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When Marriage Is Too Much: Reviving the Registered Partnership in a Diverse Society

ABSTRACT. In the years since same-sex marriage's legalization, many states have repealed their civil union and domestic partnership laws, creating a marriage-or-nothing binary for couples in search of relationship recognition. This Note seeks to add to the growing call for legal recognition of partnership pluralism by illustrating why marriage is not the right fit—or even a realistic choice—for all couples. It highlights in particular the life-or-death consequences matrimony can bring for those reliant on government healthcare benefits because of a disability or a need for long-term care. Building upon interview data and a survey of state nonmarital partnership policies, it proposes the creation of a customizable marriage alternative: the registered partnership.

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INTRODUCTION

Harold and Burnalette Perlstein were married for fifty years before they got a divorce.¹ Harold, born in 1938, had developed Parkinson's disease—a progressive illness that causes difficulty walking and speaking, as well as behavioral changes—and needed full-time care in a nursing facility.² But the couple could not afford steep nursing-home fees. Though Harold and Burnalette had several hundred thousand dollars of property and other assets between them, Burnalette was already almost seventy, and the money would not stretch far—a room in a nursing home runs about \$90,000–\$100,000 a year.³ The Perlsteins faced a bleak choice: either they could spend down all of their assets until Harold qualified for long-term care coverage under Medicaid, impoverishing Burnalette in the process, or they could divorce, enabling Burnalette to keep their savings and Harold to fall below the resource maximum for Medicaid eligibility. In early 2015, they chose the latter.⁴ The couple transferred most of their assets to Burnalette, and Harold got his Medicaid.⁵

The Perlsteins' story is not unique. In the United States, loving marriages in which one partner develops an illness or disability requiring long-term care too often end in a "Medicaid divorce," a severing of legal ties to preserve one spouse's livelihood in the face of her partner's decline.⁶ Perversely, the U.S. healthcare

1. Perlstein v. Dimas, 2019 IL App (1st) 181538-U, ¶ 11.

2. *Id.*; *Parkinson's Disease*, NAT'L INST. ON AGING (May 16, 2017), <https://www.nia.nih.gov/health/parkinsons-disease> [<https://perma.cc/UMB5-V5EZ>].

3. Dimas, 2019 IL App (1st), ¶ 11; *Nursing Home Costs by State and Region*, AM. COUNCIL ON AGING (Oct. 24, 2019), <https://www.medicaidplanningassistance.org/nursing-home-costs> [<https://perma.cc/83QU-4TNZ>].

4. Dimas, 2019 IL App (1st), ¶ 11.

5. *Id.*

6. See, e.g., Eve Kaplan, *Divorce Due to Medical Bills? Sometimes It Makes Sense*, FORBES (Aug. 21, 2014, 10:57 AM EDT), <https://www.forbes.com/sites/feeonlyplanner/2014/08/21/divorce-due-to-medical-bills-sometimes-it-makes-sense> [<https://perma.cc/6MRG-MRTK>] ("Divorce among older couples is on the rise in our country due to spiraling medical and long-term care costs."); Nicholas Kristof, Opinion, *Until Medical Bills Do Us Part*, N.Y. TIMES (Aug. 29, 2009), <https://www.nytimes.com/2009/08/30/opinion/30kristof.html> [<https://perma.cc/4JUG-7V7K>] ("[T]he existing [U.S. healthcare] system . . . unnecessarily takes lives and breaks apart families."); Jordan Rosenfeld, *The GOP Plan to Roll Back Medicaid Might Force More Couples to Get Divorced*, WASH. POST (Mar. 16, 2017, 7:00 AM EDT), <https://www.washingtonpost.com/news/soloish/wp/2017/03/16/the-gop-plan-to-roll-back-medicaid-might-force-more-couples-to-get-divorced> [<https://perma.cc/V8BQ-BGX9>] ("[M]edical divorce mostly affects the disabled and older patients in need of long-term care."); Anita Schnee, *Medicaid Divorce? Maybe . . . Maybe Not.*, EST. & ELDER L. PLAN. CTR. (Mar. 6, 2018), <https://drakeandcash.com/2018/03/medicaid-divorce-maybe-maybe-not> [<https://perma.cc/SU72->

system punishes those who have done everything right. Couples who save responsibly must choose between divorce or depleting their savings on one partner's care. Though the decades-long battle for marriage equality, resolved in the Supreme Court's 2015 *Obergefell v. Hodges*⁷ decision, highlighted the psychological, material, and civic importance of access to marriage, the freedom to marry – and stay married – is not a practical reality for many in the United States. Indeed, the law continues to burden and discourage marriage by older Americans and those with disabilities.

Even when partners are in a serious, long-term relationship, the law may render marriage an unattractive option for three reasons: its default regime of inheritance rights and asset sharing, its impact on qualification for disability and long-term care entitlements, and its inability to evolve with changing cultural norms about relationship permanence and gender roles. Marriage's automatic bundle of rights and responsibilities may not accord with each partner's intentions regarding her assets and how those assets should be passed to the next generation. More critically, if either partner is a Medicaid recipient, marriage can jeopardize eligibility or require the well spouse to impoverish herself,⁸ a burden that often falls on married women.⁹ As the Perlsteins' experience demonstrates, the Medicaid problem is no small matter: long-term care costs in the six figures are beyond the reach of most people.¹⁰ Couples of any age can face a similar Hobson's choice when one or both partners have a disability and receive government healthcare benefits.¹¹ The result is that the law may require someone to choose between exercising the freedom to be married to the person she loves and the ability to access the care she needs.¹² Even in less dire circumstances, marriage may not be the right fit for every couple. Yet the United States forces

YJDG]; Amy Zietlow, *Is Divorce the Best Option for Older Americans?*, HUFFPOST (May 16, 2015, 1:17 PM EDT), https://www.huffpost.com/entry/is-divorce-the-best-option-for-older-americans_b_6878658 [<https://perma.cc/N5SC-ZK9D>].

7. 576 U.S. 644 (2015).

8. In the context of Medicaid benefits, the well spouse, also referred to as the community spouse or nonapplicant spouse, is the “spouse of an individual who is receiving Medicaid-funded, long-term care in an institutional setting, such as a nursing home.” *Joint Assets & Medicaid - How Bank Accounts, Property & Other Assets Impact Eligibility*, PAYING FOR SENIOR CARE (Aug. 30, 2020), <https://www.payingforseniorcare.com/medicaid/joint-assets-impact-eligibility> [<https://perma.cc/ZG9B-6Y3A>].

9. See *infra* Section I.B.3.

10. See *infra* note 86 and accompanying text.

11. See *infra* Section I.B.2.

12. See *infra* Section I.B.

partners into a marriage-or-nothing binary; absent marital union, a couple will have difficulty claiming rights and protections stemming from their relationship.¹³

In the years since same-sex marriage gained widespread recognition, many states have repealed laws offering nonmarital forms of partnership,¹⁴ and those few states that still have civil unions or other statuses tend to offer partners rights and benefits nearly coextensive with marriage—making them alternatives in name only.¹⁵ This Note proposes the creation of a robust third option between marriage and singlehood: the registered partnership. Taking inspiration from the French *pacte civil de solidarité* (PACS) and Belgian legal cohabitation, I outline a new form of partnership that would allow parties to choose for themselves which obligations they wish to undertake via a ready-made template or their own contract. By letting partners decide whether they want to share assets or inherit from one another, the registered partnership model would give people the autonomy and flexibility to fashion a form of partnership that works for them.

Part I explains the numerous ways that marriage is not a perfect fit for every U.S. couple. I first discuss how views of partnership, including ideas about sharing assets, automatic inheritance, and staying with one partner until death, have changed in ways that conflict with the marriage model. I then explore the financial harms that some couples experience by virtue of being married, including losing government healthcare benefits. Part II offers an original empirical analysis of the options available to U.S. couples who wish to formalize their relationships, revealing a landscape that has become increasingly barren since same-sex marriage gained traction in the 2010s. To understand how we might be able to move away from this marriage-or-nothing framework, Part III evaluates marriage alternatives that have found success in other countries. I first present case studies of the French PACS and Belgian legal cohabitation, using interview data from both countries to lay out how each form of partnership works in practice and what kinds of couples use it. I then turn to the deeply rooted tradition of cohabitation in Latin America, discussing factors that have contributed to its increasing popularity. Finally, Part IV suggests how a registered partnership model

13. For a discussion of many couples' only alternative—private cohabitation contracts—see *infra* Section II.B.

14. Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1510 (2016) (“Where same-sex couples have won the right to marry, . . . jurisdictions have repeatedly treated that legalization as a green light to eliminate existing nonmarital statuses.”); see also Pamela Laufer-Ukeles & Shelly Kreiczer-Levy, *Family Formation and the Home*, 104 KY. L.J. 449, 451–52 (2016) (“[T]he legalization of same-sex marriage is resulting in legislatures repealing domestic relations and civil union legislation as unnecessary.”).

15. See *infra* Appendix 2.

might work in the United States, arguing that the time is ripe to create a robust new status with rights and obligations distinct from those of marriage. I conclude by summarizing the benefits a third option might offer couples, characterizing the registered partnership as a model built on choice and customizability.

I. WHY MARRIAGE IS TOO MUCH

Today, marriage is less popular than ever.¹⁶ About half of adults in the United States are married, compared with 72% in 1960, and those that do marry choose to wed later in life than did their 1960s counterparts.¹⁷ The share of U.S. adults who have never married is also at a “historic high,”¹⁸ while the number of unmarried cohabitants has nearly tripled over the past two decades.¹⁹ And cohabitation is no longer the province of the young; the U.S. Census Bureau announced in 2019 that “unmarried partners are now older, more racially diverse, more educated and more likely to earn higher wages” than in years past.²⁰ Many factors may account for U.S. couples’ increased ambivalence toward marriage, from shifting cultural norms to financial pressures and beyond, but it’s clear that a growing number of couples do not desire the thick bundle of rights and obligations it brings.

16. Ana Swanson, *144 Years of Marriage and Divorce in the United States, in One Chart*, WASH. POST (June 23, 2015, 7:00 AM EDT), <https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart> [<https://perma.cc/N5X7-X9SN>] (“[M]arriage rates have declined steadily since the 1980s. Today they are lower than any other time since 1870, including during the Great Depression.”).

17. Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RES. CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens> [<https://perma.cc/PK6V-BJR2>] (“In 2016, the median age for a first marriage was 27.4 for women and 29.5 for men—roughly seven years more than the median ages in 1960 (20.3 for women and 22.8 for men).”).

18. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), <https://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married> [<https://perma.cc/35FX-6EPF>].

19. Benjamin Gurrentz, *Unmarried Partners More Diverse than 20 Years Ago*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html> [<https://perma.cc/49YG-HXGM>].

20. *Id.*

A. *Changing Views of Partnership*

To begin, the notion of marriage comes with a symbolic meaning that many couples do not desire. As Elizabeth Scott has written, “modern marriage is embedded in its historic tradition as a religious institution,” and “[e]ven today, marriage has not fully emerged as a secular legal status.”²¹ At a time when religion in the United States “has lost its halo effect,” with almost a quarter of the population reporting no religious affiliation,²² the religious overtones that accompany marriage may be an uncomfortable fit for an increasing number of couples. Further, marriage remains historically associated with the concept of coverture—the idea that marital union makes a husband and wife a single entity in which “the very being or legal existence of the woman is suspended.”²³ Even today, marriage can perpetuate a gender hierarchy that disempowers women.²⁴ Nancy F. Cott explains that in “[t]urning men and women into husbands and wives, marriage has designated the way both sexes act in the world and the reciprocal relation between them . . . probably more emphatically than any other institution or social force.”²⁵

In addition, some modern couples acknowledge that their relationship may not last forever (though they may nonetheless desire some level of recognition from the state). This attitude is in line with what Anthony Giddens identified in the early 1990s as a growing trend in Western society: the “confluent love” model of partnership, premised on the idea of a “pure” relationship “entered into for its own sake and maintained only as long as both partners get enough satisfaction from it to stick around.”²⁶ Among some partners, there may be a sense that marriage is simply *too much*. Marriage comes with an automatic set of rights and responsibilities that not all people seek. The bundle of built-in obligations,

21. Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 538 (2007).

22. Derek Thompson, *Three Decades Ago, America Lost Its Religion. Why?*, ATLANTIC (Sept. 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/atheism-fastest-growing-religion-us/598843> [https://perma.cc/83TY-3HZ8].

23. Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 101 (2016) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *442).

24. Some argue that Justice Kennedy’s *Obergefell* opinion itself perpetuated tropes about marriage’s role in society that reinforce the notion of coverture. Allison Anna Tait suggests that Kennedy’s language “invokes not only good governance but also gender hierarchy; not only social stability but also social prescription; not only enduring commitment but also inescapable burden As the French might say, coverture is dead; long live coverture.” *Id.* at 99, 108–09.

25. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2000).

26. Kathleen E. Hull, Ann Meier & Timothy Ortyl, *The Changing Landscape of Love and Marriage*, 9 CONTEXTS, Spring 2010, at 32, 33 (relying on ANTHONY GIDDENS, THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES (1992)).

from inheritance rights to healthcare proxies, asset sharing to an expectation of “til death do us part,” does not match with many couples’ visions of their own relationships and the role they see those relationships playing in each of their lives.

To take one stick from the marriage bundle, consider the automatic inheritance rights that come about when a couple says, “I do.” Generally, when a married individual dies without a will – intestate – her spouse receives a portion of her estate.²⁷ When there are no children or parents of the deceased involved, the spouse usually receives the full estate, but even when children have a claim, the spouse still tends to receive some part of the estate.²⁸ On its face, perhaps this makes total sense. But for couples entering into marriages with children of their own who either cannot afford estate-planning services or do not think to engage them, can we be sure that this default regime is desired?

Even when a married person dies with a will, some states have inheritance laws that allow the spouse to inherit from the deceased’s estate against her wishes. These laws, called elective-share provisions, are “designed to protect a surviving spouse against disinheritance,”²⁹ but in practice, they limit what wills can do. For example, under Arkansas’s elective-share statute, “[w]hen a married person dies testate as to all or any part of his or her estate, the surviving spouse shall have the right to take against the will if the surviving spouse has been married to the decedent continuously for a period in excess of one (1) year.”³⁰ This means that when a spouse is unhappy with the amount left to her in the will, she can file for a greater share of the estate with the probate court,³¹ a state of affairs that “privileges the interests of the surviving spouse over children from earlier relationships” and others the decedent may have included in the will.³² For those not steeped in probate law, this is a startling infringement on freedom of choice.³³

27. For a fifty-state survey on intestate succession, see TRUSTS AND ESTATES: DESCENT AND DISTRIBUTION: INTESTATE SUCCESSION (STATUTES) (THOMPSON REUTERS 2018).

28. See, e.g., ALASKA STAT. § 13.12.102 (2020); FLA. STAT. § 732.102 (2020); IDAHO CODE § 15-2-102 (2020); S.C. CODE ANN. § 62-2-102 (2020).

29. Maria Korzendorfer, Note, In re Estate of Thompson: *The Shortcomings of the Arkansas Elective Share Statute*, 68 ARK. L. REV. 1089, 1089 (2016).

30. ARK. CODE ANN. § 28-39-401(a) (2020).

31. See Korzendorfer, *supra* note 29, at 1096-97.

32. Naomi Cahn, *What’s Wrong About the Elective Share “Right”?*, 53 U.C. DAVIS L. REV. (forthcoming 2020) (manuscript at 137) (on file with George Washington University Law School Scholarly Commons).

33. There are good policy reasons why we might want to prevent one spouse from disinheriting another, but my point here is simply to illustrate another way that “[c]hoosing to marry

Federal law also inhibits a spouse's ability to retain autonomy over decisions about how her own pension benefits will be paid. In certain circumstances, even though spouses might want to keep their retirement benefits separate, they cannot do so, because some benefits automatically vest in a plan participant's spouse upon retirement.³⁴ Under the Employee Retirement Income Security Act (ERISA)—a federal law that governs retirement plans covering about 141 million workers and beneficiaries³⁵—for example, spouses of some pension-plan participants are entitled to receive survivor annuity benefits unless the spouse gives consent confirmed in writing.³⁶ As the D.C. Circuit explained, “[w]ithout the spouse’s written consent expressly acknowledging the effect of the waiver or new beneficiary designation, a participant can neither waive nor alter the survivor annuity in any way.”³⁷

Even divorce does not always result in a severing of pension benefits. To remove a former spouse as beneficiary, a plan participant must obtain a “qualified domestic relations order” (QDRO) detailing the change in benefits allocation.³⁸ A QDRO is generally issued as part of a larger court order dealing with marital-property rights, such as a divorce decree, but the order must include a number of elements required by ERISA’s statutory guidelines.³⁹ A divorce decree will not suffice as a QDRO that alters the benefits structure unless it “clearly specif[ies] . . . the exact manner of calculating benefits” in accordance with the ERISA statute.⁴⁰ In one case that found its way to the U.S. Supreme Court, even

means opting into a series of override and default rules at the state and federal level.” *Id.* at 105-06.

34. See *Carmona v. Carmona*, 544 F.3d 988, 997-99 (9th Cir. 2008); 4 CALIFORNIA FAMILY LAW LITIGATION GUIDE § 63.02 (2020).
35. *Fact Sheet: What Is ERISA*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/fact-sheets/what-is-erisa> [https://perma.cc/E844-56US].
36. 29 U.S.C. § 1055(c)(2)(A)(i) (2018); David Pratt, *Marriage, Divorce, Death, and ERISA*, 31 QUINNIPIAC PROB. L.J. 101, 116 (2018). The D.C. Circuit called these benefits “[t]he crown jewel of ERISA’s spousal protection.” *VanderKam v. VanderKam*, 776 F.3d 883, 886 (D.C. Cir. 2015).
37. *VanderKam*, 776 F.3d at 886 (citing 29 U.S.C. § 1055(c)(2) (2012)).
38. Emp. Benefits Sec. Admin., *QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders*, U.S. DEP’T LAB. 3 (2014), <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf> [https://perma.cc/W8UQ-WC28].
39. *Id.* at 6-7; Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 952 (2007); Pratt, *supra* note 36, at 128-31.
40. *Kennedy v. Plan Adm’r for DuPont Sav. & Inv. Plan*, 497 F.3d 426, 431 (5th Cir. 2007), *aff’d*, 555 U.S. 285 (2009) (citing 29 U.S.C. § 1056(d)(3)(c) (2012)); Pratt, *supra* note 36, at 137 (“[I]n many situations, and absent receipt of a valid QDRO, a plan administrator may ignore

though a couple's divorce decree purported to divest one spouse of all rights related to any pension or retirement plan tied to the other spouse's employment, the Court held that the decree was insufficient to alienate ERISA benefits because it did not meet the ERISA statute's specificity requirements.⁴¹ In another case, the Ninth Circuit held that even though a deceased ERISA plan participant had attempted to name his children as pension beneficiaries in a divorce decree from his first marriage, his current spouse's "statutorily-guaranteed survivor annuity" still vested because of a lack of specificity in the decree—and the children got nothing.⁴²

Furthermore, in the modern era where, increasingly, both partners are likely to be income earners, a legal regime of automatic asset sharing may not be as desirable as it once was. In 2018, the number of families with at least one unemployed member hit a record low of 4.1 million.⁴³ The U.S. Bureau of Labor Statistics reported that 47% of U.S. workers in 2019 were women,⁴⁴ and women's participation in the workforce has skyrocketed since the mid-twentieth century.⁴⁵ As more couples choose to marry later in life, they may enter the union with equal wealth, or, as is increasingly common, as "a less-propertied husband and a wife with greater net worth."⁴⁶ In unions between older adults, couples

a divorce decree and pay out a survivor benefit in accordance with the plan's terms and the beneficiary designation forms on file." Not all couples realize that this is the case—or should they be expected to. As Susan N. Gary writes: "[I]t is at least arguable that divorcing spouses assume that their divorce agreement resolves all property issues between them. The fact that the disposition of benefits in a plan governed by ERISA will depend on the precision of the language used in the agreement . . . suggests that Congress should provide a better solution." Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 124 (2004).

