FROM *LOVING* TO *OBERGEFELL*: ELEVATING THE SIGNIFICANCE OF DISCRIMINATORY EFFECTS

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INTRODUCTION

LOVING v. Virginia and *Obergefell v. Hodges* are both landmark Supreme Court cases that advanced marriage equality.[1] In *Obergefell*, the Court invalidated bans on same-sex marriage by building upon precedent it set nearly five decades earlier in *Loving*, which declared antimiscegenation laws unconstitutional.[2] Indeed, commentators often describe *Loving* as an important precursor to *Obergefell*.[3] Yet *Obergefell*'s reasoning deviated from that of *Loving*.[4] The differences between the two cases are all too often overlooked. This Essay thus seeks to address this blind spot by drawing attention to a critical distinction: *Loving* and *Obergefell* differ in their conceptualization of discrimination.

When *Loving* evaluated whether Virginia's antimiscegenation law was discriminatory, it focused on the law's facial race-based classifications and on the government's intent behind the law.[5] *Obergefell* took a different approach. Its analysis focused on same-sex marriage bans' deleterious effects on people's lived experiences.[6] *Obergefell*'s conceptualization of discrimination thus deviated from *Loving* because *Loving*'s approach centered on *facial classifications* and *intentions*, whereas *Obergefell*'s approach centered on *effects*.

The remainder of this Essay proceeds in two Parts. Part I elaborates on *Loving*'s and *Obergefell*'s contrasting conceptualizations of discrimination. Part II then explains that *Obergefell*'s departure from *Loving*—elevating the analytical significance of discriminatory effects—was a remarkable development that should be celebrated and should help guide the development of equal protection doctrine.

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[1] *See Loving v. Virginia*, 388 U.S. 1 (1967); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

[2] *See Obergefell*, 135 S. Ct. at 2589–90.

[3] For examples of essays from this symposium that note *Loving*'s influence on *Obergefell*, see Symposium, Loving *Yesterday, Today, and Tomorrow*, 25 VA. J. SOC. POL'Y & L. 259 (2018).

[4] *See* Part I; *See also* Kim Forde-Mazrui, *Heterosexual Supremacy: If* Obergefell *Had Been More Like* Loving *and Less Like* Brown, 25 VA. J. SOC. POL'Y & L. 281 (2018).

[5] *Loving*, 388 U.S. at 7–12.

[6] *Obergefell*, 135 S. Ct. at 2602–03.

I. *OBERGEFELL*'S DEVIATION FROM *LOVING*

This section uses *Loving* as a foil to illuminate *Obergefell*'s divergent approach to discrimination analysis. Juxtaposing these two cases spotlights the significance of discriminatory effects in *Obergefell*'s analysis.

A. Loving's *Focus on Facial Classifications and Invidious Intent*

Loving concerned a statutory scheme that barred intermarriage between "any white person" and "any colored person."[7] The Court began its analysis by expressing concern about this facial classification of people based on race.[8] It insisted that "[d]istinctions drawn according to race" are presumptively "'odious.'"[9] The State of Virginia claimed that its antimiscegenation regime did not amount to discrimination because of the so-called "equal application" theory.[10] According to this theory, the law did not discriminate because it equally punished white and non-white partners in interracial marriages.[11] The Supreme Court, however, rejected the idea that "equal application" of a law's racial classification scheme could shield the law from rigorous judicial scrutiny.[12]

Moreover, the Court stated that Virginia's antimiscegenation regime did indeed discriminate based on race because it stemmed from nefarious intentions.[13] The Court emphasized that Virginia's antimiscegenation law was "designed to maintain White Supremacy"[14] and was "obviously an endorsement of the doctrine of White Supremacy."[15] In doing so, the Court set its gaze on Virginia's dishonorable intent of perpetuating racial hierarchy. This focus on intentions telegraphed subsequent cases—such as *Washington v. Davis* and *Personnel Administrator of Massachusetts v. Feeney*—in which the Court centered its analysis on whether the government was motivated by "discriminatory intent," which the Court has also referred to interchangeably as "invidious intent."[16]

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[7] The statutory scheme criminalized entering an interracial marriage in Virginia and also criminalized the evasion of Virginia law by entering an interracial marriage elsewhere. *Loving*, 388 U.S. at 4–6.

[8] *Id.* at 8–9.

[9] *Id.* at 11, quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

[10] *Loving*, 388 U.S. at 8, 11.

