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## EQUAL DIGNITY: SPEAKING ITS NAME

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### INTRODUCTION

In certain circles, it has become a sign of sophistication to speak of Justice Anthony M. Kennedy's seminal gay rights decisions, *Obergefell v. Hodges*<sup>1</sup> now foremost among them, with a knowing condescension. Even among those who emphatically agree with Justice Kennedy that the Constitution affords same-sex couples the right to marry, many are quick to claim that his sweeping opinion was heavy on rhetoric and light on legal reasoning — a political masterstroke but a doctrinal dud.<sup>2</sup>

Professor Kenji Yoshino's splendid Comment<sup>3</sup> makes clear just how misguided these glib detractions are, and eloquently elaborates the important doctrinal work done by Justice Kennedy's decision, which represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence. As Yoshino demonstrates, *Obergefell* has definitively replaced *Washington v. Glucksberg*'s<sup>4</sup> wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry of Justice Harlan's justly famous 1961 dissent in *Poe v. Ullman*,<sup>5</sup> a mode of inquiry that was embodied in key opinions from the mid-1960s to the early 1970s.<sup>6</sup>

Although Yoshino credits *Glucksberg*'s formulaic approach with having established a firmer foothold in the constitutional firmament

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> See, e.g., Ilya Somin, *A Great Decision on Same-Sex Marriage — But Based on Dubious Reasoning*, WASH. POST: VOLOKH CONSPIRACY (June 26, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning> [<https://perma.cc/H4AT-K3LC>]; Mark Joseph Stern, *Kennedy's Marriage Equality Decision Is Gorgeous, Heartfelt, and a Little Mystifying*, SLATE: BREAKFAST TABLE (June 26, 2015, 11:18 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2015/scotus\\_roundup/supreme\\_court\\_2015\\_decoding\\_anthony\\_kennedy\\_s\\_gay\\_marriage\\_decision.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_decoding_anthony_kennedy_s_gay_marriage_decision.html) [<http://perma.cc/5K4T-XDS2>]; see also Jeffrey Rosen, *The Dangers of a Constitutional "Right to Dignity"*, THE ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doctrine-of-dignity/391796> [<http://perma.cc/W87V-X3FD>] (anticipating and criticizing a ruling based on the notion of dignity).

<sup>3</sup> Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015).

<sup>4</sup> 521 U.S. 702 (1997).

<sup>5</sup> 367 U.S. 497 (1961); see *id.* at 522–55 (Harlan, J., dissenting).

<sup>6</sup> Yoshino, *supra* note 3, at 149–50.

from 1997 to 2003<sup>7</sup> than I would be inclined to attribute to that decision, there is no doubt that *Glucksberg*'s cramped methodology cast a significant pall that Justice Kennedy's *Lawrence v. Texas*<sup>8</sup> opinion in 2003 only partially swept away, that Justice Kennedy's *United States v. Windsor*<sup>9</sup> opinion in 2013 further eroded, and that his *Obergefell* opinion in 2015 finally displaced decisively. As Yoshino rightly says, Justice Kennedy has thereby fashioned a major shift in constitutional doctrine, one that will have ramifications in many cases to come.<sup>10</sup>

But by dispensing with *Glucksberg*, Justice Kennedy has not left the courts completely without guidance when identifying fundamental rights. Justice Kennedy's opinion also sets forth a foundational principle that gives form and substance to the *Poe* dissent's common law spirit. Yoshino calls this core component of *Obergefell* the "antisubordination principle,"<sup>11</sup> but although I certainly agree that antisubordination plays an important role in the doctrinal achievement of *Obergefell*, I would characterize the decision's core in different, more expansive terms. I argue 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 interpretation as an exercise in public education. Equal dignity, a concept with a robust doctrinal pedigree, 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. *Obergefell* is an important landmark, but it will not be — and should not be — the last word.

#### I. THE ANTISUBORDINATION PRINCIPLE: DISTINGUISHING *LOCHNER*

Picking up the line of criticism taken by Chief Justice Roberts in his dissent, legal conservatives have argued that the *Obergefell* decision's expansive take on fundamental rights is indistinguishable from *Lochner v. New York*,<sup>12</sup> the *bête noire* of substantive due process in which the Court struck down laws setting maximum hours and minimum wages and other forms of purely economic regulation.<sup>13</sup> Without

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<sup>7</sup> *Id.* at 162.

<sup>8</sup> 539 U.S. 558 (2003).

<sup>9</sup> 133 S. Ct. 2675 (2013).

<sup>10</sup> Yoshino, *supra* note 3, at 179.

<sup>11</sup> *Id.* at 177; *see also id.* at 174 (referring to "antisubordination liberty").

<sup>12</sup> 198 U.S. 45 (1905).

