

Predicting Partnership Rights: Applying the European Experience to the United States

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I. INTRODUCTION

Since 1989, same-sex couples in Europe and North America have begun to receive many or all of the rights and responsibilities of legal marriage. To date, nine European countries give same-sex couples either the right to marry (the Netherlands and Belgium) or to form a legal partner relationship (registered partnerships in Denmark, Norway, Sweden, Iceland, and Finland; *pactes civil de solidarite* in France; and life partnerships in Germany). Several Canadian provinces and territories now extend such rights, with federal legislation under active consideration. In the United States, Massachusetts grants same-sex couples the right to marry. California, Vermont and Connecticut provide almost all of the state-granted rights and responsibilities of marriage. New Jersey, Maine, and Hawaii provide same-sex couples with a smaller package of such rights. In several other countries and states, marriage and partnership rights legislation is scheduled to go into effect (the United Kingdom and New Zealand), or appear likely to be enacted (Spain, Luxembourg, and Switzerland).

This remarkable movement toward legal equality for gay and lesbian couples raises many intriguing questions. In particular, it forces us to wonder why some countries have moved so clearly toward equality while others have not. This question has both academic and political significance. Academically, this phenomenon poses a new challenge for scholars of comparative public policy and social movements (especially as these rights expand beyond the Scandinavian countries, with their reputation for egalitarian social policy). Unlike social welfare policy or policies related to unions, for instance, partnership recognition policies are not broadly redistributive in the sense that one social group gains at the expense of another.¹ But this is not merely a

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1. However, a few commentators have argued that giving same-sex couples partnership rights in Scandinavia and the Netherlands caused direct harm to children through a drop-off in heterosexual marriage and an increase in nonmarital births. See Stanley Kurtz, *The End of Marriage in Scandinavia*, WEEKLY STANDARD, Feb. 2, 2004, at 9, available at <http://www.weeklystandard.com/content/>

cultural shift, either. After all, marriage is an economic institution insofar as it confers rights to concrete, material benefits and comes with contractual provisions that may alter individuals' incentives regarding childbearing, labor force participation, and other kinds of economic behavior. But, because most of those effects are rooted in potentially redistributive obligations within the couple rather than redistribution at the social level, expansion of marriage rights is not a zero-sum game.²

Understanding the position of the United States in the international context is also a recurring academic issue in comparative analysis. At a time of accelerating international recognition of same-sex couples, the United States appears as something of an outlier given the unwillingness of the federal government to recognize same-sex couples and the current debate about an amendment to the U.S. Constitution that would reserve marriage only for different-sex couples. However, rather than claiming a new form of "American exceptionalism," I would argue that American states, rather than the United States as a whole, would be the appropriate units to compare to the European experience. If this is the case, then explanations of change at the country level in Europe might also be useful for explaining or predicting change at the state level in the United States. The primary goal of this paper is explore this possibility.

On a political level, understanding why some countries have been successful in expanding marriage rights for gay couples can be useful in several ways. With limited resources of human effort and financial backing, national gay rights organizations might prefer to be selective in taking on the marriage battle in particular states, and a greater understanding of these processes of change might help national groups to better select those targets. Furthermore, identification of key social and political dynamics might help activists develop strategies for gaining allies and neutralizing opposition.

In this Article, I attempt to expand our understanding of why and where legal change occurs by taking theories and evidence from Europe and applying

public/articles/000/000/003/660zypwj.asp (Last visited Apr. 6, 2005); M. van Mourik et al., *Good for Gays, Bad for Marriage*, NATIONAL POST, Aug. 11, 2004, at A16. Others have argued that Kurtz's and van Mourik's arguments fail several logical and empirical tests. William N. Eskridge, Jr., Darren R. Spedale, & Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, in ISSUES IN LEGAL SCHOLARSHIP (2004), at <http://www.bepress.com/ils/iss5/art4> (last visited Apr. 18, 2005). Also, the trends they cite as evidence for the harm to marriage were present long before same-sex couples were given marriage or partnership rights. M. V. Lee Badgett, *Will Providing Marriage Rights to Same-Sex Couples Undermine Heterosexual Marriage?*, 1 SEXUALITY RES. & SOC. POL'Y: J. OF NSRC (2004); Joop Garssen & M. V. Lee Badgett, *Equality Doesn't Harm Family Values*, NATIONAL POST, Aug. 11, 2004, at A16.

2. There does not appear to have been much concern about the potential fiscal impact of granting these rights in European countries. In the United States, by contrast, opponents of same-sex marriage have raised concerns about the cost to state and federal budgets, although the actual likely impact is positive. See M. V. Lee Badgett & R. Bradley Sears, *Putting a Price on Equality? The Impact of Allowing Same-Sex Couples to Marry on California's Budget*, 16 STAN. L. & POL'Y REV. 197 (forthcoming May 2005).

them to the United States. In the next Part, I describe two closely related theories by which legal scholars have attempted to explain the spread of same-sex partner recognition. Those theories highlight the importance of building on success and offer clear predictions for which countries and which states would be most likely to expand marriage rights to include same-sex couples. In the third Part, I offer an alternative theoretical framework that combines insights from recent work in economics and political science. This framework proposes several possible forces that promote change, highlighting those factors that related empirical work (summarized in that section) isolates as apparently being the most important in explaining change in Europe. The fourth Part presents and compares predictions of the two alternative theoretical perspectives in the United States. I assess which framework would have best predicted existing same-sex couple rights, arguing that my alternative framework explains U.S. changes at least as well as the incrementalist approach preferred by legal scholars.

