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# DUAL RATIONALITY OF SAME-SEX MARRIAGE: CREATION OF NEW RIGHTS IN THE SHADOW OF INCOMPLETE CONTRACT PARADIGM

SABY GHOSHRAY\*

**O Romeo, Romeo,  
Wherefore art thou Romeo?  
Deny thy father and refuse thy name,  
Or if thou wilt not, be but sworn my love,  
And I'll no longer be a Capulet.<sup>1</sup>**

## I. INTRODUCTION

**T**he story of Romeo and Juliet embodies the tragic theme of unattainable love, which tugs at the heartstrings of human emotions. Their unattainable love was due in part to the hate

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<sup>1</sup> See The Complete Works of William Shakespeare: Romeo and Juliet, Scene II, Act II at [http://www-tech.mit.edu/Shakespeare/romeo\\_juliet/romeo\\_juliet.2.2.html](http://www-tech.mit.edu/Shakespeare/romeo_juliet/romeo_juliet.2.2.html). *The Most Excellent and Lamentable Tragedie of Romeo and Juliet*, commonly referred to as *Romeo and Juliet*, is famous for a variety of themes, the most popular being love, or more notably unattainable love. This particular quote is clearly a recognized phrase from Shakespeare's play. Here, Juliet questions out loud from the balcony of her upstairs window, why must the man she love, Romeo have the last name of her family's enemy. But, she also proclaims, if he will not deny his family, his name, then she will deny her family, if only he will announce his love for her.

filled feud between Romeo and Juliet's families. Juliet's family, the Capulets, despised Romeo's family, the Montagues. Juliet, however, is not concerned with Romeo's name, as her love for him is greater than her family's hatred for the Montague name, "What's in a name? That which we call a rose, by any other name would smell as sweet," Juliet echoes.<sup>2</sup>

Juliet's desire to sanctify her love for Romeo symbolizes the eternal yearning of most couples to sanctify their union via societal approval in the form of a marriage. Since the days of yore, taking the husband's last name has been the symbolic representation of the couple entering into matrimony. What happens when society disapproves of one of the spouses because of their last name? Furthermore, what happens when society does not approve of the sexual relationship of the individuals who desire to marry? The above saga of Romeo and Juliet showcases these exact questions and typifies the power and influence society has in either approving or disapproving the behavior of individuals. The yearning for recognition, which existed in Romeo and Juliet, is reverberated across the length and breadth of this country, as same-sex couples<sup>3</sup> seek societal approval of their love in the form of marriage. Same-sex couples have been staging an uphill battle to gain the right to enter the protective paradigm of marriage. Many same-sex couples face severe hardships because they fall outside the umbrella of the full legal protection mechanism provided by marriage. Countless same-sex couples enter into loving, lasting relationships like their opposite-sex counterparts, yet are denied the very fundamental rights that come with such expression of exclusive commitment marked by marriage.

Marriage has profound social, cultural and religious meaning in the United States. Since the decision to get married is an intensely personal choice, it is impossible to

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<sup>2</sup> *Id.*

<sup>3</sup> The terms 'same-sex couple' and 'same-sex marriage' refer to individuals that are generally identified as gay, lesbian, or homosexual, and having romantic love, and sexual desire for members of the same sex and wish to formalize the bond within a legally recognized marriage.

enumerate all the reasons why couples decide to marry or to define or quantify the significance of the marital relationship across all communities and classes of people. In addition to the social, cultural, and religious meaning of marriage, it is also an important legal relationship.<sup>4</sup>

Despite being a private institution, marriage has been regulated by societal norms, religious perceptions, and legal doctrines. Although evidence of same-sex relationships predate centuries, historically marriage has been viewed as a heterosexual union, thereby precluding same-sex relationships from the definition of marriage.<sup>5</sup> Only recently, this complex and often controversial topic has become “part of a brave new world of family law that is now beyond the

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<sup>4</sup> Terence Dougherty, *Economic Benefits of Marriage under Federal and Oregon Law*, 3 (2004), <http://www.thetaskforce.org/downloads/reports/reports/EconomicBenefitsOR.pdf>.

<sup>5</sup> See Don Browning and Elizabeth Marquardt, *A Marriage Made in History?* N.Y. TIMES, Mar. 9, 2004, at A25, available at [http://www.americanvalues.org/html/marriage\\_history.html](http://www.americanvalues.org/html/marriage_history.html) (Historically there have been a variety of reasons for society to promote the institution of marriage. Often however, the many reasons are overlooked, as marriage is inevitably linked with only religious connotations. But:

Marriage is frequently characterized as a religious institution laden with old prejudices. It is true that Judaism and Christianity have contributed much to the Western understanding of marriage. But it is also true that they absorbed parts of the secular marital codes of Greek law, Aristotelian philosophy, Roman law and German law. Even in ancient secular systems, legal marriage was seen as a way to help society regulate and achieve a complex set of desires and goals: sexual activity, procreation, mutual help and affection, and parental care and accountability. Integrating these classic goods into the institution of marriage was a task for law, religion and other socializing elements of society. And although the religious language of sacrament and covenant adds weight to the law of marriage, each of the goods of marriage can be identified independently of the religious symbols that give them depth. *Id.*

See also Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 (2002).

complete control of either churches or gay rights advocates.”<sup>6</sup> As a result, “nearly a million gays and lesbians identified themselves as members of same-sex couples in the 2000 census.”<sup>7</sup> These same couples are being deprived of a bundle of rights, granted to opposite sex couples, such as inheritance and health care because of their denial of marriage rights based on sexual preference or sexual orientation.<sup>8</sup>

This unequal treatment of same-sex couples has been the focus of numerous judicial and legislative tugs of war over the last three decades.<sup>9</sup> Proponents both for and against

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<sup>6</sup> See William N. Eskridge, Jr. & Darren R. Spedale, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE’VE LEARNED FROM THE EVIDENCE*, 9 (2006).

<sup>7</sup> See Margie Mason, *Census Figures on Same-Sex Couples*, Aug. 8, 2001, available at <http://speakout.com/activism/apstories/10044-1.html>. For further census statistics in 2004, see generally U.S. Census Bureau, *America’s Families and Living Arrangements: 2004* at Table UC1-UC3, <http://www.census.gov/population/www/socdemo/hh-fam/cps2004.html>.

<sup>8</sup> For an excellent compilation of the many state and federal laws, as well as other articles on the issue of same-sex marriage, see Paul Axel-Lute, *Same-Sex Marriage*, Rutgers- the State University of New Jersey School of Law, Newark, Pathfinder Series, available at <http://www.rci.rutgers.edu/~axellute/ssm.htm>.

<sup>9</sup> Let us consider this tug of war. In the United States, some states do provide a variety of benefits to same-sex couples, but have not legalized same-sex marriages. Delving a little further, there is a complex web of state laws that add to the fog of confusion on the topic of same-sex marriage. For example:

On July 6, 2006, the New York Court of Appeals ruled that the New York state government is not required to allow same-sex marriage, affirming the constitutionality of a state law limiting marriage to a man and a woman. On the same day, July 6, 2006, the Supreme Court of Georgia reinstated constitutional ban on gay marriage. On July 26, 2006, the Washington Supreme Court ruled that the state’s DOMA was not unconstitutional and therefore same-sex marriage is an issue appropriate for the legislature and not the judiciary system. Only Massachusetts recognizes same-sex marriage Vermont and Connecticut offer civil unions, California, New Jersey, Maine and the District of Columbia grant benefits through domestic partnerships, and Hawaii has reciprocal beneficiary laws. In 1999, the Vermont Supreme Court decided *Baker v. Vermont*, 170 Vt. 194 (1999) that their state legislature must establish identical rights for

same-sex marriage harbor very strong views. As a result, the last few years have seen the development of a steady stream of legal scholarship, either supporting or denigrating the right to marry for same-sex couples.<sup>10</sup> In various states, the courts have been called upon to determine the validity of same-sex marriages in their respective states. Although the states of Hawaii<sup>11</sup> and Vermont<sup>12</sup> came tantalizingly close to bringing equality in marriage rights, the state of Massachusetts<sup>13</sup> was the first state to have finally achieved equality in same-sex marriage. Given the prevailing pulse of society, the stage was set for achieving the long-awaited marriage equality. The widely anticipated New Jersey Supreme Court ruling of *Lewis v. Harris*<sup>14</sup> again came short of granting equality in

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same-sex couples similar to those of married opposite-sex couples. The Massachusetts Supreme Judicial Court on November 18, 2003, ruled in the case of *Goodridge v. Department of Public Health*, 440 Mass. 309 (2003), that denial of marriage licenses to same-sex couples violates the state's Equal Protection Clause.

See Wikipedia, *Status of Same-Sex Marriage*, available at [http://en.wikipedia.org/wiki/Status\\_of\\_same-sex\\_marriage](http://en.wikipedia.org/wiki/Status_of_same-sex_marriage).

<sup>10</sup> See generally William N. Eskridge Jr., Darren R. Spedale & Hans Ytterberg, *Nordic Bliss? Scandinavian Registered Partnerships and the Same-Sex Marriage Debate*, Issues in Legal Scholarship, Single-Sex Marriage, 4 (2004)(abstract available at <http://www.bepress.com/ils/iss5/art4>).

<sup>11</sup> See *Baehr v. Lewin*, 74 Haw. 530, 645 (1993) (Hawaii is recognized as the first state to allow civil marriages to same-sex couples. IN 1993, the Hawaii Supreme Court held that limiting marriage only to opposite-sex couples was unconstitutional. Ultimately though, the state Constitution was amended to retain the restriction to marry only for opposite-sex couples).

<sup>12</sup> See *Baker*, 170 Vt. at 194 (The Vermont Supreme Court held that same-sex couples must have the same benefits that opposite-couples have. The Legislature created the civil union laws to comply with the mandate.)

<sup>13</sup> See *Goodridge*, 440 Mass. at 309 (The Massachusetts Supreme Judicial Court in 2003 held that restricting same-sex couples from privileges of marriage was unconstitutional, and the Court in 2004 also held that civil unions were not sufficient in meeting the mandate. Therefore, on May 17, 2004 the state of Massachusetts was the first state in the United States to approve same-sex marriages).

<sup>14</sup> See *Lewis v. Harris*, 188 N.J. 415 (2006) (The New Jersey Supreme Court affirmed on October 2006, that same-sex couples must receive the

marriage rights for same-sex couples. Despite the strong undercurrent of support percolating across the states, this denial in *Lewis*<sup>15</sup> reveals a profound Constitutional issue revolving around fundamental rights.<sup>16</sup> The ruling did, however, send a strong message. The State of New Jersey must provide opportunities for same-sex couples to enter into legally recognized unions. Furthermore, the Court requires the lawmakers to either (i) amend the current marriage statutes to allow same-sex couples to obtain equal rights and benefits similar to those of opposite-sex couples, or (ii) create new statutes with equal rights and privileges for same-sex couples within 180 days of the ruling.<sup>17</sup> Even with this strong message, it is important to analyze why the Supreme Court of New Jersey did not invalidate the settled law's provision against same-sex marriage after such extraordinary public interest and expectation.

The ruling recognized civil unions between same-sex couples by extending them rights and benefits similar to, but not equal to, marriage. New Jersey Governor Jon Corzine signed the 'Civil Union Bill' on December 21, 2006,<sup>18</sup> while expressing his sincere support for same-sex marriage rights. Governor Corzine lamented the fact that "society isn't ready for that, although he would sign a bill allowing same-sex

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same rights and benefits those opposite-sex couples were guaranteed. In December 2006, the Legislature then enacted a civil union statute to comply with the ruling of the New Jersey Supreme Court).

<sup>15</sup> *Id.*

<sup>16</sup> A journey through the historical archives of constitutional development in America will reveal that fundamental rights were created by various means. It came out of the Due Process Clause in *Roe v. Wade* which emerged from the Equal Protection Clause in *Skinner v. Oklahoma* as the Court said "fundamental right" "emanates" from the Bill of Rights, as shown in *Griswold v. Connecticut*. See *Roe v. Wade*, 410 U.S. 113 (1973) (discussion of the Due Process Clause); *Skinner v. Oklahoma*, 391 U.S. 535 (1942) (discussion of the Equal Protection Clause); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (discussion of the Bill of Rights).

<sup>17</sup> *Lewis*, 188 N.J. 415; see also accompanying text, *supra* note 14.

<sup>18</sup> See ABC7 Eyewitness News, *Garden State Equality's 'Practical Guide to Civil Unions'*, (Dec. 21, 2006), available at <http://abclocal.go.com/wabc/story?section=local&id=4872275>.

couples to marry.”<sup>19</sup> The New Jersey Civil Union Bill is not as expansive as many had hoped.<sup>20</sup> The right to marry still remains unattainable to same-sex couples, as noted in the legislation:

The Legislature, however, discerns a clear and rational basis for making certain health and pension benefits available to dependent domestic partners only in the case of domestic partnerships in which both persons are of the same sex and are therefore unable to enter into a marriage with each other that is recognized by New Jersey law, unlike persons of the opposite sex who are in a domestic partnership but have the right to enter into a marriage that is recognized by State law and thereby have access to these health and pension benefits.<sup>21</sup>

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<sup>19</sup> See Geoff Mulvihill, *N.J. Civil Unions Hung Up on 'Marriage'*, THE ASSOCIATED PRESS, (Dec. 5, 2006), available at <http://www.marriageequalityny.org/2006/12/nj-civil-unions-legislators-up-on.html>. (The Domestic Partnership Act, establishes a domestic partner status, and additional rights to same-sex couples that reside together, have proven mutual support, concern, and commitment for each other). See M. V. Lee Badgett, R. Bradley Sears, and Suzanne Goldberg, *Supporting Families, Saving Funds: A Fiscal Analysis of New Jersey's Domestic Partnership Act*, <http://www.lsnjlaw.org/english/family/domesticpartnership/njdpa/>. Institute of Gay and Lesbian Strategic Studies (IGLSS) and UCLA's Williams Project on Sexual Orientation Law and Public Policy, December 2003.

