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### Recommended Citation

Robert S. Chang, Will LGBT Antidiscrimination Law Follow the Course of Race Discrimination Law, 100 *Minn. L. Rev.* 2103 (2016).

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## Article

# Will LGBT Antidiscrimination Law Follow the Course of Race Antidiscrimination Law?

Robert S. Chang<sup>†</sup>

### INTRODUCTION

On June 26, 2015, the United States Supreme Court in *Obergefell v. Hodges* made marriage equality the law of the land.<sup>1</sup> In this ruling, the Court burnished its reputation as an institution that safeguards civil rights for all.<sup>2</sup> Consider the Court's opening line in *Obergefell*: "The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allows persons, within a lawful realm, to define and express their identity."<sup>3</sup> In closing, the Court says of the petitioners who sought marriage equality: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."<sup>4</sup> The Court also makes clear that the Constitution is not self-executing and that the Court is the ultimate arbiter that safeguards the civil rights guaranteed by the Constitution, even, and perhaps especially, when the democratic process would say otherwise.<sup>5</sup>

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1. See 135 S. Ct. 2584, 2604–05 (2015).

2. See, e.g., David H. Gans, *A Term to Remember*, NEW REPUBLIC (June 28, 2015), <http://www.newrepublic.com/article/122191/supreme-court-term-remember> ("Defying the view that it's entirely hostile to civil rights, the Court ruled [this term] time and again for the protection of equality.").

3. *Obergefell*, 135 S. Ct. at 2593.

4. *Id.* at 2608.

5. *Id.* at 2605 (discussing the importance of the democratic process but noting that "when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic

While some were celebrating the outcome, others wondered what would come next.<sup>6</sup> Would there be acquiescence or resistance to the ruling? In a short span of time, we saw the images of same-sex couples celebrating their legal marriages juxtaposed against Texas Governor Greg Abbott and Louisiana Governor Bobby Jindal vowing to fight the Supreme Court ruling;<sup>7</sup> Chief Justice Roy Moore of the Alabama Supreme Court directing local officials to deny marriage licenses to same-sex couples;<sup>8</sup> a Kentucky clerk refusing to issue any marriage licenses to any couples, gay or straight;<sup>9</sup> and vendors refusing to provide services for same-sex weddings.<sup>10</sup> Were these defiant acts the harbinger of massive resistance hearkening back to the aftermath of *Brown v. Board of Education (Brown I)*<sup>11</sup> that backlash prognosticators predicted?<sup>12</sup> Backlash prognosticators

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decisionmaking” (quoting *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014)).

6. See, e.g., Symposium, *After Marriage*, 42 FLA. ST. U. L. REV. 479 (2015); Robert P. Jones, *After Same-Sex Marriage, Then What?*, ATLANTIC (June 24, 2015), <http://www.theatlantic.com/politics/archive/2015/06/after-same-sex-marriage-then-what/396659>.

7. Nicole Hensley, *Louisiana, Texas Governors Vow to Fight Supreme Court Ruling on Gay Marriage While Others Pledge to Comply*, N.Y. DAILY NEWS (June 26, 2015, 5:09 PM), <http://www.nydailynews.com/news/national/governors-vow-disobey-scotus-ruling-gay-marriage-article-1.2272503>.

8. Administrative Order of the Chief Justice of the Alabama Supreme Court (Feb. 8, 2015), <http://www.scribd.com/doc/255138696/Moore-Order-to-Ala-Probate-Judges>.

9. See Alan Blinder & Richard Pérez-Peña, *Kentucky Clerk Denies Same-Sex Marriage Licenses, Defying Court*, N.Y. TIMES (Sept. 1, 2015), <http://www.nytimes.com/2015/09/02/us/same-sex-marriage-kentucky-kim-davis.html>.

10. See, e.g., Paige Cornwell, *Amid Indiana Controversy, Donations Soar for Washington Florist Who Refused Gay Wedding*, SEATTLE TIMES (Apr. 4, 2015, 1:12 PM), <http://www.seattletimes.com/seattle-news/amid-indiana-controversy-donations-soar-for-washington-florist-who-refused-gay-wedding>; Curtis M. Wong, *Georgia Florists Say They Won't Serve Gay Couples Even as State's Religious Freedom Act Stalls*, HUFFINGTON POST (Apr. 3, 2015, 4:19 PM), [http://www.huffingtonpost.com/2015/04/03/georgia-florist-gay-wedding\\_n\\_7001288.html](http://www.huffingtonpost.com/2015/04/03/georgia-florist-gay-wedding_n_7001288.html) (discussing Georgia florists as well as the Indiana pizzeria that refused to cater same-sex weddings).

11. 347 U.S. 483 (1954).

12. Briefly, the backlash thesis is “the proposition that litigation does more harm than good for social change movements by producing counter mobilization that makes reform goals more difficult to receive.” Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1237 (2010) (discussing the two scholars, Gerald Rosenberg and Michael Klarman, most closely associated with advancing this thesis with regard to marriage equality based on their analysis of what occurred after *Brown*).

were critical of the prospects for marriage equality litigation to bring about change.<sup>13</sup>

Further, what other changes lie ahead for LGBT civil rights? Though same-sex adult couples can now get married and have their marriages recognized in every state, they can still be fired from their jobs in twenty-nine states for being gay,<sup>14</sup> and in many states can be discriminated against with regard to housing and public accommodations.<sup>15</sup> Liberty and equality seem a long way off. One commentator notes that “[t]he pioneering states that first extended marriage rights to same-sex couples did so only *after* they had first enacted workplace nondiscrimination laws.”<sup>16</sup> In pronouncing marriage equality, did the Court get ahead of itself?

Only time will tell what course LGBT civil rights will take, with many struggles to come in federal and state legislative and administrative arenas, and of course in the courts. How will LGBT antidiscrimination law develop? The relevant canon of Supreme Court jurisprudence on this issue is pretty thin, with *Obergefell* joining *Romer v. Evans*,<sup>17</sup> *Lawrence v. Texas*,<sup>18</sup>

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13. See, e.g., Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 459–73 (2005) (detailing the negative consequences for same-sex marriage following *Lawrence*); Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 813–14 (2006) (“Litigation substitutes symbols for substance. . . . Without political support, court decisions will not produce social change.”). As the tide shifted, Klarman has walked back his backlash prediction. See Michael J. Klarman, *Windsor and Brown: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 148 (2013) (“[W]e have no way of knowing whether a broad constitutional ruling in favor of gay marriage would have generated political backlash on the same scale that *Brown* and *Roe* did. Yet there is reason to believe that it would not have.”).

14. Kevin Short, *The 29 States Where You Can Still Be Fired for Being Gay*, HUFFINGTON POST (Oct. 30, 2014, 3:43 PM), [http://www.huffingtonpost.com/2014/10/30/fired-for-being-gay\\_n\\_6076492.html](http://www.huffingtonpost.com/2014/10/30/fired-for-being-gay_n_6076492.html). For more detailed information about state non-discrimination laws, see *Non-Discrimination Laws: State by State Information—Map*, ACLU, <https://www.aclu.org/map/non-discrimination-laws-state-state-information-map> (last visited Mar. 31, 2016).

15. See Erik Eckholm, *Next Fight for Gay Rights: Bias in Jobs and Housing*, N.Y. TIMES (June 27, 2015), <http://www.nytimes.com/2015/06/28/us/gay-rights-leaders-push-for-federal-civil-rights-protections.html>.

16. Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1115 (2015).

17. 517 U.S. 620, 624 (1996) (finding unconstitutional a state constitutional amendment that prevented state and local governments from enacting, adopting, or enforcing “any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected

and *United States v. Windsor*.<sup>19</sup> Will advances for LGBT individuals and communities occur notwithstanding the ongoing retrenchment of rights for racial minorities as well as the maintenance of racially disparate outcomes for certain racial minorities, leading to further division and stratification?<sup>20</sup> Will the Supreme Court's LGBT jurisprudence follow a course similar to the Court's race jurisprudence?<sup>21</sup>

This Article takes up these questions, drawing from Alan David Freeman's groundbreaking article, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, in which he claims that not only did federal antidiscrimination law develop in a way that failed to redress racial inequality but, moreover, served to legitimize racial discrimination.<sup>22</sup> Part I is descriptive and sets forth the Freeman hypothesis in greater detail and reviews his periodization of Supreme Court race cases. Freeman, in a later article, revisited this topic and examined cases through 1989. Part I extends the analysis to review Supreme Court race cases since 1989 to see if the Freeman hypothesis still holds.<sup>23</sup> Draw-

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status or claim of discrimination”).

18. 539 U.S. 558, 578 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986), and finding a liberty interest in the Due Process Clause under which “[t]he State cannot demean . . . [the] existence [of] [two adults, who with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle] or control their destiny by making their private sexual conduct a crime”).

19. 133 S. Ct. 2675, 2693 (2013) (finding unconstitutional the Defense of Marriage Act which defined marriage as applying only to heterosexual unions). I do not include *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013), the case involving a constitutional challenge to California's Proposition 22, that had defined marriage as the union between one man and one woman, since a 5–4 majority of the Court did not reach the merits of the challenge because it found that the petitioners in *Hollingsworth* lacked standing.

20. See *infra* Part II.A.

21. See *infra* Part I and Part II.B.

22. Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter Freeman, *Legitimizing Racial Discrimination*].

23. Professor Freeman revisited his thesis approximately a decade later in Alan Freeman, *Antidiscrimination Law: The View from 1989*, 64 TUL. L. REV. 1407 (1990) [hereinafter Freeman, *Antidiscrimination Law*]. He passed away in 1996 so we do not have the benefit of his characterization and critique of the Court's post-1989 race jurisprudence. A moving set of remembrances of him as a teacher, scholar, and human being can be found in the *Buffalo Law Review*. See Colloquy, *A Gathering to Remember Alan Freeman*, 44 BUFF. L. REV. 613 (1996) (featuring contributions by Barry B. Boyer, Peter Gabel, Anthony Kronman, Thomas E. Headrick, Sara Nichols, Bill Magavern, Al Katz, Thomas

ing from Freeman's periodization and the course of race anti-discrimination law, Part II is conjectural and speculates on the course of antidiscrimination law as it relates to LGBT civil rights. It argues that Freeman's hypothesis will likely hold true for LGBT civil rights, though as with the course of race antidiscrimination law, there will be twists and turns along the way. Part III is prescriptive and poses the "so what" question. If we accept Freeman's hypothesis as correct with regard to race anti-discrimination law and predictive with regard to LGBT anti-discrimination law, what ought we to do? The Article concludes by suggesting that we take up Freeman's call to redirect our energy to other political institutions, including advocacy that more intentionally develops state antidiscrimination jurisprudence.

#### I. THE FREEMAN HYPOTHESIS—ANTIDISCRIMINATION LAW LEGITIMIZES RACIAL DISCRIMINATION

In 1978, Alan David Freeman published *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine* in the *Minnesota Law Review*.<sup>24</sup> Though the article emerged from Freeman's participation in Critical Legal Studies (CLS),<sup>25</sup> the article bridges CLS and Critical Race Theory (CRT), playing a key role in both.<sup>26</sup> Given the article's importance in CLS and CRT, it is no wonder that the *Minnesota Law Review* chose it as one of the articles to commemorate for its centennial celebration. In addition, though citation counts are an imperfect and incomplete meas-

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Schofield, and John Henry Schlegel).

24. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22.

25. Freeman's authorial footnote for *Legitimizing Racial Discrimination* thanks scholars from the Conference on Critical Legal Studies. *See id.* at 1049 n.\*. He self identifies as a CLS scholar and defends himself and CLS against the pieces that launch CRT. *See* Alan Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 296 (1988) (responding to Symposium, *Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987)).

26. For example, *Legitimizing Racial Discrimination* is included in one of the two initial CRT readers as one of the key writings that formed CRT. *See* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 29–46 (Kimberlé Crenshaw et al. eds., 1995); *cf.* Kimberlé Williams Crenshaw, *The First Decade: Critical Reflections, or "A Foot in the Closing Door,"* 49 UCLA L. REV. 1343, 1363 n.22 (including Alan Freeman among "Anglo scholars whose articles are key texts within CRT"). *See generally* Mario Barnes, "The More Things Change . . .": *New Moves for Legitimizing Racial Discrimination in a "Post-Race" World*, 100 MINN. L. REV. 2043 (2016) (discussing the jurisprudential place of Freeman's work).

ure of influence,<sup>27</sup> this article was recognized in 1996 as being ranked 82nd on a list of the “Most-Cited Law Review Articles of All Time.”<sup>28</sup> Since 1996, it has continued to garner scholarly attention.<sup>29</sup>

Freeman begins *Legitimizing Racial Discrimination* with the following observation: “[A]s surely as the law has outlawed racial discrimination, it has affirmed that Black Americans can be without jobs, have their children in all-black, poorly funded schools, have no opportunities for decent housing, and have very little political power, without any violation of antidiscrimination law.”<sup>30</sup> First, it is important to set forth what Freeman understood to constitute federal antidiscrimination law. He defines it as “federal constitutional and statutory law, as expounded or interpreted by the United States Supreme Court, defining the conduct to be treated as racial discrimination.”<sup>31</sup> Freeman then reviews twenty-five years of Supreme Court doctrine to show how it came to be that Black inequality can exist and persist notwithstanding federal antidiscrimination law.<sup>32</sup> In addition to being “technical assertions of legal doctrine,” Supreme Court opinions “not only reflect dominant societal moral positions, but also serve as part of the process of forming or crystallizing such positions.”<sup>33</sup> Because federal antidiscrimination law determines what is and is not discrimination, the fact that Black inequality exists and persists must occur for reasons

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27. One should be careful, though, what conclusions one draws from citation counts. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563 (1984) (commenting on the lack of attention paid to the work of minority scholars writing in the area of antidiscrimination law, describing “an inner circle of about a dozen white, male writers who comment on, take polite issue with, extol, criticize, and expand on each other’s ideas”).

