"The Great Divorce" of Government and Marriage: Changing the Nature of the Gay Marriage Debate

Cynthia M. Davis

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"THE GREAT DIVORCE"\textsuperscript{1} OF GOVERNMENT AND MARRIAGE: CHANGING THE NATURE OF THE GAY MARRIAGE DEBATE

I. INTRODUCTION

November 7, 2006, marks an important day for Wisconsin voters as they will be voting on a state constitutional amendment that limits marriage to a union between a man and a woman and that denies legal status identical or substantially similar to marriage for unmarried individuals.\textsuperscript{2} Wisconsin voters will not be the first voters in the fifty states to have been presented with such a ballot. Within the past decade, nineteen states have passed similar constitutional amendments, which, in general, limit marriage to a man and a woman.\textsuperscript{3} The trends indicate that once the proposed amendment reaches the

\begin{enumerate}
\item S.J. Res. 53, 97th Leg., Reg. Sess. (Wis. 2005). According to article XII, section 1 of the Wisconsin Constitution, any amendment agreed upon by the majority of both houses shall pass first consideration, but shall be agreed upon during a second consideration by the majority of both houses in the next chosen legislature. WIS. CONST. art. XII, § 1. If the amendment passes second consideration, the legislature shall submit the amendment to the electors, who shall approve and ratify it “by a majority of the electors voting thereon.” \textit{Id}. The constitutional amendment was first considered and passed by the 2003–04 Wisconsin Legislature. Assemb. J. Res. 66, 96th Leg., Reg. Sess. (Wis. 2004) (This resolution became Enrolled Joint Resolution 29). The senate passed the constitutional amendment on its second consideration on December 6, 2005, S.J. Res. 53, 97th Leg., Reg. Sess. (Wis. 2005), and the legislature passed the constitutional amendment on its second consideration on February 28, 2006, Assemb. J. Res. 67, 97th Leg., Reg. Sess. (Wis. 2005).
\end{enumerate}
voters by ballot, the amendment is passed easily, usually with a majority of two-thirds or higher. However, while the trends demonstrate that state constitutional amendments defining marriage are passed easily, the trends do not demonstrate that the debates on these amendments preceding the vote are non existent or non contentious. On the contrary, the debate over same-sex marriage is one of the most passionate debates in the United States today, and many people feel very strongly about their positions.

As Wisconsin voters prepare for the November 7, 2006, marriage amendment ballot, they will be asking themselves and each other whether they are “for” or “against” same-sex marriage. However, what if the answer to this political question were “neither”? What if Wisconsin voters would not limit themselves to one of two “sides” of the gay marriage debate, but instead would gain a new perspective, a perspective that does not accept the premise that government should be promoting and defining marriage? What if Wisconsin voters would recognize that this proposed constitutional amendment should not be put to a ballot; not because it violates the equal protection of same-sex couples, but because the question of who may marry should be decided in the religious or cultural realm, not the political realm?

This Comment offers an alternative model of marriage, one that recognizes the importance of government protection of marriage rather than government promotion of marriage. Frederic Bastiat, a French philosopher, once said, “If the law were confined to its proper functions, everyone’s interest in the law would be the same.” If government were confined to its

4. See Heritage Foundation, Marriage in the 50 States, http://www.heritage.org/Research/Family/Marriage50/Marriage5OStates.cfm (last visited Jan. 3, 2006) (reporting that of the nineteen states to have passed constitutional amendments, only four states, Michigan, Montana, Ohio, and Oregon, passed the amendments with less than a two-thirds majority).

5. See Stacy Forster, Marriage Vote on Track for Next Year, MILWAUKEE J. SENTINEL, Nov. 14, 2005, at 1A (stating that “national groups on both sides of the issue are likely to pour hundreds of thousands of dollars into Wisconsin to influence the amendment’s outcome”). For examples of organizations seeking to educate and influence others on their views, see Center Advocates, Inc., http://www.centeradvocates.org (last visited Jan. 3, 2006); Action Wisconsin, www.actionwisconsin.org/educate/marriage/resources.html (last visited Jan. 3, 2006); and The Family Research Institute of Wisconsin, http://www.fri-wi.org/econnections/econnection_060305.html (last visited Jan. 3, 2006).

6. See Forster, supra note 5.


8. This Comment discusses a contractual approach to marriage, as endorsed by Gary Becker in GARY S. BECKER & GUITY NASHAT BECKER, Cut the Divorce Rate with Marriage Contracts, in THE ECONOMICS OF LIFE 104, 105 (Susan Barry ed., 1997) (stating that “[w]e should replace judicial determination with marriage contracts”).

proper functions within the marriage context, government would no longer promote marriage by conferring status or benefits on married individuals. As a result, everyone's interest in the laws of marriage would be the same: same-sex couples would no longer be fighting for the political recognition of marital status or for the right to marital benefits, and opponents of gay marriage would no longer need to defend their notions of marriage in the political realm. Rather, government would protect marriage-like relationships through enforcement of private agreements. As a result, people would no longer debate about the morality of gay marriage in the political realm, and the gay marriage debate would be transformed into a strictly religious, philosophical, or cultural debate, leaving questions involving the institution of marriage to individuals.

Part II of this Comment provides a brief overview of the nature and history of the gay marriage debate, illustrating the effects of government promotion of marriage. Part III sets forth an alternative marriage model along with a discussion of its costs and benefits. Part IV illustrates the costs of government promoting marriage and maintaining the status quo. Part V sets forth a new vision of marriage and illustrates how the alternative marriage model would strengthen the institution of marriage. Part VI concludes with a brief illustration of the continuing unanswerable questions that government will face if it continues to promote and define marriage, and it challenges the reader to reconsider the political question of whether he or she is "for" or "against" same-sex marriage.