<sup>13</sup> *See, e.g.*, Symposium, *The Supreme Court Has Legalized Same-Sex Marriage: Now What?*, NAT'L REV. ONLINE (June 27, 2015, 4:00 AM) <http://www.nationalreview.com/article/420420/supreme-court-has-legalized-same-sex-marriage-now-what-nro-symposium> [<http://perma.cc>

an ostensibly constraining test like the one proposed by *Glucksberg*, these conservatives worry, substantive due process will run riot, with outcome-driven judges inventing new fundamental rights as it strikes their fancy. Yoshino persuasively dismisses the *Lochner* comparison, which the Court conspicuously (and no doubt deliberately) declines to address explicitly, by pointing to the Court's invocation of an "antisubordination principle" in *Obergefell*. If anything, Yoshino understates the extent to which the antisubordination principle keeps the *Lochner* bogeyman at bay. It's true, as Yoshino notes, that contemporary "defenders of *Lochner* argue that the freedom of contract benefited vulnerable bakers."<sup>14</sup> But he suggests that the Court simply "made an incorrect judgment about vulnerability"<sup>15</sup> when it decided *Lochner* in 1905, adding that the Court's "solicitude for vulnerable groups led the Court just three years later to uphold a maximum-hours law for women, precisely because it deemed them to be the weaker sex."<sup>16</sup> A good point, though it understates the difference between the *Lochner* framework and that of *Obergefell*. The treatment of women as categorically "weaker" than men, coupled with *Lochner*'s idealization of the baking industry as built on equal bargaining power, reflected the hierarchical worldview of the laissez-faire workplace — not a misguided empirical judgment about relative degrees of subordination. It is only through the eyes of modern observers that *Lochner* can plausibly be reconfigured as simply miscalculating the place of various social groups on the ladder of relative power. The truth is that few argued at the time of *Lochner* that the freedom of contract it espoused was justifiable as a means to redress the economic subordination of the master bakers. By contrast, the freedom to marry championed in *Obergefell* was understood by all to directly redress the subordination of LGBT individuals.

Beyond that understatement, the most potent of the dissenting Justices' arguments is one that Yoshino does not really address at all. It is, to quote the Chief Justice, that "[t]he fundamental right to marry does not include a right to make a State change its definition of marriage."<sup>17</sup> To this argument, Justice Kennedy's majority opinion offered a masterful rejoinder: in extending the right to marry to same-sex couples, the Court was not simply indulging a fashionable preference for *redefining* the always-fluid concept of "marriage" but was reasoning

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[W9YJ-P4ZR] (comments of Matthew J. Franck); Gil Troy, *Who Let the Supreme Court Make Laws?*, DAILY BEAST (July 11, 2015, 4:00 AM), <http://www.thedailybeast.com/articles/2015/07/11/how-to-restrict-the-lawmaking-power-of-the-supreme-court.html> [<http://perma.cc/E35L-E77V>].

<sup>14</sup> Yoshino, *supra* note 3, at 175.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* (citing *Muller v. Oregon*, 208 U.S. 412, 421–23 (1908)).

<sup>17</sup> *Obergefell*, 135 S. Ct. at 2611 (Roberts, C.J., dissenting).

that rights *cannot* be “defined by who exercised them in the past” without allowing “received practices [to] serve as their own continued justification.”<sup>18</sup> Justice Kennedy thereby deftly demonstrated that the dissenting Justices’ definitional gambit was, in truth, just a circular argument for preventing “new groups [from] invok[ing] rights once denied.”<sup>19</sup> So the *Obergefell* opinion does more than respond to the *Lochner* bugaboo by invoking the theme of antistatutoryism. It responds as well to the claim that the Court is vindicating a non-existent right to compel reluctant states to redefine an ancient institution and thereby, to quote Chief Justice Roberts, “[s]tealing this issue from the people . . . , making a dramatic social change that much more difficult to accept.”<sup>20</sup>

Crucially, in response to the dissenting argument that the denial of those rights was “not . . . a result of a prehistoric decision to exclude gays and lesbians,”<sup>21</sup> Justice Kennedy’s opinion strongly argues that a government practice that limits the options available to members of a particular group need not have been *deliberately* designed to harm the excluded group if its oppressive and unjustified effects have become clear in light of current experience and understanding.<sup>22</sup> Redressing those injuries to a historically subordinated group, Justice Kennedy reasoned, itself fulfills the promise of the Fourteenth Amendment’s Equal Protection Clause alongside its Due Process Clause in a way that protecting the “freedom of contract” invoked by *Lochner* could not be said to have done.<sup>23</sup> And in recognizing that even *unintended* effects can render a traditional practice or definition inconsistent with the Fourteenth Amendment, *Obergefell* may well have laid the foundation for reexamining a longstanding but always controversial doctrinal obstacle, embodied in decisions like *Washington v. Davis*,<sup>24</sup> requiring proof of *intentional* discrimination as an element of an asserted Fourteenth Amendment violation.<sup>25</sup>

## II. EQUAL DIGNITY UNDER LAW

As we have seen, Yoshino focuses on Justice Kennedy’s anticaste theme as the Court’s antidote to the Chief Justice’s repeated invoca-

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<sup>18</sup> *Id.* at 2602 (majority opinion).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2612 (Roberts, C.J., dissenting).

<sup>21</sup> *Id.* at 2613.

<sup>22</sup> *Id.* at 2598 (majority opinion).

<sup>23</sup> *Id.* at 2604–05.

<sup>24</sup> 426 U.S. 229 (1976).

<sup>25</sup> *Id.* at 239. In a case decided the day before *Obergefell*, Justice Kennedy (joined by the rest of the *Obergefell* majority) took a dramatic step in the same direction in the statutory context, finding disparate-impact claims cognizable under the Fair Housing Act. *See* *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015).

tion of *Lochner*. And I have further described how the Court's analysis limited the need to demonstrate that a challenged deprivation was initially *intended* to injure an excluded group. But *Obergefell* goes further, by furnishing an even more capacious frame for evaluating future fundamental rights claims. The core around which Justice Kennedy wound the double helix of Equal Protection and Due Process, and the rubric under which fundamental rights should be evaluated going forward, is what I will call the doctrine of equal dignity.

