CALLING OUT HETEROSEXUAL SUPREMACY: IF *OBERGEFELL* HAD BEEN MORE LIKE *LOVING* AND LESS LIKE *BROWN*

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INTRODUCTION

IN 1967, in *Loving v. Virginia*,[1] the Supreme Court invalidated state laws that banned interracial marriage. Nearly fifty years later, in *Obergefell v. Hodges*,[2] the Supreme Court invalidated state laws that banned same-sex marriage. That *Obergefell* represents the modern-day *Loving* to many gay rights activists[3] is thus understandable. Indeed, the majority and dissenting opinions in *Obergefell* cited *Loving* numerous times.[4] By contrast, no opinion cited *Brown v. Board of Education*,[5] the landmark case that invalidated racial segregation in public schools and served as the basis for invalidating all remaining segregationist laws, including the law struck down by *Loving*.

In significant ways, however, *Obergefell* was more like *Brown* than *Loving*. As Part I of this essay argues, *Obergefell* was more like *Brown* in that both decisions adopted an appeasing tone, nonjudgmental and plain-spoken analysis, and an empathetic recognition of the harm to children and society caused by the discriminatory laws. The Court in *Loving*, by contrast, was bold, judgmental and legalistic, calling out Virginia for enforcing white supremacy and declaring broadly that all racial distinctions would be subject to strict judicial scrutiny under the Equal Protection Clause.

Part II argues that *Obergefell* should have been more like *Loving* than *Brown* in two ways. First, the Court should have called out states that banned same-sex marriage for enforcing heterosexual supremacy. Second,

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[1] 388 U.S. 1 (1967).

[2] 135 S. Ct. 2584 (2015).

[3] A note on terminology: I recognize the power and limitations of language, and I regret this essay's shortcomings. I use the term "gays and lesbians" to refer to people with a same-sex or same-gender orientation. I do not mean to imply that the term "gay" only properly applies to people toward the masculine end of the gender continuum. I thus use the term "gay rights" to refer to rights of gays and lesbians. The term "same-sex marriage" refers to marriage between a man and a man or a between a woman and a woman, regardless of their sex assigned at birth. The term "different-sex marriage" refers to marriage between a man and a woman regardless of their sex assigned at birth. These terms fail to embrace the full spectrum of gender identities. The focus of the essay is on the constitutional status of same-sex marriage and of gays and lesbians as these issues are understood in conventional doctrinal discourse. I regret that the essay's scope results in under-inclusiveness.

[4] The majority in *Obergefell* mentions *Loving* 8 total times and actually cites to the case 6 times; the dissents mention *Loving* 8 total times and actually cite to the case 4 times.

[5] 347 U.S. 483 (1954).

the Court should have declared that all laws that discriminate on the basis of sexual orientation are presumptively unconstitutional and subject to strict scrutiny under the Equal Protection Clause.

Part III identifies one way in which *Obergefell* was appropriately *not* like *Loving* but instead more like *Brown*. *Obergefell* and *Brown* empathized with victims of the discriminatory laws at issue. By contrast, *Loving* failed to express empathy in any significant way for the victims of anti-miscegenation laws.[6] *Obergefell* was right to be like *Brown* in its empathy and, in fact, *Obergefell*'s empathy was more forceful and effective than *Brown*'s.

I. MORE LIKE *BROWN* THAN *LOVING*

Brown represents, more than any other case, the overthrow of Jim Crow: the repudiation of the doctrine of Separate-But-Equal.[7] Many communities in segregating states received the decision with alarm and anger, responding with massive resistance.[8] A first-time reader of *Brown* might thus be struck by its unassuming nature. With an open hand, the Court spoke to the public, especially the South. It appealed, in plain, non-legalistic terms, to potential opponents through moral persuasion. Three features of the opinion contributed to its appeal.[9] First, the Court did not blame or judge; it did not accuse the South of racism or animosity. Second,

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[6] The Court could, for example, have quoted Richard Loving who said to his lawyer, "Mr. Cohen, tell the Court I love my wife, and it is just unfair that I can't live with her in Virginia," which Mr. Cohen appears to have conveyed to the Court at oral argument. See 64 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 971 (Philip B. Kurland & Gerhard Casper eds., 1975). Alternatively or in addition, the Court could have described the harm of denying someone the right to marry the person they love simply because of their race, especially at a time when cohabiting outside of marriage was socially sanctioned and often illegal. Consider, for example, what California Supreme Court Justice Carter wrote in *Perez v. Lippold*, the California case that struck down the state's ban on interracial marriage nineteen years before *Loving*: "If [the plaintiffs] choose to face this possible prejudice and think that their own pursuit of happiness is better subserved by entering into this marriage with all its risks than by spending the rest of their lives without each other's company and comfort, the state should not and cannot stop them." 32 Cal. 2d 711, 739 (1948) (Carter, J., concurring).

[7] *See* CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF BROWN V. BOARD OF EDUCATION 311 (2004) ("*Brown I* should be celebrated for ending de jure segregation in this country.").

[8] *See generally* Michael Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 85–118 (1994); GEORGE LEWIS, MASSIVE RESISTANCE: THE WHITE RESPONSE TO THE CIVIL RIGHTS MOVEMENT (2006).

[9] I expressed several of the descriptive observations in this section in an op-ed in the University of Virginia School of Law student newspaper. *See* Kim Forde-Mazrui, *Obergefell v. Hodges: More Like Brown Than Loving*, 68 VA. L. WEEKLY, April 13, 2016.

the Court acknowledged that segregation might be consistent with the original intent behind the Fourteenth Amendment but said that our nation's understanding of education and of the harms of segregation had evolved.[10] Segregation may have been constitutional previously, but times had changed, and new circumstances and understanding required a new approach. Third, the Court explained, the effect of segregation was harmful to society, especially children. Segregation damaged the self-esteem of minority schoolchildren which, in turn, impaired their ability to learn and to participate fully as adults in our democratic society.[11] The Court did not, however, state or imply that southern states intended or knew of such harm. Segregating states may not have realized, the Court's tone suggested, that segregation inflicted harm on minority schoolchildren. Once the Court, in *Brown*, had enlightened those states, they would hopefully accept the change.

