

That Might Be Marriage, but This Is Not:  
Looking at the Same-Sex Marriage Debate Through the Lens of Interracial Marriage

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## Introduction

Enjoying their recent engagement, a man and woman enter their local bakery, hoping to discuss ideas for their wedding cake. Upon entering the business and informing the baker that they are interested in a cake to celebrate their forthcoming union, the baker informs the couple that he simply cannot provide his services because the man is black and the woman is white. Rather than being motivated solely by racism, the bakery owner claims that his sincere religious beliefs inform him that interracial marriage is a sin and, because God does not condone such a union, neither can he. To this baker, God simply never intended for the races to mix, so he cannot in good conscience provide a cake to the interracial couple to help celebrate their marriage. To bake the wedding cake would be to endorse a marriage to which his beliefs are fundamentally opposed, effectively compromising his religious integrity.

The previous scenario perhaps sounds ludicrous in contemporary America—a baker cannot discriminate against the interracial couple because such discrimination is plainly racist and thus unacceptable—yet, it is not difficult to imagine this scenario of racial discrimination arising before the 1960s, a time fraught with racial anxieties and hostility toward interracial relations. Given the remarkable progression in U.S. race relations as a result of legal activism on behalf of people of color, race is vigorously protected in today's American judicial system, making it extremely unlikely that the baker who is strongly opposed to interracial marriage would be permitted to deny service to the interracial couple. Why is it then that, when the previous scenario arose for a same-sex couple, the baker who firmly objects to same-sex marriage was permitted by the nation's highest court to deny the couple service?

Although both interracial marriage and same-sex marriage were once illegal in most of the United States, there are clear differences between the ways in which American courts and citizens respond to the now-former culture war over interracial marriage and the current culture war regarding same-sex marriage. In both contexts, marginalized couples sought to clear a daunting hurdle to gain access to the institution of marriage; however, if we closely examine how these culture war issues unfolded, it becomes clear that interracial and same-sex couples faced radically different social and legal terrains following this large jump to obtain the right to marry. I intend to flesh out some of the prominent sociopolitical and legal circumstances that led to this distinction between the public and legal battles over interracial marriage and same-sex marriage, particularly the role that religion plays in creating this distinction. I argue that the legal and sociopolitical treatment of religion is the linchpin that differentiates these two culture wars. In other words, religion—particularly Christianity—has served as the most important factor in Americans' willingness to tolerate discrimination against same-sex couples more than interracial couples. More specifically, I explore how concerns about traditional Christian gender norms and heteronormativity pervade both of these marriage debates. These concerns have played into conservative Christians' tendency to see same-sex marriage as entirely irreconcilable with traditional Christian norms in a way that differs from their perception of interracial marriage. Additionally, I claim that the respective legal landscapes in which these debates have unfolded have had profound implications on how the courts perceive Christian objections to these types of marriage. Fundamentally, we will find that it is the treatment of Christianity that leads us into a legal and social terrain where it is permissible for a baker to refuse his services to a same-sex couple but not an interracial, heterosexual couple.

Staking out the two major sides in both of these culture wars, I will employ broad categories in the interest of examining overarching themes. In the interest of consistency, I will employ the terminology used by R. Marie Griffith in her book, *Moral Combat*, to characterize those involved in the same-sex marriage debate. I will refer to conservatives as those who are reluctant about changes in traditional norms that tend to govern American legal, social, and political understandings of sex, gender, and marriage.<sup>1</sup> Opposing the conservatives are the progressives or liberals, whose identity hinges upon embracing a shifting concept of sex, gender, and marriage. Further, the progressives can be characterized by their tendency to extend rights and power to groups that are commonly marginalized by the traditional norms espoused by conservatives.<sup>2</sup> Along a similar vein, I will refer to those vehemently opposed to interracial marriage as conservative, and those in support as progressive. While this distinction between conservatives and progressives is certainly broad and imprecise, grouping together parties that may wish to remain distinct, I will still employ the categories in the interest of convenience so that we might explore the prominent arguments and sides taken in the culture wars without being weighed down by terminology. At times, I may refer to certain Christian subgroups, often found within the conservative category, as fundamentalists or evangelicals simply to conform to the language used by the relevant scholar, but by no means does this slippage in language signify that these groups are identical. I simply use these umbrella terms and categories because I believe they are common enough to convey the prominent attitudes in the contemporary culture wars in an effective manner for the purposes of this piece.

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<sup>1</sup> R. Marie Griffith, *Moral Combat* (New York: Basic Books, 2017), xi.

<sup>2</sup> Ibid.

In the process of examining what exactly causes these marriage-centric legal battles to diverge so greatly, I have isolated two common themes that characterize major facets of both the debate over interracial marriage and that over same-sex marriage: in the first place, conservative concerns over gender norms and heteronormativity and, in the second place, the political activism of conservatives in response to these types of marriage. First, I will unpack some of these deeply ingrained conservative assumptions about gender norms and heteronormativity, highlighting how both interracial and same-sex relationships are, in differing respects, able and unable to conform to these traditional standards of gender and sexuality. Though these two marriage debates are layered with social factors beyond what I describe, I merely aim to tease out how issues of gender and sex permeate through the both the interracial and same-sex marriage debates and use this particular lens to suggest why the debate over same-sex marriage diverges in distinct ways from that over interracial marriage. Then, I will turn my attention to the legal landscapes that religious objectors faced following the Supreme Court's recognition of these two forms of marriage, highlighting how the differences in these landscapes helped define the types of legal and political activism that we see on behalf of conservatives. In the process, I hope to illuminate exactly why we might view the same-sex marriage debate as fundamentally different from the interracial marriage debate, forging the social and legal terrain we now navigate where discrimination toward same-sex couples by conservative Christians is often tolerated and, at times, legally sanctioned.

## Section I:

### Exploring *Loving* and *Obergefell* and Staking Out the Culture Wars

Racism appears to be an Achilles heel for the United States, as its hateful messages have persisted through American history far beyond the era of slavery. Although today, the United States certainly continues to face many race-related issues—perhaps most visibly, racial profiling and police brutality—one that does not readily come to mind in contemporary America is the issue of marriage. While it may not be readily apparent in the twenty-first century, interracial marriage was once one of the most explosive and contentious subjects of the American sociopolitical landscape in earlier decades.<sup>3</sup> Randall Kennedy claims,

Interracial intimacy and its many ramifications are far more central to American life than many people appreciate or are willing to acknowledge. Its influence begins with the material basis of human existence: the body. Interracial intimacy—or more specifically, in this context, heterosexual intimacy—has affected, through reproduction, key physiological markers in American society, including skin pigmentation.<sup>4</sup>

While differentiations in physiological traits may not strike many today as problematic, the notion that a person of color could rightfully be in a relationship with a white person preceding the twenty-first century was unambiguously offensive and socially taboo. The amalgamation of the races was viewed by many conservative populations with the utmost hostility, thus forging the battlegrounds of the American culture war surrounding interracial marriage.<sup>5</sup>

Antimiscegenation laws are a notable feature of American legal history, reaching back into the depths of the colonial era. A number of British North American colonies legislated regulations that prohibited sex, especially marriage, between interracial couples beginning in the

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<sup>3</sup> Griffith, *Moral Combat*, 83.

<sup>4</sup> Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (New York, NY: Pantheon Books, 2003), 13.

<sup>5</sup> Griffith, *Moral Combat*, 83.

1660s.<sup>6</sup> Kennedy highlights how every state that had a black population of at least five percent of the total population enacted laws to keep races from inter-marrying.<sup>7</sup> In the early twentieth century, about thirty states prohibited marriage between a white person and a person of color until 1948 when the nation's second most populous state, California, "broke away from the antimiscegenation regime" with *Perez v. Sharp*.<sup>8</sup> The number of states stubbornly clinging to antimiscegenation laws eventually dropped to nineteen in 1965,<sup>9</sup> and subsequently, sixteen states in 1967—the year that the Supreme Court ultimately invalidated antimiscegenation laws nationwide in the landmark case, *Loving v. Virginia*.<sup>10</sup>

Much of the logic motivating antimiscegenation statutes can be readily traced to the United States's history of slavery and segregation. During the era of slavery and reaching into the twentieth century for some regions of the U.S., black people were considered less than fully human and inherently inferior to white people. Many territories codified this discriminatory perception of people of color to ensure that black people were lower in status than white people. Given the dramatic difference in the social and legal construction of the status of the races, white Americans confronted the amalgamation of the races with extreme anxiety because any cross contamination threatened the racial order created by white power. For example, mixed-race children were viewed as abominations, threatening the racial purity of whites, and to many Christians, an utmost offense to God.<sup>11</sup> In fact, preventing the mixing of the races was a

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<sup>6</sup> Peter Wallenstein, *Race, Sex, and the Freedom to Marry: Loving v. Virginia* (Lawrence, Kansas: University Press of Kansas, 2014). 23.

<sup>7</sup> Kennedy, *Interracial Intimacies*, 219.

<sup>8</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 46.

<sup>9</sup> *Ibid.*, 122.

<sup>10</sup> *Ibid.*, 131.

<sup>11</sup> Fay Botham, *Almighty God Created the Races* (Chapel Hill: The University of North Carolina Press, 2009), 102-3.

prominent Christian, primarily Protestant, concern. As Fay Botham argues, a particular “racial ethos” regarding the natural relationship between white people and people of color permeated white Protestant theology throughout the era of slavery and well after emancipation.<sup>12</sup> To an overwhelming number of southern Protestants, God intended for the races to remain segregated, and “the Protestant theology of separate races required legal action: if God had deemed racial separation as the divine plan, then humans must enact legal rules preventing any violation of that plan.”<sup>13</sup> Botham highlights how, with the exception of American Catholics who tended to view marriage as a sacrament that belonged rightfully under the jurisdiction of the Catholic Church, many American Protestants permitted that the state held primary authority to regulate the legal dimensions of marriage.<sup>14</sup> Despite its secular and civil dimensions, however, the institution of marriage in early America was still quite ubiquitously imbued with Protestant theology.<sup>15</sup> By codifying the southern Protestant mythology of race, many states perpetuated a theologically inspired fear that the races must remain distinct in the strictest sense, giving antimiscegenation laws an aura of religious and moral importance.

Policies of segregation that intended to maintain separation between the races and the superiority of the white population produced color lines that permeated various social institutions. Most prominently, the color line extended in the law throughout the realms of transportation, education, and marriage.<sup>16</sup> In these realms, white anxiety about the mixing of the races was particularly salient, focusing on race to a meticulous extent. Mere accusations about one’s lineage and appearance could result in one being legally recognized as a person of color

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<sup>12</sup> Botham, *Almighty God Created the Races*, 129.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, 81.

<sup>15</sup> *Ibid.*, 81.

<sup>16</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 44.

and therefore stonewalled from the privileges afforded to white citizens.<sup>17</sup> To illustrate, schoolchildren Tory and Loucreta Mullins were barred from attending a school for whites in 1911 after a mere rumor spread that the children were one-sixteenth black.<sup>18</sup> These social and economic sensibilities about race were often bolstered by a strong theological narrative. For example, some American Protestants who were anxious about the threat of interracial mixing argued that the biblical flood God unleashed on the world in Genesis was punishment for miscegenation.<sup>19</sup> To such individuals, interracial relations could be equated to sinful “bestial amalgamation,” so to avoid unforgivable sin, the races must remain separate and distinct to avoid wrathful punishment like that of the flood.<sup>20</sup> Thus, even after the legal termination of slavery, for many Protestant Americans, racial mixing continued to be entirely contrary to God’s plan for America. As such, any threat to God’s supposed plan for racial purity was viewed with extreme skepticism and fear well into the 1900s.

Given the intense history of racial anxiety surrounding antimiscegenation laws, the 1967 *Loving v. Virginia* decision that invalidated these long-standing statutes represented “a sea change in American constitutional law of historic proportions.”<sup>21</sup> Richard Loving, a white man, and Mildred Jeter, purported to be a black woman, met in Caroline County, Virginia, during the 1950s.<sup>22</sup> The couple was pregnant with their second child when they decided to solidify their relationship through marriage.<sup>23</sup> Months after they were officially wed in Washington D.C.—a jurisdiction where interracial marriage was legal—the Lovings were arrested for illegal

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<sup>17</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 44.

<sup>18</sup> *Ibid.*

<sup>19</sup> Botham, *Almighty God Created the Races*, 102.

<sup>20</sup> *Ibid.*, 102-3.

<sup>21</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 213.

<sup>22</sup> *Ibid.*, 79.

<sup>23</sup> *Ibid.*

interracial cohabitation and marriage.<sup>24</sup> The Lovings and their lawyers challenged the constitutionality of the antimiscegenation law in court, yet at the trial level, they were met with the stubborn racial ethos commonly embodied by southern Christian Protestants. Judge Leon Bazile, who presided over the case, plainly asserted: “Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And, but for the interference with his arrangement, there would be no cause for such marriage. The fact that he separated the races shows that he did not intend for the races to mix.”<sup>25</sup> Bazile clearly lays out the dominant southern Protestant mentality surrounding the culture war of interracial marriage—namely, that if the United States is to remain on a path of righteousness in accordance to God’s will, the government must be able to regulate the racial dimensions of marriage. Specifically, the government must be able to prohibit marriage between different races.

Given the prominence of Judge Bazile’s view in southern America, it is noteworthy that the U.S. Supreme Court openly condemned and dismissed Bazile’s words once the case entered the country’s highest court. In *Loving*, the Supreme Court sought definitively to answer the question: Are antimiscegenation laws unconstitutional? More specifically, do antimiscegenation statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment?<sup>26</sup> The Court had little trouble answering these questions affirmatively, claiming that the heart of the Fourteenth Amendment includes the obligation to “eliminate all official sources of invidious racial discrimination in the States.”<sup>27</sup> Antimiscegenation laws, and consequently the racial ethos that informed such laws, unquestionably “rest solely upon distinctions drawn according to race”

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<sup>24</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 82-3.

<sup>25</sup> Earl Warren, *Loving v. Virginia*, U.S. 1 388 (Supreme Court of the United States 1967), 3.

<sup>26</sup> *Ibid.*, 2.

<sup>27</sup> *Ibid.*, 10.

and served no legitimate purpose apart from upholding White Supremacism.<sup>28</sup> Judge Bazile's belief—that God never intended for the races to mix—was condemned and dismissed as an ignorant and racist “incident to slavery.”<sup>29</sup> Thus, in the *Loving* decision, the Supreme Court not only openly dismissed Judge Bazile's religiously-inspired justification for miscegenation laws as plainly racist and hateful, but the Court effectively devalued the entire southern Protestant racial ethos regarding marriage as discriminatory and incompatible with the American constitutional order.

Given the decrease in the number of states maintaining antimiscegenation statutes leading up to *Loving*, the culture war surrounding interracial marriage had actually dissipated somewhat preceding the 1967 decision in areas apart from the American South, and subsequently, the war has continued to dissipate into the modern day. While *Loving* certainly helped push social sentiment along toward being more supportive of interracial marriages, it is also important to note that we can also attribute the decrease in anti-interracial marriage sensibilities surrounding the *Loving* decision to a broader historical climate. Following World War II, the U.S. confronted the uncomfortable reality that remaining state antimiscegenation laws and Jim Crow legislation appeared eerily reminiscent of Hitler's Nuremberg laws, inspiring many Americans to distance themselves from the racist legislation.<sup>30</sup> Additionally, given that many African Americans were overseas, risking their lives for all back in the U.S., many became uneasy with racist policies that oppressed these men.<sup>31</sup> *Loving* was also decided over ten years into the nation's civil rights movement. Having already experienced *Brown v. Board of Education* (1954), the march on

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<sup>28</sup> Warren, *Loving v. Virginia*, U.S. 1 388, 11.

<sup>29</sup> *Ibid.*, 6.

<sup>30</sup> Kennedy, *Interracial Intimacies*, 98.

<sup>31</sup> *Ibid.*

Washington, Martin Luther King Jr.'s "I Have a Dream" speech, and the Civil Rights Act of 1964, the *Loving* decision was relatively unsurprising.<sup>32</sup> Within churches, a "more inclusive 'universal brotherhood' reading of Scripture became increasingly popular after World War II" and the civil rights movement.<sup>33</sup> Consequently, many churches became more racially tolerant in the 1960s as a result of the political culture at the time.<sup>34</sup> Overall, the historical circumstances of the former half of the twentieth century helped many Americans realize that "racial variation is *tolerable* and, ultimately, *benign*."<sup>35</sup> As a result of this revolution in American perceptions of race, it makes sense that contemporary American culture wars—still turbulent sites of serious political contention—rarely address the issue of interracial marriage or sex. Though the culture war for the legalization of interracial marriage appears to be dead, or perhaps latent, the interracial marriage debate offers a unique lens through which we can examine a contemporary culture war that is very much alive and similarly centered on the institution of marriage: same-sex marriage and the fight for LGBTQ rights.

Advancing in our timeline from *Loving* to contemporary America, we can see many parallels between the struggle for the legal recognition of interracial marriage and that of same-sex marriage. One of the main legal issues during the twentieth century that ultimately brought the Lovings to court was the fact that miscegenation statutes differed across state lines. When interracial couples traveled from a state with antimiscegenation laws to a state where their marriage was permitted, it was often the case that their home state would refuse to recognize the matrimonial union as legitimate. Similarly, the 1996 Defense of Marriage Act (DOMA), signed

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<sup>32</sup> Kennedy, *Interracial Intimacies*, 259.

<sup>33</sup> William N. Jr. Eskridge, "Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms," *Georgia Law Review* 45, no. 3 (Spring 2011): 678.

<sup>34</sup> *Ibid.*, 681.

<sup>35</sup> *Ibid.*, 665.

into law by Bill Clinton, established that no state with prohibitions against same-sex marriage was required by law to recognize the marriage of same-sex couples that was performed in a state that allowed for the union.<sup>36</sup> Both types of partners were forced to navigate a hodgepodge legal landscape, in which their union could be honored in one state and then stripped away in another, spurring legal confusion as well as stigma around the couples.

Additionally, the welfare of children is somehow tied up in both of these culture wars. For example, in a 1959 miscegenation case, *State of Louisiana v. Brown and Aymond*, Justice Frank Hawthorne of the Supreme Court of Louisiana asserts that the state has the right to prevent interracial marriage in order to ensure the well-being of children:

A state statute which prohibits intermarriage or cohabitation between members of different races we think falls squarely within the police power of the state, which has an interest in maintaining the purity of the races and in preventing the propagation of half-breed children. Such children will have difficulty being accepted by society, and there is no doubt that children in such a situation are burdened... with a “feeling of inferiority as to their status in the community that may affect their hearts and minds in a way that may affect their hearts and minds in a way unlikely ever to be undone.”<sup>37</sup>

To prohibit miscegenation is thus to avoid saddling potential mixed-race offspring with the stigma that they would face in a racially segregated world. Similarly, in the context of same-sex marriage, scholars, such as Sherif Girgis et al., argue that any question of marriage is intricately linked to the welfare of children, and same-sex couples are intrinsically unable to fully protect the welfare of children because the only type of union that fully allows for the flourishing of a child is that between the child’s biological mother and father.<sup>38</sup> When placed in the custody of a same-sex couple, children are disadvantaged because “children fare best on virtually every

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<sup>36</sup> Griffith, *Moral Combat*, 294.

<sup>37</sup> Botham, *Almighty God Created the Races*, 147.

<sup>38</sup> Sherif Girgis, Robert P. George, and Ryan Anderson, “What Is Marriage?,” *Harvard Journal of Law and Public Policy* 34, no. 1 (2010): 263.

indicator of well-being when reared by their wedded biological parents,” including educational achievement, emotional health, development, and behavior.<sup>39</sup> Thus, within both culture wars, we can find arguments that conflate preserving a particular paradigm of marriage with safeguarding the well-being of children.