The language of dignity is not accidental. As numerous scholars have recognized in recent years, the concept of dignity is central to contemporary human rights discourse.<sup>26</sup> "Dignity" has become "a crucial watchword, going global in various constitutions and international treaties, and offering judicial guidance for the protection of basic values."<sup>27</sup> The concept has a multifarious history: in some ways it bears the imprint of a premodern, hierarchical society in which only the nobility were deemed to possess dignity<sup>28</sup> — a vision of dignity addressed and dismissed, perhaps, in our Constitution's Titles of Nobility Clause.<sup>29</sup> But dignity also has deep roots in the Christian notion of grace, extended to all humanity in equal measure.<sup>30</sup> This religious conception of dignity was given secular expression in Kant's liberal universalism, best captured in his famous maxim that human individuals should be treated as ends in themselves, and never as means to an end.<sup>31</sup> It was this version of equal dignity that the Universal Declaration of Human Rights,<sup>32</sup> adopted by the newly formed United Nations in 1948, invoked by declaring in Article I: "All human beings are born free and equal in dignity and rights."<sup>33</sup> "Dignity" came to occupy a central place in the post-World War II constitutions of Germany, Japan, and Italy, countries that knew well the destruction that could be caused by authoritarian regimes,<sup>34</sup> as well as newly independent countries like India and Ireland that were emerging from centuries of foreign domination.<sup>35</sup> And in the 1990s, South Africa gave pride of

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<sup>26</sup> See, e.g., MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012).

<sup>27</sup> Samuel Moyn, *The Secret History of Constitutional Dignity*, 17 *YALE HUM. RTS. & DEV. L.J.* 39, 40 (2014).

<sup>28</sup> See generally JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012).

<sup>29</sup> U.S. CONST. art. I, § 9, cl. 8.

<sup>30</sup> See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *EUR. J. INT'L L.* 655, 658 (2008).

<sup>31</sup> See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Mary Gregor ed. & trans., Cambridge Univ. Press 1998) (1785); see also McCrudden, *supra* note 30, at 659–60.

<sup>32</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948).

<sup>33</sup> *Id.* art. I.

<sup>34</sup> McCrudden, *supra* note 30, at 664.

<sup>35</sup> *Id.* at 664–65.

place to dignity in its new constitution,<sup>36</sup> as that country threw off the yoke of apartheid.

Justice Kennedy, a noted cosmopolitan who spends his summers teaching law in places like Salzburg, Austria,<sup>37</sup> is aware of equal dignity's deep international resonance. For nearly twenty-five years, Justice Kennedy has been pushing "dignity" closer to the center of American constitutional law and discourse, bringing our centuries-old Constitution into harmony with the founding charters of our postwar, postcolonial world.

But dignity is not some alien import with no place in our own constitutional tradition. Just as Germany and South Africa adopted universal human dignity as a lodestar of their legal systems after rejecting devastating racist ideologies, so too the United States adopted the Fourteenth Amendment in the wake of the Civil War for strikingly similar reasons — to atone for our nation's own original sin and extend our Constitution's promises to all citizens.<sup>38</sup>

That Amendment's full potential was abridged by the Supreme Court in the infamous *Slaughter-House Cases*,<sup>39</sup> where the Supreme Court invoked a misguided form of federalism to neuter the Amendment's promise that no state could "abridge the privileges or immunities of citizens of the United States."<sup>40</sup> But Justice Kennedy unified the two *other* operative clauses of the Amendment, Equal Protection and Due Process, in the name of "dignity," to generate a concept of great analytic strength and political power. This combination does the work that the Privileges or Immunities Clause was originally designed to do.

Earlier in his judicial career, Justice Kennedy's references to dignity hearkened back to a more hierarchical version of the concept. This hierarchical concept was displayed most famously in *Windsor*,<sup>41</sup> which invoked the prerogative of the states to *confer* dignity upon same-sex marriages.<sup>42</sup> But this version of dignity is seen even more starkly in *Alden v. Maine*,<sup>43</sup> where the Court, speaking through Justice Kennedy, held that Congress cannot strip a state of sovereign immunity in its

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<sup>36</sup> See, e.g., S. AFR. CONST., 1996, § 1(a) (listing "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms" as one of the four fundamental values of South Africa); *id.* § 10 ("Everyone has inherent dignity and the right to have their dignity respected and protected.").

<sup>37</sup> See, e.g., *Justices Kagan and Kennedy to Teach in Salzburg Summer Program*, MCGEORGE SCH. OF LAW (Dec. 13, 2012), [http://www.mcgeorge.edu/News/Justices\\_Kagan\\_and\\_Kennedy\\_to\\_Teach\\_in\\_Salzburg\\_Summer\\_Program.htm](http://www.mcgeorge.edu/News/Justices_Kagan_and_Kennedy_to_Teach_in_Salzburg_Summer_Program.htm) [<http://perma.cc/Q2VZ-4Z5A>].

<sup>38</sup> See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* (2004).

<sup>39</sup> 83 U.S. (16 Wall.) 36 (1870).

<sup>40</sup> U.S. CONST. amend. XIV, § 1, cl. 2.

<sup>41</sup> 133 S. Ct. 2675 (2013).

<sup>42</sup> *Id.* at 2695–96.

