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## Note

### Recognition of Civil Unions and Domestic Partnerships as Marriages in Same-Sex Marriage States

Inga Nelson\*

Meghan and Shira had an elaborate ceremony to celebrate their union.<sup>1</sup> There was a white dress, a gaggle of bridesmaids in pink, a caterer, and dancing.<sup>2</sup> The couple's love and commitment was witnessed and shared by their family and friends and, since it took place in Illinois, the ceremony also meant they now had all the state-granted protections of a marriage.<sup>3</sup> Except Meghan and Shira aren't married; despite wanting to get married the only legal recognition available to them was a civil union.<sup>4</sup> Their feelings about this happy day and the safety of having their relationship recognized and protected are bittersweet.<sup>5</sup> As Meghan says, "The simple fact that there are two different options and that one of them is not available to gay people sends a subtle but clear message: You are different and you don't deserve the same treatment as the majority."<sup>6</sup>

Whereas Meghan and Shira want all the responsibilities and rights that come with marriage, a different couple might find the more limited responsibilities attached to a domestic

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1. Meghan Streit, *Civil Unions vs. Marriage: Separate and Not Equal*, HUFFINGTON POST (Feb. 14, 2013, 6:23 PM), [http://www.huffingtonpost.com/meghan-streit/civil-unions-vs-marriage-\\_b\\_2689991.html](http://www.huffingtonpost.com/meghan-streit/civil-unions-vs-marriage-_b_2689991.html) (describing her and her partner's ceremony and the demoralizing process of obtaining a civil union license instead of a marriage license).

2. *Id.*

3. *Id.*; see 750 ILL. COMP. STAT. 75/20 (2013).

4. Streit, *supra* note 1; see 750 ILL. COMP. STAT. 5/201 (2013).

5. Streit, *supra* note 1.

6. *Id.*

partnership or civil union attractive. As Professor Katherine Franke recently explained, some couples view domestic partnerships and civil unions as offering both legal protections and “an opportunity to order our lives in ways that have given us greater freedom than can be found in the one-size-fits-all rules of marriage.”<sup>7</sup> As one California elected official has recently noted, “[s]ome people, gay or straight, may not want to get married. For some, it may be a tax issue. For seniors, it may have to do with Social Security benefits. For others, it may just be a life issue.”<sup>8</sup> For these couples, both the fact that their partner could have access to benefits like health insurance and the fact that domestic partnerships or civil unions were *not* marriages was what drew them to the institutions.<sup>9</sup>

Currently, there is a patchwork of state laws governing legal recognition of same-sex relationships in the United States.<sup>10</sup> Sixteen states and the District of Columbia issue same-sex marriage licenses.<sup>11</sup> Six states provide for civil unions and four

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7. Katherine M. Franke, Op-Ed., *Marriage Is a Mixed Blessing*, N.Y. TIMES, June 24, 2011, at A25.

8. Scott Lucas, *So What's Gonna Happen to My Domestic Partnership?*, S.F. MAG., June 28, 2013, <http://www.modernluxury.com/san-francisco/story/what-happens-my-domestic-partnership> (quoting City Supervisor Scott Wiener regarding the effect on existing domestic partnerships in California following the Supreme Court's decision in *Hollingsworth v. Perry*, 133 S.Ct. 2652 (2013), finding that Proposition 8, which amended the California state constitution to prohibit same-sex marriage, violated Equal Protection).

9. *Id.*; see also Liz Moody, *Why I Chose Domestic Partnership over Marriage*, XOJANE (Sept. 12, 2012, 5:00 PM), <http://www.xojane.com/it-happened-to-me/why-i-chose-domestic-partnership-over-marriage> (explaining the author's choice to enter into a domestic partnership instead of a marriage in order to obtain a British residency visa while delaying marriage until such time as she and her partner are emotionally ready).

10. See *Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF ST. LEGISLATURES (NCSL), <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last updated June 26, 2013) [hereinafter NCSL, *Civil Unions*].

11. *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONF. OF ST. LEGISLATURES (NCSL), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx> (last updated July 26, 2013) [hereinafter NCSL, *Defining Marriage*]; Soumya Karlamangla, *With Governor's Signature, Hawaii Legalizes Gay Marriage*, L.A. TIMES, Nov. 13, 2013, <http://www.latimes.com/nation/nationnow/la-na-nn-hawaii-gay-marriage-20131113,0,4215077.story#axzz2kdwTvoQy>. Same-sex marriage is currently recognized in: California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Vermont, New Hampshire, New Jersey, New York, Massachusetts, Maryland, Maine, Minnesota, Rhode Island, Washington, and the District of Columbia. During the writing of this Note, a number of state court judges in

states provide for domestic partnerships.<sup>12</sup> Thirty-three states limit marriage to opposite-sex couples either constitutionally or statutorily; the vast majority of these states have constitutional prohibitions against same-sex marriage.<sup>13</sup> While the number of states with same-sex marriage has grown quickly in states without constitutional prohibitions against same-sex marriage, these constitutional amendments mean that many states will likely establish alternate forms of legal recognition before they grant equal marriage rights.<sup>14</sup> As a result, we are likely to see both more states with same-sex marriage and more states with alternate forms of recognition. Given our highly mobile society, couples in domestic partnerships and civil unions have—and will continue to—relocate to states with no legal protections as well as to states with same-sex marriage. Scholars have written extensively on whether and how states without same-sex mar-

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New Mexico ordered the counties under their jurisdiction to issue marriage licenses to same-sex couples. New Mexico is currently the only state in the country without a law or constitutional amendment explicitly prohibiting or authorizing same-sex marriage; further developments are likely. Fernanda Santos & Heath Haussamen, *In New Mexico, a Rush to the Altar*, N.Y. TIMES, Sept. 3, 2013, at A12.

12. NCSL, *Defining Marriage*, *supra* note 11. Civil unions: Colorado, Delaware, Hawaii, Illinois, and Rhode Island. Domestic partnerships: California, Nevada, Oregon, Washington, Hawaii, Maine, and Wisconsin. *Id.* Same-sex marriage recently became available in Delaware, Rhode Island, and Washington and all three states have either ended, phased out, or greatly restricted their civil union/domestic partnership procedures. Colorado also has a “designated beneficiary” law, which, like Hawaii’s reciprocal benefits law, allows any two adults to register as designated beneficiaries for limited purposes such as hospital visitation. *Marriage, Domestic Partnerships, and Civil Unions: Same-Sex Couples Within the United States*, NAT’L CENTER FOR LESBIAN RTS. (NCLR) 4–12 (2013), [http://www.nclrights.org/wp-content/uploads/2013/07/Relationship\\_Recognition.pdf](http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf).

13. NCSL, *Defining Marriage*, *supra* note 11. Constitutional prohibitions: Alabama, Alaska, Arizona, Arkansas, Colorado, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin. Statutory prohibitions: Wyoming, Pennsylvania, Indiana, and West Virginia. *Id.* There is currently a campaign underway in Oregon to place an amendment repealing this prohibition on the November 2014 ballot. Christian Gaston, *Gay Marriage Campaign Will Put Oregon on National Stage*, THE OREGONIAN, July 25, 2013, [http://www.oregonlive.com/politics/index.ssf/2013/07/gay\\_marriage\\_campaign\\_will\\_put.html](http://www.oregonlive.com/politics/index.ssf/2013/07/gay_marriage_campaign_will_put.html).

14. For example, Colorado has a constitutional prohibition against same-sex marriage but recently passed legislation establishing civil unions. S.B. 13-011, 69th Gen. Assemb., Reg. Sess. (Colo. 2013); Dan Frosch, *Colorado: Legislators Approve Civil Unions Law*, N.Y. TIMES, Mar. 13, 2013, at A15.

riage or legal protections have recognized out-of-state relationships, particularly when it comes to dissolution of those relationships.<sup>15</sup> However, with an increasing number of states granting same-sex marriage a new question arises: how should marriage states treat couples in out-of-state civil unions and domestic partnerships?<sup>16</sup> This question is complicated by the fact that, like Meghan and Professor Franke, individuals have

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15. Many scholars discuss this topic in regard to dissolution options because dissolution provides a specific interaction with a state's legal system that can be easily compared to non-same-sex marriage. See generally L. Lynn Hogue, *The Constitutional Obligation to Adjudicate Petitions for Same-Sex Divorce and the Dissolution of Civil Unions and Analogous Same-Sex Relationships: Prolegomenon to a Brief*, 41 CAL. W. INT'L L.J. 229 (2010) (arguing that the Full Faith and Credit Clause requires states to grant dissolution of foreign same-sex legal relationships); Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669 (2011) (arguing for a modernization of jurisdiction rules to ensure that same-sex couples have a method to dissolve their relationships); Alexander V. Maugeri, *The Missing Ingredient: How Oft-Overlooked Modern Conflict of Laws Principles Will Dictate the Reach of Same-Sex Marriage in America*, 30 ST. LOUIS U. PUB. L. REV. 325 (2011) (arguing that states that do not provide for same-sex unions will recognize such out-of-state relationships when a party thereto is not domiciled in the forum); Robert E. Rains, *A Minimalist Approach to Same-Sex Divorce: Respecting States That Permit Same-Sex Marriages and States That Refuse to Recognize Them*, 2012 UTAH L. REV. 393 (arguing that states that choose not to recognize same-sex marriage can still process dissolutions of those relationships); Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421 (2012) (arguing that the Due Process Clause of the Fourteenth Amendment creates a right to have one's same-sex marriage recognized by non-marriage states); Mark Strasser, *What if DOMA Were Repealed? The Confused and Confusing Interstate Marriage Recognition Jurisprudence*, 41 CAL. W. INT'L L.J. 249 (2010) (forecasting that a repeal of the federal Defense of Marriage Act would lead to increased litigation concerning interstate recognition of same-sex marriage); Nick Tarasen, *Untangling the Knot: Finding a Forum for Same-Sex Divorces in the State of Celebration*, 78 U. CHI. L. REV. 1585 (2011) (proposing a same-sex divorce mechanism that would allow for dissolution recognition through choice of law principles); Erica A. Holzer, *DoMA Statutes and Same-Sex Divorce Litigation* (Mar. 5, 2012) (unpublished manuscript), available at <http://ssrn.com/abstract=2060603>, (categorizing state defense of marriage statutes by their treatment of same-sex relationship dissolution).

