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Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction

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History and tradition have taken a prominent place as favored rationales for the exclusion of same-sex couples from marriage. Incrementalism likewise has been invoked to suggest that states can permissibly move “one step at a time” to redress the unequal status of same-sex couples, including by creating a civil union/marriage regime instead of providing marriage for all. Yet constitutional jurisprudence is clear that neither longevity nor tradition alone can justify the continuation of a discriminatory rule. This Article asks, then, what work these rationales perform in the marriage/civil union jurisprudence and debate, given their inadequacy from a doctrinal standpoint.

The central claim here is that governments invoke history and tradition to suggest that private actors, rather than the state, are responsible for marriage having a higher social status than civil unions. Yet this premise ignores the state’s monopoly over marriage and, therefore, over marriage’s socially valuable connotations. Consequently, even if private actors contribute to marriage’s special social value, state control over access to that value falls well within standard understandings of state action. Context-sensitive skepticism is similarly necessary toward state claims that unequal treatment should be sustained so long as the inequality is characterized as an incremental step in the direction of full equality.

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Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction

SUZANNE B. GOLDBERG*

I. INTRODUCTION

The rationales for maintaining civil unions for same-sex couples¹ and marriage for different-sex couples come in two basic forms.² One rests on an express preference for heterosexual coupling;³ the other invokes history and tradition to justify the different relationship-recognition regimes.⁴ This

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¹ Two main statuses have evolved as “marriage equivalents” in the United States, although it is important to note that neither of these provides rights, obligations, or benefits that are fully identical to marriage. Civil unions were first, having been created by the Vermont legislature in 2000 following the Vermont Supreme Court’s determination that the state could not deprive same-sex couples of the same “benefits and protections” accorded to different-sex couples through marriage. *Baker v. State*, 744 A.2d 864, 886 (Vt. 1999); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002). After that, legislatures in Connecticut, New Hampshire, and New Jersey enacted civil union laws. CONN. GEN. STAT. ANN. § 46b-38nn (West 2006 & Supp. 2008); N.H. REV. STAT. ANN. § 457-A:1 (LexisNexis 2007 & Supp. 2008); N.J. STAT. ANN. § 26:8A-2 (West 2007). The states of California, Maine, Oregon, and Washington, as well as the District of Columbia, enacted similar measures but labeled them “domestic partnerships.” CAL. FAM. CODE §§ 297–98 (West 2004); D.C. CODE ANN. § 32-701 (LexisNexis 2001 & Supp. 2007); ME. REV. STAT. ANN. tit. 22, § 2710 (1964 & Supp. 2008); H.B. 2007(9)(3), 74th Leg., Reg. Sess. (Or. 2007); WASH. REV. CODE ANN. § 26.60.010 (West 2005 & Supp. 2009). In addition, Hawaii created a “reciprocal beneficiary” status in 1997 that provides certain rights and benefits to intimate partners and others who are precluded by law from marrying. HAW. REV. STAT. § 572C-2 (2006).

In 2009, the states of Connecticut, Maine, New Hampshire, and Vermont all changed their relationship recognition regimes so that same-sex couples are now included within marriage. *See* 2009 Conn. Adv. Legis. Serv. 13; 2009 Me. Adv. Legis. Serv. 82; 2009 N.H. Adv. Legis. Serv. 59; 2009 Vt. Adv. Legis. Serv. 3.

² Under both federal and state constitutions, equality guarantees require that governments have at least a rational explanation for the classifications they draw. *See Romer v. Evans*, 517 U.S. 620, 633 (1996) (observing that classifications must “bear a rational relationship to an independent and legitimate legislative end”).

³ *See Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008) (describing “the belief that the preservation of marriage as a heterosexual institution is in the best interests of children, or that prohibiting same sex couples from marrying promotes responsible heterosexual procreation” as “two reasons often relied on by states in defending statutory provisions barring same sex marriage against claims that those provisions do not pass even rational basis review”) (citation omitted).

⁴ *See infra* notes 8–30 and accompanying text. A variation in this argument maintains that the state should be free to exclude same-sex couples from marriage to conform with the law in other states. *See, e.g., Lewis v. Harris*, 908 A.2d 196, 218 (N.J. 2006) (“In arguing to uphold the system of disparate treatment that disfavors same-sex couples, the State offers as a justification the interest in uniformity

latter argument typically twins history and tradition⁵ to suggest that the exclusion of same-sex couples from marriage is justified because “that is the definition of marriage that has always existed.”⁶

With the “heterosexual-preference” argument having been engaged thoroughly by numerous courts and scholars,⁷ I turn in this Article to the

with other states’ laws.”). This conformity argument could be characterized as suffering from the same flaw discussed later in the Article regarding the history and tradition rationales, in that the state invoking it seeks to locate responsibility for the discriminatory treatment not in relation to the same-sex couples being burdened but rather in a source outside the state’s control. In response, in New Jersey, the state’s highest court observed that “[i]n protecting the rights of citizens of this State, we have never slavishly followed the popular trends in other jurisdictions, particularly when the majority approach is incompatible with the unique interests, values, customs, and concerns of our people.” *Id.* at 220.

⁵ Although history and tradition are conceptually separable, they tend to be used interchangeably in discussions about marriage. One could profitably separate the work of the two; however, because the focus of this Article is on the ways that history and tradition, together, stand in for other arguments, distilling the distinct effects of the history and tradition frames is beyond the scope here.

⁶ *Kerrigan*, 957 A.2d at 478 (quoting the defendants); see also *In re Marriage Cases*, 183 P.3d 384, 401 (Cal. 2008) (describing the state’s asserted “interest in retaining the traditional and well-established definition of marriage”); *Lewis*, 908 A.2d at 432 (“The State rests its case on age-old traditions, beliefs, and laws, which have defined the essential nature of marriage to be the union of a man and a woman. The long-held historical view of marriage, according to the State, provides a sufficient basis to uphold the constitutionality of the marriage statutes.”).

⁷ See, e.g., *Marriage Cases*, 183 P.3d at 430–33 (rejecting the argument that “because only a man and a woman can produce children biologically with one another, the constitutional right to marry necessarily is limited to opposite-sex couples”); *Varnum v. Brien*, 763 N.W.2d 862, 899 n.26 (Iowa 2009) (“The research appears to strongly support the conclusion that same-sex couples foster the same wholesome environment as opposite-sex couples and suggests that the traditional notion that children need a mother and a father to be raised into healthy, well-adjusted adults is based more on stereotype than anything else.”); *id.* at 901 (finding that the exclusion of same-sex couples from marriage does not benefit children of heterosexual or gay and lesbian parents); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 999–1000 (Mass. 2003) (Cordy, J., dissenting) (arguing that the state legislature rationally could have concluded that “married opposite-sex parents” are “the optimal social structure in which to bear children” and that same-sex couples “present[] an alternative structure for child rearing that has not yet proved itself”); *id.* at 963, 965 n.28 (majority opinion) (observing that “the ‘best interests of the child’ standard does not turn on a parent’s sexual orientation or marital status” and criticizing the argument that “marriage is intimately tied to the reproductive systems of the marriage partners and to the ‘optimal’ mother and father setting for child rearing” as “hew[ing] perilously close to the argument, long repudiated by the Legislature and the courts, that men and women are so innately and fundamentally different that their respective ‘proper spheres’ can be rigidly and universally delineated”); *Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (holding that “the Legislature could rationally proceed on the commonsense premise that children will do best with a mother and father in the home”); *id.* at 32 (Kaye, C.J., dissenting) (citing amicus brief of American Psychological Association et al. containing “results of social scientific research studies which conclude that children raised by same-sex parents fare no differently from, and do as well as, those raised by opposite-sex parents in terms of the quality of the parent-child relationship and the mental health, development and social adjustment of the child” and concluding that no rational basis could justify the state excluding same-sex couples from marriage).

For literature focused specifically on procreation-related arguments, see, for example, Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393 (2007), and Edward Stein, *The “Accidental Procreation” Argument for Withholding Legal Recognition for Same-Sex Relationships*, 84 CHI.-KENT L. REV. (forthcoming 2009). For discussions of the defects of heterosexual preference arguments more generally, see Suzanne B. Goldberg, *Intuition, Morals, and the Legal Conversation About Gay Rights*, 32 NOVA L. REV. 523 (2008); Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607 (2006); and Lawrence A. Kurdek, *Are Gay and Lesbian Cohabiting Couples Really Different from Heterosexual Married*

work of history and tradition.⁸ I turn, as well, to the closely related reliance on incrementalism as a reason why legislatures need not rectify the different treatment of same- and different-sex couples by offering the same status to both.

My claim, in a nutshell, is that the history, tradition, and incrementalism rationales, as used in this context, contain an implicit and erroneous premise: that the state did not cause and is therefore not responsible to address the lesser social value of civil unions vis-a-vis marriage.⁹ In this guise, history and tradition are used to signal that forces outside of the state's control have given marriage whatever special status it has.¹⁰ With this foundation, the argument follows that equality

Couples?, 66 J. MARRIAGE & FAM. 880 (2004).

