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Marriage Equality and Postracialism

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ABSTRACT

When California's Proposition 8 (Prop. 8) eliminated the right to marry a person of the same sex, it aggravated a fissure between the black community and the gay community. Though Prop. 8 had nothing to do with race on the surface, the controversy that followed its passage was charged with racial blame. This Article uses the Prop. 8 controversy, including the ensuing *Perry* litigation challenging the law, as a window into relations between the black and gay communities. Although the marriage equality movement bills itself as a descendant of the black civil rights movement, it often treats its forefather as dead: The political rhetoric and legal arguments of the gay rights movement routinely embrace postracialism, the notion that American society has moved beyond racial difference and hierarchy. Such arguments imply that the struggle for racial justice is over, with gays supplanting blacks as the paradigmatic stigmatized minority. In the words of *The Advocate*, a leading Lesbian Gay Bisexual Transgender (LGBT) periodical, "Gay Is the New Black."

This is the first Article to identify the postracial narratives at the heart of marriage equality argumentation—in the media, on the streets, and in the courts. I show that such claims reflect an oppression Olympics, undermine black-gay relations, and are not dictated by constitutional precedent. Moreover, such claims may inadvertently constrict equality for both groups, marking the end of civil rights for both the black and LGBT communities. I urge the marriage equality movement to attend to race carefully, taking account of the history of the Supreme Court's application of strict scrutiny to race and the ongoing subordination afflicting the black community decades after securing formal equality. This analysis casts doubt on whether the LGBT community should aspire to be "the new black." Attending to the trajectory of black claims for civil rights could lead marriage equality advocates to create doctrinal space for remedial efforts necessary to transform formal equality into equality in fact.

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TABLE OF CONTENTS

INTRODUCTION

In 2004, after San Francisco mayor Gavin Newsom authorized city officials to marry same-sex couples, a *Chicago Tribune* writer compared Newsom to Dr. Martin Luther King and iconic civil rights activist Rosa Parks.[1] Eight years later, marriage equality advocates in North Carolina ran a black-and-white advertisement that featured the image of two water fountains, one marked "Straight" and the other "Gay," with the tag line: "On May 8, make history. Don't repeat it."[2] (See the Appendix for this and other images discussed below.) During the same month, *SF Weekly*, a San Francisco alternative newspaper, ran a cover story on sexual orientation-based bullying entitled "The Gay Selma."[3] As these examples suggest, the media, gay rights activists, and lawyers have long argued that gays are like blacks, asserting that the two groups suffer similar forms of discrimination and deserve the same legal protections, including the application of strict scrutiny to laws that discriminate against them under the Equal Protection Clause.[4] In November 2008, however, Barack Obama became the first African American to win the presidency, while California voters stripped same-sex couples of the right to marry through the passage of Proposition 8 (Prop. 8), with black voters reportedly providing strong support for the marriage ban.[5] Two important shifts followed. For the first time, people directly blamed black voters for the defeat of marriage equality, shining a spotlight on homophobia within the black community like never before.[6] The second shift emerged from the perception that blacks betrayed gays (hereinafter *the black betrayal hypothesis*), and that this duplicity—in combination with Obama's ascendency—led to gays eclipsing blacks as the para-

1. Emilie Le Beau, *Gay Newlyweds Writing History*, CHI. TRIB., Feb. 17, 2004, http://articles.chicagotribune.com/2004-02-17/news/0402180003_1_lesbian-couples-gay-marriage-gay-rights-opponent.
2. EVERY1 AGAINST 1, http://every1against1.com (last visited Feb. 21, 2014).
3. Jessica Lussenhop, *The Gay Selma: Schools Ignore Gay Bullying at Their Own Peril*, S.F. WKLY. (May 30, 2012), http://www.sfweekly.com/2012-05-30/news/lgbt-students-glsen-glaad-pflag-it-gets-better-tyler-clementi-dan-savage. For a brief synopsis of the 1965 incident, in which state troopers attacked civil rights activists in Selma, Alabama and drew critical media attention, see *March 7, 1965: Civil Rights Marchers Attacked in Selma*, N.Y. TIMES LEARNING NETWORK (Mar. 7, 2012, 4:07 AM), http://learning.blogs.nytimes.com/2012/03/07/march-7-1965-civil-rights-marchers-attacked-in-selma.
4. To cite just one example in gay rights activism, Devon Carbado has written about race-sexual orientation analogies in the initial campaign against the military's "Don't Ask, Don't Tell" policy. Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000). I discuss analogies in the marriage equality litigation below. *See infra* Part III.
5. *See infra* text accompanying note 24.
6. A Lexis and Google search for articles on homophobia in the black community found just one article in November 2004 and thirty-six articles in November 2008.

digmatic oppressed minority. Hence, *The Advocate*, a leading Lesbian Gay Bisexual Transgender (LGBT) periodical, declared, "Gay is the New Black."[7]

The racialized sting of Prop. 8 was inextricably linked to the simultaneous election of an African American president. Yet the presidential election sowed a seed of redemption as well: We elected a black leader who would come to endorse marriage equality. On May 9, 2012, in an ABC News interview, President Obama became the first president of the United States to endorse same-sex marriage.[8] Although some pundits predicted that President Obama's support for same-sex marriage would cost him black votes in the fall,[9] it appears that President Obama boosted support for same-sex marriage among blacks and Latinos.[10] An ABC News/Washington Post poll taken two weeks after President Obama's announcement found that 64 percent of people of color supported same-sex mar-

7. *The Advocate* used this slogan as its headline in December 2008, "Gay Is the New Black: The Last Great Civil Rights Struggle" in reference to Michael Joseph Gross' article. Michael Joseph Gross, *Pride and Prejudice*, ADVOCATE, Dec. 16, 2008, at 30. Interestingly, while the article posed the question "Gay Is the New Black?", the magazine cover asserted this statement as fact. *See infra* Appendix.

8. *Transcript: Robin Roberts Interview With President Obama*, ABC NEWS (May 9, 2012), http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043#.T-N5br_gIQ8. This turn of events caused another spike in media attention to "black homophobia." Based on a Lexis and Google search, there were two articles on homophobia among blacks in April 2012 and seventeen articles in May 2012.

9. *See, e.g.*, Sabrina Siddiqui, *Ohio's Black Voters Support Same-Sex Marriage After Obama's Endorsement, Poll Finds*, HUFFINGTON POST (July 3, 2012, 12:04 PM), http://www.huffingtonpost.com/2012/07/03/ohio-black-voters-same-sex-marriage-obama_n_1646189.html ("Obama's same-sex marriage endorsement was initially perceived as being controversial for the African-American community . . . ."); *see also* Madison T. Shockley II, *An Evolving Vote; African-Americans Are Still Deeply Divided on the Issue of Same-Sex Marriage*, L.A. TIMES, May 13, 2012, at A27 (exaggerating black opposition to same-sex marriage by stating that "in most states where the issue has been on the ballot, [black voters] have been overwhelmingly against it"). In fact, in most states, exit polls have found no significant racial differences, and national surveys showed agreement among the races until 2004. *See* Darren E. Sherkat et al., *Race, Religion, and Opposition to Same-Sex Marriage*, 91 SOC. SCI. Q. 80, 86–87 (2010); *infra* text accompanying notes 78–85.

10. *See* Micah Cohen, *Signs of Shift Among African-Americans on Same-Sex Marriage*, N.Y. TIMES FIVETHIRTYEIGHT BLOG (May 25, 2012, 8:30 AM), http://fivethirtyeight.blogs.nytimes.com/2012/05/25/signs-of-shift-among-african-americans-on-same-sex-marriage. Surveys in four key states (Pennsylvania, Ohio, North Carolina, and Maryland) similarly found a significant uptick in black support for same-sex marriage. *See* Dustin Ingalls, *PA Blacks Shift Quickly in Favor of Gay Marriage*, PUB. POL'Y POLLING (May 23, 2012, 1:53 PM), http://www.publicpolicypolling.com/main/2012/05/pa-blacks-shift-quickly-in-favor-of-gay-marriage.html; Tom Jensen, *Maryland Polling Memo*, PUB. POL'Y POLLING (May 24, 2012, 10:44 AM), http://www.publicpolicypolling.com/main/2012/05/maryland-polling-memo.html; Tom Jensen, *Movement Among Black North Carolinians on Gay Marriage*, PUB. POL'Y POLLING (May 17, 2012, 12:03 PM), http://www.publicpolicypolling.com/main/2012/05/movement-among-black-north-carolinians-on-gay-marriage.html; Siddiqui, *supra* note 9 (discussing Ohio polling).

riage, compared to just 46 percent of whites.[11] More recent polls have provided mixed results.[12] Several have found that whites are more supportive than blacks, but also that Latinos are as likely as or more likely than whites to support same-sex marriage.[13]

After the Supreme Court's recent decisions to strike down a key section of the Defense of Marriage Act and to uphold the judicial invalidation of Prop. 8,[14] which followed unprecedented voter approval of same-sex marriage in Maryland, Maine, and Washington,[15] the marriage equality movement is surging.[16] What

11. *Gay Marriage Opposition Hits New Low*, WASH. POST (May 22, 2012), http://www.washingtonpost.com/politics/polling/gay-marriage-opposition-hits-new-low/2012/05/23/gIQAd8yRjU_print.html; Jorge Rivas, *Poll: People of Color More Likely to Support Gay Marriage Than Whites*, COLORLINES (May 23, 2012, 12:04 PM), http://colorlines.com/archives/2012/05/people_of_color_more_likely_to_support_gay_marriage_than_whites_abc_poll_finds.html. Fifty-nine percent of African Americans supported marriage equality in this poll. An Edison Research 2012 nationwide exit poll also reported that 51 percent of blacks and 59 percent of Latinos supported same-sex marriage, compared to 47 percent of whites. *See* Marjorie Connelly, *Support for Gay Marriage Growing, but U.S. Remains Divided*, N.Y. TIMES, Dec. 7, 2012, http://www.nytimes.com/2012/12/08/us/justices-consider-same-sex-marriage-cases-for-docket.html.

12. *See, e.g.*, ZOGBY ANALYTICS, NATIONWIDE POLL OF AFRICAN AMERICAN ADULTS (2013), *available at* http://www.rljcompanies.com/phpages/wp-content/uploads/2013/03/Results-of-a-National-Opinion-Poll-Conducted-by-Zogby-Analytics-Black-Opinions-in-the-Age-of-Obama_2013.pdf (reporting a Zogby/Robert L. Johnson poll of African Americans finding 40 percent support for same-sex marriage, 42 percent opposition, and 13 percent not sure). A Reuters poll suggests that Obama's announcement shook up black opposition, shifting some who were formerly opposed to same-sex marriage to the unsure category or leading them to support civil unions instead of marriage. Patricia Zengerle, *Obama Shift on Gay Marriage Tilts U.S. Attitudes*, REUTERS (May 25, 2012, 7:52 PM), http://www.reuters.com/article/2012/05/25/us-usa-campaign-gaymarriage-idUSBRE84O1DN20120525 ("Support by African-Americans for civil unions rose by 9 percentage points to 28 percent after Obama spoke . . . and the percentage of African-Americans who were unsure rose 5 points to 21 percent.").

13. A Pew Research Center poll from July 2012 found same-sex marriage support to be 51 percent among Latinos, 49 percent among whites, and 40 percent among blacks. *Two-Thirds of Democrats Now Support Gay Marriage*, PEW F. (July 31, 2012), http://www.pewforum.org/2012/07/31/2012-opinions-on-for-gay-marriage-unchanged-after-obamas-announcement. This poll found that Obama's announcement did not impact black support. A McClatchy-Marist poll released in July 2013 found black support to be 28 percent (which is lower than most polls), with 54 percent of Latinos and 53 percent of whites supporting same-sex marriage. *7/26: Nearly Half of Americans Support Same-Sex Marriage*, MARIST POLL (July 26, 2013), http://maristpoll.marist.edu/726-nearly-half-of-americans-support-same-sex-marriage.

14. United States v. Windsor, 133 S. Ct. 2675 (2013); Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

15. *See* Erik Eckholm, *In Maine and Maryland, Victories at the Ballot Box for Same-Sex Marriage*, N.Y. TIMES, Nov. 7, 2012, at P14; Joe Connelly, *Washington Approves Same-Sex Marriage*, SEATTLEPI (Nov. 8, 2012, 2:34 PM), http://www.seattlepi.com/local/connelly/article/Washington-approves-same-sex-marriage-4018058.php.

16. *See, e.g.*, Trip Gabriel, *A.C.L.U. Sues Pennsylvania Over Ban on Gay Marriage*, N.Y. TIMES, July 10, 2013, at A11 (discussing efforts to advance marriage equality in courts, state legislatures and at the ballot box); Adam Liptak, *A Steady Path to the Justices: Gay Marriage Cases Building Momentum*, N.Y. TIMES, Feb. 15, 2014, at A1 (recounting judicial decisions in favor of marriage equality in Oklahoma, Utah, and Oklahoma).

role, if any, should race play in these appeals for same-sex marriage? Could analogies between race and sexual orientation inadvertently provoke people of color to oppose same-sex marriage?

This is the first Article to identify the marriage equality movement's embrace of postracialism and demonstrate its costs.[17] I trace postracial rhetoric from political protests in the streets to LGBT media to the legal briefs filed in litigation over same-sex marriage from 2003-2013.

While marriage equality advocates think that "like race" arguments (analogical arguments) are persuasive to white audiences and perhaps compelled by equal protection precedent, analogies between race and sexual orientation have often elicited angry reactions from blacks.[18] Consider a Zogby poll of the black community that Black Entertainment Television (BET) founder Robert L. Johnson commissioned. One question stated: "Some in the LGBT community claim that rights for LGBT people are the same as rights for African Americans. Do you believe that equal rights for gays are the same as equal rights for African Americans?" Fifty-five percent of respondents said no and 28 percent yes, even though respondents were about evenly split between supporters and opponents of same-sex marriage.[19] I argue that this manifests a problem of *perceptual seg-*

17. Key articles on "like race" arguments include early works by Janet Halley and Jane Schacter. *See, e.g.*, Janet E. Halley, *"Like Race" Arguments*, *in* WHAT'S LEFT OF THEORY?: NEW WORK ON THE POLITICS OF LITERARY THEORY 40 (Judith Butler et al. eds., 2000); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994). Another body of literature (which overlaps with the former to some extent) focuses on same-sex marriage and race. *See, e.g.*, Randall Kennedy, *Marriage and the Struggle for Gay, Lesbian, and Black Liberation*, 2005 UTAH L. REV. 781; R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 CALIF. L. REV. 839 (2008); Adele M. Morrison, *It's [Not] a Black Thing: The Black/Gay Split Over Same-Sex Marriage—A Critical [Race] Perspective*, 22 TUL. J.L. & SEXUALITY 1 (2013); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387 (2012).

18. *See, e.g.*, Carbado, *supra* note 4, at 1468–69; Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem With Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133, 134–35 (2005) (noting that media analogies between 2004 same-sex weddings and the Montgomery bus boycott and comparison of San Francisco Mayor Gavin Newsom with Dr. Martin Luther King provoked "irritation at a minimum" among progressive African Americans and "outright hostility and anger" from conservative blacks); Kennedy, *supra* note 17, at 793.

19. ZOGBY ANALYTICS, *supra* note 12 (finding 40 percent support for same-sex marriage, 42 percent opposition, and 13 percent not sure among African American adults). Similarly, an Arcus Foundation survey concluded:

> Use of the words "civil rights" to describe the struggle for LGBT equality does not create a shortcut to acceptance or "connect the dots" for African American respondents. It can instead exacerbate tensions by suggesting that LGBT advocates are not willing to respect or listen to African American definitions of a term that is near and dear to them.

DONNA VICTORIA & CORNELL BELCHER, ARCUS OPERATING FOUND., LGBT RIGHTS AND ADVOCACY: MESSAGING TO AFRICAN AMERICAN COMMUNITIES 3 (2009),

regation[20]—arguments that equate sexual orientation with race might simultaneously attract whites and repel blacks.[21] In the wake of Obama's announcement and the subsequent endorsement of marriage equality by the National Association for the Advancement of Colored People (NAACP) and leading Latino civil rights groups,[22] gay rights leaders have expressed a new willingness to attend to race and collaborate with communities of color.[23] This may be easier said than done, however, especially since antigay forces have vowed to use their "Not a Civil Right Project" message to drive a wedge between blacks, Latinos, and gays.[24] Given the problem of perceptual segregation, how should advocates for marriage equality and judges tasked with deciding same-sex marriage cases handle the thorny issue of race-sexual orientation analogies?

This Article first identifies common pitfalls of analogical arguments, including rhetoric that unnecessarily ranks antigay discrimination as more oppressive than antiblack discrimination; arguments that deny that antiblack subordination persists; and the marriage equality movement's embrace of formal equality, which has done little to change the material realities facing many

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http://www.arcusfoundation.org/images/uploads/downloads/Messaging_to_African_American_Communities_Arcus_Belcher_Victoria_2009.pdf.

20. Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093 (2008) (demonstrating that blacks and whites tend to perceive issues of racial discrimination through fundamentally different lenses); *cf.* Victoria C. Plaut et al., *"What About Me?": Perceptions of Exclusion and Whites' Reactions to Multiculturalism*, 101 J. PERSONALITY & SOC. PSYCHOL. 337 (2011) (showing that whites react positively to colorblind norms in the workplace and negatively to multiculturalism, while blacks reflect inverse reactions).

21. *See* Tim Dickinson, *Same-Sex Setback*, ROLLING STONE, Dec. 11, 2008, at 45, 47 ("Any objective consultant who has done any research on this issue will tell you that the struggle for marriage equality is not accepted by minority communities to be equivalent to the civil rights movement. In fact, it pisses minorities off." (quoting a top Democratic campaign strategist) (internal quotation marks omitted)); *see also* Gene Demby, *Poll: Majority of Blacks Support Gay Marriage After Obama's Endorsement*, HUFFINGTON POST (May 23, 2012, 4:58 PM), http://www.huffingtonpost.com/2012/05/23/black-shift-on-gay-marriage_n_1540160.html. Shame may help explain this effect. Invoking the history of slavery and Jim Crow may trigger white guilt, which does not apply to African Americans who were the victims of that oppression.

22. *See* Michael Barbaro, *In Largely Symbolic Move, N.A.A.C.P. Votes to Endorse Same-Sex Marriage*, N.Y. TIMES, May 20, 2012, at A15; Michael K. Lavers, *National Council of La Raza Board Unanimously Approves Same-Sex Marriage Resolution*, WASH. BLADE, June 22, 2012, http://www.washingtonblade.com/2012/06/22/exclusive-national-council-of-la-raza-board-unanimously-approves-same-sex-marriage-resolution (noting that National Council of La Raza Board, as well as Mexican American Legal Defense and Education Fund President Thomas A. Saenz, have backed same-sex marriage).

23. *See* Kate Taylor, *Black Leaders, Gay Advocates March in Step*, N.Y. TIMES, June 10, 2012, at A1.

24. *See, e.g.*, David Weigel, *"The Strategic Goal of This Project Is to Drive a Wedge Between Gays and Blacks,"* SLATE (Mar. 27, 2012, 10:20 AM), http://www.slate.com/blogs/weigel/2012/03/27/_the_strategic_goal_of_this_project_is_to_drive_a_wedge_between_gays_and_blacks_.html (describing National Organization for Marriage's "Not a Civil Right Project").

African Americans. I refer to the ideology that unites these moves as *marriage equality postracialism*.[25] Instead of the superficial and sometimes misleading invocations of race that pervade marriage equality litigation, I urge the marriage equality movement to attend to race carefully, taking account of the history of the Supreme Court's application of strict scrutiny to racial classifications and the ongoing subordination afflicting black communities decades after securing formal equality. This analysis casts doubt on whether the LGBT community should aspire to be "the new black." By contrast, *Romer v. Evans*,[26] a key sexual orientation precedent that declined to apply strict scrutiny or rank oppression, offers a more capacious legal standard than the Supreme Court's application of strict scrutiny in race cases.[27]

My normative guidance for marriage equality advocates and judges arises from an equal opposition to racism and homophobia. Analogies that would deny or downplay racism in order to combat homophobia (and vice versa) are problematic. As I will illustrate below, a central strategy by which marriage equality advocates minimize racial inequality is to embrace a formal rights lens. This perspective fixates on legally mandated distinctions (for example, "blacks can marry, but gays cannot") and overlooks the material disparities that linger long after courts have erased legal distinctions. Further, intersectionality guides this Article's critical analysis, which recognizes the interconnected nature of race and sexual orientation.[28] Arguments about what blacks and gays can and cannot do tend to overlook people who are black *and* gay. A robustly intersectional approach seeks to correct such elisions. Those who are committed to opposing racism and homophobia must be vigilant in rooting out discourses on homophobia that privilege whiteness and discourses on racism that privilege heterosexuality.

The Article proceeds as follows. Part I describes and critiques the black betrayal hypothesis, examining coverage in major newspapers, blogs, and signs from

25. Sumi Cho provides a helpful description of postracialism: "a twenty-first-century ideology that reflects a belief that due to the significant racial progress that has been made, the state need not engage in race-based decision-making or adopt race-based remedies, and that civil society should eschew race as a central organizing principle of social action." Sumi Cho, *Post-racialism*, 94 IOWA L. REV. 1589, 1594 (2009); *see also* Ian F. Haney López, *Is the "Post" in Post-racial the "Blind" in Colorblind?*, 32 CARDOZO L. REV. 807 (2011) (describing postracialism as a liberal embrace of colorblindness).

26. 517 U.S. 620 (1996).

27. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (plurality opinion).