16. See generally Hillel Y. Levin, *Resolving Interstate Conflicts over Same-Sex Non-Marriage*, 63 FLA. L. REV. 47 (2011) (discussing the problems which arise when couples seek recognition of their legal relationships in states that use an alternate framework); Jessica A. Hoogs, Note, *Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partner Laws*, 54 HASTINGS L.J. 707 (2003) (discussing the myriad of marriage and non-marriage state approaches to dissolving civil unions).

entered into these relationships for different purposes and there is political pressure to replace civil unions and domestic partnerships with marriage.<sup>17</sup> It is further complicated by the recent Supreme Court decision in *United States v. Windsor* which struck down the prohibition against federal recognition of same-sex marriage; as a result, same-sex marriage now brings with it both federal and state rights and responsibilities.<sup>18</sup> Marriage states have adopted a number of different approaches to this issue ranging from treating alternate forms of recognition as marriages<sup>19</sup> to ignoring them completely.<sup>20</sup>

This Note explores this question in light of the differences between same-sex marriage and civil unions and domestic partnerships. Part I introduces the current landscape of same-sex relationships and the need for systems of interstate recognition and dissolution.<sup>21</sup> Part II analyzes a number of proposed approaches to the recognition and dissolution of out-of-state alternate same-sex relationships. Part III proposes that marriage states should adopt model legislation to establish uniform procedures and principles for the recognition and dissolution of civil unions and domestic partnerships. This Note argues that treating civil unions and domestic partnerships as the equivalent of marriages creates three fundamental problems: first, it ignores the fact that individuals enter into these relationships with different expectations and understandings about their scope than married couples do; second, it can unintentionally harm some couples; and third, it reduces the political will to advocate for the expansion of marriage rights.

## I. BACKGROUND ON THE LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

Despite the variety in the nature and extent of protections in legal recognition states, the vast majority of the existing scholarship on same-sex relationships has conflated marriage

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17. See, Franke, *supra* note 7; Streit, *supra* note 1.

18. *United States v. Windsor*, 133 S. Ct. 2675 (2013) (finding § 3 of the Defense of Marriage Act, which prohibited the federal government from recognizing same-sex marriage, was a violation of equal protection).

19. Massachusetts is an example of this approach. See *infra* Part II.C.2.

20. Iowa is the best example of this approach. See *infra* Part II.C.5.

21. This Note will refer to states that recognize same-sex marriage as “marriage states,” states with domestic partnership or civil union laws as “legal recognition states,” and states which have neither same-sex marriage nor civil unions/domestic partnerships as “non-marriage states.”

and other forms of legal recognition for the purpose of analyzing the topic of same-sex divorce or to argue for or against a right to marriage equality.<sup>22</sup> However, there are significant qualitative and substantive distinctions between these legal relationships which affect the rights and responsibilities of the parties while the relationship is intact and during dissolution. This Part examines the history of legal recognition of same-sex relationships, how the various types of legal recognition differ, how those differences affect dissolution, and the current approaches of marriage states towards the recognition and dissolution of alternate forms of legal recognition.

A. THE BEGINNING OF THE PATCHWORK OF LEGAL RECOGNITION OF SAME-SEX RELATIONSHIPS

The scope of legal recognition of same-sex relationships in the United States began to take shape in the 1990s and expanded in the 2000s. This movement is widely recognized as beginning with Hawaii's legal and political battle over gay marriage.<sup>23</sup> When Hawaii denied a gay couple a marriage license in the early 1990s, they challenged this practice under the state constitution's equal protection provision in *Baehr v. Lewin*.<sup>24</sup> In reaction to the *Baehr* case and the possibility that Hawaii might enact same-sex marriage, the United States Congress passed the Defense of Marriage Act (DOMA) in 1996 which defined federally-recognizable marriages as between a man and a woman and provided a statutory basis for states to refuse to recognize same-sex marriage or marriage-like relationships entered into in other states.<sup>25</sup> In the midst of the mul-

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22. See, e.g., Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce Is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 249 (2010) (using a Connecticut state court ruling on civil union dissolution as a springboard for her discussion of same-sex divorce); Tarasen, *supra* note 15 (discussing non-marriage states' hesitancy to grant civil union dissolutions and same-sex marriage divorces interchangeably as part of his overall thesis that divorce should be available to all same-sex couples).

23. See Katharine Q. Seelye & Ethan Bronner, *U.S. Appeals Court Turns Back Marriage Act as Unfair to Gays*, N.Y. TIMES, June 1, 2012, at A1.

24. See *Baehr v. Lewin*, 852 P.2d 44, 74 (Haw. 1993) (holding that denial of marriage licenses to same-sex couples was sex-based and therefore subject to strict scrutiny under the Hawaii state constitution; vacating a lower court's order granting summary judgment to the state and remanding for a strict scrutiny analysis).

25. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419

ti-year litigation surrounding the *Baehr* case, Hawaii enacted a reciprocal benefits law, granting a small handful of protections to any two adults and then subsequently passed a constitutional amendment allowing the legislature to restrict marriage to a man and a woman.<sup>26</sup>

It was only after DOMA was enacted that states, other than Hawaii, began to explore legal recognition for same-sex relationships. Vermont was the first state to create civil unions in 2000.<sup>27</sup> At this point thirty-three states had already either enacted statutes or passed constitutional amendments limiting marriage to opposite sex couples.<sup>28</sup> Massachusetts was the first state to legally extend full marriage rights to same-sex couples in May of 2004.<sup>29</sup> In 2004 city and county offices in California, Oregon, and New Mexico began issuing marriage licenses to same-sex couples despite statutory prohibitions; these marriages were later nullified by the courts.<sup>30</sup> Between 2004 and 2007

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(codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated in part* by *United States v. Windsor*, 133 S. Ct. 2675 (2013). For further discussion on the *Windsor* decision see *infra* Part II.

26. 1997 Haw. Sess. Laws 383 (codified at HAW. REV. STAT. § 572C-6 (2008)) (creating a reciprocal benefits scheme that allowed any two adults not eligible for marriage to have some shared property, healthcare, and limited financial rights). The *Baehr* case was remanded from the state supreme court to the lower court to apply a strict scrutiny analysis and in 1997 the Hawaii Supreme Court affirmed the lower court's finding that the state had failed to show a compelling state interest in denying same-sex couples access to marriage. *Baehr v. Miike*, 950 P.2d 1234, 1234 (Haw. 1997). HAW. CONST. art. 1, § 23 (amended 1998).

27. VT. STAT. ANN. tit. 15, § 1204 (West 2010). Vermont adopted civil unions in response to a 1999 Vermont Supreme Court ruling in *Baker v. State*, which held that the Vermont Constitution required the state to extend the same legal rights and protections to same-sex couples as it did to opposite-sex couples, although those rights could be in non-marriage form. 744 A.2d 864 (Vt. 1999).

28. CONN. GEN. ASSEMBLY JOINT COMM. ON THE JUDICIARY, STATES WITH MARRIAGE RECOGNITION STATUTES 1 (2000), *available at* <http://www.cga.ct.gov/jud/old/SameSexMarriage/StatesWithMarriageRecognitionStatutes.pdf>.

29. In 2003, the Massachusetts Supreme Court held that the existing statute limiting marriage to between one man and one woman violated the Massachusetts' Constitution's equality and liberty provisions. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). The Court later advised the Legislature that civil unions would not comply with their ruling in *Goodridge* because the creation of a separate institution would further stigmatize same-sex couples and would be inherently unequal. *Op. of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

30. *Gay Marriage Timeline*, PEW RES. CENTER (Apr. 1, 2008), <http://www.pewforum.org/2008/04/01/gay-marriage-timeline/>.

twenty-three states enacted constitutional amendments limiting marriage to one man and one woman.<sup>31</sup> A number of these prohibitions went beyond marriage and banned the state from recognizing any form of legal relationship between same-sex couples.<sup>32</sup> Between 2004 and 2008, ten states recognized some level of legal protections for same-sex couples either by statute or court decisions; in some states this only included access to public employee benefits, while others adopted civil unions or domestic partnerships.<sup>33</sup>

The state constitutional amendments defining marriage as between one man and one woman limited the number of states in which it was feasible and legally possible to extend marriage to same-sex couples. In addition, DOMA made it clear that the federal government would not recognize same-sex marriages and that states would not be required to recognize marriage or marriage-like relationships entered into in other states.<sup>34</sup> The current civil union and domestic partnership laws were enacted amidst this backdrop of constitutional amendments and statutes designed to limit the scope of legal recognition for same-sex relationships. Some states with civil unions or domestic partnerships, like Oregon, themselves have constitutional prohibitions against recognizing same-sex marriage.<sup>35</sup>

Two recent Supreme Court decisions—handed down in June 2013—have further complicated the issues surrounding legal recognition of same-sex relationships and confirmed that,

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31. *Id.*

32. *See, e.g.*, S.C. CONST. art. XVII, § 15 (“This State and its political subdivisions shall not recognize or give effect to a legal status, right, or claim created by another jurisdiction respecting any other domestic union [other than a union between a man and a woman], however denominated.”) (adopted in 2006).

33. PEW RES. CENTER, *supra* note 30; *see, e.g.*, Oregon Family Fairness Act, 2007 Or. Laws Ch. 99 (codified as amended as scattered sections of OR. REV. STAT. § 106 (West Supp. 2013)) (adopting domestic partnership law); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004) (finding the Montana University System’s ban on same-sex partners accessing state-employee spousal benefits violated the Equal Protection Clause of the Montana Constitution).

34. *United States v. Windsor*, 133 S. Ct. 2675 (2013). *But see* Hogue, *supra* note 15, at 245–48 (arguing that DOMA’s provision allowing states to not recognize same-sex marriages performed in other states violates the Full Faith and Credit Clause of the Constitution).

35. Colorado, Nevada, and Oregon have constitutional prohibitions against same-sex marriage and civil union or domestic partnership laws. NCSL, *Defining Marriage*, *supra* note 11.

at least in the near future, the status of such relationships will be decided state-by-state. In *Hollingsworth v. Perry* the Court held that the proponents of California's Proposition 8—which amended the state constitution to prohibit same-sex marriage after the state supreme court had found equal access to marriage was required—did not have standing to challenge a lower court decision which invalidated Prop. 8 on Equal Protection grounds.<sup>36</sup> What is most notable about this decision, for the purposes of this Note, is that it could have been a vehicle for the Court to decide whether same-sex couples nationwide had a constitutional right to marriage; many observers believe the decision to dispose of the case on standing grounds indicates the Court's desire to let the issue of same-sex marriage play out in the states.<sup>37</sup>

The Court's second recent decision, *Windsor v. United States*, directly addresses the role of states in defining marriage.<sup>38</sup> At issue in *Windsor* was the constitutionality of Section 3 of DOMA, which prohibited the federal government from recognizing same-sex marriages; this meant that after her wife died, the United States required Edith Windsor to pay taxes on her wife's estate as though they were legal strangers and not spouses, even though they were legally married in New York.<sup>39</sup> The Court found Section 3 to be unconstitutional because it "seeks to injure the very class New York seeks to protect" which "violates basic due process and equal protection principles applicable to the Federal Government."<sup>40</sup> As evidence of this discriminatory purpose the Court noted that DOMA marked a departure from the deeply-entrenched, traditional balance of power between the states and the federal government regarding domestic relations.<sup>41</sup> The Federal Government has historically deferred "to state-law policy decisions with respect to do-

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36. As a result, same-sex couples can again marry in California. *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (regarding the constitutionality of California's Proposition 8, which ended the practice of same-sex marriage in California).

37. See Amy Howe, *A Home Run but Not a Grand Slam for Gay-Marriage Advocates: In Plain English*, SCOTUSBLOG (June 26, 2013, 3:58 PM), <http://www.scotusblog.com/2013/06/a-home-run-but-not-a-grand-slam-for-gay-marriage-advocates-in-plain-english/>.

