# DIGNITY AND LIBERTY: RECOGNIZING A NATIONAL RIGHT TO QUALITY EDUCATION UNDER THE DUE PROCESS CLAUSE

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## INTRODUCTION

Over forty years ago, the Supreme Court considered whether the United States constitution contains an implicit right to receive a quality education in *San Antonio Independent School District v. Rodriguez*.[1] The Court considered the constitutionality of a Texas state education funding system, which relied partly on local property tax revenue. Under the Texas system, per pupil spending in Edgewood—a poorer district with low property taxes—was 38% lower than per pupil spending in nearby Alamo Heights, a wealthier district. In a class-action

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[1] 411 U.S. 1 (1973).

lawsuit, students in the poorer district challenged the system's validity under the 14th Amendment's Equal Protection Clause. Notwithstanding the Court's acknowledgment of the "grave significance of education both to the individual and to our society," the Court held that the Texas system did not deprive the Edgewood students of a fundamental interest, and upheld the Constitutional validity of the Texas system. The Court did not completely foreclose the possibility that the Constitution protects "some identifiable quantum of education," but seemed to suggest the validity of any system that does not "fail[] to provide each child with an opportunity to acquire the *basic minimal skills necessary* for the enjoyment of rights of speech and of full participation in the political process."[2]

Education advocates have been hesitant to test the limits of this apparently low bar, so the Court has not had an opportunity to directly address the question of minimal education adequacy left open by *Rodriguez*. Consequently, the body of Supreme Court jurisprudence about constitutional education rights has been limited over the past forty years. However, the Supreme Court has had myriad opportunities to evaluate the boundaries of the Fourteenth Amendment and the substantive rights it protects. The Court has gradually narrowed the scope of the Equal Protection Clause, while expanding the scope of a different mechanism for ensuring fair treatment: the Due Process Clause. The strategies used by the Court to give meaning to the term "liberty" in the Fourteenth Amendment's Due Process Clause have transformed from a backward-looking approach that endeavored to identify which rights had always been enforced by our Courts, to a more forward-looking approach anchored in human dignity. This approach,

[2] *Rodriguez*, 411 U.S., at 36–37.

applied most recently in *United States v. Windsor*,[3] has repeatedly invalidated legislation that fails to accord the proper respect to human dignity.

The doctrine that guides the determination of fundamental interests protected by the Due Process clause has gone under a dramatic transformation in the forty years since *Rodriguez*. If a case with facts similar to those in *Rodriguez* were to come before the 2015 Supreme Court, it would apply an entirely different framework. This note will analyze the Supreme Court's joint treatment of the concepts of liberty and dignity, with particular emphasis on their treatment in the context of the Due Process Clause, and it will attempt to articulate the framework that has emerged. As Justice Kennedy stated in *Lawrence v. Texas*,[4] "later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." The Court in *Lawrence* recognized that, if *Bowers v. Hardwick*[5] had any social or cultural legitimacy at the time it was written, it had expired by 2003.[6] Likewise, a 21st century Supreme Court considering the national right to quality education—especially a court including Justice Anthony Kennedy—may not consider itself bound by the Court's analysis in *Rodriguez* or prohibited from raising the bar of what that right entails.

In Part I, I will provide an overview of the Supreme Court's jurisprudence on education rights and an analysis of potential textual sources for a national right to education under the

[3] 133 S. Ct. 2675 (2012).
[4] 539 U.S. 558 (2003).
[5] 478 U.S. 186 (1986).
[6] The *Lawrence* Court did not, in fact, make this concession; rather, it went into detail to discredit the alleged social and cultural legitimacy proffered in *Bowers*. *See Lawrence*, 539 U.S., at 572 (describing why the "emerging recognition [that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex] should have been apparent when *Bowers* was decided").

United States constitution. In Part II, I will describe the Supreme Court's analysis of liberty interests under the Due Process Clause, identify the opinions in which human dignity has played a prominent role, and attempt to distill a dignity-based approach for identifying which liberty interests are entitled to constitutional protection. In Part III, I will apply this approach in the context of education to determine the viability of the claim that the deprivation of a quality education is an affront to human dignity, and therefore violates both the Fifth and Fourteenth Amendments. In Part IV, I will anticipate criticisms of this approach, and explain practical obstacles to its success in the Supreme Court.

