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Integrated Nonmarital Property Rights

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INTEGRATED NONMARITAL PROPERTY RIGHTS

*E. Gary Spitko**

ABSTRACT

Nonmarital cohabitation has become a mainstream family structure in the United States. Yet despite the increasing prevalence of nonmarital cohabitants, American family property law generally fails to support nonmarital couples. This inequality under the law disproportionately disadvantages persons of color, those with relatively less education, and couples with relatively fewer economic resources. This Article considers the post-Obergefell need for law reform to better support nonmarital families, examines the principles that should ground nonmarital property rights reform, and proposes a novel approach to nonmarital property rights that integrates the law of dissolution with the law of succession, unifies the law governing nonmarital property rights with the law of marital property rights, and better serves not only the relatively privileged but also the relatively disadvantaged.

This Article proposes an integrated “accrual adaptor” to structure nonmarital property rights at dissolution and at death. The adaptor would be applied to a jurisdiction’s existing marital property law to translate a marital property right into a nonmarital property right. Thus, the proposal would not require an adopting jurisdiction to create any novel property law structures for the nonmarital context and would be fully compatible with the substantive principles and process norms that ground the adopting jurisdiction’s existing marital property law doctrines.

The accrual feature of this Article’s proposal would work to increase nonmarital property rights as the duration of the cohabitation at issue increases. This feature is premised on the notion that unmarried committed partners who have cohabited for a relatively longer period of time are more likely to have made commitments and engaged in caretaking behaviors that nonmarital property law reform should encourage. Thus, the relatively greater nonmarital property award that the proposal would assign to a cohabitation of relatively greater duration reflects the increasing trust that

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third parties develop in the propensity of the cohabitation to meet the couple's dependency needs as the relationship endures.

The proposed reform would provide nonmarital partners with lesser property rights as contrasted with marital partners in similar circumstances. This differential treatment is likely to make nonmarital property law reform more politically feasible in the short term. Moreover, such differential treatment can be justified in light of the greater commitment to mutual caregiving that marriage signifies in comparison to nonmarital cohabitation.

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I. BACKGROUND AND OVERVIEW

FOR more than half a century, marriage rates in the United States have been steadily declining.¹ Conversely, in the last several decades, cohabitation rates have increased across all adult age

1. See, e.g., *Provisional Number of Marriages and Marriage Rate: United States, 2000-2019*, CTRS. FOR DISEASE CONTROL & PREVENTION 1 (2019), <https://www.cdc.gov/nchs/data/dvs/national-marriage-divorce-rates-00-19.pdf> [<https://perma.cc/EY4E-4WKX>] (reporting a decline in marriage rate from 8.2 per 1,000 total population in 2000 to 6.1 per 1,000 total population in 2019); JULIANA HOROWITZ, NIKKI GRAF & GRETCHEN LIVINGSTON, PEW RSRCH. CTR., *MARRIAGE AND COHABITATION IN THE U.S.* 14 (2019), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2019/11/PSDT_11.06.19_marriage_cohabitation_FULL.final.pdf [<https://perma.cc/2A6A-USK4>] (reporting that the percentage of U.S. adults who are married fell from 58% in 1995 to 53% in 2019); Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 AM. COLL. TR. & EST. COUNS. L.J., 49, 51-53 (2015) (discussing evidence of the decline of marriage rates between 1967 and 2012).

groups.² Nonmarital cohabitation has now become a mainstream family structure in the United States.³ In 2019, the Pew Research Center reported that 7% of Americans were cohabiting.⁴ Cohabitation rates should be expected to continue to rise for the foreseeable future as younger cohorts with relatively more favorable attitudes toward cohabitation replace older cohorts that are relatively less accepting of cohabitation.⁵

This Article is concerned primarily with property rights for unmarried cohabitants, especially regarding marital property rights.⁶ Federal and state laws provide marital partners with a vast array of legal protections, entitlements, monetary benefits, and property rights.⁷ Significant marital property rights include, for example: community property rights in the nine states that follow community property principles; the right to seek spousal maintenance and an equitable division of marital property at fracture of the relationship; priority for the surviving spouse under every state's intestacy scheme; and the right of the surviving spouse to take a forced share of the decedent spouse's estate in all but one of the separate property states.⁸

A significant minority of states offer nonmarital couples the option of registering as civil union partners, domestic partners, or designated beneficiaries.⁹ These licensing regimes afford registrants comprehensive state

2. See, e.g., HOROWITZ ET AL., *supra* note 1, at 15 (reporting in 2019 that “cohabitation rates have increased across all age groups since 1995”).

3. See, e.g., Waggoner, *supra* note 1, at 55–56 (discussing evidence of the increase in cohabitation rates principally between 2000 and 2010).

4. HOROWITZ ET AL., *supra* note 1, at 4–5.

5. Susan L. Brown & Matthew R. Wright, *Older Adults' Attitudes Toward Cohabitation: Two Decades of Change*, 71 J. GEROONTOLOGY: SOC. SCIS. 755, 759–63 (2016) (reporting the results of their study evidencing that growing support for cohabitation among older adults is driven principally by cohort replacement rather than intracohort change of attitudes and concluding that “[t]his growth [in acceptance of cohabitation among older adults] coupled with an increasing share of unmarried adults portends rising levels of later life cohabitation in the coming years”).

6. Despite this primary focus, the Article's principal proposed legal reform may have application not only to nonmarital property rights but also to the provision to nonmarital cohabitants of a variety of additional federal and state legal protections and entitlements, such as family medical leave rights and monetary benefits, such as social security benefits.

7. *Baskin v. Bogan*, 766 F.3d 648, 658–59 (7th Cir. 2014) (listing many of the “tangible” benefits of marriage under Indiana, Wisconsin, and federal law); *Goodridge v. Dep't. of Pub. Health*, 798 N.E.2d 941, 955–56 (Mass. 2003) (noting that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death” and setting forth a non-comprehensive list of dozens of such rights); Gregg Strauss, *Why the State Cannot “Abolish Marriage”*: A Partial Defense of Legal Marriage, 90 IND. L.J. 1261, 1268–73 (2015) (discussing several categories of legal benefits arising from marital status).

8. Strauss, *supra* note 7, at 1268–73 (discussing principles of equitable distribution and spousal maintenance); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 72–73, 520–28, 553–55 (10th ed. 2017) (discussing principles of community property in Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin; the surviving spouse's privileged status under state intestacy statutes; and the surviving spouse's forced share in all of the separate property states except for Georgia).

9. See generally NAT'L CTR. FOR LESBIAN RTS., MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 5–23 (2020),

property rights.¹⁰ For example, California law affords to domestic partners all of the state rights that it affords to marital partners.¹¹ Importantly, California also imposes on domestic partners “the same responsibilities, obligations, and duties under law” that it imposes upon marital spouses.¹² This type of domestic partnership is, quite simply, marriage identified by a modern alternative label.¹³

Despite the increasing prevalence of nonmarital cohabitants, American family property law generally fails to support unlicensed nonmarital couples.¹⁴ For example, the Uniform Probate Code, which comprehensively addresses probate and non-probate transfers of property at death, fails to even acknowledge the existence of nonmarital couples.¹⁵ Indeed, no state treats a surviving unlicensed nonmarital cohabitant as an heir of the decedent partner under its intestacy statute or affords them the right to claim a forced share of the decedent partner’s estate under its elective share statute.¹⁶

<https://www.ncrights.org/wp-content/uploads/2015/07/Relationship-Recognition.pdf> [<https://perma.cc/35LR-MEVE>] (listing nine states and the District of Columbia that offer nonmarital partners the option of registering their relationship).

10. See, e.g., COLO. REV. STAT. ANN. § 14-15-107(1) (West 2021) (“A party to a civil union has the rights, benefits, protections, duties, obligations, responsibilities, and other incidents under law as are granted to or imposed upon spouses . . .”); OR. REV. STAT. ANN. § 106.340 (West 2021) (extending the privileges and obligations of marriage to domestic partners).

11. CAL. FAM. CODE § 297.5(a) (West 2021) (“Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to and imposed upon spouses.”).

12. *Id.*

13. See Dwight G. Duncan, *The Federal Marriage Amendment and Rule by Judges*, 27 HARV. J.L. & PUB. POL’Y 543, 550 (2004) (describing civil unions as “marriage-in-all-but-name”).

14. See, e.g., Danaya Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 AM. COLL. TR. & EST. COUNS. L.J. 341, 369 (2017) (“The more people in non-traditional family structures must rely on intestacy for passing wealth to their loved ones, the less likely the fit will be equitable, as the intestacy laws rely heavily on marriage and biological relationships for inheritance rights.”); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 178 (2015) (discussing ways in which the law fails to protect nonmarital couples).

15. See Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP., TR. & EST. L.J. 317, 338 (2014) (citing UNIF. PROB. CODE §§ 2-101 to 105 (amended 2010)) (“Thus, as currently drafted, the [Uniform Probate Code] continues not only to reflect but also to further entrench the privileging of marriage, attempting to skew and direct choices regarding family formation rather than leaving it to the affected individuals to choose the family form that best suits them.”); E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1104 (1999) (noting that Article II of the Uniform Probate Code “not only fails to provide intestate inheritance rights for same-sex committed partners, but also contains no indication in its two hundred-plus pages of provisions and commentary that gay men, lesbians, or the families of either exist”).

16. For an example of a court holding that no equitable remedies exist to overcome this treatment, see *In re Estate of Alexander*, 445 So. 2d 836, 840 (Miss. 1984) (holding that no equitable remedy was available to a surviving nonmarital cohabitant who had lived with the decedent for thirty-three years and who sought an equitable lien granting her a life estate in the residence that she had shared with the decedent). A New Hampshire statute

State law governing the property rights of unlicensed nonmarital cohabitants during the joint lives of the partners is far more complicated and varied.¹⁷ At one extreme, Illinois case law is utterly hostile to nonmarital property rights.¹⁸ The state rejects any “mutually enforceable property rights” arising from a nonmarital relationship, regardless of whether the claim is grounded in express contract, implied contract, or equity.¹⁹ Thus, to prevail on a claim under Illinois law against one’s nonmarital partner, one must demonstrate that the claim has an economic basis independent of the nonmarital cohabitation.²⁰ Illinois’s public policies in favor of marriage and against common law marriage undergird this hostility to the recognition of property rights arising from cohabitation.²¹

At the far opposite end of the spectrum from Illinois, Washington state case law provides for equitable distribution of property acquired during certain nonmarital cohabitations.²² To qualify for equitable distribution, a nonmarital cohabitant must first demonstrate that both partners enjoyed a “meretricious relationship,” which Washington case law defines as a “stable, marital-like relationship where both parties cohabit with the knowledge that a lawful marriage between them does not exist.”²³ Washington courts apply a non-exhaustive, five-factor test to analyze whether a meretricious relationship existed: “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for mutual benefit, and the intent of the parties.”²⁴ If a court

provides that “persons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the death of one of them, shall thereafter be deemed to have been legally married.” N.H. REV. STAT. § 457:39. Thus, cohabitants who qualify under the statute are *married* under New Hampshire law for the purposes of intestacy and the elective share.

17. See Raymond C. O’Brien, *Marital Versus Nonmarital Entitlements*, 45 AM. COLL. TR. & EST. COUNS. L.J. 79, 85–86, 117–24 (2020) (discussing how “state courts and legislatures take a variety of approaches to petitions for redress submitted by one nonmarital cohabitant against the other”); Strauss, *supra* note 7, at 1276–83 (surveying state law governing property rights of nonmarital cohabitants).

18. See *Blumenthal v. Brewer*, 69 N.E.3d 834, 860 (Ill. 2016); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979). Georgia law arguably falls at the same far end of the spectrum as Illinois law. *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977) (holding that claims premised upon a nonmarital cohabitation were not enforceable given that such claims were “founded upon an illegal or immoral consideration”). *But see Cates v. Brown*, 850 S.E.2d 764, 767 (Ga. Ct. App. 2020) (commenting that “the [Georgia] Supreme Court’s statements in holding that the fornication statute was unconstitutional bring *Rehak*’s continued applicability into doubt”).

19. See *Blumenthal*, 69 N.E.3d at 858, 860; *Hewitt*, 394 N.E.2d at 1210.

20. See *Blumenthal*, 69 N.E.3d at 855–56; *Spafford v. Coats*, 455 N.E.2d 241, 245 (Ill. App. Ct. 1983) (“[W]here the claims [between nonmarital cohabitants] do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims.”).

21. See *Blumenthal*, 69 N.E.3d at 857–59; *Hewitt*, 394 N.E.2d at 1207, 1209–11.

22. See, e.g., *In re Marriage of Pennington*, 14 P.3d 764, 769–770 (Wash. 2000) (en banc); *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (en banc).

