Imagine this: while sitting at your desk at work, you receive a frantic call from the emergency room of the local hospital informing you that your significant other has been in a terrible car accident. A drunk driver plowed through an intersection and crashed into your partner’s vehicle. The voice on the phone informs you that your partner is being taken to the operating room and that you should get to the hospital as soon as possible. You grab your keys and head for the door. You rush to the local hospital, run to the nearest desk, and ask about the status of your significant other. After you are repeatedly asked for identification and given the run-around, you finally find a nurse who directs you to the room where your loved one is recovering. You enter the room and see the person with whom you have shared the last eighteen years of your life and with whom you are raising two beautiful children, lying on a hospital bed.

Fast forward two months. Your significant other is on the way to a complete recovery from the many internal injuries sustained from the car accident—though it will be a long and painful process. The bills keep piling up. Medical costs for the hospital stay, surgery, prescription painkillers, and rehabilitative therapies are adding up to tens of thousands of dollars. Years ago, you had decided together that once you had children your significant other would be a stay-at-home parent and you would bear the responsibility of being the lone breadwinner. Now, with mounting medical costs, your salary as a lecturer at the state university is simply not enough. Your once comfortable, stable, financially-secure life is now riddled with bills and debt, and quickly approaching financial ruin—all triggered by a split-second tragedy.

This distressing anecdote hinges on two previously unstated facts: one, you and your partner of eighteen years are in a same-sex relationship;
and two, your employer does not provide dependent medical benefit coverage for your partner. Even as a number of states have begun to legally recognize same-sex unions, unfortunately, real-life stories similar to the one above may not become any more infrequent.¹

This Comment will argue that domestic partner benefits should be continued for a number of reasons irrespective of the nascent state laws recognizing the rights for same-sex couples to marry or unionize. Part I will lay the framework of the status of same sex-unions in the United States. Part II will explore reasons why it would be premature to eliminate domestic partner benefits despite the current trend among states towards legally recognizing same-sex unions. Finally, Part III places the legal discussion of domestic partner benefits within the greater framework of gay rights in America.

I. MORE THAN ONE WAY TO TIE THE KNOT: A SURVEY OF STATE LAW GOVERNING SAME-SEX RELATIONSHIPS

The saga of same-sex marriage in the courts began over a decade ago. Case law is still relatively new and the courts’ opinions vary a great deal from state to state. In 1993, the Hawaii Supreme Court held that the state law restricting marital relations to those between a male and a female was unconstitutional unless the state justified its enactment with a compelling state interest.² Five years later, in 1998, the Oregon Court of Appeals, in Tanner v. Oregon Health Sciences University, held that an institution must give unmarried couples the same benefits it offers married couples.³ One year later, in 1999, the Vermont Supreme Court held that there was a constitutional obligation for the State to extend same-sex couples the equivalent benefits and protections that “flow from marriage under [state] law.”⁴

The foundational case on the issue of same-sex unions was decided by the Massachusetts Supreme Court in 2003: Goodridge v. Department of

¹. See generally John Murawski, Defining a Domestic Partner, NEWS & OBSERVER *Raleigh, N.C.), Aug. 27, 2006, at E1, available at http://www.newsobserver.com/104/story/479600.html (discussing the struggles same-sex couples have in trying to obtain domestic partner benefits); Patricia M. Lambert, Richley Crapo, Terry Peak & Elizabeth York, Proposal to Offer Domestic Partner Benefits to Same Sex Partners at Utah State University, app. C (January 27, 2005), available at http://www.usu.edu/fsenate/archives/FSEC/Agendas/FSEC04-05/Reports04-05/domestic%20partner%20benefits%20proposal.pdf (containing testimonials from gay employees regarding the need for domestic partner benefits).


In Goodridge, the Court held that the State could not deprive a same-sex couple of the right to civilly marry and, consequently, must provide that couple with the benefits of civil marriage. This was seen as a watershed holding because, prior to Goodridge, same-sex couples in long-term committed relationships were arbitrarily denied benefits associated with marriage. After Goodridge the benefits privileged upon all married couples in Massachusetts included: “sharing a medical policy with a spouse, continued health coverage if one’s spouse dies or loses his job, ‘preferential benefits in the Commonwealth’s medical program, MassHealth,’ financial benefits for spouses of Commonwealth employees killed while working . . . and Medicaid benefits.”

