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Linda C. McClain

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BOOK REVIEW SYMPOSIUM

BIGOTRY, PROPHECY, RELIGION, AND THE RACE ANALOGY IN MARRIAGE AND CIVIL RIGHTS BATTLES: RESPONDING TO COMMENTARIES ON *WHO'S THE BIGOT?*

Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law. By Linda C. McClain.
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One of the most rewarding parts of writing a book is that it opens the door for constructive conversation with thoughtful and perceptive readers like the scholars who generously contributed to this book symposium. Their various essays touch on and offer powerful insights about the core concerns that I had when I wrote *Who's the Bigot? Learning from Conflicts over Marriage and Civil Rights Law*. They offer thoughtful empirical and normative observations and surface useful questions about important future investigations. Were I able to write a next chapter—or a sequel—all these commentaries would shape its content. As it is, I have benefited from engaging with these commentaries and will wrestle with some of the challenges they pose in my future work. In response, I briefly addresses some of the cross-cutting themes in the commentaries by putting some of the commentaries in conversation with each other, and I attempt to answer some of the constructive criticism that they offer.

SOME ANIMATING CONCERNS OF *WHO'S THE BIGOT?*

When I began writing *Who's the Bigot?*, my immediate motive was trying to analyze the provocative use of the rhetoric of bigotry in dissenting opinions in Supreme Court jurisprudence about civil marriage equality, and, in particular, charges that lawmakers and voters who opposed same-sex marriage because of their religious beliefs were being branded as bigots. As the contributors to this book symposium discuss, analogies about race and racism were and remain at the heart of these charges, raising this question: Is it instructive, as a matter of constitutional interpretation of due process liberty or equal protection, to compare racially discriminatory marriage laws to laws restricting marriage to one man and one woman (or, *traditional marriage*), or is such a comparison treating today's sincere religious believers in traditional marriage as the moral equivalent of yesteryear's odious, racist bigots? Similar questions percolate when such believers are business owners who seek exemptions from state public accommodation laws that prohibit discrimination based on sexual orientation or gender identity or based on traditional categories like race, color, national origin, and sex. Is it constitutionally instructive to recall unsuccessful First Amendment claims that the Civil Rights Act of 1964 burdened a business owner's sincere religious belief in racial segregation?



Or, once again, is the race analogy so provocative—and morally distinct—as to amount to branding present day exemption seekers as bigots?

In *Who's the Bigot?*, I examine how, in these present-day controversies over religious objections to same-sex marriage (or civil marriage equality) and LGBTQ equality, objections to the race analogy frequently invoke both “conscience” and sincerity to rebut charges of bigotry, as though religious racism was insincere, pretextual, and hypocritical. Additionally, sometimes the objections turn on the *unreasonableness* and odiousness of racism, in contrast to the *reasonableness* of decent and honorable beliefs about marriage as exclusively a one man-one woman union—or about sex or gender identity as male or female as a divine and immutable gift at birth. These types of arguments invite a focus on the definition(s) of bigotry and the critical role of time in assessing bigotry, or what I describe as bigotry’s backward-looking and forward-looking dimensions.

In *Who's the Bigot?*, I show that, as a definitional matter, the premise that a belief that is sincere or derived from conscience could never be bigoted was incorrect. I further illustrate how people appealed to conscience and religious faith both to indict bigotry (such as white supremacy and segregation) and to defend racial discrimination and to rebut charges of bigotry (as in the theology of segregation or charges that the supporters of the Civil Rights Act of 1964 were the “real” bigots) (76–126). I also examine how notions of what is “reasonable” and “unreasonable” are contested and change over time, illustrating with the competing appeals to science and reason in the theology of integration and the (now-repudiated) theology of segregation. The contributors to this symposium fruitfully engage with these dimensions of *Who's the Bigot?*

Finally, another spur to writing *Who's the Bigot?* was a perception that charges, denials, and countercharges of bigotry were increasingly frequent in the United States, especially with the 2016 election and the growing political polarization during the presidency of Donald J. Trump. In that context, race and racism were also central: Were public officials encouraging or endorsing bigotry, rather than condemning it, with the result of emboldening white supremacy that many Americans thought was among the clearly repudiated forms of bigotry? I ask, “[w]hy is there so much controversy over bigotry when renouncing—and denouncing—it seems to be a shared political value with a long history?” (4). I argue that the temporal dimension of bigotry offered some clues, as the frequently voiced concern about being on the “right” rather than “wrong” side of history illustrates.

A further aim was to help clarify and justify vital constitutional and legislative steps over the last several decades toward repudiating discrimination and unequal citizenship and realizing commitments to liberty and equality. I argue that drawing analogies between past and present struggles could support those developments, rather than be inevitably explosive.

