# Is This Any Way to Make Civil Rights Law? Judicial Extension of "Marital Status" Nondiscrimination to Protect Cohabitants

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ABSTRACT

*In recent years, civil rights legislation has been the subject of significant attention. This is due, in part, to the emergence of novel and contested interpretations of longstanding statutes offering protection against discrimination based upon sex and marital status. Courts and agencies are infusing new meanings into old laws in response to questions provoked by new behaviors. One new question concerns whether to interpret "marital status" nondiscrimination as protecting an unmarried couple's cohabiting. Four state courts and one federal court have answered "yes." But these cases work against uniting Americans behind civil rights laws—laws that ought to be a point of national pride. Because of their mistakes in the areas of statutory interpretation and separation of powers, they appear starkly ideological. They also do a poor job reflecting upon the proper balance with religious freedom.*

*Americans may wish to protect cohabiting as a "marital status." If so, this should be accomplished by a legislative process that can investigate the myriad social welfare questions cohabitation provokes, especially regarding possible effects on marriage and children's stability. Cohabitation-protective cases cannot and do not accomplish this. Instead, they play word games and manipulate statutory canons. They tell religious citizens what they are really thinking no matter what the citizen believes in her own mind. They also insist, against settled law, that the state, and not the religious citizen, knows the nature of the burden on the free exercise of religion created by a particular civil right. And throughout, such cases fashion social policy, while ignoring the vast amount of data and public opinion necessary to make informed policy. In short, they do civil rights no favor.*

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## INTRODUCTION

In recent years, civil rights legislation has been the subject of significant attention for a variety of reasons, among them the emergence of novel and contested statutory interpretations of longstanding statutes offering protection against discrimination based upon sex and marital status. Courts and agencies are infusing new meanings into old laws, in response to questions provoked by new behaviors and mores. Thus, "sex" discrimination might be interpreted to include a failure to provide or insure for contraception.[1] Sex or "sexual orientation" discrimination

1. *See, e.g.*, EEOC, DECISION ON COVERAGE OF CONTRACEPTION 2 (2000), https://www.eeoc.gov/policy/docs/decision-contraception.html [https://perma.cc/62FM-Z3KS]; Cooley v. Daimler Chrysler Corp., 281 F.Supp.2d 979, 984–85 (E.D. Mo. 2003) (exclusion of prescription contraceptives from the employee insurance plan, while "seemingly neutral" placed a burden on women given that only they have the capacity to become pregnant and the only prescription contraceptives available were for women).

may be interpreted to include a refusal to recognize or provide services for a same-sex wedding.[2]

A less-visible but similar civil rights statutory interpretation question concerns whether to interpret "marital status" nondiscrimination as protecting an unmarried couple's cohabitation. Four state courts and one federal court have interpreted over 40-year-old employment or housing nondiscrimination statutes to protect cohabitants under the category of "marital status" nondiscrimination.[3] For purposes of brevity, I will refer to this group of opinions as "cohabitation-protective" throughout this article. The balance of recent academic commentary favors this position.[4]

But cohabitation-protective opinions illustrate several serious drawbacks to judge-made civil rights law, along with the necessity, rather, for legislative deliberation on the question of protecting cohabiting as a civil right. Given the rise in the frequency of cohabitation today,[5] some states or cities may wish to extend protection to this living arrangement under the banner of marital status nondiscrimination. At the very least, however, such jurisdictions should avoid the errors that current cohabitation-protective opinions demonstrate, particularly concerning statutory interpretation and the separation of powers. These errors only provoke disrespect for civil rights legislation. They suggest that judges are acting instrumentally, to the end of sheltering or valorizing cohabitation. And because judges are acting without the investigative tools of legislatures, they also short-circuit important questions about cohabitation and the common good. Expert investigation of the costs and benefits of cohabitation is not only best undertaken by legislatures but is also handled by states as a central topic of family law, i.e., which relationships should attract state support and protection.

A body of academic literature exists treating the subject of interpreting the "marital status" category within nondiscrimination statutes.[6] These articles

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2. State v. Arlene's Flowers, Inc., 389 P.3d 543, 552–53 (Wash. 2017).

3. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 929–31 (Cal. 1996); Att'y Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998), *partially vacated on other grounds*, 593 N.W.2d 545 (Table) (Mich. 1999). A later Michigan case, which held that an employer could refuse to renew the contract of an employee who had engaged in adultery and then cohabited with his mistress, likely overruled *McCready*. It stated that *McCready* did not create a "right to cohabit" and that an employer's disapproval of such conduct did not state an antidiscrimination claim. It left *McCready* applicable only to cases in which it was marital status alone and not conduct that led to the discrimination. *See* Veenstra v. Washtenaw Country Club, 645 N.W.2d 643, 647 (Mich. 2002); *Desilets*, 636 N.E.2d at 235; Richardson v. Northwest Christian University, 242 F. Supp. 3d 1132, 1152 (D. Or. 2017).

4. *See, e.g.*, Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 808 (2015); Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2086 (2017).

5. Colleen N. Nugent and Jill Daugherty, *A Demographic Attitudinal, and Behavioral Profile of Cohabiting Adults in the United States, 2011–2015*, 111 NAT'L HEALTH STAT. REP. (May 11, 2018), https://www.cdc.gov/nchs/data/nhsr/nhsr111.pdf [https://perma.cc/M6R7-QL6R] (The percentage of adults of reproductive age who have cohabited at some point in their lives has "increased steadily over the last 2 decades.").

6. *See* articles cited *supra* note 4; *see also* John C. Beattie, *Prohibiting Marital Status Discrimination: A Proposal for the Protection of Unmarried Couples*, 42 HASTINGS L.J. 1415 (1991);

variously advance social justice and constitutional arguments for protecting cohabiting,[7] critique courts' statutory interpretation techniques,[8] and/or evaluate the free exercise claims of religious defendants.[9] This article adds to the literature with a more searching evaluation of the statutory interpretation techniques used by cohabitation-protective decisions and by fully articulating their separation of powers' errors and shortcomings. Under the latter heading, this article devotes extended treatment to the current problems with judges' free exercise analyses. Finally, it highlights how the methods adopted by cohabitation-protective judicial opinions are likely to provoke disrespect for an area of law especially important at a time of intense national political discord: civil rights.

This article will proceed as follows: Part I will describe judicial opinions interpreting the "marital status" category of housing or employment nondiscrimination laws to include protection for cohabitants.

Part II will articulate the problems posed by these opinions' statutory interpretation techniques, including their failure to consult or grapple with the relevant statutes' original meanings and contexts; their failure to respect their own jurisdictions' longstanding and pervasive choices to treat marriage more favorably than cohabitation; their reliance, instead, upon word play and emotional appeals; and their cursory resort to the remedial purposes canon of statutory interpretation.

Part III will demonstrate that cohabitation-protective opinions fail to engage the separation of powers problems involved in extending the scope of marital status nondiscrimination to protect cohabiting. Questions about which sexually intimate adult relationships the state will protect and benefit are quintessential family law questions, requiring a legislative process that generates expert reflections about the health, safety and welfare consequences of alternative legal choices. Furthermore, the subject matter of cohabitation, is quite contested. It is regularly associated with a host of problematic effects upon adults and especially children. And its appearance in employment and housing disputes provokes contests with claims of religious free exercise. In the cohabitation-protective opinions, judges

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Steven L. McConnell, *Civil Rights-Marital Status Discrimination-Refusing to Rent to Unmarried Cohabitants is Not Unlawful Marital Status Discrimination Under the Minnesota Human Rights Act*. 13 U. ARK. LITTLE ROCK L.J. 653, 669 (1991); State ex rel. Cooper v. French, 460 N.W.2d 2 (Minn. 1990), Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016) (discusses and critiques public employers' discrimination against their employees on the basis of intimate choices, arguing that it is in tension with modern constitutional doctrine).

7. Joslin, *supra* note 4, at 809; Widiss, *supra* note 4; Nicole Buonocore Porter, *Marital Status Discrimination: A Proposal for Title VII Protection*, 46 WAYNE L. REV. 1, 38–44 (2000) (arguing for more robust protections against marital status discrimination in employment).

8. Michael V. Hernandez, *The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes,"* 77 NEB. L. REV. 494, 500 (1998).

9. *See, e.g.*, Widiss, *supra* note 4, at 2133; Hernandez, *supra* note 8; Peter M. Stein, *Smith v. Fair Employment and Housing Commission: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under Employment Division v. Smith?*, 4 GEO. MASON L. REV. 141 (1995); Rebecca A. Wistner, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996).

have shown themselves unable or unwilling to weigh and balance such competing interests.

The conclusion will briefly summarize how the above problems with extant cohabitation-protective decisions risk undermining respect for civil rights laws.

## I. COHABITATION-PROTECTIVE CASES

Slightly less than half of the states have laws prohibiting "marital status" discrimination in either housing, employment, or both.[10] As will be described below,[11] bans on marital status discrimination were enacted ordinarily in the 1970s, largely in order to protect women coming into credit and housing markets in larger numbers; landowners and creditors were regularly discriminating against women based upon their marital status, None of the extant laws protect cohabitants by name as a protected class. Connecticut specifically excludes application of its housing nondiscrimination law to cohabitants.[12] Federal employment and nondiscrimination laws do not include "marital status" as a protected category, nor do they specifically name cohabitants as a protected class.

To date, judges in four states have held that the marital status category in their state's nondiscrimination law does not extend protection to cohabitants.[13] Judges interpreting nondiscrimination statutes in Alaska, California, Massachusetts, Michigan, and Oregon, however, have held that it does.[14]

In this section, I will set forth the reasoning of these cases in chronological order and without commentary as a prelude to Part II's critique of the statutory interpretation techniques used in these cases and Part III's critique of their inattention to the essential goals of separation of powers.

In the 1994 Massachusetts case, *Attorney General v. Desilets*,[15] landlords were charged with violating a state law banning rental discrimination on the basis of marital status.[16] The defendants claimed that their objection was to the prospective tenants' conduct rather than any person's status as married or single. But the

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10. NATIONAL CONFERENCE OF STATE LEGISLATURES, STATE EMPLOYMENT-RELATED DISCRIMINATION STATUTES, (2015), http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf [https://perma.cc/Z3BD-KSAP]; Nancy Leung, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1406–07 (2015) (reporting that twenty-two states and District of Columbia prohibit discrimination on basis of marital status in employment and twenty-four states prohibit discrimination on basis of marital status in housing); Widiss, *supra* note 4, at 2151.

11. See *infra* Section II.A.

12. C.G.S.A.§ 46a-64c(b)(1) (West 2009).

13. The supreme courts of North Dakota, Minnesota, Montana, and Wisconsin hold the opposite. *See* N.D. Fair Hous. Council, Inc. v. Peterson, 625 N.W.2d 551, 562 (N.D. 2001); State by Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990); Parker-Bigback v. St. Labre Sch., 7 P.3d 361, 364 (Mont. 2000); Dane v. Norman, 497 N.W.2d 714, 716 (Wis. 1993); Richardson v. Northwest Christian Univ., 242 F. Supp. 3d 1132, 1152 (D. Or. 2017) at 1150.

14. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 276 (Alaska 1994); Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909, 929–31 (Cal. 1996); McCready v. Hoffius, 586 N.W.2d 723 (1998), partially vacated on other grounds, 593 N.W.2d 545 (Table) (1999); Att'y Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994); *RIchardson* 242 F. Supp. 3d at 1152.

