DYNAMICS OF CONSTITUTIONAL DEVELOPMENT AND THE CONSERVATIVE POTENTIAL OF U.S. SUPREME COURT GAY RIGHTS JURISPRUDENCE, OR WHY NEIL GORSUCH MAY STOP WORRYING AND LEARN TO LOVE SAME-SEX MARRIAGE

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ABSTRACT

Shortly after his presidential election, Donald Trump announced that same-sex marriage was settled law. His first Supreme Court nominee, Neil Gorsuch, took the same position. Both statements are in direct conflict with Republican orthodoxy. By taking a developmental approach to constitutional change—one that highlights instances of creative syncretism and entrepreneurial actions by justices—this article reveals the conservative legal potential of the underlying rationale of recent gay rights and same-sex marriage Supreme Court decisions. Because these rulings are grounded in a reading of the equal protection clause that emphasizes individual

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dignity and eschews more traditional scrutiny doctrine, they potentially push forward long-held conservative aims to curb judicial interventionism to achieve racial equality and to limit abortion access. This dignity doctrine, as mostly developed by Justice Anthony Kennedy, shows some indications of durability, particularly as it was invoked by the Obama Department of Justice to justify some actions late in that president's term. However, whether a profound shift in how governing authorities interpret and act upon the equal protection guarantee of the Fourteenth Amendment has taken place remains to be seen.

KEYWORDS: *dignity, scrutiny doctrine, same-sex marriage, gay rights, conservative legal movement, Anthony Kennedy*

SHORTLY AFTER HIS ELECTION to the presidency, Donald Trump sought to reassure LGBT Americans by stating that he was "fine" with the legalization of same-sex marriage in the United States. In an interview on the news program *60 Minutes*, the then-president-elect noted that his personal opinions on same-sex marriage were "irrelevant" and that the constitutional question of marriage equality was "done." He stated, "These cases have gone to the Supreme Court. They've been settled. And I'm—I'm fine with that" (Stokols 2016). This position stood in marked contrast to the Republican Party's 2016 national platform, which called for overturning the two Supreme Court decisions that recognized same-sex marriage: *United States v. Windsor* (2013), which ruled that the federal government must recognize marriages where they were already recognized by state governments, and *Obergefell v. Hodges* (2015), which required recognition of same-sex marriage throughout the United States. As stated in its 2016 national platform, the Republican Party

> condemn[s] the Supreme Court's ruling in *United States v. Windsor*, which wrongly removed the ability of Congress to define marriage policy in federal law. We also condemn the Supreme Court's lawless ruling in *Obergefell v. Hodges*, which in the words of the late Justice Antonin Scalia, was a "judicial Putsch"—full of "silly extravagances"—that reduced "the disciplined legal reasoning of John Marshall and Joseph Storey to the mystical aphorisms of a fortune cookie." In *Obergefell*, five unelected lawyers robbed 320 million Americans of their legitimate constitutional authority to define marriage as the union of one man and one woman.

To correct this perceived misstep, the platform called for the "appointment of justices and judges who respect the constitutional limits on their power and respect the authority of the states to decide such fundamental social questions."

In the context of this condemnation of the same-sex marriage decisions and the call to appoint justices willing to overturn these rulings, the position taken by Trump's first Supreme Court nominee, Neil Gorsuch, was all the more surprising. During hearings before the Senate Judiciary Committee, Gorsuch sided with the president against the Republican Party platform and was out of line with the justices who dissented in *Windsor* and *Obergefell*, namely Antonin Scalia, John Roberts, Samuel Alito, and Clarence Thomas. The then-nominee called same-sex marriage "absolutely settled law" (Bollinger 2016).

Why would the Republican president and his first Supreme Court nominee to the seat once held by the anchor of contemporary conservative jurisprudence, Antonin Scalia—who himself was a vociferous dissenter in critical gay rights decisions, such as *Romer v. Evans* (1996), which struck down state limits on anti-discrimination protections for lesbians, gays, and bisexuals, and *Lawrence v. Texas* (2003), which ruled criminalization of consensual adult same-sex intimacy unconstitutional, as well as the marriage rulings—take positions on same-sex marriage at odds with long-held Republican orthodoxy? Alignment with public opinion may suggest one strategic possibility. Public acceptance of same-sex marriage has skyrocketed in recent years (Harrison and Michelson 2017). And perhaps Gorsuch did not want to appear out of the mainstream, a criticism that Senate minority leader Chuck Schumer (D-NY) used to justify filibustering the confirmation vote (Hains 2017). However, Gorsuch and Trump held consistent with long-stated Republican opposition to abortion access despite nearly 80 percent of the U.S. public wanting abortion legal under some or all circumstances (Saad 2016). Strategic alignment with public opinion would appear not to be a driving factor. So why would a conservative jurist learn to love *Obergefell*?

Conservative thinkers, lawyers, and political actors may come to accept *Obergefell* because of how its underlying rationale, namely how it places dignity at the core of equal protection, can serve the ends of the conservative legal movement. By the conservative legal movement, I refer to interests that coalesced since the 1970s to challenge New Deal and Civil Rights-era liberalism. These include corporate interests seeking to limit federal regulatory authority of the economy (Whittington 2001; Clayton and Pickerill 2004); interests challenging remedial policies aimed at overcoming legacies of inequality maintained by deeply institutionalized racism (Balkin and Levinson 2001; Lowndes et al. 2008; Avery 2009); and religious interests enraged by the Supreme Court's sanctioning of contraception and abortion, decriminalization of homosexuality, and recognition of same-sex marriage on the one hand and its curbing of public prayer on the other (Keck 2004, 2015; Teles 2008; Hollis-Brusky 2011). I argue that while dignity in U.S. constitutional

jurisprudence has been primarily developed by Justice Anthony Kennedy in the context of recent gay rights and same-sex marriage rulings, the ill-defined notion of dignity is malleable and has been utilized by Kennedy to strike against affirmative action and abortion access, positions lauded by political conservatives. Dignity, the cornerstone of progressive rulings on gay rights, can ironically become the foundation of an equal protection jurisprudence that undermines strides toward other progressive objectives.[2]

Gorsuch hinted at how conservatives might utilize *Obergefell* when he stated, during his confirmation hearing, that he was not inclined to consider persons as fitting into a particular class. When Senator Dick Durbin (D-IL) asked, in reference to LGBT individuals, whether Gorsuch had any record of "standing up for those minorities who you believe are not being treated fairly" and whether the judge could "point to statements or cases you've ruled on relative to that class," Gorsuch rejected the notion of class or group identity entirely: "Senator, I've tried to treat each case and each person as a person—not a 'this kind of person,' not a 'that kind of person'—a person. Equal justice under the law. It is a radical promise in the history of mankind" (Pramuk 2017).

By making this statement Gorsuch challenged one of the defining frameworks of equal protection jurisprudence, namely suspect class and scrutiny doctrine. In doing so, he signaled his alignment with a conservative legal movement that has, since the late 1980s, reshaped this doctrine. Conservative jurists have not yet offered a full alternative to suspect class doctrine per se. Instead, they have, over time, shifted it from its original purpose of striking against subordination of discrete classes toward a doctrine that is skeptical of any identity-group classification of individuals. Suspect *class* has been replaced gradually with suspect *classification*; whereas the former might consider laws that harm African Americans or other discrete minorities constitutionally illegitimate, the latter considers any law that

2. In this article I am agnostic toward whether achieving gay and lesbian rights recognitions through the application of rational basis review and the failure to achieve a higher scrutiny level for laws that discriminate on the basis of sexual orientation is normatively good. Some scholars, including Bedi (2013b) and Shraub (2016), have argued compellingly that this outcome is good because it basically suggests that the state can put forward no legitimate reason to discriminate on the basis of sexual orientation. My aim, by contrast, is to suggest that while the rational basis standard is utilized, Kennedy's insertion of individual dignity as the operative concept of equality is doing something more. And dignity, as utilized by Kennedy, can ultimately strike down long-held liberal aims in the areas of racial integration and abortion access. Furthermore, dignity may be used to limit the exercise of the marriage right or other gay rights if, for example, participating in a same-sex marriage or providing other services to LGBT-identified individuals can plausibly be said to harm the dignity of another's (perhaps religious) identity.

classifies by race to be illegitimate (Bedi 2013a; Oh 2004). Whereas the former notion would compel striking against the domination of groups of people who have faced historic and ongoing discrimination, the latter would treat attempts to remedy that discrimination with identity-based policies, e.g., busing for school integration, as constitutionally suspect.

The Supreme Court's gay rights rulings since *Romer* have achieved equal rights recognition without relying on scrutiny doctrine, and as such, they may hint at a conservative alternative to suspect class/classification doctrine. These decisions have discussed how government regulations, such as criminalization statutes or marriage bans, harm the individual *dignity* of the gay or lesbian-identified individual rather than considering gays or lesbians a suspect class deserving of particular constitutional protections.

