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Find out What it Means to Me: The Politics of Respect and Dignity in Sexual Orientation Anti-Discrimination

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FIND OUT WHAT IT MEANS TO ME: THE POLITICS OF RESPECT AND DIGNITY IN SEXUAL ORIENTATION ANTI-DISCRIMINATION

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I. INTRODUCTION

Often upon crucial events in social history, the intimate association between a climactic development of an issue and representational media brings us expressions that wed our desired norms with the descriptive truth of such matters. In the heart-pounding seconds after the release of *Obergefell v. Hodges*,[1] which ushered in the realities of marriage equality across the United States, the national imagination was suddenly swept into a rapturous state of acknowledging that love has just won.[2] Typical, would-be Friday morning posts on social media for a late June that would have included such things as comical pet videos, selfies at the beach, Instagram food postings, sarcastic memes, and inspirational tweets were overshadowed by the appearances of rainbow-filtered profile pics that accompanied the hashtag, #LoveWins, underscoring the voluminous extent of the viral response to the Supreme Court's 5-4 ruling.[3] Big businesses and institutions shortly weighed in on the affair.[4] The credit card company, Visa, posted a clever banner, "Love. Accepted everywhere,"[5] that fit perfectly with its "Everywhere you want to be" slogan.[6] Department store chain Macy's tweeted a picture that alluded to its bridal registry along with the tag, "From this day forward . . . #loveislove."[7] That Friday evening, rainbow colors lit the White House as a presidential acknowledgement of the judiciary's work in *Obergefell*. Proverbially-speaking, it seemed like everyone and their uncle was coming out to say something on the matter rather than forever holding their peace. But this was all justifiable. *Obergefell* was probably *the* wedlock announcement between same-sex relationships and the law on the largest altar to date.

Together, the ruling and ensuing social media reaction conveyed that mainstream acceptance of same-sex relationships had reversed decades of negative public sentiments. Within the history of American law, the open pursuit of love has been a dangerous thing for same-sex couples. In the bedroom context, consensual sexual conduct was once criminal.[8] In the marriage and family context prior to *Obergefell*, the right to wed remained unrecognized by institutions, politics, and norms that dominated mainstream ideas about sexual identity, gender,

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[1] *Obergefell v. Hodges*, 576 U.S. ___, 135 S. Ct. 2584 (2015).

[2] Adam Liptak, *Supreme Court Ruling Makes Same-Sex Marriage a Right Nationwide*, NY Times (Jun. 26, 2015), http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html?_r=0.

[3] Dawn Ennis, *Victory at Supreme Court for Marriage*, ADVOCATE (Nov. 17, 2015), http://www.advocate.com/politics/marriage-equality/2015/06/25/victory-supreme-court-marriage-equality.

[4] Patrick Kulp, *The best reactions by major companies to the historic gay marriage decision*, MASHABLE (Jun. 26, 2015), http://mashable.com/2015/06/26/brands-gay-marriage-legalized/#EiPRQpRhTEqF.

[5] *Love. Accepted Everywhere.*, VISA'S FACEBOOK (Jun. 26, 2015), https://www.facebook.com/VisaUnitedStates/photos/pb.211718455520845.-2207520000.1453988472./1171443619548319/?type=3&theater.

[6] *Id.*

[7] Macy's, "*From this day forward.…#loveislove*," Jun. 26, 2015, 7:07 AM, Tweet.

[8] *See e.g. Bowers v. Hardwick*, 478 U.S. 186, 187 (1986).

and relationships.[9] In this way, the *Obergefell* moment underscored the recent ongoing transition away from unpopular views of same-sex relationships.[10] And for an instant in that evening after the decision, the broadcast image of the Disneyworld castle in Florida basking in rainbow lights seemed to impress upon our collective consciousness of finally an outcome for same-sex couples that embodied a happy storybook ending.[11] Love, at last, was available and no longer cabined. Love had, presumably, won.

That sentiment of storybook endings was later extended in media representations of same-sex couples after *Obergefell*. Advertisements kept alive the spirit of #LoveWins in their purpose of marketing and selling as summer 2015 moved into the autumn. One prominent example was the Campbell's Soup television commercial that featured a real-life gay male couple in a humorous meal-time scene in their home kitchen with their adopted toddler son.[12] Apart from incorporating this portrayal of the gay fathers, the ad was depicting the same scene of comfort that other Campbell's Soup ads had done before using opposite-sex couples and their children.[13] The ad begins with a close-up of an opened can of Campbell's Condensed Soup, resting on a kitchen counter near a stove.[14] The can bears a picture of the Star Wars character Darth Vader to signify Campbell's marketing of the next Star Wars movie.[15] As we hear a man's voice singing the Imperial March (Darth Vader's Theme) from Star Wars, the ad cuts away from the stove and follows the singing to show a father entertaining his son in the same kitchen during mealtime.[16] "Cooper, I am your father," says the man, imitating Darth Vader while playfully attempting to spoon soup past his son's lips.[17] Suddenly the voice of another man is heard as the camera cuts to a wider shot to show that the scene only not includes one father, but two.[18] "No, no, no, I am *your* father," said the second man as he, like the first father imitates Darth Vader and also feeds the son a spoonful of soup.[19] Then the two men look amusingly at each other while the toddler obliviously reaches a hand into the bowl of soup in front of him.[20] As the scene fades quickly, we can hear one father say to the other, "That's got to be the worst Vader ever."[21] The moment is meant to invite us to pause amusingly before the scene fades to the Campbell's logo and a female voiceover announces, "Campbell's Star Wars Soups, made for real real life," and thus reminding us that this is a Campbell's Soup commercial after all.[22] It leaves us

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[9] *See generally* Molly Ball, *How Gay Marriage Became a Constitutional Right*, THE ATLANTIC (Jul. 1, 2015), http://www.theatlantic.com/politics/archive/2015/07/gay-marriage-supreme-court-politics-activism/397052/.

[10] Pew Research Center, *Changing Attitudes on Gay Marriage* (July 29, 2015), http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/.

[11] Lucas Grindley, *More Than A Dozen Landmarks You Won't Believe Were Turned Rainbow*, ADVOCATE (Jun. 27, 2015), http://www.advocate.com/politics/marriage-equality/2015/06/27/more-dozen-landmarks-you-wont-believe-were-turned-rainbow.

[12] Campbell's Soup, *Your Father (30s)- Campbell's #RealRealLife*, YOUTUBE (Oct. 5, 2015), https://www.youtube.com/watch?v=7rZOMY2sOnE.

[13] *See* Campbell's Soup, *Mouth- Campbell's #RealRealLife*, YOUTUBE (Oct. 5, 2015), https://www.youtube.com/watch?v=qxJGWK53D_4.

[14] Your Father, *supra* note ___.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

heartened—heartened enough for soup, for all-American Campbell's Soup, the soup previously advertised by Norman Rockwell illustrations,[23] the soup of Andy Warhol,[24] the soup of round-faced cartoon children,[25] the soup endorsed by one of the largest movie franchises of all time, Star Wars, now-produced by Disney.[26] By all means, as the ad suggests, same-sex couples and their children have been ushered (or ladled) into the mainstream. They have entered the popular media and are visible. They now eat Campbell's Soup—as if they had not done so before. They are branded for #RealRealLife—so *real* that they had to name it twice.[27]

In *Obergefell*, Justice Kennedy based his fundamental rights ruling on a determination that animus-fueled bans on marriage violated the dignity of same-sex couples particularly in four significant discriminatory ways.[28] Once *Obergefell* settled the question of same-sex marriage, same-sex couples would, according to the intent behind Kennedy's opinion, be given the option that hopefully dignifies them on equal footing with opposite-sex couples and their children. They would be free and autonomous in matrimonial decision-making.[29] They would engage in a right to an institution dignified by society.[30] They would raise children within the same social and legal connotations of family as legally-married opposite-sex couples.[31] They would partake in an institutional social order categorized by law and highly regarded in the heart and consciousness of American society.[32] In *Obergefell*, these four changes normatively characterize the access to equal dignity that the extension of marriage accorded same-sex couples.[33] Curiously, the Campbell Soup ad could be read in parallel with Kennedy's goals. The scenario of the ad captures the two men after they have chosen marriage. They are in the kitchen in a meal-time moment that symbolizes mainstream childrearing—albeit rearing on all-American processed food. In this way, they are no longer a gay male couple unable to marry or hindered by the law in raising children, nor are they an unmarried, childless gay couple. Instead, the couple is nationally depicted in a scene in which they are in their own perfectly-lit kitchen, feeding their child in the same playful, humorous dignified manner that we would expect an idealized opposite-sex couple from a nuclear family to be doing as well in their fictionalized kitchen in television adland. There is certainly a sense of dignity and normalcy being appropriated and realized in this representation. Yet, like extending the fundamental right to

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[23] *See generally* Campbell's, SATURDAY EVENING POST (Dec. 24, 1932), http://www.saturdayeveningpost.com/2012/12/07/art-entertainment/beyond-the-canvas-art-entertainment/old-christmas-ads.html/attachment/campbells.

[24] *See generally* Blake Gopnik, *32 Short Thoughts About Andy Warhol's Campbell's Soup Can Paintings at MoMA*, ARTNET NEWS (Oct. 9, 2015), https://news.artnet.com/art-world/andy-warhols-campbells-soup-can-paintings-at-moma-338874.

[25] *See generally Celebrate National Soup Month with Campbell's Soup*, MODERN GRAPHIC HISTORY LIBRARY, WASHINGTON UNIV. (Jan. 30, 2014), http://library.wustl.edu/celebrate-national-soup-month-with-campbells-soup/.

[26] Scott Mendelson, *'Star Wars' Is Hollywoods's Biggest, Most Enduring Original Franchise*, Forbes (Apr. 17, 2015), http://www.forbes.com/sites/scottmendelson/2015/04/17/star-wars-is-hollywoods-biggest-original-franchise/#1328901150cd.

[27] Your Father, *supra* note ___.

[28] *Obergefell*, 135 S. Ct. at 2615.

[29] *Id.* at 2599.

[30] *Id.* at 2600.

[31] *Id.* at 2637.

[32] *Id.* at 2638.

[33] Orin Kerr, *What's in the same-sex marriage ruling*, WASH. POST (Jun. 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/whats-in-the-same-sex-marriage-ruling/.

marriage to same-sex couples, bestowing that dignity to same-sex relationships creates both a hierarchical relationship between sexual minorities and the mainstream, and a moment for the mainstream—like the Campbell's Soup ad—to comment on the respectability of choices same-sex couples are making in seeking marriage.

In this way, the descriptive truth about sexual minorities does not end at a rainbow-lit Disneyworld castle—or at the kitchen table with a bowl of Campbell's Soup. The question of sexual identity and American law remains unsettled. In the figurative dinner party that is the history of gay rights, sexual minorities have been welcomed through the door and inside the house, been served cocktails and have nibbled on *hors d'oeuvres*, been seated at the dinner table and been asked to unfold the napkins. But they have only arrived at soup; there is still the rest of the meal to be had. While the right to marriage extends to same-sex couples, sexual minorities still face employment and housing discrimination.[34] Title VII of the Civil Rights Act of 1964 has no direct protection of individuals against discrimination based on sexual orientation.[35] ENDA has not been passed.[36] The issue of heightened suspect classification of sexual identity slipped through Justice Kennedy's equal protection analysis in *Obergefell* and remains unresolved on the federal level in any meaningful way.[37] In addition, despite love winning, there was still vociferous opposition to *Obergefell*. The difficulty of same-sex couples in obtaining marriage licenses—as demonstrated by Kim Davis in Kentucky and others—excerpted some of this lingering negativity.[38] The religious and conservative outcries after *Obergefell* are another.[39] The refusal to provide services to same-sex couples by small business owners further demonstrates opposition.[40] And within the *Obergefell* ruling itself, four Justices penned dissents against the majority.[41] *Obergefell* solidified the narrative of discrimination of same-sex couples in marriage. But as same-sex relationships get the kind of notoriety that they deserve, in what ways was sexual orientation anti-discrimination helped by *Obergefell*? Love won, but did *gay win*?

This Article begins with the limits of *Obergefell*. It has been evident that within the last century, dignity has been used to leverage advancements against human rights violations and restrictions within the law.[42] Dignity has been a means to an end; its post-Enlightenment, fundamental universality supplanted previous versions of humanity and has been regarded as a

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[34] *Obergefell*, 135 S. Ct. at 2625-26.

[35] *See* 42 U.S.C. § 2000e et seq.

[36] Ed O'Keefe, *Gay Rights Groups Withdraw Support of ENDA after Hobby Lobby Decision*, WASH. POST (July 8, 2014), https://www.washingtonpost.com/news/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision/.

[37] Matthew Hoffman, *Obergefell Ruling Strengthens Case for Treating Sexual Orientation as Suspect Classification*, CASETEXT (Jun. 26, 2015), https://casetext.com/posts/obergefell-ruling-strengthens-case-for-treating-sexual-orientation-as-suspect-classification.

[38] John Mura & Richard Perez-Pena, *Marriage Licenses Issues in Kentucky County, but Debate Continue*, NY TIMES (Sept. 4, 2015), http://www.nytimes.com/2015/09/05/us/kim-davis-same-sex-marriage.html?_r=0.

[39] Sherif Girgis, *After Obergefell: The Effects on Law, Culture, and Religion*, CATHOLIC WORLD REPORT (Jun. 29, 2015), http://www.catholicworldreport.com/Item/3991/after_iobergefelli_the_effects_on_law_culture_and_religion.aspx.

[40] Rudi Keller, *Hawley Seeks Exemption for Churches, Businesses to Refuse Same-sex Couples*, COLUM. TRIB. (Dec. 21, 2015), http://www.columbiatribune.com/news/politics/hawley-seeks-exemptions-for-churches-businesses-to-refuse-same-sex/article_fa7b74e3-a24f-5bea-922c-f339eb6bd88a.html.

[41] *Obergefell*, 135 S. Ct. at 2588.

[42] Erin Daly, DIGNITY RIGHTS 1 (2013).

normative individual entitlement.[43] Even before *Obergefell*, the anti-gay rhetoric that stole dignity away from sexual minorities for decades was a way in which the denial of their civil rights was justifiable under the law. As others have recounted, challenges fought in court and state legislatures over gay rights in the past were lost by gay litigants and gay rights advocates partly because the dominant rhetoric against sexual minorities was couched within the politics that disrespected them[44]—that, for instance, gays were living in a lifestyle premised on a morally-blameworthy choice or pathology, and that they practiced sexually-deviant, perverse acts.[45]

For the most part, we have moved further away from a politics of disrespect toward recognizing that dignity exists in sexual preferences.[46] So a good question to ask in the recent shadow of *Obergefell* is whether the dignity recognized by the Court specifically accorded sexual minorities the respect that they should be entitled to for being who they are or whether the dignity rhetoric in *Obergefell* stopped short of this view and settled for addressing the respectability of choices of same-sex couples for wanting to participate in marriage. *Obergefell* was an opinion about dignity as respectability.[47] So how does it impact the way in which sexual minorities move further to resolve questions of sexual identity and the law, if "further" means anti-discrimination?

This leap from respectability to respect is this Article's inquiry. If we need to move to further anti-discrimination for sexual orientation on the federal level, then we must arrive at a situation where dignity under the law is the acknowledgment of respect for sexual identities, not of the respectability of choices made by those who are sexual minorities. As the lyrics sung so famously by Aretha Franklin in a song known for its symbolic impact on 1960's gender equality, particularly for its "appeal for dignity," suggests, respect is an important human regard that is often withheld: "All I'm askin' / Is for a little respect when you come home."[48] Beyond this Part I introduction, Part II of this Article will discuss the impact of respectability in gay rights advocacy and observe dignity defined by respect politics as a normative goal. Part III will then explore how the discussion about dignity in the context of gay rights at the Court was also simultaneously a journey from the politics of disrespect to currently the politics of respectability. And Part IV will theorize how the narrative of sexual orientation anti-discrimination can proceed from dignity as respectability to dignity as respect, before Part V's conclusion.

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[43] *See id.* at 2-3.

[44] *See e.g.* Martha C. Nussbaum, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 77-85(2010) (observing *Bowers v. Hardwick* exemplifed how "[y]ears of stigmatization of gays and lesbians made it all to easy for judges . . . to talk about them as a class of moral pariahs who are not like other humans").

[45] Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 Va. L. Rev. 817, 835 (2014).