Goodridge marks a trend among state courts, and ultimately the legislatures, to conclusively make determinations about the constitutionality of denying rights to those individuals in same-sex unions. The Vermont Supreme Court in Baker v. State required equal treatment of same-sex and married couples. In response, the Vermont State Legislature passed a statute which ordered that “[p]arties to a civil union shall have all the same benefits, protections, and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage.” In California, the Domestic Partner Rights and Responsibilities Act of 2003 established that “[r]egistered domestic partners shall have the same rights, protections, and benefits . . . as are granted to and imposed upon spouses.”

Most recently, the New Jersey Supreme Court in Lewis v. Harris opined that committed same-sex couples must be afforded the same rights and benefits enjoyed by married opposite-sex couples.

As a result of Goodridge and its progeny, many employers have revamped their existing policy structure and tightened the rules for domestic partner benefits. Some employers that currently provide domestic partner benefits for same-sex couples and their children argue that they should be required to provide benefits only for same-sex couples who are civilly unionized, registered, or married depending on whatever schema

6. Id. at 948.
8. Id. (quoting Goodridge, 798 N.E.2d at 956-58) (citations omitted).
11. CAL. FAM. CODE § 297.5 (West 2004).
13. Id. at 220-21.
is available in a given state. Post-Goodridge, one of the largest employers in Massachusetts chose to provide benefits only for the same-sex partners legally married to their employees. In Vermont, after civil unions were recognized as a legal option for same-sex couples, the University of Vermont terminated their domestic partner benefits. In New Jersey, by the end of July 2007, 1/7 of the couples who had entered into civil unions since February 19 had reported to Garden State Equality, an LGBT civil rights organization, that their employers refused to recognize their civil unions and provide them with the requisite benefits.

Such reactions are not likely to be anomalies. As more states choose to conclusively rule whether they will or will not legally recognize same-sex unions, the future for those receiving domestic partner benefits is uncertain.

States can not easily be separated into those that support same-sex unions and those that forbid them. There are variations in the extent to which states have chosen to take a stand. From constitutional amendment to case law, from marriages to registered partnerships, states fall along a varied spectrum of possibilities. This Comment will argue that the evolving law and policy, even when supportive of legal recognition for same-sex unions, does not require an end to employer-provided domestic partner benefit programs, and should not result in the abolition of such programs.

A. The Current Legal Status of Same-Sex Unions in the United States

The legal status of same-sex unions in the United States varies from one state to another. Currently, Massachusetts is the only state in the union that permits same-sex marriages that are on equal legal footing with traditional heterosexual marriages. With the exception of Massachusetts,

15. See Kimberly Blanton, Unmarried Gay Couples Lose Health Benefits, BOSTON GLOBE, Dec. 8, 2004, at A1 (reporting that many Massachusetts employers have dropped benefits for unmarried same-sex domestic partners).
16. Id.
every other state either explicitly or implicitly defines marriage as a union reserved for a man and a woman.\(^2\)

Though the term "civil union" is often used interchangeably with "marriage," the former is not the legal equivalent of marriage under each state's laws. Some jurisdictions offer a third option, known as registered domestic partnership schemes, which provide even fewer rights than civil unions.\(^2\)

In *Lewis v. Harris*, the New Jersey Supreme Court gave the state's legislature 180 days to "either amend the marriage statutes to include same-sex couples or enact a parallel statutory structure by another name" affording same-sex couples the same rights and benefits enjoyed by married opposite-sex couples.\(^2\) The New Jersey legislature has recently opted to join Vermont, Hawaii, Connecticut and California in adopting a system that recognizes same-sex civil unions, while not defining those partnerships as marriages.\(^2\)

States are not the only political entities that have entered the same-sex civil union debate. The federal government has also made its interests known. In response to the *Baehr v. Lewin*\(^2\) decision, Congress passed, and

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24. 852 P.2d 44 (Haw. 1993)
President Clinton signed, the Defense of Marriage Act (DOMA) in 1996.\textsuperscript{25} DOMA explicitly defines the terms "marriage" and "spouse":