II. HISTORY AND NATURE OF THE GAY MARRIAGE DEBATE

Both "sides" on the gay marriage debate appear to agree on at least one premise: government should be involved in defining, promoting, and regulating marriage. While most individuals agree with this one premise,
they not only disagree as to the definition of marriage, but also as to which government (state or federal) and which branch of government (legislative or judicial) should define marriage. Therefore, the nature of the gay marriage debate may be characterized into three kinds of debates: (1) debates between state legislatures and state judiciaries, (2) debates between state governments and the federal government, and (3) debates amongst and between judiciaries.

First, debates arise between state legislatures and judiciaries. These debates frequently follow the same pattern: state legislatures react to the judiciaries’ interpretations of state marriage laws and their constitutionality by adopting measures, such as Defense of Marriage Acts ("DOMAs") and constitutional amendments "intended to mitigate the likelihood of a judicial redefinition of marriage." For example, in the 1990s, the Hawaii Legislature rejected the Hawaii Supreme Court’s decision in Baehr v. City and County of Honolulu. The discussion of DOMAs and constitutional amendments is further expanded in the text.

15. See infra Part II.


18. See amendments cited supra note 3.

In that case, the court found that the marriage law discriminated on the basis of sex, and this discrimination required application of a strict scrutiny analysis. When the trial court on remand found that the defendant had failed to overcome his heavy burden of proof, the case appeared to make Hawaii "the first jurisdiction in the world to officially recognize a marriage between two persons of the same sex." However, the Hawaii Legislature rejected the holding in that case, and on November 3, 1998, Hawaii voters ratified a constitutional amendment that granted authority to the legislature to "reserve marriage to opposite-sex couples."

Second, debates arise between the federal government and the state governments concerning which one has the right to define marriage. One could argue that the United States Supreme Court answered this question in Baker v. Nelson in 1972, when it dismissed the case involving the legitimacy of the Minnesota marriage laws "for want of [a] substantial federal question." Nevertheless, the debate concerning states’ rights to define marriage continues to be an issue because of the re-introduced 2005 Federal Marriage Amendment, which, if passed and ratified, would limit marriage to the union of a man and a woman. Proponents of states’ rights argue that marriage is a state issue, and a federal constitutional amendment would...
violate the principles of federalism by impinging on the states’ rights to define marriage.  

Third, debates arise amongst members of judiciaries over the validity of purported state interests and the level of scrutiny (strict scrutiny or rational basis review) employed when reviewing equal protection challenges to state marriage laws. For example, when applying a rational basis review, some courts find that the state interest in restricting marriage to opposite-sex couples is rational, mainly because the state has an interest in preserving the institution of marriage as a union of a man and a woman to promote "procreation and rearing of children within a family." Other courts find that the restriction of marriage to opposite-sex couples is irrational because the public role of marriage, such as "provid[ing] for the orderly distribution of property [and] ensur[ing] that children and adults are cared for and supported whenever possible from private rather than public funds," may still be carried out by broadening the institution of marriage to include same-sex couples.

In addition to debating the state interests and standard of scrutiny, judiciaries also debate the constitutionality of civil unions, which afford same-sex couples equal marital benefits without equal marital status. For example, in Baker v. State the Vermont Supreme Court legitimized civil unions when it held that Vermont is constitutionally required to extend to same-sex couples the same benefits that are afforded to married couples. However, the Supreme Judicial Court of Massachusetts did not agree when it ruled that a civil union bill, which conferred the same marital benefits to same-sex couples but denied them marital status, was unconstitutional.

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28. See Barr, supra note 25 (stating that "the Constitution is no place for forcing social policies on states, especially in this case, where states must have the latitude to do as their citizens see fit").

29. See Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993) (applying strict scrutiny standard); Goodridge, 798 N.E.2d at 968 (applying rational basis review).

30. Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); see Morrison v. Sadler, 821 N.E.2d 15, 25 (Ind. App. Ct. 2005) (stating that "[t]he institution of marriage not only encourages opposite-sex couples to form a relatively stable environment for the 'natural' procreation of children in the first place, but it also encourages them to stay together and raise a child or children together if there is a 'change in plans'" (footnote omitted)).

31. See Goodridge, 798 N.E.2d at 954.

32. See In re Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004).

33. 744 A.2d 864 (Vt. 1999).

34. See id. at 867.

35. See In re Opinions of the Justices to the Senate, 802 N.E.2d at 572. In a 4-3 decision, the Goodridge court held that the state discriminated against same-sex couples "for no rational reason." 798 N.E.2d at 968. The court changed the common law definition of "civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others." Id. at 969. The court remanded the case to the superior court but stayed the entry of judgment for 180 days to allow the legislature to take any appropriate action. Id. at 969-70. When the Massachusetts Senate asked for an advisory opinion from the court on the constitutionality of civil union legislation that confers all
While the nature of the gay marriage debate in the political realm usually centers around which branch of government should decide the definition of marriage and what interests in marriage are most compelling, rarely does the nature of the gay marriage debate focus on the individual's right to define marriage. Instead of debating whether the state or federal government, or whether the legislature or the judiciary, should decide the definition of marriage, government should eliminate its interests in promoting marriage, thereby allowing individuals in the religious, cultural, and philosophical realms to debate, decide, and regulate amongst themselves the definition of marriage.36

III. CHALLENGING THE STATUS QUO: AN ALTERNATIVE MARRIAGE MODEL

A. Defining the Alternative Marriage Model

The alternative marriage model is based on the following premise: government has a role in protecting the legal or commercial aspects of marriage-like relationships through enforcement of private agreements,37 but government has no role in defining or promoting marriage by conferring status and benefits on married individuals. The alternative marriage model recognizes that marriage has both commercial and non-commercial elements;38 however, the alternative marriage model redefines marriage so that marriage relates only to the non-commercial elements of marriage.

