With Dignity and Justice for All: The Jurisprudence of Equal Dignity and the Partial Convergence of Liberty and Equality in American Constitutional Law

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In its decision in Obergefell v. Hodges, finding a constitutional right for same-sex couples to be married and have their marriages recognized, the Supreme Court held that the Constitution granted the plaintiffs what they sought: "equal dignity in the eyes of the law." For a concept found nowhere in the text of the Constitution, dignity has received considerable attention of late in American constitutional jurisprudence. Especially relevant to the Obergefell decision, dignity played an important role in two key precedents, Lawrence v. Texas and United States v. Windsor. This Essay documents the development of the jurisprudence of "equal dignity" and seeks to ascertain its role and significance in the Court's fundamental rights jurisprudence. I argue that Obergefell signals a partial convergence of liberty and equality in American constitutional law. This convergence is both cause and effect of the increased salience of dignity and its emergence as a constitutional touchstone. In the jurisprudence of equal dignity, dignity does the work of tradition without the requirement of time. However, it cannot be said that Obergefell announced a new "doctrine of equal dignity." Human dignity in its liberty- and equality-regarding aspects became a sign and marker of practices that (might) warrant constitutional protection, even as it is the anterior value on which constitutional liberty and equality are grounded.

1. Introduction

On June 27, 2015, the day after the Supreme Court announced its landmark decision in *Obergefell v. Hodges*, two words were emblazoned across the front page of the *New York Times*: "'EQUAL DIGNITY.'"[1] They were drawn from Justice Anthony Kennedy's majority opinion, in which the Court established a constitutional right to same-sex marriage. For a concept found nowhere in the text of the Constitution, dignity has received much attention of late in American constitutional jurisprudence. Indeed, dignity was present at each step of the Supreme Court's journey towards finding a constitutional right of same-sex marriage. In *Obergefell*, dignitary reasoning formed a central argumentative thread, uniting the majority's treatments of liberty and equality. And dignity was the focal point of the majority's conclusion that the Constitution granted same-sex couples "equal dignity in the eyes of the law." In his opinion in *United States v. Windsor,* striking down Section 3 of the Defense of Marriage Act (DOMA), Justice Kennedy made reference to dignity or one of its cognates ten times, compared to just three instances each of "equality" and "inequality" and

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[1] NEW YORK TIMES, June 27, 2015 (http://nyti.ms/1T18Ho8).

five of "liberty." The significance of Kennedy's use of dignity there follows not from the number of times it appeared in his opinion, but rather from the role it played in his argument finding the federal law an unconstitutional violation of the Fifth Amendment. Kennedy's use of dignity in *Windsor* echoes his majority opinion a decade earlier in *Lawrence v. Texas*, where it played a less prominent though nonetheless important role. But it is only a faint echo. Whereas in *Lawrence* dignity played a supporting part, in *Windsor* it was thrust into a leading role. *Obergefell* carried forward this emphasis, building on the foundation laid in *Lawrence* and *Windsor* but modifying the specific meaning and requirements of "equal dignity."

And yet, with no clear textual home in the Constitution, dignity's increasing prominence is accompanied by persistent questions about both its legitimacy and its significance. These questions are perhaps best captured by the quotation marks surrounding the *New York Times* headline, a sign of both the provenance and the novelty of "equal dignity." Kennedy's use of dignity didn't escape the notice of the interested public or the legal academy. Nor did it escape their criticism. Within days, the legal professoriate had issued its judgment of the majority opinion: right on the merits, wrong—or at least misguided—on the reasoning.[2] This criticism should not have been surprising. In addition to the obvious fact that dignity does not appear in the Constitution, there is profound disagreement about everything from its meaning to its utility. For better or worse, controversy over dignity is anything but new. Whereas Kant used "dignity" to refer to the intrinsic value of morality,[3] Schopenhauer derided it as "the shibboleth of all the perplexed and empty-headed moralists."[4] And while Catholic and Protestant thinkers have associated human dignity with creation in God's image,[5] Marx thought the term a "refuge from history in morality."[6] More recently, a number of scholars have excavated the complicated political, religious, and legal origins of human dignity.[7] In all of these treatments, dignity comes across as a far more complex, even dangerous, concept than is suggested by the Supreme Court's recent opinions. In this respect, then, dignity has been met with much the same welcome in American constitutional law as it has received elsewhere: for every embrace, a rejection; for each word of praise, a rebuke.

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[2] See, *e.g.*, Andrew Koppelman, *The Supreme Court made the right call on marriage equality—but they did it the wrong way*, SALON, June 29, 2015 (http://bit.ly/1dvu9BO); and Jonathan Turley, *The trouble with the 'dignity' of same-sex marriage*, WASH. POST, Jul. 2, 2015 (http://wapo.st/1OJn2By).

[3] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 4:434-435.

[4] ARTHUR SCHOPENHAUER, THE BASIS OF MORALITY 100 (2005).

[5] See, *e.g.*, THE CATECHISM OF THE CATHOLIC CHURCH (Part 3, Sec. 1, Ch. 1) (official version available at http://bit.ly/1W9gGQS); and the 1995 Encyclical *Evangelium Vitae* (http://bit.ly/1AHf2fZ). See also JÜRGEN MOLTMANN, ON HUMAN DIGNITY: POLITICAL THEOLOGY AND ETHICS (2012).

[6] Karl Marx, *Moralising Criticism and Critical Morality, a Contribution to German Cultural History Contra Karl Heinzen*, DEUTSCHE-BRÜSSELER-ZEITUNG, Nos. 86 (Oct. 28, 1847), 87 (Oct. 31, 1846), 90 (Nov. 11, 1847), 92 (Nov. 18, 1847), and 94 (Nov. 25, 1847); cited in Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT. LAW 655, n. 40 (2008)

[7] See, *e.g.*, SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010); and *The Secret History of Constitutional Dignity*, 17 YALE HUM. RTS. & DEV. L.J. 39 (2014). See also LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2007).

In contrast to American law, dignity enjoys a prominent and often formal place in national and supranational legal systems across the world.[8] The most comprehensive database of world constitutions reports 150 constitutions that include at least one provision invoking dignity.[9] Perhaps the most visible body of constitutional jurisprudence on this topic arises from Germany's Basic Law (*Grundgesetz*), the opening article of which declares that, "Human dignity is inviolable."[10] Further, the first article of the Universal Declaration of Human Rights begins with the pronouncement that, "All human beings are born free and equal in dignity and rights."[11] To a great extent, the United States appears to stand out as an exception to the prominence of dignity in constitutional law and jurisprudence.[12] What, then, are we to make of the growing body of American jurisprudence that draws on dignity? What is the role and significance of "equal dignity" in American constitutional law?

