

It's [Not] a Black Thing: The Black/Gay Split
over Same-Sex Marriage—
A Critical [Race] Perspective

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I. INTRODUCTION

On Wednesday, November 5, 2008, the sun rose over a United States that elected its first African American President, a historic occasion that thrilled many, especially Blacks. Yet there was a pall over California, a state where 60.9% of the electorate voted for Barack Obama.¹ The cloud hung over supporters of same-sex marriage who were saddened by the fact that a majority of California voters had voted for Proposition 8 (Prop. 8), a ballot initiative that added an amendment to the state constitution defining marriage as between one man and one woman.² This referendum brought an end to the right of same-sex couples to marry, which the California Supreme Court determined did exist under the state's constitution just five months prior to the vote.³

In some corners, the postelection analysis as to why Prop. 8 passed became a blame game, with Black Californians as the main target.⁴ Blacks were singled out because, according to exit polling, they voted yes on Prop. 8 at 70%⁵ (a figure later challenged as being exaggerated),⁶ the largest percentage of any demographic. Marriage rights supporters, “No on 8” activists, and, particularly, lesbian and gay individuals were

1. *Election Results 2008—California*, N.Y. TIMES (Dec. 9, 2008), <http://elections.nytimes.com/2008/results/states/california.html>.

2. See SEC'Y OF STATE OF CAL., OFFICIAL VOTER INFORMATION GUIDE 128 (2008), available at <http://voterguide.sos.ca.gov/past/2008/general/pdf-guide/vig-nov-2008-principal.pdf>; see also CAL. CONST. art. I, § 7.5.

3. *In re Marriage Cases*, 183 P.3d 384, 399 (Cal. 2008).

4. See Dan Savage, *Black Homophobia*, STRANGER (Nov. 5 2008, 9:55 AM), http://slog.thestranger.com/2008/11/black_homophobia.

5. *Analysis of California Proposition 8 Exit Poll Data*, MADPICKLES.ORG, http://www.madpickles.org/California_Proposition_8.html (last visited Feb. 6, 2013).

6. See PATRICK J. EGAN & KENNETH SHERRILL, CALIFORNIA'S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD? 9 (Jan. 2009), available at http://www.thetaskforce.org/reports_and_research/prop8_analysis (“Analysis of the full range of data available persuades us that the NEP exit poll overestimated African American support for Proposition 8 by ten percentage points or more.”).

shocked by the loss and the fact that so many Blacks had voted against them.⁷ Yet Black organizations, especially churches, were cultivated as potentially fertile ground for anti-same-sex marriage votes⁸ and, in the lead up to Election Day 2008, were a major component of the “Yes on Eight” strategy.⁹ In fact, an anti-gay-marriage contingent had long been vocal within Black communities in California and across the nation, targeting Black churches as locations, and older churchgoing Blacks as individuals, to organize against marriage equality.¹⁰ However, the context in which Prop. 8 passed was unique because Barack Obama, a Black man, was the Democratic Party’s presidential candidate.¹¹

7. See, e.g., Griffin, *Andrew Sullivan Stirs Anti-Black Sentiment Among Gays, Then Condemns It*, TRAIN WRECK POLITICS (Nov. 9, 2008), <http://trainwreckpolitics.com/2008/11/09/andrew-sullivan-stirs-anti-black-sentiment-among-gays-then-condemns-it/>; Maulana Karenga, *Blaming Blacks for White Behavior*, L.A. SENTINEL (Nov. 20, 2008), http://www.la.sentinel.net/index.php?option=com_content&view=article&id=7035:blaming-blacks-for-white-behavior&catid=89&Itemid=179; Ta-Nehisi Coates, *Prop 8 and Blaming the Blacks*, ATLANTIC (Jan. 7, 2009, 11:14 AM), <http://www.theatlantic.com/culture/archive/2009/01/prop-8-and-blaming-the-blacks/6548/>; Pam Spaulding, *The N-Bomb Is Dropped on Black Passerby at Prop 8 Protests*, HUFFINGTON POST (Nov. 10, 2008, 10:09 AM), http://www.huffingtonpost.com/pam-spaulding/the-n-bomb-is-dropped-on_b_142363.html; Pam Spaulding, *The Meme That Will Not Die: Blacks Enabled Prop 8 to Pass*, HUFFINGTON POST (Dec. 8, 2008, 12:45 PM), http://www.huffingtonpost.com/pam-spaulding/the-meme-that-will-not-di_b_149280.html.

8. See Lynette Clemetson, *Both Sides Court Black Churches in the Battle over Gay Marriage*, N.Y. TIMES (Mar. 1, 2004), <http://www.nytimes.com/2004/03/01/national/01CHUR.html>; Allen G. Breed, *Blacks Divided over Use of Civil Rights Imagery To Describe Gay Marriage Push*, FLA. TIMES UNION (Mar. 7, 2004), <http://www.jacksonville.com/apnews/stories/030704/D815AP582.shtml> (“[S]ome conservative groups are appealing directly to black congregations to block attempts to co-opt the language of the civil rights movement in the gay marriage debate.”); Mark Sullivan & Sean Smith, *BC Experts Mull Gay Marriage Decision*, B.C. CHRON. (Nov. 26, 2003), http://www.bc.edu/bc_org/rvp/pubaf/chronicle/v12/n26/goodridge.html (“Republicans will use the issue of same-sex marriage to try to break the lock Democrats have heretofore held on black voters.”).

9. See Cara Mia DiMassa & Jessica Garrison, *Why Gays, Blacks Are Divided on Prop. 8*, L.A. TIMES (Nov. 8, 2008, 1:17 PM), <http://articles.latimes.com/2008/nov/08/local/me-gay-black8>; Darren Lenard Hutchinson, *Anti-Gay Group Thanks Obama, Seeks To Exploit Black Homophobia To Constitutionalize Bigotry*, DISSENTING JUST. (Oct. 6, 2008), <http://dissentingjustice.blogspot.com/2008/10/same-sex-marriage-and-racial-justice.html>.

10. See Jesse McKinley, *Same-Sex Marriage Ban Is Tied to Obama Factor*, N.Y. TIMES (Sept. 21, 2008), http://www.nytimes.com/2008/09/21/us/politics/21gay.html?_r=0 (reporting that the American Family Association, which donated \$500,000 to support Prop. 8, posted a video “featuring a clip of the Rev. Martin Luther King Jr. while a speaker comments on the duty of black pastors to speak out in favor of Proposition 8”); Richard Kim, *Marital Discord: Why Prop 8 Won*, NATION (Nov. 6, 2008), <http://www.thenation.com/article/marital-discord-why-prop-8-won> (recounting what the author refers to as “the Yes on 8 coalition’s staggering disinformation campaign,” which included a flyer “targeting black households”).

11. See McKinley, *supra* note 10.

Fast-forward to 2012 and a new presidential election cycle. Prop. 8 has been challenged in both state and federal court.¹² The United States Court of Appeals for the Ninth Circuit held it was unconstitutional,¹³ and Prop. 8 proponents appealed the decision to the United States Supreme Court.¹⁴ On Wednesday, May 9, 2012, President Obama announced, “I’ve just concluded that—for me personally . . . I think same-sex couples should be able to get married.”¹⁵ He made this statement just one day after North Carolina became the thirty-first state to pass a constitutional amendment defining marriage as between one man and one woman, thus barring same-sex marriage.¹⁶ Though same-sex marriage had remained a newsworthy story between 2008 and 2012,¹⁷ many factors brought the issue of the Black community’s stance on same-sex marriage back to the forefront of the debate: the President’s statement, the vote in North Carolina, and the fact that on election day 2012, voters would be going to the polls in four states to vote on same-sex marriage and whether or not to reelect a Black president.¹⁸

12. See, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010); *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

13. *Perry v. Brown*, 671 F.3d 1052, 1095 (9th Cir. 2012).

14. *Hollingsworth v. Perry*, 671 F.3d 1052 (9th Cir. 2012), cert. granted, 130 S. Ct. 786 (U.S. Dec. 7, 2012) (No. 12-144); see also *Hollingsworth v. Perry*, SCOTUSBLOG, http://www.scotusblog.com/case-files/cases/hollingsworth-v-perry/?wpmp_switcher=desktop (last visited Feb. 1, 2013).

15. Interview by Robin Roberts with Barack Obama, President of the United States of America, Washington, D.C. (May 9, 2012), <http://abcnews.go.com/Politics/transcript-robin-roberts-abc-news-interview-president-obama/story?id=16316043#.UIXwl7T6I0w>.

16. N.C. CONST. art. XIV, § 6; see Michael Gordon, *Amendment One: N.C. Voters Approve Measure To Block Same-Sex Marriage*, CHARLOTTE OBSERVER (May 9, 2012), <http://www.charlotteobserver.com/2012/05/08/3227863/amendment-one-nc-voters-approve.html#storylink=cpy> (reporting after the amendment’s passage that North Carolina had been the thirty-first state to pass a constitutional amendment banning same-sex marriage).

17. Between the 2008 and 2012 elections, five states (Connecticut, Iowa, New Hampshire, New York, and Vermont) and the District of Columbia legalized marriage between same-sex couples. See *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map.pdf (last updated Dec. 10, 2012) (depicting a map and list of state same-sex marriage laws with the dates that marriage equality was enacted in each state).

18. Though Minnesota, Washington, and Maine were also set to vote on same-sex marriage, Maryland was the state most focused on the Black vote, as the racial demographics of the electorate and the divisions within the Black community—especially between pastors at Black churches, with some supporting marriage rights and others opposing—drew attention to the Black/gay split over same-sex marriage. See, e.g., Marc Fisher, *Black Pastors Take Heat for Not Viewing Same-Sex Marriage as Civil Rights Matter*, WASH. POST (Feb. 23, 2012), http://www.washingtonpost.com/black-pastors-take-heat-for-not-viewing-same-sex-marriage-as-civil-rights-matter/2012/02/22/gIQAVZzeWR_story.html; Edith Honan, *Fight over Gay Rights Milestone Divides Maryland*, REUTERS (Nov. 6, 2012), <http://www.reuters.com/article/2012/11/06/us-usa-campaign-gaymarriage-idUSBRE8A504520121106>; Hamil R. Harris, *Prominent*

In North Carolina, both Blacks, who are primarily registered as Democrats,¹⁹ and Republicans were generally against same-sex marriage.²⁰ This anti-marriage-rights alliance furthered the belief that, as in California, Blacks and gays, both Democratic Party bases, were divided over the issue.²¹ President Obama's statement, seemingly forced by Vice President Biden's public comments that he was "absolutely comfortable" with same-sex marriage,²² ignited much discussion about whether or not Black voters, who turned out in record numbers to vote for him in 2008²³ when he was against same-sex marriage,²⁴ would this time reject President Obama because of his support for same-sex marriage.²⁵ In media coverage after the statement, some argued that Obama's support of marriage equality—essentially choosing his so-called "gay base" over his "Black base"—would hurt his reelection chances because Blacks would fail to turn out to vote for him in the same numbers.²⁶ Others noted that in making this announcement, Obama's support within the lesbian, gay, bisexual, and transgender (LGBT)

Black Clergy Support Maryland Same-Sex Marriage, WASH. POST (Sept. 21, 2012, 10:45 PM), http://www.washingtonpost.com/blogs/under-god/post/prominent-black-clergy-support-maryland-same-sex-marriage/2012/09/21/875731f8-042d-11e2-8102-ebee9c66e190_blog.html.

19. Laura Leslie, *2012 Turnout Data Shows NC Sharply Split*, WRAL.COM (Jan. 22, 2013), <http://www.wral.com/2012-turnout-data-shows-nc-sharply-split/12009162> (reporting that approximately 85% of registered Black voters are registered as Democrats).

20. Tom Jensen, *North Carolinians Support, but Don't Understand Marriage Amendment*, PUB. POL'Y POLLING (Mar. 29, 2012) <http://www.publicpolicypolling.com/main/2012/03/northcarolinians-support-but-dont-understand-marriage-amendment.html> (showing Republicans overwhelmingly supporting the amendment and a large number of African Americans also supporting the amendment).

21. See David Kaufman, *Tensions Between Black and Gay Groups Rise Anew in Advance of Anti-Gay Marriage Vote in N.C.*, ATLANTIC (May 4, 2012, 3:01 PM), <http://www.theatlantic.com/politics/archive/2012/05/tensions-between-black-and-gay-groups-rise-anew-in-advance-of-anti-gay-marriage-vote-in-nc/256695/>.

22. Michael Barbaro, *A Scramble as Biden Backs Same-Sex Marriage*, N.Y. TIMES (May 6, 2012), <http://www.nytimes.com/2012/05/07/us/politics/biden-expresses-support-for-same-sex-marriages.html?pagewanted=all> (internal quotation marks omitted).

23. See, e.g., Sam Roberts, *2008 Surge in Black Voters Nearly Erased Racial Gap*, N.Y. TIMES (July 21, 2009), <http://www.nytimes.com/2009/07/21/us/politics/21vote.html>; David Paul Kuhn, *Exit Polls: How Obama Won*, POLITICO (Nov. 5, 2008, 12:27 AM), <http://www.politico.com/news/stories/1108/15297.html> (reporting that 96% of Black voters supported Obama in 2008).

24. Dschabner, *Obama Says He Is Against Same-Sex Marriage But Also Against Ending Its Practice in Calif.*, ABC NEWS (Nov. 2, 2008, 6:36 PM), <http://abcnews.go.com/blogs/politics/2008/11/obama-on-mtv-i/>.

25. The 2012 election results show that 93% of Black voters supported Obama's reelection, potentially putting this question to rest. *President: Full Results*, CNN (Dec. 10, 2012, 11:22 AM), <http://www.cnn.com/election/2012/results/race/president#exit-polls>.

26. See Touré, *Will Black Voters Punish Obama for His Support of Gay Rights?*, TIME (May 9, 2012), <http://ideas.time.com/2012/05/09/will-black-voters-punish-obama-for-his-support-of-gay-rights/>.

community and his fundraising among marriage supporters rose.²⁷ A further incentive for President Obama to articulate his position may have been to quell possible protests in North Carolina, where the 2012 Democratic Convention was being held.²⁸ At the time of President Obama's announcement and the vote in North Carolina, Blacks and gays, both perceived as primarily liberal and a part of the Democratic base,²⁹ were portrayed in media coverage as split over the issue of marriage.³⁰ Even with rising support among Blacks for same-sex marriage,³¹ the perceived division persists. This Article explores the assumptions about this race/sexuality-based divide to shed light on the manner in which these constructed divisions maintain a dominant/subordinate paradigm that continues to negatively impact both Black and gay communities.³²

The existence of a Black/gay split over social or legal issues is not a new idea or point of discussion.³³ In fact, divisions between subordinated

27. See, e.g., Jen Christensen, *LGBT Donors Back President Obama, Big Time*, CNN (June 6, 2012, 9:43 AM), <http://www.cnn.com/2012/06/05/politics/lgbt-obama-donors/index.html>; Dan Eggen, *Obama's Gay Marriage Announcement Followed by Flood of Campaign Donations*, WASH. POST (May 10, 2012), http://articles.washingtonpost.com/2012-05-10/politics/35457848_1_bundlers-campaign-officials-priorities-usa-action.

28. See Mitch Weiss, *Democratic National Convention: Groups Pushing Marriage Equality Amid Ban on Gay Marriage*, HUFFINGTON POST (Aug. 25, 2012, 2:45 PM), http://www.huffingtonpost.com/2012/08/25/democratic-national-convention-gay-marriage_n_1829976.html (discussing potential protests at 2012 Democratic National Convention); Catalina Camia, *Gay Marriage Ban Won't Move Democratic Convention*, USA TODAY (May 10, 2012), <http://content.usatoday.com/communities/onpolitics/post/2012/05/gay-marriage-north-carolina-democratic-national-convention-1#.UQ1oA-gyHg5> (reporting on efforts to have the 2012 Democratic Convention moved out of North Carolina because of the vote to ban same-sex marriage).

29. Gary J. Gates & Frank Newport, *LGBT Americans Skew Democratic, Largely Support Obama*, GALLUP (Oct. 18, 2012), <http://www.gallup.com/poll/158102/lgbt-americans-skew-democratic-largely-support-obama.aspx>; *Exit Polls: President*, CNN (2008), <http://www.cnn.com/ELECTION/2008/results/polls/#USP00p1>.

30. David Crary, *Gay Marriage Foes Sought To Split Gays, Blacks*, CBS NEWS (Mar. 27, 2012, 8:46 PM), http://www.cbsnews.com/8301-201_162-57405539/gay-marriage-foes-sought-to-split-gays-blacks/; *Same-Sex Marriage Opponents Seek To Split Gays, Blacks*, S. POVERTY L. CTR. (2012), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/fall/same-sex-marriage-opponents-seek-to-spl>.

31. See Damla Ergun, *Strong Support for Gay Marriage Now Exceeds Strong Opposition*, ABC NEWS (May 23, 2012, 12:01 AM), <http://abcnews.go.com/blog/politics/2012/05/strong-support-for-gay-marriage-now-exceeds-strong-opposition/> (“[S]upport for gay marriage has reached a new high among African-Americans in ABC/Post polls, up from four in 10 in recent surveys to 59 percent now.”); Gene Demby, *Poll: Majority of Blacks Support Gay Marriage After Obama's Endorsement*, HUFFINGTON POST (May 23, 2012, 4:58 PM), http://www.huffingtonpost.com/2012/05/23/black-shift-on-gay-marriage_n_1540160.html.

32. See *infra* Part III.

33. The attitudes and approaches to addressing the AIDS/HIV pandemic is another example of differences between Black and gay communities. See, e.g., Sunny Rumsey, *AIDS Issues for African-American and African-Caribbean Women*, in *WOMEN, AIDS & ACTIVISM* 103 (The ACT UP/NY Women & AIDS Book Grp. eds., 1990) (reflecting on how attitudes about

communities over social issues are not uncommon.³⁴ Neither is it uncommon for dominant groups to work to create new or deepen existing divides between subordinated groups in order to solidify their dominant status.³⁵ This Article focuses on dominant-group influences over subordinate-group divisions in the context of Blacks and gays and same-sex marriage.

