

# WHO SHOULD BE ALLOWED INTO THE MARRIAGE FRANCHISE?

*Douglas W. Allen\**

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## I. INTRODUCTION

When it comes to the question of who should be allowed to legally marry, virtually all successful societies have responded with the following answer: One man and one woman. Opposite-sex, monogamous marriage

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\* Burnaby Mountain Professor of Economics, Simon Fraser University; B.A., Simon Fraser University, 1983; M.A., Simon Fraser University, 1984; Ph.D., University of Washington, 1988. Thanks to Michael Erikson, Andrew Koppelman, and Lynn Wardle for their comments.

has been a universal human condition. In light of this long history, the current debate over same-sex marriage is truly revolutionary. Since the introduction of the birth control pill and other methods of regulating the uncertainties of procreation, the institution of marriage has undergone numerous changes. In terms of legal regulation, the grounds for divorce have become essentially unilateral, legal concepts of illegitimacy have been removed, marriage rights have been extended to cohabitating couples—even without children or conditioned on waiting periods—child support guidelines have replaced court awards, and property division rules have been extended to many different assets previously considered separate.<sup>1</sup>

Marriage is more than the legal regulation of entry and exit conditions, and social norms and expectations regarding marriage have changed before, during, and after the legal changes. Social attitudes toward divorce, sex before marriage, unmarried cohabitation, births out of wedlock, and same-sex marriage have evolved considerably. Indeed, words like “fornication,” “illegitimacy,” and “sodomy” are no longer in common use. And the changes continue to come. Although the current marriage debate surrounds the question of whether same-sex couples should be allowed to marry, it is likely other types of unions will also challenge the traditional exclusive claim monogamous heterosexual couples have on marriage. Because there are numerous possible union types, it may be useful to have a simple framework to aid in understanding whether one type of union should be allowed to marry. This framework should explain the reason certain types of unions have or have not been included in the past. At least in principle, the framework should help place the various arguments regarding inclusion within a context that is testable.

Such a framework would certainly be useful within the current same-sex marriage debate. Currently five states—New Hampshire, Vermont, Connecticut, Iowa, and Massachusetts—and the District of Columbia allow same-sex marriage.<sup>2</sup> New York and Rhode Island recognize same-sex

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1. See, e.g., Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL'Y 949, 974–75 (2006) [hereinafter *An Economic Assessment*] (noting the movement from court-determined awards toward legislated child and spousal support guidelines); Douglas W. Allen, *An Inquiry Into the State's Role in Marriage*, 13 J. ECON. BEHAV. & ORG. 171, 182–90 (1990) (discussing state divorce laws); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 277 (1987) (noting the ability to obtain divorce unilaterally and discussing the effect of legal structures on the institution of marriage).

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

marriages performed in other jurisdictions but do not issue marriage certificates to these couples.<sup>3</sup> Other states allow for “domestic partnerships” between same-sex couples, and thirty states have constitutional bans on same-sex marriages.<sup>4</sup> For such a fundamental social institution, and given the historic uniformity in law, this new diversity is quite remarkable.

At the moment, two states are in the middle of the legal flux. In May of 2009, Maine’s legislature passed a bill allowing same-sex marriage.<sup>5</sup> Public opposition to the bill forced a referendum in November 2009, and voters rejected it with a 53% majority.<sup>6</sup> In November 2008, on the other side of the country, voters in California passed Proposition 8 by a 52.24% majority.<sup>7</sup> The Proposition changed California’s constitution to include the

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Kerrigan v. Comm’r of Pub. Health, 957 A.2d 407, 481 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 1004–05 (Mass. 2003).

3. Martinez v. County of Monroe, 850 N.Y.S.2d 740, 744 (App. Div. 2008); Letter from Patrick C. Lynch, Attorney Gen., Rhode Island, to Jack R. Warner, Comm’r, R.I. Bd. of Governors for Higher Educ. (Feb. 20, 2007) (advising that same-sex marriages validly performed in another state would be recognized); Letter from Patrick C. Lynch, Attorney Gen., Rhode Island, to Paul J. Tavares, Gen. Treasurer, Rhode Island (Oct. 19, 2004) (advising that same-sex couples be allowed to receive spousal benefits); *see also* C.M. v. C.C., 867 N.Y.S.2d 884, 889 (Sup. Ct. 2008) (holding a New York court could preside over the dissolution of a same-sex marriage validly performed elsewhere). *But see* Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007) (holding family court did not have jurisdiction to entertain divorce petition of a same-sex couple married in Massachusetts).

4. ALA. CONST. art. I, § 36.03; ALASKA CONST. art. I, § 25; ARIZ. CONST. art. XXX, § 1; ARK. CONST. amend. 83, §§ 1–3; CAL. CONST. art. 1, § 7.5, *invalidated by* Perry v. Schwarzenegger, No. C-09-2292-VRW, slip op. at 135–36 (N.D. Cal. Aug. 5, 2010); *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010); COLO. CONST. art. II, § 31; FLA. CONST. art. 1, § 27; GA. CONST. art. 1, § IV, ¶ I; HAW. CONST. art. I, § 23; IDAHO CONST. art. III, § 28; KAN. CONST. art. 15, § 16; KY. CONST. § 233a; LA. CONST. art. 12, § 15; MICH. CONST. art. 1, § 25; MISS. CONST. art. 14, § 263A; MO. CONST. art. 1, § 33; MONT. CONST. art. XIII, § 7; NEB. CONST. art. I, § 29; NEV. CONST. art. 1, § 21; N.D. CONST. art. XI, § 28; OHIO CONST. art. XV, § 11; OKLA. CONST. art. 2, § 35; OR. CONST. art. XV, § 5a; S.C. CONST. art. XVII, § 15; S.D. CONST. art. XXI, § 9; TENN. CONST. art. XI, § 18; TEX. CONST. art. 1, § 32; UTAH CONST. art. I, § 29; VA. CONST. art. I, § 15-A; WIS. CONST. art. XIII, § 13.

5. ME. REV. STAT. ANN. tit. 19–A, § 650–A (Supp. 2009) (repealed 2009).

6. Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, available at <http://www.nytimes.com/2009/11/05/us/politics/05maine.html>.

7. Jesse McKinley, *Top Court in California Will Review Proposition 8*, N.Y. TIMES, Nov. 20, 2008, at A20, available at <http://www.nytimes.com/2008/11/20/us>

statement, “Only marriage between a man and a woman is valid or recognized in California,” and effectively banned same-sex marriage.<sup>8</sup> In *Perry v. Schwarzenegger*, the plaintiffs challenged Proposition 8 in the United States District Court for the Northern District of California under the Equal Protection Clause of the United States Constitution.<sup>9</sup> The government of California decided not to defend Proposition 8, so that role fell upon proponents of the proposition.<sup>10</sup> The district court’s ruling, finding the Proposition unconstitutional, has been stayed pending an appeal.<sup>11</sup> Because the challenge is based on the Fourteenth Amendment, if proponents of the Proposition lose an appeal, the entire country could switch to same-sex marriage. The only real certainty is the debate over same-sex marriage will continue.

If the debate over same-sex marriage is any measure, the stakes seem to be getting higher as well. The joint estimated amount spent on the Proposition 8 campaign was over \$83 million, making it the most expensive social referendum in California history.<sup>12</sup> Not only did protests<sup>13</sup> and litigation<sup>14</sup> follow the outcome, but there were reports of violence, job firings, and violations of privacy on both sides.<sup>15</sup> Such undemocratic behavior fundamentally stems from a lack of respect for opposing views, and a lack of respect often—but not always—arises from the misunderstanding of opposing opinions.

The same-sex marriage debate is rife with misunderstandings and

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8. CAL. CONST. art. 1, § 7.5, *invalidated by Perry v. Schwarzenegger*, No. C-09-2292-VRW, slip op. at 135–36 (N.D. Cal. Aug. 5, 2010); *stay granted*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

9. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

10. *See Perry v. Proposition 8 Official Proponents*, 587 F.3d 947, 949–50 (9th Cir. 2009).

11. *Perry v. Schwarzenegger*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010).

12. Maloy Moore, *Tracking the Money: Final Numbers*, L.A. TIMES, Feb. 3, 2009, available at <http://www.latimes.com/news/local/la-moneymap,0,2198220.htmlstory>.

13. *E.g.*, Posting of Richard Winton & Rong-Gong Lin II to L.A. NOW, <http://latimesblogs.latimes.com/lanow/2008/11/los-angeles-p-1.html> (Nov. 6, 2008, 12:05 PST) (discussing protests throughout the Los Angeles area following the passage of Proposition 8).

14. *E.g.*, *Perry*, 704 F. Supp. 2d 921.

