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Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage

EREZ ALONI*

ABSTRACT

Scholars who have examined the legal recognition of same-sex partnerships in European countries have concluded that the path to the legalization of same-sex marriage follows an incremental process involving specific stages. They suggest that it is possible to predict, based on certain visible social and legal processes or assessable parameters, which U.S. states will be the next to recognize same-sex marriage. These scholars argue that such small cumulative legal changes at the state level constitute the best means of legalizing same-sex marriage in the United States, and that civil unions are a necessary step in this process. This article shows that predictions based on these theories have not been accurate and that attempts to generalize the experience of legalizing same-sex marriage overlook a variety of often significant and sometimes subtle social, political, and legal differences between the United States and Europe. Therefore, these theories cannot sufficiently explain how social change happens and cannot be used to formulate strategic plans for legalizing same-sex marriage in the United States. This article also proposes that the adoption of civil unions can significantly delay legal acceptance of same-sex marriage. It suggests that the theories overlooked the fact that in some European countries, lesbian and gay organizations were more interested in securing partnership rights for same-sex couples, rather than marriage itself. This path is the one that advocates in the United States should take.

I. INTRODUCTION

American scholars often look to the experiences of European states' adoption of laws permitting same-sex marriage to lend credibility to their recommendations for optimal political and social change strategies. Some of these scholars have concluded that the legalization of same-sex marriage follows an incremental legal progression through specific stages. They suggest that it is possible to predict, based on certain visible social and legal processes or assessable parameters, which state will be the next to recognize same-sex marriage. Within this incrementalist paradigm, they view civil unions as a necessary step prior to the complete legalization of same-sex marriage. These scholars argue that small cumulative legal changes at the state level constitute

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the best means of bringing about the legalization of same-sex marriage in the United States.

It is undoubtedly true that the European experience with the legal recognition of same-sex partnerships enables understanding of the way in which social and legal changes occur and provide insight into future changes. Yet predictions based on the proposed theories concerning the path leading to the legalization of same-sex marriage have been disproved and have shown that the application of a general rule falls flat in a cascade of exceptions. An overview of unfolding events on both continents casts more than a little doubt on the accepted theory of incrementalism. In this Article, I argue that the attempt to describe the experience of legalizing same-sex marriage in terms of one overarching, globally shared process overlooks a variety of significant and sometimes subtle social, political, and legal differences between the United States and Europe. To this end, there is always going to be what I call a butterfly effect—small variations of the initial condition of a dynamic system that may produce large variations in the long-term behavior of the system. In this case, unpredictable factors can influence the debate among (as well as strategies used and actions taken by) policy makers and lesbian, gay, and bisexual (LGB)¹ activists in pursuit of the legalization of same-sex marriage.

1. I use the term LGB to describe members who self-identify as lesbian, gay, or bisexual. In doing so, I do not intend to erase or obscure other identities. I also frequently make reference to the LGB “community,” a term that is a theoretical concept much more than it is a reality. This does not mean that a monolithic community of LGB individuals exists in any meaningful way. At times, the multitude of interests within this community converge; at other times, they diverge significantly. Acknowledging this to be the case, I nevertheless refer to a “community” throughout this Article, and I attempt to be clear about those times when interests within the community are most likely to diverge, particularly vis-à-vis marriage. This article does not refer specifically to transgender marriage because this raises questions concerning a state’s definition of male and female. For some transgender individuals, the option to marry already exists, even in states that do not recognize same-sex marriage. This is not to say that transgender people do not have an interest in same-sex marriage, just that the rules for determining sex of a person are different from state to state and thus involve different sets of legal rules. See generally Julia A. Greenberg, *The Road Less Traveled: The Problem with Binary Sex Categories* 51-73, in *TRANSGENDER RIGHTS* (Paisley Currah et al. eds., 2006); Gwen Cooper, *Transgender Marriage*, *ETRANSGENER* (Feb. 24, 2006), <http://etransgender.com/viewtopic.php?f=1&t=74>.

The most accepted and widely cited² theory of the path to the legalization of same-sex marriage is that of Kees Waaldijk,³ which has been embraced and advanced most notably by William N. Eskridge⁴ and Yuval Merin.⁵ They call this theory the “law of small change,” the “step-by-step” approach, and the “necessary process,” respectively. For the purposes of this Article, I refer to all three designations jointly as “the theory of small change” or “incrementalism.” Generally speaking, these scholars suggest that every country or state will, on its path to the legalization of same-sex marriage, follow the same three-stage process. In their model, change is initiated with the repeal of sodomy laws, followed by the enactment of antidiscrimination laws protecting LGB people, and then, if all goes as expected, this process culminates in the eventual legalization of same-sex marriage. In Europe, this course has often been followed by the equalization of parental rights. Extrapolating from the European experience, these scholars have arrived at a number of conclusions.

First, they suggest that it is possible to predict when the legalization of same-sex marriage will be achieved based on the stage a state is currently in.⁶ Second, they assert that the enactment of civil unions into law expedites the legalization of same-sex marriage by leading to the next step in the process and is desirable because it can show the public that their fears about same-sex partnership and its potential negative effects on society are groundless. Finally, these scholars assert that the fight for LGB rights in the United States should

2. See Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797, 930 (2008) (asserting that the survey of international practices “confirms, with only a few exceptions, Kees Waaldijk’s hypothesis of a ‘standard sequence’ of ‘legislative recognition’ of the human right to sexual freedom”); Reg Graycar & Jenni Millbank, *From Functional Family to Spinster Sisters: Australia’s Distinctive Path to Relationship Recognition*, 24 WASH. U. J.L. & POL’Y 121, 138-40 (2007) (contending that even though such progress is not necessarily linear, Australia and New Zealand generally follow the “law of small change”); DAVID A.J. RICHARDS, *THE CASE FOR GAY RIGHTS: FROM BOWERS TO LAWRENCE AND BEYOND*, 101-03 (2005) (affirming Yuval Merin’s theory of the “necessary process”); see also Brief of Liberty Counsel as Amicus Curiae in Support of Respondent at 23, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 470088, at *23 (Liberty Counsel, an opponent of same-sex marriage, referred to the law of small change in order to warn the Court about the consequences of repealing sodomy laws. It argued that if sodomy laws were invalidated by the Supreme Court, same-sex marriage would be the next step. In its words, “Waaldijk’s paper reveals that changes in the law tend to happen at a slow, incremental pace. This Court, therefore, must keep in mind that this case is not just about invalidating sodomy laws, it is about the goal of homosexuals to enter into the ‘clubhouse’ of family and marriage as it currently exists so as to ‘radically alter’ th[ose] institution[s].”). But see Nancy D. Polikoff, *Recognizing Partners but not Parents / Recognizing Parents but not Partners: Gay and Lesbian Family Law in Europe and the United States*, 17 N.Y.L. SCH. J. HUM. RTS. 711, 713-14 (2000) (“Professor Waaldijk’s analysis of the progression in Europe is wholly inapplicable to the United States. Some of the difference can be attributed to the role of the judiciary in the American context.”).

3. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN, AND INTERNATIONAL LAW* 437, 437 (Robert Wintemute & Mads Andenæs eds., 2001) [hereinafter *LEGAL RECOGNITION*].

4. See generally WILLIAM N. ESKRIDGE, JR., *EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS* (2002).

5. See generally YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES* (2002).

6. Waaldijk, *supra* note 3, at 427.

focus solely on changes at the state, rather than the federal level, because federal law, which has not yet progressed to the second stage, is not ready for such a great change.⁷ It is important to understand that the theory of small change is not just a descriptive theory; instead, it provides a normative explanation for the effect that each legal change has on the way society views LGB people. The theory of small change also provides a theoretical justification for this incremental progress. It holds that acceptance of same-sex marriage will be perceived as a *small* step once all preceding steps have been achieved, thus encouraging LGB organizations to follow these stages.

Professor of Economics M.V. Lee Badgett offers an important critique of the theory of small change. She astutely warns that “[t]ransferring political lessons and experiences from one continent to another runs the risk of ignoring important cultural or social differences between countries and continents.”⁸ She suggests that a “conditions for change” approach should supplement the theory of small change in order to accurately predict legal recognition of same-sex partnerships. This means taking account of certain factors: rates of heterosexual cohabitation, levels of religiosity, and tolerance toward homosexuality. In applying these factors to the United States, Badgett concludes that her empirical approach “is at least as good as the incrementalist framework for predicting change.”⁹

Unfortunately, neither Badgett’s empirical approach nor the incrementalist approach provides a good framework for such predictions. Both theories oversimplify the issue and fail to account for the complex and varied factors that are relevant to same-sex marriage. In this Article I argue that the current legal situation in Europe and the United States shows that there are various courses through which the legalization of same-sex marriage can be achieved, and various factors that affect the path to this goal. I present a range of examples in which predictions have not corresponded to reality. Unlike the theory of small change, which relies largely on the experience of the Netherlands and the Scandinavian countries, my survey looks at all European Union member countries. I use such extensive data because the available evidence from Great Britain, France, Germany, the Netherlands, and other Northern European countries does not hold up to one storyline. Moreover, these Northern European countries have very different attitudes toward—and definitions of—civil rights than the rest of the world; therefore, any framework that uses their experience, rather than that of other European countries, as the main source of comparison is not a reliable one.

7. Eskridge and Spedale also argue that the United States should follow European states’ example in achieving acceptance of same-sex marriage through the legislature (rather than through the courts). While I will not explore this idea in detail, the survey of the legal situation in Europe shows that in recent years, European LGB people have very often turned to courts to achieve rights for same-sex couples, including same-sex marriage. WILLIAM N. ESKRIDGE, JR., & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE* 232-41 (2006).

8. M.V. Lee Badgett, *Predicting Partnership Rights: Applying the European Experience in the United States*, 17 *YALE J.L. & FEMINISM* 71, 85 (2005).

9. *Id.* at 84.

Following the survey, I proceed to explain why these theories fail to fully explain the process that leads to same-sex marriage. I contend that a main problem with the theory of small change is the basic assumption that steps one and two (i.e., repeal of sodomy laws and the enactment of antidiscrimination laws that prohibit discrimination on the basis of sexual orientation) necessarily lead to the third step—legalization of same-sex marriage. I argue that changing legal definitions and societal understandings of marriage in both law and social practice is quite different from conferring the right to engage in sexual acts and the right not to be discriminated against. Marriage demands a public affirmation that the theory of small change's earlier stages do not consider. Moreover, arguments against legalizing same-sex marriage, although standing on equally shaky theoretical ground, are more entrenched than are arguments in favor of sodomy laws and against antidiscrimination laws that extend protections on the basis of sexual orientation. I assert that because of these factors, changes to marriage laws in the United States will never be perceived as small, no matter what prior steps have been taken.

In the next Part, contrary to those who take a more incrementalist approach, I argue that the adoption of civil unions is sometimes a stumbling block that can significantly delay legal acceptance of same-sex marriage. Granting LGB people the option of civil unions rather than marriage obfuscates the problem of discrimination against same-sex couples. Under most civil union arrangements, especially in Europe, same-sex couples receive the same rights and benefits as their opposite-sex counterparts. Thus, the general public perceives any discussion of ongoing discrimination, particularly in terms of the denial of marriage to LGB couples, as merely semantic. In addition, since civil unions often confer upon LGB people all the economic rights and benefits associated with marriage, they mitigate the economic incentives that can motivate activists' efforts to legalize same-sex marriage. Furthermore, some LGB people find civil unions preferable to marriage because they see the latter as a patriarchal and discriminatory institution, or, in certain European countries, because the declining value of marriage has made it a less desirable option. In arguing that civil unions might impede the legalization of same-sex marriage, I do not mean to imply that legal recognition of same-sex marriage should be the final goal of the LGB movement, as suggested by the theoreticians of small change.¹⁰ In fact, it seems that the lesson that the theory of small change misses is that many European LGB organizations object to same-sex marriage and are more interested in securing partnership rights for same-sex couples. To the extent that same-sex marriage is the goal, however, the effect of civil unions and the incremental approach should be clear.

The structure of this Article is as follows: Part II presents a short overview of the ways that same-sex relationships are currently recognized in the European Union and the United States in order to explain the terminology used in this Article. Part III offers a review of the existing theories on this subject. Part IV surveys the legal recognition of same-sex couples in Europe and in the

10. ESKRIDGE & SPEDALE, *supra* note 7, at 239 ("This is not to say we believe that gay and lesbian advocates and their allies should stop fighting for the immediate right to same-sex marriage. Full marriage equality is the ultimate goal of most gays and lesbians in the United States...").

United States and demonstrates that many of the predictions posited by the theory of small change have not been accurate. Instead, the theory of small change has not proved to be a reliable method for predicting the legalization of same-sex marriage. Part V critiques the empirical approach offered by Badgett. Part VI questions the assumption that a country, state, or society that is willing to decriminalize homosexual acts and enact antidiscrimination laws will necessarily be open to legalizing same-sex marriage. This Part also suggests that changes concerning marriage in the United States are never perceived as small. Part VII investigates the assumption that the introduction of the institution of civil unions raises sufficient awareness of inequalities faced by opposite-sex couples and demonstrates that some European LGB organizations and people have been more interested in securing partnership rights rather than marriage. It also suggests that there is a normative commitment from the side of the incrementalists to positing marriage as the end of the LGB struggle for equality. Part VIII offers a brief conclusion.

II. CURRENT MODELS OF RECOGNIZING SAME-SEX RELATIONSHIPS

Today there are numerous legal institutions in Europe and the United States that offer varying degrees of legal recognition to same-sex couples.¹¹ It is common to divide these institutions into three groups or models—civil marriage, registered partnerships, and cohabitation—based on the type of legal recognition that they provide.¹²

Civil marriage is a registered partnership between two persons that results in a number of legal rights and obligations (between partners and between the couple and others, including the state). The law regulates numerous aspects of the relationship, including how to terminate the marriage.¹³ Marriage continues to be the privileged and preferred legal status in Europe and the United States and provides the most expansive recognition of rights by the state.¹⁴ The legal differences between marriage and other alternatives carry additional consequences. For example, some entities do not treat registered couples as married because they do not understand, or do not want to understand, what it means. This can have serious legal implications in everyday life, for example, when one needs the help of an administrative agency or any other kind of semi-state entity.¹⁵ Civil marriage also carries a semantic advantage over other kinds

11. These forms of legal recognition include, marriage, civil unions, registered partnerships, reciprocal beneficiary schemes, informal cohabitation, and registered domestic partnerships.

12. Kees Waaldijk, *Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-Sex and Same-Sex Partners: Comparative Overview & Comparative Analysis*, in SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS-NATIONAL DIFFERENTIALS [hereinafter CROSS-NATIONAL DIFFERENTIALS] 47, 48 (Marie Digoix & Patrick Festy eds., 2004).

13. *Id.* at 77-78.

14. MERIN, *supra* note 5, at 55-56.

15. GEORGE CHAUNCEY, *WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY* 114-15 (2004) (the story of Michele Granda and Kate Hogan, a lesbian couple who were on vacation in the British Virgin Islands when Ms. Hogan was injured in an accident. The couple had in their possession various documents to ensure that they would be allowed hospital visitation, yet Ms.

of legal recognition—while almost everybody in the world knows what marriage is, the meaning of other forms of legal recognition, like civil unions, is often less clear.¹⁶

The second model, registered partnership,¹⁷ is conceived of as a legal institution more or less analogous to marriage—essentially an intermediate level of recognition, sometimes referred to as “marriage lite.”¹⁸ A registered partnership, like marriage, results in a number of legal rights and obligations (between partners and between the couple and others, including the state),¹⁹ and certain actions must be taken in order to terminate a registered partnership.²⁰ It is important to emphasize that the institution of registered partnership takes different forms in different countries and states. In some countries and states, a registered partnership scheme offers nearly all the rights that are associated with marriage, while in others this legal institution does not confer many of those rights.²¹ In most places, such as Great Britain and Germany, registered partnerships are open only to same-sex couples.²² In some countries, however,

Granda was not allowed to see her partner in the emergency room. A friend later said: “‘you can do some things’ with those documents . . . ‘but you cannot replicate marriage.’”)

16. What do same-sex couples who have had civil unions call the ceremony? How do they refer to their new status, or to each other? It is even more complicated for couples who register as reciprocal beneficiaries. Was I “unioned” yesterday with the love of my life? Do I send out announcements stating: “You are all invited to our registered reciprocal beneficiaries ceremony”?

The symbolic value of marriage extends beyond the name of the ceremony. For example, in France, heterosexual marriages are performed at the town hall, a culturally important place, while same-sex couples can register as partners only at the *tribunal d’instance*, a court that usually deals with daily-life conflicts like disputes between property owners and tenants. See Wilfried Rault, *The Best Way to Court: The French Mode of Registration and Its Impact on the Social Significance of Partnerships*, in CROSS-NATIONAL DIFFERENTIALS, *supra* note 12, at 27. On the other hand, in some European countries, the names of marriage alternatives have, in the same way as the word “marriage,” become an integral part of the language. For example, in France, the *pacte civil de solidarité* (civil pact of solidarity, known as PaCS, and discussed later in this article) “is now part of the culture, as evidenced by its acceptance in the French language: the acronym PaCS is no longer capitalized, as both noun—*les pacésés*—and verb—*se pacser*—have entered everyday parlance.” Daniel Borrillo & Eric Fassin, *The Pacts, Four Years Later: A Beginning or an End?*, in CROSS-NATIONAL DIFFERENTIALS, *supra* note 12, at 19.

17. This is the European equivalent of the American civil union. For the purposes of this Article, I will refer to these two legal institutions interchangeably.

18. ESKRIDGE & SPEDALE, *supra* note 7, at 80.

19. See, e.g., N.J. STAT. ANN. § 37:1-29 (West Supp. 2010) (“‘Civil union’ means the legally recognized union of two eligible individuals of the same sex established pursuant to this act. Parties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage.”).

20. E.g., Civil Partnership Act, 2004, c. 33, § 44 (U.K.) (“Subject to section 41, an application for a dissolution order may be made to the court by either civil partner on the ground that the civil partnership has broken down irretrievably.”).

21. For example, registered partnership in Great Britain provides same-sex couples all the rights and benefits that are offered to opposite-sex couples. Conversely, in France, Finland, Ireland, and Austria, gay couples cannot jointly adopt even if they are registered. See, e.g., Kees Waaldijk, *Overview of Forms of Joint Legal Parenting Available to Same-Sex Couples in European Countries*, 72 DROIT ET SOCIÉTÉ 383, 384 (2009). In addition, couples in civil unions are often required to demonstrate more committed behavior, such as living together for a number of years, while married couples are not required to behave similarly in order to register. See Mary Anne Case, *What Feminists Have to Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1203-04 (2010).

22. Waaldijk, *supra* note 12, at 49.

including France and the Netherlands, the registration is also open to opposite-sex couples.²³

Civil unions and registered partnerships not only carry legal and symbolic distinctions but also have practical adverse consequences. Some argue that there are negative effects of civil unions on the physical and mental health of same-sex couples and their children due to the stigma of living in a separate-but-equal regime. Some employers do not extend to couples in civil unions the rights and benefits that they grant married couples.²⁴

For many years, numerous countries did not officially recognize the third form of legal recognition, cohabitation. In the United States during the second half of the twentieth century, some states began recognizing and enforcing marriage-like contracts in which the parties committed to marriage-like obligations.²⁵ Progressively, new laws that at least partly recognize certain kinds of cohabitation have been developed, mostly in Europe.²⁶ Today, many countries provide a number of legal consequences that arise when two people have been informally cohabiting for a certain period of time. In these countries, even in the absence of a contract, a court may, at the request of one party, enforce a marriage-like commitment on the other party.²⁷ Usually there is no event or formal agreement marking or governing cohabitation, making this arrangement different from both marriage and registered partnerships. This is the only legal arrangement in which the partners must actively demand their rights in retrospect and provide proof of the nature and extent of their relationship to a government agency or court. It is also the only model that does not require an act of termination. The need for legal recognition frequently arises at the end of the relationship—when the couple dissolves the relationship or when one partner dies. This means that cohabiting status is often required by only one partner. In other places, cohabiting couples can register their

23. *Id.* In the United States, civil unions have only recently become an option for opposite-sex couples as well (Nevada, the District of Columbia, and Illinois). See, e.g., Monica Davey, *Civil Unions Advance in Illinois*, N.Y. TIMES, Dec. 1, 2010, at A19, available at <http://www.nytimes.com/2010/12/02/us/02illinois.html> (“The legislation allows heterosexual couples to seek civil unions, too.”).

24. See N.J. CIVIL UNION REVIEW COMM’N, THE LEGAL, MED., ECON. & SOC. CONSEQUENCES OF NEW JERSEY’S CIVIL UNION LAW (2008), available at <http://www.nj.gov/lps/dcr/downloads/CURC-Final-Report-.pdf> (reporting that some New Jersey employers refuse to provide the same benefits to employees’ civil union partners that are provided to employees’ opposite-sex spouses. These employers are governed by the Employee Retirement Insurance Security Act (ERISA). Since DOMA limits benefits to the opposite-sex partners of employees, and ERISA is a federal law, these employers are not required to recognize same-sex partnerships.)

25. See Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1568 (2009) (“Since the last decades of the twentieth century, however, there is a trend to narrow the gap between the mutual obligations of cohabitants and those of married partners.”).