Much happened over the thirteen years between *Brown* and *Loving*. The Court invalidated other segregationist laws beyond education. The Civil Rights Movement, through political activism and social protest, achieved the enactment of congressional laws prohibiting discrimination in the public and private sectors and protecting the right to vote.[12] By 1967, the Court and country were impatient with segregation.

In *Loving*, the Court invalidated the last segregationist laws and did so with a strikingly different tone from that of *Brown*. First, with closed fist, the Court twice accused Virginia of white supremacy.[13] Second, the Court declared that Virginia's ban on interracial marriage violated long-

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[10] *Brown v. Bd.*, 347 U.S. at 489–90 (discussing inconclusive inquiry into intent of framers of the Fourteenth Amendment); *id.* at 493 ("Today, education is perhaps the most important function of state and local governments."); *id.* at 494–95 ("To separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.") (*citing, e.g.*, K. B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (Midcentury White House Conference on Children and Youth, 1950)).

[11] 347 U.S. at 493 ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.").

[12] *See* RALPH RICHARD BANKS, KIM FORDE-MAZRUI, GUY-URIEL CHARLES & CRISTINA RODRÍGUEZ, RACIAL JUSTICE AND LAW: CASES AND MATERIALS 121-24 (2016) (describing the civil rights movement that produced the Civil Rights Act of 1964 and Voting Rights Act of 1965).

[13] *Loving v. Virginia,* 388 U.S. 1, 7 (1967) (finding that the Supreme Court of Virginia's ruling was "obviously an endorsement of White Supremacy."); *id.* at 11 ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

standing principles against odious racial distinctions and against infringing the right to marry.[14] Anti-miscegenation laws had been unlawful for a long time, the opinion suggested, and Virginia and other states had better get in line. Third, the Court did not attempt to persuade the public by citing the harm of miscegenation laws to interracial couples or their children. Rather, the Court targeted the state with formalistic judgment, discrediting the state's "equal application" argument, that blacks and whites were equally prohibited from marrying each other, and holding that the laws served no legitimate interest under equal protection scrutiny.[15]

Obergefell, like *Loving*, invalidated restrictions on the right to marry.[16] But in tone and method, *Obergefell* was more like *Brown*. With an open hand, *Obergefell* attempted to persuade the public, appealing to those who oppose same-sex marriage. First, like *Brown*, the Court did not blame or judge. It did not accuse those who oppose same-sex marriage of prejudice or anti-gay animus.[17] In fact, the Court expressed respect for the deeply-held religious and moral beliefs of different-sex marriage[18] proponents.[19] Second, the Court, as in *Brown*, acknowledged that history and the original meaning of the Fourteenth Amendment likely did not protect same-

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[14] *Id.* at 11 ("Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"); *id.* at 12 ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

[15] *Id.* at 11 ("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification.").

[16] *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[17] As used in this essay, the term "anti-gay" refers to being against same-sex or same-gender orientation, identity, conduct, relationships and/or marriage involving gays and/or lesbians. The essay does not address issues directly pertaining to bisexual, transgender, intersex or other non-typical gender identities, orientations or conduct, to the extent they may raise distinct issues.

[18] "Different-sex marriage" in this essay refers to marriage between a man and a woman regardless of their sex assigned at birth. See *supra* note 3 for further explanation of terminology.

[19] *Obergefell*, 135 S. Ct. at 2602 ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."); *id.* at 2607 ("Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate.").

sex marriage.[20] Rather, the Court explained, America had evolved in its understanding of gay rights and marriage.[21] To opponents of same-sex marriage, the Court assured, in effect, that historically they were right with the law and social values, but times have changed, and new circumstances and understanding required a new approach.

Third, like in *Brown*, the *Obergefell* Court emphasized the human and societal harm from bans on same-sex marriage. Such bans harm families in material and dignitary ways, especially children.[22] And just as *Brown* described education as foundational to society, *Obergefell* described the family as foundational to society, a foundation that is undermined for same-sex couples and their families when states deny their legality and legitimacy.[23] Moreover, like *Brown*, the Court in *Obergefell* did not suggest that the states that banned same-sex marriage intended or knew of the harms such bans inflict. Such states may not have realized, the Court's tone suggested, that banning same-sex marriage inflicted harm on same-sex couples and children. Once the Court, in *Obergefell*, had enlightened those states, they would hopefully accept the change.

II. HOW *OBERGEFELL* SHOULD HAVE BEEN MORE LIKE *LOVING*

By following the approach of *Brown*, *Obergefell* missed an opportunity to state clearly that bans on same-sex marriage, and other anti-gay laws, are repugnant to equal protection values. The Court should instead have followed *Loving*'s lead in two ways. First, it should have called out the states that banned same-sex marriage for promoting heterosexual supremacy. Second, the Court should have held that laws that discriminate based on sexual orientation should be *suspect*, *i.e.,* presumptively unconstitutional and subject to strict scrutiny.

By *heterosexual supremacy*, I mean more than anti-gay animus or hatred, although animus often motivates adherents to supremacist ideologies

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[20] *Id.* at 2598 ("It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part.").

[21] *Id.* at 2595–97 (tracing the evolution of societal understandings of marriage; "The history of marriage is one of both continuity and change."); *id.* at 2602 ("The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter."); *id.* at 2603 ("[I]n interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged.").

[22] *Id.* at 2600–01.

[23] *Id.* at 2601–02.

when their status is threatened. Heterosexual supremacy refers to the social and legal hierarchy in American society premised on the superiority of heterosexuality over homosexuality. The hierarchy is maintained structurally by pervasive features of American religious, cultural, intellectual, legal and political life that combine to systematically stigmatize and burden, through law, custom and attitude, the liberty, dignity and opportunities of gays and lesbians. It is the ideology that causes gays and lesbians to keep their sexual orientation private, especially in states with strong opposition to same-sex marriage and other gay rights. It is the ideology responsible for the high rates of violence against gays and lesbians and of suicide by gay and lesbian adolescents.