In this Article, though I use the broad terms “Blacks” and “gays” or “Black community” and “gay or LGBT community,” there are particular groups within each community to which my assertions herein apply. This work uses these popularly understood terms as generic markers in order to speak about particular segments of each group. They signify mainstream individuals and organizations within Black or gay communities who are identified as representative of or as having opinions characteristic of each group. In addressing Blacks and gays, being both myself, I want to reach all who are connected to either or both communities.

The intent of this work is to address the real, perceived, or contrived conflicts that arise over legal and political struggles for full marriage rights for same-sex couples,³⁶ to suggest why they exist, and to advance possibilities for addressing the conflicts. I argue that Black/gay splits over marriage are not actual divisions based on race and sexual orientation but are constructed as such by those opposed to same-sex marriage to win over a small, but important, part of the electorate.³⁷ Meanwhile, same-sex marriage supporters willingly believe the existence of the split as a way to dismiss Blacks and Black community issues.³⁸

homosexuality impacted the response to AIDS/HIV within Black communities, while gay communities were politically active around the epidemic).

34. See, e.g., Sumi Cho, *Understanding White Women's Ambivalence Towards Affirmative Action: Theorizing Political Accountability in Coalitions*, 71 UMKC L. REV. 399 (theorizing on divisions between white women and people of color over affirmative action); Selena Dong, Note, “*Too Many Asians*”: *The Challenge of Fighting Discrimination Against Asian-Americans and Preserving Affirmative Action*, 47 STAN. L. REV. 1027 (1995) (providing examples of subordinated communities split over social issues, including Blacks and Latinos differing with Asians over affirmative action).

35. Jonathan Capehart, *Divide and Conquer on Same-Sex Marriage*, WASH. POST (Mar. 27, 2012, 6:30 PM), http://www.washingtonpost.com/blogs/post-partisan/post/divide-and-conquer-on-same-sex-marriage/2011/03/04/gIQAk83yeS_blog.html; Scottie Thomaston, *NOM's Long-Term Strategy Revealed in Memos: 'Drive a Wedge Between Blacks and Gays,'* HUFFINGTON POST (Mar. 27, 2012, 4:21 PM), http://www.huffingtonpost.com/scottie-thomaston/nom-documents_b_1383028.html.

36. See *infra* Part I.

37. However, there are actual divisions based on the continuum of religiosity, which do have racial and sexual orientation components. See *infra* Part II.C.1.

38. See David A. Love, *The Historic Roots of Homophobia in Black America*, GRIO (May 21, 2012, 11:46 AM), <http://thegrio.com/2012/05/21/the-historic-roots-of-homophobia-in->

Using Critical Race Theory (CRT)³⁹ as my foundation, my argument incorporates the notion of dominant-group or dominant-identity influencing subordinated communities susceptible to the influence because of shared aspects of a dominant trait. With regard to Black identity, the normative dominant trait at issue is heterosexuality; however, in the gay community, the dominant identity is whiteness (and often maleness).⁴⁰ Because these dominant aspects of identity that occur within subordinated groups often align with the group that is singularly identified with that dominant identity (heterosexuals and whites), the subordinated group is influenced by the dominant group's particular agenda. This is a split-enhancing, if not split-producing, influence that limits advancement opportunities for both subordinated groups and maintains the existing discriminatory paradigm that includes racism and homophobia. It is this dominant identity and the group's influence that constructs the notion of Black homophobia as particularly virulent, or that the Black community's opposition to same-sex marriage is somehow extraordinary. That the construct of a Black community as exceptionally homophobic is false buttresses my assertion that lack of support for same-sex marriage rights is not uniquely a Black thing.⁴¹

black-america/ (“[V]oices from the white-dominated gay community have singled out black homophobia as a problem in American life.”). This attitude allows LGBT communities to dismiss Blacks and deny any necessity or desire to coalesce with Black communities in order to obtain full marriage rights, thus exacerbating the split. For a related argument about perceiving Blacks as being uniquely homophobic, see BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 124 (1989).

39. RICHARD DELGADO & JEAN STEFANCIC, *CRITICAL RACE THEORY: AN INTRODUCTION* (2d ed. 2012) (discussing Critical Race Theory as being fundamentally based on antisubordination).

40. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 *UCLA L. REV.* 1467, 1471 (2000) (addressing the perceptions and presentations of blackness as heterosexual and gayness as white, particularly in the debates surrounding “Don’t Ask, Don’t Tell”); Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 *CONN. L. REV.* 561 (1997) (discussing the interactions of race, class, gender, and sexuality); Barbara Smith & Beverly Smith, *Across the Kitchen Table: A Sister-to-Sister Dialogue*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 113 (Cherrie Moraga & Gloria Anzaldua eds., 1981) (discussing the interactions of race, class, sexuality, gender, and feminism); Cheryl Clarke, *Lesbianism: An Act of Resistance*, in *THIS BRIDGE CALLED MY BACK: WRITINGS BY RADICAL WOMEN OF COLOR* 128, 128 (Cherrie Moraga & Gloria Anzaldua eds., 1981) (“For a woman to be a lesbian in a male-supremacist, capitalist, misogynist, racist, homophobic, imperialist culture, such as that of North America, is an act of resistance.”); Jennifer C. Nash, *‘Home Truths’ on Intersectionality*, 23 *YALE J.L. & FEMINISM* 445, 453 (2011) (“Black lesbian subjectivities became fertile theoretical ground for exploring how white racism and black homophobia collaborate, making the black lesbian body the site of intersecting violent discursive projects.”).

41. Support for same-sex marriage is not exclusively a “gay thing,” but addressing that issue is beyond the scope of this Article. See, e.g., RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* (1992) (generally critical of marriage as restrictive and overly

This work uses CRT as a way to consider the Black/gay split over marriage rights and to critique Black communities' and LGBT communities' approaches to areas of contestation.⁴² I argue that racialized divisions over marriage rights are constructed by, and for the benefit of, majority groups, such as whites, males, and heterosexuals. Keeping subordinated groups divided maintains white and heterosexual domination. This is not to say that there are no differences of opinion or varied beliefs regarding marriage rights within the subordinated groups, but I assert that marking each opinion as belonging solely to one subordinated group causes fissures between Black and LGBT communities. I argue that Blacks and gays have more commonalities than differences and should not be on opposite sides of this issue. Pitting subordinate communities against one another, and creating or insuring Black/gay splits over facets of the marriage debate, such as immutability, civil rights discourse, and the definition of marriage, are key to maintaining the dominant/subordinate status quo. My core argument is this: Blacks and gays should not be divided over the issue of access to civil marriage for same-sex couples because it is not an issue of race versus sexual orientation.⁴³ Critical Race Theory helps explain the development of this split. It also provides rationales for mending the divide and strategies for doing so.

The three core CRT principles that I modify and use to interrogate the "Blacks versus gay" construct are (1) interest convergence,⁴⁴ (2) intersectionality,⁴⁵ and (3) antiessentialism.⁴⁶ Interest convergence is

domesticating); see also Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Autumn 1989, at 8-12, excerpted in WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 370 (3d ed. 2011); NANCY D. POLKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008).

42. I position myself in the middle of the split and acknowledge that I am in some ways essentializing both Black and gay communities, and projecting them as monolithic, while arguing against doing so. Essentializing in this manner calls attention to the ways communities are constructed as if there is one singular stance on each issue based on one particular identity. My position on how each community is portrayed regarding same-sex marriage is not based on an extensive review of reports, surveys, or polls, but primarily on my experience and observations of living at this particular intersection.

43. I later argue that the differences may be based on religion, but that this divide is not specific to race. See *infra* Part II.C.1.

44. Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980) (writing specifically about the interests of Blacks in "achieving racial equality").

45. Kimberle 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.

46. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (explaining the co-principle of strategic essentialism).

Professor Derrick Bell's foundational theory that claims that advances in equality, for a minority group, occur only if and when those advances benefit the interests of a majority group.⁴⁷ Intersectionality, from Kimberle Crenshaw, explains that those who are multiply subordinated are impacted differently than those who share only one subordinated identity.⁴⁸ Angela Harris's work is my primary source for defining antiessentialism, which characterizes a group as not having a core essence by which all members can be defined or identified.⁴⁹ Also incorporated into the antiessentialism aspect of this work is an acknowledgement that strategic essentialism—in which overly simplified identities are tactically employed—is necessarily a part of an antisubordination strategy.⁵⁰

Part II begins by identifying and locating the Black/gay split. I determine that there is actually more than one locus of division between these two groups. While introducing multiple locations where Black and gay perspectives and experiences divide, this Article focuses mainly on the rift between the two communities around the same-sex marriage issue. Part III introduces three areas of contestation: immutability, civil rights,⁵¹ and both religious and secular arguments over the meaning and purpose of marriage and briefly addresses how, in the discourse surrounding these issues, gays are constructed as winning, which in turn constructs Blacks as losing. Part IV explains how modifications of the three core CRT principles—interest convergence, intersectionality, and antiessentialism—can be used as tools to explain Black/gay splits over same-sex marriage. The first idea carries two labels when applied to each community: interest divergence when it pertains to Black communities and disinterest convergence when it pertains to LGBT communities. The next focus is on explaining the impact of the split on the principle I call “blind intersectionality” when referring to LGBT communities, or “intersectional blindness” when tackling the issue in

47. Bell, *supra* note 44, at 523.

48. Crenshaw, *supra* note 45, at 145.

49. Harris, *supra* note 46, at 582.

50. See GAYATRI CHAKRAVORTY SPIVAK, IN OTHER WORLDS: ESSAYS IN CULTURAL POLITICS 205 (1987) (discussing the strategic use of positivist essentialism in a postcolonial theory context). Strategic essentialism has been deployed in queer and feminist theory and has been adapted by critical race theorists. Generally strategic essentialism describes an intentional use of particular aspects of identity when doing so is advantageous to particular, usually subordinated groups. I argue for its use while differentiating it from elemental essentialism, which works to locate core unifying elements. See also *infra* Part IV.

51. Carbado, *supra* note 40 (discussing the use of civil rights rhetoric in the context of “Don’t Ask, Don’t Tell,” a policy that excluded lesbian, gay, and bisexual individuals from serving openly in the military).

Black communities. I turn to praxis in Part V, introducing multiple essentialisms (anti-, strategic, and elemental) as the theoretical underpinning for designing ways to avoid and mend Black/gay splits. I conclude that because of its focus on antisubordination and a transformation of power, utilizing CRT-based strategies can be successful in mending splits between subordinated communities—in this case Blacks and gays over civil marriage rights.

II. THE BLACK/GAY SPLIT

Stating that there is a Black/gay split over same-sex marriage is to note that access to marriage is a high priority for LGBT communities,⁵² while polling data has shown Blacks to be the racial or ethnic group least supportive of same-sex marriage.⁵³ Further, identifying a Black/gay split calls attention to the efforts to limit equal marriage access of some individuals and organizations opposed to same-sex marriage, representing those with dominant group characteristics, if not the actual prevailing ideology of the dominant groups themselves. Some groups have chosen to utilize race as a proxy for other characteristics, such as religiosity, as a rallying point in their fight against marriage equality.⁵⁴

There are other demographic splits over same-sex marriage, such as the rarely emphasized white/gay split. Focusing on a white/gay divide does not seem to be in the interests of same-sex marriage supporters or those in opposition. Articulating the presence of a white/gay split draws attention to the reality that those most prominently opposing gay marriage are white, while those most prominently supporting it are also white, but gay.⁵⁵ Black/gay splits are about subordinated groups in disagreement, whereas white/gay splits are about a dominant/subordinate

52. See SEAN CAHILL AND BRYAN KIM-BUTLER, NATIONAL GAY & LESBIAN TASK FORCE, POLICY PRIORITIES FOR THE LGBT COMMUNITY: PRIDE SURVEY 2006, at 7, available at <http://www.thetaskforce.org/downloads/reports/reports/2006PrideSurvey.pdf> (last visited Feb. 17, 2013) (noting that 70.3% of lesbians and gays identified marriage as the number one priority).

53. See *Gay Marriage Detailed Tables*, PEW RES. FOR PEOPLE & PRESS (May 23, 2012), http://www.people-press.org/files/legacy-detailed_tables/Gay%20mar%20detailed%20tables.pdf. (last visited Feb. 4, 2013) (detailing support or lack thereof for same-sex marriage based on numerous demographics, including race, which shows that in 2011-2012, Blacks supported same-sex marriage at a rate of 37%, Hispanics 43%, and Whites 48%); see also *Changing Attitudes on Gay Marriage*, PEW F. (Nov. 2012), <http://features.pewforum.org/same-sex-marriage-attitudes/slide6.php> (finding that 40% of non-Hispanic Blacks support same-sex marriage compared to 49% of non-Hispanic Whites).

54. Kevin Nix, *Previously Confidential Documents Shed Light on NOM Strategy*, HUM. RTS. CAMPAIGN (Mar. 26, 2012), <http://www.hrc.org/nomexposed/entry/must-read#.UIX35bT6l0w>.

55. See generally JOHN CORVINO & MAGGIE GALLAGHER, *DEBATING SAME SEX MARRIAGE* (2012).

paradigm—those with white and heterosexual privilege disagreeing with those who have white privilege, but are not privileged by their sexuality. Though the divisions over marriage in U.S. society are predominantly between white heterosexuals and white gays, when the ballot box is the locus of decision making and the electorate is almost evenly divided,⁵⁶ minority communities become important factions for those working for and against same-sex marriage. In battleground issues of the culture wars,⁵⁷ subordinated communities are enlisted to fight for each side.

A. *Identified*

In exploring the Black/gay split, I have found that “The Black Community” and “The Gay Community,” though not monolithic, mutually exclusive, or lacking overlaps, have assumed or have been assigned particular roles. When facing off across the marriage divide, generally Blacks are cast as a very religious, homophobic group adamantly opposed to same-sex marriage because of a white conspiracy to recruit Blacks into a sinful and/or sick lifestyle. On the other hand, gays are cast as white, upper-middle-class couples whose sole concern is getting the state to sanction their relationships as marriages and who label anyone who disagrees with them as homophobic bigots.

Divisions between Black and gay communities are articulated as two sides of the same argument when they are not. Same-sex marriage is not a racial-wedge issue, despite having been characterized as such. Similarly, it is not a religious issue but an issue of civil law. However, because in sociopolitical discourse Blacks have long been cast as very religious⁵⁸ and because Black social movements have long been run by religious institutions,⁵⁹ blackness and the Black community, as well as the Civil Rights Movement, are identified with religiosity.⁶⁰ This is one

56. See Emily Ekins, *National Exit Polls Reveal an Extraordinarily Divided Electorate*, REASON.COM (Nov. 9, 2012, 1:55PM), <http://reason.com/blog/2012/11/09/exit-polls-indicate-an-extraordinarily-d>; Lydia Saad, *Americans Issue Split Decision on Healthcare Ruling*, GALLUP (June 29, 2012), <http://www.gallup.com/poll/155447/americans-issue-split-decision-healthcare-ruling.aspx> (demonstrating a divided electorate).

57. See, e.g., JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

58. See *A Religious Portrait of African-Americans*, PEW F. (Jan. 30, 2009), <http://www.pewforum.org/a-religious-portrait-of-african-americans.aspx>.

59. See, e.g., Judith Rosenbaum, *Clergy in the Civil Rights Movement: Introductory Essay*, JEWISH WOMEN'S ARCHIVE, <http://jwa.org/teach/livingthelegacy/clergy-in-civil-rights-movement-introductory-essay> (last visited Feb. 2, 2013).

60. See Erik Eckholm, *Southern Baptists Set for a Notable First*, N.Y. TIMES (June 17, 2012), <http://www.nytimes.com/2012/06/18/us/southern-baptists-set-to-elect-their-first-black-leader.html>; John Pope, *The Rev. Fred Luter Jr. of New Orleans Elected First Black President of*

reason the notion of same-sex marriage, or any gay right, is perceived as morally wrong and a detriment to society. But instead, this notion should be perceived as a civil right.

On other culture-war fronts, there is little alignment between Blacks and the religious right. For example, the antiabortion movement's effort to divide Blacks and women on the issues of abortion and birth control asserts that abortion and birth control are each a form of genocide.⁶¹ But I argue that this assertion is not constructed as a Black/woman split, partially because there is recognition that some women are actually Black and some Blacks are actually women. Secondly, Black women have been visible in prochoice movement leadership,⁶² whereas there has been at least a perception of limited representation of Blacks in national LGBT leadership. This invisibility promotes notions that gayness equals whiteness⁶³ and sets it in opposition to blackness.

B. Located

It is important to understand the locations of Black/gay splits because, though this work primarily focuses on the most public and visible location of the split in same-sex marriages, the manner in which the CRT principles are articulated and employed applies to all locations. Black/gay splits are not merely about a division between a racial demographic known as Blacks and those individuals who identify, and

Southern Baptist Convention, TIMES-PICAYUNE (June 19, 2012, 6:27 PM), http://www.nola.com/news/index.ssf/2012/06/fred_luter_jr_of_new_orleans_e.html.

61. See *Planned Parenthood Rejects Cain Claim Abortion Clinics Are Aimed at Black 'Genocide'*, FOX NEWS (Oct. 30, 2011), <http://www.foxnews.com/politics/2011/10/30/planned-parenthood-rejects-cain-claim-abortion-clinics-are-aimed-at-black/>. See generally BLACK GENOCIDE.ORG, <http://www.blackgenocide.org> (last visited Feb. 2, 2013).

62. See FAYE WATTLETON, *LIFE ON THE LINE* (1996) (recounting a memoir by the Black former head of Planned Parenthood); Douglas Martin, *Flo Kennedy, Feminist, Civil Rights Advocate and Flamboyant Gadfly, Is Dead at 84*, N.Y. TIMES (Dec. 23, 2000), <http://www.nytimes.com/2000/12/23/us/flo-kennedy-feminist-civil-rights-advocate-and-flamboyant-gadfly-is-dead-at-84.html> (reporting on the death of Black feminist Flo Kennedy).

