THE SURVIVAL OF NONMARITAL RELATIONSHIP STATUSES IN THE SAME-SEX MARRIAGE ERA: A PROPOSAL

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Based on recent achievements by the same-sex marriage movement and current societal attitudes, it seems clear that it is only a matter of time before same-sex marriage is recognized by every jurisdiction within the United States. When this occurs, society will be left with an important decision regarding whether the widespread legalization of same-sex marriage marks the beginning or the end of the discussion in this country regarding adult relationship recognition. Hopefully, it will mark the beginning of the discussion. Individuals face incredibly limited options when it comes to legal recognition of their important relationships. The federal government and the majority of states recognize only one relationship status, marriage, leaving couples with the narrow choice of marriage or nonrecognition. It is time for the United States to follow the lead of other countries in creating an effective and comprehensive system of adult relationship recognition that does not depend solely upon marriage. There is ample evidence that marriage is in trouble in the United States. An increasing number of individuals are eschewing marriage for nonmarital cohabitation, those who marry do so later in life, and the divorce rate continues to hover around fifty percent. As marriage rates decrease, more individuals are left in the unfortunate position of having inadequate legal protections for their relationships. Many people likely would benefit from the introduction of a third option; namely, a state-based nonmarital relationship status that offered a true alternative to marriage and was recognized by the federal government. This Article offers an innovative proposal for a new system of nonmarital relationship recognition in the United States.

I. INTRODUCTION

Legal recognition of same-sex marriage is advancing at a rapid pace in the United States. Between 2004 and 2014, same-sex marriage became legal in thirty-five states,[1] and, in 2013, section 3 of the Defense of Marriage Act was struck down by the United States Supreme Court, resulting in the recognition of lawful same-sex marriages by the federal government.[2] Societal attitudes toward same-sex marriage also are changing

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1. See *infra* notes 38–41 and accompanying text.

2. United States v. Windsor, 133 S. Ct. 2675, 2695–96 (2013); Editorial, *The Expanding Power of* U.S.

quickly. Between 1996 and 2013, the number of Americans who stated that they support same-sex marriage jumped from twenty-seven percent to fifty-five percent.[3] Researchers predict that by 2020, a majority of residents in all except six states will support the legalization of same-sex marriage.[4] It seems clear that it is only a matter of time before same-sex marriage is legal throughout the United States. When widespread legal recognition of same-sex marriage occurs, society will be left with an important decision regarding whether this occurrence marks the end of the discussion in this country regarding adult relationship recognition or instead allows Americans to begin looking beyond marriage and considering additional forms of relationship recognition for same- and opposite-sex couples.

Consideration of the current state of marriage in the United States leads to the conclusion that it is time to contemplate additional ways to grant individuals important legal protections for their relationships. In 2010, for the first time, marital households comprised less than half of all households in the United States.[5] In addition, only slightly over half of all adults are currently married, an all-time low, and a mere twenty percent of adults between the ages of eighteen and twenty-nine are married.[6] The decline in marriage is not confined to one group of individuals—it is pervasive.[7] In addition, the rate of births outside of marriage also has risen steadily, with forty-one percent of all births currently occurring outside of marriage.[8] Accompanying the decline in marriage has been the sharp increase in nonmarital cohabitation. Between 1960 and 2000, the number of cohabitating opposite-sex couples increased from approximately five hundred thousand to almost five million.[9] Since then, the number of cohabitating couples has continued to rise.[10] Moreover, nearly a quarter of all births in the United States over the past five years have been to unmarried, cohabitating women.[11] Perhaps as a result of these significant changes over the years, four in ten Americans now believe that marriage is becoming obsolete.[12] Based on the state of

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v. Windsor, N.Y. TIMES, Jan. 27, 2014, at A18; *see also* Susan Page, *Poll: Support for Gay Marriage Hits High After Ruling*, USA TODAY (July 1, 2013, 10:38 PM), http://www.usatoday.com/story/news/politics/2013/07/01/poll-supreme-court-gay-marriage-affirmative-action-voting-rights/2479541/.

3. Page, *supra* note 2.

4. Nate Silver, *Assessing the Shift in Public Opinion*, N.Y. TIMES, Mar. 27, 2013, at A15.

5. Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 580 (2013).

6. D'VERA COHN, JEFFREY S. PASSEL, WENDY WANG & GRETCHEN LIVINGSTON, BARELY HALF OF U.S. ADULTS ARE MARRIED – A RECORD LOW 1–2 (2011), *available at* http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf.

7. *See* Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), http://www.prb.org/Publications/Articles/2010/usmarriagedecline.aspx (indicating that marriage rates have decreased among men and women of all major races and ethnicities).

8. Jason DeParle & Sabrina Tavernise, *Unwed Mothers Now a Majority Before Age of 30*, N.Y. TIMES, Feb. 18, 2012, at A1.

9. CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 97 (2010).

10. *See* Nicole C. Berg, Note, *Designated Beneficiary Agreements: A Step in the Right Direction for Unmarried Couples*, 2011 U. ILL. L. REV. 267, 276 (2011).

11. *See* Brian Braiker, *CDC: More Babies Being Born to Unmarried Cohabiting Couples*, PARENTING (last visited Dec. 12, 2014), http://www.parenting.com/blogs/show-and-tell/brian-braiker/co-habitation-wedlock.

12. Aloni, *supra* note 5, at 580; COHN ET AL., *supra* note 6, at 2.

marriage today, it no longer makes sense for marriage to serve as the sole manner through which relationships receive legal recognition. It is time for the United States to grant more widespread recognition to nonmarital relationship statuses.

In addition to being a logical next step based upon the current state of marriage, greater legal recognition of relationship statuses that offer an alternative to marriage would have many positive, important effects. As an initial matter, it would mean that significantly more individuals would have core protections within their relationships. As marriage rates decrease, an increasing number of individuals are left in the unfortunate position of having inadequate legal protections for their relationships. As the experiences of other countries indicate, a significant number of couples who currently are choosing cohabitation over marriage likely would take advantage of a relationship recognition option that offered basic protections without all of the rights and responsibilities that accompany marriage.[13] This would lead to significant benefits for these individuals and their families. In addition, as opposed to the current "marriage-or-nothing" choice faced by most couples, widespread recognition of nonmarital relationship statuses would provide individuals with greater autonomy and more meaningful choice in structuring their relationships. Allowing couples to choose a status other than marriage for relationship recognition likely would strengthen the quality of marriage in the United States as well.[14] This is because it would provide many couples who are not ready for marriage and who choose to enter into marriage only because it is their sole option for relationship recognition, an alternative status that is better suited for them. Overall, the potential benefits of widespread nonmarital relationship recognition are significant.

Unfortunately, the current system of nonmarital relationship recognition in the United States is inadequate. The federal government and the majority of states recognize only one relationship status, marriage, leaving couples with the limited choice of marriage or nonrecognition. In addition, while an increasing number of states have implemented nonmarital statuses, no state is required to recognize out-of-state nonmarital statuses, and many states refuse to grant any recognition to such statuses.[15] Another significant weakness of the current system of nonmarital relationship recognition is that many of the nonmarital statuses in existence today do not provide a true alternative to marriage. Instead, a significant number of existing nonmarital statuses provide all of the state-based rights and responsibilities of marriage and simply label the status something other than marriage. While there is no quick fix for the issues that exist with the current patchwork system of nonmarital relationship recognition, the numerous potential benefits of a more effective system makes undertaking the substantial task of creating a better system worthwhile.

This Article offers an innovative and comprehensive proposal for creating an improved system of nonmarital relationship recognition in the United States. The proposal is based upon a number of core considerations. As an initial matter, an ideal

13. See *infra* Part II.B for a discussion of the nonmarital relationship statuses available in other countries.

14. See *infra* Part III.B.3 for a discussion of how the widespread recognition of nonmarital relationship statuses would likely strengthen the quality of marriages in the United States.

15. See *infra* notes 68–70 and accompanying text for an overview of the various state approaches to out-of-state nonmarital status recognition.

system of nonmarital relationship recognition would provide both state and federal rights and protections to nonmarital relationship statuses. To respect the balance of power between the state and federal governments in the area of domestic relations, however, the system would need to be structured such that federal recognition of nonmarital statuses would depend upon the existence of state-based nonmarital statuses—there would be no federally created nonmarital status.

In addition, because nonmarital statuses already differ significantly from state to state, and because it would be impractical to create a different package of federal rights and benefits for each nonmarital status, the federal government would need to mandate basic requirements that state-based nonmarital statuses would be required to meet in order to receive federal recognition. This would ensure that the package of federal rights and responsibilities created for nonmarital relationship recognition logically complemented and supported each of the state-based nonmarital statuses to which it applied, while at the same time leaving states with a significant amount of freedom to experiment with different nonmarital relationship statuses in order to find the one that is most effective. Finally, the basic requirements that state-based nonmarital statuses would have to meet to attain federal recognition and the package of federal rights and benefits that would accompany nonmarital statuses would be determined through careful consideration of the goals of a more effective system of nonmarital relationship recognition. These goals would involve encouraging more individuals to have their relationships recognized by the law in a manner that provides relevant, essential protections for their relationships and providing Americans with greater autonomy and meaningful choice with regard to the legal recognition of their relationships.

This Article is organized in the following manner. Section II details the history of nonmarital relationship recognition in the United States and considers the approaches taken by other countries in creating nationally recognized nonmarital statuses open to both same- and opposite-sex couples. Section III describes the current state of marriage and nonmarital cohabitation in the United States. It then analyzes the potential benefits of widespread legal recognition of nonmarital statuses, including the provision of legal protections for a greater number of relationships, increased individual autonomy, and the potential strengthening of marriage. Section IV sets forth a detailed proposal for the creation of a more effective system of nonmarital relationship recognition in the United States. The Article concludes with an analysis of the likely benefits and the potential concerns arising from the proposed system of nonmarital relationship recognition.

II. NONMARITAL STATUSES IN THE UNITED STATES AND ABROAD

A. Nonmarital Statuses in the United States

Historically, with regard to intimate adult relationships, the United States federal government has granted rights and benefits on the basis of only one category of such relationships: marriages.[16] This remains true today—if the federal government

16. That federal law recognizes state-sanctioned common law marriages as marriages does not change the fact that an intimate adult relationship must meet the federal definition of marriage in order to receive federal rights and protections, and that marriage (as defined by federal law) is the only intimate adult relationship status that is recognized by the federal government. *See* Steven C. Thompson & Randall K. Serrett, *Joint Tax Returns Offer Distinct Advantages – Generally*, 68 PRAC. TAX STRATEGIES 158, 161 (2002)

recognizes an intimate adult relationship as a marriage, then that relationship receives more than one thousand federal rights and protections.[17] Relationship statuses other than marriage receive no recognition from the federal government.[18] Over the past several decades, however, states have begun to grant rights and benefits based on intimate adult relationship statuses other than marriage. Nonmarital statuses first emerged in the 1980s, when a small number of municipalities passed domestic partnership ordinances providing registered couples with limited rights relating to hospital visitation and health insurance.[19] In the 1990s, around sixteen cities, including the District of Columbia, followed suit, creating domestic partnership registries that typically were open to both same- and opposite-sex couples.[20] Also during this time period, Vermont began providing domestic partnership benefits for state employees, and over the years a number of other states followed suit.[21]

The next major advancement in the context of nonmarital relationship statuses occurred in 1997, when Hawaii passed a law allowing any two unmarried adults who are not eligible for marriage either because they are of the same sex or because they are related to each other to register as reciprocal beneficiaries.[22] Reciprocal beneficiaries receive limited protections relating to hospital visitation, healthcare decision making, and some property-related rights.[23] The status does not impose any support-related responsibilities.[24] The reciprocal beneficiary status was created as a political compromise after a ballot measure to grant the legislature the right to restrict marriage to opposite-sex couples, which eventually passed, was introduced in the state legislature in response to a state court decision which held that prohibiting same-sex couples from marrying violated the state constitution.[25]

In 1999, after the Vermont Supreme Court ruled that denying same-sex couples the "statutory benefits, protections, and security incident to marriage" violated the equality provision of the state constitution,[26] Vermont enacted the country's first civil

("Once established, a common-law marriage valid under local law is recognized as a marriage for federal tax purposes.").

17. Diane Lourdes Dick, Note, *The Impact of Medicaid Estate Recovery on Nontraditional Families*, 15 U. FLA. J.L. & PUB. POL'Y 525, 527 n.8 (2004).

18. *See* Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 186 (2012) ("[T]he federal government does not recognize domestic partnerships or civil unions.").

19. WILLIAM N. ESKRIDGE, JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 13–14 (2002).

20. *Id.* (stating that Berkeley's domestic partnership ordinance was atypical for the time in that it included only same-sex couples); *see also* Carlos A. Ball, *Introduction*, 61 RUTGERS L. REV. 493, 496 (2009) ("[M]any of these early domestic partnership arrangements did not make distinctions based on the gender of the parties.").

21. Stein, *supra* note 18, at 186–88.

22. A Bill for an Act Relating to Unmarried Couples, 1997 Haw. Sess. Laws 1211 (codified as amended at HAW. REV. STAT. § 572C-4 (West 2014)).

23. NATIONAL CENTER FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 7 (2014), *available at* http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf [hereinafter NCLR].

24. ESKRIDGE, *supra* note 19, at 25.

25. Jessica R. Feinberg, *Avoiding Marriage Tunnel Vision*, 88 TUL. L. REV. 257, 263 (2013).

26. Baker v. State, 744 A.2d 864, 886 (Vt. 1999).

union statute.[27] The civil union status was in existence for ten years until, in 2009, Vermont legalized same-sex marriage.[28] Civil unions were open only to nonrelated same-sex couples and provided all of the state-based rights, benefits, and obligations of marriage.[29] At the same time that it enacted civil unions, Vermont also passed a law establishing another nonmarital status—reciprocal beneficiaries.[30] This status is limited to individuals of the same- or opposite-sex related by adoption or blood,[31] and it provides rights linked to health-related decision making and abuse prevention.[32] In addition, in 1999 California became the first state to recognize a domestic partnership status that was not restricted to government employees.[33] The status initially provided limited rights relating to hospital visitation,[34] but, in 2003, California expanded its domestic partnership law to provide all of the state-based rights and obligations of marriage.[35] The status is open to all nonrelated same-sex couples and to opposite-sex couples in which at least one member is over the age of sixty-two.[36] The implementation of the age-based eligibility restriction for opposite-sex couples was based on the rationale that because individuals over the age of sixty-two risk losing certain federal benefits if they marry, a compelling reason exists for providing them with an alternative to marriage.[37]

Since the watershed 2004 Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health*,[38] ruling that denying same-sex couples the right to marry violated the state constitution,[39] same-sex marriage has been legalized in an additional thirty-four states,[40] and a number of states have enacted nonmarital

27. *See* Elizabeth M. Glazer, *Civil Union Equality*, 2012 CARDOZO L. REV. DE NOVO 125, 127, 130 (2012) (discussing the Vermont state legislature's response to the *Baker* decision).

28. Act of Sept. 1, 2009, No. 3, § 5, 2009 Vt. Acts & Resolves 33 (codified at 15 V.S.A. § 8); *see also* STATE OF VERMONT LEGISLATIVE COUNCIL, FREQUENTLY ASKED QUESTIONS ABOUT S.115, AN ACT RELATING TO CIVIL MARRIAGE, AS PASSED BY THE HOUSE AND SENATE, http://hrc.vermont.gov/sites/hrc/files/pdfs/ss%20marriage/s115faq.pdf (clarifying the status of civil unions after the passage of the act relating to civil marriage).

29. An Act Relating to Civil Unions, No. 91, 2000 Vt. Acts & Resolves 72, 72–73 (repealed 2009).

30. *Id.* at 83–88 (codified as amended at Vt. Stat. Ann. tit. 15, §§ 1301–1306 (West 2014)).

31. Tit. 15, § 1301.

32. *Id.*

33. ESKRIDGE, *supra* note 19, at 14.

34. Act of Oct. 2, 1999, ch. 588, secs. 1, 3, 1999 Cal. Stat. 4157 (codified as amended in scattered sections of CA Family, Government, and Health and Safety Codes).

35. Act of Sept. 19, 2003, ch. 421, sec. 4, 2003 Cal. Stat. 3081–3083 (codified at CAL. FAM. CODE § 297.5(a) (West 2014)).

36. *Id.* As originally enacted in 1999, the category of opposite-sex couples eligible for the status included only those opposite-sex couples wherein both members were over the age of sixty-two. Act of Oct. 2, 1999, ch. 588, sec. 2, 1999 Cal. Stat. at 4157–58. In 2001, however, eligibility was expanded to include opposite-sex couples wherein one or both members were over the age of sixty-two. Act of Oct. 14, 2001, ch. 893, sec. 3, 2001 Cal. Stat. 7283, 7283–84 (codified at CAL. FAM. CODE § 297(b)(4)(B) (West 2014)).

37. Stein, *supra* note 18, at 186.

38. 798 N.E.2d 941, 970 (Mass. 2003).

39. *Goodridge*, 798 N.E.2d at 968.