28. See Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 767, 770 (1996) (based on citations in Social Sciences Citation Index from 1956 through May 1995).

29. The article’s influence and impact as measured by citations has continued, with 390 citations after May 1995 in WESTLAW LAW REVIEWS & JOURNALS, <https://a.next.westlaw.com/search/home.html> (follow “Secondary Sources” hyperlink; then follow “Law Reviews & Journals” hyperlink; then search “(alan /2 freeman) /5 legitimizing & da(aft 5/31/1995)”) (search conducted Mar. 31, 2016).

30. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1050.

31. *Id.* at 1050 n.8.

32. *Id.* at 1057–118.

33. *Id.* at 1051 (footnote omitted).

other than discrimination.<sup>34</sup> It is in this sense that Black inequality is legitimized.

The Court has created a crimped vision of what constitutes discrimination, such that federal antidiscrimination law, in addition to being ineffectual in redressing Black inequality, actually legitimizes racial discrimination by rationalizing inequality as not resulting from discrimination. For Freeman, antidiscrimination law fits within a vision of law that “serves largely to legitimize the existing social structure,” though its operation must be sufficiently “credible for those whose allegiance it seeks as well as those whose self-interest it rationalizes.”<sup>35</sup> In other words, in order for the Court to fulfill its legitimation function, we must continue to believe in the utility of antidiscrimination law despite its ultimate and intended futility.<sup>36</sup> Antidiscrimination law, then, contains within it a dangerous contradiction.

Further, this understanding of antidiscrimination law is not part of the standard civil rights narrative, which presumes a self-correcting mechanism that moves us steadily, though if at times inconsistently, toward racial equality. Instead, Freeman’s analysis is consistent with Derrick Bell’s notion of interest convergence as it operates in the context of civil rights.<sup>37</sup>

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34. Freeman makes this point in the following hypothetical:

Suppose one were to visit the future society of racial irrelevance and discover conditions that in any other society might be regarded as corresponding with a pattern of racial discrimination. Among such conditions might be that one race seems to have a hugely disproportionate share of the worse houses, the most demeaning jobs, and the least control over societal resources. For such conditions to be fair and accepted as legitimate by the disfavored race in future society, they would have to be perceived as produced by accidental, impartial, or neutral phenomena utterly dissociated from any racist practice.

*Id.* at 1074–75.

35. *Id.* at 1051.

36. Cf. Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L.J. 1, 29 (1987). Binder, commenting on law’s legitimation function, notes:

If the actors in American politics are directed by shared values rather than opposing interests, then it is conceivable that the political process will transfer wealth and power from those with more to those with less. If the political process will lead to the empowerment of the weak and the enrichment of the poor, then the poor and weak have no need to use or threaten violence in order to achieve justice.

*Id.*

37. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 524–25 (1980) (discussing the convergence of interests that led to *Brown I*).



Bell observed that advances for racial minorities tended to occur when they served the interests of those in society with power.<sup>38</sup> Thus, one way to understand *Brown v. Board of Education* is that it came about not (merely) because of the immorality or illegality of segregation but because of the convergence of interests: “whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation” and “reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home.”<sup>39</sup>

To help elucidate his hypothesis, Freeman uses the notion of perpetrator and victim perspectives.

#### A. THE PERPETRATOR AND VICTIM PERSPECTIVES

Freeman notes that there are different ways that one might understand racial discrimination and offers the victim and perpetrator perspectives as possibilities the Court could have followed.

From the victim’s perspective, racial discrimination describes those conditions of actual social existence as a member of a perpetual underclass. This perspective includes . . . the objective conditions of life—lack of jobs, lack of money, lack of housing . . . . The perpetrator perspective sees racial discrimination not as conditions, but as actions, or series of actions, inflicted on the victim by the perpetrator. The focus is more on what particular perpetrators have done or are doing to some victims than it is on the overall life situation of the victim class.<sup>40</sup>

A clear tension exists between these perspectives and the possibilities for antidiscrimination law, depending on what perspective would dominate. If the victim’s perspective had become the animating force behind federal antidiscrimination law, we might find ourselves in a very different place, with different outcomes than what we see. Instead, the perpetrator perspective has won out, where racial discrimination takes “place in a

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38. Bell observed:

It follows that the availability of fourteenth amendment protection in racial cases may not actually be determined by the character of harm suffered by blacks or the quantum of liability proved against whites. Racial remedies may instead be the outward manifestations of unspoken and perhaps subconscious judicial conclusions that the remedies, if granted, will secure, advance, or at least not harm societal interests deemed important by middle and upper class whites.

*Id.* at 523.

39. *Id.* at 524–25.

40. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1052–53 (footnotes omitted).

virtually ahistorical realm where atomistic individuals 'intentionally' 'cause' harm to other individuals, in short, reducing the problem to one of tort.<sup>41</sup> These elements are constructed in such a way as to severely narrow what is legally recognized as discrimination.

Though ultimately the perpetrator perspective would prevail, post-*Brown* jurisprudence shows that this was not inevitable. What follows is a periodization of federal antidiscrimination law as described by Freeman up until 1989. The periodization from 1989 attempts to extend Freeman's analysis to the present. A review of these cases shows antidiscrimination law's dangerous contradiction.

## B. PERIODIZING FEDERAL ANTIDISCRIMINATION LAW—RACE CASES

### 1. 1954–1965: The Era of Uncertainty

*Brown I* ushered in what Freeman describes as an era of uncertainty.<sup>42</sup> Part of the uncertainty came from the lack of clarity with regard to the doctrinal basis for its ultimate conclusion that segregation in public schools constituted a violation of the Equal Protection Clause. There were critics like Herbert Wechsler<sup>43</sup> and defenders like Charles Black.<sup>44</sup> For Wechsler, who questioned the factual basis for segregation being harmful to blacks, assuming equal facilities as the *Brown* court did, the only doctrinal basis for the decision had to be based on the "denial by the state of freedom to associate."<sup>45</sup> The problem for Wechsler was that "if the freedom of association is denied by segregation, integration forces an association upon those for whom it is unpleasant or repugnant."<sup>46</sup> Thus, in the absence of a neutral constitutional principle, the Court in

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41. Alan D. Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1235 (1981).

42. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1057.

43. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959) (criticizing the doctrinal basis of *Brown*, finding no neutral constitutional principle upon which the decision could be based).

44. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421, 424–28 (1960) (responding to Wechsler and finding racial equality to be the neutral constitutional principle supporting *Brown I*).

45. Wechsler, *supra* note 43, at 34.

46. *Id.*

*Brown I* essentially undertook a legislative function in determining whose associational interests would prevail.

To this, Derrick Bell responds, "To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then."<sup>47</sup> Wechsler's approach is both ahistorical and acontextual, in some ways presaging techniques the Court would later use to contain and constrain what it had started in *Brown I* and in its development of antidiscrimination law. Charles Black, on the other hand, found the question as to whether segregation could constitute equal treatment within the historical context of the United States to be laughable.<sup>48</sup>

Aside from the lack of doctrinal clarity, much of the uncertainty about civil rights possibilities that might follow *Brown I* stemmed from the disjuncture between the constitutional violation and the remedy. Rather than striking down segregated public education and mandating integration, the Court remanded the cases to the lower courts the following year in *Brown II*:

Full implementation . . . may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal.<sup>49</sup>

With that, we were given the infamous direction given to the district courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis *with all deliberate speed* the parties to these cases."<sup>50</sup>

Because the determination of any remedies required attention to the particular local conditions in each school district, remedies were limited to the parties in these cases. Students in school districts other than those directly involved in the cases consolidated in *Brown I* and *II* had to file their own lawsuits if they wanted a measure of relief under the constitutional prin-

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47. Bell, *supra* note 37, at 522.

48. Black, *supra* note 44, at 421.

49. *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294, 299 (1955).

50. *Id.* at 301 (emphasis added).

ciples articulated in *Brown I*. We see in *Brown I* and *II* the Court giving voice to both the perpetrator and victim perspectives. Though the condition of Blacks subjected to segregated education (victim's perspective) provides the basis for the Court's finding of constitutional violation, a remedy that would vindicate the victim's perspective—the immediate outlawing of school segregation—is refused in *Brown II* and, instead, aggrieved parties must assert and prove their claim of constitutional violation committed by a particular perpetrator and seek and enforce that remedy against that perpetrator.<sup>51</sup>

Though *Brown* contained within it great promise, the Court's doctrinal imprecision, failure to commit to a remedy, and limitation of the remedy to the parties in the original lawsuits makes this a period of uncertainty.

## 2. 1965–1974: The Era of Contradiction

In some ways, Freeman's Era of Contradiction is ushered in, and perhaps necessitated, by the Civil Rights Act of 1964<sup>52</sup> and the Voting Rights Act of 1965.<sup>53</sup> With far-reaching legislation to reach what had been outside of constitutional purview as private discrimination or a matter for the states, the Court had to determine first whether the legislation was constitutional and second what could be accomplished under the statutes.

When Congress had previously attempted to regulate public accommodations in the Civil Rights Act of 1875, the Court, in the Civil Rights Cases, had found that Congress had overreached. Justice Bradley famously stated:

When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws . . . .<sup>54</sup>

With that, Justice Bradley found unconstitutional the portions of the Civil Rights Act of 1875 that forbid discrimination on the basis of race with regard to access to public accommodations. He held that the Fourteenth Amendment prohibited racially discriminatory state action but that the Fourteenth Amend-

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51. See discussion of desegregation cases *infra* Part I.B.2.

52. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000a-6 (2012)).

53. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 52 U.S.C. § 10101 (2014)).

54. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

ment did not reach “[i]ndividual invasion of individual rights.”<sup>55</sup> Justice Bradley constructed a divide based on the public and the private, stating:

The wrongful act of an individual, unsupported by any such [State] authority, is simply a private wrong, . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress.<sup>56</sup>

Because the first and second sections of the Civil Rights Act of 1875 tried to regulate private conduct “not sanctioned in some way by the State, or not done under State authority,”<sup>57</sup> there was no violation of the Fourteenth Amendment,<sup>58</sup> and Congress exceeded its authority under the Thirteenth Amendment.<sup>59</sup>

This time around, the Court would uphold the 1960s civil rights acts,<sup>60</sup> but had the task of determining the doctrinal requirements to establish violations and appropriate remedies. The Court would shift from the uncertainty of the earlier period and enter into a period of contradiction where some cases seemed to reflect the victim perspective with others reflecting the perpetrator perspective. Within these contradictions, the seeds of doctrinal instability were planted that would enable the Court, years later, to resurrect the ghost of Justice Bradley.<sup>61</sup> Lurking in the cases are themes that begin to emerge more strongly as the years go by: a concern about unfairly burdening whites and overcompensating blacks.

For example, in *City of Richmond v. United States*, the Court was faced with whether the city’s annexation of approx-

55. *Id.* at 11.

56. *Id.* at 17.

57. *Id.*

58. *Id.* at 19 (finding that “such plenary power” was not granted to Congress by the Fourteenth Amendment).

59. *Id.* at 21 (“[The] power to pass the law is not found in the Thirteenth Amendment.”). Though the *Civil Rights Cases* has not been overruled, and in fact has been cited positively in *Romer v. Evans*, it has been partially abrogated, at least with regard to the ability of Congress to reach purely private conduct in order “to eradicate conditions that prevent Negroes from buying and renting property because of their race or color.” *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438 (1968); *cf.* *United States v. Cannon*, 750 F.3d 492, 499 (5th Cir. 2014) (discussing the change in the interpretation of Congress’s power under the Thirteenth Amendment to reach private conduct from the *Civil Rights Cases* to *Alfred H. Mayer*).

60. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964).

