Expansion of Family Rights While Searching for the Meaning of Life, Individuality, and Self

Saby Ghoshray
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How do I love thee? Let me count the ways.
I love thee to the depth and breadth and height
   My soul can reach, when out of sight
For the ends of Being and ideal Grace.
   I love thee to the level of everyday's
Most quiet need, by sun and candle-light.
   I love thee freely, as men strive for Right;
   I love thee purely, as they turn from Praise.
   I love thee with the passion put to use
In my old griefs, and with my childhood's faith.
   I love thee with the love I seemed to lose
With my lost saints,
   I love thee with the breath,
Smiles, tears, of all my life!—and, if God choose,
   I shall but love thee better after death.

- Elizabeth Barrett Browning
Sonnets from the Portuguese (1850) #43

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I. INTRODUCTION

Images of death, destruction, and apocalyptic horrors describe the 9/11 attacks. These mind numbing images played out on television screens across the globe. What the television screens did not capture were the other victims. These were individuals victimized twice. First, they were harmed by the actual attacks and then again by a discriminatory legal landscape. These victims' scars are made obvious by reviewing a snapshot of their experiences.

On the morning of September 11, 2001, John kissed his wife, Lisa, goodbye before heading to his job as an office-cleaner in the World Trade Center's North Tower. Lisa never heard from her husband again. After searching frantically for days, Lisa accepted the reality of his disappearance. She filed for a death certificate and arranged her husband's memorial service. Lisa 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 Lisa 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 Lisa by law.

On that same morning, Juan kissed Miguel, his partner of 21 years, goodbye and headed to his job as a file-clerk in that same North Tower. Miguel never heard from Juan again. Miguel applied for Workers' Compensation and Social Security, but was told he was not eligible for those benefits because he was not Juan's legal spouse. Even though Juan and Miguel had taken some precautions to protect their commitment—such as registering as domestic partners, designating one another as beneficiaries on insurance policies, and executing healthcare proxies and powers of attorney—and even though Juan paid the same taxes as John, Miguel was not automatically entitled to any of the compensations given to Lisa. In addition to his emotional devastation, Miguel was financially devastated as well.¹

¹. This tale highlights the very real experiences of many same-sex couples
John and Lisa's marital status provided access to critical legal protections and benefits that protected them in their time of need. In fact, all 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. But, what about Juan and Miguel, what protection did this couple, living in a committed relationship spanning over two decades have? Where were their legal protections and benefits?

Not only did the aftermath of 9/11 witness discrimination against members of non-heterosexual families, but it also swept under the carpet the trials and tribulations faced by those who did not have the protection mechanism of marriage. Marriage invariably brings with it social welfare protection from certain kinds of adversity, including loss of income by one spouse via death or disability. Unfortunately, this protection mechanism is not available to all families living in meaningful relationships, as demonstrated by the two representative stories showcased above.

Despite the proliferation of diversely variant and structurally experimental family units, family law has not evolved significantly at the federal level to extend social welfare protection for all families, regardless of sexual orientation and gender delineation. Family law is premised who faced additional hardship because they were not recognized as married. Consider a real example of a same-sex partnership of eleven years. "A gay California man whose partner died in the September 11th 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,'" 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 (quoting Keith Bradkowski). Keith's 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.

2. Id.


5. See Russell, supra note 3.
on the protection of family unit\textsuperscript{6} and the maximization of social welfare,\textsuperscript{7} which invites a confusing conundrum due to the evolving conflict of ideologies.\textsuperscript{8} The conventional viewpoint hails the father-mother dyad as the basic functional unit, which must be protected from erosion of diverging family values. Contrarian viewpoints, however, emphasize that family formation should neither be dependent on gender complimentarity, nor should all meaningful relationships be sanctified by marriage. Against this backdrop, the time has come to revisit the basic assumptions of family law and explore whether we must move beyond heterosexual conjugality and embrace a fundamental reconstitution of family concept.

Given that family diversity is an irreversible feature of the post-modern family landscape, we must incorporate an emerging vision of family premised on the intensity and quality of relationships. Against this new modality, meaningful relationships must not be sanctified by marriage in order for individual members of society to obtain social welfare protection. True meaning of family should not only emerge from the concept of marriage, as more and more

\textsuperscript{6} Consider the findings of a group of twelve diverse U.S. family scholars: Cohabitation is not the functional equivalent of marriage. As a group, cohabiters in the United States more closely resemble singles than married people. Children with cohabiting parents have outcomes more similar to the children living with single (or remarried) parents than children from intact marriages. Adults who live together are more similar to singles than to married couples in terms of physical health and emotional well-being and mental health, as well as in assets and earnings ..... Couples who live together also, on average, report relationships of lower quality than do married couples — with cohabiters reporting more conflict, more violence and lower levels of satisfaction and commitment. Even biological parents who cohabit have poorer quality relationships and are more likely to part than parents who marry. Cohabitation differs from marriage in part because Americans who choose merely to live together are less committed to a lifelong relationship.


\textsuperscript{8} The Dean of Law at Griffith University in Australia, John Dewar notes, "[Legal theory about the family] has become a confused and tangled terrain of conflicting ideas and tendencies." John Dewar, Family Law and Its Discontents, 14 INT'L J.L. POL'Y & FAM. 59, 60 (2000).
individuals are shifting away from the conventional family formation while searching for meaningful social relationships. This drift away from the status quo is giving rise to an array of evolving family structures. Yet, the legal modalities remain locked in an eighteenth century puritan concept. The growing pluralism in family structures, therefore, makes it incumbent upon society to concede that intimate relationships cannot be subjected to external regulation by the state. While same-sex couples are yearning to gain societal approval for marriage, many other types of relationships are simply being vilified by society, and as a result, being ignored by the law. For example, couples involved in same-sex relationships find it extremely difficult to raise families, as several states have explicit provisions against adoption outside of heterosexual relations. Similarly, several states impose explicit bans on non-heterosexual couples enjoying inheritance or survivorship benefits. This has caused harm and hardship to their alternative families, as they fall outside of the legal mechanisms granted by marriage.

While the heterosexual conception of marriage finds its root in social, cultural, and religious-political fundamentals, historically there have been a variety of reasons for society to promote the institution of marriage. Often however, 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

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12. Historically there have been a variety of reasons for society to promote the institution of marriage. Often however, many reasons are overlooked, as marriage is inevitably linked with only religious connotations. But:
non-heterosexual family styles based on diversity of sexual preferences have become de facto relationship norms for some.\(^3\) Just as the decision to get married is an intensely personal choice, so is the desire to live in a non-marital de-facto partnership relationship.\(^4\) These non-marital relationships are predicated upon variations of socio-economic factors,\(^5\) conceptualized through various progressive liberal

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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.


14. A de facto relationship is a relationship between two people who live together but are not married. It does not matter whether the couple are heterosexual (opposite-sex) or same-sex. The law regarding the division of property at the end of a de facto relationship is based on territory law, which is different from the law that applies to married couples. The de facto relationship has not been incorporated within American legal framework, but promises to be an efficient accommodation in law to include relationships between men and women and between same-sex couples. In the Australian legal realm, a recognizable de facto relationship must come under the definition of a domestic partnership. De facto relationships include opposite-sex relationships, same-sex relationships, and companion relationships. Legal Services Commission of South Australia, *What Is a De Facto Relationship?*, http://www.lawhandbook.sa.gov.au/ch18s06s01.php (last visited Mar. 29, 2008); see generally, Mary Ann Mason, *The Modern American Stepfamily: Problems and Possibilities*, in *ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY* (Mary Ann Mason, Arlene Skolnick & Stephen D. Sugarman, eds., 1998).