40. *States*, FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last visited Dec. 12, 2014). There is currently a circuit split regarding the constitutionality of state bans on same-sex marriage. *Compare* Latta v. Otter, No. 12-17668, 2014 WL 4977682 (9th Cir. Oct. 7, 2014) (striking down same-sex marriage ban as unconstitutional); Baskin v. Bogan, 766 F.3d 648 (7th Cir. 2014) (same); Bishop v. Smith, 760

relationship statuses.[41] A number of these nonmarital statuses, especially those enacted recently, have included opposite-sex couples, thereby providing opposite-sex couples in the state with a choice between marriage and the nonmarital status. The most common nonmarital statuses enacted include domestic partnerships providing limited rights related to healthcare decision making, hospital visitation, or inheritance (limited-benefits domestic partnerships), domestic partnerships providing all of the state-based rights and responsibilities of marriage (full-benefits domestic partnerships), and civil unions providing all of the state-based rights and obligations of marriage.

In terms of limited-benefits domestic partnerships and similar statuses, Maine and Maryland established limited-benefits domestic partnerships for nonrelated same- and opposite-sex couples.[42] New Jersey and Washington established limited-benefits domestic partnerships for nonrelated opposite-sex couples in which one or both members are over age sixty-two and all nonrelated same-sex couples.[43] However, upon the legalization of same-sex marriage in Washington and the enactment of civil unions in New Jersey, the age-based restrictions in the domestic partnership laws that previously applied only to opposite-sex couples became applicable to same-sex couples as well.[44] In addition, Wisconsin established limited-benefits domestic partnerships for nonrelated same-sex couples.[45] Colorado established the status of designated beneficiary,[46] providing any two unmarried people over the age of eighteen regardless of sex or familial relation[47] the ability to choose, from a limited list, the specific rights and responsibilities that will govern their relationship.[48]

F.3d 1070 (10th Cir.), *cert. denied*, 135 S. Ct. 271 (2014) (same); Bostic v. Schaefer, 760 F.3d 352 (4th Cir.), *cert. denied sub nom.*, Rainey v. Bostic, 135 S. Ct. 286, *and cert. denied*, 135 S. Ct. 308, *and cert. denied sub nom*., McQuigg v. Bostic, 135 S. Ct. 314 (2014) (same); *with* DeBoer v. Snyder, No. 14-1341, 2014 WL 5748990 (6th Cir. Nov. 6, 2014) (upholding the constitutionality of same-sex marriage bans in Kentucky, Michigan, Ohio, and Tennessee); *see also Marriage Rulings in the* Courts, FREEDOM TO MARRY, http://www.freedomtomarry.org/pages/marriage-rulings-in-the-courts (last updated Dec. 8, 2014). It is expected that the United States Supreme Court will rule on the issue in the near future. Adam Liptak, *Petitions Push Justices on Same-Sex Marriage*, N.Y. TIMES, Nov. 15, 2014, at A16.

41. Feinberg, *supra* note 25, at 266–68.

42. Maine's domestic partnership status provides guardian and conservator rights, next of kin status, inheritance rights, and victim's compensation rights. Act of July 30, 2004, ch. 672, 2003 Me. Laws 2126, 2126–2131; *Domestic Partnerships*, EQUALITYMAINE.ORG, http://equalitymaine.org/domestic-partnerships (last visited Dec. 12, 2014). Domestic partnerships in Maryland provide rights relating to hospital visitation, medical decision making, and tax exemptions for certain property transfers between partners. Act of May 22, 2008, ch. 590, 2008 Md. Laws 4597, 4597–4611; NCLR, *supra* note 23, at 9.

43. To qualify for the New Jersey domestic partnership status, both members must be over the age of sixty-two. N.J. Stat. Ann. § 26:8A-4 (West 2014). To qualify for the Washington domestic partnership status, one member must be over the age of sixty-two. WASH. REV. CODE ANN. § 26.60.030(2) (West 2014); Andrew Garber, *Law Lets Couples Be "Partners"*, SEATTLE TIMES, July 23, 2007, at A1.

44. N.J. STAT. ANN. §§ 26:8A-1–13 (West 2014); WASH. REV. CODE ANN. § 26.60.100 (2014); *see also* NCLR, *supra* note 23, at 12, 16–17.

45. *See* WIS. STAT. ANN. §§ 770.001, 770.05 (West 2013). This status provides rights such as "hospital visitation and some medical decision-making, inheritance, the right to sue for wrongful death, and immunity from testifying against the other partner in court." NCLR, *supra* note 23, at 17.

46. COLO. REV. STAT. ANN. §§ 15-22-101 to 112 (West 2014).

47. *Id.* § 15-22-104.

48. *Id.* §§ 15-22-105 to 106. The rights and benefits individuals may choose among relate to, inter alia, property transfers, standing to sue in tort, inheritance, insurance and retirement benefits, hospital visitation, and healthcare decision making. *Id.* § 15-22-105.

A number of states also have established full-benefits domestic partnerships. Nevada established a full-benefits domestic partnership status for nonrelated same- and opposite-sex couples, and Oregon established a full-benefits domestic partnership status for nonrelated same-sex couples.[49] In addition, the District of Columbia and Washington expanded their limited-benefits domestic partnership statuses to full-benefits domestic partnership statuses.[50]

Moreover, following *Goodridge*, eight additional states enacted civil union laws providing all of the state-based rights and responsibilities of marriage (Vermont already had civil unions when *Goodridge* was decided).[51] Connecticut,[52] New Jersey,[53] New Hampshire,[54] Rhode Island,[55] and Delaware[56] created civil union statuses open to nonrelated same-sex couples. In addition, Illinois,[57] Colorado,[58] and Hawaii[59] created civil union statuses open to nonrelated opposite-sex couples as well as to nonrelated same-sex couples. It is important to note, however, that the civil union laws in Connecticut,[60] Vermont,[61] New Hampshire,[62] Rhode Island,[63] and Delaware,[64] all of

49. NEV. REV. STAT. ANN. § 122A.200 (West 2013); OR. REV. STAT. ANN. §§ 106.305, 106.310, 106.315, 106.340 (West 2014).

50. D.C. CODE §§ 32-701–710 (West 2014); NCLR, *supra* note 23, at 7, 16–17; *see also* Fredo Alvarez, *D.C. Council Passes Domestic Partner Law Expansion*, DCIST, (May 16, 2008, 1:20 PM), http://dcist.com/2008/05/dc_council_pass.php; Press Release, National Center for Lesbian Rights, New Law Protects Children Born to Same-Sex Parents in the District of Columbia (July 22, 2009), http://www.nclrights.org/press-room/press-release/new-law-protects-children-born-to-same-sex-parents-in-the-district-of-columbia/ (explaining how the law's provisions expand the rights of domestic partners to protect children of same-sex partners). Opponents of Washington state's expanded domestic partnership law sought to overturn it through a voter referendum, but were unsuccessful. Rachel La Corte, *Voters Approve 'Everything But Marriage' Bill*, KOMONEWS, (Nov. 5, 2009, 4:57 PM), http://www.komonews.com/news/69333537.html. This marked the first time that a law promoting equality for same-sex couples on a state-wide level was passed by voters in a U.S. jurisdiction. *Id.*

51. *See* Act of July 1, 2000, No. 91, 2000 Vt. Acts & Resolves 72, 72–73 (repealed 2009) (enacting civil unions in 2000).

52. *See* CONN. GEN. STAT. ANN. § 46b-38qq(a) (West 2014); CONN. JUDICIAL BRANCH LAW LIBRARIES, CIVIL UNIONS IN CONNECTICUT 3 (2013), *available at* http://www.jud.ct.gov/lawlib/Notebooks/Pathfinders/CivilUnions.pdf.

53. N.J. STAT. ANN. § 37:1-28 (West 2014), *invalidated by* Garden State Equality v. Dow, 82 A.3d 336 (N.J. Super Ct.), *stay denied*, 79 A.3d 479 (N.J. Super Ct.), *cert. granted*, 75 A.3d 1157 (N.J.), *stay denied*, 79 A.3d 1036 (N.J. 2013); *see also* LAMBDA LEGAL, CIVIL UNIONS FOR SAME-SEX COUPLES IN NEW JERSEY 1–2, http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_civil-unions-for-ss-couples-in-nj_0.pdf.

54. N.H. REV. STAT. ANN. § 457:46 (2014); *see also* Beverley Wang, *State Senate Approves Civil Unions For Same-Sex Couples,* CONCORD MONITOR, Apr. 26, 2007, http://www.concordmonitor.com/article/state-senate-approves-civil-unions-for-same-sex-couples.

55. R.I. GEN. LAWS ANN. § 15-3.1-2 (West 2014).

56. DEL. CODE ANN. tit. 13, § 202 (West 2014).

57. 750 ILL. COMP. STAT. ANN. 75/10, 75/20 (West 2014).

58. COLO. REV. STAT. ANN. § 14-15-104 (West 2014).

59. HAW. REV. STAT. ANN. § 572B-2 (West 2014).

60. Act of April 23, 2009, Pub. Act No. 09-13, Sec. 12(a) 2009 Conn. Pub. Acts 78.

61. VT. STAT. ANN. tit. 15, § 1201(4) (repealed 2009); *see also* FREQUENTLY ASKED QUESTIONS ABOUT S.115, *supra* note 28.

62. N.H. REV. STAT. ANN. § 457-A (repealed 2009); *see also* NCLR, *supra* note 23, at 11.

63. R.I. GEN. LAWS ANN. § 15-3.1-4 (repealed 2013).

which granted civil unions to same-sex couples only, were repealed upon the legalization of same-sex marriage in those states. In sum, four states currently have civil unions,[65] four states and the District of Columbia currently have full-benefits domestic partnerships,[66] and seven states currently have nonmarital statuses that provide limited rights and benefits.[67]

In terms of the recognition of out-of-state nonmarital statuses, there are a variety of approaches currently undertaken by states. Many states, including almost all of the states that have not yet enacted a nonmarital status and have not yet legalized same-sex marriage, offer no recognition to out-of-state nonmarital statuses.[68] Among the states that have enacted nonmarital statuses, some recognize out-of-state nonmarital statuses as the existing nonmarital statuses enacted in those states, while others grant such recognition only to "substantially similar" nonmarital statuses.[69] Finally, at least one state requires couples to register the out-of-state nonmarital status and pay a filing fee in order for the state to grant legal recognition to the status.[70]

With regard to federal recognition of nonmarital relationship statuses, none of the state-based nonmarital statuses in existence in the United States today are recognized by federal law. This is true for all state-based nonmarital statuses—both those that replicate marriage on the state level and those that seek to provide a true alternative to marriage. In addition to the nonrecognition of state-based nonmarital statuses, there is currently no federally created nonmarital status that individuals who do not desire to marry, but who do wish to receive at least some federal rights and benefits, can choose to enter. In other words, there is no marriage alternative offered on the federal level. Overall, couples have very limited choice if they wish to receive federal recognition of their relationships: they must choose marriage or forgo all federal rights and protections. A number of other countries, however, have taken a more expansive approach in the context of legal recognition of nonmarital relationships through the implementation of a nonmarital status as an alternative to marriage at the national level.

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64. DEL. CODE ANN. tit. 13, § 213 (repealed 2013).

65. These states are Colorado, Hawaii, Illinois, and New Jersey. COLO. REV. STAT. ANN. § 14-15-104 (West 2014); HAW. REV. STAT. ANN. § 572B-2 (West 2014); 750 ILL. COMP. STAT. ANN. 75/5 (West 2014); N.J. STAT. ANN. 26:8A-1–13 (West 2014).

66. These states are California, Nevada, Oregon, and Washington. CAL. FAM. CODE § 297.5 (West 2014); NEV. REV. STAT. ANN. § 122A.200 (West 2013); OR. REV. STAT. ANN. § 106.305 (West 2014); WASH. REV. CODE ANN. § 26.60.100 (West 2014); *see also* NCLR, *supra* note 23, at 4–5, 11, 14, 16–17 (explaining the types of full-benefits domestic partnerships available in these states).

67. These states are Colorado, Hawaii, Maine, Maryland, New Jersey, and Wisconsin. *See* COLO. REV. STAT. ANN. §§ 15-22-101, 15-22-105 (West 2014); HAW. REV. STAT. ANN. § 572C-6 (West 2014); ME. REV. STAT. ANN. tit 22, § 2710 (West 2014); MD. CODE ANN. HEALTH–GEN §6-101 (West 2014); MD. CODE ANN. TAX § 12-101 (West 2014); WIS. STAT. ANN. § 770.001 (West 2013); *see also* NCLR, *supra* note 23, at 5, 7, 9, 12, 15 (explaining the types of limited-benefits domestic partnerships that these states offer). Only competent adults who are related are eligible for Vermont's nonmarital status (reciprocal beneficiaries). VT. STAT. ANN. tit. 15, § 1303 (West 2014).

68. Stein, *supra* note 18, at 189–93.

69. *Id.*

70. *See id.* at 185 (stating that Nevada requires couples who have entered into an out-of-state nonmarital status to pay a filing fee in order to receive legal recognition as domestic partners).

B. Nonmarital Relationship Recognition in Other Countries

A number of countries have implemented, at the national level, nonmarital statuses that are open to both same- and opposite-sex couples. The nonmarital statuses operate as alternatives to marriage for opposite-sex couples in each of these countries and as alternatives to marriage for same-sex couples in those countries that recognize same-sex marriage in addition to the national nonmarital status.

The most widely discussed nonmarital status, the Pacte Civil de Solidarité (PACS), comes from France. The PACS was established as a national nonmarital status open to unrelated same- and opposite-sex couples in 1999.[71] The primary impetus for the creation of the PACS was to provide same-sex couples, who at the time could not marry, with rights and protections for their relationships.[72] This status, however, has been incredibly popular not only among same-sex couples, but also among opposite-sex couples.[73] In each year since 2001, the number of PACSs issued has increased, and among opposite-sex couples there are currently two PACSs issued for every three marriages.[74] Since same-sex marriage did not become legal in France until 2013, the statistics comparing the numbers of PACSs and marriages for same-sex couples are not yet available.[75]

The PACS differs from marriage in a number of significant ways. Unlike a marriage, a PACS is treated as a contract between the parties wherein the parties specify their rights and obligations.[76] The default rules for the PACS, the terms that will govern unless the parties contract otherwise, also differ from marriage. For example, the default rules for the PACS favor a property regime that provides for the separation of property acquired during the PACS,[77] while the default rules for marriage generally favor a joint property regime.[78] The default rules for the PACS also do not provide for post-dissolution spousal support.[79] Unlike married couples, individuals in a PACS do not receive automatic inheritance and survivor's rights.[80] In addition, unlike a marriage, a PACS does not provide any parental rights.[81] One of the most important distinctions between a PACS and a marriage is that the PACS is significantly easier to

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71. YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES 138 (2002).

72. *Id.* at 139; Aloni, *supra* note 5, at 633.

73. *See* Aloni, *supra* note 5, at 632–33 (indicating that of the 175,000 PACS registered in 2009, only five percent involved same-sex couples); Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 271 (2012) (providing that in 2000, seventy-five percent of PACS were registered by opposite-sex couples, and by 2009, that number had risen to ninety-five percent).

74. Scott Sayare & Maïa de la Baume, *Bliss for Many French Couples Is Now Less Marital Than Civil* N.Y. TIMES, Dec. 16, 2010, at A1.

75. Laura Smith-Spark, *French Lawmakers Approve Same-Sex Marriage Bill*, CNN.COM (Apr. 24, 2013, 7:21 AM), http://www.cnn.com/2013/04/23/world/europe/france-same-sex-vote/.

76. Aloni, *supra* note 5, at 637.

77. *Id.*; *Civil Solidarity Pact (PACS)*, NOTAIRES DE FRANCE (June 13, 2014), http://www.notaires.fr/notaires/en/civil-solidarity-pact-pacs.

78. Aloni, *supra* note 5, at 637.

79. *Id.* at 640.

80. *Id.*

81. *Id.*; MERIN, *supra* note 71, at 140.

dissolve. Unlike the dissolution procedure for marriage in France, which usually requires several court appearances and takes a few years, a PACS can be dissolved immediately by notification to the relevant clerk if the parties both consent or unilaterally by notification to the noninitiating party and the clerk, which allows the PACS to be dissolved three months after the notification.[82] Only five percent of PACSs are terminated unilaterally, and, importantly, judicial involvement only occurs where there is a post-dissolution conflict between the parties.[83]

There are some rights provided by a PACS, however, that are similar to those rights provided by marriage. Couples in a PACS are allowed to file joint tax returns, and a surviving member of a PACS is exempted from paying inheritance taxes when his or her partner dies.[84] The PACS also provides rights relating to social security, immigration, employment benefits, gift tax exemptions, bereavement leave, and protection for residential leases when one member of the PACS dies.[85] Moreover, members of a PACS must provide mutual support to each other during the relationship.[86]

While the PACS is the nonmarital status that has received the most attention, a number of other countries also have implemented nonmarital statuses open to both same- and opposite-sex couples at the national level. These statuses have enjoyed varying degrees of popularity. For example, Luxembourg, which recognizes same-sex marriage, also offers a nonmarital status called the Partenariat (partnership).[87] This status provides an alternative to marriage for both same- and opposite-sex couples.[88] The rights and responsibilities accompanying the partnership status were expanded in 2010.[89] Since then, the status has become increasingly popular, and for the past two years, more partnerships have been entered into than marriages.[90] Currently, partners must provide each other with mutual support, and partners enjoy rights similar to those of married couples relating to employee leave, tax breaks, social security, immigration, and pension benefits.[91] The default rule for Luxembourg's partnership status involves a regime that favors the separation of property acquired during the partnership, though

82. MERIN, *supra* note 71, at 139–40.

83. PETER DE CRUZ, FAMILY LAW, SEX AND SOCIETY: A COMPARATIVE STUDY OF FAMILY LAW 272 (2010).

84. Aloni, *supra* note 5, at 640.

85. Marie A. Failinger, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 208–09 (2004); Titshaw, *supra* note 73, at 272.

