

Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA

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1. Introduction

The legal recognition of same-sex relationships has been a legislative Gordian knot for almost three decades in the United States of America. Few issues have been so polarising as the debate surrounding the opening of marriage to same-sex couples. The aim of this article is to provide a clear picture of the current state of affairs in the United States as regards the recognition of formalised same-sex relationships. In doing so, this article will provide an overview of relevant legislation prohibiting or permitting the legal recognition of same-sex relationships in all fifty states, as well as in the District of Columbia and at the federal level. Although a number of websites and other surveys have been produced over the years, these surveys are no longer up-to-date. Furthermore, this survey aims to provide a possible theoretical framework within which future research in this field can be placed. By identifying the trends, similarities and differences, this article will provide future academics in this field with possible hypotheses as to where the law may go in the future in those states that have not yet introduced such registration schemes.

This article is divided into six sections. After this introduction, the various states currently prohibiting the recognition of same-sex marriage and/or other forms of registration will be classified according to the source of the prohibition (§2). The subsequent section will be devoted to an analysis of the spectrum of registration schemes currently in force in jurisdictions across the country, namely reciprocal benefits (§3.1), domestic partnerships (§3.2), civil unions (§3.3) and same-sex marriages (§3.4). The jurisdictions that are dealt with in these sections are obviously dealt with in much greater detail since they provide for some form of registration scheme. In total 11 jurisdictions will be dealt with in §3. Three states will form the basis of the analysis in §4, where the recognition of out-of-state same-sex marriages will be considered. After a few brief comparative remarks (§5), the article will conclude with a number of general remarks based on the overview provided (§6).

A number of choices have obviously had to be made in compiling a survey of this nature. This survey is limited to an overview of the law in the fifty states and the District of Columbia. The reason for this choice is twofold. Firstly, the sheer diversity of county, city and municipality

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ordinances is so great as to necessitate delineation of the ambit for this article. Secondly, the impact of county, city and municipality ordinances is much more limited than state-wide registration schemes. Although New York City may well be home to more than 8 million people and Vermont only 620,000, the legislation emanating out of Vermont is much more significant since this is state level legislation, instead of city level legislation. This distinction is crucial since all state level legislation is regarded as being of the highest order of legislation possible in a state, with the consequences attached thereto. This is not, however, the case as regards local government legislation, which can ultimately be superseded by state-wide level.¹ The inclusion of the District of Columbia is also justified since in this field it actually operates much more like a state than a city council, there being on authority higher in the legislative hierarchy than the federal government in the field of family law.

2. States prohibiting recognition of same-sex relationships

2.1. Federal level

Ever since the Supreme Court of Hawai'i ruled in 1993 that the State must show a 'compelling State interest' if it wished to continue to deny same-sex couples the right to marry, opponents of same-sex marriage have resorted to legislative action. Although the Hawaiian legislature eventually passed a constitutional amendment, after a popular vote, ensuring that the legislature had the power to reserve the definition of marriage to opposite-sex couples,² the aftermath of the case can still be seen today across the entire breadth of the United States.

On the 21st September 1996, President Clinton signed the Defense of Marriage Act, or the Federal DOMA as it is commonly referred to, into law. The Bill received overwhelming support in both the House and the Senate. The passage of the DOMA legislation has now ensured that 'in determining the meaning of any Act of Congress or any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife'.³

However, DOMA does two things. Not only does it define the term *marriage* and *spouse* for federal purposes, it also permits the states to deny recognition to other forms of unions.⁴ It is evident from the legislative history accompanying the passage of this bill that the authority to enact such a law is to be found in the U.S. Constitution itself, which grants Congress the power to determine 'the effect' or 'the extent' of the full faith and credit clause.⁵ Since its enactment, DOMA has engendered fierce debate with opponents arguing that Congress exceeded its power in enacting this legislation, and proponents arguing that it does not *enjoin* non-recognition, but simply grants States the *possibility* to refrain from recognition.⁶

1 W. Burnham, *Introduction to the law and legal system of the United States*, 2006.

2 Haw. Const. art. I, §23: 'The legislature shall have the power to reserve marriage to opposite-sex couples'.

3 1 U.S.C. §7.

4 28 U.S.C. 1738C: 'No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.'

5 U.S. Const. art. IV, §1: 'Full faith and credit shall be given to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, records and proceedings shall be proved and the Effect thereof.'

6 See, for example, M. Strasser, 'Defending marriage in light of the *Moreno-Cleburne-Romer-Lawrence* Jurisprudence: Why DOMA can't pass muster after *Lawrence*', 2005 *Creighton Law Review* 38, no. 2, p. 421. A bill currently in Congress would, if passed, remove jurisdiction from all federal courts to entertain challenges to DOMA: H.R. 724, 110th Congr., 1st Sess (2007). This Bill is the third in a series of similar bills, namely H.R. 3313, 108th Congr., 1st Sess. (2003) and H.R. 1100, 109th Congr., 1st Sess. (2005). In relation to the validity of a Canadian marriage for the purposes of US federal bankruptcy law, see *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004) it was held that DOMA did not violate the 4th, 5th or 10th amendments to the US Constitution. See further E. Sack, 'The Retreat from DOMA: The Public Policy of

What is perhaps most surprising about the entire DOMA debate is that it was actually founded on an incorrect reading of the constitutional full faith and credit clause.⁷ Historically speaking, marriage has never been thought to be encompassed by the full faith and credit clause. Questions of interstate marriage recognition have already been solved with resort to general principles of comity or marriage specific conflict of laws rules. According to general constitutional theory, states are not obliged to recognise each other's marriages on the basis of the stringent full faith and credit conditions. Nonetheless, debate concerning the validity of the federal DOMA has been completely overshadowed by the statutory and constitutional amendments of more than forty states that have now introduced their own mini-DOMA's.

Why then is this federal statute so important? Many federal laws use marital status as a connecting factor in attributing rights, duties and benefits. In 2004 the General Accounting Office, updating its 1997 Report, identified a total of 1,138 federal statutory provisions in which marital status is used as a factor in to determine the receipt of benefits, rights or privileges.⁸ In enacting the Defense of Marriage Act, the federal Government effectively restricted these benefits to opposite-sex married couples; thereby denying these rights and benefits to same-sex couples, regardless of their status. Although many of these rights are extremely specific and rarely used, others deserve particular attention, including the right to receive a deceased spouse's social security benefits and survivors benefits,⁹ the right to immigration benefits,¹⁰ the right to income tax rate exemptions and deductions,¹¹ the right to file for joint bankruptcy, the right to petition for domestic violence protection orders,¹² the right to funeral and bereavement leave, the right to jointly file federal tax returns,¹³ the right to make medical decisions on behalf of one's spouse, the right to spousal privilege in criminal proceedings,¹⁴ inheritance rights¹⁵ and the permission to make funeral decisions.

2.2. State level

It was, however, not only the federal legislature that feared the onslaught of same-sex marriages. No fewer than 45 States have since passed similar legislative amendments restricting their definition of marriage to that of one man and one woman. Nevertheless, it is important to identify a number of different categories.

Same-Sex Marriage and a Theory of Congressional Power Under the Full Faith and Credit Clause', 2005 *Creighton Law Review* 38, no. 2, p. 507.

7 Some have argued that this misunderstanding was the result of an overzealous press and student scholarly articles: see. P. Borchers, 'Baker v. General Motors: Implications for interjurisdictional recognition of non-traditional marriages', 1998 *Creighton Law Review* 32, no. 1, pp. 152-153; J.L. Grossman, 'Resurrecting comity: revisiting the problem of non-uniform marriage laws', 2005 *Oregon Law Review* 84, p. 433; R.G. Spector, 'Same-sex marriages, domestic partnerships and private international law: At the dawn of a new jurisprudence in the United States', in A. Bonomi (ed.), *Yearbook of Private International Law. Volume 8*, 2006, pp. 169-187, p. 173; A. Koppelman, 'Interstate recognition of same-sex civil unions after *Lawrence v. Texas*', 2004 *Ohio State Law Journal* 65, p. 1265, and slightly more expanded version in A. Koppelman, 'Interstate recognition of same-sex marriages and civil unions: A Handbook for judges', 2005 *University of Pennsylvania Law Review* 153, p. 2143. For an opposite view see: L.A. Silverman, 'Vermont civil unions, full faith and credit, and marital status', 2001 *Kentucky Law Journal* 89, p. 1075.

8 GAO/OGC-97-16, 31 January 1997 and GAO-04-353R, 23 January 2004.

9 For example, 42 U.S.C. §402.

10 For example, 8 U.S.C. §1182.

11 See the whole of the Internal Revenue Code, e.g. 26 U.S.C. §2.

12 For example, 18 U.S.C. §2261, 42 U.S.C. §10408 and 42 U.S.C. §13981.

13 I.R.C. §1.

14 Fed. R. Evid. 501. This rule actually contains two privileges, namely the privilege against adverse spousal testimony and the marital communications privilege, together commonly referred to as 'the spousal privileges'.

15 For example the exemption from estate tax, I.R.C. §2001.

2.2.1. State ban applies to same-sex marriages and other same-sex relationships

In Alabama,¹⁶ Arkansas,¹⁷ Georgia,¹⁸ Idaho,¹⁹ Kansas,²⁰ Kentucky,²¹ Louisiana,²² Michigan,²³ Nebraska,²⁴ North Dakota,²⁵ Ohio,²⁶ Oklahoma,²⁷ South Carolina,²⁸ South Dakota,²⁹ Texas,³⁰ Utah,³¹ Virginia³² and Wisconsin³³ the State Constitution has been amended so as to prohibit the recognition of any union other than that of one man and one woman. These constitutional amendments not only prohibit the celebration of same-sex marriages, civil unions and other forms of registration within the state, but also proscribe the recognition of out-of-state marriages and non-marital registrations. Although these constitutional amendments have all been passed after state-wide referenda, the constitutionality of these amendments has begun to be brought into question. However, at present no state has overturned the constitutional amendment by virtue of its unconstitutionality.³⁴

16 Ala. Const. of 1901, Amendment 774. See also, Ala. Code §30-1-19. This was also supported prior to these amendments by the Attorney General: Marriages-Marriage Licences, Ala. Op. Att’y Gen. No. 129 (20th April 2000).

17 Ark. Const. of 1874, Amendment 83. See also, Ark. Code Ann. §9-11-208(b), §9-11-208(c) and §9-11-207. In *May v. Daniels*, 359 Ark. 1000, 194 S.W.3d 771 (Ark. 2004), the Supreme Court of Arkansas was faced with a pre-emptive challenge to the proposed constitutional amendment. The claimants alleged, *inter alia*, that the amendment was phrased using vague and misleading language. The court denied the petition.

18 Ga. Const. art. I, §4. See also, Ga. Code Ann. §19-3.3.1. In *Burns v. Burns*, 253 Ga. App. 600, 560 S.E. 2d 47 (Ga. Ct. App. 2002), the 2nd Division of the Georgia Court of Appeals held that a Vermont civil union did not constitute a marriage for the purposes of interpreting a visitation agreement. Although the constitutional amendment was in force at the time of the case, reference was made to the federal DOMA, as well as the state statutes in denying recognition of the civil union.

19 Idaho Const. art. III, §28. See also, Idaho Code §32-209.

20 Kan. Const. art. XV, §16. See also, Kan. Stat. Ann. §23-101(a) and §23-115.

21 Ky. Const. §233A. See also, Ky. Rev. Stat. Ann. §402.005, §402.20, §402.040 and §402.045: ‘a legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.’

22 La. Const. art. XII, §15. See also, La. Civ. Code Ann. art. 96 and art. 3520(B). In *Forum for Equality PAC v. McKeithen*, 893 So.2d 715 (La. 2005), the Supreme Court of Louisiana reversed a district court decision (*Forum for Equal PAC v. McKeithen*, 886 So.2d 1172 (La. App. 1 Cir. 2004), in which Judge Morvant declared the amendment of the Louisiana Constitution to restrict marriage to same-sex couples unconstitutional.

23 Mich. Const. art. I, §25. See also, Mich. Comp. Laws §551.1 and §551.271. According to the Michigan Marriage Amendment: ‘To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose’. In *National Pride at Work Inc. v. Governor of Michigan*, 274 Mich. App. 147, 732 N.W. 2d 139 (Mich. Ct. App. 2007), the court had to interpret the phrase ‘similar union’. The Michigan Court of Appeals held that the phrase precluded any body in Michigan from extending benefits to same-sex or opposite-sex unmarried relationships.

24 Neb. Const. art. I, §29. See also, Neb. Rev. Stat. §42-100.

25 N.D. Const. art. XV, §28. See also, N.D. Cent. Code §14-03-01 and §14-03-08.

26 Ohio Const. art. XV, §11. See also, Ohio Rev. Code Ann. §3101.01. This statutory amendment also states that the ‘recognition or extension by the state of the specific statutory benefits of a legal marriage to non-marital relationships between persons of the same sex or different sexes is against the strong public policy of this state’: Ohio Rev. Code Ann. §3101.01(c)(3).

27 Okla. Const. art. II, §35. See also, Okla. Stat. Tit. 43, §3.1. The constitutionality of both the state constitutional amendment, as well as the state statute restricting marriage to opposite-sex couples is currently being challenged: *Bishop v. Oklahoma*, 447 F.Supp.2d 1239 (N.D. Okla. 2006). This cases involved two couples, one who wanted to celebrate a same-sex marriage in Oklahoma and another who filed for recognition of their Vermont civil union or their Canadian same-sex marriage in Oklahoma.

28 S.C. Const. art. XVII, §15. See also, S.C. Code Ann. §20-1-15. At the time of writing, Grossman argues that the statutes in South Carolina only prohibited same-sex marriages concluded in the state, and thus did not deal with the recognition of out-of-state marriages. Although this may indeed be the case, the constitutional amendment has changed this situation ensuring that same-sex marriages concluded out-of-state will not be recognised, see J.L. Grossman, ‘Resurrecting comity: revisiting the problem of non-uniform marriage laws’, 2005 *Oregon Law Review* 84, pp. 433, 478.

29 S.D. Const. art. XXI, §9. See also, S.D. Codified Laws §25—38 and §25-1-1.

30 Tex. Const. art. I, §32. See also, Tex. Fam. Code §2.001 and §6.204. §6.204 also extends to a same-sex relationship other than marriage that is ‘intended as an alternative to marriage or applies primarily to cohabitating persons and grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage.’

31 Utah Const. art. I, §29. See also, Utah Code Ann. §30-1-4.1. The statutory amendment also extends to same-sex relationships other than marriages.

32 Va. Const. art. I, §15-A. See also, 15 Va. Code Ann. §8, §20-45.2 and §20-45.3.

33 Wis. Const. art. XIII, §13: ‘a legal status identical to substantially similar to that of marriage for unmarried individuals shall not be valid or recognised in this state’.

34 Although at first instance (*Citizens for Equal Protection Inc. v. Bruning*, 368 F.Supp.2d 980 (D. Neb. 2005)) the U.S. District Court held that the amendment to the Constitution of Nebraska was unconstitutional since it violated the equal protection clause, this decision was later reversed, *Citizens for Equal Protection Inc. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

Although the amendment to the Alaskan Constitution is restricted to the non-recognition of same-sex marriages,³⁵ Section 25.05.013(b) of the Alaskan Statutes states, ‘a same-sex relationship may not be recognized by the state as being entitled to the benefits of marriage’. It would therefore appear that same-sex couples claiming the benefits of marriage via a civil union or other form of civil recognition would be denied those benefits on the basis of this provision. A similar position is also taken in Florida where, despite the lack of a constitutional amendment, the state statutes prevent the recognition of any form of same-sex relationship, regardless of the terminology attached to it.³⁶

Montana’s Constitutional amendment is also restricted to the non-recognition of same-sex marriages.³⁷ The amendment to Montana’s statutes is, however, slightly more debatable with regards to its ambit. Paragraph 4 of §451.022 reads,

‘A contractual relationship entered into for the purpose of achieving a civil relationship (...) is void as against public policy.’³⁸

One could argue, in attempting to have a civil union or domestic partnership recognised in Montana, that the benefit sought is not derived from a contractual relationship but from a legal status acquired in a foreign jurisdiction. Despite the appealing logic of this argument, it is unlikely that such an argument would succeed, and more-than-likely, that non-marital registered relationships will not be recognised in Montana on this basis.

A more convincing argument for the non-recognition of all registered same-sex relationships can be found in the statutory amendment to the Code of West Virginia, where it is stated,

‘A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such relationship, shall not be given effect by this state.’³⁹

From this text it would appear that the West Virginian legislature intended to deny recognition not only to same-sex married couples, but also those to those couples claiming a right granted to married couples on the basis of a ‘public act, record or judicial proceeding’ respecting the relationship between same-sex couples. A couple who has legally registered a domestic partnership in California would therefore not be entitled to marital benefits in West Virginia on the basis of their domestic partnership.

35 Alaska Const. art. I, §25.

36 Fla. Stat. §741.04 and §741.212. The validity of these provisions, as well as the federal DOMA, is currently pending before judges in Florida in three separate cases: *Hunt v. Ake*, Case No. 8:04-CV-1852-T-30, *Sullivan v. Bush* Case No. 04-21118-CV and *Wilson v. Ake*, Case No. 8:04-CV-1680-T-30.

