



Where will it all end?

Common trends in American same-sex relationship recognition

Same-sex
relationship
recognition

233

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Abstract

Purpose – In total, 11 US legal jurisdictions have enacted registration schemes of various types. The purpose of this paper is to clarify, describe and analyse the developments of these various same-sex relationship types in the USA and the role State constitutions play in this process.

Design/methodology/approach – The paper analyses the various types of registration schemes and categorises them into different theoretical themes as well as analysing the jurisdictions which permit and prohibit same-sex relationship legal recognition.

Findings – The findings indicate that State constitutions have been used in order to gain access to legal recognition as well as to deny access to rights and duties of legally recognised relationships. A classification has been put forward which categorises and catalogues which states have used their constitutions to prohibit as well as permit same-sex marriage and registered same-sex relationships.

Originality/value – This type of categorisation is valuable in attempting to keep track of and understand the very fast-moving area of law and law making, especially for other legal jurisdictions which may be able to use the theoretical approach of one of the US states.

Keywords Sex and gender issues, United States of America, Marriage

Paper type Research paper

1. Introduction

The legal recognition of same-sex relationships has been a legislative Gordian knot for almost three decades in the USA. Few issues have been so polarising as the debate surrounding the opening of marriage to same-sex couples. At present, debate in the USA has, however, focused on the demands of same-sex couples for equal marriage rights. This article attempts to shift that focus somewhat by comparing those jurisdictions that have either already opened marriage to same-sex couples or introduced a “marriage-like” or “marriage-alternative” institution alongside marriage. Building on the detailed description of these schemes in an *Utrecht Law Review* entitled “Is the union civil?”, this article attempts to address some of the major issues currently facing those states wishing to introduce alternative relationships forms such as civil union or domestic partnership.

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This article aims to bring some degree of clarity to the discussion regarding the various types or forms of registration scheme available in the USA. With eleven jurisdictions having enacted registration schemes, it is important at this moment in time to appreciate the similarities and differences between these various jurisdictional solutions. This is important not only from a theoretical and scientific point of view, but also especially when one turns to the conflict of laws issues that can arise as a result of increasingly mobile registered partners. In attempting to understand, for example, how to interpret Article 457-A(8) N.H. Rev. Stat, reference will need to be made to comparative US interstate family law:

...[a] civil union or a marriage between a man and another man or a woman and another woman legally contracted outside of New Hampshire shall be recognized as a civil union in this state, provided that the relationship does not violate the prohibitions of this chapter.

What exactly does the term “civil union” mean? Does this mean only those relationships with the name civil union will be entitled to be recognised, or should this provision be interpreted functionally referring to all those schemes that as “civil union like”? Obviously, before one can go on to explore the conflict of laws issues – which are abundant in this field – it is essential that one first conduct a thorough and extensive comparative analysis of the substantive schemes themselves.

Accordingly, this article centres on the registration schemes that have been created in eleven different US jurisdictions (Hawai'i, California, the District of Columbia, Maine, New Jersey, Oregon, Washington, Connecticut, New Hampshire, Vermont and Massachusetts). In this sense, although this article is focused on the registration schemes open to same-sex couples, it is necessary to examine and explore the registration schemes as they have been created in the relevant jurisdictions. It is therefore necessary to pay attention to the fact that in some jurisdictions, non-marital registration schemes are in fact open to different sex couples. It is also necessary to appreciate that different jurisdictions have employed different terminology when referring to these registration schemes, namely civil union, domestic partnership and reciprocal benefits (as well marriage of course).

This article consists of three main sections. The first section (§2) deals with the *prohibitive situation* in the USA. That is to say a summary is provided of those states in which same-sex relationships are currently prohibited. It is after all important to understand the relationship between the prohibitive and the permissive states, many of which actually appear in both categories. An understanding of the wider picture in relation to the whole American situation can therefore be of assistance in attempting to apply a taxonomy and classification in the other states. The second section (§3) deals with the *permissive situation*, that is to say those states in which a state-wide registration form (regardless of its nomenclature) has been enacted. This section will involve a simultaneous comparison of all the states involved. The third and final section (§4) will attempt to place these comparisons in a theoretical framework, thus highlighting the similarities and differences between the states.