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.\textsuperscript{26}

DOMA then goes even further, empowering states with the right to ignore the legality of same-sex marriages granted in sister states,\textsuperscript{27} thereby negating the effect the Full Faith and Credit Clause of the U.S. Constitution may have had.\textsuperscript{28} Congress enumerated the purposes for the legislation as: "(1) defending and nurturing the institution of traditional, heterosexual marriage; (2) defending traditional notions of morality; (3) protecting state sovereignty and democratic self-governance; and (4) preserving scarce federal resources."\textsuperscript{29}

With the passage of the federal DOMA, state-permitted civil unions or marriages are not privy to more than 1,100 of the federal rights and benefits provided for opposite-sex marriages.\textsuperscript{30} The myriad of rights denied include social security survivor benefits, unlimited federal estate tax deductions, and joint filing status for federal income tax filings and federal bankruptcy laws.\textsuperscript{31} On the heels of the federal DOMA enactment, many states passed their own DOMA laws that define marriage as a union exclusively between a man and a woman.\textsuperscript{32}

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{26} 1 U.S.C.S. § 7 (LexisNexis 2007).
\item \textsuperscript{27} 28 U.S.C.S. § 1738C (LexisNexis 2003).
\item \textsuperscript{28} See U.S. Const. art. IV, § 1; Ripke, supra note 19, at 280-82.
\item \textsuperscript{31} See Janice Kay McClendon, \textit{A Small Step Forward in the Last Civil Rights Battle: Extending Benefits Under Federally Regulated Employee Benefit Plans to Same-Sex Couples}, 36 N.M. L. Rev. 99, 100 (2006) (indicating that these denials adversely affect 600,000 same-sex couples and the thousands of children being raised in same-sex households).
\end{enumerate}
\end{footnotesize}
B. The Current Scope of Domestic Partner Benefits in the United States

The scope of domestic partner benefits is increasing in today’s business world.\textsuperscript{33} There is growing acceptance that discrimination on the basis of marital status is unjust; thus, providing benefits to only opposite-sex spouses or dependents of employees is increasingly disfavored. As a point of clarification, “domestic partners” is not a term that refers only to partners in same-sex couples. Rather, because there is no unified legal definition, the term has been used to cover all employees’ unmarried partners whether of the same or the opposite sex and may also refer to extended family members.

According to a recently published survey, the number of American businesses offering domestic partner benefits has increased by thirty-four percent over the past five years.\textsuperscript{34} According to the Human Rights Campaign Foundation, an organization working for Gay, Lesbian, Bisexual and Transgender (LGBT) equal rights, more than half of Fortune 500 companies now offer benefits to their employees’ same-sex partners.\textsuperscript{35}

Regardless of how they choose to define “domestic partner benefits,” many companies have adopted policies that extend these benefits, motivated not only by a sense of fairness or egalitarianism, but also in deference to their bottom lines. There are three main reasons why large employers offer domestic partner benefits.\textsuperscript{36} First, such benefits help the company to attract and retain the best employees.\textsuperscript{37} The benefit structure of a compensation package is a key factor for many individuals; the more generous that structure, the more likely a prospective employee will look upon the potential employer favorably. Second, some employers are required by law, contract, or bargaining agreements to provide domestic partner benefits.\textsuperscript{38} Finally, employers may choose to provide benefits in the

\textsuperscript{33} See Jonathan Rauch, Gay Marriage: Why It is Good for Gays, Good for Straights, and Good for America 50-51 (2004) (indicating that research has found two-thirds of these benefit programs are open to both same-sex and opposite-sex partners, and that the number of employers offering such programs has been increasing twenty percent annually since 1999).


\textsuperscript{37} Id.

\textsuperscript{38} Id.
interest of equality. Cost, though a factor, does not seem to be a driving force for most employers in deciding whether or not to provide domestic partner benefits, because only a “fairly small percentage” of employees sign up for the benefits.