86. Aloni, *supra* note 5, at 637.

87. Loi du 9 juillet 2004 [Act of 9 July 2004] 2020 (Lux.), *available at* http://www.legilux.public.lu/leg/a/archives/2004/0143/a143.pdf.

88. *Id.*; *Luxembourg MPs to Vote on Gay Marriage Before Summer*, LUXEMBURGER WORT (Feb. 7, 2013, 10:53), http://www.wort.lu/en/view/luxembourg-mps-to-vote-on-gay-marriage-before-summer-511379afe4b07d8f8fd39654.

89. Loi du 3 août 2010 [Act of 3 August 2010] (Lux.), *available at* http://eli.legilux.public.lu/eli/etat/leg/loi/2010/08/03/n3.

90. *Civil Partnerships Overtake Weddings in Luxembourg*, LUXEMBURGER WORT (Feb. 11, 2013, 3:34 PM), http://www.wort.lu/en/luxembourg/civil-partnerships-overtake-weddings-in-luxembourg-5119018ae4b09bcaaa74a3e6.

91. *Connaître les Effets Llégaux en Vivant en Partenariat (PACS)* [*Know the Legal Effects of Living in a Partnership (PACS)*], GUICHET.LU (Apr. 30, 2012), http://www.guichet.public.lu/citoyens/fr/famille/vie-maritale/partenariat-pacs/effets-legaux-partenariat/index.html#panel-11!.

partners are liable for certain debts incurred by the other partner if the debt was incurred for purposes of everyday life.[92] This is a significant difference between the partnership status and marriage in Luxembourg, as the default property regime for marriage is joint property.[93] Partnerships can be terminated through a joint or unilateral declaration to the state registrar.[94] In the case of a unilateral declaration, notice must be served on the nondeclaring partner.[95] Unlike with the dissolution of a marriage,[96] judicial involvement in the termination of a partnership only occurs where there is a post-termination dispute between the parties regarding their rights and obligations.[97]

Belgium, which recognizes same-sex marriage, also provides a nonmarital status, the cohabitation légale (legal cohabitation), as a marriage alternative for cohabitating same- and opposite-sex couples.[98] Created in 2000, this status is also open to cohabitating individuals who are related.[99] Legal cohabitants receive a limited number of rights and responsibilities. Rights provided by legal cohabitation relate to taxes, protection of the family home during the legal cohabitation, and inheritance.[100] Legal cohabitants are responsible for sharing household expenses, and they are also responsible for each other's debts where such debts were "indispensable for the purposes of common life."[101] In contrast to marriage in Belgium, a separate property regime governs legal cohabitation.[102] In addition, unlike marriage, legal cohabitation does not require judicial involvement for termination—the judicial system becomes involved only where there is a post-dissolution dispute.[103] Termination can occur through the submission of a written declaration to the registrar by one or both

92. *Id.*

93. *Les Différents Régimes Matrimoniaux* [The Various Matrimonial Regimes] GUICHET.LU, http://www.guichet.public.lu/citoyens/fr/famille/vie-maritale/mariage/regime-matrimonial/index.html#panel-10! (last visited Dec. 12, 2014).

94. *Mettre Fin à un Partenariat (PACS)* [*Ending a Partnership (PACS)*], GUICHET.LU (Sept. 1, 2013), http://www.guichet.public.lu/citoyens/fr/famille/vie-maritale/partenariat-pacs/fin-partenariat/index.html#panel-9!.

95. *Id.*

96. *Choisir une Forme de Divorce ou de Séparation (de Fait ou Légale)* [*Choosing a Form of Divorce or Separation (Factual or Legal)*], GUICHET.LU (Oct. 28, 2014), http://www.guichet.public.lu/citoyens/fr/famille/vie-maritale/separation-divorce/forme-divorce-separation/index.html#panel-12!.

97. *Mettre Fin à un Partenariat (PACS*), [*Ending a Partnership (PACS)*], *supra* note 94.

98. *See* Kees Waaldijk, *Others May Follow: The Introduction of Marriage, Quasi-Marriage, and Semi-Marriage for Same-Sex Couples in European Countries*, 38 NEW ENG. L. REV. 569, 581–84 (2004).

99. *Legal Cohabitation*, CITY OF BRUSSELS, http://www.brussels.be/artdet.cfm/4830 (last visited Dec. 12, 2014).

100. *See* Frederik Swennen & Yves-Henri Leleu, *National Report: Belgium*, 19 AM. U. J. GENDER SOC. POL'Y & L. 57, 72–74 (2011) (stating that legal cohabitation provides certain inheritance rights as well as protections relating to the residence); *Les conséquences de la cohabitation légale pour votre déclaration d'impôt* [*The Consequences of Legal Cohabitation for your Tax Return*], BELGIUM.BE, http://www.belgium.be/fr/famille/couple/cohabitation/fiscalite/ (last visited Dec. 12, 2014) (outlining the tax consequences of legal cohabitation).

101. *Cohabitation légale* [*Legal Cohabitation*], BELGIUM.BE, http://www.belgium.be/fr/famille/couple/cohabitation/cohabitation_legale/ (last visited Dec. 12, 2014).

102. *See* ERIC SPRUYT, BERQUIN NOTARISSEN, COHABITATION: ONE NAME, SEVERAL SITUATIONS 2 (2012), *available at* berquinnotarissenbe.webhosting.be/public/pdf/eng/EN_Samenwoning_ES.pdf (contrasting the matrimonial property regime with the legal cohabitant property regime).

103. *Id.*

parties.[104] The popularity of legal cohabitation has increased significantly in recent years.[105] In 2012, approximately 78,000 individuals entered into legal cohabitations, while approximately 91,500 individuals entered into marriages.[106]

In Andorra, which has not yet legalized same-sex marriage, les unions estables de parella (stable unions) are open to both same- and opposite-sex couples.[107] Couples who enter into stable unions have support obligations during the union and in some cases have such obligations after its termination as well.[108] Each member of the stable union must contribute to home maintenance and common expenses.[109] Members of stable unions enjoy rights similar to married individuals in the contexts of social security, inheritance, immigration, and employment.[110] Before entering the status, couples must create a private contract governing their property rights and obligations.[111] Unlike marriages in Andorra,[112] stable unions can be dissolved immediately through written notice to the registrar if both partners consent, or unilaterally by written notification to the noninitiating partner and the registrar, which allows the stable union to be dissolved three months after the notification.[113] Judicial involvement is required only where there is a conflict between the partners.[114] In 2012, 65 stable unions, eighty-eight percent of which were comprised of opposite-sex couples, and 276 marriages were entered into in Andorra.[115]

The Netherlands, where same-sex marriage is legal,[116] enacted its national

104. *Id.*

105. *See Cohabitation Contracts Almost as Popular as Marriage*, FLANDERSNEWS.BE (July 27, 2012, 11:22 AM), http://www.deredactie.be/cm/vrtnieuws.english/News/1.1381144 (stating that there were eighty thousand cohabitation contracts signed in 2011).

106. *Le Nombre de Mariages en Forte Baisse: 14% en Moins en 5 Ans* [*The Number of Marriages Down Significantly: 14% in Less than 5 Years*], SUDINFO.BE (June 12, 2013, 6:50 AM), http://www.sudinfo.be/741990/article/actualite/societe/2013-06-12/le-nombre-de-mariages-en-forte-baisse-14-en-moins-en-5-ans.

107. Llei 4/2005, del 21 de febrer, qualificada de les unions estables de parella [Law 4/2005 of 21 February, qualified stable unions] (2005), *available at* http://www.ciec1.org/Legislationpdf/Andorre-L.UnionsEstables21f-02-2005-EnVigueur24mars2005.pdf (last visited Dec. 12, 2014).

108. *Id.*

109. *See* Llei 4/2005 del 21 de febrer, qualificada de les unions estables de parella [Law 4/2005 of 21 February, qualified stable unions], *supra* note 107.

110. *Id*.; CARLOS VILLAGRASA ALCAIDE, THE DANISH INST. FOR HUMAN RIGHTS, STUDY ON HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY LEGAL REPORT ANDORRA 3–4, 9–12 (n.d.), *available at* http://www.coe.int/t/Commissioner/Source/LGBT/AndorraLegal_E.pdf.

111. *See* Sonia Bychkov Green*, Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J. L. & SOC. CHANGE 53, app. II at 124 (2011).

112. Llei qualificada del matrimony de 30 de juny de 1995 [qualified law of marriage of June 30, 1995], *available at* http://www.consellgeneral.ad/fitxers/documents/lleis-1989-2002/llei-qualificada-del-matrimoni.pdf/at_download/file (last visited Dec. 12, 2014).

113. *See* Llei 4/2005 del 21 de febrer, qualificada de les unions estables de parella [Law 4/2005 of 21 February, qualified stable unions], *supra* note 107.

114. *Id*.

115. MEMÒRIA DE FUNCIONAMENT DEL REGISTRE CIVIL [REPORT ON THE FUNCTIONING OF THE CIVIL REGISTRY], REGISTRE CIVIL DEL PRINCIPAT D'ANDORRA 23, 40 (2013), http://www.govern.ad/interior/item/download/258_4c172ac00ef118005cbf22abef9db23c.

116. *See* Waaldijk, *supra* note 98, at 572 (observing that the Netherlands was the first country to legalize same-sex marriage).

nonmarital status, the registered partnership, in 1997.[117] The status is available as an alternative to marriage for both same- and opposite-sex couples. It provides for almost all of the rights and obligations that accompany marriage, including a community property regime where there is no agreement otherwise,[118] although there are different rules with regard to the process of establishing parental status.[119] In addition, unlike marriages, registered partnerships can be terminated without judicial involvement if the couple has no children and there is no disagreement between the partners.[120] The popularity of registered partnerships has increased significantly over the past ten years, and in 2010, "[m]ore than one in ten couples who had their relationships legally sanctioned . . . opted for registered partnerships."[121]

Finally, New Zealand and South Africa, each of which have legalized same-sex marriage, have also each adopted a nonmarital status, the civil union, open to both same- and opposite-sex couples. The civil union statuses provide rights, obligations, and dissolution proceedings that are almost identical to those that accompany marriage.[122] Perhaps due to the almost identical nature of civil unions and marriages, civil unions in New Zealand and South Africa have not enjoyed significant popularity.[123]

III. THE VALUE OF NONMARITAL STATUSES

A. The Current State of Marriage and Cohabitation in the United States

In considering whether marriage should remain as the sole relationship status upon which a great number of legal rights and benefits accrue under federal law and in most states, it is critical to examine the state of marriage today. According to a survey conducted by the Pew Research Center, approximately four in ten Americans believe

117. *Id.* at 578–79.

118. Katharina Boele-Woelki, Registered Partnerships: Legislation of the Netherlands 47 (n.d.) (unpublished manuscript), *available at* http://ciec1.org/Etudes/ColloqueCIEC/CIEColloqueBoele_Woelki Angl.pdf.

119. *See Family Law: Marriage, Registered Partnership and Cohabitation Agreements*, GOVERNMENT OF THE NETHERLANDS, http://www.government.nl/issues/family-law/marriage-registered-partnership-and-cohabitation-agreements (last visited Dec. 12, 2014).

120. Art. 1:80a BW [Dutch Civil Code]; *see also Family Law: Divorce and Ending a Relationship*, GOVERNMENT OF THE NETHERLANDS, http://www.government.nl/issues/family-law/divorce-and-ending-a-relationship (last visited Dec. 12, 2014) (stating that a childless marriage can be ended through an agreement recorded in the Register of Births, Deaths, Marriages and Registered Partnerships).

121. *Number of Registered Partnerships Grew Further in 2010*, STATISTICS NETH. (Mar. 15, 2011, 3:00 PM), http://www.cbs.nl/en-GB/menu/themas/bevolking/publicaties/artikelen/archief/2011/2011-3331-wm.htm.

122. *See* Civil Union Act No. 17 of 2006 § 13 (S. Afr.), http://www.gov.za/sites/www.gov.za/files/a17-06_1.pdf; Kenneth McK. Norrie, *National Report: New Zealand*, 19 AM. U. J. GENDER SOC. POL'Y & L. 265, 266–68 (2011).

123. *See* MARRIAGES, CIVIL UNIONS, AND DIVORCES: YEAR ENDED DECEMBER 2012, STATISTICS N.Z. 1 (2013), *available at* http://www.stats.govt.nz/browse_for_stats/people_and_communities/marriages-civil-unions-and-divorces/MarriagesCivilUnionsandDivorces_HOTPYeDec12.aspx (explaining that in 2012 there were 303 civil unions and 20,521 marriages in New Zealand); MARRIAGES AND DIVORCES 2011, STATISTICS S. AFR. 2, 4 (2012), *available at* http://www.statssa.gov.za/publications/P0307/P03072011.pdf (explaining that in 2011 there were 867 civil unions and 167,264 civil marriages in South Africa).

that marriage is becoming obsolete.[124] While the future of marriage is far from clear, research indicates that the institution of marriage has undergone significant changes in recent years. In 2010, the Census Bureau reported that, for the first time, marital households comprised less than half of all households in the United States.[125] In addition, only slightly over half of all adults are currently married, an all-time low, and among adults aged eighteen to twenty-nine, only twenty percent are married, a steep drop from 1960 when this number was fifty-nine percent.[126]

The decline in marriage is not confined to one group of individuals, as "[m]arriage rates have dropped among all major racial/ethnic groups and for both men and women."[127] The decreasing marriage rate accompanies an increase in births outside of marriage. The rate of births outside of marriage has risen steadily in recent decades, and today forty-one percent of all births occur outside of marriage.[128] In addition, the majority of women under the age of thirty who give birth are unmarried.[129] The decline in marriage "is attributed to several factors including later first marriages, more time spent single after a divorce or the death of a spouse, . . . an increase in the number of individuals who never marry, which includes those in unmarried, cohabitating relationships,"[130] and greater educational and workforce opportunities for women.[131] While marriage rates have been declining, divorce rates have remained relatively high—with current estimates of the divorce rate ranging between forty and fifty percent.[132]

As marriage rates have declined and divorce rates have remained high in recent years, nonmarital cohabitation has soared.[133] Between 1960 and 2000, the number of cohabitating opposite-sex couples increased drastically, rising from approximately five hundred thousand to almost five million.[134] Since then, the number of cohabitating couples has continued to rise, increasing by almost forty percent between 2000 and 2008,[135] and by an additional thirteen percent by 2010.[136] In 2010, the number of

124. COHN ET AL., *supra* note 6, at 2; Aloni, *supra* note 5, at 580.

125. Aloni, *supra* note 5, at 580.

126. COHN ET AL., *supra* note 6, at 1–2.

127. Mather & Lavery, *supra* note 7.

128. DeParle & Tavernise, *supra* note 8, at A1.

129. *Id.*

130. Berg, *supra* note 10, at 275.

131. *See* Mather & Lavery, *supra* note 7 (discussing how the increase in women's earning capacity, educational attainment, and labor force participation has contributed to the decline in marriage rates).

132. Jessica R. Feinberg, *Exposing the Traditional Marriage Agenda*, 7 NW J. L. & SOC. POL'Y 301, 309 (2012) ("Today, the divorce rate remains at forty percent."); Brian Sullivan, *Marriage as a Loophole–What's Love Got to Do with It?,* 99-MAY A.B.A. J. 71 ("[T]he U.S. divorce rate stubbornly remains near 50 percent."); Sarah Bollasina Fandrey, Note, *The Goals of Marriage and Divorce in Missouri: The State's Interest in Regulating Marriage, Privatizing Dependency, and Allowing Same-Sex Divorce*, 32 ST. LOUIS U. PUB. L. REV. 447, 461 (2013) ("For the past decade, the divorce rate in America has been around 50 percent.").

133. Mather & Lavery, *supra* note 7 ("In fact, the sharp decline in marriage has been accompanied by a rapid increase in the number of cohabiting couples, as reported by the U.S. Census Bureau in September, 2010.").

134. BOWMAN, *supra* note 9, at 97.

135. *Id.* at 101.

136. Berg, *supra* note 10, at 276.

unmarried cohabitating opposite-sex couples reached 7.5 million.[137] In addition, nearly a quarter of all births in the United States over the past five years have been to unmarried, cohabitating women,[138] and "[a]lmost all of the rise in nonmarital births has occurred among couples living together."[139]

Cohabitating couples are similar to married couples in some important ways. The percentage of cohabitating couples who have children in the household, for example, is almost as high as the percentage of married couples who have children in the household.[140] There are also, however, some significant differences between married couples and cohabitating couples, especially with regard to employment and finances. For instance, cohabiting partners are more likely than spouses to both work outside of the home,[141] the relationships between cohabitating partners are generally more egalitarian than the relationships between spouses, and married women are more likely than cohabitating women to sacrifice their careers for their significant others' employment or to raise children.[142] Cohabitating mothers are significantly more likely than married mothers to work outside of the home, and cohabitating mothers also tend to work more hours than married mothers.[143] In addition, research indicates that there is "remarkably less disparity in [cohabitating] partner incomes than for married partners," as "while female cohabitants earn 90% of their partners' incomes, wives earn only 60% of their husbands' incomes."[144] Importantly, cohabitating couples are far less likely than married couples to pool their resources or to consider themselves a joint economic unit.[145] While approximately half of cohabitating couples pool their resources to some extent, only one group—the fifteen percent or so living with shared biological children—tends to engage in a level of financial merging that is similar to the level of financial merging typically undertaken by married couples.[146] Moreover, cohabitating partners "often arrange their finances so that they split expenses and do so fifty-fifty, even when partners' respective earnings are unequal."[147] In general, as compared to married couples, there is greater economic equality between cohabitating partners and less financial intertwinement and economic dependency.[148]

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137. *Id.*

138. Braiker, *supra* note 11.

139. DeParle & Tavernise, *supra* note 8.

140. Berg, *supra* note 10, at 277.

141. BOWMAN, *supra* note 9, at 143.

142. Margaret F. Brinig, *The Influence of* Marvin v. Marvin *on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1317 (2001).

143. Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J. L. & FAM. STUD. 1, 24–25 (2012).

144. *Id.* at 24.

145. *Id.* at 21 ("In terms of economic sharing, data suggests that cohabitants as a group are more likely to view each other as individual economic entities and are significantly less likely to merge their money than married couples."); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 840 & n.99 (2005) (citing reports finding that married couples are far more likely than cohabitating couples to pool their resources).

146. Kelly, *supra* note 143, at 23 & n.121; Alicia Brokars Kelly, *Better Equity for Elders: Basing Couples' Economic Relations Law on Sharing and Caring*, 21 TEMP. POL. & CIV. RTS. L. REV. 387, 396 (2012).

147. Kelly, *supra* note 143, at 22.

148. *Id.* at 24–26.

Overall, today's adults are spending less time in marital relationships than in the past and more time in nonmarital cohabitating relationships.[149] Although once widely considered deviant, unmarried cohabitation has gained significantly greater acceptance in the United States, with recent studies indicating that the majority of Americans do not believe that nonmarital cohabitation is negative for society.[150] With marriage in decline, cohabitation on the rise, and the number of children born to cohabiting couples increasing at a rapid pace, there is ample reason to rethink marriage as the sole intimate adult relationship upon which legal rights and protections are granted. Expanding rights and protections on the basis of a status other than marriage is likely to have a number of positive effects.

B. The Potential Benefits of Widespread Nonmarital Relationship Recognition

1. Providing Legal Protections for a Greater Number of Relationships

As an initial matter, if nonmarital statuses were available in addition to marriage, more people likely would have their relationships recognized by the law at any given time. While cohabitating couples have made the decision that, for whatever reason, marriage is not currently the right choice for them, these couples may be willing to enter into a relationship status that offers an alternative to marriage. Indeed, this has been the case in France.[151] Since enacting its national nonmarital status, the PACS, ninety-five percent of which are entered into by opposite-sex couples,[152] the overall number of couples who have chosen to enter into relationship statuses recognized by the government (whether marriages or PACSs) has increased.[153] The introduction of a national nonmarital status has "encourage[d] unmarried couples, regardless of sexual orientation, to secure a better arrangement for themselves."[154]

Widespread recognition of nonmarital statuses likely would have a similar effect in the United States, resulting in more people securing legal protections for their relationships. Individuals in the United States cohabit instead of marry for a number of reasons, and for many of these individuals a nonmarital status could provide a desirable alternative to the current choice of marriage or nonrecognition. For example, some Americans reject marriage because "marriage possesses a history saturated with hierarchy, inequality, exclusions, and discrimination," a history highlighted by "injustices structured not only by gender but also by race, class, religion, nationality,

149. *See* Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J. L. & FAM. STUD. 279, 284 (2008) (indicating a ten-fold increase in the number of cohabiting couples in the United States during the past forty years).

150. *See* PEW RESEARCH CTR. SOCIAL & DEMOGRAPHIC TRENDS PROJECT, THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES ii (2010), *available at* http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf (indicating that only forty-three percent of the public believes that cohabitation without marriage is bad for society, with the remainder saying that it is good or makes no difference).

151. See *supra* notes 71–86 and accompanying text for a description of the PACS, a popular nonmarital relationship status in France.

152. Jon Kelly, *Why Would a Straight Couple Want a Civil Partnership?*, BBC NEWS MAG. (Oct. 27, 2010, 10:34 AM), http://www.bbc.co.uk/news/magazine-11625835.

153. Aloni, *supra* note 5, at 578.

154. *Id.*

and of course sexual orientation."[155] Nonmarital statuses, on the other hand, are relatively new, and do not carry the baggage and exclusionary, discriminatory history of marriage.[156] In addition, because nonmarital statuses lack the traditions and expectations associated with marriage, couples may feel that they have a greater ability to structure their relationships within these statuses in the manner that works best for them, unencumbered by societal expectations.[157]

Another major reason that couples may choose to cohabit instead of marry is that they do not want their relationships to be governed by the substantial rights, obligations, and responsibilities that accompany marriage,[158] which are numerous and significant. The dissolution process highlights this—judicial involvement is required in order to obtain a divorce,[159] and it is often a costly, time-consuming, and emotionally draining experience.[160] In addition, the default rules for dissolution of marriage generally involve a property regime where, with few exceptions, the assets and debts acquired by either party during the marriage are treated not as the separate property of the spouse who acquired them, but as marital property subject to equitable distribution between the spouses upon divorce.[161] Moreover, by signing up for marriage, an individual also may be signing up for a lifetime of providing support for his or her spouse, even after dissolution, as every jurisdiction allows courts to grant spousal

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155. Judith Stacey, *Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331, 341 (2003).

156. *See* John G. Culhane, *Civil Unions Reconsidered*, 26 J. CIV. RTS. & ECON. DEV. 621, 636 (2012) (positing that people who view marriage negatively due to its exclusionary and discriminatory history may find a civil union to be an appealing alternative); Greg Johnson, *Civil Union, A Reappraisal*, 30 VT. L. REV. 891, 905–06 (2006) (suggesting that a virtue of civil unions is that they are "free from the ignoble baggage of marriage").

157. Glazer, *supra* note 27, at 141.

158. *See* Alice G. Walton, *The Marriage Problem: Why Many Are Choosing Cohabitation Instead*, ATLANTIC (Feb. 7, 2012, 11:02 AM), http://www.theatlantic.com/health/archive/2012/02/the-marriage-problem-why-many-are-choosing-cohabitation-instead/252505/ (stating that many couples may be interested in cohabitation over marriage due to the economic consequences of divorce).

159. While a number of states have summary dissolution procedures that do not require a hearing before the court (the court is still responsible for granting the dissolution, it just does so without a hearing), eligibility for summary dissolution is strict. Some of the more common requirements for eligibility include that the marriage is of a relatively short duration, no children are involved in the marriage, assets and debts are below a set amount, the parties have come to an agreement with regard to marital property, and the parties agree to a spousal support amount or waive spousal support. *See*, *e.g.*, CAL. FAM. CODE § 2400 (West 2014); COLO. REV. STAT. ANN. § 14-10-120.3 (West 2014); MINN. STAT. ANN. § 518.195 (West 2014); MONT. CODE ANN. § 40-4-130 (West 2013); NEV. REV. STAT. ANN. § 125.181 (West 2013); OR. REV. STAT. ANN. § 107.485 (West 2014).

160. *See* Jeffrey R. Baker, *The Failure and Promise of Common Law Equity in Domestic Abuse Cases*, 58 LOY. L. REV. 559, 586 (2012) ("[D]ivorce remains costly and time-consuming"); Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation from Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 492–93 (1999) ("Divorces are potentially expensive, time consuming, and emotionally draining to litigate."); Paul Lermack, *The Constitution is the Social Contract so it Must be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1438 n.202 (2007) ("Even in no-fault American states, where divorces can be had on the simple statements of the parties that the marriage has broken down, the dissolution of a marriage, with the concomitant untangling of finances, duties, and family ties, becomes an expensive and time consuming process.").

161. DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS & DAVID D. MEYER, CONTEMPORARY FAMILY LAW 473–76 (3d ed. 2012).

support upon divorce.[162] As the experiences of other countries demonstrate, there are many people who desire a relationship status that contains a package of rights and responsibilities that differs significantly from marriage.[163] A nonmarital status that offered a true alternative to marriage with regard to the package of rights and obligations provided likely would result in more people in the United States entering into a legally recognized relationship status.

More couples entering into legally recognized relationship statuses would be a positive advancement both for the individuals involved and for society for a number of reasons. To begin with, it would mean that more individuals would enjoy important legal protections and rights within their relationships, which likely would lead to improved health and stability for these individuals and their children.[164] It is undisputable that the many rights and responsibilities that accompany marriage, which touch almost every area of life, aim to provide for enhanced health and stability for those who enter the institution.[165] It is important to understand that in many states, unmarried cohabitating couples who have not entered into a nonmarital status lack even the most basic rights.

Beyond the major state-based rights, responsibilities, and protections that depend upon marriage in areas of the law such as inheritance, tax, property, support, tort, contracts, and criminal law, and the major federal rights, responsibilities, and protections that accompany marriage in areas of the law such as tax, Social Security, Medicare, and immigration, there are also a number of more basic rights that unmarried cohabitating couples lack. For example, same-sex cohabitating partners may not be covered under state domestic violence laws.[166] A cohabitating partner is also generally left out of, or placed very low on, state statutory hierarchies for appointment as his or her incapacitated partner's healthcare proxy, power of attorney, or guardian.[167] In addition, cohabitating partners are not automatically presumed to be the legal parents of children birthed by their partners,[168] same-sex cohabitating partners generally cannot take advantage of state procedures that allow for the establishment of parentage

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162. *Id.* at 542–43.

163. See *supra* Part II.B for a survey of the nonmarital statuses enacted in countries other than the United States.

164. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 963 (Mass. 2003) ("[T]he enhanced income provided by marital benefits is an important source of security and stability for married couples and their children . . . ."); Frank Flaspohler, Note, *All Who Live in Love*, 11 LOY. J. PUB. INT. L. 87, 128 (2009) ("Health care rights, tax and retirement benefits and legal recognition all foster the life-long stability and enjoyment that marriage provides.").

165. *Goodridge*, 798 N.E.2d at 963.

166. *See* ABRAMS ET AL., *supra* note 161, at 364 (indicating that some states, including Delaware, Louisiana, North Carolina, and South Carolina, exclude individuals in same-sex relationships from coverage under domestic violence laws).

167. *See* Sy Moskowitz, *Still Part of the Clan: Representing Elders in the Family Law Practice*, 38 FAM. L.Q. 213, 230 (2004).

168. *See* Leslie Joan Harris, *Voluntary Acknowledgements of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL'Y & L. 467, 467 (2012) ("The law in all states presumes that a husband is the father of his wife's children and gives him the status of the children's legal father. In sixteen states, same-sex couples can marry or enter civil unions or domestic partnerships that give the parties all or almost all the benefits of marriage under state law, including the presumption that the spouse/partner of a legal parent is presumed to be the legal parent of a child born into the relationship.").

through a voluntary acknowledgement of paternity,[169] and some states prohibit cohabitating partners from adopting children together[170] or prohibit one partner from adopting the other partner's legal child, even where the child has only one legally recognized parent.[171] Moreover, although recent federal regulations require that hospitals participating in Medicare and Medicaid adhere to patients' wishes with regard to visitors, in some circumstances cohabitating partners may not be able to visit each other at hospitals.[172] Finally, cohabitating partners also lack the basic right under federal law to take leave to care for each other under the Family and Medical Leave Act (FMLA).[173] These basic rights do not involve the presupposition that the couple functions as one unit for economic purposes; they are simply based upon the notion that the couple shares a mutually important, caring relationship. Unfortunately, these basic rights are often denied to cohabitating couples.

The denial of these basic protections is a significant detriment not only to cohabitating couples, but also to the children who live with them. These children may be denied the benefit of two loving, committed parents who are responsible for their care simply because of their parents' marital status. The availability of some of these protections through a nonmarital status, particularly those basic protections relevant to important relationships regardless of the degree of financial intertwinement and economic dependency within the relationships, would result in a significantly improved situation for many cohabitating couples and their families. Healthier, more stable relationships represent a positive advancement not only for the individuals involved in such relationships and their children, but also for society as a whole. In addition, nonmarital statuses also may provide advantages for the state by providing rights and responsibilities that encourage private, rather than public, responsibility for individual

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169. *Id*. at 469–70 ("Today, however, in all states, opposite-sex couples who cannot or do not wish to marry can establish the man as a child's legal father by signing a voluntary acknowledgment of paternity (VAP) and filing it with the state vital statistics office. . . . In contrast, same-sex couples who cannot or do not want to marry but who would like to be legal parents together do not have a cheap, simple way of achieving this goal.").

170. For example, Mississippi bans adoption by same-sex couples, MISS. CODE ANN. § 93-17-3(5) (West 2014), and Louisiana, Utah, and Michigan prohibit joint adoptions by unmarried couples whether of the same- or opposite-sex. *See* UTAH CODE ANN. § 78B-6-117(3) (West 2014) (stating that "[a] child may not be adopted by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state"); Adoption of Meaux, 417 So. 2d 522, 522–23 (La. Ct. App. 1982) (finding that the biological parents of a child could not adopt the child because they were an unmarried couple); HUMAN RIGHTS CAMPAIGN, PARENTING LAWS: JOINT ADOPTION (2014), *available at* http://hrc-assets.s3-website-us-east-1.amazonaws.com//files/assets/resources/joint_adoption_6-10-2014.pdf (explaining that unmarried couples in Michigan "may not jointly petition to adopt").

171. HUMAN RIGHTS CAMPAIGN, *supra* note 170 ("State courts have ruled that second-parent adoptions are not available under current law in Kentucky, Nebraska, North Carolina, Ohio and Wisconsin. In many states the status of parenting law for LGBT people is unclear."); *Adoption*, UNMARRIED EQUALITY, http://www.unmarried.org/parents-children/adoption/ (last visited Dec. 12, 2014) ("Countless unmarried partners (same-sex or different-sex) are co-parenting a child or children, but frequently only one partner has a legal relationship to the child(ren). In many cases it would benefit the child(ren) to have a legal relationship to both parents. Many, but not all, states allow 'co-parent adoptions' or 'second parent adoptions,' which create a second legal parent-child relationship for these families.").

172. See *infra* note 284.

173. CORPORATE COUNSEL'S GUIDE TO THE FAMILY AND MEDICAL LEAVE ACT § 1:17, LEAVE ENTITLEMENT—QUALIFYING REASONS FOR TAKING LEAVE—TO CARE FOR A FAMILY MEMBER WITH A SERIOUS HEALTH CONDITION (2014).

care.

There are many other positive effects that would stem from more people entering into legally recognized relationship statuses. For example, if more couples chose to enter into relationship statuses, then more individuals would be provided with clear, predictable rules to govern their rights and obligations upon dissolution of their relationships and could plan accordingly. Where couples have not entered into a relationship status, the rights and obligations arising from the relationship (if any) are far from clear upon dissolution.[174] Even among jurisdictions that recognize claims arising from cohabitating relationships, only express written contracts, which are rarely executed by cohabitating couples, provide any degree of predictability.[175] In all other situations, where a party makes a claim for rights arising from a cohabitating relationship pursuant to an express or implied contract, the result depends upon a case-by-case determination of whether the court believes the parties' conduct during the relationship created an express or implied contract or gave rise to an equitable claim for relief, which has led to highly unpredictable results.[176] Couples who enter a relationship status that has rules and procedures governing the relationship and its dissolution would avoid much of the uncertainty and unpredictability that currently exists for cohabitating couples with regard to their post-relationship rights and obligations.[177]

In fact, the addition of nonmarital statuses may bring greater knowledge and certainty about the rights and responsibilities governing relationships not only to individuals who enter into nonmarital statuses, but also to individuals who enter into marriages. This is because with the current choice of marriage or nonrecognition in most jurisdictions, many individuals enter into marriage without a great deal of thought regarding the specific legal rights and responsibilities that accompany it. If there was another choice for formal recognition of relationships, it likely would lead to more meaningful conversations between couples regarding the different rights and

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174. Some states will enforce only express written contracts between cohabitating couples, some states will enforce oral or written express contracts, some states will enforce implied contracts, some states allow partners to assert claims based upon restitution or unjust enrichment, and still other states refuse, for public policy reasons, to recognize any rights or obligations arising from a cohabitating relationship. *See* ABRAMS ET AL., *supra* note 161, at 266–75; Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 832 (2008). In addition, one state will recognize rights and obligations arising from a cohabitating relationship only if the court determines that the parties shared a "committed intimate relationship." ABRAMS ET AL., *supra* note 161, at 278–79.

175. *See* WILLIAM P. STATSKY, FAMILY LAW: THE ESSENTIALS 26 (2d ed. 2004) ("Rarely will the parties have the foresight to commit their agreement to writing . . . ."); Frederick C. Hertz, *When Protections are Few . . . Breaking Up is Hard to Do*, FAM. ADVOC., Summer 1997, at 13, 17 ("[I]t is extremely rare for unmarried couples to sign cohabitation agreements . . . .").

176. *See* Aloni, *supra* note 5, at 587–91 (describing cohabitation contracts as "inevitably promot[ing] uncertainty"); Twila L. Perry, *Dissolution Planning in Family Law: A Critique of Current Analyses and a Look Toward the Future*, 24 FAM. L.Q. 77, 105–13 (1990) (describing the ineffectiveness of cohabitation agreements); Ryan M. Deam, Note, *Creating the Perfect Case: The Constitutionality of Retroactive Application of the Domestic Partner Rights and Responsibilities Act of 2003*, 35 PEPP. L. REV. 733, 746 (2008) (discussing the "unpredictable system" of cohabitation agreements).