⁸ I focus particularly on the work these rationales do to respond to arguments that the marriage classification violates the equal protection rights of same-sex couples. History and tradition are also frequently advanced to support arguments that marriage is not a fundamental right for same-sex couples and therefore subject only to relatively weak protection under due process guarantees. The state of Connecticut, for example, argued that “since ancient times, marriage has been understood to be the union of a man and a woman, and only such rights that are ‘deeply rooted in this [n]ation’s history and tradition . . . and implicit in the concept of ordered liberty’ are deemed to be fundamental.” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 414 (Conn. 2008) (citation omitted). The state added that “in light of the universally understood definition of marriage as the union of a man and a woman, the right that the plaintiffs were asserting, namely, the right to marry ‘any person of one’s choosing,’ is not a fundamental right.” *Id.* Although the Connecticut Supreme Court declined to address the fundamental rights argument, *id.* at 412, other state courts responded to similar arguments. *See, e.g., Marriage Cases*, 183 P.3d at 420–21 (rejecting the argument that the marriage right claimed in the case could not be deemed fundamental without historical and precedential support for a “right to same sex marriage,” and proceeding instead to focus on the “meaning and substance of the constitutional right to marry”); *Goodridge*, 798 N.E.2d at 958 (observing that “long history availed not” in attempts to overcome due process arguments challenging prohibitions against interracial marriage).

While the use of history and tradition to set the definition of the right in question suffers some of the same flaws I identify here in connection with the rationales’ use in the equal protection context, the fundamental rights analysis also raises a different, though related, set of issues regarding the nature of the right and the level of generality at which the right is defined. *See generally* *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997) (“[W]e have a tradition of carefully formulating the interest at stake in substantive-due-process cases.”); Lawrence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990). To keep the discussion here centered on the way in which these rationales are used to distinguish between state and societal responsibility, this Article focuses on their use in the equal protection context.

⁹ There is a separate argument to be made (not here) about the factual inaccuracy of the claim that the tradition and history of marriage is as static as those rationales suggest. For further discussion on that point, see, for example, Suzanne B. Goldberg, *A Historical Guide To The Future Of Marriage For Same-Sex Couples*, 15 COLUM. J. GENDER & L. 249 (2006) [hereinafter Goldberg, *Historical Guide*].

¹⁰ There is disagreement over whether marriage, regardless of its social value, should be treated by government as a uniquely privileged familial status. *See, e.g.,* MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 46–62 (2008) (advocating recognition of family forms that turn on function and need rather than marital status). Because this Article takes the history and tradition rationales and the related unique social status of marriage as its point of departure, the focus here is not on the serious concerns raised by Professors Fineman, Polikoff and others regarding the unique treatment of marriage by the state.

guarantees¹¹ can tolerate the status difference in the relationship-recognition rules so long as the state equalizes the benefits and obligations within its control.¹² And, from there, the state's creation of civil unions can be framed as a permissible and reasonable incrementalist move toward equal relationship rights; further steps may be taken but none is required.

Yet, I argue below, the foundational premise—that the state is not responsible for the social value of marriage if it did not create the value itself—elides and obscures the deficiencies of history and tradition as constitutional rationales here.¹³ The “not our fault” premise obscures, as well, the serious flaw in the recasting of these rationales as the permissible incrementalist work of the legislature.

The history and tradition rationales may have received less scholarly attention to date in part because they conflict so patently with constitutional doctrine. The U.S. Supreme Court has repeatedly made clear that while past practices are a useful starting point for analysis, history and tradition cannot alone justify retention of a discriminatory or exclusionary rule. “Neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack,”¹⁴ the Court has said. It has observed, as well, that “[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it.”¹⁵

¹¹ Litigants typically advance due process as well as equal protection challenges to states' exclusion of same-sex couples from marriage. See Suzanne B. Goldberg, *And Justice for All? Litigation, Politics, and the State of Marriage Equality Today*, ADVANCE, Spring 2007, at 33, 42, available at <http://www.acslaw.org/node/3779> [hereinafter Goldberg, *Justice for All?*] (follow “attachment” pdf hyperlink).

¹² States make history and tradition arguments in contexts where there is no equalization of benefits as well. In those cases, the premise is the same—that the harms to individuals are not the state's fault—but the argument is asked to do more work, in that the state seeks to justify not only excluding same-sex couples from marriage but also excluding them from equal treatment. See, e.g., *Hernandez*, 855 N.E.2d at 7 (“The critical question is whether a rational legislature could decide that . . . benefits should be given to members of opposite-sex couples, but not same-sex couples.”). Because marriage/civil union cases, like *Kerrigan*, present the premise in its most limited form, this Article concentrates on them here, on the theory that arguments related to the narrower use of the “not our fault” rationale extend as well to the rationale's broader use.

¹³ The premise also obscures the state's role in contributing to and sustaining that value by privileging marriage over all other forms of adult intimate relationships, which receive fewer rights and benefits, as well as less state-sponsored social recognition. For purposes here, however, the argument does not turn on whether or how much value the state has contributed to marriage's social status.

¹⁴ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991) (quoting *Williams v. Illinois*, 399 U.S. 235, 239 (1970)). Not all members of the Court share this view. In opposing the majority's determination that the Virginia Military Institute could not constitutionally exclude women from admission, Justice Scalia stated his “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.’” *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (citation omitted).

¹⁵ *Walz v. Tax Comm'n of N.Y.*, 397 U.S. 664, 678 (1970).

Indeed, if history and tradition were all that was necessary to justify governmental line-drawing, there would be few long-sanctioned distinctions susceptible to contemporary invalidation. States could insulate discriminatory practices simply by showing that they had engaged in those practices for years, if not decades.¹⁶

To be sure, due process doctrine “has often been interpreted so as to protect traditionally recognized rights from state and federal power,”¹⁷ and, consequently, to give greater valence to arguments rooted in history and tradition. As Justice Scalia observed for a majority of the Court in sustaining a jurisdictional rule against a due process challenge, a longstanding rule’s “validation is in its pedigree.”¹⁸

Yet, longevity alone is insufficient as a response to the equal protection inquiry.¹⁹ Standard equal protection doctrine makes clear that a classification cannot be justified by reference to itself; instead, the doctrine

¹⁶ Even if history were considered an inadequate justification under heightened forms of scrutiny, most classifications are subject to rational basis review. *Cf.* Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 485 & nn.14, 17 (2004) [hereinafter Goldberg, *Equality Without Tiers*] (noting that “set” of classifications subject to heightened federal equal protection review, which currently includes “race, alienage, national origin, sex, and nonmarital parentage,” closed formally in 1976 when the U.S. Supreme Court ruled that sex-based classifications warranted heightened scrutiny). While some states have expanded their own constitutional jurisprudence to include categories that federal heightened scrutiny has not yet reached, including heightened scrutiny of sexual orientation-based classifications, the set still remains small. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 443 (Cal. 2008) (concluding “that statutes imposing differential treatment on the basis of sexual orientation should be viewed as constitutionally suspect under the California Constitution’s equal protection clause”); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 412 (Conn. 2008) (finding “statutes discriminating against gay persons are subject to heightened or intermediate judicial scrutiny”); *Varnum v. Brien*, 763 N.W.2d 862, 895–96 (Iowa 2009) (same).

A small minority of states do not follow the federal-style tiered framework, but they likewise demand weaker justifications for classifications depending on such factors as “the nature of the affected right, the extent to which the governmental restriction intrudes upon it, and the public need for the restriction.” *McCann v. Clerk of Jersey City*, 771 A.2d 1123, 1131 (N.J. 2001) (quoting *Greenberg v. Kimmelman*, 494 A.2d 294, 302 (N.J. 1985)); *see also State Dep’t of Revenue v. Cosio*, 858 P.2d 621, 629 (Alaska 1993) (applying “a sliding scale under which [t]he applicable standard of review for a given case is to be determined by the importance of the individual rights asserted and by the degree of suspicion with which we view the resulting classification scheme” (citation and internal quotation marks omitted)).

¹⁷ 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, 1170 (1988). *But see* William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183 (2000) (maintaining that the Court’s precedents do not strongly support the characterization of due process as tradition-preserving relative to equal protection).

¹⁸ *Burnham v. Superior Court*, 495 U.S. 604, 621 (1990). The specific issue in *Burnham* concerned whether a state’s exercise of transitory jurisdiction offended the Due Process Clause, a context with implications that are arguably distinct in kind from the long-term recognition and life-planning issues raised by denial of marriage to same-sex couples.

