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IMAGINE THERE'S NO MARRIAGE

By Patricia A. Cain*

I. INTRODUCTION

Most of the participants in this symposium begin with the assumption that same-sex marriages will be recognized in Hawaii, or perhaps in some other state. For them the legal question is: must the other forty-nine states recognize a same-sex marriage that is legal in the first state?

I begin with a different question: why should any state recognize marriages between any two persons? And to analyze this question, I ask the reader to engage in a different assumption: imagine there's no marriage. And "no religion too," I am tempted to say just to complete the parody of John Lennon. However, I do not really wish to imagine no religion. I only wish to imagine no civil marriage. In my imaginary world of no marriage, religious marriages would continue totally apart from the state, as they do now, and as they would be constitutionally required to do in a world without state-recognized marriage.

Lawyers have made two basic legal arguments in support of ex-

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1. See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that the state's refusal to recognize same-sex marriages is a form of sex discrimination that can only be justified by a compelling state interest under the Equal Protection Clause of the Hawaii Constitution). On December 3, 1996, Judge Kevin Chang issued an opinion holding that the State of Hawaii had failed to carry its burden of proof and that the sex-based marriage classification was thus unconstitutional on its face. Judge Chang enjoined the state from refusing to grant marriage licenses to same-sex couples. Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235, at *22 (Haw. Dec. 3, 1996). Judge Chang's order has been stayed pending appeal by the state.


3. "Imagine there's no countries, It is not hard to do, Nothing to kill or die for, And no religion too." See John Lennon, Imagine, on IMAGINE (ATV Music Corp. 1971).

tending marriage to same-sex couples:

1. **The equality argument** - Current law restricts marriage to opposite sex couples. To deny same-sex couples the same, or even similar marriage rights, is to discriminate against them, i.e., to treat them unequally. Such unequal treatment violates the Equal Protection Clause of the Fourteenth Amendment unless the state can show that the unequal treatment is justified.

2. **The fundamental rights argument** - Courts have recognized that "the right to marry is of fundamental importance." When the state burdens a fundamental right, as it does when it denies the right altogether to gay men and lesbians who wish to marry their same-sex partners, it must show a compelling reason for its action.

*Baehr*, the Hawaii same-sex marriage case, is an equality case. There are two ways to create equal access to marriage: (1) let everyone in, or (2) keep everyone out. For obvious reasons, the legal battle has been over the first option; let everyone in. In the real world, no state is about to abolish marriage completely. However, for purposes of theorizing, it is useful to focus on the second option. When trying to understand what marriage is or should be, a good starting point is to imagine a world with no marriage.

I am not the first scholar to focus on a world with no marriage. Martha Fineman, a feminist legal scholar who focuses on the relationship between the state and family, has suggested that we abolish marriage. In her view, state policies that privilege adult sexual bonds are not justified. Rather, the state should privilege family relationships of dependency, in particular the mother-child bond.

Other feminist theorists have criticized the lesbian and gay fight for equal marriage rights by posing similar questions. Why should the state privilege some adult dyads but not others? Why should the state

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5. The equality argument can be made one of two ways: (1) the marriage laws deny equality (See *Baehr*, 852 P.2d at 44; *Singer*, 522 P.2d at 1187), or (2) the marriage laws deny equality on the basis of sexual orientation. Since sex discrimination, the stronger legal argument is that marriage laws discriminate on the basis of sex.


7. 852 P.2d at 67 (holding that there is no fundamental right to same-sex marriage).


privilege only dyads? Why not triads? In other words, what business does the state have in deciding which adult personal relationships are deserving of legal protection and benefits and which are not?

I presume that a world with no marriage would satisfy these critics. People could choose their intimate associations or could choose to avoid intimacy altogether. They could choose their living arrangements, with intimates, friends, or alone—and the state would take no notice and make no distinctions. People could get married in their communities or in their churches by the twos, threes, or fours. Gender, race, age—none of these things would matter to the state—only to the relevant community or church. Marriage would mean whatever the community or church said it meant.

In such a world, I pose two questions. One is purely legal: is state recognition of adult sexual bonds, marriage as we know it, constitutionally required? That is, if all states abolished marriage tomorrow, would a couple who wished to be civilly married have a claim that the state had deprived them of rights under the Fourteenth Amendment? In particular, would such state action be a violation of substantive due process?

The second question is a policy question: would it be sound policy to remove the state from the marriage game? For example, if there are valuable benefits that the state derives from recognizing marriage as a legal institution, then it would be in the state’s interest to determine which adult sexual bonds ought to be recognized and thus privileged in some way. In our existing world, the real world of marriage, civil marriage is used as a bright line to determine appropriate state action toward couples. My question is: when, if ever, should it be a bright line?

In Part II of this essay, I will address the first question: is state recognition of the marriage relationship constitutionally required? In Part III, I provide a brief sketch of what the world would look like if the state did abolish civil marriage. In Part IV, I focus on some of the familiar benefits that the state provides married couples and analyze whether they should continue in a world without marriage. If they should continue, as I conclude they should, then, absent marriage, the state must create new methods of determining which couples receive which benefits. In conclusion, I argue that, although the right to marry may not be guaranteed as a positive right under current Supreme Court jurisprudence, marriage is clearly useful to the state and thus ought to be recognized.
II. Is State Recognition of the Marriage Relationship Constitutionally Required?

In this section, I will describe fundamental rights jurisprudence and analyze how it applies to the right to marry. I will then develop the argument that marriage, except to the extent that it is a negative liberty right, need not be affirmatively recognized by the state. I will conclude that under current law, marriage can be abolished so long as intimacy, a negative liberty, is protected.

A. Fundamental Rights Jurisprudence

The Bill of Rights guarantees certain individual rights, e.g., speech and religion, by limiting governmental infringement of those rights. These explicitly guaranteed rights are often described as “fundamental rights.” When the government goes too far and either denies the right or substantially burdens it, then courts will apply heightened scrutiny in following the constitutionality of the governmental action. Typically, if an explicit fundamental right has been infringed, the government must show that its action was “narrowly tailored” to accomplish a “compelling state interest.” If the government fails to carry this burden of proof, then the governmental action will be ruled unconstitutional.

In addition to the explicitly guaranteed rights of the first eight amendments, the Court has recognized several implied rights as “fundamental” and thus also deserving of heightened scrutiny. These implicit rights include the right of privacy, the right to vote, and the right to interstate travel. The right to marry has also been described as a “fundamental right.” These implicit fundamental rights are viewed as

10. Many governmental actions affect fundamental rights, but do not trigger heightened scrutiny. For example, governmental regulation of parade routes can affect speech rights, but generally such regulation is valid. For a good discussion of current Supreme Court treatment of burdens on fundamental rights, see Michael C. Dorf, Incidental Burdens on Fundamental Rights, 109 Harv. L. Rev. 1176 (1996).

11. In some cases, for example, infringement of commercial speech rights, the government need only show that its action was “substantially related” to an “important governmental interest.”


part of the "liberty" that is protected by the Due Process Clause of the Fifth and Fourteenth Amendments.16

Fundamental rights analysis has become crucial under equal protection doctrine as well. If the governmental action results in an unequal allocation of a fundamental right, then the Court will apply heightened scrutiny in the same way it does in an equal protection claim in which there is a suspect classification. Thus, for example, when the right to vote is not denied, but it is restricted to property owners, a non-suspect class, there is a violation of the Equal Protection Clause.17

In asking whether the state can abolish marriage, I am not interested in the fundamental rights branch of equal protection doctrine. Total abolition of marriage entails something more than a mere unequal allocation of marriage rights. Scholars who have used fundamental rights analysis to argue that denial of marriage to same-sex couples violates the Fourteenth Amendment have been making equal protection arguments, not substantive due process arguments. By contrast, I will focus on the question: does abolition of marriage violate substantive due process?

B. Marriage as a Fundamental Right

1. In General

The Supreme Court has described marriage as an interest "of basic importance in society,"18 "the most important relation in life,"19 "a vital personal right,"20 "of fundamental importance,"21 and "fundamental to our very existence."22 In at least three cases,23 the Court has held that marriage is an implied fundamental right for purposes of the Fourteenth Amendment.24 Most commentators agree,25 or at least

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24. Some fundamental rights are explicitly stated in the text of the Constitution. These include First Amendment rights relating to freedom of speech and religion as well as the Sixth Amendment guarantee of trial by jury. By contrast, marriage is nowhere mentioned. As a fundamental right, it is generally thought to be a part of the privacy right first recognized in Griswold v.
fail to question this pronouncement.\textsuperscript{26}

Because marriage is viewed as a fundamental right, its abolition would seem contrary to the dictates of fundamental rights jurisprudence. For example, the fundamental right of privacy, which includes the right to use contraceptives,\textsuperscript{27} would be violated if a state banned the use of contraceptives. Similarly, if a state banned marriage, the ban would appear to violate the Fourteenth Amendment guarantee of due process.