[46] *See Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

[47] Yuvraj Joshi, *The Respectable Dignity of Obergefell v. Hodges*, 6 Cal. L. Rev. Online 117 (2015).

[48] Aretha Franklin, *Respect* (Rhino Records 1967); *see also* Mark Ribowsky, DREAMS TO REMEMBER: OTIS REDDING, STAX RECORDS, AND THE TRANSFORMATION OF SOUTHERN SOUL (2015) (quoting *Rolling Stones* interview with Jerry Wexler, producer of Aretha Franklin's recording of "Respect" on the song's significance).

As we progress (hopefully) toward anti-discrimination for sexual minorities, respect certainly seems like the more desirable route to take when it comes to using dignity to elevate the status of sexual minorities to a protected class—whether judicially or legislatively. Dignity as respect reframes the discussion away from choices and existence in a way that deprives the dominant culture opportunities to comment, and instead, places the subgroup in a light where such type of judgment is off the table.

II. DIGNITY AS RESPECT

A. *DIGNITY IN HUMAN RIGHTS DISCOURSE*

Although no consistency exists within the vast usage and interpretations of human dignity by political institutions and courts internationally, a generalized accord does exist in tracing the history of dignity's import into the modern legal and political sphere.[49] Current political incarnations of dignity took shape briefly post-World War II in human rights movements and discourse, in which dignity was a currency of value because its connections with intrinsic humanity and worth addressed the inhumane atrocities of Nazi Europe.[50] Such use of dignity toward preserving human rights prompted examples of post-war declarations proclaiming the recognition and protection of dignity as, in some ways, a right to humanity in various contexts[51]—despite much ultimate debate over the definite and tangible contours of that right.[52] With drafting influence from Jacques Maritian, the prominent French Catholic philosopher, the United Nations Charter and the Universal Declaration of Human Rights both placed human dignity at the forefront with proclamations that mentioned respectively the "dignity and worth of the human person"[53] and "recognition of the inherent dignity . . . of all members of the human family" in their texts.[54] This acknowledgment and import of human dignity functions as the underlying cohesive force or value for the idealized furtherance of human rights efforts stated in the Universal Declaration.[55] Other international documents ensued, including by example the International Covenant on Civil and Political Rights, which provides in Article 10 that "[a]all persons deprived of their liberty shall be treated with the humanity and with respect for the inherent dignity of the human person."[56] The 1977 additions to Common Article 3 of the Geneva Conventions of 1949, dealing with captivity of non-combatants and combatants who are prisoners of war, similarly uphold human dignity during armed conflict by dictating that those held captive "shall in all circumstances be treated humanely,"[57] and explicitly prohibiting "outrages toward personal dignity, in particular humiliating and degrading treatment."[58]

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[49] DIGNITY RIGHTS, *supra* note __, at 5.

[50] Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 European J. Int'l L. 662-63 (2008).

[51] *Id.* at 670-71.

[52] *Id.* at 673-75.

[53] Preamble; U.N. CHARTER, art. 1.

[54] Universal Declaration of Human Rights, G.A. Res. 217A at 71, U.N. GAOR, 3d Sess., pmbl, U.N. Doc. A/810 (1948).

[55] See Mary Ann Glendon, *Knowing the Universal Declaration of Human Rights*, 73 Notre Dame L. Rev. 1153, 1172 (1998).

[56] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 10.

[57] Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[58] *Id.*

Of course, the concept itself of human dignity predates modernity. Scholarly work in legal and political philosophy on human dignity often cite to examples in antiquity. Both Christopher McCrudden and Rex Glensy in their respective studies on human dignity trace the concept at least to the classical Roman period where dignity had two meanings—first, as an idea of honor and respect accorded to one holding a particular status ("*dignitas homini*"); and secondly, as an idea, attributed to Cicero, of dignity as an inherent quality based on human existence ("*dignitas*").[59] The survival and evolution of the concept of human dignity through the ages is beyond this Article's inquiry but needless to say, human dignity was not an idea about human existence that was conceived in the mid-twentieth century but rather developed throughout the periods of Western thought.[60] The two competing ideas of dignity—one that would embrace status and hierarchy and another that embraced intrinsic universal worth—would play out their dominance and prevalence over the centuries. We see this modernly in plain-meaning word studies when scholars run the word "dignity" through dictionaries and come up with both meanings.[61]

But as exhibited from the international documents above, the concept of dignity as the respect for intrinsic worth or inherent humanity seems to have prevailed in modern political and legal frameworks. Nobility connotations of the dignity from antiquity, as well as the later medieval and pre-modern religious association of dignity that place the Divine as the source of intrinsic human worth, are both constrained in the modern political concepts of dignity.[62] Now devoid of its religious and feudal connotations, dignity was no longer a condition or status that was earned through rank or transformation, but an inherent secular quality as a result of having an existence that translated into an entitlement to be recognized by political institutions and under legal frameworks. Immanuel Kant, who is often credited with laying the modern foundation of dignity, certainly took the side of dignity as respect for inherent worth from a more objective posture, putting aside religious or noble influences.[63] Kant's categorical imperative demonstratives that intrinsic worth: "Humanity itself is a dignity; for a man cannot be used merely as a means by any man (either by others or even by himself) but must always be used at the same time as an end."[64] Beneath Kant's surface proclamation that one should not treat people as a means but rather as ends, other implications arise. Tethered to the intrinsic worth in every human being is the notion that "dignity is grounded in a concept of autonomy that holds at its core a valued moral center that is equal for everyone (men and women)."[65] Undoubtedly within a Kantian text, variation in opinions exists in scholarly explication and interpretation

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[59] McCrudden, *supra* note ___, at 656-57; Red D. Glensy, The Right to Dignity, 43 Colum. Human. Rights L. Rev., 65, 73 (2011).

[60] Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse* , 35 B.C. Int'l & Comp. L. Rev. 331, 334 (2012).

[61] *See e.g.* Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 Wm. & Mary Bill Rts. J. 223, 224 (1998) (finding that the American Heritage dictionary contain both definitions of dignity as "self-respect" and also of "nobility."); *see also* Ilhyung Lee, *Toward an American Moral Rights in Copyright*, 58 Wash. & Lee L. Rev. 795, 854 n. 145 (2001) (finding that the word "dignity" in Webster's Third New International Dictionary of the English Language possessed a primary definition of dignity as "intrinsic worth" and secondary meaning as "degree of esteem").

[62] Glensy, *supra* note __, at 74.

[63] Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. Pa. J. Const. L. 669, 678 (2005)

[64] Immanuel Kant, *Metaphysics of Morals* (ak 6:462).

[65] Glensy, *supra* note __, at 76.

regarding Kant's vision of dignity.[66] However, "whether rightly or wrongly, the conception of dignity most closely associated with Kant is the idea of dignity as autonomy, that is the idea that to treat people with dignity is to treat them as autonomous individuals able to choose their destiny."[67] Derived from this philosophy, "[t]he legal application of Kantian thought is to use, as a baseline, the notion that individuals should always be protected from any instrumentalization by the state."[68] From here, the distance seems short between the Kantian concept of dignity with its universalist regard for a person's inherent humanity and any politically egalitarian approaches to individual rights; and indeed Kant's idea of dignity has contributed to the development of equality in Western thought.[69] That bridge is accomplished through the derivative relationship between human dignity and individual autonomy as its proxy. As Jeremy Rabkin has observed,

> Kant certainly linked "human dignity" with equality. He grounded the claim of human dignity in human free will, in the capacity for moral choice. According to Kant this capacity is the same, in principle, in the most degraded and the most exalted of human beings. Kant made the claim to "autonomy" a central aspect of human dignity—the notion that each person makes his own moral law for his own life.[70]

A close relationship between a Kantian version of dignity and equality is plausible because between the two original core definitions of dignity—either *dignitas hominis* or *dignitas*—and their respective derivations, Kant's concept of dignity like embraces the latter (*dignitas*) by justifying an egalitarian approach to humanity over a hierarchical one. We see this import into the post-World War II era with acknowledgements of equal rights based on regard for human dignity through the intrinsic worth of individual existence.[71] In particular, the proclivities of Kantian and neo-Kantian concepts of dignity for animating notions of equality within the modern era makes adopting human dignity attractive—and almost necessary—in human rights discourse.[72] Henceforth, it is no wonder that dignity appears frequently in modern human rights documents internationally.

B. *DIGNITY AND ANTI-DISCRIMINATION IN AMERICAN JURISPRUDENCE*

Kant's influence in American political conceptions of dignity is somewhat qualified by the appearance and usage of the word "dignity" by some of the founding personalities of the early United States. Glensy notes that Thomas Paine's use of "natural dignity of man," which stressed inherent worth consistently with Kant's version of dignity, called out to individual rights protection that countered the British definition "where dignity had more of an ancient Roman connotation and was reserved for the nobility or aristocracy"[73] and that Paine's view was shared

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[66] McCrudden , *supra* note __, at 659.

[67] *Id.* at 659-60

[68] Glensy, *supra* note __, at 76.

[69] The Honourable Claire L'Heureux-Dubé, *The Search for Equality: A Human Rights Issue*, 25 Queen's L.J. 401, 405 (2000).

[70] Jeremy Rabkin, *What We Can Learn About Human Dignity from International Law*, 27 Harv. J.L. & Pub. Pol'y 145, 147 (2003).

[71] John C. Knechtle, *When to Regulate Hate Speech*, 110 Penn St. L. Rev. 539, 561 (2006).

[72] *See id.*

[73] Glensy, *supra* note __, at 77.

by Thomas Jefferson and Alexander Hamilton.[74] Yet, the definition of dignity as respect for inherent humanity faced competing tension with the meaning of dignity as status or rank, not merely with British oppressors, but also domestically within the founding philosophy of the new American republic. The competition between the two meanings of dignity reverberated through *The Federalist Papers*, as Glensy observes, as the idea of dignity "seems initially to have a central position" but "[f]ollowing the Kantian usage of the term, the concept of dignity in *The Federalist Papers* then morphs into the ancient Roman connotation."[75] Eventually, "dignity as an inherent quality of individuals was lost to a view of dignity as an attribute acquired as a result of holding an official position."[76] Of course, the other marked feature in regards to American political precepts and the use of dignity is the lack of the invocation of "dignity" in most of the founding documents. Other than its wavering usage in *The Federalist Papers*, the word "dignity" itself is not to be found in the U.S. Constitution, the Declaration of Independence, or the Bill of Rights.[77] In searching for dignitary rights within our founding texts, the word play of course can become a tug-of-war between textual exegetes and more hermeneutical readers.[78] For now, it seems as if the hermeneutical readers have won and that curious lack of "dignity" in our founding documents has not proved fatal to dignity's conceptualization, presence, and influence within American law. Perhaps in the U.S., what we have is merely a case where we adhere to invoking spirit of dignity rather than to its letter—and indeed, this seems to be have occurred in the interpretation of the Constitution at least. For instance, absent positive declarations of dignity rights in governing legal texts in the U.S., the concept that individuals possess human dignity is often established within the sphere of negative rights, in the adjudication of state interference with freedoms that not only are fundamental under due process theories but considered as proxies that externalize human dignity.[79] Likely here dignity's emergence reflects the synergies of individual rights theory and American libertarian leanings. The approach to dignity in the U.S. has been observed as "more individualistic" than communitarian approaches such as in Germany where "dignity" is a pronounced right under its constitution and embodies a definition of respect for self-worth but one that is concurrently located within the community.[80] Dignity is alive and present in American jurisprudence.

Undeniably, dignity is a word found within U.S. constitutional parlance because "[a]t least as dignity pertains to the Constitution, the Supreme Court has, albeit scantily, developed certain narratives based on human dignity as it pertains to certain constitutional rights."[81] Maxine Goodman has traced the Supreme Court's usage into eight narratives (or categories) spanning across amendments that touch upon individual rights.[82] Of the eight, two narratives encompass 14th amendment due process and equal protection theories where dignity has helped

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[74] *Id.* at 78.

[75] *Id.*

[76] *Id.*

[77] Dietmar von der Pfordten, *Chapter 2 on the Foundations of the Rule of Law and the Principle of the Legal State/rechtsstaat*, 38 IUS Gentium 15, 28 (2014) ("Human dignity is neither found originally in the common law, nor in the American Declaration of Independence, including the Bill of Rights of the American Constitution.").

[78] Glensy, *supra* note __, at 73.

[79] Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 Colum. J. Eur. L. 201, 246 (2008).

[80] McCrudden, *supra* note ___, at 699-700

[81] Glensy, *supra* note __, at 86.

[82] Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740, 757 (2006).

address rights interference that would have otherwise furthered minority discrimination based on hierarchical differentiations. First, one of the identified narratives where the presence of dignity interests appears is in the negative rights cases involving privacy, in which dignity is the underlying reason for allowing individuals to have autonomy in personal choices that affect self-identity in some way (individuality and personhood).[83] In Part III, we see this narrative line lead to the decriminalizing of consensual same-sex sodomy in *Lawrence v. Texas*.[84] The other narrative dealt with the use of equal protection in education and accommodation cases where dignity interests of litigants helped the Court address racial discrimination in *Brown v. Board of Education*,[85] and racial and gender discrimination in *Heart of Atlanta Motel, Inc. v. U.S.*[86] and *Roberts v. U.S. Jaycees*.[87] In these cases, Goodman notes that dignity interests seem to strike at inherent worth and humanity. Indeed, in handling cases that involve human dignity interests, the Court appears generally to side with Kant: "[I]t is the Kantian vision of dignity that seemingly animates those Justices who find that certain constitutional clauses incorporate the concept of human dignity. In other words, it is a person's inherent autonomy, integrity, and right to be respected by the government that motivates references to dignity by the Supreme Court."[88] Thus, with cases involving discrimination, the invocation of dignity at Supreme Court, which applies a more Kantian approach toward dignity, has been an important part of addressing minority rights to equality and to overcoming hierarchy and exclusion.

Broadly-speaking, the idea of respect in dignity has been carved out and then manifested as an equal recognition of human existence in all individuals and the rights that attach to existence. In the 14th amendment substantive due process cases Goodman mentions, the Court's regard for autonomy in privacy seem to suggest recognition of rights to exist because autonomy reflects personhood. So long as personhood serves as an agent of that humanity, this is consistent with philosophies of dignity that stress that dignity requires some sort of respect of inherent humanity. Likewise, in the equal protection cases that Goodman observes, the Court's analysis in segregation and discrimination cases goes to the stigma and injury that such acts inflict on individuals based on aspects of the inherent humanity, which the Court sees in their racial and gender identities.[89] From a negative rights perspective in U.S. constitutional law, because of the respect for the dignity of individuals, such equal recognition either in existence (i.e. identity) or fundamental rights that derive from personal autonomy should not be taken away or abridged without a methodical calculation or concern. This is the framework within equality jurisprudence and due process. On larger cosmic levels of politics, this is the framework against wholesale tyranny. Thus, respect for inherent humanity is a constitutional virtue and an aspect within human dignity that normatively ought to be preserved.