[11] *Id.* at 8.

[12] *Id.* at 8–9.

[13] *Id.* at 7–11.

[14] *Id.* at 11.

[15] *Id.* at 7.

[16] In *Washington v. Davis* and *Personnel Administrator of Massachusetts v. Feeney*, the Court refused to exercise heightened scrutiny of facially neutral government policies that adversely affected African Americans and women, respectively; the Court refused heightened scrutiny because it found that the policies were not motivated by "discriminatory" or "invidious" intent. *See* Washington v. Davis, 426 U.S. 229 (1976) (upholding a personnel screening test that allegedly

While *Loving* pointed to the intent behind Virginia's antimiscegenation law, it said virtually nothing about the actual effects of banning interracial marriage.[17] One might contend that a law intended to perpetuate racial hierarchy will likely produce such results, but the *Loving* opinion did not link intentions to consequences this way.[18] Beyond noting that Derek and Mildred Loving were sentenced to jail, the Supreme Court's *Loving* opinion failed to openly acknowledge how antimiscegenation laws affected people's lived experiences on the ground.[19] The Court would take a markedly different approach in *Obergefell* nearly five decades later.

B. *Obergefell's Focus on Discriminatory Effects*

Obergefell, like *Loving*, required the Court to consider what counts as discrimination. It ultimately treated same-sex marriage bans as a form of discrimination based on sexual orientation.[20] I suspect that, for many people, saying that same-sex marriage bans discriminate based on sexual orientation sounds intuitively correct.[21] In this section, however, I seek to transcend intuition and unpack the claim that same-sex marriage bans are discriminatory.

The *Obergefell* opinion did not explain clearly why same-sex marriage bans constitute sexual orientation discrimination.[22] While *Obergefell* was opaque in terms of what it said, it was much clearer in terms of what it did. Considering what *Obergefell* did and did not do, one ought to understand *Obergefell* as asserting that same-sex marriage bans are discriminatory because of their effects[23]—*not* because of the intents behind the

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discriminated against African Americans); Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (upholding preferential treatment granted to veterans despite its adverse impact on women). For further discussion of these two cases, see *infra* notes 74–75 and accompanying text.

[17] *See generally* Loving v. Virginia, 388 U.S. 1 (1967).

[18] *Id.*

[19] *See id.* at 3.

[20] *See* Part I.B.2.

[21] In this vein, the mainstream media often frames same–sex marriage as an issue of sexual orientation discrimination, without explaining why that frame makes sense. Indeed, the media's use of the phrase "gay marriage" to refer to same–sex marriage suggests that bans on same–sex marriage discriminate against gays and lesbians. *E.g.*, Susan Page, *Poll: No Turning Back on Gay Marriage*, USA TODAY, Apr. 19, 2015), https://www.usatoday.com/story/news/politics/elections/2016/2015/04/19/usa-today-suffolk-poll-gay-marriage-religious-freedom/25868539/.

[22] *Cf.* Steve Sanders, Pavan v. Smith: *Equality for Gays and Lesbians in Being Married, Not Just Getting Married*, ACS SUPREME COURT REVIEW: 2016–2017 161, 172 (2017) ("To be sure, much of the reasoning in *Obergefell* is opaque, and understanding its full meaning may require the reader to draw some inferences or read between the lines.")

[23] *See* Part I.B.2.

bans, and *not* because of any facial classifications in same-sex marriage bans.[24]

1. What the Court Did *Not* Do

To understand *Obergefell*'s conceptualization of discrimination, consider first what the opinion did *not* do. There are certain conceptualizations of discrimination that the Court either rejected or simply ignored. First, the Court did not conceptualize discrimination in terms of invidious intent as the Court had done in *Loving*.[25] To the extent that *Obergefell* did engage in any discussion about the intentions behind same-sex marriage bans, it absolved the bans' proponents of blame, noting that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises."[26] The Court also stated that "[the] nature of injustice is that we may not always see it in our own times."[27] This observation about not "seeing" injustice implies that the government's traditional exclusion of same-sex couples from marriage was not consciously motivated by a desire to subordinate gays and lesbians.

