

Executive Summary Backgrounder

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ENDA and the Path to Same-Sex Marriage

Thomas M. Messner

Individuals who support marriage as the union of husband and wife have strong reasons to be concerned about nondiscrimination proposals like the Employment Non-Discrimination Act (ENDA). ENDA would elevate sexual orientation to a protected status under workplace nondiscrimination laws. Proponents often argue that ENDA and similar laws at the state and local levels are focused exclusively on workplace issues, but a large body of evidence suggests that such legislation would also be viewed as, and in many cases expressly intended to be, a significant step toward redefining marriage to include homosexual unions.

This evidence includes substantial material from sources that openly favor same-sex marriage. Legal scholars who support marriage redefinition have described legislation like ENDA as a key step on the “incremental” path to same-sex marriage. Same-sex marriage advocates have observed that intermediate measures like sexual orientation nondiscrimination laws can “help[] bring marriage equality closer.” And lawyers challenging traditional marriage policies in court have cited nondiscrimination laws in arguing that defining marriage as the union of husband and wife is “utterly irrational” and constitutionally “suspect.”

Furthermore, laws like ENDA have already proved to be an important step toward legal recognition for homosexual unions in several states throughout the country. In states including Vermont, Massachusetts, New Jersey, New York, Cali-

fornia, Connecticut, and Iowa, courts have cited sexual orientation nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions. And no state has legislatively redefined marriage without first enacting a sexual orientation nondiscrimination law.

Lawmakers who object to proposals like ENDA on the ground they could lead to same-sex marriage might be pressured to drop their objection in exchange for explicit statutory language stating that such legislation should not be construed to support same-sex marriage. But history shows that such safeguards can be ineffective. In Massachusetts, Connecticut, and Iowa, for example, where lawmakers clarified that sexual orientation nondiscrimination laws should not be construed to allow same-sex marriage, courts redefining marriage nonetheless cited nondiscrimination laws.

There is no question that unjust discrimination should be opposed in every instance. It is also true, however, that this principle does not automatically lead to support for legislation that would elevate sexual orientation to a protected status like race.

This paper, in its entirety, can be found at:
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Indeed, no matter what one thinks about homosexuality and same-sex marriage, there are several reasons to be concerned about nondiscrimination laws that would govern the conduct of private citizens.

Whatever other concerns might exist, however, individuals may also be concerned about proposals like ENDA on the ground that they would advance public policy along the path to same-sex marriage. Gay-rights activists have openly stated that measures like ENDA are an important step toward the

more radical goal of marriage redefinition. And an established history of judicial and political activism demonstrates just how effective such a “step-by-step” strategy can be. Given this evidence, individuals firmly opposed to redefining marriage have solid grounds to be concerned about local, state, and federal nondiscrimination laws like ENDA.

—*Thomas M. Messner is a Visiting Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation.*

Background

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ENDA and the Path to Same-Sex Marriage

Thomas M. Messner

Abstract: *A significant body of evidence suggests that sexual orientation nondiscrimination laws like the Employment Non-Discrimination Act (ENDA) can function as important incremental steps toward same-sex marriage. This evidence, which shows how effective a step-by-step strategy can be for redefining marriage, provides substantial cause for individuals who support marriage as the union of husband and wife to be concerned about local, state, and federal nondiscrimination laws like ENDA.*

Individuals who support marriage as the union of husband and wife have strong reasons to be concerned about nondiscrimination proposals like the Employment Non-Discrimination Act (ENDA).¹ ENDA would elevate “sexual orientation” to a protected status under workplace nondiscrimination laws.² Proponents often argue that ENDA and similar laws at the state and local levels are focused exclusively on workplace issues, but a large body of evidence suggests that such legislation would also be viewed as, and in many cases expressly intended to be, a significant step toward redefining marriage to include homosexual unions.

This evidence includes substantial material from sources that openly favor same-sex marriage. Legal scholars who support marriage redefinition have described laws like ENDA as a key step on the “incremental” path to same-sex marriage.³ Same-sex marriage advocates have observed that intermediate measures like nondiscrimination laws can “help[]

Talking Points

- Legal scholars and same-sex marriage advocates have stated that elevating sexual orientation to a protected status in nondiscrimination laws is an important step on the incremental path to same-sex marriage.
- Lawyers challenging the traditional definition of marriage in court have cited sexual orientation nondiscrimination laws in support of marriage redefinition.
- Several state courts have cited sexual orientation nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions.
- No state has legislatively redefined marriage without first enacting a sexual orientation nondiscrimination law.
- Lawmakers who believe that marriage should be defined as the union of husband and wife have solid grounds to be concerned about local, state, and federal nondiscrimination laws like ENDA.

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bring marriage equality closer.”⁴ Lawyers challenging traditional marriage policies in court have cited nondiscrimination laws in arguing that defining marriage as the union of husband and wife is “utterly irrational”⁵ and constitutionally “suspect.”⁶ Several state courts have cited nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions.⁷ And no state has legislatively redefined marriage without first enacting a sexual orientation nondiscrimination law.⁸

Leading activists make no attempt to hide the fact that marriage redefinition is a fundamental goal of the gay-rights movement. Noted same-sex marriage advocate Andrew Sullivan, for example, has described same-sex marriage as the “end of the slippery slope” for homosexual men and women.⁹ Indeed, for many activists, same-sex marriage is the “ultimate goal” and “crowning achievement.”¹⁰ Intermediate steps like nondiscrimination laws, while valued by activists in their own right, are also viewed as significant advances toward more funda-

1. See Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (introduced Aug. 5, 2009), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1584is.txt.pdf; Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (introduced June 24, 2009), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3017>.
2. Both the Senate and House versions of ENDA would define “sexual orientation” as “homosexuality,” “bisexuality,” or “heterosexuality.” S. 1584, § 3(a)(9); H.R. 3017, § 3(a)(9).
3. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS xiii (2002). See also *infra* notes 19–24 and associated text.
4. Evan Wolfson, *Freedom to Marry: The Update from Gay Marriage Guru Evan Wolfson*, GENRE MAG., <http://www.genremagazine.com/2007/6-1/magazine/content/452.cfm> (last visited Sept. 17, 2009). See also *infra* notes 25–31 and associated text.
5. Petitioner City and County of San Francisco’s Opening Brief on the Merits at 37, *In re Marriage Cases*, 183 P.3d 184 (Cal. 2008) (No. S147999) (capitalization and formatting altered), available at [http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05San_Francisco_Opening_Brief_on_Merits_\(Part_1\).pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05San_Francisco_Opening_Brief_on_Merits_(Part_1).pdf).
6. Respondents’ Opening Brief on the Merits at 29–30, 32–33, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (citing California’s nondiscrimination laws in support of proposition that “laws that discriminate based on sexual orientation should be suspect”), available at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05Rymer_Opening_Brief_on_the_Merits.pdf. See also *infra* notes 32–39 and associated text.
7. See *infra* notes 40–49 and associated text.
8. Compare NATIONAL GAY AND LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. (last updated July 2009) (showing years that Vermont, New Hampshire, and Maine redefined marriage), available at http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_07_09_color.pdf, with NATIONAL GAY AND LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. (last updated July 1, 2009) (showing years that Vermont, New Hampshire, and Maine adopted sexual orientation nondiscrimination laws), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf.
9. *The Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 104th Cong. 123 (1996) (Statement of Andrew Sullivan, Editor, *The New Republic*) (opposing DOMA and suggesting that same-sex marriage would not lead to more radical outcomes) (emphasis omitted), available at http://www.domawatch.org/about/DOMA_104thCongress_2ndSession_SubCommittee_Const_Hearing_May151996_LAMBDA_Memo.pdf.
10. ESKRIDGE, *supra* note 3, at 2 (describing development of views of “many GLBT people”). See also SEAN CAHILL & BRYAN KIM-BUTLER, NATIONAL GAY & LESBIAN TASK FORCE, POLICY PRIORITIES FOR THE LGBT COMMUNITY: PRIDE SURVEY 2006, at 7 (2006) (reporting that more survey respondents “chose ‘marriage equality/partner recognition’ as a ‘policy priorit[y] for the LGBT community’ than any other issue”), available at <http://www.thetaskforce.org/downloads/reports/reports/2006PrideSurvey.pdf>; EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 123–44, 191–92 (2004) (explaining that only full marriage rights, including the word “marriage,” is satisfactory); C. Matthew Hill, Note, “We Live Not on What We Have”: Reflections on the Birth of the Civil Rights Test Case Strategy and Its Lessons for Today’s Same-Sex Marriage Litigation Campaign, 19 NAT’L BLACK L.J. 175, 196 (2006–2007) (stating that same-sex marriage “currently ranks as the first priority for many gay rights organizations” (emphasis added)).

mental goals,¹¹ including recognition through marriage for homosexual unions.