15. A recent report by the American Law Institute indicated a strong social movement towards non-marital social relationships. The report observes:

As the incidence of cohabitation has dramatically increased . . . it has become increasingly implausible to attribute special significance to the parties' failure to marry. Domestic partners fail to marry for many
movements, and emboldened into existence through various counterculture movements. These alternative family structures have created a set of social relationships which do not fall under the same degree of state control as traditional marriages. This non-conformity of social relationships within the existing legal fabric has shaped American family law in a direction that is not fully consistent with the free choices and desires of a significant section of the populace. Extension of reasons. Among others, some have been unhappy in prior marriages and therefore wish to avoid the form of marriage, even as they enjoy its substance with a domestic partner. Some begin a casual relationship that develops into a durable union, by which time a formal marriage ceremony may seem awkward or even unnecessary . . . . Failure to marry may reflect group mores. Some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others. Failure to marry may also reflect strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage. Finally there are domestic partners who are not allowed to marry each other under state law because they are of the same sex . . . . In all of these cases the absence of formal marriage may have little or no bearing on the intentions of the parties, the character of the parties' domestic relationship, or the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage.


17. There has been a growing movement calling for dismantling of traditional marriages, which can be found in recent scholarship. This scholarship argues that, either marriage should not be restricted to heterosexual couples, or alternative forms of conjugality must be sanctified by some recognized norms. These commentators include: See generally, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES (1995); Patricia A. Cain, Imagine There's No Marriage, 16 QUINNIP rAC L. REV. 27 (1996); Paula L. Ettelbrick, Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All, 64 ALB. L. REV. 905 (2001); Jennifer Jaff, Wedding Bell Blues: The Position of Unmarried People in American Law, 30 AZ. L. REV. 207 (1988); Nancy D. Polikoff, We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage," 79 VA. L. REV. 1535 (1993); Nancy D. Polikoff, Why Lesbians and Gay Men Should Read Martha Fineman, 8 AM. U. J. OF GENDER SOC. POLY & L. 167 (2000); Dianne Post, Why Marriage Should Be Abolished, 18 WOMEN'S RTS. L. REP. 283 (1997).
rights to these families has been debated while attempting to irradiate their unequal standing in law through the constitutional gloss provided by interpretations of suspect class and equal protection. Yet, the widespread judicial

18. A particular group of people could be considered members of a “suspect class” if the law categorizes them as suspect, and therefore provides them with greater judicial scrutiny. In my opinion, 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 the 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. In City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985), the Court refused to make the developmentally disabled a suspect class. Many commentators have noted, as did Justice Marshall 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. The Court revisited the issue of “suspect class” again in Lawrence v. Texas, 539 U.S. 558 (2003), 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. I shall emphasize here that 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, 517 U.S. 620 (1996), which 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. Given the current composition of the Court, it is highly probable that heightened scrutiny will not be explicitly applied to homosexuals any time soon, although it may consider 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. See Andrew Koppelman, Why Discrimination against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. REV. 197 (1994). Just recently, the Supreme Court of the state of Washington went out of its way to declare that members of the homosexual community are not a minority, that homosexuality is not an immutable characteristic, and finally that homosexuals are not a suspect class. “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 Anderson v. King County, No. 75934-1, (Wash. July 26, 2006), available at http://www.courts.wa.gov/newsinfo/content/pdf/759341opn.pdf. Needless to say, the debate over whether or not members of the same-sex community are a
prohibitions and legislative impasse continue to stymie the equal interests of the minorities.\textsuperscript{20}

In this article, I go beyond the administrative confines of family law, and intend to develop a rationale for expanding social welfare benefits to all families. Delving into the constitutional core of liberty jurisprudence, I seek to draw constitutional grants favoring my proposal that social welfare rights and benefits that emanate from marriage must not be dependent on a person's sexual preference, or the gender complimentarity within the individual's family. My article proceeds in three phases. In the first phase, as presented in Part II, I draw upon an economic cost-benefit analysis in order to engage in an expanded abstraction of social outrage cost. The result is that marriage relationships are illuminated through a prism of contract paradigm. This in turn is beneficial, because analysis indicates that economic rationality neither precludes family types, nor prohibits individuals from obtaining rights and privileges flowing through marriage.

In the second phase, drawing from scholarly views on family, I present the apparent dichotomy of using the traditional definition, and thus argue for a revision of viewpoint based on substantive relationship. By straddling the dual constructs of contractual paradigm and economic analysis, Part III of my article explores whether the conception of marriage has a gender bias— or a sexual-orientation bent, while seeking an efficient avenue between extracting social cost and regulating intimacy.

Finally, in Part IV, I delve into the deeper meaning of human existence, individuality and self, to extract constitutional grants of the legal rights, remedies, and

\textsuperscript{19} 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 that has repeatedly arisen is how to best 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.

\textsuperscript{20} See Russell, supra note 3.
consequences surrounding love relationships. In this exploration, I will engage in an analysis to determine whether the expansion of rights for those in alternative families emanate from a deeper meaning of life, existence, and self.

II. LOOKING THROUGH THE PRISM OF ECONOMIC ANALYSIS

With the explosion of substantive relationship family forms\(^2\)\(^1\) morphing away from the familiar father-mother dyad,\(^2\)\(^2\) private actions by individuals in creating families challenge us to examine the consequences of their social actions. Since family law has not advanced in sync with the evolution in family forms,\(^2\)\(^3\) tracing the roots of such

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21. See supra note 17.
22. See Lynn Wardle, *The Bonds of Matrimony and the Bonds of Constitutional Democracy*, 32 HOFSTRA L. REV. 349, 372 (2003) (asserting that society seeks to maximize its value by incorporating and implementing visions of a family premised in the traditional concept of marriage as the heterosexual union between man and woman, who would eventually form the father-mother dyad as the epicenter of a traditional family).
23. 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 we find 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* (98-032), ruling that their state legislature must establish identical rights for 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* (798 N.E.2d 941) that denial of marriage licenses to same-sex couples violates the state's Equal Protection Clause.

inconsistency will require us to explore at a more fundamental level. Although family law has made discrete advances at various state levels,\textsuperscript{24} its collective inadequacy, especially at the federal level,\textsuperscript{25} has kept same-sex couples,

\begin{itemize}
  \item See Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that limiting marriage only to opposite-sex couples was unconstitutional, becoming the first state to allow civil marriages to same-sex couples, although ultimately, the state Constitution was amended to retain the restriction to marry only for opposite-sex couples); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that restricting same-sex couples from the privileges of marriage was unconstitutional, 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 in the United States to approve same-sex marriages.); Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding that same-sex couples must receive the same rights and benefits 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.); Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that same-sex couples must have the same benefits that opposite-couples have, thus the Legislature created the civil union laws to comply with the mandate.).
  \item 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. A recent study conducted by the University of Pennsylvania showed 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:
    
    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.


Further, a \textit{Star Ledger/Eagleton-Rutgers} report states:

September 2003 Poll reveals the following favorable statistics for same-sex marriage: forty-three percent would allow same-sex couples to marry, fifty-two percent would allow civil unions, fifty-three percent would allow legally married same-sex couples from other states who move to NJ to be recognized as married in NJ, sixty percent thought same-sex couples should be entitled to health insurance and social security benefits through their partners.