This Essay seeks to answer those questions by providing an account of the jurisprudence of equal dignity and advancing an interpretation of its significance in American constitutional law. In Part 2, I offer a narrative of dignity jurisprudence from *Bowers v. Hardwick* to *Obergefell v. Hodges*, charting the development of "equal dignity." Part 3 then introduces and critically analyzes Laurence Tribe's and Kenji Yoshino's prominent interpretations of these cases and the role of dignity therein.[13] Though each of these treatments picks up on important jurisprudential developments, neither does justice to the complexity of equal dignity as it has been elaborated across the relevant cases nor to the consequences of its developmental trajectory. Only by putting dignity at the center of the analysis can we see clearly the meaning and significance of the jurisprudence of equal dignity. The critique offered in Part 3 sets the stage for Part 4, in which I offer an alternative interpretation of the jurisprudence of equal dignity. I argue specifically that doctrinal developments between *Lawrence* and *Obergefell* signal a partial convergence of liberty and equality in American constitutional law. While endorsing Tribe's general notion of the liberty-equality double helix, this argument takes a further step by maintaining that the centrality of dignity in the Court's reasoning has had the effect of twisting the strands

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[8] See, *e.g.*, AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT (2015).

[9] Data from CONSTITUTE (www.constituteproject.org), the public database of the COMPARATIVE CONSTITUTIONS PROJECT. See also ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON (2012); and Doron Shulztiner and Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 AM. J. COMP. L. 461 (2014).

[10] GRUNDGESETZ, ART. I. For commentary and analysis, see DONALD P. KOMMERS and RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 356-373 (2012); Christopher Möllers, *Democracy and Human Dignity: Limits of a moralized conception of rights in German Constitutional Law*, 42 ISRL. L. REV. 416 (2009); and Kai Moller, *On Treating Persons as Ends: The German Aviation Security Act, Human Dignity, and the Federal Constitutional Court*, PUB. L. 462 (Aug. 2006).

[11] See, *e.g.* AHARON BARAK, *supra* note 8, at 38-42 (2015); Rhoda E. Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES: A QUEST FOR CONSENSUS (1995); and JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTION ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (1987).

[12] But see Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011).

[13] Laurence H. Tribe, "Lawrence v. Texas: *The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) [hereinafter, *Fundamental Right*] and *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16 (2015) [hereinafter, *Equal Dignity*]; Kenji Yoshino, *The Supreme Court, 2014 Term—Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147 (2015) [hereinafter, *New Birth*].

of the double helix tighter, clarifying their reciprocal definition and mutual dependence. This convergence is both cause and effect of the increased salience of dignity and its emergence as a constitutional touchstone. And yet, the result is not a collapse of liberty into equality or even, as Tribe claims, a "fusion" of the two around a core of dignity.[14] The convergence is only partial, and the result is an understanding of liberty and equality that is oriented around but not reduced to their relationships to human dignity.

By documenting the development of "equal dignity," I strive to clarify *Obergefell*'s significance for the Court's fundamental rights jurisprudence. Whereas in the past it has insisted on the identification of a tradition of practice or legal protection to identify a fundamental right, *Obergefell* signals a loosening of this requirement and the corresponding elevation of human dignity in the Court's analysis. In the jurisprudence of equal dignity, dignity does the work of tradition without the requirement of time. While precluding some of the radical implications of the notion of dignity emphasized in *Windsor*, the jurisprudence of equal dignity that emerges from *Obergefell* presents a pivotal juncture in American law, a moment in which the central question concerns the nature of and relationships between our fundamental constitutional values.

2. From *Bowers* to *Obergefell*: The Jurisprudence of Equal Dignity

The jurisprudence of equal dignity is the product of a years long process of jurisprudential evolution and political change. While its roots are discernible in many of the Supreme Court's decisions on individual rights, the *jurisprudence* is most clearly understood in the context of its development across the "gays rights triptych" of *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*.[15] The jurisprudence of equal dignity, as I treat it here, is but one strain of the Court's broader dignity jurisprudence. As Leslie Meltzer Henry has recently shown, the Court has employed a number of distinct conceptions of dignity, ranging from institutional status to collective virtue.[16] Much work remains to be done to clarify and assess the relationships between and among the notions of dignity present in American constitutional law. Here I am concerned only with the conceptions of dignity that figure in the Court's *Obergefell* decision and related cases.

A. From Bowers *to* Lawrence

In *Bowers v. Hardwick*, the Supreme Court upheld a Georgia law that criminalized sodomy, finding that the Constitution did not "confer[] a fundamental right upon homosexuals to engage in sodomy,"[17] despite the fact that the law ostensibly applied to homosexuals and heterosexuals alike. Writing in dissent, Justice Stevens posed a fundamental challenge to the majority's reasoning, casting the question of the case as concerning not a particular right of homosexuals but the liberty interests protected by the Fourteenth Amendment's Due Process Clause, and emphasizing the Court's previous holdings establishing "the individual interest in privacy."[18] But, he was quick to add, "its decisions [in this area] have actually been animated by an even more fundamental

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[14] Tribe, *Equal Dignity*, at 23.

[15] See Tribe, *Equal Dignity*, at 22.

[16] See cases cited in Meltzer Henry, *supra* note 12, at n. 18-26.

[17] 478 U.S. at 190 (1986).

[18] *Id*. at 217.

concern."[19] Citing his opinion nine years earlier in the Seventh Circuit case *Fitzgerald v. Porter Memorial Hospital*, he explained that those privacy decisions dealt with "the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny."[20] And what has been the Court's role in these matters? The *Fitzgerald* quotation concludes,

> Guided by history, our tradition of respect for *the dignity of individual choice in matters of conscience* and the restraints implicit in the federal system, federal judges have accepted the responsibility for the recognition and protection of these rights in appropriate cases.[21]

For Stevens and the justices who joined his dissent, dignity was the value implicated by particular kinds of individual choice, namely those concerning matters of conscience and personal or relational intimacy.[22] Moreover, the Court's privacy jurisprudence was itself grounded in a respect for and protection of that dignity. To these dissenters it was clear that the law at issue was an invasion of constitutionally protected privacy and, therefore, a violation of individual dignity.

Sixteen years later, in *Lawrence v. Texas*, the Court was compelled to revisit its *Bowers* decision. At issue in *Lawrence* was a Texas law similar to Georgia's anti-sodomy statute, the only difference being that Texas's law was sex-specific, singling out same- but not opposite-sex sodomy. The six-member majority sharply criticized the holding in *Bowers*, going as far as declaring that, "*Bowers* was not correct when it was decided, and it is not correct today."[23] Comparing the laws at issue in both cases, Kennedy argued that, "The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[24] Because it is not the Court's role to "define the meaning of the relationship or to set its boundaries…adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their *dignity as free persons*."[25]

Whereas in *Bowers* dignity played a small, though nonetheless important, part in the dissenters' reasoning, in *Lawrence* it was thrust not only into the majority opinion but also into a more significant role. The increased significance resulted in part from *Planned Parenthood v. Casey*, a case decided in the interval between *Bowers* and *Lawrence*. Reflecting on *Casey* Kennedy wrote that *Lawrence* "again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[26] Quoting

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[19] *Id.*

[20] 523 F.2d at 719 (1975).

[21] *Id.* at 720 (emphasis added).

[22] See, *e.g.*, *Griswold v Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); and *Carey v. Population Services International*, 431 U.S. 678 (1977).

[23] 539 U.S. at 578 (2003).

[24] *Id.* at 567.

[25] *Ibid.* (emphasis added).