There is a striking contrast between *Obergefell* and *Loving* when it comes to their analyses of governmental intent. *Loving* said that legislators designed Virginia's antimiscegenation law to consciously maintain racial hierarchy.[28] *Obergefell* said nothing of that sort.[29] We can also contrast *Obergefell* with *United States v. Windsor*.[30] *Windsor* struck down the part of the Defense of Marriage Act (DOMA) that barred the federal government from recognizing marriages of same-sex couples, even if those couples were considered to be married by their home state.[31] The majority opinion in *Windsor* explicitly stated that DOMA was motivated by animus.[32] It found that the federal government intended for DOMA to

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[24] *See* Part I.B.1.

[25] I previously made this observation in Holning Lau & Hillary Li, *American Equal Protection and Global Convergence*, 86 FORDHAM L. REV. 1251, 1261–62 (2016). *See also* Carlos A. Ball, *Bigotry and Same–Sex Marriage*, 84 UMKC L. REV. 639, 639 (2016) ("*Obergefell* did not focus on the intent or motivations behind the same–sex marriage bans.").

[26] *Obergefell*, 135 S. Ct. at 2602.

[27] *Id.* at 2598.

[28] *Loving*, 388 U.S. at 7–12.

[29] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[30] *See* United States v. Windsor, 133 S. Ct. 2675 (2013).

[31] *Id.* at 2693.

[32] *Id.*

reinforce the subordination of gays and lesbians.[33] *Obergefell*, however, included no such focus on invidious intentions.[34]

Obergefell's absolution of same-sex marriage opponents may have been a response to the backlash against *Windsor*. Critics recoiled at *Windsor*'s suggestion that opposition to same-sex marriage is rooted in bigoted intentions.[35] Perhaps this criticism of *Windsor* convinced the majority in *Obergefell* not to ascribe invidious intent to opponents of same-sex marriage and to describe them instead as coming from a place of decency and honor.[36]

Just as *Obergefell* did not say same-sex marriage bans are discriminatory because of invidious intent, it also did not conclude that such bans are discriminatory based on a technical analysis of facial classifications.[37] As many commentators have explained, same-sex marriage bans facially discriminate based on sex.[38] In other words, when the law limits marriage

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[33] "[I]n *Windsor*, the Court accused Congress of acting (by overwhelming congressional majorities, no less) merely—or at least primarily—purposefully to 'injure,' 'disapprov[e],' 'stigma[tize],' 'demean,' and 'degrade' same–sex married couples and to 'humiliate[]' their children." Daniel O. Conkle, *Evolving Values, Animus, and Same–Sex Marriage*, in Essays on the Implications of Windsor and Perry, 89 IND. L.J. 27, 39–41 (2014) (quoting *Windsor*, 133 S. Ct. at 2693–96).

[34] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). In the subsequent case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, the Supreme Court demonstrated that it is troubled not only by animus toward same–sex couples, but also by animus toward religious opponents of same-sex marriage. No. 16-111, slip op. at 9, 12 (U.S. June 4, 2018). *Masterpiece Cakeshop* concerned a baker who allegedly violated Colorado's antidiscrimination statute by refusing to design and create a cake for a same–sex wedding. The Court held that the Colorado Civil Rights Commission violated the baker's First Amendment right to free religious exercise because its handling of the baker's case was marred by "clear and impermissible hostility toward the [baker's] sincere religious beliefs." *Id.* at 12, 16.

[35] *See, e.g.*, Conkle, *supra* note 33, at 39–41; Steven D. Smith, *The Jurisprudence of Denigration*, 48 U.C. DAVIS L. REV. 675, 678–86 (2014); Ryan T. Anderson, *Civility, Bullying, and Same–Sex Marriage*, HERITAGE FOUNDATION, July 15, 2013, https://www.heritage.org/marriage-and-family/commentary/civility-bullying-and-same-sex-marriage. *See also Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting) (accusing the majority of "tar[ring] the political branches with the brush of bigotry"); *Windsor*, 133 S. Ct. at 2718 (Alito, J., dissenting) (criticizing the majority for casting opponents of same–sex marriage "in the role of bigots").

[36] *Obergefell*, 135 S. Ct at 2602.

