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# Justice Kennedy’s White Nationalism

Russell K. Robinson\*

*This Essay places frequently celebrated sexual orientation opinions written by Justice Anthony Kennedy into conversation with his opinions in immigration and national security contexts. This juxtaposition reveals the identity-based borders of the liberty and dignity that Justice Kennedy often valorized when gays and lesbian asserted their rights. A close analysis of Justice Kennedy’s final sexual orientation opinion, Masterpiece Cakeshop v. Colorado Civil Rights Commission, and the final national security opinion that he joined, Trump v. Hawaii, demonstrates that Justice Kennedy’s commitment to social hierarchy privileged the interests and perspectives of white, heterosexual Christians and ultimately harmed a wide swath of sexual, racial, and religious minorities.*

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\* Copyright © 2019 Russell K. Robinson. Walter Perry Johnson Professor of Law; University of California, Berkeley, School of Law. I am grateful to Amna Akbar, Devon Carbado, Dean Erwin Chemerinsky, Angela Harris, Melissa Murray, David Pozen, Alex Reinert, Brian Soucek, Sarah Song, Amanda Tyler, and Leti Volpp for comments and suggestions on an early draft. I benefitted from presenting this paper at the UC Davis Faculty Workshop and a talk at the UC Hastings Law Journal Symposium, The Jurisprudence of Justice Anthony M. Kennedy: Four Decades of Influence. Eric Jung and Andrew Nguyen provided excellent research assistance. Edna Lewis of the UC Berkeley Law Library was very helpful.

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“Love Wins.”<sup>†</sup>  
“Love Knows No Borders.”<sup>‡</sup>

#### INTRODUCTION

Central to Justice Kennedy's legacy is a series of groundbreaking opinions concerning the rights of sexual minorities, from *Romer v. Evans*<sup>1</sup> to *Obergefell v. Hodges*.<sup>2</sup> The #LoveWins Twitter hashtag was ubiquitous after *Obergefell* announced that same-sex couples enjoy a fundamental right to marry in June 2015. President Barack Obama, First Lady Michelle Obama, and Vice President Joe Biden used the hashtag, alongside celebrities such as Lady Gaga, Beyoncé, and Taylor Swift, and corporations such as Coca Cola and Starbucks.<sup>3</sup> One corporation, Honeymaid, posted a map of the fifty states and proclaimed: “Starting today, love knows no borders.”<sup>4</sup> Yet placing *Obergefell* and its sister opinions in the context of immigration-related cases makes evident the stark limits and “borders” that Justice Kennedy imposed on the right to marry and other foundational rights. Even as Justice Kennedy

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<sup>†</sup> TWITTER, <https://twitter.com/hashtag/lovewins> (last visited Nov. 11, 2019) (in search bar, search term “#lovewins”).

<sup>‡</sup> *Visit Border*, SHUTDOWN HOMESTEAD DET. CTR., <https://migrantjustice.afsc.org/visit-border> (last visited Nov. 11, 2019) [<https://perma.cc/LY6C-UED8>].

<sup>1</sup> 517 U.S. 620 (1996).

<sup>2</sup> 135 S. Ct. 2584 (2015). Most Court observers cite Justice Kennedy's opinions on sexual orientation and First Amendment as central to his legacy. See, e.g., Floyd Abrams, *The First Amendment's Undisputed Champion*, WALL ST. J. (June 29, 2018, 6:37 PM), <https://www.wsj.com/articles/the-first-amendments-undisputed-champion-1530311830> (referring to Justice Kennedy as “the First Amendment champion of the High Court”); Opinion, *Kennedy*, N.Y. TIMES, June 27, 2018, at A26 (stating that Justice Kennedy “led the way in recognizing the equality and dignity of gays and lesbians”). Dean Erwin Chemerinsky persuasively critiques the reductive reading of Justice Kennedy's jurisprudence required to brand him a “First Amendment champion.” See Erwin Chemerinsky, *Justice Kennedy: A Free Speech Justice? Only Sometimes*, 70 HASTINGS L.J. 1193, 1193-94 (2019).

<sup>3</sup> See BEHIND THE HASHTAG, <http://series.hashtagsunplugged.com/lovewins> (last visited Sept. 4, 2019) [<https://perma.cc/9GZH-9REA>].

<sup>4</sup> *Id.* Refrains such as this have been used more often in debates about immigration law. See, e.g., “Love Knows No Borders” Protest at U.S.-Mexico Border, FSTV, <https://freespeech.org/stories/love-knows-no-borders-protest-at-us-mexico-border/> (last visited Oct. 13, 2019) (featuring an event where protesters demanded “that migrants and refugees seeking asylum in the U.S. be allowed into the country”); Cindy Knoebel, “Love Knows No Borders” Demonstrators Gather at Border, IMMPRINT (Dec. 13, 2018) <https://imm-print.com/love-knows-no-bounds-demonstrators-gather-at-border-9b2e9b12b4ee/> (describing a peaceful protest of over four-hundred people showing “solidarity with migrants facing violent anti-immigrant rhetoric and persecution from the U.S. government, and an increasingly militarized U.S. border”).

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underscored the importance of affirming gays' and lesbians' dignity and inclusion as full citizens, his jurisprudence fostered a hierarchy of belonging and exclusion along lines including race, gender, national origin, religion, citizenship, and their intersections.

This Essay argues that *Trump v. Hawaii*,<sup>5</sup> the final decision in Justice Kennedy's 30-year career, serves as a foil and provides a critical frame for understanding Justice Kennedy's sexual orientation cases. I make manifest the often-overlooked undercurrent of a caste system embedded in several earlier Kennedy opinions. The nascent hierarchy in his sexual orientation opinions became undeniable when the travel ban case validated President Trump's white nationalism. Justice Kennedy's final and fateful swing vote casts an unforgiving glare on the celebratory popular understanding of the sexual orientation cases and Justice Kennedy's overall legacy.<sup>6</sup>

In this Essay, I develop a broader project of *doctrinal intersectionality*, juxtaposing doctrinal domains that are often thought of as distinct in search of new insights and frameworks.<sup>7</sup> By assigning cases to different silos like "sexual orientation" or "immigration," scholars and teachers might miss how these cases converge or clash. Placing cases from different silos in conversation with each other may make visible broader projects that a Justice or coalition of Justices may pursue without naming the project as such.

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<sup>5</sup> 138 S. Ct. 2392 (2018).

<sup>6</sup> For an example of the unmitigated gratitude to Justice Kennedy expressed by some LGBTQ people, see Jessica Contrera, *Anthony Kennedy and the Four Supreme Court Rulings That Changed Gay Life in America*, WASH. POST. (June 27, 2018, 6:55 PM), [https://www.washingtonpost.com/lifestyle/style/anthony-kennedy-and-the-four-supreme-court-rulings-that-changed-gay-life-in-america/2018/06/27/fc2a345c-7a48-11e8-80be-6d32e182a3bc\\_story.html](https://www.washingtonpost.com/lifestyle/style/anthony-kennedy-and-the-four-supreme-court-rulings-that-changed-gay-life-in-america/2018/06/27/fc2a345c-7a48-11e8-80be-6d32e182a3bc_story.html). Such celebrations tend not to mention Justice Kennedy's role in immigration and national security jurisprudence.

<sup>7</sup> See generally Russell K. Robinson, *Unequal Protection*, 68 STAN. L. REV. 151, 215 (2016) [hereinafter *Unequal*] (arguing that "the Court is not sufficiently integrating equal protection jurisprudence across identity categories"). I thank David Pozen for suggesting the term "doctrinal intersectionality." I seek to build on Kimberlé Crenshaw's foundational work on intersectionality. See, e.g., Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (demonstrating how a single-axis framework of analysis focusing on Black men and white women in anti-discrimination law and feminist and antiracist politics marginalizes Black women); Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (arguing that narrow understandings of gender and race have worked together to marginalize Black women in the discourse of violence against women). This piece calls for a renewed effort to utilize intersectionality in the courts, with a specific focus on constitutional law.

There are multiple possible conceptions of “white nationalism.” I define this ideology as the belief that white people, especially white men, should remain at the center of national identity and hold a disproportionate amount of political and economic power.<sup>8</sup> This is a version of white supremacy that foregrounds the role of race in nation-building. In order to justify this white dominance, white nationalism requires a racial “other.” Although othering techniques shift over time, a core tactic is demonizing certain racial minorities as “un-American” and a threat to national integrity. An intersectional lens teaches us that, even though this project centers heterosexual, cisgender, Christian white men, it seeks opportunities to incorporate some white women and white LGBTQ people.<sup>9</sup>

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<sup>8</sup> Cf. Mari J. Matsuda, *This is (Not) Who We Are: Korematsu, Constitutional Interpretation, and National Identity*, 128 YALE L.J.F. 657, 677 (2019), [https://www.yalelawjournal.org/pdf/Matsuda\\_27pnjaj1.pdf](https://www.yalelawjournal.org/pdf/Matsuda_27pnjaj1.pdf) (referring to a “structural system intertwined, inevitably, with other forms of subordination that work synergistically to benefit the few who have power over the many”); Jayashri Srikantiah & Shirrin Sinnar, *White Nationalism as Immigration Policy*, 71 STAN. L. REV. ONLINE 197, 197 (2019), <https://review.law.stanford.edu/wp-content/uploads/sites/3/2019/02/71-Stan.-L.-Rev.-Srikantiah-Sinnar.pdf> (“We view white nationalism as ‘the belief that national identity should be built around white ethnicity, and that white people should therefore maintain both a demographic majority and dominance of the nation’s culture and public life.’”).

<sup>9</sup> Consider, for example, that more white women voted for Trump than Hillary Clinton. See, e.g., Molly Ball, *Donald Trump Didn't Really Win 52% of White Women in 2016*, TIME (Oct. 18, 2018), <https://time.com/5422644/trump-white-women-2016/> (recounting exit poll finding 52% Trump support and a potentially more reliable Pew study finding of 47% percent Trump support and 45% Clinton support among white women voters). Trump administration officials include openly gay white men, including Ric Grenell, the U.S. ambassador to Germany, and Judd Deere, deputy White House press secretary. See Dominic Holden, *This Trump Spokesperson Is Gay – and He Doesn't Care If That Makes the Left Mad*, BUZZFEED NEWS (July 1, 2019, 2:39 PM), <https://www.buzzfeednews.com/article/dominicholden/trump-judd-deere-lgbtq-profile>. Tech entrepreneur Peter Thiel ranks seventh on the list of Trump’s top donors, and his company has gained \$1.5 billion in government contracts, including ICE-related surveillance work. See Tristan Greene, *Study: Trump's Paid Peter Thiel's Palantir \$1.5B so Far to Build ICE's Mass-Surveillance Network*, NEXT WEB (Aug. 12, 2019, 1:28 PM), <https://thenextweb.com/artificial-intelligence/2019/08/12/study-trumps-paid-peter-thiels-palantir-1-5b-so-far-to-build-ices-mass-surveillance-network/>. A Buzzfeed profile of Deere sums up the utility of gay white men to the Republican party as follows:

Conservatives can be fine having gay Republicans around – particularly white gay men, who reflect the same bloc that makes up Trump’s white male base. These gay people enjoy a retractable leash that gives them access to social networks and power – as long as they share other Republican priorities, like a border wall and gun rights, and don’t dwell on their sexuality or gay rights. In

The racial politics embodied in President Trump's campaign to "Make America Great Again" exemplify "white nationalism." To illustrate, consider an article that Trump tweeted about in early 2019. The author, Pat Buchanan, asserted that in the absence of a "militarized" U.S.-Mexico border wall, "the United States, as we have known it, is going to cease to exist."<sup>10</sup> Buchanan argued that the "more multiracial, multiethnic, multicultural, multilingual America becomes — the less it looks like Ronald Reagan's America."<sup>11</sup> Buchanan further posited that white men are central to the American identity, and the Democratic party aims to reduce the number of white male voters while increasing the voting strength of women and people of color.<sup>12</sup>

As suggested by the above, white nationalism is a nostalgic project of building and preserving the United States by looking to the past, before the rise of civil rights, women's rights and the "browning" of America.<sup>13</sup> Proponents of white nationalism view immigration policy as inherently racialized and the resulting racial/ethnic diversity it fosters as a threat to America's essential status as a white patriarchy. White nationalism also often interpolates a conflation of "Christian," "white," and "nation."<sup>14</sup> From this perspective, the nation's survival hinges on resisting religious/racial diversification and hewing to white Christian

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this arrangement, conservatives can be accommodating to gay people, provided it remains legal to discriminate against them.

Holden, *supra*.

<sup>10</sup> Patrick J. Buchanan, *Memo to Trump: Declare an Emergency*, CNS NEWS (Jan. 11, 2019, 8:38 AM), <https://www.cnsnews.com/commentary/patrick-j-buchanan/patrick-buchanan-memo-trump-declare-emergency>; see Aaron Rugar, *Trump Promotes Pat Buchanan Column that Makes White Nationalist Case for His Border Wall*, VOX (Jan. 14, 2019 9:30 AM), <https://www.vox.com/2019/1/14/18181897/trump-pat-buchanan-column-tweet>; see also ERIC KAUFMANN, WHITESHIFT: POPULISM, IMMIGRATION, AND THE FUTURE OF WHITE MAJORITIES 92-93 (2019) (drawing connections between Buchanan's racial politics in the 1990s and those of Trump in 2016).

<sup>11</sup> Buchanan, *supra* note 10.

<sup>12</sup> See *id.* ("The only way to greater 'diversity,' the golden calf of the Democratic Party, is to increase the number of women, African-Americans, Asians and Hispanics, and thereby reduce the number of white men.").

<sup>13</sup> See KAUFMANN, *supra* note 10, at 89-90.

<sup>14</sup> See, e.g., Andrew L. Whitehead et al., *Make America Christian Again: Christian Nationalism and Voting for Donald Trump in the 2016 Presidential Election*, 79 SOC. RELIGION 147, 153 (2018) ("Christian nationalism can serve as an ethno-nationalist symbolic boundary portraying nonwhites and Muslims as threatening cultural outsiders."); *id.* at 153 n.3 ("Christian nationalism and Islamophobia, with respect to the Trump vote, might be understood as two sides of the same coin.").

dominance.<sup>15</sup> Although I look to discourse during the Trump presidency for this definition, we should understand Trump as crystallizing and deploying deep-seated conceptions of national identity, rather than creating something entirely new. Trump-era white nationalism builds on the longstanding project of white supremacy, yet it amplifies the demonization of Muslim, Arab, Middle Eastern, and South Asian people, and Latino/a/x people, especially Mexicans, all of which are deemed to be threats to the preservation of America's white identity.

Trump's racial taunts often fixate on whether or not a person is a "real" American. For instance, long before his election, he "falsely asserted that President Barack Obama was born overseas and had forged his birth certificate."<sup>16</sup> In 2019, he told four progressive congresswomen of color to "go back" to "the crime infested places from which they came" because they "hate our country."<sup>17</sup> All of them are U.S. citizens, and three were born in the United States.<sup>18</sup> When Trump demeans people of color and their origins, he often implies not only that America is "great," but also that it is pure and in need of protection from people of color.<sup>19</sup> From Trump's vantage, Latin American migrants are not everyday people coming to the United States. in search of a better life. Rather, they represent an "invasion" that includes rapists, drug dealers, and terrorists. Trump argued against admitting African immigrants from "shitholes countries" and sought to turn away Haitian immigrants with the stereotype that they "all have AIDS."<sup>20</sup> In case the racial nature

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<sup>15</sup> See *id.* at 153 ("Christian nationalism operates as a set of beliefs and ideals that seek the national preservation of a supposedly unique Christian identity.").