23. *In re Marriage of Pennington*, 14 P.3d at 770–71; *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc).

24. *In re Marriage of Pennington*, 14 P.3d at 770 (citing *Connell*, 898 P.2d at 834).

finds that a meretricious relationship existed, the court will presume that all property acquired during the relationship belongs to both partners and will equitably distribute all property between the partners (if the presumption is not rebutted).²⁵ In equitably distributing the property acquired during the meretricious relationship, the court, for guidance, may look to Washington's statute governing the disposition of property upon dissolution of a marriage.²⁶

In between the extremes of Illinois's hostility to nonmarital property rights and Washington's marriage-like equitable distribution for meretricious relationships, the vast majority of states require a nonmarital cohabitant who seeks to assert a property claim against a partner arising from their cohabitation to rely upon a variety of contract and equitable doctrines, such as express contract,²⁷ implied-in-fact contract,²⁸ quantum

25. *In re Marriage of Pennington*, 14 P.3d at 770; *Connell*, 898 P.2d at 836–37.

26. *In re Marriage of Pennington*, 14 P.3d at 770; *Connell*, 898 P.2d at 835.

27. *See, e.g.*, *Tomal v. Anderson*, 426 P.3d 915, 923 (Alaska 2018) (“[A] valid contract between the [nonmarital cohabitant] parties—express or implied—will control the classification [of property as separate or partnership property] in the first instance.”); *Joan S. v. John S.*, 427 A.2d 498, 500 (N.H. 1981) (“[A] court will enforce an action in contract [between nonmarital cohabitants], if one can be shown to exist, to the extent that it is not founded upon the consideration of meretricious sexual relations.”); *Morone v. Morone*, 413 N.E.2d 1154, 1157–58 (N.Y. 1980) (holding an express cohabitation contract to be enforceable); *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (en banc) (holding that a nonmarital cohabitant had stated a cause of action for breach of an express contract and basing that holding “on the principle that 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”).

28. *See, e.g.*, *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224 (Nev. 1992) (holding that “unmarried cohabiting adults may agree to hold property that they acquire as though it were community property” and concluding “that there is substantial evidence to support the district court’s finding that [the cohabitants] impliedly agreed to hold their property as though they were married”); *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987) (concluding that a nonmarital cohabitant may bring “a claim for damages resulting from the [partner]’s breach of an express or an implied in fact contract to share with the [cohabitant] the property accumulated through the efforts of both parties during their relationship”); *Cook v. Cook*, 691 P.2d 664, 667, 670 (Ariz. 1984) (“Although isolated acts of joint participation such as cohabitation or the opening of a joint account may not suffice to create a contract, the fact finder may infer an exchange of promises, and the existence of the contract, from the entire course of conduct between the parties.”); *Marvin*, 557 P.2d at 110, 116 (“In the absence of an express contract, the courts should inquire into the conduct of the [nonmarital cohabitant] parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties.”).

meruit,²⁹ unjust enrichment,³⁰ constructive trust,³¹ and equitable adjustment.³² Not all of these states recognize all of these types of claims in the context of a nonmarital cohabitation. Some states, for example, refuse to recognize implied cohabitation contracts.³³ Moreover, some states impose additional requirements for certain claims by one cohabitant against another. For example, a few states will not enforce even an express cohabitation contract unless the contract is in writing.³⁴

In light of this jumble of limited state protections for nonmarital cohabitants, how to respond to increasing cohabitation rates and decreasing marriage rates has been a central issue for U.S. law reform for decades.³⁵

29. See, e.g., *Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987); *Marvin*, 557 P.2d at 110, 122–23 (“[A] nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.”).

30. See, e.g., *Cates v. Brown*, 850 S.E.2d 764, 767–68 (Ga. Ct. App. 2020) (recognizing a nonmarital cohabitant’s right to bring an unjust enrichment claim); *Salzman v. Bachrach*, 996 P.2d 1263, 1266 (Colo. 2000) (en banc) (allowing cohabitant’s claim against partner for unjust enrichment); *Cates v. Swain*, 215 So.3d 492, 496–97 (Miss. 2013) (holding that a court may “grant relief to [a cohabitant] based on the theory of unjust enrichment”); *Watts*, 405 N.W.2d at 313–14 (“Many courts have held, and we now so hold, that unmarried cohabitants may raise claims based upon unjust enrichment following the termination of their relationships where one of the parties attempts to retain an unreasonable amount of the property acquired through the efforts of both.”); *Turner v. Freed*, 792 N.E.2d 947, 950 (Ind. Ct. App. 2003) (“This Court already has determined that a party who cohabitates with another person without subsequent marriage is entitled to relief upon a showing of . . . a viable equitable theory such as . . . unjust enrichment.”).

31. See, e.g., *Goode v. Goode*, 396 S.E.2d 430, 438 (W. Va. 1990) (holding that “a court may order a division of property acquired by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife[,]” and that “[s]uch order may be based upon principles of contract, either express or implied, or upon a constructive trust”); *Watts*, 405 N.W.2d at 315 (holding “that if the [cohabitant] can prove the elements of unjust enrichment . . . she will be entitled to demonstrate further that a constructive trust should be imposed as a remedy”); *Marvin*, 557 P.2d at 110 (stating that a court considering a claim concerning the distribution of property acquired during a nonmarital relationship “may also employ . . . equitable remedies such as constructive or resulting trusts”).

32. See, e.g., *In re Mallett*, 37 A.3d 333, 338 (N.H. 2012) (noting that “where such theories are properly raised, unmarried couples living together may be able to obtain equitable adjustment of their rights”).

33. See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1157–58 (N.Y. 1980) (“Finding an implied contract such as was recognized in *Marvin v. Marvin* . . . to be conceptually so amorphous as practically to defy equitable enforcement” and declining to recognize an implied cohabitation agreement (citation omitted)).

34. See, e.g., MINN. STAT. ANN. § 513.075 (West 2021) (cohabitation agreement governing property and financial relations must be in writing and signed by the parties); N.J. STAT. ANN. § 25:1–5(h) (“A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination” is not binding unless in writing); TEX. BUS. & COM. CODE ANN. § 26.01(a)(1)–(2), (b)(3) (West 2021) (“[A]n agreement made on consideration of . . . nonmarital conjugal cohabitation” is not enforceable unless it is “in writing” and “signed by the person to be charged with the promise”); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992) (“If live-in companions intend to share property, they should express that intention in writing.”).

35. See, e.g., Huntington, *supra* note 14, at 174 (“The shift toward the nonmarital family is the most important challenge facing family law today, and it is essential to think critically about how to occupy the legal space left open by the retreat of marriage.”); Thomas P. Gallanis, *The Flexible Family in Three Dimensions*, 28 LAW & INEQ. 291, 291

Early on, this nonmarital property law reform movement intersected with the LGBT Civil Rights Movement.³⁶ Widespread calls for law reform to better support nonmarital partners began long before any U.S. state recognized the right of a same-sex couple to marry and long before marriage equality seemed feasible.³⁷ For example, beginning in the early 1980s, gay and lesbian rights activists lobbied municipalities to create domestic partnership registries and to recognize limited but significant rights, such as hospital visitation privileges for registrants.³⁸

Marriage inequality added urgency to these nonmarital law reform efforts.³⁹ The exclusion of same-sex couples from state-sanctioned marriage and its considerable rights and protections exposed same-sex couples to the risk of significant financial and emotional burdens.⁴⁰ Thus, marriage inequality caused the extension of rights to nonmarital couples to be seen as a gay civil rights priority.⁴¹ At the same time, intense hostility to any legal recognition for gay relationships imposed an additional obstacle for nonmarriage law reform efforts.⁴²

(2010) (“One of the central questions facing American family law throughout the last quarter century, and continuing today, is how to respond to the ‘extraordinary growth in the rate of nonmarital cohabitation.’”); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 255–56 (2002) (identifying the need to “better serve non-marital families while at the same time maintaining a reasonable ease of administration of estates” as “a most pressing challenge facing inheritance law scholars”).

36. See, e.g., Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1240 (2016) (“[T]he earliest [domestic partnership] regimes were broadly associated with efforts to secure rights for same-sex couples.”); Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1268–69 (2001) (“[S]ame-sex couples have been the dominant force in the movement to regularize nonmarital cohabitation.”).

37. See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91 (2014) (arguing that “before *Baehr* [*v. Lewin*] and the marriage advocacy that would follow[,] marriage shaped nonmarital recognition and, conversely, nonmarital recognition shaped marriage”); see also NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 49 (2008); Murray, *supra* note 36, at 1250.

38. Strauss, *supra* note 7, at 1276 (“LGBT advocates convinced municipalities to enact the first [domestic partnership] registries in the 1980s, when state-level recognition was politically infeasible.”).

39. NeJaime, *supra* note 37, at 128.

40. See, e.g., *In re Guardianship of Kowalski*, 478 N.W.2d 790, 791–92 (Minn. Ct. App. 1991) (recounting lesbian partner’s multi-year effort to be allowed to visit with and be appointed guardian of her partner with whom she had lived for four years prior to her partner becoming disabled); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RESV. L. REV. 275, 281–85 (1999) (explaining how a testator who disinherits her close blood relations in favor of her same-sex romantic partner is at elevated risk of having a trier of fact discard her estate plan).

41. See generally POLIKOFF, *supra* note 37, at 46–62; NeJaime, *supra* note 37, at 104–05, 114.

42. See, e.g., Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 798 (2012) (attributing the Uniform Probate Code’s lack of inheritance rights for unmarried partners, in part, to the political reality that “[r]ecognition of unmarried partners, particularly same-sex partners, was, and continues to be, controversial throughout the United States”).

In the wake of the Supreme Court's decision in *Obergefell v. Hodges*,⁴³ holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment preclude a state from denying marriage recognition to same-sex couples,⁴⁴ the landscape for nonmarital property law reform has shifted.⁴⁵ Marriage equality has rendered moot a principal argument against nonmarital property rights grounded in hostility toward recognition of gay unions: the fear expressed by some that domestic partner benefits would pave the way for same-sex marriage.⁴⁶

On the other hand, marriage equality removes one compelling social justice argument in favor of extending legal protections to nonmarital couples⁴⁷: failure to extend marital property rights to persons who are excluded from marriage because of their sexual orientation is a greater and distinct injustice than denial of property rights to couples who choose not to exercise their freedom to marry.⁴⁸ At the same time, marriage equality allows for a more concentrated focus on the argument that nonmarital property rights undermine marriage by incentivizing those who are free to marry to choose not to do so.⁴⁹

43. 576 U.S. 664 (2015).

44. *Id.* at 674–75.

45. *See, e.g.*, Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1930 (2018) (agreeing with scholars who have argued “that now that marriage is available to same-sex couples, claims based on nonmarital relationships will become less viable”); Murray, *supra* note 36, at 1244 (“In nationalizing marriage equality, *Obergefell* may sound the death knell for alternative statuses—and the promise of a more pluralistic relationship-recognition regime.”).

46. *See* NeJaime, *supra* note 37, at 153 (discussing the argument by lawmakers opposed to California's domestic partnership ordinance “that the domestic partnership law would both weaken the institution of marriage and pave the way for same-sex marriage”).

47. Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1519 (2016) (“Municipalities and states that created domestic partnerships as a way to create some parity for same-sex couples might no longer see the need to provide those benefits to the unmarried.”). For a discussion of scholarly arguments that *Obergefell* and other gay rights decisions “further entrench the supremacy of marriage” and may lead to an increase in discrimination against the unmarried, see Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 426–28, 440–43 (2017).

48. *See* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 869–70 (2005); NeJaime, *supra* note 37, at 116 (noting the argument of an early proponent of domestic partnership ordinances that “opposite-gender couples may marry if and when they choose. Their *temporary, voluntary* exclusion when they do not choose to marry is *not* equal to [same-sex couples'] *permanent, involuntary, and categorical* exclusion.” (alteration in original) (emphasis added) (citation omitted)); *cf.* Matsumura, *supra* note 47, at 1518 (“The arrival of nationwide marriage equality therefore calls into question [the reasons for various state alternatives to marriage, such as municipal registries,] for being and leaves their future existence in jeopardy.”).

49. *See* *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979) (“Will the fact that legal rights closely resembling those arising from conventional marriages can be acquired by those who deliberately choose to enter into what have heretofore been commonly referred to as ‘illicit’ or ‘meretricious’ relationships encourage formation of such relationships and weaken marriage as the foundation of our family-based society?”); *id.* at 1209 (“We cannot confidently say that judicial recognition of property rights between unmarried cohabitants will not make that alternative to marriage more attractive by allowing the parties to engage in such relations with greater security.”); NeJaime, *supra* note 37, at 152–53 (discussing California Governor Gray Davis's opposition to a domestic partnership that would be open to different-sex couples on the ground that such couples, unlike same-sex couples, enjoyed the right to marry and, thus, their inclusion would devalue marriage).