61. See *infra* notes 175–77 and accompanying text.

imately twenty-three square miles of adjacent county land accompanied by a change in its at-large election of city council members was permissible under the Voting Rights Act of 1965.<sup>62</sup> Richmond was subject to § 5 of the Voting Rights Act, which required preclearance by the Attorney General or approval by federal court of any change in voting qualifications or prerequisites.<sup>63</sup> The proposed annexed territory had a population that was overwhelmingly white—45,705 whites (96.7%) and 1557 blacks (3.3%).<sup>64</sup> The effect of annexation was to change the racial composition of Richmond, which pre-annexation was 52% black/48% white to post-annexation, 42% black/58% white.<sup>65</sup> One of the questions before the Court was whether annexation would result in black voter dilution. On its face, it appears that annexation would take a majority black city and make it majority white. However, because annexation was to be accompanied by a switch from an at-large system to a ward or district system, the key inquiry for the Court was not whether blacks would go from the majority to a minority in the newly composed city; instead, all the Court asked was whether the black vote pre-annexation would be diluted post-annexation. In other words, in the newly composed city, would blacks be underrepresented on the council?<sup>66</sup> In this newly composed city, where blacks would now constitute 42% of the population and wards/districts were drawn such that four of the nine wards (44.4%) would have a majority black population, the black vote in the newly composed city could not be said to be diluted.<sup>67</sup> Instead, taken as a whole, the changes were thought to comport with fairness. Further, the effort to have wards/districts drawn that would create black majorities in five of the nine wards/districts was thought to victimize whites because it would “allocate to the Negro community in the larger city the voting power or the seats on the city council in excess of its proportion in the new community and thus permanently . . . underrepresent other elements in the community [whites].”<sup>68</sup> Ignored is the fact that prior to annexation, blacks constituted a majority, approximately 5/9 of the total population. Annexa-

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62. 422 U.S. 358, 359–60 (1975).

63. *Id.* at 361–62.

64. *Id.* at 363.

65. *Id.*

66. *Id.* at 371–72.

67. *Id.*

68. *Id.* at 373.

tion was viewed as a neutral act and all that mattered was the possibility of proportional representation pre- and post-annexation. The fact that blacks went from the majority (5/9) to the minority (4/9) was, in the absence of evidence of invidious discrimination, not seen as a dilution of their vote because blacks retained the prospect of proportional representation post-annexation.

The Civil Rights Act of 1964 included Title VII—Equal Employment Opportunity.<sup>69</sup> The Court, though, would have to determine what it meant for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”<sup>70</sup> In *Griggs v. Duke Power*, the Court was faced with an employer’s ostensibly neutral practices that had a racially disproportionate impact.<sup>71</sup> This sets up the tension between the perpetrator perspective and the victim perspective. Under the perpetrator perspective, nothing is inferred from the fact of racially disproportionate outcomes; the Court accepted the conclusion of the lower courts that Duke Power “had adopted the diploma and test requirements without any ‘intention to discriminate against Negro employees.’”<sup>72</sup> However, *Griggs*, by demanding a “justification of ostensibly neutral practices” producing racially disproportionate outcomes, shifts “from an emphasis on ‘motivation’ to one on ‘consequences’ mark[ing] a transformation of the notion of intent in anti-discrimination law. Henceforth, the intentional continuation of a course of conduct producing racially disproportionate results would be actionable, regardless of why the actor chose to continue [absent business necessity].”<sup>73</sup>

Because this notion of disparate impact was not codified in Title VII of the 1964 Civil Rights Act, it was expected to apply to aspects of employment practices beyond hiring, “especially seniority, and to other statutory and constitutional violations in areas such as school desegregation, voting, housing, land use

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69. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000a-6 (2012)).

70. *Id.* § 703(a)(1).

71. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427–28 (1971) (examining the completion of high school and satisfactory scores on two general intelligence tests).

72. *Id.* at 432 (citation omitted).

73. Freeman, *Antidiscrimination Law*, *supra* note 23, at 1422.

regulation, and provision of governmental services.”<sup>74</sup> If it had, courts would advance the victim perspective and would address conditions and outcomes. One commentator, writing the year after *Griggs*, suggested that the decision would help address institutional racism so that employers could not rely upon “the results of segregation—cultural and educational deprivation—to become a justification for the perpetuation of segregation.”<sup>75</sup> In addition, it was presumed that

Neutral practices producing racially disproportionate results would have to be justified; that, for the purposes of antidiscrimination law, intent would mean no more than voluntary conduct producing racially disproportionate results; and that the best way to avoid or at least defer the impact of the first two was to initiate a voluntary affirmative action program.<sup>76</sup>

The Court in the next era, Rationalization, quashed those expectations. Despite its language in *Griggs* that neutral practices “cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices,”<sup>77</sup> the Court proceeded to legitimize the status quo in the next era.

### 3. 1974–1984: The Era of Rationalization

Insofar as *Griggs* offered “a genuine threat to the hegemony of the perpetrator perspective, then the major task of the era of rationalization must be the obliteration of *Griggs*.”<sup>78</sup> In the era of rationalization, the Court “employed a method of containment to defeat any deviant victim perspective expectations.”<sup>79</sup> Specifically, the Court began to deploy key aspects of the perpetrator perspective through three legal concepts—remedy, causation, intent—“insist[ing] on a neat correlation between violation and remedy, proof of objective causation of injury by the perpetrator, and proof of ‘intent,’ that is, purposeful discrimination.”<sup>80</sup>

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74. *Id.*

75. Herbert N. Bernhardt, *Griggs v. Duke Power Co.: The Implications for Private and Public Employers*, 50 TEX. L. REV. 901, 902 (1972).

76. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1114–15.

77. *Griggs*, 401 U.S. at 430.

78. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1114.

79. Freeman, *Antidiscrimination Law*, *supra* note 23, at 1422.

80. *Id.* at 1418.



a. *Intent*

Just five years after *Griggs*, the Court in *Washington v. Davis*<sup>81</sup> was faced with a "test that purported to measure verbal ability, vocabulary, reading, and comprehension . . . [used] as a criterion for admission to the training program for District of Columbia police officers."<sup>82</sup> This test had a negative disproportionate impact in screening out black applicants.<sup>83</sup> One key difference, though, was that Title VII was not yet applicable to government employment so the legal challenge alleged a violation of the Due Process Clause of the Fifth Amendment.<sup>84</sup> Though the plaintiffs lost at the district court, they prevailed before the United States Court of Appeals for the D.C. Circuit, which relied upon *Griggs* to govern the due process challenge brought by the plaintiffs.<sup>85</sup>

In reversing, the Supreme Court pronounced that *Griggs'* disparate impact rubric was limited to Title VII and did not apply more broadly to due process or equal protection claims.<sup>86</sup> The Court used *Washington v. Davis* to refocus antidiscrimination law on intentional or invidious discrimination. It quickly canvassed its Equal Protection jurisprudence and emphasized that purposeful discrimination had to be established in order to prove an equal protection violation with regard to the exclusion of Negroes from grand and petit juries in criminal proceedings,<sup>87</sup> racial gerrymandering,<sup>88</sup> and school desegregation.<sup>89</sup>

The Court acknowledged that disparate impact may be a factor among the totality of relevant facts from which an invidious discriminatory purpose may be inferred.<sup>90</sup> However, it emphasized that it disagreed with lower courts "to the extent that

81. 426 U.S. 229 (1976).

82. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1115.

83. *Davis*, 426 U.S. at 235.

84. The complaint also alleged two statutory violations, 42 U.S.C. § 1981, and D.C. Code § 1-320, but partial summary judgment was sought by plaintiffs only on the due process violation, which is the issue on appeal before the Supreme Court. *Davis*, 426 U.S. at 233-36.

85. *Davis v. Washington*, 512 F.2d 956, 959 (D.C. Cir. 1975), *rev'd*, 426 U.S. 229 (1976).

86. *Davis*, 426 U.S. at 238-39.

87. *Id.* (citing *Akins v. Texas*, 325 U.S. 398, 403-04 (1945); *Strauder v. West Virginia*, 100 U.S. 303 (1880)).

88. *Id.* at 240 (citing *Wright v. Rockefeller*, 376 U.S. 52 (1964)).

89. *Id.* ("The essential element of *de jure* segregation is 'a current condition of segregation resulting from intentional state action.'" (quoting *Keyes v. School Dist. No. 1*, 413 U.S. 189, 205 (1973))).

90. *Id.* at 242.

those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation.<sup>91</sup> The Court expressed its concern that:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.<sup>92</sup>

Discriminatory purpose is the bedrock of antidiscrimination law.

*b. Remedy*

In *International Brotherhood of Teamsters v. United States*, the Court had to decide if a remedy under Title VII could invalidate a seniority system in a collectively bargained agreement that perpetuated the effects of pre-Title VII discrimination.<sup>93</sup> The Court acknowledged that the seniority system in question had resulted in the situation where

because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices."<sup>94</sup>

Nevertheless, the Court determined that the literal terms of Title VII and its legislative history provide a measure of immunity to such seniority systems.<sup>95</sup> This protects the settled expectations of the beneficiaries of discrimination, as it would be unfair to impose a remedy whose costs are borne by innocent white workers when the constitutional violation was committed by the perpetrator employer or union. The Court would express

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91. *Id.* at 245. The Court cited numerous appellate and district court cases dealing with public employment, urban renewal, zoning, public housing, and municipal services that had improperly extended *Griggs*. *Id.* at 244 n.12.

92. *Id.* at 248.

93. 431 U.S. 324, 343 (1977).

94. *Id.* at 349-50.

95. *Id.* at 350.

this more strongly in *Firefighters Local Union No. 1784 v. Stotts*,<sup>96</sup> a case that in 1984 would usher in the Era of Denial.

c. *Causation*

As the *Washington v. Davis* Court noted in commenting on its school desegregation cases, the result—segregated schools—had to be linked directly to intentional state action. Causation becomes a concept the Court manipulates to rationalize the status quo. Thus, “[d]espite extensive de jure segregation in the City of Detroit, the Court refused to approve a remedy that would consolidate Detroit schools with those of surrounding suburbs for the purpose of achieving an integrated result.”<sup>97</sup> The Court reasoned that the perpetrator was the City of Detroit and not the (largely white) suburban school districts that had not engaged in de jure segregation or the (white) parents that had moved from the city to the suburbs.<sup>98</sup> The Court emphasized that “without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.”<sup>99</sup>

Freeman notes that the lessons from *Milliken* and *San Antonio Independent School District v. Rodriguez*, “which rejected a claim of resource equalization among school districts without regard to ability to pay,” were “stark and clear: if whites can find a way to leave the inner city, they may legally insulate their finances and schools from the demands of blacks for racial equality.”<sup>100</sup> Any segregative consequences that result from the private actions of white families in response to school desegregation are beyond the remedial power of the courts.<sup>101</sup> In this way, black inequality becomes rationalized as beyond the remedial reach of the courts.

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96. 467 U.S. 561 (1984).

97. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1108 (discussing *Milliken v. Bradley*, 418 U.S. 717 (1974)).

98. *Milliken*, 418 U.S. at 745.

99. *Id.*

100. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1108.

101. *Pasadena City Board of Education v. Spangler* finishes what the *Milliken* Court started. 427 U.S. 424 (1976). Once a race-neutral plan was implemented, efforts by the district court to alter the plan to address post-remedy intradistrict movement of families that resulted in resegregation of some of the schools exceeded the court's remedial authority. *Id.* at 433.

#### 4. 1984–????: The Era of Denial

Approximately a decade after *Legitimizing Racial Discrimination*, Freeman revisited his thesis and declared a new era, Denial, during which the Court completes the

dismantling process that had begun in the period of rationalization . . . to reconsider, and reject, the implicit assumptions in *Weber*. Once statistical disparities cease to be presumptive violations, and remedies mandating numerical results are no longer required (or even permitted), the reality of inequality experienced by black Americans becomes just another neutral feature of our socioeconomic landscape.<sup>102</sup>

Though several affirmative action programs in the context of employment were found to be constitutional,<sup>103</sup> leading one commentator to announce that “the effort to kill affirmative action programs has failed,”<sup>104</sup> this era saw the Justices giving greater credence to the argument that affirmative action programs benefit non-victims and place unfair burdens on innocent non-perpetrators.<sup>105</sup>

The Court limited the reach of affirmative action in the context of layoffs. In *Firefighters Local Union No. 1784 v. Stotts*<sup>106</sup> and *Wygant v. Jackson Board of Education*,<sup>107</sup> the Court rejected the authority of the trial court to protect recently hired minority workers with less seniority from layoffs in contravention of an existing seniority system that favored white workers with greater seniority.<sup>108</sup> *Stotts* made clear that a recently hired minority worker could be granted retroactive seniority only if that worker proved that she or he was a victim of past discrimination by that employer and could prove that but for this discrimination, the worker would have been hired and accrued seniority.<sup>109</sup> However, in most instances, recently

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102. Freeman, *Antidiscrimination Law*, *supra* note 23, at 1426–27.

103. *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. 616 (1987); *United States v. Paradise*, 480 U.S. 149 (1987); *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421 (1986); *Local 93, Int'l Ass'n of Firefighters, AFL-CIO v. Cleveland*, 478 U.S. 501 (1986).

104. Herman Schwartz, *The 1986 and 1987 Affirmative Action Cases: It's All Over but the Shouting*, 86 MICH. L. REV. 524, 576 (1987).

105. See, e.g., Antonin Scalia, *The Disease As Cure: "In Order to Get Beyond Racism, We Must First Take Account of Race,"* 1979 WASH. U. L.Q. 147, 154 (“The affirmative action system now in place . . . is based upon concepts of racial indebtedness and racial entitlement rather than individual worth and individual need; that is to say, because it is racist.”).

106. 467 U.S. 561 (1984).

107. 476 U.S. 267 (1986).

108. *Wygant*, 476 U.S. at 283–84; *Stotts*, 467 U.S. at 578.