41. *Kennedy*, 555 U.S. at 289 (noting that the couple divorced subject to a decree that sought to divest one spouse "of all right, title, interest, and claim in and to . . . [a]ny and all sums . . . the proceeds [from], and any other rights related to any . . . retirement plan, pension plan, or like benefit program existing by reason of [the other spouse's] past or present or future employment").
42. *Hamilton v. Wash. State Plumbing & Pipefitting Indus. Pension Plan*, 433 F.3d 1091, 1094 (9th Cir. 2006).
43. *Economic News Release, Employment Characteristics of Families Summary*, U.S. BUREAU LAB. STAT. (Apr. 21, 2020, 10:00 AM EST), <https://www.bls.gov/news.release/famee.nro.htm> [<https://perma.cc/9C25-44SH>].
44. *Household Data: Annual Averages*, U.S. BUREAU LAB. STAT. (2019), <https://www.bls.gov/cps/cpsaat11.pdf> [<https://perma.cc/ZS7H-4ZPS>].
45. The U.S. Department of Labor reports that "[w]omen's participation in the U.S. labor force has climbed since WWII: from 32.7 percent in 1948 to 56.8 percent in 2016." Mark DeWolf, *12 Stats About Working Women*, U.S. DEP'T LAB. BLOG (Mar. 1, 2017), <https://blog.dol.gov/2017/03/01/12-stats-about-working-women> [<https://perma.cc/L5UT-LW6L>].
46. Thomas E. Simmons, *Medicaid as Coverture*, 26 HASTINGS WOMEN'S L.J. 275, 278 (2015).

often “reject traditional mores and values when it comes to their views of the partnership theory of marriage, choosing to keep their financial affairs separate and distinct from one another.”⁴⁷ When partners enter a relationship with their own careers and assets, it may not be appropriate to assume that they will want those assets comingled.

B. When Marriage Meets Medicaid

The heavy cost of marriage rests uncomfortably upon the shoulders of some modern couples. Marital union has immense financial implications for both partners, and sometimes the consequences of the institution’s asset-sharing structure can be devastating. Too often, those negative consequences are visited upon women and the most vulnerable populations in our society.

U.S. marriages differ from those in most Western democracies in one critical respect: “[M]arriage [is] a form of social insurance.”⁴⁸ Because the United States lacks universal healthcare, marriage acts as a tool for increasing the number of privately insured citizens, broadening the portion of the public whose healthcare needs can be met without significant, and often bankruptcy-inducing,⁴⁹ out-of-pocket spending. Yet this upside of marriage also has a large and underexplored downside for some couples. The Sections that follow highlight two situations in which that downside manifests: the “marriage penalty”⁵⁰ that causes many people with disabilities to lose benefits when they marry, and the Medicaid spend-down that punishes married couples who have significant savings when they find that one spouse requires long-term care. Before we get to these examples, however, I will provide a bit of background on the mechanics of Medicaid eligibility in the United States.

1. A (Very) Brief Tour of Medicaid Eligibility and the Asset Spend-Down

Medicaid is a means-tested program jointly administered by federal and state or territorial governments that pays healthcare costs for low-income individuals,

47. *Id.*

48. Anne L. Alstott, *Private Tragedies? Family Law as Social Insurance*, 4 HARV. L. & POL’Y REV. 3, 10 (2010).

49. Michael Hiltzik, *Column: Medical Bankruptcy Is an American Scandal – and That’s Not Debatable*, L.A. TIMES (Sept. 4, 2019, 10:28 AM), <https://www.latimes.com/business/story/2019-09-04/hiltzik-medical-bankruptcy-american-scandal> [<https://perma.cc/CN8J-MC4B>] (“At this point everyone agrees that many thousands of Americans suffer medical bankruptcies each year, but there’s still scholarly debate over exactly how many.”).

50. B.J. Stasio, *People with Disabilities and the Federal Marriage Penalties*, IMPACT, Spring/Summer 2010, at 26.

including older adults and those with disabilities.⁵¹ As of 2020, more than 66.7 million people were enrolled in Medicaid – about one in five Americans – making it the “single largest source of health coverage in the United States.”⁵² Medicaid eligibility for the two groups that most concern us, individuals with a disability and those aged sixty-five and over, is determined along the same lines as eligibility for Supplemental Security Income (SSI).⁵³ To receive SSI, a person with a disability or who is sixty-five or older must have resources of no more than \$2,000 for an individual and \$3,000 for a couple.⁵⁴ (Already, we see that couples are harmed by this structure, which reproduces the coverture-like notion that through marriage, “the husband and wife [become] one person in law,” each receiving less than they would as an individual.)⁵⁵ “Resources” for SSI purposes include cash, bank accounts, stocks and bonds, land, life insurance, personal property, vehicles (if you have more than one), and “anything else you own which could be changed to cash and used for food or shelter,” excluding your homestead, personal effects (like a wedding ring), burial plot, and small life-insurance policies.⁵⁶ As the Social Security Administration’s Office of Policy admits, “[i]n the Supplemental Security Income . . . program, . . . two recipients married to each other receive a benefit that is one-quarter less than if they simply lived together but not as husband and wife.”⁵⁷ On the other hand, “members of the opposite sex who cohabit and do not marry (or are not found to be

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51. See Joanna Zhang, *Marriage in the Golden Years: Revisiting Benefits and Obligations in Light of the New Individualism*, 38 N.Y.U. REV. L. & SOC. CHANGE 361, 374-75 (2014) (providing an overview of Medicaid in the United States, with an eye towards older adults).
 52. *May 2020 Medicaid & CHIP Enrollment Data Highlights*, MEDICAID.GOV (May 2020), <https://www.medicaid.gov/medicaid/program-information/medicaid-and-chip-enrollment-data/report-highlights/index.html> [<https://perma.cc/A73B-VGEL>]; *Eligibility*, MEDICAID.GOV (2019), <https://www.medicaid.gov/medicaid/eligibility/index.html> [<https://perma.cc/5WTU-VAB4>].
 53. *Eligibility*, *supra* note 52; see also 42 C.F.R. § 435.120 (2020) (requiring that the Centers for Medicare & Medicaid Services provide Medicaid to those receiving SSI). There are some differences in section 209b states, which use more restrictive eligibility criteria. *Total SSI Beneficiaries*, KAISER FAM. FOUND. (2018), <https://www.kff.org/medicaid/state-indicator/total-ssi-beneficiaries/?currentTimeframe=0> [<https://perma.cc/8KPC-FYLP>].
 54. 20 C.F.R. § 416.1205(c) (2020); *Understanding Supplemental Security Income (SSI) Resources*, SOC. SECURITY ADMIN. (2020), <https://www.ssa.gov/ssi/text-resources-ussi.htm> [<https://perma.cc/EPY9-HXV2>].
 55. 1 WILLIAM BLACKSTONE, COMMENTARIES *442. For an overview of how the Medicaid program reinforces the notion of coverture, see Simmons, *supra* note 46.
 56. *Understanding Supplemental Security Income SSI Resources*, *supra* note 54; see 20 C.F.R. § 416.1201 (2019).
 57. Richard Balkus & Susan Wilschke, *Treatment of Married Couples in the SSI Program*, SOC. SECURITY ADMIN. OFF. POL’Y 1-2 (Dec. 2003), <https://www.ssa.gov/policy/docs/issuepapers/ip2003-01.pdf> [<https://perma.cc/932A-N92M>].

representing themselves as husband and wife) are each guaranteed an income level equal to 100% of the federal benefit rate and generally fare better financially than SSI married couples.”⁵⁸ Even couples in domestic partnerships and civil unions who cohabit will be able to keep a higher resource allowance than if they were married, so long as the state does not recognize the status as a marriage⁵⁹ and the partners “do not lead people to believe that [they] are each other’s husband and wife.”⁶⁰

By contrast, when one spouse has a disability or requires long-term care, both spouses cannot have more than \$3,000 in assets if they are to maintain eligibility. To avoid total impoverishment (or, as Congress called it, “pauperization”⁶¹) of the well spouse, Congress enacted the Medicare Catastrophic Coverage Act of 1988 (MCAA).⁶² The MCAA enables the well spouse, also known as the community spouse, to keep a Community Spouse Resource Allowance (CSRA) from the couple’s assets—a minimum of \$25,728 and a maximum of \$128,640 (as of 2020).⁶³ Within that range, states may choose the amount of

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58. *Id.* Note that if a couple holds themselves out as husband and wife to the community, even if they are not legally married, they may be considered married under the SSI program. *Id.* at 3.
59. Letter from Cindy Mann, Dir., Ctr. for Medicaid & CHIP Servs., Dep’t Health & Human Servs., to State Health Officials 5 (May 30, 2014), <https://www.medicaid.gov/federal-policy-guidance/downloads/smd-14-005.pdf> [<https://perma.cc/34E3-UBJ8>] (“[T]here is no provision of the Medicaid and CHIP statutes that recognizes civil unions or domestic partnerships That said, where a state recognizes a civil union or domestic partnership as a marriage, that marital status is recognized under the Medicaid and CHIP programs”). For example, Colorado does not consider partners in a civil union to be married and conducts Medicaid-eligibility determinations for each partner individually. *Civil Unions vs. Marriage and Medicaid*, COLO. DEP’T HEALTH CARE POL’Y & FINANCING, Letter No. 14-017 (Dec. 8, 2014), <https://www.colorado.gov/pacific/sites/default/files/2014%20Agency%20Letters%20number%2014-017Civil%20Unions%20vs%20Marriage%20and%20Medicaid%20Eligibility.pdf> [<https://perma.cc/DQC6-EDTD>].
60. 20 C.F.R. § 416.1826(c)(2) (2020); *see* 20 C.F.R. § 416.1806(a)(3) (2020); Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2022 (2017). *But see* Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 WM. & MARY L. REV. 453, 489 (2019) (explaining that “[t]he Social Security Administration presumes that cohabiting applicants are married when determining eligibility for means-tested SSI benefits, even if they have not formalized their relationships under state law,” unless the couple can show that they do not hold themselves out as spouses) [hereinafter Matsumura, *The Integrity of Marriage*].
61. *Morris v. Okla. Dep’t of Human Servs.*, 685 F.3d 925, 929 (10th Cir. 2012) (quoting H.R. REP. NO. 100-105, pt. 2, at 65 (1987)).
62. Pub. L. No. 100-360, § 303, 102 Stat. 683, 754-64 (codified as amended at 42 U.S.C. § 1396r-5 (2018)).
63. 2020 SSI and Spousal Impoverishment Standards, MEDICAID.GOV (2020), https://www.medicaid.gov/sites/default/files/2020-01/ssi-and-spousal-impoverishment-standards_o.pdf [<https://perma.cc/P25D-65EJ>]; *see Spousal Impoverishment*, MEDICAID.GOV (2020), <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html> [<https://perma.cc/G3SC-DZFT>].

CSRA they wish to allow, though many permit the well spouse to keep up to half of the couple's resources, as long as they fall at or below the resource cap.⁶⁴ The spouse requiring care, known as the institutionalized spouse, may also keep \$2,000.⁶⁵

Enter the Medicaid "spend-down." For a married couple to achieve Medicaid eligibility, the couple must spend down their assets on care until they have only the resource level permitted in their state.⁶⁶ For example, if Couple A has a total net worth of \$25,000, eligibility is automatic, given that this amount is below the current resource minimum of \$25,728. However, if Couple B has a net worth of \$500,000 and lives in a state with the highest CRSA (\$128,640) that allows the well spouse to keep half of the couple's assets up to that maximum, the couple must spend down a total of \$369,360 on care before they can qualify for Medicaid.⁶⁷ This amount is more than half of the couple's net worth.⁶⁸

Moreover, assets cannot be gifted to children to circumvent the spend-down: determining Medicaid eligibility involves a mandatory look-back period of five years in most states, during which Medicaid administrators inspect an applicant's financial history "to identify transactions designed to reduce their wealth in order to qualify for public assistance."⁶⁹ If the applicant transferred money or assets during this period for less than fair-market value, there will be a delay in receiving Medicaid benefits for a "penalty period."⁷⁰ So if, for instance, "you write a check to your adult son for \$14,000 and apply for Medicaid within five years of the date on the check, then Medicaid will delay covering the cost of your nursing home care because you could have used that money to pay for it yourself."⁷¹ In some cases, irrevocable trusts can be used to avoid the Medicaid spend-down, but they, too, will be subject to the look-back period and must be planned

64. Simmons, *supra* note 46, at 308; *Spousal Impoverishment*, *supra* note 63.

65. Simmons, *supra* note 46, at 308.

66. *Id.*

67. To reach this figure, subtract \$128,640 from \$500,000 and then subtract the \$2,000 that the institutionalized spouse may retain.

68. Five hundred thousand dollars is a great deal of money, but a couple approaching retirement and in need of long-term care would need to spend about \$6,844 to \$7,698 per month on a nursing home; the \$500,000 will not get them as far as one might think. See *Costs of Care*, U.S. DEP'T HEALTH & HUM. SERVS. (Oct. 10, 2017), <https://longtermcare.acl.gov/costs-how-to-pay/costs-of-care.html> [<https://perma.cc/4EBJ-AW2R>].

69. Nancy E. Shurtz, *Tax, Class, Women and Elder Care*, 43 SEATTLE U. L. REV. 223, 255 (2019).

70. Monica J. Franklin, *Senior Moments: What Is the Difference Between the Medicaid Five-Year 'Look-Back' and a Medicaid Penalty Period?*, 51 TENN. B.J. 31, 31 (2015).

71. K. Gabriel Heiser, *Understanding the Medicaid Look-Back Period and Penalty Period*, AGINGCARE, <https://www.agingcare.com/articles/medicaid-lookback-and-penalty-period-166116.htm> [<https://perma.cc/VGF8-YHMT>].

well in advance.⁷² Finding no simple way to avoid the spend-down requirement, I now turn to its practical effects, first for those living with a disability, and then for those approaching retirement.

2. *Marrying with a Disability: The “Marriage Penalty”*

When one partner has a disability, that person may be forced into a painful choice, known as the “marriage penalty”⁷³: Should she keep the government benefits she needs to live or marry the person she loves? Low-income people with disabilities risk losing benefits such as SSI and Medicaid altogether, or having those benefits significantly reduced, if they choose to marry and their joint assets are even slightly over the resource limit for eligibility.⁷⁴ As Timothy, a person living with Duchenne Muscular Dystrophy, which requires him to be on a ventilator at all times, explained:

Having a pre-existing condition and high medical bills, the only way to receive the care I need is through Medicaid, and it is the same for many with permanent disabilities. . . . Let’s say I got married and our joint assets are more than \$3,000. I would lose my Medicaid benefits. Then, with my nursing costs alone being more than \$300,000 a year our assets would go below \$3,000 in a matter of months as we spent them down, and I could go back on Medicaid. During this process my spouse would probably have to take a pay cut or quit her job altogether to ensure we keep our assets below \$3,000.⁷⁵

A Hobson’s choice of marriage or nothing harms those living with a disability. Hundreds of people with disabilities and their loved ones have taken to Twitter to share their stories under the hashtag “#CantMarryMyLove.”⁷⁶ One user wrote: “One of the toughest things for me to come to terms with as a disabled person is that I #CantMarryMyLove. It makes me hesitant to look for the kind of love I deserve, because according to the government, I’m not worthy of it.”⁷⁷

72. See *How Medicaid Planning Trusts Protect Assets and Homes from Estate Recovery*, AM. COUNCIL ON AGING (Mar. 28, 2019), <https://www.medicaidplanningassistance.org/asset-protection-trusts> [https://perma.cc/QY6N-J6QG].

73. Stasio, *supra* note 50, at 26.

74. *Id.*

75. *Id.*

76. #CantMarryMyLove, TWITTER (2020), <https://twitter.com/search?q=%23can%27tmarry-mylove> [https://perma.cc/T62M-ZH75].

77. Heather Kerstetter (@hmkerstetter), TWITTER (Dec. 7, 2019, 1:33 PM ET), <https://twitter.com/hmkerstetter/status/1203381962263728129> [https://perma.cc/TZM8-MEVW].

Another shared: “Get legally married or stay alive. Those are my choices as a disabled person in the US.”⁷⁸

On the other hand, Anne Alstott has written that marriage can function “as a form of social insurance” for some people with caregiving needs.⁷⁹ It is surely true, as she highlights, that “the financial support and in-kind care obligations that attend marriage (as well as those that persist following divorce) represent a significant potential resource for people with disabilities.”⁸⁰ But Timothy’s story demonstrates that the trade-off between marriage and receiving annual benefits of potentially hundreds of thousands of dollars makes little financial sense unless a prospective spouse earns an income that allows her to comfortably bridge the benefits gap. Bridging that gap is not possible for most Americans. In 2018, the median household income in the United States was \$61,937,⁸¹ while estimated state disability-associated healthcare expenditures per person with a disability ranged from \$7,833 to \$22,494.⁸²

Finally, if benefits are lost, it is likely that some caregiving for the person with a disability that would have been provided by the state may be undertaken instead by the spouse or a close family member. Because caregiving duties overwhelmingly fall to women,⁸³ marriage and its accompanying loss of benefits harm women in particular, as illustrated in even starker terms in the Section that follows.

78. Carolanne Monteleone (@carolannemm), TWITTER (Dec. 7, 2019, 4:32 PM ET), <https://twitter.com/carolannemm/status/1203427074691739649> [<https://perma.cc/9TSS-8JKA>].

79. Alstott, *supra* note 48, at 10.

80. *Id.*

81. Gloria Guzman, *U.S. Median Household Income up in 2018 from 2017*, U.S. CENSUS BUREAU (Sept. 26, 2019), <https://www.census.gov/library/stories/2019/09/us-median-household-income-up-in-2018-from-2017.html> [<https://perma.cc/7RP5-JRGL>].

82. Wayne L. Anderson, Brian S. Armour, Eric A. Finkelstein & Joshua M. Wiener, *Estimates of State-Level Health-Care Expenditures Associated with Disability*, 125 PUB. HEALTH REP. 44, 46 (2010).

83. See Allison K. Hoffman, *Reimagining the Risk of Long-Term Care*, 16 YALE J. HEALTH POL’Y L. & ETHICS 147, 153–54 (2016) (noting that “informal caregivers . . . are disproportionately women” and “face staggering burdens”); Joukje Swinkels, Theo van Tilburg, Ellen Verbakel & Marjolein Broese van Groenou, *Explaining the Gender Gap in the Caregiving Burden of Partner Caregivers*, 74 J. GERONTOLOGY: SOC. SCI. 309, 309 (2017) (“Caregiver literature has consistently shown that female caregivers are more burdened than male caregivers.”). One study found that while older men may delay retirement to help financially support a loved one with a disability or who otherwise requires long-term care, women are more likely “to stay home to provide time-consuming care” themselves. Emma Dentinger & Marin Clarkberg, *Informal Caregiving and Retirement Timing Among Men and Women: Gender and Caregiving Relationships in Late Midlife*, 23 J. FAM. ISSUES 857, 875–76 (2002).

3. *Medicaid Is a Gender Issue.*

When it comes to qualifying for long-term care coverage, the interplay between marriage and Medicaid in a couple's golden years reinforces outdated notions of coverture.⁸⁴ On average, someone who is currently sixty-five has a 69% chance of needing long-term care services of some kind and about a 37% chance of requiring care in a facility.⁸⁵ Only a small number of Americans can afford the high price of long-term care insurance,⁸⁶ meaning that older adults who cannot afford to pay for care out of pocket rely on either family caregivers or government benefits for their long-term care needs. Both of these options hurt one group: married women.

Medicare does not provide for long-term care services except in limited circumstances, so a person in need of these services must obtain private care at home or qualify for Medicaid.⁸⁷ If we were to assume that Couple *B*, described above, has a combined net worth of \$500,000, and one spouse develops a condition that requires significant long-term care, the well spouse would face three options: (1) become an increasingly full-time caregiver; (2) undergo voluntary impoverishment; or (3) divorce.

Consider a heterosexual married couple in their mid-sixties, Sonia and Jacob, who have both had separate and fruitful careers such that they have \$500,000 in total resources, including retirement savings.⁸⁸ Let's assume Sonia is the younger

84. Thomas Simmons first articulated the similarities between federal Medicaid policy and coverture. Simmons, *supra* note 46, at 283 (“Medicaid eligibility determinations reinstate the archaic notions of *coverture*, ignoring the separate property rights of spouses and treating the marriage union as a unity.”).

85. *How Much Care Will You Need?*, U.S. DEP’T HEALTH & HUM. SERVS. (July 23, 2020), <https://longtermcare.acl.gov/the-basics/how-much-care-will-you-need.html> [<https://perma.cc/M7MN-6DVZ>].

86. Only about eight million Americans have long-term care insurance. Marilyn Geewax, *Long-Term-Care Insurance: Who Needs It?*, NPR (May 8, 2012, 3:13 AM ET), <https://www.npr.org/2012/05/08/151970188/long-term-care-insurance-who-needs-it> [<https://perma.cc/8zTZ-8BFT>]; see also Shurtz, *supra* note 69, at 265 (“Long-term care insurance is mostly the province of the wealthy.”). And long-term care insurance may be a “risky” investment, given that “a lot of litigation surround[s] companies’ refusal to pay and some [insurers] even go[] bankrupt.” Shurtz, *supra* note 69, at 248.