Yet marriage equality does not obviate the need for law reform to better serve the interests of nonmarital couples.⁵⁰ As Professors Bridget Crawford and Anthony Infanti have argued, “Eliminating de jure discrimination against same-sex couples by affording them access to marriage merely adds another group to a privileged circle. . . . [but] does nothing to eliminate the broader privileges based on marital status and conformity to the ‘traditional’ family norm of a conjugal couple surrounded by children.”⁵¹ Thus, critical issues remain: to what extent should nonmarital property law extend marital property rights to cohabitants who choose not to marry, and how should the law extend those rights?

For myriad reasons, millions of nonmarital couples who enjoy the freedom to marry choose not to do so.⁵² These reasons should inform the particulars of nonmarital property law reform. Many cohabitants consciously decide not to marry and not to participate in the marital property law regime in order to maintain their personal and financial autonomy.⁵³ For example, cohabitation may allow a cohabitant to maintain pension or social security benefits relating to a late or former spouse that would cease upon remarriage.⁵⁴ Cohabitation in lieu of marriage may also be the easiest and surest way for a cohabitant to protect their financial assets from a partner’s claims, allowing the property owner eventually to pass their wealth to their descendants from a prior relationship or to other favored relations.⁵⁵

For other cohabitants, cohabitation is a trial period that will conclude relatively quickly either in marriage or with a breakup of the relationship.⁵⁶ Roughly half of cohabitations end with a marriage or a breakup

50. See, e.g., Gary, *supra* note 42, at 799 (“[T]he availability of marriage or registration does not eliminate the need for an intestacy share for unmarried or unregistered partners.”); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U.L. REV. 547, 571–72 (2015) (“[M]arriage equality will not end the need to reconsider the extent to which a large number of government policies and programs rely on marriage as the exclusive mechanism of recognizing family structures.”).

51. Crawford & Infanti, *supra* note 15, at 338.

52. Waggoner, *supra* note 1, at 63–64.

53. Brown & Wright, *supra* note 5, at 756.

54. Beal v. Beal, 577 P.2d 507, 508 n.2 (Or. 1978) (en banc); Marvin v. Marvin, 557 P.2d 106, 117 n.11 (Cal. 1976) (en banc); Brown & Wright, *supra* note 5, at 756.

55. Brown & Wright, *supra* note 5, at 756 (noting that cohabitation in lieu of marriage “helps to protect assets and financial resources from being drained by the partner, facilitating economic transfers across generations”).

56. HOROWITZ ET AL., *supra* note 1, at 8 (“Most married adults (66%) who lived with their spouse before they were married (and who were not yet engaged when they moved in together) say they saw cohabitation as a step toward marriage when they first started living with their now-spouse. Among cohabiting adults who were not engaged when they moved in with their partner, 44% say they saw living together as a step toward marriage.”); Waggoner, *supra* note 1, at 64–65 (“The most important statistic for spousal-rights law is that for most people cohabitation is a temporary or short-term state. The parties either break up or get married fairly quickly.”); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 360 (2015) (“For many couples, cohabitation is experimental, a way for each cohabitant to evaluate whether the relationship is viable and the other party a trustworthy and compatible life partner.”); see also Marvin, 557 P.2d at 117 n.11 (noting that some

within eighteen months.⁵⁷ Only about 10% of cohabitations last five years or more.⁵⁸

Finally, many cohabitants do not marry because of their personal current financial insecurities.⁵⁹ In a 2019 Pew Research Center survey, 56% of cohabitants who were not engaged, but would like to marry someday, stated that their own lack of financial readiness was a reason why they were not engaged or married to their partner.⁶⁰ Fifty-three percent of these respondents listed their partner's lack of financial readiness as a reason why they were not engaged or married.⁶¹

As this data on financial insecurity suggests, participation in marriage and, thus, enjoyment of the benefits the state confers on married couples, differs along lines of class, race, and national origin.⁶² Asian and white adult Americans are far more likely to be married than are Hispanic and Black adult Americans.⁶³ Moreover, marriage rates have a positive correlation with income, education, and wealth.⁶⁴ In 2018, 77.4% of the highest U.S. earners were married, almost 49% of those in the middle three-fifths of earners were married, and only 16.7% of the lowest quintile of U.S. earners were married.⁶⁵ Among Americans twenty-five years and older, those with a bachelor's degree or more are more likely to be married than those with only some college experience who, in turn, are more likely to be married than those with only a high school diploma or less education.⁶⁶ Married Americans ages twenty-five to thirty-four have four times the median wealth of nonmarital cohabiting couples in the same age co-

nonmarital cohabitants “live together without marriage. . . . as a possible prelude to marriage”).

57. Waggoner, *supra* note 1, at 65.

58. *Id.*

59. HOROWITZ ET AL., *supra* note 1, at 9; Janet Adamy & Paul Overberg, *Affluent Americans Still Say ‘I Do.’ More in the Middle Class Don’t. Marriage and All Its Related Social and Financial Benefits Are Becoming a Luxury Good.*, WALL ST. J. (Mar. 8, 2020), https://www.wsj.com/articles/affluent-americans-still-say-i-do-its-the-middle-class-that-does-not-11583691336?st=3od1p0f9ggn34b3&reflink=desktopwebshare_permalink [<https://perma.cc/TM5U-FF9L>] (“Middle-class Americans are forsaking marriage amid financial insecurity, effectively making the institution more of a luxury good enjoyed by prosperous Americans.”).

60. HOROWITZ ET AL., *supra* note 1, at 9.

61. *Id.*

62. *See* Marvin v. Marvin, 557 P.2d 106, 117 n.11 (Cal. 1976) (“In lower socio-economic groups the difficulty and expense of dissolving a former marriage often leads couples to choose a nonmarital relationship.”). *See generally* JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY (2014) (exploring the relationships of socioeconomic class, education, and race with family structures).

63. HOROWITZ ET AL., *supra* note 1, at 16 (reporting that 63% percent of adult Asian Americans, 57% percent of adult white Americans, 48% percent of adult Hispanic Americans, and 33% percent of adult Black Americans are married).

64. *Id.*; Adamy & Overberg, *supra* note 59.

65. Mark J. Perry, *Explaining US Income Inequality by Household Demographics, 2018 Update*, AM. ENTER. INST. (Sept. 11, 2019), <https://www.aei.org/carpe-diem/explaining-us-income-inequality-by-household-demographics-2018-update> [<https://perma.cc/4PGZ-NDAZ>] (using data from the U.S. Census Bureau).

66. HOROWITZ ET AL., *supra* note 1, at 16 (reporting that, of Americans ages twenty-five and older, 66% with a bachelor's degree or more education, 56% of those with only

hort.⁶⁷ These data suggest that social justice concerns remain highly relevant to the debate over nonmarital property rights. Indeed, the need for reform to serve the interests of nonmarital families, to strengthen nonmarital relationships, and to support the efforts of nonmarital partners to care for one another remains compelling even after *Obergefell*.⁶⁸

This Article proposes an “integrated” approach to nonmarital property rights. Merriam-Webster defines “integrate” as “form[ing], coordinat[ing], or blend[ing] into a functioning or unified whole” and “unit[ing] with something else.”⁶⁹ It is in this sense that my reform proposal aims to integrate several realms of law that are too often addressed separately in the discourse on nonmarital property.

First, my proposal brings together the law of dissolution with the law of succession. The academic literature is replete with nonmarital property law reform proposals that focus solely on nonmarital property rights at the fracture of the relationship during the joint lives of the cohabitants.⁷⁰ Conversely, numerous reform proposals focus on nonmarital property rights solely when the relationship ends at death.⁷¹ These piecemeal approaches leave nonmarital cohabitants relatively more or less protected depending upon whether the cohabitation ends with a breakup or at the death of a partner. Thus, these narrow reforms risk incentivizing cohabitants to end a troubled relationship precipitously or remain in a broken relationship too long.⁷² As discussed below, although an approach to nonmarital property law reform that integrates dissolution law with in-

some college experience, and 54% with a high school diploma or less education were married).

67. Adamy & Overberg, *supra* note 59.

68. See generally Waggoner, *supra* note 1, at 93 (“If the marriage and cohabitation trends continue—downward for marriage, upward for cohabitation—or even if the trends stabilize at the current rates or reverse somewhat . . . , the lack of marital rights for committed partners will persist as a problem until a solution is found.”); Widiss, *supra* note 50, at 570 (“Larger demographic trends suggest, however, that if government policies continue to rely exclusively, or primarily, on marriage as the marker of family interdependence, the policies will leave out a significant portion of the poorest and most vulnerable same-sex couples and their children, just as the policies leave out a significant portion of the poorest and most vulnerable different-sex couples and their children.”).

69. *Integrate*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/integrate> [<https://perma.cc/7HUD-PA35>].

70. See PRINCIPLES OF THE L. OF FAM. DISSOLUTION §§ 6.01–06 (AM. L. INST. 2002); Antognini, *supra* note 45, at 1899; Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1567–69 (2009).

71. My own previous scholarship has discussed at length the need for law reform to extend intestate inheritance rights to nonmarital couples so as to promote the donative intent of the decedent nonmarital partner and to protect the reliance and reciprocity interests of the surviving nonmarital partner. See generally Mary Louise Fellows & E. Gary Spitko, *How Should Non-Probate Transfers Matter in Intestacy?*, 53 U.C. DAVIS L. REV. 2207 (2020); E. Gary Spitko, *Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience*, 103 IOWA L. REV. 2175 (2018) [hereinafter Spitko, *Intestate Inheritance Rights*]; Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409 (2010); Spitko, *supra* note 35; Spitko, *supra* note 15.

72. See *infra* Section II.C.2.

heritance law is not without potential drawbacks, my reform proposal addresses and mitigates them.⁷³

In addition, my proposed reform integrates the law governing nonmarital property rights with the law of marital property rights. The proposal is cognizant of the reasons why the law privileges marriage and of the effect that reform may have on marriage. The structure of my proposed reform reflects these concerns, respectively, in utilizing cohabitation duration to measure the cohabitants' commitment to their relationship and to mutual caretaking and in capping nonmarital property rights at a proper fraction of parallel marital property rights.⁷⁴

Finally, my proposal would reform nonmarital property law so that it better serves not only the relatively privileged but also the relatively disadvantaged. As discussed above, marriage rates correlate positively with income, wealth, and education.⁷⁵ Thus, nonmarital property law reform can disproportionately benefit adults with relatively fewer resources. This potential may be lost, however, if the reform structure requires a sophisticated understanding of legal principles to effectively opt in to nonmarital property rights given that those with fewer resources are less likely to have access to legal counsel. My reform proposal ensures that those with relatively fewer resources still benefit from the reform; the proposal eschews reliance upon contract as a primary means of protecting nonmarital cohabitants and prioritizes simplicity by piggybacking on the relevant jurisdiction's marital property law.⁷⁶

The remainder of this Article develops and defends a proposal for integrated nonmarital property rights. Part II of this Article discusses in greater detail the primary principles that ground my nonmarital property law reform proposal and puts forth a justification for reliance upon these principles.⁷⁷ These principles are (1) provision of only lesser rights for nonmarital cohabitants in comparison to marital partners; (2) compatibility with the values and norms that ground marital property rights; and (3) utilization of duration as a factor influencing a cohabitant's eligibility for any nonmarital property rights and the content of those rights. Part III details the structure of my reform proposal and explains how the proposed structure furthers the principles that should ground nonmarital property law reform.⁷⁸ The proposal's two most significant features are its adaptor mechanism and its accrual mechanism. The adaptor mechanism translates marital property rights into nonmarital property rights by applying a proper fraction to a hypothetical marital property award.⁷⁹ The accrual mechanism increases a cohabitant's nonmarital property rights as

73. *See infra* Section II.B.

74. *See infra* Section II.A.

75. *See supra* notes 62–68.

76. *See infra* Section III.B.1.

77. *See infra* Part II.

78. *See infra* Part III.

79. *See infra* Section III.B.1.

the duration of the cohabitation increases.⁸⁰ Part IV briefly concludes.