Additionally, lingering in the background of both culture wars is a Christian concern about morality—particularly sexual morality—and the notion that to cling to proper Christian morality is to cling to the only viable lifeline that will prevent the United States from sinking into immoral chaos. When progressives first challenged antimiscegenation laws, conservative Christians viewed the anti-racist activism that sought to invalidate these racially charged laws as “hopelessly mired in an anthropological ‘culture’ paradigm of cross-culture relativity that encouraged sexual decadence and amorality.”<sup>40</sup> Thus, for some, the legalization of interracial marriage would undoubtedly unleash a promiscuous and reckless social order that would be antagonistic toward traditional Christians morality, especially sexual morality. We can see a similar anxiety in the contemporary culture war for same-sex marriage. Even in the post-*Obergefell* landscape, many religious conservatives feel that they bear the responsibility for defending American morality and freedom. Authors of *The Homosexual Agenda*, Craig Osten and Alan Sears, claim that homosexuals are trying to undermine the institution of marriage, shifting the sexual mores of society to accommodate their deviant desires and perverted lifestyles.<sup>41</sup> To Osten and Sears, the homosexual agenda, at its core, is a process of “intellectualizing disordered sexual behavior” that has no place in society.<sup>42</sup> Further, this shift in

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<sup>39</sup> Girgis, George, and Anderson, “What Is Marriage?,” 257-8.

<sup>40</sup> Griffith, *Moral Combat*, 117.

<sup>41</sup> Alain Sears and Craig Osten, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today* (Nashville, Tennessee: Broadman & Holman Publishers, 2003), 93.

<sup>42</sup> *Ibid.*, 83.

sexual morality is neither innocent nor virtuous, but it is a fundamental threat to American religious life and the health of the nation. Evaluating the anxieties of Christian conservatives in both culture wars, we can see a common notion that to ignore or swim away from the lifeline of Christian morality is to essentially douse the nation in immorality and thus doom the United States to damnation.<sup>43</sup>

In 2015, advocates for same-sex marriage seemed to have enjoyed the same victory that those for interracial marriage saw in 1967. Again, the Supreme Court was the body that took a lead in transforming the American understanding of marriage in the landmark case, *Obergefell v. Hodges* (2015). Through *Obergefell*, the Court officially declared the legalization of same-sex marriage to be consistent with the U.S. Constitution and laws prohibiting it to be inconsistent. Much like the trend of increasingly positive attitudes toward interracial marriage, the general population of the country experienced a shift in mentality toward rising support for same-sex marriage leading up to the *Obergefell* decision. Though staunch opposition to same-sex marriage was a key factor in securing George W. Bush's reelection in 2004,<sup>44</sup> in a dramatic and swift wave, American attitudes toward same-sex marriage began to stir after 2004.<sup>45</sup> After Bush's election, twenty-nine states had statutory bans against same-sex marriage and sixteen had constitutional bans,<sup>46</sup> but by 2015, only thirteen states maintained constitutional bans against same-sex marriage.<sup>47</sup> In the remaining thirty-seven states and the District of Columbia, same-sex marriage was legal.<sup>48</sup> The sea change in the legal status of same-sex marriage is also reflected in

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<sup>43</sup> Robert P. Jones, *The End of White Christian America* (New York, NY: Simon & Schuster, 2016), 10.

<sup>44</sup> *Ibid.*, 120.

<sup>45</sup> *Ibid.*, 121.

<sup>46</sup> *Ibid.*, 121.

<sup>47</sup> *Ibid.*, 122.

<sup>48</sup> *Ibid.*, 122.

national public opinion in support of same-sex marriage according to leading polls, growing from about 32 percent in 2003 to about 54 percent in 2014.<sup>49</sup> Much like the shift in attitudes toward interracial marriage leading up until *Loving*, overall American attitudes, even the attitudes of some religious groups, dramatically shifted toward more support for same-sex marriage in the short span of approximately ten years. It appeared that same-sex marriage was on the same track as interracial marriage and that, once legalized, the controversy surrounding it would begin to substantially dissipate.

Although *Obergefell* and *Loving* stand alike as landmark Supreme Court cases that expand access to the institution of marriage, it quickly becomes clear once we begin to unpack the details of *Obergefell* that religion plays a crucial role in distinguishing these two cases in extreme ways. First, rather than explicitly exploring whether or not laws prohibiting same-sex marriage constitute “invidious discrimination”<sup>50</sup> as the *Loving* Court does for interracial marriage, the *Obergefell* Court treads lightly, admitting that the “nature of justice is that we may not always see it in our own times.”<sup>51</sup> Notably, the *Loving* Court did not hesitate to label antimiscegenation statutes as a racist stain of slavery. The majority in *Obergefell* is much more hesitant to categorize views against same-sex marriage as hateful homophobia or bigotry. Instead, the Court finds that it is in violation of the Equal Protection and Due Process Clauses to prohibit same-sex marriage because laws against same-sex marriage “impose stigma and injury of the kind prohibited” by the Constitution.<sup>52</sup> Furthermore, rather than chastise religious conservatives who staunchly defend laws prohibiting same-sex marriage as the *Loving* Court

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<sup>49</sup> Jones, *The End of White Christian America*, 124.

<sup>50</sup> Warren, *Loving v. Virginia*, U.S. 1 388, 10.

<sup>51</sup> Anthony Kennedy, *Obergefell v. Hodges*, U.S. \_\_\_ 576 (Supreme Court of the United States 2015), 11.

<sup>52</sup> *Ibid.*, 18.

chastises southern Protestants who defended antimiscegenation laws by implying that they were White Supremacists, the Court takes on an apologetic tone for religious conservatives who may be offended by the *Obergefell* decision. Justice Anthony Kennedy, the author of the majority opinion, admits,

Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.<sup>53</sup>

Here, we can see Kennedy do two important things that are absent from *Loving*. First, Kennedy clearly anticipates the intensity of religious objections to same-sex marriage and refrains from labeling these religious objectors as homophobic and hateful. Rather than disparage anti-gay marriage beliefs as discriminatory and unfit for the American constitutional order, Kennedy recognizes those who hold the beliefs as honorable, making clear that the Court is not painting these individuals as bigoted. Such a picture of the religious order used to justify the prohibition of same-sex marriage as “decent” is quite different from the allusions to White Supremacy inspiring antimiscegenation statutes in *Loving*. Second, Kennedy treads lightly in regard to religious objections to *Obergefell* because he anticipates undesirable entanglements with the Free Exercise Clause as a result of the controversial decision. As I will explore below, the free exercise terrain surrounding *Obergefell* is distinct from that of *Loving*, making free exercise claims from conservatives a much greater concern for *Obergefell*'s majority than *Loving*'s. In

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<sup>53</sup> Kennedy, *Obergefell v. Hodges*, U.S. \_\_ 576, 19.

fact, Kennedy continues to make a more generous claim about religious objectors who remain committed to their beliefs against same-sex marriage and their right to act on those beliefs:

Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.<sup>54</sup>

Unlike in *Loving*, we see the *Obergefell* majority make a somewhat generous promise to religious objectors that they may continue to “advocate with utmost, sincere conviction” that same-sex marriage is morally wrong.<sup>55</sup> In this sense, the Court is carving out room for accommodations to be made for religious objectors who simply cannot support same-sex marriage, effectively laying the groundwork for future free exercise cases to unfold. Clearly in the context of these two culture wars, both of which deal with access to the institution of marriage, religion is treated quite differently. *Obergefell* provides generous room for religious objectors to stake out their place in the constitutional order, ensuring that the decision will not label conservative activism against same-sex marriage as altogether unacceptable, thereby forcing these religious worldviews to recede into social background. In *Loving*, however, religious views are cast as unacceptable forms of animus that have no place in society.

Given its open minded treatment of potential religious dissent that would result from the decision, *Obergefell* certainly did not signal the end of the culture war for same-sex marriage; perhaps just one major battle. In the post-*Obergefell* landscape, the Court’s majority has continued to exhibit this particular deferentialism toward religion. The recent *Masterpiece*

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<sup>54</sup> Kennedy, *Obergefell v. Hodges*, U.S. \_\_ 576, 27.

<sup>55</sup> *Ibid.*

*Cakeshop v. Colorado Civil Rights Commission* (2018) case exemplifies this deferentialism. Jack Phillips, a devout Christian and owner of the Masterpiece Cakeshop in Colorado, found his case in the Supreme Court after he refused to create a wedding cake for a same-sex couple. Evidently, Phillips “seeks to ‘honor God through his work at Masterpiece Cakeshop,’” and since he sincerely opposes the concept that marriage is something other than the union between a man and a woman, Phillips could not, in accordance to his religious views, serve the same-sex couple.<sup>56</sup> By refusing to serve the couple, Phillips violated the Colorado Anti-Discrimination Act; however, the Supreme Court ultimately decided that it was within Phillips’s First Amendment right to discriminate against the same-sex couple in the interest of religious freedom. In fact, consistent with Kennedy’s opinion in *Obergefell*, the Supreme Court defends Phillips’ right to hold beliefs against same-sex marriage, and even more, Phillips can act on those beliefs to refuse service to a same-sex couple looking for a wedding cake. When Phillips was first confronted by the Colorado Civil Rights Commission, one commissioner frustratingly expressed:

Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others.<sup>57</sup>

The Colorado commissioner clearly holds a cynical view of religion, asserting that it simply cannot be the case that religion is used to justify horrific forms of discrimination. Staunchly in defense of Phillips, the majority opinion—written again by Justice Kennedy—emphatically asserts, “To describe a man’s faith as ‘one of the most despicable pieces of rhetoric that people

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<sup>56</sup> Anthony Kennedy, *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, US \_\_ 584 (Supreme Court of the United States 2018), 3.

<sup>57</sup> *Ibid.*, 13.

can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical—something insubstantial and even insincere.”<sup>58</sup> By defending Phillips, Kennedy effectively protects religion in *Masterpiece Cakeshop* and admonishes the Colorado Civil Rights Commission for oppressing Phillips because of his religious expression. In fact, the case was decided almost entirely upon this categorization of the Civil Rights Commission as being intolerant toward Jack Phillips. The Supreme Court finds that, during Phillips’ legal battle, the state demonstrated outward hostility toward his religious views and therefore violated the First Amendment. Aligning itself with “religious tolerance,” the Court takes *Masterpiece Cakeshop* as an opportunity to remind the state of its “high duty to the Constitution and to the rights it secures,” including religious freedom.<sup>59</sup> Consequently, the Court distances itself from points of view like that of the commissioners.

Given what we know about the culture war over interracial marriage, the words of the commissioner, which were entirely repugnant to the *Masterpiece Cakeshop* majority, ironically contain a sliver of truth and served as the logic for how to treat religion in the *Loving* decision. Religion was in fact used to justify slavery, and, many years after emancipation, the racial theology that supported racism continued to justify antimiscegenation statutes among other policies of segregation. Yet, we did not see the *Loving* Court give any careful consideration to the “honorable religious or philosophical premises” that justified antimiscegenation statutes.<sup>60</sup> Religion used to justify antimiscegenation laws were cast as morally repugnant in the *Loving* case. We can attribute this negative view of religion to a drastically different constitutional understanding of the meaning of free exercise during the *Loving*-era, which we will examine

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<sup>58</sup> Kennedy, *Masterpiece Cakeshop*, US \_\_ 584, 13-4.

<sup>59</sup> *Ibid.*, 17.

<sup>60</sup> Kennedy, *Obergefell v. Hodges*, U.S. \_\_ 576, 19.

more in depth below, but it is still of great worth to note at this moment how dismissive and condemning the *Loving* Court is of religion used to justify antimiscegenation statutes in contrast to how religion is treated in *Obergefell*.

We can also question the divergence in same-sex marriage as a culture war issue from that of interracial marriage at a broader social level, examining why religious objections to interracial marriage seemed to have simmered out after *Loving*, while religious objections to same-sex marriage boiled over in some segments of the U.S. religious population and continue to pervade society post-*Obergefell*. Although Catholics strayed from establishing any formal theology to justify miscegenation like Protestants, it is noteworthy that American Catholics were quite supportive of Richard and Mildred Loving, being the only religious group to submit a brief in support of the couple to the Supreme Court when it was deliberating *Loving*.<sup>61</sup> Now, at the institutional level, Catholics are among the staunchest objectors to same-sex marriage. The Catholic Church, rather than support same-sex couples as it did interracial couples, issued *Persona Humana* in 1975, declaring that Catholics must stay far away from the sexual deviancy of the modern age.<sup>62</sup> Furthermore, the papal decree made clear that true marriage exists only between a man and woman, painting same-sex marriage as fundamentally inconsistent with the Catholic tradition, and reiterated the sexual mores that Catholics should abide by, which responded to any anxieties the Church held about homosexual relations.<sup>63</sup> Clearly, there is something about same-sex relationships that inherently threatens Catholic understandings of sex and marriage, which makes the Church unwilling to put its approval behind same-sex couples as it did for interracial couples.

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<sup>61</sup> Botham, *Almighty God Created the Races*, 174.

<sup>62</sup> Griffith, *Moral Combat*, 288-9.

<sup>63</sup> *Ibid*.

When we sift out the convergences and evaluate the divergences of the interracial and same-sex marriage culture wars, we are left with two broad channels of inquiry. First, it is clear that there is something about same-sex marriage that inspires religious conservatives to draw a line in the sand, declaring that they will not raise a white flag in the culture war. Such an approach strays significantly from the approach of southern Protestants during the culture war for interracial marriage. As we have seen, religious objections to interracial marriage have dissipated greatly following *Loving* and rarely inspire contention in modern society. Thus, we must consider the question: What about the same-sex marriage debate sparks unabated resistance in religious conservatives, and how might the interracial marriage debate help us better understand this resistance? Second, it is clear that the Supreme Court gives religious objections considerably more weight in regard to sexual orientation than it does to race. There is no comparable *Masterpiece Cakeshop* that allows for the devoutly religious to discriminate against couples on the basis of race. The Court's difference in treatment of religious objections to interracial marriage and same-sex marriage begs a second major question: What legal and political circumstances shroud the two culture wars that led to this drastic difference in the Court's treatment of religious objections to the extension of marriage rights? In other words, we must examine the constitutional terrains and sociopolitical climates that helped shape how conservatives and their rights to free exercise are understood after both *Loving* and *Obergefell*, shedding light on why the political activism of conservatives appears to be much more intense today and why the Court is much more sympathetic to religious objections in the contemporary era. I will attempt to answer the former question in order to shed light on the latter.

## Section II:

### The Limits to Gender, Sexuality, and Marriage

#### *Challenges to Traditional Gender Norms and Standards of Heteronormativity*

A prominent theme sitting at the core of both the interracial and same-sex marriage debates is disagreement over the proper limits of gender and sexuality in society. In fact, disputes over gender and sex are arguably the most emotionally volatile issues that generate such intense conflict in both of these culture wars. Interracial sex was once and homosexual sex continues to be at the “top of the list of society’s highly taboo sexualities.”<sup>64</sup> Progressive shifts in society, which attempt to remove these types of intimacy from the realm of the taboo and thrust them into the mainstream by instilling them with a sense of normalcy, are met with extreme resistance by conservatives. Though the public sentiment regarding interracial intimacy was already shifting before *Loving*, it is no question that disdain toward interracial marriage persisted in some religious groups following the decision. Issues of gender and sex mattered to these religious dissenters, and by focusing our inquiry on these concerns over gender and sex in the context of the interracial marriage debate, we may unearth the ways in similar concerns generate extreme resistance in the same-sex marriage debate today. To many conservatives, traditional understandings of sexuality are “too fundamental for human beings to amend,” thus painting practices of sex as immutable constructs that simply cannot welcome non-mainstream practices, such as interracial and homosexual sex, into a club of socially acceptable forms of sexual expression.<sup>65</sup> Conservatives are often hesitant to sanction unfamiliar forms of sex because

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<sup>64</sup> Phoebe C. Godfrey, “Eschatological Sexuality: Miscegenation and the ‘Homosexual Agenda’ from Brown vs. Board of Education (1954) to Lawrence vs. Texas (2003),” *Jean Ait Belkhir, Race, Gender, & Class Journal* 19, no. 3/4 (2012): 147.

<sup>65</sup> Griffith, *Moral Combat*, 300.

practices of one's sexuality often take on a cosmic tone, embodying a wealth of information about the moral welfare of both the individual and of society. Phoebe C. Godfrey claims:

[H]ow and where and with whom a person expresses their sexuality has been understood in our Judeo-Christian patriarchal society as speaking volumes about that person's personal and social identity, not to mention their moral and social worth. It is for this reason that changes in racial, gender, social class and sexual norms become highly volatile triggers for ideologies of social and sexual chaos, resulting in moral panic.<sup>66</sup>

Thus, it is crucial to keep in mind that for many, practices of sex cannot simply be performed in privacy and be of no one's concern. The types of intimacy that conservatives condemn as unacceptable simply cannot be practiced altogether because sexual expression carries significant moral weight and, when sexual norms are challenged, so is the traditional ordering of society. If individuals freely practice what might be considered obscene forms of sex, then this disturbance to traditional sexual norms serves as a clear indicator to concerned conservatives that the moral health and stability of the nation is in distress.

Moreover, sexual expression is of particular concern to conservative Christians because sex is tightly linked to understandings of salvation. Amy DeRogatis unpacks how the sexual body is inextricably related to salvation, inspiring conservative Christians to view the regulation of sex as a pressing matter in furthering the kingdom of God on earth.<sup>67</sup> If God's standards for human sexuality are not strictly enforced, then many conservatives fear that, not only is their personal salvation in jeopardy, but so is the salvation of all humanity. Thus, when cases that seem to fundamentally alter traditional Christian understandings of sexuality enter the courts, these legal disputes are perceived as "direct threats to [the conservative] Christian God's social,

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<sup>66</sup> Godfrey, "Eschatological Sexuality," 144.

<sup>67</sup> Amy DeRogatis, *Saving Sex: Sexuality and Salvation in American Evangelicalism* (New York, NY: Oxford University Press, 2015), 6.

sexual and thus moral order.”<sup>68</sup> Further, conservative Christians interpret challenges to traditional sexual norms as direct threats to their progeny, stripping the next generations of the opportunity to mature in a moral society that abides by God’s wishes for human sexuality.<sup>69</sup> In response to society’s shift toward accepting non-traditional forms of sexual intimacy, conservatives define themselves precisely by their staunch opposition to such shifts and tend to affirm their faith by testifying to non-believers their vision of a proper sexual order. Many evangelicals, for example, proudly establish themselves by promoting and practicing traditional views toward sexuality—to name a couple, saving oneself until marriage and only engaging sexually with members of the opposite gender.<sup>70</sup> Because conservatives like evangelicals often distinguish themselves from others in society by their commitment to sexual purity and their strong opposition to more promiscuous forms of sex, it often appears, as DeRogatis notes, that “evangelicals cannot stop talking about sex.”<sup>71</sup> It is misleading, however, to assume that evangelicals outright reject sexual expression. In fact, to many, sex is “natural, biblically sanctioned, and—if practiced in the proper arena of heterosexual marriage—sex can be a sign of salvation.”<sup>72</sup> Evangelicals thus concede that couples can enjoy sex, but because evangelicals also understand that sexual expression must occur only when the Bible is “in the bedroom,” this often translates into a large concern with regulating sexuality not only in the privacy of one’s home, but also for the rest of American society.<sup>73</sup>

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<sup>68</sup> Godfrey, “Eschatological Sexuality,” 145.

<sup>69</sup> *Ibid.*, 145.

<sup>70</sup> DeRogatis, *Saving Sex*, 6.

<sup>71</sup> *Ibid.*, 1.

<sup>72</sup> *Ibid.*, 43.

<sup>73</sup> *Ibid.*, 44.

It is not difficult to uncover that conservatives are unwilling to sanction non-heteronormative intimacies, speaking to a larger concern over maintaining traditional gender norms. Conservative anxieties about non-traditional forms of sexual expression—including interracial and same-sex intimacies—are often manifestations of an underlying obsession to uphold principles of a white male-dominated patriarchy.<sup>74</sup> The control of women, most often by white men, takes on a heightened significance in the context of traditional Christian communities, and this obsession to control women frequently translates to a heightened regulation of female sexuality.<sup>75</sup> Karen McCarthy Brown argues that fundamentalist Christians ultimately seek to “mute the power of the flesh,” because, as a subject that is often tied to larger issues of salvation and morality, human sexuality is one of the most fear-inspiring aspects of human life to conservatives.<sup>76</sup> Additionally, since “women generally carry the greater burden of human fleshliness,” Brown insists that conservatives’ intense desire to control human sexuality “will always involve the control of women.”<sup>77</sup> For example, in the evangelical community, women learn at a young age that it is their responsibility to keep both their personal sexual desires in check as well as the potential sexual desires of their male counterparts.<sup>78</sup> Because men are sexual beings “who by nature cannot help themselves,” the burden of reining in sexual desire falls upon the female, who is less sexually inclined. Furthermore, if any sexual sin transpires, the blame is assigned to the woman, and she must live with “eternal shame” of her “sexual defilement” because she should have known better.<sup>79</sup> We can categorize this first type of

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<sup>74</sup> Godfrey, “Eschatological Sexuality,” 147.