## I. BACKGROUND: CONSIDERING A NATIONAL RIGHT TO EDUCATION

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## II. INTERPRETING LIBERTY THROUGH DIGNITY

### A. Giving Meaning to the "Liberty" Protected by the Due Process Clause

The Reconstruction amendments marked a dramatic shift in our nation's protection of individual rights and liberty interests.[7] In particular, the Fourteenth Amendment, since its ratification, has been perhaps the most important textual foundation for the Supreme Court's recognition of Constitutional rights.[8] The first two clauses of Section 1 of the amendment—the

[7] *See, generally*, 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); 2 BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION (Henry Steele Commager, Richard B. Morris, eds., 2002); Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373 (2009); *see also*, Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) (Thomas, J., concurring) ("The Fourteenth Amendment fundamentally restructured the relationship between individuals and the States . . . .").

[8] *See, e.g.*, Brown v. Bd. Of Educ. of Topeka, Kan., 347 U.S. 483 (1954) (holding that a segregated school system violated the Equal Protection Clause of the Fourteenth amendment); Loving v. Virginia, 388 U.S. 1 (1967) (holding that a miscegenation statute violated both the

Citizenship Clause and the Privileges or Immunities Clause—had perhaps the greatest capacity to confer national substantive rights to all people in the United States;[9] however, the Citizenship Clause has been largely under-utilized as authority for federal legislation,[10] and Justice Miller gutted the Privileges or Immunities Clause of its potential in the *Slaughter-House Cases*, shortly after the Amendment was ratified.[11] This decision, along with similarly limiting decisions

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Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment); Roe v. Wade, 410 U.S. 113 (1973) (holding that the Fourteenth Amendment's right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy). The Commerce Clause, U.S. CONST. art. I, § 8, has also played an important role in protecting civil rights. *See*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (upholding the constitutional validity of the Civil Rights Act of 1964 on the grounds that the Commerce Clause gave Congress the authority to pass the legislation).

[9] *See* Goodwin Liu, *Education, Equality, and National Citizneship*, 116 YALE L.J. 330, 335 (2006) (explaining the Citizenship Clause's relative advantages over the Equal Protection and Due Process Clauses, including the fact that it is "affirmatively declared[,]" "is not merely protected against state abridgment.[,]" and "[t]ogether with Section 5, it obligates the national government to secure the full membership, effective participation, and equal dignity of all citizens in the national community."); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 28 (1980) ("The most plausible interpretation of the Privileges or Immunities Clause is . . . that it was a delegation to future constitutional decision-makers to protect certain righs that the document neither lists . . . nor even in any specific way gives directions for finding.").

[10] Liu, *supra* note 9, at 335 (arguing that "the constitutional guarantee of national citizenship has never realized its potential to be a generative source of substantive rights").

[11] 83 U.S. 36 (1872) (distinguishing between the privileges and immunities held by citizens of the United States and those held by citizens of the states themselves, explaining that the latter "embrace generally those fundamental civil rights for the security and establishment of which organized society is instituted" and finding that only the former, which included only "certain exceptions mentioned in the Federal Constitution," were protected by the Fourteenth Amendment); *see also*, McDonald v. City of Chicago, Ill., 561 U.S. 742, 808–13 (2010) (Thomas, J., concurring) (describing the Court's "marginalization" of the Privileges and Immunities clause); Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the Slaughterhouse Cases*, 70 CHI.-KENT L. REV. 627, 628 (1994) ("[A]lmost all sources agree that Justice Miller's majority opinion in the Slaughter-House Cases . . . 'virtually scratched [the Privileges or Immunities Clause] from the constitution.'") (quoting Charles Fairman, What Makes a Great Justice?: Mr. Justice Bradley and the Supreme Court, 1870-1892, 30 B.U. L. REV. 49, 78 (1950)).

regarding the Thirteenth[12] and Fifteenth Amendments,[13] left the two other clauses in Section 1 of the Fourteenth Amendment to do much of the work to recognize and protect constitutional rights and human dignity in post-Civil War America: the Equal Protection Clause and the Due Process Clause.