<sup>20</sup> See e.g., *Lewis*, 188 N.J. at 448 – 51 (The Domestic Partnership Act does not provide for marital property rights or automatic parental rights when a child is born to the couple. Also, “[T]he [Domestic Partnership] Act has failed to bridge the inequality gap between committed same-sex couples and married opposite-sex couples.” *Id.* at 448. “Significantly, the economic and financial inequities that are borne by same-sex domestic partners are also borne by their children too.” *Id.* at 450. “Even though they are provided fewer benefits and rights [by the Act], same-sex couples are subject to more stringent requirements to enter into a domestic partnership than opposite-sex couples entering into a marriage.” *Id.* at 451.).

<sup>21</sup> S. 2820, 210<sup>th</sup> Leg. §e (N.J. 2003), available at [http://www.njleg.state.nj.us/2002/Bills/S3000/2820\\_U1.HTM](http://www.njleg.state.nj.us/2002/Bills/S3000/2820_U1.HTM) [hereinafter “*NJ Domestic*”]

Economists and fiscal planners have been analyzing and dissecting the economic impact of legalizing same-sex marriage since the 2004 enactment of the New Jersey Domestic Partnership Act.<sup>22</sup> Against the backdrop of societal awareness of same-sex marriage, coupled with jurisprudential precedent set in the state of Massachusetts, the Supreme Court in New Jersey could very well have granted the right to marry for same-sex couples.<sup>23</sup> Since the New Jersey Court

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*Partnership Act*"]. See generally STEPHEN J. HYLAND, *NEW JERSEY DOMESTIC PARTNERS: A LEGAL GUIDE*, (2005).

<sup>22</sup> See LSNJ Law, *New Jersey's Domestic Partnership Act*, <http://www.lsnjlaw.org/english/family/domesticpartnership/njdpa/>. (The New Jersey Domestic Partnership Act includes the following rights and responsibilities for those registering under the Act: 1) "The right to decide about medical treatment and to visit in the hospital;" 2) "New Jersey state tax benefits;" and 3) "Public employee benefits" *Id.*

<sup>23</sup> See Dr. Nathaniel Persily, *Expert Comment on Same-Sex Marriage in New Jersey*, Dec. 21, 2006, <http://www.upenn.edu/pennnews/article.php?id=1065>. New Jersey residents were positively anticipating the New Jersey Supreme Court decision as both national and the state opinions in New Jersey clearly indicate a trend of growing acceptance of same-sex marriage. In a recently conducted University of Pennsylvania study, it was shown that when it comes to the issue of same-sex marriage, many more people support civil unions, granting unmarried couples many of the legal rights of marriage. The study showed:

Our research has found that the backlash that followed the Massachusetts court's decision to allow gay marriage has completely subsided. The share of the American public supportive of same-sex marriage has returned to the place it was before the courts got involved and appears to be on an upward trajectory. During that same period, an increasing share of the American public became in favor of same-sex civil unions that fall short of marriage. The same-sex marriage debate in the courts has moved the national debate and public opinion to the left on this issue, even if no other state has followed Massachusetts' lead. ... Our conclusion is that because of the court decisions in 2003 and 2004, the debate over same-sex relationships moved to the left, and civil unions became the middle position. *Id.*

See also, American Civil Liberties Union, *State Public Opinion from States on Civil Marriage and Other Recognition of Same-Sex Relationships*, [http://www.aclu.org/getequal/ffm/section78/8b4\\_summary.pdf](http://www.aclu.org/getequal/ffm/section78/8b4_summary.pdf) (a *Star Ledger/Eagleton-Rutgers* - September 2003 Poll reveals the

fell short of equalizing marriage rights, the legislature came up with the idea of a civil union instead of a marriage right. However, it is not the equality long envisioned by the proponents of same-sex marriage.<sup>24</sup> Why are recognition and

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following favorable statistics for same-sex marriage: 43% would allow same-sex couples to marry, 52% would allow civil unions, 53% would allow legally married same-sex couples from other states who move to NJ to be recognized as married in NJ, 60% thought same-sex couples should be entitled to health insurance and social security benefits through their partners).

<sup>24</sup> Although, marriages between same-sex couples have not been recognized officially, there are states that offer something similar, besides New Jersey. *See e.g.*, *Baker v. Vermont*, 170 Vt. 194 (1999) (Vermont gives essentially equal treatment to marriage and same-sex civil unions by the enactment of a law in response to a state court decision mandating civil unions). *See also* S.B. 379, 2005 Leg., Gen. Assemb., (Ct. 2005), [http://hartford.about.com/od/connecticutlaws/Connecticut\\_Laws.htm](http://hartford.about.com/od/connecticutlaws/Connecticut_Laws.htm) [follow “Civil Union Law Passes in Connecticut” hyperlink; Scroll to end of text, then follow the “view the ‘complete text’” hyperlink] (In 2005, Connecticut enacted a law giving essentially equal treatment to marriage and same-sex civil unions, thus making it the first state legislature to enact civil union law without a court order. In this context, Connecticut State Insurance Department says that fully insured health plans are required to treat partners in a civil union the same as spouses are treated for purposes of health care benefits. However, the full impact on employers that sponsor fully insured health care plans is yet to be clarified, as it is not clear if they would have to pay for partners in civil unions, raising thereby the confusing conundrums the issues of marriage and civil union are bringing). *See also* Bob Egelko, *San Francisco State's Domestic Partner Law Survives a Legal Challenge*, SAN FRANCISCO CHRON, June 30, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/06/30/BAG22DGUC31.DTL> (California enacted the State Defense of Marriage Act (hereafter DOMA), via ballot initiative in 2000, even though it has domestic partner laws. From a healthcare point of view, California requires all group health care service plans to provide domestic partners with health coverage that is equal to what spouses receive. In addition, it applies to health care coverage offered by employers, not to self-insured health care coverage. What is not clear, however, whether California can require an employer that does not offer domestic partner coverage to offer or subsidize such coverage when providing an insured plan. In this context, it is worth noting that, California’s domestic partner law survived a legal challenge, *Knight vs. Superior Court*, S133961. The State Supreme Court rejected arguments that domestic partner law was the equivalent of marriage, in a case where the plaintiffs said it violated California’s DOMA. State Supreme Court ruled that domestic partnership was not

rights of equality so hard to come by?<sup>25</sup> While these are some of the poignant questions that confront us today, a broader economic analysis of the cost-benefit of same-sex marriage within New Jersey reveals that the economic impact of same-sex marriage is conducive to granting marriage rights to same-sex couples.<sup>26</sup> The New Jersey legislature's decision

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equal to marriage. As a result, in California, domestic partners are not eligible for some state marital benefits and a wide range of federal benefits. As the Court held, "...the domestic-partner law was not equal to marriage. The courts noted that partners are ineligible for some state marital benefits and a wide range of federal benefits and may be unable to get other states to recognize their relationships.")

<sup>25</sup> Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

<sup>26</sup> See M.V. Lee Badgett & r. Bradley Sears, *Equal Rights, Fiscal Responsibilities: The Fiscal Impact on AB205 California Budget*, 2003, <http://www.law.ucla.edu/williamsinstitute/AB205/AB205Study1.pdf> (By using data from New Jersey residents in Census 2000 and using experiences from other states, Badgett and Sears were able to quantify the likely fiscal effects of the Domestic Partnership Act (hereafter DPA)). See also M.V. Lee Badgett, and R. Bradley Sears, *Supporting Families, Savings Funds: A Fiscal Analysis of New Jersey's Domestic Partnership Act*, November 2003, <http://www.law.ucla.edu/williamsinstitute/publications/NJ-DPAStudy.pdf> [hereinafter *Supporting Families, Saving Funds*] (According to them, out of the rights and benefits provided to domestic partners in the DPA, only three seem to have any fiscal significance : (i) "the State will likely save from \$46 to \$92 million in avoided public assistance expenditures;" *Id.* at 22. (ii) "covering the health insurance of [same-sex] domestic partners of state employees and retirees will add approximately \$7 million in state expenditures, [not withstanding the fact that] [m]aking same-sex domestic partners eligible for spousal survivor benefits will probably not result in any increase in state expenditures;" *Id.* (iii) "[t]he State will also experience a loss in transfer inheritance tax revenues in the range of \$4.3 to \$7.8 million." *Id.* Badgett and Sears concluded that the DPA will have a positive impact on the state budget. They further noted that, even if their predictions about the State's savings from public benefits is too high, their smallest estimate for those savings could be reduced by two-thirds, and there would still be enough savings to off-set the highest projections for the additional costs of providing state employees with same-sex registered domestic partner health benefits and the potential loss in inheritance tax revenues. *Id.* Badgett and Sears concluded that the net impact of the DPA is over \$61 million in fiscal savings each year and thus, the Domestic Partnership Act will provide material support to many New Jersey families without placing a strain on the state budget. *Id.*).

to deny marriage equality, therefore, does not reside in the budgetary concerns of adverse economics<sup>27</sup> nor is it based on the practicality of economics,<sup>28</sup> but perhaps embedded in the deeper sanctum of the Constitution's fundamental rights doctrines. Within these doctrines lies the explanation for marriage inequality, particularly within the democratic ideals and long standing constitutional jurisprudence of America.

The liberal movement of granting equal rights of marriage to same-sex couples has withstood the agonizing years of abhorrence and apathy and dragged through decades of tacit approval and silent endorsement. The issue of marriage equality, after having been decided on and permitted in Hawaii, Vermont, Massachusetts, and California, has now touched the hallowed halls of the New Jersey Supreme Court. Despite evidence of the positive impacts far outweighing the negative impacts, the *Lewis* Court's implicit recognition of marriage equality remains unattainable.

In an effort to reconcile the inconsistency between liberal ideals and inequitable adjudication of marriage rights amongst our citizens, this article will seek answers to these issues. By straddling the contractual confines of marriage via law and economic analysis, Part II of the article explores the contractual paradigm of marriage to examine whether the framework is independent of sexual orientation and if the deliberately incomplete nature of marriage can provide consistencies for all types of marriages. Part III examines whether the private aspiration of marriage should necessarily

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<sup>27</sup> See Supporting Families, Saving Funds, *supra* note 26 (Economic analysis shows that granting marriage rights to same-sex couples could bring in substantial budgetary savings to the state. In their study, Budget and Sears have shown that depending on the proportion of couples who register, the State could save \$50 to \$100 million in welfare disbursement expenditures. They contended, however, "[t]he savings could be somewhat less if the State only assesses eligibility based on domestic partners' resources for WFNJ/TANF and Medicaid." *Id.* at 4. "As a lower bound, [however, the study showed] adding the estimates of current spending on WFNJ/TANF and Medicaid suggests that the State will save from \$46.2 to \$92.4 million if the FEA [DPA] is enacted." *Id.* For their calculations, see *Id.* at 4, Table 2.).

<sup>28</sup> *Id.* at 11.

be linked with public consequences by evaluating the impact of marriage's social cost borne by the participants in a marriage incongruent with broader societal norms. Finally Part IV engages in an analysis to determine whether equality of marriage rights come from creating new constitutional rights or it can be achieved by searching the outliers of unenumerated rights. Perhaps, implicit within these threads, somewhere buried deep beneath the constitutional labyrinth lies the answer to how long it must take to truly incorporate the *Lewis* Court's insightful view that, "equality of treatment is a dominant theme of our laws and a central guarantee of our state constitution."<sup>29</sup>

## II. DECONSTRUCTING TRADITION: MARRIAGE AS INCOMPLETE CONTRACT PARADIGM

By taking an expansive view of marriage as a social contract, it is imperative to understand whether the idea of same-sex marriage is inconsistent within the broader construct of marriage as an institution. Although the concept of marriage originated from the historical judicial interpretation of the union between a man and woman, its construct has evolved due to its attendant legal consequences and the contractual mechanisms that shape its contours. As newer intimate adult relationships evolve, the nature of societal relationships unravel to such an extent that the contractual obligations and legal protection surrounding marriage take on a more expansive meaning. Implicit in this expanded construct of marriage resides the issue of social welfare<sup>30</sup> and the impact to third parties or children,<sup>31</sup> which

<sup>29</sup> *Lewis v. Harris*, 188 N. J. 415, 456 (2006).

<sup>30</sup> See John Fitzgerald, *Marriage Prospects and Welfare Use*, in *MARRIAGE AND THE ECONOMY: THEORY AND EVIDENCE FROM ADVANCED INDUSTRIAL SOCIETIES* 177, 177-97 (Shoshana A. Grossbard-Shechtman ed., 2003).

