## EQUAL DIGNITY — HEEDING ITS CALL

Given Justice Kennedy's role as the swing vote on the Supreme Court, his departure was undoubtedly momentous. And as happens with the departure of important figures, commentators were eager to define his legacy.[1] Through the lens of politics, this was no easy task.[2] Yet, despite Justice Kennedy's seeming contradictions, one constant emerged: a robust belief in the Court's power to enforce what he believes are the promises of the Constitution.

One of those promises is that of equal dignity.[3] The precise beginnings of the concept of dignity in American jurisprudence are arguable. Invocations of equal dignity sounded the clearest in Justice Kennedy's later marriage decisions of *United States v. Windsor*[4] and *Obergefell v. Hodges*.[5] However, discussion of dignity had already been apparent in his earlier individual rights jurisprudence, namely *Planned Parenthood of Southeastern Pennsylvania v. Casey*[6] and *Lawrence v. Texas*.[7] But no matter the start, the end was inarguable. Before leaving the Court, Justice Kennedy had developed a strand of jurisprudence committed to equal dignity as a central promise of the Fourteenth Amendment.

Given Justice Kennedy's outsized role in shaping a modern concept of equal dignity, the future direction of this concept now seems unclear. However, precedents do not die with a Justice's tenure, and equal dignity should be taken seriously in a post-Kennedy era. Equal dignity has been a driver in at least four defining Fourteenth Amendment cases over the past two decades. Beyond that, the values underlying equal dignity, specifically its recognition of an intersection between substantive due process and equal protection and its emphasis on antisubordination, have deep roots in American constitutional doctrine.[8] And finally, even if one still chooses to conceptualize equal dignity as a novel concept whose precise contours have yet to be marked,[9] this fact alone cannot

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[1] *See, e.g.*, Akhil Reed Amar, *What Justice Kennedy's Legacy Could Mean for the Future of the Supreme Court*, TIME (June 29, 2018), https://ti.me/2Kwl4dv [https://perma.cc/PMF2-4MKC]; *Did Anthony Kennedy Just Destroy His Own Legacy?*, POLITICO (June 27, 2018), https://politi.co/2KrojDs [https://perma.cc/6K37-WU8F].

[2] *See* Noah Feldman, Opinion, *Justice Kennedy's Legacy Is the Dignity He Bestowed*, BLOOMBERG (June 27, 2018), https://www.bloomberg.com/view/articles/2018-06-27/anthony-kennedy-retirement-his-legacy-is-dignity-he-created [https://perma.cc/DMV2-G5YF].

[3] *See id.*

[4] 570 U.S. 744 (2013).

[5] 135 S. Ct. 2584 (2015).

[6] 505 U.S. 833 (1992).

[7] 539 U.S. 558 (2003).

[8] Dignity's roots reach even wider internationally. *See, e.g.*, Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 15 (2004). Unfortunately, a worthy comparative analysis is beyond the scope of this Note.

[9] *See, e.g.*, 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 [https://perma.cc/VB8K-VH5G].

justify dismissal. All doctrines start somewhere, and almost all are refined through the iterative process of subsequent application. Equal dignity deserves the same chance.

To that end, this Note seeks to do three things. First, Part I distills the principles underlying equal dignity, with the aim of clarifying its contours. Then, using this sketch, Part II discusses the specific doctrinal implications that equal dignity should have on our substantive due process and equal protection inquiries. Finally, Part III assesses whether lower courts have thus far properly heeded equal dignity's call. Ending in a hopeful register, this Note argues that equal dignity should have particular salience to the growing judicial recognition of the rights of transgender individuals.

## I. WHAT IS EQUAL DIGNITY?

Critics of equal dignity typically argue that it is as amorphous an idea as any, a Rorschach test for anyone seeking vindication under our Constitution.[10] These skeptics point to two things. First, that the idea of dignity is invoked across a tremendous variety of constitutional inquiries, from state dignity under the Tenth and Eleventh Amendments,[11] to individual dignity under the Second, Sixth, and Eighth Amendments.[12] Second, that even in the context of the Fourteenth Amendment, equal dignity is expressed in language seemingly foreign to the accepted frameworks for either substantive due process or equal protection inquiries.[13]

In response to the first observation, it must be said that the mere mention of the word "dignity" ought not to equate to an invocation of a specific doctrine. Because of their capacious yet fundamental nature, words like "liberty" or "equality" are likely mentioned in opinions beyond those concerning substantive due process or equal protection. Yet real doctrine undoubtedly exists for each of those inquiries. Similarly, the way forward for equal dignity is to figure out what exactly it means in a given context. As this Note argues, equal dignity has developed a special meaning under the due process and equal protection guarantees of the Fourteenth Amendment.

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[10] *See* Conor O'Mahony, *There Is No Such Thing as a Right to Dignity*, 10 INT'L J. CONST. L. 551, 551 (2012); Rosen, *supra* note 9.

[11] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 714 (1999) (stating that the Constitution "reserves to [the states] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status"); Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777 (2003).

[12] *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171–72 (2011); Rosen, *supra* note 9 (citing Henry, *supra*, at 169, for the proposition that "dignity includes various conceptions including institutional status, equality, liberty, individual integrity, and collective virtue").

[13] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2623 (2015) (Roberts, C.J., dissenting) (characterizing the majority's intertwining of due process and equal protection as not "resembling our usual framework for deciding equal protection cases").

In response to the second observation, the fact that equal dignity does not conform fully to prior frameworks of analysis does not render it mere rhetoric. True, an ambiguous concept unmoored from any existing doctrine might deserve suspicion. However, as this Part argues, the concept of equal dignity is built on three discernible features. Moreover, far from being unhinged from existing doctrine, equal dignity is acutely aware of the limits of these doctrinal frameworks and makes deliberate adjustments to them in order to vindicate their fundamental ideals.

### *A. Equal Dignity as the Intersection Between Due Process & Equal Protection*

First, the surest principle that emerges from the dignity line of cases is recognition of an intimate relationship between the substantive due process and equal protection guarantees of the Fourteenth Amendment. *Obergefell* makes this astoundingly clear, with Justice Kennedy stating that the two clauses are "connected in a profound way" in how they "converge in the identification and definition of [rights]" and further "our understanding of what freedom is and must become."[14] This emphatic declaration has not gone unnoticed, with Professor Laurence Tribe describing *Obergefell*'s "chief jurisprudential achievement" as having "tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*."[15]

This melding of due process and equal protection is not of recent vintage. As Tribe notes in a pre-*Obergefell* time, this connection was already observable in *Lawrence*, another substantive due process case inflected with equality concerns.[16] This connection is also reflected in Justice Kennedy's abortion rights jurisprudence. While ostensibly a substantive due process opinion, *Casey* emphasized the unique "liberty of the woman" and recognized the need to prevent the state from insisting upon "its own vision of the woman's role."[17] As Professor Reva Siegel explains, *Casey*'s recognition of equal protection concerns under

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[14] *Id.* at 2603 (majority opinion).

