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NOTES

IT'S NOT PERSONAL, IT'S JUST BUSINESS: THE ECONOMIC IMPACT OF LGBT LEGISLATION

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INTRODUCTION

Same-sex marriage, and the related topic of lesbian, gay, bisexual, and transgender (“LGBT”) rights, is one of the most polarizing legal issues currently being debated in America.¹ However, this debate often omits an important practical implication of LGBT inclusion or exclusion: the economic impact of LGBT legislation on the federal and state governments.² Ultimately, an economic assessment is a crucial aspect of any legal debate because “it provides a powerful tool for assessing the costs and benefits of a given rule or case outcome.”³

Economists and social scientists began seriously studying the economic impact of LGBT tolerance in the early twenty-first century.⁴ These studies presented strong correlations between a location’s wealth, prospects for economic investment, and ability to recruit talent, with its level of inclusiveness for LGBT persons.⁵ While LGBT inclusiveness is not the only factor contributing to a

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1. Clay Flaherty, *Features: Same-Sex Marriage Introduction*, JURIST, <http://jurist.org/feature/featured/same-sex-marriage/detail.php> (last visited Jan. 25, 2015), *archived at* <http://perma.cc/VRG4-GKEH>.

2. See Germaine Winnick Willett, Note, *Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate*, 73 IND. L.J. 355, 355 (1997). This in no way suggests a criticism of those sources that focus only on the major arguments. Rather, its purpose is to show that other secondary, but important, arguments are relevant to the debate.

3. THOMAS C. GALLIGAN ET AL., TORT LAW: CASES, PERSPECTIVES, AND PROBLEMS 6 (Lexis Nexis ed., 4th ed. 2007) (quoting BAILEY KULIN & JEFFREY W. STEMPEL, FOUNDATION OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER 29 (1994)).

4. See Richard Florida, *The Rise of the Creative Class*, WASH. MONTHLY (May 2002), <http://www.washingtonmonthly.com/features/2001/0205.florida.html>, *archived at* <http://perma.cc/UR9H-NPEH>; see also Xinxiang Chen, *Tolerance and Economic Performance in American Metropolitan Areas: An Empirical Investigation*, 26 SOC. F. 71, 76 (2011) (discussing the effects of tolerance and diversity on the economic performance of United States metropolitan areas).

5. Chen, *supra* note 4, at 72, 76.

state's economic vitality, it plays a key role in helping states progress in the economic development race.⁶ Additionally, many states have realized tangible economic benefits from legalizing same-sex marriage due to increases in tax revenues and decreases in public assistance expenditures.⁷ Yet, despite these findings, many states still lack several forms of positive LGBT legislation.⁸

The United States Supreme Court's landmark decision in *United States v. Windsor*⁹ marked a shift in the federal government's attitude towards LGBT persons, at least in terms of federal tax and benefits laws.¹⁰ This decision diverged from the anti-LGBT legislation attitudes maintained by many states.¹¹ While the ruling does not create a constitutional right to same-sex marriage, it does guarantee certain federal benefits to legally married same-sex couples even in those states that do not recognize same-sex marriage.¹² Notwithstanding the *Windsor* decision, states still possess the ultimate right to grant or deny same-sex marriage, and a host of other LGBT protections.¹³

States resisting pro-LGBT legislation now have a choice: either follow the example of the United States Supreme Court and shift legislative attitudes towards LGBT persons, or continue to resist and face economic repercussions.¹⁴

6. Florida, *supra* note 4.

7. See *infra* Part II.B (discussing the economic benefits of legalizing same-sex marriage within a state).

8. See *State by State LGBT Legislation*, AM. MED. STUDENT ASS'N, <http://www.amsa.org/AMSA/Homepage/About/Committees/GenderandSexuality/StatebyStateLGBTLegislation.aspx> (last visited Sept. 28, 2013), archived at <http://perma.cc/B5M6-LGWM> (documenting LGBT legislation by state in 2008); see also *In Your State*, LAMBDA LEGAL, <http://www.lambdalegal.org/states-regions/?gclid=COTKuLf77rkCFbFDMgoddIwAyA> (last visited Sept. 28, 2013), archived at <http://perma.cc/CFF9-N5WE> (documenting LGBT rights and protections by state in 2013).

9. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

10. See *Supreme Court Strikes DOMA, Dismisses Proposition 8 Appeal*, JURIST (June 26, 2013), <http://jurist.org/paperchase/2013/06/supreme-court-strikes-doma-dismisses-proposition-8-appeal.php>, archived at <http://perma.cc/2JR2-CK3U> [hereinafter *Supreme Court Strikes DOMA*] (discussing the impact of striking the Defense of Marriage Act on federal marriage benefits).

11. See *In Your State*, *supra* note 8 (documenting LGBT rights and protections by state in 2013).

12. See *Supreme Court Strikes DOMA*, *supra* note 10 (discussing the impact of striking the Defense of Marriage Act on federal marriage benefits).

13. Marci A. Hamilton, *How to Read United States v. Windsor to Understand What Gay Couples Won This Week, But Why They Still Have a Long Way to Go*, VERDICT (June 28, 2013), <http://verdict.justia.com/2013/06/28/how-to-read-united-states-v-windsor-to-understand-what-gay-couples-won-this-week-but-why-they-still-have-a-long-way-to-go>, archived at <http://perma.cc/RK94-R2Z6>.

14. David Osborne, *Republicans Face Sinking Support if They Continue to Resist Gay Marriage*, INDEPENDENT (Nov. 6, 2013), <http://www.independent.co.uk/voices/comment/republicans-face-sinking-support-if-they-continue-to-resist-gay-marriage-8925125.html>, archived at <http://perma.cc/FH58-BGH2>.

Many states continue to resist accepting pro-LGBT legislation for morality or religious purposes,¹⁵ and it is unlikely that the equality argument posed by LGBT supporters will persuade those states to adopt pro-LGBT legislation.¹⁶ However, the question remains whether reframing the argument in economic terms would persuade states on the margins.¹⁷

This Note explores the impact of LGBT legislation on a state's economy, arguing that a refusal to pass positive LGBT legislation can have a negative economic impact on a state's coffers and its ability to attract economic investment.¹⁸ Ultimately, this Note discusses two ways in which passing LGBT legislation can benefit or harm states.

First, states that have legalized same-sex marriage have benefited economically due to tax revenues earned from increases in weddings and various other types of expenditures within the state.¹⁹ In contrast, states that have not legalized same-sex marriage suffer from unrealized gains as same-sex couples within the state have traveled to neighboring states to get married, to vacation, or even to live permanently.²⁰ For example, although Illinois legalized same-sex marriage in November 2013 and is estimated to enjoy a positive budgetary impact of \$103.2 million in the first three years after legalization, the state lost some of this benefit to neighboring state, Iowa, which legalized same-sex marriage in 2009.²¹

Second, passing, or refusing to pass, LGBT legislation can impact a state's economic development.²² As states continue to legalize same-sex marriage and pass other forms of positive LGBT legislation, companies and individuals will have more options when choosing where to invest and live. "Today, ninety-eight of the Fortune 100 companies have policies that prohibit discrimination based on sexual orientation and seventy-nine of those companies offer domestic partner

15. Willett, *supra* note 2, at 374.

16. See Jerome Nathaniel, *Gay Marriage Is Good for the Economy: It Increases Government Revenue and Creates Jobs*, POLICYMIC, <http://www.policymic.com/articles/12022/gay-marriage-is-good-for-the-economy-it-increases-government-revenue-and-creates-jobs> (last visited Sept. 28, 2013), *archived at* <http://perma.cc/U5S7-XEKF> (discussing why the clash between politics and religion makes states less likely to follow in the footsteps of those states supporting marriage equality).

17. *Id.*

18. See *infra* Part III (discussing recommendations for states in order to avoid potential economic losses).

19. See *infra* Part II.B (discussing the economic benefits of legalizing same-sex marriage).

20. See Victoria Stilwell et al., *Gay Marriage Shows States Luring Discriminated Couples*, BLOOMBERG (Aug. 14, 2013), <http://www.bloomberg.com/news/2013-08-14/gay-marriage-shows-states-luring-discriminated-couples-economy.html>, *archived at* <http://perma.cc/RLL6-N4PA> (discussing Illinois's economic loss from failing to legalize same-sex marriage).

21. *Id.*

22. See *infra* Part III (discussing how failing to enact pro-LGBT legislation could negatively impact a state's ability to attract economic investment).

health benefits to employees with a same-sex partner or spouse.”²³ This suggests that, if given the choice, most top companies would choose to invest in states where its corporate beliefs and employees are most respected. Consequently, states lacking inclusive LGBT policies will miss out on valuable investment.²⁴ For example, executives of large Fortune-500 companies like Facebook have expressed hesitancy toward investing in states lacking pro-LGBT legislation.²⁵

More important than the amount of investment a state can attract, however, is the type of investment that a state can attract.²⁶ “Creative class” jobs generate significantly more wealth than traditional manufacturing or service class jobs.²⁷ High-technology firms, and other types of firms generating these creative jobs, require a well-educated, diverse workforce in order to function.²⁸ Therefore, states should focus on attracting a diverse mix of persons in order to fulfill these human capital needs, and one way a state can achieve this is by enacting positive LGBT legislation.²⁹

States refusing to enact pro-LGBT legislation will suffer economically in the future.³⁰ Given these negative economic implications, states should not pass constitutional amendments defining marriage. Constitutional amendments take too long to change and in these difficult economic times, states cannot afford to have inflexible laws.³¹

Part I of this Note focuses on the evolution of LGBT legislation, on both federal and state levels, to demonstrate the correlation between inclusive policies

23. M.V. LEE BADGETT & GARY J. GATES, THE EFFECT OF MARRIAGE EQUALITY AND DOMESTIC PARTNERSHIP ON BUSINESS AND THE ECONOMY 2 (2006), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Gates-MarriageEqualityontheEconomy-Oct-2006.pdf>, *archived at* <http://perma.cc/A9UR-DVG4>.