<sup>16</sup> Timothy L. O'Brien, *Trump Can't Just Walk Away from 'Send Her Back,'* BLOOMBERG (July 19, 2019 3:30 AM), <https://www.bloomberg.com/opinion/articles/2019-07-19/send-her-back-evokes-donald-trump-s-long-racist-past>.

<sup>17</sup> Ashley Parker, et al., *Trump Says They 'Hate Our Country,' The Democrats He Attacked Say the Country 'Belongs to Everyone,'* WASH. POST (July 15, 2019, 11:14 AM), [https://www.washingtonpost.com/politics/trump-calls-on-minority-congresswomen-to-apologize-after-he-said-they-should-go-back-to-their-countries/2019/07/15/897f1dd0-a6ef-11e9-a3a6-ab670962db05\\_story.html](https://www.washingtonpost.com/politics/trump-calls-on-minority-congresswomen-to-apologize-after-he-said-they-should-go-back-to-their-countries/2019/07/15/897f1dd0-a6ef-11e9-a3a6-ab670962db05_story.html).

<sup>18</sup> See *id.*

<sup>19</sup> See, e.g., Toluse Olorunnipa, *Trump's Incendiary Rhetoric is Met with Fading Resistance From Republican and Corporate Leaders,* WASH. POST (July 15, 2019, 8:05 PM), [https://www.washingtonpost.com/politics/trumps-incendiary-rhetoric-is-met-with-fading-resistance-from-republican-and-corporate-leaders/2019/07/15/d0e0d918-a710-11e9-86dd-d7f0e60391e9\\_story.html](https://www.washingtonpost.com/politics/trumps-incendiary-rhetoric-is-met-with-fading-resistance-from-republican-and-corporate-leaders/2019/07/15/d0e0d918-a710-11e9-86dd-d7f0e60391e9_story.html) (quoting Trump tweet in which he described the U.S. as "the greatest and most powerful Nation on earth").

<sup>20</sup> See Julie Hirschfeld Davis et al., *Trump Alarms Lawmakers with Disparaging Words for Haiti and Africa,* N.Y. TIMES (Jan. 11, 2018), <https://www.nytimes.com/2018/01/11/us/politics/trump-shithole-countries.html>.



of these comments were not plain, Trump contrasted these countries with Norway.<sup>21</sup> Even predominantly black cities that are indisputably part of America are located outside of the “real” America when Trump derides cities like Baltimore as a “rat and rodent infested mess” and assigns responsibility for their condition to black officials.<sup>22</sup> In sum, Trump’s white nationalism consistently associates people of color with danger, defecation and degeneration, and a threat to America’s purity and greatness.<sup>23</sup>

Many people believe that white nationalists are members of a fringe group akin to the Ku Klux Klan or neo-Nazis, and that their existence says little about mainstream America.<sup>24</sup> Indeed, Trump minimized the problem of white nationalism in these terms after a white Australian killed dozens of people at mosques in Christchurch, New Zealand, and praised Trump as a “symbol of renewed white identity and common purpose.”<sup>25</sup> To people who share the view that white nationalism is a

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<sup>21</sup> See *id.*

<sup>22</sup> See Spencer Kimball, *Trump Calls Baltimore a ‘Disgusting, Rat and Rodent Infested Mess’ in Attack on Rep. Elijah Cummings*, CNBC (July 27, 2019, 1:31 PM), <https://www.cnbc.com/2019/07/27/trump-calls-baltimore-a-disgusting-rat-and-rodent-infested-mess-in-attack-on-rep-elijah-cummings.html>.

<sup>23</sup> As this Essay goes to press, the House of Representatives is aggressively pursuing an impeachment inquiry. In the words of one representative, her concern is that “the president — the most powerful man in the world — reached out to a foreigner, a foreign leader, and asked him to dig up dirt on an American.” Mike DeBonis & Amber Phillips, *For House Democrats, Impeachment Probe Widens the Divide They Hoped to Bridge*, WASH. POST (Oct. 5, 2019, 4:38 PM), [https://www.washingtonpost.com/politics/for-house-democrats-impeachment-probe-widens-the-divide-they-hoped-to-bridge/2019/10/05/3be23cc2-e6b1-11e9-a331-2df12d56a80b\\_story.html](https://www.washingtonpost.com/politics/for-house-democrats-impeachment-probe-widens-the-divide-they-hoped-to-bridge/2019/10/05/3be23cc2-e6b1-11e9-a331-2df12d56a80b_story.html). Trump’s flagrant solicitation of other countries, such as Russia and China, to interfere with U.S. politics and willingness to rely on foreign powers to retain his precarious grasp on the presidency further complicates his claims about the “real America” and the need for national integrity and purity. See, e.g., Peter Baker & Eileen Sullivan, *Trump Publicly Urges China to Investigate the Bidens*, N.Y. TIMES (Oct. 3, 2019), <https://www.nytimes.com/2019/10/03/us/politics/trump-china-bidens.html>. Unfortunately, I cannot fully analyze these developments in this short piece.

<sup>24</sup> See Yoram Hazony, *How Americans Lost Their National Identity*, TIME (Oct. 23, 2018), <http://time.com/5431089/trump-white-nationalism-bible/> (“White nationalism’ is used to describe the small fringe of Americans who believe nationality is defined by the color of one’s skin. . . . Most Americans find these attempts to reduce nationality to race repugnant.”).

<sup>25</sup> See Jonathan Lemire, *After New Zealand Massacre, Trump Downplays White Nationalist Threat*, PBS (Mar. 15, 2019, 7:40 PM), <https://www.pbs.org/newshour/politics/after-new-zealand-massacre-trump-downplays-white-nationalism-threat>. When a reporter asked him about the threat of white supremacy, Trump said “I think it’s a small group of people that have very, very serious problems, I guess.” *Id.* In August 2019, a white male Trump supporter slaughtered 22 people, many of whom were Latino/a/x.

fringe issue, it must be galling to hear a law professor align a Supreme Court Justice with white nationalism. Yet this Essay argues that aiding and abetting white nationalism is itself a form of white nationalism.<sup>26</sup> This definition encompasses Trump voters and Republican officials who twist themselves into knots to avoid denouncing Trump's statements

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See Amanda Jackson et al., *Police Believe the El Paso Shooter Targeted Latinos. These Are the Victims' Stories*, CNN (Aug. 7, 2019, 12:21 PM), <https://www.cnn.com/2019/08/04/us/el-paso-shooting-victims/index.html>. Media scrutiny revealed that the FBI has often failed to treat such attacks as domestic terrorism and investigate and seek to prevent such attacks as vigorously as foreign terrorism. See, e.g., Elisha Fieldstadt & Ken Dilanian, *White Nationalism-Fueled Violence Is on the Rise, But FBI is Slow to Call It Domestic Terrorism*, NBC NEWS (Aug. 5, 2019, 12:49 PM), <https://www.nbcnews.com/news/us-news/white-nationalism-fueled-violence-rise-fbi-slow-call-it-domestic-n1039206>. The El Paso shooting followed recent shootings at a black church in South Carolina and on black shoppers at a Kroger grocery store in Kentucky, and several attacks on synagogues, mosques, and a Sikh temple. See *id.*; Matt Zapposky, *Justice Dept. Brings Hate-Crime Charges Against Man Accused of Shooting Black Customers at Kentucky Kroger*, WASH. POST (Nov. 15, 2018, 2:22 PM), [https://www.washingtonpost.com/world/national-security/justice-dept-brings-hate-crime-charges-against-man-accused-of-shooting-black-customers-at-kentucky-kroger/2018/11/15/ce01bf66-e91d-11e8-b8dc-66cca409c180\\_story.html](https://www.washingtonpost.com/world/national-security/justice-dept-brings-hate-crime-charges-against-man-accused-of-shooting-black-customers-at-kentucky-kroger/2018/11/15/ce01bf66-e91d-11e8-b8dc-66cca409c180_story.html); Kelly Weill, *More Than 500 Attacks on Muslims in America This Year*, DAILY BEAST (May 21, 2019, 5:07 AM), <https://www.thedailybeast.com/more-than-500-attacks-on-muslims-in-america-this-year>. According to Michael McGarrity, the FBI's counterterrorism chief, as of May 2019, 80 percent of the bureau's resources were focused on foreign terrorism. See Fieldstadt & Dilanian, *supra*. In 2009, an internal FBI report on white extremism caused a furious backlash when it was leaked to ring-wing media. In response, the Obama administration disbanded the team of analysts focused on right-wing extremism and stopped providing training on this front. See Daryl Johnson, *I Warned of Right-Wing Violence in 2009. Republicans Objected. I Was Right*, WASH. POST (Aug. 21, 2017, 6:00 AM), <https://www.washingtonpost.com/news/posteverything/wp/2017/08/21/i-warned-of-right-wing-violence-in-2009-it-caused-an-uproar-i-was-right/>.

<sup>26</sup> As an example of "aiding and abetting," consider Eric Kaufmann's *WHITESHIFT*, a scholarly attempt to legitimize white voters' concerns about the shrinking white majority in several Western countries. KAUFMANN, *supra* note 10. Apparently because the author is a faculty member at a respected liberal university, liberal media have greeted the book with an openness that they do not generally extend to ideological arguments that circulate on Breitbart or Fox News. See, e.g., Isaac Chotiner, *A Political Scientist Defends White Identity Politics*, NEW YORKER (Apr. 30, 2019), <https://www.newyorker.com/news/q-and-a/a-political-scientist-defends-white-identity-politics-eric-kaufmann-whiteshift-book>. But make no mistake — Kaufmann's lengthy book is, at its core, an argument in favor of preserving a "white majority." KAUFMANN, *supra* note 10, at 510. It urges white people to no longer deny their desire for their country to stay white, *see id.* at 516; tries to deflect the claim that such arguments are racist, *see id.* at 328; doubts that structural racism (an "ethereal concept") really exists, *see id.* at 331-334; deems critical race theory "anti-white" (although his citations suggest he may not have actually read much of it), *see id.* at 331, 517; and argues that whites should assimilate multiracial people (like the author) into whiteness in order to preserve white supremacy, *see id.* at 446, 466-67.

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and policies as racist and who help him maintain power.<sup>27</sup> Even those who voted for Trump *despite* his racial politics deemed the lives of people of color and the Constitution's promise of equal protection to be acceptable collateral damage. In my view, that's racist. Likewise, I will argue that Justice Kennedy's legitimation of Trump's Muslim ban advanced a white nationalist agenda even if Justice Kennedy harbored no personal animosity toward Muslims.

Notwithstanding its title, this Essay is about much more than Justice Kennedy. It is also about the evolution of racism over the last decade. As a senior FBI analyst who sounded the alarm on white supremacist terrorism in 2009 stated:

Trump's endorsement of the border wall, the travel ban, mass deportations of illegal immigrants — these ideas were touted on white supremacist message boards merely ten years ago. Now they are being put forth as official U.S. policy. Such controversial plans have placated white supremacists and anti-government extremists and will draw still more sympathetic individuals toward these extremist causes along with the sort of violent acts that too often follow, like Charlottesville. . . . The Islamist militants who brought down the World Trade Center's twin towers 16 years ago (or the ones who rammed their vehicles into pedestrians in London, Paris and Barcelona recently) had no domestic constituency. Their acts weren't enshrined instantly on social media or obliquely heralded by the president and duly elected representatives. Nor were the events rationalized by media ideologues dead set on preventing a political backlash. The terrorists I have dedicated my life to stopping have had all that going in their favor.<sup>28</sup>

As indicated by the above, white nationalism enjoys structural support that may endure long after Justice Kennedy's retirement. This Essay sheds light on the pervasiveness of white nationalism, how Trump has remade the Republican party in his image, and how Republican-appointed Justices, including even Justice Kennedy, fell in line with

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<sup>27</sup> See, e.g., Olorunnipa, *supra* note 19. The House voted to condemn Trump's "racist comments," but only four Republicans voted in favor of this measure. Allan Smith et al., *House Votes to Condemn Trump 'Racist Comments,' with Only Four Republicans Backing the Measure*, NBC NEWS (July 16, 2019, 5:02 AM), [https://www.nbcnews.com/politics/donald-trump/house-vote-resolution-condemning-trump-s-racist-comments-n1030266icansments-n1030266](https://www.nbcnews.com/politics/donald-trump/house-vote-resolution-condemning-trump-s-racist-comhttps://www.nbcnews.com/politics/donald-trump/house-vote-resolution-condemning-trump-s-racist-comments-n1030266icansments-n1030266).

<sup>28</sup> Johnson, *supra* note 25.

their avowedly political counterparts. It is a story of how racism may permeate judicial reasoning without being fully recognized as such. It is a call to probe judicial claims of neutrality — such as Chief Justice Roberts' claim that “[w]e do not have Obama judges or Trump judges,”<sup>29</sup> because they may cloak unseemly power dynamics, including a white nationalist agenda.<sup>30</sup>

In making this argument, I must confront a longstanding divide between whites and blacks as to what exactly constitutes racism.

As I wrote in a 2008 article entitled *Perceptual Segregation*:

In talking about ‘racism’ or ‘discrimination,’ black and white speakers think they are talking about the same thing, but they may not be. Whites may require overt, indisputable proof, while blacks might be more likely to accept circumstantial evidence. Moreover, whites may focus on the intent of the white person, while blacks may be concerned with the effect of the white person’s conduct, given their belief in the interactional and implicit nature of much discrimination.<sup>31</sup>

*Perceptual Segregation* synthesized a considerable body of psychological and sociological evidence demonstrating that, on average, a white person and a black person are differently situated as to how they assess the possibility of racial discrimination.<sup>32</sup> Most whites adhere to a “colorblindness perspective,” which believes that most white people do not see race.<sup>33</sup> “Deviations from this norm are unusual” and require “overt evidence of racial hostility, such as using a racial epithet.”<sup>34</sup> By contrast, black people are likely to see racism as “common and structural.”<sup>35</sup> Applying this “pervasive prejudice perspective,” black people thus may apply a differential evidentiary standard and look for

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<sup>29</sup> See Adam Liptak, *Chief Justice Roberts Defends Judicial Independence After Trump Attacks Obama Judge*, N.Y. TIMES (Nov. 21, 2018), <https://www.nytimes.com/2018/11/21/us/politics/trump-chief-justice-roberts-rebuke.html>.

<sup>30</sup> See Matsuda, *supra* note 8, at 678 (noting that “critiquing claims of neutral principles” is one goal of critical race theory).

<sup>31</sup> Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1127 (2008) [hereinafter *Perceptual*].

<sup>32</sup> See, e.g., *id.* at 1117-36. Given the limitations of available empirical data on other people of color, which is sparse and mixed, *Perceptual Segregation* refrained from drawing broad conclusions as to how such groups ascertain discrimination. See *id.* at 1104.

