

ARTICLE

**Tradition as Justification:
The Case of Opposite-Sex Marriage***Kim Forde-Mazrui*[†]

A central point of contention in the national debate over same-sex marriage is the importance of preserving tradition. That debate also features prominently in constitutional litigation over bans on same-sex marriage. Opponents of such bans argue that tradition is an illegitimate justification for the bans, while defenders of traditional marriage contend that tradition is not only a legitimate justification, but is in fact sufficiently important to withstand heightened judicial scrutiny.

This Article assesses tradition as a justification for laws challenged on equal protection grounds, with a focus on laws that limit marriage to opposite-sex couples. The Article makes two main points. First, it concludes that a state's interest in preserving tradition—including the tradition of opposite-sex marriage—is probably legally sufficient to survive the most deferential standard of rational basis review under the Equal Protection Clause.

Second, this Article argues that courts should nonetheless view tradition with skepticism when it is offered to justify laws challenged on equal protection grounds. Tradition exhibits certain features, or “indicia of suspectness,” that counsel skepticism. Those features include tradition's speculative utility, rhetorical appeal, and manipulability. Additionally, tradition is especially suspicious when offered to justify laws that burden a group toward whom there has been a cultural shift from widespread societal disapproval in the past to substantial public tolerance today. In such circumstances, tradition may serve as a convenient justification for people who are actually motivated by now-repudiated attitudes toward the burdened group. For bans on same-sex marriage, this Article contends, courts should invalidate such laws unless, after careful scrutiny, courts are satisfied that the laws are motivated by legitimate, non-tradition-based interests.

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INTRODUCTION

A common justification for banning same-sex marriage is respect for tradition. For example, in defending its ban on same-sex marriage against constitutional attack before the Iowa Supreme Court, the state argued that one of its interests in maintaining the ban was simply to preserve the traditional understanding of marriage.¹ Similarly, the State of California relied on tradition in defending its ban on same-sex marriage before its supreme court, even while expressly disavowing claims by supporting amici that same-sex relationships were inferior to opposite-sex relationships or that the interests of children would be harmed by same-sex parents.² The state insisted that the traditional

¹ See *Varnum v Brien*, 763 NW2d 862, 873, 875, 897–99 (Iowa 2009) (noting and rejecting the government’s argument that there is an important governmental interest in promoting the concept of marriage as traditionally understood); Final Amended Reply Brief of Defendant-Appellant, *Varnum v Brien*, No 07-1499, *16 (Iowa filed June 10, 2008) (available on Westlaw at 2008 WL 5156763) (defending the constitutionality of a ban on same-sex marriage on the ground that “[t]he concept of same sex marriage is just simply not part of the nation’s history, legal traditions and practices”).

² *In re Marriage Cases*, 183 P3d 384, 450–51 (Cal 2008) (accepting the state’s assertion that one-man–one-woman marriage is the historically predominant definition but rejecting the state’s argument that the traditional status of opposite-sex marriage justifies banning same-sex marriage); Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits, *In re Marriage Cases*, No S147999, *43–44 (Cal filed June 14, 2008) (available on Westlaw at 2007 WL 2905413) (“California Brief”) (“‘Tradition’ is not an empty abstract concept—it is a shorthand to describe the tangible and psychological benefits that accrue to members of a society when they respect the teachings of their predecessors.”); *id.* at *7–10 (accepting that same-sex marriage would not harm the state’s interest in the proper upbringing of children

definition of marriage—because it is traditional—was sufficient to withstand even heightened review under the state’s equal protection clause.³ In litigation in other states as well, defenders of opposite-sex-only marriage (hereinafter “opposite-sex marriage”) have cited its traditional status as reason for resisting demands for change.⁴

The status of opposite-sex marriage as a tradition has also been relied on outside the courts as a justification for laws against same-sex marriage. State legislatures have justified “defense of marriage acts” (mini-DOMAs), which typically ban same-sex marriage and preclude the recognition of same-sex marriages from other jurisdictions, on the ground that opposite-sex marriage reflects a tradition of ancient pedigree.⁵ Similarly, tradition-preserving arguments have featured prominently in the political processes in the majority of the states that have amended, through popular initiative, state constitutions to ban same-sex marriage. At the federal level, the goal of preserving tradition was invoked by Congress in passing the federal Defense of Marriage Act⁶ (DOMA), and by the more than one hundred members of Congress and the President in proposing the Federal Marriage Amendment.⁷

but arguing that the benefits and rights of marriage were already conferred upon committed same-sex partners via the state’s domestic partnership law).

³ See *California Brief* at *39, 43–45 (cited in note 2).

⁴ See, for example, *Baker v Nelson*, 191 NW2d 185, 186–87 (Minn 1971) (emphasizing that marriage is predicated on the traditional notion of procreation through the union of a man and a woman), citing *Skinner v Oklahoma*, 316 US 535, 541 (1942) (“Marriage and procreation are fundamental to the very existence and survival of the race.”); *De Santo v Barnsley*, 476 A2d 952, 954–56 (Pa Super Ct 1984) (finding that common law marriage has always been, and should continue to be, understood as the union of a man and a woman); *Anonymous v Anonymous*, 325 NYS2d 499, 500 (NY S Ct 1971) (“Marriage is and always has been a contract between a man and a woman.”).

⁵ See Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 Conn L Rev 1397, 1404–05 (2009) (noting a number of cases in which the defenders of mini-DOMAs appealed to “marriage’s ancient history”); Anthony C. Infanti, *Taxing Civil Rights Gains*, 16 Mich J Gender & L 319, 342 (2010) (reflecting that the defense of mini-DOMAs “conjures an image of marriage as an ancient citadel that is under attack by (foreign) invaders”). The term “mini-DOMA” for state-level opposite-sex marriage protection laws alludes to the federal Defense of Marriage Act (DOMA). Examples of mini-DOMAs include Ala Code Ann § 30-1-19; Ariz Rev Stat Ann § 25-103 (West); Mich Comp Laws Ann § 551.1 (West).

⁶ Pub L No 104-199, 110 Stat 2419 (1996), codified at 1 USC § 7 and 28 USC § 1738C.

⁷ Leonard G. Brown III, *Constitutionally Defending Marriage: The Defense of Marriage Act, Romer v. Evans and the Cultural Battle They Represent*, 19 Camp L Rev 159, 171 (1996) (stating that “DOMA provides a semblance of restraint on the Federal Judiciary by defining the meaning of marriage and displaying the intent of Congress to protect the traditional meaning of the word from those that wish to redefine it” and “[t]he legislative history of DOMA also clearly defines the defense of the traditional marriage as a substantial government interest”); Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work through Premarital Security Agreements*, 77 Tex L Rev 17, 32 n 55 (1998) (quoting a number of members of Congress at committee hearings asserting the importance of tradition in terms of defining marriage); Note, *Litigating the Defense of Marriage Act: The Next Battleground for Same-Sex Marriage*, 117

Legal scholars and commentators have also weighed in with arguments that advocate giving presumptive weight to the legitimacy of opposite-sex marriage by virtue of its traditional character.⁸

To be sure, opponents of same-sex marriage, whether in court, the political process, or the academy, have not always relied on tradition as the only justification for their position. They have, however, insisted that the status of opposite-sex marriage as a tradition provides a sufficient justification even though alternative justifications have also been advanced.⁹ Additionally, other than ardent traditionalists, many opponents of same-sex marriage do not cite tradition “for its own sake,” that is, without any explanation of why tradition is important.¹⁰ They have argued that traditions like opposite-sex marriage are important because they represent, for example, time-tested

Harv L Rev 2684, 2696–98 (2004) (identifying tradition as a motivating force for DOMA supporters); Sherri L. Toussaint, Comment, *Defense of Marriage Act: Isn't It Ironic . . . Don't You Think? A Little Too Ironic?*, 76 Neb L Rev 924, 935–39, 942–47, 977–78 (1997) (describing first how tradition had justified prejudice in the past and then how prejudice helped lead to the enactment of DOMA). See generally Alec Walen, *The “Defense of Marriage Act” and Authoritarian Morality*, 5 Wm & Mary Bill Rts J 619 (1997) (describing six categories of argument asserted by DOMA supporters). See also Mark Tanney, Note, *The Defense of Marriage Act: A “Bare Desire to Harm” an Unpopular Minority Cannot Constitute a Legitimate Government Interest*, 19 T Jefferson L Rev 99, 119 (1997) (stating that defining marriage as “exclusively heterosexual because ‘it has always been that way’” is factually incorrect).

⁸ See, for example, William C. Duncan, *Constitutions and Marriage*, 6 Whittier J Child & Fam Advoc 331, 338 (2007); Steven W. Fitschen, *Marriage Matters: A Case for a Get-the-Job-Done-Right Federal Marriage Amendment*, 83 ND L Rev 1301, 1310–14 (2007); Maggie Gallagher, *Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?*, 18 Notre Dame J L Ethics & Pub Pol 225, 231–33 (2004). See generally Symposium, *Moral Realism and the Renaissance of Traditional Marriage*, 17 Regent U L Rev 185 (2005); Symposium, *Same-Sex Marriage*, 18 BYU J Pub L 273 (2004).

⁹ See note 8. See also Dale Carpenter, *Bad Arguments against Gay Marriage*, 7 Fla Coastal L Rev 181, 183–219 (2005) (critiquing a number of arguments made against same-sex marriage); Eugene Volokh, *Same-Sex Marriage and Slippery Slopes*, 33 Hofstra L Rev 1155, 1167–97 (2005) (addressing a number of slippery slope arguments advanced by opponents of same-sex marriage); Maggie Gallagher, *(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman*, 2 U St Thomas L J 33, 46–48 (2004) (appealing to the need for marriages to result in procreation since “depopulation, not overpopulation, is the threat most to be feared in the contemporary context”); Ben Schuman, Note, *Gods and Gays: Analyzing the Same-Sex Marriage Debate from a Religious Perspective*, 96 Georgetown L J 2103, 2118–20 (2008) (describing how opponents of same-sex marriage warn of a future of legalized polygamy, pedophilia, and bestiality if same-sex marriage is legalized); Elizabeth Larcano, Note, *A “Pink” Herring: The Prospect of Polygamy Following the Legalization of Same-Sex Marriage*, 38 Conn L Rev 1065, 1066–67 (2006) (noting that same-sex marriage opponents have raised the specter of the legalization of polygamy as a rationale for banning same-sex marriage). See generally Editorial, *Ballot Measure 2: A Yes Vote—But a Complex Choice*, Anchorage Daily News F2 (Oct 25, 1998) (“[S]ociety has a right to define marriage and defend the tradition of marriage.”).

¹⁰ See Lynn D. Wardle, *A Response to the “Conservative Case” for Same-Sex Marriage: Same-Sex Marriage and “The Tragedy of the Commons,”* 22 BYU J Pub L 441, 449 (2008) (stating that “[c]onservatives are not opposed to change qua change” and that the conservative approach relies instead on “gradual organic evolution instead of revolution”).

wisdom¹¹ and cultural identity,¹² or because altering them may result in unintended consequences that might be irreversible.¹³ The longevity of opposite-sex marriage at least counsels patience, some caution, for society to accustom itself to such fundamental reform.¹⁴ The point remains, however, that the status of opposite-sex marriage as a tradition is emphasized as a sufficient basis to presume that it ought not be changed. Although traditionalists' fears are largely speculative,¹⁵ they concern a serious matter. At stake, they warn, is the very foundation of society—the family.¹⁶

In contrast, many advocates of same-sex marriage dismiss tradition as an irrelevant basis for limiting marriage to opposite-sex couples.¹⁷

¹¹ See, for example, William C. Duncan, *Marriage and the Utopian Temptation*, 59 Rutgers L Rev 265, 275 (2007), quoting Russell Kirk, *Edmund Burke: A Genius Reconsidered* 83 (Arlington House 1967) (“The continuity of a nation’s establishments and institutions, the true consensus of many generations, must not be imperiled by the rash innovations of a talented reformer; for though the individual is foolish, the species is wise.”); Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 Va J Soc Pol & L 291, 330 (2001) (describing how opponents of same-sex marriage assert “the wisdom that [opposite-sex] marriage is a critical aspect of social organization”).

¹² Troy King, *Marriage between a Man and a Woman: A Fight to Save the Traditional Family One Case at a Time*, 16 Stan L & Pol Rev 57, 57 (2005) (“The assaults [by same-sex marriage supporters] are being leveled against the morals, traditions, and beliefs that define who we are as a people and what matters to us.”); Kenneth W. Starr, et al, *Marriage Equality in California: Legal and Political Prospects*, 40 Loyola LA L Rev 1209, 1227, 1234–35 (2007) (maintaining that preservation of culture as it currently exists is sufficient to satisfy a rational basis standard of review).

¹³ See Amy L. Wax, *The Conservative’s Dilemma: Traditional Institutions, Social Change, and Same-Sex Marriage*, 42 San Diego L Rev 1059, 1066–67 (2005) (summarizing Burkean assumptions, including collective wisdom and unintended consequences).

¹⁴ See Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 Harv L Rev 4, 97–100 (1996) (warning that, even if bans on same-sex marriage are unconstitutional, prudence counsels no action or incremental action by courts to allow society time to adjust through deliberative, democratic process and cautioning that premature judicial recognition could provoke anti-gay backlash). See also Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind L J 1, 24–28 (1994) (noting that immediate change in social policies can have unintended consequences).

¹⁵ To describe traditionalist fears as speculative is not to denigrate them. Philosophical traditionalists would likely acknowledge that their concerns are speculative but nonetheless worth taking seriously. Their philosophy presumes that people cannot adequately predict the consequences of change and that deference to long-followed traditions guards against unknowable and unintended consequences. See notes 11–13 and 202–03 and accompanying text.

¹⁶ See Fredric J. Bold, Jr., Comment, *Vows to Collide: The Burgeoning Conflict between Religious Institutions and Same-Sex Marriage Antidiscrimination Laws*, 158 U Pa L Rev 179, 185 (2009) (noting that many Americans see opposite-sex marriage as fundamental to the concept of family, which, in turn, is fundamental to the stability of society); Lynn D. Wardle, *The Proposed Federal Marriage Amendment and the Risks to Federalism in Family Law*, 2 U St Thomas L J 137, 139–40 (2004).

¹⁷ See, for example, Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 Stan L Rev 45, 68 (1996) (arguing that a state must justify prohibiting same sex marriage “with something more persuasive than intoning tautologically that marriage ‘has always been that way’”); Wax, 42 San Diego L Rev at 1098 (cited in note 13), citing Paul Franco, *Michael Oakeshott: An Introduction* 96 (Yale 2004).

Pointing to now-repudiated traditions, such as race and sex discrimination, some go so far as to argue that tradition should count against the merits of a practice.¹⁸ The forward progress of civil rights, they contend, is marked by breaking with outmoded traditions of a less enlightened time.¹⁹ At the very least, they argue, when a law is challenged on the ground that it unconstitutionally discriminates against a minority group or infringes a fundamental right, the state should be required to advance a more substantial interest than the traditional status of the challenged law.²⁰ In the case of marriage, they contend, refusing to open the institution to same-sex couples perpetuates the subordinate status of gay and lesbian people, the security of their families, and the welfare of their children.²¹ While most reformists acknowledge

¹⁸ For scholarship critical of tradition, see Eric Alan Isaacson, *Traditional Values or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations*, 17 Geo Mason U Civ Rts L J 1, 52 (2006) (describing the increasing tension between the traditions of liberal religious sects and conservative religious sects in the United States); Adam B. Wolf, *Fundamentally Flawed: Tradition and Fundamental Rights*, 57 U Miami L Rev 101, 102–04 (2002) (asserting a number of flaws inherent to relying on tradition when engaging in judicial decisionmaking, notably that tradition can promulgate and prolong prejudice and discrimination); Robert L. Hayman, Jr., *The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism*, 30 Harv CR–CL L Rev 57, 71–73 (1995) (noting that reliance on tradition in judicial decisionmaking can be problematic because traditions can change over time); Anita L. Allen, *Autonomy's Magic Wand: Abortion and Constitutional Interpretation*, 72 BU L Rev 683, 696 (1992) (praising the Court for departing from tradition in *Planned Parenthood v. Casey*, 505 US 833 (1992)); Robin West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U Pa L Rev 1373, 1374–78 (1991) (arguing that adhering to traditions reinforces injustice and undermines human liberation); David J. Luban, *Legal Traditionalism*, 43 Stan L Rev 1035, 1042, 1045–47 (1991) (criticizing tradition as anachronistic and not always amenable to science and reason); John Charles Hayes, Note, *The Tradition of Prejudice versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after Bowers v. Hardwick*, 31 BC L Rev 375, 426–28 (1990); Helen Garfield, *Privacy, Abortion, and Judicial Review: Haunted by the Ghost of Lochner*, 61 Wash L Rev 293, 332–37 (1986) (criticizing prejudicial traditions); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U Chi L Rev 502, 528 (1964) (arguing on behalf of freedom “from the strictures of the past,” although recognizing that knowledge of historical continuity is essential in judicial decisionmaking).

¹⁹ See generally, for example, Wolf, 57 U Miami L Rev 101 (cited in note 18) (arguing that “relying on tradition frequently legitimizes and perpetuates prior discrimination, an odious result in and of itself, but also one that is at odds with the letter and spirit of the Fourteenth Amendment”).

²⁰ See Schuman, Note, 96 Georgetown L J at 2114 (cited in note 9); C. Brett Miller, Comment, *Same-Sex Marriage: An Examination of the Issues of Due Process and Equal Protection*, 59 Ark L Rev 471, 479–80 (2006); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of Lawrence v. Texas*, 88 Minn L Rev 1184, 1223–31 (2004); William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va L Rev 1419, 1493–1510 (1993).

²¹ See Liz Seaton, *The Debate over the Denial of Marriage Rights and Benefits to Same-Sex Couples and Their Children*, 4 Margins: Md L J Race, Religion, Gender & Class 127, 136–43 (2004); Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W Va L Rev 411, 436–49 (1999); Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 New Eng L Rev 263, 301–06 (1997) (identifying myriad federal benefits that same-sex couples could obtain if federal law recognized same-sex marriages). See also *Massachusetts v United*

the importance of marriage, they argue that the long-term stability of that institution would actually be strengthened by opening it to committed same-sex couples.²²

To date, looking simply at existing law, proponents of opposite-sex marriage have had qualified success in holding off reform, both in the courts and in the political process. At the time of this writing, 90 percent of states restrict marriage to opposite-sex couples,²³ including a majority in their constitutions,²⁴ and most state courts have rejected constitutional challenges to such bans.²⁵ Additionally, federal law expressly denies the validity of same-sex marriage for all federal purposes, including the tax, social security, and health benefits that opposite-sex marriages enjoy.²⁶

At the same time, proponents of same-sex marriage have made notable gains. They have won judicial rulings recognizing same-sex marriage in the highest state courts of Hawaii,²⁷ Massachusetts,²⁸ California,²⁹ Connecticut,³⁰ and Iowa,³¹ although Hawaii and California

States Department of Health and Human Services, 698 F Supp 2d 234, 242–44 (D Mass 2010) (demonstrating how marital status impacts eligibility for certain state and federal tax and healthcare benefits).

²² See, for example, Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-community Critique*, 21 NYU Rev L & Soc Change 567, 597–99 (1995) (arguing that the overall institution of marriage would be improved if it were extended to same-sex partners, particularly in regard to reducing sexism and social pressure to assume traditional gender roles), citing Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis L Rev 187, 218.

²³ As of August 2010, a total of forty-five states (90 percent) do not perform same-sex marriages. See Sandhya Somashekhar, *Federal Appeals Court Puts California Gay Marriages on Hold*, Wash Post A03 (Aug 17, 2010).

²⁴ As of August 4, 2010, thirty states (60 percent) have constitutional language banning same-sex marriage. See *Factbox: U.S. Laws on Gay Marriage, Civil Unions*, Reuters (Aug 4, 2010), online at <http://www.reuters.com/article/idUSTRE67364P20100804> (visited Nov 23, 2010). One additional state, Hawaii, has a constitution that explicitly authorizes the state legislature to ban same-sex marriage. National Conference of State Legislatures, *Same Sex Marriage, Civil Unions and Domestic Partnerships* (Sept 2010) (“NCSL Overview”), online at <http://www.ncsl.org/default.aspx?tabid=16430> (visited Nov 23, 2010).