15. Att'y Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994).

16. M.G.L.A. 151B §4 (West 2018).

court held that "analysis of the defendants' concerns shows that it is marital status and not sexual intercourse that lies at the heart of the defendants' objection."[17] In an often-quoted passage, the court wrote:

> If married couple A wanted to cohabit in an apartment owned by the defendants, they would have no objection. If unmarried couple B wanted to cohabit in an apartment owned by the defendants, they would have great objection. The controlling and discriminating difference between the two situations is the difference in the marital status of the two couples.[18]

The *Desilets* court accepted that the nondiscrimination law substantially burdened the landlords' exercise of religion, noting that such "discrimination [on the basis of marital status] is not as intense a State concern as is discrimination based on certain other classifications," because there is no "constitutionally based prohibition against discriminating on the basis of marital status."[19] The court also recognized that fornication remained a crime in Massachusetts, which suggested at least "some diminution in the strength of the Commonwealth's interest in the elimination of housing discrimination based on marital status."[20] The majority wrote that "in various ways, by statute and judicial decision, the law has not promoted cohabitation and has granted a married spouse rights not granted to a man or woman cohabiting with a member of the opposite sex."[21] Notwithstanding these observations, the court concluded that the nondiscrimination law extended special protection to cohabitants. The court then remanded the case to the superior court to consider the strength of Massachusetts' interests in housing for cohabitants.[22] On remand, the parties stipulated to dismiss the case without prejudice, and no further opinion was issued.[23]

The second case to extend the protection of a nondiscrimination law to cohabitants is the 1996 opinion of the Alaska Supreme Court in *Swanner v. Anchorage Equal Rights Commission*.[24] There, the court held that a landlord had violated both state and municipal anti-discrimination laws prohibiting refusals to rent to persons on the basis of "marital status." The landlord argued that he did not reject the plaintiffs on the basis of marital status "because he [would] rent to people who are single, married, widowed, divorced, or separated. However, he [would] not rent to those whom he expect[ed] [would] engage in conduct repugnant to his religious beliefs, namely cohabitation outside of marriage."[25] After citing an

17. *Desilets*, 636 N.E.2d at 235.
18. *Id.*
19. *Id.* at 239.
20. *Id.* at 240.
21. *Id.* at 239–40.
22. *Id.* at 241.
23. Personal communication with the Massachusetts' Franklin County Clerk of Court, July 30, 2018 (on file with author).
24. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274 (Alaska 1994).
25. *Id.* at 278.

earlier Alaska case[26] in which the "plain language" of both laws was deemed to include cohabitants,[27] the court stated:

> Swanner cannot reasonably claim that he does not rent or show property to cohabitating couples based on their conduct (living together outside of marriage) and not their marital status when their marital status (unmarried) is what makes their conduct immoral in his opinion. The undisputed facts demonstrate that Swanner would have rented to the prospective tenants if they were married. Swanner's argument that he discriminated against the prospective tenants based on their conduct and not their marital status is without merit.[28]

To reach this conclusion, the court accepted the *American Heritage Dictionary*'s definition of "cohabit," which combined both conduct—a sexual relationship—with the status of being "not legally married."[29]

The *Foreman* opinion on which *Swanner* relied acknowledged that when Alaska amended its nondiscrimination statute to add the marital status category in 1975, Alaska still had on its books an earlier law criminalizing cohabitation.[30] The criminal law was not repealed until 1978. Without referencing any principles of statutory interpretation, the court held that the meaning of the 1975 amendment should be interpreted according to the 1978 repeal of the anti-cohabitation law: "[w]e think it would be manifestly unreasonable to limit the effect of these modern, remedial provisions by reference to an outdated criminal statute which was repealed eleven years ago."[31]

Because the defendant made a religious freedom claim, the *Swanner* court also took up the question whether Alaska had a "compelling state interest" sufficient to overcome the acknowledged burden upon the defendant's free exercise of religion. The court developed and employed a new test for determining state interests. It wrote:

> The government possesses two interests here: a "derivative" interest in ensuring access to housing for everyone, and a "transactional" interest in preventing individual acts of discrimination based on irrelevant characteristics. Most free exercise cases . . . involve "derivative" state interests. In other words, the State does not object to the particular activity in which the individual would like to engage, but is concerned about some other variable that the activity will affect. This can be contrasted with a "transactional" interest in which the State objects to the specific desired activity itself . . . .
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> In the instant case, the government's derivative interest is in providing access to housing for all. One could argue that if a prospective tenant finds alternative

26. Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199 (Alaska 1989).
27. *Id*.
28. *Swanner*, 874 P.2d at 278.
29. *Id*.
30. *Foreman*, 779 P.2d at 1202.
31. *Id*.

> housing after being initially denied because of a landlord's religious beliefs, the government's derivative interest is satisfied. However, the government also possesses a transactional interest in preventing acts of discrimination based on irrelevant characteristics regardless of whether the prospective tenants ultimately find alternative housing . . . .
>
> The government's transactional interest in preventing discrimination based on irrelevant characteristics directly conflicts with Swanner's refusal to rent to unmarried couples. The government views acts of discrimination as independent social evils even if the prospective tenants ultimately find housing. Allowing housing discrimination that degrades individuals, affronts human dignity, and limits one's opportunities results in harming the government's transactional interest in preventing such discrimination . . . . [T]his interest will clearly suffer if an exemption is granted to accommodate the religious practice at issue.[32]

In short, the *Swanner* majority held that even if there is available housing for the rejected cohabitants, the government possesses a compelling interest in ensuring that cohabiting citizens are not denied housing by any particular landlord on the grounds of their cohabiting, because being unmarried is an "irrelevant characteristic," and the denial of housing might have effects on a person's sense of dignity and limit his or her "opportunities."

The *Swanner* dissent referred to the majority's religious freedom balancing test as "entirely new and unnecessary."[33] It pointed out that earlier tests made no reference to "transactional interests" and would have inquired whether or not there existed a scarcity of housing for unmarried couples. The majority opinion also evaded the question of whether the state's interest in housing unmarried couples was equal to its interests in race or gender equality.[34] The dissent chronicled Alaska's persistent refusal to grant cohabitants any of the financial or property benefits given married spouses, and remarked that "the government itself discriminates based on marital status in numerous regards, and there is no suggestion that this practice should be reexamined."[35] It also noted that the federal housing nondiscrimination act did not protect against marital status discrimination at all, and that neither federal nor state constitution employed heightened scrutiny under their equal protection analysis when examining laws distinguishing between married and unmarried couples.[36] Similarly, when the U.S. Supreme Court denied certiorari to the case, Justice Thomas dissented, expressing skepticism that "Alaska's asserted interest in preventing discrimination on the basis of marital

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32. *Swanner*, 874 P.2d at 282.
33. *Id*. at 286.
34. *See id*. at 287.
35. *Id*. at 289.
36. *Id*.; *see also* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1106 (1989) (The Fair Housing Act does not protect unmarried couples from a landlord's refusal to rent unless a case can be made that the marital status discrimination is merely a pretext for racial, ethnic, religious or gender-based discrimination.).

status [was] 'compelling' enough to satisfy these stringent standards."[37] He also pointed to the absence of heightened scrutiny accorded to marital status distinctions, as well as Alaska's regular discrimination against cohabitants through its reserving a wide variety of benefits for married couples only.[38]

Also in 1996, California decided *Smith v. Fair Employment and Housing Commission*.[39] In *Smith*, a landlord refused to rent to an unmarried couple because of the landlord's religious beliefs. California legislation provided that it was unlawful "[f]or the owner of any housing accommodation to discriminate against any person because of the . . . marital status . . . of that person."[40] Assertedly consulting the "usual and ordinary meaning" of the statute, the court concluded that it was "unavoidable" that the statute covered refusals to rent on the basis of a couple's nonmarital cohabitation.[41] Rejecting the landlord's claim that she based her refusal on assumptions about their sexual conduct, the court cited *Swanner* and quoted the formula from *Desilets* conflating conduct and status.[42]

The California Supreme Court also pointed out that the state commission charged with interpreting the housing nondiscrimination law had concluded, just two months after its enactment, that it covered cohabiting couples.[43] The court also claimed that the legislative history suggested that the legislature had contemplated protection for cohabitants;[44] however, the lower court, having read the same history, concluded the opposite: that it "suggests that the Legislature's purpose in adding 'marital status' to the list of proscribed bases for discrimination primarily was to protect single men and women, students, widows and widowers, divorced persons, and unmarried persons with children."[45]

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37. Swanner v. Anchorage Equal Rights Commission, 513 U.S. 979, 980–82 (1994) (Thomas, J., dissenting from denial of cert.).

38. *Id*. at 461.

39. Smith v. Fair Emp't & Hous. Comm'n, 913 P.2d 909 (Cal 1996).

40. *Id*. at 914 (citing Gov. Code, § 12955(a)); *see also Swanner*, 874 P.2d at 276.

41. *Smith*, 913 P.2d at 914.

42. *Id*. at 915, n.9.

43. *Id*. at 916.

44. *Id*. at 916–17. The court recited:

> While the 1975 amendment was under consideration, representatives of the Attorney General's Office advised the Legislature in hearings that one of its effects would be to override prior law, which the Attorney General had interpreted as permitting licensed realtors acting as property managers to select tenants "on the basis of a blood or marital relationship between the prospective occupants or a lack of such relationship . . . ." That the Legislature understood the 1975 amendment would protect unmarried cohabitants can also be inferred from the text of the amendment. An exception to the amendment, which continues in FEHA, expressly permitted "any postsecondary educational institution" to provide "housing accommodations reserved for either male or female students . . . or . . . married students . . . ." The exception had no apparent purpose unless the amendment, without the exception, would have required educational institutions to permit unmarried male and female students to live together, or prevented discrimination in favor of married students.

*Id*. (citations omitted).

45. *Smith v. Fair Employment and Housing*, 30 Cal. Rptr. 2d 395, 405 (Cal. Ct. App. 1994).

The *Smith* court, like the *Swanner* court in Alaska, adjudged the state's interests for purposes of the free exercise test as compelling because of the importance of access to housing, and individuals' "dignity interests" in "freedom from discrimination based on personal characteristics."[46]

Thus, the California Supreme Court echoed the *Swanner* court's interest in preserving individuals' feelings about how they were treated in real estate transactions in response to their decision to cohabit. The court wrote: "To say they may rent elsewhere is also to deny them the right to be treated equally by commercial enterprises; this dignity interest is impaired by even one landlord's refusal to rent, whether or not the prospective tenants eventually find housing elsewhere."[47]

In *McCready v. Hoffius*, Michigan became the fourth state to interpret "marital status" nondiscrimination to include cohabitation.[48] While this opinion may have been abrogated by *Veenstra v. Washtenaw Country Club*,[49] it is still important for purposes of critiquing common errors in the cohabitation-inclusive cases. In *McCready*, the defendant landlords refused to rent a property to an unmarried couple on the basis of the landlords' religious beliefs. The state's law prohibited discrimination in housing based upon the marital status of a "person or a person residing with that person."[50] At the time of the court's decision, Michigan retained a statute prohibiting "lewd and lascivious" behavior by cohabiting couples.[51] The court held that the plain language of the statute banned discrimination "based on whether a person is married," and "the defendants refused to rent to plaintiffs because their marital status is 'single.'"[52] Thus the statute protected cohabitation.

Responding to the defendants' insistence that their refusal to rent was a response to plaintiffs' conduct and not to their single status, the court quoted the now-familiar formulas of *Swanner* and *Desilets*, to conclude that "[p]laintiffs' marital status, and not their conduct in living together, is the root of the defendants' objection to renting apartments to the plaintiffs."[53]

After recognizing that Michigan law consistently favors the institution of marriage over cohabitation, the court reasoned that, still, it could "recognize marriage as laudable" or even "favored" while giving housing discrimination protection to persons who "do not enjoy" that status.[54] It further noted that the state's criminal ban prohibiting lewd and lascivious behavior by unmarried couples had fallen into disuse.[55] Finally, responding to the landlords' free exercise claims, the court highlighted citizens' "fundamental need" for housing, and asserted the

46. *Smith*, 913 P.2d at 925.
47. *Smith*, 913 P.2d at 928.
48. 586 N.W.2d 723 (Mich. 1998), *vacated in part*, 593 N.W.2d 545 (table) (Mich. 1999).
49. 645 N.W.2d 643, 647 (Mich. 2002).
50. MICH. COMP. LAWS ANN. § 37.2502(1) (West 2018)
51. *Id.* § 750.335.
52. *McCready*, 586 N.W.2d at 726–27.
53. *Id.* at 727–28.
54. *Id.*
55. *Id.* at 727.

legislatures' desire that "no one [should] be denied equal access to housing on the basis of, among other things, their marital status."[56]

On appeal, the Supreme Court of Michigan did not disturb the finding that the marital status nondiscrimination provision protected cohabitants, but did vacate that part of the opinion below which held that the state's Civil Rights Act did not violate the federal or state Constitutions' Free Exercise Clause; the court remanded the case to the circuit court for further consideration of that issue.[57]

A later Michigan Supreme Court decision in *Veenstra v. Washtenaw Country Club*, involved a married man cohabiting with a woman who was not his wife.[58] There, the court found that the "clear, unambiguous language of [an employment nondiscrimination] statute protects status, not conduct."[59] Therefore, if an employer declined to renew an employee due to his adultery, the marital status provision would not apply. It characterized the *McCready* opinion as turning on insufficient evidence that the unmarried cohabiting couple intended to engage in "lewd and lascivious" conduct and held that the opinion "should not be read so expansively as to create a right to cohabit" under the Civil Rights Act. It also recited that that Act protects "*only* the consideration of a person's marital status."[60]

Therefore, it is possible to conclude that Michigan is no longer a cohabitation-protective state in cases in which a defendant can demonstrate sufficiently that he or she rejected an application for employment or housing based upon conduct and not solely upon consideration of a person's marital status.