[15] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

[16] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004). In *Lawrence*, despite never engaging in a traditional equal protection analysis, the Court consistently referenced the inequality perpetuated between homosexual and heterosexual couples and the link between due process and equal protection. *See id.*

[17] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 852 (1992). Notably, in a prescient article published right before *Casey*, Professor Reva Siegel argued that the Court ought to replace *Roe v. Wade*'s privacy-trimester framework with analysis that recognized how the respect for the choice to get an abortion was intimately entwined with the equality of women. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 351–54 (1992).

the rubric of due process reflects a "constitutional protection[] for dignity."[18]

Moreover, the joining of due process and equal protection has roots that reach beyond Justice Kennedy's tenure. As Professor Kenji Yoshino observes, the Court has not "abide[d] by" a formal distinction between equality and liberty in cases that stretch back to 1923.[19] In particular, "[t]he Court has long used the Due Process Clauses to further equality concerns, such as those relating to indigent individuals, national origin minorities, racial minorities, [and] religious minorities."[20] One example is the 1954 desegregation decision of *Bolling v. Sharpe*.[21] Facing the problem that segregation in states had been outlawed under the Fourteenth Amendment's Equal Protection Clause, which had no counterpart in the Fifth Amendment,[22] the Court expressly noted the link between due process and equal protection: "[T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."[23]

Of course, one may accept that this intersection has been asserted in case law but question its value. However, the recognition of this link is a deliberate response to gaps that have formed in "traditional" due process and equal protection methodologies.[24] In turn, this relationship helps distill equal dignity's second and third features.

### *B. Equal Dignity as Antisubordination*

A second feature of dignity jurisprudence has been a keen emphasis on the need for equal respect for an individual's "most intimate and personal decisions,"[25] and the concurrent obligation of preventing "stigma" of these choices.[26] The *Obergefell* Court stated:

> [W]hen . . . sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon *demeans or stigmatizes* those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage

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[18] Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008).

[19] Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011).

[20] *Id.* at 749–50 (footnotes omitted); *see also* Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1506–08 (2002). In the context of equal protection, Professor Rebecca Brown has also noted how "[t]he interdependence of liberty and equality emerges even more clearly from the so-called 'fundamental interests' strand of the Equal Protection Clause," *id.* at 1508, which "depends upon a blending of liberty and equality concepts," *id.* at 1509.

[21] 347 U.S. 497 (1954).

[22] *Id.* at 498–99.

[23] *Id.* at 499.

[24] *See infra* sections I.B–C, pp. 1326–33.

[25] Obergefell v. Hodges, 135 S. Ct. 2584, 2607 (2015).

[26] *Id.* at 2602.

> the same legal treatment as opposite-sex couples, and it would *disparage their choices and diminish their personhood* to deny them this right.[27]

This emphasis on stigma is also made clear in *Windsor*. There, the Court first observed that given its unusual nature, the Defense of Marriage Act[28] (DOMA) "impose[s] a disadvantage, a separate status, and so a stigma upon" gay and lesbian couples married under state law.[29] The Court then equated this to an "interference with the equal dignity of same-sex marriages,"[30] marriages that the Court characterized as manifestations of the couple's "moral and sexual choices the Constitution protects."[31] Both these decisions illustrate clearly the line that flows through stigma, equal dignity, and autonomy. Stigmatic injury that results from state-sanctioned prejudice is an affront to the dignity that must be accorded to the intimate personal choices of individuals. Moreover, this concern for dignity is inflected with *equality* concerns, given that the stigma is directed only to one class of those individuals.

Constitutional cognizance of stigmatic harm has deep roots. Yoshino characterizes the signature contribution of *Lawrence* and *Obergefell* as their "vision" of "antisubordination liberty."[32] This antisubordination principle is a distinct value of the Fourteenth Amendment that has merely been obscured by doctrinal developments. Siegel observes that there are "[t]wo clusters of values" that define equal protection.[33] While the more familiar "[a]ntidiscrimination values are concerned with the reasoning"[34] and "justifications of . . . state actors deploying public power,"[35] "the case law is rich with diverse expressions of antisubordination values," which are "concerned with the material and dignitary injuries inflicted on members of particular social groups by public actions premised on such prejudicial habits of thought."[36]

Beyond a recognition of an antisubordination principle, equal dignity is a deliberate doctrinal attempt to restore its constitutional significance. One might presume that the natural avenue for vindicating an antisubordination principle would be through the Equal Protection Clause. However, traditional equal protection has developed in a way that obscures the importance of antisubordination in two ways.

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[27] *Id.* (emphases added).

[28] 1 U.S.C. § 7 (2012), *invalidated by* United States v. Windsor, 570 U.S. 744 (2013).

[29] *Windsor*, 570 U.S. at 746.

[30] *Id.*

[31] *Id.* at 2694.

[32] Kenji Yoshino, *The Supreme Court, 2014 Term — Comment: A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015).

[33] Siegel, *supra* note 17, at 353.

[34] *Id.*

[35] *Id.* at 368.

[36] *Id.* at 353.

First, the "technocratic" nature of modern equal protection doctrine that "speaks of prongs, tiers, and classifications" obscures the importance of an antisubordination inquiry.[37] The problem with the line-drawing and category-defining approach of traditional doctrine came to the fore in *Plyler v. Doe*,[38] where the Court purportedly applied equal protection analysis to strike down a Texas law that would have disallowed undocumented immigrants from attending public schools.[39] The difficulty there was that undocumented immigrants were not considered a "suspect class," nor had education been recognized as a "fundamental right."[40] With these traditional doctrinal hooks unavailable, the Court appeared to struggle with articulating how it was able to strike down the law under the Equal Protection Clause. Ultimately, it invoked the antisubordination principle:

> [M]ore is involved in these cases than the abstract question [of] whether [this law] discriminates against a suspect class, or whether education is a fundamental right. [This law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives.[41]

The dissenters labeled this a "depart[ure]" from doctrine and a "unique confluence of theories . . . that . . . stand[s] for little."[42] Yet it appears clear that the *Plyler* majority was attempting to vindicate antisubordination concerns under ill-equipped equal protection doctrine.

