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DEREGULATING MARRIAGE: THE PRO-MARRIAGE CASE FOR ABOLISHING CIVIL MARRIAGE

Edward A. Zelinsky*

INTRODUCTION

The decisions of the Supreme Judicial Court of Massachusetts mandating gay marriage have provoked an intense national debate about the nature of marriage. As part of that debate, the 2004 election witnessed the residents of eleven states voting against same-sex marriage. Substantively, the debate about gay marriage has revolved

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2 See, e.g., Dean E. Murphy, Court in California Hears Gay Marriage Arguments, N.Y. TIMES, Dec. 22, 2004, at A14 (discussing “the passage [in November 2004] of constitutional bans on same-sex marriage in [eleven] states”); see also Mary L. Bonauto, Goodridge in Context, 40 HARV. C.R.-C.L. L. REV. 1, 64 (discussing “the eleven states ratifying constitutional amendments in November 2004, eight of which went beyond banning [same-sex] marriage to extend to other rights”). The California electorate had previously adopted Proposition 22, which, effective as of March 8, 2000, amended California’s family code to declare “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. FAM. CODE § 308.5 (Deering 2005) (added by Proposition 22). In 2005, California Governor Arnold Schwarzenegger cited Proposition 22 when he vetoed legislation passed by the California legislature that would have opened marriage to same-sex couples. See Nancy Vogel & Jordan Rau, Gov. Vetoes Same-Sex Marriage Bill, L.A. TIMES, Sept. 30, 2005, at B3; see also CAL. CONST. art. 2, § 10(c) (“The Legislature may amend or repeal referendum statutes. It may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval.”); Joshua K. Baker, Status, Substance, and Structure: An Interpretive Framework for Understanding the State Marriage Amendments, 17 REGENT U. L. REV. 221 (2004-2005); John M. Broder, Ohio Voters Reject Effort to Revise Election Practices, N.Y. TIMES, Nov. 9, 2005, at A24 (stating that “voters in Texas resoundingly approved a constitutional amendment banning same-sex marriage, making Texas the 19th state to outlaw the practice”).

3 An equally important procedural question is whether marriage should be defined by a uniform national standard or whether each state should be able to pursue its own policies. See, e.g., William J. Quirk, The Fourth Choice, CHRONICLES, June 2004, at 23 (proposing legislation to deprive the federal courts of jurisdiction and thereby “return to the states” the issue of gay
around three positions: Marriage should be defined legally as only a relationship between a man and woman.\(^4\) Marriage should be defined as a relationship between any two consenting adults including same-sex couples.\(^5\) Marriage, as a matter of law, should be restricted to heterosexual couples, but an alternative legal category—typically denoted “civil union”\(^6\) or “domestic partnership”\(^7\)—should be recognized for couples of the same sex.

\(^4\) See, e.g., Kay S. Hymowitz, *I Do?*, COMMENTARY, June 1, 2004, at 59, 61 (reviewing JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004)) (“The procreative imperative is the only reason we are talking about marriage in the first place.”); Troy King, *Marriage Between a Man & a Woman: A Fight to Save the Traditional Family One Case at a Time*, 16 STAN. L. & POL’Y REV. 57, 59 (2005) (“The traditional family is due a defense, and a compelling one can and should be advanced.”); Douglas W. Kmiec, *The Procreative Argument for Proscribing Same-Sex Marriage*, 32 HASTINGS CONST. L.Q. 653, 675 (claiming that “the redefining of marriage is subversive of the state objective in sustaining the national population by responsible procreation”); Michael Novak, *What Marriage Is*, 156 THE PUB. INT. 24, 27 (Summer 2004) (stating that heterosexual marriage is “this privileged union”); Lynn D. Wardle, *“Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771, 774 (2001) (maintaining that “there are substantial indications that legalizing same-sex marriage would undermine some of the important social purposes for marriage and would ultimately harm society”); see also Hernandez v. Robles, 2005 N.Y. Slip Op. 9436, at *7, 2005 N.Y. App. Div. LEXIS 13892, at *14 (N.Y. App. Div. Dec. 8, 2005) (“The legislative policy rationale is that society and government have a strong interest in fostering heterosexual marriage as the social institution that best forges a linkage between sex, procreation and child rearing.”); 1 U.S.C. § 7 (2000) (stating that “‘marriage’ means only a legal union between one man and one woman as husband and wife”).

\(^5\) See, e.g., JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA (2004) [hereinafter RAUCH, GAY MARRIAGE]; Jonathan Rauch, *What I Learned at AEI*, 156 THE PUB. INT. 17, 18 (Summer 2004) (commenting that gay marriage would be “good for gays, good for communities around them (that is to say, the straight world), and above all, good for the institution of marriage as a whole”); Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 618 (2004) (“Some same-sex couples may gain valuable and unique benefits from entering marriage.”).


\(^7\) See, e.g., California Domestic Partner Rights and Responsibilities Act of 2003, CAL. FAM. CODE § 297 (West 2005); New Jersey Domestic Partnership Act, N.J. STAT. ANN. § 26:8A-1 (West 2004). The California statute permits heterosexual couples to form domestic partnerships if either partner has attained the age of sixty-two and if either is eligible for social security payments. CAL. FAM. CODE § 297(b)(5)(B) (West 2005). The New Jersey act permits heterosexual couples to form domestic partnerships when both partners have attained the age of
The decisions of the Massachusetts court came on the heels of a recommendation by the American Law Institute that, when unmarried “domestic partners” terminate their relationships, whether such partners are heterosexual or same-sex couples, they should divide property and make alimony-type payments under the same legal standards as are applicable upon the termination of a marriage.\textsuperscript{8}

I reject all these alternatives and suggest, instead, that it is time to abolish civil marriage. The law should not define, regulate, or recognize marriage. Marriage—the structured, publicly-proclaimed, communally-supported relationship of mutual commitment—should become solely a religious and cultural institution with no legal definition or status.

I favor the abolition of civil marriage from a pro-marriage perspective.\textsuperscript{9} From that perspective, there are three reasons for deregulating marriage. First, deregulating marriage is in large measure a formal recognition of current cultural and legal reality. Culturally, marriage no longer plays the role in our society it once did. In an environment in which domestic relationships outside of marriage are neither rare nor stigmatized, the legal doctrines governing such relationships—rules about child support and custody, rules about property divisions and alimony—are rapidly being applied to married and unmarried couples alike. Thus, marriage, as a legal category, is becoming unnecessary; as a practical matter, rules the same as or similar to those governing married couples increasingly apply outside of marriage also.

Second, abolishing civil marriage would strengthen marriage by ending the government’s legal monopoly in defining that institution; this would encourage a productive competition among alternative...
versions of marriage. The analogy which suggests itself is religion. A
critical cause of the strength of religion in the United States, compared
with the weakness of religion in Europe, is the competitive market for
religion here. This competitive market for religion, protected by the
First Amendment, leads to robust, diverse and entrepreneurial religious
doctrines and institutions. In contrast, churches in Europe are, de facto
or de jure, established, exercising in legal or practical terms monopoly
or quasi-monopoly status. A religious monopoly, like any other
monopoly shielded from the force of competition, becomes sluggish and
unresponsive.

When marriage is not recognized, defined, or regulated by the
state, competitive forms of marriage will emerge and will contest with
one another, strengthening the institution of marriage. Traditional
religions could be the big winners in a competitive market for marriage
if their form of the institution proves most appealing. In short, civil
marriage is a monopoly that has hurt the institution of marriage. Abolishing that monopoly would create a robust and competitive market
for marriage, thereby strengthening the institution.

Third, the classic way for a diverse polity to resolve contentious
issues with minimum strife is to decentralize and privatize those issues.
If some people believe that gay marriage is an ethical imperative while
others believe that it is a serious moral error, one or the other group will
be disappointed, if not aggrieved, by a single legal definition of
marriage. However, each group can promulgate its own definition of
marriage in a world with no civil marriage, a world in which the law
does not define, recognize, or regulate marriage. Moreover, marriage
would be bolstered if the energy and resources now devoted to the
politics of marriage were instead spent strengthening the institution in
practice.

The deregulation of marriage would not be without its
complications, including problems of transition. But it is the best
alternative. Today, the realistic choice is between the flaws and
limitations inherent in a legal regime that defines and deploys marriage
as a legal category and the imperfect (but preferable) option of
eliminating marriage as a legal construct. Abolishing civil marriage
would put neither the law nor the courts out of the domestic relations
business. In a legal system without civil marriage, there would still be
custody disputes over children and conflicts over property and income
when couples split. However, in such a system, the status of the parties
as married or not would be legally irrelevant.

Deregulating marriage would require changes to important areas of
the law, most notably, to our tax, pension, and inheritance statutes,
which today rely upon the concept of marriage. However, those
changes would be neither as extensive nor as disrupting as some might imagine.

This Article makes the pro-marriage case for abolishing civil marriage in five sections. The first three sections explore in turn each of the three arguments for such abolition, viz., that such abolition would recognize current cultural and legal reality, that such abolition would strengthen marriage by terminating the government’s monopoly and encouraging competitive versions of the institution of marriage, and that such abolition would defuse a contentious political issue by decentralizing and privatizing the definition of marriage.

The fourth section of this Article sketches a legal world without civil marriage, a world in which the law does not define, regulate, or recognize marriage. In this section, I focus upon two aspects of that world. First, such a world will be more explicitly contractual in matters of domestic relations than is the status quo. In lieu of a single, uniform state-established regime for marriage, different groups and communities will develop their own contracts to which couples will typically adhere when they embrace a particular form of marriage. Pre-nuptial agreements, once largely restricted to the very wealthy, are today increasingly utilized by middle class and mass affluent couples. Under a deregulated marriage regime, such agreements would become the norm for all married couples. When couples fail to contract, the law would provide the same default rules for married and unmarried couples alike. Second, a legal regime without a state-approved definition of marriage would entail changes to tax, pension, and inheritance rules, which today rely upon state law definitions of marriage.

The fifth and final section places my call to eliminate marriage as a legal category in the context of other commentators and their claims. In this section, I contrast my call for abolishing civil marriage with the call for such abolition from feminists who view marriage as an oppressive patriarchal institution, and from those gay and lesbian scholars who view marriage as an unworthy aspiration. I also compare my analysis with the arguments of other commentators including gay and feminist commentators who favor same-sex marriage and others who view strengthening marriage as critical to the future of inner city minority communities.

In the final analysis, marriage—the structured, publicly-proclaimed, communally-supported relationship of mutual commitment—can and should be strengthened in American society. However, strengthening marriage is a task for religious and cultural—not legal—institutions. Whatever arguments could in the past be mustered on behalf of civil marriage, perpetuating civil marriage today is a mistake. In contemporary American society, the state cannot save
marriage. A robust, competitive, diverse, i.e., deregulated, market for marriage can.

I. RECOGNIZING REALITY

While the American Law Institute’s Principles of the Law of Family Dissolution: Analysis and Recommendations has been understood as proposing radical revision of the law of domestic relations, a careful reading of that report suggests something more subtle—the extent to which that report is a confirmation of the status quo. For better or for worse, we are moving toward a world in which, as a matter of decisional and statutory law, marriage has ceased to carry legal significance since the same or similar rules increasingly apply to unmarried couples.

Consider, for example, the much-criticized but still ubiquitous “best interests of the child rule” for determining custody over minor children. The contemporary application of that rule does not depend upon the marital history of the parents but, rather, upon the court’s assessment of the children’s welfare. Today, children born out of wedlock are typically subject to the same legal regime as are children born to married parents. Illustrative in this context is the decision of the Alabama Supreme Court in Ex parte N.L.R. In that case, the trial court awarded custody of the minor children to their maternal grandmother. The parents of the children had never married, a fact the Alabama Supreme Court deemed irrelevant in reversing and awarding custody to the father:

In a custody contest between a nonparent and one who has been adjudicated to be the natural father of a child born out of wedlock, the father is entitled to the presumption that the child’s best interests will best be served by an award of custody to him . . . .

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12 863 So. 2d 1066 ( Ala. 2003).

13 Id. at 1069 (citing Ex parte S.T.S., 806 So. 2d 336, 341 (Ala. 2001)).
Note the unstated premise: as a matter of law, it is irrelevant that the father had not married the child’s mother (a fact earlier generations would have considered as indicating a certain lack of gravitas). A father is a father, whether or not he marries his children’s mother.

Consider also Dr. Michael Newdow’s First Amendment challenge on his daughter’s behalf to the Pledge of Allegiance. Six justices of the U.S. Supreme Court concluded that Dr. Newdow, under California law, lacked standing to sue on behalf of his child; three dissenters concluded otherwise. For present purposes, the issue is not which side was right, but the perceived irrelevance to the standing question of Dr. Newdow’s marital history.

Dr. Newdow never married Sandra Banning, the mother of his daughter. No member of the Court deemed this fact to be of any legal consequence. Ms. Banning supported the Pledge and was, for the Court’s majority, the ultimate decisionmaker for her child under California law. This, the Court held, precluded Dr. Newdow from pursuing the suit on his daughter’s behalf.

The California case law that, for the Court, framed the issue of Dr. Newdow’s standing involved previously married parents who had divorced. Without comment or apparent difficulty, the Court simply applied to Dr. Newdow the principles the Court gleaned from those divorce-related custody cases. It made no difference to the outcome that Dr. Newdow and Ms. Banning never married. For the Court, the same legal rules controlled for estranged but never married couples as for previously married but now divorced couples.

The increasing irrelevance of marital status in the area of parental rights is similarly manifested in the movement permitting unmarried individuals to adopt. The trend admittedly is not universal and important issues remain for decision, e.g., whether two unmarried adults may adopt the same child. Nevertheless, a review of state adoption statutes reveals the extent to which the status quo ante (only married couples may adopt) is being supplanted by a different rule for adoption, i.e., it does not matter if an otherwise fit parent is unmarried.

Consider, for example, Ohio’s adoption statute, which permits a husband and wife to adopt together, “an unmarried adult” to adopt, and a married person, under certain circumstances, to adopt by himself or herself. On its face, this statute does not establish complete parity between married and unmarried couples since the former can adopt jointly while there is no explicit authority under the statute for two unmarried persons to adopt the same child. On the other hand, the

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15 See In re the Marriage of Betty Marie and Monte Edward Mentry, 190 Cal. Rptr. 843 (1983); In re the Marriage of Anthony R. Murga and Janice Lee Murga, 163 Cal. Rptr. 79 (1980).
16 OHIO REV. CODE ANN. § 3107.03 (West 2005).
statute places an unmarried person who wants to adopt on par with a married couple.

In practice, adoption agencies might still favor married couples who want to adopt over unmarried individuals. But the point remains that statutes like Ohio’s, permitting adoption by unmarried persons, further erode the legal relevance of marital status.

Similar observations can be made about state inheritance laws; in assigning rights to a child of a parent who dies intestate, the marital status of the deceased parent is becoming irrelevant. For example, Conn. Gen. Stat. section 45a-438 today provides that, in the absence of a valid will, a child inherits from “his genetic parents, regardless of [the] marital status of such parents.”17 This statute was prompted by Equal Protection decisions of the United States18 and Connecticut19 Supreme Courts diminishing legislatures’ abilities to distinguish between legitimate and illegitimate children for purposes of state intestacy law. In proceeding in this fashion, neither the courts nor the legislatures consciously decided to fashion a world without marriage as a significant legal category. Rather, the evident purpose was to treat fairly children who, through no fault of their own, are born out of wedlock. Nevertheless, the effect of these statutes and decisions is to reinforce the trend towards a legal regime under which marital status is irrelevant—in this case, to a child’s rights to inherit.

At first blush, the statutes governing alimony and property settlements seem to tell a different story; these statutes are triggered by dissolution of a marriage.20 However, through case law, courts are constructing a parallel legal framework through which various doctrines are deployed to achieve similar outcomes when unmarried couples terminate their relationships. The cases follow a now familiar pattern: the courts typically deny that cohabitation carries any legal significance and then apply traditional legal rules—contract, constructive trust, quantum meruit—to fashion divorce-like remedies for the former cohabitants.