28. *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

political protests that were captured on the Internet. Showing the misguided factual premises underlying this hypothesis is important because otherwise marriage equality advocates and the media might continue to approach black people with undue suspicion. Evidence from recent campaigns in Illinois and Maryland shows that the media and political operatives continue to frame black voters as posing a unique threat to marriage equality.[29] My analysis questions the focus on

29. According to a Chicago paper, when the Illinois House of Representatives failed to bring a marriage equality bill to a vote, "the outrage from the community exploded and the finger-pointing began." Tony Merevick, *No Vote on Illinois Marriage Equality; Bill Delayed Until Fall*, CHI. PHOENIX (May 31, 2013), http://chicagophoenix.com/2013/05/31/no-vote-on-illinois-marriage-equality-bill-held-until-fall-session. Although some blamed the black caucus and black pastors, *see, e.g.*, Geoffrey R. Stone, *Same-Sex Marriage in Illinois: The Role of the Black Church*, HUFFPOST POL. (June, 1, 2013, 8:23 PM), http://www.huffingtonpost.com/geoffrey-r-stone/same-sex-marriage-in-illi_b_3372938.html, others argued that the bill's backers failed to engage the black community. Similar arguments were made in California. A trenchant analysis in *Rolling Stone* characterized the "No on 8" campaign as a massive failure. *See* Dickinson, *supra* note 21. According to the article, the campaign was slow in raising funds and organizing volunteers to knock on doors, rejected a Spanish-language advertisement featuring a prominent Latina, and produced "a counterproductive ad narrated by Samuel L. Jackson that, in the course of thirty seconds, tried to connect the gay-marriage struggle to the internment of Japanese-Americans in World War II, the housing-rights struggles of Armenians in California and bans on interracial marriage in the South." *Id.* A commentary by Professor Geoffrey R. Stone illustrates common problems of racial blaming in this context. Professor Stone asserted:

> Although 43 percent of whites are Democrats, 83 percent of African-Americans are Democrats, and African-Americans are 20 percent more likely than whites to identify as liberal. One might therefore have expected the members of the House Black Caucus to lead the charge in favor of a right of same-sex couples to marry. . . .
>
> Moreover, given the long and historic struggle of African-Americans to achieve equality for themselves in the United States, it might have seemed obvious that African-American legislators would be *especially* sensitive to and supportive of the demand of gays and lesbians for equality under the law.
>
> But that was not to be. The usual liberalism of the House Black Caucus apparently does not extend to protecting the equality rights of gays and lesbians. That they pulled the plug on same-sex marriage in Illinois is therefore both disappointing and perplexing.

Stone, *supra*. Stone's thinking rests on troubling assumptions. First, Stone assumes that voters who are liberal on most issues should also be liberal on same-sex marriage. This assumption emerges from white political patterns and imposes them on other races. Blacks, it seems, have to justify any departure from a white norm and are not allowed to disaggregate social issues and economic policy. Second, Stone appears to think that the long-established pattern of blacks supporting the Democratic Party means that the Democrats own black votes rather than having to work for them. People who are familiar with black communities, especially queer black people, were not perplexed by black opposition to same-sex marriage as they have often heard homophobic sentiment in black churches, barber shops, and beauty salons among blacks who consistently vote Democratic. Finally, Stone magnifies the homophobia of blacks by excluding Republicans—who are disproportionately white—from his analysis. This common move erases "white homophobia." An analysis that included Republicans found that a mere 30 percent of white House members were solid supporters of the marriage equality bill, compared to 55 percent of blacks. Edward McClelland, *Don't Thank (or Blame) Black Legislators for Killing Gay Marriage*, NBC CHI. (June 3,

race when an intersecting trait—religion—was more influential in securing Prop. 8's victory. Moreover, I reveal how homophobia among whites is almost never racially marked, whereas "black homophobia" is hypervisible and seen as especially dangerous, even when white religious voters vastly outnumber black religious voters, as in California.[30] Part II deconstructs a key assumption undergirding the black betrayal hypothesis—that blacks and gays had a harmonious relationship and were political allies before Prop. 8.

Part III turns to a different forum—litigation—to extend the examination of the racial politics of the marriage equality movement. I document the racially problematic claims made by marriage equality lawyers, which provide further evidence undermining the claim that gays and blacks shared a strong alliance before Prop. 8. My analysis in this Part is based on a review of the briefs filed by the parties in the most recent round of same-sex marriage litigation, which began with the 2003 Massachusetts Supreme Court decision in *Goodridge v. Department of Public Health*.[31] This Part highlights several problematic uses of race, and when possible, offers as a contrast lawyers who utilized race in a more careful, respectful manner. Although the racial claims in the litigation context are rarely as abrasive and troubling as the political rhetoric highlighted in Part I, they echo similar postracial themes.

In the Conclusion, I contrast the disappointing uses of race in the media, political, and litigation contexts with President Obama's skillful navigation of race and religion in his recent endorsement of same-sex marriage. Although the interview does not offer a fully formed approach for mounting a racially sensitive marriage equality argument, it provides some promising new directions.

2013, 8:36 PM), http://www.nbcchicago.com/blogs/ward-room/Dont-Thank-Or-Blame-Black-Legislators-For-Killing-Gay-Marriage-209789911.html.

30. *See California Proposition 8: Ban on Gay Marriage*, CNN, http://www.cnn.com/ELECTION/2008/results/polls/#CAI01p1 (last visited Feb. 22, 2014) (stating that 43 percent of Prop. 8 voters were Protestant and 30 percent were Catholic). Blacks make up 6 percent of California's electorate. *See infra* text accompanying note 37.

31. 798 N.E.2d 941 (Mass. 2003). In addition to the *Perry* case, my review focused on challenges to state laws and cases resolved by state supreme courts, as such cases enjoy a greater stature than cases that did not survive trial or lower appellate court review. I also reviewed the briefs in the challenges to the Defense of Marriage Act (DOMA). I read all of the briefs filed by the parties in these cases, but I did not review amici briefs (those filed by "friends of the court") as they were quite voluminous and the diversity of parties who filed briefs make them less representative of the marriage equality movement.

I. MEDIA COVERAGE AND POLITICAL ADVOCACY

In November 2008, American voters elected the country's first black president, and California voters simultaneously eliminated the right to marry a person of the same sex. A frequently cited exit poll suggested that 70 percent of blacks voted to ban same-sex marriage, compared with 53 percent of Latinos, and 49 percent of whites.[32] Immediately, protestors and media pundits began blaming black voters. Because I was concerned about this rhetoric and its impact on coalition building, I organized a program at UCLA School of Law in mid-November to discuss conflict between the black and gay communities, including people who are both black and gay. I invited a colleague at a California school who has written about marriage to join the panel, which included a gay rights lawyer and activists who work in black and Latino communities. When the colleague, a black female law professor, arrived, she told me a stunning story. En route to Los Angeles, she had flown on a regional airline that did not permit passengers to save seats. Accordingly, she asked a white gay man who had placed his Louis Vuitton bag on a neighboring seat to move it so that she could sit down. "You people," he muttered, "are the reason we lost Prop. 8."[33]

The story, and many others like it, suggest that Prop. 8 may have intensified a racial stereotype that blacks are hyperhomophobic—that is, more homophobic than whites. The man thought that the professor's skin color was enough to mark her as an enemy of gay rights. He needed to know nothing more than that she was a black woman. As it turns out, she is a strong supporter of gay rights. She voted against Prop. 8, and even provided advice to pro-same-sex marriage groups. Also surprising is that it never seemed to occur to the man that the professor might be queer. She was wearing a wedding ring, but she could have been one of the thousands of same-sex couples who married in California before Prop. 8. In his view, queer black people and straight black people who support same-sex marriage simply do not exist.[34] *All* blacks are automatically deemed opponents of gay rights. This is a form of racial profiling or stereotyping because the man would not have similarly attacked a white woman. Although the exit poll indicated that a strong majority of elderly people, suburban voters, and people with children voted against same-sex marriage,[35] the media did not broadcast

32. *See California Proposition 8: Ban on Gay Marriage*, *supra* note 30.
33. For a similar story reported by the *San Francisco Chronicle*, see Matthai Kuruvila, *Trends Beyond Black Vote in Play on Prop. 8*, S.F. GATE (Nov. 16, 2008, 4:00 AM), http://www.sfgate.com/politics/article/Trends-beyond-black-vote-in-play-on-Prop-8-3261660.php.
34. Nor did it occur to him, apparently, that she might not have voted or might have abstained from voting on Prop. 8.
35. *See infra* notes 103–106.

these traits and transform them into a profile. Thus, an elderly white woman or a suburban white father who supported Prop. 8—and there are many, many more such white Californians[36]—would escape this man's radar, while he would berate only blacks, who make up just 6 percent of California's electorate,[37] without any personal knowledge of their actual vote. In this Part I first trace the rhetoric that constructed the perception of blacks as uniquely responsible for Prop. 8's success. Then I go on to deconstruct the exit poll that serves as the linchpin of this narrative and suggest that the intense focus on African Americans rests on ignorance and misunderstanding concerning the relationship between the black and LGBT communities.

A. Political Discourse

Prop. 8 became a flashpoint in black-gay relations because many perceived a key element that drove Obama's success, strong black voter turnout, as the dispositive factor stripping LGBT people of their right to marry.[38] A *USA Today* piece written by James Kirchick succinctly made this point:

> It is . . . painfully ironic that African Americans, many of whose ancestors were brought to this country in chains, enslaved and forced to live under a system of de facto apartheid until the late middle part of the past century, voted overwhelmingly in favor of discrimination against gay men and lesbians by a margin greater than that of any other minority group, 70%-30%. Thus, at least for gays, the universally exhilarating aspect of Obama's election—that the American people elected a black man to be leader of the free world—is also the most problematic.[39]

36. *See California Proposition 8: Ban on Gay Marriage*, *supra* note 30 (providing a breakdown of the California electorate in 2008).

37. *See* MARK BALDASSARE ET AL., PUB. POLICY INST. OF CAL., JUST THE FACTS: CALIFORNIA'S LIKELY VOTERS (2013), http://www.ppic.org/content/pubs/jtf/JTF_LikelyVotersJTF.pdf (reporting that 6 percent of likely voters in California are black).

38. *See infra* note 61.

39. James Kirchick, *Where's the Outrage? Blacks Lifted Calif.'s Anti-gay Rights Measure*, U.S.A. TODAY, Nov. 12, 2008, at 11A. "Same Love," a Grammy-nominated marriage equality anthem by the white rapper Macklemore with Ryan Lewis and Mary Lambert offers a similar critique of black culture:

> If I was gay, I would think hip-hop hates me
> Have you read the YouTube comments lately?
> "Man, that's gay" gets dropped on the daily
> We become so numb to what we're saying
> A culture founded from oppression
> Yet we don't have acceptance for 'em.

I call this the *black betrayal hypothesis*. Although Kirchick may have said it best, he did not say it first. Weeks before the election, noted gay commentator Andrew Sullivan made race an issue[40] by predicting that blacks would strongly favor Prop. 8 and demanding that Senator Barack Obama, the black presidential candidate, more vigorously oppose it. Sullivan claimed that "[n]o other ethnic group comes close to the level of opposition" to same-sex marriage as blacks and that whether Obama made an advertisement against Prop. 8 would be a "core test of whether gay Americans should back Obama . . . enthusiastically."[41] In making this claim, Sullivan sought to saddle Obama with the responsibility of controlling people of his race—a claim that would be unthinkable for a white candidate. The day after the election, Sullivan wrote a blog post that stated, "[C]ruelly, a very hefty black turnout, as feared, was one of the factors that defeated us, according to the [National Election Pool Exit Poll]."[42] Around the same time, sex columnist-cum-political pundit Dan Savage also pinned the blame for Prop. 8 on black voters.[43] In an online post, he wrote, "*Seventy percent* of African American voters approved Prop[.] 8, according to exit polls, compared to 53% of Latino voters, 49% of white voters,[and] 49% of Asian voters."[44] After telling his readers that he happily "wept last night [over Obama's victory]," he continued:

"Same Love," AZLYRICS.COM, http://www.azlyrics.com/lyrics/macklemore/samelove.html (last visited Feb. 22, 2014).

40. Sullivan exemplifies a contradiction in postracial/colorblind rhetoric: Even as such proponents argue that race does not matter or that we have moved beyond race, they selectively and strategically invoke race. *See* Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN IN CULTURE & SOC'Y 811 (2013).

41. Andrew Sullivan, *Obama's Moment of Truth on Gay Equality*, ATLANTIC (Oct. 20, 2008, 10:11 AM), http://www.theatlantic.com/daily-dish/archive/2008/10/obamas-moment-of-truth-on-gay-equality/209973. Several news articles, citing Democratic informants, predicted that socially conservative blacks and Latinos would hurt the effort to defeat Prop. 8. *See, e.g.*, Patrick Healy, *Hopefuls Differ as They Reject Gay Marriage*, N.Y. TIMES, Nov. 1, 2008, at A1.

42. *See* Andrew Sullivan, *Oh, No, You Don't*, ATLANTIC (Nov. 5, 2008, 12:10 PM), http://www.theatlantic.com/daily-dish/archive/2008/11/oh-no-you-dont/208998 [hereinafter Sullivan, *Oh, No, You Don't*]. A few weeks later, Sullivan (citing Dan Savage) described blacks as "the most homophobic racial group in America" and claimed (seemingly with approval) that black homophobia explains high HIV prevalence among blacks. Andrew Sullivan, *Marriage Equality and Race*, ATLANTIC (Dec. 4, 2008, 8:34 AM), http://www.theatlantic.com/daily-dish/archive/2008/12/marriage-equality-and-race/207887.

43. Dan Savage, *Black Homophobia*, STRANGER (Nov. 5, 2008, 9:55 AM), http://slog.thestranger.com/2008/11/black_homophobia [hereinafter Savage, *Black Homophobia*]. Savage became an influential spokesperson for the white gay community in the wake of Prop. 8. In addition to appearing on the cable news shows regularly, he was featured as an op-ed contributor in the *New York Times*. *See* Dan Savage, *Anti-gay, Anti-family*, N.Y. TIMES, Nov. 12, 2008, at A31.

44. Savage, *Black Homophobia*, *supra* note 43.

> But I can't help but feeling hurt that the love and support aren't mutual.
>
> I do know this, though: I'm done pretending that the handful of racist gay white men out there . . . are a bigger problem for African Americans, gay and straight, than the huge numbers of homophobic African Americans are for gay Americans, whatever their color.[45]

Savage provided no empirical support for his claim that there are just a "handful" of racist gay men, while there are "huge numbers of homophobic African Americans."[46] He also portrays himself as courageously breaking from the "politically correct" crowd and telling it like it is.[47] Savage thus represents the emboldened white gay man, who, in the wake of Prop. 8, no longer need feel sheepish about criticizing black people. Indeed, as I explain below, white gays would go on to argue that they have eclipsed blacks as the paradigmatic despised minority.

Signs from street protests in the wake of Prop. 8's success tell this story. Photographs of the signs I reference below are in the Appendix to this Article. In the first image, a protestor hoists a sign reciting the exit poll-based claim that "7 of 10 BLKS N ½ LTNS VOTED YES ON 8? WE SUPPORTED UR RIGHTS." The implication is that gays held up their part of the assumed black-gay solidarity pact by voting for Obama, but blacks (and Latinos) betrayed gays.[48]

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45. *Id.*

46. Savage's perception is in accordance with the Supreme Court's view that antiblack discrimination exists only when a person expresses the intent to harm blacks, by using the N-word, for example. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279, 298–99 (1987) (requiring "exceptionally clear" proof of malice toward the petitioner and rejecting a systematic empirical study of racial bias). By framing the racist as a rare aberration, this perspective implies that most whites, and most policies that harm blacks, are colorblind.

47. At the end of his post, Savage notes, "This will get my name scratched of [sic] the invite list of the National Gay and Lesbian Task Force, which is famous for its antiracist training seminars, but whatever." Savage, *Black Homophobia*, *supra* note 43.

48. It seems likely that most openly gay Californians voted for Obama, but the much-cited exit poll did not ask lesbian, gay, bisexual, and transgender (LGBT) identified voters whether they voted for Obama, so it provides no data to support the claim. It is also worth noting that many prominent gays backed Hillary Clinton over Obama during the Democratic primary, despite the Clintons' checkered history on gay rights, including support of the military's Don't Ask, Don't Tell policy and the Defense of Marriage Act. *See, e.g.*, Chris Johnson, *Would We Be Better off Under President Hillary?*, WASH. BLADE, Dec. 21, 2011, http://www.washingtonblade.com/2011/12/21/would-we-be-better-off-under-president-hillary ("Clinton had a strong LGBT following in 2008 when she was competing against Obama for the Democratic nomination for president."); Paul Kengor, Op-Ed., *Hillary Clinton's Evolution on Gay Marriage: Column*, USA TODAY (Mar. 20, 2013, 5:55 PM), http://www.usatoday.com/story/opinion/2013/03/20/hillary-clinton-gay-marriage/2001229 (describing Hillary Clinton's shifting positions after DOMA); *see also* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 & 28 U.S.C. § 1738C

The second image shows a man holding a sign that reads, "I Can't Believe We Still Have To Protest This Crap." Underneath this complaint are three boxes arranged vertically, accompanied by the following three phrases, from top to bottom: "Women's Rights," "African-American," and "Gay Rights." The first two boxes—"Women's Rights" and "African-American [Rights]"—are checked off. The final box, "Gay Rights," remains unchecked. The message appears to be that society no longer has to protest for women's rights or blacks' rights. Gays are the only remaining victims of oppression.

In the third image, a person displays a sign with a symbol suggesting that love (as exemplified by two hearts) has been banned. Next to the picture, the sign commands, in brightly colored letters, "Don't be a GAYCIST." In a more explicit twist on the same message, the fourth image announces, "GAY is the NEW BLACK." Strikingly, a black man holds the sign high, and he seems to be proud of this statement.[49] He is surrounded not by other blacks, but by an all-white group of fellow protestors. The latter two images go beyond a mere comparison between blacks and gays. Gays are not just said to suffer the same degree of discrimination as blacks and to deserve the same civil rights protections. Rather, gay has displaced black. This rhetoric cannot be dismissed as the language of a fringe group of gay protestors. *The Advocate*, a leading LGBT magazine, featured the claim "GAY IS THE NEW BLACK" on its December 2008 cover.[50] Underneath the slogan, which the magazine rendered in white letters against an all-black backdrop, the subtitle read, "The Last Great Civil Rights Struggle."

(2012)) (signed by President Bill Clinton), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013); Mark Thompson, *"Don't Ask, Don't Tell" Turns 15*, TIME, Jan. 28, 2008, http://www.time.com/time/nation/article/0,8599,1707545,00.html ("It was 15 years ago, Tuesday, that President Clinton rolled out the policy that came to be known as 'Don't Ask, Don't Tell' . . . .").

49. Although I selected an image of a black man making this claim, there were other images in which whites made this claim as well.

In 1986, Bayard Rustin, a key organizer of the March on Washington who was black and gay, wrote a short essay entitled "The New 'Niggers' Are Gays." Bayard Rustin, *The New "Niggers" Are Gays*, *in* TIME ON TWO CROSSES: THE COLLECTED WRITINGS OF BAYARD RUSTIN 275 (Devon W. Carbado & Donald Weise eds., 2003). The essay is troubling for reasons that extend beyond its intemperate title. After making a postracial argument about black progress, Rustin argues: "[B]lacks are no longer the Litmus paper or the barometer of social change." *Id.* Gays, Rustin, asserts, are now "the most vulnerable." *Id.* Rustin's perception might have been shaped by the AIDS crisis, which was in full bloom at the time. http://aids.gov/hiv-aids-basics/hiv-aids-101/aids-timeline (noting that President Reagan mentioned AIDS for the first time that year). Nonetheless, I see little value in such efforts at ranking oppression, particularly when they are paired with rhetoric, such as Rustin's title, which is likely to inflame blacks. Interestingly, Rustin suggests that economic advocacy, including fighting President Reagan's plans to cut Social Security and school lunches "must go hand in hand with, and to a degree, precede the possibility of dealing with the most grievous problem—that is sexual prejudice." *Id.* at 276.

50. *See supra* note 7.

T-shirts bearing this slogan are even available for sale on Amazon.com, among other places.[51]

Moreover, even strategies that superficially appear to align gays with blacks, rather than displacing blacks, subtly distinguish among blacks. Devon Carbado and Mitu Gulati's work has shown that whites pay close attention to distinctions among blacks based on racial salience, the extent to which a particular person conforms to stereotypes of blackness.[52] Although Carbado and Gulati focus mainly on employers, we can see similar dynamics in the marriage equality movement. The marriage equality movement seeks to tether LGBT people to the moral authority of Dr. Martin Luther King and Rosa Parks and eschew rabblerousing athletes like Allen Iverson or sassy reality television personalities such as NeNe Leakes. "Gay is the New Black" evokes "the old black"—the noble, passive blacks of the civil rights movement—not the "new blacks"—those who garner mainstream media attention today, often for conforming to racial stereotypes. Similarly, Melissa Murray has documented how the marriage equality movement depicts being born to unmarried same-sex parents as an "illegitimacy injury," and how that argument subtly reinforces the sense that (white) LGBT people seeking marriage are morally superior to single black mothers, who are perceived as abandoning marriage.[53] Thus, analogical arguments in this context tend either to equate gays with the most respectable blacks or to displace blacks entirely.

B. The Exit Poll

The linchpin of the black betrayal hypothesis, whether uttered by media pundits or street protestors, was one exit poll.[54] Virtually every critique of the black community highlights this single exit poll.[55] Yet, repeatedly these speakers overlooked the weaknesses of the poll, which I detail below, and the wobbly foundation it provided for the betrayal claim.[56] Most strikingly, major media sources typically cited the exit poll's finding without any qualifications or caveats

51. *See* Search Results to "t shirt gay is the new black," AMAZON.COM, http://www.amazon.com/s/ref=nb_sb_noss?url=search-alias%3Daps&field-keywords=t+shirt+gay+is+the+new+black&x=-147&y=5 (last visited Feb. 22, 2014).
52. *See, e.g.*, Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 YALE L.J. 1757, 1792 (2003) (book review).
53. Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 419 (2012).
54. *See California Proposition 8: Ban on Gay Marriage*, *supra* note 30.
55. *See, e.g.*, Sullivan, *Oh, No, You Don't*, *supra* note 42.
56. *See infra* text accompanying notes 72–80.

about the reliability of exit polls.[57] This is troubling, particularly given that when newspapers report their own polls, they regularly note the margin of error and other qualifications,[58] and exit polls are even less reliable.[59]

Although many media outlets apparently thought the exit poll spoke for itself,[60] Dan Walters, a *Sacramento Bee* columnist offered "a mathematical analysis of voting and exit poll data," which he claimed indicated "very strongly that it was exactly [the] pro-Obama surge [of voters] that spelled victory for Proposition 8."[61] Walters argued that Obama received 2.6 million more votes than John McCain, and that this was twice the victory margin of Democratic presidential candidates in 2000 and 2004.[62] Moreover, he continued, "10 percent of voters were African American while 18 percent were Latino, and applying exit poll data to that extra turnout reveals that the pro-Obama surge among those two groups gave Proposition 8 an extra 500,000-plus votes, slightly more than the measure's margin of victory."[63] Walters fails, however, to justify his focus on black and Latino voters. Why, in his view, did these racial minorities tip the balance and not the many other demographic groups that voted against same-sex marriage? Why not Catholics or evangelicals?[64] Why not older Ameri-

57. *See, e.g.*, Karl Vick & Ashley Surdin, *Most of California's Black Voters Backed Gay Marriage Ban*, WASH. POST, Nov. 7, 2008, at A03; Shelby Grad, *70% of African Americans Backed Prop. 8, Exit Poll Finds*, L.A. NOW (Nov. 5, 2008, 12:10 PM), http://latimesblogs.latimes.com/lanow/2008/11/70-of-african-a.html.