2. Prohibitive situation

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 (art 1 §23), the aftermath of the case can still be seen today across the entire breadth of the USA.

On the 21 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” (1 U.S.C. §7).

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 (28 U.S.C. 1738C). 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 (U.S. Const. art. IV, §1). 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 (Strasser, 2005; Sack, 2005).

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 (Borchers, 1998; Grossman, 2005; Spector, 2006; Koppelman, 2004; Silverman, 2001). 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 40 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 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 to determine the receipt of benefits, rights or privileges. 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, the right to immigration benefits, the right to income tax rate exemptions and deductions, the right to file for joint bankruptcy, the right to petition for domestic violence protection orders, the right to funeral and bereavement leave, the right to jointly file federal tax returns, the right to make medical decisions on behalf of one’s spouse, the right to spousal privilege in criminal proceedings, inheritance rights 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.

2.2.1 State ban applies to same-sex marriages and other same-sex relationships. In Alabama, Arkansas, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, Virginia and Wisconsin the state constitutions have 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.

Although the amendment to the Alaskan Constitution is restricted to the non-recognition of same-sex marriages, 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 at the moment prevent the recognition of any form of same-sex relationship, regardless of the terminology attached to it (Fla. Stat. §741.04 and §741.212).

Montana's Constitutional amendment is also restricted to the non-recognition of same-sex marriages (Mont. Const. art. XIII, §7). 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.

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. (W. Va. Code §48-2-603)

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.

2.2.2 State ban only applies to same-sex marriages. In Colorado, Hawai'i, Mississippi, Missouri, Nevada, Oregon and Tennessee, 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, California, Connecticut, Delaware, Illinois, Indiana, Iowa, Maine, Maryland, Minnesota, New Hampshire, North Carolina, Pennsylvania, Vermont, Washington and Wyoming 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.

3. Permissive situation

Currently 11 jurisdictions in USA permit the state-wide registration of same-sex relationships. Four different names have been given to such schemes, namely marriage (Massachusetts and California), civil union (Connecticut, New Hampshire, New Jersey and Vermont), domestic partnership (California, the District of Columbia, Maine, New Jersey, Oregon and Washington) and reciprocal benefits (Hawai'i). It is surprising that in current American scholarship no attention has been paid to the comparison of these schemes and the possible implications for the substantive law of other states and the conflict situations that could arise as a result of the enactment of these schemes between these states. This article is aimed at dealing with the first of these scholarly gaps.

This section is divided into three main parts, dealing with the well-known tripartite distinction in the three elements of relationship law, namely the establishment of the relationship (§3.1), the rights and duties incumbent on the parties (§3.2) and the termination procedures for these relationship forms (§3.3).

3.1 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 (Curry-Sumner, 2005). This section will focus on the five separate elements relating to the establishment or formation of the relationships, namely:

- (1) the principle of exclusivity;
- (2) the sex of the parties;

- (3) the age of the parties;
- (4) relevant residency requirements; and
- (5) the prohibited degrees of relationship.

The only core principle common to all jurisdictions at this stage appears to be in relation to the principle of exclusivity. 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) (Curry-Sumner, 2005). Therefore, no jurisdiction has permitted those already involved in a marriage or registered relationship to enter into another registered relationship, prior to terminating the previous relationship (adherence to the principle of monogamy). Moreover, no jurisdiction has yet to allow more than two persons to register a relationship (adherence to the principle of exclusiveness).

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 (Curry-Sumner, 2005). 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. 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 ages imposed in the marriage laws. 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 the 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. 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.

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 appear 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 rationale underlying the establishment of civil unions is very different in these four states, since two registry systems were enacted due to judicial decisions (New Jersey and Vermont) and two were the result of legislative initiatives (Connecticut and New Hampshire), the end results are very similar (see Table I). Ultimately the aim of the legislation can be extrapolated from the original aims surrounding creation of the legislation. All 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" (Curry-Sumner, 2005). 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".

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

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

Table I.
Eligibility criteria for registration schemes

Notes: RB, reciprocal benefits; DP, domestic partnership; CU, civil union

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 is it especially interesting to note that the original bill submitted to the Senate would have created a civil union registry (§3.2.4). 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.