C. *DIGNITY IN U.S. GAY RIGHTS ADVANCEMENT*

Without explicit anti-discrimination protections, such as a delineation under the Civil Rights Act of 1964 or a heightened scrutiny classification under equal protection, sexual

[83] *Id.*
[84] *See supra* Part III.
[85] 347 U.S. 483 (1954).
[86] 379 U.S. 241 (1964).
[87] 104 S.Ct. 3244 (1984).
[88] Glensy, *supra* note __, at 86.
[89] Goodman, *supra* note __, at 762-65.

minorities have had to rely on the Supreme Court to articulate their violated dignity in order to protect themselves from marginalization based on sexual orientation or identity. By no means, has dignity been the only strategy of success. With some slight subtextual allusions to dignity, *Romer v. Evans*[90] relied mostly on the presence of majoritarian animus behind the voter passage of a state referendum in Colorado that would have singled out sexual minorities.[91] The Supreme Court's explicit use of dignity to address discrimination based on sexual orientation was first witnessed in *Lawrence*, where Justice Kennedy crafted a ruling that mentioned the dignity of consensual same-sex partners in order to overturn prior precedent condoning anti-sodomy statutes in *Bowers v. Hardwick*.[92] Through the privacy interests in the reproductive rights cases, the Court exhibited its regard for individual autonomy central to dignity and extended that privacy context to also include consensual same-sex intimacy.[93] From there, the Court noted how sexual conduct had autonomy implications that tied itself—similarly to privacy cases—to the respect for personhood and human worth requisite for the function of dignity overall. By consequence, privacy was extended from reproductive rights to sexual conduct in *Lawrence* in order to decriminalize consensual same-sex sodomy.[94] This result was significant as *Lawrence* served as a moment in which "the Court advanc[ed] human dignity as part of affording liberty"[95] and invariably "marks a more substantial shift" in use of dignity in privacy cases.[96]

Arguments have been made that at the broader reaches of *Lawrence*, the case was not just about consensual same-sex intimacy, but rather the sexual acts of willing same-sex partners served as proxy in context for sexual orientation and identity because the choices made in consensual same-sex intimacy revealed sexual preferences:

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.[97]

In some ways, as Glensy points out, dignity here served as a heuristic of something else: "Under the proxy approach to the right to dignity, the invocation of a dignitary interest in a particular circumstance does not signify something independent of another enumerated right, but rather acts as a proxy for that right (be that right related to a liberty or an equality interest for example)."[98] As he notes in this vein with *Lawrence*, "the Court held 'that adults may choose to

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[90] 517 U.S. 620 (1996).
[91] *Id.* at 632.
[92] *Lawrence*, 539 U.S. at 567.
[93] *Id.* at 564-68.
[94] *Id.*
[95] Goodman, *supra* note __, at 762.
[96] *Id.*
[97] *Lawrence*, 539 U.S. at 578 (citations omitted); *see also Constitutional Law*, 117 Harv. L. Rev. 297, 298 (2003).
[98] Glensy, *supra* note __, at 126.

enter upon this relationship in the confines of their home and their private lives and still retain their dignity as free persons.' "[99] Post-*Lawrence*, some scholarly inquiry in regards to the Kennedy's use of dignity in the sodomy case and connections to a possible insinuation of the immutability of sexual identity have also buttressed this notion that dignity can act as a channeling function for the Court to solve a problem that has no straightforward doctrinal fix by being the placeholder for sexual identity.[100] If dignity is a respect for inherent humanity, sexual identity would seemingly fit within Kantian notions of autonomy and personhood. This inherent humanity—and by extension, dignity—could conceivably serve as the placeholder for inherent or innate sexual identity (whether biological or constructive) before a real judicial discussion of it is ripe while making it also possible for a subtle and favorable reading of immutability in the subtext of Kennedy's opinion. In this way, dignity, according to Glensy's reading of *Lawrence*, bridged the gap in the conversation between sexual identity and sexual conduct: "Such coupling of privacy and dignity within the context of liberty strongly suggests if not an identity between the two, then at least a very strong correlation that is sufficiently bonded to discourage separate discussion of the two."[101] And all of these transitive properties and connections made through dignity make sense to justify *Lawrence* because the Court could not have relied readily on any doctrine that would have protected against discrimination based on sexual orientation. The Court had to resort to something else: dignity.

Interpreting *Lawrence*'s incantation of dignity, Kenji Yoshino has identified the origins of an "anti-humiliation principle" in gay rights.[102] This attachment of dignity to the context of gay rights is significant and conducive for sexual minority litigants because it counters prior social sentiments regarding sexual minorities from what Yoshino calls, "a politics of shame."[103] Dignity facilitates litigation, as well as development of doctrine. At least in *Lawrence*, it helped recognize the autonomy in conduct that could possibly express sexual identity but also the inherent humanity of that sexual identity. After *Lawrence*, the potency of dignity has served gay rights well. Beyond the decriminalization of consensual sex acts of same-sex partners, dignity interests were noted in the repeal of Don't Ask, Don't Tell,[104] in the overturning of DOMA in

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[99] *Id.* at 129.

[100] *See e.g.* Michael Boucai, *Sexual Liberty and Same-Sex Marriage: An Argument from Bisexuality*, 49 San Diego L. Rev. 415, 471-72 (2012); Susan R. Schmeiser, *Changing the Immutable*, 41 Conn. L. Rev. 1495, 1505 (2009).

[101] Glensy, *supra* note __, at 129.

[102] Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 Yale L.J. 3076, 3082 (2014).

[103] *Id.* at 3087.

[104] *See accord* President Barack H. Obama, Address Before a Joint Session of the Congress on the State of the Union (Jan. 27, 2010) ("This year, I will work with Congress and our military to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are."); *see also* Dep't of Defense, *Report of the Comprehensive Review of the Issues Associated with a Repeal of "Don't Ask, Don't Tell,"* at 13 (Nov. 30, 2010) (aligning the possible implementation of repeal with military's policies on diversity: "Hand-in-hand with military equal opportunity are Service-level policies on diversity, inclusion, and respect. These are consistent with and support basic military values of treating every military member with dignity and respect."); *see also Log Cabin Republicans v. U.S.*, 716 F. Supp. 2d 884, 923 (C.D. Cal. 2010) ("The Don't Ask, Don't Tell Act infringes the fundamental rights of United States servicemembers in many ways, some described above. The Act denies homosexuals serving in the Armed Forces the right to enjoy 'intimate conduct' in their personal relationships. The Act denies them the right to speak about their loved ones while serving their country in uniform; it punishes them with discharge for writing a personal letter, in a foreign language, to a person of the same sex with whom they

U.S. v. Windsor,[105] and finally with marriage equality in *Obergefell v. Hodges*.[106] That anti-humiliation principle seems to have immense utility. In addition, the use of dignity in the Supreme Court's gay rights opinions has been consistent in keeping with ideas of inherent human worth that justifies, by proxy, anti-discriminatory ends. By invoking ideas of autonomy and personhood, *Lawrence*, *Windsor*, and *Obergefell* all tried to tap into that association in some varying degrees. Sexual orientation would invariably be linked to that personhood and thus respect for minority sexual orientations would fulfill dignity interests.

But because dignity lacks a positivist incantation in American law and is define and shaped predominately in negative rights, an amorphous wavering exists in its meaning and it does not go unnoticed. Sometimes that seemingly age-old tension between respect and rank continues to play out in constitutional cases and the Court's recent pro-gay rights opinions exhibit this competition. However, in the case of defining dignity by rank or nobility status, in which dignity is earned and accorded, dignity by rank or nobility has been replaced with evaluations of the social respectability of sexual minorities that, upon a favorable appraisal, confer dignity and lead to recognition of relationships (such as in *Windsor*) or to the extension of the right to marry (*Obergefell*). For sexual minorities, a subgroup that has been steeped within the politics of marginalization, the significance of attaining respect within the collective social terrain cannot be overstated. Respect could be toward many things from the significant to the mundane—e.g. personal choices, images, lifestyles, tastes, what to post on social media, what wine to drink on a Friday night—that could consequently place sexual minorities in the realm beyond historical reproach, judgment, and bias to somewhere closer to social acceptance. Respect would also ideally recognize, in the neo-Kantian sense, the inherent that distinguishes sexual minorities—i.e. their distinct sexual preference—and view that attribute and expression of orientation not as an aberration but as a welcomed and contributing part of pluralism, and so by extension human existence. The question, however, is whether that respect is an entitlement, of the type reflected by the meaning of dignity as respect, or whether it must be negotiated and then earned, which is more like dignity through rank or nobility. This debate has not been a recent one in gay rights, nor has it been exclusively within sexuality rights discourse. The rise and use of dignity in the advancement of gay rights and possibly toward future advances in sexual orientation anti-discrimination warrants a continuing discussion.

In the post-*Obergefell* world, where one of the next steps for gay rights advancement is anti-discrimination, respect for inherent humanity would seem to comport with that goal. In this way, dignity rights must continue to further gay rights and anti-discrimination, serving as the channeling device or the heuristic but also the agent that facilitates respect for minority sexual orientations and identities. Here is where that tension between dignity as respect and dignity as respectability becomes an issue. Although *Lawrence* ultimately bolstered respect for autonomy and personhood in its definition of dignity, even there the opinion exhibited a bit of ambiguity in viewing consensual same-sex intimacy. Yuvraj Joshi, in his careful study of respectability and dignity in *Obergefell*, has noted that *Lawrence* tended "to affirm dignity as respect for freedom to make personal choices,"[107] but Kennedy's opinion also "did convey a measure of

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shared an intimate relationship before entering military service; it discharges them for including information in a personal communication from which an unauthorized reader might discern their homosexuality.").

[105] 133 S. Ct. 2675, 2696 (2013).

[106] *Obergefell*, 135 S. Ct. at 2597-2602 (passim).

[107] Joshi, *Respectable Dignity*, *supra* note __, at 121.

respectability: Justice Kennedy depicted sexual conduct as 'but one element of personal bond that is more enduring,' even though John Lawrence and Tyron Garner, who were convicted under the impugned Texas statute, were not known to be in a relationship."[108] Part III of this Article will demonstrate further how *Windsor* and *Obergefell* were cases in which *Lawrence*'s original idea of dignity as respect was subsequently augmented by a politics of respectability that has brought both meanings of dignity within the advancement of gay rights.

Respectability politics has a negotiating function not just in the realm of minority rights discourse, but also in furthering acceptance of a marginalized group into the mainstream. Our paths to dignity can be influenced, for better or worse, by the way different subgroups achieve social recognition in a body politic. In the evolving visibility and acceptance of sexual minorities, the historical negotiation for gays has been described as a conversation that tries to subvert marginalization by playing into respectable standards held by the dominant perspective: "Assimilation in the gay/lesbian community is based on models of respectability and upward class mobility that are heterosexually defined. Heterosexuals control the culture because the more different a gay/lesbian is to the heterosexual culture, the less likely it is that s/he will be hired to work in the highest paying jobs in our society."[109] To this end, "[g]ays and lesbians who 'pass' have been able to break through these barriers, however, usually the price is costly: 'staying in the closet'."[110] Through respectability, the whole negotiation assures hierarchy and the subgroup individual trying to gain access starts at the position of the outsider.[111] Rather than demanding respect for their inherent dignity, there is pressure to exhibit respectability in order acquire dignity from a dominant group.[112] Granted, dignity is earned through a process in which the individual is "dignified" hopefully in the end, but it is inevitably at the expense of subjugation. The politics of respectability might be pragmatic but members of subgroups compromise inherent dignity either advertently or inadvertently in order to "trade up" for social tolerance and then acceptance by a dominating group. This is not to say that all minority individuals do this involuntarily. But where pressure exists to gain respectability, the ideals of a leveled democratic playing field are thwarted by the persistence of dominant politics and hierarchy. It is a fix in the short run for obtaining social acceptance, but it may inhibit efforts toward formal equality in the long run.

The literature on race has ample examples regarding the competing politics of respect and respectability in order to achieve racial equality and acceptance. Observations and ideas about respectability in African-American negotiations against racial bias stem all the way back to slavery, for example in examining the caricature of Uncle Tom associated with the stereotypes of conformity. W.E.B. DuBois hinted at this negotiation by articulating a conflicted duality or "double consciousness" that is often present in the identities and existence of educated African-Americans in the early 20th century: "One ever feels his twoness - an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder."[113] As DuBois noted, the duality

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[108] *Id.*

[109] Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 Law & Sex. 195, 225 (1994).

[110] *Id.*

[111] Yuvraj Joshi, *Respectable Queerness*, 43 Colum. Hum. Rts. L. Rev. 415, 419 (2012).

[112] *Id.* at 421.

[113] DuBois, *supra* note __, at 3.

permeates the negotiation of African Americans: "The history of the American Negro is the history of this strife – this longing to attain self-conscious manhood, to merge his double self into a better and truer self."[114] All of this tension is traced to a desire to obtain worth—"to make it possible for a man to be both a Negro and an American without being cursed and spit upon by his fellows, without having the doors of opportunity closed roughly in his face."[115]

Evelyn Brooks Higginbottam specifically coined the term "politics of respectability" to describe this identity negotiation in African-American churchwomen in the late 19th and early 20th centuries.[116] By analogy, the concept could be observed analogously in colonial and post-colonial discourse.[117] Hence, this is not just an American domestic phenomenon. In the U.S. racial context, the discussion over a subgroup's own cultural negotiations to obtain social acceptance has survived into the post-Civil Rights era dialogue about African-American racial identity—into the presidency of Barack Obama, for instance[118]; in the heated debates over the efficacious endorsements of respectability by Randall Kennedy[119]; and race relations discourse related to #BlackLivesMatter.[120] But issues over respectability do not pertain only to African-American racial discourse because "to the extent that social acceptability and respectability is equated with whiteness, issues of cultural assimilation are issues of 'race.' "[121] Thus such issues rear themselves in discourse about other racial subgroups in the U.S. For instance, in studies on

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[114] *Id.*

[115] *Id.* ("It is a peculiar sensation, this double-consciousness, this sense of always looking at one-self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity.")

[116] Evelyn Brooks Higginbotham, RIGHTEOUS DISCONTENT: THE WOMEN'S MOVEMENT IN THE BLACK BAPTIST CHURCH, 1880-1920 185-229 (1993).

[117] *See e.g. generally* Robert Ross, STATUS AND *RESPECTABILITY* IN THE CAPE COLONY, 1750-1870: A TRAGEDY OF MANNERS (1999); *see also* Alpana Roy, *Postcolonial Theory and Law: A Critical Introduction*, 29 Adel. L. Rev. 315, 345 (2008); Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, *in* THE POST-COLONIAL STUDIES READER 28 (Bill Ashcroft et al. eds., 1995); Stacy-Ann Elvy, *A Postcolonial Theory of Spousal Rape: The Caribbean and Beyond*, 22 Mich. J. Gender & L. 89, 102-03 (2015) (discussing the concept of subalterneity in post-colonnial studies as referring to "the various hierarchies which existed within the colonized world -- that is, within the 'native' population" that have allowed British patriarchy, "which was grounded in notions of respectability and domesticity" to dominate 'subaltern sexed subject, or brown woman.' "); *see also* Natsu Taylor Saito, *Tales of Color and Colonialism: Racial Realism and Settler Colonial Theory*, 10 Fla. A & M U.L. Rev. 1, 60-61 (2014) ("The racialization of migrant Others is a strategy that has been used to subordinate peoples of color in a way that erases their particular histories and identities, replacing them with artificially constructed identities that are then used to reinforce a multi-layered racial hierarchy. Just as Indigenous peoples from hundreds of nations in North America or Africa have been categorized, officially and in public perception, as simply 'American Indian' or 'Black,' those of Chinese, Vietnamese, Korean or Filipino ancestry are all 'Asians,' while those from origins as diverse as Mexico, Puerto Rico, and Argentina are 'Hispanic.' In recent decades, the classification system has become somewhat more complex but no more accurate.") (citations omitted).

[118] *See e.g.* Frederick C. Harris, THE PRICE OF THE TICKET: BARACK OBAMA AND RISE AND DECLINE OF BLACK POLITICS (2012).

[119] *See e.g.* David A. Graham, *What Randall Kennedy Misses About Respectability Politics and Black Lives Matter*, The Atlantic (Oct. 2, 2015), http://www.theatlantic.com/notes/2015/10/what-randall-kennedy-misses-about-respectability-politics-and-black-lives-matter/407101/.

[120] *See e.g.* Shannon M. Houston, *Respectability Will Not Save Us: Black Lives Matter is Right to Reject the "Dignity and Decorum" Mandate Handed Down to Us from Slavery*, Salon (Aug. 24, 2015), http://www.salon.com/2015/08/25/respectability_will_not_save_us_black_lives_matter_is_right_to_reject_the_dignity_and_decorum_mandate_handed_down_to_us_from_slavery/.

[121] Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby-Latcrit Theory and the Sticky Mess of Race*, 85 Cal. L. Rev. 1585, 1627 (1997).