<sup>31</sup> Perhaps no other entity is impacted so significantly than the children. Commentators have noted that, "Children are the most important marital-specific asset and one of the main advantages of the family." See Christina Muller, *An Economic Analysis of Same-Sex Marriage*, in 2002 GERMAN WORKING PAPERS IN LAW AND ECONOMICS art. 14, 6, available at <http://www.bepress.com/cgi/viewcontent.cgi?article=1045&context=gwp>

further shapes the contours of marriage's contractual mechanisms. Therefore, this article will analyze whether the institutional structure of marriage requires the conservative fundamentals of religious doctrines and gender-centric viewpoints for continuation.

Marriage can be seen as a social contract that brings specific legal consequences<sup>32</sup> and inherits socio-economic impacts that come from its welfare protection mechanism and third-party implications. Among the different types of contracts that marriage can encapsulate, several categories are more prominent than others: (i) no-fault contract,<sup>33</sup> where the parties can walk away from the marriage obligation without showing any cause for the breakup, (ii) mutual-consent contract,<sup>34</sup> where both parties are required to come to an agreement for dissolution of the contract, (iii) default

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(The author of the study presented a utilitarian viewpoint of children as public goods for their parents, emphasizing the need for a stable married relationship for the development of quality in their offspring. This therefore, established how marriage is a vital ingredient for the betterment of the next generation of citizens.) *See also* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 156 (5th ed., 1998) (1977) (Posner describes a set of advantages arising out of marriage). *See also* Barbara Bennett Woodhouse, *The Constitutionalization of Children's Rights: Incorporating Emerging Human Rights Into Constitutional Doctrine*, 2 U. PA. J. CONST. L. 1, 3 (1999).

<sup>32</sup> *See generally* Steven E. Landsburg, *The Marriage Contract: Divorce Is Just a Breakdown in Negotiations*, EVERYDAY ECONOMICS, Sept. 12, 1997, available at <http://www.slate.com/id/2042>.

<sup>33</sup> *See generally id.* (In several states, a no-fault divorce is granted when it is not required for either spouse to show fault, or a reason for the breakup of the marriage. No-fault, also allows for either spouse to obtain a divorce, even if the other spouse does not agree to the divorce. A no-fault divorce is also granted if the couple has been living separated for three years.).

<sup>34</sup> *See id.* A mutual-consent contract is exactly as it sounds. Both spouses agree to end the marriage in a divorce. Mutual-consent divorce circumvents the difficult issues that arise in the one-sidedness of no-fault divorce, as it does not permit one spouse to divorce without obtaining the consent of the other spouse. In mutual-consent divorce process, the spouses, instead of the government/judges, make the decisions such as custody and how the assets/finances are distributed.

contract,<sup>35</sup> in which the states will impose laws, without the explicit provisions of a premarital contract, and (iv) covenant marriage,<sup>36</sup> a type of contract that makes it more difficult on both parties to dissolve the marriage due to the binding nature of the contract.

The concept of marriage has evolved from the medieval marriages of trade-off and arrangements by elders<sup>37</sup> to marriages that are mergers marked by ideals of individual liberty and spousal equality.<sup>38</sup> The scope and limitations of the marriage contractual construct have expanded. However, within the congruent limits of liberating ideals of spousal rights and responsibilities, the understanding of the contractual dimension of marriage is still evolving. While a nexus of contract binds the two entities involved in a

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<sup>35</sup> In various states, a default divorce is granted due to non-performance by a spouse. Literally, the non-performing spouse defaults and therefore, the spouse that originated the filing of the divorce documents is generally awarded what was requested in the complaint for divorce. *See id.*

<sup>36</sup> In general, covenant marriage laws require a couple to follow the state law; in addition, the couple must complete marriage counseling prior to the marriage and also complete counseling before a divorce is granted. *See generally* Lyle Jones, *An Analysis of Covenant Marriage in Arizona: as Fault Divorce and Contract*, Associated Content (2006), [http://www.associatedcontent.com/article/19864/an\\_analysis\\_of\\_covenant\\_marriage\\_in.html](http://www.associatedcontent.com/article/19864/an_analysis_of_covenant_marriage_in.html).

<sup>37</sup> *See* STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE* (1989) (Mintz and Kellogg describe the marriage behaviors of the new Pilgrim immigrants. The Pilgrim marriages were controlled and arranged by the parents controlling their children as a source of family income. Through dowries and inheritance, marriages helped increase family bonds and the ties through intermarriage of first cousins, as well as brothers and sisters were valuable to facilitate the family wealth, status and political ambitions.).

<sup>38</sup> *See* Lorna Jorgenson Wendt, *Creating a Prenuptial Agreement, Equality in Marriage Institute*, <http://www.equalityinmarriage.org/bmprenup.html> (No longer are prenuptial agreements for a select few individuals. Regularly, couples preparing for marriage enter into legal prenuptial agreements prior to marriage. The prenuptials are designed to protect the merger of the two individuals into marriage arrangement. Prenuptial agreements are designed to protect the married partnership. Creating a postnuptial agreement also “reflects equality in financial matters.” *Id.*).

marriage, that nexus is shaped by the relative preferences,<sup>39</sup> economic incentives,<sup>40</sup> and game-theoretic decision-makings<sup>41</sup> of the individuals involved. Although the implicit promise of a performance of the contract remains intact, both the content and cost of that contract is continuously changing within a marriage. Three fundamental factors distinguish a marriage contract from other contractual arrangements. First, there is not just one contract that defines marriage, but a multitude of contracts, sometimes inter-connected, often concurrent and even embedded within one another, all shaping the construct of marriage. Therefore, a marriage can be seen as a nexus of contracts, more like the mechanisms of a corporation. Second, success or failure of the marriage contract depends on the relative preferences between the two

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<sup>39</sup> This is the phenomenon in which agents or entities can affect the outcome of an event by tailoring their responses based on relative preference between agents in a two-party game, or amongst agents in a multi-party game. The assumption in this standard economic model is that individuals are rational and they are driven to maximize their expected utility. Recent evidence suggests that some agents' utility depends on both their own payoff and the payoffs of others. Therefore, an individual's satisfaction may depend on how much she receives relative to those in a reference group. For an excellent discussion of relative preference, see generally Michelle Alexopoulos & Stephen Sapp, *Exploring the Behavior of Economic Agents: The Role of Relative Preferences*, in 12 *ECONOMICS BULLETIN* 1, 1–7 (2006), available at <http://economicsbulletin.vanderbilt.edu/2006/volume12/EB-06L20001A.pdf>.

<sup>40</sup> Fitzgerald, *supra* note 30.

<sup>41</sup> See David K. Levine, *What is Game Theory*, Department of Economics, UCLA, available at <http://levine.sscnet.ucla.edu/general/whatis.htm> (Focusing on the interaction of couples in relationships, in particular marriage is important. Particularly, exploring interaction between individuals within the marriage, to meet their individual goals, while also working for the ultimate good of the marriage relationship. To better understand game-theoretic decision making, consider that:

Although game theory is relevant to parlor games such as poker or bridge, most research in game theory focuses on how groups of people interact. There are two main branches of game theory: cooperative and noncooperative game theory. Noncooperative game theory deals largely with how intelligent individuals interact with one another in an effort to achieve their own goals. *Id.*

entities, the asymmetry of economic incentives between the two entities, and the game-theoretic decision making between the two entities. These factors change over time resulting in a continuous evolution of contracts in both its implicit promise and cost of execution, and which makes the marriage contract a dynamic self-reinventing nature. Thirdly, if we agree to the premise that marriage is a complex web of multiple contracts, as evident by constant change, the idea of marriage is best encapsulated within an incomplete contract paradigm.<sup>42</sup>

#### A. Nexus of Contract View of Marriage

In a marriage, the involved entities are continuously entering and exiting various forms of contracts. More often, the performance of a long-term contract is dependent on entering into an existing contract from numerous smaller intermediate contracts. This continuous and evolving process ends only in the dissolution of marriage. Furthermore, when the dynamic nature of contract formation and contract restructuring becomes static, it signals either the marriage is approaching termination or was never formalized in the first place.

Some implicit and explicit contractual terms are contained within the expansive confines of marriage's contractual obligations. In addition, marriage involves a combination of complete and incomplete sets of contracts. Most contractual arrangements of a marriage include a set of inter-locking and dynamically interacting sets of complete and incomplete contracts, with the majority being incomplete. Marriage creates a freestanding entity to pursue a set of objectives whose limits are bound by a set of contractual agreements. This entity creates legal rights, social responsibilities, and various third party consequences, through its formation. The entity also inherits performance expectation and legal consequences as a prerequisite to its existence within the society, much like a corporation would.

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<sup>42</sup> See Saby Ghoshray, *Cyberspace Contracting: Embracing Incomplete Contract Paradigm in the Wake of UCITA Experience*, 11 TEX. WESLEYAN L. REV. 609 (2005).

Therefore, the marriage nexus of a contract is treated as an entity similar to a corporation. It could be seen as a quasi-corporate structure. When a corporation dissolves, the constituent elements remain responsible for legally mandated performances. Similarly, in a marriage, the constituent components become responsible for the legally mandated performance as stipulated either by the pre-marital contractual arrangements, or by the default provisions of the contract implicit within marriage.

The discussion above begs the questions: Do corporations have a specific gender? Is sexual orientation a mandatory requirement for the performance of the corporation? Could the existence of a corporation be denied because of the assigned sex to the corporation? We know that the answer to all these questions is negative. Therefore, if a corporation is not dependent on sexual orientation, why then, does sexual orientation matter for a marriage to be recognized, nurtured, and for it to prosper? Implicit acceptance of the corporation like structure of marriage is consistent with the ideals of supporting and legalizing marriage between same-sex couples.

### **B. Preference, Incentive and Game-Theoretic Decision Making: Dynamics of Marriage**

The incomplete contract paradigm<sup>43</sup> implicit in a marriage differs structurally from that of a corporation in its ability to dynamically alter the terms and conditions of the marriage. In this regard, contractual elements within a corporation are more fixed than those contained in a marriage. This is so, because in most marriages, the contractual terms and conditions go through a continuous evolution; contractual flexibility arrangement that a corporation does not have. In this context, this article identifies three main drivers that shape the contractual arrangement in practice within marriages. These are (i) individual preferences of the entities involved in a marriage, (ii) their personal incentives, and (iii)

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<sup>43</sup> *Id* at 625.

game-theoretic decision-making at play for both entities. For explicit purpose of this discussion, this article will consider only the relationship of a couple and forgo any discussion on polygamous<sup>44</sup> and polyandrous marriages.<sup>45</sup>

In a marriage, short-term contracts are created such that they are neither definite nor complete contracts due to the asymmetry in preferences between the couple. This asymmetry creates unequal and diverging incentives to complete the contractual obligations. As a result, individual parties to the contract are driven differently to either complete or alter the terms of the contract. Here, the two parties may be sharing the same resources, but each has different preferences surrounding the scope and enjoyment of those resources. This in turn drives a bargain mechanism, whereby each is influenced differently to complete the contract.

For example, two spouses enter into a contract regarding who will wash the dinner dishes. In this arrangement, the end terms are deliberately incomplete, not explicitly specifying the consequences for non-performance. Suppose the assignment of performance, doing the dinner dishes, is based on the person whose preference will be watching television in the evening. Now, suppose one spouse enjoys football on a Sunday evening, the other clearly is interested in reality television shows and they are sharing one television set.

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<sup>44</sup> Polygamy is defined as having more than one spouse at a time, for the vast majority this has been reflected in society with the male spouse having multiple wives. See generally Daniel Bachman & Ronald K. Esplin, *History of Plural Marriage/Polygamy*, in 3 *ENCYCLOPEDIA OF MORMONISM*, (1992), available at [http://www.lightplanet.com/mormons/daily/history/plural\\_marriage/History\\_EOM.htm](http://www.lightplanet.com/mormons/daily/history/plural_marriage/History_EOM.htm). See also Online Muslim Matrimonial, *Why Polygamy Is Allowed in Islam*, <http://www.ezsoftech.com/omm/polygamy.asp>.

<sup>45</sup> See Kelly Stewart, *Honey We're Home*, *THE DAVIS ENTERPRISE*, (1997) available at <http://www.anthro.ucdavis.edu/faculty/stewart.htm> (Polyandry is defined as having more than one husband at a time. However, the Tibetan culture approves of this style of marriage and because of this has become a focus of study for researchers. "Typically in a polyandrous system, a woman marries a man plus his brothers, who "share" her. Never knowing for certain whether they are fathers or uncles, the men treat the children born into the family as their own." *Id.*).

Here, the preference asymmetry between football and reality shows determines the performance of doing the dishes. Who will do the dishes is being kept open because the incentive to do the dishes is dependent on the preference over television viewing. Clearly, by giving up the preference of one's chosen television program, the spouse in question could opt out of performing the dishes. The spouse in question could re-enter into a second contract of not getting involved into an act by altering the conditions of the previous contract, by choosing to do the dishes and to also give up watching her favorite television show. The game-theoretic decision-making enters the dynamics in such that, one spouse knowing the preference profile of the other, gets into a contract with incentive such that the counterparty will more likely than not be unable to perform the contractual obligation. When competing interests of the contract are shaped by relative incentives among the participants, each party to the contract will try to gain economic advantages by entering into contracts based on their expectation of how the other party will perform.