24. *See* Stilwell et al., *supra* note 20 (discussing how Facebook’s CEO has expressed hesitancy towards investing in states which do not share Facebook’s pro-LGBT stance).

25. *Id.*

26. *See infra* Part II.C (discussing the difference in wealth creation between manufacturing jobs and “Creative Class” jobs).

27. *See* Richard Florida, *Class-Divided Cities: Atlanta Edition*, ATLANTIC (Feb. 21, 2013), <http://www.theatlanticcities.com/neighborhoods/2013/02/class-divided-cities-atlanta-edition/4613/>, *archived at* <http://perma.cc/Q93N-THCR> (Florida defines the “creative class” as “people who work in science and technology, business and management, arts, culture, media, and entertainment, law and healthcare professions”); *see also* RICHARD FLORIDA, THE RISE OF THE CREATIVE CLASS REVISITED 1, 42 (10th Anniversary ed. 2012) (discussing the income discrepancies amongst the creative, working, and service classes).

28. *Business, Law Experts Weigh in on Effects of Legalizing Same-sex Marriage*, UCLA TODAY, <http://newsroom.ucla.edu/stories/business-law-experts-weigh-in-90498> (last visited Jan. 22, 2014), *archived at* <http://perma.cc/768M-KS43>.

29. *See infra* Part II.A (discussing the benefits of enacting pro-LGBT legislation on a state’s human capital needs).

30. *See infra* Part III (recommending that states enact pro-LGBT legislation in order to avoid potentially negative economic consequences).

31. *See infra* Part III.B (discussing the inflexibility of state amendment processes).

and economic vitality. Part II introduces economic studies presenting empirical data supporting the correlation between pro-LGBT legislation and economic performance, and also highlights success stories from other states. Additionally, Part II presents a case study of LGBT legislation and Indiana's economy. Part III examines the competitive nature of the economic development race and argues that a state should not amend its constitution to define marriage, because such amendments create significant barriers to changing a state's law when it becomes necessary due to a shift in public opinion. Additionally, it encourages states to adopt pro-LGBT legislation to improve economic vitality and investment prospects.

I. LEGAL FRAMEWORK OF LGBT LEGISLATION IN THE UNITED STATES

Before analyzing the economic impact of LGBT legislation, an understanding of the evolution of LGBT legislation on the state-level is vital to determine which states are benefitting economically from its early adoption. Economic studies suggest the states that enacted positive LGBT legislation the earliest, creating a tolerant and diverse environment early on, are the same states leading the way in talent distribution and overall economic performance today.³² To illustrate, cities that ranked highly in tolerance in the early 1990s continue to rank highly in tolerance and diversity today, and such levels of openness positively affect current talent distribution.³³ Talent distribution strongly reflects income disparities in United States cities, and it is an important indicator of a region's economic vitality and potential growth.³⁴

A good example of this theory is portrayed through the success of Massachusetts, a state that has consistently maintained a progressive attitude towards LGBT rights.³⁵ Today, Massachusetts ranks second in the United States by per capita income, and the Boston metropolitan area ranks third for overall creativity by United States metropolitan area.³⁶ Today, twelve of the top twenty most-gay friendly regions rank among the top twenty regions for high-tech growth, reaffirming this close association between tolerance and economic vitality.³⁷

Richard Florida, an urban studies theorist at the University of Toronto,

32. FLORIDA, *supra* note 27, at 237; *see also* Chen, *supra* note 4, at 73 (testing Florida's original theory and finding the same results).

33. Chen, *supra* note 4, at 77.

34. *Id.* at 72.

35. *See* GARY J. GATES, MARRIAGE EQUALITY AND THE CREATIVE CLASS 1, 3 (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-MA-Creative-Class-May-2009.pdf>, archived at <http://perma.cc/2Q83-XKP8> (discussing Massachusetts' long history of being at the forefront of LGBT rights).

36. *Per Capita Personal Income by State*, BUREAU OF BUS. & ECON. RESEARCH (Apr. 2, 2013), <http://bber.unm.edu/econ/us-pci.htm>, archived at <http://perma.cc/8DS2-VDRG>; FLORIDA, *supra* note 27, at Table A1.

37. FLORIDA, *supra* note 27, at 237.

explains this phenomenon stating, “[I]t’s important for a place to have low entry barriers for people—that is, to be a place where newcomers are accepted quickly into all sorts of social and economic arrangements.”³⁸ Florida further asserts that “[s]uch places gain a creativity advantage. All else being equal, they are likely to attract and retain the sorts of people who power innovation and growth.”³⁹ Therefore, a discussion of the evolution of LGBT legislation is essential to understand why some states are outperforming others economically today.

A. Evolution of LGBT Legislation

The formation of American cities in the late nineteenth and early twentieth centuries fostered the first communities of like-minded LGBT people and led to the communities’ desire for recognition and rights codified in the law.⁴⁰ The first gay organization, the Society for Human Rights, formed in Chicago in 1924 to address this need for recognition and positive gay legislation.⁴¹ However, as more pro-gay organizations formed, opposition to the movement formed as well, and in 1953, President Dwight Eisenhower enacted legislation making homosexuality a fire-able offense from federal positions.⁴² Despite this negative federal legislation, Illinois repealed its sodomy laws in 1962 and became the first state to decriminalize homosexuality.⁴³

Despite LGBT persons banding together and protesting discriminatory laws through the 1969 Stonewall riots, the 1970s and 1980s saw little legislative progress for LGBT rights.⁴⁴ However, the LGBT rights movement did experience some victories. For example, San Francisco City Supervisor Harvey Milk helped pass the Gay Rights Bill, which provided equal rights for gay persons living in San Francisco.⁴⁵ Further, in the early 1980s, Wisconsin passed the first state law

38. *Id.* at 234.

39. *Id.*

40. Talal Al-Khatib, *Gays and the Law: A Bumpy History*, DISCOVERY NEWS (June 26, 2013, 10:40 AM), <http://news.discovery.com/history/us-history/gay-america-united-states-history-20130326.htm>, archived at <http://perma.cc/S7RH-T7ER>.

41. *Id.*

42. *Id.*; see also Joel Engardio, *How Eisenhower’s Ban on Gays Backfired*, USA TODAY (May 20, 2013), <http://www.usatoday.com/story/opinion/2013/05/20/gay-bashing-like-ike-column/2343963/>, archived at <http://perma.cc/Z3ZW-ZC34>.

43. *Timeline: Milestones in the American Gay Rights Movement*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/> (last visited Apr. 26, 2015), archived at <http://perma.cc/6F82-7XDE>.

44. See *American Experience: Stonewall Uprising*, PBS, <http://www.pbs.org/wgbh/americanexperience/films/stonewall/player/> (last visited Apr. 26, 2015), archived at <http://perma.cc/ZB3M-LANW> (indicating that the Stonewall riots, violent demonstrations in New York City protesting police brutality against LGBT persons, marked a major turning point in the modern gay civil rights movement in the United States).

45. See *The Life of Harvey Milk*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/sites/default/files/pdfs/lgbt/schoolsand youth/ramona_milk_presentation.pdf (last visited Apr. 26, 2015),

prohibiting sexual orientation discrimination.⁴⁶ Today, both San Francisco, California and Madison, Wisconsin rank among the top twenty metropolitan areas for high-tech growth and innovation.⁴⁷

The early 1990s saw both positive and negative LGBT legislation enacted at the federal level.⁴⁸ Additionally, a battle for marriage equality began playing out in state court systems.⁴⁹ In 1993, the Supreme Court of Hawaii decided *Baehr v. Lewin*, a case challenging the constitutionality of Hawaii's marriage statute, which restricted the marital relation between a man and a woman.⁵⁰ The court applied "strict scrutiny" to the state statute, remanded the case to the circuit court, and required the State of Hawaii to show compelling state interests to justify the statute.⁵¹ The State could not do so, and the circuit court ruled the statute unconstitutional.⁵² Although the State appealed the court's decision, the appeal was unnecessary because the Hawaiian legislature passed a state constitutional amendment reserving the right to define marriage to the legislature, thus reinstating the statute as constitutional.⁵³

The results of *Baehr* caused a domino effect of state and federal legislation. Before 1993, only seven states prohibited same-sex marriage, but "[w]ithin five years . . . twenty-six additional states passed either a statute or constitutional amendment barring same-sex marriage. Additionally, the United States Congress passed the Defense of Marriage Act of 1996 defining marriage as the union of a male and a female."⁵⁴

Attitudes towards LGBT rights began to change in the early twenty-first century.⁵⁵ In 2000, Vermont became the first state to legalize civil unions, and

archived at <http://perma.cc/8NZ2-MFFX> (citing San Francisco City Supervisor Harvey Milk's success in passing the *Gay Rights Bill* which provided gay persons the same rights as any other person).

46. See William B. Turner, Note, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN'S L.J. 91, 91-92 (2007) (noting that in the early 1980s, Wisconsin passed the first state law prohibiting sexual orientation discrimination).