<sup>43</sup> 527 U.S. 706 (1999).

own courts.<sup>44</sup> The idea was that doing so would impermissibly deny the “*dignity*” of any state subjected to such humiliation.<sup>45</sup> But Justice Kennedy has otherwise made clear that he views the sovereignty of the states as important much less as an *end in itself* than as a *means* to the end of protecting the liberties of those who reside in those states — both their *negative* liberties from oppressive regulation and their *positive* liberties to take part in politically accountable self-government.<sup>46</sup> From that perspective, there is no significant gap between the older concept of dignity as an attribute that attaches to powerful institutions, and the newer concept of dignity as an attribute of all individuals in society. So it is that the dominant strain in Justice Kennedy’s writings on dignity — the strain that achieved full expression in *Obergefell* — has become the notion of *equal dignity* as the very foundation of individual human rights.

That notion — the idea that *all individuals* are deserving in equal measure of personal autonomy and freedom to “define [their] own concept of existence”<sup>47</sup> instead of having their identity and social role defined by the state — has animated Justice Kennedy’s most memorable decisions about the fundamental rights protected by the Constitution, from *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>48</sup> to *Parents Involved in Community Schools v. Seattle School District No. 1*.<sup>49</sup> The importance of this idea to Justice Kennedy’s jurisprudence has been most apparent in the gay-rights triptych of *Lawrence v. Texas*,<sup>50</sup> *United States v. Windsor*,<sup>51</sup> and now *Obergefell*. In each suc-

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<sup>44</sup> *Id.* at 712.

<sup>45</sup> *Id.* at 714–15 (emphasis added).

<sup>46</sup> See *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (“Federalism secures the freedom of the individual. It allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power. True, of course, these objects cannot be vindicated by the Judiciary in the absence of a proper case or controversy; but the individual liberty secured by federalism is not simply derivative of the rights of the States.”).

<sup>47</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992).

<sup>48</sup> 505 U.S. 833 (plurality opinion co-written by Justices O’Connor, Kennedy, and Souter, but nowhere mentioned in *Obergefell*).

<sup>49</sup> See 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (“To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society.”). In *Parents Involved*, Justice Kennedy recognized that the historical and ongoing reality of race-based inequality permitted schools to implement race-conscious policies in order to encourage diversity, so long as the state did not impair personal liberty through individual classification on the basis of race. *Id.* at 797–98. Just last Term, Justice Kennedy affirmed his sensitivity to the equality side of this balance, invoking “our ‘historic commitment to creating an integrated society’” in finding disparate-impact claims cognizable under the Fair Housing Act. *Tex. Dep’t of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 2507, 2525 (2015) (quoting *Parents Involved*, 551 U.S. at 797 (Kennedy, J., concurring in part and concurring in the judgment)), noted in note 25, *supra*.

<sup>50</sup> 539 U.S. 558 (2003).

<sup>51</sup> 133 S. Ct. 2675 (2013).

cessive case, and in the opinion Justice Kennedy wrote in *Romer v. Evans*<sup>52</sup> invalidating a state constitutional amendment that he rightly described as making each LGBT individual a “stranger to its laws,”<sup>53</sup> 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.”<sup>54</sup>

In his dissent, Chief Justice Roberts claimed that a conception of dignity which conferred the right to marriage on same-sex couples lacked any foundation either in our country’s history or in that of other nations<sup>55</sup> (in a tacit acknowledgment of the international cast of Justice Kennedy’s notion of dignity and of its relevance). And countless commentators, in bars and blog posts, have found it difficult to dignify *Obergefell*’s discussion of dignity as anything beyond mere rhetoric.<sup>56</sup> But the conception of equal dignity in fact has a considerable doctrinal pedigree, one stretching across some of the most high-profile cases decided by the Court in the past half-century. The notion that *Obergefell* had no foundation is simply wrong.

### III. DIGNITY IN DIALOGUE

While both Yoshino and I have sought to deconstruct the view that *Obergefell* was all flash and no substance, the opinion’s detractors are undeniably right in at least one respect: the *Obergefell* opinion contains plenty of rhetoric — and powerful rhetoric at that. But the opinion’s critics — predominantly legal scholars — have missed the point of Justice Kennedy’s deliberate selection of universally accessible, nontechnical prose and his attempts to move a less technically experienced reader. They have focused instead on nitpicky peccadilloes, like the opinion’s near-heretical (for the academic crowd) lack of legal citations or footnotes. Justice Kennedy’s rhetoric of equal dignity, particularly in his series of gay-rights decisions, has always been fundamentally rooted in the importance of fostering dialogue among ordinary citizens and, in a sense, even among the very clauses of the Constitution itself.

Justice Kennedy’s opinions have repeatedly emphasized the notion that, through the decisions it announces and the reasons it offers for those decisions, the Court does more than resolve the particular “cases” and “controversies” entrusted to it for resolution. He has observed: “By our opinions, we teach.”<sup>57</sup> That has long been Justice Kennedy’s

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<sup>52</sup> 517 U.S. 620 (1996).

<sup>53</sup> *Id.* at 635.

<sup>54</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>55</sup> *See id.* at 2612–13, 2623–24 (Roberts, C.J., dissenting).

<sup>56</sup> *See, e.g.*, sources cited *supra* note 2.