3.2 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 (Curry-Sumner, 2005). Table II provides an overview of the methods used.

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

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	Weak
CU	Connecticut	Exclusion	Strong
	New Hampshire	Exclusion	Strong
	New Jersey	Exclusion	Strong
	Vermont	Exclusion	Strong

Notes: RB, reciprocal benefits; DP, domestic partnership; CU, civil union

Table II.
Rights and duties of
registration schemes

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 states with respect to each other. Since the introduction of these schemes, 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 state wide rights and duties attributed to spouses. What is perhaps most noticeable is the fact that the relevant legislative bodies in these jurisdictions have not, however, tampered with the name of the institution.

3.3 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 (Curry-Sumner and Curry-Sumner, 2008). It would also appear (rather logically) that the weaker the relationship form, the easier the dissolution procedure is.

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 (Curry-Sumner, 2005). The question, which can therefore be posed, is whether this classification can also be applied to the registration schemes developed in the USA.

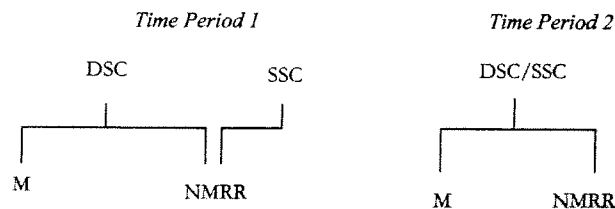
In the PLURALISTIC model couples are offered two possibilities to formalise their relationship, irrespective of their gender, namely marriage or a form of non-marital registered relationship. It must, however, be noted that jurisdictions adhering to the

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. 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 important role in the pressure placed on these Governments to amend the laws prohibiting same-sex civil marriage. 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 (Ministre de la Justice, 2004). This model can be represented diagrammatically, see Figure 1.

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. This is diagrammatically illustrated in Figure 2.

A third possibility (see Figure 3) is the MONISTIC model whereby couples, irrespective of their gender are presented with one institutionalised relationship form.

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



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

Figure 1.
PLURALISTIC model

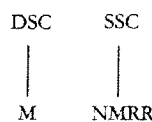


Figure 2.
DUALISTIC model

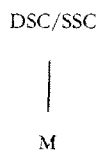


Figure 3.
The MONISTIC model

opened civil marriage to same-sex couples. It therefore has opted for the MONISTIC model. Those states that have introduced civil unions (i.e. 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 (see Table III).

5. Conclusion

In coming to some concluding remarks, it is striking that constitutions in the USA (both federal and state) have been used not only to protect the rights of same-sex couples (for example in California and Massachusetts, but also in Vermont and new Jersey when introducing civil unions), but it has also been used to deny rights to same-sex couples. For a short period of time, the polarisation of the views was no more evident than along the Californian-Nevada border. On the western side of the border same-sex couples could legally exchange wedding vows and solemnise their marriage. Should, however, a same-sex couple wish to do the same on the eastern side of the border, such a ceremony would not only not be recognised, but it would be unconstitutional!

Although this example clearly demonstrates the schism between the two camps in the USA, it is necessary that others appreciate this distinction. Those advocating the opening of marriage to same-sex couples should realise that in certain states such a claim can result in a severe conservative backlash resulting in constitutional amendments. These amendments will undoubtedly be difficult to remove and thus could impede the steady progress of equality for many, many years to come. Sometimes it may well be better to settle for less instead of more. However, do not misinterpret this statement, equality between same-sex and different-sex couples is not achieved by creating separate, but equal institutions. Far from it. Instead, it is perhaps wise to understand that sometimes to achieve your ultimate goal, it may be better to introduce an intermediate step to ensure the protection of rights and duties of couples now. The fight for equal marriage rights is an ongoing struggle that should not be compromised. Nonetheless, in trying to achieve that goal, it may well be better in certain American states to first of all secure those rights and benefits that can be secured before heading forwards for the ultimate goal. After all, no-one can climb Mount Everest in one go!

