

Brown, Not Loving: Obergefell and the Unfinished Business of Formal Equality

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Brown, Not *Loving*: *Obergefell* and the Unfinished Business of Formal Equality

Katie Eyer

INTRODUCTION

Nearly fifty years ago, in the 1967 case *Loving v. Virginia*, the Supreme Court struck down bans on interracial marriage.¹ This Term, the Court seems poised to further expand marriage equality by holding that same-sex couples, too, are guaranteed the constitutional right to marry. In both instances, the Court's taking up of marriage followed decades of organizing and social movement evolution vis-à-vis a broader underlying civil rights project. In both instances, marriage has had special symbolic significance as an area of marked, sometimes visceral, opposition among the social movement's opponents.

While there are thus numerous parallels between *Loving v. Virginia* and the latest marriage case before the Court, *Obergefell v. Hodges*,² this Essay suggests that there is at least one important difference between the two: their position vis-à-vis the institutionalization of a formal equality³ regime (that is, a legal

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

2. 135 S. Ct. 1039 (2015). *Obergefell* is the lead captioned case in a collection of consolidated cases on which the Court has granted certiorari review to resolve the issue of whether the Fourteenth Amendment requires states to license same-sex marriages directly and/or to recognize valid out-of-state marriages. See *Order List: 574 U.S.*, U.S. SUPREME CT., (Jan. 16, 2015), http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf [<http://perma.cc/P257-NZJR>]. For conciseness, I use *Obergefell* throughout this Essay as shorthand for this collection of pending cases.

3. As used herein, "formal equality" signifies a legal regime in which invidious use of a particular classification is deemed presumptively unlawful. In the statutory domain, this generally takes the form of an explicit statutory proscription on discrimination on the basis of a particular characteristic, and, in the contemporary constitutional domain, generally takes the form of "protected class" status triggering heightened scrutiny. Throughout this Essay, my discussion includes both of these forms of formal equality protections, which I consider to be equally important.

regime in which discrimination against a group is presumptively unlawful).⁴ Whereas *Loving* marked the endpoint of an era of the institutionalization of formal racial equality norms in constitutional Equal Protection doctrine and in federal statutory law, *Obergefell* stands much closer to the beginning of such a process.⁵ Indeed, although the L/G/B⁶ rights movement has achieved substantial success—in shifting public opinion, and in securing litigation victories—explicit guarantees of formal equality have—at least at the federal level—largely remained elusive. And to the extent that *Obergefell* follows the trajectory of prior case law, the Court seems likely to frame its holding in opaque terms; terms that fail to clearly implement a legal regime of formal equality for the L/G/B community.

This Essay argues that this lack of explicit formal equality guarantees matters. Although the L/G/B rights movement has achieved significant gains in both law and constitutional culture, doctrinally we remain closer to *Brown v. Board of Education*—and its unsettled posture vis-à-vis formal equality—than to *Loving*. And there are reasons to believe that this doctrinal uncertainty, in both the constitutional and statutory domains, has real costs, especially for the most marginalized members of the L/G/B community. These costs may come in the form of litigation losses—a continuing concern for many areas of L/G/B equality law—but perhaps more fundamentally in the failure to provide the

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4. Cf. Kevin Rector, *A Unique Maryland Marriage Sits at the Center of Supreme Court Case Considering Gay Nuptials*, BALT. SUN, Mar. 13 2015, <http://www.baltimoresun.com/features/gay-in-maryland/gay-matters/bs-gm-obergefell-scotus-connection-20150313-story.html> [<http://perma.cc/2VW3-J6VB>] (quoting legal scholar Jamie Raskin in relation to *Obergefell* as stating that “[t]his decision will almost certainly be the *Loving v. Virginia* for same-sex couples”). Numerous scholarly articles and judicial decisions have drawn (often compelling) parallels between *Loving* and struggles for same-sex marriage. See, e.g., Mark Strasser, *Loving Revisionism: On Restricting Marriage and Subverting the Constitution*, 51 HOW. L.J. 75 (2007).
 5. For further discussion of the ways in which formal race equality norms were instantiated in law during the pre-*Loving* time frame, see *infra* Part I.
 6. Although many of the insights of this Essay would also extend to the transgender community, because the doctrinal regimes governing the two contexts are not the same, my focus herein is on the arena most directly implicated by this Term’s same-sex marriage cases: sexual orientation discrimination. There are aspects of the legal regime governing anti-transgender discrimination that place the transgender community in certain regards closer—and in other regards more distant from—achieving formal equality. Compare *Macy v. Holder*, EEOC Decision No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (adopting as the EEOC’s official position that gender identity discrimination is per se sex discrimination, and thus prohibited by Title VII), with *Johnston v. Univ. of Pittsburgh*, No. 3:13-213, 2015 WL 1497753, at *8 & n.11 (W.D. Pa. Mar. 31, 2015) (collecting cases holding that gender identity does not constitute a suspect classification for Equal Protection purposes, and distinguishing the cases that have treated anti-transgender discrimination as unconstitutional sex discrimination). As such, for the purposes of analytic clarity only I use the more specific term “L/G/B” throughout this Essay, rather than the more inclusive “LGBT.”