Yet marriage is different from other implied fundamental rights.\textsuperscript{28} The right to privacy and the right to interstate travel\textsuperscript{29} can be described as negative rights, rights that prohibit the state from taking action that will interfere with individual choice. These rights place no obvious affirmative obligations on the state. By contrast, the right of marriage requires the state to do something, in particular to recognize the relationship and presumably to accord it certain legal protections.\textsuperscript{30}

Another strange thing about marriage as a fundamental right is that, although the United States Constitution is said to protect the right, the Court has acknowledged that the states have full power to determine what the content of the marriage right is.\textsuperscript{31} There is, for example, no developed case law which provides a core definition of marriage. Thus, if the right to marry requires a state to provide certain minimum benefits, there is no clear indication as to what those benefits might be.

One cannot even tell under current Supreme Court jurisprudence whether marriage is a “fundamental right” for purposes of substantive


27. See \textit{Griswold}, 381 U.S. at 479.

28. Implied fundamental rights include the right to vote, which is nowhere explicitly guaranteed by the Constitution. I believe the right to marry is similar to the right to vote. See discussion infra notes 45-55 and accompanying text.


30. Some talk of the right to marry as though the right were solely about state recognition of the marriage relationship. But the state must also attach some consequences to that recognition, otherwise the right to marry is a right with no content.

31. See \textit{Loving v. Virginia}, 388 U.S. 1, 7 (1967) (“[M]arriage is a social relation subject to the State’s police power.”); \textit{Maynard v. Hill}, 125 U.S. 190, 205 (1888) (“[M]arriage has always been subject to the control of the legislature.”).
due process (which would suggest it could not be abolished), or whether it is only a fundamental right whose allocation must adhere to notions of equal protection. Although classification as a fundamental right often raises both substantive due process and equal protection claims, that is not the case with all fundamental rights. Equal protection may require equal allocation of a right that has not otherwise been recognized as an independent right protected by substantive due process.\textsuperscript{32} No right to marry case has been analyzed and decided as a "pure" substantive due process case. Nor has any right to vote case. Thus both the right to marry and the right to vote, although subject to equal allocation constraints, can theoretically be abolished in total without violating due process.\textsuperscript{33} I suggest that the similarity between these two rights might explain this phenomenon.\textsuperscript{34}

First, let me explain what I mean by a "pure" substantive due process case. "Pure" substantive due process cases involve the widespread denial of a "fundamental right." Griswold \textit{v. Connecticut}\textsuperscript{35} is such a case. The Connecticut statute that was held unconstitutional in \textit{Griswold} denied all couples, married and unmarried, same-sex or opposite-sex, the right to use contraceptives. \textit{Roe v. Wade}\textsuperscript{36} is also a "pure" substantive due process case because the criminalization of abortion by the State of Texas effectively denied access to abortion to all within the state.

By contrast, some cases involve an unequal allocation of a "fundamental right," rather than a widespread denial of the right. These cases

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\item \textsuperscript{32} See e.g., Cass Sunstein, \textit{Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection}, 55 U. Chi. L. Rev. 1161, 1168 (1988) ("The 'fundamental rights' branch of equal protection doctrine is self-consciously designed to prohibit states from drawing impermissible lines with respect to rights that the Due Process Clause does not substantively protect."). Sunstein cites \textit{Skinner v. Oklahoma}, 316 U.S. 535 (1942), as an example in which the equal protection analysis protected a fundamental right (the right to procreate) that has not been recognized as a substantive right under the Due Process Clause.

\item \textsuperscript{33} See discussion regarding the right to vote infra notes 45-55 and accompanying text. Other scholars have suggested that the right to vote could be totally abolished. See Sunstein, supra note 32.

\item \textsuperscript{34} But see Maura I. Strassberg, \textit{Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage}, 75 N.C. L. Rev. 1501 (1997) (arguing that the similarities between voting and marriage rights help explain why they are both recognized as fundamental rights). Professor Strassberg makes a compelling argument about why neither voting nor marriage may be constitutionally abolished. Her position may well be correct as a matter of what ought to be. My only point in this essay is that, contrary to the assumptions of many lawyers, existing constitutional doctrine does not necessarily protect individuals against state abolition of their voting rights or of their marriage rights.

\item \textsuperscript{35} 381 U.S. 479 (1965).

\item \textsuperscript{36} 410 U.S. 113 (1973).
\end{itemize}
are really equal protection rather than substantive due process cases. Eisenstadt v. Baird,\textsuperscript{37} for example, the contraceptive case following Griswold, was decided as an equal protection case because the statute at issue distinguished between married and unmarried persons. Although the challenged statute burdened the very same "fundamental right" recognized by the Griswold Court,\textsuperscript{38} the statute created an unequal allocation of the right rather than a widespread denial. The Connecticut statute in Griswold had banned the use of contraceptives by all, whereas the Massachusetts statute in Eisenstadt criminalized the distribution of contraceptives to unmarried persons.\textsuperscript{39} Justice Brennan, writing for the Court, applied rational basis review and found that the distinction between married and unmarried individuals was unjustified. Narrowly read, Eisenstadt was a mere non-suspect classification equal protection case, which flunked the rational basis test. However, given the fact that non-suspect classifications almost always survived rational basis review,\textsuperscript{40} the outcome in Eisenstadt must be explained in part by the fact that the right at issue (i.e., the right to use contraceptives) had been previously recognized as a "fundamental right."\textsuperscript{41} Thus, Eisenstadt belongs in the "fundamental rights" branch of equal protection cases.

Similar to Eisenstadt, the Supreme Court's right to marry cases have all involved situations in which some, but not all, people experienced a denial of the right. In Loving, the right was denied to those who wished to marry a person of opposite race.\textsuperscript{42} In Zablocki, only

\begin{itemize}
\item \textsuperscript{37} 405 U.S. 438 (1972).
\item \textsuperscript{38} Griswold is often described as a case in which "marital privacy" is burdened. However, in Eisenstadt, Justice Brennan characterized the privacy right as one that inhered in the individual. Justice Brennan stated "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt, 405 U.S. at 453.
\item \textsuperscript{39} The Massachusetts statute generally prohibited distribution, but created an exception for registered physicians who prescribed contraceptives for their married patients.
\item \textsuperscript{40} But see Reed v. Reed, 404 U.S. 71 (1971) (classification based on sex failed to meet rational basis test).
\item \textsuperscript{41} One might also view most abortion cases subsequent to Roe as equal protection/fundamental rights cases. The right to choose is a fundamental right for substantive due process purposes. And it cannot be widely denied. Roe stands for that proposition. Mere regulation of abortion, however, creates a burden on the right for some, but not all women. If the burden is substantial, then the burden is "undue" in the words of the Casey joint opinion, and therefore, unconstitutional because it cannot be justified. Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 989 (1992). In other cases, where the burden is insubstantial, only rational basis review will be required. Id.
\item \textsuperscript{42} Although Loving is cited as a substantive due process case in which the right to marry is
parents who had child support obligations which they could not demonstrate an ability to meet were denied the right to marry. And in *Turner*, the burdened class was prisoners.

Thus, all of these cases fall in the equal protection category of fundamental rights analysis. The cases are consistent with the principle that once the state grants a fundamental right (here, state recognition of the marriage relationship), it must do so on an equal basis, unless it can justify the unequal allocation. Further, as the fundamental rights prong of equal protection analysis has been developed, the unequal allocation will be strictly scrutinized only if there is a "direct and substantial" burden on the right. The fact that all marriage cases involve selective denial of the right, distinguishes them from "pure" substantive due process cases such as *Griswold*.

Just as no marriage case fits neatly within the "pure" substantive due process category, neither do the right to vote cases. The Supreme Court applied strict scrutiny to strike down a Virginia poll tax in *Harper v. Virginia State Board of Elections*. It was the first time the Court had explicitly used strict scrutiny in a voting rights case. The Court's reasoning, however, was less than clear. Strict scrutiny might have been required because of the fundamental nature of the right, or because the Court viewed wealth as a suspect classification. Three years later, in *Kramer v. Union Free School Dist. No. 15*, the Court stressed the fundamental nature of the right to vote. However, the Court did not say that states must grant citizens the right to vote in

protected, the opinion is primarily an equal protection opinion. However, Justice Warren's opinion does end with a statement that the Virginia statutes, in addition to violating equal protection, "also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment." But his explanation for why the denial is unconstitutional sounds in equal protection. He says: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Loving*, 388 U.S. at 12.

43. Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that "critical examination" of the state interests advanced in support of the classification is required. Zablocki v. Redhail, 434 U.S. 374, 381 (1978).


state elections. Rather, Kramer described the individual interests at stake as the right to fair representation and the right to equal participation, or "equal voice," in the selection process. This characterization places the right to vote in the equal protection line of fundamental rights cases as opposed to the substantive due process line of cases.

Subsequently, in San Antonio Independent School District v. Rodriguez, the Court responded to the plaintiffs' attempt to link education and voting rights with the following observation:

Since the right to vote, per se, is not a constitutionally protected right, we assume that [plaintiffs'] references to that right are simply shorthand references to the protected right, implicit in our constitutional system, to participate in state elections on an equal basis with other qualified voters whenever the State has adopted an elective process for determining who will represent any segment of the State's population.

The Court has never recognized the right to vote as an independent substantive right protected under the Due Process Clause. It has only considered cases in which the right is allocated unequally. If a state were to abolish in total the right of its citizens to vote in state elections, no explicit provision of the United States Constitution would be violated. Thus, there is likely no violation of substantive due process. If the State of Connecticut abolished voting, its government would certainly lose legitimacy and the guarantee of a "Republican Form of Government" would be jeopardized. However, new constitutional arguments and theory would have to be developed for the Supreme Court to find a constitutional violation for which it could order a remedy.

Whether the right to vote is protected under substantive due process, is an open question and one that is not likely to require an answer.

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48. Id. at 631-33.
50. Id. at 35 n. 78.
52. See generally Emily Calhoun, The First Amendment and Distributional Voting Rights Controversies, 52 TENN. L. REV. 549, 554-55 (1985) (discussing debate amongst academics over whether voting is a true fundamental right).
54. The guarantee of a republican form of government is non-justiciable. See Gunther, supra note 46, at 842. Gunther suggests, however, that the right to vote might be derived from structural arguments.
so long as no state is threatening to repeal the voting rights of citizens. The difficulties in arguing that the right to vote is a fundamental right for substantive due process purposes are: (1) the contours of the right are supposed to be determined by the states, and (2) recognition and protection of the right requires positive action by the states.

These difficulties are the very same difficulties faced by the right to marry. First, marriage is a creature of state law. The Supreme Court cases that purport to recognize a fundamental right to marry do not provide any core definition of the right. Instead they defer to state definitions. Only when the state refuses to let certain people into the state-defined institution, or when the state violates the anti-discrimination principle, does the Court apply constitutional protections.

Second, marriage is different from other rights that have been declared fundamental under the Due Process Clause. It is most obviously different from those implied rights that are derived from the right of privacy recognized in Griswold. Privacy, autonomy, and abortion rights all can be characterized as negative liberties. By contrast, recognition of marriage requires positive action by the state.

55. See Michael Perry, Modern Equal Protection: A Conceptualization and Appraisal, 79 COLUM. L. REV. 1023, 1079 (1979) (observing that it is "wholly unnecessary for the Court to declare that there is a constitutional right to vote in state elections, because the existence of the franchise as a political-moral right is unquestioned," recognized by every state, and "no state would think to deny [it]").

56. Subject of course to the constraints of the Equal Protection Clause.

57. Loving might be viewed as a case in which the Supreme Court rejected the state definition of marriage as a union between persons of the same race. But a better explanation is that the "same-race" definition violated the anti-discrimination principle by supporting white supremacy. Similarly some gender discrimination cases have affected state definitions of marriage in the same way. These cases have not provided a substantive core definition, but have placed a limiting rule on marriage law declaring that its rules must reflect gender equality rather than male superiority. See, e.g., Orr v. Orr, 440 U.S. 268 (1973) (holding that if a state authorizes alimony awards for wives, it must also authorize them for husbands); Kirchberg v. Feenstra, 450 U.S. 455 (1981) (holding Louisiana's "head and master" law unconstitutional, because it gave husbands the unilateral power to dispose of jointly-owned marital property).

58. As one commentator has explained:

Marriage is a legal relationship, entered into through a legal framework, and enforceable according to legal rules. Law stands at its very core. Due to this inherent 'legalness' of marriage, the constitutional right to marry cannot be secured simply by removing legal barriers to something that exists outside of the law. Rather, the law itself must create the 'thing' to which one has a right. As a result, the right to marry necessarily imposes an affirmative obligation on the state to establish this legal framework.

William H. Hohengarten, Same Sex Marriage and The Right of Privacy, 103 YALE L. J. 1495, 1496 (1994).
2. Only Negative Liberty is Protected by the Due Process Clause

Judge Richard Posner has described the Constitution as a "charter of negative liberties." He stated that "[t]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." Other circuit courts of appeal have agreed. And the United States Supreme Court endorsed this description in DeShaney v. Winnebago County.

These cases all involve instances in which a state official failed to act, as opposed to the state legislature failing to act. However, the idea that the Due Process Clause does not require positive state action has also been applied in cases involving legislation. The abortion funding cases provide one example. In ruling on the constitutionality of the Hyde Amendment, a legislative restriction on abortion funding which was passed by Congress, the Court explained: "although government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation." Thus, even though abortion may be a fundamental right, the state is not required to provide abortions to those who need them by affirmatively paying for them.

Political theorists such as Isaiah Berlin and John Stuart Mill have argued that the only sort of liberty a state should provide its citizens is negative liberty. For the state to become involved in the provision of positive or substantive goods might result in excessive state involvement in determining what does or does not constitute the good life. Liberal political theory requires that the state remain neutral on

60. See, e.g., Wright v. Ozark, 715 F.2d 1513, 1515 (11th Cir. 1983).
61. 489 U.S. 189 (1989). See also Benavides v. Santos, 883 F.2d 385, 387 (5th Cir. 1989) (citing DeShaney for the idea that the Constitution is a "charter of negative liberties").
62. See, e.g., Jackson v. Joliet, 715 F.2d 1200, 1205 (7th Cir. 1983) (policeman failed to rescue persons from a burning car at an accident scene); Wright, 686 F.2d at 1513 (police and others failed to protect against rape); Benavides, 883 F.2d at 386 (jail officials failed to protect inmates during an escape attempt); DeShaney, 489 U.S. at 201 (Wisconsin social workers failed to protect Joshua DeShaney from the near-fatal beatings of his father).
64. Harris, 448 U.S. at 315; Maher, 432 U.S. at 464.
65. See ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY, IN FOUR ESSAYS ON LIBERTY 118 (1969).
66. See JOHN STUART MILL, ON LIBERTY 16-17 (Liberal Arts Press, Inc. 1956).
67.
this question. Thus, the state is not required to provide any social, material, or political good other than individual freedom, which, so the argument goes, is fully protected by the state’s guarantee of negative rights.

The language of the Due Process Clause also supports the notion that only negative rights are protected. The prohibition on state action is phrased negatively: “nor shall any State deprive.” This language does not mandate the state to provide. Other constitutional provisions, including amendments in the Bill of Rights, are stated positively. For example, states must provide a jury trial under the Sixth Amendment. Positively stated commands impose positive obligations. Negatively stated commands do not.68

American constitutional lawyers regularly and sharply differentiate liberty from empowerment. We know the conceptual difference between being at liberty to speak and having the ability and resources with which to speak effectively. The prevailing view is that our Constitution by and large guarantees only the liberties, not the abilities or resources.69

Not all constitutional scholars agree with this “negative liberty” thesis.70 Scholars who embrace the ideals of civic republicanism, for example, argue that the state should provide moral education for its citizens as a necessary pre-requisite for enlightened self-government.71 Under this view, the state should enable communication and debate between individuals (a “positive liberty” value) rather than merely

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leaving individuals alone.

Other commentators argue that emphasizing the protection of negative liberty is inappropriate in today’s world. As one commentator, Seth Kreimer, has explained, “[T]he conception of negative rights as freedom from coercive violence has questionable value in shaping constitutional restraints on a government that more often exerts its power by withholding benefits than by threatening bodily harm.”