\textit{See} American Civil Liberties Union, \textit{State Public Opinion from States on Civil Marriage and Other Recognition of Same-Sex Relationships},
unmarried cohabitating couples, and individuals in de facto partnerships\textsuperscript{26} outside of the protective umbrella of federal rights and benefits granted to married couples.\textsuperscript{27} Despite living in meaningful love relationships, individuals other than heterosexual married couples have been denied


27. Although, marriages between same-sex couples have not been recognized officially, there are states that offer something close to that besides New Jersey. 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. Similarly, 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 a 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. See S.B. 963, 2005 Gen. Assem., Jan. Sess. (Conn. 2005), available at http://hartford.about.com/gi/dynamic/offsite.htm?zi=1/XJ&sdn=hartford&cdn=ci tiestowns&tm=23&gps=237_1298_1020_545&f=00&su=p529.3.152.ip_p554.2.15 0.ip_p284.5.420.ip_p531.20.420.ip_&tt=2&bt=1&bts=1&zu=http%3A//www.ct.gov/2005/fc/2005SB-00963-R000379-FC.htm. 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 marriage and civil union bring. There are states with domestic partners laws. California enacted the State Defense of Marriage Act (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, is 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 v. Superior Court, 26 Cal. Rptr. 3d 687 (Cal. Ct. App. 2005). The state appellate court rejected arguments that domestic partner law was the equivalent of marriage, in a case where the plaintiffs said it violated California's DOMA. The state appellate court ruled that domestic partnership was not 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." Bob Egelko, San Francisco State's Domestic Partner Law Survives a Legal Challenge, S.F. CHRON., June 30, 2005, available at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/06/30/BAG22DGUC31.DTL.
significant legal rights, which may include inheritance rights, survivorship rights, medical rights, financial rights, and property rights, amongst others. This disparity and discrimination within the legal framework invites us to analyze the social consequences of private actions from an economic perspective. If economic protection regarding social welfare is applied asymmetrically based on individual choice of family, we must seek out the economic rationale behind

28. By using data from New Jersey residents in Census 2000 and using experiences from other states, Lee Badgett and Bradley Sears were able to quantify the likely fiscal effects of the Domestic Partnership Act (DPA). 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. 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; (ii) covering the health insurance of same-sex domestic partners of state employees and retirees will add approximately $1.8 million in state expenditures, notwithstanding the fact that making same-sex domestic partners eligible for spousal survivor benefits will probably not result in any increase in state expenditures; (iii) the State will also experience a loss in transfer inheritance tax revenues in the range of $4.3 to $8.6 million. 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. Badgett and Sears concluded that the net impact of the DPA is over $61 million in fiscal savings each year. Thus, the Domestic Partnership Act will provide material support to many New Jersey families without placing a strain on the state budget. See M.V. LEE BADGETT, & R. BRADLEY SEARS, SUPPORTING FAMILIES, SAVINGS FUNDS: A FISCAL ANALYSIS OF NEW JERSEY'S FAMILY EQUALITY ACT (2003), http://www.law.ucla.edu/williamsinstitute/publications/NJ-DPAStudy.pdf. In referring to third party impact, I focus on the issues related to children. 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." Christina Muller, An Economic Analysis of Same-Sex Marriage, in 2002 GERMAN WORKING PAPERS IN LAW AND ECONOMICS 6 (2002). 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 POSNER, ECONOMIC ANALYSIS OF LAW 156 (5th ed. 1998) (describing a set of advantages arising out of marriage); 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).
such inequitable legal consequences. Furthermore, it is important to understand whether there exists a rational basis for imposing social cost on intimate behavior and to identify whether such social cost imposes a stricter threshold of accepted behavior within our contemporary societal discourse. The benefit of using economics to illuminate marriage is that this method allows us to analyze the social actions of individuals through a dispassionate prism of cost-benefit analysis. The neutrality of this economic analysis is not shaped by a morality-laced, religion-biased social welfare argument that extols the virtues of conservative family structures. In order to conceptualize the broader implication of the institution of marriage through economic terms, I draw attention to the economic consequences of social action. The analysis can be centered on finding if there are negative consequences of extending marriage rights. Consider at the outset the consequences of social outrage that might be felt by the majority population in the event a broader bundle of protective rights, which emanate from marriage, is granted outside of heterosexual marriages. Here, I view marriage as an institution which brings both a reasonable expectation of economic protection, as well as maximization of economic benefits for the participants of the institution. Despite the culmination of private decisions borne out of humanity's inherent right to find its own identity, marriage comes with legal consequences on account of being amalgamated within the public welfare system. This immediate integration of two individuals allows for spontaneous immersion within a protection paradigm defined by a bundle of fiscal benefits and societal rights. There are

32. Id.
33. Marriage brings with it an exclusive package of legal rights. By protection mechanism, I refer to the plethora of benefits, from 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.
34. Existing law provides married couples with a slew of economic benefits
many more benefits that a couple can extract from being married than they would otherwise be able to receive in a non-marital situation. These benefits, however, flow from the government, as a legal consequence of the existing legal paradigm. For example, by conferring upon a couple the fiscal benefit of tax redistribution, the net gain transferred to society is lowered, which the society must recoup via some form of societal rent extraction.\textsuperscript{35}

Let us capture the protection paradigm of marriage with further analysis. Protection paradigm unfolds itself under a twin framework. Besides governmental grants of economic benefits, under the existing legal framework, the more economically solvent partner in a marriage becomes economically responsible for taking care of the less economically solvent partner. This protection mechanism comes via a legal framework created to extend and expand the institution of marriage with the premised goal to propagate the family.\textsuperscript{36} This is also another contentious area in today’s contemporary discourse that I will explore in the

\textsuperscript{35} 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. I argue here that, being subjected to this suppression is equivalent to paying a societal rent. Since, only heterosexuals are allowed to be part of married community, the societal rent is the suppression of same-sex orientation. By paying that rent, persons can receive the privilege of accompanying marriage rights.

\textsuperscript{36} See supra note 7.
next section. Clearly, when two individuals are granted rights that emanate from marriage, they extract economic benefits, much like a corporation earning tax breaks. A corporation gets the benefits of tax reduction for engaging in its business. In return, the corporation is expected to impart some social benefit to the society, such as enabling societal members to earn their livelihoods. Similarly, because of marriage-related tax benefits, society as a whole loses that tax gain which results in a net economic loss to the society. Thus, the society must extract some form of societal rent. What would therefore, be the costs that must emerge as a result of the benefits imparted on married couples?

A. Social Cost of Marriage: Outrage, Aversion and Transference

From an economics perspective, there is no economic consequence to society on account of opening marriage rights outside of the heterosexual community. This is understood through an analysis of the various cost drivers that could impose social cost as a result of marriage. These costs can come from (i) social outrage, (ii) aversion factor, and (iii) transference effect.