I am grateful that the contributors to this symposium believe that *Who's the Bigot?* sheds some light on the rhetoric—and the problem—of bigotry and what I called “puzzles about bigotry” (6–14). It is an honor that Henry L. Chambers, Jr. writes that “[a]nyone who cares about discrimination would profit from reading this book,”¹ and that Kyle Velte comments that “McClain’s book is essential reading for LGBT rights advocates” and that I present a “compelling picture of a through-line of the rhetoric of bigotry from the 1950s to the present day.”² It is gratifying that theologian and legal scholar M. Cathleen Kaveny believes that my book aids in understanding some of the conceptual problems with framings of contemporary legal controversies that “pit the religious freedom of devout Christians against the rights of LGBTQ Americans to be

1 Henry L. Chambers, Jr., “Who’s the Bigot? The Book Matters but the Question Does Not,” *Journal of Law and Religion* 36, no. 2 (2021) (this issue).

2 Kyle C. Velte, “Lessons for LGBT Rights Advocates from *Who’s the Bigot*,” *Journal of Law and Religion* 36, no. 2 (2021) (this issue).

treated with dignity and equality in the public square.”³ As Robin Fretwell Wilson, Aylin Cakan, and Marie-Joe Noon observe in their commentary, what rules will govern the public square are at the center of a number of “culture war fights” that seem “existential,” implicating “our deepest commitments and identities;” as they observe, in these struggles, “charges”—and countercharges—of “discrimination and bigotry” issue.⁴ I am gratified that they believe *Who’s the Bigot?* illuminates “the role that the label *bigot* has played in fracturing an already fractured society.”⁵ I now take up some of the cross-cutting themes in the six commentaries.

BIGOTRY, PROPHECY, AND HYPOCRISY

Kaveny, Chambers, and Justin Buckley Dyer each raise intriguing issues about how to define “bigot” and “bigotry.” Kaveny argues that the term “bigot” “currently functions as a term of prophetic indictment, a charge that someone is not acting in accordance with the basic moral-legal charter of our polity.”⁶ Further, such “prophetic indictment”—the “jeremiad”—is an important part of American moral discourse.⁷ This is an illuminating observation because it captures the moral power and sense of urgency at work when someone denounces bigotry—or criticizes others for failing to do so. Kaveny also points out that prophetic indictment—in the biblical tradition—not only castigates people for their sins but also calls “for repentance and reform.”⁸ In *Who’s the Bigot?*, I highlight language from civil rights-era sermons in which religious leaders both condemned racial prejudice as unscriptural and sinful and also spoke of the need to rouse the conscience of, and redeem the segregator, rescue them from the “poisonous fangs” of “racial customs and traditions that have grown up out of the hotbed of ignorance and prejudice” (92).⁹ As Kaveny observes, however, when faced with a prophetic indictment, the more typical response is to “indignantly deny the charge, often reversing it,” rather than to “humbly admit guilt, repent, and promise to reform.”¹⁰

Kaveny attributes the explosiveness of a charge of bigotry to two different definitions of bigotry: having “bad motive” (as in the historical definition of bigot as a “religious hypocrite” or too committed to the tenets of faith) or “bad reasons” (as in the bigot as being “obstinately or intolerantly devoted” to one’s opinions and prejudices, and in treating members of a “racial or ethnic group”

3 M. Cathleen Kaveny, “Reason, Feeling, Religion, and Bigotry,” *Journal of Law and Religion* 36, no. 2 (2021) (this issue).

4 Robin Fretwell Wilson, Aylin Cakan, and Marie-Joe Noon, “From Bigotry to Tolerance,” *Journal of Law and Religion* 36, no. 2 (2021) (this issue).

5 Wilson, Cakan, and Noon, “From Bigotry to Tolerance.”

6 Kaveny, “Reason, Feeling, Religion, and Bigotry.”

7 Kaveny.

8 Kaveny.

9 Quoting Charles Kenzie Steele, “The Tallahassee Bus Protest Story,” in *Rhetoric, Religion, and the Civil Rights Movement, 1954–1965*, ed. Davis W. Houck and David E. Dixon, 2 vols. (Waco: Baylor University Press, 2006–2014), 2:73–79, at 77. In *Who’s the Bigot?*, I also discuss how both Dr. Martin Luther King Jr. and his teacher, Dr. Benjamin Mays, stressed that segregation “scars the soul of both the segregator and the segregated” (92–93, quoting Martin Luther King, Jr., “Stride toward Freedom,” in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.*, ed. James Melvin Washington [New York: Harper One, 1986], 417–90, at 478; cf. Benjamin E. Mays, “The Church Amidst Ethnic and Racial Tensions,” in Houck and Dixon, *Rhetoric, Religion, and the Civil Rights Movement, 1956–1965*, 1:55–64, at 62).