87. *Does Medicare Pay for Nursing Homes?*, AARP (2020), <https://www.aarp.org/health/medicare-qa-tool/current-long-term-nursing-home-coverage> [<https://perma.cc/8T29-VYLG>]; see Hoffman, *supra* note 83, at 162 (explaining that Medicare “was intentionally *not* tailored to the needs of *chronically ill* elderly because the drafters envisioned it would eventually expand into a universal program for all Americans”).

88. This example is deliberately heteronormative to illustrate both the caregiving burden that tends to fall on women and the marital age gap that increases the odds that men will require

partner.⁸⁹ Age is the biggest risk factor for many diseases requiring significant care, such as dementia,⁹⁰ meaning that Sonia is already more likely to take on a caregiving role than Jacob. Sadly, he does develop age-related dementia, and the couple, like most Americans, lacks long-term care insurance.⁹¹

At the outset, Sonia might choose to care for her partner herself. This is a common approach; about two thirds of caregivers are women,⁹² and four-in-ten women over eighteen provide elder care in some form.⁹³ While caregiving can be a beautiful opportunity to spend time with a loved one, it is also associated with depression and burnout as well as difficulty balancing paid employment duties with caregiving responsibilities.⁹⁴ Female informal caregivers may also experience the added burden of “second shift” work—when the caregiver’s market-labor job is layered with domestic duties.”⁹⁵ And with progressive illnesses like dementia, eventually the ill spouse tends to require full-time care that goes beyond what a partner can provide.

At this point, the well spouse faces an even harder choice. Should Sonia—having responsibly saved for retirement for years—now spend down more than half of her assets, effectively impoverishing herself and her partner, to qualify for

long-term care first. Of course, this situation plays out across all forms of couples, bringing difficult decisions no matter the gender of each partner.

89. Men are more likely to marry younger women, and women tend to live longer than men—a married woman over sixty-five can expect to outlive her spouse by almost fifteen years. Shurtz, *supra* note 69, at 260; *Median Age at First Marriage: 1890 to Present*, U.S. CENSUS BUREAU (2019), <https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ms-2.pdf> [<https://perma.cc/VAD5-N8A7>].
90. Laura Oliver, *Why Alzheimer’s Hits Women Harder than Men*, BBC (July 11, 2018), <https://www.bbc.com/future/article/20180705-why-dementia-and-alzheimers-affect-women-more-than-men> [<https://perma.cc/K9PX-YDJY>]. Note, however, that Alzheimer’s-related dementia as a whole still affects more women than men, likely due in part to women’s increased longevity. *Id.*
91. “Private long-term care insurance has largely failed,” as a result of both high prices and a general tendency among Americans to underestimate future long-term care needs. Hoffman, *supra* note 83, at 157–58.
92. Hoffman, *supra* note 83, at 153–54; *Who Will Provide Your Care?*, U.S. DEP’T HEALTH & HUM. SERVS. (July 23, 2020), <https://longtermcare.acl.gov/the-basics/who-will-provide-your-care.html> [<https://perma.cc/MRN4-KUCU>].
93. Shurtz, *supra* note 69, at 257; see Rebecca Korzec, *A Feminist View of American Elder Law*, 28 U. TOLEDO L. REV. 547, 556 (1997).
94. Lynn Friss Feinberg, *The Dual Pressures of Family Caregiving and Employment*, AARP PUB. POL’Y INST. 2 (May 2016), <https://www.aarp.org/content/dam/aarp/ppi/2016-03/The-Dual-Pressures-off-Family-Caregiving-and-Employment.pdf> [<https://perma.cc/38WC-C7VZ>]; *Caregiver Burnout*, CLEVELAND CLINIC (Jan. 13, 2019), <https://my.clevelandclinic.org/health/diseases/9225-caregiver-burnout> [<https://perma.cc/FY8S-9TUU>].
95. Shurtz, *supra* note 69, at 236 (citing ARLIE HOCHSCHILD & ANNE MACHUNG, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION IN THE HOME* (1990)).

Medicaid benefits?⁹⁶ Or, should she seek a divorce to try to protect herself to the extent that she can? Both options are horrifying, an added burden that manifests at one of the darkest moments of a couple's life together.

First, let's consider "voluntary impoverishment" (a term that tells you everything you need to know).⁹⁷ When Sonia can no longer provide care at home, she will have to think about how to pay for Jacob to go into a nursing home that can better meet his needs.⁹⁸ Sonia, who by now is either approaching retirement or has retired in order to care for her husband, realizes that care in a facility will quickly drain their savings; a shared room in a nursing home costs more than \$90,000 on average and a private room over \$100,000.⁹⁹ So, she seeks to qualify for Medicaid benefits. Even if Sonia lives in a state with the highest cap on spousal assets, she needs to spend down \$369,360—more than half of the couple's assets—in order to qualify for Medicaid.¹⁰⁰ In effect, she is punished for earning money on her own and saving it responsibly for retirement. That money is gone. She and her husband will be left with \$130,640, total—a sum that Sonia is supposed to live on *for the rest of her life*. She is at retirement age, and she is now expected to survive on this money for perhaps fifteen or twenty more years.

The Medicaid spend-down punishes those couples who have done everything right and saved responsibly, leaving them in (voluntary) poverty. Long-term care is not only a gender issue—it's a class issue, too.¹⁰¹ While wealthy women have many options when it comes to long-term care for their partners and themselves, middle-class women "are often forced to engage in Medicaid planning by either spending down their savings or giving away their wealth to qualify for Medicaid benefits."¹⁰² Lower-income women have even fewer options

96. See *supra* Section I.B.1.

97. John A. Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL'Y 81, 81-82 (2003).

98. According to the Alzheimer's Association, "[m]ore than 50 percent of residents in assisted living and nursing homes have some form of dementia or cognitive impairment, and that number is increasing every day." *Dementia Care Practice Recommendations for Assisted Living Residences and Nursing Homes*, ALZHEIMER'S ASS'N 1 (Jane Tilly & Peter Reed eds., Sept. 2006), https://www.alz.org/national/documents/brochure_dcprphases1n2.pdf [<https://perma.cc/R2j2-B9X2>].

99. See *Nursing Home Costs by State and Region*, *supra* note 3; see also Michelle Singletary, *For Many Families, the Costs of Long-Term Care Are Horrifying*, WASH. POST (Oct. 31, 2019, 7:00 AM EDT), <https://www.washingtonpost.com/business/2019/10/31/many-families-long-term-care-costs-are-horrifying> [<https://perma.cc/G6DY-ADFU>] ("It's not easy or cheap to age and die these days." (quoting a family caregiver)).

100. For more on how the spend-down impacts married couples, see John A. Miller, *Medicaid Spend Down, Estate Recovery and Divorce: Doctrine, Planning and Policy*, 23 ELDER L.J. 41, 52-53 (2015).

101. Shurtz, *supra* note 69, at 239.

102. *Id.*; see *id.* at 255.

when it comes to long-term care, but without significant resources to spend down, they may have an easier time qualifying for Medicaid than those in the middle class.

What could Sonia have done to avoid the Medicaid spend-down? She could have divorced Jacob. As leading elder-law scholar John Miller has written, “the overall direction of the Medicaid system is toward encouraging divorce where one spouse needs Medicaid assistance and the other does not.”¹⁰³ We now see why. Miller highlights the startling consequences of the Medicaid spend-down and argues for an asset-counting regime that disaggregates marital property for Medicaid purposes.¹⁰⁴ That regime has yet to manifest, leaving a couple who wishes to protect the well spouse with no choice but to divorce.

If Sonia initiates a divorce, the court may appoint a guardian ad litem to protect Jacob’s interests.¹⁰⁵ (Assume, for the sake of our hypothetical, that the couple realizes this is an option and has access to attorneys or other advisors with knowledge of the qualification process for government healthcare benefits who can guide them,¹⁰⁶ which not all couples do.) The court, in consultation with the guardian ad litem, may or may not allow Sonia to keep a disproportionate amount of the couple’s assets, but even if the assets are split evenly (\$250,000 each), Sonia still ends up better off than she would be with the Medicaid spend-down.¹⁰⁷ Many couples find the divorce option stomach-turning – and it is – but this is the consequence of a healthcare system with coverture as its cornerstone. Miller’s final piece of advice, directed at “moderately well-to-do couples that form late in life,” is to simply “avoid marriage.”¹⁰⁸

Policy solutions to the long-term care crisis in the United States are notoriously “elusive,” and healthcare reform proposals often “do little to push the ball forward” when it comes to long-term care services and supports.¹⁰⁹ Medicaid

103. Miller, *supra* note 100, at 43–44.

104. *Id.* at 46.

105. *Id.* at 70.

106. See *id.* at 47 n.23 (discussing legal resources available to couples who need assistance for Medicaid planning).

107. *Id.* at 70.

108. *Id.* at 71. The long-term care dilemma in which many older Americans find themselves may be one reason why the United States has seen a significant rise in cohabitation rates among older adults in the last decade. Gurrentz, *supra* note 19 (“In 1996, only 2% of partners in cohabiting households were ages 65 or older; by 2017, that had tripled to 6 percent. Other studies have also noted a significant jump in cohabitation among older adults, particularly in the last 10 years as divorce rates went up among this group.”).

109. Everette James, Walid F. Gellad & Meredith Hughes, *In This Next Phase of Health Reform, We Cannot Overlook Long Term Care*, HEALTHAFFAIRS (Mar. 16, 2017), <https://www.healthaffairs.org>

already accounts for about 43% of national long-term care costs and “two-thirds of all nursing home costs,”¹¹⁰ and expanding it in ways that allow couples to avoid divorce and keep more than the bare minimum of resources touches on foundational political differences over federal spending and the role of the government in citizens’ lives.¹¹¹ Until healthcare reform becomes a reality, many married Americans will face choices like our hypothetical Sonia and Jacob and the very real Harold and Burnalette Perlstein. True marriage equality has not vested for everyone in the United States.

II. THE DECLINE OF NONMARITAL FORMS OF PARTNERSHIP IN THE UNITED STATES

Whether because of life-or-death healthcare concerns or simply changing philosophies about relationships, many couples chafe against marital union or

.org/do/10.1377/hblog20170316.059218/full [https://perma.cc/LQG5-EKCZ]; see also Julian J.Z. Polaris, *Personal Networks: Health Coverage Status and the Invisible Burden on Family and Friends*, 39 HARV. J.L. & GENDER 115, 173 (2016) (“A major remaining gap in America’s health coverage infrastructure is a general lack of support for long-term care services outside the restrictive Medicaid program.”); Zachary Anderson, Note, *Solving America’s Long-Term Care Financing Crisis: Financing Universal Long-Term Care Insurance with a Mandatory Federal Income Tax Surcharge That Increases with Age*, 25 ELDER L.J. 473, 506–07 (2018) (“Although many commentators have proposed solutions to solve the LTC financing crisis, no solution has yet been widely adopted.”).

110. James, Gellad & Hughes, *supra* note 109.

111. See, e.g., Susan Adler Channick, *The Ongoing Debate over Medicare: Understanding the Philosophical and Policy Divides*, 56 J. HEALTH L. 59, 59 (2003) (discussing challenges to reforming healthcare financing for older Americans, and explaining that “[a]lthough Democrats and Republicans agree that the system needs reform, they have not been able to reach agreement on how to proceed. Moreover, none of the many reform proposals offered by the parties has directly addressed the quandary of whether we should view healthcare as a private good that users finance independently through traditional marketplaces, or as a social good that should be collectively financed”); Abbe R. Gluck & Thomas Scott-Railton, *Affordable Care Act Entrenchment*, 108 GEO. L.J. 495, 500–01 (2020) (noting that Medicaid “has long been pilloried by the right as a ‘broken’ program that fostered dependency” but that the Democratic Party continues to move ever further to the left, with “large swaths of Democrats [] beating the single-payer – or ‘Medicare for All’ – drum” by the 2018 midterm elections); Ashley Kirzinger, Bianca DiJulio, Liz Hamel, Elise Sugarman & Mollyann Brodie, *Kaiser Health Tracking Poll – May 2017: The AHCA’s Proposed Changes to Health Care*, KAISER FAM. FOUND. (May 31, 2017), <https://www.kff.org/report-section/kaiser-health-tracking-poll-may-2017-the-ahcas-proposed-changes-to-medicaid> [https://perma.cc/9CMM-JHDW] (“Democrats and independents [are] more likely to view Medicaid as a health insurance program and Republicans [are] more likely to view it as a welfare program.”).

find that it is practically unavailable to them.¹¹² But what else is there? This Part highlights the precipitous decline in the availability of civil unions and domestic partnership registries in the United States following the legalization of same-sex marriage. It examines what marriage alternatives remain for partners seeking governmental recognition of their relationships and, finally, proposes that a robust registered partnership model be implemented in states and territories.

A. *The Rise and Fall of Nonmarital Forms of Partnership*

To understand the decline of nonmarital statuses in the United States, we first turn to their origins. Civil union and domestic partnership laws emerged in the mid-1980s and 1990s as a way for same-sex couples to receive some of the benefits and protections of marriage.¹¹³ In these decades, a number of municipalities enacted ordinances to give domestic partners limited rights in areas such as hospital visitation, insurance coverage, and bereavement leave — especially important benefits given the rise of the HIV/AIDS epidemic in the 1980s.¹¹⁴ Early domestic partnership advocates, both gay and straight, saw this fledgling status as “a paradigm shift” and a true “*alternative to marriage*,” not just a “second-rate marriage substitute.”¹¹⁵ Soon, states themselves, led by Vermont, California, Connecticut, and Hawaii, began to create and recognize nonmarital relationship statuses aimed at giving same-sex couples some measure of equality,¹¹⁶ though

112. Matsumura’s observation that, while we do not know “how many of the 6.8 million unmarried-couple households in the United States share [an] opposition to marriage, [] even a small percentage would amount to a significant number of people who remain unmarried by choice” illustrates this point. Matsumura, *supra* note 1414, at 1517.

113. For a superb history of the emergence of domestic partnership laws in the United States, see Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291 (2013). As Murray notes, early municipal domestic partnership schemes “were not intent on mimicking marriage. [Rather, t]he initial goal was to secure access to a more limited complement of rights and benefits than marriage offered.” *Id.* at 300–01.

114. Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 47, 51 (2014); Katherine Bishop, *San Francisco Grants Recognition to Couples Who Aren’t Married*, N.Y. TIMES (May 31, 1989), <https://www.ny-times.com/1989/05/31/us/san-francisco-grants-recognition-to-couples-who-aren-t-married.html> [<https://perma.cc/D66X-KUHZ>]; Jean-Paul Renaud, *Domestic Partner Benefits in Spotlight*, S. FLA. SUN SENTINEL (Sept. 19, 2003), <https://www.sun-sentinel.com/news/fl-xpm-2003-09-19-0309181574-story.html> [<https://perma.cc/6Y25-GMQR>].

115. Murray, *supra* note 113, at 293.

116. Feinberg, *supra* note 114, at 51–52; *Same-Sex Marriage Laws*, NAT’L CONF. ST. LEGISLATURES (June 26, 2015), <https://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> [<https://perma.cc/JV26-XVP8>].

critics slammed these unions as a “separate-but-unequal regime.”¹¹⁷ During this period and the years immediately following, states also began allowing same-sex couples to marry on a piecemeal basis.¹¹⁸

Yet, as marriage increasingly opened to same-sex couples on the state level, legislatures started to repeal laws giving recognition to nonmarital partners.¹¹⁹ Melissa Murray explains that at this critical moment for gay rights, with the nation on the cusp of embracing marriage equality, the LGBT movement’s desire for same-sex marriage eclipsed early advocates’ hopes that domestic partnership would function as a true marriage alternative for both same- and different-sex couples.¹²⁰ After same-sex marriage’s legalization in a given state, some state legislatures began to require couples in civil unions or domestic partnerships to marry in order to maintain eligibility for benefits, while others prohibited couples from registering new nonmarital partnerships.¹²¹ The legislatures in Connecticut, Vermont, New Hampshire, Rhode Island, Washington, and Delaware, for example, repealed their states’ civil union and domestic partnership laws as same-sex marriage was legalized.¹²² In effect, “[t]he excitement over the reality of same-sex marriage . . . made civil union blasé.”¹²³

Rhode Island’s experience is illustrative: in 2011, the state legalized civil unions for same-sex couples, followed by statewide marriage equality just two years later.¹²⁴ As of same-sex marriage’s legalization on August 1, 2013, couples

117. William N. Eskridge, Jr., Lecture, *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Union*, 64 ALB. L. REV. 853, 862 (2001).

118. Feinberg, *supra* note 114, at 53; *Same-Sex Marriage Laws*, *supra* note 116.

119. See *supra* note 14 and accompanying text; Matsumura, *supra* note 14, at 1512 n.13.

120. Murray, *supra* note 113, at 297.

121. See Matsumura, *supra* note 14, at 1510.

122. See Feinberg, *supra* note 114, at 55; Matsumura, *supra* note 14, at 1511; *infra* Appendix 2. Note, however, that recognition of nonmarital statuses remains possible in some municipalities under local ordinances, even though it may not be available statewide. See *Marriage & Relationships: Domestic Partnerships & Civil Unions: Vermont*, GLAD (2020), <https://www.glad.org/overview/domestic-partnerships-civil-unions/vermont> [<https://perma.cc/JV9Z-N5YF>] (highlighting the availability of some benefits to domestic partners of municipal employees in Burlington and Middlebury, Vermont). For an example of a human-resources form for domestic partners, see *Domestic Partner Affidavit*, CITY BURLINGTON (2020), https://www.burlingtonvt.gov/sites/default/files/HR/Forms/Domestic%20Partner%20Affidavit_FY15.pdf [<https://perma.cc/XHZ6-4JVZ>].

123. Greg Johnson, *Civil Union, a Reappraisal*, 30 VT. L. REV. 891, 893 (2006). Greg Johnson explains that even before same-sex marriage’s legalization in Connecticut, civil unions garnered little enthusiasm from gay-rights advocates, who viewed the status as a half-measure of equality. *Id.* at 893–94 (“[A]s one commentator put it, . . . ‘two cheers for civil unions.’”).

124. *Timeline: Legalization of Same-Sex Marriage in Rhode Island*, PROVIDENCE J. (July 31, 2014, 10:00 PM), <https://www.providencejournal.com/article/20140731/news/307319837> [<https://perma.cc/F6WG-FXHH>].

were no longer permitted to enter into civil unions.¹²⁵ Those already in a civil union could either: (1) marry and “have the civil union merged into the marriage”; (2) have their civil union recorded by the state as a marriage without a formal ceremony; or (3) maintain the civil union as is.¹²⁶ Many couples chose to migrate their unions into marriages (unsurprising, given that the state’s civil union law was meant to give couples the same set of rights and obligations as marriage¹²⁷).

Vermont followed a similar roadmap. The state recognized civil unions beginning in 2000, but when Vermont fully legalized same-sex marriage in 2009, the legislature no longer offered couples the option of entering into new unions – it became marriage or nothing.¹²⁸ Indeed, even the chair of “Vermonters for Civil Unions,” an interest group formed to support state representatives who voted for the civil union law, viewed civil unions as a mere steppingstone towards marriage equality: “Civil unions were a step forward in 2000,” she explained, “but we remain committed to full equality for same-sex couples, and civil unions fall short of that goal.”¹²⁹ The group disbanded in 2005.¹³⁰

In Washington State, lawmakers who led the charge to pass domestic partnership legislation openly hoped it would culminate in marriage equality rather than endure as a distinct status.¹³¹ And sure enough, most couples in domestic partnerships had their relationships automatically merged into marriages two years after the state legalized same-sex marriage in 2012.¹³² A *Seattle Times*

125. *Civil Unions*, ST. R.I. DEP’T HEALTH, <https://health.ri.gov/records/about/civilunions> [<https://perma.cc/7VJU-NHDV>].

126. *Id.*

127. David Klepper, Associated Press, *Same-Sex Marriage Begins in RI*, CBS BOS. (Aug. 1, 2013, 12:36 PM), <https://boston.cbslocal.com/2013/08/01/same-sex-marriage-begins-in-ri> [<https://perma.cc/7AJ2-2TK7>]; Chris Morris, *Rhode Island Senate Approves Civil Union Bill*, JURIST (June 30, 2011, 9:57 AM), <https://www.jurist.org/news/2011/06/rhode-island-senate-approves-civil-union-bill> [<https://perma.cc/ZRU6-9RUB>].