Dignity, as a constitutional right or value, is far more developed in international law and in constitutional traditions from Europe and South Africa than in United States constitutional jurisprudence (Resnik and Chi-hye Suk 2003; McCrudden 2008; Baer 2009; Hennette-Vauchez 2009; Carozza 2011; Rao 2011; Ackermann 2012; O'Regan 2013; Atuehene 2014). Nevertheless, dignity is not a wholly new concept in constitutional jurisprudence even as the U.S. Constitution contains no explicit textual right to human dignity. The term has appeared in Supreme Court rulings and dissents since at least *Skinner v. Oklahoma* (1942), in which the Court considered state-mandated sterilization to violate dignity (546), and Justice Frank Murphy's famous dissent in *Korematsu v. United States* (1944), in which internment was characterized as "destroy[ing] the dignity of the individual" (214). Yet, even as it has periodically cropped up in decisions by different justices, it has been nowhere more consistently relied upon than in Justice Kennedy's gay rights rulings: *Romer*, *Lawrence*, *Windsor*, and *Obergefell*. In addition, that equal protection for gays and lesbians rests on dignity rather than suspect class/scrutiny may be the very reason why conservative judges such as Gorsuch, who clerked for Kennedy, are willing to make their peace with *Obergefell*. It may offer a pathway to strike policies aimed at racial integration, abortion access, or even, ironically, marriage, in just the ways conservative jurists and policymakers might applaud.

Tracing the development of dignity within the gay rights jurisprudential tradition in the United States and particularly how it is distinct from traditional scrutiny doctrine reveals insights into broader processes of American constitutional and political development. A development is "a "durable shift in governing authority" (Orren and Skowronek 2004, 123). And the development of a new basis for challenging discrimination, i.e., a shift away from the twentieth-century doctrine of suspect class, may represent more than just a change in how the Constitution is

interpreted. As argued here, it could signal a move in how the Court has defined its place in a democracy—a role repeatedly questioned since its establishment (see Beard 1912; Bickel 1986; Chemerinsky 1989; Engel 2011). Any evidence of continued reliance on dignity rather than more traditional scrutiny doctrine may tell us something about changing notions of equality, i.e., ideational development, in the U.S. constitutional tradition and about how the Court invokes such ideas to justify its own purpose within a broader set of democratic institutions, i.e., institutional development.

Second, recent political development scholarship has called for more focus on tracing these types of processes of change (Skowronek and Orren 2016). The judicial articulation of dignity provides a case through which relevant mechanisms can be identified and explored. In particular, the abandonment of suspect class doctrine in the gay rights jurisprudence illustrates entrepreneurial work often cited as a crucial mechanism of political development (Sheingate 2003; Skowronek and Glassman 2007). But the reformulation of doctrine may signal more than just entrepreneurial interpretation. In a common law constitutional system, new ideas must align with precedent. As such, doctrinal development is fertile ground on which to explore creative syncretism, which is the idea that "all institutions are syncretic, that is, they are composed of an indeterminate number of features, which are decomposable and recombinable in unpredictable ways." An entrepreneurial actor can "draw on a wide variety of cultural and institutional resources to create novel combinations" and thereby break down an idea or doctrinal tradition and rebuild it to achieve new and unexpected interpretive outcomes (Berk and Galvin 2009, 543; see also Berk et al. 2013). Indeed, some outcomes may even be antithetical to the doctrine's original aims (Skowronek 2006).

Third, it may be difficult to demonstrate any durable shift given the relatively recent nature of the Court's rulings. It would also be difficult to prove that any durable shift is Justice Kennedy's intentional aim. As Rick Valelly (2012) notes, "LGBT politics may seem to be evolving so rapidly that it is too difficult to perceive and pick out the outcomes, periods, and dynamics that are 'in' that politics" (315). Nevertheless, as Theda Skocpol (2016) argued in her analysis of the value of developmental scholarship, "any analytical perspective that is truly powerful has to make sense of contemporary twists of history, not just explain events long past" (48). Furthermore, it is important to note that to posit ideational or institutional change over time actor intention need not be demonstrated; in his analysis of the changing arguments that justices may offer to articulate the Court's institutional legitimacy, legal scholar Or Bassok (2013) poignantly writes that the aim is not to "analyze the thoughts of certain members of the . . . Court on the issue of

legitimacy. My argument is not that certain Justices consciously adopted a certain legitimation theory, but how the Court and other institutions behaved" (168–69). In short, observable outcomes in rulings and how they may be used by other governing authorities—as opposed to any specific judicial intent—can be a measure of constitutional development.

If the turn to dignity represents a durable shift in how governing authorities understand equal rights claims, then it must be shown first that an existing paradigm, i.e., scrutiny doctrine, is under strain, second, that an alternative is offered, and third, that this alternative is taken up by other governing authorities in a deliberate effort to become entrenched, commonsensical, or hegemonic (Gramsci 1971; Plotke 1996; Teles 2008). This article discusses evidence of each of these steps. Durability means that an idea holds over *time*, and a precedent-based constitutional tradition is a potent framework for illustrating how certain ideas become entrenched or "the existence of a precedential spiral or sequence in the United States evolving in ways that over time provides increased legal foundations for judicial decisions" (Graber 2006, 36). But Orren and Skowronek remind us that to track durability in governance, we must also look beyond the Court's boundaries and attend to whether and how an idea spreads across and is accepted by distinct governing authorities that comprise the polity. In other words, durability can register over time and across space. Evidence that shifts prove durable is illustrated by "the extent to which shifts had the effect of bringing surrounding arrangements of authority into line with the new state of affairs. . . . [T]hey successfully over time preempt naysayers in positions of authority nearby; they engage ideologies . . . that declare the rightness of what has occurred" (Orren and Skowronek 2004, 129). This article points to some early evidence that Obama-era executive-branch actors adopted the Court's dignity framework.

To make this argument about how the rise of dignity in the gay rights rulings challenges traditional scrutiny doctrine, about the conservative potential of this doctrinal path, and about how this development brings to the fore broader underlying processes of American political and constitutional change, the article proceeds in the following manner. First, it highlights how many of the gay rights rulings since *Romer* are grounded in a jurisprudential logic conceptually distinct from traditional scrutiny doctrine. Second, it reviews the history of changes in that traditional doctrine not only to reveal how it increasingly differed from its original concept but also to highlight the creative syncretism at play and how entrepreneurial justices can rework a doctrinal tradition to achieve antithetical ends, a critical process discussed in developmental scholarship. Third, how Justice Kennedy developed dignity in the context of gay rights rulings is discussed. Fourth, how dignity has been

applied to challenge and negate policy attempts at racial integration and access to abortion is detailed. This section, in particular, is the heart of the argument that dignity defined in the context of progressive recognition of LGBT rights can be used toward antithetical ends, toward undermining policy aims liberals might value. Fifth, assessing whether dignity can be said to represent a durable shift, i.e., whether other governing authorities have utilized the concept to defend LGBT rights, is evaluated. Finally, the article concludes by assessing the underlying conservative logic of the liberal victory of same-sex marriage, which is to say, how the dignity doctrine embraces a notion of self and universality that decontextualizes the individual; ultimately and ironically that logic may restrict the recognition and exercise of the marriage right itself.

I. GAY RIGHTS RULINGS AND ABANDONING THE USUAL FRAMEWORK

When Chief Justice Roberts dissented in *Obergefell*, he claimed that the majority strayed from accepted norms for interpreting the Fourteenth Amendment's Equal Protection and Due Process clauses:

> [P]etitioners contend that the Equal Protection Clause requires their States to license and recognize same-sex marriages. The majority does not seriously engage with this claim. Its discussion is, quite frankly, difficult to follow. The central point seems to be that there is a "synergy between" the Equal Protection Clause and the Due Process Clause, and that some precedents relying on one Clause have also relied on the other. Absent from this portion of the opinion, however, is anything resembling our usual framework for deciding equal protection cases (23, citations omitted).