15. *See Drew Zahn, Voted for Prop 8? You’re Fired*, WORLDNETDAILY, Dec. 29, 2008, <http://www.wnd.com/?pageId=84812> (detailing employment discrimination and violence as a result of supporting Proposition 8).

faulty arguments. My purpose here is to provide a framework for understanding the broader question: which groups should be allowed into legal marriage? The framework is simple, but it allows for an easy breakdown of arguments—pro and con—in the same-sex marriage debate and highlights where arguments break down. As the debate continues, some type of framework is necessary to sort out the issues and provide a point of reference for clearer understanding. I go through this framework, briefly apply it to various types of couples, and finally apply it to same-sex couples in more detail. This framework points to a solution to the issue of same-sex marriage that might be acceptable to both sides.

## II. THE FRAMEWORK

The question of “inclusion” is common in the law. Most laws apply to some groups and not others. This is true, for example, for motor vehicle laws. A law stating vehicles traveling along a freeway must travel above a minimum speed and below a maximum speed necessarily excludes some vehicles from freeway travel. Indeed, this is often the explicit purpose of law. An economic approach to law would claim groups that are—or are not—included depends on costs and benefits. In general, there are costs and benefits when a group is included, and there are costs and benefits when a group is excluded. These costs and benefits depend on the context, the circumstances of a given society, and the behavior under regulation. In this sense, the question of inclusion is somewhat fluid. In the case of marriage, these costs and benefits would include the following:

Inclusion Benefits: private and social benefits of marriage.

Inclusion Costs: costs imposed by an entering group upon existing married groups or society in general.

Exclusion Benefits: private benefits from discriminating against a group by not allowing members to marry.

Exclusion Costs: logistical costs of *ex ante* identifying a specific group in order to exclude members, plus the lost value from fewer marriages.<sup>16</sup>

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16. See generally *An Economic Assessment*, *supra* note 1, at 957–58, 963–66 (examining the arguments for why people enter marriage, the purposes of marriage, and the effect of same-sex marriage on heterosexual marriage).

### A. Inclusion Benefits

There is a large amount of literature discussing the inclusion benefits of marriage; in fact, most of the same-sex marriage debate is discussed in terms of this single element.<sup>17</sup> Inclusion benefits are a natural focal point because there must be large benefits to marriage to justify the social costs of creating and enforcing such an institution—and marriage is a costly institution. That is, marriage is a man-made, nonphysical collection of formal and informal social norms, laws, and personal constraints that strive to achieve a purpose: to provide incentives for husbands and wives to behave in ways that are socially beneficial, given the unique circumstances of family life.<sup>18</sup> Over thousands of years, marriage has evolved into a robust solution for problems that arise between husbands and wives over the course of a life cycle that involves reproduction. Societies have found marriage necessary because husbands and wives often have private interests that are not compatible with the interests of their spouses, children, other family members, or communities in general.<sup>19</sup> Different problems are managed by different institutional elements of marriage, and the legal part of marriage regulates entry and exit from civil marriage.<sup>20</sup>

The specific institutional details of marriage have varied over time and space depending on the circumstances faced by an individual society.<sup>21</sup> However, several features are remarkably constant across time, cultures, and religions and must therefore reflect a universal human condition.<sup>22</sup> This universal human condition is procreation, and the essential purpose of

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17. See M.V. LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* 15–44 (2009); Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555, 556–63 (1993) (discussing the driving forces behind the evolution of marriage).

18. It is beyond the scope of this Article to detail how this is accomplished; however, there are plenty of examples in the literature. See, e.g., DAVID BLANKENHORN, *THE FUTURE OF MARRIAGE* 91–125 (2007) (discussing the concept of marriage in various human societies); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U. ST. THOMAS L.J. 33, 35–43 (2004) (describing the relationship between law and marriage, and how the law maintains marriage as a social institution).

19. See, e.g., BLANKENORN, *supra* note 18, at 91–92 (discussing historical, cultural, and legal structure of marriage).

20. *Id.* at 95–105.

21. *Id.* at 105–20.

22. *Id.* at 16–17.

marriage has been to encourage successful procreation and child-rearing.<sup>23</sup> Societies that failed to procreate in sufficient numbers or produce quality offspring became marginalized, overtaken, and eventually ceased to exist. A future generation is necessary for a society to survive and to provide social services to the earlier generation. A young generation is used to defend society and to provide other social goods. As Professor Julian Simon demonstrated, humans are the ultimate resource, and large populations lead to increased chances of exceptional people solving scarcity problems.<sup>24</sup> All else being equal, more people lead to growth and prosperity, while fewer people lead to the opposite. Today, creating a subsequent generation is still a vital matter of public policy even though our wealth and immigration policies often mask the issue.<sup>25</sup> Hence, the production of successful children is the major social benefit of marriage.<sup>26</sup>

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23. Blankenhorn argues this claim was historically understood and valid “until about five minutes ago.” *See id.* at 154 (citing JAMES TURNER JOHNSON, *A SOCIETY ORDAINED BY GOD: ENGLISH PURITAN MARRIAGE DOCTRINE IN THE FIRST HALF OF THE SEVENTEENTH CENTURY* 22 (1970)). He puts the meaning of marriage this way:

In all or nearly all human societies, marriage is socially approved sexual intercourse between a woman and a man, conceived both as a personal relationship and as an institution, primarily such that any children resulting from the union are—and are understood by the society to be—emotionally, morally, practically, and legally affiliated with both of the parents.

That’s what marriage is. . . .

The exact wording of this definition is my own, but the definition is anything by idiosyncratic. It rests on a large and growing mountain of scholarly evidence. It incorporates widely shared conclusions about the meaning of marriage reached by the leading anthropologists, historians, and sociologists of the modern era.

*Id.* at 91.

More recently, and especially among advocates for marriage reform, it has become fashionable to downplay the role of procreation in marriage and consider it as just one of many equally valid theories of marriage.

24. JULIAN L. SIMON, *THE ULTIMATE RESOURCE* 2, at xxxi–ii, 3–4 (1996).

25. Virtually all societies existed on the margin of demographic failure until the late eighteenth century. *See* Joseph J. Spengler, *Demographic Factors and Early Modern Economic Development*, 97 *DAEDALUS* 433, 434–36 (1968). Following the Industrial Revolution, population growth was spurred by growth in per capita income. *Id.* Since the mid-1970s, however, most Western societies have experienced low fertility rates, and in most major countries today, fertility rates are below replacement levels. John Bongaarts, *Fertility and Reproductive Preferences in Post-Transitional Societies*, 27 *POPULATION & DEV. REV. (SUPPLEMENT)* 260, 260 (2001).

26. Others have argued for additional social benefits of traditional marriage.

Even though marriage generates a general benefit for society, it also generates private benefits to the couple.<sup>27</sup> One of the private benefits is improved commitment, which provides confidence that specific sunk-marriage investments will be honored, respected, and valued. Commitment can enhance the physical and emotional attraction couples share. The willingness to marry acts as a signal of future behavior and an individual's assessment of match quality. Economically speaking, marriage can reduce the costs of searching for a life partner. Marriage can also reduce the costs of policing bad behavior and reduce the cost of knowledge over paternity. All of these things are valuable to a given couple. Although private benefits improve the wealth of a society, costly social institutions are unnecessary to generate these benefits, and alone, they seldom justify the costs of the social institution.<sup>28</sup> We generally allow individuals to privately contract or develop other private organizations to capture these private benefits.<sup>29</sup> If marriage only depended on private benefits, it would not have become so universally common across time and place, because private benefits are never constant. Indeed, the relatively minor variations in marriage are driven mostly by changes to private benefits.<sup>30</sup>

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Marriage might help to bridge the social divide between men and women, limit the spread of disease, encourage savings, and a host of other behaviors.

27. Gary Becker provided the first economic theory of marriage based on strictly private benefits. Gary S. Becker, *A Theory of Marriage: Part I*, 81 J. POL. ECON. 813, 813–15 (1973). As most acknowledge now, the benefits of cohabitation he articulated do not explain the institution of marriage. See Antony W. Dnes, *Cohabitation and Marriage*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 118 (Antony W. Dnes & Robert Rowthorn eds., 2002) (comparing cohabitation with marriage and characterizing cohabitation as a lower commitment alternative). Matouschek and Rasul test several theories of private benefits and conclude the most important is marriage's function as a commitment device. Niko Matouschek & Imran Rasul, *The Economics of the Marriage Contract: Theories and Evidence*, 51 J.L. & ECON. 59, 101–03 (2008). To the extent this commitment device increases the number of children, there is also a social benefit.

28. One should not confuse "benefits awarded to married people" with "private benefits of marriage." The former might include various tax, health, insurance, visitation, and work-related benefits that can, in practice, be given to anyone. The latter are benefits that only arise as a result of marriage.

29. See generally Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137 (2009) (discussing the institution of adoption along with other legal arrangements and the effects on individuals involved).