II. THEORIES OF CHANGE, PART 1: BUILDING ON SUCCESS

Most of the English-language scholarship on European same-sex partnership and marriage laws has come from legal scholars, focusing only on the legal effect rather than the causal roots of such laws.³ Dutch law professor Kees Waaldijk goes beyond that focus to offer a “law of small change” to account for the passage of same-sex partner recognition laws in Europe.⁴ Over time, he observes, European countries have gradually, steadily, and for the most part sequentially liberalized laws that place gay men and lesbians in a second-class position. Professor Waaldijk outlines a common path or “standard sequence” that starts with decriminalizing sodomy and then moves on to equalizing the age of consent for same-sex sexual relationships, enacting anti-discrimination legislation, and finally addressing partnership and parenting differences. Each step in the sequence stimulates the next in a logic that generates momentum for change. Opposition to change may be defused because the legislative change is perceived as being small at each step. Alternatively, the small change might deliberately leave some inequality that serves the purpose of “reinforc[ing] the condemnation of homosexuality.”⁵ Leaving some inequality officially reinscribes the unequal status of gay and

3. For two very useful and informative collections of articles on different countries, see *LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE* (Katharina Boele-Woelki & Angelika Fuchs eds., 2003) [hereinafter *Boele-Woelki & Fuchs*]; *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* (Robert Wintemute & Mads Andenaes eds., 2001) [hereinafter *Wintemute & Andenaes*].

4. Kees Waaldijk, *Small Change: How the Road to Same-sex Marriage Got Paved in the Netherlands*, in Wintemute & Andenaes, *supra* note 3, at 437.

5. *Id.* at 440.

lesbian people in the law, but Waaldijk argues that some progress makes it easier to move to a new level by facilitating an “orderly and reasonable” discussion: “In such an orderly discussion, it could more easily be established that there is hardly a reasonable argument against it.”⁶

Waaldijk uses the example of the Netherlands to show how the “law of small change” worked as Dutch law moved gay couples closer to full equality with heterosexual couples. First, over time the Netherlands granted a set of rights related to rent and tax laws that applied to both cohabiting same-sex and different-sex couples.⁷ As these laws accumulated, however, the treatment of same-sex couples remained obviously unequal since only heterosexual couples had the right to marry. Second, in 1998 the Dutch parliament created a new registered partnership status with an expanded set of rights (including inheritance rights, property and other tax rights equivalent to those embodied in legal marriage) that was available to all unmarried couples—same-sex and different-sex—who formally registered their relationship. But marriage itself remained the privilege of heterosexual couples, and registered partnerships were not completely equivalent to marriage. For instance, the law left out pension and immigration rights for registered partners. Waaldijk describes a series of subsequent “small changes” that narrowed those remaining differences between partnership and marriage over time.⁸ Finally, when the Netherlands opened legal marriage to same-sex couples, the jump from registered partnerships was perceived as small. But, Waaldijk’s principle was still evident since the legislation did not adjust the statutory presumption that the husband of a woman who gives birth is the legal parent of a child, leaving the lesbian partner of a woman who gives birth with no automatic full parental status (although she can later adopt the child).⁹

William N. Eskridge, Jr., presents a more nuanced theory that, like Waaldijk’s framework, links successes over time but that also fills in the gaps between legal changes with a political and social dynamic that propels change.¹⁰ An incremental path of legal developments allows for a gradual change in public opinion through improvement of attitudes toward gay people within age cohorts and through the replacement of older homophobic cohorts by younger cohorts who are less homophobic. The changed social and legal environment prompts more openness by lesbian and gay people as well as more political organizing (which is also facilitated by increased openness). Openness and political mobilization provide more information about gay people that then contributes to the falsification of stereotypes that allege that

6. *Id.* at 453.

7. Wintemute & Andenaes *supra* note 3, app. I at 777.

8. Waaldijk *supra* note 4, at 450-51.

9. See Waaldijk *supra* note 4, app. III at 457.

10. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 115-18 (2002).

equality will generate negative social effects. With the dismantling of stereotypes, more legal change is then possible, and the links between political participation, attitude change, and stereotype erosion lead to a process that reinforces the legal cycle and, it would seem, accelerates change over time.

While these two astute scholars of marriage law offer important observations about the process of change, it is important to question closely such accounts that imply the inevitability of change. Many historians of sexuality note that historical "progress" in tolerance of homosexuality is not linear. Trends toward tolerance have reversed course at various points in history.¹¹ Not surprisingly, the incrementalists offer no clear idea about how long each incremental step should or will take.