Often times, two spouses enter into a contract via bargaining.<sup>46</sup> Evidence of contract via bargaining can be seen in the framework of prenuptial agreements executed prior to marriages. During the bargaining process, the two parties enter into contractual obligations with specified terms and conditions of non-performance. When a particular spouse influences the structuring of a particular performance clause, like that of the non-performance by the other spouse, it will result in a higher economic gain for the counterparty. If the spouse knows the preference of the other and negotiates in such a way that the probability of non-performance by such counterparty is higher than that of performance, she stands a better chance of coming out ahead.

The foregoing discussion illustrates why keeping the contract deliberately incomplete has an economic value

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<sup>46</sup> See Robert B. Standler, Prenuptial and Postnuptial Law in the USA, April 24, 2004, <http://www.rbs2.com/dcontract.pdf>. See also Hedieh Nasheri, *Prenuptial Agreements in the United States: A Need for Closer Control?* 12 INT'L J.L. POL. & FAM. 307 (1998).

higher than that of making it a complete contract. We have shown how asymmetry is a preference and how divergence in economic interests creates contractual surplus in contracts that contain provisions for changing the definition of performance and including a penalty for non-performance. In addition, because of emotional factors involved in marriage, the preference profile and incentive structure could change for both parties, making it advantageous to deliberately keep most contracts incomplete.<sup>47</sup>

My analysis above explores the complex web of contracts contained within a combination of complete and incomplete and implicit and explicit sets of contracts. In cases where complete contracts are available, it is likely that the component of completeness is embedded with a larger incomplete contract. Similarly, most implicit contracts contain a multitude of smaller explicit contracts. Implicit contracts, by definition, are incomplete. Therefore, marriage in general embodies the incomplete contract paradigm, fully laden with interactive manifestation of asymmetric preferences and diverging incentives of the parties.

To conclude this section, it is clear that the performance of a marriage is governed by a series of contractual arrangements. The contracts themselves are too numerous, widely diverse, and structurally incomplete in nature. However, the structure and the performance of these contracts are no way dependent on the sexual proclivity of the individual parties for the overall function of the marriage mechanisms. Similarly, the mechanism is not influenced for its existence or efficient functioning on the sexual orientation of the parties involved. Thus, the corporate-like functional identification of marriage is not consistent with the view that sexual orientation or sexual preferences of the partners determine the characteristics of making a successful marriage.

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<sup>47</sup> For a discussion on incomplete contract paradigm, see Saby Ghoshray, *Cyberspace Contracting*, 11 TEX. WESLEYAN L. REV. 609, 625-26 (2005).

### III. PRIVATE ASPIRATIONS, PUBLIC CONSEQUENCES: REGULATING INTIMACY BY IMPOSING SOCIAL COST

Marriage is the culmination of private decisions borne out of romantic involvement of two individuals. Legal consequences of marriage allow for immediate amalgamation of married couples into the social welfare system. Marriage also brings spontaneous immersion of the individuals within a protection paradigm. With this, an intimate private matter now becomes subject to public scrutiny and thus could become the focus of public sentiment. It can be argued, that as long as a marriage does not interfere with another individual's rights, there is absolutely no case for denial of marriage to any couple, particularly when the denial of marriage keeps the couple outside of the legal protection paradigm and the social welfare system.<sup>48</sup> Within current society, marriage immediately brings a couple into a different

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<sup>48</sup> See Jean L. Cohen, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* 6 (2002). (Cohen outlines the history and the recent adjustment to the idea of regulating intimacy in society:

This mode of regulating intimacy had a clear logic: the states' public purpose was to promote heterosexual marriage and, within that institution, to support reproductive sexuality and shield the family unit. The states' privileging of heterosexual monogamous marriage and the "natural" patriarchal gender order it institutionalized meant that privacy protection was limited to the nuclear family unit. The "civil death" of the married woman—her lack of legal personality and civic equality—fit this model perfectly. Correspondingly, states had considerable freedom to regulate non- or extramarital intimacies or "public morals."

The new constitutional privacy analysis turns this approach on its head. It articulates the concept of a right to personal privacy as an individual right of ethical decisional autonomy (to pursue one's conception of the good), control over access and personal information, and a new conception of the scope of individual privacy that now applies to important aspects of the domain of morals, formerly the special preserve (along with health and safety) of state regulation. *Id.* at 6.).

protection and welfare umbrella than non-married persons. Therefore, the public sentiment about marriage must be viewed objectively. This section attempts to develop a framework to understand whether society unjustly imposes moral limits and ethical boundaries on private romantic relationships. If society does impose such limits, do they have the right? Can the majority's rejection of a private declaration of intimacy be seen as a cost of social outrage within the contractual framework? Further, does society have the right to regulate intimacy and define private romantic relationships?

#### **A. Public Consequences of Private Intimacy**

Marriage is a public act of a private decision between two individuals. With the progress of society's liberal ideals, the individuals involved in marriage do so according to their free will, without any coercive mechanism at play. Society views marriage as a culmination of private intimacy between two consenting adults who want to be bound by the legal recognition and consequences of marriage. Implicit within these legal consequences of marriage are the protections of marriage, such as social welfare protection and benefits of tax redistribution. When two individuals enter into a relationship, there is no limit placed on that relationship from a social ordering or economic consequences point of view. However, as soon as the relationship becomes transformed into marriage, the social order takes over.

Let us consider the human factor to marriage and the tangible protection measures that come from having the right to marry. Consider the frightening scenario of two couples, John and Rosa and Juan and Ryan.

On the historic, horrific morning of September 11, 2001, John kissed his wife, Rosa, goodbye before heading to his job as an office-cleaner in the World Trade Center's North Tower. Rosa never heard from her husband again. After searching frantically for days, Rosa

accepted the reality of his disappearance. She filed for a death certificate and arranged her husband's memorial service. Rosa received Workers' Compensation from the state and a small Social Security death benefit from the federal government. She contacted John's former employer, who arranged for receipt of his pension. Because John and Rosa had few assets, they had never seen the need for a will, nor did they have the financial means to hire a lawyer to prepare one. Nonetheless, John's assets, which included a small savings account, their home and a car, were given to Rosa by law.

That same morning, Juan kissed Ryan, his partner of 21 years, goodbye and headed to his job as a file-clerk in that same North Tower. Like Rosa, Ryan never heard from Juan again. Ryan applied for Workers' Compensation and Social Security, but, unlike Rosa, he was told he was not eligible for those benefits because he was not Juan's legal spouse. Even though Juan and Ryan had taken some precautions to protect their commitment — such as registering as domestic partners, designating one another as beneficiaries on insurance policies, and executing health care proxies and powers of attorney — and even though Juan paid the same taxes as John, Ryan was not automatically entitled to any of the compensations given to Rosa. In addition to his emotional devastation, Ryan was financially devastated as well.

Why did Rosa have an economic safety net, while Ryan did not? The answer can be summed up in two words: "I do."

By getting married, John and Rosa gained access to critical legal protections and benefits for couples and their children that provided for

them in their time of need. Married couples are entitled to literally hundreds of rights and protections that permeate their financial relationship, both in extraordinary circumstances such as the one mentioned above, or in everyday matters, like simply renting a car.<sup>49</sup>

While the couples in this story and the exact details are set in a hypothetical scenario, the magnitude of extraordinary difficulties same-sex couples endured are real. Not only were same-sex couples victims of 9/11, but they did not have the protection mechanism of marriage.<sup>50</sup>

Marriage brings with it societal rights and responsibilities, economic protection, and expectation exposure. For example, when an individual earns an income, he or she pays tax. When two individuals get married, the total tax payment, in general is less than the sum of the taxes paid as individuals. This redistribution of tax is seen as an economic benefit to the marriage and can be seen as a cost to society.<sup>51</sup> Therefore, the private individual decision results in a loss of

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<sup>49</sup> Lambda Legal, *Gay Partner of 9/11 Victim Urges California to Support Freedom to Marry*, Feb. 11, 2002, <http://www.lambdalegal.org/news/pr/gay-partner-of-911-victim.html> (While the details of this story are hypothetical, real same-sex couples faced additional hardship because they were not recognized as married. One such example of a partnership of 11 years, “A gay California man whose partner died in the September 11 terrorist attacks says the plight he now faces vividly shows why his home state must allow lesbian and gay couples to marry. Jeff and I got as close to marriage as we could with our domestic partnership,” according to Keith Bradkowski. His partner Jeff Collman, was a flight attendant killed in the attacks. “But it wasn’t protection enough, and now I am legally vulnerable in ways I never imagined.” *Id.*).

<sup>50</sup> *Id.*

<sup>51</sup> Fitzgerald, *supra* note 30. See also Liz Pulliam Weston, *The Myth of the Marriage Penalty*, available at <http://moneycentral.msn.com/content/Taxes/P48908.asp> (There are tangible benefits for marriage. “Despite complaints about higher taxes on married couples, the reality is that more couples get a bonus when they marry than suffer a penalty. Add to that legal and financial benefits, and marriage looks like a pretty good deal.” *Id.*).

economic revenue to society.<sup>52</sup> Society must recuperate this loss, in some form, from the married couple. Defining the exact form and cost to the society is at the heart of much debate that encompasses the spheres of morality and ethics.

### **B. Shaping Intimacy by Social Outrage and Imposed Morality**

Marriage brings with it a protection mechanism within the established legal doctrines.<sup>53</sup> When two individuals get married, they become subjected to a legal framework whereby each party inherits a protection mechanism in the event of the dissolution of the marriage. For example, a single individual does not have the economic protection of being taken care of in case he or she loses his or her livelihood. In the event of a marriage, the more economically solvent partner becomes economically responsible for taking care of the less economically solvent partner. This protection mechanism afforded to the individual members in a marriage comes via the legal framework created to extend and expand

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<sup>52</sup> See Muller, *supra* note 31 (Muller suggests that by granting tax breaks and legal benefits to the same-sex couple, the government is giving away economic benefits that are not accompanied with any other economic benefits and questions the justification of those added expenses by the government. However, the additional cost borne by the government in providing tax breaks in a same-sex marriages is more than compensated by the economic gain obtained via stabilizing families through the recognition of marriage.). See also M.V. Badgett, *The Fiscal Impact on the State of Vermont of Allowing Same-Sex couples to Marry*, IGLSS Technical Report 98-1, October 1998, available at <http://www.buddybuddy.com/iglss-2.pdf>; Nancy K. Kubasek, Kara Jennings, & Shannon T. Browne, *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 LAW & SEXUALITY 55 (1997); Jeffery Escoffier, *The Political Economy of the Closet: Notes Toward an Economic History of Gay and Lesbian Life Before Stonewall*, in HOMO ECONOMICS: CAPITALISM, COMMUNITY, AND LESBIAN AND GAY LIFE 125 (Amy Gluckman and Betsy Reed eds. 1997).

<sup>53</sup> Marriage brings with it a package of legal rights, which will not be available otherwise. By protection mechanisms, the plethora of benefits such as health care to tax breaks that are accorded to both spouses within the marriage. All these rights come via established laws in the jurisdiction of the married couple's domicile.

the institution of marriage within society. Like corporations that extract economic incentives in the form of tax breaks to carry out the function of the corporation, there are economic incentives offered to individuals involved in a marriage. Whenever a married couple extracts economic benefits, the net economic benefit to the society as a whole gets reduced.<sup>54</sup> However, while the society loses such economic advantage, it attempts to recoup some other benefit from the individuals involved in a marriage.<sup>55</sup> For example, an unmarried individual can enter into multiple romantic relationships, as there is no social outrage cost to pay for it. Whenever the same individual gets married, they are prevented by society in entering into any other extra-marital romantic relationships, as it is frowned upon. Each individual within a marriage must pay this social outrage cost or be acquiescent to the morality threshold imposed upon them. Therefore, whenever private intimacy is sanctified by marriage, society imposes a cost on the individuals. How far society can go in imposing that cost, or calculating the rent of social outrage, that must be paid in order to get married will be considered in the next section.

All individuals in a marriage pay societal rent for extracting economic benefits that would not otherwise be afforded to them.<sup>56</sup> Historically, the nature of that societal

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<sup>54</sup> Existing law provides married couples with a slew of economic benefits. These benefits are too numerous to mention. For example, by being married the couples are entitled to pay less tax compared to what they would be paying calculated separately. Since tax revenue goes towards social welfare, the loss of revenue reflects as net economic loss to the society.

<sup>55</sup> Same-sex couples would lose economic benefit from welfare disbursement as a result of obtaining marriage licenses. For a discussion on economic impact related to welfare disbursement, *see* NJ Domestic Partnership Act, *supra* note 21. *See also* HYLAND, *supra* note 21.

<sup>56</sup> When we live in a society, we have to abide by some of society's norms. These norms sometimes could impinge upon our personal preferences, restricting our freedom of choice and liberty of expression. Therefore, one prerequisite for being part of a society is suppressing one's deeper desires and intimate romantic aspirations. Being subjected to this suppression is equivalent to paying a societal rent. Since only heterosexuals are allowed to be part of a married community, the societal

rent or cost that must be extracted by the said individuals has been an issue of heated debate.<sup>57</sup> This debate stems from the societal conception of morality, ethics, and publicly sanctioned behavior. As society evolved through the ages, certain unacceptable behavior became acceptable and previously frowned upon practices gained societal approval. While the loss of societal outrage is defined by the parameters society sets upon the individuals, it is still embedded within the limits of the majority's version of morality.<sup>58</sup> This threshold of morality has been created

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rent is the suppression of same-sex orientation. By paying that rent, persons can get the privilege of marriage right.