26. See Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT’L J.L. POL’Y & FAM. 1 (2001).

27. Waaldijk, *supra* note 12, at 83.

partnerships, which make them eligible for a limited set of rights (even more limited than those conferred by a civil union).²⁸

Cohabitation, both informal and registered, provides fewer privileges than the other models discussed here.²⁹ Many benefits, especially in the areas of parental, tax, and property law, are not available to cohabiting couples. The regulations of cohabitation are very fragmentary, and only a comprehensive overview of these laws and regulations could fully demonstrate the legal consequences of cohabitation.³⁰ In addition, the rights conferred by cohabitation vary from country to country. In some countries, such as the Netherlands, the rights of cohabiting partners are numerous, even greater than those extended to couples in registered partnerships in France.³¹ In most European countries, this form of recognition is available to both same-sex and opposite-sex couples.³² Discrimination, however, often exists within this model: for example, same-sex couples are often denied many of the parental rights granted to opposite-sex couples, such as the right to adopt or subsidization of assisted reproduction technologies.³³

In the United States, domestic partnership laws vary considerably among jurisdictions.³⁴ In some states, domestic partnerships are the equivalent of European registered cohabitation, and the rights conferred by registration are limited.³⁵ In other jurisdictions, notably California, domestic partnerships are equivalent to civil unions because it provides all or almost all the rights associated with marriage, but limited to the state level.³⁶ In the United States, where marriage is usually a prerequisite for obtaining benefits for an employee's partner, domestic partnership laws allow same-sex couples to enjoy the same health care benefits as married couples.

III. THE THEORY OF SMALL CHANGE

The most accepted and recognized international theory that explains and predicts the legalization of same-sex marriage and advocates the notion of incremental progress is Waaldijk's law of small change.³⁷ This theory not only describes how the Netherlands arrived at the legalization of same-sex marriage but also uses that data to predict "how, and when, [the legalization of] same-sex marriage can be achieved in other countries"³⁸ and to suggest a political and

28. Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 *NEW ENG. L. REV.* 569, 570-71 (2004); MERIN, *supra* note 5, at 136.

29. *See generally* Waaldijk, *supra* note 28.

30. *See* Waaldijk, *supra* note 12, at 78-79.

31. *See id.* at 83-84.

32. *See id.*

33. *Id.* at 83.

34. Domestic partnership registries are often offered by cities, towns, employers, and universities. This article addresses only domestic partnerships recognized by states (and the District of Columbia). *See, e.g.*, D.C. CODE § 32-701 (2001).

35. ME. REV. STAT. ANN. tit. 22, § 2710 (2005); HAW. REV. STAT. § 572C-4 (2005).

36. *See* CAL. FAM. CODE § 297 (West 2004).

37. Waaldijk, *supra* note 3, at 440.

38. *Id.* at 437.

legal strategy for the legalization of same-sex marriage. According to Waaldijk, the legal history of the recognition of homosexuality in European countries reveals a pattern of steady incremental progress leading to the legal acceptance of same-sex marriage.³⁹ This process consists of three stages, each of which entails several sub-steps. The process is initiated with the decriminalization of sodomy, after which the age of consent for same-sex relationships is made the same as that for opposite-sex relationships (step one). Following this, legislation prohibiting discrimination on the basis of sexual orientation in the workplace and housing is enacted and sexual orientation is included as a protected category in hate crime laws (step two). Finally, partnership and parenting rights are legally addressed (step three).⁴⁰

Waaldijk argues that this theory offers two crucial lessons. First, a step only becomes possible once the previous step has been fulfilled. Second, each step facilitates the next step. Any legislative change offering legal recognition and acceptance of homosexuality can be enacted and accepted by the general public only if this change is perceived as small or insignificant. At the same time, the new legal reality must remain sufficiently discriminatory against LGB people to satisfy the opponents of LGB rights.⁴¹

Waaldijk shows how Dutch law followed the pattern proposed by the law of small change. After passing through the first two steps, the Netherlands began to address partnership issues by offering limited rights to cohabiting same-sex couples. The process continued with the introduction of a registered partnership scheme and eventually ended with the legalization of same-sex marriage. Finally, parental rights for married same-sex couples were made equal to those of married opposite sex couples.⁴² Waaldijk suggests that countries typically offer registered partnership schemes prior to legalizing same-sex marriage. He explains that the introduction of registered partnerships put pressure on the Dutch legislature to allow same-sex couples to marry because it “served to highlight the remaining discrimination caused by the exclusion of same-sex couples from marriage.”⁴³ Waaldijk ultimately posits that his theory applies to other countries as well.⁴⁴

Merin imports the theory of small change to the United States and clarifies what he sees as the “necessary process” leading to legalization of same-sex

39. It is important to note that Waaldijk characterizes the final stage of recognition only in vague terms, describing it as “legislation recognizing same-sex partnership and parenting.” *Id.* at 440. Does recognition extend to registered partnerships or same-sex marriage? Or perhaps cohabiting same-sex couples? Waaldijk’s examination of the process as it unfolded in the Netherlands suggests that “recognition” actually encompasses all these elements as sub-stages that lead to the acceptance of same-sex marriage, starting with acceptance of cohabitation.

40. *Id.*

41. *Id.*

42. See also Polikoff, *supra* note 2, at 712 (“The European legislation signaled a total separation of the approval of lesbian and gay couples as partners from the approval of lesbian and gay couples as parents. In the United States, meanwhile, trial courts had approved joint adoptions in more than half the states . . .”).

43. Waaldijk, *supra* note 3, at 447.

44. *Id.* at 439 (“The Netherlands is following the same trends as most other European countries. In that light, the opening up of marriage to same-sex couples is only natural.”).

marriage.⁴⁵ He accepts the three-stage process and concludes that “[b]efore same-sex marriage becomes possible, the final step of the necessary process must be completed, namely, broad recognition in the form of registered partnership or civil union—not merely a version of U.S. domestic partner scheme as currently construed.”⁴⁶ In other words, Merin suggests that the introduction of civil unions must always precede the legalization of same-sex marriage.

Eskridge advances the theory of small change by offering a more nuanced and sophisticated approach that addresses the important component of social attitudes.⁴⁷ He suggests that the “law cannot move unless public opinion moves, but public attitudes can be influenced by changes in the law.”⁴⁸ Accordingly, as legislation gives more visibility to LGB individuals, society becomes more accepting of them. The more society accepts LGB individuals, the easier it is to advance pro-gay changes in law and to legalize same-sex marriage. Eskridge thus concludes that “a step-by-step approach is probably a necessary way to overcome the politics of disgust so popular in the United States.”⁴⁹

Eskridge also uses the theory of small change to defend the institution of civil unions. He argues that the Netherlands’ recognition of same-sex marriage was facilitated by its prior recognition of, and successful experience with, the registered partnership scheme. He suggests that civil unions are only one stage that inevitably leads to legal acceptance of same-sex marriage and therefore the LGB community should accept civil unions as a necessary step in this process.⁵⁰

Badgett offers another model for predicting the legal recognition of same-sex partnerships, based on the European experience, but she uses an empirical

45. MERIN, *supra* note 5, at 308-37.

46. *Id.* at 333.

47. See ESKRIDGE, *supra* note 4; ESKRIDGE & SPEDALE, *supra* note 7; William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641 (2000) [hereinafter *Comparative Law and the Same-Sex Marriage Debate*]; William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001).

48. ESKRIDGE, *supra* note 4, at 115.

49. ESKRIDGE & SPEDALE, *supra* note 7, at 229. The politics of disgust is driven by emotional response. According to Eskridge and Spedale, this form of politics is most commonly seen in the context of attacks on gays and lesbians because many Americans are disgusted by the idea of nonprocreative sex. See *id.* at 220-23.

50. *Comparative Law and the Same-Sex Marriage Debate*, *supra* note 47, at 650-52. Finally, Eskridge suggests that within the federalist structure, the incremental process will create islands of recognition of same-sex partnerships. Some states will offer same-sex couples the option of marriage, others civil unions, and gradually recognition of same-sex couples will become contagious, especially among younger generations. As events unfold, more states will come to accept that same-sex marriage does not actually have detrimental effects on society. Eskridge concludes that the same-sex marriage debate should be a normative debate primarily at the state—rather than the national—level. Since some U.S. states have only recently repealed their sodomy laws, and the second stage of the theory of small change has not been achieved at the federal level (i.e., federal antidiscrimination law does not provide protection on the basis of sexual orientation), the United States is not ready for such a great change. In addition, past experience with controversial legal issues in the United States, such as miscegenation laws, shows that the Supreme Court will not get involved in the early stages of debate but will do so only when the majority of states have made the change. See ESKRIDGE & SPEDALE, *supra* note 7, at 234-47.

method to do so. I will discuss this method in depth in Part V. In the next Part, I will examine whether the predictions offered by the theory of small change have been realized.

IV. A CROSS-NATIONAL OVERVIEW OF THE SHORTCOMINGS OF THE THEORY OF SMALL CHANGE

This Part presents a description of the legal situation of same-sex partnerships in Europe and the United States. As the following discussion demonstrates, the evaluations and predictions offered so far do not stand on solid ground. A survey of the current legal situation in Europe and in the United States is necessary, since Waaldijk's and Merin's theories are based on comparative law in 2000 and 2002, respectively. Although Eskridge's analysis is more recent, some important events have taken place since 2006 that illustrate the weakness of the theory of small change. Therefore, an updated comparative law survey is necessary in order to examine if, in retrospect, the theory's predictions have been accurate.

As early as 2003, an article published by the members of the Harvard Law Review began to cast doubt on the "positive" effect that civil unions have on the path to same-sex marriage in Europe.⁵¹ The article, which responded to the theory of small change, argued that "rapid change is far from the rule in Europe. To the contrary, the European experience provides considerable evidence that progress may stall, perpetuating the second-class status of same-sex couples."⁵² Moreover, the article astutely noted that "'small change' need not mean 'slow change.'"⁵³ In light of these observations, this Part questions whether civil unions are only a temporary stage in the struggle for legal recognition of same-sex marriage or whether there is evidence that civil unions impede the legalization of same-sex marriage. It also tests the three-stage assumption by looking at whether all the countries and states that have legalized same-sex marriage followed the three necessary steps.

Waaldijk and Eskridge⁵⁴ base their theories primarily on a comparison of the United States with the Nordic countries and the Netherlands. These countries, however, are unique in terms of their social, cultural, and legal contexts and thus cannot be said to represent a larger European phenomenon. The Scandinavian countries and the Netherlands share the social model of the Nordic countries—a generous welfare state and a strong focus on human rights.⁵⁵ Therefore, these countries demonstrate only the "friendly human

51. *Developments in the Law – II. Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003) [hereinafter *Inching Down the Aisle*].

52. *Id.* at 2010.

53. *Id.* at 2009.

54. In his book *Equality Practice*, Eskridge, offers a comparison of the laws of a variety of other countries. In his latest book, *Gay Marriage for Better or Worse*, he and co-author Darren R. Spedale focus mainly on the experience of the Nordic countries.

55. TORBEN M. ANDERSEN ET AL., THE RESEARCH INST. OF THE FINNISH ECON., THE NORDIC MODEL: EMBRACING GLOBALIZATION AND SHARING RISKS (2007), available at http://www.etla.fi/files/1892_the_nordic_model_complete.pdf; see also Philip Jenkins, Religious America and Secular Holland (paper presented at the "Four Centuries of Dutch-American Relations" conference, Oct. 15-

rights competition' of the Nordic countries."⁵⁶ In addition, recent research claims that "[g]ender equality . . . emerged earlier in the Nordic countries than elsewhere in Europe" and thus suggests that the Nordic countries demonstrate the "Nordic Model of Marriage"—a unique progressive and equal attitude toward marriage and divorce.⁵⁷ Because they are not representative of the European context as a whole, an examination of other members of the European Union, especially the influential legal systems of Germany, France, and Great Britain, is necessary.

It is important to keep in mind that the European experience is inherently different from that of the United States. Because the European Court of Human Rights (ECHR) has held that sodomy laws contradict⁵⁸ the principles of the Convention for the Protection of Human Rights and Fundamental Freedoms,⁵⁹ every country in the European Union that once had sodomy laws has repealed them. In addition, every member of the European Union has enacted antidiscrimination laws that protect LGB people as a prerequisite for membership in the European Union.⁶⁰ Conversely, in the United States, while sodomy laws are unconstitutional, only twenty states extend protection on the basis of sexual orientation in their antidiscrimination laws,⁶¹ and federal antidiscrimination law does not include sexual orientation as a protected category.⁶² Thus, discussion of the European Union member countries will focus mainly on the level of legal recognition of same-sex partnerships. I will use the common method of dividing Europe into four geographical areas: Northern, Western, Southern, and Eastern.

A. Same-Sex Partnership Recognition in Europe

Northern Europe: The Nordic countries⁶³ were the first to recognize same-sex partnerships and still lead in their extensive recognition of LGB rights. Generally speaking, they followed the stages of the theory of small change. Since Denmark introduced the option of registered partnerships for same-sex couples in 1989, analogous laws have been enacted in all four other

16, 2009), available at <http://www.roosevelt.nl/Content/RSC/docs/Jenkins.pdf> ("For multiple reasons, it is extremely difficult to compare the US and the Netherlands.").

56. *Inching Down the Aisle*, *supra* note 51, at 2010 (quoting Robert Wintemute, Conclusion to LEGAL RECOGNITION, *supra* note 3, at 759, 770-71).

57. Kari Melby et al., *The Nordic Model of Marriage*, 15 WOMEN'S HIST. REV. 651 (2006).

58. See *Dudgeon v. United Kingdom*, 4 Eur. Ct. H.R. 149 (1981).

59. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

60. See Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 13, Nov. 10, 1997, 1997 O.J. (C 340).

61. See HUMAN RIGHTS CAMPAIGN, STATEWIDE EMPLOYMENT LAWS AND POLICIES, available at http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf (last updated July 26, 2010); see, e.g., CONN. GEN. STAT. § 46(a)-81(a) (West 2009 & Supp. 2010); MD. CODE ANN., art. 49B § 5 (LexisNexis 2003 & Supp. 2009).

62. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) to (e)-17 (2006).

63. I use the terms "Scandinavia" and "the Nordic countries" interchangeably to refer to all members in the Nordic Council, namely, Denmark, Norway, Finland, Iceland, and Sweden.

Scandinavian countries:⁶⁴ Norway, Iceland, Sweden, and Finland. Sweden, Norway, and Iceland recently amended their marriage laws, making them gender neutral.⁶⁵ In Finland there are signs that same-sex marriage will be legalized soon.⁶⁶

Even after the introduction of registered partnerships, same-sex couples were still denied some rights and benefits across the Nordic countries. In Denmark, for example, same-sex couples were denied the access to subsidized assisted reproductive technologies until 2007,⁶⁷ and it was not until 2010 that the law was amended to allow joint adoption by same-sex couples.⁶⁸

Even though the Nordic countries followed the incremental process, Denmark is an exception to the rule. Denmark's proposal to allow same-sex couples to marry was rejected by the government in 2006. When the Danish parliament debated whether or not to legalize same-sex marriage, the Danish Minister for the Family, Carina Christensen, argued that since civil unions already provide all the rights enjoyed by married opposite-sex couples to same-sex couples (except for the ability to marry in a church), registered partnerships are satisfactory and not discriminatory.⁶⁹

The Nordic countries offer a challenge to the theory of small change because they illustrate the double-edged nature of registered partnerships. On the one hand, the Nordic countries were the first to enact laws regulating same-sex relationships and have since generally followed the theory of small change—they all gradually fixed inequities faced by same-sex couples. Norway, Sweden, and Iceland even took the final step and now legally recognize same-sex marriage.⁷⁰ On the other hand, Denmark provides striking proof of the problems associated with registered partnerships—change is slow. Denmark was the first country to recognize same-sex relationships twenty years ago, but it currently remains at the same level of limited recognition, with no signs of change on the horizon.

64. Jens Rydström, *From Outlaw to In-Law on Registered Partnerships for Homosexuals in Scandinavia, Its History and Cultural Implications*, in CROSS-NATIONAL DIFFERENTIALS, *supra* note 12, at 175.

65. *Norway: Same-Sex Marriage Permitted*, N.Y. TIMES, June 18, 2008, http://www.nytimes.com/2008/06/18/world/europe/18briefings-SAMESEXMARRI_BRF.html; *Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS, June 11, 2010, <http://www.reuters.com/article/idUSTRE65A3V020100611>.

66. *See Gender-Neutral Marriage Law Possible by 2012*, YLE, http://www.yle.fi/uutiset/news/2010/07/gender-neutral_marriage_law_possible_by_2012_1804013.html (last visited Nov. 13, 2010).

67. Jens Rydström, *Legalizing Love in a Cold Climate: The History, Consequences and Recent Developments of Registered Partnership in Scandinavia*, 11 SEXUALITIES 193, 209 (2008).

68. *Gays Given Equal Adoption Rights*, COPENHAGEN POST, May 5, 2010, <http://www.cphpost.dk/component/content/48896.html?task=view>.

69. Carina Christensen, Minister for the Family (Den.), Address to Parliament on Proposal for a Parliamentary Decision to Introduce a Marriage Law that Equates Homosexuals with Heterosexuals (Apr. 27, 2007), available at <http://www.ft.dk/dokumenter/tingdok.aspx?samling/20061/beslutningsforslag/b76/beh1/1/forhandling.htm&startItem=#nav>.

70. Generally, even when the Swedish experience, which took fourteen years to move from civil unions to marriage, is taken into account, the experience of Nordic countries suggests a theory of slow change rather than small change, because progress has been so very markedly slow.

Western Europe: All the countries in this region of Europe have enacted laws recognizing same-sex relationships. Belgium⁷¹ and the Netherlands both allow same-sex couples to marry. The rest—France, Germany, Great Britain, Luxemburg, Ireland,⁷² and Austria⁷³—offer the option of registered partnerships, each with its own unique characteristics. Belgium, France, and Germany also recognize cohabitation of same-sex couples.⁷⁴

France and Germany: In 1999, France enacted the *pacte civil de solidarité* (PaCS), which is open to both same- and opposite-sex couples. The PaCS is very popular in France, especially among opposite-sex couples.⁷⁵ One of the limited legal institutions recognizing same-sex partnerships in Europe, the PaCS is a contract⁷⁶ and is not part of the marriage section of the civil code.⁷⁷ The PaCS is not just symbolically different from marriage; it is legally different as well. A registered PaCS may be terminated without judicial intervention and does not

71. See Paul Borghs & Bart Eeckhout, *LGB Rights in Belgium, 1999-2007: A Historical Survey of a Velvet Revolution*, 24 INT'L J.L. POL'Y & FAM. 1 (2010). In 2003, Belgium became the second country to open up the institution of civil marriage to same-sex couples, when the parliament amended the country's civil code. Belgium also offers a registered-cohabitation option, open to both same-sex and opposite-sex couples, providing limited rights. However, same-sex couples did not, until recently, have the right to adoption of any kind, and only in 2006 did the parliament pass a bill permitting same-sex couples to adopt. According to Waaldijk, Belgium also followed the law of small change. However, it is interesting to note that Belgium first addressed partnership rights by offering legal recognition to same-sex cohabiting couples, even though it provided only a minimal level of recognition, and later by enacting antidiscrimination laws. Waaldijk, *supra* note 28, at 572.

72. See *Norris v. Ireland*, 13 Eur. Ct. H.R. 186 (1988). After this decision, Ireland, a predominantly Catholic country, decriminalized homosexual sex in 1993, declaring that statutes criminalizing homosexual sex violate the right to privacy guaranteed under Article 8 of the European Convention on Human Rights. Until then, decriminalization was at the heart of the gay community's campaign for equality. See also Fergus Ryan, *From Stonewall(s) to Picket Fences: The Mainstreaming of Same-Sex Couples in Contemporary Legal Discourses*, in COMMITTED RELATIONSHIPS AND THE LAW 1, 10 (Oran Doyle & William Binchy eds., 2007); Charlie Taylor, *Civil Partnership Bill Signed into Law*, IRISH TIMES, Sept. 8, 2010, <http://www.irishtimes.com/newspaper/breaking/2010/0719/breaking29.html> (A Civil Partnership bill was signed into law in 2010, but it is very unlikely that same-sex marriage will be offered in Ireland any time soon.).

73. See *Austrian Parliament Adopts Registered Partnership Law for Same-Sex Partners*, INT'L LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOC. (Dec. 18, 2009), http://www.ilga-europe.org/home/guide/country_by_country/austria/austrian_parliament_adopts_registered_partnership_law_for_same_sex_partners (In 2010, after many efforts by the LGB community, a registered partnership bill was signed into law in Austria.).

74. See CROSS-NATIONAL DIFFERENTIALS, *supra* note 12, at 40 (In France, for example, both same-sex and opposite-sex couples can register for a *certificat de concubinage notoire*, which offers minimal rights and responsibilities and has uncomplimentary overtones. The situation of *concubinage* only allows for certain benefits received by one partner to be extended to the other partner and does not offer assistance on issues regarding property, taxes, etc.).

75. In 2009, for example, 175,000 PaCS's were registered, as opposed to 256,000 marriages, and only 5 percent were same-sex couples. *Deux pacs pour trois mariages*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES, <http://www.insee.fr/fr/ffc/ipweb/ip1276/ip1276.pdf>.

76. CODE CIVIL [C. CIV.] art. 515-1 (Fr.). ("A civil covenant of solidarity is a contract entered into by two natural persons of age, of different sexes or of a same sex, to organize their common life.")

77. Joëlle Godard, *PACS Seven Years On: Is it Moving Towards Marriage?*, 21 INT'L J.L. POL'Y & FAM. 310, 312 (2007) ("According to Article 515-1Civ.C, Pacs is a contract . . .").

confer nationality on non-French citizens.⁷⁸ The law discriminates between same-sex and opposite-sex couples with regard to prenatal rights.⁷⁹ In 2006, a few amendments beneficial to PaCS couples were made, such as providing better protection for the surviving partner in the event of the death of an individual in a PaCS,⁸⁰ but the essence of its character has not changed.⁸¹ Same-sex couples in France still lack basic parental rights, and a challenge to discriminatory adoption policies is currently pending in the ECHR.⁸²

Daniel Borrillo and Eric Fassin point out that since the passage of the PaCS legislation, both the LGB movement's pressure on the government and the intensity of the debate have decreased;⁸³ those who supported the PaCS in the beginning now fear that it has led to a "dead end."⁸⁴ Some have argued that the changes to the PaCS in 2006 were intended to decrease pressure on the government to move forward with the legalization of same-sex marriage.⁸⁵ In a recent development, the Court of Cassation, the country's highest court of

78. See Rault, *supra* note 16, at 27 (Like the registration process, conflicts between the partners are dealt with by the *tribunal d'instance*, not by the *juge aux affaires familiales*, who is authorized to address marriage issues.).