37 Mont. Const. art. XIII, §7.

38 Mont. Code. Ann. §40-1-103 and §40-1-401.

39 W. Va. Code §48-2-603.

2.2.2. State ban only applies to same-sex marriages

In Colorado,⁴⁰ Hawai'i,⁴¹ Mississippi,⁴² Missouri,⁴³ Nevada,⁴⁴ Oregon⁴⁵ and Tennessee⁴⁶ state-wide referenda have been held on whether the state definition of marriage should be restricted to opposite-sex couples. In all these states, the ensuing constitutional amendment was restricted to the non-recognition of same-sex marriages. Other forms of relationship are not mentioned. In two of these states, namely Hawai'i and Oregon, the legislature has gone on to introduce forms of non-marital registered relationship (see Sections 3 and 4).

In Arizona,⁴⁷ California,⁴⁸ Connecticut,⁴⁹ Delaware,⁵⁰ Illinois,⁵¹ Indiana,⁵² Iowa,⁵³ Maine,⁵⁴ Maryland,⁵⁵ Minnesota,⁵⁶ New Hampshire,⁵⁷ North Carolina,⁵⁸ Pennsylvania,⁵⁹ Vermont,⁶⁰

40 Col. Const. art. II. See also, Col. Rev. Stat. §14-2-104.

41 Haw. Const. art. I, §23. This constitutional amendment simply grants the legislature the power to define the meaning of marriage. See also, Haw. Rev. Stat. §572-1, §572-1.6, §572.C-1 and §572.C-7.

42 Miss. Const. art. XIV, §263A. See also, Miss. Code Ann. §93-1-1.3.

43 Mo. Const. art. I, §23. See also, Mo. Rev. Stat. §451.022.

44 Nev. Const. art. I, §21. See also, N.R.S. §122.00.1.

45 Or. Const. art. XV, §5a. See also, Or. Rev. Stat. §106.010. The statutory restriction of marriage to same-sex couples was challenged in 2005 (prior to the enactment of the constitutional amendment). Gillette J., the judge at first instance, held that the denial of the *benefits* of marriage was contrary to Or. Const. art. I, §20. However, this decision was reversed by the Supreme Court of Oregon. See *Li v. State of Oregon*, 338 Ore. 376, 110 P.3d 91 (Or. 2005).

46 Tenn. Const. art. XI, §18. See also, Tenn. Code Ann. §36-3-113.

47 Ariz. Rev. Stat. §25-101 and §25-112. In *Standhardt v. Arizona*, 206 Ariz. 276, 77 P.3d 451 (Ariz Ct. App. 2003), the Court of Appeals of Arizona held that the 'right to enter a same-sex marriage is not a fundamental liberty interest protected by due process.' (206 Ariz. 276, 285). In subsequently reviewing the denial of marriage licences to same-sex couples using a rational basis analysis the court held that there had been no infringement of the parties' equal protection rights.

48 Cal. Fam. Code §308-5. This provisions has been challenged on the basis of its constitutionality: *Smelt v. Orange County*, 447 F.3d. 673 (9th Cir. 2006), partly validating and partly dismissing the first instance decision in the same case, *Smelt v. Orange County*, 347 F.Supp.2d. 861 (C.D. Cal. 2005). The decision in this case has been stayed pending the outcome of the so-called 'Marriage Cases': *Thomasson v. Newsom*, Case No. CGC 04-428794; *Proposition 22 Legal Defense & Education Fund v. City and County of San Francisco*, Case No. CPF 04-503943; *City & County of San Francisco v. State*, Case No. CGC 04-429539; *Woo v. Lockyer*, Case No. CPF 04-504030; *Tyler v. County of Los Angeles*, Case No. BS 088506; *Clinton v. State*, Case No. CGC 04-429548. Together these cases have been filed as *In re Coordinated Proceedings, Special Title [Rule 1550(c)], Marriage Cases*, No. 4365, 2005 WL 5833129 (Cal. Super. Ct., Mar. 14, 2005).

49 Conn. Gen. Stat. Ann. §45a-727a. The non-recognition of same-sex marriages is Connecticut was also explicated in Attorney General Blumenthal's opinion on the 20th September 2005: for the text of the opinion see <http://ct.gov/AG/cwp/view.asp?A=1770&Q=302438>. Although in *Rosengarten v. Downes*, 71 Conn. App. 372, 802 A.2d 170 (Conn. App. Ct. 2002), the Appellate Court of Connecticut ruled that it was not empowered with 'plenary and general subject matter jurisdiction' to dissolve a Vermont civil union, this decision has since been called into question as a result of the enactment of civil unions legislation in the state (see §5).

50 Del. Code Ann. §101.

51 Ill. Comp. Stat. 5/201, 5/212 and 5/213.1. On the 15th February 2008, the Illinois Religious Freedom Protection and Civil Union Bill was submitted to the Illinois Senate, S.B. 2436, 95th Congr. (2008). If passed this bill would introduce civil unions in Illinois for both same-sex and opposite-sex couples. This bill is similar to legislation filed in the House in 2007 (H.B. 1826, 95th Congr. (2007)), although this bill has not been scheduled for a vote by the full house. Two other bills have been introduced into the General Assembly, one aimed at amending the Illinois Constitution to restrict marriage to opposite-sex couples (S.B. 0008, 95th Congr. (2007)) and one to permit same-sex marriages (H.B. 1615, 95th Congr. (2007)). Neither bill has progressed to a full vote.

52 Ind. Code Ann. §31-11-1-1. This statutory limitation was unsuccessfully challenged in *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App 2005).

53 Iowa Code §595. This ban was struck down for a 24-hour period in Polk County by Judge Hanson in *Varnum v. Brien*, Case No. CV5965 (Iowa D.C. 2007). Although same-sex marriage licences were permitted between the 30th and 31st August 2007, the effects of the decision were constrained by a verbal statement from Judge Hanson who stayed his verdict pending an appeal to the Court of Appeals. In *Alons v. Iowa*, 698 N.W. 2d 858 (Iowa 2005), a same-sex couple had filed for the dissolution of their marriage at the district court in Woodbury County, Iowa. The court had granted the dissolution, despite the fact that the couple had actually entered into a civil union in Vermont. The plaintiffs (two state senators, four state representatives, a pastor and a church) filed for a writ of certiorari to have the decision annulled. The district court partly vacated the original decree and granted the following equitable relief: 'terminating the Vermont civil union, freeing the parties of any obligations incident tot hat union, declaring that the parties are single individuals with all rights or unmarried persons'. The Supreme Court of Iowa annulled the writ of certiorari since the plaintiffs had no standing to challenge the district court's decision.

54 Me. Rev. Stat. Ann. Tit. 19, §701.

55 Md. Code Ann. [Family Law] §2-201. In a 4-3 decision, the Court of Appeals of Maryland (the highest court in the state) decided that the statutory impediment on same-sex marriage is constitutional: *Conaway v. Deane*, 401 Md. 219, 932 A.2d 571 (Md. 2007).

56 Minn. Stat. §517.03 and §518.01.

57 N.H. Rev. Stat. Ann. §457.1, §457.2, §457.3 and §457.43.

58 N.C. Gen. Stat. §51-1-2.

59 23 Pa. Cons. Stat. §1704.

60 Vt. Stat. Ann. Tit. 15, §1201(4) and §23.

Washington⁶¹ and Wyoming⁶² the non-recognition of same-sex marriages has been codified by statutory amendment, without resorting to constitutional amendments and state-wide referenda. It is interesting to note that six of these states (California, Connecticut, Maine, New Hampshire, Vermont and Washington) have also introduced legislative schemes permitting same-sex couples to register their relationships (these schemes will be discussed in §4 and §5).

Even though the source of the proscription is irrelevant for an individual same-sex couple, it is important to note that the procedure for amending a state constitution is more arduous than a mere statutory amendment. As a result, same-sex couples in states that have passed constitutional amendments will more-than-likely be confronted with the ramifications of that vote for many years to come.

2.2.3. No state ban currently in force

Only five states have passed neither a state constitutional amendment nor a legislative proposal restricting marriage to same-sex couples (Massachusetts, New Jersey, New Mexico, New York and Rhode Island). In all of these five states, same-sex relationships are granted some degree of recognition (discussed later in §4, §5, §6 and §7).

3. Spectrum of state mechanisms for recognising same-sex couples

3.1. Reciprocal benefits

At present only one state in the United States provides for a state-wide registry entitled ‘reciprocal benefits’, namely Hawai’i. Although the Oregon Family Council, Defence of Marriage Coalition and the Oregon House Conservatives introduced a reciprocal beneficiaries bill into the Oregon House of Representatives,⁶³ eventually House Bill 2007 was passed resulting in the introduction of domestic partnerships in the state (see Section 4). Furthermore, although bills to introduce a reciprocal beneficiary scheme have also been introduced in the Colorado Senate⁶⁴ and the Nevada Assembly,⁶⁵ neither has been successful. Nonetheless, in Nevada, at least, the issue has not been laid to rest entirely; a recent petition has been submitted to the Assembly by the Nevada System of Higher Education calling on the Assembly to introduce a system of reciprocal beneficiaries.⁶⁶

Vermont also provides for a system of reciprocal benefits. However, according to §1301 of Title 15, Vermont Statutes Annotated, the purpose of the scheme is to ‘provide two persons who are blood-relatives or related by adoption the opportunity to establish a consensual reciprocal beneficiaries relationship so they may receive the benefits and protections and be subject to the responsibilities that are granted to spouses’ in specific areas. Consequently, the scheme is not open to unrelated same-sex couples and is therefore not functionally equivalent to the reciprocal beneficiary schemes discussed in this article.

61 Rev. Code Wash. §26.04.010(1), §26.04.020(1)(c) and §26.04.020(3). The constitutionality of this amendment has been challenged, albeit unsuccessfully, *Andersen v. King County*, 158 Wn.2d. 1, 138 P.3d 963 (Wash. 2006).

62 Wyo. Stat. Ann. §20-1-101.

63 Or. H.R. 3536, 74th Cong., 1st Sess. (2007).

64 Col. S. 166, 65th Cong., 2nd Sess. (2006).

65 Nev. Assembly 496, 71st Cong., 1st Sess. (2001).

66 See <http://hr.unlv.edu/3dMemos/2007/PEBP%20Petition%2004-12-07.pdf>

3.1.1. Hawai'i

In 1993, the Hawaiian Supreme Court handed down perhaps one of the most momentous and groundbreaking judgments in its history.⁶⁷ On the 5th May 1993 in the case of *Baehr v. Miike* (renamed from *Baehr v. Lewin* after Lawrence Miike became the new director of the Department of Health, the defendant in this case), the Hawaiian Supreme Court held that it was unconstitutional for the State to continue to deny same-sex couples the benefits of marriage, unless it could prove a compelling state interest.⁶⁸ Following this ruling, the case was remanded to the trial court. After an initial postponement, the case finally came before Judge Chang of the First Circuit Court of Hawai'i in September 1996.

In finding for the plaintiff, Judge Chang held that the State had not shown compelling evidence that such prejudice or harm to the majority would result from permitting same-sex marriages. Judge Chang went on to state that even if the State has satisfied this requirement, there was no proof that §572-1 had not been defined narrowly enough to avoid 'unnecessary abridgements of constitutional rights'.⁶⁹ Although the case was appealed to the Hawaiian Supreme Court, the case was declared moot in 1999 on the basis of the 1998 Constitutional amendment, and the decision was reversed.⁷⁰

Nonetheless, this case served as fuel for the eventual introduction of the reciprocal beneficiary scheme introduced in July 1997. The legislature had hoped that by passing Act 383 (An Act relating to unmarried couples) the complaints of same-sex couples would be answered. The Act laid down a state-sanctioned registration scheme for those couples not entitled to marry.

This desire was not, however, shared by the homosexual community in Hawai'i. Since the introduction of reciprocal benefits on the islands, numerous calls have been made for the scheme to be replaced by civil unions. The latest attempt came in February 2007, when legislation to legalise civil unions was debated in both chambers of the Hawaiian State Legislature. After the hearing in the Hawaiian House Judiciary Committee, the Hawaiian House of Representatives declined to vote on the subject, in effect neutralising the bill.⁷¹ Both the Senate and House Bills have been carried over to the 2008 legislative session.

3.1.1.1. Establishment

A reciprocal beneficiary relationship is defined as 'a legal partnership between two people who are prohibited from marriage'.⁷² Moreover, the scheme is open not only to same-sex couples, but also to those within the prohibited degrees of marriage.⁷³ It is, however, not possible to conclude a reciprocal beneficial relationship if either party is under the age of 18, nor if either party is already involved in a marriage or another reciprocal beneficiary relationship.⁷⁴ Furthermore, there are no state residency or U.S. citizenship requirements for registration to be permitted. To have the relationship registered both parties must provide their full consent and pay the required registration fee (currently set at \$8).⁷⁵ As soon as all the procedural requirements have been met,

67 See, for a more detailed analysis of the historical precursors to the legislation, W. Burnette, 'Hawaii's Reciprocal Beneficiaries Act: An effective step in resolving the controversy surrounding same-sex marriage', 1998 *Brandeis Law Journal* 37, pp. 83-85.

68 *Baehr v. Lewin*, 74 Haw. 645, 852 P.2d 44 (Haw. 1993).

69 *Baehr v. Miike*, Civil No. 91-1394 (1st Circuit, Hawai'i 1996), especially at conclusions of law §§18 and 19.

70 *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

71 Haw. H.R. 908, 24th Cong. (2007) and Haw. S. 1062, 24th Cong. (2007).

72 Haw. Rev. Stat. §572C-2.

73 Haw. Rev. Stat. §572C-4(3).

74 Haw. Rev. Stat. §572C-4(1) and §572C-4(2).

75 Haw. Rev. Stat. §572C-5(a).

the couple is provided with a notarised declaration of the relationship by the Department of Health.

3.1.1.2. Rights and duties

Hawai'i opted to explicitly enumerate those rights, duties and benefits that apply to reciprocal beneficiaries.⁷⁶ In doing so, it refrained from extending the 160 rights currently granted to opposite-sex married couples, and instead made a selection of rights which are subsequently extended to reciprocal benefits by means of amendment.⁷⁷ Of those rights that remain in force, the most important relate to the possibility to consent to a post-mortem examination,⁷⁸ the applicability of intestate law,⁷⁹ the right to hospital visitation rights,⁸⁰ the right to compensation in cases of wrongful⁸¹ or accidental death,⁸² certain property rights, including joint tenancy,⁸³ holiday allowances equivalent to that of a spouse,⁸⁴ protection under Hawai'i domestic violence laws⁸⁵ and funeral leave.⁸⁶

Originally the reciprocal benefits scheme also entitled parties to benefit from the medical insurance coverage of one's partner. The Act creating the reciprocal beneficiary scheme amended §431:10A of the Hawaiian Statutes, thus granting those involved in reciprocal beneficial relationships the opportunity to avail themselves of their partner's medical insurance.⁸⁷ In 1997, the Attorney General of Hawai'i delivered two opinions that stated that Section 4, Act 383 was limited to benefits derived from insurance companies and thus did not extend to protection offered via mutual benefit societies or health maintenance organisations.⁸⁸ In Hawai'i insurance companies, mutual benefit societies and health maintenance organisations can sell health care plans to Hawaiian employers directly. By restricting the application of the provisions to insurance companies, the Attorney General in effect wiped away the relevance of this provision, since the majority of employees in Hawai'i are not insured via insurance companies.

3.1.1.3. Termination

Either party may terminate a reciprocal beneficial relationship by filing a 'signed notarized declaration of the termination' with the director of health.⁸⁹ For the filing of the declaration, the parties must once again pay the required fee (currently set at \$8). Once the declaration has been submitted, the director must issue a certificate of termination to each party and maintain a record of each declaration and certificate. Furthermore, a reciprocal beneficiary relationship may also be terminated by the subsequent issuance of a marriage license to either party.⁹⁰ After the

76 For a detailed explanation of the difference between enumeration and exclusion methods of ascribing rights and duties see, I. Curry-Sumner, *All's well that ends registered?*, 2005, pp. 290-292.

77 1997 Haw. Sess. Laws 383, sec. 4-73. A non-exhaustive list of rights granted by Hawaiian Statute to married couples can be found in *Baehr v. Muike*, op. cit. See also W. Burnette, 'Hawaii's reciprocal beneficiaries act: An effective step in resolving the controversy surrounding same-sex marriage', 1998 *Brandeis Law Journal* 37, pp. 87-88.

78 Haw. Rev. Stat. §453-15.

79 Haw. Rev. Stat. §560:2-202 (elective share), §560:2-301 (entitlement of spouse), §560:2-802 and §560:2-804.

80 Haw. Rev. Stat. §323.

81 Haw. Rev. Stat. §663-3.

82 Haw. Rev. Stat. §88-85.

83 Haw. Rev. Stat. §509-2.

84 Haw. Rev. Stat. §79-7.

85 Haw. Rev. Stat. §709-906.

86 Haw. Rev. Stat. §79-13.

87 1997 Haw. Sess. Laws 383, sec. 4.