Given this evidence, individuals who support defining marriage legally as the union of husband and wife have strong reasons to be concerned about nondiscrimination laws like ENDA, even apart from other concerns about such laws.¹² Same-sex marriage advocates have openly stated that nondiscrim-

Several state courts have cited nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions.

ination laws and other gay-rights policies are important steps toward the more radical goal of marriage redefinition. And an established history of judicial and political activism demonstrates just how effective such a “step-by-step” strategy can be. Individuals firmly opposed to redefining marriage

therefore have additional reasons to be concerned about local, state, and federal laws like ENDA.

Statements by Legal Scholars and Same-Sex Marriage Advocates

Several legal scholars who study the subject generally agree that the path to same-sex marriage is incremental and involves several key steps that build on each other. Yale Law Professor William Eskridge, for example, writes that the “tried and true path” to same-sex marriage is “incremental”¹³ and involves a “step-by-step,” “sequential” process.¹⁴ Professor Eskridge draws support for this “[p]rinciple”¹⁵ from the observations of Kees Waaldijk,¹⁶ a European scholar and expert on same-sex marriage, who, like Eskridge, thinks the path to same-sex marriage “involve[s] several small, sequential steps,” where each step is a “precursor and even a stimulant to the next.”¹⁷ Professor Waaldijk calls this process “the law of small change” and “the trend of standard sequences.”¹⁸

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11. See Kees Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 638–39 (Robert Wintemute & Mads Andenaes eds., 2001) (recognizing that “anti-discrimination provisions” have some “practical effects” but stating that the “primary importance of [such] intermediate symbolic legislation may well lie in its paving the way for such practical legislation on [same-sex] partnership and parenting”); Matthew Coles, Director, Lesbian, Gay, Bisexual, Transgender and AIDS Project of the American Civil Liberties Union, Remarks at Ohio State University Moritz College of Law (Apr. 16, 2009) (hereinafter Coles Remarks) (stating that “the point” of nondiscrimination laws “is to create a social discussion, a social discussion in which people agree that sexual orientation discrimination is wrong, and then can move on to a discussion of relationships”), available at http://moritzlaw.osu.edu/podcasts/events/090416_matt_coles.mp3; see also JAMES W. BUTTON ET AL., PRIVATE LIVES, PUBLIC CONFLICTS 130 (1997) (not discussing marriage but stating that the “actual adoption of laws or policies protecting gay rights was important beyond its substantive effect on preventing discrimination”).
 12. See *infra* at note 80.
 13. ESKRIDGE, *supra* note 3, at xiii. Similarly, University of Minnesota Law Professor Dale Carpenter has discussed the “incremental path to gay marriage,” Posting of Dale Carpenter to volokh.com, <http://volokh.com/posts/1131148084.shtml> (Nov. 4, 2005, 5:48 PM), and has stated that incrementalism “must” be a “guidepost[] in the battle for gay marriage,” Dale Carpenter, *Spousal Rights by Increments: California Shows the Way*, INDEP. GAY FORUM, Nov. 25, 2004, <http://www.indegayforum.org/news/printer/26682.html>.
 14. ESKRIDGE, *supra* note 3, at 154 (emphasis in second quotation omitted). See also WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 320 (1999) (“Equality comes on little cat’s feet, not in a single step.”).
 15. ESKRIDGE, *supra* note 3, at 115.
 16. See *id.* at 115, 153–54 (citing 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, *supra* note 11).
 17. 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, 577 (2004) (discussing marriage redefinition in the Netherlands as an example of “the ‘law of small change’ and the ‘trend of standard sequences’”). See also Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law*, *supra* note 11, at 635, 637–38.

In this view, elevating sexual orientation to a protected status in nondiscrimination laws is a key step on the incremental path to same-sex marriage.¹⁹ Yuval Merin, formerly a visiting scholar with the Williams Institute at UCLA Law School, describes nondiscrimination laws as an essential step in the “necessary process” for legally recognizing homosexual unions.²⁰ Similarly, Professor Eskridge identifies nondiscrimination laws as an important step toward the “legal recognition of same-sex marriage.”²¹ According to Professor Eskridge, nondiscrimination laws “make it easier to recognize same-sex unions”²² and states that implement them with other gay-rights measures are the “most likely to take the next logical step and recognize same-sex unions.”²³ Several scholars also think that particular jurisdictions are unlikely to recognize same-sex unions legally

until they elevate sexual orientation to a protected status in their nondiscrimination laws.²⁴

Like these scholars, same-sex marriage advocates outside the academy also see laws like ENDA as an

Intermediate steps like nondiscrimination laws, while valued by activists in their own right, are also viewed as significant advances toward more fundamental goals, including recognition through marriage for homosexual unions.

important step on the path to same-sex marriage. Evan Wolfson, the founder and executive director of Freedom to Marry, an organization committed to same-sex marriage advocacy, has described local nondiscrimination laws as one of several steps that

18. Kees Waaldijk, *Others May Follow*, *supra* note 17, at 577 (internal quotations omitted). *See also* Waaldijk, *Towards the Recognition of Same-Sex Partners in European Union Law*, *supra* note 11, at 636–39 (discussing “The Trend of Steady Progress,” “The Trend of Standard Sequences,” “The ‘Law of Small Change,’” and “The ‘Law of Symbolic Preparation’”); YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 326 (2002) (citing Professor Waaldijk in arguing that there is a “standard pattern or process...toward a high level of recognition of same-sex partnerships”).
19. *See* ESKRIDGE, *supra* note 3, at xiv (discussing key steps toward same-sex marriage, including “state laws prohibiting public and private discriminations against sexual and gender minorities”); MERIN, *supra* note 18, at 309 (stating that nondiscrimination laws are a “prerequisite[]” for “expansive recognition of same-sex partnerships”); Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891, 908 (2006) (discussing nondiscrimination laws as a precursor to legal recognition of same-sex unions); *Developments in the Law—The Law of Marriage and Family, Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2012 (2003) (listing sexual orientation nondiscrimination laws as one of the key steps in the progression toward legal recognition for homosexual unions in Vermont); Waaldijk, *Others May Follow*, *supra* note 17, at 577–78 & n.43 (stating that marriage redefinition in the Netherlands was “contingent” on intermediate steps including “the introduction of anti-discrimination laws”).
20. MERIN, *supra* note 18, at 309 (emphasis omitted). *See also* The Williams Institute, UCLA School of Law, <https://www.law.ucla.edu/williamsinstitute/about/merin.html> (last visited Apr. 17, 2009) (announcing that Professor Yuval Merin would be a Williams Institute Visiting Scholar in 2004).
21. ESKRIDGE, *supra* note 3, at 154. *See also id.* at xiii–xiv, 118; William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853, 876 (2001).
22. ESKRIDGE, *supra* note 3, at 118.
23. *Id.* at 232. *See also* WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, GAY MARRIAGE: FOR BETTER OR FOR WORSE? 88 (2006) (listing the enactment of sexual orientation nondiscrimination laws as a factor in identifying those “countries most likely to recognize same-sex marriages or partnerships”); MERIN, *supra* note 18, at 334 (stating that “states with antidiscrimination laws should be ripe for legislative introduction of a version of civil unions”).
24. *See* ESKRIDGE, *supra* note 3, at 232 (stating that “states in this country are unlikely to adopt such recognition [of lesbian and gay unions] as long as they have criminal sodomy laws and no antidiscrimination laws”); MERIN, *supra* note 18, at 309 (stating that “the enactment of antidiscrimination legislation” is a “prerequisite[]” for “expansive recognition of same-sex partnerships”); *id.* at 336 (stating that even where sodomy laws have been repealed “most U.S. states would still have to provide gays protection from discrimination before they would be ready to consider same-sex marriage”); Johnson, *supra* note 19, at 908 (stating that “even a ‘compromise’ like civil union is not likely to come about in a state that does not have an antidiscrimination statute in place”); Waaldijk, *Others May Follow*, *supra* note 17, at 577–78 (stating the legal recognition of same-sex marriage in the Netherlands was “contingent” on the decriminalization of homosexuality and the introduction of nondiscrimination laws).