¹⁹ Although this position dominates equal protection jurisprudence for the reasons set out in the discussion below, Justice Scalia has taken exception, suggesting that the deference to historical practices that he characterizes as fundamental to due process extends to equal protection analysis as well. *See, e.g., Virginia v. United States*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) (describing the “function of this Court [as] to preserve our society’s values regarding . . . equal protection, not to revise them”); *see also supra* note 14.

requires an *independent* justification for state-sponsored distinctions.²⁰ As the Connecticut Supreme Court explained in reviewing the state's marriage law in *Kerrigan v. Commissioner of Public Health*, "[t]o say that the discrimination is 'traditional' is to say only that the discrimination has existed for a long time."²¹ Invoking the U.S. Supreme Court's invalidation of Colorado's ban on anti-discrimination protections for gay people, the court added that "a classification . . . cannot be maintained merely 'for its own sake.'"²² American constitutional history reinforces the point. The legacy of discriminatory rules based on race, sex, and other characteristics would have made invalidation of those distinctions more difficult, if not impossible, were history and tradition sufficient responses to equal protection challenges.²³

Still, states defending themselves in marriage litigation continue to advance past practices to justify ongoing discrimination. As Connecticut argued in defending its limitation of marriage to different-sex couples,

[i]t is entirely rational for the legislature to retain the term 'marriage' to describe the union of one man and one woman because that is the definition of marriage that has always existed in Connecticut throughout its history and continues to represent the common understanding of marriage in almost all states in the country.²⁴

New Jersey defended its marriage law in a similar way, "rest[ing] its case on age-old traditions, beliefs, and laws, which have defined the essential

²⁰ See *Romer v. Evans*, 517 U.S. 620, 633 (1996) ("By requiring that the classification bear a rational relationship to an *independent* and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.") (emphasis added).

²¹ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 478 (Conn. 2008).

²² *Id.* (citing *Romer*, 517 U.S. at 635). Chief Judge Kaye, dissenting from the New York state high court's validation of that state's marriage law, similarly observed that "[b]ecause the 'tradition' of excluding gay [persons] from civil marriage is no different from the classification itself, the exclusion cannot be justified on the basis of 'history.' Indeed, the justification of 'tradition' does not explain the classification; it merely repeats it." *Hernandez v. Robles*, 855 N.E.2d 1, 33 (N.Y. 2006) (Kaye, C.J., dissenting); see also *Varnum v. Brien*, 763 N.W.2d 862, 898 (Iowa 2009) ("A specific tradition sought to be maintained cannot be an important government objective . . . when the tradition is nothing more than the historical classification currently expressed in the statute being challenged."); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 972–73 (Mass. 2003) (Greaney, J., concurring) ("To define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question [at issue in the equal protection inquiry].").

²³ See generally Goldberg, *Equality*, *supra* note 16, at 497–515 (reviewing numerous classifications invalidated under the Fourteenth Amendment's Equal Protection Clause).

²⁴ Brief of Defendant-Appellees with Appendix at 54, *Kerrigan*, 957 A.2d 407 (No. 17716); see also *id.* at 56 ("Given Connecticut's long-held understanding of marriage as the union of one man and one woman, which is consistent with the definition of marriage in every other state in the nation except Massachusetts, it simply cannot be deemed 'irrational' for the legislature, while electing to extend new rights to same-sex relationships, to have chosen to describe such relationships using a term other than 'marriage.'").

nature of marriage to be the union of a man and a woman.”²⁵ According to that state, this “long-held historical view of marriage . . . provides a sufficient basis to uphold the constitutionality of the marriage statutes.”²⁶ California likewise advanced the argument that the marriage restriction could not be invalidated by the state’s courts “because the institution of marriage traditionally (both in California and throughout most of the world) has been limited to a union between a man and a woman.”²⁷

Judges have also, at times, accepted history and tradition as rationales for states’ exclusion of same-sex couples from marriage, notwithstanding doctrinal admonitions to the contrary.²⁸ For example, although a majority of the Connecticut Supreme Court declined to accept the state’s history and tradition justifications, the lead dissenting opinion invoked marriage’s ancient history as a reason to castigate the court’s marriage equality ruling. Declaring marriage “the product of a state’s history, tradition, custom, widely shared expectations and law,” the dissent characterized the majority’s decision as “an extreme” and improper determination.²⁹

The New Jersey Supreme Court likewise latched on to history and tradition as *the* reason the state could not be barred from reserving marriage to different-sex couples. The court criticized the dissenters in that case, who would have ordered full marriage equality, for “substitut[ing] their judicial definition of marriage for the statutory definition, for the definition that has reigned for centuries, for the definition that is accepted in forty-nine states and in the vast majority of countries in the world.”³⁰

²⁵ *Lewis v. Harris*, 908 A.2d 196, 206 (N.J. 2006).

²⁶ *Id.*

²⁷ *In re Marriage Cases*, 183 P.3d 384, 447–48 (Cal. 2008).

²⁸ In California, for example, the majority observed the well-settled state constitutional doctrine holding that “[t]radition alone, however, generally has not been viewed as a sufficient justification for perpetuating, without examination, the restriction or denial of a fundamental constitutional right.” *Id.* at 427. The dissenters, by contrast, embraced the position that “the state has a legitimate interest in enforcing the express legislative and popular will that the traditional definition of marriage be preserved.” *Id.* at 464 (Baxter, J., concurring and dissenting); *see also id.* at 469 (Corrigan, J., concurring and dissenting) (“The people are entitled to preserve this traditional understanding in the terminology of the law, recognizing that same-sex and opposite-sex unions are different.”) (emphasis added).

²⁹ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 505 (Conn. 2008) (Borden, J., dissenting); *see also Hernandez v. Robles*, 855 N.E.2d 1, 8 (N.Y. 2006) (supporting its decision to sustain the different-sex marriage law by emphasizing that, until relatively recently, “it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex”).

³⁰ *Lewis*, 908 A.2d at 222. The court added:

We cannot escape the reality that the shared societal meaning of marriage—passed down through the common law into our statutory law—has always been the union of a man and a woman. To alter that meaning would render a profound change in the public consciousness of a social institution of ancient origin.

Id. The California appellate court which sustained the exclusion of same-sex couples from marriage likewise concluded that it was “rational for the Legislature to preserve the opposite-sex definition of marriage, which has existed throughout history and which continues to represent the common

Further, Justice O'Connor, in her concurrence in *Lawrence v. Texas*, cited tradition as a permissible rationale for reserving marriage only to different-sex couples. Contrasting the rejection of tradition as a justification for the Texas sodomy statute invalidated in *Lawrence*, O'Connor wrote that "preserving the traditional institution" would be a legitimate basis for sustaining the exclusion of same-sex couples from marriage.³¹

Given their weak doctrinal footing,³² history and tradition rationales must be doing some other work in the contemporary marriage cases³³ to be taken as seriously as they have been. My interest here is in illuminating this work. My aim, as well, is to call the rationales more deeply into question and to suggest several broader concerns about the use of history and tradition, and the related use of incrementalism, as independent justifications for government action even outside the marriage context.

I proceed by identifying in Part II the set of reasons why states might advance history and tradition as rationales and why judges might accept them despite their inadequacy as legal arguments. The third Part exposes how the "not our fault" premise operates within the invocations of history and tradition in the marriage/civil union context. In Part IV, I develop the constitutional implications of the state's monopolistic control over access to marriage even given the role of private sentiment in creating and preserving marriage's unique social value. The fifth Part examines the flaws of the related incrementalism rationale, and a brief conclusion follows.

II. ON THE APPEAL OF HISTORY AND TRADITION AS RATIONALES

One might plausibly argue that the reason governments invoke history and tradition in the context of marriage litigation has less to do with constitutional doctrine than just suggested. Instead, it is quite possible, indeed likely in some instances, that the rationale's use is the product of a political calculation by state officials who want to avoid expressing dislike or disapproval of gay and lesbian couples but need, by virtue of their

understanding of marriage in most other countries and states of our union." *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 720 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008).

³¹ *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring). She did not explain why the marriage rule escaped the Court's admonitions about the limitations of history in other contexts.

³² See *supra* notes 14–23 and accompanying text.

³³ An earlier set of cases brought during the 1970s and 1980s, in which litigants universally lost their challenges to the exclusion of same-sex couples from marriage, are likely best explained by socio-cultural factors and the political and legal opportunity structures that more generally shaped the treatment of gay rights claims at that time. See Goldberg, *Justice for All?*, *supra* note 11, at 34–35 (reviewing early marriage litigation in the U.S.); see also ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS & INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2006) (tracing gay rights litigation pursued by the Lambda Legal Defense and Education Fund).

institutional role, to defend the state law.³⁴ By avoiding the “heterosexual preference” argument, which is the other leading explanation for the distinction between same- and different-sex couples,³⁵ officials can arguably elide accusations of bias and minimize the offense taken by their lesbian, gay and allied constituents. Connecticut’s express disavowal of the position that “the preservation of marriage as a heterosexual institution is in the best interests of children, or that prohibiting same sex couples from marrying promotes responsible heterosexual procreation,”³⁶ might be explained in this way.³⁷

Alternately, the proffer of history and tradition might flow from concerns that a state’s credibility will be diminished if it takes a “heterosexual-preference” position in marriage when it rejects that position elsewhere in its law and policy. In particular, if the state’s courts do not treat sexual orientation as a relevant factor in custody determinations, and if the state permits lesbians and gay men to foster and adopt children on equal footing with non-gay adults, there is no plausible ground for asserting a preference for heterosexual parents as a matter of state policy.³⁸