Courts have chipped away at the “negative liberty” thesis, recognizing exceptions to the general rule that the Constitution requires no affirmative obligations. For example, once the state has acted, it may be required to act responsibly. Also, when the state has custody of a person, the state may owe that person certain minimal protections.

Nonetheless, after the Supreme Court’s decision in Deshaney, it is unlikely that the Court will recognize any affirmative obligations under substantive due process, absent special circumstances such as a special relationship between the individual and the state. Thus, those implied fundamental rights that are viewed as part of the “liberty” protected by the Due Process Clause are, under current decisional law, restricted to negative liberties.

3. Conclusion: Marriage Can be Abolished So Long as Intimacy is Protected

Both positive and negative liberty are implicated in state recognition of marriage. The positive liberty aspects are of two kinds: (1) providing economic and social benefits to couples who are married, and (2) taking positive action to enable the togetherness of married couples. There is no precedent for concluding that the state must

72. Kreimer, supra note 70, at 1295.
73. See, e.g., White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (holding that police are under an affirmative obligation to protect children after arresting the adult who was with them).
74. See Estelle v. Gamble, 429 U.S. 97 (1976) (holding a duty to provide medical care to incarcerated prisoners); See also Youngberg v. Romeo, 457 U.S. 307 (1982) (holding a duty owed to person who is institutionalized and wholly dependent on the state).
75. For example, federal tax law allows spouses to make gifts to each other free of transfer taxes. See I.R.C. §§ 2056 and 2523 (West 1996). Only spouses benefit from community property regimes and only spouses can own property as tenants by the entirety, an estate which protects one spouse from the creditors of the other spouse. Spouses cannot disinherit each other. See, e.g., Iowa Code Ann. § 633.236 (West 1992) (elective share provision for surviving spouse).
76. For example, immigration laws permit foreign spouses of American citizens to enter the United States as long-term residents. See 2 CHARLES GORDON ET. AL., IMMIGRATION LAW AND PROCEDURE § 36.02 (1996). The Family and Medical Leave Act of 1993 requires certain employers to grant employees leave for the purpose of caring for a spouse who is seriously ill. See 29
either provide benefits or enable togetherness. Thus, the only issue is whether marriage must be recognized in order to protect negative liberty.

The negative liberty aspects of marriage include those privacy rights that the Court has explicitly recognized, not just in marriage relationships, but in family relationships generally. This "right to intimate association" was described in *Roberts v. U.S. Jaycees*:

The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State . . . . Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State . . . . Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty.77

The marital relationship has been afforded protection from unwarranted state interference,78 so have other family relationships, including parent/child79 and grandmother/grandchild.80 Although the Supreme Court has not had occasion to determine which adult sexual relationships will be protected and which will not,81 it has never indi-

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81. One might view *Bowers v. Hardwick*, 478 U.S. 186 (1986), as a case in which the Court held the relationship was not worthy of protection. At one level, *Hardwick* might be distinguished from other "intimate association" cases by looking at the difference in the relationships. *Hardwick*, after all, did not involve a long-term committed relationship, but rather a casual one. The right at issue in that case is best described as an individual privacy-right, which the Court declared unprotected by the Constitution. *Hardwick* did not involve a jointly-shared right of intimacy akin to that experienced in the ideal marriage.

I do not assert this as a matter of fact, but rather as a statement about the Court's view of the facts. Michael Hardwick and his partner may well have shared a deep and intimate relationship beyond the sex act that was at the focus of the case. But, if they did, the Court did not see it or understand it as such. Justice White, speaking for the majority, said: "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent." *Id.* at 191.
cated that the right of intimate association should be limited to married couples. 82 Furthermore, lower courts have recognized the right of intimate association in cases involving unmarried adult couples. 83

If intimacy is the value worthy of protection, then the negative liberty thesis ought to prohibit the state from unduly interfering in intimacy that is valuable. Marriage appears to have served as a bright line to identify those couples whose intimacy is presumed to be deserving of such protection. Whether it is a constitutionally mandated bright line is open to question. Relying on the Court's description of intimate association in Roberts, one can conclude that any couple who can demonstrate a level of commitment to a shared life from which they "draw... emotional enrichment" ought to be protected from state intrusion. Thus, intimacy outside of the marriage context ought to be accorded constitutional protection, in which case marriage as a bright line would be under-inclusive.

Furthermore, the presumption that all married couples experience "good" intimacy which is deserving of constitutional protection has proved to be untrue. A major contribution of the modern women's movement has been to expose the abusiveness in intimate relationships, including marriage. 84 The widespread evidence of spousal battering and marital rape show that marriage is often not the best proxy for "good" intimacy. 85 Using marriage as a bright line would be over-inclusive.

Thus, I conclude that protection of "good" intimacy, of family integrity, of close personal relationships is at the core of the negative liberties that have been recognized by the Court in its marriage and family privacy cases. The state need not recognize marriage to protect these values. Rather, intimacy can be protected in those cases in which

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At another level, the Court's failure to understand the intimate nature of the relationship in Hardwick or the connection between "homosexual activity" and "family" might explain why the case was wrongly decided.

82. In Roberts, the Court said:
  Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments.... We need not mark the potentially significant points on this terrain with any precision.

Roberts, 468 U.S. at 619.


85. See DIANA E. H. RUSSELL, RAPE IN MARRIAGE (1982).
the parties demonstrate personal commitment to a shared life. This means that substantive due process is not violated if marriage is abolished.

III. IMAGINE A WORLD WITHOUT MARRIAGE

A. Introduction

In a world without marriage, meaning no legal recognition of marriage, committed adult dyads would continue to exist. Two people in love would continue to pledge their troths to each other and to make promises akin to the familiar “until death do us part.” A repeal of the legal institution of marriage would do nothing more radical than this: it would force opposite sex couples into the very world that same-sex couples now inhabit.

Those of us who are gay and lesbian can imagine such a world because it is our world. Those who are not gay and lesbian and who believe in marriage, whether as a legal institution, a moral one, or just one that adequately expresses one’s current commitment to another, have a bit more difficulty with the image.86

What would a world without marriage look like? First, all couples who wished to formalize their understandings of personal and financial commitment and responsibility would have to do so for themselves, that is, without the state’s provision of a default set of rules known as the marriage contract.87 Same-sex couples currently do this, as do some opposite-sex couples who opt out of marriage. Privately drafted contracts in lieu of, or in addition to the state-drafted marriage contract, are a good thing. Not all relationships are the same. Customized agreements that reflect the reasonable expectations of the parties make it easier for the couple to live up to those expectations.88 Furthermore,

86. In addition to the lesbian gay community in which there is no choice regarding marriage, there are many feminists who have chosen to reject the world of marriage. Although they are more able to imagine a world without marriage than those who have chosen marriage, their experience, and thus their perspective, is very much different from those of us who are not only forced into the world of no marriage, but are also perceived by others with whom we come in contact as uncoupled, uncommitted, and thus single. Committed opposite-sex couples will be presumed to be married, and silence on their part generally supports that presumption. By contrast, everyone knows that same-sex couples, no matter how committed they are to each other, are, in the eyes of the law, unmarried.

87. The marriage contract provides only a few rules about the ongoing marriage relationship. Examples include the spousal support obligation, presumption that the husband is father of all children born during the marriage, and criminal laws about sex outside of marriage. There are many more rules regulating the dissolution of the marriage, i.e., divorce.

88. See Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State
couples who discuss their expectations in advance of commitment are much less likely to be disappointed at some future date when it turns out that the two people had very different images of how they might live their lives together. American culture, the culture of romantic love and marriage, may well contribute to the destabilization of long term coupledom, as expressed in the current regime of state-defined marriage. The romantic notion that love conquers all, that love is blind, and that marriage is the ultimate expression of that love, may lead couples all too quickly into a relationship that is not of their own making.\textsuperscript{89}

\section*{B. Rights and Responsibilities of the Couple}

Without marriage, couples would have to negotiate their own contracts. These private contracts could easily cover questions of property rights and support rights. They could also cover questions regarding the raising of children.