128. *Civil Union and Dissolution*, VT. JUDICIARY, <https://www.vermontjudiciary.org/family/divorce/civil-union-and-dissolution> [<https://perma.cc/GEE7-788D>]. Moreover, questions still exist about how the years couples spent together before marrying should count when it comes to federal benefits, alimony, and more. See Michael J. Higdon, *While They Waited: Pre-Obergefell Lives and the Law of Nonmarriage*, 129 YALE L.J.F. 1, 2 (2019).

129. Johnson, *supra* note 123, at 892 (quoting Vermonters for Civil Unions Chair Susan Murray).

130. *Id.*

131. Matsumura, *supra* note 14, at 1522.

132. WASH. REV. CODE § 26.60.100(3) (2012) (merging all domestic partnerships into marriages unless one partner is sixty-two or older or dissolution, annulment, or legal separation is pending); Matsumura, *supra* note 14, at 1511. After June 30, 2014, only couples in which one partner is sixty-two or older can register as domestic partners in Washington State. *Domestic Partnerships: Frequently Asked Questions*, WASH. SECRETARY ST., <https://www.sos.wa.gov/corps/domesticpartnerships/faq-2014.aspx> [<https://perma.cc/G59Y-F3KF>].

headline that ran the weekend before the automatic conversion date asked, memorably: “Thousands to be married Monday, but do they know it?”¹³³

This pattern demonstrates that many state legislatures viewed marriage alternatives solely as stand-ins for marriage itself at a time when opening the institution to same-sex couples was politically unpalatable.¹³⁴ The Washington State example, where the legislature determined that couples in domestic partnerships should be deemed married through no action of their own, reveals this thinking. Even in Wisconsin, a state that only recently did away with domestic partnerships, one representative dismissed the status as simply “marriage lite,” an option no longer needed once same-sex couples could wed.¹³⁵ Murray observes: “Throughout the country, efforts to secure marriage equality have necessarily focused on marriage as the paradigm model,” and “[i]n so doing, they have characterized marriage alternatives, like domestic partnerships and civil unions, as cut-rate counterfeits that may serve as interim measures in the struggle to secure marriage equality, but not as ends unto themselves.”¹³⁶ Given that repeal of marriage alternatives and legalization of same-sex marriage happened simultaneously in many states, it appears legislatures took little time to think critically about whether civil unions and domestic partnerships might have a different role to play.

133. Zahra Farah, *Thousands to Be Married Monday, But Do They Know It?*, SEATTLE TIMES (June 28, 2014, 1:16 PM) (capitalization altered), <https://www.seattletimes.com/seattle-news/thousands-to-be-married-monday-but-do-they-know-it> [<https://perma.cc/RAS9-MSVM>].

134. See, e.g., SUSAN GLUCK MEZEY, *GAY FAMILIES AND THE COURTS: THE QUEST FOR EQUAL RIGHTS* 145 n.5 (2009) (quoting New Hampshire’s now-repealed civil union law, which entitled persons joined in a civil union to all the rights and responsibilities of a married couple); *Civil Union and Dissolution*, *supra* note 128 (noting that Vermont’s civil union law “extended almost all of the benefits and responsibilities of civil marriage to same-sex couples”). Indeed, *Obergefell* itself reflects this thinking. As Murray explains, “*Obergefell* reads like a love letter to marriage” and “builds the case for equal access to marriage on the premise that marriage is the most profound, dignified, and fundamental institution into which individuals may enter. Alternatives to marriage . . . are by comparison undignified, less profound, and less valuable.” Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1210, 1212 (2016). At the same time, Kaiponanea Matsumura posits that states that created nonmarital statuses as distinct marriage alternatives, open even to couples that could choose to marry, might be less likely to repeal those statuses, even with the advent of same-sex marriage. Matsumura, *supra* note 14, at 1519.

135. Molly Beck, *Wisconsin Lawmaker Calls for Repeal of State’s Domestic Partner Registry*, WIS. ST. J. (June 27, 2015), https://madison.com/wsj/news/local/govt-and-politics/wisconsin-lawmaker-calls-for-repeal-of-states-domestic-partner-registry/article_5bbf1b48-f40a-5a4e-99d2-1f95e26cd7do.html [<https://perma.cc/X7B5-R3CL>] (quoting Rep. Jeremy Thiesfeldt). For additional examples of some state lawmakers’ dismissive attitudes towards nonmarital partnerships, see Matsumura, *supra* note 14, at 1512 n.13.

136. Murray, *supra* note 113, at 293.

In 2015, the U.S. Supreme Court legalized same-sex marriage nationwide in *Obergefell v. Hodges*,¹³⁷ marking the end of a decade of state-by-state recognition and rollback of alternative forms of partnership.¹³⁸ Today, nonmarital statuses are offered in fewer than a dozen states.¹³⁹ This Note seeks to examine the future of nonmarital forms of partnership after the *Obergefell* era and add to the growing call for legal recognition of partnership pluralism.¹⁴⁰ The Sections that follow will explore what these statuses look like in practice and which other avenues of protection are available to partners who wish to formalize their relationship without marrying.

B. The Current Landscape

Out of a total of fifty-five states and territories, plus Washington, D.C., only eleven allow residents to enter into some form of nonmarital partnership.¹⁴¹ The remaining states and territories either repealed nonmarital-partnership laws following the legalization of same-sex marriage or never had them in the first place.

137. 576 U.S. 644 (2015).

138. See *A Timeline of the Legalization of Same-Sex Marriage in the U.S.*, GEO. L. LIBR. (July 29, 2020, 7:23 AM), <https://guides.ll.georgetown.edu/c.php?g=592919&p=4182201> [<https://perma.cc/Q57U-PE6U>].

139. See *infra* Appendix 2.

140. See Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 914 (2019) (“There is a growing scholarly consensus in favor of family pluralism, or what William Eskridge calls a ‘larger menu of [family] options.’” (footnote omitted) (quoting William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1889 (2012))); Murray, *supra* note 134, at 1210 (“Although the *Obergefell* decision is a victory for same-sex couples that wish to marry, it is likely to have negative repercussions for those—gay or straight—who, by choice or by circumstance, live their lives outside of marriage.”); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 295 (2015) (“Many contemporary scholars and policy advocates challenge the privileged status of marriage, arguing that the state should recognize and support other family relationships.”); see also Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2260 (2017) (arguing for pluralism in parental recognition by placing a “greater emphasis on parenthood’s social dimensions” to affirm the rights of same-sex parents); Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 81–93 (2015) (advocating for the recognition of marital-property rights for some unmarried cohabitating couples by codifying a *de facto* marriage act). See generally NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 126–45 (2008) (arguing that reserving legal rights and privileges for married couples devalues other kinds of families).

141. See *infra* Appendix 2. (And, as Appendix 2 demonstrates, this is a generous count; given that Washington State only allows domestic partnerships where one partner is sixty-two or older, and Oregon allows them only between partners of the same sex, nine might be the more accurate number.)

Today, in four states, unmarried adults can enter a civil union,¹⁴² and in seven states and Washington, D.C., they can form a domestic partnership.¹⁴³ This means that nonmarital forms of partnership are open to less than 30% of the U.S. population.¹⁴⁴

But some nonmarital statuses are marriage alternatives in name only (though they might nonetheless enable a couple to avoid the Medicaid asset spend-down).¹⁴⁵ In all four states that recognize civil unions, for example, the associated rights, benefits, and obligations are coextensive with those of marriage.¹⁴⁶ Domestic partnership statutes present a greater departure, but the structure of these relationships varies from state to state. Most domestic partnership laws require that partners be unmarried and unrelated,¹⁴⁷ and state statutes generally emphasize that the benefits and obligations of domestic partnership should approach those of marriage.¹⁴⁸

142. Colorado, Hawaii, Illinois, and New Jersey. *See id.*

143. California, Maine, Maryland, Nevada, New Jersey, Oregon (only if partners are of the same sex), Washington (only if one or both partners is sixty-two or older), and Washington, D.C. *See id.*

144. I arrived at this figure by calculating the total populations of California, Colorado, Hawaii, Illinois, Maine, Maryland, Nevada, New Jersey, Oregon, Washington State, and Washington, D.C. (approximately 91,224,498) as a percentage of the population of the United States (approximately 330,510,027).

145. *See, e.g.,* K. Gabriel Heiser, *How Does a Domestic Partnership Affect Medicaid Eligibility?*, AGING-CARE, <https://www.agingcare.com/articles/domestic-partnership-effect-on-medicaid-eligibility-194334.htm> [<https://perma.cc/FR9C-ZGLJ>] (arguing that a couple must weigh the pros and cons based on the way their specific state's Medicaid rules treat domestic partnerships).

146. COLO. REV. STAT. ANN. § 14-15-107 (West 2020); HAW. REV. STAT. ANN. § 572B-9 (West 2019); 750 ILL. COMP. STAT. ANN. 75/20 (West 2020); N.J. STAT. ANN. § 37:1-31 (West 2020); *see also* Tax Filing Status of Partners of Civil Unions, Op. Haw. Att'y Gen. Op. No. 11-2, at 4 (Oct. 19, 2011), https://ag.hawaii.gov/wp-content/uploads/2012/11/OP11_2.pdf [<https://perma.cc/337G-8S4G>] (“[C]ivil union partners have all the same rights, benefits, protections, and responsibilities under the law as married couples . . .”).

147. *See infra* Appendix 2.

148. *See, e.g.,* CAL. FAM. CODE § 297.5(a) (West 2020); N.J. STAT. ANN. § 26:8A-2(d) (West 2020) (“All persons in domestic partnerships should be entitled to certain rights and benefits that are accorded to married couples under the laws of New Jersey.”); NEV. REV. STAT. ANN. § 122A.200 (West 2019); OR. REV. STAT. ANN. § 106.340 (West 2020). Some states do allow for rights given to domestic partners to be modified by contract, however. N.J. STAT. ANN. § 26:8A-6(e) (West 2020) (“Domestic partners may modify the rights and obligations to each other that are granted by this act in any valid contract between themselves [with some exceptions] . . .”). *But see* COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 8:12 (Sept. 2020 update) (noting that Maryland grants domestic partners only limited rights related to “hospital visitation, funeral arrangements, and property transfer tax[es]”).

This survey of U.S. civil union and domestic partnership laws reveals that most American couples face a stark choice between marriage or nothing. The majority of nonmarital statuses bring the same rights and obligations as marriage without the symbolism, a consequence of their genesis in the pre-*Obergefell* era.¹⁴⁹ Where does this leave a couple that seeks rights and protections stemming from the relationship but does not wish to marry? First, in a small number of states, the couple could claim certain rights by virtue of cohabiting. In Washington State, for example, partners in “a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist” may be eligible to retain some share of the community property upon termination of the relationship or death.¹⁵⁰ The same is true in a few other states.¹⁵¹ This minority approach focuses on the status of the parties as cohabitants, without requiring any contract between them.¹⁵²

Second, in almost all states, two adults can enter into private cohabitation contracts with the help of a lawyer.¹⁵³ The couple can create a written contract,

149. Even California, which updated its domestic partnership statute effective January 2020, maintains that “[r]egistered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, . . . as are granted to and imposed upon spouses.” CAL. FAM. CODE § 297.5(a) (West 2020); see S.B. 30, 2019 Gen. Assemb. (Cal. 2019).

150. *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995).

151. Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 353 (2016); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1041 n.156 (2018) (noting that Alaska and some Oregon state courts also take this approach); see *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984) (“Where it is alleged . . . and proven that there was an agreement to acquire and hold property as if the couple was married, the community property laws of the state will apply by analogy.”).

152. See Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL’Y 119, 130 (2004).

153. Aloni, *supra* note 151, at 351 (“Today, all states except for three enforce written contractual obligations between unmarried partners.” (footnote omitted)). The three exceptions, discussed in the next paragraph, are Georgia, Illinois, and Louisiana. *Id.* at 351 n.221. For more on courts’ treatment of cohabitation agreements, see 1 KAREN MOULDING, *SEXUAL ORIENTATION AND THE LAW* § 3:3 (2019), which explains that “if the written [cohabitation] agreement is properly drafted and adequate, [and] valid consideration is stated, express written agreements concerning property rights or support will be given effect by the courts in most jurisdictions”; and 7 SAMUEL WILLISTON & RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 16:23 (4th ed. 1990), which notes that “the mere fact that parties to an agreement are cohabitants is no ground for refusing to give effect to contracts between them, whether express or implied.” See also *Boland v. Catalano*, 521 A.2d 142, 145-46 (Conn. 1987) (recognizing private cohabitation contracts as enforceable in Connecticut); *Dutton v. Laine*, 130 P.3d 1247, No. 93,934, 2006 WL 851389 (Kan. Ct. App. Mar. 31, 2006) (unpublished table decision) (holding that a written cohabitation agreement concerning a couple’s property was enforceable in Kansas); *Wilcox v. Trautz*, 427 Mass. 316, 334-35 (1998) (recognizing private cohabitation contracts as enforceable in Massachusetts).

so long as it abides by contract law, to lay out rights and duties between them, including aspects of a shared life like healthcare proxies and property division. As one leading case put it, “adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights.”¹⁵⁴ While contracts concerning “sexual services” are subject to greater judicial scrutiny and may not be enforced unless the illicit terms can be severed from the rest of the contract,¹⁵⁵ couples “may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property; conversely, they may agree that each partner’s earnings and the property acquired from those earnings remains the separate property of the earning partner.”¹⁵⁶ In sum, “[s]o long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements.”¹⁵⁷

A major downside to private cohabitation agreements, however, is the effort and cost they require.¹⁵⁸ Most couples will need to hire a lawyer and think seriously about what to contract around—not to mention that the couple will need to consider this far enough in advance to take the step of drawing up a contract in the first place. As Cynthia Grant Bowman has written:

A . . . profound problem with the use of contract principles to redress inequities that may arise on termination of a cohabiting relationship is that cohabiting couples—like married couples—typically do not make contracts; they simply proceed trusting that their relationship will endure and that each party will treat the other fairly.¹⁵⁹

A bespoke cohabitation contract is not a realistic option for couples with limited time and resources, and it is not an option available in every state. In

154. *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976); see also Joslin, *supra* note 140, at 927–28 (describing *Marvin* as the “dominant approach to nonmarital property division claims in the United States” but noting some variation among states).

155. *Marvin*, 557 P.2d at 116; see WILLISTON & LORD, *supra* note 153, § 16:23; MOULDING, *supra* note 153, § 3:3.

156. *Marvin*, 557 P.2d at 116.

157. *Id.*

158. Some states will enforce implied cohabitation contracts, but many refuse due to the difficulty of distinguishing which acts were undertaken because of a contractual relationship and which occurred because the parties “value each other’s company or because they find it a convenient or rewarding thing to do.” *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980).

159. Bowman, *supra* note 152, at 128; see Joslin, *supra* note 140, at 917 (“Today, the law no longer criminalizes the choice to form a nonmarital partnership. But the law still largely fails to meaningfully recognize and respect these relationships once they are formed.” (footnote omitted)).

Georgia, Illinois, and Louisiana, no rights are available for unmarried cohabitants.¹⁶⁰ Moreover, states that do recognize some rights stemming from cohabitation “will often condition recovery on how closely the nonmarital relationship resembles a traditional marriage,”¹⁶¹ which could pose an obstacle for people that reject partnership norms. This system is, at best, “unstable” and likely murky to couples without a passion for family law or the resources to procure a trained attorney.¹⁶² We can do better.

III. MARRIAGE ALTERNATIVES

In the United States, we choose to live in a world of black and white: either partners get married—and receive recognition, dignity, and benefits from the state—or, in most states, they have no way to formalize their relationship. Other countries find shades of gray. The Sections that follow explore nonmarital forms of partnership finding success across the globe, from Western Europe to Latin America. To begin, I highlight two case studies that demonstrate a third possible option in the United States that may better fit the needs of some partners.

A. *Two Case Studies of Nonmarital Forms of Partnership*

In France and Belgium, nonmarital forms of partnership are thriving.¹⁶³ Like the European Union as a whole, where the marriage rate has declined by 50%

160. Aloni, *supra* note 151, at 351 n.221; Bowman, *supra* note 152, at 125; Higdon, *supra* note 128, at 5.

161. Higdon, *supra* note 128, at 5. In this sense, unmarried couples must meet a higher bar than spouses, who do not have to live together or “even see each other on a regular basis” to receive the benefits and protections that marriage brings. Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772 (2004) (quoting *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 946 (Mass. 2003)).

162. Bowman, *supra* note 152, at 146. As one family-law scholar put it, “In the United States, the ‘law’ of cohabitation is quite simply a mess.” John G. Culhane, *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples’ Real Relationships*, 58 FAM. CT. REV. 145, 147 (2020).

163. I chose France and Belgium as case studies primarily because both countries offer a nonmarital form of partnership that has a set of customizable rights and obligations distinct from marriage, as opposed to a marriage alternative in name only, as is the case in countries like the Netherlands. See *infra* notes 321–322 and accompanying text. Furthermore, like the United States, both France and Belgium have legalized same-sex marriage, allowing us to see whether nonmarital partnerships thrive even where marriage equality has vested. Finally, and more practically, these countries work nicely as case studies because there is a wealth of up-to-date statistical information about their marriage and partnership rates available online on French and Belgian government websites and on European Union databases, which makes for an easier and more detailed comparison than with countries that do not publish such data.

since the 1960s, both countries have witnessed a precipitous drop in the popularity of marriage.¹⁶⁴ At the dawn of the twenty-first century, France and Belgium began to search for new forms of partnership that would provide legal recognition to same-sex couples distinct from marriage. As these developments coalesced, vibrant marriage alternatives emerged in both countries. In the United States, where marriage rates are in a four-decade slump,¹⁶⁵ the French PACS and Belgian legal cohabitation offer a roadmap for how American states and territories might think about structuring their own novel forms of partnership.

1. *The French PACS*

In France, a growing number of different-sex couples are taking advantage of the opportunity to enter into a civil union, or PACS, and “shunning traditional marriages.”¹⁶⁶ The PACS (pronounced like “paks”) is a form of partnership introduced in 1999 with same-sex couples in mind that keeps the couple’s assets separate and can be dissolved with just a letter.¹⁶⁷ Today, it is wildly popular among different-sex couples, who find this lighter form of commitment attractive for reasons almost as numerous as the number of PACS concluded annually.

The PACS,¹⁶⁸ a contractual form of partnership, pulls elements from both marriage and singlehood. It obligates partners to contribute to the household and pay their share of the expenses of everyday life but allows them to choose whether they wish to combine their assets and property; by default, each person’s property is considered separate.¹⁶⁹ Partners are also not responsible for each

164. *Marriage and Divorce Statistics*, EUROSTAT (July 9, 2020), https://ec.europa.eu/eurostat/statistics-explained/index.php/Marriage_and_divorce_statistics [https://perma.cc/5RRT-KSTV].

165. Swanson, *supra* note 16.

166. Scott Sayare & Maïa de la Baume, *In France, Civil Unions Gain Favor over Marriage*, N.Y. TIMES (Dec. 15, 2010), <https://www.nytimes.com/2010/12/16/world/europe/16france.html> [https://perma.cc/KW9A-SKLU].

167. *Id.*; see Molly Moore, *French Marriage Rate Plunges as Population, Birth Rate Rise*, SEATTLE TIMES (Nov. 23, 2006, 12:00 AM), <https://www.seattletimes.com/nation-world/french-marriage-rate-plunges-as-population-birth-rate-rise> [https://perma.cc/BZ4A-AJNT]. For more on the history of the PACS, including a discussion of debates over which couples should be able to take advantage of it, see Ji Hyun Kim, Scott A. Oliver & Margaret Ryznar, *The Rise of PACS: A New Type of Commitment from the City of Love*, 56 WASHBURN L.J. 69, 82-83 (2017).

168. The PACS is codified in Art. 515-1 through 515-7 of the French Civil Code. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515-1 to -7. (Fr.). For an English translation, see *France: Law Relating to the Civil Solidarity Pact* (Law No. 99-944), 39 INT’L LEGAL MATERIALS 224 (2000).