The distinction between heterosexual supremacy and anti-gay animus is worth emphasis. My initial reaction to *Obergefell* was that it should have followed the Court's approach in *Romer v. Evans*[24] and *United States v. Windsor*[25] in finding that animus, a "bare desire to harm a politically unpopular group,"[26] was the illegitimate motivation behind the anti-gay laws the Court struck down in those cases. The Court in *Obergefell* retreated from that disapproving position in favor of treating the states with a gentler hand. But while many people who voted for Colorado's Amendment 2 and the federal Defense of Marriage Act (DOMA) were no doubt motivated by anti-gay animus, the larger purposes of Amendment 2 and DOMA were to preserve heterosexuality as a superior identity and different-sex marriage as the uniquely privileged marital status. Those broader purposes do not require animus, but they are nonetheless inconsistent with according equal protection to gays and lesbians.

Justice Scalia was probably right in his dissent in *Romer* when he wrote that the "Court has mistaken a Kulturkampf for a fit of spite."[27] His point was that the Court had erroneously assumed that Coloradans who voted to strip away antidiscrimination protection for gays and lesbians through Amendment 2 were motivated by hatred rather than, in Scalia's terms, "traditional sexual mores."[28] Scalia was likely right that many supporters of Amendment 2 were motivated by traditional sexual mores rather than hatred. But Scalia was wrong in concluding that such mores are a constitutionally legitimate reason to discriminate against gays and lesbians. "Traditional sexual mores" is simply a benign term for heterosexual supremacy, a core value of which is the moral superiority of heterosexuality over homosexuality.[29] Scalia's characterization of the gay rights

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[24] 517 U.S. 620 (1996).

[25] 133 S. Ct. 2675 (2013).

[26] *Romer*, 517 U.S. at 634; *Windsor*, 133 S. Ct. at 2693–94.

[27] *Romer*, 517 U.S. at 637 (Scalia, J., dissenting).

[28] *Id.*

[29] As I have argued elsewhere, those who cite tradition as justification for discriminating against gays and lesbians often do so to cover more unacceptable, ulterior motives. *See* Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 333 (2011).

movement confirms that traditional mores, as he understood them, disparaged same-sex orientation. He claimed that Coloradans were merely defending their traditional values from the "homosexual agenda,"[30] what he calls the gay rights movement, an agenda he chides for seeking full acceptance, not just tolerance.[31] Full acceptance – under law – is indeed what the gay rights movement seeks. Another term for that objective is *equality*.[32]

Other social and legal hierarchies in America also reflect a distinction between animus and a broader ideology of superiority. Consider race. People today often perceive segregationists of the past as hateful, at least toward black people. Certainly many were.[33] But many Americans who believed in segregation were well-intentioned people who believed that segregation was good for black people as well.[34] They genuinely thought that black people, biologically and culturally, were less capable of moral

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[30] *Romer*, 517 U.S. at 646–47 (Scalia, J., dissenting) (explaining that Colorado "sought to counter . . . the disproportionate political power of homosexuals"); Lawrence v. Texas, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting) (characterizing that power as the "homosexual agenda").

[31] *Romer*, 517 U.S. at 646 ("Quite understandably, [gay rights proponents] devote their political power to achieving not merely a grudging social toleration, but full social acceptance, of homosexuality.").

[32] A recent and lengthy report by Huma Rights Watch on the state of gays and lesbians is aptly called, "All We Want is Equality." See Human Rights Watch, "All We Want is Equality": Religious Exemptions and Discrimination against LGBT People in the United States (February 2018) (ISBN: 978-1-6231-35751) https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUKEwiGs4LE9vzcAhUotlkKHdbACh8QFjAAegQIABAC&url=https%3A%2F%2Fwww.hrw.org%2Fsites%2Fdefault%2Ffiles%2Freport_pdf%2Flgbt0218_web_1.pdf&usg=AOvVaw3SVXGkROAu-QzOaV9UF6GIc

[33] *See* MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION, AND THE SENSES 124 (2006) (describing the vicious characterizations segregationists used for black civil rights activists); David L. Chappell, *The Divided Mind of Southern Segregationists*, 82 GA. HIST. Q. 45, 53-54 (1998) (describing a split between segregationists focusing on the constitutional rhetoric of states' rights and those who focused on stirring up racial resentment using slogans that "contained racial epithets and sexual innuendo that the constitutionalists avoided using.")

[34] *See* MARK M. SMITH, HOW RACE IS MADE: SLAVERY, SEGREGATION, AND THE SENSE 124-25 (2006) ("some maintained, segregation was good for blacks, not least because they were not—and could not be—like whites."); JAMES JACKSON KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION (1962) (arguing that allowing Southerners to choose which schools their children attend was best because "it also offers the greatest opportunity to the Southern Negro himself."); Shannon D. Gilreath and Arley Ward, *Same-Sex Marriage, Religious Accommodation, and the Race Analogy*, 41 VT. L. REV. 237, 258 (2016) ("Supporters of segregation claimed, nearly always premised on religious grounds, that segregation was for the good of blacks and whites alike.").

virtue and intellectual achievement, and that limiting them to serve in certain roles that fit their capacities was realistic and prudent.[35] Many felt genuine affection for black people, such as their nannies or other domestics. [36] They nonetheless believed in the supremacy of white people.[37] There remain today white supremacists who openly express animosity toward black people and other minority groups.[38] But we fail to understand how American society did and continues to systematically privilege whiteness if we limit our focus to overt racists and white supremacist hate groups.

Male supremacy has, through law and custom, systematically subordinated women in a variety of ways throughout America's history. From violent domination and assault to role-control to demeaning stereotypes, male supremacy has devalued women and limited their opportunities.[39]

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[35] For example, in 1939, when 5,000 white respondents were asked "Do you think Negroes now generally have higher intelligence than white people, lower, or about the same?", seventy-two percent replied "lower." MILDRED A. SCHWARTZ, TRENDS IN WHITE ATTITUDES TOWARD NEGROES 19 (1967), available online at http://www.norc.org/PDFs/publications/NORCRpt_119.pdf. See also JAMES JACKSON KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION 26 (1962) (arguing that white Southerners believed that "Here and now, in his own communities, in the mid-1960s, the Negro race, as a race, plainly is not equal to the white race, as a race; nor, for that matter, in the wider world beyond, by the accepted judgment of ten thousand years, has the Negro race, as a race, ever been the cultural or intellectual equal of the white race, as a race."); Morton H. Fried, *The Need to End the Pseudoscientific Investigation of Race*, *in* SCIENCE AND THE CONCEPT OF RACE 122, 123-126 (Margaret Mead et al. eds., 1968) (describing some of the pseudoscientific studies used to defend racial hierarchy during the height of segregation).