58. For example, a *Washington Post* story reporting on a poll showing the public's approval of Obama's job performance concluded with this paragraph, "The latest poll was conducted by conventional and cellular telephone Wednesday through Sunday among a random national sample of 1,288 adults including interviews with 1,151 registered voters. The results for the full survey have a margin of sampling error of plus or minus 3.5 percentage points." Dan Balz & Jon Cohen, *Confidence in Obama Reaches New Low, Washington Post-ABC News Poll Finds*, WASH. POST, July 13, 2010, at A01.

59. *See* Japhy Grant, *Nate Silver on African-Americans, Prop. 8 and Being a Hero to Gays & Geeks Everywhere*, QUEERTY (Nov. 21, 2008), http://www.queerty.com/exclusive-nate-silver-on-african-americans-prop-8-and-being-a-hero-to-gays-geeks-everywhere-20081121/#ixzz0tUcGaQhv ("Exit polls are somewhat less reliable than telephone-based polls of the same sample size.").

60. *See* Grad, *supra* note 57 (discussing results of exit poll).

61. Dan Walters, *Pro-Obama Turnout Aided Proposition 8*, SACRAMENTO BEE, Nov. 11, 2008, at A3.

62. *See id.*

63. *Id.*

64. *See California General Exit Poll*, SACBEE.COM (Nov. 5, 2008, 12:06 PM), http://media.sacbee.com/smedia/2008/11/05/18/prop8.source.prod_affiliate.4.pdf (reporting that 65 percent of Protestants and 64 percent of Catholics voted for Prop. 8). According to one report, 30 percent of voters were Catholic. Matthai Kuruvila, *To Pass Measure, Catholics and Mormons Allied*, S.F. CHRON., Nov. 10, 2008, at A1 [hereinafter Kuruvila, *Catholics, Mormons Allied to Pass Prop. 8*]. Although gay rights groups have harshly criticized Mormons, including a campaign to strip the church of its tax-exempt status, *see* Matthai Kuruvila, *Church Tax-Exemption Questioned for Funders of Prop. 8 Campaign*, S.F. CHRON.,

cans?[65] Why not suburban voters?[66] Why not parents?[67] All of these groups are substantially larger than black or Latino voting groups.[68] Thus, if one believes the exit poll, these groups contributed more votes to Prop. 8's success than did black and Latino voters.[69]

Some commentators displayed greater care and nuance in their analysis than mainstream media. Roughly a week after the election, influential political blogger Nate Silver (who is openly gay) rebuked what he labeled Prop. 8 myths.[70]

Nov. 28, 2008, at B1, they have largely ignored the Catholic Church. According to the *San Francisco Chronicle*:

> The last Field Poll, conducted a week before the election, showed that weekly churchgoers increased their support in the final week from 72 percent to 84 percent. Catholic support increased from 44 percent to 64 percent—a jump that accounted for 6 percent of the total California electorate and equivalent to the state's entire African American population combined.

Kuruvila, *Catholics, Mormons Allied to Pass Prop. 8*, *supra*, at A1. Catholic leaders not only avidly generated Prop. 8 support from their congregations, but also were instrumental in enlisting Mormon support. *See id.* While religious groups opposed to same-sex marriage were organizing, the supporters of same-sex marriage largely overlooked religion, including religious supporters of marriage equality. *See id.* (quoting Reverend Roland Stringfellow, Center for Gay and Lesbian Studies in Religion and Ministry, Pacific School of Religion); *see also* Lisa Miller et al., *Our Mutual Joy—Opponents of Gay Marriage Often Cite Scripture. But What the Bible Teaches Us About Love Argues for the Other Side*, NEWSWEEK, Dec. 15, 2008, at 28 (arguing that the Bible supports same-sex marriage).

65. *See California Proposition 8: Ban on Gay Marriage*, *supra* note 30 (reporting that 61 percent of voters sixty-five and older voted for Prop. 8).

66. *See California General Exit Poll*, *supra* note 64 (reporting that 59 percent of suburban voters voted for Prop. 8).

67. *See id.* (reporting that 68 percent of voters who were married with children voted for Prop. 8, as did 64 percent of voters who had children under eighteen living in their household).

68. Walters and likeminded critics essentially viewed increased black and Latino turnout for Obama as a bad thing. Rather than being applauded for exercising their civil rights and helping to elect the first black president, black and Latino voters were seen as contaminating the political process and undercutting the power of white voters. *See, e.g.*, Walters, *supra* note 61, at A3 ("To put it another way, had Obama not been so popular and had voter turnout been more traditional—*meaning the proportion of white voters had been higher*—chances are fairly strong that Proposition 8 would have failed." (emphasis added)).

69. Further, even if one focuses on race, one could slice the numbers differently to produce other racial claims. Although a majority of whites (51 percent) voted in favor of same-sex marriage (by voting against Prop. 8), focusing only on white men provides another narrative. A majority of white men (51 percent) voted against same-sex marriage—a number close to the 53 percent of Latinos who opposed same-sex marriage. *California Proposition 8: Ban on Gay Marriage*, *supra* note 30. Why were Latinos demonized, but not white men? Numbers, therefore, cannot fully explain the discrepancy.

70. Nate Silver, *Prop 8 Myths*, FIVETHIRTYEIGHT.COM (Nov. 11, 2008, 3:47 PM), http://www.fivethirtyeight.com/2008/11/prop-8-myths.html; *see also Doubt by the Numbers*, GUY2K (Nov. 7, 2008, 6:49 AM), http://guy2k.blogspot.com/2008/11/doubt-by-numbers.html (pointing out that the exit poll provided no crosstab for first-time African American voters for Obama). Silver would later achieve great acclaim for predicting President Obama's 2012 re-election. *See* Aaron Hicklin, *Nate Silver: Person of the Year*, OUT (Dec. 18, 2012), http://www.out.com/news-opinion/2012/12/18/nate-silver-person-year; Jack Mirkinson, *Nate Silver Takes a Victory Lap After Obama*

Taking direct aim at Walters' claim in the *Sacramento Bee* that Obama elicited minority voters who were responsible for Prop. 8's success, he pointed out that a strong majority of first-time voters (62 percent) opposed Prop. 8, while a majority of experienced voters (56 percent) favored Prop. 8.[71] Therefore, if Obama had not been on the ballot and energized first time voters,[72] and the electorate's demographics were similar to 2004 and 2000, Prop. 8 would likely have won by a larger margin.[73]

Moreover, Silver cautioned against reading too much into the exit poll.[74] First, exit polls are less reliable than other polls because they utilize a technique called cluster sampling. That is, rather than surveying a random sample of all voters in the state, pollsters interview voters only at certain precincts, which introduces a source of error.[75] Second, Silver warned:

> [R]emember that whenever we're looking at the voting patterns of just one subgroup—such as African-Americans—the margins for error are much larger than when we're looking at the entire sample. In consideration of these two things, the margins of error [can] in fact be quite high. There's probably about a 10-point margin of error in looking at how African-Americans decided on Prop 8, for instance.[76]

A subsequent study by political scientists Patrick Egan and Kenneth Sherrill agreed with Silver's estimation, concluding that actual black support for the same-sex marriage ban was about 58 percent—12 percentage points below the much-touted 70 percent figure.[77] They also estimated that Latino support was likely 59 percent—6 points higher than suggested by the exit poll.[78] Although the media tended to cite only the exit poll, the study by

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Re-election, HUFFINGTON POST (Nov. 7, 2012, 2:38 AM), http://www.huffingtonpost.com/2012/11/07/nate-silver-obama-reelection_n_2086556.html.

71. Silver, *supra* note 70; *see also Doubt By the Numbers*, *supra* note 70.
72. Eighty-three percent of first-time voters supported Obama. Silver, *supra* note 70.
73. *See, e.g.*, Grant, *supra* note 59.
74. Silver, *supra* note 70.
75. *See id.* For example, it appears that the exit poll may have undercounted recently emigrated Asians, especially those who did not speak English, who were more likely to support Prop. 8. *Cf.* Heather Knight, *Prop 8 Support in S.F.*, S.F. CHRON., Nov. 14, 2008, at A1 (finding strong support for Prop. 8 in Chinatown, San Francisco).
76. Grant, *supra* note 59.
77. PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 9 (2009) ("Analysis of the full range of data available persuades us that the [National Exit Poll] overestimated African American support for Proposition 8 by ten percentage points or more."). The Evelyn & Walter Haas, Jr. Fund in San Francisco, "a foundation whose mission includes the advancement of the civil rights of gays and lesbians," commissioned the study, and the National Gay and Lesbian Task Force Policy Institute released it. *Id.* at 1.
78. *Id.* at 3.

Egan and Sherrill pointed out that four other polls taken right before and after the election found "insignificant differences in support for Proposition 8 between African Americans and Californians as a whole."[79] Egan and Sherrill also examined voting data at the precinct level from five counties—Alameda, Los Angeles, Sacramento, San Diego, and San Francisco—that collectively make up 66 percent of the state's black population.[80] This analysis suggested that between 57 and 59 percent of black voters supported Prop. 8.[81] Based on their examination of multiple sources, Egan and Sherrill described the exit poll's 70 percent figure as an "outlier."[82]

In addition, Egan and Sherrill analyzed a poll of voters by David Binder from research that was conducted between November 6–16, 2008.[83] They concluded that "[d]espite the intense attention placed on race and ethnicity as factors in determining the vote on Proposition 8, this variable only affected about six percent of the total vote."[84] Interestingly, Egan and Sherrill found that gender had almost as much of an impact as race (with men more likely to support Prop. 8),[85] and yet the media and Prop. 8 protestors who fixated on race had nothing to say about the role of gender. More influential than race and gender were party identification (15.2 percent), ideology (14.6 percent), religiosity (11.8 percent), and age (8.7 percent).[86]

Moreover, once the authors controlled for religion, *there were no significant racial differences* between supporters and opponents of Prop. 8.[87] Thus, the biggest difference between the white vote and the black vote is not race, but *religion*.[88] This suggests that instead of talking primarily about race, we should be

79. *Id.* at 9. This finding is consistent with an exit poll from March 2000, when Californians voted on Proposition 22, a statutory ban on same-sex marriage. Fifty-nine percent of black respondents supported the measure, compared to 60 percent of voters. According to the poll, Latino support was slightly higher, at 63 percent. *Gay Marriage Amendments in California—Exit Poll Results*, ABC NEWS, http://abcnews.go.com/images/PollingUnit/CAExitPollGayMarriage.pdf (last visited Feb. 22, 2014).

80. EGAN & SHERRILL, *supra* note 77, at 10–11.

81. *Id.* at 11.

82. *Id.* at 9.

83. The poll included "an oversample of 266 African American, Latino, and Asian-American [sic] voters"; the total sample encompassed 1066 respondents. *Id.* at 2 (footnote omitted).

84. *Id.* at 8.

85. *Id.* at 7 (finding that gender impacted 4.9 percent of vote, compared to 5.5 percent for race); *see also* Sherkat et al., *supra* note 9, at 89 (stating, based on multivariate analysis of General Social Survey data, that "women are consistently more supportive [of same-sex marriage] than men").

86. *See* EGAN & SHERRILL, *supra* note 77, at 7.

87. *See id.* at 11.

88. Sherkat et al., *supra* note 9, at 89–90 ("Controls for church attendance reduce the difference between whites and African Americans to insignificance."); *see also id.* at 81 ("African Americans have the highest rates of religious participation of any subgroup of the U.S. population.").

engaged in a national conversation about religion and same-sex marriage and, more specifically, whether one's religious beliefs should dictate other people's access to marriage. Although the Egan and Sherrill study had the potential to dismantle the racial blaming, it gained little traction in the mainstream media. After disseminating the tantalizing story of minority-versus-minority infighting, the media showed little interest in disclosing a study that called this framing into question.[89]

Some readers may not be persuaded that the role of religion excuses blacks for their votes. One might argue that blacks are excessively religious. LGBT people may be particularly primed to respond this way because mainstream religions have long demonized homosexuality and supported rigid gender roles. In my view, which is based on the black experience, religion can be a productive and cohesive force in creating community.[90] The black church played a central role in galvanizing the black civil rights movement, which paved the path of equality for the LGBT movement. Rather than demonizing all religion, we should seek to reconstruct religions to make them more hospitable to LGBT people.[91] Further, we should resist deeming blacks as too religious simply because they are more religious than whites. Psychological research suggests that some black LGBT people use their faith to endure and overcome discrimination (whether racial, gender, or sexual orientation-based).[92]

Another problem with using the Prop. 8 vote as proof of a broader narrative about black betrayal is that California is just one of thirty states that have banned same-sex marriage. One cannot understand black homophobia by looking just at California; nor should one isolate the Prop. 8 vote. Timothy Stewart-Winter, writing in the *Los Angeles Times*, reported:

> In March 2000, when Californians voted on Proposition 22 (the statutory ban on gay marriage that the state Supreme Court struck down in May), a *Los Angeles Times* exit poll showed that levels of sup-

89. This may be largely due to the fact that the news cycle had moved on to other stories.

90. *See, e.g.*, Eddie Glaude Jr., *Of the Black Church and the Making of a Black Public*, *in* AFRICAN AMERICAN RELIGIOUS THOUGHT: AN ANTHOLOGY 338, 340–41 (Cornel West & Eddie S. Glaude Jr. eds., 2003).

91. *See, e.g.*, Kelly Brown Douglas, *Homophobia and Heterosexism in the Black Church and Community*, *in* AFRICAN AMERICAN RELIGIOUS THOUGHT: AN ANTHOLOGY, *supra* note 90, at 996, 1015.

As I argue in the conclusion, President Obama's invocation of his religious beliefs as a reason to *support* same-sex marriage took a major step in the right direction.

92. Ja'Nina J. Walker & Buffie Longmire-Avital, *The Impact of Religious Faith and Internalized Homonegativity on Resiliency for Black Lesbian, Gay, and Bisexual Emerging Adults*, 49 DEVELOPMENTAL PSYCHOL. 1723, 1727 (2013). Perhaps counterintutively, the authors found that religious faith bolstered people experiencing higher levels of internalized homonegativity but did not contribute to resiliency among those lower in internalized homonegativity. *Id.*

> port were very similar among the major ethnic groups, with Latinos slightly more opposed to allowing gays to marry, Asians and whites slightly less opposed, and blacks right in the middle.[93]

These exit polls, of course, may be subject to the same caveats as the Prop. 8 exit poll. I do not mean this discussion to imply that exit polls are reliable. Rather, I cite such polls because, to the extent that some find them relevant, they cannot justify consulting only the polls that cast blacks in an unfavorable light.

When one looks at exit polls outside of California, the landscape becomes more complicated. Florida also amended its constitution to prohibit same-sex marriage in November 2008, and the exit poll depicted a racial pattern similar to that in California: blacks providing the strongest support (71 percent), with Latinos in the middle (64 percent), and whites (60 percent) the least supportive.[94] But in Arkansas, which passed a law banning unmarried couples from adopting, the exit poll suggested that white voters were more likely to support the law (58 percent) than black voters (54 percent).[95] (The exit poll included too few Latino voters to estimate a level of support from Latinos). The Arkansas vote received a fraction of the funding poured into the fight over Prop. 8 and little attention from national media.[96] Also in 2008, Arizona passed a marriage ban, and whites and Latinos supported the ban equally (55 percent).[97] (The exit poll included too few black voters to estimate a level of support from blacks). Moreover, Stewart-Winter reported:

> When constitutional amendments banning same-sex marriage were on eleven state ballots in 2004, blacks in Arkansas, Kentucky, Michigan, Mississippi, Ohio and Oklahoma were at least one percentage point *less* likely than whites to vote for them, according to CNN exit

93. Timothy Stewart-Winter, *Gay Marriage and the Black Vote*, L.A. TIMES, Aug. 14, 2008, at A15.

94. *Florida Amendment 2: Ban on Gay Marriage*, CNN, http://www.cnn.com/ELECTION/2008/results/polls/#val=FLI01p1 (last visited Feb. 22, 2014). State law required at least 60 percent support to amend the constitution. 2012 FLORIDA CONSTITUTIONAL AMENDMENTS INFORMATION GUIDE 17 (2012), *available at* http://www.hollyhillfl.org/wp-content/uploads/2012/08/2012-amendment-booklet-single-page.pdf.

95. *See Arkansas Initiative 1: Ban on Gay Couples Adopting Children*, CNN, http://www.cnn.com/ELECTION/2008/results/polls/#val=ARI01p1 (last visited Feb. 22, 2014). Although the law's supporters seemed to be concerned primarily about gay couples adopting, the law also banned other unmarried couples from adopting.

96. A report by the National Institute on Money in State Politics found that committees raised less than $500,000 for the Arkansas campaign compared to $86.1 million for Prop. 8. PETER QUIST, NAT'L INST. ON MONEY IN STATE POLITICS, MONEY BEHIND THE 2008 SAME-SEX PARTNERSHIP BALLOT MEASURES (2009), *available at* http://www.followthemoney.org/press/PrintReportView.phtml?r=406.

97. *See Arizona Proposition 102: Ban on Gay Marriage*, CNN, http://www.cnn.com/ELECTION/2008/results/polls/#val=AZI01p1 (last visited Feb. 22, 2014).

> polls. Only in Georgia were blacks slightly more likely to vote for the amendment.[98]

Gregory Lewis's research shows that black views on homosexuality and LGBT rights are much more complex than gay pundits like Savage and Sullivan think.[99] Lewis explains that because they are more likely to be religious than whites, "blacks appear to be more likely than whites to see homosexuality as wrong but they also are more likely to favor gay rights laws," such as a ban on sexual orientation-based discrimination in employment.[100] Polls have frequently shown a gap between black attitudes toward homosexuality and their votes. In short, because of black religious traditions, black attitudes tend to be strongly judgmental, yet this does not inevitably translate into a stronger vote against gay rights, as exemplified by the votes regarding the eleven state bans in 2004 and the more recent Arkansas adoption ban vote.[101] A principal way forward, then, would seem to be figuring out why antigay attitudes have not translated into antigay votes in particular contexts. But the campaign against Prop. 8 utterly failed to mine this territory.

C. Media Coverage

The media fueled this racial rancor through its flawed reporting on Prop. 8.[102] This Subpart is based on a review of all news and opinion items in three major newspapers during November 2008, the month of the election. I selected the *Los Angeles Times* and the *San Francisco Chronicle* because they are the two largest newspapers in California. I included the *New York Times* because it is arguably the most influential national newspaper.[103] The general pattern of the coverage was as follows. The *New York Times* coverage was the most problematic in undu-

98. Stewart-Winter, *supra* note 93. "The remaining four states had too few blacks to make a meaningful comparison." *Id.*; *see also* Patrick J. Egan & Kenneth Sherrill, California's Proposition 8 and America's Racial and Ethnic Divides on Same-Sex Marriage 6 (Jan. 2010) (unpublished manuscript), *available at* http://as.nyu.edu/docs/IO/4819/marriagedivides.pdf ("Historically, exit polls from statewide ballot measures on same-sex marriage bans have found no significant differences in the votes of blacks and Latinos compared to whites.").

99. *See* Gregory B. Lewis, *Black-White Differences in Attitudes Toward Homosexuality and Gay Rights*, 67 PUB. OPINION Q. 59, 66 (2003); *see also* Sherkat et al., *supra* note 9, at 83 (stating that the "split in African American sentiment between the morality of homosexuality and rights for GLBT persons . . . suggests that opinion on marriage rights may be pliable").

100. Lewis, *supra* note 99, at 66, 69.

101. *Supra* note 96.

102. Some may regard the newspapers on which I focus as liberal. To be sure, conservative media sources, such as Fox News, also propagated the narrative that "[i]t was the black vote that voted down gay marriage." Kuruvila, *supra* note 33, at A1 (quoting Fox News host Bill O'Reilly).

103. I also reviewed stories in other California and national newspapers, but not in a systematic fashion.

ly highlighting race and ignoring other factors. The *San Francisco Chronicle*'s reporting was the most nuanced and balanced; it recognized that race is one of many factors that explain Prop. 8's success. The *Los Angeles Times*'s coverage fell in between these two poles.

The *New York Times*'s first postelection story on Prop. 8 explained the loss: "Supporters of same-sex marriage in California, where the fight on Tuesday was fiercest, appeared to have been outflanked by the measure's highly organized backers and, exit polls indicated, hurt by the large turnout among black and Hispanic voters drawn to Senator Barack Obama's candidacy. Mr. Obama opposes same-sex marriage."[104] This story exemplifies some of the problems evident in much of the media coverage. First, the *Times* underscored race, while overlooking other more influential demographic factors.[105] Other media outlets made similar claims.[106] For example, the *Washington Post* melodramatically declared that blacks, "[t]he same voters who turned out strongest for Barack Obama[,] also drove a stake through the heart of same-sex marriage."[107]

Second, the article presented the exit poll as reliable, which, as I have argued above, is hardly the case.[108] Finally (and atypically), the article actually misrepresented the exit poll's findings and stated Obama's position on Prop. 8. The exit poll found that 51 percent of whites (the barest majority) opposed Prop. 8, not—as the *Times* reported—53 percent.[109] More than eighteen months after the election, the *Times* website contained no correction of this misstatement. In addition, the article linked the racial minority vote to Obama by stating, "Mr. Obama opposes same-sex marriage."[110] That statement was technically true. Yet the *Times* omitted its very important corollary: Obama also opposed Prop. 8 and

104. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 5, 2008, http://www.nytimes.com/2008/11/06/us/politics/06marriage.html. To their credit, the authors stated that "[s]upporters of the bans [on same-sex marriage] in California, Arizona and Florida benefited from the donations and volunteers mobilized by a broad array of churches and religious groups from across the ethnic spectrum." *Id.* But they followed that passage with a quote from a Latino pastor who bragged that "'[w]ithout the Latino vote, . . . Proposition 8 would never have succeeded.'" *Id.* The authors then turned to Frank Schubert, the leader of Protect Marriage, the principal group fighting for Prop. 8, who "agreed that minority votes had put the measure over the top, saying that a strategy of working with conservative black pastors and community leaders had paid off. 'It's a big reason why we won, no doubt about it,' he said." *Id.*

105. *See supra* Part I.B.