Second, as demonstrated by Tribe's recapitulation of *Lawrence*,[43] a formalistic application of equal protection analysis is inadequate in remedying harms to equal dignity. In the context of *Lawrence*, such an analysis, which allows a state to level down and retain a sodomy law so long as it is applied equally to same-sex and opposite-sex intimacy, would "leave in place the discrimination against and stigmatization of gays and lesbians."[44] This result ensues because the "social and cultural meaning of the ban on sodomy operates to deny the equal worth and equal liberty" of homosexuals who may be socially and culturally defined by such behavior.[45] Justice Kennedy said as much in *Lawrence*:

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[37] Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3080 (2014) (commenting on Professor Bruce Ackerman's analysis of the doctrine in 3 BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014)).

[38] 457 U.S. 202 (1982).

[39] *Id.* at 210, 230.

[40] *Id.* at 223.

[41] *Id.*

[42] *Id.* at 243 (Burger, C.J., dissenting).

[43] Tribe, *supra* note 16, at 1907–16.

[44] *Id.* at 1910.

[45] *Id.* at 1914.

> 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 . . . . If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.[46]

Put another way, because "traditional" equal protection doctrine is agnostic to the potential unequal stigma that may result from an equal application of the law, it alone cannot vindicate the antisubordination principle at the heart of the Fourteenth Amendment.

Equal dignity's understanding of these two problems with traditional doctrine can be situated within a broader movement to recognize the problems with American constitutional jurisprudence's overwhelming focus on formal equality. As expressed by Professor Peter Westen and elaborated on over the years, the premise that "equality" can be enforced without any nod to substantive values has hollowed out the principle.[47] In that sense, the "intimate relationship" between due process and equal protection is as much a marriage born of necessity as it is of affinity. And in that same vein, equal dignity doctrine can be seen as a response to calls that a course correction is due.[48]

For one, because dignity is concerned with according respect for these intimate choices of an individual, regardless of one's membership in a particular social group, realizing a dignity interest in the context of substantive due process immediately focuses the inquiry on any stigmatic subordination harm that threatens such dignity. Next, by locating equal dignity primarily in the doctrine of substantive due process, which requires a vindication of the dignity interest and not merely a leveling down to achieve formal equality, equal dignity uproots any stigma that could have remained from an equal application of the law.

Seen in this light, the antisubordination principle not only exists as a central feature of equal dignity, thereby giving a clearer shape to the doctrine, but it also provides a reason for the doctrine's blend of due process and equal protection. Because a formal equal protection doctrine cannot achieve one of its principal values, the recognition of a due process right to one's dignity, such as freedom from state-induced subordination, is necessary for Fourteenth Amendment course correction.

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[46] Lawrence v. Texas, 539 U.S. 558, 575 (2003).

[47] Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 560–77 (1982); *see also, e.g.*, Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

[48] Similar formulations for course correction include Professor Martha Fineman's suggestion to recognize a substantive principle of "vulnerability," which would then require the state to "ensure that institutions and structures within its control do not inappropriately benefit or disadvantage certain members of society." Fineman, *supra* note 47, at 20.

### C. Equal Dignity as an Evolutive Exercise

The above recognition solves only half of the equal dignity conundrum. After all, if a dignity-based right to intimate personal decisions can be recognized under the rubric of substantive due process, why throw equal protection principles back into the mix? This question points to the third and final feature of equal dignity: its evolutive yet guided approach to the recognition of rights.

An undeniable feature of equal dignity jurisprudence is its recognition that the rights-finding exercise must be open to accepting previously unrecognized rights. *Lawrence* gives a nod to laws and traditions, but notes that history and tradition cannot be "the ending point of the substantive due process inquiry."[49] *Obergefell* offers even more candor, stating that "rights 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."[50]

However, while this is one of the clearest features of dignity jurisprudence, it is also one most open to criticism. Specifically, an approach not fully anchored to history and tradition faces two doctrinal hurdles: first, the history-focused approach to substantive due process articulated in *Washington v. Glucksberg*;[51] and second, the idea articulated by Justice Scalia in *Michael H. v. Gerald D.*[52] that calls for framing the right at "the most specific level at which . . . [it] can be identified."[53] These two principles in turn speak to a fundamental quandary for substantive due process: how to find a limiting principle for a clause that provides none on its face.[54] For proponents of narrow approaches, judicial caution is necessary to prevent substantive due process from turning into a freewheeling exercise of judicial subjectivity.[55]

Citing *Glucksberg*, the *Obergefell* Court issued a direct rejoinder to both these arguments. In particular, the Court reasoned that while a "most circumscribed . . . approach may have been appropriate for the

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[49] *Lawrence*, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

[50] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

[51] 521 U.S. 702, 710–19 (1997).

[52] 491 U.S. 110 (1989).

[53] *Id.* at 127 n.6.

[54] The Supreme Court is historically "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992). For a seminal proposal for how to solve this problem, see Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990).

[55] Even those seemingly empathetic to the protection of minorities may appear uncomfortable with the lack of a limiting principle. *See* Heather K. Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 851 (2007) (arguing that generalizing upward requires courts to "either remain high in the realm of abstraction, never acknowledging that the law in question denies the right to a particular group" or to "move from the abstract to the particular, from the grand rights of humanity to the fight on the ground about who gets them," the latter of which is an uneasy transition).

asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[56] As noted by Yoshino, this can be seen as a rebuke of the limitations of history and specificity identified in *Glucksberg* and *Michael H.*, signaling a more nuanced approach to the rights-finding exercise.[57]

However, to say that equal dignity rejects both history and tradition would tell only half the story. Equal dignity goes further to show *when* and *why* these restraints can be rejected. Note the above-quoted language from *Obergefell*. There, the Court did not overrule *Glucksberg* and instead accepted that such an approach might generally be "appropriate."[58] The Court therefore rejected the *Glucksberg* approach only in the context of "other fundamental rights, including marriage and intimacy."[59] The rest of the paragraph then explained the reason for this distinction. Specifically, the Court observed that in cases involving marriage and intimacy, the analysis did not turn on the right in the abstract.[60] Instead, "each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant *class* from the right."[61] Lest the emphasis on classes be overlooked, the Court again mentioned the centrality of "group" interests to the rights-finding exercise.[62] This idea of group harm, or antisubordination, more traditionally seen as an equal protection concept, thus appears to justify *when* the substantive due process analysis can be freed from limitations of history and specificity.

Seen in this light, the evolutive nature of equal dignity thus provides another reason for the doctrine's connection of due process and equal protection. Given that a substantive due process doctrine operating at an abstract, generalized level of autonomy and free choice would arguably have been dangerously unbounded, the introduction of an equal protection element limits the instances where *equal* dignity may be invoked to cases where subordination is afoot.

