

Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of *United States v. Windsor*

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Juggling Rights and Utility: A Legal and Philosophical Framework for Analyzing Same-Sex Marriage in the Wake of *United States v. Windsor*

Chris Bower*

In June of 2013, Justice Anthony M. Kennedy authored the majority opinion in United States v. Windsor,¹ striking down the Defense of Marriage Act as an unconstitutional “deprivation of the equal liberty of persons.”² Instead of applying the Supreme Court’s traditional tiers-of-scrutiny framework,³ Justice Kennedy’s due process and equal protection analysis weighed multiple factors: the significance of the liberty interest at stake,⁴ the extent to which similarly situated individuals were being treated differently under the law,⁵ the presence of animus or moral disapproval of a politically unpopular class in the law’s purpose and effect,⁶ and the legitimacy

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1. *United States v. Windsor*, 133 S. Ct. 2675 (2013).

2. *Id.* at 2680.

3. Traditionally, the Court examines due process and equal protection issues using either strict scrutiny (when the case involves a fundamental right or suspect class), *e.g.*, *Roe v. Wade*, 410 U.S. 113, 155 (1973), or rational basis review (in all other cases), *e.g.*, *Washington v. Glucksberg*, 521 US 702, 722 (1997), though it has also employed a form of intermediate scrutiny in the area of gender classifications, *e.g.*, *Craig v. Boren*, 429 U.S. 190, 218 (1976).

4. The Court held that the constitutionally protected liberty interests relevant to the case included the right to marry and the right to “[p]rivate, consensual sexual intimacy between two adult persons.” See *Windsor*, 133 S. Ct. at 2692; see also *id.* at 2694 (“The differentiation demeans the couple, whose moral and sexual choices the Constitution protects.” (citing *Lawrence v. Texas*, 539 U.S. 558 (2003))).

5. See *id.* at 2693–94 (“[DOMA’s] avowed purpose and practical effect [is] to impose . . . a separate status. . . . DOMA writes inequality in the entire United States Code . . . [and] places same-sex couples in an unstable position of being in a second-tier marriage.”).

6. See *id.*

and strength of the government's policy justifications.⁷ Justice Kennedy's approach in *Windsor* incorporates important due process and equal protection considerations that the tiers-of-scrutiny framework would have failed to capture.⁸ His more holistic analysis, however, lacks the clarity and precision necessary to guide future cases effectively, particularly with regard to the constitutionality of state bans on same-sex marriage.⁹

If Justice Kennedy's nuanced and integrative approach is to endure, additional work is needed to provide a methodology that is detailed, coherent, and replicable. This Comment presents a conceptual framework that courts could use to engage in the type of weighing called for in *Windsor* while avoiding the decision's vulnerabilities. Through the use of an approach in philosophy and normative economics called "deontologically constrained cost-benefit analysis,"¹⁰ the proposed framework balances the various utilitarian¹¹ and deontological¹² considerations in the same-sex marriage debate with greater clarity. Further, as applied to state bans on same-sex marriage, the proposed framework demonstrates why such bans ought to be declared unconstitutional: the purported costs of same-sex marriage, even when viewed in a light most favorable to opponents of same-sex marriage, are insufficient to override the relative strength of the due process and equal protection interests of gay and lesbian individuals.

7. See *id.* at 2694 ("The principal purpose is to impose inequality, not for other reasons like governmental efficiency.").

8. See *infra* notes 47–50 and accompanying text.

9. The Supreme Court will likely have to confront the issue of same-sex marriage again in the near future as a result. See, e.g., *Kitchen v. Herbert*, No. 13-4178 (10th Cir. June 25, 2014) (citing *Windsor* in striking down Utah's ban on same-sex marriage as unconstitutional); but see *Glossip v. Missouri Dep't of Transp. & Highway Patrol Employees' Ret. Sys.*, 411 S.W.3d 796, 804 (Mo. 2013) (distinguishing *Windsor*).

10. Deontologically constrained cost-benefit analysis, sometimes known as "threshold" or "moderate" deontology, "holds that deontological norms govern up to a point despite adverse consequences; but when the consequences become so dire that they cross the stipulated threshold, consequentialism takes over." See Larry Alexander Michael Moore, *Deontological Ethics*, The Stanford Encyclopedia of Philosophy (Winter 2012 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/win2012/entries/ethics-deontological/>.

11. The term utilitarian will be used interchangeably with the term "cost-benefit analysis." It is also generally synonymous with "consequentialism" and "economic analysis." Regardless of the term used, these concepts assess issues solely based on their consequences. For the purposes of this Comment, a utilitarian or consequentialist assessment of same-sex marriage evaluates the issue based on its net costs and benefits to society. See Walter Sinnott-Armstrong, *Consequentialism*, The Stanford Encyclopedia of Philosophy (Spring 2014 Edition), Edward N. Zalta (ed.), <http://plato.stanford.edu/archives/spr2014/entries/consequentialism/>.

12. Deontological theories assess issues based on their conformity with a moral norm as opposed to their consequences. For the purposes of this Comment, a deontological assessment of same-sex marriage evaluates the issue based on the extent to which it is consistent with individual rights. *Supra* note 10.

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INTRODUCTION

Arguments in the legal and philosophical literature for and against same-sex marriage typically take either of two seemingly incompatible forms. Those that take a utilitarian or consequentialist¹³ approach argue either for or against same-sex marriage based on the net costs and benefits to society. These costs and benefits may include the potential that same-sex marriage might erode heterosexual marital norms such as monogamy;¹⁴ the legal, financial, social, and psychological benefits that same-sex marriage might bring to same-sex couples and their children;¹⁵ the alleged harm that would be caused by same-sex marriage if the percentage of children who are raised by their biological parents is reduced;¹⁶ and so on. In contrast, deontological or rights-based¹⁷ arguments find such considerations largely irrelevant in the context of an issue that implicates the fundamental rights of individuals, such as the right to marry¹⁸ and the right to be treated as an equal under the law.¹⁹

Characterizing the same-sex marriage debate exclusively as either a matter of rights or utility is problematic for several reasons. First, it is unproductive. Since a strict utilitarian framework is mutually exclusive and incompatible with a strict deontological framework, arguments intended for one fail to address the concerns raised by the other. Second, purely deontological or utilitarian approaches are contrary to most individuals' moral intuition. Although most acknowledge the moral significance of rights and duties and their primacy over utilitarian or consequentialist considerations, individuals and governments regularly make moral calculations that require the sacrifice of a right or a duty in the face of overwhelming costs or benefits.²⁰ Finally, and most importantly for our purposes, such an approach is inconsistent with due process and equal protection jurisprudence. Under the traditional tiers-of-scrutiny framework, a government action that treats a suspect class unequally or infringes on a fundamental right can be justified whenever the violation is narrowly tailored to achieve a compelling government interest—that is, whenever the utility considerations are significant enough to trump the individual rights of those affected.²¹ The unconventional heightened scrutiny analysis employed in

13. See *supra* note 12.

14. See *infra* Part IV.C.2.

15. See *infra* Part IV.D.

16. See *infra* Part IV.C.1.

17. See *supra* note 11.

18. See *infra* Part III.A.

19. See *infra* Part III.B.

20. See, e.g., *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 655 (1990) (allowing for the restriction of the right of freedom of speech if it is narrowly tailored to achieve a compelling government interest), *overruled by* *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (permitting suspect classifications based on race in order to achieve the compelling government interest of achieving diversity in higher education).

21. See, e.g., *infra* notes 92–94 and accompanying text.

United States v. Windsor required an even more elaborate balancing of the Fifth Amendment rights at stake and the underlying policy justifications for the Defense of Marriage Act (DOMA).²² Thus, to be useful, any analysis of the legal issues related to same-sex marriage must be able to effectively grapple with both rights and utility.

Abandoning the relatively straightforward tiers-of-scrutiny framework for an approach that more effectively integrates deontological and utilitarian considerations is admittedly more complicated and potentially less rigorous and precise if inadequately explained. The Court in *Windsor* attempted to move beyond the traditional framework, but as the dissent rightly points out, the majority failed to provide much analytical detail, leaving one to guess how they arrived at their conclusions and how lower courts ought to apply their ruling to novel issues and facts.²³ As a result, there is a significant need for scholarship that can detail a methodology that is consistent with *Windsor*, that effectively weighs relevant deontological interests against utilitarian justifications, and that can be used by courts in future cases involving same-sex marriage.

Accordingly, the first goal of this Comment is to propose an analytical framework that courts can use for integrating deontological and utilitarian considerations, providing much-needed structure and precision to the analysis in *Windsor*. The second objective is to illustrate an application of the framework to the constitutionality of state bans on same-sex marriage. To achieve this, my proposal will build on scholarship that has articulated a conceptual approach at the intersection of law, economics, and philosophy called deontologically constrained cost-benefit analysis (CBA).²⁴

To that end, Part I will examine the *Windsor* decision with particular emphasis on the way in which the heightened scrutiny used by the Court calls for a balancing of rights and utility. Part II will outline this Comment's underlying assumptions concerning constitutional interpretation and what is meant by the word "marriage." Parts III and IV will detail the main utilitarian and deontological considerations that are relevant in determining whether the Court should overturn state laws that prohibit same-sex marriage. Part V will then demonstrate how an application of deontologically constrained CBA to same-sex marriage avoids the mistake of analyzing the issue solely as a matter of *either* rights *or* utility. Through the use of threshold functions that model mathematically²⁵ how such an integrated approach could work, I will then illustrate an application of the framework and demonstrate why bans on same-sex marriage ought to be ruled unconstitutional.

22. See *infra* notes 30–35 and accompanying text.

23. See *United States v. Windsor*, 133 S. Ct. 2675, 2705, 2709 (2013) (Scalia, J., dissenting).

24. See *generally supra* note 13 and accompanying text.

25. The mathematical representations in this Comment are mainly for illustrative purposes and to provide an additional amount of precision to the analysis. Although courts might find the formulas useful, it is the overall methodology that this Comment argues they ought to adopt.

I.

UNITED STATES V. WINDSOR AND THE BROADER LEGAL CONTEXT

In June of 2013, the Supreme Court in *Windsor* struck down DOMA, holding in a 5-4 decision that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.”²⁶ Passed in 1996, DOMA allowed states to refuse recognition of same-sex marriages granted under the laws of other states²⁷ and defined marriage for the purposes of federal law as exclusively the legal union between one man and one woman.²⁸ As a result of the Court’s ruling, the federal government now recognizes same-sex unions performed in states where same-sex marriage is legal.

Windsor involved two separate but related concepts in Fifth Amendment jurisprudence—substantive due process and equal protection.²⁹ Writing for the majority, Justice Kennedy declined to apply due process and equal protection as separate constitutional tests. Instead he adopted a more holistic approach to Fifth Amendment jurisprudence that weighed multiple factors: the significance of the liberty interest at stake,³⁰ the extent to which similarly situated individuals were being treated differently under the law,³¹ the presence of animus and moral disapproval of a class in the law’s purpose and effect,³² the extent to which the law impinged on individual dignity and imposed a stigma,³³ the legitimacy and strength of the government’s policy justifications for the law,³⁴ and DOMA’s cost to individuals and society.³⁵ Of those factors,

26. *Windsor*, 133 S. Ct. at 2695.

27. See 28 U.S.C. § 1738C (2012).

28. 1 U.S.C. § 7 (2012).

29. Although the Equal Protection Clause is found in the Fourteenth Amendment, which applies to the states, it has been applied to the federal government through the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954); see also *Windsor*, 133 S. Ct. at 2695 (“While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific . . .”).

30. The Court held that the constitutionally protected liberty interests relevant to the case included the right to marry and the right to “[p]rivate, consensual sexual intimacy between two adult persons.” See *Windsor*, 133 S. Ct. at 2692; see also *id.* at 2694 (“The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . .” (citing *Lawrence v. Texas*, 539 U.S. 558 (2003))). The Court also cited *Loving v. Virginia*, 388 U.S. 1 (1967), a seminal right-to-marry case. *Id.* at 2691.

31. See *Windsor*, 133 S. Ct. at 2693–94 (“[DOMA’s] avowed purpose and practical effect . . . [is] to impose . . . a separate status. . . . DOMA writes inequality into the entire United States Code . . . [and] places same-sex couples in an unstable position of being in a second-tier marriage.”).

32. See *id.*

33. See *id.* at 2681 (“The question is whether the resulting injury and indignity is a deprivation DOMA’s avowed purpose and practical effect [is] to impose a disadvantage . . . and so a stigma.”).