106. *See, e.g.*, Knight, *supra* note 75, at A1 (citing a voting expert who analyzed race, but not religion, which correlates with race).

107. Vick & Surdin, *supra* note 57, at A3.

108. *See supra* Part I.B.

109. *Compare* McKinley & Goodstein, *supra* note 104, at A1, *with California Proposition 8: Ban on Gay Marriage*, *supra* note 30.

110. McKinley & Goodstein, *supra* note 104, at A1.

described it as "discriminatory."[111] It is odd that the *Times* would refer only to Obama's views on same-sex marriage and not his official position on Prop. 8.[112]

By contrast, the *San Francisco Chronicle*'s lead story on the Prop. 8 outcome mentioned race, but primarily highlighted religion.[113] Its central point was that voters, including Democrats, voted their religion when it came to Prop. 8.[114] The *Los Angeles Times* coverage was mixed. On the one hand, the day after the election, its blog announced that "70% of African-Americans backed Prop. 8, exit poll finds."[115] The post did mention that religious voters, married voters, and voters with children provided key support for Prop. 8, but the reference to religious voters is telling. According to the post, seven in ten Christians backed Prop. 8—precisely the same figure provided for black voters—yet the headline focused only on blacks, ignoring the intersection of black Christians and the many more white Christians in the electorate.[116] The *Los Angeles Times* also published an article about southwestern Riverside County, however, which it described as a "sprawling Republican stronghold of social conservatives and mega-churches," where many households planted two or three "Yes on 8" signs in their yards.[117] In focusing on a predominantly white community[118] stocked with McCain-Palin supporters, the story never mentioned race. Although it helpfully suggested that blacks were not the only religiously-motivated supporters of Prop. 8, the article also illustrates how homophobia among whites is almost never marked as "white homophobia," even as homophobia among blacks

111. Healy, *supra* note 41, at A13.

112. Indeed, this description resembles the distortion of Obama's position disseminated by the "Yes on 8" campaign. *See* Editorial, *After Prop. 8*, L.A. TIMES, Nov. 6, 2008, at A28. This is not to deny that there may have been tension between Obama's stance on same-sex marriage (opposed) and Prop. 8's ban on same-sex marriage (also opposed). But the *Times* description was crude and may have misled readers. A pre-election article provided a fairer description of Obama's position on Prop. 8. *See* Healy, *supra* note 41, at A13; *cf.* Editorial, *Equality's Winding Path*, N.Y. TIMES, Nov. 6, 2008, at A32 (recounting in a postelection editorial that Gov. Arnold Schwarzenegger both vetoed a same-sex marriage bill and opposed Prop. 8).

113. John Wildermuth, *Many Obama Supporters Also Backed Prop. 8*, S.F. GATE (Nov. 6, 2008, 4:00 AM), http://www.sfgate.com/news/article/Many-Obama-supporters-also-backed-Prop-8-3186289.php.

114. *See id.* ("'What the exit polls say is that religion trumps party affiliation when it comes to social issues,' said Mark DiCamillo, director of the Field Poll.").

115. *See* Grad, *supra* note 57.

116. *See id.*

117. David Kelly, *Committed to Their Cause in a Red Stretch of a Blue State*, L.A. TIMES, Nov. 5, 2008, at B1.

118. *Riverside County, California*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/06/06065.html (last updated Jan. 6, 2014) (reporting an 80.8 percent white population in Riverside County).

is typically linked to race.[119] The *Los Angeles Times* published an op-ed written by John Corvino, a philosophy professor at Wayne State University, which lamented that "[o]ne of the especially painful ironies of the Proposition 8 vote is the fact that historically oppressed minorities—including blacks, Mormons and Catholics—were among the measure's strongest supporters."[120] Although this story highlights blacks as culprits, it departs from the dominant narrative in linking blacks not only with Mormons, but also with Catholics. The next Part explores and critiques a central reason why the media latched onto black voters: the belief that blacks and gays, as historically oppressed minorities, shared an alliance before the Prop. 8 vote ruptured it.

II. THE PRESUMED BLACK-GAY ALLIANCE

As discussed above, many other demographic groups supported Prop. 8, and yet they escaped the critical scrutiny heaped on blacks (and sometimes on Latinos). Several factors contributed to this blaming. Some perceive a special relationship between blacks and gays, which may distinguish blacks from many of the groups that escaped blame. According to this understanding, since blacks have historically been subordinated, they should be especially sensitive to discrimination and at the vanguard of efforts to expand civil rights protections.[121] Some have suggested that because of their long struggle to overthrow slavery and Jim Crow, blacks should be the last to deny another group its civil rights.[122] As one person who wrote a letter to the editor of the *San Francisco Chronicle* stated, "Rosa Parks didn't sit at the front of the bus just to tell other oppressed people to go to the back."[123] By contrast, most people do not expect (white) older Americans, evangelicals, or parents, for example, to share a strong sensitivity to and opposition of discrimination.

Another factor arises from the extreme loyalty of blacks to the Democratic Party. Because blacks have been among the most reliable supporters of left politics,

119. *Cf.* Russell K. Robinson, *Racing the Closet*, 61 STAN. L. REV. 1463, 1465 (2009) (discussing the invisibility of "white men on the down low" and the media spotlight on similarly behaving black men).

120. John Corvino, *Happily Ever After, Delayed*, L.A. TIMES, Nov. 6, 2008, at A29.

121. *See, e.g.*, Walters, *supra* note 61, at A3.

122. *E.g.*, Lola Adesioye, *Time to Overcome Black Homophobia*, HUFFINGTON POST (Nov. 13, 2008, 7:07 PM), http://www.huffingtonpost.com/lola-adesioye/time-to-overcome-black-ho_b_143626.html ("Gay rights supporters are surprised that African Americans could have voted against gay marriage believing that they, more than anyone, should understand discrimination having suffered from it for so long.").

123. Madelyne Cromwell, Letter to the Editor, *Turning Their Backs on Another Minority*, S.F. CHRON., Nov. 8, 2008, at B4.

some LGBT people (who are also reliable supporters of the Democratic Party) may have felt that an ally betrayed them.[124] By contrast, most LGBT people do not regard evangelicals or suburbanites as political allies.

Although this theory helps explain the outrage of gay rights activists,[125] it rests on several erroneous assumptions. First, it reflects unfamiliarity with discrimination *within* the black community and *within* the LGBT community. This is one place where an intersectional perspective, drawing on the experiences of black LGBT people, could have informed the debate. Black women (straight and queer) and black queer people (male, female, and transgender) are all too aware of the reality that being black does not necessarily make one less likely to be sexist, homophobic, or transphobic.[126] Black women and black LGBT people have long struggled to convince black men and black heterosexuals that discrimination based on gender and sexual orientation are as contemptible as the racism faced by all blacks. Yet black groups often perceive homophobia and sexism as beyond their mandate, just as groups organized around gay identity often deem race and gender discrimination against LGBT people as nongay issues.[127] Perhaps unfamiliarity with the experiences of LGBT people of color prevented white LGBT people from understanding this.

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124. *See* Quentin Kidd et al., *Black Voters, Black Candidates, and Social Issues: Does Party Identification Matter?* 88 SOC. SCI. Q. 165, 165 (2007). Black political values are considerably more complex than suggested by blacks' consistent record of supporting Democratic candidates. While white evangelicals tend to see their religion as consistent with conservative economic policies, blacks tend to see the Bible as calling for a strong governmental safety net. But black Christians tend to resemble white evangelicals when it comes to social issues such as same-sex marriage and abortion. *See id.* at 166–67.

125. I do not doubt that the outrage expressed by whites such as Dan Savage is sincere, even if misguided. When whites come out as LGB, they may for the first time form an identity as a minority, and this new consciousness may lead them to feel connected to other minorities, including people of color. A study by Patrick Egan is consistent with this theory. PATRICK J. EGAN ET AL., FINDINGS FROM THE HUNTER COLLEGE POLL OF LESBIANS, GAYS AND BISEXUALS: NEW DISCOVERIES ABOUT IDENTITY, POLITICAL ATTITUDES, AND CIVIL ENGAGEMENT 21–22 (2008) (finding that a significant subset of LGB respondents said that coming out made them feel closer to people of other races and more distant from their families of origin and religion). This heightened awareness of minorities, however, (which was not reported by a majority of respondents in the Egan survey) does not automatically erase a lifetime of experiences as a fully privileged white American, nor does it eradicate the white privilege that LGB people enjoy even when fully out of the closet.

126. *See, e.g.*, Carbado, *supra* note 4, at 1476–78; Crenshaw, *Mapping the Margins*, *supra* note 28 *passim*; Darren Lenard Hutchinson, *"Gay Rights" for "Gay Whites"?: Race, Sexual Identity, and Equal Protection Discourse*, 85 CORNELL L. REV. 1358, 1371 (2000); Dwight A. McBride, *Can the Queen Speak? Racial Essentialism, Sexuality and the Problem of Authority*, 21 CALLALOO 363 *passim* (1998).

127. *See, e.g.*, Allan Bérubé, *How Gay Stays White and What Kind of White It Stays*, *in* THE MAKING AND UNMAKING OF WHITENESS 234 (Birgit Brander Rasmussen et al. eds., 2001); *see also infra* text accompanying note 139.

But even if we set aside race for the moment,[128] we can see that there is oppression among the white LGBT community itself. Here, I name some of these power hierarchies. In general, in terms of status and power within the LGBT community, the *G* is more powerful than the *L*, which is more powerful than the *B* and the *T*. I have written elsewhere about sexism among gay men, including the desire to keep queer women out of gay male sexualized spaces.[129] Controversies about the exclusion and marginalization of transgender people have garnered considerable attention in the gay press.[130] Bisexual erasure tends to be so complete that it rarely warrants discussion.[131] Finally, gay men tend to draw distinctions among gay men based on gender performance. Many express a preference for romantic partners or friends who are "masculine."[132] These hierarchies among sexual minorities undermine the descriptive claim that minorities do not discriminate against other minorities.[133]

128. In reality of course the hierarchies that I describe in this paragraph are interwoven with racial privilege and disadvantage.

129. Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2802–03 (2008).

130. *See, e.g.*, EGAN ET AL., *supra* note 125, at 24 (finding that, although most respondents in an LGB survey favored including transgender people in the Employment Non-Discrimination Act's protections, "LGBs rank securing rights for transgender people as a relatively low priority"); Craig Willse & Dean Spade, *Freedom in a Regulatory State?:* Lawrence, *Marriage & Biopolitics*, 11 WIDENER L. REV. 309, 309 n.2 (2005) (referring to the "disgraceful battles over transgender inclusion in the federal Employment Non-Discrimination Act (ENDA), backed by the Human Rights Campaign, or the New York State Sexual Orientation Non-Discrimination Act (SONDA) backed by the Empire State Pride Agenda" as "only some of the more blatant examples"). In particular, nearly 75 percent of LGB young people (ages eighteen to twenty-five) described marriage equality as a priority, while less than 40 percent similarly described transgender rights. EGAN ET AL., *supra* note 125, at 26.

131. *See generally* Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353 (2000) (positing that the erasure of bisexuality in American political and legal discourse is not reflective of the incidences of those orientations in the population, but rather due to overlapping interests of heterosexuals and homosexuals such as the stabilization of exclusive sexual orientation categories, the retention of sex as an important diacritical axis, and the protection of norms of monogamy).

132. *See* J. Michael Bailey et al., *Butch, Femme, or Straight Acting? Partner Preferences of Gay Men and Lesbians*, 73 J. PERSONALITY & SOC. PSYCHOL. 960, 972 (1997) (analyzing personal ads); Russell K. Robinson, *Uncovering* Covering, 101 NW. U. L. REV. 1809 (2007). The word "homophobia" does not fully capture this phenomenon in which some homosexuals discriminate against other homosexuals. Cleo Manago uses the term "femophobia," which strikes me as more precise. *See* Cleo Manago, Remarks at the UCLA School of Law Panel: The Aftermath of Prop. 8: Is Gay *Really* the New Black? (Nov. 19, 2008).

133. There are some studies finding crossgroup identification or empathy in specific contexts. *See, e.g.*, Benjamin G. Bishin & Andrea Silva, Descriptive Representation by Surrogate: Are African American Members of Congress More Likely to Support Gay Rights? 17–18, 23 (Oct. 5, 2012) (unpublished manuscript) (on file with author) (concluding that black representatives in Congress are more likely than whites to support gay rights, and that this finding also holds when comparing

Further, the presumed black-gay alliance ignores the fraught relationship between the mainstream gay community and many black sexual minorities. The colorblind belief that blacks and gays, pre-Prop. 8, were united against discrimination may have been informed by the extreme whiteness of most mainstream gay communities and the reality that they were particularly out of touch with blacks.[134] Living at the intersection of two stigmatized identities, black LGBT people face racism in white gay spaces and homophobia in black communities. If white gay activists had formed meaningful relationships with black LGBT people—especially with blacks who do not identify solely with the white gay community—they would have known that many black people felt estranged from the white gay community. The sources of this alienation are addressed below.

A. White Male Political Domination

Wealthy white males dominate the gay rights agenda, which prioritizes rights that are most meaningful for people who are middle or upper class and neglects the discrimination faced by poorer LGBT people, such as in the contexts of immigration and mass incarceration.[135] This dynamic is not simply the result of intentional efforts by white men to force women and people of color to the margins of the movement. For example, white gay and bisexual men earn higher incomes than their female and people of color counterparts.[136] Further,

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black Democrats to white Democrats). A body of social psychology studies discussed below, however, points the other direction.

134. *See, e.g.*, H. Fisher Raymond & Willi McFarland, *Racial Mixing and HIV Risk Among Men Who Have Sex With Men*, 13 AIDS & BEHAV. 630 (2009) (reporting results of survey of men who have sex with men in San Francisco, which found that black men were the race least likely to be part of white men's friendship networks).

135. *See, e.g.*, John Wildermuth, *Wealthy Gay Men Backed Anti-Prop. 8 Effort*, S.F. CHRON., Nov. 16, 2008, at B1 (showing that several white gay men were major donors to the No on Prop. 8 campaign); John Cloud, *The Gay Mafia That's Redefining Liberal Politics*, TIME, Oct. 31, 2008, http://content.time.com/time/magazine/article/0,9171,1855344,00.html; Amy Sueyoshi, *Inequality in the Marriage Equality Movement*, RAINBOWZINE (July 20, 2009, 6:37 AM), http://www.rainbowzine.com/component/content/article/997-inequality-in-the-marriage-equality-movement.

The gender breakdown of the LGBT people who have been identified as among President Obama's "bundlers"—"supporters who work on behalf of the campaign to collect donations from their own circles"—is also telling. Viveca Novak & Russ Choma, *Obama Bundlers Include Many Who Are LGBT*, OPENSECRETS.ORG (May 4, 2012, 5:08 PM), http://www.opensecrets.org/news/2012/05/obama-bundlers-include-many-who-are-lgbt.html (listing twenty-six men and six women who have been publically identified as Obama bundlers). Around 81 percent of Obama's LGBT bundlers are male. *Id.*

136. *See, e.g.*, ANGELIKI KASTANIS & GARY J. GATES, THE WILLIAMS INST., LGBT AFRICAN-AMERICANS AND AFRICAN AMERICAN SAME-SEX COUPLES 1, 6 (2013), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Census-AFAMER-Oct-2013.pdf (reporting that

white male influence may stem in part from the fact that people of color and women have additional stigmatized identities; hence, they are less likely to make sexual orientation (defined narrowly) the sole or central focus of their identities and political agendas.[137] Rather than taking into account the competing demands on people of color and women, however, leaders of the mainstream gay rights movement have tended to aggravate this phenomenon by telling people who try to raise issues such as reproductive rights or racial justice that such issues are not gay issues.[138] Because the gay rights agenda is indifferent to the concerns of many black LGBT people, it is common for many black LGBT people to be indifferent to the gay rights agenda.[139]

B. Cultural Exclusion

Both the dominant gay community and the heterosexual black community are responsible for creating the public impression that gay means white. That is, all the gays—or at least all those who matter—are white; and all the blacks—or all those who matter—are straight. Devon Carbado identified this dynamic in the context of the initial campaign against the military's discriminatory Don't Ask, Don't Tell policy.[140] He found that the gay rights movement emphasized "respectable" white victims of the policy and marginalized nonconforming blacks.[141] Although in the intervening years, some gay rights lawyers have made commendable efforts to obtain a more diverse set of plaintiffs, too often white people continue to be the representatives of gay rights. When LGBT people rally around victims of hate crimes or bullying, they tend to favor white representatives. They turned Matthew Shepard (and later Tyler

African American female same-sex couples report incomes that are lower than African American and non-African American male couples).

137. *See* HUMAN RIGHTS CAMPAIGN FOUND., AT THE INTERSECTION: RACE, SEXUALITY AND GENDER 12 (2009), http://www.hrc.org/files/documents/HRC_Equality_Forward_2009.pdf (showing that some people of color rank the eradication of racial discrimination as a higher priority than typical gay rights movement issues such as same-sex marriage).

138. *See, e.g.*, URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 274–77 (Anchor Books 1995); Bérubé, *supra* note 127, at 235; *see also* Kendell, *supra* note 18, at 135 ("[O]ur movement exists, with our collusion, in the popular consciousness as largely white and economically privileged . . . .").

139. *See, e.g.*, Jasmyne A. Cannick, Op-Ed., *The Gay/Black Divide*, L.A. TIMES, Nov. 8, 2008, http://articles.latimes.com/2008/nov/08/opinion/oe-cannick8 ("Does someone who is homeless or suffering from HIV but has no health care, or newly out of prison and unemployed, really benefit from the right to marry someone of the same sex?").

140. Carbado, *supra* note 4, at 1506.

141. *Id.*

Clementi) into an icon, not Sakia Gunn.[142] Although gay rights advocates surely do not intend to alienate black voters, their selection of whites, and often elite whites, as plaintiffs fortifies antigay arguments that gay rights is not a black issue and is about affording extra privileges or "special rights" to white people who are already relatively comfortable.[143]

The exclusion or denigration of blacks sweeps beyond the political context to the broader culture. Although a few high-profile blacks have come out recently, including comedian Wanda Sykes, news anchor Don Lemon, and singer Frank Ocean, movie and television depictions of LGBT people have been overwhelmingly white, from *Will & Grace* to *Ellen* to *Brokeback Mountain* to *The Kids Are All Right*. Consequently, even as such media images persuade the public that LGBT identity is normal and healthy, they simultaneously reinforce the idea that gay is white.

C. Racial Bias and Marginalization

Racism in the gay community is a serious, and rarely acknowledged, problem. First, there remains a significant amount of old-fashioned racism in the gay community. During some Prop. 8 protests, including one near UCLA, protestors assailed blacks, including black LGBT people, with racial epithets such as the N-word.[144] Gay male nightclubs have been sites of antiblack discrimination—what else do we call it when a club in San Francisco requires only blacks to show multiple forms of identification?[145] What else can we say when the owner of the Abbey, a popular bar and lounge in West Hollywood, California complains of the "dark" crowds that flock to his club on Sunday night—that would be

142. If the reader is asking "Who is Sakia Gunn?," well, that is the point. For more information on Gunn, see Kavita Ramakrishnan, *Inconsistent Legal Treatment of Unwanted Sexual Advances: A Study of the Homosexual Advance Defense, Street Harassment, and Sexual Harassment in the Workplace*, 26 BERKELEY J. GENDER L. & JUST. 291, 321 (2011).

143. *See* Hutchinson, *supra* note 126, at 1368–75.

144. *E.g.*, Kuruvila, *supra* note 33 (reporting that a black female driver who opposed Prop. 8 was approached by "a group of men [who] came up to her window and said, 'Tell your people to be careful because it is because of them that we don't have equal rights'"); Rod McCullom, *N-Word Hurled at Blacks During Westwood Prop 8 Protest*, ROD 2.0 (Nov. 7, 2008), http://rodonline.typepad.com/rodonline/2008/11/n-word-and-raci.html (stating that a UCLA student was "called the n-word at least twice" and that "three older men accosted [a black gay couple holding 'NO ON PROP 8' signs] and shouted, 'Black people did this, I hope you people are happy!'").

145. *See* Dennis McMillan, *HRC Rules Gay Bar Owner Violates Civil Rights*, S.F. BAY TIMES, Apr. 28, 2005, http://www.sfbaytimes.com/?sec=article&article_id=3625; *see also, e.g.*, Annie Ro et al., *Dimensions of Racism and Their Impact on Partner Selection Among Men of Colour Who Have Sex With Men: Understanding Pathways to Sexual Risk*, 15 CULTURE, HEALTH & SEXUALITY 836, 840 (2013) (recounting men of color's experiences with racism in West Hollywood).

"Black Night"—and changes the music from hip-hop to karaoke?[146] And then there is Shirley Q. Liquor. Shirley is a white gay man dressed up in drag and blackface. Shirley Q. serves up virtually every black female stereotype—she has many "baby daddies," is obese, and incapable of speaking proper English. Despite these blatant racial and gender stereotypes, Shirley Q. is popular in the gay white community, appearing at numerous bars and events, and has been embraced by gay celebrities such as the stars of *Queer Eye for the Straight Guy*.[147]

While most people may think that racism is a form of hate, such a definition misses many dynamics that exclude and stigmatize black people and other people of color. There is plenty of racial exclusion that is harmful even though it is not intended to harm and cannot be reduced to overt hatred. For example, the romantic realm is rife with "romantic segregation" or "intimate discrimination."[148] Consider the common statements on gay dating website adam4adam.com that say, "No Blacks or Asians."[149] These words on profiles are often followed with something like: "Sorry, guys, it's just my preference." My empirical study showed that black and Asian men received fewer emails on adam4adam than white men, even when controlling for physical attractiveness.[150] To be clear, this Article's argument is not that the white LGBT community is *more* racist than heterosexuals, but there is little evidence that it is consistently *less* racist, thus undermining the minority solidarity assumption.[151] An intersectional perspective reveals the oppression that thrives within gay and black communities and makes clear that minority status is no panacea for bias.

146. Russell K. Robinson, *Masculinity as Prison: Sexual Identity, Race, and Incarceration*, 99 CALIF. L. REV. 1309, 1399 n.556 (2011). My research did not reveal similar incidents involving queer women. This may reflect the fact that nightclubs and the Internet (which I discuss below), which yield overt, public manifestations of bias, play a more central role in gay male communities.