<sup>75</sup> Karen McCarthy Brown, “Fundamentalism and the Control of Women,” in *Fundamentalism and Gender*, ed. John Stratton Hawley (New York, NY: Oxford University Press, 1994), 176.

<sup>76</sup> *Ibid.*, 176.

<sup>77</sup> *Ibid.*

<sup>78</sup> DeRogatis, *Saving Sex*, 40.

<sup>79</sup> *Ibid.*

gender-oriented anxiety as the placement of sexual burden on women: if sexuality is to be properly regulated in society, then women must fulfill their role of being sexually pure and not tempt men to be otherwise either.

Another central concept in conservative Christianity regarding the control of women is the notion that women are the naturally submissive counterparts to men, which I will refer to as the theme of the subservience of women. In many evangelical communities, the good Christian woman is silent, submissive, and tends to the needs of her husband and other male figures in her life.<sup>80</sup> Some evangelicals, like writer Debi Pearl, go so far to claim that even in cases where a wife may be more competent than her husband, she should embrace her submissive role and allow her husband to lead the family incompetently. Pearl writes to evangelical women, “If you successfully do the job of leading the family, you will not find satisfaction in it. *It is far better that the job be done poorly by your husband than to be done well by you*’ (emphasis in the original).”<sup>81</sup> Perhaps in an attempt to empower Christian women in embracing their subordinate role to men, conservatives claim that it is precisely through submission to one’s husband that one is liberated.<sup>82</sup> Although the wife is largely a domestic character who caters to her husband and children, she allegedly has the most important role in the household, as she is responsible for the religious upbringing of her children.<sup>83</sup> Wives are seen as the “religious keystone” of the family, and Randall Balmer claims that, as the primary educators who are responsible for the religious nurturing of the next generation, the degree to which women remain in the household and fulfill

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<sup>80</sup> Randall Balmer, “American Fundamentalism: The Ideal of Femininity,” in *Fundamentalism and Gender*, ed. John Stratton Hawley (New York, NY: Oxford University Press, 1994), 49.

<sup>81</sup> DeRogatis, *Saving Sex*, 108.

<sup>82</sup> Balmer, “American Fundamentalism,” 49.

<sup>83</sup> *Ibid.*, 53.

their domestic duties is often considered a gauge of the moral well-being of the entire nation.<sup>84</sup> If women are fulfilling their domestic roles in the home, not only are women in their proper place, which provides a sense of moral security for conservatives, but they are also teaching the next generation about proper morals, providing a sense of moral security for years to come.

Conservatives become anxious when the domestic role of females is challenged, locating feminism as the “primary menace to godly families.”<sup>85</sup> DeRogatis identifies how feminism disturbs commonly held assumptions about the role of women for evangelicals because feminism confuses gender roles, thus creating “friction within couples.”<sup>86</sup> Feminism encourages women to act outside of their proper roles in the home, threatening the stability of marriages, families, and, consequently, the moral integrity of the nation. Expressing a similar distaste for the rise of feminist ideology, prominent evangelical, Pat Robertson, dramatically claims that the “feminist agenda is not about equal rights for women. It is about a socialist anti-family political movement that encourages women to leave their husbands, kill their children, practice witchcraft, destroy capitalism and become lesbians.”<sup>87</sup> By Robertson’s prediction, feminism poses a serious threat to American life because it not only removes women from their place in the home, but as a result of this gendered dislocation, feminist ideologies unleash a slew of evil upon society. Therefore, keeping women as submissive caretakers in the home often speaks to a larger goal of keeping American families godly and moral.

Although the interracial marriage debate in U.S. history was strictly understood in the context of heterosexual couples, we can still see that interracial unions were also often

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<sup>84</sup> Balmer, “American Fundamentalism,” 51.

<sup>85</sup> DeRogatis, *Saving Sex*, 127.

<sup>86</sup> Ibid.

<sup>87</sup> Leslie Bentz, “The Top 10: Facebook ‘Vomit’ Button for Gays and Other Pat Robertson Quotes,” *CNN*, July 9, 2013, <https://www.cnn.com/2013/07/09/us/pat-robertson-facebook-remark/index.html>.

understood to radically challenge traditional gender norms. It cannot be overstated how influential issues of interracial sex were in promoting anxieties about interracial relations, even beyond marriage. For example, in 1912, when proposing a constitutional amendment that would prohibit marriage between a white person and a black person, Representative Seaborn A. Rodenverry of Georgia vividly insisted that,

no blacker incubus ever fixed its slimy claws upon the social body of this Republic than the embryonic cancer of Negro marriage to white women in certain parts of our country... No more voracious parasite has ever sucked at the heart of pure society, innocent girlhood, or Caucasian motherhood than one which welcomes and recognizes the sacred ties of wedlock between Africa and America.<sup>88</sup>

Critically, Rodenverry's dramatic assertion touches upon arguably the main sexual anxiety expressed by those who were staunchly opposed to interracial intimacies: white women must be protected from black men because black men are sexually threatening. During the few times that a marriage would take place between a black man and a white woman, a recurrent theme was for relatives and friends to act as though the wedding they were attending was really a funeral.<sup>89</sup> Not only did the taboo union symbolize a negative social stain on the couple and the couple's families, but it also symbolized a pointed attack on white femininity. Godfrey argues that there are deep connections between race, sexuality, and morality that cannot be ignored when we examine interracial relations, especially those between white women and black men.<sup>90</sup> Black men were viewed as possessing an animalistic sexuality that could corrupt white women, thereby threatening the social standing of the white race and unleashing chaos and immorality among society's understandings of the proper role of the white female.

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<sup>88</sup> *Congressional Record* 49, (1912): 503-4, quoted in Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, and Adoption* (New York, NY: Pantheon Books, 2003): 85.

<sup>89</sup> Kennedy, *Interracial Intimacies*, 90.

<sup>90</sup> Godfrey, "Eschatological Sexuality," 153.

Clearly, intimacies between white women and black men have posed a serious threat to the conservative understanding of gender roles, particularly the argument for the subservience of women. The dominant narrative, devised by white males, was that white females, must be strictly regulated in order to prevent interracial sex, easing white male anxieties about miscegenation. Seeing themselves as “embattled in a struggle to maintain civilization against people of different religions and races,” white men in colonial times went to great lengths to thwart miscegenation between black men and white females.<sup>91</sup> In particular, colonists struggled to resolve how mixed-race children would be treated under the law if one parent was enslaved and the other free. The Virginia legislature spoke of the issue of mixed-race offspring in 1691 as “‘that abominable mixture and spurious issue’ that would no doubt increase unless white women were prevented from having sex with nonwhite men.”<sup>92</sup> While states’ legal resolutions to the issue of mixed-race children varied, in its most extreme form, laws required white women to become indentured in addition to the child born of the interracial relationship.<sup>93</sup> Here, we can see the emergence of the conservative theme that women are responsible for sexual transgressions: white women should know better than to engage with a man of an inferior race, so she will be punished for failing to abide by proper sexual mores. Less extreme legislation did not commit the white woman to a life of slavery, but her child would be lost to slavery.<sup>94</sup> In this case, although perhaps less obvious, we see the other common mentality conservatives hold toward women—namely, that women are inherently submissive to men. The fate of the woman’s child was determined for her because women were seen as intellectually inferior to men (she was not smart enough to stay

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<sup>91</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 24.

<sup>92</sup> *Ibid.*, 23.

<sup>93</sup> Botham, *Almighty God Created the Races*, 57.

<sup>94</sup> *Ibid.*

away from black men). Moreover, there was no way that the woman's chosen sexual partner—a slave—could fulfill the role of the patriarch of the family, which would be necessary since by traditional gender norms, women must depend on men for support.<sup>95</sup> Thus, in both of these main types of legislation enacted to prevent white women from engaging sexually with black men, we can see how white male assumptions about gender norms and the role of women in society are translated into restrictions on women's sexual conduct.

The patriarchal nature of legislation restricting interracial sex is more apparent when we examine the flip side of the coin: white men and black women relations. Rather than restricting white males from engaging sexually with black females, laws tended to assert the racial and gendered dominance of the white man, especially the slave master. As such, laws against miscegenation were rarely understood to pertain to white men in practice. Slave masters would freely engage in sexual relations with their female slaves, often raping them, and if the slave were to become pregnant, there was no anxiety about the status of the mixed race offspring because the white man simply just had another slave for free.<sup>96</sup> Therefore, while there was an almost “neurotic anxiety about white femininity,” informing legislatures’ open “hostility toward racial hybridity,” this sexual anxiety primarily applied to white women because they were considered “dependent, sexually untrustworthy, and in need of the protection of white males.”<sup>97</sup> Moreover, because black women were perceived as “so insignificant as to merit no attention at all,” laws failed to regulate white male and black female relations with nearly as much urgency as those for black males and white females.<sup>98</sup> Thus, white men routinely demonstrated only a

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<sup>95</sup> Botham, *Almighty God Created the Races*, 57.

<sup>96</sup> *Ibid.*, 58-9.

<sup>97</sup> *Ibid.*, 59.

<sup>98</sup> *Ibid.*

“selective aversion to amalgamation,” finding the most fault with interracial intimacies among white women and black men because such intimacies challenged the main assumptions white men held about gender norms, including the natural subservience of the white female.<sup>99</sup>

Though in the contemporary social climate, the factor of race has dropped out of the conversation in many ways, conservative concerns over the control of women’s sexuality have carried over into opposition to homosexuality. In the context of modern concerns over female sexuality, the rise of feminism has played a significant, enduring role. Conservatives Osten and Sears claim that feminism is largely at fault for the prominence of homosexuality in contemporary America, asserting that “radical feminists... tried to convince us that girls and boys were basically the same—it was the environment that made boys aggressive and athletic and girls feminine and domestic. The result? Sexually confused children who grew up to be sexually confused adults.”<sup>100</sup> Here, Osten and Sears clearly embody an anxiety about gender distinctions, and implicitly, the subservience of women. Homosexuality distorts gender norms beyond recognition, confusing adolescents to pursue immoral forms of sexuality. Additionally, without the structure of a heterosexual relationship, “sexually confused children” are unable to appreciate how women supposedly take on the sexual burden in a relationship, taming the man’s increased sex drive. To conservatives, feminists obliterate the gender norms that correctly orient the way that one should approach a sexual relationship, leading to undesirable relationships like same-sex relationships.

We also see major themes of conservative anxiety toward the types of sexual relations being practiced by same-sex couples. Firstly, there often exists an extreme discomfort among

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<sup>99</sup> Kennedy, *Interracial Intimacies*, 253.

<sup>100</sup> Sears and Osten, *The Homosexual Agenda*, 110-11.

religious conservatives with male-male sexual practices, such as sodomy. Religious conservatives demonstrate an intense desire to restrict sex to its “natural” state between a man and a woman because same-sex relations are seen as unnatural and perverse. Catholic journalist and political commentator, Joel Mowbray, expresses a particular concern with male-male sexual relationships, claiming, “Male homosexuality is inherently promiscuous. In a heterosexual relationship, women moderate the innate, intense male sex drive. But in homosexual conduct, there is no such check... gay couples have two people with male attitudes about sex, which naturally leads to a more permissive view of sexuality.”<sup>101</sup> Many, like Mowbray, fear that, without the proper balance that females provide in a heterosexual relationship, male homosexuals will undoubtedly be overwhelmed by their intense masculine sex drive and have perverted sex, and if tolerated by the rest of society, perverted sexual expression will become common practice. Put in terms of the gender norms we have discussed, because sexual burdens are placed on women, there is no clear placement of that burden in a relationship between men, leading to uninhibited promiscuous sexual relations. Similarly, politician, Rick Santorum, laments, “If the Supreme Court says you have the right to consensual [gay] sex within your home then you have the right to bigamy, you have the right to polygamy, you have the right to incest...”<sup>102</sup> To conservatives, homosexual relations unquestionably open the door for other undesirable relationships. Without the gendered structure that heterosexual relationships provide, many conservatives fear that the United States will soon become accustomed to a perverted and promiscuous sense of sex, endangering the moral integrity and salvation of the nation.

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<sup>101</sup> Sears and Osten, *The Homosexual Agenda*, 140-1.

<sup>102</sup> Sean Loughlin, “Santorum Under Fire for Comments on Homosexuality,” *CNN*, April 22, 2003, <https://www.cnn.com/2003/ALLPOLITICS/04/22/santorum.gays/>.

Why is it that conservatives react to shifts in gender norms with such aversion? To many liberal Americans, changes in the dynamics of gender norms are viewed as natural progressions in society and generally considered to be positive changes, so why are such shifts extremely problematic for conservative portions of the population? In part, the shifts we have seen in gender norms and sexuality are particularly troublesome for religious conservatives because the legal decisions involving these issues have consistently validated liberal ideas about sexuality and gender. In many ways, the anxiety conservatives experience when confronting shifts in gender norms is a reaction to this legal trend that fails to validate conservative worldviews about gender and sex. Moreover, Brown argues that shifts in gender norms can be anxiety-inducing to religious conservatives because gender norms themselves traditionally offer a sense of normalcy and control to those who support them. For years, making distinctions between the genders has provided an aura of social order and control to many Americans.<sup>103</sup> The extent to which Americans stray from traditional gender norms often serves as an indicator of other large shifts in the American cultural order. For example, the women's suffrage movement in Jim Crow South was met with extreme hostility from religious conservatives because many feared that the recognition of women's rights would inflict mortal wounds on the moral integrity of the entire nation.<sup>104</sup> If women were granted increased rights, they would leave the homes, unleashing a culture rampant with infidelity and increased rates of divorce. Furthermore, white Southerners feared that the legal recognition of women's rights would trigger the recognition of rights for black people, culminating to instigate the "murder of a nation."<sup>105</sup> Thus, in the case of women's suffrage in the Jim Crow South, to oppose women's rights was to defend religion, morality, and

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<sup>103</sup> Brown, "Fundamentalism and the Control of Women," 177.

<sup>104</sup> Griffith, *Moral Combat*, xvi.

<sup>105</sup> *Ibid.*

the gender norms that allow religion and morality to flourish. To conservatives, anxieties about disruptions to gender norms are not circumscribed issues that only pertain to sex and the family, but they are also indicative of widespread shifts in society toward immorality. Because the alteration of gender norms is tied to the alteration of a moral society, conservatives understand there to be extremely high stakes regarding the nation's status quo and how Americans abide by traditional gender norms and sexual mores, instigating the intense culture wars we see surrounding issues of sex.<sup>106</sup>

Further, many conservatives understand there to be a natural or biological element that justifies gender norms and heteronormative relationships. DeRogatis notes how the evangelical understanding of sex rests almost exclusively on the distinction between the genders. Many evangelical writers purport that couples must “understand the ‘natural’ differences between male and female sexual desires” in order to have fulfilling and biblically-sanctioned sex—of course, in the context of heterosexual marriage.<sup>107</sup> Sex can occur only between a man and a woman because that is the only natural sexual pairing by God's creation. It is the wife's job to satisfy her husband because men have strong sex drives, and moreover, by satisfying her husband, a wife helps bolster his ego and sense of self, offering him the support he needs in order to be the provider of the family.<sup>108</sup> To many evangelicals, “The key to success and happiness in Christian marriage is for each person to fulfill his or her specific role and respect the unique qualities and distinctions between husband and wife. Trouble begins when either spouse acts outside of their God-given gender role.”<sup>109</sup> Clearly, then, same-sex couples face friction with this understanding

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<sup>106</sup> Griffith, *Moral Combat*, xx.

<sup>107</sup> DeRogatis, *Saving Sex*, 52.

<sup>108</sup> *Ibid.*, 61.

<sup>109</sup> *Ibid.*, 101.

of marriage and sexuality, as the relationship is missing one gender that is deemed indispensable to a natural union. Gender norms and heteronormative views toward sex, justified by understandings of the natural of proper biological affinity between the two genders, combine to form a conservative vision of sex and sexuality to which conservatives remain steadfastly committed.

Heteronormative views played into the interracial marriage debate in complex ways. While a prominent factor, the narrative that black men threatened the domesticity of white women—the pinnacle of harmony and the glue that binds society—does not entirely capture the picture of the gender-centered anxieties white males experienced during the interracial marriage debate. Kennedy notes how objections to interracial relations are intimately tied to concerns with maintaining racial purity, claiming,

Fears of interracial intimacy, and especially interracial marriage, constituted an emotion and psychological seedbed from which sprouted all manner of efforts to distance blacks and subordinate them. Through segregation, disfranchisement, and the brutality used to effectuate these policies, whites sought to shield themselves from unwanted associations with people whom they considered their racial inferiors.<sup>110</sup>

Tied to objections to interracial intimacies were profound anxieties about racial purity and how the white race could remain in a position of privilege and power, making concerns over gender norms and heteronormativity deeply entangled with concerns over racial hierarchies. Godfrey argues that issues of sex and miscegenation were the most emotionally volatile of the issues to emerge from the era of slavery, and the fear of interracial sex was the most effective motivation to uphold white supremacy.<sup>111</sup> To bolster this claim, Martha Hodes argues that it was mostly during and after Reconstruction that white men violently reacted to sexual transgressions

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<sup>110</sup> Kennedy, *Interracial Intimacies*, 23.

<sup>111</sup> Godfrey, “Eschatological Sexuality,” 147.

between black men and white women.<sup>112</sup> Upon the death of racial slavery, white men became increasingly threatened by the prospect of losing the racial hierarchy that slavery supported,<sup>113</sup> which triggered many to fixate “on the taboo of sex between black men and white women with newfound urgency.”<sup>114</sup> Violence toward interracial intimacies was thus a mixture of gendered anxieties and racial anxieties.

Moreover, we have already discussed how white men often saw interracial relationships between white men and black women as less problematic than those between black men and white women. Kennedy argues that this selective aversion to interracial sex was primarily the product of the white male desire to “suppress sexual competition.”<sup>115</sup> After emancipation, white men ferociously sought to “vilify and contain expressions of black ‘manhood’” because many feared that black masculinity and sexuality were more animalistic and potent, and thus would be more alluring to white women.<sup>116</sup> While robust efforts to tame interracial relations were often framed as efforts to protect white women from the threat of black men, antimiscegenation efforts were also in many ways an effort to demonize black male sexuality and eliminate any cross-racial competition for sexual partners.<sup>117</sup> Although opponents of Reconstruction and, further down the line, desegregation, argued that “talk of racial equality encouraged black men to rape white women, white racists were, in fact, the main principle perpetrator of racially motivated rapes.”<sup>118</sup> Bans on interracial sexual relationships served to uphold gendered

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<sup>112</sup> Martha Hodes, *White Women, Black Men: Illicit Sex in the 19th-Century South* (New Haven and London: Yale University Press, 1997): 147.

<sup>113</sup> *Ibid.*, 4.

<sup>114</sup> *Ibid.*, 147

<sup>115</sup> Kennedy, *Interracial Intimacies*, 17.

<sup>116</sup> *Ibid.*, 189.

<sup>117</sup> *Ibid.*, 205.

<sup>118</sup> *Ibid.*, 178.

stereotypes—white women are in need of protection—but they also largely spoke to an anxiety to uphold a white-dominated patriarchy.

By fixating on the issues of gender roles and sexual norms, white men sought to control racial mixing by controlling the sexual lives of white women, suggesting that anxieties about the gendered aspects of interracial relations were intimately tethered to the goal of “disempowering black people after the Civil War.”<sup>119</sup> White obsessions with maintaining racial purity have profound connections to anxieties about gender roles and the sexual norms of white women. None of this is meant to deny the importance of concerns about racial distinctions and racial purity in the interracial marriage debate, but here, my focus is on how particular racial anxieties work hand-in-hand with anxieties about heteronormativity and patriarchy and how these hybrid anxieties translated into conservative resistance. While we can certainly see how racialized gender norms configured into conservative resistance to interracial intimacies, it cannot be ignored that the debate about interracial sex and marriage took place with the assumption that the interracial couple was heterosexual. The question about the permissibility of interracial sex was never only about the genders of the couple, but the race and the implications that race had on gender. One of the main anxieties about interracial sex was that race somehow affected one’s sexuality. Though interracial relationships certainly challenged gender norms in the twentieth century, these relationships never necessarily shattered gender norms themselves because interracial couples were understood to be heterosexual and could ultimately adapt to these norms,<sup>120</sup> especially when racial anxieties began to quell with the dismantling of the legal structure of segregation.<sup>121</sup> In other words, the sexual anxieties that accompanied racial anxieties failed to

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<sup>119</sup> Hodes, *White Women, Black Men*, 197.