Typical is Evans v. Wall21 in which the Florida Court of Appeal affirmed a trial court’s monetary judgment to an unmarried woman who had lived in the home of a man who ultimately evicted her. The appeals court characterized the trial court’s order as in the nature of constructive trust, “reimbursing a woman—ejected from her former lover’s home—

17 Conn. Gen. Stat. § 45a-438(b) (2005); see also id. § 45a-438(c) (stating that “legal representatives shall include legal representatives of children born out of wedlock”).
20 See, e.g., Wyo. Stat. Ann. § 20-2-114 (Michie 2005) (“In granting a divorce, the court shall make such disposition of the property of the parties as appears just and equitable . . . . The court may decree to either party reasonable alimony . . . .”).
the reasonable value of capital, materials, and labor invested over a five-
year period in his residential/commercial property.” In response to
strong dissent, the appeals court disclaimed reliance on “palimony, or
any other novel legal theory.” This case, the court declared, involved
 “[m]oney, labor, and material—separate and distinct from spouse-like
services.”

Insofar as the appeals court meant that there was more to the
parties’ relationship than sex, the court was evidently correct, given its
description of the facts. But insofar as the court suggested that Ms.
Wall’s overall activities were not “spouse-like,” the court’s observations
are not convincing. Ms. Wall “worked outside the home” and
contributed her earnings and labor to run the household. She also
contributed money and labor toward the improvement of the property
on which she and Mr. Evans lived. This looks more “spouse-like”
than the appeals court admitted. Even though the court disclaimed any
interest in “palimony” and grounded its decision in the rubric of
constructive trust, the substance of the court’s decision is close to,
perhaps indistinguishable from, the outcome the court would have
reached on these facts had the parties been married.

Consider also Kerkove v. Thompson, a factually similar case in
which the Iowa Court of Appeals reached a comparable result under
theories of express and implied contract, i.e., a monetary payment to an
unmarried woman upon the termination of her relationship with a man
with whom she cohabitated. In terms similar to those used by the
Florida court, the Iowa court declared that it would enforce contracts
between cohabitants “which exist independently of cohabitation and are
supported by separate consideration.” This appears to mean that, in
the cohabitation context, the court will not authorize payments for
consortium. However, the Iowa court made clear that, upon the
termination of unmarried relationships, a panoply of legal doctrines are
available to recognize the rights of the previously cohabitating parties:
“statutory or common law partition, damages for breach of express or
implied contract, constructive trust and quantum meruit.”

In short, if the law of marriage is viewed as a default regime, the
courts, recognizing the realities of modern America, are using

22 Id. at 1056.
23 Id.
24 Id. at 1057.
25 Id. at 1056.
26 Id.
28 Id. at 696.
29 Id. (quoting Shold v. Goro, 449 N.W.2d 372, 373 (Iowa 1989)).
30 See also Boland v. Catalano, 521 A.2d 142, 146, 202 Conn. 333, 341 (Conn. 1987). (“The
decided trend among commentators and courts that have found an agreement between unmarried
cohabitants is to endorse the enforcement of such agreement.”); see also Garrison, supra note 10,
traditional doctrines to create a comparable legal structure for unmarried couples. As a result, marriage is ceasing to play its formerly unique role as a legal category.

In this context, let us revisit the ALI proposal to provide the same economic remedies to domestic partners who terminate their relationships as are available to married couples who divorce. This proposal would consolidate under a single set of rules the parallel regimes that today exist for married and unmarried couples, thereby codifying and simplifying the law. This will seem like a radical innovation to those unaware of the extent to which the courts are already creating a parallel regime for unmarried couples. However, in light of that regime, the ALI proposal is essentially a recognition of existing realities—Hester Prynne has potential legal remedies today she did not have in an earlier age.32

Not only have the courts and legislatures adjusted to modern realities, but employers have as well. Consider, for example, the now common practice of employer-provided fringe benefits for employees’ domestic partners. Sometimes, such domestic partnership provisions pertain only to same-sex couples;33 sometimes, they also apply to unmarried heterosexual couples. In either incarnation, the mechanics are typically the same: the employee (sometimes jointly with the employee’s domestic partner) files with the employer a declaration of a domestic relationship. As long as that declaration stays on file, the employer provides spousal-type fringe benefits to the partner.34

Whether or not these arrangements are desirable, they are proliferating and thus confirm that marriage, as a legal category, increasingly ceases to perform a unique function. Consider how a corporation that provides fringe benefits to domestic partners would respond to the abolition of civil marriage. That corporation might require all couples seeking fringe benefits, including those married by

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31 See, e.g., David Brooks, Sex and the Cities, N.Y. Times, May 1, 2004, at A15 (“Over all, Americans are spending much less time married. They marry later and divorce at high rates, and remarry less and less.”).

32 Which is not to say Hester will necessarily win.

33 See, e.g., Nancy D. Polikoff, Why Lesbians and Gay Men Should Read Martha Fineman, 8 AM. U. J. GENDER SOC. POL’Y & L. 167, 175 (2000) (noting that the author’s employer, American University, limits domestic partnership fringe benefits to same-sex couples “because heterosexual couples can marry”).

34 For a description of a typical domestic partner fringe benefit program, see Burke v. Kodak Retirement Income Plan, 336 F.3d 103, 106 (2d Cir. 2003); see also Irizarry v. Bd. of Educ., 251 F.3d 604 (7th Cir. 2001) (rejecting a constitutional challenge to a domestic partner fringe benefit program limited to same-sex couples); Foray v. Bell Atl., 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (rejecting Title VII and Equal Pay Act challenges to a domestic partner fringe benefit program limited to same-sex couples).
religious or secular institutions, to file the same kind of statement as do unmarried domestic partners. Or the corporation might accept for fringe benefit purposes any marriage certificate issued by a religious or other institution as evidence of marriage, entitling the employee’s spouse to fringe benefits. In that case, the corporation might require the certificate for its files or require production upon the corporation’s request. Or the corporation might pursue all of these options, i.e., permit married couples to file the same type of fringe benefit statement as do domestic partners, or permit such couples to file a marriage certificate produced by the entity marrying them, or require married couples to furnish a marriage certificate when the corporation might request it.

Relevant also in this context is the pronounced shift of employer-sponsored retirement plans from traditional defined benefit pensions to contemporary defined contribution plans, typically 401(k) arrangements. Like many of the developments I have been discussing, this shift was not intended to make marriage irrelevant as a legal category; it has just turned out that way. As a result of this shift, pension wealth, previously transmittable on death only to a spouse, can today be transmitted to anyone, including an unmarried domestic partner.

The traditional defined benefit pension pays an annuity to the pension participant upon her retirement with a smaller survivorship annuity typically continuing on the participant’s death to the participant’s surviving spouse. Under this configuration, pension wealth can be transmitted testamentarily only to one’s spouse via a continuing annuity stream from the plan. Children and domestic partners typically receive no death benefit under traditional defined benefit pensions.

The link between marriage and traditional pension death benefits has been so well understood that federal law specifically authorizes defined benefit plans to ignore marriages solemnized within one year of the participant’s death, on the evident theory that such “death-bed” marriages are presumptively motivated by the desire to secure for the new spouse the survivor’s annuity on the participant’s imminent death.

35 The shift from the defined benefit format to the defined contribution paradigm was caused by the overregulation of defined benefit plans; the decline of union membership and of traditional industries sponsoring defined benefit plans; the desire of employers to transfer longevity, investment, and funding risk to their employees; and the compatibility of defined contribution plans with American cultural norms of private ownership and autonomy. See Edward A. Zelinsky, The Defined Contribution Paradigm, 114 YALE L.J. 451 (2004). Coincidentally, that shift has also reinforced the reduced significance of marriage as a legal category.

In contrast, under defined contribution plans, typified by section 401(k) arrangements and IRAs, the participant has her own individual account under the plan, an account transferable by the participant at her death. If a balance remains in the account on the unmarried participant’s death, that balance is transmitted to the beneficiary designated by the participant while alive. Thus, unlike traditional defined benefit annuities, which continue only for surviving spouses, a 401(k) or IRA account balance can be conveyed at death to the unmarried participant’s (same-sex or heterosexual) domestic partner—or anyone else. Thus, under the defined contribution paradigm, there is no need to marry to convey pension wealth at death.

Two other retirement plan phenomena reinforce the increasing irrelevance for pension purposes of the participant’s marital status: the emergence of the IRA rollover38 and the growth of cash balance pensions.39 As a result of job switches and consequent rollovers, individuals’ retirement wealth is increasingly concentrated in their IRAs. In the contemporary workplace, in which the typical employee works for a large number of employers during the employee’s lifetime, it is common for that employee, upon each job termination, to receive a qualified plan distribution which the employee then directs to her IRA. As a result, the IRA is today the cumulative locus of much middle-class financial wealth from successive rollovers.

An unmarried individual can leave her IRA on death to whomever the individual chooses, including a domestic partner. This reinforces the legal irrelevance of marital status: previously, the participant could have transmitted pension wealth only to a spouse receiving a survivor’s annuity from the traditional defined benefit plan. In contrast, today, a participant, as she successively changes jobs, will typically accumulate her pension resources over her career in a rollover IRA, which she can leave on death to her domestic partner. There is thus no longer a need to marry to transmit pension wealth at death.

Further reinforcing the irrelevance of marital status for pension purposes has been the growth of cash balance pensions. While these are defined benefit plans, they typically pay to the employee a lump sum distribution that the employee can then rollover to her IRA. This further diminishes the previous prevalence of survivor annuities (transmittable only to spouses) and augments the rise of rollover IRA balances (transferable by unmarried individuals to domestic partners). 

38 The statutory bases for rollovers are Internal Revenue Code sections 401(a)(31) and 402(c).
upshot of these trends is that pension-motivated marriage is largely a thing of the past. More generally, the shift to the defined contribution paradigm represents one more factor making marriage legally irrelevant: pension wealth can now, via individual accounts, be transferred to domestic partners, unlike old-style defined benefit survivor annuities, payable only to spouses.

To summarize: a world in which marriage ceases to be a state-sponsored or -defined relationship poses no insuperable barriers since increasingly the same or similar legal rules apply to married and unmarried couples alike. Abolishing civil marriage would recognize the reality that marriage already plays a reduced role in our culture and legal system.

II. STRENGTHENING MARRIAGE THROUGH COMPETITION

Some, perhaps many, readers will respond to this line of argument by agreeing that, as an empirical matter, marriage no longer plays the cultural and legal role it once did, but by rejecting the conclusion that the law should recognize this reality by abolishing civil marriage. Precisely because marriage no longer occupies the place in our society it once did, the rejoinder goes, marriage needs to be strengthened. Privatizing marriage, the argument concludes, would weaken an institution already under assault, an institution that needs to be bolstered, not demolished.

By way of rebuttal, I contend that eliminating civil marriage will strengthen marriage by encouraging competition among alternative versions of marriage. The analogy which suggests itself is religion. There is no established church in the United States; Americans are among the most religious people in the world. There is a connection here: In the zone of religious autonomy protected by the First Amendment, there has arisen an active market for religion, a competitive environment that encourages and rewards new and entrepreneurial religious institutions and personages.40 This deregulated market for religion in large measure explains why Americans, in contrast to Europeans, are a religious people.

The most influential statements of this analysis come from Professors Roger Finke and Rodney Stark:

Where many faiths function within a religious economy, a high degree of specialization as well as competition occurs. From this it follows that many independent religious bodies will, together, be

40 See, e.g., Brian C. Anderson, Secular Europe, Religious America, 155 THE PUB. INT. 143, 153 (Spring 2004) (“Religions facing competitive pressure . . . work harder and thrive.”).
able to attract a much larger proportion of a population than can be
the case when only one or very few firms have free access.  

[Competition results in eager and efficient suppliers of religion, just
as it does among suppliers of secular commodities, and with the
same results: far higher levels of overall “consumption.”]  

Whether a firm is in the business of making money or of saving souls,
Professors Finke and Stark tell us, a “compelling . . . principle of
economics . . . applies: Monopoly firms always tend to be lazy.”  

James Madison, in the idiom of an earlier generation, similarly
observed: “‘Experience witnesseth that ecclesiastical establishments,
instead of maintaining the purity and efficacy of Religion, have had a
contrary operation.’”  

Consider in this context the career of Dr. Richard D. Warren who
in 1980 started the Saddleback Valley Community Church “in his
home” in California. Today, Dr. Warren’s church “covers 120 acres,
and draws up to 20,000 people on Sundays.”  However, the church is
just part of the religious structure he has created, a structure which
extends to California’s prisons and to the New York Times best seller
lists where, cited simply as Rick Warren’s The Purpose-Driven Life, Dr.
Warren’s book is now into its fourth year on the “Advice, How-to and
Miscellaneous” list.  Time magazine named Dr. Warren one of the

41 ROGER FINKE & RODNEY STARK, THE CHURCHING OF AMERICA, 1776-1990, at 20-21
(1992) [hereinafter CHURCHING].

42 RODNEY STARK & ROGER FINKE, ACTS OF FAITH: EXPLAINING THE HUMAN SIDE OF
RELIGION 36 (2000) [hereinafter ACTS]; see also id. at 201-02 (“To the degree that religious
economies are unregulated and competitive, overall levels of religious participation will be
high.”).

43 CHURCHING, supra note 41, at 19; see also id. at 205 (stating that “pluralism strengthens
religion.”)

44 Lee v. Weisman, 505 U.S. 577, 590 (1992) (quoting James Madison, Memorial and
Remonstrance Against Religious Assessments (1785), in 8 PAPERS OF JAMES MADISON 301 (W.
Rachal, R. Rutland, B. Ripel, & F. Teute eds., 1973)).

45 Warren v. Comm’r of Internal Revenue, 114 T.C. 343, 344 (2000). Dr. Warren and his
wife, Elizabeth, were the taxpayers in widely-noted litigation concerning the constitutionality
of Internal Revenue Code (“Code”) section 107, which excludes from gross income in-kind housing
for ministers and parsonage allowances. See Warren v. Comm’r of Internal Revenue, 282 F.3d
1119 (9th Cir. 2002); Warren v. Comm’r of Internal Revenue, 302 F.3d 1012 (9th Cir. 2002).

The Warren litigation engendered substantial commentary. See, e.g., Edward A. Zelinsky,
Dr. Warren, Section 107, and Texas Monthly: A Reply, 95 TAX NOTES 1663 (2002), reprinted in
37 TAX EXEMPT ORG. TAX REV. 33 (2002); Edward A. Zelinsky, Dr. Warren, Section 107
and the Court-Appointed Amicus, 96 TAX NOTES 1267 (2002); Edward A. Zelinsky, Dr. Warren,
The Parsonage Exclusion, and the First Amendment, 95 TAX NOTES 115 (2002), reprinted in 36 TAX
EXEMPT ORG. TAX REV. 185 (2002).

46 John Leland, Offering Ministry, and Early Release, to Prisoners, N.Y. TIMES, June 10,

47 Id.

(noting that the book is the “No. 1 seller at religious bookstores,” and “has been on the New York
Times Advice best-seller list for more than 60 weeks”).
“People Who Mattered” in 2004. Dr. Warren has received official recognition as an American icon: he is quoted on Starbucks coffee cups. It is hard to imagine an establishment church producing a Rick Warren. While Dr. Warren is uniquely successful, he is not unique, but is, rather, a quintessentially American phenomenon: the religious entrepreneur.

Civil marriage is a legal monopoly of the definition and terms of marriage, comparable to the monopoly of an established church. Terminating that monopoly, by abolishing civil marriage, would unleash religious and cultural entrepreneurialism as churches, synagogues, and other religious and nonreligious institutions would propound and practice their respective concepts of marriage in a competitive market for marriage. The most immediate response to the deregulation of marriage would be the performance of gay marriages by those churches that favor such marriages but now feel constrained by state law from solemnizing such marriages. In the longer term, traditional institutions (e.g., evangelical churches, orthodox synagogues) would enter the competitive marketplace for marriage as well, offering their respective versions of the institution. Just as these sectarian organizations have thrived in the deregulated market for religion, once freed of the government’s monopoly in the definition of marriage, these organizations would bring their energy and entrepreneurialism to promoting their own forms of marriage.