Beyond this, equal dignity jurisprudence also reveals a deeper reason why the importation of equality concerns is principally justified. A common feature in the cases' discussions of change is a focus on how liberty is as much a matter of judicial recognition as it is a matter of growing public acceptance. In *Lawrence*, the Court pointed out an "emerging awareness" that liberty extends substantial protection to homosexuals to

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[56] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).
[57] Yoshino, *supra* note 32, at 151–59.
[58] *Obergefell*, 135 S. Ct. at 2602.
[59] *Id.*
[60] *Id.*
[61] *Id.* (emphasis added).
[62] *Id.*

engage in intimate conduct.[63] Importantly, while the Court cited to a *judicial* decision (of the European Court of Human Rights), the rest of the evidence marshaled included legislative and state recognition of this liberty.[64] Similarly, *Obergefell* recognizes this dynamic. Describing how society reached an "enhanced understanding of the issue" of same-sex marriage, the *Obergefell* Court recognized the "referenda, legislative debates, and grassroots campaigns" waged extrajudicially.[65]

It is equal dignity's very recognition of the importance of democratic debate that further justifies the recognition of equal protection principles. Specifically, while understandings of liberty can develop through the rough and tumble of public debate, the Court uses equal dignity as a means of structuring the debate such that those whose rights are at stake have the chance to show their worth and plead their case.

This dynamic is seen most strikingly in *Windsor*. In 2013, while the Court appeared not yet ready to recognize a constitutionally protected right to same-sex marriage, the *Windsor* opinion demonstrated a sensitivity to the robust national debate that was developing and then ensured that the voices of same-sex couples were given equal dignity in this deliberative process. The Court first observed that the extension of rights to same-sex couples at the state level had occurred after "statewide deliberative process[es] that enabled its citizens" a chance to recognize "an injustice that they had not earlier known or understood."[66] This recognition was likely a key step in enabling states to confer dignity on these same-sex marriages. Yet, by categorically denying them federal recognition, DOMA threw cold water on the powerful dignity-conferring effects of such state deliberative decisions. Seen in this light, equal dignity sheds light on the arguably puzzling federalism aspects of the *Windsor* decision. Federalism was not important because of any independent right of the states but because gay couples had used this system to persuade their communities to confer dignity on them through state law, naturally in hopes of national recognition.[67] DOMA's unconstitutional harm was the short-circuiting of this liberty-enhancing exercise and its attempt to stack the deck to tell same-sex couples that their dignity would never be equal, even if they had validly achieved it through deliberative processes at the state level.

In this conflict-structuring role, equal dignity harkens to another principle associated with equal protection. In particular, *United States*

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[63] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

[64] *Id.* at 572–73.

[65] *Obergefell*, 135 S. Ct at 2605.

[66] United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

[67] For a deeper analysis of this concept, see Heather K. Gerken, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015).

*v. Carolene Products Co.*[68] footnote four, with its emphasis on the political vulnerabilities of "discrete and insular minorities," was a recognition that the political process might fail certain groups and was thus a doctrinal nuance to compensate for this failure.[69] Equal dignity appears to address a similar process-related concern. Equal dignity recognizes the *realpolitik* of the continuous liberty-enhancing exercise, one that is fought as much in public debate as it is in the courts. It then guarantees that the groups are given a fair shot in the ongoing debate, first by granting them the basic dignity of self-definition, and then by protecting their ability to advance this version of dignity through our constitutional structure and processes.

Post-*Obergefell*, equal dignity's conflict-structuring role is also evident, and perhaps becomes even clearer. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,[70] although Justice Kennedy punted on the harder questions involved in the clash between antidiscrimination ordinances and the First Amendment, he did so while noting that the ultimate answer to these questions must take into account the "dignity" of married couples and the risk of "community-wide stigma."[71] Thus, while it may be tempting to see *Lawrence*, *Windsor*, and *Obergefell* as discrete chapters, the promise of equal dignity and its role in structuring conflict transcends and prevails.[72]

To summarize Part I, three features of equal dignity doctrine emerge — easing tension between equal protection and due process, preserving antisubordination, and evolving with and facilitating public debate over the estimation of rights — the latter two providing the principled justification for the first. The Court's move to vindicate an antisubordination principle explains the need to begin the analysis with a dignity interest under substantive due process, while the need to provide a limiting principle to the rights-finding exercise mandates the reincorporation of equality principles. Equal dignity is thus more than just a combination of liberty and equality, but is also a doctrinal correction to ensure the Fourteenth Amendment lives up to its ideals.

## II. WHAT DOES EQUAL DIGNITY DO?

To the extent that equal dignity is a direct response to the gaps in traditional frameworks, blindly following "traditional doctrine" would both defy Supreme Court precedent and disregard the fundamental principles that motivated the doctrinal shift. But if fidelity to equal dignity is desired, how is this fidelity achieved?

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[68] 304 U.S. 144 (1938).
[69] *Id.* at 152 n.4.
[70] 138 S. Ct. 1719 (2018).
[71] *Id.* at 1727.
[72] *See* Tribe, *supra* note 15, at 29–32.

The answer to this query may already be before us. In particular, the three features of equal dignity illustrate three practical doctrinal implications. First, far from ushering in a whole new approach to substantive due process, equal dignity is invoked only when subordination concerns are at hand. Second, when equal dignity *is* invoked, it allows a court to adopt a higher level of generality in framing the right involved and guides a court in how to do so. Third, it provides a court navigating the means and ends inquiries of the current tiers-of-scrutiny approach with a qualitative rubric of enforcing antisubordination.

### *A. Step One: Triggering Equal Dignity*

First, equal dignity does not portend a wholesale revision of our substantive due process jurisprudence. Instead, Justice Kennedy's recapitulation of the doctrine in *Obergefell* suggests that equal dignity merely forms an alternative branch of substantive due process.[73] Specifically, acknowledging that the *Glucksberg* approach may remain relevant in cases such as assisted suicide, he cabins equal dignity's more expansive approach to previous cases where the analysis turned on the relationship between the "relevant class" and the right asserted.[74] As explained, this suggests that equal dignity is relevant only when there are concerns about subordination at stake.[75]

Despite arguments from equal dignity skeptics to the contrary, an antisubordination limitation on the invocation of equal dignity is a workable one, in both principle and practice. First, to an equal dignity skeptic, there might appear to be a fundamental problem in divining any real value from this proposed limitation. After all, won't almost all substantive due process claims have a tinge of equality? Substantive due process plaintiffs will almost always be forwarding such a claim *because* they belong to a group of individuals who have been deprived that right. Moreover, this right will also likely be particularly important to this specific group. To the extent that equal dignity is invoked so long as a plaintiff can point to perceived unequal treatment as a member of a group, the equal dignity branch might threaten to creep into the entire substantive due process framework.