79. The greatest absurdity was that until 2008, single women were eligible for subsidized artificial insemination, while same-sex couples were not. Generally, all parental rights—except for cross-adoption—were prohibited. However, recent intervention by the ECHR somewhat rectified the matter. *E.B. v France*, App. No. 43546/02, Eur. Ct. H.R. (2008), available at <http://www.echr.coe.int>. In February 1998, a woman in a same-sex couple applied for approval as a possible adoptive parent, but her application was rejected because of her sexual orientation. In June 2002, the *Conseil d'État* upheld the rejection of her application. She argued that the decision was a breach of Articles 8 and 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Article 8 guarantees the right to a private family life, while Article 14 stipulates that the enjoyment of such rights must be secured without discrimination on any grounds. In 2008, the ECHR held that in rejecting the woman's application for authorization to adopt, the domestic French authorities had made a distinction based on considerations regarding her sexual orientation, a distinction that is unacceptable under the Convention. Therefore, it seems that this decision applies to all of the countries that are parties to the Convention and allow two single people to adopt children. It is not yet certain how each country will react to it and what the implications will be.

80. Loi 2006-728 du 23 juin 2006 portant réforme des successions et des libéralités [Law 2006-728 of June 23, 2006 on the Reform of Inheritance and Gifts], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], June 24, 2006, p. 9513.

81. Since 2008, same-sex couples who marry abroad have been able to gain recognition in France as married couples for tax purposes only. This change came about after a Dutch male couple who had married legally in the Netherlands sought official recognition of their marriage in France. Jean-Pierre Stroobants, *La France reconnaît le mariage d'un couple d'hommes néerlandais*, LE MONDE, Sept. 6, 2008, http://www.lemonde.fr/europe/article/2008/09/05/la-france-reconnait-le-mariage-d-un-couple-d-hommes-neerlandais_1091846_3214.html (Fr.).

82. *Gas v. France*, App. No. 25951/07 (challenging the denial of a lesbian couple's request for cross-adoption).

83. Borrillo & Fassin, *supra* note 12, at 19.

84. Borrillo and Fassin, however, acknowledge that the PaCS did have a positive effect on society in that society has generally become more tolerant of LGB relationships. Yet the law is still frozen and has not followed subsequent changes in society. *Id.* at 25 ("This means that the law shapes society, of course; but as society evolves, the law may have soon enough to catch up with further evolutions of society. Unless outside pressure (from the European Union) forces change, without waiting for public opinion.").

85. Godard, *supra* note 77, at 318.

appeals, ordered the Constitutional Council to rule on whether the French ban on same-sex marriage violates the state constitution.⁸⁶

The German Lower House of Parliament adopted a bill titled the Law on Ending Discrimination against Same-Sex Communities: Lifetime Partnership Act, which came into full force in 2001. Unlike the PaCS, the life partnership law mainly duplicates the part of the German civil code that governs marriage between members of the opposite sex and offers this option only to same-sex couples.⁸⁷ Following a recent ruling by the Federal Constitutional Court, same-sex couples are eligible for all the rights that are associated with marriage.⁸⁸ However, it is not clear that Germany is headed toward legalization of same-sex marriage, because it appears that same-sex marriage will probably face a constitutional challenge.⁸⁹ Recently, a gay couple who married in Canada asked the German Court to recognize their marriage. The Court recognized their marriage as a lifetime partnership, not as a marriage.⁹⁰

86. Drew Singer, *France Court Orders Review of Same-Sex Marriage Ban*, JURIST (Nov. 18, 2010), <http://jurist.org/paperchase/2010/11/france-court-%20orders-review-of-same-sex-marriage-ban.php>. This is an interesting development: even if the Constitutional Council decides that the ban on same-sex marriage is unconstitutional, this situation demonstrates why the generalization of the European experience provides an unreliable legal framework. Eskridge and Spedale argue that “[a] very important lesson that the Scandinavian experience has for the United States is that the focus of democratic deliberation should be the legislature.” ESKRIDGE & SPEDALE, *supra* note 7, at 234. But a broader look at Europe tells us the Europeans also try to use the courts whenever they can. See also *infra* notes 88-95 and accompanying text.

87. See Andreas Maurer, *Federal Constitutional Court To Decide Whether to Issue a Temporary Injunction Against Germany’s New Lifetime Partnerships Law for Homosexual Couples*, 2 GERMAN L.J. (2001), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=42> (In 2004, the Life Partnership Act (Revised) was passed in the Lower House of Parliament, increasing the rights of registered life partners to include, *inter alia*, the possibility of adoption and simpler alimony and divorce rules, but excluding the tax benefits gained through marriage.).

88. See *German Top Court Boosts Gay Couples’ Pension Rights*, EXPATICA.COM, Oct. 23, 2009, http://www.expatica.com/de/news/german-news/German-top-court-boosts-gay-couples_pension-rights_57500.html; David Levitz, *Germany’s Gay Couples to Receive Equal Inheritance Tax Rights*, DEUTSCHE WELLE, Aug. 17, 2010, <http://www.dw-world.de/dw/article/0,,5918626,00.html>.

89. Following the enactment of the registered partnership, the center-right parties in Germany’s Federal Constitutional Court challenged the Lifetime Partnership Act. The court held the Act constitutional by a 5-3 majority. The main substantive argument against the law was that the Act conflicts with the freedom to marriage guaranteed in Article 6 of the German Constitution. The majority held that the freedom to marry is not affected by the Act, because the institution of lifetime partnership does not pose an obstacle to those wishing to entering into marriage, as it deals exclusively with same-sex couples. Marriage, according to the majority, is not defined in the German Constitution but could be interpreted as a union between one woman and one man. It seems, therefore, that this case creates an obstacle to future legislation attempting to legalize same-sex marriage. Indeed, according to the dissenting opinion, Article 6 prevents the legislature from extending its substantive protection to same-sex couples. See Russell Miller & Volker Röben, *Constitutional Court Upholds Lifetime Partnership Act*, 3 GERMAN L.J. ¶ 8 (2002), available at <http://www.germanlawjournal.com/index.php?pageID=11&artID=176>; see also Mathias Möschel, *Germany’s Life Partnerships: Separate and Unequal?* 16 COLUM. J. EUR. L. 37, 39 (2009-2010) (describing “some of the highly problematic assumptions and rhetorical and strategic moves used by German judges to justify the unequal treatment of life partnerships and marriage.”).

90. *Court Rules Germany Must Recognise Foreign Gay Marriages*, LOCAL, Jun. 15, 2010, <http://www.thelocal.de/society/20100615-27871.html> (“The court agreed with the view of the authorities that he could not be registered as ‘married’ because a marriage under German law requires different-sex couples”).

Great Britain: Great Britain represents a comprehensive model for registered partnerships. The Civil Partnership Act of 2004 provides same-sex couples with rights and responsibilities identical to those offered by civil marriage.⁹¹ Before this, there was no recognition of same-sex relationships in Great Britain.⁹²

In 2003, Susan Wilkinson and Celia Kitzinger were legally married in Canada and then returned home to England. Great Britain did not accept their marriage and recognized their relationship only as a civil partnership. In 2006, Wilkinson and Kitzinger sought a declaration that their Canadian marriage be considered a marriage in England.⁹³ As it was not recognized, they asked for a declaration of incompatibility with Section 4 of the Human Rights Act of 1998. In refusing to grant the declaration, the House of Lords held that the United Kingdom's Parliament, when enacting the Civil Partnership Act, implicitly expressed its wish not to allow marriage for same-sex couples. The court's strong defense of the Act's benefits, which was not legally necessary for its holding, was very conservative: "By withholding from same-sex partners the actual title and status of marriage, the Government declined to alter the deep-rooted and almost universal recognition of marriage as a relationship between a man and a woman."⁹⁴ Considering the court's rhetoric and the general environment, it seems likely that it will not extend marriage rights to same-sex couples in the near future.⁹⁵

91. Civil Partnership Act, 2004, c. 33 (Eng.) (Civil partners are entitled to the same property rights as married opposite-sex couples, and the same exemptions as married couples on inheritance tax, social security, and pension benefits. The Act also grants individuals in civil partnerships the ability to obtain parental responsibility for a partner's child.).

92. See *Hyde v. Hyde*, [1866] L.R. 1 P. & D. 130 (H.L.) [133] (appeal taken from England) (As early as 1866, marriage was defined as the union of "one man and one woman, to the exclusion of all others."); *Talbot v. Talbot*, [1967] 111 Sol. J. 213 (A woman went through a marriage ceremony with a person whom she believed was a man but who turned out to be a woman. The marriage was annulled, and it was concluded that "there was plainly no marriage and [the court] pronounced a decree nisi (of nullity) saying that the decree could be made absolute forthwith."). Subsequently, section 11 of the Matrimonial Causes Act 1973 was amended to declare that marriage between two people of the same sex is a cause to invalidate the marriage.

93. *Wilkinson v. Kitzinger*, [2006] EWHC (Fam) 2022, [75] (Eng.).

94. *Id.* ¶ 88.

95. Another indication of the unwillingness of the British legislature to open marriage to same-sex couples is the position of the United Kingdom in the submission to the European Court of Justice of a case involving an Austrian gay couple who registered as civil partners in England. The couple brought a claim against the Austrian government for their refusal to recognize their status as civil partners in Austria. The United Kingdom submitted to the court an opinion arguing that the Austrian government should not recognize the couple's status. Why should the United Kingdom argue against recognition of a status that it conferred? There is only one reasonable explanation. The United Kingdom was probably concerned that if the European Court of Justice ruled that Austria has a duty to recognize marital status conferred by another country, a similar argument could be made that the United Kingdom has a duty to recognize same-sex marriages from other EU countries. Afua Hirsch, *UK Challenged the Right to Civil Partnerships of Gay Couples Abroad*, *GUARDIAN*, Dec. 9, 2008, <http://www.guardian.co.uk/uk/2008/dec/09/civil-partnership-rights-austria-uk>.

For a portion of the LGB community in the United Kingdom, civil partnership may be more desirable than marriage.⁹⁶ Though I will discuss this in greater detail *infra*, it is important to note that Stonewall, one of Britain's bigger and important LGB organizations, pushed for the enactment of civil partnerships instead of civil marriage because they thought it was a better option for LGB people.⁹⁷ However, straight and LGB activists recently initiated the Equal Love Campaign, in which they aim to challenge in the ECHR the ban on same-sex marriage and, simultaneously, dispute the ban forbidding opposite-sex couples from registering as civil partners.⁹⁸

The Netherlands: In 1998, the Netherlands introduced a legal scheme making registered partnerships an option available to both same- and opposite-sex couples. In 2001, it became the first country in the world to open up the institution of civil marriage to same-sex couples.⁹⁹ Following the next step of the theory of small change, parental rights laws were amended to grant same-sex couples equal parental rights. In 2005, the parliament eliminated the law disallowing same-sex couples from adopting children from abroad, thus repealing the only discriminatory provision that remained in its laws.¹⁰⁰ According to Waaldijk, the fact that it was the first nation to offer same-sex marriage is can be attributed to the incremental process, the secular nature of the country, and a long tradition of tolerance toward the LGB community.¹⁰¹

Southern Europe: Litigation for the recognition of same-sex marriage was unsuccessful in Spain during the 1990s.¹⁰² By 2005 nearly all the autonomous regions in the country had some form of registered partnership. However, when the socialist party proposed same-sex marriage legislation, massive

96. Sir Elton John, for example, said recently, "I don't want to be married...David and I are not married. Let's get that right. We have a civil partnership. What is wrong with Proposition 8 is that they went for marriage. Marriage is going to put a lot of people off. It's the word marriage." He believes that same-sex couples should be happy with a civil partnership, as it gives them the same legal rights and protection as opposite-sex couples. "I'm very happy with a civil partnership. If gay people want to get married, or get together, they should have a civil partnership." Tim Walker, *Sir Elton John: I Would Not Be Anyone's Wife*, TELEGRAPH, Nov. 14, 2008.

97. See Beccy Shipman & Carol Smart, "It's Made a Huge Difference": Recognition, Rights and the Personal Significance of Civil Partnership, 12 SOC. RES. ONLINE ¶ 2.5 (2007), <http://www.socresonline.org.uk/12/1/shipman.html> ("Although Stonewall used the language of equal rights, they did not argue for simply expanding the institution of marriage to include homosexuals (as has happened in Canada). Instead they argued that Civil Partnership was preferable to marriage because it should be seen as a twenty-first century means of recognising modern relationships and that this was preferable to attempting to radicalise the traditional notion of marriage.").

98. Adam Gabbatt, *European Court Urged to End UK Marriage "Apartheid,"* GUARDIAN, Dec. 19, 2010, <http://www.guardian.co.uk/lifeandstyle/2010/dec/19/european-court-marriage-civil-partnerships>.

99. See Waaldijk, *supra* note 28, at 572 (The Dutch parliament made this change by amending Article 30 of Book 1 of the Dutch civil code to provide: "A marriage can be contracted by two persons of different sex or of the same sex.").

100. See *id.* at 575 (There is concern that countries will prohibit international adoption to countries where children might be given to same-sex couples. This concern was minimized after South Africa, one of the countries from which children commonly arrive, announced that it would allow same-sex marriage.).

101. Waaldijk, *supra* note 3, at 474.

102. See José Ignacio Pichardo Galán, *Same-Sex Couples in Spain: Historical, Contextual and Symbolic Factors*, in CROSS-NATIONAL DIFFERENTIALS, *supra* note 12, at 159, 160-62.

opposition arose, including a huge demonstration of half a million people against the legislation.¹⁰³ Nevertheless, the legislation passed in 2005, and Spain became the third country in the world to recognize same-sex marriage.

Portugal presents a similar story. In 2001, the Portuguese legislature introduced a weak registered partnership scheme for same-sex couples living together for more than two years as a “de facto” union.¹⁰⁴ Recently, however, the Portuguese parliament passed a bill to legalize same-sex marriage; it became effective in June 2010.¹⁰⁵ Therefore, it seems that both Spain and Portugal conform to the incremental pattern.

Italy, Greece, Malta, and Cyprus are the least developed with regards to same-sex marriage.¹⁰⁶ None of these countries offer recognition of any kind for same-sex couples. Article 29 of the Italian Constitution of 1948 stipulates, “The Republic recognizes the rights of the family as a natural society based on marriage.” This was invoked as a strong argument against opening marriage to same-sex couples, and most scholars interpret this Article as preventing the legalization of same-sex marriage.¹⁰⁷ Although a few scholars have suggested different interpretations, this is still the common belief.¹⁰⁸ The discussion has been on the national agenda for years, and though a small number of proposals have been discussed by the legislature, they have not led to significant results. Serious attempts by the Government of Romano Prodi in 2007 to introduce legislation failed after members of the governing coalition threatened division in opposition to the proposals. The main proposal called for a *patto civile di solidarietà* (PaCS), but it offered even fewer rights than its French counterpart.¹⁰⁹

103. See ESKRIDGE & SPEDALE, *supra* note 7, at 84-85.

104. See Rosa Martins, *Same-Sex Partnerships in Portugal: From De Facto to De Jure?*, 4 UTRECHT L. REV., no. 2, June 2008 at 194, 195, <http://www.utrechtlawreview.org/index.php/ulr/article/view/74/74> (The institution of registered partnerships denied same-sex partners many financial, property, and prenatal rights granted to married couples.).

105. See *Portugal Allows Same-Sex Marriage*, ABC NEWS, May 18, 2010, <http://www.abc.net.au/news/stories/2010/05/18/2903000.htm>.

106. See Themis Katsagiannis, *Parliament Denies Recognition of Same Sex Partners*, ILGA EUR., Aug. 4, 2009, available at http://www.ilga-europe.org/home/guide/country_by_country/greece/Parliament-denies-recognition-of-same-sex-partners (In Greece, the institution of cohabitation recently received recognition. The legislature conferred a few rights upon unmarried couples, but explicitly included only opposite-sex couples. A bill to confer a limited set of rights on same-sex partners was rejected by the parliament.); Anthee Carassava, *Same-Sex Marriages Performed in Greece*, N.Y. TIMES, June 4, 2008, <http://www.nytimes.com/2008/06/04/world/europe/04greece.html> (A minor scandal occurred when the mayor of a small island married a few same-sex couples.); David Frueh, *Greece Justice Minister Denounces First Same-Sex Marriages*, JURIST, June 4, 2008, available at <http://jurist.law.pitt.edu/paperchase/2008/06/greece-justice-minister-denounces-first.php> (The Greek Justice Minister quickly declared the marriages “non-existent.”); Kees Waaldijk, *supra* note 21, at 384 (Malta does not recognize same-sex partnerships at all.).

107. See Gioia Scappucci, *Italy Walking a Tightrope Between Stockholm and the Vatican: Will Legal Recognition of Same-Sex Partnerships Ever Occur?*, in LEGAL RECOGNITION, *supra* note 3, at 519, 529-30.

108. Matteo Bonini Baraldi, *Family vs. Solidarity: Recent Epiphanies of the Italian Reductionist Anomaly in the Debate on De Facto Couples*, 4 UTRECHT L. REV., no. 2, June 2008 at 175, <http://www.utrechtlawreview.org/index.php/ulr/article/view/URN%3ANBN%3ANL%3AUI%3A10-1-101092/73>.

109. The Italian proposal also allowed partnership registration for family members other than first-degree relatives. For example, cousins would be able to register as partners and achieve the same rights as same-sex couples.

Hence, it is very unlikely that Italy will move toward the legalization of same-sex marriage anytime soon.¹¹⁰

Eastern Europe: Eastern European countries are the newest members of the European Union and generally lag behind their European Union counterparts with regard to same-sex marriage. Slovenia, Croatia, and Montenegro all decriminalized homosexual conduct in 1976, significantly earlier than their neighbors Serbia and Kosovo (1994), Macedonia (1997), and Bosnia and Herzegovina (1998). In Slovenia, a 2006 law provides a weak level of registered partnership;¹¹¹ though it lacks many provisions concerning parental rights and financial benefits.¹¹² Recently, however, a bill legalizing same-sex marriage and permitting same-sex couples to adopt passed in the lower house of parliament and is now pending in the Labour, Family and Social Affairs Committee.¹¹³

Based on the necessary steps of the theory of small change, Merin suggested in 2002 that the Czech Republic belongs to a group that is “not likely to recognize same-sex couples anytime soon.”¹¹⁴ Nevertheless, the Czech Republic introduced a registered partnership scheme in 2006 and an amendment to grant greater rights to registered partners in June 2008, effectively making registered partners closer in legal status to married couples.¹¹⁵

In 1995, the Hungarian Constitutional Court held that marriage is restricted to opposite-sex couples, though it took a more liberal approach in recognizing the cohabitation rights of same-sex couples. After years of attempts to legislate registered partnerships in Hungary, the parliament adopted such a scheme for

110. The Italian court system has also proven to be ineffective, as illustrated by the case of a lesbian couple caught up in a controversy over a child raised by both women. After the couple ended their relationship, the nonbiological mother asked the court for custody. The court held that, as they were not a family according to the law, she lacked standing to resolve the dispute. Baraldi, *supra* note 108, at 192 (“The court could only conclude that, according to current Italian law, only (biological or adoptive) parents have standing in court for such requests. Therefore, it had to turn down the application for contact on grounds of lack of standing.”).

111. Roman Kuhar, *The Impracticability of Active Citizenship Beyond the Closet in Slovenia*, in *THE GAYS’ AND LESBIANS’ RIGHTS IN AN ENLARGED EUROPEAN UNION* 147, 151-52 (Anne Weyembergh & Sinziana Carstocea eds., 2006).

112. See Matej Avbelj & Arne Marjan Mavčič, *Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation – Slovenia*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS – FRA 5 (Feb. 2008), available at http://fra.europa.eu/fraWebsite/attachments/FRA-hdgso-NR_SI.pdf (discussing the lack of provisions concerning children and other shortcomings of the Slovenian law).

113. *Family Law Debate Remains Stuck at Beginning*, SLOVENIA TISKOVNA AGENCIJA, May 5, 2010, <http://www.sta.si/en/vest.php?s=a&id=1509509>; *Slovenia First Ex-Communist Country with Gay Marriage?*, GAY MARRIAGE BLOG (Sept. 8, 2010, 9:48 AM), <http://www.thegaymarriageblog.com/2010/09/slovenia-to-be-first-ex-communist-country-with-gay-marriage/>; *The Status of Same-Sex Marriage World-Wide*, UNITED FAMS. INT’L BLOG (Dec. 9, 2009, 12:03 PM) <http://unitedfamiliesinternational.wordpress.com/2009/12/09/the-status-of-same-sex-marriage-world-wide/>.

114. MERIN, *supra* note 5, at 331.

115. See ILGA Eur. & Global Rights, *The Status of Lesbian, Gay, Bisexual and Transgender Rights in the Czech Republic: Submission to the Human Rights Council for the Universal Periodic Review (1st Session)*, UNIVERSAL PERIODIC REVIEW (July 2007), http://lib.ohchr.org/HRBodies/UPR/Documents/Session1/CZ/ILGA_CZE_UPR_S1_2008_InternationalLesbianandGayAssociation_uprsubmission.pdf.

both same-sex and opposite-sex couples in December 2007.¹¹⁶ On December 23, 2008, however, the Constitutional Court struck down the law, holding that the law allowing opposite-sex couples to enter into registered partnerships diminished the value of constitutionally guaranteed heterosexual marriage.¹¹⁷ The Hungarian parliament thus passed the bill again, this time allowing registered partnerships for same-sex couples only.