177. *See* Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 521 (1992) (criticizing the current approach to rights between cohabitating partners and explaining that "[c]hannelling institutions, in contrast, set bright lines which establish for all concerned what people's status is. They make it easier for people to predict the consequences of their acts").

responsibilities that come with each option.

Providing rights and protections to a greater number of relationships through the introduction of nonmarital statuses would be beneficial regardless of the final destination of such relationships. For the substantial portion of cohabitating couples who eventually marry, the rights and protections accompanying a nonmarital status likely would place those couples and their families in a more stable, healthy situation than they otherwise would have enjoyed going into their marriages. For cohabitating relationships that terminate before marriage, extending core rights and benefits to these couples would result in important, basic protections during the relationship, and more clear and effective rights and protections for these couples and their families at dissolution. Finally, cohabitating couples who remain together for a substantial period of time without marrying or dissolving their relationships, as well as their families, would also undoubtedly benefit from the availability of a nonmarital status that provided core rights and protections for their relationships.[178]

2. Respecting Individual Choice and Autonomy

Nonmarital relationship statuses also would further individual choice and autonomy and would allow many couples to choose a relationship recognition option that better meets their needs. As a result of the current relationship recognition regime in most United States jurisdictions, meaningful choice regarding the recognition of relationships is lacking. As noted above, in most jurisdictions the options for intimate adult relationship recognition are marriage or nonrecognition. While prenuptial agreements provide individuals with some choice in that they allow couples to depart from some of the default rights and responsibilities that accompany marriage, few individuals have the knowledge, ability, or desire to hire an attorney to draft an effective prenuptial agreement or to draft one themselves.[179] Moreover, going into marriage, most people estimate that their chances of divorce are zero, and thus most people see little need to consider, let alone plan for, the dissolution of their relationships.[180] Consequently, only five to ten percent of first marriages involve prenuptial agreements.[181] Similarly, although cohabitating couples can contract for certain rights and responsibilities to govern their relationships, very few cohabitating couples have the knowledge, ability, or desire to execute such agreements.[182] Thus, most people likely continue to perceive their relationship recognition options as marriage or nonrecognition. In addition, a number of the rules and obligations that come with marriage, such as the significant requirement of undergoing divorce proceedings to terminate the relationship, cannot be altered by agreement.[183] Thus, choice and autonomy under the current system of relationship recognition remain severely limited.

Due to the diversity of individuals and relationships that exist in the United States,

178. Approximately ten percent of cohabitating couples who have not married are still together after five years. Garrison, *supra* note 149, at 289.

179. ABRAMS ET AL., *supra* note 161, at 840.

180. *Id.* at 850.

181. *Id.* at 840.

182. See *supra* note 174–75 and accompanying text.

183. ABRAMS, *supra* note 161, at 867–70.

it is difficult to dispute that there are relationships that would be better served by an option other than marriage. The structure of marriage, although it may work well for some people, clearly does not work well for all people. It is important to understand that this critique is not unique to marriage—it is hard to believe that there is any one relationship status or set of rights and responsibilities that would best serve each, or even most, of the millions of relationships that exist throughout the United States today. As other scholars have argued, introducing statuses that provide an alternative to marriage could "create choices for forms of household and partnership recognition that might better respond to the diverse forms that real households take, depending on their specific and varying needs, while preserving marriage for those whose needs and desires favor the marital arrangement."[184]

This is not to say, as some scholars have proposed,[185] that individuals should have complete freedom to structure the rights and obligations that come with their relationships through private contracts. Such an approach raises serious issues with regard to fairness, efficiency, and enforceability.[186] States indisputably have an interest in ensuring that the legal rights and obligations governing the relationships of their residents adequately protect the interests of both parties and promote stable, healthy relationships. Nonmarital statuses, unlike private contracts, are created by the states, and states therefore have the opportunity to structure the statuses in such a way that they further important state interests. Creating an alternative to marriage through nonmarital statuses is a reasonable middle-ground approach between providing couples with only one choice for relationship recognition and allowing couples complete freedom to structure their relationships through contracts. Nonmarital statuses provide individuals with greater autonomy and meaningful choice in structuring their relationships, while still respecting state interests in promoting healthy, stable relationships and protecting the individuals involved in such relationships.[187]

3. Strengthening the Quality of Marriages in the United States

Beyond the positive effects that would flow from the widespread recognition of nonmarital statuses as a result of more individuals having their relationships recognized and protected by the law, providing for the recognition of nonmarital statuses also may have the effect of strengthening the quality of marriages in the United States. Currently,

184. Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 617 (2004).

185. *See*, *e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 226–29 (1995) (proposing that marriage should no longer be a legal category, but instead an agreement governed by contract law); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1164 (2006) (stating that the institution of marriage would be strengthened if it were not recognized or defined by the state).

186. *See generally* Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311, 1321–22 (2006) (positing that privatizing marriage could result in more vulnerability for women and minorities); *see also* Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1270, 1276 (2006) (asserting that private agreements between same-sex couples are often not recognized by third parties); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 359–60 (2010) (arguing that deregulation of marriage would be difficult to enforce due to limited judicial resources).

187. *See* Sanger, *supra* note 186, at 1316.

most couples are left with a narrow choice when it comes to legal recognition for their relationships: marry or forgo a significant number of rights and protections arising under state and federal law.[188] This limited choice between marriage and nonrecognition likely results in some couples entering into marriages before they are ready to do so. It is hard to see how couples choosing marriage solely because it is the only option available for public and legal recognition of their relationships does anything but weaken the institution of marriage. Since divorce rates are lower for individuals who marry later in life, presumably because such individuals have waited until they are financially and emotionally ready to marry, it makes sense to make it easier for people to wait to enter into marriage by providing an alternative other than that of forgoing almost all legal rights and protections for their relationships.[189]

Indeed, in countries that have enacted national nonmarital statuses, such as France, these statuses often are used as a trial run for marriage to ensure that the couple is ready to make the type of commitment that marriage entails.[190] In France, marriage, which automatically dissolves a PACS, has been the reason for PACS dissolutions in over one-third of all cases.[191] For couples who entered into a PACS and later married, the PACS, by allowing these couples to make a public commitment and providing a number of rights and protections, likely reduced the pressure to marry and enhanced the ability of these couples to delay marriage until they were confident that it was the correct choice for their relationships. It is these couples, as opposed to those couples who entered into a PACS and then decided to end their relationships for reasons other than marriage, who would seem most likely to strengthen the quality of the institution of marriage. Thus, nonmarital statuses may serve a filtering function—helping to identify those couples who are ready for marriage and those who are not.

In addition, research demonstrates that more than half of couples who cohabit will eventually marry,[192] approximately two-thirds of all couples who marry cohabit before marriage,[193] and most Americans view cohabitation as a step toward marriage.[194] This represents a significant link between marriage and cohabitation for a large proportion of the United States population. If couples were able to receive some rights and protections during their premarital cohabitation by registering for a nonmarital status,

188. See *supra* Part II.A for a survey of nonmarital relationship statuses throughout the United States.

189. *See* Belinda Luscombe, *Divorcing by the Numbers* TIME, May 24, 2010, at 47; Susan Krauss Whitbourne, *Lowering the Odds of Divorce: Ways to Boost your Marital Longevity*, PSYCH. TODAY (May 31, 2011), http://www.psychologytoday.com/blog/fulfillment-any-age/201105/lowering-the-odds-divorce-ways-boost-your-marital-longevity.

190. MERIN, *supra* note 71, at 141; CARL F. STYCHIN, GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM 63 (2003); *see also* Robert Korengold, *Marriage or PACS? In France Things Are Changing*, BONJOURPARIS, http://www.bonjourparis.com/story/marriage-or-pacs-france-things-are-changing/ (last visited Dec. 12, 2014).

191. *See* Aloni, *supra* note 5, at 641.

192. *See* Garrison, *supra* note 149, at 289 ("[A]pproximately sixty percent of all cohabitants and seventy percent of those in a first premarital cohabitation marry within five years.").

193. *See* Aaron Ben-Zeév, *Does Cohabitation Lead to More Divorces?*, PSYCH. TODAY (Mar. 28, 2013), http://www.psychologytoday.com/blog/in-the-name-love/201303/does-cohabitation-lead-more-divorces ("[M]ore than 70% of US couples now cohabit before marriage.").

194. *See* Meg Jay, *The Downside of Cohabiting Before Marriage*, N.Y. TIMES, Apr. 14, 2012, at SR4 (noting a 2010 Pew survey finding that nearly two-thirds of Americans saw cohabitation as a step toward marriage).

perhaps those couples who eventually decide to marry would be in a more stable, healthy situation than they otherwise would have been. This too would contribute toward improving the quality of marriages in the United States.

IV. A NEW SYSTEM OF NONMARITAL RELATIONSHIP RECOGNITION IN A POST-SAME-SEX MARRIAGE UNITED STATES

While the need for nonmarital relationship recognition is substantial in light of the current state of marriage, and the potential value of nonmarital statuses is great, there are significant problems with the current system of nonmarital relationship recognition in the United States.[195] Chief among the drawbacks of the current system are the lack of federal recognition for nonmarital statuses, the lack of interstate recognition for nonmarital statuses, and the lack of meaningful alternatives for individuals who would benefit from a different set of legal rights and protections for their relationships than that which accompanies marriage. None of the nonmarital statuses in existence today receive federal recognition,[196] no state is required to recognize the nonmarital status of any other state, and only a handful of jurisdictions have nonmarital statuses that provide a package of state-based rights and responsibilities that differs in any significant way from that which accompanies marriage.[197]

Unfortunately, there is no quick or easy fix for these problems. Even if the federal government decided to recognize nonmarital statuses that function as state-based marriages, like civil unions, as marriages, marriage (as newly defined by the federal government) would continue to be the basis upon which over one thousand federal rights and protections were granted. As discussed above, the current state of marriage in the United States leads to the conclusion that marriage should no longer function as the sole basis upon which to grant so many rights and protections, and expanding definitions of marriage to include statuses that share all of the same rights and responsibilities of marriage, but simply use a different name, likely would do little to improve the current state of marriage.[198] Moreover, simply treating certain nonmarital statuses as marriages at the federal level would do nothing to alleviate the issues with interstate recognition of nonmarital statuses. In addition, the problem of a lack of true marriage alternatives would remain, since civil unions or similar statuses would provide the same package of rights and responsibilities as marriage not only on the state level, but also on the federal level. In a future where both same- and opposite-sex couples are eligible for marriage, the value of this type of nonmarital status will be significantly less than a nonmarital status that offers a meaningful alternative to marriage. Overall, although there is no quick or easy solution for the issues facing the current system of nonmarital relationship recognition in the United States, the numerous potential benefits of a more effective system make undertaking the substantial task of creating such a system worthwhile.

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195. See *supra* Section III for an overview of the current state of marriage and cohabitation in the United States and a discussion of the likely benefits that would result from widespread nonmarital relationship recognition.

196. *See* Stein, *supra* note 18, at 186.

197. See *supra* Part II.A for a detailed account of the various state-based nonmarital statuses available in the United States.

198. See *supra* Part III.A for a discussion of the issues facing marriage in the United States.

A. The Proposed System of Nonmarital Relationship Recognition

This Part sets forth a proposal that is based upon the federal government granting a package of rights and benefits to state-based nonmarital statuses that meet certain basic requirements. The proposal aims to further federal recognition of state-based nonmarital statuses through a system that will provide more individuals in the United States with essential rights and protections for their relationships at both the state and federal levels through true marriage alternatives. At the same time, the proposed system will not disrupt the important role that states historically have played in the realm of domestic relations—it leaves the enactment of nonmarital statuses within the discretion of each state and allows states great leeway in structuring nonmarital statuses that will qualify for federal recognition. It is important to note that the proposal set forth here is an initial attempt to create a more effective system of nonmarital relationship recognition, and, while it aims to provide a fully considered, detailed plan, its purpose is to serve as a catalyst for further discussion and exploration of this topic.

1. The Roles of the State and Federal Governments Under the Proposed System

While the experiences of other countries will be helpful to the United States in implementing a more effective system of nonmarital relationship recognition, the approach taken by the United States should differ in an important manner from the approach taken by other countries in this context. The approach of other countries has been to create a nonmarital status at the national level.[199] In the United States, this would mean having the federal government create a nonmarital status that individuals could enter in order to receive federal rights and protections for their relationships. For a variety of reasons related to the way in which the state and federal governments function in the United States in the context of domestic relations and relationship recognition, however, this approach likely would not be feasible. Federal recognition of state-created nonmarital statuses is a significantly more viable and realistic option.

It has often been stated that domestic relations is an area of the law that is governed by the states.[200] While this is true to a certain extent,[201] a number of legal scholars have noted that the relationship between the state and federal governments in the domestic relations context is actually quite complex.[202] In 1858, the United States Supreme Court, in *Barber v. Barber*,[203] declared that federal courts could not exercise

199. See *supra* Part II.B for a discussion of the nonmarital relationship statuses enacted in other countries.

200. *E.g.*, United States v. Windsor, 133 S. Ct. 2675, 2680 (2013) (stating that domestic relations have long been exclusively left to state governance); Mark Strasser, *Congress, Federal Courts, and Domestic Relations Exceptionalism*, 12 CONN. PUB. INT. L.J. 193, 214 (2012) ("Over one hundred years ago, the *Burrus* Court announced that the 'whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.' That case has been cited with approval numerous times.") (footnotes omitted).

201. *See* Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 279 (2009) ("Even under the strong view of national power, however, state courts, legislatures, and local administrative and law enforcement agencies continue to do most of the daily work of family law.").

202. *See*, *e.g.*, *id.* at 267; Ryiah Lilith, *Caring for the Ten Percent's 2.4: Lesbian and Gay Parents' Access to Parental Benefits*, 16 WIS. WOMEN'S L.J. 125, 156 (2001).

203. 62 U.S. 582 (1858).

diversity jurisdiction to preside over claims for divorce or alimony.[204] Pursuant to this court-created "domestic relations exception," which has been reaffirmed and clarified by the Supreme Court since *Barber*, "federal courts will not exercise diversity jurisdiction to grant or deny a divorce, alimony, property distribution or child custody or visitation."[205] In retaining the domestic relations exception over the years, the Supreme Court has reasoned that domestic relations decrees often involve continued interaction with the issuing court, and since "state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees," the domestic relations exception furthers judicial economy.[206] The Court also has explained that the expertise developed by state courts over the years in the area of domestic relations further supports the retention of the domestic relations exception.[207] Thus, due to the domestic relations exception, state courts hear the vast majority of domestic relations cases.[208]

Although state courts generally grant or deny divorces and determine alimony, property distribution, and child custody issues when relationships dissolve, the domestic relations exception does not remove all domestic relations cases from federal courts. Throughout the years, a number of federal courts have accepted jurisdiction to hear cases that raise domestic relations claims that the court determines do not fall under the domestic relations exception, construing the exception to involve only claims relating to the issuance or modification of a divorce, alimony, property, child support, or child custody order.[209] A number of federal courts also have been willing to accept jurisdiction in domestic relations cases that raise federal questions, regardless of the

204. *Barber*, 62 U.S. at 584.

205. ABRAMS ET AL., *supra* note 161, at 950.

206. Ankenbrandt v. Richards, 504 U.S. 689, 704 (1992).

207. *Id.*

208. *Legal System of the United States*, 40 ST. LOUIS U. L.J. 1413, 1413 (1996).

209. *See*, *e.g.*, *Ankenbrandt*, 504 U.S. at 706–07 ("The [domestic relations] exception has no place in a suit such as this one, in which a former spouse sues another on behalf of children alleged to have been abused. Because the allegations in this complaint do not request the District Court to issue a divorce, alimony, or child custody decree, we hold that the suit is appropriate for the exercise of § 1332 jurisdiction . . . ."); Lloyd v. Loeffler, 694 F.2d 489, 492–93 (7th Cir. 1982) (holding that an action brought by the father of a child against the child's mother, her husband, and maternal grandparents for interference with his custody did not fall within the domestic relations exception); Aldahondo-Arroyo v. Camacho-Izquierdo, 573 F. Supp. 2d 505, 507 (D.P.R. 2008) ("Since only the issuance of divorce, alimony, and child custody decrees remain outside federal jurisdictional bounds, this Court finds that it does not lack jurisdiction to enforce the property settlement agreement."); Norton v. Hoyt, 278 F. Supp. 2d 214, 228 (D.R.I. 2003) (refusing to decline jurisdiction in a case involving contract and tort claims between former lovers and stating that "the domestic relations exception requires abstention by federal courts in only a narrow category of cases, specifically those involving divorce, alimony and child custody decrees"); *see also* CHARLES ALAN WRIGHT ET AL., JUDICIALLY CREATED LIMITATIONS ON DIVERSITY JURISDICTION—DOMESTIC RELATIONS CASES—GENERAL PRINCIPLES, 13E FED. PRAC. & PROC. JURIS. § 3609 (3d ed. 2013) ("Federal courts may not probate or annul a will or administer an estate. Nor can they issue divorce, alimony, or child custody decrees. But if the other requirements for diversity of citizenship jurisdiction are met, numerous federal courts have made it clear that district judges must exercise their subject matter jurisdiction in cases involving other domestic relations and probate related matters."); Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 141 (2009) ("Some lower federal courts applied the exception expansively to exclude a broad variety of domestic relations issues from federal review, while other lower courts construed the doctrine narrowly to bar only divorce, custody, and alimony decrees.").

precise subject matter at issue.[210] Consequently, despite the existence of the domestic relations exception, federal courts have played a significant role in shaping domestic relations law. A number of important domestic relations questions have involved federal constitutional concerns, and the United States Supreme Court has issued a number of important constitutionally based domestic relations decisions on topics such as marriage, procreation, child rearing, contraception, and the rights of family members.[211]

In the legislative realm, the state-federal relationship is also complex. Although state legislation governs a wide range of domestic relations issues relating to, inter alia, eligibility requirements and accompanying state-based rights and responsibilities of marriage and other familial statuses; support for family members; property rights among family members; child custody and visitation; parental status; adoption; domestic violence; cohabitation; dissolution of familial relationships; and family-related claims arising in contract, tort, and criminal law, there also exists a significant amount of federal law that affects familial rights and responsibilities.[212] This is because, as the Supreme Court recently noted, "Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue."[213] Consequently, federal law touches on many areas of family life. As one family law scholar has explained, "[W]hatever other legal subjects they implicate, federal social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law are also forms of family law."[214] As a general matter, however, "federal law will not be permitted to displace state domestic relations law unless there would otherwise be major damage to important federal interests."[215]

Importantly, in the context of domestic relations, the federal government generally has deferred to state-law policy decisions,[216] and in granting rights and benefits on the basis of familial status, federal law usually relies upon state-based definitions of family.[217] This deference is seen with regard to marriage[218]—it is state law that usually

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210. Courts differ with regard to whether they view the domestic relations exception as applying only to diversity jurisdiction or as applying to both federal question and diversity jurisdiction. Strasser, *supra* note 200, at 212; *see also* Mandel v. Town of Orleans, 326 F.3d 267, 271 (1st Cir. 2003) ("[T]he courts are divided as to whether the [domestic relations exception] is limited to diversity claims and this court has never decided that issue. The debate is esoteric but, as federal law increasingly affects domestic relations, one of potential importance.") (footnote omitted); Harbach, *supra* note 209, at 147 n.64 (describing a number of instances where courts have exercised jurisdiction in domestic relations cases that raise federal questions, but noting the trend in some jurisdictions to construe the domestic relations exception as applying to federal questions).