³⁴ Although a state could conceivably agree with the litigants’ challenges and leave other interested parties to defend the distinction, this has not occurred in any marriage litigation (or in any gay rights litigation that I have found in which the state has been named a defendant) and is not likely to occur given the political risks state officials would almost surely face for a refusal to defend a state law. This would be particularly true, it seems, where the state is charged with defending a measure passed by voter initiative, which was the case in California. *In re Marriage Cases*, 183 P.3d 384, 402–03 (Cal. 2008). Still, states can limit, and some have limited, the arguments they are willing to make to defend their marriage laws, and, in a number of cases, amici have advanced the child protection argument where the state has specifically disclaimed a preference for heterosexual parents. *Compare*, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 477–78 (Conn. 2008) (noting that the state had disavowed any claim that the exclusion of same-sex couples from marriage was “motivated by” an interest in children having heterosexual parents or in promoting procreation by heterosexuals), *with* Brief of Family Research Council as Amicus Curiae at 11, *Kerrigan*, 957 A.2d 407 (No. 17716) (“[T]he promotion of responsible procreation . . . is an important and central interest served by marriage laws to encourage the optimal environment for rearing the resulting children.”), *and* Brief Amicus Curiae of United Families Conn. in Support of Defendants-Appellees at 7–8, *Kerrigan*, 957 A.2d 407 (No. 17716) (arguing that the institution of marriage is fundamentally focused on child-rearing and that heterosexuals are better suited than gay and lesbian adults for that responsibility).

³⁵ See *supra* notes 3, 7, and accompanying text.

³⁶ *Kerrigan*, 957 A.2d at 477–78.

³⁷ See also *In re Marriage Cases*, 183 P.3d 384, 428 (Cal. 2008) (“This state’s current policies and conduct regarding homosexuality recognize that . . . gay individuals are fully capable of entering into the kind of loving and enduring committed relationships that may serve as the foundation of a family and of responsibly caring for and raising children.”); *Lewis v. Harris*, 908 A.2d 196, 205–06 (N.J. 2006) (“The State concedes that state law and policy do not support the argument that limiting marriage to heterosexual couples is necessary for either procreative purposes or providing the optimal environment for raising children.”).

³⁸ Yet this point did not stop New York’s highest court from embracing the child-welfare rationale to justify the exclusion of same-sex couples from marriage. The majority explained that “[a] person’s preference for the sort of sexual activity that cannot lead to the birth of children is relevant to the [s]tate’s interest in fostering relationships that will serve children best.” *Hernandez v. Robles*, 855 N.E.2d 1, 11 (N.Y. 2006); see also *id.* at 7 (“The Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father. Intuition and experience suggest that a child benefits from having before his or her eyes, every day, living models of

Yet another possibility is that states invoke history and tradition not out of solicitude for their gay and lesbian constituents or out of an interest in political consistency but instead out of a strategic decision to mask their disapproval of or hostility toward homosexuality or same-sex couples. As Justice Scalia asserted, in response to Justice O'Connor's embrace of the tradition rationale in *Lawrence*, "'preserving the traditional institution of marriage' is just a kinder way of describing the State's *moral disapproval* of same-sex couples."³⁹

Still another explanation for the history and tradition proffer might be an underlying commitment to a Burkean-style incrementalism, with the view that the risks associated with sharply altering tradition may outweigh the benefits of change.⁴⁰ One version of this argument would cite the dangers associated with casting off the wisdom of the ages in favor of the unknown, and take the position that change ought to occur slowly and incrementally to minimize the risk of error and unnecessary loss of past value.⁴¹ A second version would acknowledge the different-sex marriage rule as arbitrary but seek to preserve it nonetheless because it had become, over time, organic to and constitutive of the political community. On this view, the current rule's undoing, even in the name of equality, could endanger the polity because of our long-term collective reliance on the rule as an important, if not foundational, socio-political organizing premise.⁴²

Although courts grapple with a set of institutional legitimacy concerns different from that of legislators, the history and tradition rationale might also be accepted in the adjudication context for reasons similar to those just discussed. Judges are less likely to be accused of acting on personal biases if they embrace a neutral-sounding rationale like history and tradition than if they declare the legitimacy of the legislature's belief that heterosexuals are better at parenting than gay people. And judges in jurisdictions that have disavowed distinctions based on sexual orientation in other contexts

what both a man and a woman are like." *But see id.* at 32 (stating that "such a preference would be contrary to the stated public policy of New York, and therefore irrational") (Kaye, C.J., dissenting).

³⁹ *Lawrence v. Texas*, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting).

⁴⁰ *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 259 (J.C.D. Clark ed., Stanford Univ. Press 2001) ("By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other."); *see also* Cass Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (explaining that "Burkeans insist on incrementalism; but they also emphasize the need for judges to pay careful heed to established traditions"). Even here, however, there is a strong argument that permitting same-sex couples to marry is the next reasonable incremental step in the evolution of marriage over time. *See* Goldberg, *Historical Guide*, *supra* note 9.

⁴¹ This approach could also be aimed strategically to pick up some of the presumptive valuing of tradition expressed within due process doctrine. *See supra* notes 17–18 and accompanying text.

⁴² Of course, if Burkean incrementalism and these related arguments were to become an accepted constitutional justification in response to equal protection challenges, they would have the same potential as the history and tradition rationales to justify virtually all governmental classifications, but more on that below.

may find it difficult to embrace an explicit preference for heterosexual parents where no such preference exists elsewhere in state law.⁴³

III. THE “NOT OUR FAULT” ARGUMENT AT WORK

Although all of these factors likely contribute to the sustained attention the history and tradition rationales have received in the marriage/civil union setting, my claim here is that their traction derives not only from their political or adjudicative expedience but also from their implicit distinction between social value (i.e. the value that arises from historical pedigree and traditional status) and state responsibility. This Part will illuminate that distinction; in the next Part, I will show the distinction’s flaws.

The history and tradition rationales start from the premise that marriage has special value relative to civil unions. They recognize, too, that different-sex couples are the exclusive beneficiaries of that value under current marriage rules. After all, absent any difference in value between civil unions and marriage, no explanation for the different treatment would be needed because, arguably, the government would have not drawn a classification warranting scrutiny. Along these lines, the *Kerrigan* majority specifically rejected the state trial court’s determination that no cognizable harm arose from the difference between the two statuses and that, therefore, the state did not need to justify the distinction.⁴⁴ Instead, the court described marriage as holding an “exalted status” and civil unions as “new and unfamiliar.”⁴⁵ The *Kerrigan* dissenters also recognized that the two statuses were different “in the public consciousness,”⁴⁶ even while arguing that the difference should be sustained as a constitutional matter. The lead dissent, for example, explicitly characterized civil unions as “an important step in th[e] process” toward marriage, thereby acknowledging the lack of equivalence between the two statuses.⁴⁷

⁴³ Some judges have not found this to be an insurmountable hurdle, as noted earlier. *See supra* note 38; *see also Hernandez*, 855 N.E.2d at 8 (accepting the “commonsense premise that children will do best with a mother and father in the home,” even though state statutory and case law specifically forbade treating sexual orientation as a negative factor in parenting determinations).

⁴⁴ *See Kerrigan v. State*, 909 A.2d 89, 90 (Conn. Super. Ct. 2006) (finding that “the plaintiffs have failed to prove that they have suffered any legal harm that rises to constitutional magnitude”).

⁴⁵ *Kerrigan v. Comm’r of Public Health*, 957 A.2d 407, 416–18 (Conn. 2008).

⁴⁶ *Id.* at 505 (Borden, J., dissenting) (quoting *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006)).

⁴⁷ *Id.* at 514. Interestingly, at one point the same dissenter questioned whether civil unions were actually less socially valuable than marriage. *See id.* at 486 (“In short, the state of social flux in this entire realm is simply too new and too untested for four members of this court to declare as an established social fact that civil unions are of lesser status than marriage in our state.”). *But see id.* at 419 n.16 (majority opinion) (responding to this argument by observing that “[w]e do not see how the recently created legal entity of civil union possibly can embody the same status as an institution of such long-standing and overriding societal importance as marriage”); *see also id.* at 417 n.14 (“Any married couple [reasonably] would feel that they had lost something precious and irreplaceable if the

In the usual constitutional analysis, the next step would be to identify a difference between same-sex and different-sex couples that could justify this uneven distribution of a valued status. Instead of following this course, however, the history and tradition rationales reframe the equal protection inquiry. *They concede the distinction but maintain that society, rather than the state, is responsible for the special value of marriage relative to civil unions. As a result, the argument goes, the disparate allocation of this value lies outside the state's control (and therefore outside the state's responsibility).*⁴⁸ As one of the *Kerrigan* dissenting opinions stated, “[m]arriage is more than a relationship sanctioned by our laws.”⁴⁹ “It is,” the opinion continued, “a fundamental and ancient social institution that has existed in our state from before its founding and throughout the world for millennia.”⁵⁰

The following step in the argument turns responsibility for addressing the inequity in social value to the discretion of the legislature: *If the difference in value between marriage and civil unions is not the state's doing, because marriage predates and outsizes the state, then its undoing, rather than being constitutionally mandated, is handled most appropriately by the legislature as a political determination.* “In this way,” the *Kerrigan* dissenters argued, “a fundamental *social* institution . . . is [not] changed by the decision of judges,” who are not accountable to social values in the same ways as legislators.⁵¹ “Whether an issue with such far-reaching social implications as how to define marriage falls within the judicial or democratic realm, to many, is debatable,”⁵² Judge Borden wrote in his dissenting opinion, expressing a strong preference for any alteration of marriage's scope to occur instead “by a natural process of social change”

government were to tell them that they no longer were “married” and instead were in a “civil union.” The sense of being “married”—what this conveys to a couple and their community, and the security of having others clearly understand the fact of their marriage and all it signifies—would be taken from them. These losses are part of what same sex couples are denied when government assigns them a “civil union” status. If the tables were turned, very few heterosexuals would countenance being told that they could enter only civil unions and that marriage is reserved for lesbian and gay couples.” (quoting Brief of Amicus Curiae Lambda Legal Def. & Educ. Fund, Inc. at 5, *Kerrigan*, 957 A.2d 407 (No. 17716)).