Here, again, the analysis of Professors Finke and Stark is instructive. In their understanding of the history of American religion, the religions succeeding in the competitive marketplace are those which demand much of their adherents and are in tension with the prevailing secular culture. This analysis suggests that those religious and cultural institutions that, in the name of tradition, reject worldly sexual norms and instead emphasize the importance, permanence, and difficulties of marital commitment may similarly prevail in a competitive market for marriage. In the final analysis, marriage is a cultural and religious institution that, imperiled today, needs the mobilization of cultural and religious forces, not the heavy hand of legal regulation.

Consider, in this context, “covenant marriage,” an alternative to conventional marriage first adopted in Louisiana and now available in

51 See CHURCHING, supra note 41, at 40-43; 249-55; ACTS, supra note 42, at 151-54 (“Throughout our history, growth has been concentrated among the higher-tension religious groups, while lower-tension groups have declined.”).
Arizona and Arkansas. The three features which distinguish covenant, from regular, marriage are mandatory counseling prior to marriage; a formal, written declaration of the permanence of the marriage; and more limited grounds for divorce if a couple has elected theirs to be a covenant marriage. One view of covenant marriage, consistent with the claims of its proponents, is that covenant marriage represents the status quo ante, the way marriage used to be. In prior years (or at least the idealized version of those years), prospective spouses received pastoral counseling before the commencement of their marriages, they understood and took seriously the permanence of marriage, and they faced significant legal and cultural barriers to divorce. The covenant marriage option gives couples in three states the ability to elect such a regime today.

But why couples in just those three states? In a world without civil marriage, all religious or other marriage-performing institutions that wanted to do so could offer their form of covenant marriage. Each institution sponsoring that alternative would have its own counseling system as well as a prenuptial agreement (similar to the statutory declaration now signed by covenant marriage couples), signifying commitment to a “lifelong relationship.” That agreement would provide the same limited grounds for divorce as do covenant marriage statutes.

The critics of covenant marriage will not like it any better in a deregulated marriage market. However, in that market, the critics of covenant marriage will be able to fashion their own competing version of marriage or, if they prefer, their opposing vision of a nonmarital domestic partnership or, if they prefer, their alternative model of life with neither marriage nor any other kind of domestic partnership. In the competition among these choices, the law would be a neutral bystander.

But, a potential rejoinder goes, religious institutions and pro-marriage groups can today promote marriage. What then is gained by deregulating the institution?

55 See, e.g., Katherine Shaw Spaht, Louisiana’s Covenant Marriage: Social Analysis and Legal Implications, 59 La. L. Rev. 63, 78 (1998) (“[T]he covenant marriage legislation seeks to restore some protection and some power to the ‘innocent’ spouse who has kept her promises and desires to preserve the marriage.”). Other proponents of covenant marriage view it as an improvement on the easy divorce status quo but short of their marital ideal. See, e.g., Douglas W. Kmiec, Editorial, A Genuine Proposal, Chi. Trib., June 1, 1998, at 13 (“The covenant marriage option is an improvement over the status quo, but it is still not the whole of the [marital] obligation.”). For a less positive view of covenant marriage, see Daniel W. Olivas, Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to be Ignored, 71 Tenn. L. Rev. 769 (2004).
It is true that sectarian and secular organizations now promote marriage, but that promotion is constrained by the current legal definition of the institution. Indeed, that constraining legal definition is the core of civil marriage. Suppose, for example, that Dr. Warren were to conclude that covenant marriage, with its restricted grounds for divorce, is the best model of marriage for his congregants. California law does not provide him or his congregants with that alternative.\textsuperscript{57} California law does not authorize prenuptial agreements that embody the norms of covenant marriage.\textsuperscript{58} While Dr. Warren’s congregants can liberally contract about the financial aspects of their marriages, they cannot specify, limit, or modify the grounds for divorce. Thus, Dr. Warren (or any other California clergyman) can today promote only the official state-sponsored version of marriage.

Moreover, once free of the constraints inherent in a legal definition of civil marriage, additional, presently unforeseeable models of marriage will emerge as entrepreneurial energies are focused on the deregulated market for marriage. Those new models will be tested by the rigors of the marketplace.

In short, there are, as I discuss \textit{infra}, those who would deregulate marriage because of their hostility towards marriage.\textsuperscript{59} These commentators would abolish civil marriage to delegitimate the institution of marriage. In contrast, I would eliminate civil marriage to bolster the institution of marriage. I expect that a deregulated market for marriage would be competitive and robust, just like the American market for religion. Indeed, the actors and institutions in the marriage market would largely (though not exclusively)\textsuperscript{60} be the same as those in the religion market. As competition among religious groups has strengthened religion, competition in the marriage market will strengthen marriage.

\section*{III. MINIMIZING POLITICAL STRIFE}

A third reason for abolishing civil marriage is the depoliticization that will result from making the definition of marriage a matter of religious preference and individual choice. The now time-honored way for a diverse polity to resolve contentious moral issues with minimum

\textsuperscript{57} See \textsc{Cal. Fam. Code} § 2310 (Deering 2005) (providing as grounds for divorce either “[i]reconcilable differences” or “[i]ncurable insanity”).

\textsuperscript{58} The parties cannot alter the grounds of divorce by premarital agreement. Under current law, such agreements are generally restricted to financial and property-related matters. \textit{See Cal. Fam. Code} § 1612 (Deering 2005). This provision corresponds to the Uniform Premarital Agreement Act.

\textsuperscript{59} \textit{See infra} notes 117-139 and accompanying text.

\textsuperscript{60} As I discuss \textit{infra}, I would expect nonreligious institutions to enter the market for marriage.
strife is to decentralize and privatize those issues. Relevant in this context are Professor Schuck’s observations that

a society that relies on decentralized choice gains an incalculable value—political conflict reduction—that goes well beyond the efficiency and autonomy values enjoyed by those who exercise it. This muting of political conflict is essential to the survival of a polity as diverse and competitive as twenty-first-century America. 61

In a similar vein, Andrew Sullivan, a prominent advocate of gay marriage, properly attributes to the classic liberal tradition the principle that the polity should be neutral in ethical and religious matters to reduce political discord:

In the religious wars and schisms of the seventeenth and eighteenth centuries, the European state discovered within it a way to protect the lives of its citizens from the horrific consequences of religious, moral and philosophical conflict. The most important matters in life—the meaning of the universe, the fate of the soul, the means to salvation—were deemed outside politics. The state was subsequently to remain neutral in religious matters; it was to respect the private practices of its citizens, so long as they respected public norms of obedience to law. 62

From this vantage, if some people believe that gay marriage is an ethical imperative while others believe that it is a serious religious error, one or the other group will be disappointed, if not aggrieved, by a single legal definition of marriage. However, each group can promulgate its own understanding of marriage in a world in which the law does not define, regulate, or recognize marriage. Similarly, if covenant marriage appeals to some couples in a particular state, but not to a political majority, deregulation would permit those favoring covenant marriage to craft for themselves their preferred version of marriage without securing political permission from an adverse majority with a different concept of marriage. 63

Professor Quirk urges Congress to pass legislation ensuring that marriage will be regulated by each state for itself, rather than by Congress or by the federal courts. Devolving the definition of marriage to the states, he tells us, “can act as a safety valve to relieve pressure on the [U.S. Supreme] Court and on society as a whole.” 64 If so, abolishing civil marriage altogether would “relieve pressure” on the

61 Peter H. Schuck, Diversity in America: Keeping Government at a Safe Distance 328 (2003).
62 Andrew Sullivan, Virtually Normal 137-38 (1996). As noted infra note 202 and accompanying text, Mr. Sullivan is not prepared to take this normative vision of the conflict-avoiding state to the next step—the abolition of marriage as a legal category.
63 See Rick Lyman, Trying to Strengthen an ‘I Do’ With a More Binding Legal Tie, N.Y. Times, Feb. 15, 2005, at A1 (“[T]wo dozen [states] have considered the idea [of covenant marriage] and declined to embrace it.”).
64 Quirk, supra note 3, at 25.
deregulating marriage avoids some difficult church-state conundrums posed by gay marriage and opposition to it. Suppose, for example, that efforts to amend the Massachusetts constitution fail, leaving same-sex marriage mandated by the Massachusetts Supreme Judicial Court.70  Suppose, as I suspect is likely, that many religious

\[\text{Polity further, moving the definition of marriage from an intra-state affair to a matter of religious and individual choice.}\]

An analogy which suggests itself is the ethical decision to provide nutrition and hydration to the terminally ill. Some believe that withholding nutrition and hydration from the terminally ill is medically correct and ethically proper; others disagree.65  As a society, we have largely devolved this controversial bioethical issue to individual choice through such devices as living wills,66 health care directives,67 and durable powers of attorney for health care.68  These devices allow the individual to make such ethically-charged decisions for himself or to designate another to make those decisions for him. These devices have, in large measure, removed this contentious moral issue from the political arena. The courts are still called upon when a terminally ill person has failed to execute any of these instruments and there is disagreement as to the appropriate course of treatment for this person.69

Nevertheless, today, few (if any) call for legislating either a rule that the terminally ill must be fed or that they cannot be. The decentralization of this issue to the patients, their families, and their designated caregivers has removed a divisive moral question from the political arena to the privacy of family and individual choice.

Similarly, in a world with no civil marriage, when couples split without having entered into enforceable agreements, the law will necessarily provide default rules for matters such as child custody and the distribution of property. However, after the abolition of civil marriage, the basic regime for marriage will be private ordering, the definition of marriage, and the terms of its dissolution a matter of religion and contract, not of regulation and statute. Under such a privatized regime, cultural competition will be conducted in the culture, not in the courts or the legislatures.

65 Note, for example, the many and diverse amici in the Cruzan controversy, some who supported the parents’ right to terminate feeding of their daughter, others who opposed it. Cruzan v. Mo. Dep’t of Health, 497 U.S. 261 (1990).
67 See, e.g., CAL. PROB. CODE § 4605 (Deering 2005).
69 This, for example, was the case in Cruzan, 497 U.S. 261, as well as in the Schiavo controversy which I discuss infra. See infra note 161 and accompanying text.
70 This appears likely. See Pam Belluck, Massachusetts Rejects Bill to Eliminate Gay Marriage, N.Y. TIMES, Sept. 15, 2005, at A14. For earlier coverage, see Frank Phillips, Senate Boss Plans to Delay Gay Marriage Vote, BOSTON GLOBE, Feb. 10, 2005, at B1; see also Bonauto, supra note 2, at 49-55 (discussing efforts to amend the Massachusetts state constitution
institutions refuse to perform same-sex marriages. Will these churches, synagogues, and mosques lose their property tax exemptions on the ground that their refusal to perform gay and lesbian marriages violates constitutional norms of equality?71

Consider the opposite situation: a church that performs same-sex marriages in a state that does not recognize gay marriage. Can the opponents of gay marriage challenge the legal and tax status of this church? All in all, these are fights best avoided, as they would be under a deregulated marriage regime.72

Devolving any particular issue is unacceptable to those who believe both that there is a single correct resolution of that issue and that the issue entails values so fundamental that it is impermissible to allow others to resolve the issue for themselves wrongly. On these grounds, for example, the Abolitionists rejected popular sovereignty—and American history today records that they were correct to oppose both slavery and its possible extension on a state-by-state basis. Some issues are too fundamental for decentralized choice. On the other hand, history has been unkind to the Prohibitionists and their belief that alcoholic beverages require a national regulatory regime. Few today seek restoration of the Eighteenth Amendment or subscribe to its premise that there is a single proper approach to alcohol, rightly imposed on the nation as whole.

Abolishing civil marriage will prove objectionable to those for whom a competitive market for marriage is unacceptable and who (emulating the Abolitionists and the Prohibitionists) insist that a single, legally-enforced definition of marriage must apply throughout the nation. A proponent of gay marriage who believes the purpose of such marriage is public approval of his sexual orientation is uninterested in the pluralistic regime that will emerge from a deregulated marriage market, even though that regime will permit him to pursue his personal vision of same-sex marriage. So too an opponent of gay marriage who believes it essential that the law confirm his vision of exclusively

71 Commentators disagree as to the likelihood of this scenario. Compare Jack B. Harrison, The Future of Same-Sex Marriage After Lawrence v. Texas and the Election of 2004, 30 U. DAYTON L. REV. 313, 336 (2005) (“Recognition of same-sex civil marriages will never result in any religious organization being forced by the state to conduct gay marriages . . . .”), with Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. ST. THOMAS L.J. 33, 67 (2004) (“If same-sex marriage is a right, powerful legal pressures will be brought to bear on religions and other organizations that fail to acknowledge this right.”).

72 Note that, in a world in which the state does not define, regulate, or recognize marriage, the state cannot tell persons that they may or may not marry on the basis of race. Absent civil marriage, marriage will be defined by the agreement of the parties, informed by the norms of the secular and religious institutions sponsoring marriage. Cf. Loving v. Virginia, 388 U.S. 1 (1967) (striking down on Equal Protection grounds Virginia’s laws against interracial marriage).
heterosexual marriage will have no interest in the political conflict-reduction stemming from the elimination of civil marriage. However, for a proponent of gay marriage who seeks legal equality, deregulation achieves that equality, permitting same-sex couples the identical ability to craft marital agreements as heterosexual couples.73 Similarly, for a proponent of traditional marriage limited to heterosexual couples, deregulation allows that proponent and his religious institution to adhere to their beliefs.

In short, for those willing to agree to disagree, deregulation carries the advantage that, under such deregulation, the definition of marriage would cease to be a zero-sum political game, generating political conflict among contending visions of that institution. Instead, the definition of marriage would become a matter of individual and religious choice.

Depoliticizing the definition of marriage in this fashion would be good, not only for the polity, but for marriage itself. The energies and resources now invested in political fights over the meaning of civil marriage would instead be freed for competition in the deregulated marriage marketplace, augmenting the institution rather than fueling political conflict.

A theme of gay marriage advocates is that same-sex marriage would be good, not just for homosexuals, but for marriage in general since gay marriage would reinforce the norm of monogamous, permanent marital commitment.74 Advocates of covenant marriage make similar claims that their version of the institution would be good, not just for those who elect the covenant marriage regime, but also for the broader society, which benefits from the example of those who make a deeper commitment to their marriage.75 I do not know whether these claims will prove correct. I do know that the energy and resources devoted to enshrining these versions of marriage in the statute books is better spent making these models of marriage work in practice.

The abolition of civil marriage would not eliminate all marriage-related political conflict. As I have noted76 and as I discuss further

73 This contention rests on the premise that courts will uphold agreements entered into by gay and lesbian couples. It is my intent that they do so, rather than declare such agreements void on public policy or other grounds.
74 See RAUCH, GAY MARRIAGE, supra note 5, at 86; SULLIVAN, supra note 62 at 112, 181-83 (arguing that “the notion of stable gay relationships might even serve to buttress the ethic of heterosexual marriage”); Rauch, What I Learned, supra note 5, at 18 (“Above all, the institution of marriage itself is a likely beneficiary of same-sex marriage. This is an opportunity to bolster the ethic and the culture of marriage at a time when society has been abandoning these things.”).
75 See Katherine Shaw Spah, Beyond Baehr: Strengthening the Definition of Marriage, 12 BYU J. PUB. L. 277, 279 (1998) (stating that covenant marriage “restore[s] permanence to marriage thereby returning it to its status as a social institution”).
76 See supra Part III.
below, a deregulated marital regime would require default rules for those couples who fail to contract and for those couples whose contracts fail to address particular issues. Any contract regime, including one for marital and cohabitation agreements, must decide who can contract and when their deals violate public policy. Determining these default rules and the contours of public policy will be contentious in a heterogeneous and democratic polity like the United States at the beginning of the twenty-first century, but not nearly as contentious as the status quo of civil marriage. In short, a deregulated marital regime, while it would not eliminate all political conflict related to marriage and cohabitation, would sharply reduce the quantum of such conflict, a reduction that would be good both for the polity and for the institution of marriage.

IV. THE LAW WITHOUT CIVIL MARRIAGE

In this section, I outline a legal regime without civil marriage, that is, a legal regime under which the law does not recognize, define, or regulate marriage. This outline confirms that a legal world without civil marriage is workable and not as different from the status quo as many might suppose.