This "usual framework" refers to the doctrine of suspect class and tiered scrutiny. It holds that should a law affect a class of persons that is either or in combination identified as (1) having suffered a history of discrimination, (2) this discrimination is based on a distinguishable or immutable characteristic irrelevant to the policy objective, and (3) this discrimination has rendered the group politically powerless, then laws affecting this class must be evaluated with heightened scrutiny (*Bowen v. Gilliard* [1987], 602–3). To be constitutional, a law must be narrowly tailored to achieve a compelling government interest (strict scrutiny, which applies to racial classifications and fundamental rights) or substantially related to the achievement of an important government interest (intermediate scrutiny, which applies to sex

and gender classifications) (Fallon 2013, 139–89). Instead, the Court grounded the *Obergefell* decision in a vague if uplifting concept of dignity (see Cooper 2015). In so doing, it further developed dignity as a guiding jurisprudential principle that had earlier been used to anchor rulings in *Lawrence* and *Windsor*. In his dissent, Roberts echoed Scalia's dissent in *Windsor* offered two years earlier:

> [I]f this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. In accord with my previously expressed skepticism about the Court's "tiers of scrutiny" approach, I would review this classification only for its rationality. As nearly as I can tell, the Court agrees with that. . . . The sum of all the Court's nonspecific hand-waving is that this law is invalid (maybe on equal-protection grounds, maybe on substantive-due process grounds, and perhaps with some amorphous federalism component playing a role) because it is motivated by a "'bare . . . desire to harm'" couples in same-sex marriages. (16–17, citations omitted)

All that confusion was captured by Judge Christopher Piazza of Arkansas when he struck down a state ban on marriage: "Attempting to find a legal label for what transpired in *Windsor* is difficult" (*Wright v. Arkansas* [2014], 11). The legal label is difficult to identify inasmuch as it does not comport with the traditional tiered-scrutiny approach. Nevertheless, there is an internal logic within *Lawrence*, *Windsor*, and *Obergefell* and a logic that connects each to the other, namely a dignity principle.

Most current scholarship on same-sex marriage litigation—and LGBT rights litigation more broadly—has focused on three areas. One school has assessed whether a litigation approach to social change promotes movement goals (Rosenberg 2008; Keck 2009; Nielsen 2009; Klarman 2012). Another has evaluated whether rulings linked to social reform are "activist" insofar as they may overturn the will of a democratic majority or, instead, appropriately capture democratic sentiment measured through public opinion, state law, or alignment with a political regime (Dahl 1957; Ackerman 1998; Whittington 2007; Friedman 2010; Engel 2011; Pildes 2011). A third area examines decision making on a multi-judge panel and evaluates whether judges decide in line with the political values of their appointing presidents, make strategic calculations that may curb their sincere beliefs, or respond to political and cultural changes in the broader society (Gillman and Clayton 1999; Maltzman et al. 2000; Segal and Spaeth 2002; Epstein and Segal 2005).

This article takes a different and distinctly developmental approach, which has not often been applied to questions regarding sexuality (see Novkov 2008 and Valelly 2012; notable exceptions include Canaday 2009 and Engel 2016). Nevertheless, by evaluating gay rights jurisprudence this way, namely as an ideational shift in our understanding of how equal rights are conceptualized as well as how that articulation signals any institutional repositioning by the Court, this article bridges the ideational and institutional schools that have defined approaches to American political and constitutional development (Smith 1988; Lieberman 2002; Glenn 2004; Kersch 2004; Kahn and Kersch 2006).

With regard to the ideational or doctrinal shift, legal scholars have suggested that recent gay rights rulings since *Romer* indicate that the Court often views anti-LGBT discrimination as grounded only in animus.[3] Gays, lesbians, and bisexuals, as a class of people who have suffered a history of discrimination and/or a history of political powerlessness grounded in an immutable trait—as scrutiny doctrine demands—have never been so identified.[4] Therefore, laws that have targeted gays and lesbians for unequal treatment have only been held to the lowest level of judicial review—rational basis—whereby a law must be rationally related to a legitimate government purpose. Because Justice Kennedy—who authored the majority rulings in *Romer*, *Lawrence*, *Windsor*, and *Obergefell*—sees only animus motivating anti-LGBT discrimination, scholars have contended that these decisions collectively indicate an anti-harm or anti-humiliation principle as the basis for rational basis review (Ackerman 2014; Carpenter 2014; Koppelman 2014; Yoshino 2014, 2015).[5] They suggest that traditional equal protection jurisprudence is intact, but they hold that these rulings may be more elegant than suspect class analysis since

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3. Exceptions include *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.* (1995) and *Boy Scouts of America v. Dale* (2000).

4. See, however, Kennedy's brief identification of gays and lesbians as having the elements of suspect class status, including an "immutable nature," but not applying higher scrutiny in *Obergefell*, as discussed in Section V of this article.

5. Associating an anti-harm principle as motivating *Obergefell* ignores the ways in which the decision's assumptions about what constitutes dignity, namely adherence to heteronormative coupling, actually do harm and make invisible members of the LGBT communities. As Yuvraj Joshi (2015) has cogently argued, "*Obergefell*'s reasoning inflicts its own dignitary harms. It affirms the dignity of married relationships, while dismissing the dignitary and material harms suffered by unmarried families. It demands that same-sex couples demonstrate the same love and commitment that are taken for granted in the case of heterosexual couples. And, it implies that legal protection of dignity depends on the prior social acceptance of gay persons and relationships. Put together, *Obergefell* disregards the idea that different forms of loving and commitment might be entitled to equal dignity and respect" (117–18). See also Ben-Asher (2014).

the dignity/anti-harm/anti-animus principle does not require the designation of suspect class status, which can prove exclusionary. As Kimberle Crenshaw (1989) famously critiqued: "the paradigm of sex discrimination tends to be based on the experiences of white women; the model of race discrimination tends to be based on the experiences of the most privileged Blacks" (151). In other words, the scrutiny doctrine does not recognize the intersectional nature of identity; discrimination is experienced either as a woman or as an African American, but often the experience of an African American woman goes unrecognized precisely because a discrimination claim cannot be proved on the singular counts of either race or sex.

Because the gay rights rulings do not invoke group identity as the operative concept but instead suggest that some individual level of human dignity is denied, the underlying logic of these rulings is often lauded. Lawrence Tribe's assessment of *Obergefell* is illustrative: "Justice Kennedy's decision represents the culmination of a decades-long project that has revolutionized the Court's fundamental rights jurisprudence. . . . *Obergefell* has definitively replaced . . . [the] wooden three-prong test focused on tradition, specificity, and negativity with the more holistic inquiry" (Tribe 2015, 16).

The gay rights jurisprudence, while it may articulate an anti-harm principle or, more robustly, an equal dignity principle as a foundation for rational basis review, in fact does much more. *Lawrence*, *Windsor*, and *Obergefell*'s dignity principle is not only an ideational turn from scrutiny but also suggests a different way that the Court is conceptualizing its role in the democratic matrix of separated branches. It indicates and underlies a profound *institutional* development regarding how the Court's decision rationales—the way it has approached and defined its purpose in a democracy—relate to and support its legitimacy.

Dignity is both individualized and universalized such that grappling with the context and structure of inequality is rendered unnecessary. When Kennedy states in *Lawrence* that the criminalization of same-sex sexual relations is unconstitutional, he does not suggest that the long history of discrimination against gays and lesbians, which he nevertheless traces, merits that the Court must be more skeptical of the statute than it would be otherwise. Instead, he states a universal principle, namely that "adults may choose to enter upon this relationship in the confines of their own homes and their private lives and still retain their dignity as free persons." The ruling does not apply to gays or lesbians as gays or lesbians but broadens out such that the historical context of discrimination proves almost unnecessary to the articulation of a libertarian principle. Similarly, in *Windsor*, Kennedy writes that the Court strikes down the Defense of Marriage Act because through it the federal government seeks only to "disparage and to injure those whom the State, by

its marriage laws, sought to protect in personhood and dignity." Dignity is again invoked as a universal good, one that follows for the nature of personhood itself, and as such, no complicated rubric of tiered scrutiny that requires attention to historical, political, or cultural context needs to be applied.

This *ideational* turn gestures toward an *institutional* development regarding the role the Court plays in a democracy. The gay rights rulings illustrate that to identify inequality, the Court no longer needs to examine the very factors that underlie scrutiny doctrine, namely histories of discrimination, powerlessness, etc. And this move repositions the Court's role in U.S. democracy, at least inasmuch as it has developed over the twentieth century. Indeed, when the Court's institutional legitimacy was challenged during the first third of the twentieth century, particularly as it struck down much of the economic regulation that attempted to mitigate the harm of the Great Depression, the Court shifted course to save itself from becoming politically manipulated by the other branches (Ross 1993). Over a series of rulings in the late 1930s, the Court conceded territory, so to speak, to the legislature on economic matters and instead staked out a distinct responsibility to review with higher skepticism those laws that regulated elements of democratic process, e.g., rights as protected in the Bill of Rights or laws that seemed to disproportionately target a discrete and insular minority (Eli 1981; Leucthenberg 1995). This role is captured in *United States v. Carolene Products* (1938), in which the Court laid out a theory of its role in a democratic polity. It would be grounded in a responsibility to ensure that democracy did not malfunction and that access to the pluralistic venues of legislative debate was protected (Eskridge 2005).

Recognizing that laws flowed from a flawed system in which not everyone had equal access to participate, the Court was more suspicious of laws that appeared to have a disproportionate impact on particular groups, especially groups that could demonstrate that their voice was not duly heard when the law was crafted and executed. The Court's institutional legitimacy, then, was not grounded in its position as a unique interpreter of constitutional text as it had been for much of the nineteenth century (O'Neill 2005). It was now grounded in the judge's unique position to ensure that pluralist democracy functioned or to intervene by being more skeptical of laws that seemed to target groups with a history of political powerlessness. That skepticism was institutionalized as tiered-scrutiny doctrine, which operated as the framework for mid- and late-twentieth-century Fourteenth Amendment equal protection interpretation.