A relatively recent decision interpreting a state employment nondiscrimination law to protect cohabitants is *Richardson v. Northwestern Christian University*.[61] The plaintiff in *Richardson* was a teacher at a Christian university, and had agreed upon her hiring to demonstrate a "maturing Christian Faith" for students.[62] When the university discovered that she was cohabiting with and pregnant by a man to whom she was not married, it offered her the options of getting married, moving out, or quitting her job.[63] The teacher sued the university claiming marital status discrimination, but the university replied that it based its decision upon the woman's conduct and had never discriminated in employment on the basis of marital status.

No Oregon state court had opined on the scope of the marital status provision in its civil rights law. The federal court acknowledged that "the text of the law is ambiguous and fairly susceptible to both parties' interpretations."[64] It also took

56. *Id*. at 729.
57. McCready v. Hoffius, 593 N.W.2d 545 (Mich. 1999).
58. 645 N.W.2d 643 (2002).
59. *Id*. at 646.
60. *Id*. at 647–48.
61. 242 F. Supp. 3d 1132, 1149–50 (D. Or. 2017).
62. *Id*. at 1139.
63. *Id*. at 1138.
64. *Id*. at 1150.

notice of the jurisdictional split on the question.[65] The court held that the law's context did not resolve the ambiguity: the statute neither defined "marital status" nor addressed the validity of a distinction between conduct and status.[66]

The court consulted the decisions of other jurisdictions and noted that some courts had opted *not* to protect cohabitation because the jurisdiction had anti-cohabitation laws or a public policy explicitly promoting the stability of marriage and family. It claimed that Oregon did not possess either.[67]

The court then "question[ed the] utility" of the status/conduct distinction, referring mostly to cases involving issues such as a criminal ban on homosexual sodomy (*Lawrence v. Texas*[68]), or vendors' refusals to participate in gay weddings, or a student group's refusal of membership or elected office to persons of any sexual orientation who did not conform to Christian sexual teachings.[69] It further opined that the relationship between sexual conduct and marital status is "not as clear" given that married persons too can have nonmarital sex. But it declared the cases involving homosexual behavior "illuminating because they underscore that '[c]onduct and status are often inextricably linked.'"[70] The court also pointed out that much of discrimination law is concerned with assumptions about conduct that stem from one's status.[71] It concluded finally that "[e]ven though both married and unmarried individuals may have sex outside of marriage, when single people have sex, it is always outside of marriage."[72] Consequently, the conduct/status correlation is "close enough."[73]

Even these brief descriptions of the cohabitation-protective opinions suggest miscalculations and questionable rationales on the part of the courts involved, especially regarding statutory interpretation and separation of powers. I now turn to these.

## II. STATUTORY INTERPRETATION PROBLEMS

### *A. Original Legislative Intent*

Except for California's *Smith* decision, the cohabitation-protective opinions failed to give serious consideration to their respective legislatures' intentions regarding the scope of protection offered by their state's "marital status" provision. Perhaps the most perplexing opinion in this regard is *Richardson*. The court

65. *Id.*
66. *Id.* at 1151.
67. *Id.*
68. 539 U.S. 558 (2003).
69. *Richardson*, 242 F. Supp. 3d at 1151 (citing Christian Legal Soc'y Chapter of the Univ. of Cal, Hastings College of the Law v. Martinez, 561 U.S. 661 (2010); State v. Arlene's Flowers, Inc., 389 P.3d 543 (Wash. 2017)).
70. *Id.* at 1152 (quoting Veenstra v. Washtenaw Country Club, 645 N.W.2d 643, 650 (2002) (Cavanaugh, J., dissenting)).
71. *Id.*
72. *Id.*
73. *Id.*

stated that in all cases involving statutory interpretation, its first task was to "discern the legislature's intent."[74] "If the legislature's intent remains unclear after examining text, context, and legislative history," the court stated, it "may resort to general maxims of statutory construction to aid in resolving the remaining uncertainty."[75]

After finding the language of marital status "ambiguous," however, the court specifically chose *not* to consult the statute's legislative history. [76] It claimed that while Oregon courts have precedent stating that they "may consider legislative history whenever it appears 'useful' to their statutory analysis," the reviewing court is permitted to limit "its consideration of legislative history to the information that the parties provide to the court."[77] Given, however, that neither party relied upon legislative history in their briefs, the court decided explicitly *not* to inform its analysis of the meaning of "marital status" with legislative history.[78]

On the matter of legislative intent about the scope of marital status nondiscrimination, Alaska's *Swanner* and *Foreman* opinions effectively decided that when the housing nondiscrimination legislation was passed in 1975, the legislature wanted to extend cohabitants special protection to live together, although Alaska law at that time continued to criminalize cohabitation. While it is true that Alaska repealed its criminal cohabitation law three years after adding marital status to its nondiscrimination code, the *Foreman* court glossed over this fact with the conclusory remark that:

> Given the intent so plainly reflected in the language of [the state and municipal nondiscrimination statutes], we think it would be manifestly unreasonable to limit the effect of these modern, remedial provisions by reference to an outdated criminal statute, which was repealed eleven years ago.[79]

Michigan's *McCready* opinion did not consider the state legislature's purposes in adding the marital status category to its fair housing act in 1975. But the legislative history accompanying the act indicates clearly that the law was intended to prohibit landlords and sellers from excluding *women* on the basis of their marital status. According to records kept by the responsible Michigan House Committee (the Committee on Constitutional Revision and Women's Rights), the amendment to the state's housing nondiscrimination bill to include the protected categories of "sex, marital status, age or handicap" was a response to the following:

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74. *Id*. at 1149.
75. *Id*. at 1149–50 (citing State v. Gaines, 206 P.3d 1042, 1050–51 (Or. 2009)).
76. *Id*. at 1150.
77. *Id*. at 1150 n.5 (citing OR. REV. STAT. § 174.020(3)).
78. *Id*.
79. Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1202 (Alaska 1989).

> The movement of females, younger people and handicapped persons into well paying levels of employment has created a financial potential among these groups for paying for housing . . . .
>
> Single persons . . . particularly women, have historically encountered difficulty in obtaining rental housing or credit for purchasing a decent home. The problem is especially acute for single parent families with children.[80]

The League of Women Voters took an official position in favor of the bill, and communicated this to the bill's chief sponsor, Barbara-Rose Collins, Chairman of the Committee on Constitutional Revision and Women's Rights.[81]

Like the *McCready* court, the *Desilets* court in Massachusetts gave cursory consideration to the fact that, at the time the marital status provision was added to its housing nondiscrimination law, "fornication" remained a crime in Massachusetts.[82] Like Alaska, Massachusetts concluded irrationally that its state legislature wished to enhance cohabitants' ability to live together while simultaneously criminalizing their sexual behavior. The court acknowledged only that the state's criminal ban on cohabitation suggested "some diminution in the strength of the Commonwealth's interest in the elimination of housing discrimination based on marital status."[83]

However, had the court in Massachusetts consulted the legislative history of the bill that amended the state's housing nondiscrimination law, it would have found important evidence that the bill was not directed to protecting cohabiting. Marital status was added to the nondiscrimination law in 1973 by House Bill No. 2624 and introduced in the Massachusetts House of Representatives as "An Act to Protect Single or Divorced Persons from Unlawful Discrimination in Housing."[84] The Massachusetts legislature described this bill as a "Petition of John F. Cusack, John A. Businger and others for legislation to protect single or divorced persons from unlawful discrimination in housing."[85]

While the bill was moving through the legislature, a February 1973 article in *The Boston Globe* featured coverage of "marital status" nondiscrimination in Massachusetts in connection with access to credit for women. It reported that lenders had been looking at whether a woman was married or single as a signal about whether she might have children or leave her job.[86] A 1975 *Boston Globe*

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80. S. 13, REGULAR SESSION (Mich. 1975).

81. Memorandum from Legislative Office, League of Women Voters of Michigan to the Legislative office of Rep. Barbara-Rose Collins, Chairman, Committee on Constitutional Revision and Women's Rights (Mar. 10, 1975) (on file with the author).

82. *See* MASS. GEN. LAWS ANN. ch. 272, § 18 (West 2018). Cohabitation was also forbidden: MASS. GEN. LAWS ch. 272, § 16 (1968).

83. Att'y Gen. v. Desilets, 636 N.E.2d 233, 329 (Mass. 1994).

84. H.R. 2624, An Act to Protect Single or Divorced Persons from Unlawful Discrimination in Housing (Mass. 1973) (bill draft by "Mr. Cusack of Arlington petition of John F. Cusack, John A. Businger and others for legislation to protect single or divorced persons from unlawful discrimination in housing.").

85. Mass. Legislature, Bill History Index, Bill History of H. 2624, 4191.

86. Otile McManus, *Mortgage Trap Engulfs Women*, BOS. GLOBE, Feb. 11, 1973, at B1.

article about the implementation of Massachusetts law barring marital status discrimination respecting credit also treated "marital status" as referring to being married, single or divorced.[87] The bill was similarly described four times in the Journal of the House as it made its way through that chamber.[88]

Nearly all "marital status" amendments were adopted in the early 1970s. The meaning of "marital status" in a high-profile federal law of that period is another important clue about state legislatures' intentions for the scope of marital status discrimination legislation. Both the federal law and coincident American Bar Association discussions indicate that marital status protections were designed to protect single and married women applying for credit for housing and other purposes, at historically high rates.[89]

The federal law is the Equal Credit Opportunity Act, passed in 1974.[90] The original version prohibited discrimination on the bases of sex and marital status.[39] The Act was passed in the wake of congressional hearings revealing that it was difficult for women who were never-married, divorced, or widowed to obtain credit.[91] According to a 1974 statement by Congresswoman Leonor Sullivan, the bill's primary sponsor:

> Married women, no matter what their earnings or resources, were denied credit cards or charge accounts except in their husbands' names. Divorced or separated women, regardless of individual creditworthiness, found it almost impossible to get credit. Widows discovered that their life-time record for paying their bills were insufficient evidence of creditworthiness when they tried to get credit in their own name.[92]

Also testifying in favor of enacting this law banning "marital status discrimination," the Chairman of the U.S. Commission on Civil Rights stated that "women as a class have been notoriously discriminated against in credit transactions. Their treatment varies depending upon whether they are married, unmarried, widowed, separated or divorced."[93] He further detailed the kinds of harms visiting upon individual "married women," "the young [married] woman of child-bearing years," women as "heads of households," the "young unmarried woman," and the

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87. Boston Globe Staff, *Rules Bar Discrimination in Granting Credit*, BOS. GLOBE, Jan. 24, 1975, at 6.

88. MASS. GEN. COURT., JOURNAL OF THE HOUSE 420, 1020, 1038, 1049 (1975).

89. Proceedings of the 1974 Midyear Meeting of the House of Delegates of the Amer. Bar. Assn, 99 ANN. REP. A.B.A. 151 (1974).

90. 15 U.S.C. § 1691 (West, Westlaw through Pub. L. No. 115-281).

91. Joslin, *supra* note 4, at 811–12.

92. *Hearings before the Subcomm. on Consumer Affairs of the Comm. on Banking and Currency on H.R. 14856 and H.R. 14908*, 93rd Cong. 1, 4 (1974) (Statement of Leonor Sullivan, Chairwoman, House Merchant Marine and Fisheries Comm.).

93. *Equal Credit Opportunity Act of 1974: Hearings on H.R. 14856 and H.R. 14908 Before the Subcomm. on Consumer Affairs of the H. Comm on Banking and Currency*, 93rd Cong. 131–32 (1974) (Statement of Arthur S. Fleming, Chairman, U.S. Commission on Civil Rights).

"separated" or "divorced" woman.[94]

Opinions in states that have *rejected* the application of marital status protection to cohabitants, such as Washington, further confirm that a concern for fair treatment for individual women led to the wave of marital status nondiscrimination laws in the early 1970s:

> A review of the legislative history of HB 404, which amended [Revised Code of Washington] 49.60 in 1973 to include "marital status," showed that the "main purpose for adding 'marital status' to our antidiscrimination laws was to remedy situations, especially in credit and insurance transactions, where women, particularly those *separated, divorced or widowed*, have received much discrimination," and to provide women, regardless of marital status, rights and responsibilities equal to those held by men.[95]

Likewise, in his extensive treatment of laws concerning nonmarital sexual expression, Professor Robert E. Rodes, Jr. summarizes the "original idea" of these laws as "keep[ing] employers from favoring workers who would be more exploitable, because they had no family responsibilities to compete with their jobs," and affecting "landlords of rooming houses who took a punitive attitude toward single mothers or who preferred not to have potentially growing families on their hands."[96] He cites a discussion by a Florida attorney of the factors provoking passage of Florida's then-recently-enacted marital status nondiscrimination law.[97] These included: employer demands that employees be single or married; the enforcement of no-spouse or anti-nepotism laws; employers' refusals to hire single mothers; employers' refusals to hire mothers but not fathers; the employment of married couples only; and employers' requiring female employees to change their names at marriage.[98] Cohabitants' interests are not mentioned.