[36] *See* JAMES JACKSON KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION 23-24 (1962) (Kilpatrick, immediately before describing the "Negro race" as inferior to the "white race," describes the two black servants in his childhood home by writing, "as far as love and devotion and respect can reach, they were members of the family."); Elizabeth Gillespie McRae, *White Womanhood, White Supremacy, and the Rise of Massive Resistance*, *in* MASSIVE RESISTANCE: SOUTHERN OPPOSITION TO THE SECOND RECONSTRUCTION 181, 189 (Clive Webb ed. 2005) (describing how Florence Sillers Ogden, a prominent white supremacist activist in Mississippi, denied the murder of Emmett Till while countering that the Jim Crow South was a benevolent society in which white women "took care" of their black servants and neighbors.)

[37] See JAMES JACKSON KILPATRICK, THE SOUTHERN CASE FOR SCHOOL SEGREGATION 26 (1962) (describing white Southern attitudes in the 1960s as based on white racial superiority).]

[38] *See, e.g.,* MARK PITCAVAGE, ANTI-DEFAMATION LEAGUE, WITH HATE IN THEIR HEARTS: THE STATE OF WHITE SUPREMACY IN THE UNITED STATES (2015).

[39] *See, e.g.,* Marc Spindelman, *Gay Men and Sex Equality*, 46 TULSA L. REV. 123, 125 (2010); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1281–82 (1991). *See generally* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

And while much of the mistreatment of women has been misogynistic or animus-based, much has been based on sincerely held cultural beliefs in natural differences between men and women that purportedly justified restricting women's rights. Such restrictions, Justice Brennan explained, were often "rationalized by an attitude of 'romantic paternalism' [but], in practical effect, put women, not on a pedestal, but in a cage."[40]

Returning to heterosexual supremacy and bans on same-sex marriage, if *Obergefell* had focused exclusively on anti-gay animus, it would have been inaccurate and inadequate. It would have been inaccurate because many supporters of bans on same-sex marriage likely did not act out of animosity toward gays and lesbians.[41] It would have been inadequate because heterosexual supremacy inflicts greater harm than does subjective animosity alone. Animus is insufficient to account fully for the systemic attitudes, norms and other structural disadvantages that subordinate gays and lesbians.

If the Court's assessment of anti-gay laws, including bans on same-sex marriage, required proof of anti-gay animus, it would be too hard on plaintiffs and too easy on society. It would be too hard on plaintiffs, not only because proving invidious intent is exceedingly difficult under equal protection doctrine,[42] but because animus would often not exist. It would be too easy on society because it would excuse the many Americans who support heterosexual supremacy but who are not motivated by anti-gay animus, those who find reassurance by distinguishing themselves from the

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[40] Frontiero v. Richardson, 411 U.S. 677, 684 (1973).

[41] For example, the amicus briefs filed in support of respondents—*i.e.*, opposing same-sex marriage—repeatedly reject the notion that their positions are based on anti-gay animus. Rather, they articulate other justifications based on traditions and societal interests. *See, e.g.*, Brief of Foundation for Moral Law as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519044, at *27–*28 ("*Amicus* presents these statistics, not out of any animus toward homosexuals, but out of concern that there may be unhealthy aspects of the homosexual lifestyle[.]"); Brief of Lighted Candle Society as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1545069, at *39 (criticizing courts for "brand[ing] voters who support the male-female definition as infected with 'animus' or hatred"); Brief of Judicial Watch, Inc. as Amicus Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1545071, at *6 ("The Respondent States and their citizens have given several bases for maintaining the traditional definition of marriage which include child-rearing, tradition and respect for our constitutional concept of federalism."); Brief of Scholars of Fertility and Marriage as Amici Curiae Supporting Respondents, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1519043 (arguing states are allowed to only recognize same-sex marriage based on a societal interest in procreation).

[42] David Kairys, *Unexplainable on Grounds Other Than Race*, 45 AM. U. L. REV. 729, 731 (1996) (describing the intent requirement of equal protection claims as a "near impenetrable brick wall").

bigots holding signs that read, "God Hates Fags."[43] Many religious and other conservatives, however, who profess credibly not to hate gays and lesbians nonetheless support or acquiesce in devaluing gay and lesbian identity and same-sex relationships. Consider Jack Phillips, for example, the cake maker who refused to make a wedding cake for a same-sex couple because of his religious beliefs. He was, however, willing to sell the gay couple baked goods for other purposes and is apparently unwilling to make a cake with a homophobic message.[44] His stance plausibly reflects a perspective that does not hate gays and lesbians but cannot participate in celebrating a marriage inconsistent with his belief in the divinely-ordered, male-female nature of that union.

And Mr. Phillips is not alone. Millions of religious conservatives, as well as conservative churches, schools, colleges and other organizations, believe and teach that sex and marriage between members of the same sex is inconsistent with the teachings of God, but that gay and lesbian people should not be hated, but loved.[45] Expressing this position, Professor John Tuskey states: "God does not 'hate fags,' despite the fevered insistence of some misguided zealots otherwise. Rather, He sees homosexuals, as He sees all of us, as fallen creatures in need of healing and salvation."[46] "[F]ollowing Jesus with respect to homosexual persons," Tuskey explains, "means loving those who are inclined to engage in homosexual acts and those who do engage in such acts."[47]

Accepting that Phillips, Tuskey and many others who claim to "love the sinner, hate the sin," are sincere and free of anti-gay animus, their ideology is nevertheless based on heterosexual supremacy. Their belief systems hold that same-sex marriage is, literally, morally inferior, to different-sex marriage, the latter morally exalted and blessed, the former deeply immoral, a sin. That ideology, moreover, harms the lives of gays and lesbians. Mr. Phillips will not create wedding cakes for same-sex couples and

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[43] Such bigots include the Westboro Baptist Church, whose website is www.godhatesfags.com, and their website states "GodHatesFags and That's Why I abohre them."

[44] *See Masterpiece Cakeshop* at 1745 (Thomas, J., joined by Gorsuch, J., concurring) ("Phillips also refuses to bake cakes containing alcohol, cakes with racist *or homophobic* messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries.") (emphasis added).