Such concerns demonstrate the importance of understanding a key distinction between general concerns of "equal treatment" and the more distinct concept of antisubordination. As explained earlier, antisubordination is not concerned with every manifestation of unequal treatment between groups; instead it is targeted at unequal treatment that then has the result of further entrenching stigma against the group on the basis of its differentiating characteristic. As means of illustration, while plaintiffs asserting a "right to die" might argue that the denial of this

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[73] Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015).

[74] *Id.* at 2602.

[75] *See supra* p. 1331.

right has an obvious unequal effect on the terminally ill, this denial will not rise to the level of antisubordination unless they can prove that denying them the right to assisted suicide is based on, and further entrenches, unequal prejudice.[76]

The second possible objection to an antisubordination limitation on equal dignity is a practical one. How exactly is a court to figure out when antisubordination is afoot? Thankfully, case law and judicial experience provide guidance. For one, jurisprudence flowing from *Carolene Products* footnote four already provides some indicators of how such a group may be identified. While the Supreme Court has yet to identify a new footnote-four minority since its recognition of gender as a quasi-suspect class,[77] case law has suggested four criteria: members of the group have historically been discriminated against or have been subject to prejudice, hostility, or stigma, perhaps due, at least in part, to stereotypes;[78] they possess an immutable or highly visible trait;[79] they are powerless to protect themselves in the political process;[80] and the group's distinguishing characteristic does not inhibit it from contributing meaningfully to society.[81] These indicators have been useful to lower courts when recognizing new minority groups in the context of equal protection analysis,[82] and could be a useful starting point for the identification of a subordination concern under the auspices of equal dignity.[83] Moreover, these indicators manifest a need to show the presence of "prejudice, hostility, or stigma," thereby focusing on the group-based stigmatic concerns germane to an antisubordination interest, as opposed to more general showings of unequal treatment.

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[76] The Court in *Glucksberg* did not entertain this argument, and Justice Kennedy appears to keep to the line that the "right to die" falls outside the scope of equal dignity. *See Obergefell*, 135 S. Ct. at 2602. However, it is possible a court reviewing *Glucksberg* through the lens of equal dignity might be more sensitive to the possible subordination of the disabled and infirm. To the extent that a denial of assisted suicide is drawn with a prejudice that these individuals cannot make decisions for themselves, and such stigma is entrenched by the unequal denial of a right to die as one sees fit, equal dignity may prove salient.

[77] *See* Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723–24 (1982).

[78] *See, e.g.*, Lyng v. Castillo, 447 U.S. 635, 638 (1986).

[79] *See id.*

[80] *See, e.g.*, *id.*

[81] *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442 (1985).

[82] *See, e.g.*, Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) (applying the criteria to transgender individuals); Adkins v. City of New York, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015) (same); Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 985–90 (N.D. Cal. 2012) (applying the criteria to gays and lesbians).

[83] There is of course significant criticism of the *Carolene Products* footnote-four framework. *See* Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713, 717 (1985); Lea Brilmayer, Carolene*, Conflicts, and the Fate of the "Inside-Outsider*," 134 U. PA. L. REV. 1291 (1986). However, much of this criticism is directed at claims that the footnote is able to provide a modest yet all-encompassing theory of judicial review. *See* Ackerman, *supra*, at 737–40; Brilmayer, *supra*, at 1330–33. This Note does not employ footnote four for this proposition and merely seeks to use its criteria as guideposts for identifying subordination.

Additionally, there are concrete litigation mechanisms that allow courts to make a finding of subordination. Yoshino, building on Professor Bruce Ackerman's advocacy for an "antihumiliation principle" in constitutional law, identifies the "civil rights trial" as the preferred method of discerning "institutionalized humiliation," a concept analogous to that of subordination.[84] Yoshino focuses on the example of the civil rights trial ordered by the district judge in *Perry v. Schwarzenegger,*[85] which determined questions of fact regarding the constitutionality of California's gay marriage ban, including the presence of institutionalized humiliation. In *Perry,* such a trial allowed "plaintiffs and lay witnesses to speak directly on the record about their own experiences with institutionalized humiliation" that came as a result of Proposition 8, "experts . . . to contextualize those individual voices[,]" and then each side to examine the other's testimony in the crucible of adversarial litigation.[86] The presentation and examination of evidence of subordination thus remove these issues from the realm of abstract judicial intuition.

### *B. Step Two: Generalizing Upward*

Once equal dignity is invoked through recognition of subordination concerns, equal dignity then works two doctrinal shifts on the traditional due process framework.

First, equal dignity allows courts to generalize upward in the rights-framing exercise and teaches us how to do so in a principled manner. As explained in Part I, equal dignity analysis, once invoked, loosens the limitations of history and specificity in the general substantive due process inquiry.[87] However, as Gerken points out, generalizing upward is easy, but applying abstract generalities is hard. Specifically, even if the right is framed most broadly as one to dignity or autonomy, there will be an inevitable need to then look back down and decide what specific activities fall within the scope of protection.[88] Here, equal dignity provides the possible doctrinal answer. Because the lodestar for the doctrine of equal dignity is the need to prevent further entrenchment of group subordination, the exercise in generalization must also be guided by this qualitative principle.

The clearest example of this principle in operation is the Court's doctrinal shift between *Bowers v. Hardwick*[89] and *Lawrence*. Specifically, in *Lawrence*, the Court rejected *Bowers*'s narrow framing of the right as the "fundamental right [for] homosexuals to engage in

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[84] Yoshino, *supra* note 37, at 3092.
[85] 704 F. Supp. 2d 921 (N.D. Cal. 2010).
[86] Yoshino, *supra* note 37, at 3093.
[87] *See supra* p. 1331.
[88] *Supra* note 55.
[89] 478 U.S. 186 (1986).

sodomy."[90] It did so because such framing would be inherently discriminatory toward gay couples.[91] So long as the framing of a right includes the very basis of discrimination, and the analysis is then chained to history, historical discrimination becomes a justification unto itself. Accordingly, a recognition of equal dignity guides a court to frame the right in a way that purposefully precludes the constitutional perpetuation of such stigma. "Homosexual sodomy" must instead be framed as "sexual intimacy," "same-sex marriage" as "marriage," and "a woman's right to abortion" as "a right to bodily autonomy."