In Poland, three attempts to legislate registered partnership have all been rejected, and it seems highly unlikely that the current government will support such a bill.¹¹⁸ In Romania, the Senate voted in 2008 to amend the Family Code to define marriage as the union between a man and a woman.¹¹⁹ There is strong resistance to same-sex partner registration in the Baltic States of Estonia, Lithuania, and Latvia¹²⁰ and in Latvia there is a constitutional ban on same-sex marriage.¹²¹

In sum, this survey of the legal situation in Europe offers a few lessons. First, some countries, mainly in Scandinavia, have followed the pattern suggested by the theory of small change. Second, it is not yet clear that same-sex marriage in Europe is inevitable or even that it is likely to be the final stage in some countries. Whether the eastern and southern countries will ever open marriage to same-sex couples is a question of great importance. It is also not clear whether the other members of the European Union will permit same-sex marriage in the future or will stay with civil unions. Indeed, the most influential legal systems in Europe seem determined to offer legal recognition only through civil unions and do not appear inclined to allow same-sex marriage in the near future. I do not, however, argue that these countries will never offer same-sex marriage. For example, it is likely that Denmark will, at some point, expand the institution of marriage to include same-sex couples.¹²² But until it does, describing the effect of civil unions in Belgium and the Netherlands as the general rule while disregarding the effect that civil unions have had in other countries such as Denmark paints an inaccurate picture. Clearly, the European Union will soon require member states to recognize same-sex partnerships, but

116. See Orsolya Szeibert-Erdős, *Same-Sex Partners in Hungary: Cohabitation and Registered Partnership*, 4 UTRECHT L. REV., no. 2, June 2008, at 212, 212, <http://www.utrechtlawreview.org/index.php/ulr/article/view/75/75>.

117. See Ellen M. Rice, *Hungarian Court Strikes Down Heterosexual and Same-Sex Civil Unions Over Damage to the Family*, LIFESITENEWS.COM, Dec. 16, 2008, <http://www.lifesitenews.com/ldn/2008/dec/08121605.html>.

118. See Katharina Boele-Woelki, *The Legal Recognition of Same-Sex Relationships Within the European Union*, 82 TUL. L. REV. 1949, 1960 (2008).

119. *Romania: Discriminatory Partnership and Adoption Provisions in New Civil Code*, INT'L GAY & LESBIAN HUM. RTS. COMMISSION (July 30, 2009), <http://www.iglhc.org/cgi-bin/iowa/article/takeaction/resourcecenter/953.html>.

120. See Boele-Woelki, *supra* note 118.

121. See Merle Haruoja et al., *Thematic Legal Study on Homophobia and Discrimination on Grounds of Sexual Orientation (Estonia)*, EDZ ARCHIDOK (Feb. 2008), http://www.pedz.uni-mannheim.de/daten/edz-b/ebr/08/FRA-hdgso-NR_EE.pdf.

122. See Associated Press, *Europe Split on Gay Marriage*, GAY NEWS FROM 365GAY.COM (Dec. 18, 2006), <http://web.archive.org/web/20080129053504/http://www.365gay.com/Newscon06/12/121806euPoll.htm> (In a poll conducted by the European Union, sixty-nine percent of Denmark's population supported same-sex marriage, placing Denmark third, behind Sweden and the Netherlands.).

it will likely allow individual states to decide whether to offer the option of marriage or unions.¹²³ Recently the European Court of Human Rights held, in a 4-3 decision, that the member states of the European Council have no obligation to allow same-sex marriage.¹²⁴ Third, this study suggests that civil unions should not be understood as necessarily catalyzing the legalization of same-sex marriage, as civil unions can actually often impede it. Finally, it is clear that in many countries the courts have been active in granting LGB individuals equal rights, and in many other countries the intervention of the courts has been requested by LGB people. Contrary to the common belief concerning the European courts' lack of involvement in the recognition of same-sex couples, this study shows that in most European countries, LGB people have petitioned both the national courts and the European Court of Human Rights, and that some of these courts have been very active in denying or granting same-sex couples the right to marry.

B. Recognition of Same-Sex Couples in the United States

Generally speaking, while some states, such as Vermont¹²⁵ and Connecticut,¹²⁶ have followed the theory of small change, other states have

123. The European Union Parliament has often demonstrated its commitment to LGB rights generally and to legal recognition of same-sex partnerships specifically. In 2003 it delivered the following resolution, calling on "Member States to abolish all forms of discrimination—whether legislative or de facto—which are still suffered by homosexuals, in particular as regards the right to marry and adopt children." European Parliament Resolution on the Situation as Regards Fundamental Rights in the European Union, EUR. PARL. DOC. (2002/2013(INI)) ¶ 77 (2002). Recently, the European Parliament has adopted a resolution calling for all EU member states to engage in "the mutual recognition of the effects of civil status documents." EUR. PARL. DOC. (2010/2080(INI)) (2010), available at <http://www.europarl.europa.eu/oeil/FindByProcnum.do?lang=en&procnum=INI/2010/2080>. Eskridge and Spedale estimate that "[a]t some point, the European Union will impose some uniform requirement upon its member states." ESKRIDGE & SPEDALE, *supra* note 7, at 241. A uniform requirement, however, does not necessarily mean marriage, but more likely means a demand to offer same-sex couples the same rights as opposite-sex couples.

124. *Case of Schalk and Kopf v. Austria*, EUR. CT. HUM. RTS., <http://www.echr.coe.int/echr/en/header/press/multimedia/webcasts+of+public+hearings/webcasts2010.htm> (follow "Judgment of 24/06/10" hyperlink).

125. See, e.g., *Baker v. State*, 744 A.2d 864, 867 (Vt. 1999) (requiring statutory benefits for same-sex couples). At the time of the *Baker* decision, Vermont had already decriminalized sodomy laws and introduced antidiscrimination laws. *Id.* at 891 (Dooley, J. concurring). Then in 1999, the Vermont Supreme Court ruled, based on the state constitution, that same-sex couples must be granted rights and privileges equal to those granted to married opposite-sex couples. *Id.* at 867. While the final implementation was left to the state legislature, the justices declared that "Whatever system is chosen . . . must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law." *Id.* The state legislature then embraced the idea of civil unions and recently voted to allow marriage between members of the same sex. 2009 Vt. Acts & Resolves 3.

126. Connecticut, the second jurisdiction in the United States to legalize same-sex marriage, has followed the stages of the theory of small change, but it is unclear whether the establishment of civil unions had any effect on this decision. In 2004, eight couples submitted a lawsuit to the Connecticut trial court, asserting that denying same-sex marriage is unconstitutional. At the time, Connecticut offered only a domestic partnership registry. While the action was pending in the trial court, the legislature passed a civil union law, which established the right of same-sex partners to enter into civil unions and conferred on them all the rights and privileges that are granted to spouses in a marriage. The civil union did not satisfy the plaintiffs and they sustained the claim, asserting that

followed very different paths. In fact, many states have legalized same-sex marriage without ever passing civil unions or following the path proscribed by Waaldjik.¹²⁷

Hawaii is a good example of the problems associated with the theory of small change and the incremental approach. In the 1993 case of *Baehr v. Lewin*,¹²⁸ the Hawaiian Supreme Court became the first in the United States to recognize that the exclusion of same-sex marriage amounts to discrimination on the basis of sex.¹²⁹ The Hawaiian Supreme Court remanded the case to the lower court to examine whether the state had a compelling reason to discriminate against same-sex couples. By the time the case returned to the Hawaiian Supreme Court, Hawaiian voters had, by an overwhelming majority of 69 percent, ratified a constitutional amendment in a state referendum giving the Hawaiian legislature the authority to amend the marriage law to apply only to opposite-sex couples.¹³⁰ Following the court's decision, Hawaii enacted the Reciprocal Beneficiaries Act, which provides a limited set of rights to same-sex couples.¹³¹

Recently, the Hawaiian State House approved a bill offering civil unions to same-sex couples.¹³² The bill, however, failed in Senate committee.¹³³ A second attempt to enact civil unions succeeded but was ultimately vetoed by the

the civil union law and its prohibition against same-sex marriage did not pass constitutional muster. Demian, *Civil Unions: The Connecticut Approach*, PARTNERS TASK FORCE (Nov. 21, 2009), <http://www.buddybuddy.com/d-p-conn.html> (discouraging couples from entering into civil unions); *Kerrigan v. State*, 909 A.2d 89, 101-02 (Conn. 2006). Indeed, at the end of July 2006, only 1072 civil unions were registered, and it does not seem that it has had a great influence on society in Connecticut. The trial court rejected the plaintiffs' claims, asserting that "the effect of [the civil union law] has been to create an identical set of legal rights in Connecticut for same-sex couples and opposite-sex couples." *Id.* On appeal, the Connecticut Supreme Court ruled by a 4-3 majority that denying same-sex couples the right to marry was against the equality and liberty rules in the Connecticut Constitution. Connecticut, therefore, did follow the classic stages. It is not clear, however, that civil unions actually *contributed* to the incremental process toward same-sex marriage. The civil unions were legislated while a court challenge was pending and, therefore, could not really have an effect on the process. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

127. A total of fifteen states had passed mini-DOMAs by the end of 1996, and at the time of this writing, thirty states have constitutional provisions limiting recognition of same-sex relationships, and several other states have amended their marriage laws for the same purpose. *See, e.g.*, DOMA WATCH, <http://www.domawatch.org> (last visited Jan. 20, 2011) ("There are 30 states that have constitutional amendments protecting traditional marriage, including the three states (Arizona, California, and Florida) that passed constitutional amendments in November 2008.").

128. *See Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993), *reh'g granted in part*, 875 P.2d 225 (Haw. 1993), *aff'd sub nom. Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997).

129. *See id.* at 561-72 (The Court did not decide that withholding marriage from same-sex couples is unconstitutional, but rather that denying marriage licenses to same-sex couples is *prima facie* sex discrimination requiring justification and therefore remanded the case to a lower court to examine whether the state could provide a compelling rationale.); *Baehr v. Miike*, 1996 WL 694235, at *15 (Haw. Cir. Ct. 1996) (In 1996, on remand, a Hawaiian state circuit court found that the State had not provided sufficient justification.).

130. MERIN, *supra* note 5, at 221-22.

131. *See HAW. REV. STAT. § 572C* (1997) (providing that any two single adults who cannot get married have access to some state rights benefits, such as inheritance rights, the right to sue for wrongful death, and health and pension benefits for the partners of state employees).

132. H.B. 444, 25th Leg. (Haw. 2009).

133. Mark Niese, *Committee Deadlocks on Hawaii Same-Sex Unions Bill*, ASSOCIATED PRESS, Feb. 28, 2009, <http://www.webcitation.org/5ewQDxNaq>.

governor.¹³⁴ It took Hawaii twelve years to begin discussing replacing the reciprocal beneficiaries scheme with civil unions, and they have not yet succeeded in doing so. A review of the State House's discussion while the bill was being argued makes clear that a majority of the members of the legislature, as well as proponents of civil unions in the general public, were primarily concerned with equalizing the day-to-day rights of same-sex couples but showed no clear desire to enhance their official status.¹³⁵ Moreover, Hawaiian couples recently filed a lawsuit "seeking a status like civil unions" in order to attain rights and benefits equal to those granted to opposite sex-couples.¹³⁶ The case of Hawaii thus shows how registered partnership schemes can impede the legalization of same-sex marriage by focusing efforts on the struggle for civil unions and putting same-sex marriage on the backburner. Incrementalism in Hawaii's case has been too slow and too gradual.

While Vermont was the first state to enact civil unions, Massachusetts was the first to recognize same-sex marriage.¹³⁷ Massachusetts is a prime example of why an incrementalist process is not always necessary. The Massachusetts Supreme Judicial Court held in a 4-3 majority that the Massachusetts Constitution prohibits the state from denying same-sex couples the right to marry.¹³⁸ When faced with the question of whether offering civil unions rather than marriage is constitutional, the Massachusetts Supreme Judicial Court replied sharply that:

Segregating same-sex unions from opposite-sex unions cannot possibly be held rationally to advance or "preserve" what we stated in *Goodridge* were the Commonwealth's legitimate interests in procreation, child rearing, and the conservation of resources Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status.¹³⁹

The case of Massachusetts demonstrates that legal recognition of same-sex marriage can be achieved in the absence of the incremental approach. Eskridge clarifies that Massachusetts "had deregulated sodomy and adopted sweeping antidiscrimination and hate crime laws protecting LGBT people, *but each* [Massachusetts and Vermont] *had also adopted statewide domestic partnership regimes for state employees.*"¹⁴⁰

I believe Eskridge overestimates the progress demonstrated in Massachusetts before the state's Supreme Court decision. Indeed,

134. Associated Press, *Hawaii: Governor Vetoes Same-Sex Unions*, N.Y. TIMES (July 7, 2010), http://query.nytimes.com/gst/fullpage.html?res=9B05E5DC1230F934A35754C0A9669D8B63&ref=same_sex_marriage.

135. Testimony on H.B. 444, 25th Leg. (Haw. 2009), available at http://www.capitol.hawaii.gov/session2009/Testimony/HB444_TESTIMONY_JUD_02-05-09_.pdf.

136. *Young v. Lingle*, LAMBDA LEGAL (July 29, 2010), <http://www.lambdalegal.org/in-court/cases/young-v-lingle.html>.

137. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (2003) ("We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.").

138. *Id.*

139. Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

140. ESKRIDGE & SPEDALE, *supra* note 7, at 35-36 (emphasis added).

Massachusetts decriminalized sodomy laws and adopted antidiscrimination laws protecting LGB people in 1998,¹⁴¹ but it only offered an extremely limited domestic partnership registry. An executive order signed by Governor William Weld in 1993 provided limited rights for a limited number of high-level employees: it allowed employees in same-sex relationships to register their partners for *non-medical* benefits and bereavement purposes only.¹⁴² Domestic partnership schemes, however, usually provide substantial rights, including such rights as to remain in a rent-controlled apartment after the domestic partner and leaseholder dies, to visit the domestic partner in a city hospital, and (in the case of the partners of city employees) to access subsidized health insurance.¹⁴³

Moreover, while several cities and towns in Massachusetts have offered a more expansive recognition of domestic partnership, including medical benefits, the Supreme Judicial Court of Massachusetts ruled in 1999 that the City of Boston did not have the power to expand the reach of the state insurance laws by including domestic partners in the group health system.¹⁴⁴ Although not directly at issue in the case, the benefits provided to domestic partners and their dependents by nearby towns and cities were called into question by the court's ruling.¹⁴⁵

Therefore, when the Massachusetts Supreme Judicial Court issued its decision, it had passed only the first two steps proposed by the theory of small change, i.e., decriminalizing sodomy and enacting antidiscrimination laws.¹⁴⁶ There was only minimal legal recognition of same-sex relationships, and Massachusetts did not offer the option of civil unions or expansive domestic partnership registration when the court decision was handed down. As such, Massachusetts is an exception to Merin's theory that the stage of civil unions always precedes legal recognition of same-sex marriage.

This is made even clearer by the case of Iowa, a state that never had any civil union or domestic partnership scheme prior to the Iowa Supreme Court ruling that struck down the ban on same-sex marriage.¹⁴⁷ In fact, sexual orientation was added to the antidiscrimination law in 2007, only two years prior to the aforementioned court ruling. Thus, Iowa did not go through any sort of incremental process or the "necessary progress" described by the theory of small change.

141. MASS. GEN. LAWS ch. 151B, § 3(6) (July 1, 2003).

142. Mass. Exec. Order No. 340 (Nov. 19, 1993).

143. See N.Y. Executive Order No. 33, *Establishing a State Policy Against Discrimination of the Basis of Sexual Orientation and Reviving a Task Force to Address Individuals' Rights to Benefit of Government Services and Opportunity for Government Service Regardless of Sexual Orientation*, 9 NYCRR 5.33 (1996).

144. See *Connors v. City of Boston*, 714 N.E.2d 335, 342 (Mass. 1999) (revoking an Executive Order issued by Boston's mayor which granted health insurance benefits to registered domestic partners of city employees).

145. See Jennifer L. Levi, *Massachusetts' Domestic Partnership Challenge: Hope for a Better Future*, 9 LAW & SEXUALITY 137, 149 (1999-2000).

146. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 1004 (Mass. 2003).

147. *Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009).

California, in contrast to other states, clearly followed incremental process.¹⁴⁸ As early as 1997, the County of San Francisco enacted the Equal Benefits Ordinance, the first ordinance in the United States requiring certain private actors to recognize same-sex relationships.¹⁴⁹ Other jurisdictions, such as Berkeley and Los Angeles, followed. In 1999, California was the first state to enact a domestic partnership registry.¹⁵⁰ In 2000, however, 61 percent of voters voted to enact a ballot initiative known as Proposition 22, adding a section to the California Family Code formally defining marriage as a union between a man and a woman.¹⁵¹ In October 2001, California expanded the rights of same-sex couples under its domestic partnership law, and in 2003, the state enacted an even more substantial extension.¹⁵² This process has steadily continued ever since, with at least one bill extending greater rights to same-sex couples passing every year.

In 2004, in the wake of the Massachusetts Supreme Court decision,¹⁵³ San Francisco Mayor Gavin Newsom ordered that county marriage licenses be issued “on a non-discriminatory basis, without regard to gender or sexual orientation.”¹⁵⁴ This caused substantial controversy, and the Supreme Court of California subsequently voided the marriages, ruling unanimously that the mayor had overstepped his authority by issuing licenses to same-sex couples.¹⁵⁵ Following this case, LGB organizations challenged the constitutionality of the marriage law.¹⁵⁶ In September 2005, while the California court heard the case, the California legislature approved a bill legalizing same-sex marriage, making it the first state in the nation to approve a same-sex marriage bill without court intervention. Unfortunately, Governor Arnold Schwarzenegger vetoed the bill.¹⁵⁷

In 2008, the California Supreme Court held that limiting marriage to opposite-sex couples violated the state constitution. While the court was still considering the case, opponents of same-sex marriage brought forth a ballot initiative proposing an amendment to California’s constitution: “Only marriage between a man and a woman is valid or recognized in California.” This proposal, commonly known as Proposition 8, was accepted in the 2008 election by 52.3 percent of the vote. The validation of the amendment was almost immediately challenged in the California Supreme Court, which upheld the amendment but also validated the marriages of the almost 30,000 same-sex

148. See ESKRIDGE, *supra* note 4, at 115 (stating that California was “the only state with comparable protection for lesbians and gay men.”).

149. MERIN, *supra* note 5, at 202.

150. *Id.*

151. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

152. Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West 2005).

153. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 1003-04 (Mass. 2003).

154. *Lockyer v. City of San Francisco*, 95 P.3d 459, 464 (Cal. 2004).

155. *Id.*

156. *Marriage Cases*, 183 P.3d 384.

157. Nancy Vogel & Jordan Rau, *Gov. Vetoes Same-Sex Marriage Bill*, L.A. TIMES, Sept. 30, 2005, <http://www.latimes.com/la-me-timelinegaymarriage-2005sep30,0,1040616.story>.

couples who had already married.¹⁵⁸ More recently, however, the Northern District of California overturned Proposition 8, ruling that it violated the Fourteenth Amendment of the United States Constitution.¹⁵⁹ The case is currently under appeal.¹⁶⁰

A few explanations were given for the victory of Proposition 8. One of the popular explanations was that the candidacy of Barack Obama affected the results. Those in support of this claim argue that African American and Latino voters, who traditionally oppose same-sex marriage, showed up at the polls in great numbers in support of President Obama and, while there, voted for Proposition 8.¹⁶¹ This belief, however, cannot fully account for the passage of Proposition 8. To be sure, while 70 percent of California's African American voters *did* vote yes on Proposition 8,¹⁶² a study shows that the initiative would still have passed, albeit barely, even if African American and Latin voters had shown up in the same numbers as they had for the 2004 elections.¹⁶³ Others suggest that the Church of Jesus Christ of Latter-day Saints' donation of approximately twenty million dollars in support of the amendment assisted the passage of the proposition.¹⁶⁴ Still others blame gay rights organizations for failing to effectively publicize the lack of rights experienced by LGB couples.¹⁶⁵

Whatever the reason, the victory of Proposition 8 led to the realization that there are important and unpredictable factors influencing the path to legal recognition of same-sex marriage. These factors have significant influence on the ultimate acceptance of same-sex marriage—perhaps as much as or more than the incremental process. The case of California demonstrates the aforementioned concept of the butterfly effect.¹⁶⁶ When it comes to same-sex

158. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009).

159. *Perry v. Schwarzenegger*, 264 F.R.D. 576, 584 (N.D.Cal. 2009).

160. *Perry v. Schwarzenegger*, 2010 WL 3212786 (9th Cir. Aug. 16, 2010) (ordering the district court's judgment stayed pending appeal).

161. See Jesse McKinley, *Same-Sex Marriage Ban Is Tied to Obama Factor*, N.Y. TIMES, Sept. 20, 2008, <http://www.nytimes.com/2008/09/21/us/politics/21gay.html>.

162. See Hendrik Hertzberg, *Eight Is Enough*, NEW YORKER, Dec. 1, 2008, http://www.newyorker.com/talk/comment/2008/12/01/081201taco_talk_hertzberg.

163. Marisa Abrajano, *Are Blacks and Latinos Responsible for the Passage of Proposition 8? Analyzing Voter Attitudes on California's Proposal to Ban Same-Sex Marriage in 2008*, 63 POL. RES. Q. 922, 929 (2010) ("[E]ven if turnout rates among these two groups remained at the same levels as they did in the 2004 presidential race, Proposition 8 still would have garnered a majority of support from California's voters. Nonetheless, given their large share of the state's eligible voting population (31 percent), black and Latino voters played an important role in the passage of Proposition 8.").