1. Social Outrage

We begin the analysis by exploring the social outrage cost because economics realigns resources by eventually engaging in a social ordering. In such an ordering, the benefits imparted upon individuals must include the equivalent cost which has to be extracted from such individuals. This social cost extraction does not take place in a premarital scenario, a relationship condition in which no social-welfare-related benefits are provided. Social cost extraction takes place immediately after marriage by imposing on married couples a set of behavioral norms. These are a bundle of restrictive covenants, and not adhering to them could cause social outrage.
When two individuals enter into a relationship without the framework of marriage, no limit is placed on the relationship either from a social ordering or from an imposition of social cost point of view. When society loses economic advantages, it must attempt to recoup some other benefits from the individual, which could come via extraction of societal cost from such an individual. This cost extraction can manifest itself by restricting the individual from engaging in a set of socially prohibited behavioral patterns. It is important to note that these prohibited behavioral patterns may not be legally impermissible in some jurisdictions and therefore, the enforcement becomes predicated on the imposition of social outrage. Not following these behavior patterns could create social outrage from fellow members of society, which in turn impedes the married couple's pursuit of happiness. Once individuals enter into marriage, they are prohibited from entering into multiple romantic relationships or engaging in extramarital relationships. These prohibitions or restrictions in behavior are either mandated by explicit legal provisions, or prevented by the imposition of societal outrage. In this way, social cost is extracted from entities that enjoy rights of marriage, either by means of legally sanctioned behavior, or by being subject to societal outrage cost.

Implied in the concept of social outrage cost are the societal dynamics that unfold themselves by imposing explicit prohibitions on extending marriage benefits beyond heterosexual individuals. Another way of looking at the social cost extraction would be to view social cost as the suppression of inherent desires, foregoing the right to one's sexuality, and relinquishing an individual's right to a family. I would argue that not extending the protective paradigm of financial benefits and welfare rights to individuals outside of the heterosexual community is driven by society's desire to impose social outrage costs on those individuals. Society is attempting to extract outrage costs by taking an opposing view toward granting marriage rights to same-sex individuals.

These benefits, however, do not come without attendant societal behavioral norms by which the married couple must abide. When an individual within marriage or the married couple themselves behave differently, they incur society's outrage, which can be seen as a cost to be borne by married individuals.
or by not extending rights to individuals who are unwilling to follow the path of a heterosexual couple’s life.

2. Aversion Factor

Society opposes extending marriage-associated rights outside of the heterosexual community due to aversion to lifestyles that contradict the majority’s view of a legitimate lifestyle. Could this aversion impose sufficient social cost on individuals which would preclude them from being integrated within the broader protection paradigm of marriage rights? In my view, aversion should not be seen as a compelling societal interest to shape issues of rights. Instead, aversion to a lifestyle by the majority should be viewed as a clash of two opposing lifestyles, each of which may have legitimate reasons for proliferation. Furthermore, when significant clashes in lifestyles emerge within the social framework, no specific group’s right must be curbed. Instead, the determination of its affirmation or abrogation has to be conducted at a more fundamental level. This calls for an enquiry based on the individual’s right to individuality, premised on constitutional principles of equality, privacy, and liberty. I would argue that aversion to a particularized way of life, which does not encroach onto the prohibited confines of egregious behavior, can in no way impose social costs upon individuals involved in these alternative lifestyles. Therefore, this cost driver should not be taken into consideration when granting the protective umbrella of social welfare or expanding of welfare benefits to individuals. Since society neither has the right to regulate intimacy, nor the authority to impose limits on private behavior, the aversion factor based on a differing sexual proclivity than the majority population should not be an avenue through which society can impose social outrage cost.

3. Transference Effect

In its principled opposition to extending marriage rights beyond heterosexual individuals, society routinely invokes

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40. See supra note 7.
41. See supra note 34.
transference effect as an element to impose social cost on individuals. Transference effect can be defined as the shaping effect young individuals might be exposed to as a result of sustained and legitimized exposure to the same-sex idealism. The proponents of this viewpoint argue that, with the government's granting of those rights, it would also legitimize same-sex relationships within the social framework, ultimately colluding young impressionable minds into accepting same-sex behavior as more fundamental behavior. However, overwhelmingly, the existing biological or social research indicates that homosexuality is neither learned, nor acquired, calling into serious doubt the legitimacy of the shaping effect on young people. Sociological research further illustrates that the time frame between an adolescent maturing into an adult and entering into a meaningful relationship has increased over the years, exposing individuals to a plethora of choices and external stimuli which would indeed nullify any shaping effect incidents that homosexuality might have caused. Therefore, the transference effect should be considered an inadequate driver of imposing social outrage cost. I would argue, therefore, that aversion does not provide a legitimate basis of imposing social cost on individuals attempting to amalgamate within the protective umbrella of social welfare protection. It can be inferred, therefore, that social cost analysis does not provide an adequate rationale for not granting marriage rights beyond heterosexual couples.

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43. On the topic of homosexuality, there are strong sentiments both for and against. I will allow the reader to draw their own conclusion. Here, I argue 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 Stephen Jay Gould, Ever Since Darwin: Reflections in Natural History (1977); J.M. Bailey & R.C. Pillard, A Genetic Study of Male Sexual Orientation, in 48 Archives of General Psychiatry 1089-96 (1991). 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 organization removed homosexuality from DSM-III in 1973. See generally Richard A. Isay, The Homosexual Analyst, in 46 Psychoanalytic Study of the Child 199-216 (1991).


45. Id.
B. Contract Paradigm Analysis

Setting aside the social cost element, I shall now consider the institution of marriage through a contract paradigm analysis. The concept of marriage has morphed from the frozen inequalities of the medieval era as it embraced elements of individual liberty and spousal equalities. Along the way, its contractual construct has expanded within the congruent limits of these liberating ideals. Thus, the very institution can be viewed as a nexus of contract in which two entities are in constant negotiation. These entities are bound by a cascading array of incomplete contracts, embedded within a larger contract, interconnected by asymmetric preference between the two entities. This nexus is shaped, therefore, by asymmetric incentives and game-theoretic decision making. Like the contract fundamentals, each valid contract comes with the implicit premise of performance. While this implicit premise of performance remains intact, both the content and cost of that contract

46. Here, I draw attention to 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. Our 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 BULL. 1-7 (2006) (discussing relative preferences).

47. Here I draw attention to the interaction of couples in relationships, in particular, marriage. Particularly, I want to explore this 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.


performance continually changes within marriage. I would argue that marriage establishes contractual arrangements on two fronts. While one contractual arrangement is between the parties themselves, the other arrangement is between the government and the couple.

To better understand the contractual framework embodied in marriage, it is important to comprehend the scope and limitation of the contractual construct of marriage, which has expanded since the earliest marriages marked by trade-offs and arrangement by elders to today's marriages in which many resemble mergers by two competing themes of individual liberty and spousal equality. While the contract paradigm of marriage has legal significance, it also conveys a significant deeper meaning. When we recognize the contractual aspect of marriage, we also are drawn to understand an individual's property interests as a derivative of this contractual arrangement. By taking an expansive view of marriage as a social contract, we can better understand future implications of marriage on two grounds. First, it will form a proper perspective of whether the idea of marriage as applicable to other de facto cohabitating unions beyond heterosexual marriage is inconsistent with this social contract construct. Second, it will broaden the definitional paradigm and place the institution of marriage on a firmer conceptualization. Although the concept of matrimony can be traced via its historical judicial interpretation between heterosexual men and women, its construct has evolved due to the continual legal consequences and the binding contractual mechanism shaping its contours. As the shape and form of intimate adult relationships multiply, the nature of societal relationships evolve to such an extent that the contractual obligations and legal protections of marriage take a more expansive connotation.