34. See *id.* at 2694 (“The principal purpose is to impose inequality, not for other reasons like governmental efficiency.”).

35. See *id.* at 2694–95 (ruling that DOMA “places same-sex couples in an unstable position of being in a second-tier marriage[,] . . . makes it even more difficult for the children to understand the

evidence of animus in the law's purpose and effect was the most significant, triggering more "careful consideration" of the government's justifications than would have otherwise been appropriate under traditional rational basis review.³⁶

Breaking the pattern followed in most equal protection cases, Justice Kennedy did not begin his analysis with a determination of whether gays and lesbians constituted a suspect class, on which the application of heightened scrutiny typically turns.³⁷ He nevertheless employed a form of heightened scrutiny after finding that the purpose and effect of DOMA was based, at least in part, on animosity toward gays and lesbians as a group.³⁸ Although Justice Kennedy's decision departed from the traditional suspect/nonsuspect class dichotomy, it was not the first time he employed a form of heightened scrutiny or enhanced rational basis review after identifying evidence of animus in a law's purpose and effect. In *Romer v. Evans*, Justice Kennedy struck down an amendment to the Colorado Constitution that prohibited, among other things, laws meant to prevent discrimination against gays and lesbians.³⁹ Instead of basing his equal protection ruling in *Romer* on a suspect-class determination, Justice Kennedy justified the Court's close scrutiny of the government's rationale for the law on evidence that it was motivated by animus.⁴⁰

Similar to the way in which an equal protection ruling typically turns on a suspect-class determination, the outcome of the Court's due process analysis is normally a function of whether the law in question infringes on a fundamental constitutional right.⁴¹ Justice Kennedy, however, did not limit himself to binary categories in his due process analysis either. Although he was not willing to declare a fundamental right to same-sex marriage, he found that same-sex marriage implicated a significant liberty interest (at least in states where it is legal).⁴² The significance of the liberty interest—while not necessarily

integrity and closeness of their own family[.] . . . prevents same-sex married couples from obtaining government healthcare benefits[.] . . . deprives them of the Bankruptcy Code's special protections[.] . . . forces them to follow a complicated procedure to file their state and federal taxes jointly[.] . . . brings financial harm to children[.] . . . raises the cost of health care . . . [and] denies or reduces benefits allowed to families upon the loss of a spouse and parent[.]").

36. *Id.* at 2693. Typically, most laws are evaluated under traditional rational basis review where the Court is highly deferential to the government. *See, e.g., City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." (citations omitted)).

37. *See, e.g., Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

38. In establishing the role of animus in the law's purpose and effect, Justice Kennedy pointed extensively to the fact that marriage was traditionally a matter of state law. *See Windsor*, 133 S. Ct. at 2693 ("DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage . . . is strong evidence of a law having the purpose and effect of disapproval of that class.").

39. *Romer v. Evans*, 517 U.S. 620 (1996).

40. *Id.* at 632.

41. *See, e.g., Roe v. Wade*, 410 U.S. 113, 155–56 (1973).

42. *See Windsor*, 133 S. Ct. at 2680–81, 2695.

sufficient to trigger heightened scrutiny on its own, as a fundamental right would be—contributed to the Court’s final determination that DOMA was unconstitutional.⁴³

Evidence of animus played a critical role in the Court’s due process analysis, just as it did in the equal protection analysis.⁴⁴ Mirroring the due process approach that Justice Kennedy took several years earlier in *Lawrence v. Texas*,⁴⁵ the Court found that an infringement on a significant liberty interest⁴⁶ combined with evidence of animus in the law’s purpose and effect⁴⁷ was lethal to the law’s constitutionality.

Justice Kennedy’s Fifth Amendment approach in *Romer*, *Lawrence*, and *Windsor* rightly moves beyond the formalistic and mechanical approach of placing groups of individuals and constitutional rights into neat binary categories such as “suspect class” and “fundamental right.” While such categories are an easily applied heuristic for judges, they can be contrived, rigid, and inadequate in their ability to capture the moral and legal substance underlying the phrases “due process” and “equal protection.”⁴⁸ In particular, as Susannah Pollvogt has pointed out, Justice Kennedy’s focus on whether there exists evidence of animus in a law’s purpose and effect “gives life to the strong anti-caste mandate of the federal Equal Protection Clause” that is otherwise lacking from the more categorical tiers-of-scrutiny framework.⁴⁹

Justice Kennedy’s Fifth Amendment extrapolation—that individuals ought not be disadvantaged through the law solely on account of popular animus toward a class to which they belong—is a relatively modest constitutional inference that comports with basic notions of fairness. It can be reasonable to discriminate across groups. For example, only older Americans are eligible for Social Security. When there is evidence that a law was motivated by animus, however, it raises the possibility that the government is unjustifiably seeking to treat groups of similarly situated Americans unequally. In these situations, principles of basic fairness and justice embedded in the Fifth Amendment call for a more thorough review. This heightened examination weighs the extent to which the due process and equal protection

43. See *id.* at 2695.

44. See *id.* at 2693.

45. *Lawrence v. Texas*, 539 U.S. 558 (2003).

46. In *Windsor*, the liberty interest was the federal government’s respect for same-sex marriage in states where it was legal. See 133 S. Ct. at 2691–93. In *Lawrence*, it was the consensual sexual practices of adult gay men. See 539 U.S. at 578.

47. See *Windsor*, 133 S. Ct. at 2693; *Lawrence*, 539 U.S. at 577 (“[T]he fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice” (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003))).

48. For an account of the principles underlying due process and equal protection as they apply to same-sex marriages, see *infra* Part III.

49. See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 *FORDHAM L. REV.* 887 (2012). For a description of the Court’s traditional tiers-of-scrutiny, see *id.*

interests of individuals are being infringed against any legitimate public policy rationales for the law in question.

Evidence of animus does not necessarily render a law unconstitutional under this approach. While evidence of animus appropriately triggers a more thorough review, the ultimate determination of a law's constitutionality is a function of multiple factors, including the significance of the liberty interest at stake, the extent to which similarly situated individuals are being treated differently under the law, and the legitimacy and strength of the government's justifications for the law. For example, even though a law establishing a sex offender registry might be motivated to some extent by animus toward sex offenders, such a law might be reasonable given evidence that the purpose was also based on legitimate policy rationales, such as protecting children, that are sufficiently strong to justify an infringement on an individual's right to privacy, freedom of movement, or association.⁵⁰ In determining whether the justifications for such a law are sufficient, concerns about animus should not only trigger more careful scrutiny but should also inform the choice of which interests to take into account: in weighing rights infringements against policy justifications, the only policy justifications that ought to count are those that are not based merely on animus or moral disapproval.⁵¹

The chief problem with expanding beyond the traditional, categorical approach to Fifth Amendment jurisprudence, however, is the extent to which a broader approach loses clarity, rigor, and precision. As the dissent in *Windsor* points out, without a more detailed account of how to both define animus and weigh rights infringements against policy justifications, one is left guessing as to how the Court came to various conclusions.⁵² Despite the Court's lack of detail, however, it appears to propose a three-step analysis: First, a court must assess the extent to which individual rights under the Fifth Amendment have been limited or infringed—whether there is a significant liberty interest at stake, whether similarly situated individuals are being treated differently, and so on.⁵³ Second, a court must assess the extent to which there are legitimate policy justifications for the law under review and discard those that are based merely on animus.⁵⁴ Finally, a court must weigh the outcome of the first step in the analysis against the outcome of the second step.⁵⁵

50. Various other considerations would also likely be relevant under this framework, such as the extent to which a right has been infringed, whether sex offenders are similarly situated, and whether the restriction significantly restricts their liberty.

51. See, e.g., *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy [enhanced] rational basis review under the Equal Protection Clause." (citations omitted)).

52. See *Windsor*, 133 S. Ct. at 2705–06, 2709 (Scalia, J., dissenting).

53. See *supra* notes 30–31 and accompanying text.

54. See *supra* note 34.

55. See *Windsor*, 133 S. Ct. at 2696 (holding that "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity").

Although the first and second steps independently pose significant analytical and jurisprudential challenges, the third step is particularly difficult. It requires weighing claims regarding rights and individual liberty interests that are largely deontological—in the case of same-sex marriage, the right to equal protection, to marry, to form intimate relationships—against policy justifications that are largely utilitarian—the extent to which a ban on same-sex marriage benefits children and preserves marital norms. There is a significant need, therefore, to establish a framework that adds clarity and rigor to the constitutional analysis and can weigh individual rights against utility considerations. After Part II clarifies several preliminary matters, Parts III–V will set out to do just that.

II.

PRELIMINARY MATTERS

A. Basic Assumptions

The goal of this Comment is to make a contribution to the line of legal theory that sees economic and philosophical reasoning as relevant both to positive theories of how judges interpret the law, and more significantly, to constructing normative theories on how judges ought to interpret the law. Admittedly, from the point of view of an originalist or a textualist, one could argue that there is little or no relationship between philosophy, morality, economics, and the role of a judge in determining what the law is. There are volumes dedicated to this debate and the extent to which originalism, textualism, and similar theories are different jurisprudential approaches or just disguises for value disagreements.⁵⁶ Such debates are not my concern, however, nor are the potential critiques from legal realists or moral relativists who find normative legal theories misguided from the start.

Having taken the relevance of philosophical and economic thought in jurisprudence as a given, I readily acknowledge that there is no single philosophical or economic theory that can claim sole legitimacy in the American system. In fact, it is my hope that one of my contributions to the same-sex marriage debate will be to show how deontologically constrained CBA is a particularly helpful tool for judges grappling with valid but competing principles such as freedom, equality, and traditional social norms concerning same-sex marriage.⁵⁷ As Professors Medina and Zamir argue in

56. See, e.g., William N. Eskridge, Jr., *The New Textualism and Normative Canons*, 113 COLUM. L. REV. 531, 531 (2013) (book review) (criticizing “new textualism” by pointing out that “[f]or any difficult case, there will be as many as twelve to fifteen relevant ‘valid canons’ cutting in different directions, leaving considerable room for judicial cherry-picking”).

57. See Eyal Zamir & Barak Medina, *Law, Economics, and Morality: Response to Critiques*, 3 JERUSALEM REV. LEGAL STUD. 107, 112 (2011) (“Moderate deontology [also known as deontologically constrained CBA] is particularly attractive in the legal sphere because . . . it

Law, Economics, and Morality, the role of economic analysis and deontologically constrained CBA in the law can best be understood as

[A] way of framing and thinking about the pertinent issues, rather than as an algorithm for use by judges or policymakers. This is how . . . standard economic analysis often contributes to legal analysis. Even without inserting specific numbers into the equations, these formulae help us to identify the pertinent normative factors and their interrelations in a more comprehensive and rigorous way than we could with either conventional economic analyses or conventional deontological discussions.⁵⁸

Indeed, whether judges are willing to admit it or not, the constitutional analysis of issues like same-sex marriage force them to grapple with normative arguments grounded in natural law theory, deontological principles, and various forms of consequentialism. Since each of these theories has a legitimate claim on our legal and political tradition, judges ought to maximize the extent to which their interpretive approach is both integrative and coherent, à la Ronald Dworkin's theory of law as integrity.⁵⁹ On the issue of same-sex marriage, deontologically constrained CBA provides the most effective analytical framework to achieve that goal.

B. What Is Marriage Anyway?

"Marriage" for the purposes of this paper has to do with the *legal* institution of marriage—that is, state-sanctioned marriage as opposed to marriage that is based on private contract or religious ceremony. Thus, the framework that will be set out in Parts III and IV addresses the question of whether *courts* should grant same-sex couples full equality, grant something short of full equality such as civil unions, or leave the issue to legislatures. Before proceeding, however, it is critical to try to understand the normative core of marriage, assuming there is one. Establishing some clarity in this regard will help differentiate substantive arguments from those that are merely definitional⁶⁰ and therefore circular—for instance "marriage is between a man and a woman, therefore same-sex couples cannot get married." At the same time, distilling whatever substance is available from arguments that might be somewhat circular will prevent the analysis from prematurely writing off arguments (typically made by opponents of same-sex marriage) as merely definitional.

outperforms its rivals as an interpretative theory of the law . . ."). For a general description of deontologically constrained CBA, see *supra* note 13.