This article has furthermore proposed a possible system for classifying the various registration schemes currently available in the USA. It is clear that although there is a vast degree of unanimity between those states having created civil unions, a similar degree of homogeneity is not apparent when one turns to domestic partnerships or reciprocal benefits. With some jurisdictions having introduced weak forms of domestic

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)
D.C.	Domestic partnership	Pluralistic (time phase 1)
Hawai'i	Reciprocal benefits	Pluralistic (time phase 1)

Table III.
Theoretical framework

partnership and other having introduced strong forms, any classification is bound to be subject to exception. Nonetheless, if one distinguishes between the civil union states, on the one hand, and the other registration schemes, on the other, one is able to present an overall classification of the current situation with regards the recognition of same-sex relationships in the USA. Table IV draws a distinction between same-sex marriage recognition on the one hand, and non-marital registered relationship forms on the other. This distinction is crucial should one wish to gain a full picture of those states where change may be possible with regards the possible (short-term) future enactment of non-marital registration schemes.

One other 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:

- (1) 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; 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).
- (2) Of the four states that have introduced civil unions, three 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, 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.

Classification	Marriage	Non-marital registered
Constitutional ban	AL, AK, AR, CO, FL, GA, HI, ID, KS, KY, LA, MI, MS, MO, MT, NE, NV, ND, OH, OK, OR, SC, SD, TN, TX, UT, VA, WV, WI	AL, AK, AR, FL, GA, ID, KS, KY, LA, MI, MT, NE, ND, OH, OK, SC, SD, TX, UT, VA, WV, WI
Statutory ban	AZ, CT, DE, IL, IN, IA, ME, MD, MN, NH, NC, PA, VT, WA, WY	-
No ban	NJ, NM, NY, RI	AZ, CO, DE, IL, IN, IA, MD, MA, MN, MS, MO, NV, NM, NY, NC, PA, RI, TN, WY
Permitted	MA, CA	<i>Civil union:</i> CT, NH, NJ, [OR], VT <i>Other forms:</i> CA, HI, ME, NJ, WA

Table IV.
Overall classification of
American states

- (3) Those states that have introduced domestic partnerships and reciprocal benefits have done so according to one of two different paths:
- 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, 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, 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.
 - The second group consists of those jurisdictions that have introduced domestic partnership or reciprocal benefits for same-sex couples and different-sex couples (the 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.).

In summary, it would appear that the picture is not so gloomy as at first it would appear. Despite the fact that 45 states have introduced anti-marriage bans, 11 jurisdictions within the USA have introduced marriage and marriage-like institutions aimed at providing same-sex couples with an opportunity to openly express their commitment to each other. One can only hope that these schemes are indeed only base camp on the upward climb towards full marriage equality for same-sex couples.

State legislation and constitutional amendments

Alaska: Ala. Const. of 1901, Amendment 774.

Arizona: Ariz. Rev. Stat. §25-101 and §25-112.

Arkansas: Ark Constitution of 1874, Amendment 83, *May v. Daniels*, 359 Ark. 1000, 194 S.W.3d 771 (Ark. 2004).

California: Cal. Fam. Code §308-5.

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

Connecticut: Conn. Gen. Stat. Ann. §45a-727a.

Delaware: Del. Code Ann. §101.

Georgia: Ga. Const. art. I, §4. See also, Ga. Code Ann. §19-3.3.1.

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

Illinois: Ill. Comp. Stat. 5/201, 5/212 and 5/213.1.