<sup>120</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 181.

<sup>121</sup> *Ibid.*, 118.

persist as an enduring flash point for religious objectors to interracial relationships because ultimately, interracial couples were to a large degree able to conform to heteronormative standards of gender and sex.

The degree to which interracial relationships were relatively compatible with gender norms and heteronormativity is made clear once compared to same-sex relationships. In the context of the same-sex marriage debate, traditional gender norms appear to be entirely irreconcilable with same-sex relationships. DeRogatis paints an expansive picture of the robust system of literature evangelical writers have created, which is entirely devoted to providing sex advice to married Christian couples.<sup>122</sup> These “evangelical sex manuals,” often authored by “husband and wife teams,” are devoted to unpacking the proper way to practice intercourse in the context of a heterosexual marriage.<sup>123</sup> While the literature appears to be written with a white audience in mind, race is not a common factor cited by evangelical authors to dictate who should be having sex with whom. What is extremely prevalent in the manuals, however, is the authors’ dedication to upholding gender norms and standards of heteronormativity. For example, evangelical sex manuals rarely include detailed diagrams or illustrations about sex out of fear that they could be construed as pornographic, which would be sinful.<sup>124</sup> In the sparing diagrams included in the manuals—composed of minimal details and often resembling diagrams one might find in a medical textbook—authors fervently make clear that the two bodies depicted are male and female through details such as ensuring the female has a manicured hand and the male has a

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<sup>122</sup> DeRogatis, *Saving Sex*, 51.

<sup>123</sup> *Ibid.*

<sup>124</sup> *Ibid.*, 58.

strong chest.<sup>125</sup> Above all else, evangelical sex manuals fixate on issues of gender roles and heteronormativity in order to lay out what constitutes biblically-sanctioned sex.

In part, we can attribute conservatives' fixation on only condoning sexual expression in the context of heterosexual relationships to the ways in which same-sex relationships seem to shatter traditional gender norms. Andrew Koppelman argues that homosexuality is considered to be particularly threatening to traditional values because "its existence suggests that even in the realm where a person's sex has been regarded as absolutely determinative, anatomy has less to do with destiny than one might have supposed."<sup>126</sup> When an individual does not conform to the sexual norms of their birth-given gender, then that individual fundamentally threatens how conservatives understand gender and how sexual relationships should be. For example, homosexuality is threatening to males because "it calls into question the distinctive and superior status of being male" within the context of traditional gender norms.<sup>127</sup> If two men are in a relationship, it is unclear who the dominant male figure of the relationship—and consequently, the patriarch of the family—would be. Additionally, Koppelman notes that lesbianism also challenges male privilege because it "denies that female sexuality exists, or should exist, only for the sake of male gratification."<sup>128</sup> Sexual relations between females thus challenge the narrative that female sexuality only exists as a counterpart to male sexuality, instilling females a sexual autonomy that profoundly challenges traditional gender norms because it is divorced from any male desire; this sexual autonomy entails women pursuing sexual relations merely because they want to. In order to uphold traditional gender norms and combat the implications homosexuality

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<sup>125</sup> DeRogatis, *Saving Sex*, 58.

<sup>126</sup> Andrew Koppelman, "The Miscegenation Analogy: Sodomy Law as Sex Discrimination," *The Yale Law Journal* 98, no. 1 (November 1988): 159.

<sup>127</sup> *Ibid.*, 159-60.

<sup>128</sup> *Ibid.*, 160.

has on these norms, conservatives go to great lengths to prove that their approval of sex extends only to heterosexual relations.

Another telling example of conservative discomfort with disruptions to traditional gender norms and heteronormativity is the official position taken by the Catholic Church in regard to same-sex relations. As mentioned earlier, the Catholic Church supported the right of the Lovings to marry. In the Catholic tradition, marriage is considered as a sacrament, and as one of the holiest decisions a couple can make, a marriage should be fully consensual and made with the intentions of lifelong commitment.<sup>129</sup> Thus, many Catholics understood it to be more important that a marriage is stable and happy, regardless of race, than for marriage to be limited to one's own race.<sup>130</sup> Although Catholics were by no means enthusiastic advocates for the cause of interracial marriage, any existing Catholic doctrine certainly did not condemn interracial pairings as Protestant theologies did. Conversely, conservative Catholics remains staunchly opposed to same-sex marriage and homosexual relations more generally. At a glance, this position seems a bit contradictory given the Catholic understanding of marriage as a sacrament. If one would experience the most fulfilling and happy marriage with an individual of the same sex, then why should the Church be opposed to such a suitable union? The answer to this question is certainly layered, but I argue that some of the major themes at the heart of Catholic objections to same-sex relations are what we have already discussed: discomfort with challenges to gender norms and deviations from heteronormativity.

Homosexual relations disrupt both gender norms and heteronormative assumptions about sexual norms in ways that make same-sex relationships irreconcilable with traditional

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<sup>129</sup> Botham, *Almighty God Created the Races*, 73.

<sup>130</sup> *Ibid.*, 72-3.

understandings of gender and sex. Alternatively, interracial sex between a man and a woman is inherently reconcilable with heteronormative standards of sex, allowing conservatives to view such intimacies with some sense of leniency. Some deeply conservative Christians are disturbed by sex that is not oriented toward childbearing, even in the context of heterosexual marriages.<sup>131</sup> Obviously, same-sex couples and the sexual practices of same-sex couples are entirely unacceptable to these conservative groups because child rearing is not possible. Others, who concede that it is okay to have sexual relations without the intent of having a child, appear to be unable to separate same-sex relationships from issues of sex. To these types of conservatives, heterosexual relationships are cast as natural, and consequently, discomfort rarely arises as long as sex takes place between a man and woman who are married to each other. Alternatively, discomforts with sex appear to be intimately tied to any mention of a same-sex couple. For example, conservative talk show host, Bryan Fischer, tweeted during the 2014 Grammys, which broadcasted the marriage of 34 gay and straight couples, ““Heads up: Grammy telecast to feature sodomy-based wedding ceremonies.””<sup>132</sup> By labeling the ceremonies in terms of sodomy, Fischer’s fixation on the sexual practices of gay couples in relation to marriage is made clear. We can also see conservative aversion toward same-sex intimacies in a statement from Pat Robertson in response to photos of same-sex couples kissing on social media. Robertson retorts, ““You’ve got a couple of same-sex guys kissing, do you like that? Well that makes me want to throw up.””<sup>133</sup> Clearly, opponents of homosexuality and the recognition of same-sex marriage at large refuse to accept any deviations from heteronormative standards of sex and romantic expression. By categorizing homosexual relations as deviant and unnatural, conservatives reject

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<sup>131</sup> DeRogatis, *Saving Sex*, 94.

<sup>132</sup> Jones, *The End of White Christian America*, 115.

<sup>133</sup> Bentz, “The Top 10.”

that same-sex couples can have a respectable union in the same way that heterosexual couples can, because the sexual root of such relationships is inherently obscene and incompatible with traditional understandings of gender.

Ultimately, we find that the heterosexual nature of interracial intimacies during the interracial marriage debate failed to undermine traditional assumptions about heteronormativity and gender norms at a fundamental level. Consequently, issues of gender and sex failed to persist as enduring flash points in the interracial marriage debate. In contrast, conservatives in the contemporary debate over same-sex marriage see the ways in which same-sex couples challenge traditional understandings of gender and sex as completely irreconcilable with conservative Christian views of gender and heteronormativity. Thus, despite the fact that gender roles and heteronormativity played a large role in both of these marriage debates, a key difference in the ways that we understand these debates is that traditional understandings of sex and gender continue to be a serious point of contention in the same-sex marriage debate, whereas these understandings were somewhat reconciled in the interracial marriage debate. As Godfrey abridges, “to speak about homosexuality is to speak about sex, whereas to speak about heterosexuality is to merely speak.”<sup>134</sup> Interracial intimacies do not shatter traditional gender roles and heteronormative sexual standards, so conservatives are able to come to terms with interracial relationships to some degree, despite how taboo these relationships once were. Of course, the interracial marriage debate is deeply related to anxieties about racial purity, but what I have unearthed is that the prominent concerns about gender and heteronormativity that permeated both of these marriage debates failed to persist as a central point of resistance in

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<sup>134</sup> Godfrey, “Eschatological Sexuality,” 155.

regard to interracial marriage. In contrast, these concerns are central to conservative Christians in the same-sex marriage debate and continue to be enduring flash points for religious opposition to same-sex unions. Same-sex relationships simply cannot conform to conservative norms surrounding sex, painting these relationships as fundamentally threatening to traditional understandings of gender and sexuality, and thus, conservative Christians' entire worldview on sex and gender.

### *Challenges to the Heteronormative Definition of Traditional Marriage*

Although the welcoming of interracial couples to the institution of marriage may cast *Loving* as a gateway for same-sex couples to gain similar access, it is inaccurate to assume *Loving* was instrumental in paving the way for *Obergefell*. Conservative discomfort with the ways in which same-sex relationships challenge traditional gender norms and heteronormativity lurk in the background of debates over the definition of marriage and have interesting legal implications. In particular, conservatives passionately assert that any legal definition of marriage must be consistent with the definition of traditional marriage, which revolves around a heteronormative view of marriage. Though conservatives during the *Loving*-era may have argued that a traditional definition of marriage must have racial dimensions, I will mainly focus on one generally accepted aspect of a traditional definition of marriage—namely, that marriage is between a man and a woman.

First, I will unpack the notion of traditional marriage by examining narratives offered by a well-known conservative political organization, Focus on the Family (FOTF). FOTF prides itself as a strong advocate for traditional marriage and the traditional family values that such

marriages generate, so it is of use to examine exactly what they, and many other conservatives, mean by traditional marriage. FOTF first claims that traditional marriage is a “sacred covenant designed by God,” highlighting the religious and moral significance of matrimony.<sup>135</sup> Further, the organization claims that marriage is the “basic building block of human civilization,” emphasizing the profound social significance of traditional marriage and asserting that the traditional definition of marriage is so fundamental that it predates any legal system.<sup>136</sup> FOTF also argues that traditional marriage “is intended by God to be a thriving, lifelong relationship between a man and a woman,” and Christians must fight to defend God’s intended design of the institution.<sup>137</sup> Sex differences are quite significant to FOTF and other conservatives as a key factor in defining traditional marriage because differences in sex “serve as the foundation of marriage, the family, and subsequently, society. As God intended, male and female co-exist in equal and complementary roles in ways that mysteriously reflect *who* God is and lead to the general betterment of civilization.”<sup>138</sup> Thus, in the definition of traditional marriage, we can see prominent themes of gender norms and heteronormativity shine through: it is the complementary distinctions between the genders that make marriage the special institution that it is.

In an attempt to distinguish *Masterpiece Cakeshop* from a similar scenario where the couple that is denied service is interracial, scholar, Ryan T. Anderson, argues, “If a business refused to participate in an interracial marriage, it was because that business thought whites were

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<sup>135</sup> Focus on the Family, “About Us: Our Values,” Focus on the Family, 2020, <https://www.focusonthefamily.com/about/foundational-values/>.

<sup>136</sup> Ibid.

<sup>137</sup> Ibid.

<sup>138</sup> Focus on the Family Issue Analysts, “Casting God’s Vision for Sex and Sexuality,” Focus on the Family, July 29, 2019, <https://www.focusonthefamily.com/get-help/casting-gods-vision-for-sex-and-sexuality/>.

superior to blacks and therefore shouldn't marry them."<sup>139</sup> Alternatively, in the context of same-sex marriage, "a small number of bakeries can't in good conscience celebrate same-sex marriage because they think marriage can't be same-sex."<sup>140</sup> Here, Anderson's argument strikes at the heart of a central argument that distinguishes interracial marriage from same-sex marriage. Critically, we must first observe that interracial marriage simply does not challenge the heteronormative aspects of the traditional definition of marriage. As Peter Wallenstein correctly notes, *Loving v. Virginia* was about maintaining traditional marriage with the exception that race could no longer be a restricting condition to such a union.<sup>141</sup> In order to prevent a similar form of logic to unfold in terms of sex—namely, that sexual orientation or gender cannot be a restricting condition on marriage—many conservatives latch onto the notion of traditional marriage to distinguish same-sex marriage from interracial marriage. In a case from the 1970s about gay marriage, lawyers Paul Baurick and John Singer articulated the tenuous connection between the legal battle for interracial marriage and that for same-sex marriage, arguing that both *Loving* and *Perez v. Sharp* (1948), the case that invalidated antiscegenation statutes in California, failed to have any bearing on the invalidation of laws prohibiting same-sex marriage. Baurick and Singer claimed: "an analogy between racial classifications involved in *Loving* and *Perez* and the alleged sexual classification involved" is inappropriate.<sup>142</sup> In the antiscegenation cases, "the parties were barred from entering into a marriage relationship because of an impermissible racial classification. There is no analogous sexual classification involved in the instant case."<sup>143</sup> The

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<sup>139</sup> Ryan T. Anderson, "The Continuing Threat to Religious Liberty," *National Review*, August 3, 2017, <https://www.nationalreview.com/2017/08/religious-liberty-under-attack/>.

<sup>140</sup> *Ibid.*

<sup>141</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 179.

<sup>142</sup> *Ibid.*, 180.

<sup>143</sup> *Ibid.*

two lawyers maintained that the same-sex couple was “not being denied entry into the marriage relationship because of their sex; rather, they are being denied entry into the marriage relationship as one which may be entered into only by two persons who are members of the opposite sex.”<sup>144</sup> Thus, to Baurick and Singer, it is not a question of whether or not same-sex couples are being discriminated against because of their sex when they are barred from marrying. Same-sex couples cannot marry because such a marriage is incoherent under the traditional definition of marriage. Alternatively, it is logically natural for interracial couples to be able to marry because such a marriage is entirely consistent with heteronormative aspects of traditional marriage. While *Loving* certainly challenged racialized notions of marriage, many saw the case as an extension of marriage to members of different races in response to what was clearly race discrimination—not necessarily a complete reformulation of the institution of marriage itself.

While it is true that race discrimination and sex discrimination are not identical in nature, the overlap between narratives surrounding these two breeds of discrimination is still worth examining. Although the *Loving* Court declared that antimiscegenation statutes constitute race discrimination, legal scholar, GW Dent, argues that it is simply false that laws defending traditional marriage constitute sex discrimination. Dent insists that limiting marriage to those of the opposite sexes is not discriminatory because “traditional law treats the sexes equally in that everyone may marry a person of the other sex but not a person of the same sex.”<sup>145</sup> Noteworthy, however, is how Dent’s logic is eerily similar to the legal arguments formerly presented in support of antimiscegenation statutes: so long as both races were punished equally for the act of interracial marriage, no one race is discriminated against unlawfully.<sup>146</sup> After dismissing laws

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<sup>144</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 180.

<sup>145</sup> George W. Jr. Dent, “The Defense of Traditional Marriage,” *Journal of Law and Politics* 15, no. 581 (1999): 608.

<sup>146</sup> Kennedy, *Interracial Intimacies*, 22.

against same-sex marriage as sex discrimination using this problematic logic, Dent asserts that we should not consider laws banning interracial marriage to have the same moral weight or legitimacy as those banning same-sex marriage. Dent's claim rests on his conception of *Loving* having enshrined a Western and progressive idea of marriage into American culture.<sup>147</sup>

Contrarily, Dent views same-sex marriage as inherently non-Western, contending that, since *Loving* ultimately defends Western values, the case "argues against [the] recognition of same-sex marriage."<sup>148</sup> Pulling the influence of religion into his argument, Dent continues to argue that the analogy between same-sex marriage and interracial marriage is faulty, because

Jim Crow segregation was a regional aberration, a deviation from Western tradition and from Christian and Jewish doctrine. By contrast, disapproval of homosexuality and reverence for traditional marriage are integral to Western tradition and Christianity. Thus a better comparison than racial integration would be cannibalism or commission of sex acts in public. Both have been condoned in some societies but long abhorred in Western civilization. It is doubtful that legalizing these acts would rapidly lead to their public acceptance.<sup>149</sup>

Given our previous discussion of the weight antimiscegenation sentiments carried in American culture, I would argue that Dent's claim is not quite fair nor accurate. Religious justification for keeping the races maritally distinct held tremendous weight in wide swaths of the nation for a majority of American history. Religious justification for antimiscegenation statutes was not only well-developed, but widely accepted in numerous regions of the U.S. To characterize these sentiments as backwards and an anomaly of Western culture overlooks the prevalence of such views and mischaracterizes them to be less serious than they were. In both culture wars, Christianity was or is employed to justify restricting marriage to a certain class of citizens, and to

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<sup>147</sup> Dent, "Defense of Traditional Marriage," 615.

<sup>148</sup> *Ibid.*, 615.

<sup>149</sup> *Ibid.*, 622.

categorize one theological stance as more Western than the other is somewhat misguided. While the discriminatory aspects of interracial marriage and same-sex marriage are certainly distinct, it is enlightening to investigate the ways by which conservatives thinkers, like Dent, attempt to divorce the two issues, because such attempts seem to highlight the discomforting overlap that exists between them.

What is the function of traditional marriage, and why is it worth defending? From this point, I will evaluate GW Dent's argument in support of traditional marriage in his piece, *The Defense of Traditional Marriage*. Although Dent claims that he is able to argue successfully for traditional marriage in purely secular terms, his constant reference to traditional Christian values render this success questionable. Though we might conclude that the traditional definition of marriage is irrevocably tied to Christian thought, this is not always the case. In fact, Dent's line of argumentation nicely illustrates the ways in which arguments put forth in support of the traditionalist definition of marriage often resemble a mix of both secular and theological arguments. Fundamentally, Dent asserts that the government has the right to prohibit non-traditional forms of marriage because the government has the right to "induce desirable behavior" in its citizens,<sup>150</sup> and it is coincidental that the desirable behavior the government should induce is largely consistent with Christian theology.<sup>151</sup> Dent's passive acceptance of Christian understandings of marriage is unsatisfactory, as it overlooks the profound influence Christianity, primarily Protestantism, has had on shaping American culture, permeating the American legal system. Thus, it is noteworthy to keep in mind whether or not Dent's defense of traditional marriage is truly divorced from religious thought or steeped in it. Regardless of his

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<sup>150</sup> Dent, "Defense of Traditional Marriage," 587.

<sup>151</sup> *Ibid.*, 590.

success in presenting a secularized argument in support of traditional marriage, Dent concisely presents an array of arguments that quite nicely characterize conservative Christian reasoning put forth in support of traditional marriage, as I will demonstrate by pulling specific religious positions into the conversation. Through the lens of Dent's work, we can examine the common threads among conservatives that represent the main objections to same-sex marriage as a type of marriage that clashes with traditional marriage.

One central function of traditional marriage that Dent puts forth as a compelling reason to defend the institution is the rearing of children—a function which Christians have long recognized.<sup>152</sup> Conservatives with views similar to Dent's stress, "Under every standard—educational achievement, drug use, criminal activity, physical and emotional health, social adjustment and adult earnings—children of intact [traditional] marriages have fewer problems than children of broken families."<sup>153</sup> Broken families raise broken people who, in turn, "pull down the behavior" of others in society, and same-sex marriages constitute a broken family since they lack both a mother and father figure.<sup>154</sup> By providing children with a stable home that is conducive to their flourishing, those in traditional marriages help to raise the next generation to be virtuous citizens. Anita Bryant, a Christian singer and anti-gay activist during the 1970s, organized a series of "Save Our Children" campaigns, which attempted to expose the evil intentions of "militant homosexuals" in corrupting children.<sup>155</sup> Bryant and Christians with similar views argued that the gay rights movement must be put to an end because it endangered tautologies that have been used to inundate children with moral values for thousands of years.<sup>156</sup>

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<sup>152</sup> Dent, "Defense of Traditional Marriage," 593.

<sup>153</sup> *Ibid.*, 594.

<sup>154</sup> *Ibid.*, 598.

<sup>155</sup> Griffith, *Moral Combat*, 290.

<sup>156</sup> *Ibid.*, 291.