An article strongly favoring legislation protecting cohabitants under marital status provisions also acknowledges the most likely purposes of these laws. Professor Courtney Joslin reports that current marital status nondiscrimination laws were enacted following a pattern of "discrimination that impeded the financial independence of women, including single women" as well as married women.[99] In a later article, Professor Joslin acknowledges again that extant

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94. *Id*. at 132–33.

95. Magula v. Benton Franklin Title Co., 930 P.2d 307, 315–16 (Wash. 1997) (Sanders, J. dissenting)

(quoting a letter dated February 13, 1973, from Jocelyn Marchisio, President, League of Women Voters of Washington to Rep. Lorraine Wojahn, Chairman, Committee on Commerce) (internal quotations omitted).

96. Robert E. Rodes, Jr., *On Law and Chastity*, 76 NOTRE DAME L. REV. 643, 669 (2001) (citing John Edward Alley, *Marital Status Discrimination: An Amorphous Prohibition*, 54 FLA. B.J. 217, 217–18 (1980)).

97. FLA. STAT. § 13.261 (1978).

98. Alley, *supra* note 96, at 217.

99. Joslin, *supra* note 4, at 811–12 (citing Suzanne Kahn, *Valuing Women's Work in the 1970s Home and the Boundaries of the Gendered Imagination*, HARV. J.L. & GENDER (2013)).

marital status nondiscrimination laws were not intended to protect cohabitants. She adds that the advocates for such statutes "were primarily concerned about the treatment of those who were living inside of marriage"[100] as well as the formerly married.[101] Both were discriminated against on the basis of their presumed dependency upon a husband.

In sum, every state that decided to include cohabitants under the marital status nondiscrimination statute, possibly excepting California, did so either by refusing to consult legislative history or by ignoring that its decision created a special category of protection for activity that the state had deemed criminal at the time its nondiscrimination law was amended to include "marital status."

### *B. Failure to Acknowledge Contradictory State Law on Cohabitation*

Every cohabitation-protective opinion ignored or marginalized the body of their state's family law that expressed a preference for marriage over cohabitation. Their states' family law expressed such a preference by attaching myriad rights and obligations to marriage but not to cohabitation. In fact, for nearly all purposes, it might be said that every state except Washington is "legally disinterested" in cohabitation, save under very limited circumstances described below. And in Washington, it is only upon the dissolution of certain cohabitations that property distribution rules apply to the couple. Even then, the rules applicable to cohabitants are not as favorable as those applying to marriage. This is because the Washington Supreme Court has stated that its legislature has *not* agreed that cohabitations are the "legal equivalent to marriages."[102]

One might also say that every state save Washington treats marriage but not cohabitation as a "status." A family law "status" is created when a state automatically attaches a number of rights, benefits, and responsibilities to a couple's private agreement about their relationship. These rights, benefits, and responsibilities are related to the state's interests in the relation. In a famous summary by the U.S. Supreme Court:

> The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor

100. Courtney G. Joslin, *Discrimination In and Out of Marriage*, 98 B.U. L. Rev. 1, 19 (2018).

101. *Id.* at 23–24.

102. Connell v. Francisco, 898 P.2d 831, 836 (1995) (interpreting the Revised Code of Washington § 26.09.080 to require cohabitants to share at their dissolution, *only* property acquired during a "stable, marital-like relationship" and not—as with the married—property acquired both during and before the relationship).

> progress. This view is well expressed by the supreme court of Maine in *Adams* v. *Palmer*, 51 Me. 481, 483. Said that court, speaking by Chief Justice APPLETON: "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the state, statutory or common, which defines and prescribes those rights, duties, and obligations."[103]

Thus cohabitants, unlike the married, do not by living together obtain rights and obligations respecting inheritance, testimonial privilege,[104] property distribution (except in Washington) or maintenance at dissolution. Nor may they recover for wrongful death or loss of consortium. This is also true in the states adopting a cohabitation-protective interpretation of marital status.[105] For example, Massachusetts, home of the *Desilets* opinion, insisted that it was necessary to deny a cohabitant a loss of consortium claim because to do otherwise would "erase the bright line between civil marriage and other forms of relationship that has heretofore been carefully preserved by the Legislature and our prior decisions."[106]

Nor are third parties required to treat cohabitants like spouses. Cohabitants almost never receive private insurance survivors' benefits,[107] or unemployment benefits related to a relocating partner.[108] Health insurance companies are legally free to allow or disallow insuring a cohabiting partner as part of an employer-provided health insurance benefit.[109] The federal government offers Social Security survivors' benefits only to formally married spouses and not to cohabitants.[110] States regularly decline to grant survivor benefits to cohabiting partners of state employees.[111] This pattern obtains in each of the states where courts have decided

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103. Maynard v. Hill, 125 U.S. 190, 211 (1888).

104. 25 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5574 (1989) ("Courts have been less [than] enthusiastic about extending the marital privileges to nonmarital relationships; the idea has been rejected by every court that has considered it."); Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 800 (2010); Julia L. Cardozo, *Let My Love Open the Door: The Case for Extending Marital Privileges to Unmarried Cohabitants*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375 (2010).

105. *See, e.g.*, Eldon v. Sheldon, 758 P.2d 582 (Cal. 1988) (no loss of consortium recovery for cohabitants unless relationship "stable and significant").

106. Charron v. Amaral, 889 N.E.2d 946, 952 (Mass. 2008).

107. *See* Jacobs v. Michigan Mutual Insurance Company, 307 N.W.2d 693 (Mich. Ct. App. 1981) (denial of private insurance survivors' benefits to cohabiting partner).

108. Davis v. Employment Sec. Dept., 737 P.2d 1262 (Wash. 1987).

109. *See Insurance for the Newly Engaged and Cohabitants*, INSURANCEQUOTES.COM, http://www.insurancequotes.org/auto/insurance-for-the-newly-engaged-and-cohabitants/, [https://perma.cc/EYQ8-3ET3] (last visited Nov. 11, 2018).

110. 42 U.S.C. § 416(h)(1)(A)(i) (Westlaw through Pub. L. No. 115-281).

111. *See, e.g.*, Glossip v. Missouri Dept. of Transp. and Highway Patrol Employees' Retirement System, 422 S.W.3d 796 (Mo. 2013) (upholding refusal of survivor benefits to cohabiting partner of deceased patrolman); Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904, 910 (Cal. 1983)

to protect cohabitation as a marital status for purposes of employment or housing nondiscrimination statutes.

The *Desilets* court *did* acknowledge that Massachusetts' law favored marriage over cohabitation in myriad areas of law: "in various ways, by statute and judicial decision, the law has not promoted cohabitation, and has granted a married spouse rights not granted to a man or woman cohabiting with a member of the opposite sex."[112] Still, the court did not take this into account in interpreting the statute; it instead suggested that the state's disfavoring cohabitation affected only the *weight* of the state interest in protecting cohabitants, but not its existence.

In *Swanner*, the Alaska court made no reference to the many ways in which its state law favors marriage over cohabitation, although the subject was taken up by the dissent in detail.[113] The Supreme Court of California in *Smith* also failed to grapple with state law's broad preference for marriage, despite a lengthy treatment of the subject by the lower court.[114]

The *Richardson* court relied upon the absence of a specific anti-cohabitation law in Oregon. It ignored Oregon's overarching refusal to offer cohabitants the benefits given to married couples, instead summarily concluding that the state has no "formally expressed public policy" about promoting the stability of marriage.[115]

Given the increasing frequency of cohabitation and scholarly recommendations to grant it marriage or marriage-like status[116]—including recommendations by the prestigious American Law Institute[117]—states' refusals to conform cohabitation to marriage are significant. More than a few law review articles over recent decades remark upon the persistence of states' refusals to equate cohabitation and

("[N]either the statutes nor our decisions beginning with Marvin require that we extend to partners in nonmarital relationships such as plaintiff, the evidentiary benefits extended to marital partners.").

112. Att'y Gen. v. Desilets, 636 N.E.2d 233, 239–40 (Mass. 1994).

113. Swanner v. Anchorage Equal Rights Commission, 513 U.S. 979 (1994) (Thomas, J., dissenting from denial of cert.).

114. *See* Smith v. Fair Employment & Hous., 30 Cal. Rptr. 2d 395, 404–405, *as modified on denial of reh'g* (Cal. Ct. App. 1994) ("[T]he Legislature has not extended to unmarried couples numerous rights which married couples enjoy. Citing typically the lack of legislative approval, the courts have consistently refused to treat unmarried couples as the legal equivalent of married couples. (E.g., Elden v. Sheldon 758 P.2d 582 (unmarried person does not have cause of action either for negligent infliction of emotional distress or for loss of consortium), *In re Cummings*, 640 P.2d 1101 (1982) (prison regulations may properly allow conjugal visitation rights to married couples but deny them to unmarried couples) . . . If the need to eradicate discrimination against unmarried couples is so compelling as complainants and the Commission contend, the Legislature would have responded to these judicial decisions to extend equal rights to all cohabiting Californians.").

115. Richardson v. Northwest Christian University, 242 F. Supp. 3d 1132, 1151 (D. Or. 2017).

116. Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017) (arguing that there exists a very clear trend that the individual seeking property, who in nearly all cases is a woman, has a difficult time receiving anything outside of marriage, and advocates moving beyond the marriage-nonmarriage dyad in allocating property rights between individuals who are not, or have not been, married).

117. *Principles of the Law of Family Dissolution: Analysis and Recommendations*, 8 DUKE J. GENDER L. & POL'Y 1, 29–32 (2001).

marriage.[118] For example, professor Margaret Mahoney concluded: "the relationship of unmarried cohabitants is not, as a general rule, recognized as a legally significant family status. As a result, no benefits or obligations, either between the partners or vis-à-vis third parties and the government, attach to the relationship."[119] Professor Marsha Garrison summarizes the situation as follows: "[A]lthough the California Supreme Court's widely cited decision in *Marvin v. Marvin* appeared to inaugurate a new era of expanding law and rights for nonmarital cohabitants, courts and legislatures . . . have in fact responded to *Marvin* quite cautiously . . . . I conclude that this cautious approach is justified."[120] She adds, "as the typically short duration and relatively rare sharing expectations suggest, cohabitation and marriage are simply not equivalent states."[121] Furthermore, "the research evidence shows that marriage is associated with a range of health, wealth, and happiness benefits for both adult partners and their children, benefits that might be lost if increasing numbers of couples spend more time in cohabiting relationships and bear children within them."[122]

This is not contradicted by the fact that so many states including Oregon, Massachusetts, Alaska, California, and Michigan, recognize contracts between cohabitants so long as they are not founded on an exchange of sexual promises.[123] Nor is this contradicted by a state's decision to extend domestic violence statutes to cohabiting couples,[124] or to cease considering a parent's nonmarital cohabitation as a factor mitigating against custody or visitation with a minor child.[125]

Rather, state recognition of contracts between cohabitants is a reflection of states' increasing deference to freedom of contract between cohabiting couples and is not the equivalent of extending legislative, marriage-like protections to them. Furthermore, states play no role in encouraging cohabiting couples to contract about their rights and obligations. When states incorporate cohabitants into domestic violence laws, they are simply recognizing the existence of violence in cohabiting households.[126] And when states cease allowing cohabitation to be an

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118. *See, e.g.*, Mark Strasser, *Marriage, Cohabitation, and the Welfare of Children*, 3 ALA. C.R. & C.L.L. REV. 101 (2013) (legal analysis regarding cohabitants' property claims has not evolved since *Marvin v. Marvin* in 1976); Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL'Y & L. 437 (2012).

119. Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 158 (2005).

120. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309 (2008).

121. *Id.* at 325.

122. *Id.* at 325–26.

123. *See, e.g.*, Latham v. Latham, 547 P.2d 144 (Or. 1976); Wilcox v. Trautz, 643 N.E.2d 141 (Mass. 1998); Bishop v. Clark, 54 P.3d 804 (Alaska 2002); Hierholzer v. Sardy, 340 N.W.2d 41 (Mich. Ct. App. 1983); Garrison, *supra* note 120, at 315–16 (2008).

124. *See* Mahoney, *supra* note 119, at 193–94 (2005).

125. *See, e.g.*, UTAH CODE ANN. § 77-36-1 (West 2018) (Cohabitant Abuse Procedures Act).