211. *See* Harbach, *supra* note 209, at 135–36.

212. *See generally* ABRAMS ET AL., *supra* note 161.

213. United States v. Windsor, 133 S. Ct. 2675, 2690 (2013).

214. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 875 (2004).

215. Strasser, *supra* note 200, at 229.

216. *Windsor*, 133 S. Ct. at 2691.

217. *See* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537, 599 (2010) (describing "the normal reliance of federal law on state law definitions of personal and family relationships not only in the context of immigration law, but in federal bankruptcy law, federal criminal law, federal tax law, Social Security, copyright law, and other areas of federal law as well."); Germaine Winnick Willett, Note, *Equality Under the Law or Annihilation of Marriage and Morals? The Same-Sex Marriage Debate*, 73 IND. L.J. 355,

determines whether a relationship will be recognized as a marriage for purposes of federal law.[219] State law also determines what adult relationship statuses (marriage, civil unions, etc.) are recognized in the state, the eligibility rules for entering the statuses, the rules for termination of the statuses, and the array of state-based rights and responsibilities that accompany the statuses.[220] It is also important to note, however, that it is clearly the federal government, and not the state governments, that determines which federal rights and responsibilities will accompany marriage. Moreover, few individuals would question that it is the role of the federal government, and not the state governments, to determine which federal rights and benefits, if any, will accompany state-based nonmarital statuses.

With this history in mind and in keeping with the approach in the United States to domestic relations law, regardless of whether the federal government would have the right under the current legal system to create nonmarital relationship statuses, it is the states that should create such statuses. The federal government then should determine which federal rights and benefits, if any, it wishes to provide to state-based nonmarital statuses. That is, to avoid upsetting the balance of state and federal power in the context of domestic relations, nonmarital relationship statuses should emerge from the states, not from the federal government. Whether the federal government grants rights and responsibilities on the basis of a state-based relationship status, and which federal rights and responsibilities are granted, should remain, as it always has been, the province of the federal government.

There are other practical reasons for taking this approach. A nonmarital status created at the national level would not necessarily provide any state-based rights, responsibilities, or recognition. This would lead to crucial problems with regard to, among other things, the dissolution of these relationships and the determination of the rights and responsibilities flowing from dissolution. State law governs the dissolution of relationships, and for over 100 years, state courts, not federal courts, have conducted proceedings to determine the rights and responsibilities of intimate partners upon the dissolution of their relationships.[221] It simply would not be practical for the federal courts to become enmeshed in this area of the law now. Considering the history and traditions of domestic relations regulation and the practical issues involved in the legal recognition of relationships, it also seems highly unrealistic that the United States federal government would seek to take the step of independently creating and implementing a nonmarital status.

Finally, leaving the creation of nonmarital relationship statuses largely to the

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376 (1997) ("Congress has traditionally left regulation of marriage and family matters to the states, deferring to state definitions in construing federal laws touching on marriage and family.").

218. *See Windsor*, 133 S. Ct. at 2696 (holding that the Defense of Marriage Act is invalid, in part, because it defeats the protection the New York legislature has given through its marriage law to same-sex couples).

219. See *supra* note 218 and accompanying text. This is especially true now that section 3 of the Defense of Marriage Act, which set forth a federal definition of marriage, has been determined to be unconstitutional by the United States Supreme Court. *Windsor*, 133 S. Ct. at 2683, 2696.

220. See *supra* Part II.A for an examination of the various nonmarital statuses that have been enacted in United States jurisdictions.

221. See *supra* notes 200–208 for a discussion of the extent to which domestic relations law is governed by the states.

states allows the states to continue to serve as laboratories for innovation. Historically, states have acted as laboratories, experimenting with new ideas, laws, and regulations in order "to devise various solutions where the best solution is far from clear."[222] Nonmarital statuses are perfect candidates for this type of experimentation, as they are a relatively new advancement in domestic relations law.[223] In fact, states already are serving as laboratories for innovation with regard to nonmarital statuses, with states implementing vastly differing statuses in order to determine which would best further their relationship recognition goals.[224] The proposed system encourages states to continue their important work in this regard—work that has the potential to benefit many individuals across the United States.

2. The Requirements for Federal Recognition of State-Based Nonmarital Statuses Under the Proposed System

While, for the reasons described above, nonmarital statuses should emerge from the states, the federal government still will need to determine which state-based statuses will be recognized for federal purposes. In stark contrast to the over one thousand rights and responsibilities granted by federal law on the basis of marriage, Congress has thus far chosen not to recognize any of the state-based nonmarital statuses in federal statutes.[225] As a result of the differing purposes for which state-based nonmarital statuses have been enacted and the significant differences with regard to the rights, responsibilities, and protections that accompany the various state-based statuses in existence today across the United States—differences that are far more severe than those that exist among the states in the context of marriage[226]—it simply would not be practical for the federal government to provide the same package of federal rights and benefits to each of these nonmarital statuses.

For example, some nonmarital statuses can be dissolved simply by filing paperwork,[227] while others require the dissolution procedures used for marriage.[228] Similarly, some statuses provide all of the state-based rights and responsibilities that accompany marriage,[229] while others provide only a handful of rights and

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222. United States v. Lopez, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring).

223. See *supra* Part II.A.

224. See *supra* Part II.A.

225. See *supra* notes 16–18 and accompanying text.

226. See *supra* Part II.A.

227. *See*, *e.g.*, COLO. REV. STAT. ANN. § 15-22-111(1) (West 2014) ("A designated beneficiary agreement that has been recorded with a county clerk and recorder may be unilaterally revoked by either party to the agreement by recording a revocation with the clerk and recorder of the county in which the agreement was recorded."); ME. REV. STAT. ANN. tit. 22, § 2710(4) (West 2014) ("A registered domestic partnership is terminated . . . by the filing with the registry of: A. A notice under oath signed by both registered domestic partners before a notary that the registered domestic partners consent to the termination; or B. A notice under oath from either registered domestic partner that the other registered domestic partner was served in hand with a notice of intent to terminate the partnership.").

228. *See*, *e.g.*, 750 ILL. COMP. STAT. ANN. 75/45 (West 2014) ("A court shall enter a judgment of dissolution of a civil union if at the time the action is commenced it meets the grounds for dissolution set forth in Section 401 of the Illinois Marriage and Dissolution of Marriage Act."); N.J. STAT. ANN. § 37:1-31(b) (West 2014) ("The dissolution of civil unions shall follow the same procedures and be subject to the same substantive rights and obligations that are involved in the dissolution of marriage.").

229. *See*, *e.g.*, N.J. STAT. ANN. § 37:1-31(a) ("Civil union couples shall have all of the same benefits,

responsibilities.[230] Moreover, some nonmarital statuses were enacted to protect only intimate adult relationships and are structured accordingly, while others were created to protect a broader spectrum of relationships and are open to individuals who are related to each other and other individuals who do not share intimate relationships.[231] Due to these major differences among state-based nonmarital statuses, it would not make sense to grant each state-based nonmarital status the same package of federal rights and benefits. Nor would it be practical or realistic, at least initially, for the federal government to create a different package of federal rights and responsibilities for each of the various nonmarital statuses enacted by states.

It would therefore make the most sense for the federal government to create one package of rights and benefits, and then apply that package only to state-based nonmarital statuses that share certain basic characteristics. Requiring nonmarital statuses to meet certain basic requirements for federal recognition would ensure that the package of federal rights and responsibilities created for nonmarital relationship recognition logically complements and supports each of the nonmarital statuses to which it applies. While the proposal is for one initial package of rights and responsibilities to apply to all nonmarital statuses that meet the basic requirements, it does not foreclose the possibility of creating other packages of federal rights and benefits in the future to apply to nonmarital statuses that do not meet the basic requirements set forth for the initial package—it merely provides a realistic starting point for federal recognition of nonmarital statuses.

In determining the basic requirements that a nonmarital status must meet in order to receive federal recognition, the federal government first must determine what goals it hopes to further by granting federal recognition to nonmarital statuses. Based on the potential benefits of legally recognized nonmarital statuses discussed in Section III, it will be assumed that if the federal government was to recognize nonmarital relationship statuses, it would do so to encourage more individuals to have their relationships recognized by the law in a manner that provides relevant, essential protections for their relationships and to provide individuals with greater autonomy and meaningful choice with regard to legal recognition of their relationships.[232] The experiences of other countries indicate that the type of nonmarital relationship status that will attract the

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protections and responsibilities under law, whether they derive from statute, administrative or court rule, public policy, common law or any other source of civil law, as are granted to spouses in a marriage."); R.I. GEN. LAWS ANN. § 15-3.1-6 (West 2014) ("A party to a civil union lawfully entered into pursuant to this chapter shall have all the rights, benefits, protections, and responsibilities under law, whether derived from statutes, administrative rules, court decisions, the common law, or any other source of civil or criminal law as people joined together pursuant to chapter 15-3 [the law governing marriage].").

230. For example, Maine's domestic partnership status provides guardian and conservator rights, next of kin status, inheritance rights, and victim's compensation rights. *Domestic Partnerships*, *supra* note 42 (delineating the rights provided to domestic partners under Maine law). Domestic partnerships in Maryland provide rights related to hospital visitation, medical decision making, and tax exemptions for certain property transfers between partners. NCLR, *supra* note 23, at 9–11 (outlining the rights afforded to domestic partners in Maryland).

231. For example, related individuals are eligible for the reciprocal beneficiary statuses in Vermont and Hawaii, the domestic partnership status in the District of Columbia, and the designated beneficiary status in Colorado. *See* COLO. REV. STAT. ANN. § 15-22-104 (West 2014); D.C. CODE § 32-701 (2014); HAW. REV. STAT. ANN. § 572C-4(3) (West 2014); VT. STAT. ANN. tit. 15, § 1301(a) (West 2014).

232. See *supra* Section III.

greatest number of individuals is one that offers a meaningful alternative to marriage by providing fewer rights in exchange for fewer responsibilities and easier dissolution in a manner that supplies useful, relevant protections for important relationships that do not necessarily involve the degree of financial intertwinement and economic dependency that often accompanies marital relationships.[233]

Experiences in the United States in the contexts of cohabitation and covenant marriage lend further support to the notion that this type of nonmarital status would be the most effective with regard to encouraging more people to have their relationships recognized, and that the other option, creating a status that offers an alternative to marriage by providing for greater rights and responsibilities and more difficult dissolution, would not be effective. As discussed above, there has been a substantial increase in cohabitating couples over the past fifty years, with over 7.5 million couples cohabitating in the United States today.[234] Cohabitation, depending on the jurisdiction, provides few, if any, rights and protections, in exchange for few responsibilities and the absence of any mandated, formalized dissolution procedure.[235] It seems very unlikely that cohabitating couples, who are opting out of marriage, would opt in to any status that involved more responsibilities and a more difficult dissolution process than marriage. Instead, it is much more likely that cohabitating couples, who are far less likely than married couples to be financially intertwined and economically dependent,[236] would be drawn to a status that provides fewer rights in exchange for fewer responsibilities and easier dissolution in a manner that supplies useful protections for important relationships that do not necessarily involve the degree of financial merging that often accompanies marital relationships.

In fact, it seems unlikely that any significant number of couples in the United States would choose to enter a status that provided for greater responsibilities and more onerous dissolution procedures than marriage. To date, only three states—Louisiana, Arizona, and Arkansas—have enacted covenant marriage laws.[237] Covenant marriage laws limit the grounds for divorce, mandate premarital counseling, require couples to sign a declaration of intent stating that each person will do everything in his or her power to save the marriage before seeking a divorce, and overall make divorce more difficult and costly.[238] Even though such laws have been implemented in conservative states, covenant marriage has been a resounding failure—it is estimated that less than one percent of couples that marry in these states choose covenant marriage.[239]

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233. See *supra* Part II.B for a discussion of nonmarital statuses that are popular in other countries.

234. See *supra* notes 133–37 and accompanying text for a description of the current state of cohabitation in the United States.

235. See *supra* notes 174–77 and accompanying text for a discussion of the rights and protections afforded to unmarried cohabitating couples.

236. See *supra* notes 144–148 and accompanying text for a discussion of the economic behaviors of unmarried cohabitating couples.

237. Feinberg, *supra* note 132, at 309.

238. *Id.* at 308–10.

239. *See* Amanda J. Felkey, *Will You Covenant Marry Me? A Preliminary Look at a New Type of Marriage*, 37 E. ECON. J. 367, 380 (2011) (stating that in Arkansas, between 2000 and 2003, one half of one percent of new marriages were covenant marriages); Steven L. Nock, Laura Sanchez, Julia C. Wilson & James D. Wright, *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. 169, 170 (2003) (stating that in 2003, less than two percent of new marriages in Louisiana took the covenant form); Scott D. Drewianka,

It thus seems apparent that Americans are not looking for a relationship recognition option that involves greater rights and responsibilities and makes ending the relationship more difficult. Rather, like their foreign counterparts, Americans seek a status that provides fewer rights in exchange for fewer responsibilities and easier dissolution. It is this type of nonmarital status that would supply many cohabitating couples who are currently choosing nonrecognition over marriage with an attractive, useful, and relevant relationship recognition option. Moreover, the combination of these attributes in a nonmarital status is logical, as eschewing some of the rights and responsibilities that accompany marriage, particularly those rights and responsibilities that presuppose financial dependency, allows for and complements easier dissolution procedures.

The basic requirements for federal recognition of state-based nonmarital statuses, then, should ensure that it is this type of nonmarital status—one that provides fewer rights in exchange for fewer responsibilities and easier dissolution in a manner that supplies useful, relevant protections for important relationships that do not necessarily involve the degree of financial intertwinement and economic dependency that often accompanies marital relationships—that receives the package of federal rights and benefits. In setting forth the basic requirements, consideration also should be given to the fact that the relationships at which nonmarital relationship recognition is in large part aimed, cohabitating relationships, are almost as likely as marital relationships to involve children. While having basic requirements for federal recognition will help to ensure that the government is able to create a package of rights and benefits that properly supports all of the nonmarital statuses to which it applies, it is important that the federal government keeps requirements to the absolute minimum amount necessary to further its goals. Keeping requirements to a minimum allows states, the laboratories of innovation, the freedom to experiment with different forms of nonmarital relationship statuses in order to determine which statuses best meet state goals, while still receiving federal recognition for those statuses.

The most successful marriage alternatives implemented abroad, which seek to further the same general goals as the proposed system, generally share a few core features.[240] Namely, they allow for dissolution of the relationship with little or no judicial involvement, provide for a default regime that favors the separation of property, and otherwise provide a package of rights and responsibilities that differs from that which accompanies marriage but still supplies a number of core protections.[241] In addition, while the statuses are open to both same- and opposite-sex couples, they are not open to individuals who are currently married or who are already registered for a nonmarital status with someone else.[242] By keeping legal entanglements

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Civil Unions and Covenant Marriage: The Economics of Reforming Marital Institutions, Presentation at the Midwest Economics Association Annual Meeting (March 2003), *available at* https://pantherfile.uwm.edu/sdrewian/www/MEApaper2003.pdf (stating that in 2003, five years after Arizona instituted covenant marriage, approximately one-fourth of one percent of newly married couples had selected covenant marriages).

240. See *supra* Part II.B for a discussion of the popular nonmarital statuses implemented by France, Luxembourg, and Belgium.

241. See *supra* Part II.B for a review of the core components of France's PACS, Luxembourg's Partenariat, and Belgium's cohabitation légale.