[37] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[38] *See, e.g.*, Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same–Sex Marriage Debate*, 16 STAN. L. & POL'Y REV. 98, 107 (2005); Mary Anne Case, *What Feminists Have to Lose in Same–Sex Marriage Litigation*, 57 UCLA L. REV. 1199 (2010); Holning Lau, *Formalism: From Racial Integration to Same–Sex Marriage*, 59 HASTINGS L.J. 843 (2008); Christopher Leslie, *Embracing Loving: Trait–Specific Marriage Laws and Heightened*

to relationships between "one man and one woman," it creates facial sex-based classifications. Commentators have argued that this formalistic sex discrimination dovetails with the fact that same-sex marriage bans reflect and reinforce gender stereotypes.[39] Some courts have endorsed the conclusion that same-sex marriage bans constitute sex discrimination.[40] For example, in the landmark case of *Baehr v. Lewin*—the first major courtroom victory for same-sex couples seeking marriage rights—the Supreme Court of Hawaii concluded that limiting marriage to different-sex couples amounts to sex discrimination.[41] *Obergefell*, however, was silent about same-sex marriage bans' embodiment of sex-based categories.[42]

While same-sex marriage bans facially distinguish between men and women, they do *not* draw any formal distinction between gay individuals and their straight counterparts.[43] Indeed, opponents of same-sex marriage have long argued that same-sex marriage bans are facially neutral with respect to sexual orientation because they prohibit both gay and straight individuals from marrying partners of the same sex; meanwhile, gay and straight individuals alike can marry someone of the opposite sex.[44] I

Scrutiny, 99 CORNELL L. REV. 1077 (2014). *See also* Brief Amici Curiae of Legal Scholars Stephen Clark et al., In Support of Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) Nos. 14–556, 14–562, 14–571 and 14–574 (U.S. Mar. 5, 2015).

[39] *See, e.g.*, Appleton, *supra* note 38, at 108; Case, *supra* note 38, at 1202; Lau, *supra* note 38, at 870; Leslie, *supra* note 38, at 1117–18. *See also* Brief Amici Curiae of Legal Scholars Stephen Clark et al., *supra* note 38, at 18–23.

[40] *E.g.*, Lawson v. Kelly, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010); Baehr v. Lewin, 852 P.2d 44, 64–67 (Haw. 1993) (plurality opinion).

[41] *Baehr*, 852 P.2d at 67.

[42] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[43] *See* Case, *supra* note 38, at 1220–21 ("On their face, bans on same–sex marriage do not discriminate on the basis of sexual orientation—no state has ever sought to prohibit a gay man from marrying a lesbian . . .").

[44] Note that this is not merely a rearticulation of the failed equal application theory. *Loving* said that equal application of race–based classifications did not legitimize the race–based classifications. *See* Part I.A. Same–sex marriage bans do not facially classify individuals based on sexual orientation to begin with, so the discussion of equal application does not apply. To the extent that *Loving*'s discussion of equal application theory applies to same–sex marriage bans, it is in the context of sex discrimination: equal application of the bans' sex–based facial classifications does not legitimize the sex–based classifications. *See* Leslie, *supra* note 38, at 1130.

Numerous judges have accepted the conclusion that same-sex marriage bans are facially neutral with respect to sexual orientation. *See, e.g.*, Sevcik v. Sandoval, 911 F. Supp. 2d 996, 1004 (D. Nev. 2012); *In re* Marriage Cases, 183 P.3d 384, 465 (Cal. 2008) (Baxter, J., concurring in part and dissenting in part); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 521 n.11 (Conn. 2008) (Zarella, J., dissenting); Dean v. District of Columbia, 653 A.2d 307, 362–63 (D.C. 1995)

suspect this formalistic analysis is unsatisfying to many people, but as a technical matter, this analysis is correct: same-sex marriage bans do not facially discriminate between individuals based on sexual orientation.[45]

Same-sex marriage bans do, however, create a classification scheme that distinguishes between same-sex and different-sex couples (as opposed to gay and lesbian individuals), and a court could construe this distinction as a form of sexual orientation discrimination.[46] *Obergefell*, however, did not pursue this rationale.[47] For a good example of a court that did pursue this logic, we can look abroad to the Ontario Court of Appeal. In the same-sex marriage case of *Halpern v. Attorney General of Canada*, it explained that excluding same-sex couples from marriage "constitutes a formal distinction between opposite-sex and same-sex couples" that amounts to sexual orientation discrimination.[48] In contrast, *Obergefell* did not analyze same-sex marriage bans in terms of the formal distinctions that they draw.[49]

2. What the Court *Did* Do

Instead of centering its analysis on discriminatory intent or the formal categories drawn by same-sex marriage bans, *Obergefell* focused on the harms of same-sex marriage bans. It elaborated on same-sex marriage bans' deleterious effects not only on the lives of same-sex couples who wish to marry, but also on their children, and on gay and lesbian communities generally.[50]