<sup>33</sup> See *id.* at 1126.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

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indicators of bias that may elude most white readers.<sup>36</sup> Importantly, blacks and whites tend to differ strongly on the value of race-consciousness. Many mainstream white people experience efforts to think about the racial dimensions of society and law as offensive and uncomfortable, while “blacks tend to see race-consciousness as critical to their survival in white-dominated realms.”<sup>37</sup>

An important study by Samuel Sommers and Michael Norton, explored what they called “lay theories about white racists” with a predominantly-white sample of students and working adults.<sup>38</sup> Sommers and Norton found broad support among whites for a narrow construction of racism, such as being a member of a group that promotes white supremacy or favoring white job applicants over blacks,<sup>39</sup> but there was much less support for more mundane examples of possible racism.<sup>40</sup> For example, there was less agreement on the idea that denying that racism remains a problem is itself a manifestation of racism.<sup>41</sup> Similarly, white subjects were less likely to describe as racist acquiescing to a friend telling an offensive joke or “only dat[ing] white people.”<sup>42</sup> Sommers and Norton (who are both white men) theorized that white subjects considered their own behavior when defining racism and excluded practices that might be self-implicating. The people of color in their study were more likely to define racism broadly.<sup>43</sup>

*Perceptual Segregation* was published a few months before the nation elected its first black president, Barack H. Obama.<sup>44</sup> The election of Donald Trump ushered in an era of newly explicit and pervasive racial hostility. Some mainstream white people who had been seduced by the idea that Obama’s victory signified a “post-racial” landscape may have been jolted out of complacency by Obama’s successor, who denied that Obama was a U.S. citizen, stereotyped Mexicans as rapists and thugs, promised to build a wall to keep out undesirable immigrants, vilified

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<sup>36</sup> See *id.* at 1126-27.

<sup>37</sup> *Id.* at 1127.

<sup>38</sup> See Samuel R. Sommers & Michael I. Norton, *Lay Theories About White Racists: What Constitutes Racism (and What Doesn’t)*, 9 GROUP PROCESSES & INTERGROUP REL. 117, 121, 125-26, 130 (2006).

<sup>39</sup> See *id.* at 127-28 (“Most laypeople seem to agree that a White person who ‘discourages kids from playing with Blacks,’ ‘favors White over Black job applicants,’ or ‘belongs to a group that promotes racial bigotry’ constitutes a racial prototype.”).

<sup>40</sup> See *id.* at 132.

<sup>41</sup> See *id.* at 130.

<sup>42</sup> See *id.* at 126-28, 128 n.3.

<sup>43</sup> See *id.* at 132.

<sup>44</sup> Robinson, *Perceptual*, *supra* note 31.

Muslims as terrorists, and would go on to defend neo-Nazi protestors in Charlottesville, Virginia, as “very fine people.”<sup>45</sup>

Emerging evidence suggests that a silver lining of the Trump era is that some white Democrats “increasingly hold a perspective that acknowledges racism and discrimination as obstacles to Black success.”<sup>46</sup> As one political scientist argues, news coverage of Trump’s hateful tweets and “[w]hite nationalist rallies may gain the most attention . . . [b]ut this neglects the effects these events may have on the formation of more positive racial attitudes among those opposed to Trump and his administration.”<sup>47</sup> Notably, shifts among white liberals may have narrowed the racial gap documented in *Perceptual Segregation*.<sup>48</sup> Moreover, this evidence suggests growing diversity and

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<sup>45</sup> Glenn Thrush & Maggie Haberman, *Trump Gives White Supremacists an Unequivocal Boost*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-charlottesville-white-nationalists.html>; see *supra* text accompanying notes 16–23.

<sup>46</sup> Andrew M. Engelhardt, *Trumped by Race: Explanations for Race’s Influence on Whites’ Votes in 2016*, 14 Q.J. POL. SCI. 313, 325 (2019). Other factors contributing to this shift may include a series of high-profile police shootings of unarmed black people and the Black Lives Matter movement.

<sup>47</sup> *Id.*; see also *The Partisan Divide on Political Values Grows Even Wider*, PEW RESEARCH CTR., (Oct. 5, 2017), <https://www.people-press.org/2017/10/05/4-race-immigration-and-discrimination/> (concluding that “Democrats . . . are increasingly likely to take racially liberal and pro-immigrant positions, while Republican views have remained relatively stable”); Thomas B. Edsall, *Trump Is Changing the Shape of the Democratic Party, Too*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/opinion/trump-racial-resentment.html>; Eric Kaufmann, *Americans are Divided by Their Views on Race, Not Race Itself*, N.Y. TIMES (Mar. 18, 2019), <https://www.nytimes.com/2019/03/18/opinion/race-america-trump.html>. For example, although many Republicans and Democrats had expressed support for a border wall during previous decades, Trump’s pledge to build a wall has convinced more whites that the idea is racist. See Emily Ekins, *Americans Used to Support a Border Wall. What Changed Their Minds?*, CATO INST. (Jan. 14, 2019), <https://www.cato.org/publications/commentary/americans-used-support-border-wall-what-changed-their-minds> [<https://perma.cc/M4PB-85WK>].

<sup>48</sup> See PEW RESEARCH CTR., *supra* note 47 (finding that “in recent years the share of Hispanics and whites saying the country needs to continue making changes to give blacks equal rights with whites have grown significantly, narrowing the opinion gap with blacks”). In 2014, just 39% of whites agreed that the country needed to make further changes to provide equal rights for blacks. *Id.* By 2017, that number had climbed to 54%, and that change was predominantly driven by shifting views of white liberals. See *id.* Most strikingly, the Pew study found in 2017 that slightly more white Democrats than black Democrats (66% vs. 62%) reported that racial discrimination is the main reason why blacks cannot get ahead. *Id.* A recent study by Ian Haney-López found that whites, blacks, and Latino/a/x subjects were similarly likely to endorse a “racial fear” message calling for increased scrutiny of immigrants coming from “terrorist countries” and “places overrun with drugs and criminal gangs.” Ian Haney-López, *Opinion, How*

contestation *among whites* as to the prevalence of racism and the need for government to combat it.<sup>49</sup>

This prefatory note warns readers to be conscious of how their own racial identity and socialization may predispose them to react to a thesis that implicates Justice Kennedy in white nationalism. To be sure — *Spoiler Alert* — this Essay cites no examples of Justice Kennedy uttering racial epithets or other evidence that would convince a staunch adherent of the colorblindness school. However, I hope to speak to white readers who are open to rethinking their assumptions about the prevalence of racial injustice. The Sommers and Norton study found that many white subjects did understand that whites have incentives to conceal their racist attitudes, which would suggest that requiring explicit evidence of bias in a judicial opinion will lead one to overlook significant bias.<sup>50</sup>

To be clear, there are at least three analytical pathways that could lead one to link Justice Kennedy to white nationalism. First, recent equal

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to Beat Trump at His Own Game, N.Y. TIMES (Oct. 15, 2019), <https://www.nytimes.com/2019/10/15/opinion/debate-dog-whistle.html>. Haney-López crafted a counter-message, which fused race and class, and found that this message appealed to subjects of diverse racial/ethnic backgrounds. *Id.*

<sup>49</sup> See, e.g., Edsall, *supra* note 47. One example of this disaggregation is that some white moderate Democrats blamed catering to “identity politics” for Clinton’s loss to Trump. See, e.g., Mark Lilla, *The End of Identity Liberalism*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/20/opinion/sunday/the-end-of-identity-liberalism.html>. Many of these pundits have argued that the party needs to focus on winning back Rust Belt white voters, even though this too is a form of identity politics. See, e.g., Ronald Brownstein, *Democrats Two Roads to Beating Trump*, ATLANTIC (Feb. 28, 2019), <https://www.theatlantic.com/politics/archive/2019/02/democrats-two-paths-beating-trump-2020/583846/>. By contrast, some of the Democratic presidential contenders (whites and people of color) are taking forceful stands on criminal justice and immigration, and even discussing concepts such as structural racism, reparations, and intersectionality, which may appeal not only to black and Latino/a/x voters but also race-conscious white voters. See, e.g., Matt Viser, *Democrats Debate How Far Left Is Too Far Left as They Prepare to Take on Trump*, WASH. POST (July 14, 2019, 6:31 PM), [https://www.washingtonpost.com/politics/democrats-debate-how-far-left-is-too-far-left/2019/07/14/deb8ce90-9f38-11e9-9ed4-c9089972ad5a\\_story.html](https://www.washingtonpost.com/politics/democrats-debate-how-far-left-is-too-far-left/2019/07/14/deb8ce90-9f38-11e9-9ed4-c9089972ad5a_story.html).

<sup>50</sup> See, e.g., Sommers & Norton, *supra* note 38, at 127 (finding that some of the most highly-rated evidence of bias was “[b]elieves Blacks are inferior but never says so publicly” and “[s]hares biased thoughts with white friends but not the public”). This Essay seeks to build on Jerome Culp’s claim that “we do [law] a disservice if we examine only the stated part of . . . judicial opinions. While various factors enter into the decision-making process, an individual judge may simply not state all the factors which motivate her towards a particular result. In addition to the arguments actually articulated, there is a ‘deep theory,’ what literary critics call the story.” Jerome McCristal Culp, Jr., *Understanding the Racial Discourse of Justice Rehnquist*, 25 RUTGERS L.J. 597, 597 (1994); see also *id.* at 599 (“Justice Rehnquist has reinserted a jurisprudential view of race which seems to draw upon old notions of white supremacy.”).

protection cases demand “smoking gun” evidence of malicious intent, which typically immunizes government against claims of racial discrimination.<sup>51</sup> Justice Kennedy typically applied this exacting standard in race and sex cases brought by people of color and women and found no equal protection violation.<sup>52</sup> I previously pointed out an inconsistency in Justice Kennedy’s equal protection jurisprudence.<sup>53</sup> He sidestepped the malice test in sexual orientation cases, in order to accuse Congress of harboring “animus” toward gay and lesbian couples,<sup>54</sup> and Colorado of enacting a constitutional amendment based on a “bare . . . desire to harm” gay, lesbian, and bisexual people.<sup>55</sup> In neither of these majority opinions did Justice Kennedy marshal evidence of invective that would meet the malice test. Instead, he quietly lowered the bar, inferring bias based on his understanding of the relationship between the law and the social context.<sup>56</sup> Ian Haney-López calls this model “contextual intent” and argues that it is a workable method for deciding equal protection cases.<sup>57</sup> For purposes of this Essay, I draw on this animus/contextual intent approach — providing context that aspires to cast new light on Justice Kennedy’s reasoning. In essence, I judge Justice Kennedy by the same standard he applied to the government in the sexual orientation cases. This argument does turn on the reader being convinced that some form of bias (perhaps implicit bias or stereotyping) infected Justice Kennedy’s legal judgment.<sup>58</sup> A third pathway, however, might avoid any reliance on animus or bias in intention, cognition, or attitude. From this perspective, even if Justice Kennedy felt warmly toward racial and religious minorities, the effect of his decision to acquiesce to white nationalism makes him culpable in its rise.<sup>59</sup>

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<sup>51</sup> See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 312-19 (1987).

<sup>52</sup> See Robinson, *Unequal*, *supra* note 7, at 198-204.

<sup>53</sup> See *id.* at 166.

<sup>54</sup> See, e.g., *United States v. Windsor*, 570 U.S. 744, 770-72 (2013).

<sup>55</sup> See *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (citing *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

<sup>56</sup> See Robinson, *Unequal*, *supra* note 7, at 170-72.

<sup>57</sup> See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1785 (2012).

<sup>58</sup> See Robinson, *Unequal*, *supra* note 7, at 185-86.

<sup>59</sup> Here, it might be helpful to think about government decision-makers who stood by while Japanese-Americans were interned and Jews were massacred during the Holocaust. Some would argue that one can be complicit if he or she holds power and goes along with an atrocity even if he or she is sympathetic to the oppressed group. For instance, Representative Mark Takano stated in a speech on the floor of Congress: “How you react to the Muslim ban today is how you would have reacted to the imprisonment of my grandparents and parents 75 years ago [Japanese-Americans who were interned].”



In addition, I aim to encourage black readers, who may be used to seeing racial subordination in contexts such as criminal justice, voting rights, and education to notice how it also shapes doctrine in the contexts of immigration and national security. For example, the Supreme Court often resolves cases like *Trump v. Hawaii* by relying on the “plenary power doctrine,” which commits control over the nation’s borders to the President and Congress.<sup>60</sup> Yet this doctrine was first articulated in cases that plainly turned on the exclusion of Chinese immigrants. The government deemed people of Chinese ancestry incapable of blending into a white-majority country.<sup>61</sup> In my view, a Justice who simply relies on this precedent and chooses to overlook its racist underpinnings acquiesces to white nationalism.<sup>62</sup> By reckoning with the white nationalist impulses in some of Justice Kennedy’s most lauded opinions, we can recognize the centrality of racial hierarchy in contemporary U.S. constitutional law, including a wide swath of immigration law — before and after Trump’s election.

Finally, a reader might ask: *Why focus on Justice Kennedy? And why these particular cases?* Surely Justice Kennedy is not singularly responsible for the opinions that I critique — in general, he secured at least four other Justices’ votes. But Justice Kennedy has staked his reputation on neutrality, open-mindedness and being the “swing vote” unlike the other current Justices. More specifically, I focus on him because I fear that his prominent role in the sexual orientation cases will enable myth-making that frames him as more progressive than he actually was.<sup>63</sup> This myth-making is perpetuated by the tendency of

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If you are silent today, you would have been silent then. If you are . . . complicit today, you would have been complicit then.” Representative Mark Takano, 1 Minute Speech on Recent Immigration Ban, C-SPAN (Jan. 30, 2017), <https://www.c-span.org/video/?c4653641/rep-mark-takano-1-minute-speech-recent-immigration-ban>.

<sup>60</sup> See Srikantiah & Sinnar, *supra* note 8, at 203-04 (arguing that plenary power doctrine has “operated, for the most part, to insulate federal immigration statutes from developments in constitutional law for over a century”). See generally Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases: The “Plenary Power” Justification for On-going Abuses of Human Rights*, 10 *ASIAN L.J.* 13, 13-14 (2003).

<sup>61</sup> See Saito, *supra* note 60, at 13-16 (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) and *Fong Yue Ting v. United States*, 149 U.S. 698 (1893)); see also Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 *U. ILL. L. REV.* 525, 528-29 (2000).

<sup>62</sup> It would be more difficult to make this claim about a lower court judge, because she may be constrained by the fear of being overruled for disregarding precedent.

<sup>63</sup> Gabriel Chin’s work on *Plessy v. Ferguson* is an inspiration for this Essay. See Gabriel Chin, *The Plessy Myth: Justice Harlan and the Chinese Cases*, 82 *IOWA L. REV.* 151, 155-56 (1996). Chin argued that Justice Harlan’s defense of the rights of black

lawyers and constitutional law scholars to think and write along a “single axis” such as race *or* sexual orientation *or* immigration, but rarely all three. Doctrinal intersectionality is thus a vital tool in providing greater context and clarity in understanding a single line of cases. In this Essay, I focus on three streams of jurisprudence: sexual orientation, immigration, and national security. My argument is not that readers should roundly condemn Justice Kennedy and all of his opinions. Rather, we should situate the progressive aspects of his record<sup>64</sup> alongside those that perpetuated white nationalism, and we should recognize the humanity, fallibility, and complexity of the Justice and the man.