126. *See, e.g.*, In re Marriage of McKeever, 453 N.E.2d 1153 (Ill. App. Ct. 1983); *see also* Michael v. Hernandez, *The Right of Religious Landlords to Exclude Unmarried Cohabitants: Debunking the Myth of the Tenant's "New Clothes,"* 77 NEB. L. REV 494, 506–08 (1998).

absolute bar to child custody, they are recognizing the good of fostering a child's ongoing relationship to his or her biological parent. None of these developments are equivalent to a decision that cohabitation is itself a behavior the legislature wishes to protect.

### *C. Word Play and Emotional Appeal*

Cohabitation-protective courts rely upon word play and emotional appeals to insist that defendants are discriminating against single persons. They do not engage in meaningful analysis of a state's legislative intent regarding the scope of "marital status nondiscrimination" and they do not investigate the state's disposition toward cohabitation. Examples of both are provided below.

The word play is not only easily falsifiable—(as commentators before me have demonstrated)[127]—but fails to convincingly demonstrate that defendants are discriminating against persons on the grounds of their marital status. And making emotional harm the basis of a demand for a civil rights remedy is a hotly contested topic with important ramifications for free speech.[128] On both accounts, these judicial techniques for granting rights to cohabitants give the appearance of exercising ideological commitments over judicial functions.

Regarding courts' word play, Part I described cohabitation-protective courts' "proofs" that employers and landlords are discriminating against singles when they refuse to hire or employ cohabitants. For convenience, I repeat these formulas here. Alaska's *Swanner* opinion recited:

> [B]ecause the landlord would have rented to the prospective tenants had they been married, and he refused to rent the property only after learning the couple was not married, "[t]his constitutes unlawful discrimination based on marital status." The same reasoning applies here. Because *Swanner* would have rented the properties to the couples had they been married, and he refused to rent the property only after he learned they were not, Swanner unlawfully discriminated on the basis of marital status.[129]

The *Desilets* Court stated:

> If married couple A wanted to cohabit in an apartment owned by the defendants, they would have no objection. If unmarried couple B wanted to cohabit in an apartment owned by the defendants, they would have great objection. The controlling and discriminating difference between the two situations is the difference in the marital status of the two couples.[130]

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127. Adam J. MacLeod, *Tempering Civil Rights Conflicts: Common Law for the Moral Marketplace*, 2016 MICH. ST. L. REV. 643, 707–08 (2016); Stein, *supra* note 9, at 197–98.

128. *See, e.g.*, Douglas Laycock, *Religious Liberty for Politically Active Minority Groups: A Response to Nejaime and Siegel*, 125 YALE L.J. FORUM 369, 376 (2016).

129. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 278 (Alaska 1994) (citation omitted).

130. Att'y Gen. v. Desilets, 636 N.E.2d 233, 235 (Mass. 1994).

The *Smith* and *McCready* courts repeated both the *Desilets* and the *Swanner* formulas.[131] The *Richardson* court did acknowledge, however, that a person did not have to be single to have sex outside of marriage or cohabit with a non-spouse, but further noted that that "when single people have sex, it is always outside of marriage."[132]

*Richardson* did not further explain why this latter fact should have any bearing on its statutory interpretation. Was the court assuming that the defendant Christian university would be more punitive respecting single people engaging in nonmarital sex than married people cheating on their spouses? There was no evidence of this. Or was it suggesting that opposition to nonmarital sex is statistically likely to affect more single people? The court's thinking is opaque. In the end, it simply concluded that a "bright-line distinction between conduct and status" was of "questionable utility."[133]

Yet cohabitation-protective courts' formulas effectively conflating conduct with status are easily falsifiable. First, even *Desilets*' claim about what distinguishes "Couple A" from "Couple B" cannot avoid relying upon the couples' conduct (sexual intimacy), given that this conduct is a feature of both relationships. If the *Desilets* court did not mean to reference conduct by the phrase "unmarried couple" then the court's conclusion—"[t]he controlling and discriminating difference between the two situations is the difference in the marital status of the two couples"—is factually wrong. As Professor Adam MacLeod[134] and others have observed, the defendant landlord would certainly rent to persons not engaging in nonmarital sexual intercourse such as an "unmarried couple" who were siblings, or to an adult child caring for an older relative, or to friends or other non-intimate roommates. When a landlord's or employer's objection is to nonmarital sex, one can also assume that he or she would object to housing or employing a cohabiting couple in which *both* partners are married, but not to each other.[135] Another way of framing this critique of *Desilets* is to say that "but for" the conduct involved, the couple's status as married or unmarried would not matter at all.

It is likewise simple to restate the *Swanner* court's formula for conflating status and conduct to show that an objection to conduct is an essential part of the defendant's rationale. That is, Swanner would have rented the properties to the unmarried couple were they not sexually involved, but refused to rent the property only after he learned that they were, and therefore Swanner unlawfully discriminated on the basis of sexual conduct.

At the very least, a court should have acknowledged that conduct is an important element of the defendants' refusal. Cohabitation-protective courts' "proofs"

131. Smith v. Fair Emp't Hous. Comm'n, 913 P.2d 909, 915 (Cal. 1996); McCready v. Hoffius, 586 N.W.2d 723, 727 (Mich. 1998).

132. Richardson v. Northwest Christian University, 242 F. Supp. 3d 1132, 1152 (D.Or. 2017).

133. *Id.*

134. *MacLeod*, *supra* note 127, at 708.

135. Stein, *supra* note 9, at 197–98 (1995).

do not answer the central question of whether a defendant was discriminating on the basis of marital status; instead, they make a *choice* to elevate the status over the conduct of the plaintiffs when they claim to know the basis for defendants' refusals to rent to them. This ignores the defendants' past equal treatment of single and married persons. It also looks like the courts involved were making a "policy choice" and not engaging in true statutory interpretation.

Some cohabitation-protective courts also rely upon emotional appeals. They assert a state interest protecting cohabitants from feeling offended by rejections based upon their lifestyle choices. For example, the *McCready* court understood itself as working to "eliminate the effects of offensive or demeaning stereotypes, prejudices and biases," against cohabitants.[136] The *Swanner* court referred to the government's transactional interests in avoiding "degrad[ing]" persons or "affront[ing]" their "dignity" or "limit[ing]" their "opportunities."[137] As discussed below, there are risks to free expression posed by this formulation of a state's interest.

From time to time a commentator will propose the importance of having a "roof over one's head" as the basis for extending a remedial statute to a newer situation. [138] It is undoubtedly good to have secure housing. But the strength of a state's interests in this good is not clear; states obviously and persistently fail to provide sufficient housing for the poorest citizens, or even the working poor.[139] How is their interest in housing cohabitants special?

Another scholar supporting a cohabitation-protective interpretation of nondiscrimination laws, Professor Deborah Widiss, would bring nonmarital cohabitation under the umbrella of "marital status" by means of what is called the "new immutability theory."[140] She notes that antidiscrimination laws were *formerly* justified because they "protect individuals against discrimination based on immutable characteristics, expressing a consensus in modern American society that it is unfair to be excluded from opportunities simply because of who one is." But she argues that courts and commentators, more recently, are embracing a broader concept—dubbed the "new immutability"—that includes not only unchangeable traits, but also "traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically."[141] But even this theory—which focuses on protection for individual traits—does not easily encompass

136. *McCready*, 586 N.W.2d at 726.

137. Swanner v. Anchorage Equal Rights Comm'n, 874 P.2d 274, 283 (Alaska 1994).

138. *See, e.g.*, Steven L. McConnell, *Civil Rights—Marital Status Discrimination—Refusing to Rent to Unmarried Cohabitants Is Not Unlawful Marital Status Discrimination Under the Minnesota Human Rights Act*, 13 U. ARK. LITTLE ROCK L.J 653, 670 (1991).

139. *See, e.g.*, S. Burlington Cty. NAACP v. Twp. Of Mount Laurel, 336 A.2d 713 (N.J. 1975); *7 Things You Should Know About Poverty and Housing*, HABITAT FOR HUMANITY, https://www.habitat.org/stories/7-things-you-should-know-about-poverty-and-housing [https://perma.cc/YM56-JR47] (last visited Apr. 8, 2019).

140. Widiss, *supra* note 4, at 2111.

141. *Id.*

cohabitation, which involves the living arrangements of a couple *combined* with their conduct.

Furthermore, cohabitation is not easily characterized as a trait central to personal identity. In the United States, the average length of a cohabitation is less than two years.[142] After this, only about 50% entering into marriage.[143] People also serially cohabit; according to a 2018 survey, about 44% of current cohabitants, and 20% of people who are not presently cohabiting, have lived with another cohabitant before.[144] People also enter into cohabitation for a wide variety of reasons not closely or even remotely tied to expressing identity. Scholarship reports that people cohabit for reasons ranging from convenience and economic pressure, to an unexpected pregnancy, to testing the relationship, to wanting to spend more time together.[145]

It is quite unlikely, therefore, that individuals closely link their choice to cohabit with their core identity, or with their dignity as a human person. Furthermore, even if they did, the question of whether to allow harms to dignity to trigger civil rights' remedies is fraught with consequences both for free speech and religious freedom. In the words of First Amendment scholar Douglas Laycock:

> But however great or small the effects, I agree that there is a dignitary harm in being refused service because of perceived immorality.
>
> Preventing these harms cannot be a compelling interest that justifies suppressing someone else's individual rights. These are expressive harms, based on the "communicative impact" of the religious practice—a justification that is generally fatal to regulation of expressive conduct. That justification must be equally fatal when offered to override protections for religious conduct. That your religion offends me is not a sufficient reason to suppress it.[146]

Consequently, a decision regarding the weight to be given to dignitary harms is not a matter to be resolved summarily by a judge in the context of an individual controversy.

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142. Casey E. Copen et al., *Premarital Cohabitation in the United States: 2006–2010 National Survey of Family Growth* (Apr. 4, 2013), https://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf [https://perma.cc/VBA8-SFEC].

143. *Id*.

144. Scott Stanley & Galena Rhoades, *Cohabitation is Pervasive*, INST. FOR FAMILY STUDIES (June 20, 2018), https://ifstudies.org/blog/cohabitation-is-pervasive [https://perma.cc/M84R-N9ET].

145. *See* Galena K. Rhoades, Scott M. Stanley & Howard J. Markman, *Couples' Reasons for Cohabitation: Associations with Individual Well-Being and Relationship Quality*, 30 J. FAM. ISSUES, 233–58 (2009); Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 442 (2004).

146. Laycock, *supra* note 128, at 376 (2016).

### *D. Stretching the Remedial Purposes Canon*

In addition to ignoring legislative intent and engaging in easily falsifiable "proofs," cohabitation-protective courts and some sympathetic scholarly commentary rely on brief references to the "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purpose."[147] According to a 2010 scholarly exploration of the remedial purposes canon: "If a statute promotes the public good by establishing necessary standards, protecting vulnerable classes of people, or invoking any other method for promoting a benefit to the general welfare, then courts are likely to consider it remedial by its very nature."[148]

In the course of its statutory interpretation, for example, the *Foreman* court noted that Alaska's housing nondiscrimination statute is a "modern, remedial provision."[149] The *Richardson* court concluded that it should broadly construe Oregon's remedial nondiscrimination law in order to "promote the beneficial results intended"—i.e., protecting employees from discrimination.[150] Interestingly, the *Richardson* court adopted this tactic after explicitly *declining* to investigate the statute's legislative history, and in the face of relevant Oregon law indicating that a court should not rely on general principles of statutory construction until it had exhausted both the statute's text and its context.[151]

Commentators supporting cohabitation-protective conclusions write similarly. Professor Widiss, for example, writes that "[t]o the extent there is any ambiguity, it tilts in favor of coverage under a general principle of statutory interpretation that remedial statutes are to be interpreted broadly."[152] This directly contradicts, however, her discussion of widespread social disapproval of cohabiting at the very same period during which the allegedly "ambiguous" statutes were adopted.[153] Professor Joslin observes that a disproportionate number of poor and minority[154] Americans cohabit and suggests that refusing to rent on the basis of cohabitation may be a proxy for discrimination based on race and nonmarital birth.[155] Professor Widiss's observation about high rates of cohabitation among minority groups points in the same direction.[156] As elaborated below, however, these uses of the "remedial purpose" canon fail to observe or even grapple with some of its basic elements, even as I acknowledge that the civil rights laws in question qualify as "remedial."

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147. Tcherepnin v. Knight, 389 U. S. 332, 336 (1967).

148. Lea J. Heffernan, *Application of the Remedial Purpose Canon to CERCLA Successor Liability Issues After United States v. Bestfoods: Why State Corporate Law Should Be Applied in Circuits Encompassing Substantial Continuity Exception States*, 30 N. ILL. U. L. REV. 387, 412 (2010).

149. Foreman v. Anchorage Equal Rights Comm'n, 779 P.2d 1199, 1202 (Alaska 1989).

150. Richardson v. Northwest Christian University, 242 F. Supp. 3d 1132, 1152 (D. Or. 2017).

151. *Id*. at 1149–50.