As I have suggested, the law following the deregulation of marriage would be both contractual and pluralistic. In a competitive market for marriage, different groups will promulgate their own visions of marriage, visions that will typically be embodied in standardized agreements signed by those marrying under the auspices of each particular group. While most of the institutions sponsoring marriage will be religious in nature, nonreligious organizations will emerge to service those seeking a secularized vision of marriage. Nonbelievers, instead of going to a judge or other civil officer, will have their marriages performed by such nonreligious entities. Alternatively, couples could eschew involvement with any marriage-sponsoring group and instead, on their own volition, pronounce themselves married.

Some marriage-sponsoring groups will likely offer variants of a basic marital agreement. A church, for example, might give couples a choice in its standard form marriage contract among community property, separate property, and equitable apportionment schemes. Similarly, a church might offer couples one marital contract with limited grounds for divorce and an alternative agreement with broader bases for terminating the marriage. Some couples will customize

77 See infra note 79 and accompanying text.
78 See infra notes 80-81 and accompanying text.
marriage contracts or will craft their own, in the same way that some couples today enter into prenuptial agreements.

In sum, the deregulation of marriage will stimulate the democratization of the antenuptial agreement. Besides the standard form agreements promulgated by religious and secular institutions sponsoring marriage, standard form antenuptial contracts will be developed and promoted by bar associations, legal publishers, independent websites—anyone with an ideological or economic interest in servicing the deregulated marriage market.

Even so, some (perhaps many) couples in a deregulated marriage market will marry without benefit of contract, because they marry under the auspices of a sectarian or secular institution that does not promulgate its own marriage contract, because these couples decline to sign that contract and the institution marries them anyway, or because these couples, on their own, declare their relationships to constitute marriages without further defining those relationships. Consequently, in a world without civil marriage, the legal system will need default rules applicable when couples fail to contract and cannot agree on the terms for terminating their relationships. While I expect standard form cohabitation contracts to arise, many (perhaps most) unmarried couples living together will not contract79 and will thus be subject to the default rules of their particular state. On termination of their relationship, if the cohabitating couple cannot agree on terms, those terms will be supplied by state law.

In a legal world without civil marriage, the same state law default norms will apply alike to married and unmarried couples who fail to contract and to married and unmarried couples whose contract does not cover a particular issue. Suppose, for example, that a man and woman divorcing under the deregulated marriage regime had married in a synagogue that sponsors a marriage contract that is silent on the distribution of property upon divorce. If that divorcing couple cannot agree on such a distribution, the law will provide a default rule—the same rule that would apply if the couple had not married. Similarly, if that couple did not contract for the grounds for divorce, the state would provide default rules for terminating the relationship—the same rules applicable to a nonmarried couple who failed to contract terms for ending their relationship.

These default rules would likely consider such traditional factors as the length of the relationship, the parties’ respective reliance on each others’ behavior and representations, the parties’ respective contributions to each others’ well-being, and the interests of any children born of the relationship. Courts and legislatures, in fashioning

79 See Garrison, supra note 10, at 852 (commenting that “few cohabitating couples currently enter into contracts even though they are legally empowered to do so”)
these default rules, would confront all of the standard trade-offs between norms that require individualized, fact-based assessments of particular relationships and more easily-applied objective laws. In addition, a contract-based domestic relations regime will confront many of the same kinds of issues as any other contract regime as well as issues unique to domestic relations contracts. The law, for example, will need an age of consent, below which persons are deemed incapable of contracting into marital or cohabitation arrangements. Current state statutes providing minimum ages for marriage can be easily adapted for this purpose.\footnote{See, e.g., NEV. REV. STAT. §122.025 (2004) (providing that the age of consent for marriage in Nevada is sixteen).} Similarly, the law will (by statute, case law or both) identify contract provisions that are repugnant to public policy and thus unenforceable. Some (perhaps many) states will void contracts embodying polygamous arrangements while other states will view any arrangement entered into by consenting adults as valid.\footnote{As observed earlier, see \textit{supra} note 73, under my proposal I expect courts to uphold contracts between same-sex couples, rather than to declare such contracts void on public policy grounds. I would also be inclined to uphold unconventional arrangements among validly consenting adults, including polygamous marriages.}

However, in a world without civil marriage, the courts should use sparingly the power to void particular features of marriage or cohabitation agreements as against public policy. The benefits of a competitive market for marriage—innovation, diversity, entrepreneurialism, conflict reduction—obtain only if consenting adults are free to pursue their particular visions of marriage. The deregulation of marriage will not diminish political conflict if fights over the definition of marriage are simply transformed into equivalent struggles to declare public policy as to marital and cohabitation contracts. Similarly, groups promoting their respective visions of marriage will be constrained from experimentation and customization if the declared boundaries of public policy are too narrow. Indeed, sufficiently restrictive declarations of public policy (especially when combined with particularly intrusive default rules) could in practice reestablish civil marriage, i.e., a monopolist legal framework for couples, without explicitly invoking the legal label of civil marriage.

Consequently, the courts (and legislatures) in a world without civil marriage should not invalidate voluntary arrangements except upon very compelling grounds, e.g., to protect minor children. The abolition of civil marriage achieves the desired ends only if no comparable regulatory regime is reintroduced through the back door. In short, it would be undesirable for a nominally deregulated regime to recreate civil marriage in substance by formulating default rules and declarations
of public policy, which de facto reestablish the legal inflexibility of civil marriage.

I suspect that that possibility is unlikely. If there is strong political support for de facto civil marriage, there is likely to be strong support for civil marriage de jure. I thus find improbable a scenario in which there is sufficient political support to abolish civil marriage in form but equally great political support to recreate civil marriage in substance through restrictive declarations of public policy and default rules. It is nevertheless a scenario to be guarded against.

Another important issue under a contract-based domestic relations regime will be the status of arbitration. Many institution-drafted contracts will provide for arbitration through that institution. For example, the marriage agreements of a particular denomination might require that a divorcing couple bring their disagreements under that denomination’s contract to a panel sponsored by the denomination. In such cases, the courts and legislatures must decide if the arbitral decisions of such panels are entitled to the high level of deference given to commercial arbitration\(^{82}\) outcomes, or if those arbitral decisions should be subject to greater judicial scrutiny, perhaps even de novo review.\(^{83}\) Again, my vision of a diverse and vibrant market for marriage suggests that those who agree to particular marriage agreements should be bound by them, including agreements to be bound by the decisions of particular arbitration panels.

Yet another important topic under a contract-based domestic relations regime will be the issue of disclosure. Presumably, all states (per standard contract norms) will void marital and cohabitation agreements in the face of fraud. If one party deliberately misrepresents a material fact to a prospective domestic partner, the defrauded partner will have the conventional contract remedy of vitiating the contract. However, some (maybe most) states will insist on a higher standard of full disclosure, as is often required today for pre-nuptial agreements.\(^{84}\) Under a full disclosure standard, it would not be sufficient to avoid

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\(^{83}\) This issue arises under a civil marriage regime when divorcing parties use a religious tribunal as an arbitral forum and the courts must decide whether to enforce the tribunal’s judgment. See, e.g., Ginnine Fried, The Collision of Church and State: A Primer to Beth Din Arbitration and the New York Secular Courts, 31 FORDHAM URB. L.J. 633 (2004). The issue would become pronounced under a deregulated marriage regime since many (perhaps most) religious institutions sponsoring standard form marriage contracts would provide in such agreements for arbitration under the institutions’ own dispute-resolution procedures.

\(^{84}\) See, e.g., McHugh v. McHugh, 436 A.2d 8, 11 (Conn. 1980) (“The duty of each party to disclose the amount, character, and value of individually owned property, absent the other’s independent knowledge of the same, is an essential prerequisite to a valid antenuptial agreement containing a waiver of property rights.”); MINN. STAT. § 519.11, subdiv. 1 (2002) (stating that an antenuptial agreement requires “a full and fair disclosure of the earnings and property of each party”).
fraud; the prospective marital partners would have an affirmative duty to provide all relevant information to each other. My purpose here is not to debate the relative merits of the fraud and full disclosure standards but to emphasize that a world without a legal definition of marriage will require contract and domestic relations law, will entail choices among alternative formulations of the law, and will not look as different from the legal status quo as some might suspect.

Under the contract-based regime that will emerge for marital and nonmarital relationships, some of the most difficult issues will involve children. The source of the difficulty is well-known: On the one hand, the law values parental autonomy. On the other hand, parents may not pursue their children’s best interests. The latter insight, for example, explains the common rule that parents are not automatically the guardians of their children’s property: a parent might be tempted to use his child’s money for the parent’s own purposes, to the child’s detriment. However, the former insight explains why, in practice, the courts, when called upon, commonly do appoint parents to be their children’s financial guardians: fear of parental self-interest is balanced by concern for parental autonomy.

The same tension will play out in a world without civil marriage as more couples embrace the standard form marriage contracts of the institutions marrying them. Suppose, for example, that a particular church’s marriage contract commits the couple to raise their children in that church. Suppose further that, on divorce, one of the parties wants to leave that church and take the children with him or her. Or suppose that the church’s contract provides that, on divorce, the mother is always the custodial parent and that a divorcing father claims that such maternal custody is no longer in the children’s best interests. Today, the general rule is that prenuptial agreements do not bind as to the child’s welfare. Presumably, some, perhaps many, states will continue that rule once marriage has ceased to be a recognized legal category. Others may not. However, with marriage deregulated, whatever the rule may be, it will apply regardless of the marital status of the child’s parents (which is essentially true today).

85 See, e.g., CONN. GEN. STAT. § 45a-631(a) (2005) (“A parent of a minor . . . shall not receive or use any property belonging to the minor in an amount exceeding ten thousand dollars in value unless appointed guardian of the estate of the minor . . . .”).
86 See, e.g., Brooke v. United States, 468 F.2d 1155 (9th Cir. 1972) (taxpayer/father appointed by local probate as guardian for his children).
87 See, e.g., MONT. CODE ANN. § 40-2-605(2) (2005) (“The right of a child to support may not be adversely affected by a premarital agreement.”). This provision corresponds to the Uniform Premarital Agreement Act.
88 See supra notes 11-19 and accompanying text; see also Patricia A. Cain, Imagine There’s No Marriage, 16 QUINNIPIAC L. REV. 27, 49 (1996) (stating that “many fights over custody and visitation present very close questions in which the prior agreement of the parties ought to be determinative”).
Implicit in the foregoing is that, when the law ceases to recognize civil marriage and contested divorces, the hostile split-ups of unmarried couples will still result in bitter, hard fought litigation. There will, however, be two important differences from the status quo. First, such litigation under a deregulated marriage regime will typically involve the application and interpretation of marital and cohabitation contracts. Second, in such litigation, whether it is contract-based or applies default domestic relations law, the parties’ characterization of their relationship as marriage *vel non* will be irrelevant.

I do not pretend that this discussion exhausts all of the contract and domestic relations issues that the courts and legislatures will be called upon to address once the law jettisons marriage as a legal category. I do suggest that this discussion demonstrates that a legal world without civil marriage is workable and not as different from the status quo as many might suppose.

Consider also in this context three important areas of the law: pension, tax, and inheritance law. For most middle class families, pension resources—today, typically 401(k) accounts and IRAs—are the family’s primary financial asset. The question arises: Does the nonworking partner have an interest in that asset? Here, again I suggest that the issue can be resolved without a legal definition of marriage and that we are closer to a deregulated regime than many might realize.

As previously noted, today unmarried participants in defined contribution plans can transfer their respective account balances, including IRAs, as death benefits to whomever the participants please, including their cohabitating partners. Thus, assuming that a relationship is intact at death and that the employed partner properly executes the necessary forms, that partner can transmit his pension wealth at death to his (same-sex or heterosexual) unmarried partner. In cases where married couples divorce, current law authorizes qualified domestic relations orders (QDROs) under which state divorce courts allocate pension entitlements between the divorcing spouses. It would be simple to expand the definition of QDROs to include pension-apportioning orders issued by state courts when unmarried couples split.

Perhaps the most challenging of the pension-related issues in a world without civil marriage is the question of protecting persons in extended relationships, e.g., spouses in long-term marriages and unmarried individuals in long-lived cohabitation arrangements. Today, as noted earlier, traditional defined benefit plans must presumptively

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89 See *supra* notes 35-39 and accompanying text.
91 See *supra* notes 36-37 and accompanying text.
pay retirement benefits to married participants in the form of qualified joint and survivor annuities. Such plans must also presumptively pay death benefits to deceased participants’ widows and widowers in the form of qualified preretirement survivor annuities. While the details governing these annuities are complex, the underlying policy is not: traditional pension plans must presumptively pay benefits in a fashion that guarantees the married survivor that periodic payments will continue to her after her spouse dies. This assures the survivor of resources she might not have if her spouse instead takes a single lump sum distribution during his lifetime (which lump sum he can consume in its entirety) or if her spouse instead takes a single life annuity (which annuity ends when the participant dies and thus pays no continuing benefit to the widow).

Current law permits a couple to elect against these spousal-protecting annuities in favor of such lump sums or single life annuities. Anecdotal evidence (including the emergence of cash balance plans that typically pay lump sum benefits) suggests that many couples dislike the spousal protection annuities and prefer the other benefit forms when they are available. This, in turn, suggests the simplest adaptation of the spousal annuity provisions to a world of deregulated marriage: repeal those provisions. This would still permit (though not require) plans to offer these survivor-protecting annuity options to married and unmarried participants with domestic partners. However, the law would cease to mandate such annuities for spouses as the presumptive distribution form since the law would not recognize spouses as such.

Some would oppose repeal of the spousal annuity requirements on the grounds that the presumptive annuity form protects widows and (less commonly) widowers through inertia. Experts in retirement issues have increasingly focused upon the evidence that rank-and-file workers often exhibit great inertia with respect to retirement savings decisions. See, e.g., ALICIA H. MUNNELL & ANNIKA SUNDEN, COMING UP SHORT: THE CHALLENGE OF 401(K) PLANS 63-65 (2004); Zelinsky, supra note 35, at 527-28.
While the question is close,\textsuperscript{94} on balance, I favor abolishing the mandatory spousal protection provisions under a deregulated marriage regime. However, one need not agree to accept my basic argument: we can plausibly adapt our pension laws to a regime without civil marriage. Indeed, in important measure, we already have via defined contribution plans, lump sum payments, IRAs, and rollovers, all of which (unlike traditional pensions) reinforce a world in which marital status is irrelevant since participants have their own account balances they can leave to their domestic partners or other nonspousal beneficiaries.

Comparable issues arise under the federal Social Security system. Today, widows and widowers receive Social Security death benefits based on the deceased spouse’s lifetime earnings. Particularly when the widowed spouse has no substantial claim of his or her own under the Social Security system, this death benefit can be an important source of retirement income.

In a world without civil marriage, two of the choices for Social Security death benefits parallel the private pension options, i.e., abolish the spousal death benefit or extend the spousal death benefit to nonmarried domestic partners. However, as Professor Staudt has demonstrated, a third option is to credit imputed Social Security earnings for nonworking individuals for such tasks as full-time child rearing.\textsuperscript{95} In this fashion, retirees (whether married or not) without their own histories of wage-based earnings will nevertheless be entitled to Social Security payments based on their imputed wages. While I am tempted by this last alternative, my goal is not to advocate a particular configuration of the federal Social Security system for a world without civil marriage. Rather, my goal is to indicate that plausible, if not perfect, alternatives exist for such a world—just as current law reflects plausible, rather than perfect, choices.

Similar observations can be made about the income tax laws. Today, the federal income tax places taxpayers into different filing statuses based on marriage. Married couples must either file jointly\textsuperscript{96} and thus use one set of progressive rates for their combined income, or use a different set of progressive rates for married persons filing separately.\textsuperscript{97} Single persons must pay income tax using yet another set

\textsuperscript{94} Annuities are an excellent way of providing retirement security via their guarantee that the participant (and then his widow) cannot outlive their pension income. In contrast, lump sum distributions place longevity risk on the participant by requiring the participant to structure his affairs to avoid the premature exhaustion of his retirement resources. Despite the benefits of pension annuities, the defined contribution paradigm, with its lump sum rather than annuity payouts, is too entrenched for a return to the status quo ante. \textit{See} Zelinsky, \textit{supra} note 35.