The story of gay and lesbian<sup>65</sup> equality in the Supreme Court began with Justice Kennedy's unexpected majority opinion in *Romer v. Evans* in 1996.<sup>66</sup> The *Romer* majority ruled that a Colorado constitutional amendment that placed a special disability on lesbian, gay, and bisexual people's right to seek protection from the state was “inexplicable by anything but animus” — or a “bare . . . desire to harm”<sup>67</sup> — “the class

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people and a “colorblind” Constitution overshadowed racist remarks and votes in several of his opinions addressing the rights of people of Chinese ancestry. *See id.*

<sup>64</sup> For instances of Justice Kennedy's progressive record, see, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016) (striking down a state law that would have shut down many clinics that provide abortions); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198, 2214-15 (2016) (approving of a particular affirmative action program); *Boumediene v. Bush*, 553 U.S. 723, 733 (2008) (holding that Congress violated the Suspension Clause in curtailing the availability of judicial review of the legality of detentions of alleged enemy combatants at Guantanamo Bay). I do not deny that these decisions required considerable courage and to some extent offer counter-evidence to my thesis. This intervention is an effort to make more central cases that have too often been hidden by the shadow of the few cases in which Justice Kennedy delivered a swing vote to the left. Moreover, we ought to situate each “victory” in their respective bodies of law, which continue to restrict race-conscious admissions decisions, permit many restrictions on women's reproductive rights, and grant government much leeway to detain non-citizens. *See* Russell K. Robinson & David M. Frost, “Playing It Safe” with Empirical Evidence: Selective Use of Social Science in Supreme Court Cases About Racial Justice and Marriage Equality, 112 *Nw. U. L. REV.* 1565, 1568-69 (2018) [hereinafter *Playing It Safe*].

<sup>65</sup> I will generally refer to Justice Kennedy's understanding of the relevant class as “gays and lesbians” in keeping with the framing of marriage equality litigators and the rhetoric in most of Justice Kennedy's opinion. In referring to my own conception of the community, I generally use the more inclusive term “sexual minorities” or “LGBTQ.” *See generally* Russell K. Robinson & David M. Frost, *The Afterlife of Homophobia*, 60 *ARIZ. L. REV.* 213, 218 n.13 (2018) [hereinafter *Afterlife*] (explaining the rationale for using these terms).

<sup>66</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>67</sup> *Id.* at 632-35 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)) (internal quotation marks omitted).

it affects.”<sup>68</sup> Interestingly, Justice Kennedy began his majority opinion by citing a century-old case involving racial segregation. He wrote:

[T]he first Justice Harlan admonished this Court that the Constitution “neither knows nor tolerates classes among citizens.” Unheeded then, those words now are understood to state a commitment to the law’s neutrality where the rights of persons are at stake. The Equal Protection Clause enforces this principle and today requires us to hold invalid a provision of Colorado’s Constitution.<sup>69</sup>

Justice Kennedy thus linked *Romer*’s commencement of a gay and lesbian liberation project to the civil rights of black people and grounded both in the principle of state neutrality to individual rights. But he did so in a curious way.<sup>70</sup> He cited the *Plessy* dissent as if Justice Harlan had firmly rebuked racial segregation and affirmed the full citizenship and equality of black people.<sup>71</sup> However, even a cursory reading of Harlan’s dissent shows otherwise. Justice Harlan declared:

The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty. But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.<sup>72</sup>

Moreover, Justice Harlan objected that “a Chinaman can ride in the same passenger coach with white citizens of the United States” even though “the Chinese race” is “so different from our own that we do not

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<sup>68</sup> *Id.* at 632.

<sup>69</sup> *Id.* at 623 (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) (citation omitted), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

<sup>70</sup> Justice Kennedy followed a longstanding practice of gay and lesbian advocates of awkwardly seeking to link the rights of sexual minorities to those of racial minorities. See generally Russell K. Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010 (2014) [hereinafter *Postracialism*] (critiquing activists and litigators for rhetoric supplanting racial minorities in favor of sexual minorities and minimizing the persistence of racial subordination); Russell K. Robinson & David M. Frost, *LGBT Equality and Sexual Racism*, 86 FORDHAM. L. REV. 2739 (2018) (discussing gay and lesbian litigants’ reliance on *Loving v. Virginia*, 388 U.S. 1 (1967)).

<sup>71</sup> See *Romer*, 517 U.S. at 623.

<sup>72</sup> *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

permit those belonging to it to become citizens of the United States.”<sup>73</sup> Justice Kennedy never acknowledged the disconnect between Justice Harlan's rhetoric approving of white supremacy, including his claim that Chinese immigrants are unworthy of citizenship, and Justice Harlan's vote to invalidate a state law requiring racial separation in railroad travel. In relying on Justice Harlan's views, and declining to disavow his racism, Justice Kennedy perhaps inadvertently planted a seed of white nationalism in an opinion widely regarded as a pathbreaking advance for sexual minorities.<sup>74</sup>

Moreover, Justice Kennedy's handiwork shares a related dissonance. *Romer* is representative of several of Justice Kennedy's opinions in that it pairs soaring, aspirational language with his complicity in ongoing social stratification.<sup>75</sup> I will argue that white nationalism persisted as an undercurrent in Justice Kennedy's subsequent cases concerning sexual orientation, family formation, and the right to marry and then became most manifest in a series of national security opinions. This critical lens reveals that, notwithstanding his flowery rhetoric, for Justice Kennedy, constitutional liberty does not in fact extend equally and neutrally to all.<sup>76</sup>

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<sup>73</sup> *Id.* at 561.

<sup>74</sup> See *infra* text accompanying note 209 (discussing Justice Kennedy's argument in *Masterpiece Cakeshop* that a judge who fails to disavow religious bias expressed by a different decision-maker shares in that bias).

<sup>75</sup> See, e.g., *Schuette v. BAMN*, 134 S. Ct. 1623, 1629-38 (2014) (plurality opinion) (declining to find that an amendment to a state constitution prohibiting affirmative action violated the Equal Protection Clause); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-76 (2001) (Kennedy, J., concurring) (agreeing with the Court's decision to bar federal suits by people with disabilities to recover money damages for a state's failure to comply with the Americans with Disabilities Act).

<sup>76</sup> Justice Kennedy has often described neutrality as a critical requirement for judges. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (referring to “the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary”); *Romer*, 517 U.S. at 623 (discussing how the Equal Protection Clause enforces the concept of the law's neutrality). My argument challenges those who have argued that cases like *Romer* reflect a neutral principle that applies beyond sexual minorities. See, e.g., Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 243-45 (arguing that combining racial-purpose and animus standards creates a framework for maintaining judicial neutrality beyond minority-centered cases); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 257-58 (1996) (arguing that *Romer* represents a “pariah principle,” which “forbids the government from designating any societal group as untouchable, regardless of whether the group in question is generally entitled to some degree of judicial protection, like blacks, or to no special protection, like left-handers (or, under current doctrine, homosexuals)”). For a full discussion of what I have called Justice Kennedy's “LGBT exceptionalism,” see generally Robinson, *Unequal*, *supra* note 7. To say that these cases are specific to the context of sexual minorities is not to argue that they were wrongly decided. My argument instead is that the Court has failed to

## I. WHITE NATIONALISM IN FAMILY FORMATION CASES

This Part analyzes cases that concern the boundaries of family and the government's willingness to recognize family bonds. The first set concerns whether U.S. citizens who decline to marry a sexual partner of another nationality can transmit their citizenship to a child of that unmarried relationship who is born outside of the United States. The second set of cases addresses the extent to which the Court regards people in same-sex relationships as entitled to the same protections, responsibilities, and rights as male-female married couples and their children.

A. *Nguyen v. INS*

In three cases that spanned twenty of Justice Kennedy's thirty years on the Supreme Court, the Justices struggled with whether Congress can impose different conditions on the ability of U.S. citizen men and women to transmit citizenship to children born outside the United States to unmarried parents.<sup>77</sup> I focus on the second of these three cases because Justice Kennedy wrote the majority opinion. In closing this discussion, I explain how the other two cases flesh out Justice Kennedy's stance on family formation that crosses national borders.

*Nguyen v. INS* is primarily thought of as a gender discrimination case, but a closer look suggests that a desire to maintain the nation's racial demographics seemingly drove the majority's gender discrimination analysis. Doctrinal intersectionality urges us to see how law may simultaneously construct gender roles, shape race, and sculpt nation-building.<sup>78</sup> In *Nguyen*, Justice Kennedy upheld a federal law determining the transmission of citizenship against a Fifth Amendment equal protection challenge.<sup>79</sup> The statute imposed different requirements on unmarried U.S. citizen fathers and mothers for conferring citizenship to their children born outside of the United States with a noncitizen.<sup>80</sup> A mother had to show that she had U.S. citizenship at the time that she gave birth and also that she had prior physical

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extend their underlying principles to equally compelling contexts, such as the discrimination embodied in Trump's travel ban. *See infra* Part III.

<sup>77</sup> *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 (2017); *Nguyen v. INS*, 533 U.S. 53, 56 (2001); *Miller v. Albright*, 523 U.S. 420, 424 (1998).

<sup>78</sup> *See, e.g.*, Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405, 409, 456-58 (2005).

<sup>79</sup> *Nguyen*, 533 U.S. at 58-59.

<sup>80</sup> *See id.* at 59-60 (describing the different requirements under 8 U.S.C. § 1409(a) and § 1409(c)).

presence in the United States for a continuous year.<sup>81</sup> Fathers, however, had to establish a blood relationship by clear and convincing evidence, legitimate the child through a judicial procedure, and prove that they had agreed to provide financial support while the child was a minor.<sup>82</sup>

A straightforward application of intermediate scrutiny to this gender classification would have required the Court to invalidate the law.<sup>83</sup> In doing the opposite and upholding the law, the *Nguyen* majority mangled intermediate scrutiny until it was unrecognizable. Its notable departures include Justice Kennedy inventing a rationale that the government itself did not advance: “the opportunity for a meaningful relationship between citizen parent and child.”<sup>84</sup> Such hypothesized rationales are supposed to be out of bounds when applying intermediate scrutiny.<sup>85</sup> Second, although the application of intermediate scrutiny was intended to disrupt lawmakers’ tendency to rely on gender stereotypes, the *Nguyen* majority reinforced the view that women are natural nurturers — and thus law should make it easier for them to transmit citizenship to their children.<sup>86</sup>

By contrast to mothers, Justice Kennedy imagined men in the military and male business travelers as sexually reckless and unlikely to desire a relationship with their offspring.<sup>87</sup> Justice Kennedy went out of his way to express special concern about the potential for military deployment to expand the ranks of American citizens.<sup>88</sup> He noted that in 1969, during the Vietnam War, and the year in which *Nguyen* was born, there were approximately one million military personnel stationed abroad, nearly all of whom were male.<sup>89</sup> He went on to state:

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<sup>81</sup> *See id.*

<sup>82</sup> *See id.*; *see also id.* at 80 (O’Connor, J., dissenting).

<sup>83</sup> *See id.* at 79-80 (O’Connor, J., dissenting). *But see id.* at 60-61 (majority opinion). Since the 1970s, the Court has applied a heightened level of review, “intermediate scrutiny,” when a law classifies on the basis of sex or gender. Under this standard, the government must provide an important state interest, and the law must be substantially related to that interest. *See, e.g., Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

<sup>84</sup> *Nguyen*, 533 U.S. at 64-65; *see also id.* at 67-68 (“Statements from the government’s brief are not conclusive as to the objects of the statute . . . as we are concerned with the objectives of Congress, not those of the INS. We ascertain the purpose of a statute by drawing logical conclusions from its text, structure, and operation.”).

<sup>85</sup> *See id.* at 84 (O’Connor, J., dissenting).

<sup>86</sup> *See id.* at 88-89 (O’Connor, J., dissenting).

<sup>87</sup> *Id.* at 65-67 (majority opinion).

<sup>88</sup> *See id.* at 65 (“One concern in this context has always been with young people, men for the most part, who are on duty with the Armed Forces in foreign countries.”).

<sup>89</sup> *See id.* (citing DEP’T OF DEF., SELECTED MANPOWER STATISTICS 48, 74 (1999); DEP’T OF DEF., SELECTED MANPOWER STATISTICS 29 (1970)).

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The ease of travel and the willingness of Americans to visit foreign countries have resulted in numbers of trips abroad that *must be of real concern*.... Congress is well within its authority in refusing . . . to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process.<sup>90</sup>

Although the majority of men affected (those in the military and business travelers) were likely white men, the opinion suggests that it was significant that the Court imagined their progeny as biracial children likely to have difficulty assimilating into American social and political values. Justice Kennedy expressed concern about “the realities of the child’s own ties and allegiances.”<sup>91</sup> Thus, Justice Kennedy’s majority opinion can be read to codify a “boys will be boys” social norm that makes it easy for American men to leave their foreign-born children (of color) and exclude them from the national polity.<sup>92</sup>

The inference that race played a factor in Justice Kennedy’s opinion in *Nguyen* opinion is bolstered by an analysis of his votes in two related cases. From 1998 to 2017, the Court wrestled with the constitutionality of gender distinctions in legal rules determining the transmission of citizenship. Over the course of the three cases, Justice Kennedy’s position on the core doctrinal question dramatically vacillated. In the first case, *Miller v. Albright*,<sup>93</sup> he joined a concurring opinion by Justice O’Connor.<sup>94</sup> This concurrence considered it as significant that the petitioner, a woman who was born in the Philippines, was seeking citizenship without the benefit of her American father petitioning alongside her. Justice O’Connor argued that the statute discriminated against the father, not the daughter, even though the daughter was the person denied U.S. citizenship.<sup>95</sup> If the father had not dropped his case, Justice O’Connor suggested that she likely would have ruled in his favor because “[i]t is unlikely, in my opinion, that any gender classifications based on stereotypes can survive heightened scrutiny.”<sup>96</sup> Justice O’Connor admitted that the Court possessed the authority to permit the

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<sup>90</sup> *Id.* at 66-67 (emphasis added).

<sup>91</sup> *Id.* at 67.

<sup>92</sup> Cf. Leti Volpp, *The Citizen and the Terrorist*, 23 IMMIGR. & NAT’LITY L. REV. 561, 581 (2002) [hereinafter *The Citizen*] (“[R]ace and other markers appear and reappear to patrol the borders of belonging to political communities.”).

<sup>93</sup> 523 U.S. 420 (1998).

<sup>94</sup> *Id.* at 445 (O’Connor, J., concurring).

<sup>95</sup> *Id.* at 445-46 (O’Connor, J., concurring).

