
**BIGOTRY IN TIME:
RACE, SEXUAL ORIENTATION, AND GENDER**

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INTRODUCTION

In a classic 1997 essay, Professor Reva Siegel focuses on how status hierarchies persist even as they are challenged, as the rules and reasons used to justify such hierarchies change through contestation—a phenomenon she labels “preservation-through-transformation.”¹ Siegel begins from an important temporal observation, noting that “we often express judgments about subordinating practices of the past as if they were timeless truths.”² But, she argues, condemning past practices of injustice can have the effect of legitimizing current practices.³ Because these past practices are now universally condemned, they cannot look so similar to current practices that are subject to dispute and debate.⁴

Siegel’s insight helps us to make sense of the role of bigotry in contemporary struggles over LGBT equality. Society now confidently condemns past practices of racial inequality—specifically segregation—as animated by bigotry. But this retrospective judgment fuels arguments of those who today oppose LGBT equality.⁵ Opponents of same-sex marriage and LGBT antidiscrimination law invoke bigotry in two related ways: First, they argue that, by comparing contemporary forms of LGBT inequality to past forms of racial subordination that have been universally repudiated, those supporting LGBT equality have unfairly cast their opponents as bigots. Second, they assert that by refusing to credit or make space for reasonable and sincerely held beliefs opposing same-sex marriage, those supporting LGBT equality are themselves the bigots.⁶

Fortunately, Siegel suggests an approach to inequality that applies lessons from the past to controversies in the present without viewing understandings that emerged from past struggles as timeless truths. Past practices were fiercely debated before their repudiation, so we must acknowledge that “[t]hat which we

¹ Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1113 (1997).

² *Id.* at 1112 (explaining how “retrospective judgment[s]” about moral status of a form of inequality “afford[] little guidance in evaluating contemporary practices”).

³ *Id.* at 1113.

⁴ *See id.* (“We have demonized subordinating practices of the past to such a degree that condemning such practices may instead function to exonerate practices contested in the present, none of which looks so unremittingly ‘evil’ by contrast.”); *id.* at 1147 (“We have now forged something close to a national consensus that these old forms of status regulation [like slavery and coverture] were wrong: bad acts animated by ‘prejudice’ that the nation must strive to transcend. But it is precisely this retrospective judgment that helps support the conviction that current forms of state action cannot be half so bad.”).

⁵ While Siegel focused on group-based inequality over time—for example, comparing past practices of racial subordination to current practices of racial subordination—her argument also sheds light on comparisons between past practices of subordination targeting a specific group and current practices of subordination targeting a different group.

⁶ Note how this comparative argument not only exonerates LGBT inequality but also implies that racial inequality is no longer a problem.

retrospectively judge evil was once justified as reasonable.”⁷ As Siegel instructs, “[i]f we reconstruct the grounds on which our predecessors justified subordinating practices of the past, we may be in a better position to evaluate contested practices in the present.”⁸ In her deeply engaging manuscript, *Who’s the Bigot: Conflicts over Marriage and Civil Rights Law*, Professor Linda McClain does just that—and, in the process, gives us a more clear-eyed assessment of the role that bigotry plays in struggles over inequality.⁹

By locating herself in the thick of conflicts as they were understood at the time, McClain shows that, while today there may be consensus about whether a particular view is considered bigoted, that view emerges only after decades of conflict over the status of a marginalized group.¹⁰ Now, bigotry is understood to appropriately describe those who supported segregation. But McClain shows that, at the time, whether such support was bigoted was deeply contested.¹¹ And not only opponents but also supporters of discriminatory practices invoked bigotry to support their position.¹² Today, bigotry remains hotly debated in the conflict over LGBT equality and features on both sides of the issue—even as many would predict a future in which only support for current forms of LGBT inequality would be condemned as bigoted.

At base, then, bigotry may be about time. As McClain asks, “Is ‘bigotry’ simply a term used to signal an anachronistic and now-reviled view? By calling someone a bigot, are we declaring that their position is not within the boundaries of civility or acceptable reasons for supporting or opposing laws or policies?”¹³ As McClain observes, “People turn to the term ‘bigotry’ to characterize views that have ceased to be acceptable.”¹⁴ On this account, the bigot can hardly be present in debates in the here and now. And thus in a society-wide debate, there may be power in claiming that one’s opponents have labeled one a bigot and have made the judgment that term entails.

In this Essay reflecting on McClain’s manuscript, I focus on the temporal dimensions of bigotry. To consider how the invocation of bigotry has manifested in law, I examine *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*

⁷ Siegel, *supra* note 1, at 1113.

⁸ *Id.*

⁹ See generally LINDA C. MCCLAIN, WHO’S THE BIGOT?: CONFLICTS OVER MARRIAGE AND CIVIL RIGHTS LAW (forthcoming 2020) (on file with the Boston University Law Review). Page references to *Who’s the Bigot?* in this Essay refer to the penultimate version of the book (indicated as “manuscript”).

¹⁰ See *id.* (manuscript at 2-3).

¹¹ *Id.* (manuscript at 2) (explaining how “when some members of Congress argued that all Americans had a stake in passing the Civil Rights Act of 1964 and repudiating bigotry, prejudice, and racial discrimination, opponents strongly resisted charges that segregation was bigotry and flipped the charges, calling supporters of the Act ‘anti-bigot bigots’” (quoting 110 CONG. REC. 14,480 (June 19, 1964) (statement of Sen. Robert Byrd))).

¹² See *id.* (manuscript at 105).

¹³ *Id.* (manuscript at 9).