type of clear legal and moral messaging that produces voluntary compliance. In short, insofar as we view deterrence and culture change as key objectives of an antidiscrimination regime, the lack of formal equality provisions explicitly barring anti-L/G/B discrimination should be deeply troubling.

Thus, if the Supreme Court rules this Term in favor of same-sex marriage, its holding should be cause for celebration among supporters of L/G/B rights, but not for rest. The project of achieving formal equality – itself just the first step in the longer project of achieving real equality on the ground – is not yet won for the L/G/B rights movement.⁷ And, whether formal equality is ultimately achieved may well depend on urgency with which its supporters – academic, financial, political, and among the general public – continue to pursue the project of legal reform.⁸

1. THE ELUSIVENESS OF L/G/B FORMAL EQUALITY

Brown v. Board of Education is often thought of today as institutionalizing a categorical norm of formal equality vis-à-vis race.⁹ But in fact, *Brown's* reasoning – focusing on the importance of education, and the harm to minority

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7. As many prior scholars, including myself, have noted, the institutionalization of formal equality in law – while important – is, in reality, only the starting point of the more difficult project of achieving actual equality for a nominally protected group. See, e.g., Katie Eyer, *Have We Arrived Yet? L/G/B Rights and the Limits of Formal Equality*, 19 LAW & SEXUALITY 159 (2010). For example, few would argue that the institutionalization of a formal equality regime vis-à-vis race in law (in the period leading up to and including *Loving*) has achieved real equality for racial minorities, even today. See, e.g., Devon Carbado et al., *After Inclusion*, 4 ANN. REV. L. & SOC. SCI. 83, 87 (2008) (noting that primary and secondary schools remain racially segregated today, and that, to some extent, formal equality has rendered efforts to equalize resources for such segregated schools more difficult by “mask[ing] inequality in the terms on which minority students are included in educational institutions”); cf. Tomiko Brown-Nagin, *The Civil Rights Canon: Above and Below*, 123 YALE L.J. 2698, 2719-21 (2014) (noting that many contemporary civil rights leaders, including Martin Luther King, Jr., understood that formal equality would not alone be enough to achieve real equality for African Americans).
 8. To be clear, this concern relates primarily to the many external supporters necessary to any movement’s ultimate success, and not necessarily to those actively working within the movement, most of whom seem at little risk of abandoning the quest for formal equality. See, e.g., Russell Robinson, *Marriage Equality and Postracialism*, 61 UCLA L. REV. 1010, 1062 & n.269 (2014) (noting and critiquing the L/G/B rights movement’s continuing pursuit of formal equality doctrines); cf. David Schraub, *Sticky Slopes*, 101 CALIF. L. REV. 1249, 1264 (2013) (describing the ways that partial victories can lead to demobilization of movement supporters).
 9. 347 U.S. 483 (1954); see also Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1470 (2004) (making the related observation that “[t]oday, many understand *Brown* to have ended the era of segregation in America by declaring the constitutional principle that government may not classify on the basis of race”).

children—could be, and often was, understood in its immediate aftermath in much more limited terms.¹⁰ Thus, as scholars such as Michael Klarman have shown, *Brown* was often understood as a “fundamental rights” case—one extending equality rights to African Americans only within the context of education (as opposed to within all areas of the law)¹¹ by virtue of education’s singular contemporary significance.¹²