²⁵ See, for example, *Conaway v Deane*, 932 A2d 571, 624–27 (Md 2007); *Andersen v King County*, 138 P3d 963, 979 (Wash 2006); *Hernandez v Robles*, 855 NE2d 1, 6–9 (NY 2006); *Lewis v Harris*, 875 A2d 259, 271 (NJ 2005). But see *Perry v Schwarzenegger*, 704 F Supp 2d 921, 995–1003 (ND Cal 2010); *Varnum*, 763 NW2d at 906; *Goodridge v Department of Public Health*, 798 NE2d 941, 969 (Mass 2003).

²⁶ See DOMA, 1 USC § 7. See also Robb, 32 New Eng L Rev at 301–06 (cited in note 21) (listing a plethora of federal benefits available only to married persons, which DOMA restricts to opposite-sex marriages).

²⁷ *Baehr v Lewin*, 852 P2d 44, 67–68 (Hawaii 1993).

²⁸ *Goodridge*, 798 NE2d at 969.

²⁹ *In re Marriage Cases*, 183 P3d at 419–20, 426–27, 432, 444–46.

³⁰ *Kerrigan v Commissioner of Public Health*, 957 A2d 407, 481 (Conn 2008).

³¹ *Varnum*, 763 NW2d at 906.

overturned those rulings through state referenda.³² Three states—Vermont,³³ New Hampshire,³⁴ and Maine³⁵—and the District of Columbia³⁶ have legalized same-sex marriage without judicial compulsion, although Maine saw that legislation overturned by state referendum,³⁷ and a number of states are moving toward recognizing such marriages from other states even though they would not be recognized if performed within their own jurisdictions.³⁸ Moreover, a growing number of states authorize same-sex civil unions or domestic partnerships that carry many to most of the same tangible legal benefits under state law that accompany marriage.³⁹

As the litigation over same-sex marriage under state constitutions continues to work its way through state courts, it seems inevitable that the federal judiciary, and ultimately the Supreme Court, will be asked to rule on whether bans on same-sex marriage violate provisions of the federal Constitution, such as the Equal Protection and Due Process Clauses. In fact, two federal cases are currently on appeal from

³² See *Strauss v Horton*, 207 P3d 48, 119–21 (Cal 2009) (upholding Proposition 8, a 2008 constitutional amendment to ban same-sex marriage, but also upholding same sex marriages performed in the state prior to the amendment's passage); Kristin D. Shotwell, Note, *The State Marriage Cases: Implications for Hawai'i's Marriage Equality Debate in the Post-Lawrence and Romer Era*, 31 U Hawaii L Rev 653, 655–57 (2009) (detailing the development and passage of Hawaii's 1998 constitutional amendment banning same-sex marriages); Eric Bailey and Michael Rothfeld, *Voters Are Divided on State Ballot Measures*, LA Times B1 (Nov 6, 2008). See also Cal Const Art I, § 7.5 (“Only marriage between a man and a woman is valid or recognized in California.”).

³³ See Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, NY Times A1 (Apr 8, 2009) (describing the legislation and its path to adoption by the legislature).

³⁴ See Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, NY Times A19 (June 4, 2009).

³⁵ See Abby Goodnough, *Maine Governor Signs Same-Sex Marriage Bill*, NY Times A21 (May 7, 2009).

³⁶ See Keith L. Alexander and Ann E. Marimow, *For Gays, a D.C. Day to Treasure*, Wash Post A1 (Mar 4, 2010).

³⁷ See Abby Goodnough, *Gay Rights Rebuke May Result in a Change in Tactics*, NY Times A25 (Nov 5, 2009).

³⁸ Three states recognize same-sex marriages performed in other states (New York, Rhode Island, and, recently, Maryland) but do not perform same-sex marriages themselves. See *Godfrey v Spano*, 920 NE2d 328, 335–37 (NY 2009) (affirming that county employees who are a party to a same-sex marriage performed in another state are entitled to spousal benefits); Katie Zezima, *Rhode Island Steps toward Recognizing Same-Sex Marriage*, NY Times A19 (Feb 22, 2007), citing Letter from Rhode Island Attorney General Patrick C. Lynch to Jack R. Warner, Commissioner, Rhode Island Board of Governors for Higher Education (Feb 20, 2007) (on file with author); Tara Bahrapour, *Gays Laud Marriage Decision in Maryland to Recognize Same-Sex Marriages from Other Places*, Wash Post B1 (Feb 26, 2010).

³⁹ See *NCSL Overview* (cited in note 24) (reporting that California, Oregon, New Jersey, Nevada, and Washington offer civil unions or domestic partnerships that closely mirror the state benefits of marriage and that an additional three states—Hawaii, Maine, and Washington—offer domestic partnerships with some of the state benefits of marriage).

trial courts that invalidated, respectively, DOMA⁴⁰ and Proposition 8 (“Prop 8”).⁴¹ When the Supreme Court eventually grants review of challenges to bans on same-sex marriage and the state justifies such bans on grounds of tradition, how should the Court evaluate tradition as a justification?

This Article assesses tradition as a justification for a law challenged on equal protection grounds. The Article asks two main questions. First, is tradition a legitimate governmental justification for equal protection purposes? Second, if it is, should courts nonetheless treat tradition as a suspicious justification, that is, one that warrants suspicion that illegitimate purposes or beliefs actually motivated the classification being justified? The Article explores these questions with reference to the contemporary controversy over laws that limit marriage to opposite-sex couples.

The Article focuses on equal protection doctrine for a number of reasons. An account of tradition’s relevance in this doctrinal context is most contested and underdeveloped, both in the courts and scholarship. For doctrines such as substantive due process, criminal procedure, and separation of powers, there is substantial consensus that tradition is entitled to some deference, although jurists differ sharply over the weight to be given tradition and how specifically to define it.⁴² For equal protection doctrine, in contrast, some cases and jurists accord positive weight to a law because it reflects a tradition, but other cases suggest that a law’s basis in tradition may instead counsel *against* its legitimacy, as when the underlying tradition constitutes a “history of discrimination,” warranting judicial skepticism.⁴³

In legal scholarship, although some attention has been given to the role of tradition for equal protection analysis, the issue remains undertheorized. The scholarship critical of tradition, including in the same-sex marriage debate, tends inordinately to dismiss tradition’s potential virtues, citing race and sex discrimination as dispositive proof that tradition ought not serve to justify the legality of a law or practice.⁴⁴ Traditionalist scholarship on same-sex marriage also tends to be underdeveloped and often alarmist, lacking careful explanation

⁴⁰ See *Massachusetts*, 698 F Supp 2d at 248–49, 253; *Gill v Office of Personnel Management*, 699 F Supp 2d 374, 386–97 (D Mass 2010).

⁴¹ See *Perry*, 704 F Supp 2d at 991–1003.

⁴² See notes 66–74 and accompanying text.

⁴³ See notes 75–111 and accompany text.

⁴⁴ For scholarship critical of tradition, see sources cited in notes 17–22.

of the ways in which same-sex marriage would risk the stability of traditional families.⁴⁵

Of particular significance, absent in the debate over tradition is attention to the susceptibility of tradition to be offered as a justification when ulterior motivations are actually at work. Scholarship assessing the value of tradition tends to ask only whether a law's status as a tradition gives it value without asking the additional question whether the fact that tradition is being offered as a justification for the law indicates a likelihood that the law actually stems from problematic purposes. If tradition is in practice more likely to be offered as a justification when illegitimate reasons motivated a law, then asking simply whether the law reflects a tradition may result in overestimating the virtues of the law or the motivations of those who enacted it. Indeed, as this Article argues, from an equal protection standpoint, the circumstances in which tradition tends to be offered as a justification gives reason to doubt the law's validity. An effective approach for analyzing laws justified in the name of tradition is thus warranted to guard against evasion of equal protection guarantees.

Part I summarizes the principal arguments in the debate over the value of tradition as a matter of both policy and equal protection doctrine. The discussion highlights the social appeal of tradition, the philosophical debate about its importance, the role of tradition in Supreme Court opinions, and the way tradition has featured in cases about sexual orientation, including same-sex marriage. This Part is descriptive only, intended to identify and describe common arguments for and against the value of tradition, especially in the equal protection context.

Part II considers whether tradition is a legitimate governmental justification for equal protection purposes. Part II.A explains the concept of a legitimate governmental interest or justification as reflected in Supreme Court doctrine. The Court has not articulated a clear definition of a legitimate interest, but it has provided some guidance through example. Part II.B considers whether preserving tradition constitutes a legitimate justification, including for laws limiting marriage to opposite-sex couples. This Part concludes that tradition is not a sufficient justification "for its own sake," but that the consequential benefits that may result from preserving tradition, such as time-tested utility, reinforcing social identity, and avoiding unintended consequences, are legitimate interests. As to whether preserving the tradition

⁴⁵ See Wax, 42 San Diego L Rev at 1062–63 (cited in note 13) (describing traditionalist writings that "make strong appeals to tradition, past practice, and customary understandings, with little analysis of why these elements should receive deference"). For scholarship favorable to tradition, see notes 8–16.

of opposite-sex marriage is rationally related to a legitimate interest, this Part concludes that, while the case is not strong, it is probably sufficiently plausible to survive the most deferential standard of rational basis review.

Part III is the principal contribution of this Article. It argues that, even if preserving tradition may serve legitimate ends, it should be treated as suspicious, that is, assumed likely to result from illegitimate motivations when emphasized as the basis for upholding classifications alleged to violate equal protection rights. Part III.A argues that, just as some concerns or “indicia of suspectness” have led the Court to view certain classifications with skepticism, similar concerns justify skepticism toward certain governmental justifications offered to support a challenged classification. Tradition, Part III.B argues, constitutes such a justification. Indicia that counsel skepticism toward tradition include its historical use to justify obnoxious laws, its speculative rather than demonstrable utility, its rhetorical appeal, and its manipulability. Additionally, tradition is an especially attractive justification to those defending laws that burden groups toward whom there has been a cultural shift from societal disapproval in the past to a substantial degree of public tolerance today. The result is that tradition tends to emerge as a justification when other potential justifications are either unacceptable, such as outmoded prejudice or stereotype, or unpersuasive, such as justifications based on purported empirical facts or risks that turn out to be erroneous or unsubstantiated.

Historical laws justified by tradition that illustrate this pattern include race and sex discrimination. When ideologies of white and male supremacy became politically and constitutionally objectionable, and when empirical claims of racial difference and of the natural roles of women became discredited, tradition emerged as the last justification against reform. The implication for equal protection analysis is that a law justified by tradition should be invalidated unless, after careful judicial scrutiny, a court is satisfied that the classification was actually motivated by constitutionally permissible purposes. Such an approach would place the burden on the state to dispel the suspicion that the actual purposes underlying the law ostensibly justified in the name of tradition are impermissible. Part III.C considers these points in the context of laws excluding same-sex couples from marriage, concluding that tradition is suspicious when offered to justify these laws, especially in light of America’s increasingly repudiated history of societal animosity toward homosexuality.

Part IV sketches how courts adjudicating tradition-based justifications for discriminatory laws should proceed. Part IV.A briefly considers other justifications that should arguably be considered suspicious. An awareness of other suspicious justifications is important as

they are likely to be offered in lieu of tradition if courts were to treat tradition skeptically. Part IV.B considers what close judicial scrutiny of laws justified by tradition and other suspicious justifications would entail, including allocating burdens of proof, guarding against the risk of evasion, and addressing mixed-motive cases.

I. THE CONTESTED VALUE OF TRADITION

Americans honor and laud traditions so routinely as to make the need to justify their value seem unnecessary. From religious services, military honor guards, national holidays, and weddings, to the (arguably) less important opening day pitch, summer-camp songs, and college football rivalries, traditions evoke pride, nostalgia, and community spirit. The appeal of tradition, moreover, extends paradoxically to the claiming of *new* traditions. A letter to alumni from the dean of my law school alma mater, for example, expresses excitement about the school's traditions, including, for the first time, a "new tradition" of first-day law students pledging a career of the highest professional ethics.⁴⁶ The University of Virginia's public relations newspaper proudly announced that "Trailblazers inaugurate a tradition" of the "first-ever" annual class film.⁴⁷ And a cover of the *University of Virginia Magazine* proudly announced "Changing Traditions," although the inside story would be more accurately described as "dead traditions," depicting, in grainy black-and-white photos, the annual rituals of the good old days, such as streaking across Jefferson's Academical Village Lawn on the first day of fall classes and the custom that hats must be worn at all times on Grounds by (apparently all-white-male) "first years" (the traditional term for freshmen at Virginia).⁴⁸

Notwithstanding tradition's rhetorical appeal, its value is a matter of ongoing debate in legal and philosophical scholarship.⁴⁹ A variety of

⁴⁶ See Letter from Evan Caminker, Dean, University of Michigan Law School (on file with author).

⁴⁷ Brevy Cannon, *Trailblazers Inaugurate a Tradition*, Inside UVA 16 (May 18, 2007). See also *New Issue of Inside UVA Highlights the Class of 2007*, UVA Today (May 18, 2007), online at <http://www.virginia.edu/uvatoday/newsRelease.php?id=2100> (visited Nov 23, 2010).

⁴⁸ See Coy Barefoot, *According to Custom: Student Traditions at Virginia*, U Va Mag 40, 44–45 (Fall 2007) (providing capsule histories of UVA traditions). Note that although most of the traditions described in the article were depicted photographically, the streaking tradition was not.

⁴⁹ See notes 8–22, 50–65, and accompanying text. See also Robert H. Bork, *Alexander M. Bickel, Political Philosopher*, 1975 S Ct Rev 419, 419–21 (exploring the traditionalism of Alexander Bickel); Alexander M. Bickel, *The Morality of Consent* 11–25 (Yale 1975) (arguing for Burkean incrementalism in constitutional interpretation); Luban, 43 Stan L Rev at 1040–42 (cited in note 18) (critiquing traditionalism, particularly Anthony Kronman's argument); Anthony T. Kronman, *Precedent and Tradition*, 99 Yale L J 1029, 1047–64 (1990) (using Burkean philosophy to argue for the inherent authority of tradition); Frank I. Michelman, *Super Liberal: Romance, Community, and Tradition in William J. Brennan, Jr.'s Constitutional Thought*, 77 Va

arguments support giving favorable weight to a law because the law has been in effect sufficiently long to constitute a tradition. Some reasons are consequential. A law's longevity suggests it has been time tested.⁵⁰ A political community has likely retained a law over many years or generations because it has proven useful.⁵¹ Deferring to tradition thus involves deferring to the experience, judgment, and wisdom of prior generations. Moreover, adhering to traditions may serve predictability and reliance interests.⁵² To the extent people develop expectations and structure their lives based on current laws, especially laws whose longevity suggests their likely continuance, abandoning such laws may cause a certain degree of social and economic disruption. Finally, respecting traditions can reinforce a sense of shared social identity and heritage, either within discrete cultural or religious communities or in the nation as a whole.⁵³

In addition to consequential benefits, deferring to traditions may serve deontological interests,⁵⁴ such as fairness and equality. Modifying laws means that prior generations were subject to different rights and responsibilities than those of current and subsequent generations. Scholars have argued that fairness requires that like cases be treated alike, including over time.⁵⁵ It is arguably unfair, at least without affirmative justification, to subject people to different laws across generations.

L Rev 1261, 1312–27 (1991) (describing different approaches to tradition taken by Justices John Paul Stevens, William Brennan, and Antonin Scalia); Rebecca L. Brown, *Tradition and Insight*, 103 Yale L J 177, 212–13 (1993) (critiquing Burkean traditionalism); Katharine T. Bartlett, *Tradition, Change, and the Idea of Progress in Feminist Legal Thought*, 1995 Wis L Rev 303, 318 (comparing Justice Scalia's and Edmund Burke's traditionalism).

⁵⁰ See note 11. See also Kronman, 99 Yale L J at 1056 (cited in note 49) (discussing Burke's arguments in favor of abiding by legal tradition and precedent). For an argument that, over long periods of time, decentralized lawmaking processes, such as the common law and state constitutional law, tend to produce "constitutionally efficient" traditions, see A.C. Pritchard and Todd J. Zywicki, *Finding the Constitution: An Economic Analysis of Tradition's Role in Constitutional Interpretation*, 77 NC L Rev 409, 445–57 (1999).

⁵¹ A law's longevity does not, of course, necessarily prove the law's usefulness. Legislative inertia, for example, may result in outmoded laws remaining on the books. See Guido Calabresi, *A Common Law for the Age of Statutes* 6 (Lawbook Exchange 2000).

⁵² Kronman, 99 Yale L J at 1037–38 (cited in note 49) (asserting the practical value of predictability and reliance interests to refute the suggestion that a tradition of precedent blindly "honor[s] the past for its own sake"), citing Frederick Schauer, *Precedent*, 39 Stan L Rev 571, 595–97 (1987).

⁵³ See Bartlett, 1995 Wis L Rev at 303, 318–20, 331, 334 (cited in note 49) (arguing that tradition is important to the creation of social identity).

⁵⁴ For a brief explanation of the term "deontological," see note 155 and accompanying text.

⁵⁵ Schauer, 39 Stan L Rev at 595–97 (cited in note 52) (emphasizing the importance of consistency to traditional conceptions of fairness and pointing out that "treating like cases alike" raises the question of what "alike" means); Kronman, 99 Yale L J at 1039–41 (cited in note 49) (articulating the reasoning behind consistent application of justice over time as a deontological understanding that "[i]f moral personality—the foundation of whatever rights we have—is colorless and sexless, then it must be timeless too").

Professor Anthony Kronman offers another justification for honoring traditions, one that he argues recognizes the inherent authority of tradition in ways that the consequentialist and deontological rationales do not.⁵⁶ Drawing on the work of Edmund Burke, Kronman argues that the uniqueness of humanity as compared with animals and God is the capacity to learn from and build upon the cultural work of prior generations and to pass along our generation's cultural accomplishments to future generations.⁵⁷ Animals cannot learn from prior generations, and God does not need to.⁵⁸ To give no weight to tradition, Kronman argues, is to disregard the capacity for the multigenerational collaboration that makes humans unique.⁵⁹ When understood as exerting inherent authority, to be honored for its own sake, tradition serves as a kind of "civil religion," as Professor Rebecca Brown observes,⁶⁰ authoritative in itself rather than valuable for the utility that may explain its longevity.⁶¹

A number of arguments counsel against deferring to laws that reflect or enforce traditions. As Professor David Luban argues, every tradition of value began at some point, at which time it represented a break with prior traditions.⁶² Without an examination of the current costs and benefits of a tradition, its status as a tradition does not indicate whether it continues to be useful.⁶³ Also, historical experience suggests that some traditions were never laudable. The odious institution of slavery, for example, was a legally protected practice of long standing, as was racial segregation.⁶⁴ Similarly, women's rights were defined and denied by longstanding traditional views about the roles of men and women that society repudiates today.⁶⁵ Indeed, the phrase "traditional gender roles" often has a negative connotation. Even if

⁵⁶ Kronman, 99 Yale L J at 1041–43 (cited in note 49) (distinguishing his deference-to-tradition rationale from deontological and utilitarian rationales).

⁵⁷ Id at 1064.

⁵⁸ Id at 1065. The claim that animals lack the capacity for culture and multigenerational collaboration is Kronman's interpretation of Burke. The claim is, in fact, disputed. See Frans de Waal, *The Ape and the Sushi Master: Cultural Reflections of a Primatologist* 177 (Basic Books 2001).

⁵⁹ Kronman, 99 Yale L J at 1068 (cited in note 49).

⁶⁰ Brown, 103 Yale L J at 205 (cited in note 49) (discussing deference to the authority of tradition as akin to civil religion).

⁶¹ Id at 206.

⁶² Luban, 43 Stan L Rev at 1052–53 (cited in note 18). See also Jack M. Balkin, *Deconstruction's Legal Career*, 27 Cardozo L Rev 719, 726 (2005) ("[T]o respect tradition is also to betray, submerge, and extinguish other existing and competing traditions.").

⁶³ Luban, 43 Stan L Rev at 1056–57 (cited in note 18).

⁶⁴ Id at 1056 (observing that "racial segregation was a multigenerational project that depended for its survival on the next generation pitching in to preserve it; yet it had no value, or rather, negative value").

⁶⁵ See Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv L Rev 947, 977–87, 993–97 (2002).

race and gender discrimination became traditions because they were valuable to those advocating them, the point remains that their retention over time did not demonstrate the moral worthiness of their continuation. To the extent such traditions endured a test of time, they failed the test of justice.