Asian-American experiences with race, the ideas of cultural assimilation and "model minority" have classically demonstrated the emergence of respectability politics. There is a duality as well in the experience of Asian American identities negotiating for acceptance by courting with respectability. As Natsu Taylor Saito puts it, the "model minority" is a label that "reflects its intent to both subordinate and manipulate. Asians are a 'minority'—i.e., not settlers—and thus to be relegated to a subordinate status within settler society. Simultaneously, however, we are the 'model,' presumably for other 'minorities.' "[122] But as the label "evokes the imagery of Asians as hardworking, economically successful, and anxious to assimilate,"[123] what it also does is "mask[] the distinct problems faced by particular subgroups,"[124] and "send[] the not-so-subtle message to Asian Americans that we should be 'grateful' not to be at the bottom of settler racial hierarchy, reinforcing settler hegemony by creating barriers to our ability to see common patterns of subordination."[125]

On sexual orientation and the law, legal scholarship has identified and explored respectability politics—most often either in describing its affects or the contextualized ways in which sexual minorities obtain social and legal acceptance.[126] Much has been said critically about the integration, visibility, and acceptance of sexual minorities. One of the most vivid historical accounts of this debate in gay rights was the famous exchange of articles between Paula Ettelbrick and Tom Stoddard in the Fall 1989 issue of *Out/Look* magazine over the potential pros and cons of pursuing recognition of same-sex marriages.[127] Ettelbrick opposed the strategy for gaining equality through same-sex marriage while Stoddard was more responsive and hopeful to the idea. But both attorneys recognized the transformative properties of marriage in terms of its respectability. Ettelbrick noted that

> [t]he growing discussion about the right to marry may be explained in part by this need for acceptance. Those closer to the norm or to power in this country are more likely to see marriage as a principle of freedom and equality. Those who are more acceptable to the mainstream because of race, gender, and economic status are more likely to want the right to marry. It is the final acceptance, the ultimate affirmation of identity.[128]

Stoddard offered a similar take:

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[122] Saito, *supra* note __, at 62.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See e.g.* Joshi, *Respectable Queerness*, *supra* note __; Kenji Yoshino, *Covering*, 111 Yale L.J. 769 (2002);

Katherine Franke, *The Politics of Same-Sex Marriage Politics*, 15 Colum. J. Gender & L. 236 (2006); Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 Wm. & Mary Bill Rts. J. 1539 (2006); Nancy D. Polikoff, *Equality and Justice for Lesbian and Gay Families and Relationships*, 61 Rutgers L. Rev. 529 (2009); Darren Lenard Hutchinson, *Sexual Politics and Social Change*, 41 Conn. L. Rev. 1523 (2009); Mariana Valverde, *A New Entity in the History of Sexuality: The Respectable Same-Sex Couple*, 32 Feminist Stud. 155 (2006).

[127] *See generally* Thomas B. Stoddard & Paula L. Ettelbrick, *Gay Marriage: A Must or a Bust?*, OUT/LOOK: NAT'L GAY AND LESBIAN Q., Fall 1989, at 8-17.

[128] *Id.* at 16.

> Given the imprimatur of social and personal approval which marriage provides, it is not surprising that some lesbians and gay men among us would look to legal marriage for self-affirmation. After all, those who marriage can be instantaneously transformed from "outsiders" to "insiders," and we have a desperate need to become insiders.[129]

Ettelbrick ultimately urged a politics of respect as the norm: "Justice for gay men and lesbians will be achieved only when we are accepted and supported in this society *despite* our differences from the dominant culture and the choices we make regarding our relationships."[130] Meanwhile, Stoddard had hopes to overcoming respectability, perhaps in order to get to respect: "[M]arriage may be unattractive and even oppressive as it is currently structured and practiced, but enlarging the concept to embrace same-sex couples would necessarily transform it into something new."[131] The importance of the Ettelbrick/Stoddard discussion is one of relevancy in the wake of *Obergefell*. It reminds us of the progress in the marriage equality movement, hopefully in part precipitated by the increased social visibility of sexual minorities and hopefully precipitating, in part, to more protection further down the line. Conversely, the Ettelbrick/Stoddard debate helps verify whether the gay rights movement since 1989 has also succumbed to the politics of respectability instead of a more wholeheartedly staunch entrenchment in the politics of respect. After all, both of them assumed that marriage has been a traditionally heteronormative institution.[132] And the studies in gay assimilation or respectability have revealed that the dominate norms and end up controlling identity negotiations with respectability are those values directly reflecting a white, heteronormative, middle-class, and suburban demographic.[133] Was Ettelbrick more correct than Stoddard? Or do we need more time to wait and see Stoddard's view? And if so, should we have make certain to direct the transformation of same-sex relationships within the fundamental right to marriage toward the politics of respect?

Incidentally, this tension between respectability and respect playing out in the ways one could interpret that recent Campbell Soup Ad. On the one hand, the image of the two fathers with their adopted son is a celebration of gay visibility—one that, of course, also affixes a sense of progressiveness to the Campbell's brand identity. On the other hand, there is a slippery slope in which it could also be a moment where a national chain is conferring worth and approval of gay relationships. Both interpretations feed into the grand logic, which is this: if respectability is more about choices one makes to be viewed with dignity by adhering to dominant social norms, then dignity is less about inherent humanity of an individual and more about the negotiations one has to take to become "dignified." Respectability subverts intrinsic dignity and equal recognition, perpetuating the notion that dignity is not inherent but must be earned from a dominant group. This notion inhibits equality because it creates and sustains hierarchy. It would not—according to most views—be a normative goal for defining a framework for human dignity in the law. Since the vagueness of dignity or differences in interpretations regarding dignity can obfuscate or deny the path to true intrinsic worth and value of human existence that effectuates equality and liberty, it is no wonder how easily we lose sight of respect in place of respectability.

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[129] *Id.* at 9.
[130] *Id.* at 14.
[131] *Id.* at 13.
[132] *Id.* at 9-10, 14.
[133] *See* Angela P. Harris, From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality, 14 Wm. & Mary Bill Rts. J. 1539 1569-70 (2006).

But a politics of respect preserves inherent humanity and appeals to senses of formal equality. Henceforth, in moving beyond marriage equality toward sexual orientation anti-discrimination, dignity as respect for the sexual identity of individuals with should be stressed, rather than dignity as respectability of choices that might represent sexuality. In this way, sexual identity or orientation serves as the proxy for inherent humanity. Two reasons underlay this preference.

First, respect is about recognition of intrinsic qualities that reflect human existence, including sexual identities and preferences. Unlike respectability, such recognition is antithetical to a concession that is motivated by the desire for approval, but rather stresses entitlement to recognition based on basic human worth. A result in this perspective would be more likely to help show the innateness or the immutability of sexual identity as the association would be between sexual orientation or identity with inherent humanity. As Part IV will explore, bolstering the immutability of sexual orientation, in turn, would help clarify anti-discrimination protections for sexual minorities. The connection to human dignity so long as the concept fosters a politics of respect over respectability would help establish the inherency of sexual identity. And we will see also in Part IV, dignity as respect for the inherent might be a helpful extension that serves to explain away the nature of sexual orientation toward a better understanding of its immutability—ultimately further justifying anti-discrimination protections in the law for sexual minorities.

Secondly, dignity as respect offers another approach toward anti-discrimination for sexual minorities because the idea of respect itself is in line with anti-discrimination. As noted above in the racial discrimination cases, *Heart of Atlanta Motel* and *Brown*, dignity has the potential for furthering equality. But helpful as well is Glensy's analysis of the Supreme Court abortion cases and how construing dignity as respect also furthers anti-discrimination. In cases such as *Casey* and *Carhart*, dignity's anti-discrimination potential appears when the Supreme Court connects the right of women to determine their reproductive health and the right to dignity by "characteriz[ing] the idea of dignity as respect in the form of governmental non-interference."[134] By doing so, the Court "also introduce[d] an element of equal treatment into the mix by coining the phrase 'equal liberty.' "[135] In this way, as Glensy sees it, "dignity also encompasses, at least in words, an anti-discrimination component."[136] Most importantly in this area for sexual minorities is the association between *Lawrence* and the Supreme Court abortion cases, which Part III will illustrate. According to Glensy, "[a]bortion rights cases use the concept of dignity in a manner that mirrors *Lawrence*."[137]

To be sure, respectability might obtain a sense of social acceptance and safety for the individual and it might—as we will explore with the Supreme Court's marriage cases—pragmatically bring on developments in the short run that benefits same-sex relationships and, by extension, sexual minorities.[138] But the flaws in respectability politics house larger implications for the struggle and advancement of sexual orientation anti-discrimination. As this Article's next part will show, in the current dialogue of gay rights, despite the achievement of marriage equality across the U.S., that conversation has left us at the doorstep of respectability. The

[134] Glensy, *supra* note __, at 91.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *See* Joshi, *Respectable Dignity*, *supra* note __, at 123-24.

progressive era of gay rights has incrementally moved away from a politics of disrespect that held once enormous indignities against sexual minorities. However, *Obergefell* is long from the type of dignity imbued with the politics of respect that would ultimately have gains for advances in sexual orientation anti-discrimination.

III. FROM DISRESPECT TO RESPECTABILITY

Kees Waadiljk has long articulated that the legal progress for advancing the recognition and rights of sexual minorities in various European countries has been animated by a peculiar "law of small change" that moves toward significant triumphs in a series of sequences rather than a few swift and dramatic turn of events.[139] His theory, later furthered by William Eskridge[140] and Yeval Merin,[141] have helped exemplify that the progress to marriage equality in U.S. was invariably a journey of incremental changes that leveraged limited successes within one gradual move toward equality for same-sex couples.[142] In my previous work, I have called this "marriage equality incrementalism" and identified the significant points in the U.S. chronology toward same-sex marriage on the federal level.[143] But if marriage equality amongst all the states was just one of such triumphs—albeit a significant one—within a larger movement toward the rights of sexual minorities, this larger movement in itself would be punctuated and cabined in its own incrementalism for anti-discrimination. If dignity as respect is a normative goal in the advancement of gay rights against discrimination and has, in some capacity, shaped the case law regarding sexual minorities, it would be possible to track the development of dignity as respect within the major gay rights cases at the Supreme Court as an incremental journey of its own. Indeed in this Part III, the progression for calibrating dignity with respect in these cases does arise within a shift from the politics of deliberate indignity and disrespect to sexual minorities toward according gays a more worthy recognition. Yet if such conceptualization of dignity is normative, the following will show that we have only reached respectability. We still have distances to travail.

A. BOWERS *AND* ROMER: *THE POLITICS OF DISRESPECT*

There is no doubt that *Bowers* was a decision that singled out sexual minorities by intentionally lacking respect for them. The Georgia anti-sodomy statute at question in *Bowers* was neutral in regards to the biological sex of the individuals committing such acts, criminalizing both same-sex or opposite-sex sodomy.[144] Yet, from the beginning of Justice White's majority

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[139] Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 437, 440-441 (Robert Wintemute & Mads Andenæs eds., 2001).

[140] William N. Eskridge Jr., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS (2002)

[141] Yuval Merin, EQUALITY FOR SAME-SEX COUPLES: THE LEGAL RECOGNITION OF GAY PARTNERSHIPS IN EUROPE AND THE UNITED STATES (2002).

[142] *See* Jeremiah A. Ho, *Weather Permitting: Incrementalism, Animus, and the Art of Forecasting Marriage Equality After* U.S. v. Windsor, 62 Clev. St. L. Rev. 1, 6-9 (2014).

[143] *See id*. at 24-55.

[144] Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 Va. L. Rev. 1721, 1741-42 (1993) ("Georgia defined sodomy to be '*any sexual act* involving the sex organs of one person and the mouth or anus of another,' thus imposing a facially neutral prohibition of the specified bodily contacts notwithstanding the gender of the actors. Not only is it not limited to 'homosexuals,' it does not even mention them.").

decision in *Bowers*, sexual orientation was deliberately an issue. White referenced Hardwick's admission as a "practicing homosexual"[145] and followed that reference with a decision in which he justified anti-sodomy laws based on the reasoning that private homosexual conduct was against traditional prevailing morality.[146] His framing of the issue as to whether there was an unenumerated but fundamental right to homosexual sodomy permitted within 14th Amendment Due Process was unnecessary.[147] In doing so, White narrowed the discussion from a case about sodomy to a case about conduct that could be indicative of homosexuality.[148]

On the one hand, this narrowing in *Bowers* singled out sexual minorities, but on the other hand, it also displaced sexual minorities and prevented them from receiving dignified mainstream recognition. Both perspectives are significant for disrespect because the result is that their sex and intimacy do not deserve legal protection and in fact should remain criminalized. First, *Bowers*' use and description of "homosexual sodomy" differentiated the sex involved in the case from the category of sex acts situated in the reproductive cases and allowed the Court to cabin it away from the reach of individual privacy rights. According to White, heterosexual procreative sex was protectable even if it was abortive or involved contraceptives.[149] But non-procreative sex acts between same-sex partners were not constitutionally protected because *Bowers* involved no child-rearing, family, or marital interests whatsoever.[150] This categorization of sodomy, between same-sex and opposite-sex iterations, was the conduit for significant disrespect toward sexual minorities in *Bowers*. It reflected a heteronormative preference because it resulted in a hierarchy that placed opposite-sex sex partners within a protected realm and left same-sex sex partners available for criminal conviction.

The privacy protections denied in *Bowers* are significant for showing who and what the disrespect was directed toward. Privacy in the realm of these cases covered individual autonomous choices that had fundamental affect to the persons whose rights had been constitutionally violated. Correspondingly, refusing to recognize such rights in sexual minorities who "practiced homosexuality" denied sexual minorities recognition in the realm of sex, and denied them autonomy to decide whether to engage in behavior that had personal significances in intimacy, bonding, and sexual identity. Along this trajectory between sex and privacy, it would

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[145] *Bowers*, 478 U.S. at 188.

[146] *Id.* at 196.

[147] See *id*. at 199 (Blackmun, J., dissenting) ("First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens.").

[148] *See* John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 Cardozo L. Rev. 1119, 1155-56 (1999) ("Bowers called upon the Court to consider the constitutionality of a statute that prohibited consensual sodomy. The text of the statute did not differentiate between heterosexual and homosexual sodomy, nor did it create any exception for married couples. The procedural history of the case, however, gave the Court the opportunity to avoid the question of whether the law could constitutionally be applied to heterosexual couples, and the five-Justice majority lunged at the chance to consider only the right of the defendant before it, who had been arrested while engaging in oral sex with another man.") (citations omitted); *see also* Halley, *supra* note __ , at *Reasoning About* 1741-42 ("The majority Justices' deft manipulation of act and identity responded to Hardwick's own efforts to manage these elements by trapping Hardwick under the rubric 'homosexual sodomy' and permitting heterosexual sodomy—and identity—to escape from view.").

[149] *Bowers*, 478 U.S. at 190-91 (citing privacy and reproductive cases).

[150] *Id.* at 191 ("No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by the respondent.")

not have been difficult to link a protection of homosexual sodomy with the developing concepts regarding individuality in privacy and autonomy that the prior cases Hardwick and the Eleventh Circuit in *Bowers* relied upon to articulate their positions. These cases exuded overtones of human dignity concepts despite not invoking the concept explicitly.[151] Although the association between privacy and human dignity did not fully realize into the language of Supreme Court opinions until *Planned Parenthood v. Casey*[152] came forth after *Bowers*, the dignity concepts associated alongside autonomy and privacy were already taking shape in prior privacy cases such as *Griswold v. Connecticut*.[153]

The Court's lack of respect fully realized when White further justified Georgia's sodomy statute by referencing prior sodomy laws to bolster the notion that the right to engage homosexual sodomy had not been a deeply-rooted right under the history and tradition of the

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[151] *See* Jeremy M. Miller, *Dignity As A New Framework, Replacing the Right to Privacy*, 30 T. Jefferson L. Rev. 1, 36 (2007) ("Although the Court labeled these constitutional rights as facets of the right to privacy, analysis of those cases demonstrates that the Court was attempting to protect human dignity. Whether the decision pertained to the right to child-rearing or education, or the right to use contraceptives or to undergo an abortion, the court was not protecting the secrecy of the matter, but the right of the individual to retain respect from others and sustain self-worth. In fact, all of these so-called privacy rights involve conditions which either painfully or blissfully involve a loss of privacy. In the hospital setting, such as the abortion cases, all privacy is lost to doctors, nurses, and other personnel. In the sexual setting, all privacy is lost to the partner. The Court was struggling for a concept and, quite simply, missed the mark."); Barroso, *supra* note __, at 347-48 ("It is within the context of the right to privacy that human dignity arguably plays its most prominent role. It is true that dignity was not expressly invoked in the early landmark cases, such as *Griswold v. Connecticut* and *Roe v. Wade*. Yet, the core ideas underlying human dignity—autonomy and the freedom to make personal choices—were central to these decisions.") (citations omitted).

[152] 505 U.S. 833 (1992).