By June 1967, when *Loving v. Virginia* was decided, much had changed in the landscape of race antidiscrimination law. In the constitutional domain, the Court had signaled a move toward broad presumptive constitutional invalidity of race-based laws (that is, formal equality) in *McLaughlin v. Florida*¹³—a move it confirmed and solidified in *Loving* itself.¹⁴ In the statutory domain, Congress had enacted a series of laws effectuating formal equality guarantees (and, at times, arguably going farther in providing not only for formal, but also

10. See, e.g., Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 247-48 (1991); cf. Siegel, *supra* note 9 (also noting *Brown*’s ambiguity, but identifying a number of broader possible understandings of the decision that were considered plausible at the time).
11. See, e.g., *Lonesome v. Maxwell*, 123 F. Supp. 193, 205 (D. Md. 1954) (finding that *Brown* and *Bolling v. Sharpe*, 347 U.S. 497 (1954), were limited to the field of education, and did not extend to public recreational facilities), *rev’d* 220 F.2d 386 (4th Cir. 1955), *aff’d* 350 U.S. 877 (1955); *Holmes v. City of Atlanta*, 124 F. Supp. 290, 293-94 (N.D. Ga. 1954) (allowing continued segregation at a public golf course and reading *Brown* as only extending to the context of public education), *aff’d* 223 F.2d 93 (5th Cir. 1955), *vacated*, 350 U.S. 879 (1955); *State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (rejecting challenge to Louisiana’s antimiscegenation law, and citing *Brown* as supportive authority on the grounds that the children of interracial relationships would be stigmatized in a similar way to segregated children); see also *Stell v. Savannah-Chatham Cnty. Bd. of Ed.*, 220 F. Supp. 667 (S.D. Ga. 1963) (reading *Brown* as resting on a factual finding of harm to black children arising from segregation, and thus holding that *Brown* mandated a refusal of relief where the Court had found harm would result from desegregation, even in the public education domain), *rev’d* 318 F.2d 425 (5th Cir. 1963). Of course, there are also reasons to believe that many of these cases involved motivated reasoning by judges hostile to *Brown*’s principles. But the ambiguity of the doctrinal reasoning in *Brown* left room for such motivated reasoning, just as, as described by Siegel, *supra* note 9, it left open room for more expansive understandings of the decision.
12. Klarman, *supra* note 10, at 247-48; see also *id.* at 235-36 (explaining that the legal regime of the Court’s *Plessy*-era Equal Protection doctrine rested on this type of a “fundamental rights” structure, whereby the project of the Reconstruction Amendments was viewed as one focused exclusively on securing “fundamental rights” for African Americans). In some regards, this type of a regime could be counted as a limited formal equality regime vis-à-vis race, but a highly restricted one, insofar as it would only reach those domains deemed “fundamental.” In practice, subconstitutional doctrines during the *Plessy* era largely eviscerated even these limited formal equality rights that existed pre-*Brown*. See generally Katie Eyer, *Ideological Drift and the Forgotten History of Intent*, 51 HARV. C.R.-C.L. L. REV. (forthcoming 2015).
13. 379 U.S. 184 (1964).
14. Klarman, *supra* note 10, at 255.

substantive, equality mandates).¹⁵ As such, *Loving* can be seen as the endpoint of a process of institutionalization of formal racial equality norms; as the last piece of a legal regime protecting against invidious racial classifications in most public and private domains.¹⁶

As a wave of lower court rulings have invalidated same-sex marriage bans in the aftermath of *United States v. Windsor*,¹⁷ it is unsurprising that some have marked *Obergefell*—and the Supreme Court’s expected decision in favor of same-sex marriage—as a comparable juncture for L/G/B equality.¹⁸ And indeed, especially in the marriage domain, it appears that many lower courts have recognized, and chosen to follow, the Supreme Court’s shifting trajectory with respect to gay and lesbian rights.¹⁹ Public opinion has undergone similarly dramatic shifts, with support for many rights for the L/G/B community rising significantly in the past decade.²⁰