Tradition is relevant to a broad range of constitutional doctrines. Tradition generally serves to justify according constitutional validity to a claimed right or exercise of governmental power. Tradition features especially prominently in substantive due process doctrine. When the Supreme Court analyzes a challenge to a law on the ground that it infringes a fundamental liberty interest, it typically asks whether the liberty in question is deeply rooted in our nation's traditions.⁶⁶ The more a liberty interest reflects a longstanding and widely protected tradition, the more likely the Court will conclude that it is protected against legislative encroachment. For example, in *Griswold v Connecticut*,⁶⁷ the foundation of modern substantive due process, the Court invalidated a ban on the use of contraception as applied to married couples on the ground that marital privacy is a deeply rooted tradition, "older than the Bill of Rights—older than our political parties, older than our school system."⁶⁸

Tradition also serves a justificatory role in structural constitutional doctrines, such as federalism and separation of powers, serving to justify the exercise of governmental power to the extent there has been a tradition of similar exercises in the past that have been condoned or acquiesced in by the political or judicial branches.⁶⁹ In the criminal procedure context as well—from the traditional authority to deny bail to murder defendants,⁷⁰ to the traditional importance of peremptory challenges,⁷¹ to the tradition of requiring proof beyond a reasonable doubt⁷²—tradition guides and defines the contours of criminal

⁶⁶ See, for example, *Griswold v Connecticut*, 381 US 479, 487 (1965) (Goldberg concurring); *Moore v City of East Cleveland*, 431 US 494, 503 (1977); *Lawrence v Texas*, 539 US 558, 568 (2003).

⁶⁷ 381 US 479 (1965).

⁶⁸ *Id.* at 486.

⁶⁹ See *Brown*, 103 Yale L.J. at 187 (cited in note 49). See also *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 610 (1952) (Frankfurter concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them.").

⁷⁰ See *United States v Salerno*, 481 US 739, 765 n.6 (1987) (Marshall dissenting) (attributing the tradition of denying bail in capital cases to "the considered presumption of generations of judges that a defendant in danger of execution has an extremely strong incentive to flee").

⁷¹ See *Batson v Kentucky*, 476 US 79, 91 (1986) ("While the Constitution does not confer a right to peremptory challenges, those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.") (citations omitted).

⁷² See *In re Winship*, 397 US 358, 361–63 (1970) (holding that the proof beyond a reasonable doubt standard is constitutionally required in all criminal proceedings, including those for

adjudication. And in the Establishment Clause context, tradition can immunize from constitutional challenge government practices that would otherwise violate the separation of church and state, such as legislative prayer and Sunday closing laws.⁷³ Similarly, the Court has upheld certain restrictions on freedom of expression in part because the First Amendment has traditionally recognized such exceptions.⁷⁴

The value of tradition in equal protection doctrine is more uncertain. Initially, the Court gave positive weight to tradition as it continues to do in other doctrinal contexts. Nineteenth-century cases, including the infamous *Plessy v Ferguson*⁷⁵ and *Bradwell v Illinois*,⁷⁶ upheld, respectively, racial segregation and sex discrimination explicitly due to the traditional or customary nature of the discriminatory laws. In developing modern equal protection doctrine, however, the Court has taken a far more skeptical view of tradition. In contrast to substantive due process, the Court views some discriminatory laws challenged under the Equal Protection Clause with suspicion because of the laws' historical character.⁷⁷ *Loving v Virginia*⁷⁸ exemplifies the tension between equal protection and substantive due process regarding tradition. On the one hand, the Court held that the ban on interracial marriage warranted judicial skepticism under the Equal Protection Clause, notwithstanding that restricting interracial marriage was a common and longstanding tradition dating back to the colonial period.⁷⁹ On the other

juveniles, in significant part because of long and widespread adherence to that standard in state and federal courts).

⁷³ See Scott C. Idleman, *Religious Premises, Legislative Judgments, and the Establishment Clause*, 12 Cornell J L & Pub Pol 1, 27, 59–61 (2002).

⁷⁴ See *R.A.V. v City of St. Paul*, 505 US 377, 383 (1992).

⁷⁵ 163 US 537, 550 (1896).

⁷⁶ 83 US (16 Wall) 130, 141–42 (1872) (Bradley concurring).

⁷⁷ In explaining why certain classifications are deemed suspect and therefore receive heightened judicial scrutiny under the Equal Protection Clause, the Court has emphasized that an important factor counseling close scrutiny is when there has been a long history of discrimination on the basis of the classification in question. See *City of Richmond v J.A. Croson Co*, 488 US 469, 492 (1989) (explaining that a history of racial discrimination warrants the application of strict scrutiny to all racial classifications); *City of Cleburne v Cleburne Living Center*, 473 US 432, 440–41 (1985), citing *Massachusetts Board of Retirement v Murgia*, 427 US 307, 313 (1976) (explaining that a factor contributing to characterizing a classification as suspect and subject to strict scrutiny is when there has been a history of discrimination based on that classification); *Frontiero v Richardson*, 411 US 677, 682–85 (1973) (plurality) (explaining that sex-based classifications, like those based on race, warrant strict scrutiny because there has been a similar history of discrimination).

⁷⁸ 388 US 1 (1967).

⁷⁹ *Id.* at 6, 11–12 (explaining that racial distinctions, including the one contained in the Virginia antimiscegenation statute, must satisfy the most rigid judicial scrutiny). The Court in *Loving* did not describe the antimiscegenation law as a “tradition,” perhaps to avoid the positive connotation of the term, but the Court has since characterized *Loving* as rejecting a law that was supported by history and tradition. See *Lawrence*, 539 US at 577–78 (referring to *Loving* for the proposition that “neither history nor tradition could save a law prohibiting miscegenation from

hand, the Court held that the right to marry warranted judicial protection because it has long been recognized as essential to free people.⁸⁰ The Court thus viewed one tradition—racial discrimination—as something to guard against despite its deep historical roots. At the same time, it viewed an alternative tradition—liberty of marriage—as something to protect because of its deep historical roots.

A negative role for tradition in the equal protection context may be explained by the purpose of the Equal Protection Clause. As Cass Sunstein observes, the Due Process Clause, as interpreted, “safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.”⁸¹ “The Equal Protection Clause, in contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding.”⁸² Moreover, as Rebecca Brown argues, traditions tend to be majoritarian, at least when protected by law.⁸³ A majoritarian tradition is of questionable relevance to an equal protection claim that the majority is unfairly discriminating against a minority.

In contrast, other jurists interpret the Equal Protection Clause as tradition-respecting. For originalists, such as Robert Bork, extant traditions during the ratification of the Fourteenth Amendment provide evidence of the Amendment’s objective meaning, a meaning the Court should adhere to in applying the Amendment today.⁸⁴ Michael McConnell also views the Fourteenth Amendment as tradition-protecting, although he contends that the Amendment’s purpose is to return our nation to the Founding tradition of equality, a tradition that was not, he explains, followed in the antebellum South.⁸⁵

constitutional attack”), quoting *Bowers v Hardwick*, 478 US 186, 216 (1986) (Stevens dissenting). The Court has also made clear since *Loving* that the traditional or historical character of discrimination not only does not save the discrimination from challenge, but the history of the discrimination in fact supplies a reason to subject it to strict scrutiny. See note 77.

⁸⁰ *Loving*, 388 US at 12.

⁸¹ Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U Chi L Rev 1161, 1163 (1988). For Sunstein’s fuller discussion, see *id* at 1174–76. See also *Watkins v United States Army*, 875 F2d 699, 718–19 (9th Cir 1989) (Norris concurring) (arguing that tradition is irrelevant to equal protection and indeed equal protection to protect homosexuals has traditionally been denied).

⁸² Sunstein, 55 U Chi L Rev at 1163 (cited in note 81).

⁸³ Brown, 103 Yale L J at 205 (cited in note 49) (discussing the majoritarian nature of traditions).

⁸⁴ See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 180 (Free Press 1990).

⁸⁵ See Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 Loyola LA L Rev 1159, 1174 (1992) (concluding that “the Thirteenth and Fourteenth Amendments were important, but not because they brought us radical change: they were important as fulfillments of the original promise”); *id* at 1176 (arguing against the view that the Fourteenth Amendment represented a “radical break from the tradition”).

Supreme Court justices are also divided over the relationship between tradition and equal protection. *United States v Virginia*⁸⁶ (the VMI case) reveals a particularly sharp contrast between the majority opinion, by Justice Ruth Bader Ginsburg, and the dissent, by Justice Antonin Scalia, over the relevance of tradition for equal protection analysis.⁸⁷ In striking down the all-male admissions policy of the Virginia Military Institute (VMI), the Court not only gave no weight to VMI's longstanding tradition of training male "citizen soldiers" for honorable leadership in the state and nation, but it also viewed the tradition negatively, as reflecting outmoded stereotypes about the roles of men and women.⁸⁸ In the majority's view, the function of the Equal Protection Clause is to extend protection to people traditionally excluded from full citizenship:

Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history. As a plurality of this Court acknowledged a generation ago, "our Nation has had a long and unfortunate history of sex discrimination." Through a century plus three decades and more of that history, women did not count among voters composing "We the People." . . .

. . .

A prime part of the history of our Constitution . . . is the story of the extension of constitutional rights and protections to people once ignored or excluded. VMI's story continued as our comprehension of "We the People" expanded. There is no reason to believe that the admission of women capable of all the activities required of VMI cadets would destroy the Institute rather than enhance its capacity to serve the "more perfect Union."⁸⁹

Dissenting, Justice Scalia criticized the majority's treatment of tradition as exactly backward:

[T]he function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them; to prevent backsliding from the degree of restriction the Constitution imposed upon democratic government, not to prescribe, on our own authority, progressively higher degrees. For that reason it is my view that, whatever abstract tests we may

⁸⁶ 518 US 515 (1996).

⁸⁷ Compare *id.* at 541–42 (majority) with *id.* at 569 (Scalia dissenting) (denying that it is the Court's role to challenge traditional practices that are not explicitly addressed by the Bill of Rights).

⁸⁸ *Id.* at 542–43 (majority).

⁸⁹ *Id.* at 531, 557–58 (citations omitted).

choose to devise, they cannot supersede—and indeed ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people’s understanding of ambiguous constitutional texts. More specifically, it is my view that “when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down.” The same applies, *mutatis mutandis*, to a practice asserted to be in violation of the post–Civil War Fourteenth Amendment.⁹⁰

Despite the tension between tradition and modern claims to equal rights, liberal justices have not consistently eschewed tradition.⁹¹ To the contrary, both liberal and conservative justices have often enlisted tradition in support of their interpretations of equal protection doctrine. In *Romer v Evans*,⁹² for example, the Court invalidated a state constitutional amendment prohibiting antidiscrimination protection for gay and lesbian people in part on the ground that the law was “unprecedented” and inconsistent with “our constitutional tradition.”⁹³ Dissenting, Justice Scalia defended the right of Colorado citizens to protect “traditional sexual mores” and criticized the Court for its own unprecedented interpretation.⁹⁴ In *Grutter v Bollinger*,⁹⁵ the Court upheld an affirmative action program in part based on the traditional deference accorded to schools of higher education to structure their admissions policies.⁹⁶ Justice William Rehnquist’s dissent, in contrast, faulted the majority for failing to apply the rigorous scrutiny traditionally accorded a state institution’s use of race.⁹⁷ In the same term, the *Lawrence v Texas*⁹⁸ majority, in striking down a ban on same-sex sodomy, found an “emerging” tradition respecting privacy

⁹⁰ *Virginia*, 518 US at 568–69 (Scalia dissenting) (citations omitted).

⁹¹ Although this Article is principally concerned with equal protection analysis, it is worth noting a similar ambivalence toward tradition by liberal justices in substantive due process cases. Justices Thurgood Marshall and William Brennan, for example, two of the most liberal justices in modern times, were highly critical of tradition-based limitations on the scope of fundamental rights under the Due Process Clause, but they were willing to employ tradition when it served to recognize rights. See Wolf, 57 U Miami L Rev at 148 (cited in note 18) (noting Marshall’s dissent in *San Antonio Independent School District v Rodriguez*, 411 US 1 (1973)); Wolf, 57 U Miami L Rev at 150–51 (cited in note 18) (discussing Brennan’s concurrence in *Moore*, 431 US 494, and his dissent in *Cruzan v Missouri Department of Health*, 497 US 261 (1990)).

⁹² 517 US 620 (1996).

⁹³ Id at 621, 633.

⁹⁴ Id at 636 (Scalia dissenting).

⁹⁵ 539 US 306 (2003).

⁹⁶ Id at 328–29.

⁹⁷ Id at 380 (Rehnquist dissenting).

⁹⁸ 539 US 558 (2003).

surrounding sex between consenting adults, a characterization that Justice Scalia considered an oxymoron.⁹⁹ To be precise, the majority in *Lawrence* relied on substantive due process grounds, invalidating all antisodomy laws, rather than the equal protection basis of Justice Sandra Day O'Connor's concurrence, which would have invalidated only antisodomy laws limited to same-sex participants.¹⁰⁰ The majority's expressed reason for doing so, however, was an equality-based concern over discrimination against gay and lesbian people if gender-neutral anti-sodomy laws were permitted.¹⁰¹ Furthermore, the Court in *Lawrence* expressly repudiated the tradition-based reasoning of *Bowers v Hardwick*:¹⁰² "[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; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack."¹⁰³

And in the recent school integration cases,¹⁰⁴ tradition was invoked several times across majority and dissenting opinions. A plurality of the Court invalidated the race-conscious assignment plans based on the skepticism traditionally accorded racial classifications,¹⁰⁵ while the dissenters complained that the Court was ignoring a tradition of deference to local school boards,¹⁰⁶ a claim Justice Clarence Thomas criticized as akin to the segregationists' tradition-based defense of separate schools for colored children.¹⁰⁷

This Article's introduction described the reliance by opponents of same-sex marriage on tradition as reason to reject equal protection challenges.¹⁰⁸ Lower courts, and judges within those courts, have

⁹⁹ Id at 590 (Scalia dissenting).

¹⁰⁰ Compare id at 578 (majority) (ruling in favor of the petitioners on the basis of the Due Process Clause) with id at 579 (O'Connor concurring) (basing her decision on the Equal Protection Clause).

¹⁰¹ Id at 575.

¹⁰² 478 US 186 (1986).

¹⁰³ *Lawrence*, 539 US at 577, quoting *Bowers*, 478 US at 216 (Stevens dissenting). See also *Bowers*, 478 US at 210 (Blackmun dissenting) ("I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's scrutiny."); *Planned Parenthood v Casey*, 505 US 833, 847-48 (1992) (plurality) ("Marriage is mentioned nowhere in the Bill of Rights and interracial marriage was illegal in most States in the 19th century, but the Court was no doubt correct in finding it to be an aspect of liberty protected against state interference by the substantive component of the Due Process Clause.").

¹⁰⁴ See *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 730 (2007).

¹⁰⁵ Id at 747-48 (plurality).

¹⁰⁶ Id at 804 (Breyer dissenting).

¹⁰⁷ Id at 773-79 (Thomas concurring).

¹⁰⁸ See notes 1-4 and accompanying text.

disagreed on the significance of tradition in analyzing such challenges. Some courts, such as the District of Columbia Court of Appeals, have accepted tradition as a basis for total rejection of challenges to opposite-sex marriage laws.¹⁰⁹ Other courts, such as the Supreme Court of New Jersey, have accepted tradition as a basis for reserving “marriage” to opposite-sex couples while requiring an alternative for same-sex couples with the same tangible rights and responsibilities.¹¹⁰ And still others, such as the supreme courts of California and Iowa, have rejected tradition completely as an irrelevant or insufficient justification for denying same-sex couples full access to marriage.¹¹¹

Tradition thus continues to feature in cases challenging laws on equal protection grounds, including on the basis of race, sex, and sexual orientation, but no consensus has been reached on the Supreme Court regarding tradition’s proper role. The litigation over same-sex marriage in the lower courts, moreover, reveals a similar divergence of views. That litigation will likely provide an opportunity for the Court to clarify whether tradition is relevant to a law’s constitutionality and, if so, how.

II. TRADITION AS LEGITIMATE JUSTIFICATION

This Part considers whether preserving opposite-sex marriage laws because they are traditional could constitute a legally sufficient justification for equal protection purposes. Doctrinally, the question is whether preserving traditional marriage because of its traditional status could satisfy rational basis review. The question of tradition’s legal sufficiency is raised by some reformists’ claims that tradition is an illegitimate or irrelevant basis for preserving a law.¹¹² If the reformists are

¹⁰⁹ See, for example, *Dean v District of Columbia*, 653 A2d 307, 315 (DC 1995) (upholding the traditional understanding of the definition of marriage), partially abrogated by Domestic Partnership Judicial Determination of Parentage Act 2009, DC Code § 7-201(4A)–(4B) (West) (amending the marriage statute at issue in *Dean* and granting domestic partners the same rights and benefits as married couples).

¹¹⁰ See *Lewis v Harris*, 908 A2d 196, 211, 224 (NJ 2006). See also *Baker v State*, 744 A2d 864, 885 (Vt 1999) (granting state benefits to same-sex couples and asserting that, “to the extent that state action historically has been motivated by an animus against a class, that history cannot provide a legitimate basis for continued unequal application of the law”).

¹¹¹ See *In re Marriage Cases*, 183 P3d 384, 401 (Cal 2008) (holding that the state’s “interest in retaining the traditional and well-established definition of marriage” is insufficient to withstand heightened scrutiny under the state’s equal protection clause); *Varnum v Brien*, 763 NW2d 862, 873, 875 (Iowa 2009) (rejecting the government’s argument that promoting the traditional concept of marriage is sufficiently important to uphold a law denying same-sex marriage).

¹¹² See notes 17–22 and accompanying text. See also *Watkins v United States Army*, 875 F2d 699, 718 (9th Cir 1989) (Norris concurring) (stating that the Equal Protection Clause calls into question traditional practices when they burden minorities).

right, then a state's asserted reliance on tradition would entitle a challenger to prevail on the pleadings as a matter of law.

In contrast, if deference to tradition could plausibly serve legitimate interests, then a state could rely on tradition to defeat a motion for judgment as a matter of law. Whether the state would need to offer more than a bare assertion of tradition would depend on the kind of rational basis review applied by the court. Under the most deferential standard, any legitimate justification offered by a state in litigation warrants dismissing a complaint whether or not the state was in fact motivated by that justification in enacting the challenged law.¹¹³ Under a more searching rational basis review "with teeth," a court might inquire whether the state actually relied on tradition in enacting the law and whether the law adequately served that interest.

Part II.A explicates the meaning of legitimate interest for equal protection purposes. Part II.B considers whether tradition could plausibly constitute a legitimate interest that, if rationally served by bans on same-sex marriage, could justify such laws against equal protection challenge.

A. Legitimate and Illegitimate Interests

Modern equal protection doctrine is premised on the distinction between legitimate and illegitimate governmental purposes.¹¹⁴ Legitimate purposes are within the authority of government to pursue; illegitimate purposes are not.¹¹⁵ For clarity's sake, the terms "purpose," "justification," and "interest" are essentially interchangeable. Moreover, they are broader than simply the intended goal or end of

¹¹³ See *FCC v Beach Communications, Inc.*, 508 US 307, 323 n 3 (1993) (Stevens concurring) (explaining that, under rational basis review, classifications will be upheld unless every conceivable basis that could support them is negated).

¹¹⁴ Although earlier case law applied a cost-benefit analysis to laws challenged on equal protection grounds, since the 1970s, the Court has looked to the purpose behind the law. See Caleb Nelson, *Judicial Review of Legislative Purpose*, 83 NYU L Rev 1784, 1850 (2008) (stating that in the 1970s the Court began to allow investigations of the legislative process in equal protection cases to determine governmental purpose); Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 Georgetown L J 2331, 2354–59 (2000) (explaining how the court determines if there is an illegitimate governmental purpose for equal protection analysis, particularly for racial classifications); *id.* at 2360 (distinguishing the case of suspect classifications, in which the Court requires proof of the actual purpose, from the case of classifications subject to only rational basis review, in which the Court is usually content to consider hypothesized purposes).