10 Kaveny, “Reason, Feeling, Religion, and Bigotry.”

with “hatred and intolerance”).¹¹ Considering these definitions, a charge of bigotry puts the recipient in a place that is “not comfortable”: “the charge means that the target’s reasons for acting are so flawed that they are either intellectually obtuse or could not possibly be acting in good faith.”¹² Kaveny insightfully connects this definitional dilemma to a cogent critique of the state of First Amendment jurisprudence, where the issue is the *sincerity* of litigants’ religious claims, not the rationality of those claims. Indeed, courts are not to assess such rationality. This leads to an equation of sincerity with “depth and intensity of personal feeling, rather than coherence of intellectual and moral judgment.”¹³ I will not take up the jurisprudential point here, but I commend to readers Kaveny’s thoughtful argument about the broader societal implications of this emphasis on sincerity—it risks reducing sincerity merely to feeling, in contrast to religious traditions that urge believers to examine “emerging ethical questions in light of the insights of scripture, tradition, and reason, as well as experience.”¹⁴

Kaveny’s essay dovetails well with that of Wilson, Cakan, and Noon, who point to the limits of courts in facilitating this kind of critical examination in order to facilitate a shift, as they call it in the title of their essay, “from bigotry to tolerance.”¹⁵ While Kaveny argues that First Amendment jurisprudence leads religious believers making claims of religious liberty to think those claims “should be insulated from scrutiny from their fellow citizens and fellow believers,”¹⁶ Wilson, Cakan, and Noon argue that there is a vital space, outside of courts, in which people with divergent religious beliefs can move toward peaceful coexistence and tolerance through dialogue and a “culture of engagement built on mutual respect.”¹⁷ They offer an encouraging example of a young person from a “small, religious town,” inculcated in the view that “legalizing gay marriage was a threat to my religious beliefs,” coming to reject that view and instead wanting to be an “ally” after observing a family of two dads and their “young son.”¹⁸ This example also suggests the power of social contact with members of a minority or group that is discriminated against (as I discuss in *Who’s the Bigot?*) to change negative views of the group—a step toward tolerance (30–33, 45–46). With respect to institutional conflicts, such as the terms on which religious social service agencies contract with government, as raised in *Fulton v. City of Philadelphia*,¹⁹ Wilson, Cakan, and Noon argue that, by contrast to the “zero-sum” framings that pit rights against each other in constitutional litigation, the legislative and executive branches of government have the potential to find “creative” approaches that work for “common ground positions.”²⁰ Wilson has long labored for this kind of common ground, and I applaud her continuing efforts. However, as is often the case, the proverbial devil is in the details; as I examine in *Who’s the Bigot?*, there are sharply conflicting views about the terms on which “peaceful coexistence” is possible (181–94).

11 Kaveny, quoting Merriam-Webster, s.v. “bigot (n.),” accessed July 13, 2021, <https://www.merriam-webster.com/dictionary/bigot>.

12 Kaveny.

13 Kaveny.

14 Kaveny.

15 Wilson, Cakan, and Noon, “From Bigotry to Tolerance.”

16 Kaveny, “Reason, Feeling, Religion, and Bigotry.”

17 Wilson, Cakan, and Noon, “From Bigotry to Tolerance.”

18 Wilson, Cakan, and Noon, quoting Cicily Bennion, “#ToleranceMeans That You’ve Taken the First Step towards Loving Someone Different from You,” *Tolerance Means Dialogues*, June 17, 2019, <https://www.tolerancemeans.com/essaylist/2019/6/17/cicily-bennion-graduate-brigham-young-university>.

19 *Fulton et al. v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *rev’d*, 141 S. Ct. 1868 (2021).

20 Wilson, Cakan, and Noon, “From Bigotry to Tolerance.”

Like Kaveny, Chambers also discusses the relationship among religious sincerity, hypocrisy, and bigotry. Picking up on my definitional point that sincere religious belief *can* be bigoted, Chambers argues that I should have investigated further the difference between sincere religious belief and “mere preferences based on supposed religious doctrine” and that I should also have centered the role of “hypocrisy” in my analysis.²¹ One should ask, he argues, “whether people who claim religious belief as the basis for their discriminatory views sincerely believe that their religion requires those views as opposed to merely preferring an interpretation of religious doctrine that leads to those views or wishing society would be organized around their desire that may be supported by, but not required by, religious orthodoxy.”²² This is a helpful point. As Chambers notes, I do observe that some religious leaders have explored these distinctions. For example, I quote sermons in the decade after the *Brown v. Board of Education* era that appealed to “conscience” to help teach white churchgoers that they must live by Christian conviction and conscience, “rather than by preference and by *prejudice*”—including prejudice about interracial marriage (91–92, quotation at 92).²³ Similar sermons noted the thinking of “many Christians in our [white] churches,” who “know what is right”—and “Christian”—“but prefer to follow our prejudices” and oppose desegregation (91).²⁴