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15. See, e.g., Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended in scattered sections of 52 U.S.C.); Civil Rights Act of 1964, Pub. L. No. 88-353, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.); see also Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3619 (2012) (prohibiting housing discrimination the following year). Many of the laws that Congress enacted during this time frame either on their face or as ultimately construed by the Supreme Court went farther than a simple anti-disparate-treatment regime in their efforts to effectuate substantive equality. See, e.g., Voting Rights Act of 1965, 79 Stat. 445; *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
 16. *But cf.* Dorothy E. Roberts, *Loving v. Virginia as a Civil Rights Decision*, 59 N.Y.L. SCH. L. REV. 175, 205 (2014) (arguing that *Loving* was an important antisubordination precedent, and that the decision in fact rejected formal arguments based on equality of treatment alone). As noted *supra* note 7, while the institutionalization of formal racial equality in law was an important milestone in achieving racial justice objectives, it is important not to confuse this milestone with actual racial equality.
 17. 133 S. Ct. 2675 (2013).
 18. In casual conversation with movement supporters, both inside and outside of legal academia, I have regularly heard remarks to the effect that after the Supreme Court finds in favor of marriage equality, there will be no further work to be done. See generally Urvashi Vaid, *Now You Get What You Want, Do You Want More?*, 37 N.Y.U. REV. L. & SOC. CHANGE 101, 108-09 (2013) (making the similar observation that “winning marriage gives many the illusion of winning the war for L/G/B rights,” and identifying concrete examples of post-marriage demobilization in states that have secured marriage equality). For a discussion of the many cases that have invalidated same-sex marriage bans in the aftermath of *Windsor*, see, for example, Margo Schlanger, *Stealth Advocacy Can (Sometimes) Change the World*, 113 MICH. L. REV. 897, 903-04 (2015). For examples of such decisions at the circuit level, see, for example, *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014).
 19. See, e.g., Katie Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 566 (2014).
 20. See, e.g., *Gay and Lesbian Rights: Historical Trends*, GALLUP, <http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx> [<http://perma.cc/UCJ9-58P6>].

But these changes—in both lower court approaches and public opinion—rest atop surprisingly thin changes in the regime of formal equality rules governing L/G/B equality. Most notably, despite supermajority levels of public support for an L/G/B-inclusive antidiscrimination law,²¹ there remain no explicit statutory protections at the federal level against sexual orientation discrimination. Thus, unlike race discrimination—which is proscribed by statute in the employment, public accommodations, housing and voting rights domains—federal statutory law is largely silent on the question of sexual orientation discrimination, leaving vast domains of private discrimination unaddressed.²²

Even in the constitutional domain, the doctrinal framework undergirding recent advances for L/G/B rights arguably remains far closer to *Brown* than to *Loving*. In both the Supreme Court's doctrine and in most circuits, no presumptive constitutional rule exists against sexual orientation discrimination.²³ Rather, most recent constitutional advances have instead been achieved under minimum-tier scrutiny (rational basis review) or, in the marriage cases, under doctrines requiring stringent scrutiny of infringements on the right to marry.²⁴ As such, there is, nationally, no generally applicable constitutional rule that automatically renders most instances of anti-gay government discrimination unlawful.²⁵ Thus, the institutionalization of a formal equality mandate vis-à-vis anti-gay discrimination has remained

21. *Id.*

22. This is not to suggest that L/G/B litigants have been entirely unable to take advantage of federal statutory antidiscrimination law. Rather, there are a number of theories that have been successfully used by L/G/B litigants to bring federal antidiscrimination claims. See, e.g., Katie R. Eyer, *Protecting Lesbian Gay Bisexual and Transgender (LGBT) Workers* (ACS White Paper, 2006), <http://ssrn.com/abstract=1441282> [<http://perma.cc/6LA5-V7FP>]. State law provides another alternative for those living in states that have enacted their own L/G/B-inclusive laws. *Id.* However, many L/G/B employment discrimination plaintiffs continue to regularly lose their claims. See *infra* Part II.

23. See generally Katie Eyer, *Lower Court Popular Constitutionalism*, 123 YALE L.J. 197 (2013) (discussing the history of efforts to achieve heightened scrutiny based on sexual orientation in the lower courts, and noting that the lower courts have been slow to adopt heightened scrutiny). *But cf.* *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014) (finding that heightened scrutiny should apply to sexual orientation discrimination); *SmithKline Beecham Corp. v. Abbott Labs*, 740 F.3d 471 (9th Cir. 2014) (same); *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012) (same), *aff'd on other grounds*, 133 S. Ct. 2375 (2013).