36. See Zelinsky, supra note 13, at 23.
37. See BECKER & BECKER, supra note 8, at 105.
38. See Martha M. Ertman, Marriage as a Trade: Bridging the Private/Private Distinction, 36 HARV. C.R.-C.L. L. REV. 79, 98 (2001) (stating that "perhaps we can conceive of intimacy that is partly commercial and partly noncommercial").
thereby making marriage "solely a religious and cultural institution with no legal definition or status." 39

B. Commercial and Non Commercial Elements of Marriage

Eliminating marriage as a legal institution would leave a significant gap in the law governing married individuals. 40 This gap in the law would be created because marriage has commercial or legal elements in addition to its non commercial or religious elements. 41 The non commercial elements involve those things most commonly associated with the religious institution of marriage: "mutuality, companionship, intimacy, fidelity, and family." 42 The commercial elements of marriage involve those rights and services that have market value, such as ownership of property 43 and "homemaking services like cleaning, childcare, cooking, [and] carpooling." 44 These commercial elements of marriage make "marriage different from other living arrangements such as those involving roommates and live-in servants" 45 because they involve notions of comparative advantage, with each spouse specializing in what he or she does better than the other and both spouses sharing in their returns. 46

Because marriage involves this set-up of specializing and sharing, spouses may benefit from establishing terms of a contract to define their expectations and responsibilities. 47 Government's proper role, accordingly, is to protect this spousal relationship by enforcing private contracts between individuals. 48

Therefore, while government should not have any role to play in the religious or non commercial elements of marriage, government should still maintain its role in protecting and facilitating the unique contractual relationship between married individuals.

39. See Zelinsky, supra note 13, at 23. An alternative marriage model would allow differing religious thinkers, cultural groups, and individuals to "promulgate [their] own definition of marriage in a world where the law does not define or regulate it." Id.
40. For a list of the many laws relating to marriage, see Goodridge, 798 N.E.2d at 955-57 and Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993).
41. See Ertman, supra note 38, at 98.
42. Goodridge, 798 N.E.2d at 954.
43. See Lewin, 852 P.2d at 59.
44. Ertman, supra note 38, at 98.
46. See id.
48. See BECKER & BECKER, supra note 8, at 105.
C. Governmental Protection of the Commercial Elements of Marriage: Reshaping Marriage Under Principles of Business Law

The commercial elements of marriage and other living arrangements have many similarities to different business models. For example, marriage is similar to a close corporation; cohabitation is similar to a partnership; and "polyamorous" relationships are similar to a limited liability company ("LLC"). These similarities illustrate how business models may be used to define, regulate, and protect the commercial elements of marriage, as well as why applying business models to marriage would not represent a drastic departure from the current law.

Marriage, as defined today, is similar to a close corporation, especially concerning formation, dissolution, and taxes. Corporations, like marriages, may be formed for any lawful purpose, one of which usually includes profit maximization. The formation of corporations and marriages also "requires application to and certification from the state." Corporations and marriages can also dissolve in much the same way. For example, voluntary corporate dissolution is similar to no-fault divorce. Administrative corporate dissolution resulting from the corporation's failure to fulfill statutory requirements is analogous to annulment. Corporate dissolution also "requires the formality of filing articles of dissolution, just as divorce requires formal state action." Shareholders also "divide assets upon dissolution based on their percentage ownership, just as spouses divide assets based on their ownership interest." Corporations and marriages are also taxed the same way in that both are taxed as separate entities.

49. Ertman, supra note 38, at 101. This section seeks only to summarize the similarities described in Professor Ertman's article.
50. Id.
51. See Posner, supra note 13 (stating that "[t]he analogy would be to partnership law, which allows the partners to define the terms of their relationship").
52. See F.H. Buckley & Larry E. Ribstein, Calling a Truce in the Marriage Wars, 2001 U. ILL. L. REV. 561, 597 (stating that marriage and contract are quite comparable in that even today "private contracting offers a method through which the parties might obtain many of the benefits of ... marriage").
53. Ertman, supra note 38, at 109, 112.
54. Id. at 117.
55. Id.
56. See id. at 118.
57. Id. at 118-19.
58. Id. at 119.
59. Id.
60. Id.
61. Id. at 109.
While marriage is similar to a corporation, cohabitation is similar to a business partnership, especially concerning formation, dissolution, and taxes. A business partnership is formed whenever two or more persons operate a business for profit. Likewise, when two people move in together, the formal relationship begins, and presumably, the couple is "expecting to benefit from the arrangement personally and economically." Also, unlike the formation of a corporation or a marriage, formation of a partnership or cohabitation does not require state action.

Dissolution is also similar between the business partnership and cohabitation because no judicial action is required to formalize the dissolution. A business partnership dissolves when one partner leaves, just like cohabitation typically dissolves when the partners break up.

Lastly, both partnerships and cohabitants "are taxed as disaggregated groups," unlike corporations and marriages that "are generally taxed as separate entities." Polyamorous relationships represent yet another living arrangement that is similar to the LLC business model. "[T]he hybrid nature of LLCs (part corporation, part partnership) mirrors the hybrid nature of many polyamorous affiliations (which may include a marriage or other primary relationship alongside relationships with more peripheral individuals)."

These similarities between business models and living arrangements help to show how applying the concepts of business law could reform the institution of marriage without drastically altering it. As described in the succeeding section, the LLC business model provides a useful example.


As illustrated in the preceding section, living arrangements, including

62. Id. at 103, 109.
63. UNIF. P’SHP ACT art. 2, § 202(a) (1997); Ertman, supra note 38, at 103-04.
64. Ertman, supra note 38, at 104.
65. Id.
66. Id. at 107.
67. Id. at 107-08.
68. Id. at 109.
69. This term refers to "a wide variety of relationships that include more than one participant." Id. at 124.
70. Id. at 127.
71. Id. LLCs will be discussed in greater detail in the succeeding section.
marriage, are already very similar to existing business models. Therefore, under the alternative marriage model, principles of business law would regulate the commercial aspects of intimate relationships. Business models could be created so that individuals may enter into legal relationships similar to those created when individuals marry.