30. See, e.g., Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079, 1080–83 (2002)

### B. *Inclusion Costs*

Marriage, unlike general contracts, is the same for everyone within a jurisdiction—one size fits all.<sup>31</sup> This feature creates a possibility for inclusion costs when a different type of union is allowed entrance. Inclusion costs rest on two assumptions: legal marriage is designed for heterosexual couples; and different types of unions require different types of legal regulation. If the rich fabric of institutional constraints we call marriage has been honed to the particular needs of one man, one woman, and their biological children, then introducing a second type of relationship with its own different set of incentive problems under the same law must necessarily imply a bad outcome for one group. Either marriage remains the same, and the second group is regulated poorly, or marriage changes, and the first group is no longer regulated optimally. There is no escaping this dilemma.<sup>32</sup>

Marriage law, aside from determining who enters the franchise, essentially regulates how marriages dissolve, the division of assets, and how custody of children will be shared when the marriage breaks down.<sup>33</sup> This functions reasonably well so long as there is a strong modal pattern among those married over the margins regulated by the law. This was traditionally the case in heterosexual, monogamous marriage where a similarity existed across disputes and resolutions. By this I do not mean the specifics of any dispute and resolution are similar; rather, the fundamental conflicts and solutions were relatively homogeneous. In procreation, the mother always bears the children, the father knows paternity with only some probability, successful child-rearing often takes the bulk of an adult lifetime, and children long for a connection to both biological parents. Conflicts arising

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(discussing the elimination of coverture as a response to changes in the value of women outside the home).

31. See BADGETT, *supra* note 17, at 14 (noting, with respect to Dutch sentiments of the country's legal same-sex marriage, "[t]here is no gay marriage here—it's just the same marriage for everybody").

32. The effect may often be subtle. Marriage, as an institution, is composed of both formal and informal regulations. Changes to formal, legal regulations that hurt existing unions imply these unions will seek alternative forms of regulation. Often these take the form of private and informal regulations. These are necessarily second-best, and not everyone will have equal ability to access them.

33. See, e.g., Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1628 (2007) (noting state marriage law "primarily regulates marriage only during the entry and exit stages").

over these issues are common to mating couples, and family law is the institutional response to these conflicts. When conflicts lack some threshold level of commonality across mating couples, they are resolved within communities, families, and the couple.<sup>34</sup> The law regulating marriage is but a small part of the institution of marriage, but its standard application within a jurisdiction has worked for centuries because of the relative homogeneity of couples with respect to certain sources of conflict.<sup>35</sup> Historically, the law kept fringe unions out in order to preserve the homogeneity of legally-regulated conflicts.

However, when different types of relationships are added into the marriage franchise, new marriage laws may be needed to help regulate these new types of relationships, and these new regulations—which automatically apply to all marriages—will necessarily be inappropriate for the original members of the class.<sup>36</sup> Inappropriate marriage laws mean marriages will have more difficulty managing marriage-related problems over their life cycle, resulting in more failed marriages.<sup>37</sup> This negative feedback—or externality—is the cost of including different types of couples. The more similar the new group is to the existing class of married couples in terms of conflicts regulated by the law, the smaller the inclusion costs; the more different, the larger the costs.

### C. Exclusion Benefits

Every society is made up of different subpopulations of varying sizes who feel strongly about which groups should be allowed to marry. When there are different social values and one group is discriminated against, there will be utility gains to those who are doing the discriminating. These gains are the exclusion benefits. For example, a racist society might gain a high level of utility by preventing interracial couples from marrying. Or, a secular, feminist society might gain a high level of utility by preventing

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34. *An Economic Assessment*, *supra* note 1, at 950.

35. *Id.* at 951 n.6.

36. *See id.* at 959–66.

37. I have drawn this general conclusion from over twenty years of empirical work on the family. *See, e.g.*, Douglas W. Allen, *Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679, 679–85 (1992); Douglas W. Allen, *No-Fault Divorce in Canada: Its Cause and Effect*, 37 J. ECON. BEHAV. & ORG. 129, 129–49 (1998); Douglas W. Allen, *The Effect on Divorce of Legislated Net-Wealth Transfers*, 23 J.L. ECON. & ORG. 580, 580–97 (2007).

polygamous marriages. In either case, the increased utility from discrimination constitutes an exclusion benefit. Depending on the values of the majority, exclusion benefits may be discounted, ignored, or heavily supported. Hence, today, to the extent sentiments opposed to interracial marriage still exist, these views are not considered valid. Changing values over time play a large role in changes to the size of exclusion benefits.

#### D. *Exclusion Costs*

Excluding any type of union from marriage is costly to some extent. There are two major components to these costs. First, if a group is to be excluded from marriage, it must be identified before the marriage takes place and then logistically kept out. In many circumstances, this is a trivial matter, but in others, the costs may be enormous or the task impossible. Second, when a couple is excluded from marriage, the private and social benefits of that marriage are foregone. This opportunity cost is the second component of the costs of exclusion.

Thus, whether a union type should be allowed to marry comes down to the net value of these four different types of costs and benefits. If a class generates positive net benefits, it should be allowed into the marriage franchise. On the other hand, if a class generates a net loss, it should not be allowed to marry. Either some other social institution should be developed or nothing should be done at all. This simple idea of looking at all the costs and benefits is missing from most discussions of same-sex marriage, but it provides an interesting method by which to evaluate different unions, and it points to a possible solution.

### III. EVALUATING UNIONS: THE NON-SAME-SEX CASES

Although the current marriage debate is over same-sex couples, in the future other types of unions will attempt to enter into marriage in order to achieve the private benefits it provides. Different classes of couples have different combinations of the four categories of costs and benefits. This section briefly considers a number of actual types of unions other than same-sex unions in order to develop a feel for the cost-benefit approach. It begins by examining the costs and benefits of individual couples and then considers the total costs and benefits by adjusting for group size. For some types of costs and benefits, adjusting for group size makes a big difference, while for others it does not.

### A. Individual Couples

To begin, consider the costs and benefits of individual couples and ignore how common or rare these types of couples are in the population. It is useful to consider heterosexual, monogamous couples as the benchmark class. From the earliest records, across all societies and until very recently, marriage was based around this type of couple.<sup>38</sup> Indeed, it still is. There are strong inclusion benefits for a heterosexual couple. These benefits include private benefits to increase commitment and protect the interests of men and women over the difficult process of procreation, and other private benefits mentioned above. More importantly, a heterosexual couple produces children which perpetuate society, and as a result, there are large benefits to including these couples into marriage.<sup>39</sup> On the other hand, because this is the benchmark couple, there are no inclusion costs. In addition, the biological features and conflicts arising from heterosexual reproduction are standard across these couples, and a “one-size-fits-all” marriage institution works well. Legal issues needing to be resolved for one heterosexual, monogamous couple tend to naturally apply well to others.<sup>40</sup> In terms of exclusion benefits, heterosexual, monogamous couples have never been the victims of discrimination, and so the exclusion benefits are small. Finally, although the costs of identifying a heterosexual, monogamous couple are low, the opportunity costs of excluding them are high. These costs and benefits are laid out in the first row of Table 1.

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38. Lloyd R. Cohen, *Rhetoric, the Unnatural Family, and Women's Work*, 81 VA. L. REV. 2275, 2287 (1995).

39. There is substantial literature on this “responsible procreation” aspect of marriage. Much of it relates to the correlation between marriage and successful children. See, e.g., Donald S. Moir, *A New Class of Disadvantaged Children: Reflections on “Easy” Divorce*, in IT TAKES TWO: THE FAMILY IN LAW AND FINANCE 63, 80–83 (Douglas W. Allen & John Richards eds., 1999).

40. Much is often made of the fact there exists large amounts of heterogeneity among heterosexual couples. But, of course, marriage law does not deal with “Where to spend Christmas?” or “Who should take the children to the doctor?” Marriage law broadly regulates property, custody, and support, and the strong and constant asymmetry between men and women allows for this.

TABLE 1: The Benefits and Costs of Different Individual Unions

<b>Relationship</b>	<b>Inclusion Benefits</b>	<b>Inclusion Costs</b>	<b>Exclusion Benefits</b>	<b>Exclusion Costs</b>
Opposite-Sex Monogamous	High	Zero	Low	High
Interracial	High	Zero	Past: High Today: Low	High
Infertile	Low	Low	Low	High
Elderly	Low	Low	Low	Moderate
Incestuous	Moderate	Moderate	High	Low
Polygamous	High	High	Depends	High
Same-Sex	Low	High	Depends	Low

Table 1 also provides a series of nonstandard relationships down the far left column and my own assessment of the levels of costs and benefits of including or excluding a given couple. Others will no doubt argue with my particular assessments; however, my main point here is to show how the simple framework is useful in laying out the inclusion debate. Breaking down the costs and benefits in this manner reveals some interesting comparisons. But first, I will briefly explain my assessed values of the levels of costs and benefits.