24. See, e.g., ALISON M. SMITH, CONG. RESEARCH SERV., R43481, SAME-SEX MARRIAGE: A LEGAL BACKGROUND AFTER *UNITED STATES V. WINDSOR* (2014), <http://fas.org/sgp/crs/misc/R43481.pdf> [<http://perma.cc/HHZ5-VZ45>]. While such successes are no doubt significant, even where achieved under minimum tier/rational basis review, they are not the equivalent of a formal equality regime, as they do not create a rule for future cases that presumptively deems sexual orientation discrimination to be unlawful. See *supra* note 3 and accompanying text (defining “formal equality” as used herein).

25. See *supra* note 23.

elusive, even as successes—both legal and extralegal—have increasingly suggested that the L/G/B rights movement has “arrived.”²⁶

There are few reasons to believe that *Obergefell* will disrupt this existing framework. Most obviously, the Court cannot and will not modify the lack of a backdrop of gay-protective statutory law, and will therefore leave domains of private discrimination untouched. But there are also substantial reasons to believe that *Obergefell*, although likely to find in favor of same-sex marriage, will not do so by institutionalizing an L/G/B-protective formal equality regime (even in the constitutional domain). Most notably, Justice Kennedy—who has had, and will likely continue to have, an outsized role in shaping the Court’s gay jurisprudence—generally eschews speaking in such formally concrete doctrinal terms.²⁷ Thus, it seems unlikely that *Obergefell* will meaningfully reshape the doctrinal landscape vis-à-vis L/G/B formal equality; and thus, that we will remain, ultimately, far closer in the L/G/B rights movement’s formal equality trajectory to *Brown* than *Loving*.

II. WHY FORMAL EQUALITY MATTERS

If *Obergefell* seems unlikely to institutionalize formal equality for the L/G/B community, why might this matter? There have long been substantial scholarly critiques of formal equality’s limits.²⁸ And the L/G/B rights movement has already achieved substantial gains without a statutory or constitutional regime of formal equality. One might reasonably question whether formal equality remains important; whether pursuing a regime that explicitly recognizes sexual orientation discrimination as presumptively invalid is worthwhile or needed.

But there are a number of reasons for thinking that, ultimately, formal equality does matter. Most obviously, without the backdrop of formal equality, there continue to be areas of major importance to the L/G/B community in which L/G/B litigants continue to regularly lose their claims.²⁹ Thus, L/G/B litigants’ claims under federal antidiscrimination statutes—the primary body of law governing private employment discrimination and housing³⁰—continue to

26. See *supra* notes 19-20 and accompanying text (discussing the success experienced by the L/G/B rights movement in recent years in both doctrinal and public opinion domains).

27. See, e.g., Robert C. Farrell, *Justice Kennedy’s Idiosyncratic Understanding of Equal Protection and Due Process, and Its Costs*, 32 QUINNIPIAC L. REV. 439, 440 (2014).

28. A vast literature is dedicated to critiquing the limitations of a formal equality model. For a small sampling of the relevant literature, see Eyer, *supra* note 7, at 161 n.4 (collecting articles).

29. See *infra* notes 31-33 and accompanying text.

30. Public accommodations law (the body of antidiscrimination law governing access to services like restaurants hotels and service providers) also is largely governed by statute, rather than the Constitution. There is very little, if any, ability for L/G/B litigants to bring public

have only modest success.³¹ As such, private employment discrimination and housing discrimination against members of the gay and lesbian community remains only rarely actionable under federal law.³² For the many members of the L/G/B community who live in one of the twenty-nine states that do not have their own L/G/B-inclusive antidiscrimination laws, such a lack of federal protections means that many forms of discrimination they face will be treated by the courts as entirely lawful.³³

Similarly, in the constitutional domain, the lack of a formal equality regime under Equal Protection doctrine arguably has had significant implications for the L/G/B community. For example, “no promo homo” laws – requiring the indoctrination of public school students with anti-gay messaging – continue to exist across a number of Southern and Western states, and would clearly be invalid under a formal equality regime.³⁴ And yet successful legal challenges to

accommodations claims under federal law, because federal law does not proscribe sex discrimination in public accommodations, and sex discrimination is the primary argument that L/G/B litigants have relied on in the absence of explicit protections for sexual orientation.