In particular, children must be taught in a way that is consistent with God's plan for humanity, learning a "humble compliance with the will of God, whatever one's personal preference."<sup>157</sup> Homosexuals would corrupt children and prevent them from learning these important religious values, detracting civilization from God's plan.

Furthermore, Dent claims that children raised in a traditional household are better equipped to navigate a binary gendered world because "it is reasonable to assume that children with both a mother and father will learn better how to live in a world composed of males and females."<sup>158</sup> FOTC claims that the sexual chaos unleashed by the gay rights movement has regrettably found its way into the lives of children in the form of gender confusion. The group expresses deep concern with efforts by public schools to provide lessons on gender identity, promoting tolerance for transgender or gender-fluid individuals.<sup>159</sup> In response, an information pamphlet encourages parents to talk to children about embracing gender distinctions to "show God that we are thankful for his gift of being male and female."<sup>160</sup> Additionally, parents should tell confused children the two genders are a gift from God and allow for marriages like that between "mommy and daddy."<sup>161</sup> Overall, Dent and others argue that traditional marriage is entirely beneficial to both children and society at large because "the family provides both the literal nursery for our children and the metaphoric nursery of the family of man."<sup>162</sup> Without the

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<sup>157</sup> Griffith, *Moral Combat*, 291.

<sup>158</sup> Dent, "Defense of Traditional Marriage," 595.

<sup>159</sup> TrueTolerance, "Equipping Parents to Respond to Gender-Confusing Messages in Schools," TrueTolerance: A Project of Focus on the Family, n.d., [https://media.focusonthefamily.com/free-downloads/pdf/Gender\\_Confusing\\_Messages\\_Schools\\_True\\_Tolerance\\_Guide\\_2017.pdf](https://media.focusonthefamily.com/free-downloads/pdf/Gender_Confusing_Messages_Schools_True_Tolerance_Guide_2017.pdf), 4-5.

<sup>160</sup> *Ibid.*, 6.

<sup>161</sup> *Ibid.*, 6.

<sup>162</sup> Dent, "Defense of Traditional Marriage," 598.

nurturing of a traditional family, children grow up to be confused adults who are unable to live out the word of God and be virtuous citizens.

Highlighting an immediate concern about the effects of the sexual practices of homosexuals on children, another common narrative amongst religious conservatives is that, by allowing same-sex couples to raise children, same-sex couples are inundating children with their “homosexual agenda,” unjustly tricking children into thinking homosexual behavior is permissible. Worse, conservatives fear that homosexuals seek to convince children that they, themselves, might be homosexuals.<sup>163</sup> In their book, which is written precisely to warn against the homosexual agenda, Osten and Sears claim that same-sex couples use children as “pawns” in their ultimate quest to reshape the sexual mores of society to be more tolerant of the deviant sexual practices of homosexuals.<sup>164</sup> According to Osten and Sears, “Legalizing same-sex unions is a warm-up act” for same-sex couples, who ultimately seek “to eliminate any barriers, any signposts, that limit or channel the exercise of human sexuality.”<sup>165</sup> Under Osten and Sears’ doomsday vision of the gay rights movement, children are regrettably trampled over by homosexual adults who wish to create a new generation of citizens that tolerate deviant sex practices.

Beyond its orientation toward producing children, traditional marriage is also presented as a social good. Marriage teaches individuals to put others’ needs before their own,<sup>166</sup> although, it is somewhat unclear how this goal is achieved in only traditional marriages and not same-sex

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<sup>163</sup> Godfrey, “Eschatological Sexuality,” 154.

<sup>164</sup> Sears and Osten, *The Homosexual Agenda*, 93.

<sup>165</sup> *Ibid.*, 96.

<sup>166</sup> Dent, “Defense of Traditional Marriage,” 596.

marriages. Dent stresses that, despite progressions in modernity, we simply cannot ignore the social goods that traditional marriage inspires:

Although some dismiss the traditional family as an anachronism, a vestige, a historical relic, the opposite is true—the traditional family is more essential now than ever. In order to thrive the modern, liberal, capitalist democracy needs citizens with higher job skills, education, and moral character than pre-modern or undemocratic societies. These qualities are best cultivated in the traditional family; indeed, no society has developed such a citizenry except through the traditional family.<sup>167</sup>

Non-traditional marriages are thus not conducive to a Western, capitalistic democracy under Dent’s picture, so they should be prohibited. The norms generated by traditional marriages, and the way these norms orient us to relate to others, are a vital source of American success. Contrarily, gay marriage degrades the way we “see and relate to others,” encouraging citizens to stray from the traditional norms that allow the country to prosper.<sup>168</sup> If society chooses to validate gay marriages as equal to traditional marriages, large segments of the population would be supporting a type of marriage that does not offer sufficient conditions for raising competent children, who will become the next generation of adult citizens, endangering the future welfare of society.<sup>169</sup> The Christian organization, Family Research Council (FRC), claims that true families “are formed only by ties of blood, marriage or adoption,” understanding marriage to be “a union of one man and one woman.”<sup>170</sup> An increase in same-sex couples, therefore, takes away from the pool of candidates to form traditional families because same-sex couples are incapable of forming the type of family that FRC considers to be of value to society. The homosexual “movement” asserts “a radical personal autonomy” that flies in the face of the traditional

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<sup>167</sup> Dent, “Defense of Traditional Marriage,” 596.

<sup>168</sup> *Ibid.*, 599.

<sup>169</sup> *Ibid.*, 601.

<sup>170</sup> Family Research Council, “Marriage and Family,” *Family Research Council* (blog), n.d., <https://www.frc.org/Marriage-and-Family>.

Christian values that allow for the flourishing of families that have supported society for so long.

<sup>171</sup> Further, the validation of a non-reproductive relationship somehow disincentivizes potential traditional marriage candidates from wanting to participate in traditional marriages, instigating a society that lacks the stability of traditional households.<sup>172</sup> Dent concedes that Judeo-Christian values are the reason why the U.S. is so successful, suggesting that it would be a mistake to abandon those values.

Another fear that arises when we talk of traditional marriage is the fear of deviant sexuality within marriages. Many conservatives allege that homosexuals are so sexually deviant that they cannot even fit into the institution of marriage, let alone traditional marriage. In a somewhat awkward claim, Dent asserts that most gay people do not even want to get married because “many homosexuals despise marriage as stifling and fear that validating gay marriage ‘would further outlaw all gay and lesbian sex that is not performed in a marital context.’ For some, promiscuity is desirable, not a fault to be corrected by punishing gays into marriage.”<sup>173</sup> Because homosexual individuals are somehow more predisposed to desire extramarital sex than heterosexual individuals, it is supposedly to the benefit of same-sex couples that they are barred from the institution of marriage. Writer for FRC, Peter Sprigg, admonishes the sexual behavior of homosexuals—particularly gay men—citing numerous studies that found that “homosexual men who were *in partnered relationships* had an *average* of eight sexual partners *per year* outside of the primary relationship,” which stands in “astonishing contrast” to the married couples, among whom 75 percent of men and 85 percent of women remained faithful throughout

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<sup>171</sup> Peter Sprigg, “How to Respond to the LGBT Movement,” Family Research Council, 2018, <https://downloads.frc.org/EF/EF18B16.pdf>, 1.

<sup>172</sup> Dent, “Defense of Traditional Marriage,” 601.

<sup>173</sup> *Ibid.*, 643.

their entire marriage.<sup>174</sup> Homosexuals, according to Sprigg, are not fit for marriage, and if “homosexual relationships, promiscuity and all, are held up to society as being a fully equal part of the social idea that is called ‘marriage,’ then the value of sexual fidelity as an expected standard of behavior for married people will further erode—even among heterosexuals.”<sup>175</sup> Thus, it is to the detriment of the institution of marriage to welcome same-sex couples, because the sexual promiscuity of homosexuals will spread to other, heterosexual couples involved in the institution, as well.

Shifting his argument to address women, Dent asserts that defending traditional marriage is a good thing for feminist women. Dent claims, “Some lesbians disdain marriage as inherently patriarchal and prefer lesbian communes or question whether lesbian lovers should even live together.”<sup>176</sup> Thus, the traditional gender norms that traditional marriages incur may be distasteful to some lesbians, so it makes sense that they need not be included in the coveted institution. While Dent attempts to provide a progressive argument, arguing that women who disagree with traditional gender norms are better off avoiding the institution of traditional marriage altogether, there is more going on in his argument. Dent’s claims also serve to validate the traditional gender norms that keep women subservient to men. Lesbian couples threaten the traditional role of the woman as the wife and mother who stays in the home and listens to her husband, and to allow lesbians access to marriage puts female gender norms at risk of being discarded. Rather than fix the imbalances of power between the genders in a traditional marriage,

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<sup>174</sup> Peter Sprigg, “The Top Ten Harms of Same-Sex ‘Marriage,’” Family Research Council, 2011, <https://downloads.frc.org/EF/EF11B30.pdf>, 4.

<sup>175</sup> Ibid.

<sup>176</sup> Dent, “Defense of Traditional Marriage,” 643.

Dent argues that those who disagree with this power imbalance simply are not cut out for the institution.

Although we have certainly seen how narratives of sexual deviancy undergirded antagonism toward interracial marriage, what we can see in the warnings of Dent and conservatives alike is the notion that same-sex relationships give rise to a different, more threatening set of sexual anxieties and aversions. In the midst of the racialized language about black men and their threat to white women, one prominent concern intermixed with these sexual anxieties was the way in which black men threatened a white-dominated patriarchy.<sup>177</sup> Moreover, as I have previously argued, racialized arguments concerning heteronormativity were easier to resolve for traditional Christians than the threats same-sex relations pose to heteronormativity. What is critical to note in the juxtaposition of interracial sexual deviancies and same-sex sexual deviancies is the fact that, despite the anxieties interracial sex creates, race distinctions in matters of sex fail to fundamentally undermine heteronormative standards, and consequently, the heteronormative aspect of traditional marriage. Racial anxieties about white purity certainly mixed with narratives of the sexual deviancy of black people, but in many ways, the topics of gender and sexuality dropped out of the interracial marriage debate. Contrarily, arguments about the sexual deviancy of same-sex couples appear to be inextricable from the main source of anxiety that leads conservatives to be opposed to such unions—deviations from gender norms and heteronormativity—and persist as an intense point of contention in the debate over same-sex marriage. Therefore, for many conservatives, it is easier to detect that the supposed sexual deviancy of homosexuals poses an immediate danger to the heteronormative aspects of the

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<sup>177</sup> Godfrey, “Eschatological Sexuality,” 153.

traditional family than that of interracial couples, because apprehensions toward homosexual deviancy are the dominant source of discomfort with allowing these couples to marry. In comparison, interracial couples were largely able conform to heteronormative standards, making interracial marriage seem less threatening to the gendered aspect of traditional marriage.

More than in the case for interracial intimacies, we can see how same-sex intimacies are seen by conservatives as direct threats to traditional families and marriages, because same-sex relations are seen as fundamentally entangled with deviant sex practices. Because conservatives often cannot look past the sexual aspect of same-sex partnerships, same-sex marriage is largely defined by its inability to conform to traditional forms of heteronormativity. For example, when considering the legal recognition of same-sex marriage, Sears and Osten claim that allowing same-sex couples access to the institution “means marriage will be no better than anonymous sodomy in a bathhouse.”<sup>178</sup> The types of sex associated with same-sex marriage, more so than the heterosexual sex associated with interracial marriage, directly challenge basic assumptions about the very definition of marriage itself—that it is meant to be a monogamous union between one man and one woman—which unsettles and disorients conservatives. If homosexual acts are permissible in the marriage setting, then same-sex couples effectively transform the definition of marriage to permit subversive expressions of sexuality, leaving traditional marriage in its wake.

The validation of same-sex marriage also threatens gender norms that are associated with and lend support to traditional marriages. Griffith notes that to conservative Christians, the gay rights movement is just “one more arm of the secular humanist campaign to destabilize the nuclear family, weaken male authority, and de-Christianize the nation. Its impact urgently

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<sup>178</sup> Sears and Osten, *The Homosexual Agenda*, 96.

need[s] to be contained.”<sup>179</sup> If American families lack the structure that traditional marriages offer—a household with a father and a mother—then how are we to make sense of the family? Sprigg warns that “the parent who says, ‘I’m gay,’ is telling his or her child that he or she has no intention of providing a parent of both sexes for that child. And a homosexual who ‘marries’ someone of the same sex is declaring that this deprivation is to be permanent—and with the blessing of the state.”<sup>180</sup> Sprigg’s words certainly depict a chaotic and bleak picture of family that resonates strongly with many other conservatives; how are we to make sense of the structure of the family without the distinctions between the sexes? We can return to Dent, who offers the following argument in support of standing by the gender norms of traditional marriages:

[M]ales are domesticated not by a wedding but by women and children. By law and by social and religious tradition fathers are supposed to provide for and instruct their children. Despite the declining importance of gender differences, an expectation... lingers that husbands should be the primary breadwinners in the family. These laws, traditions, which urge men to be socially responsible, would not extend to same-sex marriages.<sup>181</sup>

Dent’s argument here is reminiscent of the evangelical thought DeRogatis explores in her work—namely, that it is the complementary nature of the two genders that create stable marriages and stabilize society more generally. According to many evangelicals, men and women are simply not equal.<sup>182</sup> Women were specifically created to “have the desire to nurture children, a desire that is fulfilled with the help of a man who can support her.”<sup>183</sup> Happiness

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<sup>179</sup> Griffith, *Moral Combat*, 288.

<sup>180</sup> Sprigg, “The Top Ten Harms of Same-Sex ‘Marriage,’” 5.

<sup>181</sup> Dent, “Defense of Traditional Marriage,” 605.

<sup>182</sup> DeRogatis, *Saving Sex*, 102.

<sup>183</sup> *Ibid.*, 103.

eludes those who blur gender norms,<sup>184</sup> so these norms simply should not be challenged in order to maintain a happy, stable society.

Thus, embedded in the defense of the gender norms buttressed by traditional marriages, we can see how traditional definitions of marriage support the patriarchal structures to which many conservatives cling. Women supposedly have a vested interest in sheltering traditional marriages, because “in all societies a parent who leaves the family is more likely to be the father.”<sup>185</sup> As such, women have an interest in taming men, and by endorsing traditional marriages, women support a cultural ideal that, when practiced widely, influences men to stay with their families. Men, according to Dent, are more reluctant to marry, so by creating an environment in which traditional marriage is expected, men have more incentive to marry women.<sup>186</sup> Dent claims homosexuality to be more common among men than women, so women should recognize homosexuality as an immediate threat since “heterosexual monogamy requires equal numbers of marriageable men and women.”<sup>187</sup> Thus, “even a small increase in the number of active homosexuals could exacerbate the imbalance between marriageable men and women,” leaving many women husbandless and childless.<sup>188</sup> Why women supposedly crave traditional marriage more than the average man goes unaddressed, yet Dent’s silence on this matter is quite emblematic of the patriarchal nature conservative supporters of traditional marriages seek to maintain. The male-centric attitude that accompanies traditional gender norms and traditional marriage still prevails, despite Dent’s attempt to frame traditional marriage as an institution that benefits women rather than oppresses them.

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<sup>184</sup> DeRogatis, *Saving Sex*, 103.

<sup>185</sup> Dent, “Defense of Traditional Marriage,” 610.

<sup>186</sup> *Ibid.*, 611.

<sup>187</sup> *Ibid.*, 614.

<sup>188</sup> *Ibid.*

Furthermore, many conservatives claim that, by opening the door to marriage for same-sex couples, the U.S. is opening the door to other undesirable forms of marriage—an argument that was certainly less pronounced during the legalization of interracial marriage. Adding to Dent’s assertion that permitting same-sex marriage will ultimately lead to shortage of marriageable men with whom women can create traditional families, Dent claims that “validating gay marriage [will] also increase the social need for polygamy.”<sup>189</sup> This is undesirable because monogamy “encourages a man to care for his wife (because he can only have one) and children (because he is likely to have fewer children than a polygynist). Monogamy also protects weaker men by preventing stronger men from accumulating harems.”<sup>190</sup> Aside from his misogynistic justification for monogamy, it seems that many Americans would agree with Dent’s point that polygamy should not be considered a valid form of marriage in the U.S. Dent also claims that, logically, if same-sex marriage is allowed, then courts will be able to legalize other forms of undesirable marriage, including endogamy, bestiality,<sup>191</sup> and child marriage.<sup>192</sup> Similarly, Sprigg argues that, if “love and companionship are” the only “truly necessary elements of marriage,” then “why should *other* relationships that provide lifelong commitment,” such as pedophilic or incestuous relationships, “not *also* be recognized as ‘marriages?’”<sup>193</sup> Clearly, most people do not want the law to allow pedophiles to marry children; however, it must be stressed that same-sex marriage undermines the very definition of traditional marriage in such serious ways that conservatives envision marriage unraveling to incorporate many types of undesirable relationships as a consequence. In contrast, interracial marriage failed

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<sup>189</sup> Dent, “The Defense of Traditional Marriage,” 629.

<sup>190</sup> *Ibid.*, 629.

<sup>191</sup> *Ibid.*, 628.

<sup>192</sup> *Ibid.*, 637.

<sup>193</sup> Sprigg, “The Top Ten Harms of Same-Sex ‘Marriage,’” 7.

to challenge the definition of traditional marriage as directly as same-sex marriage, amounting to a less catastrophic blow to the integrity of the institution of marriage itself. Though interracial marriage certainly challenged racial assumptions about the institution, the interracial marriage debate left the gendered aspect of marriage essentially untouched, leaving conservatives with some security about their definition of marriage.

A prevalent narrative that exemplifies how, to many conservatives, homosexuality threatens the definition of marriage in ways that interracial intimacies fail to achieve, is the idea that same-sex marriage somehow cheapens the institution of marriage as a whole. Dent suggests that same-sex couples do not truly want to be incorporated into the institution of marriage, but same-sex couples merely want the “honor” that access to marriage bestows.<sup>194</sup> As modern, liberal culture—the culture that supports adding same-sex marriage to the mix of legal marriages—chips away at traditional marriage, conservatives like Osten and Sears claim that “marriage is being increasingly cheapened to the point that it could soon become irrelevant.”<sup>195</sup> Same-sex marriage is not understood as something that occurs in a vacuum, incurring no real effect on those who do not participate. Rather, conservatives argue that merely including same-sex couples into the mix of eligible people for marriage ruins the matrimonial institution for everyone. Consider the following quote from David Frum, former speechwriter for George W. Bush:

The argument over gay marriage is only incidentally and secondarily an argument over gays. What it is first and fundamentally is an argument over marriage. Unless a government is sufficiently powerful and disdainful of religion to crush the objection of the local churches—and a few governments are—gay marriage will turn out in practice to mean the creation of an alternative form of legal coupling that will be available to homosexuals and heterosexuals alike. Gay marriage, as the French are vividly

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<sup>194</sup> Dent, “Defense of Traditional Marriage,” 619.

<sup>195</sup> Sears and Osten, *The Homosexual Agenda*, 90.

demonstrating, does not extend marital rights; it abolishes marriage and puts a new flimsier institution in its place.<sup>196</sup>

The homosexual agenda threatens the stability of marriage itself as an institution, undermining the integral role traditional marriages play in maintaining the stability of the nation. FRC similarly asserts that same-sex marriage is “counterfeit” marriage that “cheapens and degrades the real thing.”<sup>197</sup> Ominously, the group claims that “virtually no society has ceased to regulate sexuality within marriage as defined as the union of a man and a woman, and survived.”<sup>198</sup> Unlike the case with interracial marriage, conservatives emphatically argue that same-sex marriage will poison the institution from the inside, spoiling marriage for all who wish to participate. Even more, given the importance of marriage as a foundation of society in the eyes of such commentators, this poisoning of marriage bleeds further, infecting society itself.

Clearly, we can see that conservatives consider same-sex marriage to radically undermine and jeopardize the institution of traditional marriage because same-sex unions are irreconcilable with the gendered aspect of the traditional definition of marriage: the union between one man and one woman. Consequently, it is difficult for conservatives to adjust their understanding of marriage to incorporate couples of the same sex. It is unclear how similar arguments could be put forth in respect to interracial marriage, because, despite the racial and sexual anxieties that opponents to interracial marriage held, such a union ultimately conforms to the traditional definition of marriage in a heteronormative sense. To be clear, the *Loving* decision certainly posed a threat to racialized understandings of marriage, but critically, the decision did not shatter

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<sup>196</sup> David Frum, “The Fall of France,” *National Review*, November 8, 1999, quoted in Alain Sears and Craig Osten, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today* (Nashville, Tennessee: Broadman & Holman Publishers, 2003): 92.