### 1. *Interracial Couples*

Within living memory there were states that outlawed interracial marriages.<sup>41</sup> Aside from race, these couples are identical to same-race couples. Accordingly, these couples have inclusion costs and benefits identical to heterosexual, monogamous marriages. Furthermore, because it is easy to identify an interracial couple, the exclusion costs are also

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41. MARIA ROOT, *LOVES REVOLUTION: INTERRACIAL MARRIAGE* 2–8 (2001).

identical.<sup>42</sup> This means the only explanation for the historical ban on interracial couples is racist communities received high benefits by excluding a given interracial couple from marriage. Almost everyone today would say these benefits no longer exist, and if indeed they do, we should not recognize them as legitimate under the law. Once the exclusion benefits are low, interracial couples have a set of costs and benefits identical to the benchmark case. Thus, Table 1 highlights the similarity between interracial and same-race couples and points to the explanation for why they were once illegal in some jurisdictions.

### 2. *Infertile Couples*

An infertile couple benefits privately from marriage. As mentioned, marriage provides signaling and commitment benefits allowing the infertile couple to reap larger gains from specialized activities within the household. However, because these relationships, by definition, produce no children, they generate no social inclusion benefits. On the other hand, they are heterosexual and monogamous, and therefore they produce no inclusion costs, or negative feedbacks, on other marriages. It seems unlikely anyone would benefit from excluding these couples from marrying, so the exclusion benefits are also low. However, the critical cost with respect to this type of union is the exclusion costs. The cost of identifying members, before they are married, is likely high. The couples themselves may be unaware of their infertility when they marry, and although a couple is currently infertile, they may not remain that way forever.

### 3. *Elderly Couples*

Elderly couples marry for the private benefits marriage can supply, but they generate few children and therefore provide low social inclusion benefits.<sup>43</sup> However, the unions are heterosexual and monogamous and therefore provide no negative feedback or inclusion costs on other

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42. This is true for black–white marriages, which were the target of most interracial bans. It is also likely more true when there is a ban on such unions or immediately following the ban. As time goes on, the ability to identify interracial couples might become very difficult. Hence, over time the exclusion costs are likely to rise.

43. However, they may raise children from a previous marriage, and if they do this more successfully than a single-parent household, it provides a social benefit. On the other hand, if the couple is elderly, the children are likely adults and able to care for themselves, so I therefore ignore this potential benefit.

heterosexual couples. Few people object to the elderly marrying, indubitably because aging is the ultimate, universal human condition. Like the infertile couple, it is difficult to identify all elderly couples *ex ante*. It is easy to identify two octogenarians at the local senior center as elderly, but not so easy to identify the marginal elderly couple, who are perhaps in their forties. Nor is it low cost to identify an elderly male marrying a younger woman as an elderly couple. Over time, and with the advancement of reproductive technology that extends female fecundity, this identification has become even more difficult. Hundreds of women in their fifties now give birth each year,<sup>44</sup> and in 2008, a seventy-year-old woman in India gave birth to twins.<sup>45</sup> Thus, there are moderate costs associated with excluding elderly couples from marriage.

#### 4. *Incestuous Couples*

Socially speaking, incest is a matter of degree. Marrying a first cousin might be considered incest by some, but it was quite common in the past. Recent studies have shown the most successful chances for reproduction come from matches of third or fourth cousins.<sup>46</sup> In some cultures, marriage between half siblings or first cousins is legal or even preferred.<sup>47</sup> For the sake of argument, here I consider marriage between siblings, or parents and children, as incest. Although these unions can produce children, the chance of genetic disorders increases, and the increased chance of a coerced union lowers the social inclusion benefits.<sup>48</sup> Because a parent-child union differs from an ordinary heterosexual couple, it is likely to

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44. See Hamisu M. Salihu et al., *Childbearing Beyond Maternal Age 50 and Fetal Outcomes in the United States*, 102 *OBSTETRICS & GYNECOLOGY* 1006, 1006 (2003) (noting a total of 539 children were born to mothers over the age of fifty in the United States between 1997 and 1999).

45. David Banh, Dora L. Havemann & John Y. Phelps, *Reproduction Beyond Menopause: How Old Is Too Old for Assisted Reproductive Technology?*, *J. ASSISTED REPROD. & GENETICS* 365, 365 (2010), available at <http://www.springerlink.com/content/j5v13467k15771uj/fulltext.pdf>.

46. Agnar Helgason et al., *An Association Between the Kinship and Fertility of Human Couples*, 319 *SCI.* 813, 815 (2008).

47. Scott Michels, *All in the Family: Where Does Incest Begin?*, ABC NEWS, May 7, 2008, <http://abcnews.go.com/TheLaw/story?id=4799115&page=1>.

48. See, e.g., *id.* (acknowledging in 2008, Germany's highest court noted "the need to protect the family order and avoid serious genetic illness" as reasons for upholding the country's law that makes incest a crime).

cause some negative feedback, raising the costs of inclusion. Although these relationships are monogamous and heterosexual, these inclusion costs are likely moderate.<sup>49</sup> Incest is considered immoral by virtually everyone, and thus the benefits of exclusion are high. Finally, because marital relationships are a matter of public record, the costs of identifying these couples are low.

### 5. *Polygamous Partners*

A single, polygamous union likely has large private benefits conferred from legal marriage when compared to any other union. Given polygamy is illegal and most polygamous unions are actually cases of adultery, these unions are left with minimal institutional options concerning the regulation of such relationships. By definition, there are more than two people involved in these unions.<sup>50</sup> So, for an individual union, the private benefits from increased commitment, signaling, etc., are necessarily large.<sup>51</sup> These unions also produce children, which generate social benefits. As a result, the inclusion benefits for an individual, polygamous union are high—if not higher—than for the benchmark case. On the other hand, polygamous disputes, issues of custody and support, and other matters that may require state enforcement are likely to be significantly different from monogamous couples. Polygamous partners then stand to impose high inclusion costs on the benchmark couple if marriage rules are modified to fit their circumstances. In terms of exclusion benefits, many groups within our society oppose polygamy on many different grounds. Feminist groups often claim women are exploited in polygamous unions.<sup>52</sup> Most religious groups feel polygamy is immoral.<sup>53</sup>

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49. This is speculation on my part, but parent-child unions are likely to intimately involve third parties—the other parent and siblings. Issues of marital property may, for example, arise when someone is both a child and a spouse. This is different from the marital property issues present in the benchmark case. I can think of no feedback effect for sibling marriage.

50. See BLACK'S LAW DICTIONARY 1197 (8th ed. 2004) (defining polygamy as “[t]he state or practice of having more than one spouse simultaneously”).

51. This is assuming the utility from such things is equal across all types of people.

52. See, e.g., Adrien Katherine Wing, *Polygamy from Southern Africa to Black Britannia to Black America: Global Critical Race Feminism as Legal Reform for the Twenty-first Century*, 11 J. CONTEMP. LEGAL ISSUES 811, 813–15 (2001) (discussing international trends and attitudes regarding the effects polygamy has on women).

Generally, men oppose polygamy because it raises the costs of marriage.<sup>54</sup> Hence, there are social exclusion benefits of keeping them out. Still, some small sects promote polygamy as sacred unions; many Muslims support polygamy<sup>55</sup>—and Muslims are a growing subculture in North America<sup>56</sup>—and others promote general polyamorous unions.<sup>57</sup> When HBO can have a hit series with *Big Love*, through which ordinary Americans watch and enjoy the mundane yet extraordinary life of the polygamous Bill Henrickson,<sup>58</sup> social attitudes toward polygamy are clearly changing. Hence, the exclusion benefits may be high or low and depend on the make-up and mores of the society. Certainly the costs of identifying this class are small, but the opportunity costs are high. Therefore, the exclusion costs are likely high.

### B. Total Costs and Benefits

Because the sizes of the different couple populations are not the same, looking at the costs and benefits of a given couple is insufficient to decide whether a given class of union should be included or excluded from

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53. This is an interesting position. Within Islam, polygamy may be practiced. See *Al Quran* 4:3. Within almost all Christian sects, polygamy is considered immoral. Yet, I can find no prohibition against polygamy in the Bible. In fact, many Biblical patriarchs—Abraham, Jacob, and Solomon, for example—were polygamists. See *2 Samuel* 12:8; *1 Kings* 11:3. Compare *Genesis* 16:1 (“Sarai Abram’s wife bare him no children . . .”), and *Genesis* 16:3 (“Sarai Abram’s wife took Hagar her maid . . . and gave her to her husband Abram to be his wife.”), with *Genesis* 25:1 (“Then again Abraham took a wife, and her name was Keturah.”).

54. This is a famous prediction of the Becker model. See Gary S. Becker, *A Theory of Marriage: Part II*, 82 J. POL. ECON. S11, S18 (1974) (finding a monogamous marriage is “optimal” because it “maximize[s] the total output of commodities over all marriages”). Polygamy raises the demand for wives and therefore increases the shadow price of wives. *Id.* at S20.

55. See Wing, *supra* note 52, at 837–38.

56. See JACK JEDWAB, ASS’N FOR CANADIAN STUDIES, CANADA’S DEMO-RELIGIOUS REVOLUTION: 2017 WILL BRING CONSIDERABLE CHANGE TO THE PROFILE OF THE MOSAIC 6 (2005), available at <http://www.acs-aec.ca/oldsite/Polls/30-03-2005.pdf>; DANIEL PIPES & KHALID DURÁN, CTR. FOR IMMIGRATION STUDIES, MUSLIM IMMIGRANTS IN THE UNITED STATES 1 (2002), available at <http://www.cis.org/articles/2002/back802.pdf>.