152. Widiss, *supra* note 4, at 2122–23.

153. *Id*. at 2119.

154. Joslin, *supra* 4, at 806.

155. *Id*.

156. Widiss, *supra* note 4, at 2089, 2099.

I also acknowledge that, respecting a remedial statute, a court may decide to extend its scope beyond the principle concern of the legislators. Obviously, however, courts seek further guidance before deciding whether to extend a given statute beyond its clearly articulated remedial purpose. It is not enough to call a statute "remedial" in order to conclude that it protects against any and all plausibly phrased harms. For example, the Supreme Court held in a case involving same-sex sexual harassment under Title VII that, when interpreting a statute by means of the remedial purpose canon, a court should look to "the provisions of our laws," and "not the principal concerns of our legislators."[157] In that case, the Court held that "sex discrimination" clearly encompassed discrimination because a person was of the same sex and male, not—as the statutory drafters had imagined—a person of the opposite-sex and female. It is plainly discrimination based on a person's "sex"—male or female—in both cases. The Court further cautioned that Title VII should not "expand into a general civility code."[158]

But the "marital status" provision at issue here does not facially or clearly compel the protection of cohabiting, which is an inseparable mix of status with conduct. The other categories of persons ordinarily protected in these nondiscrimination statutes refer clearly to status, not conduct: race, religion, sex, national origin, sexual orientation, and others.

There are also important factors constraining a court's application of the remedial purpose canon. These include the existence of extra-statutory goals or meta-principles found in the law of the relevant jurisdiction, which contradict the requested broad interpretation of the statute.[159] Certainly, a state's decision to prize marriage over cohabitation is such an extra-statutory goal or meta-principle. Some state codes additionally contained law directly expressing disapproval of nonmarital sex or cohabitation at the time their marital status nondiscrimination provisions were adopted.[160]

As part of their remedial purposes analysis, some cohabitation-protective courts and commentators have resorted to reframing the scope of the "harm" to be remedied to include emotional or dignitary harm.[161]

In sum, the statutory interpretation practices of cohabitation-protective opinions are easily contested. They demonstrate a wide variety of problems, which highlight the need for the type of clarity that legislative processes can provide. Furthermore, the subject matter at hand (i.e., which sexually intimate relationships draw state interest and protection) is a family law matter long addressed by

157. Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75, 80 (1998).

158. *Id*. at 81.

159. *See* Blake Watson, *Liberal Construction of CERCLA Under the Remedial Purpose Canon: Have the Lower Courts Taken a Good Thing Too Far?*, 20 HARV. ENVTL. L. REV. 199, 243 (1996) (citing Ardestani v. INS, 502 U.S. 129, 145–48 (1991) (Blackmun, J., dissenting); Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 178–79 (O'Connor, J., dissenting) (1983) (finding that extra-statutory goals counsel against a liberal construction of the remedial statute at issue).

160. *See supra* Part I (discussing *Swanner*, *Foreman* and *Desilets*).

161. *See supra* Part II.

legislatures, which typically employ fact-finding processes adequate to address the complex health, safety, and welfare questions raised by cohabitation. I now turn to a closer consideration of this separation of powers question.

## III. RESPECTING SEPARATION OF POWERS

Decisions concerning whether or not to specially protect cohabitation should be left to legislatures for several reasons. First, the matter concerns family law proper: the health, safety, and welfare of persons in connection with intimate or parental relationships. These are the kinds of topics legislators regularly address in lengthy state family codes. Second, there are many complex questions raised by cohabitation, especially concerning the welfare of children and marriage. These are best addressed using legislative fact-finding processes. Finally, protecting cohabitation will provoke free exercise of religion challenges. An examination of the sloppy ways in which cohabitation-protective courts approach these challenges strongly indicates that legislators will do a better job elaborating and balancing religious with other interests.

### *A. It is the Purview of Family Law to Determine Which Relationships a State Wants to Protect*

The matter of the sexual relationships of adults who regularly become economically and socially interdependent to a greater or lesser degree, and regularly have and/or rear children together, is a subject matter addressed by legislatures in all fifty states and the District of Columbia. It is a central aspect of citizens' health, safety, and welfare, and therefore quintessentially within a state legislature's "police power" jurisdiction. Justice Kennedy in *U.S. v. Windsor* highlighted states' "broad authority" to "regulate" the subject of domestic relations with respect to the "'[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.'"[162]

Family codes in every U.S. jurisdiction always and in elaborate detail address which sexually intimate relationships give rise to special rights and duties. These codes address the requirements for entering into a relational status to which the state attaches such rights and obligations—rights and obligations not of the couples' choosing. These rights and obligations apply during the ongoing relationship of the adults, and to the relationships of adults and their children. Family codes also address the requirements for terminating or exiting such relationships. Professor Janet Halley characterizes family law as "about the formation of the core relationships, which are paradigmatically marital and parental, and about the dissolution of marriage and its consequences for adults and children."[163] Professor Doulas NeJaime writes that family law is characterized by: "[l]egislatures pass[ing] statutes that define and regulate relationships between adults as

162. 570 U.S. 744, 766 (2013) (citing Williams v. North Carolina, 317 U.S. 287, 298 (1942)).
163. Janet Halley, *What Is Family Law? A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 5 (2011).

well as parents and children."[164] He adds that "marriage and parenthood are central institutions in family law."[165]

Cohabitation is therefore manifestly a concern of family law. This is underscored by the considerable number of scholarly articles on cohabitation, which recommend that legislatures attach new rights and obligations to this living arrangement.[166] Cohabitants' sexual relationships regularly produce children and thus create children's family structure. In the U.S. today, over 70% of adults are likely to cohabit at some time.[167] Twenty-three percent of all births in the U.S. today occur in cohabiting households.[168] By age twelve, about 40% of U.S. children will have spent some time in a cohabiting household.[169] Cohabitation thus constantly engages questions about adult interdependencies, rights, and obligations between the couple and between the couple and third parties, including the state. It also engages questions about rights and obligations concerning children.

Cohabiting also concerns a *core* family law matter: marriage. According to numerous judges, legislators and commentators, lawmaking on cohabitation may affect marriage either by encouraging it (because marriage brings more state benefits) or discouraging it (because separated cohabitants usually owe nothing to each other).[170] The possible effects are often contested,[171] but the bottom line is remarkably consistent: almost universally, states do not encourage cohabitation by attaching rights and benefits to it.

The Supreme Court of Illinois discussed states' refusal to encourage cohabitation in a case in which the court was asked to overturn its common law position refusing to recognize contracts entered into by cohabitants for the distribution of money and property upon dissolution. The court wrote:

> There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships. Of substantially greater importance than the rights of the immediate parties is the impact of

164. Douglas NeJaime, *The Family's Constitution*, 32 CONST. COMMENT. 413, 414 (2017).

165. *Id*. at 417.

166. *See, e.g*., Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1 (2007); Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751 (2010); 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 (2016).

167. Stanley, *supra* note 144.

168. Casey E. Copen et al., *Premarital Cohabitation in the United States: 2006–2010 National Survey of Family Growth* (Apr. 4, 2013), https://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf [https://perma.cc/ZQT5-7FDC].

169. Wendy D. Manning, *Cohabitation and Child Wellbeing*, 25 FUTURE CHILD 51 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4768758/ [https://perma.cc/X9DV-YRWF].

170. *See generally* Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 166–72 (2005).

171. *See, e.g*., Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1 (2007) (analyzing arguments about cohabitation's potential effects upon marriage).

> such recognition upon our society and the institution of marriage. 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? . . .
>
> The issue, realistically, is whether it is appropriate for this court to grant a legal status to a private arrangement substituting for the institution of marriage sanctioned by the State. The question whether change is needed in the law governing the rights of parties in this delicate area of marriage-like relationships involves evaluations of sociological data and alternatives we believe best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field.[172]

Thirty-six years after this decision, the Illinois Supreme Court—in a case involving the dissolution of an unmarried cohabitation—continued to insist that the question whether to recognize rights between cohabitants remained legislative, not judicial, given that "[w]hen deciding complex public-policy considerations," such "questions are appropriately within the province of the legislature."[173]

Courts which have refused to protect cohabitants under a marital status nondiscrimination statute write similarly. Maryland's highest court, for example, refused to extend protection to cohabitants partially upon the grounds that it would constitute a policy decision to "denigrate the institution of marriage."[174] The Washington Supreme Court described the question of "whether social relations deserve protection" in nondiscrimination law as "a decision for the legislature, not this Court."[175] The court wrote: "It is a public policy question whether or not to protect a type of living arrangement no matter that public opinion in its favor has changed.[176] Minnesota's Supreme Court similarly worried about whether protecting cohabitation would erode "marriage and family life," which it described as "institutions which have sustained our civilization."[177]

In sum, when state courts read protection for cohabitation within nondiscrimination statutes, they are expressing judgments of the kind ordinarily consigned to legislatures. In turn, legislatures have made a choice—despite the vast numbers of cohabitants and calls from important scholars—*not* to protect cohabitation. Yet some courts are placing cohabiting couples, including those in both short-term or long-term relationships, those who are engaged, and those living together

172. Hewitt v. Hewitt, 394 N.E.2d 1204, 1207 (Ill. 1979) (citations omitted).
173. Blumenthal v. Brewer, 69 N.E.3d 834, 857 (Ill. 2016) (citations omitted).
174. Maryland Comm'n on Human Relations v. Greenbelt Homes, Inc., 475 A.2d 1192, 1197 (Md. 1984).
175. Waggoner v. Ace Hardware, 953 P.2d 88, 92 (Wash. 1998) (citations omitted).
176. McFadden v. Elma Country Club, 613 P.2d 146 (Wash. Ct. App. 1980).
177. State by Cooper v. French, 460 N.W.2d 2, 6 (Minn. 1990).

for economic convenience, on the same plane as married couples. These courts suggest that cohabiting is a social good and that a desire to avoid cooperating with cohabiting is equivalent to disparaging another's identity and dignity. These are important policy statements about the health, safety, and welfare of citizens of the kind legislatures investigate and declare. These policy choices are better suited to legislative rather than judicial determinations.

### *B. The Complex Policy Questions Raised by Cohabitation*

Underscoring that legislatures are the appropriate venue for any change in cohabitation law is the ongoing debate over whether cohabitation is a net social good or a net social problem. Cohabitation intersects numerous human and social welfare questions, which are complex and require the kind of processes—especially the investigatory capacities—that legislatures possess. This is another way of saying that it is factually inaccurate and simplistic for judges or commentators to frame cohabitation as a matter concerning only individual dignity or freedom of sexual expression. Cohabitation is rather a profoundly social phenomenon with more than a few consequences for the parties involved, regularly including vulnerable children. And state legislatures take a very special interest in assigning rights and responsibilities in connection with children, given that adults *make* children *and* their family structure, and are therefore held responsible for both of them. Furthermore, children are vulnerable citizens who invite the *parens patriae* protection of the state.

The evidence about the effects of cohabitation is not always clear; new data continue to emerge nearly monthly. And investigators cannot always cleanly distinguish selection from causal effects. When causation is found, its degree may be uncertain. This will be noted below in discussing individual claims. Still, it appears that three observations can be made overall.

First, there is a great deal of well-regarded, peer-reviewed literature on cohabitation.[178]

Second, there does not appear to be any reason for state law to support cohabitation generally as a social phenomenon. This is not equivalent to a statement that there is an argument for legally punishing it. Rather, it is an observation that cohabitation is a complex phenomenon, not easily associated with positive social benefits, especially for children, and not therefore a living arrangement to be casually protected by judicial decisions devoid of full investigations of the phenomenon. Regarding its social impact—again, speaking generally—some cohabitation appears to increase self-reported happiness, although by a lower amount than marriage.[179] But there is no evidence that cohabitation generally benefits men, women, and especially children (individually or as a group) in ways that society would wish to protect or encourage.

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178. *See infra* Section III.A.

179. *See* Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARRIAGE AND FAM. 527, 531 (1998).

Third, there is a steady stream of research indicating that cohabitation is associated with more negative phenomena, with the possible exception of the cohabitation of an already engaged-to-be-married couple and some older as well as educationally privileged couples. Some of the negative correlates of cohabitation appear to be selection effects (i.e., less advantaged individuals and/or people less interested in or able to effect commitment, select for cohabitation). However, there is a body of data finding some negative causal effects as well. In either case—whether we are dealing with either or both selection or causation—it makes no sense for judges to protect a living arrangement in which negative events are more likely to occur.