However, each step might require significant political mobilization and could generate increasing practical and symbolic opposition. In their study of U.S. battles over sexual orientation antidiscrimination laws, Marieka Klawitter and Brian Hammer argue that a compromise half-way position might be a consolation prize rather than a step in the direction of continued change.¹² The political backlash against the Massachusetts *Goodridge v. Department of Health* decision in the United States has led President George W. Bush to support and the U.S. Congress to consider the Federal Marriage Amendment, which would create an enormous barrier to granting rights to same-sex couples. In the international context, Denmark has gradually equalized registered partnerships with marriage, but the barrier to marriage per se remains in place sixteen years after the implementation of registered partnerships.¹³ Furthermore, seeing change as part of an almost deterministic dynamic begs the question of why a country would ever begin this process of recognizing same-sex couples. Presumably changes in marriage laws would be related to whatever factors prompted the initial rethinking of all policies related to homosexuality, such as increased political mobilization of gay people or changing cultural norms about sexuality.

Finally, the law of small change and its variant seem in some ways more like a political-legislative strategy for the gay and lesbian social movement than the inexorable process as presented by Waaldijk and by Eskridge.¹⁴ The idea of building on success necessarily ties changes in marriage laws to prior successes of the gay, lesbian, bisexual, and transgender social movement. Connections to larger demographic trends or non-gay political struggles (such as those around

11. See JOHN BOSWELL, *CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY* (1980); JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994); GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD 1890-1940* (1994).

12. Marieka Klawitter & Brian Hammer, *Spatial and Temporal Diffusion of Local Antidiscrimination Policies for Sexual Orientation*, in *GAYS AND LESBIANS IN THE DEMOCRATIC PROCESS* (Ellen D.B. Riggle & Barry L. Tadlock eds., 1999).

13. Ingrid Lund-Andersen, *The Danish Registered Partnership Act*, in Boele-Woelki & Fuchs *supra* note 3, at 23.

14. ESKRIDGE, *supra* note 10, at 114.

family leave or child care, for instance) are missing, however. Granted, Waaldijk and Eskridge acknowledge the importance of thinking about broader social characteristics that might contribute to some nations' more progressive policy orientation toward gay couples, but those characteristics form only the background in their central dynamic that drives change.

III. THEORIES OF CHANGE, PART 2: CONDITIONS FOR CHANGE

An alternative approach to understanding the expansion of marriage rights to include same-sex couples (either through marriage or through a new status) comes from theoretical and empirical work on institutions in economics, political science, and sociology. In a recent paper, I have proposed two possible motivations for legal recognition of same-sex couples: (1) enhancing social and economic efficiency for couples and society; and (2) resolving social conflicts in favor of more powerful groups who want to recognize same-sex couples.¹⁵ Here I summarize those propositions.

Efficiency motivations for change: 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,¹⁶ by encouraging economies of scale,¹⁷ by reducing transaction costs,¹⁸ and by encouraging the utilization of caring labor.¹⁹ As a result of these advantages, couples and societies have an incentive to develop and expand this efficiency-enhancing institution. Same-sex couples, especially those couples with property or children, would have a material incentive to seek this status, in addition to any other customary benefits of being married.²⁰ Happier, healthier, and richer couples and children will thereby contribute to a more productive economy and society, giving policymakers an incentive to

15. See M. V. Lee Badgett, *Variations on an Equitable Theme: Explaining International Same-Sex Partner Recognition Laws*, in INSTITUT NATIONAL D'ETUDES DEMOGRAPHIQUES, DOCUMENTS DE TRAVAIL NO. 124, Same-sex couples, same-sex partnerships & homosexual marriage: A focus on cross-national differentials, (Marie Digoix & Patrick Festy, eds., 2003), available at <http://www-same-sex.ined.fr/publica.htm> (last visited Apr. 4, 2005).

16. GARY S. BECKER, TREATISE ON THE FAMILY (1991).

17. Julie A. Nelson, *Household Economies of Scale in Consumption: Theory and Evidence*, 46 *ECONOMETRICA* 1301 (1988).

18. Robert A. Pollak, *A Transaction Cost Approach to Families and Households*, 23 *J. OF ECON. LITERATURE* 581 (1985).

19. Nancy Folbre, *'Holding Hands at Midnight': The Paradox of Caring Labor*, *FEMINIST ECON.* 73 (1995).

20. For instance, in many countries married couples receive survivor rights in public pensions or spousal coverage in private health care benefit provision. See KEES WAALDIJK, MORE OR LESS TOGETHER: LEVELS OF LEGAL CONSEQUENCES OF MARRIAGE, COHABITATION AND REGISTERED PARTNERSHIP FOR DIFFERENT-SEX AND SAME-SEX PARTNERS, A COMPARATIVE STUDY OF NINE EUROPEAN COUNTRIES 9 (2005), available at <http://www.ined.fr/publications/collections/dossiersrecherches/125.pdf> (last visited Apr. 4, 2005).

adopt a Pareto-improving modification to existing law that would give more couples access to such an important status.²¹

Thus recognition of same-sex couples could be explained in several ways. First, as same-sex couples become more visible socially and more vocal politically about their need for marriage, policymakers may alter formal institutions to accommodate these newly identified needs. Second, and with a very different effect, if marriage becomes less efficiency-enhancing, as when certain European welfare states have taken over some traditional responsibilities of the family, then policymakers might see less of a need for expanding marriage rights to same-sex couples, and same-sex couples themselves might see less of a need for those rights. In that case, efficiency considerations might *reduce* the likelihood of opening up marriage to same-sex couples. However, efficiency concerns will still favor opening up marriage as long as it continues to improve couples' well-being, as when the state privileges married couples in some ways (e.g. waiving inheritance taxes) or when the contractual components of marriage are useful for couples (e.g. rules for the division of property when a marriage ends).