58. Zamir & Medina, *supra* note 57, at 125. See also EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010).

59. See generally RONALD DWORKIN, *LAW'S EMPIRE* 176–225 (1986).

60. See, e.g., Stephen C. Whiting, *Gay Marriage Is an Oxymoron*, 19 ME. B. J. 79, 83 (2004).

1. *Utilitarian Rationales for Marriage*

The core of the utilitarian or consequentialist view on marriage is easy to understand: marriage exists for the sake of maximizing overall utility (or some proxy such as wealth) by promoting responsible procreation, long-term romantic relationships, and family and social stability. Consequentialist arguments can be employed to argue both for and against same-sex marriage. They can also be used to argue either that marriage should be preserved as a legal institution or that it should be relegated to private contracting and religious ceremony. Thus, for consequentialists, the issue of marriage is entirely an empirical one that requires an analysis of the costs and benefits of the various alternatives.⁶¹ As Judge Richard A. Posner articulated, marriage from this perspective is largely a “[f]unctional, secular, instrumental, [and] utilitarian . . . theory of sexual regulation.”⁶²

For consequentialists, whether society is even justified in maintaining marriage as a legal institution as opposed to leaving it to individuals to contract privately is an open question, the answer to which can change over time. As Judge Posner and Gary Becker point out:

The fundamental economic question is why is marriage a legal status. One can imagine an approach whereby marriage would be a purely religious or ceremonial status Marriage has changed enormously over the course of history With the rise of no-fault divorce, the enforcement of prenuptial agreements, and the decline of alimony, marriage is evolving in the direction of contract.⁶³

Other theorists, however, have rejected the notion that consequentialism leads to the conclusion that marriage is nothing more than a means of contracting. For example, Douglas Allen argues that “[e]conomists often mischaracterize marriage by calling it a contract. Although there are contractual aspects to marriage, its details go well beyond this description.”⁶⁴ Whereas Judge Posner’s focus on private benefits led him to conclude that marriage was little more than a form of contracting, Allen and others see its value primarily as a social institution with the main aim of controlling the negative externalities of sex.

2. *Deontological Rationales for Marriage*

While utilitarian justifications for marriage seem rather straightforward, a deontological argument for marriage requires showing that marriage itself implicates core deontological principles. Admittedly, such a rationale is not

61. See RICHARD A. POSNER, *SEX AND REASON* 3 (1992).

62. *Id.*

63. GARY S. BECKER & RICHARD A. POSNER, *UNCOMMON SENSE: ECONOMIC INSIGHTS, FROM MARRIAGE TO TERRORISM*, 18–19 (2009).

64. Douglas W. Allen, *An Economic Assessment of Same-Sex Marriage Laws*, 29 HARV. J.L. & PUB. POL’Y 949, n.2 (2005).

immediately obvious. A case can be made, nevertheless, that given current social and cultural attitudes in the United States, marriage is central to many individuals' ability to achieve happiness, exercise their autonomy, and shape their identity. Indeed, for many people, marriage is critical to their ability to maintain strong and stable romantic relationships over time, to build and maintain a family, and to publically formalize their romantic partnerships. The Supreme Court employed similar rationales when it declared, and repeatedly reaffirmed, marriage as a fundamental individual right.⁶⁵

The notion of marriage as a fundamental right has survived decades of case law. In early cases, the Court characterized marriage as "the most important relation in life,"⁶⁶ and as "the foundation of the family and of society, without which there would be neither civilization nor progress."⁶⁷ In *Meyer v. Nebraska*, the Court held that marriage was a central part of the liberty recognized in the Due Process Clause.⁶⁸ Similarly, in *Skinner v. Oklahoma*, marriage was described as "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race."⁶⁹

Modern cases have continued to recognize the right to marriage. In *Loving v. Virginia*, the Court reiterated that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."⁷⁰ In *Zablocki v. Redhail*, the Court defined marriage as a right of liberty,⁷¹ and as constituent of the fundamental right to privacy in *Griswold v. Connecticut*.⁷² In *Casey v. Planned Parenthood*, the Court described individual decisions such as marriage as

[T]he most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy* . . . central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.⁷³

Finally, the Court in *M.L.B. v. S.L.J.* held that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society.'"⁷⁴ Thus, not only can

65. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

66. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

67. *Id.* at 211.

68. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

69. *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

70. *Loving*, 388 U.S. at 12.

71. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

72. See *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) ("[Marriage is] a right of privacy older than the Bill of Rights[.] . . . intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.").

73. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (emphasis added).

74. *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

a deontological case be made for marriage on philosophical grounds, but it is the prevailing view in Supreme Court jurisprudence.

3. *An Individual Right to Civil Marriage?*

Even if a deontological right to marriage exists, it does not follow that the government should be the one to provide it. Whether a right to *civil* marriage exists turns in large part on whether it would somehow be unjust for the government to get out of the business of marriage, leaving churches or other associations to define the institutional role of marriages, and private individuals to sort out a marriage's contractual aspects on their own. In this regard, the right to a civil marriage is a separate issue from the notion that if the government provides civil marriages, it should do so in a nondiscriminatory manner.

This Comment will proceed under the assumption that such a right exists for two reasons: First, assuming an individual right to marry in general,⁷⁵ a right to civil marriage exists because, in the context of a pluralistic and secular society, it would be unjust to relegate such a crucial institution to religious or other private organizations, thereby denying access to those who are not connected to such institutions. Second, as a practical matter, the Supreme Court has held that the legal right to marry is a fundamental constitutional right under the Fifth and Fourteenth Amendments.⁷⁶ Therefore, whether there is a legally cognizable right to state-sponsored marriage is a question answered conclusively by the Court in *Loving* and its progeny.⁷⁷

III.

DEONTOLOGICAL CONSTRAINTS ON THE PROHIBITION OF SAME-SEX MARRIAGE

There are two main deontological considerations that potentially constrain the government's moral authority to prohibit same-sex marriage: an individual's fundamental right to marry and the right to equality under the law. These moral principles have been incorporated into our constitutional law through the Due Process and Equal Protection Clauses, respectively.

A. *The Right to Marry*

Given a legally and morally cognizable "right to marry" in general, the central issue is how that right ought to be defined. As the defendants pointed out in *Perry v. Schwarzenegger*,⁷⁸

75. See *supra* notes 65–74 and accompanying text.

76. *Id.*

77. *Id.*

78. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010), *aff'd sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated and remanded sub nom.* *Hollingsworth v. Perry*, 133 S.

Plaintiffs . . . trumpet the Supreme Court's statements regarding "freedom of personal choice in matters of marriage," . . . and the importance of the right to marry "for all individuals." . . . But these statements do not get Plaintiffs very far, for the question in this case is not . . . *who* has the right to marry but rather what the right to *marry* is.⁷⁹

The defendants went on to argue that the substance of the right to marry was the right to marry someone of the opposite sex, focusing on the benefits that heterosexual marriage provides in encouraging "responsible procreation."⁸⁰ One way to respond to such a claim is to analogize it to an individual's right to freedom of religion as long as one is Catholic. The problem, of course, with making such a claim is that it does not capture what freedom of religion is about. Arguably, the normative substance underlying freedom of religion does not have to do with the utility of religion so much as it has to do with the right of the individual to realize her conception of a good life through spiritual expression. Similarly, it is important to understand the normative substance underlying the individual right to marry.

Opponents claim that if an individual is not interested in members of the opposite sex, then he or she does not lose anything when denied the opportunity to marry. This argument is based on the notion that the right to marry is animated by a concern for responsible procreation and not by a concern with equal access to the institution *per se*.⁸¹ In *Perry*, the defendants summarized their understanding of the substance of the right: "[N]o purpose other than responsible procreation can explain why marriage is so universal, so critical to society, or even why it exists at all—let alone why it has existed in every civilized society throughout history."⁸² To claim that marriage is a right because it is critical to society's ability to organize heterosexual sexual relations in a way that promotes the best outcomes for children, however, is entirely consequentialist and does not provide a basis for an *individual* right to marriage.⁸³

No doubt marriage exists, at least in part, to encourage men and women to raise children together as a family. However, if this were the only relevant

Ct. 2652 (2013). *Perry*, which was subsequently dismissed by the Supreme Court for lack of standing, challenged California's ban on same-sex marriage. *See id.*

79. Defendant-Intervenors-Appellants' Reply Brief at 31, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696).

80. *See id.* at 31–32.

81. *See id.* at 84–85.

82. *Id.* at 27.

83. Admittedly, rights can also be based on consequentialist justifications. *See, e.g.*, Brad Hooker, *Rule-Consequentialism*, 99 MIND 67 (1990). In addition to the value of marriage to society, the right to marry has been championed as a deontological right of the individual. *See, e.g., supra* notes 65, 66, 68, 70, 73 and accompanying text. It is critical, therefore, to understand the normative substance of the deontological right, separate and apart from its role in maximizing social utility and to determine whether those rationales are equally applicable in the context of same-sex relationships.

consideration, then marriage would not exist as an individual *right*, as it would not be about the individual at all but rather the important societal goal of promoting child welfare. When society protects something as a “right,” it is claiming that individuals are morally entitled to a given privilege, separate or even in spite of the net efficiency to society.⁸⁴ Thus, even though it is possible that society as a whole would be better off if individuals did not always have the First Amendment right of freedom of speech, we protect that right, because the freedom to express oneself is essential to being a truly autonomous human being. That is, the right belongs to the individual and is not merely a means to achieve some other social goal. In short, rights enjoy a privileged status that insulates them from consequentialist arguments for or against because they are critical to an individual’s ability to function as an autonomous rational agent, to achieve happiness, and to be treated with equal dignity and respect.

Unlike policy goals that are only valuable to the extent that they maximize social welfare, deontological principles are intrinsically valuable because they are fundamental to what it means to be a human being. Opponents are free to argue against a right to marry by claiming that marriage is merely a means to achieve responsible procreation, and as such, the legislature is free to define the benefit in a way that best achieves that goal. However, by leaning on instrumental rationales for marriage and its role in promoting responsible heterosexual procreation, they cannot claim that marriage is a right without explaining its fundamental importance to the individual.

Not only are rights-based arguments about responsible procreation conceptually flawed, but they also ignore how the Supreme Court has defined the right in modern cases. In *Loving*, the Court held that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”⁸⁵ In *Zablocki*, the Court defined marriage as a right of liberty,⁸⁶ and in *Griswold* and *Casey*, as constituent of the individual right to privacy.⁸⁷ It is from this perspective that we can understand marriage as an individual right—one that ought to be protected regardless of net benefits to society as a whole. Thus, insofar as access to marriage is central to human happiness and autonomy, there is no reason why it should be denied to same-sex couples.

In sum, the substance of the right to marry, if it is to exist as a right at all, must be grounded in its importance as one of “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy.”⁸⁸ As will be shown in Part V, the CBA and rights-based analyses regarding marriage are not mutually exclusive, and therefore I do not mean to

84. See *supra* note 11.

85. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

86. See *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

87. See *supra* note 72.

88. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

imply that opponents consequentialist claims are irrelevant. For the purposes of this Section, however, it was important to distinguish consequentialist from rights-based considerations in order to first define the right with precision. It is only at that point that one can assess whether consequentialist considerations have the potential to override the deontological constraint.

B. The Right to Equal Protection of the Laws

Even if there is no moral right to marry, once the government has decided to provide such a benefit for one group of citizens, there is a legal and moral duty not to deny the same benefit to similarly situated groups. To illustrate, renowned legal theorist Ronald M. Dworkin framed the legal and moral debate on same-sex marriage as follows:

Americans who oppose gay marriage on . . . cultural ground[s] . . . believe that a majority of citizens has the right, acting through the normal political process, to shape the religious and spiritual character of our shared culture by law. Those who favor permitting gay marriage believe, on the contrary, that a religious and spiritual culture must be shaped organically, by the individual, free decisions of everyone. Which view best matches our shared ideals and principles of human dignity? . . . [Human dignity] forbid[s] subordination. . . . It forbids my accepting that other people have the right to dictate what I am to think about what makes a good life or to forbid me to act as I wish because they think my personal values wrong. Dignity therefore forbids me to accept any manipulation of my culture that is both collective and deliberate—that deploys the collective power and treasure of the community as a whole and that aims to affect the personal choices and values of its members.⁸⁹

As Professor Dworkin argues, a ban on same-sex marriage not only infringes on the previously described deontological rationales for marriage, such as the ability of an individual to achieve happiness, but also infringes on human dignity by subordinating certain individuals through “the collective power and treasure of the community.”⁹⁰ In fact, this deontological constraint—the mandate implicit in the Equal Protection Clause that individuals be treated fairly as equals—applies regardless of whether the arguments regarding marriage as a fundamental right are persuasive.