### *C. Step Three: Qualitatively Reviewing Means and Ends*

The third doctrinal move that equal dignity calls for is a more qualitative approach to the means and ends inquiry that currently forms the basis of judicial review. In the tiers of scrutiny inherent in the substantive due process and equal protection inquiries, courts are tasked with evaluating the fit between the state's stated "ends" and the "means" it takes to achieve them.[92] While this review must take into account the nature of the interest, be it compelling or legitimate, and the nature of the fit, be it the least restrictive means or merely rational, these words hardly provide a qualitative principle in judging what is an important enough goal, or close enough fit.[93] Again, with the guidance of the antisubordination principle, equal dignity offers some doctrinal clarity.

By way of example, Siegel explains this qualitative approach to the means and ends exercise through the lens of *Casey*'s undue burden framework.[94] She argues that the undue burden framework is ideally a means of recognizing the competing qualitative principles of the dignity of life that a state wishes to protect and the dignity of a woman that needs to be guaranteed.[95] By recognizing these interests, the undue burden framework is then supposed to function as a way of allowing the state the use of different means of forwarding its purported ends, so long as neither has the effect of denigrating the equal dignity of a woman by treating her as a mere "instrument[]" for state ends.[96]

The same dynamic can be seen in the other equal dignity cases. First, with regard to the stated purpose of the legislation, or the "ends," equal dignity dictates that a government's *stated* purpose cannot be that of enforcing broad-based prejudice against a politically vulnerable

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[90] Lawrence v. Texas, 539 U.S. 558, 566 (2003) (quoting *Bowers,* 478 U.S. at 190).

[91] *Id.* at 567.

[92] GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 453 (7th ed. 2013).

[93] *See* Michael Stokes Paulsen, *Medium Rare Scrutiny*, 15 CONST. COMMENT. 397, 397 (1998) (describing the tiers of scrutiny as "gibberish").

[94] *See* Siegel, *supra* note 18, at 1696.

[95] *Id.* at 1745–52.

[96] *Id.* at 1751.

group. In that sense, this comports with the oft-repeated incantation that "at the very least . . . a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* government interest."[97]

Second, a qualitative ideal like dignity also helps to clarify the "means" that states may employ to achieve a given purpose. Justice Stevens advocated for a similar principle in *Carey v. Population Services International*[98] by suggesting that some "means" are out of bounds.[99] There, despite accepting that a state "may properly perform a teaching function" in dissuading underage sex, he warned that "inflicting harm on the listener [ought to be] an unacceptable means of conveying a message that is otherwise legitimate."[100] In the context of equal dignity, the preclusion of subordination demands that, whatever a state's intended goals, none of the means it undertakes can have the effect of imposing a broad-based stigma on the affected minority group.

In *Lawrence*, the tool used was that of the criminal law, "with all that imports for the dignity of the persons charged[,]" including "bear[ing] on their record the history of their criminal convictions"[101] and the "collateral consequences . . . such as notations on job application[s]."[102] Most importantly, the action (homosexual conduct) that triggered this badge of criminality was intimately associated with the personhood-defining characteristics of the group (homosexuals), such that their very membership in this group was continually stigmatized.[103] Accordingly, because the method of achieving the state's goals was itself hugely stigmatizing, it was not a legitimate "means" under any basis of review.

The same reasoning is reflected in *Windsor*. Examining the breadth of DOMA, the Court observed that "DOMA touches many aspects of married and family life," with consequences ranging from differences in recourse to the criminal law to financial stability.[104] Thus by "writ[ing] inequality into the entire United States Code," the "system-wide" means employed by DOMA could not pass muster under any due process standard of review.[105] These examples help clarify that when courts adjudge the "means" employed by legislation in the context of equal dignity, mere reference to fit is insufficient, and a qualitative look at the true, possibly stigmatic, effect of these means must be undertaken.

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97 Romer v. Evans, 517 U.S. 620, 634 (1996) (second alteration in original) (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

98 431 U.S. 678 (1977).

99 *Id.* at 715 (Stevens, J., concurring in part and concurring in the judgment).

100 *Id.*

101 Lawrence v. Texas, 539 U.S. 558, 575 (2003).

102 *Id.* at 576.

103 *See id.* at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.").

104 United States v. Windsor, 570 U.S. 744, 772 (2013).

105 *Id.* at 771.

In sum, equal dignity, far from being mere rhetoric, has three clear doctrinal effects. First, it asks whether the asserted right at stake is intimately associated with a vulnerable minority group, such that its deprivation threatens stigmatic harm. Second, equal dignity allows the court to generalize upward when framing rights, while drawing the limits of protection to those rights intimately associated with the aforementioned class. Third, the doctrine adds a qualitative component to judicial review, now requiring that both the means and ends be scrutinized through the lens of antisubordination.

## III. HAVE COURTS ANSWERED THE CALL?

It has been more than three years since the Court's last word on equal dignity in *Obergefell*. Since then, lower courts have had to address a diverse range of fundamental right assertions, including the rights to die,[106] to education,[107] to private consensual sex,[108] to the use of sex toys,[109] to BDSM sexual activity,[110] to international travel,[111] and to not wear a seatbelt.[112] A survey of these cases suggests that while lower courts are indeed cognizant of the fact that equal dignity has worked doctrinal change on the law of substantive due process, many have yet to heed equal dignity's true call. At least three errors can be identified.

First, some courts have yet to understand how equal dignity fits into the traditional Fourteenth Amendment framework. In *Mohamed v. Holder*,[113] the district court analyzed whether a U.S. citizen placed on a "No Fly List" could claim a fundamental right to international travel. Addressing *Obergefell*'s impact, the court characterized the change as an "expan[sion]" of the "scope of [the] analysis."[114] To the court, *Obergefell* merely added, to traditional factors, the consideration of "any history and tradition of animus."[115] Seen in the context of Part II of this Note, the *Mohamed* court's analysis is only partially complete. By characterizing animus as merely an additional consideration, the court failed to realize that equal dignity is itself a doctrinal nuance that branches *off* traditional due process analysis. Doing so potentially disregards the latter two doctrinal implications of equal dignity, namely its allowance for

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106 Morris v. Brandenburg, 376 P.3d 836 (N.M. 2016).
107 Gary B. v. Snyder, No. 16-cv-13292, 2018 WL 3609491 (E.D. Mich. July 27, 2018).
108 Ramirez v. State, No. 13-16-00069-CR, 2018 WL 637367 (Tex. Ct. App. Jan. 31, 2018).
109 Flanigan's Enters., Inc. v. City of Sandy Springs, 831 F.3d 1342 (11th Cir. 2016).
110 Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602 (E.D. Va. 2016).
111 Mohamed v. Holder, 266 F. Supp. 3d 868 (E.D. Va. 2017).
112 Burr v. Attorney Gen. Del., 641 Fed. App'x 194 (3d Cir. 2016).
113 266 F. Supp. 3d 868.
114 *Id.* at 877.
115 *Id.* (quoting Struniak v. Lynch, 159 F. Supp. 3d 643, 667 (E.D. Va. 2016)).

a generalized framing of the right and its focus on the qualitative principle of antisubordination in review of the legislation's fit.