47. FLORIDA, *supra* note 27, at 232.

48. See *Timeline: Milestones in the American Gay Rights Movement*, *supra* note 43 (noting that President George Bush signed the Ryan White Care Act into law in 1990 which provided federal funding for people living with AIDS; however, in 1993 the Department of Defense adopted "Don't Ask, Don't Tell," a policy preventing openly gay persons from serving in the military).

49. See Melissa B. Neely, Note, *Indiana Proposed Defense of Marriage Amendment: What Will It Do and Why Is It Needed?*, 41 IND. L. REV. 245, 247-248 (2008) (discussing *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993)).

50. *Baehr*, 852 P.2d at 47-49.

51. *Id.* at 68.

52. Neely, *supra* note 49, at 247.

53. *Id.* at 247-48.

54. See *id.* at 248 (stating that "[i]n the aftermath of *Baehr*, a virtual flood of state legislation occurred throughout the United States").

55. See Al-Khatib, *supra* note 40 (noting that the gay marriage movement "hit its stride in

in 2004, Massachusetts became the first state to legalize gay marriage.⁵⁶ Like San Francisco and Madison, Boston, Massachusetts and Burlington, Vermont currently rank among the top twenty metropolitan areas for high-tech growth and innovation.⁵⁷

Additionally, in 2000, the United States Supreme Court held that state sodomy laws are unconstitutional in *Lawrence v. Texas*.⁵⁸ Despite these increases in pro-LGBT legislation and judicial decisions, California voters approved Proposition 8, making same-sex marriage in California illegal in 2008.⁵⁹ However, two same-sex couples challenged the law, and the trial court ruled Proposition 8 unconstitutional.⁶⁰ In June 2013, the United States Supreme Court dismissed an appeal brought by proponents of Proposition 8 and reaffirmed the right of LGBT persons to marry in California.⁶¹

On that same day, in *United States v. Windsor*, the United States Supreme Court struck down section three of the Defense of Marriage Act (DOMA) as unconstitutional.⁶² The Court's decision extended federal tax and benefit laws to legally married same-sex couples.⁶³ However, despite the *Windsor* decision, states possess the ultimate right to grant or deny same-sex marriage, and a host of other LGBT protections.⁶⁴

B. Types of LGBT Laws and Protections

Although some metropolitan areas in the early 1990s were considered more open or tolerant than others, same-sex marriage was illegal everywhere in the United States, and this perception of openness did not involve marriage equality legislation.⁶⁵ Instead, such places were considered more tolerant due to the existence of other types of positive LGBT legislation, which guaranteed rights and benefits to LGBT people that were not available elsewhere.⁶⁶

While there are over 1000 benefits, rights, and protections provided on the

the United States in the 21st century").

56. *Timeline: Milestones in the American Gay Rights Movement*, *supra* note 43.

57. FLORIDA, *supra* note 27, at 232.

58. *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003).

59. *Timeline: Milestones in the American Gay Rights Movement*, *supra* note 43.

60. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010).

61. Bill Mears, *Supreme Court Dismisses California's Proposition 8 Appeal*, CNN POLITICS (June 27, 2013, 8:27 AM), <http://www.cnn.com/2013/06/26/politics/scotus-prop-8/index.html>, archived at <http://perma.cc/7SX3-9YET>.

62. *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

63. *See Supreme Court Strikes DOMA*, *supra* note 10 (discussing the impact of striking the Defense of Marriage Act on federal marriage benefits).

64. Hamilton, *supra* note 13.

65. *See GATES*, *supra* note 35, at 3 (Massachusetts was the first state to legalize same-sex marriage in 2004).

66. *See id.* (discussing how states such as Massachusetts and Wisconsin enacted early pro-LGBT legislation despite not extending the right to marry to same-sex couples).

basis of marital status in federal law, DOMA is not the only type of legislation benefiting or hurting same-sex individuals.⁶⁷ Today, just as in the late twentieth century, states vary significantly on the number of rights and protections they have extended to LGBT persons.⁶⁸

While same-sex marriage is the most widely publicized right either granted or denied to same-sex persons, several other categories of rights and protections exist as well. Medical rights, such as allowing people the right to visit their same-sex partner in the hospital or make decisions on their behalf, do not exist in the majority of states in the Midwest and Southeast.⁶⁹ Additionally, while all states allow a single LGBT person to petition for child adoption, less than half allow same-sex couples to file jointly, and the law is unclear in many states as to whether a LGBT person can file a petition to adopt their partner's child.⁷⁰

Discrimination in employment and housing also varies significantly by state. While the federal government prohibits federal housing programs from discriminating on the basis of sexual orientation or gender, less than half of the states prohibit this type of discrimination on the state level.⁷¹ Further, the majority of states in the Northeast and Northwest protect workers against discrimination on the basis of both gender identity and sexual orientation;⁷² Pennsylvania, Arizona and Utah are the only states in these regions that protect against neither.⁷³ But in the Midwest, only about a third of the states provide any protection, with only three states, Minnesota, Iowa, and Illinois, extending protection in both areas.⁷⁴ Similarly, only two states in the Northwest extend protection to both groups, and the Southeast has no laws protecting against discrimination based either on gender identity or sexual orientation.⁷⁵

Most states have statutes addressing discrimination and bullying in schools, but only in the Northeast region do all states, apart from Pennsylvania, have legislation that specifically addresses both sexual orientation and gender identity.⁷⁶ In the same vein, only thirty states prohibit hate crimes based on sexual orientation, and only sixteen of these states prohibit hate crimes based on

67. Letter from Dayna K. Shah, Assoc. Gen. Counsel of U.S. Gen. Accounting Office, to Bill Frist, U.S. Senator (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>, archived at <http://perma.cc/F7KF-729M>.

68. See *In Your State*, *supra* note 8 (discussing different types of pro-LGBT legislation including workplace discrimination laws, anti-bullying laws, adoption laws and other types of relationship recognition).

69. *Gay Rights in the US, State by State*, GUARDIAN (May 8, 2012), <http://www.theguardian.com/world/interactive/2012/may/08/gay-rights-united-states>, archived at <http://perma.cc/5KPW-HMV8>.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *In Your State*, *supra* note 8.

75. *Gay Rights in the US, State by State*, *supra* note 69.

76. *In Your State*, *supra* note 8.

gender identity.⁷⁷

Although many states refuse to legalize same-sex marriage for religious or morality purposes, there are many other areas in which states could modernize LGBT legislation besides marriage equality.⁷⁸ The question remains, however, whether any incentives exist for states to pass these varying types of LGBT legislation.

II. THE ECONOMICS OF TOLERANCE

A. Economists' Perspectives

Economists and social scientists began seriously studying the economic impact of LGBT tolerance in the late twentieth and early twenty-first centuries.⁷⁹ Richard Florida, an economist and Professor of Regional Economic Development at the University of Toronto, discussed his findings in this area in his book *The Rise of the Creative Class*.⁸⁰

Florida first started his line of research after recognizing that talented young persons were leaving Pittsburgh at astounding rates after college, despite the world-class universities, Fortune-500 companies, and other amenities available within the city limits.⁸¹ Florida's research led him to develop the "Creative Capital Theory" which postulates that "regional economic growth is driven by the location choices of creative people—the holders of creative capital—who prefer places that are diverse, tolerant and open to new ideas."⁸² Said differently, Florida surmised that the key to a region's economic growth is its ability to attract creative people, and creative people are primarily drawn to open and tolerant communities.⁸³ While Florida does not limit his definition of diversity solely to LGBT persons, he does believe LGBT inclusiveness is a strong measure of diversity because "lack of societal acceptance of gays is the most significant remaining bastion of intolerance and discrimination around the world. Accordingly, places that accept gays are also likely to be accepting of all different types of people."⁸⁴

Florida suggests that a place's ability to develop the three T's of economic

77. *Id.*

78. Willett, *supra* note 2, at 383.

79. Florida, *supra* note 4; *see also* Chen, *supra* note 4, at 76.

80. RICHARD FLORIDA, *THE RISE OF THE CREATIVE CLASS* (paperback ed. 2004); *see also* FLORIDA, *supra* note 27, at 237 (discussing the updated version of Florida's original research).

81. FLORIDA, *supra* note 80, at 216.

82. *Id.* at 223.

83. *Id.* at 226. Florida was not the first economist to recognize the importance of attracting creative people for spurring economic growth. In 1984, Jane Jacobs proposed this theory in her book, *Cities and the Wealth of Nations*. *See* Zach Fairlie, *Economic Development Strategy: The Creative Capital Theory*, UNIBUSINESS UNIV. N. IOWA 1-3 (2012), available at <http://business.uni.edu/economics/Themes/fairlie.pdf> (discussing Jacobs' pioneering research in this area).

84. FLORIDA, *supra* note 27, at 239.

development, Technology, Talent, and Tolerance, plays a significant role in attracting creative people, generating innovation, and stimulating economic growth.⁸⁵ Using this theory, Florida was able to demonstrate why cities with high-technology infrastructure (T1) and world-class research universities (T2) were still falling behind in the economic development race due to lack of diversity and tolerance (T3).⁸⁶

However, it is important to note that despite finding a correlation between tolerance and economic growth, correlation is not causation.⁸⁷ As Florida states, tolerance is not the only factor contributing to a location's ability to attract economic investment.⁸⁸ "The key to success today lies in developing a world-class *people climate*," and this Note discusses but one aspect of improving that people climate: modernizing LGBT legislation to create tolerant and diverse communities.⁸⁹

Additionally, this Note does not assume that a state's wealth is solely dependent on its past and current ability to attract economic investment. The vast wealth divide between the Northeast and South is the product of a number of factors including, but not limited to, the historical development of a merchant economy in the North and an agrarian economy in the South.⁹⁰ So, despite this Note's discussion of economic differences resulting from open and diverse policies, it in no way assumes that early adoption of LGBT legislation led to such differences.⁹¹ This Note simply contends that such policies have contributed to a state's ability to attract investment and human capital.⁹²

Some critics argue Florida's model is not as far-reaching or necessary as he claims, and that the model has its limitations.⁹³ Nevertheless, a reexamination of

85. FLORIDA, *supra* note 80, at 249.

86. *See id.* at 304-14 (discussing why Pittsburgh lags behind many other large cities in the economic development race despite possessing amenities traditionally thought to attract investment).