No matter what the companies want to do for their employees, whether motivated by egalitarianism or by fiscal initiatives, state or municipal laws affect the extent to which benefits can cover a variety of familial compositions. For example, companies located in states that recognize common law marriages are more likely to extend benefits to unmarried opposite-sex partners, referred to as common law spouses. Conversely, other companies may argue that since legally recognized marriages are available to opposite-sex couples, they need not extend benefits to those who choose not to take advantage of this legal option. Courts have upheld the legality of restricting domestic partner benefits to include only same-sex partners when marriage was only an option for heterosexual couples. In New York, an employee sued his employer claiming that the domestic partner benefits offered by the company to same-sex couples discriminated against the employee and his opposite-sex partner who were not eligible for the benefits. The District Court dismissed the case because the employee had the ability to marry and then receive marital benefits, whereas same-sex couples do not have that opportunity. The Court’s reasoning could be extrapolated to permit companies with offices in states where same-sex relationships are legally recognized to abolish domestic partner benefit programs since same-sex couples could be included under traditional benefit programs if they choose to obtain legal recognition.

The application of such reasoning, however, fails to recognize the obstacles faced by same-sex couples when deciding whether to become legally committed. The choice for same-sex couples to marry/unionize highlights specific issues that are not implicated when a heterosexual couple decides to marry. Consequently, the choice to marry/unionize is not the same for same-sex and opposite-sex couples and until it is, there should be benefits offered to same-sex couples and their families to reflect the

39. Id.
40. See id.; see also Blanton, supra note 15, at Al (noting that “[c]ost is a factor in dropping same-sex benefits,” while also noting “the proportion of employees who avail themselves of domestic-partner benefits is small, ranging from less than 1 percent at some employers to perhaps 2 percent”).
42. See Kimberly Blanton, supra note 15, at A1 (quoting a company’s vice president of human resources as saying, “We’re saying if you’re a same-sex domestic partner, you now have the same option heterosexuals have, so we have to apply the same rules to you”).
44. Id. at 330.
inherent inequity. The following section will discuss the reasons that same-sex couples should receive the option of domestic partner benefits even if they reside in states where they have the option to marry/unionize.

II. AN UNPRIVILEGED PARTNERSHIP: REASONS FOR THE MAINTENANCE OF DOMESTIC PARTNER BENEFIT PROGRAMS

In 1991, when computer giant Lotus Development Corporation, a subsidiary of IBM, reported that it would be providing domestic partner benefits for its gay employees, the vice president for human resources explained that the benefits would not apply to unmarried, cohabiting heterosexual couples.\(^45\) The reasoning behind such a decision was cited as being, "straight couples have the option of marriage, while homosexual colleagues don't."\(^46\) The logical extension of this business judgment, shared by a number of corporations besides Lotus, would be that once same-sex couples have the right to marry or join in a civil union, they need not be provided domestic partner benefits to even the playing field. Instead, same-sex couples who choose to marry or unionize would be provided benefits under traditional spousal plans, while same-sex couples who choose not to formally unionize would be in the same boat as straight couples who choose not to legally marry.

The likelihood of this conclusion being drawn is no longer simply a hypothetical. Mere months after the Massachusetts Supreme Court handed down their \textit{Goodridge} decision,\(^47\) many of the state's largest employers that previously championed the adoption of domestic partner benefits are now withdrawing these plans: "If gays and lesbians can now marry, they should no longer receive special treatment in the form of health benefits that were not made available to unmarried, opposite-sex couples."\(^48\)

The logic of this conclusion relies on a fairly straightforward analysis. However, this analysis ignores major considerations same-sex couples are forced to encounter. I argue that employers should maintain, or even institute, domestic partner benefit programs even in light of the recent decisions among states to allow same-sex couples to formally unionize. This conclusion is supported by three distinct justifications. First, getting married or unionized may carry severe repercussions for many same-sex couples. Same-sex unions, marriage or otherwise, have yet to be granted


\(^{47}\) See supra text accompanying notes 5-13.

the same protections as opposite-sex marriages, thereby leaving these
same-sex couples open to a variety of legal forms of discrimination.
Consequently, many same-sex couples may reasonably choose to forego
marriage not for lack of commitment, but for fear of the repercussions of
formally declaring their sexuality. Second, in jurisdictions where gay
couples are given the option to unionize in a form other than marriage, the
benefits received through marriage do not also flow from the union.
Therefore, removing the option of having domestic partner benefits simply
makes the already inequitable scheme, more inequitable. Third, continuing
or initiating domestic partner benefit plans is a prudent business decision.
This section will discuss the advantages that will flow to employers that
sustain these benefit plans. In sum, whether viewing domestic partner
benefits through a lens of equality or measuring the benefits by their effect
on the bottom-line, this comment will argue that both schools of thought
lead to the conclusion that domestic partner benefit plans should be
maintained regardless of the states’ same-sex union laws.