The Court explained that same-sex marriage bans deny same-sex couples a long list of rights and responsibilities that the government confers upon marriage.[51] Marital status has consequences in a wide range of legal contexts such as "taxation; inheritance and property rights; rules of

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(Steadman, A.J., concurring); Baehr v. Lewin, 852 P.2d 44, 51 n.1 (Haw. 1993); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting); Hernandez v. Robles, 855 N.E.2d 1, 20 (N.Y. 2006) (Graffeo, J., concurring); Andersen v. King Cty., 138 P.3d 963, 997 (Wash. 2006) (Johnson, J., concurring).

[45] I have written about this analysis previously in Lau & Li, *supra* note 25, at 1261.

[46] *See infra* notes 47–50 and accompanying text. *See also* Holning Lau, *Transcending the Individualist Paradigm in Sexual Orientation Antidiscrimination Law*, 94 CAL. L. REV. 1271, 1321 (2006).

[47] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[48] Halpern v. Canada (Att'y Gen.), [2002] O.J. No. 2714 (Can. Ont. Sup. Ct. J.), at para. 65. Although the Ontario Court of Appeal made this observation, its analysis was not entirely formalistic. In light of the Canadian constitutional system's commitment to substantive equality, the court went on to discuss the harmful effects of excluding same–sex couples from marriage. *See id.* at paras. 78–99.

[49] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[50] *Id. See also* Lau & Li, *supra* note 25 at 1261–62; Ball, *supra* note 25 at 639.

[51] *Obergefell*, 135 S. Ct. at 2601, 2604.

intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules."[52] As the Court noted, marriage "is a significant status for over a thousand provisions of federal law."[53] According to the Court, denying same-sex couples the benefits of marriage results in same-sex couples being "consigned to an instability many opposite-sex couples would find intolerable."[54]

The Court made clear that same-sex marriage bans also inflict dignitary injuries.[55] According to the Court, banning same-sex marriage "necessarily . . . demeans or stigmatizes"[56] same-sex couples and "disparage[s] their choices and diminish[es] their personhood."[57] In light of both the tangible and intangible consequences, "denial to same-sex couples of the right to marry works a grave and continuing harm."[58]

This deleterious impact of banning same-sex marriage reaches beyond same-sex couples. The Court remarked that the bans "harm and humiliate the children of same-sex couples."[59] Banning same-sex marriage forces children of same-sex couples to "suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life."[60] Additionally, the Court stated that same-sex marriage bans "demean[],"[61] "disrespect and subordinate"[62] gays and lesbians generally, not only those who wish to marry.[63]

To be sure, the majority in *Obergefell* spent a large portion of its opinion connecting its analyses of liberty and equality by noting that the freedom to marry is a fundamental liberty that different-sex couples can exercise while same-sex couples cannot.[64] The *Obergefell* opinion spent more

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[52] *Id.* at 2601.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 2602–04.

[56] *Id.* at 2602.

[57] *Id.*

[58] *Id.* at 2604.

[59] *Id.* at 2600–01.

[60] *Id.* at 2590. The Court also stated: "Without the recognition, stability, and predictability marriage offers, children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated to a more difficult and uncertain family life. The marriage laws at issue thus harm and humiliate the children of same–sex couples."). *Id.*

[61] *Id.* at 2602.

[62] *Id.* at 2604.

[63] *Id.* at 2601–02.

[64] *See id.* at 2602–04. For commentary remarking on *Obergefell*'s linking of equality and liberty, *see, e.g.,* Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIR. 107 (2015); Laurence H.

time linking liberty and equality than the *Loving* opinion did.[65] This linkage comports with my claim that the Court is concerned about discriminatory effects: The Court's attention to liberty is essentially attention to impact.[66] By emphasizing that a *fundamental* liberty was a stake—not just a garden variety liberty interest—*Obergefell* underscored the gravity of same-sex marriage bans' adverse consequences. Moreover, instead of mechanistically stating that infringing fundamental rights triggers strict scrutiny, the Court elaborated on the ways that denying same-sex couples of this fundamental right is harmful.[67]

Indeed, *Obergefell* advances a conceptualization of discrimination that centers on the ways laws affect lived experiences unequally. In contrast to *Loving*, *Obergefell* did not engage in a formalistic assessment of facial classifications, nor did it focus on the invidiousness of the government's intentions.[68]