¹⁴ *Id.*

*Commission*¹⁵—a case that McClain explores. The U.S. Supreme Court found that the government violated the free exercise rights of a bakery owner who refused to provide a wedding cake to a same-sex couple.¹⁶ The temporal nature of bigotry facilitated arguments on behalf of the baker, as his supporters distinguished his sincere religious beliefs about marriage from racist beliefs of the past.¹⁷ The Court appeared to appreciate this distinction, as it faulted the state government for failing to treat the bakery owner with “respect.”¹⁸ Yet the Court did not allow the seeming reasonableness of the claimant’s beliefs to prevent it from connecting past struggles over racial equality to current struggles over LGBT equality. Drawing on my work with Reva Siegel,¹⁹ I show that the Court disaggregated the question of how the government must treat the religious beliefs of those opposed to LGBT equality from the question of whether the government can enforce LGBT antidiscrimination law against religious objectors. Ultimately, *Masterpiece Cakeshop* does not authorize retrospective judgments about bigotry to insulate current practices of inequality from appropriate scrutiny.

McClain presents a number of puzzles about bigotry.²⁰ In this spirit, I conclude with an additional puzzle. Today, those opposed to same-sex marriage dismiss views that animated past practices of racial subordination as racist and bigoted. Yet they do not dismiss views that animated past practices of gender subordination in the same way. Indeed, they frequently invoke views about marriage that are premised on stereotypes about the distinct and complementary roles that women and men play in the family. Why is this not understood as bigoted? Why does gender not feature as prominently in accounts of bigotry? What does this say about ongoing struggles over gender equality?

I. BIGOTRY, THEN AND NOW

McClain’s account does not simply show a dynamic in which beliefs once seen as unremarkable and reasonable come to be seen as harmful and unacceptable—as bigoted.²¹ It also shows how those defending views that society may soon come to condemn, but that are still debated, invoke the idea of

¹⁵ 138 S. Ct. 1719 (2018).

¹⁶ *Id.* at 1724.

¹⁷ *See id.*

¹⁸ *Id.* at 1729 (“The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission’s treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.”).

¹⁹ *See generally* Douglas NeJaime & Reva Siegel, *Religious Exemptions and Antidiscrimination Law in Masterpiece Cakeshop*, 128 *YALE L.J.F.* 201 (2018).

²⁰ *See* MCCLAIN, *supra* note 9 (manuscript at 6-14).

²¹ *Id.* (manuscript at 8-9) (“[I]deas about what is reasonable and unreasonable change over time. The various struggles over civil rights and marriage reveal that time is often critical to understanding contests over what is bigoted.”).

bigotry in defense—as a way both to discredit their opponents (that their opponents unfairly brand them bigots) and to establish their own position as worthy of legal protection (that not treating them with respect and accommodating them through law is itself bigoted). The discussion that follows unpacks this move by attending to the temporal dimensions of bigotry.

A. *Bigotry and Reasonableness*

Those supporting LGBT equality harken back to history—equating the push for racial equality and the rejection of opposing views with the push for LGBT equality. Comparing contemporary sexual orientation discrimination to past race discrimination is powerful, both culturally and legally. History both models and justifies equality reform in the present.

Those opposing LGBT equality attempt to distinguish history—distancing themselves from those who opposed racial equality in an earlier era. Justifications for past practices of racial subordination, they assert, have been properly rejected as bigoted. But, they contend, such practices have little in common with contemporary practices being challenged by LGBT individuals. In McClain’s description, those opposed to same-sex marriage “insist that their sincerely held views are nothing like odious racist views or opposition to interracial marriage.”²² On this view, support for the contemporary practices under attack rests on nonbigoted, reasonable, and even respect-worthy beliefs.

The temporal nature of bigotry allows us to see why opponents of LGBT equality find the universal condemnation of past practices of racial subordination helpful to their cause. For current conflicts, some views on both sides are, almost necessarily, understood as reasonable. If only one side held views plausibly deemed reasonable, there would likely not be a society-wide debate. Accordingly, we might expect bigotry to feature on both sides of contemporary debates over equality and years later—once the conflict has resulted in some public settlement in favor of equality—to see bigotry invoked to describe only the opponents of equality.

On this view, we would expect to see bigotry appear on both sides of debates over civil rights at the moment of struggle, even though today bigotry is invoked only to describe those obstructing civil rights advances. McClain’s account bears this out.²³ Senators opposed to the Civil Rights Act of 1964 worried that “[a]nyone who opposes a civil rights bill is labeled . . . a bigot.”²⁴ They also reversed the charge of bigotry, referring, in Senator Harry Byrd’s words, to “[t]he antibigot bigots in this country.”²⁵ Consider the quote by Senator Russell Long with which McClain opens Chapter Five:

²² *Id.* (manuscript at 36).

²³ *Id.* (manuscript at 124).

²⁴ *Id.* (quoting 110 CONG. REC. 14,480 (June 19, 1964) (statement of Sen. Robert Byrd)).

²⁵ *Id.*

Time and again those of us who oppose this outrageous legislation have been called prejudiced and bigoted, but it seems to this Senator that those terms apply much more accurately to those who would cram [the public accommodations bill] down the throats of Americans without really understanding its whole meaning.²⁶

In this way, opponents of civil rights legislation in the mid-twentieth century “contend[ed] that it was supporters of the [Civil Rights Act] who were the *real* bigots.”²⁷

Today, opponents of the Civil Rights Act are widely condemned as bigoted. But viewing the conflict in retrospect—from the perspective of today’s settled understandings—may help to insulate current forms of inequality. As McClain suggests, some conceptions of bigotry allow “*reasonableness* of a belief [to] counter a charge of bigotry.”²⁸ And reasonableness, of course, changes over time.