A. Potential Negative Repercussions Faced by Married/Unionized Same-
Sex Couples

Employment discrimination protections can be adopted by the
legislative, executive, or the judicial branch of government, and passed at
the local, state, or federal level. Employment law’s treatment of
discrimination is varied depending on the sector of employment being
addressed—public, private, military, civil service, corporate, partnerships,
education, government contractors, among others. This highly
differentiated field of law leads to a wide range of domestic partner
benefits, from none to complete spousal reciprocity. The following
analysis of the necessity for domestic partner benefits cuts across the lines
dividing these groups and shows that discrimination against homosexuals is
not only rampant, but also not subject to the full protections of the law.

Marrying a same-sex partner could put one’s job prospects in danger.
For example "[i]f an individual needs to change job locations or transfer
within a company, or even contemplates moving . . . some day for new
opportunities, being married to a same-sex partner can ‘out’ them as gay or
lesbian, jeopardizing their job and career path."
Furthermore, "[i]t is still legal to discriminate based on sexual orientation in [thirty-six] states." There is also no federal employment discrimination protection for sexual orientation bias. In Norton v. Macy, a case dealing with the discharge of a gay public civil service employee, the Court of Appeals for the D.C. Circuit opined that discharge of a homosexual must be justified by finding that his conduct affected the efficiency of the service. This case also suggests that the nature of the workplace be a main factor in determining the rights of the gay employee. The court’s framing of the rational relationship test provides some limits when reviewing sexual orientation discrimination in employment. However, the court emphasized that its holding relied on the facts that the plaintiff’s homosexual conduct was during off-duty hours and that he did not “flaunt[] nor carelessly display[] his unorthodox sexual conduct in public.” This dictum left the door open to the interpretation that homosexual employees who are open about their sexuality in the workplace could legally be dismissed.

In Singer v. United States Civil Service Commission, the court was led to just that interpretation. In Singer, the plaintiff, John Singer, was fired by his employer, ironically the Equal Employment Opportunity Commission, partially due to the publicity surrounding his attempt to marry his partner Paul Barwick. Singer challenged his discharge, but lost the battle. The court focused on the distinction between private homosexual conduct and public homosexual conduct and held that the plaintiff’s “‘open[] and public flaunting [of] his homosexual way of life and indicating further continuance of such activities,’ while identifying himself as a member of a federal agency” discredited the government he was representing. Currently, protection of gay and lesbian federal employees appears to continue to depend on the extent to which the employee’s sexuality is kept quiet.

52. Id.
53. Id.
54. 417 F.2d 1161 (D.C. Cir. 1969).
55. Id. at 1164-65.
56. Id.
57. Id. at 1167.
59. Id. at 249. See also Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (rejecting Singer’s and Barwick’s attempt to get a marriage license).
60. Singer, 530 F.2d at 256.
61. Id. at 255.
62. Singer was subsequently vacated by the Supreme Court after the adoption of new civil service regulations and the plaintiff ultimately prevailed at an administrative hearing. However, that Circuit Court’s reasoning regarding the extension of the Norton holding continued to be cited even after the Supreme Court’s vacating. See, e.g., Childers v. Dallas
A step as public as fighting for the legal recognition of one's same-sex marriage is not even necessary to put one's employment in jeopardy. Georgia Attorney General Michael Bowers, the petitioner in *Bowers v. Hardwick*, withdrew a job offer to Robin Shahar upon learning of her plans to unite with her partner in a religious ceremony. Shahar challenged Bowers' decision on the grounds that it was a violation of her religious freedom, but lost.