¹¹⁵ See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 Colum L Rev 1689, 1694–98 (1984) (highlighting the judicial understanding that government actions must be in pursuit of some public value and not merely in pursuit of raw preference); Forde-Mazrui, 88 Georgetown L J at 2354 (cited in note 114) (distinguishing between legitimate and illegitimate purpose, the latter including prejudice and certain stereotypes).

legislation, comprising any legislative motivations, including reasons, beliefs, and assumptions.

The Supreme Court has not clearly explained what constitutes a legitimate versus an illegitimate purpose. The guidance the Court has provided has more often focused on what is illegitimate. This may be explained by two reasons. First, the deferential posture of rational basis review presumes that the great majority of legislative objectives are legitimate, with illegitimate interests constituting the exceptional cases warranting identification. Second, states typically allege interests that are plainly legitimate, making the dispute in the few cases invalidating laws under rationality review turn on whether the state's asserted interests are sincere, not whether they are legitimate.

At a high level of generality, the Court has identified illegitimate purposes as including state action that is either arbitrary or irrational, or that is motivated by animosity or a "bare . . . desire to harm a politically unpopular group."¹¹⁶ The Court has also provided more specific guidance by example regarding what ends are impermissible. The Court's development of a purpose-based equal protection doctrine initially focused on race and other suspect classifications.¹¹⁷ The Court identified as illegitimate racially discriminatory laws based on a belief in the inferiority of racial minorities or motivated by "invidious," "odious," or "evil" antagonism toward them.¹¹⁸ The Court found similarly illegitimate attitudes reflected in laws that discriminate on the basis of national origin,¹¹⁹ ethnicity,¹²⁰ alienage,¹²¹ and religion.¹²² With sex classifications, the Court has identified distinctions between men

¹¹⁶ *United States Department of Agriculture v Moreno*, 413 US 528, 534 (1973). As the Court explained in *Romer*, it is illegitimate to disadvantage a group out of "animosity toward the class of persons affected," and "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." 517 US at 634, quoting *Moreno*, 413 US at 534.

¹¹⁷ See Nelson, 83 NYU L Rev at 1852 (cited in note 114) (stating that the Court began to expand the search for illegitimate governmental purposes in cases related to race and sex discrimination).

¹¹⁸ See, for example, *Loving*, 388 US at 11 (holding that the governmental purpose in banning interracial marriage was illegitimate because justifications could not stand independent of "invidious racial discrimination"); *Hirabayashi v United States*, 320 US 81, 100 (1943) (stating that classifications based on race alone are "odious to a free people" and "a denial of equal protection"); *Yick Wo v Hopkins*, 118 US 356, 373–74 (1886) (explaining that a facially neutral statute violates equal protection if applied "with an evil eye and an unequal hand").

¹¹⁹ *Yick Wo*, 118 US at 374.

¹²⁰ See *Hernandez v Texas*, 347 US 475, 479 (1954).

¹²¹ *Yick Wo*, 118 US at 368–69.

¹²² Doctrinally, discrimination on the basis of religion comes under the First Amendment rather than the Equal Protection Clause, but the analysis is similar. See, for example, *Church of the Lukumi Babalu Aye v City of Hialeah*, 508 US 520, 531–40 (1993) (invalidating under the First Amendment an ordinance targeting the practice of Santeria).

and women as illegitimate when they are based on hostility, outmoded stereotypes about the proper roles of men and women, or exaggerated and false assumptions about purported natural differences between the sexes.¹²³ A disdain for “stereotypes” has also been applied to race in the context of affirmative action,¹²⁴ electoral districting,¹²⁵ and jury selection.¹²⁶

The Court’s willingness to declare a legislative purpose illegitimate has been extended beyond race, sex, and other suspect classifications to traits receiving only rational basis scrutiny. Thus, the Court has identified as illegitimate antagonism toward “hippies,”¹²⁷ an irrational fear of people with mental disabilities,¹²⁸ and anti-gay animus.¹²⁹ In sum, laws motivated by race or gender prejudice or stereotypes are illegitimate. Moreover, regardless of the trait on which a classification is based, a state may not discriminate arbitrarily or out of irrational fear of or animosity toward the group disadvantaged by the classification.

The Court has not defined what constitutes a legitimate interest other than to acknowledge that it encompasses a very broad range of interests within the state’s power to regulate for the public interest or general welfare. Scholars have offered modestly more substantive accounts of equality, although the concept is necessarily abstract. According to Ronald Dworkin, the right to equal protection means that one is entitled to be treated by government with the same concern

¹²³ See *Frontiero v Richardson*, 411 US 677, 684 (1973) (plurality) (disapproving of the nation’s long history of paternalism toward women that resulted in stereotyped statutory distinctions between the sexes); *Virginia*, 518 US at 542 (holding that state actors cannot exclude individuals based on overbroad generalizations and fixed notions of the sexes).

¹²⁴ See, for example, *City of Richmond v J.A. Croson Co.*, 488 US 469, 493 (1989) (explaining the use of strict scrutiny to “smoke out” illegitimate classifications such as those based on racial stereotypes); *Adarand Constructors, Inc v Pena*, 515 US 200, 228 (1995) (stating that strict scrutiny is utilized to distinguish legitimate classifications based on relevant differences from illegitimate classifications).

¹²⁵ See *Shaw v Reno*, 509 US 630, 650 (1993) (explaining that race-based districting injures voters by reinforcing stereotypes); *Miller v Johnson*, 515 US 900, 914 (1995) (rejecting arguments in favor of race-based districting because racial stereotypes underlie the arguments).

¹²⁶ See *Powers v Ohio*, 499 US 400, 410 (1991) (refusing to accept as a “defense to racial discrimination [in jury selection] the very stereotype that the law condemns”).

¹²⁷ See *Moreno*, 413 US at 534 (holding that the challenged classification could not stand because the legislative history showed an intent to exclude hippies from the food stamp program out of a bare desire to harm an unpopular group).

¹²⁸ See *City of Cleburne v Cleburne Living Center*, 473 US 432, 450 (1985) (invalidating a zoning ordinance that discriminated against people with mental disabilities because such discrimination rests on irrational prejudice).

¹²⁹ See *Romer*, 517 US at 632 (dismissing a statutory amendment because it could be explained only by anti-gay animus).

and respect as other members of the political community.¹³⁰ Similarly, Paul Brest suggests that equality requires extending to a minority the same sympathy and care given to one's own group.¹³¹ By these accounts, a legitimate interest must be a purpose or reason consistent with treating the interests of those burdened by a law with the same consideration as those benefited by it.

As with illegitimate interests, the best doctrinal guidance of what purposes are legitimate is provided by illustration. Cases upholding social and economic laws that, for instance, favor optometrists over opticians,¹³² businesses that advertise on their own trucks,¹³³ and regulatory exemptions for cable companies servicing multiple-dwelling units¹³⁴ suggest the broad latitude accorded economic purposes. Cases involving suspect classifications also provide some data points. Any governmental interest is necessarily legitimate if it is sufficiently important or compelling to justify the use of a suspect classification. Remedying identified discrimination,¹³⁵ achieving the educational benefits of a diverse student body,¹³⁶ and protecting national security¹³⁷ are compelling and therefore legitimate. Remedying societal discrimination is important, at least as a justification for sex-based classifications,¹³⁸

¹³⁰ See Ronald Dworkin, *Unenumerated Rights: Whether and How Roe Should Be Overruled*, 59 U Chi L Rev 381, 387–88 (1992) (stating that an abstract principle of constitutional jurisprudence “argues that the Equal Protection Clause creates a right of equal concern and respect”).

¹³¹ See Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 Harv L Rev 1, 7–8 (1976) (describing “racially selective sympathy and indifference . . . [as] the unconscious failure to extend to a minority the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one's own group”).

¹³² See *Williamson v Lee Optical of Oklahoma, Inc.*, 348 US 483, 487–88 (1955).

¹³³ See *Railway Express Agency v New York*, 336 US 106, 109–10 (1949).

¹³⁴ See *Beach Communications*, 508 US at 318.

¹³⁵ See *J.A. Croson*, 488 US at 505 (acknowledging that remedying identified discrimination is a compelling interest).

¹³⁶ See *Grutter*, 539 US at 324, citing with approval *Regents of the University of California v Bakke*, 438 US 265, 312 (1978) (Powell) (“The atmosphere of ‘speculation, experiment and creation’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.”).

¹³⁷ See *Korematsu v United States*, 323 US 214, 220 (1944) (stating that public necessity can justify racial discrimination and holding that the compulsory relocation of Japanese Americans was justified during wartime). *Korematsu* has, of course, been roundly criticized, including by the Court itself. See, for example, *Stenberg v Carhart*, 530 US 914, 953 (2000) (Scalia dissenting). The disapproval has not, however, been to the compellingness of national security in a time of war but rather to the unfounded assumption that the Japanese Americans who were interned posed a security threat. See, for example, *Grutter*, 539 US at 351.

¹³⁸ See *Kahn v Shevin*, 416 US 351, 353 (1974) (upholding a state law allowing widows, but not widowers, a property tax exemption because “whether from overt discrimination or from the socialization process,” such women faced more difficult barriers in the job market than widowers); *Califano v Webster*, 430 US 313, 317 (1977) (upholding a law allowing women to exclude more low-earning years from social security retirement benefits calculations on the ground that “[r]eduction of the disparity in economic condition between men and women caused by the long history of discrimination against women [is] an important governmental objective”).

although not sufficiently compelling to justify racial preferences.¹³⁹ Traffic safety,¹⁴⁰ a choice between single-sex and coeducational higher education,¹⁴¹ and the adversative method of military school instruction¹⁴² all seem to be important, although states face great difficulty pursuing such objectives through sex-based classifications. Likewise, although administrative convenience, the best interests of children, and social order have failed to justify suspect classifications, the Court seems to view these interests as legitimate.¹⁴³ In still other cases, the Court has described with approval the government's interest in preserving distinct cultures¹⁴⁴ as well as promoting the common cultural values necessary for good citizenship in a democratic society.¹⁴⁵

It is worth observing that, in determining which interests are legitimate for equal protection purposes, the Court appears to rely on moral theories of both a consequential and deontological nature. Consequentialist values are evident in many cases, especially those involving social and economic regulation subject to rational basis review.¹⁴⁶ Laws that address, for example, professional licenses,¹⁴⁷ commercial businesses,¹⁴⁸ public utilities,¹⁴⁹ driving and vehicle regulations,¹⁵⁰

¹³⁹ See *J.A. Croson*, 488 US at 505–06 (denying that remedying societal discrimination is a compelling governmental interest); *Wygant v Jackson Board of Education*, 476 US 267, 274 (1986).

¹⁴⁰ See *Craig v Boren*, 429 US 190, 199–200 (1976) (accepting that traffic safety is an important government interest but holding that the law in question did not substantially serve it).

¹⁴¹ See *Virginia*, 518 US at 539–40 (accepting that diversity of educational opportunities—including single-sex education—was important, but finding that it was not the actual objective of VMI's single-sex policy).

¹⁴² *Id.* at 540–46 (accepting that the adversative method at VMI was important but holding that VMI failed to prove that excluding women would jeopardize it).

¹⁴³ See *Frontiero*, 411 US at 690–91 (plurality) (holding that sex-based discrimination cannot be “for the sole purpose of achieving administrative convenience” without violating the Due Process Clause); *Palmore v Sidoti*, 466 US 429, 433 (1984) (holding that the best interests of children is of the highest importance but cannot justify removing a child from its mother based on the race of her spouse); *Buchanan v Warley*, 245 US 60, 80 (1917) (denying that preserving social order can justify a racial zoning law).

¹⁴⁴ See *Mississippi Band of Choctaw Indians v Holyfield*, 490 US 30, 49–50 (1989) (upholding the Indian Child Welfare Act as a valid measure by Congress to protect Indian cultural survival); *Wisconsin v Yoder*, 406 US 205, 234–36 (1972) (invalidating a mandatory school attendance law as applied to the Amish, as attending public school would undermine the Amish people's ability to acculturate their children).

¹⁴⁵ See *Brown v Board of Education*, 347 US 483, 493 (1954) (describing the importance of public education in awakening cultural values and preparing children for good citizenship in a democratic society).

¹⁴⁶ See John E. Nowak and Ronald D. Rotunda, *Principles of Constitutional Law* § 14.3 at 376 (West 3d ed 2007).

¹⁴⁷ See *Lee Optical*, 348 US at 487–88.

¹⁴⁸ *Beach Communications*, 508 US at 318.

¹⁴⁹ See *Nashville, Chattanooga & St. Louis Railway v Browning*, 310 US 362, 370 (1940).

¹⁵⁰ See *Railway Express*, 336 US at 109.

and distribution of controlled substances¹⁵¹ are typically justified by the useful consequences to society of such laws or the potential harm from their absence.¹⁵² Consequentialist reasoning has also featured in cases involving suspect classifications, serving both to uphold and to invalidate such classifications. Thus, the Court has upheld racial preferences to create a diverse student body because of the benefit to the educational experience,¹⁵³ and the Court has struck down racial preferences on the ground that racial classifications, even for benign purposes, tend to reinforce racial stereotypes and exacerbate racial tensions.¹⁵⁴

Deontological moral principles—that is, principles for determining the moral status of a law that are independent of the law’s instrumental utility¹⁵⁵—have also animated the Court’s equal protection analysis. Deontological values plainly inform those cases that have invalidated laws. Indeed, the Court has characterized the core purpose of the Equal Protection Clause in deontological terms—as imposing a moral imperative to eradicate state-sponsored race distinctions that are unfair,¹⁵⁶ that are “by their very nature odious to a free people,”¹⁵⁷ and, even with respect to affirmative action, that raise “serious problems of justice.”¹⁵⁸ Moreover, the Court has emphasized the normative purpose of the Equal Protection Clause when invalidating

¹⁵¹ See *United States v Lawrence*, 951 F2d 751, 755 (7th Cir 1991) (holding that a disproportionate sentencing scheme was rationally related to the purpose of combating the effects of crack cocaine); *United States v Buckner*, 894 F2d 975, 980 (8th Cir 1990) (finding that the disproportionate sentencing scheme was rationally related to the purpose of protecting the public welfare).

¹⁵² Indeed, the Court has suggested that its deference to the legislature regarding the societal consequences of nonsuspect classifications should be virtually absolute, stating that “[t]he calculus of effects, the manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility.” *Personnel Administrator of Massachusetts v Feeney*, 442 US 256, 272 (1979).

¹⁵³ See *Grutter*, 539 US at 308.

¹⁵⁴ See, for example, *J.A. Croson*, 488 US at 493 (applying strict scrutiny to a minority set-aside program because all racial classifications risk “stigmatic harm” and “racial hostility”).

¹⁵⁵ Ethicists generally contrast deontological accounts of morality with consequentialist theories that measure the moral value of actions by their consequences. Not all deontological theories deem the consequences of actions irrelevant, but consequences are not the primary basis for determining the morality of actions. For an explanation of deontological moral theory, see Robert G. Olson, *Deontological Ethics*, in Paul Edwards, ed, 2 *The Encyclopedia of Philosophy* 343, 343 (Collier-Macmillan 1967).

¹⁵⁶ See *Bolling v Sharpe*, 347 US 497, 499–500 (1954) (describing the “unfairness” of racial segregation in violation of the Due Process Clause of the Fifth Amendment).

¹⁵⁷ *Hirabayashi*, 320 US at 100. See also *Loving*, 388 US at 11.

¹⁵⁸ *Grutter*, 539 US at 341 (“We acknowledge that ‘there are serious problems of justice connected with the idea of preference itself.’”), quoting *Bakke*, 438 US at 298 (Powell).

discriminatory laws even when empirical evidence suggested that the laws had useful consequences.¹⁵⁹

The Court has also upheld discriminatory laws based on deontological principles. Consider, for example, that the Court considers remedying identified past discrimination legitimate and, indeed, compelling.¹⁶⁰ The Court justifies this conclusion on the ground that racial discrimination is immoral and that, implicitly drawing on corrective justice theory, remedying immoral discrimination is morally justified and at times required.¹⁶¹ Or consider that a preference for hiring military veterans discriminates against nonveterans. A justification for such a preference could cite utilitarian interests, such as providing incentives for enlisting in the armed service, or deontological values, such as providing aid to deserving veterans in reward for their service, a rationale that the Court upheld in *Personnel Administrator of Massachusetts v Feeney*.¹⁶²

A final condition for an interest to suffice to justify a discriminatory law is that, even if the interest is ostensibly legitimate, it must not be tainted by illegitimate purposes, beliefs, or assumptions. An interest is tainted when the reasoning or motivation leading a state to pursue an ostensibly legitimate interest includes an illegitimate assumption or belief, such as an irrational fear or impermissible stereotype. Consider, by analogy, that an interest in preserving property values and minimizing violence are legitimate interests on their face, but a law cannot exclude black people or the mentally disabled from residing in a community based on a prejudiced assumption or irrational fear that their presence would degrade or disrupt the neighborhood.¹⁶³

¹⁵⁹ See *Boren*, 429 US at 204 (“[P]roving broad sociological propositions by statistics . . . is in tension with the normative philosophy that underlies the Equal Protection Clause.”); *J.E.B. v Alabama*, 511 US 127, 139 n 11 (1994) (noting that statistical support for gender-based differentiations cannot justify impermissible stereotypes under the Equal Protection Clause).

¹⁶⁰ See *J.A. Croson*, 488 US at 505.

¹⁶¹ *Id.* at 492 (noting that the state has an interest in remedying identified discrimination or discrimination in which the state has been a “passive participant”); *id.* at 518 (Kennedy concurring) (noting that states have a duty to remedy discrimination in some circumstances). See also Kim Forde-Mazrui, *Taking Conservatives Seriously: A Moral Justification for Affirmative Action and Reparations*, 92 Cal L Rev 683, 692 (2004).

¹⁶² 442 US 256, 277 (1979) (upholding a hiring preference in favor of veterans on the grounds that it was not intended to discriminate in favor of men but rather in favor of veterans, a group “perceived to be particularly deserving”).

¹⁶³ See *Buchanan*, 245 US at 80–81 (invalidating a racially restrictive zoning law despite the state’s concern about social disruption from integration); *Cleburne*, 473 US at 448 (invalidating the denial of a permit for a home for the mentally disabled despite asserted fears of crime). As *Palmore v Sidoti*, 466 US 429 (1984), makes clear, a state actor’s pursuit of an otherwise legitimate interest can be tainted by giving effect to illegitimate beliefs even if the state actor does not itself hold those beliefs. In *Palmore*, the state actor was a Florida trial court that removed a child from her mother’s custody because the mother’s second marriage was to a black man. *Id.* at 431.

B. Is Opposite-Sex Marriage Justifiable by Tradition?

Evaluating tradition-based justifications for bans on same-sex marriage raises three questions. The first is whether preserving tradition in general qualifies as a legitimate justification. The second is whether the purpose of preserving opposite-sex marriage *in particular because it is traditional* is legitimate. The third question is whether the classification that excludes same-sex couples from marriage constitutes a rational means for preserving traditional, opposite-sex marriage. Only if affirmative answers to all three questions are plausible can tradition be considered minimally sufficient as a justification for bans on same-sex marriage. The following discussion concludes that affirmative answers are indeed sufficiently plausible to satisfy at least the most deferential standard of rational basis review.

1. Preserving tradition generally.

Is the purpose of preserving tradition a legitimate justification under the Equal Protection Clause? The question is whether it is legitimate for a state to assume that a law's status as a tradition warrants the conclusion that the law ought to be continued. As the debate described in the previous Part reveals,¹⁶⁴ several benefits may follow from preserving tradition. These include consequential benefits, such as maintaining predictability and settled expectations, reinforcing the community identity of those who define themselves based in part on the tradition, and avoiding unintended consequences of change.¹⁶⁵ Preserving tradition may also have deontological benefits, such as intergenerational fairness.¹⁶⁶ And the benefits of preserving tradition may include the intergenerational, cultural collaboration identified by Kronman,¹⁶⁷ although the extent to which this interest is distinct from consequential utility is disputed.¹⁶⁸ Viewed in the abstract, the legitimacy of these interests seems evident. Surely a state can, and arguably

The Supreme Court accepted that the trial court was concerned for the welfare of the child, who might experience social prejudice toward her mother's interracial marriage, and the Court made no suggestion that the trial judge himself harbored such prejudice. *Id.* at 432. The Court nonetheless held the trial court's action unconstitutional. *Id.* at 433. Although "the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause," the Court explained, that interest could not be achieved by giving effect to private prejudice. *Id.* "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Id.*

¹⁶⁴ See text accompanying notes 50–61.