\textsuperscript{95} \textit{See} Nancy C. Staudt, Taxes, supra note 35.

\textsuperscript{96} I.R.C. § 1(a) (2005).

\textsuperscript{97} \textit{Id.} § 1(d).
of progressive brackets\textsuperscript{98} or, if they qualify for head of household status, using still another set of progressive tax rates.\textsuperscript{99}

For many couples, this structure creates the well-known “marriage penalty.”\textsuperscript{100} The joint income tax burden typically goes down when an earner and a nonearner marry. However, when two earners marry, their total tax bill usually increases, often substantially. Professor Cain, in her discussion of a legal regime without marriage, succinctly captured the federal income tax consequences of marriage: “In some instances the tax treatment may be beneficial and in others it may be detrimental.”\textsuperscript{101}

There are two basic choices for a tax system that does not use marriage as a legal category. First, Congress could abolish the joint return. Hence, the tax law could require everyone (married or not) to file his or her own return for his or her own income. Second, Congress could permit any self-declaring couple (married or not) to file a joint return for their combined incomes.\textsuperscript{102} Either way, marriage would cease to play a role under the federal income tax. Neither of these choices is perfect, but the status quo, with its marriage penalty for many couples, is not perfect either.

\textsuperscript{98} Id. \S 1(c).

\textsuperscript{99} Id. \S 1(b). A head of household for these purposes is an unmarried person who maintains a household that is the principal residence for certain family members or dependents. Id. \S 2(b).

\textsuperscript{100} The literature on the income tax marriage penalty is voluminous. An early and important discussion is Boris I. Bittker, \textit{Federal Income Taxation and the Family}, 27 STAN. L. REV. 1389 (1975). For more recent discussions, see Ann F. Thomas, \textit{Marriage and the Income Tax Yesterday, Today, and Tomorrow: A Primer and Legislative Scorecard}, 16 N.Y.L. SCH. HUM. RTS. 1 (1999); Lawrence Zelenak, \textit{Doing Something About Marriage Penalties: A Guide for the Perplexed}, 54 TAX L. REV. 1 (2000); see also N.Y. STATE BAR ASS’N, TAX SECTION, REPORT ON NEW YORK STATE TAX ISSUES RELATING TO SAME-SEX UNIONS 6 (2005), \textit{reprinted in TAX NOTES TODAY}, June 23, 2005, at 125-76 (commenting that “while it is frequently assumed that joint returns are more favorable to taxpayers, that assumption frequently is incorrect”).

\textsuperscript{101} Cain, \textit{supra} note 88, at 54.

Similar observations are to be made about the federal estate tax. As a result of the Reagan-inspired reforms of 1981, widows and widowers can, by virtue of the unlimited marital deduction, today receive uncapped inheritances from deceased spouses without incurring any federal estate tax.\(^\text{103}\) While the federal estate tax currently affects only a relative handful of affluent families,\(^\text{104}\) if one seeks instances in which the law treats married couples better than unmarried couples, this is example number one: an unlimited fortune can be passed to a surviving spouse, free of all federal estate taxes. That same fortune, passed to an unmarried domestic partner, is subject to heavy estate taxation.

In a world without marriage as a legal category, Congress could either extend to unmarried domestic partners the same estate tax benefits now enjoyed by married couples only, or it could abolish those tax benefits for all couples, including those who are married. The option of extending the unlimited marital deduction to self-declared domestic partners looks too manipulable to me. I can well imagine death bed declarations of domestic partnership with little credibility but with much tax-saving potential. Consequently, I would abolish (rather than extend) the marital deduction, probably conjoining that abolition with a significant increase in the base inheritance that can be left tax-free.

Today, the unified credit exempts from federal estate taxation the first $2,000,000 of the decedent’s taxable estate. I would increase that basic exemption to some higher figure, say $5,000,000, while eliminating the marital deduction altogether. Under such a regime, decedents could leave anyone (a spouse, children, a domestic partner) a large base amount free of federal estate tax. Above that protected amount, everyone (married or not) would incur the same federal estate tax on their respective inheritances.

Of course, if President Bush succeeds in his goal of eliminating the federal estate tax,\(^\text{105}\) he will, by definition, eliminate any disparity in estate tax treatment between married and unmarried couples.

An important concern of supporters of same-sex marriage is state inheritance and intestacy laws. A recurring theme they advance\(^\text{106}\) is


\(^{104}\) As of 2006, the estate tax unified credit exempts from federal estate taxation the first $2,000,000 of the decedent’s taxable estate. I.R.C. § 2010 (2005). Consequently, only the most affluent families face any federal estate tax liability.


that same-sex partners lack the death-related protections now enjoyed by surviving spouses. Here, again, the choice in a world without civil marriage is to abolish or extend, i.e., eliminate spousal inheritance rights or broaden those rights to include domestic partners. In this instance also, I come down on the side of abolition, given the practical problems of determining when unmarried persons are or are not partners for inheritance purposes.

In this area, my preference for abolition is augmented by the vision of an unregulated, increasingly contractual regime for domestic relationships once civil marriage is abolished. As married and cohabitating couples learn to execute agreements governing their affairs and as marriage-sponsoring institutions promulgate standard contracts for the couples coming together under their respective umbrellas, those contracts will commit the parties to arrangements for sharing property, during lifetime and on death. In a world without a legal definition of marriage, all couples will be increasingly sensitized to the need to execute proper estate planning documents—wills, trusts, health care directives.

In a world without civil marriage and no statutory inheritance rights for widowed partners (whether married or not), legal doctrines will be available in appropriate cases to avoid hardship for parties failing to contract. Consider, for example, a long-term couple (married or not) that never enters into any agreements or undertakes any estate planning. On death, the survivor, as discussed earlier,\textsuperscript{107} will be able to invoke such doctrines as implicit contract, constructive trust and quantum meruit to account for his or her contribution to the decedent’s estate.

One need not agree with my choices to accept my basic point: a legal regime without a legal definition of marriage is workable and, in many respects, closer to our existing rules than many might suspect. A legal regime without civil marriage will have its problems and its imperfections, as does the status quo. If it makes sense for the reasons I have argued to abolish civil marriage—to recognize current legal and cultural reality, to energize an unregulated market for marriage, to reduce political conflict by privatizing the definition of marriage—there are workable alternatives to our current, marriage-based law, alternatives often not significantly different from existing law except that these alternatives would be neutral toward the institution of marriage.

Under such neutrality, the law would neither hinder nor subsidize marriage. Just as neutrality implies no more burdens like the income tax marriage penalty, such neutrality also proscribes marriage-

\textsuperscript{107} See \textit{supra} notes 21-31 and accompanying text.
encouraging programs of the sort favored by the Bush Administration\textsuperscript{108} as well as the kind of marriage-fostering income tax credit approved by the Michigan legislature.\textsuperscript{109} The proponents of such programs, however well-meaning they might be, follow the path of those who favored establishment churches as good for religion. In contrast, I conclude that marriage would be strengthened by the decentralization and diversity stemming from the abolition of civil marriage and the consequent rise of a competitive market for marriage.

Neutrality is no more self-defining in the context of marriage than it is the context of religion. As we have seen, neutrality as to marital status in practice entails both choices, some of them close, and borderline, some of them difficult. Sometimes marital neutrality is best advanced by extending the coverage of a particular provision to domestic partners and unmarried cohabitants. In other contexts, it makes more sense in a world without civil marriage to repeal certain provisions altogether. Some will decide these particular issues differently than I do. The availability and plausibility of these other choices are, I submit, an argument for the theoretical and practical possibilities of a world in which the law does not define, regulate, or recognize marriage.

Consider in this context the related questions of transition and uniformity. Suppose that some states abolish civil marriage quickly while others take their time about it. Suppose that yet other states never do so. Or suppose that some states, embracing the unregulated spirit animating the vision of a competitive marriage market, give their residents broad latitude to contract for their marital arrangements while other states give their residents less scope and refuse to honor many kinds of out-of-state agreements on public policy grounds.\textsuperscript{110} Consider, finally, the ultimate transition argument: no state will ever actually abolish civil marriage.

As to the latter possibility, I understand that neither any state nor the federal government will deregulate marriage tomorrow. I likewise doubt that we will, any time soon, witness candidates for state legislatures promising to expunge from the statute books all legal


\textsuperscript{110} See, e.g., VA. CODE ANN. § 20-45.2 (2005) (“Any marriage entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created by such marriage shall be void and unenforceable.”). For a listing of similar statutes in other states, see William C. Duncan, \textit{Revisiting State Marriage Recognition Provisions}, 38 Creighton L. Rev. 233, 233 n.2 (2005).
distinctions based on marital status. Nevertheless, for two reasons, the vision of a world without civil marriage is valuable. First, ideas once thought impractical have a way of coming to fruition, sometimes after prolonged periods of ridicule, often quite unexpectedly. I suspect that, after an extended cultural war over the meaning of marriage, the weary combatants will decide that a state that does not define, regulate, or recognize marriage is the best solution for a diverse polity.

Second, as we grapple with the legal and political issues surrounding marriage, the vision of a world without civil marriage is a valuable yardstick with which to approach those issues. A tax policy maven may have no expectation that Congress can or will adopt a fair, efficient, and administrable Internal Revenue Code any time soon. Nevertheless, the vision of such a Code provides an important metric for assessing current law and proposals to change it. Similarly, the prospect of a world without civil marriage, even if that world is not imminent, is a useful lens for viewing the various proposals being advanced today on the subject of marriage.

A case in point is the proposal to amend the federal constitution to outlaw gay marriage as well as the legislation to preclude the federal courts from entering the gay marriage controversy. Many partisans in this area tend to favor both (to do whatever can be done to stop gay marriage) or to oppose both (to keep open all options for the legalization of same-sex marriage). In contrast, the vision of a world without civil marriage leads me to oppose the constitutional amendment defining marriage (I don’t want further codification of civil marriage), but to favor the legislation restricting the jurisdiction of the federal courts (devolving to the states is an important step on the road to abolishing civil marriage).

In this context, consider Citizens for Equal Protection, Inc. v. Bruning, in which the U.S. District Court for the District of Nebraska ruled unconstitutional Article I, Section 29 of the Nebraska Constitution. That section provides that “only marriage between a man and a woman shall be valid or recognized in Nebraska.” That section


further provides that “[t]he uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska.”\textsuperscript{114} I envision a legal regime without decisions like \textit{Citizens} or provisions like Section 29 since the law, under such a regime, would not define, regulate, or recognize marriage.

It is likely that the process of abolishing civil marriage, once begun, will take time and will not be completed quickly. In a world in which some states have deregulated marriage and others have not, there will be important issues regarding the Full Faith and Credit Clause and conflict-of-laws. If privatizing marriage is sensible for society and for marriage itself, grappling with these ancillary issues is a reasonable price to pay for that policy. No policy is costless. Indeed, we already have problems of state differences under the current civil marriage regime as some states refuse to recognize forms of civil marriage they fear other states will adopt.\textsuperscript{115}

Also knotty are the transition problems pertaining to couples married under the current civil marriage regime. One possible approach is to grandfather these couples indefinitely, maintaining civil marriage for those married before a specified cut-off date. Similarly plausible is a limited transition period, e.g., five years, during which civil marriage would be retained for those already married. This transition period would afford these previously married couples time to adjust to the new deregulated system by selecting an appropriate contract for their union. If they do not contract during the transition period, these couples would then be subject to their state’s default regime for married and unmarried couples alike. Still another possibility is different transition periods for different purposes. For example, a legislature might elect to continue for all previously married couples the rules of intestate succession, but eliminate joint income tax returns after a single transition year. None of these possibilities is perfect, but then, again, neither is the status quo. If the abolition of civil marriage is, as I have argued, good for the polity and for the institution of marriage, confronting these transition issues (perhaps for an extended period) is a price worth paying for the long-run benefits of a deregulated marital regime.

Under even the most optimistic scenario, the ultimate emergence of a competitive, robust and diverse market for marriage lies in the future. The First Amendment did not lead overnight to today’s vigorous market for religion. As Professors Stark and Finke observe, it took two

\textsuperscript{114} \textit{Id.}.

\textsuperscript{115} See, e.g., VA. CODE ANN. § 20-45.2 (2005); see also Edward Stein, \textit{Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights}, 49 UCLA L. REV. 471, 477 (2001) (“Even if a state were to allow same-sex couples to marry, few if any U.S. jurisdictions would recognize this marriage, despite the Full Faith and Credit Clause of the U.S. Constitution.”).
hundred years for the deregulated American environment for religion to give rise to the high levels of church membership that most Americans today take for granted.\textsuperscript{116} I do not believe that two centuries must similarly elapse from the abolition of civil marriage until the emergence of a dense network of marital options, if for no other reason than that the churches, synagogues, and other religious institutions, which will be important actors in that marriage-sponsoring network, already exist. Nevertheless, the ultimate competitive market for marriage will not spring up overnight after the abolition of civil marriage. But it will emerge.

V. SOME COMPARISONS

In this section, I compare my pro-marriage proposal to abolish civil marriage with the analyses of several important commentators. In the legal academy, the earliest voice calling for the abolition of marriage as a legal category was Professor Fineman’s. For Professor Fineman, the conventional, marriage-based family is a citadel of male domination:

The patriarchal family is an “assumed institution” with a well-defined, socially constructed form complete with complementary roles—husband/head of household, wife/helpmate, child. The significant family tie is the sexual affiliation that, when legally sanctified, creates marriage. The assumed inevitability and primacy of this form of intimate connection reinforces patriarchy in that it defines male presence as essential and dominant within the family.\textsuperscript{117} There have been, Professor Fineman acknowledges, efforts to refashion the traditional family in “egalitarian” terms, i.e., as a more equal relationship between men and women.\textsuperscript{118} These efforts at equality within the family were “initially undertaken largely in response to women resisting their historically assigned roles as wives and mothers.”\textsuperscript{119} However, these efforts have failed. “Feminist legal reformers,” Professor Fineman writes, “naively assumed that sharing could and would happen” as spouses moved to less gendered roles within the family.\textsuperscript{120} This assumption has proved false: “Equality rhetoric and family law reforms aside, the burdens associated with intimacy and its maintenance have always been and continue to be

\textsuperscript{116} STARK & FINKE, ACTS, supra note 42, at 225.
\textsuperscript{117} FINEMAN, supra note 11, at 23. Professor Fineman’s critique of marriage has provoked much interesting scholarship on the merits of marriage as a legal category. See, e.g., Vivian Hamilton, Mistaking Marriage for Social Policy, 11 VA. J SOC. POL’Y & L. 307 (2004).
\textsuperscript{118} FINEMAN, supra note 11, at 158.
\textsuperscript{119} Id.
\textsuperscript{120} Id. at 159.
disproportionately allocated to women.” 121 Consequently, Professor Fineman argues, “we must abandon the pretense that we can achieve gender equality through family-law reform.” 122

Moreover, the proliferation of divorce and single motherhood has rendered unrealistic the “notion of husband and wife as a couple forming the basic family core.” 123 This traditional paradigm of the family “is belied by the statistics reflecting the ways women and men live.” 124 In light of these “current social realities”—efforts to make marriage more equal have failed, more women live without husbands—“the historic model of the family can no longer be considered viable.” 125

Since state-sponsored marriage is the “traditional foundational relationship” 126 of this failed model of the family, Professor Fineman proposes abolishing marriage as a legal category. 127

In important measure, Professor Fineman conceives of the legal world without civil marriage in terms similar to those I have advanced. After the law ceases to define, recognize, or regulate marriage, couples will fashion their relationships by contract. 128 This deregulated regime, Professor Fineman indicates, will entail less change from the legal status quo than many might expect as the law already encourages prenuptial agreements and settlements on divorce and increasingly recognizes both explicit and implicit cohabitation agreements. 129 To this extent, Professor Fineman and I agree.