<sup>57</sup> Here, societal rent is the suppression of same-sex desires. Same-sex marriage debate has been taking center stage for quite sometime. Extracting that rent means taking an opposing view of granting marriage rights to same-sex couples.

<sup>58</sup> See The Moral Majority Coalition, <http://www.moralmajority.com/>. (An example of a majority view agenda is the political organization founded in 1979, the Moral Majority, which pursued a campaign theme of conservative evangelical Christian agenda. The Moral Majority was led for many years by televangelist Jerry Falwell. The organization's political agenda focused on upholding Christian conservative ideology of the moral law. The organization officially dissolved in 1989, but found a new face, and a new name under the leadership of another televangelist Pat Robertson. Some of the main campaign issues were outlawing abortion, opposition to state recognition and acceptance of homosexuality, and elimination of homosexuals. Prior to his death, Reverend Falwell had said: "[W]e must stop the homosexuals dead in their tracks — before they get one step further towards warping the minds of our youth." Reverend Falwell, Moral Majority Fundraiser, (Apr. 1, 1981) *available at* [http://www.rightwingwatch.org/2007/05/rev\\_jerry\\_falwe.html](http://www.rightwingwatch.org/2007/05/rev_jerry_falwe.html)); He also stated:

In my age, we laughed at queers, fairies, and anyone who was thought to be a homosexual. It was a hideous thing, and no one talked about it, much less ever confessed to being a homosexual... I believe the United States will be destroyed if we permit homosexuality as an alternative lifestyle.

Reverend Falwell, How You Can Help Clean Up America *available at* [http://www.rightwingwatch.org/2007/05/rev\\_jerry\\_falwe.html](http://www.rightwingwatch.org/2007/05/rev_jerry_falwe.html). The Reverend Falwell further stated, "Can you imagine a regiment of homosexual men and lesbian women leading an assault on the Red Army? How much respect would the Communists have for such a

through centuries of prevalent practices and sociological developments. In my view, this threshold of morality has been established without explicitly understanding all facets of intimate human behavioral patterns including those that are socially innocuous innate human desires. Who then, is the arbiter of the social outrage cost that must be borne by the participants of marriage? Does society have the right to impose limits on human intimate behavior, and dictate the terms of private human intimacy?

I will concede that society must extract a cost, when private intimate desires are brought under the purview of public consequences, because it allows for legal protection and social welfare to work for the participants of the marriage. This is also consistent from a traditional, sociological perspective, as societies have imposed limits of private behavior on marriage. When married individuals derive economic benefits via participating in the legal framework, the participants should require a cost that is implicit within the economic theory of a cost-benefit analysis. Earlier, this article argued that the economic framework of the institution of marriage is sustainable without explicit identification of gender involved in such unions. This non-gender centric view of marriage must therefore be studied in the context of social outrage. As society cannot, however, extract cost from marriage by imposing gender-specific sanctions in a marriage.

The limits that society can impose on the institution of marriage have a deep-rooted significance within the religious, sociological, and historical point of view. Whenever private individual behavior crosses the threshold of such societal sanctioned norms, outrage is created. If the collective outrage is such that, it signals the signs of breakdown of the traditions of a civilized society, the cost becomes too much to pay for the individuals.

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collection of perverts." Reverend Falwell, Billings (MT) Gazette, (Mar. 11, 1981) *available at* [http://www.rightwingwatch.org/2007/05/rev\\_jerry\\_falwe.html](http://www.rightwingwatch.org/2007/05/rev_jerry_falwe.html)).

For example, if a 30-year old man intends to marry an 8-year old girl,<sup>59</sup> the societal outrage cost will be too high for the individuals to pay and thus they will not be allowed to enter a marriage. On the other hand, if a 90-year old man intends on getting married to a 20-year old girl,<sup>60</sup> the outrage cost may be high due to the repugnant nature of such behavior, but not high enough to disallow the marriage to go forward. Similarly, there are heterosexual couples separated by more than two generations of chronological age that can enter into marriage, and the institution of marriage is able to withstand the social outrage. Why then must same-sex individuals, driven by love for each other, desiring to continue their life jointly, be confronted with such societal outrage costs that they cannot marry?

Sociological development over time exhibits evidence of society's implicit approval of various intimate behaviors. There is biological evidence<sup>61</sup> that supports the assertion that the attraction towards members of the same sex is inherent

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<sup>59</sup> In this example, it would be illegal to marry or have a relationship with a child of such age. Age of consent laws have varied by state, but have been passed to deter adults from entering into marriage or any sexual relationships with people underage. *See generally* State Age of Sexual Consent Laws, *available at* <http://www.actwin.com/eatonohio/gay/consent.htm>. *See also* TEX. PENAL CODE ANN. ch 21(Vernon 2007) *available at* <http://tlo2.tlc.state.tx.us/statutes/docs/PE/content/htm/pe.005.00.000021.00.htm> (last visited Oct. 12, 2007).

<sup>60</sup> In this example, it is not illegal to engage in sexual relationship or to marry. But, examples exist where society has rejected these relationships as authentic. A publicized relationship in this context was the marriage between eighty-nine year old billionaire J. Howard Marshall II in 1994 to Anna Nicole Smith when she was twenty-six years old. *See* Charles Lane, *Anna Nicole Smith's Supreme Fight: Justices Hear Celebrity's Bid for Cut of Late Husband's Riches*, WASH. POST, Mar. 1, 2006, at A1, *available at* [http://www.washingtonpost.com/wp-dyn/content/article/2006/02/28/AR2006022800142\\_pf.html](http://www.washingtonpost.com/wp-dyn/content/article/2006/02/28/AR2006022800142_pf.html) (Last visited Oct. 13, 2007).

<sup>61</sup> On the topic of homosexuality, there are strong sentiments both for and against. This is a behavior that can no longer be denied or labeled as a mental health issue. To consider the biological aspect of homosexuality, *see generally* J.M. Bailey & R.C. Pillard, *A genetic study of male sexual orientation*, 48 ARCHIVES OF GENERAL PSYCHIATRY 12, 1089-96 (1991).

and not driven by aberration or psychological mental health issues.<sup>62</sup> Rather, homosexuality is viewed:

Like all complex behavioral and mental states, homosexuality is...neither exclusively biological nor exclusively psychological, but results from an as-yet-difficult-to-quantitate mixture of genetic factors, intrauterine influences...postnatal environment (such as parent, sibling and cultural behavior), and a complex series of *repeatedly reinforced choices* occurring at critical phases of development.<sup>63</sup>

If society's goal is to allow individuals to prosper and continue their lives within a collective environment bound by contractual arrangements, society must collect rent in return. When individuals get societal protection in exchange for affordable rent to society, creating rent surplus for certain

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<sup>62</sup> For many years the psychiatric community had been labeling homosexuality as a sexual disorder. However, based in part on research and on-going study of homosexual individuals the "APA removed homosexuality from *DSM-III* in 1973; with the 1987 publication of *DSM-III-R*, ego-dystonic homosexuality was deleted as well. Thus, homosexuality is no longer considered an illness." See Richard A. Isay, M.D., *Remove Gender Identity Disorder From DSM*, Psychiatric News Viewpoints, <http://www.psych.org/pnews/97-11-21/isay.html>.

<sup>63</sup> JEFFREY SATINOVER, M.D., *HOMOSEXUALITY AND THE POLITICS OF TRUTH*, 8 (1996) (The research on homosexuality or same-sex attraction is ongoing and there are no absolute explanations why some individuals are attracted to members of the same-sex. This article is not intended to provide scientific evidence explaining same-sex attraction. Same-sex attraction as a substantial number of individuals in the homosexual community have proven, they are law abiding, educated, mentally stable, and contribute to the welfare of the nation; and could not be viewed as a deviant sub-culture of the society. It is also interesting to note, under the U.S. Military's "Don't Ask, Don't Tell" policy, unless a soldier announces his sexual affinity, there is no way to determine which soldier is homosexual or heterosexual and are allowed to serve the nation). See also Gregory M. Herek, Ph.D., *Don't Ask, Don't Tell: Revisited*, University of California (2006), available at <http://psychology.ucdavis.edu/rainbow/html/military.html>.

members of the society is not equitable nor is it justified. Here, denial of marriage rights of equality to certain members of society can be seen as imposing a high rent for providing them the protection umbrella of marriage. The argument that society cannot continue to impose such high rent on individuals, leads to the conclusion that marriage rights should be extended to same-sex couples. Furthermore, societal outrage analysis of marriage reveals that, denial of marriage rights to same-sex couples is not based on any fundamental belief. Instead, it is borne out of an exclusionary philosophy of denial of equal rights.

### C. Regulating Intimacy or Limiting Private Desires

By deciding to live in a society, individuals implicitly enter into a contract to abide by some of the society rules and regulations. Implicit within the limits of ordered society, resides a conglomeration of thresholds that shape the patterns of society sanctioned intimate behaviors.<sup>64</sup> Though evidence of individuals of same-sex relationships has been in existence since the birth of civilization, this intimate behavior has not received the sanction of a marriage. Does society have the right to regulate such intimate behavior, particularly when these intimate behaviors are not impinging on others' exercise of free will, and are not inconsistent with biological or social behaviors witnessed throughout the ages all over the world?<sup>65</sup>

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<sup>64</sup> In this context, thresholds refer to the barriers to individual freedoms. These barriers shape the socially accepted behavior based on majority's acceptance. Although individual members of the society are predominantly free to act, they cannot always do what they want. Similarly, a threshold has been placed on the right to marry. When a person is legally permissible to marry only the members of opposite sex, there is a threshold placed on that person. By not allowing the individual to marry the person of her choice, the threshold is not only limiting her behavior but also developing a predictable pattern.

<sup>65</sup> See Paul Halsall, *Homosexuality in History: A Partially Annotated Bibliography*, Version 3.12, Sept 7, 2000, available at <http://www.fordham.edu/halsall/pwh/gayhistbib.html#c3>.

How does society regulate intimacy? Most individuals within a society try to adhere to the limits of socially sanctioned behavior for fear of outrage or societal backlash.<sup>66</sup> Often times, an individual realizes early in his life that he is attracted to the members of the same-sex, but understands the public shame that is placed upon such behavior. Thus, he intentionally hides his sexual feelings and suppresses his pursuit of finding a partner of his choice and settles in a more socially acceptable behavior of getting married with a woman. Is this not intimate behavior being limited by society?<sup>67</sup>

Earlier this article explained how private intimate behavior and romantic desires get sanctioned by marriage. It is, therefore, most individuals' objective, in some form or other, to bring their private desires into the public eye, thereby finding legitimacy in their existence. If, however, some individuals are prevented from bringing their private romantic aspirations into the collective sphere of societal acceptance for fear of being unacceptable, isn't this society regulating intimate behavior? Especially, if the intimate behavior in question is not harming anyone, not sanctioning such relationships should be considered the real social outrage, rather than the pursuit of such relationships. Therefore, by not legalizing the marriage between same-sex consenting adults that choose to be in intimate relationships, is indeed proving that society regulates intimacy. On the other hand, merely not legalizing such marriage is in no way limiting privacy. The rights to privacy are not implicit in its recognition of a marriage, but reside in its explicit ability to carry out such behavior without fear of legal consequences.

Finally, as society evolves where the frontiers of privacy, individual liberty, and free choice, have been extended much more than before, it is to the ultimate benefit of society not to

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<sup>66</sup> See generally Ann Ferguson, *Gay Marriage: An American and Feminist Dilemma*, 22 *HYPATIA* 1, 39-57 (2007).

<sup>67</sup> See Complete Works of Shakespeare, *Romeo and Juliet*, *supra* note 1. (Like the *Romeo and Juliet* saga, societal disapproval, family disapproval, and legal disapproval prevent individuals from publicly proclaiming their love in a recognized union of marriage).

impose artificial limits of acceptable behavior. This is especially true if such behavior is born out of a flawed concept of morality or emerges as a derivative of the majority's morality injected into the minority. History has proven that repression of individuals does no good for society, as repressed individuals do not contribute fully to the welfare of collective advancement.<sup>68</sup> Regulation of intimacy or imposing artificial limits represses individuals. Therefore, society must advance and do away with such regulatory mechanisms and allow individual expression of sexual orientation to flourish as long as such expression is centered on harmless loving behavior.