The gay rights rulings, because they do not utilize the context-specific identification of suspect class designation or higher scrutiny and instead articulate a universal claim to human dignity, follow a discernably distinct logic and thus provide

a distinct basis for the unelected Court's institutional standing in a democracy. The twentieth-century interventionist frame grounded in assessment of democratic process competes with a universalism that is purposively abstract. The gay rights and marriage equality rulings, by advancing individual dignity as the core principle animating the Fourteenth Amendment, do more than offer an anti-harm principle as the foundation of rational basis review; they articulate a privatized, individualized, and abstractly universal notion of dignity that potentially curbs the Court's ability to recognize, regulate, and limit subordination. By grounding equal treatment in a "universal" notion of equal dignity, the Court can remove itself from the identity politics of suspect class, from the uncomfortable position of rank ordering who has suffered a long-enough history of political powerlessness to merit strict or intermediate scrutiny.

Dignity may do the work of appearing as a universalistic good. It may seem the self-evident foundation of equal treatment and due process. Precisely because it appears timeless, it can stand as a seemingly neutral concept. It may therefore help to reorient the legitimate role of the judge in a democracy, which, at least rhetorically, has been one objective of the conservative legal movement (see Teles 2008; Tamanaha 2010, 2016; Hollis-Brusky 2015). It did provide a way for Justice Kennedy to achieve his desired result in gay rights rulings without employing critiqued scrutiny doctrine. And, as discussed further in the next section, it gained traction at a moment when scrutiny doctrine was being creatively reworked by the justices to achieve ends seemingly antithetical to its purpose.

II. STRATEGIC REWORKING OF IDEAS TOWARD ANTITHETICAL ENDS: FROM CLASS TO CLASSIFICATION AND THE CONSERVATIVE REWORKING OF SCRUTINY DOCTRINE

Stephen Skowronek (2006) has argued that institutional and cultural developments follow from how ideas are put to use in distinct ways over time. Building on the notion that U.S. political culture is composed of multiple strands, e.g. liberal traditions, republican traditions, and a set of ascriptive prejudices (Smith 1993), Skowronek argues that governing institutions do not simply map on to one of those possible traditions but instead that institutional development follows from the exchange between ideas and the purposes for which actors seek to use them. According to Skowronek, entrepreneurial political actors can create "cultural composites, ideas characterized by the interpenetration of these antithetical ends" and thereby foster a new developmental trajectory; these new formulations are "constitutive of action along lines all their own" (386).

The "audacity to be found in the play of ideas over time" (386) is strongly illustrated in how some conservative justices have redefined scrutiny doctrine from an effort to remediate discrimination against particular suspect classes to an effort to call certain classifications in law constitutionally suspect, thereby undermining attempts to carry out targeted remedial policies. Indeed, between 1990 and 2003, 73 percent of race-conscious statutes were struck down through the use of strict scrutiny, and "almost every single law that was struck down in that period was one that sought to ameliorate the status or racial minorities such as affirmative action" (Winkler 2003; Bedi 2010, 543). In short, the idea of suspect class as developed in scrutiny doctrine has been put to antithetical effect. And that shift can be traced in the deliberate moves of particular justices.

That a precedential pathway can be carved to challenge the original meaning of the foundational precedent is not a particularly shocking idea. I trace this process to demonstrate how entrepreneurial actors can foster a durable shift in how governing authorities understand constitutional commitments, here the meaning of Fourteenth Amendment equal protection. I also hope to show that the shift from suspect class to suspect classification not only reveals a conservative aversion to identity group politics and privileges the individual but also that such privileging provides an opportunity to develop the doctrine of dignity.

How justices have relied on *Loving v. Virginia*, the decision striking down laws that banned interracial marriage, provides a useful illustration of the malleability of rulings to serve particular ideological aims. Liberals cheered the ruling, but it also ironically laid the foundations for later decisions that overturned policies meant to remedy racial inequality and subordination, later decisions that disappointed liberals. Historian Peggy Pascoe (2009) notes that while Chief Justice Earl Warren was careful in his ruling for the unanimous Court to stipulate that Virginia's miscegenation law was an invidious discrimination on its face and thus overruling that law constituted an anti-subordination act, she also notes "a tendency to regard the *Loving* decision as proof positive to Justice John Marshall Harlan's famous 1896 assertion that 'our constitution is colorblind' and, as such, *Loving* became useful to opponents of affirmative action in higher education admissions" (287).

Liberals had long touted colorblindness as a value and sought to overturn miscegenation laws because they racially classified in order to subordinate. The remedy was to declare the classification that enabled this subordination—that perpetuated systems of white supremacy—at odds with the Constitution's guarantee of equal protection. But, conservative jurists could utilize the anti-classificatory language of *Loving* to support a more blunt reading of the equal protection guarantee as simply

anti-classification altogether (something Kennedy would come to do). Insofar as the remedy in *Loving* required that states could no longer classify by race, conservatives on the Court could use *Loving* to challenge affirmative action and busing cases that relied on classification to function. As Pascoe notes,

> in several highly controversial cases on these issues, references to *Loving* lined both sides of a deep judicial divide. In affirmative action cases, liberal justices returned to the position Earl Warren had originally taken in *Loving*, and began to insist that when it came to race classifications, purpose really did matter. . . . Conservative justices, however, insisted on treating the race classifications in affirmative action programs as if they were exact parallels to the race classifications in segregation law. (305)

While affirmative action policies remain constitutional despite repeated challenges, that Justice Kennedy could cite *Loving* in his concurrence to strike down a busing policy in 2007 aimed at promoting public school integration only highlights how a ruling that liberals once cheered can be utilized to support interpretations long sought by the conservative legal movement (*Parents Involved in Community Schools v. Seattle School District No. 1* [2007]).

At the core of conservative reinterpretation of *Loving* is the conflation of suspect class with suspect classification. The Virginia ban on interracial marriages was unconstitutional not merely because it created racial classification but also because it did so with the purpose of maintaining racial hierarchy: "The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy" (8). As Pascoe suggests, the law is problematic because it subordinates via its classification. Conservatives have increasingly argued that any racial classification is illegitimate, whereas liberals on the Court have tried and failed to hold to the original idea that classification that might remedy discrimination was constitutionally permissible. A scrutiny developed to monitor the context in which law was crafted so that undemocratic subordination may be countered was transformed into a decontextualized doctrine of abstract principle to guard against any classification that indicated difference (Bedi 2013a).

The conflation of class with classification is illustrated by the 1989 ruling *City of Richmond v. J.A. Croson Company* (1989). The Court struck down Richmond's Minority Business Utilization Plan, which required that the city hire a certain percentage of minority business enterprises. Justice Sandra Day O'Connor, with separate concurrences from Justice Scalia and Kennedy, read the Fourteenth Amendment's equality

commitment not as a remedial responsibility but as requiring race neutrality. Any racial classification becomes suspect. According to O'Connor: "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification" (495). For Kennedy, "[t]he moral imperative of racial neutrality is the driving force of the Equal Protection Clause" (519). And, for Scalia, "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign' "(521).

In dissent, Justice Thurgood Marshall noted the significant redirection that *Croson* cast: "Today, for the first time, a majority of this Court has adopted strict scrutiny as its standard of Equal Protection Clause review of race-conscious remedial measures. This is an unwelcome development" (522). According to Marshall, "[a] profound difference separates government actions that themselves are racist, and governmental actions that seek to remedy the effects of prior racism or to prevent neutral governmental activity from perpetuating the effects of such racism" (552–53). Marshall criticized how O'Connor's ruling for the majority twists the metrics by which "suspect" class is determined. For example, O'Connor called into question that African Americans can be treated as a minority for the purposes of remedial legislation as they constitute 50 percent of the population of Richmond and hold a majority of five seats on the nine-member city council. But Marshall responded by noting that this conception of minority strays from the standard that the Court has applied in the development of the scrutiny doctrine. According to Marshall, "this Court has never held that numerical inferiority alone, makes a racial group 'suspect' and thus entitled to strict scrutiny review. Rather, we have identified other 'traditional indicia of suspectness': whether a group has been saddled with such disabilities, or subjected to a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection of the majoritarian political process" (525). Marshall clinged to the established understanding of scrutiny doctrine because it draws on the interventionist overseer legitimacy that flows from the *Carolene* footnote. But he went further to highlight how O'Connor's claim that the Fourteenth Amendment's equal protection command requires that states not classify by race or that any policy that classifies, even for remedial purposes, violates the meaning of that amendment. He forcefully argued that O'Connor's turn to see race as a suspect classification rather than African Americans as a suspect class reorients the Fourteenth Amendment toward an end antithetical to its original purpose:

> The fact is that Congress' concern in passing the Reconstruction Amendments, and particularly their congressional authorization provisions, was that States

> would not adequately respond to racial violence or discrimination against newly freed slaves. To interpret any aspect of these Amendments as proscribing state remedial responses to these very problems turns the Amendments on their heads. (526)

In other words, to read the Fourteenth Amendment as a ban on classification undermines the remedial aims of the framers of that text. And, in this way, Marshall highlighted the entrepreneurial construction that O'Connor and her fellow justices offered in their ruling for the Court.