Conflict and power explanations: Other social scientists propose that institutions are less the outcome of a competitive struggle for efficiency than an outcome of social and political bargaining. In this view, more powerful groups are able to shape institutions that serve their own political and economic interests.²² And since institutions are shaped by internal conflict and relative power, then any larger collective value of the institutions is accidental rather than intentional. Further, conflict and power will influence both the institutions themselves and the rules of access to those institutions. That is, both the legal and social meanings of marriage and the rules governing who can marry will be shaped by political competition.

An opening of access to marriage for same-sex couples could be related to three key factors in this framework. First, if some countries have people with more liberal attitudes toward homosexuality, or if those attitudes become more liberal over time, we would expect to see a greater likelihood that the country would give same-sex couples marriage rights. Second, if groups favoring rights for gay couples gain in political power, then recognition of those rights would be more likely. The rising power of left political parties, increasing influence of gay social movement organizations, or declining influence of

21. For a review of several studies in the United States that suggest that the fiscal impact of marriage or marriage-like rights and responsibilities for same-sex couples actually tips in the state's favor, see Badgett & Sears, *supra* note 2.

22. JACK KNIGHT, INSTITUTIONS AND SOCIAL CONFLICT (1992); Daron Acemoglu, *Root Causes: A Historical Approach to Assessing the Role of Institutions in Economic Development*, in FINANCE & DEVELOPMENT 27-30 (June 2003); Daron Acemoglu, Simon Johnson & James Robinson, *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q. J. OF ECON. 1231-94 (2002); Daron Acemoglu & James A. Robinson, *Political Losers as a Barrier to Economic Development*, 90 AM. ECON. REV. PAPERS & PROC. 126-30 (2000).

religious organizations would all make laws recognizing same-sex couples more likely.²³ A third conflict-oriented access route is related to efficiency concerns. The declining material importance of marriage could improve the likelihood that states will recognize same-sex couples, perhaps because there would be less resistance to changing an institution that is viewed as less important than it once was. Countries that provide individual-based benefits, such as health insurance, might have a lower value of marriage than places like the United States, where marriage is an important route to health insurance coverage.²⁴

Some differences between this broader context of efficiency and conflict concerns and the approaches of Eskridge and Waaldijk are important to note. First, the framework outlined here contains contradictory hypotheses rather than a building-on-success type of dynamic, e.g. same-sex marriage is *more* likely when marriage comes with economically valuable benefits but is also *less* likely when benefits are provided through marriage. The point of this conceptual exercise is to broaden the possible explanatory stories rather than to identify the precise culprits in shaping social change. Developing a deeper sense of the European dynamic requires empirical testing of some of these possible causal routes of change. Second, this theoretical framework highlights the roles of some of the same factors that Waaldijk and Eskridge have noted in the passage of same-sex partnership and marriage laws, such as religiosity, the importance of marriage, and attitudes toward lesbians and gay men.

As a test of the relative importance of efficiency and conflict factors, I created and gathered measures that correspond to the different components mentioned in the discussion of the broader theoretical framework.²⁵ Using these measures, I use two analytical techniques to identify which factors predict

23. Other observers have focused on these potential routes of change, including Waaldijk and Eskridge. Political scientists studying the passage of gay-related laws in the United States find mixed support for some of these influences. Some studies find that proxies for attitudes toward lesbian and gay people, such as high education or urbanization, are associated with gay-positive policy outcomes actions. E.g., Scott Barclay & Shauna Fisher, *The States and the Differing Impetus for Divergent Paths on Same-Sex Marriage, 1990-2001*, 31 POL'Y STUD. J. 331 (2003); Donald P. Haider-Markel & Kenneth J. Meier, *The Politics of Gay and Lesbian Rights: Expanding the Scope of the Conflict*, 58 J. POL. 332 (1996); Donald P. Haider-Markel, Mark R. Joslyn & Chad J. Kniss, *Minority Group Interests and Political Representation: Gay Elected Officials in the Policy Process*, in 62 J. POL. 568 (2000). Places with more members of gay rights organizations have a higher likelihood of gay-positive outcomes. Barclay & Fisher *infra*; Haider-Markel & Meier *infra*. In some cases higher measures of religiosity reduce the likelihood of pro-gay positions. Haider-Markel & Meier *infra*; Kenneth D. Wald, James W. Button, & Barbara A. Rienzo, *The Politics of Gay Rights in American Communities: Explaining Antidiscrimination Ordinances and Policies*, in 40 AMER. J. POL. SCI. 1152 (1996); Gregory B. Lewis, *Contentious and Consensus Gay Rights Issues: Public Opinion and State Laws on Discrimination and Same-Sex Marriage*, Presented at Association for Public Policy Analysis and Management Meetings in Washington D.C. (Nov. 6-8, 2003).