II. PRINCIPLES TO GROUND NONMARITAL PROPERTY RIGHTS

Three main principles comprise the blueprint for my proposed nonmarital property law reform. Whether a nonmarital partnership should be considered the equivalent of marriage for property rights purposes is the focus of intense academic debate. Therefore, this Part begins with a discussion of the nonmarriage equality issue. This Part then discusses the need for nonmarital property law reform to be compatible with the values and norms that ground marital property law. Finally, this Part concludes with a discussion of the use and importance of cohabitation duration or relationship duration to the structure of nonmarital property law reform.

A. LESSER RIGHTS FOR NONMARITAL PARTNERS

A number of scholars have advanced constitutional arguments in favor of a fundamental right not to marry that would give rise to protections for nonmarital property rights.⁸¹ A strong form of the constitutional argument provides that the state violates the fundamental right to remain unmarried when it favors married persons over unmarried persons with respect to any determination of rights.⁸² Thus, Jennifer Jaff has argued that “there is not even a rational relation between the promotion of family values and differential treatment of married and unmarried people; and laws and regulations which distinguish between people on the basis of marital status whether explicitly or in effect, should be struck down.”⁸³ However, Jaff herself conceded at the time she made her argument that “it would be foolish to expect this argument to meet with the Supreme Court’s approval.”⁸⁴ Indeed, to date, the Supreme Court has not held that the Constitution protects a fundamental “right to nonmarriage.”⁸⁵

Moreover, Jaff’s argument fails to acknowledge, let alone give sufficient weight to, the state’s interests in favoring marriage so as to encourage familial commitment and promote stability in core family

80. See *infra* Section III.B.2.

81. See, e.g., Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207, 208 (1988); Joslin, *supra* note 47, at 431.

82. Jaff, *supra* note 81, at 224–25.

83. *Id.* at 230.

84. *Id.* at 231.

85. Joslin, *supra* note 47, at 477 (“To be sure, a majority of the [Supreme] Court has never expressly embraced a broad right to nonmarriage.”); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1280 (2015) (discussing Supreme Court case law holding that various illegitimacy classifications violated equal protection and concluding that, in these cases, “[t]he Court found nothing unconstitutional about . . . promoting traditional marriage”); O’Brien, *supra* note 17, at 140 (“Currently there are no circumstances indicating that . . . the Court will act to extend entitlements to nonmarital cohabitants . . .”); see also *Schwegmann v. Schwegmann*, 441 So. 2d 316, 323 (La. Ct. App. 1983) (rejecting arguments in favor of a “constitutionally protected right against discrimination between wives and concubines”).

relationships.⁸⁶ The state benefits when marital partners commit to care for one another until parted by death.⁸⁷ The state also benefits when the commitment and stability of marital parents helps the parents' children to flourish.⁸⁸ Professor Clare Huntington has reviewed empirical data evidencing differential outcomes between children who live with married parents and children who live with cohabiting but unmarried biological parents.⁸⁹ She has written of the complex relationship between marriage, stable parenting units, and the best interests of children:

Children of unmarried parents fare much worse on a variety of metrics than children growing up with married parents. Poverty and factors such as parental education explain much of this differential, but there is increasing evidence that family structure is an independent causal factor. The connection between family structure and child outcomes is rooted in developmental psychology, particularly in a child's need for strong, stable, positive relationships.⁹⁰

In addition to its interest in familial commitment and stability, the state has a practical interest in minimizing the danger of specious and fraudulent claims given the ambiguous nature of many nonmarital relationships.⁹¹ This is especially relevant when the claimed nonmarital partnership ended because of the death of one of the purported partners. In such cases, the decedent is unavailable to testify as to the nature of the relationship.⁹²

86. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010) (listing the facilitation of "stable households in which the adults who reside there and are committed to one another by their own consents will support one another as well as their dependents" as among the reasons that the state licenses and fosters marriage); *Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904, 909 (Cal. 1983) (citing "the state's legitimate interest in promoting marriage" in rejecting the constitutional claim "that nonmarried persons must be afforded all the rights and benefits extended to married persons").

87. *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008) ("[T]he legal obligations of support that are an integral part of marital and family relationships relieve society of the obligation of caring for individuals who may become incapacitated or who are otherwise unable to support themselves."); O'Brien, *supra* note 17, at 142 ("What makes marriage distinctive and worthy of entitlements is the state-sponsored commitment structure that begins and continues through it.")

88. See, e.g., *Obergefell v. Hodges*, 576 U.S. 664, 668 (2015) ("Marriage also affords the permanency and stability important to children's best interests."); *Baskin v. Bogan*, 766 F.3d 648, 661 (7th Cir. 2014) ("[Marriage] enhance[s] child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together"); *In re Marriage Cases*, 183 P.3d at 423 ("Society, of course, has an overriding interest in the welfare of children, and the role marriage plays in facilitating a stable family setting in which children may be raised by two loving parents unquestionably furthers the welfare of children and society."); Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy; Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 475–76 (1983) (arguing that stability and continuity "are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage").

89. Huntington, *supra* note 14, at 196–202.

90. *Id.* at 170.

91. *Norman*, 663 P.2d at 910; *Harrod v. Pac. Sw. Airlines, Inc.*, 118 Cal. App. 3d 155, 158 (Cal. Ct. App. 1981).

92. See *Harrod*, 118 Cal. App. 3d at 158 (rejecting the equal protection and due process claims of an unmarried cohabitant who was precluded from bringing a wrongful death

A more moderate form of the constitutional argument provides that a constitutional right to nonmarriage might require the state to give some property rights to nonmarital couples, but it concedes that such a fundamental right would not preclude the state from favorably treating marriage in comparison to nonmarriage.⁹³ Thus, Professor Courtney Joslin argues that a complete denial of protection for nonmarital partners may infringe a fundamental right to nonmarriage.⁹⁴ More specifically, with respect to nonmarital property rights, Joslin argues that the state's failure to provide nonmarital partners with some meaningful property-related claims upon the dissolution of their partnership "raises significant constitutional concerns" given the autonomy interests of the cohabitants in entering into a nonmarital relationship and the significant financial harms and stigma that such a denial would impose upon the nonmarital partners.⁹⁵

Yet Joslin acknowledges that "[t]here are plausible arguments in favor of applying different property division rules to married couples and nonmarital couples."⁹⁶ Indeed, Joslin cites empirical evidence—evidence suggesting that cohabitation is a less stable family form than marriage and that nonmarital partners are less likely to be financially interdependent than are marital partners—as a seemingly reasonable justification for disparate treatment of marital and nonmarital couples.⁹⁷ Similarly, Professor Kaiponanea Matsumura concludes that a constitutional right not to marry, if one exists, would not preclude the state from privileging marriage over nonmarriage, provided that the state refrains from coercive disparate treatment.⁹⁸ He notes that "the state has historically taken an active role in promoting marriage and determining its legal incidents" and that "[c]ourts have repeatedly held that the government can distribute benefits to married couples without running afoul of a right not to marry."⁹⁹

Thus, again in light of the state's interests in incentivizing familial commitment and stability, even the moderate form of the constitutional argument for positive nonmarital property rights should be rejected. Although the Constitution may limit the state from coercing nonmarital

action following the death of her nonmarital partner, noting that "an action based on meretricious relationship presents greater problems of proof and dangers of fraudulent claims than an action by a spouse or putative spouse").

93. Joslin, *supra* note 47, at 431 ("[I]n arguing that the Constitution extends protection to those living outside of marriage, I do not mean to suggest that any time the government extends a particular protection to married people but not to unmarried people such differentiation is unconstitutional.").

94. *See generally id.*

95. *Id.* at 481–83.

96. *Id.* at 482.

97. *Id.*; *see also* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 100 (2016) ("Unmarried couples are less likely than married couples to commingle their assets.").

98. Matsumura, *supra* note 47, at 1546, 1555–56.

99. *Id.* at 1545. He adds that "history and precedent teach that states need not safeguard the choice to marry from any state encouragement." *Id.* at 1512.

cohabitants into marriage, the state need not provide any marital property rights to those who choose not to marry.¹⁰⁰ Rather, the state is free to insist that nonmarital cohabitants may obtain the property rights the state offers to incentivize marriage only by entering into marriage.¹⁰¹

The more serious arguments in favor of equal treatment between marital relationships and nonmarital relationships are policy-based. A number of influential academics and law reformers have advanced such nonmarriage equality arguments.¹⁰² In broadly advocating for law reform that would seek to promote the economic and emotional security of all families and would reject special rights for marital families that are not available to nonmarital family forms, Professor Nancy Polikoff has argued that “[c]ouples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have* to marry to reap specific and unique legal benefits.”¹⁰³ Professor Polikoff explains, “The most important element in implementing this approach is identifying the purpose of a law that now grants marriage unique legal consequences. By understanding a law’s purpose, we can identify the relationships that would further that purpose without creating a special status for married couples.”¹⁰⁴

The American Law Institute’s (ALI) Principles of Family Dissolution (ALI Principles) endorse a more limited nonmarriage equality by providing for nearly identical *inter se* remedies for domestic partners as for marital spouses upon dissolution of their partnership, but no rights for

100. Murray, *supra* note 36, at 1211 (“*Obergefell*, with its pro-marriage rhetoric, preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family and relationship formation.”); *see also id.* at 1248–49.

101. *See* Blumenthal v. Brewer, 69 N.E.3d 834, 860 (Ill. 2016) (“Since marriage is a legal relationship that all individuals may or may not enter into, Illinois does not act irrationally or discriminatorily in refusing to grant benefits and protections under the [Illinois] Marriage and Dissolution Act to those who do not participate in the institution of marriage.”); *see also* Willard v. Wash. Dep’t of Soc. & Health Servs., 592 P.2d 1103, 1106–07 (Wash. 1979) (en banc) (holding that a state regulation that included both parents of a child in an assistance unit when the parents were married to each other but included only one parent of a child in an assistance unit if the parents were not married to each other did not violate the equal protection rights of the excluded unmarried parent); *cf.* Califano v. Jobst, 434 U.S. 47, 53–54 (1977) (“Since it was rational for Congress to assume that marital status is a relevant test of probable dependency, the general rule . . . terminating all child’s benefits when the beneficiary married[] satisfied the constitutional test normally applied in cases like this.”); Califano v. Boles, 443 U.S. 282, 289 (1979) (“Congress could reasonably conclude that a [surviving parent] who has never been married to the wage earner [decendent parent] is far less likely to be dependent upon the wage earner at the time of [their] death.”).

102. *See, e.g.*, Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1166–67 (1981) (proposing that certain nonmarital cohabitants be treated as equivalent to marital spouses for purposes of property division and support claims at the dissolution of the nonmarital partnership and that all nonmarital cohabitants be treated as equivalent to marital spouses for purposes of intestate distribution and the forced share when the nonmarital partnership ends at the death of a partner).

103. POLIKOFF, *supra* note 37, at 3.

104. *Id.* at 5.

domestic partners against the state or third parties.¹⁰⁵ The ALI Principles, which the ALI adopted in 2000, are premised on the notion that in many cases “the absence of formal marriage may have little or no bearing on the character of the parties’ domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.”¹⁰⁶ Thus, at the fracture of a qualifying domestic partnership, the ALI Principles would extend the rules that apply to spouses for allocation of marital property and entitlement to “compensatory payments,” as though the domestic partners had been married during their domestic partnership.¹⁰⁷

More recently, Professor Lawrence Waggoner proposed for discussion a “De Facto Marriage Act,” significantly informed by the ALI Principles, which would grant all federal and state marital rights to qualifying nonmarital cohabitants.¹⁰⁸ Professor Waggoner justifies granting full marital property rights to certain nonmarital cohabiting couples by citing what he sees as a consensus that has emerged in legislation in Australia, Canada, Ireland, New Zealand, and Scotland, as well as the ALI proposal, in favor of treating sufficiently committed nonmarital couples as married-in-fact.¹⁰⁹ In fact, Ireland and Scotland grant only lesser nonmarital property rights to unlicensed cohabitants.¹¹⁰

Moreover, it is worth noting that the domestic partnership provisions of the ALI Principles have failed to gain legislative acceptance anywhere in the United States in the two decades after the ALI’s adoption of them.¹¹¹ Thus, the ALI Principles serve as a cautionary tale for those

105. IRA MARK ELLMAN, ALI FAMILY LAW REPORT (2000), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=241418 [<https://perma.cc/2QKC-MA3M>] (“Once parties are considered domestic partners, the dissolution of their relationship triggers property and compensatory payment . . . remedies that overlap almost entirely with those available at the dissolution of marriage.”).

106. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02 cmt. a (AM. L. INST. 2002) (asserting that certain domestic relationships “closely resemble marriages in function, and their termination therefore poses the same social and legal issues as does the dissolution of a marriage”).