#### IV. CREATION OF NEW RIGHTS: PROMISE OF *LAWRENCE* AND BEYOND

As we enter the early phase of the 21<sup>st</sup> century, we are emboldened by the expansion of individual liberty and rights of privacy in vast aspects of life. Yet, the marriage rights for same-sex couples remain a distant dream due to judicial non-acknowledgement in most parts of the nation. Amidst a lot of soul-searching and warring factions trumpeting their justifications on various grounds, same-sex couples have not achieved marriage equality, with the exception of Massachusetts whose highest court has granted same-sex couples the right to marry. The issue of same-sex marriage has percolated through the state and federal court systems.<sup>69</sup> This contentious issue has been debated on various grounds from suspect class,<sup>70</sup> to the Equal Protection Clause,<sup>71</sup> to

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<sup>68</sup> I have discussed in detail the role repression plays in impacting an individual and how the relationships among repression, collective mechanism, and society eventually shape the development of societal standards and collective aspirations. See Saby Ghoshray, Chapter Fourteen: *Symmetry, Rationality and Consciousness: Revisiting Marcusean Repression in America's War on Terror*, Eros and Liberation: Herbert Marcuse's Vision For A New Era, Penn State University Press, 2006 (Forthcoming).

<sup>69</sup> See cases cited *supra* notes 11-14 and accompanying text.

<sup>70</sup> A particular group of people could be considered members of a "suspect class" if law categorizes them as suspect and therefore provides

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them with greater judicial scrutiny. The issue of whether to make the members of the same-sex community a suspect class depends on whether homosexuality can be considered an immutable behavior or a matter of choice. Scientific evidence has demonstrated that attraction to members of same-sex is in part biologically based, yet the judiciary has historically denied the “suspect class” status on the homosexuals. Historically, the Supreme Court has been unwilling to extend “suspect class” status to groups other than women and racial minorities. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-47 (1985) (the Court refused to make the developmentally disabled a suspect class. Justice Marshall noted in his partial concurrence in *City of Cleburne* that the Court does appear to examine the City of Cleburne's denial of a permit to a group home for mentally retarded people with a significantly higher degree of scrutiny than is typically associated with the rational-basis test. *Id.* at 447-50.). *See also* *Lawrence v. Texas*, 539 U.S. 558 (2003) (The Court revisited the issue of “suspect class” again here, where it struck down a Texas statute prohibiting homosexual sodomy on substantive due process grounds. By taking resort to the development in the City of Cleburne, Justice Sandra Day O’Connor noted in her concurring opinion, that by prohibiting only homosexual sodomy, and not heterosexual sodomy as well, Texas’s statute did not meet rational-basis review under the Equal Protection Clause. Justice O’Connor may have applied a slightly higher level of scrutiny than mere rational basis, but the Court as a whole did not really extend suspect-class status to sexual orientation. In her opinion in *Lawrence*, Justice O’Connor also relied on the Court’s decision in *Romer v. Evans* (1996) that struck down a Colorado constitutional amendment aimed at denying homosexuals “minority status, quota preferences, protected status or [a] claim of discrimination.” O’Connor’s invocation of *Romer* is significant as *Romer* seemed to employ a markedly higher level of scrutiny than the nominal application of the rational-basis test. *Id.*)

Based on the current composition of the Court, it is highly probable, therefore, that the Court may not explicitly apply heightened scrutiny to homosexuals any time soon, although it may decide about the constitutionality of laws prohibiting the same-sex marriages. It has also been argued that discrimination based on sex should be interpreted to include discrimination based on sexual orientation, in which case intermediate scrutiny (higher level of scrutiny than mere rational basis test) could apply to same-sex rights cases. Just recently, the Supreme Court of the state of Washington went out of its way to declare members of the homosexual community not a minority, homosexuality not an immutable characteristic, homosexuals not a suspect class. The court states, “The plaintiffs have not established that they are members of a suspect class or that they have a fundamental right to marriage that includes the right to marry a person of the same sex.” *See* *Heather Andersen and Leslie Christian, et. al. v. King County, State of*

fundamental rights of the rational basis,<sup>72</sup> and still the judicial prohibitions on same-sex marriage remain the same. Several states have come quite close to bringing marriage rights to same-sex couples, but still remain unconsummated.<sup>73</sup> Consider a very poignant question: Would the judiciary ever end the legal prohibitions on same-sex marriage? Same-sex couples are everywhere; we interact with them everyday. They are our neighbors, our colleagues, our priests, and our soldiers.<sup>74</sup> We find same-sex couples even among the highest offices within our government. A compassionate father, Vice-President Dick Cheney states, "Lynne and I have a gay

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Washington, et. al, No. 75934-1 (July 26, 2006) (Justice Barbara A. Madsen majority opinion) *available at* <http://www.courts.wa.gov/newsinfo/content/pdf/759341opn.pdf> (the debate over whether or not members of the same-sex community are a suspect class is far from over).

<sup>71</sup> U.S. CONST. Amend. XIV (The doctrine of "equal protection" states that any law that is otherwise constitutional, is a valid law and therefore, must be applied equally to all persons. Sometimes, however, this equal application of law results in asymmetrical and unequal outcomes for various identifiable groups. A question repeatedly raised is, how to achieve the intended meaning of "equal protection" so that everyone is entitled to the same outcome. Relying on this "equal protection" clause of the Fourteenth Amendment, some jurisdictions give same-sex spouses the same access to his or her "partner's" company's health-insurance plan as a spouse in a traditional marriage. However, the judiciary is still far removed from applying this doctrine universally in recognizing a same-sex marriage on the same basis as traditional marriage.)

<sup>72</sup> See Ghoshray, *supra* note 68.

<sup>73</sup> See Status of Same-Sex Marriage, *supra* note 9, and accompanying text.

<sup>74</sup> See Lewis, 188 N.J. at 453 (The Supreme Court:

Gays and lesbians work in every profession, business, and trade. They are educators, architects, police officers, fire officials, doctors, lawyers, electricians, and construction workers. They serve in township boards, in civic organizations, and in church groups that minister to the needy. They are mothers and fathers. They are our neighbors, our co-workers, and our friends. In light of the policies reflected in the statutory and decisional laws of this State, we cannot find a legitimate public need for an unequal legal scheme of benefits and privileges that disadvantages committed same-sex couples. *Id.*

daughter, so it's an issue our family is very familiar with. With the respect to the question of relationships, my general view is freedom means freedom for everyone. ... People ought to be free to enter into any kind of relationship they want to."<sup>75</sup> Shouldn't we listen to this father's appeal to recognize his daughter's right to marry? Why then, are they not recognized as married couples in the majority of the country? What will it take to recognize the rights of same-sex couples to marry? Does it require the creation of new constitutional rights hitherto unrecognized? Will these rights ever be validated via a legislative process? Can our two hundred year old Constitution comprehend the expansive meaning of intimacy and love in the 21<sup>st</sup> century? Answers to these profound questions of law, fundamental values, legality, and matters of the heart will be explored in the next section.

#### A. Creation of New Rights or Going Beyond Unenumerated Rights

Despite making tremendous inroads in expanding their rights in the last two decades, the proponents of same-sex rights are yet to receive the ultimate recognition: The recognition sanctified by marriage. Since the landmark 1986 Supreme Court decision of *Bowers v. Hardwick*,<sup>76</sup> which upheld a Georgia State Law<sup>77</sup> prohibiting homosexual

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<sup>75</sup> See Associated Press, *Cheney At Odds with Bush on Gay Marriage*, (Aug. 25, 2004), available at <http://www.msnbc.msn.com/id/5817720/>.

<sup>76</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (noting that the denial of homosexual rights was based on a careful consideration of historic tradition, in which states consistently intervened in homosexual conduct on the grounds of moral and ethical standards). Cf. *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring). (dismissing Chief Justice Burger's reasoning on grounds of historical inaccuracy and improper relevance. In *Lawrence*, Justice Kennedy explained that historical traditions could be taken into consideration only up to a certain extent, echoing his earlier findings in *Lewis*. *Id.* (discussing *Lawrence*, 539 U.S. at 571-72)).

<sup>77</sup> See *Bowers*, 478 U.S. 186 (The U.S. Supreme Court upheld the constitutionality of a Georgia sodomy law, which criminalized oral and

sodomy, both sides of this same-sex marriage debate have been active. On one side, the opponents of same-sex rights, through their elected national and state legislatures have attempted to retain the traditional definition of marriage, first through the passage of federal and state Defense of Marriage Acts (DOMA),<sup>78</sup> and recently through the legislative process of the National Elections held November 2, 2004. These elections resulted in 11 states voting to amend their Constitutions and ban same-sex marriage.<sup>79</sup>

The amendments won, often by huge margins, in Arkansas, Georgia, Kentucky, Michigan, Mississippi, Montana, North Dakota, Oklahoma, Ohio, Utah and Oregon — the one state where gay-rights activists hoped to prevail. The bans won by a 3-to-1 margin in

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anal sex between consenting adults.) *But cf. Lawrence*, 539 U.S. 558 (holding that such sodomy laws were unconstitutional).

<sup>78</sup> Defense of Marriage Act, Pub. L. 104-199, 100 Stat. 2419 (codified at 1 U.S.C. §7, 28 U.S.C. §1738C) (The DOMA is a federal law designed to give states the right to refuse recognition of a same-sex marriage approved by another state. It also defines marriage as a union between a man and woman for the purposes of federal law. The Act was introduced by Republican Rep. Bob Barr of Georgia, in May 1996. The bill passed both the House of Representatives and the Senate and later President Clinton signed the bill on Sept. 21, 1996. The Act focuses on two key components. The first, is the authority given to states, that “No state, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other state, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state, territory, possession, or tribe, or a right or claim arising from such relationship.” *Id.* §1783C. The second component deals with the federal definition of marriage as an institution between one man and one woman, with the word “spouse” referring only to a person of the opposite sex who is a husband or wife, *Id.* §7(a)).

<sup>79</sup> See Rona Marech, *The Battle Over Same-Sex Marriage: One Year Later Both sides claim victory, but courts will decide*, SAN FRANCISCO CHRON., Feb. 12, 2005, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/02/12/MNG8ABA7RC1.DTL>.

Kentucky and Georgia, 3-to-2 in Ohio, and 6-to-1 in Mississippi.<sup>80</sup>

On the other side, the same-sex rights advocates have gone through the reversal of *Bowers* and through a series of court decisions that nearly opened the door to gain full equality in marriage rights, as they journeyed from tolerance to acceptance, to public endorsement.<sup>81</sup> While the continuation of denying same-sex marriage rights was disheartening, it still remains an issue in the forefront of same-sex couple's dialogue and continues seeking equality.

As we look beneath the surface and examine the Supreme Court's decision on same-sex rights, the apparent reversal of same-sex rights in *Bowers* was an aberration in the Court's continuous expansion of the frontiers of individual rights and privacy. The journey began in *Griswold v. Connecticut*,<sup>82</sup> in which the Court extended the limits of intimacy and rights of consenting adults, unlocking the door to sexual pleasure and

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<sup>80</sup> Associated Press, *Campaign 2004: 11 States Ban Same-Sex Marriage*, CBS News Nov. 2, 2004, available at <http://www.cbsnews.com/stories/2004/09/30/politics/main646662.shtml>.

<sup>81</sup> Same-sex couples still struggle to gain tolerance, acceptance or even approval by society. A recent poll details that "... of 1,002 adults May 8-11 shows that by a 58-39 percent margin American adults oppose redefining marriage to include homosexuals. Additionally, 50 percent favor and 47 percent oppose a marriage amendment to the U.S. Constitution." See Michael Foust, *Gallup poll: 58 percent oppose 'gay marriage,' half support amend*, Baptist Press, May 22, 2006, available at <http://www.bpnews.net/bpnews.asp?ID=23295>.

<sup>82</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding the constitution protects the right to privacy. The ruling was based on an 1879 Connecticut law, which prohibited the use of contraceptives or drugs that were for the sole purpose of preventing conception. Justice Goldberg wrote a concurring opinion, relying on the Ninth Amendment to support his findings. Justice Harlan wrote a concurring opinion in which he relied on the Fourteenth Amendment, and the Due Process Clause. Justice Byron White also relied on the due process clause in his concurring opinion.); See *Roe v. Wade*, 410 U.S. 113 (1973) (holding that abortion was a private decision between a woman and her doctor. For the most part, the Court in the subsequent rulings relied on Justice Harlan's substantive due process opinion).

sexual release between married couples.<sup>83</sup> Thus, by separating the procreative idealism of marriage from the right to intimacy, the Court opened up a new frontier to expand the definition of marriage in the first place. The Court extended the right to privacy to unmarried couples while untangling “private sin” from “public crime” in *Eisenstadt v. Baird*.<sup>84</sup> Although, the Court was quick, during this long march to liberation, to separate procreative and unitary idealism of marriage for sex, it took longer to extend these rights to same-sex couples. The Court needed a deeper understanding of the human person, the complexities of human anthropology, as it revealed in the poignant “mystery passage” of *Planned Parenthood v. Casey*,<sup>85</sup> where it held:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>86</sup>

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<sup>83</sup> See *Griswold*, 381 U.S. at 486-99 (Goldberg, J., Concurring Opinion).

<sup>84</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (holding that a Massachusetts law which criminalized the distribution of contraceptives to unmarried people was unconstitutional).

<sup>85</sup> *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992) (The U.S. Supreme Court ruled on the constitutionality of Pennsylvania laws regulating abortion. The Court held the right to have an abortion and lowered the standard on the restrictions of that right).