87. *See* John Oakes, *Causation Versus Correlation*, GROSSMONT, <http://www.grossmont.edu/johnoakes/s110online/Causation%20versus%20Correlation.pdf> (last visited Oct. 7, 2013) (discussing the difference between causation and correlation, stating that correlation only means there is a relationship between two or more things which can be described mathematically; in contrast, causation means "cause and effect" or one event occurs because of the other).

88. *See* FLORIDA, *supra* note 80, at 293.

89. *Id.* (emphasis original).

90. *See* Dain Fitzgerald, *Huge Income Gap Between Poor South and Rich Northeast*, POLITIX (Sep. 20, 2012), <http://politix.topix.com/story/2192-huge-income-gap-between-poor-south-and-rich-northeast>, archived at <http://perma.cc/YE46-3HTS> (discussing the income gap between the Northern and Southern parts of the United States).

91. *See supra* Part II.A (discussing the economic differences observed by economists due in part to the varying levels of diversity amongst United States cities).

92. *See supra* Part II.A

93. *See, e.g.,* Fairlie, *supra* note 83, at 11-12 (noting that Florida's capital theory strategy may not be right for every area); *see also* Joel Kotkin, *Richard Florida Concedes the Limits of the Creative Class*, DAILY BEAST (Mar. 20, 2013, 4:45 AM), <http://www.thedailybeast.com/articles/>

Florida's theory again supports his idea that tolerance, and tolerance-based diversity, do impact a region's economic vitality.⁹⁴ Further, anecdotal evidence supports Florida's theory that tolerance is important for attracting investment and talent.⁹⁵

Nevertheless, during the DOMA debate in the early 1990s, "members of Congress openly expressed concerns that new marriages would have an adverse effect on the federal budget, [because] gay couples would qualify for, among other things, social security survivor benefits and employment benefits provided to spouses."⁹⁶ Therefore, the next section explores the economic impact of LGBT legislation on states' budgets.

B. Economic Indicators on the Federal and State Level

At the height of the DOMA debate in the early 1990s members of Congress argued that marriage equality would have a negative economic impact on the federal budget.⁹⁷ Several studies have taken up this question and analyzed the impact of legalizing same-sex marriage on both the federal and various states' budgets.⁹⁸ While legalizing same-sex marriage is not the only right or protection that state governments may extend to LGBT persons, it has received the most attention and, therefore, the majority of these studies focus on the impact of extending marriage to same-sex couples.⁹⁹

On the federal level, the Congressional Budget Office performed a study that found that if the right to marry was extended to same-sex couples in all fifty states, the legislation would increase federal assets by almost \$1 billion per year. The majority of this revenue would result from decreased spending on public assistance programs and increased spending on weddings, resulting in higher-volume sales tax revenues.¹⁰⁰ However, federal DOMA is no longer in existence

2013/03/20/richard-florida-concedes-the-limits-of-the-creative-class.html, *archived at* <http://perma.cc/G27F-WUL2> (discussing the limitations of Florida's "Creative Capital Theory" in respect to "trickle down" economics, the idea that tax breaks or other economic benefits provided to businesses will benefit lower income members of that society because the economy will improve as a whole).

94. See Chen, *supra* note 4, at 72 (supporting Florida's theory and arguing that "tolerance and tolerance-based diversity in metropolitan areas affect the distribution of talent, thereby indirectly affecting the difference in income per capita across U.S. metropolitan areas").

95. See *infra* Part III.B (discussing anecdotal evidence which suggests that anti-LGBT policies have a negative impact on attracting economic investment and talent).

96. M.V. Lee Badgett & R. Bradley Sears, *Putting a Price on Equality? The Impact of Same-Sex Marriage on California's Budget*, 16 STAN. L. & POL'Y REV. 197, 199 (2005).

97. *Id.*

98. E.G. Fitzgerald et al., *Economic Impact Reports*, WILLIAMS INSTITUTE, <http://williamsinstitute.law.ucla.edu/category/research/economic-impact-reports/> (last visited Oct. 23, 2013), *archived at* <http://perma.cc/W72N-G8YH>.

99. *Id.*

100. BADGETT & GATES, *supra* note 23, at 5.

and same-sex couples now receive the same federal benefits as heterosexual couples.¹⁰¹ But this is not true at the state-level, and therefore, the question remains: what impact, if any, does positive LGBT legislation have on state economies?

Legalizing same-sex marriage can have a significant impact on a state's economy in areas including, but not limited to, tax revenues, public welfare programs, and job creation.¹⁰² State specific impact was analyzed in a series of studies performed by various economists via the Williams Institute.¹⁰³ A sampling of these findings is detailed below.

In a highly populated state, like California, legalizing same-sex marriage has a significant economic impact. Although same-sex marriage in California remained in limbo until recently, the United States Supreme Court dismissed a lawsuit brought by proponents of Proposition 8 and effectively legalized same-sex marriage in the state for good.¹⁰⁴ Legalizing same-sex marriage has both positive and negative effects on a state's economy.¹⁰⁵ For example, marriage equality opponents have long pointed to the loss of income tax revenue that would result from legalizing same-sex marriage.¹⁰⁶ In California, this theory holds true, as economists project a loss of \$8 million in income tax revenue as a result of marriage equality.¹⁰⁷

Despite this negative tax revenue implication, economists project that legalizing same-sex marriage would have several positive effects on California's economy as well. For example, as a result of increased spending on weddings and tourism, among other things, extending marriage to same-sex couples could increase government revenues by over \$63.8 million.¹⁰⁸

Additionally, California accounts for one-third of America's welfare

101. See *Supreme Court Strikes DOMA*, *supra* note 10 (discussing the impact of striking the Defense of Marriage Act on federal marriage benefits).

102. BADGETT & GATES, *supra* note 23, at 2-3, 5.

103. *Id.* at 7-8.

104. Mears, *supra* note 61.

105. Dr. M.V. Badgett, Testimony to the California State Senate Revenue and Taxation Committee (April 26, 2006) (transcript available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Testimony-California-State-Senate-Revenue-Taxation-Committee-April-2006.pdf>), archived at <http://perma.cc/D83P-2E38> [hereinafter Testimony by Dr. M.V. Lee Badgett].

106. See *7 Tax Advantages of Getting Married*, TURBOTAX (2013), <https://turbotax.intuit.com/tax-tools/tax-tips/Family/7-Tax-Advantages-of-Getting-Married-/INF17870.html>, archived at <http://perma.cc/26LX-8T9B> ("Marriage can help reduce the tax burden for married couples who file jointly").

107. Testimony by Dr. M.V. Lee Badgett, *supra* note 105.

108. BRAD SEARS & M.V. LEE BADGETT, THE IMPACT OF EXTENDING MARRIAGE TO SAME-SEX COUPLES ON THE CALIFORNIA BUDGET 1 (2008), available at <http://williamsinstitute.la.w.ucla.edu/wp-content/uploads/Sears-Badgett-EconImpact-CA-Marriage-June-2008.pdf>, archived at <http://perma.cc/2TZJ-UT5D>.

recipients, although it only accounts for one-eighth of the population.¹⁰⁹ LGBT people are more likely to receive certain types of public assistance from government programs intended to support low-income persons.¹¹⁰ This is because LGBT persons sometimes have greater difficulty finding jobs, same-sex spouses do not receive the same corporate benefits, and LGBT persons tend to receive less financial assistance from family members or friends.¹¹¹ Therefore, it is no surprise that legalizing same-sex marriage would have a positive impact on public assistance spending, because states can count the newly married couple's pooled income and assets for determining eligibility for public assistance programs.¹¹² Given these factors, legalizing same-sex marriage could lead to a significant decrease in public assistance spending within a state.¹¹³

For other highly populated states, where significant decreases in public assistance spending and increases in tax revenues are likely, the results are similar. A 2012 report indicated that marriage equality generated \$259 million in the year following passage of New York's Marriage Equality Act in New York City alone.¹¹⁴ Further, economists project that Illinois would benefit from \$54 to \$103 million in new spending in the first three years after same-sex marriage is legalized, with state and local economies enjoying an economic boost of \$66 million in the first year alone.¹¹⁵ Additionally, Illinois state tax revenues were projected to increase by \$8.5 million.¹¹⁶

109. Nash Keune, *California: America's Welfare Queen*, NAT'L REVIEW ONLINE (June 12, 2012, 4:00 AM), <http://www.nationalreview.com/articles/302148/california-america-s-welfare-queen-nash-keune>, archived at <http://perma.cc/TB44-NQTY>.

110. RANDY ALBELDA ET AL., POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY i-iii (2009), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Albelda-Badgett-Schneebaum-Gates-LGB-Poverty-Report-March-2009.pdf>, archived at <http://perma.cc/KXP5-NYYK>.

111. *Id.*

112. See M.V. LEE BADGETT & R. BRADLEY SEARS, COUNTING ON COUPLES 2 (2005), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Badgett-Curtis-Kukura-CT-CountingOnCouples-Mar-2005.pdf>, archived at <http://perma.cc/CE9T-7RZU> (discussing why state expenditures on public benefit programs will fall if a state legalizes same-sex marriage because "public assistance programs can count the spouse's income and assets in assessing eligibility for state health and income assistance programs").