What Marshall called "a full-scale retreat from the Court's longstanding solicitude to race-conscious remedial efforts" was followed by some attempts to reassert the traditional application of suspect class. Thus, the Court narrowly ruled that the federal government's use of preferences for minority businesses to achieve remedial effects in *Metro Broadcasting v. FCC* (1990) was constitutional. However, this reassertion of Marshall's allegiance to the original application of suspect class doctrine was overturned five years later when O'Connor ruled in *Adarand Constructors v. Pena* (1995). Asserting that *Crosson* established the principles that any racial or ethnic preference in the law must be reviewed with skepticism and that the standards of review under the Fourteenth Amendment must be consistent regardless of whether the statute in question is state or federal, O'Connor cemented the suspect classification rendering of the Fourteenth Amendment's command. Perhaps even more important, she stated that these principles are grounded in the fundamental principle that "the Fifth and Fourteenth Amendments to the Constitution protect persons, not groups" (201). That statement is a clear rejection of the *Carolene* notion that the Court would utilize a more searching scrutiny when the law disproportionately affects insular and discrete minorities. And it resonates with Gorsuch's assertion, offered during his confirmation hearings, that he sees individuals as persons and not as members of particular classes or groups.

If O'Connor represents the entrepreneurial jurist who illustrates the kind of creative syncretic approach of utilizing perhaps commonsensical notions of equality or of treating people the same in order to reconfigure the long understood and applied aims of the Fourteenth Amendment as Marshall defined them, then Kennedy stands as the innovator who grasps a seemingly new concept—dignity—to take O'Connor's move one step further. Where O'Connor moves from class to classification, Kennedy does not even seek to classify. If the Fourteenth Amendment only sees persons, then it cannot see the categories that might contextualize or classify. Nowhere is this universal aspiration to a purely individualized notion equal personhood more clearly evident than in Kennedy's repeated reliance on dignity in the gay rights rulings.

III. THE DIGNITY ALTERNATIVE: THE DISTINCT PATHWAY OF GAY RIGHTS JURISPRUDENCE

Human dignity as textual constitutional value, or "a social value that has been expressed—explicitly or implicitly—in the constitution of the state" is a recent phenomenon (Barak 2015, 12). It gained popularity in response to the atrocities associated with the Second World War. Postwar constitutions and international treaties are replete with references to dignity as the foundation for rights. Yet even as dignity has gained traction in national and international legal traditions, especially in Europe and post-apartheid South Africa, it has been roundly criticized as problematically vacuous, devoid of specific content, and all too elusive (Eberle 1997; Eckert 2002; Macklin 2003; Bagaric and Allan 2006; Rosen 2012).

In the United States, the Supreme Court has invoked the concept of dignity, perhaps more often in dissents than in majority rulings, since the 1940s. And the earliest uses hardly amounted to a consistent doctrine much less definition; scholars have called the treatment of dignity "episodic and underdeveloped," "tentative," and "fragmented" (Jackson 2004, 17; Rao 2008, 202; Barak 2015, 206). As legal scholar, Aharon Barak (2015) summarizes the trend of the Court: "The Justices point out that their decisions are an attempt to realize human dignity, but they do not explain what human dignity is, what it covers, and what are the elements that comprise it" (206). Barak points out that at least three Supreme Court justices are crucial to the articulation of dignity as a constitutional value: Frank Murphy, William Brennan, and Anthony Kennedy. And Kennedy has turned dignity into the rhetorical cornerstone of contemporary gay rights discourse in his authorship of *Romer*, *Lawrence*, *Windsor*, and *Obergefell*.

"Equal Dignity," the banner headline of the *New York Times* on June 27, 2015, was taken from a powerful sentence in Kennedy's ruling for the Court in *Obergefell*. Kennedy characterized the plaintiff's desire for marriage as simply asking for "equal dignity in the eyes of the law. The Constitution grants them that right" (28). In *Obergefell*, the majority decision invoked "equal dignity" twice. And that phrase marked just how distinct *Obergefell* and other gay rights rulings seemed to be. For example, *Loving v. Virginia*, the decision that forty-eight years earlier had struck down state bans on interracial marriage, never used the word "dignity." The phrase "equal dignity" was used once in *United States v. Windsor*, the 2013 ruling that struck down the federal Defense of Marriage Act (DOMA), when the majority declared, "[t]he history of DOMA's enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute. It was its essence" (21). The phrase was not used at all in *Lawrence v. Texas*. Nevertheless, *Lawrence* did mention "dignity" two times, *Windsor* nine times,

and *Obergefell* nine times. And while all of these cases discussed the dignity of gays and lesbians to love whom they choose, none identified gays and lesbians as a suspect class or sexual orientation to be a suspect classification.

The refusal to so identify gays and lesbians as a suspect class came on the heels of the Court's *Adarand* ruling that the Fourteenth Amendment protects persons, not groups. A year later, Kennedy would apply that interpretation in *Romer v. Evans* (1996). The Supreme Court struck down an amendment to the Colorado constitution that prohibited adoption or enforcement of any statute "whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any persons or class of persons to have or claim any minority status, quota, preferences, protected status or claim of discrimination" (624). Kennedy argued for the majority that the state constitutional amendment under review unconstitutionally "named class, a class we shall refer to as homosexual persons or gays and lesbians," and then restricted the rights of these persons and no other (624). The amendment unjustly imposed a "broad and undifferentiated disability on a single named group," essentially cutting that group out of any democratic process (632). And the imposition was so broad that it could not be explained by any other motive "but animus toward the class it affects" (632). While the Court appears to begin the process of characterizing gays, lesbians, and bisexuals as a suspect class by identifying these persons as a discriminated class, Kennedy clearly holds that the class status is created and imposed unconstitutionally by the state of Colorado. The state, in other words, created a class in order to discriminate against it. The Court, it would seem, had no intention of compounding this action by then utilizing traditional suspect class analysis. Instead, it merely stated that Colorado cannot put forward a legitimate interest to justify its constitutional amendment. The Court declared the amendment a "status-based enactment divorced from any factual context from which we could discern a relationship to legitimate state interests; it is a classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit" (635).

Kennedy's refusal to employ either suspect class or the suspect classification doctrine carried forward into *Lawrence*, *Windsor*, and *Obergefell*. That *Lawrence* failed to do so is evidenced by the scholarly calls that "the Supreme Court not only ought to make gay men and lesbians a suspect or quasi-suspect class, but that it has in practice already done so, albeit *without* the sufficient binding force of precedent" (Smith 2004, 2770; see also Roberts 1993). Legal scholars seemed to accept that LGBT persons fit the characteristics of a suspect class. And in the wake of *Lawrence*, as same-sex marriage cases proceeded through state courts, some of those courts independently considered gays and lesbians as comprising a protected class and

held laws classifying by sexual orientation, such as restrictions on same-sex marriage, to intermediate review.[6]

In *Lawrence*, *Windsor*, and *Obergefell*, the Court's reasoning relied less on a formulaic categorization of suspect class or classification and more on a claim of human dignity. *Lawrence* has been called the *Brown v. Board of Education* (1954) and the *Loving v. Virginia* (1967) moment of the LGBT rights movement (Eng 2010, 17, 41). Yet, unlike *Brown* and *Loving*, Kennedy explicitly ruled that *Lawrence* was not decided as a matter of equal protection.[7] Instead, he subsumed an equal protection claim under a construction of fundamental rights as protected under due process: "As an alternative argument in this case, counsel for the petitioners and some amici contend that *Romer* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity" (574–75). Kennedy sought to fully reverse *Bowers v. Hardwick* (1986), and to do so he had to engage *Bowers* on its own assumptions. But by subsuming equality under due process liberty, *Lawrence* stands primarily as a ruling about individual freedom, autonomy, and dignity rather than equality.