Currently, some individuals, who are generally not married or are denied the right to marry but still want to form a legal relationship between them, have already turned to business law. These individuals are turning to what has been termed the new marriage model, the Relationship LLC ("RLLC"). An RLLC is a limited liability company whereby particular assets are pooled together to form a start-up business. The RLLC would function like any other LLC regarding formation, membership, legal rights, liability, taxes, and dissolution.

An RLLC may be formed by filing "Articles of Organization" with the secretary of state. An operating agreement sets the terms of the legal relationship and allows individuals to alter the default rules governing their legal relationship.

Unlike the current system of marriage or civil unions, membership in an RLLC is not confined to individuals with sexual or intimate relations, but is "available to everyone, couples (of any sexual mix) who wish to pursue life

72. Id. at 79.
74. Id.
75. Id.
76. LLCs are defined as the following:

Limited liability companies (LLCs) are noncorporate entities that are created under special statutes that combine elements of corporation and partnership law. As under corporation law, the owners (members) of LLCs have limited liability. As under partnership law, an LLC has great freedom to structure its internal governance by agreement. Like a corporation, an LLC is an entity, so that it can, for example, hold property and sue and be sued in its own name. LLCs come in two flavors: member-managed LLCs, which are managed by their members, and manager-managed LLCs, which are managed by managers who may or may not be members.

MELVIN ARON EISENBERG, AN INTRODUCTION TO AGENCY, PARTNERSHIPS, AND LLCs 135 (3d ed. 2000) (italics in original).
77. See Relationship LLC, supra note 73.
78. See DEL. CODE ANN. tit. 6, § 18-201(a) (2005); UNIF. LTD. LIAB. CO. ACT § 202(a), 6A U.L.A. 578 (1996); Ertman, supra note 38, at 128.
together, a single parent family and groups of friends." Like any LLC, the RLLC may be managed by all of its members or a manager (who may or may not be a member). The option of a manager-managed RLLC is amenable to families with children because it allows the children as members to reap the benefits of the legal relationship but vests the authority to act for the RLLC in the parents as managers.

Concerning the scope of its legal authority, the RLLC functions as a legal entity that "could buy property, provide health insurance to its members, obtain credit cards, serve as the couple's consulting company . . ., lease a car, file a tax return as a partnership and[,] in general, engage in any legitimate business."

Concerning liability, the members of the RLLC may decide how many resources they would like to share, and none of the members would be personally liable for the debts of the RLLC, unless the court "pierces the veil." Therefore, instead of the default rules of marriage dictating what property is community or separate, individuals would choose how much they would like to contribute to the company. In addition, the RLLC could be taxed as a corporation or a partnership, depending on what the members choose.

Concerning dissolution, LLCs often have perpetual lives unless dissolved,

80. See Relationship LLC, supra note 73.
85. See Hollowell v. Orleans Reg'l Hosp., No. Civ. A. 95-4209, 1998 WL 283298, at *9 (E.D. La. May 29, 1998) (finding that the limited liability company "veil" may be pierced under certain circumstances, resulting in individual liability for its debts). A court may "pierce the veil," for example, if the RLLC's members or managers were defrauding third parties or if the RLLC was operating as the "alter ego" of the members. See id. at *10. In the case of an RLLC, courts would probably be more apt to pierce the veil of protection because the nature of an RLLC entails a close, if not identical, relationship between the members' personal and "business" activities.
88. See Treas. Reg. §§ 301.7701-2(c)(1), 301.7701-3(a) (as amended in 2003).
and the ownership interests are freely transferable. Perpetual life allows couples that separate the opportunity to continue operating the RLLC if they choose. Couples with children would most likely find this option favorable because they could maintain their legal relationship for the benefit of their children even after severing their intimate relationship. In addition, freely transferable interests would allow for easy exit, and dissolution of the RLLC would not require a “divorce-style proceeding in court,” thus saving time, resources, and heartache.

While the RLLC is one alternative business model, individuals are not limited to this model and may pursue other legal relationships through contracting. Whichever model individuals choose to pursue, government’s proper function should be to protect and facilitate their private agreements.

E. Costs of the Alternative Marriage Model

Deregulating marriage and relying solely on individuals’ freedom to contract a marriage-like relationship creates some societal costs and concerns.

Primarily, a system of law that encourages complex contracting, involving the formation of business organizations, yields high transaction costs. For example, properly forming a business partnership or an LLC may cost thousands of dollars and usually requires the assistance of an attorney. However, proponents of the RLLC argue that RLLCs differ from general

89. Ertman, supra note 38, at 128; see DEL. CODE ANN. tit. 6, § 18-702(a) (2005); UNIF. LTD. LIAB. CO. ACT §§ 501(b), 503(a), 6A U.L.A. 604-05 (1996).
90. See Relationship LLC, supra note 73.
95. This Comment will not discuss the public policy concerns, such as exploitation of women, of applying the law governing economic exchanges to intimate relations. For a thorough discussion on the legal regulation of economic exchange in marriages and the arguments for and against legalized “commodification” of marriage, see Hasday, supra note 47.
96. Nishimoto, supra note 94, at 385.
97. Rllc, supra note 92.
partnerships and LLCs in that they are simply startups with "seed" funds invested in them; therefore, they are much easier to create and are commonly created without an attorney.  

However, because not all individuals have access to the necessary resources, statutory and common law would need to develop a system of default rules to reduce the high transaction costs associated with contract formation. Just as marriage laws provide default rules for those who do not contract around them, new laws could also provide default rules for those who intend to, but do not, form a legal relationship. For those individuals, the law could provide a default legal relationship modeled on the laws of a general partnership and based on an implicit agreement.  

Society would also incur the costs of reforming the numerous laws that currently rely on the definition of marriage to extend benefits to married individuals. For example, under the alternative marriage model, the default rules regarding intestacy would need to be reformed to better reflect the donative intent of each deceased individual. In addition, the rules regarding marital evidentiary privileges, qualifications to make medical decisions for an incompetent or disabled spouse, and employee benefits would also need to be reformed to reflect that the beneficiary may be one other than a spouse.  