109. *Stotts*, 467 U.S. at 578–79 (citing *Int'l Bhd. of Teamsters v. United*

hired workers are not able to meet this high burden, and even if discriminatory hiring practices are proven, "mere membership in the disadvantaged class is insufficient to warrant a seniority award."<sup>110</sup>

*Wygant* was a reverse discrimination lawsuit brought by white teachers who were laid off while minority teachers with less seniority were retained. In finding that this practice violated the Equal Protection Clause, the Court noted that there was a key difference between preferential hiring plans and preferential layoff plans: "While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals . . ."<sup>111</sup> In describing the position of these innocent (white) workers, the Court observed:

A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns,' worth even more than the current equity in his home." Layoffs disrupt these settled expectations in a way that general hiring goals do not.<sup>112</sup>

These settled expectations become a property interest that the law protects, even though "many white employees would not have been hired in the first place" absent racial discrimination, "and would therefore have no basis to claim seniority preferences."<sup>113</sup>

Several cases decided during October Term 1988 tried to consolidate the pushback on civil rights that characterized the Era of Denial.<sup>114</sup> *Wards Cove Packing Co. v. Atonio* severely limited *Griggs* by requiring: (1) a more specific showing with re-

States, 431 U.S. 324, 367-371 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976).

110. *Id.* at 579.

111. *Wygant*, 476 U.S. at 283.

112. *Id.* (citation omitted).

113. See Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1776 (1993).

114. See generally *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (overturning much of *Griggs*); *Martin v. Wilks*, 490 U.S. 755 (1989) (permitting collateral challenge by white firefighters, jeopardizing consent decrees that had resulted in remedial affirmative action policies); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (holding that strict scrutiny is to be applied for race remedial affirmative action policies enacted by subnational governmental entities); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (limiting Title VII to hiring and not harassment or other discrimination after employment).

gard to disparate impact to establish a prima facie case;<sup>115</sup> (2) a stricter demonstration of causation where a particular hiring practice, rather than aggregate practices, had to be proven to have a significant disparate impact;<sup>116</sup> and (3) changing the *Griggs*' burden shifting regime so that once a prima facie case was established, the employer had only a burden of producing evidence of a business justification for the challenged practice, but the "burden of persuasion, however, remain[ed] with the disparate-impact plaintiff."<sup>117</sup>

*Martin v. Wilks* was another form of a reverse discrimination case in which white firefighters brought a collateral challenge to a consent decree that resulted in an affirmative action program that included goals for hiring and promoting black firefighters.<sup>118</sup> The failure of the white firefighters to intervene earlier in the proceedings leading to the consent decree was held to not bar them from pursuing a later collateral challenge.<sup>119</sup> The Court, in permitting this challenge by the white firefighters, "invite[d] legal attack by aggrieved whites on longstanding affirmative action programs originating in litigation, and it confers on whites a continuing right to complain about reverse discrimination in court."<sup>120</sup>

*Patterson v. McClean Credit Union* involved a claim based on 42 U.S.C. § 1981 brought by a black female employee who claimed that she had been harassed, not promoted, and then discharged, all because of her race.<sup>121</sup> Though the Court affirmed its holding that § 1981 reaches private conduct and prohibits racial discrimination with regard to making and enforcing contracts,<sup>122</sup> it stated that § 1981 does not reach conduct by the employer after contract formation.<sup>123</sup> In refusing to reach this private conduct, the Court stated:

The law now reflects society's consensus that discrimination based on the color of one's skin is a profound wrong of tragic dimension. Neither our words nor our decisions should be interpreted as signaling one inch of retreat from Congress' policy to forbid discrimination in

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115. *Wards Cove*, 490 U.S. at 654–55.

116. *Id.* at 656–58.

117. *Id.* at 659.

118. *Wilks*, 490 U.S. at 758.

119. *Id.* at 768.

120. Freeman, *Antidiscrimination Law*, *supra* note 23, at 1432.

121. 491 U.S. 164, 169 (1989).

122. *Id.* at 175.

123. *Id.* at 179–80 (noting, though, that racial harassment during the course of employment is actionable under Title VII).

the private, as well as the public, sphere. Nevertheless, in the area of private discrimination, to which the ordinance of the Constitution does not directly extend, our role is limited to interpreting what Congress may do and has done. The statute before us, which is only part of Congress' extensive civil rights legislation, does not cover the acts of harassment alleged here.<sup>124</sup>

Even while severely limiting the reach of federal antidiscrimination law, the Court professed its commitment to the principle of racial justice.

In these three cases (and in *Price Waterhouse v. Kins*<sup>125</sup>), the Court in its zeal to curtail even further the reach of antidiscrimination law overplayed its hand. Congress, two years later, would enact the Civil Rights Act of 1991 that would overrule key aspects of the Supreme Court's overreach.<sup>126</sup>

One major case, *City of Richmond v. J.A. Croson Co.*, from that Supreme Court term survived and is an exemplar of the technique of denial.<sup>127</sup> *Croson* involved a challenge to the Richmond City Council's Minority Business Utilization Plan, which

124. *Id.* at 188.

125. 490 U.S. 228 (1989) (finding the causation requirement in Title VII permits an employer to avoid liability if it can prove that it would have made the same decision despite the existence of an improper discriminatory motive).

126. The Civil Rights Act of 1991 made these findings and expressed the following purposes:

SEC. 2. FINDINGS.

The Congress finds that—

- (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
- (2) the decision of the Supreme Court in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) has weakened the scope and effectiveness of Federal civil rights protections; and
- (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

SEC. 3. PURPOSES.

The purposes of this Act are—

- (1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace;
- (2) to codify the concepts of "business necessity" and "job related" enunciated by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989);
- (3) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.); and
- (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.

Civil Rights Act of 1991, 42 U.S.C. §§ 2-3 (1991).

127. 488 U.S. 469 (1989).

required "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of the dollar amount of the contract to one or more Minority Business Enterprises."<sup>128</sup> Doctrinally, *Croson* is important because it established that remedial racial classifications are subject to the same level of scrutiny as discriminatory racial classifications.<sup>129</sup> Justice O'Connor's opinion observed that the program had been enacted by a city council where five of its nine members were black and noted that "[t]he concern that a political majority will more easily act to the disadvantage of a minority based on unwarranted assumptions or incomplete facts would seem to militate for, not against, the application of heightened judicial scrutiny in this case."<sup>130</sup> Further, the Court emphasized that the city of Richmond needed a strong basis in evidence in order to justify remedial action.<sup>131</sup> The fact that in a city with a 50% black population where 0.67% of prime contracts in a five-year period were awarded to minority contractors was insufficient evidence.<sup>132</sup> The fact that in 1977 Congress had determined "that the effects of past discrimination had stifled minority participation in the construction industry nationally" did not provide a strong basis in evidence that this was the case in Richmond.<sup>133</sup> The fact that there were very few minority contractors in local and state contractors' associations was not enough. Nor were statements that there had been past discrimination in the construction industry.<sup>134</sup> The Court went so far as to say that "none of the evidence presented by the city points to any identified discrimination in the Richmond construction industry."<sup>135</sup> We are left then with the world as it is—a city with a 50% black population with 0.67% of prime contracts going to minority business enterprises<sup>136</sup>—as being a fact disconnected from racial discrimination, and thus, beyond the power of law to redress.

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128. *Id.* at 477.

129. *Id.* at 493–94.

130. *Id.* at 495–96.

131. *Id.* at 500 (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986)).

132. *Id.* at 499.

133. *Id.*

134. *Id.* at 500; *see also id.* at 501 (declaring that a "governmental actor cannot render race a legitimate proxy for a particular condition merely by declaring that the condition exists").

135. *Id.* at 505.

136. *Id.* at 479–80.



The Court also found it troubling that Richmond's set-aside program also included Spanish-speaking, Oriental, Indian, Eskimo, or Aleut as minorities.<sup>137</sup> Noting that Richmond may have never had an Aleut or Eskimo citizen, that the program might provide a remedy to someone who may have never suffered past discrimination in the construction industry in Richmond was seen to be grossly over-inclusive and to "strongly impugn[] the city's claim of remedial motivation."<sup>138</sup>

*Croson* provides the most striking example of denial when the Court stated, with no sense of irony, that "[b]lack may be disproportionately attracted to industries other than construction."<sup>139</sup> One wonders if Justice O'Connor was talking about the same Richmond as Justice Marshall.<sup>140</sup> Justice Marshall opens his dissent by stating, "It is a welcome symbol of racial progress when the former capital of the Confederacy acts forthrightly to confront the effects of racial discrimination in its midst."<sup>141</sup> Marshall writes that this is the same Richmond whose

- 1969 annexation plan "was infected by the impermissible purpose of denying the right to vote based on race through perpetuating white majority power to exclude Negroes from office through at-large elections";<sup>142</sup>
- "sordid history of . . . [its] attempts to circumvent, defeat, and nullify the holding of *Brown I* has been recorded in the opinions of this and other courts";<sup>143</sup> and
- "numerous public and private acts of discrimination" tended to "perpetuate apartheid of the races in ghetto patterns throughout the city . . . ."<sup>144</sup>

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137. See *id.* at 506 ("There is *absolutely no evidence* of past discrimination against Spanish-speaking, Oriental, Indian, Eskimo, or Aleut persons in any aspect of the Richmond construction industry.").

138. *Id.* (citing *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 284 n.13 (1986)).

139. *Id.* at 503.

140. Compare the different histories in Justice O'Connor's plurality opinion with Marshall's dissent. *Id.*

141. *Id.* at 528. See generally Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989). For further analysis of *Croson*, see Peter Charles Hoffer, "Blind to History": *The Use of History in Affirmative Action Suits: Another Look at City of Richmond v. J.A. Croson Co.*, 23 RUTGERS L.J. 271 (1992).

142. *City of Richmond v. United States*, 422 U.S. 358, 373 (1975) (discussing and adopting the Special Master's conclusions about the earlier annexation plan); see also *supra* text accompanying notes 63-68.

143. *Bradley v. Sch. Bd. of Richmond*, 462 F.2d 1058, 1075 (4th Cir. 1972) (Winter, J., dissenting), *aff'd*, 412 U.S. 92 (1973).

Notwithstanding these facts, the *Croson* Court comments that “it is sheer speculation how many minority firms there would be in Richmond absent past societal discrimination.”<sup>145</sup> The world made by discrimination becomes frozen as the status quo; black inequality is rationalized and then denied.

### C. EXTENDING FREEMAN’S PERIODIZATION<sup>146</sup>

A year after Freeman’s *Antidiscrimination Law* article, the Supreme Court decided *Board of Education of Oklahoma City Public Schools v. Dowell*.<sup>147</sup> The Court expressed the view that desegregation decrees were not intended to operate into perpetuity, and that a district court, in determining whether to dissolve a desegregation decree, did not have to find that the vestiges of past discrimination had been eliminated.<sup>148</sup> Instead, the correct inquiry was whether the school district had complied in good faith with the desegregation decree and the vestiges of past discrimination had been eliminated to the extent practicable.<sup>149</sup> This made it much easier for school districts to establish that they had achieved unitary status, which would end federal court supervision. Perhaps it should not come as a surprise that desegregation peaked in the early 1990s, with resegregation occurring thereafter.<sup>150</sup>

A set of three cases decided in 1995 marks the end of the era of denial and the ushering in of what some describe as post-civil rights America.<sup>151</sup> In *Miller v. Johnson*, the Court empha-

144. *Id.* at 1065.

145. *Croson*, 488 U.S. at 499.

146. Professor Freeman passed away in 1995 and did not revisit his thesis after his 1990 *Antidiscrimination Law* article.

147. 498 U.S. 237 (1991).

148. *Id.* at 249–50.

149. *Id.*

150. See Sam Erman & Gregory M. Walton, *Stereotype Threat and Antidiscrimination Law: Affirmative Steps to Promote Meritocracy and Racial Equality in Education*, 88 S. CAL. L. REV. 307, 321 (2015) (citing GARY ORFIELD ET AL., E. PLURIBUS . . . SEPARATION: DEEPENING DOUBLE SEGREGATION FOR MORE STUDENTS, CIVIL RIGHTS PROJECT 17–19, 22–23, 32–33, 76–77 (2012), [http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield\\_epluribus\\_revised\\_omplete\\_2012.pdf](http://civilrightsproject.ucla.edu/research/k-12-education/integration-and-diversity/mlk-national/e-pluribus...separation-deepening-double-segregation-for-more-students/orfield_epluribus_revised_omplete_2012.pdf)).