By avoiding an equal protection argument, the Court sidestepped the question of whether sexuality was a suspect classification, whether gays, lesbians, or bisexuals constituted a suspect class or whether and what kind of scrutiny need be applied. As Justice Scalia pointed out in his dissent:

> Though there is discussion of "fundamental proposition[s]" . . . and "fundamental decisions". . . nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the

6. See further discussion of these state rulings in Section V.

7. *Loving* contained an equal protection component *and* a fundamental rights component. The state law banning interracial marriage under review in *Loving* violated equal protection because the law only maintained white supremacy and the state's claim that it treated the races equally inasmuch as it banned each from marrying members of the race did not meet the standard or meaning of equal protection. As Chief Justice Warren stated in the Court's unanimous decision, "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discriminations" (*Loving v. Virginia* [1967], 9). In addition, because marriage constituted a fundamental right, the ban also violated a basic due process consideration. Warren states: "These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" (*Loving v. Virginia* [1967], 13; citations omitted).

> Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a "fundamental right." Thus, while overruling the *outcome* of *Bowers*, the Court leaves strangely untouched its central legal conclusion: "[R]espondents would have us announce . . . a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do." Instead the Court simply describes petitioners' conduct as "an exercise of their liberty"—which it undoubtedly is—and proceeds to apply an unheard-of form of rational-basis review that will have far reaching implications beyond this case. (586)

Indeed, rather than adhering to the language and formulaic construction of tiered scrutiny, Kennedy waxed poetic that the criminalization statutes in question denied gays and lesbians of dignity:

> It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice. (567)

The Court relied on dignity as an operative concept: laws that violate dignity are likely grounded in no other motivation than animus and thus unconstitutional.

Kennedy's reliance on dignity surfaced again in *Windsor*. When ruling that the federal government must recognize same-sex marriage where it is recognized by state governments, Kennedy framed the requirement as necessitated by dignity. He began by noting that "[i]t seems fair to conclude that, until recent years, many citizens had not even considered the possibility that two persons of the same sex might aspire to occupy the same status and dignity as that of a man and woman in lawful marriage" (13). He stipulated that when a state offers the recognition of marriage to a class of persons, it "confer[s] upon them a dignity and status of immense import" (18). In so doing, the state enhances the "recognition, dignity, and protection of the class in their own community" (18). He then characterized DOMA as creating an "injury and indignity" that "is a deprivation of an essential part of liberty protected by the Fifth Amendment" (19).

He considered New York's decision to recognize same-sex marriage as constituting "further protection and dignity to that bond" and that it represented a determination by the state that same-sex couples were "worthy of dignity in the community equal with all other marriages" (20). He contended that "[t]he history of DOMA's

enactment and its own text demonstrate that interference with the equal dignity of same-sex marriages, a dignity conferred by the States in the exercise of their sovereign power, was more than an incidental effect of the federal statute" (21). He argued that marriage creates responsibilities and rights that "enhance the dignity and integrity of the person" that DOMA denies (22). Finally, he declared the statute invalid because "no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity" (25–26). Although Kennedy used the phrase "legitimate purpose," his reliance on human dignity elides the formal structure of the scrutiny tiers.

Windsor did not compel states to recognize same-sex marriage. And, as in *Lawrence*, Kennedy again did not specify the level of review explicitly. Given his discussion of animus, dignity, and legitimate government purpose, the ruling, however, would seem to imply that there is no *rational basis* for the federal government not to recognize same-sex marriage. In short, gays, lesbians, and bisexuals are not, according to the Supreme Court, a suspect class, and neither is sexual orientation a suspect classification. Nor does such identification need to take place for the Court to view anti-gay laws as unconstitutional.

On June 26, 2015, the second anniversary of the *Windsor* ruling and the twelfth anniversary of the *Lawrence* ruling, Justice Kennedy issued yet another ruling that would endear him to gay and lesbian rights activists and secure his legacy as the stalwart promoter of legal equal treatment for gays and lesbians. Kennedy delivered the ruling for the five-justice majority in *Obergefell*, which held "that same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them" (22–23). Just as in *Lawrence* and *Windsor*, Kennedy premised the *Obergefell* decision on claims to dignity; he defined marriage as a union that "always has promised nobility and dignity to all persons, without regard to their station in life" (3). In fact, he used the term no less than nine times: he discussed marriage has transformed over time to recognize the "equal dignity" of women in cross-sex marriages (6); he discussed the dignity of homosexuality as a personhood or identity rather than considering it a mere sexual act and that predominance of the latter social conception and indeed the criminalization of the act violated that dignity (7); he suggested, reiterating *Lawrence*, that personal intimate choice was a marker of that dignity (10); he suggested that marriage is one of those personal choices in which 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" (13); he suggested that state recognition of marriage constitutes a "basic dignity" (26). He also defined the action sought by petitioners—the recognition of their marriage—because "[t]hey ask for equal dignity in the eyes of the law. The Constitution grants them that

right." The word "scrutiny" appears once in the majority decision and then only in a description of the Hawaii ruling granting marriage recognition in 1993. The terms "suspect class" or "protected class" do not appear at all in the ruling.

IV. THE DIGNITY ALTERNATIVE: ITS USE FOR ANTI-LIBERAL ENDS

While dignity has been mostly drawn out in Kennedy's gay rights rulings, it has been referenced in other Court rulings, including but not limited to abortion rulings and affirmative action decisions. In these cases, Kennedy has invoked dignity to strike down policies aimed at racial integration and access to abortion. Consider Kennedy's invocation of dignity in his dissent in *Stenberg v. Carhart* (2000). In this case, the Court struck down a Nebraska prohibition on late-term abortions. In dissent, Kennedy considered the ban constitutional in part because he claimed the abortion procedures bore a striking relation to infanticide and thereby undermined the dignity of the physician performing the procedure as well as the dignity of the fetus: "A State may take measures to ensure the medical profession and its members are viewed as healers sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others" (962).

Kennedy revived this argument in his ruling for the Court seven years later in *Gonzalez v. Carhart* (2007), which upheld the Federal Partial-Birth Abortion Ban Act of 2003. That statute banned a particular late-term abortion procedure, known as dilate and extract (D&E). While abortion access had been, to this point, litigated under the fundamental right of privacy, and thus laws affecting it held to heightened scrutiny, Kennedy instead reviewed this federal statute under the lowest threshold of rational basis review. He justified this move by contending that at stake was not a right to abortion access but the state's right to ban a particular medical procedure. Such a ban fell within the domain of government power to regulate so long as the regulation had a rational relation to a legitimate purpose. Kennedy also spoke to the need of maintaining human dignity as this legitimate purpose. He characterized the federal statute as "express[ing] respect for the dignity of human life" and stated "[n]o one would dispute that, for many, D&E is a procedure itself laden with the power to devalue human life." Of course, Kennedy's dignity concern was limited in scope and application. According to one legal scholar, "the dignity interests of women confronted with an unwanted pregnancy went largely unacknowledged" (Meyer 2007, 59). Instead, Kennedy was concerned with the dignity of the physician—performing late-term abortions seemingly destroyed their humanity—the dignity of fetal life and the dignity of the woman but only insofar as she should be saved from the emotional trauma of choosing the procedure: "[I]t seems

unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." Other legal scholars noted that the ruling is "remarkable" for "its almost complete indifference toward the holders of those rights: women" and that consequently, "[a]bortions seem only, in the eyes of the Supreme Court to involve the 'abortion doctor,' 'the fetus,' and 'the cervix'" (Grossman and McClain 2007).

Or consider how Kennedy has claimed that racial classifications undermine dignity. For example, when evaluating whether an individual suffered race-based discrimination in exercising the right to vote in *Rice v. Cayetano* (2000), Kennedy claimed: "One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities" (962). Kennedy's hostility toward racial classifications regardless of whether the statute in question aims to remedy race-based subordination is also evident in his concurrence in *Parents Involved*: "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in society" (797). Kennedy's aversion to classification would seem to suggest not only that it be treated as constitutionally suspect but also that the Court try to avoid reinforcing it through its particular rendering of the Fourteenth Amendment's equal protection guarantee as a group-based right, with groups defined either as classes or by classifications.

Instead, Kennedy sounds the conservative chord of equality at the level of individuals—that all individuals be treated as fundamentally the same before the law. Dignity, as expressed in the gay rights decisions, offers that potential. And, perhaps unsurprisingly, it also undergirds conservative aims to challenge abortion access and eliminate affirmative action. In short, Kennedy's emerging dignity doctrine, while it grounds the gay rights decisions in ways political progressives might applaud, has been the foundation of other rulings that conservatives have long sought.