⁴⁸ When invoked by a court, rather than by the state, the history and tradition rationales could also be read to mean that the current court feels constrained not to upend previous courts' and legislatures' embrace of the longstanding rules regarding marriage. This sense of constraint could, in turn, stem from concerns with legitimacy, reliance interests, or a commitment to Burkean-style incrementalism of the sort discussed *supra* note 40 and *infra* Part IV.

⁴⁹ *Kerrigan*, 957 A.2d at 503 (Borden, J., dissenting). The California Court of Appeal made a similar point in sustaining the exclusion of same-sex couples from marriage, stating that “[m]arriage is more than a ‘law,’ of course; it is a social institution of profound significance to the citizens of this state, many of whom have expressed strong resistance to the idea of changing its historically opposite-sex nature.” *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 723 (Cal. Ct. App. 2006), *rev'd*, 183 P.3d 384 (Cal. 2008).

⁵⁰ *Kerrigan*, 957 A.2d at 503.

⁵¹ *Id.* at 505 (emphasis added).

⁵² *Id.* (quoting *Lewis v. Harris*, 908 A.2d 196, 222 (N.J. 2006)).

or with “the general support . . . of the people” through their elected representatives.⁵³

The State of California made this “not our fault” argument even more explicitly than did Connecticut. In its brief to the state’s highest court, California maintained that the state law did all it could or needed to do by providing domestic partnership to same-sex couples even while maintaining marriage for different-sex couples. “To the extent that it derives from California law,” the state wrote, “there is no right, benefit, privilege, or responsibility that can be accomplished by a marriage contract that cannot be accomplished by a domestic partnership.”⁵⁴ Consequently, the state argued, same-sex couples suffered no constitutional deprivation as a result of the state’s provision of domestic partnership to them and marriage to different-sex couples.

IV. MARRIAGE AS MONOPOLY

The chief problem with the distinction between state and societal responsibility is that it blinks reality. Although the decision whether to marry is left largely to private ordering, marriage itself is not. A web of laws in each state governs who may marry and the conditions under which a marriage may be civilly sanctified.

As a result of these and related rules, only those authorized by the state can access “marriage” and, therefore, marriage’s socially valuable connotations. Put another way, the state exercises monopoly authority over the entry into, incidents of, and dissolution of civil marriage. As gatekeeper, the state has full control over this value. This is true regardless of whether the value itself is created by the state, by society, or, more realistically, by some combination of the two.

This monopolistic control over the good of marriage means, in turn, that the state cannot avoid constitutional liability on the ground that non-state parties contributed to the good’s value.⁵⁵ By way of analogy,

⁵³ *Id.* at 504–05.

⁵⁴ Answer Brief of State of California and the Attorney General to Opening Briefs on the Merits at 62, *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (No. S147999); *see also id.* at 469 (Corrigan, J., concurring and dissenting) (declaring that the state can have different designations for same- and different-sex couples but “[w]hat they are not entitled to do is *treat* them differently under the law”); *Lewis*, 908 A.2d at 221–22 (“Because this State has no experience with a civil union construct that provides equal rights and benefits to same-sex couples, we will not speculate that identical schemes called by different names would create a distinction that would offend [the N.J. Constitution]. We will not presume that a difference in name alone is of constitutional magnitude.”); Brief of Defendant-Appellees with Appendix at 14, *Kerrigan*, 957 A.2d 407 (No. 17716) (“[A] difference in name alone between the State’s identical statutory schemes for marriage and civil unions is simply not differing treatment of constitutional magnitude.”).

⁵⁵ This is different, of course, from a situation in which the state heavily regulates a *private* monopoly, such as a public utility. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974). As the Court explained in *Jackson*, “The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment.” *Id.* at 350.

consider a state's shoreline or lake front. The state surely could not justify separating access for same-sex and different-sex couples, or drawing other similar lines between other social groups, on the ground that it was not fully, or even largely, responsible for the shoreline's or lake front's value.

To be clear, the point is not that gay and lesbian couples—or any social group, for that matter—have a constitutional right to a particular social value, just as neither women nor men have a right to the social benefits derived from attending a military training institute⁵⁶ and neither blacks nor whites have a right to the value of a particular law school education.⁵⁷ But when the state wholly controls a status or institution that confers these types of benefits, it cannot disclaim responsibility for disparate access to the higher-valued good merely because society played a role in generating that value.

While there are many other contexts in which courts are asked to determine whether certain acts fall more on the public, and thus constitutionally regulable, or private side of the line, two have particular resonance here, and both reinforce the point that the state's monopolistic authority renders the “not our fault” defense insufficient to immunize government from liability.

Arguably the closest analogues are cases in which governments have been accused of impermissibly fostering private biases. The marriage cases are different, of course, in that those challenging their exclusion from marriage seek access to a status that is privately valued⁵⁸ rather than protection from private hostility. But in both contexts, the fundamental question is whether the state can sidestep its equal treatment obligation on the ground that the sentiment at issue, whether good or bad, resides in private actors, rather than the state.⁵⁹

See also id. (stating that “the fact that the regulation is extensive and detailed” does not justify subjecting a private monopolist to rules governing state action). *But cf.* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001) (recognizing state action where a nominally private entity has “pervasive entwinement” with the state).

⁵⁶ *Cf.* *United States v. Virginia*, 518 U.S. 515, 557 (1996) (“Women seeking and fit for a [Virginia Military Institute]-quality education cannot be offered anything less, under [Virginia's] obligation to afford them genuinely equal protection.”).

⁵⁷ *Sweatt v. Painter*, 339 U.S. 629, 635 (1950) (“[P]etitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races.”); *see also Marriage Cases*, 183 P.3d at 445 (finding that plaintiffs “persuasively invoke [*Sweatt*] by analogy”).

⁵⁸ The good is characterized as private here only for purposes of developing this argument. As suggested earlier, marriage can be more accurately characterized as having a value created by a mix of public and private support.

⁵⁹ To be sure, this question is a complicated one, particularly regarding official acts that may have negative consequences for a particular social group but are neutral on their face. Closure of public swimming pools, *see Palmer v. Thompson*, 403 U.S. 217, 227 (1971), and a measure making it more difficult for the state to build low-income public housing, *see James v. Valtierra*, 402 U.S. 137, 142-3 (1971), for example, were both sustained by the Court against accusations that the government was involved in effectuating private racial hostility. But the crux of the swimming pool case was that the government had closed all pools equally and that no evidence showed government involvement when the pools reopened with racially segregated access rules. *Palmer*, 403 U.S. at 222 (“[T]here is nothing

In *Shelton v. Tucker*, for example, the Court recognized that constitutional harm can arise when a state imposes rules that, while neutral on their face, expose individuals associated with minority groups or positions to privately-generated harms.⁶⁰ In the course of invalidating an Arkansas law requiring teachers to declare their organizational memberships, the Court observed “that fear of public disclosure [wa]s neither theoretical or groundless” for members of “unpopular or minority organizations.”⁶¹ The broad disclosure rule infringed associational rights precisely because of the “constant and heavy” pressure that teachers would face “to avoid any ties” that might run counter to prevailing sentiment.⁶²

Similarly, in *Palmore v. Sidoti*, the Court considered the relationship between privately held sentiments about race and the government’s constitutional obligations. In that case, a white father sought to alter his custody agreement with the child’s mother on the grounds that the mother, who was white, was romantically involved with an African-American man.⁶³ The plaintiff expressed concerns about the prejudice the child might face as a result of the mother’s relationship. The Court, in a holding cited widely in marriage cases,⁶⁴ rejected the father’s claim, holding that “the law cannot, directly or indirectly, give” effect to private bias.⁶⁵

Although the Court’s observations in these cases focus on private prejudice, the crucial point is that a state does not shield itself from constitutional accountability on the ground that the regulated individuals are exposed to and affected by attitudes or views of private, rather than public, actors. Yet this is precisely the move that the history and tradition rationales make; their very purpose is to suggest that marriage’s special value lies outside the state’s control and that the state, therefore, in exposing couples to this privately-generated differential valuation, is not bound by ordinary equal treatment obligations. *Palmore* makes clear, however, that by controlling a legal status in a way that gives effect to private sentiment, the state implicates itself and constitutional restrictions

here to show the city is directly or indirectly involved in the funding or operation of either pool.”) And the low-income housing referendum’s validity turned on the measure’s race-neutral terms and the absence of record evidence showing that the measure was “in fact aimed at a racial minority.” *Valtierra*, 402 U.S. at 141. In both cases, in other words, there was state action but no impermissible distinction. Moreover, in *Palmore v. Sidoti*, 466 U.S. 429 (1984), the Court cited with approval Justice White’s dissenting observation in *Palmer* that “Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.” *Id.* at 433 (quoting *Palmer*, 403 U.S. at 260–61 (1971) (White, J., dissenting)).