164. Cf. Mark Schoofs, *Mormons Boost Antigay Marriage Effort*, WALL ST. J., Sept. 20, 2008, <http://online.wsj.com/article/SB122186063716658279.html>.

165. See Matthew Coles, *Prop 8: Let's Not Make the Same Mistake Next Time*, HUFFINGTON POST (Feb. 26, 2009), http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the_b_170271.html.

166. Nassim Nicholas Taleb's "black swan" theory offers a different way of looking at the often unpredictable nature of same-sex marriage. NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2d ed. 2010). According to this theory, a black swan is an historical event, an outlier, that comes as a surprise to the observer, has consequences on human lives, and is explained retrospectively. *Id.* at xxi-xxiii. Such events include the September 11, 2001 terrorist attacks; World War I; and the meteoric success of a book. One interesting observation made by Taleb is that a black swan event is often analyzed and rationalized in the aftermath of the event,

marriage, it is hard to foresee what seemingly small factors will have great influence on the final outcome.¹⁶⁷ California also provides striking proof of the fact that when it comes to marriage, change is never a small matter.

Maryland offers a more complicated picture regarding same-sex marriage, though this picture demonstrates the point that there are many paths leading to legalization of same-sex marriage. Maryland passed through the first two stages of the theory of small change¹⁶⁸ and came close to arriving at the final stage of

leading people to assume that it should have been possible to predict the event. That was the case with the terrorist attacks: people looked back and argued that it should have been possible to prevent it, that the data needed to prevent the event were there. But according to Taleb, such an event can be “predicted” only in retrospect, because people’s minds are not trained to deal with black swans. Human nature makes people think in hindsight of an event that it could have been predicted beforehand. Taleb explains that “black swan” is an objective issue and that it is appropriate to deal with it with empirical skepticism—on the one hand by using data, and on the other hand by remembering that there are many things beyond our knowledge that could affect our conclusions. *Id.* at 145-57. That is why, according to Taleb, people should be cautious about interpreting scientific theories that give good explanations for events that have already transpired, because in fact they lead us to fail to consider factors of which we are not aware. They provide us with the illusion of knowledge and inflated confidence, thus catalyzing the next black swan. *Id.* at 137-45. Applying this idea to the predictability of same-sex marriage demonstrates that LGB organizations should avoid assuming that everything—the outcome of a court case or a lobbying effort, for example—can be known in advance. A case like *Perry v. Schwarzenegger*, which challenged the ban on same-sex marriage in California, could, in the end, be determined by the composition of the U.S. Supreme Court, sudden changes to which are not common. As stated by Professor Erwin Chemerinsky, “The question is whether it’s too soon to risk that the court will reject it. We don’t know who’s going to be on the court.” Andrew Harmon & Neal Broverman, *Legal Expert Concerned by Fed Prop 8 Case*, THE ADVOCATE, May 27, 2009, http://www.advocate.com/Politics/Marriage_Equality/Legal_Experts_Outraged_by_Federal_Prop_8_Case.

167. The case of *Perry v. Schwarzenegger* also “illustrated how the politics of litigation can operate in unpredictable ways.” See Nan Hunter, *Ninth Circuit Sends Prop 8 Standing Issue to California Supreme Court*, Jan. 4, 2011, HUNTER JUST. (Jan. 4, 2011, 10:50 PM), http://hunterforjustice.typepad.com/hunter_of_justice/2011/01/ninth-circuit-sends-prop-8-standing-issue-to-california-supreme-court.html. After the trial court concluded that the ban on same-sex marriage in California violates the Due Process and Equal Protection Clauses of the U.S. Constitution, California’s governor and attorney general refused to represent the appellants on appeal. Therefore, the appellant may lack standing to appeal. To resolve the question of standing, the Ninth Circuit decided to let the California Supreme Court determine whether proponents of Prop 8 have standing to pursue the case. *Perry v. Schwarzenegger*, 2011 WL 9633 (9th Cir. Jan. 4, 2011) (order certifying a question to the Supreme Court of California). Judge Reinhardt, a very progressive judge, wrote a separate concurrence in which he criticized the lawyers on both sides for choosing litigation strategies that created the standing problem. *Perry v. Schwarzenegger*, 2011 WL 9576 (9th Cir. Jan. 4, 2011) (Reinhart, J. concurring). Specifically, he criticized Boise and Olson, the lawyers representing the opponents of Prop 8, because “the issues concerning standing [would have been] wholly avoidable in this case” if they had filed a lawsuit against a broader set of defendants. *Id.* at *7. Judge Reinhardt is a pro-gay-rights judge as well as “a sharp critic of how procedural issues like standing can erect obstacles to a court reaching the merits of a case.” Hunter, *supra*. Hunter therefore concludes that “the politics of litigation can operate in unpredictable ways,” and that “[t]he only thing certain about the impact of today’s rulings is that the progress of the case has considerably slowed down.” *Id.* Hence, she suggests that the cases concerning the constitutionality of DOMA at the federal level may arrive at the U.S. Supreme Court faster than this case. *Id.* In other words, there are a number of different factors that affect the path to legal recognition of same-sex partnerships—judges, litigation strategies, and other court cases that are adjudicated at the same time.

168. *Williams v. Glendening*, No. 98036031/CL-1059, 1998 WL 965992, at *7 (Md. Cir. Ct. Oct. 15, 1998) (holding that “the statute as it is written does not encompass consensual, non-commercial,

legalizing same-sex marriage when the Court of Appeals of Maryland reversed, by a 4-3 split, the lower court's decision that the ban on same-sex marriage violated the state constitution.¹⁶⁹

Even though the Maryland case may be construed as a failure for LGB organizations, it stimulated the passage of domestic partnership legislation.¹⁷⁰ Recently, Maryland's Attorney General also announced that the state will recognize same-sex marriages performed in other states.¹⁷¹ In several ways, the situation in Maryland illustrates the complexity that can characterize the path to same-sex marriage. First, the fact that three justices were ready to accept the argument that banning same-sex marriage is unconstitutional indicates that it is possible that Maryland could have moved directly to allowing same-sex marriage, bypassing the other stages of the theory of small change. Second, at least according to Merin, it is a fundamental mistake to go to court to ask for marriage equality before all the preceding "necessary" steps have been completed. Nevertheless, despite the failure to procure same-sex marriage rights in Maryland, this court decision did stimulate the enactment of a domestic partnership law.

New York presents a different path. Eskridge predicted that New York would be one of the first states to "follow Vermont and create an institution for same-sex couples."¹⁷² Although his prediction was correct, it did so in a unique way. In *Hernandez v. Robles*, New York's Court of Appeals, the state's highest court, held that the ban on same-sex marriage is constitutional because there are rational grounds on which the legislature could choose to restrict marriage to opposite-sex couples.¹⁷³ Recently, however, the Appellate Division, Fourth Judicial Department of New York determined that this ruling does not preclude recognition of same-sex marriages that are performed in Canada.¹⁷⁴ Following this decision, New York Governor David Paterson issued a memo to state agencies calling on them to recognize same-sex marriages performed in other states.¹⁷⁵ As evidenced by the steps taken in New York, whose Senate recently rejected a same-sex marriage bill,¹⁷⁶ the path to same-sex marriage is usually more complicated than that described by the theory of small change and involves more than three stages.

heterosexual or homosexual activity between adults in private"); MD. CODE ANN., STATE GOV'T § 20-602 (LexisNexis 2009) (Maryland's antidiscrimination law outlaws discrimination based on sexual orientation).

169. *Conaway v. Deane*, 932 A.2d 571, 630 (Md. 2007).

170. 2008 Md. Laws 4597.

171. See Associated Press, *Gay Marriage Makes Gain in Maryland*, N.Y. TIMES, Feb. 24 2010, at A21, available at <http://www.nytimes.com/2010/02/25/us/25marriage.html>.

172. ESKRIDGE, *supra* note 4, at 233.

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

174. *Martinez v. County of Monroe*, 850 N.Y.S.2d 740, 740 (N.Y. App. Div. 2008).

175. *Martinez v. County of Monroe et al. (Seeking Recognition in New York for Valid Same-Sex Marriages Performed Outside the State)*, NEW YORK CIVIL LIBERTIES UNION, <http://www.nyclu.org/node/1088> (last visited Nov. 14, 2010).

176. See Jeremy W. Peters, *New York State Senate Votes Down Gay Marriage Bill*, N.Y. TIMES, Dec. 2, 2009, at A1, available at <http://www.nytimes.com/2009/12/03/nyregion/03marriage.html>.

There are many other exceptions to this theory. Maine, for example, enacted domestic partnership laws in 2004 but did not add sexual orientation as a protected category to its antidiscrimination law until 2005.¹⁷⁷ In New Jersey, the legislature enacted a civil union scheme in 2006 after its Supreme Court decision in *Lewis v. Harris*¹⁷⁸ but recently voted down a same-sex marriage bill.¹⁷⁹ A change in legal status is not likely to come soon, as Governor Chris Christie opposes same-sex marriage.¹⁸⁰ Recently, the New Jersey Supreme Court refused to hear a case challenging the constitutionality of offering only same-sex couples the option of civil unions, which again shows that civil unions may not catalyze progress but may actually impede it.¹⁸¹

In conclusion, the survey of the American legal situation shows some similarities to the European one. It mainly demonstrates that the incremental approach is not always the solution, and that there are a variety of factors that affect the path to same-sex marriage. The theory of small change overlooks this multitude of factors. A survey of the different patterns leading to legal recognition of same-sex partnerships in Europe and the United States demonstrates that the process described by the theory of small change is not accurate and does not allow for the complexities inherent in the struggle to achieve legalization of same-sex marriage. The landscape does not show that legal recognition of same-sex marriage is inevitable. Many countries and states seem to be reluctant to move beyond the stage of civil unions, while others have constitutional bans prohibiting same-sex marriage. Furthermore, the courts of some of these countries and states have gone so far as to interpret existing constitutional provisions as prohibiting same-sex marriage.

Now that it has been demonstrated that the theory of small change is not able to accurately predict the legalization of same-sex marriage, I will consider whether Badgett's method offers a better framework.

177. ME. REV. STAT. ANN. tit. 5, § 4572 (Supp. 2009). Moreover, the case of Maine also suggests that the granting of marriage rights by the legislature does not make a state immune to the problems associated with legalization of same-sex marriage by the court. The fact that the legislature grants such rights does not preclude the possibility that those rights will be revoked by the people in a referendum. In Maine, a same-sex marriage bill was approved by the legislature and signed into law by the Governor in 2009. Nevertheless, opponents successfully petitioned for a referendum on the issue, putting the new law on hold before it came into effect; the referendum was approved by 53 percent of voters, preventing the new law from ever going into effect. Abby Goodnough, *A Setback in Maine for Gay Marriage, but Medical Marijuana Law Expands*, N.Y. TIMES, Nov. 4, 2009, http://www.nytimes.com/2009/11/05/us/politics/05maine.html?_r=1&scp=10&sq=maine+same-sex+marriage&st=nyt.

178. 908 A.2d 196 (N.J. 2006).

179. See David Kocieniewski, *New Jersey Senate Defeats Gay Marriage Bill*, N.Y. TIMES, Jan. 7, 2010, at A18, available at <http://www.nytimes.com/2010/01/08/nyregion/08trenton.html>.

180. *Id.*

181. See Associated Press, *New Jersey Supreme Court Declines Gay Marriage Case*, N.Y. TIMES, July 27, 2010, at A17, available at http://www.nytimes.com/2010/07/27/nyregion/27jersey.html?ref=same_sex_marriage.

V. BADGETT'S EMPIRICAL METHOD FOR PREDICTING THE RECOGNITION OF SAME-SEX PARTNERSHIPS

Badgett offers important criticism of Eskridge's and Waaldijk's theories.¹⁸² First, she argues that the theory of small change "impl[ies] the inevitability of change," while history actually suggests that progress in promoting tolerance toward homosexuality has not been linear.¹⁸³ In addition, the theory offers no clear idea of how long each stage of the process should or will take. Second, each stage fosters compromise—a consolation prize—rather than a concrete step in the direction of change. She uses as an example Denmark, which in 1989 became the first country in the world to offer same-sex couples the option of registered partnerships but has not yet achieved legal acceptance of same-sex marriage.¹⁸⁴ Finally, Badgett suggests that the theory of small change seems to be a strategic plan for LGB organizations rather "than the inexorable process as presented by Waaldijk and by Eskridge."¹⁸⁵ This notion of building on the previous successes of the LGB movement fails to take into account many important social, historical, and political factors not directly related to LGB politics, such as changes in family structure and other social components.¹⁸⁶ She posits that there are many factors affecting the acceptance of same-sex marriage. Such factors include attitudes about homosexuality, the power of LGB organizations, and the power of opponents of same-sex marriage. Additionally, local ideological attitudes, such as liberalism, also play an important role.¹⁸⁷ Badgett also asserts that the legal institution of marriage promotes efficiency at the societal and family levels, and that this might affect the path to legal recognition of same-sex partnerships in various ways. For example, if marriage provides economic benefits, same-sex couples will have greater material incentive to seek some form of recognition offering the same benefits.

Badgett suggests an alternative approach to understanding the expansion of marriage rights to include same-sex couples based on "theoretical and empirical work on institutions in economics, political science and sociology."¹⁸⁸ She argues that an examination of the European countries that provide some form of recognition may shed light on the factors that explain why and where legal change occurs. She suggests two different methods, which produce consistent findings, for identifying these factors. The first method, based on a quantitative regression analysis, stipulates that laws recognizing same-sex

182. In her article, "Predicting Partnership Rights," *supra* note 8, Badgett refers only to Waaldijk's and Eskridge's theories, while in her newest book, *When Gay People Get Married: What Happens When Societies Legalize Same-Sex Marriage* she also refers to Merin's theory. Badgett, *supra* note 8; M.V. LEE BADGETT, *WHEN GAY PEOPLE GET MARRIED: WHAT HAPPENS WHEN SOCIETIES LEGALIZE SAME-SEX MARRIAGE* 177 (2009).

183. Badgett, *supra* note 8, at 75.

184. *Id.*

185. *Id.*

186. *Id.* 75-76; BADGETT, *supra* note 182, 175-99 (using the same method to examine whether change regarding recognition of same-sex relationships is too fast for the political climate or the public's will).

187. M.V. Lee Badgett, *Variations on an Equitable Theme: Explaining International Same-Sex Partner Recognition Laws*, in *CROSS-NATIONAL DIFFERENTIALS*, *supra* note 12, at 97.

188. Badgett, *supra* note 8, at 76.

partnerships are found in countries with high rates of cohabiting opposite-sex couples, more tolerant attitudes toward LGB people, higher social expenditures, and greater visibility and density of LGB organizations. The second method, a qualitative comparative analysis, shows that countries providing some kind of legal recognition to same-sex couples tend to have a low level of religiosity, a high rate of cohabiting opposite-sex couples, and high tolerance toward the LGB community.¹⁸⁹ Badgett uses the factors obtained through the second method, however, because it finds two important factors—lower levels of religiosity and the presence of a left-leaning government—to be statistically meaningful.¹⁹⁰ Badgett utilizes these three factors (low level of religiosity, a high rate of cohabiting opposite-sex couples, and high tolerance toward the LGB community) to examine the current situation in the United States and determine which states are most likely to legally recognize same-sex partnerships and when. Essentially, Badgett’s research method assigns each state a score ranging from zero to three.¹⁹¹ The higher the score, the more likely it is that a state will recognize same-sex partnerships in the near future.¹⁹²

The legalization of same-sex marriage in Iowa demonstrates the inadequacy of Badgett’s theory, which assigns Iowa only two of a possible three points. According to her theory, states with three points (such as Alaska, Florida, Arizona, and Maryland) should have recognized same-sex partnerships *before* Iowa. This was not the case, however. Similarly, two states that provide full legal recognition to same-sex couples in the form of civil unions, such as New Jersey¹⁹³ and Illinois, received only two points, while some states that received three points, such as Delaware and Florida, offer no recognition of same-sex relationships.

Badgett’s argument exhibits five main shortcomings. First, her method does not draw significantly different conclusions than those drawn by Waaldjik’s and Eskridge’s theories. Tellingly, she concludes that her method “might be at least as relevant” as the theory of small change.¹⁹⁴ Although one of her main criticisms is that the incremental approach does not explain *why* some

189. *Id.* at 81.

190. *Id.* at 77-78.

191. *Id.* at 82.

192. States that received three points were Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. States that received two points were Illinois, Iowa, Minnesota, Montana, New Jersey, New Mexico, Ohio, Pennsylvania, and Wyoming. States that received one point were Idaho, Indiana, Kansas, Louisiana, Nebraska, North Dakota, South Dakota, Utah, and West Virginia. Alabama, Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, and Virginia all received zero points. *Id.* at 87-88 tbl. 2.

193. Badgett recognizes that her prediction regarding New Jersey was incorrect. *Id.* at 82 (“Like the building-on-success models, the conditions-for-change framework predicts six out of seven states with existing partnership laws, with New Jersey the exception this time because of its relatively low rate of heterosexual cohabitation.”). The other examples I mention—Iowa and Illinois—could not have been recognized as exceptions because these developments occurred after Badgett’s research was published.

194. *Id.* at 84.

countries have progressed faster than others,¹⁹⁵ she too provides no clear explanation in quantifiable terms. Rather, she simply lists factors that should be added to the theory of small change¹⁹⁶ but falls short in proving in any way that these factors enhance the accuracy of the theory's predictions.

Second, Badgett's method does not distinguish between same-sex marriage and registered partnerships. It is important to emphasize that Badgett, as the title of her article ("Predicting Partnership Rights," rather than "Predicting Same-Sex Marriage") suggests, attempts to predict only some kind of legal recognition of same-sex couples (which might take the form of domestic partnerships or civil unions)—not the legal recognition of same-sex marriage. She does not provide any predictions or explanations with regard to why one state permits same-sex marriage while another allows only civil unions. The theory's inability to see marriage as a distinct legal category significantly lessens the value of her argument. Indeed, as I shall discuss in greater detail *infra*, marriage in the United States holds vastly more significance and is much more complex than domestic partnership and civil unions. Therefore, Badgett's method cannot help explain, for instance, why Nevada (three points) has opted for registered partnerships while Massachusetts (also three points) has legalized same-sex marriage.

Third, Badgett attempts to predict the recognition of same-sex partnership through empirical analysis, but this method has been shown to be inaccurate and tends to oversimplify the debate. To begin with, the data Badgett uses is imprecise. For instance, to examine levels of religiosity, she calculates "the proportion of the state's population who are adherents of evangelical churches."¹⁹⁷ It is clear that basing estimations of the level of religiosity solely on this type of data misses the mark. Are non-evangelical Christians and members of other religions necessarily more likely to support the recognition of same-sex relationships?

We may answer this question by looking at the state of Utah. According to Badgett, the average percentage of evangelicals in the fifty states is 14.5 percent.¹⁹⁸ In Utah, only 1.9 percent of citizens are members of an evangelical church, less than in Massachusetts.¹⁹⁹ However, Utah is known for being one of the most religiously conservative states in the United States, with approximately 58 percent of its adult inhabitants claiming membership in the Church of Jesus Christ of Latter-day Saints, one of the most prominent opponents of same-sex marriage.²⁰⁰ Under Badgett's method, Utah actually received the highest score

195. *Id.* at 75 ("[T]he incrementalists offer no clear idea about how long each incremental step should or will take.").

196. *Id.* at 76-78.

197. *Id.*

198. *Id.* at 87; BADGETT, *supra* note 182, at 197.

199. Badgett, *supra* note 8, at 87; BADGETT, *supra* note 182, at 197.

200. See THE PEW FORUM ON RELIGION & PUB. LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 99 (2008), <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>; see also Frank Newport, *Mormons Most Conservative Major Religious Group in U.S.*, GALLUP (Jan 11, 2010), <http://www.gallup.com/poll/125021/Mormons-Conservative-Major-Religious-Group.aspx> ("Members of the Church of Jesus Christ of Latter-day Saints, or Mormons, are the most

possible in this category, indicating a low level of religiousness that the State does not possess in reality.²⁰¹

Fourth, the factors suggested by Badgett can lead to consequences other than legal recognition of same-sex couples. In France, for example, a high tolerance toward homosexuality (one of the factors she mentions) has led to a very weak LGB movement. The French LGB movement has not been “militant, and [has] looked only for limited improvements in the situation.”²⁰² The relatively comfortable legal and social condition of the LGB community “partly explains the lack of militant movements and the individualism of French homosexuals.”²⁰³ And, as Badgett herself recognizes, the power and visibility of the LGB movement is one of the important factors influencing the achievement of the recognition of same-sex partnerships.²⁰⁴

Fifth, in applying the principles abstracted from the European experience, Badgett disregards her own warning that “[t]ransferring political lessons and experiences from one continent to another runs the risk of ignoring important cultural or social differences between countries and continents.”²⁰⁵ For instance, Badgett’s method does not account for the fact that the unique legal culture and political philosophy of many European countries may affect these countries’ paths to the legalization of same-sex marriage.²⁰⁶ Such differences among jurisdictions call into question the benefit such comparisons may provide. This

conservative major religious group in the country, with 59 [percent] identifying as conservative, 31 [percent] as moderate, and 8 [percent] as liberal.”).

201. Badgett, *supra* note 8, at 88 tbl. 2 (indicating that 1.9 percent of Utah’s population belongs to an evangelical church). Similarly, in Rhode Island, a state that “does not recognize gay marriage, partly owing to opposition from Roman Catholic church leaders in the most heavily Catholic state in the country,” only 1.6 percent of the population is evangelical, which gives it the lowest level of religiosity in the United States according to Badgett’s data. *Rhode Island Lawmakers Back Same-Sex Couples Rights to Plan Funerals*, FOX NEWS, Jan. 5, 2010, <http://www.foxnews.com/politics/2010/01/05/rhode-island-lawmakers-sex-couples-rights-plan-funerals#ixzz18tcPa3w9>.