Such examples do suggest a hypocrisy and perceived self-interest in relying on religious belief to justify opposition to racial justice. Even so, some segregationist ministers expressed their conviction that segregation was God’s will and required by scripture with a strong sense of confidence and moral certitude, giving religious legitimacy to efforts to maintain segregation (98). As Velte observes, while “most Americans look back at that historical moment and cringe at what we now see as overt racism,” it does not change “the historical fact” that reliance on conscience and faith to defend segregation was “considered sincere and mainstream” and, by some, “even virtuous” (80–81).²⁵

In highlighting how *Who’s the Bigot?* could have brought a sharper focus to hypocrisy, Chambers offers the constructive criticism that my analysis of *Loving v. Virginia* would have been strengthened by grappling with “the existence of interracial relationships and children of such relationships prior” to *Loving*, including children of white men and enslaved Black women, most famously, Thomas Jefferson and Sally Hemmings.²⁶ Chambers aptly observes that “[v]arious prominent Virginians seemed unconcerned with relationships involving dubious consent that produced mixed-race children, but they deemed fully consensual marriage that did so to be problematic,” suggesting that this reveals the hypocrisy and bigotry of Virginia’s arguments in *Loving* that centered around barring interracial marriage for the sake of the children such unions might produce.²⁷ While Virginia’s child-centered arguments in *Loving* purported to be more rooted in social science than in theology (by contrast to the trial judge’s appeal to divine separation of the races), Chambers has a point about hypocrisy. I do recount that, in their brief, the Lovings pointed to the long history of white men’s sexual exploitation of Black women in the south while being fixated on the “purity of white womanhood” and described the white man’s “‘sore conscience’ under the

21 Chambers, “Who’s the Bigot? The Book Matters but the Question Does Not.”

22 Chambers.

23 Quoting Haywood N. Hill, “This I Believe,” in Houck and Dixon, *Rhetoric, Religion, and the Civil Rights Movement*, 1:405–07, at 406 (emphasis added in *Who’s the Bigot?*).

24 Quoting Charles P. Bowles, “A Cool Head and a Warm Heart (Luke 10:25–37),” in Houck and Dixon, *Rhetoric, Religion, and the Civil Rights Movement*, 1:31–36, at 34.

25 Velte, “Lessons for LGBT Rights Advocates from *Who’s the Bigot?*”

26 Chambers, “Who’s the Bigot? The Book Matters but the Question Does Not.”

27 Chambers.

'illicit conditions fostered by the miscegenation laws'" (136).²⁸ I also report W. E. B. DuBois's retort to the "cry" of 'Southern Gentlemen' to '[d]eliver us from the vision of intermarriage.'" "[L]egal marriage," DuBois wrote, "is infinitely better than systemic concubinage and prostitution." He went on to lodge an implicit indictment of their hypocrisy in observing: "The wrong which you gentleman have done against helpless black women in defiance of your own laws is written on the foreheads of two millions of mulattoes, and written in ineffaceable blood" (85–86).²⁹

THE CRUCIAL ROLE OF TIME IN ASSESSING BIGOTRY

Several of the commentators engage with my attention in *Who's the Bigot?* to the role of time in assessing bigotry. For example, Jonathan Kahn agrees with me that "attention to the temporal aspect of bigotry is critical."³⁰ Kahn picks up on my discussion of Justice Kennedy's observation, in his "gay rights" jurisprudence—"the nature of injustice is that we may not always see it in our time" (17)³¹—to assert, "[i]dentifying racism in real time is, indeed, the challenge of the moment. Nobody ever thinks they are a bigot."³²

To the various examples I offer in *Who's the Bigot?*, Kahn supplies still more instances of the appeal to morality, religion, law, and conscience to justify racism and racial segregation. Tellingly, in a 1957 statement by white homeowners in Levittown, Pennsylvania, about why they opposed integration and race "mixing," the homeowners praise themselves as "moral, religious, and law-abiding," and claim their desire for a "closed community" is not an act of prejudice or discrimination; instead, they assert a separate but equal notion of "equal rights": "Negroes" have "equal opportunity to build" their own community without "intermingling" with their white one.³³ In *Who's the Bigot?* I quote similar denials of bigotry and prejudice in statements by white businessmen and politicians against the Civil Rights Act of 1964, as they argued the better way was not forced integration and intermingling, but parallel, equal institutions and communities (118–20). These speakers, in other words, did not (evidently) *see* injustice and racism in these conceptions of equal opportunity that justified racial segregation. Or, as Chambers might argue, their interpretation of what religion and morality required was either pretextual or shaped by a self-interest in maintaining the unequal status quo.