151. Though the term “post-civil rights era” is used sometimes to refer to the period after the 1960s civil rights acts, I use it to refer to the period where “Supreme Court decisions have departed [dramatically] from established civil rights approaches.” See Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1087 (1992)

sized that the Voting Rights Act of 1965 was intended to grant “authority to the federal courts to uncover official efforts to abridge minorities’ right to vote” but not to require states to engage in “presumptively unconstitutional race-based districting.”<sup>152</sup> In *Adarand Constructors, Inc. v. Peña*, the Court finished what it had begun in *Croson* by extending the application of strict scrutiny of all racial classifications by state and local governments to the federal government.<sup>153</sup> In both *Miller* and *Adarand*, the racial remedy is equated with, and found equally offensive to, racial discrimination. In *Missouri v. Jenkins*,<sup>154</sup> the Court clarified its holding in *Milliken I*, which found interdistrict remedies to be beyond the remedial authority of the district court if it extended to “innocent” districts in which segregation could not be said to have been caused by the offending district.<sup>155</sup> In *Jenkins*, the state of Missouri and the offending district attempted to attract (white) students from other districts (the suburbs) by spending a lot of money to create magnet schools in the offending district.<sup>156</sup> The *Jenkins* Court ruled that this was an impermissible attempt to do an end run around its holding in *Milliken I*.<sup>157</sup> In addition, the *Jenkins* Court expressed what might be termed “racial exhaustion,”<sup>158</sup> noting at the outset of its opinion that “[a]s this school desegregation litigation enters its 18th year, we are called upon again

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(“[W]e inhabit a period that is widely described as the ‘post-Civil Rights era.’”). The term “post-civil rights America” starts to make its way into the law review literature in the early 1990s. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2206 n.284 (1992) (noting “at least 12 themes reflected in the move from the civil rights era of the mid-1960s to the present post-civil rights era”); Eric K. Yamamoto, *Rethinking Alliances: Agency, Responsibility and Interracial Justice*, 3 ASIAN PAC. AM. L.J. 33, 36 (1995) (describing the post-civil rights era as marked by “the end of the civil rights movements of the 1960s and 1970s and the ideological dismantling of civil rights approaches to racial justice”).

152. 515 U.S. 900, 927 (1995).

153. 515 U.S. 200, 227 (1995) (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny.”).

154. 515 U.S. 70 (1995).

155. *Milliken v. Bradley*, 418 U.S. 717, 745 (1974).

156. *Jenkins*, 515 U.S. at 76–77.

157. *Id.* at 94.

158. Darren Hutchinson explores the theme of racial exhaustion, describing Justice Bradley’s opinion in the *Civil Rights Cases* as an exemplar and how it has played out in history and in contemporary politics and jurisprudence. See generally Darren Lenard Hutchinson, *Racial Exhaustion*, 86 WASH. U. L. REV. 917 (2009).

to review the decisions of the lower courts.”<sup>159</sup> This echoed the opinion in *Dowell* that desegregation decrees were not intended to operate into perpetuity. One can be “special favorites” for only so long.<sup>160</sup>

The next two decades would see more iterations of a post-civil rights America. In *Shelby County v. Holder*, the Court went beyond *Miller* and found that the § 4(b) formula for determining which jurisdictions are subject to the preclearance requirements of § 5 of the Voting Rights Act to be unconstitutional.<sup>161</sup>

In *Ricci v. DeStefano*, a reverse discrimination lawsuit brought by one Hispanic and seventeen white firefighters, the Court had to address the inevitable tension between disparate treatment and disparate impact when an employer acted affirmatively to avoid disparate impact.<sup>162</sup> In 2003, the New Haven Fire Department administered a test to fill a number of openings for promotion to lieutenant and captain.<sup>163</sup> The pass rate for African Americans and Hispanics was far lower than it was for whites.<sup>164</sup> When the city recognized that the promotion exam had a disproportionate negative impact on black and Hispanic applicants, the city’s Civil Service Board, an independent review board that must vote to certify test results before the promotion process could continue, held hearings and ultimately refused to certify the test results.<sup>165</sup> As a result, promotions were not given.<sup>166</sup> The reverse discrimination claim alleged that New Haven, regardless of its potential liability for disparate impact had it accepted the test results, had engaged in disparate treatment on the basis of race.<sup>167</sup>

Justice Kennedy, writing for the Court, assumed that because the city looked at the results and saw the racially disparate impact, it must have known that refusing to certify the test results would negatively affect a group of test takers who nec-

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159. *Jenkins*, 515 U.S. at 73.

160. The Civil Rights Cases, 109 U.S. 3, 25 (1883).

161. 133 S. Ct. 2612, 2631 (2013).

162. 557 U.S. 557 (2009). Justice Scalia in his concurrence makes clear that the Court has deferred deciding what he describes as “the war between disparate impact and equal protection.” *Id.* at 595.

163. *Id.* at 566.

164. *Id.*

165. *Id.* at 567–74.

166. *Id.* at 574.

167. *Id.* at 575.

essarily were predominantly white.<sup>168</sup> Thus, the city's race conscious decision, seeking to avoid a racially disproportionate impact, was taken as intentional racial discrimination against the group that had performed well on the test.<sup>169</sup> Justice Kennedy recognized the tension between disparate impact and disparate treatment. Can the fear of disparate impact liability justify disparate treatment? Justice Kennedy resolved this question by articulating a new standard under which New Haven might be able to avoid disparate treatment liability if there was a strong basis in evidence that, had it not taken the action, it would have been liable under the disparate impact statute.<sup>170</sup> One problem though is that the Court leaves open the possibility that even if an employer meets the "strong-basis-in-evidence standard," this will not necessarily insulate an employer from liability from a disparate treatment plaintiff; a strong basis in evidence of disparate impact may still not justify discriminatory treatment under the Constitution.<sup>171</sup> *Ricci* sets up the inevitable conflict between disparate impact and disparate treatment that may complete the attempt by the October Term 1988 Supreme Court to essentially overturn *Griggs*, despite the explicit statutory espousal of *Griggs* in the Civil Rights Act of 1991.

An additional aspect of this case relates to the question of what is the appropriate temporal framework. When one reads Justice Kennedy's opinion or Justice Alito's concurrence, the facts in this case are presented as if there were no past. We have only the disappointed meritorious firefighters, the City of New Haven, and various public officials who worked to block their promotions. This might be contrasted with Justice Ginsberg's approach. She notes the long, pervasive history of racial discrimination practiced by municipal fire departments.<sup>172</sup> She notes that New Haven shared in this history, including a 1973

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168. *Id.* at 584.

169. One wonders if any affirmative action program in any context could survive this logic. For example, if a school selected a race neutral alternative that produced the desired race conscious result, one commentator points out that "it is unclear why those alternatives would not themselves violate the *Washington v. Davis* prohibition on intentional discrimination." Girardeau A. Spann, *Good Faith Discrimination*, 23 WM. & MARY BILL RTS. J. 585, 602-03 (2015).

170. *Ricci*, 557 U.S. at 585.

171. *Id.* at 584 ("We also do not hold that meeting the strong-basis-in-evidence standard would satisfy the Equal Protection Clause in a future case.").

172. *Id.* at 610.

lawsuit by black firefighters that resulted in 1974 consent decree that was largely ineffective in diversifying the fire department.<sup>173</sup> Justice Ginsberg argued that the city's actions had to be placed within this context. However, her view did not carry the day, and as we have seen in the course of antidiscrimination law, it is applied in an ahistorical manner. Divorced from history, perhaps it is no wonder that the Court found in favor of the reverse discrimination plaintiffs.<sup>174</sup>

In *Parents Involved in Community Schools v. Seattle School District No. 1*, the Court examined the legal question of “whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments”<sup>175</sup> and answered it in the negative.<sup>176</sup> The Court’s opinion concludes with a sentence that revives the ghost of Justice Bradley, where racial minorities can no longer depend on being the special favorites of the law. Justice Roberts pronounces, “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>177</sup> Under this reasoning, any form of racial remediation is itself racial discrimination.

If only it were that simple.

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173. *Id.* at 610–11.

174. In addition, *Ricci* set up the inevitable conflict between disparate treatment and disparate impact. *See id.* at 595; *see also* *Briscoe v. City of New Haven*, 654 F.3d 200 (2d Cir. 2011) (analyzing a disparate impact claim by a black firefighter who was not promoted following the Supreme Court’s order in *Ricci* to reinstate the test results despite its disparate impact).

175. 551 U.S. 701, 711 (2007).

176. *Id.* at 747–48.

177. *Id.* at 748.

## II. THE FREEMAN HYPOTHESIS AND LGBT ANTIDISCRIMINATION LAW<sup>178</sup>

The course of race antidiscrimination law in education went from *Brown* to *Parents Involved*; in employment, from *Griggs* to *Ricci*; in voting from *Katzenbach v. McClung* to *Shelby County*. Despite decades of the Court's enforcement of anti-discrimination law, in 2015, 35 to 45% of black and Latino students attend "intensely segregated schools;"<sup>179</sup> racial minorities live in segregated neighborhoods;<sup>180</sup> racial discrimination persists in the job market<sup>181</sup> and in the housing market;<sup>182</sup> typical black households have "just 6% of the wealth of the typical white household";<sup>183</sup> and racial minorities remain politically

178. This Part is informed by what might be described as foundational articles from the early to mid-1990s putting forward a jurisprudential vision for addressing LGBT discrimination. See generally RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992); William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607 (1994); Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989); Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283 (1994); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1 (1995).

179. Erman & Walton, *supra* note 150, at 321–22 (citation omitted).

180. See Alana Semuels, *Where the White People Live: How Self-Segregation and Concentrated Affluence Became Normal in America*, ATLANTIC (Apr. 10, 2015) <http://www.theatlantic.com/business/archive/2015/04/where-the-white-people-live/390153>.

181. See Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991 (2004) (concluding employment discrimination applies equally across the employment market); Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name? On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WISC. L. REV. 1283.

182. See generally MARGERY AUSTIN TURNER ET AL., U.S. DEPT OF HOUS. & URBAN DEV., *HOUSING DISCRIMINATION AGAINST RACIAL AND ETHNIC MINORITIES 2012* (2013), [http://www.huduser.gov/portal/Publications/pdf/HUD-514\\_HDS2012.pdf](http://www.huduser.gov/portal/Publications/pdf/HUD-514_HDS2012.pdf).

183. Laura Shin, *The Racial Wealth Gap: Why a Typical White Household Has 16 Times the Wealth of a Black One*, FORBES (Mar. 26, 2015, 8:00 AM), <http://www.forbes.com/sites/laurashin/2015/03/26/the-racial-wealth-gap-why-a-typical-white-household-has-16-times-the-wealth-of-a-black-one/#23233dcf6c5b>. These wealth differences exist for every income quintile. See Robert S. Chang & Jerome M. Culp, Jr., *Business as Usual? Brown and the*

powerless.<sup>184</sup> With the course of race antidiscrimination law as a backdrop, this Part examines possible trajectories for LGBT antidiscrimination law. Trajectory 1 is, perhaps, already underway, in which LGBT antidiscrimination law is treated as sex discrimination. Following this path would require only an extension of the way that some LGBT discrimination is already recognized as sex discrimination. This trajectory has the advantage of already having a doctrinal architecture but may ultimately fail because not all LGBT discrimination can be described as sex discrimination. Trajectory 2 would require the Supreme Court to recognize LGBT persons as belonging to a distinct suspect or quasi-suspect category. Trajectory 3 speculates that regardless of whether the Supreme Court recognizes a new suspect or quasi-suspect category, Congress will likely amend some of its civil rights statutes to grant formal equality, but that once this is achieved, the Court will engage in tactics similar to what has occurred in race antidiscrimination law. In some ways, the Court has already begun employing some of these tactics. These tactics will rely on narrow interpretations of any statutory changes and upon manipulation of the public/private distinction as well as the accommodation of religion.

This Part begins, though, by discussing the course of LGBT antidiscrimination law thus far.

#### A. THE COURSE OF LGBT ANTIDISCRIMINATION LAW THUS FAR

Thus far, the course of LGBT antidiscrimination law has been defined largely by the failure of law to protect the rights of LGBT persons. William Eskridge writes that “[i]n 1956, it was not exactly illegal to be a ‘homosexual’ in the United States, but it was a felony to make love to anyone of the same sex, and mere suspicion of homosexuality could cost a citizen her livelihood.”<sup>185</sup> Efforts to get the courts to recognize discrimination against LGBT persons were rejected or fell on deaf ears. An example was the effort of Dr. Franklin Kameny to challenge his dismissal from the Army and his being barred from federal employment by the Civil Service Commission following his arrest

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*Continuing Conundrum of Race in America*, 2004 U. ILL. L. REV. 1181, 1185–87.

184. Cf. Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 75 (1996) (discussing “African-Americans’ historical political powerlessness and its present consequences”).

185. William N. Eskridge, Jr., *January 27, 1961: The Birth of Gaylegal Equality Arguments*, 58 N.Y.U. ANN. SURV. AM. L. 39, 39 (2001).



for solicitation.<sup>186</sup> After his claim was dismissed, on January 27, 1961, he filed a pro se certiorari petition to the Supreme Court in which he argued that the employment bar “makes of the homosexual a second-rate citizen, by discriminating against him without reasonable cause.”<sup>187</sup> The Supreme Court, without comment, denied his petition.<sup>188</sup> Then in 1986, the Court explicitly rendered constitutional laws similar to the one that led to Dr. Kameny’s arrest when it determined that state laws criminalizing “homosexual sodomy [sic]”<sup>189</sup> between consenting adults did not violate a fundamental right of homosexuals.<sup>190</sup>

In the midst of federal sanctioning of anti-LGBT discrimination, a number of states and local governments began enacting civil rights protections on the basis of sexual orientation.<sup>191</sup> In Colorado, in response to certain municipalities enacting protective civil rights legislation to protect against discrimination on the basis of sexual orientation, a statewide referendum known as Amendment 2 was voted into law.<sup>192</sup> It operated to invalidate all of these protections and to prohibit “all legislative, executive or judicial action at any level of state or local government designed to protect the named class, a class we shall

186. *Id.* at 40.