These reforms may sound daunting and costly at first thought; however, the current similarities between marriage and contract allow for a relatively smooth transition from traditional marriage laws to alternative marriage model laws. For example, in the area of employee benefits, laws could allow each private employer the freedom to define "dependent" on its own terms. For an employer that still wishes to provide employment benefits solely to previously defined married individuals, the employer could use other indicia besides a marriage license to determine which individuals qualify for

98. Id.
100. Nishimoto, supra note 94, at 385.
102. See Posner, supra note 13.
103. See id.
104. See supra text accompanying note 40.
105. Nastich, supra note 99, at 163. For a thorough explanation on the increasing need to reform intestate inheritance rights as cohabitation among unmarried couples becomes more common in the United States, see E. Gary Spitko, An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners, 81 OR. L. REV. 255 (2002).
107. See Buckley & Ribstein, supra note 52, at 597.
dependent status, such as evidence of a religious marriage ceremony, a marital-like contract between the employee and his or her partner, or a declaration of commitment similar to the declaration required to gain domestic partnership status in California. The only difference in the declaration would be that instead of filing the declaration with the Secretary of State, the employee would “file” the declaration with the employer. The employer could then use these indicia of marriage-like status to determine eligibility for dependent status. Any change in the marital-like relationship would trigger certain provisions in the employment benefits plan, in the same way that a divorce currently triggers certain provisions.

108. See infra Part V.
109. See CAL. FAM. CODE § 297(a), (b) (West 2004). When California passed the California Domestic Partner Rights and Responsibilities Act of 2003, A.B. 205, 2003 Leg., Reg. Sess. (Cal. 2003) (eff. Jan. 1, 2005), it extended to “[r]egistered domestic partners . . . the same rights, protections, and benefits . . . as are granted to and imposed upon spouses.” CAL. FAM. CODE § 297.5(a). To establish domestic partnership status, same-sex partners are required to file a declaration with the Secretary of State, § 297(b), and must meet the following requirements at the time of the filing:

1. Both persons have a common residence.
2. Neither person is married to someone else or is a member of another domestic partnership with someone else that has not been terminated, dissolved, or adjudged a nullity.
3. The two persons are not related by blood in a way that would prevent them from being married to each other in this state.
4. Both persons are at least 18 years of age.
5. Either of the following:
   A. Both persons are members of the same sex.
   B. One or both of the persons meet the eligibility criteria under Title II of the Social Security Act . . . for old-age insurance benefits or Title XVI of the Social Security Act . . .
6. Both persons are capable of consenting to the domestic partnership.

CAL. FAM. CODE § 297(b).

One can imagine a system whereby private employers would condition the terms of an employee benefits plan on the signing of a similar, albeit private, declaration, setting forth the employer’s particular eligibility requirements. This approach would, admittedly, raise equal protection concerns as courts would no longer be able to distinguish heterosexual couples from homosexual couples on the basis of marital status. See, e.g., Phillips v. Wis. Pers. Comm’n, 482 N.W.2d 121, 129 (Wis. Ct. App. 1992) (holding, in part, that denial of insurance coverage to same-sex partners did not discriminate on the basis of sexual orientation but rather on the basis of marital status; therefore, the denial did not violate the equal protection clause of the Wisconsin Constitution, WIS. CONST. art. I, § 1).

110. CAL. FAM. CODE § 297(b).
111. See, e.g., MASS. GEN. LAWS. ch. 175, § 110I (2000).
IV. THE COSTS OF MAINTAINING THE STATUS QUO: MORAL HAZARD, CROSS-SUBSIDIZATION, AND ADVERSE SELECTION

Although the costs of the alternative marriage model are significant, the costs of continuing governmental promotion of marriage are also significant, and society has much to benefit if these latter costs were eliminated. Just as in any kind of wealth distribution scheme, when government provides benefits to one class of individuals and denies the same to another class of individuals, unintended consequences occur and inefficiencies result because the protected class of individuals no longer must bear the full cost of its activities. One way to describe the reason for these unintended consequences is to analogize governmental promotion of marriage to an example of a wealth redistribution scheme, such as insurance. The terms used to explain the phenomena of unintended consequences in the insurance realm are the terms associated with a loss of social welfare: moral hazard, cross-subsidization, and adverse selection.

A. The Concepts of Moral Hazard, Adverse Selection, and Cross-Subsidization As They Relate to Insurance

In the insurance realm, moral hazard occurs when insureds change their behavior by not investing efficiently in accident prevention. Moral hazard results because insureds do not have to bear the full cost of their activities but pay only a premium that is usually less than the full cost of their activities. Because insureds do not have to bear the full cost, they will not take proper precautions, resulting in more accidents, higher total costs, and eventually higher premiums. Therefore, "all insureds end up paying more for insurance and having more accidents than they would if they were required to weigh the full costs to themselves."

Cross-subsidization results when all insureds pay the same premium, which leads to low-risk insureds funding high-risk insureds. The result is

114. Id.
115. Id.
116. Id.
117. Id.
118. Id.
an inefficient insurance regime. A solution to the cross-subsidization problem is to "charge insureds competitively according to their individual risk." However, due to asymmetrical or imperfect information, insurers do not have the ability or the resources to calculate each insured's expected damages and, therefore, cannot charge premiums according to each insured's expected damages.

Adverse selection occurs "when potential insureds who know that they pose above average risk 'self-select' into insurance pools," resulting in a "social welfare loss by raising the pool's average risk and thereby forcing low-risk individuals to choose between paying disproportionately high premiums or foregoing insurance."

These phenomena of moral hazard, cross-subsidization, and adverse selection are analogous to the problems associated with governmental promotion of marriage. For purposes of this analogy, government is the insurer, the high-risk insureds are married individuals, and the low-risk insureds are unmarried individuals.