In his commentary, Justin Dyer raises concerns about my focus on the "element of time" (213) and my emphasis on "evolving understandings of justice" (for example, the role, in constitutional interpretation, of "new insights" in revealing injustice [150]).³⁴ As I understand this critique, it is because I show how appeals to "reason, nature, religious authority," and "transcendent moral principle" have been used to oppose civil rights that I discount such arguments.³⁵ Dyer asks, if there are not "unchanging moral principles," and "reason and justice" emerge "only after a societal

28 Quoting Brief for Appellants at 24–25, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395) (internal citations omitted).

29 Quoting W. E. B. Du Bois, *The Souls of Black Folk* (1903; repr. New Haven: Yale University Press, 2015), 81.

30 Kahn, "Seeing Racism in Real Time," *Journal of Law and Religion* 36, no. 2 (2021) (this issue).

31 Quoting *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015).

32 Kahn, "Seeing Racism in Real Time."

33 Kahn, quoting David Kushner, *Levittown: Two Families, One Tycoon, and the Fight for Civil Rights in America's Legendary Suburb* (New York: Walker, 2009), 112.

34 Justin Buckley Dyer, "Bigotry, Time, and Moral Progress," *Journal of Law and Religion* 36, no. 2 (2021) (this issue).

35 Dyer, "Bigotry, Time, and Moral Progress."

consensus,” then what standard, other than “convention,” guides reform?³⁶ Dyer finds an “implicit underlying moral anthropology” in which “reason does not provide insight into any transhistorical truths” or help us discover “those moral principles we collectively affirm.”³⁷ My focus, in *Who’s the Bigot?*, on time and on “generational moral progress” in realizing the Constitution’s guarantees of liberty and equality was not to embrace a sort of moral relativism or render suspect or useless any appeal to “reason” or to “reasonableness” as a criterion in controversies over equality and justice (128–29). I do not think Dyer and I disagree that, historically, parties have appealed to “reason” to justify opposition to civil rights. We may disagree on what the implications of those earlier controversies are for present-day controversies over civil rights. I believe reasoning and deliberation are critical in these political controversies and in constitutional interpretation. Dyer and I may disagree over methods of constitutional interpretation, such as the critical role of evolving understandings of justice and of the broad constitutional commitments to liberty and equality. But I agree with him that recognizing the temporal dimension of understandings of bigotry, injustice, and reasonableness raises questions and challenges.

One such question is: What allows people to see injustice in “real time”? Kahn powerfully argues that the horrifying video of Derek Chauvin “staring brazenly, enduringly, and persistently into the lens of the camera” while kneeling on the neck of George Floyd had the effect that some white people became able to “see” the injustice that they had not seen in “the myriad other horrific videos we have been confronted with over the past decade”: Chauvin’s “gaze of complicity” invited white persons watching the video to become complicit in his murderous act, unless they were willing to confront racism “in real time.”³⁸ The multiracial protests for racial justice and showing of support for #BlackLivesMatter after the murder of Floyd were one way that white persons rejected that invitation to complicity.

Kahn and I agree that identifying injustice in our time is “especially hard if one dismisses history as irrelevant,” since “seeing and perception” are critical to understanding this history, raising the question: “What are we able to see in our own time and how do we respond to it?”³⁹

Velte echoes my observation that the United States “is a nation steeped in historical amnesia that has led to a collective forgetting” about its long history of race discrimination; she notes her law students’ “historical knowledge gaps” about prior civil rights struggles.⁴⁰ Defending the use of the analogy to race discrimination in advocacy for LGBT rights, and illustrating how *Who’s the Bigot?* can aid in drawing that analogy, Velte persuasively argues that “our collective forgetting” about how religiously based arguments were made on both sides of struggles over desegregation, passage of the Civil Rights Act of 1964, and bans on interracial marriage makes it difficult to explain the analogy without reductive rejoinders that one is labeling today’s sincere religious believers as the moral equivalent of religious racists.⁴¹ Common moves, as she notes, are either to question the sincerity of religious defenders of racial segregation or to contend that these were fringe, rather than widely held, positions.

36 Dyer.

37 Dyer.

38 Kahn, “Seeing Racism in Real Time.”

39 Kahn.

40 Velte, “Lessons for LGBT Rights Advocates from *Who’s the Bigot?*” In *Who’s the Bigot?*, I offer historian Peggy Pascoe’s comment that shortly after *Loving v. Virginia*, there was a national “forgetting” of the “three-century-long history of bans on interracial marriage” (139, quoting Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America* [New York: Oxford University Press, 2009], 292).

