at 12-13 (describing flawed research methods of Overlooked Opinions, marketing company in Chicago). Although later studies show lesbian and gay income levels comparable to society as a whole, the originally slanted figures found their way into the anti-gay propaganda surrounding Colorado's Amendment 2. See Gluckman & Reed, supra note 8, at 6 (noting that Attorney General's office sought information to establish that gay men and lesbians were affluent group who were not in need of "special rights").

104. This underscores Komesar's observation that institutions "tend to move together." KOMESAR, supra note 9, at 23.

105. This is similar to the concern regarding the division of the community into "good gays" and "bad gays" depending upon who marries. See supra note 54.

106. The question of which employees qualify for employee benefits really implicates two trends within the workplace. First, there is the increase in the use of part-time workers that was highlighted by the recent UPS strike. Then, there is the relatively small number of part-time jobs that carry benefits. For example, the Bureau of Labor Statistics reports that in 1996 part-time workers received an average of $1.82 worth of benefits per hour, whereas full-time workers received an average of $5.82 of benefits per hour. See Jonathan Marshall, Full-Time, Part-Time Facts and Fiction, S.F. CHRON., Aug. 15, 1997, at B1. In addition, only 20% of part-time workers receive employer-provided health insurance. See id.

107. For a discussion of the number of consultants and books available on the subject of domestic partnership benefits, see supra text accompanying notes 32-35.
ing outsider identities may be reluctant to march down to the personnel office and request an affidavit of domestic partnership. These additional barriers might explain the notoriously low level of participation in domestic partnership benefits once they are adopted.

The notion of exit provides some relief for the employee who does not receive domestic partnership benefits. The myth of exit provides that an employee who highly values domestic partnership benefits will vote with his or her feet and move to other employment that is more welcoming and offers a domestic partnership policy. Although this construct can produce a cozy model of the workforce, it is unrealistic in that it assumes a much higher degree of autonomy than is currently experienced by workers, particularly lesbian and gay workers. It assumes a job skill that is in demand, minimal transaction costs upon relocation, and the existence of a pro-gay employer in the same job market.

Same-sex marriage offers individuals the opportunity to protect core personal values in a manner that is not contingent on employment. Typical marriage statutes impose only minimal requirements on the individuals applying for a marriage license. Same-sex marriage offers broad participation regardless of information level, mobility, employer values, or outness (or security) on the job. Accordingly, judicial or legislative recognition of same-sex marriage would make the recognition and protection of same-sex relationships available to all who are qualified and who chose to marry. A comparable level of accessibility could be achieved with a public-regarding form of domestic partnership, although there may be additional threshold requirements imposed on those seeking to qualify.

Securing domestic partnership benefits entails considerable transaction costs. Currently, same-sex partners can use certain declarations and contrac-

108. For an example of the type of disclosure that is required on a domestic partnership affidavit, see supra note 47.
109. Companies report that less than two percent of the work force sign up for domestic partnership benefits and that costs usually increase less than one percent. See Terry Wilson, Family Values: Despite the Disney Brouhaha, Domestic Partnership Benefits are Widely Available for Same-sex Couples. So Why are Very Few Taking Advantage of Them?, Chi. Trib, June 29, 1997, at 1C (explaining that “companies say they are better able to fairly distribute benefits among staff members, gain or maintain a competitive advantage when recruiting new talent, and present a progressive image at an insignificant cost”). See also Foster, supra note 101.
111. See Baehr v. Lewin, 852 P.2d 44, 48-49 n.1 (Haw. 1993) (quoting Hawaiian marriage law to require minimum age of at least 16 (or 15 with parental consent), no other lawful spouse, no fraud, and “no loathsome disease”).
112. It is possible that the degree of one’s outness in the community might play a factor in whether one would choose to marry. See Charles R. P. Pounsy, Marriage and Domestic Partnership: Rationality and Inequality, 7 Temp. Pol. & Civ. Rts. L. Rev. 363 (Spring 1998). This is similar to the suggestion that workers who are not comfortable being “out” at work will not ask for domestic partner benefits. Given that only a handful of states prohibit discrimination on the basis of sexual orientation, choosing to get married may entail a level of openness in the community that the individual may not be willing to risk.
113. See supra notes 46-49 and accompanying text (discussing typical requirements).
tual arrangements to secure a degree of recognition and protection for their relationships. These private building blocks of family are relatively costly and require not just money, but also access to the legal profession. State-sanctioned unions would not involve the same level of costs. They also could provide a much more comprehensive package of rights (and responsibilities) than individuals are able to craft with existing legal tools. In this way, state-sanctioned unions are less flexible and less subject to individualization by the parties.