57. See, e.g., Elizabeth F. Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 283–85 (2004).

58. *Big Love* (HBO).

marriage. Generally speaking, the size of a given class of union will influence the inclusion benefits and exclusion costs, but not the inclusion costs and exclusion benefits.

Marriage is very common among heterosexuals. A 2004 study found by the age of 35, 69.7% of heterosexual men and 77.7% of heterosexual women have married, and by the age of 65, over 95% of each sex have done so.<sup>59</sup> Elderly—defined here as marriage over 45—and infertile marriages are reasonably common. Later life marriages have increased in popularity over the years; for example, in 2003 about 13% of marriages were among individuals over age 45.<sup>60</sup> Of the reproductive-age population, about 12% are infertile or have impaired fertility.<sup>61</sup> Interracial couples, though not uncommon, represent a small fraction of married couples.<sup>62</sup> Of course, this depends on how race is defined and what jurisdiction is being considered. Given their legal status, both polygamous and incestuous relationships are very rare. Polygamy also requires an individual male to have sufficient wealth, such that a female is better off being the second wife rather than the first wife of a lower income male. Few males have such wealth levels. Evolutionary pressures have likely hard-wired humans for

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59. U.S. Census Bureau, Detailed Tables—Number, Timing and Duration of Marriages and Divorces: 2004, [http://www.census.gov/population/www/socdemo/marr-div/2004detailed\\_tables.html](http://www.census.gov/population/www/socdemo/marr-div/2004detailed_tables.html) (follow “Marital History for People 15 Years and Over, by Age and Sex: 2004: All Races: Excel” hyperlink). The statistics in the table predominantly represent heterosexual marriages—the first state-sanctioned same-sex marriage in the United States did not take place until May 2004. See Scott S. Greenberger, *Lawmakers Urge Medicaid Benefits for Same-Sex Couples*, BOSTON GLOBE, Nov. 25, 2005, [http://www.boston.com/yourlife/health/aging/articles/2005/11/25/lawmakers\\_urge\\_medicaid\\_benefits\\_for\\_same\\_sex\\_couples/](http://www.boston.com/yourlife/health/aging/articles/2005/11/25/lawmakers_urge_medicaid_benefits_for_same_sex_couples/).

60. See Sharon Jayson, *Singles Find Love, Marriage After Age 45*, USA TODAY, June 2, 2008, [http://www.usatoday.com/news/health/2008-06-01-late-life-marriage\\_N.htm](http://www.usatoday.com/news/health/2008-06-01-late-life-marriage_N.htm).

61. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., FERTILITY, FAMILY PLANNING AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 2, 21–24 (2005), available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_025.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf). Not all infertile people marry, but it only takes one infertile person to make the couple infertile.

62. See Kara Joyner & Grace Kao, *Interracial Relationships and the Transition to Adulthood*, 70 AM. SOC. REV. 563, 563–64 (2005) (noting the number of interracial marriages in the United States climbed from 157,000 in 1960 to 1,674,000 in 2002, which represented 2.9% of marriages in 2002).

preferences opposed to incest.<sup>63</sup> Thus, the different categories of couples vary in terms of their total number within the population.

In order to calculate the total benefits of inclusion, the size of benefits to individual couples must be multiplied by the size of the group. This means for small groups the total benefits will still be relatively small, even if the individual benefits are large. For example, even though an incestuous brother–sister marriage might produce children and generate high inclusion benefits, the rarity of this relationship means the total social benefits are extremely small when compared to the benchmark case of heterosexual and monogamous couples. This also implies the total exclusion opportunity costs are necessarily small for any small group.

On the other hand, the size of a given class does not necessarily influence the inclusion costs or the exclusion benefits. Because one marriage law applies to everyone, small groups of couples can still impose large costs on others. When a particular family law is adjusted to accommodate one particular type of family, that law almost always applies to every family, regardless of the frequency of the initial family type. In terms of exclusion benefits, people's attitudes toward a particular union type seldom depend on the size of the group. Table 2 adjusts the values from Table 1 to account for population sizes. Table 2 also draws a conclusion in the last column regarding whether a class should be included or not based on the values of the table.

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63. See JOSEPH SHEPHER, *INCEST: A BIOSOCIAL VIEW* 45–49 (1983); see also ARTHUR P. WOLF, *SEXUAL ATTRACTION AND CHILDHOOD ASSOCIATION: A CHINESE BRIEF FOR EDWARD WESTERMARK* 505–08 (1995) (summarizing hypotheses on evolution and incest).

TABLE 2: The Total Benefits and Costs of Different Unions

<b>Relationship</b>	<b>Inclusion Benefits</b>	<b>Inclusion Costs</b>	<b>Exclusion Benefits</b>	<b>Exclusion Costs</b>	<b>Include in Marriage?</b>
Opposite-Sex Monogamous	High	Zero	Low	High	Include
Interracial	Low	Zero	Past: High Today: Low	High	Include
Infertile	Moderate	Low	Low	High	Include
Incestuous	Low	Moderate	High	Low	Exclude
Polygamous	Low	High	Depends	Low	Exclude
Same-Sex	Low	High	Depends	Low	Exclude

Consider the first row for opposite-sex monogamous couples. On every cost and benefit dimension, these types of couples should be allowed to marry. Individually, they provide large social benefits, and collectively, these benefits are enormous because heterosexuality is dominant. Taken together, the benefits exceed the costs for including this benchmark class into the franchise of marriage, and by a wide margin. They should be allowed to marry, and societies should encourage their marriage. At an individual-couple level, interracial couples are identical to same-race couples in terms of the costs and benefits of inclusion. Given interracial couples are rare, they generate low inclusion benefits, and therefore, society sacrifices little if they are excluded.<sup>64</sup> But given there are no costs of including them and our society does not recognize racism as a legitimate value, there are no benefits of excluding them either, and therefore, interracial couples should be included in marriage for the same reasons same-race couples are allowed to marry.

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64. In private correspondence, Andrew Koppelman noted a miscegenation prohibition may have helped support other elements of white supremacy, and its elimination, therefore, created enormous social benefits. If true, the total benefits and costs of interracial couples would be identical to those of heterosexual, monogamous couples, and this would reinforce the argument for inclusion.

Table 2 also shows another natural pairing of couples is infertile couples and elderly couples. In terms of the costs and benefits of including these couples within the franchise of marriage, a small case can be made. Although neither provides large social benefits, there are private benefits, and these types of couples are quite common. In addition, they are unlikely to impose costs on heterosexual couples. Perhaps a stronger rationale for including them stems from the costs of excluding them. Both types of couples are difficult to identify, at least for the marginal case. Hence, it makes sense that societies have allowed these types of couples to marry.

Finally, Table 2 shows two other unions are similar in terms of their social costs and benefits—polygamous and incestuous unions.<sup>65</sup> Although polygamists might gain much through marriage, and even though they produce children, their small numbers mean the social benefits of inclusion are low. This implies the costs of exclusion are also low, especially because it is easy to identify such unions. The costs of including these unions remain high, and so, barring a society having large numbers with strong feelings of support for polygamy, the optimal policy would be to exclude them from marriage. Incestuous couples likewise generate low inclusion benefits, moderate inclusion costs, and low exclusion costs. Incestuous couples are slightly unique among the union types listed in that there is a social consensus against them.<sup>66</sup> As a result, they should not be allowed to marry.

#### IV. THE SAME-SEX MARRIAGE DEBATE

This brings us to same-sex couples. In this section, I will go through the various costs and benefits in more detail. As can be seen from Table 2, I will argue same-sex couples are similar to polygamous couples, and therefore should not be allowed into the marriage franchise. The great difficulty in arguing for or against same-sex marriage is we know so little about these unions—how they behave if married and how they interact with other unions.<sup>67</sup> Hence, any discussion of costs and benefits is

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65. Although the levels of costs and benefits are similar, the reasons for them are different.

66. See, e.g., Sam Vaknin, *The Incest Taboo*, AM. CHRON., Oct. 17, 2007, <http://www.americanchronicle.com/articles/view/40538>.

67. See, e.g., BADGETT, *supra* note 17, at 223–29 (providing an empirical examination of same-sex marriage, but only using a sample of nineteen couples).

necessarily based on incomplete information. In this respect, same-sex marriage is a risky social venture, and it is important to consider both the possible positive impact and the potential risks. It is also important to consider alternative arrangements if they drastically reduce the social risk.