147. Recently, a protest in Portland, Oregon led the manager of a bar to cancel a scheduled appearance by Liquor. *E.g.*, Casey Parks, *The Eagle Cancels Blackface Shirley Q. Liquor Performance After Protests of Racism*, OREGONIAN (Feb. 1, 2013, 5:04 PM), http://www.oregonlive.com/portland/index.ssf/2013/02/the_eagle_cancels_blackface_sh.html. The manager expressed astonishment that anyone would find her performance offensive. *Id.* ("I never in a million years thought there would be so much hate and anger over having Shirley Q. Liquor here . . . ." (internal quotation marks omitted)).

148. *See* Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1309–11, 1318–25 (2009); Robinson, *supra* note 129, at 2788–91.

149. White men usually make such statements, but sometimes men of color also refuse to date men of color.

150. Robinson, *supra* note 129, at 2813–18.

151. For historical examples of minority-against-minority competition and infighting, see Kennedy, *supra* note 17, at 798–800. Racism among LGBT people may take on particular forms because of particular features of the community. For instance, some gay white men seem to think they have greater freedom to dress up as a black woman, as in the example of Shirley Q. Liquor, or call a black woman a bitch, whereas white straight men might refrain from doing so for fear of being labeled a racist and a sexist.

In closing, I want to tease out and address three important and related questions. The first two questions are descriptive. First, do members of the majority tend to judge members of stigmatized minority groups who express prejudice against another minority more harshly than they judge majority group members who express the same prejudice? Recent research suggests that people in the majority do in fact hold stigmatized minorities to a higher standard.[152] The researchers found that student subjects reacted more negatively to gays and people with disabilities when they were intolerant of immigrants, as compared to non-stigmatized people who held similar views.[153] Moreover, majority group members' judgment of intolerant minorities was intensified when the researchers told the subjects that the intolerant minority group had overcome the negative consequences of past discrimination.[154] This helps us make sense of the Prop. 8 imbroglio. Postracial narratives in society, including LGBT discourse, which depicted President Obama's election as proof that blacks had overcome racial discrimination, may have primed white LGBT people to judge black voters harshly.

Second, do minorities rise to these higher moralized expectations of tolerance toward other minorities? For example, is a member of a minority group (say, a black man) more or less likely than a member of the majority group (a white man) to oppose discrimination against a different minority group (say, LGBT people)? Although there are competing findings, some research suggests that, at least in certain circumstances, "expecting members of different stigmatized groups to join forces in the fight for equality, presumably due to a sense of shared experience as members of disadvantaged groups, may be unrealistic."[155] For instance, one recent study found that white female students who read a study about pervasive gender discrimination experienced by female students and alumni were more likely subsequently to express prejudice against blacks and Latinos than white women who read a gender-neutral article.[156] The study suggests that

152. Saulo Fernández et al., *Higher Moral Obligations of Tolerance Toward Other Minorities: An Extra Burden on Stigmatized Groups*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 363 (2014). The Fernández et al. study found this effect with respect to both gays and people with a disability (dwarfism). *Id.* at 374. One limitation of the study for present purposes is that it was conducted with a sample of Spanish students in Spain. *Id.* at 364.

153. *Id.* at 366, 372.

154. *Id.* at 367, 372.

155. Maureen A. Craig et al., *Do Unto Others as Others Have Done Unto You? Perceiving Sexism Influences Women's Evaluations of Stigmatized Racial Groups*, 38 PERSONALITY & SOC. PSYCHOL. BULL. 1107 (2013). *But see* Maureen A. Craig & Jennifer A. Richeson, *Coalition or Derogation?: How Perceived Discrimination Influences Intraminority Intergroup Relations*, 102 PERSONALITY & SOC. PSYCHOL. BULL. 759 (2012) (finding that priming perceptions of racial discrimination among Latinos and Asians prompted members of those groups to express more positive attitudes toward blacks).

156. *See* Craig et al., *supra* note 155.

such bias may be situationally contingent. A white woman might respond to certain discriminatory events (or her perception of discrimination) by derogating another minority group in order to bolster her self-esteem. Based on that theory, whites who expressed anger toward blacks and Latinos after the November 2008 election may have been reacting to the injury of Prop. 8 rather than manifesting a stable prejudiced attitude toward blacks and Latinos.

The final question is normative: Should society judge a member of a minority group (say, a white lesbian) who harbors bias against a different minority group (say, Latinos) more harshly than a member of the majority (a heterosexual white man) who is similarly biased (against Latinos)?[157] Two reasons lead me to resist the urge to answer "yes." First, as I argue more fully later, oppression takes many different forms even when the law tries to address them under a singular constitutional framework like equal protection.[158] It does not surprise me that an upper-class lesbian in the Midwest might have little understanding of the plight of poor, undocumented Latinos since the oppression that an undocumented immigrant faces might seem quite dissimilar and distant from her lived experience. And if so, then there is no reason to hold her to any higher a standard than we do others. In order to bridge these differences, people who experience the intersections of these oppressions, such as queer undocumented people, may be able to educate and persuade the white lesbian.[159] Second, holding minorities to a higher standard in terms of supporting other minority groups effectively makes prejudiced majority group members less blameworthy. This strikes me as perverse in that it would heap greater punishment on minorities who already experience at least one form of oppression and whose adverse reaction to another minority group might very well be a psychological response to oppression.[160] In the words of one psychological study,

> expecting more from victimized groups is a hidden burden for non-privileged groups in society, where they not only face discrimination

157. The Fernández et al. study suggests that members of the majority impose heightened moral obligations on members of stigmatized groups in order to "manage the threat that the suffering by stigmatized groups poses for majority group members." Fernández et al., *supra* note 152, at 375. Majority members find it comforting to believe that suffering ennobles minorities. Minorities who display intolerance for other minorities upset this expectation and thus incur greater judgment than would a similarly situated member of the majority. *Id.*

158. *See infra* text accompanying notes 235–239.

159. These efforts can focus on the similarities of the oppressions, such as the need to come out as undocumented. The risk of this approach, however, is that the differences between the experiences might outweigh the similarities. That is, the white lesbian might not find the analogy convincing. Thus, in some circumstances, an advocate might eschew analogical arguments and make arguments that do not depend on the two groups being parallel.

160. *See* Craig et al., *supra* note 155, at 1108.

> but are also expected to be more moral in their treatment of others and are judged more severely when they violate these expectations—all of which is in the service of protecting privileged group members' well-being.[161]

Therefore, although I support efforts to sensitize members of minority groups to other forms of oppression, I see charges that intolerant minorities are especially contemptible as unfair and a diversion from the shared social obligation to promote equality.

III. SAME-SEX MARRIAGE LITIGATION AND POSTRACIALISM

The frequency of postracial narratives in marriage equality political discourse and litigation serves as further evidence of the falsity of the claim that gays and blacks have a natural alliance. This Part identifies postracial themes in the marriage equality briefs filed during the last decade of litigation over same-sex marriage (2003–2013).[162] I begin each critique with an example from the *Perry* briefs and then cite examples from other cases. Although I read all of the briefs filed by the parties in these cases, the focus of my analysis is the arguments made by the parties seeking marriage equality. Because I expect the state and other opponents of marriage equality to make offensive arguments, they are not the focus of my critique.[163]

Let me be clear that marriage equality advocates make many race-based arguments that do not trouble me, and that I am not categorically opposed to analogical arguments. Some of the anodyne arguments concern *Loving v. Virginia*.[164] For example, the plaintiff-appellants in *Goodridge v. Department of Public Health*[165] pointed out that the *Loving* Court's due process analysis did not define the right to marry at the "most specific level,"[166] as some more recent Su-

161. Fernández et al., *supra* note 152, at 375.

162. Gay rights groups filed many of the pro-marriage equality briefs. A significant subset of the lawyers in my sample, however, appears to have had minimal connections to the mainstream gay rights movement. Thus, my critiques extend to movement and non-movement lawyers.

163. While same-sex marriage opponents make many offensive arguments, few of them explicitly address race. *See, e.g.*, Brief of Intervenors at 36, 47–48, Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (No. 75934-1) (arguing for reinforcing rigid gender roles, portraying same-sex couples as promiscuous and unstable, and claiming that "natural" families are superior to bonds formed through other methods of procreation). Nonetheless, I considered opponents' arguments to the extent that they provided helpful context for understanding the claims made by proponents of marriage equality.

164. 388 U.S. 1 (1967).

165. 798 N.E.2d 941 (Mass. 2003).

166. Reply Brief of Plaintiffs-Appellants at 26 & n.23, *Goodridge*, 798 N.E.2d 941 (No. SJC-08860).

preme Court opinions have suggested.[167] A definition at the most specific level would have entailed asking whether there was a tradition protecting interracial marriage instead of a right to marry in general. The plaintiff-appellants thus use *Loving* effectively to rebut the claim that courts must find historical protection of a "right to same sex marriage" in order to strike down laws that restrict marriage to one man and one woman. In addition, some litigants compare interracial and same-sex marriage by showing that opponents of both have invoked religion to support their positions, and arguing that religion is an illegitimate basis for restricting marriage.[168] The focus of this discussion, however, is identifying common pitfalls of arguments analogizing race and sexual orientation.

A. Lesbians and Gays are Less Politically Powerful Than Blacks and Women, Also Known as the Oppression Olympics

Like virtually every marriage equality brief in my study,[169] the *Perry* plaintiffs-appellees argued in their brief that the court should deem lesbians and gays[170] (LGs) a suspect class and apply strict scrutiny, but also argued that the ban on same-sex marriage violates the Constitution under any standard of review.[171] In this section, I describe the basic structure of equal protection analysis to lay a foundation for my critiques of the argument that LGs are less politically powerful than blacks and women, which was made not only in the *Perry* appellee brief but in several other marriage equality briefs. Although courts consider several factors when deciding whether to treat a group as a suspect class, the question of political powerlessness is where analogical arguments are most likely to surface.[172] My bottom-line claim is that equal protection law, whether under the federal Consti-

167. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989) (plurality opinion).

168. *See, e.g.*, Brief for Plaintiffs-Appellants, Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) (No. 103434/04) [hereinafter Brief for Plaintiffs-Appellants, *Hernandez*].

169. A rare exception is Edith Windsor's Supreme Court brief, which argued for intermediate scrutiny, rather than strict scrutiny. Brief on the Merits for Respondent Edith Schlain Windsor at 17–19, United States v. Windsor, 133 S. Ct. 2675 (2013) (No. 12-307). In the lower courts, Windsor sought strict scrutiny. *See, e.g.*, Brief of Plaintiff-Appellee Edith Schlain Windsor at 18 n.9, Windsor v. United States, 699 F.3d 139 (2d Cir. 2012) (No. 12-2335-CV(L)). But after new counsel joined her case, she sought only intermediate scrutiny.

170. Brief for Appellees at 23, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (No. 10-16696) [hereinafter Brief for Appellees, *Perry*]. Virtually every marriage equality brief focuses on "lesbians and gays" rather than LGBT people, and so I use "LG" as an abbreviation. I also discuss below the significance of excluding bisexual and transgender people from these cases.

171. *Id.*

172. *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412, 439–44 (Conn. 2008) (comparing sexual orientation to race and sex, and ultimately, relying on the sex comparison).

tution or state constitutions, does not require marriage equality advocates to prove that lesbians and gays are less powerful than blacks.

When evaluating an equal protection challenge, the Supreme Court typically begins its analysis by asking whether the statute targets a suspect class, such as race.[173] If so, the Court applies strict scrutiny, which is the most demanding standard of review.[174] In order to justify the statute, the state must demonstrate that it has a compelling governmental interest and that the statute is a necessary means of advancing that interest.[175] In addition, the Court recognizes a middle tier of scrutiny, termed intermediate, which applies when the Court deems a class quasi-suspect, such as gender.[176] In such circumstances, the law "must serve important governmental objectives and must be substantially related to achievement of those objectives."[177] In the absence of a suspect or quasi-suspect classification, the Court "has merely asked whether there is any rational foundation for the discriminations, and has deferred to the wisdom of the state legislatures."[178]

Although scholars tend to treat this three-tier structure of equal protection jurisprudence as deeply entrenched, it is striking how rarely and incompletely the Court has justified it. Indeed, the key cases extending heightened scrutiny to race and gender provided virtually no rationale for these momentous decisions. In 1944, the Court first announced its rule that the "most rigid scrutiny" applies to racial classifications in the notorious *Korematsu* decision.[179] Not only did the Court fail to provide a rationale for this rule, but it went on to defer to the government's decision to single out Japanese and Japanese Americans for wartime internment—the antithesis of strict scrutiny. There was compelling evidence that the internment policy rested on a racial stereotype. The government presumed all people of Japanese ancestry to be disloyal, while it afforded people of German and Italian descent individual hearings to assess loyalty.[180] In later cases involving African Americans, the Court treated race as suspect but provided little new reasoning to justify the rule.[181]

173. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 9 (1967) (beginning equal protection analysis by noting that the challenged statute contained a racial classification).
174. *See, e.g.*, *id.* at 9 (referring to "the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race").
175. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 754 (3d ed. 2009).
176. *E.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).
177. *Id.*
178. *Loving*, 388 U.S. at 9.
179. Korematsu v. United Sates, 323 U.S. 214, 216 (1944); CHEMERINSKY, *supra* note 175, at 754.
180. *See Korematsu*, 323 U.S. at 240–41 (Murphy, J., dissenting).
181. *E.g.*, *Loving*, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); McLaughlin v. Florida, 379 U.S. 184, 191–92 (1964) ("But we deal here with a classification based upon the race

The Court's path to applying heightened scrutiny to laws classifying on the basis of gender was also circuitous. In *Frontiero v. Richardson*,[182] Justice Brennan compared women to African Americans, noting several points of convergence between these groups, but also some differences.[183] He used this race-gender comparison to support his conclusion that the Court should treat gender as a suspect class.[184] But Justice Brennan failed to obtain majority support for this view, and his opinion did not become law. When the Court revisited this question three years later in *Craig v. Boren*, it announced—without reference to Brennan's *Frontiero* opinion criteria or any other factors—that women are a quasi-suspect class.[185]

The Court's most in-depth explanations of its suspect class methodology have come not in cases extending such protection to race and gender, but in cases denying it to other classes.[186] Even there, however, the Court has referred to a shifting matrix of factors, namely: (1) a history of discrimination, (2) the rele-

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of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications 'constitutionally suspect' . . . . " (quoting Bolling v. Sharpe, 347 U.S. 497, 499 (1954))); *Bolling*, 347 U.S. at 499 ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." (citing *Korematsu*, 323 U.S. at 216)).

182. 411 U.S. 677 (1973) (plurality opinion).

183. Justice Brennan stated, "Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children." *Id.* at 685. Justice Brennan also characterized race and sex as highly visible and immutable. *Id.* at 686. He acknowledged that women, unlike blacks, could not be described as a "small and powerless minority," since they constitute a majority of the electorate. *Id.* at 686 n.17. Nonetheless, he identified the substantial underrepresentation of women in politics as the signal feature of their oppression. *Id.* Although Justice Brennan saw several similarities between race and gender oppression, he failed to ask whether other traits that trigger strict scrutiny, namely alienage and national origin, are similar to race. Considering all four traits together would have strained Brennan's "like race" analogy, revealing the complexity and diversity of oppressions. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 562 & n.330 (1998) ("Had alienage been considered alongside race as an already-protected group, we could not have had the factors that were derived from *Frontiero*, for alienage is neither an immutable nor a visible characteristic."). I agree with Yoshino that Justice Brennan's decision to measure sex against race, instead of alienage or national origin, reflects a "restrictive animus." *Id.*; *see also* SERENA MAYERI, REASONING FROM RACE: FEMINISM, LAW, AND THE CIVIL RIGHTS REVOLUTION 74–75 (2011) (criticizing Justice Brennan's analogical approach).

184. *Frontiero*, 411 U.S. at 688 ("[W]e can only conclude that classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny.").

185. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

186. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440–47 (1985) (finding that individuals with mental disabilities do not qualify as a suspect class); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 312–14 (1976) (per curiam) (refusing to apply strict scrutiny to age classifications).

vance of the trait to contribute to society, (3) political powerlessness, (4) immutability, and (5) visibility.[187] Although the Court has discussed each of these factors in several cases, it has not consistently mentioned all of them in each case. Further muddying the waters is the fact that many marriage equality cases arise under state constitutions, and such constitutions often permit judges to depart from federal case law to afford more capacious constructions of state constitutional rights.[188] Thus, many state courts need not follow the federal criteria.

Rather than devising a test for ascertaining suspect classes and then applying it consistently, the Court has generally worked backwards—deciding to protect race and later sex, and then providing justifications. As Kenji Yoshino wrote:

> Generally, the inquiry has not been, "What principles define groups that are worthy of judicial protection?" but rather, "Is group X in or out?" Although certain factors have been generated from the latter inquiry, these factors have been selected based upon the protected groups at issue rather than vice versa.[189]

A similar form of ad hoc analysis operates with respect to the political powerlessness factor, the home of most analogical arguments. The Court has proffered three different measures of political powerlessness. In *United States v. Carolene Products Co.*, the Court equated political powerlessness with status as a "discrete and insular minorit[y]."[190] In *Frontiero*, Justice Brennan downplayed *Carolene Products*'s identification of minority status and insularity as key, instead asking whether women are underrepresented in the "[n]ation's decisionmaking councils."[191] It is difficult not to read this shift as an implicit recognition that *Carolene Products*'s formulation weighs against treating women as a suspect class. The Court modified political powerlessness again in *Cleburne*, where it asked not whether people with mental disabilities are underrepresented in the "nation's decisionmaking councils," but whether the group is able "to attract the attention of the lawmakers."[192] The history of how suspect class criteria accumulated, as

187. *See, e.g.*, CHEMERINSKY, *supra* note 175, at 754–55 (noting that the Court has used a history of discrimination, political powerlessness, and immutability as factors to identify suspect classes); Yoshino, *supra* note 183, at 489 (identifying key factors as "the history of discrimination suffered by the group, the group's political powerlessness, and the immutability and visibility of the characteristic defining the group").

188. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948–49 (Mass. 2003) (finding that the Massachusetts Constitution prohibits the denial of civil marriage to same-sex couples).

189. Yoshino, *supra* note 183, at 559.

190. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

191. Frontiero v. Richardson, 411 U.S. 677, 686 n.17 (1973) (plurality opinion).

192. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 433 (1985). The Court dismissed the relevance of underrepresentation, stating, "Any minority can be said to be powerless to assert direct control over the legislature, but if that were a criterion for higher level scrutiny by the courts, much

well as the Court's failure to apply the criteria consistently, should give us pause and motivate litigators to resist treating these criteria as constituting an indomitable test.

As the above discussion suggests, political powerlessness is just one of several factors considered when determining whether a group should be deemed a suspect class. Courts do not invariably require a finding of political powerlessness, and the Supreme Court has offered at least three (sometimes conflicting) measures of political power. In my view, the marriage equality briefs generally disappoint in their lack of creativity, as few successfully marked this terrain as unsettled to allow manipulation of it. To its credit, the Brief for Appellees in *Perry* acknowledges the uncertain nature of the Supreme Court case law in this area and argues that a history of discrimination is sufficient to qualify as a suspect class, and the court need not evaluate the extent to which the group is politically powerless.[193] The brief goes on, however, to make a political powerlessness claim and to rank sexual orientation oppression against racial subordination.[194] Quoting one of its expert witnesses, Professor Gary Segura, the brief asserts, "There is simply no other person in society who endures the [same] likelihood of being harmed as a consequence of their identity [as] a gay man or lesbian."[195]

Legal arguments that LG people suffer as much or more discrimination than people of color and women typically engage in at least one of three errors. First, some briefs baldly assert this as a self-evident fact and provide little, if any, support for the claim. For example, the appellees in *Conaway v. Deane*,[196] who were represented by the American Civil Liberties Union (ACLU) Lesbian and Gay Rights Project and a private law firm, argued that LG people "have yet to achieve anything close to comprehensive protection for themselves and their families—and indeed have achieved far less than racial minorities or women have

economic and social legislation would now be suspect." *Id.* at 445. To be fair, neither *Carolene Products* nor *Frontiero* constituted binding law. The footnote in *Carolene Products*—no matter how famous—was dicta. In addition, Justice Brennan's opinion in *Frontiero* was a plurality, rather than a majority, opinion.

193. Brief for Appellees, *Perry*, *supra* note 170, at 60.

194. To be clear, I am not opposed to the argument that gays are politically powerless, although it does strike me as an uphill climb as every few months brings a new victory won through the political process, including: legislative approval of marriage in New York, Maryland, Maine, and Washington state; the dismantling of Don't Ask, Don't Tell; the Obama Administration's refusal to defend the Defense of Marriage Act; and President Obama's groundbreaking announcement that he supports same-sex marriage.

195. Brief for Appellees, *Perry*, *supra* note 170, at 57. Later, the brief hedges, stating that "[a]s much as (if not more than) any other minority group, gay men and lesbians require the protections of heightened scrutiny to shield them from the often-discriminatory whims of the political process." *Id.* at 67.

196. 932 A.2d 571 (Md. 2007).

in this regard."[197] The offhand and unsupported nature of the claim is troubling. Likewise, the Brief of Plaintiffs-Appellants in *Goodridge v. Department of Public Health*,[198] asserts at the tail end of its argument (and with no empirical support) that "gay people 'share a history of persecution comparable to that of blacks and women.'"[199]

A second problematic move involves a temporal sleight of hand that makes it easier to show that LGs are less politically powerful than blacks. The *Perry* brief exemplifies this strategy.[200] Beginning with the claim that less than three hundred of the half million people who currently hold public office in the United States are openly gay, the brief then juxtaposes the African American experience: "In contrast, African-Americans have served as President of the United States, Attorney General, and Secretary of State, as well as in the United States Senate and on the U.S. Supreme Court, and there are currently 41 African-American members of the House of Representatives."[201] Yet the issue is not the extent to which blacks *currently* wield political power, but whether blacks exercised political power *when the Supreme Court declared race a suspect class*.[202] The Court first declared race a suspect class in its 1944 *Korematsu* decision.[203] At the time, *Plessy v. Ferguson* was still good law—which is to say,

197. Brief of Plaintiffs-Appellees at 49 n.38, *Conaway*, 932 A.2d 571 (No. 44).

198. Brief of Plaintiffs-Appellants, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (No. SJC-08860).

199. *Id.* at 90–91 (quoting People v. Garcia, 92 Cal. Rptr. 2d 339, 344 (Ct. App. 2000)).

200. The *Conaway* brief similarly fudges the temporal issue in comparing the present-day political power of blacks and gays. Brief of Plaintiffs-Appellees, *supra* note 197, at 49 n.38.