[45] See Sam Hotchkiss, Disputes Between Christian Schools and LGBT Students: Should the Law Get Involved?, 81 UMKC L. Rev. 701 (2013) (discussing rise of student resistance to anti-homosexuality teachings at Christian colleges, universities and private Christian organizations, and describing the "love the sinner and hate the sin" position that Christian schools teach).

[46] John Tuskey, And They Became One Flesh: One Catholic's Response to Victor Romero's "Other" Christian Perspective on Lawrence v. Texas, 35 S.U. L. Rev. 631, 671 (2008) (citations omitted).

[47] Tuskey, supra note __, at 671.

Professor Tuskey calls on members of his faith to oppose same-sex marriage and even intimacy between loving partners of the same sex:

> [W]hat does it mean to follow Jesus and not Caesar in modern America with respect to marriage and homosexual acts? … [I]t means, despite societal pressure to rationalize sexual immorality, maintaining and defending the traditional understanding of marriage as the committed lifelong union of a man and woman and the corollary understanding that all non-marital sexual acts are immoral. It means resisting efforts to legally recognize same-sex relationships as marriages.[48]

Beyond sex and marriage, the heterosexual supremacy embodied in religiously conservative views cause gays and lesbians to lose their jobs, housing, access to public accommodations and, if many had their way, would exclude gays and lesbians from serving in the military, prohibit gays and lesbians from adopting, fostering or teaching children, deny gays and lesbians access to their life partners suffering in hospital rooms, and imprison gays and lesbians for sexual intimacy in the privacy of their homes. Colorado's Amendment 2 that Justice Scalia defended as protecting traditional mores without hatred declared it legal for gays and lesbians (but not heterosexuals) to be discriminated against by public or private actors for any reason in any context without any legal recourse.[49] As the majority in *Romer* explained, that law denied gays and lesbians equal protection "in the most literal sense,"[50] independent of the motivation behind it.[51]

Nor is heterosexual supremacy limited to religious and political conservatives. States and citizens across the political spectrum have opposed same-sex marriage and other legal rights for gays and lesbians. When *Obergefell* nationalized same-sex marriage three years ago, only eleven

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[48] Tuskey, supra note __, at 671. Disagreeing with Professor Victor Romero, who claims that same-sex relationships are consistent with biblical teachings if they are based on love and not lust, Tuskey claims that all same-sex intimacy is sinful. See id at 633, 635 (citing Victor C. Romero, An "Other Christian Perspective on Lawrence v. Texas, 45 J. Cath. Legal Stud. 115, 125-26 (2006)).

[49] See Romer v. Evans, 517 U.S. 620, 624 (1996) (quoting language of Amendment 2). Distilled to its most discriminatory terms, Amendment 2 stated: No state or local govt. ... shall ... enforce any ... policy ... whereby homosexual orientation ... shall constitute ... the basis of ... any ... claim of discrimination." Id.

[50] *Romer*, 517 U.S. at 633 (describing the operation of Amendment 2, the Court explained, "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.").

[51] The Court in Romer discusses the literal-violation flaw in Amendment 2 as a sufficient basis for invalidating Amendment 2, and then goes on to identify an alternative basis for striking down Amendment 2, namely, that it was motivated by animosity toward gays and lesbians. See *Romer*, 517 U.S. at 633-34.

states had legalized same-sex marriage through legislative or popular vote, and five additional states had by state-court interpretation of state constitutions.[52] Thus, sixty-eight percent of states banned same-sex marriage under state law, and seventy-eight percent would have were it not for state court intervention. A Gallup poll shortly before the decision revealed that three out of four Democrats supported same-sex marriage,[53] a percentage that has risen to four out of five in the intervening three years.[54] Among black Americans, a population that votes overwhelmingly for the Democratic Party, only 39% supported same-sex marriage when *Obergefell* was decided, a number that has risen to 51% in Pew's most recent survey.[55] Today, moreover, a majority of states, including typically "blue" states, provide no legal protection to gays and lesbians from discrimination in a variety of contexts, including employment, housing and public

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[52] *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., joined by Scalia and Thomas, J.J., dissenting) ("In all, voters and legislators in eleven States and the District of Columbia have changed their definitions of marriage to include same-sex couples. The highest courts of five States have decreed that same result under their own Constitutions. The remainder of the States retain the traditional definition of marriage.")

[53] A Pew Research Center survey conducted in May 2015, the month before Obergefell was decided, found that "65% of Democrats and an identical percentage of independents favor gay marriage; only about one third (34%) of Republicans do so." "Support for Same-Sex Marriage at Record High, but Key Segments Remain Opposed: 72% Say Legal Recognition is 'Inevitable,'" Pew Research Center (June 8, 2015), http://www.people-press.org/2015/06/08/support-for-same-sex-marriage-at-record-high-but-key-segments-remain-opposed/. A Gallup poll reported in May 2015 indicated that support for same-sex marriage was 76% among Democrats, 64% among independents, and 37% among Republicans. Justin McCarthy, "Record-High 60% of Americans Support Same-Sex Marriage" (May 19, 2015), https://news.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx.

[54] A Gallup poll reported in May 2018 indicates that support for same-sex marriage is 83% among Democrats, 71% among independents, and 44% among Republicans. Justin McCarthy, "Two in Three Americans Support Same-Sex Marriage" (May 23, 2018), A June 2017 Pew Research Center poll found that 76% of Democrats and 47% of Republicans support the legality of same-sex marriage, "Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical: For first time, as many Republicans favor as oppose gay marriage," Pew Research Center (June 26, 2017), http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/.

[55] See "Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical: For first time, as many Republicans favor as oppose gay marriage," Pew Research Center (June 26, 2017), http://www.people-press.org/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/.

accommodations.[56] If I am being unduly charitable or naïve about opponents of same-sex marriage, and that the prevailing heterosexual supremacy in America is in fact based on animus, then the Court in *Obergefell* should all the more have called out heterosexual supremacy with unequivocal disapproval.[57]

Thus, my first critique of *Obergefell* is that the Court should have called out heterosexual supremacy as the Court in *Loving* called out white supremacy. The second way in which *Obergefell* should have been more like *Loving* is that it should have held that all laws that discriminate on the basis of sexual orientation are presumptively unconstitutional. In doctrinal terms, *classifications* (laws that classify) on the basis of sexual orientation should be considered *suspect* and therefore subject to strict judicial scrutiny. Applied to bans on same-sex marriage, the Court should have presumed them unconstitutional because of their purpose to deny marriage to gays and lesbians. Under strict scrutiny, states would have to demonstrate that such bans are necessary to advance a compelling interest.