#### A. Inclusion Benefits

I believe there are essentially no social-inclusion benefits for same-sex marriage. Creating children, mothering, fathering, and producing a high-quality subsequent generation are important societal values. Same-sex unions, by definition, are unable to produce new children without assistance, and therefore, the inclusion benefits result solely from the private benefits of same-sex unions. While determining the total number of homosexuals in the population is difficult,<sup>68</sup> a CDC survey showed, among respondents 18 to 44 years old, 2.3% of men and 1.3% of women identified themselves as homosexual.<sup>69</sup> Given most of these individuals would not marry,<sup>70</sup> the total inclusion benefits are low.<sup>71</sup>

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68. See SARAH BOSLAUGH, LOCATING DEMOGRAPHIC INFORMATION ON GLBT PEOPLE: A GUIDE TO THE AVAILABLE REFERENCE SOURCES (2006), available at <http://sfpl.org/pdf/main/glc/glbtdemogboslaugh.pdf> (mentioning several difficulties in measuring the homosexual population, such as differing definitions of homosexual, little scholarly interest in the answer, and discrimination making collecting accurate answers difficult).

69. WILLIAM D. MOSHER, ANJANI CHANDRA & JO JONES, U.S. DEP'T OF HEALTH & HUMAN SERVS., SEXUAL BEHAVIOR AND SELECTED HEALTH MEASURES: MEN AND WOMEN 15–44 YEARS OF AGE, UNITED STATES, 2002, at 3 (2005), available at <http://www.cdc.gov/nchs/data/ad/ad362.pdf> (asking the question: “Do you think of yourself as heterosexual, homosexual, bisexual, or something else?”).

70. See Maggie Gallagher & Joshua K. Baker, *Demand for Same-Sex Marriage: Evidence from the United States, Canada, and Europe*, 3 INST. FOR MARRIAGE & PUB. POL'Y 1, 1 (2006), available at <http://www.marriagedebate.com/pdf/imapp.demandforssm.pdf> (“[O]ur survey of marriage statistics from various countries that legally recognize same-sex unions suggests that today between 1% and 5% of gays and lesbians have entered into a same-sex marriage.”).

71. An issue we know little about is the quality of children raised in same-sex families. A report to Congress summarizing child abuse concluded:

Children living with their married biological parents universally had the lowest rate, whereas those living with a single parent who had a cohabiting partner in the household had the highest rate in all maltreatment categories. Compared to children living with married biological parents, those whose single parent had a live-in partner had more than 8 times the rate of maltreatment overall, over 10 times the rate of abuse, and nearly 8 times the rate of neglect.

Proponents of same-sex marriage tend to downplay the social benefits of inclusion.<sup>72</sup> One way of doing this is to downplay the role of children in marriage. They promote the idea marriage is simply a private contract between two loving individuals because this sidesteps the question of social benefits and naturally implies inclusion.<sup>73</sup> If marriage is mostly a way for couples to generate private benefits, then same-sex couples are likely to generate benefits of similar size to opposite-sex couples.<sup>74</sup> However, even though the private benefits may be large for any individual couple, given the small numbers of same-sex unions, the total private benefits are also small.<sup>75</sup> Thus, although there is much banter back and

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ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 12 (2010). This is an issue for all household types where the children are not biologically linked to both parents—a situation that is ubiquitous in same-sex relations. Although extremely important, I will ignore it here and assume there is no difference in the quality of children in same-sex and opposite-sex homes.

72. See, e.g., Kevin J. Mumford, *The Miscegenation Analogy Revisited: Same-Sex Marriage as a Civil Rights Story*, 57 AM. Q. 523, 524 (2005) (reviewing historians' work explaining the evolution of marriage into an institution emphasizing spousal satisfaction rather than a patriarchal social institution).

73. See, e.g., David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate*, SLATE, Apr. 25, 1997, <http://www.slate.com/id/2440>. Proponents argue that in the past, marriage may have been grounded around children, but they say this is no longer the case. They also point out children are present in same-sex households even though they were not created by the same-sex couple. See Scott Bidstrup, *Gay Marriage: The Arguments and the Motives*, <http://www.bidstrup.com/marriage.htm> (last visited Sept. 12, 2010). Raising these children may be a social benefit if the children perform better than in single households or the same as in heterosexual households.

74. The private gains are likely to be lower because specialization gains increase with differences between the couple. See generally GARY S. BECKER, A TREATISE ON THE FAMILY 30–79 (Enlarged ed. 1991) (explaining the theory of household specialization). Opposite-sex couples are naturally more different than same-sex couples, and this allows for greater gains in specialization. See *id.* at 44. For example, opposite-sex couples are better able to exploit wage differences between men and women to achieve higher levels of household production. *Id.* at 15. Still, in our modern world, the differences between sexes are less important than they were even a generation ago.

75. Consider the following back-of-the-envelope calculation: Daniel Hamermesh, an expert witness in *Perry*, estimated the value of surplus to marriage generated by improved specialization and commitment to be \$9,675. Expert Report of Daniel S. Hamermesh at 9, *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal.

forth over the issue of inclusion benefits, this margin is likely to remain indecisive. The benefits are small indeed, but so what?

### B. *Inclusion Costs*

It is a much different story for inclusion costs. When same-sex marriage is introduced there are immediate changes in family law, and there is also the potential for further evolution.<sup>76</sup> Immediate changes occur because, with the sexual symmetry of same-sex couples, many marriage laws make no sense for these couples. As a result, when a jurisdiction introduces same-sex marriage, there are necessarily immediate changes to tax laws, paternity laws, child custody, the definition of parenthood, and the like. Thus, the claim same-sex marriage leads to legal and regulatory feedback on opposite-sex couples is not a theoretical boogeyman. Two examples of changes in the law that happen immediately when same-sex marriage is introduced are changes in the definition of parent from “natural parent” to “legal parent” and changes in definition of the “presumption of paternity” to the “presumption of parentage.”<sup>77</sup>

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2010) [hereinafter Expert Report]. That is essentially the household savings of a married couple compared to two single individuals. In the United States, there were approximately 205 million people between the ages of fifteen and sixty-five in 2008. U.S. Census Bureau, *Age and Sex in the United States: 2008*, [http://www.census.gov/population/www/socdemo/age/age\\_sex\\_2008.html](http://www.census.gov/population/www/socdemo/age/age_sex_2008.html) (follow “Population by Age and Sex: 2008: Excel” hyperlink). Let us assume 1% of these couples will be homosexual and every one of them would take advantage of the right to marry. This means there would be close to \$20 billion worth of inclusion benefits. Of course, this would represent the upper bound on benefits because many will not choose to marry. Now suppose only 50% of the 205 million people would enter into an opposite-sex marriage. Those benefits add up to close to \$1 trillion. Of course, this has to represent the lower bound because it does not include any social benefits of having and raising successful children. Whatever private benefits there are for same-sex couples, they will be dwarfed by the benefits accruing to opposite-sex couples simply because same-sex couples are rare in the population.

76. See generally *An Economic Assessment*, *supra* note 1, at 950–54 (discussing the evolution of marriage and family law).

77. See *id.* at 963–65. With respect to this last change, Maggie Gallagher asks, “will all men . . . have a new legal standing to reject the obligations of fatherhood on the grounds they only consented to sex and not to parenthood?” *Id.* at 965 (quoting Gallagher, *supra* note 18, at 57). This issue arose in *Mintz v. Zoering*, 198 P.3d 861 (N.M. Ct. App. 2008). There, a man donated sperm to a lesbian couple and later, after the couple broke up, donated sperm for a second child. *Id.* at 862. The mother subsequently sued the sperm donor for child support. *Id.* at 866. He appealed the

But there are many other cases of subsequent changes at the court level. For example, a number of North American cases have involved custody, birth certificates, and visitation in which the courts have ruled private relationships trump biological connections. In *Mason v. Dwinnell*, the court awarded shared custody of a child to the lesbian partner over the biological mother's objection.<sup>78</sup> In a case before the Supreme Court of Ireland in 2008, a sperm donor was denied guardianship rights over a son raised by the child's biological mother and her lesbian partner.<sup>79</sup> The court recognized the nonbiological relationship as the de facto family.<sup>80</sup> In *Griffiths v. Taylor*, two men in a domestic partnership who had contracted with a surrogate mother sought to remove her name from the birth certificate and have their names placed on the certificate.<sup>81</sup> The court agreed over the State's objection, concluding, "In this era of evolving reproductive technology and intent based parenthood, our laws must acknowledge these realities and not simply cling to genetic connections as preconditions to being placed on a birth certificate."<sup>82</sup> Here we see the effects of same-sex marriage in the jurisdictions that are in the shadow of jurisdictions in which it has become legal.

In all of these cases, the notion of legal relationship trumped the biological relationship. Historically, marriage has strengthened the biological ties between parents and their children, which many argue to be important.<sup>83</sup> However, same-sex marriage necessarily breaks the

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district court's ruling that he pay \$670 per month in child support. *Id.* at 863. In this particular case, the court rejected the father's claim and held he was responsible for support. *Id.* Of course, New Mexico does not have same-sex marriage, but the case illustrates such challenges to paternity are possible.