24. Eighty percent of non-elderly insured people in the United States receive coverage through their own employment or through the employment-based health insurance of a family member. U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS P60-220, HEALTH INSURANCE COVERAGE: 2001, available at <http://www.census.gov/prod/2002pubs/p60-220.pdf> (last visited Apr. 4, 2005).

25. For more details on these measures, see Badgett *supra* note 1, at 101-03.

the passage and implementation of a law recognizing same-sex partners (or SSPR for same-sex partner recognition law) for twenty-six OECD countries from 1989-2004, including all nine with SSPR laws in effect in 2004. Many of the measures, including attitudes toward homosexuality, attitudes toward marriage, and cohabitation rates, come from the 1990-93 wave of the World Values Surveys.²⁶

The empirical models included a variety of country-level measures. Efficiency-related measures captured the value of marriage (state expenditures on social welfare programs as a percentage of GDP, cohabitation rates of heterosexual couples, divorce rates, and attitudes toward marriage), the visibility of same-sex couples (proxied by the visibility of commercial establishments oriented toward the gay community as captured by a gay business index), attitudes toward homosexuality (percentage of country's respondents reporting that they would not want to have a homosexual neighbor), political power of gay and lesbian people and potential allies (union density, an index of gay organizations, the existence and persistence of a national gay and lesbian political organization, and the existence of a left government for at least two years), and the size of potential religious opponents to partnership rights (percentage of residents with frequent church attendance).

Two different methods for identifying predictors of an SSPR law, one quantitative and one more qualitative method, produce consistent findings. In the quantitative regression analysis, SSPR laws are found in countries with higher heterosexual cohabitation rates, more tolerant attitudes toward homosexuality, higher social expenditures, and higher gay organizational density. Other factors with the expected effects on SSPR laws—lower religiosity and the presence of a left government—are not statistically significant, however. A second technique, known as qualitative comparative analysis,²⁷ reveals that all nine SSPR countries have low religiosity, high cohabitation, and high tolerance for homosexuality. In addition to those three characteristics, many of the nine countries also have either high social welfare expenditures or high gay organization or gay business index values.

Overall, the findings from the empirical analysis suggest that gay and lesbian visibility is greater in countries recognizing same-sex partners, that support for tolerance of homosexuality is higher, and that political power of gay-rights allies is stronger and gay-rights opponents is weaker in countries with SSPR laws. The importance of high heterosexual cohabitation rates seems

26. RONALD INGLEHART, ET AL., *WORLD VALUES SURVEY 1990-93 (2000)* (both of these surveys are conducted periodically, but only the most recent publication date is given).

27. See CHARLES C. RAGIN, *THE COMPARATIVE METHOD: MOVING BEYOND QUALITATIVE AND QUANTITATIVE STRATEGIES* (1987). Ragin and others have developed Qualitative Comparative Analysis (QCA) to allow for studies with that are larger than typical case studies but smaller than the large samples necessary for regression analysis. QCA is designed both to capture parsimoniously the important qualitative details of a case and to operationalize the idea that causal conditions tend to occur together in groups.

to undermine the efficiency perspective, in which the low value of marriage implied by heterosexual couples' decisions to avoid marriage would reduce the likelihood of an SSPR law.

It is difficult but interesting, however, to consider exactly what the cohabitation-SSPR link implies. The heterosexual cohabitation rate is possibly a proxy for the presence of same-sex couples, in which case this variable picks up visibility of gay and lesbian couples—an efficiency-related effect. In the United States, the correlation between the percentage of cohabiting heterosexual couples and the proportion of same-sex couples is large and positive,²⁸ for instance, but we do not have such figures for same-sex couples in European countries. Other interpretations of the cohabitation variable, on the other hand, suggest a conflict perspective. Heterosexual couples who “vote with their feet” against marriage must see marriage as a less valuable institution than married heterosexual couples, so perhaps policymakers find less resistance to giving same-sex couples some or all marriage rights where many people see an attractive alternative to marriage. Alternatively, policymakers in countries with cohabitators might see value in official recognition of many family forms, including unmarried heterosexual couples and same-sex couples. As evidence of this effect, note that cohabitating different-sex couples receive many of the positive and negative legal consequences of marriage in the SSPR countries.²⁹ Or perhaps the changes that same-sex couples build on are not changes related to gay issues, as Waaldijk argues, but changes related to family recognition. That is, once countries give rights to different-sex unmarried couples, perhaps extending that particular package of rights to same-sex couples is a small, manageable, or relatively uncontroversial step.

IV. APPLYING MODELS OF CHANGE TO THE UNITED STATES

An alternative test of these two contrasting approaches to explaining social change would be to see how well they explain existing patterns in the United States and to follow the relative success of the frameworks' respective predictions over time. Below I make predictions based on the two frameworks using data on the fifty states. I then compare those two sets of predictions to see how well each predicts the current state of the law with respect to partnership rights in the U.S.

Seven states provide (or will soon provide) at least some legal rights to same-sex couples who register their relationship with the state. Only

28. Author's calculation from Census data in TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE & UNMARRIED-PARTNER HOUSEHOLDS: 2000 13-14 tbl. 6 (2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf> (last visited Apr. 4, 2005).