The debate over bigotry is not simply one about whether opposition to equality is reasonable or bigoted. Rather, advocates dispute the very description of the views at issue. Those who support equality mandates frame their opponents’ claims as unjust and discriminatory, while those who opposed frame their arguments as reasonable and nondiscriminatory. In Siegel’s framework of preservation-through-transformation, as moral judgments about the status of the group at issue become less acceptable, opponents of equality law offer seemingly more benign justifications for existing status hierarchies.²⁹

As McClain documents, over time, those opposed to racial equality mandates framed their arguments not by appeal to explicit claims of racial hierarchy but instead by resort to claims that sounded in less offensive registers.³⁰ They justified segregation based on religious convictions. “[T]he Bible,” some asserted, “deals with miscegenation and interracial marriages in no uncertain terms, holding this to be contrary to the principles of godliness, and in contradiction to the teachings of Christianity.”³¹ The religious defense of segregation, they argued, was neither “bigotry” nor “race prejudice.”³²

²⁶ *Id.* (manuscript at 103) (alteration in original) (quoting 110 CONG. REC. 12,316 (June 1, 1964) (statement of Sen. Russell Long)).

²⁷ *Id.* (manuscript at 16).

²⁸ *Id.* (manuscript at 8).

²⁹ See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2119 (1996); Siegel, *supra* note 1, at 1113s.

³⁰ See MCCLAIN, *supra* note 9 (manuscript at 76-77) (describing how religious reasoning was significant part of segregationist rhetoric).

³¹ *Id.* (manuscript at 78) (quoting 103 CONG. REC. 4341 (Mar. 25, 1957) (extension of remarks of Hon. William M. Tuck) (entering into record Address by Hon. John Bell Williams Before the Defenders of State Sovereignty and Individual Liberties) (Mar. 22, 1957))).

³² *Id.*

As McClain shows, arguments grounded in theology traveled alongside arguments grounded in marriage and the family. In *Loving v. Virginia*,³³ the 1967 Supreme Court decision striking down interracial marriage bans,³⁴ “Virginia recast its antimiscegenation law as rooted not in racial bigotry and prejudice, but in ‘modern’ concerns over how marital ‘differences’ make marital ‘adjustment’ difficult and lead to divorce and harm children.”³⁵ The relevance of race, Virginia’s attorney argued, emerged not from racial hierarchy but merely racial “difference.”³⁶ On his view, interracial marriage was to be prohibited not to legitimize racial prejudice but merely because “intermarried families are subjected to much greater pressures and problems than are those of the intramarried.”³⁷ By advancing an interest in “successful marriages which lead to stable homes and families,”³⁸ Virginia argued that it had a benign justification that was directed at the state’s traditional and unquestioned role in regulating the family.

Today, of course, these arguments are widely seen as wrong and offensive. Religious convictions that justified race discrimination as well as views about marriage that supported antimiscegenation laws are almost universally rejected as bigoted. The reasonableness of these views shifted over time in relation to changing understandings of equality.

B. *Bigotry and Marriage Equality*

In our own time, assertions of religious belief and views about the family motivate arguments against LGBT equality. Those opposed to same-sex marriage and LGBT nondiscrimination mandates generally do not make arguments about the immorality of homosexuality. Instead, they appeal to sincere religious convictions and traditional understandings of marriage.³⁹ They contend that, by equating these reasonable beliefs with racist views that justified segregation and antimiscegenation laws, their opponents wrongly treat them as bigots. Further, they claim that those pressing LGBT equality are themselves the bigots, expressing intolerance for reasonable, good-faith beliefs rooted in religion and the family. Consider reactions to recent court decisions protecting same-sex couples’ right to marry.

³³ 388 U.S. 1 (1967).

³⁴ *Id.* at 12.

³⁵ MCCLAIN, *supra* note 9 (manuscript at 132) (quoting Transcript of Oral Argument at 20, *Loving*, 388 U.S. 1 (No. 395)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 *YALE L.J.* 2516, 2552-65 (2015); Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination*, 100 *CALIF. L. REV.* 1169, 1212-13 (2012).

In *United States v. Windsor*,⁴⁰ the Court struck down part of the federal Defense of Marriage Act (“DOMA”) and thereby required the federal government to treat same-sex couples who were married under state law as spouses.⁴¹ Finding that Congress sought “to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages,” the Court concluded that DOMA was motivated by “an improper animus or purpose.”⁴²

The Court’s animus-based reasoning prompted charges that it treated those opposed to marriage equality on sincere religious and moral grounds as bigots. In dissent, Chief Justice Roberts accused the majority of “tar[ring] the political branches with the brush of bigotry.”⁴³ Justice Alito, in a separate dissent, viewed the majority as “cast[ing] all those who cling to traditional beliefs about the nature of marriage in the role of bigots.”⁴⁴ Commentators echoed these concerns, charging the Court with mistaking traditional religious beliefs for “bigoted” views “unworthy of respect.”⁴⁵ Even some who supported the result in *Windsor* worried that the Court’s reasoning was “demeaning to all those who for a host of non-bigoted reasons uphold the traditional understanding of marriage as an essentially heterosexual institution.”⁴⁶

Two years later, in *Obergefell v. Hodges*,⁴⁷ the Court struck down state bans on same-sex marriage and thereby opened marriage to same-sex couples nationwide.⁴⁸ The majority ruled primarily on due process grounds, finding that the fundamental right to marry, protected as a matter of liberty, extends to same-sex couples.⁴⁹ The Court also held that marriage bans violated equal protection law.⁵⁰ But in doing so, the Court never mentioned animus and focused on the laws’ impact rather than its purpose. State laws excluding same-sex couples from marriage, the Court reasoned, “serve[d] to disrespect and subordinate” gays

⁴⁰ 570 U.S. 744 (2013).

⁴¹ *Id.* at 775 (“DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper.”).

⁴² *Id.* at 770.

⁴³ *Id.* at 776 (Roberts, C.J., dissenting).

⁴⁴ *Id.* at 813 (Alito, J., dissenting).

⁴⁵ See Richard W. Garnett, *Worth Worrying About?: Same-Sex Marriage & Religious Freedom*, COMMONWEAL (Aug. 5, 2013), <https://www.commonwealmagazine.org/worth-worrying-about>.

⁴⁶ See Michael J. Perry, *Right Result, Wrong Reason: Same-Sex Marriage & The Supreme Court*, COMMONWEAL (Aug. 5, 2013), <https://www.commonwealmagazine.org/right-decision-wrong-reason>.