**B. The Concepts of Moral Hazard, Adverse Selection, and Cross-Subsidization As They Relate to Governmental Promotion of Marriage**

When government promotes marriage by conferring benefits, such as reduced tax liability, on married individuals to the exclusion of unmarried individuals, government is creating a moral hazard problem because married individuals no longer have to bear the full costs of their activities. Some unmarried individuals, who would rather remain unmarried but for the marital benefits, decide to become married individuals. Cross-subsidization occurs when the smaller pool of remaining unmarried individuals subsidizes the married individuals through an increased tax liability. The result is adverse selection whereby the pool of married individuals increases, yet the pool of

119. Id.
120. Id.
121. See id. at 220-21.
122. Id. at 218.
123. Id. at 219.
124. See Nastich, supra note 99, at 151-52 (stating that "individuals in one readily identifiable group, married people, receive significantly better treatment for the purpose of taxation than the individuals in another readily identifiable group—unmarried people").
125. Cf. id. at 129 (stating that "[d]istributing benefits and status through marriage creates a perverse incentive for individuals to marry, even when they have no intention of maintaining a permanent, monogamous, heterosexual relationship").
126. Id.
127. Cf. id. at 152 (stating that "all taxpayers contribute financially to married couples").
unmarried individuals still has to subsidize the married individuals.\textsuperscript{128}

\textbf{C. Examples of the Unintended Consequences of Moral Hazard, Cross-Subsidization, and Adverse Selection}

Due to the dangers of moral hazard, cross-subsidization, and adverse selection, governmental promotion of marriage is detrimental to society because status and benefits are conferred on all married individuals, not just those who help government achieve its societal goals.\textsuperscript{129} Examples of individuals who marry without helping government achieve its societal goals are those who undergo sham or fraudulent marriages.\textsuperscript{130}

Fraudulent marriages often occur when a United States citizen agrees to marry a non United States citizen to help with immigration matters.\textsuperscript{131} For example, in \textit{Lanza v. Ashcroft},\textsuperscript{132} Ana Maria Lanza, a citizen of Argentina, sought review of a final order of the Board of Immigration Appeals ("BIA") denying her petition for asylum.\textsuperscript{133} While the case was remanded for further proceedings,\textsuperscript{134} the court noted Lanza's marriages to two United States citizens.\textsuperscript{135} Lanza testified that she had wanted to divorce her husband, Roy Rowan, after having discovered he was having an affair; however, she heeded Rowan's advice and did not pursue a divorce in order to remain "protected."\textsuperscript{136} Rowan died of AIDS in 1996.\textsuperscript{137} Although Lanza denied the government's allegation that her first marriage was fraudulent, she admitted

\textsuperscript{128} Unlike in the insurance world where low-risk insureds can choose to forgo insurance instead of paying the high premiums, Hanson & Logue, \textit{supra} note 113, at 219, unmarried individuals do not have this choice and must continue subsidizing married individuals, see Nastich, \textit{supra} note 99, at 152 (stating that "the current system of taxation obligates unmarried individuals to pay for the economic benefits married couples receive").

\textsuperscript{129} \textit{Cf. id.} at 164. By promoting marriage and conferring benefits and status to opposite-sex married couples, government encourages individuals to marry. \textit{Id.} at 129. However, government does not want just any unmarried heterosexual individuals to marry; it wants only those who will help government achieve certain societal goals. \textit{Id.} at 138. These goals include "encouraging procreation to occur in a context where both biological parents are present to raise the child," Morrison v. Sadler, No. 49D13-2011-PL-001946, 2003 WL 23119998, at *5 (Ind. Super. Ct., May 7, 2003), "promoting the traditional family as the basic living unit of our free society," \textit{id.} at *7, and "protecting the integrity of traditional marriage," \textit{id.} at *8.

\textsuperscript{130} Nastich, \textit{supra} note 99, at 129.

\textsuperscript{131} \textit{See id.} at 129-30.

\textsuperscript{132} 389 F.3d 917 (9th Cir. 2004).

\textsuperscript{133} \textit{Id.} at 919.

\textsuperscript{134} \textit{Id.} at 936.

\textsuperscript{135} \textit{Id.} at 921.

\textsuperscript{136} \textit{Id.}

\textsuperscript{137} \textit{Id.}
that her second marriage to Willie Ray James was “one of convenience.”138 While Lanza knew that James was gay and had been diagnosed with HIV, she still married him, stating that the “primary purpose of the marriage was to help her with her immigration problems.”139 She also indicated that she had paid him for his help.140

Another example of a fraudulent marriage is the case of United States v. Lee.141 In that case, a man married a woman from the Philippines to prevent her deportation.142 In exchange for the marriage, the Filipino woman compensated Lee, and “[a]ccording to plan, both he and his new wife then went their separate ways immediately after the wedding and were divorced about 6 months later.”143 Lee also defrauded the Navy by accepting marital benefits.144

Finally, in Safadi v. Gonzalez,145 the court denied Safadi’s petition of review of the BIA’s order,146 which denied his application for asylum.147 The BIA had denied asylum partly because Safadi “had previously entered into a sham marriage for the purpose of obtaining an immigrant visa,” and this fact weakened the credibility of Safadi’s testimony.148

These fraudulent marriages illustrate the concepts of moral hazard, cross-subsidization, and adverse selection.149 In these cases, government, acting as the insurer, provides benefits and status to married individuals.150 People like Lanza, Lee, and Safadi, who would otherwise not have been married but for the marital benefits, get married.151 Moral hazard results because, once they are married, they no longer bear the full cost of their activities. Therefore, Lanza, Lee, and Safadi become “high-risk” or married individuals, while

138. Id. at 921 n.5.
139. Id. at 922.
140. Id.
142. Id. at 796.
143. Id.
144. Id.
146. Id. at 377.
147. Id. at 373.
148. Id.
149. See Hanson & Logue, supra note 113, at 218. These are examples of fraudulent marriages that have actually been recognized in a court proceeding. Other incidents of fraudulent marriages occur more often and may not always be subject to a court proceeding. For example, Terry McMillan, a best-selling author, stated that she was divorcing her younger Jamaican husband “on the grounds that he is gay, and had married her only to gain U.S. citizenship.” McMillan’s Rude Awakening, The Week, Oct. 14, 2005, at 12.
150. See Nastich, supra note 99, at 129
151. See id. at 129-30.
“low-risk” or unmarried individuals are left to subsidize their activities. Adverse selection occurs as the number of “high-risk” or married individuals increases.