169. *Effets d’un Pacs* [Effects of a PACS], SERV.-PUB. (Jan. 29, 2019), <https://www.service-public.fr/particuliers/vosdroits/F1026> [https://perma.cc/JL5A-YEYT]; see also Kim et al., *supra*

other's manifestly excessive expenditures, including large loans and debts contracted before the PACS.¹⁷⁰ But those in a PACS can file joint tax returns, share insurance policies, and avoid inheritance taxes, just as they would be able to in a marriage.¹⁷¹

Entering and exiting a PACS is remarkably easy. To enter a PACS, a couple need only create a PACS agreement (a template of which is provided on the French government's website and reproduced in Appendix 1) providing basic personal details and explaining where they will live, whether they choose to keep their assets separate, and whether they would like to fix their amount of mutual monetary assistance at a certain figure. The partners then register their agreement at their local town hall or with a notary.¹⁷² Dissolving a PACS is even simpler: dissolution can occur unilaterally, at the request of either partner, by sending a letter to the notary or to the civil-status officer of the municipality where the PACS was initiated.¹⁷³ The arrangement also terminates automatically upon the death or marriage of either partner.¹⁷⁴ It is easy to see the appeal of the PACS. The agreements can be customized to fit the needs of the parties,¹⁷⁵ there are few barriers to entry and exit, and the union allows both partners to maintain some autonomy.

A variety of couples choose the PACS, and it offers both symbolic and practical benefits that fit the needs of partners at many different life stages. Although

note 167, at 84 ("In terms of property distribution, the default regime under a PACS agreement is *la separation de biens*. Under this regime, unless otherwise agreed upon within the PACS contract, each member of the couple is separately responsible for that party's own property and assets.").

170. *Effects of a PACS*, *supra* note 169.

171. *Id.*; Kim et al., *supra* note 167, at 84; Sayare & de la Baume, *supra* note 166; see Moore, *supra* note 167.

172. See *infra* Appendix 1. More details are available on the French government's user-friendly website, *Se pacser*, SERV.-PUB. (Mar. 23, 2020), <https://www.service-public.fr/particuliers/vosdroits/F1618> [<https://perma.cc/R75U-CBY3>].

173. *Civil Solidarity Pact/PACS*, INSTITUT NATIONAL DE LA STATISTIQUE ET DES ÉTUDES ÉCONOMIQUES (May 21, 2019), <https://www.insee.fr/en/metadonnees/definition/c1281> [<https://perma.cc/R75U-CBY3>]; *Dissoudre un Pacts [Dissolve a PACS]*, SERV.-PUB. (June 11, 2019), <https://www.service-public.fr/particuliers/vosdroits/F1620> [<https://perma.cc/2Z58-LCWZ>].

174. Kim et al., *supra* note 167, at 85.

175. Unfortunately, to my knowledge, statistics are not available on how couples modify the form for a PACS agreement or if doing so is common, but French sociologist Wilfried Rault believes that most couples probably use the template agreement provided by the government. Interview with Wilfried Rault, French Nat'l Inst. for Demographic Studies, in Paris, Fr. (Jan. 3, 2020) (on file with author).

France legalized same-sex marriage in 2013,¹⁷⁶ among the French, “[t]he notion of eternal marriage has grown obsolete.”¹⁷⁷ Marriage rates have been “in crisis” since the 1970s, leaving room for a new form of partnership to move in.¹⁷⁸ In the years since its introduction in 1999, the popularity of the PACS has skyrocketed; the total annual number of PACS declarations has increased steadily in every year but one since 2001.¹⁷⁹ In 2016, for example, approximately 190,000 PACS were registered, as compared to 235,000 marriages.¹⁸⁰ Demographic experts suggest that the PACS appeals both to younger couples, who see it as a stepping-stone toward marriage,¹⁸¹ and to older adults who are “disenchanted” with the whole idea of marriage¹⁸² (though the PACS does tend to skew younger). It also attracts those who see marriage as inextricably linked to religious symbolism and patriarchal structures.¹⁸³ Younger couples often choose the PACS in order to gain some autonomy from their families and begin their lives together, even if neither partner feels ready for marriage,¹⁸⁴ while others seek the tax benefits or sense of commitment that formal recognition of a relationship brings.¹⁸⁵

In many ways, the PACS has something for everyone.¹⁸⁶ It appeals to those who aspire to marry eventually and to those who want to avoid the “heavy and invasive” institution altogether.¹⁸⁷ Of course, the PACS isn’t the right fit for

176. Christian Fraser, *Same-Sex Marriage: France Changes Law*, BBC (Apr. 23, 2013), <https://www.bbc.com/news/av/world-europe-22270363/same-sex-marriage-france-changes-law> [<https://perma.cc/29XR-E7VN>].

177. Sayare & de la Baume, *supra* note 166.

178. Interview with Wilfried Rault, *supra* note 175.

179. *Civil Unions (PACS)*, INSTITUT NATIONAL D’ETUDES DEMOGRAPHIQUES (June 2018), https://www.ined.fr/en/everything_about_population/data/france/marriages-divorces-pacs/pacs [<https://perma.cc/X9H8-9L4G>].

180. Wilfried Rault, *Is the Civil Solidarity Pact the Future of Marriage? The Several Meanings of the French Union*, 33 INT’L J.L. POL’Y & FAM. 139, 139 (2019).

181. Interview with Wilfried Rault, *supra* note 175.

182. See Estelle Bailly & Wilfried Rault, *Are Heterosexual Couples in Civil Partnerships Different from Married Couples?*, 497 POPULATION & SOC’YS 1, 2 (2013); Sayare & de la Baume, *supra* note 166.

183. Interview with Wilfried Rault, *supra* note 175.

184. *Id.*; see also Celestine Bohlen, *How the French View Life as a Couple*, N.Y. TIMES (Jan. 27, 2014), <https://www.nytimes.com/2014/01/28/world/europe/how-the-french-view-life-as-a-couple.html> [<https://perma.cc/AH9Z-4MVJ>] (describing the PACS in France).

185. Sayare & de la Baume, *supra* note 166.

186. See Bailly & Rault, *supra* note 182, at 4 (explaining that “we are witnessing the democratization of PACS partnerships” in the sense that “they are becoming more prevalent in social groups that did not initially ‘espouse’ them”). For an overview of the characteristics of couples who tend to choose the PACS, see Rault, *supra* note 180.

187. Sayare & de la Baume, *supra* note 166 (quoting Wilfried Rault, a sociologist at the French National Institute for Demographic Studies).

every couple—some may desire the religious connotations of marriage or feel more secure in a union that cannot be unilaterally ended—but that is not to say it shouldn't be an option at all.

2. *Belgian Legal Cohabitation*

In Belgium, where same-sex marriage has been legal since 2003,¹⁸⁸ a limited form of commitment remains an option open to both different- and same-sex companions via legal cohabitation (*wettelijke samenwoning/cohabitation légale*).¹⁸⁹ As with the French PACS, legal cohabitation was first proposed in 1998 as a non-marital solution for same-sex partners, at a time when there was still resistance to recognizing a same-sex couple as a family.¹⁹⁰ Notably, the law governing legal cohabitations can be found in the section of the Belgian Civil Code on contracts, not family law.¹⁹¹ In order to avoid forcing same-sex partners to come out of the closet and declare their orientation before government officials, legal cohabitation was made an option for any two unmarried persons, regardless of gender.¹⁹² And as with the PACS, legal cohabitation rates in Belgium have soared—and not just among same-sex couples. In 2013, for example, 37,854 marriages and 39,196 new legal cohabitations were registered.¹⁹³ Since the early 2010s, the number of legal cohabitations has approached or surpassed the number of annual marriages

188. Am. Bar Ass'n Section of Family Law, *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 408 (2004).

189. Frederik Swennen & Dimitri Mortelmans, *Informal Relationships: National Report: Belgium*, COMMISSION ON EUR. FAM. L. 1 (Jan. 2015), <http://ceflonline.net/wp-content/uploads/Belgium-IR.pdf> [<https://perma.cc/Q5RT-S448>].

190. Interview with Frederik Swennen, Dean of the Faculty of Law, Univ. of Antwerp, in Antwerp, Belg. (Jan. 9, 2020) (on file with author); see Aude Fiorini, *New Belgium Law on Same Sex Marriage and Its PIL Implications*, 52 INT'L & COMP. L.Q. 1039, 1039 (2003).

191. Articles 1475-1479 of the Belgian Civil Code govern statutory cohabitation. CODE CIVIL [C.Civ.] arts. 1475-1479 (Belg.); Interview with Frederik Swennen, *supra* note 190; see Olivier de Schutter & Anne Weyembergh, "Statutory Cohabitation" Under Belgian Law: A Step Towards Same-Sex Marriage?, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIP: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW* 465, 468 (Robert Wintemute & Mads Andenas eds., 2001).

192. Interview with Frederik Swennen, *supra* note 190.

193. Swennen & Mortelmans, *supra* note 189, at 8-9.

in Belgium,¹⁹⁴ while the country's overall marriage rate has declined significantly since the 1960s.¹⁹⁵

Legal cohabitation is a form of contractual partnership that gives cohabitants property rights over a shared household.¹⁹⁶ Unlike marriage and the PACS, legal cohabitation is open even to people who are related but seek to share a common life and residence (though it can only be between two people).¹⁹⁷ To enter into a legal cohabitation, the cohabitants need only file a declaration in writing with their local civil registrar containing basic information, such as personal details, the address of the common home, and whether the parties have crafted any notarized cohabitation contract to govern their relationship.¹⁹⁸

While cohabitants enjoy some inheritance rights and protections related to the shared home,¹⁹⁹ legal cohabitation maintains a default of separate property for couples, but cohabitants can choose to have a joint-ownership regime if they wish.²⁰⁰ Cohabitants can also create their own cohabitation contracts to govern issues such as how childcare expenses will be handled and who will contribute how much for household costs, subject to certain restrictions, such as not limiting freedom to terminate the cohabitation.²⁰¹ Some cohabitation contract templates composed by notaries exist,²⁰² but in practice, unique contracts are rare,

194. *Id.* at 8; *Declarations of Legal Cohabitation*, STATBEL (Nov. 4, 2019), <https://statbel.fgov.be/en/themes/population/partnership/declarations-legal-cohabitation#figures> [<https://perma.cc/D5A5-SR2M>]; *Marriages*, STATBEL (Nov. 4, 2019), <https://statbel.fgov.be/en/themes/population/partnership/marriages#figures> [<https://perma.cc/8LB9-UB3R>].

195. The crude marriage rate per 1,000 people in Belgium was 7.1 in 1960 and had dropped to 3.9 by 2017. *Marriage and Divorce Statistics*, *supra* note 164.

196. Swennen & Mortelmans, *supra* note 189, at 1.

197. *Id.* Unfortunately, statistics are not available on the number of relatives, as opposed to romantic partners, that opt to legally cohabit; only the gender of each cohabitant is collected. Interview with Frederik Swennen, *supra* note 190.

198. *Marriage & Cohabitation: Début* [*Marriage & Cohabitation: Beginning*], NOTAIRE (2020), <https://www.notaire.be/se-marier-vivre-ensemble/la-cohabitation-legale/debut-et-fin/debut> [<https://perma.cc/3BHS-D75N>].

199. Feinberg, *supra* note 114, at 59 (citing Frederik Swennen & Yves-Henri Leleu, *National Report: Belgium*, 19 AM. U. J. GENDER SOC. POL'Y & L. 57, 72-74 (2011)).

200. Swennen & Mortelmans, *supra* note 189, at 1.

201. Eric Spruyt, *Cohabitation: One Name, Several Situations*, BERQUIN NOTARISSEN 3 (Sept. 23, 2012), http://berquinnotarissenbe.webhosting.be/public/pdf/eng/EN_Samenwoning_ES.pdf [<https://perma.cc/3NBP-RJKN>]; *Marriage & Cohabitation: Contenu du Contrat de Cohabitation* [*Marriage & Cohabitation: Content of the Cohabitation Contract*], NOTAIRE (2020), <https://www.notaire.be/se-marier-vivre-ensemble/la-cohabitation-legale/contrat-de-cohabitation-legale> [<https://perma.cc/3W2A-ZN6R>].

202. For one example of a Dutch-language cohabitation contract (*samenlevingsovereenkomst*) template, see NOTARIËLE ACTUALITEIT 2009-2010, at 99-110 (Christoph Castelein & Alain en Luc Weyts eds., 2010).

and most cohabitants opt for the default regime.²⁰³ Under this regime, a surviving cohabitant has the right to inherit “the usufruct or lease of the main residence and the household goods, but can be disinherited.”²⁰⁴ Cohabitants also have an obligation to contribute to the costs of sharing a common life in proportion to each person’s financial capability, but there is no maintenance obligation following the end of a cohabitation, as there would be with a marriage.²⁰⁵ A legal cohabitation can be dissolved jointly or unilaterally before a civil registrar and automatically dissolves when a cohabitant dies or marries.²⁰⁶

Frederik Swennen, the Dean of the Faculty of Law at the University of Antwerp and an expert in family law and kinship studies, explained to me that there are many reasons Belgians find legal cohabitation more attractive than marriage. Often, these echo the factors that coalesced to create the popularity of the PACS. First, legal cohabitation is easy to enter into. Generally, the civil registrar provides a copy of the declaration of cohabitation, meaning that “[i]n practice, you just need to go to the civil status office in your municipality with your identity document” in order to register a new legal cohabitation.²⁰⁷ Second, this status brings with it less symbolism and ceremony than marriage and may be attractive to partners who hope to marry in the future and see cohabitation as a less expensive “stepping-stone.”²⁰⁸ Ruth Gaffney-Rhys explains, “[T]he expectations placed on couples to hold an elaborate marriage ceremony and reception should not be underestimated The enormity of the event can discourage the self-conscious from marrying, while the cost of the wedding will deter many more.”²⁰⁹ Third and finally, legal cohabitation is cheap, simple, and fast to dissolve. In Brussels, it costs twenty-five euros to register a new legal

203. Interview with Frederik Swennen, *supra* note 190.

204. Swennen & Mortelmans, *supra* note 189, at 2; see CODE CIVIL [C.CIV.] art. 745 (Belg.); Gerd D. Goyvaerts, *Belgium: International Estate Planning Guide*, TIBERGHIE 5 (Feb. 2017), <https://www.ibanet.org/Document/Default.aspx?DocumentUid=DD84CA5C-7728-43F5-8886-9A28E74A5E80> [<https://perma.cc/2NMD-PPDF>].

205. Spruyt, *supra* note 201, at 1.

206. Swennen & Mortelmans, *supra* note 189, at 1-2.

207. *Marriage & Cohabitation: Début* [Marriage & Cohabitation: Beginning], *supra* note 198.

208. Interview with Frederik Swennen, *supra* note 190.

209. Ruth Gaffney-Rhys, *Same-Sex Marriage but Not Mixed-Sex Partnerships: Should the Civil Partnership Act 2004 Be Extended to Opposite-Sex Couples?*, 26 CHILD & FAM. L.Q. 173, 190 (2014).

cohabitation.²¹⁰ No court is necessary, nor is it even necessary to inform your partner when you end the arrangement – the municipality will tell her for you.²¹¹

Belgian legal cohabitation offers partners, romantic or otherwise, the chance to live together with some shared level of security but without the cumbersome and automatic commitments of marriage. Those who desire a deeper level of commitment can contract for it when they enter into the cohabitation, but cohabitation as a whole allows partners to formalize their relationship and obtain many of the benefits of marriage without incurring the bundle of obligations that would be theirs if they chose to wed.²¹²

B. Nonmarital Partnerships in Latin America

Nonmarital forms of partnership may be on the rise in France and Belgium, but they are by no means an exclusively European practice.²¹³ While many countries find that marriages and alternative partnerships can coexist in society, this trend is especially salient (and entrenched) in Latin America. The French and Belgian case studies explored how formal partnership statuses have been successfully implemented in Western Europe, but this Section will show that alternative relationship arrangements can also thrive in countries with less homogeneous populations.

Latin America has long embraced a “dual nuptiality” regime, in which formal and informal partnerships – similar in their social recognition and reproductive patterns, but divergent with regard to their stability, legal obligations and safeguard mechanisms – coexist side by side.²¹⁴ The region’s census records “have historically provided an explicit category for consensual unions,” known as

210. *Declaration of Legal Cohabitation*, CITY BRUSSELS, <https://www.brussels.be/declaration-legal-cohabitation> [https://perma.cc/E4EC-2PNK].

211. *Marriage & Cohabitation: Fin [Marriage & Cohabitation: End]*, NOTAIRE (2020), <https://www.notaire.be/se-marier-vivre-ensemble/la-cohabitation-legale/debut-et-fin/fin> [https://perma.cc/W5NT-5AME].

212. A A, “I Don’t”, FLANDERS TODAY (Apr. 6, 2011), <http://www.flanderstoday.eu/living/i-dont> [https://perma.cc/C2CY-H247] (explaining that “for a number of couples, the motivations for getting married just aren’t compelling enough,” because “[l]egally registered couples and married couples are treated very similarly” (quoting Belgian lawyer Marc Quaghebeur)).

213. Teresa Castro-Martín, *Consensual Unions in Latin America: Persistence of a Dual Nuptiality System*, 33 J. COMP. FAM. STUD. 35, 35 (2002).

214. Teresa Castro-Martín & Antía Domínguez-Rodríguez, *Consensual Unions in Central America: Historical Continuities and New Emerging Patterns*, in COHABITATION AND MARRIAGE IN THE AMERICAS: GEO-HISTORICAL LEGACIES AND NEW TRENDS 157, 157 (Albert Esteve & Ron J. Lesthaeghe eds., 2016).

uniones libres or *uniones consensuales*.²¹⁵ As early as the 1970s, more consensual unions were reported than formal marriages in El Salvador, Guatemala, and Honduras,²¹⁶ but the tradition of dual nuptiality dates back centuries. During the colonial period in Latin America, “formal marriage was the norm within the Spanish elite in order to guarantee the intergenerational transmission of property, whereas informal unions were mainstream among the majority mestizo population.”²¹⁷ Today, the tradition of cohabitation persists across all age groups and remains common among low-income populations.²¹⁸ But scholars have also identified a new type of cohabitation in Latin America more “closely linked to the consensual union practiced by higher-educated groups in Western . . . countries,”²¹⁹ one that “denot[es] a trial period before marriage or an alternative to singlehood.”²²⁰ In recent decades, cohabitation has increased in popularity across the region, experiencing a particularly rapid rise in the 1990s.²²¹ This new cohabitation “is visible among all social groups,” including upper-class women and those with high levels of education, categories not typically associated with traditional cohabitation.²²²

Cohabitation, whether of the new or traditional type, remains popular throughout Latin America.²²³ In Panama, for instance, about two thirds of all partnerships are informal cohabitations, and in Honduras and Nicaragua,

215. Albert Esteve, Ron Lesthaeghe & Antonio López-Gay, *The Latin American Cohabitation Boom, 1970-2007*, 38 *POPULATION & DEV. REV.* 55, 58 (2012).

216. Castro-Martín & Domínguez-Rodríguez, *supra* note 214, at 157.

217. *Id.* at 158.

218. *Id.* at 158, 171; *see also* Esteve, Lesthaeghe & López-Gay, *supra* note 215, at 57 (“In many areas [in Latin America,] late-nineteenth- and twentieth-century mass European immigration . . . reintroduced the Western European marriage pattern characterized by monogamy, institutionally regulated marriage, condemnation of illegitimacy, and low divorce. As a consequence, the European model became a marker of social success and an ingredient in the process of *embourgeoisement*. This . . . produced the emergence of a marked gradient by educational level and social class: the higher the level of education, the lower the incidence of cohabitation and the higher the incidence of marriage.”).

219. Maira Covre-Sussai, Bart Meuleman, Sarah Botterman & Koen Matthijs, *Traditional and Modern Cohabitation in Latin America: A Comparative Typology*, 32 *DEMOGRAPHIC RES.* 873, 874-75 (2015).

220. *Id.* at 879.

221. Esteve et al., *supra* note 215, at 62 (discussing “remarkable rises” in the rates of cohabitation in Latin American countries during the 1990s: in Venezuela “the share of cohabiting young women rose from 37 percent in 1990 to 52 percent in 2000, and [in] Peru [it] jump[ed] from 43 percent to 70 percent over the same decade”).

222. Covre-Sussai et al., *supra* note 219, at 876.

223. Maira Covre-Sussai and her coauthors explain that within Latin America, regional differences exist in the popularity of traditional cohabitation versus the new forms of cohabitation she identifies. *Id.* at 892.

cohabitations outpace the number of marriages.²²⁴ While these nonmarital partnerships are not formally recognized by the state, they do receive recognition within society and help us understand that, even in large and diverse nations, marriage does not have to be a couple's only choice.²²⁵ Moreover, some Latin American nations do formally recognize nonmarital statuses. Ecuador, whose constitutional court legalized same-sex marriage in 2019, continues to offer de facto civil unions to both same- and different-sex couples,²²⁶ and Uruguay permits people of any gender to enter into a civil union, though it legalized same-sex marriage in 2013.²²⁷ In Brazil, where same-sex marriage has been legal since 2011, couples can choose to enter into stable unions, a legal designation that affords protections for families enshrined in the Brazilian Constitution.²²⁸ As Adilson José Moreira writes: "Rejecting a position that classifies the family as an institution that begins with civil marriage, the 1988 Brazilian Constitution instituted the protection of the family in its multiple forms as a fundamental goal."²²⁹ Though the stable union does have marriage as an aspirational end point—the constitution indicates that "the law shall facilitate conversion of such unions into marriage"²³⁰—it is notable that Brazil sought to ensure protection

224. Castro-Martín & Domínguez-Rodríguez, *supra* note 214, at 163.

225. Castro-Martín, *supra* note 213, at 35 ("[C]onsensual unions in Latin America are best described as surrogate marriages. The absence of a formal ceremony or a legal contract does not preclude full social recognition or condition childbearing behavior.").