⁴⁷ 135 S. Ct. 2584 (2015).

⁴⁸ *Id.* at 2604 (“[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.”).

⁴⁹ *Id.* at 2598-600.

⁵⁰ *Id.* at 2604.

and lesbians.⁵¹ The focus remained on the practical effect and social meaning of the laws rather than the motivation of those who voted for them.

Further, the Court went out of its way to frame those opposed to marriage equality as holding respect-worthy beliefs: “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”⁵² Those opposed to same-sex marriage may be motivated by “honorable” beliefs, but their views could not justify government action that had the effect of harming gays and lesbians.

Some have suggested that, seeking to avoid the charges leveled against the *Windsor* majority, the Court decided *Obergefell* on grounds that refrained from accusing those who supported same-sex marriage bans of animus.⁵³ Yet the Court’s reasoning did not save it from such accusations. As in *Windsor*, Chief Justice Roberts’s dissent in *Obergefell* charged the majority with “portray[ing] everyone who does not share [its] ‘better informed understanding’ [of marriage] as bigoted.”⁵⁴ Justice Alito again wrote a separate dissent worrying that those who oppose same-sex marriage “risk being labeled as bigots and treated as such by governments, employers, and schools.”⁵⁵ Justice Scalia, as well, criticized the majority for seeing only “bigotry” in the position of those defending the marriage laws.⁵⁶ As in *Windsor*’s wake, social conservatives asserted that the Court’s decision in *Obergefell* cast those opposed to same-sex marriage on sincere religious grounds as bigots. As Ed Whelan wrote in the *National Review*, the majority “regard[s] traditional beliefs about marriage as a form of bigotry.”⁵⁷

That these charges were made against a decision that steered clear of animus reasoning and went out of its way to characterize opposition to same-sex marriage as rooted in “honorable” beliefs suggests that those opposed to marriage equality may have strategic reasons to draw on charges of bigotry. By accusing the Court of labeling the many Americans opposed to same-sex marriage as bigots, advocates attempt to combat comparisons between racial equality and LGBT equality. As one conservative commentator argued, the “false analogy between the Civil Rights Movement and the LGBT movement”

⁵¹ *Id.*

⁵² *Id.* at 2602.

⁵³ See, e.g., Thomas C. Berg, *Masterpiece Cakeshop: A Romer for Religious Objectors?*, 2017-2018 CATO SUP. CT. REV. 139, 158 (“*Obergefell*, I’d suggest, reflected the Court’s sense that to call states’ opposite-sex-only marriage laws the product of ‘animus’ would have hurt the cause of getting acceptance for the decision.”).

⁵⁴ *Obergefell*, 135 S. Ct. at 2626 (Roberts, C.J., dissenting).

⁵⁵ *Id.* at 2643 (Alito, J., dissenting).

⁵⁶ *Id.* at 2630 (Scalia, J., dissenting) (“These Justices *know* that limiting marriage to one man and one woman is contrary to reason; they *know* that an institution as old as government itself, and accepted by every nation in history until 15 years ago, cannot possibly be supported by anything other than ignorance or bigotry.” (footnote omitted)).

⁵⁷ Edward Whelan, *After Obergefell*, NAT’L REV. (July 20, 2015, 5:00 AM), <https://www.nationalreview.com/magazine/2015/07/20/after-obergefell/>.

had rendered dissent in the wake of *Obergefell* a “form of bigotry.”⁵⁸ So long as opposition to same-sex marriage remained common, it appeared unfair to equate racism with “beliefs about traditional marriage.”⁵⁹ Accordingly, characterizing marriage equality decisions as drawing that precise parallel may be a politically powerful move.

C. *Bigotry, Conscience, and Marriage*

In *Obergefell*'s wake, bigotry has provided an important frame for claims seeking exemptions from laws protecting same-sex couples' right to marry and shielding gays and lesbians from discrimination. McClain closes her manuscript with cases of this kind, including *Masterpiece Cakeshop*.⁶⁰ When Jack Phillips refused to provide a wedding cake to a same-sex couple, he was charged with violating Colorado's public accommodations law, which prohibits businesses from discriminating based on sexual orientation.⁶¹ Phillips responded by asserting that enforcing the law against him violated his First Amendment rights to speech and free exercise.⁶²

As McClain documents, Phillips's supporters accused Colorado of having “labeled and treated [him] as a bigot.”⁶³ This move depended on rejecting a parallel between race discrimination and sexual orientation discrimination. As the Ethics and Religious Liberty Commission of the Southern Baptist Convention argued, “[c]omparisons between [Phillips's] measured objection to celebrating same-sex marriage and someone else's racist beliefs or opposition to interracial marriage should be discarded as unfair and offensive.”⁶⁴

The fact that Phillips invoked religious convictions to support his position on same-sex marriage made the charge of bigotry more powerful. As McClain explains, his supporters asserted that if the Court denied the exemption, it would essentially “tell him—and all traditional Muslims, Orthodox Jews, and Christians—that acting on beliefs central to his identity is wrong, benighted,

⁵⁸ Brandon McGinley, *Post-Obergefell, Dissent Is Now the Highest Form of Bigotry*, THE FEDERALIST (June 26, 2015), <http://thefederalist.com/2015/06/26/post-obergefell-dissent-is-now-the-highest-form-of-bigotry/> [<https://perma.cc/LX5V-9MQG>].

⁵⁹ Brief of Amici Curiae Ethics & Religious Liberty Commission of the Southern Baptist Convention et al. in Support of Petitioners at 6, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 4005657, at *6 [hereinafter *Amici Brief of Ethics & Religious Liberty Commission et al.*].

⁶⁰ MCCLAIN, *supra* note 9 (manuscript at 191-203).

⁶¹ *Masterpiece Cakeshop*, 138 S. Ct. at 1726.