[26] *Id.* at 573-574.

directly from perhaps the best known, and most frequently derided,[27] passage from *Casey*, Kennedy continued,

> These matters, involving the most intimate and personal choices a person may make in a lifetime, *choices central to personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[28]

Lawrence thus not only affirmed the notion of dignity put forth by Stevens in his *Bowers* dissent. It also underscored the connection between dignity and the rights of privacy protected by the Court's due process jurisprudence. Constitutional liberty, as far as the Fifth and Fourteenth Amendments are concerned, entails an individual's ability to freely make the decisions that define his or her existence. And it is the individual's dignity that renders unlawful any attempt to control or unduly burden those decisions. In Kennedy's extension of Stevens' *Bowers* argument, individual dignity requires a sphere of inviolability, which the Court had established and elaborated through its privacy and due process jurisprudence over the previous three decades.

B. From Lawrence *to* Windsor

A decade after *Lawrence* was decided the Court agreed to hear *United States v. Windsor*, an equal protection challenge to the Defense of Marriage Act (DOMA). The respondent, Edith Windsor of New York, was seeking a refund for the estate taxes she paid after the death of her spouse, Thea Spyer. Though the two had been engaged since 1967 they were not wed until 2007, which required that they travel to Toronto, Ontario. And although same-sex marriage was not then legal in New York, upon returning home their marriage was recognized under a 2008 gubernatorial order that directed state agencies to recognize such marriages from other jurisdictions. When Spyer died in 2009, Windsor sought the federal estate tax exemption for which surviving spouses are eligible. But she was prevented from doing so because Section 3 of DOMA, through an emendation to the Dictionary Act, excluded same-sex partners from the definitions of "marriage" and "spouse."

As in *Lawrence*, Justice Kennedy delivered the opinion of a divided Court, striking down Section 3 of DOMA as an unconstitutional "deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[29] What is striking about the decision is not only the prominent role dignity plays in Kennedy's argument, but also the uniformly different sense in which it is used. To a greater extent than *Lawrence*, *Windsor*'s rationale depends on a robust notion of dignity. And that notion bears little resemblance to the one used in *Bowers* and *Lawrence*.

Windsor's break from the notion of dignity in *Lawrence* as individual liberty and autonomy is clear from the first paragraph of Kennedy's treatment of the central question presented by the case. After explaining why the Court does, in fact, have jurisdiction over the case,[30] he turned to the substance of the case presented, noting almost immediately that for many individuals the "possibility that two persons of the same sex might aspire to

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[27] Justice Scalia famously ridiculed Kennedy's argument in his *Lawrence* dissent, styling this the "sweet-mystery-of-life passage" (*id*. at 590).

[28] *Id*. at 574, quoting *Casey*, 505 U.S. at 851 (1992) (emphasis added).

[29] 133 S.Ct. at 2695.

[30] *Id*. at 2684-2689.

occupy the same status and dignity as that of a man and woman in lawful marriage"[31] had been a recent revelation. For Windsor and Spyer, that "status and dignity" was made manifest through the actions of the State of New York, whose "decision to give [same-sex] persons the right to marry conferred upon them a dignity and status of immense import."[32] This decision, in turn, "enhanced the recognition, dignity, and protection of the class in their own community."[33] Recapitulating New York's actions in this area, Kennedy ultimately concluded that the state's actions had established the "equal dignity of same-sex marriages."[34] *Windsor* thus introduced the notion of "equal dignity," a result of state action that, for reasons of both federalism and equal protection, the federal government was compelled to recognize. The closing lines of the opinion bring together the relevance of the state's actions with the dignity claim at stake in *Windsor*, and in so doing they mark the evolution of dignity's meaning since *Bowers*. "The federal statute is invalid," Kennedy wrote, "for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity."[35]

C. From Windsor *to* Obergefell

The Court's decision in *Windsor*, paired with its simultaneous resolution of *Hollingsworth v. Perry* on procedural grounds,[36] was widely seen as the prelude to another, even more constitutionally significant case. This perception was heightened by the Court's decision in the fall of 2014 to deny cert in a challenge to appeals court rulings permitting same-sex marriage, which had the effect of letting gay marriage proceed on the ground in a total of 24 states and the District of Columbia. These developments set the scene for subsequent cases that would lead to a split in the lower courts over the constitutionality of same-sex marriage. In January 2015, the Court consolidated cases out of Michigan, Ohio, Kentucky, and Tennessee and granted cert.

Obergefell v. Hodges presented two constitutional questions. First, does the Fourteenth Amendment require a state to license a marriage between two people of the same sex? And second, must a state recognize the lawfully performed and licensed marriage of a same-sex couple performed out of state? The answer to both of these questions, the Court found, was yes. As in *Windsor*, the Court was divided 5-4. And as in *Windsor*, Justice Kennedy wrote the opinion of the Court. Once again, dignity figured prominently in the opinion.

Reading Kennedy's opinion in the context of dignity's evolution from *Lawrence* to *Windsor*, one is immediately struck by the discontinuities between *Obergefell* and *Windsor*. Gone are the references to the conferral or granting of dignity, though, as is discussed below, a vestige of this conception remains. Here, once again, is the language of inherence and extant dignity interests that demand recognition. The dignitary reasoning of the opinion is held together by an attempt to connect the seemingly disparate threads laid out

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[31] *Id.* at 2689.

[32] *Id.* at 2692.

[33] *Ibid.*

[34] *Id.* at 2693.

[35] *Id.* at 2696.

[36] 570 U.S. ____ (2013) (holding that the official proponents of a ballot initiative did not have standing to appeal the decision of the district court).

in *Lawrence* and *Windsor*. The liberty-regarding dignity of the former is joined with the equality-regarding dignity of the latter. The arc traced across Kennedy's opinion moves from the equal dignity of man and woman, gay and straight, to the inherent dignity that serves as the basis for constitutionally protected liberties, and finally to the recognition-requiring dignity of all marital bonds. The sole exception to this movement is the first appearance of the term: "The lifelong union of man and woman always has promised nobility and dignity to all persons, without regard to their station in life."[37] But this usage —somewhere between inherence and governmental recognition—serves as a frame for the Court's argument, for it both draws on the dignity inherent in all individuals and anticipates the dignity of official recognition.

In his treatment of the evolution of marriage, Kennedy puts dignity at the center of the relevant changes. The abandonment of the law of coverture, he writes, followed the increased understanding "that women have their own equal dignity."[38] This same pattern of new understandings of freedom accompanying realizations of equal dignity was reproduced in the context of homosexuality, except this time in the negative. The social and resulting legal condemnation of gay intimacy was at the root of the reality that "many persons did not deem homosexuals to have dignity in their own distinct identity."[39] And despite the "greater awareness of the humanity and integrity of homosexual person [that] came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions."[40]

As the opinion shifts from the history of marriage and gay rights to the constitutional questions connected to the Fourteenth Amendment, so too does Kennedy's use of dignity. In the opening discussion of the liberties protected by the Due Process Clause, he writes, referencing *Eisenstadt* and *Griswold*, that "these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[41] Kennedy then proceeds to show how one's inherent dignity extends, and is thus implicated in situations, beyond strict individuality. The bridge for this extension is the class of intimate decisions recognized as the basis for constitutionally protected privacy stretching back, through *Lawrence*, to *Eisenstadt* and *Griswold*, the dignitary dimensions of which Justice Stevens identified in his *Bowers* dissent. In so doing, the *Lawrence* notion of inherent dignity was connected to the notion of recognized—but not conferred—dignity in *Windsor*. With additional reference to *Loving*, Kennedy writes, "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[42] The intimate and autonomous bond between two dignity-bearing individuals, regardless of sex, is itself possessed of dignity. And entering into that bond affects the dignity of the individuals involved: "The right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[43] This is a modulation from *Windsor*, which emphasized the states' role in enhancing

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[37] 135 S. Ct. at 2594.