38. *Windsor*, 133 S. Ct. 2675.

39. *Id.* at 2682–83.

40. *Id.* at 2693.

41. *Id.* at 2692.

mestic relations,” especially regarding marital law.<sup>42</sup> This is because “[t]he definition of marriage is the foundation of the State’s broader authority to regulate the subject of domestic relations.”<sup>43</sup> As a result of the *Windsor* decision, married same-sex couples will receive a host of federal benefits, an issue which is explored in depth in Part II of this Note. Combined with the decision in *Perry*, it also suggests that states will continue to define the scope of legal recognition available to same-sex couples.<sup>44</sup>

As a result of the rapid adoption of laws concerning same-sex relationships and the state-by-state variation in the potential scope of any legal recognition, there are significant differences in the substance and purpose of the alternative forms of legal recognition.

## B. TYPES OF SAME-SEX LEGAL RECOGNITION

In addition to the environment in which civil unions and domestic partnerships were developed, the variety in their substantive provisions makes them different from marriage. The names states assign to legal recognition schemes do not reflect uniform packages of rights and responsibilities. For example, Oregon and Wisconsin both have institutions called “domestic partnerships.” However, Oregon’s version is intended to give couples nearly all the state-created rights and benefits of marriage while Wisconsin’s version specifically states it is not intended to mirror the rights and responsibilities of marriage and includes only a handful of rights.<sup>45</sup> In general, however, there are three substantive types of alternate legal recognition: those that provide nominal benefits, comprehensive schemes which seek to replicate marriage in everything but the name, and those that fall somewhere in between.

### 1. Nominal Benefits Schemes

Some domestic partnerships and schemes termed “reciprocal benefit” arrangements provide nominal rights and recogni-

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42. *Id.* at 2691.

43. *Id.*

44. Eric Restuccia & Aaron Lindstrom, *Federalism and the Authority of the States to Define Marriage*, SCOTUSBLOG (June 27, 2013, 3:49 PM), <http://www.scotusblog.com/2013/06/federalism-and-the-authority-of-the-states-to-define-marriage/>.

45. OR. REV. STAT. § 106 (2011); WIS. STAT. ANN. § 770.001 (2009); NCSL, *Defining Marriage*, *supra* note 11.

tion. Hawaii and Wisconsin are the best examples of this type of alternate legal recognition scheme.<sup>46</sup> Hawaii's reciprocal benefits law is open to any two adults including non-married immediate family members as a way to create the legal right to do things such as make medical decisions.<sup>47</sup> Wisconsin's domestic partnership law also provides nominal benefits such as the right to hospital visitation.<sup>48</sup> In Wisconsin, couples can enter into a domestic partnership for the sole purpose of state employee benefits eligibility or a slightly more expanded partnership which affects forty areas of rights and responsibilities under state law, a far cry from the full scope of rights and responsibilities related to marriage.<sup>49</sup> For example, in the areas of "ongoing property ownership, control, and management issues . . . [and] division of property . . . . [D]omestic partners will continue to be treated as unrelated strangers."<sup>50</sup>

## 2. Comprehensive Schemes

The majority of current civil union and domestic partnership statutes seek to provide "the same rights, protections, and benefits . . . responsibilities, obligations and duties" as marriage.<sup>51</sup> However, states which extend "everything but marriage" alternatives typically emphasize "that numerous distinctions will exist between" those institutions and marriage.<sup>52</sup> Those states also often emphasize that the domestic partnership or civil union is not "a marriage" which is "between a man and a woman."<sup>53</sup> Advocates who provide advice and interpretation of these statutes are quick to remind couples that "individual states can choose whether to recognize such relationships,

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46. HAW. REV. STAT. § 572C-6 (West 2008); WIS. STAT. ANN. § 770.001 (West Supp. 2012); *see also* COLO. REV. STAT. ANN. §§ 15-22-101 to -112 (West 2013) (establishing the designated beneficiary law extending limited protections to any two adults).

47. HAW. REV. STAT. § 572C-6 (West 2008).

48. WIS. STAT. ANN. § 50.36(3j) (West 2011).

49. Howard A. Sweet, *Understanding Domestic Partnerships in Wisconsin*, WIS. LAW., <http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=82&Issue=11&ArticleID=1857> (last visited Nov. 26, 2013).

50. *Id.*

51. NEV. REV. STAT. § 122A.200(1)(a) (2009).

52. OR. REV. STAT. § 106.305(7) (2011).

53. 750 ILL. COMP. STAT. 5/201 (1977-78).

and how much or how little protections to offer” if the couple leaves the state.<sup>54</sup>

### 3. Schemes Falling In-Between Nominal and Comprehensive Benefits

A final few states have alternate legal recognition schemes which provide most, but not all, of the state-based rights and protections of marriage. Rhode Island’s civil union law is an example of this type of legal recognition.<sup>55</sup> While the Rhode Island civil union law purports to guarantee couples “all the rights, benefits, protections, and responsibilities under law” as married couples, the law also provides for a broad religious/conscience exemption.<sup>56</sup> Any person or entity affiliated with a religious or charitable organization can choose not to “treat as valid any civil union” if doing so would conflict with the organization’s religious or conscience-based beliefs.<sup>57</sup> Thus, while in theory couples in civil unions have the right to visit each other in the hospital, if the hospital is religiously affiliated they can refuse to recognize the civil union as valid and deny the hospitalized individual’s partner access.<sup>58</sup>

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54. *Domestic Partnerships in Nevada: A Practical Guide for Same-Sex and Opposite-Sex Couples*, AM. CIV. LIBERTIES UNION NEV., <http://aclunv.org/category/issue/lgbt/domestic-partnership-guide> (last updated Apr. 5, 2012); see also OR. REV. STAT. § 106.305(7) (“[T]he legal recognition of domestic partnerships under the laws of this state may not be effective beyond the borders of this state and cannot impact restrictions contained in federal law.”); Richard A. Wilson, *Family Law: A Guide to the New Illinois Civil Union Law*, 99 ILL. B.J. 232 (2011) (“Illinois law does little if anything to address the refusal of other jurisdictions, in particular the federal government, to recognize its grant of a civil union. Thus, to be truly protected, clients need to continue securing rights to inheritance through powers of attorney, wills, and trusts; to children through legally recognized parentage independent of the relationship (e.g., adoption or surrogacy); and to property by title. The piecemeal pursuit of securing of rights will and must continue until and unless uniform recognition occurs.”).

55. R.I. GEN. LAWS § 15-3.1 (2011).

56. *Id.* §§ 15-3.1-6, -5. This remains true despite Rhode Island’s recent extension of marriage rights to same-sex couples because both in-state and out-of-state civil unions and out-of-state domestic partnerships will continue to be recognized and subject to the broad religious exception law. GAY & LESBIAN ADVOCATES & DEFENDERS, RHODE ISLAND MARRIAGE GUIDE FOR SAME-SEX COUPLES 12–13 (2013), available at <http://www.glad.org/uploads/docs/publications/ri-marriage-guide.pdf>.

57. R.I. GEN. LAWS § 15-3.1-5.

58. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 56, at 13.

The exact scope and meaning of alternate legal relationships varies significantly among the states with such statutory schemes. Similarly, there is no uniform package of rights and responsibilities that comes along with a domestic partnership or a civil union.<sup>59</sup> As a result, in order to assess how similar a particular legal scheme is to marriage, a thorough investigation into the details and scope of each state's statute is necessary.

### C. MARRIAGE STATES' RECOGNITION OF CIVIL UNIONS/DOMESTIC PARTNERSHIPS

Just as the rights and responsibilities associated with alternate forms of legal recognition vary state-by-state so do other states' methods of recognizing these relationships. A number of scholars have analyzed the complexities of non-marriage states' recognition, or lack of recognition, of same-sex marriages performed in other states.<sup>60</sup> State recognition of same-sex marriage is relatively recent and constantly changing and there is little scholarship on how those states treat alternate forms of same-sex relationships. The number of states recognizing marriage is expanding at a rapid pace, with seven additional states joining the ranks of those who do during the writing of this Note.<sup>61</sup> As a result, marriage-states' approaches to alternate forms of relationships are dynamic and likely to continue changing. The fourteen jurisdictions with same-sex marriage currently utilize five different approaches to recognizing civil

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59. Recognizing the lack of uniformity in the substantive scope of civil unions, The Williams Institute at UCLA has proposed model civil union legislation in an attempt to bring more consistency to the packages of rights and responsibilities in civil union states. JENNIFER C. PIZER & SHEILA JAMES KUEHL, THE WILLIAMS INST., UCLA SCH. OF LAW, SAME-SEX COUPLES AND MARRIAGE: MODEL LEGISLATION FOR ALLOWING SAME-SEX COUPLES TO MARRY OR ALL COUPLES TO FORM A CIVIL UNION (2012), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Pizer-Kuehl-Model-Marriage-Report.pdf>.

60. See sources cited *supra* note 15.

61. Voters in Washington, Maine, and Maryland approved ballot measures granting marriage rights in November 2012. Terry Baynes, *Analysis: Gay Marriage Votes Could Sway U.S. Supreme Court*, REUTERS (Nov. 9, 2012, 10:50 AM), <http://www.reuters.com/article/2012/11/09/us-usa-court-gaymarriage-idUSBRE8A801020121109>. Delaware, Rhode Island, and Minnesota passed legislation awarding marriage rights effective the summer of 2013. NCSL, *Defining Marriage*, *supra* note 11. In September, a New Jersey judge ruled that the state must allow same-sex couples to marry. Kate Zernikie & Marc Santora, *Judge Orders New Jersey to Allow Gay Marriage*, N.Y. TIMES, Sept. 27, 2013, available at <http://www.nytimes.com/2013/09/28/nyregion/new-jersey-judge-rules-state-must-allow-gay-marriage.html>.

unions and domestic partnerships both while intact and for the purposes of dissolution.<sup>62</sup>

### 1. Immediate Recognition as Equivalent to Marriage Per Statute

Some states, such as New Hampshire and Connecticut, have statutes regarding recognition of out-of-state civil unions and, to some extent, domestic partnerships.<sup>63</sup> Both states automatically recognize some out-of-state alternative legal recognition schemes as equivalent to marriage.<sup>64</sup> New Hampshire's statute states: "[a] civil union legally contracted outside of New Hampshire shall be recognized as a marriage in this state."<sup>65</sup> However, this does not convert the civil union into a marriage under New Hampshire law, instead couples with civil unions will receive the same state benefits and protections but not be considered married.<sup>66</sup> In Connecticut, "a relationship that provides substantially the same rights, benefits and responsibilities as a marriage, between two persons entered into in another state or jurisdiction and recognized as valid by such other state or jurisdiction shall be recognized as a valid marriage in this state."<sup>67</sup> Both states limit this recognition to couples who could have legally entered into a marriage in that state, meaning, for example, if another state allowed two sisters to enter into a civil union New Hampshire and Connecticut would not recognize such a relationship as equivalent to marriage because it is contrary to their marriage laws.<sup>68</sup>

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62. This Note primarily addresses the ways marriage states recognize out-of-state forms of legal recognition but will also discuss treatment of in-state civil unions or domestic partnerships if relevant for comparison.