⁶² *Id.*

⁶³ MCCLAIN, *supra* note 9 (manuscript at 196) (quoting Brief of North Carolina Family Values Coalition & the Family Research Council as Amici Curiae in Support of Petitioners at 22, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005659, at *22).

⁶⁴ Amici Brief of Ethics & Religious Liberty Commission et al., *supra* note 59, at 26.

even bigoted.”⁶⁵ Invoking religious beliefs also helped Phillips to reverse claims of bigotry. As McClain shows, some of those supporting Phillips contended that the “civil rights commissioners and judges who denied business owners like Phillips a religious exemption from state civil rights laws were the *real* bigots, ‘intolerant’ toward his conscientious religious beliefs.”⁶⁶

As we have seen, McClain’s earlier examination of the historical record in debates over racial equality allows us to appreciate how arguments of this kind recur. Despite this history, the role of religious arguments for practices of racial subordination is often minimized in contemporary debates over LGBT equality.⁶⁷ But those opposing LGBT equality have not merely obscured religious justifications for racial inequality; they have also distinguished their religious beliefs from religious beliefs that supported racial inequality. Characterizing the analogy between race and sexual orientation as “mere hyperbole,” the Alliance Defending Freedom, which represented Phillips, asserted that “those who cited religion as an excuse for racism” differ from those who “just cannot celebrate same-sex marriages.”⁶⁸ Just like secular justifications, religious justifications for past practices of racial subordination are now rejected as bigoted. As the Heritage Foundation’s Ryan Anderson argued in his *Masterpiece Cakeshop* amicus brief, the “Court could rule in favor of Phillips but not in favor of a racist baker.”⁶⁹

This is not how we conventionally reason about religious liberty, at least as a formal doctrinal matter. Ordinarily, a sincere religious conviction can justify an exemption claim even if the conviction is far outside the mainstream. Indeed, protecting those who hold idiosyncratic religious beliefs is frequently understood as a main purpose of religious accommodation. On this view, it is not for the government, including courts, to assess the reasonableness of the belief.

Yet those with religious objections to LGBT equality have urged courts to reject religious objections to racial equality as simply bigotry rather than faith. The reasonableness of religious beliefs—from both a religious and a secular

⁶⁵ MCCLAIN, *supra* note 9 (manuscript at 196) (quoting Brief of Amicus Curiae Sheriff Girgis Supporting Petitioners at 17, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4005664, at *17).

⁶⁶ *Id.* (manuscript at 6-7) (citing Richard A. Epstein, *The Government’s Civil Rights Bullies*, DEFINING IDEAS (Sept. 26, 2016), <https://www.hoover.org/research/governments-civil-rights-bullies> [<https://perma.cc/LA86-P3KG>]).

⁶⁷ See MCCLAIN, *supra* note 9 (manuscript at 13).

⁶⁸ Appellants’ Reply Brief at 13, *Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, 370 P.3d 272, *rev’d sub nom.* *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2015 WL 13622552, at *13.

⁶⁹ Amicus Curiae Brief of Ryan T. Anderson, Ph.D., & African-American & Civil Rights Leaders in Support of Petitioners at 22, *Masterpiece Cakeshop*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 4004529, at *22 [hereinafter Amicus Brief of Ryan T. Anderson et al.].

perspective—appears to matter, and such reasonableness changes over time.⁷⁰ As McClain documents, those supporting Phillips “argued that his religious beliefs about marriage are not only sincere, but also ‘reasonable.’”⁷¹ They “contrasted religious objections to interracial marriage as unreasonable: rooted in white supremacy, racist-pseudo-science, and distortion of religion.”⁷² In this sense, opponents of LGBT equality distance themselves not simply from racist beliefs of the past, but from racist *religious* beliefs of the past. If religious justifications for segregation today appear simply as bigotry, it is easier to distinguish opposition to racial equality from opposition to LGBT equality.⁷³

Phillips’s supporters framed their convictions as reasonable by appeal not only to religion but also to the family. Traditional views about marriage, conservative advocates contend, are nothing like racist views of the past. Accordingly, as Anderson argued in his *Masterpiece Cakeshop* amicus brief, a ruling for Phillips would send “no message about the supposed inferiority of people who identify as gay” but rather would communicate “that citizens who support the historic understanding of marriage are not bigots and that the state may not drive them out of business or civic life.”⁷⁴ On this view, gays and lesbians appear largely irrelevant to the vision of the family espoused by opponents of same-sex marriage.⁷⁵

Arguments about marriage were advanced, and ultimately rejected, as justifications for antimiscegenation laws.⁷⁶ Today, such arguments are rarely recalled. Instead, as with religious arguments for past practices of racial subordination, opponents of same-sex marriage obscure the role of the family-based rationales that McClain unearths in fights over interracial marriage. All such rationales are simply dismissed as racist and bigoted. As Anderson argued, while opposition to interracial marriage was rooted in “racist bigotry,”

⁷⁰ See William N. Eskridge Jr., *Noah’s Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms*, 45 GA. L. REV. 657, 712 (2011) (discussing how religion, society, and the State evolve together, as when American law shifted away from segregation while southern religions were shifting away from apartheid support).

⁷¹ McCLAIN, *supra* note 9 (manuscript at 8) (citing Amicus Brief of Ryan T. Anderson et al., *supra* note 69, at 3, 5, 23).

⁷² *Id.*

⁷³ *Id.* (manuscript at 129) (discussing Phillips’s attempt to distinguish bigotry and racism that supported antimiscegenation laws from honorable religious convictions of reasonable people who oppose same-sex marriage).

⁷⁴ Amicus Brief of Ryan T. Anderson et al., *supra* note 69, at 4.

⁷⁵ See Carlos A. Ball, *Bigotry and Same-Sex Marriage*, 84 UMKC L. REV. 639, 653 (2016) (discussing Justice Alito’s view that same-sex relationships are relevant to same-sex marriage debate simply because same-sex couples cannot procreate and marriage relates primarily to procreation); Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 625 (2015) (asserting that “gay people are marginal” to views of those opposed to same-sex marriage).