201. Brief for Appellees, *Perry*, *supra* note 170, at 66. The Iowa Supreme Court made a similar argument, claiming:

> [R]acial minorities enjoy growing political power . . . . By one measure—occupation of public office—the political power of racial minorities is unbounded in this country today. This fact was on display January 20, 2009 when Barack H. Obama, the African-American son of a native Kenyan, was inaugurated as the forty-fourth President of the United States of America.

Varnum v. Brien, 763 N.W.2d 862, 894 & n.21 (Iowa 2009). Claims that Obama's election signifies black political power—in addition to ignoring that this breakthrough occurred nearly sixty years *after* the Court deemed race a suspect class—tend to overlook the racial silencing embedded in Obama's victory and political power. That is, his power is predicated on not mentioning race or fighting for racial justice as a goal. Race must always be subsumed in and obscured by a supposedly universal goal. López, *supra* note 25, at 828. On the rare occasions when Obama has waded into racial controversy, he has typically faced public rebuke and quickly retreated. *Id.* at 820–22 (noting that Obama approached the controversy regarding the arrest of Harvard Professor Henry Louis Gates "in an extraordinarily cautious manner" and "[a]voiding any direct allegation of bias, he did no more than implicitly tie Gates's experience to the patent unfairness of racial profiling").

202. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 461 (Conn. 2008) (comparing the political power of gays in 2008 to the political power of women in the early 1970s).

203. The Court did not apply this rule in a case involving blacks until 1954. The case was *Bolling v. Sharpe*, a companion case to *Brown* involving segregation in the District of Columbia public

blacks were formally segregated and had very little political power. In 1944, there was no Justice Thurgood Marshall,[204] no President Obama, and no Voting Rights Act (VRA). There was a lone black Congressman[205] and no black senator.[206] Additionally, there were no black governors;[207] nor were there any black mayors of big cities.[208] While African Americans obtained incremental victories in the executive and judicial arenas,[209] Congress often blocked black progress, including two hundred antilynching bills.[210] None of the briefs discloses these facts or otherwise engages in a comprehensive evaluation of black political power in 1944 as compared to LG political power in modern times. Such misleading historical glosses "end up diminishing our collective memory of . . . Jim Crow,"[211] even as marriage equality forces seek shelter from the black civil rights movement's moral authority.

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schools. Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." (citing Korematsu v. United States, 323 U.S. 214, 216 (1944))). Interestingly, the much-celebrated *Brown* opinion chose not to mention strict scrutiny. *Brown* could have been decided applying "rational basis with bite," or what Ian Haney López calls "contextual intent." Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779 (2012). In my view, such invidious laws do not require strict scrutiny.

204. At the time, Thurgood Marshall was Chief Counsel for the National Association for the Advancement of Colored People (NAACP). *NAACP Legal History*, NAACP, http://www.naacp.org/pages/naacp-legal-history (last visited Feb. 22, 2014). The NAACP was founded in 1909 and by 1946, it had roughly 600,000 members. *NAACP: 100 Years of History*, NAACP, http://www.naacp.org/pages/naacp-history (last visited Feb. 22, 2014).

205. He was William Levi Dawson, Representative from Illinois. OFFICE OF HISTORY & PRES., BLACK AMERICANS IN CONGRESS, 1870–2007, H.R. DOC. NO. 108-224, at 752 (2008).

206. *Id.*

207. Raphael J. Sonenshein, *Can Black Candidates Win Statewide Elections?*, 105 POL. SCI. Q. 219, 219 (1990). In fact, there have only been four black governors in American history, three of whom served after 1990.

208. Roger Biles, *Black Mayors: A Historical Assessment*, 77 J. NEGRO HIST. 109, 109 (1992). The first black mayor of a major city was elected in 1967. *Id.*

209. For example, in 1941, President Franklin D. Roosevelt issued Executive Order 8802, which banned racial discrimination in hiring by the federal government. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 25, 1941). By 1944, the NAACP had secured several Supreme Court victories. *See, e.g.*, Smith v. Allwright, 321 U.S. 649, 661–62 (1944) (forbidding racial discrimination in primary elections); Mitchell v. United States, 313 U.S. 80, 97 (1941) (holding invalid unequal treatment in railroad accommodations on the basis of race); Chambers v. Florida, 309 U.S. 227, 239–40 (1940) (invalidating confessions by four black men induced by police coercion); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 352 (1938) (holding that states must provide equal in-state education to whites and blacks).

210. Although blacks in 1944 lacked the protections of an antilynching law, LGBT people recently obtained protection from a federal hate crimes law. (This is not to say that lynching and hate crimes are on all fours.)

211. James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 61 (2012).

A third misstep is that when marriage equality lawyers do cite evidence to support their claim that LG people are politically powerless, they tend to cherry-pick the evidence.[212] That is, they highlight evidence that suggests that LGs are relatively powerless compared to blacks and overlook contrary data. The *Perry* case's expert witness on political power provides the central example of this problem. The *Perry* brief's political powerlessness claim rests entirely on the shoulders of Professor Gary Segura, who is a Professor of American Politics and Chair of Chicano/a Studies in the Center for Comparative Studies in Race and Ethnicity at Stanford University. Segura concluded that "[t]here is simply no other person in society who endures the [same] likelihood of being harmed as a consequence of their identity [as] a gay man or lesbian."[213] A closer look at Segura's testimony reveals that he applies a double standard, emphasizing the importance of formal legal protections for blacks while minimizing the importance of extant sexual orientation-based legal protections. Indeed, as I discuss below, Segura's testimony exhibits most of the problems I catalogue herein, including the endorsement of formal equality. As an initial matter, Segura and plaintiffs' counsel seem to have been confused about the date on which the Court conferred suspect class status on race. Plaintiffs' counsel Ted Boutrous asks Segura about "[his] conclusions regarding the relative political power between gay men and lesbians on the one hand, and African-Americans on the other hand, before the Civil Rights Act of 1964?"[214] Segura then seems to misidentify the 1964 Civil Rights Act as "the time that suspect classification was extended to cover racial and ethnic minorities."[215]

212. There are two versions of cherry-picking. First, lawyers might ignore contrary evidence when making a comparative claim about black and gay political power. Second, even when lawyers refrain from making a comparative claim between minority groups, they may ignore evidence that shows gays are gaining political power or are relatively well-off in certain domains, such as education. In the text, I focus on the first version. Parties opposing same-sex marriage also engage in both kinds of cherry-picking. For example, the intervenors in *Andersen v. King County* cited the results of a single election to prove gay political power: "The Gay and Lesbian Victory Fund announced that at least 41 of the 65 openly gay candidates it endorsed were elected to national, state and local offices in 2004 including in five of the twelve states that passed state constitutional amendments prohibiting same-sex 'marriage.'" Intervenor's Reply Brief at 27–28, Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (No. 75934-1).

213. Brief for Appellees, *Perry*, *supra* note 170, at 57 (quoting Transcript of Proceedings at 1571, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (2010) (No. 09-2292-VRW) [hereinafter Transcript of Proceedings, *Schwarzenegger*]).

214. Transcript of Proceedings, *Schwarzenegger*, *supra* note 213, at 1648.

215. *Id.*; *see also id.* at 1535 (summarizing his main conclusions, including his comparison of gays and lesbians to other groups "when they were granted judicial protection"). Opposing counsel largely acquiesced to this timeframe. *See id.* at 1824 (asking Segura about black power "prior to the Civil Rights Act of 1964"). *But cf. id.* at 1825 (asking Segura about black representation in Congress in the 1940s and 1950s). Even if one were to regard *Korematsu* as irrelevant because it involved Asian

Strikingly, Segura concludes that even before the Civil Rights Act, racial equality was "complete" because "there were three amendments to the United States Constitution that formally established civil equality for racial and ethnic minorities."[216] Segura thus adopts formal equality as the central measure of political power, no matter how meaningless such ostensible equality was on the ground. Formal equality is generally understood to require the elimination of facial statutory distinctions based on protected identities. As important as formal equality is symbolically and practically, it often does not reach the underlying systems of subordination. As Alan Freeman explained with respect to race, "[F]or as surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law."[217] For Segura, the fact that Jim Crow laws continued to mark blacks as second-class citizens (a violation of even formal equality) and "socioeconomic conditions were very bad" for most blacks is of minimal relevance because the Civil War Amendments[218] were on the books.[219]

Segura also applies a double standard in evaluating the extent to which legal protections are relevant and secure. At points in his testimony, he stresses the lack of sexual orientation-based federal antidiscrimination laws as strong evidence of LG powerlessness: "So there is no federal-level antidiscrimination protection for housing and employment. There's no federal-level protection, really, on any level beyond the recently passed Hate Crimes Bill."[220] But when asked about the ample sexual-orientation antidiscrimination laws on California's books, Segura pivoted, "While it's certainly good to have that, it's difficult to conclude that that's a measure of political power in and of itself. . . . We have antidiscrimination statutes because there's discrimination."[221] One could say the same about

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Americans, in 1954, the Court applied strict scrutiny in *Bolling*, a case involving blacks. Hence, the latest relevant date would be 1954, not 1964. Later in his testimony, Segura shifts to comparing present-day black and gay political power, thus making the same mistake that the *Perry* lawyers make in their brief. *See id.* at 1651.

216. *Id.* at 1648–49.

217. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1050 (1977).

218. The Thirteenth Amendment abolished slavery; the Fourteenth Amendment established birthright citizenship and the due process and equal protection guarantees, among other things; and the Fifteenth Amendment guaranteed blacks the right to vote.

219. Transcript of Proceedings, *Schwarzenegger*, *supra* note 213, at 1648–49. Segura admitted that "there was all sorts of statutory nonsense that took place in the wake of those amendments. But the establishment, at the Constitutional level, of equality was complete." *Id.* at 1649.

220. *Id.* at 1546.

221. *Id.* at 1549.

the Civil War Amendments and the Civil Rights Act of 1964, but Segura never does. Further, Segura's response to nearly every gay legal victory raised by opposing counsel—including the LGBT movement's success in enacting virtually all of its agenda into law in California, save same-sex marriage[222]—is that political winds could change and LGs could lose these protections.[223] Yet he never acknowledges this same possibility with respect to the rights of people of color. For example, he cites the Voting Rights Act of 1965 (VRA) as an advantage that blacks enjoy over LGs[224] but does not seem to be aware that this law and black and Latino voting rights more generally are very much under attack. The year before Segura testified, the Supreme Court had expressed doubt about the constitutionality of the VRA,[225] and four years later, a divided Court struck down a key section of the statute.[226] Notwithstanding the Court majority's skepticism of the need for the VRA, in recent years, ample evidence demonstrates the emergence of what have been deemed second-generation forms of discrimination, including laws restricting blacks' and Latinos' access to voting, often under the pretense of voter fraud protections.[227] Further, many states have passed felon disenfranchisement laws, which also disparately impact the rights of blacks and Latinos to vote.[228]

Ignoring evidence of retrenchment in black progress (and increasing discrimination against Latinos as evidenced by Arizona's anti-immigrant law SB 1070), Segura explicitly distinguishes the trajectories of blacks and LGs:

> Some would suggest that gays and lesbians aren't as oppressed as African Americans were, and there might be good reason to suggest that that's true for at least some gays and lesbians in more open social environments.

222. *Id.* at 1664–65.

223. *See, e.g.*, *id.* at 1550, 1666 (discounting gay marriage victories in New Hampshire and Vermont on the grounds that such protections may be "subject to reversal" and have not been completely "secured").

224. This claim, of course, ignores the fact that there is no history of discrimination in voting based on sexual orientation.

225. *See* Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204 (2009) ("The Act's preclearance requirements and its coverage formula raise serious constitutional questions . . . .").

226. *See* Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013).

227. *See, e.g.*, *id.* at 2634–35 (Ginsburg, J., dissenting); Ethan Bronner, *Legal Battles Erupt as Voters Fear Exclusion by Tough ID Laws*, N.Y. TIMES, July 20, 2012, at A1. Attorney General Holder is challenging several of these laws in pending lawsuits under the Voting Rights Act (VRA). *See* Bronner, *supra*; Charlie Savage, *Justice Department Poised to File Lawsuit Over Voter ID Law*, N.Y. TIMES, Sept. 30, 2013, at A11 (discussing lawsuits against North Carolina and Texas).

228. *See* Fox Butterfield, *2 Studies Find Laws on Felons Forbid Many Black Men to Vote*, N.Y. TIMES, Sept. 23, 2004, at A22.

> But [for gays and lesbians] the hour is moving in the opposite direction. So in 1990, there was not a single constitutional establishment of inequality for gays and lesbians, and today there are in about three-fifths of the states, there is constitutionally-established inequality [state constitutions that ban same-sex marriage].[229]

Like the political rhetoric of Prop. 8 rallies, Segura spins a postracial narrative: Blacks are doing "quite well," while LGs are struggling to achieve parity and even moving backwards.[230] This canard is particularly hard to swallow in the aftermath of the final term of the Supreme Court's 2012–2013 term, in which the Court provided two victories for same-sex marriage while gutting the VRA.[231] Moreover, Segura does not indicate awareness of legal indifference to contemporary black struggles with mass incarceration,[232] homelessness,[233] unemployment,[234] and health disparities, such as HIV/AIDS.[235] Nor does he give much weight to the admitted fact that many out LGs are materially comfortable or even

229. Transcript of Proceedings, *Schwarzenegger*, *supra* note 213, at 1650; *see also id.* at 1669 ("I would say that no gay and lesbian in the United States enjoys a meaningful degree of political power.").

230. *Id.* at 1652. Admittedly, Segura often inserts caveats to the effect that "I don't want to provide the impression that I don't think African Americans and the category of race and ethnicity isn't still of significant concern in our society." *Id.* But he goes on to reach conclusions that resemble "Gay is the New Black" discourse, citing the Voting Rights Act (VRA) and Obama's election to show that "in terms of political power today, compared to gays and lesbians, [blacks] are doing quite well." *Id.* He fails to ask whether increased black representation produces increased policies that serve black interests.

231. Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. (forthcoming 2015) (on file with author).

232. *See* Ian F. Haney López, *Post-racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023, 1028 (2010) ("[O]ne in every thirty-one adults in the United States is in prison or on parole or probation; broken down by race, that is one in every eleven African Americans, one in twenty-seven Latinos, and one in forty-five whites.").

233. *See* Alexander Eichler, *Black Families Seven Times More Likely to Be Homeless Than Whites: Study*, HUFFINGTON POST (Mar. 6, 2012, 2:31 PM), http://www.huffingtonpost.com/2012/03/06/black-families-homeless_n_1324290.html (citing study finding that blacks are seven times more likely to be homeless than whites).

234. *See id.* (reporting that black unemployment rate is 15.8 percent, over twice that of whites); *see also id.* ("Median wealth for white households fell just 16 percent between 2005 and 2009. For blacks, the drop-off was 53 percent. For Hispanics, it was 66 percent.").

235. *See, e.g.*, RUSSELL ROBINSON & AISHA C. MOODIE-MILLS, HIV/AIDS INEQUALITY: STRUCTURAL BARRIERS TO PREVENTION, TREATMENT, AND CARE IN COMMUNITIES OF COLOR 1 (2012), *available at* http://www.americanprogress.org/issues/2012/07/hiv_aids_communities_of_color.html ("African-Americans, who make up only 14 percent of the U.S. population, make up 44 percent of the HIV-positive population." (citing CTR. FOR DISEASE CONTROL & PREVENTION, HIV AMONG AFRICAN AMERICANS (2011), http://www.cdc.gov/hiv/risk/racialethnic/aa/pdf/HIV_AAA.pdf (discussing HIV facts concerning the African American population in 2009))).

affluent and live in tolerant big cities.[236] His central measure of progress is the right to marriage: Since blacks can marry, and gay people cannot, blacks have achieved more progress than gays. And even on that score, he does not consider the plummeting marital rates in black communities.[237] Material realities, it seems, do not figure in Segura's argument.

Finally, Segura at times singles out unique features of antigay oppression, while ignoring unique features of antiblack and anti-Latino oppression. He stresses that no other group has had to defend its rights through the ballot initiative process as frequently as LG people.[238] Even assuming this is true, it does not prove much. One could argue that only blacks have been enslaved, or only Latinos and Asians have faced pervasive language discrimination.[239] These claims, however, do not establish that any single trait should serve as the sine qua non of political powerlessness.[240] Explaining her opposition to same-sex marriage, Illinois State Representative Monique Davis, who is African-American, said, "Have they ever hung from trees?"[241] This invocation of lynching illustrates the danger of isolating a particular form of oppression and establishing it as a prerequisite. My critiques of Segura's testimony demonstrate how arbitrary analysis of political powerlessness can be. To avoid the restrictive effects of this type of analysis,

236. *See* Transcript of Proceedings, *Schwarzenegger*, *supra* note 213, at 1825 (acknowledging, on cross-examination, that "from an economic perspective and from a social perspective it is quite likely the case that gays and lesbians in California in 2010 are better off than many, perhaps even most African-Americans prior to the passage of civil rights legislation"). *But cf.* Darren Lenard Hutchinson, *"Not Without Political Power:" Gays and Lesbians, Equal Protection and the Suspect Class Doctrine*, 65 ALA. L. REV. (forthcoming 2014) (manuscript at 55), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2238733## (warning against the stereotype that LGBT people are uniformly affluent).

237. *See, e.g.*, RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011); Robinson, *supra* note 119, at 1503–04.

238. *See* Transcript of Proceedings, *Schwarzenegger*, *supra* note 213, at 1552–53 ("[N]o group has been more targeted than gays and lesbians [through ballot initiatives].").

239. *See* Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329 (1991). I should note that these categories overlap. For example, black gay and lesbians were enslaved.

240. *See* Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 314 (D. Conn. 2012) ("[T]here is likely no single talisman that signals which groups are the subject of classifications offensive to the principle of equal protection."); Richard Delgado, *Four Reservations on Civil Rights by Analogy: The Case of Latinos and Other Nonblack Groups*, 112 COLUM. L. REV. 1883, 1911–12 (2012); Schacter, *supra* note 17, at 314 ("The inquiry must be why justice demands gay civil rights legislation, not why gay men and lesbians are 'comparable' to other protected groups.").

241. Zach Buchheit, *Black Illinois House Members Split on Gay Marriage Bill, Sun-Times Survey Finds*, CHI. SUN-TIMES (May 21, 2013, 9:52 AM), http://www.suntimes.com/news/elections/23026151-505/black-illinois-house-members-split-on-gay-marriage-bill-sun-times-survey-finds.html.

courts should develop a consistent, empirically rigorous methodology for assessing political power.[242]

In my view, marriage equality advocates can and should seek to avoid ranking forms of oppression because such claims tend to be divisive and are not compelled by precedent. African Americans and other people of color who are also LGBT tend to regard racial discrimination as at least as burdensome as sexual orientation discrimination, if not more so.[243] Thus, claims that gays have it worse than blacks are likely to alienate LGBT African Americans, the very group that might be ideally situated to help white marriage equality advocates understand and navigate race and sexuality.

A brief filed by Lambda Legal in *Hernandez v. Robles* illustrates a more respectful approach to analogical arguments. The lawyers—including a black gay male attorney[244]—designed a class of plaintiffs that was unusually diverse, including people of Caribbean, Latino, and interracial heritage, as well as interracial couples.[245] The brief draws persuasive connections between the opposition to same-sex marriage and the opposition to interracial marriage at the time of the Supreme Court's decision in *Loving*.[246] These similarities include a belief that divine law condemned such marriages and that men and women (in the case of same-sex marriage) and blacks and whites (in the case of interracial marriage) have "different natures."[247] The brief also notes, however, that "analogies to the uniquely appalling discrimination faced by racial minorities in our nation's history are not exact,"[248] an admission that such briefs rarely make. The brief states that even "though racial and anti-gay discrimination certainly are not the same, the lessons learned from past civil rights struggles are relevant here."[249] This example

242. *See* Hutchinson, *supra* note 236, manuscript at 64 (offering proposals to reform political power doctrine). Although most of Segura's analogies are to race, he also unfairly minimizes sexism. *See* Transcript of Proceedings, *Schwarzenegger*, *supra* note 213, at 1647 ("[W]ere they so motivated, [women] could determine most if not all political outcomes. . . . I wouldn't want to, you know, understate the importance of [sexism] historically—[but] being a woman is not inherently controversial. Families don't hate their daughters. In fact, women are quite beloved by many, many people.").

243. *See* HUMAN RIGHTS CAMPAIGN FOUND., *supra* note 137, at 11–12 (showing that LGBT people of color tend to rank the eradication of racial discrimination a higher priority than typical gay rights movement issues such as same-sex marriage).

244. Alphonso David was a lawyer at Lambda Legal at the time.

245. *See* Brief for Plaintiffs-Appellants, *Hernandez*, *supra* note 168, at 22.

246. *See id.* at 46–47 ("The legacy of challenges to anti-miscegenation laws demonstrates that the fundamental right to marry may not be denied based on longstanding beliefs about the exclusionary nature of marriage.").

247. *See id.*

248. *Id.* at 49 n.20.

249. *Id.* at 50 n.20.

shows how one can demonstrate a link between civil rights struggles without suggesting that they are generic and identical or, even worse, ranking one above another. The *Hernandez* brief emphasizes the malleability of the suspect class criteria and that the Court has not always looked to political powerlessness to determine whether a trait is suspect.[250] Although the brief declares that "classifications based on race and sex have been held to require heightened scrutiny notwithstanding far more comprehensive legislation[,]"[251] it goes on to eschew a postracial argument: "Such measures acknowledge rather than mark the end of a history of purposeful discrimination."[252]

As Janet Halley has argued, "like race" arguments "promote[] the idea that the traits of subordinated groups, rather than the dynamics of subordination, are the normatively important thing to notice."[253] In my view, marriage equality advocates ought to avoid ranking forms of oppression and treating African American-like experiences as necessary for a successful equal protection claim. If a court decided to inspect closely the historical evidence as I do here, this analogical strategy would boomerang on marriage equality advocates. Moreover, installing African American-like oppression as a prerequisite unnecessarily fences out other worthy civil rights claimants, such as people with disabilities. Instead of playing the oppression Olympics, marriage equality advocates should focus on providing detailed, compelling accounts of antigay discrimination, which can stand on their own footing.