In three significant respects, however, Professor Fineman envisions the world without civil marriage quite differently than I do. First, we disagree as to the cultural and religious aftermath of the legal deregulation of marriage. “Of course,” Professor Fineman writes, “people would be free to engage in ‘ceremonious’ marriage.” 130 Such “ceremonious” marriage is evidently of little value to Professor Fineman and, in the world she envisions, of little practical import. In contrast, I anticipate that sectarian and secular marriage-sponsoring groups will play more than a “ceremonious” role in a world without civil marriage and that the impact of these marriage-sponsoring groups will be both pronounced and desirable. In the robust, deregulated, and competitive market I anticipate for different forms of marriage, religious and secular entities will develop standard form agreements

121 Id. at 162; see also id. at 165 (stating that “rhetoric aside, empirical information indicates sharing is not happening”).
122 Id. at 228.
123 Id. at 160.
124 Id. at 228.
125 Id. at 164.
126 Id. at 227.
127 Id. at 228-30.
128 Id. at 229.
129 See id.
130 Id.
reflecting their particular conceptions of marriage. Public ceremony will play an important role (as it does today) in affirming those conceptions of marriage. I envision marriage as strengthened by the entrepreneurial energies unleashed by the deregulation of the institution, energies which are far more than “ceremonious.”

Second, unlike Professor Fineman, I anticipate that default rules will play a significant role in a world without civil marriage. Some couples will marry or cohabitate without contracts. Some contracts will be ambiguous or will fail to address particular issues. In such cases, the law will provide the same default rules for married and unmarried couples alike. In contrast, Professor Fineman writes, abolishing marriage as a legal category “would obliterate the whole idea of ‘marital property’ and end obligations for spousal support during and after termination of the relationship.”

At one level, this statement is tautologically true. There would be no such thing as “marital” property under a legal regime without marriage. Likewise, there would be no “spousal” support when there is no legal category of a spouse. On the other hand, the law, without a legal definition of marriage, would still need default rules about property and income when couples fail to contract.

Suppose, for example, that a man and woman cohabitate on a long-term basis without any formal contract. Suppose further that all property is placed in the man’s name and that the woman provides household services and raises the couple’s children. Then, the man leaves. Professor Fineman’s position implies that, in this case, the woman has no claim to the man’s property or income, having failed to contract with him. That strikes me (and, I am sure, others) as quite unfair to this woman, disappointing expectations and reliance interests she might reasonably, if implicitly, have developed from the nature and length of the relationship and, perhaps, from her partner’s explicit statements. Consequently, I expect the default law regime to recognize this woman’s contributions via at least minimal property and support rights.

At one level, Professor Fineman recognizes the need for default rules when she contends that, in a world of domestic relations agreements, “the basis of current contract law may have to be rethought and revised.” However, she suggests that any revision “would be applied to all contracts, sexually-based or otherwise.” This one-size-fits-all approach to contract is not compelling. Consumer contracts differ from commercial contracts between businesses. So too domestic contracts have their unique attributes and thus require their unique rules.

131 Id. at 230.
132 Id.
133 Id.
In a world without civil marriage, courts and legislatures will need to supply those rules. Courts and legislatures will also need to provide default rules (many of them) to cover situations where couples fail to contract or fail in their contract to address particular situations. A world without civil marriage would still be a world of law.

Finally, Professor Fineman’s proposal to abolish marriage as a legal category rests on her conviction that marriage as an “institution is incapable of reform.” From that pessimistic premise, to deregulate marriage is to kill it—and deservedly so. In contrast, my proposal rests on the premise that marriage is good and that the feminist project which Professor Fineman rejects—reforming marriage and family law to make both fairer to women—has had and ought continue to have commendable success, success which has benefited women and men alike. I would deregulate marriage to save it.

Professor Polikoff extends Professor Fineman’s analysis to the question of same-sex marriage and concludes that “the demand for equality underlying the push for lesbian and gay marriage” is best satisfied by abolishing marriage as a legal category. In a world of deregulated marriage, “there is complete equality between adult, coupled heterosexual and homosexual relationships. Neither relationship receives legal recognition by the state.” This leads Professor Polikoff to oppose same-sex marriage as a goal unworthy of gay and lesbian pursuit:

Supporters of legalizing same-sex marriage are correct when they complain that domestic partnership benefits for gay and lesbian couples while only heterosexual couples can marry perpetuates inequality. They are wrong when they see equal access to marriage as the only way out of this inequality. Abolish marriage as a legal category for everyone.

Following Professor Fineman’s analysis, Professor Polikoff notes that abolishing marriage as a legal category would not affect “[c]eremonies, secular or religious, [which c]ould continue if they suited a couple’s desire for public or sacred affirmation.” However, like Professor Fineman, Professor Polikoff is primarily concerned with formal legal equality and evidently views “ceremonious” celebrations and the groups sponsoring such celebrations to be of little import. This

\[134\] *Id.*
\[136\] *Polikoff, supra* note 33, at 174.
\[137\] *Id.*
\[138\] *Id.* at 176.
\[139\] *Id.* at 173.
highlights, again, the difference between those who would deregulate marriage to delegitimate the institution and thereby hasten its demise and those who would deregulate marriage to strengthen it by unleashing a robust and competitive market for marriage.

It is hard to imagine a vision of marriage more different from Professor Fineman’s than Jonathan Rauch’s. Mr. Rauch describes himself as a “true believer in the special importance and unique qualities of the institution of marriage.” Like Professor Eskridge and other advocates of same-sex marriage, Mr. Rauch argues that such marriage is a “win-win-win” proposition, “good for homosexuals, good for heterosexuals, and good for the institution of marriage: good, in other words, for American society.” Marriage, Mr. Rauch contends, has proved particularly adept at “settling the young, particularly young men; and providing reliable caregivers.”

Mr. Rauch’s positive vision of marriage is explicitly tied to legal regulation of the institution. He describes marriage as “two people’s lifelong commitment, recognized by law and by society, to care for each other.” For two reasons, Mr. Rauch rejects a privatized vision of marriage by contract. First, he tells us, marriage is not merely an arrangement between the two partners, but also involves “their community” and that community’s “social expectations.”

I agree, which is why I expect the deregulated marriage market to be filled by religious and secular marriage-sponsoring organizations representing society and its norms. In contrast, Mr. Rauch portrays a contract-based marriage regime as an anomic environment in which couples mate in isolation from “their community” and its “social expectations.” Undoubtedly, there will be couples in a world without civil marriage who will come together for self-described marriages in isolated fashion, disengaged from religious or other communal connections—just as there are people today who marry this way, without broader attachments. However, more common in a world without civil marriage will be couples coming together (as they do

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140 RAUCH, GAY MARRIAGE, supra note 5, at 7.
141 See ESKRIDGE, supra note 106, at 8 (“My further thesis is that same-sex marriage is good for gay people and good for America, and for the same reason: it civilizes gays and it civilizes America.”); id. at 104 (“Same-sex marriage will civilize both gays and straights, teaching each something about the unitive features of marriage.”); id. at 116 (recognizing the “substantial benefits that same-sex marriage offers to society as a whole”); id. at 118 (arguing that “the entry of same-sex couples into the institution of marriage will infuse it with much-needed fresh blood”).
142 RAUCH, GAY MARRIAGE, supra note 5, at 5. Like Professor Quirk, Mr. Rauch values the ability of the decentralized American polity to resolve the issue of same-sex marriage “one state at a time.” Compare id. at 6, with Quirk, supra note 3.
143 RAUCH, GAY MARRIAGE, supra note 5, at 18.
144 Id. at 24.
145 Id. at 32-33.
today) under the auspices of sectarian and nonreligious institutions which embody a wider community and its norms.

Indeed, I would reverse Mr. Rauch’s point and rejoin that a contract-based marriage regime will be planted more firmly in communal ties and social norms than is the civil marriage status quo. In a competitive market for marriage, a dense and robust network of marriage-sponsoring institutions will emerge, each promoting its particular vision of marriage. The danger, if any, in such a competitive market is not that couples will marry anomically, isolated from family, church, and community. Rather, the danger is that, confronted with a surfeit of choices, some couples will make poor decisions in selecting the form of marriage that is right for them. 146

In short, Mr. Rauch’s conception of a deregulated marriage market is unpersuasive since he assumes that the network of communal and familial attachments, which today makes marriage unique, will somehow disappear in that market. To the contrary: that network will remain—indeed, will be strengthened—in a world without the government monopoly that is civil marriage. Thus, considerations of “community” and “social expectations” argue for, not against, a world in which the law does not define, recognize, or regulate marriage and thereby encourages a plurality of religious and secular institutions to promote their respective visions of marriage.

Mr. Rauch’s second argument for legal regulation of marriage stems from the “legal benefits and prerogatives of marriage.” 147 Mr. Rauch acknowledges that many of these benefits can today be arranged for unmarried domestic partners. 148 Thus, for example, unmarried partners can execute health care directives that make each the decisionmaker for the other. They can, as I noted earlier, 149 also leave their 401(k) and IRA balances to each other and can execute wills for the rest of their estates.

This, however, is not good enough for Mr. Rauch since, as a legal matter, marriage creates a “metamessage, which the bundle of legal prerogatives brings.” 150 As to the “big basket of legal prerogatives which” marriage entails, 151 Mr. Rauch explains: “[B]y delivering the whole package all at once the government signifies that, after your wedding, you are a different kind of person—a married person. It is not

146 Some social scientists have become concerned that individual decisionmaking may become worse when some decisionmakers confront too many choices. See, e.g., MUNNELL & SUNDEN, supra note 93, at 71-73.
147 RAUCH, GAY MARRIAGE, supra note 5, at 35.
148 Id.
149 See supra notes 35-39, 92 and accompanying text.
150 RAUCH, GAY MARRIAGE, supra note 5, at 35.
151 Id. at 39.
just that you have chosen to assume this or that responsibility. You have bought into the whole deal.”

As a defense of the status quo, this argument is subtle but unpersuasive: the legal “package” Mr. Rauch describes is far less impressive than he suggests and actually contains some elements quite burdensome to marriage. The closest Mr. Rauch comes to specifying this metamessage-delivering legal package is the following:

Spouses are generally exempted from having to testify against each other in court. They can make life-or-death decisions on each other’s behalf in case of incapacity. They have hospital visitation rights. A doctor cannot refuse to tell them their spouse’s condition. They have inheritance rights. They can file taxes as a single unit. On and on.

A hard look at each element of this legal package indicates that there is less here than Mr. Rauch believes. Spouses do have more legal rights than nonspouses. However, the “big basket” is not as big or as categorical as Mr. Rauch suggests. Indeed, parts of the marital basket penalize, rather than support, marriage. Consider, in turn, each element of this legal basket:

(a) A spouse has only limited ability to avoid testifying against her mate and to preclude her mate from testifying against her. There are actually two, often overlapping privileges for married couples, one denoted the spousal testimonial privilege, the other labeled the marital confidences privilege. The former, when applicable, precludes one spouse from serving as a witness against the other, regardless of the nature of the spouse’s potential testimony. The latter, when applicable, prevents one spouse (or a former spouse) from testifying about confidential marital communications.

By definition, the confidences privilege only precludes a spouse from testifying about private marital communications. Notwithstanding this privilege, an individual can be compelled to testify against her spouse as to events which occur and communications which are made in the presence of a third party. In that context, there is no expectation of marital confidence and therefore no confidential communication to protect.

152 Id. at 35.
153 Id. at 24. Professor Mohr’s list of the legal benefits conferred by marriage is similar. See Richard D. Mohr, The Long Arc of Justice: Lesbian and Gay Marriage, Equality, and Rights 63-64 (2005). According to Professor Mohr, the legal benefits of marriage include “the right to make medical decisions in the event a partner is injured or incapacitated,” “income tax advantages,” “rights of inheritance in the absence of wills,” and the “spousal immunity against compelled testimony.” Id.
In terms of the spousal testimonial privilege, the U.S. Supreme Court has held that, in the federal courts, one spouse may voluntarily waive the privilege and thereby testify over the opposition of the other spouse as to nonconfidential communications and events. The federal courts of appeals conclude that there is no spousal testimonial privilege in civil proceedings. In other jurisdictions, spousal privilege is hemmed in by exceptions and limitations.

If, for example, in the privacy of the marital relationship, a husband discloses to his wife that he has impulses toward child molestation, this confidential communication is generally protected from disclosure. If, on the other hand, the husband makes this statement in front of his wife and a close friend, the statement, because it was also made in front of a third party, lacks the privilege of a confidential marital communication. The wife could invoke spousal testimonial privilege and therefore decline to divulge this nonconfidential statement in a federal criminal proceeding; however, she could, if she so chose, volunteer her testimony over the husband’s objections. Moreover, in a federal civil proceeding, the wife could be compelled to disclose this nonconfidential declaration by her husband. All of this leaves me skeptical that the law of spousal privilege, by itself or as part of a package, sends the strong pro-marriage metamessage that Mr. Rauch perceives it to.

(b) The same is true of spouses’ legal ability to make medical decisions for each other. No doubt, spouses make such decisions every day for each other as a matter of “social expectation.” The law, however, is less weighty than Mr. Rauch thinks. There is little authority, case law or statutory, authorizing spouses to make medical decisions for each other. Michael Schiavo’s well-publicized

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156 See, e.g., United States v. 281 Syosset Woodbury Rd., 71 F.3d 1067, 1070 (2d Cir. 1995) (“The adverse spousal testimony privilege has traditionally been limited to criminal cases.”).
157 See, e.g., CAL. EVID. CODE § 972 (Deering 2005); see also Crawford v. Washington, 541 U.S. 36, 40 (2004) (applying the Sixth Amendment to Washington’s rule denying privilege “to a spouse’s out-of-court statements admissible under a hearsay exception”).
158 This assumes that the statement is relevant and otherwise admissible.
159 Again, this assumes that the statement is relevant and otherwise admissible.

Contrary to the Chief Justice’s comments in Goodridge, neither her opinion in Shine nor the authorities on which she relied in Shine establish an “automatic” right for family members to make medical decisions. Shine, accurately reflecting the case law and commentary, holds that a physician, confronted with an incompetent patient in an emergency situation, “should seek the consent of a family member if time and circumstances permit.” Shine, 709 N.E.2d at 64, 429 Mass. at 466. Neither Shine nor the authorities upon which it relies purports to address
difficulties in terminating his wife Terri’s life support graphically demonstrated that spouses, as such, often do not have the automatic legal right to make health care decisions for each other. \( \text{161} \) Mr. Schiavo, who spent over a decade fighting for the legal right to end his wife’s life support, would likely respond with dismay to Mr. Rauch’s assertion that spouses as such “can make life-or-death decisions on each other’s behalf in case of incapacity.” \( \text{162} \)

The paucity of legal authority confirming spouses’ ability to make medical decisions for each other explains why husbands and wives routinely grant each other that right explicitly via health care directives, health care proxies, medical powers of attorney, and similar devices. In so doing, these spouses use the same legal devices and take the same legal steps as are available to unmarried domestic partners. The commonplace grants of health care authority between spouses belie the notion that marriage per se confers an automatic right to make medical decisions for one’s spouse.

It is, moreover, not surprising that the law often lacks a general spousal right to make medical decisions for one’s mate: spouses may have serious conflicts-of-interest when it comes to medical decisionmaking. A spouse who terminates life support for his or her mate may inherit by virtue of the resulting death or may be relieved by such death of an otherwise onerous spousal support obligation. These conflicts-of-interest may be particularly acute when the marital nonemergency situations or to create a generalized right for family members to make medical decisions.

For the proposition that family members, absent explicit authority, do not have a legal right to make medical decisions, see Cruzan v. Mo. Dep’t of Health, 497 U.S. 261 (1990), in which the Missouri Supreme Court and the U.S. Supreme Court held that, under both Missouri law and the federal Constitution, Ms. Cruzan’s parents did not have the legal right to terminate her medical treatment.


An advocate of gay marriage could argue that the Schiavo controversy demonstrates the standing of a spouse like Mr. Schiavo to petition the courts for appointment as his mate’s guardian and for judicial approval of the medical decisions he makes as such guardian. In contrast, a same-sex partner, as such, lacks such standing. Fair enough. But this argument is a far cry from the claim that, as a matter of law, “spouses can make life-or-death decisions on each other’s behalf in case of incapacity.” \( \text{RAUCH, GAY MARRIAGE, supra note 5, at 24.} \)

\( \text{162} \) \( \text{RAUCH, GAY MARRIAGE, supra note 5, at 24.} \)
relationship is strained. In light of such conflicts-of-interest, it is sensible to require spouses to execute health care documents naming one’s mate as one’s medical decisionmaker—just as unmarried partners can use such documents to designate each other as medical decisionmakers.