63. I am not specifically referring to the race of politicians or individual staff members of LGBT organizations working to secure marriage rights, or on any other issue, because I make no assumptions about racial identity from pictures (though to my knowledge much of the identified organizational leadership has not self-identified as people of color). When writing about the whiteness of gay communities and organizations, I note the absence of self-identified people of color and the perceptions built around that limited visibility. See, e.g., Kate Kendell, *Race, Same-Sex Marriage, and White Privilege: The Problem with Civil Rights Analogies*, 17 YALE J.L. & FEMINISM 133, 135 (2005) (noting that the image of the gay community is a white one); URVASHI VAID, *VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION* 274-306 (1995) (discussing racial and gender intolerance in the LGBT movement, but identifying an increase within the movement in the number of women and people of color who hold leadership positions).

have been grouped together, as LGBT—they are also among and within these racial and sexual demarcations and identities internal to communities and individuals.⁶⁴

This Article focuses on the public visibility of the “Between Communities” location. It has garnered the most interest and was the most noteworthy articulation of the split during the events surrounding Prop. 8. Further, The National Organization for Marriage’s⁶⁵ efforts to manufacture divisions between Blacks and gays⁶⁶ has heightened interest in this particular schism. However, I first briefly explore other dividing lines relating to same-sex marriage that occur among and within each of the communities as internal splits that impact the larger, external one.

Among Black communities and gay communities there are expectations about how individuals should behave, such as being discrete or covering,⁶⁷ and about where loyalties to each group should lie. Black and LGBT communities are internally divided over the issue of marriage as well as its significance.⁶⁸ Members of both communities have questioned the importance of marriage,⁶⁹ thus reinforcing the notion that marriage is for whites and for heterosexuals. Black LGBT persons have

64. See, e.g., Freddie Allen, *Same-Sex Marriage Divides Black Ministers*, DIST. CHRONICLES (Nov. 4, 2012, 9:11 PM), <http://www.districtchronicles.com/same-sex-marriage-divides-black-ministers-1.2944385#.UKMDYKX6I0w>; Barbara Bradley Hagerty, *Black Ministers in D.C. Divided over Gay Marriage*, NPR (July, 1 2009, 12:10 AM), <http://www.npr.org/templates/story/story.php?storyId=106162356>; Honan, *supra* note 18.

65. NAT’L ORG. FOR MARRIAGE, <http://www.nationformarriage.org> (last visited Feb. 17, 2013).

66. See Thomaston, *supra* note 35; Mark Potok & Evelyn Schlatter, *National Organization for Marriage Continues To Spread Lies About Gays*, SOUTHERN POVERTY L. CTR. (Summer 2012), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/summer/shading-the-truth>.

67. See KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* ix (2006) (“To cover is to tone down a disfavored identity to fit into the mainstream. In our increasingly diverse society, all of us are outside the mainstream in some way. Nonetheless, being deemed mainstream is still often a necessity of social life. For this reason, every reader of this book has covered, whether consciously or not, and sometimes at significant personal cost.”).

68. See RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* (2011) (addressing the decline in marriage rates among Blacks and articulating the notion that some Blacks may not see it as necessary, though it may be desirable, if it means marrying outside the race); John D’Emilio, *The Marriage Fight Is Setting Us Back*, GAY & LESBIAN REV. WORLDWIDE (Nov./Dec. 2006), <http://www.glreview.com/issues/13.6/13.6-demilio.php>. But see R.A. Lenhardt, *Integrating Equal Marriage*, 81 FORDHAM L. REV. 761 (2005) (discussing how the argument that “gays and lesbians are good stewards of marriage” frames Blacks, who are not marrying in the same numbers as other demographics, as bad for marriage).

69. E.g., Lenhardt, *supra* note 68; Ettelbrick, *supra* note 41, at 370.

ranked marriage rights as an issue of low priority for LGBT community organizing and investment of resources.⁷⁰

Further, within individual Blacks, gays, gay Blacks and Black gays (different identities because at times a person may need to choose which comes first) there are ongoing private struggles. Torn between two mandates—“don’t put your business in the streets”⁷¹ and “come out, come out, wherever you are”⁷²—LGBT African-Americans are in a catch-22 of conflicting messages between two groups with which they identify. Also present is the notion that there is an ability to be closeted but not an ability to hide blackness, which places Black gays in a perilous position of attempting to be authentically Black and acceptably gay. Further, both communities expect that its own identity should be the only (or at least the primary) one with which the individual identifies, requiring Black gays to “choose” one identity and community over the other and resulting in living partial lives in either or both communities. Within gay communities, as with the rest of society, whiteness is both the norm and the ideal, meaning that a gay Black person must often racially cover.⁷³ Thus, divisions among and within Blacks and gays, and each community, enhance splits between the two groups.

III. CIVIL (MARRIAGE) RIGHTS: DIVISIONS OVER . . .

At the heart of divisions between Blacks and gays over marriage rights are differences based on definitions and usage of some core terms. Three heavily contested terms are “immutability,” “civil rights,” and “marriage.” Generally, LGBT-rights organizations fighting for marriage have found success in courtrooms⁷⁴ and with legislatures⁷⁵ because they

70. Sally Steenland & Susan Thistlethwaite, *Working for Equality in the Great Lakes State: Collaborations Between LGBT and Faith Groups in Michigan*, CTR. FOR AM. PROGRESS 6 (Jan. 2011), <http://www.americanprogress.org/issues/lgbt/report/2011/01/27/8895/working-for-equality-in-the-great-lakes-state/> (“Race and ethnicity affected how issues were prioritized, with African-American interviewees ranking marriage equality lower than white interviewees.”). *But see* Cahill & Kim-Butler, *supra* note 52, at 5 (finding that “marriage/partner recognition” was the number one priority for all racial and ethnic LGBT groups surveyed).

71. Darlene Clark Hine, *Reflections on Race and Gender Systems*, in *HISTORIANS AND RACE: AUTOBIOGRAPHY AND THE WRITING OF HISTORY* 51, 62 (Paul A. Cimbala & Robert F. Himmelberg eds., 1997) (writing specifically about Black women being cautioned in this manner, but noting that the cautionary phrase was an “often heard refrain” in Black communities).

72. Jamie McGonnigal, *Come Out, Come Out, Wherever You Are!*, LGBTQ NATION (Oct. 11, 2012), <http://www.lgbtqnation.com/2012/10/come-out-come-out-wherever-you-are/>.

73. *See* Yoshino, *supra* note 67, at 122.

74. *See generally In re Marriage Cases*, 183 P.3d 384 (Cal. 2008), *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

75. *See* N.Y. DOM. REL. LAW § 10-a (2011); C.G.S.A. § 46b-20 (2009); D.C. CODE §§ 46-401, 46-402, 46-403, 46-406 (2011).

advocate for the universality of these terms and define them in a legal context. On the other hand, Black, mostly religious, organizations argue about meaning and usage from a sociocultural (often religious) standpoint.⁷⁶ Furthermore, divisions can be exacerbated by courtroom victories. In reviewing the marriage cases, from *Baehr v. Lewin*⁷⁷ to *Perry v. Brown*,⁷⁸ it is apparent that LGBT groups are “winning” the discourse war; the language used and definitions posited by the “marriage rights” movement have been incorporated in legal decisions.⁷⁹

However, these legal wins do not occur in cases where the parties are Black or where Black identity is at issue; there is no legal fight at this location. The legal skirmishes are between whites over nonracial issues. The proponents and opponents both represent whites and whiteness, whether representing the interests of heterosexuals and “traditional” marriage, or gay men and lesbians and same-sex marriage. Both groups argue over the same language, often in the context of the true meaning of the holding in *Loving v. Virginia*.⁸⁰ In no same-sex marriage-related case has the assertion been made that the right argued for—whether it is the fundamental right to marry or the right to religious freedom—should exclude Blacks. Thus even though the courtroom has been relatively friendly to gay marriage, the positive decisions have not come at the expense of Blacks. Still, in the public arena, there is a perception that the courts are siding with the gays and the discourse makes it appear as if this is occurring at the expense of Blacks.⁸¹

The debate over each of these terms or issues—immutability, civil rights, and the definition and purpose of marriage—has become an

76. Karen Pennington, *Is Marriage a Legal Term or a Religious One? Framing the Issue of Homosexual Marriage*, EXAMINER (Nov. 6, 2009), <http://www.examiner.com/article/is-marriage-a-legal-term-or-a-religious-one-framing-the-issue-of-homosexual-marriage>; Mick Bloom, *‘Marriage’ a Religious Term Before It Was a Legal Term*, CUMBERLAND TIMES-NEWS (Mar. 25, 2011), <http://times-news.com/opinion/x449324836/-Marriage-a-religious-term-before-it-was-a-legal-term>.

77. *Baehr v. Lewin*, 74 Haw. 530 (1993).

78. *Perry v. Brown*, 265 P.3d 1002 (Cal. 2011).

79. At the time of the decision in *Baehr*, the Hawaii Supreme Court accepted an argument that marriage was for procreation, but by the time *Perry* was decided, the California Supreme Court agreed with the argument that marriage was for more than procreation.

80. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

81. The number of organizational endorsements of same-sex marriage including those by the NAACP and the National Council of La Raza increased in the run up to the 2012 election. See Michael Barbaro, *In Largely Symbolic Move, N.A.A.C.P. Votes To Endorse Same-Sex Marriage*, N.Y. TIMES (May 19, 2012), <http://www.nytimes.com/2012/05/20/us/politics/naacp-endorses-same-sex-marriage.html>; Michael K. Lavers, *National Council of La Raza Board Unanimously Approves Same-Sex Marriage Resolution*, WASH. BLADE (June 22, 2012), <http://www.washingtonblade.com/2012/06/22/exclusive-national-council-of-la-raza-board-unanimously-approves-same-sex-marriage-resolution/>.

argument over comparisons. Comparing one subordinated group's social and legal status to another's inevitably invokes a hierarchy of oppressions where subordinated groups are ranked according to who has had it worse, so to speak, and who is more deserving of access to resources perceived as limited.⁸² Immutability has become a question of whether or not sexual orientation is "the same as" race. The civil rights question has been framed to ask, are gay rights civil rights? And the marriage question has been framed to ask, can two people of the same sex be "married" in the way a man and woman of different races can be married? An argument articulated by those opposed to same-sex marriage is that if any of the answers to these questions is yes, it is to the detriment of Blacks.

These particular questions about marriage are framed to create a false dichotomy with race on one side and sexual orientation on the other as if they are comparable in the same-sex marriage context. However, race is not an integral aspect of same-sex marriage and bringing it into the debate is a red herring. This is not to say that applying cases that focus on racial discrimination in the context of making a sex- or sexual orientation-based argument or counterargument is inappropriate, nor is it meant to argue that antidiscrimination laws should not be equally applicable to all groups facing discrimination. But using racial identity as the main reason to support or oppose same-sex marriage serves no purpose but to create division. The assertion that race is not integral to the same-sex marriage discussion is not meant to imply that the advancements made by extending marriage rights to all who qualify may benefit white LGBT persons in ways that do not benefit Black LGBT persons since racialized benefits relate to existing racial hierarchies. If same-sex couples are extended marriage rights, Blacks, whether straight or gay, will remain the same distance behind whites in society, whether straight or gay. There is no net negative effect on Blacks or Black identity because race is not an aspect of same-sex marriage itself. Finally, there are arguments about the benefits gays and lesbians will bring to marriage as an institution, which R.A. Lenhardt articulates as "the 'good stewards' notion that gay and lesbian couples are affirmatively 'good' for marriage [while] some others—gay or straight—are decidedly 'bad' for it."⁸³ In the "good steward" argument, Blacks are "cast as 'bad'

82. Linda Briskin, *Identity Politics and the Hierarchy of Oppression: A Comment*, 35 FEMINIST REV. 102, 102-03 (1990) (discussing the problems with Kathryn Harriss's argument in favor of a class based analysis).

83. Lenhardt, *supra* note 68, at 765-66.

for marriage.”⁸⁴ This suggests that indeed there is a negative impact on Blacks if same-sex marriage is legal, but the problem is the heteronormativity of the traditional marriage structure and the notion that same-sex marriage does not, and should not, change it. Lenhardt argues against the “legal stewards” narrative and for the value of “a range of intimate arrangements.”⁸⁵ Thus, the racial aspects of the problem are not found in the same-sex aspects of marriage, but found in the existing structure of traditional marriage and the willingness of two people, gay or straight, to bind themselves to it.

A. *Immutability*

If a characteristic or trait is immutable, it has been “determined solely by the accident of birth,”⁸⁶ and is therefore unchangeable. A basic disagreement in the Black/gay split over marriage is over the immutability of race and sexual orientation, where race is immutable and sexual orientation is not.⁸⁷ However, when arguing about immutability, particularly outside the legal context, the debate is over whether one can or should change one’s sexual orientation,⁸⁸ which is often grounded in the question of whether sexual orientation is really about conduct or status.⁸⁹ Though not necessarily a legal dividing line, courts have noted that identity/status and conduct/behavior are different from one another⁹⁰ while “declin[ing] to distinguish between [the two] in [the] context of sexual orientation.”⁹¹ Commonly, these two concepts are found to be intertwined so that one may not separate homosexual identity from conduct related to it.⁹² In other words, one is what one does.⁹³ This

84. *Id.*

85. *Id.* at 770.

86. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

87. Angela Onwuachi-Willig, *Undercover Other*, 94 CALIF. L. REV. 873, 879-80 (2006).

88. *See Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2990 (2010); *Michael M. v. Sonoma Cnty.*, 450 U.S. 464, 477-78 (1981) (discussing immutable characteristics).

89. *See Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Kiley v. Am. Soc. for Prevention of Cruelty to Animals*, 296 F. App’x 107 (2d Cir. 2008).

90. *See Romer v. Evans*, 517 U.S. 620 (1996); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Grp. of Boston*, 515 U.S. 557 (1995); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Lawrence v. Texas*, 539 U.S. 558 (2003); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *see also Yoshino*, *supra* note 67.

91. *Perry v. Brown*, 265 P.3d 1002, 1093 (Cal. 2011) (citing *Christian Legal Soc’y*, 130 S. Ct at 2990).

92. *See Christian Legal Soc’y*, 130 S. Ct. at 2990 (“This case itself is instructive in this regard. CLS contends that it does not exclude individuals because of sexual orientation, but rather ‘on the basis of a conjunction of conduct and the belief that the conduct is not wrong.’ Our decisions have declined to distinguish between status and conduct in this context.” (citation omitted)); *see also* Brief of Amici Curiae for Lambda Legal Defense and Education Fund, Inc., et

means that one is gay because he or she does gay things—generally referring to particular sex acts. The opposition then is to the “gay acts,” and not necessarily to the gay person, because there fundamentally is no such identity.⁹⁴ Therefore, when it comes to sexual orientation, even if there is an acknowledgement of a status that is different from a conduct, the status is defined by the conduct. This is not so with race, whether determined by law, society, or within Black communities. Though there is a notion of how to be Black, the determination of blackness is still very rooted in the one-drop rule⁹⁵ and physical characteristics,⁹⁶ rather than behavior.

It has been posited that within Black communities, LGBT-ness is still understood as behavior-driven, as something one does,⁹⁷ while within gay communities it is an identity,⁹⁸ or something one is. One simply is lesbian, gay, bisexual, or transgender, without doing anything.⁹⁹ If these differential understandings are true, it can help explain Black/gay splits.

al. in *Support of Respondents 720*, 130 S. 2971 (2010); cf. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270 (1993) (“A tax on wearing yarmulkes is a tax on Jews.”).

93. *But see Lawrence*, 539 U.S. at 560 (differentiating between the criminalization of a behavior based on an identity and conduct).

94. Note that the term “homosexual” is a creation of Victorian England. Before this time, no such identity existed—at least not as a matter of law. See DAVID F. GREENBERG, *THE CONSTRUCTION OF HOMOSEXUALITY* 409 (1988).

95. F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* (1991), *excerpt available at* <http://www.pbs.org/wgbh/pages/frontline/shows/jefferson/mixed/onedrop.html> (“The nation’s answer to the question ‘Who is black?’ has long been that a black is any person with *any* known African black ancestry. This definition reflects the long experience with slavery and later with Jim Crow segregation. In the South it became known as the ‘one-drop rule,’ meaning that a single drop of ‘black blood’ makes a person black.”). I argue that gay identity is constructed by a “one act rule,” meaning that one same-sex encounter means that someone is gay.

96. See Keith B. Maddox, *Perspectives on Racial Phenotypicality Bias*, 8 *PERSONALITY & SOC. PSYCH. REV.* 383 (2004), *available at* <http://ase.tufts.edu/psychology/documents/pubs/MaddoxPerspective.pdf> (discussing biases based on race-related characteristics of the face).

97. The Black community’s understanding of homosexuality as an act or behavior that can be changed may be based on religious influences. See, e.g., Jeffrey G. Ford, *Healing Homosexuals: A Psychologist’s Journey Through the Ex-Gay Movement and the Pseudo-Science of Reparative Therapy*, 5 *J. GAY & LESBIAN PSYCHOTHERAPY* 69, 70-71 (2001) (arguing that reparative therapy has a religious foundation by being grounded in the idea that homosexuality is a negative behavior (in religious parlance, a sin) that can be repaired).

98. See, e.g., RODERICK A. FERGUSON, *ABERRATIONS IN BLACK: TOWARD A QUEER OF COLOR CRITIQUE* (2004); MIGNON R. MOORE, *INVISIBLE FAMILIES: GAY IDENTITIES, RELATIONSHIPS, AND MOTHERHOOD AMONG BLACK WOMEN* (2011).

99. But note the argument that has been advanced is if one does, one is. This often comes into play when an individual has not self-identified as gay or lesbian but is suspected of, or known to be, sexually involved with people of the same sex. Famous or influential people have been “outed,” as “actually” gay or lesbian even if they does not identify as such. See Daniel D’Addario, *Outward Bound: Celebs Struggle To Keep Sexuality Secret(ish), But Media Make Mischief*, *N.Y. OBSERVER* (June 20, 2012, 8:00 AM), <http://observer.com/2012/06/outward-bound-celebs-struggle-to-keep-sexuality-secretish-but-media-make-mischief/?show=all>.