202. 2 FLORENCE TAMAGNE, *A HISTORY OF HOMOSEXUALITY IN EUROPE* 267 (2004).

203. *Id.* at 305.

204. Badgett, *supra* note 8, at 77.

205. *Id.* at 85.

206. There are differences in the perceptions of the role of the court in countries governed by civil law and the United States. For example, in France the courts have traditionally not been political and it is therefore understood that they should not intervene in the work of legislatures. In ancient France, law courts, known as the Parlements, often assumed a legislative role by protecting royal decisions in order to defend the privileges of the social classes to which the judges belonged. As a result, the French Revolution fostered a negative view of judges legislating from the bench. This was reflected in the Napoleonic Code, which prohibited judges from passing judgments exceeding the scope of the matter being judged. In theory, this is the reason that there is no case law in France: judges were simply to decide the case they heard rather than try to establish precedents. However, the courts still had to fill gaps in the laws. As a result, a large body of jurisprudence was born, principally in the Conseil d’État. However, a judicial decision still cannot be based solely on a previous decision. There is also a very limited form of judicial review in France: the Constitutional Council can review legislation on constitutional grounds, but only in the period between passage of a bill and signing by the President, and only on a referral by the authorized people (the President, for example). Once the law is signed, it cannot be repealed by the court. The judges on the Constitutional Council serve for only nine years. Charles de Gaulle explicitly rejected the American idea of a Supreme Court, which he regarded as a form of “government by judges.” In a democracy, he reportedly said, “the only supreme court is the people.” See JOHN MERRYMAN, *THE CIVIL LAW TRADITION* 30-36 (1985); CATHERINE ELLIOTT ET AL., *FRENCH LEGAL SYSTEM* 135-40 (2d ed. 2006).

critique is also relevant to the theory of small change's failure to consider the unique characteristics of each country and the way such attributes influence the national debate over same-sex marriage.²⁰⁷

For example, the way the French Republic defines citizenship affects the country's same-sex marriage debate perhaps more than any other factor. At the heart of the French debate are the roles of republic itself and the important concept of universalism—the oneness, the sameness, of all individuals.²⁰⁸ According to French universalism, that sameness is the basis for equality. That equality is achieved by making one's social, religious, sexual orientation, and any other “origins” irrelevant in the public sphere.²⁰⁹ France insists on assimilation to a singular culture: the embrace of shared language, history, and political ideology. Under this concept, individual rights are secondary; the republic comes first. Universalist ideals are evident in the unique nature of the *pacte civil de solidarité* as an institution that is open to both same- and opposite-sex couples. The American perception of individual rights and citizenship, however, falls at the other end of the spectrum. Mary Ann Glendon argues that Americans use “rights talk”—a tendency to convert social controversies into a clash of rights that sets it apart from other Western democracies.²¹⁰

In conclusion, while Badgett offers an important and valid critique, her proposed method does not, and cannot, address a number of important political and philosophical concepts and does not provide a reliable means of predicting legal recognition of same-sex couples. It is clear that the social, cultural, economic, philosophical, legal, and historical factors at play are so numerous that such predictions are impossible. In the next Part, I offer a suggestion as to why the theory of small change fails to accurately predict or explain the way social change regarding same-sex marriage occurs.

VI. WHY A CHANGE TO MARRIAGE IN THE UNITED STATES IS NEVER SMALL

The basic assumption of the theory of small change is that a correlation exists between the first two stages and the ultimate legalization of same-sex marriage. The theory assumes that recognition of same-sex marriage by a state will necessarily follow a repeal of sodomy laws and the addition of sexual orientation as a protected category to antidiscrimination laws.

As I have shown, the theory of small change does not conform to the reality. The reason for this is that the three stages described by the theory are materially and normatively different. I argue that the two rationales underpinning the theory of small change—i.e., (1) that each step improves the

207. An additional factor that might affect the struggle for same-sex marriage in the United States, but is not relevant to the situation in Europe, is the repeal of the military's “Don't Ask, Don't Tell” policy. This policy change will allow LGB people who serve in the army to argue that if they fight for their country, they should have the right to enjoy all the rights and benefits associated with marriage, including the right to marry. Such an argument can make the argument for the legalization of marriage stronger and may induce recognition of same-sex partnerships.

208. ENDA MCCAFFREY, *THE GAY REPUBLIC: SEXUALITY, CITIZENSHIP AND SUBVERSION IN FRANCE* 15-20 (2005).

209. JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* 11 (2008).

210. See generally MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1993).

societal condition of LGB people and brings them closer to same-sex marriage and (2) that the legalization of marriage is perceived as a small change once all previous steps have been taken—are wrong. I contend that there is a substantial difference between the right to not be prosecuted for engaging in homosexual sex or the right to be free from discrimination based on sexual orientation and the right to marry generally and the right to marry a person of the same sex specifically. Societal acceptance of LGB rights does not necessarily mean acceptance of same-sex marriage, because the rights at stake are often perceived as so different that adoption of one of does not necessarily lead to the adoption of others. In light of the importance of the institution and concept of marriage in American society, any attempted change will not be perceived as “small,” regardless of the events that may precede it. Perhaps in the Netherlands the legalization of same-sex marriage was a small change, but this is not the case in the United States, where marriage is oft perceived solely as a phenomenon of opposite-sex partnership blessed by God and is undergirded by an historical legacy based on societal beliefs.²¹¹ As Nancy Cott, an expert on the history of marriage, argues:

From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy, sprouting repeatedly as the nation took over the continent and established terms for the inclusions and exclusion of new citizens.²¹²

The meaning of marriage in the Netherlands, one of the most secular nations in the world, is very different from its meaning in the United States, where marriage has great religious significance.²¹³ “Marriage is like the [S]phinx,” writes Cott, “a conspicuous and recognizable monument on the landscape, full of secrets.”²¹⁴ A change to such an institution in American society cannot be perceived as small. Consider, for example, the recent statement of American Evangelical Pastor Rick Warren:

I support full equal rights for everybody in America. I don’t believe we should have unequal rights depending on particular lifestyles so I fully support equal rights. . . [But] nowhere in the constitution can you find the “right” to claim that

211. See René König, *Sociological Introduction*, 4 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 39 (Aleck Chloros ed., 1974) (“[M]an’s ideas concerning the topic of love-and-marriage are much more diverse and flexible than the structure of the family. While notions concerning love and marriage often change with fashion, the family, as a universal human institution, is not so easily changed.”).

212. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 1 (2000).

213. A recent study conducted by the Pew Research Center compared perceptions and rates of marriage between the United States and Europe and found that “Americans have a unique relationship with marriage. Compared with most other western nations, the U.S. has one of the highest marriage rates as well as one of the highest divorce rates.” See *The Decline of Marriage and Rise of New Families*, PEW RES. CENTER (Nov. 18, 2010), <http://pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/2/>; see also SPECIAL EUROBAROMETER: SOCIAL VALUES, SCIENCE & TECHNOLOGY 9 (2005), available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_225_report_en.pdf (indicating that only 34 percent of Dutch survey respondents said they believe in God).

214. COTT, *supra* note 214, at 3.

any loving relationship [is] identical to marriage. It's just not there. I'm not opposed to that [same-sex marriage] as much as I'm opposed to redefinition of a 5,000 year definition of marriage.²¹⁵

Warren's statement indicates a special resistance to opening the institution of marriage to same-sex couples, even though he accepts that LGB people deserve equal rights. Similarly, when deciding that sodomy laws targeting adults engaging in consensual sex were unconstitutional, United States Supreme Court Justice Anthony Kennedy emphasized that there is a difference between granting the right to engage in homosexual sex and granting individuals the right to marry a member of the same sex:

[The case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.²¹⁶

Polls indicate a substantial difference between the percentage of people who support decriminalizing sodomy or adding sexual orientation as a protected category in antidiscrimination laws and the percentage of people who support same-sex marriage.²¹⁷ In fact, every proposed ballot initiative to ban same-sex marriage has thus far been successful.²¹⁸ What accounts for these vast differences between attitudes toward the repeal of sodomy laws, the enactment of antidiscrimination laws, and legalization of same-sex marriage?

There are several likely explanations. Society views the rights encompassed by each stage of the theory of small change differently. In Hohfeldian terms,²¹⁹ we can argue that having the right to engage in a same-sex act, and not to be the target of discriminated based on sexual orientation, is a sort of claim while the "right" to marry is a sort of liberty or privilege.²²⁰ Indeed, in *Zablocki v. Redhail*,²²¹ Justice Stewart cites Hohfeld in a concurring opinion to support his claim that he does "not agree with the Court that there is

215. Rick Warren's *Controversial Comments on Gay Marriage*, BELIEFNET (Dec. 17, 2008, 4:20 PM), <http://blog.beliefnet.com/stevenwaldman/2008/12/rick-warrens-controversial-com.html>.

216. *Lawrence v. Texas*, 539 U.S. 558, 560 (2003).

217. See Paul R. Brewer & Clyde Wilcox, *The Polls—Trends: Same-Sex Marriage and Civil Unions*, 69 PUB. OPINION Q. 599, 600 (2005).

218. See Ramesh Ponnuru, *Option Four: A Compromise on Gay Marriage*, NAT'L REV., June 6, 2005, at 38, 39, available at <http://www.nationalreview.com/articles/216805/option-four/ramesh-ponnuru> ("[V]oters supported initiatives against same-sex marriage in every state where they were on the ballot."). In Arizona, a ballot initiative did not pass in 2006, but succeeded in 2008.

219. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30-33 (1913) (dividing "rights" into eight categories: right versus no-rights, privilege versus duty, power versus disability, immunity versus liability [jural opposites], right versus duty, privilege versus no-right, power versus liability, and immunity versus disability [jural correlatives]).

220. See generally Allen Thomas O'Rourke, *Refuge from a Jurisprudence of Doubt: Hohfeldian Analysis of Constitutional Law*, 61 S.C. L. REV. 141 (2010) (explaining how to interpret constitutional rights in Hohfeldian terms).

221. 434 U.S. 374 (1978).

a ‘right to marry’ in the constitutional sense.”²²² Rather this is, for Justice Stewart, “more accurately” described as a “privilege.”²²³

The right to not be discriminated against in work and accommodations and the right to marriage hold important practical and symbolic meaning, but freedom from the possibility of criminal charges or imprisonment is significantly more fundamental. It is not a coincidence that in criminal cases the burden of proof required is beyond reasonable doubt, while a preponderance of the evidence is the standard required in most civil cases. Freedom from criminal prosecution is more basic from a rights point of view than the right to employment or marriage.

The right to engage in homosexual acts is part of the notion of privacy that is itself rooted in the American legal system.²²⁴ The idea of privacy rights originates in classical liberal principles based on the value of individual freedom, as expressed in John Stuart Mill’s classic statement of the harm principle.²²⁵ According to Mill’s theory, a person is free to act as he or she wishes, so long as no one else is harmed. The possibility of creating good outcomes does not justify state action; only the possibility of preventing harm provides such justification. For all other activities, individuals retain “the right to be let alone.”²²⁶ The right to do whatever one wants in one’s own private domain amounts to the right to be let alone.²²⁷

Engaging in homosexual sex could traditionally be perceived as a negative right to be let alone, while marriage demands more than just being let alone.²²⁸ Some scholars see the right to marry as a negative right, as opposed to an affirmative entitlement to state-sanctioned marriage.²²⁹ Nevertheless, marriage is not a clear-cut negative right; rather, it is a legal institution that requires the official recognition and sanction of the state.²³⁰ Further, many legal rights and

222. *Id.* at 392. *But see* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 970 (Mass. 2003) (Greaney, J., concurring) (“The right to marry is not a privilege conferred by the State, but a fundamental right that is protected against unwarranted State interference.”).

223. *Id.*

224. *See* DAVID A.J. RICHARDS, *TOLERATION AND THE CONSTITUTION* 280 (1986). *But see* *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 478 U.S. 186 (2003) (finding no fundamental right to engage in homosexual sex).

225. JOHN STUART MILL, *ON LIBERTY* 9-15 (Emery Neff ed., 1926).

226. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

227. *Cf.* Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 724 (1999) (“The liberal conception of private choice is the idea that government ought to promote interests in decisional privacy, chiefly by allowing individuals, families, and other nongovernmental entities to make many, though not all, of the most important decisions concerning friendship, sex, marriage, reproduction, religion, and political association.”).

228. *But see* STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 48 (1999) (arguing that all rights must be positive because they all depend on an agent of government for their enforcement).

229. *See, e.g.*, ELIZABETH PRICE FOLEY, *LIBERTY FOR ALL* 69 (2006) (“The Court’s marriage jurisprudence therefore does not conceptualize the right to marry as an affirmative entitlement to a state-sanctioned marriage. Rather, the right to marry is best conceptualized as a negative right . . .”).

230. Therefore, Mill himself did not think that polygamy should be criminalized, but rather believed that the state should not recognize polygamous marriage. ESKRIDGE & SPEDALE, *supra* note 7, at 220.

benefits come with it. Therefore, while the decriminalization of homosexual sex seems to restore a basic right and does not require even minimal effort from the government, marriage demands at the very least a certificate, a judge, and state registration. While most people agree that the right to marry is part of decisional privacy, and that marriage is a private relationship, it is also accepted that the state may interfere with this right by imposing age restrictions, prohibiting polygamy, etc.²³¹ Marriage does not happen solely in the private sphere, as it is a legal institution that always requires public affirmation:

To *be* marriage, the institution requires public affirmation. It requires public knowledge—at least some publicity beyond the couple themselves; that is why witnesses are required for the ceremony and why wedding bells ring. More definitively, legal marriage requires state sanction, in the license and the ceremony.²³²

The right to marry is also different from the right not to be discriminated against, and the fact that a person, a government, or a society chooses to protect a LGB person from discrimination does not lead to the conclusion that the same entity will be open to legalizing same-sex marriage. Antidiscrimination laws are not as basic as the right to privacy in order to engage in homosexual acts. However, it is generally understood that antidiscrimination laws are an essential part of a just society and thus validate the burden they might place on some employers or society as a whole.²³³ Indeed, “[a]nti-discrimination laws are not designed to protect majority views; they are written for protection of the minority, even if generally unpopular.”²³⁴ The basic idea is to protect people from the indignities of prejudicial mistreatment.²³⁵

The differences between public perceptions of antidiscrimination laws and of same-sex marriage are well illustrated by the following example. When the Senate voted on the Defense of Marriage Act (DOMA),²³⁶ many of its members also pushed for the passage of the Employment Nondiscrimination Act,²³⁷ which would provide protection to LGB individuals in employment. This, the Senate

231. See Allen, *supra* note 227, at 727 (“Marriage is considered a private relationship, yet governments require licenses and medical tests, impose age limits, and prohibit polygamous, incestuous, and same-sex marriages.”). Of course, the state also imposes some limitations on the right to engage in certain sexual acts, such as incest, but such cases are often punished after the event rather than prevented from occurring.

232. COTT, *supra* note 214, at 1-2.

233. See Sujit Choudhry, *Distribution vs. Recognition: The Case of Anti-discrimination Laws*, 9 GEO. MASON L. REV. 145, 147 (2000); see generally Cass R. Sunstein, *Three Civil Rights Fallacies*, 79 CALIF. L. REV. 751 (1991) (arguing that antidiscrimination laws are of little assistance in combating broader patterns of socioeconomic disadvantage on the basis of race and sex).

234. Nantiya Ruan, *Accommodating Respectful Religious Expression in the Workplace*, 92 MARQ. L. REV. 1, 19 (2008).

235. Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, in PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 1, 19 (Robert C. Post et al. eds., 2001).

236. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000), 28 U.S.C. § 1738C).

237. *Senate Vote on Passage: S. 2056 [104th]: Employment Nondiscrimination Act of 1996*, GOVTRACK.US, <http://www.govtrack.us/congress/vote.xpd?vote=s1996-281> (last visited Jan. 7, 2011).

thought, would be a way to show support for the LGB community while also supporting DOMA.²³⁸ The Employment Nondiscrimination Act fell just one vote short of passage in the Senate, while DOMA was passed by a margin of 85-14.

It is easy for society to accept negative rights as natural.²³⁹ Sodomy laws fall rather comfortably under the banner of sexual privacy, a negative liberal concept, while same-sex marriage seems significantly more advanced and affirmative.²⁴⁰ Antidiscrimination laws protect a person's basic rights and prove to be much less controversial than same-sex marriage.²⁴¹ Marriage requires affirmative acceptance—far more investment than a demand simply to be let alone or not to be discriminated against based on sexual orientation.²⁴²

One may argue that my analysis does not refute the basic assumption of the theory of small change, which contends that the more society progresses, the more LGB people are accepted and consequently the more the idea that marriage should be open to same-sex couples enters the mainstream. My argument is, however, that because of the very different nature of the three rights in question, we cannot assume that the legal progress and changes in norms provided by stages one and two actually lead to same-sex marriage. These three rights are both distinct and autonomous from each other.

Moreover, while there are surely arguments as to why sodomy laws should be sustained or why a sexual orientation category should not be added to antidiscrimination laws, these arguments are largely based on morality (or homophobia, or politics of disgust)²⁴³ and have the same basis as the “no promo homo” arguments.²⁴⁴ As such, these arguments are actually a modern version of

238. See JASON PIERCESON, *COURTS, LIBERALISM, AND RIGHTS: GAY LAW AND POLITICS IN THE UNITED STATES AND CANADA* 116-20 (2005).

239. See *id.* at 37-38.

240. See *id.*

241. A majority of Americans believe that sexual orientation should be protected under antidiscrimination laws. See SUSAN GLUCK MEZEY, *QUEERS IN COURT* 221 (2007) (reporting that 59 percent of heterosexual American respondents indicated in a survey that they would favor a federal law prohibiting job discrimination on the basis of sexual orientation).

242. *But see* ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 159 (1995) (rejecting less radical and controversial elements of the gay rights movement, such as antidiscrimination laws, because they violate the public-private distinction, but arguing for the legalization of same-sex marriage).

243. *But see* *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (“Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as ‘discrimination’ which it is the function of our judgments to deter. So imbued is the Court with the law profession’s anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously ‘mainstream’; that in most States what the Court calls ‘discrimination’ against those who engage in homosexual acts is perfectly legal; that proposals to ban such ‘discrimination’ under Title VII have repeatedly been rejected by Congress . . .”).

244. See William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1328-29 (2000) (“No promo homo” is a phrase meaning “No promotion of homosexuality.” No promo homo arguments have been spread in order to prevent “pro-gay” measures in law and norms, based on the belief that “gay people do disgusting things or are diseased or predatory.”).

old prejudices against homosexuality based on natural law and the immorality of LGB people, in addition to fears that they will infect others with their “problem” or “recruit” others. According to these arguments, the state should not repeal sodomy laws or add sexual orientation as a protected category because the state should not promote immoral conduct that encourages the participation of others.²⁴⁵ The implication is that homosexuality and homosexual conduct are not as worthy as heterosexuality and heterosexual conduct.²⁴⁶ Some of these approaches may leave the Bible out of the argument, but they still cling to the perception that homosexuality is inherently immoral.

In contrast, arguments against same-sex marriage sometimes encompass more than concealed bigotry and thus present real legal and societal challenges.²⁴⁷ For example, traditionalists emphasize the importance of marriage in encouraging people to procreate “responsibly.”²⁴⁸ They point out that children who live in “traditional” households enjoy a higher standard of living and better economic situation than children in “alternative” families, who are more likely to suffer from physical and emotional problems, abuse, etc.²⁴⁹ They aver that nontraditional families pose a danger to the social fabric because of the high rate of child poverty that they experience, the financial cost of divorce, and the high rate of teenage pregnancy and juvenile delinquency among children born outside marriage. In this regard, traditionalists advocate preserving marriage’s special status as a framework for reproduction. These arguments should be understood in light of the dramatic decline in the number of marriages in many places around the world.²⁵⁰ Some traditionalists perceive a relationship between changes in family structure and the recognition of same-sex partnerships. For example, Stanley Kurtz asserts that registered partnership laws in Nordic countries have caused a decrease in marriage rates and an increase in the number of people raising children out of wedlock.²⁵¹ Kurtz argues that acceptance of same-sex marriage tells society that marriage itself is outdated, and that virtually any family form, including parenthood in the

245. *Id.* at 1329.

246. *Id.* at 1343.

247. There are a number of arguments against same-sex marriage, and I view many of them as flawed and ridiculous.

248. *E.g.*, Lynn D. Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J. L. & PUB. POL’Y 771-814 (2001).

249. *E.g.*, Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 RUTGERS L. REV. 377 (2007).

250. See Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 L. & POL’Y 87 (2004) (In the United States, there are approximately five million cohabiting couples—the highest number in American history—yet they are entitled to only some of the legal safeguards available to married couples.); Erik Eckholm, *Saying No to “I Do,” with the Economy in Mind*, N.Y. TIMES, Sept. 28, 2010, at A15. Cf. Godard, *supra* note 77, at 311 (In France in the 1970s, close to 400,000 marriages were celebrated each year; by 2006, this number fell to 274,400, a decline of 30 percent. The decline has been accompanied by a rise in cohabitation and divorce.).

251. Stanley Kurtz, *The End of Marriage in Scandinavia*, WKLY. STANDARD, Jan. 23, 2004, <http://www.weeklystandard.com/Content/Public/Articles/000/000/003/660zypwj.asp>.

absence of marriage, is acceptable.²⁵² These sorts of arguments are often driven by different political views rather than by the politics of disgust.