187. *Id.* at 41 (quoting Brief for Petitioner at 32, *Kameny v. Brucker*, 365 U.S. 843 (1961) (No. 60-676)).

188. *Id.* at 42.

189. Though the Court characterized the activity this way, I think the “[sic]” designation is appropriate.

190. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003).

191. See *Developments in the Law—Employment Discrimination*, 109 HARV. L. REV. 1568, 1625, 1627 (1996) (noting nine states and a large number of local governments have enacted some gay civil rights protections); Schacter, *supra* note 178, at 286–87 (listing the eight states that as of 1994 had statewide protections, all of which prohibit discrimination on the basis of sexual orientation, and some of which extended to public accommodations, housing, education, insurance, and credit or banking).

192. *Romer v. Evans*, 517 U.S. 620, 623 (1996). The Amendment read:

No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art II, § 30b, *quoted in Romer*, 517 U.S. at 624.

refer to as homosexual persons or gays and lesbians.”<sup>193</sup> Initially challenged in state court, the Colorado Supreme Court invalidated the amendment as failing strict scrutiny, which the court thought was required based on federal voting rights cases and the discriminatory restructuring of governmental decisionmaking.<sup>194</sup> Justice Kennedy, in a cryptic opinion,<sup>195</sup> did not directly address the Colorado Supreme Court’s rationale other than describing it, and then stating that it affirmed the judgment of that court but on a different rationale.<sup>196</sup> The opinion has come to be characterized as “rational basis with bite,” and some commentators have placed *Romer* as following along *United States Department of Agriculture v. Moreno*<sup>197</sup> and *City of Cleburne v. Cleburne Living Center, Inc.*<sup>198</sup> What distinguishes these three cases from the typical rational basis application is that, while formally under rational basis review, each involved animus against a particular group.<sup>199</sup> The animus requires, then, that the legislation be subject to a more searching scrutiny.

Though the majority opinion in *Romer* did not mention *Bowers v. Hardwick*, an absence pointedly noted by Justice

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193. *Romer*, 517 U.S. at 624.

194. *Id.* at 625 (citing *Evans v. Romer*, 854 P.2d 1270 (Colo. 1993)) (citations omitted).

195. A number of commentators over the years described the opinion and the Court’s reasoning as cryptic. See, e.g., Steven G. Calabresi, *Textualism and the Counter-majoritarian Difficulty*, 66 GEO. WASH. L. REV. 1373, 1381 (1998); Michael Stokes Paulsen, *Does the Supreme Court’s Current Doctrine of Stare Decisis Require Adherence to the Supreme Court’s Current Doctrine of Stare Decisis*, 86 N.C. L. REV. 1165, 1186 (2008) (noting *Romer*’s “notoriously cryptic majority opinion”); Jane S. Schacter, *Unequal Inequalities? Poverty, Sexual Orientation, and the Dynamics of Constitutional Law*, 2014 UTAH. L. REV. 867, 870 (noting that *Romer* is “doctrinally cryptic”).

196. *Romer*, 517 U.S. at 625–26.

197. 413 U.S. 528 (1973).

198. 473 U.S. 432 (1985). See Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 409–10 (1996) (“[The *Romer* decision] is clearly consistent with, and follows directly from, the Court’s earlier decision in *Moreno*, which the Court cited, and *Cleburne*, which the Court curiously omitted.”); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 760 (2011) (discussing *Moreno*, *Cleburne*, and *Romer*).

199. Yoshino, *supra* note 198 (arguing that a commonality of the *Romer*, *Cleburne*, and *Moreno* decisions is discrimination against a particular group). In addition to *Cleburne*, there were additional cases from 1985 in which the Court appeared to be applying a heightened rational basis test. See Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987) (discussing four cases during the 1985 term).

Scalia in dissent,<sup>200</sup> some wondered if *Bowers* could survive the equal protection logic of *Romer*.<sup>201</sup> One appellate court went so far as to claim, in dicta, “[o]f course *Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court’s holding in *Romer v. Evans*.”<sup>202</sup>

Ultimately, *Bowers* would be overturned, but not based on the equal protection theory animating *Romer*. In *Lawrence v. Texas*, the Court noted that equality of treatment and liberty were linked and noted that “[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination in both the public and in the private spheres.”<sup>203</sup> The Court, while finding a “tenable argument” that “*Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause,” refused to do so on that basis,<sup>204</sup> instead overturning *Bowers* based on a liberty interest protected by due process.<sup>205</sup>

*Romer*, though, was key in *United States v. Windsor*,<sup>206</sup> in which the Court declared the federal Defense of Marriage Act (DOMA) to be unconstitutional. Echoing its description of Colorado’s Amendment 2 as identifying “persons by a single trait and then den[y]ing them protection across the board,”<sup>207</sup> the *Windsor* Court declared that “DOMA writes inequality into the entire United States Code.”<sup>208</sup> In some ways, *Romer* and *Windsor* are analogues to *Croson* and *Adarand*. Recall that in *Croson*, the Court found that state and local governments could not institute an affirmative action program without having the appropriate factual predicate to justify the program and that

200. *Romer*, 517 U.S. at 640 (Scalia, J., dissenting).

201. See, e.g., William N. Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 HOFSTRA L. REV. 817, 954 n.642 (1997) (suggesting “the possibility that *Romer* provides an occasion to rethink and someday overrule *Hardwick*”); Kevin H. Lewis, Note, *Equal Protection in the Wake of Romer v. Evans: Implications for the Defense of Marriage Act and Other Laws*, 49 HASTINGS L.J. 175, 200 (1997) (contending “the *Romer* decision could be interpreted as overruling *Bowers sub silentio*”).

202. *Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996), cited in Lewis, *supra* note 201.

203. 539 U.S. 558, 575 (2003).

204. *Id.* at 574–75.

205. *Id.* at 564.

206. 133 S. Ct. 2675, 2695–96 (1996).

207. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

208. *Windsor*, 133 S. Ct. at 2694.

state and local government actions in this context were subject to strict scrutiny. In *Adarand*, the Court extended these requirements to the federal government before it can institute an affirmative action program.

Though *Windsor* was then key to *Obergefell*,<sup>209</sup> there is a danger to the development contained in *Windsor*'s equal protection analysis: "The very aggressiveness of the Court's approach to the underlying equal protection question appears to exclude congressional participation in the same antidiscrimination project."<sup>210</sup> In the same way that racial remediation becomes equated with racial discrimination and subject to strict scrutiny, any remediation efforts on behalf of LGBT persons by any governmental entity may be subject to *Windsor*'s heightened examination. *Romer/Windsor* and *Croson/Adarand* are analogues potentially in more ways than one.<sup>211</sup>

In addition to this potential problem, it is important to note that the constitutional path to *Lawrence* and *Obergefell* was not smooth and direct. Along the way, there were the challenges to the military's "Don't Ask, Don't Tell" policy<sup>212</sup> and challenges to private acts of discrimination under state public accommodations laws.<sup>213</sup> The Court's approach to these challenges and how it likely will impact the course of LGBT anti-discrimination law is set forth below in Part II.D.

Further, current and anticipated advances in LGBT civil rights can be examined against the backdrop of the Court's further retrenchment in race cases. The Court may continue its

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209. 135 S. Ct. 2584 (2015).

210. William D. Araiza, *After the Tiers: Windsor, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 400 (2014). Marcy Strauss describes this as the problem of symmetry that pervades antidiscrimination law. See Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135, 168–70 (2011).

211. This point is developed more fully *infra* Part II.D.

212. For legal challenges post-*Lawrence v. Texas*, see, for example, *Log Cabin Republicans v. United States*, 658 F.3d 1162 (9th Cir. 2011); *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008); *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

213. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557 (1995). An interesting aspect about these two cases is that the private acts of discrimination were challenged in state courts and the plaintiffs prevailed under the respective state public accommodations laws. The Supreme Court then overturned these state supreme court decisions based on expressive First Amendment rights of, respectively, *Hurley*, 515 U.S. at 574–75, and *Dale*, 530 U.S. at 644.

course of granting formal equality to LGBT persons while simultaneously undoing civil rights advances that protected racial minorities.<sup>214</sup> Though there is an internal contradiction, this course would serve the legitimation function for the Court because it gets to reinforce its position in society as a defender of civil rights. This course, as well as the advocacy strategy of LGBT organizations, would make coalition building between the LGBT community and racial minorities more difficult.<sup>215</sup>

It is worth noting that *Romer v. Evans* followed just one year after the 1995 trilogy of cases discussed earlier that marked the turn to a post-civil rights America. It is also worth noting that the major advances for LGBT rights were all authored by Justice Kennedy.<sup>216</sup> In 1995, Justice Kennedy authored *Miller v. Johnson*,<sup>217</sup> joined Justice Rehnquist's majority opinion in *Missouri v. Jenkins*,<sup>218</sup> and joined Justice O'Connor's opinion of the Court in *Adarand Constructors, Inc. v. Peña*.<sup>219</sup> Justice Kennedy, the prime mover in advancing the Supreme Court's LGBT antidiscrimination jurisprudence, has typically fallen short when it has come to race.<sup>220</sup> Freeman might write that this is consistent with his point about the legitimation function that law serves.<sup>221</sup>

214. Cf. *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (striking down portions of the Voting Rights Act); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2528 (2013) (requiring a higher standard of proof for Title VII causation); *Ricci v. DeStefano*, 557 U.S. 557, 593 (2009) (allowing defendants to avoid disparate-impact liability if failure to take the challenged action would have exposed the defendant to disparate-treatment liability).

215. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1498–500 (2000) (criticizing the simultaneous invocation of race analogies for the discrimination claim with the erasure of blacks in the advocacy strategy against “Don’t Ask, Don’t Tell”); Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1058 (2014) (criticizing the “like race” arguments behind marriage equality efforts which were accompanied by postracialism and an appeal to formal equality that erased existing black subordination and undercuts efforts to redress it). This is discussed more fully *infra* Part II.D.

216. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2591 (2015); *United States v. Windsor*, 133 S. Ct. 2675, 2681 (2013); *Lawrence v. Texas*, 539 U.S. 558, 561 (2003); *Romer v. Evans*, 517 U.S. 620, 621 (1996).

217. 515 U.S. 900, 903 (1995).

218. 515 U.S. 70, 72 (1995).

219. 515 U.S. 200, 203 (1995).

220. Cf. Heather K. Gerken, *Justice Kennedy and the Domains of Equal Protection*, 121 HARV. L. REV. 104, 104–05 (2007) (discussing the shift in Justice Kennedy's race jurisprudence).

221. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1051.

The next three parts examine how LGBT antidiscrimination law might develop.

## B. TRAJECTORY 1: LGBT DISCRIMINATION IS SEX DISCRIMINATION

Rather than forging its own path, LGBT antidiscrimination law might follow sex antidiscrimination law. One commentator notes, "According to the sex discrimination argument, when states (and private employers) discriminate against gay individuals, they do so not only because of their sexual orientation but also because of their sex."<sup>222</sup> Andrew Koppelman has advanced this position consistently over the past twenty years.<sup>223</sup>

The Court in *Oncale v. Sundowner Offshore Services, Inc.*,<sup>224</sup> accepted the argument that same-sex sexual harassment was actionable as discrimination on the basis of sex under Title VII.<sup>225</sup> However, *Oncale* did not extend Title VII protection to sexual orientation. Federal circuits, both before and after *Oncale*, appear to agree that Title VII generally does not encompass discrimination against someone based on that person's sexual orientation.<sup>226</sup> But the fact that harassment is same-sex is sufficient to bring this within Title VII.

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222. Cunningham-Parmeter, *supra* note 16, at 1104.

223. Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm,"* 64 CASE W. RES. L. REV. 1045, 1053 (2014) ("All discrimination against gay people is sex discrimination for the same reason that discrimination against members of interracial couples is race discrimination."); Andrew Koppelman, *The Right to Privacy?* 2002 U. CHI. LEGAL F. 105, 105 (opening sentence: "Laws that discriminate against gay people discriminate on the basis of sex."); Koppelman, *supra* note 178, at 203 ("[D]iscrimination against gays is sex discrimination.")

224. 523 U.S. 75 (1998). *Oncale's* recognition of sex stereotyping for same-sex sexual harassment is consistent with the sex stereotyping theory relied upon in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). But, as discussed *infra* note 226, protecting against discrimination based on sex-stereotyping is very different from protecting more generally against discrimination based on sexual orientation.

225. *Oncale*, 523 U.S. at 82.

226. *Rene v. MGM Grand Hotel, Inc.* 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc) ("[S]exual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) (noting Title VII does not prohibit discrimination based on sexual orientation); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("[Plaintiff has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("[W]e regard it as settled law that, as drafted and authoritatively construed, Title VII does

The EEOC and a number of lower courts have found that certain LGBT discrimination claims are cognizable under Title VII as sex discrimination. For example, an LGBT individual alleging sex-stereotyping has a sex discrimination claim under Title VII.<sup>227</sup> Similarly, discrimination against a person who is transgender (gender identity discrimination) is discrimination because of sex under Title VII.<sup>228</sup> However, the federal circuits and the Supreme Court have not extended *Oncale* and *Price Waterhouse* to discrimination “because of sexual orientation.” The result is that some claims that are really at their core animus based on sexual orientation succeed *only* if they can be shoehorned formalistically into the “because of sex” category. “Because of sex” sexual orientation discrimination is necessarily underinclusive.