88 Section 4 of Act 383, Relating to Unmarried Couples, Op. Att'y Gen. 97-05 (1997) and Health Insurance Coverage for Reciprocal Beneficiaries, Op. Att'y Gen. 97-10 (1997).

89 Haw. Rev. Stat. §572C-7(a).

90 Haw. Rev. Stat. §572C-7(c) and (d).

termination of the relationship neither partner is entitled to claim alimony (or maintenance) from the other, nor any other of the rights and benefits enjoyed during the validity of the relationship.⁹¹

3.2. Domestic partnership

Although the term ‘domestic partnership’ has come to be associated with the East Coast of the U.S. and is often used to refer to registration schemes in states with substantially fewer rights than those states offering civil unions, this is not always the case. The term itself was first used in a legal action brought by Human Rights Campaign employee Larry Brinkin in 1982 against the Southern Pacific Railway Company. He was denied three days of paid leave by his employer upon the death of his partner of eleven years, since this right was only granted to a widow or widower. During this case, counsel for Mr. Brinkin argued that he had been involved in a ‘domestic partnership’ which was akin for all intents and purposes to a marriage. Although Mr. Brinkin lost his the case, the term ‘domestic partnership’ became popular in California to refer to unmarried couples living together as though they were married. Just three years later, the City of Berkeley became the first municipality in the country to enact a domestic partner registry and the first employer to offer domestic partner benefits. Although the term is also used in many municipality, city and county ordinances, this article will only focus on state-wide domestic partnership schemes.⁹²

3.2.1. California

With this history in mind, it should come as no surprise that the first movement towards introducing a state-wide domestic partnership surfaced in California. In 1995, the first Bill aimed at introducing a state-wide registration scheme was submitted to the Californian Assembly. Although the Bill died in committee, it was an important step on the long and often arduous road to a full domestic partnership registry in the State.⁹³ Three similar bills were also introduced in 1997 and 1998, two of which despite being passed were subjected to the veto of the Governor Wilson.⁹⁴

Change came in 1999 with the passage of Assembly Bill 26 (A.B. 26). Although A.B. 26, like its counterpart Senate Bill 75, extended the partnership registry to all unmarried couples, it was later restricted to two categories, namely same-sex couples and those couples where both parties were older than 62 years of age.⁹⁵ The Governor found this proposition much more appealing, since it could not be regarded as providing a competitive alternative to marriage for opposite-sex couples. Governor Davis eventually signed the Bill into law on the 22nd September 1999. Although modest in scope, this legislation was immensely significant since it signalled the first time in U.S. legislative history that a state legislature had dealt with the issue of same-sex

91 Although not explicitly stated, this is implicit from the wording of the statute and can also be inferred from the relevant provisions on the applicability of intestate law, see Haw. Rev. Stat. §560:2-802 and §560:2-804.

92 According to the 10th Amendment to the U.S. Constitution certain legislative powers are reserved to the individual states. In the latter half of the 20th century, many states have recognised the need for the local government to have more authority. The introduction of domestic partner registries is a classical example of how these local governments have seized this opportunity. See, V. Berger, ‘Domestic partnership initiatives’, 1991 *De Paul Law Review* 40, p. 437; D. Weigel, ‘Proposal for domestic partnership in the city of Detroit: Challenges under the law’, 1997 *Detroit Mercy Law Review* 74, pp. 835-844. Although no recent statistics are available, due to the exponential increase in availability, in 1999 according to Lambda Legal Defense and Education Fund (New York) there were 123 colleges and universities, 37 labour unions, 476 private employees and 103 municipalities that offered domestic partnership benefits: S. Katz, ‘Domestic partnership laws’, in A. Bainham (ed). *International Survey of Family Law 1997*, 1999 pp. 485-505, p. 495.

93 Cal. A.B. 627, 1995-1996 Session (1995).

94 Cal. A.B. 54, 1997-1998 Session (1997), Cal. A.B. 1059, 1997-1998 Session (1997) and Cal. S.B. 75, 1999-2000 Session (1998). The last two bills were both vetoed by the resident Governor (A.B. 1059 by Governor Wilson and S.B. 75 by Governor Davis).

95 This restriction was late relaxed so that either party had to have reached the age of 62, 2001 Cal. Stat. 893, sec. 3.

registered relationships without pressure from the judiciary. From 1999 until 2005, the domestic partnership registry underwent constant amendment, revision and extension.⁹⁶

The introduction of the California Domestic Partner Rights and Responsibilities Act of 2003 (or Assembly Bill 205) signalled a major shift in the legislature's approach to domestic partnerships. Although basic eligibility remained unaltered, the previous approach of enumerated rights was replaced by the wholesale presumption that domestic partners were to have all of the rights and responsibilities afforded to spouses under state law. Although certain exceptions were carved out, mainly regarding the creation and dissolution of domestic partnerships and certain tax issues, the presumption was a substantial step forward in the fight for the full legal equality of same-sex couples. Since the legislation dramatically changed the circumstances of existing domestic partnerships, the legislature directed the Secretary of State to inform all previously registered domestic partnerships of the changes and delayed the effect of the law for an additional year, until 1st January 2005.⁹⁷ Governor Davis signed the bill into law on 19th September 2003.⁹⁸

3.2.1.1. Establishment

Although the rights and duties attached to the status of domestic partner have since been extended, the conditions which need to be met before a domestic partnership can be registered have remained virtually unchanged since their enactment. Accordingly, two adults who have 'chosen to share one another's lives in an intimate and committed relationship of mutual caring' are permitted to register as domestic partners if they satisfy a number of procedural conditions.⁹⁹ Only two persons may be involved in one registered relationship (either a marriage or domestic partnership) at any one time, and may not be related to each other by blood in a way that would prevent them from being married to each other in the state of California.¹⁰⁰ Both persons, who must be over the age of eighteen, may either be (a) of the same-sex or (b) be of opposite-sex as long as one of the parties is over the age of 62 and either one of them meet the eligibility criteria under Title II, 42 U.S.C. §402(a) with regards old age benefits, or Title XVI, 42 U.S.C. §1381 with regards aged individuals.¹⁰¹

It is also a condition of the domestic partnership legislation that the parties have a common residence. Although §297(c) provides further clarification of the exact meaning of the term 'common residence', no geographical location is provided for this common residence, thus permitting out-of-state residents sharing the same residence to register a domestic partnership in California. The domestic partnership is established when both persons file a declaration of domestic partnership with the Secretary of State and the appropriate fee is paid.¹⁰² After the form

96 Cal. A.B. 25, 2001 Cal. Stat. 893 (extension of right and duties of domestic partners), Cal. A.B. 2216, 2001 Cal. Stat. 447 (intestate succession rights), Cal. S.B. 1049, 2001 Cal. Stat. 146 (survivor benefits for San Mateo), Cal. A.B. 2777, 2002 Cal. Stat. 373 (survivor benefits for the counties of Los Angeles, Santa Barbara and Marin), Cal. S.B. 1575, 2002 Cal. Stat. 412 (voiding wills in cases where domestic partners have assisted in drafting the will), Cal. S.B. 1661, 200, Cal. Stat. 901 (temporary disability).

97 For the text of the letter issued to all existing domestic partners, see Cal. Fam. Code §299.3.

98 Again, this piece of legislation has also been substantially amended by virtue of Cal. A.B. 2208, 2004 Cal. Stat. 488 (clarifying health and disability insurance extension to domestic partners), Cal. S.B. 565, 2005 Cal. Stat. 416 (transfer of property without tax), Cal. S.B. 973, 2005 Cal. Stat. 418 (pension benefits), Cal. S.B. 1827, 2006 Cal. Stat. 802 (obligation to submit joint state tax returns), Cal. A.B. 2051, 2006 Cal. Stat. 856 (\$23 domestic funding increase in registration fee), A.B. 102, 2007 Cal. Stat. 567 (possibility to change surname).

99 Cal. Fam. Code §297(a).

100 Cal. Fam. Code §297(b)(2) and §297(b)(3).

101 Cal. Fam. Code §297(b)(4) and §297(b)(5).

102 Cal. Fam. Code §298.5. At present the fee is set at \$10, although same-sex partners must pay an extra \$23. The additional \$23 fee is used to develop and support a training curriculum specific to lesbian, gay, bisexual, and transgender domestic abuse support service providers, and to provide brochures specific to lesbian, gay, bisexual, and transgender domestic abuse.

has been filed, the couple receives a copy of the form, a certificate of registration of domestic partnership, as well as a brochure entitled ‘Your future together’.¹⁰³

3.2.1.2. Rights and duties

According to §297.5, ‘registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses’. This therefore ensures total parity between same-sex domestic partners and opposite-sex married couples. As a result domestic partners are also granted the same rights as spouses with regards, *inter alia*, rights and duties of spouses during the relationship, including the marital community of property and inheritance provisions,¹⁰⁴ adoption,¹⁰⁵ domestic violence,¹⁰⁶ and ex-spousal alimony.¹⁰⁷ Although until February 2008, with regards state tax returns, domestic partners had to use the same status as they use for their federal tax returns, *i.e.* unmarried,¹⁰⁸ this has since been amended.¹⁰⁹ As a result domestic partners are now permitted to file joint state tax returns. Accordingly, California now recognises domestic partners as functionally *identical* to spouses, in *everything* apart from name (as of course federal benefits).

3.2.1.3. Termination¹¹⁰

A domestic partnership may be terminated in one of two ways. Firstly, if specific requirements are met, a domestic partnership may be terminated by filing a Notice of Termination with the California Secretary of State. In order to qualify, all of the following requirements must be met:

- both parties have lived in California for six months prior to filing;
- the domestic partnership has lasted less than 5 years;
- no children were born prior or during the domestic partnership;
- no children were adopted during the domestic partnership;
- neither partner is pregnant;
- neither partner has any interest in real estate;
- neither partner is renting any land or building;
- except for automobile loans, the community obligations do not exceed \$5,000;
- except for automobiles, the community property is worth less than \$33,000;
- except for automobiles, neither partner has separate property totaling more than \$33,000; and
- both parties agree to waive may rights with regards support from the other partner, except insofar as it is included in the property settlement agreement dividing the community property and community obligations.¹¹¹

103 For more information, see <http://www.sos.ca.gov/dpreistry/index.htm>.

104 Cal. Fam. Code, Division 4.

105 Cal. Fam. Code, Division 13. See also Cal. Fam. Code §297.5(e).

106 Cal. Fam. Code, Division 10.

107 Cal. Fam. Code, Division 9.

108 Cal. Fam. Code §297.5(g)

109 Cal. S.B. 1827, Cal. Stat. 802.

110 This article will not deal with conversion of ‘old-style’ Californian domestic partnerships into ‘new-style’ domestic partnerships, as provided for in Cal. Fam. Code §299.3. According to the old-style domestic partnership legislation, a domestic partnership could be terminated by sending ones partner a notice (by registered mail) terminating the domestic partnership, or if either party subsequently married, or if the parties ceased to share a common residence. Since the 1st January 2005, these termination procedures have been repealed.

111 Cal. Fam. Code §299(a).

If any of these conditions are not met, then either partner must initiate dissolution proceedings in the Superior Court.¹¹² These dissolution procedures are identical to the corresponding divorce proceedings. According to current Californian divorce law, a divorce may be granted if the parties have pleaded irreconcilable differences that have led to the irremediable breakdown of the marriage or that one of the parties is incurably insane.¹¹³

3.2.2. *Maine*

The 121st Maine Legislature passed Bill Number 1579, a domestic partner bill, in April 2004. This measure passed the House on 12th April 2004 with an 84 to 58 vote and the Senate on 27th April 2004 with an 18 to 14 vote. On 28th April 2004, Governor Baldacci signed law into effect; the law went into effect on 30th July 2004.

3.2.2.1. Establishment

Any mentally competent adult who satisfies the conditions laid down in §2710, Title 22, Maine Statutes may enter into a domestic partnership with one other person. Accordingly, neither partner may already be involved in a registered domestic partnership with anyone else or married to anyone else.¹¹⁴ Furthermore, Maine imposes a 12-month residency requirement prior to the filing application. Through use of the word ‘domiciled together’ it is suggested that this 12-month period must be by virtue of a shared residence.¹¹⁵ Although Title 22, Maine Statutes does not specify the age that someone must have attained in order to register a domestic partnership, use of the term ‘adult’ would tend to suggest that both parties must have attained the age of 18.¹¹⁶ The domestic partnership register in Maine is unique in the U.S. in that it open to both same-sex and opposite-sex couples on an equal basis.

Registration of the partnership entails that the partners jointly file a declaration of domestic partnership with the Office of Vital Statistics, accompanied by the required filing fee (currently set at \$35). The declaration must be under oath and their signatures must be notarised prior to filing the declaration. No ceremony is permitted. Once the registry has received the declarations they will be filed, with two copies returned to the parties at their common residence.¹¹⁷

3.2.2.2. Rights and duties

The aim of the ‘Act to promote the financial security of Maine’s families and children’ was not the equalisation of the position of same-sex and opposite-sex couples. Instead the Act aimed to extend a limited number of rights, which were at that time restricted to opposite-sex married couples, to other couples that had evidenced ‘a commitment to remain responsible indefinitely for each other’s welfare’.¹¹⁸ As a result, the Act only affected rights in the field of inheritance and medical decision-making. Accordingly, if a domestic partner dies without a will, trust, or other estate plan, the surviving domestic partner shall inherit the deceased partner’s property in the

112 Cal. Fam. Code §299(d). The only distinction is that neither party need be a resident of or domiciled in California in order to file for dissolution of a domestic partnership, *i.e.* Cal. Fam. Code §2320 does not apply to the dissolution of a domestic partnership.

113 Cal. Fam. Code §2310.

114 Me. Rev. Stat. Ann. Tit. 22, §2710.2.C and §2710.2.D.

115 Me. Rev. Stat. Ann. Tit. 22, §2710.2.B. This is further supported with reference to the ‘common residence’ in §2710.3.

116 In accordance with Me. Rev. Stat. Ann. Tit. 19-A, §101.1: “‘Adult’ means a person who is 18 years of age or older”. Although this provisions is restricted in its interpretation to Title 19-A, there is no reason to assume that the General Assembly had any other intention when using the word ‘adult’ with respect to the domestic partnership registry.

117 Me. Rev. Stat. Ann. Tit. 22, §2710.3.

118 2003 Me. Laws 672, sec. 2 and 17.

same manner as a surviving spouse.¹¹⁹ A domestic partner will, furthermore, also be considered the first next of kin, in the same manner as a spouse is the first next of kin, when determining who has the right to make funeral and burial arrangements.¹²⁰

3.2.2.3. Termination

A domestic partnership is terminated if:

- either domestic partner gets married;¹²¹
- a notice of termination is filed indicating each partner's consent to the termination. This declaration must be signed by both domestic partners in the presence of a notary;¹²² or
- a notice under oath from either domestic partner that the other domestic partner was directly given a notice of intent to terminate the partnership. If giving notice by hand is not feasible, then a different way of giving notice may be accomplished as provided by the Maine Rules of Civil Procedure for commencement of a civil action. Termination under this method is not effective until 60 days after the notice has been given.¹²³

3.2.3. New Jersey

Prior to the introduction of civil unions (see §5.3), domestic partnership was the only way option for same-sex couples wishing to have their relationship publicly recognised.¹²⁴ As of the 19th February 2007, this is no longer the case. Since this date, domestic partnerships are only allowed to be registered if both parties to the domestic partnership have attained the age of 62. Nonetheless, all those domestic partnerships entered into between 10th July 2004 and the 19th February 2007 remain unaltered with regards to the rights and responsibilities of domestic partnerships. All those domestic partners eligible to convert their domestic partnership into a civil union were given notice of this possibility prior to the entry into force of the civil union legislation. As a result of these legislative changes, domestic partnerships in New Jersey will remain outside the scope of this article.

3.2.4 Oregon

On the 8th July 2005, the Oregon Senate approved legislation to allow same-sex civil unions. As originally written, Senate Bill 1073 would have created civil unions and prohibited discrimination based on sexual orientation. However, on the 21st July, the House performed a series of moves aimed at torpedoing the bill, removing most of its language. Instead of containing anti-discrimination provisions and reference to civil unions, the bill referred to the state constitutional amendment and proposed to create a system of reciprocal benefits. The changes effectively killed momentum to pass the bill, which died in committee.

However, after the November 2006 mid-term elections Democrats won a majority of the formerly Republican-controlled house and in early 2007, Democrats re-introduced a bill in the House similar to original 2005 civil union legislation. The bill adopted the term 'domestic

119 Me. Rev. Stat. Ann. Tit 18-A, §1-201.17, §2-102. This means that a surviving domestic partner would inherit the entire estate, half the estate plus \$50,000, or half the estate, depending on whether the deceased domestic partner has surviving children or parents.

120 Me. Rev. Stat. Ann. Tit. 22, §2843-A.1.D. If parties neglected to register with the state but can show that they meet the definition of domestic partners in §2710, this right will also be extended to them. This does not, however, extend to intestacy rights.

121 Me. Rev. Stat. Ann. Tit. 22, §2710.4. It is not expressly stated that the partners must marry a third person. It is therefore to be expected that should an opposite-sex couple subsequently marry each other, this marriage will automatically terminate their domestic partnership.