<sup>96</sup> *See id.* at 452 (O’Connor, J., concurring).

daughter to litigate her father's equal protection right, yet for "prudential" reasons, she refused to follow this route.<sup>97</sup>

When the Court decided *Nguyen* three years later, a case that did not implicate such prudential concerns, Justice Kennedy's majority opinion embraced arguments that Justice Stevens had articulated in *Miller* to deny the equal protection challenge, leaving Justice O'Connor to write a fiery dissent.<sup>98</sup> Nearly twenty years later, the Court returned to this issue in *Sessions v. Morales-Santana*.<sup>99</sup> This time, Justice Ginsburg wrote for the majority and found an equal protection violation, and Justice Kennedy joined her opinion.<sup>100</sup> But there was a catch. The majority decided that Congress would prefer the Court to fix the gender inequity by making it harder for mothers to transmit citizenship.<sup>101</sup> As a result, Justice Ginsburg's opinion did not grant U.S. citizenship to a single person.

It is virtually impossible to reconcile Justice Kennedy's substantive positions in these cases — he seemingly found an equal protection violation; then he didn't; and then he did! However, we can understand this flip-flopping by identifying the thread that connects all three of the opinions that Justice Kennedy wrote or joined: he consistently voted to deny citizenship to the person of color (a Filipina, a man of Vietnamese descent, and a Puerto-Rican/Dominican man). Moreover, this trilogy shows how at times Justice Kennedy masked likely substantive resistance to individual rights underneath procedural justifications, a theme that recurs in his national security opinions, discussed below.<sup>102</sup> In sum, Justice Kennedy's *Nguyen* opinion and votes in all three cases advanced white nationalism by effectively establishing a higher bar for people of color to be recognized as U.S. citizens. The opinion reified a patriarchal legal rule that allows mostly male and mostly white business and military travelers to engage in sexual intercourse without bearing

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<sup>97</sup> *Id.* at 445-46. (O'Connor, J., concurring). In dissent, Justice Breyer strongly disputed these prudential considerations. *See id.* at 473-74 (Breyer, J., dissenting).

<sup>98</sup> Compare *id.* at 444 (opinion of Stevens, J., joined by Rehnquist, C.J.) (arguing that "fathers are less likely than mothers to have the opportunity to develop relationships"), and *Nguyen v. INS*, 533 U.S. 53, 65-68 (2001) (contending that mothers are more likely than fathers to form meaningful relationships with children), with *id.* at 84 (O'Connor, J., dissenting) (rejecting the majority's argument as hypothetical rationale that is unsubstantiated by concrete facts).

<sup>99</sup> 137 S. Ct. 1678 (2017).

<sup>100</sup> *Id.* at 1685-86.

<sup>101</sup> *Id.* at 1700-01.

<sup>102</sup> *See infra* notes 167-175 and accompanying text.



the legal risk that their children may attain citizenship and follow them to the United States without their permission.<sup>103</sup>

B. United States v. Windsor & Obergefell v. Hodges

In 2013 and 2015, the Court decided its two most famous marriage equality cases, *United States v. Windsor*<sup>104</sup> and *Obergefell v. Hodges*,<sup>105</sup> and Justice Kennedy wrote both majority opinions. Many scholars have critiqued the respectability politics that fueled the decision-making of LGBTQ rights and marriage equality movement lawyers.<sup>106</sup> My prior writings have trained their fire primarily on the lawyers, who assumed that Justice Kennedy could support marriage equality only if they airbrushed gay and lesbian identity to make it resemble someone from Justice Kennedy's background who just happened to be gay or lesbian because of a genetic quirk.<sup>107</sup> In a recent piece, David M. Frost and I lamented what might have been if movement lawyers had embraced inclusion, rather than exclusion.<sup>108</sup> With virtual uniformity, the movement's briefs recited "gays and lesbians" as the relevant class, even though bisexual, transgender, and other sexual and gender minorities also stood to benefit from marriage equality.<sup>109</sup> The lawyers selected plaintiffs who were likely to appeal to the Justices in that they were disproportionately white and middle- or upper-class.<sup>110</sup> For example,

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<sup>103</sup> Recall that under the legal rule validated in *Nguyen* the father must take action to legally recognize and support the child in order for his child to obtain citizenship. This rule lets the U.S. father determine whether or not the U.S. embraces his offspring. See *Nguyen*, 533 U.S. at 70-71.

<sup>104</sup> 570 U.S. 744 (2013).

<sup>105</sup> 135 S. Ct. 2584 (2015).

<sup>106</sup> See, e.g., Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS 811, 834-35 (2013) (discussing race and sexual orientation in relation to gay rights advocacy); Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004) (discussing how nonnormative sexual practices are relegated to a second tier within the context of gay rights advocacy); Cynthia Godsoe, *Perfect Plaintiffs*, 125 YALE L.J.F. 136, 140-41 (2015) (explaining how the intersection of race, class, and sexuality has been overlooked in the context of same-sex marriage); Melissa Murray, *What's So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 435 (2012) (arguing that the marriage equality movement has failed to build bridges with groups that have been marginalized due to race and gender); Robinson, *Postracialism*, *supra* note 70 (discussing how the mainstream gay and lesbian community has a tense relationship with racial minorities, bisexual and transgender people).

<sup>107</sup> See, e.g., Robinson & Frost, *Afterlife*, *supra* note 65, at 224-26.

<sup>108</sup> See Robinson & Frost, *Playing It Safe*, *supra* note 64, at 1602.

<sup>109</sup> *Id.* at 1593-94.

<sup>110</sup> See Robinson & Frost, *Afterlife*, *supra* note 65, at 224-25.

one lawyer argued that a same-sex couple who filed for bankruptcy would be a bad representative of the LGBTQ community.<sup>111</sup> Of the plaintiffs in *Obergefell*, 83% were white, compared to 67% of the LGBTQ community.<sup>112</sup> While 24% of the LGBTQ community makes less than \$24,000 in income, none of the *Obergefell* plaintiffs fell into this category.<sup>113</sup> This centering of white, affluent plaintiffs unnecessarily perpetuated perceptions that marriage equality is a white, assimilationist project.<sup>114</sup>

There is little text in *Obergefell* and *Windsor* that explicitly adopts these racial and class boundaries.<sup>115</sup> One could argue that the lawyers imposed these identity-based limits on the framing of the marriage equality claim, and Justice Kennedy is not to blame. Still *Obergefell* in particular is notable for its emphasis on citizenship. The majority opinion provided four main reasons for extending the right to marry to same-sex couples.<sup>116</sup> The fourth and final reason linked marriage to national identity.<sup>117</sup> Justice Kennedy opined that “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”<sup>118</sup> He continued: “Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago [stating]: ‘There is certainly no country in the world where the tie of marriage is so much respected as in America.’”<sup>119</sup> Quoting *Maynard v. Hill*,<sup>120</sup> Justice Kennedy asserted that marriage is “the foundation of the family and of society, without which there would be neither civilization nor progress.” Marriage, the *Maynard* Court said, has long been ‘a great

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<sup>111</sup> Ariel Levy, *The Perfect Wife*, NEW YORKER (Sept. 23, 2013), <https://www.newyorker.com/magazine/2013/09/30/the-perfect-wife>.

<sup>112</sup> Godsoe, *supra* note 106, at 139 fig.1.

<sup>113</sup> *Id.*

<sup>114</sup> See Robinson & Frost, *Playing It Safe*, *supra* note 64, at 1602.

<sup>115</sup> Surely some scholars would castigate the entire marriage equality project as animated by white respectability, which perhaps is a cousin of white nationalism. Cf. Murray, *supra* note 106, at 416. But there is scant text in the key opinions that expressly affirms this reading. Thus, it is critical to look beyond the context of marriage equality, which I do below. See *infra* Part I.C.

<sup>116</sup> “These four benefits are the following: (1) marriage as an expression of personal autonomy, (2) marriage as a unique opportunity, (3) marriage as a means of protecting children and family, and (4) marriage as a central social institution.” Robinson & Frost, *Playing It Safe*, *supra* note 64, at 1586 (citing *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599-01 (2015)).

<sup>117</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* (citing ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 309 (Henry Reeve trans., rev. ed. 1990) (1835)).

<sup>120</sup> 125 U.S. 190 (1888).

public institution, giving character to our whole civil polity.”<sup>121</sup> *Obergefell* shows that Justice Kennedy understood marriage to be central to citizenship, belonging, and nation-building. Moreover, Justice Kennedy regarded marriage equality as a means of incorporating a subset of gays and lesbians (those willing and able to marry) into the polity. For instance, he declared that “[i]t demeans gays and lesbians for the State to lock them out of a central institution of the Nation’s society.”<sup>122</sup> He observed that the Court’s *Lawrence* opinion, which decriminalized sex between men and sex between women, did not confer full citizenship on gays and lesbians: “Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.”<sup>123</sup> In sum, the marriage equality cases link marriage to citizenship and through the focus on particular plaintiffs arguably link same-sex marriage and whiteness. Further, *Obergefell* ties marriage to civilization and implies that the “uncivilized” reside outside the West.<sup>124</sup> Justice Kennedy’s position in *Kerry v. Din* provides further support for this claim.

### C. *Kerry v. Din*

Just ten days before the Court decided *Obergefell*, it announced its decision in *Kerry v. Din*, a largely overlooked right-to-marry case.<sup>125</sup> Fauzia Din is a U.S. citizen who came to the United States from Afghanistan as a refugee.<sup>126</sup> Din petitioned the U.S. government to have her husband, Kanishka Berashk, a resident citizen of Afghanistan, classified as an “immediate relative,” in order for him to receive priority

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<sup>121</sup> *Obergefell*, 135 S. Ct. at 2601 (citing *Maynard*, 125 U.S. at 211, 213).

<sup>122</sup> *Id.* at 2602. *Windsor* even more strongly condemned the effort to stigmatize gays and lesbians, although it did not expressly mention citizenship. See *United States v. Windsor*, 570 U.S. 744, 770-72 (2013). By contrast, *Obergefell* undermined its anti-subordination rationale by broadly deeming opponents of same-sex marriage to be reasonable people of good faith. See Robinson & Frost, *Playing It Safe*, *supra* note 108, at 1588 (discussing *Obergefell*, 135 S. Ct. at 2594).

<sup>123</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>124</sup> *Id.* at 2601 (quoting Alexis de Tocqueville “[t]here is certainly no country in the world where the tie of marriage is so much respected as in America...”). Justice Kennedy’s use of the de Tocqueville quote about other countries could be read to imply that countries that do not value marriage in the same way that Americans do and are thus “less civilized.”

<sup>125</sup> *Kerry v. Din*, 135 S. Ct. 2128 (2015); Kerry Abrams, *The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law*, 103 CORNELL L. REV. 501, 505-06 (2018) (arguing that “neither *Obergefell* nor *Din* can be understood without the other,” yet *Din* has generally been overlooked).

<sup>126</sup> *Kerry*, 135 S. Ct. at 2132.

in his application for a visa.<sup>127</sup> After the government denied her husband's visa application, Din argued that the failure to provide a detailed reason for the denial violated her due process right to live in the United States with her spouse.<sup>128</sup> The Ninth Circuit held that Din had a "protected liberty interest in marriage that entitled [her] to review of [her] spouse's visa."<sup>129</sup> In a snide plurality opinion, Justice Scalia flatly declared that there is no such constitutional right.<sup>130</sup>

Justice Kennedy's opinion, which Justice Alito joined, concurred in the judgment. Unlike the plurality and Justice Breyer's dissent, Justice Kennedy refused to decide whether Din had a protected liberty interest arising from her marriage.<sup>131</sup> He concluded that, assuming that Din had such an interest, "Din received all the process to which she was entitled."<sup>132</sup> All the Court's precedent required, Justice Kennedy opined, was a "facially legitimate and bona fide reason," and courts may "neither look behind the exercise of that discretion, nor test it by balancing its justification against" a citizen's constitutional right.<sup>133</sup> In short, Justice Kennedy gave no weight to Din's interest in living together with her husband in America.<sup>134</sup> He concluded that "respect for the political branches' broad power over the creation and administration of the immigration system" counsels against requiring the government to disclose the underlying facts and allowing Din to challenge them.<sup>135</sup>

Justice Kennedy's concurrence declined even to discuss Din's personal stake in the visa decision — that is, how enforced separation from her husband would impact the integrity of their union. In *Obergefell*, by contrast, Justice Kennedy carefully detailed the interests of five of the petitioners (all of them white, even though the group of petitioners included some people of color) to "illustrate the urgency of their cause."<sup>136</sup> He considered and ultimately dismissed the argument that the Court should defer to the democratic process: "when the rights

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<sup>127</sup> See *id.* at 2131-32.

<sup>128</sup> *Id.* at 2131-32 ("A consular officer informed Berashk that he was inadmissible under § 1182(a)(3)(B) [which broadly proscribes people who are connected to terrorist organizations] but provided no further explanation.").

<sup>129</sup> *Id.* at 2132 (quoting *Din v. Kerry*, 718 F.3d 856, 860 (9th Cir. 2013)).

<sup>130</sup> *Id.* at 2131. Scalia referred to Din's arguments as "absurd," and argued that precedent "protecting 'the sacred precincts of the marital bedroom' . . . do[es] not plausibly extend into the offices of our consulates abroad." *Id.* at 2133, 2138.

<sup>131</sup> *Id.* at 2139 (Kennedy, J., concurring).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 2140 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

<sup>134</sup> See *id.* at 2140-41.

<sup>135</sup> *Id.* at 2141.

<sup>136</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594-95 (2015).

of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decision making. . . . This holds true even when protecting individual rights affects issues of the utmost importance and sensitivity."<sup>137</sup>

*Windsor* similarly involved the question of deference. The Defense of Marriage Act ("DOMA") was passed by Congress and signed by President Bill Clinton, and concerned the executive branch's administration of thousands of benefits to individuals based on a narrow definition of marriage.<sup>138</sup> Justice Kennedy considered a challenge by Edith Windsor — an affluent, white woman who had to pay more than \$350,000 in estate taxes because the federal government refused to treat her marriage to a woman as legitimate — and Justice Kennedy found her claim compelling.<sup>139</sup> By contrast in *Din*, *Nguyen*, and the national security cases discussed below, the people whose rights were at issue were mostly people of color (predominantly Asian and Middle-Eastern), non-Christians (often people who were Muslim or perceived as Muslims because of their racial identities), and they were either not U.S. citizens or their asserted citizenship was the subject of dispute (*Nguyen*). Leti Volpp describes how people in these groups "are always already assumed to come from elsewhere, and to belong elsewhere when their behavior affronts."<sup>140</sup> Far from challenging such social hierarchies, Justice Kennedy's jurisprudence reflexively entrenched them. When *Windsor* and *Obergefell* are placed alongside cases like *Nguyen* and *Din*, we can see that *Din*'s and *Nguyen*'s identities as racial and/or religious minorities provide a plausible explanation for the absence of empathy in Justice Kennedy analysis, a conspicuous contrast to the "dignity" he afforded *Windsor* and *Obergefell*.

## II. WHITE NATIONALISM IN JUSTICE KENNEDY'S NATIONAL SECURITY OPINIONS

This Part explores Justice Kennedy's opinions in two cases decided in the post-September 11 context. These cases make manifest the troubling tendency of Justice Kennedy's avowed commitment to individual liberty to crumble when confronted with claims of sweeping executive authority.

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<sup>137</sup> *Id.* at 2605 (citing *Schuette v. BAMN*, 134 S. Ct. 1623, 1637 (2014)).

<sup>138</sup> See Defense of Marriage Act, Pub. L. No. 104-199, § 3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2013)), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013).