In conclusion, the moral demand that people be treated fairly and equally relative to similarly situated individuals is relatively straightforward, especially compared to the more complex analysis that was required in order to establish an individual right to marry under the Due Process Clause. By declaring that gay and lesbian relationships are inferior, the law creates an inferior class of

89. Ronald Dworkin, *Three Questions for America*, 53 N.Y. REV. BOOKS, Sept. 21, 2006, at 24, 27, available at <http://www.nybooks.com/articles/archives/2006/sep/21/three-questions-for-america>.

90. *Id.*

citizens in clear violation of equal protection principles, especially since what defines someone as gay or lesbian is his or her relationships.

C. Concluding Thoughts on the Deontology of Same-Sex Marriage

Deontological considerations are at the heart of the same-sex marriage debate. While supporters of same-sex marriage defend the various benefits that marriage equality will provide and rebut claims of its costs, the core of their argument is that marriage is a crucially important institution in our society and that to deny same-sex couples access to it deprives them of equal dignity and respect.⁹¹ With that said, the issue cannot be dealt with solely through the lens of individual rights and equality. Although rights ought to be understood independent of their costs and benefits, it would be extreme to claim that individual rights should be upheld regardless of the severity of the consequences to the rest of society. Indeed, it is because of the relevant costs and benefits that we allow for some amount of discrimination as a means to achieve diversity in higher education,⁹² to prohibit people from screaming “fire!” in a crowded theater,⁹³ and to allow states to place some limits on a woman’s right to choose whether or not to have an abortion.⁹⁴ Given the importance of costs and benefits to the final determination of any law’s constitutionality, I now turn to an assessment of the potential costs and benefits of same-sex marriage.

IV.

A UTILITARIAN ANALYSIS OF SAME-SEX MARRIAGE

A. Overview

Utilitarian approaches in general evaluate the desirability of policies solely according to an outcome’s effect on welfare without concern for moral constraints on how one achieves the outcome. That is, they aim to calculate the net costs and benefits.⁹⁵ Theorists often use a social welfare function to conceptualize this task,⁹⁶ which can be represented as:

$$W = f(u_1, u_2, \dots, u_n)$$

where W is the net impact on total social welfare and u_n is each individual’s net utility. Although there has not been an effort to quantify the intensity of individuals’ preferences on the issue of same-sex marriage, we will assume that

91. See Nathaniel Frank, *How Gay Marriage Finally Won at the Polls*, SLATE (Nov. 7, 2012, 2:00 AM), http://www.slate.com/articles/news_and_politics/politics/2012/11/gay_marriage_in_maryland_and_maine_the_inside_strategy.html (describing the “Why Marriage Matters” campaign message of “love, commitment, family” and no mention of rights or benefits).

92. See *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

93. See, e.g., *Schenck v. United States*, 249 U.S. 47, 52 (1919).

94. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 852 (1992).

95. See *supra* note 12.

96. See, e.g., ZAMIR & MEDINA, *supra* note 58, at 13.

the best way to do so, at least on a theoretical level, is to measure each individual's willingness to pay to either secure same-sex marriage or to avoid it, discounted by differences in income given the diminishing marginal utility of wealth.

B. Which Preferences Matter?

Separate from how costs and benefits are best measured, a much more difficult question is whether the social welfare function should take into consideration any and all preferences. Given that people often make mistakes about what is good for them or about the probability of future events, arguably we ought to incorporate their preferences in a way that corrects for these types of objective miscalculations. Such mistakes result from incomplete information, psychological biases, faulty reasoning, and so on. That is not to say, however, that the *strength* of an individual's preference for or against a given outcome should be adjusted. In the context of same-sex marriage, for example, if an individual has a particularly strong preference for or against an outcome that would result in the dilution of traditional sexual norms, the strength of that preference should not be adjusted, even if it is an extreme outlier. Indeed, given that the strength of one's preference is by definition subjective, correcting for irrationality in this context would be no different than substituting one person's preferences for another.

With that said, preferences can and should be discounted by the probability that the outcome in question will actually occur and by its present value given that, at least in theory, such things can be measured objectively and do not involve a subjective account of one's preferences or the intensity of one's preferences. Thus, a particular individual's social welfare function can be expressed more precisely as:

$$u_n = f(d_1x_1 + d_2x_2 \dots n_1y_1 - n_2y_2 \dots)$$

where u is the sum of costs and benefits to an individual, x is a particular benefit, y is a particular cost or harm, and d and n are discount factors that reduce a benefit or harm based on its probability of occurring and its present value (which will diminish the magnitude of the preference as it becomes chronologically more remote).

To illustrate, assume that a given individual would enjoy ten units of utility at some point in the future, discounted to present value, as measured by their willingness to pay, if sexual norms were diluted (if, for instance, they had a preference for polyandrous social norms over monogamous norms) and there was a 10 percent chance of such a change taking place as a result of the legalization of same-sex marriage. For this individual, x_1 would equal 10 and d_1 would equal 0.1. If that individual would also suffer a harm of 20 as a result of the expansion of the institution of marriage (e.g., if the individual opposed the institution of marriage itself and therefore was harmed by its expansion), and there was a 100 percent chance of that happening if same-sex marriage was

allowed, then y_1 would equal 20 and n_1 would equal 1. Assuming they would not incur any other benefits or costs, their individual social welfare function would appear as follows: $u_n = f((0.1 * 10) - (1 * 20))$, the sum of which would equal -19. In order to calculate society's overall social welfare function, W , this amount would be added to every other individual's social welfare function:

$$W = f(-19, u_2, \dots, u_n).$$

An even more difficult question is whether preferences should be included that are normatively objectionable—for example, if they are based on prejudice, sadism, animus, and so on. One could object to introducing such a filter on the grounds that introducing deontological principles to cancel out certain preferences would result in the loss of the neutral attributes that make a CBA approach appealing in the first place (given that such an approach attempts to take people's preferences as they are). The proposed framework in this Comment, however, takes the normative force of deontological principles as a given, and seeks to effectively integrate them with CBA in order to realize the benefits of both.⁹⁷ Thus, excluding preferences that are clearly inconsistent with these basic principles is necessary. With that said, a distinction should be made between preferences that are animated by invidious motives versus those that are based on a principled theory of the good, even though the conclusions that are drawn by each set of motives might often end up being the same. Making such a distinction can be difficult in practice, but there is nevertheless a substantive difference, as illustrated in several Supreme Court cases, most recently in *Windsor*.⁹⁸

In constitutional cases that call for rational basis review, the Supreme Court almost always accepts any rationale that the government puts forward to justify an infringement on a non-fundamental liberty or for treating a nonsuspect class unequally.⁹⁹ Despite this permissive criterion, the Court will reject rationales that it suspects are animated by animus or similarly objectionable motives. Thus, in *Lawrence*, even though the Court did not hold that intimacy between same-sex couples was a fundamental right, it struck down on due process grounds a sodomy law that existed solely or primarily in order to discriminate and persecute homosexuals.¹⁰⁰ Similarly, in *Romer*, even though the Court did not declare gays and lesbians to be a suspect class, it

97. See generally Robert Justin Lipkin, *The Harm of Same-Sex Marriage: Real or Imagined?* 11 WIDENER L. REV. 277, 278–79, 308 (2005) (arguing that “[i]n a democratic society, all sorts of harms must be tolerated if liberty, equality, and community are to be the governing political and legal values” and applying a deontological filter to conclude that the type of harm that same-sex marriage might cause (harm to one’s “normative environment”) is not the type of harm that ought to be considered in such a society).

98. *United States v. Windsor*, 133 S. Ct. 2675, 2693–94 (2013).

99. See generally Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & LIBERTY 898 (2005).

100. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

struck down on equal protection grounds a Colorado law that prohibited all legislative, executive, or judicial action that would protect gay and lesbian people as a class because it found that the law's intent was to disadvantage them.¹⁰¹ In *Windsor*, the Court struck down on both due process and equal protection grounds DOMA because the law's purpose and effect was "to injure the very class" that states who have legalized same-sex marriage sought to protect.¹⁰²

The final issue is whether preferences that are animated solely by religious beliefs and not bolstered by any other rationale ought to be included. Such beliefs, without more, cannot in themselves serve as a legitimate justification given that religious beliefs can theoretically justify any preference, including slavery¹⁰³ and other forms of oppression. In *Windsor*, the Court rejected the legitimacy of entirely religious or moralistic rationales as a basis for infringing on the liberty of others when it pointed to language in the legislative history regarding the supposed immorality of homosexuality as evidence of animus.¹⁰⁴ Thus, while preferences can be informed by religion, the only legally and morally cognizable preferences are those that are not entirely circular and that are based, at least to some extent, on secular policy arguments.¹⁰⁵

C. Costs

After determining which preferences to include in the social welfare function and to what extent they should be discounted, the next step is to estimate the net impact on social utility—that is, the *W* value of the social welfare function. There are, of course, two sides to this calculation: costs and benefits. This Section will focus on the costs, which opponents of same-sex marriage characterize in three main arguments: same-sex marriage will result in (1) fewer children being raised by their biological mother and father, (2) damage to marital norms, and (3) harm to a significant number of individuals' sensibilities and religious beliefs.

101. See *Romer v. Evans*, 517 U.S. 620 (1996).

102. *Windsor*, 133 S. Ct. at 2693.

103. See, e.g., 1 ALEXANDER H. STEPHENS, A CONSTITUTIONAL VIEW OF THE LATE WAR BETWEEN THE STATES (Philadelphia, Nat'l Publ'g Co. 1868) (using the Bible to justify slavery during the Civil War).

104. *Windsor*, 133 S. Ct. at 2693.

105. See also Peter M. Cicchino, *Reason and the Rule of Law: Should Bare Assertions of "Public Morality" Qualify as Legitimate Government Interests for the Purposes of Equal Protection Review?*, 87 GEO. L.J. 139, 140 (1998) (arguing that "an assertion of public morality without any observable, empirical connection to the public welfare" should not "serve as a legitimate government interest for the purpose of equal protection review").

1. Fewer Children Will Be Raised by Both Their Biological Mother and Father

It seems reasonable to believe that same-sex marriage will result in a greater number of same-sex couples raising children together. Thus, as Judge Posner framed the issue, “The net gain to the adopting couple and the natural mother must be compared with the loss, if any, to the child.”¹⁰⁶ The argument can be made that children will suffer as a result of same-sex marriage insofar as they will lose the benefits of being raised by their biological mother and father, they will face stigma, and so on. The data is somewhat mixed on the issue, however. A study by Dr. Ellen Perrin from Tufts University looked at several studies conducted through 2005 and found that children growing up in same-sex parental households do not necessarily differ from children growing up in heterosexual parent homes in terms of their self-esteem, gender identity, or emotional development.¹⁰⁷ However, a study by Mark Regnerus from the University of Texas looked at a nationally representative sample of 2,988 people between the ages 18 to 39 and found that the young adult children of gay couples were disadvantaged across a number of categories.¹⁰⁸ Most recently, an Australian study investigated the impact same-sex parents had on their children and found that children with gay parents were “happier and healthier” than their peers who have straight parents.¹⁰⁹

Regardless of which study is more accurate, the issue of computing the costs of increased childrearing by same-sex couples is for several reasons not as simple as comparing children of heterosexual parents with children of same-sex parents. First, to the extent that marriage provides various advantages to raising children, it is difficult to predict how well the children of same-sex couples will fare once marriage is made available to their parents. More significantly, however, the societal costs of any increase in childrearing by same-sex couples must be measured relative to the children’s alternatives. Although same-sex couples who raise children increase the number of children raised outside of biological heterosexual marriages, they would not necessarily decrease the number of children who are raised within biological heterosexual marriages. Insofar as same-sex couples increase the demand for adoption, more same-sex couples raising children would result in fewer children in the foster care system, international orphanages, and other institutions. Where same-sex

106. POSNER, *supra* note 61, at 417.

107. See Linda Little, *Children of Same-Sex Couples Do as Well as Other Children*, MEDSCAPE (Oct. 13, 2005), <http://www.medscape.com/viewarticle/514477> (subscription required).

108. Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752 (2012).