63. CONN. GEN. STAT. § 46b-28a (2009); N.H. REV. STAT. ANN. § 457:45 (2009). Historically, states have recognized marriages performed in other states under the principle of comity. *See, e.g.*, *Catalano v. Catalano*, 170 A.2d 726, 728–29 (Conn. 1961) (holding that recognition of out-of-state marriages does not require the recognition of relationships that would be illegal if entered into in the state in question). For a discussion of the concept of comity and how it encourages, but does not require, states to recognize marriages performed in other states see *Johnson*, *supra* note 22, at 230–31.

64. CONN. GEN. STAT. § 46b-28a; N.H. REV. STAT. ANN. § 457:45.

65. N.H. REV. STAT. ANN. § 457:45.

66. GAY & LESBIAN ADVOCATES & DEFENDERS, HOW TO GET MARRIED IN NEW HAMPSHIRE 14 (2013), *available at* <http://www.glad.org/uploads/docs/publications/how-to-get-married-nh>.

67. CONN. GEN. STAT. § 46b-28a.

68. *Id.* §§ 46b-28a, 46b-21; N.H. REV. STAT. ANN. § 457:45 (prohibiting marriage between a person and that "person's parent, grandparent, child,

Despite these statutory provisions, due to the lack of uniform rights and responsibilities linked to civil unions or domestic partnerships, it is not clear which relationships from which states will be recognized as equivalent to marriage in Connecticut and New Hampshire. In New Hampshire, relationships clearly designated as civil unions should be recognized as equivalent to marriages for the purpose of determining rights and responsibilities.<sup>69</sup> There is, however, a slight distinction because, unlike civil unions entered into in New Hampshire before the legislature extended marriage to same-sex couples, out-of-state civil unions are not converted into marriages under New Hampshire law, they are just treated like marriages.<sup>70</sup> If a couple wishes to be married, they must dissolve their pre-existing out-of-state civil union in order to marry in New Hampshire.<sup>71</sup> The distinction is particularly important now that the Supreme Court has overturned Section 3 of DOMA since the federal government now recognizes same-sex marriages, although the full implications of this decision have yet to be realized.<sup>72</sup> Couples with out-of-state civil unions will be treated by

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grandchild, sibling, parent's sibling, sibling's child, stepparent or stepchild"); N.H. REV. STAT. ANN. § 457:2 ("No person shall marry his or her father, mother, father's brother, father's sister, mother's brother, mother's sister, son, daughter, brother, sister, son's son, son's daughter, daughter's son, daughter's daughter, brother's son, brother's daughter, sister's son, sister's daughter, father's brother's son, father's brother's daughter, mother's brother's son, mother's brother's daughter, father's sister's son, father's sister's daughter, mother's sister's son, or mother's sister's daughter."). While this may seem like nothing more than a formal prohibition, states with the limited reciprocal benefits schemes, such as Hawaii and Colorado, allow immediate family members to register as reciprocal beneficiaries. COLO. REV. STAT. § 15-22-104 (2013) HAW. REV. STAT. § 572C-4 (2012). Thus, these prohibitions serve to clarify that even if those legal institutions could be considered to fall within the scope described in the statutes, particular relationships may not.

69. N.H. REV. STAT. ANN. § 457:45.

70. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 66, at 14. This distinction is potentially quite important. If the federal government considers civil unions that are considered marriages by marriage states to be "legally recognized marriages," those relationships should be eligible for federal recognition. However, if a marriage state simply treats a civil union like a marriage for state rights but does not consider it to be converted into a marriage, then the relationship will likely not be federally recognized. It is not clear whether this distinction has been considered by the federal government. *See* Press Release, U.S. Dep't of the Treasury, All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes (Aug. 29, 2013), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2153.aspx>.

71. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 66, at 14–15.

72. It appears possible that under the recently released IRS guidelines,

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New Hampshire as if they were married, but unless they dissolved their civil union and were married in New Hampshire, they would not be technically married and, thus, ineligible for federal marriage benefits.<sup>73</sup>

Additionally, while the law explicitly states that “civil unions” will be recognized as marriages there is some dispute as to whether comprehensive domestic partnerships will also be treated as marriages.<sup>74</sup> This means that a couple with a domestic partnership from Oregon, Washington, California, or Nevada (which include all the rights and responsibilities of marriage) may or may not have their relationship recognized by New Hampshire, while a couple with a civil union from Rhode Island (which has a somewhat more limited scope than any of the states referenced above with comprehensive laws) will have their relationship recognized by New Hampshire.<sup>75</sup> The lack of clarity regarding recognition appears to be compounded by the fact that town clerks are apparently making the decisions about whether to treat domestic partnerships as civil unions.<sup>76</sup> Since being considered a “civil union” brings with it both recognition of the rights and responsibilities of marriage and a requirement that the pre-existing legal relationship be dissolved prior to marrying in New Hampshire,<sup>77</sup> the question of whether domestic partnerships are included or excluded in that recognition has far-reaching consequences. Additionally, the potential for town-by-town variation on this issue presents the potential for serious complications and lack of clarity.

## 2. Courts Retroactively Interpreting Civil Unions as Marriage

The Massachusetts Supreme Judicial Court held in *Elia-Warnken v. Elia* in 2012—eight years after Massachusetts be-

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only couples who were married in a same-sex marriage state will have their marriages recognized by the federal government; couples who entered into civil unions and then moved to states which treat those civil unions as marriages may or may not be recognized as married by the federal government. See Press Release, U.S. Dep’t of the Treasury, *supra* note 70 (explaining Revenue Ruling 2013-17, which implemented the Supreme Court’s decision in *Windsor* by basing federal recognition of same-sex marriages on whether the marriage was entered into in a state which authorizes same-sex marriage, not whether the couple lives in a state which recognizes same-sex marriage).

73. *Id.*

74. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 66, at 15.

75. *Id.* at 34.

76. *Id.* at 15.

77. *Id.* at 33.

gan marrying same-sex couples—that a Vermont civil union is the equivalent of marriage under Massachusetts law.<sup>78</sup> Massachusetts does not have a statute similar to New Hampshire or Connecticut explicitly recognizing civil unions as marriages or equivalent to marriages. Instead, the issue first arose in the context of a divorce petition involving two men, Todd and Richard, who were married in Massachusetts in 2005.<sup>79</sup> Two and a half years before Todd and Richard married Todd had entered into a civil union in Vermont with another man.<sup>80</sup> At the time, out-of-state couples were eligible to enter into a civil union with no residency requirement, but in order to dissolve a Vermont civil union at least one party had to live in the state for one year prior to dissolution.<sup>81</sup> Todd never legally dissolved his Vermont civil union and the relationship was short-lived.<sup>82</sup> Todd and Richard married shortly after Massachusetts allowed same-sex couples to marry.<sup>83</sup> Todd filed for divorce in 2009; it was only after this point that Richard learned Todd had ever had a previous civil union.<sup>84</sup> Richard urged the court to find their marriage invalid on the grounds that Todd’s previous civil union was equivalent to a marriage and that therefore, Todd was a bigamist.<sup>85</sup>

The Massachusetts Supreme Judicial Court agreed with Richard and held that Vermont civil unions were to be considered marriages under Massachusetts law retroactively.<sup>86</sup> The court reasoned that the meaning of a marriage in Massachusetts was a “voluntary union of two persons as spouses, to the exclusion of all others.”<sup>87</sup> Vermont civil unions were the func-

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78. *Elia-Warnken v. Elia*, 972 N.E.2d 17, 22 (Mass. 2012). When Vermont changed its marriage laws to allow for same-sex marriage it also ended the ability of couples to enter into a civil union, although it continues to recognize civil unions entered into in Vermont prior to the extension of marriage. Act effective Sept. 1, 2009, S.115, 2009 Vt. Acts & Resolves No. 3 (codified at VT. STAT. ANN. tit. 15, §§ 1a, 8 (2009)).

79. *Elia*, 972 N.E.2d at 18.

80. *Id.*

81. Act effective July 1, 2000, H.847, 2000 Vt. Acts & Resolves (codified at VT. STAT. ANN. tit. 15, § 592 (2009)).

82. *Elia*, 972 N.E.2d at 18.

83. *Id.* at 18–19.

84. *Id.* at 18.

85. *Id.*

86. *Id.* at 21.

87. *Id.* at 20 (citing *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003)).

tional equivalent of such a union.<sup>88</sup> Massachusetts “ordinarily extend[s] recognition to out-of-State marriages under principles of comity, even if such marriages would be prohibited here, unless the marriage violates Massachusetts public policy, including polygamy, consanguinity and affinity.”<sup>89</sup> Therefore, the court held, Vermont civil unions should be treated as marriages.<sup>90</sup> The arguments the Massachusetts court had earlier made that civil unions were not sufficient for equal protection purposes did not apply in this instance because the Vermont civil unions were functionally equivalent and the distinction only matters for purposes of creating the institutions, not recognizing them.<sup>91</sup> Indeed, the court worried that not recognizing civil unions as equivalent to marriages would perpetuate discrimination against same-sex couples who lived in states without marriage.<sup>92</sup>

While Massachusetts has not addressed comprehensive domestic partnerships and the *Elia* case did not discuss the matter, it seems likely that application of the same reasoning would lead Massachusetts to treat such domestic partnerships as marriage. It is unclear, however, whether less comprehensive schemes, such as Wisconsin domestic partnerships or Colorado designated beneficiaries would also be treated as marriages because the court did not identify what made a relationship functionally equivalent to marriage.

### 3. Limited Recognition by Statute or Judicial Equity Powers

New York, which expanded marriage to same-sex individuals through legislative action in June 2011, has adopted a hybrid recognition system.<sup>93</sup> By statute, New York recognizes out-of-state civil unions and domestic partnerships for specific purposes including hospital visitation, decision-making about a partner’s remains, and benefits for surviving partners of individuals killed on Sept. 11, 2001.<sup>94</sup> A New York appellate court

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88. *Id.*

89. *Id.*

90. *Id.* at 21.

91. *Id.* at 20–21; *see* Op. of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

92. *Elia*, 972 N.E.2d at 21.