31. A search of recent Title VII claims involving gay plaintiffs amply illustrates this trend, with a large number of such claims continuing to be dismissed through pre-trial dispositions, for reasons related to the lack of formal equality guarantees. To replicate this search, access the “All Federal” Westlaw Database and search for “adv: (gay lesbian “SEXUAL ORIENTATION”) /200 “title vii” and DA(aft 06/22/2013).” For a few of the many search results produced, see, for example, *Hively v. Ivy Tech Cmty. Coll.*, No. 3:14-CV-1791, 2015 WL 926015, at *3 (N.D. Ind. Mar. 3, 2015) (dismissing claims brought under Title VII for sexual orientation discrimination on the grounds that sexual orientation discrimination is not proscribed by Title VII); *Milot v. TJ Maxx*, No. 1:14-CV-00759, 2015 WL 770250 (S.D. Ohio Feb. 23, 2015), *report and recommendation adopted*, No. 1:14-CV-759, 2015 WL 1201275 (S.D. Ohio Mar. 16, 2015), at *3 (S.D. Ohio 2015) (same); *Revely v. Cincinnati State Technical & Cmty. Coll.*, No. 1:13-CV-353, 2014 WL 5607605, at *2-3 (S.D. Ohio Nov. 4, 2014) (finding Plaintiff’s claim was truly one of sexual orientation discrimination, rather than sex discrimination, and awarding summary judgment); *Bostick v. CBOCS, Inc.*, No. 8:13-CV-1319-T-30TGW, 2014 WL 3809169 (M.D. Fla. Aug. 1, 2014) (same).
32. See sources cited *supra* note 31. *But cf.* *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (holding that plaintiff’s allegation of sexual orientation discrimination was actionable as sex discrimination under Title VII of the Civil Rights Act of 1964); *Castello v. Donahue*, EEOC DOC 0520110649, 2011 WL 6960810 (Dec. 20, 2011) (endorsing a similar rationale, that a per se gender stereotyping theory, under which sexual orientation discrimination would be, *contra* the rule in most circuits today, generally actionable as sex discrimination).
33. See, e.g., David S. Cohen & Leonore Carpenter, *Anti-Gay Bias Legal in Indiana Before New Law*, USA TODAY, Mar. 31, 2015, <http://www.usatoday.com/story/opinion/2015/03/31/indiana-religious-freedom-restoration-act-discrimination-anti-gay-column/70723684> [<http://perma.cc/AZ2T-PFDB>] (noting that twenty-nine states do not prohibit sexual orientation discrimination, and that few protections exist under federal law).
34. For example, Texas’s law requires that educational materials intended for those under 18 years of age emphasize “that homosexuality is not a lifestyle acceptable to the general public.” See TEX. HEALTH & SAFETY CODE ANN. § 163.002 (West 2013). Some others do not require affirmative anti-gay messaging, but prohibit the “advocacy of homosexuality.” See, e.g., UTAH CODE ANN. § 53A-13-101 (West 2014). For a full listing of current laws, see

such laws remain rare, even in federal judicial circuits or districts that have already ruled for marriage equality.³⁵

Less obvious than the litigation implications, but equally troubling, is the impact that the lack of a formal equality regime is likely to have on antidiscrimination law's deterrence value. For the vast majority of members of a protected group—who will never bring an antidiscrimination claim—antidiscrimination law's benefits are felt, if at all, in its power to prevent discrimination.³⁶ This is especially true for poor and otherwise marginalized members of a group, such as racial minorities or prisoners, who are disproportionately likely to lack access to the financial and network resources needed to successfully bring claims.³⁷ For such members of the community, the

DontEraseUs: State Anti-LGBT Curriculum Laws, LAMBDA LEGAL, <http://www.lambdalegal.org/dont-erase-us/laws> [<http://perma.cc/4CJ5-EQYC>].