113. *Id.*

114. *New York Gay Marriage Generated \$259 Million in Economic Impact for NYC, According to Report*, HUFFINGTON POST (July 24, 2012), http://www.huffingtonpost.com/2012/07/24/new-york-same-sex-marriage-million-economic-impact_n_1699089.html, archived at <http://perma.cc/9KYL-JYG8>.

115. The majority of this revenue would likely result from higher-volume tax revenues due to an increase in wedding spending within the state. ANGELIKI KASTANIS & M.V. LEE BADGETT, ESTIMATING THE ECONOMIC BOOST OF MARRIAGE EQUALITY IN ILLINOIS 1 (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/IL-Econ-Impact-Mar-2013.pdf>, archived at <http://perma.cc/W36B-8YNL>.

116. *Id.*

States with smaller populations would also see a boost, but on a lesser scale, given that fewer LGBT persons live within the state.¹¹⁷ For example, same-sex marriage was legalized in Iowa in 2009 when the Iowa Supreme Court struck down a state law banning same-sex marriage.¹¹⁸ In the first two years after legalization, Iowa enjoyed an increase in spending of \$12 to \$13 million and almost \$1 million in additional tax revenue to the state.¹¹⁹ In total, 2099 same-sex couples married in Iowa the first year after legalization.¹²⁰

The impact of legalizing same-sex marriage in states with larger LGBT populations could be even greater.¹²¹ Approximately 10,200 same-sex couples live in Indiana, and based off of patterns in other states, studies project that fifty percent of these couples, or 5100, would marry if extended the right.¹²² Therefore, legalizing same-sex marriage in Indiana could increase spending in the wedding industry alone by over \$30 million.¹²³

The impact in the less-populated New England states may appear nominal, but proportionally is quite significant.¹²⁴ For example, before same-sex marriage was legalized in Connecticut, studies projected a positive impact of \$3.1 million on the state budget.¹²⁵ However, even more significant is the projection that Connecticut would save \$11.2 million on public assistance savings alone.¹²⁶ Further, in Hawaii, a state with significant tourism, legalizing same-sex marriage could boost spending by \$217 million in the first three years after legalization.¹²⁷

117. See GARY J. GATES & FRANK NEWPORT, GALLUP SPECIAL REPORT: NEW ESTIMATES OF THE LGBT POPULATION IN THE UNITED STATES (2013), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/gallup-lgbt-pop-feb-2013/>, archived at <http://perma.cc/EHH8-7SFC> (discussing the difference in LGBT populations by state).

118. *Same Sex Marriage Fast Facts*, CNN U.S. (Oct. 22, 2013, 6:34 AM), <http://www.cnn.com/2013/05/28/us/same-sex-marriage-fast-facts/index.html>, archived at <http://perma.cc/EP6P-HDCJ>.

119. Elizabeth Hartfield, *Gay Marriage Has Boosted Iowa's Economy, Study Concludes*, ABC NEWS (Dec. 8, 2011), <http://abcnews.go.com/blogs/politics/2011/12/gay-marriage-has-boosted-iowas-economy-study-concludes/>, archived at <http://perma.cc/YGB9-EFXZ>.

120. ANGELIKI KASTANIS ET AL., ESTIMATING THE ECONOMIC BOOST OF MARRIAGE EQUALITY IN IOWA: SALES TAX 2 (2011), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Kastanis-Herman-IA-Economic-Boost-Dec-2011.pdf>, archived at <http://perma.cc/EL5R-Q7EE>.

121. See GATES & NEWPORT, *supra* note 117 (discussing the difference in LGBT populations by state).

122. BADGETT & GATES, *supra* note 23, at 7.

123. *Id.* The calculated average cost of a wedding in Indiana is \$5910. This number multiplied by 5110, the number of couples likely to marry, resulted in the \$30 million figure.

124. See BADGETT & SEARS, *supra* note 112, at 2 (discussing how despite decreased spending projections, small states such as Connecticut will still benefit significantly from decreased public-assistance spending).

125. *Id.*

126. *Id.*

127. Oskar Garcia, *Gov. Signs Bill Legalizing Gay Marriage in Hawaii*, ABC NEWS (Nov. 13,

Overall, no matter the population of the state, a positive economic impact resulted from legalizing same-sex marriage in areas such as overall spending and sales tax revenue.¹²⁸ Although the studies did project that some states would lose income tax revenues, this loss was relatively minor and was outweighed by the other positive impacts.¹²⁹

C. Case Study: Indiana

In a 2013 nationwide survey of more than five hundred chief executives, Indiana was ranked as the fifth best place to do business in the nation.¹³⁰ For many, this is no surprise as recent Indiana governors have made it a top priority to increase Indiana's attractiveness for economic investment.¹³¹ Today, Indiana ranks highly in several areas of business attractiveness including taxes and infrastructure investment, and it is one of only nine states to receive an AAA credit rating from all major credit rating agencies.¹³²

Further, in 2012, Indiana enacted legislation making it the twenty-third "right to work" state and evidence shows that the business incentives are paying off.¹³³ In 2012, Indiana's gross domestic product ("GDP") increased by 3.3 %, making it the eighth fastest growing economy in the nation.¹³⁴ Yet, in that same year,

2013), <http://abcnews.go.com/Health/wireStory/gov-signs-bill-legalizing-gay-marriage-hawaii-20880290>, archived at <http://perma.cc/Q439-XHCQ>.

128. Fitzgerald et al., *supra* note 98.

129. See Testimony by Dr. M.V. Lee Badgett, *supra* note 105 (discussing how an estimated income tax revenue decrease of \$8 million constitutes less than 0.0001 of California's overall budget of \$90 billion).

130. JP Donlon, *2013 Best & Worst States for Business*, CHIEF EXECUTIVE (May 6, 2013), <http://chiefexecutive.net/best-worst-states-for-business-2013>, archived at <http://perma.cc/G3ZR-H9TN>.

131. *About Former Governor Daniels*, IN.GOV, <http://www.in.gov/governorhistory/mitchdaniels/2635.htm> (last visited Apr. 26, 2015), archived at <http://perma.cc/3TTY-38HW> (discussing Governor Daniels' legislative success in creating the Indiana Economic Development Corporation in his mission to attract economic investment and create jobs).

132. See *Indiana Info*, IND. ECON. DEV. CORP., <http://iedc.in.gov/indiana-info> (last visited Oct. 7, 2013), archived at <http://perma.cc/BTV6-YEWK> (discussing Indiana's attractive business climate in terms of taxes, incentives, and infrastructure).

133. A "right-to-work" law is a statute that prohibits employers from requiring union membership for all employees as a condition of employment. IND. CODE §§ 22-6-6-1 to -13 (2012). However, in September 2013, a Superior Court Judge ruled that portions of the statute were unconstitutional. Tim Evans, *Indiana Attorney General Appeals Ruling that 'Right to Work' Law is Unconstitutional*, INDY STAR (Sept. 12, 2013), <http://www.indystar.com/article/20130912/NEWS/309120046/Indiana-attorney-general-appeals-ruling-right-work-law-unconstitutional>, archived at <http://perma.cc/STPF-3TKB>. The appeal will go immediately to the Indiana Supreme Court to determine whether the statute will stand.

134. Alexander E.M. Hess & Michael Sauter, *Top States with the Fastest Growing Economies*, USA TODAY (June 15, 2013, 12:43 PM), <http://www.usatoday.com/story/money/business/>

Indiana ranked only thirty-ninth on the list of America's wealthiest states.¹³⁵

Where is this disconnect between Indiana's high economic growth yet low wealth? Although many factors play a part, this Note argues that one answer is that Indiana is attracting the wrong kind of investment. For example, in 2012, durable-goods manufacturing contributed 1.7 % of Indiana's 3.3 % GDP growth, making it the largest contributor to Indiana's economy.¹³⁶

This is not to criticize Indiana's strong manufacturing industry. However, members of what economists define as the "creative class" earn substantially more than members of the manufacturing and service classes.¹³⁷ Therefore, a state that ranks number one in the nation in manufacturing jobs as a percentage of all jobs, and whose economy is comprised of almost thirty percent manufacturing, would fall behind the national average in per capita income.¹³⁸ Therefore, if Indiana would like to raise its per capita income level, one key is attracting higher paying jobs like those found within the "creative economy."¹³⁹ The question remains: what should Indiana do to attract these types of jobs and the people to fill them?

As previously stated, Florida believes the key to attracting this type of investment is to develop and cultivate the three T's—Technology, Talent, and Tolerance—within any given place, and ultimately, to develop a world-class "people climate."¹⁴⁰ This Note focuses primarily on improving the third "T" of Tolerance by encouraging Indiana to enact positive LGBT legislation.

Economist Xinxiang Chen expanded on Florida's "Creative Class" hypothesis and argued that those states that enacted positive LGBT legislation the earliest, therefore, creating a tolerant and diverse environment, are the same states that

2013/06/15/states-with-the-fastest-growing-economies/2416239/, archived at <http://perma.cc/CJC4-WMLQ>.

135. *Per Capita Personal Income by State*, *supra* note 36.

136. Howard Greninger, *Automobiles Driving Indiana Economy*, IND. ECON. DIGEST (June 9, 2013, 11:27 AM), <http://indianaeconomicdigest.com/Main.asp?SectionID=31&SubSectionID=66&ArticleID=70123>, archived at <http://perma.cc/H6RW-64TG>.