107. *Id.* §§ 6.04–06 (establishing the principal exception to the identical treatment of spouses and domestic partners under the ALI Principles that domestic partners do not qualify for recharacterization of separate property as partnership property); *see id.* § 6.04(3) (“Property that would be recharacterized as marital property under § 4.12 if the parties had been married is not domestic-partnership property.”).

108. Waggoner, *supra* note 1, at 81–93.

109. Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 216 (2016).

110. *See* Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) §§ 173–175, 187 (Ir.) (setting out lesser rights for qualifying nonmarital cohabitants); Family Law Act 2006, (ASP 2) §§ 25–29 (Scot.) (also giving lesser rights to qualifying nonmarital cohabitants).

111. Carbone & Cahn, *supra* note 97, at 66 (“The ALI *Principles* effectively make the same remedies available following the dissolution of a cohabitation as a marriage, but the provision subjecting domestic partners and married couples to the same equitable division and alimony rules have not been fully adopted by any state.”); Scott & Scott, *supra* note 56, at 343 n.189, 359 (noting that the ALI Principles’ domestic partnership provisions “have gained little traction” and that “American states have not adopted either the *Principles* or the domestic-partnership status”).

hoping to see nonmarital property law reform enacted; enactment of legislation extending equal marital property rights to nonmarital partners may not be politically feasible in the near term.¹¹² Law reform advocates might better serve nonmarital families by crafting reforms that legislatures are more likely to enact.¹¹³

One powerful political objection to reform implementing a nonmarriage equality principle is likely to be that such reform would discourage and undermine marriage.¹¹⁴ Indeed, Professor Waggoner once advanced such an argument, although his most recent proposal evidences that his views on nonmarriage equivalence have evolved. His earlier scholarship proposed intestacy reform that favors unmarried committed partners by granting a surviving partner a lesser interest in the decedent partner's estate than the survivor would have received had the couple been married "to maintain the incentive to enter into a formal marriage."¹¹⁵

Leaving political necessity or prudence aside, a nonmarital property rights structure that calculates a nonmarital partner's award as a proper fraction of a marital property award may be justified in light of the greater commitment that marriage signifies.¹¹⁶ As the Massachusetts Su-

112. See UNIF. COHABITANTS' ECON. REMEDIES ACT prefatory note (UNIF. L. COMM'N 2021) (labeling the provisions of the ALI Principles relating to cohabitants "ambitious" and "perhaps radical"); Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 250–51 (advocating for intestate inheritance rights for fiancés and suggesting that setting the intestate share for a surviving fiancé at less than the share for a surviving spouse "might prove a political necessity"). *But see* Waggoner, *supra* note 1, at 83 (speculating that the ALI Principles may have failed to achieve legislative acceptance because "[t]he ALI is not organized to take any post-publication action to promote enactment of its Principles Statutes").

113. See Gary, *supra* note 42, at 824 (proposing intestacy reform that would make nonmarital partners *potential* heirs but not default heirs, and arguing that although some nonmarital partners may feel that her proposal does not go far enough, "being a potential heir is better than not being an heir at all").

114. Garrison, *supra* note 48, at 857, 861 (arguing that treating cohabitation and marriage as equivalent "discourages marital commitment and investment" and "devalues marriage"); see also Spitko, *Intestate Inheritance Rights*, *supra* note 71, at 2191 (noting that the principal objection to extension of legal protections to unmarried committed partners in Scotland was the concern that such reform "would undermine marriage and discourage people from marrying"); Mary Louise Fellows, Monica Kirkpatrick Johnson, Amy Chiericozzi, Ann Hale, Christopher Lee, Robin Preble & Michael Voran, *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 14 (1998) (reporting the concern that inclusion of unmarried committed partners in the intestacy scheme would be inconsistent with the role of intestacy law in supporting traditional marriage). *But see* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 57 (2017) (arguing that failure to confer nonmarital property rights may "impose competing incentives onto the individuals in the relationship, at least in considering property distribution: the man may seek to avoid marriage in order to retain his assets, while the woman may seek out that very status in order to ensure her property rights when the couple separates"); PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 6.02 cmt. b (AM. L. INST. 2002) (reasoning that "to the extent that some individuals avoid marriage in order to avoid responsibilities to a partner, this Chapter [providing for nonmarital property rights] reduces the incentive to avoid marriage because it diminishes the effectiveness of that strategy").

115. Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 80 (1994).

116. Hirsch, *supra* note 112, at 250–51 (arguing that an intestate share assigned to a surviving fiancé probably should be less than the intestate share assigned to a surviving spouse "given gradations of commitment").

preme Court has explained, “[I]t is the exclusive and permanent commitment of the marriage partners to one another . . . that is the sine qua non of civil marriage.”¹¹⁷ Marriage generally involves a formal, public, and express commitment by the partners to care for one another, in good times and in bad, in sickness and in health, until death do them part.¹¹⁸ In contrast, the commitments arising from cohabitation are far more ambiguous.¹¹⁹ Indeed, as noted above, there is significant evidence that nonmarital cohabitation is less stable than marriage, and nonmarital cohabitants are less financially interdependent than are marital partners.¹²⁰

Unquestionably, many married persons do not live up to the ideal of marital commitment. Conversely, many nonmarital partners demonstrate a commitment equal to that of the ideal marital spouse.¹²¹ Still, nonmarital property law reform should appropriately take into account the less certain commitment to mutual caregiving that generally arises from cohabitation, in contrast with marriage, by granting to nonmarital partners lesser property rights as compared to those granted to marital partners.¹²²

B. COMPATIBILITY WITH THE VALUES AND NORMS THAT GROUND MARITAL PROPERTY RIGHTS

Nonmarital property law reform should reflect the core substantive values and process norms that ground marital property law. Structuring nonmarital property rights to maximize compatibility with marital property law’s values and norms will tend to minimize the likelihood that

117. *Goodridge v. Dep’t. of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003).

118. *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (“[I]nmate marriages, like others, are expressions of emotional support and public commitment” and “expression[s] of personal dedication”); *Garrison*, *supra* note 48, at 817, 824; *Lifshitz*, *supra* note 70, at 1594 (noting that marriage “enables a person to pre-commit herself and hence to *signal* to her spouse, children, and society as a whole the scope and seriousness of her commitment”); *see also* *Widiss*, *supra* note 50, at 563 (“[F]ederal laws typically use marriage as an administratively convenient mechanism for identifying couples who are likely to have made a long-term commitment to each other, and/or likely to have intertwined finances.”).

119. *Carbone & Cahn*, *supra* note 97, at 94 (“[M]arried couples make an unqualified commitment to each other—for better or worse, in sickness and in health—while unmarried couples typically make a more contingent one.”); *Scott & Scott*, *supra* note 56, at 360 (“The decision not to marry when marriage is an option sends a confusing signal about the nature of cohabitants’ relationships and the extent to which they are defined by family-commitment norms.”).

120. *See Carbone & Cahn*, *supra* note 97, at 68 (“Unmarried couples are less likely than married couples to embrace financial interdependence.”); *Scott & Scott*, *supra* note 56, at 311–12, 360 (“Researchers have found that cohabitants have lower levels of commitment to their relationships than do married couples; perhaps for this reason, informal unions typically are far less stable than marriages.” (footnote omitted)); *Waggoner*, *supra* note 109, at 215 (observing that most cohabitants “either break up or get married fairly quickly”).

121. *Carbone & Cahn*, *supra* note 97, at 59 (noting that some cohabitations “involve profound commitments equivalent in every respect to the strongest marriages—except state sanction”).

122. *See id.* at 118 (“Recognizing nonmarriage as a legitimate system on its own terms requires acknowledging the different patterns of commitment between adults and to children.”).

nonmarital property law reform will undermine marriage. Such compatibility also should facilitate adoption and implementation of nonmarital property law reform.

Thus, appreciating why society privileges marriage is a critical issue for nonmarital property law reform. The answer to this question differs depending on whether both of the marital partners are living or the marriage has ended at the death of a marital partner. The apex value of family law, as distinct from succession law, is the promotion and facilitation of the legal family's private support of family dependencies.¹²³ Federal and state governments leverage their support of "family" to maximize the likelihood that family members will take care of one another, while minimizing the necessity of state support of dependent family members.¹²⁴ Dean Laura Rosenbury has explained,

Instead of bestowing positive rights to [certain benefits], states bestow the status of spouse, parent, or child and attach limited benefits to them. Indeed, the most robust benefit may be the right to family privacy, a negative right available only to those who opt into legal family status. In exchange for this privacy, families are largely expected to address their own needs; if they do not, the state often intervenes in a punitive fashion.¹²⁵

In succession law, in contrast to family law generally, incentivizing the legal family's private support function plays a subsidiary but still significant role.¹²⁶ The right of a surviving spouse to elect a forced share of the decedent spouse's estate, for example, is grounded in part on the notion that the marital support obligation to some degree survives the death of a spouse.¹²⁷ The forced share, however, is a rarity in succession law in that it curtails, rather than promotes, the decedent's donative freedom.¹²⁸

Without question, the central principle of American succession law is

123. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1865 (2014) (arguing that "the ultimate value underlying legal recognition of family [is] the value of private family support").

124. *Id.* at 1860 ("[G]overnment recognition of family ultimately appears rooted in the desire to privatize the dependencies of family members, encouraging families to 'take care of their own' with minimal financial assistance from the state.").

125. *Id.* at 1867 (footnotes omitted).

126. See Spitko, *supra* note 40, at 278 ("Testamentary freedom also contributes to the stability of the family by providing a financial incentive, if one is needed, for children and more distant relations to care for their physically declining (and soon-to-be-devising) family members.").

127. UNIF. PROB. CODE ART. II, Pt. 2 gen. cmt. (amended 2019) ("Another theoretical basis for elective-share law is that the spouses' mutual duties of support during their joint lifetimes should be continued in some form after death in favor of the survivor, as a claim on the decedent's estate."). The principal rationale for the modern elective share is the theory that marriage is an economic partnership and, thus, both marital partners have a right to share in the economic fruits of the marriage regardless of how the family wealth is titled. *Id.*

128. *Id.* (noting that most states treat disinheritance of the surviving spouse "as one of the few instances in American law where the decedent's testamentary freedom with respect to his or her title-based ownership interests must be curtailed").

the promotion of donative freedom.¹²⁹ Succession law favors the decedent's spouse and children, for the most part, because of the empirically grounded understanding that most decedents would want these family members to take their estate to the exclusion of others.¹³⁰ Succession law privileges donative freedom, which in turn promotes several important social policies. Chief among these policies is the maximization of wealth.¹³¹ The right to pass one's property at death to the persons or entities of one's choosing incentivizes the donor to continue to work diligently, invest productively, and consume prudently.¹³²

Nonmarital property law reform ought to be concerned with not only these primary substantive goals of marital property law, but also with marital property law's principal process norms. Here, too, the law of marital dissolution and succession law diverge. The law of marital dissolution gives judges a high degree of discretion, empowering them to weigh a host of considerations to arrive at an equitable distribution of marital property between the spouses.¹³³ In contrast, succession law prizes certainty and ease of administration of estates.¹³⁴ This process norm manifests in succession law's overwhelming preference for fixed entitlements.¹³⁵

These process norms evolved to support the substantive values of their respective spheres of law. Succession law's preference for predictability, for example, promotes donative freedom and the policies that ground donative freedom; a property owner's certainty during life that their estate plan will be given effect at their death increases the property owner's satisfaction and augments their incentive to maximize their wealth.¹³⁶

The Scottish experience with intestacy law reform to include unmarried committed partners is instructive on the dangers of ignoring relevant process norms. In 2006, Scotland enacted legislation extending intestate inheritance rights to certain unmarried committed partners.¹³⁷ This Scottish law reform granted to courts almost unlimited discretion to set the size, if any, of a qualified surviving nonmarital cohabitant's intestate share.¹³⁸ In sharp contrast, Scottish law grants fixed rights in the decedent spouse's

129. See John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1677 (2014); Spitko, *supra* note 15, at 1068–71, 1074.

130. See Spitko, *supra* note 15, at 1070–71.

131. Spitko, *supra* note 40, at 278.

132. *Id.*

133. Strauss, *supra* note 7, at 1317.

134. UNIF. PROB. CODE Art. II, Pt. 2 gen. cmt. (amended 2019) (noting that “ease of administration and predictability of result are prized features of the probate system”); cf. *Beren v. Beren*, 349 P.3d 233, 242 (Colo. 2015) (“[T]he [Colorado Probate] Code normally operates in favor of prompt disposition of estate matters”).

135. Spitko, *supra* note 15, at 1076–77.

136. See Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 7–8 (1992) (discussing the relationship between the satisfaction arising from bequeathing property to others and the normative goal of wealth maximization).