Marriage can be viewed as a social contract centered on two dimensions while providing specific legal consequences and inheriting socio-economic impacts. These two dimensions manifest themselves by the relationships between the individuals involved in the marriage and by relationships between the state and the married couple in question. The socio-economic impact of marriage comes from the de jure welfare protection mechanism accorded by the government and the de facto third party implication presented by the
union. These contractual frameworks can encapsulate various categories that range in differing prominence, such as (i) no fault contract, in which the contracting parties can walk away from the marriage obligation without showing any cause for the break up, (ii) mutual consent contract, in which the contracting individuals are mandated to enter into an agreement for the dissolution of the contract, (iii) default contract, where the state as a supervising authority will impose its legal principles in the absence of explicit provisions of premarital contract, and lastly, (iv) covenant marriage, where both parties have to overcome a higher threshold or a more-difficult hurdle for the dissolution of the contract due to its binding nature.

Typically, in trying to expand upon the contractual framework of marriage, the focus is given only on the implicit promise of a performance, which the contract embodies without abstracting the content and cost of that contract. It is important to consider the basic factors that distinguish a marriage contract from non-marital contracts. A marriage resembles the mechanism of a corporation in that no one contract defines marriage, but an array of cascading contracts embedded within a larger contract is nestled at the center of a marital relationship. Since some of these contracts are embedded within one another, the performance aspect of the contract is dependent on the performance of another part of the contract. Moreover, the success or failure of each of these contracts is dependent on other factors. Such factors include the asymmetry of economic incentives between the two entities, relative preferences between contractual parties, and game-theoretic decision making of the contractual parties involved. All of these factors change as a function of time, which in turn impacts the performance of the contract.

Without a doubt, two contractual relationships continue to evolve within a marriage. These contracts emanate from the relationships between the individual entities and the relationship between the government and the contracting couple. The success, failure, or the continuation of the contractual relationship between the contractual couple

49. See id.
50. Id.
depends on relative preference between the individuals.⁵¹ This preference framework in turn is governed by asymmetric economic incentives, which in turn is shaped and evolved in time by game-theoretic decision making by the individuals.⁵² This renders the contractual arrangement within the marriage between the participants very complex. Furthermore, due to the contract performance’s dependence on economic preference, game-theoretic decision making, and the composition of incomplete contracts, this relationship could be best described as an incomplete paradigm.

On the contrary, the relationship between the government and the couple is straightforward in nature, as it is based on expectation of performance on both ends. Upon formation of a legal relationship by marriage, the government enters into a contract with the couple. According to the performance expectation arising out of the contract, the government extends both a bundle of rights and a set of protections to the married entity. Thus, marriage forms an entity which creates legal rights and social responsibilities along with various legal consequences through its formation. This entity inherits performance expectation and incurs legal consequences as a prerequisite of its existence within society.⁵³

The social cost analysis provides adequate illumination about the economic consequences of social action to dispel the notion that expanding marriage rights to a broader community cannot be invalidated on grounds of social outrage. The contract paradigm analysis places the burden away from discussions on gender complimentarity and sexual orientation. Economic analysis based on contract formation rejects the exclusivity of marriage based on criteria borne out of sexual orientation or gender preference.⁵⁴ Clearly, the fulfillment of an entity-agency relationship between the dyad and the government is neither based on sex, nor dependent on gender. While the dyad inherits some responsibility and accepts the imposition of social cost, it in turn comes under the protection umbrella offered by the government. Thus, there is no basis for either gender complimentarity or sexual

⁵¹ See supra note 46.
⁵² See supra note 47.
⁵³ See supra note 48.
⁵⁴ See discussion supra Part II.
preference to be a necessary or sufficient condition for such a legal entity, which can gain all of the rights and benefits enjoyed by heterosexual unions.

III. RECONCEPTUALIZING FAMILY: GOING BEYOND THE DEFINITIONAL CONUNDRUM

Implicit in this enquiry thus far is the recognition that granting marriage rights may not be the exclusive province of heterosexual couples. This is evident in that neither the social cost argument, nor the contractual framework analysis supports such exclusivity. If so, then what is missing? The answer comes from extricating the definition of family from the archaic inequalities of eighteenth century puritan beliefs and honoring an expanded conception of family which adequately encompasses all types of family structures. Against the backdrop of a definitional conundrum regarding the meaning of family, an expanded definition of family is a necessary condition to broaden the existing frontiers of family law. Surely, this would be a significant step forward.

Historically, marriage and the concept of family have been intertwined in all socio-legal discussions. Anchored in the basic premise of a stable family is the precursor to a viable democracy. The definitional construct of family gained currency under the conventional framework of the mother-father dyad is the backbone of family law. Although marginal expansion of social welfare rights and supplemental enhancement of fiscal protection has taken place in the evolution of family law within the last couple of

55. See Steven Mintz & Susan Kellogg, Domestic Revolutions: A Social History of American Family Life (1988) (describing the marriage behaviors of the new Pilgrim immigrants, whose 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).

56. See, e.g., Wardle, supra note 22 (asserting that society seeks to maximize its value by incorporating and implementing visions of a family premised in the traditional concept of marriage as the heterosexual union between man and woman, who would eventually form the father-mother dyad as the epicenter of a traditional family).

decades, it has not altered significantly the legal bastion premised on conventional family values. Conservative voices contend that the government should promote marriage as only the union between man and woman. According to this viewpoint, father-mother dyad is considered the only proxy for the most stable family structure. As such, maximization of social welfare comes from the stabilizing effect of a conventional family which only heterosexual couples, delineated by gender complimentarity and characterized by heterosexual orientation, can provide. However, the recent explosion of alternative family structures fosters the converse of such a viewpoint, and therefore, we must reject the notion that heterosexual households are the only privileged place from where family values spring forth.

I would argue that the viewpoint drawn from the historical text to define “marital family as the generator of domestic habits” fails to represent the full range of family structures. With a growing array of family forms fully capable of fostering family members into both intimate and nurturing relationships, this assertion is squarely outdated.


60. See Wardle, supra note 22.

61. Id. at 371-72 (noting that society seeks to attain maximum value by promoting family virtues through heterosexual marriage).

62. See generally id. For traditional marriage views which idolize heterosexual marriage as the “seedbed of civic virtue,” see, COUNCIL ON CIVIL SOCIETY, A CALL TO CIVIL SOCIETY (1998) [Hereinafter COUNCIL]; NAT'L COMM'MN ON CIVIC RENEWAL, A NATION OF SPECTATORS: HOW CIVIC DISENGAGEMENT weakens America and What We Can Do About It (1998) (extolling the virtues of two-parent heterosexual families and calling for the reduction in teenage and non-marital births); Mary Ann Glendon, Forgotten Questions, in SEEDBEDS OF VIRTUE 3 (Mary Ann Glendon & David Blankenhorn eds., 1995) (observing some consensus among commentators who identify the recent phenomenon of “weakening of child-raising families” as negatively contributing to the development of virtuous citizens); see generally GLENDON, supra, note 30 (arguing that contemporary rights discussions subsume the role of civil society in inculcating the virtues necessary for ordered liberty).