can “help[] bring marriage equality closer.”²⁵ Matthew Coles, the director of the ACLU’s LGBT & AIDS Project, has said that nondiscrimination laws are a “predicate” to making progress on issues involving relationship recognition.²⁶ Mary Bonauto, the lead counsel in the Massachusetts same-sex marriage case, has written that the Massachusetts same-sex marriage case was the “logical next step of a decades-long process”²⁷ that included “enacting a sexual orientation non-discrimination law.”²⁸ And “many observers,” according to an article in *The Advocate*, a leading LGBT news source, consider ENDA to be one of the “crucial building blocks” for marriage redefinition efforts federally.²⁹

An op-ed published in *The Washington Blade*, another LGBT news source, discusses this concept even more figuratively. The op-ed likens ENDA and other gay-rights legislation to the structure of a house with civil unions as the “roof structure” and same-sex marriage as the “shingles.”³⁰ “[T]here is a

No state has legislatively redefined marriage without first enacting a sexual orientation nondiscrimination law.

logical progression to all of this,” states the op-ed, “[y]ou don’t build a house upside down.”³¹ This opinion reflects the thinking of many activists that laws like ENDA are an important step on the incremental path to same-sex marriage.

State Court Decisions Involving Recognition of Same-Sex Unions

In marriage litigation throughout the country, same-sex marriage advocates have cited sexual orientation nondiscrimination laws in arguing that traditional marriage laws are unconstitutional. In Massachusetts,³² California,³³ and New York,³⁴ for example, same-sex marriage advocates have cited

25. Wolfson, *supra* note 4.

26. Coles Remarks, *supra* note 11 (stating that “nondiscrimination laws and the public conversation that goes with them are really a predicate to doing anything serious on relationships”), available at http://moritzlaw.osu.edu/podcasts/events/090416_matt_coles.mp3. In the same remarks, Mr. Coles also describes nondiscrimination laws as part of the “groundwork” required for repealing state constitutional amendments that define marriage as the union of husband and wife. *See id.*

27. Mary L. Bonauto, *Goodridge in Context*, 40 HARV. C.R.-C.L. L. REV. 1, 2 (2005).

28. *Id.* at 10. *See also* WILLIAM N. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 357–58 (2008) (associating Massachusetts’s “broad antidiscrimination law” with “normative shift” that “made *Goodridge* possible”); DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE 34 (2006) (stating that “roots” of the movement for same-sex marriage in Massachusetts “go back at least to 1989” when Massachusetts “include[d] sexual orientation in statewide laws banning discrimination in employment and public accommodations”); Freedom to Marry, History and Timeline of Marriage, http://www.freedomtomarry.org/get_informed/marriage_basics/history_overview.php (last visited Feb. 4, 2009) (stating that same-sex couples who filed the Massachusetts same-sex marriage case were “building on” previous developments that included “protections” in employment).

29. Sean Kennedy, *A Tipping Point, Year?*, ADVOCATE, Jan. 15, 2008, at 3 (stating that “many observers” agree that federal hate crimes legislation and ENDA are “crucial building blocks” in the “ongoing effort to gain federal marriage equality”), available at http://advocate.com/issue_story_ektid50926.asp?page=3. *See also* Posting of Matt Coles to pamshouseblend.com, <http://www.pamshouseblend.com/diary/12380/the-value-of-a-little-history-the-myth-of-a-big-federal-fix> (Aug. 6, 2009, 14:52:37 PM EDT) (stating that “passing ENDA and getting members on record will help us get DOMA repealed”).

30. Monica Helms, Op-Ed., *Building a House from the Roof Down*, WASH. BLADE, Aug. 24, 2007, available at <http://www.washblade.com/2007/8-24/view/columns/11121.cfm>.

31. *Id.*

32. *See* Brief of Plaintiffs-Appellants at 77–78, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (No. SJ08860) (citing Massachusetts’s sexual orientation nondiscrimination laws in arguing that homosexual men and woman form a “[s]uspect [c]lass”); *see also id.* at 90 & n.55 (citing Massachusetts’s sexual orientation nondiscrimination laws as evidence that the Massachusetts legislature had explicitly “acknowledged gay people to form a distinct group”).

nondiscrimination laws in arguing that sexual orientation is a “suspect” or “quasi-suspect” classification deserving heightened scrutiny. Lawyers for the City of San Francisco have cited nondiscrimination laws and other gay-rights policies to argue that defining marriage as a relationship between a man and a woman is “totally inconsistent,”³⁵ “utterly irrational,”³⁶ “schizophrenic,”³⁷ and “entirely erratic.”³⁸ In some cases advocates have cited nondiscrimination laws, more generally, as evidence of a history or

policy trajectory consistent with or supporting marriage redefinition.³⁹

State courts in Vermont, Massachusetts, New Jersey, New York, California, Connecticut, and Iowa have put some stock in this kind of reasoning.⁴⁰ Courts in each of these states have cited sexual orientation nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions. For instance:

33. See Respondents’ Opening Brief on the Merits at 30, 32–33, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (citing California’s nondiscrimination laws in arguing that “sexual orientation is [not] a proper basis for differential treatment of individuals” and should be considered a “suspect classification”), available at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05Rymer_Opening_Brief_on_the_Merits.pdf; Opening Brief on the Merits at 33, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (arguing that “steps taken by both California courts and the California legislature to protect individuals from discrimination based upon their sexual orientation support the conclusion that statutes which discriminate using classifications based upon sexual orientation are ‘suspect’ and require strict judicial scrutiny”), available at http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/02clinton_openbrief.pdf; Petitioner City and County of San Francisco’s Opening Brief on the Merits at 63–64, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (citing California’s nondiscrimination laws in arguing that “lesbians and gay men are a suspect class for equal protection purposes”), available at [http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/06San_Francisco_Opening_Brief_on_Merits_\(Part_2\).pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/06San_Francisco_Opening_Brief_on_Merits_(Part_2).pdf).
34. See Brief for Plaintiffs-Appellants at 64, 65 & n.37, 67 & n.39, *Hernandez v. Robles*, 821 N.Y.S.2d 770 (N.Y. 2006) (Nos. 86–89) (citing New York’s sexual orientation nondiscrimination laws in arguing that sexual orientation classifications deserve heightened scrutiny), available at <http://data.lambdalegal.org/pdf/608.pdf>; see also Brief of Amici Curiae Parents, Families & Friends of Lesbians and Gays, Inc., Family Pride Coalition, Human Rights Campaign, Human Rights Campaign Foundation, and The New York City Gay & Lesbian Anti-Violence Project in Support of Plaintiffs-Respondents at 9, 13–14, *Hernandez v. Robles*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005) (citing sexual orientation nondiscrimination laws in arguing that New York courts “may treat sexual orientation as a suspect classification” (capitalization and formatting altered)), available at <http://data.lambdalegal.org/pdf/524.pdf>.
35. Petitioner City and County of San Francisco’s Opening Brief on the Merits at 37, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999), available at [http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05San_Francisco_Opening_Brief_on_Merits_\(Part_1\).pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05San_Francisco_Opening_Brief_on_Merits_(Part_1).pdf).
36. *Id.* (capitalization and formatting altered).
37. *Id.* at 39.
38. *Id.* at 40.
39. See Brief of the Plaintiffs-Appellants at 9, *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (No. 17716) (citing Connecticut’s sexual orientation nondiscrimination laws as one of the steps in the “journey of Connecticut lawmakers in confronting and eliminating aspects of discrimination against lesbian and gay people”), available at <http://www.glad.org/uploads/docs/cases/2006-11-22-kerrigan-supreme-court-brief.pdf>; see also Brief Amici Curiae of Iowa Professors of Law and History at 5–6, *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (No. 07-1499) (citing Iowa’s sexual orientation nondiscrimination law as evidence of Iowa’s “longstanding commitment to equality”), available at <http://data.lambdalegal.org/pdf/legal/varnum/iowa-historians-and-law-professors-iowa-supreme-court-brief.pdf>; Petitioner City and County of San Francisco’s Opening Brief on the Merits at 15–16, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999) (citing sexual orientation nondiscrimination laws as part of California’s “evolving recognition of the humanity of its gay and lesbian citizens”), available at [http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05San_Francisco_Opening_Brief_on_Merits_\(Part_1\).pdf](http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/05San_Francisco_Opening_Brief_on_Merits_(Part_1).pdf); Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment at 47, 49 & n.43, *Hernandez v. Robles*, 794 N.Y.S.2d 579 (N.Y. Sup. 2005) (No. 103434/2004) (citing New York’s sexual orientation nondiscrimination law in discussion of “New York’s evolving history of respect for and protection of same-sex relationships”), available at <http://data.lambdalegal.org/pdf/346.pdf>.