137. See Florida, *supra* note 27 (Florida defines the "creative class" as "people who work in science and technology, business and management, arts, culture, media, and entertainment, law and healthcare professions"); see FLORIDA, *supra* note 80, at 76 (discussing the income discrepancies among the creative, working, and service classes).

138. *Indiana Leads Nation in Percentage of Manufacturing Jobs*, INDY STAR (Sept. 19, 2013, 7:22 PM), <http://www.indystar.com/article/20130919/INTERACTIVE01/309190005/Indiana-leads-nation-percentage-manufacturing-jobs>, archived at <http://perma.cc/7YP4-KQQQ>; see *Per Capita Personal Income by State*, *supra* note 36 (noting that Indiana's per capita income in 2012 was \$36,902 as compared to \$42,693 for the entire United States).

139. See FLORIDA, *supra* note 80, at 76 (jobs comprising the "creative economy" pay substantially more than traditional manufacturing jobs or jobs within the service industry; therefore, one way for Indiana to increase its per capita income is to increase the percentage of "creative economy" jobs comprising the overall economy).

140. *Id.* at 249, 293.

lead the way in talent distribution and overall performance today.¹⁴¹ If this theory holds true, it provides a very plausible explanation for Indiana's lag behind many other states.¹⁴² Before the domino effect of DOMA legislation enacted in response to *Baehr*, Indiana was one of only a few states that had a statute explicitly prohibiting same sex marriage.¹⁴³

Today, Indiana lags behind many states with respect to most areas of LGBT legislation. While Indiana does extend adoption rights to LGBT persons, it has yet to enact many other types of pro-LGBT legislation.¹⁴⁴ Therefore, in order to develop a world class "people climate," and attract both talent and investment, Indiana should enact positive LGBT legislation.

First and foremost, Indiana correctly decided not to pass an amendment barring same-sex marriage within the state constitution because, as discussed later in this Note, passing an amendment would have had severe economic implications.¹⁴⁵ Not only would the state have gained large amounts of negative media attention, but also, the amendment would have impacted over six hundred state laws, making Indiana a very undesirable place for LGBT persons to live.¹⁴⁶ As previously stated, tolerant and diverse places fare better economically in terms of innovation and growth, and a marriage amendment would have certainly set back these goals.¹⁴⁷

On October 6, 2014, the United States Supreme Court rejected Indiana's same-sex marriage appeal and effectively legalized same-sex marriage in the state.¹⁴⁸ Despite this achievement, the state could still enact other types of pro-LGBT legislation to create a more open and diverse environment.¹⁴⁹ Currently, Indiana has no hospital visitation rights for same-sex partners, it does not prohibit housing discrimination based on sexual orientation or gender identity, it only extends protection against discrimination based on sexual orientation and/or

141. Chen, *supra* note 4, at 73.

142. See *Per Capita Personal Income by State*, *supra* note 36 (discussing how Indiana ranks 39th on the list of America's wealthiest states).

143. Willett, *supra* note 2, at 383.

144. See, e.g., *In re Infant Girl W.*, 845 N.E.2d 229, 241-244 (Ind. Ct. App. 2006); *Gay Rights in the US*, *State by State*, *supra* note 69.

145. See *infra* Part III.B (discussing the inflexibility of state amendment processes).

146. Eric Bradner, *Study: Same-sex Marriage Amendment Would Impact 600 Indiana Laws*, IND. ECON. DIGEST (Nov. 26, 2012, 7:39 PM), <http://www.indianaeconomicdigest.net/main.asp?SectionID=31&SubSectionID=135&ArticleID=67539>, archived at <http://perma.cc/M8HD-NJ9J>.

147. See Chen, *supra* note 4, at 72 (discussing how "tolerance and tolerance-based diversity in metropolitan areas affect the distribution of talent, thereby indirectly affecting the difference in income per capita across U.S. metropolitan areas").

148. Annie Change, *UPDATE: Gay marriage now legal in Indiana*, WSBT 22 (Oct. 7, 2014, 9:12 AM), <http://www.wsbt.com/news/local/high-court-denies-gay-marriage-appeals-from-indiana-4-other-states/28967734>, archived at <http://perma.cc/HP6M-U4RB>.

149. See, e.g., *Maps of State Laws & Policies*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/maps-of-state-laws-policies> (last visited Oct. 23, 2013), archived at <http://perma.cc/CE22-DZ7Z>.

gender identity to public employees, it has no laws addressing hate or bias crimes against LGBT persons, it has a law prohibiting bullying in schools but does not list categories of protection, and finally, it has no law prohibiting discrimination against LGBT students.¹⁵⁰

Ultimately, talent levels today are not completely predetermined by past tolerance and, therefore, the levels can be changed.¹⁵¹ So, despite Indiana's past and current lack of LGBT rights and protections, the state can improve its future prospects if it enacts pro-LGBT legislation today.¹⁵²

III. ANALYSIS AND RECOMMENDATIONS: IMPLICATIONS FOR STATES

A. *Lack of Tolerance and its Negative Impact on State Economies*

First and foremost, this Note recommends that states legalize same-sex marriage or enact other types of positive LGBT legislation to create a more tolerant and diverse climate and avoid significant economic consequences. Further, this Note recommends that those states which already have an amendment barring same-sex marriage in place begin the process of repealing the amendment, as amendment repealing processes are longer than processes to repeal a state statute.

Repealing a marriage amendment and enacting pro-LGBT legislation is vital because ultimately, it does not make economic sense to have anti-LGBT legislation in place.¹⁵³ Anti-LGBT legislation negatively impacts a state's ability to attract economic investment and attract or retain talent; therefore, those states that continue to resist enacting pro-LGBT legislation will likely suffer in these areas in the near future.¹⁵⁴

Today, states compete fiercely against each other to attract economic investment from foreign and domestic companies.¹⁵⁵ Additionally, "many

150. *Id.*

151. Chen, *supra* note 4, at 92-93. Chen argues that the study's findings do not automatically predetermine future talent, but rather "have significant implications for urban planners and policy-makers, who need to take social and cultural factors into account in making policy and planning urban projects."

152. The quantifiable monetary gain discussed in Part II.B is recognized only when a state legalizes same-sex marriage. Therefore, Indiana will not benefit from decreased public-assistance expenditures and increased tax revenues unless it legalizes same-sex marriage. However, Indiana could benefit in areas of economic development as discussed in Part III.B.

153. *See infra* Part III.B (discussing the shortcomings of state amendment processes and the negative economic implications associated with anti-LGBT legislation).

154. *See* Chen, *supra* note 4, at 76 (discussing how inclusiveness is an important factor for attracting both talent and economic investment).

155. *See* Erin Sparks, *Top Trends in State Economic Development*, NAT'L GOVERNORS ASS'N (Aug. 19, 2013), <http://www.nga.org/cms/home/nga-center-for-best-practices/center-publications/page-ehsw-publications/col2-content/main-content-list/top-trends-in-state-economic-dev.html>, archived at <http://perma.cc/8YMZ-DF5M> (discussing trends and strategies for states to attract

economists and social scientists believe that differences in talent and human capital are at the root of large differences in income per capita across U.S. metropolitan areas.¹⁵⁶ Therefore, states are not only trying to attract and retain economic investment from outside firms, but talented people as well.¹⁵⁷

Florida argues that the key to attracting talented people is no longer luring them with jobs, by attracting businesses into a region.¹⁵⁸ Instead, his framework suggests that “tolerance based diversity, referred to as low barriers to entry for talent or human capital, increases a region’s ability to compete for talent and, in turn, in its ability to generate and attract high-technology industries and increase its income.”¹⁵⁹ In other words, today talented people do not follow jobs, jobs follow talented people.¹⁶⁰ Therefore, one could argue that the key to attracting lucrative economic investment lies not only in tax incentives or infrastructure improvements but, also, in open and inclusive policies to attract a diverse mix of talented people.¹⁶¹

Currently, thirty-seven states and the District of Columbia have legalized same-sex marriage.¹⁶² Laws ban same-sex marriage in thirteen states, and there are currently eight states where gay marriage bans have been overturned, but where appeals are in progress.¹⁶³ Therefore, the majority of Americans now live in a state where same-sex marriage is legal.¹⁶⁴

Ultimately, those states that have yet to recognize many forms of positive LGBT legislation now have a decision to make. Follow suit, or continue to resist enacting positive LGBT legislation and miss out on attracting valuable talent and high-technology innovation.¹⁶⁵ Additionally, as stated previously, these states could miss out on positive budgetary impacts in bleak economic times, when

economic development).

156. Chen, *supra* note 4, at 92.

157. See Lu Ann Franklin, *Infrastructure, Attracting Talented Young Workers Vital*, NWI.COM (Sept. 13, 2013), http://www.nwitimes.com/business/local/infrastructure-attracting-talented-young-workers-vital/article_9c492508-ea04-5c48-8274-cd0b61da4904.html, *archived at* <http://perma.cc/3U8P-HYBR> (noting that infrastructure and retaining talent are two keys to attracting economic investment).

158. Chen, *supra* note 4, at 76.

159. *Id.*

160. See FLORIDA, *supra* note 80, at 6 (“Access to talented and creative people is to modern business what access to coal and iron ore was to steelmaking. It determines where companies will choose to locate and grow, and this in turn changes the ways cities must compete.”).

161. Chen, *supra* note 4, at 76.

162. *Gay Marriage*, PROCON.ORG, <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (last visited May 2, 2015), *archived at* <http://perma.cc/QY95-9BKL>.