137. Family Law Act 2006, (ASP 2) §§ 25, 29 (Scot.).

138. *Id.* § 29(3)(d) (authorizing a court to consider “any other matter the court considers appropriate” in setting the size of an unmarried committed partner's intestate share).

testate or intestate estate to a surviving spouse and affords a court no discretion in setting the amount of a spouse's award.¹³⁹ The Scottish intestacy law reform recognizing unmarried committed partners has given rise to significant criticisms and calls for repeal among Scottish judges, law reformers, academics, and practitioners because of the nearly unfettered judicial discretion and resulting uncertainty that the provisions introduced into Scottish inheritance law.¹⁴⁰ Thus, the Scottish experience has led me to conclude that U.S. law reformers concerned with nonmarital property rights should seek to structure reform so "that the tolerance for uncertainty in the intestacy statute's cohabitation provisions . . . reflect[s] the tolerance for uncertainty found in the society's succession law generally."¹⁴¹

In sum, to avoid being at cross-purposes with marriage, nonmarital property law reform should respect the goals and process norms of *marital* property law. Thus, the law should protect nonmarital property rights at dissolution, first and foremost, to encourage nonmarital cohabitants to support one another and to support their children. In contrast, the law should afford nonmarital property rights at the death of a cohabitant primarily to promote the donative intent of the decedent but also to serve the goals of the state's elective share provisions. Finally, nonmarital property law reform should be mindful of the ways in which the distinct process norms of marital dissolution law and marital succession law serve the distinct cardinal substantive goals of these two bodies of law.

C. CONSIDERATION OF DURATION

A third critical issue that should be a focus for advocates of nonmarital property law reform concerns the significance to nonmarital property rights of both the duration of the cohabitation and the duration of the relationship. Indeed, consideration of either cohabitation duration or relationship duration, or both, is a ubiquitous feature of nonmarital property rights statutes, case law, and reform proposals.¹⁴² These frameworks

The surviving unmarried committed partner's intestate share may not exceed what the partner would have received had she been married to the decedent. *Id.* § 29(4).

139. Spitko, *Intestate Inheritance Rights*, *supra* note 71, at 2190–91 (discussing Scottish law's protections for a surviving spouse with respect to the decedent spouse's testate and intestate estate). Unlike the law of England and Wales, Scottish inheritance law does not provide for a discretionary family maintenance system. *See* Inheritance (Provision for Family and Dependents) Act 1975, W.S.I. 1975/63 (W. 1) art. 1, ¶ 1.

140. Spitko, *Intestate Inheritance Rights*, *supra* note 71, at 2189–91 (detailing criticisms from these groups); Alison C. Hetherington, *Cohabitation in Scots Succession Law: A Critical Examination of Section 29 of the Family Law (Scotland) Act 2006*, 10 ABERDEEN STUDENT L. REV. 1, 11–13 (2020) (commenting that "over a decade after its introduction, it is generally accepted that this [intestacy] provision is 'unsatisfactory' following the serious issues arising from its application" and noting that the widespread criticism of the intestacy reform has focused on the unguided judicial discretion and consequent inconsistency and uncertainty that the reform introduced into Scottish intestacy law).

141. Spitko, *Intestate Inheritance Rights*, *supra* note 71, at 2196.

142. *See Family Law Act 1975* ss 4AA(2)(a), 90SB(a) (Austl.); Waggoner, *supra* note 109, at 240.

typically consider cohabitation or relationship duration as relevant to the threshold question of whether the cohabitants fall within the scope of the nonmarital property rights scheme, the appropriate amount of a nonmarital property award under the scheme, or both of these issues.¹⁴³

1. *The Ubiquity of Duration*

Comprehensive nonmarital property rights statutes abroad generally treat the duration of the cohabitation or relationship as highly significant. New Zealand's "de facto relationship" statute is typical in its use of duration criteria.¹⁴⁴ Under New Zealand law, a "de facto relationship" gives rise to most of the property rights of marriage.¹⁴⁵ To qualify for de facto relationship status, the partners must have lived together as de facto partners for a minimum of three years unless the couple is raising a child together or one partner "has made a substantial contribution" to the relationship.¹⁴⁶ Moreover, once a claimant satisfies this duration prerequisite, the assessment as to whether the partners "live[d] together as a couple," a critical element in the statute's definition of a de facto relationship, focuses on "the duration of the relationship," among other factors.¹⁴⁷

Similar to New Zealand's use of duration, Australia and Ireland utilize cohabitation or relationship duration in both a qualifying period and a statutory definition of cohabitants.¹⁴⁸ The duration prerequisite, subject to exceptions, is two years in Australia and five years in Ireland.¹⁴⁹ Ireland also treats duration of the relationship as a relevant consideration for the court in determining the amount of a nonmarital property award.¹⁵⁰

Scotland's nonmarital property rights statute does not utilize a qualify-

143. *See infra* notes 144–166.

144. *See generally* Property (Relationships) Act 1976 (N.Z.).

145. *See, e.g., id.* ss 11–14 (governing division of relationship property).

146. *Id.* ss 1C(2)(b), 2E(1)(b), 14A.

147. *Id.* s 2D(2)(a). A New Zealand court deciding whether two people "live[d] together as a couple" must consider "the nature and extent of common residence," but the partners need not live in the same household to qualify under the statute. *Id.* ss 2D(2)(b), 2D(3).

148. *Family Law Act 1975* ss 4AA(2)(a), 90SB(a) (Austl.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) § 172(2)(a), (5)(b) (Ir.).

149. *Family Law Act 1975* s 90SB(a) (Austl.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) § 172(5)(b) (Ir.).

Several Canadian provinces also use duration prerequisites in their nonmarital property rights frameworks. *See, e.g.,* Adult Interdependent Relationships Act, R.S.A. 2002, c A-4.5, § 3(1) (Alberta) (prescribing a three-year cohabitation prerequisite); Family Law Act, S.B.C. 2011, c 25, § 3(1)(b)(i) (British Columbia) (prescribing a two-year cohabitation prerequisite); Family Property Act, C.C.S.M. 2017, c F25 § 1(1) (Manitoba) (prescribing a three-year cohabitation prerequisite); Family Law Act, R.S.O. 1990, c F.3 § 29(a) (Ontario) (prescribing a three-year cohabitation prerequisite); Family Law Act, R.S.N.W.T. 1997, c 18, § 1(1) (Northwest Territories and Nunavut) (prescribing a two-year cohabitation prerequisite); Family Property Act, R.S.S. 1997, c F-6.3, § 2(1) (Saskatchewan) (prescribing a two-year cohabitation prerequisite).

150. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 (Act No. 24/2010) § 173(3)(e) (Ir.).

ing period.¹⁵¹ The Scottish framework utilizes duration, however, in defining a “cohabitant.” One of three factors a Scottish court “shall have regard to” in determining whether an applicant qualifies as a cohabitant is “the length of the period during which [the nonmarital partners] have been living together (or lived together).”¹⁵²

In the United States, Washington state case law—the most comprehensive scheme in the United States for recognizing nonmarital property rights—utilizes duration criteria in determining which cohabitants are eligible for equitable distribution of property acquired during their cohabitation and also in determining how that property should be equitably distributed.¹⁵³ Under Washington law, as noted earlier, duration of the relationship is one of five nonexclusive relevant factors a court uses in analyzing whether a “meretricious relationship” existed such that, at fracture of the relationship, the court will equitably distribute property acquired during the relationship.¹⁵⁴ If the court finds that a meretricious relationship existed and proceeds to equitably distribute the property acquired during the meretricious relationship, the court may look to Washington’s statute for the disposition of property upon dissolution of a marriage for guidance.¹⁵⁵ That statute provides that duration of the marriage is one of four nonexclusive factors that the court shall consider in making an equitable distribution.¹⁵⁶ In U.S. states with less comprehensive nonmarital property rights frameworks, duration criteria can be relevant to an express or implied contract claim or a claim for equitable relief.¹⁵⁷

Finally, consideration of cohabitation duration or relationship duration also has been a significant feature of prominent nonmarital property law reform proposals both in the United States and abroad.¹⁵⁸ The ALI Prin-

151. See Family Law Act 2006, (ASP 2) §§ 25–29 (Scot.).

152. *Id.* § 25(2)(a).

153. *Warden v. Warden*, 676 P.2d 1037, 1039 (Wash. Ct. App. 1984) (applying “the least fictional analysis,” which “recognize[s] that certain meretricious relationships of long and durable standing may give rise to community property rights similar to those which prevail between married persons”).

154. *In re Marriage of Pennington*, 14 P.3d 764, 770–71 (Wash. 2000) (en banc); *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc).

155. *In re Marriage of Pennington*, 14 P.3d at 770; *Connell*, 898 P.2d at 835.

156. WASH. REV. CODE ANN. § 26.09.080(3) (West 2021).

157. See *Goode v. Goode*, 396 S.E.2d 430, 438 (W. Va. 1990) (holding that principles of express and implied contract and constructive trust may support an order dividing nonmarital cohabitants’ property acquired during their relationship and that “[f]actors to be considered in ordering such a division of property may include: the purpose, duration, and stability of the relationship and the expectations of the parties”); *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984) (holding that a nonmarital cohabitant’s complaint had sufficiently stated a cause of action for breach of an implied-in-fact contract and commenting that “[e]ach case should be assessed on its own merits with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties”).

158. See, e.g., *Waggoner*, *supra* note 109, at 240 (listing relationship duration as a factor that courts should consider in deciding whether nonmarital cohabitants qualify as “de facto spouses” entitled to marital property rights and establishing a rebuttable presumption that two people had a committed relationship if the couple “shared a common household with their minor children for a continuous period totaling [four] or more years” (alteration in original)); *Lifshitz*, *supra* note 70, at 1603–05, 1621–22 (proposing nonmarital property law

principles, for example, define qualified domestic partners as “two persons . . . not married to one another, who for a significant period of time share a primary residence and a life together as a couple.”¹⁵⁹ The ALI Principles also establish a rebuttable presumption that two persons are domestic partners “when they have maintained a common household . . . for a continuous period that equals or exceeds a duration . . . set in a rule of statewide application.”¹⁶⁰ Moreover, the size of “compensatory payments” to a domestic partner under the ALI Principles also depends upon the duration of the partners’ cohabitation.¹⁶¹

The more recent 2021 Uniform Cohabitants’ Economic Remedies Act (UCERA) also utilizes duration, although less extensively.¹⁶² In 2018, in response to the dramatic increase in cohabitation in the United States, the Uniform Law Commission convened a committee to draft a “model law to standardize the economic rights of unmarried cohabitants.”¹⁶³ The end product—UCERA—is a modest “enabling act” that merely seeks to protect the rights of cohabitants to bring contractual and equitable claims against a fellow cohabitant “without subjecting them to hurdles that would not be imposed on [non-cohabitant] litigants of similar claims.”¹⁶⁴

UCERA does not employ duration in its definition of a “cohabitant.”¹⁶⁵ UCERA, however, expressly makes duration relevant to the resolution of a cohabitant’s claim for equitable relief. Section 7 of the uniform law provides that “the court adjudicating a claim [for equitable relief] shall consider . . . the duration and continuity of the cohabitation.”¹⁶⁶

reform that would utilize a minimum cohabitation period prerequisite for “regular” cohabitation rights and would provide enhanced “relational” cohabitation rights arising only from longer-term cohabitations); SCOTTISH L. COMM’N, REPORT ON SUCCESSION 157–58 (2009), <https://scotlawcom.gov.uk/files/7112/7989/7451/rep215.pdf> [<https://perma.cc/L2XZ-WD9Q>] (concerning inheritance rights for nonmarital cohabitants and listing cohabitation duration as one of three exclusive factors that a court shall use to determine the portion of the decedent nonmarital cohabitant’s testate or intestate estate to which the surviving nonmarital cohabitant shall be entitled).

159. PRINCIPLES OF THE L. OF FAM. DISSOLUTION § 6.03(1) (AM. L. INST. 2002).

160. *Id.* § 6.03(3).

161. *See id.* § 6.06(1).

162. *See generally* UNIF. COHABITANTS’ ECON. REMEDIES ACT (UNIF. L. COMM’N 2021).

163. UNIF. L. COMM’N, UNIFORM LAW COMMISSION ANNUAL REPORT 11 (2017–2018) UNIF. COHABITANTS’ ECON. REMEDIES ACT prefatory note (UNIF. L. COMM’N 2021) (stating that UCERA “responds to the dramatic increase in the number of nonmarital cohabitants in the United States over the past half-century”).