Moreover, while people who vote against same-sex marriage in referenda may certainly be motivated by disgust or homophobia, when a state defends these arguments in courts, it must rely on non-homophobic, non-morality-based reasons for denying same-sex couples the right to marry. As Justice Scalia observed in his *Lawrence* dissent, judges, unlike the general populace, need to extend principles to their logical end.²⁵³ Therefore, when arguments about responsible reproduction come before a court, judges can ascertain whether such arguments pass a rational basis test. An example of the practical application of such a stance can be found in the New York Court of Appeals' holding in *Hernandez v. Robles* that "[i]n the absence of conclusive scientific evidence, the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home In sum, there are rational grounds on which the Legislature could choose to restrict marriage to couples of opposite sex."²⁵⁴

Thus people may oppose gay marriage for reasons arguably unrelated to homophobia or disgust, and judges can conclude that the legislature or the people in referenda had a legitimate reason to restrict marriage to opposite-sex

252. Of course, as Badgett points out, the decline in marriage rates started before the recognition of same-sex partnerships and can be attributed to many different factors. BADGETT, *supra* note 182, at 67-82. Moreover, the assertion that marriage's main purpose is to regulate reproduction is mistaken. As indicated by the Supreme Judicial Court of Massachusetts, procreation has never been the sole purpose of marriage—consider that sterile couples, as well as post-menopausal women, have never been prohibited from getting married. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003) ("If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.").

In addition, research has shown that there is no connection between the presence of two opposite-sex parents and an optimal child-rearing environment. Rather, various factors affect a child's overall welfare: the child's DNA; abilities; character; surroundings; peers, parents and other relatives; diet; the quality of the schools the child attends; the financial status of his or her family; and so on. See Carlos A. Ball, *Lesbian and Gay Families: Gender Nonconformity and the Implications of Difference*, 31 CAP. U. L. REV. 691 (2003) (reviewing two major reports regarding LGB parents, including one issued by the Committee on Psychosocial Aspects of Child and Family Health of the American Academy of Pediatrics, and concluding that there are no meaningful differences between the children of LGB parents and those of heterosexuals parents); Michael J. Rosenfeld, *Nontraditional Families and Childhood Progress Through School*, 47 DEMOGRAPHY 755 (2010); Michael S. Wald, *Adults' Sexual Orientation and State Determinations Regarding Placement of Children*, 40 FAM. L.Q. 381, 388-89 (2006) (presenting research that did not find any special psychological problems among the children of LGB parents); Brief of Amici Curiae, *Baehr v. Miike*, 950 P.2d 1234 (Haw. 1997) (No. 91-1394-05), available at <http://www.qrd.org/qrd/usa/legal/hawaii/baehr/1997/brief.doctors.of.sociology-06.02.97>.

In fact, the most significant research on the welfare of the children of lesbians from conception through adolescence found that these children rated better than average in social skills, academics, and general competence and registered a significantly lower rate of social problems. See Nanette Gartrell & Henny Bos, *US National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year-Old Adolescents*, 126 PEDIATRICS 28, 28 (2010).

253. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) ("One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.").

254. *Hernandez v. Robles*, 855 N.E.2d 1, 4 (N.Y. 2006).

couples only. As such, it cannot be assumed that anyone who supports the decriminalization of sodomy or the inclusion of sexual orientation as a protected category in antidiscrimination laws must also support same-sex marriage with the passage of time. Eskridge himself acknowledges the differences between these rights:

Moderate Americans willing to promote gay people from criminals to social misfits (like alcoholics) support sodomy decriminalization but not same-sex marriage. Finally, the idea that marriage must be between one man and one woman is a core part of the belief systems and even the social identities of many Americans.²⁵⁵

Indeed, the perceived uniqueness of marriage makes the battle for same-sex marriage different from attempts to obtain other types of rights for LGB individuals or couples. It is thus safe to say that recognition of same-sex marriage will never be seen as a small step, no matter what other milestones have already been achieved.

VII. THE EFFECT OF CIVIL UNIONS ON THE PATH TO SAME-SEX MARRIAGE

The most problematic assumption that the theory of small change makes is that civil unions are a temporary stage inevitably leading the way toward same-sex marriage. According to Waaldijk, the fact that registered partnership law was enacted in the Netherlands

... did not silence the call for the opening up of marriage. On the contrary, the social and political pressure increased. In retrospect, it seems that the whole legislative process leading to the introduction of registered partnership and joint custody served to highlight the remaining discrimination caused by the exclusion of same-sex couples from marriage: the awkward exceptions ... and the *separate and equal social status* of registered partnership as compared to marriage.²⁵⁶

Waaldijk adds that many same-sex couples choose not to register because of their commitment to same-sex marriage.²⁵⁷

Merin makes a similar argument; even though he believes alternatives to marriage are based in a tradition of separate-but-equal and serve only to maintain compulsory heterosexuality as the dominant culture,²⁵⁸ he contends that civil unions are still a necessary step on the way to same-sex marriage, because only then will a state be ready, "in terms of its sociopolitical and legal climate," to move to next stage.²⁵⁹ Conversely, Eskridge does not see civil unions as falling under the umbrella of separate-but-equal, because unlike the segregation of African Americans, the institution of civil unions seeks to

255. Eskridge, *supra* note 244 at 1349.

256. Waaldijk, *supra* note 3, at 447.

257. *Id.* at 449 ("Anecdotal evidence suggested that many same-sex couples were not registering their partnerships, because they preferred to wait for real marriage.")

258. MERIN, *supra* note 5, at 304 ("Separate 'marriage-like' institutions only serve to perpetuate homophobia, heterosexual superiority, and gender binarism.")

259. *Id.* at 326-27.

advance liberal values, while segregation was part of an apartheid regime.²⁶⁰ According to Eskridge, civil unions are actually a kind of “equality practice,” *inter alia*, because they are a necessary temporary stage on the way to same-sex marriage.

The theory of small change is based on a number of premises. First, civil unions bring to the forefront the differences between opposite- and same-sex couples, because the public and the legislature cannot see a good reason to maintain such an unequal status. Consequently, civil unions encourage the legalization of same-sex marriage. Second, the theory of small change assumes that civil unions are a necessary stage before same-sex marriage, because without it, the public is unprepared for same-sex marriage. Third, the theory of small change hypothesizes that the final frontier of LGB activism is the legalization of same-sex marriage and that LGB people and organizations are united in their desire to achieve the legalization of same-sex marriage. In other words, by situating marriage as the final goal, the theory of small change not only describes or evaluates the path to same-sex marriage but rather advances an ideal—that same-sex marriage is indeed the final and ultimate goal of the LGB movement. These assumptions, however, are not well founded. While the introduction of civil unions could, in theory, serve to highlight the differences and disparities between marriage and unions, in most cases it actually blurs the lines between the two, potentially leading to the general public’s view that civil unions are a fair compromise. Furthermore, the LGB community has less of an incentive to fight for same-sex marriage once its members enjoy all or most of the rights that are associated with marriage. Most importantly, it appears that in European countries, because of the declining value of marriage and the stigma that it often carries, some LGB organizations are not overly eager to legalize same-sex marriage.

A. Does the Institution of Civil Unions Really Highlight the Differences?

Marriage is a legal institution with substantial economic underpinnings. It entails many benefits, including tax and property benefits, health insurance, and citizenship.²⁶¹ The same is true with regard to civil unions. In European countries, civil unions provide most, and sometimes all, of the economic benefits for which opposite-sex married couples are eligible. In the United States, in states that offer civil unions or expansive rights and benefits to domestic partners (and those that allow same-sex marriage), all the benefits provided to married couples by the state are conferred upon same-sex couples; yet this does not include federal benefits, which are substantial.²⁶²

260. ESKRIDGE, *supra* note 4, at 144.

261. See COTT, *supra* note 214, at 1-5 (describing the development of the connection between the state interest in marriage and the benefits that followed or were denied).

262. Since DOMA defines marriage as a “legal union between one man and one woman,” most benefits that are provided to married couples are denied to same-sex couples. This is an important distinction that the current theories do not succeed in addressing: in a country where civil unions offer all the rights associated with marriage (as in the European context), the distinction between marriage and civil unions is less pronounced. In the United States, however, both civil unions and same-sex marriage deny same-sex couples many rights from the federal government; thus the pressure on resolving these inequalities is stronger, and it seems fruitless to compare the two.

Many scholars share the belief that individuals have an incentive to marry because it is an efficient institution.²⁶³ It provides economic benefits and is a public good; the more marriage is associated with such benefits, the more individuals seeking to improve their economic situation will desire marriage. Therefore, “[i]ndividual same-sex couples, especially those with property or children, would have the same economic incentives as different-sex couples to desire access to the legal framework created by marriage, in addition to any other customary benefits of being married.”²⁶⁴ Economic analysis regards both marriage and cohabitation (and thus civil unions) as the result of rational behavior when individuals seek financial, as well as physical and emotional, benefits.²⁶⁵

If civil unions provide all the benefits associated with marriage, it stands to reason that the LGB community will have less incentive to fight for same-sex marriage. Not surprisingly, the economic benefits accrued by marriage have consistently been one of the main engines of the battle for same-sex marriage. For example, among first-world countries, one of the main factors motivating the fight for same-sex marriage was the AIDS crisis.²⁶⁶ The AIDS crisis made clear to same-sex couples how vulnerable their relationships are, often with respect to the rights and benefits that they were denied. Gay men were required to pay inheritance taxes on their partners’ apartments after they passed away, were not eligible for their partners’ health insurance, could not take advantage of rent control when their partners passed away when the lease was in the latter’s name, and had no standing regarding property inheritance. These are strong economic and efficiency incentives to vigorously fight for the legal recognition of same-sex relationships. Importantly, these problems initiated a number of legal actions with the goal of granting such benefits to individuals in same-sex partnerships.²⁶⁷ When such issues no longer exist (for example, if LGB couples in civil union regimes have full rights in this respect), however, complacency within the LGB community sets in.

It may be argued that discrimination against same-sex couples results in emotional damage that has corollary economic consequences as well. Ultimately, the treatment of same-sex couples as second-class citizens should constitute a strong enough incentive for LGB people to continue investing in the battle for same-sex marriage. Misha Isaak, for example, argues that even if civil unions provide full economic benefits:

263. See, e.g., Badgett, *supra* note 8, at 76 (“Economists from many traditions argue that the legal institution of marriage promotes efficiency at the social level and at the family level by promoting the specialization of labor within the household. . .”).

264. *Id.*

265. See Antony W. Dnes, *Cohabitation and Marriage, in THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 118, 120 (Antony W. Dnes & Robert Rowthorn eds., 2002).

266. See, e.g., CHAUNCEY, *supra* note 15, at 96-104; FRÉDÉRIC MARTEL, *THE PINK AND THE BLACK: HOMOSEXUALS IN FRANCE SINCE 1968*, 208-15 (1999) (describing a similar effect in France, with a much later response, and the “import” of ACT-UP Paris); Rydström, *supra* note 64, at 203-05 (describing the effect of the AIDS crisis on the struggle for recognition of same-sex relationships in Scandinavia).

267. See, e.g., CHAUNCEY, *supra* note 15, at 102-3 (describing *Braschi v. Stahl Assocs. Co.*, 543 N.E. 2d 49 (1989)).

[T]hey fail to provide marriage's intangible benefits, such as esteem, self-definition, and the stabilizing influence of social expectations. Although these benefits may be less concrete than, say, tax exemptions, they are no less constitutionally significant.²⁶⁸

Even assuming that Isaak is correct that civil unions do not offer the same emotional rewards that marriage does (though some people reject that assertion),²⁶⁹ the emotional aspect is a far less substantial rallying cry than the viable benefits and rights at stake. When LGB couples have the same economic benefits and rights as opposite-sex couples, they have less incentive to fight for marriage. Additionally, courts and legislatures have less of an impetus to push for same-sex marriage as there is less of an identifiable harm or damage. In other words, it is much simpler to argue for equality in benefits and protection than in terms of emotional equality. The main weakness in Isaak's argument is his failure to take into consideration the decline in the value of marriage in many places around the world.²⁷⁰ For many, marriage is not tied to self-definition.²⁷¹ Many are able to find "self-definition" through civil unions and cohabitation.

Badgett's study suggests that in countries where the value of marriage has declined, the chances of achieving legal recognition of same-sex relationships are higher.²⁷² Thus, civil unions usually take place in countries where marriage is less meaningful on a societal level. A large number of cohabiting unmarried opposite-sex couples has proved to demonstrate the declining material importance of marriage in a particular state or country.²⁷³ In such places, same-sex couples who achieved all the benefits offered by marriage are probably less passionate about the fight for same-sex marriage and marriage is probably not tightly linked to self-esteem and identity.

For example, France has an exceptionally high number of cohabiting opposite-sex couples, which, as mentioned previously, is a strong indicator of the declining value of marriage.²⁷⁴ In 2006 the PaCS was amended to provide almost all the economic rights accompanying marriage; same-sex couples now enjoy many of the same benefits as their straight counterparts. Even though the

268. Misha Isaak, Comment, "What's in a Name?" *Civil Unions and the Constitutional Significance of "Marriage,"* 10 U. PA. J. CONST. L. 607, 612 (2008).

269. See, e.g., Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15, 19-20 (2000) (arguing that civil unions are a worthy alternative to marriage).

270. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 254 (1989) ("Declining marriage rates in all the industrial countries are witness not only to a general postponement of marriage, but also to a certain shift away from formal unions.").

271. See generally Clare Chambers, *Feminism, Liberalism and Marriage* (2010) (unpublished manuscript), available at <http://www.brown.edu/Research/ppw/files/Feminism,%20Liberalism%20and%20Marriage.doc> ("Feminists should support the abolition of state-recognised marriage.").

272. See Badgett, *supra* note 8, at 77.

273. *Id.*

274. See MCCAFFREY, *supra* note 208, at 20 n.12 (In 2002, fourteen percent of people living as couples in France were cohabiting – the highest percentage of thirty countries studied.); see also ORG. FOR ECON. CO-OPERATION & DEV., *COHABITATION RATE AND PREVALENCE OF OTHER FORMS OF PARTNERSHIP*, available at <http://www.oecd.org/dataoecd/52/27/41920080.pdf> (Of French adults between twenty and thirty-four years of age, 21.8 percent were cohabitating.).

PaCS was created mainly for same-sex couples, it seems to be more popular among opposite-sex couples²⁷⁵ who often choose the PaCS over marriage.²⁷⁶ For every two marriages in France, a PaCS is celebrated, totaling half a million PaCSed couples in 2009, a number that is rising steadily.²⁷⁷ It is likely that in such circumstances, LGB individuals feel less discriminated against and have less motivation to fight for same-sex marriage.

This is not to say that limiting marriage to opposite-sex couples is harmless. Some critics argue that civil unions are damaging to children raised by parents in same-sex relationships because the children see society treating their parents as second-class citizens. A more palpable grievance recognized by the California Supreme Court is the exposure same-sex couples may experience every time they identify themselves as part of a civil union (in places where such unions are open only to same-sex couples) rather than as married.²⁷⁸ Despite being possibly offensive and a violation of privacy, such potential injury is not perceived as a severe grievance compared to, for example, denial of the right to visit a loved one in hospital or to make important medical decisions for one's partner when he or she is unconscious. Moreover, as the trend of opening civil unions to opposite-sex couples continues, the privacy injury will be diminished.

Another way civil unions potentially impede the path to same-sex marriage involves general public opinion. In essence, when LGB couples receive full rights, it is no longer a question of whether same-sex couples deserve recognition, but *what type* of legal recognition they deserve. It goes without saying that the more support the general public has for same-sex marriage, the more likely it is that same-sex marriage will be codified into law. However, surveys show that the majority of the public prefers civil unions to same-sex marriages.²⁷⁹

275. See, e.g., Patrick Festy, *The "Civil Solidarity Pact" (PACS) in France: An Impossible Evaluation*, POPULATION & SOCIÉTÉS (Institut National D'études Démographiques, Paris, Fr.), June, 2001, available at http://www.ined.fr/fichier/t_publication/697/publi_pdf2_pop_and_soc_english_369.pdf (French law prohibits the collection of statistical records on the type of PaCS, but estimates are published frequently.)

276. Godard, *supra* note 77, at 313-14 ("It is becoming an increasingly popular option . . . it seems, in fact, to be more popular with heterosexuals.").

277. Edward Cody, *Straight Couples in France Are Choosing Civil Unions Meant for Gays*, WASH. POST, Feb. 14, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/02/13/AR2009021303365.html>.

278. *In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008) ("[O]ne consequence of the coexistence of two parallel types of familial relationships is that—in the numerous everyday social, employment, and governmental settings in which an individual is asked whether he or she 'is married or single'—an individual who is a domestic partner and who accurately responds to the question by disclosing that status will (as a realistic matter) be disclosing his or her homosexual orientation, even if he or she would rather not do so under the circumstances and even if that information is totally irrelevant in the setting in question.").

279. See Brewer & Wilcox, *supra* note 217, at 602 ("Public support for civil unions . . . appears to be substantially greater than public support for same-sex marriage This finding stands out most clearly in the nine (three Gallup, two ABC News/*Washington Post*, four Pew, and one Quinnipiac) polls that included questions about both same-sex marriage and civil unions: in these polls, the percentage supporting civil unions exceeded the percentage supporting same-sex marriage by at least 3 percentage points and by as much as 19 percentage points The average difference was 14 percentage points."); *Most Still Oppose Gay Marriage, but Support for Civil Unions Continues to Rise*,

The public is more likely to understand the need for change, and therefore show more support for same-sex marriage, if they are exposed to the stories of discrimination faced by real LGB people—in essence, stories that foster empathy for the “underdog.”²⁸⁰ Since the beginning of the public debate over same-sex marriage, stories of the consequences of discrimination against LGB couples have often been the most efficient means of convincing the public of the need to extend the institution of marriage to same-sex couples.²⁸¹ Matthew Coles, Director of the American Civil Liberties Union’s Lesbian Gay Bisexual Transgender & AIDS Project, has written recently about the reasons why he believes California’s Proposition 8 succeeded, and the steps that should be taken in order to prevent future losses of this kind. At the center of his analysis, he suggests “people have to hear about discrimination from a personal perspective, not as an abstract principle.”²⁸² Indeed, the main criticism of California’s LGB organizations is that they did not effectively publicize the pain caused by the denial of rights to same-sex couples.²⁸³

The rights offered by civil unions make the current form of discrimination more abstract and mundane, as they seem to address and resolve the very issues that gave such shock value and emotional punch to these stories.²⁸⁴ Stories like that of Sharon Kowalski and her life partner, Karen Thompson²⁸⁵—a story that

PEW RES. CENTER (Oct. 9, 2009), <http://pewresearch.org/pubs/1375/gay-marriage-civil-unions-opinion>.

280. Gandhi was very cognizant of the fact that certain incremental improvements in the laws toward Indians in South Africa and India would blunt the truth of the perception of injustice among Afrikaners and the British. Therefore, he was very careful to push for certain changes in the law and not others. See LOUIS FISCHER, *GANDHI: HIS LIFE AND MESSAGE FOR THE WORLD* 62 (1982) (“Ready to die for principle, [Gandhi] preferred to compromise and arbitrate. He wished to collaborate with the British and hoped that the twentieth century would vanquish the ancient dinosaur. But when Dominion status [of India] was shelved, when instead repressive wartime measures were confirmed, the Mahatma took his first deliberate action against British imperialism in India.”)

281. See e.g., CHAUNCEY, *supra* note 15, at 96-104 (anecdotes about gay relationships lacking legal standing, in the context of the AIDS crisis), 111-19 (the story of Sharon Kowalski).

282. Matthew Coles, *Prop 8: Let’s Not Make the Same Mistake Next Time*, (Feb. 26, 2009), http://www.huffingtonpost.com/matt-coles/prop-8-lets-not-make-the_b_170271.html.

283. See Louis Weisberg, *Prop 8, What Went Wrong*, 365 GAY (Nov. 25, 2008), <http://www.365gay.com/living/prop-8-what-went-wrong/3> (“Renna and other critics say what was fatally missing from the No on 8 campaign’s advertising was the presence of actual gay and lesbian families telling their stories. By holding back on the emotional punch and choosing instead to focus on cold principles, they say the campaign failed to move people on the opposing side.”).

284. That was the response of the British House of Lords in the same-sex marriage case *Wilkinson v. Kitzinger*. [2006] EWHC (Fam) 2022, [75] (Eng.) (“I propose to adopt that broader approach by treating the matter on the basis that, although Parliament had no positive obligation under the Convention to take steps to redress the perceived social disadvantages experienced by same-sex partners as compared with married persons, by embarking on legislation designed to alleviate such social disadvantage and passing the measures contained in the CPA [Civil Partnership Act] which provided for recognition and treatment of a foreign marriage as a civil partnership only, brought the facts of the Petitioner’s situation within the ambit of Article 12.”)

285. See CHAUNCEY, *supra* note 15, at 112-14 (In 1983, Sharon Kowalski and her life partner, Karen Thompson, were leading closeted lesbian lives. Neither woman had told her parents about the relationship. Thompson was a teacher and feared she would be fired if her sexual orientation became known. The two women owned a house jointly and had lived together in a committed relationship for more than nine years. On her way home from work, Kowalski was severely injured in an automobile accident. The hospital to which she was admitted denied her life partner

“brought the vulnerability of lesbian and gay couples home to everyone”²⁸⁶—are no longer as common in a civil unions regime.