109. See UNIV. OF MELBOURNE, THE AUSTRALIAN STUDY OF CHILD HEALTH IN SAME-SEX FAMILIES (ACHESS): INTERIM REPORT, available at http://mccaugheycentre.unimelb.edu.au/_data/assets/pdf_file/0008/786806/simon_report.pdf (last visited Mar. 15, 2014); Felicity A. Morse, *Gay Marriage: Children with Same-Sex Parents “Happier and Healthier” Study Says*, HUFFINGTON POST (May 6, 2013), http://www.huffingtonpost.co.uk/2013/06/05/gay-couples-children-happier_n_3388498.html.

couples conceive using assisted reproductive technology, the alternative would be for the child never to have existed in the first place. From this perspective, it is hard to see how an increase in childrearing by same-sex couples could cause anything but a net benefit to children.

Separate but related to their arguments about whether children are less well-off with same-sex couples than they are with biological parents, opponents of same-sex marriage have argued that it will also result in more children being raised in single-parent heterosexual households.¹¹⁰ Allegedly, such an outcome would occur because same-sex marriages would cause the dilution of the social norm of raising children within the confines of marriage.¹¹¹ Maggie Gallagher¹¹² makes the point that, “[a]fter accepting gay marriage, you just can’t say that there’s anything especially important, normative, crucial to the common good, or ideal for children or society about the man and the woman who make the baby sticking around and loving each other and the baby, too.”¹¹³ Similarly, Professor Douglas Allen describes the chain of causation from same-sex marriage to an increase in children in single-parent heterosexual homes as follows:

The value of marriage as an institution will fall, fewer people will marry, more will seek private methods to protect themselves from ex post marriage exploitation, and the final result will be lower fertility rates and more children raised in single-parent homes. It is this feedback that presents the fundamental danger to heterosexual marriage.¹¹⁴

The issue of whether same-sex marriage is likely to erode sexual and marital norms will be dealt with in the next Section. If same-sex marriage did lead to more children being raised by single parents, there is evidence that suggests that those children would indeed be worse off.¹¹⁵ Those harms, however, would have to be weighed against the benefits gained by same-sex couples deciding to raise children more often as a result of same-sex marriage. This measurement would also be discounted by the fact that an increase in single-parent homes might have occurred regardless of same-sex marriage, and constrained by the deontological right to raise a family.

110. See JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME-SEX MARRIAGE* 214 (2012).

111. *Id.*

112. Gallagher serves as president of the Institute for Marriage and Public Policy, a nonprofit organization that lobbies on issues of marriage law. She is a founder, executive committee member, former president, and former chairman of the board of the National Organization for Marriage, a leading organization in opposition to same-sex marriage and other legal recognition of same-sex partnerships.

113. CORVINO & GALLAGHER, *supra* note 110.

114. Allen, *supra* note 64, at 964.

115. See, e.g., BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, *CENSUS BRIEF: CHILDREN WITH SINGLE PARENTS—HOW THEY FARE* (1997), available at <http://www.census.gov/prod/3/97pubs/cb-9701.pdf>.

2. Marital Norms Will Change for the Worse

A second cost that opponents of same-sex marriage often put forth is that same-sex marriage will damage existing marital norms, which are critical to family structures and society. The defendants in *Perry* put it this way:

And while the future societal consequences of redefining marriage cannot yet be known with certainty, concerns about them are certainly *rational*. They are rooted principally in recognition of the fact that eliminating the necessary presence of a man and a woman from the legal definition of marriage decisively severs any inherent connection between that institution and societal interests in responsible procreation and childrearing, thus leading to the eminently reasonable concern that over time such a change would harm marriage's ability to serve these vital interests.¹¹⁶

This Section, therefore, attempts to evaluate the extent to which same-sex marriage would cause society to lose the benefits that marriage creates through the maintenance of social norms.

The utilitarian conception of marriage sees marriage as having a crucial role in regulating the sexuality of individuals for the sake of relationship stability, family security, and responsible procreation. As Douglas Allen points out, "[s]ignaling, self-binding commitments, and third-party sanctions (to name a few) are part of the marriage incentives that encourage socially good behavior and punish socially bad behavior, which incentives are necessary because both husbands and wives often have private incentives at odds with the interests of the community and other family members."¹¹⁷ Maggie Gallagher describes one theory of harm that connects same-sex marriage with the dilution of norms that promote family stability and responsible procreation when she writes that

Men in same-sex relationships . . . frequently find that sexual novelty with outside partners helps them sustain their core domestic affection. . . . Putting both sorts of relationships under the same marriage rules is likely to cause problems in sustaining marital norms . . . [that] may be dysfunctional for same-sex couples The greater danger, however, is the capacity of a tiny proportion of same-sex couples in the marriage pool to disrupt existing marriage norms in the pursuit of the promises government and society make in embracing "marriage equality." . . . Marital fidelity is a classic case of an individual good that requires intense social support in order for that good to be realized in individual lives. Even modest undermining of that social support is likely to make achieving faithful marriages more challenging.¹¹⁸

116. Defendant-Intervenors-Appellants' Reply Brief, *supra* note 79, at 68.

117. Allen, *supra* note 64, at 950.

118. CORVINO & GALLAGHER, *supra* note 110, at 138–39.

There are a few problems with this argument, however. First, opponents such as Gallagher concentrate only on same-sex relationships involving men, even though they oppose same-sex marriage regardless of gender. Second, opponents fail to notice the contradiction in claiming, on the one hand, that marriage is essential for monogamy, while at the same time condemning gay couples for their alleged inability to have successful monogamous relationships even though they have been denied access to marriage. If, in fact, monogamy and family stability are desirable social goals, then that would seem to call for an expansion of marriage.

Those initial objections aside, Gallagher's argument seems to have two steps. First, it assumes that men in same-sex relationships are significantly more likely to be unfaithful or to arrange an open relationship. Second, the argument theorizes, with very little support, that if gay men were allowed to marry, infidelity in those marriages would somehow make heterosexual men less faithful in their marriages. The first part of the argument can be evaluated empirically based on the data available regarding gay relationships. The second part of the argument, however, is harder to assess given that it seems entirely speculative. As John Corvino points out in his response to Gallagher:

Gays are, and always will be, a relatively small percentage of the population. So same-sex couples will be a small fraction of marriages, *male* same-sex couples will be about half of those, and male same-sex couples *in open relationships* will be a smaller subset still. Yet somehow, this tiny subset of marriages would change the institution's meaning generally, even to the point of causing heterosexual fathers to cheat on their wives and abandon their children? Even Gallagher acknowledges that the "free love" movement among heterosexuals never quite caught on. Why should we think that gay males will affect heterosexual marriage in a way that straight swingers never did? It seems just as likely, if not more, that mainstream marital norms will affect gay males' behavior—although this sort of effect will take time, as the marriage culture takes root in the gay community.¹¹⁹

Whereas there is little data to support Gallagher's theory, there's some data that supports Corvino's point. In their article *Same-Sex Marriage and Negative Externalities*, Laura Langbein and Mark Yost used data from 1990 to 2004 to test the claim of the Family Research Council that same-sex marriage will have negative impacts on marriage, divorce, abortion rates, the proportion of children born to single women, and the percent of children in female-headed households. In sum, they found that there is "no statistically significant adverse effect from allowing gay marriage" in those states that have permitted it.¹²⁰

119. CORVINO & GALLAGHER, *supra* note 110, at 195–96.

120. Laura Langbein & Mark A. Yost, Jr., *Same-Sex Marriage and Negative Externalities*, 90 SOC. SCI. Q. 292 (2009).

Although it is extremely hard to imagine heterosexual marriages breaking down as a result of open gay marriages or infidelity among gay couples, one could make the argument that gay marriage should be avoided insofar as it is part of a larger effort, beginning with the sexual revolution in the twentieth century, to erode sexual norms and destabilize traditional family structures.¹²¹ Assuming that such an argument is valid (and that one could justify denying an entire class of people the right to marry based on the fact that their sexual norms, generally speaking, are different), it is worth assessing the extent to which gay men will be significantly more likely to be unfaithful in a marriage or arrange open marriages.

Although there have been a significant number of studies done on the nature of gay relationships, the vast majority of studies over the last forty years have been methodologically flawed; they have used convenience samples¹²² that suffer from various biases, for example, by collecting data almost exclusively from gay bars and similar venues where respondents were not representative of the overall population. These convenience samples found that gay men are significantly more likely to have a higher number of sexual partners, to be unfaithful to their partners, to arrange open relationships, to participate in sexual acts that involve more than two people, and so on.¹²³

Separate from those convenience samples, there have been a few studies that are more representative, though given the small size of the population and the difficulty in reaching or identifying many individuals (particularly the ones who are not out), collecting a statistically significant sample continues to be a challenge.¹²⁴ These studies paint a picture of behavior and attitudes toward sex and relationships that is much more similar to heterosexual men than the

121. See generally CORVINO & GALLAGHER, *supra* note 110, at 175 (“I do not blame gay people for gay marriage, I do hold it as a decision point for the rest of us: do we care enough about the danger and damage done by the lies of the sexual revolution to rise up and defend the core principles of marriage?”).

122. Convenience sampling is a non-probability sampling technique where subjects are selected because of their convenient accessibility and proximity to the researcher.

123. See, e.g., ALAN P. BELL & MARTIN S. WEINBERG, *HOMOSEXUALITIES: A STUDY OF DIVERSITY AMONG MEN AND WOMEN* 138 (1978) (finding that many more gay men in their study fell into their “open-coupled” than their “close-coupled” category); David Blasband & Letitia Anne Peplau, *Sexual Exclusivity Versus Openness in Gay Male Couples*, 14 *ARCHIVES SEXUAL BEHAV.* 395, 407 (1985) (finding that 74 percent of men whose relationships had always been closed had nonetheless had sex with at least one other person); Colleen C. Hoff & Sean C. Beougher, *Sexual Agreements Among Gay Male Couples*, 39 *ARCHIVES SEXUAL BEHAV.* 774, 778 (2010) (finding that 64 percent of gay male couples in the San Francisco Bay Area described agreements that, to varying degrees, allowed sex with outside partners).

124. See Letitia Anne Peplau, Adam Fingerhut & Kristin P. Beals, *Sexuality in the Relationships of Lesbians and Gay Men*, in *THE HANDBOOK OF SEXUALITY IN CLOSE RELATIONSHIPS* 349, 352 (John H. Harvey, Amy Wenzel & Susan Sprecher eds., 2004) (“Current conclusions about sexuality in the committed relationships of lesbians and gay men are based on a few major investigations. These are supplemented by smaller and more focused studies. None of the studies is representative, and most samples are disproportionately young, White, urban, and relatively well educated. Further, most studies were published 10 or 20 years ago.”).

studies based on convenience samples would suggest. For example, in 2001, the Kaiser Foundation found that 74 percent of gay men and lesbians report that they would like to get married some day.¹²⁵ Similarly, Gregory Herek's 2010 study used a representative probability sample and found that nearly 90 percent of lesbians and 80 percent of gay men indicated some likelihood of marrying their current partner.¹²⁶

Given the lack of statistically rigorous studies on gay relationships, a sound understanding of the extent to which gay relationships differ from straight relationships required additional research and analysis. To that end, original research was performed for this Comment using General Social Survey (GSS) data from 2002 to 2012. GSS is a sociological survey used to collect data on demographic characteristics and attitudes of United States residents.¹²⁷ The survey is conducted by the National Opinion Research Center at the University of Chicago, capturing a randomly selected sample of adults who are not institutionalized.¹²⁸ The survey includes yearly data from 1972 to 1994. Since 1994, it includes data from every other year. The range of topics covered and the inclusion of demographic information in the survey allow social scientists to correlate demographic factors like age, race, gender, and sexual orientation. This information, in turn, allows them to determine whether, for example, men who have sex exclusively with other men have more partners on average than men who have sex exclusively with females.

In order to find out the extent to which gay men differ from straight men in their levels of promiscuity, I pulled data from 2002 to 2012 on the question, "How many sexual partners have you had in the last five years?"¹²⁹ I then sorted answers according to men who have sex exclusively with other men and men who have sex exclusively with women. Given same-sex marriage opponents' argument that marriage is critical to the regulation of the sexual behavior of men, the appropriate comparison for our purposes is between single gay men and single straight men (given that marriage was not available to the vast majority of gay men from 2002 to 2012). To that end, I filtered data to exclude married men in order to measure sexual behavior stripped of any impact that marriage might have on that behavior.

125. KAISER FAMILY FOUND., *INSIDE-OUT: A REPORT ON THE EXPERIENCES OF LESBIANS, GAYS AND BISEXUALS IN AMERICA AND THE PUBLIC'S VIEWS ON ISSUES AND POLICIES RELATED TO SEXUAL ORIENTATION* (2001), available at <http://kaiserfamilyfoundation.files.wordpress.com/2013/01/new-surveys-on-experiences-of-lesbians-gays-and-bisexuals-and-the-public-s-views-related-to-sexual-orientation-chart-pack.pdf>.

126. Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 SEXUALITY RES. & SOC. POL'Y 176, 194 (2010).

127. See *General Social Survey*, UNIV. OF CHI., <http://www3.norc.uchicago.edu/gss+website/> (last visited Mar. 15, 2014).

128. *Id.*

129. Data from multiple years was aggregated so that the sample size would be sufficiently large.

A summary of the results is provided in the table below. The first row provides the results for men who have sex exclusively with men, and the second row provides the results for men who have sex exclusively with women.¹³⁰ The bolded numbers indicate the percentage of respondents within those two categories who indicated that they have had one partner, two partners, and so on over the last five years. The numbers in parentheses indicate the range of percentages within a 95 percent confidence interval (the range is larger for gay men given the smaller sample size). The number below that indicates the weighted sample size. For example, the top left hand box shows that 31.2 percent of gay men responded that they have had one partner in the last five years; there is a 95 percent chance that between 23.4 percent to 40.2 percent of gay men in the United States have had sex with only one person in the last five years.

Frequency Distribution											
Cells contain: - Row percent - Confidence intervals (95 percent) - Weighted N		PARTNRS									
		1 1	2 2	3 3	4 4	5 5-10	6 11-20	7 21-100	8 MORE THAN 100 PARTNERS	9 1 OR MORE, DK #	ROW TOTAL
SEXSEX5	1: EXCLUSIVELY MALE	31.2 (23.4-40.2)	11.4 (6.3-19.9)	9.2 (3.7-21.1)	9.6 (5.0-17.8)	19.6 (11.3-32.0)	9.0 (5.0-15.5)	5.8 (2.5-13.2)	3.7 (1.8-7.6)	.4 (0.1-3.3)	100.0 ---
		28.7	10.5	8.4	8.9	18.1	8.3	5.4	3.4	.4	92.3
	3: EXCLUSIVELY FEMALE	25.3 (23.0-27.7)	16.1 (14.2-18.2)	12.7 (11.0-14.7)	11.1 (9.7-12.7)	18.6 (16.6-20.6)	9.4 (8.0-11.1)	4.5 (3.4-6.0)	.6 (0.3-1.1)	1.7 (1.2-2.4)	100.0 ---
		482.1	306.1	242.2	211.9	353.4	179.6	85.8	11.0	32.2	1,904.3
COL TOTAL		25.6 (23.3-28.0)	15.9 (14.1-17.8)	12.6 (10.9-14.5)	11.1 (9.6-12.7)	18.6 (16.7-20.7)	9.4 (8.0-11.0)	4.6 (3.5-6.0)	.7 (0.4-1.3)	1.6 (1.1-2.3)	100.0 ---
		510.9	316.6	250.6	220.7	371.5	187.9	91.2	14.4	32.6	1,996.6

The responses did not differ significantly between gay and straight men. When the results are grouped into low (1–4 partners), medium (5–10 partners), high (11–20 partners), and very high (more than 100 partners), the results for gay men tend to track the results for straight men until you get to the very high category, as shown by the table below. Thus, whereas the average number of

Frequency Distribution					
Cells contain: - Row percent - Confidence intervals (95 percent) - Weighted N		PARTNRS			
		1 low	2 med	3 hi	4 very hi
SEXSEX5	1: EXCLUSIVELY MALE	61.7 (49.4-72.6)	28.7 (18.5-41.7)	5.9 (2.5-13.3)	3.8 (1.8-7.6)
		56.6	26.4	5.4	3.4
	3: EXCLUSIVELY FEMALE	66.4 (63.6-69.0)	28.5 (26.3-30.8)	4.6 (3.4-6.1)	.6 (0.3-1.1)
		1,242.3	533.0	85.8	11.0
COL TOTAL		66.1 (63.2-69.0)	28.5 (26.2-30.9)	4.6 (3.5-6.1)	.7 (0.4-1.3)
		1,298.9	559.4	91.2	14.4

130. Women were not analyzed in this study because the aim is to test opponents' claim that gay men are more likely to be promiscuous. A similar claim has not been made against lesbian women.

partners for unmarried gay men might be higher than unmarried straight men, it appears that the medians are nearly the same. It is likely, therefore, that there exists a small group of gay men who are indeed significantly more promiscuous, but they appear to be the exception. In sum, while it is likely that there are some differences between the nature of heterosexual and same-sex relationships and sexual behavior, those differences seem much more limited than the opponents of same-sex marriage claim.

If there really are differences, however, it is worth understanding this behavior and the extent to which it is immutable or influenced by various social factors. As Judge Posner points out, “the balance of private costs and private benefits determines the relative frequency of different sexual practices.”¹³¹ Same-sex couples do not grapple with the same negative externalities of sex that constrain heterosexual behavior. Chief among these externalities is the risk of unwanted pregnancy. In addition, costs and benefits are affected by gay and lesbians’ particular social context. Though significant progress has been made in the last twenty years, gays and lesbians have generally been cast out as social pariahs. As a result, the marginal cost of being promiscuous is lower for a gay or lesbian individual insofar as he or she will not be condemned by society any more than he or she has been already. To put it another way, in a culture of homophobia, heterosexuals have a lot more to lose by acting on their sexual urges than do gays and lesbians. Gays and lesbians have also gravitated to urban centers as a result of discrimination, thereby lowering the search costs of finding a sexual partner.

Given that marriage and children are to a large extent unavailable to gays and lesbians, there are also fewer costs to ending a relationship or stepping out of it sexually. Due at least in part to the availability of marriage, more heterosexual relationships are established and maintained with the expectation that one day they will be married and have children. Admittedly, the AIDS epidemic should have been a significant constraint on promiscuity, and indeed gay male sexual behavior has changed in response, demonstrating that the sexual behavior of gay men, while possibly different, is not necessarily static, immutable, or inherent.¹³² Thus, as gay male sexual behavior functions in the context of a homophobic society and is not influenced by marital norms or by

131. POSNER, *supra* note 61, at 116.

132. See Donald E. Riesenber, *AIDS-Prompted Behavior Changes Reported*, 255 J. AM. MED. ASS’N 171–72 (1986) (finding that the mean number of sexual partners for homosexual and bisexual men decreased from 5.3 to 3.2 after the respondents (patients at an STD clinic) learned about AIDS); see also John L. Martin, *AIDS Risk Reduction Recommendations and Sexual Behavior Patterns Among Gay Men: A Multifactorial Categorical Approach to Assessing Change*, 13 HEALTH EDUC. & BEHAV. 347–58 (1986) (reporting a substantial change in some types of behavior); Leon McKusick, William Horstman & Thomas J. Coates, *AIDS and Sexual Behavior Reported by Gay Men in San Francisco*, 75 AM. J. PUB. HEALTH 493–96 (1985) (showing that sexual activity levels among gay men in San Francisco were lower in November 1983 than in November 1982).

the reproductive concerns of females, it is not surprising that it would differ from the sexual behavior of heterosexual men. Moreover, if there is anything to same-sex marriage opponents' central claim that marriage is important because it makes men more monogamous and thereby creates a better environment for children and families, it is hard to see why that would not be the case with gay men as well.¹³³

3. Same-Sex Marriage Will Offend a Significant Number of People's Sensibilities

It seems likely that a very large segment of the population would be harmed by same-sex marriage in that they would feel some level of emotional distress, anger, and anxiety about the country heading in a direction that does not comport with their beliefs. So long as those preferences are grounded in some amount of reason and not based solely in animus or an entirely abstract sense of moral disapproval, they should be counted.¹³⁴

For example, if an individual was not harmed directly by same-sex marriage but was discomforted by evidence that suggests that same-sex marriage would negatively impact marital norms, then that preference would count, discounted by the probability that the feared outcome would actually occur.¹³⁵ The mere fact that such preferences are primarily other-regarding and do not reflect direct harm to the individual is not an adequate reason to exclude them, so long as they are based in reason and are not entirely speculative.

The proposed social welfare function for same-sex marriage will also take into account the benefits enjoyed by same-sex marriage proponents whose happiness might increase as a result of the legalization of same-sex marriage even though they, themselves, will experience no direct benefit. Those that are motivated by nothing other than animus, religious beliefs, or moral disapproval, however, should be excluded given that such motivations are neither legally nor morally cognizable.¹³⁶ Thus, outrage can be incorporated as a harm within these guidelines, though it should also be discounted by the probability that the outrage will diminish over time as people adjust to emerging norms.

133. See CORVINO & GALLAGHER, *supra* note 110, at 175 ("The most important fact about marriage as a public institution is not that it satisfies individual desires but that it reduces the harm men and women routinely do to each other in our sexual lives, and most importantly to our children.").

134. An example of legitimate outrage that is not based merely on moral disapproval is outrage that one might have about the harmful behavior of one person toward another. The harm to the individual that is harmed would be counted along with the outrage that it causes others who witness it.

135. See *supra* Section IV.B.

136. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 582 (O'Connor, J., concurring) ("Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy [enhanced] rational basis review under the Equal Protection Clause." (citations omitted)).

D. Benefits

As Judge Posner and Becker note, “[o]bviously there are benefits to homosexual couples from marriage—otherwise there would be no pressure to extend marriage rights to them.”¹³⁷ Given that 74 percent of gay or lesbian individuals report wanting to get married, there seems to be significant demand and therefore potentially significant benefits.¹³⁸ As Judge Posner and Becker point out, “as marriage becomes more like a contract, it becomes harder to see why homosexuals . . . should be excluded from its benefits.”¹³⁹ Additionally, there seems to be little reason to believe that the gains for same-sex couples would be any different from those for heterosexual couples.

However, insofar as individuals are free to contract on their own, particularly if they are able to secure a civil union in their state, it is not clear what would be left to gain strictly in terms of contractual benefits for same-sex couples by extending marriage rights. It is from this limited perspective that Judge Posner and Becker opine, “Why so much passion is expended over the word ‘marriage’ baffles me. After all, even today, and even more so if civil unions were officially recognized, homosexual couples can call themselves ‘married’ if they want to.”¹⁴⁰ Thus, given the large number of states that have civil unions, the demand for same-sex marriage must be a function of benefits that would accrue beyond the fruits of the marriage contract.

The second potential set of benefits relates to the legal privileges of marriage. Although civil unions, in states that have them, have provided same-sex couples with many of the legal benefits of marriage, a constitutional requirement demanding marriage equality at the federal level and across every state would allow same-sex couples to move freely across state lines while maintaining those privileges. It would also expand those benefits to same-sex couples who currently reside in states that do not allow same-sex marriage.

Although the legal benefits of same-sex marriage would be significant, a federal requirement that all states provide civil unions would seem sufficient to achieve that goal. Thus, from an economic perspective, if the effort to achieve same-sex marriage is anything more than a struggle for semantic equality, it must be justified on grounds other than the contractual or legal benefits that individuals derive. Given the focus and strategy of the marriage equality movement of late, it seems clear that the most important benefits to advocates include achieving equal status/dignity for their relationships and the increased likelihood that they will be able to start and maintain stable families given the social and institutional supports that civil marriage provides.¹⁴¹ Professor

137. BECKER & POSNER, *supra* note 63, at 18.

138. See *supra* note 125 and accompanying text.

139. BECKER & POSNER, *supra* note 63, at 19.

140. *Id.* at 20.

141. See Frank, *supra* note 91.

Corvino aptly describes the significance of this benefit to gays and lesbians when he writes:

[M]arriage is a social institution with messages. Among these is a powerful signal of affirmation: *we the community take your love and commitment seriously*. Whether or not it follows logically, here's the corollary people draw when denied marriage: *your love isn't worthy; your relationship doesn't matter*. For those of us who have been told repeatedly that our deep romantic longings are sick, unnatural, and evil, such denial can feel like an additional slap.¹⁴²

A further benefit of same-sex marriage that is not immediately obvious is the extent to which the negative externalities of intolerance would be reduced for all of society. As Judge Posner writes, "One of the better-documented findings in the empirical literature on homosexuality is that the proportion of male homosexuals who marry [a woman] is higher the more intolerant the society is of homosexuals. Intolerance makes the practice of homosexuality more costly, so there is substitution in favor of a heterosexual alternative."¹⁴³ As the film *Brokeback Mountain* powerfully demonstrated, incentives that keep homosexuals in the closet can have huge costs not only for gay and lesbian individuals, but also for their opposite-sex partners, their families, and so on.¹⁴⁴

Finally, there are additional peripheral benefits worth mentioning. There should be significant benefits for children: the increase in demand for adoption that would presumably result if same-sex couples had access to marriage, the additional lives created through IVF, and the decreased stigma of growing up with same-sex parents.¹⁴⁵ Furthermore, if opponents of same-sex marriage are correct about the extent to which marriage supports stable relationships over the long term and makes it easier to raise a family, homosexual individuals' happiness overall should increase as a result of those institutional supports (and pressures). Finally, just as the preferences of those who are opposed to same-sex marriage but who are not harmed directly by it were taken into account in the previous Section, the benefits that will accrue to straight individuals who support same-sex marriage, as measured by their willingness to pay, will be taken into account as well.