- The Vermont Supreme Court cited Vermont's sexual orientation nondiscrimination laws as part of the "history, logic, and experience" supporting the conclusion that "none of the interests asserted by the State provides a reasonable and just basis" for limiting the benefits of marriage to relationships between a man and a woman.⁴¹
- The Massachusetts Supreme Judicial Court cited Massachusetts's sexual orientation nondiscrimination laws in rejecting the argument that a collective moral consensus disfavoring homosexual conduct provided an adequate basis for defining marriage legally as the union of husband and wife.⁴²
- The New Jersey Supreme Court cited New Jersey's nondiscrimination laws as evidence of an "evolving expansion of rights" supporting some form of legal recognition for homosexual unions.⁴³
- A New York trial court cited New York's sexual orientation nondiscrimination laws as evidence of an "evolving public policy" reinforcing the court's decision to extend the "right to choice in marriage" to homosexual couples.⁴⁴
- The California Supreme Court cited California's sexual orientation nondiscrimination laws in support of its conclusion that "homosexual

40. UCLA Law Professor Eugene Volokh has written on several occasions about how the enactment of sexual orientation nondiscrimination laws and other gay-rights legislation can and has influenced judicial reasoning in marriage cases. See Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 HOFSTRA L. REV. 1155, 1160–61 (2005); Eugene Volokh, *The Mechanisms of the Slippery Slopes*, 116 HARV. L. REV. 1026, 1084–87 (2003); Posting of Eugene Volokh to volokh.com, http://volokh.com/archives/archive_2009_04_05-2009_04_11.shtml#1238948132 (Apr. 6, 2009, 12:21 PM) (hereinafter Volokh April 6, 2009 posting); Posting of Eugene Volokh to volokh.com, <http://volokh.com/posts/1210877596.shtml> (May 15, 2008, 2:53 PM) (hereinafter Volokh May 15, 2008 posting); Posting of Eugene Volokh to volokh.com, http://volokh.com/archives/archive_2006_10_22-2006_10_28.shtml#1161812027 (Oct. 25, 2006, 5:33 PM) (hereinafter Volokh October 25, 2006 posting); Posting of Eugene Volokh to volokh.com, <http://www.volokh.com/posts/1124298617.shtml> (Aug. 17, 2005, 1:10 PM) (hereinafter Volokh August 17, 2005 posting).
41. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999). See *id.* at 885–86 (citing sexual orientation nondiscrimination laws); *id.* at 902 n.5 (Johnson, J., concurring in part and dissenting in part) (stating that, "as both the majority and concurrence acknowledge, allowing same-sex couples to obtain the benefits and protections of marriage is a *logical extension of Vermont's legislatively enacted public policy* prohibiting discrimination on the basis of sex and sexual orientation, decriminalizing consensual homosexual conduct between adults, and permitting same-sex partners to adopt children" (internal citations omitted and emphasis added)); Volokh, *The Mechanisms of the Slippery Slopes*, *supra* note 40, at 1084–85 (stating that a "major part of the [Vermont Supreme] [C]ourt's stated reason" for its decision was the "legislature's previous decisions to enact" gay-rights legislation including legislation "prohibiting private discrimination based on sexual orientation"); see also MERIN, *supra* note 18, at 332–33 (citing Vermont and its adoption of sexual orientation nondiscrimination laws as an illustration of the "necessary process" leading to recognition for same-sex unions); Johnson, *supra* note 19, at 906 (stating that Vermont provides a "good example" of the step-by-step process described by Professor Eskridge).
42. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 967–68 (Mass. 2003). See also Volokh, *Same-Sex Marriage and Slippery Slopes*, *supra* note 40, at 1161 (stating that "part of [the court's] reasoning rested on the legislature's decision to ban sexual orientation discrimination"); Volokh August 17, 2005 posting, *supra* note 40.
43. *Lewis v. Harris*, 908 A.2d 196, 212 (N.J. 2006). See *id.* at 212–15 (citing nondiscrimination laws and other gay-rights policies); see also Volokh October 25, 2006 posting, *supra* note 40 (discussing how sexual orientation nondiscrimination laws influenced the decision of the New Jersey Supreme Court and stating that the decision "seems to be an illustration that the slippery slope is a real phenomenon").
44. *Hernandez v. Robles*, 794 N.Y.S.2d 579, 607 (N.Y. Sup. 2005), *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff'd*, 821 N.Y.S.2d 770 (N.Y. 2006). This decision was overturned on appeal, see 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff'd*, 821 N.Y.S.2d 770 (N.Y. 2006), but demonstrates the receptiveness of judges to this type of reasoning, see 794 N.Y.S.2d at 606 (N.Y. Sup. 2005) (citing nondiscrimination laws); see also 821 N.Y.S.2d at 796–97 (N.Y. 2006) (Kaye, C.J., dissenting) (citing legislative findings associated with New York's sexual orientation legislation in concluding that homosexual persons constitute a suspect class for purposes of equal protection analysis).

orientation” is not a “constitutionally legitimate basis” for withholding the right to marry found in the California Constitution.⁴⁵

- The Connecticut Supreme Court, in determining how closely to scrutinize Connecticut’s traditional marriage laws, thought it was “highly significant” that Connecticut had included sexual orientation in its nondiscrimination laws.⁴⁶
- And the Iowa Supreme Court, in applying a heightened level of scrutiny in striking down Iowa’s traditional marriage law, reasoned that Iowa laws and regulations protecting sexual orientation “express a desire to remove sexual orientation as an obstacle to the ability of gay and lesbian people to achieve their full potential.”⁴⁷

These cases illustrate what UCLA Law Professor Eugene Volokh describes as “the tendency of some legislative decisions to affect future judicial

decisions, even judicial decisions that cover territory considerably beyond the original statute.”⁴⁸ By citing nondiscrimination laws in judicial decisions involving the much broader issue of mar-

In marriage litigation throughout the country, same-sex marriage advocates have cited sexual orientation nondiscrimination laws in arguing that traditional marriage laws are unconstitutional.

riage definition, these courts extended the effect of those nondiscrimination laws beyond their original scope. This case history provides another reason for individuals who support marriage as the union of husband and wife to be concerned about laws like ENDA.⁴⁹

45. *In re Marriage Cases*, 183 P.3d 384, 429 (Cal. 2008), *superseded by constitutional amendment as stated in* *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009). *See In re Marriage Cases*, 183 P.3d at 428 & n.46 (citing nondiscrimination laws); *see also* Volokh May 15, 2008 posting, *supra* note 40.

46. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 435 (Conn. 2008). *See also id.* at 447–48, 451–52 (additional citation of nondiscrimination laws).

47. *Varnum v. Brien*, 763 N.W.2d 862, 891 (Iowa 2009). *See also* Volokh April 6, 2009 posting, *supra* note 40. The Iowa Supreme Court bolstered its reliance on Iowa’s nondiscrimination laws by observing that the Connecticut Supreme Court had “[relied] on Connecticut statutes banning discrimination based on sexual orientation.” *Varnum*, 763 N.W.2d at 891 n.20.

48. Volokh May 15, 2008 posting, *supra* note 40. In addition to these cases, a dissenting opinion in the Maryland marriage case thought the existence of nondiscrimination laws was “highly significant” in determining “whether Maryland’s marriage law is rationally related to a legitimate governmental interest.” *Conaway v. Deane*, 932 A.2d 571, 639 (2007) (Raker, J., concurring in part and dissenting). This opinion, which would have required Maryland to extend the rights and benefits of marriage to same-sex couples but not necessarily to redefine “marriage,” *see id.* at 636–37, considered nondiscrimination laws and other gay-rights policies in asserting that “discrimination on the basis of sexual orientation is against the law in this State” and the state’s justification of its marriage policy must be analyzed in this “context,” *id.* at 639. Although the controlling opinion in that case cited nondiscrimination laws as evidence that homosexual persons, as a class, exercise political influence, a factor in determining there was no suspect class, *see id.* at 611–14; *see also* *Andersen v. King County*, 138 P.3d 963, 974–75 (Wash. 2006) (plurality) (same), the opinion by Judge Raker provides additional evidence of the receptivity of judges to the types of arguments advanced by advocates of same-sex marriage in this context, *see, e.g.*, Brief of *Amici Curiae* Organization of American Historians et al. at 42–43, *Conaway v. Deane*, 932 A.2d 571 (2007) (No. 44) (arguing that same-sex marriage is “consistent with” the establishment of sexual orientation nondiscrimination laws and policies, which “reflect a public policy commitment in Maryland to full legal and social equality for gay and lesbian people in this state”), *available at* http://www.aclu.org/images/asset_upload_file152_27248.pdf.

49. The establishment of nondiscrimination laws and policies can also influence executive officials. *See* Letter from Patrick C. Lynch, Attorney General, State of Rhode Island, to Jack R. Warner, Commissioner, Rhode Island Board of Governors for Higher Education at 6 (Feb. 20, 2007) (stating that Rhode Island’s sexual orientation laws, when considered with other gay-rights policies, lend support to the argument that “Rhode Island does *not* have a strong public policy against...same-sex relationships”), *available at* http://www.domawatch.org/cases/rhodeisland/chambersvormiston/RI_AG_Opinion_on_SSM.pdf. *See id.* at 5 & n.13 (citing sexual orientation nondiscrimination laws).

Facilitating the Political Conditions for Same-Sex Marriage

Same-sex marriage advocates also think that the enactment of nondiscrimination laws and other gay-rights legislation can facilitate the conditions for redefining marriage politically. In certain European countries, for example, where marriage has been redefined politically rather than judicially, the passage of sexual orientation nondiscrimination laws was an important step in the process.⁵⁰ Similarly, in Vermont, New Hampshire, and Maine—the only states in this country to have redefined marriage legislatively—nondiscrimination laws were important precursors to legal recognition through marriage for homosexual unions.⁵¹ As one source observed after Maine established its nondiscrimination law, “every piece of pro-gay legislation is another piece of the

treasure map, and, in Maine, activists aren’t at all squirrely about their plan now.”⁵²

According to several sources, an incremental strategy built on a series of “small changes” can advance the political conditions for same-sex marriage in at least three ways.

First, same-sex marriage advocates think that “[s]tep-by-step” changes to the law can facilitate the “gradual adjustment” of “public attitudes” about homosexuality.⁵³ Advocates understand that, “[c]ompared to legalizing same-sex marriage, prohibiting employment discrimination on the basis of sexual orientation looks quite tame to most Americans.”⁵⁴ However, “[o]nce the citizenry adjusts to antidiscrimination laws...[,] it gradually becomes ready for civil union. After another period of adjustment, [same-sex] marriage may follow.”⁵⁵ In

50. See Waaldijk, *Others May Follow*, *supra* note 17, at 578 (discussing marriage redefinition in the Netherlands); *id.* at 583 (stating that Belgium “followed a similar path” to same-sex marriage by taking steps including decriminalizing sodomy and enacting sexual orientation nondiscrimination laws).
51. See Portland, Maine, Resolution Supporting the Passage of LD1020 “An Act To End Discrimination in Civil Marriage and Affirm Religious Freedom,” Res. No. 16-08/09 (April 27, 2009) (citing ordinance protecting sexual orientation in resolution supporting same-sex marriage legislation in Maine), available at <http://www.portlandmaine.gov/orders/fy08-09/resolve16.pdf>; MINORITY REPORT FOR THE COMMISSION ESTABLISHED BY SB 427 TO STUDY SAME SEX MARRIAGE AND ITS LEGAL EQUIVALENTS 30 (Nov. 30, 2005) (stating that legislatively commissioned study concerning same-sex marriage in New Hampshire was “the next chapter” in a legislative history that included the enactment of a sexual orientation nondiscrimination law and other gay-rights legislation), available at <http://www.nhhousegop.com/Reports/MinorityRep21-40.pdf>; *Vermont Lawmakers Legalize Gay Marriage*, MSNBC, Apr. 7, 2009 (reporting that former lawmaker celebrating passage of Vermont same-sex marriage legislation “recalled efforts to expand gay rights dating to an anti-discrimination law passed in 1992”), <http://www.msnbc.msn.com/id/30089125/>. Compare NATIONAL GAY AND LESBIAN TASK FORCE, RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE U.S. (last updated July 2009) (showing years that Vermont, New Hampshire, and Maine redefined marriage), available at http://www.thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_07_09_color.pdf, with NATIONAL GAY AND LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. (last updated July 1, 2009) (showing years that Vermont, New Hampshire, and Maine adopted sexual orientation nondiscrimination laws), available at http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf.
52. Tony Giampetruzzi, *Next Stop: Marriage*, PHOENIX, June 8, 2007, available at <http://thephoenix.com/Boston/Life/41432-Next-stop-marriage/>. Indeed, the Maine Freedom to Marry Coalition states on its Facebook page, “After the success of Maine Won’t Discriminate [a campaign to defend Maine’s sexual orientation nondiscrimination law], advocates knew it was time to extend protections to Maine’s LGBT families.” Facebook Page of Maine Freedom to Marry Coalition, <http://www.facebook.com/group.php?gid=49715786086>.
53. ESKRIDGE, *supra* note 3, at 115. See also ESKRIDGE, *supra* note 28, at 357–58 (linking Massachusetts’s sexual orientation nondiscrimination laws and other gay-rights measures to the “flourishing of an open LGBT culture in the state” and associated “normative shift”); BUTTON ET AL., *supra* note 11, at 131 (stating that “laws protective of gay and lesbian rights have also modified behavior in ways that have ultimately affected attitudes toward gays”); *id.* at 208 (“We have found that gay rights measures are often helpful in altering behavior, attitudes, and institutions and thereby influencing social change.”); Carpenter, *Spousal Rights by Increments*, *supra* note 13 (not discussing nondiscrimination laws but stating in discussion of developments in California domestic partnership laws that “[i]ncrementalism [] gives the public time to adjust to each advance”).

this view, enacting “small changes” like ENDA can lead the public to see more radical changes like same-sex marriage “as less extreme and thus more acceptable.”⁵⁶

Second, success in passing incremental measures like nondiscrimination laws can make it easier politically for elected officials and swing voters to support more controversial measures like same-sex marriage. Activists understand that more people

By citing nondiscrimination laws in judicial decisions involving the much broader issue of marriage definition, these courts extended the effect of those nondiscrimination laws beyond their original scope.

will support an issue that is “perceived to ‘have momentum’”⁵⁷ and that political mobilization for one issue can translate into support for other issues.⁵⁸ Perhaps it was this understanding that led Matthew Coles, an attorney with the ACLU, to state recently that “passing ENDA and getting members

on record will help us get DOMA [the Defense of Marriage Act] repealed.”⁵⁹

Third, a “small change” strategy allows activists to deflect unwelcome attention from more radical goals while taking the necessary intermediate steps to achieve them. For example, an op-ed in *The Washington Blade* suggests that, for a certain time at least, “[same-sex] marriage and civil unions should remain silent issues—at least silent to the straight public. Tactics and strategies can be formed behind closed doors, while focusing our primary efforts on the passable issues.”⁶⁰ The op-ed makes clear that passing nondiscrimination laws should be one of the primary efforts. Other sources, more generally, have observed that gay-rights activists might need to consider “a selective withholding of information”⁶¹ and pointed to the story of the Trojan Horse as an illustration of how “moderate discourse” can lead to radical “transformation.”⁶² Focusing on “small changes” like nondiscrimination laws allows activists to manage their messages, deflect criticism, and lay the groundwork for more challenging goals like marriage redefinition.