122 Me. Rev. Stat. Ann. Tit. 22, §2710.4.A

123 Me. Rev. Stat. Ann. Tit. 22, §2710.4.B.

124 2003 N.J. Laws 246, 'An act establishing the rights and responsibilities of domestic partners, and revising parts of the statutory law'.

partnership’ to describe these unions. This bill enjoyed a relatively easy passage through the legislature and passed the house on the 17th April 2007 (by a vote of 34-26) and the Senate on the 2nd May 2007 (by a vote of 21-9). Governor Kulongiski signed the Oregon Family Fairness Act on the 9th May 2007. The law was scheduled to take effect on the 1st January 2008, but was delayed by a preliminary injunction. The injunction was finally lifted and the law came into force on the 1st February 2008. The first domestic partnerships took place on the 4th February 2008.

3.2.4.1. Establishment

Although a marriage in Oregon can be celebrated as soon as a person attains the age of 17,¹²⁵ a domestic partnership may only be concluded between parties both of whom who have reached the age of 18.¹²⁶ Furthermore, domestic partnership is only open to same-sex couples, one of whom must be resident in Oregon.¹²⁷ The prohibited degrees of relationship are, however, identical to those applicable to aspirant married couples.¹²⁸ Furthermore both facets of the principle of exclusivity are adhered to, namely that only two people may conclude a domestic partnership, and neither party may already be involved in a marriage, nor another domestic partnership.¹²⁹

Two individuals wishing to become partners in a domestic partnership must complete and file a declaration of domestic partnership with the county clerk. In county clerk registers the declarations and returns a copy of the registered form, as well as a certificate of registered domestic partnership to the partners.¹³⁰ Signatures must be witnessed by a notary public.¹³¹ The fee required varies per county, but is normally between \$40-\$50).

3.2.4.2. Rights and duties

According to sec. 9, ‘Any privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual.’ As a result domestic partners and spouses have been placed on an identical footing as regards the rights and duties incumbent on the parties to such relationships.¹³²

3.2.4.3. Termination

If the domestic partnership was solemnized in Oregon and either party is a resident of or domiciled in Oregon at the time the suit is commenced, a suit for its annulment or dissolution may be maintained where the ground alleged is one set forth in §106.020 or §107.015.¹³³ When the civil union was not solemnized in Oregon or when any ground other than set forth in §106.020 or §107.015 is alleged, at least one party must be a resident of or be domiciled in Oregon at the time the suit is commenced and continuously for a period of six months prior

125 Or. Rev. Stat. §106.010.

126 2007 Or. Laws §99 sec. 3. The Act was also entitled the ‘Oregon Family Fairness Act’.

127 2007 Or. Laws §99 sec. 3(1).

128 Compare Or. Rev. Stat. §106.020(b) and 2007 Or. Laws §99 sec. 4(b).

129 Compare Or. Rev. Stat. §106.020(a) and 2007 Or. Laws §99 sec. 4(a).

130 Sec. 6(1) and 6(2), 2007 Act.

131 Sec. 6(5)(f), 2007 Act.

132 This extension of rights and benefits is, however limited to those rights and benefits extended at state level: sec. 9(5), 2007 Act.

133 Or. Rev. Stat. §107.075(1) and (2).

thereto. In turn this means that civil unions will need to be dissolved when ‘irreconcilable differences have led to the irremediable breakdown of the marriage’.¹³⁴

3.2.5. Washington

As already stated above, although Washington has not passed a constitutional amendment, the statutory definition of marriage has been amended so as to restrict it to marriages between opposite-sex couples. Furthermore, shortly after the Washington Supreme Court upheld the validity of this ban, two bills were submitted to the Washington Senate. The first would have opened up marriage to same-sex couples (and thus overturned the ban on same-sex marriage),¹³⁵ whilst the other bill aspired to introduce a domestic partnership registry.¹³⁶ The bill aimed at opening marriage to same-sex couples died in committee, whilst the domestic partnership bill received warm support in both the House (28 votes to 19) and the Senate (63 votes to 35). The Bill was eventually passed by the Senate on the 1st March 2007 and by the House on the 10th April 2007. Governor Gregoire signed the bill into law on the 21st April 2007, and the law entered into force on the 22nd July 2007, making Washington the fourth state to introduce a state-wide domestic partnership registry scheme.¹³⁷

In enacting this legislation, the legislature identified two separate groups that would be served by the legislation,

‘The legislature finds that same sex couples, because they cannot marry in this state, do not automatically have the same access that married couples have to certain rights and benefits, such as those associated with hospital visitation, health care decision-making, organ donation decisions, and other issues related to illness, incapacity, and death. Although many of these rights and benefits may be secured by private agreement, doing so often is costly and complex.

The legislature also finds that the public interest would be served by extending rights and benefits to different sex couples in which either or both of the partners is at least sixty-two years of age. While these couples are entitled to marry under the state's marriage statutes, some social security and pension laws nevertheless make it impractical for these couples to marry. For this reason, Chapter 156, Laws of 2007 specifically allows couples to enter into a state registered domestic partnership if one of the persons is at least sixty-two years of age, the age at which many people choose to retire and are eligible to begin collecting social security and pension benefits.’¹³⁸

3.2.5.1. Establishment

The principle of exclusivity is also upheld in Washington’s registration scheme, since the scheme is restricted to two persons of whom neither is married to someone other than the party to the domestic partnership and neither person is in a state registered domestic partnership with another person.¹³⁹ Although at first glance the phrase ‘neither person is married to someone other than the party to the domestic partnership’ would appear straight forward, a certain element of

134 Or. Rev. Stat. §107.025(1). As a result of §107.036, the doctrine of fault has been abolished in Oregon divorce law, except for particular circumstances.

135 Wash. S. 5335, 60th Congr., 1st Sess. (2007), entitled Addressing Civil Marriage Equality.

136 Wash. S. 5336, 60th Congr., 1st Sess (2007), entitled Protecting individuals in domestic partnerships by granting certain rights and benefits.

137 2007 Wash. Laws 156.

138 Rev. Code Wash. §26.60.010.

139 Rev. Code Wash. §26.60.030(2) and §26.60.030(3).

ambiguity does arise since the domestic partnership scheme in Washington is not only open to same-sex couples, but also to opposite-sex couples if either one of the parties is over the age of 62.¹⁴⁰ Read together, these provisions mean that married opposite-sex couples over the age of 62 are permitted to enter into a domestic partnership, despite the fact that they are already married to each other. Although there would be no advantage from doing so, it is strange that the legislature has not prevented this possibility.

Although the parties must also share a common residence, the geographical location of this residence does not have to be in Washington State. A couple living together in Oregon or Idaho are thus permitted to enter into a domestic partnership in Washington, subject to fulfilling all the other requirements. Furthermore, neither party may be a sibling, child, grandchild, aunt, uncle, niece, or nephew to the other person, nor may either person be nearer of kin to each other than second cousins, whether of half or whole blood.¹⁴¹ If all the abovementioned conditions are satisfied, the parties may file a signed, notarised declaration to the Secretary of State.¹⁴² Once the declaration has been received, verified and a fee paid (currently set at \$50),¹⁴³ the document is subsequently registered and a certificate of state registered domestic partnership is issued to each party.¹⁴⁴

3.2.5.2. Rights and duties

Although the enumeration method has been used to ascribe rights to the Washingtonian domestic partners, the rights are all contained in Chapter 156, Laws of 2007. The rights and duties extended to domestic partners are:

- the extension of all employee benefits by virtue of the relationship,¹⁴⁵ including health care, life insurance, liability insurance, accidental death and dismemberment insurance, and disability income insurance;¹⁴⁶
- the ability to grant informed consent for health care for a patient who is not competent;¹⁴⁷
- the ability to be able to speak with health care providers who will now be able to disclose information about the other partner without that partner's authorisation;¹⁴⁸
- a surviving domestic partner may bring a wrongful death action based on the death of the other partner;¹⁴⁹
- title and rights to cemetery plots and rights of internment;¹⁵⁰
- the ability to authorise autopsies and request copies of autopsy reports and records;¹⁵¹
- the right to control the disposition of the remains of a deceased partner;¹⁵²
- the ability to consent to the removal of human remains from a cemetery plot;¹⁵³
- the ability to make anatomical gifts;¹⁵⁴

140 Rev. Code Wash. §26.60.030(6).

141 Rev. Code Wash. §26.60.030(5).

142 Rev. Code Wash. §26.60.040(1).

143 Rev. Code Wash. §26.60.040(4).

144 Rev. Code Wash. §26.60.040(2).

145 Rev. Code Wash. §41.05.

146 Rev. Code Wash. §41.05.065 and 2006 Wash. Laws 299, §2.

147 Rev. Code Wash. §7.70.065 and 2006 Wash. Laws 93, §1.

148 Rev. Code Wash. §70.02.050 and 2006 Wash. Laws 235, §3.

149 Rev. Code Wash. §4.20.020 and 1985 Wash. Laws 139, §1, as well as Rev. Code Wash. §4.20.060 and 1985 Wash. Laws 139, §2.

150 For example, Rev. Code Wash. §68.32.020, §68.32.040, §68.32.060 and §68.32.110 and 2005 Wash. Laws 365, §92, §94 and §96.

151 Rev. Code Wash. §68.50.100 and 2003 Wash. Laws 53, §307, as well Rev. Code Wash. §68.50.101 and 1987 Wash. Laws 331, §57.

152 Rev. Code Wash. §68.50.160 and 2005 Wash. Laws 365, §141.

153 Rev. Code Wash. §68.50.200 and 2005 Wash. Laws 365, §144.

154 Rev. Code Wash. §68.50.550 and 1993 Wash. Laws 228, §4.

- extension of intestate succession law when the domestic partner dies without a will;¹⁵⁵ and
- administration of an estate if the domestic partner died without a will or if the representative named in the will declines or is unable to serve.¹⁵⁶

As a result, no rights are granted to domestic partners with respect to children rights,¹⁵⁷ domestic violence,¹⁵⁸ property relationships,¹⁵⁹ or maintenance (alimony).¹⁶⁰ However, these rights and duties have since been extended in 2008. Accordingly, approximately one third of all rights and duties attributed to married couples have been extended to domestic partners.¹⁶¹

3.2.5.3. Termination

A domestic partner may terminate the relationship by filing a notice of termination with the Secretary of State, coupled with the appropriate fee (currently set at \$50). The notice must contain the notarised signature of one or both parties. If the form is, however, only signed by one party the party seeking termination must also file an affidavit with the Secretary stating that (a) the other party has been served in writing in the manner prescribed for the service of summons in a civil action, or (b) that the party seeking termination has not been able to find the other party after ‘reasonable effort’.¹⁶² If either of these methods for terminating a domestic partnership is used, the termination is deemed to be effective ninety days after the filing of the notice of termination and payment of the relevant fee.¹⁶³ A domestic partnership is also brought to an immediate end by the subsequent marriage of either party either with each other or with another person.¹⁶⁴

3.2.6. District of Columbia

Although the federal District of Columbia has recognised domestic partnerships since 11th June 1992, the scheme was not properly funded by Congress until the fiscal year 2002.¹⁶⁵ The original Act, entitled the *Health Care Benefits Expansion Act of 1992*,¹⁶⁶ authorised the Director of the Department of Health to amend Title 29 of the District of Columbia Municipal Regulations. As a result, the Director inserted a new Chapter 80 into the rules and thereby created the domestic partnership registry in the District of Columbia. Subsequent amendment to the provisions came in the form of the Domestic Partnership Equality Amendment Act of 2006, which came into effect on 4th April 2006.¹⁶⁷ In effect, this Act guarantees that in almost all cases a domestic partner will have the same rights as a spouse.¹⁶⁸

155 Rev. Code Wash. §11.04.015 and 1974 Wash. Laws (old) 117, §6.

156 Rev. Code Wash. §11.28.120 and 1995 Wash Laws (1st Supp.) 18, §61.

157 For example, no extension of the uniform parentage act provisions to domestic partners: Rev. Code Wash. §26.26.011 *et. seq.*

158 Although domestic partners benefit from the protection of the domestic violence protection by virtue of their shared residence, they are not explicitly mentioned as a group deserving of protection in the statutes: Rev. Code Wash. §26.50.010.

159 Washington is one of the states to operate a matrimonial ‘community of property’ system: see Rev. Code Wash. §26.16.030. This marital community is not applicable to domestic partners, unless they contract otherwise.

160 No extension of the rights listed in Rev. Code Wash. §26.09.090.

161 2008 Wash. Laws 6.

162 Rev. Code. Wash. §26.60.050(1)(a).

163 Rev. Code. Wash. §26.60.050(2).

164 Rev. Code. Wash. §26.60.050(4).

165 Mayor’s Order 2002-56, dated 4th March 2002.

166 D.C. Law 9-114.

167 D.C. Law 16-79.

168 See §3.2.6.2.

3.2.6.1. Establishment

Unlike many of the other domestic partnership schemes, the institution created in District of Columbia is open to both same-sex and opposite-sex couples. Furthermore, domestic partnerships are also permitted between people who are related by blood (*e.g.*, siblings or a parent and adult child, provided both were single).¹⁶⁹ Nonetheless, the principle of exclusivity is still adhered to, both in terms of the prohibition on multiple simultaneous formal relationships, as well as with respect to the ‘two persons’ requirement.¹⁷⁰ The parties, both of whom must be over the age of 18, must also share a common residence.¹⁷¹ The exact geographical location is not further specified, thus permitting out-of-state residents to register their partnership in the District of Columbia.¹⁷²

To become domestic partners, the parties must appear in person, provide documentation to establish that they satisfy the registration requirements, submit a single application for registration, and pay the appropriate fee (currently set at \$45).

3.2.6.2. Rights and duties

The domestic partnership laws as they applied up until the recent amendment provided couples registered as domestic partners the same rights as family members to visit their domestic partners in the hospital and to make decisions concerning the treatment of a domestic partner’s remains after the partner’s death. Registration also granted District of Columbia Government employees a number of benefits. Furthermore, domestic partners were eligible for health care insurance coverage, could use annual leave or unpaid leave for the birth or adoption of a dependent child or to care for a domestic partner or a partner’s dependents, and could make funeral arrangements for a deceased partner. Although a number of legislative amendments were made to the rights and duties after the implementation of the law in 2002, the substantial package of rights and duties remained more-or-less unaltered until 2006.¹⁷³

As a result of the 2006 amendment, the methodology and ideology behind the institution has made a paradigm shift. Instead of using the *enumeration method*, the District of Columbia legislature has moved to an *exclusion method*, whereby all the rights and duties applied to married couples are now *mutatis mutandis* applicable to domestic partners, unless otherwise provided. The new law equates the position of domestic partners and spouses in many areas including, *inter alia*, mortgages, intestate succession, child support and premarital agreements.

169 The restrictions laid down in D.C. Mun. Regs. Tit. 29, §8001.2 do not mention any restriction with regards the prohibited degrees of marriage.

170 D.C. Mun. Regs. Tit. 29, §8001.2(b) and §8001.2(d).

171 A number of evidential tools are nonetheless provided aimed at assisting the Registrars task of determining whether parties have a shared residence: D.C. Mun. Regs. Tit. 29, §8004.1, namely (a) a current lease or rental agreement for residential property that names both applicants as occupants of the premises named in the lease or rental agreement; (b) a mortgage for residential property that names both applicants as mortgagors; (c) a deed for residential property that states that both applicants share title to the premises named in the deed; (d) utility bills for residential property that name both persons as being responsible for payment of the utility fees for the same address; or (e) an affidavit executed within the previous six months in which the parties each state under penalty of perjury that both domestic partners share the same residence.

172 D.C. Mun. Regs. Tit. 29, §8001.2(a) and (c).

173 These minor amendments include: D.C. Law 15-17 (effective 21st June 2003, with regards health care benefits), D.C. Law 15-176 (effective 8th September 2004, with regards domestic partners treated the same as spouses in relation to deed recordation tax), D.C. Law 15-307 (effective from 8th April 2005, with regards exemption from excise tax on transfer of title) and D.C. Law 15-309 (effective from 8th April 2005, with regards the definition of ‘spouse’ in the Human Rights Act 1997).

3.2.6.3. Termination

A domestic partnership may only be terminated automatically when:

- either domestic partner dies;¹⁷⁴
- one of the domestic partners marries another person or the domestic partners marry one another;¹⁷⁵ or
- one of the domestic partner abandons the domestic partnership or the partner's mutual residence.¹⁷⁶

Alternatively if the parties wish to terminate their partnership they may also file for termination, either jointly or separately.¹⁷⁷ If only one partner files for termination that partner must serve notice of his or her intent to terminate the partnership on the other domestic partner.¹⁷⁸ A termination of domestic partnership statement filed pursuant to §8002.3 will become effective six months after the date the statement is filed with the Registrar.¹⁷⁹

3.3. Civil union

3.3.1. Connecticut

On the 1st October 2005, Connecticut became the third US State to introduce a registry for same-sex couples entitled the 'civil union registry'. Unlike its predecessors, New Jersey and Vermont, Connecticut's decision to introduce a civil union registry was neither pre-empted nor mandated by a judicial decision. Nonetheless, cases did appear before the judiciary in Connecticut claiming that the inability for same-sex couples to marry was unconstitutional.