78. *Mason v. Dwinnell*, 660 S.E.2d 58, 62, 73 (N.C. Ct. App. 2008).

79. *McD. v. L.*, [2009] I.E.S.C. 81 (10th December, 2009) (S.C.) (Ir.) available at <http://www.supremecourt.ie/Judgments.nsf/1b0757edc371032e802572ea0061450e/e38386fa6f02e44e80257688003f7a9a?OpenDocument> (last visited Sept. 14, 2010).

80. *Id.*

81. *Griffiths v. Taylor*, No. FA084015629, 2008 WL 2745130, at \*1 (Conn. Super. Ct. June 13, 2008).

82. *Id.* at \*7.

83. See Margaret Somerville, *Children's Human Rights and Unlinking Child-Parent Biological Bonds with Adoption, Same-Sex Marriage and New Reproductive Technologies*, 13 J. FAM. STUD. 179, 179-82 (2007). Somerville argues the separation of children from their biological parents violates their human "right to be born from natural human origins that have not been tampered with by anyone else." *Id.* at 180.

importance of biology within the realm of parenthood. If same-sex marriages never included children, the consequences would be minimal. But children are often involved, and as a result, changes designed to handle same-sex parenting matters carry over to heterosexual couples where there is a biological connection.

Legal changes occurred in European countries with legalized same-sex marriage, as well. Specifically, the Netherlands is particularly interesting because it has the longest experience with same-sex marriage.<sup>84</sup> In the Netherlands, there is no automatic presumption of legal parentage for the father in a registered partnership.<sup>85</sup> Instead, the male partner must have the permission of the biological mother to become the legal parent.<sup>86</sup> Nor does the presumption of legal parentage exist for same-sex couples.<sup>87</sup> This means there is an asymmetry between parentage within lesbian and gay couples. In the case of lesbian couples, the donor father may become the legal parent.<sup>88</sup> The nonbiological co-mother may become a legal parent if the biological father is unwilling to be the legal parent.<sup>89</sup> With gay couples, only the mother is the legal parent.<sup>90</sup> The biological father may be recognized as the legal parent if he wishes, but the co-father may only become the legal parent if the mother is willing to give up her legal parentage because only two parents can be considered a legal parent at one time.<sup>91</sup> Out of all of this has come the legal standing of “parental authority.” Such authority grants certain rights and responsibilities to the same-sex couple independently of the legal parent.<sup>92</sup> How all of this will

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84. Mircea Trandafir, *The Effect of Same-Sex Marriage Laws on Different-Sex Marriage: Evidence from the Netherlands 1* (Univ. of Sherbrooke, Paper No. 09-23, 2009), available at <http://www.mcgill.ca/files/economics/trandafir.pdf>.

85. See Machteld Vonk, *One, Two or Three Parents? Lesbian Co-Mothers and a Known Donor with ‘Family Life’ Under Dutch Law*, 18 INT’L J.L. POL’Y & FAM. 103, 104 (2004).

86. *Id.*

87. *Id.* at 105–06.

88. *Id.*

89. *See id.*

90. *See id.*

91. *See id.* at 104–05.

92. *Id.* at 104.

play out in terms of child welfare and heterosexual rights is yet to be seen.<sup>93</sup> However, it points to the difficulty in trying to handle parental rights when the law moves away from the biological notion of the natural parent.<sup>94</sup>

Other cases show how same-sex marriage recognition affects other aspects of family. In 2008, the Saskatchewan Human Rights Tribunal fined a marriage commissioner \$2,500 for refusing to perform a same-sex marriage on religious grounds.<sup>95</sup> He was ordered to perform such marriages in the future.<sup>96</sup> In 2006, Catholic Charities in Massachusetts decided to terminate the practice of placing children for adoption in order to avoid conflicts that would arise with placements with same-sex couples.<sup>97</sup>

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93. Given the short lapse in time that has passed since the 2001 introduction of same-sex marriage in the Netherlands, it is no surprise careful empirical work is sparse. However, Trandafir's research provides some perspective. Trandafir, *supra* note 84. Using both a detailed micro-level data set and aggregate data, he found several effects of interest. *Id.* at 28–29. First, changes to domestic partnerships and same-sex marriage have different impacts on different regions of the country. *Id.* People living in urban areas responded differently than those living in a rural setting, and members of the Dutch Bible Belt responded differently from the rest of the country. *Id.* Second, legalizing same-sex marriage lowered the overall marriage rate, but the rate of heterosexual unions remained unchanged. *Id.* at 29. In other words, different-sex couples opted to form domestic partnerships or cohabituate rather than marry. *Id.* Because there are institutional details of marriage that go beyond the legal contractual obligations, these differences in union regulation are likely to have consequences down the road. For example, separation rates could be higher in the future.

94. The Netherlands also maintained domestic partnerships when they introduced same-sex marriage, and they opened this option to opposite-sex couples. *Id.* at 28–29. This provides an interesting, if not unique, example of negative feedback. Interestingly, there has been a considerable flow of married and opposite-sex couples toward registered partnerships. Maintaining the distinct relations is not necessary, but it created an example of how unexpected costs can feed back on opposite-sex couples. In 2007, 28,567 opposite-sex married couples in the Netherlands converted their marriages into registered partnerships. BADGETT, *supra* note 17, at 61. According to Badgett, most of these conversions were then terminated through a “flash annulment,” which is an easily administered divorce procedure available for partnerships but not marriages. *Id.* Badgett noted “[t]hese flash annulments were an unintended effect of the law that gave same-sex couples the right to marry.” *Id.*

95. Nichols v. M.J., 2009 SKQB 299, ¶ 1 (Can.).

96. *Id.* ¶ 73.

97. Daniel Avila, *Same-Sex Adoption in Massachusetts, the Catholic Church, and the Good of the Children: The Story Behind the Controversy and the Case for Conscientious Refusals*, CHILD. LEGAL RTS. J., Fall 2007, at 1, 11–14.

In Belgium, a 1998 law allowed same-sex couples to create registered partnerships, and by 2006, same-sex couples could marry and adopt children.<sup>98</sup> Allowing same-sex marriage is not so simple. The implications are far-reaching.<sup>99</sup>

When same-sex marriages are introduced, subsequent changes are inevitable and even necessary. If same-sex couples are indeed different in terms of the legal regulation they require, then family law will continue to evolve to accommodate them. If same-sex relations are more likely to be “open” marriages, shorter term marriages, or any other host of differences, the current laws regulating modal opposite-sex marriage will be inadequate. We know so little about same-sex marriages, but the research done on these unions points to radical differences. Consider, for example, the research conducted by the Center for Research on Gender and Sexuality in the San Francisco Bay area.<sup>100</sup> A number of studies have found gay couples to have explicit open-marriage agreements in about fifty percent of unions.<sup>101</sup> These agreements tend to break down about thirty percent of the time.<sup>102</sup> However, according to the research, the couples

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98. Loi modifiant certaines dispositions du Code civil en vue de permettre l'adoption par des personnes de même sexe [An Act to Amend Certain Provisions of the Civil Code to Allow Adoption by Same-Sex Couples] of May. 18, 2006 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jun. 20, 2006, 31128–29; Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil [Law Opening Marriage to Same-Sex and Amending Certain Provisions of the Civil Code] of Feb. 13, 2003 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Feb. 28, 2003, 9880–83; Loi instaurant la cohabitation légale [Act Establishing the Legal Cohabitation] of Nov. 23, 1998 MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Jan. 12, 1999, 786.

99. Families are complicated organizations, and it is very difficult to predict how changes that allow same-sex marriage will spill over onto opposite-sex couples. Forty years ago, the Western world began the switch to no-fault divorce, and at the time, no one predicted any of the changes to divorce rates, household violence, suicides, marriage age, labor-force participation, or attitudes to divorce that would result.

100. The Center for Research on Gender and Sexuality, <http://crgs.sfsu.edu/> (last visited Sept. 14, 2010).

101. See, e.g., Colleen C. Hoff et al., *Serostatus Differences and Agreements About Sex with Outside Partners Among Gay Male Couples*, 21 AIDS EDUC. & PREVENTION 25, 32 (2009).

102. *Id.*

more often report extra sexual partners improve their relationships.<sup>103</sup> This type of behavior contrasts significantly with heterosexual relationships in which open marriages are extremely rare.<sup>104</sup> Family law has always been designed to encourage fidelity, monogamy, and closed unions. How can such laws benefit unions that improve with open relationships? How can accommodations to open relationships benefit opposite-sex couples?

These few examples merely hint at the inclusion costs. As Badgett notes in her analysis of the switch to same-sex marriage in the Netherlands, same-sex marriage changes the meaning of marriage for society in general and for every type of couple.<sup>105</sup> These changes include the social meaning of marriage and the use of terms like wife, husband, and partner.<sup>106</sup> In Badgett's words: "Heterosexual people might perceive a difference in the meaning of marriage for same-sex couples, or a different meaning for an institution of 'marriage' that includes same-sex couples, that will eventually alter the meaning of marriage for heterosexuals."<sup>107</sup> The negative feedback of same-sex marriage on heterosexual marriage is likely to be enormous.<sup>108</sup> If the institution of marriage is designed to help heterosexual couples remain together and connected to their children in a loving relationship, alterations to this institution to accommodate others necessarily weaken the institution. Heterosexual marriages become less stable and the result is

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103. *See id.* at 32–35.