41 Velte, “Lessons for LGBT Rights Advocates from *Who’s the Bigot?*”

I find intriguing Velte's proposed approach of seeking to present to judges the "facts of religious objections to civil rights" as a "*factual* comparison" rather than a "*normative* comparison between opponents of racial equality and today's exemption seekers."⁴² Of course, whether an "explicitly factual, normatively neutral approach" is desirable, even if it is feasible, is one question. In *Who's the Bigot?*, I offer some examples of lower federal court opinions striking down state "defense of marriage" laws in which judges seemed to take this approach. Judge Robert Hinkle of the Northern District of Florida, for example, observed that religious arguments for miscegenation laws seem, "nearly 50 years later," an "obvious pretext for racism," making it "hard for those who were not then of age to understand just how sincerely those views were held." "50 years from now," Judge Hinkle continues, observers would have a similar difficulty, wondering "just how those views could have been held" (127).⁴³ At the same time, one lesson I drew from my own excavation of Supreme Court jurisprudence was that judges and justices hear charges of bigotry whenever another jurist draws a parallel between earlier, race-based restrictions and present-day sexual orientation-based restrictions, even when no language of bigotry is used (170–210).

Consider Justice Alito's frequently quoted dissent in *Obergefell*, in which he predicted that even to draw an analogy between race and sex discrimination in marriage and the restrictions at issue (limiting marriage to one man and one woman) would lead to traditional believers being branded as bigots.⁴⁴ More recently, his Federalist Society speech reiterated his objection to *Obergefell* and the predictions in his *Obergefell* dissent about its impact on religious liberty. He asserted: "you can't say that marriage is the union between one man and one woman. Until very recently, that's what the vast majority of Americans thought. Now it's considered bigotry."⁴⁵

Justice Thomas also continues to enlist the rhetoric of bigotry in voicing his continuing dissent from *Obergefell*. Thus, when the Supreme Court denied Kentucky clerk Kim Davis's petition for a writ of certiorari in *Ermold v. Davis*⁴⁶—after the Sixth Circuit denied rehearing on her claim of qualified immunity in a lawsuit brought by same-sex couples for damages due to Davis's refusal to issue marriage licenses—Justice Thomas (joined by Justice Alito) concurred in the denial because it did not "cleanly present" important issues about *Obergefell*.⁴⁷ However, he strongly stated his continuing criticism of *Obergefell* for failing to protect religious liberty: "Davis may have been one of the first victims of this Court's cavalier treatment of religion in its *Obergefell* decision, but she will not be its last."⁴⁸ He contended that *Obergefell* "enables courts and governments to brand religious adherents who believe that marriage is between one man and one woman as bigots, making their religious liberty concerns that much easier to dismiss." Thus, "[d]ue to *Obergefell*, those with sincerely held religious beliefs concerning marriage will find it increasingly difficult to participate in society without running afoul of *Obergefell* and its effect on other antidiscrimination laws."⁴⁹

As I observed in *Who's the Bigot?*, even as these conservative justices criticize *Obergefell* for allowing government to brand believers as bigots, they also appeal to *Obergefell's* "promise" that such "sincere" believers will continue to be able to exercise their First Amendment rights.

42 Velte (emphasis Velte's).

43 Quoting *Brenner v. Scott*, 999 F. Supp. 2d 1278, 1281 (N.D. Fla. 2014).

44 *Obergefell v. Hodges*, 576 U.S. 644, 741–42 (2015) (Alito, J., dissenting).

45 Josh Blackman, "Video and Transcript of Justice Alito's Keynote Address to the Federalist Society," Volokh Conspiracy, *Reason*, November 12, 2020, <https://reason.com/volokh/2020/11/12/video-and-transcript-of-justice-alitos-keynote-address-to-the-federalist-society/>.

46 936 F.3d 429 (6th Cir. 2019), cert. denied, *Davis v. Ermold*, 141 S. Ct. 3 (2020).

47 *Davis*, 141 S. Ct. at 4.

48 *Davis*, 141 S. Ct. at 3.

49 *Davis*, 141 S. Ct. at 3–4.

Kennedy's language about "decent" and "honorable" premises for those beliefs has supported arguments by conservative justices and religious opponents of civil marriage equality that their beliefs are not tantamount to religious racism. Justice Kennedy's opinion in *Masterpiece Cakeshop* provided further support for these kinds of distinctions.

Although Kennedy never referred explicitly to bigotry or claimed Jack Phillips was being branded as a bigot, he did chastise the Colorado civil rights commissioner for showing "hostility" toward Phillips by comparing his religious beliefs about marriage to religious defenses of slavery and the Holocaust. At the same time, his opinion drew on the race analogy: Kennedy enlisted *Newman v. Piggie Park Enterprises*, a precedent that upheld the Civil Rights Act against an objection rooted in religious opposition to racial integration, to explain, as I point out in *Who's the Bigot?*, that while "religious and philosophical objections to gay marriage" were protected views, there is a "general rule" that business owners holding those views may not "deny protected persons equal access to goods and services" under public accommodations law (206).⁵⁰ Thus, *Masterpiece Cakeshop* offered something for everyone: it confirmed the relevance of civil rights-era precedents to current battles over antidiscrimination law while also indicating that there was a moral distance between Phillips and religious racists.