Several scholars and courts have argued that sexual orientation should receive strict scrutiny.[58] While I agree with their conclusion, my view is

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[56] See "United States: State Laws Threaten LGBT Equality" (Feb. 19, 2018), https://www.hrw.org/news/2018/02/19/united-states-state-laws-threaten-lgbt-equality (observing that 28 states have no statutory prohibition of sexual-orientation discrimination in employment, housing and public accommodations, while 3 more have only partial protections, and describing increase in statutory exemptions for religiously-motivated discrimination against LGBT people, including in healthcare, adoption and foster care); "Beyond I Do," https://beyondido.org/states/ (interactive map indicating states without LGBT protective laws, including Wisconsin, Virginia, Michigan, Pennsylvania, New Hampshire, Ohio and Florida).

[57] Professor Victor Romero is willing to give heterosexual and white supremacists the benefit of the doubt as to their intentions, including that they might not be aware of their supremacist ideologies: "[W]e are all too often blind to how even our best intentions lead to the oppression of others. Hence, just as we (and our government) can be guilty of unconsciously contributing to racism, we can also be guilty of unconsciously perpetuating homophobia." Victor C. Romero, An "Other Christian Perspective on Lawrence v. Texas, 45 J. Cath. Legal Stud. 115, 128 n.63 (2006).

[58] *See, e.g.,* Katie Eyer, Brown, Not Loving: Obergefell and the Unfinished Business of Formal Equality, 125 Yale L.J. Forum 1 (Apr. 28, 2015) (arguing that the Court should hold that gays and lesbians are entitled to "formal equality" under the Equal Protection Clause, which would require that state-sponsored discriminations against them are subject to strict scrutiny); Darren Lenard Hutchinson, *"Not Without Political Power": Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1030–34 (2014) (arguing that sexual orientation discrimination should be subject to strict scrutiny under both a "political powerlessness doctrine" and an "antisubordination theory," and assembling cases and articles in support). Professor Eyer's essay was prescient in predicting that Obergefell would fail to explicitly grant formal equality to gays and lesbians. See Eyer, this footnote, at 7.

that in justifying application of strict scrutiny to sexual orientation, the Court should not engage in a mechanical application of the *Frontiero* factors -- history of discrimination, immutability, visibility, political underrepresentation, and ability to contribute to society.[59] Nor do I endorse as a necessary or sufficient condition that the group in question, here gays and lesbians, be discrete and insular in order to receive the protection of strict scrutiny.[60] The foregoing factors are relevant indicia that a group is treated without equal concern and respect, but such factors ought not be dispositive in deciding whether strict scrutiny should apply to laws that discriminate against them. The pertinent question for whether strict scrutiny is warranted should be whether discrimination on the basis of a particular trait is significantly more likely to be motivated by illegitimate than legitimate purposes.[61] As American society increasingly recognizes the wrongfulness of heterosexual supremacy, we should recognize that laws that discriminate on the basis of sexual orientation are highly likely to be motivated by illegitimate beliefs or purposes. Such illegitimate motivations include a purpose to preserve heterosexual supremacy or otherwise to discriminate against gays and lesbians based on a belief in the inferiority of homosexuality.

Indeed, the case for applying strict scrutiny to sexual orientation is arguably stronger than the case for applying strict scrutiny to race. The Court applies strict scrutiny to a classification independent of knowing the reason for which the state is using the classification or the context in which the classification is used.[62] Those circumstances enter the analysis after the level of scrutiny is triggered and are relevant to whether the application of strict scrutiny upholds the classification. The Court's application of strict scrutiny to racial classifications is justified by the scarcity of

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[59] Frontiero v. Richardson, 411 U.S. 677, 684–88 (1973); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 442–47 (applying *Frontiero* factors to find no strict scrutiny for disability); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (applying *Frontiero* factors to find no strict scrutiny for age). For a review of the different standards of scrutiny that courts have applied to sexual orientation, see Stacey L. Sobel, *When Windsor Isn't Enough: Why The Court Must Clarify Equal Protection Analysis for Sexual Orientation*, 24 CORNELL J.L. & PUB. POL'Y 493, 521–26 (2015) (assembling federal cases wherein the courts declined to apply strict scrutiny).

[60] United States v. Carolene Prods., Co., 304 U.S. 144, 152–53 n.4 (1938) (citing prejudice against discrete and insular minorities as reason for more search judicial scrutiny); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980), at 73–100 (describing *Carolene Products* footnote 4 and discussing countermajoritarianism).

[61] Kim Forde-Mazrui, *Tradition as Justification: The Case of Opposite-Sex Marriage*, 78 U. CHI. L. REV. 281, 302 (2011) ("Modern equal protection doctrine is premised on the distinction between legitimate and illegitimate government purposes.").

[62] Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2360 (2000).

legitimate reasons to discriminate by race compared to the likelihood that illegitimate purposes underlie a racially discriminatory law.[63] One of the few legitimate interests that a racial classification might serve is to remedy racial discrimination against past generations of people of color, especially black people, that manifest in socioeconomic disadvantages experienced by black people today.[64] Such classifications designed to benefit racial minorities in order to remedy discrimination against prior generations constitute a form of race-based affirmative action.

For classifications based on sexual orientation, history similarly reveals a high likelihood of illegitimate purposes.[65] In contrast to race, however, affirmative action for gays and lesbians today is less likely to remedy discrimination against prior generations of gays and lesbians. That is not because such past discrimination did not occur or is less deserving of redress, but rather because past discrimination against gays and lesbians is less likely to have cumulative, intergenerational effects on gays and lesbians today in the way that past racial discrimination has intergenerational effects on black people today. The reason is that race is far more inheritable than sexual orientation. Black parents overwhelmingly have black offspring and black descendants in subsequent generations, while white parents rarely do. Gay and lesbian parents, by contrast, are more likely to have *heterosexual* children and descendants than to have gay or lesbian children and descendants. Moreover, while heterosexual parents are also more likely to have heterosexual than gay or lesbian children,[66] they appear as likely to have gay or lesbian children and descendants as gay and lesbian parents do.[67] Affirmative action for gays and lesbians today would

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[63] *Id.* at 2354.