As a pragmatic matter, this trajectory is attractive because there is already a doctrinal structure in place, though that same doctrinal structure creates limitations that have led some scholars and advocates to argue for a distinct suspect or quasi-suspect class.

### C. TRAJECTORY 2: A DISTINCT SUSPECT OR QUASI-SUSPECT CLASSIFICATION

Despite efforts to establish sexual orientation as a suspect or quasi-suspect classification, the Supreme Court has thus far not based its pro-LGBT decisions on that theory. Litigants have not always sought recognition as a suspect or quasi-suspect class, quite likely as a matter of litigation strategy. At times, the argument has been carried forward by amicus briefs. For example, though the respondents in *Romer* did not argue before the U.S. Supreme Court for heightened scrutiny as a suspect or quasi-suspect class, some amicus briefs did.<sup>229</sup> Similarly, peti-

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not proscribe harassment simply because of sexual orientation.”); *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 751–52 (4th Cir. 1996) (“Title VII does not prohibit conduct based on the employee’s sexual orientation, whether homosexual, bisexual, or heterosexual. Such conduct is aimed at the employee’s sexual orientation and not at the fact that the employee is a man or a woman.”); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (“Title VII does not prohibit discrimination against homosexuals.”).

227. See *Cunningham-Parmeter*, *supra* note 16, at 1125–32 (discussing Title VII cases brought by sexual minorities based on sex-stereotyping).

228. See Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562 (2007).

229. See, e.g., Brief for Asian American Legal Defense & Education Fund et al. as Amici Curiae Supporting Respondents at 25–26, *Romer v. Evans*, 517 U.S. 620 (1996) (No. 94-1039) (“[S]uch a State constitutional provision [(Colo-

tioners in *Lawrence v. Texas* did not argue suspect classification. Instead, as in *Romer*, this argument was made by amici.<sup>230</sup>

Perhaps emboldened by *Lawrence*, as well as the successes in advancing marriage equality in the states, respondents and the government in *Windsor* argued that DOMA discriminates on the basis of sexual orientation, which triggers heightened scrutiny.<sup>231</sup> In *Obergefell*, each of the Briefs for the Petitioners whose cases were consolidated on appeal made the argument that LGBT persons were a suspect classification.<sup>232</sup>

Absent a change in the ideological makeup of the Court, the near future likely will not find sexual orientation to be a suspect or quasi-suspect classification. In addition, tempting though it has been in the face of discrimination to seek suspect or quasi-suspect classification, the lessons from race antidiscrimination law demonstrate the dangers of such “protection.” Jane Schacter discusses this more generally as a problem that exists with statutory identity categories.<sup>233</sup> As with race and sex, the category that would receive protection is not a minority or subordinated status as LGBT persons; instead, it would be the neutral “sexual orientation.”<sup>234</sup> Neutral categories, though perhaps initially beneficial for the group that suffers discrimi-

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rado Amendment 2)] makes the group against which it is aimed a suspect class, precisely as past formal exclusions from legal protection have made the groups at which they were directed suspect or quasi-suspect . . .”).

230. Brief of Human Rights Campaign et al. as Amici Curiae Supporting Petitioners at 9 n.22, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102) (“In our view, the kind of governmental and private discrimination gay people have suffered, along with the political disempowerment such discrimination has caused, entitles gay men and lesbians to protection as a suspect or at least quasi-suspect class.”). This is more directly argued in Brief of the National Lesbian & Gay Law Ass’n et al. as Amici Curiae Supporting Petitioners at 14–28, *Lawrence*, 539 U.S. 558 (No. 02-102).

231. See Brief for the United States on the Merits Question at 18–22, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307); Brief on the Merits for Respondent Edith Schlain Windsor at 17–19, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

232. Brief for Petitioners at 32–36, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-574); Brief for Petitioners at 50–53, *Obergefell*, 135 S. Ct. 2584 (No. 14-571); Brief for Petitioners at 34–36, 39–44, *Obergefell*, 135 S. Ct. 2584 (No. 14-562); Brief for Petitioners at 38–40, *Obergefell*, 135 S. Ct. 2584 (No. 12-307).

233. Jane S. Schacter, *Skepticism, Culture, and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 686 (1997) (reviewing ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* (1995), and URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* (1995)).

234. *Id.* at 705.



nation, lead all too quickly to reverse discrimination claims such that the innocent whites in the race remediation context are correlative to the innocent heterosexuals in the sexual orientation remediation context. Stated differently, formal equality only goes so far and is, in some ways, a trap.

A challenge going forward is to figure out what doctrinal tools will best allow discrimination to be challenged and what tools will best allow discrimination to be redressed.

#### D. TRAJECTORY 3: THE SEXUALITY-BLIND CONSTITUTION, THE PUBLIC/PRIVATE DIVIDE, AND THE ACCOMMODATION OF RELIGION

In 1997, Jerome Culp and I predicted, based on Justice Kennedy's invocation of Justice Harlan's dissent in *Plessy v. Ferguson*,<sup>235</sup> that *Romer* "sets up the architecture of a sexuality-blind constitutionalism" similar to colorblind constitutionalism.<sup>236</sup> In a nutshell, colorblind constitutionalism

draws a public-private distinction employing an ideological structure that parallels the classic vision of economic liberty. Under this racial public-private distinction, public officials exercising state powers operate according to the rule that race is *not* to be considered. In the private sphere, however, race *may* be considered.<sup>237</sup>

Under this mode of thinking, race remediation by public officials is racial discrimination. Remember that the "way to stop discrimination on the basis of race is to stop discriminating on the basis of race."<sup>238</sup> The holding in *Ricci*, though involving public officials, likely extends to private employers who must proceed with extreme caution before engaging in any voluntary employment action if intended to avoid a racially disparate outcome, because that itself becomes a race-conscious decision that discriminates on the basis of race.

235. 163 U.S. 537, 552 (1896) (Harlan, J., dissenting).

236. Robert S. Chang & Jerome McCristal Culp, Jr., *Nothing and Everything: Race, Romer, and (Gay/Lesbian/Bisexual) Rights*, 6 WM. & MARY BILL RTS. J. 229, 235 (1997); see also Todd M. Hughes, *Making Romer Work*, 33 CAL. W. L. REV. 169, 173 (1997) ("[A]n equal protection gained only for status is not equal at all; it simply protects a name—homosexual, gay, lesbian—without protecting any content the life attached to that name may have.").

237. Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind,"* 44 STAN. L. REV. 1, 8 (1991).

238. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (plurality opinion); cf. *Ricci v. DeStefano*, 557 U.S. 557, 592–93 (2009) (prohibiting racially motivated action, even where inaction leads to a racial disparate outcome).

Another key aspect of colorblind constitutionalism is the creation of a private sphere within which racial discrimination can occur with no legal recourse. Recall that in 1883 in the *Civil Rights Cases*, the Court rejected Congress's authority under the Thirteenth and Fourteenth Amendments to prohibit and provide a remedy for acts of private discrimination even though they involved the provision of services in the area of public accommodations.<sup>239</sup> This did not change until 1964 when, in *Heart of Atlanta Motel, Inc. v. United States*<sup>240</sup> and *Katzenbach v. McClung*,<sup>241</sup> the Court upheld Title II of the 1964 Civil Rights Act. The Court re-characterized what it had previously taken to be merely private acts of discrimination as sufficiently public because they involved public accommodations involving interstate commerce.<sup>242</sup>

Absent changes to federal civil rights laws, most private discrimination on the basis of sexual orientation will remain beyond legal redress. This has been the case even in certain instances when state laws have been found to protect against discrimination against LGBT persons. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*<sup>243</sup> and *Boy Scouts of America v. Dale*<sup>244</sup> present stark examples of this phenomenon. In *Hurley*, the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) applied to march in the 1992 St. Patrick's Day Parade in South Boston.<sup>245</sup> The parade's organizers, the South Boston Allied War Veterans Council (Council), rejected the application, but GLIB obtained a court order permitting their participation and marched in that year's parade.<sup>246</sup> The next year, GLIB applied and was again rejected by the Council.<sup>247</sup> GLIB sued in state court alleging violations of the Massachusetts and U.S. Constitutions as well as Massachusetts public accommodations law.<sup>248</sup> The trial court rejected

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239. See *supra* text accompanying notes 54–60.

240. 379 U.S. 241 (1964).

241. 379 U.S. 294 (1964).

242. *McClung*, 379 U.S. at 300; *Heart of Atlanta Motel, Inc.*, 379 U.S. at 250–51; cf. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (recognizing that state action in judicial enforcement of private racially restrictive covenants implicates the Fourteenth Amendment).

243. 515 U.S. 557 (1995).

244. 530 U.S. 640 (2000).

245. *Hurley*, 515 U.S. at 561.

246. *Id.*

247. *Id.*

248. *Id.*

the Council's First Amendment argument and found that the denial of the application was based on sexual orientation discrimination in violation of Massachusetts' public accommodations law.<sup>249</sup> The Supreme Judicial Court of Massachusetts affirmed.<sup>250</sup> The Supreme Court, in overturning the Massachusetts court, described the conflict not as a right to be free from sexual orientation discrimination but instead as compelled access speech, whereby GLIB was seen as trying to use state public accommodations law in order to compel access to the parade in a way that infringed upon the expressive First Amendment rights of the parade organizers.<sup>251</sup>

In *Boy Scouts of America*, expressive First Amendment rights provided the constitutional rationale to override New Jersey public accommodations law as interpreted and applied by the New Jersey courts.<sup>252</sup> James Dale achieved the rank of Eagle Scout and was an adult member of the Boy Scouts of America and an assistant scoutmaster when the Boy Scouts learned that Dale "is an avowed homosexual and gay rights activist" and revoked his membership.<sup>253</sup> The New Jersey Supreme Court determined that the Boy Scouts was a place of public accommodation and that the Boy Scouts violated New Jersey public accommodations law when it revoked Dale's membership based on his homosexuality.<sup>254</sup> The opening rule statements in Justice Rehnquist's majority opinion focused on the First Amendment's right to freedom of association. The opinion held that freedom of association "presupposes a freedom not to associate"<sup>255</sup> and "[t]he forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."<sup>256</sup> The Court went on to emphasize that the Boy Scouts is a private, nonprofit organization and that Dale's

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249. *Id.* at 561-63.

250. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc. v. City of Boston*, 636 N.E.2d 1293, 1301 (Mass. 1994), *rev'd sub nom. Hurley*, 515 U.S. 557 (1995).

251. *Hurley*, 515 U.S. at 568-70.

252. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

253. *Id.*

254. *Id.* at 646.

255. *Id.* at 648 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

256. *Id.*

forced inclusion would significantly burden the Boy Scouts' expressive desire not to promote homosexuality.<sup>257</sup>

In *Hurley and Boy Scouts of America*, the Court draws careful distinctions between what constitutes public as opposed to private discrimination. Private acts of discrimination cannot be overridden by state public accommodations laws because of the First Amendment's expressive rights of association. State public accommodations laws cannot be used to compel access of unwanted messages or forced inclusion of unwanted individuals.

The accommodation of private discrimination gains added constitutional impetus when it is mixed with the accommodation of religion.<sup>258</sup> In an ongoing set of cases in Washington state,<sup>259</sup> in which a flower shop, Arlene's Flowers, refused to sell flowers to a same-sex couple for their wedding, what will the interplay be between the First Amendment, the Religious Freedom Restoration Act, and Washington state constitution and statutes?<sup>260</sup> Will *Arlene's Flowers* follow a course similar to *Hurley and Boy Scouts of America*? Though there are state analogues that protect the right to make and enforce contracts free from discrimination on the basis of sexual orientation, 42 U.S.C. § 1981 only protects against race discrimination.

Though formal equality has been granted in the sphere of marriage, it seems that federal LGBT antidiscrimination law will be stunted absent amendments to many of our federal civil

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257. *Id.* at 656.

258. See Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 622 (2015).

259. The same-sex couple filed a civil complaint against Arlene's Flowers in 2013. Complaint, *Ingersoll v. Arlene's Flowers, Inc.*, No. 13-2-00953-3 (Wash. Super. Ct. Apr. 18, 2013). The State of Washington filed a civil complaint against Arlene's Flowers in 2013. Complaint for Injunctive and Other Relief Under the Consumer Protection Act, *State v. Arlene's Flowers, Inc.*, No. 13-2-00871-5 (Wash. Super. Ct. May 14, 2013). Arlene's Flowers sued Attorney General Robert Ferguson in 2013, originally in state court but removed to federal court a few months after the initial complaint was filed in 2013. Notice of Removal to Federal Court, *Arlene's Flowers, Inc. v. Ferguson*, No. CV-13-5094-RMP (E.D. Wash. Aug. 27, 2013). Partial summary judgment in favor of the State of Washington was granted in that state court proceeding. Notice of Appeal to the Supreme Court of Washington, *State v. Arlene's Flowers, Inc.*, No. 13-2-00953-3 (Wash. Super. Ct. Apr. 27, 2015).