142. CORVINO & GALLAGHER, *supra* note 110, at 198.

143. POSNER, *supra* note 61, at 117.

144. *Id.* at 305 (pointing out that "[t]he greatest inherent . . . disadvantage of homosexuality is the impact on family life in a culture of companionate marriage").

145. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (noting that DOMA "humiliates tens of thousands of children now being raised by same-sex couples").

E. Concluding Thoughts on the Utilitarian Analysis of Same-Sex Marriage

Professor Darren Bush provides a good summary of the case for the net efficiency of same-sex marriage:

Same-sex marriage contracts have efficiencies similar if not identical to those attributable to heterosexual marriage. Moreover, same-sex marriage remedies some of the externalities imposed upon society by heterosexual sexual relations, such as the externality of unwanted children. Most importantly, same-sex marriage does not impose any identifiable costs upon society that are not attributable to marriage in general. Thus, same-sex marriage is marginally more efficient and welfare enhancing than heterosexual marriage.¹⁴⁶

Based on the costs and benefits detailed in this paper, Professor Bush's conclusion seems sound. The net effect on children is clearly positive. The effect on marital norms is not known entirely: it is questionable whether married gay men would stray significantly from heterosexual marital norms, particularly as marital norms begin to develop in that community, but to the extent that they do stray, it is even more questionable that such behavior would have an effect on heterosexual marriages. Finally, the net costs and benefits of opponents' outrage relative to proponents' satisfaction seems too difficult to predict, though it is worth noting that support for gay marriage has been increasing rapidly in recent years and is predicted to continue to increase given that younger generations are far more likely to support it than older Americans.¹⁴⁷

While there seem to be few to no direct harms to heterosexuals, there are significant direct benefits for same-sex couples and closeted individuals who are deterred by the stigma associated with homosexuality: the dignity and respect that same-sex couples will enjoy as a result of their relationships being recognized as equal before the law, the indirect effect of lowering social stigma for all homosexuals, the benefits that same-sex couples will enjoy as a result of the institutional supports that marriage provides (insofar as it promotes stability, monogamy, and strengthens families), the legal benefits, and so on.

Additionally, the claim that same-sex marriage would be inefficient is based on a speculative theory of harm. As the plaintiffs argued to the Ninth Circuit in *Perry*, the legal and moral question is "whether the existence of a *theory*—unsupported by empirical evidence or other facts—that marriage equality *might* have negative effects constitutes a basis for perpetuating . . . inequality."¹⁴⁸ Even a speculative theory of harm, however, might constitute

146. Darren Bush, *Moving to the Left by Moving to the Right: A Law & Economics Defense of Same-Sex Marriage*, 22 WOMEN'S RTS. L. REP. 115, 137 (2001).

147. See, e.g., Jennifer De Pinto & Stephanie Condon, *Poll: 51 Percent Support Same-Sex Marriage*, CBS NEWS (Nov. 30, 2012, 6:30 PM), http://www.cbsnews.com/8301-250_162-57556481/poll-51-percent-support-same-sex-marriage/.

148. Brief for Appellees at 93, *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696).

such a basis insofar as inequality is neither inherently good nor bad from a law and economics perspective. Given that it is theoretically possible that same-sex marriage could have a negative effect on society, courts would have a sufficient basis for upholding laws that prohibit it based on a law and economics point of view. Furthermore, given principles of judicial restraint and the Court's reluctance to declare new rights and subvert the legislature, even a strong case for the net efficiency of same-sex marriage might not be sufficient if one were only concerned with weighing the costs and benefits. Such an analysis would be grossly incomplete, however, given that it fails to grapple with deontological issues at the core of the debate: the fundamental right to marry and equal protection before the law.

V.

DEONTOLOGICALLY CONSTRAINED COST-BENEFIT ANALYSIS AND SAME-SEX MARRIAGE

In this final Section, the Comment will build on a conceptual approach in philosophy and economics called deontologically constrained CBA in order to present a framework for the moral and legal analysis of same-sex marriage that integrates both rights *and* utility. The proposed framework can be used by courts to engage in the type of balancing found in the Court's *Windsor* analysis while maintaining a greater level of clarity and precision than that case offered. The framework, like deontologically constrained CBA in general, is meant as "a way of framing and thinking about the pertinent issues, rather than as an algorithm for use by judges."¹⁴⁹ In that way, the purpose of the mathematical representations found in this Section is merely to help "identify the pertinent normative factors and their interrelations in a more comprehensive and rigorous way."¹⁵⁰

A. Overview

Every lawyer and law student is familiar with the Supreme Court's traditional constitutional test under strict scrutiny: fundamental rights may not be infringed and a suspect class may not be treated differently under the law unless doing so is narrowly tailored to achieve a compelling government interest.¹⁵¹ A similar principle underlies necessity justifications in criminal law: whenever a defendant is acquitted on the basis of a necessity defense, the law acknowledges that the defendant infringed the rights of others, but at the same time, declares that the infringement was necessary and therefore justified given

149. Zamir & Medina, *supra* note 57, at 125.

150. *Id.*

151. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (applying strict scrutiny in the context of equal protection); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (applying strict scrutiny in the context of substantive due process).

the harm that was avoided in the process.¹⁵² Notably, the moral logic underpinning strict scrutiny and the necessity defense closely mirrors the way most people approach moral decisions in their everyday lives.

Many individuals see themselves as having moral duties unrelated to any consequentialist considerations such as whether performing the duty maximizes overall social utility. This is because duties, like rights and other deontological concepts, are morally binding for reasons other than whether their consequences are efficient for society. For that reason, we see the act of making a promise as imposing a duty on us that is binding not because performing the duty will benefit society in general, but because of the nature of what it means to promise. In instances where the costs of acting in accordance with a duty overwhelm the normative force of the duty itself, however, we are often willing to compromise. Thus, most individuals would likely be willing to break their duty to keep a promise if in doing so they are able to avoid substantial harm to others. Similarly, I suspect that few individuals would object to the violation of the deontological constraint against discrimination if profiling in a given situation was *necessary* to prevent a significant amount of harm to a community. Thus, in both the law and individuals' everyday lives, we do not find it inconsistent to claim on the one hand that duties and individual rights constrain our ability to choose outcomes that maximize utility, and at the same time, that utilitarian or consequentialist considerations can override the normative force of such duties in certain circumstances where the costs of performing the duty are sufficiently extreme.

Deontologically constrained CBA assumes that there is a point where utility calculations overwhelm our commitment to deontological rights and duties, and then seeks to explore where that point might lie in specific cases, at least conceptually. As applied to same-sex marriage, assuming there is a right to marry and a right to equal protection, such an approach would ask, How much harm would same-sex marriage have to cause society in order to justify an infringement on the right to marry and the right to equal protection through a ban on same-sex marriage? Such an approach would also ask, what evidence is there that same-sex marriage will cause that level of harm?

It is not enough for proponents of same-sex marriage to argue that the prohibition on same-sex marriage is an infringement on individual rights given that such an infringement may very well be justified insofar as the costs are sufficiently severe—for example, under strict scrutiny, if it is necessary to achieve the compelling government interests of ensuring responsible procreation among heterosexuals and to protect the interests of children. In short, the consequences matter, even if proponents effectively establish that there are fundamental rights or at least significant liberty interests at stake. Deontologically constrained CBA grapples with this dynamic.

152. See MODEL PENAL CODE § 3.02 (Council Draft 1958).

Deontologically constrained CBA is a helpful conceptual tool for designing an analytical framework to evaluate the constitutionality of state bans on same-sex marriage because it is consistent with the approach taken in *Windsor* while providing a greater level of precision and structure. In *Windsor*, the Court found that DOMA infringed upon a significant liberty interest protected by the Due Process Clause, even though the interest did not constitute a fundamental right.¹⁵³ In addition, the Court found that the deontological constraints imposed by the Equal Protection Clause were implicated as a result of evidence of animus in the law's purpose and effect, even though gays and lesbians did not constitute a suspect class.¹⁵⁴ After identifying these constitutionally protected interests, the Court examined the government's utilitarian policy justifications for the law, testing whether they were sufficient to justify an infringement on those interests.¹⁵⁵ In order to engage in this type of analysis with any amount of clarity, a framework is needed that can capture the nuances of the liberty and equal protection interests at stake relative to the costs and benefits of the law in question.

B. *A Threshold Function to Test the Constitutionality of Banning Same-Sex Marriage*

Having established the necessity of integrating deontological constraints with utilitarian/consequentialist/economic methodology (specifically, CBA), the next step is to provide a description of how to achieve this integration. To that end, this Section will provide a conceptual framework through the use of a threshold function—that is, a function that sets a threshold that the costs of same-sex marriage must exceed in order to justify an infringement on gay and lesbian individuals' rights to marry and to be treated as equals under the law. As Professors Barak Medina and Eyal Zamir point out, using stylized mathematical representations such as threshold functions “facilitates a more definite and less ambiguous description of the [deontological] constraints, their scope, and the types of [utilitarian] benefits and costs they take into account.”¹⁵⁶

To begin, it is important to explain the distinction between a deontological constraint and a utilitarian cost:

Deontologically constrained CBA . . . integrates such [deontological] values as human dignity and autonomy as constraints on promoting the good, rather than as components of the good to be promoted. An infringement of a constraint is not yet another [utilitarian] “cost” of the

153. See *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013).

154. See *id.*

155. See *id.* at 2696 (holding that “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity”) (emphasis added).

156. ZAMIR & MEDINA, *supra* note 58, at 79.

pertinent act or rule, to be considered along with other costs and benefits. Rather, constraints must not be infringed unless sufficiently large good (or bad) outcomes are at stake.¹⁵⁷

Thus, it is not the case that the right to marry or the right to be treated equally under the law should simply be integrated into the social welfare function in an additive way based on their effect on individuals, nor is it the case that the threshold should be set twice as high simply because there are two rights potentially at stake.¹⁵⁸ Although the benefits and costs of granting marriage equality should be calculated, that is an initial and discrete step. Once the costs and benefits are determined, one must assess the separate related question, whether there is an individual right at stake that would constrain the outcome of the social welfare function.

Once this is completed, the task turns to trying to understand the threshold that the relevant costs and benefits must exceed in order to override such constraints. In the case of same-sex marriage, the function will model the extent to which the benefits of a ban on same-sex marriage would have to exceed the costs in order to override the constraints imposed by the individual right to marry (or the liberty interest in same-sex marriage as discussed in *Windsor*) and the right to equal protection under the law. Before modeling a decision function—a mathematical representation of the various factors involved in making a decision and how those factors relate to each other—for same-sex marriage, however, it is helpful to sketch out the decision functions for rational basis review and strict scrutiny under the traditional tiers-of-scrutiny approach used by the Court in most of its due process and equal protection cases.

Under traditional rational basis review, a law is constitutional so long as there exists a conceivable rationale for its purpose.¹⁵⁹ Not only is there no threshold over which a given law's benefits must exceed its costs, there is no welfare function¹⁶⁰ under rational basis review. Rather, a single benefit is sufficient even if the costs are substantial; any weighing of costs and benefits under rational basis review is left to the legislature. Accordingly, the decision function for rational basis review could be represented as $R = f(x_1 + x_2 \dots)$ such that a given law (R) would be constitutional if the sum of the function was positive. R would be positive, signaling that the law is valid, so long as there existed at least one cognizable benefit (x).

On the other end of the spectrum, laws that infringe on fundamental rights or that involve a suspect class are subject to strict scrutiny and are valid only if

157. *Id.* at 104.

158. For an argument for why rights are not additive, see John M. Taurek, *Should the Numbers Count?*, 6 PHIL. & PUB. AFF. 293 (1977).

159. *See supra* note 36.