D. How the Alternative Marriage Model Eliminates the Unintended Consequences of Governmental Promotion of Marriage

In the insurance world, the moral hazard costs associated with first-party insurance result from a lack of perfect information about the insured’s expected accident costs. To obtain such information, the insurer would have to spend significant resources “analyzing the safety characteristics of every consumer product and the consumption choices of every insured.” Thus, the high costs of information gathering and the costs of monitoring insureds’ activity levels prevent insurers from charging a premium reflecting each insured’s expected accident costs.

Some argue that an enterprise liability system, whereby manufacturers are held strictly liable for all accidents and bear the insurance burden, would be a more efficient system. The reason is that manufacturers are more efficient than first-party insurers at gathering information and assessing the risks inherent in their products. Therefore, under an enterprise liability system, manufacturers “could adjust insurance premiums through the market price” by adding the cost of the risk to the cost of the product. In this way, the insured buys the product at a cost that reflects a truer cost of the activity.

Like the problems with first-party insurance, the problems with governmental promotion of marriage result from a lack of perfect information. Government, like an insurer, faces high costs associated with information gathering. For example, although fraudulent marriages like the ones mentioned in Lanza, Lee, and Safadi are illegal, government must spend many resources to gather information about these fraudulent marriages and to monitor the status of these marriages. By offering marital benefits, government seeks to promote stable and healthy relationships; however, it

153. Id.
154. Id.
155. Id. at 221. For a more in-depth discussion refuting the notion that an enterprise liability system leads to cross-subsidization and adverse selection, see id. at 222-24.
156. Id.
157. Id. at 221.
158. See id.
159. See Nastich, supra note 99, at 130.
160. Id. at 138.
does not have the capacity to monitor every couple’s marriage to determine that it is promoting societal goals. Therefore, government ends up charging the same “premium” or conferring the same benefits to all married individuals regardless of their achievement of societal goals. Because of imperfect information, government cannot eliminate the moral hazard costs associated with governmental promotion of marriage.161

The alternative marriage model, however, would eliminate the moral hazard costs associated with governmental promotion of marriage. Just as under an enterprise liability system, the insurance company no longer insures,162 under the alternative marriage model, government no longer subsidizes married individuals through marital benefits and status.163 Instead, government allows married individuals to bear the full cost of their activities.164

In this way, the moral hazard, cross-subsidization, and adverse selection costs would be eliminated because unmarried individuals would no longer have the incentive to marry to gain legal benefits and status that they could not gain as unmarried individuals.

V. WHAT REMAINS OF MARRIAGE AND HOW THE ALTERNATIVE MARRIAGE MODEL STRENGTHENS THE INSTITUTION OF MARRIAGE

Under the alternative marriage model, marriage is solely a religious or cultural institution with no government recognition, definition, promotion, or regulation.165 As a result, the debate about same-sex marriage would move from the political realm into the religious and cultural realm, in which

161. Contra Nastich, supra note 99, at 142 (stating that if government truly wants to encourage stable and loving relationships, government should “afford stable and loving gay, straight, polygamous, and incestuous relationships the same social, economic, and legal treatment”). However, because government does not have perfect information concerning the stability of each individual’s relationship, the moral hazard costs will not be eliminated by affording benefits to individuals in purported stable and loving relationships. This solution merely shifts differing interests in the law from married versus unmarried individuals to individuals in a “stable” relationship versus individuals not in a “stable” relationship. Therefore, government should stop bestowing benefits and status on any class of individuals.

162. Hanson & Logue, supra note 113, at 221.

163. Therefore, under the alternative marriage model, the Domestic Partner Health Benefits Act, S. 1360, 109th Cong. (2005), which proposes giving same-sex couples “the same tax breaks married couples enjoy in purchasing health insurance,” Jill Elswick, Employer Coalition Seeks Benefits Tax Equity for Domestic Partners, EMP. BENEFITS NEWS, Jan. 2006, at 1, would be moot as government would no longer be providing tax breaks for married individuals.

164. The analogy breaks down here as the married individual acts as both the high-risk insured and the manufacturer.

165. See Zelinsky, supra note 13, at 23.
different religions and organizations would define and regulate their own conceptions of marriage.  

Different forms of marriage would likely emerge, and the increase in competitive forms of marriage would potentially strengthen marriage by forcing individuals seeking to marry to consider the true meaning of marriage (beyond the mere obtainment of a marriage license from the state) and then subscribe to the form of marriage in which they believe.  

For example, from a Christian perspective, marriage would be strengthened because Christians choosing to marry would have to truly consider the importance of a Christian marriage and its meaning set forth in the Bible. The focus of marriage, therefore, would shift from acquiring a privileged legal status to entering into a sacred covenant with their spouse before God. By focusing on this covenant, Christians would be able to better practice their faith through fidelity and commitment in marriage because they would feel ethically compelled to do so, not because the state compels them. In addition, people seeking answers to questions of morality, such as the morality of same-sex marriages, would be forced to turn to their faith and its teachings, rather than to government and its secular laws. The  