63. See id at 107-08, COUNCIL.

64. See Roger Rubin, Alternative Lifestyles Today: Off the Family Studies Screen, in HANDBOOK OF CONTEMPORARY FAMILIES 32, 33 (Marilyn Coleman &
Today's alternative family structures are fully capable of accomplishing, through mutual support and interdependence, the awesome responsibility of nurturing children into adulthood. These alternative families are fully equipped to realize the full potential of every individual, and create productive and bona fide citizens. Therefore, the hackneyed concept of marital family as the only capable entity to become the foundational unit of society needs historic revision. Implicit within this particularized vision of family is the primitive understanding of societal welfare, based on transference of virtuous qualities through both mother and father. The question that arises is whether this construct is still applicable. The ensuing enquiry then becomes more poignant against a broader and expanding conception of liberty and diverging ideals of family formation.

While defending traditional marriage, some commentators have pleaded not to change the domestic habits of the American people while emphasizing the role of marriage in constituting virtuous citizens. These commentators have defined marital family as the "seedbed of republican civic virtue." According to such viewpoints, reconceptualizing family and redefining the marital construct would alter American domestic habits, which would lead to radical revisionism of the Constitution's basic premises, ultimately resulting in structural changes in the government within a very short time frame. This implies in no

Lawrence Ganong eds., 2004) (establishing that same-sex marriage laws threaten the dyadic restriction on marriage because in order for same-sex couples to have children without resorting to adoption they must necessarily involve a third person in order to conceive and bear a child, which will eventually transform the dyadic relationship into an asymmetric triadic formation).


66. See generally, supra note 62.

67. See Glendon, supra note 62.

68. See Wardle, supra note 22, id at 361-365.
unmistakable terms that one of the basic impediments in going beyond the conventional concept of marriage and redefining marriage is to overcome unsubstantiated fears of losing traditions and norms known to the majority population. While the world outside of the United States is embracing the changes in the diverging conceptions of family and incorporating within their constitutional jurisprudence the rights and benefits of all types of family structures, constitutional jurisprudence in the United States continues to repudiate these much-needed changes. It still clings to this particular vision of family consisting of a dyad of husband-wife with gender complimentarity. Although domestic partnerships and civil unions highlight the advancement in recognizing rights of individuals with alternative desires in some states, the legal revolution within the broader United States has remained stagnant. Barring a few states such as Vermont, Massachusetts, and New Jersey, the courts and legislatures have failed to broaden the institution of marriage, and thus failed to enhance the concept of marriage to comport with constitutional commitments to individual liberty and equal citizenship.

Neither same-sex marriage rights, nor the economic protection for alternative families have progressed in-step with the explosion of family structures long in vogue within the country. Although marriage in general has moved from a hierarchical-based to an equity-based framework, it has not gone beyond the gender complimentarity and sex-based

69. See Maxwell, supra note 9.
70. Id.
71. See Wood & Duck, supra note 16.
72. See Wikipedia, supra note 23.
73. See Baker v. State, 744 A.2d 864 (Vt. 1999) (holding that same-sex couples must have the same benefits that opposite-couples have, thus the Legislature created the civil union laws to comply with the mandate).
74. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding that restricting same-sex couples from the privileges of marriage was unconstitutional, 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 in the United States to approve same-sex marriages).
75. Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding that same-sex couples must receive the same rights and benefits 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).
discriminatory framework. In my view, keeping the gender complimentarity within marriage does more harm in its continuation of the gender-based schism. It would, on the contrary, be better if gender diversity and sexual preference is given entry into reconceptualizing family boundaries. After all, family diversity is an irreversible feature of the post-modern family landscape and the legal paradigm must encapsulate that reconceptualization.

IV. THE RIGHT TO INDIVIDUALITY, SELF AND THE CREATION OF FUNDAMENTAL RIGHTS

Thus far, I have established that the restrictive covenant of marriage does not flow from the economic consequence of social action, nor does it emanate from any prohibition within the contractual paradigm of marriage. Thus, I see no reason for not expanding the protective paradigm of marriage beyond the existing framework. Further, I do not see any compelling national interest for not redefining and reconceptualizing the definition of family. I shall, therefore, move beyond the definitional construct of family and the economic prism, and attempt to realign the current issue within the constitutional framework.

Lost amidst the discussion of social cost and economic impact of marriage is the analysis of fundamental rights determination. The rights to a protective paradigm emanating from legal consequences of marriage should be viewed through a more fundamental analysis of human existence. The enquiry must revolve around whether individuals coming from alternative family structures have the fundamental right of economic and social protection from the society. However, before examining how far the contours of this right can extend, I will frame the discussion at a more granular level. The determination of this right should emanate from a deeper understanding of human existence, seen through an expanded abstraction of human individuality and inherent dignity. This inquiry can be constructed around a set of well-defined questions: Is the drive for homosexuality anchored in the pursuit of a meaningful existence in the universe? Is adherence to an alternative family structure a necessary component for fulfilling human individuality? In my view, an attempt to understand human individuality will inevitably lead to a determination of whether retention of
one's own individuality can be encapsulated within a fundamental rights discourse. What then, is the definition of individuality?

Individuality is part and parcel of the right to define one's own existence. Individuality flows through a set of inherent desires, manifested via a set of actions. The right to individuality could be seen as an inalienable right of an individual, as long as his or her actions do not come in conflict with other persons' rights to individuality. Individuality is therefore protected by a zone of privacy, driven by an individual pursuit of happiness, and manifested in one's own definition of self. This definition of self evolves through a set of social actions and solidified via a series of life events. Therefore, a person's individuality is also revealed through her sexuality, established by her choice of companionship, solidified by her desire to assimilate within a family, and validated via entitlement to a right to legacy. In most individuals, this legacy evolves through inheriting children, either by biological procreation or by means of adoption. Attaining one's own individuality, therefore, requires obtaining a bundle of rights. These rights will guarantee the person's right to happiness that emanates from one's expression of sexuality and living in a meaningful relationship within a desired family and obtaining children.

A set of social actions flow through the desires identified above, each of which can be particularized and encapsulated within the larger body of family law as some specific right of an individual. By granting an individual a collective framework of all these rights, the said individual is enabled to define one's self. The enquiry therefore, centers on determining the nature of these rights. Is the pursuit of finding one's self or trying to create one's individuality a fundamental right? Although not explicitly articulated in the Constitution, could they be unenumerated rights? Since

76. The Bill of Rights contains 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 has 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]
all these rights are essential components to fulfill one's
destined individuality, could we identify an umbrella of
unenumerated rights to self, which ought to be
constitutionally protected? In my view, this fog of confusion
arising from an erroneous recognition of unenumerated rights
could best be eradicated by further irradiating the contours of
constitutional protection.

The fallacy of enumerated rights stems from the belief
that the only protected rights are those that are explicitly
mandated in the Constitution. Under this fallacy, rights
that are not specifically mentioned must not be construed as
protected rights and therefore, their existence depends on

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." See Randy Barnett, The Ninth
see also JOHN HART ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL
REVIEW (2006) (asserting that these rights come from a broad principle of
equality and democratic process).