II. BEYOND *OBERGEFELL*

Looking to the future, what should we me make of the fact that *Obergefell* gave primacy to discriminatory effects? In this section, I address this question in two steps. First, from a normative perspective, I submit that *Obergefell*'s focus on discriminatory effects is a development worth celebrating.[69] Scholars have argued persuasively that antidiscrimination regimes are far too underprotective if they focus solely on facial classifications and invidious intentions.[70] Such regimes are underprotective partly because prejudiced lawmakers can easily conceal their discriminatory intentions and write facially neutral laws that bear extremely harmful

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Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 29–32 (2015); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748 (2011).

[65] *See* Hunter, *supra* note 64, at 113.

[66] For my discussion of this point in previous writing, *see* Lau & Li, *supra* note 25, at 1263.

[67] *See supra* notes 50–59 and accompanying text. For examples of earlier cases where courts reasoned mechanistically that restricting the fundamental right to marry triggers heightened scrutiny, see Zablocki v. Redhail, 434 U.S. 374, 383–88 (1978) (discussing the marriage rights of noncustodial parents who owe child support); Bostic v. Schaefer, 760 F.3d 352, 375 (4th Cir. 2014) (reasoning mechanistically that denying same–sex couples the fundamental right to marry triggers strict scrutiny in equal protection analysis).

[68] *See* Part I.A (discussing *Loving*).

[69] Although I celebrate *Obergefell* here, I have previously discussed some of the opinion's shortcomings in Holning Lau, *Marriage Equality and Family Diversity: Comparative Perspectives from the United States and South Africa*, 85 FORDHAM L. REV. 2615 (2017) (critiquing the majority opinion in *Obergefell* for its conceptualization of dignity as it relates to marriage).

[70] *See* Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 375 n.5 (2007) (listing articles criticizing the Court's constitutional jurisprudence that restricts disparate impact claims).

discriminatory effects.[71] Intent-based antidiscrimination regimes are also underprotective because a great deal of objectionable prejudice is unconscious and, therefore, remains unaddressed by antidiscrimination regimes that focus on conscious motivations.[72] In light of these considerations, *Obergefell* is a welcome development because it embodies the normative principle that discriminatory effects are troubling, regardless of whether the discriminatory effects are accompanied by invidious intent or facially discriminatory classification schemes. To be clear, I am not suggesting that courts should completely eschew analyses of intent and facial classifications.[73] Instead, I submit that courts should also be concerned about discriminatory effects.

My second point about the significance of *Obergefell* deals with doctrine. *Obergefell*'s focus on discriminatory effects casts doubt on the line of equal protection cases that trace back to *Washington v. Davis*.[74] According to these cases, courts shall not rigorously review a facially neutral law that disproportionately harms a particular social group, no matter how egregious that disparate impact is, unless the law was clearly motivated by invidious intent.[75] *Washington v. Davis* sits well with *Loving* because both cases focused their attention on finding facial discrimination and invidious intent.[76] *Davis* and *Obergefell*, however, stand in tension with each

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[71] *See* Yoshino, *supra* note 64, at 764.

[72] *See* Jerry Kang & Kristin Lane, *Seeing Through Colorblindness: Implicit Bias and the Law*, 58 UCLA L. REV. 465, 465–89 (2010) (discussing the pervasiveness of unconscious biases).

[73] *Cf.* WILLIAM D. ARAIZA, ANIMUS: A SHORT INTRODUCTION TO BIAS IN THE LAW (2017) (contending that courts ought to continue examining the intent behind laws and invalidating laws when intent is tied to animus); Katie Eyer, Brown, *Not* Loving: Obergefell *and the Unfinished Business of Formal Equality*, 125 YALE L.J. F. 1 (2015) (explaining that both formal and substantive equality are important).

[74] *See* Washington v. Davis, 426 U.S. 229, 238–48 (1976) (refusing to apply strict scrutiny to a personnel test for screening applicants to a police force, despite the test's purported discriminatory effects based on race, because the test was facially neutral and not motivated by invidious intent).

[75] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252, 265 (1977); *Davis*, 426 U.S. at 238–48. *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 698, 740–51 (5th ed. 2015) (summarizing the Supreme Court's constitutional jurisprudence on disparate impact cases).