242. *See* CODE CIVIL [C. CIV] art. 515-2 (Fr.), *available at* http://www.legifrance.gouv.fr/

between the participants to a minimum while still providing core rights and protections, these basic features of successful nonmarital statuses implemented abroad form a logical core for providing a meaningful alternative to marriage that will appeal to a number of people who otherwise would choose nonrecognition for their important relationships. The United States federal government should follow suit and should base the requirements for recognition of state-based nonmarital statuses, in part, on the inclusion of these types of features. It also must consider, however, the unique issues that arise in the United States in the context of relationship recognition as a result of the ability of states to deny recognition to out-of-state relationship statuses,[243] the strong government interests in the welfare of children,[244] and the distinct characteristics of couples in the United States who are choosing nonrecognition for their relationships.[245]

The first requirement for recognition of nonmarital statuses should be that the status is open to same- and opposite-sex couples, but is not open to individuals who are already married or who are already registered for a nonmarital status with someone else. With regard to the requirement that the statuses be open to both same- and opposite-sex couples, not only is there a strong argument that excluding individuals from governmentally created relationship statuses on the basis of sex or sexual orientation is unconstitutional, but the purpose of implementing such statuses is to provide more people with protections for their intimate relationships. Restricting eligibility based upon sex or sexual orientation directly contravenes that purpose. In terms of the requirement that individuals who enter the status be unmarried and not registered for a nonmarital status with someone else, even the minimum protections a state will have to grant on the basis of its nonmarital status in order for the status to receive federal recognition under the proposed system (which will be discussed in more detail below) would not lend themselves well to a scheme that allowed for individuals to enter the nonmarital status while married or registered for a nonmarital status with someone else. For example, the requirement that individuals who have entered into the status together be given preference as each other's power of attorney or healthcare proxy under state law only logically accompanies a system of nonmarital relationship recognition that restricts eligibility to individuals who are not already married or involved in a nonmarital status with someone else. Beyond these two requirements, eligibility for the status should be within the complete discretion of the state. It is expected that some states may experiment with statuses that grant recognition to important adult relationships that are not sexual in nature, such as relationships between individuals who are related by blood or adoption.

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243. See *supra* notes 68–70.

244. *See generally* Helen Cavanaugh Stauts, *Parens Patriae: The Federal Government's Growing Role of Parent to the Needy*, 2 J. CENTER FOR FAMS., CHILD. & CTS. 139, 147–49 (2000) (noting the federal government's increasingly proactive role in protecting needy, dependent children in the United States through national legislation and federally funded programs).

245. See *supra* notes 140–48 and accompanying text.

The second requirement for federal recognition of state-based nonmarital statuses should be that the nonmarital status provides for a dissolution procedure that does not require judicial intervention where there are no minor children involved. Either party should be able to end the relationship by providing notice to the other party and filing with the local government office or registry through which they entered the nonmarital status initially, in which case the relationship should be dissolved within sixty to ninety days after notice is given. In cases where the parties file for dissolution jointly, the timeframe for granting the dissolution should be short—ten or fewer days.[246] That individuals have the autonomy to end the relationship without encountering serious hurdles is essential to the success of a true marriage alternative.

Moreover, this type of dissolution procedure, while commonly used in other countries,[247] also does not differ significantly from the procedures currently used in a number of United States jurisdictions for the dissolution of certain marriages and nonmarital relationships. For example, a number of states have implemented "summary dissolution" procedures for marriages that meet certain requirements.[248] Common requirements for summary dissolution eligibility are that the marriage is relatively short in duration, children are not involved, and there are limited marital assets and debts.[249] Qualifying couples are able to have their marriages dissolved by the court in a timelier manner, without a hearing.[250] The distinction between summary dissolution procedures, which involve a minimal level of judicial intervention, and the procedure proposed here, which involves only administrative approval for dissolution, is not great. In addition, many of the state-based nonmarital statuses in existence today provide for a dissolution procedure that does not require judicial involvement and is very similar to the proposed procedure.[251] Thus, the dissolution procedure proposed here as a requirement for federal recognition of state-based nonmarital statuses is something that is already functioning successfully in a number of jurisdictions in the United States.

It is important to understand that this requirement does not leave individuals without recourse for claims involving rights and responsibilities arising from the

246. These time frames for dissolution do not differ greatly from the time frames already implemented in a number of U.S. jurisdictions that allow for the dissolution of nonmarital statuses without judicial involvement. See *infra* note 251.

247. See *supra* Part II.B.

248. See *supra* note 159.

249. See *supra* note 159.

250. See *supra* note 159.

251. *See, e.g.*, COLO. REV. STAT. ANN. § 15-22-111(1) (West 2014) ("A designated beneficiary agreement that has been recorded with a county clerk and recorder may be unilaterally revoked by either party to the agreement by recording a revocation with the clerk and recorder of the county in which the agreement was recorded. A revocation shall be dated, signed, and acknowledged. The revocation shall be effective on the date and time the revocation is received for recording by the county clerk and recorder."); ME. REV. STAT. ANN. tit. 22, § 2710(4) (2014) ("A registered domestic partnership is terminated . . . by the filing with the registry of: A. A notice under oath signed by both registered domestic partners before a notary that the registered domestic partners consent to the termination[,] [which allows for immediate termination]; or B. A notice under oath from either registered domestic partner that the other registered domestic partner was served in hand with a notice of intent to terminate the partnership[,] [which allows for termination 60 days after notice is served]"); 15 VT. STAT. ANN. tit. 15 § 1305 (West 2014) ("Either party to a reciprocal beneficiaries relationship may terminate the relationship by filing a signed notarized declaration with the commissioner . . . [w]ithin 60 days of the filing of the declaration . . . the commissioner shall file the declaration and issue a certificate of termination of a reciprocal beneficiaries relationship to each party of the former relationship.").

relationship. Where there is a post-dissolution disagreement between the parties, one party may bring an action for property, support, or other rights arising from the relationship. Unlike in the context of marriage, however, judicial involvement would not be a requirement for dissolution and would occur only in situations where post-dissolution disagreements existed between the parties.

In cases where there are children involved, it should be left to the states to determine whether judicial intervention is necessary for dissolution and in what situations it is necessary.[252] Some states may find it necessary to require judicial intervention at the time of dissolution where there are children involved since the prevailing rule in the United States in the context of marital dissolution is that child custody and child support generally should be granted based upon the best interests of the child as determined by the court, as opposed to any agreement between the parents.[253] This is based on the notion of the traditional *parens patriae* duty of the court—the duty to protect the welfare of children.[254] This preference for judicial involvement where children are involved is further reflected by the fact that a number of the states that have summary dissolution procedures, which allow couples to avoid a judicial hearing in dissolving their marriages, condition eligibility on the absence of children.[255] Thus, some states likely will take the approach of requiring judicial involvement in the form of hearings for dissolution of nonmarital statuses where children are involved, as the court's interest in protecting the best interests of children is the same regardless of the marital status of the parents.[256]

Some states may choose a middle-ground approach, requiring narrow judicial involvement in the dissolution of the nonmarital status where children are involved. For example, some states may provide that couples with children can avoid a judicial hearing if the parties submit a custody and support agreement to the court. This is the approach taken by two states that allow for summary dissolution of marriages where children are involved. Under the Nevada[257] and Colorado[258] summary dissolution laws, eligibility extends to couples with children who have reached an independent agreement regarding child custody and child support, meaning that these couples can

252. For example, some states may require judicial intervention only where there is a child to whom both parties are the legal parents residing in the household.

253. *See* ABRAMS ET AL., *supra* note 161, at 893 (stating that courts must ensure that any private agreement reached by the parents with regard to child support or child custody furthers the best interests of the child); E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1175 (2000) (stating that parents cannot enter into a contract to avoid judicial review of a child support award) (quoting Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 494 (1981)).

254. Spitko, *supra* note 253, at 1175.

255. *See*, *e.g.*, CAL. FAM. CODE § 2400 (West 2014) (providing that divorcing couples are ineligible for summary dissolution if they have children); MINN. STAT. ANN. § 518.195 (West 2014) (same); OR. REV. STAT. ANN. § 107.485 (West 2014) (providing that divorcing couples are ineligible for summary dissolution if they have living minor children).

256. In the Netherlands, for example, dissolution of a registered partnership requires court intervention when children are involved. *Family Law: Divorce and Ending a Relationship*, *supra* note 120.

257. NEV. REV. STAT. ANN. §§ 125.181–125.184 (West 2013).

258. COLO. REV. STAT. ANN. § 14-10-120.3 (West 2014).

divorce without undergoing a judicial hearing.[259] This middle-ground approach is also logical in the sense that most courts simply defer to or "rubber stamp" the custody and support provisions in separation agreements between divorcing parents, indicating that hearings may not serve a significant function in situations where the parties are able to reach an agreement regarding child custody and child support.[260]

Other states, however, relying on the commonly used judicial presumption that fit parents act in the best interest of their children[261] and following the lead of a number of the most popular nonmarital statuses enacted abroad,[262] may decide that there is no need for any type of judicial involvement for the dissolution of nonmarital statuses where there is no dispute regarding child custody and child support. After all, this is the approach taken in the United States for cohabitating couples with children who dissolve their relationships—there is no requirement that these couples seek judicial determination of their custody and support rights when their relationships end.[263] Court involvement occurs only when there is disagreement between the parties. There are also state-based nonmarital statuses in existence today that allow all couples, regardless of the existence of children, to terminate the relationship status without judicial intervention.[264] Like the situation for unmarried couples whose relationships end, the judicial system is only involved if the parties do not reach an independent agreement and one party seeks a child custody or child support order from the court. Some states that decide not to require judicial involvement for dissolution of nonmarital statuses where children are involved, nonetheless may decide to require couples to submit a child custody and child support agreement to the registry through which they file for dissolution—with administrative involvement limited to ensuring that an agreement has been reached.

It is important to understand that no matter which dissolution approach is adopted for couples with children, the parties would have the ability to bring a separate action at any time in order to have a court consider each party's rights and obligations with regard to child custody and child support. Courts always have jurisdiction to designate or modify child support and child custody rights, regardless of any agreement reached by the parents and regardless of the relationship status of the parents.[265] Under the proposed requirement, states simply have the power to decide whether judicial involvement is necessary for dissolution where the parties are in agreement regarding child custody and child support and have not requested judicial intervention.

The third requirement to which nonmarital statuses should have to adhere in order to receive federal recognition should be that the nonmarital status provides for a default

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259. Under the Colorado law, each party must be represented by counsel in reaching the agreement for child custody and child support. *Id*.

260. *See* ABRAMS ET AL., *supra* note 161, at 888.

261. 67A C.J.S. *Parent and Child* § 110 (2013).

262. See *supra* Part II.B. for a discussion of the dissolution procedures for the nonmarital statuses in France, Luxembourg, and Belgium.

263. Frederick Hertz, *Legal Issues When an Unmarried Couple Breaks Up*, NOLO, http://www.nolo.com/legal-encyclopedia/free-books/living-together-book/chapter10-1.html (last visited Dec. 12, 2014).

264. *See*, *e.g.*, COLO. REV. STAT. ANN. § 15-22-111(1) (West 2014); ME. REV. STAT. ANN. tit. 22, § 2710(4) (West 2014).

265. ABRAMS ET AL., *supra* note 161, at 887.

regime that favors separate property as opposed to joint property. In the context of property rights during the relationship (before the time of dissolution), this simply involves using the approach that forty-one states and the District of Columbia currently take in the context of marriage. For intact marriages (marriages that neither party is seeking to dissolve), property acquired during the marriage is considered to be the property of the titleholder.[266] There is no question that the type of nonmarital status that this proposal seeks to further, one which favors fewer responsibilities in exchange for fewer rights and easier dissolution as compared to marriage, should not seek to provide for greater predissolution financial intertwinement than that which accompanies marriage. Thus, taking the approach that most states take in the context of allocating property rights during marriage and providing for a default regime of separate property during the nonmarital relationship status is the only logical option.

While a separate property approach does not differ from that which most states follow in the context of property rights during marriage,[267] it is not the general default rule for property distribution in the context of the dissolution of marriage, where property acquired by either party during the marriage is generally presumed to be the property of the marital unit, regardless of how it is titled.[268] A default regime of separate property governing the dissolution of nonmarital statuses therefore creates a significant substantive difference between nonmarital statuses and marriage. This does not mean that for couples who enter into nonmarital statuses no joint property can exist at dissolution besides property that is titled in both parties' names—just as the presumption of joint property can be rebutted in various ways in many jurisdictions in the marriage dissolution context, states also can implement their own rules for rebutting the presumption of separate property at dissolution for nonmarital statuses.[269] Since eligible nonmarital statuses will feature dissolution rules that generally do not require judicial involvement for termination, default rules that minimize financial intertwinement would be the most logical and effective, and a separate property regime at dissolution is essential to minimizing financial intertwinement. It also is important to note that the requirement only mandates a default rule of separate property; states can grant couples the opportunity to avoid the default rule through, for example, the enforcement of contracts that alter the default rule or by providing an opt-out option at the time of registration.

The fourth requirement for federal recognition of state-based nonmarital statuses should be that, beyond the default rules for granting dissolution and property rights, the remaining package of rights and responsibilities is not identical to that which accompanies marriage, but still provides basic minimum protections for the partners and the children involved in their relationships. Like the other requirements, the minimum-protections requirement should be aimed at providing an optimal solution for individuals who share a mutually important, supportive relationship that does not necessarily involve the degree of financial intertwinement and economic dependency that is presumed to accompany marriage. That cohabitating couples are almost as likely as married couples to have children in the household also should be considered in

266. *Id.* at 471–72.

267. *Id.* at 474.

268. *See* 27C C.J.S. *Divorce* § 939 (2014).

269. *Id.*

setting forth the minimum requirements.[270]

With this in mind, the minimum protections states should have to provide to partners who enter into nonmarital statuses include: (1) visitation rights equal to those of spouses for all hospitals licensed by the state, including those hospitals that do not receive federal funding; (2) coverage under state laws that address family and medical leave; (3) protection for each partner under the state's domestic violence laws; (4) preference for designation as each other's healthcare proxy, power of attorney, and guardian in situations where no relevant advance directives have been executed (though state law may allow the preference to be overcome where the court determines the designation inappropriate); (5) for unrelated cohabitating couples, if state law does not create a presumption of parentage for an individual whose partner has birthed or conceived a child during the relationship status, the existence of legitimation and paternity acknowledgement procedures that apply regardless of the sex of the individual seeking to use such procedures;[271] and (6) where there is a child residing in the partners' common home and only one partner is the child's legal parent, that the other partner have the same limited rights and obligations with regard to the child as a stepparent under state law, such as rights related to adoption,[272] and, if applicable, support obligations during the relationship[273] and standing to seek visitation post-dissolution.[274] These are the types of basic rights that logically accompany a range of important relationships and offer core protections to the adults and children involved in those relationships.

Moreover, these minimum rights and protections that states must provide in order for their nonmarital statuses to receive federal recognition are not unnecessarily restrictive and allow states significant latitude to experiment. Beyond these required rights and protections, the package of rights and protections provided under the status, as long as it is not the same package as that which accompanies marriage, is left up to each state. States may or may not wish to provide rights relating to, inter alia, inheritance, taxes, testimonial privileges, support, debt liability, and claims in tort and contract, though any rights and protections provided must be available to any couple who enters the status regardless of sex. Notably, the experience thus far with nonmarital statuses indicates that many states will choose to go beyond the minimum requirements in providing state-based rights and protections on the basis of their statuses. In addition to the freedom states will have to create unique packages of rights and benefits to accompany their nonmarital statuses, states also will have leeway to

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270. Berg, *supra* note 10, at 277.

271. Many states may decide to implement parental presumptions for children born to unrelated couples who have entered into nonmarital statuses, as a number of states already use the presumption for children born during civil unions or domestic partnerships. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-first Century*, 5 STAN. J. C.R. & C.L. 201, 215 (2009) (stating that "ten states and the District of Columbia allow . . . same-sex couples to enter a formal legal status that grants the same parentage rights as marriage"). In addition, "[m]any countries recognize a presumption of paternity in cohabitation situations." W. Craig Williams, Note, *The Paradox of Paternity Establishment: As Rights Go Up, Rates Go Down*, 8 U. FLA. J.L. & PUB. POL'Y 261, 278 (1997).

272. *See* COURTNEY JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAM. L. § 5:3 (2014).

273. *See* ABRAMS ET AL., *supra* note 161, at 597.

274. *See id.* at 789.

experiment with regard to the structure of their nonmarital statuses. For example, instead of creating one package of state-based rights and responsibilities to apply to every couple who enters the status, a state may decide to take an approach similar to that taken by Colorado's designated beneficiary status, which allows a couple at the time of registration to choose, from a limited list, which rights and responsibilities will govern the relationship.[275]

To lessen the hardships that may result under the current system when a couple who has entered into a nonmarital status in one state moves to another state, the fifth requirement for state-based nonmarital statuses to qualify for federal recognition should be that the issuing state agrees to grant a minimum amount of recognition to out-of-state nonmarital statuses that themselves qualify for federal recognition. Specifically, to qualify for federal recognition of its own nonmarital status, the state must provide out-of-state nonmarital statuses with at least the six basic state-based rights and protections outlined above.[276] This is not an onerous requirement, as those states that wish to receive federal recognition for their nonmarital statuses already will be recognizing these specific rights and protections for their own qualifying nonmarital statuses.