<sup>139</sup> See *Windsor*, 570 U.S. at 753-54, 775.

<sup>140</sup> Volpp, *The Citizen*, *supra* note 92, at 582 n.84.

A. *Iqbal v. Ashcroft*

In *Iqbal v. Ashcroft*,<sup>141</sup> Javaid Iqbal, a Muslim man of Pakistani descent who had lived and worked in the United States for ten years, was captured in an immigration roundup weeks after the attack on the Twin Towers.<sup>142</sup> He alleged that while confined in the Metropolitan Detention Center in Brooklyn, New York, his jailors “kicked him in the stomach, punched him in the face, and dragged him across’ his cell without justification, subjected him to serial strip and body-cavity searches when he posed no safety risk to himself and others, and refused to let him and other Muslims pray because there would be ‘[n]o prayer for terrorists.’”<sup>143</sup> After his release, Iqbal argued that John Ashcroft, the former Attorney General of the United States, and Robert Mueller, then the Director of the Federal Bureau of Investigation, “adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.”<sup>144</sup>

Justice Kennedy, writing for five Justices, held that the complaint failed to “state a claim to relief that is plausible on its face.”<sup>145</sup> He expounded: “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”<sup>146</sup> He then applied this new test to Iqbal’s case:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim — Osama bin Laden — and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain

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<sup>141</sup> 556 U.S. 662 (2009).

<sup>142</sup> *Id.* at 666; see also Shirin Sinnar, *The Lost Story of Iqbal*, 105 GEO. L.J. 379, 394-97 (2017).

<sup>143</sup> *Iqbal v. Ashcroft*, 556 U.S. 662, 668 (2009) (citing Complaint for Respondent at 113, 143-45, 154, *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007)).

<sup>144</sup> *Id.* at 666.

<sup>145</sup> *Id.* at 678, 680 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 550 (2007)).

<sup>146</sup> *Id.* at 679.

aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that ‘obvious alternative explanation’ for the arrests, . . . and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.<sup>147</sup>

This passage presents the detentions as “self-evidently” legitimate, which eliminated any need to consult evidence.<sup>148</sup> As Shirin Sinnar argues, this critical passage is susceptible to two interpretations, both of which are problematic.<sup>149</sup> First, one could read it to say that “the detentions were based on specific information that tied individuals to terrorism without any reference to race or religion, and that the detentions merely affected mostly Arabs or Muslims because members of those groups were disproportionately involved in al Qaeda terrorism or disproportionately likely to know the hijackers.”<sup>150</sup> However, such a conclusion would require supporting evidence, rather than mere faith in the innocent motives of law enforcement. In fact, the available evidence undercuts this good faith assumption. The Justice Department’s Inspector General concluded that the “leads that resulted in the arrest of a September 11 detainee often were quite general in nature,”<sup>151</sup> such as a person viewing it as suspicious that their Arab neighbor kept odd hours.<sup>152</sup> For example, according to Human Rights Watch, a Somali man attracted suspicion for praying in public; and an Egyptian man was detained after he asked a police officer for directions.<sup>153</sup> Moreover, government policy was to arrest undocumented people encountered while investigating a tip — even when the person was not the target of the tip.<sup>154</sup> Justice Kennedy had

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<sup>147</sup> *Id.* at 682.

<sup>148</sup> See Sinnar, *supra* note 142, at 382.

<sup>149</sup> See *id.* at 389-90.

<sup>150</sup> *Id.* at 389.

<sup>151</sup> *Id.* at 420 (quoting OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 16 (2003), <https://oig.justice.gov/special/0306/full.pdf>).

<sup>152</sup> See OFFICE OF THE INSPECTOR GEN., U.S. DEP’T OF JUSTICE, THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS 16 (2003), <https://oig.justice.gov/special/0306/full.pdf> [hereinafter SEPTEMBER 11 DETAINEES].

<sup>153</sup> Sinnar, *supra* note 142, at 420 (citing HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 12-15 (2002)). For other examples, see SEPTEMBER 11 DETAINEES, *supra* note 152, at 16-17.

<sup>154</sup> See SEPTEMBER 11 DETAINEES, *supra* note 152, at 15.

these facts before him when he decided *Iqbal*. He even cited the Inspector General's report describing the investigative process that led to detentions of people like *Iqbal*.<sup>155</sup> He made no effort to square the Inspector General's report with his blithe confidence that the detentions were legitimate and that *Iqbal*'s claim of bias was implausible.

These accounts are reminiscent of the now widely discussed experience of "driving while black" and "driving while brown" — the phenomenon of people of color drawing police scrutiny for engaging in common daily acts such as driving. In the last few years, in the wake of the Black Lives Matter movement, black people have gone viral by recording and sharing their accounts of white people calling the police on them for trying to use a restroom in a Starbucks, talking on the phone in a hotel lobby, barbecuing in a park, and checking out of an AirBnB rental, to name just a few examples.<sup>156</sup> In cases seeking to challenge racially-motivated stops by the police outside the context of terrorism or immigration, Justice Kennedy has generally voted with the majority to make it nearly impossible for people of color to show constitutional violations.<sup>157</sup>

Surely a judge hearing *Iqbal*'s case could have examined the evidence and reasonably concluded that the FBI relied on racially-tainted "tips" in many cases rather than specific and objective evidence that the detainees were linked to terrorism. Eight years after *Iqbal*, Justice

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<sup>155</sup> *Ashcroft v. Iqbal*, 556 U.S. 662, 667 (2009).

<sup>156</sup> See, e.g., Gianluca Mezzofiore, *A White Woman Called Police on Black People Barbecuing. This is How the Community Responded*, CNN (May 22, 2018, 3:25 PM), <https://www.cnn.com/2018/05/22/us/white-woman-black-people-oakland-bbq-trnd/index.html>; Matt Stevens, *Starbucks C.E.O. Apologizes After Arrests of 2 Black Men*, N.Y. TIMES (Apr. 15, 2018), <https://www.nytimes.com/2018/04/15/us/starbucks-philadelphia-black-men-arrest.html>; Daniel Victor, *A Woman Said She Saw Burglars. They Were Just Black Airbnb Guests*, N.Y. TIMES (May 8, 2018), <https://www.nytimes.com/2018/05/08/us/airbnb-black-women-police.html>; Mihir Zaveri, *Doubletree in Portland Fires 2 Employees After Kicking Out Black Man Who Made Call From Lobby*, N.Y. TIMES (Dec. 28, 2018), <https://www.nytimes.com/2018/12/28/us/black-man-kicked-out-hotel-portland.html>; see also Melissa Gomez, *Babysitting While Black: Georgia Man Was Stalked by Woman as He Cared for 2 White Children*, N.Y. TIMES (Oct. 9, 2018), <https://www.nytimes.com/2018/10/09/us/black-man-babysitting.html?module=inline>; Kristine Phillips, *A Black Lawmaker Was Canvassing Door to Door in Her District. A Constituent Called 911*, WASH. POST (July 6, 2018, 5:31 AM), [https://www.washingtonpost.com/news/post-nation/wp/2018/07/05/a-black-lawmaker-was-campaigning-door-to-door-in-her-district-a-constituent-called-911/?utm\\_term=.8c2e3d420480](https://www.washingtonpost.com/news/post-nation/wp/2018/07/05/a-black-lawmaker-was-campaigning-door-to-door-in-her-district-a-constituent-called-911/?utm_term=.8c2e3d420480).

<sup>157</sup> See, e.g., *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-54 (2001) (joining Justice Souter's opinion granting police broad discretion to arrest drivers for minor offenses); *Whren v. United States*, 517 U.S. 806, 813 (1996) (joining opinion by Justice Scalia holding that police officer's actual motivation for stopping a motorist, including a racial motive, was irrelevant under the Fourth Amendment).



Kennedy acknowledged this form of potential bias in *Ziglar v. Abbasi*, a related September 11 detainee case: “[s]ome tips were based on well-grounded suspicion of terrorist activity, but many others may have been based on fear of Arabs and Muslims.”<sup>158</sup> In *Iqbal*, Justice Kennedy found implausible the allegation of bias by high-level officials (Mueller and Ashcroft), yet seemingly was more open to the possibility of bias among low-ranking officials. Neither opinion fully explains Justice Kennedy’s divergent assumptions about the potential for bias among high- vs. low-ranking law enforcement. Ultimately, *Abbasi* found additional reasons to deny detainees opportunities for relief.<sup>159</sup>

Second, the *Iqbal* majority opinion might have concluded “that even if law enforcement officials did take into account ethnicity and religion in their investigation, such considerations were legitimate because of the ethnic and religious composition of the hijackers and al Qaeda.”<sup>160</sup> Simply being an “Arab Muslim” might have provided the “potential connection[] to those who committed terrorist acts” that Justice Kennedy perceived as “obvious.”<sup>161</sup> If this is true, Justice Kennedy’s reasoning effectively endorsed racial profiling in the war on terror.<sup>162</sup> Sinnar argues: “the Court treated the mass detentions as banal — as if it were entirely natural that horrific violence committed by nineteen men should generate suspicion of thousands of others who shared (or appeared to share) their broadly defined racial or religious identity.”<sup>163</sup> And if targeting “Arab Muslims” is a valid investigative tool for catching

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<sup>158</sup> *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1852 (2017).

<sup>159</sup> See *infra* text accompanying note 178-193.

<sup>160</sup> Sinnar, *supra* note 142, at 389-90.

<sup>161</sup> See *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009). Leti Volpp has shown that September 11 “facilitated the consolidation of a new identity category that groups together persons who appear ‘Middle Eastern, Arab, or Muslim’ and associates them with terrorism.” Volpp, *The Citizen*, *supra* note 92, at 562. This logic is particularly vexing as applied to *Iqbal* because he is not Arab. He is Pakistani. See Sinnar, *supra* note 142, at 414. But this difference seemed not to matter to Justice Kennedy, who appeared to conflate Arabs and Muslims. See *id.* (“Most Muslims are not Arab, and most Arab-Americans are not Muslim, but the Justices conflated the two groups as readily as the U.S. public after September 11.”) See also *id.* at 416-17. Justice Souter made the same error. See *Iqbal*, 556 U.S. at 698 (Souter, J., dissenting).

<sup>162</sup> It is true that Justice Kennedy concludes the passage by stating that “purposeful, invidious discrimination . . . is not a plausible conclusion.” *Iqbal*, 556 U.S. at 682. However, this might simply mean that because targeting “Arab Muslims” was rational in the post 9-11 context, such racial/religious targeting was not “invidious.”

<sup>163</sup> Sinnar, *supra* note 142, at 429; see also Dawinder S. Sidhu, *First Korematsu and Now Ashcroft v. Iqbal: The Latest Chapter in the Wartime Supreme Court’s Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419, 496 (2010) (comparing *Iqbal* to *Korematsu v. United States*, 323 U.S. 214 (1944)).

terrorists, wouldn't stopping "Latino looking people" be a legitimate way of finding undocumented immigrants? Wouldn't stopping black drivers be a reasonable means of catching drug dealers? *Iqbal's* susceptibility to this reading extends a body of Fourth Amendment law that consistently turns a blind eye to law enforcement practices that link race and criminality.<sup>164</sup> And lower courts have cited *Iqbal's* musing on identity and policing to justify stopping people based on race during routine criminal investigations.<sup>165</sup> My argument need not turn solely on which interpretation Justice Kennedy subjectively intended. Rather than depending on an inquiry into what was in his "heart,"<sup>166</sup> one can blame Justice Kennedy for drafting language that can reasonably be read as an endorsement of racial profiling and failing to repudiate that interpretation in subsequent opinions. Lower courts' reliance on the racial profiling interpretation demonstrates the real-world consequences of this incendiary passage.<sup>167</sup>

Moreover, *Iqbal's* "plausibility" test inflicts widespread harm beyond the policing and immigration context.<sup>168</sup> It deters claims by plaintiffs alleging discrimination by encouraging judges to turn to their personal

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<sup>164</sup> See, e.g., *Brown v. City of Oneonta*, 221 F.3d 329, 339 (2d Cir. 2000) (validating mass questioning of African-American men and women after crime victim identified an African-American man as the perpetrator); Devon W. Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 CALIF. L. REV. 125, 125 (2017); see also R. Richard Banks, *Race-Based Suspect Selection and Colorblind Equal Protection Doctrine and Discourse*, 48 UCLA L. REV. 1075, 1075 (2001).

<sup>165</sup> See, e.g., *Monroe v. City of Charlottesville*, 579 F.3d 380, 389-90 (4th Cir. 2009) (describing *Iqbal* as "instructive in [the] analysis of the legitimacy of the City's" policy targeting black men).

<sup>166</sup> The same point applies to Trump's embrace of white nationalism, which might be strategic. Cf. KAUFMANN, *supra* note 10, at 116 ("It's not entirely clear if Trump sincerely believes in immigration restriction or merely found it a useful tool to acquire the presidency."); *id.* at 93 (noting that in the '90s, Trump lambasted rival Pat Buchanan as racist toward blacks, anti-Semitic, and anti-gay).

<sup>167</sup> In cases concerning racial classifications, such as affirmative action, Justice Kennedy often inveighed against policies that rely on racial stereotypes. See, e.g., *Schuette v. BAMN*, 572 U.S. 291, 308 (2014) (plurality opinion). Sadly, the key passage in *Iqbal* disregards these warnings. Each year, 1L students in many law schools read and discuss *Iqbal* as part of the core civil procedure curriculum. Yet professors often do not call it out for wrongly legitimizing racial profiling. This failure creates a risk that new lawyers will come to regard racial profiling as self-evidently legal and uncontroversial.

<sup>168</sup> See, e.g., Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2170-71 (2015) (concluding that *Iqbal* "has brought increased inequality, reduced access to justice, and provided little measurable benefit" and that "plausibility pleading is associated with decreased access to justice for individuals, often to the benefit of corporations and governmental entities").

experience, which is likely to be shaped by their privileged identities.<sup>169</sup> As noted in the introduction, social science has documented substantial differences among racial groups as to their cognitive frameworks for perceiving discrimination.<sup>170</sup> For example, a black person might reasonably infer discrimination based on facts that would not persuade the average white observer.<sup>171</sup> Yet Justice Kennedy glided past these social fissures and affirmed a belief in a unitary judicial “common sense.” Empirical studies suggest that *Iqbal*’s heightened standard has been particularly detrimental to civil rights and employment discrimination claims, as well as claims brought by prisoners.<sup>172</sup>

The lens of doctrinal intersectionality helps us see how this intuitive approach to ascertaining discrimination spread from the sexual orientation context in *Romer* in 1996 to discrimination claims generally more than ten years later in *Iqbal*. As Justice Scalia suggested in his *Romer* dissent, the majority opinion overflowed rhetorically but contained scant doctrinal analysis.<sup>173</sup> For example, Justice Kennedy did not significantly analyze the adequacy of the state’s asserted interests en route to his conclusion that the law was motivated by “animus” against gay, lesbian, and bisexual people.<sup>174</sup> *Iqbal*’s “plausibility” standard extends this intuition-based approach beyond the context of equal protection sexual orientation claims to constitutional and statutory claims asserting discrimination on the basis of race, gender, and sexual orientation (and well beyond the context of discrimination).