V. A DURABLE SHIFT? EVIDENCE OVER TIME AND ACROSS SPACE

Will this shift toward dignity and away from more traditional (either suspect class or suspect classification) equal protection analysis prove durable? It is difficult to answer this question with any certainty. It is always possible that the Court's flirtation with dignity could be limited to the gay rights jurisprudence. The notion of dignity has thus far proven durable within the confines of LGBT rights jurisprudence, which is to say, no Supreme Court decision employed the more traditional analysis when it was clearly available to the justices. *Obergefell* came after a variety of state

supreme court rulings that invoked scrutiny doctrine. Some, such as the Connecticut and Iowa supreme courts, systematically determined gays and lesbians to constitute a suspect class by a standard multipronged test and struck down bans on same-sex marriage by invoking intermediate or higher scrutiny (*Kerrigan v. Commissioner of Public Health* [2008] and *Varnum v. Brien* [2009]). Others also considered marriage a fundamental right and struck the bans down by applying strict scrutiny (see *In re Marriage Cases* [2008]). Some federal courts did the same; some applied suspect class analysis and declared state bans on marriage to be violations of equal protection via intermediate scrutiny (*Wolf v. Walker* [2014] and *Latta v. Otter* [2014]), whereas others suggested that since marriage was a fundamental right state bans could not withstand strict scrutiny (*Kitchen v. Herbert* [2014] and *Bostic v. Shaefer* [2014]).

Kennedy did not take either route even as he hinted at some elements of suspect class analysis in *Obergefell*. That it was not taken may reflect the personal values of Kennedy himself (Segal and Spaeth 2002). Since *Romer*, *Lawrence*, *Windsor*, and *Obergefell* were all crafted by Kennedy, the repeated invocation of dignity could amount to no more than a personal decision, an attempt to fit LGBT equality within a set of personal political values that do not correspond to the rigid identity group politics upon which scrutiny doctrine rests. Second, scholars have pointed to Kennedy's Catholicism as a unique source for his invocation of dignity in his gay rights, abortion, and death penalty jurisprudence (Colucci 2009; Jelliff 2012; Moyn 2014). Third, it is possible—although much more investigation would be necessary into his own papers—that Kennedy's reliance on dignity purposively recalls the position of another Republican-appointed judge to the bench increasingly out of step with the ideological trajectory of the conservative movement, namely John Paul Stevens (Epstein and Segal 2005). Indeed, Stevens dissented in *Bowers*, the 1986 ruling that maintained a state government's ability to criminalize adult consensual same-sex sexual relations. In that dissent, Stevens wrote:

> These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating "basic values," as being "fundamental," and as being dignified by history and tradition. The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom—the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in

> the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases. (215)[8]

Stevens discussed a distinct conception of sexuality than the other justices, who held homosexuality to be a sexual act, either entitled or not to occur within the private domain of the home. Privacy was an inadequate concept for what was at stake in the question of whether a person should face criminal sanction for realizing their full self within the scope of intimacy. Instead, Stevens suggested that such sexual intimacy is an expression of human dignity. By replacing privacy with dignity, Stevens, if even only for himself and Justices Brennan and Marshall, who joined his dissent, moved beyond the limits of act and to a richer conception of how sexuality defines selfhood. Kennedy's gay rights jurisprudence clearly follows.

But if the gay rights jurisprudence tracks the thought of primarily one justice—even if it has roots in the writings of others—can it be called a development in as much as that term connotes a durable shift in ideational or institutional authority? Perhaps it is simply too early to tell. As constitutional legal development is, given the principle of *stare decisis*, a path-dependent endeavor grounded in precedent, the dignity doctrine is just too young. Not enough cases in not enough distinct constitutional realms have occurred in which the concept could be invoked.

Nevertheless, there are some signs that dignity may persist beyond the musings of a single justice. First, the Court issued no concurrence in *Obergefell* that employed scrutiny doctrine even as there were clear examples from lower federal and state courts that would have sufficed as models. Second, the executive branch under Barak Obama embraced the dignity rationale in its robust defense of transgender rights and importantly did not utilize the trappings of scrutiny doctrine. This is a profoundly different move compared with its explicit reliance on scrutiny doctrine in its earlier refusal to defend DOMA. This move from scrutiny to dignity beyond the judiciary suggested initial acceptance of the new paradigm by a presidential administration, even as this position has been reversed by the Trump administration.

The Court's refusal to apply suspect class analysis in *Obergefell* is all the more striking because the ruling identified many of the characteristics that define suspect class. First, Kennedy recognized a history of enduring unjust discrimination:

> Until the mid-20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the

8. This passage in *Bowers* is a quotation of an earlier statement by Justice Stevens offered in *Fitzgerald v. Porter Memorial Hospital* (cert. denied, 425 U.S. 916 [1976]).

> criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. (7)

Second, unlike any previous ruling, Kennedy defines sexuality as an immutable trait: "Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their *immutable nature* dictates that same-sex marriage is their only real path to this profound commitment" (4). Despite making the beginnings of what would seem a systematic identification of suspect class characteristics, Kennedy grounds the ruling in the dignity that inheres in marriage. Despite recognizing histories of discrimination, there is no formulaic identification of the distinguishable traits that would render a class suspect and call for higher scrutiny of the state's reasons for limiting access to marriage. The Court has made a profound move to avoid scrutiny doctrine.

That avoidance is a marker of a durable shift in jurisprudential thinking from traditional equal protection analysis to a new dignity-based framework. Another indicator is the lack of a concurring opinion in *Obergefell*, signed by at least a minority of justices, that performs the traditional suspect class analysis. This absence is all the more striking since, leading up to *Obergefell*, multiple state courts had provided examples of how this analysis—determining gays and lesbians to make up a suspect class and thereby subjecting restrictions on marriage recognition to higher scrutiny—could have been done. In 2008, in *In re Marriage Cases*, the California Supreme Court analogized sexual orientation to race and sex in two ways, which thereby permitted and compelled the Court to evaluate the state's claims by strict scrutiny. First, the marriage statutes classify or discriminate "on the basis of sexual orientation, a characteristic that we conclude represents—like gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment" (10). Second, the Court determined that such treatment "impinges upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple" (10). The state's interest in distinguishing marriages from same-sex domestic partnerships, so as to

maintain "the traditional and well-established definition of marriage," was not considered to be compelling or that the existing exclusion was necessary to achieve this interest (11).

A few months later, the Connecticut Supreme Court engaged in a systematic analysis evaluating whether gays qualify as a quasi-suspect class and thus whether laws classifying so as to exclude that class are subject to heightened scrutiny. It found that gay persons endured a history of discrimination, that sexual orientation is unrelated to a person's ability to participate in or contribute to society, that the distinguishing characteristic of the class while not immutable is also not easily changed, and that the class has a history of political powerlessness (22–48). Because the immutability of sexual orientation is subject to debate, the Court's rumination on this point requires some detailing. The Court did not declare sexual orientation to be immutable; it did find that "it is not necessary for us to decide whether sexual orientation is immutable in the same way and to the same extent that race, national origin, and gender are immutable" (27). Instead, the Court declared that, as stipulated in *Lawrence*, sexual intimacy is so integral to personal identity and sexual orientation plays a "central role . . . in a person's fundamental right to self-determination" (28). Therefore, it operates as "the kind of distinguishing characteristic that defines them as a discrete group for purposes of determining whether that group should be afforded heightened protection under the equal protection provisions of the state constitution" (28). A year later, the Iowa Supreme Court conducted a similar analysis. Utilizing the four-pronged test to determine suspect class status, the Iowa Supreme Court recognized gay persons as a suspect class and sexual orientation as a suspect classification. In applying the intermediate scrutiny standard such that the statutory classification excluding gays and lesbians from marriage recognition must be substantially related to an important government interest, the U.S. Supreme Court determined that none of the five interests put forward by the state rose to that level.

Given all of these examples from state supreme courts, that there is no concurrence in *Obergefell* even among a minority of justices that lays out a similar argument is a striking example of how the Court refused or perhaps saw no need to pursue the traditional doctrinal path. In speaking to this omission, Justice Ruth Bader Ginsburg relied on the pragmatic and symbolic effects of a single decision:

> Perhaps because in this case it was more powerful to have the same, single opinion. . . . That kind of discipline is to say, "I'm not the queen and if the majority is close enough to what I think . . . then I don't have to have it exactly as I would have written it." . . . On the whole, we think of our consumers—other judges, lawyers, the

> public. The law that the Supreme Court establishes is the law that they must live by, so all things considered, it's better to have it clearer than confusing. (Stern 2015)

While a single rationale—the dignity claim—may be less confusing, the well-entrenched doctrine of tiered scrutiny as possibly applied to a marriage equality claim would hardly be difficult to follow. It had been articulated by legal scholars and lower courts for at least a decade. Without it, LGBT persons continue to go unrecognized as a suspect class, and the Court continues in deepening its commitment to rights grounded more explicitly in the rhetoric of individual autonomy and dignity than in the state's commitment to equality.

Finally, another aspect of durability is whether governing authorities accept a possible constitutional interpretation. Is the new approach used beyond the branch that has put it forward? Indeed, the executive branch has recently employed the dignity framework, tellingly abandoning the doctrine of tiered scrutiny, which it had pointedly relied on only a few years ago. In 2011, Attorney General Eric Holder announced that the administration would not defend DOMA in federal court (DOJ 2011). President Obama concluded that Section 3 of the law, which defined marriage as a union between one man and one woman, was unconstitutional. According to Holder, the president determined that gays and lesbians constituted a suspect class, that laws affecting that class should be held to heightened judicial scrutiny, and that DOMA would not survive that level of scrutiny: "[G]iven a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a more heightened standard of scrutiny." Holder's statement is significant because of how closely it held to the traditional equal protection analysis; it recognized gays and lesbians as a suspect class even as it acknowledged that the Supreme Court has not.