¹⁶⁵ See notes 50–53 and accompanying text.

¹⁶⁶ See note 55 and accompanying text.

¹⁶⁷ See Kronman, 99 *Yale L J* at 1065 (cited in note 49). See also notes 56–59 and accompanying text.

¹⁶⁸ See, for example, Luban, 43 *Stan L Rev* at 1056 (cited in note 18).

should, seek to promote a sense of common heritage, shared identity, social stability, and intergenerational fairness for its constituency. Indeed, such interests are akin to the kinds of interests that the Court has approved in prior cases.¹⁶⁹ One may object, however, as the Court did in *Meyer v Nebraska*¹⁷⁰ and *Pierce v Society of Sisters*,¹⁷¹ that the Constitution guards against state-coerced cultural homogeneity or orthodoxy.¹⁷² Critical to the Court's reasoning in those cases, however, seems to be the restrictive nature of the laws rather than the aspiration of promoting a common cultural identity.¹⁷³

A more difficult question is whether it is plausible to assume that the foregoing legitimate benefits do in fact follow from preserving tradition and that those benefits are likely to outweigh the benefits of reform. Traditionalists assume that, on balance, continuing traditions is more likely to have good consequences than changing them. In the abstract, this assumption is questionable. That a social practice has been in existence for considerable time does not reveal whether circumstances have reached a point at which retaining the tradition is doing more harm than good. Nor does a law's status as a tradition indicate the attitudes animating the tradition's adherents toward those burdened by it, or whether that burden is consistent with equal consideration of their interests. Many traditions have reflected prejudicial attitudes inconsistent with contemporary notions of equality.

Nonetheless, the traditionalist assumption is not without plausibility. The most plausible traditionalist position is not that traditions should never be altered but rather that traditions deserve some deference, a deference that could be overcome in particular circumstances.¹⁷⁴ If American society is a functioning democracy that values majoritarian preferences, it is plausible to assume that a law that has been retained for many generations has served the interests of a majority of the polity, and that altering it may well have negative consequences. It is at least within reason to put the burden on reformists to point to particular circumstances that make the tradition outmoded.¹⁷⁵

¹⁶⁹ See notes 132–45 and accompanying text.

¹⁷⁰ 262 US 390, 403 (1923) (invalidating a law mandating English-only instruction of young children).

¹⁷¹ 268 US 510, 534–35 (1925) (invalidating compulsory public education).

¹⁷² See *West Virginia State Board of Education v Barnette*, 319 US 624, 642 (1943).

¹⁷³ See, for example, *Meyer*, 262 US at 403 (noting the law's "infringement of rights long freely enjoyed"); *Pierce*, 268 US at 534–35 (holding that a compulsory public education law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

¹⁷⁴ See Cass R. Sunstein, *Burkean Minimalism*, 105 Mich L Rev 353, 366–69 (2006).

¹⁷⁵ See Maimon Schwarzschild, *Marriage, Pluralism, and Change: A Response to Professor Wax*, 42 San Diego L Rev 1115, 1116 (2005).

A more difficult question than whether preserving tradition has plausible benefits is whether preserving tradition “for its own sake” is legitimate—that is, when no further interest is expected to be served by preserving a tradition other than its preservation. Political arguments defending tradition, including that of opposite-sex marriage, often seem premised on the assertion that preserving tradition is important for no other reason than that the tradition is a tradition.¹⁷⁶ It is difficult to see how preserving tradition for its own sake could be a legitimate interest.¹⁷⁷ When the Court defers to the legislature, absent use of a suspect classification, the Court presumes that the political process is expected to change laws that prove to be undesirable. As the Court has observed, “the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.”¹⁷⁸ Indeed, one of the principal rationales for subjecting certain legislation to heightened judicial scrutiny is that it “restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation.”¹⁷⁹ It conflicts with this view of the political process to posit that legislation that may have become undesirable should endure simply because it has not been changed for a period of time sufficient to qualify as a tradition. At the least, it undermines the assumption that a law of long standing reflects time-tested utility, as it may just reflect legislative adherence to a tradition regardless of the tradition’s value.

In fairness to traditionalists, many go beyond reliance on tradition alone to positing the time-tested wisdom that traditions might reflect. Indeed, some expressly disclaim reliance on tradition for its own sake just as some criticize those reformists who, traditionalists claim, desire change for its own sake.¹⁸⁰ And those traditionalists who do expressly cite tradition alone may implicitly rely on assumptions about the time-tested experience that may underlie the tradition or some other legitimate benefit that preserving tradition may produce.¹⁸¹

¹⁷⁶ See, for example, George W. Dent, Jr, *The Defense of Traditional Marriage*, 15 J L & Polit 581, 616–27 (1999).

¹⁷⁷ Consider Oliver Wendell Holmes, Jr, *The Path of the Law*, 10 Harv L Rev 457, 469 (1897) (“It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”).

¹⁷⁸ *Cleburne*, 473 US at 440. See also *Feeney*, 442 US at 272 (“[W]hen there is no ‘reason to infer antipathy,’ it is presumed that ‘even improvident decisions will eventually be rectified by the democratic process.’”), quoting *Vance v Bradley*, 440 US 93, 97 (1979).

¹⁷⁹ *United States v Carolene Products Co*, 304 US 144, 152 n 4 (1938).

¹⁸⁰ See Wardle, 22 BYU J Pub L at 449 (cited in note 10).

¹⁸¹ See, for example, Dent, 15 J L & Polit at 589 (cited in note 176); Milton C. Regan, Jr, *Reason, Tradition, and Family Law: A Comment on Social Constructionism*, 79 Va L Rev 1515, 1529–30 (1993) (arguing that one account of the social constructionist approach to marriage

2. Preserving the tradition of opposite-sex marriage.

The next question is whether the goal of preserving opposite-sex marriage because of its traditional status is legitimate. It is not this Article's purpose to engage in detail with the debate over the value of opposite-sex marriage compared to other forms of relationships.¹⁸² The Article's interest is whether the traditional status of opposite-sex marriage supplies a basis for preserving it in addition to reasons unrelated to tradition. As with tradition in general, preserving the specific tradition of opposite-sex marriage for its own sake—that is, just because it is a tradition—is not a legitimate basis for preserving it.¹⁸³ A more plausible claim, however, is that the traditional nature of opposite-sex marriage is evidence of time-tested utility that warrants caution against change. The plausibility of the claim depends on what is meant by opposite-sex marriage. If the goal is merely that heterosexual couples continue to marry at high rates, then the goal is plainly within the broad range of legitimate policy goals entrusted to the political process. Experience reveals countless opposite-sex marriages in which partners exhibit mutual care for each other and for their children. It is true that many such relationships have been dysfunctional, but the state's objective is to promote well-functioning opposite-sex marriages. Moreover, the longevity of opposite-sex marriage as an institution is likely probative of its virtues. The extent to which the majority of adults have chosen to enter opposite-sex marriages throughout history suggests that it offers benefits that on balance have proven useful.¹⁸⁴ It is at least sufficiently plausible to count as legitimate under rational basis review.

It is also worth noting that the desirability of opposite-sex marriage is not seriously disputed in litigation over same-sex marriage. Indeed, reformists typically endorse opposite-sex marriage, at least implicitly, in denying that same-sex marriage would undermine opposite-sex marriage.¹⁸⁵ It is also implausible to believe that any court in the United States would consider it illegitimate or irrational for a state

accepts tradition as “a legitimate point of departure in evaluating state regulation” because “tradition represents a form of practical reasoning”).

¹⁸² For examples of the debate over the value of opposite-sex marriage, see notes 8–9.

¹⁸³ See Part II.B.1.

¹⁸⁴ See Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 *J L & Fam Stud* 279, 284–85, 298–304 (2008) (describing a number of benefits of marriage not related to the law and how the vast majority of Americans still get married at some point in their lives).

¹⁸⁵ See, for example, Erwin Chemerinsky, *Same Sex Marriage: An Essential Step towards Equality*, 34 *Sw U L Rev* 579, 592–93 (2005) (rejecting categorically the notion that marriage will be harmed if same-sex partners can marry and noting that no harm resulted from overturning bans on interracial marriage).

to believe that opposite-sex marriage offers a useful form of relationship worth supporting.

A more problematic legislative purpose would be to have opposite-sex marriage be the exclusive or more privileged form of family structure over alternative arrangements, including same-sex and nonmarital, opposite-sex relationships. Relevant questions for evaluating this purpose include whether it is empirically justified and whether it involves illegitimate beliefs or assumptions about alternative relationships. Regarding the empirical question, the assumption that opposite-sex marriage is preferable to other relationships because it is traditional must take account of the existence of alternative relationships throughout history. Even if opposite-sex marriage has been dominant in our society, it has existed alongside a variety of alternative family structures. Any time-tested experience would therefore also support these other relationships. Indeed, some question whether marriage is preferable even for raising children. Western European countries experience a decreasing number of marriages but continue to have well-functioning, stable families that raise children.¹⁸⁶ In fact, although Western European children are less likely than American children to be raised by married parents, they are more likely to be raised by two parents who are in a committed relationship with each other.¹⁸⁷ The point is simply that a legislative purpose to privilege opposite-sex marriage over other relationships is less justified by tradition-based reasoning than a purpose to value opposite-sex marriage as equal to other relationships.

The second concern with the objective that opposite-sex marriage should prevail over other relationships is that the purpose may be rooted in animosity or irrational attitudes toward alternative families, including same-sex relationships.¹⁸⁸ If the state's interest in privileging opposite-sex marriage relies on irrational or otherwise illegitimate assumptions about the value or moral character of same-sex or other relationships, then the interest would be tainted and, consequently, constitutionally vulnerable.

3. A word about means.

In addition to requiring a legitimate interest, rational basis review requires that the discriminatory law or classification rationally serve

¹⁸⁶ See Andrew J. Cherlin, *The Marriage-Go-Round: The State of Marriage and the Family in America Today* 15–20 (Knopf 2009).

¹⁸⁷ Id. See also Interview with Andrew J. Cherlin, online at <http://www.randomhouse.com/catalog/display.pperl?isbn=9780307266897&view=auqa> (visited Nov 23, 2010).

¹⁸⁸ Consider Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 Yale J L & Feminism 269, 287 (1996).

that interest.¹⁸⁹ Assuming that preserving tradition generally and opposite-sex marriage in particular are legitimate interests, the question is whether the means of legally reserving marriage exclusively to opposite-sex couples is rationally related to preserving opposite-sex marriage. This Article's principal inquiry concerns the legitimacy of preserving tradition as a governmental interest, not whether bans on same-sex marriage rationally serve that interest. This Part nonetheless offers a few observations regarding this final step of the analysis.

Two conditions must be satisfied in the relationship between the state's interest and the means or classification employed to achieve it. First, the classification must be effective, that is, it must plausibly serve the asserted interest.¹⁹⁰ A classification does not rationally serve an interest with which it has no positive causal relationship. Second, the government's interest must be sufficiently weighty to justify the burden on the group disadvantaged by the classification. Although the weight typically need only be light for rational basis review, the Court has held a governmental justification insufficient when the burden imposed by the classification was grossly unreasonable in view of the government's interest, how well the interest was furthered, and the availability of less burdensome alternatives.¹⁹¹ This sufficiency requirement seems to serve two purposes. First, it ensures that a claimed justification is the actual purpose for the law.¹⁹² This concern is not so much about the legitimacy of the purpose as about the plausibility that it actually motivated the law. A second rationale for considering the overall importance of the governmental purpose in relation to the means used is to ensure that the burden imposed by the law is outweighed by the governmental interest. Despite the deferential nature of rational basis scrutiny, cases such as *Eisenstadt v Baird*,¹⁹³ *Plyler v Doe*,¹⁹⁴ and *Lawrence v Texas*¹⁹⁵ have invalidated classifications on the ground that the governmental interest, although legitimate in general, was insufficient to justify the burden imposed by the particular law in question.

¹⁸⁹ See *New York City Transit Authority v Beazer*, 440 US 568, 591–92 (1979); *Lee Optical*, 348 US at 491.

¹⁹⁰ See *Railway Express*, 336 US at 110.

¹⁹¹ See, for example, *Romer*, 517 US at 626–31; *Plyler v Doe*, 457 US 202, 229 (1982).

¹⁹² See *Romer*, 517 US at 635 (finding it “impossible to credit” Colorado’s rationale for Amendment 2 because “the breadth of the amendment is so far removed from these particular justifications”).

¹⁹³ 405 US 438, 447 (1972) (invalidating a ban on the possession of contraceptives by unmarried persons).

¹⁹⁴ 457 US 202, 230 (1982) (invalidating restrictions on public education for undocumented children).

¹⁹⁵ 539 US at 578 (“The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.”).

A court applying the most deferential rationality review would presume that the conditions of effectiveness and weightiness are met based on speculation or on the state's assertions unless they are utterly implausible.¹⁹⁶ Otherwise, under a more searching form of rational basis review, a court might consider whether admissible evidence proffered by the parties raised a genuine issue of material fact.¹⁹⁷

In the case of opposite-sex-only marriage laws, they must plausibly promote opposite-sex marriage. Under highly deferential rationality review, a court could accept the possibility that reserving marriage to opposite-sex couples might encourage some opposite-sex marriages that otherwise would not take place. Perhaps, for example, opposite-sex couples would decline to marry if same-sex marriage were allowed because marriage would seem less privileged.¹⁹⁸ Or, as some traditionalists have recently argued, excluding same-sex marriage may reinforce a connection between marriage and bearing children that encourages heterosexual males to marry the females they accidentally impregnate.¹⁹⁹ And it is at least conceivable that some people who would marry someone of the same sex would instead choose opposite-sex marriage if that remained the only legally and socially approved union.²⁰⁰ However tenuous and speculative these claims are, they are

¹⁹⁶ See *Beach Communications*, 508 US at 313 (articulating a version of rational basis review under which a classification will be upheld so long as any conceivable, legitimate interest is at all served by it).

¹⁹⁷ See Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv L Rev 1, 20–24 (1972) (suggesting a rational basis scrutiny model with “bite”).

¹⁹⁸ See George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J Pub L 419, 437 (2004) (stating that “recognition of same-sex marriage will make traditional marriage less popular by making it less special, less honored”).

¹⁹⁹ See generally Kerry Abrams and Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 Yale J L & Humanities 1 (2009) (critiquing the accidental procreation argument). See also *Goodridge v Department of Public Health*, 798 NE2d 941, 995 (Mass 2003) (Cordy dissenting) (“The institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other.”).

²⁰⁰ The societal pressure in the United States to marry is substantial. See Edward J. Alessi, *Staying Put in the Closet: Examining Clinical Practice and Countertransference Issues in Work with Gay Men Married to Heterosexual Women*, 36 Clin Soc Work J 195, 196 (2008) (noting that the motivation of gay men to enter into an opposite-sex marriage may include pressures on a gay man to marry from his family as well as the desire to hide or deny the “feared homosexual orientation”); Daryl J. Higgins, *Same-Sex Attraction in Heterosexually Partnered Men: Reasons, Rationales and Reflections*, 21 Sexual & Relationship Therapy 217, 218–19, 221 (2006) (noting that societal homophobia and religious intolerance may cause men with same-sex attractions to enter into an opposite-sex marriage); Marie A. Failing, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 Wm & Mary J Women & L 195, 248 (2004). Whether societal pressure to conform to opposite-sex marriage has led gay people to marry someone of a different sex is difficult to prove, but it seems at least plausible. Certainly, thousands of gay adults have entered opposite-sex marriages that have ultimately failed, and,

not impossible, empirically or logically, and a highly deferential court might err in favor of accepting them.

A more uncertain question is whether a court applying rational basis review with some teeth would find bans on same-sex marriage to be a rational means for promoting opposite-sex marriage. Such an inquiry would consider the effectiveness of the bans to the state's interest, the burden imposed on same-sex couples, and the importance of the state's interest compared to that burden. These are highly contested empirical and normative questions at the center of the same-sex marriage debate. To date, traditionalists have not proven that same-sex marriage would undermine opposite-sex marriage or that recognizing same-sex marriage would harm children, especially given that hundreds of thousands of children are already being raised by same-sex parents.²⁰¹ Whether a court would be convinced of traditionalist concerns would thus depend critically on the degree of deference accorded the state.

Traditionalists could object, however, that requiring them to prove the negative consequences of same-sex marriage misses their point. Their deference to tradition, to the wisdom of the ages, is rooted in a humility about the capacity of one generation of people to assess the risks of changing important institutions. Describing the traditionalist perspective, Professor Amy Wax explains:

Because people have limited powers of understanding and intellect, they cannot be expected to weigh all the costs and benefits that might accrue from discarding accepted forms and striking out in new directions. Indeed, many of the collective and long-term

historically, the largest proportion of children living with gay parents were born to one of their gay parents while that parent was in an opposite-sex marriage. Even today, approximately one-third of children living with gay parents were born to one of their gay parents while that parent was in an opposite-sex marriage. See Suzanne M. Johnson and Elizabeth O'Connor, *Lesbian and Gay Parents: The National Gay and Lesbian Family Study* *5 (unpublished presentation, American Psychological Association Convention, Aug 2001), online at http://www.apgl.fr/documents/APAWkshp2_2001.pdf (visited Nov 23, 2010). See also Charlotte J. Patterson, *Family Relationships of Lesbians and Gay Men*, 62 *J Marriage & Fam* 1052, 1058 (2000) (noting that most gay parents are assumed to have become parents in opposite-sex marriages, although there is an increasing trend in recent years for gay parents to become parents within same-sex relationships); James G. Pawelski, et al, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 *Pediatrics* 349, 359 (2006) (stating that "most children whose parents are gay or lesbian have experienced the divorce of their biological parents").

²⁰¹ See Wax, 42 *San Diego L Rev* at 1083 (cited in note 13) (reflecting that "[t]he data [against same sex marriage] either do not yet exist or are radically inconclusive"). See also *Perry v Schwarzenegger*, 704 F Supp 2d 921, 948-49 (ND Cal 2010).

effects of radical changes are hard to anticipate. And once these effects are felt, they often cannot later be reversed.²⁰²

Consequently, Wax explains, traditionalists believe that “people do better by looking to age-old, well-tested practices to guide their conduct towards socially beneficial goals.”²⁰³ Applied to opposite-sex marriage, the widespread and longstanding tradition of that institution, so defined, is presumed to reflect collective, intergenerational judgments about the family that individuals and even groups alive today are not in a position to second-guess. Their approach is thus one of caution toward precipitous change that may cause unintended and irreversible harm. To the extent that such a philosophy is plausible and occupies a significant place in our nation’s culture, a court applying the open-textured standard of the Equal Protection Clause arguably has no principled basis for rejecting its legitimacy.

* * *

This Part has not purported to resolve whether deference to tradition justifies laws limiting marriage to opposite-sex couples. The point has been to ask whether it is at least plausible that a state could rely in any part on tradition in defending such laws. Although the discussion has noted certain conditions and difficulties that such a justification would face, it seems at least plausible that respect for tradition could serve as a legitimate governmental purpose.

Skeptics may ask, however, what of “the dark side of tradition”?²⁰⁴ As previously noted, American history reveals many repugnant traditions.²⁰⁵ Moreover, many of those traditions were justified by virtue of their status as traditions. These points arguably suggest categorizing tradition as an illegitimate justification for a discriminatory law. This Article’s response to the concern over the dangers of tradition-based justifications is to distinguish between illegitimate and suspicious justifications. Despite the perniciousness of some traditions and the ways in which tradition-based arguments have defended them, respecting tradition can sometimes be useful. Preserving tradition should

²⁰² Amy L. Wax, *Traditionalism, Pluralism, and Same-Sex Marriage*, 59 Rutgers L Rev 377, 384 (2007).

²⁰³ Id at 382 (explaining traditionalists’ view that human beings are limited in virtue, and so “customary institutions such as marriage” are deemed “essential to a workable social and moral order”). See also Duncan, 59 Rutgers L Rev at 275 (cited in note 11), quoting Kirk, *Edmund Burke* at 83 (cited in note 11).

²⁰⁴ See Brown, 103 Yale L J at 181 n 12 (cited in note 49), citing Rebecca L. Brown, *The Dark Side of Tradition* (unpublished manuscript) (on file with author).