This is concerning in part because the federal judiciary remains predominantly white and male.<sup>175</sup> Indeed, President Trump’s

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<sup>169</sup> See Robinson, *Perceptual*, *supra* note 31, at 1153-56 (arguing that anti-discrimination law reflects an “insider bias”).

<sup>170</sup> See *id.* at 1127-28.

<sup>171</sup> See, e.g., *id.* at 1096-97.

<sup>172</sup> See, e.g., Reinert, *supra* note 168, at 2146-47, 2157.

<sup>173</sup> See *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (criticizing Justice Kennedy’s “heavy reliance upon principles of righteousness rather than judicial holdings”); see also Farber & Sherry, *supra* note 76, at 257 (noting that many constitutional law scholars argue that “*Romer* cannot mean what it says,” and stating, “[t]he [*Romer*] Court explicitly avoided the most doctrinally plausible grounds for invalidating Colorado’s ban on anti-discrimination protections for homosexuals”).

<sup>174</sup> See *Romer*, 517 U.S. at 635.

<sup>175</sup> Data from the Federal Judicial Center show that of sitting Article III judges (both active and senior), 60% are white and male. *Biographical Directory of Article III Federal Judges*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export> (last visited February 17, 2019). The same data show that Trump-appointed judges are 70% white and male. *Id.*; see also Carrie Johnson & Renee Klahr, *Trump Is Reshaping the Judiciary. A Breakdown by Race, Gender and Qualification*, NPR (Nov. 15, 2018, 5:00 AM), <https://www.npr.org/2018/11/15/>

unprecedented success at filling judicial vacancies means that increasingly white, conservative, Christian-identified, male, and heterosexual judges will consult their personal experience in order to dismiss discrimination claims brought by people of color, women, sexual and gender minorities, and religious minorities. To be sure, long before *Iqbal*, Justices and judges looked to their own life experiences in order to understand and assess legal claims.<sup>176</sup> For example, the *Plessy* majority did this in asserting that racial segregation did not imply black inferiority.<sup>177</sup> *Iqbal*, however, makes this worrisome tendency a formal part of a legal gate-keeping test. Instead of viewing one's personal background as a source of insight but also potential distortion of the merits of a claim, *Iqbal* grants a judge free rein to write his "racial common sense"<sup>178</sup> into law.

### B. *Ziglar v. Abbasi*

In a subsequent case, *Ziglar v. Abbasi*, Justice Kennedy again erected procedural roadblocks to relief for immigrants detained in the aftermath

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667483587/trump-is-reshaping-the-judiciary-a-breakdown-by-race-gender-and-qualification (showing similar figures for Trump appointees, including those not yet confirmed). Justices Alito and Sotomayor have described how their ethnic backgrounds inform their judging. See *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., To Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 475 (2006) ("When I get a case about discrimination, I have to think about people in my own family who suffered discrimination because of their ethnic background or because of religion or because of gender, and I do take that into account."); Sonia Sotomayor, *A Latina Judge's Voice*, 13 BERKELEY LA RAZA L.J. 87, 92 (2002) ("I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life . . . My hope is that I will take the good from my experiences and extrapolate them further into areas with which I am unfamiliar. I simply do not know exactly what that difference will be in my judging. But I accept there will be some based on my gender and my Latina heritage."). However, only Justice Sotomayor was vilified for her comments about a "wise Latina." See David G. Savage, *Sotomayor Backs Off "Wise Latina" Remarks*, L.A. TIMES (July 15, 2009, 12:00 A.M.), <http://articles.latimes.com/2009/jul/15/nation/na-sotomayor-wise15>.

<sup>176</sup> See Robinson, *Unequal*, *supra* note 7, at 197 n.285 (discussing *Gonzales v. Carhart*, 550 U.S. 124, 159-60 (2007), and *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374-75 (2001) (Kennedy, J., concurring)).

<sup>177</sup> The Court stated: "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority." *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896) *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>178</sup> See Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. REV. 1779, 1822-23 (2012).

of September 11.<sup>179</sup> The respondents were detainees who were held in the same Brooklyn facility that had held Iqbal and alleged similarly harsh conditions, such as physical abuse, excessive strip searches, exposure to bright light throughout the day and night, and denial of access to basic hygiene.<sup>180</sup> The *Abbasi* respondents alleged that they were subjected to these conditions because of their racial and religious identities; they asserted violations of equal protection and substantive due process under the Fifth Amendment and violations of the Fourth Amendment.<sup>181</sup> The primary question in the case was whether the lower court should have implied a cause of action, following *Bivens v. Six Unknown Federal Narcotics Agents*,<sup>182</sup> in the absence of Congress creating a cause of action.

Despite early cases such as *Bivens* that generously implied a cause of action to vindicate individual rights, Justice Kennedy dismissed this practice as belonging to an “*ancien regime*” and imported a preference against implied rights of action from recent statutory cases, such as *Alexander v. Sandoval*.<sup>183</sup> Citing *Iqbal*, Justice Kennedy made clear that *Bivens* remedies are now disfavored and presumptively unavailable.<sup>184</sup> The question of availability, he stated, turns on the extent to which the instant claims closely mirror claims in one of the three Supreme Court cases where the Court provided a *Bivens* remedy.<sup>185</sup> Justice Kennedy then described multiple ways in which a case might differ from these precedents and suggested that any such difference precludes an implied remedy.<sup>186</sup> It is difficult to read this laundry list as anything other than a mechanism designed to distinguish prior *Bivens* cases and deny plaintiffs a right of action.<sup>187</sup>

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<sup>179</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1865 (2017).

<sup>180</sup> See *id.* at 1853-54.

<sup>181</sup> *Id.*

<sup>182</sup> 403 U.S. 388 (1971).

<sup>183</sup> See *Abbasi*, 137 S. Ct. at 1855 (citing *Alexander v. Sandoval*, 532 U.S. 275, 287 (2001)).

<sup>184</sup> See *id.* at 1857 (indicating that Congress “most often” will bear responsibility for creating remedies).

<sup>185</sup> See *id.* at 1859-60.

<sup>186</sup> See *id.* These “meaningful” differences may include “the rank of the officers involved; the constitutional right at issue; the statutory or other legal mandate under which the officer was operating; the risk of disruptive intrusion by the Judiciary into the functioning of other branches . . .” and a catch-all — “the presence of potential special factors that previous *Bivens* cases did not consider.” *Id.*

<sup>187</sup> Cf. *id.* at 1865 (holding that even differences that are “perhaps small, at least in practical terms” may be “meaningful”).

Justice Kennedy applied this test to the *Abbasi* claims and found they were meaningfully different from *Bivens* precedent. He declared:

[T]hese claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged. These consequences counsel against allowing a *Bivens* action against the Executive Officials, for the burden and demand of litigation might well prevent them — or to be more precise, future officials like them — from devoting the time and effort required for the proper discharge of their duties.<sup>188</sup>

As an additional reason for denying a right of action, Justice Kennedy noted that the respondents “challenge as well major elements of the Government’s whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security. . . . National-security policy is the prerogative of the Congress and President.”<sup>189</sup> Because *Bivens* and its progeny did not implicate the national security context, Justice Kennedy concluded, the *Abbasi* claims were meaningfully different from that precedent.<sup>190</sup> Moreover, Justice Kennedy found congressional silence since September 11 to be “telling.”<sup>191</sup> Congress’s failure to provide a remedy, in his view, apparently stripped the Court of its role of remedying the violation of constitutional rights.<sup>192</sup> Although the Court has often cited wartime contexts as a special reason for judicial intervention,<sup>193</sup> Justice Kennedy

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<sup>188</sup> *Id.* at 1860.

<sup>189</sup> *Id.* at 1861.

<sup>190</sup> *See id.*

<sup>191</sup> *Id.* at 1862.

<sup>192</sup> *But see* *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605-06 (2015) (“An individual can invoke a right to constitutional protection when he or she is harmed, even if the broader public disagrees and even if the legislature refuses to act. The idea of the Constitution ‘was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.’” (quoting *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 638 (1943))).

<sup>193</sup> *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (plurality opinion by Justice O’Connor, joined by Justice Kennedy) (“Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake.”); *Abbasi*, 137 S. Ct. at 1873 (Breyer, J., dissenting) (“In wartime as well as peacetime, ‘it is important, in a civilized society, that the judicial branch of the Nation’s government stand ready to afford a remedy’ ‘for the

regarded them instead as grounds for judicial abdication.<sup>194</sup> *Trump v. Hawaii*, discussed below, further extends this posture of deference to a policy far removed from the exigent circumstances of September 11 and one plainly animated by racist and xenophobic instincts.

In sum, Justice Kennedy's opinions in the national security context suggest that he regards constitutional liberty as limited for certain classes of people, particularly those who are not white, not Christian, and/or not born in the United States. This undercurrent of white nationalism became explicit in the final opinion that Justice Kennedy joined before announcing his retirement.

### III. LGBTQ RIGHTS AND NATIONAL SECURITY CONVERGE

*Trump v. Hawaii* makes plain Justice Kennedy's tendency to subordinate rights of individuals to claims of executive authority when those individuals are people of color and they assert claims that are said to implicate national security. Throughout Donald Trump's campaign and well into his presidency, Trump consistently linked Islam with violence and hatred of American values and vowed to install a "total and complete shutdown of Muslims entering the United States until our country's representatives can figure out what is going on."<sup>195</sup> Trump's advisor Rudy Giuliani brazenly spoke of Trump asking him to find a legal way of effectuating a Muslim ban.<sup>196</sup> Yet the majority in *Trump v.*

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most flagrant and patently unjustified,' unconstitutional 'abuses of official power.'") (citing *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 410-11 (1971) (Harlan, J., concurring in the judgment), and *Boumediene v. Bush*, 553 U.S. 723, 798 (2008)). Justice Breyer, who also dissented in *Iqbal*, concluded: "these claims are well-pleaded, state violations of clearly established law, and fall within the scope of longstanding *Bivens* law." *Id.* at 1873; *see also id.* at 1878, 1881-82.

<sup>194</sup> At the end of his opinion, Justice Kennedy lamented: "If the facts alleged in the complaint are true, then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they were subjected. The question before the Court, however, is not whether petitioners' alleged conduct was proper, nor whether it gave decent respect to respondents' dignity and well-being, nor whether it was in keeping with the idea of the rule of law that must inspire us even in times of crisis." *Abbasi*, 137 S. Ct. at 1869. Yet his professed concern with the detainees' dignity and right to be respected, concepts which are central in his sexual orientation opinions, was mere rhetoric in *Abbasi*. Even a potentially "tragic" violation of constitutional rights did not lead Justice Kennedy to permit a judicial remedy in the war on terror context.

<sup>195</sup> *See, e.g., Trump v. Hawaii*, 138 S. Ct. 2392, 2417 (2018); *id.* at 2435 (Sotomayor, J., dissenting).

<sup>196</sup> *See* Rebecca Savransky, *Giuliani: Trump Asked Me How to Do a Muslim Ban "Legally,"* HILL (Jan. 29, 2017, 8:48 AM), <https://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally>.

*Hawaii* — which Justice Kennedy joined — deemed Trump's voluminous remarks “extrinsic statements” that had no bearing on the constitutional question since the executive order was facially legitimate.<sup>197</sup> Relying on Justice Kennedy's argument in *Din*, the majority opinion declared: “[T]he courts will neither look behind that exercise of [executive] discretion, nor test it by balancing its justification' against the asserted constitutional interests of U.S. citizens.”<sup>198</sup> So deferential was the Court that it merely “assume[d]” that it had the power to apply the rational basis test, the lowest level of constitutional scrutiny. And its application of that test did not encompass a search for the *actual* motive behind the policy, notwithstanding a line of cases, including Justice Kennedy's own *Romer* opinion, that asked the motive question to give some “bite” to the analysis.<sup>199</sup> The scrutiny that the Court assumed was utterly toothless.

The Court decided *Trump v. Hawaii* on the heels of deciding a case that involved a clash between claims of religious freedom and LGBTQ equality. The Colorado Civil Rights Division brought suit against Masterpiece Cakeshop after its owner refused to make a cake for the wedding reception of Charlie Craig and David Mullins, a gay male couple that planned to marry out of state.<sup>200</sup> Jack Phillips, the owner, argued that his religious beliefs, his artistic freedom as a baker, and Colorado's failure to recognize same-sex marriage as of 2012, entitled him to an exemption from the Colorado antidiscrimination statute.<sup>201</sup> According to an amicus brief filed by the Williams Institute, “after [Phillips] rejected the request of Charlie Craig and David Mullins . . . Charlie left the bakery shaking, crying, and embarrassed, and feeling like a failure before his mother, who witnessed the incident.”<sup>202</sup>

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<sup>197</sup> See *Trump*, 138 S. Ct. at 2418-19; *id.* at 2421 (“The text says nothing about religion.”). The Court regarded the “review process undertaken by multiple Cabinet officials and their agencies” as sanitizing any taint stemming from President Trump's anti-Islam statements. *Id.*

<sup>198</sup> *Id.* at 2419 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 770 (1972)).

<sup>199</sup> See *id.* at 2420 (“For our purposes today, we assume that we may look behind the face of the Proclamation to the extent of applying rational basis review.”); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985); *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 544-45 (1973).

<sup>200</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276 (Colo. App. 2015).

<sup>201</sup> *Id.*

<sup>202</sup> Brief of Ilan H. Meyer, PhD, et al. as Amici Curiae Supporting Respondents at 3, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).



Colorado courts rejected Phillips's defenses, and he appealed to the Supreme Court.<sup>203</sup>

Justice Kennedy's opinion for the Court rhetorically affirmed the importance of equality for sexual minorities but ultimately sided with the evangelical Christian.<sup>204</sup> The baker had discriminated against the gay couple and made hateful remarks to another same-sex couple. In rejecting a request by a female couple, Phillips asserted that he was "not willing to make a cake for a same-sex commitment ceremony, just as he would not be willing to make a pedophile cake."<sup>205</sup> Justice Kennedy conveniently omitted this fact and somehow regarded the baker as the only injured party. Although Justice Kennedy's earlier sexual orientation opinions were bold in calling out animus steeped in religious justification,<sup>206</sup> his *Obergefell* opinion smuggled in a validation of evangelical perspectives even as it ruled in favor of same-sex couples.<sup>207</sup> This turnabout set the stage for the evangelical baker in *Masterpiece Cakeshop* to displace the same-sex couple as the real victim.

The majority concluded that the Colorado Civil Rights Commission's handling of the dispute "has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection."<sup>208</sup> The majority relied heavily on the following comment made by a commissioner:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to

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<sup>203</sup> See Petition for Writ of Certiorari, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111).

<sup>204</sup> See *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719, 1728-32 (2018).

<sup>205</sup> Brief for Respondents at 5, *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. 1719 (No. 16-111). Comparing an adult couple that desire to make a lifelong romantic commitment to child abuse is a play on one of the oldest anti-gay epithets. It serves as a double entendre: degrading a consensual, loving relationship by comparing it to the victimization of children, and reiterating the baseless stereotype that gays are prone to molest children. See, e.g., Clifford J. Rosky, *Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia*, 20 YALE J.L. & FEMINISM 257 (2009); cf. *Lawrence v. Texas*, 539 U.S. 558, 599 (2003) (Scalia, J., dissenting) (arguing that the majority's decision to overturn *Bowers v. Hardwick* opened the door to legalized bestiality).