[153] 381 U.S. 479 (1956); *see also* Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of A Right*, 37 Ohio N.U. L. Rev. 381, 408-09 (2011):

> Justice Douglas's understanding of the intertwining nature of dignity, privacy, and liberty would, of course, culminate in his opinion in Griswold v. Connecticut, though he had already been playing with these ideas in the criminal law context (as seen above) and in several cases in the preceding years. And yet, his opinion in Griswold v. Connecticut does not mention human dignity at all. The right to privacy expounded upon in all the opinions in Griswold is significantly narrower than Douglas's conception of dignity, limited as it may be to marital relations and to the "sacred precincts of marital bedrooms" and grounded as it is in the penumbras of the first ten amendments.
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> But just as Justice Douglas's focus on privacy would bear fruit in the later abortion cases, so too would his recognition that state intrusion into the private sphere of the individual might threaten his or her dignity. In Thornburgh v. American College of Obstetricians & Gynecologists, the Court wrote that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision - with the guidance of her physician and within the limits specified in Roe - whether to end her pregnancy."
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> This would find slightly fuller expression in Planned Parenthood v. Casey, where a plurality (comprising of Justices O'Connor, Kennedy, and Souter) jointly reaffirmed the principle that a woman's right to terminate a pregnancy receives some degree of constitutional protection. As in many other cases since Griswold, the plurality groups abortion with other decisions dealing with family, procreation, marriage, and raising children. What is new in Casey is the turn in the language from privacy to dignity[.]
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> *Id.* (citations omitted).

states. White reported that "[p]roscriptions against that conduct have ancient roots"[154] and then listed a historical catalogue of sodomy laws over three consecutive footnotes to legalistically belabor his assertion.[155] Indeed, White's sullying of homosexual sodomy here in *Bowers* was an advantageous transition to his eventual reason for upholding the constitutionality of Georgia's anti-sodomy law. According to White, the majoritarian view in Georgia that "homosexual sodomy is immoral and unacceptable" is a rational basis for the law because "[t]he law . . . is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[156] First, the argument for affirming the Georgia statute based on morality against homosexuality, which White counted as strong and robust in Georgia, was rather weak and conclusory. A majoritarian morality might contribute to the existence of a law that discriminates and marginalizes a particular subgroup of the population or such morality might permit laws that have bad consequences.[157] Should this not have warranted that law's invalidity? Was this not observed in *Loving v. Virginia*, one of the cases that White distinguishes from Hardwick's situation? And what were these morals, if not reflective of heterosexism? White did not explicitly reveal these morals in content but his reliance on the factual context of the privacy cases—family, marriage, procreation, child-rearing—and the deeply-rootedness of sexual practices in the history of the nation tended to hint at a heteronormative basis for these morals and values that cast sexual minorities in a disrespectful light. The message in *Bowers* was clear—that consensual intimacy enjoyed by opposite-sex couples was protectable based on factual and moral situations that did allow recognize consensual same-sex intimacy indicative of same-sex preferences. White's denial of privacy here was important as far as exemplifying a politics of disrespect because the constitutional privacy protections that were not extended to sexual minorities also, in part, deny humanity. Accordingly, *Bowers* lodged disrespect against sexual minorities engaging in consensual same-sex intimacy, which shamed, disgraced, and criminalized them in regards to particular conduct that could express their sexual identities. All of which White justified through a hierarchy of protectable sex based on majoritarian values and a dismissal of privacy interests that he would probably have championed for heterosexual couples.

If *Bowers* was an example of how sexual minorities was cast within the politics of disrespect at the Supreme Court, then *Romer v. Evans*, a decade later, was an opinion that specifically associated a name with that disrespect: animus. Ironically, the law at issue, Colorado's Amendment 2, a voter-initiated referendum to modify Colorado's anti-discrimination statute to exclude protections toward discrimination based on sexual orientation, resembled the kind of law based in a majoritarian morality that White was reluctant to overrule in *Bowers*. In this way, within the continuing politics of disrespect toward sexual minorities at the Supreme Court, *Bowers* and *Romer* were antithetical; even though *Romer* did not overrule *Bowers*, nor did it enumerate that a fundamental right to consensual same-sex intimacy existed, *Romer* did address the constitutionality of a law linked to morals that would have left sexual minorities out of discriminatory protections under the Colorado state constitution. In interpreting *Romer*, Ronald Dworkin has noted that "[i]t is true that White spoke in terms of moral disapproval and Kennedy in terms of 'animus.' But there can be no difference in what these words mean in this

[154] *Bowers*, 478 U.S. at 192.
[155] *Id.* at 192 nn 5-7.
[156] *Id.* at 196.
[157] *See Romer*, 517 U.S. at 634-35; *Windsor*, 113 S. Ct. at 2693-94.

context."[158] At least in terms of morality specifically involved in the facts that led up to *Romer*, the context Dworkin alluded to reveals the politics of disrespect behind the campaign against protecting sexual orientation in Amendment 2.

When anti-discrimination ordinances were enacted in Colorado municipalities between the 1970s and early 1990s and protections based on sexual orientation became prominent,[159] efforts by a conservative Christian group in Colorado began to campaign for signatures to put Amendment 2 on a state referendum.[160] Martha Nussbaum has observed that "[t]he campaign was clever" in that the initiators of the referendum convinced Colorado voters to pass the referendum through an "equal rights, not special rights" theme.[161] As a result, "[t]hat gave ordinary citizens a reason to support the referendum without thinking that in so doing they were expressing dislike of gays and lesbians."[162] The Amendment read:

> No Protected Status Based on Homosexual, Lesbian or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.[163]

Some voter conscience might have been assuaged by such campaigning but majoritarian disapproval could still be articulated into law. And disrespect does not have to be captured within the subtext of majoritarian gestures alone. The campaign for Amendment 2 explicitly conjured a sense of immorality in order to portray sexual minorities in a disrespectful light. And heteronormative ideals about family, sex, and privacy versus the degradation of morals through same-sex conduct were part of the rhetoric: "You may know that the sexual practices of gays differ drastically from those of most of Colorado's population. But how much these practices differ—and the dangerous perversions they involve—may shock you!"[164]

Consensual same-sex behavior was again painted as choices that are morally blameworthy, in part because the campaigns call them "dangerous" and "perverse," but also because the campaign affixed false assumptions with same-sex behavior: "Gays have been unwilling (or unable) to curb their voracious, unsafe sex practices in the face of AIDS."[165] Then it listed purported sex behavior statistics: "Overall, surveys show that 90% of gay men engage in anal intercourse—the most high risk sexual behavior in society today. . . . About 80% of gay

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[158] Ronald Dworkin, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 464 (2000).
[159] Nussbaum, *supra* note __, at 96.
[160] *Id.*
[161] *Id.* at 101.
[162] *Id.*
[163] *Romer*, 517 U.S. at 624.
[164] Nussbaum, *supra* note __, at 94 (quoting a "pamphlet circulated by Colorado for Family Values during the campaign for Colorado's Amendment 2).
[165] *Id.*

men surveyed have engaged in oral sex upon the anus of partners. Well over a third of gays in 1977 admitted to 'fisting.' "[166] Not only do these alleged statistics about gay male same-sex behavior placed nearly all gay men in a depraved and diseased light—with the politics of disrespect being used prominently here—but the references to same-sex sodomy and other sex practices were of the non-procreative type outside of the morally dignifying patronage of heteronormative values. The pamphlet's punch-line revealed this rationale in a rhetorical question: "Is this the kind of lifestyle we want to reward with special protection, and protected against ethnic status? Gay activists want you to think they're 'just like you'—but these statistics point out how false that is."[167]

Kennedy's decision in *Romer* led him to call out such politics of disrespect, as "anything but animus toward the class it affects."[168] Unlike the deliberate and seemingly-just reliance on the politics of disrespect in *Bowers* to rationalize the singling out and criminalizing of sexual minorities under the Georgia statute, Kennedy's opinion in *Romer* found a reflective opposite in that logic. The morality is a hateful one and its service behind Amendment 2 to disadvantage sexual minorities was not justifiable. In fact, unlike White in *Bowers*, Kennedy disregarded this relationship between morals and law even where the State proffered that Amendment 2 "respect[s] other citizens' freedom of association, and in particular the liberties of landlords or employers who have personal or religious objections to homosexuality."[169] Here inequality was not enough to maintain efficiency. Kennedy dismissed the relationship between morals and law, morals that engendered disapproval and disrespect, because of the inequality Amendment 2 perpetuates through that relationship. In doing so, that politics of disrespect reared itself in the concept of animus. In the gay rights canon of Supreme Court cases, *Romer* is definitively a case about unconstitutional animus. Dignity was not specifically invoked by Kennedy but *Romer* was a post-*Casey* decision in which privacy issues had been eventually couched in the language and sentiments of dignity.[170] There were, in the subtext, whisperings or murmurings of humanity that will help draw the jurisprudence for gay rights toward concepts of dignity and respect. But distinctly, *Romer* called out disrespect and aligned it within a specific doctrine.

B. LAWRENCE *AS RESPECT*

Like *Bowers*, *Lawrence* involved consensual same-sex sexual behavior that fell within criminalization under a state sodomy statute. But with *Lawrence*, the incremental journey that started with *Bowers*' politics of disrespect—politics that was later located as animus in *Romer*—now transitioned to recognize that sexual minorities deserved respect. This was achieved partly through the advancement of privacy and dignity interests in the interim between *Bowers* and *Lawrence*—notably with *Casey* where the constitutional privacy rights stemming from

[166] *Id.*
[167] *Id.*
[168] *Romer*, 517 U.S. at 632.
[169] *Id.* at 635.
[170] John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 Cardozo L. Rev. 1119, 1158 (1999) ("[O]ne problem with Romer is that 'the opinion is strikingly enigmatic in ways that make it perilous to venture strong claims about what the case means.' Nonetheless, several central principles can be discerned. First, the Court emphasized and criticized the comprehensiveness of the amendment, noting that it would place protections afforded others beyond gay men and lesbians.").

controversial cases such as *Roe v. Wade* that were on shakier ground during time of *Bowers*.[171] The social visibility of sexual minorities in the early 1990s and *Romer*'s anti-discrimination seemingly also contributed to respect in *Lawrence*.[172]

The two doctrinal approaches that facilitated *Lawrence*'s politics of respect appeared early in Kennedy's decision. The first was Kennedy's willingness to explore the constitutional privacy aspects of the case to imagine an unenumerated constitutional due process protection that perhaps *Bowers* had failed (or refused) to see. Kennedy's incantation of privacy cases—*Pierce v. Society of Sisters*,[173] *Meyer v. Nebraska*,[174] *Griswold v. Connecticut*,[175] *Eisenstadt v. Baird*,[176] *Roe v. Wade*,[177] and *Carey v. Population Services*[178]—began the focus on the deeper aspects of consensual same-sex intimacy in *Lawrence* (and by analogy *Bowers*) than White's legalistic contrast and delineation based on facts alone.[179] Such incantation revisited the protections of privacy,[180] autonomy,[181] and individualism[182] in those cases and facilitated import into protections for consensual same-sex intimacy.[183] This connection between privacy cases and

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[171] *See* David A. J. Richards, THE SODOMY CASES: *BOWERS V. HARDWICK* AND *LAWRENCE V. TEXAS* 114 (2009) ("*Bowers v. Hardwick* was decided in period of considerable debate in the nation and on the Supreme Court itself about the legitimacy of *Roe v. Wade*, which clearly showed in Justice White's opinion for the Court in *Bowers*, reflecting skepticism not only about *Roe v. Wade* but about the principle of constitutional privacy.") This skepticism could have also set up White's narrow construance of the boundaries of constitutional privacy in his refusal to extend its application to situations involving consensual same-sex sodomy in *Bowers*. *See* Culhane, *supra* note __, at 1155 n. 169 (noting that "the tone of Justice White's decision makes clear his skepticism with the entire enterprise of what he called "announcing rights not readily identifiable in the Constitution's text" and that "[i]n addition to the just-quoted language, he stated that at least some of the privacy cases "recogniz[e] rights that have little or no textual support in the constitutional language" (quoting *Bowers*, 478 U.S. at 191)). According to Culhane, White's skepticism seems to have helped in a more exegetical leaning toward interpreting privacy: "*Bowers* distinguished and criticized the bulwark of cases establishing and expanding the right of privacy. Justice White made the remarkable statement that none of the privacy cases, nor any of 'the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . asserted in this case.' The privacy cases were explicitly tied to the contexts of marriage, procreation, and family from which they arose. Since homosexual sodomy bore no connection to any of these roots, privacy protection was unavailable." *Id.* at 1155-56 (quoting *Bowers*, 478 U.S. at 190-191).

[172] As some have noted, "*Lawrence* . . . shows the evolution in the Supreme Court's jurisprudence as well as the increasing societal acceptance of gay persons." Kristin D. Shotwell, *The State Marriage Cases: Implications for Hawai'i's Marriage Equality Debate in the Post*-Lawrence *and* Romer *Era*, 31 U. Haw. L. Rev. 653, 658 (2009).

As for respect politics building from *Romer*, Kennedy indicated that "[t]he foundations of *Bowers* have sustained serious erosion from our recent decisions in *Casey* and *Romer*," pointing, *inter alia*, to the growing privacy and antidiscrimination concerns that prompted revisiting the sodomy issue from *Bowers*. *Lawrence*, 539 U.S. at 573-76.

[173] 260 U.S. 510 (1925).

[174] 262 U.S. 390 (1923).

[175] 381 U.S. 479 (1965).

[176] 405 U.S. 438 (1972).

[177] 410 U.S. 113 (1973).

[178] 431 U.S. 678 (1977).

[179] *See id.* at 564-58.

[180] *Id.* at 564 (citing *Griswold* for "establishing that the right to make certain decisions regarding sexual conduct extends beyond the marital relationship").

[181] *Id.* at 565 (citing *Eisenstadt*'s recognition that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into the matters so fundamentally affecting a person as to the decision whether to bear or beget a child").

[182] *Id.* ("Roe recognized the right of a woman to make certain fundamental decision affecting her destiny.").

[183] *Id.* at 566 (Kennedy noting that the facts of *Bowers* had some similarities to *Lawrence*).

consensual same-sex intimacy prompted the second approach to assist respect politics. That approach involved the broadening of the due process issues regarding consensual same-sex intimacy from a *Bowers*-like fundamental rights inquiry regarding "homosexual sodomy" to one about the efficacy of the Texas law in "violat[ing defendants'] vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment" and of *Bowers* itself.[184] Helped also by his own account of the history of American sodomy laws and departing from White's narrative in *Bowers* over how ancient that "ancient roots" observation was in the past persecution of gays,[185] Kennedy's broadening of the legal issue in *Lawrence* was a crucial step toward a politics of respect as it aligned interests in privacy and sex in *Lawrence* with privacy and dignitary interests in *Casey*.

Once Kennedy invoked *Casey*, his reliance on *Casey* was not merely to superficially show that consensual same-sex intimacy has dignity for dignity's sake. *Casey* helped leverage dignitary interests so that Kennedy could use it to dislodge the connection between the Texas law and justifications through morality that had disrespected sexual minorities by devaluing their sex choices and behavior as blameworthy and disgusting. Quoting *Casey*, Kennedy observed in a way reminiscent of his attack on morality in *Romer* that

> [i]t must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[186]

If *Romer* was a case that involved disrespect as animus, *Lawrence* would become a case about the respect for sexual minorities articulated through dignity interests against the laws that attempt to marginalize them. The justification for such judicial and constitutional regard was not morals-based but more sweeping on a human level: " 'At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.' "[187] This shift from what animated or governed the liberties at stake from morality to humanity was conducive to according respect for sexual minorities. We see this underlying effect in Kennedy's evaluation of harm arising from morals-based laws that regulated and inhibited aspects of humanity such as sexual freedom. Using *Romer* to leverage and extend *Casey*, he drew from the example of when morals-based legislation, the basis for his concept of animus, can cause dignitary harm. Once he associated *Casey* and *Romer* together, Kennedy further underscored that harm from disrespect on social and human terms:

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[184] *Id.* at 564.
[185] *Id.* at 569-71.
[186] *Id.* at 571(quoting *Casey*, 505 U.S. at 850).
[187] *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

> Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. 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. 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.[188]

It all ultimately justified the holding in *Lawrence* that *Bowers*' "continuance as precedent demeans the lives of homosexual persons."[189] *Lawrence* was the Supreme Court's opinion on dignity as respect for gay rights. And as a result, that politics was reached.