93. N.Y. DOM. REL. LAW § 10-a (McKinney 2011).

94. N.Y. PUB. HEALTH LAW § 2805-q (McKinney 2004) (guaranteeing hospital visitation by domestic partners); N.Y. PUB. HEALTH LAW § 4201 (McKinney 2006) (granting rights of surviving domestic partners with respect to dis-

held that out-of-state civil unions can be recognized for the purposes of dissolution.<sup>95</sup> Similar to *Elia*, this issue arose due to the end of a relationship and involves a Vermont civil union.<sup>96</sup> Audrey and Sonya entered into a civil union in Vermont in 2003.<sup>97</sup> Sonya verbally and physically abused Audrey and eventually Audrey left Sonya; they began living apart in 2006.<sup>98</sup> Since neither lived in Vermont nor could feasibly relocate to Vermont for a year to obtain dissolution of their civil union, they were not able to legally dissolve the relationship.<sup>99</sup> Audrey sought equitable and declaratory relief dissolving the relationship from a New York court in 2007.<sup>100</sup>

The appellate division court held the civil union was not a marriage and therefore New York divorce laws could not be applied.<sup>101</sup> The trial court had found it could not grant equitable relief without statutory authorization.<sup>102</sup> However, the appellate division found the court's equitable powers gave it "inherent authority . . . to fashion whatever remedies are required for the resolution of justiciable disputes and the protection of the rights of citizens, tempered only by our Constitution and statutes."<sup>103</sup> Since New York divorce law did not apply and Audrey could not get dissolution pursuant to Vermont's laws, she would have been left without a remedy if the court did not use its equitable powers to dissolve the relationship.<sup>104</sup> As this would be unjust, the appellate division court directed the lower court to use its equitable powers to dissolve the relationship.<sup>105</sup> This decision suggests that couples in a variety of legal recognition schemes should be able to have their relationships dissolved in New York through petitions for equitable relief.<sup>106</sup>

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position of remains); N.Y. WORKERS' COMP. LAW § 4 (McKinney 2002) (authorizing benefits for surviving domestic partners of employees killed on September 11, 2001).

95. *Dickerson v. Thompson*, 928 N.Y.S.2d 97, 98–99 (App. Div. 2011).

96. *Id.*

97. *Id.* at 98.

98. *Id.* at 100.

99. *Id.*

100. *Id.* at 98.

101. *Id.* at 100.

102. *Id.* at 99.

103. *Id.* (citation omitted) (internal quotation marks omitted).

104. *Id.* at 100.

105. *Id.*

106. This option is not available in all states because family law is often handled in courts of limited jurisdiction without equity powers. *See infra* note

#### 4. Limited Recognition Pending Affirmative Steps Toward Marriage

Washington State approved same-sex marriage by voter referendum in the November 6, 2012 election.<sup>107</sup> Washington has had a comprehensive domestic partnership law since 2007 and a reciprocity statute providing for recognition of both marriage and non-marriage unions with the same substantive rights and responsibilities as those provided for by Washington's domestic partnership law.<sup>108</sup> As a result of this background, the Washington marriage law included provisions for transitioning existing domestic partnerships to marriage and recognition of out-of-state non-marriage relationships.<sup>109</sup> Existing domestic partnerships will automatically convert to marriages in 2014 if the couple neither dissolves the partnership nor marries before the conversion date.<sup>110</sup> Out-of-state couples with civil unions or comprehensive domestic partnerships will be treated as having the same rights and responsibilities of married couples, meaning visiting couples and new transplants to Washington will continue to receive relationship protections.<sup>111</sup> However, if a couple lives in Washington for over a year without marrying, they will no longer receive recognition of their out-of-state marriage alternative.<sup>112</sup>

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173 and accompanying text.

107. *November 06, 2012 General Election Results, Referendum Measure No. 74 Concerns Marriage for Same-Sex Couples*, WASH. SEC<sup>Y</sup> ST., <http://vote.wa.gov/results/20121106/Referendum-Measure-No-74-Concerns-marriage-for-same-sex-couples.html> (last updated Nov. 27, 2012).

108. WASH. REV. CODE § 26.60.090 (2012). Prior to the recognition of same-sex marriage, Washington's reciprocity statute recognized civil unions, comprehensive domestic partnerships, and same-sex marriages as domestic partnerships under Washington law. Unique to Washington state's domestic partnership law is a provision allowing couples where at least one partner is over the age of sixty-two to enter into a domestic partnership regardless of whether the couple is opposite-sex or same-sex. This provision will continue in Washington, making domestic partnerships a way of extending rights and responsibilities to older Washingtonians who might lose pensions or other forms of support by remarrying. *See* WASH. REV. CODE § 26.60.030.

109. WASH. REV. CODE § 26.04.260 (providing for one year for out-of-state couples to transition to marriage); *Id.* § 26.60.090 (continuing reciprocity for domestic partnerships); *Id.* § 26.60.100 (converting Washington state domestic partnerships to marriage).

110. *Id.* § 26.60.100.

111. *Id.* § 26.04.260.

112. *Id.*

## 5. No Recognition

Some marriage states do not recognize out-of-state civil unions or domestic partnerships. For example, currently Iowa has no statute recognizing out-of-state civil unions and the courts have yet to decide a case addressing this question.<sup>113</sup> As such, it is unclear whether couples with out-of-state alternate legal relationships need to dissolve those relationships prior to marrying in Iowa or whether Iowa would recognize those relationships in some manner for the purposes of dissolution.

### D. HOME-STATE DISSOLUTION OPTIONS

Historically, in order for opposite-sex couples to obtain a divorce in a particular state, including the state in which the couple had married, at least one party had to be domiciled in that state.<sup>114</sup> The goal of this rule was to make it more difficult for one spouse to avoid strict divorce rules in their home-state.<sup>115</sup> The United States Supreme Court endorsed this state-based jurisdictional rule in a pair of cases in the 1940s, resulting in a common understanding that domicile must be established in order for a court to grant a divorce.<sup>116</sup> The effect of the domicile rule on opposite-sex couples seeking divorces has decreased since the 1960s due to a general loosening of standards for divorce.<sup>117</sup> However, the domicile rule has been particularly impactful on same-sex couples who were married or entered civil unions or domestic partnerships in one state and live in states that do not recognize same-sex relationships because it virtually locks them into a continuing legal relationship.<sup>118</sup>

Some states and jurisdictions, taking advantage of the fact domestic partnerships and civil unions are distinct legal entities from marriage, have adopted provisions to work around the domicile rule and allow couples to file for dissolution in the

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113. Drew A. Cumings-Peterson, *Out-of-State Civil Unions in Iowa After Varnum v. Brien: Why the State of Iowa Should Recognize Civil Unions as Marriages*, 96 IOWA L. REV. 297, 303 (2010).

114. Joslin, *supra* note 15.

115. *Id.*

116. *Williams v. North Carolina*, 325 U.S. 226 (1945) (*Williams II*); *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*); Joslin, *supra* note 15, at 1675. Generally see *id.*, for a more complete discussion of domicile, the strength of the precedent on the matter, and for an argument that the domicile rule should be abandoned.

117. Joslin, *supra* note 15, at 1708–10.

118. *Id.* at 1678–89; see also Hogue, *supra* note 15, at 229.

state in which they entered into an alternate legal recognition even if neither party is domiciled in that state.<sup>119</sup> This return to home-state approach to dissolution is based on the power of a court to exercise personal jurisdiction over individuals with their consent.<sup>120</sup> California has established this home-state jurisdiction for couples who enter into domestic partnerships, by requiring them to consent to jurisdiction for the purpose of dissolution.<sup>121</sup> Illinois has a similar approach for civil unions, allowing parties to file any civil action regarding a civil union in Illinois, even if neither party is domiciled there.<sup>122</sup> Washington D.C. has gone further and allows couples married in D.C. to file for divorce there, even if neither is domiciled in D.C., if they are unable to divorce in the state in which they live.<sup>123</sup>

This approach, which has yet to be challenged under the marriage domicile rule, provides couples with an avenue to dissolve their relationship if the state in which they live does not recognize it or, in some cases, is not well situated for handling non-marriage dissolutions.

As this Part identified, there is a severe lack of uniformity in the types of legal recognition of same-sex relationships, the scope of the protections within each type of recognition, and the ways that marriage states are recognizing alternate forms of legal recognition. There are three main types of recognition: nominal benefits schemes, comprehensive benefits schemes, and schemes that fall in between the two. The titles attached to these types of recognition are not uniform. For example, domestic partnerships may extend minimal hospital visitation benefits or mirror the full-extent of state-based marriage rights. This lack of uniformity becomes even more complicated when viewed through the lens of how marriage states treat these different types of relationships. Marriage states have adopted five approaches: ignore the relationships, recognize for the purpose of dissolution or minimal benefits, treat as equivalent to marriage per statute, retroactively treat as marriage per court decision, and recognize for a set period of time pending the couple taking affirmative steps toward marriage. As a result of these disparate approaches and the prevalence of the domicile rule

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119. Joslin, *supra* note 15, at 1716–18.

120. *Id.*

121. CAL. FAM. CODE § 298(c)(3) (West 2009).

122. 750 ILL. COMP. STAT. 75/45 (2011).

123. 2012 D.C. LEGIS. SERV. 19-133 (West) (to be codified at D.C. CODE § 16-902 (2012)).

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for dissolution proceedings, some couples are locked in legal relationships that receive little or no recognition in their current state. The next Part will analyze the problems this lack of uniformity creates.

### III. ANALYSIS: EXISTING APPROACHES ARE INSUFFICIENT

The existing approaches to recognizing and dissolving alternate forms of legal recognition by marriage states do not work. This Part will analyze why these approaches are insufficient by first focusing on the significant problems with state approaches that automatically treat civil unions and some domestic partnerships as marriages. Second, this Part will examine why the approaches of states that have provided some level of protections and rights to alternate forms of recognition should not be adopted wholesale. Finally, this Part will focus on the underlying problem with current state approaches: the lack of uniformity and clarity among the states.

#### A. TURNING NON-MARRIAGE INTO MARRIAGE

The Massachusetts Supreme Judicial decision in *Elia* and the statutory schemes in New Hampshire and Connecticut treat civil unions and at least some domestic partnerships as marriage.<sup>124</sup> While these approaches mean that couples relocating from states where they had substantial rights and responsibilities are not suddenly legal strangers in their new home state, they also raise a number of concerns and complications which make this a well-intentioned but short-sighted strategy. There are three core problems with this approach: 1) A lack of notice and recognition of different expectations; 2) Some individuals and couples will suffer unintended harm; and, 3) It damages the pro-marriage equality argument that civil unions and domestic partnerships are not equal to marriage.

##### 1. Lack of Notice and Different Expectations

Civil unions and domestic partnerships are legal experiments that were developed to work around existing legal and political prohibitions against same-sex marriage.<sup>125</sup> They were created amidst expectations that they would have limited port-

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124. *Supra* Part I.C.1-2.

125. *Supra* Part I.A.

ability and scope.<sup>126</sup> The statutes creating these institutions often warn couples that recognition of those relationships “may not be effective beyond the borders of this state.”<sup>127</sup> Especially early in the existence of civil unions and domestic partnerships it was highly unclear if any other states would recognize these legal relationships.<sup>128</sup> As a result, individuals entering into alternate legal relationships may not believe or intend them to have the same scope and effect as a marriage. Automatically treating these relationships as marriages creates a significant notice problem.

The notice problem is particularly clear in the case of Massachusetts, where the recognition of civil unions as marriages was announced by a court and applied retroactively.<sup>129</sup> Same-sex couples had been marrying for eight years in Massachusetts before the court’s decision in *Elia* holding that civil unions were marriages under Massachusetts law.<sup>130</sup> As a result couples were entering into marriages for eight years without notice that a prior undissolved civil union would be considered an undissolved marriage. It is still unclear whether any or all domestic partnerships will be considered marriages in Massachusetts.<sup>131</sup> This approach places an unfair burden on individuals who may not have chosen to enter into a marriage if one was available. Those individuals entered into a legal relationship which the creating state warned would be unlikely to be recognized beyond its borders and did not bring with it the same rights and responsibilities as marriage.