Next, even where courts have demonstrated an awareness that equal dignity presents a separate path forward from the traditional substantive due process analysis, they have tended not to understand that the differentiating principle between the two paths is that of antisubordination. One example is the New Mexico Supreme Court in *Morris v. Brandenburg*,[116] which addressed a claim for a right to assisted suicide. There, the court, rejecting the plaintiff's argument that *Obergefell* called for departure from *Glucksberg*, reasoned that "unlike *Loving*, *Turner*, *Zablocki*, and *Obergefell*, which had as a tradition the fundamental right to marry with all of the rights, responsibilities, and divorce procedures carefully defined, we do not have such a tradition to fall back on regarding physician aid in dying."[117] In doing so, the court appeared to distinguish *Glucksberg* on the basis of whether a predefined right had existed such that expansion would be easy, rather than from the fact that antisubordination interests had motivated the *Obergefell* court to reject the *Glucksberg* approach.

The third mistake that lower courts have made when applying the equal dignity precedent has been a misunderstanding of the relevance of stigmatic injury. In *Gary B. v. Snyder*,[118] the plaintiffs claimed a right to education and sought solicitude under *Obergefell*'s recognition that "exclusion[s] that . . . demean[] or stigmatize[]" are subject to greater scrutiny.[119] Plaintiffs argued that the denial of this right to education and literacy "consign[ed] them to 'instability in both social and economic terms'" and "lock[ed] them out of valuable social and political institutions."[120] In dismissing these arguments, the district court appeared to acknowledge *Obergefell*'s doctrine-altering potential, but concluded that such appeals based on stigmatic harm proved too limitless.[121] After all, the court reasoned, "if the State's failure to provide a good or service to a person results in a limitation of future opportunities and social stigma" that requires constitutional recognition, then "the same could presumably be said for a person who must go without a sanitary place to live, or must live in an abusive home."[122] This reasoning may seem persuasive, yet it misunderstands the relevance of such stigmatic harm in the context of equal dignity. True, not all stigmatic harm must be

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116 376 P.3d 836 (N.M. 2016).

117 *Id.* at 848.

118 No. 16-cv-13292, 2018 WL 3609491 (E.D. Mich. July 27, 2018).

119 *Id.* at *14 (quoting Plaintiff's Response in Opposition to Defendants' Motion to Dismiss at 30, *Gary B.*, No. 16-cv-13292 [hereinafter Plaintiff's Response]).

120 *Id.* (quoting Plaintiff's Response, *supra* note 119, at 34).

121 *Id.*

122 *Id.*

constitutionally cured. Instead, as fitting with the antisubordination principle, it is stigma tied to a defining trait of a vulnerable group that is relevant. Accordingly, the *Gary B.* court, instead of speaking of an abstract slippery slope, ought to have looked at whether the stigmatic harm imposed by the denial of literacy was done on the basis of, or had the effect of, entrenching the subordinate position of a particular group.

Thankfully, there are some courts that appear to get it right. Take *Burr v. Attorney General Delaware*,[123] where the Third Circuit addressed an assertion of a fundamental right to not wear a seatbelt. Dismissing the arguably facetious claim, the court rightly reasoned that *Obergefell*'s analysis was confined to laws that "treat a group of persons unequally in ways that disrespect and subordinate that group."[124] Similarly, the district court in *Struniak v. Lynch*[125] demonstrated a proper understanding of equal dignity in a case concerning the asserted right to reside in the United States with one's spouse. There, the court not only rightly realized that equal dignity presented an "equal" alternative route for substantive due process,[126] and not merely a tacked-on consideration, but it also correctly identified that animus and subordination were the key concerns of *Lawrence* and *Obergefell*.[127]

Unfortunately for the development of equal dignity doctrine, *Burr* and *Struniak* failed to provide opportunities to positively enforce equal dignity's promise. The assertion of a right not to wear a seatbelt was facetious at best, and the right to reside in the United States with a spouse was denied on the basis of a legitimate, nonstigmatic reason.[128] However, there appears to be one promising avenue for exploring how equal dignity may work in new areas of the law, namely the rising litigation over the rights of transgender individuals in lower courts.

Given the history and present-day reality of transgender discrimination,[129] equal dignity doctrine may soon be called upon to vindicate the rights of transgender individuals. Most courts that have advanced the

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123 641 F. App'x 194 (3d Cir. 2016).

124 *Id.* at 196.

125 159 F. Supp. 3d 643 (E.D. Va. 2016).

126 *Id.* at 667.

127 *See id.* at 668 (reasoning that "*Lawrence* and *Obergefell* stemmed from mere condemnation of immutable characteristics" and "a history of impermissible animus").

128 *Id.* (finding that the asserted liberty interest at issue was not judicially enforceable because its deprivation was a response to a separate criminal conviction, as opposed to "mere condemnation of immutable characteristics").

129 Courts have already begun to address cases involving antitransgender bathroom ordinances, *see* Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267 (W.D. Pa. 2017), laws that restrict the legal change of gender on identity documentation, *see* Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327 (D.P.R. 2018), and President Trump's efforts to restrict the service of transgender individuals in the military, *see* Stockman v. Trump, No. EDCV 17-1799 (KKx), 2017 WL 9732572 (C.D. Cal. Dec. 22, 2017); Karnoski v. Trump, No. C17-1297, 2017 WL 6311305 (W.D. Wash. Dec. 11, 2017).

rights of transgender individuals have thus far relied upon traditional equal protection frameworks, either by reasoning that transgender discrimination is a form of gender discrimination worthy of heightened scrutiny, or by recognizing transgender individuals as a suspect class of their own.[130] However, at least two courts have addressed the issue through the lens of substantive due process. In *Karnoski v. Trump*,[131] the district court addressed a challenge to President Trump's memorandum excluding transgender individuals from the military. After first concluding that the policy could likely be invalidated on equal protection grounds,[132] the court then reasoned that it likely violated substantive due process by "interfer[ing] with Plaintiffs' ability to define and express their gender identity, and penaliz[ing them] for exercising their fundamental right to do so openly by depriving them of employment and career opportunities."[133] Separately, in *Arroyo Gonzalez v. Rossello Nevares*,[134] a district court invalidated, on substantive due process grounds, a Puerto Rico policy that limited one's ability to change one's gender marker and name on their birth certificate.[135] Citing *Casey*, the court reasoned that the policy "forced disclosure" of one's transgender status on a fundamental identification document and violated "their constitutional right to decisional privacy."[136]

These decisions are a good starting point, but must arguably be better theorized to fully live up to equal dignity's call. In that effort, the three doctrinal steps identified in Part II are a good place to start.