163. *Id.*

164. Josh Levs et al., *With Hawaii and Illinois, U.S. Crosses a Same-sex Marriage Mark*, CNN (Nov. 13, 2013), <http://www.cnn.com/2013/11/13/politics/hawaii-same-sex-marriage/>, *archived at* <http://perma.cc/G39U-PG8H>; *Gay Marriage*, *supra* note 162.

165. See *supra* Part II.A.

even a little boost goes a long way.¹⁶⁶

Some proponents of amendments barring same-sex marriage and other forms of anti-LGBT legislation argue that such legislation has no economic impact on attracting economic investment.¹⁶⁷ These proponents argue that because “the top five states for best business growth in 2012 and 2013 all have marriage-protection amendments . . . [t]he myth that public policy support for traditional marriage is somehow bad for business is a red herring and a scare tactic.”¹⁶⁸ But, this argument is misleading: until recently, only a small number of U.S. states had legalized same-sex marriage and, therefore, the overwhelming majority of Fortune 500 companies that support same-sex marriage only had the high-cost, New England states as investment options if they wished to invest in states which share their same views.¹⁶⁹ However, as the status quo shifts, and more states legalize same-sex marriage, these companies will have the luxury of choosing to invest in a number of states which are both low-cost and support same-sex marriage.¹⁷⁰ Additionally, although proponents of a marriage amendment deny that it has a negative impact on attracting investment and talent, the following anecdotal evidence suggests that this simply is not true.

“‘Entrepreneurs are very careful when deciding where to start a company,’ said [Chris Hughes, co-founder of Facebook, Inc.]. ‘Building a business in a state that denies basic rights to LGBT couples is difficult to justify to potential employees—straight or gay.’”¹⁷¹ The Governor of Rhode Island echoed this sentiment stating “[a]s our reputation for tolerance and equality spreads beyond our borders . . . new employers will want to put down roots in a state where they can find the brightest who want to work free of the distraction and worry of inequality.”¹⁷² The head of Arkansas’ economic development commission also advocated for repealing the state’s gay marriage ban stating that it would allow Arkansas to “attract more investment capital, human capital, and encourage more

166. See *supra* Part II.B.

167. Jon Murray, *Indy Chamber Votes to Oppose State Gay Marriage Ban*, INDIANAPOLIS STAR (Oct. 22, 2013), <http://www.usatoday.com/story/news/nation/2013/10/22/gay-marriage-amendment-indiana/3151331/>, archived at <http://perma.cc/R68Y-5BGV>.

168. *Id.*

169. See *LGBT Equality at the Fortune 500*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500> (last visited Nov. 16, 2013), archived at <http://perma.cc/R3F4-SC5A> (suggesting that Fortune 500 companies desire to protect and provide rights to LGBT persons with eighty-eight percent of these companies prohibiting discrimination based on sexual orientation and over sixty percent providing domestic partner health insurance benefits to their employees).

170. See Ned Flaherty, *12 States That Will Probably Legalize Gay Marriage in 2013-2014*, POLICYMIC.COM (Mar. 11, 2013), <http://www.policymic.com/articles/29294/12-states-that-will-probably-legalize-gay-marriage-in-2013-2014> (discussing several states that will likely legalize same-sex marriage in 2013-2014).

171. Stilwell et al., *supra* note 20.

172. *Id.*

workers to stay in Arkansas.”¹⁷³ As further proof that anti-LGBT legislation can impact a state’s economic vitality, the National Football League was preparing to move Super Bowl XLIX from Phoenix to Tampa if Arizona’s Governor signed into law a bill which would allow businesses to refuse service to LGBT persons.¹⁷⁴

Additionally, while attracting economic investment is a significant concern, states with anti-LGBT policies, and companies within those states, may also miss out on attracting and retaining talent.¹⁷⁵ In February 2013, over sixty Fortune 500 companies submitted a brief to the United States Supreme Court arguing that “keeping same-sex marriage illegal made it difficult for them to recruit and hire top applicants.”¹⁷⁶ Universities have also expressed concern over anti-LGBT policies, arguing that such policies hurt their ability to attract students and recruit or retain faculty.¹⁷⁷ Further, studies suggest that LGBT persons and same-sex couples are leaving those states with anti-LGBT legislation, for states with more open and inclusive policies.¹⁷⁸

While holdout states could suffer economically from anti-LGBT legislation, other states are uniquely positioned to gain greater economic benefits if policymakers leverage LGBT legislation to their favor.¹⁷⁹ Des Moines, Iowa is

173. See *State Economic Development Chief Touts Gay Marriage*, ARKANSAS NEWS (July 8, 2013, 4:14 PM), <http://arkansasnews.com/sections/news/arkansas/state-economic-development-chief-touts-gay-marriage.html>, archived at <http://perma.cc/63ZQ-PB7W> (discussing how the head of Arkansas’ economic development agency defied Arkansas’ Governor and advocated for the repeal of the state’s gay marriage ban because doing so would allow Arkansas to “attract more investment capital, human capital and encourage more workers to stay in Arkansas”).

174. Barry Petchesky, *NFL Was Preparing to Move Super Bowl If Arizona’s Anti-Gay Bill Passed*, DEADSPIN.COM (Feb. 27, 2014, 10:01 AM), <http://deadspin.com/anti-gay-bill-could-cost-arizona-the-super-bowl-1531409894/1532424065/+barryap>, archived at <http://perma.cc/5TC4-N778>.

175. Jillian Berman, *8 Ways Legalizing Same Sex Marriage Is Good For the Economy*, THE HUFFINGTON POST (May 15, 2012, 8:09 AM), http://www.huffingtonpost.com/2013/05/15/same-sex-marriage-economy_n_3267725.html, archived at <http://perma.cc/D72Q-HPA8>.

176. *Id.*

177. See *Open Letter to President McRobbie: Take a Stand Against HJR-6*, CHANGE.ORG, <http://www.change.org/petitions/open-letter-to-president-mcrobbe-take-a-stand-against-hjr-6> (last visited Apr. 26, 2015), archived at <http://perma.cc/45JE-HUT9> (discussing the negative implications of Indiana’s proposed DOMA amendment on Indiana University including its ability to attract students and recruit or retain faculty).

178. See GATES, *supra* note 35, at 4 (finding that individuals in the creative class who are part of same-sex couples are 2.5 times more likely to move to Massachusetts after marriage equality than before); see also Stilwell et al., *supra* note 20 (discussing how states with legal same-sex marriage are attracting same-sex couples from states where same-sex marriage is not legal).

179. See, e.g., Kurt Badenhausen, *Des Moines Tops List of the Best Places For Business and Careers*, FORBES (Aug. 7, 2013), <http://www.forbes.com/sites/kurtbadenhausen/2013/08/07/des-moines-tops-list-of-the-best-places-for-business-and-careers/>, archived at <http://perma.cc/ULF7-DFHJ> (discussing how Iowa has transformed itself into a sought after location for economic

a prime example of this advantage. In many respects, Des Moines may not be considered the ideal place to live and do business. It failed to make Forbes' list of "America's Coolest Cities," it did not make Businessweek's list of "America's 50 Best Cities," and the city even needs its own website to prove that "Des Moines is not boring."¹⁸⁰

However, Iowa legalized same-sex marriage in 2009 and in 2013, Forbes named Des Moines the "Best Place for Business and Careers" citing low business costs and a highly educated workforce.¹⁸¹ Forbes also noted that "tech giants Facebook and Microsoft [are] branching out in central Iowa" and "Facebook announced plans in [April 2013] to invest \$300 million to build its fourth owned and operated data center."¹⁸² So why does a competitive advantage potentially exist for states like Iowa? As previously stated, most businesses still consider "cost of doing business" as a major factor when determining where to invest.¹⁸³ Additionally, given low-wage growth during the recession, cost of living is a significant factor when an individual is choosing where to work and live.¹⁸⁴ Therefore, cities that are both low-cost and tolerant are uniquely positioned to gain economic investment and attract talent in these economic times. Because cities like Des Moines have a low-cost competitive advantage over hip, tolerant cities like San Francisco and Boston, and a tolerance or diversity advantage over low-cost cities like Indianapolis and Mobile, these cities will likely see significant economic growth and prosperity in the future.¹⁸⁵

However, this "competitive advantage" of sorts will not last forever and as

investment given its strong business climate and educated workforce).

180. Morgan Brennan, *Houston Tops Our List of America's Coolest Cities*, FORBES (Aug. 26, 2012, 4:29 PM), <http://www.forbes.com/sites/morganbrennan/2012/07/26/houston-tops-our-list-of-americas-coolest-cities-to-live/>, archived at <http://perma.cc/UT5R-XBSP>; Alex Konrad, *America's 50 Best Cities*, BLOOMBERG BUSINESSWEEK (Sept. 28, 2012), <http://images.businessweek.com/slideshows/2012-09-26/americas-50-best-cities#slide2>, archived at <http://perma.cc/X55Q-3DUD>; PROVING DES MOINES IS NOT BORING, <http://desmoinesisnotboring.com/wordpress/> (last visited Oct. 8, 2013), archived at <http://perma.cc/J9H8-FTZ9>.

181. Ken Millstone, *Where Gay Marriage Stands in All 50 States*, MSNNEWS (June 26, 2013), <http://news.msn.com/us/where-gay-marriage-stands-in-all-50-states?stay=1>, archived at <http://perma.cc/FT6L-DT3W>; Badenhausen, *supra* note 179.