⁷⁶ See McCLAIN, *supra* note 9 (manuscript at 196).

opposition to same-sex marriage emerges from “decent and honorable premises” that view marriage as a “conjugal union of husband and wife.”⁷⁷

II. *MASTERPIECE CAKESHOP*, BIGOTRY, AND ITS LIMITS

McClain expresses an intuition that bigotry is an unhelpful concept for those pressing equality claims.⁷⁸ To be sure, some proponents of LGBT equality have labeled their opponents bigots.⁷⁹ But this is not as common as one might gather from reading the arguments of those opposed to same-sex marriage and LGBT nondiscrimination. Instead, as we have seen, those resisting LGBT equality have found it strategically useful to accuse their adversaries of labeling them bigots.⁸⁰

Accordingly, when those seeking to advance equality norms make comparisons to the past to support arguments in the present, their opponents cast that comparison in terms of bigotry; that is, they assert that in invoking past forms of discrimination that have been rightly repudiated, today’s advocates for equality law are equating their contemporary opponents with racist bigots. The charge is effective precisely because the current debate is in fact a *current* debate, while the debate of the past now appears appropriately settled. The temporal quality of bigotry allows those opposed to relatively new equality mandates to do more with the bigotry trope than those supporting such mandates. As the following discussion shows, *Masterpiece Cakeshop* reveals the power of the bigotry frame while also suggesting its limits.

The Court not only treated Phillips as deserving respect but also repudiated the government for failing to do the same. The Court ruled in Phillips’s favor by finding that he was not given “[t]he neutral and respectful consideration to which [he] was entitled.”⁸¹ Instead, in the Court’s view, the Colorado Civil Rights Commission exhibited “impermissible hostility toward the sincere religious

⁷⁷ *Id.* (manuscript at 196) (quoting Amicus Brief of Ryan T. Anderson et al., *supra* note 69, at 3).

⁷⁸ *Id.* (manuscript at 229-30).

⁷⁹ *See* Ball, *supra* note 75, at 639 n.21 (collecting sources).

⁸⁰ *See id.* at 645 (“[T]he bigotry charge plays into the effort by some religious and social conservatives to paint themselves as the victims of an LGBT equality movement that is purportedly committed to silencing their opponents and to punishing anyone who expresses disagreement with the movement’s objectives.”); Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 241-42 (2014) (explaining that “the National Organization for Marriage . . . urged that gay-marriage supporters be baited into calling opponents ‘bigots’ in order to split the coalition of gays and blacks who work together on other causes”).

⁸¹ *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018).

beliefs that motivated his objection.”⁸² This led sympathetic commentators to praise the Court for “tak[ing] left-wing bigotry to task.”⁸³

What exactly had the Commission done wrong? One commissioner observed that “[f]reedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the [H]olocaust.”⁸⁴ The commissioner then characterized the invocation of religious belief in such settings as “despicable pieces of rhetoric.”⁸⁵ The commissioner’s comments, the Court found, “disparage[d] [Phillips’s] religion” and approached his religious beliefs as “something insubstantial and even insincere.”⁸⁶ Further, “compar[ing] Phillips’ invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust” was “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law—a law that protects against discrimination on the basis of religion as well as sexual orientation.”⁸⁷

Temporality is key to the Court’s reasoning. The views that justified slavery are now universally condemned. Religious justifications for slavery are thus not viewed as respect-worthy convictions even if sincerely held; instead, they are rejected as wrong and evil. In disputes today, comparisons to invocations of religious belief that justified discriminatory practices in the past are unpersuasive precisely because the views currently at issue are currently at issue. Phillips’s views are still considered reasonable and are widely held. Accordingly, it seems wrong to compare his views to those that justified past practices that have been rightly and universally repudiated. It is those who draw such comparisons, rather than Phillips himself, who are deemed offensive.

The Court required the government to address religious objectors evenhandedly and with respect when the government adjudicates religious exemption claims (in conflicts over LGBT equality). Nonetheless, the invocation of bigotry does not lead where opponents of LGBT equality hope. Some view the requirement of respect—in some ways, a requirement not to treat the objector as a bigot—as a requirement to exempt the claimant from antidiscrimination obligations.⁸⁸ But, as Reva Siegel and I have shown, the

⁸² *Id.*

⁸³ Thomas Wheatley, Opinion, *In Cakeshop Case, Justice Kennedy Takes Left-Wing Bigotry to Task*, THE HILL (June 5, 2018, 1:30 PM), <https://thehill.com/opinion/judiciary/390768-in-cakeshop-case-justice-kennedy-takes-left-wing-bigotry-to-task> [<https://perma.cc/Y7VA-KJER>].

⁸⁴ *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See Stephanie Barclay, Opinion, *Supreme Court’s Cakeshop Ruling Is Not Narrow—and That’s a Good Thing*, THE HILL (June 6, 2018, 2:00 PM), <http://thehill.com/opinion/judiciary/391004-supreme-courts-cakeshop-ruling-is-not-narrow-and-thats-a-good-thing> [<https://perma.cc/A9W4-UTAD>]; David French, *In Masterpiece Cakeshop, Justice Kennedy*

obligation of respect imposed on the government does not translate into a mandate for exemptions. The government can treat religious objectors with neutrality and respect without cutting back on its commitment to equality.⁸⁹

We have analyzed this situation in terms of role.⁹⁰ When the government adjudicates claims, it must do so with respect and neutrality. This says nothing about the role requirement imposed on the seller under a public accommodations law, whereby the seller is charged with providing goods and services without discriminating against protected classes. The requirement that the government serve as a neutral adjudicator does not affect the seller's obligation to serve in a nondiscriminatory manner.⁹¹

The Court's opinion makes clear that the government can deny exemptions to those with religious objections to same-sex marriage and LGBT nondiscrimination.⁹² Even as it distances religious justifications for past forms of racial subordination from religious justifications for opposition to same-sex marriage, the Court's opinion connects the government's efforts to eradicate past forms of racial subordination to the government's efforts to eradicate forms of LGBT subordination.⁹³ Ultimately, *Masterpiece Cakeshop* authorizes the government to treat religious objections to LGBT equality like religious objections to racial equality *for purposes of exemptions from antidiscrimination law*.