\subsection*{1. Property Rights}

Lesbian and gay couples negotiate their own contracts in lieu of marriage. Under current law these contracts are fully enforceable unless they violate the public policy doctrine of contract law. Post \textit{Marvin},\textsuperscript{90} most courts have upheld contracts between same-sex couples, at least to the extent they allocate property rights. If the contract appears to require payment for sexual services, the contract may not be enforced, however, since sex for money is against public policy.\textsuperscript{91}

Thus, lesbian and gay couples often negotiate contracts in which they make agreements about who will make payments for upkeep on

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\item \textit{Policy}, 70 CAL. L. REV. 204, 251 (1982) ("If individual happiness is the primary goal of intimacy, then individual preferences as to intimate arrangements should be honored.").
\item \textsuperscript{89} There is empirical evidence that individuals are unrealistically optimistic about the likelihood that their own marriages will succeed. See Lynn A. Baker and Robert E. Emery, \textit{When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage}, 17 LAW & HUM. BEHAV. 439, 443 (1993). They are also badly informed about the state-imposed terms to their marriage contracts. \textit{Id.} at 441 (asserting that knowledge of state-imposed terms "only slightly better than chance"). \textit{See also} MARTHA A. FINEMAN, \textit{THE ILLUSION OF EQUALITY: The Rhetoric and Reality of Divorce Reform} (1991).
\item Marvin v. \textit{Marvin}, 557 P.2d 106 (1976) (holding that public policy considerations do not void a contract between unmarried cohabitants except to the extent the contract is "explicitly founded on the consideration of meretricious sexual services").
\item \textsuperscript{91} \textit{See} Jones v. \textit{Daly}, 176 Cal. Rptr. 130 (1981). \textit{See also} Crooke v. Gilden, 414 S.E.2d 645 (Ga. 1992) (dissenting opinion would not enforce written contract between two lesbians regarding home ownership because their relationship involved illegal sexual activity, presumably sodomy).
\end{itemize}
\end{footnotesize}
property (e.g., mortgage payments, repairs, and property taxes) and how proceeds will be split if the property is sold. The most important asset for same-sex and opposite sex couples usually is the home. Even when unmarried couples resist contracting for support and love and commitment, they will often be advised to contract for terms regarding the division of the home in the event the relationship ends. In some ways, these contracts mirror the buy-sell agreements of unrelated parties who own property or businesses together. But they often include terms that are rarely present in contracts between unrelated parties. For example, a lesbian couple may provide that fault in ending a relationship should be considered in determining who gets to keep the home. Or, the couple may understand that the relationship is sufficiently fragile that it may not last forever and bargain for terms that will not burden either party in the event the relationship is ended. Such terms may include generous buy-out provisions for the partner who is more personally attached to the home, or in some cases, provisions for joint use of the home even after the relationship has ended.

In a world without marriage, relationship contracts that provide the terms for property division in the event the relationship ends would take the place of divorce laws. Such contracts should be an adequate substitute for divorce laws provided the couple has bothered to enter into an express contract. Absent express contracts, the law of implied contracts and property would determine how property should be divided when two persons both have claims to ownership.

In a world without marriage, all couples would be treated the same by the law. The state would take neither side in a dispute over

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92. Law is the enemy of unmarried couples with respect to these terms. Contract law has developed around commercial exchanges and not around personal relationships. Marriage and family law has been the legal domain of personal relationships. Thus, unmarried couples who wish to express their understandings about love, commitment, and emotional support are often advised to leave those terms out of legal contracts. The message that is sent to the lesbian and gay community when such advice (and it is responsible advice) is given is that the only thing that matters about a relationship, the only thing the law will protect, is economic interests. One has to wonder about a legal system that says economic interests are more important than the human heart. But see Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Calif. L. Rev. 204 at 294 (1982) ("Another change that is particularly important with respect to the feasibility of contractual governance of intimate relationships is the increased recognition of the non-economic dimensions of contract.").

93. Contract law would provide protections against overreaching, as it does today under doctrines of unconscionability, duress, etc.

94. There is a substantial body of case law that has developed recognizing and enforcing implied and oral contracts between unmarried cohabitants. See, e.g., Carroll v. Lee, 712 P.2d 923 (Ariz. 1986); Boland v. Catalano, 202 Conn. 333, 521 A.2d 142 (1987).
property and proof of an intimate relationship would give rise to no particularized set of default rules regarding ownership of property. The existence of the relationship would merely be one factor in proving to a court what the intent of the parties was regarding property ownership.

2. Support Rights

The state-imposed marriage contract imposes support obligations for husbands and wives. This obligation, as enforced by the courts, is quite minimal. It covers only "necessaries" and does not obligate one spouse for the debts of the other spouse generally. Lesbian and gay couples who draft their own contracts, by contrast, often provide that income will be pooled for their mutual support or that one partner will support the other by making all household payments. There are no reported cases dealing with enforcement of support rights between

95. See, e.g., WIS. STAT. ANN. § 765.001(2) (West 1993) (spouses "owe to each other mutual responsibility and support," and "[e]ach spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of . . . the other spouse.").

"Providing for a spouse's necessary medical treatment according to one's ability is a duty of support owed under section 765.001(2) ...." St. Mary's Hosp. Med. Ctr. v. Brody, 519 N.W.2d 706, 710 (Wis. Ct. App. 1994).

96. The meaning of "necessaries" is inexact and may vary from state to state. "Necessaries" include medical expenses and other items similarly required for the spouse's well-being. Thus, when a wife must defend herself against criminal charges, the husband may be required to pay for an attorney. See Elder v. Rosenwasser, 144 N.E. 669 (N.Y. 1924):

Where a wife living with her husband, whom he is obliged to support, is arrested on a criminal charge or prosecuted in a civil action which may result in her incarceration, the necessity for a lawyer may be as urgent and as important as the necessity for a doctor when she is sick .... The mental suffering and anguish which may result from an unwarranted suit for alleged libel may be as disastrous in its effects as any other mental sickness or disorder. Such actions may, therefore, dependent, of course, upon circumstances, require the husband to pay a reasonable lawyer's bill for services in protecting his wife.

Id. at 670.

See also D.H. Holmes Co. Ltd. v. Huth, 49 So.2d 875 (La. App. 1951) (holding dresses, umbrella, cologne, hosiery, scarf, men's shirts worn with slacks at home, costume jewelry, slippers and underthings costing $131.41 were necessaries). The obligation to provide necessaries may cease if the spouse leaves the marital home. "The husband's duty is to provide for the support of his wife at the matrimonial domicile, but he is nevertheless under the obligation to furnish support to her if she is forced to find shelter elsewhere, when the separation was not caused through her fault." Id. at 877.

97. The spouse is only liable for necessaries and not other items purchased on credit. See, e.g., Bergh v. Warner, 50 N.W. 77 (Minn. 1891) (holding diamond earrings not "necessaries"); Stevens v. Hush, 176 N.Y.S. 602, 605 (N.Y. App. 1919) (vacation expenses not "necessaries"). See also Mathews Furniture Co. v. La Bella, 44 So.2d 160 (La. App.) (holding furniture company could not recover against husband for furniture sold to wife on wife's credit).
same-sex couples during the relationship, but presumably the terms would be enforced provided they did not violate public policy.

Support rights and obligations generally become important at the time of divorce. Obligations of support exist during the relationship because the relationship is mutually beneficial. But once the relationship ends, different considerations enter the question of whether one spouse should continue to be responsible for the other. In a world without marriage, spouses at time of divorce could not rely on state laws regarding alimony or even on equitable distribution laws that take one spouse’s dependency on the other into account when dividing property. In a world without marriage, couples would have to bargain on their own for such support rights to continue in the event the relationship ended.

Forward-looking couples might well include such terms in their relationship agreements provided they were well informed and both partners had equal power in negotiating the terms. Couples often arrange their personal lives in a way that increases the dependency of one partner on the other. Such arrangements are common not just for married couples, but also for committed same-sex couples. These arrangements occur because couples operate as a unit for the benefit of the unit. As time passes, however, decisions made for the benefit of the unit may turn out to benefit one partner more than the other once the unit is dissolved. For example, couples may agree that one partner should stay home and take care of the house and children, while the other develops a career. Similarly, a couple may agree to move to a new location in order to improve the employment opportunities of one of the partners. If the relationship continues, what is good for the unit is also good for the individual partners. But if the relationship ends at a time when one partner has been consistently disadvantaged regarding individual market skills, then the advantaged partner should be obligated to make an equitable adjustment. In the absence of explicit contract terms so providing, a court might rely on implied contract terms or on

98. Cases regarding support tend to arise when the relationship ends, either by “divorce” or by death. See, e.g., Whorton v. Dillinham, 248 Cal. Rptr. 405 (Ct. App. 1988) (regarding claim brought at “divorce” based on verbal agreement to support for life). See also Cox v. Elwing, 432 A.2d 736 (D.C. App. 1981)(claim for support to survive summary judgment, but unclear whether relationship had terminated).