<sup>57</sup> Lani Guinier, *The Supreme Court, 2007 Term — Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 7 (2008) (quoting Justice Kennedy responding to a Harvard Law



view of the Court's role in helping to structure and stimulate public debate regarding the rights that should be afforded to LGBT individuals and to same-sex couples, as well as the evolving character of marriage as an institution. In *Obergefell*, Justice Kennedy's discussion of the history of marriage is manifestly structured not just to respond in legal terms to the dissenters' claim that the institution has had a fixed meaning for millennia<sup>58</sup> but also to make ordinary people focus more closely on how the evolution of gender roles, among many other developments, has silently but assuredly transformed the institution's meaning.<sup>59</sup> The idea that the populace at large will actually read the Court's opinions may seem naive. But if one reflects on how those opinions reverberate through both traditional and social media outlets, the idea's innocence may come to be appreciated and even admired in time.

The focus on the importance of dialogue, both among people and institutions at any given time and across the centuries, is evident throughout *Obergefell*. It becomes most explicit when Justice Kennedy describes the multitude of ways in which "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."<sup>60</sup>

Indeed, Justice Kennedy poignantly lays bare his own, internal dialogue when he discusses — in a way that is rare if not unprecedented for a Supreme Court opinion — the difficulty of deciding between more gradually building a solid foundation for the recognition of new constitutional rights and immediately addressing serious indignities and other harms, whenever or wherever they may be found.<sup>61</sup> To leave newly recognized constitutional wrongs that undermine the equal

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School student's question: "The Constitution is the enduring and common link that we have as Americans and it is something that we must teach to and transmit to the next generation. Judges are teachers. By our opinions, we teach."). This vision of the Constitution as a great teacher recurs throughout Justice Kennedy's writings on the bench in *Obergefell* and elsewhere. See *Obergefell*, 135 S. Ct. at 2598 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."); *id.* at 2602–03 ("The Due Process Clause and the Equal Protection Clause . . . may be instructive as to the meaning and reach of the other."); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2676 (2012) (joint dissent) ("It should be the responsibility of the Court to teach . . ."); *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 901 (1992) ("Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one.").

<sup>58</sup> See, e.g., *Obergefell*, 135 S. Ct. at 2612–13 (Roberts, C.J., dissenting).

<sup>59</sup> See *id.* at 2595–96 (majority opinion).

<sup>60</sup> *Id.* at 2596.

<sup>61</sup> See *id.* at 2605–06.

dignity of individuals uncorrected in the name of caution beyond the point where those wrongs have at last become clear to a majority of the Court, Justice Kennedy says, causes unjustified “pain and humiliation.”<sup>62</sup> Whatever might be said for moving more slowly, he observes, “men and women [are] harmed in the interim,” and “[d]ignitary wounds cannot always be healed with the stroke of a pen.”<sup>63</sup>

There is some irony, for a Justice so dedicated to dialogue, in the fact that Justice Kennedy’s majority opinions rarely wrestle directly with the arguments made by the dissenting Justices. In *Obergefell*, for example, despite the way his antisubordination theme provides a ready response to the repeated invocation of *Lochner*’s ghost in the dissenting opinions, it is noteworthy that Justice Kennedy’s majority does not mention the *Lochner* decision even once.

Yet there is one central argument made in all the *Obergefell* dissents, and particularly emphasized in the principal dissent by the Chief Justice, that Justice Kennedy engages head-on: it is the argument that a commitment to democracy renders the Court’s intervention in the marriage wars fundamentally illegitimate.<sup>64</sup> With that argument in mind, Justice Kennedy reminds his readers — conspicuously including Chief Justice Roberts — that, for all its presumptive virtues, democracy has its limits.<sup>65</sup> Although some mix of direct and representative democracy is presumed by our Constitution to be the “appropriate process for change” and indeed is “most often” the vehicle through which “liberty is preserved and protected in our lives,” the “dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.”<sup>66</sup> In particular, Justice Kennedy rejects the argument that the proper way to construct a foundation for a newer conception of rights in a democratic republic would have required the Court, in the instance of marriage equality, to wait for majority votes in state legislatures and statewide referenda. To address that argument, Justice Kennedy cuts directly to the chase and, rather than losing readers in the weeds of complex political and philosophical theories about the judiciary’s role, embraces the simple vision that the “idea of the Constitution,”<sup>67</sup> quoting Justice Robert H. Jackson, is “to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and offi-

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<sup>62</sup> *Id.* at 2606.

<sup>63</sup> *Id.*

<sup>64</sup> See *id.* at 2611–12 (Roberts, C.J., dissenting); *id.* at 2626–29 (Scalia, J., dissenting); *id.* at 2631–32 (Thomas, J., dissenting); *id.* at 2640–41 (Alito, J., dissenting).

<sup>65</sup> See *id.* at 2605 (majority opinion).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 2605–06.

cials and to establish them as legal principles to be applied by the courts.”<sup>68</sup>

Notably, the decision Justice Kennedy quotes for that common-sense reminder about the purpose of a Bill of Rights is *West Virginia State Board of Education v. Barnette*,<sup>69</sup> the 1943 case in which the Court held that schoolchildren may not be compelled to recite the Pledge of Allegiance.<sup>70</sup> In drawing on *Barnette*, Justice Kennedy selects one of the Court’s most enduring and celebrated precedents; it is no coincidence that *Barnette*, like *Obergefell*, relies on no single clause of the Bill of Rights but on the broader postulates of our constitutional order.