The Court began its analysis by observing the "general rule" that religious objections "do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."⁹⁴ To support this "general rule," the Court cited *Newman v. Piggie Park Enterprises, Inc.*⁹⁵ The *Piggie Park* Court affirmed the lower courts' rejection of a business owner's claim for a free-exercise exemption from the race nondiscrimination requirement of Title II of the 1964 Civil Rights Act.⁹⁶ The Supreme Court's very brief decision in *Piggie Park* is understood to stand for the enforcement of public accommodations law in the face of a religious liberty challenge.

Strikes a Blow for the Dignity of the Faithful, NAT'L REV. (June 4, 2018, 1:30 PM), <https://www.nationalreview.com/2018/06/masterpiece-cakeshop-ruling-religious-liberty-victory/>.

⁸⁹ See NeJaime & Siegel, *supra* note 19, at 218-21.

⁹⁰ See *id.* at 218-19 ("The roles of distinct actors are at issue: the government in adjudicating a claim, the seller in abiding by public accommodations law, and the buyer in engaging in a transaction protected by the public accommodations law.").

⁹¹ *Id.* at 219.

⁹² See *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

⁹³ See *id.*

⁹⁴ *Id.*

⁹⁵ 390 U.S. 400, 402 n.5 (1968) (per curiam) (describing respondent's religious defense of racial discrimination as "not even a borderline case" and "patently frivolous"), *aff'g* 377 F.2d 433 (4th Cir. 1967).

⁹⁶ *Id.*

By citing *Piggie Park* as authority for the treatment of sexual orientation in the public accommodations framework, the Court rejected a critical implication of the bigotry trope. Consider Sherif Girgis's account of *Masterpiece Cakeshop*, which concludes that, for the Court, "traditionalism on marriage isn't the new Jim Crow."⁹⁷ Girgis views the reasonableness of beliefs on racial equality and LGBT equality side-by-side, at the same moment, without historical context: "If Phillips deserved to be treated like a racist," he asserts, "the majority would not have balked at Colorado officials' dismissiveness toward his religion. (There's nothing wrong with being dismissive of racism.)"⁹⁸ Inattentiveness to temporality allows Girgis to connect his reading to the question of exemptions. The Court treated beliefs opposing same-sex marriage as worthy of respect—as it did in *Obergefell*—whereas society treats beliefs supporting racial segregation as evil.⁹⁹ On Girgis's view, this observation means that the government should treat sexual orientation discrimination differently than race discrimination.¹⁰⁰

Drawing a distinction between past and present in this way justifies arguments for what Siegel and I have called a "two-tiered antidiscrimination model."¹⁰¹ On this model, sexual orientation nondiscrimination should be subject to exemptions because objections to LGBT equality are now seen as more reasonable than objections to racial equality, whereas race nondiscrimination is (rightly) subject to universal enforcement. But *Masterpiece Cakeshop* rejects a two-tiered antidiscrimination framework and instead credits an antidiscrimination regime that treats racial equality and sexual orientation equality similarly.¹⁰² By citing *Piggie Park*, the Court assimilated sexual orientation into the general public accommodations framework, endorsing an approach in which government "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public."¹⁰³

Accordingly, the *Masterpiece Cakeshop* Court's treatment of Phillips's views as worthy of respect does not translate into a requirement of religious exemptions. Instead, the government can give the religious claimant "neutral

⁹⁷ Sherif Girgis, *Filling in the Blank Left in the Masterpiece Ruling: Why Gorsuch and Thomas Are Right*, PUB. DISCOURSE (June 14, 2018), <http://www.thepublicdiscourse.com/2018/06/21831/> [<https://perma.cc/D3LP-HDKA>] (distinguishing religious objection in context of racial discrimination from that of sexual orientation).

⁹⁸ *Id.*

⁹⁹ See *Masterpiece Cakeshop*, 138 S. Ct. at 1729.

¹⁰⁰ See Girgis, *supra* note 97.

¹⁰¹ NeJaime & Siegel, *supra* note 19, at 205, 207.

¹⁰² See *id.* at 208 (noting that *Masterpiece Cakeshop* Court adopts "one public accommodations framework" that applies generally to protect lesbian and gay individuals as full members of national community).

¹⁰³ *Masterpiece Cakeshop*, 138 S. Ct. at 1728.

and respectful consideration”¹⁰⁴ and still pursue the aims of its antidiscrimination law that the Court recognized as important. The Court credited the government’s interest in ensuring that protected individuals have equal access in the market and are shielded from dignitary harm.¹⁰⁵ These interests, the Court explained, may require the government to “confine” exemptions. Otherwise, “a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.”¹⁰⁶

The Court made clear that the government can both meet the requirement of respect in adjudication and also enforce its antidiscrimination law against the claimant.¹⁰⁷ In fact, it observed “that the State’s interest could have been weighed against Phillips’ sincere religious objections in a way consistent with the requisite religious neutrality.”¹⁰⁸ Further, the Court concluded its opinion by emphasizing *both* respect for religious claimants *and* the importance of the government’s interests in enforcing antidiscrimination law, advising that “disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.”¹⁰⁹

From this perspective, we need not cast judgments on beliefs or motivations to view discrimination as wrongful and to understand a remedy as motivated by important government interests. That is, we need not make a judgment about whether the disparate treatment is motivated by a bigoted and unreasonable view or a sincere and reasonable religious conviction. As antidiscrimination scholar Deborah Hellman argues, “wrongful discrimination” occurs when “distinguish[ing] among people on the basis of a given attribute . . . demeans any of the people affected.”¹¹⁰ Whether the distinction is demeaning, Hellman continues, “is determined by the meaning of drawing such a distinction in that context, in our culture, at this time.”¹¹¹ From this perspective, the motivations of those engaged in discrimination need not matter to an assessment of whether the discrimination is wrongful.¹¹² The government has important interests in ensuring that gays and lesbians have equal access in the market and are shielded

¹⁰⁴ *Id.* at 1729.