Even since the enactment of the Act concerning Civil Unions, same-sex couples continue to fight for the right to marry.¹⁸⁰ For example, eight same-sex couples brought a legal action before the state's courts, challenging the state's alleged discriminatory exclusion of same-sex couples from the right to marry. On 12th July 2006 a Superior Court judge court ruled against them arguing that: 'Civil union and marriage in Connecticut now share the same benefits, protections and responsibilities under law (...) The Connecticut Constitution requires that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection and process.' In concluding, the judge held that denying same-sex couples the right to marry did not violate Connecticut's Constitution. This decision has been appealed to the Supreme Court of Connecticut and arguments were heard on the 14th May 2007; the decision is still pending.

Activity has also been evident in the Connecticut Legislature with a bill having been introduced to the House on the 31st January 2007 aimed at providing same-sex couples with full marriage rights.¹⁸¹ Although the bill passed the judiciary committee, the bill was never submitted

174 C. Mun. Regs. Tit. 29, §8002.1(a).

175 D.C. Mun. Regs. Tit. 29, §8002.1(b).

176 D.C. Mun. Regs. Tit. 29, §8002.1(c), in conjunction with §8002.2.

177 D.C. Mun. Regs. Tit. 29, §8002.3

178 D.C. Mun. Regs. Tit. 29, §8002.3(a) and §8002.3(b).

179 D.C. Mun. Regs. Tit. 29, §8002.4.

180 In *Kerrigan v. State of Connecticut*, 49 Conn. Super. 644, 909 A.2d 89 (Ct. Super Ct. 2006), eight same-sex couples petitioner to the court to declare that the distinction between civil union and marriage violated the Connecticut Constitution. The Court held 'that the Connecticut Constitution required that there be equal protection and due process of law, not that there be equivalent nomenclature for such protection'.

181 Conn. H.B. 7395, January Session 2007.

to the full House or Senate, more than likely because Governor Rell said that she would veto any move to pass same-sex marriage legislation.

3.3.1.1. Establishment

Any two ‘eligible persons’ may enter into a civil union in Connecticut. This means persons over the age of eighteen,¹⁸² who are of the same-sex,¹⁸³ and neither party is already married or involved in a civil union.¹⁸⁴ Although perhaps verging on the bounds of this article,¹⁸⁵ problems have arisen as regards the extent to which out-of-state registered relationships will be recognised with respect to this provision. In an opinion on the 20th September 2005, the Attorney General of Connecticut stated that,

- ‘1. Couples with a Vermont civil union or a California domestic partnership will be treated in Connecticut in the same way as a couple with a Connecticut civil union, but cannot also enter into a Connecticut civil union;
2. Same-sex couples with an out-of-state marriage, e.g. from Massachusetts or Canada, can enter into a Connecticut civil union, but the state of Connecticut will not recognize their marriage as valid; and
3. Couples with a form of domestic partnership other than from California might or might not be able to enter into a Connecticut civil union depending upon a comparison of the specific provisions of the out-of-state domestic partnership law to Connecticut law.’¹⁸⁶

Furthermore, according to §§46b-38bb, in conjunction with §§46b-38cc, kindred are prohibited to the virtually the same extent from entering into civil unions as they are prevented from marrying.¹⁸⁷ Similarly to marriage, Connecticut also has no residency requirement for entering into a civil union. In order to register a civil union, both parties must appear and make an application before the registrar of the town in which either: (1) the civil union is to be celebrated, or (2) either person to be joined in the civil union resides.¹⁸⁸ However, it would seem that parties may appear before the registrar separately since the law provides that ‘if the license is signed and sworn to by the applicants on different dates, the earlier date shall be deemed the date of application.’ The statute also requires that the ‘license shall be completed in its entirety, dated, signed and sworn to by each applicant and shall state each applicant’s name, age, race, birthplace, residence, whether single, widowed or divorced and whether under the supervision or control of a conservator or guardian.’¹⁸⁹

Once the application has been filed, the couple has 65 days to enter into a civil union. The same individuals authorised to legally join two people in marriage are authorized to join two people in a civil union.¹⁹⁰ This means that religious officials may also preside over civil unions.

182 Conn. Gen. Stat. §46b-38bb(3).

183 Conn. Gen. Stat. §46b-38bb(2).

184 Conn. Gen. Stat. §46b-38bb(1).

185 This article is predominantly focused upon the substantive law issues arising in this field and does not address the conflict of laws aspects (except in so far as dealt with in §4).

186 Op. Conn. Att’y Gen (20th September 2005). See <http://ct.gov/AG/cwp/view.asp?A=1770&Q=302438>

187 According to Conn. Gen. Stat. §46b-21 prohibits marriages between a man and his stepdaughter or stepmother (and likewise for a woman and her stepson or stepfather). However, these prohibitions are not extended to civil unions, those permitting civil unions between a man and his stepson or stepfather and likewise a woman and her stepdaughter or stepmother.

188 Conn. Gen. Stat. §46b-38gg.

189 Conn. Gen. Stat. §46b-38hh.

190 Conn. Gen. Stat. §46b-38dd(a).

They may do so ‘in any town in the state’,¹⁹¹ although not for non-resident couples, since these civil unions must be celebrated at the place where the licence was issued.

3.3.1.2. Rights and duties

According to §46b-38nn, ‘parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage.’ Accordingly now significant changes were necessary to Connecticut’s statutes. From 1st October 2005, all those laws granting rights to ‘spouses’, ‘husbands’ and ‘wives’ were equally extended to those involved in civil unions.

3.3.1.3. Termination

No specific dissolution laws were passed alongside the civil unions registry. Instead, all laws and regulations regulating Connecticut divorce law are equally applicable to those involved in a civil union. This means that either party must (a) have been resident in the state for at least 12 months immediately preceding the date of the filing of the complaint, (b) one of the parties was domiciled in Connecticut at the time of the civil union and returned to Connecticut with the intention of permanently remaining before the filing of the complaint; or (c) the cause for the dissolution of the marriage arose after either party moved into this state. The grounds for the dissolution are also identical to those applicable for divorce in the state. This includes both fault and no-fault grounds. Unlike New Hampshire, it would appear that Connecticut does not restrict adultery to heterosexual sexual intercourse.¹⁹²

3.3.2. New Hampshire

New Hampshire became the fourth state to recognize civil unions when Governor Lynch signed the bill into law on 31st May 2007. The law has been effective since 1st January 2008. The law itself is one of the shortest of all the ten states to have enacted registration schemes for same-sex couples. The move to introduce civil unions came without any court order or even the existence of a marriage lawsuit.

3.3.2.1. Establishment

Although the age to register a civil union is not markedly different from other states, namely 18, it is different from the applicable age limits set for marriage in New Hampshire.¹⁹³ At present, males may marry, subject to parental permission, from the age of 14 and females from the age of 13.¹⁹⁴ Although as regards the prohibited degrees of marriage, the prohibitions are fundamentally identical, one unexplainable difference is apparent, namely that civil unions are expressly prohibited with one’s grandparent, although this restriction does not apply to marriages in the State.¹⁹⁵

There is no residency requirement for marriage in New Hampshire and, by clear implication, no residency requirement for a New Hampshire civil union. Although complexities could

191 Conn. Gen. Stat. §46b-38dd(a).

192 For example, see *Swanson v. Swanson*, 128 Conn. 128, 20 A.2d 617 (Conn. Super. Ct. 1941. See also Conn. Gen. Stat §46b-40(f): ‘adultery means voluntary sexual intercourse between a married person and a person other than such person’s spouse’.

193 N.H. Rev. Stat. §457-A:2-4.

194 N.H. Rev. Stat. §457-4-7.

195 N.H. Rev. Stat. §457-A:3-4, compared with §457:1-2.

occur with respect to the residency requirements in New Hampshire,¹⁹⁶ first indications would seem to point to this provision currently not being interpreted so as to prevent out-of-state couples from registering a civil union in New Hampshire.¹⁹⁷ As regards the formal ceremonial aspects, exactly the same procedure is applicable to the formation and registration of a civil union as that used to solemnise a marriage.¹⁹⁸ The only difference being that a minister, clergyman or clergywoman is not obliged to perform a civil union.¹⁹⁹

3.3.2.2. Rights and duties

According to N.H. Rev. Stat. §457-A:6 and notwithstanding any law to the contrary, ‘the parties to a civil union will be granted all the rights and subject to all the obligations and responsibilities provided for in the state law that apply to parties’ who are married.

3.3.2.3. Termination

New Hampshire has also opted to apply its divorce legislation *mutatis mutandis* to the dissolution of a civil union.²⁰⁰ This means that the divorce grounds will need to be applied to the dissolution of a civil union, namely the general ‘irreconcilable differences’²⁰¹ ground and the fault-based grounds listed in N.H. Rev. Stat. §458. Although there are obviously certain advantages to the simple corresponding application of the divorce provisions to the dissolution of a civil union, many of these grounds will need to be ‘reinterpreted’ by the courts. Take, for example, adultery. In a 2003 case, the Supreme Court of New Hampshire held that a homosexual relationship between a married person and another did not constitute adultery within the meaning of N.H. Rev. Stat §458:7, II.²⁰² As the law currently stands a civil union partner could therefore only obtain dissolution of the civil union if his or her partner had sexual intercourse with a person of the opposite-sex!

A further issue also arises with respect to dissolving a New Hampshire civil union. According to New Hampshire law, the courts will only have jurisdiction to dissolve a civil union or a marriage if (a) both the parties were domiciled in New Hampshire when the action was commenced, (b) the plaintiff was so domiciled and the defendant was personally served with process within the state or (c) the plaintiff was domiciled in the state for one year prior to the action being filed.²⁰³ If one reads these requirements in conjunction with the lack of residency requirements for registration of a civil union, one will immediately see the problem; although out-of-state couples may register their civil union in New Hampshire, they will have to reside at least one year in New Hampshire to be able to dissolve it!

196 The complexity is created by a 1979 New Hampshire Act that provides that non-residents may not marry in New Hampshire, ‘if such [a] marriage would be void if contracted in [their home state]’: N.H. Rev. Stat. §457:44. Although this statute speaks only of marriages, the civil union legislation states that ‘parties entering into a civil union shall be subject to the same requirements and conditions as contained in N.H. Rev. Stat. §457’ which includes the abovementioned restriction: N.H. Rev. Stat. §457-A:2. If one interprets this restriction as a ‘requirement or condition’, then the possibility exists that same-sex couples will not be able to enter into a civil union in New Hampshire, if they reside in a state that expressly provides that a civil union would be void in that state. At the same time, this type of restriction – which exists in only a handful of states – has often not been enforced and may not be enforced in New Hampshire.

197 <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20080112/FRONTPAGE/801120399>

198 N.H. Rev. Stat. §457-A:5, compared with §457:31 and §5-C:41-61.

199 N.H. Rev. Stat. §457-A:5, last sentence.

200 N.H. Rev. Stat. §457-A:7, in conjunction with §458.

201 N.H. Rev. Stat. §458:7-a.

202 *In the Matter of David G. Blanchflower and Sian E. Blanchflower*, 150 N.H. 226, 834 A.2d. 1010 (N.H. 2003). Thank you to Dan Krislov, Small and Lyons, Attorneys-at-law, Nashua, New Hampshire, for the confirmation of this interpretation.

203 N.H. Rev. Stat. §458:5.

3.3.3. New Jersey

On 14th June 2005, the New Jersey Court of Appeal (2-1 decision) held in the case of *Lewis v. Harris* that excluding same-sex couples from the right to marry did not violate the New Jersey Constitution.²⁰⁴ On 25th October 2006, the New Jersey Supreme Court overturned the Court of Appeal, holding that it was unconstitutional to deny same-sex couples the rights and benefits provided of marriage.²⁰⁵ The court reserved the question of whether those rights and benefits must be called marriage and directed the legislature to provide either marriage or another form of relationship recognition. In December 2006, the New Jersey legislature passed a civil unions law, which took effect in February 2007.

3.3.3.1. Establishment

For two persons to establish a civil union, they must satisfy all of the following criteria:

- neither may be a party to another civil union, domestic partnership or marriage recognised in the state of New Jersey;
- both parties must be of the same sex and therefore be excluded from the marriage laws of New Jersey;
- both parties must have attained the age of eighteen, except as provided for in Section 10.²⁰⁶

These conditions therefore ensure that both aspects of the exclusivity principle are adhered to. Furthermore, although these are the only eligibility criteria specifically applicable to civil unions, the marriage provisions have also been amended. It is there that one finds reference to those relatives not entitled to register a civil union; the list is identical for both opposite-sex marriages and same-sex civil unions.²⁰⁷

With regards to the procedure, the marriage or civil union license must be obtained from the registrar in the New Jersey municipality in which either applicant resides. Since there are no residency requirements imposed on aspirant civil union partners, should out-of-state residents wish to celebrate a civil union, they must file the declaration with the municipality where they intend to celebrate their civil union. Once the forms have been submitted, the relevant fee (currently set at \$28) has been paid and the licence has been issued, the civil union is deemed to come into existence.²⁰⁸

3.3.3.2. Rights and duties

On the basis of the decision in *Lewis v. Harris*, §37:1-31.4.a states that ‘civil union couples shall have all of the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage.’ Although thereafter a number of rights and benefits are explicitly mentioned, these are not to be regarded as exclusive. Instead the New Jersey

204 *Lewis v. Harris*, 378 Super 168, 875 A.2d 259 (N.J. App. Div. 2005). In 2005, the Tax Court of New Jersey also determined that a same-sex marriage validly concluded in Canada was not entitled to recognition in New Jersey.

205 *Lewis v. Harris*, 188 N.J. 415, 908 A.2d 196 (N.J. 2006). The Supreme Court afforded the legislature and the executive 180 days to enact statutory amendments to achieve parity between same-sex and opposite-sex couples. For a case revolving around the moment at which this party should be regarded as taking effect, see *Quarto v. Adams*, 395 N.J. Super 802, 929 A.2d 1111 (N.J. Super. Ct. 2007).

206 N.J. Rev. Stat. §37:1-30.

207 N.J. Rev. Stat. §37:1-1.

208 For a list of those judges competent to hear the case §37:1-13.

legislature has opted for the exclusionary method, whereby all rights granted to married couples are extended to those involved in a civil union, unless stated otherwise.²⁰⁹

3.3.3.3. Termination

According to §37:1-31(b), the ‘dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of a marriage’. This therefore means that §2:34-2 will apply to the grounds upon which a civil union may be terminated in New Jersey. Adultery is also a ground for divorce in New Jersey. However, in *S.B. v. S.J.B.*, the Superior Court of New Jersey held that a homosexual relationship did constitute adultery for the purposes of construing the New Jersey divorce statutes.²¹⁰ It is therefore to be presumed that this will also apply equally to the dissolution of civil unions.

Jurisdiction will be founded if either party was a bona fide resident of New Jersey both at the time the cause of action arose, as well as at the time of the commencement of the action. However, no action may be filed for any cause other than adultery, unless one of the parties has been a bona fide resident for the year preceding the commencement of the action.²¹¹

3.3.4. Vermont

On 20th December 1999, the Vermont Supreme Court held in *Baker v. State*²¹² that refusing to provide committed same-sex partners with the benefits and privileges granted to married couples violated the Vermont Constitution’s Common Benefits Clause. In response to the court’s decision, the Vermont legislature enacted a law permitting same-sex couples to enter into civil unions. As a result, Vermont became the first state in the United States to enact a registration scheme akin to marriage specifically for the registration of same-sex couples.

3.3.4.1. Establishment

Vermont also adheres to both facets of the principles of exclusivity, ensuring that civil unions in the state are only possible between two persons who are not already involved in another civil union or marriage.²¹³ Both parties must be of the same-sex and must have attained the age of 18.²¹⁴ There are no residency requirements imposed on aspirant civil union partners.²¹⁵ Those prohibited from registering a civil union on the basis of their affinity or consanguinity are identical to those prohibited from entering into a marriage.²¹⁶

3.3.4.2. Rights and duties

Despite the fact that Vermont has chosen to enumerate all those rights and duties which are extended to partners in a civil union,²¹⁷ it has actually extended all state benefits to such couples. The first paragraph of §1204 states that ‘Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law, or any other source of civil law, as are granted to spouses in a

209 N.J. Rev. Stat. §37:1-32.5.

210 *S.B. v. S.J.B.*, 259 N.J. Super. 151, 609 A.2d 124 (N.J. Super Ct. 1992).

211 N.J. Rev. Stat. §2A:34-10.

212 170 Vt. 194, 744 A.2d. 864 (Vt. 1999).

213 15 Vt. Stat. Ann. §1202(1).

214 15 Vt. Stat. Ann. §1202(3), in conjunction with 18 Vt. Stat. Ann. §5163(a).

215 18 Vt. Stat. Ann. §5160(a): ‘The license shall be issued by the clerk of the town where either party resides or, if *neither is a resident* of the state, by any town clerk in the state’. (emphasis added).

216 15 Vt. Stat. Ann. §1203(a) and (b), compared with 15. Vt. Stat. Ann. §1 and §2.

217 15 Vt. Stat. Ann. §1204.

marriage'. This catch-all provision would appear to negate the need to then continue to specify all the individual rights and duties incumbent on civil union partners.