Justice Kennedy’s choice of *Barnette* is particularly apt in light of a central point made by Chief Justice Roberts in his *Obergefell* dissent, which noted the absence of any “‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution”<sup>71</sup> — as though that absence were somehow decisive. Justice Kennedy’s opinion lets the Court’s towering *Barnette* decision — a precedent he knows Chief Justice Roberts admires greatly and cites often<sup>72</sup> — speak for itself as a rebuttal to Chief Justice Roberts’s “No Such Clause” observation. Justice Kennedy knows that the dissenters, led by Chief Justice Roberts, realize that the right affirmed in *Barnette* extends not only to religious objectors but to everyone. *Barnette*, and other decisions that followed in its wake, also reached well beyond a right to speak one’s mind; it applied even if those under compulsion to convey beliefs with which they disagreed remained free to voice their disagreement with those beliefs.<sup>73</sup> Thus the line of cases Justice Kennedy invokes conspicuously protects rights resting not on any particular clause, like the Freedom of Speech Clause or the Free Exercise of Religion Clause, but instead on the dignity and autonomy of the individual standing against the forces of coerced conformity — on principles underlying the written Constitution but nowhere expressly articulated in its text.

Although Justice Kennedy’s subtext in leaning so heavily on *Barnette* could not have escaped his dissenting colleagues, he was not principally speaking to insiders, as his choice of rhetorical style made clear. Justice Kennedy’s opinions can be best understood as deliberately fostering and enriching broad public debate regarding issues like

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<sup>68</sup> *Id.* at 2606 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943)).

<sup>69</sup> 319 U.S. 624.

<sup>70</sup> *Id.* at 642.

<sup>71</sup> *Obergefell*, 135 S. Ct. at 2616 (Roberts, C.J., dissenting).

<sup>72</sup> See, e.g., *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2689 (2015) (Roberts, C.J., dissenting); *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006).

<sup>73</sup> See, e.g., *Wooley v. Maynard*, 430 U.S. 705 (1977).

same-sex marriage. That ambition is not far removed from the idea — espoused by Alexander Bickel, Christopher Eisgruber, Ralph Lerner, and Eugene Rostow, among others — that the Court should play an educative role in society, furthering the public’s knowledge and understanding both of the Constitution and of the vast array of legal issues that the Court confronts each year.<sup>74</sup>

While we have seen that Justice Kennedy ascribes to the view that the Court’s own opinions serve to spur debate and educate both lower courts and the public at large, even more noteworthy is his insistence that the *greatest* teacher in these matters is not any opinion drafted by the Justices but the Constitution itself.<sup>75</sup>

A too-rarely noted aspect of Justice Kennedy’s opinions in this realm, beginning in *Romer* and *Lawrence* and culminating in *Obergefell*, is the belief that the Constitution is written and designed to shed light on society’s evolving experience, framing windows through which to view and assess that experience, and to thereby educate us in how we might proceed to form an ever more perfect union. It does so in part by opening with a conspicuously aspirational preamble, in part by deliberately casting some of the rights it protects and principles it embodies at a high level of abstraction and generality, and in part by manifestly leaving spaces and silences between the specific guarantees it enumerates, expressly instructing that the text’s failure to enumerate a particular right may not be “construed to deny or disparage” that right’s existence.<sup>76</sup>

Nowhere is this educative or pedagogical vision of the Constitution more present than in Justice Kennedy’s creative intertwining of the Equal Protection and Due Process Clauses into a principle of equal dignity.

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<sup>74</sup> See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961 (1992); Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127; Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952).

<sup>75</sup> I first began expanding upon this notion in *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 441–42 (1983). Others have also remarked that the Constitution itself may serve an educative function. See, e.g., Akhil Reed Amar, *The Supreme Court, 1999 Term — Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 27 (2000) (“[W]e would do well to study our amended Constitution with care, because it can teach us a great deal about who We are as a People, where We have been, and where We might choose to go.”); Rebecca L. Brown, Essay, *Tradition and Insight*, 103 YALE L.J. 177, 177 (1993) (“The Constitution educates Americans about the political values that permit this nation to survive and to mature. The Framers wrote the Constitution to teach future generations of Americans the lessons they had learned about political freedom. The Constitution and its traditions are the core of our political education.”); *id.* at 218 (“[T]he Constitution has much to teach us about general concepts, such as equality.”).

<sup>76</sup> U.S. CONST. amend. IX.

Yoshino rightly emphasizes how Justice Kennedy's 2003 *Lawrence* opinion had already illustrated one way in which the Equal Protection and Due Process Clauses each taught a lesson about the necessary reach of the other<sup>77</sup> — a lesson that the Court concluded required it not only to strike down the gender-specific antisodomy law at issue in *Lawrence* but also to hold that, from the day it was decided, *Bowers v. Hardwick* had been wrong to uphold even a gender-neutral antisodomy law.<sup>78</sup> But in *Obergefell*, the lesson went further, teaching that the deeper purposes of neither equal protection nor due process could be satisfied if only *negative* liberty — the liberty “to engage in intimate association without criminal liability” — was entitled to constitutional protection.<sup>79</sup>