[38] *Id*. at 2595.

[39] *Id*. at 2596.

[40] *Ibid*.

[41] *Id*. at 2597.

[42] *Id*. at 2599.

[43] *Id*. at 2600.

individual and relational dignity. Here, though, it is the relationship and the right to enter therein that is the source of dignity.

In a litany that identified by name each person in three of the fourteen couples petitioning the Court, Kennedy asked whether the "[d]ignitary wounds" wrought for the seventeen years in which *Bowers* was good law would be visited upon these and countless other couples. The couples "now ask whether" any state can "deny to [them]…the basic dignity of recognizing" their marriages.[44] The dignity of the marital bond stands independently of the state, but it demands the recognition of the state. Kennedy concluded his opinion of the Court with a terse but direct summary: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[45]

3. Understanding Equal Dignity: Two Views

The burden of Part 2 was to lay out the development of the Court's dignity jurisprudence from *Lawrence* to *Obergefell*, identifying continuities and discontinuities across the cases. This narrative presents a fundamental question: What are we to make of the jurisprudence of equal dignity? What are the contours of the notions of dignity employed by the Court, and what is the significance of these opinions? In this Part, I introduce and critically evaluate two leading efforts to understand various aspects of the jurisprudence of equal dignity. While each picks up on important features of the jurisprudence, neither does justice to the complexity of equal dignity as it has been elaborated across the relevant cases nor to the consequences of its developmental trajectory. Only by putting dignity at the center of the analysis can we see clearly the meaning and significance of the jurisprudence of equal dignity.

A. The Liberty-Equality Double Helix

Arguably the most prominent advocate of dignity's centrality to American constitutional law is Laurence Tribe, who in an influential post-*Lawrence* article characterized the "Substantive Due Process-Equal Protection synthesis" as a "legal double helix."[46] On this view liberty and equality constitute two intertwined strands of constitutional thought that give expression to a more fundamental value: human dignity. To wit, Tribe situated *Lawrence* "in the context of the larger project of elaborating, organizing, and bringing to maturity the Constitution's elusive but unquestionably central protections of liberty, equality, and—underlying both—respect for human dignity."[47] Thus constitutional dignity is not the novel end product of Due Process or Equal Protection reasoning but the very ground on which such reasoning is based and the goal towards which it proceeds.

Following *Obergefell*, Tribe returned to the liberty-equality double helix and again emphasized the centrality of human dignity. In a response to the piece by Kenji Yoshino discussed below, Tribe argued that "*Obergefell*'s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*—and to have located that doctrine in a tradition of constitutional

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[44] *Id*. at 2606.

[45] *Id*. at 2608.

[46] Tribe, *The Fundamental Right*, at 1902 and 1898.

[47] *Id*. at 1895.

interpretation as an exercise in public education."[48] On this view, dignity serves as the core around which Equal Protection and Due Process are wound. Moreover, he argues, "the rubric under which fundamental rights should be evaluated going forward, is what I call the doctrine of equal dignity."[49]

The existence and future viability of this "doctrine of equal dignity" depends on what Tribe sees as a fusion of the liberty and equality strands. Whereas his earlier work limned the contours of the liberty-equality double helix, his most recent work emphasizes their convergence around the value that underlies both—human dignity. Reflecting on Kennedy's opinions in "the gay rights triptych," as well as *Romer v. Evans*, Tribe argues that, "Justice Kennedy has wound the Equal Protection and Due Process Clauses more tightly, finally fusing them together in *Obergefell* with the notion of 'equal dignity in the eyes of the law.'"[50] The result is a more "tightly wound" double helix the result of which is a "doctrine of equal dignity" that "does not simply look back to purposeful past subordination, but rather lays the groundwork for an ongoing constitutional dialogue about fundamental rights and the meaning of equality."[51]

While I address both the empirical and normative dimensions of Tribe's convergence claim in the next Part, it is necessary here to attend to his treatment of dignity. For though he emphasizes dignity more than Yoshino, he nonetheless collapses much of the jurisprudential development of equal dignity into a narrative amenable to his overarching argument about the due process-equal protection fusion. Thus, in explaining the "constitutional pedigree" of equal dignity, Tribe invokes the Fourteenth Amendment and its role in American constitutional development, saying that it was adopted "to atone for our nation's own original sin and extend our Constitution's promises to all citizens."[52] Despite early developments that limited the Amendment's potential—particularly the evisceration of the Privileges or Immunities Clause—Justice Kennedy was able to unify the Due Process and Equal Protection clauses under the rubric of dignity. This unification, in turn, "does the work that the Privileges or Immunities Clause was originally designed to do."[53]

On Tribe's telling, Kennedy's dignity jurisprudence is characterized by two dominant understandings of dignity between which there is ultimately "no significant gap[.]"[54] The first is a "hierarchical version of the concept," that rests on the autonomy and prerogatives of the states. Because states have a dignity, they are empowered to confer or extend dignity through their official actions. It was this version of dignity, Tribe claims, that was at play in *Windsor*. The second understanding of dignity inheres not in states or other governing institutions but in individuals. This is the dignity of personal autonomy and self-determination. These understandings are not only compatible but ultimately quite close to each other because Kennedy has been clear that state sovereignty, and thus state dignity, is a means to an end and not an end in itself. The end for which state dignity is a means is the

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[48] Tribe, *Equal Dignity*, at 17 (emphasis in original).

[49] *Ibid*.

[50] *Id*. at 23, citing *Obergefell*, 135 S. Ct. at 2608.

[51] *Id*. at 17.

[52] *Id*. at 21.

[53] *Ibid*.

[54] *Id*. at 22.

protection of individual liberty and autonomy. In short, the dignity of state governments is of instrumental value for securing individual dignity.

The designation of *Windsor*'s dignity as hierarchical is puzzling. As the discussion in Part 2 suggests, Kennedy's use of the concept there was concerned more with granting or enhancing dignity. And further, that dignity does not exist in a clearly structured hierarchy. The dignitary harm consists in the exclusion from a relative status open to other similarly situated couples, not from an objective hierarchy of status. Any conclusion about relative dignity is reached via a comparison of similarly situated individuals and couples, thus necessitating *Windsor*'s development of the equality-regarding dimensions of dignity. State autonomy is certainly a factor in the opinion, though principally for the purpose of establishing the states' historical prerogative to regulate marriage and, hence, their ability to confer dignity on married couples. But none of the Court's uses of dignity is applied to the states. Instead, dignity is always an attribute of the couples, their relationship, or the institution of marriage.