(c) The claim that only spouses have legal rights to hospital visitation confuses social convention with legal right. In most jurisdictions, neither statute nor case law tells hospitals that spouses can visit the hospitals’ patients and that nonspouses cannot. Hospitals regulate visitation of their patients with an eye toward social convention, administrative convenience and, in some states, that state’s respective version of a “Patient’s Bill of Rights.” Convention and convenience, no doubt, explain why spouses sometimes have visiting privileges, but nonspouses do not. However, as a legal matter, marriage as such typically does not guarantee rights of hospital visitation.

Instructive in this respect is the statute that New York has recently adopted on the subject of hospital visitation by domestic partners.163 The New York statute provides that “any hospital, nursing home or health care facility” must afford to patients’ domestic partners the same visitation rights as “are accorded to spouses and next-of-kin.”164 This formulation confirms that, ultimately, the medical institution sets its visitation policy—not that there is some inherent legal right of spousal visitation.165

(d) As to the provision of health care information, it is again critical to distinguish social convention from legal entitlement. Physicians do frequently share information with spouses even when such spouses lack the authority to receive such information under a health care directive or similar instrument. Often, however, this practice is not legally compelled, but reflects quite sensible social practice.

(e) Spouses have two types of inheritance rights. If one spouse executes a will disinheriting the other, state law gives the disinherited

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164 Id.

165 Some confusion in this area apparently stems from the decision of gay activists to address the problem of hospital visitation legislatively. See, e.g., HAW. REV. STAT. § 323-2 (2004); N.Y. PUB. HEALTH LAW § 2805-q. As a practical matter, that approach is more efficient than lobbying individual hospitals to extend visiting rights to same-sex partners since legislation, in a single fell swoop, forces a change for all hospitals in the state. Moreover, legislation guaranteeing domestic partners visitation rights is arguably more secure than a change of hospital policy that the hospital, having implemented, could reverse.

This emphasis on legislation has apparently led Mr. Rauch, and others, to conclude that spouses, as a matter of law, invariably have legally-enforceable hospital visitation rights by virtue of their statuses as spouses. However, when a hospital permits a spouse to visit, typically the hospital is not complying with any statutory or case law mandate but is instead doing a sensible thing for nonlegal reasons.
spouse an interest in the deceased spouse’s estate, usually one-third of the estate, sometimes less. As a metamessage of lifelong commitment, this is not impressive. If a spouse dies without a will, the survivor typically inherits more. If a husband or wife dies intestate with neither children nor parents living, the survivor usually inherits all. If a husband or wife dies intestate, survived by parents and by his or her spouse, the parents usually take a minority interest in the estate—suggesting why properly-advised spouses execute estate plans and do not rely on the laws of intestacy.

Consider in this context an incident Mr. Rauch relates in which a gay couple lived together for almost three decades and “built a business together” in rural Washington State. When one of the couple died without a will, his family, as intestate heirs, claimed all of the couple’s assets including the business and home, rendering the survivor potentially “penniless.” This scenario was easily avoidable under current law through such legal devices as a will (leaving the estate to the survivor) and joint tenancy (making the partners co-owners during life and on the death of the first to die). In light of the gay couple’s failure to engage in estate planning of this sort, the survivor would indeed have been better off with spousal intestacy rights under Washington law. However, even had such rights attached to the survivor, if the deceased were survived by a parent, a sibling, a niece or a nephew, that parent, sibling, niece or nephew could, under Washington’s law of intestate succession, have inherited as much as one-quarter of the estate. This leads, again, to the conclusion that spousal rights are not a substitute for proper estate planning.

(f) “[F]iling taxes as a single unit” is frequently a bad thing. As discussed earlier, the well-known “marriage penalty” often results in a higher (often substantially higher) joint tax burden than if the taxpaying couple were unmarried. Legal scholars and Congress have, with mixed success, grappled with the quandaries of the marriage penalty for two generations. It is, accordingly, strange to be told that

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166 See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 5-1.1-A (Consol. 2005).
167 For example, under Connecticut law, the spousal elective share against the will is a life estate in one-third of the deceased’s assets. CONN. GEN. STAT. § 45a-436 (2004). Particularly if the survivor is an older person, the value of this life estate may be considerably less than the value of an outright one-third.
168 See, e.g., id. § 45a-437(1).
169 See, e.g., id. § 45a-437(2).
170 RAUCH, GAY MARRIAGE, supra note 5, at 57.
171 Id.
173 RAUCH, GAY MARRIAGE, supra note 5, at 24.
174 See supra note 100 and accompanying text.
175 See supra note 100.
176 See supra note 100.
the income tax treatment of married couples sends the metamessage that marriage is good. The income tax marriage penalty in fact sends the opposite message to many, particularly affluent, couples: to minimize income taxes, cohabitate.

(g) “On and on.”177 There are more legal benefits that flow from marriage than these, just as there are additional penalties placed on marriage. Federal immigration law, for example, strongly favors married couples.178 In contrast, Title XIX, commonly denoted as Medicaid, discourages marriage.179 Eligibility for Title XIX coverage is means-tested and, in the case of a married couple, depends upon the couple’s total resources. Thus, when one spouse requires Title XIX assistance, the other spouse is required to “spend down” his or her resources until their joint assets are low enough to qualify for Title XIX. In effect, the well spouse must impoverish himself or herself to obtain Title XIX for the ill spouse.

On the other hand, if a couple cohabitates, there is no provision under Title XIX for pooling their resources when means-testing for eligibility. Thus, the well (and unmarried) partner can retain his or her own assets intact while the sick and impoverished partner goes onto Title XIX. Just as the income tax marriage penalty signals to affluent, two-earner couples that they should not marry, Title XIX signals to less affluent couples that, if either contemplates the need for Medicaid assistance, the other is better off financially as a cohabitant (retaining her assets), rather than as a spouse (forced to exhaust her assets to enable her spouse to qualify for Medicaid).

Instructive in this respect are the New Jersey and California domestic partnership statutes, which permit older (age sixty-two and up) heterosexual couples to form domestic partnerships.180 These statutory provisions are best understood as facilitating heterosexual unions short of marriage so that neither partner need spend down his or her resources to make the other Medicaid-eligible. Since Medicaid discourages marriage, California and New Jersey have used their domestic partnership statutes to create a legal relationship short of marriage for older heterosexual couples contemplating the possibility that either (or both) will require Medicaid assistance.

177 RAUCH, GAY MARRIAGE, supra note 5, at 24.
179 For a discussion of Medicaid and of divorce as a Medicaid planning tool, see Michael Farley, When “I Do” Becomes “I Don’t”: Eliminating the Divorce Loophole to Medicaid Eligibility, 9 ELDER L.J. 27 (2001).
180 See, e.g., CAL. FAM. CODE § 297(b)(5)(B) (2005) (permitting heterosexual couples to form domestic partnerships if either partner has attained the age of sixty-two and if either is eligible for social security payments); N.J. STAT. ANN. § 26:8A-4(b)(5) (2004) (permitting heterosexual couples to form domestic partnerships when both partners have attained the age of sixty-two).
Mr. Rauch’s perception of a large legal package of marital rights apparently stems from a 1997 report of the General Accounting Office (GAO).\footnote{See GAO, DOMA, supra note 178. This initial report has been updated. See U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (2004) [hereinafter GAO, DOMA: UPDATE TO PRIOR REPORT]. While Mr. Rauch does not cite the GAO report, it appears that that report underlies his claim that the law creates a large package of rights communicating the metamessage that marriage is good. Other supporters of gay marriage have similarly and without attribution invoked the results of the GAO report. See, e.g., DAVINA KOTULSKI, WHY YOU SHOULD GIVE A DAMN ABOUT GAY MARRIAGE 4-5 (2004). Evan Wolfson, on the other hand, explicitly acknowledges the GAO reports as sources for the claim that marriage confers significant benefits. See EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 4-5 (2004). Mary L. Bonauto, who asserts that many homosexuals “are categorically denied enormous rights and protections because they are denied marriage,” is more careful in her invocation of the GAO data. Bonauto, supra note 2, at 5. Ms. Bonauto notes the “1138 federal laws that use marital status as a factor” and, in a footnote, acknowledges that “[t]here are some people for whom marriage is disadvantageous.” Id. at 5 & n.15.} That report has given rise to the much-repeated claim that “[t]here are more than 1,049 federal rights that accompany civil marriage.”\footnote{See KOTULSKI, supra note 181, at 3.} However, the GAO itself was far more precise in describing its research results. There are, the GAO carefully stated, “1049 federal laws” “in which benefits, rights, and privileges are contingent on marital status” or “in which marital status is a factor.”\footnote{GAO, DOMA, supra note 178, at 1-2 (emphasis added).} The GAO made no effort to quantify how many of these 1,049 statutory provisions bestow rights and how many burden marriage.

Many (perhaps most) of these 1,049\footnote{The 2004 revision updates this figure to 1,138. See GAO, DOMA: UPDATE TO PRIOR REPORT, supra note 181, at 1.} statutory provisions do indeed confer “benefits, rights, and privileges.” However, as we have seen, some of these provisions use “marital status [as] a factor” to penalize marriage. These penalties can be harsh in their impact—just ask the newly-married members of an affluent two-earner couple who have filed their first joint federal income tax return, or a healthy spouse who has impoverished herself so that her mate may utilize Medicaid. In short, the “big package” of legal rights, which, for Mr. Rauch, sends the metamessage that marriage is good, is neither as big nor as categorical as he suggests. The metamessage of marital commitment stems from the parties’ religious, cultural, and personal understanding of the nature of their marriage, not from some package of legal arrangements which, upon examination, is less weighty than Mr. Rauch (and many others) suggest.

Mr. Rauch might retort that the legal package is greater than the sum of its parts and thus in toto conveys an overall message about marriage, even if particular parts of the package are weak or actually disadvantage marriage (like the income tax marriage penalty). I know
of no metric to prove or disprove this thesis. I am, however, skeptical that the legal package provides any coherent message about the desirability *vel non* of marriage. Rather, the law today contains a grab bag of miscellaneous, often conflicting, policies, many of which support marriage, others of which discourage it.

In the final analysis, most people do not marry to acquire legal rights or obligations of which they are usually unaware and do not understand. Rather, marriage itself conveys a message, a message of commitment, a message of family. That message does not derive from the legal framework governing marriage but from the publicly-proclaimed, communally-supported affirmation of cultural and religious norms of mutual commitment. Such affirmations would continue in—indeed, would be strengthened by—the competitive market for marriage that would flow from the abolition of civil marriage.

At the core of Mr. Rauch’s opposition to a privatized contractual marriage regime lies an ambivalence about variety in the context of marriage. Mr. Rauch documents the historic evolution of marriage and wants to push that evolution further, opening the institution to same-sex partners. He favors state-by-state resolution of the gay marriage question, indicating that a plethora of legal regimes may emerge from a decentralized, federalist approach and that the resulting experimentation would be desirable. Nevertheless, given the possibility of decentralizing all the way, Mr. Rauch recoils from privatizing the definition of marriage.

Mr. Rauch identifies with the American Enterprise Institute where he “learned so much from so many of the leading lights of conservatism.” He characterizes much of his analysis as “conservative arguments” in the tradition of Friedrich August von Hayek. Mr. Rauch’s call for resolving gay marriage on a state-by-state basis reflects this Hayekian ethos. But, for Mr. Rauch, this ethos goes only so far; he sees no virtue in decentralizing marriage further, thereby embracing more fully the conservative values of choice, entrepreneurialism, and markets by deregulating the definition of marriage.

Resolving the definition of marriage on a state-by-state basis, Mr. Rauch tells us, carries “the benefit of avoiding a national culture

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185 See RAUCH, GAY MARRIAGE, supra note 5, at 40-41, 168.
186 Id. at 121 (stating that “same-sex marriage is a reform, a big reform, and to most people it is a radical change”).
187 See id. at 172-86.
188 RAUCH, WHAT I LEARNED AT AEI, supra note 5, at 17.
189 Id.
190 RAUCH, GAY MARRIAGE, supra note 5, at 160-71.
191 See id. at 172-80.
But, defining marriage politically state-by-state produces intra-state culture wars, which don’t look so attractive either. Deregulating marriage altogether avoids culture war altogether, placing cultural competition where it belongs: the cultural marketplace.

There is, finally, a particular irony in Mr. Rauch’s opposition to a contractual regime for marriage, given Mr. Rauch’s celebration of the marriage of Tevye and Golde as an ideal. An unabashed Fiddler on the Roof fan, Mr. Rauch suggests that, in their old fashioned, unromantic commitment to each other, “Tevye and Golde know something that many of us . . . have forgotten.”

Under Jewish law, marriage is fundamentally a contractual relationship. Tevye and Golde’s was a marriage of contract, not of state regulation. Before their wedding, Tevye and Golde signed a Ketubbah, a standard form, Jewish marriage contract. What made their marriage work was not the legal force of the Czarist state, but the religious and cultural norms which Tevye and Golde internalized from a coherent and functioning community. Under the marital chuppa, the young Tevye and Golde did not cite vows from the Book of Common Prayer, but, rather, the contractual commitments of the Jewish marriage ceremony. Those contractual commitments, reinforced by the “social expectations” of the Jews of Anatevka, fashioned the marriage of Tevye and Golde, not the heavy hand of the hostile Russian state and its legal system. Why is this Jewish, contractual vision of marriage now obsolete for Tevye and Golde’s offspring in America?

In a similar vein, Andrew Sullivan’s call for gay marriage is a summons for legal recognition of same-sex unions. Marriage, Mr. Sullivan writes, “has become a way in which the state recognizes an emotional commitment by two people to each other for life.” But the classically liberal state, much admired by Mr. Sullivan, should “remain neutral in religious matters” and ought to “respect the private practices of its citizens.” Why, then, should this self-constrained state be in the business of defining, recognizing, and regulating life-long, emotional commitments? Mr. Sullivan never tells us, but instead starts his case for gay and lesbian equality from “within [the] definition” of marriage as a legal category. That, however, assumes away the question to be

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192 Id. at 176.
193 Consider in this context the eleven states in which the electorate voted against gay marriage in 2004. See supra note 2.
194 RAUCH, GAY MARRIAGE, supra note 5, at 11-12.
195 Id. at 12.
196 Ketubbah, 10 ENCYCLOPEDIA JUDAICA 926 (1971). See also id. at vi (defining a Ketubbah as a “marriage contract, stipulating husband’s obligations to wife”).
197 Quoted by Mr. Rauch in GAY MARRIAGE, supra note 5, at 26-27.
198 SULLIVAN, supra note 62, at 180.
199 Id. at 138.
200 Id. at 180.
decided: Should there be civil marriage? If, as I have concluded, the answer is “no,” deregulating marriage establishes for same-sex couples the “formal public equality” Mr. Sullivan seeks. Under the deregulated regime I propose, such couples’ marital and cohabitation agreements would be enforced in the same way as the marital and cohabitation agreements of heterosexual couples.

Like Mr. Rauch, Mr. Sullivan rejects a deregulated marriage regime by assuming that marriage under such a regime would be devoid of social content and celebration. “Marriage,” Mr. Sullivan tells us, “is not simply a private contract; it is a social and public recognition of a private commitment.” Quite so. And so it would be in a world without civil marriage. Abolishing marriage as a legal category would not deprive marriage of its religious and communal aspects; instead, it would emphasize them.

The urgency that Jonathan Rauch and Andrew Sullivan bring to the banner of marriage is matched in its intensity by the growing pro-marriage movement in the African-American community. Consider, for example, the comments of Representative Eleanor Holmes Norton at a Brookings conference entitled The Marriage Movement and the Black Church. There is, Rep. Norton stated, “a catastrophic disparity between the number of marriageable young, black men . . . and the number of marriageable young, black women,” a disparity that is “getting worse.” In part, the problem is attributable to “black unemployment,” commencing with “the flight of manufacturing jobs . . . beginning in the late ‘50s and the 1960s.” But, in important part, the problem, Rep. Norton says, is cultural: “It has penetrated the culture of many parts of the African-American community to become acceptable . . . to have children without being married.”