<sup>86</sup> *Id.* at 851. See also Kevin J. Hasson, *God and Man at the Supreme Court: Rethinking Religion in Public Life*, The Heritage Foundation, Oct. 14, 1997, available at <http://www.heritage.org/Research/Religion/HL599.cfm> (Much has been written about this opinion and the inner message of Justice Kennedy's words. These words provide a glance into the Supreme Court's thoughts. It can be argued however, Justice Kennedy, like the early philosophers Albert Camus and Jean-Paul Sartre, is the present day philosopher. His rulings are formed on the “predominant assumptions about the great ideas—about God and man, about the nature of society and the state, of freedom and responsibility,

Perhaps this deeper understanding of human existence could have helped the Court in making its decisions to provide them with the rights that adult married and unmarried heterosexuals have taken for granted for decades.

The journey from *Bowers* to *Lawrence* was a predictable one. In his *Bowers* dissent, Justice Blackmun almost derived *Lawrence*'s constitutionally protected enumerated right from *Griswold*'s interpretation of fundamental rights:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with other suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting their relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.<sup>87</sup>

Justice Stevens concluded Justice Blackmun's unfinished business by explicitly linking a married couple's right to engage in non-procreative sex with partners of the same-sex having intimate sexual encounters; "The essential 'liberty' that animated the development of the law in cases like *Griswold* and *Eisenstadt* ... surely embraces the right to engage in non-reproductive, sexual conduct that others may consider offensive or immoral."<sup>88</sup> The promise of *Lawrence*, however, remains unfulfilled, as we continue to search for equality in the right to choose one's partner for marriage, long after having attained the equality of right to engage in sexual intimacy.

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and so forth." Further, "America's public philosophy is uniquely influenced by Supreme Court decisions." *Id.* But, there are naysayer's that discount the substantive nature of his opinion and dismiss it as mere judicial hubris.).

<sup>87</sup> See Ghoshray, *supra* note 68, at 205.

<sup>88</sup> *Id.* at 217.

By delving into the framework of enumerated rights of the Constitution, the unfulfilled promise of *Lawrence* to bring marriage equality for same-sex couples becomes more transparent. If *Lawrence* has settled the issue of same-sex intimacy under the premise of enumerated rights, then why can't the same enumerated rights doctrine be extended to those seeking the rights to marry their same-sex partner? On the surface, it seems that an originalist's viewpoint would be that same-sex marriage rights are not necessarily protected by the Constitution under the enumerated rights doctrine. This is because the originalist interpretation of the Constitution mandates, protecting those rights, which are actually located in the Constitution.<sup>89</sup> A more dynamic constitutional interpretation,<sup>90</sup> however, would suggest a different

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<sup>89</sup> See Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709 (2006) (detailing the various shades and hues of originalist interpretation of the Constitution).

<sup>90</sup> Here we are confronted with the issue of strict constructionist vs. dynamic constitutional interpretation. Dynamic constitutional interpretation argues for the need to expand the meaning of constitutional clauses as a result of changing values and complex sociological dimensions. The changing realities based on the evolving nature of our understanding of human existence makes it incumbent upon all of us to extricate ourselves from the frozen, static-in-time version of the Constitution to embrace a more dynamic Constitution. By referring to a dynamic Constitution, attention is drawn to the process by which the Constitution adapts to the changing conditions in the society. As the frontiers of the freedom of speech, the freedom of religion, the rights to privacy and sexual practices among consenting adults continue to expand within the meaning of our Constitution, we are confronted with its dynamic aspect. In most parlances, the dynamic Constitution and the living Constitution is used synonymously. See Richard H. Fallon, Jr., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW*, 1-2, 12-13, 269 (2004). See also *Trop v. Dulles*, 356 U.S. 86 (1958) (The term living is used to denote that the Constitution is still evolving in consonance with the evolving needs of the society, rather than possessing a fixed in time, definitive meaning. The concept of a living Constitution is noted by the Court in *Trop*: "[T]he words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100-01 (discussing *Weems v. United States*, 217 U.S. 349 (1910)). See

conclusion than that espoused by an originalist, support of which can be gleaned from an expansive reading of The Bill of Rights. The Bill of Rights was originally created to protect liberty from the corrosive impact of any governmental or republican interference. Implicit in the concept of the Bill of Rights resides the guarantee that there are some rights so fundamental, either the government or the legislature can never regulate them. Therefore, no majority, no matter how large, could violate the rights of individuals. These are indeed the enumerated rights.

The framers of the Constitution however agreed that there could not possibly be an exhaustive list of enumerated rights, and thus, they created unenumerated rights.<sup>91</sup> Could we

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*also* Thurgood Marshall, Justice, United States Supreme Court, Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *available at* [http://www.thurgoodmarshall.com/speeches/constitutional\\_speech.htm](http://www.thurgoodmarshall.com/speeches/constitutional_speech.htm) (last visited Oct. 12, 2007). (The concept of a living Constitution further gained currency in Marshall's lecture titled, *The Constitution: A Living Document*, where he argued that the Constitution must be interpreted in light of the moral, political and cultural climate of the age of interpretation.). *See also* Ruth Bader Ginsburg, Assoc. Justice, United States Supreme Court, Keynote Address Before the American Society of International Law Annual Meeting (Apr. 1, 2005), *available at* <http://www.asil.org/events/AM05/ginsburg/050401.html>. *See also* Ghoshray, *supra* note 89, at 101-52.

<sup>91</sup> The Bill of Rights contained numerous rights called enumerated rights, which are different than unenumerated rights. While the enumerated rights are explicitly mentioned in the Constitution, the unenumerated rights have not been explicitly mentioned, but the Supreme Court had long held that the Constitution protects those rights. The difficulty in distinguishing between enumerated rights and unenumerated rights has created significant constitutional confusion. Unenumerated rights are retained by the people. Commenting on unenumerated rights, Randy Barnett says, "The purpose of the Ninth Amendment was to ensure that all [enumerated and unenumerated] individual natural rights had the same stature and force after some of them were enumerated as they had before; and its existence argued against a latitudinarian interpretation of federal powers." RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2003). *See also*, JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* (2006) (1980) (John Hart Ely asserts that these rights come from a broad principles of democratic process and equality and democratic process.).

presume that anything that is not explicitly protected by the Constitution as such is an unenumerated right? Rights not specifically enumerated therefore, may be limited, or legislatively rendered insignificant if a majority or their representatives see fit. What then, is the purpose of the Ninth amendment?<sup>92</sup> According to the Bill of Rights, unenumerated rights are protected under the Ninth Amendment?<sup>93</sup> Does that mean then these types of rights are subject to the whims and interpretations of the lawmakers and their governments? This is absolutely unconscionable, and doing so would render the entire concept of unenumerated rights meaningless and interpret the Ninth Amendment as an extra-terrestrial encroachment into the Constitution. Could the right to marry by same-sex couples be a good example of unenumerated liberties within the meaning of the Ninth Amendment? In this context, when states act to protect liberty, either through state Constitutions or via legislative measures in the state legislation, they act to protect rights explicitly recognized

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<sup>92</sup> See U.S. CONST. Amend. IX (addresses the rights of the people that are not specifically enumerated in the Constitution. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” *Id.* See also *Griswold*, 381 U.S. at 481 (Justice Arthur Goldberg, Chief Justice Warren and Justice Brennan expressed the opinion that the Ninth Amendment is relevant to interpretation of the Fourteenth Amendment:

[T]he Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights.... I do not mean to imply that the .... Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government.... While the Ninth Amendment - and indeed the entire Bill of Rights - originally concerned restrictions upon federal power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. *Id.*)

<sup>93</sup> U.S. CONST. Amend. IX.

within the Constitution but not created by the Ninth Amendment. Clearly, the framers believed that every possible right could be recognized in the Constitution by means of constitutional interpretation but they cannot be explicitly created. Therefore, we are all entitled to fundamental rights that the government must recognize and that the purpose of the governments is to protect those rights. Therefore, all rights are recognized by government, not created by government.

The challenge with this argument then revolved around determining what a right is and is not. Otherwise, we create a situation where anybody who wants to do anything can claim that they have a right to do so. For example, an individual could say they have the right to drive with blaring music pounding through their neighborhood at two a.m. We can have noise ordinances or driving restrictions to prohibit that, but the person claiming that right would say, "If I am entitled to this right, then you can't pass an ordinance to strip me of that right." It would then be up to the courts to decide as to whether there is a right to an individual to either drive with a cranked up stereo at two a.m. or there exists no such right.

While the explicitly listed rights are clearly recognized, there ought to be some adjudication process to determine what the unlisted rights that can be recognized are. In the above example, what is going to stop the driver with the cranked up stereo from asserting his rights, "This is a right that you must recognize." Therefore, the challenge comes from ascertaining what is a legitimate unenumerated right and what is not. It is against this backdrop that an analysis is needed to consider the issue of same-sex marriage and the rights of equality for all couples regardless of their sexual orientation. Under what circumstances do unenumerated rights become binding on the government such that the majority could neither regulate nor violate? How do we go about discerning between a legitimate and illegitimate assertion of an unenumerated right? We cannot deny the fact that there will be disagreements over what is and is not legitimate. The right of marriage to same-sex couples falls in that category. Who should be the moral arbiter to determine

whether this right should be bestowed upon same-sex couples or not? Who determines if this right is a legitimate right? The proponents of natural rights believe that all issues of unenumerated rights must be determined on the basis of natural rights, the rights that are embedded in the presumption of liberty.<sup>94</sup>

Although the Ninth Amendment provides us a protective umbrella of presumption to all other exercises of liberty, this presumption of liberty interpretation does not get us close to an understanding of whether the right to same-sex marriage is an enumerated right. Otherwise, several state Supreme Courts would not have denied these equality rights to same-sex couples.<sup>95</sup>

The problem of interpreting the Ninth Amendment arises from the confusion surrounding the definition of rights, specifically to know what rights should be protected. Here, the Ninth Amendment cannot be solely relied on for support to identify which rights are protected and which rights are not. Should this then be decided by the judiciary and allow the Justices the right to pick and choose what rights the Ninth Amendment covers and what rights it does not? This

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<sup>94</sup> See BARNETTE, *supra* note 91 (In his noteworthy commentary, Randy Barnett describes this presumption of liberty:

As long as they do not violate the rights of others (as defined by the common law of property, contract and tort), persons are presumed to be “immune” from interference by government. This presumption means that citizens may challenge any government action that restricts their otherwise rightful conduct, and the burden is on the government to show that its action is within its proper powers or scope. At the national level, the government would bear the burden of showing that its acts were both “necessary and proper” to accomplish an enumerated function, rather than, as now, forcing the citizen to prove why it is he or she should be left alone. At the state level, the burden would fall upon state government to show that legislation infringing the liberty of its citizens was a necessary exercise of its ‘police power’ - that is, the state’s power to protect the rights of its citizens... *Id.*

<sup>95</sup> *Baehr v. Lewin*, 74 Haw. 530, 645 (1993).

particular point is to emphasize that the doctrine of unenumerated rights should be read to interpret that the government interference in regulating certain individual liberties should be rejected outright. With this caveat, however, these individual liberties must not interfere with other established enumerated rights by other individual citizens. Several such unenumerated rights have been firmly established within a broader constitutional interpretation, although there may not be explicit mention of those rights within the Constitution.

For example, there is no “right of free association” enumerated in the Constitution, yet the Courts have long recognized that there is such a right and no one has challenged it. Why therefore, can the same not be said about the right to marry for same-sex couples? Earlier this article has shown that the law and economic theory of marriage is not inconsistent with same-sex couples obtaining marriage rights. The Supreme Court has already established the uniqueness of human existence and the conception of human liberty goes far beyond our hackneyed ideals of morality and contemporary ethics. These liberated ideals and expanded conceptions of humanity should, therefore, shape our views on fundamental rights. If we can establish the mutual exclusivity of the rights of same-sex couples to marry with other established and recognized individual rights, we have come far in our explication of the nature of rights for constitutional adjudication.

The Supreme Court has already taken the procreative component out of the definition of marriage, and has stripped the exclusivity component from the rights of enjoying sexual pleasure. Recently, through *Lawrence*, the Courts have taken the provision of the sexual orientation from the rights to privacy. Providing the right to marry to same-sex couples will be a continuation of such ideals, which is rightfully consistent with the last several decades’ constitutional development in individual rights and privacy. The concept of unenumerated rights has evolved through various interpretations, whether in the words of the Framers of the Constitution about the proper aims and legitimate powers of

government<sup>96</sup> or in the natural rights philosophy based interpretation of the presumption of liberty.<sup>97</sup> Emanating from these expansive doctrines and liberal ideals is the view that enumerated rights assertion to the rights to marry by same-sex couples, is not inconsistent with constitutional objectives.

Did Thomas Jefferson think that same-sex couples had rights to marry when he provided us with this eloquent explication, “[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness?”<sup>98</sup> Or, did Mr. Jefferson, when defining the limits of legitimate law within a free society, envision that there exists, among us, with aspirations and human desires, a section of our brethren, who find themselves hopelessly perched at the outlier of our legal firmament?

Of liberty I would say that, in the whole plenitude of its extent, it is unobstructed action according to our will. But rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others. I do not add ‘within the limits of the law,’ because law is often but the

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<sup>96</sup> Such examples of interpretation of the constitution are found in The Federalist Papers. The authors of the Federalist Papers intended to both influence ratification and future interpretations of the Constitution. The original eighty-five articles were compiled and formed the Federalist Papers, which urged the ratification of the United States Constitution. They were published beginning in October 1787. The Federalist Papers serve as an important constitutional interpretive tool, as they outline the philosophy and motivation of the newly formed government. *See* Primary Documents in American History, The Federalist Papers, Library of Congress, <http://www.loc.gov/rr/program/bib/ourdocs/federalist.html>.