LGBT communities have formed around sexual orientation and gender as identities;¹⁰⁰ this is core to organizing around marriage rights and the arguments in same-sex marriage cases.¹⁰¹ If indeed, within Black communities, homosexuality is still constructed only as a behavior, and if the notion of sexuality being an identity is perceived as a threat to blackness or contrary to existing racial group membership,¹⁰² then the two groups are not even speaking the same language on issues relating to sexuality. Further, if LGBT-ness is about behavior, then being lesbian, gay, bisexual, or transgender may be an issue of perceived misbehavior or, in religious parlance, sin. Thus, same-sex marriage gives legal and social sanction to misbehavior/sin.¹⁰³ Current media coverage of the same-sex marriage debate and the Black position on it, as espoused by religious leaders, presents the notion that Black communities construct homosexuality as a freely chosen behavior, as it is regularly referred to as a sin.¹⁰⁴ However, the position of sexuality as an identity, espoused by LGBT groups and same-sex marriage supporters, seems to be winning in legal discourse.¹⁰⁵

This debate over whether sexual orientation is a choice and whether it is an identity or behavior is not unique to disagreements over same-sex marriage. The position ascribed to the Black community—that being gay is based on what one does—is a core argument against gay rights in

100. See GAY CULTURE IN AMERICA: ESSAYS FROM THE FIELD (Gilbert Herdt ed., 1993); Gary W. Harper & Margaret Schneider, *Oppression and Discrimination Among Lesbian, Gay, Bisexual and Transgendered People and Communities: A Challenge for Community Psychology*, 31 AM. J. OF COMM. PSYCH. (June 2003), available at <http://www.springerlink.com/content/1411067qmx8016tq/>.

101. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E. 2d 941 (Mass. 2003); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Baker v. Vermont*, 744 A.2d 864 (Ver. 1999); see also Steenland & Thistlethwaite, *supra* note 70, at 27.

102. See Mignon R. Moore, *Articulating a Politics of (Multiple) Identities: LGBT Sexuality and Inclusion in Black Community Life*, 7 DU BOIS REV. 315 (2010) (discussing Black LGBT individuals negotiating LGBT identities in Black environments); see also MOORE, *supra* note 98.

103. See Celine Abramschmitt, Note, *The Same-Sex Marriage Prohibition: Religious Morality, Social Science, and the Establishment Clause*, 3 FIU L. REV. 113, 145 (2007) (“What is revealed in some of the case law, which discusses moral values as a basis for the prohibition, is an attitude of moral judgment that same-sex sexual practices are inherently immoral and thus same-sex marriage is morally wrong.”).

104. See, e.g., Matt Slick, *What Does the Bible Say About Homosexuality?*, CHRISTIAN APOLOGETICS & RESEARCH MINISTRY, <http://carm.org/bible-homosexuality> (last visited Feb. 6, 2013); Sasha Aslanian, *The Deep Roots of the Marriage Debate*, MINN. PUB. RADIO (Oct. 25, 2012), <http://minnesota.publicradio.org/collections/special/2012/campaign/amendments/marriage/timeline/home/>.

105. The language throughout same-sex marriage decisions refers to “gays” and “lesbians,” and not to gay and lesbian acts or behaviors. See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

general.¹⁰⁶ In the “is” versus “does” part of a racialized same-sex marriage debate, opponents of marriage equality construct sexual orientation in opposition to race. They assert that one is a choice—sexual orientation—and one is not—race—which renders any analogizing, especially in the context of utilizing *Loving*¹⁰⁷ as the model for marriage rights litigation, erroneous because of the comparison between two unlike traits.¹⁰⁸

The issue of the immutability of sexual orientation is tied to determining whether sexual orientation is based on what a person does or is. If sexual orientation is identified by behavior, then a person can change his or her sexual orientation; if sexual orientation is based on who one is, he or she cannot change this core identity. In state and federal constitutional jurisprudence, immutability is important to determining issues related to classification. While in the debate between Blacks and gays, immutability relates to whether or not race and sexuality can or should be compared. Arguing that sexual orientation is the same as, or just like, race is an argument that may prove successful in a court of law, but may fail in a court of public opinion.¹⁰⁹ Further, whether one can change one’s sexual orientation, one’s race, or both, is irrelevant to supporting or opposing same-sex marriage because if same-sex marriage bans are lifted, then gender, sexual orientation, and gender identity are removed from determining who may marry. Thus the question of how or why homosexuals, bisexuals, or transgender individuals exist no longer matters when granting access to civil marriage.

There is no logic to an argument that posits that because blackness is an immutable characteristic and gayness is mutable, Blacks should oppose same-sex marriage. In addition, simply because sexual orientation, like race, is immutable,¹¹⁰ it is equally illogical to assert that Blacks should support same-sex marriage. As with most declared points of demarcation along the Black/gay split, when addressing issues of identity and identification, one has little or nothing to do with the other.

106. See James Hormel, *Being Gay Is Not a Choice*, CNN (Nov. 16, 2011, 7:46 PM), <http://www.cnn.com/2011/11/16/opinion/hormel-shorter-gay-not-a-choice/index.html>; Abramschmitt, *supra* note 103, at 181.

107. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

108. Note that *Loving* was decided on both privacy and equal protection grounds. *Id.* at 12; see also CORVINO & GALLAGHER, *supra* note 55, at 89.

109. See Catherine Smith, *Queer as Black Folk?*, 2007 WIS. L. REV. 379, 380 (2007) (discussing the problems with the “same-as” argument).

110. See *Conaway v. Deane*, 932 A.2d 571, 616 (Md. 2007); *Hernandez v. Robles*, 26 A.D.3d 98, 114-15 (N.Y. 2005); *Lewis v. Harris*, 908 A.2d 196, 210 (N.J. 2006).

B. “Civil Rights”

The divide over civil rights often comes down to what I refer to as capital “C” and “R” versus lower case “c” and “r,” with the capital letters referring to the Civil Rights Movement¹¹¹ and the lower case version referring to civil rights as a class of rights that should be afforded to all people. The argument advanced by some same-sex marriage opponents, that gay rights are not civil rights, is more appropriately stated by asserting that gay rights were not a part of the agenda of the African-American Civil Rights Movement of the 1950s and 1960s.¹¹² This is an accurate statement, as homosexual issues were invisible and homosexuals themselves were marginalized, at best, in that particular social movement. Lower case “c” and “r” civil rights are their own category¹¹³ that includes many individual and group rights, such as the right to marry.

Comparing the marriage-rights movement to the Black Civil Rights Movement is a suspect tactic. It is also one that, as with other comparisons involving two minority groups, some find offensive.¹¹⁴ Certain members of the Black community, especially those involved in the movement activism of the Fifties and Sixties, may feel a sense of ownership as it relates to the civil rights moniker. Understandable is the concern that usage of the phrase by other groups dilutes the Movement’s impact and meaning, ultimately minimizing the struggle for racial equality and marginalizing the efforts of those who fought and died during that time period.

I argue that a reason a divide exists over the use of the term civil rights is that the lower case “c” and “r” civil rights have become part of a same-sex marriage public relations and political campaign, when usage of the term should have remained part of a court-based strategy.

111. See JUAN WILLIAMS, *EYES ON THE PRIZE: AMERICA’S CIVIL RIGHTS YEARS, 1954-1965*, at xi (1987).

112. See *generally id.*

113. Civil rights are a broad category, though not as broad as human rights. See Legal Information Institute, *Civil Rights: An Overview*, CORNELL UNIV. L. SCH. (Aug. 19 2010, 5:12 PM), http://www.law.cornell.edu/wex/civil_rights; see also *The Universal Declaration of Human Rights*, GAOR (1948).

114. See Travis Loller, *Southern Baptists: Gay Rights Not Civil Rights*, HUFFINGTON POST (June 20, 2012, 7:50 PM), http://www.huffingtonpost.com/2012/06/21/southern-baptists-gay-rig_n_1615466.html; Kate Taylor, *Black Leaders and Gay Advocates March In Step*, N.Y. TIMES (June 9, 2012) (“The distance that has long existed between the gay rights and civil rights movements has complex roots. In addition to the strain of social conservatism that pervades many black Protestant churches, gay rights advocates’ use of the phrase ‘civil rights’ and comparisons of the two movements have sometimes offended African-Americans, according to Michael Eric Dyson, a professor of sociology at Georgetown University.”).

Litigation is a significant aspect of the same-sex marriage-rights movement because it established marriage as a fundamental right.¹¹⁵ This is perhaps why incorporation of case-based arguments about civil rights has found its way to the public arena. The decision in *Loving v. Virginia* was as much of a Civil Rights Movement victory as was *Brown v. Board of Education*.¹¹⁶ Thus, comparing a litigation-based marriage-rights movement grounded by a precedent-setting case, to the Civil Rights Movement, which also utilized the courts, seems appropriate when formulating legal arguments. However, when working on transforming public opinion, there may be more suitable comparisons such as analogizing marriage rights and reproductive rights, or sexual freedom and religious freedom.¹¹⁷

C. *The Meaning(s) and Purpose(s) of Marriage*

The meaning of marriage itself is the subject of debate between the Black and gay communities. As previously noted, the definition from the perspective of the Black community, as articulated especially by clergy,¹¹⁸ is that a marriage is a union between a man and a woman. That is simply what marriage is, and therefore any relationship between members of the same sex cannot be a marriage. There is no need to issue marriage licenses to same-sex couples because they cannot have a marriage, even if the couple or anyone else refers to the relationship as such. Though seemingly an argument over the definition of a word, the debate is really over what marriage means within society and what benefits, both tangible and intangible, it offers through the law.

While the extension of the status of civil marriage to same-sex couples is not a race issue, this is not to imply that marriage itself is not racialized. Cultural or community-based norms may racialize marriage,

115. See *Loving v. Virginia*, 388 U.S. 1, 2 (1967) (holding Virginia's antimiscegenation law, which criminalized marriage between whites and nonwhites, unconstitutional); *Zablocki v. Redhail*, 434 U.S. 374, 390-91 (1978) (striking down a Wisconsin law prohibiting parents who were delinquent on child support from remarrying); *Turner v. Safley*, 482 U.S. 78, 81 (1987) (determining that even prisoners could exercise the right to marry).

116. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

117. See Jeffrey A. Redding, *Queer/Religious Friendship in the Obama Era*, 33 WASH. U. J.L. & POL'Y 211, 213 (2010).

118. *Coalition of African American Pastors Coalesces Key Civil Rights Leaders for Marriage*, PRWEB (May 15, 2012), <http://www.prweb.com/releases/2012/5/prweb9499716.htm> (reporting that Black Clergy "[d]eclare that 'one man, one woman' definition of marriage is where they will stand"); see also C. Nicole Mason, *At the Crossroads: African-American Attitudes, Perceptions and Beliefs Toward Marriage Equality*, NAT'L BLACK JUST. COAL. 7 (2009), available at <http://nbjc.org/resources/reports-publications> (documenting the importance of the church in the Black community and the link between church teachings and attitudes about same-sex marriage).

producing differences between a married couple where both partners are Black and one where both are white.¹¹⁹ Further, each of these monoracial marriages may differ from one that is interracial.¹²⁰

Same-sex marriage has been constructed as racialized when politically expedient to do so. In states where there are a significant number of Blacks and Latinos, both pro- and anti-marriage equality forces have made efforts to incorporate racial messages in their campaigns.¹²¹ The campaigns in locales with Black populations large enough to impact votes on same-sex marriage, such as California, Maryland, Washington D.C., and North Carolina, are arguably examples of places where campaigns were racialized.¹²²

I am not contending that same-sex marriages are identical to opposite-sex marriages but am simply acknowledging that race, gender, and sexuality-based differences may exist within individual marriages or marriage itself. Same-sex and opposite-sex marriages may be different from each other, but each opposite-sex and same-sex marriage differs from any other as well. Essentially every marriage is different in degree, if not in kind. These differences, however, do not mean that same-sex

119. There is an ongoing discussion about the place of opposite-sex marriage within the Black community, as well as the necessity of marrying within the race. See Banks, *supra* note 68, at 535 (incorporating cultural and community concerns about marriage while exploring the decline in marriage rates amongst Blacks); see also Lenhardt, *supra* note 68, at 766 (noting that African Americans have a high rate of noncompliance with traditional marriage norms).

120. See Jeffrey Passel, Wendy Wang & Paul Taylor, *One-in-Seven New U.S. Marriages Is Interracial or Interethnic*, PEW RES. CTR. (June 4, 2010), <http://pewresearch.org/pubs/1616/american-marriage-interracial-interethnic>; see also Onwuachi-Willig, *supra* note 87, at 874 (describing how being a Black woman married to a white man “destabilizes [her] racial identity in the eyes of some people,” while addressing “a prevalent attitude in the black community that rejects an analogy between contemporary legal bans on same-sex marriages and once-existing bans on interracial marriages”).

121. See, e.g., Baird Helgeson, *Black Voters Targeted in Minnesota’s Marriage Amendment Fight*, STAR TRIB. (Oct. 23, 2012, 6:20 AM), <http://www.startribune.com/politics/statelocal/175337851.html>; Andrew McCarthy, *Maryland Voters Poised To OK Gay Marriage*, SLATE (Oct. 18, 2012, 1:17 PM), http://www.slate.com/blogs/the_slatest/2012/10/18/maryland_gay_marriage_vote_wapo_poll_suggests_state_could_be_first_to_vote.html; Kaufman, *supra* note 21; *NC NAACP Rolls Out Statewide Media Campaign To Expose the Truth About Amendment One*, COAL. TO PROTECT N.C. FAMILIES (Apr. 26, 2012), <http://www.protectncfamilies.org/news/nc-naacp-rolls-out-statewide-media-campaign-expose-truth-about-amendment-one>.

122. See Kheven LaGrone, *Pimping Blackness in the Fight Against Prop 8*, S.F. BAY VIEW (Nov. 19, 2008), <http://sfbayview.com/2008/pimping-blackness-in-the-fight-against-prop-8/> (“Proposition 8 was compared to legalized racial oppression.”); Molly Ball, *The Marriage Plot: Inside This Year’s Epic Campaign for Gay Equality*, ATLANTIC (Dec. 11, 2012, 7:05 AM), http://www.theatlantic.com/politics/archive/2012/12/the-marriage-plot-inside-this-years-epic-campaign-for-gay-equality/265865/?single_page=true (discussing the “unique challenge” Maryland posed because of the percentage of the electorate that was made up of Blacks and the National Organization for Marriage’s racial-wedge strategy).

marriage, or even marriage itself, is about race. Neither does it mean that same-sex marriage, designed to bring same-sex couples into the existing meaning of marriage, will change the impact of race on marriage, marriage on race, or the meaning of marriage itself.

The modern meaning of marriage and its purpose, even when exclusively in the realm of opposite-sex couples, has not been legally racialized since *Loving*.¹²³ Though it may be possible to deny interracial couples the social status or acceptability of a “real marriage” despite being married under the laws of every state, this denial of social recognition does not contravene the legality. If the pair otherwise meets the requirements for a marriage license, then they can marry under the law. Though marriage as a status is not an issue of race and should not be one of sexual orientation, the impact of being married or being able to marry may have a race or sexuality-based component. Same-sex marriage does not make Black people more nor less Black or gay people more nor less gay.¹²⁴

With respect to the racialized element of marriage, it is not in the meaning or purpose but the consequences of being married. For instance, there are questions as to whether marriage benefits Blacks in the same way it does whites.¹²⁵ Though not the focus of this work, same-sex marriage can reframe the social constructs known as the African American family as well as LGBT families.¹²⁶ Within both communities, the definition of the word “family” already often includes more than those legally recognized as such. To incorporate same-sex married couples in what we know as the “Black Family” can transform Black communities and the narrative about the “Black Family” as well as “Black Fatherhood” and “Black Motherhood.”

The full incorporation of Black families into LGBT communities also reframes how we understand LGBT identity and its relationship to

123. See *Loving v. Virginia*, 388 U.S. 1 (1967). But see *Miscegenation*, NEW WORLD ENCYCLOPEDIA, <http://www.newworldencyclopedia.org/entry/Miscegenation> (last visited Feb. 2, 2013) (“When the U.S. Supreme Court ruled anti-miscegenation laws unconstitutional, 16 states still had laws prohibiting interracial marriage. Those laws were not completely repealed until November 2000, when Alabama became the last state to repeal its anti-miscegenation law.”).

124. Though there is an argument that marrying makes one less “queer,” that discussion is beyond the scope of this Article.

125. I suggest that when same-sex marriage is more common, the impacts will be more similar along race and gender lines than sexual orientation-based ones.

126. Steven Ruggles, *The Origins of African-American Family Structure*, 59 AM. SOC. REV. 136, 136-37 (1994) (explaining the social structure of the African-American family); Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 J. MARRIAGE & FAM. 3 (Feb. 2010); Gary J. Gates, *Family Formation and Raising Children Among Same-Sex Couples*, 51 NAT’L COUNCIL ON FAMILY RELATIONS F1 (2011); ABBIE E. GOLDBERG, *LESBIAN AND GAY PARENTS AND THEIR CHILDREN: RESEARCH OF THE FAMILY LIFE CYCLE* (2010).

marriage. When relationships are layered with a subordinated racial identity, marriage may not carry the same meaning or have the same impacts.¹²⁷ The assertion is that Black LGBT married couples may not actually be able to access the same privileged status that marriage may bring to white gays. For people of color, marriage might be more about benefits and less about status; domestic partnerships or civil unions may actually provide for unmet needs in a sufficient manner.¹²⁸ Thus we may see opposition to marriage as a status, but not to the benefits conferred by marriage.¹²⁹ Conversely, as it seems to exist currently for Black LGBT people, we may see a ranking of other issues as more important than marriage.¹³⁰ If marriage means something different for Blacks, straight or gay, then coalition-building efforts need to utilize different strategies.¹³¹

1. Religious Arguments

At its core, the Black/gay split is one that rests in religion. The leadership in the Black community that has been most vocal against marriage rights for same-sex couples has primarily been Black clergy.¹³² It was clergy and other people of faith who were “disappointed” in President Obama when he made his statement personally supporting same-sex marriage,¹³³ and Black churches have been the targets for antigay marriage campaigns, such as California’s Prop. 8 and North

127. See JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* 6 (2004); *Dematteo v. Dematteo*, 762 N.E.2d 797, 809 (Mass. 2002) (“Marriage is not a mere contract between two parties, but a legal status from which certain rights and obligations arise.”); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 941 (Mass. 2003); Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1 (2010) (addressing marriage as a status and not merely a collection of benefits received and burdens undertaken).

128. See *Civil Unions & Domestic Partnership Statutes*, NAT’L CONF. OF ST. LEGISLATURES (Nov. 2012), <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>; *Comparing Marriage and Civil Unions*, CNN (Feb. 26, 2004, 10:02 AM), <http://www.cnn.com/2004/LAW/02/26/bush.civil.unions/index.html>.