Moreover, *Obergefell* wasn't at all a simple extension of *Windsor's* dignity. As suggested above and developed more fully below, *Obergefell* entailed a significant departure from *Windsor's* emphasis on variable dignity and a qualified return to *Lawrence's* inherent dignity. Far from the apotheosis of Kennedy's dignitary reasoning that Tribe suggests, *Obergefell* charted new jurisprudential territory while self-consciously turning away from other conceptions the Court had previously employed. And the jurisprudence of equal dignity that emerged from *Obergefell* is not without unresolved questions and persistent tensions of its own. Thus, while Tribe offers one way of telling the story of equal dignity, it is an account that simplifies some aspects of its development and leaves others out entirely.

B. Anti-Subordination and the New Equal Protection

If Tribe is the foremost advocate of dignity's relationship to liberty and equality and its centrality to the constitutional enterprise, then Kenji Yoshino is the foremost interpreter of the Court's recent liberty and equality jurisprudence. As a result, he has confronted the continued use of and reliance on dignity. In two articles, one before *Windsor* and one after *Obergefell*,[55] Yoshino provides a compelling account of how the Court's recent decisions reoriented due process and equal protection jurisprudence. But in each, the importance of dignity is subsumed by what he sees as more important developments in the Court's due process jurisprudence. Accordingly, the central focus is liberty (and cognate concepts) and not dignity. His is an account in which dignity drops out almost entirely, and its accuracy suffers as a result.

For Yoshino, *Obergefell* is "a game changer for substantive due process jurisprudence."[56] More specifically, it signals a methodological reorientation of the Court's fundamental rights jurisprudence away from the "closed-ended formulaic approach" set out in *Washington v. Glucksberg* and towards the "open-ended common law approach" advocated by Justice Harlan's dissent in *Poe v. Ullman*. But if *Obergefell* is a game changer, it is in the context of a game in which there are more innings to play. "*Obergefell* did not categorically resolve the ongoing conflict between the two models," Yoshino concedes, "but it heavily favored *Poe*."[57]

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[55] Yoshino, *New Birth,* and *The New Equal Protection*, 124 HARV. L. REV. 747 (2011).

[56] *New Birth* at 148.

[57] *Id.* at 149.

The essence of the common law approach associated with *Poe* is that the content of due process "cannot be determined by reference to any code…No formula could serve as a substitute, in this area, for judgment and restraint."[58] The content of due process has been (and must be) identified through a process that is "of necessity rational," but also one that is disciplined by judicial balancing of individual liberty and "the demands of organized society." Moreover, this process is illuminated by the American traditions of development and repudiation—those on which the country has been built and against which it has been defined. And far from fixed, this tradition is inherently evolutionary; it is "a living thing."

In contrast, the majority opinion in *Glucksberg* outlined a multipart analysis markedly more rigid than that set forth in Harlan's *Poe* dissent. The Court's due process inquiry was to be disciplined by three restrictions. The first was the tradition-based restriction: to qualify as a due process liberty, a right had to be "'deeply rooted in the Nation's history and tradition,' and 'implicit in the concept of ordered liberty.'"[59] The second was the specificity restriction: a valid due process liberty right required "'careful description' of the asserted fundamental liberty interest."[60] And the third was the negative rights restriction: the opinion signaled that, as Yoshino puts it, "the Court was more open to recognizing negative 'freedom from' rights than positive 'freedom to' rights[.]"[61] Yoshino devotes considerable attention to the use and development of these three restrictions, specifically, and the *Glucksberg* methodology, more generally. It will suffice for our purposes to note that the *Glucksberg* framework was treated by both sides as the controlling authority in the *Obergefell* briefs.[62]

In Yoshino's telling, *Obergefell* changed all this and, in so doing, reoriented the Court's due process jurisprudence along the lines of *Poe*'s common law methodology. In the course of his majority opinion, Kennedy pushed back against the rigidity of the tradition restriction, resisted the requirements (and even applicability) of the specificity constraint, and implicitly rejected the dissenters' objection that recognizing a right to same-sex marriage would constitute the affirmation of a positive right.[63] Along the way, he explicitly dismissed the *Glucksberg* methodology and endorsed the *Poe* approach.[64] Moreover, his disquisition on the nature of liberty was redolent of *Poe*'s treatment of tradition as "a living thing." Rights rooted in tradition "come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[65] The movement away from *Glucksberg*—the failure to

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[58] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

[59] *Glucksberg*, 521 U.S. 702, 721 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

[60] *Ibid*. (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

[61] *New Birth*, at 150.

[62] *New Birth*, note 136.

[63] 135 S. Ct. at 2598-2602.

[64] See, *e.g.*, *id*. at 2598.

[65] *Id*. at 2602.

treat it as controlling precedent—is made clear also by the emphasis the dissenters put on how the majority's argument didn't conform to the *Glucksberg* methodology.[66]

As noted at the outset, dignity does not play much of a role in Yoshino's account of the recent past and immediate future of the Court's fundamental rights jurisprudence. And we must regard this as a conscious decision. Discussing Kennedy's emphasis on liberty in *Obergefell*, Yoshino writes, "In previous cases, such as *Lawrence*, *Casey*, and *Windsor*, he relied heavily on the notion of 'dignity.' While *Obergefell* makes repeated reference to dignity, it focuses more on the concept of liberty. It addressed the substantive due process methodology question by using the argot of liberty."[67] While it is certainly true that in *Obergefell*, unlike in *Windsor*, references to liberty outnumber references to dignity, this should neither be surprising nor taken as evidence of a movement away from dignity. In its attempt to ground the right for same-sex couples to marry on a firm constitutional foundation, it is entirely understandable that the majority would emphasize formal constitutional language and established doctrinal frameworks. Nor should Kennedy's rhetoric in *Obergefell* lead us to interpret the jurisprudence emerging from that case as being similarly inflected, that is, as prioritizing the frame of liberty over the frame of dignity. Nor, finally, should Kennedy's emphasis on liberty be taken as de-emphasizing dignity. Indeed, because dignity had already been identified as the value in which liberty is rooted (*Lawrence*) and through which liberty is related to equality (*Windsor*), the invocation of liberty in this context brings dignity squarely into the picture.

When viewed within the context of dignity's use and evolution across *Lawrence*, *Windsor*, and *Obergefell*, the Court's reliance on liberty can be seen in a quite different light than that provided by Yoshino's account. Specifically, *Obergefell*'s elaboration of the liberty interests of marriage cognizable under the Fourteenth Amendment builds on the dignitary foundations laid in *Lawrence* and *Windsor*. *Lawrence* grounded constitutional liberty in the inherent dignity of the individual—a dignity that requires the protection of autonomy and self-determination. *Windsor* elaborated a starkly different notion of dignity, one that is conferred by government and is a function of one's standing in a political and social community. The development of this notion led directly to considerations of equality, thus connecting the liberty- and equality-regarding aspects of dignity. In *Obergefell*, the *Windsor* notion of conferred dignity all but disappeared and the emphasis shifted to the dignity of the bond and relationship between two individuals. This relational dignity was then connected to the liberty-regarding dignity interests of autonomy and self-determination identified in *Lawrence*.