Yet, as progressive as *Lawrence* was for same-sex sex partners in overturning *Bowers* and decriminalizing consensual same-sex intimacy, the slight problem with *Lawrence* in regards to respect politics was its narrow reading of sexual identity typified by the facts of *Lawrence* itself—i.e. the convictions of defendants because of their engaged sex acts—and by focus on the inquiry toward conduct rather than identity. In fact, the opinion emphasized conduct by discussing the cases in terms of "the respect the Constitution demands for the autonomy in persons making [reproductive] choices"[190] in *Casey*, and in terms of how "[e]quality of treatment and the due process right to demand respect for conduct protected by substantive guarantee of liberty."[191] Of course, the underscoring on choices and conduct was consistent with the way in which the issues were framed to discuss "sexual intimacy" and not sexual identity. But it kept the politics of respect adhered slightly to constitutional respect for the conduct, behavior, and choices indicative of sexual identity, but not directly for sexual identity itself.

C. WINDSOR *AND* OBERGEFELL*: MARRIAGE AND RESPECTABILITY*

Although there was some achievement for respect in dignity for sexual minorities in *Lawrence*, the slippage created by the distance between respect politics and toward what it was specifically modifying—sexual conduct rather than sexual orientation—limited direct progress for sexual orientation anti-discrimination. *Lawrence*, with its incantations to autonomy and privacy and its inquiry over the constitutionality of regulating sex acts, was more about according dignity to specific personal choices—and by extension, the constitutional protections over conduct, choices, and acts—rather than to identity precisely. That slippage has produced mixed results for elevating anti-discrimination protections for sexual minorities, while advancing other goals within gay rights, particularly for achieving marriage equality. For better or worse, the politics of the marriage context is soupy for developing an inherent respect for sexual minorities. What also begins to emerge more readily between the politics of disrespect and respect was a growing trend toward respectability politics.

Kennedy's decision in *U.S. v. Windsor* expressed this latter sentiment by aligning with *Lawrence* to protect choices, but also by differing in context because the choices made were not

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[188] *Id.* at 575.
[189] *Id.*
[190] *Id.*
[191] *Id.*

as exclusively indicative of sexual identity. They were also choices indicative of same-sex couples vying for positive social and legal recognition. Marriage allowed for symbolic gesturing and visibility of relationships,[192] of which sexual identity has very significant import.[193] However, the choice to marry short-changed sexual orientation because marriage, as it has been regarded modernly, has hardly been a same-sex institution or status. Seeking marriage is toying and cooking with heteronormativity. And even the gesture of seeking suggests that same-sex couples are vying for recognition from an already-subordinated position that leads to a question of worthiness—questions often answered by respectability.

This worth was what Kennedy's decision in *Windsor* explored. The opinion addressed DOMA by borrowing the doctrinal approach from *Romer*. Yet post-*Lawrence*, the concepts of animus and dignity in gay rights were much more concretely and evenly realized. Animus and dignity were intertwined as an anti-stereotyping principle that drew out the inequality that DOMA propagated against state-recognized same-sex marriages by consequently not recognizing them on the federal level. Kennedy linked the two concepts in a correlative sense to demonstrate how an irrational hatred against gays and their desire to marry in order to achieve recognition—i.e. animus—manifested as a strong moral disapproval itself within congressional intent for DOMA. Such animus or hatred could not support a law that perpetuated inequality and stigma—i.e. harms to dignity—by creating a hierarchy between same-sex and opposite-sex relationships on the federal level when no such hierarchy existed between both relationship groups in the marriage schemes of particular states that sanctioned same-sex or opposite-sex marriages, such as New York. In this way, DOMA interfered with the way in which states regulated marriage that not only stirred up discrimination against same-sex couples but also federalism implications as well.[194]

Kennedy's legislative scrutiny uncovered to no surprise that DOMA was backed by a moral disapproval that embodied disrespect toward same-sex couples: "The House concluded the DOMA expresses 'both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.' "[195] He noted that "[t]he stated purpose of [DOMA] was to promote an 'interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.' "[196] Animus served to enliven DOMA and was instilled by disrespect toward minority sexual orientations that preferred to keep same-sex couples out of marriage. The next question was whether that animus, as in *Romer*, also contained a bare desire to harm, which Kennedy found in its ability "to identify a

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[192] *See e.g. Perry v. Brown*, 671 F.3d 1052, 1078 (9th Cir. 2012) ("We need consider only the many ways in which we encounter the word 'marriage' in our daily lives and understand it, consciously or not, to convey a sense of significance. We are regularly given forms to complete that ask us whether we are "single" or "married." Newspapers run announcements of births, deaths, and marriages. We are excited to see someone ask, "Will you marry me?", whether on bended knee in a restaurant or in text splashed across a stadium Jumbotron.").

[193] Douglas NeJaime, *Marriage Inequality: Same-Sex Relationships, Religious Exemptions, and the Production of Sexual Orientation Discrimination,* 100 Calif. L. Rev. 1169, 1197-98 (2012).

[194] *Windsor*, 133 S. Ct. at 2692 (discussing how New York state's efforts toward same-sex marriages "were without doubt a proper exercise of its sovereign authority within our federal system, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other.").

[195] *Id.* at 2693 (quoting to H.R. Rep. No. 104-664, at 16 (1996)).

[196] *Id.*

subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency."[197] That was its "principle effect."[198]

Hence, the concept of dignity in *Romer* and *Lawrence* found accord with *Windsor*. Inequality as harm in DOMA had dignity implications beyond rights and benefits. As Kennedy observed, that harm was also figurative because the rights and incidents denied federally "enhance the dignity and integrity of the person."[199] However, unlike the dignity of the freedom of couples to engage in same-sex intimacy in *Lawrence*—where dignity precluded morally blameworthy judgment regarding those intimate choices that could translate into disrespect—Kennedy discussed the harm through dignity with more subjectivity here in *Windsor*, expressly illustrating how the inequality of DOMA creates a discussion of worthiness. At first the language seemed to direct us toward the type of dignity in *Lawrence*: "By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect."[200] Then, however, it appeared that Kennedy veered strictly away from that course by defining dignity as worthiness: "By this dynamic DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition."[201] Shortly-thereafter, Kennedy returned to discussing how the inequality or "differentiation demeans the couple, whose moral and sexual choices the Constitution protects."[202] Yet then Kennedy also noted that the inequality has led to demeaning the couple "whose relationship the State has sought to dignify."[203] The vacillation between the inequality of DOMA that demeaned or disrespected same-sex couples and the dignified status that traditional heteronormative marriage conveyed upon same-sex couples if recognized creates ambiguity. One reading could be that marriage dignified all relationships because that has been a social norm—regardless of opposite-sex or same-sex coupling. And yet another reading could be that marriage dignified same-sex relationships in the ways that no existing commitment status in same-sex relationships could. This ambiguity begged the question: what would make same-sex couples worthy to be dignified through marriage? This duality has added a spoonful of the politics of respectability in *Windsor*'s attempts to address gay rights and discrimination.

Additionally, it is the decision to marry—i.e. the choices and conduct—that the politics of respect and respectability go toward enhancing, not sexual orientation itself. All of this meditating is calibrated towards conduct and choices and the worth of such effort, rather than respect for sexual identity or orientation: "For the same-sex couple who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the

[197] *Id.*
[198] *Id.* at 2694.
[199] *Id.*
[200] *Id.*
[201] *Id.*
[202] *Id.*
[203] *Id.*

State worthy of dignity in the community equal with all other marriages."[204] This result in *Windsor* created much more equality amongst married couples, same-sex or otherwise. But was it equality tempered by respectability? And what did this do for sexual orientation directly?

Obergefell v. Hodges probed at deeper questions about the way sexual minorities have either negotiated themselves into a favorable status within the law and by extension within society at large. Its advancement for marriage equality was great, obviously. But from *Obergefell*, the advancement for sexual orientation anti-discrimination was not quite as absolute. At first on the constitutional level, Kennedy's due process inquiry here would seem to be helpful towards equality because the broadness of a "fundamental right to marry" inquiry versus a "fundamental right to same-sex marriage" inquiry invited comparisons with the way the constitutional issue of sodomy was framed in *Lawrence*. In *Obergefell* as it was in *Lawrence*, the inquiry here was set broadly and not narrowly, thus allowing for extension to same-sex couples of the fundamental right to marry.[205]

But whatever potential the broadness of Kennedy's due process inquiry in *Obergefell* might have connoted, the actual shape and perspective of *Obergefell*'s due process inquiry was not quite like *Lawrence* after all. *Lawrence*'s fundamental rights inquiry regarding sodomy laws was an example of a resolution cast more so under a negative rights inquiry, involving questions into unnecessary or unconstitutional state burdens on individual liberties.[206] Even if the conclusion held that sexual minorities have constitutional rights to engage consensually in sex that had been otherwise criminalized by state sodomy laws and therefore invalidating such sodomy laws, the state burdens upon liberties were ultimately phrased negatively and not positively in *Lawrence*. In *Obergefell*, the Fourteenth Amendment Due Process inquiry was cast under a positive rights analysis—whether the fundamental right to marry for opposite-sex couples extends to same-sex couples.[207] In some ways, the differences also revealed the disparities between state criminalizing of same-sex intimacy and state bans on recognizing marital status in same-sex relationships. In *Bowers* and *Lawrence*, same-sex couples were already engaging in consensual sexual activity long before the enforcement of anti-sodomy laws. By contrast, in *Obergefell*, because marriage was a practice given state legal pronouncement only upon opposite-sex couples traditionally, same-sex couples were not legally married prior to state marriage bans. In this way, it was hard to articulate that same-sex couples had a practice or choice in marriage that was constitutionally protected and subsequently infringed upon by state marriage bans. Instead, in *Obergefell*, the Court's answer to the fundamental right to marriage question was resolved in a more positive rather than negative rights approach, recognizing that same-sex couples should have fundamental marriage rights that they did not have under the

[204] *Id.* at 2692.

[205] The issues in *Obergefell* involved whether the Fourteenth Amendment "requires a State to license a marriage between two people of the same sex" and "requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right." *Obergefell*, 135 S. Ct. at 2593.

[206] *But see generally* Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 Minn. L. Rev. 1184 (2004) (discussing potential positive rights implications in *Lawrence*).

[207] *See Obergefell*, 135 S. Ct. at 2640 (Thomas, J., dissenting) ("Today's decision casts that truth aside. In its haste to reach a desired result, the majority misapplies a clause focused on 'due process' to afford substantive rights[.]")

Constitution the night before the *Obergefell* decision.[208] Ultimately, the distinctions between *Lawrence* and the realities of litigating the same-sex marriage issue could be reconciled through an expansive reading of *Lawrence*, drawing on its broadness and moments of commingling liberty and equality on issues of sex, privacy, and relationships to influence and resolve the same-sex marriage debate.[209] But in *Obergefell*, the distinctions also led to a compromise for sexual orientation anti-discrimination in the decision's promise of marriage rights to same-sex couples, whereas an equality inquiry in *Obergefell* contingent on finding marriage bans discriminated based on sexual orientation might not.[210]

There are other reasons that Kennedy's fundamental rights inquiry compromised advancement for sexual orientation anti-discrimination. Kennedy's application of the fundamental right to marry for same-sex couples in *Obergefell* extended an institution, practice, and/or status that even he explicitly emphasized as something that historically has been heterosexist.[211] This heterosexism underscored a heteronormative bias that Kennedy had to downplay or at least a wholesale heterosexual attribute of the practice of marriage traditionally that Kennedy had to insist was evolving. Either way, he uses that heterosexual characteristic implicitly as the demarcation line of exclusion. This was his starting point. The bigger implication from this starting point later when he persuasively extends the fundamental right to marriage to same-sex couples was that Kennedy's judicial extension of the right to marry possibly imported same-sex couples into a heteronormative world. In this way, the *Obergefell* decision recognized and preserved the heterosexual presence of marriage, envisioned same-sex couples as seeking the right to marry, and invariably played the dynamics in order to extend that right to same-sex couples by relying on respectability politics.

Respectability politics in *Obergefell* emerged first through Kennedy's version of marriage—how it possessed and imparted dignity through its transformative powers based on its historical connotations—and secondly from his evaluation of whether same-sex couples, who were asking for marriage, should be extended that right. At the decision's opening, Kennedy situated his marriage ruling within the language of dignity and identity, praising marriage as

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[208] Yoshino, *Freedom*, *supra* note __, at 168-69 ("Justice Kennedy's use of "liberty" rather than "equality" here is significant. . . . The Court could have circumvented the issue of whether the negative right at issue in *Lawrence* should be extended to the positive right at issue in *Obergefell* by relying on the fact that even if marriage were not a right, it could not be denied on the basis of gender or orientation. Instead, however, Justice Kennedy chose to deal with the issue as a matter of liberty, deliberately eliding the negative/positive liberty distinction in this context.").

[209] David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 Vill. L. Rev. 891, 896 (2006) ("[S]ome have found support in Lawrence and other cases for a positive right to marry rooted in substantive due process. Carlos Ball, for example, contends that an affirmative right to public recognition of marriage can be justified as an 'important exception' to the usual understanding of the Constitution as embodying only negative rights against state interference.").

[210] Kyle C. Velte, Obergefell*'s Expressive Promise*, 6 HLRe 157, 158 (2015) ("In short, although Obergefell had the opportunity to make formal equality for LGBT people part of its constitutional canon, it did not.6 Its doctrinal reach is thus limited, leaving LGBT people without legal protections in many facets of life. Being able to marry on Sunday, but being lawfully fired on Monday is a far cry from formal equality.")

[211] *See Obergefell*, 135 S. Ct. at 2594 (Kennedy, J., majority) ("There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.").

something that offered "promised nobility and dignity" [212] and "allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons."[213] It came as no surprise after *Lawrence* and *Casey* that *Obergefell* would have relied on dignity interests in order to articulate the constitutional implications in a couple's decision to marry. He talked up marriage in the most human sense—quoting Confucius and Cicero, and generalizing the "beauty of marriage" expressed in religion, philosophy, and art.[214] But the transcendent qualities of marriage are limited; they are shortly tempered by Kennedy's "fair and necessary" realization that "these references [to marriage] were based on the understanding that marriage is a union between two persons of the opposite sex."[215] This realization was an indication that Kennedy seemed to locate marriage within heteronormative traditions and values.

His full-throated vagueness here, like in *Windsor*, created slippage. Though *Obergefell* ultimately extended a fundamental right to marry for same-sex couples, what was consistent with that positive rights framing of the issue offered not respect for sexual identity or even same-sex couples but a possible respectability. Marriage has not been an inherent entitlement for same-sex couples as it has been for opposite-sex couples since antiquity. As a long-standing heterosexual status and practice, marriage dignified relationships and was being sought by same-sex couples who seek to be recognized. Ultimately, they had to show that they had earned it.

We see this evaluation in the thrust of Kennedy's opinion in *Obergefell*. As he justified extending marriage, he revisited concepts of animus and dignity and intertwined them as he did in *Windsor* as anti-stereotyping principle to mediate toward respectability. The correlation between animus that propagated laws and the harms to dignity was at once a narrative structure in which a history of exclusion of sexual minorities and same-sex relationships were uncovered—a history that bore constitutional significance because it was animated by hatred and disrespect toward sexual minorities and created the marriage bans at issue, and consequently a history of legal exclusion stemming from animus that resulted in bans on certain personal choices that limited autonomy in such a way that harmed human dignity. But because the mediating goal was marriage equality through respectability, both animus and dignity were calibrated to that effect in *Obergefell*.