<sup>197</sup> Timothy J. Dailey, “The Slippery Slope of Same-Sex Marriage,” Family Research Council, 2004, <https://downloads.frc.org/EF/EF04C51.pdf>, 10.

<sup>198</sup> *Ibid.*

longstanding heteronormative assumptions about the definition of marriage. In contrast, opponents to same-sex marriage simply cannot ignore their discomforts with homosexual activity when addressing the issue of marriage. Thus, despite the supposed sexual deviancy of interracial couples, it was not quite as difficult for conservatives to locate a space in the institution of marriage for interracial couples when considering issues of gender and sex as it is for conservatives to now find room for same-sex couples, who flout traditional gender norms and traditional marriage in almost every sense. The question remains: how do these convictions that conservatives hold about the immutability of gender norms and traditional marriage translate into the intense legal battles that we see conservative organizations undergo in the current culture war surrounding same-sex marriage and gay rights?

### **Section III:**

#### **A Turn in Free Exercise Jurisprudence and the Political Clout of Christian Victimhood**

Conservative Christian anxieties about the evolution of society's understandings of gender and sexuality extend far beyond private contempt, for the recent societal trend away from traditional sexual mores has triggered conservatives to take serious action socially and politically. The rise of feminism and disputes over the supposed immutability of gender norms have sparked a sense of "cultural dislocation" among American conservatives, leaving them bewildered as to how the U.S. has strayed so far from the values they have long understood to be permanent fixtures of a moral life.<sup>199</sup> We can see how the pervasive anxieties conservatives hold regarding the role of women forge a moral and political ambition to slow America's departure

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<sup>199</sup> Balmer, "American Fundamentalism," 54.

from traditional gender norms, and eventually, to return to a traditional culture that resonates with conservative values. Groups like Focus on the Family acknowledge that sex-based roles have changed throughout time across cultures, but they maintain that there is an essence of gender roles that is immutable by nature.<sup>200</sup> Because these groups understand gender to be unchangeable to a certain extent, the cultural changes that have unfolded in recent years regarding gender and sexuality are perceived as directly subversive to the values of a traditional moral society. Fearing the moral degradation that results from contemporary liberal culture, issues of sex and gender are particularly galvanizing for conservatives and have had a striking effect on conservatives' political agendas.<sup>201</sup> As Balmer notes, the political agenda that contemporary fundamentalists pursue is a manifestation of a "desperate attempt to reclaim the nineteenth-century for themselves and for a culture that has abandoned that ideal."<sup>202</sup> Efforts to keep the genders, particularly women, confined to their traditional roles are about more than just a preferred way of life. Commitments to traditional understandings of gender, sex, and marriage signify a more cosmic commitment to maintaining a moral order that preserves the culture conservatives hold dear to both their personal identity as well as the identity of the nation. Given the serious ties conservatives see between the observance of traditional gender norms and sexual mores with the well-being of the nation, it is relatively unsurprising that we see concerned religious groups translate their moral distaste with contemporary American culture into committed political and legal action.

Though there was no shortage of white Protestants eager to protest interracial marriage, today's heightened and organized political action on the part of conservative Christians was

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<sup>200</sup> Focus on the Family, "About Us: Our Values."

<sup>201</sup> Balmer, "American Fundamentalism," 55.

<sup>202</sup> *Ibid.*, 59.

notably absent in the 1950-60s. When *Loving* was decided, it is crucial to acknowledge that opponents to interracial marriage faced a vastly different constitutional terrain than opponents in contemporary America currently navigate. First, *Loving* unfolded during a period in history when it was somewhat unclear whether or not the Fourteenth Amendment, and consequently the Equal Protection Clause, applied to individual states.<sup>203</sup> Furthermore, Randall Kennedy remarks that the historical record “strongly indicates that the politicians who framed the Fourteenth Amendment did *not* intend for it to render illegal statutes prohibiting interracial marriage.”<sup>204</sup> In fact, proponents of the Fourteenth Amendment repeatedly stressed that the amendment would fail to affect the legality of antimiscegenation statutes if such laws were properly drafted.<sup>205</sup> Additionally, the Court had not yet stepped into its role as a sort of moral arbitrator. While today, many understand the Supreme Court to be the government body that radically alters the moral landscape of the nation’s laws through landmark decisions such as *Obergefell v. Hodges* it was not until the mid-1980s that the Court truly became the site to enact serious moral change in the arena of sexuality and marriage.<sup>206</sup> Consequently, *Loving* was not necessarily interpreted as a serious threat to the heteronormative moral order for Christians, because the conservatives in the 1960s did not necessarily see *Loving* as one in a long line of decisions that was molding the moral fabric of society regarding sexuality and gender in an unsavory way.

One notable area of politics that was markedly different in the *Loving*-era is the realm of free exercise jurisprudence. Firstly, free exercise cases regarding state laws were still in a relatively embryonic form, as the Supreme Court only incorporated the Free Exercise Clause to

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<sup>203</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 45-6.

<sup>204</sup> Kennedy, *Interracial Intimacies*, 252.

<sup>205</sup> *Ibid.*

<sup>206</sup> Noah Feldman, *Divided by God: America’s Church-State Problem—and What We Should Do About It* (New York: Farrar, Straus and Giroux, 2005), 200.

apply to states, in addition to the federal government, in 1940.<sup>207</sup> Additionally, as we have noted, the issue of religion hardly emerges in the *Loving* decision. Certainly, individuals made efforts to raise religious arguments in opposition to interracial marriage, but these arguments were not taken seriously by the Court. The Court's lack of concern for the effects of the *Loving* decision on religious individuals who object to interracial marriage can be explained by what Noah Feldman refers to as "legal secularism."<sup>208</sup> The main intention behind legal secularism was to draw sharp distinctions between church and state in service of protecting religious minorities,<sup>209</sup> and at the time when *Loving* was decided, legal secularism dominated the Supreme Court's understanding of free exercise claims. Many justices understood the fundamental purpose of the Free Exercise Clause to be a road block that prevents majority religions from trampling over the rights of minority religions,<sup>210</sup> and critically, the "default background religion" that threatened to eclipse the rights of minority religions was plainly Christianity, most often Protestantism.<sup>211</sup> Legal secularism thus inspired Supreme Court justices to mainly focus on the free exercise infringements of minority religions who were most at risk or having their rights overlooked rather than Christians, who often were understood to be the main instigators of such infringements.

Moreover, *Loving* was decided during an era when Christianity occupied a privileged position culturally in the United States, and as a consequence, Christianity remained relatively unthreatened by the *Loving* decision. Christianity remained the nation's dominant source of moral values, so *Loving* was not necessarily seen as aggressively challenging conservative moral

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<sup>207</sup> Feldman, *Divided by God*, 153.

<sup>208</sup> *Ibid.*, 170.

<sup>209</sup> *Ibid.*

<sup>210</sup> *Ibid.*, 180.

<sup>211</sup> *Ibid.*, 185.

frameworks. Furthermore, given its understanding of free exercise jurisprudence, the Supreme Court likely did not consider itself to be stepping on the free exercise rights of Christians, because mainstream Christians were not commonly understood to be at risk of free exercise violations. As Feldman argues, the secular approach that the Court undertook during the 1960s in regard to the Free Exercise Clause posed little threat to conservative Christians, and, because “they did not feel the threat, religious organizations... did not organize against the new, legal secularism in any serious way. For their part, secularists turned to a version of secularism that made no great claims about religion or its lack of value, focusing instead of its relationship to the law.”<sup>212</sup> Though *Loving* was not a free exercise case, it makes sense that the *Loving* Court did not express concern about potential entanglements with the Free Exercise Clause as a result of the decision given the general consensus about legal secularism’s rather benign relationship with religion. Thus, the political atmosphere surrounding *Loving* did not create the conditions to spark a blaze of religious backlash in reaction to the decision.

Conversely, the role of the Supreme Court and the free exercise jurisprudence of contemporary America is vastly different. To conservatives today, secularism is viewed as posing a serious threat to religion, in part because the Court’s understanding of free exercise has evolved dramatically. The competing narrative with legal secularism during the *Loving*-era was that one’s loyalty as an American should take precedence to one’s religious identity, which would minimize the instances in which free exercise was used as an excuse to not follow certain laws.<sup>213</sup> Now, almost no Americans, regardless of their political affiliation, would align themselves with this formulation of free exercise,<sup>214</sup> and the Court certainly espouses a more

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<sup>212</sup> Feldman, *Divided by God*, 182.

<sup>213</sup> *Ibid.*, 161.

<sup>214</sup> *Ibid.*, 163.

generous understanding of the breadth of religious freedom, which is clear from the *Obergefell* decision. Recall Justice Kennedy’s promise to religious conservatives that they may continue to “advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned,” leaving room for those who object to same-sex marriage to act upon those beliefs.

<sup>215</sup> Although the Court currently seems to agree that the free exercise of religion encapsulates a wide variety of activity and belief, the Supreme Court nevertheless navigates a rather murky free exercise terrain after legal secularism began to experience serious pushback in the 1970s.<sup>216</sup>

America’s Third Great Awakening, sparked by the sexual revolution and a surge in fundamentalist belief, radically altered the religious makeup of the American population, contributing to a splintering of beliefs within Christianity itself.<sup>217</sup> In combination with the country’s new religious makeup came a new approach to free exercise, which Feldman terms “values evangelicalism,” as many conservatives became concerned with the direction of legal secularism.<sup>218</sup> Whereas legal secularism argues that the fundamental purpose of the Free Exercise Clause is to protect religious minorities, values evangelicalism appeals to the value of religion as an essential piece of American life and suggests that not only religious minorities but all religious groups should receive a fair chance to freely exercise their religion and affect politics.

<sup>219</sup> A values evangelical approach to free exercise thus promises all religions—minority or majority—generous latitude to freely exercise their religion in the public realm. Today, there is contention within the Court regarding which approach to free exercise is correct, and as a result, it is somewhat unclear how to treat issues of free exercise. As Feldman writes, we are currently

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<sup>215</sup> Kennedy, *Obergefell v. Hodges*, U.S. \_\_ 576, 27.

<sup>216</sup> Feldman, *Divided by God*, 191.

<sup>217</sup> *Ibid.*, 188.

<sup>218</sup> *Ibid.*

<sup>219</sup> *Ibid.*

“witnessing the way constitutional ideas pile up, instead of arranging themselves neatly.”<sup>220</sup>

Critically, “Values evangelicalism has not totally replaced legal secularism as the only theory about church and state. It has, rather pushed secularism to the side, squeezing it against the edge of the tectonic plate and creating pressure for the future to address.”<sup>221</sup> While free exercise issues are certainly never clear cut, it is substantial to note that the *Obergefell* decision emerged during an entirely different era of free exercise jurisprudence—an era, during which more and more free exercise claims are taken seriously by the Court, regardless of the religious person’s status as a part of a minority or a majority religion.

Additionally, it is essential to recognize that today, Christianity—particularly conservative branches of Christianity—no longer sits comfortably in the cultural majority. In *The End of White Christian America*, Robert P. Jones calls attention to the fact that White Christian America (WCA) no longer “sets the tone for the country’s culture as a whole.”<sup>222</sup> Diminishing influence as well as a drastic decrease in church presence has left WCA not only vulnerable to the effects of marginalization, but has also threatened WCA’s “national mythos”—namely, that Christianity is the moral glue that holds the nation together.<sup>223</sup> In particular, conservative Christians are being pushed to the margins of society as a result of the debate over sexual mores, which essentially ripped American Christian denominations into “enemy faiths.”<sup>224</sup> While more progressive Protestant faiths learned to embrace certain progressive causes, such as same-sex marriage, other conservative faiths, such as evangelicals and Catholics, remained fundamentally opposed. As a result of a decrease in membership and a marginalization of their conservative

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<sup>220</sup> Feldman, *Divided by God*, 212.

<sup>221</sup> *Ibid.*

<sup>222</sup> Jones, *The End of White Christian America*, 39.

<sup>223</sup> *Ibid.*, 49.

<sup>224</sup> Griffith, *Moral Combat*, 277.

views, conservative Christians have effectively become a political minority.<sup>225</sup> White Christians no longer dominate culturally, thereby forcing conservatives to find new ways to assert themselves in the political domain.<sup>226</sup> It cannot be overestimated how unprecedented this cultural shift away from white Christians is, and the political fallout from this shift has profound implications for how we might understand unfolding of opposition of same-sex marriage to be fundamentally different in comparison to that of interracial marriage.

In response to their dwindling cultural influence over the last forty years, Andrew R. Lewis argues that conservatives have adjusted to the modern political and legal landscapes by undergoing a profound shift in their approach to political activism.<sup>227</sup> Notably, when white Christians sat within the nation's cultural majority, much of their political activism revolved around the codification of Christian moral values. Christians could take advantage of their role as the "moral majority" and speak of policies as desirable or undesirable based on their moral worth in accordance to Christian values.<sup>228</sup> Conversely, liberals traditionally appealed to the language of rights in their approach to political activism.<sup>229</sup> For example, for many Southern Protestants during the *Loving*-era, antimiscegenation statutes should have been upheld because they were considered morally justified in enforcing God's wish to keep the races distinct, whereas progressive advocates for the legalization of interracial marriage argued that the laws should not be upheld, because interracial couples should have the right to marry just as intraracial couples do. As Jones highlights, however, "the death of White Christian America," more than anything,

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<sup>225</sup> Andrew R. Lewis, *The Rights Turn in Conservative Christian Politics: How Abortion Transformed the Culture Wars* (Cambridge, United Kingdom: Cambridge University Press, 2017), 5.

<sup>226</sup> *Ibid.*, 3.

<sup>227</sup> *Ibid.*, 7-8.

<sup>228</sup> *Ibid.*

<sup>229</sup> *Ibid.*, 6.

“has robbed its descendants of the security of their place and beliefs.”<sup>230</sup> Without the cultural security conservative Christians once enjoyed, the moral value of their views resonates with less of the general U.S. population. As a result, we can see a remarkable shift conservative political action toward embracing minority politics, now focusing on individual liberties rather than majoritarian morals.<sup>231</sup>

The strongest example for how conservatives have altered their political strategy to frame issues in terms of rights rather than morals stems from another American culture war: the abortion debate. Rather than primarily attacking *Roe v. Wade* (1973) by claiming abortion to be immoral or sinful, conservatives do something much more politically sophisticated: they appeal to individual rights, such as the “right to life” of the fetus.<sup>232</sup> The right to life discourse has posed a serious challenge to a woman’s “right to choose,” creating remarkable legal tension in the abortion debate.<sup>233</sup> Furthermore, pro-life politics that have permeated other forms of conservative political activism.<sup>234</sup> Although it is perhaps more difficult to locate a right of comparable strength to the right to life in the abortion debate, we can still see conservatives putting weight behind rights language in the context of the same-sex marriage debate. In fact, Lewis claims that the “politics of gay rights is the final blow to majoritarian Christian America. It has propelled evangelicals to consider themselves as a threatened minority, and it has impelled an increasing emphasis on rights claims.”<sup>235</sup> In effect, conservatives have assumed the language of rights to recast the same-sex marriage debate as “the right to equal treatment” of same-sex couples

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<sup>230</sup> Jones, *The End of White Christian America*, 228.

<sup>231</sup> Lewis, *Rights Turn in Conservative Christian Politics*, 7-8.

<sup>232</sup> *Ibid.*, 23.

<sup>233</sup> *Ibid.*, 27.

<sup>234</sup> *Ibid.*, 22.

<sup>235</sup> *Ibid.*, 149.

“versus the right to religious freedom.”<sup>236</sup> We can clearly see this competing rights narrative in action following the controversy with Kim Davis, the county clerk from Kentucky who refused to issue a marriage license to a same-sex couple shortly after the *Obergefell* decision. Lawyers defending Davis lamented, ““Today, for the first time in history, an American citizen has been incarcerated for having the belief of conscience that marriage is the union of one man and one woman.”<sup>237</sup> Put differently, Kim Davis has the right to believe what she wants about marriage and live according to those beliefs, and her incarceration simply represents a gross violation of her right to religious freedom. It is not a question of whether Kim Davis is morally correct to object to same-sex marriage; it is a question of whether or not she has the right to act on her beliefs. This focus on rights is arguably a much more legally sophisticated approach that lends legitimacy to conservative views on current culture war issues, because the contrary approach—majoritarian moral arguments—fail to hold significant weight in society as the cultural influence of Christians continues to dwindle.

Lewis’s claim about the turn in conservative politics toward a rhetoric of rights becomes clear once we examine how conservatives speak of the same-sex marriage debate. Even before the *Obergefell* decision, Ross Douthat anticipated that the federal legalization of same-sex marriage would be a devastating blow to the religious freedom of conservative Christians. A year before the Supreme Court issued its decision, Douthat lamented that the Court was on track to “redefine marriage to include gay couples.”<sup>238</sup> Given the controversial nature of same-sex marriage, Douthat predicted two outcomes for dissenting religious conservatives. First, the

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<sup>236</sup> Lewis, *Rights Turn in Conservative Christian Politics*, 160.

<sup>237</sup> *Ibid.*, 157.

<sup>238</sup> Ross Douthat, “The Terms of Our Surrender,” *The New York Times*, March 1, 2014, <https://www.nytimes.com/2014/03/02/opinion/sunday/the-terms-of-our-surrender.html?auth=linked-google>.

“substantial minority” of conservatives will be forced to “recede into the cultural background, with marriage joining the long list of topics on which Americans disagree without making a political issue out of it.”<sup>239</sup> Arguably, this is precisely what happened with the population of religious dissenters following the *Loving* decision. As Kennedy highlights, there was not a massive public outcry in response to *Loving*, and “opponents of *Loving* were unable to mount anything like a ‘massive resistance’” similar to what we see today.<sup>240</sup> Opponents of interracial marriage simply receded into the cultural background, perhaps disapproving of the decision within their private lives, but they failed to translate their disapproval into a public outcry.

Alternatively, Douthat suggested that the “dissenting subculture” of those opposed to same-sex marriage will endure a more problematic fate, one in which we will see the “unwilling photographer” at a same-sex wedding being treated like “the proprietor of a segregated lunch counter,” suffering financially in their businesses as a result of their religious views.<sup>241</sup> This option appears to be the scenario in which conservatives find themselves today given the recent *Masterpiece Cakeshop* decision. It is also interesting that Douthat compares the anti-same-sex marriage business owner to the segregationist business owner. While some may find the comparison apt and perhaps counterintuitive to his argument, Douthat clearly views the two types of business owners as distinct. In fact, Douthat continues to claim that any sort of legal protection for religious individuals who disagree with same-sex marriage is not the same thing as “‘Jim Crow’ for gays.”<sup>242</sup> Why is this the case? Partially, the answer lies in the fact that Douthat considers religious objectors to gay marriage to be an innocent minority whose rights are being

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<sup>239</sup> Douthat, “The Terms of Our Surrender.”

<sup>240</sup> Kennedy, *Interracial Intimacies*, 273.

<sup>241</sup> Douthat, “The Terms of Our Surrender.”

<sup>242</sup> *Ibid.*

threatened by the Supreme Court. Douthat fears that, rather than allowing conservatives to come to a negotiated surrender where exemptions will be carved out so religious people will not be forced to violate their beliefs, liberals will simply assert to conservatives that “*you bigots don’t get to negotiate anymore.*”<sup>243</sup> Douthat paints conservative Christians as victims in a culture war—an innocent group that will be unfairly overpowered in the same-sex marriage debate—with a final concluding thought: “But it’s important for the winning side to recognize its power. We are not really having an argument about same-sex marriage anymore... all that’s left is the timing of the final victory—and for the defeated to find out what settlement the victors will impose.”<sup>244</sup> Here, we can see a defeatist sentiment espoused by religious conservatives even before the Supreme Court issued its judgment on the matter, which was absent during the interracial marriage debate.