166. See id.  
167. See id. (describing increased competitive forms of marriage); Joshua L. Weinstein, A Matter of State—and Church—The Debate Over Same-Sex Marriage Resounds Not Just in the Halls of Government, But Also in the Churches and Synagogues that May—or May Not—Perform Such Ceremonies, PORTLAND PRESS HERALD, Jan. 17, 2004, at 1C.  
168. According to traditional Christian perspective, “God himself is the author of marriage,” Wilhelm Ernst, Marriage as Institution and the Contemporary Challenge to It, in CONTEMPORARY PERSPECTIVES ON CHRISTIAN MARRIAGE 39, 47-52 (Richard Malone & John R. Connery eds., 1984), and the purpose of marriage is for God to unite man and woman in one flesh, see Mark 10:6-9.  
170. DAVID. M. THOMAS, CHRISTIAN MARRIAGE: A JOURNEY TOGETHER 22 (1983). Vatican II began to describe marriage as a covenant between the wife and husband in an attempt to get away from “the more traditional, but too restrictive, language of contract.” Id. The Council thought that the language of “covenant” would expand the theology of marriage because it would encourage “full focus on the persons involved rather than rights or services exchanged.” Id. at 23.  
171. See Ernst, supra note 168, at 52 (stating that the New Testament of the Bible envisions the “definitive and irrevocable character of the pledge of fidelity in marriage as an ethical requirement and not as an extrinsic, rigid law”).  
172. Under this new model, theologians could play an even greater role in shaping human behavior and choices. For a description of what theology has to offer, see THOMAS, supra note 170, at 25, who states the following:  

Theology can then be thought of as having a very practical purpose. It should use language accessible to all who might profit from its descriptions. Unwillingness to avail oneself of the insights and directives of good theology
increased study and research of one’s faith thus strengthens the institutions which that faith promotes.

Churches and synagogues in the United States have already begun to shift the focus of marriage away from its legal meaning to its religious meaning.\textsuperscript{173} For example, a United Church of Christ congregation in New Hampshire no longer conducts marriage ceremonies in the church.\textsuperscript{174} Instead, it offers a covenant ceremony for any couple that meets its requirements.\textsuperscript{175} If the couple is also interested in civil marriage, the congregation advises the couple to perform the civil marriage at the city hall.\textsuperscript{176} What happens in the church is strictly a religious ceremony, thus eliminating the church’s function as an agent of the state.\textsuperscript{177}

The minister of this church emphasized that, sadly, “what makes a real marriage for many people is not the religious ceremony, it’s the piece of paper.”\textsuperscript{178} He stated that covenant ceremonies encourage people to focus on the things that really matter, such as “how do you sustain a committed relationship?[,] how do you share your life fairly with another person?[,] and what does it mean to love in the hard times as well as the easy times?”\textsuperscript{179}

Under the alternative marriage model, these covenant ceremonies would constitute the marriage ceremony. Churches, synagogues, and other religious organizations would define marriage and would perform marriage ceremonies only for those individuals who meet their requirements. The requirements for marriage, therefore, would vary from church to church, and synagogue to synagogue.\textsuperscript{180}

The new marriage model thus would strengthen the institution of marriage by forcing individuals to focus on what truly matters in marriage instead of raises the chances that one will embark on an errant life journey. One might create all kinds of out-dated, silly, even harmful ideas about God and the human situation. Theologians are not infallible; but when they responsibly exercise their craft, what results is worth a hearing, particularly in areas touching everyday life.

\textit{Id.}

\textsuperscript{173} See Weinstein, \textit{supra} note 167.

\textsuperscript{174} \textit{Id.}

\textsuperscript{175} \textit{Id.}

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{See id.}

\textsuperscript{178} \textit{Id.}

\textsuperscript{179} \textit{Id.}

\textsuperscript{180} For example, certain requirements could be set like those of a rabbi of the Temple Beth El in Oregon, who has also performed commitment ceremonies like the pastor in New Hampshire: she will officiate a same-sex commitment ceremony, but she will not officiate an interfaith commitment ceremony. \textit{Id.}
VI. CONCLUSION

This Comment has sought to provide a brief overview of the nature and history of the gay marriage debate and to discuss an alternative marriage model that recognizes government's role in protecting marriage-like relationships but not in promoting marriage.

The gay marriage debate usually centers around the competing interests of (1) state legislatures and judiciaries, (2) state governments and the federal government, and (3) differing state judiciaries. However, rarely does the gay marriage debate focus solely on the interests of individuals. Under the alternative marriage model, the gay marriage debate would not disappear completely; however, the debate would disappear from the political realm, leaving individuals to debate gay marriage in the religious and cultural realm. Government would be left with the role of enforcing contractual relationships amongst individuals, while individuals in the religious and cultural realms would be left to define marriage and to perform marriage or covenant ceremonies. While significant costs are associated with reforming marriage, reform would eliminate the moral hazard costs associated with any type of wealth distribution scheme such as governmental promotion of marriage.

In addition, if reform is not undertaken, the gay marriage debate will become only more controversial as technology creates additional situations that government does not have the capacity to solve. Legislatures and judiciaries will no longer be deciding merely whether same-sex individuals may marry each other, but they will also be facing questions such as the gender of a transsexual for purposes of the marriage laws. As technology progresses, judiciaries and legislatures will continue to expend more and

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181. See id.
182. Without commenting on the merits of the Court's logic in Roe v. Wade, 410 U.S. 113 (1973), the author would like to underscore that this situation would not be the first one where government has conceded its incapacity to answer certain questions. See id. at 159 (Responding to the question of when life begins, the Court noted, "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").
183. See Kantaras v. Kantaras, 884 So. 2d 155 (Fla. Dist. Ct. App. 2004). This issue has faced the Florida court in Kantaras v. Kantaras, stating that, for the purposes of the marriage statutes, the biological sex of a transsexual is determined by the biological sex of the transsexual at birth. See id. at 161. Therefore, the plaintiff in the case, who was "a postoperative female-to-male transsexual person" could not "validly marry a female under the current law of [Florida]." Id. at 155.
184. See id. at 161 (stating, "Whether advances in medical science support a change in the
more time and resources deciding these unanswerable questions. These questions are best left to individuals, religious thinkers, and philosophers, not government.

Therefore, as Wisconsin voters prepare for the vote on the constitutional marriage amendment, they should ask themselves whether there are truly only two answers to the political question: Am I, and are you, for or against same-sex marriage?

CYNTHIA M. DAVIS