#### IV. THE FEDERAL STRUCTURE AS EXEMPLIFYING INTRATEXTUAL “CONVERSATION”

Justice Kennedy's decisions repeatedly recognize the ways in which distinct pieces of our constitutional structure are put into a kind of “conversation” with one another. In *Windsor*, Justice Kennedy leaned heavily and deliberately on the structural principles of federalism in closely scrutinizing the federal government's unusual intrusion into marriage, the traditional province of the states.<sup>80</sup> In essence, he treated the federal structure as telling the Court to question why the federal Defense of Marriage Act departed from the norm by displacing state definitions of marriage in one and only one respect. This reliance on federalism reflected in part Justice Kennedy's earlier interest in the dignity of the states as such — but reflected as well his frequent reminder that federalism, like the separation of powers, exists not just to protect the component parts of our governmental architecture, but for the more basic reason of protecting the individuals that architecture serves. For Justice Kennedy, these structures ensure both the *positive* liberty of collective self-governance within a system whose accountability is preserved by the way it vertically allocates power, and the *negative* liberty of shielding persons from government subordination that invades their equal dignity. The proposition, advanced in many leading cases (like *Bond v. United States*<sup>81</sup>) by Justice Kennedy in particular, that the Constitution's implicit division of powers between the national government and the states exists principally to protect personal liberty and equality, is thus fully consistent with the more fun-

<sup>77</sup> See, e.g., Yoshino, *supra* note 3, at 152, 154 n.57, 172–73.

<sup>78</sup> See *Lawrence v. Texas*, 539 U.S. 558, 574–75 (2003).

<sup>79</sup> *Obergefell*, 135 S. Ct. at 2600.

<sup>80</sup> 133 S. Ct. 2675, 2695–96 (2013).

<sup>81</sup> 131 S. Ct. 2355 (2011).

damental demand that *no* level of government exercise its power in a manner that, however rooted in tradition, ends up depriving individuals of those very rights.<sup>82</sup>

It was that fundamental demand that dominated both public dialogue and lower court decisions in the wake of *Windsor*. As Justice Scalia's *Windsor* dissent had rightly forecast,<sup>83</sup> people around the nation, including federal and state judges, rapidly recognized that equal dignity could not permanently be contained by the federalism frame in which Justice Kennedy had initially set it. Partly because it became evident that the spreading legal recognition of same-sex marriage did not cause the skies to fall; partly because that phenomenon in turn led more LGBT individuals to emerge from the shadows and generate both more empathy and less fear; and partly because that emergence cast a light on the lodestar of human dignity that had guided earlier decisions like *Windsor* even without being fully articulated in those decisions, a cascade was set in motion for which the *Windsor* Court must have hoped, but that it could not confidently predict.<sup>84</sup>

After *Windsor* the lower federal courts began to strike down same-sex marriage bans across the country in rapid succession.<sup>85</sup> In some states, the public, through the passage of statutes or referenda, directly affirmed the dignity of same-sex marriages.<sup>86</sup> By the time Justice Kennedy wrote the Court's opinion in *Obergefell*, he observed that the dialogue in the states and the lower courts had begun to allow equal dignity to shake off its constraining armature and stand on its own. He properly recognized that the time had come to jettison the federalism scaffolding with which he had earlier surrounded that core right.

## V. THE WORLD AFTER *OBERGEFELL*: A NEW ORTHODOXY?

*Obergefell's* doctrine of equal dignity points a way forward in the still ongoing struggle for equal rights for LGBT individuals — a

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<sup>82</sup> See *supra* note 46.

<sup>83</sup> See 133 S. Ct. at 2710 (Scalia, J., dissenting) (“[T]he majority arms well every challenger to a state law restricting marriage to its traditional definition. . . . The majority’s limiting assurance will be meaningless . . .”).

<sup>84</sup> See Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 308–09 (1975) (explaining how a new, more tolerant moral consensus may emerge as courts permit more and more individual dissenters to deviate from a previously rigid rule); see also Heather K. Gerken, Lecture, *Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015) (praising *Windsor* for “clearing the channels of political change,” *id.* at 600 (quoting JOHN HART ELY, *DEMOCRACY AND DISTRUST* 105 (1980)), by striking down the Defense of Marriage Act and giving full federal recognition to same-sex marriages, *id.* at 601–02).

<sup>85</sup> See, e.g., *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014).

<sup>86</sup> See, e.g., Religious Freedom and Marriage Fairness Act, 2013 Ill. Legis. Serv. P.A. 98-597 (West).

struggle that will have to be waged not just in the courts but in regulatory bodies, legislatures, and popular lawmaking through initiatives and referenda. The doctrine of equal dignity signals the beginning of the end for discrimination on the basis of sexual orientation in areas like employment and housing, which remains legal in many states and has yet to be expressly banned in federal legislation. The Equal Employment Opportunity Commission (EEOC) has recently ruled that federal laws banning gender discrimination in employment should be understood to ban discrimination based on sexual orientation as well,<sup>87</sup> but a future EEOC might rule otherwise, and new federal legislation making such a ban explicit would clearly help to secure that principle as an enduring part of our national law. Such legislation might also be needed to give fuller meaning to the principle of equal dignity for women, who remain the too-often forgotten half of the human equation.

The constitutional principle of equal dignity also gives the lie to public officials who discriminate against LGBT individuals, like the Kentucky county clerk who defied a federal court order by refusing to issue any marriage licenses at all unless and until she is permitted, in accord with her religious convictions, to issue them only to opposite-sex couples.<sup>88</sup> As the *Obergefell* majority makes clear, the First Amendment must protect the rights of such individuals, even when they are agents of government, to *voice* their personal objections — this, too, is an essential part of the conversation — but the doctrine of equal dignity prohibits them from *acting on* those objections, particularly in their official capacities, in a way that demeans or subordinates LGBT individuals and their families by preventing them from giving legal force to their marriage vows.