99. See MARTHA A. FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 41-42 (1991) (pointing out that judges consider some factors based on the needs of the relative spouses when dividing property at divorce and criticizing the fact that not enough weight is given to factors of need and dependency).
equitable principles regarding unjust enrichment. We do not need marriage and divorce laws to accomplish this result because private contract law is sufficient.

3. Children

Marriage as a legal institution has historically held great significance for children. The law makes a distinction between children born in and out of marriage, designating those born outside of marriage as illegitimate, and, until recently, severely limiting their rights. Although marriage continues to impact children, modern legal trends have lessened that impact. Because unmarried mothers and fathers both owe a duty of support to their children, marriage is generally irrelevant to the issue of child support. And in many states, marriage is no longer the only route to becoming an adoptive parent. In some states, single persons can adopt. In addition, several states have allowed the same-sex partner of a biological parent to adopt the child, even though the partners are unable to marry under state law.

In a world without marriage, the state would continue to have an interest in protecting children. A parent’s responsibility for a child exists independent of marriage and would continue to do so. In a world without marriage, however, couples would be more likely to negotiate private contracts regarding child-raising and child support responsibilities. Such contracts might also include terms regarding obligations for support and rights of visitation when the relationship ends. Lesbian couples, for example, often enter into such contracts when they decide to raise a child together. The question might arise whether contracts involving children violate public policy concerns regarding the state interests in child welfare. As a general matter, I should think such

100. See, e.g., Levy v. Louisiana, 391 U.S. 68 (1968) (striking down state law that barred non-marital children from bringing a wrongful death action for the loss of a mother); Gomez v. Perez, 409 U.S. 535 (1973) (striking down Texas law that made fathers liable for support only to their legitimate children); Trimble v. Gordon, 430 U.S. 762 (1977) (striking down state law that prevented illegitimate children from inheriting from their fathers).

101. See, e.g., Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding a California statute that presumed the husband of the mother to be the father of a child despite the biological father’s claim of paternity and his desire to visit his daughter).

102. See, e.g., In re Tammy, 619 N.E.2d 315 (Mass. 1993); In re Jacob, 660 N.E.2d 397 (N.Y. 1995); In re B.L.V.B., 628 A.2d 1271 (Vt. 1993).

103. See, e.g., Alison D. v. Virginia M., 572 N.E.2d (N.Y. 1991) (holding that the second parent had no standing to assert visitation rights because she was not a parent under New York’s Domestic Relations Law and ignoring the contract in which the biological mother and partner had agreed at time of dissolution of relationship to visitation and continued support).
contracts would be fully enforceable so long as the partners can show that the contract was negotiated with the best interests of the child in mind. Indeed, with respect to agreements about custody and visitation in the event the relationship is dissolved, terms negotiated by the partners at the beginning of the relationship are likely to be a better solution than terms determined by a family law judge based upon evidence submitted at the termination of the relationship. I do not mean to suggest that privately negotiated contracts ought to trump the “best interests” of the child. Contracts which are clearly not in the “best interests” of the child should not be enforced. However, many fights over custody and visitation present very close questions in which the prior agreement of the parties ought to be determinative.

In the absence of any prior agreement, a couple who is unable to reach a current agreement regarding support, visitation, and custody will have to ask the state to intervene. If marriage were abolished, then there would be no divorce to trigger state intervention. Instead, state intervention would be triggered whenever unresolvable disagreements arose. State recognition of marriage is not necessary to determine who is the best custodian of a child.

C. The Couple and the State

A world without marriage would be one in which privately negotiated contracts regarding personal relationships would be the norm. Such a world ought to be imaginable as to the couple’s property rights, support rights, and their relationship with children whom they agree to co-parent. When the issues involve questions of rights and responsibilities between the members of the “marital unit,” private law can be used to resolve disputes. However, if the state becomes a necessary party, private law is insufficient.

Tax law and immigration law are two obvious areas where the state is a necessary party. Federal tax law recognizes the marital unit in determining how income should be reported for income tax purposes and in determining whether property transfers from one person to another should be subject to gift and estate taxes. Immigration law grants spouses of American citizens preferential status. In a world without marriage, these types of benefits would have to be either denied or made available on some other basis. Furthermore, government would have to review benefits attached to marriage and determine whether such benefits are worthy of continuance, and, if they are, to whom they should be granted.

A similar issue arises when one partner dies or becomes disabled.
In the absence of specific and enforceable private agreements between the partners, the state becomes a necessary party in actions regarding property disposition, medical care, and burial. Either the state must take action on behalf of the deceased or incompetent, or the state must appoint a representative to make decisions. In a world with marriage, decision-making in such areas is usually assigned to the spouse or to another legally recognized family member. These decisions are ones that should be made by someone who knows or knew the individual well and not by the state. In a world without marriage, the state would have to designate the default decision maker by some other means. Marriage, as a bright line for making these sorts of decisions, can be justified on efficiency grounds.

The remainder of this paper addresses the question of governmental benefits and default decision makers. It will show that there are ethical as well as efficiency justifications for state recognition of marriage. Furthermore, these justifications support the notion that marriage should be extended to same-sex couples whose relationships mirror their opposite-sex counterparts.

IV. STATE RECOGNITION OF COUPLES IN A WORLD WITHOUT MARRIAGE

A. Introduction

There are many benefits that are conditioned upon state recognition of the marriage relationship. Other scholars have identified these benefits, but few have given sufficient attention to the nature of these benefits and analyzed closely whether or not these benefits are deserved by married couples or whether they might also be deserved by some non-married couples. In a recently published article, David Chambers, takes on this task. He divides the special rules that are


attached to marriage into three categories: (1) those that recognize affective or emotional bonds, (2) those that relate to the raising of children, and (3) those that reflect notions of the way married couples ought to arrange their economic affairs. He concludes that existing rules and benefits of marriage are appropriate for and would serve the interests of same-sex couples.

My focus in this section is somewhat different from that of Professor Chambers. I ask how recognition of marriage and its accompanying benefits serve the interests of the state. Of course the state may be indirectly benefited by serving the interests of its citizens. My purpose in this section, however, is to describe, from the state’s perspective, why legal recognition of couples is a good thing, not just for the couple, but for the state as a whole. I choose to focus on two sorts of benefits that are associated with marriage, non-economic and economic. The non-economic benefits are of two types: (1) negative liberty (non-intrusion into a couple’s intimacy), and (2) positive liberty (enabling togetherness). Although there are numerous economic benefits attached to marriage, I will focus primarily on tax benefits.

B. Justifications for Extending Non-Economic Benefits to Couples

Couples who share households produce real goods and services for the members of their households and form an economy that is separate from the production of gross national product in the market place. Couples operate as bartering units. “I’ll cook you dinner if you’ll wash the dishes.” The members of the unit are the best determiners of who should engage in which tasks, assuming equal bargaining power and equal information. As productive units in society, couples produce efficiency gains that carry over into the market place. Not only is it generally less expensive in dollars for two people to live together, it also takes less time to do necessary tasks, thereby freeing family household members to make additional contributions beyond the household.

Couples who operate as a family do more than create economic gains for society. Families provide emotional support for their members and give individuals a safe place to develop psychologically. To interact normally in society, individuals need to form intimate relationships with persons they can trust more than a co-worker or a friend. The trust and commitment in these intimate relationships generate an inter-

107. *Id.* at 453.
dependence that individuals come to count on in their daily lives, both as a benefit and as a responsibility. When these relationships are working correctly, they produce a psychic benefit not just for the individuals in them, but also for society in general.\textsuperscript{109}

William Hohengarten, in arguing that marriage is not only wise policy, but also constitutionally required, says:

Without marriage or a similar legal institution, every person is reduced to the status of a legal atom. Individuals lose the legal medium whereby they may join together and appear before the state and others as a couple. More importantly, without marriage couples are prevented from making a legally enforceable commitment to remain together in an intimate relationship. In a world in which the state has monopolized the power to enforce commitments, the withdrawal of that power from a particular sphere of life is a productive redeployment of state power in its own right. By eliminating the legal framework of marriage, the state produces an isolated legal subject whose capacity to embark upon committed projects with others is limited to the sphere of self-interested economic transactions. . . .\textsuperscript{110}

Although I disagree with his conclusion that marriage is constitutionally required,\textsuperscript{111} the argument that the state should enable coupledom rather than producing "isolated legal subject[s]" is a good policy argument in favor of marriage, or some similar legal institution.