164. UNIF. COHABITANTS’ ECON. REMEDIES ACT prefatory note (UNIF. L. COMM’N 2021); *see also id.* § 4(a)(2) (2021) (providing that a cohabitant’s contractual or equitable claim arising from contributions to the cohabiting relationship “is not . . . subject to additional substantive or procedural requirements because the parties are or were cohabitants or because of a sexual relationship between the cohabitants”).

165. *Id.* § 2(1) (defining “cohabitant” without reference to relationship duration or cohabitation duration); *id.* at prefatory note (“The term [cohabitant] does not set a time limit as to how long the individuals must cohabit in order to meet the definition.”).

166. *Id.* § 7(c)(2).

2. *The Utilities of Duration*

Use of duration criteria in nonmarital property rights frameworks has at least two principal purposes, both of which are related to the informal nature of nonmarital cohabitation.¹⁶⁷ First, duration of the nonmarital cohabitation or duration of the relationship can serve as an indication of the commitment of the nonmarital partners to one another and to the relationship.¹⁶⁸ Entry into a nonmarital cohabitation lacks the public declaration of commitment that is intrinsic to the entry into a marriage.¹⁶⁹ For nonmarital cohabitants, therefore, the passage of time substitutes for the public declaration of marriage as a signal to society and to the cohabitants themselves of their commitment to each other and their relationship.¹⁷⁰

Second, a durational prerequisite or qualifying period can be designed to give the parties a temporary safe harbor from the obligations that the nonmarital property rights framework otherwise would impose on nonmarital cohabitants.¹⁷¹ Thus, a durational prerequisite protects cohabitants who may not understand the nuances of the nonmarital property rights framework at the outset of their cohabiting relationship.¹⁷² A durational prerequisite also affords the cohabitants the opportunity to experience living together as a couple before deciding whether to assume mutual nonmarital property obligations.¹⁷³

This Article's reform proposal makes use of cohabitation duration for both of these purposes. The proposal utilizes a durational prerequisite so that its framework of nonmarital property rights and responsibilities does not apply to short-term cohabitants.¹⁷⁴ The proposal also employs duration as a marker for commitment by assigning greater nonmarital property rights as the duration of the nonmarital cohabitation increases.¹⁷⁵

167. Cf. Spitko, *supra* note 35, at 295–300 (arguing that the duration of a nonmarital cohabitation is likely to correlate positively with a decedent partner's intent to provide at death for the surviving cohabitant and with the survivor's contributions to the decedent and the survivor's reliance interests in their partnership).

168. N.Z. L. COMM'N, REVIEW OF THE PROPERTY (RELATIONSHIPS) ACT 1976: PREFERRED APPROACH, 82 (2018), <https://www.lawcom.govt.nz/sites/default/files/projectAvailableFormats/PRA%20-%20Preferred%20Approach%20-%20Issue%20Paper%2044%20-%20Final.pdf> [https://perma.cc/W8FA-5956] Scott & Scott, *supra* note 56, at 363–64 (“Well-designed proxies such as [significant duration of the cohabitation] would allow regulators to sort cohabitants in family relationships from those whose commitment (and social value) is less compelling.”).

169. Carbone & Cahn, *supra* note 97, at 95 (noting that, in contrast to marital partners, “[u]nmarried partners . . . may enter into and leave relationships without formalities and often without explicit markers commemorating the changing status of a relationship”).

170. N.Z. L. COMM'N, *supra* note 168, at 82 (“In the absence of a deliberate decision by the partners to formalise their relationship by getting married . . . the passage of time is used to indicate when a relationship has reached a sufficient level of commitment that justifies the imposition of property sharing obligations.”).

171. *Id.* at 82–83.

172. Bill Atkin, *Family Property*, in FAMILY LAW POLICY IN NEW ZEALAND 209, 216 (Mark Henaghan & Bill Atkin eds., 2013).

173. N.Z. L. COMM'N, *supra* note 168, at 82.

174. See *supra* Section II.C.1.

175. See *supra* Section II.C.2.

Moreover, this reform proposal is fully consistent with the two other principles that this Part argues should ground nonmarital property rights reform. First, the reform proposal affords only lesser rights for nonmarital cohabitants relative to marital partners. Second, by its very nature, the proposal is fully compatible with the substantive values and process norms that ground marital property rights.¹⁷⁶ In the next Part, the Article turns to a thorough explanation of my proposal for integrated nonmarital property rights reform.

III. AN INTEGRATED ACCRUAL ADAPTOR FOR NONMARITAL PROPERTY RIGHTS

I propose an integrated “accrual adaptor” that would structure nonmarital property rights at dissolution and at death. This Part explains how such an accrual adaptor would apply to nonmarital property rights across the board. This Part further discusses the significant merits of my proposed reform and evaluates the likely primary criticism of an integrated approach to nonmarital property law reform.

In short, as this Part details, my proposed framework would allow a qualifying nonmarital cohabitant to claim any marital property right, but the nonmarital entitlement would be reduced in value relative to a marital property award to reflect the fact that the claim arises from a nonmarital cohabitation rather than a marriage. Thus, calculation of a nonmarital property interest would begin by considering what marital property award the claimant would have been entitled to had they been married to their partner during the entirety of their cohabitation. This preliminary award would then be discounted, with the discount off the marital property award being inversely proportional to the duration of the nonmarital cohabitation.

A. QUALIFICATION OF AN APPLICANT AS AN UNMARRIED COMMITTED PARTNER

Any provision of a nonmarital property right to an unmarried committed partner involves two principal steps: qualification of an applicant as an unmarried committed partner and quantification of the nonmarital property right. This Article deals primarily with the latter. Still, a thoughtful evaluation of the Article’s proposed scheme for calculation of a nonmarital property interest requires an appreciation of the nature of the means for qualification of the unmarried committed partner.

Statutory reform might provide for qualification of nonmarital partners via a registration scheme, which enables self-identification; a multi-factor approach, which requires a court to evaluate the nature and quality of the relationship against a statutorily defined standard; or a combination of

176. *See supra* Section II.B.

the two.¹⁷⁷ While the registration approach has the virtue of certainty, it suffers from the same type of underinclusiveness as the marital property regime in that it excludes otherwise deserving applicants who failed to formalize their union with the state.¹⁷⁸ The multi-factor approach mitigates underinclusiveness but at the cost of increased uncertainty that a subjective inquiry necessarily entails.¹⁷⁹

The combination registration/multi-factor approach is preferable.¹⁸⁰ The combination approach lessens underinclusiveness through its multi-factor component while affording committed partners the option of certainty through the safe harbor of registration. Thus, the combination approach introduces uncertainty in fewer cases.¹⁸¹ Still, a significant degree of uncertainty remains a feature of the combination registration/multi-factor approach given that a claimant may seek to qualify as an unmarried committed partner by means of a subjective inquiry.

My proposal for an integrated accrual adaptor for nonmarital property rights is designed to accommodate this uncertainty through the accrual mechanism discussed in detail below. The rationale is that society can be more confident of a cohabiting couple's commitment to their relationship and to one another the longer their relationship endures. Thus, the accrual mechanism gradually increases nonmarital property awards as cohabitation duration increases, along with society's certainty in the commitment of the cohabitants.

B. QUANTIFICATION OF THE NONMARITAL PROPERTY RIGHT

Given a policy or political decision to structure nonmarital property law reform so that a nonmarital partner's property award does not mirror that of a similarly-situated marital partner, my proposed integrated accrual adaptor for nonmarital property rights has much to recommend it as a means to implement a decision to differentiate between marital and nonmarital property rights. My proposed accrual adaptor translates marital property rights into nonmarital property rights by discounting the former. Thus, the accrual adaptor approach affords lesser property rights to nonmarital partners in contrast with marital partners in similar circumstances. As discussed below, the integrated adaptor feature of my proposal has the virtue of simplicity of design and the related virtue of inherent compatibility with the adopting jurisdiction's marital property law substantive values and process norms. Moreover, the accrual feature of my proposal builds a reasoned proportionality into nonmarital property law reform, so that the size of any nonmarital property award reflects the level of confidence that outside parties can have that the nonmarital part-

177. Spitko, *supra* note 35, at 259–61 (discussing the merits and demerits of each approach).

178. *Id.* at 259–60.

179. *Id.* at 260–61.

180. T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 84 (2004); Spitko, *supra* note 35, at 261.

181. Spitko, *supra* note 35, at 261.

ners at issue committed to performing caregiving functions for one another.

1. *The Adaptor Feature*

Whatever the nonmarital property right at issue, my scheme would require a court to first calculate a preliminary award that the qualified nonmarital partner applicant would have received under parallel marital property law had the applicant been a marital partner. The court would then apply an adaptor to this preliminary award to calculate the final nonmarital property award.¹⁸² Thus, the adaptor would work with whatever rules the jurisdiction applies to the parallel marital property right at issue to translate the marital property right into a nonmarital property right.¹⁸³

For example, assume an adaptor with a fixed value of 25%. Assume further that a court using the state's marital property law calculates a preliminary property award for the nonmarital cohabitant claimant valued at \$100,000, which represents what the claimant would have received had they been married to their partner during their cohabitation. The court would then use the adaptor to translate that \$100,000 marital property figure into a nonmarital property award valued at \$25,000.¹⁸⁴

A virtue of the proposed adaptor is its simplicity.¹⁸⁵ The adaptor works with a jurisdiction's existing marital property law. Thus, a legislature might adopt my proposal without having to create any novel corresponding property law structures for the nonmarital context and, indeed, without otherwise modifying the jurisdiction's law of property division, support, intestacy, or the elective share.¹⁸⁶

182. Cf. SCOTTISH L. COMM'N, *supra* note 158, app. A, at 157 (directing a court to consider several factors in determining an "appropriate percentage" of the decedent cohabitant's testate or intestate estate to which the qualified surviving cohabitant would have been entitled had she been the decedent's spouse or civil partner (citing Succession Bill (Draft) §§ 22(3), 23(2) (Scot.)).

183. Thus, my instant proposal differs from my 2002 proposal for an accrual/multi-factor approach to intestate inheritance rights for unmarried committed partners in that the latter is a stand-alone reform that would override a jurisdiction's existing intestacy scheme. See generally Spitzko, *supra* note 35.

184. In 2009, the Scottish Law Commission proposed succession law reform for nonmarital cohabitants that would have directed courts "to decide to what extent the surviving cohabitant *deserves* to be treated as the deceased's spouse or civil partner for the purposes of the rules of succession." SCOTTISH L. COMM'N, *supra* note 158, at 72. The proposed reform would have given courts discretion, after considering several exclusive factors, to award to the surviving cohabitant an "appropriate percentage" of the decedent cohabitant's estate to which the survivor would have been entitled had she been the spouse or civil partner of the decedent cohabitant. *Id.* at 157. The Scottish Parliament did not enact the proposed reform.

185. Cf. Gary, *supra* note 42, at 810–11 (speculating that recent changes to the Uniform Probate Code have not been widely adopted because of their complexity).

186. See Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 VICTORIA U. WELLINGTON L. REV. 793, 794 (2009) (commenting with respect to New Zealand's nearly identical treatment of marital spouses and "de facto relationship" partners that "there are advantages in drawing upon the same body of jurisprudence instead of re-inventing the wheel each time an issue arises"); O'Brien, *supra* note 17, at 137 (commenting with respect to the ALI Principles,

This simplicity should work to the advantage of nonmarital cohabitants. Because the proposed reform uses existing rather than novel structures, cohabitants are more likely to be familiar, at least broadly, with the governing structures. Thus, nonmarital cohabitants should be relatively more aware of the need to opt out of the default law when that law is at odds with their wishes and expectations.

Further, because the proposed adaptor simply fits over a jurisdiction's existing marital property law structures, a legislature that adopts the proposal also need not rethink the principles that ground the jurisdiction's various marital property law doctrines. Thus, this simplicity of the proposed adaptor gives rise to a companion virtue of compatibility. The proposed adaptor would enable any jurisdiction to implement reform to recognize unmarried committed partners that is wholly compatible with the substantive values and process norms that ground the jurisdiction's various marital property law doctrines.

The adaptor also would ensure that nonmarital property law reform would be low maintenance. The proposed reform would not require amendment in response to future changes in marital property law. Rather, those changes would be self-executing by means of the adaptor.¹⁸⁷

Another significant merit of the adaptor is that it best allows for an integrated approach to nonmarital property rights at dissolution and at death. An integrated scheme, as contrasted with a piecemeal approach, would extend all types of marital property rights to a qualifying nonmarital couple. Thus, the scheme would apply to property division and support claims at the dissolution of a nonmarital partnership and would also apply to the claim of a surviving partner for an intestate share or a forced share of the decedent partner's estate when the nonmarital partnership ends at the death of a partner.