129. See *Poll: Americans Support Civil Unions, but Oppose Same-Sex Marriage*, PBS (Oct. 12, 2009, 2:14 PM), http://www.pbs.org/newshour/updates/politics/july-dec09/gay-marriage_10-12.html.

130. Steenland & Thistlethwaite, *supra* note 70, at 31.

131. Though I argue that same-sex marriage may impact marriage and family as institutions, I do not assert that the impacts will necessarily be negative.

132. See *Black Clergy Group Opposes Pres. Obama on Gay Marriage*, C-SPAN (July 31, 2012, 1:55 PM), <http://www.c-span.org/Events/Black-Clergy-Group-Opposes-Pres-Obama-on-Gay-Marriage/10737432751/>; Cheris F. Hodges, *Black Clergy Rip Obama on Gay Marriage*, CHARLOTTE POST (Sept. 6, 2012, 7:52 AM), <http://www.thecharlottepost.com/index.php?src=news&srctype=detail&category=News&refno=4944>.

133. *Black Clergy Group Opposes Pres. Obama on Gay Marriage*, *supra* note 132.

Carolina's Proposition 1.¹³⁴ Blacks describe themselves as religious or churchgoers at much higher rates than other racial or ethnic groups¹³⁵ and one may find many at church on Sunday.¹³⁶ The active involvement of churches, clergy, and churchgoers indicates that the anti-same-sex marriage argument is truly religious, and the Black/gay split is not a racial matter but a religious one. What follows is that if the argument against same-sex marriage is fundamentally based in religion, and Blacks are more religious/churchgoing than other groups, a religion-based division over same-sex marriage may be unavoidable, but does not require that a race/sexuality-based split to be inevitable.

There are two basic questions that relate to religion and same-sex marriage: (1) should a law's validity be determined by religious belief or doctrine, and (2) should one who holds a particular religious belief or is a member of a community of faith hold another to their standards when the other individual does not adhere to that same belief? In the context of a race-based split over marriage, the answers are not pertinent. I argue that because each question relates to religion and not race or sexual orientation, the questions themselves are fundamentally immaterial to the issue of the Black/gay split.

There is another construction of the Black/gay split in the context of religion, which acknowledges differing levels of religiosity between the two communities. Blacks are generally more religious than other racial groups¹³⁷ and LGBT persons are generally less religious than those who are members of the sexual orientation and gender-identity majority.¹³⁸

134. Leslie Fulbright & Matthai Kuruvila, *Prop. 8 Rivals Seek Support in Black Churches*, SFGATE (Oct. 22, 2008, 4:00 AM), <http://www.sfgate.com/news/article/Prop-8-rivals-seek-support-in-black-churches-3264774.php>; see also Kaufman, *supra* note 21 (reporting the purposeful targeting of African Americans by antigay marriage groups, such as NOM).

135. Theola Labbé-DeBose, *Black Women Are Among Country's Most Religious Groups*, WASH. POST (July 6, 2012), http://www.washingtonpost.com/local/black-women-are-among-countrys-most-religious-groups/2012/07/06/gJQA0BksSW_story.html?hpid=z5.

136. See Frank Newport, *Americans' Church Attendance Inches Up in 2010*, GALLUP (June 25, 2010), <http://www.gallup.com/poll/141044/americans-church-attendance-inches-2010.aspx> (showing that 55% of non-Hispanic Blacks and 52% of Black Hispanics frequently attended church, the highest rates of church attendance over a five-month period of any race or ethnic demographic).

137. *Id.*

138. See *Spiritual Profile of Homosexual Adults Provides Surprising Insights*, BARNAGROUP (2009), <http://www.barna.org/barna-update/article/12-culture/282-spiritual-profile-of-homosexual-adults-provides-surprising-insights> ("Although most adults affirm the importance of faith in their life, regardless of their sexual orientation, straight adults (72%) were more likely than gay adults (60%) to describe their faith as "very important" in their life. And even though most Americans consider themselves to be Christian, there is a noticeable gap between heterosexuals who self-identify that way (85%) compared to homosexuals (70%."); see also LGBT Alliance, *How Many LGBT Jews Are There*, JEWISH COMM. FED., <http://www.jewishfed.org>.

However, even with a divide over church attendance or religious affiliation, these differing levels of religiosity are not indicators of either group's position on same-sex marriage. Each group contains members who are in opposition to the religious or nonreligious majority. There are LGBT persons opposing marriage, Black ministers who support same-sex marriage,¹³⁹ and religious denominations that support equal marriage rights.¹⁴⁰ Fundamentally, a position supporting or opposing same-sex marriage is not a Black thing: it is a religion thing.

2. Secular Arguments

Of course, there are also secular arguments against same-sex marriage.¹⁴¹ The primary non-religion-based arguments focus on procreation and child rearing. These particular points of view often begin by identifying marriage as “an ancient institution that has always been defined as the union of one man and one woman.”¹⁴² The arguments also address heterosexuality in a monogamous union as being natural, good, and necessary for procreation and child rearing. They conclude that society should support traditional marriage through the law as it currently and historically exists because to do otherwise is detrimental to children and families.¹⁴³

Though not the focus of this Article, I argue civil marriage, as it currently exists, does not serve the purpose that those who advocate for “traditional marriage” believe it serves. It is not a “social institution powerful enough to actually change the sexual behavior of people”¹⁴⁴ or “a microcosm of civilization, and an organic connection between human

org/community/page/lgbt-demographic (last visited Feb. 18, 2013) (finding that 16% of lesbian, gay, and bisexual identified Jews were synagogue members while 36% of heterosexuals were synagogue members).

139. See Aaron C. Davis, *Rev. Sharpton, Black Clergy Urge Support of Md. Same-Sex Marriage Referendum*, WASH. POST (Sept. 21, 2012, 7:16 PM), http://www.washingtonpost.com/blogs/maryland-politics/post/rev-sharpton-black-clergy-urge-support-of-md-same-sex-marriage-referendum/2012/09/21/53ca94a2-0436-11e2-91e7-2962c74e7738_blog.html.

140. *Religious Groups' Official Positions on Same-Sex Marriage*, PEW F. (Dec. 7, 2012), <http://www.pewforum.org/gay-marriage-and-homosexuality/religious-groups-official-positions-on-same-sex-marriage.aspx>.

141. See generally Polikoff, *supra* note 41; Maggie Gallagher, *Prepared Statement of Maggie Gallagher*, 58 DRAKE L. REV. 889 (2010).

142. Ross Douthat, *The Marriage Ideal*, N.Y. TIMES, Aug. 8, 2010, at A1.

143. Gallagher, *supra* note 141, at 889; Seth Forman, *Five Arguments Against Gay Marriage: Society Must Brace for Corrosive Change*, N.Y. DAILY NEWS (June 23, 2011, 4:00 AM), <http://www.nydailynews.com/opinion/arguments-gay-marriage-society-brace-corrosive-change-article-1.131144>.

144. Gallagher, *supra* note 141, at 891.

generations.”¹⁴⁵ The anti-same-sex marriage fight is not a fight to maintain the status quo. Instead, it is a fight to return to an understanding of marriage that may have existed in the past but is utterly incongruous with modern American notions of equality and antidiscrimination—including gender equality, women’s rights, and rights for sexual- and gender-identity minorities.¹⁴⁶

Some argue that no vision of marriage can incorporate gender equality¹⁴⁷ or that marriage is not in line with queer identity.¹⁴⁸ While this is debatable, the “traditional” notion of marriage, especially as articulated by those opposed to extending marriage rights to same-sex couples, is not what society and the law presently support; nor can it exist in modern times without undoing much of current family law. The argument is that the law should support the ideal notion of marriage as “the commitment to lifelong fidelity and support by two sexually different human beings . . . that involves the mutual surrender, arguably, of their reproductive self-interest . . . in which children grow up in intimate contact with both of their biological parents.”¹⁴⁹ The problem is that excluding same-sex couples from marrying, and defining marriage as between one man and one woman, actually does not succeed in creating that kind of relationship. Achieving that “ideal” marriage necessitates addressing state, national, and international laws related to families in such a way that makes covenant marriages look progressive.¹⁵⁰

The secular arguments that focus on procreation and child rearing do not comport with reality. There are two primary and interrelated arguments: (1) the primary purpose of marriage is to encourage responsible procreation¹⁵¹; and (2) same-sex marriages cannot be marriages because the two people in them cannot procreate through sexual activity with each other, and children are best raised in an environment where the two people to whom they are biologically related

145. See Douthat, *supra* note 142.

146. See STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 11 (2006) (debunking the concept of ideal traditional marriage, pointing out that traditionally women were chattel, abused, raped, and abandoned without access to their children or property).

147. See Mary Anne Case, *What Feminists Have To Lose in Same-Sex Marriage Litigation*, 57 UCLA L. REV. 1199, 1223 (2010).

148. Redding, *supra* note 117.

149. Douthat, *supra* note 142.

150. See Gallagher, *supra* note 141; Elizabeth H. Baker et al., *Covenant Marriage and the Sanctification of Gendered Marital Roles*, 30 J. FAM. ISSUES 147, 171-73 (Feb. 2009).

151. Brief of Petitioners at 8, *Hollingsworth v. Perry*, No. 12-144 (U.S. Jan. 22, 2013) (“Marriage is thus inextricably linked to the objective biological fact that opposite sex couples, and only such couples, are capable of creating new life together and, therefore, are capable of furthering, or threatening, society’s existential interests in responsible procreation and child rearing.”).

are married to each other.¹⁵² Civil marriage under the law is defined and delineated in whatever way the state chooses.¹⁵³ The state declares whether someone is married regardless of what each involved participant labels himself or herself. In the case of common-law marriages,¹⁵⁴ the state can declare someone as having been married after an individual's death. The state may also declare two parties as never married at all if, for instance, the individuals were too young or too closely related,¹⁵⁵ by declaring the marriage void *ab initio*¹⁵⁶—even if a license was issued and a ceremony performed. Though basic standards and processes exist, there really is no absolute uniformity on the legal definition or recognition of marriage. In the United States, keeping within the boundaries of U.S. constitutional law, states are free to limit or expand marriage within the parameters of their own laws.¹⁵⁷

As to the question of whether or not children do “better” in certain family structures or with a parent or parents of a particular sexual orientation, one must ask the question, better than what or whom? Studies seem to agree that the intactness, class status, education levels of

152. See Susie O'Brien, *Study Claims Kids Do Better with Straight Parents*, HERALD SUN (June 12, 2012, 12:00 AM), <http://www.heraldsun.com.au/news/victoria/study-claims-kids-do-better-with-straight-parents/story-fn7x8me2-1226392357240>; Mark Regnerus, *How Different Are the Adult Children of Parents Who Have Same-Sex Relationships? Findings from the New Family Structures Study*, 41 SOC. SCI. RES. 752, 761-66 (2012) (finding that children raised by still-married heterosexual couples “do better” on a number of social, emotional, and psychological variables than children raised by a parent who had a same-sex relationship). But see Abbie Goldberg, *Flawed Study of “Gay Parenting”: Roundup of Recent Media Coverage and Critiques*, PSYCH. TODAY (June 29, 2012), <http://www.psychologytoday.com/blog/beyond-blood/201206/flawed-study-gay-parenting-roundup-recent-media-coverage-and-critiques> (summarizing major critiques of Regnerus's study).

153. For example, the court in *Goodridge* determined that the state did have the power to regulate marriage but also found that barring same-sex couples from marrying was an unconstitutional use of that power. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 953 (Mass. 2003) (“[R]ecogniz[ing] the long-standing statutory understanding, derived from the common law, . . . ‘marriage’ means the lawful union of a woman and a man[, and] history cannot and does not foreclose the constitutional question [of whether] government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State’s authority to regulate conduct.”); Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493 (2006).

154. Common-law marriage is defined as “One not solemnized in the ordinary way, but created by an agreement to marry, followed by cohabitation; a consummated agreement to marry, between persons legally capable of making a marriage contract.” BLACK’S LAW DICTIONARY 346 (rev. 4th ed. 2004).

155. See, e.g., WIS. STAT. ANN. § 765.02 (West 2009); VA. CODE ANN. § 20-89.1 (2012); MISS. CODE ANN. § 93-7-1 (1972).

156. Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 KY. L.J. 275, 280 (2008).

157. Family law is generally within the jurisdiction of state law. See *Family Law-State Statutes*, LEGAL INFO. INST., http://www.law.cornell.edu/wex/table_family (last visited Feb. 2, 2013).

parents, or degree of conflict in families has a greater impact on whether children do better compared to others than does the race, ethnicity, sexuality, or marital status of the parents.¹⁵⁸

As with the religious arguments against same-sex marriage, secular arguments about procreation and child rearing are not uniquely Black and will not have a uniquely negative impact on Black procreation or Black child rearing. Some argue that same-sex marriage will reduce responsible procreation by contributing to the “undermin[ing] [of fidelity] by social indifference to the nature and purposes of sexual unions,”¹⁵⁹ which in turn undermines “[t]raditional marriages [that] survive and thrive when spouses are faithful to one another.”¹⁶⁰ This is purportedly true in Black communities for some of the following reasons. There is the notion that Black men on the “down-low”¹⁶¹ who are married to or dating women will become full-time gays and marry men, thus leaving Black women without anyone to marry or with whom to procreate, or leaving Black children without their fathers in the home.¹⁶² This idea presupposes that it is unique to Black men to be married to or dating women while dating or having sex with other men. It also assumes that there are high Black marriage rates.¹⁶³ Another argument about the particular impact of same-sex marriage on Black families and child rearing is it will create more gay and lesbian Blacks and fewer Black children.¹⁶⁴ However, studies show that one quarter of same-sex Black couples are raising “their ‘own’ children.”¹⁶⁵ A third

158. See CORVINO & GALLAGHER, *supra* note 55.

159. Joe Hargrave, *A Secular Argument Against Gay Marriage*, AM. CATH. (Sept. 7, 2010), <http://the-american-catholic.com/2010/09/07/a-secular-argument-against-gay-marriage/>.

160. *Id.*

161. Benoit Denizet-Lewis, *Double Lives on the Down Low*, N.Y. TIMES (Aug. 3, 2003), <http://www.nytimes.com/2003/08/03/magazine/double-lives-on-the-down-low.html?pagewanted=all> (“Rejecting a gay culture they perceive as white and effeminate, many black men have settled on a new identity, with its own vocabulary and customs and its own name: Down Low.”); KEITH BOYKIN, BEYOND THE DOWN LOW: SEX, LIES, AND DENIAL IN BLACK AMERICA 8-19 (2005); DONALD F. REUTER, GAY 2 ZEE: A DICTIONARY OF SEX, SUBTEXT, AND THE SUBLIME 59 (2006) (“[D]own low, on the” (DL) is defined as “African-American jargon for a black male who has secret sexual relations with another male while still in an intimate relationship with a woman (usually unaware of her mate’s actions).”).

162. The idea is that fathers will be less likely to take care of children if same-sex marriage passes. See CORVINO & GALLAGHER, *supra* note 55, at 115.

163. See Banks, *supra* note 68.

164. See *10 Reasons Why Homosexual Marriage Is Harmful and Must Be Opposed*, TFP STUDENT ACTION, <http://www.tfpstudentaction.org/politically-incorrect/homosexuality/10-reasons-why-homosexual-marriage-is-harmful-and-must-be-opposed.html> (last visited Feb. 18, 2013).

165. Gary J. Gates, *Same-Sex Couples in Census 2010: Race and Ethnicity* (Apr. 2012), available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/same-sex-couples-census-2010-race-ethnicity/>.

argument that same-sex marriage harms Black procreation and child rearing is that if gays and lesbians can get married and adopt children, they will adopt more Black children who will be raised in white households, which harms the children's Black identity. Given that most states do not bar homosexuals, bisexuals, or unmarried couples from adopting,¹⁶⁶ this actually speaks more to the issue of cross-racial adoption than same-sex marriage. Further, the majority of adoptions are by different-sex couples, not same-sex couples.¹⁶⁷ Two counterpoints to all of these arguments are that the contentions either do not specifically impact Black identity or blackness (cheating on one's wife with a man is not uniquely Black) or where there may be an impact on Black identity (arguably in the case of Black children being raised by white parents), the issue at hand is not same-sex marriage. This is not to say that procreation and child rearing are not racialized, but the potential negative impacts of same-sex marriage on procreation and children are not amplified by adding blackness. If one wants to argue that children are in some way harmed by same-sex marriage, Black children are not more harmed by marriage equality because they are Black. It is not a Black thing. It is a sex, or procreation, or parenting thing.

IV. THE SPLIT: A CRITICAL RACE THEORY PERSPECTIVE

Though there is no valid reason for a Black/gay split over the issue of marriage, a division does exist and presents obstacles to political and social advancement for both communities. Critical Race Theory (CRT) can shed light on the reasons for the rift and serve as a tool to mend it. Inherent in my assertion is that gay groups want to increase LGBT rights and that Black groups do not want to be sidetracked in their efforts to attain racial equality. They do not want to put resources into issues irrelevant to the advancement of Black interests, or that maintain the existing dominant/subordinate paradigm.

The basis of my argument in this Part is that the Black/gay split on the issue of same-sex marriage persists primarily because both communities subject themselves to dominant group divide-and-conquer

166. *Adoption by Lesbian, Gay, and Bisexual Parents: An Overview of Current Law*, NAT'L CTR. FOR LESBIAN RTS. (Mar. 2012), http://www.nclrights.org/site/PageNavigator/site/Search_results?cx=013049449121606409760%3Ajhyzv2vlroe&cof=FORID%3A11&q=adoption&sa.x=0&sa.y=0.

167. However, there may be higher incidences of same-sex couples adopting "special needs" children, which often include children of color, especially Black children. See Tanya M. Washington, *Throwing Black Babies Out with the Bathwater: A Child-Centered Challenge to Same-Sex Adoption Bans* 6 HASTINGS RACE & POVERTY L.J. 1, 1 (2009).

tactics that maintain both heterosexual and white supremacy¹⁶⁸ and distract from coalition building around converging and intersecting interests. Here, core CRT principles, specifically interest convergence theory and intersectionality, are modified to describe the interactions that occur in the context of the Black/gay split over marriage. I describe these modifications as *disinterest convergence*, *interest divergence*, *blind intersectionality*, and *intersectional blindness*. The modifications are utilized to illuminate the differing ways in which, within, between and against each community that dominant groups work to create and maintain the split. Further, the modifications highlight the manner in which each community as a particularized subordinate group contributes to perpetuating it as well.