<sup>206</sup> See, e.g., *United States v. Windsor*, 570 U.S. 744, 770 (2013); *Lawrence*, 539 U.S. at 577-78 (quoting *Bowers v. Hardwick*, 478 U.S. 186 (1986) (Stevens, J., dissenting)); *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>207</sup> See *Obergefell v. Hodges*, 135 S. Ct., 2584, 2602 (2015) ("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."); see also *id.* at 2594; Robinson & Frost, *Playing It Safe*, *supra* note 64, at 1588-89.

<sup>208</sup> *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1729.

justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be — I mean, we — we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to — to use their religion to hurt others.<sup>209</sup>

Justice Kennedy regarded this statement as inflammatory:

To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical — something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is 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.<sup>210</sup>

In short, Justice Kennedy treated the commission as if its zeal for protecting LGBTQ rights blinded it to its bias toward religion and caused it to violate the foundational rule of religious neutrality. He also emphasized that none of the judges who heard the appeal from the Commission's decision disavowed these remarks.<sup>211</sup>

Justice Kennedy's reading of this statement as "clear" evidence of anti-religious bias<sup>212</sup> not only appears overly rooted in his personal intuition, making it reminiscent of his *Iqbal* and *Romer* opinions, but it also ignores well-established facts.<sup>213</sup> The commissioner did not actually call Christianity "despicable"; rather, she argued that it was despicable to *use religion* to justify discrimination against marginalized groups, whether gays and lesbians, enslaved people, or Jewish people.<sup>214</sup> This

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<sup>209</sup> *Id.* (quoting Transcript of Oral Argument at 11-12, *Masterpiece Cakeshop Ltd.*, 138 S. Ct. 1719).

<sup>210</sup> *Id.*

<sup>211</sup> *See id.* at 1729-30.

<sup>212</sup> *See id.* at 1729.

<sup>213</sup> *See id.* I identify as a progressive Christian (and black and gay) and offer in this section a competing interpretation of the commissioner's statement. Justice Kennedy's doctrinal framework provides no space or standard for acknowledging and reconciling competing Christian interpretations of particular statements.

<sup>214</sup> *See id.* at 1729.

statement need not be read as anti-religion or anti-Christianity. Indeed, many Christian scholars and theologians have decried how other Christians have used religion to justify oppression — whether racial, gender, or other — that is inconsistent with their view of their own faith.<sup>215</sup> From this Christian perspective, the offense arises from other believers turning what they regard as sacred, precious, and inclusive into a weapon of oppression and exclusion. Moreover, the Court’s own precedents document people who identify as Christian invoking religion to justify what is now widely understood as discrimination, such as a restaurant refusing to serve black people or a university forbidding white people from dating people of color.<sup>216</sup> Thus, it should be unexceptional for one to recognize the historical fact that many people (sincerely or not) have relied on Christianity and other religions to oppress marginalized groups. And yes, this history extends to religious justifications for the Holocaust and slavery.

While Justice Kennedy in *Masterpiece Cakeshop* latched onto stray “biased” remarks, raising them at oral argument and eventually making them the fulcrum of his opinion, he was at best apathetic about President Trump’s pervasive Islamophobic invective. In *Trump v. Hawaii*, Justice Kennedy wrote a brief concurrence stating that just because the Constitution allows a person to make biased remarks does not mean that he or she should do so.<sup>217</sup> Clearly, Justice Kennedy had President Trump’s comments in mind, yet in phrasing his concern in hypothetical, gender-inclusive terms, he declined to name or confront

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<sup>215</sup> See, e.g., RACHEL HELD EVANS, *INSPIRED* 41 (2017); MATTHEW VINES, *GOD AND THE GAY CHRISTIAN: THE BIBLICAL CASE IN SUPPORT OF SAME-SEX RELATIONSHIPS* 177 (2014). Attorney General Jeff Sessions provoked outrage among some religious believers when he cited the Bible to justify the administration’s policy of separating migrant families. Several religious leaders denounced this use of Scripture. See, e.g., Jennifer Bendery, *Christian Leaders to Jeff Sessions: The Bible Does Not Justify Separating Families*, HUFFPOST (June 15, 2018, 7:04 PM), [https://www.huffingtonpost.com/entry/jeff-sessions-trump-immigration-family-separation-border\\_us\\_5b23ff24e4b0783ae128f90d](https://www.huffingtonpost.com/entry/jeff-sessions-trump-immigration-family-separation-border_us_5b23ff24e4b0783ae128f90d). Some linked Sessions’ misguided argument to the use of Scripture to justify slavery and the Holocaust. See *id.*; see also Anya Crittenton, *Religious Leaders Say Masterpiece Cakeshop Case is About Discrimination, Not Religious Freedom*, GAY STAR NEWS (Dec. 12, 2017, 12:27 AM), <https://www.gaystarnews.com/article/religious-leaders-masterpiece-cakeshop-case-discrimination/#gs.9Hh4Vpo> (including a video of Christian pastors objecting to the baker Phillips’s invocation of religion to justify discrimination).

<sup>216</sup> See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983); *Newman v. Piggie Park*, 390 U.S. 400, 402 n.5 (1968) (per curiam).

<sup>217</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring) (“[T]he very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise.”).

Trump.<sup>218</sup> Hence, his timid approach did exactly what Justice Kennedy faulted the Colorado courts for doing in *Masterpiece Cakeshop* — refusing to disavow biased remarks.<sup>219</sup>

Further, Justice Kennedy's handling of these two cases betrayed his avowed commitment to neutrality toward religion.<sup>220</sup> In *Masterpiece Cakeshop*, he adopted a controversial view of Christianity in claiming that the commissioner's statement was offensive. He offered no citations in support of his claim, and seemingly rested on his own perspective as a Christian.<sup>221</sup> At the same time, he treated far more harmful language targeting Islam as beside the point.<sup>222</sup> Thus, Justice Kennedy's concern with religious neutrality appeared disproportionately fixated on the interests of white, heterosexual, evangelical Christians, as opposed to those of all religious people. This bias perpetuated a hierarchy in which people who identify with Christianity enjoy greater judicial protection than those who practice a minority religion.

Justice Kennedy's decision to join the *Trump v. Hawaii* majority opinion is puzzling not just because of its jarring contradiction of *Masterpiece Cakeshop*'s "neutrality" command, but also because it gratuitously struck a blow to *Romer*, one of his most important precedents. In *Romer* and later *Windsor*, Justice Kennedy concluded that the relevant laws were motivated by "animus" or a "bare desire to harm" sexual minorities,<sup>223</sup> yet he made little effort to define that central concept. As I have observed elsewhere, "animus" in these opinions is

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<sup>218</sup> See *id.*

<sup>219</sup> Justice Kennedy used this claim to justify attributing the views of a sole, low-level commissioner to the judges that subsequently reviewed the case and may not even have been aware of that comment. See *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1729-30. By contrast, Justice Kennedy was fully apprised of the discriminatory remarks made by the President, the nation's chief law enforcement officer, and yet he granted Trump "discretion free from judicial scrutiny." *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring). See also *supra* note 74 (noting that Justice Kennedy failed to disavow white supremacist rhetoric in Justice Harlan's *Plessy* dissent).

<sup>220</sup> *Masterpiece Cakeshop Ltd.*, 138 S. Ct. at 1732. Cf. Volpp, *The Citizen*, *supra* note 92, at 569 (noting tension between American ideals that welcome all religions and races and enduring practices that privilege white Christians).

<sup>221</sup> Justice Kennedy was raised Catholic, and Catholicism is a branch of Christianity. See Carol Zimmerman, *Justice Anthony Kennedy to Retire from Supreme Court*, NAT'L CATH. REP. (June 27, 2018), <https://www.nronline.org/news/people/justice-anthony-kennedy-retire-supreme-court> (naming Justice Kennedy as one of five Catholic Justices on the Court).

<sup>222</sup> Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 168-69 (2018) ("There has never been a case in which the Court was presented with more evidence of religious animus on the part of a single and final executive decisionmaker.").

<sup>223</sup> *United States v. Windsor*, 570 U.S. 744, 795 (2013).

amenable to a “thin” or “thick” reading.<sup>224</sup> Because the opinions do not hold together as iterations of the traditional rational basis test, one can read them as tacitly adopting a more powerful or “thick” construction of equality that bans not only laws based on “hate” (the thin reading) but also those that were motivated by anti-gay stereotyping and implicit bias. For example, I show that *Windsor* cannot persuasively be boiled down to a conclusion that governmental refusal to recognize same-sex marriage arises *only* from a “bare desire to harm” same-sex couples (the thin version). Hostility was certainly in the mix,<sup>225</sup> but many politicians who opposed same-sex marriage as recently as 2012 were liberals who also supported other legal rights for LGBTQ people, such as protection from employment discrimination, and were concerned about issues such as preserving traditional gender roles.<sup>226</sup> Because the Kennedy-era Court never formally recognized LGBTQ people as a “suspect class” entitled to invoke heightened scrutiny, the question of the robustness of *Romer* and *Windsor* and their progeny will likely determine the trajectory of LGBTQ rights.

Chief Justice Roberts’s majority opinion in *Trump v. Hawaii* harmed LGBTQ rights by diminishing *Romer*, reading it as a thin and marginal case that offers protection only insofar as laws can be traced *solely* to blatant animus.<sup>227</sup> This reading is in tension with *Romer* itself, in which Colorado plausibly argued that it was concerned with conserving resources and protecting the associational freedoms of religious people.<sup>228</sup> It is true that Justice Kennedy brushed aside these rationales,<sup>229</sup> but he provided no reasoning to explain why they could not have formed at least part of the state’s justification. Nor did he offer any methodology (such as examining ballot materials to see if they

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<sup>224</sup> See Robinson, *Unequal*, *supra* note 7, at 186 (“[S]ome of Justice Kennedy’s sexual orientation opinions, particularly *Romer* and *Windsor*, seem more interested in announcing conclusions than making a sustained effort to explain why discrimination is morally wrong. Such thin opinions invoke the concept of a bare desire to harm, rather than acknowledging the complexity of discrimination, and rely heavily on personal intuition.”).

<sup>225</sup> See, e.g., Robinson & Frost, *Playing It Safe*, *supra* note 64, at 1565.

<sup>226</sup> See Robinson, *Unequal*, *supra* note 7, at 187-88.

<sup>227</sup> See, e.g., *Trump v. Hawaii*, 138 S. Ct. 2392, 2420-21 (2018); cf. Farber & Sherry, *supra* note 76, at 280-81 (reading *Romer* as establishing the “pariah principle” but describing this as a narrow rule that leaves in place much discrimination against sexual minorities).

<sup>228</sup> See *Romer v. Evans*, 517 U.S. 620, 635 (1996).

<sup>229</sup> See *id.*

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relied on homophobic arguments) to guide future courts in deciding when a law is *really* based on hatred.<sup>230</sup>

Of all the possible readings of *Romer*, Chief Justice Roberts selected a malnourished version in order to deem *Romer* inapposite because, at worst, the travel ban was motivated by animus *and* national security.<sup>231</sup> Remarkably, Justice Kennedy signed onto this minimalist reading of *Romer* and rejected the principal dissent's more capacious construction of *Romer*.<sup>232</sup> Just hours before announcing his retirement, Justice Kennedy threw precedent central to his legacy into grave doubt and set back LGBTQ rights. When faced with a choice between legitimizing a ban on immigrants and bolstering the rights of sexual minorities (who were sure to face an assault as soon as he retired), Justice Kennedy opted to end his career by writing white nationalism into law.

#### CONCLUSION

This Essay has sought to complicate the tendency of many scholars and activists to view cases like *Romer* and *Obergefell* solely through the "single axis" of gay and lesbian rights. By using doctrinal intersectionality to connect domestic disputes with international ones and sexuality cases with immigration and national security decisions, we can begin to see Justice Kennedy's hierarchical value system, which reflects white nationalism. From this vantage point, white Christian citizens sit atop a legal and social caste system, respectable gays and lesbians who marry reside a rung below, and racial and religious minorities, especially those who are non-citizens, are trapped at the bottom.<sup>233</sup> The empathy and dignity that guided Justice Kennedy's pathbreaking sexual orientation decisions failed to trickle down to reach the minorities in the immigration and national security cases. Moreover, this caste system ultimately turned on gays and lesbians

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<sup>230</sup> In my view, the Court could have credited these rationales and still struck down the amendment because it was infected by bias.

<sup>231</sup> *Trump*, 138 S. Ct. at 2420-21.

<sup>232</sup> *Id.* at 2423-24 (Kennedy, J., concurring); *id.* at 2441-42 (Sotomayor, J., dissenting); see also Robinson, *Unequal*, *supra* note 7, at 188-89 (noting the frailty of the thin reading because "invidious motives are often interwoven with more legitimate interests").

<sup>233</sup> This short Essay does not and cannot account for all of Justice Kennedy's jurisprudence. For a fuller discussion of Justice Kennedy's votes in cases concerning women and people of color, see Robinson, *Unequal*, *supra* note 7, at 198-200 (finding that Justice Kennedy voted against women and people of color in the vast majority of 5-4 cases decided during his tenure).

when their rights were seen as a threat to those of a white evangelical heterosexual man.

Ultimately all of these cases may pale in comparison to the harm that Justice Kennedy inflicted on LGBTQ people and other marginalized groups by coordinating with President Trump to ensure that Trump could replace Justice Kennedy with a more conservative Justice.<sup>234</sup> By most accounts, Justice Brett Kavanaugh is more conservative than Justice Kennedy and poses a risk to the rights of women, people of color, and LGBTQ people.<sup>235</sup> Only time will tell.<sup>236</sup> This exploration offers a cautionary tale for the LGBTQ rights movement, which should now understand that the security of LGBTQ rights is interconnected with that of other marginalized populations. Hopefully, the movement can evolve into a truly intersectional and inclusive formation that affirms the humanity of all. Further, this Essay pushes scholars of constitutional law to test claims by Justice Kennedy and other Justices that they adhere to neutral rules by inspecting the connections between and among cases.

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<sup>234</sup> See Adam Liptak & Maggie Haberman, *Inside the White House's Quiet Campaign to Create a Supreme Court Opening*, N.Y. TIMES (June 28, 2018), <https://www.nytimes.com/2018/06/28/us/politics/trump-anthony-kennedy-retirement.html>.

<sup>235</sup> See Adam Liptak, *How Brett Kavanaugh Would Transform the Supreme Court*, N.Y. TIMES (Sept. 2, 2018), <https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html>.

<sup>236</sup> There are some glimmers of a new potential landscape with three swing votes, each gravitating to different issues. See Amelia Thomson-DeVeaux, *The Supreme Court Might Have Three Swing Justices Now*, FIVETHIRTYEIGHT (July 2, 2019, 6:00 AM), <https://fivethirtyeight.com/features/the-supreme-court-might-have-three-swing-justices-now/> (“Based on how they have ruled this year, there are now three justices who could reasonably be seen as ‘swing’ votes of one kind or another: Roberts, Kavanaugh and Gorsuch. And it’s possible to argue that all — or none — of these justices have replaced Kennedy as the court’s “swing” justice.”).