An integrated approach to nonmarital property law reform has at least one significant advantage over piecemeal reform. Comprehensive reform should avoid some of the perverse incentives to which piecemeal reform is likely to give rise. For example, if a jurisdiction were to provide property rights when a nonmarital cohabitation ends at breakup, but not when a nonmarital cohabitation ends at death, an unmarried committed partner who quits the relationship may fare better financially than they would have had they stayed committed to the relationship until the death of a partner.¹⁸⁸ On the other hand, where the jurisdiction provides nonmarital

which would provide domestic partners upon dissolution of their partnership with nearly identical *inter se* remedies as those afforded to marital spouses, that "providing property and support in a manner identical to married spouses would provide state courts with guidelines familiar to those historically used").

187. Hetherington, *supra* note 140, at 22 ("The further benefits of the [Scottish Law Commission]'s suggestions are that this system of calculating a percentage of what an equivalent spouse of civil partner would be entitled to is much more robust.").

188. *See Sullivan v. Burkin*, 460 N.E.2d 572, 577 (Mass. 1984) ("It is neither equitable nor logical to extend to a divorced spouse greater rights in the assets of an inter vivos trust

property rights only at the death of a partner, an unmarried committed partner may feel pressured to remain in an unhealthy or unsafe nonmarital partnership.

Conversely, an integrated approach to nonmarital property rights risks significant disadvantages that should be considered. Chief among these drawbacks is that an integrated approach is likely to complicate nonmarital property law reform both politically and as a matter of design. As discussed below, however, the adaptor helps mitigate this principal disadvantage, arguably tipping the balance in favor of an integrated approach.

The design complication arises from the fact that different and sometimes conflicting principles ground the various subsets of marital property law. For example, if reformers are thinking about qualifying a nonmarital partner for the purposes of intestacy reform, they might reasonably focus on the decedant's intent.¹⁸⁹ If reformers are contemplating qualifying a nonmarital partner for the purposes of an elective share or for the purposes of property division, however, focusing on donative intent may be self-defeating.

One way to mitigate this design complication would be to tinker with the means for defining a nonmarital partner. The multi-factor approach to qualification of a nonmarital partner might be structured at a fairly general level with all or most elements focusing on the cohabitants' commitment to each other and to their relationship. The defining statute might then add a final factor allowing the court to consider the nature of the relationship in light of the purpose or purposes for which a partner is being qualified. For example, New Zealand utilizes a scheme for the qualification of de facto partners, for use with statutes that do not contain their own definition of that term, that directs the court or person considering the issue to "have regard to . . . the context, or the purpose of the law, in which the question is to be determined."¹⁹⁰

An integrated approach to nonmarital property rights may further complicate law reform given that some components of comprehensive reform may be less politically feasible than others. The Scottish experience with inheritance law reform efforts provides a prime example. By 2009, a consensus had arisen in Scotland that the current intestacy provisions relating to unmarried committed partners should be repealed and re-

created and controlled by the other spouse than are extended to a spouse who remains married until the death of his or her spouse.").

189. See Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 230 (1991) (noting that the "predominant consideration" grounding an intestacy statute is the decedent's intent).

190. Interpretation Act 1999, s 29A(3)(a) (N.Z.). *But see* Atkin, *supra* note 186, at 802-04 (remarking with respect to a substantially similar 2005 New Zealand statutory provision that "it is still anomalous to have two distinct tests for what is essentially the same question: were the parties living together in a de facto relationship?" and concluding that "[s]urely it would be better to have one definition for qualifying relationships").

placed.¹⁹¹ The Scottish Law Commission packaged its 2009 intestacy reform proposal with a forced share reform proposal that would have, for the first time, extended application of the forced share beyond personal property to include real property as well.¹⁹² Powerful farming interests opposed such an extension of the forced share.¹⁹³ Thus, opposition to a certain forced share reform complicated and arguably defeated intestacy law reform, at least temporarily.¹⁹⁴

Because of its simplicity of design and inherent compatibility with an adopting jurisdiction's marital property law, the proposed adaptor feature should mitigate this potential drawback of comprehensive reform. The adaptor simply works with a jurisdiction's existing components of marital property law, most of which are the products of a successful legislative process. Thus, one might reasonably suspect that having comprehensive nonmarital property law reform piggyback on existing marital property law structures should lessen political opposition to such reform.

2. *The Accrual Feature*

This Part's discussion so far has assumed an adaptor with a single fixed value. My proposed adaptor, however, would not utilize a single fixed value. Rather, I propose an adaptor that incorporates an accrual schedule feature that would critically influence the calculation of any nonmarital property award. This accrual schedule would set forth a series of increasing adaptor values matched with a corresponding series of increasing cohabitation duration periods.

For example, the adaptor value might initially be set at 0% for any cohabitation that lasted less than five years. As noted above, cohabitation is often a trial period for the nonmarital partners before the cohabitation ends in either marriage of the partners or breakup of the relationship.¹⁹⁵ Having a significant durational prerequisite period before a cohabitant might assert a nonmarital property right would avoid capturing these trial cohabitants within the nonmarital property rights net.

191. See SCOTTISH L. COMM'N, *supra* note 158, at 68 (noting that “[t]here is no doubt that there is genuine concern about [the intestacy provisions relating to nonmarital cohabitants]” and that “[a]lmost all our consultees expressed reservations about the current provisions”).

192. *Id.* app. A, at 155–60.

193. See Barney Thompson, *Scottish Landowners Resist Inheritance Reform*, FIN. TIMES (Dec. 8, 2014), <https://www.ft.com/content/cf3e3a38-7f01-11e4-a828-00144feabdc0> [<https://perma.cc/UXG6-5AJV>] (discussing the concern of some Scottish landowners that proposed succession law reforms would result in the splitting of large estates of land to the extent that such estates would no longer be viable as businesses).

194. See Scottish Government Response to the Consultation on the Law of Succession, UK WEB ARCHIVE ¶¶ 38–40 (Oct. 18, 2018), <https://www.webarchive.org.uk/wayback/archive/20181226070023/https://www2.gov.scot/Topics/Justice/law/damages/succession/scottish-government-response-succession-consultation> [<https://perma.cc/A4M5-74TV>] (discussing concerns that proposed forced share reform that would remove the distinction between moveable (personal) property and heritable (real) property might compromise the viability of certain agricultural/land based businesses and stating the Scottish Government's position that “we do not intend to bring forward reforms in this area”).

195. See *supra* notes 56–58 and accompanying text.

The adaptor value might then be reset to 25% for any cohabitation that lasted at least five years but less than six years, and might thereafter increase 5% for each increase of one year in the cohabitation duration, before topping out at 75% for any cohabitation period of fifteen years or more. The accrual schedule feature ensures that, all else being equal, the partner of a longer cohabitation generally would receive a greater nonmarital property award than would the partner of a shorter cohabitation, reflecting the state's greater confidence in the commitment of nonmarital partners in a relatively longer cohabiting relationship. Topping out the accrual schedule at a significant discount off of the full marital property right would operationalize the state's preference for marriage over nonmarital cohabitation.

The accrual feature of my proposal seeks to address concerns arising from the uncertainty about the extent to which any given nonmarital couple performs the caregiving functions that the state should seek to encourage families to perform. The feature is grounded on the assumption that relatively long-term cohabitants are more likely to exhibit these functions than are relatively short-term cohabitants.¹⁹⁶ Thus, under my proposal, nonmarital property rights increase as the duration of the cohabitation increases.¹⁹⁷

My accrual approach finds support in the iterative theory of family property rights set forth by Professors Elizabeth Scott and Robert Scott.¹⁹⁸ The Scotts' model proceeds from the broad public consensus that the state should grant a special legal status to a family structure only to the extent that the structure satisfies certain dependency needs, such as providing for the physical and emotional necessities of family members.¹⁹⁹ The state investment in such families through the provision of services, financial subsidies, and legal rights pays dividends when family members meet dependency needs that the state otherwise would have to expend resources to address.²⁰⁰

Outside parties may have great difficulty, however, discerning whether a novel family form is meeting its members' dependency needs, especially

196. Scott & Scott, *supra* note 56, at 317 ("Commitment is usually tentative when relationships are new, and it grows over time unless or until one or both of the parties realizes that the relationship is unsuccessful."); Spitko, *supra* note 35, at 296–99 (proposing an accrual approach to intestate inheritance rights for unmarried committed partners grounded in the assumption that a surviving partner's financial contributions, acts of care, and reliance interests with respect to the decedent partner are likely to correlate positively with the duration of their cohabiting partnership).

197. Cf. PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 4.12, 5.04, 6.06 (AM. L. INST. 2002) (providing for marital and nonmarital remedies that depend upon the duration of the marital and nonmarital relationship, respectively, to determine both eligibility for an award and the size of an award); Blumberg, *supra* note 36, at 1299 (commenting that "the duration of cohabitation is likely to be the main determinant of [domestic-partner] property claims" under the ALI Principles).

198. See generally Scott & Scott, *supra* note 56.

199. *Id.* at 296 n.3, 304–05.

200. *Id.* at 304–05, 313–15.

in the absence of any express public promises of commitment from the members.²⁰¹ Scott and Scott argue that the state is unlikely to extend full legal recognition to a novel family form unless the novel group is able to overcome this “verifiability” problem.²⁰² The Scotts further suggest that confidence in the functioning of a novel family form to meet dependency needs can be built incrementally through an iterative process “in which the legal rights and responsibilities are assigned incrementally, allowing the state to monitor family functioning over time in the process of certifying family status.”²⁰³

Applying their model to unmarried cohabitants, Scott and Scott hypothesize that cohabitants as a family form have failed to achieve widespread state recognition because of the great variability among cohabitants with respect to their commitment to meeting dependency needs.²⁰⁴ Moreover, they argue, “the state has not found an effective means of distinguishing those cohabiting partners who are committed to assuming long-term family obligations from others who are not.”²⁰⁵ My accrual feature addresses this variability/verifiability problem.

Indeed, my accrual feature reflects the state’s trust that builds over time in the commitment of a nonmarital couple to meeting the family’s dependency needs. The feature assigns rights and responsibilities incrementally as the cohabiting couple continues to function as a family unit. Thus, the accrual method seeks to distinguish between those nonmarital partners who are committed to assuming long-term family obligations and those who are not by considering the extent to which the nonmarital partners have actually demonstrated a commitment to one another over a lengthy period of time.

Finally, the accrual method also is designed to lower the stakes in cases of short-term cohabitations where generally it is less likely to be certain that the cohabitants should qualify as committed partners for the purposes of the nonmarital property law reform. The relatively smaller nonmarital property award that the accrual feature produces in a cohabitation of relatively shorter duration reduces the incentive of the cohabitants to litigate the nonmarital property award issue in what are more likely to be borderline cases.²⁰⁶ Further, the accrual feature reduces the cost of a court making a “wrong” qualification decision in such borderline cases given the relatively smaller resulting nonmarital property award.²⁰⁷

201. *Id.* at 320–21.

202. *Id.* at 338.

203. *Id.* at 339.

204. *Id.* at 374 (“[T]he lack of substantial movement toward granting legal benefits to unmarried cohabitants is evidence that the state remains committed to a welfarist criterion for granting legal status, one that embodies a commitment to family-functioning norms; as a category, cohabitants are too diverse to satisfy this criterion.”).

205. *Id.* at 300.

206. Spitko, *supra* note 35, at 300.

207. *Id.* at 300–01.

IV. CONCLUSION

This Article proposes an integrated “accrual adaptor” to structure nonmarital property rights at dissolution and at death. The adaptor would be applied to a jurisdiction’s existing marital property law to translate a marital property right into a nonmarital property right. Thus, the proposal would not require an adopting jurisdiction to create any novel property law structures for the nonmarital context and would be fully compatible with the substantive principles and process norms that ground the adopting jurisdiction’s existing marital property law doctrines.

The accrual feature of this Article’s proposal would work to increase nonmarital property rights as the duration of the cohabitation at issue increases. This feature is premised on the notion that unmarried committed partners who have cohabited for a relatively longer period of time are more likely to have made commitments and engaged in caretaking behaviors that nonmarital property law reform should encourage. Thus, the relatively greater nonmarital property award that the proposal would assign to a cohabitation of relatively greater duration reflects the increasing trust that third parties develop in the propensity of the cohabitation to meet the couple’s dependency needs as the relationship endures.

The proposed reform would provide nonmarital partners with lesser property rights as contrasted with marital partners in similar circumstances. This differential treatment is likely to make nonmarital property law reform more politically feasible in the short term. Moreover, such differential treatment can be justified in light of the greater commitment to mutual caregiving that marriage signifies in comparison to nonmarital cohabitation.