160. *See supra* Part IV.A.

they are narrowly tailored to achieve a compelling government interest.¹⁶¹ The threshold function for strict scrutiny will be represented as F , such that a law that infringes on a fundamental right or discriminates against a suspect class is permissible only if F is positive. Finally, the minimum net benefit a law must provide to society to justify an infringement on fundamental rights or equal protection will be represented as C . The sum of the social welfare function, will be represented as W .¹⁶² Accordingly, we get the following: $F = W - C$ where C is a relatively large value. In order for the sum of the function to be positive the net efficiency of the law in question would have to be quite high. That is, for the law to pass constitutional muster the net benefits would have to be so great that the law would be narrowly tailored to achieve a compelling government interest.

As demonstrated in Part III, a strong normative case can be made for analyzing same-sex marriage under the strict scrutiny rubric given the significant deontological interests at stake. It seems more likely, however, that in testing the constitutionality of state bans on same-sex marriage, the Court will employ a form of enhanced rational basis review similar to the one that was used to strike down DOMA in *Windsor*.

The heightened scrutiny that the Court employed in *Windsor* was triggered in large part by evidence of animus in the law's purpose and effect.¹⁶³ In particular, the Court found that "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage" was "strong evidence of a law having the purpose and effect of disapproval of that class."¹⁶⁴ State defendants in future cases that challenge *state* bans on same-sex marriage will likely argue that in the absence of the federalism concerns that were present in *Windsor*, the Court ought to use a traditional rational basis test when reviewing *state* laws regarding marriage. In addition to the federalism issues, however, the Court in *Windsor* also pointed to "[t]he history of DOMA's enactment and its own text" as evidence of animus.¹⁶⁵ Moreover, as in *Lawrence*, the *Windsor* Court pointed to the significance of the liberty interests at stake—marriage and intimate relationships generally—in justifying its heightened scrutiny of the law.¹⁶⁶ Thus, while the Court emphasized the extent to which the federal government's intrusion into an area of state law was evidence of animus, it is not necessarily the case that DOMA would have been

161. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 299 (1978) (applying strict scrutiny in the context of equal protection); *Roe v. Wade*, 410 U.S. 113, 155 (1973) (applying strict scrutiny in the context of substantive due process).

162. See *supra* Part IV.A.

163. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

164. *Id.*

165. *Id.*

166. See *id.* at 2692.

found constitutional were it not for the federalism issues.¹⁶⁷ The rulings in *Lawrence* and *Romer*, for example, were made on similar grounds, and those cases—which struck down *state* laws—did not implicate any federalism concerns.

Lower courts are already using the enhanced rational basis test, or heightened scrutiny, that the Court employed in *Windsor* to call into question the constitutionality of various state marriage laws. In granting a preliminary injunction against a Michigan statute that prohibited public employers from providing spousal health care benefits to unmarried domestic partners (same-sex couples are not able to get married in Michigan), a federal district court held that “[t]he historical background and legislative history of the Act demonstrate that it was motivated by animus against gay men and lesbians.”¹⁶⁸ The court modeled its animus determination on the approach that the Supreme Court took in *Windsor*, citing Justice Kennedy’s analysis of DOMA’s historical background and legislative history.¹⁶⁹ Similarly, a district court in Ohio recently cited *Windsor* to call into question the constitutionality of an Ohio law that prohibits the recognition of same-sex marriages performed in other states.¹⁷⁰ Thus, while it is possible that the Court could decide to distinguish a future case regarding a state ban on same-sex marriage on the grounds that the ban involves a state law instead of a federal law, the weight of authority from *Lawrence*, *Romer*, and *Windsor* suggests that if given legislative history and statutory text similar to DOMA, the correct approach to analyzing the law is a version of enhanced rational basis review.

The question then becomes whether the heightened rational basis test in *Windsor* is analytically more like traditional rational basis review or strict scrutiny. If the Court’s analysis in *Windsor* was limited to taking a given justification at face value, testing it to see if it was based in animus, and determining whether there was at least one legitimate rationale left to justify the law, then the Court’s heightened review in *Windsor* would have resembled traditional rational basis review in most respects. In that case, the decision function for enhanced rational basis review would mimic the decision function for traditional rational basis review— $R = f(x_1 + x_2)$ —where x would represent benefits that are not based on animus. The Court, however, did not limit its analysis to a simple filtering of benefits.

Unlike it would have done under traditional rational basis review, the Court took into consideration not only the benefits of the law, but also its costs. The Court held that DOMA

167. See *id.* (“[I]t is unnecessary to decide whether this . . . is a violation of the Constitution because it disrupts the federal balance. The State’s power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.”).

168. *Bassett v. Snyder*, 951 F. Supp. 2d 939, 968 (E.D. Mich. 2013).

169. *Id.* at 969.

170. See *Obergefell v. Kasich*, No. 1:13-cv-501, 2013 WL 3814262, at *4 (S.D. Ohio July 22, 2013).

places same-sex couples in an unstable position of being in a second-tier marriage[,] . . . demeans the couple[,] . . . humiliates tens of thousands of children now being raised by same-sex couples[,] . . . makes it even more difficult for the children to understand the integrity and closeness of their own family[,] . . . prevents same-sex married couples from obtaining government healthcare benefits[,] . . . deprives them of the Bankruptcy Code's special protections[,] . . . forces them to follow a complicated procedure to file their state and federal taxes jointly[,] . . . brings financial harm to children[,] . . . raises the cost of health care[,] . . . [and] denies or reduces benefits allowed to families upon the loss of a spouse and parent"¹⁷¹

Rather than merely differentiating between rationales that were and were not based in animus, the Court set out various deontological constraints that were relevant to its analysis, including the right to marry,¹⁷² the constitutionally protected liberty interest in "[p]rivate, consensual sexual intimacy between two adult persons of the same sex,"¹⁷³ and principles of equal protection.¹⁷⁴ Thus, although there are differences between the heightened scrutiny in *Windsor* and strict scrutiny, the structure of the *Windsor* analysis mirrors strict scrutiny in that it involves a welfare function that includes an account of benefits *and* costs,¹⁷⁵ the sum of which must be sufficiently large to justify an infringement on various Fifth Amendment interests such as marriage, intimate relations, and equal treatment before the law.¹⁷⁶

The threshold function for same-sex marriage under enhanced rational basis differs from strict scrutiny primarily in degree. Whereas the threshold under strict scrutiny must be high enough to create a strong presumption against the constitutionality of a given law, such that only those laws that are narrowly tailored to achieve a compelling government interest will be deemed valid, the approach taken in *Windsor* implied a weaker presumption. The Court did not demand that the government demonstrate a compelling government interest or that the law be narrowly tailored to achieve that interest. Instead, the Court adopted a more holistic approach that weighed multiple factors together: the significance of the liberty interest at stake,¹⁷⁷ the extent to which similarly situated individuals were being treated differently under the law,¹⁷⁸ the presence of animus and moral disapproval of a class in the law's purpose and effect,¹⁷⁹ the extent to which the law impinged on individual dignity and

171. *Windsor*, 133 S. Ct. at 2694–95.

172. *Id.* at 2680, 2692.

173. *Id.* at 2692.

174. *Id.* at 2693, 2695.

175. *See id.* at 2694–95.

176. *See supra* notes 172–74.

177. *See supra* note 30.

178. *See supra* note 31.

179. *See Windsor*, 133 S. Ct. at 2693.

imposed a stigma,¹⁸⁰ the legitimacy and strength of the government's policy justifications for the law,¹⁸¹ and DOMA's cost to individuals and society.¹⁸²

Accordingly, the basic threshold function for the constitutionality of same-sex marriage can be represented as M , such that a law that bans same-sex marriage is permissible only if M is *positive*. The threshold level will be represented as K , which will equal the minimum level of net benefit to society caused by a given ban on same-sex marriage that will be required to justify an infringement on the due process and equal protection interests at stake. W will equal the sum of the social welfare function.¹⁸³ This gives us the following equation:

$$M = W - K.$$

Alternatively, the function can be represented as:

$$M = \begin{cases} \text{Constitutional if } \sum_{i=1}^n x_i > K \\ \text{Unconstitutional if } \sum_{i=1}^n x_i < K \end{cases}$$

where $\sum_{i=1}^n x_i$ represents the net benefits and harms of a state ban, and K is the level of benefits of a same-sex marriage ban below which an infringement on the right of same-sex couples to get married would never be justified.

The precise value of K cannot be determined, which is appropriate given the purpose of the function as a heuristic.¹⁸⁴ With that said, several things can be said about its parameters. The value of K is less than the value of the threshold under strict scrutiny, C , but greater than zero. Beyond those general outlines, the value of K will be a function of the strength of the due process and equal protection interests at stake with respect to a given state ban on same-sex marriage. A strong case can be made that those interests are at least as strong in the context of a state ban on same-sex marriage as they were with respect to DOMA, if not stronger given that DOMA only deprived same-sex couples of federal recognition, whereas state bans deny them state and federal recognition. With that said, *Windsor* demonstrated how equal protection concerns are more salient in the presence of animus in a law's purpose and effect. Thus, to the extent that certain state bans are based on animus to a lesser degree, the value of K might be somewhat less.

180. See *supra* note 33.

181. See *supra* note 34.

182. See *supra* note 35.

183. Note that the costs and benefits that were listed in previous Sections were with respect to the costs and benefits of same-sex marriage, not with respect to a ban on same-sex marriage. The terms are now flipped since we are discussing the validity of a *ban* on same-sex marriage.

184. See *supra* notes 57–58 and accompanying text.

Given the normative significance of the deontological principles detailed in Part III, the net efficiency of a ban on same-sex marriage would have to be significant to justify an infringement on the various due process and equal protection interests implicated. Legally, the efficiency might not need to be as significant as it would be if there was a fundamental right or suspect class involved, but it is clear from *Windsor* that a strong justification is necessary, nevertheless. For such a justification to exist, the benefits of same-sex marriage would have to be surprisingly low given the current data,¹⁸⁵ and opponents' claims that same-sex couples are a poor fit for marriage and would be less happy as a result would have to be true.¹⁸⁶ In addition, the costs to the rest of society would have to be significant. For example, opponents' worst fears about the dilution of marital norms would have to be true, even after being discounted for probability and present value. Again, given the data,¹⁸⁷ such a conclusion seems rather unreasonable.

CONCLUSION

The integration of CBA with deontological constraints puts the issue of same-sex marriage in proper moral and constitutional perspective. By grappling with all the potential costs and benefits of same-sex marriage, it acknowledges that marriage is a social institution with value and purpose, not merely a government benefit or a means of gender, racial, or heteronormative oppression that ought to be torn down.¹⁸⁸ At the same time, through the use of a social welfare function, it forces one to distill the true substance of marriage by dismissing alleged costs that are based on arguments that are merely circular, definitional, or grounded solely in animus or religious beliefs. Crucially, it then introduces, through the use of threshold functions, relevant deontological constraints that are central to the debate but that do not have a place in traditional social welfare functions: in particular, the rights to marriage and equal protection. Finally, by modeling the integration mathematically, the framework brings greater rigor and precision to the Court's Fifth Amendment jurisprudence.

When the data on the costs and benefits of same-sex marriage are weighed against the deontological interests at stake using the threshold function proposed, the unconstitutionality of state bans on same-sex marriage becomes clear. The analysis put forth concedes that a speculative argument can be made that the costs of same-sex marriage might theoretically exceed the benefits as a

185. See *supra* Part IV.

186. For example, this claim might be true if same-sex couples decided not to pursue marriage even once they were given access, if they were plagued by costly divorces, if the institution did not provide any of the benefits that it provides heterosexual couples in terms of relationship and family stability, and so on.

187. See *supra* Part IV.

188. See *supra* Part II.B.

result of a fundamental change in marital norms,¹⁸⁹ thereby undermining the value of marriage as a social institution. That concession does not do much work for opponents' arguments, however. Highly speculative and unsubstantiated claims that are discounted by their probability and present value will almost always fail under the proposed framework given the presence of a threshold function that calculates the significance of the alleged harms and weighs them against the significant deontological interests at stake.¹⁹⁰

189. See *supra* Part IV.C.

190. See Brief for Appellees, *supra* note 148, at 94–95 (“[I]f Proponents are correct that an unsubstantiated fear of negative externalities of *equality* is sufficient to justify *inequality*, then discrimination can become self-justifying. . . . And the more valued the institution from which a class is excluded—which is to say, the more injurious the inequality—then the stronger the self-justification for the inequality becomes.” (citations omitted)).