[64] *Id.* at 2364–81.

[65] Rowland v. Mad River Local Sch. Dist., 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("[H]omosexuals have historically been the object of pernicious and sustained hostility."); EVAN GERSTMANN, THE CONSTITUTIONAL UNDERCLASS: GAYS, LESBIANS, AND THE FAILURE OF CLASS-BASED EQUAL PROTECTION 62 (1999) (describing the history of legal and social discrimination suffered by gay and lesbian persons); RICHARD A. POSNER, SEX AND REASON 291 (1992) (For centuries, the prevailing social attitude toward gay and lesbian persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment."); Hutchinson, *supra* note 39, at 1030–33 (describing the history of political powerlessness and discrimination suffered by gay and lesbian persons).

[66] See Fiona Tasker, "Lesbian Mothers, Gay Fathers, and Their Children: A Review," 26 Developmental and Behavioral Pediatrics, 224-240, 233 (2005) (finding that "The large majority of sons and daughters of lesbian or gay parents grow up to identify as heterosexual.").

[67] The question whether the children of gay or lesbian parents are more likely to be gay or lesbian than the children of heterosexual parents is not free from doubt. The great weight of studies find no greater likelihood of same-sex orientation for the children of gay or lesbian parents, but that consensus has been challenged. *See* Walter R. Schumm, Children of Homosexuals More Apt to be

thus be highly inaccurate at identifying the descendants of gays and lesbians discriminated against in prior generations. Most affirmative action beneficiaries would have descended from heterosexual parents and ancestors, and some heterosexuals not benefited by such affirmative action would have descended from gay or lesbian parents or ancestors who did experience discrimination. A constitutional mandate that government ignore sexual orientation, a result that strict scrutiny would practically require, is thus less likely than a mandate that government ignore race to prevent needed affirmative action to redress present effects of historic injustice.

I emphasize that the application of strict scrutiny to laws that discriminate on the basis of sexual orientation would not at all undermine antidiscrimination protections for gays and lesbians. Strict scrutiny would largely prohibit state-sponsored affirmative action for gays and lesbians, but it would not prohibit legislation or regulations designed to prevent discrimination, by government or private actors, against gays and lesbians. Indeed, it would practically forbid laws and other governmental actions that discriminate against gays and lesbians.

The Court should also have held that bans on same-sex marriage constitute sex discrimination subject to intermediate scrutiny. Such bans expressly classify people by their sex in determining whether a putative marriage is lawful. The Court in *Loving* explained that a law discriminates by race when it denies an otherwise lawful marriage based on the race of the participants.[68] By the same reasoning, reserving marriage to one man and one woman necessarily discriminates based on the sex of the participants. Chief Justice John Roberts made this point succinctly during oral argument in *Obergefell*:

Homosexuals? A Reply to Morrison and to Cameron Based on an Examination of Multiple Sources of Data, 42 J. Biosocial Sci. 721 (2010) (acknowledging the substantial consensus of no difference, but claiming that the research supports some greater likelihood that children of gay or lesbian parents will be gay or lesbian). Schumm's paper has received criticism on methodological and ethical grounds. E.g., Jim Burroway, "'Children of Homosexuals' Researcher More Apt To Ape Paul Cameron," Box Turtle Bulletin (Oct. 17, 2010) (methodological critique), http://www.boxturtlebulletin.com/2010/10/17/27400 ; Wayne Besen, "Dangerous New Anti-Gay Sham Study Debunked," Huffington Post (Nov. 17, 2011) (ethical and methodological critique), https://www.huffingtonpost.com/entry/dangerous-new-antigay-sha_b_767507. Even if Schumm's criticisms of the scientific consensus were justified, the point would remain that the sexual orientation of parents is far less predictive of the orientation of their children and descendants than the predictive value of race is.

[68] Loving v. Virginia, 388 U.S. 1, 11 (1967) ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.").

> Counsel, I'm not sure it's necessary to get into sexual orientation to resolve the case. I mean, if Sue loves Joe and Tom loves Joe, Sue can marry him and Tom can't. And the difference is based upon their different sex. Why isn't that a straightforward question of sexual discrimination?[69]

I have yet to read a persuasive rebuttal to the Chief Justice's point that bans on same-sex marriage constitute sex discrimination, including by him. Yet the Chief Justice inexplicably failed to follow or even mention his point when he dissented in *Obergefell*. Moreover, a claim by some traditionalists that bans on same-sex marriage do not discriminate against gays and lesbians appears to be based on reasoning that such bans discriminate by sex instead. Their claim is that gays and lesbians are free to marry as much as heterosexual people are provided they limit their choice to someone of a different *sex*.[70] Classifications based on sex require heightened, intermediate scrutiny, which would have required the states to prove that bans on same-sex marriage substantially serve important interests, a test they would very likely have failed.[71]

In short, the Court in *Obergefell* should have charged states with advancing heterosexual supremacy and should have held that all laws that discriminate on the basis of sexual orientation are suspect and thus subject to strict scrutiny. The question arises how the Court should assess other societal hierarchies. For example, how should the Court evaluate two-person marital supremacy, which American law enforces through criminal punishment? And how should the Court assess marital supremacy, the social and legal privileges accorded married people over non-married people? Marital supremacy has been weakened in recent decades, a cause of

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[69] Chief Justice Roberts, Transcript of Oral Argument, at 61–62, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

[70] *See* Justin T. Wilson, *Preservationism, or The Elephant in the Room: How Opponents of Same-Sex Marriage Deceive Us Into Establishing Religion*, 14 DUKE J. GENDER L. & POL'Y 561, 630 (2007) ("Many preservationists claim that gay and lesbian individuals have not actually been deprived of their right to marry, because they can simply 'choose' to marry an individual of the opposite sex."); Goodridge v. Department of Public Health, 798 NE.2d 941, 974-75 (Mass. 2003) (Spina, J., dissenting) (arguing that Massachusetts' challenged marriage law "does not create any disadvantage identified with gender, as both men and women are similarly limited to marrying a person of the opposite sex. . . . Similarly, the marriage statues do not discriminate on the basis of sexual orientation. . . . All individuals, with certain exceptions not relevant here, are free to marry. Whether an individual chooses not to marry because of sexual orientation or any other reason should be of no concern to the court.").