3.3.4.3. Termination

Also as regards the dissolution of the relationship, Vermont applies the law applicable to married couples *mutatis mutandis* to civil unions. As a result those wishing to dissolve their civil union in Vermont will have to show evidence satisfying one of the divorce grounds in 15 Vt. Stat. Ann. §551. This list includes 'adultery', which in Vermont has not yet been defined as either including or excluding 'homosexual activity'.²¹⁸ As a result, it is unclear whether a same-sex civil union partner can rely on the 'adultery' ground if his or her partner has engaged in 'extra-civil-union sex' with someone of the same sex.

4. Marriage

4.1. Massachusetts

'The question before us is whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry. We conclude that it may not. The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens.'²¹⁹

Against this background, the Supreme Judicial Court of Massachusetts went on to hand down its momentous decision in the 2003 case of *Goodridge v. Department of Public Health*.²²⁰ Interpreting the legislature's intent using the plain meaning of the marriage licensing statutes, the court recognised 'the long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of a woman and a man. But that history cannot and does not foreclose the constitutional question.'²²¹

After pointing out that 'civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition',²²² the court sketched the most important of the tangible and intangible benefits associated with marriage. According to the state constitution 'both the equality and liberty [provisions] guarantee, [that the] regulatory authority must, at very least, serve a legitimate purpose in a rational way; a statute must bear a reasonable relation to a permissible legislative objective.'²²³ The court concluded that the marriage ban does not meet even this lowest standard of constitutional review, so there is no need to consider whether the case merits a stricter judicial scrutiny.²²⁴

The Department of Public Health provided three rationales for the ban: '(1) providing a 'favorable setting for procreation'; (2) ensuring the optimal setting for child rearing, which the

218 This despite that in other jurisdictions this has been restricted, *e.g.* *Cohen v. Cohen*, 200 Misc. 19, 103 N.Y.S.2d 426 (N.Y. Super Ct. 1951). The statutory definition of adultery was later expanded so as to include homosexual activity.

219 *Goodridge v. Department of Public Health*, 440 Mass. 309, 312 (Mass. 2003).

220 *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003). In a later opinion, the Supreme Judicial Court also held that in implementing this decision, the Massachusetts legislature could not suffice with introducing civil unions: *Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565 (Mass. 2004).

221 *Ibid.* at 320.

222 *Ibid.*

223 *Ibid.* at 329.

224 *Ibid.* at 331.

department defines as ‘a two-parent family with one parent of each sex’; and (3) preserving scarce State and private financial resources.’²²⁵

Taking these in turn, the court first analysed that with the civil marriage laws, ‘it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage.’²²⁶ Subsequently, the court explained that although protecting the welfare of children is a paramount State policy, ‘[r]estricting marriage to opposite-sex couples (...) cannot plausibly further this policy’ of creating an optimal setting for child rearing because, among many other stated reasons, ‘[t]he “best interests of the child” standard does not turn on a parent’s sexual orientation or marital status.’²²⁷ Indeed, the court finds that ‘excluding same-sex couples from civil marriage will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of “a stable family structure in which children will be reared, educated, and socialized”.’ Finally, the court dismissed the logic behind the Department’s third rationale stating that a ban on same-sex marriage bears no rational relationship to the goal of economy, stating that it ignores the reality of many same-sex couples, including the named plaintiffs, who have children and other dependents in their care.²²⁸

After recognising that the decision marked ‘a significant change in the definition of marriage’,²²⁹ the court gave reassurance that the definitional change would ‘not disturb the fundamental value of marriage’²³⁰ in U.S. society. The court also rejected the argument that expanding civil marriage in Massachusetts would lead to interstate conflict. Just as Massachusetts won’t dictate to other states how they should respond to this decision, ‘neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution’.²³¹ In the end, the court construed ‘civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others.’²³² As regards all conditions with respect to the establishment of a same-sex marriage, the rights and duties incumbent of the couple and the method applicable termination procedures, no difference is discernible between same-sex and opposite-sex marriages. Nonetheless, one important distinction is worth noting, namely that of residency.

According to the Supreme Judicial Court of Massachusetts, three categories of states must be distinguished from each other when determining the residency requirements for entry into a same-sex marriage in Massachusetts.²³³ The first category of states are those states whose marriage licencing laws say that a marriage entered into by a same-sex couples at home would be void.²³⁴ Any same-sex marriage celebrated by a resident from one of these states will be void in Massachusetts. The second category includes those states referred to as ‘prohibited home states’. In these states, marriage licencing laws prohibit same-sex couples from marrying, but do

225 *Ibid.*

226 *Ibid.*

227 *Ibid.* at 334.

228 *Ibid.* at 335.

229 *Ibid.* at 337.

230 *Ibid.*

231 *Ibid.* at 340.

232 *Ibid.* at 343. The dissent in the case rests on a standard, plain meaning analysis (*ibid.* at 351): ‘The power to regulate marriage lies with the Legislature, not with the judiciary.’

233 *Cote-Whitacre v. Department of Health*, 446 Mass. 350, 844 N.E.2d 623 (Mass. 2006).

234 Although the Supreme Judicial Court only dealt with one State, namely Maine, it is more than likely that 15 states satisfy this definition, namely Arizona, Arkansas, Delaware, Indiana, Kansas, Kentucky, Minnesota, Mississippi, Montana, Ohio, South Carolina, Tennessee, Texas and Utah.

not go so far as to declare such marriages to be ‘void’.²³⁵ Any same-sex marriage celebrated by a resident from one of these states will be voidable in Massachusetts. According to *Cote-Whitacre v. Department of Health*, same-sex couples who live in states from either of these two categories will not be permitted to marry in Massachusetts, unless they indicate an intent to reside in Massachusetts after marrying.²³⁶ The third category includes those states whose marriage licencing laws are ‘silent or ambiguous’ on the question of marriage because they do not expressly allow or expressly prohibit same-sex couples from marrying there. Thus far, it has been determined that Rhode Island does not prohibit same-sex marriages and that New York did not prohibit such marriages until the 6th July 2006.²³⁷ In July 2007, the Massachusetts Department of Public Health also determined that New Mexico fits this definition.²³⁸

4.2. California

On the 15th May 2008 the Californian Supreme Court finally gave its decision in the *In re Marriage Cases*. This case was a consolidated appeal of no fewer than six individual cases.²³⁹ The main legal question put before the Supreme Court was whether it was unconstitutional to differentiate the formalised union of a different-sex couple, regarding this as a ‘marriage’ and the formalised union of a same-sex couple, regarding this as a ‘domestic partnership’.²⁴⁰ Although the Court acknowledged that there were indeed still minor differences between marriage, on the one hand, and domestic partnership, on the other,²⁴¹ it found that these two institutions existed as functional equivalents of each other.²⁴²

In answering this question the Court needed to determine the nature and scope of the right to marry. Referring to previous decisions of the Court,²⁴³ the Supreme Court held that the right to marry is a fundamental constitutional right embodied in the Californian Constitution; a right that has over the decades changed with regards to its scope.²⁴⁴ The Court, referring to *Perez*, noted that the examination of the right to marry must focus on ‘the nature and substance of the interests’ and explicitly referred to the repeated recognition that the right to marry represents ‘the right of an individual to establish a legally recognised family with the person of one’s choice,

235 Although the Supreme Judicial Court only deals with Connecticut, Vermont and New Hampshire, it is more than likely that 32 states satisfy this definition, namely Alabama, Alaska, California, Colorado, District of Columbia, Florida, Georgia, Hawai’i, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Missouri, Nebraska, Nevada, New Jersey, New York (from 6th July 2006 onwards), North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

236 *Cote-Whitacre v. Department of Health*, 446 Mass. 350, 359-361 (void home states) and 361-364 (prohibited home states).

237 *Cote-Whitacre v. Department of Health*, Case No. 04-2656, 2006 Mass. Super. Lexis 670 (Mass. Super Ct. 2007). This is a result of the decision of the New York Court of Appeals in *Hernandez v. Robles*, *supra*.

238 See http://www.mass.gov/Eeohhs2/docs/dph/vital_records/impediment.pdf

239 *City and County of San Francisco v. State of California* (A110449 [Super. Ct. S.F. City & County, No. CGC-04-429539]); *Tyler v. State of California* (A110450 [Super. Ct. L.A. County, No. BS-088506]); *Woo v. Lockyer* (A110451 [Super. Ct. S.F. City & County, No. CPF-04-504038]); *Clinton v. State of California* (A110463 [Super. Ct. S.F. City & County, No. CGC-04-429548]); *Proposition 22 Legal Defense and Education Fund v. City and Council of San Francisco* (A110651 [Super. Ct. S.F. City & Council, No. CPF-04-503943]); *Campaign for California Families v. Newsom* (A110652 [Super. Ct. S.F. City & County, No. CGC-04-428794]).

240 *In re Marriage Cases*, No. S14799 (Cal. May 15, 2008).

241 Nine differences have been identified: (1) common residence requirement for domestic partners, not applicable to spouses, (2) application for lifting of the minimum age requirement not possible for domestic partners, (3) to register a domestic partnership the couple must file a declaration with the Secretary of State, whilst spouses must obtain a marriage licence from the county clerk, (4) possibility for confidential marriage in which marriage certificate and date of the marriage are not made public, not applicable to domestic partners, (5) summary dissolution for domestic partnership initiated by filing joint notice of termination with Secretary of State, for summary dissolution of a marriage is petitioned to the superior court, (6) residency requirements for dissolution are different providing for a *forum necessitates* for domestic partners, (7) differences with respect to the State Public Employee’s Retirement System, (8) difference in interpretation with regards the property tax exemption for unmarried spouse of a veteran and (9) putative spouse doctrine does not apply to domestic partners.

242 *In re Marriage Cases*, No. S14799 (Cal. May 15, 2008), p. 45.

243 *In re Marriage Cases*, No. S14799 (Cal. May 15, 2008), pp. 49-51.

244 The Court refers particularly to the amendments to divorce, the minimum age requirements, the equalisation in the minimum age requirements and so forth in illustrating that the concept of marriage is not static, *id.*, pp. 25-26.

and, as such, is of fundamental significance both to society and to the individual'.²⁴⁵ However, the Court also recognised that the role of civil marriage is not only to serve the interests of society. Instead, it recognised that the right to marry is a basic, constitutionally protected right, a fundamental right of all free men and women.

On this basis the Court found that the right to marry is an integral component of an individual's *personal autonomy* interest protected by the *privacy* provision of Article I, Section 1 and an individual's *liberty interest* protected by the *due process* clause of Article I, Section 7. Although the Court acknowledges that state marriage has always been limited to a union between one man and one woman, it also admits that tradition alone cannot be regarded as a sufficient justification for perpetuating (without examination) the restriction or denial of a *fundamental constitutional right*.

In moving to the particular case at hand, the Court argues that the State can transformed its own appreciation and understanding of homosexuality, admitting that the State now recognises that gay individuals are fully capable of entering into 'the kind of loving and enduring committed relationships that may serve as the foundation of a family'.²⁴⁶ Furthermore, the court refused to accept the contentions of the Proposition 22 Legal Defense Fund and the Campaign for Californian Families that the right to marry was inextricably linked to the possibility to procreate. The Court stated,

'Men and women who desire to raise children with a loved one in a recognised family but who are physically unable to conceive a child with their loved one have never been excluded from the right to marry. Although the Proposition 22 Legal Defence Fund and the Campaign assert that the circumstances that marriage has not been limited to those who can bear children can be explained and justified by reference to the State's reluctance to intrude upon the privacy of individuals by inquiring into their fertility, if that were an accurate and adequate explanation for the absence of such a limitation it would follow that in instances in which the State is able to make a determination of an individual's fertility without such an inquiry, it would be constitutionally permissible for the State to preclude an individual who is incapable of bearing children from entering into marriage. There is, however, no authority whatsoever to support the proposition that an individual who is physically incapable of bearing children does not possess a fundamental constitutional right to marry.'²⁴⁷

Having established that same-sex couples were guaranteed the same substantive constitutional rights as different-sex couples to choose one's life partner and enter with that person into a committed, officially recognised and protected family relationship that enjoys all the constitutionally based incidents of marriage, the court moved on to the core question of whether it was legitimate for the State to assign different names to the individual institutions (*i.e.* marriage for different-sex couples and domestic partnership for same-sex couples). In drawing inspiration from the Perez case involving the prohibition on interracial marriages, the court held that in drawing a distinction in the name of the institutions, the State was withholding from same-sex couples the 'historic and rightly respected designation of marriage'.

245 *In re Marriage Cases*, No. S14799 (Cal. May 15, 2008), p. 57.

246 *In re Marriage Cases*, No. S14799 (Cal. May 15, 2008), p. 68.

247 *Ibid*, pp. 72-73.

Surprisingly the court in assessing the equal protection claim under the Californian Constitution argued that the claim must be analysed on the basis of the strict scrutiny test and not according to the rational basis standard of review.²⁴⁸ What is perhaps even more surprising that this was accepted with regards to sexual orientation discrimination. This therefore places sexual orientation discrimination on the same level as sex and race discrimination in California; perhaps the most groundbreaking element of the decision, alongside the factual opening up of civil marriage to same-sex couples. In reaching the conclusion that the strict scrutiny standard must be applied the court first had to identify why sexual orientation was a ‘suspect classification’. Reference was made to the Californian Court of Appeal’s decision in *Sail’er Inn, Inc. v. Kirby*,²⁴⁹ in which a three criteria test was outlined, in that the defining characteristic must

- (a) be based upon an ‘immutable trait’;
- (b) bear no relation to a person’s ability to perform or contribute to society, and
- (c) be associated with a stigma of inferiority and second class citizenship.

Although the Supreme Court agreed with the Court of Appeal’s decision in that the last two criteria were indeed satisfied, it disagreed with the Court of Appeal’s reasoning with regards to the first criterion.²⁵⁰ The majority Supreme Court argued that regardless of whether sexual orientation is immutable, immutability is not a requirement for suspect classifications, since religion is also regarded as a suspect classification and religion is not immutable.

In applying the strict scrutiny test, the Court forced the State to provide a constitutionally compelling state interest in treating the two categories of individuals differently. Furthermore, the State must also show that the measures taken are not only related to that interest, but also that they are necessary to further that interest. In defending the disparate treatment, the State argued that the term ‘marriage’ has traditionally been defined as a union of one man and one woman. The court vehemently rejected this argument stating ‘if we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority race and toward women over the past half-century, it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that frequently is not recognised or appreciated by those not directly harmed by those practices or traditions’.²⁵¹ The court eventually concluding that the State interest did not satisfy the constitutional compelling test since it was not clear that the measure taken was necessary to protect those rights currently enjoyed by those people who may marry; ‘extending access to the designation of marriage to same-sex couples will not deprive any opposite-sex couple or their children of any of the rights and benefits conferred by the marriage statutes.’²⁵²

Although the Court holds that the necessary remedy to is strike Section 300 from the Californian Family Code and open civil marriage to same-sex couples, the Court does not provide any answer to question of what should happen with the current domestic partnerships and the institution of domestic partnership as such. Since the institution is also currently used by

248 According to American constitutional analysis, traditionally two standards have been applied by the California courts in evaluating challenges made to legislation under the equal protection clause: (a) the rational basis standard and (b) the strict scrutiny standard. Over the course of time a third standard of review has developed in California entitled the ‘intermediate scrutiny standard’ (this is equivalent to standard applied by the U.S. Supreme Court in cases of sex or illegitimacy).

249 (1971) 5 Cal.3d. 1, at 18-19.

250 The Court of Appeal had argued that sexual orientation was not immutable and therefore sexual orientation was not a suspect classification, and thus not entitled to strict scrutiny analysis.

251 *In re Marriage Cases*, No. S14799 (Cal. May 15, 2008), p. 115.

252 *Ibid.*, p. 117.

different-sex couples over the age of 62, it is unclear what the State will do with regards this point. Will California become similar to another New Jersey retaining domestic partnership for the elderly? Or will California progress towards the Massachusetts model and retain one institution open to all?

5. Recognition for out-of state relationships

5.1. *New Mexico*

The validity in New Mexico of a same-sex marriage contracted in Massachusetts has not been challenged. New Mexico has not passed a constitutional amendment restricting marriage to opposite-sex couples, nor has it statutorily restricted marriage to such couples. The question therefore remains open.

5.2. *New York*

New York is one of the five states not to have enacted any form of statutory restriction with regards same-sex marriage. As a result, the question currently remains open as to whether same-sex marriages legally performed in other jurisdictions will be recognised in New York. In 2004, both New York State Comptroller Hevesi,²⁵³ and New York Attorney General Spitzer, issued opinions affirming the belief that out-of-state same-sex marriages should be recognised as valid in New York with respect to the state's retirement system and for all areas of the law, respectively.²⁵⁴ Not long after these opinions, New York City Mayor Bloomberg also requested the state's five pension schemes to recognise those involved in same-sex marriages, civil unions and domestic partnerships for the purposes of city employee benefits. All three of these decisions are, however, being challenged in the courts.