A. *(Dis)Interest [Di][Con]vergence*

*Interest convergence [is the] [t]hesis pioneered by Derrick Bell that the majority group tolerates advances for racial justice only when it suits its interest to do so.*¹⁶⁹

What interest convergence generally means for Black and gay communities is that Black interests will only be advanced when those interests benefit whites, and gay interests will only be advanced when they benefit straights. However, in their efforts to build support for the passage of Prop. 8, those representing traditional (read: heterosupremacist) interests convinced some Blacks that it was to their benefit to oppose same-sex marriage by asserting that there were convergent interests such as protecting civil rights. But those interests did not converge. Blacks have not made any gains, in advancing civil rights or otherwise, by opposing same-sex marriage or, in California, by supporting Prop. 8.

While the converse of Bell's interest convergence theory is interest divergence, applicable in this context to Black communities, disinterest convergence is a related theory that sheds light on the experiences in LGBT communities. Though manipulated by dominant identity groups, both interest divergence and disinterest convergence reflect the dynamics that occur between, among, and within subordinated groups instead of the relationships between dominant and subordinated groups. In both contexts the problem lies along the identity axis that is dominant at the

168. See Adele M. Morrison, *Same-Sex Loving: Subverting White Supremacy Through Same-Sex Marriage*, 13 MICH. J. RACE & L. 177 (2007) (arguing that because of interconnected subordinations, same-sex marriage subverts white supremacy and works for Black advancement).

169. DELGADO & STEFANCIC, *supra* note 39, at 147.

time. In other words, interest divergence and disinterest convergence are both located at the intersections of race and sexual orientation. Black communities, although subordinated along a racial axis, assert domination along a sexuality axis because they identify with a heterosexual orientation. This manufactures divergent interests between Blacks and LGBT persons, including Black LGBT persons. LGBT communities are subordinated along the sexuality axis. However, as they are perceived as predominantly white, and white-identified, regardless of the actual racial or ethnic demographics of the community, are dominant on a racial axis. Thus, the disinterest in issues of race converges with straight whites who are similarly disinterested¹⁷⁰ in issues important to Blacks.

1. Black Communities and Interest Divergence

Interest convergence theory focuses more on dominant/subordinate group dynamics, while interest divergence focuses on the interactions between subordinate groups in relation to a dominant identity. My assertion is that because of interest divergence, particular individuals and groups within Black communities are limiting the advancement of Blacks as a whole by actively opposing same-sex marriage. The assessment is positivistic as to the way communities are behaving, descriptive as to results, and normative as to how communities, particularly Black communities, ought to respond. As a subordinated group with a majority of members who have voted against same-sex marriage and spokespersons aligned with antigay groups, the Black community is perceived as being more homophobic than other racial or ethnic groups.¹⁷¹ This perception has created divisions within the

170. See, e.g., Dan Rafter, *An Open Letter: Standing Alongside Trayvon Martin's Family & Friends*, HUM. RTS. CAMPAIGN (Apr. 2, 2012), <http://www.hrc.org/blog/entry/an-open-letter-standing-alongside-trayvon-martins-family-and-friends> (addressing whites and their reaction to Trayvon Martin's death).

171. The polling data shows that Blacks support same-sex marriage at lower rates than Latinos/as or whites. See, e.g., *Gay Marriage Detailed Tables*, PEW RESEARCH FOR PEOPLE AND THE PRESS (May 23, 2012), <http://www.people-press.org/2012/05/23/changing-views-of-gay-marriage-a-deeper-analysis/> (detailing lack of support for same-sex marriage based on numerous demographics, including race, which showed that Blacks supported same-sex marriage at a rate of 37%, Hispanics 43%, Whites 48%). These results may be perceived as demonstrative of Black communities being more homophobic than others. See, e.g., Savage, *supra* note 4 (lamenting the passage of Prop. 8 by titling a blog post "Black Homophobia" and referring to the "huge numbers of homophobic African Americans"); George E. Curry, *News Analysis: Understanding Black Attitudes Toward Homosexuality*, BLACK VOICE NEWS (Oct. 11, 2010), <http://www.blackvoice.com/news/news-wire/45105-news-analysis-understanding-black-attitudes-toward-homosexuality.html> (citing Black religiosity as a reason for "African Americans [being] less supportive of homosexuality than other racial and ethnic groups").

communities that have excluded LGBT Blacks and their allies. While a variety of Black groups could come together to work on issues important to all within the community, such as police brutality,¹⁷² incarceration,¹⁷³ unemployment rates,¹⁷⁴ or failing schools,¹⁷⁵ instead, they focus on an issue not related to Black interests or advancement. This is causing internal divides.¹⁷⁶

Interest divergence manifests itself when a subordinate group comes to believe or accept that there is a common interest with a dominant group, when in fact there is not.¹⁷⁷ In holding this false belief, subordinated groups are pitted against each other, as they attempt to align themselves with a dominant group along a particular identity axis or interest area in order to make gains in the efforts to obtain full equality. The result is that none of the subordinated groups are able to advance along any identity axis or interest area.

Dominant groups distract subordinated groups with misdirection by waiving token handouts, which are often ultimately withdrawn, or by stoking fear or mistrust of other groups with notions of scarcity of rights, privileges, and material goods. The dominant group diverts the attention of the subordinate group from working to overcome its own oppression

172. See Kirsten West Savali, *Killers Behind the Badge: NewsOne's Investigative Series on Police Brutality in Black America*, NEWSONE (July 6, 2012), <http://newsone.com/2023676/police-brutality-against-blacks/>; Kary L. Moss & Daniel S. Korobkin, *Destination Justice*, 80 MICH. B. J. 36 (2001).

173. See DEMICO BOOTHE, WHY ARE SO MANY BLACK MEN IN PRISON? (2007); Marc Maurer & Ryan S. King, *Uneven Justice: State Rates of Incarceration by Race and Ethnicity*, SENT'G PROJECT (July 2007), http://www.sentencingproject.org/doc/publications/rd_stateratesofinbyraceandethnicity.pdf.

174. See Emily Jane Fox, *African-American Jobless Rate Surges*, CNN MONEY (July 6, 2012, 12:58 PM), <http://money.cnn.com/2012/07/06/news/economy/black-unemployment-rate/index.htm>; *Employment Situation Summary*, U.S. BUREAU OF LABOR STATS. (Nov. 2, 2012), <http://www.bls.gov/news.release/empsit.nr0.htm>.

175. See William H. Honan, *Study on Education of Blacks Finds Problems*, N.Y. TIMES (June 4, 1997), <http://www.nytimes.com/1997/06/04/us/study-on-education-of-blacks-finds-problems.html>; *Blacks: Education Issues*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/15215.htm> (last visited Feb. 2, 2013).

176. Given the high percentage of Blacks who voted to reelect Barack Obama, there seemed to be an ability to put aside any differences relating to his endorsement of same-sex marriage. See Richard S. Dunham, *Obama Wins Re-Election*, SFGATE (Nov. 7, 2012, 4:54 PM), <http://www.sfgate.com/politics/article/Obama-wins-re-election-4014681.php>; Tom Cohen, *Obama Takes Key Battlegrounds to Win Re-Election*, CNN (Nov. 7, 2012, 5:07 AM), <http://www.cnn.com/2012/11/06/politics/election-2012/index>; *President Exit Polls*, N.Y. TIMES (2012), <http://elections.nytimes.com/2012/results/president/exit-polls> (showing that 93% of Blacks voted for Obama's reelection); see also Taylor, *supra* note 114 (reporting on issues of concern for Black leaders around which they are coalescing with gays).

177. See Cho, *supra* note 34 (discussing white women's lack of support for affirmative action); DAVID ROEDIGER, *THE WAGES OF WHITENESS* (2007) (addressing racial divisions among the working-class).

by promises of inclusion or by misdirecting them to look at another group as a threat. Further, one subordinate community can be used as a tool or weapon against another, which keeps the second group from gaining access to rights or power. Thus, dominant groups turn subordinate communities into the “master’s tool,”¹⁷⁸ employing them to bar the door against others. The interlocking system of oppression insures that subordinated communities become participants in a system that perpetuates their own subjugation.

Illustrative of this point is the manner in which those opposing same-sex marriage have targeted Blacks. With the aim of driving a wedge between gays and Blacks, the National Organization of Marriage (NOM) devised a strategy to use racially charged “civil rights” language and deploy Black clergy to deliver the organization’s anti-marriage rights message.¹⁷⁹ I argue that one of the messages from this strategy asserted that same-sex marriage had an impact on African-Americans along their subordinated racial identity axis, rather than along the dominant sexuality axis. I further contend that the essence of this tactic was to construct the idea of same-sex marriage as being injurious to Black racial identity itself, and not Black sexuality, heterosexuality, Black relationships, or marriages. The harm was allegedly to Blacks as individuals and families, Black identity, and Black gains from the Civil Rights Movement. In reacting to this tactic, especially the campaigns related to Prop. 8 (though the articulation by NOM of the racial divide strategy came later), certain members of Black communities aligned themselves with certain whites who were against same-sex marriage in order to be perceived as “like” the dominant group.¹⁸⁰ The message relayed to those in the dominant group was the Blacks believed they would be treated equally. I argue that the motivation behind presenting this sort of message is the belief that if similarities are demonstrated, then access to power will be granted. But that is not what happened with Prop. 8, or other similar cases. This is not to say that the Black community was duped; rather, what occurs is a problem of strategic misalliance. Often, it is politically advantageous to align one’s group or community with the dominant group if there are

178. AUDRE LORDE, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110 (1984).

179. Nom Deposition Exhibit 28: Marriage \$20 Million Strategy for Victory, Nat’l Org. for Marriage v. McKee, 666 F. Supp. 2d 193 (D. Me. 2009) (No. 09-538-B-H) (stating NOM’s strategic plan for defeating same-sex marriage); Amer Madhani, *Anti-Obama Black Pastors Group Has Deep Conservative Ties, Records Show*, WASH. POST (Aug. 10, 2012), http://articles.washingtonpost.com/2012-08-10/national/35492306_1_gay-marriage-anti-obama-conservative-groups.

180. Madhani, *supra* note 179.

actual commonalities on the issue and/or benefits to be obtained. In relation to same-sex marriage, opponents as embodied by organizations dominated by white heterosexual interests asserted that there was at least one benefit for Blacks—that there was an opportunity for racial advancement if same-sex marriage rights were repealed. However, there has been no measurable racial advancement benefit to Blacks in standing against same-sex marriage.

Same-sex marriage takes nothing away from Blacks, as Blacks comprise a unique culture and identity. Neither does maintaining marriage exclusivity provide a benefit to Blacks. It only supports heterosupremacy and ensures that heterosexuals will continue to reap the rewards of access to marriage. Same-sex marriage does not negatively impact blackness as an identity or culture, though the fear is that it does. However, supporting marriage equality does do something positive for Blacks and blackness. The interconnected subordinations and interlocking systems of oppression allow same-sex marriage to subvert white supremacy.¹⁸¹ Fundamentally, the interests of Blacks in advancing Black concerns and the interests of straights in maintaining heterosupremacy are divergent interests that run along separate axes of identity. The interests do not converge.¹⁸²

2. LGBT Communities and Disinterest Convergence

With gay groups, it is not interest divergence from which problems arise¹⁸³ but difficulties with what I label “disinterest convergence.” Disinterest convergence holds that identifiable LGBT communities and groups—as actually, or perceived to be, primarily white¹⁸⁴ and as identified with white interests—share a disinterest with heterosexual whites in racial issues. Disinterest convergence also holds that in the context of same-sex marriage, LGBT communities are disinterested in issues of race. Yet LGBT organizations utilize racial themes when arguing for the converging interests of Blacks and gays. Incorporating racial themes in a pro-marriage-rights campaign is designed to attract Blacks to the cause as well as to tap into a liberal or progressive belief in equality for all. An example of using racial themes is the employment of

181. Morrison, *supra* note 168 (arguing that same-sex marriage subverts white supremacy).

182. There may be an argument that standing against same-sex marriage advances religious interests but those are not the same as Black interests.

183. In fact, part of the pro-same-sex marriage strategy is to assert that Black interests merge with gay marriage interests against discrimination. As I have argued elsewhere, there truly is interest convergence. *See* Morrison, *supra* note 168.

184. *See* Kendell, *supra* note 63 (discussing gay communities being perceived as white).

civil rights rhetoric, based on the assumption that Blacks and progressives will identify with the language and embrace the same-sex marriage cause. Advocates also construct “same as” or “just like” arguments between sexual orientation and race in order to convince Blacks that, because the two identities are fundamentally alike, Blacks should be in agreement with gays on this and any other issue.¹⁸⁵

However, some mainstream LGBT organizations have historically shown little interest in the aspects of sexuality that are racialized,¹⁸⁶ nor have they made note that Blacks, whether gay or straight, may lack interest in or are unwilling to prioritize marriage.¹⁸⁷ Especially in the time period leading up to Prop. 8 and in the wake of its passing, progressive communities and organizations of color, including some clergy,¹⁸⁸ addressed issues relating to sexuality. These organizations did so more than LGBT communities and groups have addressed issues relating to race.¹⁸⁹ As more states move to determine whether or not to sanction same-sex marriage, especially through ballot initiatives,¹⁹⁰ LGBT organizations need to pay more attention to Black communities and their potentially common interests.¹⁹¹ But as LGBT organizations have begun to see that it may be politically beneficial to at least appear to be interested in events where race is an issue,¹⁹² some members of the gay community have responded that LGBT groups should stick to what they

185. See Smith, *supra* note 109.

186. Kendell, *supra* note 63 (discussing predominately white LGBT organizations' failures to address race in the same-sex marriage context); Vaid, *supra* note 63.

187. Banks, *supra* note 68.

188. See Harris, *supra* note 18.

189. *NAACP Backs Same-Sex Marriage as Civil Right*, USA TODAY (May 19, 2012, 7:47 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-05-19/gay-marriage-naacp/55082316/1>; *Coretta Scott King Gives Her Support to Gay Marriage*, USA TODAY (Mar. 24, 2004, 11:30 AM), http://usatoday30.usatoday.com/news/nation/2004-03-24-king-marriage_x.htm; Sharon Lettman-Hicks, *Letter to Community: National Black Justice Coalition Condemns NOM's Racially Divisive Anti-Gay Tactics*, SAN DIEGO GAY & LESBIAN NEWS (Mar. 29, 2012), <http://sdgln.com/commentary/2012/03/29/letter-community-national-black-justice-coalition-condemns-noms-racially-divis>). *But see* Rafter, *supra* note 170; Taylor, *supra* note 114 (emphasizing that LGBT groups have shown increasing support in the wake of the NAACP's announcement supporting same-sex marriage).

190. See Ben Brumfield, *Voters Approve Same-Sex Marriage for the First Time*, CNN (Nov. 7, 2012, 2:24 PM), <http://www.cnn.com/2012/11/07/politics/pol-same-sex-marriage/index.html>; Chelsea J. Carter & Allison Brennan, *Maryland, Maine, Washington Approve Same-Sex Marriage; 2 States Legalize Pot*, CNN (Nov. 7, 2012, 11:51 AM), <http://www.cnn.com/2012/11/01/politics/ballot-initiatives/index.html>.

191. See, e.g., Zach Stafford, *Why Gay Folks Should Care About Trayvon Martin's Case*, HUFFINGTON POST (Mar. 21, 2012, 2:18 PM), http://www.huffingtonpost.com/zach-stafford/trayvon-martin_b_1367291.html.

192. See Rafter, *supra* note 170.

know and remain focused only on LGBT issues.¹⁹³ For others, race simply is not an issue, possibly because of a belief that race relations in general are relatively good.¹⁹⁴ In fairness, it should be pointed out that not all of the major Black organizations have shown great interest in issues related to sexual-orientation discrimination or gay rights. However, certain Black organizations that were founded to advocate primarily for racial and economic justice, and Black individual leaders and icons, have spoken up in favor of gay rights and inclusion.¹⁹⁵ They have also started organizing around LGBT issues more frequently than LGBT leadership has organized around race issues. This may be because Black communities may be more willing to be publicly divided over an issue such as marriage rights¹⁹⁶ whereas LGBT groups may feel a need to maintain laser-like focus on marriage because it is perceived as the “catalyst that ends other inequalities.”¹⁹⁷ This speaks to a limited scope of

193. It appears as if much of LGBT organizing around racial issues is done by grassroots LGBT groups of color rather than white dominated mainstream LGBT organizations. See Yvonne Yen Liu & Nayantara Sen, *Better Together in Action: Organizations Working To Integrate Racial Justice and LGBT Issues*, APPLIED RESEARCH FOUND. (June 2012), available at [http://www.arcusfoundation.org/images/uploads/downloads/Better-Together_In_Action-June_2012\[3\].pdf](http://www.arcusfoundation.org/images/uploads/downloads/Better-Together_In_Action-June_2012[3].pdf) (listing organizations that work on “racial equity” and “LGBT advocacy”); see also Ari Karpel, *Will We Evolve Too?*, ADVOCATE (Oct. 8, 2012, 3:00 AM), <http://www.advocate.com/print-issue/current-issue/2012/10/08/will-we-evolve-too> (“Once marriage has been secured for gays and lesbians, will we reach beyond ourselves to turn us into a broader, progressive community rather than the association of self-motivated, single-issue voters we often are? Will the LGBT community evolve, too?”); Cameron Tolle, *National LGBT Rights Groups Issue Joint Open Letter on the Killing Trayvon Martin*, FREEDOM TO MARRY (Apr. 2, 2012, 2:08 PM), <http://www.freedomtomarry.org/blog/entry/national-lgbt-rights-group> (describing how a coalition of LGBT rights groups issued a joint statement describing the killing of Trayvon Martin (a Black teenager) as a “national call to action”); Taylor, *supra* note 114.