54. William B. Turner, *The Gay Rights State: Wisconsin’s Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 WIS. WOMEN’S L.J. 91, 114 (2007). See also Darren Lenard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 LAW & INEQ. 1, 86–87 & n.468 (2005) (explaining that Americans are less opposed to laws like ENDA than to same-sex marriage).

55. Johnson, *supra* note 19, at 908.

56. Volokh, *The Mechanisms of the Slippery Slopes*, *supra* note 40, at 1100 (second quotation in sentence only). In this instance, Professor Volokh is discussing the mechanics of slippery slopes generally, not the slippery slope to same-sex marriage specifically. See *id.* (“Implementing decision A may also lead people to see B as less extreme and thus more acceptable.”).

57. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS 178 (John D’Emilio et al. eds., 2000) (“Washington politics are fickle. If an issue is perceived to ‘have momentum,’ more people will support it; conversely, if an issue is perceived to have ‘lost momentum,’ people who should support the issue will desert it.”). See Volokh, *Same-Sex Marriage and Slippery Slopes*, *supra* note 40, at 1183 (stating that “[s]wing-vote legislators are more likely to accede to the demands of a movement that seems to have political momentum” (internal quotations omitted)); see also Lou Chibbaro, Jr., *Hate Crimes, ENDA Seen at Top Legislative Priorities*, WASH. BLADE, Dec. 2, 2008 (reporting view of activist that “‘more challenging’” legislation can be addressed once “‘Congress [] pass[es] the first one or two bills’” (quoting David Stacy, a public policy advocate with the Human Rights Campaign)), available at http://www.washblade.com/thelatest/thelatest.cfm?blog_id=22742.

58. See Volokh, *The Mechanisms of the Slippery Slopes*, *supra* note 40, at 1124–25 (“Successful movements often have paid staff who are enthusiastic about pushing for further action, and unenthusiastic about losing their jobs. The staff have experience at swaying swing voters, an organizational structure, media contacts, volunteers, and contributors.”); see also James W. Button et al., *Politics of Gay Rights at the Local and State Level*, in THE POLITICS OF GAY RIGHTS 286–87 (2000) (“The political push for civil rights protection proved to be an effective mobilizing strategy for gays and their allies.”); BUTTON ET AL., *supra* note 11, at 209–10 (stating that “the adoption of gay rights legislation has often increased the political mobilization of gays and lesbians”).

59. Coles, *supra* note 29.

60. Helms, *supra* note 30.

In sum, many gay-rights activists understand that “[d]ismantling the opposition piecemeal has always worked better.”⁶³ In terms of democratic principles, addressing the question of whether to redefine marriage using politically accountable legislatures is certainly procedurally preferable to courts imposing that choice on unwilling populations. But lawmakers who do not wish the traditional understanding of marriage to be “dismantled piecemeal” by any process should pay close attention to the power of changes that seem “small” compared to more radical measures.

Ineffective Safeguards for Marriage

Lawmakers who object to laws like ENDA on the ground they could lead to same-sex marriage might be pressured to drop their objection in exchange for explicit statutory language stating that such legisla-

tion should not be construed to support same-sex marriage. History shows, however, that such measures can be ineffective safeguards for marriage.

In Massachusetts, for example, when lawmakers were considering whether to enact a sexual orientation nondiscrimination law, one concern was that such legislation could lead to same-sex marriage.⁶⁴ Massachusetts lawmakers clarified that nothing in the legislation should “be construed so as to legitimize or validate a ‘homosexual marriage.’”⁶⁵ But the Massachusetts Supreme Judicial Court nevertheless cited Massachusetts’s nondiscrimination laws in redefining marriage for that state.⁶⁶

Similarly, the Connecticut legislature stipulated that its decision to include sexual orientation in the state’s nondiscrimination laws should not be construed as authorizing “the recognition of or the right

61. Peter M. Cicchino et al., Comment, *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 629–30 (1991) (“For the gay and lesbian community, a selective withholding of information—the presentation of a limited, culturally non-threatening public persona—may be the precondition for securing basic civil rights in the present political climate.”).
62. Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 601 (1994–1995). In relating the story of the Trojan Horse to the movement for same-sex marriage, Mr. Wolfson explains that the Greeks were able to get their horse inside the walls of Troy—and thus achieve a “fairly radical” transformation—by persuading the Trojans that breaching their walls was “the last thing the Greeks would have wanted.” *Id.* at 600–01. The point, writes Mr. Wolfson, is that “sometimes the people arguing cases or battling in the trenches are not best placed to say just anything or to reveal everything.” *Id.* at 601.
63. *ENDA to Be Separated Into Two Bills: Sexual Orientation and Gender Identity*, ADVOCATE, Sept. 29, 2007–Oct. 1, 2007 (reprinting statement of Rep. Barney Frank about passing version of ENDA that would elevate sexual orientation but not gender identity to a protected status), available at http://advocate.com/news_detail_ektid49439.asp. See also, e.g., Feldblum, *supra* note 57, at 186 (stating that history of ENDA shows “change usually occurs only in incremental steps”); Wolfson, *supra* note 62, at 592 (stating that “social change occurs through the possibilities enlarged by each gain in altered reality and evolution”); Vic Basile, Editorial, *The Long Road to Equality*, WASH. BLADE, Nov. 2, 2007 (former executive director of Human Rights Campaign stating that “political victories come in small, incremental steps”), available at <http://www.washblade.com/2007/11-2/view/editorial/11499.cfm>; Carpenter, *Spousal Rights by Increments*, *supra* note 13 (praising “gay lobbyists and openly gay legislators [who] proceeded incrementally” in securing certain legal recognitions for homosexual unions in California); Coles Remarks, *supra* note 11 (describing an incremental path to same-sex marriage nationwide).
64. See Bruce Mohl, *Senate Approves State Gay Rights Bill*, BOSTON GLOBE, Oct. 12, 1989, at 1 (reporting that opponent of Massachusetts nondiscrimination law “predicted the next legislative goal of the gay community will be laws authorizing gay marriages”); cf. Editorial, *A Gay-Protection Forum*, BOSTON GLOBE, Oct. 15, 1989, at A30 (denying that Massachusetts sexual orientation nondiscrimination law put Massachusetts on a slippery slope to same-sex marriage or domestic partnership benefits).
65. MASS. GEN. LAWS ch. 151B, § 4, Historical and Statutory Notes; 1989 MASS. LEGIS. SERV. 516, § 19 (West). See Frank Phillips, *Gay Rights Bill Wins; Final House Approval*, BOSTON GLOBE, Oct. 24, 1989, at 19 (reporting that opponents of Massachusetts sexual orientation nondiscrimination law added an amendment “stipulating that the bill does not authorize homosexual marriages”).
66. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 967 (Mass. 2003). See also Volokh, *Same-Sex Marriage and Slippery Slopes*, *supra* note 40, at 1161 (stating that “part of [the court’s] reasoning rested on the legislature’s decision to ban sexual orientation discrimination”).

of marriage between persons of the same sex.”⁶⁷ As in Massachusetts, this measure failed to stop the Connecticut Supreme Court from citing Connecticut’s nondiscrimination laws in a decision redefining marriage for that state.⁶⁸

Success in passing incremental measures like nondiscrimination laws can make it easier politically for elected officials and swing voters to support more controversial measures like same-sex marriage.