But the doctrine of equal dignity, much as it protects same-sex couples from discrimination, does not, as Justice Alito suggested, amount to a “new orthodoxy.”<sup>89</sup> Like the right affirmed in *Barnette*, *Obergefell*’s promise extends beyond same-sex couples to ensure that *all* individuals are protected against the specter of coerced conformity. Thus, much as I admired it otherwise, Justice Kennedy’s opinion left me with one major pang of disappointment for the degree to which it privileged marriage as an institution that it described as essential to human flourishing — and as the only viable antidote to a life of lonely yearning. Many scholars and activists, Nancy Polikoff perhaps fore-

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<sup>87</sup> See *Complainant v. Foxx*, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

<sup>88</sup> See generally Alan Blinder & Richard Pérez-Peña, *Kim Davis, Released from Kentucky Jail, Won't Say If She Will Keep Defying Court*, N.Y. TIMES (Sept. 8, 2015), <http://www.nytimes.com/2015/09/09/us/kim-davis-same-sex-marriage.html>.

<sup>89</sup> *Obergefell*, 135 S. Ct. at 2642 (Alito, J., dissenting).

most among them,<sup>90</sup> have cautioned against the fight for marriage equality as a surrender to a crabbed vision of the diverse ways in which individuals can build their lives and relationships. While Justice Kennedy's final rhetorical flourish, suggesting that unmarried individuals are "condemned to live in loneliness,"<sup>91</sup> may seem to give comfort to this enemy, I am heartened by the knowledge that the Court *learns* as well as *teaches*. The right to marry the person of one's choice is nowhere mentioned in the Constitution. Nor is the right *not* to marry. Yet the Supreme Court as early as 1971, in *Boddie v. Connecticut*,<sup>92</sup> in an opinion written by Justice Harlan (the author of the *Poe v. Ullman* dissent that Yoshino rightly identifies as an important building block for *Obergefell*<sup>93</sup>), recognized a right to dissolve a marriage when it held unconstitutional a state's insistence on limiting that right to those who could afford to pay a filing fee for the privilege of obtaining a divorce.<sup>94</sup> The *Boddie* opinion, unlike *Obergefell*, spoke only of the right not to be deprived of liberty without due process of law and did not rely at all on equal protection, but it clearly drew on ideas from both of those Fourteenth Amendment strands, just as the Court did decades earlier in *Skinner v. Oklahoma ex rel. Williamson*<sup>95</sup> in 1942 and, of course, in *Loving v. Virginia*<sup>96</sup> in 1967.

Such precedents would be difficult to cabin in any principled way that does not encompass a *right to remain unmarried* without suffering penalties for that choice. And while selective exclusion from marriage as an institution for those who desire to share in its rights and responsibilities deeply harms their dignity, it would be wrong to equate the Court's recognition of that hurtful reality with a view that demeans those choosing other forms of intimate companionship — or choosing to live without the solace of any close companionship at all. To penalize individuals for living either alone or in intimate nonmarital arrangements in the name of honoring and encouraging marriage is akin to denying same-sex couples the right to marry in the name of honoring and encouraging marriage by opposite-sex couples — a justification that Justice Kennedy's *Obergefell* opinion rightly repudiated. *Nei-*

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<sup>90</sup> See NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 84 (2008) ("Advocating marriage for same-sex couples is a sensible way to champion equal civil rights for gay men and lesbians. Unfortunately, it is not a sensible approach toward achieving just outcomes for the wide range of family structures in which LGBT people, as well as many others, live.").

<sup>91</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>92</sup> 401 U.S. 371 (1971).

<sup>93</sup> Yoshino, *supra* note 3, at 163–64 (citing *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

<sup>94</sup> *Boddie*, 401 U.S. at 374.

<sup>95</sup> 316 U.S. 535 (1942).

<sup>96</sup> 388 U.S. 1 (1967).



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*ther* limiting marriage to opposite-sex couples *nor* excluding the unmarried from the circle of those whose autonomy the law respects is consistent with the commitment to equal dignity that lies at the heart of *Obergefell*. Thus, while Justice Kennedy may have displayed a distressing marriage myopia in parts of his *Obergefell* opinion, that opinion is otherwise farsighted and fully capable of expanding our understanding of the Constitution to protect new freedoms as we come to appreciate them.

#### CONCLUSION

Justice Alito, dissenting in *Obergefell*, complains that the majority's position enables "those who cling to old beliefs . . . to whisper their thoughts in the recesses of their homes" but condemns them to "risk being labeled as bigots and treated as such by governments, employers and schools" if they "repeat those views in public."<sup>97</sup> As a matter of constitutional *law*, he is surely wrong. But even as a matter of constitutional *culture*, everything he says could equally have been said by those whose "old beliefs" told them to exclude African Americans from their lunch counters or to refuse to bake cakes for the weddings of interracial couples, not to mention those county clerks whose religious convictions supposedly prevented them from granting such couples marriage licenses. The great advance of *Obergefell* is to have pointed the way forward for resolving these remaining conflicts by creating a legal and social environment in which dignity can proudly speak its name.<sup>98</sup>

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<sup>97</sup> *Obergefell*, 135 S. Ct. at 2642–43 (Alito, J., dissenting).

<sup>98</sup> Cf. Laurence H. Tribe, Essay, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (situating *Lawrence* within "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").