182. Badenhausen, *supra* note 179.

183. See Alan Farnham, *Mobile: U.S. South Winning War for Foreign Investment*, ABCNEWS (July 3, 2012), <http://abcnews.go.com/Business/airbus-alabama-winning-economic-war/story?id=16703449>, archived at <http://perma.cc/XB2H-6EK6> ("[Companies looking to invest] don't want to throw their money around. They want a good deal. They're extremely conscious of costs.").

184. *The 10 Cities with The Highest Cost of Living: Report*, HUFF POST BUSINESS (Jan. 28, 2012), http://www.huffingtonpost.com/2012/01/27/cities-high-cost-of-living_n_1236841.html, archived at <http://perma.cc/Z6AN-K4G8>.

185. See, e.g., *State Economic Development Chief Touts Gay Marriage*, *supra* note 173 (Arkansas' head of economic development seems to recognize such advantage stating, "I think [legalizing gay marriage is] the right move for Arkansas in a lot of ways. It's the right move for Arkansas' economy . . . I think Arkansas has a real opportunity here to lead the South.").

more states are likely to legalize gay marriage in 2015, and the U.S. Supreme Court will make a decision regarding the issue, legislatures in holdout states must make important decisions so as not to fall behind both socially and economically.¹⁸⁶

B. Shortcomings of State Amendment Processes

This Note recommends that states do not amend their constitutions to bar same-sex marriage. Such an amendment would be more difficult to repeal when doing so becomes necessary, given the negative economic implications and changing social attitudes.¹⁸⁷

Although the Court in *Windsor* struck down section three of DOMA which defined marriage, under federal law as between a man and a woman, section two of DOMA, giving states the power to create their own definition of marriage, remains intact.¹⁸⁸ The majority of states define marriage as between a man and a woman via constitutional amendment, while the minority ban it only by state statute.¹⁸⁹

“State constitutions do not limit their own content and contain many provisions that are virtually indistinguishable from normal legislation.”¹⁹⁰ This is true of most marriage-amendments as well, where in many states, a marriage amendment tracks the language in the statute and is essentially redundant.¹⁹¹ Yet, the question remains: if many constitutional amendments are redundant, why do states pass them in the first place?

A hierarchy exists within the legislative process, which includes statutes, court decisions, administrative rules and regulations, and constitutions.¹⁹² “Although constitutions do not exist everywhere, where they do exist they typically are more difficult to change than other forms of law that are lower in the hierarchy.”¹⁹³ Ultimately, constitutional amendments are more difficult to change and for this reason, many states chose this route to define marriage.¹⁹⁴ “Unlike

186. FLORIDA, *supra* note 27, at 400; Chris Weiss, *Same Sex Marriage: 7 States Most Likely to Legalize Gay Marriage in 2013*, POLICY MIC, <http://www.policymic.com/articles/22346/same-sex-marriage-7-states-most-likely-to-legalize-gay-marriage-in-2013>, archived at <http://perma.cc/ZJ89-P2Z2>.

187. See Bruce E. Cain & Roger G. Noll, Note, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1517 (2009) (discussing the inflexibility of state amendment processes).

188. See *United States v. Windsor*, 133 S. Ct. 2675, 2683-96 (2013) (only section three of DOMA was at issue in *Windsor* and the Court ruled it unconstitutional).

189. Millstone, *supra* note 181.

190. Cain & Noll, *supra* note 187, at 1525.

191. See Neely, *supra* note 49, at 253-54 (discussing Indiana’s proposed marriage amendment).

192. Cain & Noll, *supra* note 187, at 1517.

193. *Id.*

194. *Id.* at 1525-26.

simple legislation, constitutional amendments cannot be repealed by subsequent elected officials, so a successful amendment makes a policy change more durable. In essence, the malleability and specificity of state constitutions invite political attention from political actors who otherwise would fight things out in the legislature.”¹⁹⁵

As described above, the main legal effect of passing an amendment, in many cases, is to prevent future elected officials from easily repealing the state’s statute barring same-sex marriage and effectively legalizing it within the state.¹⁹⁶ The difficulty of the process for passing an amendment varies by state.¹⁹⁷ Only nine states allow passage of an amendment with a simple majority of both chambers in a single session, fifteen require the proposed amendment to be passed in two successive legislative sessions, and twenty-nine states require supermajority approval of the amendment.¹⁹⁸ After successful passage through the legislature, all but one state requires the electorate to then ratify the amendment.¹⁹⁹ In many instances, the process of passing an amendment can take several years.²⁰⁰ For example, Nevada began the process of passing a constitutional amendment to repeal the existing marriage amendment in its 2013 legislative session.²⁰¹ The measure will not go to a public vote until 2016.²⁰²

Recently, federal judges struck down amendments barring same-sex marriage in a number of states, including Utah.²⁰³ While many hailed these decisions, opponents of same-sex marriage argued that activist judges should not be permitted to substitute their views for the views of the state’s citizenry.²⁰⁴ Additionally, opponents argue that it is wrong for activist judges to effectively amend a state’s constitution without going through the traditional amendment process.²⁰⁵ The United States Supreme Court agreed with these arguments and postponed same-sex marriages in Utah while the state’s appeal is pending before

195. *Id.*

196. *Id.*

197. *Id.* at 1523.

198. *Id.*

199. *Id.*

200. Sean Whaley, *Nevada Legislature Advances Gay Marriage Resolution*, LAS VEGAS REV-J. (May 23, 2013, 3:50 PM), <http://www.reviewjournal.com/news/nevada-legislature/nevada-legislature-advances-gay-marriage-resolution>, archived at <http://perma.cc/2HMN-HBF5>.

201. *Id.*

202. *Id.*

203. Niraj Chokshi, *Why 6 Federal Judges Struck Down State Gay Marriage Bans*, in *Their Own Words*, WASH. POST (Feb. 27, 2014, 12:02 PM), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/02/26/why-6-federal-judges-have-struck-down-state-gay-marriage-bans-in-their-own-words/>, archived at <http://perma.cc/83QU-LDRQ>.

204. David Davenport, *Federal Judges In Utah And Oklahoma Out of Bounds on Same Sex Marriage*, FORBES (Jan. 24, 2014, 9:49 PM), <http://www.forbes.com/sites/daviddavenport/2014/01/24/federal-judges-in-utah-and-oklahoma-out-of-bounds-on-same-sex-marriage/>, archived at <http://perma.cc/97WS-Q3GR>.

205. *Id.*

the Tenth Circuit Court of Appeals.²⁰⁶

Unless the Court rules that judges individually may strike down state amendments defining marriage, a significant advantage exists for those states that do not have such an amendment. States without an amendment have the flexibility to change their law in a much easier, but more importantly, quicker process than those states with an amendment. In the ultra-competitive race for attracting economic development and talent, every minute counts and states need policies that are malleable in order to address these economic implications and changing social attitudes. For those states that maintain the status quo or go even further to prevent equal rights, the economic implications could be devastating.²⁰⁷

CONCLUSION

In the United States, as in many countries around the world, the tide has turned in favor of same-sex marriage and LGBT rights. *Windsor* helped equalize LGBT rights on the federal level, but inequality at the state-level remains prevalent. It is now up to individual states to decide whether to extend rights and protections to LGBT persons, or continue to resist.

Evidence suggests that anti-LGBT policies can have a significant impact on a state's ability to attract and retain talent, and entice economic investment. While opponents of positive LGBT legislation argue that such laws negatively impact state and federal budgets, research suggests that this simply is not the case. Ultimately, the decisions a state makes now can dramatically affect its economic vitality in the future.

States considering amending their state constitutions to include a marriage provision should reconsider. Because the process to amend state constitutions is generally inflexible, states with such amendments are at a large disadvantage when trying to attract talent and economic investment. Additionally, states that already have these amendments should begin the process of repealing the amendment now and consider either maintaining the policy simply as a statute or legalizing same-sex marriage outright. Another creative option for states is to adopt an amendment that reserves the right to define marriage to the legislature, as the Hawaiian legislature did in 1993. This would alleviate concerns of court interference, while retaining a significant amount of flexibility.²⁰⁸

206. Richard Wolf, *Supreme Court Puts Utah Same-Sex Marriages on Hold*, USA TODAY (Jan. 6, 2014, 3:18 PM), <http://www.usatoday.com/story/news/nation/2014/01/06/supreme-court-halts-utah-gay-marriage/4338799/>, archived at <http://perma.cc/H3RD-CEBL>.

207. FLORIDA, *supra* note 27, at 400.

208. See *Hawaii Passes Gay Marriage Bill; Ceremonies Set to Begin Dec. 2*, HUFFINGTON POST (Nov. 12, 2013, 5:58 PM), http://www.huffingtonpost.com/2013/11/12/hawaii-passes-gay-marriage-bill_n_4262477.html, archived at <http://perma.cc/SZ48-R6GS> (discussing how Hawaii's legislature voted to legalize same-sex marriage after a five day public hearing). Hawaii was able to quickly pass a same-sex marriage resolution because, although it had an amendment addressing the issue, the amendment did not define marriage but rather left the definition of marriage up to the legislature. Such an amendment prevents state courts from legalizing same-sex marriage through

In addition, states should consider either legalizing same-sex marriage, or at the very least, enacting other types of pro-LGBT legislation in order to create a more tolerant and diverse climate. Even in states where same-sex marriage is legal, there are still many other ways to modernize LGBT legislation. For example, a state could enact legislation protecting LGBT persons against housing discrimination, job discrimination, and bullying, to name a few.

These are critical economic times in the United States and while some states may not be socially ready to pass legislation guaranteeing marriage equality, they should pass some form of positive LGBT legislation, or risk falling significantly behind economically.

a court decision, while allowing the legislature to legalize same-sex marriage without going through the formal, inflexible amendment process.