The notice issue raises a number of unanswered questions and potential consequences. Take the example of a couple with a civil union from Vermont who had been living in Massachusetts for seven years prior to the *Elia* decision. If they filed and paid taxes during that time as single individuals but, per *Elia*, their civil union retroactively counts as a marriage, are they li-

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126. *Supra* Part I.A.

127. OR. REV. STAT. § 106.305(7) (2011); *supra* note 54 and accompanying text; see also Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)).

128. Joanna Grossman, *Will Other States Recognize Vermont’s Civil Unions?*, CNN.COM (May 20, 2003, 2:08 PM), <http://www.cnn.com/2003/LAW/05/20/findlaw.analysis.grossman.civilunions.txt/> (noting that this was a particularly relevant question since 85% of those granted civil unions in the first three years of its existence were from out-of-state).

129. *Elia-Warnken v. Elia*, 972 N.E.2d 17 (Mass. 2012).

130. *Supra* Part I.C.1.

131. *Supra* Part I.C.1.

able for any back taxes that would have been owed as a married couple? Imagine the couple separated pre-*Elia* but did not dissolve their civil union because it would have required one of them to relocate to Vermont and one partner later died. The deceased former partner failed to write a will because they intended their estate to be awarded to their parents as Massachusetts law provides for single individuals.<sup>132</sup> Can the former partner challenge the probate and seek the entire estate as a spouse?<sup>133</sup> These, and other questions, have yet to be answered but illustrate the problem with retroactively treating alternate forms of legal recognition as marriage. Since Massachusetts did not provide notice that it intended to treat alternate relationships as marriage retroactively, couples in these relationships or separated from these relationships were not aware that they needed to take steps to ensure those relationships would not be treated like marriage. It is unfair to impose the expectations and requirements marriage brings on the individuals in alternate-recognition relationships without notice.

The statutory notice provided by New Hampshire and Connecticut ameliorates this concern to some extent for couples moving from out-of-state, but does not negate it.<sup>134</sup> An example will best illustrate the problem. Lisa and June were in love and in college in Connecticut in 2000 when Vermont began performing civil unions. They jumped at the chance to symbolically celebrate their love and entered into a civil union. Like eighty-five percent of those who entered into civil unions in the first three years, they were both from out-of-state.<sup>135</sup> A couple of years later in 2002 they graduated college and broke up. June stayed in Connecticut. Lisa moved to Idaho and the two fell out of touch. Neither thought about the legal implications of their undissolved civil union, which in order to dissolve at least one of them would have to live in Vermont for a year.<sup>136</sup> Then in 2009, after Connecticut legalized same-sex marriage, Connecticut passed a law recognizing civil unions as marriages in Connecti-

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132. MASS. GEN. LAWS ANN. Ch. 190B, § 2-103 (West 2011) (providing for the entire estate to pass to the parents if the deceased has no spouse or children).

133. *Id.* § 2-102 (establishing the share of a spouse's inheritance when the spouse dies intestate).

134. CONN. GEN. STAT. § 46b-28a (2009); N.H. REV. STAT. ANN. § 457:45 (2009).

135. Grossman, *supra* note 128.

136. VT. STAT. ANN. tit. 15, § 592 (2009).

cut.<sup>137</sup> Despite no affirmative steps on their part and with no notice prior to entering into their Vermont civil union, Lisa and June were now married according to Connecticut and subject to Connecticut's divorce laws.<sup>138</sup>

The story of Lisa and June illustrates the potential disconnect between the expectations and intentions of the individuals who have entered into alternate-recognition schemes and the impact of a state recognizing those relationships as marriage. Even if the couple hopes or knows a state may recognize their relationship for the purposes of state-based protections, considering those relationships marriages could create a new set of complications now that Section 3 of DOMA has been overturned and the federal government is recognizing same-sex marriages.<sup>139</sup> The federal government has now taken steps to recognize legally valid same-sex marriages, but it has declined to extend federal marriage rights and responsibilities to couples in civil unions and domestic partnerships.<sup>140</sup> For couples who remain in the state which created the civil union or domestic partnership, changes in federal law regarding recognition of same-sex marriage will not grant them any of the "over 1,138 federal rules and benefits [that] use the term 'spouse.'"<sup>141</sup> These rules and benefits include tax filing status, retirement and disability benefits, avoiding a requirement that an individual pay taxes on the value of their partner's health insurance, immigration sponsorship, and tax-free inheritance of the marital estate.<sup>142</sup> These benefits are now available to legally married couples but remain unavailable to couples in civil unions or domestic partnerships.<sup>143</sup> This disparity in access to federal benefits means that married couples are dissimilarly situated from couples in alternate relationships. This disparity will likely persist for couples who entered into their relationship in a

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137. *Id.* § 46b-28a.

138. CONN. GEN. STAT. § 46b-40.

139. Defense of Marriage Act of 1996, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (2012) and 28 U.S.C. § 1738C (2012)), *invalidated in part* by *United States v. Windsor*, 133 S. Ct. 2675 (2013).

140. John O'Brien, Dir. For Healthcare & Ins., Office of Personnel Mgmt., Benefits Administration Letter 13-203 (July 17, 2013), *available at* <http://www.opm.gov/retirement-services/publications-forms/benefits-administration-letters/2013/13-203.pdf>.

141. Wilson, *supra* note 54, at 232.

142. *Id.*

143. O'Brien, *supra* note 140.

non-marriage state, even if they relocate to a marriage state which treats their alternate form of recognition as marriage.<sup>144</sup>

Further, as Washington recognized by continuing a non-marriage alternative for seniors who are likely to have pensions or social security benefits that are affected by marriage, there are good reasons why some couples might choose not to enter into a marriage even if they would seek out some form of legal protections.<sup>145</sup> Automatically treating these relationships as marriages could undermine the expectations the parties had regarding their scope when they entered into them.

## 2. Some Couples and Individuals Will Be Less Protected

The story of Todd and Richard at the core of the *Elia* case in Massachusetts perfectly illustrates the impact that considering civil unions marriages can have on couples.<sup>146</sup> In the *Elia* case it was Richard, who did not previously know about Todd's undissolved civil union, who argued it invalidated their marriage.<sup>147</sup> However, it is not difficult to imagine a different scenario which would place Richard in an extremely difficult financial situation and strip him of the protections he thought he had by getting married. It appears both Todd and Richard entered into their marriage believing it was valid, they lived as a married couple for four years, presumably amassing the shared costs, assets, and commitments that are typical of a marriage.<sup>148</sup> If Richard had given up his career to stay home and take care of their adopted daughter and sought spousal support in a divorce petition, the idea that Todd could avoid any obligation to Richard as a result of a previous civil union would seem

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144. This is due to the Obama Administration's current adoption of the "state of celebration" rule for recognition as opposed to the "state of domicile" in determining whether couples are eligible for federal benefits and assessing tax status; although this specific scenario does not appear to have been addressed by the administration. See Josh Hicks, *Federal Benefits Won't Extend to Domestic Partners Under DOMA Ruling*, WASH. POST, July 8, 2013, <http://www.washingtonpost.com/blogs/federal-eye/wp/2013/07/07/federal-benefits-wont-extend-to-domestic-partners-under-doma-ruling/>; O'Brien, *supra* note 140.

145. See, e.g., WASH. REV. CODE § 26.60.030 (2012); Martha Ackelsberg and Judith Plaskow, *Why We're Not Getting Married*, COMMONDREAMS.ORG (June 1, 2004), <http://www.commondreams.org/views04/0601-10.htm>.

146. *Elia-Warnken v. Elia*, 972 N.E.2d 17, 18 (Mass. 2012).

147. *Id.*

148. *Id.*

inherently unfair. However, under the *Elia* decision that is a plausible scenario.<sup>149</sup>

Additionally, for some couples there are benefits to being in a relationship which provides some, but not all, of the protections and responsibilities of marriage.<sup>150</sup> Some individuals who were previously married and are receiving pension or retirement benefits as a result of this previous marriage could lose those benefits if they are considered married.<sup>151</sup> This was one of the reasons that Illinois chose to extend its civil union statute to opposite as well as same-sex couples.<sup>152</sup> Similarly, as part of the law extending marriage to same-sex couples, Washington State maintained domestic partnerships for any two non-related persons over the age of sixty-two.<sup>153</sup> California has also chosen to continue to recognize and offer domestic partnerships, despite the availability of same-sex marriage post-*Perry*, similarly recognizing that there are significant benefits to not being married for some couples.<sup>154</sup> Many couples may find significant financial benefits regarding repayment of student loans if they chose not to get married—monthly payments for a person in a non-federally recognized relationship can be less than half that of a similarly situated person in a federally-recognized marriage.<sup>155</sup> Immigration status can be negatively

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149. See *id.* at 21 (recognizing Vermont civil union to guard against inconsistent legal obligations).

150. See Lucas, *supra* note 8.

151. Melynda Dovel Wilcox, *Love & Money Senior Style*, KIPLINGER'S PERS. FIN., Oct. 1996, at 84 (explaining that while not all forms of retirement benefits are threatened by remarriage, some Social Security and public employee pensions are).

152. Micheal S. Jordan, *Seniors, Social Security, and the Civil Union Law*, 99 ILL. B.J. 232 (2011).

153. NCLR, *Civil Unions*, *supra* note 10.

154. The Supreme Court upheld a lower court decision invalidating California's Proposition 8, which amended the state constitution to prohibit same-sex marriage after the state supreme court had found equal access to marriage was required, as a violation of Equal Protection; as a result, same-sex couples can again marry in California. See *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (regarding the constitutionality of California's Proposition 8, ending the practice of same-sex marriage in California); Lucas, *supra* note 8; *California Domestic Partner Registry*, CAL. SEC. ST., <http://www.sos.ca.gov/dpregistry/> (last visited Nov. 26, 2013).

155. See Megan Slack, *Income Based Repayment: Everything You Need to Know*, WHITEHOUSE.GOV, <http://www.whitehouse.gov/blog/2012/06/07/income-based-repayment-everything-you-need-know> (last visited Nov. 14, 2013) (discussing the effect of federally recognized marriage on income based repayment).

affected by marrying.<sup>156</sup> It can be easier to qualify to adopt a child as a legally single individual than as a married gay or lesbian couple since most foreign governments do not sanction adoptions by gay or lesbian couples.<sup>157</sup> Additionally, for a host of personal reasons couples may be attracted to legal schemes which allow them access to benefits but which do not require a high level of commitment and responsibility.<sup>158</sup> The decision to enter into an alternate legal relationship during the past ten to fifteen years likely involved an assessment of all of the above considerations. Automatically treating these alternative relationships as marriages could strip these individuals of the protections and advantages those relationships provide over marriage.