77. The Ninth Amendment to the United States Constitution addresses
rights of the people that are not specifically enumerated in the Constitution. As
part of the Bill of Rights, the Ninth Amendment reads, "The enumeration in the
Constitution, of certain rights, shall not be construed to deny or disparage
others retained by the people." Justice Arthur Goldberg, Chief Justice Warren,
and Justice Brennan expressed the opinion that the Ninth Amendment is
relevant to interpretation of the Fourteenth Amendment. This opinion is

[The 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. at 490-91. The concurring opinion is available at

78. Id.

79. Consider a noteworthy commentary by Randy Barnett. He 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
the vagaries of governmental decision or juridical invocation. The history of the Framing period indicates not only were the Framers concerned about protecting some rights from federal assault, but also recognized that they may not have conceived of the entire suite of rights that future descendants might require for perpetuation of their meaningful existence. Therefore, explicit enlisting of some rights in the form of enumerated rights does not mean that there are some rights that may not be constitutionally protected. This is echoed in the Ninth Amendment which reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Ninth Amendment was clearly designed to grant security to certain rights that were not envisioned, but perhaps would flow from the sociological development of the future generations. This was noted by James Madison:

It has been objected also against a bill of rights, that by enumerating particular exceptions for the grant of power it would disparage those rights which were not placed in

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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 . . . .

*See* Randy Barnett, A Ninth Amendment For Today’s Constitution, 26 Valparaiso University Law Review 419 (1991), id at 432.

80. *See, e.g.*, Letter from James Madison to Thomas Jefferson (Oct. 17, 1788) (expressing concerns that rights may be reserved in a manner in which federal powers are granted), available at http://www.constitution.org/jm/17881017_tj.htm; Letter from James Madison to George Washington (Dec. 5, 1789) (noting the existence of a dividing line between the powers granted and the rights retained does not necessarily preclude abridgement of any legitimate rights via non-enumeration), available at http://memory.loc.gov/cgi-bin/query/r?ammem/njmtext:@field(DOCID+@lit(jm050127)).

81. Harvard historian Bernard Bailyn captured the Ninth Amendment’s connotation of encompassing unspecified rights in the future, when he observed that the Ninth Amendment refers to, “a universe of rights, possessed by the people - latent rights, still to be evoked and enacted into law . . . a reservoir of other, unenumerated rights that people retain, which in time may be enacted into law.” Bernard Bailyn, Remarks at White House Millennium Evening (2000), available at http://clinton2.nara.gov/Initiatives/Millennium/bailyn.html.

that enumeration: and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the general government, and were consequentially insecure.\textsuperscript{83}

The promise of the Ninth Amendment is found in its rejection of the inference that by listing certain rights, other rights would lack protection.\textsuperscript{84} The Constitution does not prohibit the expansion of some rights to isolated minorities within the society, even if an existential analysis supports formation of such rights. We must then determine whether denial of this umbrella of rights to a meaningful existence prevents the individuals in question from finding their individuality and more importantly, their self.

Before determining whether the right to one's self and the retention of one's individuality falls under fundamental rights, we must trace the constitutional trajectory based on tradition and historical development in law. The pursuit of determining one's self must be insulated from federal encroachment and thus protected by a halo of privacy. The right to privacy is protected as long as that privacy component is not encroaching into a domain marked off-limits by law. Although the right to self has a privacy component by the very nature of this right, it is debatable if this right can be fully secured under a privacy analysis. Constitutional jurisprudence, from \textit{Griswold v. Connecticut}\textsuperscript{85} to \textit{Lawrence v.}


\textsuperscript{84} Such examples of interpretation of the Constitution are found in The Federalist Papers. The writers 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. The Federalist papers are available at http://www.loc.gov/rr/program/bib/ourdocs/federalist.html.

\textsuperscript{85} Griswold v. Connecticut, 381 U.S. 479 (1965). (holding that the Constitution protected the right to privacy). The ruling was based on an 1879 Connecticut law, which was virtually never enforced. \textit{Id.} The law prohibited the use of contraceptives or drugs that were for the sole purpose of preventing conception. \textit{Id.} 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. \textit{Id.} Justice Byron White also relied on the Due Process Clause in his concurrence. \textit{Id.} Since \textit{Griswold}, the Supreme Court has cited the right to
Texas,\textsuperscript{86} has reshaped the privacy law, morphing from Griswold's "penumbra of privacy"\textsuperscript{87} to Lawrence's "zone of privacy."\textsuperscript{88} Although Griswold elevated the concept of privacy from discrete individualized restrictions on government actions to providing an expanding protective umbrella of self autonomy, I question if Griswold's privacy necessarily encompasses rights to self and individuality. Rather, I see the right to human individuality as recognized under Lawrence's illumination of the zone of privacy. Recognized within the confines of human existence, this privacy is so fundamental and so secure that no legislative invalidation or governmental institution should be allowed within that zone. Griswold's privacy jurisprudence, penned by Justice Douglas, comes via assertion of a definite right, while collectively emerging from the various Amendments,\textsuperscript{89} or finding life under the constitutional glosses of the Fourteenth\textsuperscript{90} and the Ninth Amendments,\textsuperscript{91} or buried in the penumbras\textsuperscript{92} of the individual Amendments. According to Justice Harlan,
however, this privacy right naturally emanates from the Constitution’s fidelity to substantive due process and thus may invalidate legislative statutes prohibiting certain intimate behaviors.\textsuperscript{93} Thus, the privacy of \textit{Griswold} does not announce the creation of new rights. Yet, it becomes problematic in recognizing an expanded abstraction of rights, which must emanate in contradiction to existing statutory prohibitions. In order to develop a meaningful framework to understand the right to individuality, I shall therefore shift the analysis from a privacy-centric framework to a liberty-based discussion.

\textit{Washington v. Glucksberg}\textsuperscript{94} transforms the privacy jurisprudence to liberty jurisprudence, while ascertaining certain fundamental rights based on historical tradition. However, \textit{Glucksberg}’s difficulty comes from the recognition that certain social actions may not comport with historical tradition, while attempting to expand the contours of fundamental rights for individuals. Regardless, the purely fundamental rights analysis seems consistent with the \textit{Glucksberg} jurisprudence, when the privacy doctrine is expanded into fundamental rights abstraction predicated on a liberty interest. This assertion of a liberty component and an expanded abstraction of privacy can be traced back to constitutional jurisprudence, given life from various Justices, most notably by Justice Brandeis, according to whom, the right to privacy flows from the inviolable right to self.\textsuperscript{95}

\textsuperscript{93} This is seen in Justice Harlan’s conception of the right to privacy as the constitutional right that is enshrined in "the concept of ordered liberty," such that any statute that violates the basic tenants of such "ordered liberty" is infringing on the rights to privacy. Thus, according to Justice Harlan, right of privacy is one of these basic values that emanates from “the Due Process Clause of the Fourteenth Amendment,” which can be achieved "only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms.” \textit{Griswold}, 381 U.S. at 501 (Harlan, J., concurring).


\textsuperscript{95} On the issue of privacy, Justice Brandeis observed:
The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man’s spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They
Therefore, going beyond privacy allows for defining the scope and contours of liberty within the explicit guarantees of the Constitution, which in turn provide answers to fundamental questions intricately related to the pursuit of individuality. This manifestation of individuality is predicated upon the assertion of the individual's right to inherent dignity and the pursuit of the individual's right to happiness. Pursuit of happiness collectively emanates from the basic building blocks of defining one's self. This framework dictates that an individual should have the right to (i) express his or her sexuality, (ii) choose a companion according to one's sexual orientation, (iii) form a family which can provide a meaningful relationship, and (iv) nurture children according to one's desire, as long as these actions and choices do not come in conflict with others' rights to meaningful existence and pursuit of self.