194. See *LOGO 2012 Presidential Election Survey*, HARRIS INTERACTIVE (Aug. 23, 2012) (reporting that in a poll conducted by Harris Interactive of over 1000 LGBT individuals and over 1000 members of the “general population,” 49% of LGBT Americans found that Obama’s first term had a positive effect on “race relations”).

195. See Harris, *supra* note 18; see also Mildred Loving, *Loving for All* (June 12, 2007) (remarks prepared for delivery on the fortieth anniversary of *Loving v. Virginia*), available at http://www.freedomtomarry.org/page/-/files/pdfs/mildred_loving_statement.pdf (“I believe all Americans, no matter their race, no matter their sex, no matter their sexual orientation, should have that same freedom to marry.”). But see Molly Hennessy-Fiske, *Civil Rights Group Threatens to Fire Local Leader for Gay Marriage Endorsement*, L.A. TIMES (July 11, 2009), <http://articles.latimes.com/2009/jul/11/local/me-sclcl1>.

196. See Deborah Quinn Hensel, *NAACP’s Support of Gay Marriage Reverberates at Convention*, REUTERS (July 12, 2012), <http://www.reuters.com/article/2012/07/12/us-usa-marriage-naacp-idUSBRE86B19Z20120712>; *Black Clergy Group Opposes Pres. Obama on Gay Marriage*, *supra* note 132; Hodges, *supra* note 132.

197. I. Bennett Capers, *Enron, DOMA, and Spousal Privileges: Rethinking the Marriage Plot*, 81 *FORDHAM L. REV.* 715, 716 (2012).

understanding, because marriage equality may not deliver all that is expected.¹⁹⁸

B. Blindness and Intersectionality

*“Intersectionality: Belief that individuals and classes often have shared or overlapping interests or traits.”*¹⁹⁹

Intersectionality speaks to the reality that individuals and groups are made up of multiple overlapping or intersecting traits that create one’s individual or group identity.²⁰⁰ Because of this multiplicity, both privileges and burdens of a given group or individual can be magnified. Intersectionality recognizes, for example, that women of color experience discrimination differently than white women because of racial and gender discrimination, while white men, when compared to women of color, will have both race and gender privilege.²⁰¹

In this Part, I describe how Black and gay groups can become laser-focused on the subordinated identity that applies to them and are unable to see the presence of another privileged trait or to see that those within the group may have important, overlapping subordinated traits. These situations are respectively labeled blind intersectionality and intersectional blindness. Employing white women as the exemplar of a subordinated group, blind intersectionality is the focus on gender-based discrimination, which can result in failing to comprehend the positive impacts of having a privileged identity. In the case of white women, the privileged identity is race. Intersectional blindness produces an inability to see the negative impacts of sitting where women of color sit—at an intersection of the subordinated identities of race and gender. Blind intersectionality afflicts LGBT groups, rendering invisible their own privileges or others’ disadvantages. This causes the misperception that the point of overlap or a single similarity is enough to create fidelity to a group that shares no other connection. Intersectional blindness plagues Black communities, who exhibit an inability to see any interests that may be shared with another subordinated group such as gays.

198. See *id.* at 730 (questioning the purpose of pursuing the right to marry as essentially the highest priority of LGBT groups).

199. DELGADO & STEFANCIC, *supra* note 39, at 165.

200. See Crenshaw, *supra* note 45; see also Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991); Frank Rudy Cooper, *Against Bipolar Black Masculinity: Intersectionality, Assimilation, Identity Performance, and Hierarchy*, 39 U.C. DAVIS L. REV. 853 (2006) (introducing an application of intersectionality theory to the heterosexual black man, as the author notes in the abstract).

201. Crenshaw, *Mapping the Margins*, *supra* note 200.

1. Blind Intersectionality and LGBT Expectations

Within the LGBT community, both the blindness to, and by, intersectionality result in a failure to see how race and gender privilege may overlap to create privilege or disadvantage. These impairments in vision can lead to the misuse of similarities within and among subordinated communities, particularly those who are multiply burdened²⁰² and are members of both or many groups. This blind intersectionality has led to foolish assumptions, simplistic expectations, cultural misunderstandings, and misappropriation of culture, all of which block potentially productive coalitions between Blacks and gays.

Being blind to intersectionality, in this case, results in a failure to understand that there are LGBT people of color who face compounded issues because they are multiply burdened.²⁰³ More importantly, being blind to intersectionality means one is unable to appreciate racialized privilege. This lack of appreciation can be manifested through an expectation that Blacks, because they have to fight against their own oppression,²⁰⁴ will accept that the discrimination gays and lesbians face is equally as oppressive. There is also an expectation that they will be ready, willing, and able to embrace the LGBT cause. However, the magnifying effect of multiple marginalities may make this embrace by Blacks impossible and leads LGBT communities to be blinded by, and to, intersectionality.

The designation of blind intersectionality carries with it metaphorical power; a blind intersection is the place in the road where vision is impaired such that a driver cannot see oncoming or cross traffic.²⁰⁵ When it comes to marriage rights, lesbian and gay

202. See Nancy Ehrenreich, *Subordination & Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 254 (2002).

203. See Darren Lenard Hutchinson, *Identity Crisis: "Intersectionality," "Multi-dimensionality," and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 287-88 (2001); Darren Lenard Hutchinson, *New Complexity Theories: From Theoretical Innovation to Doctrinal Reform*, 71 UMKC L. REV. 431 (2002).

204. The oppression is characterized by years of racism grounded in centuries of being property and not persons, *de facto* and *de jure* segregation, the profound limitations of Jim Crow laws, and the violence perpetrated to maintain white supremacy. See generally IRA BERLIN, *GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES* (2003); *Jim Crow Laws*, NAT'L PARK SERV., http://www.nps.gov/malu/forteachers/jim_crow_laws.htm (last visited Jan. 13, 2013); Frances L. Edwards & Grayson Bennett Thompson, *The Legal Creation of Raced Space: The Subtle and Ongoing Discrimination Created Through Jim Crow Laws*, 12 BERKELEY J. AFR. AM. L. & POL'Y 145 (2010); C. VANN WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1955).

205. "An intersection is considered 'blind' if there are no stop signs at any corner and you cannot see for 100 feet in either direction during the last 100 feet before crossing." *California Driver Handbook—Laws/Rules of the Road*, CAL. DEP'T OF MOTOR VEHICLES (2011), http://dmv.ca.gov/pubs/hdbk/speed_limits.htm.

organizations are the drivers of the bus for marriage rights and are unable to see the impacts at the intersections. The groups are also unable to see the LGBT Blacks in the crosswalks from whom there is an expectation of selfless loyalty based on shared sexual orientation.

One aspect of the same-sex marriage issue that mainstream LGBT groups are unable or unwilling to address is the perception of the subject as a white issue, especially by Blacks. The continued use of the argument that gay is “the same as” Black²⁰⁶ only serves to produce an angry backlash in Black communities. Cultural blindness, and the arrogance of privilege allows white gays to assume that something is owed to them and that people of color, particularly Blacks, are to blame for the passage of Prop. 8.²⁰⁷ This is actualized when Black organizations are labeled as being especially or uniquely homophobic, or as bigots.²⁰⁸ White organizational leadership’s blindness to white privilege renders invisible to them the reality that Blacks, whether gay or straight, perceive or understand that when whites are advantaged, Blacks are disadvantaged. When whites get, Blacks give. Thus, if full marriage rights are won, the perception is whites, with the attendant white privilege, win; and Blacks, once again, lose.

But same-sex marriage is not inherently a racial issue, it has simply been constructed as one. As a result of being blind to the racialized nature of the discourse utilized by LGBT groups in their fight for marriage rights, same-sex marriage advocates join anti-marriage-rights groups in creating a racial wedge. For example, I argue that because of the cultural ties to the Civil Rights Movement, many in Black communities feel that particular language should be utilized only in the context of addressing African American Civil Rights; thus, the language does not apply in the gay rights context. To many, especially older Blacks, gay rights simply are not civil rights.²⁰⁹ But it is not only those

206. See Smith, *supra* note 109.

207. LaGrone, *supra* note 122 (“After Proposition 8 passed, Black gay men holding ‘No on Proposition 8’ signs were verbally assaulted by white gay anti-Prop 8 protesters at a rally in Westwood, California. Though the Black gay men had come to join the fight against Proposition 8, they were called ‘niggers,’ and ‘their people’ were blamed for its passage. I understand those white protesters might have been angered because they had voted for Obama but then felt stabbed in the back by a ‘fellow oppressed group’ voting for what they felt was their oppression.”).

208. See, e.g., Savage, *supra* note 4 (“I’m done pretending that the handful of racist gay white men out there—and they’re out there, and I think they’re *scum*—are a bigger problem for African Americans, gay and straight, than the huge numbers of homophobic African Americans are for gay Americans, whatever their color.”).

209. See Fisher, *supra* note 18. But see Scott Woledge, *Civil Rights Leaders Respond to Leaked NOM Memos, Maggie No-Shows on MSNBC*, DAILY KOS (Mar. 28, 2012, 10:34 AM), <http://www.dailykos.com/story/2012/03/28/1078527/-National-Organization-for-Marriage-s-Maggie-Gallagher-blows-off-MSNBC> (quoting Julian Bond responding to NOM).

who are against same-sex marriage who misuse race. Racial blindness motivates organizations such as the Human Rights Campaign to use the headline “Confidential NOM Documents Reveal Dark Underbelly of Anti-Gay Movement,”²¹⁰ while at the same time denouncing NOM for having a strategy that creates a Black/gay split. The norm in the English language is that which is dark is bad, scary, or evil, and in the United States, those who are darker skinned, Black, or brown are already “othered.” When a leading LGBT organization uses language that conjures images of this colorist and racist othering in discussing an anti-same-sex marriage group’s efforts, it can stir up antigay sentiment among Blacks. This is an example of blind intersectionality at work.

2. Intersectional Blindness and Black Identity

Intersectional blindness describes how, on certain issues, including same-sex marriage, Black communities fail to see that their interests do not converge with whites but may converge with other Blacks—in this case, those who are LGBT. Whereas blind intersectionality means that individuals in one disadvantaged group presume commonality with another subordinated group,²¹¹ intersectional blindness explains the unwillingness or inability to recognize subordinated traits other than the one shared by the members *within* the group. For example, when relating to gay Blacks, straight Blacks identify with Black identity but ignore gay identity. What transpires in these cases of intersectional blindness is that one subordinated trait or identity obscures another and, consequently, obscures any common interests.

This obscuring of sexuality by race occurs partially because race is, or is at least perceived to be, readily identifiable, and sexuality is something that can, or should be, hidden. Also, as noted previously, race is understood as something one *is*, while sexual identity is based on something one *does*. The “being” versus “doing” dichotomy relates to the way subordination is understood.²¹² Because race is both visible and understood as immutable, there is nothing one needs to do about being subordinated. In contrast, an understanding of gayness as a behavior that

210. Kevin Nix, *Confidential NOM Documents Reveal Dark Underbelly of Anti-Gay Movement*, HUM. RTS. CAMPAIGN (Mar. 26, 2012), <http://www.hrc.org/blog/entry/hrcs-exposure-of-nom-docs-reveals-dark-underbelly-of-anti-gay-movement>.

211. See *supra* Part III.A.1.

212. See *supra* Part III.A.

can be engaged in or not results in the perception that an individual is only subordinated because of bad choices.²¹³

Because LGBT subordination is viewed as a result of an individual's choices, Black communities can ignore or dismiss discrimination against LGBT individuals as the result of bad decision-making rather than recognizing it as the result of sexuality-based bias. This intersects with and potentially magnifies race-based subordination. Black communities can marginalize Black gays by determining that there simply are no such people,²¹⁴ or that Blacks who claim a gay identity are misbehaving or acting white.²¹⁵ There are others within the community who are regarded as misbehaving, such as drug addicts, gang members, or single mothers on welfare. However, these individuals are believed to behave badly as a result of societal racism, whereas Blacks exhibiting gay behavior are determined to do so as a result of sin, or trying to be white.

Intersectional blindness helps explain the split over same-sex marriage. If Black communities are unable or unwilling to admit the presence of LGBT Blacks within their midst, there is no need to support same-sex marriage because it is something only relevant to whites.²¹⁶ Supporting same-sex marriage will not be on the Black agenda because it is believed that doing so brings no benefit to, and possibly is a detriment for, Black communities. But same-sex marriage does benefit Black communities, by benefiting individual Blacks, Black couples, Black families, and Black children.²¹⁷ Further, to support same-sex

213. If one does not want to be subordinated because of being gay, one simply needs to not be gay. This can be accomplished by covering, remaining closeted, or passing. See YOSHINO, *supra* note 67; Onwuachi-Willig, *supra* note 87.

214. This denial of black gayness may be a result of determining that, as Devon Carbado articulates, "homosexuality is fundamentally unblack." Carbado, *supra* note 40, at 1473 (citations omitted).

215. See *id.* at 1473-83. Carbado further explains the history of "[b]lack assertions that homosexuality is a white phenomenon," *id.* at 1476, and how "[r]ace is an [i]dentity [and] [h]omosexuality is a [l]ifestyle." *Id.* at 1478; see also Onwuachi-Willig, *supra* note 87 (addressing ideas of difference between race and sexual orientation); Roland G. Fryer, *Acting White*, EDUC. NEXT (2006), <http://educationnext.org/actingwhite/> (defining the term "acting white").

216. See Mason, *supra* note 118, at 2 (identifying that included in the "dominant beliefs, perceptions, and attitudes" of African-Americans is "the idea that marriage equality and gay rights are issues that do not directly impact the African-American community or that they are 'majority' race issues").

217. The United States Governmental Accountability Office has identified "1,049 federal statutory provisions classified to the United States Code in which benefits, rights, and privileges are contingent on marital status or in which marital status is a factor." See GOV'T ACC. OFFICE, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT (Jan. 23, 2004), available at <http://www.gao.gov/products/GAO-04-353R>.

marriage is to support equality in general, and support for equality for others impacts equality for all. Advancing the security of individuals, couples and families, as well as expanding equality can be interests common to gay and Black communities.²¹⁸

V. PRAXIS WHAT WE PREACH: FROM ANTI- TO ELEMENTAL ESSENTIALISM

Because Critical Race Theory helps illuminate the causes of the Black/gay split, I now turn to CRT to identify ways to help mend this divide. I focus on LGBT communities and organizations because those who identify as lesbian and gay are currently leading the charge for same-sex marriage and asserting that they are treated unfairly because they lack access to marriage. Therefore, it is same-sex marriage advocates, led by LGBT organizations, who also need to do the work necessary to get what they want—full marriage rights—even as Black communities may realize some benefits from those efforts.

Though Critical Race Theory is fundamentally antiessentialist in that it recognizes that groups do not have one “unique essence,”²¹⁹ or individuals a “single, easily stated, unitary identity,”²²⁰ I argue that consistent with this is the idea of elemental essentialism, based on the elements that are essential to human life.²²¹ The phrase is not used in a scientific manner but as a metaphor for a concept that extends and expands upon strategic essentialism.²²² Whereas strategic essentialism recognizes the advantages of a deliberate deployment of a single dimensional intragroup identity, elemental essentialism is the idea of drilling down to common elements of intergroup identity and deploying them to work against subordination. It grounds the work necessary to find superordinate goals,²²³ which, if accomplished, can help to end ongoing divisions on social, legal, and political issues.

218. See *infra* Part IV (discussing elemental essentialism and finding commonalities).

219. DELGADO & STEFANCIC, *supra* note 39, at 146.

220. *Id.* at 9.

221. “Essential Elements” are defined as “any chemical element required by an organism for healthy growth. It may be required in large amounts (macronutrient) or in very small amounts (trace element).” *Essential Element*, COLLINS DICTIONARY (2013), <http://www.collinsdictionary.com/dictionary/english/essential-element>. “Essential” is defined as “of the utmost importance.” *Essential*, MERRIAM-WEBSTER DICTIONARY (2013), <http://www.merriam-webster.com/dictionary/essential>. “Elements” is defined as “any of the four substances air, water, fire, and earth formerly believed to compose the physical universe” or as “a constituent part.” *Element*, MERRIAM-WEBSTER DICTIONARY (2013), <http://www.merriam-webster.com/dictionary/element>.

222. See Spivak, *supra* note 50.

223. Smith, *supra* note 109.

However, part of the work that is necessary to mend the split does fall on Black community and organizational leadership. Individuals must step forward and recognize actual interest convergence and see the multiple intersections that do exist. There is an increasing number of Black individuals, sometimes representing large organizations, sometimes only expressing personal opinions, who are supporting same-sex marriage.²²⁴ In response to NOM's divide-and-conquer strategy, Julian Bond, former Chair of the NAACP,²²⁵ stated that gay rights are civil rights,²²⁶ as did Reverend Al Sharpton.²²⁷ As noted, President Obama also stated that he personally supports same-sex couples' right to marry.²²⁸ Sometimes there are repercussions from Black organizations when Black leaders take a public stand for same-sex marriage. When the Reverend Eric P. Lee, president of The Southern Christian Leadership Conference, Los Angeles Chapter, spoke out against Proposition 8²²⁹ the SCLC "threaten[ed] to fire [him] because he supports same-sex marriage."²³⁰ Though still a supporter of same-sex marriage, Reverend Lee later criticized LGBT organizations over racism within them, noting that this may be a reason for limited support from Black communities for same-sex marriage. He said the "white male-dominated LGBT community" was the problem, pointing out that the organizations were talking "at" Black folk as opposed to speaking to, or with, African Americans.²³¹ This is a message LGBT groups should have heeded and seemingly did when working on the same-sex marriage ballot initiatives that appeared on state

224. See Keli Goff, *Black Celebs Who Have Supported Gay Rights*, ROOT (Aug. 24, 2012, 1:12 PM), <http://www.theroot.com/blogs/jay-z/oprah-and-other-black-celebs-come-out-gay-rights>; Marisa Taylor, *NAACP Board Votes in Support of Same-Sex Marriage*, ABC NEWS (May 20, 2012), <http://abcnews.go.com/US/naacp-board-votes-support-sex-marriage/story?id=16387644>.

225. The National Association for the Advancement of Colored People is focused on "ensur[ing] the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination." *Our Mission*, NAACP, <http://www.naacp.org/pages/our-mission> (last visited Feb. 18, 2013).