In February 2008, the Fourth Department of the New York Appellate Division ruled that a same-sex marriage in Canada should be recognised in New York. In *Martinez v. County of Monroe*, the court reasoned as follows. Firstly, out-of-state opposite-sex marriages that would not have been legal in New York are only refused recognition if recognising them would violate the state's public policy. On this basis out-of-state same-sex marriages must be held to a similar standard.²⁵⁵ It is therefore essential to determine whether the recognition of same-sex marriages validly concluded in another jurisdiction is against the public policy of New York. In concluding that same-sex marriage recognition is not against the public policy of New York, the Appellate Division reversed the trial judge's ruling that Monroe Community College did not have to extend health benefits to an employee's same-sex spouse. Monroe County subsequently announced its intention to move for leave to appeal the decision to the Court of Appeals. Nonetheless, in the meantime, the decision has already begun its precedential working. Less than a month later, in *Beth R. v. Donna M.*, State Supreme Court Justice Drager issued a divorce licence to a same-sex couple married in Canada, citing *Martinez v. County of Monroe* as authority for the basis of her decision.²⁵⁶

253 See references in *Godfrey v. Hevesi*, 238 N.Y.L.J. 55.

254 The opinion was actually signed by the New York Solicitor General, Caitlin Halligan, although released via the Attorney General's Office, 2004 Op. Att'y Gen. No. 1 2004-1 (3rd March 2004). For the full text, see http://www.oag.state.ny.us/press/2004/mar/mar03a_04.html.

255 Case No. 06-02591, Civ. 1562, 2008 NY Slip Op 909 (N.Y. App. Div. 4d Dep't. 2008). This follows decision of the Supreme Court of New York, Albany County in *Godfrey v. Hevesi*, op. cit. where a case was brought against the State Comptroller for his decision to recognise out-of-state marriages for the purposes of the State retirement system. The court held that it was not bound by *Hernandez v. Robles*, because that dealt with the in-state celebration of same-sex marriages, nor by *Langan v. St. Vincent's Hospital*, because that dealt with the recognition of out-of-state civil unions. See also *Godfrey v. Spano*, 15 Misc. 3d 809, 836 N.Y.S.2d 813 (2007).

256 Case No. 350284/07.

Alongside the debate surrounding the recognition of same-sex marriages, case law has begun to develop on the basis of the recognition of out-of-state civil unions. In *Langan v. St. Vincent's Hospital of New York*, the claimant and the decedent had entered into a civil union in Vermont. The decedent was struck by a car while he was working for the claimant's insurance business, resulting in a serious leg injury. Whilst undergoing surgery on his leg, the decedent died. The claimant commenced a wrongful death action against the hospital where the surgery was performed. The Second Department of the Appellate Division held that a civil union partner could not sue the hospital to recover damages for wrongful death because he did not qualify as a surviving spouse,²⁵⁷ thus reversing the original decision of the trial judge.²⁵⁸ The claimant also filed for worker's compensation as the decedent's spouse pursuant to §16(1-a), Worker's Compensation Law. The Third Department of the Appellate Division rejected his claim stating that principles of comity did not require the New York courts to recognise a Vermont civil union.²⁵⁹

Furthermore, debate has also been intense regarding the right of New York residents to enter into same-sex marriages in New York.²⁶⁰ In 2004, the mayor of the village of New Paltz was charged with solemnizing marriages for individuals who had not obtained marriage licences.²⁶¹ The mayor argued that the licensing requirement in the New York statute was unconstitutional and thus asked for dismissal of the charges in the interests of justice. In dismissing the charges Justice Katz noted the permanent injunction issued by Supreme Court Justice Kavanagh to prevent the issuance of more licences, as well as the constitutional implications of denying same-sex couples licences. In 2006, the Court of Appeals of New York (New York's highest court) held that the Constitution of New York does not compel the state to issue marriage licences to same-sex couples.²⁶² More recently, although a Senate Bill seeking to legalise same-sex marriage died in committee, an identical bill submitted to the House is now up for third reading, after being passed 85-65 votes.²⁶³

5.3. Rhode Island

In the absence of a state DOMA, the question has been posed whether Rhode Island will recognise same-sex marriages from other states, despite the fact that its own residents cannot lawfully marry in their own state. On the 20th February 2007, Attorney General Lynch issued a public statement in which he declared that same-sex marriages lawfully concluded in Massachusetts would be entitled to recognition in Rhode Island.²⁶⁴ In arriving at his conclusion, Attorney General Lynch identified the *public policy* of Rhode Island with respect to marriage, stating that

257 25 A.D.3d 90, 802 N.Y.S.2d 476 (N.Y. App.Div. 2d Dep't. 2005).

258 196 Misc.2d. 440, reversed (2003).

259 849 N.Y.S.2d 105 (N.Y. App. Div. 3d Dep't. 2007).

260 In *Matter of Shields v. Madigan*, 5 Misc. 3d 901, 783 N.Y.S.2d 270 (N.Y. Sup. Ct. 2004), 20 petitioners were denied marriage licences and sought an order directing the town clerk to issue marriage licences. In noting the constitutional implications of this issue, the court held that 'marriage is a legal status subject to the control of the legislature ... It is the legislature that is the appropriate body to engage in the studied debate that must necessarily precede the formulation of social policy with respect to same-sex marriage and the decision to extend any or all rights and benefits associated with marriage to same-sex couples' (783 N.Y.S.2d 270, 277). The decision was affirmed in 2006, *Matter of Shields v. Madigan*, 32 A.D.3d 1036, 820 N.Y.S.2d 890 (N.Y. App. Div. 2d Dep't. 2006).

261 *People v. West*, 4 Misc. 3d 605, 780 N.Y.S. 2d 723 (N.Y. Just. Ct. 2004).

262 *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (N.Y. 2006). The decision to permit same-sex couples to marry, it was held, is a decision that must be taken by the legislature.

263 A.B. 8590 (2007), and the original Senate Bill: S.B. 5884 (2007).

264 R.I. Op. Att'y Gen. 2/20 (2007).

‘Rhode Island has not enacted any legislation prohibiting same-sex marriages or stating a public policy against same-sex marriages even though they have been validly performed in neighbouring Massachusetts for approximately three years.’²⁶⁵

Furthermore, Rhode Island had passed legislation specifically enunciating its affirmative policy to prevent discrimination on the basis of sexual orientation. Taken together with other favourable conditions, such as the extension of health insurance benefits to domestic partners of state employees²⁶⁶ and the courts recognition of *de facto* parental status for same-sex non-biological parents,²⁶⁷ Lynch comes to the conclusion that same-sex marriages are not against the public policy of Rhode Island. Accordingly on the basis of the principles of full faith and credit and comity, a same-sex marriage validly concluded elsewhere will be recognised in Rhode Island. Whether this treatment extends to the recognition of civil unions, domestic partnerships and reciprocal benefits is unclear.

Although not technically binding, the opinion does provide a clear idea of the relevant legal principles involved specifically addressing the legal situation in Rhode Island. Furthermore, it makes a strong argument for supporting the view that there is nothing in the public policy of Rhode Island that would prevent the recognition of same-sex marriages. To add further fuel to the fire, the legislature has also been confronted with a number of specific attempts to either legalise same-sex marriages in the state or introduce a form of civil union.²⁶⁸

This open and liberal attitude has, however, recently been thrown into doubt as a result of the Supreme Court decision in *Chambers v. Ormiston*.²⁶⁹ The case centred around a female same-sex couple legally married in Massachusetts. They filed for divorce in Rhode Island, and the Supreme Court had to determine whether or not they had subject-matter jurisdiction. In the 3-2 decision, the court held that in determining the meaning of the word ‘marriage’ in the divorce statutes, reference had to be made to the ordinary meaning of the word ‘at the time of enactment’. In so doing, the court came to the conclusion that the ordinary meaning of the word marriage was to be understood as a legal union between ‘one man and one woman’. As a result, the court held that it did not have subject-matter jurisdiction to grant a divorce. The effects of this case have yet to be determined, however, it is to be hoped that the heed will be taken of the court’s reluctance to extent the ambit of the holding beyond the material facts of the case at hand.²⁷⁰

6. Comparative remarks

This article has attempted to provide a (brief) summary of the various statutory registration schemes currently available across the U.S. In doing so, the complexity of the substantive law situation is abundantly clear. This section compares the variety of registration schemes currently available throughout the United States. Despite the apparent lack of uniformity, a number of tentative conclusions and possible trends can, however, be identified.

265 R.I. Op. Att’y Gen. 2/20 (2007), p. 4.

266 R.I. Gen. Laws §36-12-1.

267 *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

268 S.B. 202 (2007) and H.B. 6081 (2007): Two bills in favour of same-sex marriage, and H.B. 5356 (2007), H.B. 5643 (2007) and S.B. 893 (2007): Three bills restricting the definition of marriage to opposite-sex couples and introducing civil unions. S.B. 687 (2007) and H.B. 6159 (2007): Two bills with the sole aim of restricting the definition of marriage to opposite-sex couples.

269 *Chambers v. Ormiston*, 935 A.2d 956 (R.I. 2007).

270 *Chambers v. Ormiston*, 935 A.2d 956, conclusion (R.I. 2007).

6.1. Establishment

In comparing the eligibility criteria for entry into the various relationship schemes provided for in the USA, a number of similarities and differences are evident. The overwhelming emphasis is, however, on the diversity of the solutions. No two schemes are entirely identical, although this is often the result of differences in the marriage laws between the states rather than the result of differences between the ethos of the registration schemes themselves.²⁷¹ This section will focus on the five separate elements relating to the establishment or formation of the relationships, namely (i) the principle of exclusivity, (ii) the sex of the parties, (iii) the age of the parties, (iv) relevant residency requirements, and (v) the prohibited degrees of relationship.²⁷²

The only core principle common to all jurisdictions at this stage appears to be in relation to the principle of exclusivity. As mentioned above, the principle of exclusivity is comprised of two requirements. Firstly, only two persons may be involved in the relationship at any one time (the so-called principle of monogamy) and secondly that neither party to the relationship may already be involved in a marriage or other registered relationship (the so-called principle of exclusiveness).²⁷³ Thus far, no jurisdiction has permitted those already involved in a marriage or registered relationship to enter into another registered relationship,²⁷⁴ prior to terminating the previous relationship (the principle of exclusiveness). Moreover, no jurisdiction has yet to allow more than two persons to register a relationship (the principle of exclusiveness). All the surveyed jurisdictions adhere to this fundamental principle.

However, complete consistency ceases here. With respect to the sex of the parties, a variety of different approaches can be discerned. In Hawai'i, Maine and the District of Columbia the registration scheme is open to different-sex couples regardless of age, whereas in California, Washington, and the domestic partnership scheme in New Jersey, different-sex couples are only permitted to register if either one of the partners has attained the age of 62 (California and Washington) or both have attained this age (New Jersey). In the other States, namely Oregon, Connecticut, New Hampshire, Vermont, as well as the civil union scheme in New Jersey, registration is restricted to same-sex couples. Hence, in comparing American jurisdictions, it is impossible to disentangle the age and sex requirements from each other; one is completely intertwined in the other.²⁷⁵ Although no jurisdiction permits registration below the age of 18, in California, Washington and New Jersey (although only with the domestic partnership regime), a lower age limit of 62 has been introduced for different-sex partner registration.²⁷⁶ The reason for this criterion is linked to the loss of social security benefits for widows and widowers upon remarriage. If a widow or widower remarries after having reached the age 62, he or she will lose his or her entitlement to social security benefits. In these states, registration therefore offers a possibility for elderly couples to enter into a secure relationship with their new partner, without risking the loss of important social security benefits. One other interesting point to note regarding the age limits imposed on aspirant registered partners is that they are not always identical to the equivalent ages imposed on aspirant spouses. For example in New Hampshire and Oregon the age to register a civil union and domestic partnership respectively is higher than the equivalent

271 For the difference between external and international consistency see I. Curry-Sumner, *All's well that ends registered?*, 2005, pp. 257-259.

272 The formal procedure to register a partnership has been excluded from this comparison, since this section focuses on the *eligibility* criteria, rather than the procedural mechanism for registration.

273 For a fuller description of this principle, see I. Curry-Sumner, *All's well that ends registered?*, 2005, pp. 42 and 259-260.

274 At this point ignoring the loophole created in Washington regarding opposite-sex couples over the age of 62.

275 This is a peculiarly American phenomenon, having not at all been witnessed with regards a similar comparison of European jurisdictions:

I. Curry-Sumner, *All's well that ends registered?*, 2005, Chapter VIII.

276 In New Jersey this age limit also applies to same-sex registration of a domestic partnership.

ages imposed in the marriage laws.²⁷⁷ The reason for this could stem from the fact that the marital age limits are inherently linked to the ability to procreate (the age limit being linked to the age at which boys and girls are able to conceive children). Since these factors do not relevant in same-sex relationships, the reasons for the lower age limit do not apply, and hence the age is set at the age of majority.

Diversity is also present in the relevant residency requirements imposed on aspirant registered partners. Nonetheless, a certain trend is apparent. Every jurisdiction that has introduced a domestic partnership regime has also imposed a form of residency requirement, either by means of a common or shared residency requirement (California, Washington and District of Columbia), an individual residency requirement (Oregon) or a one year joint communal residency requirement (Maine). On the other hand, those states that have introduced reciprocal benefits or civil unions have not imposed any form of residency requirement, in line with the marriage laws in these states (Hawai'i, Connecticut, New Hampshire, New Jersey and Vermont). It could be that this distinction reflects a difference in the nature of the institutions. Whereas domestic partnership focuses on a common household and domesticity of the relationship, civil union addresses the actual relationship between the parties and is not focused on the living arrangements of the parties. It is in this aspect interesting to note that when Oregon changed the name of its relationship bill from 'civil union' to 'domestic partnership', a residency requirement was introduced.²⁷⁸ Whether or not this can be regarded as a fundamental and inherent difference between these jurisdictions is, however, highly debatable. It is possible, the difference is simply the result of coincidence.

Regarding restrictions to the prohibited degrees of relationship, only Hawai'i and the District of Columbia permit those unable to get married because they are relatives to register their relationship. All other jurisdictions (California, Maine, Oregon, Washington, Connecticut, New Hampshire, New Jersey and Vermont) impose the same restrictions regarding degrees of relationship to registered relationships as are applied to marriages.²⁷⁹

Nonetheless, despite this overall non-uniform picture, if one looks at these those relationships bearing the same name, one is able to distil certain patterns or trends. There appears to be three distinct state groupings:

1. states that have introduced civil union statutes (CT, NH, NJ, VT, [OR]);
2. states that have introduced domestic partnerships statutes from same-sex couples and different-sex couples over the age of 62 (CA, NJ, WA);
3. states that have done neither of the above (HI, DC, ME).

In examining the first group of states, although the initiative underlying the establishment of civil unions is very different in these four states, since two registry systems were pre-empted by a judicial decision (New Jersey and Vermont) and two were the result of legislative initiatives (Connecticut and New Hampshire), the end results are very similar. Ultimately the aim of the legislation can be extrapolated from the original aims surrounding creation of the legislation. All

277 New Hampshire: Civil unions are permitted once parties have attained 18 years of age; marriages are permitted from 14 years of age for males and 13 for females. Oregon: Marriages are permitted from 17 years of age, domestic partnerships from 18.

278 Senate Bill 1073, section 1: 'Civil union' means a civil contract that is solemnized in accordance with ORS 106.150 and that it entered into in person between two individuals of the same sex who are at least 17 years of age and who are otherwise capable', compared with House Bill 2007, section 3: 'Domestic partnership' means a civil contract entered into in person between two individuals of the same sex who are at least 18 years of age, who are otherwise capable *and at least one of whom is resident in Oregon.*' (emphasis added).

279 At this point, the small difference noted in New Hampshire is regarded as so insignificant so as not to necessitate mention here.

those states to have introduced civil unions have done so on the same basis, namely by creating ‘a state-regulated union created alongside marriage restricted to same-sex couples in which both parties have attained the age of 18 and are not related to each other within the prohibited degrees of relationships set forth in statute’.²⁸⁰ In *Baker v. Vermont* and *Lewis v. Harris*, the Vermont and New Jersey Supreme Courts respectively held that it was unconstitutional to deny same-sex couples the rights and benefits of marriage. The question was left open whether marriage would be opened to same-sex couples, or a new institution would be created providing the same rights and benefits as marriage and in the same manner. In Connecticut and New Hampshire, the legislative intent was to create a registry scheme permitting ‘same-sex couples to have the same rights, responsibilities and obligations as married couples’.²⁸¹

In the jurisdictions that have introduced a domestic partnership scheme open to same-sex couples and different-sex couples over the age of 62 (*i.e.* California, New Jersey and Washington), a similar belief lay behind the original enactment of the statute. Although wanting to address the rights of same-sex couples, the legislature in all of these states found it politically difficult to introduce a registry scheme that would be restricted to same-sex couples. However, on the other hand, opening the scheme to different-sex couples resulted in other criticism since it would provide a competitive alternative to marriage for different-sex couples. In the end these states have all opted for a compromise solution. All same-sex couples may register their relationship, as may those different-sex couples over the age of 62 who wish to avoid the negative effects of remarriage on their social security benefits. In making this compromise, the fundamental argument for enacting a non-marital registration scheme is different than in those states that have introduced civil unions. The fact that New Jersey has since restricted its domestic partnership scheme can be explained with reference to the enactment of civil unions in the state. Same-sex partners now have the opportunity to enter into a ‘marriage-like equivalent’ and are thus no longer granted the opportunity to enter into a domestic partnership, along identical lines to different-sex couples.