[71] *See* United States v. Virginia, 518 U.S. 515, 532–33 (1996) (defining and applying heightened intermediate scrutiny).

concern to some,[72] but not all.[73] Marital supremacy remains significant,[74] however, and *Obergefell* reinforced it with moving accounts of the value of marriage.[75]

What supremacies are constitutionally illegitimate is a difficult question. American society has largely reached a point at which heterosexual supremacy is not constitutionally acceptable and this essay argues that the Court should acknowledge such forcefully. For other supremacies, questions for the Court include whether a supremacy is premised on a belief in the inferiority of a group and, if so, whether that belief is justified in terms of harm caused by the group's defining characteristic or conduct. Does the subordinated group cause cognizable harm by the characteristic or conduct that purportedly justifies discrimination against them? Heterosexual supremacy is based on a belief in the inferiority of gays and lesbians without a credible claim that gays and lesbians, married or not, cause cognizable harm to others by virtue of their sexual orientation. As for other supremacies, if answering the foregoing questions determines that a supremacy is unjustified, courts should recognize it as such and declare it presumptively unconstitutional.

III. HOW *OBERGEFELL* WAS COMMENDABLY *NOT* LIKE *LOVING*

The Court in *Obergefell* was appropriately *not* like *Loving* but instead like *Brown* by empathizing with the plaintiffs and other victims of discrimination. In fact, the Court in *Obergefell* empathized with the plaintiffs even more movingly and effectively than it did in *Brown*. The *Obergefell* Court's humanizing description of the plaintiffs and the Court's explanation of how denying same-sex marriage is humiliating, demeaning and economically harmful to same-sex couples, including those with children, can usefully inform the public why such laws deprive gays and lesbians of equal protection. Courts have a legitimate though limited ability to advance equality for socially marginalized groups. Educating the public to

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[72] *See, e.g.,* NANCY POLIKOFF, BEYOND STRAIGHT (AND GAY) MARRIAGE 63–82 (2008) (explaining how the "marriage movement," connected to the politics of the Christian Right, has advocated for marriage supremacy beginning in the 1980s in response to perceived threats to traditional social norms).

[73] *See, e.g., id.* at 123–43 (arguing that family law too often privileges marital status over the best interests of children and advocating for "valuing all families" reform that would continue to chip away at marital supremacy).

[74] *See* Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CAL. L. REV. 1277, 1279 (2015) ("Marital supremacy—the legal privileging of marriage—endures, despite soaring rates of nonmarital childbearing and a widening "marriage gap" that divides American by race, wealth, and education." (footnotes omitted)).

[75] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.").

facilitate the social and political dismantling of heterosexual supremacy is a purpose that courts can aid in advancing.

A question raised by this essay's endorsement of judicial empathy is to what extent should courts empathize with all groups affected by a case, regardless of any such group's position toward the issues at stake. In *Obergefell* itself, for example, the Court empathized with the "utmost, sincere" beliefs of same-sex marriage opponents "that are so fulfilling and so central to their lives and faiths."[76] This essay's claim that *Obergefell* should have called out opponents of same-sex marriage for heterosexual supremacy arguably suggests that the Court's empathy for them may have undermined the Court's ability to confront that supremacy. Consider also plaintiffs who challenge antidiscrimination protections for gays and lesbians, such as the cake maker who refused to make a wedding cake for a same-sex couple.[77] Should the Court have empathized with him, as it did?[78]

Empathy is an important virtue, indeed imperative, for sound judicial decision-making. The perspectives of opponents of same-sex marriage most certainly should be understood and taken into account. That does not, however, dictate how courts should decide the ultimate question. Empathy does not necessitate agreement. Understanding the perspective of opponents of same-sex marriage does not, and should not, preclude identifying their belief system as supremacist. This essay has argued that opponents of same-sex marriage need not be motivated by animosity. But it has also explained that people of good faith can hold beliefs, whether from socialization or other causes, that are constitutionally illegitimate justifications for discriminatory laws.

CONCLUSION

This essay has defended the virtues of judicial candor and boldness in calling out supremacist ideologies and in presuming laws unconstitutional that promote illegitimate supremacies. In *Obergefell*, the Court should have called out bans on same-sex marriage as premised on and promoting

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[76] *Obergefell*, 135 S. Ct. at 2607. *See also supra*, note 19 (expressing empathy and respect for the religious and philosophical beliefs of same-sex marriage opponents).

[77] *See* Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018) (holding that free exercise rights of cake maker who refused to make cake for same-sex wedding were violated because commission's decision against him was tainted by animosity toward his religion).

[78] Thus, the Court observed that, as the baker "would see the case," making the wedding cake would amount to an "endorsement in his own voice and of his own creation," would implicate "his deep and sincere religious beliefs," and he "likely found it difficult to find a line" between his customers' rights and his religious obligations. The baker's "dilemma was particularly understandable," the Court went on, in light of the fact that Colorado did not recognize same-sex marriage at the time the baker refused to bake the cake. See *Masterpiece Cakeshop*, *supra*, note 44, at 1728.

heterosexual supremacy, and should have held that sexual orientation is a suspect classification subject to strict scrutiny. When the Court next hears a case involving anti-gay discrimination, it should correct these shortcomings.

At the same time, the Court's process of adjudicating challenges to laws should include empathizing with the people impacted by those laws, including those who believe in ideologies inconsistent with equality. With respect to *Obergefell*, this essay commends the Court for its empathy with gays and lesbians. The Court advances the Constitution and society's commitment to equality by informing itself, the legal profession and the public about how gays and lesbians experience discrimination.

This essay's recommendations should guide the Court beyond same-sex marriage and the rights of gays and lesbians. The Court should empathize with all parties impacted by laws, both as a means of respecting them and in order to gain understanding of the interests at stake. If, however, after empathizing with all relevant parties and perspectives, the Court nonetheless concludes that a discriminatory law promotes an illegitimate supremacy, the Court should call out such supremacy clearly, unequivocally, and with a firm hand.

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