226. David Badash, *NAACP's Julian Bond Attacks NOM, Tells AC360 Gay Rights Are Civil Rights*, NEW CIV. RTS. MOVEMENT (Mar. 30, 2012), <http://thenewcivilrightsmovement.com/naacps-julian-bond-attacks-nom-tells-ac360-gay-rights-are-civil-rights/politics/2012/03/30/37334>.

227. *Statement from Rev. Al Sharpton Regarding President Obama's Support of Same-Sex Marriage*, NAT'L ACTION NETWORK (May 9, 2012), <http://nationalactionnetwork.net/press/statement-from-rev-al-sharpton-regarding-president-obamas-support-of-same-sex-marriage/>.

228. Interview by Robin Roberts, *supra* note 15.

229. See Jennifer Steinhauer, *Civil Rights Group Divided over Gay Marriage*, N.Y. TIMES (July 11, 2009), <http://www.nytimes.com/2009/07/11/us/11gay.html>.

230. Hennessy-Fiske, *supra* note 195.

231. Rev. Eric Lee, *Travesty of Justice*, HUFFINGTON POST (Aug. 26, 2010, 9:50 PM), http://www.huffingtonpost.com/rev-eric-lee/travesty-of-justice_b_696429.html.

ballots in the November 2012 elections. But it is more likely that the personal support of Barack Obama for same-sex marriage had a more positive impact on some Black individuals, resulting in their support of same-sex marriage.²³²

The purpose of grounding praxis in elemental essentialism is to locate converging interests and aspects of group (not necessarily individual) identities that interconnect and interact. Elemental essentialism argues that there are values or issues fundamental to both communities and aspects of group identities that are essential to both groups as well as being individually elemental to the particular identity. In the case of organizing to defeat anti-same-sex marriage amendments, one might have found that a core group conviction between Black communities and LGBT communities is a belief in antidiscrimination.²³³ This belief could be articulated as against the notion of writing discrimination into a state Constitution. There may be connections between the two groups around the essential concept that the fundamental right to marry is grounded in choosing whom to marry,²³⁴ being in favor of the deregulation of intimacy,²³⁵ or that being able to access the benefits that marriage provides is positive for individuals, couples, and society as a whole.²³⁶ Foundational issues are not the only place to find essential elements. There may be commonalities around racial or sexuality-based passing or covering being wholly inconsistent with racial or sexual pride.²³⁷ Elemental essentialism calls for a particular ideological approach that meets individuals where they are and works within communities with their existing beliefs, rather than trying to move them away from fundamental values or convince them of something they

232. See Demby, *supra* note 31; Sabrina Siddiqui, *Ohio's Black Voters Support Same-Sex Marriage After Obama's Endorsement, Poll Finds*, HUFFINGTON POST (July 3, 2012, 12:04 PM), http://www.huffingtonpost.com/2012/07/03/ohio-black-voters-same-sex-marriage-obama_n_1646189.html.

233. See, e.g., *Our Mission*, *supra* note 225 (“The mission of the National Association for the Advancement of Colored People is to ensure the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.”); *Mission Statement*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/the-hrc-story/mission-statement> (last visited Feb. 2, 2013) (“By inspiring and engaging all Americans, HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all.”).

234. *Loving v. Virginia*, 388 U.S. 1 (1967).

235. See *Lawrence v. Texas*, 539 U.S. 558 (2003) (decriminalizing sodomy, thereby deregulating one form of intimacy).

236. *Marriage and the Public Good: Ten Principles*, WITHERSPOON INST. (Aug. 2008), http://www.winst.org/family_marriage_and_democracy/WI_Marriage.pdf; INST. FOR AM. VALUES, WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES (2d ed. 2005), available at http://americanvalues.org/pdfs/why_marriage_matters2.pdf; Rauch, *supra* note 127, at 86-89.

237. See Onwuachi-Willig, *supra* note 87; YOSHINO, *supra* note 67.

do not believe. To make elemental essentialism work, LGBT groups need to: find a reference point other than race, and realize that indeed race is everything and focus on an antisubordination-based strategy.²³⁸

A. *Find Another Reference Point*²³⁹

LGBT individuals and groups seem to be limited in their understanding of history in that the primary analogy they put forth in their efforts to garner support for the pro-marriage-equality position is to the Civil Rights Movement.²⁴⁰ Maybe this is because the Civil Rights Movement was deemed as successful. Because the main issue on which LGBT groups are currently focused is marriage, and since *Loving* is a core marriage case, it may seem only natural to invoke all aspects of the Civil Rights Movement in order to make the case for marriage equality. But, I argue there are other social movements more directly related to gay rights, such as the women's rights movement, that might be a more effective analogy. Linking one's cause to racial equality is an easy, albeit simplistic, connection because there is some national agreement that racism is bad and race is a protected classification.²⁴¹ Civil rights are universal and the Civil Rights Movement is a touchstone for those working on equality and justice. It is easy for LGBT groups to embrace the Civil Rights Movement as its model and utilize the rhetoric and imagery as their own; however, as noted earlier, doing so causes problems. Claiming the mantle of the new Civil Rights Movement implies that the old one is over when it is not. It is time to expand the repertoire of analogies and realize that Blacks have not been replaced by gays; gay is not the new Black.²⁴²

238. See *Better Together: Research Findings on the Relationship between Racial Justice Organizations and LGBT Communities*, APPLIED RESEARCH CENTER 17-19 (Sept. 2010), http://arc.org/dev3/images/lgbt%20report_091710_final.pdf (advancing practical recommendations for effective collaborations between LGBT groups and racial justice groups). The recommendations include the following: "Increase support for groups of color;" "Invest in tools for strategic clarity;" "Lift up LGBT leaders of color;" and "Build the media and communications infrastructure." *Id.*

239. CHELY WRIGHT, *LIKE ME: CONFESSIONS OF A HEARTLAND COUNTRY SINGER* 192, 263 (2010) (referring to *Loving v. Virginia* and Rosa Parks in her memoir about coming out as comparators to gay rights struggles).

240. See Eve Conant, *Uncivil Rights?*, NEWSWEEK, Dec. 20, 2010, at 36.

241. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

242. Michael Joseph Gross, *Gay Is the New Black?*, ADVOCATE (Nov. 16, 2008, 12:00 AM), <http://www.advocate.com/news/2008/11/16/gay-new-black>.

B. Race Is Everything

What LGBT organizations and supporters of marriage equality²⁴³ demonstrate by using race and racism as proxies, analogies, metaphors—or even simply as examples of how much sexual orientation and heterosexism are the same in the context of marriage—is that race and that which has been “mistaken” for race are still what demarks status, domination or subordination, and success or failure. It is not really race as a whole but blackness and whiteness. Blacks are the ultimate other.

An idea articulated or implied by pro-marriage rights advocates is that gays are “the same as”²⁴⁴ or “just like” Blacks, and marriage manifests itself in the same way for both groups. As I have argued, when working with this issue in the context of litigation, it is true that there is an analogy between discrimination based on race and discrimination based on sexual orientation in the marriage context,²⁴⁵ just as there is one based on gender discrimination and sexual orientation discrimination. But the Supreme Court and the court of public opinion are two separate entities, as demonstrated by California in *In re Marriage Cases* and Prop. 8. It was not Black community members who were up in arms after the California Supreme Court decision, which located the right for same-sex couples to marry in the state constitution, nor was it Black churches who funded the Prop. 8 Campaign.²⁴⁶ Blacks were merely a part of the 52% of voting Californians who voted for the proposition.²⁴⁷ Recognizing that

243. See generally EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY* (2004).

244. Smith, *supra* note 109.

245. See Morrison, *supra* note 168; see also Adele M. Morrison, *Black v. Gay? Centering LGBT People of Color in Civil-Marriage Debates*, in *LOVING V. VIRGINIA IN A POST-RACIAL WORLD: RETHINKING RACE, SEX, AND MARRIAGE*, 235, 237 (Kevin Noble Maillard & Rose Villazor eds., 2012) (discussing the *Loving* analogy).

246. See Justin Ewers, *California Same-Sex Marriage Initiative Campaigns Shatter Spending Records*, U.S. NEWS (Oct. 29, 2008), <http://www.usnews.com/news/national/articles/2008/10/29/california-same-sex-marriage-initiative-campaigns-shatter-spending-records>; Dan Morain & Jessica Garrison, *Prop. 8 Foes, Fans Amass \$60 Million*, L.A. TIMES (Oct. 25, 2008), <http://articles.latimes.com/2008/oct/25/local/me-marriagemoney25> (“Primary contributors to the opposition have included celebrities, liberal groups including the American Civil Liberties Union of Northern California, public employee unions and gay philanthropists.”).

247. Richard Kim, *Why Proposition 8 Won in California*, CBS NEWS (Nov. 7, 2008, 11:46 AM), http://www.cbsnews.com/8301-251_162-4581859.html. Exit polling had showed 70% support for Prop. 8 among Blacks, while later analysis showed 58%. See *Prop. 8 Exit Polls*, CNN (2008), <http://www.cnn.com/ELECTION/2008/results/polls/#val=CAI01p1>; PATRICK J. EGAN & KENNETH SHERRILL, *CALIFORNIA’S PROPOSITION 8: WHAT HAPPENED, AND WHAT DOES THE FUTURE HOLD?* 9 (2009), http://www.thetaskforce.org/downloads/reports/reports/pi_prop8_1_6_09.pdf; John Wildermuth, *Black Support for Prop. 8 Called Exaggeration*, SFGATE (Jan. 7, 2009, 4:00 AM), <http://www.sfgate.com/politics/article/Black-support-for-Prop-8-called-exaggeration-3177138.php>.

race is everything and choosing not to make those comparisons, or at least use them sparingly such as when applying the *Loving* analogy,²⁴⁸ may go a long way toward success with the public, courts, and legislatures.²⁴⁹

Further, the absence of Black leadership on the pro-same-sex marriage side of the issue is telling.²⁵⁰ When President Obama announced his personal support for same-sex marriage, support for marriage rights rose within the Black community.²⁵¹ This, to me, indicates that communication on social issues is more effective when those who share some common identity, especially one as strong as race, speak to each other.²⁵² Similarly, the success of those who are against marriage rights lies partially in religious leaders speaking to other religious leaders, using religious discourse and stoking the flames by couching the issue in racialized rhetoric. If LGBT organizations limit racialized rhetoric and make space for Black leadership, they will

248. See Morrison, *supra* note 168, at 179 (discussing how advocates invoke *Loving* to compare same-sex marriage to interracial marriage, which has come to be known as the “*Loving* analogy”).

249. Regardless of what happens in courts or legislatures, the country will be voting on the issue. Even if the Supreme Court finds that the fundamental right to marry extends to members of the same sex, there may be an effort to amend the U.S. constitution, which means more votes. See Laura E. Davis, *Supreme Court Considers Gay Marriage in Wake of Ballot Box Breakthroughs*, YAHOO! NEWS (Nov. 30, 2012), <http://ca.news.yahoo.com/blogs/lookout/ballot-box-victories-gay-marriage-battle-heads-back-145856047.html> (noting that the next same-sex battles will be in state court and legislatures, though there are still states that will likely vote on same-sex marriage, such as Oregon, Indiana, and possibly again California).

250. There may be some resistance to being defined by one’s sexuality, given that Blacks have been and continue to be sexually objectified while simultaneously racially oppressed. See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

251. See Jonathan Capehart, *Pew Poll Shows Rising Support for Gay Marriage*, WASH. POST (July 31, 2012, 4:57 PM), http://www.washingtonpost.com/blogs/post-partisan/post/pew-poll-shows-rising-support-for-gay-marriage/2012/07/31/gJQAJsLSNX_blog.html; Amanda Terkel, *Maryland Marriage Equality Poll Shows Increased Support from African-American Voters*, HUFFINGTON POST (Aug. 2, 2012, 11:05 AM), http://www.huffingtonpost.com/2012/08/02/maryland-marriage-equality_n_1732555.html; Ergun, *supra* note 31 (“[S]upport for gay marriage has reached a new high among African-Americans in ABC/Post polls, up from four in 10 in recent surveys to 59 percent now.”).

252. John Sides, *Obama and Black Support for Same-Sex Marriage*, MONKEY CAGE (May 24, 2012), <http://themonkeycage.org/blog/2012/05/24/Obama-and-black-support-for-same-sex-marriage>. The article cites a 1994 experiment by James Kuklinski and Norman Hurley that lead them to find that “subjects deem the race of the political leader, not his ideological reputation, to be the relevant contextual information.” They further determined that “This is nothing unique to . . . African-Americans, of course. Sources of information are generally more credible when they are perceived as sharing our identities, values, etc.” *Id.*; see also Aaron Blake, *African Americans and Latinos Spur Marriage Revolution*, WASH. POST (Nov. 12, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/12/african-americans-and-latinos-play-big-role-in-gay-marriage-revolution/>.

recognize the salience of race. This could demonstrate a commitment to coalescing around other issues once marriage rights are won.

C. An Antisubordination-Based Strategy

The LGBT Community's use of civil rights language was successfully deployed for judges and legislatures and has, as of late, proven not to be the detriment it once was with voters. However, using the language of the Civil Rights Movement is not the most effective tool with which to create an antisubordination movement. This should be the long-term goal, instead of merely securing marriage rights. Subordinated groups excluding or offending other subordinated groups, only serves to perpetuate the subordination and limit advancement. One only need to look at the Black Power Movement and its deeply rooted misogyny,²⁵³ the Civil Rights Movement's sexism and homophobia, the first and second waves of the Women's Liberation Movement's racism and homophobia,²⁵⁴ and the Labor Movement's racism,²⁵⁵ for examples of divisions that have limited advancements of subordinated groups. These fissures continue to have negative impacts, which helps to explain the inability to build and sustain a poor people's movement²⁵⁶ and why the same battles are being fought over and over, with California's Prop. 8 as a prime example. This is why the marriage-rights movement will be taking one step forward as exemplified by *In re Marriage Cases*, winning the right to marry through the courts, and two steps back with Prop. 8,

253. See JO FREEMAN, THE WOMEN'S LIBERATION MOVEMENT: ITS ORIGINS, STRUCTURES AND IDEAS (1971), available at <http://library.duke.edu/rubenstein/scriptorium/wlm/womlib/> (quoting Stokely Carmichael's remarks that "the only position for women in SNCC is prone").

254. See Carbado, *supra* note 40, at 1474-75 ("[I]n 1963 Bayard Rustin, a gay black man and one of the main organizers of the March on Washington, was not accepted by some members of the civil rights movement. Rustin was not supposed to be a homosexual. And certainly, as a homosexual, he was not supposed to represent the black community." (citations omitted)). In the second wave of feminism, feminist leaders sought to exclude lesbians from organizations such as NOW (The National Organization for Women), referring to them as "The Lavender Menace." See KARLA JAY, TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION (1999); PAULA GIDDINGS, WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA 124-28 (1996) (describing how the first and second waves of the Feminist Movement, from suffrage to women's liberation, also faced race-based divisions where white suffragists rejected Black women, and during the second wave Black women felt forced by white women to choose between their racial and gender identities).

255. See generally Roediger, *supra* note 177.

256. See Lawrence Lessig, *#OccupyWallSt, Then #OccupyKSt, Then #OccupyMainSt*, HUFFINGTON POST (Oct. 5, 2011, 6:48 AM), http://www.huffingtonpost.com/lawrence-lessig/occupywallst-then-occupyk_b_995547.html (discussing the aims of the Occupy Movement); Colleen O'Connor, *Rev. Martin Luther King Jr. Aimed To Alter Balance of Power*, DENVER POST (Jan. 16, 2012), http://www.denverpost.com/news/a_19750416 (comparing the Occupy Movement to Martin Luther King Jr.'s Poor People's Campaign).

wherein voters stripped citizens of that right. The U.S. Supreme Court could also set back marriage rights in 2013 with rulings on the Defense of Marriage Act and marriage-related cases out of Arizona and California.²⁵⁷ When solid coalitions between subordinated groups focused on antisubordination work are built, there are success stories. The Women's Liberation Movement, in which white feminists and feminists of color worked together,²⁵⁸ the Civil Rights Movement, which incorporated whites and Blacks to produce victories,²⁵⁹ and the fight against AIDS/HIV, which found lesbians and gay men side by side in service, advocacy, and action,²⁶⁰ all saw such success. Gays and Blacks building a coalition that is focused on antisubordination and on disseminating the message of its purpose will go a long way in attaining marriage rights and mobilizing around other issues when necessary.

VI. CONCLUSION

This Article utilizes the ideas of Critical Race Theory as manifested by disinterest convergence/interest divergence and blind intersectionality/intersectional blindness, and applies them to the splits between Black and gay communities. The ideas are also applied to debates over Black and LGBT identities and reveal some elements essential to building meaningful coalitions. At this time, mainstream LGBT organizations are heavily focused on marriage while Black organizations have diverse foci aimed at ending racial and economic disparities. However, each community's goals are rooted in certain essential elements, such as equality and antisubordination. Both communities can work toward equality and ending subordination without being pitted against each other and without challenging deeply held beliefs. Each group can also call on the other to address the racism, homophobia, and heterosexism internal to each community. There has been dramatic progress between the 2008 and 2012 elections, both of which resulted in a Barack Obama presidency, but with dramatically different results for same-sex marriage. The 2008 election cancelled marriage rights for some in the most populous state in the country, while

257. See Amy Howe, *Court To Consider Same-Sex Marriage Cases: In Plain English*, SCOTUSBLOG (Nov. 29, 2012, 8:39 PM), <http://www.scotusblog.com/2012/11/court-to-consider-same-sex-marriage-cases-in-plain-english/> (explaining the ten petitions under consideration by the U.S. Supreme Court that relate to same-sex marriage).

258. See 20 U.S.C.A. §§ 1681-1688 (1972); 42 U.S.C.A. ch. 136, subch. III (1994).

259. See 42 U.S.C.A. § 1973 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); DAVID L. CHAPPELL, *INSIDE AGITATORS: WHITE SOUTHERNERS IN THE CIVIL RIGHTS MOVEMENT* (1994).

260. See *generally* DEBORAH B. GOULD, *MOVING POLITICS: EMOTION AND ACT UP'S FIGHT AGAINST AIDS* (2009).

the 2012 voting extended marriage in more states. It is arguable that this change came because both Blacks and gays began to mend the split by realizing that an anti-same-sex marriage position is not a Black thing.