<sup>97</sup> *See* Griswold, 381 U.S. 479 (Supreme Court illuminated this concept); *See also* Planned Parenthood v. Casey, 505 U.S. 833, 855 (1992).

<sup>98</sup> DECLARATION OF INDEPENDENCE, pmbl (U.S. 1776), *available at* <http://www.ushistory.org/declaration/document/index.htm>.

tyrant's will, and always so when it violates the right of an individual.<sup>99</sup>

When the Framers penned their thoughts on fundamental rights, enumerated rights, and unenumerated rights, they were not oblivious to homosexual behavior, as, homosexuality has been with humanity since the dawn of time. It is plausible the Framers could have had a limited scope of understanding on the biological, physiological, and sociological mechanisms behind homosexuality, as even in modern times, we struggle with understanding homosexuality. Nonetheless, they were not blind to it.

Now, the understanding of human existence, and the fundamental rights that go to the very core of human existence have evolved in the last two hundred years since the Constitution was first enacted. Although this aging document has done a good job of providing the judiciary the tools to uphold basic fundamental rights enshrined in the Constitution, questions could be raised as to whether it is time to create new rights. It appears we remain hopelessly deadlocked as to the assertion of unenumerated rights in the profound issue of extending the equality of marriage rights to all citizens. We remain fiercely contentious as to how far we could expand the frontiers of our evolving conceptions of liberty, privacy, and the rights to intimacy, when it comes to assert legal acceptance to same-sex couple's right to the pursuit of happiness.<sup>100</sup> Are legislative changes needed in the existing constitutional amendments to properly capture the meaning of human existence as revealed in the mystery of human life discussed earlier?<sup>101</sup> Might this debate be captured within the evolving constitutional adjudications in

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<sup>99</sup> See Thomas Jefferson on Politics and Government, *Thomas Jefferson to Isaac H. Tiffany, 1819*, available at <http://etext.lib.virginia.edu/jefferson/quotations/jeff0100.htm>.

<sup>100</sup> By referring to the Jeffersonian spirit embedded in the invocation of "pursuit of happiness," the question is whether minorities belonging to specific sexual orientation could be excluded from attaining that happiness.

<sup>101</sup> This refers to the mystery passage. See *Casey*, 505 U.S. 833.

the legal arena that centers on a debate between *originalism* vs. *dynamic constitutionalism*?<sup>102</sup>

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<sup>102</sup> See Ghoshray, *supra* note 89, at 716-27 (Essentially, Originalism refers to the Constitutional interpretation that seeks the meaning that was intended by the Framers for the society when it was written. By discerning the historical meaning of the terms used—the originalist avoids any fanciful analysis of the Framers’ mind to uncover a hidden interpretation. Sometimes the originalist ideology is manifested in its reliance on textualism, the interpretive process that interprets the law based on the text and tradition of the Constitution, without focusing on the moral or intellectual compass of the society or individual. Anchored in the text, structure, and history of the Constitution, the textualist seeks the most literal meaning, free from the perceptive idealism of broader social purpose). See also, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1510 (1998) (reviewing ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997)) (noting how Justice Scalia rejects the use of common sense principles when the plain language of the rule is clear); Donald J. Kochan, *The Other Side of the Coin: Implications for Policy Formation in the Law of Judicial Interpretation*, 6 CORNELL J.L. & PUB. POL’Y 463, 464–66 (1997); Larry Kramer, *Judicial Asceticism*, 12 CARDOZO L. REV. 1789, 1790–92 (1991) (discussing Justice Scalia’s deep commitment to a formalist jurisprudence). By referring to a dynamic Constitution, attention is drawn to the process by which the Constitution adapts to the changing conditions in society. As the frontiers of the freedom of speech, the freedom of religion, the rights to privacy and sexual practices among consenting adults continue to expand within the meaning of our Constitution, we are confronted with its dynamic aspect. In most parlances, the phrases “dynamic Constitution” and “living Constitution” are used synonymously. See generally RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 3–4 (2001) (explaining that the Constitution provides principles that the Court identifies and implements “through a highly moralized, philosophic inquiry According to Justice Ginsburg, the Constitution ought to be read as belonging to a global twenty-first century, not as fixed forever by eighteenth century understandings). See Ginsburg, (Apr. 1, 2005), *supra* note 90 (quoting *Missouri v. Holland*, 252 U.S. 416, 433 (1920), Justice Ginsburg invokes the immortal words of Justice Oliver Wendell Homes, Jr.:

[W]hen we are dealing with words . . . [in] the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. . . . The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.

Marriage rights for same-sex couples have been debated for several decades without judicial validation. Does it then require the creation of new enumerated rights, such that the fundamental nature of that right is so profound that denial of such right will pass the “shock and conscience” test<sup>103</sup> of the constitutional adjudication? To give a marriage right to any minority member of society does not require the creation of new rights, it requires keeping the implicit promise of guarantying fundamental rights to all citizens. It requires delving into the bottomless crevices of the Constitution’s expansive meaning, a meaning that must evolve with the time.

As the understanding of human nature has evolved so has the appreciation for individual human desires and aspirations. This allowed the broadening of frontiers of privacy rights, as seen over three decades of settled law in *Bowers* being invalidated in *Lawrence*. The journey that began in *Griswold*, opening the door to privacy rights, continued on in *Roe v. Wade*,<sup>104</sup> creating a newer enumerated right of reproduction for women. Thus, the arrival of *Lawrence* was no judicial accident, rather the culmination of a historical journey by the American judiciary into the expansive domain of bringing recognition to individual private desires and romantic aspirations. That the implicit promise of *Lawrence* has not yet materialized into procuring marriage rights for same-sex couples is disheartening, but not shocking. Although *Lawrence* provided a renewed appreciation of the anthropological complexities of human kind and provided us

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<sup>103</sup> See *Rochin v. California*, 342 U.S. 165, 172-73 (1952) (The ‘shock and conscience’ test was popularized after Justice Felix Frankfurter writing for the U.S. Supreme Court established the ‘shock-the-conscience test’, based on the Fourteenth Amendment’s prohibition against states depriving any person of “life, liberty, or property without due process of law.” This test attempts to determine whether an action/behavior fall outside the standards of civilized decency. The test, however, has its detractors that criticize permitting judges to assert their individual views on what constitutes shocking).

<sup>104</sup> See *Roe v. Wade*, 410 U.S. 113 (1973).

with a deeper understanding of substantive due process,<sup>105</sup> it did not solve the constitutional inadequacies of separating enumerated rights from the unenumerated rights. Looking into the historical evolution of constitutional jurisprudence surrounding private rights and public acceptance, I see no reason why provisions of marriage for same-sex couples should not be lifted on multiple grounds. It is not the majority's opinion that should be counted while deciding matters of grave public interest, rather the consistency in the direction of change that must be taken into consideration as held by Justice Stevens who eloquently articulated a newer national consensus standard based on the "consistency of the direction of change that has been demonstrated in *Roper v. Simmons*."<sup>106</sup>

If the current framework of rights, fundamental or enumerated, is too narrow to legitimize marriage rights for same-sex couples, the alternatives must be sought to create a

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<sup>105</sup> See generally *Lawrence v. Texas*, 539 U.S. 558 (2003); For a further explanation on Substantive Due Process, see Wikipedia, *Due Process: Substantive Due Process Basics*, [http://en.wikipedia.org/wiki/Due\\_process](http://en.wikipedia.org/wiki/Due_process) [follow "Substantive Due Process Basics" link] (The legal description of Substantive Due Process is the fundamental constitutional legal theory upon which many privacy rights are based. The doctrine of Substantive Due Process holds that the Due Process Clause not only requires "due process," that is, basic procedural rights, but that it also protects basic substantive rights. "Substantive" rights are those general rights that reserve to the individual the power to possess or to do certain things, despite the government's desire to the contrary. These are rights, like freedom of speech and religion. "Procedural" rights are special rights that, instead, dictate how the government can lawfully go about taking away a person's freedom or property or life, when the law otherwise gives them the power to do so.

Modern substantive due process doctrine protects such rights as the right to privacy, under which falls rights of bodily autonomy, private sexual activity (*Lawrence v. Texas*), contraception (*Griswold v. Connecticut*), and abortion (*Roe v. Wade*), as well as most of the protections of the Bill of Rights. However, what are seen as failures to protect enough of *our basic liberties* and what are seen as *past abuses* and *present excesses* of this doctrine continue to spur debate over its use. *Id.*)

<sup>106</sup> *Roper v. Simmons*, 543 U.S. 551, 559 (2005).

new set of constitutional rights. To ensure equality amongst all members of society, we must not fret over the explicit creation of new rights, as long as that right does not infringe on other fundamental rights. Obviously, as we evolve as a society where multitude of diverging interests and desires interact with renewed aspirations and empowerment, the societal fabric may always be confronted with new challenges. As long as the developments of new empowerment are not in direct conflict of other fundamental rights, we must not vacillate from the path of creation of such newer fundamental rights. Implicit in these new rights, reside the promise of equality for all.

### **B. Judiciary vs. Legislature: Who Decides?**

The recent New Jersey ruling in *Lewis v. Harris* and the subsequent legislative development brings the realization that the right to marry by the same-sex couple might indeed come down to a legislative decision, as the judiciary becomes increasingly apprehensive of ruling against settled law in the land. The problem with this scenario is that it will almost certainly become impossible in America for any legislature to lift the provision against same-sex marriage and grant marriage rights to same-sex couples. This is where the futility of exploring legislative avenues in securing this important fundamental right lies.

The issue must be analyzed in two threads. First, an explicit determination must be made as to whether this is a legislative right or a judicial constitutional right. This issue is intrinsically linked to the resolution of who can create new rights. Second, we must be cognizant of the practical limitations under which the legislative branch works. The right to marry by any individual is a fundamental right deeply ingrained in the humanities eternal yearning to be equal and to be recognized. The right to marry is a fundamental human right, and no fundamental human right is based on the gender of that individual. Therefore, the issue is not who grants or determines such rights, rather why that right remained unattainable to a sizable portion of the population.

Furthermore, the right to marry must be determined through the judicial process, as the legislature is hopelessly ill equipped to deal with such a deeply fundamental matter of personal rights and private matters. Implicit in the recognition of our private intimate matters comes prejudicial predisposition and religious underpinnings. As a result, the general public is divided in their opinion on this issue and the political process is dependant on the majority's view. However, it is not the majority's view that must be adhered to in this context; rather a significant directional change should be the indicator of change.

## V. CONCLUSION

This article deconstructs the traditional view of marriage as an opposite-sex only union and presents a nexus of contract interpretations of marriage, which supports the right of same-sex couples to marry. Detouring away from the hackneyed ideals of marriage, marriage equality must be extended to all people regardless of sexual orientation. Examining the economic realities of marriage, there is no budgetary hurdle that justifies keeping the same-sex couples outside of the protective umbrella of marriage. All empirical evidence provides strong indication that society can extract net economic gain by extending marriage rights to its same-sex couples.

Extending the theory of contract to define marriage, the institution of marriage is structurally similar to the nexus of contract arrangements of a corporation, and as a result its viability is inconsistent with a sexual-orientation bias. The review that marriage's dynamic decision making and deliberately incomplete bargaining model is consistent with the incomplete contract paradigm. Therefore, this strictly constructionist view of marriage is consistent with the idea of bestowing marriage rights to same-sex couples, as the structural arrangement of the institution is robust against gender or sexual orientation.

As private romantic aspirations culminate into marriage, individuals bring their intimate desires into public square.

Entry to this public square must not be limited by sexual orientation. Same-sex marriage challenges many of society's long held beliefs and comes into a collision course with the majority's morality. However, even society's cost of moral outrage cannot justify keeping same-sex couples outside the exclusivity of marriage.

Delving into the archives of America's constitutional history the frontiers of privacy and the rights to equality are expanding continuously. Yet, these liberal ideals of the Constitution are hopelessly ill equipped to recognize marriage rights for same-sex individuals. Debate rages on through the court system, through the legislatures, through the legal scholarship, grappling over what right must encapsulate same-sex couple's ability to marry. From a constitutional perspective, extending marriage rights to same-sex individuals may not require creating new rights; rather it requires fulfilling the promise of recognition to the unenumerated rights.

The journey from *Griswold* to *Lawrence* has been long and arduous. *Lawrence*'s promise of equality may not have been fulfilled, yet each constitutional turning point gets us closer to developing a full understanding of human existence and of human personhood. Implicit in this human understanding is the recognition of same-sex orientation, not as a choice, rather as an immutable uniqueness in man's evolution. Caught in the web of unattainable love are those unique immutable individuals amongst us, yearning for equality and approval. Granting social approval to same-sex couples will not only require deviation from the path nestled deeply in American historical traditions, but also rewrite Shakespeare's saga of two star-crossed lovers, haunted forever by their unobtainable, unrecognized love. While the beloved Juliet could never gain social approval for her love of Romeo, we could learn from antiquity's mistakes. Do we have the courage?