The use of animus and dignity as an anti-stereotyping device that channeled toward the right to marriage in *Obergefell* led Kennedy to discuss distinctly the dignity implications of marriage alongside acknowledging the dignitary harms that exclusion from marriage caused. Here *Obergefell*'s reliance on dignity focused on how much having a marriage right conferred dignity and how same-sex couples now qualified to get that right. According to Kennedy, there were "four principles and traditions [that] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples."[216] Essentially, these four principles and traditions allowed Kennedy to specifically evaluate the qualifications of same-sex couples to be given the right to marry. Each of these principles and traditions dealt, in their own manner, with what marriage conferred upon a couple and how same-sex couples, as far as each principle and tradition was concerned, qualified to receive marriage. The first was the

[212] *Id.*
[213] *Id.*
[214] *Id.*
[215] *Id.*
[216] *Id.* at 2599.

importance of marriage for facilitating personal choice, autonomy, and self-definition: "Choices about marriage shape an individual's destiny."[217] The way in which Kennedy justified conferring marriage to same-sex couples from this aspect of marriage was connected to dignity: "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices."[218] Curiously, Kennedy identified this dignity and used it to find same-sex couples were sufficiently qualified to receive the right to marry. Yet, had Kennedy avoided qualifications and merely described the harms to dignity that animus-filled bans on marriage have had on decisions in their relationships, this "sufficient" qualification would have likely connoted less respectability through dignity and more on respect. Similarly in the second principle and tradition of marriage that Kennedy analyzed, where marriage "supports a two-person union unlike any other in its importance to the committed individuals,"[219] a likewise rhetorical theme arose in which Kennedy discussed what marriage conferred and whether same-sex couples qualified enough to obtain the right to marry, rather than showing the harms to personal dignity. Marriage " 'dignifies couples who 'wish to define themselves by their commitment to each other.' "[220] Since such couples had traditionally been opposite-sex ones, the dignifying characteristic of marriage reflected a paternalistic, heteronormative value that placed married opposite-sex couples above cohabiting opposite-sex couples. The type of dignity that marriage gives was not about inherent dignity that was entitled to respect but about respectability accorded to couples who chose to register themselves as married rather than unmarried; and likewise it would expand similarly amongst same-sex couples, creating a hierarchy between married and unmarried same-sex couples. Again, the discussion of this second attribute of marriage was imbued with a certain dignity that is achieved based on worthiness obtained from a comparison to opposite-sex couples and not inherent entitlement or respect.

On the surface, the third attribute seemed to possess a difference from the first two as it appeared to discuss the dignitary harms that families with same-sex parents suffered because of the exclusion out of wedlock.[221] Marital rights of parents also impart substantive rights, incidents, and presumptions of parenting in certain instances that escaped unmarried parents with children, particularly if there are no blood relations.[222] Absent rights to marry, children of unmarried same-sex parents lack legitimacy: "Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser."[223] The stigma—or dignitary harm—might be disrespect because of the heterosexist hierarchy marriage created, but the bigger message here was that marriage was the foremost way to connote family. This, again, like the previous aspect regarding marriage, was a traditional but somewhat outdated view—both arcane toward modern families and ironic in its injection in a case about the changing face of marriage. To be sure, marriage can have major social benefits to parents and families. But the harm to dignity should be about the potential for segregating between families of same-sex couples and unmarried opposite-sex couples on the one hand, and married opposite-sex couples on the other; the stigma was about discrimination if one class of families was favored over another based on the values placed on the constructed

[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.* at 2600.
[222] *Id.*
[223] *Id.*

status of marriage. Families were not "somehow lesser" inherently because they stood outside the institution of marriage. Rather the more correct perspective was that families should be viewed as having inherent dignities to be respected under the law.

Finally, the last attribute Kennedy mentioned to justify extending the right to marry for same-sex couples was its symbolism. "[M]arriage is the keystone of our social order," Kennedy wrote.; and as a result of that social exultation of marriage, "just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union."[224] Once again, marriage *gives* something and here as the pinnacle of social order—or heteronormative hierarchy—it gave legitimacy to the marrying couples. Since same-sex couples were traditionally excluded from marriage, they have suffered from denials in certain privileges attached to marriage: "Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage."[225] But that harm had also symbolic connotations because "[s]ame-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.[226] This observation was the closest to describing harm to dignity from the animus and disrespect to same-sex couples that would require redress through marriage calibrated in respect. However, after describing this harm, what followed was respectability: "Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning."[227] The focus here should have been fully on the dignitary harm that the marriage exclusion inflicted on same-sex couples and not to the dignifying qualities of marriage and its symbolism. With that last statement, the sentiment became again patronizing, drawing this section back to respectability politics.

After all these justifications, Kennedy pronounced that same-sex couples may be given the fundamental right to marriage. He used the animus-dignity connection as a mediating device, an anti-stereotyping principle, to evaluate whether that extension would be justifiable based on analogous interests that he viewed same-sex couples shared in their relationships versus the essential attributes that marriage embodied. What was problematic here was that the objective of marriage equality here was preceded and was affected by the politics of respectability. In turn, that respectability was being channeled by the animus-dignity connection to justify the worthiness of same-sex couples in seeking and obtaining marriage for themselves. Marriage, as Kennedy portrayed either knowingly or inadvertently, conferred not only dignity through respectability but heteronormative values and demands that might have expected same-sex couples to negotiate their subjugation once marriage was available to them. This was not dignity as respect, which would have been ideal, but it was dignity as respectability, which deviated from *Lawrence*.

From the politics of disrespect in *Bowers* to respect in *Lawrence* and now to the politics of respectability in *Obergefell*, progress seemed to have stalled if human worth is earned and inherently respected. One might have surmised that that progress would have been more absolute—linear in trajectory. But more true to political incrementalism, lasting change may come from a spiraling movement that must process back and forth, from one station of progress

[224] *Id.* at 2601.
[225] *Id.*
[226] *Id.*
[227] *Id.*

to another. Accordingly, once respect was obtained in *Lawrence*, it was not impossible to conceive of veering in *Obergefell*, which it did. The question in Part IV is how to right the course.

IV. RESTORING RESPECT

For same-sex relationships and families, obtaining nationwide marriage recognition at the Supreme Court was a monumental step—even in the face of past criticisms regarding its efficacy for formal equality. Justifiably, after decades of judicial and legislative disrespect towards same-sex relationships in denying requests for marriage, *Obergefell* was a cause for genuine celebration, in real life or on social media. Marriage imports rights and benefits to support relationships and families that an otherwise unmarried status would not. And symbolically, the recognition of marriage provides some legitimization of same-sex relationships and families from the dominant culture, which consequently brings visibility and acceptance to the lives of sexual minorities.

There are limitations, however, to the specific procurement of marriage equality in *Obergefell*. From an ideological perspective, the Ettelbrick/Stoddard questions linger cautiously regarding its efficacy and value, as marriage characteristically was the epitome of monogamous heterosexual relationships that promoted heteronormative—and arguably heterosexist—views on family, childrearing, sexuality, and gender. Its traditional subordination of women, which still has remnants here and there, poses serious implications for same-sex relationships and how they are perceived or even subordinated by the dominant culture.[228] An institution that, by itself, historically fostered the subordination of women in ways analogically similar to Adrienne Rich's concept of "compulsory heterosexuality,"[229] could suggest its incompatibility for the symbolic recognition of same-sex relationships unless same-sex relationships affirmatively and unapologetically undergo an appropriation of marriage that weds the symbolic shell of marriage with substantive merits and values of gay existence. That development would align itself with Thomas Stoddard's original thoughts and hopes for same-sex marriage in 1989.[230] Otherwise, Ettelbrick's view might prevail somewhat more strongly as the politics of respectability extends into the post-*Obergefell* period, allowing for heteronormative values to potentially morph and cross over to subordinate same-sex relationships.[231]

Doctrinally-speaking, this milestone in the marriage equality movement leaves gay rights at the Supreme Court with a strong admission of respectability politics that could functionally and philosophically inhibit long-term anti-discrimination advances for sexual minorities. Kennedy's use of dignity in *Obergefell*, which leaves us in the politics of respectability—in the realms of rank and hierarchy—should provoke unease as the likelihood for stratification continues, this time more subtly than outright disrespect (as in *Bowers*). Respectability politics reinforces social hierarchies and places heterosexual values over the values of other groups in exchange for acceptance that is fundamentally less egalitarian from the get-go. The realities of *Obergefell* from this examination here indicate we are still in a place where heteronormative

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[228] *See generally* Nancy D. Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 Va. L. Rev. 1535 (1993).

[229] Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 Signs 631, 633 (1980).

[230] *See* Out/Look, *supra* note ___, at 13.

[231] *Id.* at 17.

values frame our ideas about sexual identity and orientation in ways that might stave off a more true-to-form theory of human existence within formal equality. In addition, that gap is even furthered by the fundamental rights approach that focused on extending the marriage right to same-sex couples but gave short-shrift to the equal protection potential for sexual orientation anti-discrimination. The unanswered questions regarding heightened protections for sexual orientation from *Windsor* continue to linger. Sexual minorities cannot avail themselves to protected classifications under the 14th amendment, but they are, at least, respectable.

Yet even if it seems that in the contest between #LoveWins and #GayWins, the former has prevailed over the latter, hope still resides. None of this is ever a total and infinite loss. Observations about progress in the gay rights movement often expose incrementalist tendencies in which intervals of small steps eventually culminate and advance into bigger, more significant changes. The theory of political incrementalism posits that progress on a heavy societal topic pressing the consciousness of a large body politic often resembles the slow mental ruminations that a person might engage in over an important issue.[232] Change perseverates back and forth on the pros and cons until a clear resolution is reached—a more or less, two-steps-forward-but-one-step-back approach.[233]

Even in the road to marriage equality, the movements and shifts to *Obergefell* on the federal level did not advance at all cleanly from one stage to another, but the movement was a spiraling back-and-forth along a trajectory in which the changing norms for gay rights finally gave the impetus for a movement forward to marriage.[234] One of the important acts that drove this shape of progress was the repeated and persistent leveraging of one victory, however large or small, for another victory down the line, and so on and so forth. This notion of incrementalism specifically in gay rights is compounded with the observations that countries slow down on gay rights after marriage,[235] creating an urgency that proponents of gay rights must capture the excitement of gay marriage and the enthusiasm over social acceptance of gays to then carefully springboard to advancements in sexual orientation anti-discrimination that are more truly egalitarian and more precisely locate the existence of sexual minorities within the politics of respect.

On the federal level, absent legislation that guarantees protections against discrimination, such as Title VII, constitutional case law should continue to develop and underscore individual rights protections for sexual minorities.[236] Accordingly, the same 14th Amendment due process and equal protection realm would serve as doctrinal venue to stretch gay rights advocacy in a

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[232] David Braybrooke & Charles E. Lindblom, A Strategy of Decision: Policy Evaluation as a Social Process 81 (1963).

[233] *See accord* Susan Block-Lieb & Terence C. Halliday, *Incrementalisms in Global Lawmaking*, 32 Brook. J. Int'l L. 851, 851 (2007) ("Academics have noted that global law may develop only slowly--two steps forward, three steps back, three steps forward, two steps back. Some are frustrated with the interminable pace and the fragmentation caused (they claim) by incrementalism in international law.") (citations omitted).

[234] Jeremiah Ho, *Once We're Done Honeymooning:* Obergefell v. Hodges, *Incrementalism, and Advances for Sexual Orientation Antidiscrimination,* 104 Ky. L.J. (forthcoming 2016) (on file with author).

[235] *Developments in the Law: Sexual Orientation & Gender Identity*, 127 Harv. L. Re. 1682, 1689-90 (2014) (citing examples from the Netherlands and Canada where concern that "once the marriage equality fight is won nationwide, the urgency of fighting for other LGBT rights will diminish").

[236] This does not rule out state claims based on nondiscrimination ordinances or federal claims based on other types of federal legislation.

counter-majoritarian way that could perhaps provoke a supportive legislative response down the line. Now that major gay rights litigation can continue more steadily outside the direct context of marriage,[237] discrimination cases under both due process and equal protection theories can litigate more directly over discrimination based on sexual orientation rather than discrimination over relationship status. Such judicial inquiry into discrimination based on sexual orientation could focus itself back to identity without as many contextual filters that allow courts to take themselves away from difficult conversations regarding the acceptance of minority sexual orientations, particularly now that the climate for sexual minorities is more open and promising in the post-*Obergefell* era.

Consequentially, these future cases must persist with exploring and preserving the dignity interests of sexual minorities. Dignity, from *Lawrence*, still has its currency and should not be abandoned in judicial advancements in sexual orientation. Rather, pro-gay litigants must now continue to draw upon dignity, in part, to couch their cases against discrimination post-*Obergefell*—except that dignity must not trigger a politics of respectability. It must be recalibrated back towards a politics of respect, where it serves to advance an entitlement and not worth that is earned. The following explores three ways.

A. *DIGNITY IN FUNDAMENTAL RIGHTS*

In the Due Process context, if indeed Kenji Yoshino's vision regarding the end of equal protection doctrine is correct and that due process liberty protections are the current and future engines of constitutional change for marginalized groups,[238] then the opportunities that were available for the use of dignity in *Lawrence* and *Obergefell* will likely continue in future cases that deal with violations of fundamental rights issues. Shortly, within the immediate aftermath of *Obergefell*, both Nan Hunter and Laurence Tribe in their own respects concurred with Yoshino about due process jurisprudence—at least that the rise of liberty has underscored the triumphs of sexual minorities against discrimination in constitutional case law.[239] And in *Obergefell* specifically, Yoshino articulated that Kennedy's opinion here was furthering an approach in substantive due process jurisprudence that favors a more "open-ended common law approach," traced to Justice Harlan's dissent in *Poe v. Ullman*,[240] and was later followed by *Casey*.[241] As Yoshino summarizes, Harlan's approach "outlined a balancing methodology that weighed individual liberties against governmental interest in a reasoned manner. Such an approach always occurred against a backdrop of tradition, but was not shackled to the past, not least because tradition was itself 'a living thing.' "[242] The anti-thesis of this approach was the more "formulaic" one that the Court used in *Washington v. Glucksberg*,[243] where "to be recognized as a due process liberty a right had to be 'deeply rooted in this Nation's history and tradition,' and

[237] *See e.g. Evans v. Ga. Regl. Hosp.*, 15-15234 (11th Cir. Nov. 19, 2015) (appeal by employee based on alleged sex and sexual orientation discrimination by employer hospital); *Lively v. Fletcher Hospital, Inc.*, 1:16-CV-00031 (W.D. N.C. Feb. 10, 2016) (suing for employment discrimination under Title VII, *inter alia*, under sexual orientation).

[238] *See* Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747, 796 (2011).

[239] *See* Nan D. Hunter, Interpreting Liberty and Equality Through the Lens of Marriage, 6 Cal. L. Rev. Circuit 107 (2015); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv. L. Rev. F. 16 (2015).

[240] 367 U.S. 497 (1961).

[241] Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 Harv. L. Rev. 147, 149 (2015).

[242] *Id.* at 150.

[243] 521 U.S. 702, 721 (1997).

'implicit in the concept of ordered liberty.' It also required a ' "careful description" ' of the asserted fundamental interest."[244] In this way, "the Court was more open to recognizing negative 'freedom from' rights than positive 'freedom to' rights—though to be clear, it did not formally require the alleged right to fall on the 'negative-right' side of the divide."[245] One could already anticipate Kennedy's preference for a more one-ended, perhaps more holistic approach in *Obergefell* from the differences between his majority opinion in *Lawrence* and that of Justice White's in *Bowers*. In *Lawrence*, the intimate association of consensual same-sex partners was couched in broader terms so that privacy concerns could draw forth the fundamental rights violations. In contrast, *Bowers* executed a narrower categorization of sexual acts between same-sex and opposite-sex couples that followed from the use of a more formulaic approach to substantive due process, which permitted morality to stifle any fundamental rights recognition and protection. The focus from the benefits of the liberty approaches in *Lawrence* and *Obergefell* combined is what Yoshino calls an "anti-subordination principle" that the Court, in Yoshino's word, can use to "guide a proper understanding of the guarantee of 'liberty' in the future (as it has in the past)"[246] and perhaps provide for "[d]iscerning new liberties" as "more an art than a science."[247] The bigger implication from Yoshino is that "[t]his increased emphasis could serve to close as well as to open new channels of liberty. For this reason, this new birth of freedom is also a new birth of equality."[248] A conclusion about *Obergefell* in this way elevates its potential beyond its landmark utility for bringing marriage to same-sex relationships and serving to dignify same-sex couples and their families. There is a saving grace here if an anti-subordination concept is paired with the Court's parting words in *Obergefell*—that beyond marriage same-sex couples "ask for equal dignity in the eyes of the law"[249] and that "[t]he Constitution grants them that right."[250] From *Obergefell* into future cases addressing marginalization of rights based on a bias against a minority sexual orientation, dignity rights articulation should continue to be strengthened.