29. According to a recent report, the percentage of marital rights and responsibilities for cohabiting different-sex partners ranges from 23% in Germany to 75% in the Netherlands and Sweden. WAALDIJK *supra* note 20, at 51.

Massachusetts allows same-sex couples to marry. Vermont, Connecticut, and California offer a civil union or domestic partnership status to same-sex couples that comes with all (Vermont and Connecticut) or almost all (California) of the state-granted rights and responsibilities of marriage. Three other states offer more limited packages of rights for same-sex couples who register with the state as “reciprocal beneficiaries” (Hawaii) or domestic partners (New Jersey and Maine).³⁰

A “building on success” approach in the American context would predict expanded partnership rights in states that had already acted to give equal rights in other contexts to gay, lesbian, and bisexual people. As Waaldijk suggests, laws making discrimination in employment illegal typically precede the granting of partnership rights.³¹ The left-hand column of Table 1, *infra*, lists the sixteen states (including the District of Columbia) that currently forbid employment discrimination based on sexual orientation, in order of the year of passage.³² The six states in bold type currently recognize same-sex couples in some way, as noted in the above paragraph. Of these states, only Maine does not currently outlaw employment discrimination based on sexual orientation. The fact that the six states with same-sex partnership recognition were also among the first seven states to pass nondiscrimination laws supports the building-on-success theory, since we would expect the states with the longest history of supporting the principle of equal treatment in employment for gay, lesbian, and bisexual people to be the first to move on the marriage or partnership issue.

A “conditions for change” approach in the United States is more complicated to calculate. I use state-level measures of the three key necessary conditions for change found in my earlier paper: relatively high heterosexual cohabitation rates, relatively low religiosity, and relatively high tolerance of homosexuality. While the measures are somewhat different from those used in the international context, the relative uniformity of data collected in the United States presents the opportunity to use variables more closely related to the concepts identified in the theoretical framework:

30. See HUMAN RIGHTS CAMPAIGN, ANSWERS TO QUESTIONS ABOUT MARRIAGE EQUALITY 17-18 (undated), available at http://www.hrc.org/Template.cfm?Section=Get_Involved1&Template=/ContentManagement/ContentDisplay.cfm&ContentID=17262 (last visited Apr. 18, 2005). For Connecticut, see Daniela Altimari, *A Gay Rights Milestone: Rell Signs Civil Unions Bill; Opponents Call it a Sad Day*, HARTFORD COURANT, April 21, 2005, <http://www.courant.com/news/local/hc-civilunion0421.artapr21,0,1357108,print.story?coll=hc-big-headlines-breaking,acc 4/21/05>.

31. This relationship is not strictly observed in Europe, however. Both Germany and Belgium passed laws granting partnership rights before they passed nondiscrimination laws. See Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law: Expectations Based on Trends in National Law*, in Wintemute & Andenaes *supra* note 3, at 635, 638, and app. at 649.

32. See HUMAN RIGHTS CAMPAIGN, THE STATE OF THE WORKPLACE FOR LESBIAN, GAY, BISEXUAL, AND TRANSGENDER AMERICANS 30 (2003), available at <http://www.hrc.org/Template.cfm?Section=20042&Template=/ContentManagement/ContentDisplay.cfm&ContentID=18678> (last visited Apr. 18, 2005); S.B. 3186, 93d Gen. Assem. (Ill. 2004) (enacted).

- Heterosexual cohabitation rates come from Census 2000, calculated as the proportion of different-sex couples who classify themselves as “unmarried partners.”³³
- As a state-level measure of tolerance, I use state-level tolerance measures calculated by Gregory Lewis from several surveys that ask about the morality of homosexual behavior or whether homosexual acts should be legal or not;³⁴
- For the religiosity measure, I calculate the proportion of the state’s population who are adherents (members, their children, and other nonmember participants) of evangelical churches from the 2000 Religious Congregations and Membership survey of religious bodies, conducted by the Association of Statisticians of Religious Bodies.³⁵

For each measure, I calculate the average state value and assign a subscore of one for each of the following conditions: above average cohabitation rates, above average tolerance measures, and below average proportions of evangelical residents.³⁶ I add the three subscores to get the overall score, which ranges from zero to three. Scores and underlying measures are reported in Table 2, *infra*.

The second column of Table 1 shows the twenty states with scores of three, indicating that they have relative measures of cohabitation, tolerance, and religiosity that would make them most like the European countries that recognize rights for same-sex partners. 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.

Overall, one might note that the two sets of states significantly overlap. However, New Jersey, Minnesota, New Mexico, and Illinois show up in group

33. SIMMONS & O’CONNELL, *supra* note 28, at 4.

34. Lewis, *supra* note 23.

35. The survey data were collected by Dale E. Jones, Sherri Doty, Clifford Grammich, James E. Horsch, Richard Houseal, Mac Lynn, John P. Marcum, Kenneth M. Sanchagrin and Richard H. Taylor. This data forms the basis of Dale E. Jones et. al., *Evangelical Denominations—Total Adherents (2000)*, in RELIGIOUS CONGREGATIONS AND MEMBERSHIP IN THE UNITED STATES 2000: AN ENUMERATION BY REGION, STATE AND COUNTY BASED ON DATA REPORTED FOR 149 RELIGIOUS BODIES. My data was drawn from a United States map associated with this project, which is available at <http://www.thearda.com/arda.asp?Show=RCMS2000> (last visited Apr. 18, 2005).