Even if conservatives had not yet come to understand themselves as victims of the same-sex marriage debate, the dissenting justices of *Obergefell* make explicit exactly why conservative Christians should be enraged by the majority’s treatment of religious freedom, effectively lending credibility to the notion that conservatives should consider themselves to be an embattled minority. Jenna Reinbold highlights how the *Obergefell* decision itself spurred conservative Christians to view the issue of same-sex marriage as a “pressing matter of religious free exercise.”<sup>245</sup> In an explicit fashion, the dissenting justices effectively amplified conservative anxieties about the legal implications of validating same-sex marriage and located the reasons why the majority’s opinion is “the latest in a long line of developments that have reduced

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<sup>243</sup> Douthat, “The Terms of Our Surrender.”

<sup>244</sup> Ibid.

<sup>245</sup> Jenna Reinbold, “‘Honorable Religious Premises’ and Other Affronts: Disputing Free Exercise in the Era of Trump,” *Studies in Law, Politics, and Society* 79 (2019): 32.

religious conservatives to the recipients of ‘blatant prejudice’ from those who claim to uphold the principle of religious freedom.”<sup>246</sup> Consider, for example, Chief Justice John Roberts’s charge that the majority’s opinion “creates serious questions about religious liberty. Many good and decent people oppose same-sex marriage as a tenet of faith, and their freedom to exercise religion is—unlike the right imagined by the majority—actually spelled out in the Constitution.”

<sup>247</sup> In the same breath, Roberts foreshadows a bleak future for the religious individuals who do not support same-sex marriage and accuses the majority of eclipsing these honorable individuals’ religious freedom for the sake of a right—the right for same-sex couples to marry—that has no constitutional grounding. By doing so, Roberts not only casts the *Obergefell* decision as the product of atrocious judicial overreach, but also as the death knell for religious freedom.

The dissenting justices in *Obergefell* also express profound concern with the majority’s “belief-centered conception of religious free exercise,” claiming that Kennedy’s promise to religious objectors that they may “advocate”<sup>248</sup> for their traditional view of marriage effectively removes the teeth from the Free Exercise Clause.<sup>249</sup> Roberts chastises the majority, contending that the First Amendment guarantees “the freedom to ‘*exercise*’ religion. Ominously, that is not a word the majority uses.”<sup>250</sup> Similarly, Justice Samuel Alito warns that the majority’s treatment of religion in *Obergefell* merely promises that “those who cling to old beliefs will be able to whisper their thoughts in the recesses of their homes, but if they repeat those views in public, they will risk being labeled as bigots and treated as such by governments, employers, and

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<sup>246</sup> Reinbold, “Honorable Religious Premises,” 42.

<sup>247</sup> John Roberts, *Obergefell v. Hodges*, U.S. \_\_ 576 (Supreme Court of the United States 2015), 27.

<sup>248</sup> Kennedy, *Obergefell v. Hodges*, U.S. \_\_ 576, 27.

<sup>249</sup> Reinbold, “Honorable Religious Premises,” 35.

<sup>250</sup> Roberts, *Obergefell v. Hodges*, U.S. \_\_ 576, 28.

schools.”<sup>251</sup> In other words, it is unclear how individuals who object to same-sex marriage will be able to freely live out their beliefs without being prohibited by the state or slandered by their fellow citizens. Through their resentful dissents, both Roberts and Alito stoke the flames in conservative denouncement of *Obergefell*, painting religious objectors to same-sex marriage as effectively persecuted by the majority’s opinion, which fails to fully account for how those who believe same-sex marriage to be sinful can live out those beliefs freely post-*Obergefell*. For those conservatives who may be unsure of how the legalization of same-sex marriage directly threatens their freedoms, the *Obergefell* dissenters explicitly delineate how the majority’s decision delivers a fatal blow to the religious free exercise of conservatives, galvanizing conservatives to keep the culture war alive for the sake of religious freedom.<sup>252</sup>

We can see the effects of *Obergefell*’s dismal forecast for the future of religious freedom manifested in the ways that various conservative groups talk about the primary issues that conservatives face in today’s political landscape. Many political organizations, including Focus on the Family Research Council and Concerned Women for America (CWA), list religious freedom as one of the main issues that their group is dedicated to defending. On their site, FRC writes that “Family Research Council believes that religious liberty is the freedom to hold religious beliefs of one’s choice and to live out those beliefs,”<sup>253</sup> and fear that private citizens’ religious beliefs are being censured by the state, especially those which deal with beliefs about sexuality.<sup>254</sup> *Masterpiece Cakeshop* is an enlightening example of this fear of censure, as the case

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<sup>251</sup> Samuel Alito, *Obergefell v. Hodges*, U.S. \_\_\_ 576 (Supreme Court of the United States 2015), 7.

<sup>252</sup> Reinbold, “Honorable Religious Premises,” 36.

<sup>253</sup> Family Research Council, “Issues: Religious Liberty,” Family Research Council, n.d., <https://www.frc.org/Religious-Liberty>.

<sup>254</sup> Family Research Council, “Hostility to Religion: The Growing Threat to Religious Liberty in the United States,” *Family Research Council*, June 2017, 17.

explored whether or not Jack Phillips was in violation of Colorado’s antidiscrimination statute by acting on his belief that same-sex marriage is wrong as a business owner and not simply in the privacy of his home. Because FRC understands religious liberty to protect not only private expressions of beliefs but public expressions as well, instances where conservatives are prevented from fully living out their beliefs due state-endorsed limits, such as antidiscrimination laws, are cast as calamitous for religious liberty.

Similarly, CWA lists religious liberty as one of its “core issues.”<sup>255</sup> The group expresses deep concern with the “erosion of religious liberty and cultural imposition of anti-Judeo-Christian philosophies upon our society.”<sup>256</sup> The latter concern is somewhat interesting if we recall Feldman’s argument about how secularism was not perceived as a menacing threat to Christianity during the 1960s in relation to the Free Exercise Clause. Clearly, secularism, or what CWA considers “anti-Judeo-Christian philosophies,”<sup>257</sup> is perceived as a significant threat to religious freedom today, signifying the drastically different understanding of the breadth of free exercise that has emerged over the past few decades. CWA recognizes the deteriorating cultural presence of conservative Christianity within mainstream American culture, framing the shift of society toward secular ideologies as a pressing free exercise issue, because society is gradually becoming a more hostile setting to hold and act on Christian values. One interesting publication put forth by CWA is a bookmark for Christian students that outlines their rights to religious freedom within the public school system—an area that they fear will inundate religious students with anti-Christian values. To list a few examples, CWA encourages students

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<sup>255</sup> Concerned Women for America, “Issues: Religious Liberty,” Concerned Women, n.d., <https://concernedwomen.org/issues/religious-liberty/>.

<sup>256</sup> Ibid.

<sup>257</sup> Ibid.

to express “your religious beliefs in discussions and assignment,” “[r]ead your Bible during free time and share your faith with others,” and “[b]e exempted from any activity that violates your religious convictions.”<sup>258</sup> Here, we can clearly see CWA embrace rights language as Lewis suggests, as the organization explicitly enumerated the rights of students to express their religion in a bookmark titled, “Know Your Rights...”<sup>259</sup> Additionally, the medium and intended audience of this publication seem to speak to the remarkable sense of embattlement conservatives feel they endure in contemporary America. Religious students in public schools should carry a bookmark listing their rights because that environment is seen as fundamentally threatening to religious freedom, much like most of public life, which is supposedly saturated with anti-Christian values.

Furthermore, the dramatic shift in church-state dynamics is made clear with the emergence of legal groups like Alliance Defending Freedom (ADF), which was formed in 1994 by over thirty Christian leaders “to build a ministry that would defend your religious freedom—before it was too late.”<sup>260</sup> ADF situates itself within the American legal system as a wedge to “keep the doors open for the Gospel in the United States” and advocates on behalf of conservative Christians regarding an array of issues, including religious liberty, freedom of speech, and marriage and family.<sup>261</sup> Recognizing religious freedom as Americans’ “first freedom,” ADF dedicates its efforts to fighting against the “secular forces” that “chip away at our nation’s Judeo-Christian roots.”<sup>262</sup> According to ADF, faith is not an exclusively private

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<sup>258</sup> Concerned Women for America, “Know Your Rights... Freedom of Speech & Religion in Public Schools,” <https://concernedwomen.org/wp-content/uploads/2019/12/CWA-Bookmark-Know-Your-Rights.pdf>.

<sup>259</sup> Ibid.

<sup>260</sup> Alliance Defending Freedom, “Who We Are,” Alliance Defending Freedom, n.d., <https://www.adflegal.org/about-us>.

<sup>261</sup> Ibid.

<sup>262</sup> Alliance Defending Freedom, “Issues: Our First Freedom,” Alliance Defending Freedom, n.d., <https://www.adflegal.org/issues/religious-freedom>.

matter—it constitutes who people are and influences their daily lives beyond Sunday services.<sup>263</sup> Society is increasingly threatening the ability of conservatives to live out their faith, however, because “efforts are being made to remove religion’s moral influence on society by censoring it from the public sphere. People of faith are increasingly threatened, punished, and silenced for simply living according to their beliefs.”<sup>264</sup> Again, we can see a familiar rhetoric which casts conservative Christians as victims of the modern era who are denied the religious freedom promised to them by the U.S. Constitution. ADF sees itself as doing its desperately needed part of ensuring that conservative Christians are able to live out their beliefs without being unjustly prohibited by liberal government.

Emerging from this rhetoric of the death of religious freedom, conservatives have clearly assumed a defensive position in American politics. Rather than fighting to overturn laws that they find morally abhorrent altogether, many conservatives have shifted their focus toward seeking accommodations that exempt those with religious apprehensions from being forced to abide by laws that force them to violate their religious beliefs. Again, we can see this in cases like *Masterpiece Cakeshop*, where Phillips’ was asking to be exempt from Colorado’s antidiscrimination laws that would prevent him from denying services for a same-sex couple’s wedding. This shift toward accommodations is indicative of the shift toward using rights language to defend conservative views, because conservatives are attempting to leverage their individual rights in order to carve out areas of exemption for laws to which they remain fundamentally opposed, such as laws dealing with abortion or same-sex marriage.<sup>265</sup> Thus, we

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<sup>263</sup> Alliance Defending Freedom, “Issues: Living Your Faith in the Public Square,” Alliance Defending Freedom, n.d., <https://www.adflegal.org/issues/religious-freedom/public-square>.

<sup>264</sup> Ibid.

<sup>265</sup> Lewis, *Rights Turn in Conservative Christian Politics*, 159.

can see that conservatives have effectively taken a “defensive position in regard to sexual morality.”<sup>266</sup> At this point in time, it is unlikely that moral arguments put forth by religious conservatives will convince the majority of America to criminalize same-sex marriage or reverse other progressive trends in the way American’s view sexuality. Rather than primarily remedying the situation by convincing their fellow citizens to adopt traditional values, conservatives point out how, if unmitigated, the newly liberated era of sexuality will “force Christians into subjugation to radical sexual deviancy,” essentially “punishing Christians’ religious liberty.”<sup>267</sup> Only when the rights of Christians are fairly protected amidst the nation’s journey toward embracing more liberal sexual norms will conservatives be at peace with the cultural changes that have emerged. Clearly, conservatives can no longer merely assert their moral authority to regulate the sexual norms of the country, so they instead seek to find ways to create accommodations for the laws they disagree with, which is why we see cases like *Masterpiece Cakeshop* enter the Supreme Court.

The effects of this shift in conservative Christian rhetoric to that of being a marginalized group cannot be overstated as forging a completely different arena for the same-sex marriage culture war to unfold in comparison to that for interracial marriage. Robert B. Horwitz categorizes religious conservatives’ assumption of an oppressed status as the “politics of victimhood,” a political strategy that has gradually taken a fairly central role in the modern political realm.<sup>268</sup> In fact, Horwitz argues that the role of “victim” has become one of the most

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<sup>266</sup> Lewis, *Rights Turn in Conservative Christian Politics*, 162.

<sup>267</sup> Rob Chambers, “The Equality Act Is a Religious Liberty Wrecking Ball,” *American Family Association*, May 10, 2019, <https://www.afa.net/the-stand/culture/2019/05/the-equality-act-is-a-religious-liberty-wrecking-ball/>.

<sup>268</sup> Robert B. Horwitz, “Politics as Victimhood, Victimhood as Politics,” *The Journal of Policy History* 30, no. 3 (2018): 552–74.

important “identity positions” in American politics.<sup>269</sup> By collectively identifying as victims, groups forge a unique political identity that allows them to assert themselves as in need of special attention and accommodations.<sup>270</sup> Additionally, groups who identify themselves as victims often assert a sort of moral superiority and self-righteousness, claiming that they not only stand for “their own wounds and innocence,” but for some larger cause, such justice or the health of the nation.<sup>271</sup> Clearly, we can see these moral assertions being made by religious conservatives as they paint themselves victims of liberal America. FRC asserts that “religious freedom is not merely an American right, but an inherent human right for all people of all faiths everywhere.”<sup>272</sup> Thus, the group represents itself as not simply looking out for the rights of conservative Christians who share its values, but it is fighting for the religious freedoms of all faiths. The cause of religious freedom takes on an aura of moral superiority that hovers above any particular set of conservative values. Furthermore, we have seen how the well-being of the nation is endangered when people stray from traditional gender roles and sexual mores, so as a consequence, abiding by evangelical standards of gender and sexuality is for the greater good of keeping the nation morally well.<sup>273</sup> Casting their ambitions as morally elevated, conservative Christians seem to settle into the role of victim quite seamlessly.

While I have already argued that conservatives Christians were less threatened by the *Loving* decision than Christians today are by the *Obergefell* decision because Christianity enjoyed a prominent role in determining the moral values of majority culture in the 1960s, it remains worth noting that the politics of victimhood that we see today had not yet fully emerged

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<sup>269</sup> Horwitz, “Politics as Victimhood,” 553.

<sup>270</sup> *Ibid.*, 554.

<sup>271</sup> *Ibid.*

<sup>272</sup> Family Research Council, “Issues: Religious Liberty.”

<sup>273</sup> DeRogatis, *Saving Sex*, 101.

in the *Loving*-era. Victimhood, according to Horwitz, only became a “primary feature of American political life” after the “contentious politics of the 1960s, specifically the civil rights movement and its aftermath.”<sup>274</sup> Thus, the 1960s were only setting the scene for the new political strategy to come. In part, conservative Christians did not assert themselves as victimized by the *Loving* decision because identifying one’s group as victims was not yet an effective political strategy. It is somewhat ironic to note, however, that it was the civil rights movement that forged the politics of victimhood after the government conceded that some marginalized groups—in this case, African Americans—need special attention and rights to balance out systemic imbalances of power.<sup>275</sup> The political by-product of the interracial marriage debate and the civil rights movement more largely has thus seeped into the same-sex marriage debate, formulating an effective force of opposition against the marginalized couples who now wish to marry.

Perhaps most significantly, by claiming the status of victimhood, conservative Christians have been able to reverse the traditional rhetoric within the same-sex marriage culture war: the LGBTQ community is not being oppressed by conservatives; in fact it is the LGBTQ community that is oppressing conservatives. For example, by redefining marriage to include same-sex couples, Ryan T. Anderson claims that advocates are weaponizing this newly defined marriage, demanding other citizens to celebrate or condone same-sex marriage.<sup>276</sup> Furthermore, by legalizing same-sex marriage and creating antidiscrimination legislation that protects LGBTQ individuals, Anderson argues that liberals have effectively decided that “civil liberties aren’t for conscientious objectors to the sexual revolution.”<sup>277</sup> As a result of the legalization of same-sex

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<sup>274</sup> Horwitz, “Politics as Victimhood,” 554.

<sup>275</sup> *Ibid.*, 555.

<sup>276</sup> Anderson, “The Continuing Threat to Religious Liberty.”

<sup>277</sup> *Ibid.*

marriage, conservatives have been pushed to the margins of society and stripped of their civil liberties, making them the true victims of the culture war. Anderson also argues that “harmless actions and interactions, such as decisions not to perform sex-reassignment surgery or not to bake a cake for a same-sex wedding, are being declared unlawful forms of discrimination.”<sup>278</sup> In other words, conservatives are being unfairly punished for living their lives by their beliefs, because in reality, acting on those beliefs is not that harmful. While LGBTQ advocates would certainly disagree, and Anderson’s argument perhaps ignores the serious discrimination same-sex couples have faced precisely by the same group he so eagerly defends, the suggestion that conservatives are being censored and discriminated against nevertheless forces us to navigate a new, more thorny territory: who suffers most in the same-sex marriage debate, and who should the courts protect? Suddenly, it is not so clear that Christians are the oppressors and same-sex couples the oppressed, because conservative advocates have distorted that binary classification altogether. Now, we must consider the case where the oppressor has become the oppressed—where it is the conservative Christians that are in dire need of legal protections rather than same-sex couples.

To illustrate the extent to which conservatives understand themselves to be particularly oppressed in modern society, we can examine an article produced by FRC, specifically written to educate religious conservatives of the alarming threats conservatives unwillingly face. FRC claims that many conservatives “are ridiculed and shamed in the court of public opinion for simply holding... religious convictions” in opposition to same-sex marriage.<sup>279</sup> Worse, FRC warns that “individuals have not even had to make a public statement to be subject to such

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<sup>278</sup> Anderson, “The Continuing Threat to Religious Liberty.”

<sup>279</sup> Family Research Council, “Hostility to Religion,” 17.

hatred; a simple donation to a political group is enough to draw hostility for their ‘unacceptable’ viewpoint.”<sup>280</sup> It is not merely an issue of free exercise because conservatives are hatefully condemned for merely holding beliefs that stray from liberal views of gender and sexuality. Following this discussion, FRC continues to list seventy-two instances of hostility toward religious individuals who disagree with liberal understandings of sexuality between the years 2005 and 2007.<sup>281</sup> After reading through countless instances of individuals being fired from work, bullied, belittled, threatened, suspended or expelled from school, and violently attacked for simply holding views that same-sex marriage is wrong, readers are certainly left with the lingering sense that religious dissenters in the same-sex marriage debate are oppressed in at least some capacity. FRC’s article concludes by lamenting, “The stories you read above feature real Americans who are trying to live peaceful, faithful lives, but find their conscience and liberty under attack. They are fathers, mothers, sons, and daughters. Many of them look like us and our neighbors.”<sup>282</sup> Put in this light, the people who are harmed by the same-sex marriage debate are far from hateful bigots; they are just anyone else that we care about, and they are simply trying to live their lives in accordance to their faith. Religious individuals are cast as innocent victims of the modern era, living in a state of unease to express their sincere beliefs about sexuality and gender out of fear of the hostile backlash they will receive for expressing such sentiments. Thus, it is not conservatives who are intolerant, but the liberal Americans and same-sex marriage advocates who silence these religious dissenters.

When compared to today’s marriage debate, we simply do not see an adequate parallel of Christian victimhood in the interracial marriage debate. From the *Loving* Court’s standpoint,

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<sup>280</sup> Family Research Council, “Hostility to Religion,” 17.

<sup>281</sup> *Ibid.*, 17-31.

<sup>282</sup> *Ibid.*, 51.

opponents to interracial marriage were simply individuals trying to uphold racist values.<sup>283</sup> This is clear in the Court's notable lack of concern for the implications the decision would have on the free exercise of religious objectors. From a cultural standpoint, white Christians still remained in a position of prominent cultural and political power. Furthermore, while some religious conservatives "long objected that equality for blacks would promote 'racial mixing,' impose an unwanted association upon whites, or censor white people's expression," those concerns were never clearly translated into serious political action, and these concerns certainly failed to trigger anxieties about the free exercise of religion in the same way we see today.<sup>284</sup> The oppressor during *Loving* was clearly white Christians, and in response to the decision, those in favor of antimiscegenation statutes failed to cast themselves as somehow oppressed in the aftermath of the culture war.

As Craig and Osten somewhat dramatically assert in *The Homosexual Agenda*, the current state of the culture war surrounding same-sex marriage portrays religious freedom and LGBTQ rights to be completely incompatible, forging a battleground that suggests only the rights of one side can survive. In an unprecedented shift in the U.S. sociopolitical landscape, many conservative Christians today have come to identify themselves as minorities, and further, these Christians call upon the courts to recognize the rights violations they experience as a marginalized group. In the same-sex marriage culture war, the oppressor label is fluid in character, floating back and forth between the LGBTQ community and religious conservatives depending on which side one is on. Because conservative Christians have embraced an identity as an oppressed minority, framing the legalization of same-sex marriage as a catastrophic battle

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<sup>283</sup> Warren, *Loving v. Virginia*, U.S. 1 388, 11.