It is important to note that this is the minimum protection states must provide to out-of-state nonmarital statuses. As a number of states do today in the context of recognition of out-of-state nonmarital statuses, a state could go further and choose to recognize as that state's own existing nonmarital status either all out-of-state nonmarital statuses or those out-of-state nonmarital statuses that are "substantially similar" to that state's existing nonmarital status.[277] States could also choose to recognize an out-of-state nonmarital status on its own terms—granting it the same set of rights and responsibilities provided by the state in which it was entered. While this requirement does not lessen the hardship for couples who enter into a nonmarital status in one state and then move to another state that has not enacted any nonmarital status, it provides a significantly greater number of individuals with protections for their relationships while still respecting the autonomy of states to chart their own course in the context of nonmarital relationship recognition.

Finally, to further reduce the significant hardships related to the lack of interstate recognition of nonmarital statuses, the sixth requirement to which states should have to adhere in order to receive federal recognition for their nonmarital statuses addresses the inability of many individuals who enter nonmarital statuses in one state and then move to another state to dissolve their relationships because the state in which they currently reside refuses to grant the dissolution.[278] The only way to dissolve the relationship in many cases is for one party to meet the dissolution-related residency requirements of a state that recognizes the status—something that may be difficult, or nearly impossible, for many people.[279] To avoid this problem, states that wish to receive federal recognition for their nonmarital statuses must agree to dissolve their statuses through

275. COLO. REV. STAT. ANN. § 15-22-105 (West 2014).

276. See *supra* notes 271–74 and accompanying text for the six basic state-based rights that any state that wishes to receive federal recognition must provide to individuals who enter into the nonmarital status enacted in that state.

277. *See* Stein, *supra* note 18, at 189–93.

278. *Id.* at 193.

279. *Id.*

their usual processes, including providing a forum for claims arising from the dissolution, regardless of whether the parties currently reside in that jurisdiction. These states also must mandate that couples who enter the statuses consent to this jurisdiction at the time of registration. Importantly, this approach is one that has already been implemented successfully in the United States, as a number of states that have enacted nonmarital statuses require couples to consent to dissolution jurisdiction in the issuing state at the time of registration.[280]

3. The Package of Federal Rights and Protections Granted to Qualifying Nonmarital Statuses Under the Proposed System

While it is beyond the scope of this Article to analyze each of the over one thousand federal rights, responsibilities, and protections granted on the basis of marriage in order to determine which should accompany eligible nonmarital statuses, it is useful to consider the general categories of federal rights, responsibilities, and protections that should be granted to qualifying nonmarital statuses.

In order to complement and provide useful protections to the types of relationship statuses that will further the goals of the proposed system of nonmarital relationship recognition and will qualify for federal recognition under the requirements set forth above, the federal rights and responsibilities granted on the basis of nonmarital relationship statuses should be those that relate to the ability of the partners to care for each other and their families, but are not predicated upon the notion that the partners are financially intertwined or economically dependent. Thus, as an initial matter, eligibility under the FMLA should be expanded to allow one partner to take unpaid leave to care for the other partner.[281] In addition, although the Department of Labor has clarified that the FMLA allows for anyone who assumes the role of caring for a child to take leave regardless of the person's legal or biological connection to that child, meaning one partner could take leave to care for the child of the other partner, the text of the FMLA should be explicitly amended to provide for this.[282] Similarly, partners should have the same rights as spouses with regard to visitation in institutions that receive federal funding such as prisons[283] and hospitals.[284] In addition, the partner of a

280. *Id.* at 194.

281. *See* 29 U.S.C. § 2611 (stating that "[t]he term 'spouse' means a husband or wife, as the case may be"); *Overview of Federal Benefits Granted to Married Couples*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples (last visited Dec. 12, 2014) ("The Family and Medical Leave Act (FMLA) guarantees family and medical leave to employees to care for parents, children or spouses. As currently interpreted, this law does not provide leave to care for a domestic partner or the domestic partner's family member.").

282. News Release, U.S. Dept. of Labor, US Department of Labor Clarifies FMLA Definition of 'Son and Daughter' (June 22, 2010), http://www.dol.gov/opa/media/press/WHD/WHD20100877.htm.

283. *See*, *e.g.*, FED. CORR. INST. OF BASTROP, TEXAS, U.S. DEP'T OF JUSTICE, BAS 5267.08C, VISITING REGULATIONS 2 (Nov. 24, 2009), *available at* http://www.bop.gov/locations/institutions/bas/BAS_visit_hours.pdf.

284. Although unmarried partners generally should not have trouble visiting each other under current regulations, there are certain situations in which difficulties may arise, such as when the hospitalized partner is incapacitated and has not executed an advance directive. Presidential Memorandum from Barack Obama to the Sec'y of Health and Human Servs., Office of the Press Secretary, The White House, Hospital Visitation (Apr. 15, 2010), http://www.whitehouse.gov/the-press-office/presidential-memorandum-hospital-visitation. To ensure equal visitation rights for partners and spouses, the relevant federal regulations should be amended to

federal employee who has entered into a qualifying nonmarital status should be eligible for coverage under the federal-employee partner's healthcare plan. Moreover, where employers decide to provide healthcare coverage for the partners of employees who have entered into nonmarital statuses that qualify for federal recognition, the federal tax code should apply the same rule that is used for spouses, which excludes an employer's contribution toward a spouse's coverage from the employee's taxable income.[285] Finally, although federal domestic violence laws generally cover individuals who cohabit, these laws should be amended to explicitly cover individuals who have entered into nonmarital statuses.[286]

Federal rights, responsibilities, and protections that should not be provided on the basis of entering into a qualifying nonmarital status are those that can be characterized as predicated on the idea of the partners forming one financial unit. Therefore, partners should not have the same tax-related rights that individuals receive as a result of entering into marriage. In addition, partners should not be eligible for the benefits provided to a spouse on the basis of the other spouse's financial contributions under major federal programs such as Social Security and Medicare. On a similar note, provisions in these types of federal programs that eliminate or reduce a person's benefits when that person marries or remarries will not apply where a person enters into a qualifying nonmarital status.[287]

With regard to the many remaining federal provisions that are based upon marital status, whether couples who enter into qualifying nonmarital statuses should be treated as spouses under those provisions should depend on an in-depth analysis of the nature and purpose of the federal provision in question. Federal rights and responsibilities that relate to the ability of the partners to care for each other and their families and are not predicated upon the notion of financial intertwinement and economic dependency should be extended to include individuals who have entered into a qualifying nonmarital status. Importantly, as is the case so far with some of the federal rights granted on the basis of a lawful same-sex marriage,[288] the package of federal rights accompanying the nonmarital status should follow the couple and should not depend on recognition by the state in which the couple currently lives. However, states without nonmarital statuses and states that do not wish for their nonmarital statuses to receive federal recognition will have full discretion with regard to whether they provide any state-based rights on the basis of out-of-state nonmarital statuses.

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prohibit discrimination on the basis of marital status. *See, e.g.*, 42 C.F.R. § 482.13(h)(3) (2014) (providing that a hospital must not "restrict, limit, or otherwise deny visitation privileges on the basis of race, color, national origin, religion, sex, gender identity, sexual orientation, or disability").

285. *Overview of Federal Benefits Granted to Married Couples*, *supra* note 281 (stating that federal tax law imposes a burden on employees in domestic partnerships because their employer contributions are included in their taxable income as a fringe benefit).

286. *See*, *e.g.*, 18 U.S.C. § 921(a)(32) (2014) ("[I]ntimate partner" means . . . the spouse of the person, a former spouse of the person, an individual who is a parent of a child of the person, and an individual who cohabitates or has cohabited with the person.").

287. *See*, *e.g.*, 20 C.F.R. § 404.331 (2014); 20 C.F.R. § 404.335 (2014); 20 C.F.R. § 404.352 (2014).

288. *See* AMERICAN CIVIL LIBERTIES UNION ET AL., LGBT ORGANIZATIONS FACT SHEET SERIES: AFTER DOMA: WHAT IT MEANS FOR YOU (n.d.), *available at* http://www.hrc.org/files/assets/resources/Post-DOMA_General_v4.pdf.

B. The Expected Benefits and Foreseeable Concerns Under the Proposed System

As mentioned above, this is an initial proposal aimed to serve as a catalyst for discussion regarding the best manner through which to improve the current system of nonmarital relationship recognition in the United States. While the proposal improves the current system in many ways, it does not solve every issue that exists under the current system. In terms of improvements, under the proposed system, people who enter into qualifying state-based nonmarital statuses now will receive a number of important federal rights, responsibilities, and protections, as well as the basic state-based rights, responsibilities, and protections that will accompany each nonmarital status and any additional rights and protections that states decide to include. This is a significant improvement to the current system, under which federal law does not provide any recognition to state-based nonmarital statuses. Moreover, the proposed system reduces some of the current hardships experienced by couples who enter into nonmarital statuses and then leave the issuing state. This is done in part through the proposed requirement that states that wish to receive federal recognition for their nonmarital statuses provide couples who have entered into nonmarital statuses in other states with at least the same basic core rights that must be included in each qualifying state's nonmarital status. In addition, by requiring issuing states to agree to dissolve their nonmarital statuses regardless of a couple's current residence and mandating that couples entering into qualifying statuses agree to the issuing state's jurisdiction for dissolution, the proposed system does a significant amount to rectify the inability of couples to dissolve their nonmarital relationship statuses after moving from the issuing state.

The important federal and state rights, responsibilities, and protections that will accompany qualifying nonmarital statuses, and the improved mobility of these statuses, will increase the value of such statuses and likely will increase the demand for them, resulting in more states enacting nonmarital statuses. Moreover, the requirements relating to the substance of the nonmarital statuses ensure that such statuses will provide a true alternative to marriage and will do so in a manner that encourages the greatest number of individuals to choose legal recognition for their relationships. Increasing the number of states that enact nonmarital statuses and the number of people who choose to enter into nonmarital statuses will result in a greater number of people having essential protections within their relationships.

While these improvements are significant, there are still a number of concerns with the proposed system. As an initial matter, under the current system, there is still the potential that some states will decline to adopt a nonmarital status and will refuse to recognize nonmarital statuses entered into in other states, leaving residents of such states without any option for nonmarital relationship recognition. Unfortunately, this is a necessary consequence of the structure of domestic relations law in the United States. It would likely be deemed unconstitutional for the federal government to mandate that states enact nonmarital statuses,[289] and a federal law requiring states to recognize out-of-state nonmarital statuses, in addition to raising constitutional concerns,[290] would be

289. See *supra* Part IV.A.1 for a discussion of the roles of the federal and state governments in the regulation of family law.

290. *But see* BRAINERD CURRIE, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, *in* SELECTED ESSAYS ON THE CONFLICT OF LAWS 125–27 (1963) (expressing the view that Congress has

out of keeping with the traditional balance of power between the state and federal governments in the area of domestic relations.[291] The proposed system does, however, aim to minimize this problem. It does so by (1) making nonmarital statuses more desirable to people and thereby encouraging more states to enact them, (2) requiring states with qualifying nonmarital statuses to grant basic recognition to out-of-state statuses, and (3) making recognition of out-of-state statuses uncomplicated by requiring only that such statuses receive the basic rights and protections that will already accompany every qualifying nonmarital status.[292]

Another concern is that the proposal does not do enough to protect women in opposite-sex relationships. Women already are disadvantaged in the divorce context in the sense that a woman's standard of living tends to decrease upon divorce, while a man's standard of living tends to increase.[293] Experts cite a number of reasons for this, including that women are more likely to have primary custody of children post-dissolution, which involves greater expenses and can limit work opportunities;[294] women are more likely to be homemakers and caretakers during the relationship, which can result in lost opportunities and lesser earning capacity;[295] and women on average make less money than men in the workplace.[296] Critics of the proposed system might fear that under this system, women will be even further disadvantaged than they are in the divorce context because the proposed system provides for a default regime of separate property upon dissolution. Indeed, the marital joint-property system, which is based upon the idea that marriage is a partnership and the law should assume that both parties have earned their respective share of the marital property regardless of whose name the property is titled in or who purchased it, was created in large part to remedy the unfair results for women of a separate property regime.[297]

An initial response to this concern is that most of the couples who are choosing nonrecognition over marriage, the individuals to whom the proposal is largely aimed, are not structuring their relationships in the same way as married couples when it comes to finances. As compared to married couples, cohabitating couples are far less likely to pool their resources, are more likely to include two members who work outside of the home, and have significantly greater equality between their incomes.[298] In addition, cohabitating women are less likely than married women to sacrifice their careers for their partner's career or to care for their children.[299] These relationships also

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"[p]lenary power" to prescribe choice of law for state courts under the second sentence of the Full Faith and Credit Clause).

291. See *supra* Part IV.A.1 for a discussion of the roles of the federal and state governments in the regulation of family law.

292. See *supra* Part IV.A.

293. Jill C. Engle, *Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty*, 16 J. GENDER RACE & JUST. 1, 9 (2013).

294. ABRAMS ET AL., *supra* note 161, at 548–59.

295. Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 200 n. 8, 204–08 (2012).

296. Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95, 98 (1989).

297. ABRAMS ET AL., *supra* note 161, at 470, 472–74.

298. *See supra* notes 141–148 and accompanying text.

299. See *supra* note 142 and accompanying text.

tend to be shorter in duration than marriages.[300] Thus, not only is a separate property regime a more logical approach for these couples, but there also is a much greater likelihood that women in such relationships will have more property titled in their own names or titled in both parties' names than married women and also will not have suffered the decrease in earning capacity that many married women experience. In addition, under a joint property regime, any debt as well as any assets obtained by either party during the relationship may be equitably distributed between the parties upon dissolution. Under the proposed system, however, women will not be saddled with the debts incurred by their partners, which also makes sense based upon the general characteristics of nonmarital relationships.[301] Finally, it is likely that nonmarital relationship statuses would be far less desirable for couples who are currently choosing nonrecognition over marriage if these statuses mandated marriage-like default rules, such as joint property, that presuppose financial intertwinement and economic dependency between the parties and required extensive procedures to untangle that intertwinement at dissolution. A separate property regime is likely a key factor in encouraging more people, regardless of sex, to opt in to legal recognition for their important relationships.

It is also important to note that, as a whole, the proposed system provides significant rights and protections that may be particularly beneficial to women. The core protections of the statuses ensure, among other things, that women, who are disproportionately victims of domestic abuse, are protected by domestic violence laws regardless of the sex of their significant others.[302] They also ensure that women will have the ability to provide care for their significant others without losing their jobs. This is especially important when considering that women are significantly more likely than men to take time off to care for their loved ones.[303] The proposal also makes it significantly easier for unmarried individuals to provide their children with two legal parents, meaning that parents with primary caretaking responsibilities for their children post-dissolution, the majority of whom are women, will receive more financial support in raising their children. In addition, it is likely that the proposal will result in more women receiving employer-sponsored healthcare. Overall, the proposed system, while it does not provide all of the rights and protections of marriage, will significantly benefit the many women who would otherwise choose nonrecognition for their relationships.

The final concern is that couples who choose nonmarital statuses will be stigmatized by society for choosing a status other than marriage. The stigma of nonmarital statuses has been discussed extensively,[304] and will not be recounted here,

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300. Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 241 (2010).

301. *See* ABRAMS ET AL., *supra* note 161, at 525.

302. Molly Dragiewicz & Yvonne Lindgren, *The Gendered Nature of Domestic Violence: Statistical Data for Lawyers Considering Equal Protection Analysis*, 17 AM. U. J. GENDER SOC. POL'Y & L 229, 266 (2009).

303. Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 182 (2009).

304. *See, e.g.*, Marc R. Poirer, *Name Calling: Identifying Stigma in the "Civil Union"/"Marriage" Distinction*, 41 CONN. L. REV. 1425, 1438 (2009) (arguing that the distinction between civil unions and marriages in Connecticut had a stigmatic effect).

but it is enough to say that the current stigma attached to nonmarital statuses stems from the fact that in many instances they have been created as political compromises aimed at providing same-sex couples with the rights and obligations of marriage without the name.[305] Thus, nonmarital statuses have been perceived as a second-class marriage substitute for same-sex couples, who the state deems undeserving of full marriage equality.[306] This perception of nonmarital statuses, however, would change if, as the proposal presupposes, both same- and opposite-sex couples had the option of choosing between marriage and a nonmarital status. Nonmarital statuses then would become a true marriage alternative for both same- and opposite-sex couples as opposed to a second-class marriage substitute for one class of individuals who are perceived to be less deserving. While there likely will always be individuals who view any status other than marriage as inferior, the ever-increasing popularity of nonmarital statuses in countries that have enacted them and the growing acceptance within the United States of diverse familial forms indicate that society is ready to welcome and accept nonmarital relationship statuses.

V. CONCLUSION

In the coming years, society will need to address the important question of whether the widespread legalization of same-sex marriage marks the beginning or the end of the discussion in this country regarding the legal recognition of nonmarital adult relationships. Hopefully, it will mark the beginning of the discussion, as it no longer makes sense for marriage to remain the sole status upon which so many state and federal rights and protections depend. Numerous individuals, including many of those who are currently choosing cohabitation over marriage, would benefit from the introduction of a relationship status other than marriage that offered core state and federal protections for their relationships. Healthier, more stable individuals and relationships would lead to a healthier, more stable society. The question of how to advance the widespread legal recognition of nonmarital statuses is not an easy one. Lawmakers in the United States must carefully consider how to create a system of legal recognition of nonmarital statuses that results in more individuals having their important relationships recognized by the law, but also ensures that the balance of power between the state and federal governments in the area of domestic relations is respected. Although the task of creating an effective system of nonmarital relationship recognition will be difficult, it is feasible, and the important benefits of such a system make undertaking this task essential.

305. Feinberg, *supra* note 25, at 286–87.

306. *Id.* at 282.