226. Sophie Lewis, *Ecuador's Highest Court Legalizes Same-Sex Marriage*, CBS NEWS (June 13, 2019, 3:25 PM), <https://www.cbsnews.com/news/ecuador-highest-court-legalizes-same-sex-marriage> [<https://perma.cc/8WFJ-A7DU>]; *Where Are Heterosexual Civil Partnerships Legal?*, BBC (June 27, 2018), <https://www.bbc.com/news/world-44633711> [<https://perma.cc/6H43-EH7A>].

227. Jason Pierceson, *Variations in the Judicialization of Same-Sex Marriage Politics in Latin America*, in *SAME-SEX MARRIAGE IN LATIN AMERICA: PROMISE AND RESISTANCE* 53, 62 (Jason Pierceson, Adriana Piatti-Crocker & Shawn Schulenberg eds., 2013); *Uruguay Congress Approves Gay Marriage Bill*, BBC (Apr. 11, 2013), <https://www.bbc.com/news/world-latin-america-22102740> [<https://perma.cc/9A9C-CDJA>].

228. Adilson José Moreira, *We Are Family! Legal Recognition of Same-Sex Unions in Brazil*, 60 AM. J. COMP. L. 1003, 1004 (2012); Daniel De La Cruz, Comment, *Explaining the Progression of the Rights of Same-Sex Couples in South America*, 14 SAN DIEGO INT'L L.J. 323, 330 (2013).

229. Moreira, *supra* note 228, at 1006.

230. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 226, § 3 (Braz.), translated in *Brazil's Constitution of 1988 with Amendments Through 2017*, CONSTITUTE PROJECT (Keith S. Rosenn trans., May 12, 2020, 10:19 PM), https://constituteproject.org/constitution/Brazil_2017.pdf [<https://perma.cc/X6G5-2MYS>].

for families in various forms, rather than insisting that a family begins with a wedding.²³¹

In their study of cohabitation in Latin America from 1970 to 2007, demographers Albert Esteve, Ron Lesthaeghe, and Antonio López-Gay identified several factors that have contributed to its increasing popularity, many of which are equally applicable in the U.S. context. First, cohabitation is an “easy in, easy out” arrangement; it saves costs both at the start of a relationship (no elaborate ceremony) and at its end (no expensive divorce).²³² The authors observe that “in many instances, such short-term advantages may outweigh the firmer long-term commitment offered by marriage.”²³³ Cultural attitudes also play a key role. Tolerance for “non-conformist behavior,” including same-sex relationships, may have helped to decrease the stigma of cohabitation in some countries.²³⁴ Maira Covre-Sussai and her coauthors argue that the empowerment of some groups of women, such as those with exposure to higher education, also helped to ignite Latin America’s cohabitation boom.²³⁵ They also note that marriage rates in the region are declining as rates of cohabitation are increasing,²³⁶ a phenomenon that opened the door for nonmarital partnerships to succeed in France and Belgium. While the Latin American experience with cohabitation does not necessarily provide models that the United States could pull from directly in the way that the French PACS and Belgian legal cohabitation do, it does show that there is historical and contemporary precedent for a “dual nuptiality” regime²³⁷ in countries more comparable to the United States in their size and diversity.

IV. THE REGISTERED PARTNERSHIP MODEL

With the Belgian, French, and Latin American examples in mind, this Note argues that state and territorial legislatures should create a registered partnership status with a set of rights and obligations distinct from those of marriage. I take as a starting point that Americans desire many different kinds of partnerships and that these desires should be nurtured and celebrated, not shoehorned into a marriage-or-nothing binary that impedes a “meaningful menu of family

231. Moreira posits that a possible explanation for this “is the social acceptance of domestic cohabitation as a legitimate form of an adult relationship” by both different- and same-sex couples. Moreira, *supra* note 228, at 1006.

232. Esteve et al., *supra* note 215, at 69.

233. *Id.*

234. *Id.* at 75.

235. Covre-Sussai et al., *supra* note 219, at 900.

236. *Id.* at 901.

237. Castro-Martín & Domínguez-Rodríguez, *supra* note 214, at 157.

formation options.”²³⁸ As Kristi Williams, editor of the *Journal of Marriage and Family*, puts it, “[a]s families evolve and diversify . . . we have new opportunities to learn from each other.”²³⁹

A. *Creating a Registered Partnership Alternative*

I propose a registered partnership model that blends elements of the French PACS and Belgian legal cohabitation with protections available in some states to unmarried cohabitants. Having a ready-made framework in place would allow people to easily choose whether they would like to be formally “partnered,” establishing an opt-in regime that avoids the uncertainties inherent in current state treatment of unmarried cohabitants.²⁴⁰ States could determine for themselves the exact criteria for who may enter into a registered partnership, perhaps restricting it on the basis of shared domicile, kinship status,²⁴¹ or total number of partners, but at a minimum, it should be open to any two unmarried adults, regardless of gender.

The registered partnership model is built upon choice. It contrasts sharply with the current framework, which, as Courtney Joslin has lamented, “permits consideration of only a very limited set of formal decision points—the decision to enter into marriage (or not) and the decision to enter into an agreement to share (or not).”²⁴² Under this model, prospective partners would have access to a partnership agreement template with options to opt in or opt out of key rights and benefits, including:

- Separation of assets;
- Responsibility for debts acquired by partner;
- Medical visitation and decision-making rights;
- Specifying the amount each partner will contribute to the expenses of a common life; and

²³⁸ Joslin, *supra* note 140, at 915.

²³⁹ Stephanie Coontz, *How to Make Your Marriage Gay*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/opinion/sunday/marriage-housework-gender-happiness.html> [<https://perma.cc/FHK4-M25L>].

²⁴⁰ See *supra* Section II.B.

²⁴¹ States may wish to disregard kinship status to recognize that there are platonic but long-term relationships, such as that between an older parent and caregiving child, that would benefit from some level of formalized rights and protections, following the logic of Hawaii’s reciprocal beneficiary statute. HAW. REV. STAT. § 572C-2 (LEXIS through Ch. 8 of 2020 Leg. Sess.); see *infra* Appendix 2. Note that these relationships do not have the same rights and obligations as marriage. § 572C-6.

²⁴² Joslin, *supra* note 140, at 915.

- Inheritance of common domicile or lease upon termination or death.

The protections the registered partnership model I propose encompasses are similar to those offered by Colorado's designated-beneficiary law, which allows two people to select from a list of rights enumerated on a form provided by the state.²⁴³ Each partner can select whether she chooses to "grant" or "withhold" rights in sixteen different categories, and partners can answer differently (for instance, one person might grant her partner the right to dispose of her last remains while the other does not).²⁴⁴ The registered partnership model would expand upon these options—which, as the name suggests, deal primarily with healthcare and estate administration—by allowing partners to specify rights between them during their life together, like whether to share assets. The model would also empower partners, if they chose, to supplement the template with a contract of their own creation, subject to some limitations, such as not restricting the ability to terminate the relationship and not purporting to make a binding determination on child custody rights.²⁴⁵ It might also be open to more than two partners, as long as rights and obligations do not conflict.²⁴⁶ Adults would be able to enter into registered partnerships by appearing before their local county clerk with a basic form and could exit the partnership unilaterally at any time by submitting a notarized letter to the clerk, though states might opt for a more supervised dissolution should the parties decide to share property over a certain value or custody of children.²⁴⁷ While Colorado's designated beneficiary status,

243. See Colorado Designated Beneficiary Agreement Act, COLO. REV. STAT. §§ 15-22-101 to 15-22-112 (LEXIS through 2020 Leg. Sess.); Kaiponanea T. Matsumura, *Breaking Down Status*, 89 WASH. U. L. REV. (forthcoming Jan. 2021) (manuscript at 25) (on file with author).

244. *Designated Beneficiary Agreement*, DENVER OFF. CLERK & RECORDER (2020), <https://www.denvergov.org/content/dam/denvergov/Portals/777/documents/MarriageCivilUnions/Designated%20Beneficiary%20Agreement.pdf> [<https://perma.cc/T2QP-CMTR>]; see Culhane, *supra* note 162, at 149–50; Matsumura, *The Integrity of Marriage*, *supra* note 60, at 515–16.

245. Colorado does allow parties to a reciprocal-beneficiary agreement to limit the agreement's scope "by executing a superseding legal document," § 15-22-106(4), but the documents the state contemplates are "will[s], power of attorney [designations], or beneficiary designation[s] on an insurance policy or pension plan." *Designated Beneficiary Agreement*, *supra* note 244. The form makes no mention of contracts.

246. John Culhane argues for this approach in his excellent article *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples' Real Relationships*. Culhane, *supra* note 162, at 151.

247. California's domestic partnership law follows this approach to protect the more vulnerable partner. See CAL. FAM. CODE § 299 (West 2020).

like many others, terminates automatically upon the marriage of either party,²⁴⁸ that need not necessarily be the case under the registered partnership model.²⁴⁹

The registered partnership model takes inspiration from Elizabeth Brake's concept of "minimal marriage," in which "individuals select from the rights and responsibilities associated within marriage and exchange them with whomever they want, rather than exchanging a predefined bundle of rights and responsibilities with only one amatory partner."²⁵⁰ Although my proposal moves away from the marriage label, it aligns with Brake's vision that a minimal contractual regime through which people can construct caring relationships on their own terms is needed and that, indeed, "a liberal state is required to provide such a legislative framework for personal relationships."²⁵¹ The registered partnership model fosters both minimalism, for couples that seek it, and pluralism, encouraging couples to chart their own paths without a rigid framework.²⁵²

The registered partnership, with its ease of entry and exit, enables partners to find happiness. It does not trap people in unhappy marriages because of the cost of divorce,²⁵³ nor does it commingle partners' assets unless they so choose. This foregrounds individual choice and removes many structural obstacles to partners' happiness inherent in marriage. The ease of exit also means that for couples in abusive relationships, the partner suffering abuse can end the relationship unilaterally, without interacting with her abuser again. Not so in a marital divorce.²⁵⁴

248. COLO. REV. STAT. § 15-22-111(3) (LEXIS through 2020 Leg. Sess.).

249. See Culhane, *supra* note 162, at 151 (explaining that marriage can complement other state-recognized relationships and need not be an exclusive status).

250. ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 156 (2012).

251. *Id.* at 157.

252. Similarly, Brake explains that "minimal marriage" can actually be thought of as "marital pluralism," arguing that "a liberal state can set no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring relationships." *Id.* at 158.

253. Louise Rafkin, *Divorce Advice (and It Won't Cost You a Thing)*, N.Y. TIMES (Apr. 24, 2019), <https://www.nytimes.com/2019/04/24/fashion/weddings/divorce-advice-and-it-wont-cost-you-a-thing.html> [<https://perma.cc/5G7X-NXTU>] (reporting that U.S. divorces cost, on average, \$15,500 for each party).

254. See, e.g., Zoe Greenberg, *Their Husbands Abused Them. Shouldn't Divorce Be Easy?*, N.Y. TIMES (May 11, 2018), <https://www.nytimes.com/2018/05/11/nyregion/divorce-domestic-abuse-survivors.html> [<https://perma.cc/Y34S-WGYK>]. A person would see her abuser again if she sought to enforce a partnership agreement in court, but at least under the partnership regime, she would get to make that choice (unlike in a divorce, where couples *must* go through the legal system to dissolve their union).

And as Kathleen Hull, Ann Meier, and Timothy Ortyl note, children are likely to be better off when raised by two happily married parents, “[b]ut marital happiness is key.”²⁵⁵ They explain:

A number of studies have found that frequently quarrelling parents who stay married aren’t doing their kids many favors. Children of these types of marriages have an elevated risk of emotional and behavioral problems. But with the notable exception of parents in high-conflict marriages, most children who are raised by caring parents—one or two of them, married or not—end up just fine.²⁵⁶

Moreover, domestic violence within marriages “teach[es] children injustice,” making such marriages “by definition destabilizing.”²⁵⁷ The registered partnership model, by contrast, can offer children a support network without forcing parents to stay in an unhappy or unsafe situation.²⁵⁸

Although a registered partnership might not be the right fit for every couple, people should be given the option to make that choice for themselves. Not everyone desires the dense commitment that marriage brings, and even fewer couples have the ability to draft a cohabitation contract on their own without any framework from the state. A robust registered partnership alternative creates an opening for adults who do not (or not yet) wish to marry to form stable relationships on their own terms—a win for the state and for the partners.

B. Evaluating the Registered Partnership Model

The benefits of the registered partnership model far outweigh its potential downsides. This model allows couples the freedom to fashion a partnership that works for them and can be tailored to their desires and needs. Because it lacks the patriarchal history and symbolic significance of marriage, it also provides an avenue for partners to create their own roles in the relationship, unfettered by the gendered weight of “husband and wife.” The discussion that follows addresses some potential critiques of the model, to better flesh out the role registered partnerships might play in the United States.

²⁵⁵. Hull et al., *supra* note 26, at 33.

²⁵⁶. *Id.*

²⁵⁷. BRAKE, *supra* note 250, at 172.

²⁵⁸. See *id.* Brake argues that marriage is a “poor solution” to the poverty associated with single parenthood, because marriage itself “promotes female dependency, making women and children vulnerable,” and “[t]he economic costs of single parenting must be weighed with the detrimental effects of high-conflict and abusive marriages.” *Id.* at 191.

1. *The Registered Partnership and the Family*

One possible counterargument is that registered partnerships would result in a less stable family environment than our current regime. We might assume that a registered partnership would be inherently more volatile than a marriage, which could negatively affect both adults and children in a family. But let's interrogate this assumption on two fronts. First, the heavy commitments of marriage, in combination with its symbolic and practical financial impacts, cause many couples to choose not to marry at all. These couples are left in the "unstable" space of state-level protections for cohabitants,²⁵⁹ which may or may not exist, and are in a more uncertain position than registered partners would be.²⁶⁰

Second, while marriages may ultimately be more stable than registered partnerships, given that one virtue of the registered partnership is the ease of entry and exit, we should ask what kinds of couples remain in these stable marriages. Is it happy couples who choose to remain together because of barriers to divorce? Probably not. One study found that spouses in unhappy marriages are likely to suffer from "attachment insecurity, in the form of concerns about abandonment and love worthiness"²⁶¹ and another that "unhappily married people . . . seem to be moderately worse off" than their divorced counterparts.²⁶² Some sociologists "suggest that unhappily married people who dissolve low-quality marriages likely have greater odds of improving their well-being than those remaining in such unions,"²⁶³ a finding that supports—rather than undermines—the registered partnership model. Also, thinking through issues like asset-sharing and last wishes at the outset of a relationship would help to ensure that partners communicate their expectations to one another and might lead to a more stable relationship than is typical of current cohabitants.²⁶⁴

But what about children? I take the concern that children could be harmed by a new, and perhaps less stable, alternative to marriage seriously. Research shows that children do better in predictable environments,²⁶⁵ and we might

259. Bowman, *supra* note 152, at 146 ("The system as it now exists is clearly unstable.").

260. See Higdon, *supra* note 128, at 1 ("[C]ouples who choose to cohabit without marrying do so at their legal peril.").

261. Joanne Davila & Thomas N. Bradbury, *Attachment Insecurity and the Distinction Between Unhappy Spouses Who Do and Do Not Divorce*, 15 J. FAM. PSYCHOL. 371, 388 (2001).

262. Daniel N. Hawkins & Alan Booth, *Unhappily Ever After: Effects of Long-Term, Low-Quality Marriages on Well-Being*, 84 SOC. FORCES 451, 466 (2005).

263. *Id.* at 468.

264. See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 95-96 (2016).

265. See, e.g., Heather Sandstrom & Sandra Huerta, *The Negative Effects of Instability on Child Development: A Research Synthesis*, URB. INST. 25 (Sept. 2013),

worry that the registered partnership would destabilize family structures. Currently, married parents in the United States are more likely to stay together than cohabiting ones, and that may remain true to some extent even with a formal cohabitation option.²⁶⁶ However, conceiving a child during cohabitation makes a couple less likely to end their relationship.²⁶⁷ And although “cohabitation is often a marker of family instability,” associated with the negative effects instability has on children, “stable cohabiting families with two biological parents seem to offer many of the same health, cognitive, and behavioral benefits that stable married biological parent families provide.”²⁶⁸ Moreover, Naomi Cahn and June Carbone point out that most fathers of nonmarital children *do* cohabit with mothers following the child’s birth “and contribute substantially to them materially and emotionally”²⁶⁹ (though the parents may not stay together in the long term²⁷⁰).

Parents are already raising children outside of marriage in record numbers in the United States without any alternative partnership form on the table.²⁷¹ One in four parents are now unmarried,²⁷² and the registered partnership option could offer these families a greater degree of stability than currently exists outside of marriage. According to the American Academy of Pediatrics, “[c]hildren

<https://www.urban.org/sites/default/files/publication/32706/412899-The-Negative-Effects-of-Instability-on-Child-Development-A-Research-Synthesis.pdf> [<https://perma.cc/88AT-TR9W>] (“[I]ncreasing evidence has . . . documented the negative effects of family instability on children.”).

266. Richard V. Reeves & Eleanor Krause, *Cohabiting Parents Differ from Married Ones in Three Big Ways*, BROOKINGS INST. (Apr. 5, 2017), <https://www.brookings.edu/research/cohabiting-parents-differ-from-married-ones-in-three-big-ways> [<https://perma.cc/D3MY-ND9W>] (“[T]wo-thirds of cohabiting parents split up before their child reaches age 12, compared with one quarter of married parents.”).
267. Zheng Wu, *The Stability of Cohabitation Relationships: The Role of Children*, 57 J. MARRIAGE & FAM. 231, 234-35 (1995) (“[C]ohabiting couples with children in the relationship are less likely to experience union disruption than are childless couples. This finding provides evidence for the argument that having children can encourage both married and unmarried couples to stay together by increasing the benefits of the division of labor in the relationship, and by raising the financial, psychic, and opportunity costs of disruption.”); see Wendy D. Manning, *Children and the Stability of Cohabiting Couples*, 66 J. MARRIAGE & FAM. 674, 687 (2004).
268. Wendy D. Manning, *Cohabitation and Child Wellbeing*, 25 FUTURE CHILD. 51, 51 (2015).
269. Carbone & Cahn, *supra* note 264, at 118 (citing data from Princeton and Columbia University’s landmark Fragile Families and Child Wellbeing Study).
270. Laura Tach & Kathryn Edin, *The Compositional and Institutional Sources of Union Dissolution for Married and Unmarried Parents in the United States*, 50 DEMOGRAPHY 1789, 1790 (2013).
271. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RES. CTR. (Apr. 25, 2018), <https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents> [<https://perma.cc/6FL9-52DF>]. In 2009, “more than 40% of births were to unmarried mothers.” Tach & Edin, *supra* note 270, at 1789.
272. Livingston, *supra* note 271.

who are raised by civilly married parents benefit from the legal status granted to their parents,” yet sociologists observe that low-income women often “set a high financial bar for marriage,” opting not to wed until they feel they “can support a ‘white picket-fence’ lifestyle.”²⁷³ Offering a formal status to unmarried cohabitants would provide security and stability to these partners and many others.²⁷⁴

Furthermore, the French and Belgian examples demonstrate that a nonmarital form of partnership can work even when a couple has children. Although PACS couples do tend to have children “less often than married couples,” they have children “more often than those in a consensual union” – and in significant numbers.²⁷⁵ Sixty-eight percent of PACSers aged 30–34, 81% of PACSers aged 35–39, and 82% of PACSers aged 40–44 report having children²⁷⁶ – a signal that, in France at least, the popularity of a marriage alternative is not impeded by parenthood, and the two can coexist beneficially. The same is likely true in Belgium. Cohabitation with children is more common there than in France.²⁷⁷ One study of private households in the Flanders region showed that from 1990 to 2007, the number of couples cohabitating with children increased by 376%, while the number of couples married with children went down by 20% during the same period.²⁷⁸ This helps us understand that many couples choose to raise children in a partnership other than marriage and do so successfully.²⁷⁹

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273. Kathryn Edin & Maria Kefalas, *Unmarried with Children*, 4 CONTEXTS 16, 18 (2005). Low-income women may believe that getting married will make their lives harder, not easier, and “[i]f they cannot enjoy economic stability and gain upward mobility from marriage, they see little reason to risk the loss of control and other costs they fear marriage might exact from them.” Kathryn Edin, *What Do Low-Income Single Mothers Say About Marriage?*, 47 SOC. PROBS. 112, 130 (2000).
274. James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 361 (2006).
275. Bailly & Rault, *supra* note 182, at 2.
276. *Id.*
277. Zuzana Žilinčíková, *Do Children Matter for the Stability of Cohabitation? A Cross-National Comparison*, 72 POPULATION 649, 656 (2017).
278. Swennen & Mortelmans, *supra* note 189, at 13 tbl.6.
279. See, e.g., Claude Martin & Irène Théry, *The PACS and Marriage and Cohabitation in France*, 14 INT’L J.L. POL’Y & FAM. 135, 139 (2001) (“[C]ohabitation is now quite integrated in French society as a normal first stage in the establishment of a partnership, and even as a normal situation for millions of children. The situation of these children is very different from that of [children born out of wedlock] in past times . . . [t]his normalization process is leading to the total legal assimilation of [children born out of wedlock and children born within marriages].”); Sharon Sassler & Daniel T. Lichter, *Cohabitation and Marriage: Complexity and Diversity in Union-Formation Patterns*, 82 J. MARRIAGE & FAM. 35, 52 (2020) (“The cultural hegemony of the traditional family, with marriage as a centerpiece, is over. Complexity, diversity, and heterogeneity are ascendant . . .”).