¹⁰⁵ *See* NeJaime & Siegel, *supra* note 19, at 214-15.

¹⁰⁶ *Masterpiece Cakeshop*, 138 S. Ct. at 1727.

¹⁰⁷ *See id.* at 1724.

¹⁰⁸ *Id.* at 1732.

¹⁰⁹ *Id.*

¹¹⁰ DEBORAH HELLMAN, *WHEN IS DISCRIMINATION WRONG?* 7 (2008).

¹¹¹ *Id.* at 7-8.

¹¹² *See id.* at 9 (“[A]s far as discrimination goes, it’s not the thought that counts.”).

from the dignitary harm of refusals.¹¹³ A business owner's sincere religious objection—regardless of how reasonable the religious objection appears—does not necessarily mediate the impact of the discrimination from the government's perspective of achieving its important ends.¹¹⁴

III. BIGOTRY AND GENDER

As we have seen, today, views that are expressly premised on judgments about racial difference are rejected as bigoted. Yet it seems that views that are expressly premised on judgments about sex difference are not. While McClain devotes much attention to comparisons between race and sexual orientation, the argument to distinguish race from sexual orientation travels alongside an argument to tie sexual orientation to sex. As Louisiana argued in defense of laws against same-sex marriage, whereas interracial marriage bans rested on “invidious racial discrimination,”¹¹⁵ same-sex marriage bans rest on the “fundamental difference in sex.”¹¹⁶ While only rarely does McClain refer to gender from the perspective of bigotry,¹¹⁷ gender appears more prominently in her treatment of contemporary arguments against same-sex marriage.

In fact, while opponents of LGBT equality mandates reject defenses of past practices of racial subordination as racist and bigoted, they appeal to past practices of gender subordination to justify opposition to same-sex marriage. Consider arguments that McClain documents from recent litigation involving Virginia's marriage law. Hired to defend Virginia's ban on same-sex marriage, the Alliance Defending Freedom's Austin Nimocks asserted that marriage is about the “unique complementarity and fundamental differences between men and women.”¹¹⁸ Going further, McClain shows how Nimocks mobilized the gender-hierarchical order embedded in marriage for centuries by “recast[ing] the common law system of coverture that the colonies inherited from England—with married women's loss of legal identity and acquisition of various legal disabilities—as a policy ‘celebrating’ sex difference.”¹¹⁹

Even as the Court has repudiated the gender-hierarchical view of marriage that law had sanctioned for centuries, Nimocks invoked it—seemingly without fear that such invocation would be characterized as bigoted. Even as the Court has repudiated stereotypes about women and men as a basis for lawmaking, such

¹¹³ See *Masterpiece Cakeshop*, 138 S. Ct. at 1727; NeJaime & Siegel, *supra* note 19, at 214-15.

¹¹⁴ See NeJaime & Siegel, *supra* note 39, at 2580-81.

¹¹⁵ Brief of Louisiana et al. as Amici Curiae Supporting Respondents at 25, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1608213, at *29.

¹¹⁶ *Id.*; see also McCLAIN, *supra* note 9 (manuscript at 149).

¹¹⁷ McCLAIN, *supra* note 9 (manuscript at 149, 179).

¹¹⁸ *Id.* (manuscript at 145) (quoting Transcript of Proceedings at 53, *Bostic v. Rainey*, 970 F. Supp. 2d 460 (E.D. Va. 2014) (No. 2:13-cv-00395)).

¹¹⁹ *Id.*

stereotypes continue to resonate in social life and to structure views about marriage, reproduction, and parenthood. Why are these views not *bigoted*? What does this tell us about the status of gender subordination?

The belief in “fundamental differences between men and women” may be doing much to insulate gender hierarchy and gender stereotypes from charges of bigotry.¹²⁰ Our law has long recognized “real differences” between women and men and has allowed these differences to, in some circumstances, justify sex-based classifications.¹²¹ On this dimension, there is clearly an important difference in the treatment of race and sex. The fact that we recognize “real differences” means that we are unlikely to dismiss all views premised on sex-based differences as bigoted. Instead, law and society leave space for some distinctions between women and men.

Yet this feature of our legal approach to sex equality may blur the line between distinctions based on biological differences and distinctions based on gender-based judgments. Even if there is consensus over the existence of “fundamental differences between men and women,”¹²² there is fierce debate over what those differences are and how they should matter. The logic of “real differences” may be shielding social and legal judgments about gender from scrutiny. Biological justifications may naturalize gender-based roles, leading courts and legislatures to struggle in separating permissible from impermissible sex-based classifications.

Ultimately, McClain’s careful evaluation of bigotry in the contexts of race and sexual orientation should prompt us to ask questions about bigotry and gender. Views about the roles of women and men in the family appear to be insulated from charges of bigotry. Worse, such views may subtly shape the legal regulation of marriage, reproduction, and parenthood and yet be obscured by the appearance of “real differences.”¹²³

¹²⁰ *Id.*

¹²¹ See, e.g., *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (“The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender.”); *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion) (“[T]his Court has consistently upheld statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances.”).

¹²² MCCLAIN, *supra* note 9 (manuscript at 145) (quoting Transcript of Proceedings, *supra* note 118, at 53).

¹²³ See generally Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. (forthcoming 2020) (motherhood); Douglas NeJaime, *Marriage, Biology, and Gender*, 98 IOWA L. REV. BULL. 83 (2013) (marriage); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2619 (2017) (parenthood); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992) (reproduction).