Thus, it is the Court's treatment of dignity in *Lawrence* and *Windsor* that enabled the majority in *Obergefell* to weave together components of two strains of reasoning, expressing the holding in the parlance of liberty and freedom. Throughout the *Obergefell* majority opinion, dignity—of the individual *qua* individual, of autonomous decision-making, of self-definition, of socio-political standing—provides the scaffolding for the argument that concludes with an explicit affirmation of the central importance of this concept: "They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[68]

It is, of course, possible to provide an account of the jurisprudential paths leading to and beyond *Obergefell* without reference to dignity, relying instead on the doctrinal silos of liberty and equality. And such may be required by the imperative of defining a clear

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[66] See, *e.g.*, *id*. at 2618 and 2620-2621 (Roberts, C.J., dissenting).

[67] *New Birth*, at 170 (citations omitted).

[68] 135 S. Ct. at 2608.

doctrinal foundation for the right of same-sex marriage. But to do so is to mistake the doctrinal articulation of a right for the value on which it is grounded and on which the Court has focused intently in the relevant cases. What's more, an interpretation that doubles down on the language of Court precedents runs the risk of obscuring the potentially radical ways in which its emphasis on dignity reconfigures the terrain of its fundamental rights jurisprudence and, in so doing, opens up new jurisprudential possibilities. The lens of liberty, as Yoshino demonstrates, allows us to see certain aspects of *Obergefell*'s significance, principally the qualified continuities with due process precedents. But the lens of equal dignity allows us to see more and to see more clearly.

4. Equal Dignity: The Partial Convergence of Liberty and Equality

The inadequacy of extant accounts of the jurisprudence of equal dignity calls for a sufficient account, one that captures both the centrality of dignitary reasoning and the multiple conceptions of the central term. This Part attempts to do just that by advancing a two-pronged case for understanding the jurisprudence of equal dignity as a partial convergence of liberty and equality. By partial convergence I mean that the development of the concept of "equal dignity" is both cause and effect of liberty and equality being brought closer together in constitutional law, emphasizing how each illuminates the other and how offenses against one implicate the other. More fundamentally, human dignity is cast as the foundation of liberty and equality, thus providing a conceptual center of gravity relative to which each operates and should be understood. This argument has obvious affinities with Tribe's notion of the "legal double helix" of liberty and equality. And, indeed, I use this metaphor to illustrate the argument. However, in contrast to Tribe, I stress that the convergence is only *partial*. Liberty and equality have not been "fused" together such that one can do the work of the other, or that both have been reduced to human dignity.[69] In short, *Obergefell* does not herald the arrival of a "doctrine of equal dignity," as Tribe argues.[70] Equal dignity is an expression of the relationship between liberty and equality, and the component strands are drawn closer as the focus on dignity increases. Nonetheless, those strands maintain an independence and autonomy. Thus conceived, dignity is the foundational value of liberty and equality, and each of the latter are cast as constitutionally grounded emanations of dignity. Their jurisprudential function, then, is imbued with dignity.

The first prong of this argument is empirical; it seeks to show how the jurisprudence of equal dignity announced in *Obergefell* emerges from the relationships between and among dignity, liberty, and equality. The second prong is normative; it seeks to show that partial convergence is preferable to total convergence. By clarifying the relationship between dignity, liberty, and equality while emphasizing the irreducibility of the latter two to the first, dignity is "projected outwards" through liberty and equality. In resisting complete convergence around dignity, the Court effectively created a dignitary hook in the jurisprudence of both equality and liberty, positioning liberty and equality as emanations of dignity. Viewed thusly, liberty and equality, unlike privacy, are emanations with deep and explicit constitutional roots. By positioning liberty and equality rights as elaborations of and protections for human dignity, the jurisprudence of equal dignity shifts future debate

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[69] Tribe, *Equal Dignity*, at 23.

[70] *Ibid*.

away from the precise technical or doctrinal meaning of "dignity" and towards the ways in which dignity augments and illuminates liberty and equality interests.

A. The Empirical Case for Partial Convergence

In the wake of both *Windsor* and *Obergefell*, a number of observers noted the Court's treatment of the relationship between liberty and equality. And the subject matter of the cases lent itself to a pithy expression of this observation: liberty had married equality.[71] As outlined above, this relationship is captured by Tribe's argument that *Obergefell* tightly wound the legal double helix of liberty and equality. The fundamental recognition here is that the expansion of gay rights involved the articulation of the liberty-regarding and equality-regarding dimensions of marriage and intimate relations. As a result, the Court also articulated the connection between these two fundamental constitutional values, recognizing and elaborating their relationship with the consequence of "pushing" them closer together.

As is true for the jurisprudence of equal dignity, the observation that liberty and equality are related in fundamental ways was not new to *Obergefell*. It was a refrain that appeared in each of the three central gay rights cases. Though the decision in *Lawrence* was formally based on the right to liberty located in the Fourteenth Amendment's Due Process Clause, the majority opinion acknowledged that the alternative equal protection rationale presented by the petitioners was "a tenable argument."[72] Justice Kennedy synthesized the arguments from liberty and equality thusly: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[73] In *Windsor* this liberty-equality relationship was put in even sharper focus, though this time with the equality frame privileged over the liberty frame because the case presented an Equal Protection challenge to DOMA. The fourth and final section of Kennedy's majority opinion presents the argument that DOMA "violates basic due process and equal protection principles applicable to the Federal Government."[74] Immediately following this section, he concludes that due process liberty "contains within it" the guarantee of equal protection.[75] Over the course of these cases, then, the strands of liberty and equality are, as Tribe puts it, wound together increasingly tightly as the Court spoke to their co-implication in questions of individual liberty and intimate relations.

But fully understanding this convergence requires acknowledging the centrality of dignity to the Court's reasoning about liberty and equality. Indeed, the convergence of liberty and equality is premised on the relationship that each of the latter has with dignity. Put simply, dignity is at the center of the relationship between liberty and equality, hence the aptness of the description of liberty and equality as converging *on* or *around* dignity. This is most clear in the expression the Court developed to capture the constellation of interests and rights implicated by marriage and intimate relations: equal dignity. The decisions in *Windsor* and *Obergefell* concerned the liberties protected by the Due Process

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[71] See, *e.g.*, Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014).

[72] 539 U.S. at 574 (2003).

[73] *Id*. at 575.

[74] 133 S. Ct. at 2693.

[75] *Id*. at 2695.

Clause of the Fifth and Fourteenth Amendments, respectively. Housed in this jurisprudential framework, the invocations of equality and dignity—with the former as a modifier of the latter—spoke to the centrality of all three concepts. Moreover, it spoke to their relative relationships. Liberty protects and preserves human dignity, and equality requires that the recognition and protection of dignity be applied to all similarly situated individuals in a given socio-legal context.

The relationship between liberty and equality becomes a central focus not only for jurisprudential reasons—the decision had to be made under a specific provision and by the appropriate methods—but also because of the increased focus on dignity. Here an extension of the double helix metaphor can shed light on the development of the jurisprudence of equal dignity. What Tribe does not emphasize, but what became increasingly clear in *Windsor* and *Obergefell*, is that unlike the descriptive and naturalistic processes evoked by the double helix nomenclature, in constitutional jurisprudence the relationship between the values of liberty and equality is worked out through the interactions between advocates and judges, among justices, across cases, and (in a broader compass) within social movements and their interactions with the state. In short, the relationship between liberty and equality as regards dignity is constructed through the legal process.