Summarized briefly, cohabitation is associated with the following:

1. Educational and Emotional Difficulties for Children Affected by Instability

About 66% of cohabiting parents separate before their child is twelve years old, compared with only 25% of married parents.[180] And it is one of the most persistent themes in family scholarship that "[a]ll else equal, children raised in stable families are healthier, better educated, and more likely to avoid poverty than those who experience transitions in family structure."[181] Instability is regularly linked to the greater emotional and educational difficulties suffered by children from cohabiting homes,[182] in every country studied.[183] Even in Nordic countries with generous social welfare policies, where cohabitation differs legally and financially only a little from marriage, the children involved are still more "likely to experience disruption than those born to married parents."[184]

Sociologist Sara McLanahan and her colleagues report that "children living with their mother and her cohabiting partner have the poorest outcomes, or are more similar to children living with single mothers than to children living with a married stepparent," and that "these differences are not completely explained by the poorer economic circumstances or parental engagement in cohabiting

180. Richard Reeves & Eleanor Krause, *Cohabiting Parents Differ from Married Ones in Three Big Ways*, *in* BROOKINGS INSTITUTION: SOCIAL MOBILITY PAPERS (2017), https://www.brookings.edu/research/cohabiting-parents-differ-from-married-ones-in-three-big-ways/ [https://perma.cc/4CLT-EX6U].

181. *Id.*; *see also* P. Fomby & A.J. Cherlin, *Family Instability and Child Well-Being*, AM. SOCIOL. REV. 181 (2007); T. L. Craigie, J. Brooks-Gunn & J. Waldfogel, *Family Structure, Family Stability, and Outcomes of Five-Year-Old Children*, 1 FAM., RELATIONSHIPS & SOCIETIES 43 (2012); J. Waldfogel, T.A. Craigie & J. Brooks-Gunn, *Fragile Families and Child Wellbeing*, 20 FUTURE CHILD 87 (2010).

182. Wendy D. Manning & Ronald Bulanda, *Cohabitation and Measurement of Family Trajectories*, *in* BOWLING GREEN STATE UNIVERSITY, WORKING PAPER SERIES (2004–2006), (measuring suspension and expulsion from school); Kelly R. Raley, Michelle L. Frisco & Elizabeth Wildsmith, *Maternal Cohabitation and Educational Success*, 78 SOCIOL. EDUC. 144 (2005); Elizabeth T. Thompson, T. L. Hanson & Sara S. McLanahan, *Family Structure and Child Well-Being: Economic Resources Versus Parental Behaviors*, 73 SOC. FORCES 221 (1994).

183. W. Bradford Wilcox & Laurie DeRose, *In Europe, Cohabitation is Stable . . . Right?*, *in* BROOKINGS INSTITUTION: SOCIAL MOBILITY PAPERS (2017), https://www.brookings.edu/blog/social-mobility-memos/2017/03/27/in-europe-cohabitation-is-stable-right/ [https://perma.cc/UAE8-YK24].

184. Elizabeth Thomson & Sara S. McLanahan, *Reflections on "Family Structure and Child Well-Being: Economic Resources vs. Parental Socialization,"* 91 SOC. FORCES 45, 47 (2012).

stepfamilies compared with married stepfamilies." [185] Furthermore, according to McLanahan, even "cohabiting biological parents are in many ways more similar to cohabiting stepfamilies than to married biological parents."[186] She associates this with economic disadvantage, but also notes that "[c]ohabiting biological parents may also provide lower quality parenting and home environments than married biological parents." Referring to the stability factor, she writes that this outcome is also likely linked to the fact that cohabiting biological parents are more likely to separate than married parents," and the cumulative number of changes "may be independently and negatively associated with outcomes during childhood and young adulthood."[187]

McLanahan further points out that there are much higher levels of complexity in unmarried versus married parent stepfamilies. Not only do the adults switch partners more often, but also cohabiting households contain more half-siblings or unrelated children. She writes that this accounts for a "great deal of the poorer outcomes among children living with a parent and stepparent," even if both of the child's biological parents are present.[188]

### 2. Elevated Rates of Violence for Children Living with an Unrelated Male-Partner of the Mother

In 2017, after writing a blog post about children and cohabitation, I received the following email:

> My grandson was killed two years ago by a boyfriend of my daughter . . . . From what I have learned, the protective natural instincts of a man toward his child are not as much there statistically for the child of a girlfriend of another father. This does not come from research, but it was told to me by the detectives who put together the case . . . . I am sure there is some good forensic research in this area as child protective detectives knew this awful idiom well. I wish I had on tape the lecture that [Detective] Wischer gave to my daughter the night he was arrested . . . on . . . the danger of a non-father in a nonmarried relationship.[189]

It is becoming increasingly well known that cohabitation involving a man living with his partner's unrelated child is the source of a significant amount of violence to children. The Fourth National Incidence Study of Child Abuse and Neglect[190] compared rates of physical, sexual, and emotional abuse in households comprised of different family structures, including those with a single parent and

185. *Id*. at 46.
186. *Id*.
187. *Id*. at 47.
188. *Id*. at 48.
189. Email from J. Garland Pollard, Grandfather of Deceased 17-Month-Old Child, William Quincy Pollard (Nov. 20, 2017) (on file with the author).
190. DEPARTMENT OF HEALTH AND HUMAN SERVICES, INCIDENCE OF ENDANGERMENT STANDARD ABUSE BY FAMILY STRUCTURE AND LIVING ARRANGEMENT, THE FOURTH NATIONAL INCIDENCE STUDY OF CHILD

an unrelated partner. As compared with married families, rates of physical abuse in these latter households were over ten times larger; rates of sexual abuse were about thirteen times larger; and rates of emotional abuse more than seven times larger. A 2005 study in the journal *Pediatrics* reported rates of inflicted-injury deaths among children under five living with an unrelated male, of fifty times the rates of such children living with two biological parents.[191] This appears to be the result not only of selection effects (women in healthier relationships will more likely select for marriage) but also of causal effects. Such causal effects might include men's and society's expectations for the behavior of married men and married men's commitment, including commitment to the physical safety of a spouse.[192] A 2008 Iowa Supreme Court decision incorporated this type of analysis. In *State v. Mitchell*,[193] an unmarried mother was convicted of child endangerment for bringing her child into the cohabiting home she shared with a convicted sex offender. The mother argued that the relevant law violated the Equal Protection guarantee because her ex-husband—the child's father—was also a sex offender. The Iowa court upheld the conviction, however, stating that it was rational for the state to determine that "a sex offender married to the parent will have a greater sense of commitment to the family unit created by the marriage . . . so that the sex offender feels he . . . has a stake in the well-being of the children . . . . The legislature could reasonably conclude that unmarried cohabitation of a parent with a sex offender poses greater danger to children than cohabitation between married spouses."[194]

A great deal of cohabitation today involves the presence of an unrelated male. In fact, of all children living in cohabiting households, only half are living with two biological parents, while the other half live with one biological parent and their cohabiting partner.[195]

Such data have helped lead scholars on both the left and the right to advocate for a state-sponsored campaign in favor of marriage and marital parenthood.[196]

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ABUSE AND NEGLECT: REPORT TO CONGRESS (2010), https://www.acf.hhs.gov/opre/resource/fourth-national-incidence-study-of-child-abuse-and-neglect-nis-4-report-to [https://perma.cc/9LQY-QR49].

191. Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting from Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 J. PEDIATR. e687, e690 (2005), http://pediatrics.aappublications.org/content/116/5/e687.full [https://perma.cc/269A-ZEQX].

192. W. Bradford Wilcox & Robin Fretwell Wilson, *One Way to End Violence against Women? Married Dads*, WASH. POST (June 10, 2014), https://www.washingtonpost.com/posteverything/wp/2014/06/10/the-best-way-to-end-violence-against-women-stop-taking-lovers-and-get-married/?utm_term=.aec6d2f63b13 [https://perma.cc/2H2F-KEZV].

193. 757 N.W.2d 431 (Iowa 2008).

194. *Id*. at 438.

195. Reeves, *supra* note 180.

196. BROOKINGS INSTITUTION AND AMERICAN ENTERPRISE INSTITUTE, OPPORTUNITY, RESPONSIBILITY AND SECURITY: A CONSENSUS PLAN FOR REDUCING POVERTY AND RESTORING THE AMERICAN DREAM, https://www.brookings.edu/wp-content/uploads/2016/07/Full-Report.pdf [https://perma.cc/UL7J-CLJ2].

3. Elevated Rates of Violence and Infidelity Between Cohabiting Adults

In an important paper investigating sexual infidelity between both cohabiting and married couples, researchers Judith Treas and Deirdre Giesen concluded that cohabiters are "more likely than married people to engage in infidelity even when we controlled for permissiveness of personalities regarding extramarital sex. This finding suggests that lower investments in unions between cohabiters, not their less conventional values, accounted for their greater risk of infidelity."[197]

Violence against women is also more prevalent among cohabiting couples compared to couples who are married. According to the U.S. Department of Justice, married women are the least likely of all women to suffer intimate partner violence.[198] University of Chicago sociologist Linda Waite found that "after controlling for education, race, age and gender, people who live together are still three times more likely to report violent arguments than married people."[199] Waite attributed the difference in part to lower levels of commitment and more infidelity in cohabiting couples, both of which can lead to domestic violence.

Cohabiting couples on average also report lower relationship quality than married couples. As summarized by Professor Mark Strasser, "cohabiting couples tend to have more conflict, less communication, less commitment, feel less secure in the relationship, and experience more infidelity."[200] Scholars report more than a few possible reasons for these outcomes, such as the absence of a long-run perspective, higher rates of infidelity,[201] and relationships characterized by inertia instead of commitment.[202] Additionally, an atmosphere of mutual "testing," instead of a mutual commitment to build a relationship, is also a possible factor.[203]

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197. Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 59 (2000).

198. Shannan Catalano, *Intimate Partner Violence, 1993–2010*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS (2012), https://www.bjs.gov/content/pub/pdf/ipv9310.pdf [https://perma.cc/S68C-M8EL].

199. LINDA WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER AND BETTER OFF FINANCIALLY 156 (2002); *see also* Catherine T. Kenney & Sara McLanahan, *Why Are Cohabiting Relationships More Violent Than Marriages?* 44 DEMOGRAPHY 127, 140 (2006).

200. Mark Strasser, *Marriage, Cohabitation, and the Welfare of Children*, 3 ALA. CIV. RTS. & CIV. LIBERTIES. L. REV. 101 (2013) (citing Joanna M. Reed, *Not Crossing the Extra Line: How Cohabitors with Children View their Unions*, 68 J. MARRIAGE FAM. 1117, 1119 (2006)).

201. Judith Treas & Deirder Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J MARRIAGE FAM. 48, 59 (2004), https://onlinelibrary.wiley.com/doi/pdf/10.1111/j.1741-3737.2000.00048.x [https://perma.cc/53CM-SXN9].

202. Scott Stanley, Galena K. Rhoades & Howard J. Markman, *Sliding vs. Deciding: Inertia and the Premarital Cohabitation Effect*, 55 FAM. RELS. 499 (2006).

203. Galena K. Rhoades, Scott M. Stanley & Howard J. Markman, *Couples' Reasons for Cohabitation: Association with Individual Well-Being and Relationship Quality*, 30 J. FAMILY ISSUES 233, 252 (2009).

### 4. Divorce Rates

Scholars largely agree that if cohabitants are not engaged when they begin to cohabit, or are younger, they are more likely to divorce after marriage than couples who have not cohabited prior to marriage or who are older.[204] Sociologist Scott Stanley theorized that this is due in part to cohabitants' developing a "sliding versus deciding" mentality.[205] By this, Stanley is referring to a mentality that slides into marriage because of past co-residence and sexual entanglement, versus a mentality that makes a clear decision to commit for life to another person.[206]

### 5. Beneficial Effects

What about the benefits to cohabitation a legislature might wish to consider, especially in the context of nondiscrimination laws?

Some commentators suggest that cohabitation should be socially protected because it is economic to share housing, which is especially important to poor and minority citizens.[207] Many agree that decent housing is an important social good. Nonetheless, housing for the poor is scarce, given that both local governments and developers are so resistant to providing it.[208] A legislature considering protecting cohabitation might want to consider whether its jurisdiction is experiencing or is likely to experience a housing shortage, given the considerable number of people interested in cohabiting.

Some researchers, as noted above, highlighted the association between cohabitation and an improved sense of well-being or happiness for married and nonmarried cohabiters. It appears that regular companionship is a benefit in both arrangements.