When New York elevated sexual orientation to a protected status in its nondiscrimination laws, lawmakers stipulated that the legislation should not be construed to “create, add, alter or abolish any right to marry” that may exist under federal or state law.⁶⁹ In a decision redefining marriage, a New York trial court noted the statutory construction provision, but nevertheless concluded that the nondiscrimination law “clearly evinces a public policy choice by the legislative and executive branches in favor of eliminating discrimination based on sexual orientation.”⁷⁰ The trial court’s decision to redefine marriage was overturned on appeal, but nevertheless demonstrates that political compromises constituting “small steps” toward same-sex marriage can facilitate significant, unintended, and even expressly disavowed consequences.

Iowa lawmakers also made clear that the state’s sexual orientation nondiscrimination laws should “not be construed to allow marriage between persons of the same sex.”⁷¹ The Iowa Supreme Court, though insisting it was not violating this legislative dictate,⁷² nevertheless cited Iowa’s nondiscrimination laws in redefining marriage and expressly relied on the “legislative judgment” underlying those laws in subjecting Iowa’s definition of marriage as one man and one woman to heightened scrutiny.⁷³

Similar compromises in the guise of statutory construction language also might be proffered at the federal level. The version of ENDA under consideration currently, for example, though not going nearly as far as the statutory construction language in the state statutes discussed above, would expressly incorporate the definition of marriage set forth in the Defense of Marriage Act.⁷⁴ There is no reason to conclude, however, that such measures at the federal level would provide any more protection than similar measures provided in Massachusetts, Connecticut, and Iowa.

Even if courts redefining marriage do not, in a strict sense, construe nondiscrimination laws as creating, allowing, or authorizing same-sex marriage, one cannot deny the effect that nondiscrimination laws and other gay-rights policies might very well have on marriage cases. As the state court precedents set forth in the previous section demonstrate,

67. CONN. GEN. STAT. § 46a-81r(4) (repealed 2009). “Specifically, in 1991, when passing laws prohibiting discrimination based upon an individual’s sexual orientation, the General Assembly stated...[that] [n]othing in [those laws] shall be deemed or construed...to authorize the recognition of or the right of marriage between persons of the same sex.” Letter from Richard Blumenthal, Attorney General, State of Connecticut, to Diane Goss Farrell, First Selectwoman, Town of Westport, Connecticut, and Kenneth M. McKeever, Town Attorney, Town of Lyme, Connecticut (May 17, 2004) (Op. No. 2004-006) (internal quotations omitted), 2004 WL 1110332, at *2.

68. See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 435, 447–48, 451–52 (Conn. 2008).

69. 2002 Sess. Law News of N.Y., ch. 2, § 1 (A. 1971).

70. *Hernandez v. Robles*, 794 N.Y.S.2d 579, 606 n.35 (N.Y. Sup. 2005), *rev’d*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005), *aff’d*, 821 N.Y.S.2d 770 (N.Y. 2006). See also 821 N.Y.S.2d at 797 (N.Y. 2006) (Kaye, C.J., dissenting) (citing legislative findings associated with New York’s sexual orientation legislation in concluding that homosexual persons constitute a suspect class for purposes of equal protection analysis).

71. IOWA CODE § 216.18A; 2007 Iowa Acts Chapter 191, § 16.

72. *Varnum v. Brien*, 763 N.W.2d 862, 891 (Iowa 2009) (explaining that construing the state’s nondiscrimination laws “to allow marriage between persons of the same sex” was “expressly forbidden in the Iowa Code”).

73. *Id.* at 892. The Iowa court also stated that laws and regulations protecting sexual orientation “reflect at least some measure of legislative and executive awareness that discrimination based on sexual orientation is often predicated on prejudice and stereotype.” *Id.* at 891 (emphasis added).

some courts might cite nondiscrimination laws in support of decisions subjecting marriage laws to a higher level of scrutiny, which means that public officials would be required to provide more compelling reasons for defining marriage as the union of husband and wife than otherwise would be the case. Those precedents also demonstrate that some courts might cite nondiscrimination laws and other gay-rights legislation as evidence that society has abandoned certain precepts undergirding a policy of defining marriage as the union of husband and wife or as evidence that society has embraced an evolving public policy of protecting homosexuality, either of which could make it more difficult for state officials to defend marriage even if nondiscrimination laws contain provisions stating they should not be interpreted to allow same-sex marriage. Furthermore, such statutory construction provisions can even backfire, as in Connecticut, where the court cited statutory construction language in Connecticut's nondiscrimination law as evidence that the state had disfavored homosexuality in a way that supported scrutinizing the state's marriage law more closely.⁷⁵ Provisions intended to prevent nondiscrimination laws from being construed to under-

mine marriage as the union of husband and wife are inadequate to safeguard marriage from the potential effects of enacting such laws.

Lawmakers Who Support Marriage Have Serious Reasons to Be Concerned About Laws Like ENDA

Suggestions that laws like ENDA could lead to same-sex marriage have been “pooh-pooed,”⁷⁶ decried as a “sham,”⁷⁷ and flatly denied.⁷⁸ But the evidence discussed in this paper shows that slippery slope concerns about ENDA and similar laws at the state and local levels are well founded and cannot be summarily dismissed.⁷⁹

Indeed, concerns about marriage justify serious reservations about measures like ENDA for at least four reasons.

First, although many activists might deny that same-sex marriage is itself a stepping stone to more radical social and legal outcomes, there is no question that activists are committed to achieving the future outcome under consideration with respect to nondiscrimination laws—that is, same-sex marriage. Gay-rights activists seek to redefine marriage to include homosexual unions and, in arguing that

74. Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. § 8(c) (2009) (stating that “the term ‘married’ refers to marriage as such term is defined in...the ‘Defense of Marriage Act’”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1584is.txt.pdf; Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 8(c) (2009) (same), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.3017:>. When ENDA was debated and passed by the U.S. House of Representatives in 2007, lawmakers considered but rejected a proposal to include more explicit language that would have specifically prohibited courts from using ENDA as a legal predicate in litigation concerning the definition of marriage. See 153 CONG. REC. H13228, H13250 (Nov. 7, 2007), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H13250&dbname=2007_record. In opposing that proposal, Representative Barney Frank (D-MA) argued the bill had already been modified to address concerns that ENDA would affect marriage. See *id.* at H13251 (statement of Rep. Frank) (“We have already today twice voted overwhelmingly to repudiate any suggestion that this had anything to do with marriage.”), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H13251&dbname=2007_record.

75. The Connecticut Supreme Court thought a provision in Connecticut's nondiscrimination law stating the law did not express approval of homosexuality or same-sex marriage “perpetuate[s] feelings of personal inferiority and inadequacy among gay persons,” “stigmatizes gay persons,” and “equates their identity with conduct that is disfavored by the state.” See *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 448–49.

76. Deb Price, *Marriage Is Only Acceptable Option*, SAN JOSE MERCURY NEWS, May 23, 2002 (stating that “some gay-rights advocates felt the need to pooh-pooh the ‘slippery slope’ argument by foes that we’d ultimately try to push beyond any piecemeal rights thrown our way and would be satisfied with nothing less than full marriage”). See also Volokh, *Same-Sex Marriage and Slippery Slopes*, *supra* note 40, at 1161 (stating that “slippery-slope arguments” regarding gay-rights legislation were dismissed, “sometimes contemptuously”); Volokh May 15, 2008 posting, *supra* note 40 (stating that the “tendency of some legislative decisions to affect future judicial decisions” is “often pooh-pooed when the initial legislative decision takes place” because “the decision’s backers want to argue that the decision is quite narrow” (quoting Price, *supra*, later in same posting)).

civil unions and domestic partnerships perpetuate discrimination and fall short of the ultimate goal, have demonstrated an intention to settle for nothing less than same-sex marriage.