The decline of marriage is bad for children: “[W]e’ve got to tell the truth about what the absence of marriage, widespread in our community, has done to millions of children.”

201 Id. at 171.
202 Id. at 179.
204 Brookings Transcript at 7.
205 Id. at 8.
206 Id.
207 Id. at 12.
208 Id. at 9.
209 Id. at 12.
For Rep. Norton, the black church must emulate its success in the civil rights movement by today creating a comparable pro-marriage movement:\textsuperscript{210}

Somebody has to speak up for marriage. Somebody has to speak up for family. . . . [S]omebody needs to bring the moral and practical clarity up front about marriage, about what it’s meant to family life, about what it’s meant to the progress of African Americans from slavery until today. It must be done in the name of marriage. We must do it in the name of the black family, but we must do it, first and foremost, for our own children.\textsuperscript{211}

This, of course, is a different normative view of marriage and single motherhood than Professor Fineman’s and an equally different prescription for the future, as Rep. Norton seeks to restore the centrality of the traditional family consisting of married husband and wife raising their children together. In comparing the role of black churches in the civil rights movement to their role in a contemporary pro-marriage campaign, Rep. Norton invokes some of the strongest moral iconography of the twentieth century.\textsuperscript{212}

For present purposes, the question is: How would a program of legal deregulation affect this pro-marriage movement? Under Mr. Rauch’s theory of legal metamessage, the answer would be: adversely. If, as Mr. Rauch contends, the law teaches a comprehensive pro-marriage lesson, abolishing civil marriage would terminate that lesson and thereby hinder the pro-marriage effort sought by Rep. Norton and others.

As noted earlier,\textsuperscript{213} I am skeptical that the law sends a consistent, pro-marriage message—or that it should. Representative Norton correctly places marriage in a religious, cultural, and economic context. Strengthening marriage is not about law. If it were and if the law sent the metamessage Mr. Rauch perceives it to, the condition of American marriage would be healthier than it is today. Strengthening marriage today entails the invigoration of religious and cultural norms of mutual commitment. The best the law can do is to get out of the way, surrendering its monopoly definition of marriage to better suited institutions for the promotion of marriage, like the African-American church.

\textsuperscript{210} Id. at 9-10.
\textsuperscript{211} Id. at 12-13. Rep. Norton’s concerns increasingly find expression in the popular press. See, e.g., Jason DeParle, Raising Kevion, N.Y. TIMES MAG., Aug. 22, 2004, at 26, 48 (“Inner-city kids want and need dads, and while marriage is no panacea . . . stable marriages are the surest way to provide them.”).
\textsuperscript{212} Much recent history highlights the central role played by the religious community in the civil rights movement, particularly African-American churches. See, e.g., WARREN GOLDSTEIN, WILLIAM SLOANE COFFIN JR.: A HOLY IMPATIENCE 103-28 (2004).
\textsuperscript{213} See supra notes 154-184 and accompanying text.
If Rep. Norton’s message exemplifies the traditional defense of traditional marriage—husband and wife living together constitute the best environment for raising children—Professor Bernstein’s defense of civil marriage\(^\text{214}\) starts from a decidedly different premise. Professor Bernstein rejects the arguments advanced by most pro-marriage partisans and, instead, concludes that “state-sponsored marriage” “is a crucial intermediate institution,” exercising authority that would otherwise be exercised by the state itself or by the market. If there were no marriage, she argues,

some new source of power and governance would move into the space that marriage now holds. There are only two contenders for this role in governing private lives. One is the state, regulating individuals directly rather than through its current indirect practice of making a status out of a pairing. The other is the market.\(^\text{215}\)

From this perspective, marriage is important, not as an intrinsically good institution, but as a bulwark against an ever-encroaching state and market. Paradoxically, however, the state itself must sponsor marriage for marriage to thrive. When, Professor Bernstein argues, “American law stops recognizing a particular status, that status goes into decline in day-to-day life, not just in legal form.”\(^\text{216}\)

Thus, like Mr. Rauch and Mr. Sullivan, Professor Bernstein insists that the law must condone marriage for marriage to flourish. For the reasons already articulated, I disagree: the law already has diminished the significance of marriage; a competitive, pluralistic, diverse market for different forms of marriage will bolster the institution just as a competitive, pluralistic, diverse market for religion in America has caused religion to prosper; deregulating the definition of marriage will diminish political conflict; such deregulation will also free resources and energies now devoted to wrangling over the nature of civil marriage to the task of strengthening the institution of marriage in its varied forms.

Professor Shanley is a feminist scholar who supports both civil marriage and the effort to reform marriage to make it a more equitable institution available to heterosexual couples and same-sex partners alike. While she acknowledges that a contract-based marital regime “has much to be said for it,”\(^\text{217}\) Professor Shanley ultimately argues against such a regime. First, she states, marriage is both “deeply relational” and “unpredictable.”\(^\text{218}\) “Marriage partners,” Professor Shanley writes, “are not only autonomous decision makers; they are

\(^{215}\) Id. at 204-05.
\(^{216}\) Id. at 205.
\(^{217}\) Mary Lyndon Shanley, Just Marriage 26 (2004).
\(^{218}\) Id. at 16.
fundamentally social beings who will inevitably experience need, change, and dependency in the course of their lives."\(^{219}\) Contracts, Professor Shanley further asserts, “do not account well for the obligations that may arise from unforeseen circumstances, such as the illness or disability of an aging parent, a spouse, or a child.”\(^{220}\)

As this argument suggests, many contracts implement isolated transactions among parties who, once their deal is completed, never see each other again. Agreements for home purchases, for example, do not structure long-term relationships, but, rather, set the terms for discrete transactions between buyers and sellers who typically have no further dealings with each other after the closing. Marriage does not fit this model of a transactional contract.

However, Professor Shanley is wrong to suggest that all contracts are transactional in nature. To the contrary: many contracts frame long-term relationships with all of the uncertainties and “unforeseen circumstances” that such relationships entail. Academic lawyers often speak of “relational contracts”\(^{221}\) and practicing lawyers draft such contracts all the time, most obviously, the increasingly common antenuptial agreement.

A compelling characterization of civil marriage is that it is a standard form relational contract to which parties adhere by default when they marry unless they opt for their own prenuptial agreement.\(^{222}\) It is not clear why the one-size-fits-all civil marriage contract crafted for the marital relationship by legislators and judges is superior to the explicit relational contracts that would proliferate under a deregulated marriage regime. Indeed, I suggest that the contrary is true, i.e., that the proliferation of marital contracts following the abolition of civil marriage will improve the quality of marital contracting by virtue of the diversity and experimentation which an unregulated marriage market will encourage.

To consider one of Professor Shanley’s examples, I can find no state in which the law specifies how spouses will respond to the illness of an aging parent. On the other hand, as marriage contracts blossom in an unregulated marriage regime, different approaches to this issue may emerge. The resulting experimentation may result in marriage contracts that explicitly address in different ways the problems posed by aging parents. Other contracts will (like the current civil law regime) be silent on the subject. Perhaps one formula will come to predominate; perhaps

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\(^{219}\) Id. at 15.

\(^{220}\) Id. at 16.

\(^{221}\) See, e.g., Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981); see also Cain, *supra* note 88, at 43 (referring to “a default set of rules known as the marriage contract”).

many formulas will ultimately evolve, presenting couples with a variety of alternatives for their relationships, including the option of silence on the subject of aging parents—the approach of the current civil marriage regime.

In short, the legal system regularly produces relational contracts in general and antenuptial contracts for marital relationships in particular. The civil marriage framework operates as a relational contract to which individuals adhere by default when they marry. The choice, then, is between the experimentation and pluralism that will emerge from a competitive, unregulated marriage market, with its multiplicity of pre-marital and cohabitation agreements, or the standard, default relational contract that is civil marriage. Experimentation and diversity, I contend, will strengthen marriage.

Professor Shanley’s second argument against a contract-based marital regime is that such a regime overlooks the public’s “legitimate interest” “in the terms of marriage.” I agree with Professor Shanley that there is a strong public interest in the terms of marriage. However, from that shared premise, it does not follow that civil marriage is better than a contract-based regime in furthering the public interest in marriage.

In a liberal, pluralistic society, primary responsibility for many important social interests is assigned to institutions other than law and government. There is, for example, a strong public interest in children being raised with high ethical standards. Primary responsibility for that important task is assigned to families, parents, churches, and other character-building institutions, not to courts and legislators. Similarly, there is a strong public interest in the availability of productive economic work for individuals. Again, we do not assign the prime responsibility for producing work opportunities to public agencies, but rather to markets and private firms.

In sum, to say that there is a public interest in marriage merely sets the stage for the next inquiry: Through what institution is that interest best pursued? Professor Shanley’s argument suggests that the public interest in marriage is best advanced by the legal monopoly that is contemporary civil marriage. However, for the reasons outlined above, I conclude that our interest in marriage is, at this time in our history, best served through a deregulated marriage regime, a regime that assigns to sectarian and secular marriage-sponsoring institutions responsibility for defining and encouraging marriage. Abolishing civil marriage will strengthen the institution of marriage by unleashing the diverse, entrepreneurial energies of a competitive market for marriage.

223 SHANLEY, supra note 217, at 16.
Consider, in this context, the particular concern which Professor Shanley views as paramount in the reform of contemporary marriage: equality.\footnote{See id. at 18 (“Equality must be a central attribute of any marital regime based on considerations of justice.”).} A contract regime does not diminish the importance of that concern or preclude its pursuit. Rather, a deregulated marital regime shifts the forum in which equality (and other interests) must be sought. Instead of implementing the vision of egalitarian marriage in courtrooms and legislative halls, that vision, in an unregulated marriage market, must be pursued in the market through competition among different groups’ conceptions of marriage. In such a market, the proponents of egalitarian marriage would seek to embody the norm of marital equality, not in statutes and judicial decisions, but in marital contracts.\footnote{In a world without civil marriage, there will be residual political battles over the default rules to be adopted by legislatures and courts for couples who fail to contract. Nevertheless, in such a world, the principal focus of those concerned about the nature of marriage will be the terms on which couples contract.}

In such a world, some (perhaps many) individuals will marry on contract-based terms of which Professor Shanley disapproves. Professor Shanley’s awareness of this possibility buttresses her opposition to the contract model of marriage: “The contract model is an insufficient foundation for spousal equality. . . . Vigorous state action is needed to promote spousal equality.”\footnote{SHANLEY, supra note 217, at 20.} Taken to its logical conclusion, this is a deeply coercive and illiberal vision: since otherwise competent individuals might contract for marital relationships that are insufficiently egalitarian, the state will paternalistically compel marriage on egalitarian terms.

This vision is neither feasible nor desirable. Couples who reject the egalitarian norms Professor Shanley would infuse into civil marriage can cohabitate and thereby avoid the civil marriage regime. Couples who reject the norms of an egalitarian civil marriage regime but who feel that, for religious or other reasons, they must marry civilly will have political recourse. Domestic relations laws must ultimately be approved by legislators and judges\footnote{Many state court judges are elected or are appointed for terms of years, subject to a political confirmation process. Even life-tenured judges emerge from political processes.} who account to the electorate or such laws must be approved by the electorate itself. Perhaps Professor Shanley’s vision of more egalitarian marriage will emerge triumphant from the political process, but perhaps not. Civil marriage as fashioned by cultural warfare may look quite different from Professor Shanley’s egalitarian vision of the institution.

When the monopoly that is civil marriage embodies Professor Shanley’s conception of equality, that monopoly will intrude deeply
into the marital relationship. Suppose, for example, that a couple marries in a church that believes that men should be the only breadwinners, that men should control all income and assets, and that women should stay at home to raise children with total economic dependence on their husbands. Will the law as molded by Professor Shanley’s egalitarian vision deny the validity of this marriage because the relationship is insufficiently egalitarian? If not, then what kind of “vigorou...
abolished, many women, under a deregulated, contract-based system of marriage, will bargain for more protection for themselves than they would have received under a one-size-fits-all civil marriage regime.

Third, in a competitive marriage market, secular and religious groups concerned about women’s rights will promote better models of marriage for women than civil marriage as it exists now or is likely to exist in the future. Among those active in the competitive market for marriage will be feminist marriage-sponsoring organizations as well as other sectarian and secular institutions concerned about the welfare of women. These institutions will promulgate marital contracts designed to protect women.

Groups will also emerge to educate women about bargaining skills in the marital context. I expect that profit-making entities (like the Karass organization) that teach bargaining skills in commercial settings will expand their services in a deregulated marriage market. If, for a fee, such entities can instruct businesspeople in the techniques of commercial negotiation, they can also teach bargaining skills to prospective marriage partners. In light of the foregoing, it is possible, perhaps likely, that a world without civil marriage would see a net, perhaps a substantial, improvement in the legal positions of married women.

Consider, finally, Professor Dershowitz’s argument that the law should not jettison the notion of marriage, but should instead make the status of civil union available to all who seek it.230 Thus, “the secular rights and responsibilities that are currently associated” with civil marriage would be transferred to the legal status denoted “civil union.”231 Independently, any religious group could denominate as “marriage” only those relationships the group chooses to condone.

The Dershowitz proposal is a clever half-way measure that doesn’t quite make it half-way. In effect, the government’s current monopoly, called “civil marriage,” would be perpetuated but repackaged as “civil union.” This would leave the substance of civil marriage untouched. The law would still define, recognize, and regulate, only the label for the government-approved relationship would be switched to civil union.

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231 Dershowitz, supra note 230, at B15.
Labels can be important, but so can substance. In substance, Professor Dershowitz’s proposal constrains religious and secular marriage-sponsoring institutions with a government-mandated, one-size-fits-all legal framework, which is the essence of civil marriage. It is precisely to free marriage-sponsoring institutions of such a monopoly framework that civil marriage, however denoted, should be abolished. Relabeling will not suffice.

Consider, for example, the definition of divorce. Presumably, under Professor Dershowitz’s proposal, the law will continue to define the grounds for divorce. The only difference from the status quo would be that the relationship being terminated under the government’s monopoly ground rules would be denoted civil union.

In contrast, if we truly abolish (not repackage) civil marriage, grounds for divorce (like the grounds for terminating any other contractual relationship) would be agreed upon contractually; only parties (married or cohabitating) who fail to contract will be subject to the legal default rules. This would enable different marriage-sponsoring institutions to pursue their own respective concepts of marriage. The resulting diversity and experimentation would be good for society as a whole and for the institution of marriage in particular.

The Dershowitz proposal highlights the danger, noted earlier, that a nominally deregulated regime, while abolishing civil marriage in form, might recreate civil marriage in substance by formulating default rules and declarations of public policy which de facto reestablish civil marriage. While I believe this possibility is neither desirable nor likely, it is nevertheless a trap to be avoided, as is recreating civil marriage under the guise of universal civil union.

CONCLUSION

The time has come to abolish civil marriage. Such abolition would recognize the current reality that marriage today plays a reduced role in our law and culture. Abolishing civil marriage would also strengthen marriage by encouraging competition among alternative versions of the institution and by eliminating the political strife inherent in government propounding a single legal definition of marriage for a heterogenous polity.

A legal regime without marriage as one of its categories would be workable, indeed closer to current law than many would expect. Such a
regime would be heavily contractual in nature as the secular and sectarian sponsors of marriage develop their own agreements for couples, agreements embodying the sponsors’ respective definitions of the institution. In the absence of controlling contractual provisions, the law would provide the same default rules for married and unmarried couples alike.

Marriage—the structured, publicly-proclaimed, communally-supported relationship of mutual commitment—does not need the continuing heavy-hand of the state but, rather, a robust, competitive, diverse market driven by the entrepreneurial energies of sectarian and secular marriage-sponsors. Whatever the arguments for civil marriage might have been in the past, today perpetuating the monopoly that is civil marriage is a mistake. The time has come to rectify that mistake by abolishing civil marriage.