\begin{itemize}
  \item \textsuperscript{109} Same-sex couples produce household goods and services and provide emotional stability at the same rate as opposite-sex married couples. The book American Couples is often cited for the proposition that same-sex couples are less stable than married couples. See Philip Blumstein & Pepper Schwartz, \textit{American Couples} at 308 (1983) (chart showing percentage of married, unmarried heterosexual, gay men, and lesbian couples in researchers' sample who broke up). But the statistics only show that same-sex couples are more likely than married couples to break up when they are together less than 10 years. After ten years, the rate of break up is virtually the same. Given the fact that the economic and social benefits of the marriage help keep couples together in the early years and the fact that this study was done in the 1970s the differences are not surprising. Expert testimony in \textit{Baehr v. Miike}, including testimony by Dr. Pepper Schwartz, convinced the trial judge that there was little difference between married couples and committed same-sex couples. Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at *11 (Haw. Dec. 3, 1996).
  \item \textsuperscript{110} William M. Hohengarten, \textit{Same-Sex Marriage and the Right of Privacy}, 103 \textit{Yale L.J.} 1495, 1529 (1994).
  \item \textsuperscript{111} I disagree because although marriage is helpful in accomplishing the goals that Hohengarten identifies, I do not believe that state recognition is necessary. Culture and society exist apart from the state. So does the Church. Two people can celebrate their union as a cultural event or a religious event and the relevant communities will recognize their coupledom. This fact prevents individuals from being "reduced to the status of [an] atom," although the state may treat them as "legal" atoms. Self-definition, creation of personhood, including personhood developed within intimate relationships, is possible without the protection of the state. Indeed, that is what lesbians and gay men have been doing for centuries.
\end{itemize}
Simply stated, if certain couples produce benefits, both economic and social, to the state, then the state ought to protect their coupledom. At the very least, the state should protect the couple’s intimacy and facilitate the partners’ togetherness.

The question is whether courts should make the determination of which couples to protect on a case by case basis, or should use marriage (or something else) as a bright line test for differentiating deserving couples from undeserving ones. There are efficiency costs to making determinations on a case by case basis, but those costs must be weighed against the potential benefit to the state of protecting the right couples. What types of factors should be considered in determining who the “right couples” are? The following factors seem appropriate: (1) evidence of mutual support; (2) evidence of legally enforceable commitments; (3) the fact that the couple shares intimate space (e.g., a home or shelter, some place that provides privacy); and (4) a statement by the couple that they hold each other’s welfare foremost and wish to be accorded protection for their intimacy. And when should this evidence be presented? Only once, or each time a question arises? If it were to be the latter, efficiency costs would increase. In addition, it would be hard to protect the intimacy of a couple if we could not determine whether they were a couple until a problem had arisen. Thus, a pre-existing bright line test would be helpful and would produce efficiency gains.

A bright line test such as marriage would also protect privacy. If courts are asked to make determinations on a case by case basis, they will have to review evidence that supports the couple’s claim that they are committed to a shared life. Although this has been done in cases involving same-sex couples, offering such evidence in a public proceeding produces obvious privacy costs to the couple.

For these reasons, it is good policy for the state to recognize adult couples. Whether that recognition is accomplished via the current institution of marriage, or some alternative institution such as domestic partnership, is a question beyond the scope of this paper. It may be

113. Domestic partnership is a term that was coined in San Francisco in the early 1980s. Several municipalities and employers have taken action to recognize certain couples as domestic partners and have accorded such couples varying benefits, such as health care and bereavement leave. There is no single definition of “domestic partner” and there are wide variances in the benefits that are available to such couples. No state currently recognizes domestic partners as a legal entity to which benefits or responsibilities attach, although the Hawaii legislature is considering legislation that would do so for limited purposes. See H.B. 118, 19th Leg., (Haw. 1997).
that efficiency gains would be increased if the state offered several different forms of recognition to accommodate the different sorts of couples that are deserving of protection. But when it comes to protecting intimacy and enabling togetherness, all committed couples should be equally benefited.

C. Justifications for Extending Economic Benefits to Couples

A broad range of economic benefits is extended to married couples. Tax benefits, social security benefits, health care benefits are but a few examples. In a world without marriage, should these benefits continue, and to whom should they be extended? This question is much more complex than the earlier question dealing with intimacy and togetherness. The mere fact of coupledom presumes intimacy and togetherness worthy of protection. But economic benefits are quite another thing and their appropriateness depends not just on the fact of being a couple, but on how the partners live their economic lives.

Federal tax law, for example, assumes that all spouses are similarly situated and taxes them accordingly. In some instances the tax treatment may be beneficial and in others it may be detrimental. For wealthy couples at least, the benefits outweigh the detriments. In this section, I will focus on the law of taxation and ask whether it is beneficial to the state to recognize marriage.

Under current tax law, state recognition of marriage is crucial. For example, marriage determines which rate schedule a taxpayer must use...
when computing federal income taxes. Married couples have only two choices: (1) file jointly, which for two-earner families will result in a higher tax bill than if the two people filed as unmarried taxpayers, or (2) file as married filing separate returns, which usually does not reduce the tax bill but does avoid the potential dangers of joint and several liability.

Federal tax law, apart from the marriage penalty aspects of the joint return, is designed to benefit spouses in several ways. First of all, spouses may enter and exit marriage tax-free, arranging and rearranging their joint and separate property interests to suit their living arrangements. Section 1041 assures that there will be no taxable gain on property transfers during marriage or incident to divorce, and the 100% marital deduction relieves all interspousal transfers from gift tax. So, when two people, H and W, get married and move into the same home, there are no tax consequences. If H owns the home and lets W live there rent-free, there are no income or gift tax consequences to the arrangement. If H sells a half interest in the home to W so that W can share in ownership of her own home, H recognizes no taxable gain. If H gives W a half interest in the home, there is no taxable gift. All economic transfers that H and W enter into in order to create the household unit that suits their specific needs can be accomplished tax-free.

By contrast, unmarried couples do not receive these benefits.

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117. See I.R.C. § 1 (West 1996).

118. The resulting higher tax on the two-earner married couple is often called the “marriage tax penalty.” Scholars have argued that we ought to change our filing system to avoid this problem. See, e.g., Pamela B. Gann, Abandoning Marital Status as a Factor in Allocating Income Tax Burdens, 59 Tex. L. Rev. 1 (1980); Douglas K. Chapman, Marriage Neutrality: An Old Idea Comes of Age, 87 W. Va. L. Rev. 335 (1985); Laura A. Davis, Note, A Feminist Justification for the Adoption of an Individual Filing System, 62 S. Cal. L. Rev. 197 (1988).


120. Under the current rate structure, a married couple in which both spouses earn income will pay higher taxes than two single persons with the same amount of income. See generally Edward J. McCaffery, Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code, 40 UCLA L. Rev. 983, 991 (1993).

121. I.R.C. § 2523 (West 1996). See also I.R.C. § 2056 (West 1996) which provides a similar marital deduction for bequests made to a surviving spouse.

122. When one spouse provides the other with housing, “support” is being provided. Payment of support has never created income or gift tax issues so long as the support is provided to persons one is legally obligated to support, i.e., spouses and dependent children. See, e.g., Gould v. Gould, 245 U.S. 151 (1917) (judicial exclusion of support from income).

123. I.R.C. § 1041(a) (West 1996).


125. There is, of course, the anomaly that unmarried couples may fare better under the in-
come tax because they are not subject to the marriage penalty that results from applying the joint return rates to two earner couples. In addition, some code provisions penalize relationships. See, e.g., I.R.C. § 267(a) (West 1996) (forbidding loss recognition on sales between related parties. Since unmarried couples are unrelated for tax purposes, they may take advantage of tax reduction schemes unavailable to married couples). See infra note 135 and accompanying text.

126. One reason she has no income is that Anna offers her services as a chef as a gift, rather than as compensation for anything. Of course, an aggressive IRS agent might argue that Anna is exchanging her services as a chef for the services Beth provides to her. Since in the eyes of the law, they have no legal obligation to support each other (no matter what their private contractual obligations might be), Anna is not providing Beth with excludable support. Thus, the agent might argue, the services are “payment” for what Anna gets back, a quid pro quo, a taxable exchange. Although such bargained-for exchanges would be taxed if we accomplished them through a barter club, see Rev. Rul. 80-52, 1980-1 C.B. 100, the IRS has not generally sought to tax such arrangements between members of the same household. Furthermore, it can be argued that such instances of in-kind personal consumption, outside of the employment context, simply do not produce taxable income because they do not increase “ability to pay.”