36. One known omission in these data is several large African-American churches and the National Baptist Convention. Since some of these groups might be considered “evangelical”, the measure used in this paper will underestimate the proportion of a state’s population that adheres to an evangelical religion. However, to the extent that these missing evangelicals would be more likely to live in the states that have high proportions of reported evangelicals, the comparison used in this paper would not be very sensitive to the omissions. That is, the focus here is on states with low proportions of evangelicals relative to the average, so the relative position of those states is not likely to change. See Jones, *supra* note 35. This page is also available at http://www.glenmary.org/grc/RCMS_2000/method.htm (last visited Apr. 18, 2005).

one but not group two.³⁷ Alaska, Arizona, Colorado, Delaware, Florida, Maine, Michigan, Oregon, and Washington show up in group two but not group one. To break the current “tie” between the two frameworks’ predictions, we will need to follow future events in these states.

However, two other comparisons offer sneak previews. First, state courts in Washington State³⁸ and New York³⁹ have recently ruled favorably on the principle of equal marriage rights.⁴⁰ Second, at least one other state currently appears close to achieving some form of recognition for same-sex couples. This year the Maryland General Assembly passed a bill establishing a domestic partner registry that gives partners rights for medical decision-making, which now awaits the governor’s signature or veto.⁴¹ Of these three states, only Washington does not meet the building-on-success criterion of a nondiscrimination law, but the conditions-for-change framework predicts that all three states, including Washington, would be likely candidates for some form of legal recognition of same-sex couples. Finally, note that Maryland (in 2001) and New York (in 2004) are fairly recent additions to the list of states with nondiscrimination protections, suggesting that the time required for building-on-success is variable and nonspecific enough to be a relatively poor guide as to timing of passage of partnership laws.

One final possibility is to combine the two approaches. Recalculating the scores by adding one when a state has a nondiscrimination law results in a shorter list of predictions. Six of the seven states with existing partner laws get the highest score: California, Connecticut, Hawaii, Maine, Massachusetts, and Vermont. Maryland, Nevada, New Hampshire, New York, Rhode Island, and Wisconsin also get the highest score, suggesting that they would be prime targets for same-sex marriage advocates. But the ability to predict the states with existing laws and to predict those that seem poised to recognize same-sex partners is no better than either framework alone.

In summary, the conditions-for-change framework provides a slightly better fit to actual and likely future legal recognition of same-sex couples than does the building-on-success framework. Each framework’s predictions

37. The District of Columbia is not included in the conditions-for-change predictions because no data on DC was provided by Lewis.

38. *Andersen v. King Country*, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Aug. 4, 2004), *appeal argued* (Wash. Ct. App. Mar. 8, 2005).

39. *Hernandez v. Robles*, No. 103434/2004, slip op. 25057 (N.Y. Sup. Ct. Feb. 4, 2005), *transferred to* N.Y. App. Div., 2005 N.Y. LEXIS 752 (Ct. App. Mar. 31, 2005) (Mo. No. 225 SSD 11).

40. A 1998 Alaska decision also seemed to pave the way for same-sex couples to marry in a state singled out by the conditions-for-change approach, but a subsequent referendum to amend the state constitution stopped that effort. *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998). See *ESKRIDGE supra* note 10, at 40-42.

41. Md. Sen. Bill 796, 2005 Gen. Assem., 420th Reg. Sess., *available at* <http://mlis.state.md.us/2005rs/bills/sb/sb0796f.pdf> (last visited Apr. 18, 2005). Sumathi Reddy, *Fight Persists on Medical Decisions*, BALTIMORE SUN, Apr. 13, 2005, *available at* <http://www.baltimoresun.com/news/local/politics/bal-md.domestic13apr13,1,4039365.story?ctrack=2&cset=true> (last visited Apr. 21, 2005).

correctly include six out of the seven existing states with a partnership or marriage law that includes same-sex couples and two of the three states that may be moving toward such a law. The conditions-for-change model would edge ahead slightly in the scorecard if Washington were to allow same-sex couples to marry as a result of the pending litigation there.

V. CONCLUSION

One possible conclusion from the overlapping predictions of the two theoretical frameworks is that they overlap conceptually as well. The tolerance and religiosity measures highlighted by the conditions-for-change argument could also help explain the existence of a nondiscrimination law. And if the contribution of the cohabitation measure is that it is correlated with the number of gay, lesbian, and bisexual people in a state, or perhaps the number of feminist heterosexual women who do not want to marry, then cohabitation likely picks up a political power effect. In that case, we might interpret the building-on-success model as simply nested within a larger political or social movements framework (similar to the conditions-for-change model) that explains the success of the gay rights movement in general. But if the cohabitation rate captures some family-policy-specific aspect of social conflict, such as a lower economic value of marriage or an acceptance of a broader definition of family in a given state—as cohabitation might imply in the European situation—then the two frameworks appear much more distinct.