Second, several same-sex marriage advocates have openly stated that passing laws like ENDA is an important step toward marriage redefinition. If same-sex marriage advocates think that the judicial, political, and cultural movement for same-sex marriage depends on a series of “small changes” like ENDA, then individuals who think that marriage is the union of husband and wife have more than sufficient justification to be concerned about laws like ENDA. This is especially true when lawyers have cited nondiscrimination laws in legal briefs arguing that defining marriage as the union of husband and wife violates constitutional principles.

Third, laws like ENDA have already proved to be an important step toward legal recognition for

homosexual unions in several states throughout the country. In states including Vermont, Massachusetts, New Jersey, New York, California, Connecticut, and Iowa, courts have cited sexual orientation nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal rec-

Laws like ENDA have already proved to be an important step toward legal recognition for homosexual unions in several states throughout the country.

ognition for homosexual unions. And no state has legislatively redefined marriage without first enacting a sexual orientation nondiscrimination law.

Fourth, history shows that legislative compromises designed to safeguard marriage from the effects of laws like ENDA can be ineffective. In Massachusetts,

77. 153 CONG. REC. H13228, H13251 (Nov. 7, 2007) (statement of Rep. Frank), available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H13251&dbname=2007_record. In the course of legislative proceedings concerning ENDA in 2007, Representative Randy Forbes (R-VA) offered a motion to recommit that “called for adding language that would prevent courts from using ENDA to ‘modify, limit, restrict or in any way overturn any state or federal definition of marriage as between one man and one woman, including the use of this act as a legal predicate in litigation on the issue of marriage.’” Lou Chibbaro, Jr., *House Passes ENDA in ‘Historic’ Vote*, WASH. BLADE, Nov 7, 2007, available at http://www.washblade.com/thelatest/thelatest.cfm?blog_id=14845. See 153 CONG. REC. at H13250, available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H13250&dbname=2007_record. Representative Barney Frank stated the bill had already been modified to address concerns about marriage, characterized the proposal as a “sham” designed to delay a vote on the bill, and said he took the procedural tactic “personally.” *Id.* at H13251, available at http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=H13251&dbname=2007_record.
78. See Feldblum, *supra* note 57, at 161 (quoting lawmaker in 1980 congressional hearing concerning earlier federal gay-rights bill who stated that issue of same-sex marriage “has nothing at all to do with this specific piece of legislation”); Paul Carrier, *Voters Endorse Maine Gay Rights Law; Reversing Previous Votes, Maine Becomes the Last New England State with a Law to Protect Gays Against Bias*, PORTLAND PRESS HERALD, Nov. 9, 2005 (reporting that opponents of sexual orientation nondiscrimination law in Maine argued it would pave the way for same-sex marriage but supporters of the law “countered that the law had nothing to do with marriage”); Editorial, *Gay Rights Bill a Landmark for Illinois*, STATE JOURNAL-REGISTER, Jan. 12, 2005, at 6 (characterizing argument that Illinois gay-rights legislation “was another step out onto a slippery slope that would inevitably lead to same-sex marriage” as one of the “usual arguments” and asserting that “the legislation has nothing to do with same-sex marriage”); Emmet Meara, *Question 6, Failure Looms for Gay Rights*, BANGOR DAILY NEWS, Nov. 8, 2000 (reporting that those in favor of gay-rights legislation “said the issue was discrimination, not same-sex marriages”); Editorial, *supra* note 64 (denying that the Massachusetts sexual orientation nondiscrimination law “put Massachusetts on a ‘slippery slope’ toward [‘gay marriage’ or ‘domestic benefits’ for homosexual, lesbian or unmarried heterosexual couples]”).
79. See also Volokh, *Same-Sex Marriage and Slippery Slopes*, *supra* note 40, at 1201 (“Slippery slope risks are real risks...”); Volokh, *The Mechanisms of the Slippery Slopes*, *supra* note 40, at 1029 (“Slippery slopes are, I will argue, a real cause for concern...”); Volokh May 15, 2008 posting, *supra* note 40 (stating that “slippery slope risks have to be taken seriously”); Volokh April 6, 2009 posting, *supra* note 40 (“I don’t think it’s credible at this point to just casually dismiss the possibility of slippage in this area, given how many slippery slope effects we have already seen.”); Volokh October 25, 2006 posting, *supra* note 40 (stating in discussion of New Jersey civil unions decision that “one can’t dismiss the possibility that slippery slope effects, good or bad, are indeed present here”).

Connecticut, and Iowa, for example, where lawmakers clarified that laws like ENDA should not be construed to allow same-sex marriage, courts nonetheless cited nondiscrimination laws in decisions redefining marriage. The Connecticut Supreme Court even cited that state's statutory construction language as evidence reinforcing the court's standard for reviewing the marriage laws in that state.

Conclusion

There is no question that unjust discrimination should be opposed in every instance. It is also true, however, that this principle does not automatically justify support for measures that would elevate sexual orientation to a protected status like race. Indeed, no matter what one thinks about homosexuality and same-sex marriage, there are several reasons to be concerned about nondiscrimination laws

A number of state courts have cited sexual orientation nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions.

that govern the conduct of private citizens.⁸⁰ Whatever other concerns might exist, however, the growing body of evidence demonstrating a connection between nondiscrimination laws and marriage redefinition provides solid grounds for lawmakers who support marriage as the union of husband and wife to be seriously concerned about local, state, and federal measures like ENDA.

—Thomas M. Messner is a Visiting Fellow in the Richard and Helen DeVos Center for Religion and Civil Society at The Heritage Foundation.

80. These concerns include that: laws restricting private discrimination represent a threat to civil liberties generally, *see generally*, e.g., DAVID E. BERNSTEIN, YOU CAN'T SAY THAT!: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS (2003); laws like ENDA could impose significant burdens on religious liberty, *see e.g.*, *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. 90–92 (2007) (Letter from Thomas Berg, Professor, Univ. of St. Thomas Law School, and Steven H. Aden, Senior Counsel, Center for Law and Religious Freedom of the Christian Legal Society, to John Kline, Representative, U.S. Congress (Sept. 4, 2007) (explaining how nondiscrimination laws can burden religious liberty)), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf, “chip away at the at-will employment doctrine that has made the American labor market so strong and created so many jobs,” Ryan Messmore and James Sherk, *Freedom of Religious Schools and Employers Threatened by ENDA*, Heritage Found. WEBMEMO (No. 1677), Oct. 24, 2007, at 2, available at http://author.heritage.org/Research/Labor/upload/wm_1677.pdf, and lead to a swell of expensive litigation and impose significant costs on small businesses and consumers, *see id.* at 36 (statement of Lawrence Z. Lorber, partner, Proskauer Rose, LLP) (not stating whether or not legislation should ultimately be passed but noting “that the greatest single area of growth in federal civil litigation involves employment and labor law”); Volokh, *Same-Sex Marriage and Slippery Slopes*, *supra* note 40, at 1200 (stating that nondiscrimination laws can create “substantial litigation costs” and “litigation avoidance costs”); and ENDA would represent the highly invasive use of government power to address issues that already are being handled effectively and efficiently by the free market, *see, e.g.*, *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Hearing Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, *supra* at 44 (Statement of Mark A. Fahleson, of Rembolt Ludtke, LLP, and Adjunct Professor of Employment Law, the University of Nebraska College of Law) (stating “it appears that the free market and local regulators are already addressing the issues raised by [the ENDA bill]”), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:37637.pdf; Jeremy Quittner, *Tempting Gay Employees*, *ADVOCATE*, Oct. 24, 2000 (reporting, in 2000, that “gay workers are in something of a buyers’ market”), available at http://advocate.com/issue_story_ektid20902.asp. A version of ENDA that would elevate gender identity to an elevated status just like race would, of course, raise several additional issues that are not addressed in this paper.