This right to pursue happiness and fulfillment of one's own inherent dignity must also encompass the right to shape and define one's legacy by meaningful interaction with an individual's descendent. That means, an individual is free to exert one's self, free to define one's own individuality, and will have all the rights to have children and raise these children within his or her own home, as long as that behavior does not encroach into legal bounds. In order for these rights to have a meaningful gloss of fundamental rights, the courts have to get involved in the business of identifying specific fundamental rights. The enquiry should revolve around whether these rights flow from the recognition of specific individual needs, as a result of sociological development, or whether these rights emanate as specific fundamental rights. Justice Souter's concurring opinion in *Glucksberg* further illuminates this dilemma.96 According to Justice Souter's *Glucksberg* framework, once a fundamental right is conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.


96. *Glucksberg*, 521 U.S. at 752 (Souter, J. concurring).
identified, its lack of recognition could be justified only if
assertion of such right goes against a compelling government
interest. If such a right does not infringe on governmental
interests, it may be enshrined as a fundamental right under
the liberty interest guarantee of the Fourteenth Amendment.

Let us analyze how the present issue is illuminated
under the constitutional development discussed above. If we
were to expand rights flowing from legal marriage to
individuals outside of heterosexual marriage, the derivative
legal consequences could unravel in various ways. This could
bestow upon homosexual couples social welfare protection at
par with married heterosexual individuals. This could
provide a transgendered individual right to raise children. If
all these actions are the necessary precondition to live in
meaningful relationships for the furtherance of the
individual's self and for the continuation of a person's
individuality, how should the constitutional jurisprudence
treat this? I am drawn to Justice Souter's key observation in
Glucksberg:

The weighing or the valuing of contending interests in this
sphere is only the first step, forming the basis for
determining whether the statute in question falls inside or
outside the zone of what is reasonable in the way it
resolves the conflict between the interests of state and
individual. . . . It is only when the legislation's justifying
principle, critically valued, is so far from being
commensurate with the individual interest as to be
arbitrarily or pointlessly applied that the statute must
give way.98

Drawing from Justice Harlan's dissent in Poe v.
Ullman,99 Justice Souter engages in a substantive due process
analysis once a particular interest of an individual is
identified.100 Here, Justice Souter calls for explicit balancing
of the interests of the individual against the state's
interest.101 Clearly, primacy is given to the individual's
interest, while keeping the state's interest at a marginal
level, unless a compelling state interest can be asserted.

97. Id. at 768.
98. Id. at 770.
100. See Glucksberg, 521 U.S. 702, at 771.
101. Id. at 771.
The analysis in the above context must proceed through a series of enquiries to identify whether prohibitive legislation could block the furtherance of individual rights. For example, would disallowing retirement benefits to homosexual couples, at par with married heterosexuals, stymie their pursuit of happiness and, in the process, limit meaningful existence in life? Could legislative prohibition against transgendered adoption deconstruct the inherent dignity of that individual by not allowing a family to raise a child, and in the process, interfering with that individual’s right to happiness? These are the frameworks that we must consider before identifying fundamental rights of individuals within alternative families. These are deeply fundamental and extremely poignant issues related to individual existence. Individuality must be ascertained via careful analysis of the weight of inherent dignity of defining of one’s self and the importance of the pursuit of happiness in prospering one’s individuality. Thus, a shifting norm in the privacy component and an expanded conception of the liberty component will aid in the determination of defining what fundamental right is being denied. In this context, Justice Souter believes Justice Harlan’s dissent in *Poe v. Ullman* can provide a guidepost. In *Washington v. Glucksberg*, Justice Souter noted:

[S]uch review is not the identification of extratextual absolutes, but scrutiny of a legislative resolution . . . of clashing principles, each quite possibly worthy in of itself, but each to be weighed within the history of our values as a people. . . . Thus informed, judicial review still has no warrant to substitute one reasonable resolution of the contending positions for another, but authority to supplant the balance already struck between the contenders only when it falls outside the realm of reasonable.102

Nowhere do we see the manifestation of “clashing principles” of family values more poignant than in the current debate of granting marriage rights beyond conventional families. While one side is extolling the virtues of a conventional family unit as the abiding principle for the furtherance of societal welfare, the other side is trying to find and redefine their existence in the universe by following the

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call of their biological construct and finding it difficult to pursue a meaningful existence in this universe under the same protective umbrella of the law. Doesn’t this call for juridical scrutiny of a legislative principle which perhaps cannot provide resolution to these clashing principles of conception of family? This clashing principle will continue to shape the contemporary socio-legal discourse as long as definitional confusion of “family” remains within our sociological framework. This beckons us to invoke informed judicial review, which must comport via reasonable analysis based on careful scrutiny to identify what constitutes pursuit of happiness. If this pursuit of happiness is tied to defining one’s individuality, which in turn can be traced to defining one’s self and inherent dignity, let us bestow upon our fellow humans the basic fundamental right enshrined in the Constitution, which has long remained unattainable to some.

V. CONCLUDING REMARKS

By shifting away from a same-sex marriage rights discussion, my article argues for a broader expansion of social welfare protection for non-traditional families. In this context, the relationship between marriage and rights come from the fact that the rights argued here typically emanate from the legal consequences of marriage. I do, however, delineate between marriage rights and a broader umbrella of rights that provide social welfare protection. Distinguishing between marriage rights and marriage-like economic rights is important for a myriad of reasons. First, the invocation of marriage evokes a strong sentiment in the public foray. It may happen that contemporary discourse on marriage may subsume the more fundamental issue of attaining rights. Second, the objective of expanding rights is to broaden the protective umbrella of social welfare to families, which may consist of adults living in meaningful love relationships, for which marriage may not have any importance in the traditional sense. Therefore, the focus must be on the recognition of families, and securing their right to social welfare for the betterment and continuation of all family structures.

Looking through the prism of economic consequences at social actions has indicated that there cannot be a social cost associated with granting marriage rights. Although I do not
argue for expansion of marriage rights in this article, I engage in an analysis based on social outrage cost and contractual framework of marriage to drive home the premise that sexual preference or gender distortion does not pose impediments for marriage contracts to formulate. In the same way, the formation of a love relationship is not dependent on sexual preference or gender complimentarity. The broader scope of contract framework and the invalidation of social outrage doctrine provide a stronger rationale to reconceptualize the definition of family. I argue, therefore, that the time has come to extricate the hackneyed definition of family from the frozen inequalities of the father-mother dyad. In the same respect, an emerging definition must incorporate the hopes and desires of all types of individuals, who aspire to live in a meaningful relationship to pursue their happiness. It is implicit that in an expanded conception of family resides the promise of securing multiple rights of economic protection, which flow from the framework of family laws.

Finally, my article seeks to find fundamental rights in the expansion of social welfare rights of non-traditional families. Tracing the constitutional contours of privacy, liberty, and equality, I propose to expand the frontiers of unenumerated rights for non-traditional individuals living in alternative families by drawing upon humanity's eternal aspirations. I argue that, implicit within a person's search for his or her individuality, resides the yearning to find one's own self, and the desire to define one's own conception of family. This desire, this aspiration, is an unalienable right, secured within a halo of privacy opaque to existing laws, insulated from federal assaults and thus, must be recognized. Recognizing such rights does not require invalidation of settled laws, and does not require encroaching upon the rights of other individuals, but it does require a deeper understanding of the individual's right to existence within the meaning of democratic constitutionalism. The resounding clarion call urges expanding the contours of rights for all individuals, which shall guarantee a meaningful existence to all persons, and in turn creating sound and stable family structures across the United States.