The appropriate metaphor, then, may not be genetic discovery but genetic engineering. In a host of interpretive tools—captured well by Bobbitt's modalities of constitutional argumentation[76]—judges have at their disposal the methods with which and raw materials out of which the constitutional genotype is constructed. But their construction does not proceed without guidance or direction. Rather, they have as their goals the fundamental commitments of the constitutional order—liberty, equality, the rule of law, self-government, and, increasingly, human dignity. These are the phenotypes of constitutional genetics, the expressed traits and regime characteristics that discipline the interpretive process. What we see in *Windsor* and *Obergefell* is a more explicit and self-conscious engagement with the phenotype of dignity than before. The results are opinions that focus primarily on the expressed trait—dignity—and secondarily on the arrangement and composition of the constitutive parts—liberty and equality. With the emergence of "equal dignity," dignity had become the apple of gold in the frame of silver structured by liberty and equality. The convergence of liberty and equality, then, is largely due to the fact that dignity has moved from the constitutional background (as in *Bowers*, *Casey*, and *Romer*) to the foreground (as in *Lawrence* and, to a greater extent, *Windsor* and *Obergefell*). The ongoing expression of dignity has been articulated in the language of the intertwined values of liberty and equality. The name of that relationship is "equal dignity."

Nonetheless, this convergence is not complete. The strands of liberty and equality have not so converged as to be unified in meaning, much less in jurisprudence. But Tribe's post-*Obergefell* analysis seems strongly to suggest precisely this kind of convergence. So either he endorses complete convergence as a descriptive matter or risks being fairly interpreted as saying as much. While I think the former is the case, I am less concerned with refuting his argument than I am with clarifying the nature of the convergence signaled by *Obergefell*. To begin, the Court is careful to specify the location of its decision in *Obergefell*, just as it was in *Windsor*. Both cases are due process decisions and proceed along the appropriate jurisprudential lines of analysis, even though, as Yoshino persuasively argues, that process involved a reorientation of those lines. The pivot to equal protection comes only after the issue had been resolved on due process grounds, and the traditional resources of equal protection are not deployed in this resolution. Kennedy says, for example, "The right

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[76] PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."[77] Throughout the *Obergefell* majority opinion, equal protection is portrayed as a support—and not independent grounds—for the Court's decision. Moreover, the equal protection conclusion hinges on the prior identification of a fundamental right, which required the due process analysis. Absent the latter, the former would lack its necessary condition.

On a rhetorical level, the *Obergefell* majority makes a clear distinction between "central precepts of equality" and formal equal protection.[78] This was a necessary move because the justices writing and joining the opinion clearly wanted to make a point about the relationship between liberty and equality, and yet there was not sufficient appetite (or opportunity) to present a free-standing equal protection analysis vindicating the right of same-sex couples to marry. Chief Justice Roberts devotes an entire (albeit short) section of his dissent to this point. Noting that the petitioners made an equal protection argument in addition to the due process argument, he said that, "[t]he majority does not seriously engage with this claim."[79] Responding to the majority's discussion of the "intertwined" nature of liberty and equality, Roberts continues, "Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases." Citing one of the leading constitutional law casebooks, he goes on to show that the standard equal protection method of analysis—"a means-ends methodology in which judges ask whether the classification the government is using sufficiently related to the goals it is pursuing"—makes no appearance in Kennedy's opinion.[80]

B. The Normative Case for Partial Convergence

The fact of the partial convergence of liberty and equality in the jurisprudence of equal dignity is only one part of the analysis. It remains to be determined whether this is a good or advantageous development. I argue in this section that this development is, in fact, normatively preferable because it further entrenches dignity as a constitutional value but does so in a way that maintains a robust and multifaceted definition of human dignity in constitutional law. The partial convergence outlined in the previous section *dignifies* liberty and equality jurisprudence, grounding each in an ultimate constitutional value while also imbuing them with a notion of dignity that resonates with their respective traditions and purposes. Of course, the force of the normative case offered here depends on one's position on the aptness or utility of dignity in constitutional law and discourse. Kennedy's opinion is unlikely to persuade dignity's many critics. But for those who ascribe to human dignity an important place in American constitutionalism, the jurisprudence of equal dignity not only entrenches but also stabilizes dignitary reasoning in constitutional law. And for that reason, its merits should be recognized.

The distinguishing characteristic of the partial convergence I have sketched is the simultaneous tightening of the liberty-equality relationship while preventing the complete convergence of these values into a unified doctrine. Avoiding the collapse of these strands into a "doctrine of equal dignity" has two principal consequences. First, it leaves largely

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[77] 135 S. Ct. at 2602.

[78] *Id*. at 2604.

[79] *Id*. at 2623.

[80] *Ibid*., citing STONE ET AL., CONSTITUTIONAL LAW 453 (7th ed. 2013).

intact the doctrinal formulations of substantive due process and equal protection. Rather than announce a new doctrinal formulation of liberty, equality, or even dignity, the *Obergefell* majority sought to establish the coherence between their decision and earlier precedents. As I argued above, that coherence draws on the Court's dignitary reasoning over the previous three decades. Here Yoshino's central point is not only accurate but also clarifying: *Obergefell* reorients but does not revolutionize the Court's fundamental rights jurisprudence. By using old jurisprudential wineskins, the *Obergefell* majority placed the right of same-sex marriage on as stable a legal foundation as possible, which no doubt was a salient concern for a case of its magnitude. In so doing, the Court made constitutional law possible. That is, it used the mode of analysis set out in earlier cases even as it modified that methodology in service of stable jurisprudential categories. "Equal dignity" emerged from the relationship between constitutional values with deep roots, not as a replacement.

Crucially important in this connection is the role of dignity in the Court's reoriented fundamental rights jurisprudence. After *Obergefell*, what work does dignity do? As Yoshino argues, Kennedy's opinion shifts the emphasis away from *Glucksberg*'s requirement that a due process liberty be "deeply rooted in this Nation's history and tradition," a restriction that poses a significant obstacle for groups and practices that have not traditionally enjoyed sanction or protection. The *Obergefell* majority instead favors something closer to the "living" notion of tradition identified by Justice Harlan in his *Poe* dissent. As I intimated above, Yoshino is wrong to marginalize the significance of dignity in the Court's reasoning precisely because the rigid tradition requirement is loosened in large part by the dignity interests of same-sex couples identified in *Lawrence* and *Windsor*. This is a role dignity can continue to play in the reoriented rights methodology announced by *Obergefell*. Rather than looking for a historical record of protection for a right or liberty, as the tradition requirement would entail, an emphasis on dignity directs the analysis towards considerations of equal treatment and self-determination, as well as the harms—the *indignities*—wrought by denials of these rights or protections. Dignity also foregrounds the social conventions and government actions that codify acceptance, support, and approval of groups or practices once marginalized and prohibited. In stark contrast to the tradition restriction, dignity is not bound by temporal duration. Once a dignity interest is identified or vested, it matters not for how long that has been so. Indeed, the period for which that interest was denied may even *enhance* the need for its present and future protection. Such a role for dignity in the Court's fundamental rights jurisprudence could be seen as a response to Harlan's insistence on the need to distinguish between "traditions from which [this country] developed as well as the traditions from which it broke."[81] In short, dignity does the work of tradition without the requirement of time.