As political and judicial battles evolve over same-sex marriage and other forms of recognition for same-sex couples, the value of these conceptual frameworks for understanding that process will become more clear. In the meantime, broadening our thinking about important political precursors to same-sex marriage may still be useful. One important strategic question concerns the order of change. An incrementalist approach suggests that test cases and legislative efforts to gain rights for same-sex couples should focus on states that already have nondiscrimination laws. In this view, taking on the partnership issue in states that do not have nondiscrimination laws might run the risk of failure and a backlash that will make future changes more difficult.

The more expansive theoretical approach sketched out in this article would argue that other factors related to the social conditions in a given state might be at least as relevant. Those conditions might be more likely to be present where a gay, lesbian, and bisexual political movement has already emerged and has won some battles. This broader contextual approach is at least as good as the incrementalist framework for predicting change, providing an alternative understanding as to why some states are more amenable to change than others. The broader cultural factors appear to add information about the social and

political context that both lawyers and political activists should consider while plotting strategies.

Transferring political lessons and experiences from one continent to another runs the risk of ignoring important cultural or social differences between countries and continents. In the context of efforts to gain recognition for same-sex partners, however, the general structure of experiences in Europe maps fairly well onto the United States—so far, at least.

TABLE 1: PREDICTIONS OF STATE ADOPTION OF PARTNERSHIP RIGHTS FOR
SAME-SEX COUPLES

Building on Success Approach	Conditions for Change Approach
Wisconsin (1982)	Alaska
Massachusetts (1989)	Arizona
Connecticut (1991)	California
Hawaii (1991)	Colorado
California (1992)	Connecticut
New Jersey (1992)	Delaware
Vermont (1992)	Florida
Minnesota (1993)	Hawaii
Rhode Island (1995)	Maine
New Hampshire (1997)	Maryland
Nevada (1999)	Massachusetts
District of Columbia	Michigan
Maryland (2001)	Nevada
New York (2002)	New Hampshire
New Mexico (2003)	New York
Illinois (2004)	Oregon
	Rhode Island
	Vermont
	Washington
	Wisconsin
Notes: States listed in order of nondiscrimination law passage.	

TABLE 2

State	% Cohabiting Diff. Sex Couples	% Evangelical Adherents	% Expected to Support Legal Gay Sex	Overall Score
Alabama	5.3%	40.6%	39.6	0
Alaska	11.7%	12.5%	69.0	3
Arizona	9.7%	9.5%	69.6	3
Arkansas	6.0%	43.1%	47.6	0
California	9.1%	7.2%	73.2	3
Colorado	8.6%	10.6%	73.6	3
Connecticut	8.3%	2.4%	78.8	3
Delaware	9.7%	5.2%	63.1	3
Florida	9.3%	14.0%	63.1	3
Georgia	7.5%	27.8%	54.7	0
Hawaii	8.9%	8.1%	84.1	3
Idaho	7.0%	9.0%	57.0	1
Illinois	7.7%	10.3%	66.8	2
Indiana	8.4%	16.0%	57.0	1
Iowa	7.7%	11.7%	66.0	2
Kansas	6.3%	15.6%	64.2	1
Kentucky	7.0%	33.7%	43.6	0
Louisiana	8.5%	21.5%	55.3	1
Maine	11.2%	3.3%	65.7	3
Maryland	9.1%	7.7%	70.4	3
Massachusetts	8.7%	2.4%	76.6	3
Michigan	8.8%	10.8%	63.6	3
Minnesota	8.2%	11.1%	67.3	2
Mississippi	7.5%	39.7%	42.8	0
Missouri	8.2%	24.7%	60.1	0
Montana	8.0%	11.2%	67.7	2
Nebraska	7.0%	14.6%	64.7	1
Nevada	11.6%	5.4%	76.2	3
New Hampshire	10.2%	2.4%	74.6	3
New Jersey	7.6%	2.4%	72.3	2

New Mexico	10.3%	13.1%	54.8	2
New York	9.1%	2.9%	72.9	3
North Carolina	7.2%	25.6%	51.0	0
North Dakota	7.2%	9.7%	57.5	1
Ohio	8.4%	10.0%	60.0	2
Oklahoma	6.2%	41.5%	50.4	0
Oregon	9.9%	11.4%	73.2	3
Pennsylvania	8.1%	5.7%	64.6	2
Rhode Island	9.5%	1.6%	72.9	3
South Carolina	7.4%	29.4%	55.1	0
South Dakota	7.7%	13.8%	59.7	1
Tennessee	6.7%	37.0%	45.2	0
Texas	6.7%	24.4%	55.4	0
Utah	4.5%	1.9%	55.7	1
Vermont	11.3%	2.4%	77.9	3
Virginia	7.3%	17.1%	62.0	0
Washington	9.5%	9.8%	68.1	3
West Virginia	7.4%	11.1%	46.8	1
Wisconsin	9.0%	12.7%	65.4	3
Wyoming	8.3%	11.4%	65.7	2
Average	8.3%	14.5%	62.9	