<sup>284</sup> Eskridge, "Noah's Curse," 661.

waged against religious freedom, it is easy to see how the treatment of religious objectors to same-sex marriage has come to be fundamentally different from those to interracial marriage in the court system. While the *Loving* Court did not hesitate to label those against interracial marriage as White Supremacists, courts today are extremely hesitant and uncomfortable to label views and actions against same-sex marriage as simply unacceptable, thereby categorizing opponents to same-sex marriage as homophobic bigots. The evolution of conservative Christians' cultural standing has played no small role in reformulating the group's political and legal activism to cast conservative Christians as uniquely embattled in contemporary American life, swaying courts to treat conservatives, and their ability to act on their beliefs on the current culture war issues, much more gently than we ever saw in the interracial marriage debate.

### **Conclusion**

While marriage rates in the U.S. have declined in the past decade, marriage continues to occupy an elevated place in society. *Obergefell* refers to marriage as the “keystone of our social order.”<sup>285</sup> The *Loving* Court spoke of the institution as “one of the ‘basic civil rights of man.’”<sup>286</sup> Taking a step back from both of these marriage-centered conflicts, we can certainly see that marriage is important to many Americans. Perhaps because marriage is so central to Americans, many are willing to engage in serious cultural and legal debate over the limits of marriage and to whom the institution should extend. Though not all marriage debates are equal, the above analysis helps demonstrate why we might be able to use the interracial marriage debate to offer a

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<sup>285</sup> Kennedy, *Obergefell v. Hodges*, U.S. \_\_ 576, 16.

<sup>286</sup> Warren, *Loving v. Virginia*, U.S. 1 388, 12.

unique lens through which to examine the intense debates surrounding same-sex marriage and why it continues to thrive as a culture war issue.

While they do not completely tell the whole story of these marriage debates, traditional gender norms and heteronormativity play major roles in how these debates unfolded and continue to evolve. Same-sex relationships simply cannot hold up to the gender norms and standards of heteronormativity that conservatives consider to be immutable fixtures of moral life. There are certainly layers of social issues that extend beyond gender and sexuality (for example, the extent to which concerns over racial purity during the interracial marriage debate played a much larger role than I was able to appreciate in the scope of this thesis), but ultimately, the topics of gender and heteronormativity offer a unique vein that ties the culture war over same-sex marriage to that over interracial marriage and offers an explanation as to why we do not see the contemporary marriage debate unfold in the same way as the the 1960s and 1970s debate. Moreover, we can appreciate how different legal contexts provide a backdrop to marriage conflicts and have had a profound influence on how these two debates have transpired. Depending on the constitutional era, religious dissent weaves through these legal landscapes in very distinct ways. In the *Loving*-era, religion was unable to successfully integrate itself into the Supreme Court's judgment, casting the decision as a free exercise issue, and in many ways, history suggests that religious dissenters were not resolute in their efforts to turn the interracial marriage debate into a religious freedom issue. Christians who condemned the *Loving* decision still sat in the cultural majority socially and politically, making the Court's judgment a minimal threat to their Christian worldview. In the *Obergefell*-era, however, religion is woven intricately into the logic of both the majority and dissents' opinions, making clear that the decision was

perceived to pose a serious threat to religious free exercise. Before *Obergefell*, the tides shifted both culturally and legally to furnish a landscape in which conservative Christians could both identify themselves as minorities and paint cases like *Obergefell* as pressing free exercise issues.

Though I have attempted to examine some major social and legal frameworks that distinguish the same-sex marriage debate from the interracial marriage debate above, there are certainly other areas of inquiry that shed light on this distinction and are worth exploring. In particular, it is also beneficial to investigate the role that identity politics play in both of these culture war issues and how the Supreme Court's equal protection jurisprudence categorizes groups in ways that might prevent same-sex couples from receiving the same treatment by the Court as an interracial couple. Notably, the U.S. Constitution does not enumerate which groups are afforded equality under the Fourteenth Amendment, allowing the Supreme Court's equal protection analysis to be fashioned quite broadly.<sup>287</sup> The level of scrutiny employed by the Court to guarantee equality, however, proves to be somewhat imprecise in practice. Rights violations of different groups are held to different standards of scrutiny, depending on how vulnerable the group is to experiencing injustices in the eyes of the Court. Legal scholar, Martha Albertson Fineman argues that the "potential avalanche" of cases dealing with the Equal Protection Clause "was severely limited by Supreme Court precedents fragmenting the formally expressed universal subject along group identity lines and adopting different levels of scrutiny for review of legislative cases under American equal protection jurisprudence."<sup>288</sup> Fearing the slippery slope of equal protection cases that may emerge under a very generous understanding of the term, the Supreme Court has established a precedent of evaluating equal protection issues under varying

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<sup>287</sup> Martha Albertson Fineman, "Beyond Identities: The Limits of an Antidiscrimination Approach to Equality," *Boston University Law Review* 92, no. 6 (December 2012): 1725.

<sup>288</sup> *Ibid.*, 1726.

levels of scrutiny, applying the strictest scrutiny to groups who are seen as most at risk for equal protection violations. Strict scrutiny is the highest level of judicial scrutiny, for which the government must prove that a law that infringes on the rights of a specific group is both narrowly tailored and serves a compelling government interest.<sup>289</sup> Strict scrutiny applies to any case involving race because race is considered a suspect classification. Cases involving sexuality only require courts to apply heightened scrutiny, for which the government must demonstrate that a law has a “substantial relationship” to a state purpose.<sup>290</sup> The government therefore needs a much better reason to discriminate on the basis of race than sexual orientation, and the fact that sexual orientation does not fall into the a suspect class deserving strict scrutiny certainly has implications for the same-sex marriage debate.

Some legal scholars note that the Supreme Court’s equal protection jurisprudence is problematic because it requires the government to make distinctions between groups on the basis of how oppressed the group is to assess which are most deserving of heightened protection.<sup>291</sup> In order to have the Supreme Court consider a groups’ case with strict scrutiny, the group must establish itself as a “discrete and insular minority.”<sup>292</sup> Thus, it really matters whether or not a group is able to demonstrate a visible history of discrimination and powerlessness. Arguably, this is easier for black people than LGBTQ individuals. Throughout American history—before homosexuality even had a name—LGBTQ individuals were simply considered “moral lepers, diseased human beings who needed to be segregated, lest they pollute children and society.”<sup>293</sup>

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<sup>289</sup> Evan Gerstmann and Christopher Shortell, “The Many Faces of Strict Scrutiny: How the Supreme Court Changes the Rules in Race Cases,” *Pitt. L. Rev.* 72, no. 1 (Fall 2010): 2.

<sup>290</sup> *Ibid.*

<sup>291</sup> Koppelman, “The Miscegenation Analogy,” 164.

<sup>292</sup> Fineman, “Beyond Identities,” 1726

<sup>293</sup> Eskridge, “Noah’s Curse,” 688-689.

Until 1973, the American Psychiatric Association considered homosexuality to be a mental abnormality, and even beyond this official psychiatric categorization, many thought of those who exhibited homosexual tendencies to be mentally disturbed in some capacity.<sup>294</sup> It has taken some time for the LGBTQ community to be understood as a cohesive group that differs from mainstream society as a result of their sexual orientation and not necessarily some moral or psychological defect. Additionally, because society has kept a “tight lid on sexual and gender minorities,” legally prohibiting homosexual behaviors for much of the twentieth century, “hysterical views” toward homosexuality did not “occupy an important place in mainstream religion” until recent decades.<sup>295</sup> It was not until the 1960s and 1970s that gay people became increasingly prominent in the public realm and political movements formed to decriminalize homosexual behaviors.<sup>296</sup>

Conversely, the social and political struggle of black people occupies a well-known space in U.S. history. The very fact that African Americans entered the country as enslaved people provides the clearest possible reminder of how this population has suffered greatly throughout U.S. history. The issue of racism has a very visible and rich history and continues to define a sizable part of American race relations. Even in the past century, the abuse toward black people in response to interracial intimacies has occupied a public setting, such as with public lynchings—a spectacle for which hundreds to thousands of white people would enthusiastically show up to watch a black man’s brutal death.<sup>297</sup> The violence demonstrated toward black people on behalf of white people occupies a prominent and shameful place in U.S. history, making it

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<sup>294</sup> Griffith, *Moral Combat*, 282.

<sup>295</sup> Eskridge, “Noah’s Curse,” 689.

<sup>296</sup> *Ibid.*, 689-90.

<sup>297</sup> Griffith, *Moral Combat*, 93.

very easy to see the systemic and ongoing injustices that black people have experienced because of the color of their skin. Because the oppression of black people is a palpable feature of American race relations, black people became obvious and deserving candidates for strict scrutiny by the Court.

It is also worth noting that the Court's equal protection jurisprudence may oversimplify characteristics, leading to ambiguity regarding which groups should be understood as in need of strict scrutiny. For example, both of the marriage debates we have discussed were considered in a binary fashion: race in terms of black and white, sexuality in terms of gay or straight, and gender in terms of man and woman. Clearly, these binaries fail to capture the entirety of these marriage debates. Racial identity is not as clear cut as black and white, and in part, states began to stray away from antimiscegenation statutes precisely because it became too difficult to keep track of what constitutes a white person and what constitutes a colored person.<sup>298</sup> Similarly, sexuality and gender are not as straightforward as gay or straight and man or woman. Sexuality and gender exist on a spectrum, making it extremely difficult to define these identities in a legal sense. We might want to explore how this spectrum of race, gender, and sexuality factor into the Court's resistance to consider sexual orientation as a suspect class in need of strict scrutiny. Again, this might be an issue of visibility: it is often the case that even if one does not know another's racial makeup in its entirety, race tends to be a visible characteristic. Contrarily, because sexuality and gender-identity may not necessarily be visible or detectable, it is more difficult to locate these groups as candidates for strict scrutiny. Additionally, the Court may be extremely uncomfortable with finding sexual orientation as a suspect class because it is difficult

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<sup>298</sup> Wallenstein, *Race, Sex, and the Freedom to Marry*, 57.

to categorize and detect someone's sexual orientation. Because sexuality is somewhat ambiguous, the Court may fear establishing sexual orientation as a suspect class, leading to a large volume of cases that depend entirely on the word of the person who claims to have a particular sexual orientation. Furthermore, many remain unconvinced that sexuality is even an innate characteristic; some maintain that sexuality is a choice and non-heterosexual individuals can simply choose to be heterosexual. Consequently, it does not make sense to find sexual orientation as a suspect class if someone may simply choose a heterosexual lifestyle that does not result in discrimination. In comparison, race is clearly not a choice, and since one cannot change one's race, it is more intuitive that race should be heavily protected by the Court in response to any discrimination one experiences as a result of one's race. Overall, race and sexuality are extremely complex issues that cannot be easily settled by the Court, but it does seem to help that race is visible in ways that sexuality is not.

Additionally, black people are more easily categorized as a discrete group than are LGBTQ individuals—a categorization which has incited the Court to consider cases dealing with race under the strictest scrutiny. Most gay children are born to heterosexual parents and often have intimate ties to majority culture as a consequence.<sup>299</sup> Thus, even if the LGBTQ community is marginalized, they have more ties to the majority and have more allies in mainstream culture who will ardently advocate on their behalf. Pamela Karlan argues it is a great irony that the “success of the gay rights movement relative to racial justice movements may be precisely because gay individuals are *less* insular in a particularly relevant sense than are people of color.”

<sup>300</sup> For example, Karlan notes that it is not the case that a white person will wake up someday and

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<sup>299</sup> Pamela S. Karlan, “Just Desserts?: Public Accommodations, Religious Accommodations, Racial Equality, and Gay Rights,” *Sup. Ct. Rev.* 145\*, 2018, 9.

<sup>300</sup> Karlan, “Just Desserts?,” 7.

suddenly discover that their child is African American; however, a person may discover one day that their child is gay.<sup>301</sup> Though the black community has certainly developed important ties with politically powerful white advocates over the years, these ties were not quite as organic as is the case with some of the LGBTQ community. LGBTQ individuals are often surrounded by straight allies because families and friendships are not often built solely based on sexuality. It is often the case that an individual's network of people do not know that they are gay until deep connections are already made with those people. Whereas one may be able to hide their sexuality, one cannot hide one's race. Because the LGBTQ community has been able to readily forge intimate ties with heterosexual individuals who sit comfortably in America's majority culture, they are seen as less insular relative to black people, and thus, less in need of strict scrutiny from the courts.

Furthermore, many legal scholars agree that it is culture at large that helps determine who constitutes an insular minority in need of strict scrutiny. Eskridge notes that, because "society, religion, and law are united in support of the proposition that racial variation is benign and ought not be the basis for exclusion from public programs and private workplaces and accommodations," there exists a general consensus that strict scrutiny is appropriate for marginalized racial groups. Contrarily, there is no larger consensus about the status of homosexuality as a benign classification, which helps explain why strict judicial review is not triggered. Fineman argues that "claims for nondiscrimination based on individual characteristics or statuses are inherently the products of their time and place; they arise during certain periods of history and are shaped in distinct political, cultural, and social contexts."<sup>302</sup> Thus, it is likely that

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<sup>301</sup> Karlan, "Just Desserts?," 9.

<sup>302</sup> Fineman, "Beyond Identities," 1731.

the way that a group is viewed by society at large seriously determines how we even consider cases of discrimination. If society does not view non-heterosexual individuals as deserving of any special protections, then this cultural attitude may bleed into the way the Court considers the status of sexual orientation as a protected class.

The Court's somewhat patchwork application of strict scrutiny poses a problem for how we think of justice and equality. Fineman suggest the fact that discrimination against certain groups are considered with high scrutiny "effectively leaves those outside of the narrow categories of race, ethnicity, and gender with no realistic way to challenge state treatment that minimally pulls itself over the arbitrary hurdle of rational basis review, no matter how detrimental or destructive."<sup>303</sup> By understanding equality in terms of groups and identities, oppressed groups must struggle to prove themselves as in need of strict scrutiny, which turns out to be a difficult feat for many like the LGBTQ community.

Furthermore, with the rise of Christian victimhood, we now see not only rights claims made by marginalized groups, such as the LGBTQ community, but from Christians themselves. In a legal landscape where it becomes more and more difficult to decide who is the oppressed and who is the oppressor, it is extremely difficult to discern whose rights should win out—the religious liberty of conservative Christians or the civil rights of LGBTQ individuals. With recent Supreme Court cases, such as *Obergefell* and *Masterpiece Cakeshop*, it becomes evident that the Court has no clear answer for which of these rights should prevail, especially since it appears that conflicts between free exercise and the rights of same-sex couples culminate into a zero-sum game. It becomes increasingly difficult to afford strict scrutiny to LGBTQ individuals if this type

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<sup>303</sup> Fineman, "Beyond Identities," 1727.

of judicial scrutiny could ultimately harm religious conservatives, who have proven themselves to be vulnerable to cases dealing with same-sex marriage and other sex-related issues.

Though I have examined the ways in which the sociopolitical battles over interracial marriage are distinct from those over same-sex marriage, we may still wonder: Will the issue of same-sex marriage ever converge with that of interracial marriage, eventually simmering down to a point where religious dissent is not quite so intense and society views same-sex marriage as relatively benign? We are already seeing slight shifts developing within the Catholic Church. Shortly after the *Obergefell* decision, Pope Francis lamented that, in modern society, “there is a global war trying to destroy marriage... they don’t destroy it with weapons, but with ideas. It’s certain ideological ways of thinking that are destroying it... we have to defend ourselves from ideological colonization.”<sup>304</sup> While the ideologies that Francis considers to be threatening to the institution of marriage are likely layered and complex, he locates gender theory as a “great enemy of marriage.”<sup>305</sup> Gender theories that challenge heteronormativity and consequently legitimize homosexuality thus are still largely resisted by the Catholic Church at the institutional level, speaking to the degree of discomfort conservative Christians have with straying from traditional ways of thinking about gender and sex. While we can see that Pope Francis certainly does not steer from the Church’s official doctrine opposing homosexuality in his comment about the danger of gender theories, Francis has made some remarks in recent years that seem to point to a modest change in the Church’s attitude toward the LGBTQ community. When speaking of the issue of priests who identify as gay just three years prior to his comments about the modern attack on marriage, Francis said, ““If someone is gay and he searches for the Lord and has good

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<sup>304</sup> Inés San Martín, “Pope Calls Gender Theory a ‘Global War’ Against the Family,” *Crux*, October 1, 2016, <https://cruxnow.com/global-church/2016/10/pope-calls-gender-theory-global-war-family/>.

<sup>305</sup> *Ibid.*

will, who am I to judge?”<sup>306</sup> This “who am I to judge” logic stands in stark contrast to the position of Francis’ predecessor, Pope Benedict XVI, who openly condemned homosexuality as an “intrinsic moral evil.”<sup>307</sup> Though the Church by no means condones same-sex marriage, Francis’s seemingly benevolent attitude toward LGBTQ individuals and the lives they lead is certainly a remarkable development in Catholicism. Responding to shifts in religious tolerance toward certain social taboos like same-sex marriage, Eskridge optimistically suggests that these types of shifts in religious belief may continue to develop in a way that will ultimately benefit the LGBTQ community. Eskridge claims that “religious belief changes as the surrounding culture changes and can contribute to” cultural changes “by validating more inclusive emotions and precepts that undermine prejudices and stereotypes. Religion, society, and law are mutually constitutive: each affects the others.”<sup>308</sup> Though religious opposition to same-sex marriage may appear long-lasting, religion may soon adapt to surrounding changes in majority culture, leading to more widespread acceptance of LGBTQ individuals.

Moreover, perhaps a large factor that contributed to the relative tolerance of *Loving* was a sort of resistance fatigue on behalf of white supremacists, finally succumbing to the cultural wave against racism brought on by a series of race-related Supreme Court cases that routinely sided against whites’ concerns for racial purity. White supremacists simply did not want to keep fighting in a losing war; however, a similar argument could be put forth regarding conservatives in the contemporary same-sex marriage debate. The Supreme Court has consistently ruled against traditional views of sexual mores over the past few decades, perhaps contributing to a

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<sup>306</sup> Rachel Donadio, “On Gay Priests, Pope Francis Asks, ‘Who Am I to Judge?’,” *New York Times*, July 29, 2013, <https://www.nytimes.com/2013/07/30/world/europe/pope-francis-gay-priests.html>.

<sup>307</sup> *Ibid.*

<sup>308</sup> Eskridge, “Noah’s Curse,” 663.

sense of resistance fatigue on the part of religious conservatives. Nevertheless, the current legal terrain suggests that conservatives will not surrender in the culture wars on the behalf of fatigue. As we saw with *Masterpiece Cakeshop*, the current free exercise jurisprudence opens the door for conservatives to seek accommodations rather than complete victory by, for example, overturning decisions like *Obergefell*. Though conservatives may experience some resistance fatigue after struggling against the cultural wave that increasingly supports more progressive standards of gender and sexuality, the fact that the Supreme Court now appears more willing to provide exemptions for religious dissenters suggests that resistance to same-sex marriage will not dissipate as quickly as it did for resistance to interracial marriage. Instead, we are likely to see localized battles continue in the contemporary marriage culture war for an extended period of time, as conservatives continue to carve out their area of dissent in a broader culture that largely supports same-sex marriage. Therefore, given the current U.S. legal landscape, it appears unlikely that these two marriage debates will experience any serious convergence in the near future.

Ultimately, the same-sex marriage debate might dissipate in time, but it seems like what we see today in this modern culture war is about something larger than just another debate about marriage. In many ways, the current contention surrounding same-sex marriage constitutes a larger struggle to define the American identity itself.<sup>309</sup> With the rise of secularism in majority American culture, conservatives find themselves navigating a society that refrains from saying “Merry Christmas,” opting for the more generic, “happy holidays.”<sup>310</sup> While this shift toward secularism may be welcomed by certain groups as progressive and timely, conservatives may

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<sup>309</sup> Feldman, *Divided by God*, 213.

<sup>310</sup> *Ibid.*, 214.

feel more culturally dislocated now than ever before, spurring conservatives groups to hold tight to their identities so as to not be lost in a cultural sea change. Issues of sex are obviously deeply contentious and personal, especially for religious conservatives, and how society comes to regulate issues of sex has profound implications for the moral wellbeing of society itself to these individuals. As a consequence, it appears that the culture war over same-sex marriage will endure for some time.

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