260. In addition to the Washington case, there are a number of other cases involving religious accommodations that will make their way through state and federal courts. See Alex J. Luchenitser, *A New Era of Inequality? Hobby Lobby and Religious Exemptions from Anti-Discrimination Laws*, 9 HARV. L. & POL'Y REV. 63, 72-73 (2015) (describing some of these cases).

rights laws. Without such amendments, we will likely be left with Herbert Wechsler's neutral principals<sup>261</sup> where courts fear to promote one person's associational rights over another. Recall the language from *Hurley* and *Boy Scouts of America*—the apparatus of state power through the courts cannot be used to compel access or force inclusion that contravenes a private party's expressive First Amendment rights.<sup>262</sup> Though jurisprudentially located within speech rights, at the heart of those opinions is the protection of a private party's free association rights. What the *Hurley* and *Boy Scouts of America* Court ignores is that in deciding to not compel access or force inclusion, it is using the power of the state through its courts to empower private parties to discriminate on the basis of sexual orientation. The Court becomes not quite a neutral participant in discrimination on the basis of sexual orientation. It legitimizes sexual orientation discrimination. Even if federal civil rights laws are amended to include certain protections against sexual orientation discrimination, the doctrinal architecture already exists with *Hurley* and *Boy Scouts of America* (and *Hobby Lobby*)<sup>263</sup> and can be borrowed from race antidiscrimination law where formal equality is achieved yet discrimination and inequality persist.

### III. IF ALAN FREEMAN IS RIGHT, WHAT OUGHT WE TO DO?

Freeman's hypothesis is admittedly "descriptive and explanatory, *not* prescriptive or normative."<sup>264</sup> If he is correct with regard to his characterization of federal race antidiscrimination law, and if his hypothesis extends to predict the course of federal LGBT antidiscrimination law, that it will ultimately serve to legitimate discrimination against LGBT persons, what ought we to do? In *Antidiscrimination Law*, Freeman states, "If the federal courts are to become, as they were in the past, little

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261. See text accompanying notes 44–46.

262. See *Boy Scouts of Am.*, 530 U.S. at 661; *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 581 (1995).

263. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014). In finding that a private, closely held corporation is a "person" and protected under the Religious Freedom Restoration Act of 1993, the Court sets up religious liberty to play a role similar to speech and associational rights in *Hurley* and *Boy Scouts of America* to authorize private discrimination.

264. Freeman, *Legitimizing Racial Discrimination*, *supra* note 22, at 1050–51.

more than reactionary apologists for the existing order, we should treat them with the contempt they deserve.”<sup>265</sup>

Branding the federal courts and judges monolithically as reactionary apologists is probably overstated. After all, when the Supreme Court overturns a lower court as part of its project of legitimizing racial discrimination, it is, after all, overturning a lower court whose decision presumably might help ameliorate racial discrimination. One might turn this around, though, and describe the enterprise as an elaborate charade, with participants being willingly or unwillingly co-opted. From this, one might surmise that it is naïve to put our faith in constitutionalized rights and that we ought to abandon the federal courts.

In some ways, this reprises the conversation between Critical Legal Studies (CLS) and Critical Race Theory (CRT) about rights discourse. On the one hand, the CLS critique of rights discourse and the radical indeterminacy of rights was taken by some to mean that we ought to abandon the pursuit of rights.<sup>266</sup> This prompted CRT critiques of the CLS critique.<sup>267</sup> In one attempt to move past the debate, Kimberlé Williams Crenshaw noted, “The fundamental problem is that, although [CLS] Critics criticize law because it functions to legitimate existing institutional arrangements, it is precisely this legitimating function that has made law receptive to certain demands in this area.”<sup>268</sup>

We might describe the moment that we find ourselves in, following *Lawrence*, *Windsor*, and *Obergefell*, as one in which the legitimating function is precisely what advocates have been able to deploy successfully. But we should be mindful of the

265. Freeman, *Antidiscrimination Law*, *supra* note 23, at 1441.

266. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404 (1987) [hereinafter Williams, *Alchemical Notes*] (describing “part of CLS which rejects rights-based theory”); Robert A. Williams, Jr., *Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for Peoples of Color*, 5 L. & INEQ. 103, 120 (1987) [hereinafter Williams, *Taking Rights Aggressively*] (“[E]xpositors of [CLS] . . . have . . . sweeping negative critiques of liberalism, rights and rights theory.”). For an excellent synthesis and overview of the CLS critique of rights, see generally Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, in LEFT LEGALISM/LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002).

267. See, e.g., Williams, *Alchemical Notes*, *supra* note 266, at 404–05 (expressing discomfort at the CLS rejection of CRT); Williams, *Taking Rights Aggressively*, *supra* note 266, at 121–27 (describing the perils of the CLS critique).

268. Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1366 (1988).

CLS critique of rights and what Freeman criticizes as the failures of race antidiscrimination law.

But in moving forward, Crenshaw makes clear that co-optation is a real danger<sup>269</sup> and accepts at least part of the CLS critique, warning that the civil rights community “must come to terms with the fact that antidiscrimination discourse is fundamentally ambiguous and can accommodate conservative as well as liberal views of race and equality.”<sup>270</sup> She concludes by saying that “[f]or Blacks, the task at hand is to devise ways to wage ideological and political struggle while minimizing the costs of engaging in an inherently legitimating discourse.”<sup>271</sup> Though there are dangers in comparing the histories and challenges of differently situated groups,<sup>272</sup> I would suggest the same for advocates seeking to advance LGBT equality. In some ways, advocates for LGBT equality are already working to do this. And those seeking racial and LGBT equality cannot abandon the federal courts.

Freeman, after his corrosive characterization of the federal courts, states simply and unsatisfactorily, “One can only hope that other political institutions will be reinvigorated.”<sup>273</sup> While I agree that activity should be redirected, including to other political institutions, I would suggest that activity be redirected toward developing state antidiscrimination law and jurisprudence. While not abandoning efforts to reform federal antidiscrimination law, we should be mindful and pragmatic to direct our efforts to reform what we can. This was already being done in the political and legal struggle for marriage equality.<sup>274</sup> But that approach tended to focus on a single issue, and national advocacy organizations tended to view it as a state-by-state campaign, moving on to the next state(s) when achieving success in one.<sup>275</sup>

What I suggest is a little different and in some ways is less satisfying because states have vastly different antidiscrimination laws and jurisprudence, with some states amenable to

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269. *Id.* at 1335.

270. *Id.*

271. *Id.* at 1387.

272. See Carbado, *supra* note 215, at 1485 (describing comparisons between blacks and gays as problematic); Robinson, *supra* note 215, at 1035–38 (examining differences between the LGBT and the black community).

273. Freeman, *Antidiscrimination Law*, *supra* note 23, at 1441.

274. See Cummings & NeJaime, *supra* note 12, at 1247.

275. *Cf. id.* at 1254–55 (describing how advocacy groups in different states approached the issue differently).

change, with others, not.<sup>276</sup> The already existing patchwork of differential inequality will become intensified. But better this than to do nothing or waste one's efforts.

In addition, changes at the state level can lead to changes at the federal level. The Court's Eighth Amendment jurisprudence and the Court's inquiry into "our society's evolving standards of decency" to help determine what constitutes cruel and unusual punishment is instructive.<sup>277</sup> For example, in *Roper v. Simmons*, the Court commented on its earlier decision, *Atkins v. Virginia*, which declared the death penalty for the mentally retarded unconstitutional. The Court considered objective indicia in the form of legislative enactments and state practice to conclude that there was a national consensus against executing the mentally retarded.<sup>278</sup> Similarly, it found in *Roper* objective indicia—"the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice"—sufficient to conclude "that today our society views juveniles . . . as 'categorically less culpable than the average criminal.'"<sup>279</sup> Reforms that occur at the state level can become federalized.

There was a time during the civil rights struggle when the federal courts were crucial to overcome the recalcitrance of state institutions. To the extent that the federal system is recalcitrant or resistant to justice for marginalized groups and individuals, the terrain shifts with state institutions (courts, legislatures, administrative agencies, executives) becoming important as places to advance civil rights.<sup>280</sup>

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276. For example, prior to *Obergefell*, seventeen states made gay marriage legal through state action, while thirteen states had banned gay marriage through state action. Danielle Kurtzleben, *Map: How Same-Sex Marriage Laws Will Now Change Nationwide*, NPR (June 26, 2015, 10:39 AM), <http://www.npr.org/sections/itsallpolitics/2015/06/26/417715124/map-heres-how-same-sex-marriage-laws-will-now-change-nationwide>.

277. *Roper v. Simmons*, 543 U.S. 551, 563 (2005).

278. 536 U.S. 304 (2002).

279. *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316).

280. This will not be the case in all circumstances. For example, in Arizona, with the passage of SB 1070 (anti-immigrant legislation) and HB 2281 (anti-ethnic studies bill), the federal courts are a crucial institution to curb the excesses of local democracy. *See, e.g.*, *Arce v. Douglas*, 793 F.3d 968, 973 (9th Cir. 2015) (challenging a law prohibiting certain ethnic courses); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1012 (9th Cir. 2013) (challenging law criminalizing the harboring of aliens). By way of disclaimer, I am co-counsel to the student plaintiffs who challenged HB 2281. By order of the Ninth Circuit panel, this case is headed for trial on the students' equal protection claims and further



After *Shelby County v. Holder*, efforts could be made in Congress to revive the unconstitutional portions of the Voting Rights Act by developing current data rather than relying on, as the *Shelby* Court described, “decades-old data relevant to decades-old problems.”<sup>281</sup> But while those efforts are underway, and even alongside them, efforts could be made at the state level. The California Voting Rights Act of 2001 (CVRA),<sup>282</sup> written by Joaquin Avila,<sup>283</sup> presents an example of a state voting rights act that supplements, and in some ways improves, on the federal VRA.<sup>284</sup> Efforts have been underway during the last three legislative sessions in Washington to pass a Washington Voting Rights Act (WVRA).<sup>285</sup> Each time, the bill has progressed further in the legislative process.<sup>286</sup> In addition to working to pass the WVRA, the CVRA and proposed WVRA offer models for other states. Though it is likely that these efforts would develop only a patchwork of state VRAs, it would advance voting rights in those states and might lead to a greater appetite to revive and improve the federal VRA.

One barrier within law schools is that there is too much emphasis in the law school curriculum and in the legal academy on the federal courts and the federal system, with insufficient attention paid to states. We forget sometimes that this is a discursive process, state to federal, federal to state, and back again.<sup>287</sup>

The call to utilize the states as laboratories, and to achieve justice where and when you can, brings up the point that there is nothing inherently wrong with incrementalism as part of a

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proceedings on viewpoint discrimination. *Arce*, 793 F.3d at 990.

281. 133 S. Ct. 2612, 2629 (2013).

282. CAL. ELEC. CODE § 14025–32 (West 2016).

283. See Marguerite Mary Leoni & Chris Skinnell, *The California Voting Rights Act*, in *AMERICA VOTES! A GUIDE TO MODERN ELECTION LAW AND VOTING RIGHTS* 219, 221 (Benjamin E. Griffith ed., 2d ed. 2012) (crediting Joaquin Avila as the author of CVRA).

284. See Kareem U. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 239–40 (2010) (discussing CVRA as a mini-VRA that has substantial improvements to the federal VRA).

285. *Washington House Passes Voting Rights Act*, COLUMBIAN (Mar. 5, 2015, 12:00 AM), <http://www.columbian.com/news/2015/mar/05/Washington-house-passes-voting-rights-act>.

286. *Id.*

287. Cf. Daniel Lewallen, Note, *Follow the Leader: Why All States Should Remove Minimum Employee Thresholds in Antidiscrimination Laws*, 47 IND. L. REV. 817, 819 (“As enacted, Title VII followed state antidiscrimination laws closely and, in fact, included much of the same language.”).

political and legal advocacy strategy. This ought to be clear from the NAACP litigation strategy to overturn *Plessy v. Ferguson*,<sup>288</sup> and it ought to be clear from the marriage equality legislative and litigation strategy.<sup>289</sup>

A tough lesson in doing this work is that sometimes, by losing, you win.<sup>290</sup> The toughest lesson, though, is that sometimes, you just lose.

### CONCLUSION

On the wall in my office at work, I have a post-it that says, “the limits of antidiscrimination law.” Every day, I look at it and I think about how we might be able to overcome those limits. Most days, I just butt my head against that wall (and the limits of antidiscrimination law). I imagine a conversation that I might have with Alan Freeman if he were alive. I imagine that he would call me an idiot or a fool, or both. But I also imagine that he might laud our efforts at the Korematsu Center for Law and Equality. There is something that can be admired about tilting at windmills.

In thinking about this Article’s title and whether LGBT antidiscrimination law will follow the course of race antidiscrimination law, though the course of race antidiscrimination law ought not to give one a lot of hope, the course of race antidiscrimination law is not yet completed. Many of us are working to shift the course of race antidiscrimination law, in theory and in practice. It is likely that LGBT antidiscrimination law will develop in fits and starts, sometimes one step forward and two steps back. Though the march toward progress is not inevitable, there is no predetermined course for LGBT antidiscrimination law. Instead, it remains for us to write/right the course.

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288. See generally RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* (1976) (chronicling black rights from *Plessy* through *Brown v. Board of Education*).

289. Cummings & NeJaime, *supra* note 12 (discussing the incremental nature of marriage law in California).

290. See Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 945 (2011).

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