Both domestic partnership policies and state-sanctioned unions can lead to divisions within the lesbian and gay community. In the case of same-sex marriage, the division is not based on employment, but based on closeness to the heterosexual norm. The push for same-sex marriage can also compromise an otherwise progressive agenda for transformative social change and at the same time lead to the type of backlash evidenced by the preemptive anti-marriage legislation enacted by many states and Congress. This negative reaction to state approval of same-sex relationships (or to simply the request for such approval) could reduce the likelihood of widely available state-sanctioned same-sex unions. Of course, domestic partnership policies have also met with considerable backlash and negative publicity.

II. CLOSING THOUGHTS

Based on the foregoing, it is possible to compare the market-based domestic partnership benefits with legal recognition of same-sex marriage or a public-regarding form of domestic partnership. Both domestic partnership benefits and same-sex marriage further the goal of securing the recognition and protection of same-sex relationships. Both also entail certain negatives. Employer-provided domestic partnership benefits have considerable limitations that make them a less than desirable means of attaining broad-based recognition and protection of same-sex relationships. That being said, the marketplace (or at least some portions of it) appears to be more receptive to the demand for increased recognition and protection of same-sex relationships than the courts and the legislatures. Further, there is something decidedly transgressive, yet at the same time normalizing, about Xerox, Disney,

114. In addition to domestic partnership benefits, same-sex couples can use a variety of contractual arrangements and estate planning documents to delineate the terms of their relationship, including cohabitation agreements, wills, and individual declarations, such as powers of attorney and advance health care directives.

115. One exception would be a case where the partners wanted to opt out of the default setting provided by the state-sanctioned union. See Foderaro, supra note 65.

116. See Foster, supra note 101 (applying “Huxtable Family Syndrome” to gay men and lesbians).

117. See Eitelbrick, supra note 54, at 404 (noting that same-sex marriage can serve as disincentive to progressive goals).

118. See Posner, supra note 71, at 311 (1992) (noting that “permitting homosexual marriage would be widely interpreted as placing a stamp of approval on homosexuality, while decriminalizing sodomy would not, at least not to anywhere near the same extent”).

119. See supra text accompanying notes 38-44.
and Chevron recognizing same-sex relationships. For these reasons, it is understandable that securing domestic partnership benefits remains a priority concern on the lesbian and gay civil rights agenda.

Activists and commentators frequently argue over who should have the prerogative to set the terms of this agenda, noting that finite reserves of time, money, and energy should not be squandered on cross purposes. The ongoing debate over the efficacy of the marriage struggle is but one example of this, and "gays in the military" immediately jumps to mind as another example.120 Perhaps we are destined to have multiplicity in our struggle, just as being lesbian or gay in a homophobic society requires us to develop a "multiple-consciousness."121

The advent of the Beyond Queer generation attests to the fact that the lesbian and gay community is not single-mindedly dedicated to progressive social change.122 In fact, we are not one, but many communities, sometimes united only by the way we are viewed by outsiders. The myth of a single community prompts arguments over the production of a single agenda. When much of the disagreement stems from fundamental questions of perspective and goal articulation, the challenge is not to determine whose goal prescription is right or more desirable, but rather, to try to respect the myriad of differing articulations emanating from our diverse communities.123

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120. See Gabriel Rotello, To Have and To Hold: The Case for Gay Marriage, THE NATION, June 24, 1996, at 11 (noting that "modern lesbian and gay rights movement has a history of stumbling into battles it is ill-prepared to fight" like same-sex marriage and gays in the military).
122. See generally Beyond Queer, CHALLENGING GAY LEFT ORTHODOXY xii, xiv (Bruce Bawer ed., 1996).
123. See Marc A. Fajer, Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage, 15 YALE L. & POL'Y REV. 599 (1997). To this end, the adage that "we are all going to the same place, just taking different trains" might prove helpful. Of course, it remains to be seen whether we really have a common destination in mind.