### 3. Undermines Campaign for Marriage Equality

Marriage equality advocates continue to push for marriage based on the argument that “[t]here is no substitute for the social power of a marriage certificate in affirming a couple’s common humanity and equality.”<sup>159</sup> Treating marriage alternatives as equal to marriage minimizes the real qualitative differences between these institutions and undercuts the arguments of those who are advocating for marriage in non-marriage and legal recognition states.

As the Massachusetts Supreme Court stated in its decision finding the existing ban on same-sex marriage to be unconstitutional, “Because it fulfills yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition.”<sup>160</sup> Echoing the arguments of marriage equality advocates the Massachusetts Court stated it found civil un-

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156. Cf. *Relationship-Based Petitions*, IMMIGRATION EQUALITY, <http://www.immigrationequality.org/issues/couples-and-families/relationship-based-petitions/> (last visited Nov. 26, 2013) (noting that now that DOMA has been overturned, marriage may have significant immigration benefits).

157. Jennifer B. Mertus, *Barriers Hurdles, and Discrimination: The Current Status of LGBT Inter-country Adoption and Why Changes Must Be Made to Effectuate the Best Interests of the Child*, 39 CAP. U. L. REV. 271, 281–82 (2011) (describing how many countries have bans or functional restrictions on adoptions by homosexual couples).

158. Lucas, *Domestic Partnership*, *supra* note 8.

159. *Talking Points*, MARRIAGE EQUALITY R.I., [http://www.marriageequalityri.org/learn/talking\\_points/](http://www.marriageequalityri.org/learn/talking_points/) (last visited Nov. 26, 2012).

160. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003).

ion/domestic partnership statutes “reflect[] a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”<sup>161</sup> Social scientists have found that campaigns in favor of constitutional amendments limiting marriage to opposite-sex couples increase stress, mental anxiety, and fears about the lack of familial legal protections among gay and lesbian individuals.<sup>162</sup> Many of these same individuals say denial of marriage makes them feel like second class citizens.<sup>163</sup> As Jodi Weiner testified before the New Jersey Civil Union Commission when describing the different treatment she and her spouse received after being married as compared to when they were in a civil union “[w]e can all talk about how the civil union law is supposed to work just like marriage. But in my case and others, it doesn’t work that way in the real world.”<sup>164</sup> Treating these alternate forms of legal recognition as marriage fails to recognize the unique, bittersweet, and sometimes harmful essence of creating separate legal institutions for same-sex couples.

It is somewhat ironic that the Massachusetts Supreme Court and gay rights advocates view the *Elia* decision as combating the “separate yet equal” nature of alternate legal recognition schemes.<sup>165</sup> The Massachusetts court argued that “[r]efusing to recognize a legal spousal relationship that granted rights equal to those acquired through marriage, in a State that did not allow same-sex couples to marry at the time, would only perpetuate the discrimination against same-sex couples” that the court intended to avoid by requiring marriage instead of alternate legal recognition under the Massachusetts Constitution.<sup>166</sup> Choosing to equate civil unions or domestic partnerships with marriage undercuts the argument that such institutions are less than marriage. Further, by doing so, marriage

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161. Opinions of the Justices, 802 N.E.2d 565, 570 (Mass. 2004).

162. Sharon Scales Rostosky et al., *Lesbian, Gay, and Bisexual Individuals’ Psychological Reactions to Amendments Denying Access to Civil Marriage*, 80 AM. J. ORTHOPSYCHIATRY 3, 302, 305–06 (2010).

163. *Id.*

164. Tina Kelley, *New Jersey Civil Union Law Has Fallen Short in Its First Year, Commission Is Told*, N.Y. TIMES, Oct. 28, 2007, <http://www.nytimes.com/2007/10/28/nyregion/28civil.html>.

165. *Elia-Warnken v. Elia*, 972 N.E.2d 17, 21 (Mass. 2012); *Todd Elia-Warnken v. Richard Elia*, GLAD (July 26, 2012), <http://www.glad.org/work/cases/todd-elia-warnken-v-richard-elia/> (announcing victory for LGBT rights in the *Elia* case).

166. *Elia*, 972 N.E.2d at 21.

states miss an opportunity to present a practical and compelling argument for non-marriage states to adopt marriage as opposed to alternate legal recognition. The fact that alternate recognition results in a lack of uniform recognition and varying packages of rights is a compelling argument for why states should adopt marriage when faced with the decision of what, if any, type of recognition to extend. Uniform and consistent forms of recognition are easier for businesses and local and state governments. If a marriage state is going to treat alternate forms of recognition as marriage, non-marriage states do not need to consider the issue of recognition when choosing what form of recognition to implement.

Further, since twenty-nine states have constitutional amendments prohibiting same-sex marriage, it will be necessary to repeal those constitutional amendments prior to marriage being an option.<sup>167</sup> Although it is significantly easier to amend most state constitutions than it is to amend the federal Constitution, many states require more than a simple majority of voters or legislators to approve a change to the state constitution.<sup>168</sup> As a result, in those twenty-nine states with constitutional amendments, more than a simple majority of the voters may need to support marriage equality.<sup>169</sup> To garner widespread support for marriage equality, advocates need a strong and unified message that alternative legal recognition schemes are not equal to marriage.<sup>170</sup> Treating these relationships as the legal equivalent of marriage undercuts this message.

#### B. RECOGNIZE DISTINCTIONS BUT EXTEND SOME PROTECTIONS

Both New York and Washington State have developed systems which recognize that civil unions and domestic partnerships are not marriages and still provide some level of legal

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167. *Statewide Marriage Prohibitions*, HUM. RTS. CAMPAIGN, [http://www.hrc.org/files/assets/resources/marriage\\_prohibitions\\_072013.pdf](http://www.hrc.org/files/assets/resources/marriage_prohibitions_072013.pdf) (last visited Nov. 26, 2013).

168. *See, e.g.*, FLA. CONST. art. XI, § 5 (e) (requiring approval by sixty-percent of those voting on the measure to pass a constitutional amendment); JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 56, 62, 310–11 nn.106–08, 313 n.132 (2006).

169. DINAN, *supra* note 168 at 310–11 nn. 106–108. This also means that it is most likely that states with constitutional bans on same-sex marriage will extend alternate forms of recognition before they are able to repeal the constitutional prohibition and extend marriage since alternate forms of recognition will require approval from just a majority of the legislature or voters.

170. *Supra* note 159 and accompanying text.

protections.<sup>171</sup> This is the general route that marriage states should take. However, there are some reasons why these specific approaches would not work universally. New York's scheme is largely driven by judicial decisions that have not been affirmed by the state's highest court.<sup>172</sup> This means there is little certainty as to whether the equity powers approach will continue and to what kinds of relationships from which states it will apply. Since a number of states address petitions for dissolution through courts of limited jurisdiction, not all state courts could adopt the equity approach.<sup>173</sup> Further, outside of the equity approach to dissolution, New York provides extremely limited rights and protections to couples prior to their choosing to marry in New York.<sup>174</sup> While Washington State's statute provides a one-year window of recognition for couples with out-of-state civil unions or comprehensive domestic partnerships, it is not clear whether less comprehensive relationships would be recognized and whether the courts would dissolve those relationships.<sup>175</sup> While these approaches do allow for some recognition of alternate relationships neither approach should be adopted by other marriage states without some changes, which will be discussed in Part III.

### C. FUNDAMENTAL LACK OF UNIFORMITY AND CLARITY

The underlying problem with marriage states' recognition of alternate legal relationships is a lack of clarity and uniformity. If a couple from Oregon moves to Washington they will have protections for a year at which time they must decide whether to marry.<sup>176</sup> If the same couple moves to Massachusetts they will be considered to be married.<sup>177</sup> If they move to Iowa, they

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171. *Supra* Part I.C.1, I.C.4.

172. *Dickerson v. Thompson*, 928 N.Y.S.2d 97, 98–99 (N.Y. App. Div. 2011).

173. *See, e.g.*, S.C. CODE ANN. § 63-3-10 (West 2013) (creating “courts of limited jurisdiction to be known and designated in this title as ‘family courts’”); *Family Courts*, GREENVILLE COUNTY, S.C., [http://www.greenvillecounty.org/family\\_court/](http://www.greenvillecounty.org/family_court/) (last visited Nov. 26, 2013).

174. N.Y. PUB. HEALTH LAW § 2805-q (McKinney 2007) (guaranteeing hospital visitation by domestic partners); N.Y. PUB. HEALTH LAW § 4201-2(a)(ii-a) (McKinney 2002) (granting rights of surviving domestic partners with respect to disposition of remains); N.Y. WORKERS' COMP. LAW § 4 (McKinney 2005) (authorizing benefits for surviving domestic partners of employees killed on September 11, 2001).

175. WASH. REV. CODE § 26.04.260 (2011).

176. *Id.*

177. *Elia-Warnken v. Elia*, 972 N.E.2d 17, 21 (Mass. 2012).

may or may not be considered legal strangers.<sup>178</sup> Even more confusing, if the Oregon couple moves to a particular town in New Hampshire, they will be considered married, whereas if they move to a different town in New Hampshire fifty miles away, they will be considered legal strangers.<sup>179</sup>

This lack of clarity and uniformity has significant real-world consequences. Take, for example, John and Sam, a couple from Oregon, who move to a town in New Hampshire where the town clerk does not consider domestic partnerships to be marriages under New Hampshire law.<sup>180</sup> John and Sam break up and fail to dissolve their Oregon domestic partnership. John moves to Massachusetts, falls in love, and a few years later gets married. Sam stays in the same town in New Hampshire, also falls in love and gets married. John's marriage in Massachusetts is considered invalid and his spouse would fail to receive the benefits and rights they both believed he was entitled to by marrying in Massachusetts.<sup>181</sup> Sam's marriage, however, is considered valid and his spouse is protected.<sup>182</sup> The lack of uniformity among marriage states causes confusion and results in unequal treatment of similarly situated couples. In order for there to be predictability and fairness among the states that recognize same-sex relationships, there must be a uniform coordinated approach to recognition of non-marriage relationships by marriage states.

### III. FINDING CLARITY: PROPOSING A UNIFORM APPROACH TO MYRIAD DIFFERENT LAWS

Numerous scholars have commented on the lack of clarity and uniformity in this field.<sup>183</sup> True uniformity and clarity will not exist until there is marriage equality in all the states. However, until that time, steps can be taken to minimize the variation in marriage and alternate-recognition laws to create more

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178. Cumings-Peterson, *supra* note 113, at 299–300.

179. *Supra* notes 70 and 75 and accompanying text.

180. *Supra* Part I.C.1.

181. See *Elia*, 972 N.E.2d at 22 (finding that a prior civil union was a marriage for purposes of polygamy statute).

182. *Supra* Part I.C.1.