B. Single-Issue Politics

Single-issue politics is a term that we might understand as the opposite of intersectional politics. Single-issue politics artificially isolates a single identity, such as gay identity, and disregards the fact that people with this identity also face discrimination because of overlapping identities, like their race and gender. Many of the marriage equality briefs employ single-issue politics. The parties tend to pay attention to race when they think that the comparison advances the claim for marriage equality, but elsewhere they ignore race, seemingly because they imagine their clients as exclusively white and privileged. For example, the ACLU brief in *Conaway* claims that LGs "remain the target of persecution through majoritarian processes, including popular referenda that are aimed pre-

250. *Id.* at 64 ("[T]here is no rigid test for a particular group to qualify for heightened scrutiny . . . .").
251. *Id.* at 68. This statement fails to identify the date on which the Court decided to treat race as a suspect class.
252. *Id.*
253. Halley, *supra* note 17, at 51.

cisely at taking away what political victories they have achieved."[254] Clearly, the same-sex marriage bans in various states, such as Prop. 8 in California, support this claim. But the brief simultaneously ignores Proposition 209 and the various race-based referenda that attacked affirmative action in its wake, as well as Proposition 187 and other anti-immigrant referenda.[255] This is notable because the *Conaway* brief quote is embedded in a claim that LGs are less powerful than blacks and women. The affirmative action bans generally prohibit affirmative action based on race and sex, but permit it for sexual orientation.[256] Thus, even though these measures indicate that people of color and LGBT people remain susceptible to majoritarian political processes, and LGBT people of color are intensely impacted, the brief obscures race-based vulnerability as well as one way in which sexual orientation enjoys an advantage over race and sex. This elision is particularly jarring in the *Conaway* case because the lawyers appear to have made a point of selecting racially diverse plaintiffs, which is commendable.[257] The lawyers' race-consciousness, however, did not fully permeate their arguments.

254. Brief of Plaintiffs-Appellees, *supra* note 197, at 50 n.38.

255. *See, e.g.*, Lindy Royce, *Affirmative Action Ban Heads for Ballot in 5 States*, CNN (Mar. 7, 2008, 10:23 PM), http://articles.cnn.com/2008-03-07/politics/affirmative.action_1_ballot-initiatives-affirmative-action-education-or-public-contracting?_s=PM:POLITICS (discussing five referenda on the ballot in 2008).

256. I recognize that the extent to which employers or schools have explicit policies that permit giving a "preference" based on sexual orientation is unclear (or whether sexual orientation confers advantages in a softer fashion), and certainly race and sex-based policies have garnered more attention. Nonetheless, many diversity-related admissions policies describe diversity broadly and would seemingly allow sexual orientation (among many other traits) to function as a type of plus factor that enhances an applicant's candidacy. To the extent that state law prohibits race and sex from similarly enhancing an application, those traits are disadvantaged compared to sexual orientation. *See* Devon W. Carbado & Cheryl I. Harris, *The New Racial Preferences*, 96 CALIF. L. REV. 1139 (2008).

Further, as more jurisdictions prohibit sexual orientation-based discrimination, they may adopt policies that could be interpreted as special protections for LGBT populations. *Cf.* Robinson, *supra* note 146 (critiquing a special unit in Los Angeles County Men's Jail said to protect gay and transgender inmates from sexual assault); *Incoming UC Students May Be Asked to Declare Their Sexual Orientation*, CBS L.A. (Mar. 9, 2012, 10:40 PM), http://losangeles.cbslocal.com/2012/03/09/incoming-uc-students-may-be-asked-to-declare-their-sexual-orientation (discussing University of California's tentative steps toward asking new students to disclose their sexual orientation); Tanya Caldwell, *More College Students May Be Asked to Declare Sexual Orientation*, CHOICE (Mar. 14, 2012, 5:48 AM), http://thechoice.blogs.nytimes.com/2012/03/14/sexual-orientation-university-of-california (stating that Elmhurst College in Illinois asks applicants to disclose their sexual orientation in admissions applications, and those who self-identify as LGBT may be eligible for a diversity scholarship); *see also* Ryan H. Nelson, *Affirmative Action for LGBT Applicants & Employees: A Proposed Regulatory Scheme*, 30 HOFSTRA LAB. & EMP. L.J. 179 (2012) (discussing push for Obama executive order, which would require government contractors to engage in sexual orientation-based affirmative action).

257. *See* Brief of Plaintiffs-Appellees, *supra* note 197, at 2–3 (indicating that plaintiffs include African Americans and Latinos).

C. Bisexual Erasure

Virtually all of the marriage equality briefs ignore bisexuals. Many state at the outset that each and every plaintiff is gay or lesbian.[258] They also repeatedly refer to "gays and lesbians" or "lesbians and gays," never even mentioning the word "bisexual." Yet, surveys show that there are just as many, if not more, bisexual Americans as there are gays and lesbians.[259] Moreover, marriage laws that restrict marriage to a male-female couple inflict unique injuries on bisexuals, whose sexual decisionmaking may be particularly vulnerable to state coercion.[260] Marriage equality lawyers have clearly sought to exclude bisexuals and the distinct injuries that they face from the ambit of their cases.[261] This decision appears to stem from an attempt to disassociate their class of upstanding lesbians and gays from bisexuals, who are stereotyped as promiscuous.[262] Further, the lawyers may see the flexibility of bisexuality as undermining their claim that homosexuality is a fixed, immutable state, and thus "gays are like blacks."[263]

This finding is troubling as a freestanding matter, and is not dictated by doctrine, as Michael Boucai has shown. But some might ask, what is the connection to postracialism? Bisexuals are disproportionately people of color and dis-

258. *See, e.g.*, *id.* at 2 ("Plaintiffs, each of whom is lesbian or gay, have same-sex partners whom they love and seek to marry.").

259. *See, e.g.*, EGAN ET AL., *supra* note 125, at 6 (stating that half of LGB people identify as bisexual and half as homosexual); Yoshino, *supra* note 131, at 377–85 (reviewing studies of self-reports of sexual desire and concluding that "the incidence of bisexuality was greater than or comparable to the incidence of homosexuality" (emphasis omitted)).

260. Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument From Bisexuality*, 49 SAN DIEGO L. REV. 415 (2012). To be fair, bisexuals are probably less likely to marry someone of the same sex than gays and lesbians since bisexuals experience genuine attraction to men and women. *See* Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a US Probability Sample*, 7 SEX RES. SOC. POL'Y 176 (2010) (finding that bisexuals are more likely to partner with someone of a different sex than the same sex). Thus, they are likely underrepresented among people who want to marry a same-sex partner. That I have yet to find a *single* avowedly bisexual plaintiff in the marriage equality cases, however, suggests that the problem is not simply an issue of underrepresentation. Indeed, as Boucai persuasively argues, underrepresentation is evidence of the distinct harms that fall on bisexuals—they are more likely to be coerced into a heterosexual marriage because they experience significant attraction to people of a different sex.

261. To the extent that bisexuals are included as plaintiffs, they may be required to pass as gay or lesbian—more specifically, disavow past different-sex relationships and affirm that they have always experienced attraction only to the same sex. Boucai, *supra* note 260, at 444–45 (discussing cross-examination of Sandy Stier in the *Perry* trial).

262. *See, e.g.*, Yoshino, *supra* note 131; *cf.* Brief for Appellees, *Perry*, *supra* note 170, at 91–96 (challenging opponents' argument that lesbians and gays (LGs) do not value "sexual fidelity").

263. *Cf.* Brief for Appellees, *Perry*, *supra* note 170, at 64–65 (rebutting argument by opponents that sexual orientation is amorphous and changes over time for some people).

proportionately female.[264] Conversely, the class of homosexuals is disproportionately white male. For example, a recent nationally representative federal government survey found that 3.5 percent of women ages eighteen to forty-four identified as bisexual, while just 1.1 percent of men identified as such.[265] Women are more likely to identify as bisexual than lesbian (3.5 percent vs. 1.1 percent), whereas men are more likely to identify as gay than bisexual (1.7 percent vs. 1.1 percent).[266] Thus, the exclusion of bisexuals has the effect of aligning LGB identity with white gay men, not unlike the sign discussed in Part I in which the male speaker suggests that African American and women's rights have been "checked off" and white gay men are the last minority standing.[267] As Janet Halley has written, these litigation choices are exercises of power that shape how members of the group think of themselves as well as public perceptions of the group.[268]

264. *E.g.*, EGAN ET AL., *supra* note 125, at 6 ("[M]en make up two-thirds of those who identify as [homosexual], while women account for two-thirds of those who are bisexual."); *see, e.g.*, Gary Goldbaum et al., *Differences in Risk Behavior and Sources of AIDS Information Among Gay, Bisexual, and Straight-Identified Men Who Have Sex with Men*, 2 AIDS & BEHAV. 13, 16 (1998) (finding that black men at MSM [men who have sex with men] public sex venues were more likely to identify as bisexual or straight than white men); Gregorio Millett et al., *Focusing "Down Low": Bisexual Black Men, HIV Risk and Heterosexual Transmission*, 97 J. NAT'L MED. ASS'N 52S, 53S (2005) ("Studies clearly show that black MSM are more likely than MSM of other races and ethnicities to identify themselves as bisexual and to be bisexually active."); J.P. Montgomery et al., *The Extent of Bisexual Behaviour in HIV-Infected Men and Implications for Transmission to Their Female Sex Partners*, 15 AIDS CARE 829, 831–32 (2003) (reporting that the following percentages of HIV-positive MSM reported sex with women in the last five years: 34 percent black, 26 percent Hispanic, 19 percent Asian/Pacific Islander, 13 percent American Indian/Alaska Native, and 13 percent white). The tendency of people of color to be more likely to behave or identify as bisexual than whites may be driven by differences among men, rather than among women. *Cf.* Anjani Chandra et al., *Sexual Behavior, Sexual Attraction, and Sexual Identity in the United States: Data From the 2006–2008 National Survey of Family Growth*, 36 NAT'L HEALTH STAT. REP. 1 (2011).

265. Chandra et al., *supra* note 264, at 29–30.

266. *Id.*

267. The marriage equality briefs also overlook transgender individuals, but this appears to be a strategic decision made by transgender advocates. None of the briefs describes a plaintiff as transgender. Transgender people can legally marry in some states if they have taken measures to change their gender. *See* Julie A. Greenberg & Marybeth Herald, *You Can't Take It With You: Constitutional Consequences of Interstate Gender Identity Rulings*, 80 WASH. L. REV. 819, 833–36 (2005). Even when state laws do not make this option available or the person lacks the resources to satisfy the law (by having surgery, for example), *see* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731 (2008), so long as the transgender person and his or her partner appear as a gender-conforming different-sex couple, they often may obtain a marriage license as a practical matter, *see* E-mail from Shannon Minter, Legal Dir., Nat'l Ctr. for Lesbian Rights (NCLR), to Russell Robinson (July 11, 2012, 1:57 PM) (on file with author). Minter, who is one of the nation's leading advocates for transgender people, informs me that transgender advocates chose to opt out of the marriage equality litigation because they did not want to create precedents that might call into question their current access to marriage in some states. *Id.*

268. *See* Halley, *supra* note 17, at 45, 52.

D. Reflexive Pursuit of Strict Scrutiny

Virtually every brief arguing for marriage equality urges the court to apply strict scrutiny.[269] Federal and state courts have used various levels of scrutiny to invalidate marriage bans, including rational basis with bite and intermediate scrutiny.[270] Thus, although it is understandable that litigators would seek the most demanding standard of review (perhaps for symbolic reasons), the aforementioned cases demonstrate that it is not necessary to invalidate marriage bans. Moreover, as I discuss below, the experience of African Americans suggests that strict scrutiny may not be desirable.

At least since *Regents of California v. Bakke*,[271] the designation of race as a suspect classification has facilitated civil rights retrenchment, not reform. The principal effect of the Court applying strict scrutiny to racial classifications in recent years has not been the protection of *blacks*, but rather the protection of *whites* claiming reverse discrimination. From contexts such as schooling to government contracting to voting rights, the Court has invoked strict scrutiny in order to scrutinize closely and often invalidate race-based policies meant to address racial subordination.[272] Even though whites are not politically powerless and lack a history of being discriminated against on the basis of race, the Court has consistently deployed strict scrutiny to protect white claimants.[273] Moreover, landmark cases that dismantled segregation could have been achieved without employing strict

269. *See, e.g.*, Brief for Appellees, *Perry*, *supra* note 170; Brief for Plaintiffs-Appellants, *Hernandez*, *supra* note 168, at 71; Brief of Respondents at 37–38, Andersen v. King Cnty., 138 P.3d 963 (Wash. 2006) (No. 75934-1) [hereinafter Brief of Respondents, *Andersen*]. The relative uniformity in the marriage equality briefs with respect to formal equality and racial analogies stands in marked contrast to the women's rights movement, which reflects greater vacillation and contestation as to whether analogies between sex and race best serve women's interests. *See generally* MAYERI, *supra* note 183.

270. *See, e.g.*, Windsor v. United States, 699 F.3d 169, 184–85 (2d Cir. 2012) (comparing "homosexuals" to women and holding that intermediate scrutiny, not strict scrutiny, applies); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008) (comparing sexual orientation to sex, applying intermediate scrutiny, and finding no need to reach the strict scrutiny question); Varnum v. Brien, 763 N.W.2d 862, 896 (Iowa 2009) (using intermediate scrutiny); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 960–61, 968 n.33 (Mass. 2003) (adopting a *Romer*-like rationale, but saying that court need not find animus); *see also id.* at 980 (Sosman, J., dissenting) (arguing that majority applies "some undefined stricter standard" than traditional rational basis test). I discuss the *Perry* opinions in the Conclusion.

271. 438 U.S. 265 (1978).

272. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007) (plurality opinion); Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); Shaw v. Reno, 509 U.S. 630 (1993); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989).

273. *See, e.g.*, *Parents Involved*, 551 U.S. 701.

scrutiny.[274] Indeed, *Brown v. Board of Education* (which marriage equality lawyers often cite[275]) never mentioned strict scrutiny in denouncing "separate but equal." The pursuit of strict scrutiny represents another selective approach to race—marriage equality advocates invoke race to install gays as the paradigmatic victims of oppression, but they ignore what strict scrutiny has done to African American progress.

Further, the narrower form of review in Supreme Court opinions vindicating gay rights leaves open more possibilities for state action directed at remedying the effects of sexual orientation-based discrimination. The key alterna- alternative to strict scrutiny is found in Justice Kennedy's majority opinions in *Romer v. Evans* and *Windsor*.[276] This approach, while declining to declare sexual orientation a suspect or quasi-suspect class or to inquire about political powerlessness, forbids laws that single out a group based on animus. While it is painfully clear how the Court analyzes laws that seek to remedy race-based disparities, the animus framework leaves open the question of how to analyze remedial policies based on sexual orientation. Since this standard makes "a bare . . . desire to harm" the fulcrum of its holding,[277] a heterosexual claimant would face a daunting task in attempting to show that a governmental policy favoring LGBT people is based on antiheterosexual animus. Under current race doctrine, by contrast, the Court fixates on whether the law contains a racial classification, applies a demanding standard of review to all such classifications, and generally disregards the extent to which a classification is based on animosity toward a particular class.[278] Thus, relying on *Romer*, instead of importing principles from race cases, may afford broader possibilities for policies that uproot the effects of sexual orientation-based discrimination.[279]

E. Endorsing Formal Equality

Marriage equality lawyers tend to endorse formal equality, which simply requires law on its face to treat people without regard to sexual orientation. For example, the Brief for Appellees in *Perry* asserts that "formal equality before the law

274. *See infra* text accompanying notes 276–278 (discussing *Romer* as a possible model for race discrimination claims).

275. *See, e.g.*, Brief for Appellees, *Perry*, *supra* note 170, at 23, 54 n.38.

276. United States v. Windsor, 133 S. Ct. 2675, 2693 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996). Justice Kennedy's opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), which relied on the Due Process Clause, similarly avoided applying strict scrutiny.

277. *Romer*, 517 U.S. at 635.

278. *See, e.g.*, *Parents Involved*, 551 U.S. 701.

279. For more extensive analysis on this point, see Robinson, *supra* note 231.

is the bedrock of our legal system."[280] That brief opens with a quote from Justice Harlan's famed dissent in *Plessy v. Ferguson*: "In respect of civil rights, all citizens are equal before the law."[281] But this reliance on Harlan's quote may be misguided. Lawyers have commended Justice Harlan for being on the right side of history in rejecting the *Plessy* majority's separate but equal holding decades before the Supreme Court unanimously condemned it in *Brown*.[282] But in recent years, conservative Supreme Court Justices have lionized Justice Harlan's dissent, making his statement that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens"[283] the lodestar for a string of opinions invalidating race-conscious policies benefitting blacks and Latinos.[284] And Justice Harlan tethered his endorsement of colorblindness to an embrace of white supremacy, opining in the same dissent:

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.[285]

He thus made clear that formal equality and colorblindness are compatible with enduring white supremacy—the former need not disturb the latter.[286]

Those who endorse formal equality today express little concern about material differences, which law may set in motion and perpetuate long after courts have erased facial classifications. Consider *Brown v. Board of Education*'s[287] effort to desegregate the schools.[288] Decades after *de jure* segregation has faded from the national landscape, inner-city public schools remain overwhelmingly segre-

280. Brief for Appellees, *Perry*, *supra* note 170, at 55 (quoting Jinro Am. Inc. v. Secure Invs., Inc., 266 F.3d 993, 1009 (9th Cir. 2001)) (internal quotation marks omitted).
281. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).
282. For example, a brief filed by Lambda Legal Defense and Education Fund, the Northwest Women's Law Center, and two Seattle law firms, stated, "More than one hundred years ago, a lone Supreme Court justice, dissenting from the majority's approval of 'separate but equal' railway cars, declared that our law 'neither knows nor tolerates classes among citizens.'" Brief of Respondents, *Andersen*, *supra* note 269, at 12 (citing *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).
283. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).
284. *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 730 n.14 (2007) (plurality opinion); *id.* at 772 (Thomas, J., concurring).
285. *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting).
286. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 272–73 (1995) (Ginsburg, J., dissenting).
287. 347 U.S. 483 (1954).
288. The late Derrick Bell, a former litigator with the NAACP Legal Defense Fund, wrote extensively and critically about the failures of the lawyers who litigated the school desegregation cases. *See, e.g.*, Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 480 (1976).

gated.[289] As Derrick Bell recounted, after *Brown*, the NAACP did not sufficiently challenge the poor quality of majority black schools—even when some of its clients would have preferred that strategy—because of the organization's singular focus on the symbolic importance of integration.[290] Marriage equality litigators today similarly tend to focus on formal distinctions in law when they compare gays to blacks.[291] For example, (the argument goes) blacks can marry a person of a different race, but gays cannot marry a person of the same sex. Yet, even as marriage equality lawyers invoke race, they overlook the history that trailed *Brown*. Thus, they simultaneously attend to race and disregard the lessons that one could learn from the African American civil rights movement.

Marriage equality lawyers' embrace of formal equality is double-edged and shortsighted. As to the first, formal equality cuts against marriage equality litigators when they argue that marriage bans that do not mention the words heterosexual or homosexual nonetheless discriminate based on sexual orientation. For instance, in *Varnum*, the state argued that the relevant law "does not explicitly refer to 'sexual orientation' and does not inquire into whether either member of a proposed civil marriage is sexually attracted to the other . . . [and] only incidentally impacts disparately upon gay and lesbian people."[292] Because such laws allow gay men to marry women, and lesbians to marry men, those opposed to same-sex marriage often argue that such laws are facially neutral, which means same-sex couples must show that the marriage law was enacted with a discriminatory purpose.[293] In so doing, they draw on race and gender equal protection cases that have been interpreted to require evidence of invidious intent to succeed.[294] Some courts reject this argument by focusing on the

289. *See, e.g.*, Angela Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1541 (2006) ("[F]ull racial integration symbolized by the decision in *Brown* was ultimately defeated by the suburban geography of race and class segmentation."); Goodwin Liu, *Seattle and Louisville*, 95 CALIF. L. REV. 277, 277–78 (2007). Bell predicted this in a seminal article in 1976, stating "remedies that fail to attack all policies of racial subordination almost guarantee that the basic evil of segregated schools will survive and flourish, even in those systems where racially balanced schools can be achieved." Bell, *supra* note 288, at 488; *see also id.* at 515–16.

290. Bell, *supra* note 288, at 489.

291. Some may defend the focus on formal distinctions as simply the first step in eradicating antigay oppression. After the gay rights movement eliminates the remaining formal distinctions, they might say, it can tackle other manifestations of homophobia. The problem, however, is that many seem to see marriage as the last frontier of gay rights. *See infra* text accompanying notes 323–329.

292. Varnum v. Brien, 763 N.W.2d 862, 884 (Iowa 2009).

293. *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 975 (Mass. 2003) (Spina, J., dissenting) ("There is no restriction on the right of any plaintiff to enter into marriage.").

294. *See* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 521–22 (Conn. 2008) (Zarella, J., dissenting) (pointing out that "the majority apparently relies on the notion that the *disparate impact* of the marriage laws on gay persons who wish to enter into marriage creates a classification on the

practical effect of marriage bans: Even though a gay man can legally wed a woman, that right is meaningless as a practical matter because of the lack of romantic desire.[295] In order to make this argument effective, courts—following the lead of marriage equality litigators—erase bisexuals because even if she cannot marry a woman, a bisexual woman still enjoys a significant body of male potential marital partners to whom she may be attracted.[296] The point is not that marriage equality advocates cannot overcome the formal equality objection, but rather that their arguments are inconsistent, and thus vulnerable, in that they selectively invoke formal equality.

More importantly, as I will argue in greater detail in a forthcoming work, marriage equality advocates should ask whether formal equality is all that LGBT people need. Marginalized members of the LGBT community, including people of color and those who are socioeconomically disadvantaged, are least likely to find a marriage license sufficient to ensure access to a stable, committed relationship. But even as to the middle-class white couples who dominate same-sex marriage litigation, the assumption of their advocates appears to be that once the state grants same-sex couples marriage licenses, the couples will live happily ever after, or at least have the same chance at a fairy-tale ending as similarly situated heterosexuals. I think this is unlikely, and the state bears some responsibility. It would be remarkable if over a century of legal condemnation and attempted erasure of same-sex desire did not leave a mark on individual LGBT people, their psyches, and their capacity to find and maintain a committed relationship. To assume that same-sex couples will follow the trajectory of different-sex couples seems curious and shortsighted. Advocates for LGBT people should think more critically about the enduring effects of homophobia as well as the structural obstacles that same-sex couples are likely to face, including families of origin that are less likely to respect and support a same-sex marriage. In limiting their claims to formal equality, marriage equality advocates may foreclose future avenues of relief.