²⁰⁵ See text accompanying notes 64–65.

thus not be illegitimate *per se*. To the extent tradition may carry serious risks when offered to justify discriminatory laws, however, it should be viewed skeptically even if not precluded as a matter of law.

III. TRADITION AS SUSPICIOUS JUSTIFICATION

This Part argues that, even if preserving tradition is plausibly a legitimate justification, courts should view tradition-based justifications with skepticism and, at least for certain classifications, invalidate the challenged classification unless, after careful scrutiny, the court is satisfied that legitimate interests motivated the classification. The three sections that follow contend that some justifications should be treated as suspicious for equal protection purposes, that tradition constitutes a suspicious justification, and that tradition is especially suspicious as a justification for classifications that limit marriage to opposite-sex couples.

A. From Suspect Classification to Suspicious Justification

The three-tiered structure of judicial scrutiny applied to legislative classifications under the Equal Protection Clause will be familiar to many readers. An explication of the primary rationales for this structure should, however, aid in assessing whether similar reasons support applying close judicial scrutiny to certain governmental justifications. This section first explains the rationales for treating certain classifications as suspect for equal protection purposes and thus subject to strict scrutiny. It then argues that similar rationales support treating certain justifications as suspicious. This Article uses the term “suspicious” for justifications rather than “suspect,” because while the point is to approach such justifications with skepticism, it is not to import wholesale the mechanistic means–end framework that the Court applies to suspect classifications.

Recall that modern equal protection doctrine is concerned with whether legislative classifications are motivated by legitimate or illegitimate purposes.²⁰⁶ The level of judicial scrutiny applied to a challenged classification reflects the degree of deference that courts accord the legislature regarding whether the legislature acted for constitutionally permissible reasons.²⁰⁷ Respecting separation of powers principles, courts generally presume that legislatures classify groups for legitimate purposes.²⁰⁸ Applying “rational basis review,” the Court presumes that the great majority of classifications are valid unless no

²⁰⁶ See Part II.A.

²⁰⁷ See Forde-Mazrui, 88 *Georgetown L J* at 2360 (cited in note 114).

²⁰⁸ *Id.*

legitimate purpose is served by a classification, raising an inescapable inference of illegitimate motives.²⁰⁹ In a few cases, the Court has invalidated legislative classifications even though they conceivably served legitimate purposes, because the totality of the circumstances strongly suggested that illegitimate purposes were at work.²¹⁰

A few classifications, in contrast, are so likely motivated by illegitimate purposes that the Court presumes that they are based on illegitimate purposes unless the state can dispel this concern.²¹¹ Such classifications are “suspect” and must satisfy a more stringent standard of judicial review.²¹² Under “strict scrutiny,” the government must prove that the suspect classification is employed for a compelling purpose and that its use is necessary to achieve that objective.²¹³ Laws that classify by race are the paradigmatic example of a suspect classification. Racial classifications do not necessarily violate the Equal Protection Clause, but they are presumed invalid because they carry a risk of having been motivated by illegitimate purposes that is too great to justify the judicial deference normally accorded legislative classifications.²¹⁴ The suspicion surrounding racial classifications is based on the long history of such classifications being used to oppress blacks and other minorities based on illegitimate beliefs in their inferior status.²¹⁵ Accordingly, all racial classifications are suspect and subject to strict scrutiny. Only if such review is satisfied will the risk of illegitimate motivations be considered acceptably low.²¹⁶

²⁰⁹ *Id.*

²¹⁰ See Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 Colum J Gender & L 355, 391 (2006).

²¹¹ See Forde-Mazrui, 88 Georgetown L J at 2354 (cited in note 114).

²¹² See *id.*

²¹³ See *id.* at 2340–41.

²¹⁴ See *Washington v Davis*, 426 US 229, 241–42 (1976).

²¹⁵ See *Shaw v Reno*, 509 US 630, 650 (1993) (holding that racial gerrymandering should be subject to strict scrutiny because of “our country’s long and persistent history of racial discrimination in voting”); *City of Cleburne v Cleburne Living Center*, 473 US 432, 440 (1985) (“[R]ace, alienage, or national origin . . . are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”); *Frontiero v Richardson*, 411 US 677, 682, 684–85 (1973) (plurality) (noting that a history of discrimination is a reason to subject classifications based on race, alienage, national origin, or sex to a heightened level of judicial scrutiny).

²¹⁶ See *City of Richmond v J.A. Croson Co*, 488 US 469, 492 (1989):

[T]he purpose of strict scrutiny is to “smoke out” illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen “fit” this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.

Similarly, with sex-based classifications, a long history of subordinating women justifies treating such classifications with skepticism.²¹⁷ Here, however, the Court believes that the chances that distinctions reflect legitimate contemporary norms are greater for sex-based than for race-based distinctions, so the Court applies a less exacting standard of review than it does to racial classifications.²¹⁸ Under “intermediate scrutiny,” the presumption that “quasi-suspect” sex-based classifications reflect illegitimate prejudice or stereotype is overcome only if the state can demonstrate that the classification is substantially related to an important governmental interest.²¹⁹ As American society becomes increasingly opposed to sex-based distinctions, the intermediate scrutiny accorded sex-based classifications appears to be getting stricter.²²⁰

The determination to treat a classification as suspect for equal protection purposes thus reflects an assessment of the relative likelihood that the classification is motivated by legitimate versus illegitimate purposes. With race and sex classifications, the Court has determined that there is a substantial likelihood that they reflect impermissible purposes or beliefs, while there is a low probability that government would classify people based on race or sex for legitimate purposes. The Court has identified several factors, or “indicia of suspectness,” that contribute to the determination whether a classification should be considered suspect and subject to heightened review.²²¹ The most important factor is whether there has been a history of discrimination based on the classificatory trait in question.²²² The longstanding and widespread history of discrimination based on illegitimate attitudes toward blacks and women suggests a likelihood that race and sex classifications employed today may reflect similarly obnoxious notions. The plurality in *Frontiero v Richardson*²²³ also noted that race and sex were immutable and bore little relationship to individuals’ ability to contribute to society.²²⁴ These factors seem to minimize the likelihood of legitimate motivations, as the state generally ought to avoid denying rights to people based on traits they cannot control, especially if those traits do not affect a person’s physical or

²¹⁷ See *Frontiero*, 411 US at 684–88 (plurality); *Virginia*, 518 US at 531.

²¹⁸ See *Virginia*, 518 US at 555.

²¹⁹ See *Craig v Boren*, 429 US 190, 197–98 (1976); *Virginia*, 518 US at 524.

²²⁰ See *Virginia*, 518 US at 571 (Scalia dissenting) (explaining how the Court’s test resembles strict scrutiny); Denise C. Morgan, *Anti-subordination Analysis after United States v Virginia: Evaluating the Constitutionality of K–12 Single-Sex Public Schools*, 1999 U Chi Legal F 381, 408–09.

²²¹ See *San Antonio Independent School District v Rodriguez*, 411 US 1, 28 (1973).

²²² See Michael A. Helfand, *The Usual Suspect Classifications: Criminals, Aliens and the Future of Same-Sex Marriage*, 12 U Pa J Const L 1, 15 (2009).

²²³ 411 US 677 (1973).

²²⁴ *Id.* at 686.

mental capacities. The relative political weakness of blacks and women also supports skepticism toward discriminatory classifications that burden them.²²⁵ The history of discrimination against such groups for unjustifiable reasons is more likely to continue if they have not gained sufficient political power to ensure they are treated fairly. The Court has sometimes, but not always, identified the visibility of a group as a factor in characterizing classifications that burden the group as suspect.²²⁶ The point may be that if members of a minority group are easily identifiable, then lawmakers can target them with burdensome legislation without inadvertently burdening the majority. The greater suspectness accorded racial over sex-based classifications has not been clearly explained, but it may reflect a perception by the Court that discrimination against minorities has been more invidious, that the insularity of minority communities makes empathy with their interests less likely to develop on the part of the majority, that their small population undermines their ability to protect themselves in the political process, and that “real differences” between the sexes make it more likely that there are legitimate reasons to differentiate on the basis of sex than on the basis of race.

If certain classifications, depending on their historical use and other circumstances, are more likely to reflect illegitimate than legitimate purposes, the question arises whether certain justifications may be more likely to be used for illegitimate purposes depending on their historical use and other circumstances. Consider the factor of historical use. Heightened scrutiny of suspect classifications is premised in large part on the proposition that the historical use of such classifications to pursue illegitimate purposes justifies skepticism toward such classifications today even when used for ostensibly legitimate purposes.²²⁷ Similarly, the historical use of certain justifications for laws based on illegitimate purposes justifies skepticism toward such justifications today even when used to support laws ostensibly based on legitimate purposes. The logic behind the relevance of history in justifying the application of strict scrutiny to race and other suspect classifications is that past predicts present. To the extent racial classifications have in the past reflected illegitimate underlying motivations, the present use of such classifications is likely to reflect similar illegitimate purposes, even when the classifications are ostensibly benign. Likewise, if certain justifications have in the past been used to support classifications based on illegitimate purposes, then their present use is likely supporting

²²⁵ See *id.* at 685.

²²⁶ See Helfand, 12 U Pa J Const L at 54–55 (cited in note 222).

²²⁷ See, for example, *Parents Involved in Community Schools v Seattle School District No 1*, 551 US 701, 720 (2007).

classifications based on illegitimate purposes even when ostensibly benign. More generally, if certain justifications are more likely to be offered to support classifications based on illegitimate than legitimate purposes, then such justifications should be viewed suspiciously absent further demonstration on the state's part of the legitimacy of the supported classifications. As the next section argues, tradition represents a justification with several "indicia of suspectness" when used to justify classifications challenged on equal protection grounds.

Before turning to that argument, it is worth observing that questioning the adequacy of ostensibly benign justifications finds support in existing equal protection doctrine. The Court has viewed with skepticism certain justifications under strict scrutiny. In particular, the remedying of societal discrimination and the provision of role models are considered inadequate to justify racial classifications.²²⁸ The Court does not reject these justifications as themselves illegitimate, but rather as too "amorphous" and therefore too easily alleged by the state to justify racial preferences that may in fact have been motivated by ulterior, illegitimate purposes.²²⁹ Also, even under rational basis review, the Court in *Lawrence v Texas* held that morality alone was insufficient to justify the criminal ban on same-sex sodomy absent some showing of likely harm.²³⁰ The Court thus believes that certain justifications, such as remedying societal discrimination, providing role models, and traditional sexual morality, although not illegitimate per se, are too imprecise, manipulable, or insubstantial to justify certain discriminatory classifications.

B. The Suspiciousness of Tradition

This section argues that tradition should be considered a suspicious justification when offered to support a classification challenged under the Equal Protection Clause. When tradition is offered as a primary justification for a legislative classification, the risk that the classification is motivated by illegitimate purposes is too great to accept without a closer examination of the actual purposes underlying the classification. The argument does not dispute that there are potentially legitimate interests served by preserving tradition, such as time-tested experience, community identity, and avoidance of unintended consequences. Notwithstanding such benefits, the risk of illegitimate

²²⁸ See, for example, *J.A. Croson*, 488 US at 497 (explaining that a governmental interest in remedying past discrimination must be based on findings of a constitutional or statutory violation), discussing *Wygant v Jackson Board of Education*, 476 US 267, 274 (1986).

²²⁹ *J.A. Croson*, 488 US at 497, 499.

²³⁰ 539 US at 582 ("Moral disapproval of this group . . . is an interest that is insufficient to satisfy rational basis review.").

purposes underlying a classification justified by tradition is too great to let tradition suffice without a persuasive demonstration of sincerely held and rationally pursued legitimate objectives.

As argued in the previous section, a justification should be considered suspicious if the likelihood that the justification would be used to support a law motivated by illegitimate purposes outweighs the likelihood that the justification would be used to support a law motivated by legitimate purposes. For a number of reasons, tradition is more likely to be used to justify a law motivated by illegitimate purposes. Tradition is relatively unpersuasive as a justification for a law that serves legitimate purposes but quite useful for a law based on illegitimate grounds. This is especially true when the classification being justified burdens a group toward which there has been a shift in social attitudes from strong moral disapproval in the past to relative tolerance today. Other attributes of tradition that counsel skepticism toward its use include that a law's status as a tradition does not, without more, indicate whether it currently has deontological or consequential value; that tradition has been used historically to justify objectionable laws; that tradition is rhetorically appealing; and that tradition is manipulable. These points are developed below.

A state is more likely to offer tradition to justify a law when illegitimate purposes actually motivated it than if legitimate purposes, consequential or deontological, were actually pursued. Consider first consequential benefits. A law's status as a tradition would have limited usefulness in justifying a law that demonstrably produces beneficial consequences. Such a law is more likely to seem justified than a law with no identifiable benefits, or with only speculative benefits, regardless of the longevity of the law's existence. Indeed, a law of long standing that has ceased to have any benefit or has become harmful in light of changed conditions will not seem as justified as a new law with demonstrable utility. Accordingly, those defending a law, whether in politics or litigation, have every incentive to identify the instrumental benefits of the law and to emphasize those benefits over the length of time since the law's enactment or since the emergence of the tradition protected by the law. Indeed, given that countless laws have eventually been repealed or modified for good reason, one might expect a defender of a law that offers demonstrable benefits to give little or no weight to the law's status as a tradition over and above the law's operational utility.

In contrast, consider the incentives of those who support a law for illegitimate or problematic purposes to rely on tradition to justify the law. They would be reluctant to reveal, much less argue, reasons that may be viewed as illegitimate. A more promising strategy would be to cite legitimate, consequential benefits of the law if such benefits

could persuasively be shown. Such benefits, however, may be lacking, since illegitimate motivations need not correlate to legitimate interests. Indeed, there may generally be an inverse correlation between illegitimately desired legislation and the extent to which such legislation produces legitimate benefits, given that prejudice often motivates arbitrary or otherwise unwarranted burdens on disfavored groups. If a law motivated by illegitimate purposes arguably qualifies as a tradition, that fact may represent the most benign justification available to those defending the law. In short, because invoking tradition is less persuasive than demonstrating a law's operational utility, but more benign than expressly justifying a law on illegitimate or controversial rationales, tradition is more likely to reflect the latter motivations when it is emphasized as a justification for continuing a law. A state's reliance on a law's status as a tradition in defense of a charge that it unfairly discriminates thus suggests that the consequential benefits of the law are weak or lacking.

Similarly, a state is likely to offer legitimate, moral justifications of a deontological nature over tradition to justify a law if such justifications have been persuasively served by the law. Just as a law's longevity does not indicate whether it continues to have, if it ever had, beneficial effects, a law's longevity does not, without more, indicate whether it continues to serve, if it ever served, deontological moral purposes. As discussed previously, history reveals that certain traditions were unjust at their inception or eventually came to be understood as such.²³¹ A more persuasive defense of a law than its longevity would thus be to demonstrate how it is morally justified currently. If the law were convincingly required or at least permitted by a constitutionally acceptable theory of justice or morality, then a state would likely emphasize such a theory over the longevity of the law or the speculative benefits that its longevity might suggest.

An example of the foregoing dynamic may be useful. Consider laws against incest. While such laws are traditional, society does not rely on that fact to justify them. Instead, society justifies criminal proscriptions of incest because the practice is widely considered morally repugnant and because incest carries an unacceptable risk of exploitation, abuse, and genetic defect. If, however, lawmakers and litigators were to emphasize the traditional status of incest bans over moral and harm-based objections, it would suggest that these latter concerns were either unconvincing or illegitimate.

Another important factor that suggests the suspiciousness of tradition as a justification is when the law sought to be justified burdens

²³¹ See notes 63–65 and accompanying text.

a group toward which there has been a substantial increase in social acceptability. In such circumstances, the law may have been originally adopted for reasons considered legitimate at the time but that now are considered prejudicial or empirically unfounded, prompting those who support the law to resort to tradition as a justification in lieu of acknowledging actual motivations now considered outmoded or mistaken. Notice, moreover, that when there has been a shift in cultural norms over time, the older a law is, the more likely it will have been motivated by outmoded attitudes compared to laws enacted recently. A law's status as a tradition would thus tend to coincide with laws enacted for now-repudiated purposes, making tradition especially likely to lend support to those motivated by such purposes.

The shift in cultural attitudes also undermines the extent to which a traditional law can reasonably be presumed to reflect time-tested value. If certain societal attitudes now considered illegitimate prevailed for a significant period of time, then the continuation of a law that served those attitudes likely reflects satisfaction over time of illegitimate purposes, not the "wisdom of the ages." One of the principal rationales for deferring to tradition—time-tested experience—is thus inapplicable to a tradition that discriminates against a group long considered inferior but that is now increasingly accepted as equal.

The rhetorical appeal and manipulability of tradition provide additional reasons to be wary of tradition when offered to justify a law. Although a law's status as a tradition does not by itself indicate the law's enacting purpose or current effect, it is also true that tradition tends to have a laudable connotation in our society. It can thus put a benign gloss on a law without having to demonstrate that the law serves legitimate interests. Furthermore, as several scholars have pointed out, tradition is a manipulable construct.²³² Depending on the level of generality at which a tradition is described, many laws that may be motivated by illegitimate purposes can be described as reflecting

²³² See, for example, William N. Eskridge, Jr, *Sodomy and Guns: Tradition as Democratic Deliberation and Constitutional Interpretation*, 32 Harv J L & Pub Pol 193, 199 (2009) (arguing that the *Bowers* decision shows the "plasticity of tradition"). See also Laurence H. Tribe and Michael C. Dorf, *On Reading the Constitution* 98–99 (Harvard 1991) (commenting that "historical traditions are susceptible to even greater manipulation than are legal precedents" and referring to the "manipulability of historical traditions"); Wolf, 57 U Miami L Rev at 128–33 (cited in note 18) (summarizing fundamental rights cases in which both sides employed tradition to justify their positions); Bartlett, 1995 Wis L Rev at 317 (cited in note 49) (describing as fiction the notion that tradition has readily ascertainable content and that conflicting traditions have always existed simultaneously); Luban, 43 Stan L Rev at 1046 (cited in note 18) (describing tradition as a "heavily edited anthology of the past"); J.M. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 Cardozo L Rev 1613, 1618 (1990) (arguing that the meaning of a tradition depends on how narrowly it is viewed and is subject to selective understanding depending on one's predilections).

some tradition. Just as the Court is wary of remedying societal discrimination as a justification for racial classifications because the amorphousness of the justification enables it to serve as a cover for illegitimate purposes, the manipulability of tradition likewise counsels against accepting it as a sufficient justification, especially when other circumstances surrounding the challenged classification give reason for concern.

Tradition's aconsequential status (its failure to identify a law's effect), its rhetorical appeal, and its manipulability combine to create the following calculus: Assume two laws reflect traditions of equally long status, but one is motivated by legitimate purposes and the other by illegitimate purposes. A state is more likely to justify the illegitimate law based on tradition than the legitimately motivated law. Any law based on tradition serves purposes unrelated to its status as a tradition. If those purposes are laudable and substantial, the state would likely put them forward in defense of the law. If the underlying purpose for a law is instead controversial or impermissible, however, a state has strong incentives to invoke tradition, with its positive connotation, to justify the law. Accordingly, the more tradition is relied on as a justification for a law, the more likely ulterior justifications of dubious value are covertly at work.

The argument thus far for viewing tradition skeptically when offered to justify an allegedly discriminatory law has largely been one of logic. Empirical support can be found in the historical use of tradition, which both illustrates and corroborates the foregoing dynamic. Even a cursory understanding of American history reveals that tradition has repeatedly been used to justify repugnant laws and practices, such as race and sex discrimination. These laws were initially sustained by ideologies of white and male supremacy. As these ideologies became increasingly challenged by social and legal reform movements, defenders of discriminatory practices resorted to the protection of tradition as a leading justification for resisting change. The difference between *Dred Scott v Sandford*²³³ and *Plessy v Ferguson* may reflect this dynamic. In *Dred Scott*, the Supreme Court had no trouble rationalizing the exclusion of blacks from citizenship by observing that blacks were "so far inferior[] that they had no rights which the white man was bound to respect."²³⁴ In *Plessy*, by contrast, the Court denied any suggestion that blacks were inferior to whites²³⁵ or that the "equal but

²³³ 60 US (19 How) 393 (1856).

²³⁴ *Id.* at 407.