Even so, the invocation of *Piggie Park* highlights that the decency or indecency of a religious belief is not the point for considering whether government must provide an exemption. As Velte and Kaveny point out, First Amendment jurisprudence insists only that beliefs be "sincere," not reasonable or decent. From this, Velte draws the important observation that it may be possible to instruct judges about factual analogies to race without making a normative judgment (such as bigoted then/bigoted now).

Fulton did not prove to be the case in which to test Velte's proposal. Certainly, there was keen interest in the race analogy at oral argument. Several justices drew analogies to religiously motivated race discrimination, asking questions like: "What if a religiously motivated social service provider didn't want to certify as foster parents an interracial couple?"⁵¹ Through such questions, the justices sought to determine what line Catholic Social Services wanted them to draw concerning when the government has to let contractors follow their religious beliefs and when it can decline because of compelling governmental interests in equal treatment and nondiscrimination. For example, is race the *only* area in which the government's interest in prohibiting discrimination is so compelling (that is, "super-compelling," a term used at oral argument) that, even if a service provider has religious beliefs against interracial marriage, government could readily deny an exemption? Or, as the City argued, is prohibiting sex discrimination and sexual orientation discrimination also compelling because of (as Justice Sotomayor put it) the stigma created by rejection?

Chief Justice Roberts's narrowly reasoned opinion in *Fulton* did not engage the race analogy. Roberts focused on the fact that a clause in the City's contract, which states that government contractors like Catholic Social Services shall not reject a prospective foster parent or child based on "sexual orientation," also allows for an exception granted in the "sole discretion" of the commissioner.⁵²

50 Quoting *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2018).

51 Linda C. McClain, "Religious Liberty Exemptions for Government Contractors," interview by Kimberly Miragliuolo, *The Record*, July 1, 2021, <https://www.bu.edu/law/record/articles/2021/religious-liberty-for-government-contractors/>. See also Linda C. McClain, "The *Fulton v. City of Philadelphia* Oral Argument: Interracial Marriage as a Constitutional Lodestar—Or Third Rail?—in Reasoning about Religiously-Motivated Discrimination," *Balkinization* (blog), November 17, 2020, <https://balkin.blogspot.com/2020/11/the-fulton-v-city-of-philadelphia-oral.html>.

52 *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1878 (2021).

Citing *Employment Division v. Smith*, 494 U.S. 872 (1990), and other First Amendment cases, Roberts reasoned that the contract is not “generally applicable”; as a result, the city could not refuse to allow an exemption to Catholic Social Services without a “compelling reason.”⁵³ It is encouraging that, in granting the City’s “weighty” interest in “equal treatment of prospective foster parents and foster children,” Roberts quotes Justice Kennedy’s words from *Masterpiece Cakeshop*: “[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.”⁵⁴ However, Roberts concludes: “On the facts of this case, however, this interest cannot justify denying C[atholic] S[ocial] S[ervices] an exception for its religious exercise,” because the contract allows exceptions and the City offered “no compelling reason” for denying Catholic Social Services an exception.⁵⁵ Roberts noted that the City contracts with many other foster care agencies willing to certify gay couples and that Catholic Social Services is willing to refer gay couples to them. Roberts avoided deciding whether the city treated the agency’s religion with “hostility,” as it had argued (invoking *Masterpiece Cakeshop*).⁵⁶

The race analogy was not entirely absent in *Fulton*, however. In a concurring opinion joined by Justices Gorsuch and Thomas, Justice Alito drew on the analogy in a way that shows how some view any comparison to religiously based race discrimination reads as a charge of present-day bigotry. Alito writes: “Suppressing speech—or religious practice—simply because it expresses an idea that some find hurtful is a zero-sum game. While C[atholic] S[ocial] S[ervice]’s ideas about marriage are likely to be objectionable to same-sex couples, lumping those who hold traditional beliefs about marriage together with racial bigots is insulting to those who retain such beliefs.”⁵⁷ Alito quotes both from *Obergefell*’s majority opinion and its “promise” to religions and their adherents and from *Masterpiece Cakeshop* to insist that “traditional beliefs about marriage” are “decent and honorable” and should not be equated with “racism, which is neither.”⁵⁸ This concurring opinion suggests that, for at least three justices, the race analogy still sounds as a charge of bigotry.