183. *E.g.*, PIZER & KUEHL, *supra* note 59, at 1; Hogue, *supra* note 15, at 229–31; Hoogs, *supra* note 16, at 708; Johnson, *supra* note 22, at 249 (using a Connecticut state court ruling on civil union dissolution as a springboard for her discussion of same-sex divorce); Levin, *supra* note 16, at 47; Tarasen, *supra* note 15, at 1585.

uniform institutions and practices for recognition and dissolution. Because the problem is in large part statutory the ultimate solution also needs to be statutory, although there are steps courts can take in the meantime to encourage uniform and clear recognition practices. Jennifer C. Pizer and Sheila James Kuehl from the Williams Institute at UCLA have proposed model civil union and same-sex marriage legislation.<sup>184</sup> Similar model legislation should be developed including some significant changes to address the concerns raised by this Note: the lack of uniformity in the recognition of alternate legal relationships, the need for recognition of those relationships, and the need to recognize the differences between these relationships and marriage. Model legislation should be developed for marriage states and non-marriage states.

#### A. MARRIAGE STATES

Marriage states should adopt uniform model legislation to provide notice about the type and scope of relationships that will be recognized in their states and to express a public policy preference for marriage. Additionally, courts in marriage states that fail to adopt such legislation can steer couples toward home-state dissolution options or exercise equity powers to dissolve unions.

##### 1. Model Legislation

Model marriage legislation should contain provisions regarding recognition of alternate legal relationships in a way that recognizes their distinctions, yet continues to provide couples in those relationships with legal protections. Existing proposals for model legislation are insufficient because they suggest that marriage states should treat civil unions and domestic partnerships as marriages and grant the same rights and responsibilities even when parties do not choose to marry in a state with marriage.<sup>185</sup> The best existing model is Washington State's statute, which extends protections for a year to all

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184. PIZER & KUEHL, *supra* note 59.

185. The Williams Institute Model Marriage Legislation proposes to treat civil unions and domestic partnerships as marriages and to grant the same rights and responsibilities even when parties do not choose to marry in states with marriage, therefore it is not ideal. See PIZER & KUEHL, *supra* note 59, at 36-37.

relationships that have similar rights and responsibilities to marriage while the couple decides whether or not to marry.<sup>186</sup>

Washington's recognition law reads:

If two persons in Washington have a legal union, other than a marriage, that:

- (1) Was validly formed in another state or jurisdiction;
- (2) Provides substantially the same rights, benefits, and responsibilities as a marriage; and
- (3) Does not meet the definition of domestic partnership in RCW 26.60.030,

then they shall be treated as having the same rights and responsibilities as married spouses in this state, unless:

- (a) Such relationship is prohibited by RCW 26.04.020 (1)(a) or (2);  
or
- (b) They become permanent residents of Washington state and do not enter into a marriage within one year after becoming permanent residents.<sup>187</sup>

Similar model language should be augmented by a provision governing recognition of relationships that are not substantively equivalent to marriage for the purpose of dissolution; indeed, the model legislation should provide a manner for recognizing and dissolving all three major types of non-marriage relationships. Couples should be allowed to marry without first dissolving their existing unions, which would avoid the problem of needing to either return to their home state to dissolve the union or needing to unnecessarily expend the resources to hire an attorney to dissolve the union when the couple simply wants to obtain the benefits of marriage. This would guarantee that couples in relationships in states such as Wisconsin and Colorado could end their legal relationships in marriage states and that non-marriages would not be conflated with marriages. Additionally, the statewide determination of those relationships could avoid the New Hampshire problem of town-by-town assessment. The model legislation should read:

**Legal Union Recognition**

(A) If two persons in (*adopting state*) have a legal union, other than a marriage, that:

- (1) Was validly formed in another state or jurisdiction;
- (2) Provides substantially the same rights, benefits, and responsibilities as a marriage; and
- (3) Does not meet the definition of domestic partnership (*if applicable*),

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186. WASH. REV. CODE § 26.04.260 (2012).

187. *Id.*

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Then they shall be treated as having the same rights and responsibilities as married spouses in this state, unless:

- (a) Such relationship is prohibited by (*relevant laws of the adopting state*); or
- (b) They become permanent residents of (*adopting state*) and do not enter into a marriage within one year after becoming permanent residents.

(B) If two persons in (*adopting state*) have a legal union, other than a marriage, that:

- (1) Was validly formed in another state or jurisdiction; and
- (2) Provides fewer rights, benefits, and responsibilities than a marriage; and
- (3) Does not meet the definition of domestic partnership (*if applicable*)

Then they shall be granted the same rights, benefits, and responsibilities in this state as granted under the foreign state's law authorizing the legal union, unless:

- (a) They have been permanent residents of (*adopting state*) for more than one year.

(C) If two persons who have been permanent residents of (*adopting state*) for more than one year,

- (1) Have a legal union as defined by subsection (B); and
- (2) File for dissolution of that union in a court of (*adopting state*)

Then the court will dissolve the union according to the applicable laws of the state in which it was entered.

(D) If two persons in (*adopting state*) have a legal union, other than a marriage, that:

- (1) Was validly formed in another state or jurisdiction; and
- (2) They apply for marriage license in (*adopting state*)

They may receive a marriage license and have the marriage solemnized without the need to dissolve the existing legal union.

This model legislation achieves three goals. First, it ensures that couples from legal recognition states have continuing protections and recognition when they move to a marriage state. Second, it allows for marriage states to express a public policy preference for marriage by setting a time limit for the continued recognition of non-marriage unions. Third, it ensures that even those couples who chose not to marry in a marriage state can dissolve their union at any time after becoming residents of the marriage state.<sup>188</sup>

Model legislation could be advocated for by both state bar associations and state-based LGBT rights organizations. Both types of organizations have coordinated national counterparts which could disseminate model legislation and assist in nation-

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188. *Supra* note 175 and accompanying text.

al coordination. Additionally, LGBT organizations, especially those in marriage states, have experience coordinating campaign efforts with other states and their national counterparts.<sup>189</sup>

## 2. Considerations for Courts

While such model legislation is pending, whenever possible, courts in marriage states should adopt the New York equity powers approach of recognizing non-marriage relationships for the purpose of dissolution and apply equity principles in assessing the fairest manner in which to dissolve the relationship, taking into account the differences between those relationships and marriages.<sup>190</sup> Courts with limited jurisdiction have less discretion to act outside the state's statutory scheme.<sup>191</sup> However, courts can and should evaluate whether home-state dissolution is an option for the couple and encourage its utilization.

### B. NON-MARRIAGE STATES

While this Note's focus is on how marriage states should treat alternate forms of legal recognition, it is worth noting that non-marriage states need guidance in how to craft new legal recognition legislation and how to approach existing relationship dissolutions. Practically, model legislation should be developed for all three major types of non-marriage relationships. Ideally model legislation could narrow the types of relationships into two major types, extensive civil union/domestic partnerships and basic relationship registrations, with uniform packages of rights and responsibilities, therefore making it easier for marriage states to assess how to treat out-of-state relationships. For purposes of dissolution, legal recognition legislation should include a provision for home-state dissolution proceedings similar to California's domestic partnership law.<sup>192</sup> This would provide a way for couples to dissolve their relationships when living in non-marriage states which do not allow for dissolution of same-sex unions. Similarly, those who live in dif-

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189. See, e.g., *HRC 2012: Unprecedented Mobilization for Equality*, HUM. RTS. CAMPAIGN, [http://www.hrc.org/files/assets/resources/HRC2012UnprecedentedMobilizationforEquality\\_2012.pdf](http://www.hrc.org/files/assets/resources/HRC2012UnprecedentedMobilizationforEquality_2012.pdf) (last visited Nov. 26, 2013).

190. See *Dickerson v. Thompson*, 928 N.Y.S.2d 97, 98–99 (N.Y. App. Div. 2011) (explaining the New York equity powers approach).

191. *Supra* note 106 and accompanying text.

192. CAL. FAM. CODE § 298(c)(3) (West 2013).

ferent types of legal recognition states are likely to experience similar issues with recognition of their unions in other states. As the number of alternate-recognition states increase as support for legal recognition grows in states with existing constitutional bans on same-sex marriage, a growing number of states will need assistance developing legislation and legal standards for recognizing and dissolving alternate legal recognition relationships.<sup>193</sup>

Model legislation which addresses these concerns could result in more uniform and clear protections for all couples, respect the qualitative distinction between marriage and non-marriage relationships, and provide further argument for marriage equality.

### C. CHALLENGES TO IMPLEMENTATION OF THIS PROPOSAL

There are at least two easily identifiable challenges to implementing the solution proposed by this Note. First, passing uniform legislation in at least sixteen states will require coordination and a uniform agenda. Second, political actors with a vested interest in marriage equality may view this proposal as taking inadequate steps towards equal marriage rights. The argument that passing uniform legislation in multiple states is impractical is easily countered. State and National LGBT rights organizations have decades of experience of coordinating efforts regarding marriage equality which could be replicated to lobby for uniform model recognition legislation.<sup>194</sup> It would be most challenging to pass legislation in states where marriage rights were extended by courts as opposed to the legislature, such as Iowa.<sup>195</sup> However, the argument could be made that proactively defining the scope of recognition would minimize subsequent court challenges regarding recognition.

Whereas some marriage equality advocates would argue that this approach would harm the campaign for equal marriage rights, this Note argues that it would actually further the cause for marriage equality. Critics of this approach may argue along the lines of the Massachusetts court in *Elia* that failing to treat alternate forms of recognition as marriage perpetrates the imposition of a two-tiered relationship recognition scheme

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193. *Supra* note 14 and accompanying text.

194. *Supra* note 189 and accompanying text.

195. *See Varnum v. Brien*, 763 N.W.2d 862, 906 (Iowa 2009) (extending marriage rights to same-sex couples).

on gay and lesbian individuals.<sup>196</sup> However, this argument ignores the reality that legal recognition states have created a two-tiered system and many non-marriage states are likely to follow. The reality is that alternate forms of legal recognition are not marriage and ignoring the qualitative differences of those relationships minimizes the argument that they are not sufficient to provide equal rights. This Note argues that providing recognition and protection of individuals in those relationships while professing a public policy preference for marriage is a more effective and transparent way to support the cause for universal marriage equality.

### CONCLUSION

Legal recognition of same-sex relationships is a dynamic and evolving concept. The development of alternative legal relationships is limited to the last fifteen years and the speed with which the type and scope of legal recognition has changed is reflected in the myriad legal issues those relationships have raised. A whole host of complications has arisen from the ad hoc approach to creating and recognizing these relationships in the United States and in the interaction of those relationships with state and federal prohibitions on same-sex marriage. Three major types of non-marriage relationships have developed and marriage states have responded with ten different approaches to recognizing those relationships as intact and for the purposes of dissolution. As this Note has shown, none of these approaches is sufficient and there is an underlying lack of uniformity and consistency across the country.

As additional states extend marriage rights and other states, most likely the twenty-nine with constitutional prohibitions against same-sex marriage, establish alternate forms of legal recognition, more marriage states will be faced with the question of how to recognize and dissolve alternate forms of legal relationships. Uniform model legislation is needed that respects and recognizes the differences between these relationships and marriage yet also extends some level of protection to couples. If marriage states adopt the model legislation proposed in this Note, couples in alternate-recognition relationships will have increased predictability regarding the recognition and dissolution of those relationships in a way that strengthens, rather than weakens, the call for uniform marriage equality.

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196. *Elia-Warnken v. Elia*, 972 N.E.2d, 17 21 (Mass. 2012).