35. It appears that legal challenges to such laws remain rare overall. Lambda Legal's recently initiated campaign to address such laws, for example, explicitly focuses only on "speaking out" and information dissemination rather than litigation. See, e.g., John Wright, *Lambda Legal Targets Antigay 'No Promo Homo' Laws in 8 States, Calls Them Unconstitutional*, TOWLEROAD (Dec. 2, 2014) <http://www.towleroad.com/2014/12/lambda-legals-donteraseus-campaign-targets-no-promo-homo-laws-in-8-states.html> [<http://perma.cc/Q33Y-RRRR>]. But cf. Emily Bazelon, *A Big Win: The Landmark Settlement in a Minnesota Bullying Case and How It Could Help Gay Students Everywhere*, SLATE, Mar. 7, 2012, http://www.slate.com/articles/news_and_politics/bulle/2012/03/the_anoka_hennepin_settlement_a_big_win_in_the_fight_against_gay_bashing_bullies.html [<http://perma.cc/2AUZ-VXSR>] (documenting a settlement in a federal sex discrimination case involving anti-gay harassment, partly arising from the anti-gay climate created by a "No Promo Homo" policy). There may well be reasons other than the lack of formal equality protections that challenges to such laws have been rare, including the possibility that such laws are not in some states being actively enforced. But it seems likely that one would see greater litigation activity—both in the initiation of litigation, and in actual invalidation—if there were a clear formal equality regime.
36. See, e.g., Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 30 (2005) (only a small fraction of those who perceive discrimination engage in claiming behavior). It is instructive to, for example, compare the number of EEOC charges filed annually for race discrimination to the general population of African Americans in the United States (an approach that no doubt overstates the claiming rate, since not all race claims are brought by African Americans, and individuals can bring more than one claim). Using only this rough measure, one can estimate that in 2013 less than one-tenth of one percent of African Americans engaged in even the sort of preliminary claiming behavior that EEOC filings represent. *Compare 2013 Black Populations*, BLACKDEMOGRAPHICS.COM, <http://blackdemographics.com> [<http://perma.cc/5MG3-7LKQ>] (reporting that census estimates suggest that roughly 45 million African Americans were living in the United States in 2013), with *Charge Statistics FY 1997 Through FY 2014*, EEOC, <http://eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<http://perma.cc/EZZ4-M66M>] (indicating that only 33,068 race discrimination charges were brought in total in 2013).
37. See, e.g., Amy Myrick et al., *Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 705 (2012); Eloise Pasachoff, *Special Education, Poverty, and the Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1420-

promise of a litigation-based remedy is largely illusory—a theoretically possible, but not real, benefit of the law.

While the deterrence value of antidiscrimination law is difficult to measure—and thus to quantify—it seems deeply implausible that the absence of a formal equality baseline does not do harm to this key objective. Most obviously, under the type of opaque regime that exists today, those would-be discriminators whom the law is meant to deter are far less likely to even know that their conduct is unlawful.³⁸ For example, while information regarding sex discrimination remedies for sexual orientation discrimination no doubt reach the largest companies able to hire specialized employment counsel,³⁹ there are few reasons to believe that smaller employers—many of whom are entirely uncounseled—are similarly well-informed.⁴⁰ And, for the truly intransigent, the opacity of the current regime provides an excuse to continue obstructionist and potentially unlawful conduct, conduct that will continue in the near-term to do real harm to L/G/B individuals and families.⁴¹

50 (2011); see also M. V. Lee Badgett et al., *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, WILLIAMS INST. (June 2013) <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> [<http://perma.cc/D6GQ-UZJM>] (finding higher rates of poverty among L/G/B couples and their children than among heterosexual adults).

38. This is true of both statutory and constitutional law at the federal level, as both domains, as set out *supra* Part I, still largely do not contain clear explicit rules rendering sexual orientation discrimination unlawful.
39. See, e.g., Albert Llosas Barreuco, *EEOC Makes Protecting LGBT Workers a Top Priority*, PEPPER HAMILTON LLP (2013), http://www.pepperlaw.com/pdfs/Labor_2013_2.pdf [<http://perma.cc/Z4UG-RSJQ>] (reporting, as part of the Pepper Hamilton Labor & Employment Law Update, on recent developments in the EEOC's approach to treating sexual orientation and gender identity claims as sex discrimination).
40. Many small businesses, even with faced with significant legal concerns, proceed without an attorney because of cost or other concerns. See, e.g., C. Daniel Baker, *Many Small Businesses Don't Seek Legal Help Despite Risks*, BLACK ENTERPRISE (Apr. 17, 2015), <http://www.blackenterprise.com/small-business/small-businesses-need-legal-help> [<http://perma.cc/4MHH-BAJR>] (reporting that a majority of those small businesses facing significant legal events in the past year did not seek legal counsel). It seems highly improbable that information about recent developments in, for example, gender stereotyping case law (the primary arena in which L/G/B litigants have achieved statutory antidiscrimination success) will reliably reach such uncounseled businesses. Obviously, to the extent such businesses are simply unaware of L/G/B favorable legal developments of this kind, the possibility of any deterrence effect is eliminated.
41. For example, there are reasons to be concerned that states that have traditionally been unreceptive to marriage equality may continue to obstruct L/G/B access to family law rights in other ways even following a marriage equality ruling. Cf. *Gartner v. Iowa Dep't of Pub. Health*, 830 N.W.2d 335 (Iowa 2013) (holding that Iowa's marital presumption statute on its plain language did not extend to same-sex couples, but concluding that, so construed, it violated the Iowa Constitution's Equal Protection guarantees).