Other supporters of protections for cohabitants might highlight how consensual sexual expression is an exercise of human freedom.[209] They might additionally assert that the Supreme Court considers all consensual sexual expression—not only among the married—as a constitutional right. Professor Joslin briefly referenced this possibility, citing *Lawrence v. Texas*.[210] And Professor Widiss wrote that *Lawrence* offered "robust protection for both homosexual and heterosexual individuals' intimate choices, including the choice to engage in nonmarital

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204. Arielle Kuperberg, *Age at Coresidence, Premarital Cohabitation, and Marriage Dissolution: 1985–2009*, 76 J. MARRIAGE & FAM. 352 (2014); Galena H. Kline et al., *Timing is Everything: Pre-Engagement Cohabitation and Increased Risk for Poor Marital Outcomes*, 18 J. FAM. PSYCHOL. 311 (2004), https://pdfs.semanticscholar.org/1091/a968826628b7e11f6531335d1e3282eb0b06.pdf [https://perma.cc/5F78-VMVF].

205. Scott Stanley, Galena K. Rhoades & Howard J. Markman, *Sliding vs. Deciding: Inertia and the Premarital Cohabitation Effect*, 55 FAM. RELS. 499 (2006).

206. *Id*.

207. Joslin, *supra* note 4, at 806–07.

208. *See generally* Alana Semuels, *Where Should Poor People Live?*, ATLANTIC (June 2, 2015), https://www.theatlantic.com/business/archive/2015/06/where-should-poor-people-live/394556/ [https://perma.cc/Q82Q-MMUJ].

209. *See generally* Widiss, *supra* note 4.

210. Joslin, *supra* note 4, at 815.

intimacy."[211] She argued that *Lawrence* thereby "served to delegitimize discrimination on the basis of . . . formerly stigmatized forms of sexual intimacy more generally."[212]

Nonetheless, the constitutional argument for protecting cohabitation is not so straightforward. Although some lower courts used *Lawrence* to strike down state bans on fornication and cohabitation (as Widiss suggested),[213] it is not clear that *Lawrence* demands a strict scrutiny analysis of laws banning consensual adult sexual behavior. It may require only a rational relationship test, or something a bit stronger.[214] Even assuming that *Lawrence* is highly protective of all consensual nonmarital sex, its holding was a response to laws banning and criminalizing nonmarital homosexual relations. This is wholly different from the matter of whether or not to permit private citizens to avoid cooperating with cohabitation, and from the question of state policy respecting *procreative* sex (versus the nonprocreative sex in *Lawrence*) and nonmarital parenting; as Professor Widiss correctly describes *Lawrence*, it was about the "state's ability to *proscribe* intimacy."[215] This is quite different from a suggestion that a state's broad and longstanding decision to favor marriage over cohabitation has disappeared.

Arguments about the alleged robust constitutional protection that is due to cohabiting would also have to grapple with the fact that about half the states' and all federal nondiscrimination laws, do not contain a provision about marital status nondiscrimination.

It is further worth noting here how much the arguments for protecting cohabitation as a constitutional matter focus upon the *conduct* that cohabitants choose—sexual expression—and not their status as unmarried. This would seem to strengthen the arguments of defendants in the nondiscrimination cases to the effect that they are reacting to cohabitants' conduct and not their marital status.

Looking at all the above evidence, a locale may decide that it wishes to secure the maximum available housing and employment opportunities for cohabiting couples on the grounds of the goods of cohabitation. Legislators may also conclude that while it is not likely that there will be a large number of landlords or employers with strong moral objections to cohabitation—there are still some whose opposition to cohabitation the legislature wishes to deter in advance. A jurisdiction might come to this conclusion either because it feels strongly about the goods of cohabitation, and/or because it fears a higher degree of discrimination against it in its particular locale, and/or because it wishes to preclude in advance what it considers to be denigrating messages to persons on the basis of their domestic and sexual choices. Perhaps, due to fears similar to those expressed by

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211. Widiss, *supra* note 4, at 2094.

212. *Id*. at 2095.

213. *Id*.

214. *See* Kenji Yoshino, *The Court Can Strike Down Marriage Restrictions under a Rational-Basis Review*, SCOTUSBLOG (Aug. 23, 2011), http://www.scotusblog.com/2011/08/why-the-court-can-strike-down-marriage-restrictions-under-rational-basis-review/ [https://perma.cc/N6JR-ML92].

215. Widiss, *supra* note 4, at 2094 (emphasis added).

Professor Joslin, a jurisdiction may wish to protect cohabiting because it fears that a refusal to hire or serve a cohabitant may be pretext for race discrimination. While housing and employment nondiscrimination laws already contain processes to surface and reject "pretextual" rationales in race discrimination suits, some jurisdictions may want to provide additional protections against these, if they discern upon investigation that discrimination against cohabitants is being employed as such a pretext.[216]

Alternatively, a locale may be persuaded by the above information not to protect cohabitation. It may worry about its association with harm to children, women, and marriage. Or it may simply not find any strong reason to like and protect cohabitation, especially if it is faced with a choice to put cohabiting on the same plane as race, religion, sex, and national origin.

A state may also wish to consider its constituents' opinions on cohabitation. Despite how common cohabitation has become, and surveys showing a growing acceptance of the phenomenon, Americans are not at all united about its value.[217] On the more specific subject of cohabiting parenthood, a 2015 Pew Forum report showed that 48% believed it to be a negative trend for the country, 45% an unimportant trend and only 6% a social good.[218]

Whether a jurisdiction chooses to pursue cohabitation protection or not, the myriad and disputed correlates involve, establish that the decision belongs to the legislative branch, not the judicial.

### *C. Legislatures Are Better Suited to Strike the Proper Balance with Religious Freedom*

Legislatures have the far better opportunity to reflect upon the balance their community would like to strike between religious freedom and the state's interest in protecting cohabitation. This is important because, to the extent there is a refusal to hire or employ cohabitants, it will most likely come from religious individuals or institutions.

It is common today for judges to declare in free exercise cases concerning sexual expression, that states' compelling interests in nondiscrimination easily trump the right to freely exercise one's religion. This is most frequently noted with respect to race. For example, in *Burwell v. Hobby Lobby*[219] the majority refuted the dissent's charge that hiring discrimination based on race "might be cloaked as

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216. *See generally* Michael C. Wynter, *What is the Proper Test? The Implications of* Quigg v. Thomas County School District *on Mixed-Motive Title VII Cases at Summary Judgment*, 10 J. MARSHALL L.J. 88 (2017) (discussing the standard for "pretext").

217. *See, e.g.*, RICH MORIN, THE PUBLIC RENDERS A SPLIT VERDICT ON CHANGES IN FAMILY STRUCTURE, PEW RESEARCH CTR. 1 (Paul Taylor et al. eds., 2011), http://www.pewresearch.org/wp-content/uploads/sites/3/2011/02/Pew-Social-Trends-Changes-In-Family-Structure.pdf [https://perma.cc/83UU-L233].

218. Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RESEARCH CTR. (Apr. 25, 2018), http://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/#fn-24392-2 [https://perma.cc/Q74X-JLJT].

219. 134 S. Ct. 2751, 2783 (2014).

religious practice to escape legal sanction," saying "[o]ur decision today provides no such shield."[220]

Even though race is the usual subject of such concerns, if a marital status provision is added alongside a race provision, unless a legislature says otherwise, it is quite possible that all protected categories will be interpreted to express "compelling" state interests. Cohabitation-protective commentators encourage this. According to Professor Widiss, for example: "Courts have long recognized that statutes intended to eliminate discrimination serve compelling purposes, even when they address factors that do not receive strict scrutiny under constitutional law."[221] According to this analysis, every time a cohabitation-protective court "balances" free exercise with a state's interests in nondiscrimination, free exercise would lose.

Furthermore, and as described above, states' interests for or against protecting cohabitation may be many and complex. But so are religious freedom interests, in ways that have been very poorly explored or even alluded to in current state cases.

It would constitute a lengthy article on its own to describe the roles sexual norms play in traditional religions. These roles drive believers to refuse to cooperate with violations of their norms, whether as individuals or as institutions attempting to carry out and to pass on their missions. A very brief look at the matter in the Christian tradition illustrates this point. I have written about it more extensively elsewhere.[222]

Christianity teaches that sexual relationships between men and women—their one-flesh unity, their permanence, and their procreativity—are supposed to image the permanent, faithful, and fruitful union of the three persons of a triune God: Father, Son and Holy Spirit. These relationships are also supposed to model how God loves human being, and how human beings are to love God and one another. There is a great deal of theology on this point.[223] My point here is simply that the matter of sexual morality has significance for Christians beyond what a court might explore, but not beyond the capacity of a legislature to investigate.

Disagreements over sex, therefore, would matter to Christian owners of real estate being asked to give cohabitants a bedroom, and to religious employers—especially within institutions where the work of passing on the faith is explicitly pursued. The transmission of faith is a protected religious activity according to *Hosanna Tabor v. Evangelical Lutheran*.[224]

A legislature may also want to remember that calling a Christian defendant's refusal to employ or house a cohabitant "marital *status* discrimination"—and

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220. *Id.*

221. Widiss, *supra* note 4, at 2089.

222. Helen M. Alvaré, *Religious Freedom Versus Sexual Expression: A Guide*, 30 J.L. & REL. 475 (2015).

223. *See, e.g.*, POPE JOHN PAUL II, MAN AND WOMAN HE CREATED THEM: A THEOLOGY OF THE BODY (Michael Waldstein trans.) (2006).

224. 565 U.S. 171 (2012).

rejecting the defendant's claim that he or she is responding to *conduct*—seems to be an accusation that defendant is violating his or her own religion. To wit: Christianity requires adherents to "do unto others as you would have them do to you,"[225] and to "love one another as I have loved you,"[226] at the same time as it requires them to avoid cooperating with *acts* their religion judges to be morally wrong.[227] Landlords and employers refusing to cooperate with a person on account of that person's "status," (single, married, etc.) would be violating this Golden Rule. But while the state claims that they are violating this religious prescription, the religious landlord or employer believes themself rather to be obeying the religious command not to cooperate with a morally wrong *action*.

Insisting that a religious defendant is burdened by having to house or employ single people also seems to violate the Supreme Court's statements in *Burwell v. Hobby Lobby*, *Masterpiece Cake v. Colorado Civil Rights Commission*,[228] and elsewhere[229] that the religious citizen, and not the state, gets to define the nature of the burden on his or her religion. Again, potential religious defendants are *not* burdened by housing single people. Instead, they are burdened by government actions which coerce them into providing bedrooms for unmarried couples or hiring people to serve within their religious institutions whose lives openly defy the teachings of the potential defendant's religion.

For all of these reasons it is far better to leave legislatures to consider and balance the interests of religious freedom and of protected classes than it is to permit judges to ignore or gloss over the important issues at stake for a religion.

## CONCLUSION

The United States is experiencing a highly-charged debate over significant developments concerning sexual expression, adult intimate relationships, and parenting. State and federal laws do not usually mirror yesterday's survey results concerning each fraught development. While opinions are moving toward accepting sexual, domestic, and parenting arrangements deemed immoral or even illegal only decades ago, simultaneously, a significant body of data is suggesting that some of the new arrangements disrupt the stability necessary for healthy child development. The data is poised to affect public opinion and is already bringing the left and the right together to think more deeply about the relationship between stable adult relations and child welfare.

Religious believers within large denominations who have long resided within the United States are now finding themselves branded bigots or worse for refusing to like or even to cooperate with these new dispensations. Their requests for

225. *Luke* 6:31 (New American Bible).

226. *John* 13:34 (New American Bible).

227. *See* John A. DiCamillo, *Understanding Cooperation with Evil*, 38 ETHICS & MEDICS 7 (2013), https://www.ncbcenter.org/files/7214/4916/4375/NCBC_EM_July2013.pdf [https://perma.cc/P3YA-VLH2].

228. 138 S. Ct. 1719, 1738 (2018).

229. *See, e.g.*, Thomas v. Review Bd. of the Ind. Emp't Sec. Div., 405 U.S. 707 (1981).

exemptions or declarations of their constitutional or statutory rights are regularly characterized as begging for a license to harm others.

Amid these tensions, judges using weak and questionable arguments to expand the scope of nondiscrimination laws are doing civil rights no favors. Rather than suggest that civil rights are an essential element of American freedom and a point of shared national pride, their highly flawed opinions make civil rights a partisan battleground.

These debates should be engaged in and settled by legislatures. There, the arguments about a statute's original meaning, about any need for amendments, about the situation of any classes that might merit new protections, and about the balance to be struck with religious freedom, can be fully explored. Cohabitation-protective judicial opinions instead play word games and manipulate statutory canons; they tell religious citizens what they are "really" thinking no matter what the citizen believes in her own mind. They also insist, against settled law, that the state, and not the religious citizen, knows the nature of the burden on the free exercise of religion created by a civil rights law. Moreover, such cases fashion social policy while ignoring the vast amount of data and public opinion necessary to make informed policy. In short, these cases appear starkly ideological and fail to make an attractive case for civil rights.