A final note on the question of children and registered partnerships is this: one of the groups that might benefit most from the registered partnership model, older adults facing the Medicaid spend-down, will likely not have to worry about how these unions affect young children. When I suggest expanding the range of partnership options available to couples, it is with an understanding that not every form of partnership is right for every person, circumstance, or life stage. In some cases, the registered partnership may not be the best choice when children are involved, but it would nonetheless be a valuable, and possibly life-saving, option for some people.

2. *Would Partners – and States – Embrace a New Relationship Status?*

A second critique is that Americans might simply not take advantage of registered partnerships. This is a risk, but as the discussion in Part I demonstrates and the French and Belgian examples suggest, couples are in search of nonmarital forms of partnership. Though both the French PACS and Belgian legal cohabitation were introduced before either country had legalized same-sex marriage, the popularity of these alternative forms of partnership continues unabated, even with marriage now open to all couples.²⁸⁰ It is true that Americans tend to be more religious than their European counterparts,²⁸¹ perhaps suggesting that they may be less likely to embrace a secular marriage alternative, but we have seen that nonmarital partnerships succeed even in nations with strong religious ties, like Brazil.²⁸² Moreover, Americans are not a monolith, and the religiously unaffiliated share of the population continues to grow at a breakneck pace.²⁸³ (And what of the religious Americans who may face divorce in order to

280. See *supra* Sections III.A, III.B.

281. *The Age Gap in Religion Around the World*, PEW RES. CTR., at app. B (June 13, 2018), <https://assets.pewresearch.org/wp-content/uploads/sites/11/2018/06/12094011/Appendix-B.pdf> [<https://perma.cc/VBP4-TC7L>].

282. *Brazil's Changing Religious Landscape*, PEW RES. CTR. (July 18, 2013), <https://www.pewforum.org/2013/07/18/brazils-changing-religious-landscape> [<https://perma.cc/TSQ6-TVFV>].

283. As of 2018, the share of the U.S. population “who describe[s] their religious identity as atheist, agnostic or ‘nothing in particular,’” was 26%, increasing from 17% in 2009. *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RES. CTR. (Oct. 17, 2019), <https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace> [<https://perma.cc/LQZ2-JHHF>]. But see SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS AND THE REMAKING OF RELATIONSHIPS 193 (2017) (arguing that Americans’ “religious underpinnings make it unlikely that marriage will lose its place as a sacred or special type of union any time soon [and that e]ven if they are not religious . . . many American young adults . . . believe in marriage as the pinnacle of a love relationship”).

obtain healthcare benefits?²⁸⁴) To my knowledge, no state has enacted a domestic partnership statute with rights and obligations distinct from marriage and found it unsuccessful.²⁸⁵ Even if this alternative status is used by only a small number of couples – some of whom may be among the most marginalized in our society²⁸⁶ – it would still be worthwhile.

At the same time, the differences between the United States, a country of about 330 million people, and France and Belgium, which have around 76.7 million people combined, are not to be discounted.²⁸⁷ The United States's greater size and its higher marriage rate compared to France and Belgium (whose marriage rates are among the lowest in OECD countries²⁸⁸) will affect how this new form of partnership is implemented, as well as its popularity. Yet, from another perspective, the United States's vastness and diversity may argue in favor of the registered partnership model's adoption. In a country made up of so many different states and territories, each having distinct political and cultural identities, it is likely that a progressive marriage alternative would be favorable to at least some state legislatures. Though the United States as a whole has a high rate of marriage compared to many European countries (16.6 per 1,000 women aged fifteen and over in 2018), individual states and territories vary widely.²⁸⁹

284. Divorce can have significant implications with regard to a person's standing in her religion and may be an especially painful choice for a religious person to make. See, e.g., Michael Paulson, *As Vatican Revisits Divorce, Many Catholics Long for Acceptance*, N.Y. TIMES (Jan. 24, 2015), <https://www.nytimes.com/2015/01/25/us/as-vatican-revisits-divorce-many-catholics-long-for-acceptance.html> [<https://perma.cc/FMK6-SVMU>].

285. States have enacted some forms of partnership not comparable to the registered partnership model and found them unpopular, however. Vermont's brief but earnest experiment with reciprocal-beneficiary relationships, which the state enacted in 1999 (at the same time as civil unions), illustrates this point. *Marriage & Relationships: Domestic Partnerships & Civil Unions: Vermont*, *supra* note 122. Vermont's reciprocal-beneficiary statutes allowed "persons who are blood-relatives or related by adoption" to obtain benefits and protections related to medical decision-making, disposition of remains, and other advance directives. VT. STAT. ANN. tit. 15, § 1301(a) (repealed 2013). Ultimately, the legislature repealed the law effective May 2014, after finding that it had never been used. *Marriage & Relationships: Domestic Partnerships & Civil Unions: Vermont*, *supra* note 122.

286. See *supra* Section I.B.

287. *Belgium Population*, WORLDOMETER (2020), <https://www.worldometers.info/world-population/belgium-population> [<https://perma.cc/Q6Y8-XWCV>]; *France Population*, WORLDOMETER (2020), <https://www.worldometers.info/world-population/france-population> [<https://perma.cc/6VP7-2FJ9>]; U.S. *and World Population Clock*, U.S. CENSUS BUREAU (Aug. 30, 2020, 12:39 PM EST), <https://www.census.gov/popclock> [<https://perma.cc/44MS-CWUS>].

288. *Marriage and Divorce Rates*, OECD FAM. DATABASE 2 (June 30, 2019), https://www.oecd.org/els/family/SF_3_1_Marriage_and_divorce_rates.pdf [<https://perma.cc/PVH2-EASE>].

289. U.S. *Marriage and Divorce Rates by State*, U.S. CENSUS BUREAU (Jan. 15, 2020), <https://www.census.gov/library/visualizations/interactive/marriage-divorce-rates-by-state.html> [<https://perma.cc/4MSC-FK2R>].

Connecticut, for example, has a rate of 13.2, Utah comes in at 23.1, and Puerto Rico has a rate of just 6.9.²⁹⁰ Furthermore, as in France and Belgium, marriage rates have declined significantly in the United States since the 1960s,²⁹¹ and in 2016, nonmarital relationships numbered about nine million²⁹²—an indicator that the country may be open to a new form of partnership.

Other scholars have argued that “the United States needs lobbyists to fight for unmarried cohabitants,”²⁹³ and the registered partnership model this Note proposes offers benefits that might appeal to a wide range of interest groups. Building a broad coalition of support was a key factor in the success of proposals to increase protections for cohabitants in Europe;²⁹⁴ in France, for example, during debates about which groups ought to be eligible for the PACS, the French Parliament chose to expand its ambit to include different-sex couples for this reason.²⁹⁵ Elder- and disability-rights organizations, women’s and gender-equality groups, and those opposed to the entanglement of law and religion might each find something to like in the registered partnership. Yet the United States’s federal system will present challenges for organizing on a national scale. Unlike France, Belgium, Brazil, and other countries with marriage alternatives, a new form of partnership cannot be enacted in every U.S. state with a single stroke. But as Heather Gerken reminds, federalism is not an obstacle to, but a source of support for, new ideas and policies: “States . . . are the sites where we *battle* over—and forge—national policy, national politics, and national norms. National movements, be they red or blue, begin at the local and state level and

290. *Id.*

291. Parker & Stepler, *supra* note 17.

292. Joslin, *supra* note 140, at 915; see SASSLER & MILLER, *supra* note 283, at 1 (“The number of unmarried couples who live together in intimate unions has increased dramatically over the past few decades. . . . Furthermore, two-thirds of couples married since the beginning of the new century lived together before the wedding—suggesting that we have truly become a cohabitation nation.”); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 430 (2017) [hereinafter Joslin, *The Gay Rights Canon*] (“Marital supremacy continues to pervade the civil law despite the fact that about half of all American adults today live outside of marriage.”); Waggoner, *supra* note 140, at 50–57 (describing the decline of marriage and rise of cohabitation in the United States).

293. London S. Ballard, Comment, *Unmarried Cohabitants: How the United States Is Still Not Protecting Same-Sex Couples*, 20 OR. REV. INT’L L. 275, 303 (2018).

294. See Kim et al., *supra* note 167 and accompanying text; 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, 583 (2004).

295. Kim et al., *supra* note 167, at 82–83. The authors note that including different-sex couples in the PACS helped build broader support for its passage and that nonromantic “homesharers” were initially considered for inclusion as well, though they were ultimately excluded from the final law. *Id.*

move their way up.”²⁹⁶ Like the fight for marriage equality, a movement for non-marital partnership protections might begin in progressive states with strong grassroots organizing but could soon move into the national conversation.

3. *Administrative Costs*

Still, marriage is so ubiquitous and ingrained in our society that we might worry about introducing a novel form of partnership. Mary Anne Case describes the institution as “an off-the-rack rule,” akin to corporate status, whose “principal legal function . . . may not be to structure relations between the members of the marital couple, but instead to structure their relations with third parties.”²⁹⁷ What if registered partnerships, with their signature customizability and lack of uniformity, throw a wrench in this whirring machine, imposing administrative costs and negative externalities?²⁹⁸ I would point to Brake’s observation that, while the current marriage regime “may be an efficient system, it is not . . . currently just.”²⁹⁹ Marriage harms people in real ways, both in how it structures access to healthcare benefits and in how it limits the ability of couples to construct relationships on their own terms. Though marriage continues to be the dominant form of partnership in the United States, its legal meaning has changed over time in ways that increase costs to third parties because we have determined that these costs are justified. Marriage used to define the limits of the law of rape, establish who could have sex with whom and whether two people could live together, and regulate access to contraception.³⁰⁰ Not so today. These changes undoubtedly impose extra administrative costs—now, for example, a person who accuses her spouse of rape is entitled to a response from the justice system, regardless of marital status—but these administrative costs are worth it.

Moreover, many couples who wish to be together but maintain a separation of property, whether married or not, already engage in individualized contracting that imposes additional administrative costs.³⁰¹ If costs will be incurred on some scale regardless, it is preferable for states to create a standardized way for

296. Heather K. Gerken, *Federalism* 3.0, 105 CALIF. L. REV. 1695, 1696 (2017).

297. Case, *supra* note 161, at 1781; see BRAKE, *supra* note 250, at 159.

298. Matsumura, for example, notes increased “information-gathering costs” as a concern in his discussion of recognizing formal relationship statuses other than marriage. Matsumura, *The Integrity of Marriage*, *supra* note 60, at 515.

299. BRAKE, *supra* note 250, at 159.

300. See Case, *supra* note 161, at 1769; Joslin, *The Gay Rights Canon*, *supra* note 292, at 429; see generally *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (holding unconstitutional a state law that prohibited the provision of contraceptives to unmarried persons).

301. See *supra* Section II.B.

couples to define their relationships' parameters, which have the added benefit of helping to protect the more vulnerable partner.³⁰² In the absence of this, couples are forced into the proverbial Wild West of cohabitation contracts, and the right to a relationship on terms both parties desire exists only for those who can afford it.³⁰³

4. *Why Not Healthcare Reform Instead?*

Another potential concern is that the registered partnership offers an end run around means-tested government assistance programs like Medicaid. But this is a feature, not a bug. A central point of the registered partnership is to maintain partners' individual identities and asset structures (if they wish), avoiding the coverture-like consequences of marriage when it comes to government benefits.³⁰⁴ In general, it is a less intrusive form of partnership than marriage, and it makes sense that it preserves assets in this sphere, too. Moreover, we know that some married couples already intentionally sidestep Medicaid's income threshold requirements by divorcing³⁰⁵ — a dilemma that is as painful as it is increasingly prevalent in our aging society.³⁰⁶ Couples facing the Medicaid spend-down, which has been widely criticized for its effects on well spouses' assets,³⁰⁷ will do their best to preserve their resources and autonomy, no matter their circumstances. The law should not force them to sever legal ties to someone they love in their golden years. Instead, embracing a new form of partnership that

302. Kim et al., *supra* note 167, at 88 (suggesting that while U.S. laws do not currently “provide any set frame of contract for cohabitants to protect the more vulnerable party, France has created [the] PACS to facilitate such protection . . . [and the French example] may offer new ideas for protecting the more vulnerable party in cohabitations”); *see also* de Schutter & Weyembergh, *supra* note 191, at 466 (noting that the “principal purpose” of Belgian legal cohabitation when enacted “was to offer legal protection to the weakest partner in a relationship outside marriage”).

303. *See supra* Section II.B for a discussion of the costs and unpredictable enforcement inherent in private cohabitation contracts. Moreover, as Joslin highlights, courts have long dealt with “interstitial marriage cases . . . involving couples whose relationships include periods of marriage and periods of nonmarriage,” a phenomenon that “demonstrate[s] that courts are capable of figuring out how to . . . account for periods of nonmarital cohabitation.” Joslin, *supra* note 140, at 974, 976.

304. *See supra* Section I.B.3.

305. *See supra* notes 1–6 and accompanying text.

306. Jonathan Vespa, *The Graying of America: More Older Adults than Kids by 2035*, U.S. CENSUS BUREAU (Mar. 13, 2018), <https://www.census.gov/library/stories/2018/03/graying-america.html> [<https://perma.cc/LSY5-XHUT>].

307. *See supra* note 100 and accompanying text.

could be especially attractive to older Americans would allow couples to age with dignity.

An additional issue is the role that Medicaid-eligibility conditions currently play in reducing welfare spending. If legislatures use the aggregation of marital property for eligibility purposes as a tool to cabin benefits eligibility, thereby limiting welfare spending, they may be less likely to embrace a partnership status that undermines these cost-saving intentions. But this is not a reason to dismiss the registered partnership. To start, the registered partnership, when compared to marriage, saves the state money in a number of other areas. For example, when a couple is partnered instead of married, the state does not lose out on “marriage bonuses” that stem from a married couple’s joint filing of tax returns,³⁰⁸ and when one partner dies, the other might not be able to avoid paying gift, estate, and inheritance taxes imposed by some states in the way that spouses can.³⁰⁹ However, given that public-welfare spending has become the largest line item in state and local budgets,³¹⁰ these offsets may not be enough to make up for increased Medicaid expenses resulting from newly eligible beneficiaries. But even if it increases healthcare costs, the registered partnership model nonetheless has the potential to be a progressive, state-led, and socially popular tool for expanding Medicaid coverage and creating a more equal society for states willing to embrace this vision.

Yet one might wonder why I recommend creating a new form of partnership when what is actually needed is healthcare and social-welfare reform. I have two responses. First, reform in these spheres is desperately needed. A dramatic expansion of the U.S. social safety net, and especially an expansion that eliminates marital status as a factor in determining Medicaid eligibility,³¹¹ would alleviate many of the long-term care issues this Note identifies. For example, research suggests that states that opted to expand Medicaid under the Affordable Care

308. *Key Elements of the U.S. Tax System: What Are Marriage Penalties and Bonuses?*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/what-are-marriage-penalties-and-bonuses> [<https://perma.cc/KP5U-J7U8>] (“A couple is not obliged to file a joint tax return, but their alternative – filing separate returns as a married couple – almost always results in higher tax liability.”); see BRAKE, *supra* note 250, at 159.

309. *The State of State (and Local) Tax Policy: How Do State and Inheritance Taxes Work?*, TAX POL’Y CTR. (May 2020), <https://www.taxpolicycenter.org/briefing-book/how-do-state-estate-and-inheritance-taxes-work> [<https://perma.cc/BW6A-GLH7>].

310. *Public Welfare Expenditures*, URB. INST. (2020), <https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/public-welfare-expenditures> [<https://perma.cc/VE8G-7JMB>].

311. See generally Miller, *supra* note 100 (suggesting that marital property be disaggregated for Medicaid-eligibility purposes); *supra* text accompanying note 104.

Act experienced lower levels of Medicaid divorce among older adults.³¹² But American healthcare reform has fallen prey to the political gridlock that characterizes the modern Congress,³¹³ and large-scale federal welfare reform does not appear to be on the horizon, at least not in the near future.³¹⁴ The registered partnership model would create a pragmatic, state-driven way around this gridlock, enabling a wider swath of citizens to receive the healthcare benefits that they need while avoiding sacrificing formal recognition of their relationship. Second, healthcare reform is not a panacea to the real downsides of marriage for some couples. While it would certainly help remedy the indignity of the Medicaid spend-down, access to entitlements is not the only reason we might want a marriage alternative. Couples who seek to avoid commingling assets for inheritance and pension purposes, who wish to avoid the possibility of a complicated divorce, who reject the gendered weight of marital union, and more all might benefit from the registered partnership option.³¹⁵ Healthcare reform will not help them.

5. *The Future of Nonmarital Statuses*

Finally, it is worth noting that in both France and Belgium, the future of marriage alternatives remains in flux. Though the rights and obligations of the

312. See generally David Slusky & Donna Ginther, *Did Medicaid Expansion Reduce Medical Divorce?* (Nat'l Bureau of Econ. Research, Working Paper No. 23139, 2020), <https://www.nber.org/papers/w23139.pdf> [<https://perma.cc/R75B-PKBX>] (finding that Medicaid expansion reduced the number of Medicaid divorces among adults aged fifty to sixty-four with a college degree).

313. See, e.g., Sheryl Gay Stolberg & Nicholas Fandos, *As Gridlock Deepens in Congress, Only Gloom Is Bipartisan*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/us/politics/congress-dysfunction-conspiracies-trump.html> [<https://perma.cc/5X6P-4W8D>] (“Capitol Hill is absorbed with concern that Mr. Trump’s presidency has pushed an already dysfunctional Congress into a near-permanent state of gridlock that threatens to diminish American democracy itself . . . ‘The Senate has literally forgotten how to function,’ said Senator Angus King, independent of Maine.”).

314. See, e.g., ROBERT CHERNOMAS & IAN HUDSON, *TO LIVE AND DIE IN AMERICA: CLASS, POWER, HEALTH AND HEALTHCARE* 123-69 (2013) (describing the U.S. healthcare system as the result of conflict between different groups and arguing that the medical-industrial complex creates an obstacle to significant reform); ANTHONY DiMAGGIO, *THE RISE OF THE TEA PARTY: POLITICAL DISCONTENT AND CORPORATE MEDIA IN THE AGE OF OBAMA* 151-69 (2011) (recounting the Tea Party’s role in stymying progressive healthcare reform); Geoffrey Wetherell, Christine Reyna & Melody Sadler, *Public Option Versus the Market: Perceived Value Violations Drive Opposition to Healthcare Reform*, 34 POL. PSYCH. 43 (2013) (arguing that negative stereotypes about public-option beneficiaries contribute to the divisive debate over U.S. healthcare reform); N. Gregory Mankiw, *Why Health Care Policy Is So Hard*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/upshot/why-health-care-policy-is-so-hard.html> [<https://perma.cc/9BJS-QR8X>].