⁶⁰ *Shelton v. Tucker*, 364 U.S. 479 (1960).

⁶¹ *Id.* at 486–87.

⁶² *Id.* at 486.

⁶³ *Palmore*, 466 U.S. 429.

⁶⁴ See, e.g., *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 479 (Conn. 2008); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003).

⁶⁵ *Id.* at 433.

will apply.

The public-function doctrine similarly helps illuminate the relationship between state action and privately created value. The doctrine provides, essentially, that private actors may be subject to constitutional limitations when carrying out public functions. This rule, in turn, requires courts to determine the conditions under which private acts should be treated as though they were public.⁶⁶ For purposes here, the doctrine's critical insight is that the private takeover of the government function must be *exclusive*, meaning that individuals must go to the private actor to obtain what they ordinarily would seek from government.⁶⁷

Governments' use of the history and tradition rationales to justify the marriage/civil union distinction implicates similar concerns, albeit from the flipside position. Rather than casting themselves as private actors, the governments invoking these rationales argue that they are distinct from the private actors that have added to marriage's value. If private actors—rather than the government—have made it so that marriage has more value than civil unions, the argument goes, government should not be limited in its legislative authority to draw that distinction.

But, as the public function doctrine makes clear, when one entity has exclusive control over a good that has both public and private dimensions, we have more cause to be concerned than when there are multiple access points to the good, some public and some private. In our setting, there is no hurdle to proving government action in a conventional sense, of course, as is ordinarily at issue in the public function cases. Instead, the work of the tradition and history arguments is to distance the government from the arguably private function of according marriage its special value. Drawing from the public function doctrine's focus on control, however, we can see that because the government exercises direct, monopolistic control over marriage access, the public/private distinction advanced by the tradition and history rationales fall short.

Some might object that the state's level of control with regard to the value of marriage is overstated here. After all, plenty of same-sex couples call themselves married after entering civil unions or domestic partnerships. And well before civil union and domestic partnership even existed as legal frameworks, same-sex couples pronounced themselves married, often privately but sometimes socially as well.⁶⁸

⁶⁶ *Cf. Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 159 (1978) (“The question is, Under what circumstances can private property be treated as though it were public? The answer . . . is when that property has taken on *all* the attributes of a town.”) (quoting *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 332 (1968) (Black, J., dissenting)).

⁶⁷ *See Flagg*, 436 U.S. at 158–63.

⁶⁸ Couples who call themselves married among friends are often selective about how they characterize their relationship to others. *Cf. Shahar v. Bowers*, 114 F.3d 1097, 1100–01 (11th Cir. 1997) (en banc) (observing that lesbian plaintiff who was to marry her partner in a religious ceremony

Most obviously, though, when same-sex couples hold themselves out as married in a state that forbids them from marrying, they do not access all of the connotations of marriage afforded to same-sex couples, even if they obtain some of them. To be sure, their friends and family may treat them as (and call them) married. But these couples face an array of challenges when they bear the legal label of civil union or domestic partnership, regardless of the self-assigned, social label they choose.⁶⁹ In short, however individuals work with (or around) the law that governs their lives, the state ultimately controls the formal titling of the relationship, which, in turn, shapes many—if not all—of the third-party consequences that flow from that naming.

This brings us to what is perhaps the most fatal of the flaws associated with the marriage/civil union distinction, which I address briefly here to lay the groundwork for the next Part's consideration of the incrementalism argument. By declaring that same- and different-sex couples are equal in the eyes of the state for purposes of all civil rights and benefits, but creating a distinct bureaucracy and status for administering those rights and benefits, the state is unavoidably signaling a difference between the two types of couples.

Further, because the status assigned to different-sex couples has high social value, as per the history and tradition rationales, and the status assigned to same-sex couples has questionable social value precisely because of its lack of history and tradition, the difference reflects negatively on same-sex couples. As the Connecticut Supreme Court observed, “[a]lthough marriage and civil unions do embody the same legal rights under our law, they are by no means ‘equal.’”⁷⁰ Instead, “the former is an institution of transcendent historical, cultural and social significance, whereas the latter most surely is not.”⁷¹ “Ultimately,” the court added, “the message is that what same-sex couples have is not as important or as significant as ‘real’ marriage, that such lesser relationships cannot have the name of marriage.”⁷²

indicated her marital status on job application as “engaged” and listed her partner under relatives as her “future spouse”).

⁶⁹ See, e.g., N.J. CIVIL UNION REVIEW COMM'N, FIRST INTERIM REPORT OF THE NEW JERSEY CIVIL UNION REVIEW COMMISSION 6–18 (2008), available at <http://www.nj.gov/oag/dcr/downloads/1st-InterimReport-CURC.pdf> (identifying wide-ranging problems experienced by same-sex couples as a result of having a civil union rather than a civil marriage).

⁷⁰ *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 418 (Conn. 2008).

⁷¹ *Id.*

⁷² *Id.* at 417 (quoting *Lewis v. Harris*, 908 A.2d 196, 226–27 (N.J. 2006) (Poritz, C.J., concurring and dissenting)); see also *In re Marriage Cases*, 183 P.3d 384, 446 (Cal. 2008) (“While it is true that this circumstance may change over time, it is difficult to deny that the unfamiliarity of the term ‘domestic partnership’ is likely, for a considerable period of time, to pose significant difficulties and complications for same-sex couples, and perhaps most poignantly for their children, that would not be presented if, like opposite-sex couples, same-sex couples were permitted access to the established and well-understood family relationship of marriage.”).

Taking this difference between the statuses together with the state's claim that it values same- and different-sex couples equally, the only plausible explanation for the different marriage rules and their differential allocation of status can be hostility, discomfort, or, perhaps, pure arbitrariness. On this point, the law is well settled. None of these is a legitimate basis for government action.⁷³

And this, in turn, brings us back to the work of the history and tradition rationales. Because the state cannot claim to be acting arbitrarily or with hostility toward same-sex couples, history and tradition sound, by contrast, like permissible explanations for the line-drawing. Yet, for the reasons we have seen, they cannot legitimately do that work.

V. ON THE FLAWS OF INCREMENTALISM

Finally, the incrementalism rationale, which suggests that states can continue to discriminate so long as they are in the process of addressing a "social problem," grows directly out of the history and tradition rationales. Not surprisingly, it suffers related flaws. The rationale, as expressed by the lead dissenter in *Kerrigan*, would allow the marriage/civil union distinction because "[i]t is entirely rational for the legislature to address the issue of gay marriage step-by-step, rather than all at once."⁷⁴

Incrementalism itself is not an unusual rationale in rational-basis equal protection review. Courts regularly declare that legislatures are "entitled to take things one step at a time."⁷⁵ As the *Kerrigan* dissenters put the point, "[t]he paradigm of a rational basis upon which challenged legislation may

⁷³ See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996) (invalidating state constitutional amendment which "seems inexplicable by anything but animus toward the class it affects; [and thus] lacks a rational relationship to legitimate state interests" (emphasis added)); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) ("The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded . . ."); *O'Brien v. Skinner*, 414 U.S. 524, 530-31 (1974) (finding New York statutes prohibiting pretrial detainees and misdemeanants from voting "wholly arbitrary," leaving the court "no choice, therefore, but to hold that, as construed, the New York statutes deny appellants the equal protection of the laws guaranteed by the Fourteenth Amendment"); *U.S. Dept. of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); *Lake Shore & Mich. S. Ry. Co. v. Clough*, 242 U.S. 375, 385 (1917) (noting that when a state court construes and applies a state law based on arbitrary distinctions, there is a denial of equal protection.).

⁷⁴ *Kerrigan*, 957 A.2d at 514 (Borden, J., dissenting); cf. *Marriage Cases*, 183 P.3d at 471 (Corrigan, J., concurring and dissenting) ("Democracy is never more tested than when its citizens honestly disagree, based on deeply held beliefs. In such circumstances, the legislative process should be given leeway to work out the differences.").