Negative repercussions are not reserved only for those gay employees seeking domestic partner benefits. Many gays and lesbians serving in the military would be affected if their civilian partners were forced to marry or unionize in order to keep their benefits. The military's controversial "Don't Ask, Don't Tell" policy, which describes its ban on "out" lesbian and gay men in the services, says that acknowledgment of being in a same-sex relationship is a basis for discharge. The Department of Defense guidelines state that the armed services "must discharge individuals who engage or have engaged in homosexual acts, who state that they are homosexual or bisexual, or who attempt to marry a member of the same sex." Servicepersons discharged for these reasons are to receive an honorable or general discharge unless he or she participated in homosexual acts "under certain aggravating circumstances." The reasons elucidated in the United States code for the prohibition of homosexual conduct in the military are as follows:

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of

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67. *See 135-175 U.S. Army Reg. § 2-39(c) (1987) (explaining that a service member can be discharged if he or she marries or attempts to marry a person of the same sex).


morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

In sum, marrying a same-sex partner would mean an automatic discharge from the military or the reserves. Couples would be forced to make a choice between one’s military career and further commitment to his or her relationship. This difficult choice is not present when opposite-sex partners choose to marry, regardless of whether one member is a serviceperson.

Other negative consequences outside of the employment arena could also befall a same-sex couple that chooses to marry. For example, a married same-sex couple cannot adopt a child internationally. Additionally, if a married same-sex couple was bi-national, the non-citizen partner would be exposed to immigration officials and could risk deportation.

While some states include sexual orientation as a protected class in their state’s anti-discrimination laws, many others do not provide such protections. Also, with the enactment of federal and state DOMAs, same-sex couples are faced with different levels of respect for their union depending on their state of legal residence. This legal uncertainty makes marriage an impractical option for same-sex couples; therefore, as employees, they should not be penalized for exercising a rational amount of caution. Due to the concerns discussed above, it is unreasonable to expect same-sex couples to marry in order to maintain their benefit coverage. If

70. 10 U.S.C.A. § 654a (West 1998).
71. See GAY & LESBIAN ADVOCATES & DEFENDERS, supra note 51, at 1 (discussing the negative consequences a same-sex couple may face by choosing to get married).
72. See, e.g., MASS. GEN. LAWS. ANN. ch. 272 § 98 (West 2006); HAW. REV. STAT. §§ 368-1, 489-1 (1993) (stating that discrimination on the basis of sexual orientation is against public policy); CONN. GEN. STAT. ANN. §§ 4a-60a to -61a, 46-81a to -81n (West 1998), amended by 2007 CONN. LEGIS. SERV. P.A. 07-142 (West) (prohibiting the discrimination of individuals based on sexual orientation); N.J. STAT. ANN. § 10:5-12 (West 2007) (prohibiting employers from discriminating on the basis of “marital status, civil union status, domestic partnership status, [and] affectional or sexual orientation”).
73. A number of states have declared that they will not recognize domestic relationships other than the union of a man and a woman. Furthermore, they will specifically prohibit any marriage, civil union, domestic partnership, or other state sanctioned arrangement between persons of the same sex. See, e.g., GA. CONST. art. I, § IV, ¶ 1(b); KAN. CONST. art. XV, § 16(b); KY. CONST. § 233a; LA. CONST. art. XII, § 15; MICH. CONST. art. I, § 25; N.D. CONST. art. XI, § 28; UTAH CONST. art. I, § 29; ALASKA STAT. § 25.05.013 (2006); OKLA. STAT. ANN. tit. 51, § 255(A)(2) (West 2000); TEX. FAM. CODE ANN. § 6.204(b) (Vernon 1998); VA. CODE ANN. § 20-45.3 (2007).
forced to marry, these couples would automatically face a number of potentially life-altering hurdles. Worse yet, if either partner changes jobs, it is possible domestic partner benefits may not carry over to the new employment and the couple would be faced with the negative consequences inherent in the unequal marriage scheme.