One state, Oregon, causes slight problems in relation to this threefold distinction. Oregon has created an institution which is entitled ‘domestic partnership’, yet in all facets it resembles a ‘civil union’. In this respect it is especially interesting to note that the original bill submitted to the Senate would have created a civil union registry.²⁸² However, the Republican-controlled House of Representatives effectively prevented the bill’s passage. The subsequent compromise was the submission of an almost identical bill with the words ‘domestic partnership’ replacing the words ‘civil union’. A rather cosmetic alteration since the content of the bill remained remarkably similar. One significant difference is the imposition of a residency requirement, expressly called for by the Republicans to ensure that Oregon would not become a home for same-sex registration tourism. In this respect, Oregon has really created a civil union in disguise.

The third and final category consists of Hawai’i, Maine and the District of Columbia. All three jurisdictions have created a relatively weak form of non-marital registered relationship, ensuring that only the minimum requirements are imposed on those wishing to register their relationship. In comparing these three jurisdictions, one is struck by the overwhelming non-uniformity of their schemes. Neither the reasons for the enactment of this legislation nor the choices made within this framework appear to resemble each other in any significant way.

280 This definition also applies in a European context, see See I. Curry-Sumner, *All’s well that ends registered?*, 2005, p. 343.

281 For Connecticut see, for example, the bill analysis accompanying Senate Bill 963. For New Hampshire see the title of the Act enacting civil unions.

282 See §3.2.4.

Table 1: Eligibility criteria for registration schemes

Registration Scheme / Jurisdiction		Sex	Age	Residency	Prohibited Degrees	Exclusivity
RB	Hawai'i	Same and different sex	>18	None	None	2 persons
DP	California	Same and >62 different sex	>18 (> 62 if different sex)	Common residence	Same as marriage	2 persons
	District of Columbia	Same and different sex	>18	Common residence	None	2 persons
	Maine	Same and different sex	>18	Common residence & >12 months in ME	Same as marriage	2 persons
	New Jersey	Same and different sex	>62	Common residence	Same as marriage	2 persons
	Oregon	Same-sex only	>18	One party resident in OR	Same as marriage	2 persons
	Washington	Same and >62 different sex	>18 (> 62 if different sex)	Common residence	Same as marriage	2 persons
CU	Connecticut	Same-sex only	>18	None	Same as marriage	2 persons
	New Hampshire	Same-sex only	>18	None	Same as marriage	2 persons
	New Jersey	Same-sex only	>18	None	Same as marriage	2 persons
	Vermont	Same-sex only	>18	None	Same as marriage	2 persons

Key: RB: Reciprocal Benefits; DP: Domestic Partnership; CU: Civil Union

6.2. Rights and duties

With regard to the rights and duties attributed to non-marital registered partners, little uniformity can be deduced. At the one extreme, states such as Massachusetts, California and New Hampshire have extended all the rights and duties granted to married couples to those involved in same-sex equivalents. At the other end of the extreme, states such as Michigan and Alaska have passed constitutional and statutory amendments that deny same-sex couples *any* of the benefits granted to married couples.

Restricting comparison to those states that allow for some form of registration, one is able to deduce the utilisation of two different techniques. Some states have chosen to use an *enumeration* method to extend rights and benefits, explicitly stating each right, benefit, duty and responsibility that is granted to same-sex registered couples. Other states have instead opted for the *exclusion* method whereby *all* rights are extended, unless explicitly proscribed.²⁸³ Table 2 provides an overview of the methods used.

283 See I. Curry-Sumner, *All's well that ends registered?*, 2005, pp. 298-299.

Table 2: Rights and duties of registration schemes

Registration Scheme / Jurisdiction		Method	Extent
RB	Hawai'i	Enumeration	Weak
DP	California	<2005: Enumeration >2005: Exclusion	Strong
	District of Columbia	<2006: Enumeration >2006: Exclusion	Strong
	Maine	Enumeration	Weak
	New Jersey	Enumeration	Weak
	Oregon	Exclusion	Strong
	Washington	<2008: Enumeration >2008: Enumeration ²⁸⁴	Weak
CU	Connecticut	Exclusion	Strong
	New Hampshire	Exclusion	Strong
	New Jersey	Exclusion	Strong
	Vermont	Exclusion ²⁸⁵	Strong

Key: RB: Reciprocal Benefits; DP: Domestic Partnership; CU: Civil Union

Once again, three distinct groupings are discernible:

1. states that have introduced civil unions (CT, NH, NJ, VT, [OR]);
2. states that have introduced relationship schemes with weak benefits (HI, ME, NJ, WA);
3. states that have introduced domestic partnership with strong benefits (CA, DC).

The first category does not require much explanation. As already stated above, whether by virtue of a judicial decision or legislative proposal, the objective of all four pieces of legislation is to introduce a statutory institution identical (yet separate) to marriage, restricted to same-sex couples. If one also takes on board the previous discussion with regards to Oregon actually being a civil union state, then one could argue that with respect to the rights and duties attributed to non-marital registered partners, Oregon also adopts a 'civil union' approach.

The second category consists of those states that have introduced partnership schemes with only limited rights and duties. These states have thus opted for a very different type of relationship scheme. Despite the apparent clarity of this grouping, the background surrounding the introduction of each State's legislation is very different. In Hawai'i the reciprocal benefits scheme was introduced as a palliative response to the calls for same-sex marriage. In the other three states this was not the case. What is perhaps most interesting in this category is the apparent divergence of the state with respect to each other. Since the introduction of these schemes,

²⁸⁴ Legislative amendments in 2008 have resulted in more rights and duties being granted to domestic partners in Washington. However, these rights and duties are not extensive enough to constitute categorisation as 'strong registration'. For the precise categorisation criteria, see I. Curry-Sumner, *All's well that ends registered?*, 2005, pp. 291-298.

²⁸⁵ For a discussion of the exact method utilized by Vermont, see §3.3.4.2.

Hawai'i has restricted the rights and duties available, New Jersey has limited the eligibility criteria (but since introduced civil unions), Washington has extended the rights available, whereas Maine has not amended its legislation at all. This grouping is therefore perhaps the most fluid of all three groups and can therefore perhaps best be regarded as a 'temporary pit-stop' on the way to some other destination.

The third category is, however, slightly more difficult to explain. In these jurisdictions, the legislature has chosen to extend all the rights and benefits attributed to married couples to those involved in a non-marital registered relationship. In California and the District of Columbia this has been the result of legislative amendment in 2005 and 2006 respectively. In this respect, it is perhaps interesting to note that both jurisdictions *at the moment of creation* enumerated all the rights and duties attributed to domestic partners. However, both jurisdictions have gone on to extend those rights and duties to include all or virtually all the statewide rights and duties attributed to spouses. What is perhaps most remarkable is the fact that the legislatures in these states have not, however, tampered with the name of the institution.

6.3. Termination

As regards the termination of these relationship forms, little uniformity can be deduced. States such as Hawai'i simply require notification to be sent by certified mail, whereas other states such as California require (in some cases) the parties to prove in court that the relationship has irremediably broken down. One clear uniform trend is, nonetheless apparent: those states that have introduced civil unions have regulated the termination of these relationships on exactly the same basis as the existing divorce rules, with the ensuing oddities with respect to adultery! It would also appear (rather logically) that the weaker the relationship form, the easier the dissolution procedure is.

6.4. Theoretical framework

On the basis of European research, it has been suggested that there are three models that can be distinguished with respect to non-marital registered relationships, the so-called pluralistic, dualistic and monistic models.²⁸⁶ The question, which can therefore be posed, is whether this classification can also be applied to the registration schemes developed in the United States of America.

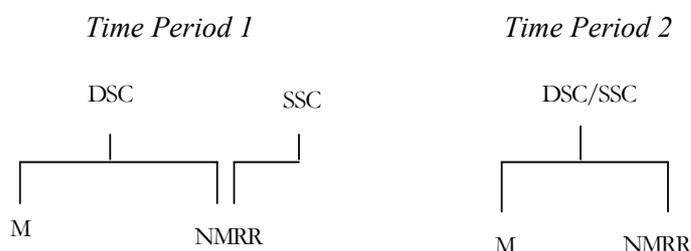
In the pluralistic model couples are offered two possibilities to formalise their relationship, irrespective of their gender, namely marriage or a form of non-marital registered relationship. It must, however, be noted that jurisdictions adhering to the pluralistic model tend to attain the end phase of this model by virtue of a two-stage process, thereby necessitating the division of the pluralistic model into two time-periods. The first time-period involves opening non-marital registration to both different and same-sex couples, whilst leaving marriage legislation entirely intact and unaltered. Once this has been achieved, the arguments for opening civil marriage to same-sex couples are strengthened, since the discrimination originally faced by same-sex couples, in not being able to marry, is simply replaced with a new form of discrimination; although different-sex couples are offered a choice of relationship forms, same-sex couples are not.²⁸⁷ It is irrefutable that the option for different-sex couples to register their relationship along identical lines to same-sex couples in The Netherlands and Belgium, for example, played an

286 I. Curry-Sumner, *All's well that ends registered?*, 2005, pp. 266-278, 286-291, and 307-313.

287 See, for example, Dutch Second Chamber, *Kamerstukken II* 1995-1996, 23 761, No. 7, p. 10.

important role in the pressure placed on these Governments to amend the laws prohibiting same-sex civil marriage.²⁸⁸ This model can be represented diagrammatically.

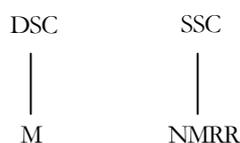
PLURALISTIC MODEL



Key: DSC: *Different-Sex Couples*, SSC: *Same-Sex Couples*
 M: *Marriage*, NMRR: *Non-Marital Registered Relationship*

On the other hand, some jurisdictions have preferred the dualistic model, where couples are only provided with one institutionalised relationship form dependent on their sex: different-sex couples are able to marry, whilst same-sex couples are entitled to register their non-marital relationship. Diagrammatically illustrated:

DUALISTIC MODEL



A third possibility is the monistic model whereby couples, irrespective of their gender are presented with one institutionalised relationship form.

MONISTIC MODEL



In relation to the American jurisdictions to have enacted registration schemes, it would appear that these models also hold true, although certain amendment is necessary. Massachusetts is perhaps the easiest State to begin with, having simply opened civil marriage to same-sex couples. It therefore has opted for the monistic model. Those states that have introduced civil unions (*i.e.*

²⁸⁸ It is, therefore, argued that over the course of time, France will gradually come to debate the issue of opening civil marriage to same-sex couples. This issue has in fact already been raised in the courts as well as politically.

Connecticut, New Hampshire, New Jersey and Vermont) have all done so in a similar fashion to those European states that have adhered to the dualistic model.

State	System	Model
Massachusetts	Marriage	Monistic
Connecticut	Civil Union	Dualistic
New Hampshire	Civil Union	Dualistic
Vermont	Civil Union	Dualistic
Oregon	Domestic Partnership	Dualistic
California	Marriage / Domestic Partnership	Dualistic (and >62) → monistic (?)
New Jersey	Civil Union / Domestic Partnership	Dualistic (and >62)
Washington	Domestic Partnership	Dualistic (and >62)
Maine	Domestic Partnership	Pluralistic (time phase 1)
District of Columbia	Domestic Partnership	Pluralistic (time phase 1)
Hawai'i	Reciprocal Benefits	Pluralistic (time phase 1)

One particular feature deserves particular attention, since it would appear that the terminology used to identify the relationship form is significant for the typology of the registration scheme in any particular State.

- (a) Those states to have opened up *marriage* to same-sex couples (Massachusetts and California) would appear to be monistic states (assuming that California will indeed implement the holding of the Californian Supreme Court decision and subsequently remove domestic partnership).²⁸⁹
- (b) 3 of the 4 States that have introduced *civil unions* have all done so on similar grounds, albeit for different reasons (Connecticut, New Hampshire and Vermont). In these States the legislature has created a parallel similar operating along identical lines to marriage. As already stated above, it is particularly interesting to note that Oregon, despite having introduced a form of domestic partnership, has done so along identical lines as those states to have introduced civil unions. This would appear to confirm the hypothesis that the terminology used to identify this new form of relationship is crucial. In Oregon the legislature refused to pass a Bill when it proposed to introduce *civil unions* (a term now associated with the dualistic system), whereas when the same Bill was reintroduced using the name *domestic partnership* (a term now associated with the pluralistic system), the objections were far less pronounced.
- (c) Those States that have introduced *domestic partnerships* and *reciprocal benefits* have done so according to one of two different paths.
 - (i) The first group consists of those States that have introduced domestic partnership for same-sex couples and different-sex couples over the age of 62 (California, New Jersey and Washington). It has been argued in this article that this group is, however,

²⁸⁹ An alternative solution is obviously that the Californian legislature opens civil marriage to same-sex couples, and at the same time opens domestic partnership to different-sex couples. Although theoretically possible, there would appear to be no indication that this route will be followed.

characterised by flux. All three States belonging to this group have, since enactment of domestic partnership, either introduced a new formalised registration system (New Jersey with civil union and California with marriage) or extensively expanded the rights and duties incumbent on the parties involved (Washington). If one considers the possibility for different-sex couples over the age of 62 as a specificity of these systems that should be removed from the analysis,²⁹⁰ one is left with adherence to the dualistic model. In all these States, the State has begun with a registration with limited rights and duties, but has since extended those rights and duties extensively ensuring that two of three States now attribute rights and duties via the exclusion method instead of the enumeration method.

- (ii) The second group consists of those jurisdictions that have introduced domestic partnership or reciprocal benefits for same-sex couples *and* different-sex couples (District of Columbia, Hawai'i and Maine). These States have therefore all adhered to the pluralistic model of registration. In this group it is worth noting that all three states also originally used the enumeration method to attribute rights and duties to same-sex partners, and that the package of rights and duties that was extended can be classified as being weak. It is, however, with respect to this group of jurisdictions that one can witness the most diversity of solution (*i.e.* with regards the prohibited degrees of relationship, the extent of the rights and duties attributed, the method used to attribute the rights and duties etc.).

7. Conclusion

With a country so divided on the issue of same-sex relationships, it would seem difficult, and possibly foolish, to propose possible solutions to the potential chaos that the United States may encounter in this field. Nevertheless, there are a couple of points that can be learnt from this brief summary of the state of affairs anno 2008.

Firstly, same-sex couples are increasingly gaining state recognition of their relationships. Although the road ahead would appear to be a long one, it does appear to be one which is slowly changing. Less than 10 years ago, same-sex couples were provided virtually no recognition anywhere in the country. Today, more than 10 jurisdictions provide for state-wide registration schemes and two states have even gone so far as to open marriage to same-sex couples. Although the fight has not been won, same-sex couples should take solace in the fact that a similar picture was also true of Europe ten years after Denmark became the first country in Europe to introduce 'registered partnerships'.²⁹¹

Secondly, the states should pay more attention to ensuring that distinctions between marriage, on the one hand, and same-sex relationship recognition, on the other, serve a particular purpose. If the decision has been taken to extend all of the rights and benefits of marriage to same-sex couples, the conditions for establishment of the relationship should also mirror that institution; if a prohibition exists for one category, well-founded reasons should be provided as to why this prohibition does not apply to the other category. Take, for example, the Oregon statute which ensures that opposite-sex couples may marry from 17 years of age, whereas same-

²⁹⁰ The argument for this is that the reason for these couples to utilise the domestic partnership regime is simply to avoid losing social security benefits. The legislature could alternatively choose to amend the social security legislation to ensure that these benefits would not be lost upon remarriage, and the need for different-sex domestic partnership would disappear.

²⁹¹ For an overview of the European situation, see I. Curry-Sumner, *All's well that ends registered?*, 2005.

sex couples can only register a domestic partnership from the age of 18. What is the reason for this difference? What purpose does this serve, other than to draw unnecessary distinctions?

Thirdly, it would appear crucial that more attention is paid to the terminological differences between the States. The name given to a State's registration scheme would appear to be representative not only of a State's political ideology with respect to same-sex relationships, but also representative of the type of registration scheme that is being created. This is of utmost importance as States pay increasing attention to the developments in sister states. The ever-increasing mobility of citizens across the United States will only lead to states being confronted with relationship forms from other states. Since 2002, the number of cases involving interstate recognition has begun to increase. As more states open their doors to same-sex recognition, more attention should be paid to the conflict of laws issues involved. Not only will the beast raise its ugly head with regards the recognition and termination of such relationships, but perhaps ever more frequently with regards the rights and duties associated with the relationship.²⁹²

The debate will, however, no doubt continue. Nonetheless, let us not forget the words of Chief Justice Deborah T. Poritz, in a powerful concurring and dissenting opinion in the case of *Lewis v. Harris*,

‘What we name things matters, language matters (...) Labels set people apart surely as physical separation on a bus or in school facilities (...) By excluding same-sex couples from civil marriage, the State declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples. Ultimately the message is that what same-sex couples have is not as important or as significant as ‘real’ marriage, that such lesser relationships cannot have the name of marriage.’

292 See I. Curry-Sumner & N. Maxwell, ‘Same-sex, different statutes?’, *Wayne State Law Review* (forthcoming).