²³⁵ 163 US at 544 ("The object of the amendment was undoubtedly to enforce the absolute equality of the two races.").

separate” railcar statute implied as much.²³⁶ Nonetheless, the Court upheld the law based on tradition, explaining that the Fourteenth Amendment requires that any state-imposed segregation be “reasonable” and that “[i]n determining the question of reasonableness, [the state] is at liberty to act with reference to the established usages, customs, and traditions of the people.”²³⁷ What explains the difference in justification? A plausible explanation suggests itself, namely, that the change from *Dred Scott* to *Plessy* reflected in some part the intervention between the two decisions of the Civil War and the constitutionalization of racial equality in the Fourteenth Amendment, leaving states and the Court no longer at liberty to justify racial discrimination in white supremacist terms.

The historical use of tradition to justify racial discrimination also reveals how tradition has been used to justify laws originally founded on religious beliefs. American slavery, for example, was frequently justified in the name of Christianity.²³⁸ Following slavery, segregationist laws were likewise justified in theological terms. In justifying Virginia’s antimiscegenation law, for example, the lower court in *Loving v Virginia* explained, “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. . . . The fact that he separated the races shows that he did not intend for the races to mix.”²³⁹ Nor were religious justifications for racism limited to the South. Massachusetts, for example, defended its antimiscegenation law as fulfilling the “Infinite Wisdom” of “God’s design.”²⁴⁰ Similarly, Pennsylvania justified antimiscegenation laws as preserving the arrangement required by the “order of Divine Providence.”²⁴¹

Laws enforcing “traditional” sex roles were also justified by religious doctrine.²⁴² Consider the following passage from Justice Joseph Bradley’s concurring opinion in *Bradwell v Illinois*, which upheld the exclusion of women from the practice of law:

²³⁶ Id at 540, 551 (“[T]he assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority . . . is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.”).

²³⁷ Id at 550.

²³⁸ See Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 BU L Rev 1283, 1322 (2000).

²³⁹ See *Loving*, 388 US at 3 (quoting the unpublished opinion of the Circuit Court of Caroline County, Virginia).

²⁴⁰ Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* 245 (Pantheon 2003), citing Committee on the Judiciary Report Respecting Distinctions of Color, Massachusetts House of Representatives (Feb 25, 1839), reprinted in *The Liberator* A4 (Mar 15, 1839).

²⁴¹ *The West Chester and Philadelphia Railroad Co v Miles*, 55 Pa 209, 213 (1867).

²⁴² See Mary E. Becker, *The Politics of Women’s Wrongs and the Bill of “Rights”: A Bicentennial Perspective*, 59 U Chi L Rev 453, 460–61 (1992).

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. . . . The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.²⁴³

Although religious doctrine does not necessarily conflict with legitimate legislative ends, the extent to which religion expressly justifies a law is increasingly controversial in public discourse and raises thorny Establishment Clause concerns.²⁴⁴ It is thus not surprising that tradition would emerge as a substitute public justification for faith-based motivations.

In addition to its historical use to support repugnant ideologies and religious theories, tradition has been used to justify laws erroneously believed to reflect the natural order. As Justice Bradley's quotation reveals, the roles of women as wives and mothers were deemed inherent in the nature of things, as essential and, therefore, inevitable. Similarly, biological theory purportedly justified slavery and racial segregation. As I explain elsewhere, "[r]acial groups were understood as fundamentally different, and intimate relations between them were considered unnatural. Those who would engage in such relationships were commonly believed to be mentally disturbed or overcome by bestial passion."²⁴⁵ To the extent laws justified by tradition in the past tended to be understood inaccurately as reflecting immutable, natural laws, tradition's use to justify contemporary laws may likewise reflect the false belief that culturally contingent practices are metaphysically necessary and immune from change.

As the foregoing historical sketch suggests, race and sex discrimination were initially justified by ideologies of white and male supremacy, rooted in religious and biological theories. As those beliefs became discredited and cultural norms came to view them as inconsistent with equality, those defending the continuation of such laws were required to emphasize other reasons. Given that race and sex bear little or no relationship to ability, however, functional justifications for race and

²⁴³ 83 US (16 Wall) at 141–42 (Bradley concurring).

²⁴⁴ See Phillip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal L Rev 817, 836 (1984).

²⁴⁵ Kim Forde-Mazrui, Book Review, *Live and Let Love: Self-Determination in Matters of Intimacy and Identity*, 101 Mich L Rev 2185, 2187 (2003).

sex discrimination were generally unpersuasive. Therefore, defenders of segregation and of sex-discriminatory laws had to rely on tradition and reasons associated with preserving tradition, such as protecting cultural expectations and minimizing social disruption. American society came to understand, however, that tradition was not an adequate justification for such discriminations and that those invoking tradition often believed in the inferiority of those burdened by the laws.

An alternative, more benign explanation for the use of tradition as a justification is the comfort of habit or custom. Some defenders of a traditional law may be motivated simply by a reflexive attachment to the law they are accustomed to rather than by more invidious motives. Nonetheless, while an interest in preserving what one is accustomed to is understandable, the insistence that a law's longevity justifies its continuance in response to repeated complaints by those burdened by it suggests a clinging to habit that borders on arbitrariness and indifference to the perspective of the excluded group. Tenaciously holding to a discriminatory classification, especially one that burdens a historically disfavored group, without a reasoned evaluation of its continuing justification, does not accord those burdened by the classification the consideration required by the Equal Protection Clause. As Justice John Paul Stevens observed:

The Court must be especially vigilant in evaluating the rationality of any classification involving a group that has been subjected to a "tradition of disfavor [for] a traditional classification is more likely to be used without pausing to consider its justification than is a newly created classification. Habit, rather than analysis, makes it seem acceptable and natural to distinguish between male and female, alien and citizen, legitimate and illegitimate; for too much of our history there was the same inertia in distinguishing between black and white. But that sort of stereotyped reaction may have no rational relationship—other than pure prejudicial discrimination—to the stated purpose for which the classification is being made."²⁴⁶

In short, laws justified on grounds of tradition, especially when the classification being justified and other circumstances give reason for concern, should be viewed suspiciously to ensure that tradition is not obscuring illegitimate motivations.

²⁴⁶ *Cleburne*, 473 US at 453 n 6 (Stevens concurring) (citation omitted) (alteration in original).

C. Tradition as a Suspicious Justification for Opposite-Sex Marriage

This section argues that the various concerns identified in the previous section counsel treating tradition as a suspicious justification when offered in defense of laws limiting marriage to opposite-sex couples. First, recall that a law's longevity does not indicate the purpose behind its enactment, which is the critical question for equal protection analysis. That marriage has traditionally been limited to opposite-sex couples does not indicate why that is so, that is, what purposes or beliefs about same-sex couples motivated the laws excluding them from marriage. Recall also that tradition is especially suspicious when offered to justify a law burdening a group that has suffered a history of prejudice but that has more recently gained a degree of social acceptance. Considering the history of societal prejudice toward gays and lesbians, the risk that excluding them from marriage is based on illegitimate purposes is significant. Gays and lesbians have long been the target of violence, hatred, disgust, ridicule, irrational fear, and a belief that they are moral inferiors, that is, sinners.²⁴⁷ Even assuming that not all classifications discriminating on the basis of sexual orientation are illegitimate, just as not all race-based discriminations are impermissible,²⁴⁸ the kind of disapproval behind most discriminatory laws and actions toward homosexuals likely falls on the illegitimate side of the equal protection line. The Supreme Court inferred such illegitimate animosity in *Romer v Evans* with respect to the state constitutional amendment invalidating antidiscrimination protections for gays and lesbians, finding that the law was motivated by a "bare desire to harm a politically unpopular group."²⁴⁹ And in *Lawrence v Texas*, although the Court relied on substantive due process to invalidate all laws proscribing private, adult consensual sodomy, the Court expressed concern that anti-sodomy laws reinforced societal prejudice against gay and lesbian people.²⁵⁰ Despite the persistence of prejudice against homosexuality, it is also evident that condemnation of gay and lesbian

²⁴⁷ See Kevin T. Berrill, *Anti-gay Violence and Victimization in the United States: An Overview*, in Gregory M. Herek and Kevin T. Berrill, eds, *Hate Crimes: Confronting Violence against Lesbians and Gay Men* 19, 19–25 (Sage 1992); Yvonne Zylan, *Passions We Like . . . And Those We Don't: Anti-gay Hate Crime Laws and the Discursive Construction of Sex, Gender, and the Body*, 16 *Mich J Gender & L* 1, 11 (2009).

²⁴⁸ See *Grutter*, 539 US at 343 (upholding race-based admissions preferences); *Adarand Constructors, Inc v Pena*, 515 US 200, 237 (1995) (rejecting the notion that strict scrutiny is "strict in theory, but fatal in fact," and providing an example of a statute that had recently survived strict scrutiny because the race-based action was narrowly tailored to further a compelling governmental interest), quoting *Fullilove v Klutznick*, 448 US 448, 519 (1980) (Marshall concurring).

²⁴⁹ 517 US at 634, citing *Department of Agriculture v Moreno*, 413 US 528, 534 (1973).

²⁵⁰ 539 US at 575.

people has become increasingly unacceptable in public discourse.²⁵¹ Moreover, cases such as *Romer* and *Lawrence* suggest that evidence of such condemnation in connection with laws that discriminate on the basis of sexual orientation may jeopardize the constitutionality of such laws.²⁵² Tradition may thus serve as a less controversial justification for anti-gay legislation than the actual motivations behind such laws. Accordingly, when laws designed to limit marriage to opposite-sex couples are justified as preserving “traditional” marriage, historical experience counsels against accepting the sufficiency of such a justification.

In addition to, or instead of, anti-gay animus, some opposition to same-sex marriage seems to be rooted in a preference for traditional gender roles. The traditional model of marriage includes a masculine husband and father, usually the financial provider, and a feminine wife and mother, usually the primary caregiver.²⁵³ Many traditionalists find this arrangement comforting as well as encouraged by their religious teaching and community norms.²⁵⁴ Same-sex marriage, as Professor Richard Banks observes, “necessarily abolishes traditional gender roles in marriage, creating a more unisex institution where roles cannot be easily assigned by gender.”²⁵⁵ While preserving traditional gender roles is a legitimate personal preference, it can hardly serve as a state’s justification for a discriminatory law challenged under the Equal Protection Clause. At the very least, the gender-based purpose should trigger intermediate scrutiny. Accordingly, to the extent tradition-based arguments for laws against same-sex marriage might be motivated by gender-role stereotypes, such arguments should be viewed skeptically and scrutinized carefully.

Some corroboration for the emergence of tradition as a justification for anti-gay laws can be found in comparing language referring to same-sex sodomy contained in judicial opinions and appellate briefs at various points in history. In early twentieth-century prosecutions for sodomy between men, courts could barely contain their disgust for the

²⁵¹ See Rebecca L. Marino, *Manifestations of Homophobia: Attitudes toward Social and Cultural Aspects of Homosexuality among Male and Female College Students*, 1 *Epistimi* 34, 34 (2004) (noting that although homophobia has not disappeared in the United States, it has decreased over the past three decades).

²⁵² See *Romer*, 517 US at 634–35; *Lawrence*, 539 US at 571–72.

²⁵³ See Danielle Kie Hart, *Same-Sex Marriage Revisited: Taking a Critical Look at Baehr v. Lewin*, 9 *Geo Mason U Civ Rts L J* 1, 12–26 (1998).

²⁵⁴ *Id.* at 37–47; Elizabeth S. Scott, *A World without Marriage*, 41 *Fam L Q* 537, 538 (2007) (“Vestiges of the religious origins of marriage continue to shape attitudes and inform the views of many marriage defenders.”).

²⁵⁵ Ralph Richard Banks, *Why Do So Many People Oppose Same-Sex Marriage?*, 5 *Stan J CR & CL* 409, 421 (2009).

“unspeakable” crimes involved in the cases.²⁵⁶ The idea that such criminal laws could infringe constitutional rights was unthinkable. By *Bowers v Hardwick* in the late twentieth century, social acceptance of homosexuality had progressed to the point at which a challenge to crimes against homosexual sodomy was plausible, though unsuccessful.²⁵⁷ The state of Georgia in *Bowers* justified the law on the ground that “the very act of homosexual sodomy . . . epitomizes moral delinquency” inconsistent with the state’s moral traditions.²⁵⁸ While the state’s criticism of homosexual sodomy was strong, the language was milder than that used in cases a half-century before. By 2003, in *Lawrence v Texas*, the state’s disapproval of same-sex sodomy was noticeably milder still. The state insisted that Texas respected the equality rights of homosexual people,²⁵⁹ but argued that the legislature could rationally defer to existing laws against homosexual sodomy because such laws are ancient and thus likely to reflect the collective wisdom of many generations.²⁶⁰ The Court had progressed as well to the point that moral tradition alone was insufficient to justify criminally punishing the consensual sexual conduct of gay (and straight) adults.²⁶¹

²⁵⁶ See *State v McAllister*, 136 P 354, 355 (Or 1913) (describing sodomy as a “crime against nature being too well understood and too disgusting to be herein more fully set forth”); *State v Start*, 132 P 512, 513 (Or 1913) (“[Sodomy] is an offense against nature. There can be no difference in reason whether such an unnatural coition takes place in the mouth or in the fundament . . . The moral filthiness and iniquity against which the statute is aimed is the same in both cases.”); *People v Hall*, 16 NYS2d 328, 329 (NY County Ct 1939) (“[T]he defendant had been a person with abnormal, unnatural and perverted sexual desires. This crime is unusual and unnatural. The statute refers to it as a crime against nature. A normal person would not commit the crime.”).

²⁵⁷ *Bowers*, 478 US at 187, 196 (holding, in a five-to-four decision, that a state law criminalizing homosexual conduct was constitutional).

²⁵⁸ Brief of Petitioner Michael J. Bowers, Attorney General of Georgia, *Bowers v Hardwick*, No 85-140, *36 (US filed Dec 17, 1985) (available on Westlaw at 1985 WL 667939).

²⁵⁹ See Transcript of Oral Argument, *Lawrence v Texas*, No 02-102, *47–48 (US Mar 26, 2003) (available on Westlaw at 2003 WL 1702534) (defending Texas’s treatment of homosexuals, stating that “Texas welcomes all into the political debate,” pointing to recent hate crimes legislation that included enhanced punishment for selecting a victim based on sexual orientation, and denying any Texas policy to discriminate against homosexuals as a group); Respondent’s Brief, *Lawrence v Texas*, No 02-102, *35, 39–41 (US filed Feb 17, 2003) (available on Westlaw at 2003 WL 470184) (“Texas Brief”) (denying that the Texas legislature intended to discriminate against gay people); id at *45–46 (stating that it would violate equal protection to discriminate against people simply because of their sexual orientation including, for example, by prohibiting homosexuals from attending public school).

²⁶⁰ *Texas Brief* at *47–48 (cited in note 259) (arguing that prohibitions of homosexual sodomy are ancient in American and Texan law and, therefore, it is rational for the legislature to defer to them); id at *48 n 30, quoting Michael W. McConnell, Book Review, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, 98 Yale L J 1501, 1504 (1989) (“Tradition . . . is composed of the cumulative thoughts and experiences of thousands of individuals over an expanse of time.”).

²⁶¹ See *Lawrence*, 539 US at 571.

Laws protecting the traditional definition of marriage, as well as other laws that discriminate against homosexuals, have also been justified on religious grounds and as reflecting the natural order. As I have observed elsewhere:

Opposition to homosexual intimacy, like historical opposition to interracial intimacy, is rooted in an ideology of nature. Same-sex relationships are commonly rejected as unnatural or bestial, a violation of the biologically appropriate form of sexual relations between man and woman. Relatedly, same-sex relationships, like interracial relationships, have been considered a product of mental defect, including by the psychological profession. . . .

In addition to biological concerns are moral and religious objections. Just as miscegenation purportedly violated God's will, sex and marriage between homosexuals is commonly condemned as violating the Bible or otherwise blasphemous.²⁶²

For reasons discussed in the previous section, opponents of same-sex marriage have strong incentives to rely on tradition to cover up more controversial motives. Tradition is a convenient, manipulable, rhetorically appealing justification that enables opponents of same-sex marriage to stand on ostensibly benign grounds for their position. If, however, limiting marriage to opposite-sex couples were based on laudable purposes of legitimate moral content or consequence, then one would expect such purposes to be emphasized more than the assertion that preserving the traditional definition of marriage is important because the definition is traditional. True, some traditionalists may sincerely believe that negative consequences of legitimate concern may result from same-sex marriage even if such consequences are unknowable or unprovable. Given the substantial risk that tradition-based arguments are obscuring illegitimate purposes, however, a fear of unintended consequences is too speculative and insubstantial to justify banning same-sex marriage.

IV. SCRUTINIZING TRADITION (AND OTHER SUSPICIOUS JUSTIFICATIONS)

If courts were to treat tradition as suspicious for equal protection purposes, what would follow? This Part considers some key issues likely to arise in litigating claims in which tradition has been relied on by the state in defense of a discriminatory law. Part IV.A anticipates that, in response to courts treating tradition with skepticism, states

²⁶² Forde-Mazrui, 101 Mich L Rev at 2200 (cited in note 245).

might resort to other justifications that should also be treated as suspicious. Part IV.B considers some issues of proof that would need to be resolved in litigation, such as burdens of persuasion, the risk of evasion, and the possibility of mixed motives. This Part is not intended to be thorough. Rather, it serves to sketch some implications of the argument set forth in the previous Part for judicial scrutiny of tradition-based justifications.

A. Other Suspicious Justifications

This section briefly identifies some other justifications that may have features similar to those that make tradition suspicious. Recall that tradition is a suspicious justification because, by itself, it is unrelated to the consequential or other moral interests served by the law, it has a history of being used to support illegitimate discrimination or discrimination based on religious doctrine or unfounded claims about the natural world, and it is both manipulable and rhetorically appealing, making it convenient for use in lieu of revealing more controversial motivations. Other justifications may share these features to some degree.

Such arguably suspicious justifications include those asserting that a law reinforces the identity of a community. Terms such as “heritage,” or phrases such as “who we are” or “what it means to be American” (or other social identity) exemplify this type of justification.²⁶³ It is not that such justifications are necessarily objectionable; the problem is that, like tradition, they do not identify whether the defended law is based on legitimate or illegitimate assumptions. Honoring the American flag is part of our heritage as Americans and usually reflects legitimate purposes, but honoring the Confederate flag may be a legitimate recognition of Southern forefathers who gave their lives in battle, or it may reflect support for white supremacy.²⁶⁴ That it is part of a community’s heritage or how it understands itself

²⁶³ See, for example, Kwame Anthony Appiah, *What Will Future Generations Condemn Us For?*, Wash Post B1 (Sept 26, 2010) (arguing that those who defend customs later thought to be morally pernicious “tend not to offer moral counterarguments but instead invoke tradition, human nature or necessity”); Jonathan Martin and Ben Smith, *The New Battle: What It Means to Be American*, Politico (Aug 20, 2010), online at <http://www.politico.com/news/stories/0810/41273.html> (visited Nov 23, 2010) (describing the defining debate of President Barack Obama’s term as one “related to the role of government and the very meaning of America”); Dahleen Glanton, *In Mississippi, Flag Vote Shows Deep Divide: “World is Watching” State Referendum*, Chi Trib N1 (Apr 16, 2001) (reporting on a ballot initiative to remove the Confederate flag from the Mississippi state flag and quoting a local opponent who defended the flag by asserting that it was a “part of our history and [] always will be”).

²⁶⁴ Thomas Becnel, *Beneath an Infamous Rebel Flag in East Tampa*, Sarasota Herald-Trib A1 (Oct 27, 2010) (describing a thirty-by-fifty-foot Confederate flag over a Florida interstate and the resulting local controversy over whether it is a symbol of hate or Southern heritage).

does not address the nature of the purposes or ideologies underlying it. Moreover, for reasons similar to the concerns relating to the use of tradition, assertions of community identity are rhetorically appealing and sufficiently abstract as to facilitate their use to justify laws based on ulterior, objectionable motives.

Other justifications that may lend themselves to obscuring illegitimate purposes include claims based on religion or assertions of morality, what is “inherent” or “natural,” and what is “by definition.”²⁶⁵ Although justifications ostensibly based on morality and religion may well serve laudable and important interests, these are also justifications that, as history reveals, may be alleged in support of practices rooted in illegitimate purposes or beliefs.²⁶⁶ Justifications based on what is inherent or natural, although possibly accurate in some circumstances, have historically been used to support laws rooted in illegitimate beliefs that were eventually understood to be erroneous or socially constructed.²⁶⁷ And justifications based on definition reflect the conclusory and illogical assumption that how cultural practices have been defined in the past necessarily reflects how they must or ought to be defined for all time.