Indiana: Ind. Code Ann. §31-11-1-1.
Iowa: Iowa Code §595.
Hawaii: Haw. Const. art. I, §23, Haw. Rev. Stat. §572-1, §572-1.6, §572.C-1 and §572.C-7.
Kansas: Kan. Const. art. XV, §16. See also, Kan. Stat. Ann. §23-101(a) and §23-115.
Kentucky: Ky. Const. §233A. See also, Ky. Rev. Stat. Ann. §402.005, §402.20, §402.040 and §402.045.
Louisiana: La. Const. art. XII, §15. See also, La. Civ. Code Ann. art. 96 and art. 3520(B).
Maine: Me. Rev. Stat. Ann. Tit. 19, §701.
Maryland: Md. Code Ann. [Family Law] §2-201.
Michigan: Mich. Const. art. I, §25. See also, Mich. Comp. Laws §551.1 and §551.271.
Minnesota: Minn. Stat. §517.03 and §518.01.
Mississippi: Miss. Const. art. XIV, §263A. See also, Miss. Code Ann. §93-1-1.3.
Missouri: Mo. Const. art. I, §23. See also, Mo. Rev. Stat. §451.022.
Nebraska: Neb. Const. art. I, §29. See also, Neb. Rev. Stat. §42-100.
Nevada: Nev. Const. art. I, §21. See also, N.R.S. §122.00.1.
North Carolina: N.C. Gen. Stat. §51-1-2.
New Hampshire: N.H. Rev. Stat. Ann. §457.1, §457.2, §457.3 and §457.43.
North Dakota: N.D. Const. art. XV, §28. See also, N.D. Cent. Code §14-03-01 and §14-03-08.
Ohio: Ohio Const. art. XV, §11. See also, Ohio Rev. Code Ann. §3101.01.
Oklahoma: Okla. Const. art. II, §35. See also, Okla. Stat. Tit. 43, §3.1.
Oregon: Or. Const. art. XV, §5a. See also, Or. Rev. Stat. §106.010.
Pennsylvania: 23 Pa. Cons. Stat. §1704.
South Carolina: S.C. Const. art. XVII, §15. See also, S.C. Code Ann. §20-1-15.
South Dakota: S.D. Const. art. XXI, §9. See also, S.D. Codified Laws §25-38 and §25-1-1.
Tennessee: Tenn. Const. art. XI, §18. See also, Tenn. Code Ann. §36-3-113.
Texas: Tex. Const. art. I, §32. See also, Tex. Fam. Code §2.001 and §6.204.
Utah: Utah Const. art. I, §29. See also, Utah Code Ann. §30-1-4.1.
Vermont: Vt. Stat. Ann. Tit. 15, §1201(4) and §23.
Virginia: Va. Const. art. I, §15-A. See also, 15 Va. Code Ann. §8, §20-45.2 and §20-45.3.
Washington: Rev. Code Wash. §26.04.010(1), §26.04.020(1)(c) and §26.04.020(3).
Wisconsin: Wis. Const. art. XIII, §13.
Wyoming: Wyo. Stat. Ann. §20-1-101.

References

- Borchers, P.J. (1998), "Baker v. General Motors: implications for interjurisdictional recognition of non-traditional marriages", *Creighton Law Review*, Vol. 38, pp. 152-3.
- Curry-Sumner, I. (2005), *All's Well that Ends Registered?*, Intersentia, Antwerp, pp. 257-9.
- Curry-Sumner and Curry-Sumner (2008), "Is the union civil? Same-sex marriages, civil unions, domestic partnerships and reciprocal benefits in the USA", *Utrecht Law Review 2008*, available at: www.utrechtlawreview.org
- Grossman, J.L. (2005), "Resurrecting comity: revisiting the problem of non-uniform marriage laws", *Oregon Law Review*, Vol. 84, p. 433.
- Koppelman, A. (2004), "Interstate recognition of same-sex civil unions after *Lawrence v. Texas*", *Ohio State Law Journal*, Vol. 65, p. 1265.
- Ministre de la Justice (2004), *Le pacte civil de solidarité. Réflexions et propositions de réforme. Rapport remis à Monsieur Dominique Perben*, p. 6.

Sack, E.J. (2005). "The retreat from DOMA: the public policy of same-sex marriage and a theory of congressional power under the full faith and credit clause", *Creighton Law Review*, Vol. 38, p. 507.

Silverman, L.A. (2001), "Vermont civil unions, full faith and credit, and marital status", *Kentucky Law Journal*, Vol. 89, p. 1075.

Spector, R.G. (2006), "Same-sex marriages, domestic partnerships and private international law: at the dawn of a new jurisprudence in the United States", in Bonomi, A. (Ed.), *Yearbook of Private International Law*, Vol. 8, pp. 169-87.

Strasser, M. (2005), "Defending marriage in light of the *Moreno-Cleburne-Romer-Lawrence* jurisprudence: why DOMA can't pass muster after *Lawrence*", *Creighton Law Review*, Vol. 38, p. 421.

Further reading

Koppelman, A. (2005), "Interstate recognition of same-sex marriages and civil unions: a Handbook for judges", *University of Pennsylvania Law Review*, Vol. 153, p. 2143.

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