When Attorney General Loretta Lynch commented on whether and how a North Carolina law, HB2, violated existing federal civil rights statutes or the Fourteenth Amendment's guarantee of equal protection, she tellingly did not employ any of the trappings of scrutiny doctrine as had her predecessor. She did invoke the operative concept of *Obergefell*: dignity. The bill, which prevented municipalities from passing antidiscrimination ordinances that would include sexual orientation and gender identity and specifically banned transgender individuals from using public restrooms that correspond to their gender identity, was deemed "in direct opposition to federal laws prohibiting discrimination on the basis of sex and gender identity." Because North Carolina responded to the federal government's position by suing the federal government, the Department of Justice brought a countersuit. Explaining part of the rationale for that suit, Lynch stated:

> This action is about a great deal more than just bathrooms. This is about the dignity and respect we accord our fellow citizens and the laws that we, as a people and as a country, have enacted to protect them—indeed, to protect all of us. And it's about the founding ideals that have led this country—haltingly but inexorably—in the direction of fairness, inclusion and equality for all Americans.

She went on to invoke a long history of discrimination that the Court has invalidated ranging from Jim Crow laws to bans on same-sex marriage bans.

By framing HB2 as legislative backlash against inroads toward LGBT rights recognition, Lynch channeled Justice Kennedy. Lynch characterized the law as "inflict[ing] further indignity on a population that has already suffered far more than its fair share. This law provides no benefit to society—all it does is harm innocent Americans" (DOJ 2016). First, Lynch's rhetorical invocation of dignity, the way she defines dignity in exact parallel to how the Court did so in *Lawrence*, *Windsor*, and *Obergefell*, and the absence of any reference to suspect class or political powerlessness would all seem to indicate a durable shift in the making. Second, Lynch, just as Kennedy did in *Windsor*, indicated that LGBT persons have long suffered a history of discrimination but did not translate that recognition into a claim of suspect class or higher scrutiny as Holder had done in 2011. Third, Lynch referenced how an appeal to dignity was inherently not class-specific but instead the Department of Justice's actions were meant to "protect all of us." In short, the invocation of dignity refuses to consider discrimination in historical and cultural contexts as suspect class doctrine requires. Precisely because the Department of Justice has invoked the discursive and interpretive shifts innovated by Kennedy, this newer dignity approach to equality seemed on the cusp of developmental durability, at least until the election of Donald Trump.

Under the guidance of Trump's attorney general, Jeff Sessions, the Department of Justice dropped its lawsuit against North Carolina's HB2 in April 2017 (Drew 2017). The case relied on the Obama administration's guidelines issued jointly in May 2016 from the Departments of Justice and Education that transgender students be allowed to use the public bathrooms that align with their expressed gender identity. The administration maintained that schools that did not follow these guidelines violated Title IX of the Education Amendments of 1972, which banned discrimination on the basis of a student's sex. The Trump administration rescinded this guidance in March 2017, which then cleared the way for the Department of Justice to drop the lawsuit against North Carolina. Thus, it would seem that inroads to any durability of dignity were cut off when Trump won the presidential election. Yet, developmental paths are hardly linear. Rights recognitions, however they

may proceed over time, do not follow a steady pathway of teleological progress but instead illustrate "the trajectories of development taken by political institutions and protean intellectual currents, of chance, unintended consequences, developmental paths, and pockets of resistance" (Kersch 2004, 26). Even this suggests that dignity, which as Gorsuch hinted at, may be useful to conservative jurists, may ultimately, over time, not prove useful to the political or legal aims of LGBT rights activists.

VI. CONCLUSION: THE CONSERVATIVE LOGIC OF A LIBERAL RULING AND THE POSSIBILITIES OF CONSTITUTIONAL DEVELOPMENT

This article has illustrated how *Obergefell* could, through its articulation of dignity as an alternative doctrinal pathway for equal protection, accommodate and even facilitate outcomes that progressive jurists would seek to avoid. The Kennedy oeuvre of gay rights rulings—*Romer*, *Lawrence*, *Windsor*, and *Obergefell*—is not only made up of rational basis rulings within the traditional scrutiny doctrine of Fourteenth Amendment equal protection decisions. Rather, they also supplant tradition with a new possible paradigm grounded in dignity. Moreover, when we consider how Justice Kennedy has conceptualized dignity in other arenas of human liberty, particularly abortion access, it becomes all too clear how dignity may operate against the aims associated with the political left.

Ironically, *Obergefell* may open the door to opportunities to restrict LGBT rights. The dignity doctrine does not provide a clear answer to the new front in LGBT mobilization: equal treatment in employment, housing, and public accommodations. Kennedy's invention pits one conception of dignity—that of the religious believer—against another—that of the individual seeking to live and to earn a living free from discrimination. Who has a greater claim on free expression as constitutive of dignity—the gay or lesbian individual who seeks to live free from prejudice or the religious believer who seeks also to live openly and free from prejudice? Historically, when the Court has construed gay rights claims to conflict with First Amendment claims to freedom of expression, the latter have won out (see *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* [1995] and *Boy Scouts of America et al. v. Dale* [2000]). Just as Kennedy's reliance on dignity as a substitute for the formulaic application of scrutiny curbed abortion access, it could be used to curb gay rights claims, particularly those that take expression of sexual identity beyond the conceptual bounds of the private heteronormative bedroom, household, and family. In this regard the coming Supreme Court ruling in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, which pits an expression claim against an

equal protection claim, could prove telling to whether and how the dignity doctrine is utilized.

The article has also shown how the same-sex marriage jurisprudence is not merely historically contingent—coming at a particular cultural point when the concept of gay rights is far more publicly accepted—but also does work within broader political and discursive efforts to ground the institutional authority of the Court to rule (Novkov 2001; Kersch 2004; Brandwein 2011). The underlying principle of dignity that courses through *Lawrence*, *Windsor*, and *Obergefell*, even as it is "responsive to political concerns, takes place within the available legal discursive frameworks of the jurisprudential movement in which it occurs" (Novkov 2015, 820). In other words, while we have tended to think of *Lawrence* and the marriage equality rulings as progressive victories, both the language and logic of dignity in these landmark rulings reflects a broader arc of conservative legal efforts to reshape how the equal protection clause is interpreted: from the application of scrutiny to suspect classes to the application of scrutiny to suspect classification (often with results antithetical to the original aspirations of the doctrine) and then to the refusal to apply higher scrutiny altogether by relying on some professed "universal" notion of dignity.

This ideational development aligns with a broader institutional shift in how the Court justifies its own place among three equal branches in a democracy. While the Court's institutional legitimacy for much of the twentieth century relied on its representation-reinforcing potential, on its unique ability to make democracy work by recognizing when it malfunctions and denies access to particular groups, the dignity framework points to a role that is less interventionist and comports with the broader aims of the conservative legal movement to curb judicial interventionism. To illustrate and defend these claims, the article detailed the erosion of scrutiny doctrine, described the emerging alternative in the gay rights rulings, showcased how dignity has been used to undercut liberal policies of racial integration and abortion access, and offered some evidence of how dignity has been used by distinct federal governing authorities.

Tiered scrutiny and suspect class/classification doctrine is a particular historical construction, and its maintenance over time is contingent, at least in part, on judicial appointment and the ongoing development of conservative legal infrastructure. Any newer doctrine of dignity will likely prove the same if it is to survive beyond the jurisprudential idiosyncrasies of one particular justice and the rollbacks of the Trump administration. Gorsuch's endorsement of *Obergefell* as "absolutely settled" and his claim to understand the Fourteenth Amendment to apply to individual persons rather than classes of people at least indicates some potential for

dignity to become entrenched. Ironically, dignity has been developed in the context of seemingly liberal gay rights victories, or, put differently, it is a liberal means to achieve a conservative end. We might, therefore, as Schopenhauer (1965) famously suggested, be cautious of treating dignity as an unalloyed good. We might be wary of judicial reliance on dignity precisely because, to this date, "that imposing expression" would appear to "lack of any real basis of morals, or, at any rate, one that had any meaning." Schopenhauer warned that people may "be glad to see themselves invested with such a dignity and would accordingly be quite satisfied with it" (100). Denied of dignity for so long, treated with moral and legal disgust (Nussbaum 2010), gays and lesbians rightfully celebrated when in June 2015, the *New York Times* splashed the banner headline of "Equal Dignity" across its front-page coverage of *Obergefell*. And, yet, dignity as a legal doctrine can support outcomes that might cause political liberals—long proponents of LGBT rights—to cringe.

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