But perhaps the most concerning result of the absence of a formal equality regime is the loss of moral messaging that a formal equality regime provides. When the federal government—be it Congress, the Court, or the President⁴²—adopts formal equality guarantees, it sends a deep message about what we, as a nation, believe is the type of invidious discrimination that should be deemed illegitimate. Conversely, the lack of such a clear, formal regime leaves that key moral question open to contestation. For the many who rely on the law’s capacity to persuade, this moral ambiguity is troubling indeed.⁴³

In short, there are many reasons to believe that formal equality—while imperfect—remains an important starting point for deeper equality work. Especially for those many members of the L/G/B community for whom the true promise of antidiscrimination law will be in its capacity to change primary conduct, a lack of formal equality comes with the potential for real and substantial costs. Thus, although we should not diminish the L/G/B rights movement’s legal and societal gains, neither should we ignore its unfinished business: the important work of formal equality.

CONCLUSION

The fight for L/G/B marriage equality has captured the imagination of the American public, and rightly so. Marriage equality has long been one of the pivotal fields in which advocates and opponents of L/G/B rights have struggled over constitutional culture, just as it was one of the pivotal fields of struggle between advocates and opponents of racial equality.⁴⁴ Moreover, marriage is a

42. The executive branch under President Obama represents the one major exception to the failure of the federal branches to implement formal equality guarantees for the L/G/B community. See, e.g., Office of Fed. Contract Compliance Programs, *President Obama Signs Executive Order to Protect LGBT Workers*, DEP’T OF LABOR, <http://www.dol.gov/ofccp/LGBT/LGBT.html> [<http://perma.cc/F5ML-AR3H>] (announcing President Obama’s adoption of a L/G/B-inclusive formal equality rule by Executive Order, in the context of federal contractors); cf. Michael D. Shear, *Obama Administration Extends Marriage Benefits to Same-Sex Couples*, N.Y. TIMES, June 21, 2014, <http://www.nytimes.com/2014/06/21/us/politics/obama-to-extend-array-of-marriage-benefits-to-gay-couples.html> [<http://perma.cc/XS6M-47FL>] (discussing the Obama administration’s decision to, to the extent possible under existing statutes, extend federal marriage benefits to all married same-sex couples following *Windsor*). There are reasons to be optimistic that such executive actions may ultimately help pave the way for broader legislative and judicial formal equality gains. See, e.g., Jeffrey A. Jenkins & Justin Peck, *Building Toward Major Policy Change: Congressional Action on Civil Rights, 1941-1950*, 31 L. & HIST. REV. 139, 142-43 (2013) (describing federal executive actions taken in the 1940s in the area of African-American civil rights).

43. See *supra* notes 36-37 and accompanying text.

44. This is not suggest that interracial marriage was considered among the most important equality objectives by the African American civil rights movement—indeed, many accounts suggest that it was an issue that the civil rights movement initially avoided taking up. See, e.g., Roberts, *supra* note 16, at 183-90. However, it is clear that interracial marriage was an

matter of deep personal and cultural significance to many Americans, regardless of sexual orientation. A decision mandating marriage equality will thus no doubt have many important implications.

But marriage's political, cultural, and social significance should not be mistaken for its legal centrality. Unlike *Loving*, a favorable ruling for marriage equality in *Obergefell* is unlikely to establish a broader legal regime of formal equality in constitutional doctrine; and it is sure not to do so in the context of statutory rights. As such, while *Obergefell* will no doubt have real significance—social, political, and, in part, legal—it should not be mistaken for formal equality. For that unfinished business, as after *Brown*, much continuing work—in the courts, in the legislature, and among the people—lies ahead.

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especially inflammatory issue for those opposing civil rights, and one that implicated deeply entrenched and strongly held value judgments about the inherent inequality of racial minorities. *Id.*; see also Rebecca Schoff, Note, *Deciding on Doctrine: Anti-Miscegenation Statutes and the Development of Equal Protection Analysis*, 95 VA. L. REV. 627 (2009).