WHY TALK ABOUT IMPLICIT BIAS WHEN THERE IS SO MUCH OVERT BIGOTRY AND RACISM?

Chambers and Kahn both focus on the attention I give to a shift in the scientific study of prejudice from overt bigotry and prejudice to implicit or unconscious bias. Chambers comments that *Who’s the Bigot?* focuses primarily on “bigotry and explicit bias,” but makes a “brief detour into unconscious bias”; he speculates that “the potential firestorm over calling people bigots or views bigoted” may have led me to “consider whether unconscious bias may have replaced bigotry in the discrimination hierarchy.”⁵⁹ Kahn aptly observes how problematic it is when implicit bias is elevated “into

53 *Fulton*, 141 S. Ct. at 1878–79.

54 *Fulton*, 141 S. Ct. at 1882, quoting *Masterpiece Cakeshop*, 138 S. Ct. at 1727 (brackets in *Fulton*).

55 *Fulton*, 141 S. Ct. at 1882.

56 *Fulton*, 141 S. Ct. at 1877.

57 *Fulton*, 141 S. Ct. at 1925 (Alito, J., concurring in the judgment).

58 *Fulton*, 141 S. Ct. at 1925. See my further analysis of the implications of *Fulton*: Linda C. McClain, “Is There a ‘Center’ to Hold in Supreme Court Jurisprudence on Religious Liberty and LGBTQ Rights?,” Berkley Forum, July 26, 2021, <https://berkeleycenter.georgetown.edu/responses/is-there-a-center-to-hold-in-supreme-court-jurisprudence-on-religious-liberty-and-lgbtq-rights>.

59 Chambers, “Who’s the Bigot? The Book Matters but the Question Does Not.”

a sort of master narrative for talking about issues of racial justice.”⁶⁰ I completely agree that racism, not implicit bias, was the problem when the manager of a Philadelphia Starbucks, after questioning two Black men who sat down without ordering and being informed that they would wait to order until a third person arrived, called the police and had them arrested.⁶¹

I agree with Chambers and Kahn that a discussion of implicit bias should not divert attention to the continuing problems of both overt racism and structural, or systemic, racism. In my book, I identify some tensions within classic works such as W. Gordon Allport’s 1954 *The Nature of Prejudice*,⁶² and I also examine the shift in the scientific understanding of prejudice to focus less on self-reported prejudice to tools like the Implicit Association Test to highlight unconscious bias at odds with (voiced) egalitarian commitments (for example, “the hidden biases of good or good-ish people”) (44). I did this not to suggest either that overt and structural racism—and other forms of discrimination—were irrelevant to understanding battles over bigotry, but to float a tension between viewing “the bigot” as a fixed, irredeemable personality type and viewing prejudice as arising out of ordinary cognitive processes. Events since I finished writing *Who’s the Bigot?*, including the police killings of George Floyd and other Black and Brown Americans that spurred a summer of protests, show the urgent need to address overt and structural/systemic racism. Tellingly, in the Trump administration’s rhetoric about these protests, demands to address systemic racism were met with a claim that the problem was simply a few “bad apples.” As I elaborate elsewhere, Trump and some of his supporters turned the diagnosis of systemic racism and demand for reform into a charge that good, decent, ordinary Americans were being branded as bigots.⁶³ This suggests the continuing potency of the rhetoric of bigotry when used to deflect attention to problems of injustice. By comparison, the Biden administration has appealed to “core values and beliefs” that Americans share to condemn forcefully hate, white supremacy, racism, sexism, and xenophobia; both President Biden and Vice President Harris have not been afraid to recognize the problem of systemic racism and have called for a government-wide commitment to racial equity.⁶⁴

Linda C. McClain

Robert Kent Professor of Law, Boston University School of Law

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⁶⁰ Kahn, “Seeing Racism in Real Time.”

⁶¹ Kahn.

⁶² W. Gordon Allport, *The Nature of Prejudice*, 25th anniversary ed. (New York: Basic Books, 1979).

⁶³ See Linda C. McClain, “Why Talk about Bad Actors versus Good People Misses the Problem of Systemic Racism,” *OUPblog*, June 19, 2020, <https://blog.oup.com/2020/06/why-talk-about-bad-actors-versus-good-people-misses-the-problem-of-systemic-racism/>.

⁶⁴ See, for example, Andrea Shalal, “Biden, Harris, Condemn U.S. Racism, Sexism in Blunt Language,” *Reuters*, March 21, 2021, <https://www.reuters.com/article/us-usa-biden-racism/biden-harris-condemn-u-s-racism-sexism-in-blunt-language-idUSKBN2BE019>; Joseph R. Biden Jr., Executive Order for Advancing Racial Equity and Support for Underserved Communities through the Federal Government, January 20, 2021, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

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