127. Some might argue that the value of chef services is a gift, but within the $10,000 per year per donee annual exclusion. See I.R.C. § 2503 (West 1996). In my opinion, there is no gift in the first place because the gift tax is meant to apply only to transfers of property. See I.R.C. § 2511 (West 1996).

128. But see Patricia A. Cain, Same-Sex Couples and the Federal Tax Laws, 1 LAW & SEXUALITY 97, 123-29 (1991) (arguing that support payments of this sort ought not to be considered taxable gifts for gift tax purposes).

129. See 26 C.F.R. § 25.2511-1(h)(5) (1996) (stating that creation of a joint tenancy with the funds of one joint tenant shall be treated as a gift of 50% of the property’s value to the other joint tenant). It ought to be possible to avoid this result if there is clear evidence of intent (preferably in writing) that the joint tenants share only in proportion to their contributions.

130. If rent is paid, then part of the home becomes income-producing property. Deductions related to the rental, including depreciation, would be authorized under I.R.C. § 212 (Law. Co-op. 1996). Those deductions, however, will be limited by I.R.C. § 280A (West 1996) which applies to the rental of property used by the taxpayer as a personal residence.
provisions of Section 1034 might not apply to the rented portion of the home. Thus, the unmarried couple is not free to arrange home ownership and related economic agreements regarding their living situation without tax costs.

Functioning households create value to the state whether the household members are married or not. For a household to function well, its members ought to be free to arrange their economic relationships within the household free from tax penalties. The tax law question then becomes: how can we determine which households ought to be free to arrange their economic relationships free from taxation? Currently, marriage serves as a bright line to answer that question.

In a world without marriage, it would be possible to structure a tax system that would recognize households. Indeed, it would be possible to recognize "tax households" with no accompanying state recognition or definition of such units. Individuals could form voluntary associations such as partnerships and elect to be taxed as a household unit. Who was in or out of the association would be totally a matter of private decision. However, there is one major difficulty with this arrangement. Given the opportunity for avoiding tax costs and in the absence of any real substantive costs or responsibilities for maintaining such a unit, individuals would be likely to form "tax households" for the sole purpose of receiving the tax benefits. Thus benefits would be extended to too broad a group of units.

If groups were required to prove that they were in fact functional households entitled to the benefits, this requirement would ameliorate the problem. But this new requirement would create a problem of its own: potential invasion of privacy.

For the IRS to be certain that a household was a "true household," evidence of how the group functioned would have to be shared with the agency. If personal commit-

132. If transfers between household members were not taxed and if value of services provided by household members were not taxed to the persons who receive the benefits of the service, then communes would become the tax shelters of the day. Imagine the amount of tax that could be saved if 20 people elected to be a household and one of them (a carpenter) agreed to take care of all house repairs and another (a chef) agreed to cook all meals and another (a millionaire) agreed to provide all necessary supplies and materials and others agreed to provide child care, legal services, medical services, etc.
133. Absent marriage, a couple has to prove that they are committed, that they are family in a real and substantial sense. See Braschi v. Stahl Ass'n., 543 N.E.2d 49 (1989). And to do this requires the couple to make public many things that couples would prefer to keep private. See Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy, Balancing The Individual and Social Interests, 81 Mich. L. Rev. 463, 487 (1983).
ment, love and affection, as opposed to mutually beneficial economic arrangements, were the tests for establishing a "true household," the problem would become even more obvious. The image of the Internal Revenue Service inquiring into the amount of love and affection present in a household is not an attractive proposition. Bright line definitions by the state reduce this problem.

Tax law ought to facilitate the formation of beneficial households. Decisions about how those households should be formed ought to be left up to the individuals involved. At the same time, the state will benefit from a bright line test such as marriage to determine which households ought to be left alone by the tax law. The state will benefit for the same reasons identified in the prior section: using marriage as a bright line will create efficiency gains and avoid privacy costs. Furthermore, marriage works as a bright line for tax purposes because it carries with it "substantial economic effect." Thus, state recognition of marriage, or of some similar legal institution, works well for a state that wishes to reduce tax burdens on personal decisions regarding household formation.

Recognition of adult committed relationships within the world of federal tax benefits the state in other ways as well. In a world of progressive tax, high bracket taxpayers will search for ways to shift income to lower bracket taxpayers who share the same household. Alternatively, low bracket taxpayers will search for ways to shift deductions to higher bracket taxpayers. Income shifting is possible between individual taxpayers so long as the transaction is more than a gratuitous assignment of income. In addition, individual taxpayers can structure gains and losses between them so as to take advantage of the time value of money.  

134. "Substantial economic effect" is a tax term in the realm of partnerships. Special allocations of partnership gain and loss will not be recognized for tax purposes unless they have "substantial economic effect." See, e.g., Treas. Reg. § 1.704-1(b)(2) (as amended in 1994). Simply put, the tax law will not recognize mere paper transactions because two people have agreed that tax benefits and burdens ought to be allocated in a certain way. The transaction must have economic substance. Marriage serves as a transaction with economic substance because spouses, once married, truly have new and different legal responsibilities and liabilities.

135. See Lucas v. Earl, 281 U.S. 111 (1930) (refusing to recognize husband's gratuitous assignment of salary to wife for tax purposes).

136. For example, A can sell Blackacre to B on the installment method with payment to occur in ten years. In that event, A will recognize no gain until the deferred payment is made. B will have a cost basis equal to the agreed-upon purchase price. Thus, B can sell to C immediately for cash at no gain. If A and B are members of the same household, this deal would allow them to realize a taxable gain without paying taxes until year ten. Because of the potential for abuse, Congress amended the installment sales provisions to require A to recognize gain upon B's sale to C,
Current tax law recognizes the potential for manipulation of tax results when transactions occur between related parties. Examples include the special rule for installment sales between related parties,\(^\text{137}\) the nonrecognition of loss when sales occur between related parties,\(^\text{138}\) the conversion of all gain to ordinary income when a taxpayer sells depreciable property to a related party,\(^\text{139}\) and special rules dealing with family partnerships\(^\text{140}\) and family-controlled corporations.\(^\text{141}\) By contrast, unmarried couples, no matter how committed and no matter how much they operate as a single economic unit are untouched by these rules.

When government interacts with taxpayers, it ought to recognize the reality of their lives. Government’s failure to recognize personal relationships can be costly in the sort of income tax system we currently have. For example, when the tax law ignores the fact that there are many committed and financially entwined same-sex couples and thereby treats such taxpayers as though they were unrelated persons bargaining at arm’s length, such treatment can actually result in losses to the treasury. As a general principle, failure to conform tax law to the realities of life will produce unnecessary inefficiencies.

In sum, the household is an important economic and social unit. Thus, our tax laws should be applied to household units so that their beneficial activities (e.g., supporting and improving its members) are not taxed. Current law accomplishes this result for some households, depending on the marital status of its members. Marriage as we know it could be abolished and tax laws could be written to support functional households. But, to protect privacy concerns, some legal definition of household unit is required. The current definition, opposite sex couples who are legally married, is too narrow to serve the state’s interest
in facilitating functioning households. It is also too narrow to protect the state against manipulation of the tax rules. The definition of household could and should be tailored to fit the facts of the tax regime as well as to support the type of household units that are valuable to the state. At the very least, this household unit ought to include same-sex couples who are willing to commit to each other and provide support for each other in the same way that opposite-sex married couples do.

V. CONCLUSION

State recognition of married couples is not constitutionally required because marriage implicates positive liberties. The liberty protected by the Due Process Clause is a negative liberty. Protection of intimacy, a negative right, is constitutionally required. But the Constitution can and does protect intimacies beyond those of married couples. Thus, marriage is not a constitutionally required prerequisite to protection of intimacy.

Although we can imagine a world without marriage in which couples negotiate their own contracts and courts determine default rules on a case by case basis, such a world would create efficiency and privacy costs. Thus, state recognition of adult committed relationships is good public policy. Whether the current institution of marriage, with its presumptions about how most couples arrange their affairs and its exclusion of committed same-sex couples, is the best way to accomplish the social and economic goals of the state is a debatable question. This essay has attempted to shift the focus from what is good for the couple to what is good for the state. From the state’s perspective, couples that benefit the state ought to be accorded legal recognition so that their relationships can be protected and supported. Marriage as a bright line test for determining which couples to protect and support is both over and under-inclusive. Thus, either marriage ought to be redefined or the state ought to recognize new legal relationships in addition to marriage. In either case, state recognition of adult couples ought to include same-sex, as well as opposite sex, couples.