The claim here is not that the foregoing alternative justifications are identical in suspiciousness to tradition, or that they represent an exhaustive list of suspicious justifications. A more thorough examination of each would be required to determine the degree to which they should be viewed with suspicion. The point is simply that courts should receive certain justifications with skepticism because they may be of slight justificatory value for equal protection purposes, may have a history of use to justify illegitimate laws, and may serve as convenient covers for illegitimate purposes.

²⁶⁵ For evidence of recent justifications of laws on the grounds that they target “unnatural” behavior, see, for example, Elizabeth A. Tedesco, Note, “*Humanity on the Ballot*”: *The Citizen Initiative and Oregon’s War over Gay Civil Rights*, 22 BC Third World L J 163, 164 (2002). For a mention of the argument that marriage is “by definition” between a man and a woman, see Kevin G. Clarkson, David Orgon Coolidge, and William C. Duncan, *The Alaska Marriage Amendment: The People’s Choice on the Last Frontier*, 16 Alaska L Rev 213, 230 n 105 (1999).

²⁶⁶ Commenting on the historical dangers of morality-based justifications, Professor Andrew Koppelman observed that “the post-Civil War Southern Black Codes . . . undeniably rested on powerful moral convictions.” Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L Rev 197, 284 (1994). To be clear, the concern over morality-based justifications is not that morality cannot justify a discriminatory law. As previously discussed, the Court has upheld laws based on moral justifications of both a deontological and consequentialist nature. See Part II.A. The point here is simply that bare assertions of morality should not be accepted at face value but rather should be examined to ensure that the moral theory relied on is constitutionally acceptable.

²⁶⁷ See text accompanying notes 238–46 and 256–62.

B. Proof, Evasion, and Mixed Motives

This section sketches how courts should scrutinize tradition-based justifications, including allocating burdens of proof and confronting issues of evasion and mixed motives. As with heightened scrutiny of suspect classifications, the objective of judicial scrutiny would be to “smoke out” illegitimate purposes.²⁶⁸ The proposed scrutiny is not, however, meant to be a mechanistic framework of means–end analysis. Rather, the approach would ask for substantiation of legitimate purposes underlying a law other than preserving tradition, taking account of the risk, suggested by the use of tradition, that illegitimate purposes may lurk behind whatever legitimate purposes are advanced.

Determining legislative intent is familiar to equal protection analysis. For example, in claims of race and sex discrimination challenging laws neutral on their face, plaintiffs must present evidence of the alleged discriminatory intent motivating the law. As the Court explained in *Village of Arlington Heights v Metropolitan Housing Development Corp.*,²⁶⁹ such a procedure involves a presentation of any direct and indirect evidence of the motivations of those who enacted the law.²⁷⁰ The burden of proof would be different here, however. Because the use of tradition would create a suspicion of illegitimate purposes, the burden should be on the state to establish that legitimate purposes actually motivated the law. The nature of the evidence, however, would be similar to that outlined in *Arlington Heights*.

Courts also have experience evaluating a state’s proffered justification for a discriminatory law, including when the burden of proof is on the state. In cases in which a plaintiff successfully proves a suspect discriminatory purpose, the state then bears the burden of articulating a sufficiently weighty justificatory objective and of substantiating with adequate evidence that such an objective was the actual reason for using the suspect classification.²⁷¹ The state must also present persuasive evidence that the use of a suspect classification was the least restrictive means available after considering nonsuspect alternatives.²⁷² In *Virginia* and *Grutter*, for example, the states were required to present evidence of their actual purposes in enacting the sex- and race-based classifications at issue, and evidence that sex- and race-neutral means would not have been as effective.²⁷³ The state succeeded in

²⁶⁸ See *City of Richmond v J.A. Croson Co.*, 488 US 469, 493 (1989).

²⁶⁹ 429 US 252 (1977).

²⁷⁰ *Id.* at 265–67 (discussing various types of evidence that can be used to prove a discriminatory purpose).

²⁷¹ *Id.* at 270 n 21.

²⁷² See *Bernal v Fainter*, 467 US 216, 219 (1984).

²⁷³ See *Virginia*, 518 US at 535; *Grutter*, 539 US at 318–20.

meeting its burden in *Grutter*²⁷⁴ but failed in *Virginia*.²⁷⁵ In the context of laws justified by tradition, such as laws against same-sex marriage, courts should place the burden of proof on the state to demonstrate that the law serves a legitimate purpose and that such a purpose was in fact the actual purpose behind the law.

Close scrutiny into legislative intent should reveal purposes that fall into three categories: illegitimate, suspicious, and legitimate. Regarding the first category, if the purposes behind a law justified by tradition are revealed to be invidious, arbitrary, or otherwise illegitimate, then the court should invalidate the law. Thus, if laws excluding same-sex couples from participating in marriage are revealed to be based on animosity, hatred, irrational fear, or a belief in the inferiority of gay and lesbian people, then courts should invalidate such laws.

The second category of purposes that may be revealed by close judicial scrutiny comprises alternative suspicious justifications. For example, a state might instead attempt to justify a law against same-sex marriage on the ground that it reflects “our heritage,” the “natural” form of marriage, or the “definition” of marriage. As suggested previously, such justifications are also suspicious and should not, therefore, satisfy the state’s burden to substantiate a legitimate justification.²⁷⁶ In response, a court could, within its discretion, permit the state to present additional evidence of a legitimate justification, taking account of the risk that the state’s proffer of alternative, suspicious justifications resulted from the state’s suppression of illegitimate motivations. If the state fails to meet its burden of proof, then the court should invalidate the law.

Evidence of religious motivation presents a special case of a suspicious justification. Unlike other suspicious justifications that sound benign and therefore serve as convenient covers, religion is unlikely to be offered by the state as a justification, even if it did play a role, because it raises potential Establishment Clause concerns. As discussed previously, however, religious beliefs have historically motivated laws subsequently justified by tradition, so it is plausible that closer scrutiny of contemporary laws justified by tradition would sometimes reveal religious motivations. This is not to say that religious motives necessarily invalidate a law. If they did, then such motivations would be illegitimate, not just suspicious. On the one hand, the Establishment Clause prohibits religious doctrine from being the sole or primary justification for a law.²⁷⁷ On the other hand, it may be unrealistic and

²⁷⁴ 539 US at 343.

²⁷⁵ 518 US at 555–58.

²⁷⁶ See Part IV.A.

²⁷⁷ See *Lemon v Kurtzman*, 403 US 602, 612 (1971).

arguably objectionable to expect legislators to exclude their faith from their assessment of the wisdom of laws upon which they vote.²⁷⁸ Moreover, the prescriptions contained in religious doctrines are often legitimate on secular grounds. Laws against murder, for example, are justified by legitimate secular purposes and ought not be questioned simply because religious doctrine agrees, or even because some legislators who voted to criminalize murder were motivated by religious beliefs. As Justice Stevens observed, “[a] law conscripting clerics should not be invalidated because an atheist voted for it.”²⁷⁹ At the same time, notwithstanding rights of religious freedom, religious-based beliefs are not immune from rejection when used to justify a law. Religious doctrines that have endorsed white or male supremacy cannot support a law challenged on equal protection grounds. Managing this complexity is a difficult matter about which the Court has not provided clear guidance. A proposed approach is this: If a court finds that religious faith or doctrine played a significant role in the enactment of a law, then the court should require at least two conditions to sustain the law’s validity. First, the law should have the effect of serving one or more legitimate secular purposes. Second, the religious beliefs actually motivating the law should not include prejudicial or outmoded stereotypical assumptions. A belief that children ought to obey their parents,²⁸⁰ for example, is legitimate even if a legislator came to hold the belief because of his faith. In contrast, a belief that women should be subservient to their husbands is an illegitimate stereotype for a state to act upon, whether or not a legislator motivated by that belief derived it from his religion.

Judicial scrutiny of suspicious justifications may also reveal that the legislature’s purpose falls into a third category: legitimate purposes. It is conceivable that a law justified on tradition-preserving grounds also has legitimate purposes motivating it. The rhetorical appeal of tradition might lead legislators to promote a law based on that ground even if the underlying purposes are legitimate. It may be, for example, that the actual purposes, even though legitimate, are myriad and represent a coalition of different constituent interests. Bringing such a coalition together may be facilitated by emphasizing the more general and broad-appealing purpose of honoring tradition. If pressed to demonstrate the underlying combination of purposes, a state may be able to demonstrate that legitimate purposes motivated the law.

²⁷⁸ Consider, for example, Abner S. Greene, *The Political Balance of the Religion Clauses*, 102 Yale L J 1611, 1631 (1993).

²⁷⁹ *Washington v Davis*, 426 US 229, 253 (1976) (Stevens concurring).

²⁸⁰ See, for example, Hawaii Rev Stat § 577-6 (West) (“All children during their minority shall obey the lawful commands of their parents.”).

Such a demonstration should be viewed skeptically because, as explained previously, the state would likely have identified a law's legitimate benefits in advocating for it in the political process or at the outset of litigation. Nonetheless, the state should be given the opportunity to prove that a law promoted on grounds of tradition in fact was designed for legitimate, non-tradition-based purposes. In the context of same-sex marriage, legislatures banning such marriage may be motivated by arguably legitimate purposes, such as promoting procreation. If such a purpose were reasonably served by the law and could convincingly be shown to have actually motivated it under close judicial scrutiny, then the law should arguably be upheld.

Before accepting evidence of legitimate purposes as adequate, however, two possible concerns should be recognized: the risk of evasion and the possibility of mixed motives. The risk of evasion could arise if, in order to survive the scrutiny proposed by this Article, a state falsely offers legitimate justifications other than preserving tradition. To the extent a law has been justified initially by tradition or some other suspicious justification, and especially if the law in question burdens a stigmatized group, courts should be skeptical of legitimate purposes offered late in the day and should take care to ensure that the evidence of legitimate purposes is convincing.

The point of mixed motives is that a demonstration that legitimate purposes played a role in the enactment of a law does not preclude the possibility that illegitimate purposes also contributed to its enactment. Such a "mixed motive" situation arises under equal protection doctrine and civil rights laws when some impermissible factor, such as race or sex, played a role in an employment or other decision that was also motivated by legitimate purposes. Under current equal protection doctrine and some civil rights laws, if the government can demonstrate that the same decision would have been reached independent of the impermissible motive, then the decision should be upheld.²⁸¹ In contrast, under the 1991 amendments to Title VII of the Civil Rights Act of 1964,²⁸² an impermissible motive in an employment

²⁸¹ See *Arlington Heights*, 429 US at 270 n 21 (explaining that the burden of proof is on the state once it is found that race played a role in the decisionmaking process), citing *Mt. Healthy City School District Board of Education v Doyle*, 429 US 274, 287 (1977); Daniel A. Farber, William N. Eskridge, Jr, and Philip P. Frickey, *Cases and Materials on Constitutional Law: Themes for the Constitution's Third Century* 221 (West 4th ed 2009); George A. Rutherglen and John J. Donohue III, *Employment Discrimination Law and Theory* 98 (Foundation 2005) (explaining mixed-motive analysis for statutes other than Title VII, such as the Age Discrimination in Employment Act and § 1981 of the Civil Rights Act).

²⁸² Civil Rights Act of 1991, Pub L No 102-166, 105 Stat 1071, codified as amended in various sections of Titles 2 and 42.

decision establishes a violation of law regardless of whether the same decision would have been reached on legitimate motives alone.²⁸³

Even assuming that the more state-friendly equal protection approach would be followed under the scrutiny proposed herein, the question of a law's validity would turn on whether the state would have enacted the law independent of illegitimate purposes found to have played a role. For example, if laws against same-sex marriage were motivated both by animosity toward gay and lesbian people and by a legitimate and rational concern for the promotion of procreation, then a court would have to decide whether the procreation objective by itself would have motivated the law to enactment. That an illegitimate motive also contributed to the law's enactment would counsel skepticism toward the state's claim that same-sex couples would have been excluded from marriage based on the procreation concern alone. A court would likely inquire, for example, into why opposite-sex couples are not required to indicate a desire or a likely capacity to procreate as a condition of marriage.²⁸⁴ Perhaps more puzzling is that many states today permit first-cousin marriages only if at least one partner is sterile or is at a sufficiently advanced age that procreation is unlikely.²⁸⁵ States thus require that a condition of marriage is that the couple *cannot* procreate. A state claiming that it would have banned

²⁸³ See Rutherglen and Donohue, *Employment Discrimination Law* at 97–98 (cited in note 281). See also 42 USC § 2000e-2(m) (“Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”).

²⁸⁴ Justice Scalia identified similar difficulties facing the procreation justification for denying same-sex marriage. Dissenting in *Lawrence*, he argued that the majority's reasoning for protecting a right to same-sex sodomy would necessarily protect a right to same-sex marriage. He asked, “[W]hat justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution[]’ . . . ? Surely not the encouragement of procreation, since the sterile and the elderly are allowed to marry.” *Lawrence*, 539 US at 605 (Scalia dissenting). Indeed, with respect to first-cousin marriages, several states today grant a right to marry *only* to the sterile and the elderly. See note 285 and accompany text.

²⁸⁵ Half of the states permit first-cousin marriages. Some of those states require, however, that at least one partner be over a certain age, such as sixty, or be infertile. National Conference of State Legislatures, *State Laws Regarding Marriages between First Cousins*, online at <http://www.ncsl.org/default.aspx?tabid=4266> (visited Nov 23, 2010). One state, Maine, permits first-cousin marriage on the condition of genetic counseling. *Id.* Interestingly, inability to procreate as a condition of marriage has historical precedent regarding interracial marriage. For example, in the early twentieth century “a [legislative] proposal in New York [that] would have tolerated racial intermarriage provided the couple submitted to sterilization.” Forde-Mazrui, 101 Mich L Rev at 2189 (cited in note 245), citing Kennedy, *Interracial Intimacies* at 255 (cited in note 240), citing Byron Curtis Martyn, *Racism in the United States: A History of the Antimiscegenation Legislation and Litigation* *922 (unpublished PhD dissertation, University of Southern California, 1979) (on file at the University of Wisconsin–Madison).

same-sex marriage based on procreation alone would thus have a difficult, though not impossible, task.

CONCLUSION

The debate over same-sex marriage divides the nation along political, cultural, and religious lines. Central to that debate is the question whether the traditional definition of marriage, requiring one man and one woman, should be protected because that definition is traditional. In litigation under the Equal Protection Clause, the doctrinal question is whether the traditional status of opposite-sex marriage is a sufficiently legitimate justification for excluding same-sex couples from marriage.

This Article concludes that tradition can serve as a legally sufficient basis on which to uphold discriminatory laws, including bans on same-sex marriage. More specifically, the benefits associated with tradition, such as time-tested wisdom, social-identity reinforcement, and avoiding unintended consequences, are legally permissible justifications for a law challenged under the Equal Protection Clause, provided that tradition is not relied on simply for its own sake and that the expected benefits that might result from preserving tradition are not premised on illegitimate purposes or beliefs. In the case of opposite-sex marriage, the Article concludes, a state's reliance on the presumed benefits of traditional marriage articulates a legally sufficient justification able to withstand the most deferential standard of rational basis review.

This Article has also argued, however, that certain circumstances warrant skepticism toward the use of tradition when offered to justify a discriminatory law. A significant factor warranting suspicion is that a tradition serves beliefs that have become repudiated, such as antagonism toward a historically stigmatized group that has gained substantial social acceptance. In such circumstances, tradition may serve as a convenient justification for those who hold the attitudes that are no longer an acceptable justification for the discrimination in question. The risk is heightened when tradition is emphasized as the sole or primary justification for the law rather than the law's consequential benefits or other legitimate moral foundation. That the concept of tradition is manipulable and has rhetorical appeal further contributes to its opportunistic usefulness to support a law that is in fact based on illegitimate or arbitrary motivations. As a result, tradition is as likely as not to reflect outmoded attitudes that are not expressed due to their current unacceptability. Courts should therefore be skeptical of a law justified by tradition, and should not uphold it absent a convincing showing of alternative, legitimate purposes.

In the case of laws against same-sex marriage, a number of circumstances make the risk significant that opponents of same-sex marriage

offer tradition to justify such laws when their opposition is actually motivated by illegitimate attitudes. There has been a long history of societal disapproval of homosexuality, a disapproval still prevalent among some populations and in certain locales. At the same time, public expression of such disapproval has become increasingly unacceptable and, equally important, courts have concluded that animosity toward gay and lesbian people is not a constitutionally legitimate basis for state-sponsored discrimination. The tradition of limiting marriage to opposite-sex couples serves the interests of people holding anti-gay beliefs and—because of the tradition’s longevity—is likely rooted in such beliefs. Moreover, claims about the purported psychological pathology of homosexuality have been repudiated and contemporary claims about the harmfulness to children of same-sex parents remain unproven and improbable. Given that opposition to same-sex marriage cannot be justified by demonstrable harm and reliance on moral disapproval risks constitutional invalidation, it is not surprising that resort to tradition as the justification of choice would emerge at this time and in this context. Accordingly, to guard against the risk that tradition is serving as a veil for illegitimate attitudes, courts should require states to substantiate that the consequences of same-sex marriage are demonstrably harmful or that bans on same-sex marriage are otherwise based on constitutionally acceptable moral grounds.

The extent to which tradition should be viewed suspiciously when offered to justify other discriminatory laws is difficult to assess in the abstract. For the reasons discussed in this Article, any emphasis on tradition over other justifications should invite some inquiry into whether ulterior motives are at work. Many of the circumstances that make tradition a suspicious justification, however, are contingent on the particulars of the law being justified, including past and present societal attitudes toward the burdened group, the nature of the burden imposed, the availability of less burdensome alternatives, and the persuasiveness and constitutional acceptability of other justifications. The degree of suspicion and corresponding scrutiny warranted will thus depend on the specific law being challenged. Moreover, as this Article has acknowledged, that a practice or law is a tradition may give reason to believe that it serves some useful purpose, depending on the circumstances in which the tradition has been sustained. It is thus prudent to assess carefully the virtues of any tradition before changing it.

At the same time, traditions do not exist in a vacuum. They exist in a world in which some attitudes once well accepted come to be understood by society as unfair or unfounded and by the courts as constitutionally invalid. Throughout American history, different groups once disdained or misunderstood have been welcomed into the

political and constitutional fold. If social change brings acceptance to other groups in the future, we can expect that those resistant to such change will seek refuge in tradition when other justifications become unacceptable or unpersuasive.

Taking a broader perspective, the debate over same-sex marriage and the value of tradition reflects a larger debate in American culture and politics. In very general terms, traditionalists, associated with political conservatism, tend to see America's values as rooted in the past, in its founding origins and longstanding traditions, whereas reformists, associated with liberal progressivism, tend to see America's virtue in what has changed and in what can be attained in the future. Traditionalists favor the status quo, putting the burden on groups discontented with extant laws to substantiate that reforms in their interest would not be unduly disruptive. Reformists, in contrast, view disadvantages imposed on a traditionally disfavored group as presumptively objectionable, placing the burden on those who defend the status quo to demonstrate that change would do more harm than good. These perspectives are not, of course, binary, but rather reflect a continuum upon which different people and communities fall. Where people situate themselves with respect to a given controversy tends to reflect the extent to which they find inspiration in the past or hope in the future.

Managing this tension is a continuous challenge of American politics, a process in which courts can play only a limited role. That role can be important, however, and the interpretive approach proposed in this Article can contribute to it. If optimal policymaking about potential legal reform, including the pace of implementation, is aided by informed deliberation and reasoned argument, then processes that help to reveal the actual concerns that motivate people on competing sides of a controversy can serve a useful function. Equal protection analysis, which aims to reveal the motivations behind legislative and state constitutional enactments, can help to facilitate a candid and realistic assessment of laws that impose burdens on historically disfavored groups. By "smoking out" the real reasons for laws that discriminate, including bans on same-sex marriage, courts can facilitate in litigation and encourage in the political process a fuller airing of competing perspectives on societal controversies. A more open, deliberative process can, in turn, inform questions such as whether to reform existing institutions, in what manner, and at what pace. Judicial scrutiny of tradition and other suspicious justifications can thus contribute constructively to the process of legal change.