Two referenda in Arizona provide an example of how the enactment of civil unions can hamper achievement of the same-sex marriage goal. In 2006, Arizona became the first U.S. state to reject a ballot initiative aimed at preventing the state from “creat[ing] or recogniz[ing] a legal status for unmarried persons that is similar to marriage.”²⁸⁷ Voters rejected this initiative by a slim majority of 51.8 percent. In 2008, another referendum was presented, though this time opponents of same-sex marriage “decided to push for a simple, straightforward amendment that would enshrine the traditional definition of marriage without touching the domestic partnership issues.”²⁸⁸ In other words, whereas the first initiative utilized expansive, broad language to deny any kind of recognition to same-sex couples, the second referendum precluded only the possibility of recognizing same-sex marriage. Not surprisingly, a majority (56 percent) voted in favor of the second referendum. There were several explanations for this “flip.” Undoubtedly, the most influential factor was the fact that the second referendum was not aimed at excluding the legal recognition and rights of same-sex couples, but only at excluding the right of same-sex couples to marry. The public is more likely to protect same-sex couples when they are being denied most rights or recognition, not when they are affirmatively seeking the ability to marry. In conclusion, the public may view civil unions as a fair compromise, reasoning that even if they result in some form of abstract discrimination, civil unions are a just solution.²⁸⁹

Choice set theory argues that public opinion becomes more systematic and “rational” when citizens are forced to respond to a clearly binary “choice set”: yes or no, black or white.²⁹⁰ Without such binary oppositions, citizens cannot make good decisions because there is too much information, a lack of information, or simply too many choices. Civil unions have created a new

notification, information, and visitation rights, and because of the extent of her injuries, she was unable to communicate her own preferences. When Kowalski’s parents arrived, they intensified the exclusion of Thompson from Kowalski’s life. The parents denied that their daughter was a lesbian and suggested that if Thompson were allowed to see Kowalski, she would sexually molest her. The father eventually became the court-appointed guardian and permanently enforced the separation. Kowalski and Thompson became the public faces of the battle for the rights of marriage, and for several years, gay pride parades were led by wheelchairs.)

286. *Id.* at 111.

287. ARIZ. SEC’Y OF STATE, 2006 BALLOT PROPOSITION GUIDE (2006), available at <http://www.azsos.gov/election/2006/info/PubPamphlet/english/Prop107.pdf>.

288. Kevin Vance, *Why Arizona Flipped On Gay Marriage*, CBS NEWS (Dec. 2, 2008), <http://www.cbsnews.com/stories/2008/12/02/opinion/main4643975.shtml>.

289. The feeling that civil unions are not a very discriminatory regime may be reinforced by the argument that marriage should be safeguarded as a religious institution and that civil unions are a suitable secular alternative. See Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at B15; Martha C. Nussbaum, *A Right to Marry*, 98 CAL. L. REV. 667, 695 (2010) (“I personally favor the solution of leaving civil unions to the state and leaving marriage to religions and other private entities.”).

290. See Kenneth Cimino & Gary Segura, *From Radical to Conservative: The Political Construction of Civil Unions and Changing Public Attitudes* (paper presented at the annual meeting of the American Political Science Association, Sep. 1, 2005), available at http://www.allacademic.com/meta/p_mla_apa_research_citation/0/4/1/5/4/p41545_index.html.

situation in social science theory, a unique structure that does not fit choice set theory.²⁹¹ The option of civil unions offers an intermediate step and thus a “trichotomous” choice set, forcing the public to choose from among three options (i.e., no legal recognition for same-sex couples, civil unions, or same-sex marriage). It has been suggested that the presence of the third alternative might reduce the willingness of some moderates to go as far as supporting same-sex marriage as the option of civil unions provides a safe compromise.²⁹² In addition, opponents of same-sex marriage might believe that civil unions could undermine the momentum of the struggle for same-sex marriage²⁹³ and thus support the establishment of civil unions as a means of preventing the legalization of same-sex marriage. These two possibilities strongly support the notion that civil unions can have paralyzing effects on the path to same-sex marriage.

B. Is Marriage Really the Final Frontier of European LGB Organizations? (Why Marriage Is Not Everything)

The theory of small change does not just tell us that civil unions are a temporary stage that facilitates progress toward same-sex marriage; by neglecting to take into consideration the lack of enthusiasm for the legalization of same-sex marriage among many LGB communities in Europe, it also situates marriage as the final stage without examining whether this is indeed the case. In doing so, it goes beyond its claims to explain the past and predict the future by cementing the notion that marriage is the final and most important stage in Europe, and that the United States just needs to follow the same path. The picture is far from accurate. If there is an important lesson for the United States, it is that marriage is *not* everything.

The incrementalist account of same-sex marriage legalization is manifestly teleological—it presents marriage as the end, both literal and normative, of the LGB movement. Behind this kind of thinking is, in part, the belief that nothing signals approval of homosexuality more than same-sex marriage.²⁹⁴ This is apparent from Eskridge’s description of his vision of social acceptance of LGB people: acceptance becomes greater and more widespread as more legal progress is made, until its final end—marriage—is obtained.²⁹⁵ This is clearly wrong or at least varies from person to person, and from culture to culture. For example, the French believe that adoption by same-sex couples signals approval of homosexuality (or at least genuine indifference to it) more than the legalization of same-sex marriage, since adoption supposedly involves questions

291. *Id.*

292. *Id.* at *23 (“As the debate endures, it is likely, we think, that this alternative will continue to draw greater and greater interest from the middle of the American political spectrum.”).

293. *Id.*

294. See also WILLIAM N. ESKRIDGE, JR, *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 206 (1996) (arguing that gay males should get married in order to become sexually civilized).

295. SULLIVAN, *supra* note 242, at 180-85 (1995) (predicting and hoping that the gay movement can pack up and go home once marriage is attained).

concerning the sexual formation of children.²⁹⁶ In other words, there is a normative commitment that informs Eskridge's and others' notion of progress: the idea that marriage is the final goal of LGB activism. But this vision of marriage as the final frontier is not representative of the goals of the LGB community in Europe. In fact, the evidence demonstrates that many Europeans are most interested in securing partnership rights and not marriage.

It is striking, especially from an American perspective, to recall that one of Great Britain's largest and most influential LGB organizations, Stonewall, does not advocate the goal of same-sex marriage. In fact, the organization advances the idea "that Civil Partnership [i]s preferable to marriage because it should be seen as a twenty-first century means of recognising modern relationships and that this [i]s preferable to attempting to radicalize the traditional notion of marriage."²⁹⁷ In outlining its key priorities, the organization does not currently use the word "marriage."²⁹⁸ Nicola Barker argues that organizations representing the LGB community have generally welcomed the Civil Partnership Act in England.²⁹⁹ Criticism has been largely confined to substantive rather than ideological issues; but the fact that civil partnership is nominally different from marriage has not been of particular concern to the LGB organizations.

Similarly, the websites of some of the important LGB organizations in Germany, England, and France do not advocate same-sex marriage. LSVD (the Lesbian and Gay Federation in Germany), one of Germany's largest LGB organizations, is proud of the achievement of the Lifetime Partnerships and regularly works for the improvement of the benefits accompanying it. Its website states:

Only ten years after our foundation we were successful in obtaining a registered partnership law in Germany. This means that we convinced the German Parliament and society that equal rights for gay and lesbian couples are necessary for a modern, democratic society. Nevertheless, we still have to struggle for equal rights in areas like taxation and pension laws, adoption and child custody.³⁰⁰

The focus on rights rather than marriage should come as no surprise. Germany, like some other European countries, has experienced an increasing number of cohabiting couples, a high number of divorces, and the flourishing of

296. See McCaffrey, *supra* note 208, at 137-42. Cf. Polikoff, *supra* note 2, at 728 ("A review of the European experience reveals one dominant pattern. Partnership rights for gay and lesbian couples reflect a willingness to confer economic and social benefits on gay men and lesbians. Concomitantly, disapproval, or at least, skepticism, concerning gay and lesbian parenting has resulted in explicit denial of joint adoption rights and/or denial of access to donor insemination services.").

297. Shipman & Smart, *supra* note 97, at ¶ 2.5.

298. STONEWALL, www.stonewall.org.uk/about_us (last visited Nov. 14, 2010).

299. Nicola Barker, "Gay Marriage": Civil Partnerships for Same-Sex Couples in the United Kingdom (paper presented at the annual meeting of The Law and Society Association, May 27, 2004).

300. LSVD: THE LESBIAN & GAY FED'N IN GER., <http://typo3.lsvd.de/229.0.html> (last visited Nov. 14, 2010).

alternative families.³⁰¹ What is unique about Germany is that it has a strong pluralistic view and there is no panic with regard to the consequences of such changes on the family structure.³⁰² In this atmosphere, it is no wonder that many LGB people seek not marriage but equal rights.

Moreover, data shows that in European countries that have legalized same-sex marriage or offer registered partnership schemes, the number of same-sex couples who married or registered is significantly lower compared to both the number of same-sex couples residing in the country and the number of opposite-sex couples who have registered or married.³⁰³ While there are a number of contradicting explanations for this phenomenon,³⁰⁴ it no doubt testifies to the lack of enthusiasm demonstrated by LGB Europeans toward marriage or other marriage-like institutions.³⁰⁵ In essence and in practice, LGB Europeans choose to enjoy legal recognition, but less frequently institutionalize their relationships.

Conversely, American LGB couples are much more likely to register or marry than their European counterparts and have more interest than their European counterparts in securing marriage rights.³⁰⁶ In American organizations same-sex marriage has “emerged as the highest of priorities in the gay community”³⁰⁷ and is an issue to which the general public devotes a fair amount of attention.³⁰⁸ Another indication of the single-minded focus on same-sex marriage in the United States is demonstrated by the amount of spending on campaigns and advocacy in this area. Opponents of Proposition 8, for example, invested more than thirty-one million dollars on this mission.³⁰⁹ One of the first items appearing on the website of the Lambda Legal Defense and Education

301. See Ilona Ostner, *Cohabitation in Germany—Rules, Reality and Public Discourses*, 15 INT’L J. L., POL’Y & FAM. 88, 89 (2001).

302. *Id.* at 88-89 (“Germany is also a peculiar case: divorce and lone parenthood do not create stigma”).

303. Patrick Festy, *Legal Recognition of Same-Sex Couples in Europe*, 61 POPULATION 1, 53-55, 71-88 (2006), available at http://www.cairn.info/article.php?ID_REVUE=POPE&ID_NUMPUBLIE=POPE_604&ID_ARTICLE=POPE_604_0417&REDIR=1; see also BADGETT, *supra* note 182, at 45 (“[T]he number of couples registering as partners seemed surprisingly low.”).

304. *Do Homosexuals Really Want to Get Married?*, CROSSWALK, <http://www.crosswalk.com/1410340/> (last visited Jan. 7, 2011) (suggesting that LGB people do not want to get married). *But see* BADGETT, *supra* note 182, at 46-56 (suggesting that over the time LGB people will get married in greater numbers).

305. Cohabiting LGB people in those states enjoy a large number of legal rights and do not need to marry or register.

306. BADGETT, *supra* note 182, at 54 (“When given the opportunity, same-sex couples in the United States appear to be much more likely to marry or register than do those in Europe.”).

307. Katherine M. Franke, *The Politics of Same-Sex Marriage*, 15 COLUM. J. GENDER & L. 236, 237 (2006).

308. *Id.* at 236 (“In a very short period of time, this issue has moved to the center of the gay and lesbian rights movement as well as larger mainstream political and legal debates.”).

309. Dan Morain & Jessica Garrison, *Prop. 8 Foes, Fans Amass \$60 Million*, L.A. TIMES, Oct. 25, 2008, <http://articles.latimes.com/2008/oct/25/local/me-marriagemoney25>; see also *Pro-Marriage Equality Groups Spent Big in Vermont, Got Big Results*, LEZGETREAL (July, 2009), <http://lezgetreal.com/2009/07/pro-marriage-equality-groups-spent-big-in-vermont-got-big-results> (“Of the groups supporting marriage equality, Vermont Freedom To Marry spent the most money. Their entire amount came to just under \$300,000.”).

Fund, the oldest and largest LGB organization in the country, for example, is the New Jersey Civil Union Watch, the mission of which is “work[ing] toward the goal of marriage equality.”³¹⁰ Unlike its European counterparts, Lambda Legal regularly works toward both civil unions and marriages, though it sees marriage as the ultimate goal.

Normatively, there are good reasons for working on securing partnership rights rather than focusing solely on same-sex marriage, or positing marriage as the final goal of the LGB movement. Marriage does not offer relief from discrimination against LGB individuals who do not seek or live in marriage-like arrangements. Moreover, LGB people who do not live in marriage-like relationships will be subjected to additional discrimination if the married-versus-unmarried distinction gains cultural value.³¹¹ Likewise, legalization of same-sex marriage may validate those couples who fit in best with straight culture and implicitly penalize those who are not married, thus privileging to an even greater extent already normative authorizations. Marriage wages an attack on sexual LGB culture in its failing attempt to create “good gays” and reinforces the hierarchy of sexual shame by delegitimizing otherwise potentially fulfilling non-monogamous sexual lives.³¹² There is cause for additional concern when a group finally wins its rights: the group often creates new hierarchies that mirror those of the dominant culture.³¹³ In this way, some group members become second-class citizens if they do not adopt the behavior of the dominant culture.³¹⁴

Similarly, legalization of same-sex marriage may exert pressure on people to get married and may limit the options for couplehood. In fact, it is argued that same-sex marriage will narrow, perhaps irretrievably, the scope of future possibilities for intimate life and the family for LGB people.³¹⁵ For example, same-sex marriage does not provide for the recognition of other forms of kinship that are not currently recognized by the law, such as the complex kin relations between close friends that are common in San Francisco.³¹⁶

310. *Marriage, Relationships, and Family Law*, LAMBDA LEGAL, <http://www.lambdalegal.org/our-work/issues/marriage-relationships-family/> (last visited Nov. 14, 2010).

311. See generally Janet Halley, *Recognition, Rights, Regulation, Normalisation: Rhetorics of Justification in the Same-Sex Marriage Debate*, in *LEGAL RECOGNITION*, *supra* note 3, at 97.

312. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (2000).

313. See Judith Butler, *Is Kinship Always Already Heterosexual?*, in *LEFT LEGALISM / LEFT CRITIQUE* 229, 241 (Wendy Brown & Janet Halley eds., 2002).

314. We can read the normalization of same-sex marriage by looking at the leading counsel in *Perry v. Schwarzenegger*, the case challenging the constitutionality of Proposition 8 in federal court. Lead counsel and the person who initiated the lawsuit is Theodore Olson, who served as solicitor general under President George W. Bush. He joined the fight for the legalization of same-sex marriage because he “believe[s] that a conservative value is stable relationships and stable community and loving individuals coming together and forming a basis that is a building block of our society, which includes marriage.” FoxNews Sunday: Ted Olson: Same-Sex Marriage is a Conservative Value (*FoxNews television broadcast Aug. 8, 2010*), available at <http://videocafe.crooksandliars.com/node/38878>.

315. See Franke, *supra* note 307, at 240.

316. See KATH WESTON, *FAMILIES WE CHOOSE: LESBIANS, GAYS, KINSHIP* (1997).

Some feminist scholars view marriage as a harmful institution and thus urge the LGB community not to pursue it. Philosopher Clare Chambers suggests, based on a review of numerous feminist accounts of marriage, that marriage's practical effects on women make them worse off³¹⁷ because marriage reinforces the gendered division of labor and thus women earn less than men and are less independent. Marriage also reinforces the notion that housework is primarily the domain of women, even if they work outside the home.³¹⁸ Yet there are pressures for women to get married, and women are commonly seen as flawed and unsuccessful if they are not married.³¹⁹ Therefore, Chambers concludes that "both women and gay men are better off, and justice is served, if marriage ceases to exist as an institution."³²⁰

In conclusion, it seems that the theory of small change offers an inaccurate map of the process to same-sex marriage. Although a variety of opinions exists among European LGB people,³²¹ and steps have been taken to legalize same-sex marriage in several European countries, it appears that LGB individuals and organizations are not united in their views concerning same-sex marriage and that the overall level of investment in legalizing same-sex marriage is very different in Europe. In light of the strong arguments against making marriage the ultimate goal of the LGB movement, the European LGB community's

317. See generally Chambers, *supra* note 271.

318. *Id.* at *3 ("[A]s Claudia Card insists, it would be wrong to think that practical harms have ceased as laws have changed: the progress embodied in the criminalization of marital rape and violence, she writes, 'has been mostly on paper. Wives continue to die daily at a dizzying rate.'").

319. *Id.* at *5 ("One particularly pernicious form of symbolic violence that marriage enacts on women in contemporary western societies is the sense that they are flawed and failing if unmarried. This perception may be encouraged by pressure from peers, family, news reports, novels, television, film and self-help books. Research shows that many heterosexual women see single life as a temporary phase preceding marriage, and that being single for longer or when older is construed as sad and shameful, and at least partially the fault of the single woman herself.").

320. *Id.* at 10.

321. It seems that debate over this issue within the LGB movement could result in controversy causing divisions within the community and resulting in a weaker movement. The question is to what extent, if at all, such debate impedes the activity of LGB organizations. The experience of other social movements teaches that fragmentation within a movement may preclude it from achieving its goals. David S. Meyer, *Institutionalizing Dissent: The United States Structure of Political Opportunity and the End of the Nuclear Freeze Movement*, 8 SOC. F. 157, 158 (1993) (suggesting, based on the experience of the nuclear freeze movement, that fragmentation may have an adverse effect on social movements); JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION: A CASE STUDY OF AN EMERGING SOCIAL MOVEMENT AND ITS RELATION TO THE POLICY PROCESS* 129-43 (suggesting that disputes within the feminist movement of the second wave, especially between radical and non-radical feminists, and the controversy about the role of lesbians within the movement tore "apart, slowly but surely, the reticulate interstices of the movement. The segmented groups were becoming fragmented groups; increasing in number and decreasing in communication.").

Such fracturing may have even more serious effects when the movement is becoming institutionalized, i.e., when it is working within the mainstream and abiding by the rules. Meyer, *supra*, at 175-76. However, researchers of social movements also suggest that divisions may have positive effects: they can facilitate the development of new ideas and can allow movements to accommodate people with conflicting ideas. FREEMAN, *supra*, at 127 ("Its segmentary nature also encourages proliferation, adaptation, and responsiveness to its environment."). I do not think that such conflicts are a very significant factor in the LGB struggle for same-sex marriage, but only wish to demonstrate that, along with other factors impeding efforts to achieve legal recognition of same-sex marriage, the establishment of civil unions may have an overall paralyzing effect.

restraint in its efforts to secure the right to marry, and its commitment to secure rights, offers a valuable lesson.

VIII. CONCLUSION

To date, the notion that the recognition of same-sex marriage can be predicted on the basis of the experiences of different countries has not been challenged. On the contrary, there is general acceptance of the theory of small change within the scholarly community. Yet a brief survey of events casts more than a little doubt on the accepted theory. The only significant attempt to challenge this theory, Badgett's empirical method, seems to fall into a similar pattern of generalization. It appears that the attempt to generalize the experience of arriving at legal recognition of same-sex marriage not only misses key components in the equation but also makes faulty assumptions. This article proposes that overall, the theory of small change and the empirical method described by Badgett are not reliable ways of predicting the legalization of same-sex marriage and are not capable of explaining in a satisfying fashion the legal and societal process that have led to the legalization of same-sex marriage in some European countries.

More troubling is the suggestion that the process of achieving legal recognition of same-sex marriage can be definable, as this can lead to complacency within the LGB rights movement. After all, if it is believed that one factor predicts another, it is easy to accept it as an unfortunate stage necessary to reach an ultimate goal. Once we recognize that no such factor inevitably leads to that goal, we must accept that no stage prior to the acceptance of same-sex marriage should be taken as a harbinger of the legalization of same-sex marriage.

The effect of civil unions in Europe is not completely clear at this point. However, it is apparent that it is not a springboard to the next stage but rather a legal institution with a number of important implications. In the United States the effects are far from obvious. Therefore, the LGB community and its supporters should not take anything for granted; instead, they must challenge any commonly held assumptions regarding the path leading to legal recognition of same-sex marriage. This discussion is relevant not only on a scholarly level but also on a practical one. For example, based on a rationale similar to that offered by the incremental approach, LGB organizations objected to turning to the federal court in the case of *Perry v. Schwarzenegger*.³²² However, if we understand that nothing is really predictable or obvious, a move to the federal court becomes more acceptable. In other words, if the incremental approach is dispensible, and its progress can be slow, perhaps the time has come for a more aggressive approach—at the federal level. Ultimately, an even better idea would be to leave behind the struggle for same-sex marriage and focus attention

322. E.g., Jesse McKinley, *Bush v. Gore Foes Join to Fight Gay Marriage Ban*, N.Y. TIMES, May 27, 2009, at A1 (“‘We think its [sic] risky and premature,’ said Jennifer C. Pizer, marriage project director for Lambda Legal in Los Angeles, adding that a loss at the Supreme Court level could take decades to undo.”).

on a broader change—the opening of an alternative to marriage for both opposite- and same-sex couples.

Furthermore, because the theory of small change assumes a chronological process and presumes the end goal to be marriage, the stages of the incremental process validate a particular course of action and undermine actions that seek to achieve each right for its own sake. For example, the model delegitimizes attempts to win hospital visitation rights for same-sex couples that do not have marriage as their end goal or the right of individuals in same-sex relationships to exemptions from the inheritance tax in the case of partner's death, because it asserts that marriage and the bundle of rights that it offers will satisfy all the needs of LGB people. By viewing marriage as the final frontier, the theory of small change also posits marriage—a stage that symbolizes the normalization of LGB people—as the most important and final goal of the LGB movement. The European experience tells a more complex story if we are willing to take a closer look at it. Many European LGB organizations object to or simply are not very enthusiastic about working toward legal recognition of same-sex marriage and are more interested in securing partnership rights for same-sex couples. Thus, future research needs to look at the creation of marriage alternatives as “equality practice,” not in the sense that Eskridge advocates but rather in the sense of creating other legal institutions (not just marriage by a different name) that treat opposite- and same-sex couples equally.