As Nan Hunter notes that post-*Obergefell*, "[a]dditional challenges to laws that restrict liberty within the zone of intimate association seem inevitable"[251]—which seems to broaden potential discrimination cases here beyond the marriage context[252]:

> The Supreme Court has described the prototype of intimate association as relationships that involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life." Cases brought on this ground have often involved plaintiffs who were fired from public sector jobs, frequently in law enforcement, for beginning romantic relationships with co-workers or offenders in violation of agency policies.[253]

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[244] Yoshino, *Freedom*, *supra* note __, at 150.
[245] *Id.*
[246] *Id.* at 179.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] Hunter, *supra* note __, at 115.
[252] *Id.* at 114-15.
[253] *Id.* at 115 (citaitons omitted).

But Hunter seems to be unsure on "how the liberty right recognized in *Obergefell* will interact with government policies that ban or impose penalties for intimate associations in workplace or other settings."[254] Applying an antisubordination concept to the equal dignity concept in *Obergefell* that competed with respectability politics in that case might serve to help answer Hunter's uncertainty. The pairing in future Due Process cases could solidify dignity interests and rights when dealing with fundamental rights violations with a sexual orientation component—perhaps discrimination of same-sex cohabitation based outside of marriage (taking us in the context somewhere between *Lawrence* and *Obergefell*) or in cases that somehow pit sexual orientation with First Amendment rights and public accommodations. Tribe has noted that "[t]he 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."[255] Accordingly, dignity in due process cases is less nebulous as critics have noted; instead, "[t]he constitutional principle of equal dignity also gives the lie to public officials who discriminate against LGBT individuals."[256] In Tribe's First Amendment example that mentions Kim Davis (the county clerk from Kentucky who personally challenged the *Obergefell* ruling by refusing to issue marriage licenses until she was able to do so in a way that was aligned with her religious beliefs), Tribe notes that

> [a]s 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.[257]

If there is a continued trend to couple dignity with the anti-subordination approach from *Obergefell* outside the marriage context, the use of dignity might ultimately sustain cases that achieve anti-discrimination based on fundamental rights theories. It might restore respect.

B. *RESPECT IN EQUAL PROTECTION*

Even if equal protection is relied upon instead of due process for propagating and justifying dignity interests after *Obergefell*, dignity as respect could still resurge as a concept that animates the invidiousness of discrimination based on minority sexual orientation. The shell of dignity from *Windsor*, despite it being from a marriage case, has much import potential into from

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[254] *Id.* at 115.

[255] Tribe, *Equal Dignity*, *supra* note __, at 30.

[256] *Id.*

[257] *Id.*; *see also* Yoshino, *Freedom*, *supra* note __, at 173 ("By basing its ruling on the Due Process Clause (this time in addition to, rather than in lieu of, the Equal Protection Clause), the Obergefell Court required the equality of the vineyard. And even then, as we have seen, some state actors have chosen to refuse to issue marriage licenses across the board rather than to issue them to same-sex couples. Those actors violate a due process ruling in a way that would not violate an equal protection ruling.").

one equality jurisprudence case to another because of its use in that decision. Again, no longer limited in the marriage context, equal protection claims based on sexual orientation would side-step entirely one probable circumstance that could divert discussions purely on the basis of discrimination to those based on sameness—thus incurring notions of respectability. What is left behind from *Windsor* is the doctrinal assessment of scrutiny based on animus borrowed from *Romer*, now solidified by the DOMA case in that more searching form toward discrimination premised on sexual orientation—despite questions of whether it was a higher form of rational basis or something else. In addition, the narrative structure of sexual orientation discrimination based on sexual orientation could also survive in future cases by carrying over the animus-dignity connection that shows the animus behind a discriminatory exclusion of sexual minorities correspondingly hurts their dignity interests because it sustains a politics of disrespect. The remnant from *Obergefell* is the further solidification of animus and dignity concepts as an anti-stereotyping principle. With a continued focus on litigating the dignity interests and rights of sexual minorities under equal protection claims, dignity would be more easily recalibrated to a politics of respect where the focus falls more naturally on violations against the inherent humanity of sexual minorities—with their minority sexual orientation as proxy for humanity—rather than solely and particularly on the cultural assimilation of same-sex couples and families. In those opportunities to litigate, a recalibration of the anti-stereotyping properties of the animus-dignity connection must occur in which dignity reflects respect and not respectability.

From *Romer*, *Windsor*, *and Obergefell*, animus has been used to reveal the politics of disrespect underneath the heterosexist disapproval flagrantly inflicted upon gays but couched in moral terms. Animus has been used to address that disrespect—by noting that such disrespect for their humanity engenders laws that are consequently discriminatory. The impact of animus and its discriminatory harms are brought out even further when such harms are couched within dignity concepts that can show that animus or disrespect serves to offend humanist interests that also violate constitutional principles of liberty and equality. From *Lawrence*, dignity emerged in gay rights as way to speak about the inherent worth of sexual minorities as it did in *Casey* about the individual personhood interests of women. And by facilitating this conversation, dignity also points to what exactly needs to be protected and preserved in individual rights jurisprudence: autonomy and personhood—not respectability. Thus, respect should be reserved for an individual's sexuality as an extension of an inherent part of his or her identity or personhood, and respect is the better choice in future cases. Accordingly, returning to dignity as respect in the constitutional litigation of gay rights in equal protection helps recover the anti-discrimination aspect of the gay rights movement in a more appropriate light.

C. *RESPECT AND IMMUTABILITY*

A further guarantee for future equal protection cases to recalibrate dignity as respect might be through its help for courts to articulate sexual identity as an immutable trait in cases that are prone to finding discrimination against sexual minorities. Immutability serves as one of the several factors federal courts have reserved for determining a protectable trait under the 14th Amendment.[258] But until recently, the debate over a person's sexual orientation and its

[258] *See e.g.* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 Seattle U. L. Rev. 135, 146 (2011) ("[A]lthough described in different ways, the basic factors for determining suspect class status were in place by the early 1980s: (1) prejudice against a discrete and insular minority; (2) history of discrimination against the group; (3)

immutability was tipped in favor of mutability, particularly when homosexuality was considered immoral or biologically aberrant. Indeed, nature or nurture, biology or choice, the dilemma over immutability has been an issue that has plagued the finding of sexual orientation as protected class for heightened scrutiny. Perhaps it was the misunderstanding of homosexuality as an immoral lifestyle (which means you can choose) or pathology (which means you can be cured) that made it hard to see sexual orientation as an immutable trait. In any event, for gays, immutability was one of the hardest factors to substantiate in favor of finding protected class status, and therefore, any elevation for heightened protections under equality jurisprudence for sexual minorities was stalled.

To ask whether a trait was changeable in terms of nature or nurture implied that courts traditionally defined immutability more so along the lines of biological mutability.[259] Cases in this vein often would explain the immutability factor by calling it "accident of birth."[260] Over the years, however, out of a minority of cases, a reinterpretation of the immutability factor occurred where its definition honed in on a trait's significance in terms of one's personhood so much so that one should not be coerced into changing the trait.[261] Hence, the immutability of the trait—or the efficacy of forcing mutability upon the trait—became of a means to find the fundamental importance of the trait, and not an end to itself for describing the biology of it. The way in which courts would determine whether this factor weighed in favor of a protected class finding would be to render how "immutable" a trait was by weighing out the fundamental nature in the face of interferences with some sort of coerced conformity that would change that trait. From that aspect, it is possible to see that this meaning of immutability carved out by certain courts, "is sensitive to the importance of self-concept and embraces the idea that certain characteristics are core to an individual's sense of self and thus must be deemed unalterable."[262]

The contentious history behind determining the immutability of sexual orientation itself has a start in the politics of disrespect. But post-*Lawrence*, and when marriage began to acquire more traction after *Goodridge*, that history started to shift in the redefinition immutability frequently at state levels in courts that had decided on the marriage equality issue in the short period before *Windsor* and in the period up to *Obergefell*. In 2008, the California Supreme Court, in part, took note of the Ninth Circuit's use of the minority definition of immutability in its suspect classification of sexual orientation in *In re Marriage Cases*: "Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."[263] Soon after, the state supreme courts in Connecticut and Iowa respectively found the same in their pro-gay marriage cases.[264]

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the ability of the group to seek political redress (i.e., political powerlessness); (4) the immutability of the group's defining trait; and (5) the relevancy of that trait.").

[259] *Id.* at 161. ("Initially, courts considered immutability something that a person is born with, a trait biologically determined[.]").

[260] *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

[261] Strauss, *supra* note __, at 162.

[262] Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1513 (2011) .

[263] 183 P.3d 384, 442 (2008).

[264] *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 438 (2008) ("This prong of the suspectness inquiry surely is satisfied when, as in the present case, the identifying trait is 'so central to a person's identity that it would

But at this point, there is little guidance in the federal courts regarding this factor's current incarnation in constitutional case law after *Obergefell*. There is criticism about the efficacy of this newer, less formulaic definition from its seemingly empirical older sibling, as well as the definition's champions.[265] But its use to find sexual orientation as suspect trait in one of the lower federal court marriage decisions in the Sixth Circuit that eventually consolidated with others to become *Obergefell* does reveal some continuing dependence on immutability as part of the four-factor test for protected traits in recent equality jurisprudence. In *Obergefell v. Wymyslo*,[266] the federal district court in Ohio was quick to use the less formulaic, more holistic approach: "To the extent that "immutability" is relevant to the inquiry of whether to apply heightened scrutiny, the question is not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon."[267] From there, despite "now broad medical and scientific consensus that sexual orientation is immutable,"[268] the *Wymyslo* court intimated its appeal for the less formulaic, less empirical definition and stated that "[e]ven more importantly, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if such a choice could be made."[269] As support, the *Wymyslo* court cited to *Lawrence* and its underlying endorsement of individual autonomy in the Supreme Court's holding to reveal how it interpreted the importance of this less rigid definition of immutability.[270] Other federal marriage cases leading up to *Obergefell* that adopted the same meaning of immutability have cited also to *Lawrence* in similar vein.[271]

Essentially the way in which *Wymyslo* and other federal cases have aligned this definition of immutability with *Lawrence*'s regards for autonomy and personhood in adopting it to find that sexual orientation is a protected trait for heightened scrutiny exhibits some degree of accord with the politics of respect. Between respect and respectability, this second definition of immutability seems to favor respect because of these doctrinal connections to individual freedoms and

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be abhorrent for government to penalize a person for refusing to change [it] . . . .' "); *see also Varnum v. Brien*, 763 N.W.2d 862, 893 (Iowa 2009) (""[W]e agree with those courts that have held the immutability 'prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." ' ").

[265] *Compare* Jessica A. Clarke, *Against Immutability*, 125 Yale L.J. 2, 32-53 (2015) *with* Zachary A. Kramer, *The New Sex Discrimination*, 63 Duke L.J. 891, 949-50 (2014).

[266] 962 F. Supp. 2d 968 (S.D. Ohio 2013).

[267] *Id.* at 990.

[268] *Id.* at 991.

[269] *Id.*

[270] *See id.*; *see also Lawrence*, 539 U.S. at 577 ("The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.").

[271] *See e.g. De Leon v. Perry*, 975 F. Supp. 2d 632, 651-52 (W.D. Tex. 2014) ("As the Supreme Court acknowledged, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual—even if one could make a choice.") (citing *Lawrence*, 539 U.S. at 576–77); *Wolf v. Walker*, 986 F. Supp. 2d 982, 1013 (W.D. Wis.) ("Rather than asking whether a person could change a particular characteristic, the better question is whether the characteristic is something that the person should be required to change because it is central to a person's identity. Of course, even if one could change his or her race or sex with ease, it is unlikely that courts (or virtually anyone else) would find that race or sex discrimination is any more acceptable than it is now. In *Lawrence* . . . the Supreme Court found that sexual expression is "an integral part of human freedom" and is entitled to constitutional protection, which supports a conclusion that the law may not require someone to change his or her sexual orientation (quoting *Lawrence*, 539 U.S. at 577).

identity. It shifts its balancing toward inherent identity rather than negotiation. There is almost a negative rights analysis associated with liberty embedded in the analysis of interference with change to a particular trait with "the right to be who you are" basically represented by a certain inherent autonomy that the factor recognizes.[272] Thus, it embodies both anti-humiliation principles and anti-subordination principles that Yoshino has found elsewhere in gay rights cases. In addition, the signature of this definition of immutability is compatible with the animus-dignity narrative of sexual orientation discrimination that has been used in gay rights cases to show how governmental interference on the basis of sexual orientation has led to discrimination that demeans the individual. Indeed the contour of the definition has anti-stereotyping potential and pairing it with the animus-dignity connection would underscore the relevance and appropriateness of this immutability definition over the previous one.

If animus and dignity concepts paired together with the newer interpretation of immutability, then this coupling would be another instance where dignity could be recalibrated as respect rather than respectability. Dignity as respect could place this definition of immutability in the tradition of *Lawrence* as far as elevating gay rights and support casting sexual orientation under a broader immutability theory. Incidentally, it would also not be inconsistent with *Obergefell*'s passing mention of immutability; in fact, it could further augment Kennedy's definition in the opinion when he incidentally mentioned that the "immutable nature" of same-sex couples mandated the extension of the right to marriage[273] or that "sexual orientation is both a normal expression of human sexuality and immutable."[274] Along that vein, the associations of dignity as respect within the immutability discussion would reify respect politics and at the same time make case for the immutability of sexual orientation to help gain ground eventually for heighten scrutiny. Immutability, above other factors, has been one that has most often prevented a finding of suspect classification. In other words, what dignity as respect would admit and reveal what this Article has tried to demonstrate with respect rhetoric is that that sexual identity is innate as part of human existence. From here, that mediating effect in animus and dignity concepts recalibrated toward respect could potentially broaden the immutability factor for building up a suspect or quasi-suspect classification for sexual orientation under equal protection.

And suspect classification doctrinally minds that gap between *Obergefell* and anti-discrimination advances for sexual orientation. In this method, pairing dignity as respect with immutability might advance anti-discrimination as it clarifies immutability but also aligns it with anti-discrimination politics. If equal protection finally recognizes sexual orientation under a protected classification, not only does it enhance protections for sexual minorities under the 14th amendment but it presents the leveraging opportunities for anti-discrimination outside the judiciary; such recognition also presses for majoritarian clarification for protection under legislation, such as Title VII. Anti-discrimination protects immutable traits.[275] The purpose of immutability is to help clarify that the trait in question is one in which discrimination has been

[272] Michael Boucai, *supra* note __, at 471 ("As the term's originator recognized, the new immutability, like the Supreme Court's holding in Lawrence, is ultimately about individual "self-determination" in the domain of sexuality.") (citations omitted).

[273] *Obergefell*, 135 S. Ct. at 2594.

[274] *Id.* at 2596.

[275] Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 Vand. L. Rev. 439, 476-77 (2010).

premised upon and one that should not continue to be premised upon.[276] Therefore, pairing the newer definition of immutability with a recalibrated animus-dignity connection that reflects respect politics could convince courts of the adoption of the newer immutability definition and in turn obtain heightened scrutiny for gays. In the long run, such advances bode well for legislative developments in anti-discrimination, as well as preserve a more effective use of dignity as respect. All of this supports dignity as a respect as the normative rather than dignity as respectability. Eventually, if the courts are beginning to elevate protections for sexual minorities by respecting their sexual identities, then there is pressure to do the same on the legislative end. Hopefully, the legislatures will then follow suit.

V. CONCLUSION

Indeed, as this Article has shown, the movement in gay rights advocacy must continue to persist for stronger anti-discrimination protections this era after marriage equality. Sexual minorities have arrived at significant successes of late, but their cultural acceptance is enveloped within a politics of respectability that is incompatible with normative positions on dignity within American constitutional law. Instead, that politics of respectability restricts the visibility of sexual minorities and leaves them within a paradigm that supports a hierarchy of norms and values antithetical, as we have seen here, to formal equality and anti-discrimination. Progressing to the meat of things invariably means that we must move quickly beyond soup.

To reverse the trend, dignity will have to be recalibrated to reflect inherent respect toward sexual identities—in litigation and in ways in which we view substantive rights and equality. Otherwise, minority sexual identities will continue to be subordinated post-*Obergefell*—only this time in deceptively smaller but no less discourteous ways. Consequently, rather than finding out what sexuality means to the dominant culture and allowing the mainstream to define its approach to sexual identity, dignity as respect helps us get closer to allowing sexual minorities to have an equal footing. Respect, and not respectability, would better facilitate the equality that would eventually get both law and society to find out what dignity ought to mean to all of us.

[276] *See* Hoffman, *supra* note __, at 1519-21 (discussing reasons for protecting immutable traits).