These considerations point to the second consequence of the partial convergence of liberty and equality. By uniting the two strands under the heading of "equal dignity," the Court *dignified* liberty and equality jurisprudence. Even as dignity serves as the common foundation of liberty and equality, it is also projected outwards through them, adding a dignitary hook to the respective analyses. By avoiding the creation of a "doctrine of equal dignity," the jurisprudence of equal dignity that emerges from *Obergefell* allows for the preservation of a robust and multifaceted notion of dignity in constitutional law. As outlined in both Part 2 and the previous section, that notion of dignity has liberty-regarding and equality-regarding dimensions, and it all but lacks the component of variability and state conferral that figured so prominently in the *Windsor* decision. In this way, the articulation of dignity is guided by the jurisprudence of liberty and equality, even as it

[81] 367 U.S. at 542.

unsettles some of its exclusions and limitations. Read through the lens of equal dignity, both liberty and equality jurisprudence have dignitary hooks, points at which dignity illuminates the interest at stake. Viewed in this light, the jurisprudence of equal dignity is far from revolutionary. By preserving liberty and equality as autonomous jurisprudential inquiries while also emphasizing their intimate connection, the Court further entrenched extant modes of inquiry and assimilated the right of same-sex marriage to a markedly traditional conception of marriage.

It is important to acknowledge, by way of conclusion, that the exact definitions and precise requirements of human dignity as it figures in the jurisprudence of equal dignity are not abundantly clear. It is, for example, not yet known how the dignity interests identified in *Obergefell* relate to other dignity interests, such as the dignity of religious free exercise that Kennedy identified in the *Hobby Lobby* case.[82] Nor is it self-evident what implications, if any, equal dignity has for issues like employment non-discrimination and protections for transgender individuals. However, by articulating equal dignity as a relationship between liberty and equality, the Court identified conceptions of dignity considerably more refined than would have been the case had it announced a unified *doctrine* of equal dignity. By remaining extra-doctrinal, dignity is up for debate, though the parameters of that debate are structured in part by the jurisprudential development of liberty and equality. This, it would seem, is one purpose of Kennedy's persistent use of dignity—to return the Court to a first principle that can too easily be obscured by the repeated application and refinement of doctrinal tests. Our perceptions and understandings of liberty, equality, and dignity change as society changes, sometimes by concerted political effort and other times as a consequence of developments in social norms and commitments. As Kennedy put it in his *Obergefell* opinion, "new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."[83] As evidenced by the jurisprudence of equal dignity, dignity can play a crucial role in this process, serving as a marker for the "new dimensions of freedom" apprehended by "new generations." The debate over equal dignity is a debate in which the Court is but one of many actors. Legislators, executives, and judges, in addition to individual activists and entire social movements, are engaged in a process of fleshing out dignity's meaning and legal requirements. It is a debate whose unfolding will be decisively shaped by the partial convergence of liberty and equality brought about by the jurisprudence of equal dignity.

5. Conclusion

Anthony Kennedy's opinion in *Lawrence v. Texas*, elaborating the relationship between liberty and equality and connecting both to human dignity, opened the door for a reconsideration of the dynamics of American rights jurisprudence. If liberty and equality are so closely connected, what are the implications for doctrinal categories that treat them as largely separate? If dignity underlies both liberty and equality, how, if at all, does it fit in constitutional law? With its continued elaboration of the liberty-equality relationship, *United States v. Windsor* posed the same questions while also engaging more explicitly with the centrality of human dignity to constitutional rights. *Obergefell* sought to answer these questions by reconciling the divergent notions of dignity employed in the previous cases.

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[82] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, at 2785 (2014).

[83] 135 S. Ct. at 2596.

The resulting jurisprudence, I have argued, expressed a relationship between liberty and equality, a relationship undergirded and animated by human dignity.

With characteristic insight, Laurence Tribe's post-*Lawrence* observation that liberty and equality form a "legal double helix" diagnosed the inextricably connected and reciprocally illuminating relationship between the two strands, gesturing towards their grounding in human dignity. But this characterization provides a static snapshot of what is, in fact, a dynamic process and an incomplete convergence. This partial convergence is the result of an increasingly clear connection between liberty and equality, on the one hand, and human dignity, on the other. The convergence first emerged in *Windsor* where the Court, building on the dignitary reasoning in *Lawrence*, focused on the value underlying the strands of liberty and equality. The result was "equal dignity," a formulation that expressed the relationship between liberty and equality, and the centrality of dignity to that relationship. Federal constitutional recognition of the dignity interests of same-sex couples came in *Obergefell*, with the Court weaving together the liberty-regarding aspects of dignity in *Lawrence* with the equality-regarding aspects in *Windsor*. The result was a jurisprudence of equal dignity that has the potential to reconfigure the Court's fundamental rights jurisprudence.

Though the partial convergence argument is new to this Essay, its spirit is implicit in a number of treatments of the Court's rights jurisprudence, many of which are animated by the conviction that, in the words of Heather Gerken, "doctrinal categories give shape to court decisions."[84] Accordingly, they have largely focused on the viable avenues of development *within* traditional doctrinal categories of liberty and equality. One suspects that this perceived imperative is responsible, at least in part, for Tribe's contention that *Obergefell* announced the arrival of a new constitutional doctrine of equal dignity. For her part, Gerken believed that "it seems inevitable that Larry's double helix will be split."[85] This Essay has advanced a contrary argument: the liberty-equality helix was twisted tighter, into a jurisprudence of equal dignity. The splitting of the liberty-equality double helix, then, may not be inevitable, precisely because a hard distinction between traditional jurisprudential categories could not long persist. It is *because* doctrinal categories are so important in constitutional law and litigation that liberty and equality jurisprudence have partially converged in a relationship centered on human dignity.

Just as Justice Stevens's identification of dignity with privacy rights in *Bowers* set the stage for Justice Kennedy's establishment in *Lawrence* of dignity as the value protected by the Constitution's liberty guarantee, *Windsor's* emphasis on dignity as a foundational constitutional value that draws on both liberty and equality offered an opportunity for continued elaboration and extension. *Obergefell* took up this opportunity, simultaneously expanding on and uniting the strands developed in the previous cases. But by unsettling traditional doctrinal categories, the convergence of liberty and equality around dignity has produced a highly consequential juncture in constitutional law and politics. As *Windsor* clarified the implications of *Lawrence*, and *Obergefell* the implications of *Windsor*, only future cases will reveal the import of the Court's reliance on human dignity as an organizing constitutional value. Whichever direction those cases go, they will either build on the jurisprudence of equal dignity or operate in its shadow. For this reason, dignity will likely remain at the center of constitutional discourse, an appropriate future for so fundamental a constitutional value.

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[84] Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 851 (2007).

[85] *Ibid.*