104. *See* EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 186 (1994).

105. *See* BADGETT, *supra* note 17, at 82–85, 89–103 (discussing how gay and lesbian couples alter the cultural understanding of marriage from both a homosexual and heterosexual perspective).

106. *Id.* at 108–13.

107. *Id.* at 88.

108. *See, e.g.*, Expert Report, *supra* note 75. In 2008, there were 58,945,000 married couples with households in the United States. U.S. CENSUS BUREAU, *HOUSEHOLDS, FAMILIES, SUBFAMILIES, AND MARRIED COUPLES: 1980 TO 2008 (2008)*, available at <http://www.census.gov/compendia/statab/2010/tables/10s0059.pdf>. Suppose the introduction of same-sex marriage had an impact on divorce similar to no-fault divorce. This would mean, over the life of these marriages, another fifteen percent would divorce. Suppose the only costs of divorce are the loss of economies of scale due to living together—\$9,675. Expert Report, *supra* note 75, at 9. This means the loss of marriage surplus would be approximately \$180 billion. Of course, this would be a lower bound because the costs of divorce are actually much higher. In fact, this type of calculation completely ignores the types of costs discussed in this section.

higher divorce rates, as well as the negative social consequences that will follow.

Proponents of same-sex marriage are adamant inclusion costs are small. They note there are few same-sex couples and such a small number is unlikely to even be noticed by the larger heterosexual community. However, this ignores the fact it is not the size of the added union that matters, but rather the extent of its difference from heterosexual monogamy. Same-sex marriage proponents usually deny that the behavior of same-sex couples is any different than opposite-sex couples, and therefore, negative feedback loops are unlikely to generate.<sup>109</sup> But this simply avoids the key difference: same-sex is not opposite-sex. Ultimately this is an empirical question, but given 1) the economic understanding that institutions have a purpose, 2) the large amount of empirical literature on the sensitivity of divorce to changes in other marriage laws, and 3) the fundamental change same-sex marriage entails, one needs a tremendous amount of confidence and blind faith to assert inclusion costs are inevitably negligible.

### C. *Exclusion Benefits*

The debate on same-sex marriage is quite explosive because so much of it hinges on exclusion benefits. These benefits depend on the normative moral values of members of society, and both sides view the other side's beliefs as immoral, illegitimate, and not worth counting. On the one hand, those opposed to same-sex marriage tend to exaggerate the benefits of exclusion. Some argue same-sex marriage is immoral and the state should not support it. For these opponents, the exclusion benefits are quite large—although most recognize religious arguments carry little weight in a secular debate on civil marriage. However, at one time the majority of Americans probably felt this way, and indeed, it is likely the changing tide in these values has provided same-sex marriage the success it has had.

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109. BADGETT, *supra* note 17. Badgett's rhetorical subtitle is "What Happens When Societies Legalize Same-Sex Marriage." *Id.* Her answer throughout the book is: nothing happens. *Id. passim.* So what is wrong with using something for an unintended purpose? Just as screwdrivers are not intended to be used to pry open cans of paint, when a novel use of an inherited artifact is proposed, the question ought to be whether that use is a good one, not whether it is consistent with the artifact's original purpose.

On the other hand, the proponents of same-sex marriage argue strongly against any benefits of exclusion. They understand the benefits of exclusion involve discrimination often based on religious beliefs and, consequently, often refer to opponents as bigots or religious imperialists.<sup>110</sup> They argue this discrimination is wrong and similar to the discrimination faced by interracial couples of the past.<sup>111</sup> Indeed, they hold to the secular belief same-sex marriage is a fundamental civil right and a matter of equality.<sup>112</sup> Proponents know there is a changing tide of moral values on the question of homosexuality, and they drive this point home. In essence, they argue the exclusion benefits are wrong, shrinking, and less than the inclusion benefits.

#### D. *Exclusion Costs*

Generally, both sides of the same-sex marriage debate agree on the costs of excluding same-sex couples from marriage. Exclusion costs are low. Same-sex couples are easy to identify and therefore easy to exclude from marriage. There are relatively few potential same-sex marriages given the small numbers of homosexuals in the population, and even fewer of them will procreate. Therefore, society sacrifices little in terms of lost marriage values by excluding them. For opponents, this is simply a green light for exclusion. For proponents, they know same-sex couples are easily identified and argue such identification, whether on census forms or other areas of society, is wrong. They also tend to overstate the marriage values in an effort to raise the perception of foregone benefits.

#### V. CONCLUDING REMARKS

But I do not see what is wrong with using something for an unintended purpose. . . . Screwdrivers are not intended to be used to open a can of paint! When a novel use of an inherent artifact is proposed, I think the question should not be, is this consistent with the artifact's original purpose; the question should just be, is this a good use of the artifact?<sup>113</sup>

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110. *See, e.g.,* Bidstrup, *supra* note 73.

111. *See id.*

112. *Id.*

113. *Prepared Statement of Andrew Koppelman*, 58 *DRAKE L. REV.* 905 (2010).

Andrew Koppelman's screwdriver analogy is intended to support the idea of same-sex marriage, and yet it points to so much that is missing from the debate. There is no question a screwdriver can open a can of paint. However, as any mechanic will tell you, if you respect your screwdriver and want it to last and perform well when you need to remove a screw, you should not open cans of paint with it. Opening paint cans smooths the sharp edges of the screwdriver and might cause the tip to chip. The result is a stripped screwhead the next time the driver is used. But there is more. Any decent paint seller will also tell you not to use a screwdriver for paint lids. They only grab the outer lip of the lid and stretch it. After several openings, the lid fails to seal properly, and the paint inside starts to deteriorate. A proper paint seller always provides a proper can opener which works better and maintains the integrity of the lid. As academics, same-sex marriage seems as obvious as opening a can of paint with a screwdriver, but our confidence only stems from our lack of understanding how the real world works.

If there is any merit to my assessment of the costs and benefits of same-sex marriage, the conclusion is clear: this type of couple should not be allowed into the marriage franchise. The critical factor in this argument lies in the costs of inclusion, and in my opinion, most other arguments ignoring this issue are just red herrings. For example, much is made of the fact that at one time, interracial couples were sometimes banned from marriage. But from Table 2, it is clear how inappropriate the comparison is between interracial and same-sex couples. They are only similar in terms of the costs and benefits of exclusion. They are actually opposites in terms of the costs and benefits of inclusion. It is the cost of inclusion that really matters.

The same can be said of other arguments. Should any loving couple be allowed to marry? No. This only considers the private benefits of inclusion. It ignores the other three categories of costs and benefits. If same-sex marriage already exists in spirit, should society just accept it? No. This, again, only considers benefits and ignores the other costs. Do the children of same-sex marriages require protection too? They do, and this would be a social benefit of same-sex marriage. However, if this makes other marriages less stable, the children of those marriages are worse off. Again, the costs must also be considered. Does banning same-sex marriage serve any secular purpose? Yes, if it means avoiding the costs of inclusion. The arguments go on and on, always ignoring some category of cost or benefit and usually ignoring the costs of inclusion.

Because the costs of inclusion are ignored, the obvious solutions are seldom discussed. The key problem with all three currently excluded groups—incestuous, polygamous, and same-sex—is the costs of inclusion. These types of unions are fundamentally different from the benchmark case and, therefore, necessarily require different types and levels of regulation. To solve this problem, there must be a “break” between the unions so legal changes made to accommodate one type of couple are not binding on other types of couples. This can be accomplished in one of three ways. First, simply maintain the status quo. Unions that are not legally recognized cannot legally influence existing marriages. Second, create a separate type of legal union. This is effectively done with “domestic partnership” laws, although not to the satisfaction of same-sex couples. Finally, allow for same-sex marriage, but explicitly recognize laws regulating custody, parenthood, marital assets, grounds for divorce, and the like are allowed to evolve for that class of marriage, independent of other marriages. In other words, abandon the “one-size-fits-all” characteristic of family law. Same-sex marriage can be called marriage, and it can start out exactly the same as marriage. As same-sex-couple disputes arise, and as these disputes are resolved in courts, legislatures, and their own communities, these resolutions will have no bearing on opposite-sex marriages. If same-sex marriage really is the same as opposite-sex marriage, then thirty years from now they will have evolved the same. If they are different, then thirty years from now they will have become different beasts, and both will be the better for it. Such a procedure allows same-sex marriages to achieve all the inclusion benefits of marriage, including the social status of marriage, without imposing any of the inclusion costs. Of course, this brings family law one step closer to mere contract, and many might argue this still lowers the social value of marriage. However, this solution is considerably better than the current solution working its way through the United States court systems.