⁷⁵ *Kerrigan*, 957 A.2d at 514; see also *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 489 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. . . . [T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 610 (1935) (observing that the state need not "strike at all evils at the same time or in the same way").

be sustained is that the legislature is not required to solve all aspects of a social problem . . . at once.”⁷⁶ A California dissenter likewise wrote, “[i]n a democracy, the people should be given a fair chance to set the pace of change without judicial interference.”⁷⁷

True enough, but the incrementalism argument is, again, a description of, not a justification for, government action. Here, it describes the state’s decision to equalize rights and benefits for different- and same-sex couples but not to equalize status. It does not explain *why* the state has chosen to proceed in this way and to allocate social value to one set of couples but not the other.⁷⁸

Thus, there must be another explanation suffusing this gap between description and explanation if we are to treat incrementalism as a meaningful rationale. The dissent in *Kerrigan* offered a detailed description of the legislature’s step-by-step improvements in treatment of same-sex couples, perhaps in an effort to fill out the argument.⁷⁹ But this chronology, while illustrating the legislature’s tilt toward equality, still does not explain why the inequalities can continue consistent with the equal protection guarantee.

This is where arguments from history and tradition seep back in by implication. The incrementalist rationale, at least as framed in the marriage cases, makes sense only by reference to changes over time. Embedded in the argument that the state can move incrementally to redress inequality is a claim that because the state has gone some way to rectify past inequities, it should be excused, in effect, from having to rectify those inequities fully. The acceptance of incrementalism, as such, suggests as well that the state need not even justify its choice of a stopping point in remedying past problems other than by citing how far it has moved from past practice.

This, in turn, returns us to the basic constitutional doctrine discussed at the outset of this Article. Since history and tradition cannot justify the continuation of past discriminatory practices into the future, it cannot be that those same arguments become viable so long as the state has taken a partial remedial step. Indeed, the incrementalist rationale is arguably even weaker than the history and tradition rationales discussed above, in that the argument itself concedes both the existence of a past problem and the

⁷⁶ *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 514 (Conn. 2008).

⁷⁷ *Marriage Cases*, 183 P.3d at 471.

⁷⁸ See *Kerrigan*, 957 A.2d at 476 n.78 (majority opinion) (“[C]haracterizing the state’s interest in terms of changing the law incrementally is simply another way of asserting that the state currently has an interest in maintaining the status quo out of respect for tradition. We therefore see no need to treat this proffered reason separately from the state’s asserted interest in tradition.”).

⁷⁹ *Kerrigan*, 957 A.2d at 493–99 (Borden, J., dissenting).

state's failure to address that problem fully.⁸⁰

Although a full consideration of incrementalism as an equal protection rationale is beyond this Article's scope, two arguments in incrementalism's defense warrant brief discussion and rebuttal here. The first, more practical concern is that if incrementalism no longer suffices as a defense against equal protection claims, states may be less willing to take even partial steps toward equalizing the rights of subordinated groups. This concern may be exacerbated further if the incrementalist rationale is treated as not only insufficiently explanatory but also as amounting to a concession regarding the impermissibility of existing inequalities, as suggested above. If a state's "step-by-step" response amounts to a concession of constitutional violation, states may become even more risk averse than they currently are in redressing entrenched forms of discrimination.

The best, albeit partial, response to this concern is to concede it but then argue that the concern, while real, is also overrated. Although states may become more risk averse if the incrementalism rationale is no longer available, self-protective inaction will be viable only for as long as society is willing to tolerate the inequality at issue in its traditional, historical form. Presumably, even under current conditions, most elected officials take steps toward reforming past practices only when their political base demands change.⁸¹ At that point, even if full equalization is fraught with political difficulty, the alternative—inaction—may be equally fraught. The reframing accomplished by the removal of the incrementalism defense thus arguably, in the course of achieving a more coherent legal principle, also makes full equalization more likely. Put simply, if the only move available is toward full equality, pressure may mount to make that move rather than do nothing at all.

The second concern has deep institutional and doctrinal roots, bringing

⁸⁰ One might take the contrary position that a state should be considered to have met its constitutional obligation once it has done all it can do to approximate equal treatment for all group even if it has not provided perfect equality. *But cf.* *Tennessee v. Lane*, 541 U.S. 509, 520 n.3 (2004) (characterizing Congress's power under Section 5 of the Fourteenth Amendment as including the authority "to secure to all persons the enjoyment of *perfect equality* of civil rights" (emphasis added) (quoting *Ex Parte Virginia*, 100 U.S. 339, 345–46 (1879)). Perhaps the strongest argument in this regard would be in situations, as in California, where a state's high court or legislature mandated marriage equality but then voters, by initiative, reinstated a measure reserving marriage only for different-sex couples. *See, e.g.*, CAL. CONST. art. I, § 7.5 (2008) (reinstating different-sex marriage eligibility rule following the California Supreme Court's decision in *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) rejecting the exclusion of same-sex couples from marriage). Even still, it seems to me that while the state's efforts surely deserve political appreciation, the remaining unequal rules cannot be justified, as a constitutional matter, on the basis of the state's good faith.

⁸¹ Not all elected officials proceed so conservatively, even in this area. After San Francisco mayor Gavin Newsom declared that he would recognize same-sex couples' marriages, a series of local government officials in New Jersey, New Mexico, New York, and Oregon also stated that they would issue marriage licenses to same-sex couples. *See* Goldberg, *Justice for All?*, *supra* note 11, at 38. Still, inertia almost always presents fewer risks for elected officials than diversion from the status quo.

with it the spectre of *Lochner*.⁸² By telling states that they legislate incrementally at their peril, courts arguably exercise undue influence over the legislative process and risk undermining valuable separation-of-powers principles. More specifically, disallowing incrementalist lawmaking, according to this concern, would run the risk of courts overtaking the legislature's role in determining how best to address social problems and engender, in turn, a host of constitutional design and institutional competency difficulties.

Taking this argument further, not only would courts be pressured to reach outcomes well ahead of popular sentiment, contrary to apparent institutional preferences as reflected in current and historical practice, but these rulings might also pose heightened risks to judicial legitimacy, given courts' counter-majoritarian status.⁸³ From this standpoint, the argument follows that if the Supreme Court had found itself compelled to order fully equal treatment of African Americans and whites, or women and men, at the time the earliest challenges to inequalities began to meet with success, the resistance those decisions faced would have reached an even more pitched scale.⁸⁴

These are serious concerns, but I will attempt to meet them here in a basic way, leaving further development of these arguments for another forum. First, with respect to separation-of-powers principles, if we take seriously constitutional commands that require courts to evaluate government classifications to ensure equality, we should have little concern, at a theoretical level, that courts are fully enforcing those

⁸² *Lochner v. New York*, 198 U.S. 45, 64-65 (1905) (rejecting the state's use of its police power to restrict bakery employee working hours in the interests of public health). On the spectre of *Lochner* and related cases, see David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373, 375 (2003) (arguing that the *Lochner* Court erred in "mak[ing] freedom of contract a preeminent constitutional value that repeatedly prevails over legislation that, in the eyes of elected representatives, serves important social purposes"). For a collection of similar "traditional" critiques of *Lochner*, see David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 3, 4 n.14 (2003) (cataloguing *Lochner*-era and modern scholarship that argues that "the [*Lochner*] Court exceeded its legitimate judicial role"). For an alternate critique, see Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987) (arguing that the primary problem with *Lochner* was that the Court treated common law rules as "natural" rather than as a legal construct and then treated government action inconsistent with those rules as "unnatural" and illegitimate).

⁸³ On the ways in which courts restrain their decision-making to preserve their institutional legitimacy, see Suzanne B. Goldberg, *Constitutional Tipping Points: Civil Rights, Social Change, and Fact-Based Adjudication*, 106 COLUM. L. REV. 1955, 1960 n.8 (2006) [hereinafter Goldberg, *Tipping Points*] (citing sources addressing the ways in which courts "remain roughly within parameters acceptable to the surrounding society").

Even in state courts where judges are elected, the legitimacy concern could conceivably arise because judicial elections typically frame the role of the judge as responsive to, but not fully representative of, the views of voters. Cf. *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) ("Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency." (quoting *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964))), *aff'd*, 409 U.S. 1095 (1973) (per curiam).

⁸⁴ See *infra* note 95.

guarantees. Indeed, the judiciary's admission and embrace of partial enforcement should give us pause.⁸⁵

If this point is correct, then one might argue that the remaining concerns associated with rejecting the incrementalist rationale, while serious, are consequentialist and that the pragmatic concerns that underlie them ultimately should not prevail over our foundational, non-consequentialist commitment to equality.⁸⁶ Still, if the judiciary (and possibly legislative bodies) lose significant legitimacy in carrying out an absolutist commitment to equality, the flame of full equality may not be worth the candle of destroying the institutions empowered to secure and protect that equality.

Here, the best response may be to agree that, both in the marriage/civil union context and as a general matter, absolutist commitments to principle almost inevitably have unintended negative consequences. In this light, the guiding principle I offer here is one that would acknowledge the need for courts to make context-sensitive judgments about how best to limit those negative consequences but, at the same time, urge courts to remain more deliberately committed than they currently are to a non-consequentialist analysis of inequalities and a more skeptical view of incrementalist claims.