B. Equal Pay for Equal Work: Equity Among All Employees

The issue of domestic partner benefits has been framed as a necessary corollary of "equal pay for equal work." Mary Bonauto, the Civil Rights Director for Gay & Lesbian Advocates & Defenders (GLAD), illustrates the inequity in an example: "Absent domestic partnership, a lesbian employee of twenty years can secure no benefits for her partner of twenty years, but a new employee can automatically secure benefits for her husband of two weeks." Former New York City Mayor Rudy Giuliani made the following argument in support of a proposed New York City domestic partnership law:

What [domestic partnership] really is doing is preventing discrimination against people who have different sexual orientations, or make different preferences in which they want to lead their lives. Domestic partnerships not only affect gays and lesbians, but they also affect heterosexuals who choose to lead their lives in different ways.

Domestic partner benefits are grounded in an existing familial relationship rather than marital status. Historically, a straight, married individual could secure benefits through their spouse's employer; however, lesbian and gay domestic partners cannot get the same coverage because many employers do not recognize their partnership as a family. The last quarter-century has brought numerous challenges to this traditional employment benefits structure.

In jurisdictions that do not make the leap to same-sex marriages, but instead offer same-sex couples the option of civil unions or registered domestic partnerships, employers should retain domestic partner benefits in

75. Id.
77. See Bonauto, supra note 74, at 179.
78. See generally Holcomb, supra note 45, at 105 (discussing employer-sponsored health insurance coverage for domestic partners).
the interest of equity. In *Devlin v. City of Philadelphia*, the court recognized that even in jurisdictions that allow domestic partners to register, the benefits that flow from such registration cannot be seen as on par with heterosexual marital status. Therefore, these registered domestic partners would still need domestic partner benefits.

Even in jurisdictions where state law has expressly prohibited the recognition of same-sex marriages, courts have permitted employers to extend domestic partner benefits to their employees because it is seen as a personnel decision made in order to retain qualified employees and not a usurpation of the state’s power to regulate the institution of marriage. Therefore, employers need not be hesitant in continuing or implementing domestic partner benefit programs even if their state passes legislation defining marriage as a heterosexual institution. Employers need not fear that they are overstepping the bounds provided by the legislature or the courts; since providing domestic partner benefits to same-sex couples is not the same as legally-recognizing them.

Offering benefits to domestic partnerships has no effect on the taxpayer’s marital status, which is determined by state law. The tax repercussions for those receiving domestic partner benefits also do not mirror those of legally-recognized spouses. Benefits for domestic partners who do not qualify as “dependents” under the tax code must be included in the employee’s income to the extent that their fair market value exceeds the contribution the employee made to its cost.

Simply put, same-sex partnerships do not elicit the same protections and benefits, and in the interest of equity of employees, employers should attempt to even the playing field. By cutting back on the already minimal benefits that same-sex couples can depend on, the workplace becomes yet another place where same-sex couples are treated as less worthy than their heterosexual colleagues.

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79. 862 A.2d 1234 (Pa. 2004)
80. *Id.* at 1245 (opining that “the unmarried status of Life Partnership ... gives Life Partners only very limited rights ... and obligations that the Commonwealth has afforded to married couples . . .”).
C. *A Nod to the Bottom Line: The Maintenance of Domestic Partner Benefits as a Prudent Business Practice*

American businesses have been adding domestic partner policies to their list of benefits since the early 1980s. In 1982, the Village Voice in New York City was the first company to offer health insurance to its employees' domestic partners. Today, some forty percent of Fortune 500 companies provide such benefits. The addition of domestic partner benefits has been rooted in prudent business plans: "Respected employees perform better and stay longer and these benefits cost very little." The employers' costs in providing domestic policy benefits are a repercussion of the Internal Revenue Service (IRS) considering them taxable income to the employee. Therefore, federal-income and payroll taxes are levied on the premiums paid to cover domestic partners. The costs are relatively inconsequential in the grand scheme of the business plan, but there is a noteworthy administrative burden on companies that are forced to set up different payroll systems; one for married heterosexual couples and another for partnered couples.

Former White House adviser Howard Paster concludes that the abolition of domestic partner benefit programs would be an ill-advised business decision. Paster argues:

>[It] would cause a nationwide disruption to workplace productivity and to corporate America's efforts to build successful teams that honor and respect human diversity . . . . The changes give me serious concern about the ability of U.S. employers to succeed in a global marketplace where many of our allies and trading partners are moving forward in respecting the rights of gays and lesbians.