315. See *supra* Section I.A.

French PACS remain distinct from those of marriage, scholars suggest that the PACS has “evolved in the past decade toward an institution similar to marriage.”³¹⁶ But Wilfried Rault, a French sociologist and demographic researcher, argues that the PACS will never completely replace marriage, despite the latter’s “continual decline for several decades” in France.³¹⁷ The “more prudent hypothesis,” he suggests, is that “the diversity of forms of union” will “becom[e] increasingly well-established within French society,” allowing space for both PACSers and spouses.³¹⁸ Because of the multitude of reasons a couple might choose to enter into a PACS, it is likely to remain an attractive option for some groups. In Belgium, the future of the legal cohabitation regime is more precarious. Some seek to make legal cohabitation a copy-and-paste duplicate of marriage that lacks only the religious symbolism of marital union.³¹⁹ Currently, most users of legal cohabitation plan to eventually marry, leading some to push to make cohabitation closer to marriage, but Swennen argues that legal cohabitation should instead return to its roots as a “minimal contractual regime” for those who cannot or do not want to marry.³²⁰

The experience of marriage alternatives in the Netherlands, which in 2001 became the first country to legalize same-sex marriage,³²¹ serves as a cautionary note. Today, though the Netherlands maintains a cohabitation option, its treatment of marriage and registered partnerships has become almost coextensive.³²² The same is true of civil unions in New Zealand and South Africa, where “[p]erhaps due to the almost identical nature of civil unions and marriages, civil unions . . . have not enjoyed significant popularity.”³²³ These examples leave some questions about the future of marriage alternatives in France and Belgium: will the PACS and legal cohabitation move closer to marriage or retain their status as limited forms of partnership? A more limited partnership may be a better fit for some couples, and having a middle ground between marriage and singlehood allows couples to choose the best option for their needs.

316. Angélique Devaux, *The New French Marriage in an International and Comparative Law Perspective*, 23 TUL. J. INT’L & COMP. L. 73, 74 (2014).

317. Rault, *supra* note 180, at 154.

318. *Id.* at 154–55.

319. Interview with Frederik Swennen, *supra* note 190.

320. *Id.*

321. *Same-Sex Marriage*, GOV’T NETH., <https://www.government.nl/topics/family-law/same-sex-marriage> [https://perma.cc/Y9RK-JJVH].

322. *Marriage, Registered Partnership and Cohabitation Agreements*, GOV’T NETH., <https://www.government.nl/topics/family-law/marriage-registered-partnership-and-cohabitation-agreements> [https://perma.cc/734S-RJKW].

323. Feinberg, *supra* note 114, at 61.

Yet, as we consider what lessons these examples might offer in the U.S. context, it is important to remember one thing. The emerging Belgian-Dutch critique that marriage alternatives are in fact marriage stepping-stones (and so it makes sense to move them closer to marriage) is largely possible because both Belgium and the Netherlands have universal healthcare systems.³²⁴ In the United States, where marriage heavily impacts healthcare options,³²⁵ fostering a robust marriage alternative is even more imperative; indeed, part of the impetus for California and Washington's creation of nonmarital statuses was a desire to preserve access to healthcare benefits for seniors.³²⁶ The U.S. healthcare situation could act as a bulwark, preventing the registered partnership from moving closer to marriage itself.

Whether viewed through a financial or emotional lens, the benefits of the registered partnership model could be enormous for some couples. For those with disabilities or who anticipate needing long-term care, the financial downside of marriage cannot be overstated. A registered partnership alternative opens formal relationship recognition to a wide swath of the population that is, in a practical sense, excluded from marriage because of the United States's healthcare system. Even for couples without these considerations – though, in some sense, most people may eventually face the question of what to do when a partner requires long-term care – the registered partnership model frees partners from the expenses and expectations endemic to marriage. As the French, Belgian, and Latin American experiences demonstrate, nonmarital partnership can be a wonderful route for a couple not yet ready for (or able to afford) marriage to express commitment to one another.

324. Mark Pearson, Francesca Colombo, Yuki Murakami & Chris James, *Universal Health Coverage and Health Outcomes*, OECD 9 (July 22, 2016), <https://www.oecd.org/health/health-systems/Universal-Health-Coverage-and-Health-Outcomes-OECD-G7-Health-Ministerial-2016.pdf> [<https://perma.cc/6C6T-3ULZ>].

325. See, e.g., Heeju Sohn, *Health Insurance and Risk of Divorce: Does Having Your Own Insurance Matter?*, 77 J. MARRIAGE & FAM. 982, 991 (2015) (finding “that on average, people who were insured through their spouses’ health plans had lower rates of divorce,” and explaining that “[n]ot having an alternative source for health care outside their current arrangement . . . made individuals less likely to terminate their . . . marriages”); Carly Stern, *Forced to Divorce: Americans with Disabilities Must Pick Marriage or Health Care*, OZY (Apr. 24, 2019), <https://www.ozy.com/the-new-and-the-next/forced-to-divorce-americans-with-disabilities-must-pick-marriage-or-health-care/92284> [<https://perma.cc/2TN5-BW75>].

326. WASH. REV. CODE § 26.60.010 (West 2012); Murray, *supra* note 113, at 298.

CONCLUSION

Nancy F. Cott has described “[t]he monumental public character of marriage” as “its least noticed aspect.”³²⁷ From healthcare benefits to property inheritance, marriage alters the way federal and state governments view an individual and shapes the level of control she enjoys over her own future. Not every couple desires marriage’s thick conception of commitment, nor is the institution equally available to all Americans.³²⁸

This Note has put forward a vision for a robust alternative to the marriage-or-nothing dilemma: registered partnerships. Freed from the structure of marriage, which comes with both symbolic weight and tangible downsides, this partnership status will enable people to choose and shape a form of commitment that works for them. Some may wish to affirmatively choose marriage, while others may prefer a more limited form of partnership that enables them to retain more individual autonomy. The point is that the choice is theirs.

327. COTT, *supra* note 25, at 1.

328. People with disabilities, for example, face particular barriers to marriage: marrying may put at risk the healthcare benefits they need in order to live. See *supra* Section I.B.2.

APPENDIX

APPENDIX 1

PACS TEMPLATE³²⁹

REPUBLIQUE FRANCAISE



n°15726*02

Convention-type de pacte civil de solidarité (Pacs)

(Articles 515-1 à 515-7-1 du code civil)

Vous êtes célibataires, majeurs, et vous souhaitez conclure un pacte civil de solidarité (Pacs) pour organiser votre vie commune, dans votre mairie de résidence commune, ou dans votre consulat ou ambassade dans le ressort duquel dépend votre résidence commune.

Celui-ci est ouvert aux couples, de même sexe ou de sexe différent.

Aucune condition de nationalité n'est exigée pour conclure un Pacs en France. Pour conclure un Pacs à l'étranger, l'un au moins des partenaires doit être de nationalité française.

Vous êtes susceptibles de devoir respecter certaines conditions si vous faites l'objet d'une mesure de protection juridique.

Nous vous invitons à lire attentivement la notice explicative avant de remplir ce formulaire.

Veuillez cocher les cases correspondant à votre situation, renseigner les rubriques qui s'y rapportent, dater et signer conjointement cette convention de Pacs.

Pour rendre effectif votre Pacs, vous devez vous rendre devant l'officier de l'état civil de la commune dans laquelle vous fixez votre résidence commune ou, pour les futurs partenaires résidents à l'étranger, devant l'agent consulaire ou diplomatique de la circonscription consulaire dans le ressort de laquelle est située votre résidence commune, et présenter :

- le formulaire Cerfa n°15725*02 intitulé « Déclaration conjointe d'un pacte civil de solidarité (Pacs) » ;
- ce formulaire complété, si vous avez opté pour l'établissement d'une convention-type de Pacs dans le formulaire Cerfa n° 15725*02 intitulé « Déclaration conjointe d'un pacte civil de solidarité (Pacs) » ;
- les pièces justificatives nécessaires (listées dans la notice explicative n°52176*02).

329. *Convention-Type de Pacs* [Standard PACS Agreement], SERV.-PUB. (Jan. 18, 2019), <https://www.service-public.fr/particuliers/vosdroits/R48755> [https://perma.cc/T379-6SG8].

*Cerfa n°15726*02 – Convention-type de pacte civil de solidarité (PACS)*

L'identité des partenaires

Identité du premier partenaire

☐ Madame ☐ Monsieur

Votre nom (de famille) : _____

Votre/vos prénom(s) : _____

Votre date de naissance (au format JJ MM AAAA) : | _ | _ | _ | _ | _ | _ |

Votre lieu de naissance (commune, département, pays) : _____

Votre/vos nationalité(s) : _____

Identité du second partenaire

☐ Madame ☐ Monsieur

Votre nom (de famille) : _____

Votre/vos prénom(s) : _____

Votre date de naissance (au format JJ MM AAAA) : | _ | _ | _ | _ | _ | _ |

Votre lieu de naissance (commune, département, pays) : _____

Votre/vos nationalité(s) : _____

L'organisation de la vie commune des futurs partenaires

Afin d'organiser leur vie commune, les futurs partenaires ont opté pour l'établissement de la convention-type de Pacs suivante :

Convention-type de Pacs

(à compléter si les futurs partenaires ont choisi de ne pas utiliser de convention spécifique rédigée par leurs soins)

Article liminaire

Entre nous, il est conclu un pacte civil de solidarité, conformément aux articles 515-1 à 515-7-1 du code civil. Nous convenons d'organiser notre vie commune dans les conditions définies aux articles suivants.

Article 1- Aide matérielle

Nous nous engageons à une vie commune, ainsi qu'à une aide matérielle et une assistance réciproques. L'aide matérielle sera :

- ☐ proportionnelle à nos facultés respectives.
- ☐ fixée à hauteur de _____ euros par an.

Article 2- Solidarité des partenaires

A l'égard des tiers, nous serons tenus solidairement au paiement des dettes contractées par l'un de nous pour les besoins de la vie courante, sauf pour les dépenses manifestement excessives. Sur le plan fiscal, nous ferons l'objet d'une imposition commune établie à nos deux noms pour l'ensemble de nos revenus (y compris pour les revenus perçus l'année de l'enregistrement de la déclaration de Pacs, sauf option contraire).

Article 3- Régime des biens

Nous optons pour :

- ☐ le régime légal de la séparation des patrimoines.
- ☐ le régime de l'indivision des biens que nous acquerrons, ensemble ou séparément, à partir de l'enregistrement du Pacs.

Article 4- Formalités relatives à l'enregistrement du Pacs

Nous nous engageons à procéder à la déclaration conjointe de conclusion de Pacs devant :

- ☐ l'officier de l'état civil de la commune dans laquelle nous fixons notre résidence commune, c'est-à-dire à la mairie de :

- ☐ l'agent consulaire ou diplomatique de la circonscription consulaire dans le ressort de laquelle est située notre résidence commune, fixée à :

Le Pacs prend effet entre nous le jour de son enregistrement. L'accomplissement de la formalité de publicité rendra le présent pacte opposable aux tiers.

Cerfa n°15726*02 – Convention-type de pacte civil de solidarité (PACS)

Signatures des partenaires

Fait à : _____

Le l l l l l l l l

Signature du premier partenaire

Signature du second partenaire

*La convention-type de Pacs doit être restituée aux partenaires et conservée par ces derniers.
L'officier de l'état civil n'en garde pas de copie.*

La loi n°78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés garantit un droit d'accès et de rectification des données auprès des organismes destinataires de ce formulaire.

Champs à compléter par l'officier de l'état civil ou l'agent consulaire ou diplomatique procédant à l'enregistrement de la déclaration de PACS

[illegible]

Sous le numéro : | | | | | | | | | | | | | | | |

Signature et sceau de l'officier de l'état civil ou de l'agent consulaire ou diplomatique :

APPENDIX 2
ALTERNATIVES TO MARRIAGE BY U.S. STATE AND TERRITORY³³⁰

Many states, such as Connecticut,³³¹ Delaware,³³² New Hampshire,³³³ Rhode Island,³³⁴ Vermont,³³⁵ Washington,³³⁶ and Wisconsin³³⁷ allowed couples to enter into civil unions or domestic partnerships before they legalized same-sex marriage, but no longer offer these statutes.

State/Territory	Nonmarital Form of Partnership Currently Recognized?	Applicable Law
Alabama	No	
Alaska	No	

330. In some states, while civil unions or domestic partnerships are not generally recognized, individual municipalities may choose to recognize these forms of partnership within city limits. See, e.g., *How to File for a Domestic Partnership*, CITY BOS., <https://www.boston.gov/departments/city-clerk/how-file-domestic-partnership> [<https://perma.cc/3NC3-E2EC>].

331. Connecticut repealed its civil union statutes, effective October 1, 2010, and converted existing civil unions into marriages. CONN. GEN. STAT. §§ 46b-38aa to 46b-38oo (repealed 2009).

332. DEL. CODE ANN. tit. 13, § 218 (2013) (prohibiting the establishment of civil unions beginning July 1, 2013); Associated Press, *Delaware Legalizes Gay Marriage*, POLITICO (May 7, 2013, 5:39 PM EDT), <https://www.politico.com/story/2013/05/delaware-gay-marriage-091035> [<https://perma.cc/XLB6-DQEA>].

333. N.H. REV. STAT. ANN. § 457:46 (2010) (prohibiting the establishment of civil unions beginning January 1, 2010).

334. 15 R.I. GEN. LAWS ANN. §§ 15-3-1 to 15-3-13 (West 2014); H.B. 5015, Reg. Sess. (R.I. 2013) (legalizing same-sex marriage and repealing civil union laws).

335. Vermont continues to recognize civil unions entered into before September 1, 2009, when the state legalized same-sex marriage, but no new civil unions were allowed after that date. *Marriage & Relationships: Domestic Partnerships & Civil Unions: Vermont*, *supra* note 122. Vermont also offered reciprocal-beneficiary relationships for a time but repealed this law in 2013. See *supra* note 285 and accompanying text.

336. WASH. REV. CODE ANN. § 26.60.100(3)(a) (West 2012) (merging most domestic partnerships into marriages as of June 30, 2014). After Washington legalized same-sex marriage, the state limited domestic partnerships only to relationships in which at least one partner was 62 or older. Lornet Turnbull, *State to Same-Sex Domestic Partners: You're About to Be Married*, SEATTLE TIMES (Feb. 16, 2014, 8:37 PM), https://web.archive.org/web/20140217063604/http://seattletimes.com/html/localnews/2022921079_marriageconversionxml.html [<https://perma.cc/J4F7-75E8>].

337. WIS. STAT. ANN. § 770.07(1)(a) (West 2018) (prohibiting the establishment of new domestic partnerships after April 1, 2018).

American Samoa	No ³³⁸	
Arizona	No	
Arkansas	No	
California	Domestic partnerships open to two unmarried and unrelated adults.	CAL. FAM. CODE §§ 297-299.6 (West 2020)
Colorado	Civil unions open to two unmarried and unrelated adults; “[p]arties to a civil union may create agreements modifying the terms, conditions, or effects of a civil union.” ³³⁹	COLO. REV. STAT. ANN. §§ 14-15-102 to 14-15-118 (West 2018) (civil unions)
	Designated-beneficiary agreements allow two unmarried individuals to grant each other rights to make healthcare and estate administration decisions.	COLO. REV. STAT. ANN. §§ 15-22-101 to 15-22-112 (West 2018) (designated-beneficiary agreements)
Connecticut	No	
Delaware	No	
Florida	No	
Georgia	No	
Guam	No ³⁴⁰	

338. American Samoa is the only part of the United States in which same-sex marriage is not recognized. American Samoans are considered U.S. nationals, not U.S. citizens, and the territory has yet to determine whether the *Obergefell* decision applies to residents. See Fili Sagapolutele & Jennifer Sinco Kelleher, *American Samoa Questions Gay Marriage Validity in Territory*, ASSOCIATED PRESS (July 10, 2015), <https://apnews.com/c1deb598da6a482587fdd5bac501fc94> [<https://perma.cc/J5V3-QFVF>].

339. COLO. REV. STAT. ANN. §§ 14-15-108(1), 14-15-110 (West 2018).

340. In 2009, Guam legislators introduced multiple bills to recognize same-sex relationships, including domestic partnerships, but none passed. See, e.g., B. 212-30, 24th Leg., 1st Reg. Sess. (Guam 2009).

Hawaii	Civil unions open to two unmarried and unrelated adults.	HAW. REV. STAT. §§ 572B-1 to 572B-11 (2013) (civil unions)
	Reciprocal-beneficiary relationships allowed between two adults who are legally prohibited from marrying. ³⁴¹ The purpose of this law is to recognize “that there are many individuals who have significant personal, emotional, and economic relationships with another individual yet are prohibited by legal restrictions from marrying . . . , such as a widowed mother and her unmarried son.” ³⁴²	HAW. REV. STAT. §§ 572C-1 to 572C-7 (2013) (reciprocal-beneficiary agreements)
Idaho	No	
Illinois	Civil unions open to two unmarried and unrelated adults.	750 ILL. COMP. STAT. ANN. 75/1 to 75/90, 80/1 (2011)
Indiana	No	
Iowa	No	
Kansas	No	
Kentucky	No	
Louisiana	No	

341. See *Registration of Reciprocal Beneficiary Relationship*, STATE HAW., https://health.hawaii.gov/vitalrecords/files/2013/05/rbr_app.pdf [<https://perma.cc/XRX9-EG3L>].

342. HAW. REV. STAT. § 572C-2 (West 2013).

Maine	Registered domestic partnerships open to two unmarried and unrelated adults “who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other’s welfare.” ³⁴³	ME. REV. STAT. ANN. tit. 22, § 2710 (2010) (establishing registry)
Maryland	Domestic partnerships open to two unmarried and unrelated adults.	MD. CODE ANN., HEALTH-GEN. § 6-101 (West 2020)
Massachusetts	No	
Michigan	No	
Minnesota	No	
Mississippi	No	
Missouri	No	
Montana	No	
Nebraska	No	
Nevada	Domestic partnerships open to two unmarried and unrelated adults.	NEV. REV. STAT. §§ 122A.010-122A.510 (2009)
New Hampshire	No	
New Jersey	Civil unions allowed between two unmarried and unrelated adults.	N.J. REV. STAT. §§ 37:1-1 to 37:1-36 (2007) (civil unions)
	Domestic partnerships allowed between two unmarried and unrelated adults who are each sixty-two years old or older.	N.J. REV. STAT. §§ 26:8A-1 to 26:8A-13 (2007) (domestic partnerships)
New Mexico	No	

343. ME. REV. STAT. ANN. tit. 22, § 2710 (2010); *Declaration of Domestic Partnership*, ME. CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.maine.gov/dhhs/mecdc/public-health-systems/data-research/vital-records/documents/pdf-files/VS70.pdf> [<https://perma.cc/C6LL-9VE6>].

WHEN MARRIAGE IS TOO MUCH

New York	No ³⁴⁴	
North Carolina	No	
North Dakota	No	
Northern Mariana Islands	No	
Ohio	No	
Oklahoma	No	
Oregon	Domestic partnerships allowed between two unmarried and unrelated adults of the same sex. ³⁴⁵	OR. REV. STAT. ANN. §§ 106.300-106.325 (West 2008)
Pennsylvania	No	
Puerto Rico	No	
Rhode Island	No	
South Carolina	No	
South Dakota	No	
Tennessee	No	
Texas	No	
Utah	No	
Vermont	No	
Virginia	No	
U.S. Virgin Islands	No	

344. New York does allow domestic partners or those in a “similar relationship” limited rights by statute, such as hospital visitation and the right to control disposition of a partner’s remains. N.Y. PUB. HEALTH LAW § 2805-q (McKinney 2019); N.Y. PUB. HEALTH LAW § 4201 (McKinney 2019).

345. See *Declaration of Oregon Registered Domestic Partnership*, OR. DEP’T HUM. SERVS., <https://www.oregon.gov/oha/PH/BirthDeathCertificates/GetVitalRecords/Documents/45-6.pdf> [<https://perma.cc/8242-XFV4>].

Washington	Domestic partnerships allowed between two unmarried and unrelated adults if one partner is at least sixty-two years old. The state legislature explains that “[w]hile these couples are entitled to marry under the state’s marriage statutes, some social security and pension laws nevertheless make it impractical for these couples to marry.” ³⁴⁶	WASH. REV. CODE §§ 26.60.010-26.60.901 (2014)
Washington, D.C.	Domestic partnerships allowed between two unmarried adults.	D.C. CODE §§ 32-701, 32-702 (2016)
West Virginia	No	
Wisconsin	No	
Wyoming	No	

346. WASH. REV. CODE § 26.60.010 (2014).