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basis of sexual orientation" and arguing that *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979), requires more—that marriage laws were based on "discriminatory animus toward gay persons"); Dean v. District of Columbia, 653 A.2d 307, 363 (D.C. 1995) (Steadman, J., concurring) (citing *Feeney* and *Washington v. Davis*, 426 U.S. 229 (1976), and stating that it would be a "considerable stretch" to find invidious intent).

295. *See Kerrigan*, 957 A.2d at 431 n.24; *Varnum*, 763 N.W.2d at 885 (reasoning that a ban on same-sex couples is "so 'closely correlated with being homosexual' as to make it apparent the law is targeted at gay and lesbian people as a class" (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment))); *Goodridge*, 798 N.E.2d at 968 n.33.

296. In my view, this argument ultimately founders because the right to marry is about the right to choose one's marital partner—whomever that may be. *See* Lenhardt, *supra* note 17, at 887–88.

CONCLUSION

Although most of this Article has leveled criticism at marriage equality advocates, litigators, and the media, I highlight in the Conclusion a positive model for changing public attitudes toward same-sex marriage. In May 2012, President Obama declared during an ABC News interview: "I've just concluded that—for me personally, it is important for me to go ahead and affirm that—I think same-sex couples should be able to get married."[297] President Obama's decision to announce that he supports same-sex marriage might have seemed like political suicide given the public perception that blacks were staunchly opposed to same-sex marriage and the political reality that Obama needed a strong black turnout to be re-elected. To the contrary, Obama displayed a deep understanding of the mainstream black psyche and considerable finesse in how he framed his announcement.

First, he constructed the interview as if it were a private black community conversation by selecting Robin Roberts, a black, female, Christian reporter who was rumored to be gay.[298] (Roberts came out as gay about 18 months later.)[299] Sociological studies suggest that Roberts's identity was influential in determining how black viewers interpreted the interview. Consider an empirical study of homophobia among blacks, which found that blacks who did not include black men in their conceptualization of gay identity scored higher in homophobia than blacks who thought of gay identity as including black men.[300] This finding reflects the insights of intersectionality. Being cognizant of people who are black *and* gay makes it more difficult for black heterosexuals to "other" gays and see them as disconnected from the black community. Roberts's female identity may also have been salient for some viewers. Mainstream depictions of the gay community tend to be overwhelmingly white, male, and affluent.[301] By contrast, black queer women are on the opposite end of the socioeconomic spectrum from white gay men. They earn less, are much more likely to raise children, and live in

297. *Transcript: Robin Roberts Interview with President Obama*, *supra* note 8.

298. *See* A.J. Daulerio, *Sources: Robin Roberts Feared Obama Interview Would Out Her as a Lesbian*, GAWKER (May 10, 2012, 4:56 PM), http://gawker.com/5909343/sources-robin-roberts-feared-obama-interview-would-out-her-as-a-lesbian.

299. Stuart Emmrich, *'In Other News': TV Personalities' Low-Key Coming Out*, N.Y. TIMES, Dec. 31, 2013, http://www.nytimes.com/2014/01/02/fashion/gay-news-anchors-coming-out-lgbt-news.html (discussing Roberts's acknowledgement of her long-term female partner in a Facebook post).

300. Gregory M. Herek & John P. Capitanio, *Black Heterosexuals' Attitudes Toward Lesbians and Gay Men in the United States*, 32 J. SEX RES. 95, 101 (1995). The study unfortunately did not ask this question with respect to including black women in one's conception of lesbian.

301. *See, e.g.*, Robinson, *supra* note 119, at 1508–09.

mostly black neighborhoods, rather than predominantly white gay enclaves.[302] Aligning gay identity with white affluent men thus may facilitate homophobic attitudes among blacks.

A recent study on black support for same-sex marriage also suggests that linking black and gay identities can help build support. The study found that black respondents in a telephone survey were significantly more likely to identify as a supporter of same-sex marriage if the caller was black.[303] Although future research needs to be conducted to understand fully the dynamics underlying this survey, it may be that black respondents assumed that a black caller asking about same-sex marriage support was likely LGBT and that this link between black identity and gay rights made the respondents more supportive. Thus, President Obama may have recognized that making his announcement to a black queer woman might help some members of the black community formulate a different concept of LGBT identity.

Second, President Obama inverted arguments that antigay forces have effectively used to oppose marriage, namely religious condemnation and a desire to protect children from homosexuality.[304] President Obama explained that his children and his faith led him to endorse same-sex marriage, which helped to rewrite popular narratives about homosexuality. He stated that his daughters exposed him to same-sex parents because several of their friends are being reared in such families.[305] Further, he said that his Christian faith, including his belief in the Golden Rule,[306] led him to support same-sex marriage. Although these reasons were sketched in broad terms, they have particular resonance in the African American community, where regular church attendance and concern about the fragile black family are common.[307]

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302. *See, e.g.*, GARY GATES & R. BRADLEY SEARS, BLACK SAME-SEX COUPLES IN CALIFORNIA 1, 8 (2005), *available at* http://williamsinstitute.law.ucla.edu/experts/gary-gates/black-same-sex-couples-in-california-data-from-census-2000.

303. Brian F. Harrison & Melissa R. Michelson, It Does Matter if You're Black or White: Race-of-Caller Effects on Black Support for Marriage Equality 12 (Feb. 2012) (unpublished manuscript), *available at* http://cess.nyu.edu/policon2012/wp-content/uploads/2012/02/Harrison-Michelson-2012.pdf. It does not appear that the callers identified their race or that the researchers confirmed their assumption that respondents could identify a caller as black. The study also found that mentioning that Coretta Scott King supported marriage equality did not increase black support for marriage equality. *See id.* at 11–12. Some might perceive this finding as in tension with my argument that President Obama's endorsement of marriage equality increased black support. A bare statement that a deceased civil rights figure supported marriage equality, however, is quite different from a carefully staged endorsement by the first black President.

304. *See, e.g.*, Murray, *supra* note 53, at 359.

305. *Transcript: Robin Roberts Interview With President Obama*, *supra* note 8.

306. This is the Biblical command to do unto others as you would have them do unto you. *Matthew* 7:12.

307. *See, e.g.*, Carbado, *supra* note 4, at 1474; Douglas, *supra* note 91, at 1008.

But the interview is most notable for what is conspicuously absent. During the twenty-minute conversation, President Obama never compared race to sexual orientation or the gay rights movement to the African American civil rights movement. An interview that he gave to *The Advocate* in 2008—ironically, not long before the magazine would declare Gay the New Black—suggests that this omission was deliberate.[308] When the interviewer asked him to compare the black experience to the gay experience, Obama replied, "You always want to be careful comparing groups that have been discriminated against because each group's experiences are different."[309]

I believe that this omission of analogical arguments helps to explain why the interview persuaded many African Americans to back marriage equality.[310] Surveys suggest that Obama's announcement had little impact on white voters. If anything, it appears to have hurt him more than it helped him among this constituency.[311] By contrast, blacks were much less likely to say that his announcement made them feel less favorably toward him.[312] Further, as noted earlier, Obama's interview appears to have shifted opinion in black and Latino communities.[313] It is hard to think of a better spokesperson for making a "like race" argument than Obama. He is the most prominent African American leader, the child of an interracial union, and he continues to be viewed favorably by many Americans. Thus, he could have credibly invoked the black civil rights movement and attempted to shame whites into supporting same-sex marriage. But Obama may have known of the risk of perceptual segregation. In short, he may have had to choose between appealing to white and black audiences, and he chose to focus on blacks.

My analysis ultimately suggests that the alignment of LGBT identity with white men serves as an obstacle to increasing black support for same-sex marriage. To the extent that marriage equality is seen as the project of entitled white

308. Kerry Eleveld, *Obama Talks All Things LGBT With the Advocate*, ADVOCATE (Dec. 23, 2008, 1:00 AM), http://www.advocate.com/news/2008/12/23/obama-talks-all-things-lgbt-the%C2%A0advocate.

309. *Id.*

310. *See supra* notes 10–11.

311. According to a Pew Research Center poll, 29 percent of white respondents stated that Obama's new position made them view him less favorably, while 20 percent said they viewed him more favorably. *Half Say View of Obama Not Affected by Gay Marriage Decision*, PEW RES. CTR. (May 14, 2012), http://www.people-press.org/2012/05/14/half-say-view-of-obama-not-affected-by-gay-marriage-decision/1.

312. The Pew Research Center poll found that 13 percent of blacks stated that they viewed Obama less favorably, 16 percent viewed him more favorably, and 68 percent stated that their opinion of him did not change. *Id.*

313. *See* Zengerle, *supra* note 12.

men laying claim to the black civil rights legacy, blacks will resist it.[314] Arguments that avoid or carefully frame analogical arguments, and explain how same-sex marriage is consistent with faith and family, are more likely to persuade black audiences.

Although one might believe that analogical arguments are necessary to persuade white audiences, even if they inflame blacks,[315] judges have written persuasive arguments for marriage equality without invoking race. For all the references to race in the *Perry* litigation, it is notable that neither the Ninth Circuit nor the district court *Perry* opinions compared race to sexual orientation.[316] Indeed, race barely surfaces at all in these opinions. Moreover, both courts declined to apply strict scrutiny. The district court flirted with the possibility of deeming LGs a suspect class, but ultimately receded from the question.[317] The Supreme Court ultimately declined to reach the merits in *Perry*.[318] The Court did reach the merits in *United States v. Windsor*.[319] Although Justice Kennedy eschewed most of the logic of the district court and Ninth Circuit *Perry* opinions, he similarly avoided mentioning race and applying strict scrutiny. As I argue more fully elsewhere, *Windsor* indicates that the Court has developed distinct trajectories for race and sexual orientation.[320] It is now clear that sexual orientation need not mimic race in order to warrant protection. To the contrary, Justice Kennedy is more generous toward sexual orientation claims than he is toward race and sex-based equal protection claims.[321] This shows that neither analogical arguments nor strict scrutiny are necessary to invalidate laws that ban same-sex marriage.[322]

When President Obama announced his support for same-sex marriage, the *New York Times* analysis opined that it signaled a shift in "what many people con-

314. *Cf.* VICTORIA & BELCHER, *supra* note 19, at 3.

315. I have not found any empirical studies exploring whether analogical arguments are effective in persuading the white public.

316. Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012); Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

317. *Perry*, 704 F. Supp. 2d at 997 ("The trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. . . . Here, however, strict scrutiny is unnecessary. Proposition 8 fails to survive even rational basis review.").

318. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

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

320. Robinson, *supra* note 231.

321. *Id.*

322. Some courts, admittedly, have made analogical arguments, *see, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 412 (Conn. 2008), but rarely are they central to pro-marriage equality holdings. For example, in *Pedersen*, Judge Vanessa L. Bryant, an African American female district court judge, compared gays and lesbians to women and blacks in her political powerlessness analysis, but ultimately held that DOMA failed rational basis review. Pedersen v. Office of Pers. Mgmt., 881 F. Supp. 2d 294, 326–33 (D. Conn. 2012).

sider the last civil rights movement."[323] This echoes *The Advocate*'s 2008 declaration that gay rights are "[t]he Last Great Civil Rights Struggle." Andrew Sullivan has been the most vocal and transparent proponent of this view. In the mid–90s, he identified "formal public equality" as the endgame for the gay rights movement, and rights of access to marriage and the military as equality's two central planks.[324] Indeed, he argued, "If nothing else were done at all, and gay marriage were legalized, ninety percent of the political work necessary to achieve gay and lesbian equality would have been achieved. *It is ultimately the only reform that truly matters.*"[325] Dan Savage, who emerged as a gay leader in the wake of Prop. 8, recently declared that the "entire gay rights agenda" entails the right to marry, bans on discrimination in employment and education, and immigration rights for transnational same-sex couples.[326] He went on to say that once these laws are in place, "the fight over gay rights [will be] essentially over" and conservatives can enjoy "rais[ing] their children in a country where they don't have to hear about homosexuality every time they turn on the news."[327] In another interview, Savage acknowledges that "homophobia's not going away," yet he seems to imagine no role for the law in combating homophobia once formal equality is in place.[328] Even though some in the movement may imagine a broader agenda than Sullivan and Savage, they have not captured the popular imagination like Savage and Sullivan's rather cramped notion of equality. The rhetoric in the marriage equality briefs certainly provides no glimpse of a vision that extends beyond formal equality. Rather, marriage equality litigation is generally consistent with marriage being the "final frontier"[329] of civil rights, no matter what vestiges of homophobia linger afterward.

323. Adam Nagourney, *A Watershed Move, Both Risky and Inevitable*, N.Y. TIMES, May 9, 2012, http://www.nytimes.com/2012/05/10/us/politics/obamas-watershed-move-on-gay-marriage.html.

324. *See* ANDREW SULLIVAN, VIRTUALLY NORMAL 173, 178 (1995).

325. *Id.* at 185 (emphasis added). Sullivan's argument is particularly disturbing because of his indifference as to what happens after formal equality and his attempt to disassociate gays from blacks, arguing that gays ought not seek "preferences" or "special rights" (for example, remedial measures such as affirmative action).

326. Dan Savage, Op-Ed., *A Gay Agenda for Everyone*, N.Y. TIMES, Jan. 22, 2011, http://www.nytimes.com/2011/01/23/opinion/23savage.html.

327. *Id.*

328. Alex Halperin, *Dan Savage: Homophobia's Not Going Away*, SALON (July 20, 2013, 2:45 PM), http://www.salon.com/2013/07/20/dan_savage_women_whove_had_abortions_need_to_be_out_about_it.

329. *E.g.*, Errin Haines & Jesse Washington, *Obama Gay Marriage Announcement: Many Black Americans Shrug Off New View*, HUFFINGTON POST (May 11, 2012, 8:20 PM), http://www.huffingtonpost.com/2012/05/12/obama-gay-marriage-announcement_n_1511545.html; *cf.* Harris, *supra* note 289, at 1570 (criticizing marriage equality movement for pursuing "equality lite").

The racialized terms of the marriage equality debate pose these stark questions: Is the black civil rights movement truly over? Are we done with racial equality? And will formal access to marriage exhaust claims for LGBT equality? The time to confront such questions is now. Instead of formal equality being the end of civil rights or a stepping stone to the next fight, efforts to obtain it should be infused with a larger final goal of substantive equality for gays, blacks, and black gay people.

APPENDIX


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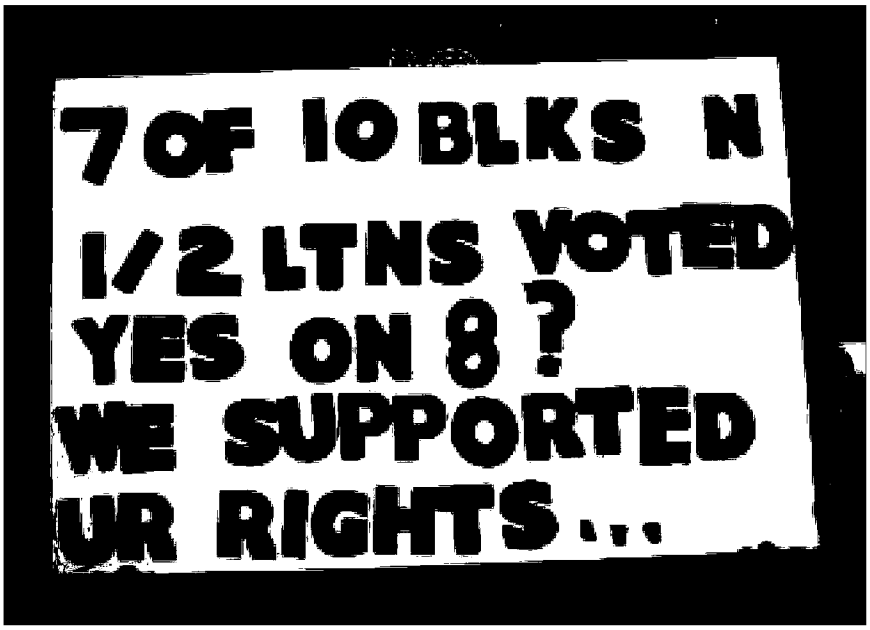
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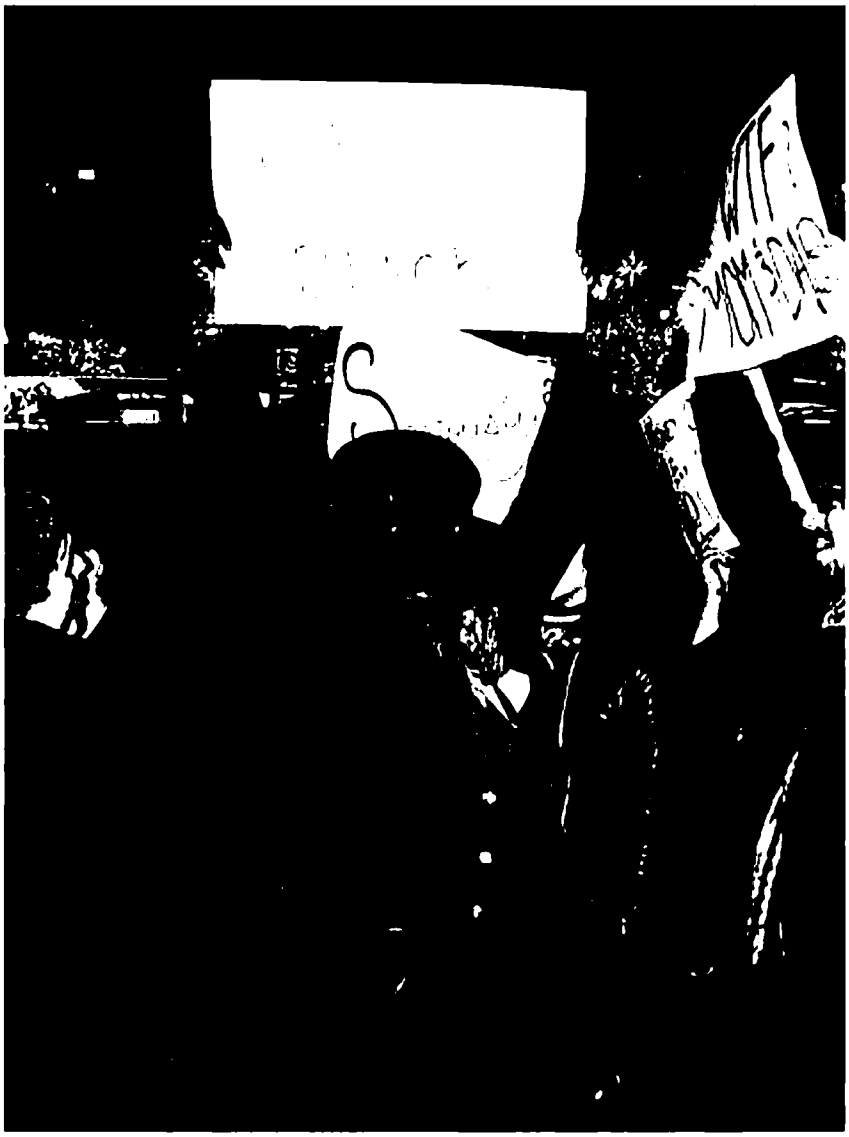
THE ADVOCATE
GAY IS THE NEW BLACK
The Last Great Civil Rights Struggle

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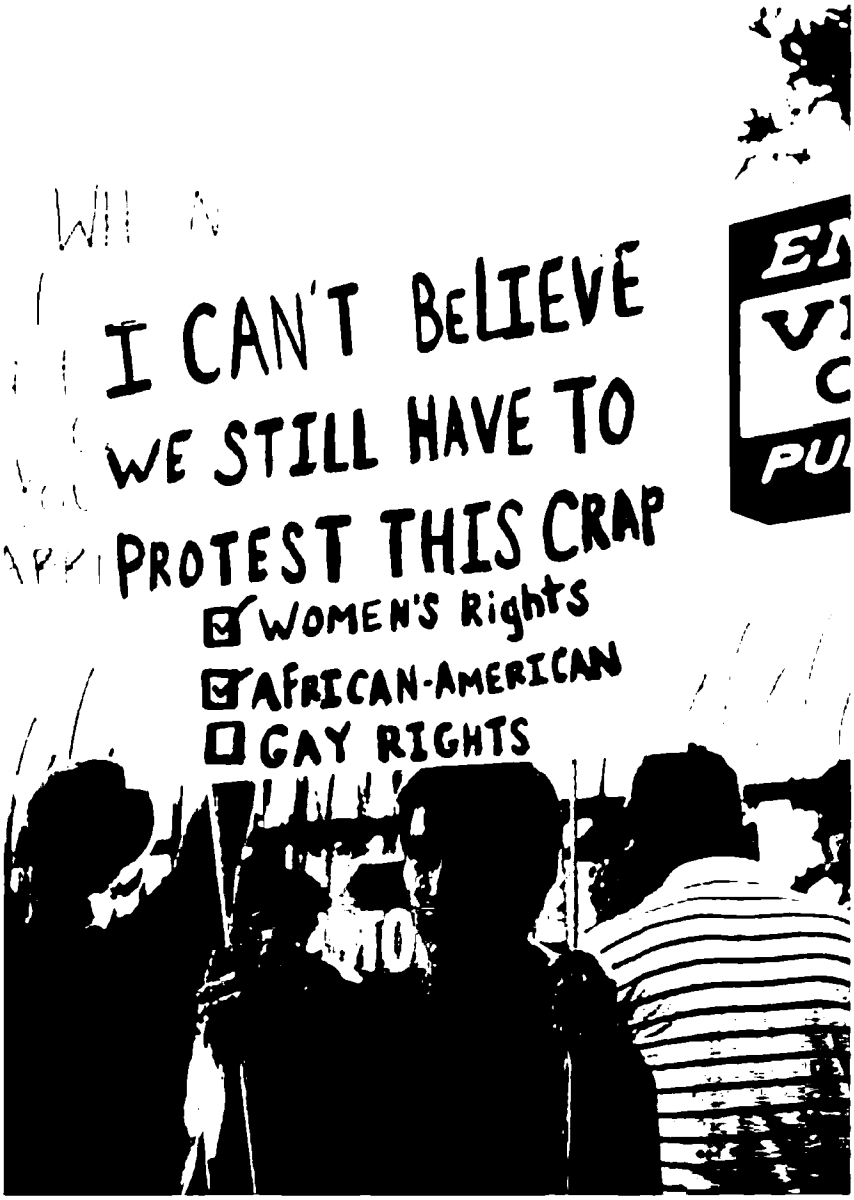
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☐ GAY RIGHTS