Offering domestic partner benefits has been shown to be quite manageable in terms of cost to employers. First, the population of people signing up for these benefits is small. A study undertaken in 1998 concluded that the average enrollment in plans where the total eligible population is between one thousand and one hundred thousand employees

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85. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id.
is .7% to 1% in gay-only plans and 2% to 4% if straight people are also included. In plans where there are less than one thousand or more than one hundred thousand employees, the rates rise to over 1 percent in gay-only plans and 5 percent for straight-inclusive plans.

The tax repercussions for employers who offer domestic partner benefits should also not dissuade them from providing the benefits. Employers are able to treat their premium contribution of the coverage as a compensation expense attributable to employment. Therefore, these premium contributions are counted as tax deductions because they fall under the category of ordinary and necessary business expenses.

Secondly, employers should offer these benefits to compete with the many companies who do offer the benefits; and to attract those skilled employees who are seeking to work for progressive companies. Researcher Richard Florida found that heterosexual employees, even those without domestic partners, often look for domestic partner benefits as a signal of an employer that values diversity and creativity. Florida further argues that regions that do not embrace the benefits of diversity-friendly policies risk alienating the creative workforce that is the key to gaining a competitive edge in the global market.

If domestic partner benefits are not exceedingly costly and have been shown to attract high-quality employees, it seems like good business sense for employers to retain such programs, let alone the notion of equality among employees.

III. THE 3 F’s: FAIRNESS, FAMILIES & THE FUTURE: FINAL REMARKS

Domestic partner benefits were instituted in the spirit of fairness in order to provide “equal pay for equal work.” Even though some states may no longer deny marriage or unions to same-sex couples, domestic partnership benefits remain important. There is no reason to terminate domestic partnership policies immediately and a number of good reasons to

93. Id. at 117.
94. Id. The caveat was noted that a younger-than-average workforce, meaning the average age of employees is twenty-five years old or less, may experience a higher enrollment, primarily for straight-inclusive plans, and therefore would have higher implementation costs. Id.
95. Id. at 120.
96. Id. at 119.
97. Id.
100. Bonauto, supra note 74, at 179.
maintain them for the foreseeable future. The unfair repercussions of marriage that could befall same-sex couples, the notion of equity, and good business judgment have all been set forth as reasons to continue supporting these policies.

The battles rage on towards the ultimate goal of granting gay men and women equal rights under the law. From anti-discrimination laws to marriage rights, there are still a number of hurdles that must be cleared before homosexuality ceases to be an unfortunate brand of second-class citizenship. The arguments forwarded in this Comment rest on the regrettable premise that being gay in America carries a number of adverse repercussions. Even though some state governments are slowly beginning to recognize that their gay constituents deserve the benefits that they have been previously denied, progress is slow and inconsistent. The reality is, as this Comment discusses, that even as benefits are bestowed, negative repercussions may still be attached.

A number of public opinion research organizations have noted a shift in the public’s attitudes toward homosexuality over the last two decades. One such research center found that “[a]bout half of Americans now say in surveys that homosexuality should be considered an acceptable alternative lifestyle,” compared to only one-third of people surveyed twenty years ago. On the flip side, however, surveys compiled by the same research institutions have also indicated that Americans have mixed feelings about how far the government should go in codifying rights for gays and lesbians. As the political climate surrounding gay rights remains in a state of flux, maintaining domestic partner benefits will protect thousands of same-sex families across the country.

As much legal, political, religious, and philosophical discourse surrounds the issue of same-sex families, the simple fact remains that these families do exist and should not be left vulnerable. The opening anecdote of this Comment was intended to shed some light on the harsh consequences facing families that are not covered under domestic partner benefit plans. The consequences are sudden, destructive, life-changing, and most importantly, avoidable. Gay men and women may choose, for a

102. Id.
103. Id.
variety of logical reasons, not to civilly unionize even if they live in a state with that option. These hard-working, tax-paying families should still be protected. Equal work must merit equal pay—regardless of whom one chooses to love.

106. See supra Part II.A.