First, when advancing a substantive due process claim, transgender plaintiffs may justify the invocation of equal dignity's more expansive approach by demonstrating the subordination concerns at stake. In fact, courts have already begun to demonstrate cognizance of the subordination faced by transgender individuals. The Seventh Circuit, in *Whitaker v. Kenosha Unified School District*,[137] emphatically pronounced that "[t]here is no denying that transgender individuals face discrimination, harassment, and violence because of their gender identity."[138] District courts have favorably applied the four-factor *Carolene Products*

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[130] *See, e.g.*, *Evancho*, 237 F. Supp. 3d at 288–89; *Stockman*, 2017 WL 9732572, at *13–14; F.V. v. Barron, 286 F. Supp. 3d 1131, 1145 (D. Idaho 2018).

[131] 2017 WL 6311305.

[132] *Id.* at *7–8.

[133] *Id.* at *8.

[134] 305 F. Supp. 3d 327.

[135] *Id.* at 332–34.

[136] *Id.* at 333.

[137] 858 F.3d 1034 (7th Cir. 2017).

[138] *Id.* at 1051. The court ultimately did not conclusively determine that transgender individuals are a quasi-suspect class, though only because it could reach intermediate scrutiny through a finding of gender discrimination. *See id.* at 1051–54.

analysis to transgender individuals.[139] Moreover, the pretrial affidavits to current cases demonstrate willingness of transgender individuals to testify on the stigmatic harm they suffer. Brock Stone, the named plaintiff in the *Stone v. Trump*[140] challenge against President Trump's transgender military ban, states in his declaration that the ban has caused both "intense uncertainty, stress, and psychological harm" and a fear that hostility toward him might "become more commonplace" in the military.[141] Similarly, plaintiffs in the Puerto Rico litigation submitted declarations regarding the "prejudice" and "stigma" they suffered.[142] Should plaintiffs have the added benefit of a civil rights trial à la Yoshino's proposal, a compelling legal record of stigmatization and subordination may further crystallize.

Once this subordination is established and equal dignity invoked, the second doctrinal step would then allow transgender plaintiffs to generalize upward in the rights-framing exercise. Take *Stone* and *Arroyo Gonzalez*, mentioned earlier. A narrow rights-framing approach would first suggest that the claims be defined as "the ability to enter the military despite one's transgender status" and "the right to change one's gender marker on a birth certificate," before inevitably dooming these claims by chaining them to a strict historical analysis. However, equal dignity's more expansive approach would instead demand that these rights be framed in a manner free of discrimination. To achieve these antisubordination goals, courts ought then to recognize the rights transgender plaintiffs seek as manifestations of the equal right to self-definition and autonomy already recognized in *Casey* and its progeny.

Finally, once equal dignity is invoked and the right properly framed, transgender individuals may then qualitatively assess the means and ends of state action, with the aim of showing a dignity-based harm. In both the military ban and birth certificate cases, even if the ends of these actions are legitimate, the means taken arguably fall afoul of equal dignity. Take the transgender military ban, with its stated "end" of operational readiness. Even if we discount the questionable nature of this asserted purpose, the means of achieving this through a broad exclusion of transgender personnel must be further scrutinized. In turn, the ban's arbitrarily broad scope — based on the sole determinant of one's transgender status and attenuated from the actual operational readiness

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139 *See, e.g.*, Evancho v. Pine-Richland Sch. Dist., 237 F. Supp. 3d 267, 288 (W.D. Pa. 2017); Bd. of Educ. v. U.S. Dep't of Educ., 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016); Adkins v. City of New York, 143 F. Supp. 3d 134, 139–40 (S.D.N.Y. 2015).

140 280 F. Supp. 3d 747 (D. Md. 2017).

141 Declaration of Brock Stone in Support of Plaintiffs' Motion for Preliminary Injunction at 5, *Stone*, 280 F. Supp. 3d 747 (No. 17-cv-02459).

142 *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 5–6, Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327 (D.P.R. 2018) (No. 17-cv-01457).

of each individual — is arguably reflective of prejudice against transgender individuals and writes such stigma into government policy.[143] Or take the Puerto Rico Birth Certificate policy, with its intuitively more benign "end" of informational accuracy. Here, the "means" of achieving that goal still imposed a dignity harm. By categorically prohibiting any changes in gender markers, and only allowing red-line edits for name changes, the policy not only failed to give recognition to the intimate choice of self-expression, but effectively forced individuals to disclose their transgender status on a fundamental identification document. As plaintiffs described, this policy "subject[ed] them to invasions of privacy, prejudice, discrimination, [and] humiliation" by "erect[ing] a barrier to full engagement in [a] society" where concerns of prejudice are "particularly acute."[144] Given equal dignity's qualitative focus, neither of these policies ought to pass constitutional muster.

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Ultimately, it might seem curious to have written a Note on equal dignity at this time. The architect of the modern conception of the doctrine has retired. The Supreme Court will likely be turning toward a narrower conception of individual rights. However, as this Note hopes to have shown, equal dignity has a clear set of core principles and has worked specific doctrinal changes on Fourteenth Amendment jurisprudence that cannot be ignored. For lower courts — and Justices — willing to keep the promise of equal dignity alive, there is already sufficient shape and definition to the doctrine for us to properly heed its call.

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143 *See, e.g.*, Noah Feldman, Opinion, *A Ban on Transgender Troops Is Doomed in the Courts*, BLOOMBERG (July 26, 2017 3:12 PM), https://www.bloomberg.com/opinion/articles/2017-07-26/a-ban-on-transgender-troops-is-doomed-in-the-courts [https://perma.cc/9UEU-NYEG]; Jamal Greene, *The Transgender Ban Is Facially Unconstitutional*, TAKE CARE (July 26, 2017), https://takecareblog.com/blog/the-transgender-ban-is-facially-unconstitutional [https://perma.cc/BB25-8QXU]; Richard Primus, *Why Trump's Ban on Transgender Servicepeople Is Flatly Unconstitutional*, POLITICO (July 26, 2017), https://www.politico.com/magazine/story/2017/07/26/why-trumps-ban-on-transgender-servicepeople-is-flatly-unconstitutional-215423 [https://perma.cc/TH9H-DHZH].

144 Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment at 5–6, *Arroyo Gonzalez*, 305 F. Supp. 3d 327 (No. 17-cv-01457).