Of course, this proposed guiding principle begs a host of questions about the factors that should be taken into account in balancing between absolute commitments to equality and judicial legitimacy interests. Any move toward context-sensitivity triggers, as well, the challenges associated with the choice of standards over more definite rules and grants of discretion over detailed restrictions on power.⁸⁷ Endorsing flexible enforcement as a means of accommodating institutional legitimacy concerns arguably undermines the force of the non-consequentialist

⁸⁵ Courts that have invalidated the exclusion of same-sex couples from marriage have made this point. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 448 (Cal. 2008) (“[A] court has an *obligation* to enforce the limitations that the California Constitution imposes upon legislative measures, and a court would shirk the responsibility it owes to each member of the public were it to consider such statutory provisions to be insulated from judicial review.”) (emphasis added); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 481 (Conn. 2008) (“[W]e do not exceed our authority by mandating equal treatment for gay persons; in fact, any other action would be an abdication of our responsibility.”).

⁸⁶ Of course, the question of what the equality commitment actually requires is itself contested, as reflected in strong debates regarding the merits of formal and substantive approaches to equality as well as the meaning of equality more generally. See Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003) (discussing formal and antisubordination equality theories and their jurisprudential manifestations); Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1168 (1983) (advocating a framework that includes “substantive principles of equality”); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 280–81 (1983) (addressing the substantive effect that equality rhetoric has on legal rights and political culture); Kenneth W. Simons, *Equality as a Comparative Right*, 65 B.U. L. REV. 387, 389 (1985) (“A right to equal treatment is a *comparative* claim to receive a particular treatment just because another person or class receives it.”); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 596 (1982) (stating that equality “is an empty form having no substantive content”).

⁸⁷ For an extended analysis of the consequences of rules and standards formulations, see Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

argument against incrementalist rationales—that equality guarantees are rendered meaningless (or certainly less meaningful) if they are treated as contingent and sometimes only partial.

A second difficulty may be that the proposal ultimately endorses the arguably flawed approach courts currently take when they recognize an inequality but accept an incrementalist response as sufficient. Indeed, some of the extant marriage/civil union opinions could be described as already embodying this context-sensitive position when they find an equality violation but leave to the legislature whether to resolve the violation via marriage or civil union.⁸⁸ The New Jersey Supreme Court, for example, in deciding that the state could not deny marital rights and benefits to same-sex couples but deferring to the legislature on how best to remedy that violation, acknowledged the view of some that courts, not legislatures, should resolve the remedy question. “Nevertheless,” the majority wrote, “a court must discern not only the limits of its own authority, but also when to exercise forbearance, recognizing that the legitimacy of its decisions rests on reason, not power.”⁸⁹

Still, I would maintain that a paradigm arising from a commitment to full equality and an acceptance of incrementalist approaches as exceptional rather than as the normal course would be different, and better, than our current non-nuanced approach to incrementalist rationales in two important ways. First, states would not be able to prevail with an incrementalist rationale as a matter of right, as the *Kerrigan* dissent seemed to suggest. Instead, both states and courts would need to justify the deviation from the full equality norm. This would benefit the analysis by ensuring, at least to a greater degree than the current doctrine seems to require, that the incrementalist rationale would be recognized for what it is—a partial and incomplete move toward equality. Second, exposing the reasons for partial, rather than full, equality would arguably help ensure more reasoned deliberation before an incrementalist remedy is accepted.

As with virtually all efforts to tweak doctrine to force the exposure of otherwise undisclosed reasoning, this approach would not necessarily change outcomes, particularly among those courts inclined to sidestep the remedial question after finding that the absence of marriage rights infringes the equality of same-sex couples. Indeed, in the New Jersey example just

⁸⁸ This is also akin to the approach William Eskridge has described as the “jurisprudence of tolerance,” by which some forms of inequality are forbidden but “room remains for the state to signal the majority’s preference[s].” William N. Eskridge, Jr., *Lawrence’s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004). Eskridge developed this point in connection with *Lawrence v. Texas*, which he characterized as “mean[ing] that traditionalists can no longer deploy the state to hurt gay people or render them presumptive criminals, but room remains for the state to signal the majority’s preference for heterosexuality, marriage, and traditional family values.” *Id.*

⁸⁹ *Lewis v. Harris*, 908 A.2d 196, 223 (N.J. 2006).

discussed, the court did not find that the absence of marriage per se amounted to a violation; it held only that the disparity in marital rights and benefits infringed the state constitution.⁹⁰ Under that framing, which may be more typical than the bare incrementalism advanced in the *Kerrigan* dissent, courts do not concede that they have accepted an incremental version of equality. Instead, they characterize the equality violation as deriving from the lesser rights accorded to same-sex couples so that deference to the legislature to create an equal-rights regime appears to be a reasonable resolution rather than an abdication of the court's responsibility as rights-enforcer.

Moreover, forcing exposure of context-sensitive compromises runs the risk, both in these cases and elsewhere, of enshrining as legitimate the courts' taking account of social sentiment in determining the amount of equality to which a given group is entitled. While this filtering of equality guarantees through the lens of social norms may be the case regardless of whether the doctrinal framework requires exposure or permits elision, judicial statements affirming the malleability of constitutional equality rights may ultimately do more harm than good to the cause of those who seek greater legal protection through equality-based claims.⁹¹

Yet embracing incrementalism as a stand-alone rationale, rather than a deviation from the norm that must be explained and justified, runs serious risks as well. States and courts may fail to try hard enough to enforce equality guarantees fully (or at least more fully than under current conditions). Further, outright embrace of incrementalism necessarily signals, whether intentionally or not, that both the judiciary and representative bodies are free to provide constituents with protection short of full equality.

In the end, we are left with something of a difficult choice. Do we insist on a non-instrumental commitment to full equality or accept a flexible commitment in exchange for incremental advances and increased institutional legitimacy? Even when we accept flexibility (as I believe we have and will continue to do), the difficulties remain, as we must still determine how to both administer and express that less-than-unequivocal commitment. As this Article aims to show, there are costs at every turn, with no easy answers.

Brown v. Board of Education,⁹² popularly known as *Brown II*, may be the paradigmatic illustration of this point. The Court's ruling that the defendant school districts must desegregate "with all deliberate speed,"

⁹⁰ *Id.* at 220–21.

⁹¹ See generally Goldberg, *Tipping Points*, *supra* note 83 (arguing that although courts deciding socially contentious cases focus on facts, rather than normative judgments, about social groups, those judgments inevitably shape both analyses and outcomes).

⁹² *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

rather than immediately,⁹³ surely reflects an incrementalist approach. Its consequentialist hedging is particularly striking given the Court's unqualified ruling, just a year earlier, that, "in the field of public education[,] the doctrine of 'separate but equal' has no place."⁹⁴ Yet, as some have argued, a more absolutist alternative, insistent on immediate, pervasive desegregation, would have spurred great disorder and worse harms.⁹⁵

As suggested above, my own cost-benefit analysis favors increased skepticism toward incrementalist rationales and more exposure of them when they are accepted. At the same time, our history has shown these rationales to be among the necessary, if unprincipled, lubricants that enable our courts and constitutional system more generally to function amidst the complexities of a pluralist world. Still, I would argue, there is one sharp bottom line: However one ultimately comes out on the question of the permissibility and desirability of incrementalist rationales, uncritical acceptance of incrementalism as a justification for inequality is position that cannot be sustained.

VI. CONCLUSION

In short, the marriage/civil union cases prompt important questions about the role of history, tradition, and incrementalism as rationales for state-imposed inequality. These questions, in turn, force a closer look at the state's relationship to private sentiments about who deserves equality and how much equality any given group deserves relative to others. In particular, they demand that we consider the advantages and perils of allowing states to disclaim responsibility for differentially allocating privately-valued goods and, relatedly, allowing states to proceed with unequal treatment so long as they are moving toward equality.

How we respond to these demands depends inevitably on calculations about how much we can afford to give up fundamental constitutional commitments to equality in exchange for institutional legitimacy and social peace. Acknowledging the contingency of equality in this way surely makes many (including me) shudder even as it reflects what has long been known about the limited inclinations and abilities of courts, and states more generally, to reshape societal norms.⁹⁶ At the same time, this

⁹³ *Id.* at 301.

⁹⁴ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 (1954).

⁹⁵ Yet others have taken the position that the Court's order, which embraced "practical flexibility," *Brown II*, 349 U.S. at 300, rather than an unequivocal demand for immediate change, undermined the strong commitment to racial equality expressed the previous year in *Brown I*. For commentary regarding both positions, see generally MICHAEL J. KLARMAN, *BROWN V. BOARD OF EDUCATION AND THE CIVIL RIGHTS MOVEMENT* (2007); RICHARD KLUGER, *SIMPLE JUSTICE* (1977).

⁹⁶ See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008) (discussing limits on judiciary's power to change social norms and

contingency requires us all, whether we shudder or not, to grapple with refining the frameworks that influence the meaning of our fluctuating yet foundational promise to ensure equal protection of the law.

practices); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 6–7 (1996) (arguing that “the Court’s capacity to protect minority rights is more limited than most justices or scholars allow” and that “deep-seated political, social, economic, and ideological forces . . . have rendered possible the transformation of large areas of constitutional doctrine”).