Note that my focus is constitutional law, not civil rights statutes. In some statutory areas, the Court has been much more willing to find impermissible discrimination based on disparate impact. *See, e.g.,* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 135 S. Ct. 2507, 2525 (2015) (discussing the Fair Housing Act); Griggs v. Duke Power Co., 401 U.S. 424, 428–29 (1971) (discussing Title VII of the Civil Rights Act of 1964). The Civil Rights Act of 1991 also explicitly makes disparate impact claims of employment discrimination colorable. 42 U.S.C. § 1981 (2012).

[76] *See* Part I.A (discussing *Loving*).

other: whereas *Davis* minimized the significance of discriminatory impact, *Obergefell* centered its analysis on the discriminatory consequences of same-sex marriage bans.[77]

Obergefell did not explicitly address *Davis*.[78] Nor did *Obergefell* announce any new rule that would replace the doctrine from *Davis*.[79] With that said, the normative principle embodied in *Obergefell*, which elevates the significance of laws' adverse impacts, calls into question the way that *Davis* minimized the doctrinal significance of discriminatory effects.[80] In the future, the Court ought to reconcile this tension by building on *Obergefell*, using it as a springboard for explicitly rejecting *Davis*'s doctrinal test that emphasizes intent over effects.[81]

Looking beyond our borders, one will find that many reputable foreign jurisdictions already define discrimination in terms of effects.[82] In jurisdictions such as Canada, South Africa, the Council of Europe, and Hong Kong, government action that adversely affects a protected social group can violate their respective constitutions (or treaty, in the case of the Council of Europe), even if the government action is facially neutral and not marred by invidious intent.[83] These foreign jurisdictions call this sort of impermissible discrimination "indirect discrimination."[84] Although the United States should not blindly follow foreign law, the experience of respected foreign jurisdictions suggests that *Obergefell* moved the United States in the right direction, toward an equal protection jurisprudence that pays more attention to discriminatory effects.[85]

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[77] *See* Part I.B.2. (discussing *Obergefell*). Recall also that *Obergefell*'s analysis did not hinge on finding facial discrimination or invidious intent. *See* Part I.B.1

[78] *See generally* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[79] *Id.*

[80] *See* Part I.B. (discussing *Obergefell*).

[81] It is beyond the scope of this Essay to propose a specific legal test for evaluating the discriminatory impacts of facially neutral state actions. I do, however, wish to address two relevant concerns that I sometimes hear. First, commentators sometimes wonder whether it is too difficult for courts to evaluate the severity of discriminatory effects. While I recognize that there is difficulty in evaluating discriminatory effects, I would submit that it is equally if not more difficult to ascertain the severity of discriminatory intents. Thus, from a practical standpoint, I see no reason to focus on intents instead of effects. Second, commentators sometimes wonder what ought to be the threshold for discriminatory effects to trigger rigorous judicial review. To this question, I would note that it may not be necessary for courts to identify a threshold. Instead, courts might adopt a more fluid balancing test, under which they would weigh discriminatory effects against justificatory factors on a sliding scale.

[82] *See* Lau & Li, *supra* note 25, at 1279–85.

[83] *See id.*

[84] *See id.*

[85] *See id.* at 1296–99.

While I think the Court ought to reconcile the tension between *Obergefell* and the *Davis* line of disparate impact cases, it is far from clear that the Court will actually do so. Some commentators have suggested that the Court seems to be very comfortable with the gap between its progressiveness in the context of sexual orientation and the context of race.[86] It is thus unclear that the Court will take a principle that it germinated in the sexual orientation case of *Obergefell* and cultivate it in other contexts, such as race discrimination. It would be very unfortunate, however, if the Court chooses not to further develop its equal protection jurisprudence in a way that maintains fidelity to *Obergefell*'s focus on discriminatory effects.[87]

CONCLUSION

Using *Loving* as a foil, this Essay has illuminated the fact that *Obergefell* conceptualized discrimination in terms of the effects of state action. *Obergefell*'s deviation from *Loving* ought to be celebrated because it reflects an antidiscrimination framework that is appropriately more capacious and more protective. *Obergefell*'s focus on discriminatory effects ought to inspire further reform of the United States' equal protection doctrine.

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[86] *E.g.,* Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 22–24 (2017); Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 162–63 (2016).

[87] *See supra* notes 69–73 and accompanying text (explaining that *Obergefell*'s focus on effects is cause for celebration).