Although civil rights advocates successfully invoked the Equal Protection Clause to persuade the Supreme Court to ensure certain liberties and opportunities,[14] the doctrine developed in a way that limited meaningful review of actions that maintained the pre-Reconstruction social and economic stratification to instances of intentional discrimination[15] by a

[12] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883) (holding that the Civil Rights Act of 1875 was not supported by the Thirteenth Amendment, on the grounds that the Thirteenth Amendment was intended to abolish all "badges and incidents of slavery," and finding that unequal access to public accommodations was not regarded as a badge of slavery); United States v. Harris, 106 U.S. 629, 641 (1883) ("[T]he [Thirteenth amendment] . . . simply prohibits slavery and involuntary servitude."); Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that the Thirteenth Amendment prohibited "bondage" "ownership of mankind as chattel" and "control of the labor and services of one man for the benefit of another" but did not invalidate laws prohibiting African Americans from sitting in the same train cars as white people). *But see*, Jones v. Alfred H. Mayo Co., 392 U.S. 409, 439 (1968) (holding that the Thirteenth Amendment gives Congress "the power to eliminate all racial barriers to the acquisition of real and personal property"). *See also, generally*, William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment*: *Defining the Badges and Incidents of Slavery*, 40 U.C. DAVIS L. REV. 1311, 1325–29 (2007) (providing an overview of the Supreme Court's interpretation of the Thirteenth Amendment).

[13] *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903) (holding that the Supreme Court did not have the jurisdiction to force states to register minority voters, so long as the voter registration laws were racially neutral).

[14] Brown v. Bd. Of Educ. of Topeka, Kan., 347 U.S. 483 (1954) (holding that a segregated school system violated the Equal Protection Clause of the Fourteenth amendment); Loving v. Virginia, 388 U.S. 1 (1967) (holding that a miscegenation statute violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment).

[15] *See* Washington v. Davis, 426 U.S. 229 (1976) (holding that even where a state action has a disparate impact on a protected class, it is presumptively valid unless there is evidence of intentional discrimination).

state[16] against a few narrowly defined classes of people,[17] leaving advocates with the Due Process Clause as the primary vehicle for the recognition of substantive civil rights: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."[18]

Although at first glance the Due Process Clause may seem primarily to concern legal procedures,[19] the suggestion that the "liberty" protected by the Due Process Clause includes substantive rights beyond "mere freedom from physical restraint or the bounds of a prison" gained traction shortly after the amendment was ratified,[20] and, some of the Court's most conservative justices have accepted it as settled law[21]. Justice Harlan explained the importance of recognizing the substantive liberty in the clause:

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[16] *See*, *Civil Rights Cases*, 109 U.S., at 11 ("It is state action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the amendment.").

[17] *See* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755–57 (2011) (listing the five characteristics that receive heightened scrutiny—"race, national origin, alienage, sex, and nonmarital parentage"—noting that the Supreme Court has not accorded a new characteristic heightened scrutiny since 1977, and so arguing that, "[a]t least with respect to federal equal protection jurisprudence, this canon has closed").

[18] U.S. CONST. amend. XIV, § 1; *see also*, U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law").

[19] *See*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997) (["T]he whole idea that the Due Process Clauses have anything to do with the substance of legislation, as opposed to the procedures that are used by the government, is subject to the standard objection that because "process" means procedure, substantive due process is not just an error but a contradiction in terms.").

[20] Munn v. Illinois, 94 U.S. 113, 142 (1876) (Field, J., dissenting); *see also, e.g.*, Powell v. Pennsylvania, 127 U.S. 678, 691 (1888) (Field, J. dissenting) ("Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from actual servitude, imprisonment, or restraint, but the right of one to use his faculties, in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation.") (internal quotation marks omitted); Taylor v. Beckham, 178 U.S. 548, 602 (1900) (Harlan, J., dissenting) ("In my judgment the words 'life, liberty, or property' in the 14th Amendment should be interpreted as embracing every right that may be brought within judicial cognizance, and therefore no right of that kind can be taken in violation of 'due process of law.'").

[21] *See*, *e.g.*, Albright v. Oliver, 510 U.S. 266, 283 (1994) ("We have held, of course, that the Due Process Clause protects interests other than the interest in freedom from physical restraint, and . .

> Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.[22]

This interpretation of the clause and its accompanying doctrine, often referred to as "substantive due process," began to take hold in the context of economic liberties in *Lochner v. New York*.[23] Although the *Lochner* decision eventually fell into disrepute and was overruled,[24] the understanding that "liberty" had a substantive element has endured;[25] "substantive due process," although a controversial term, has become a mainstay in constitutional lexicon.[26] In

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. we can assume, *arguendo*, that some of the interests granted historical protection . . . are protected by the Due Process Clause.") (Rehnquist, C.J., writing for the majority) (internal citations omitted); Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) ("It is an established part of our constitutional jurisprudence that the term "liberty" in the Due Process Clause extends beyond freedom from physical restraint.") (Scalia, J., writing for the majority). *But see*, United States v. Windsor, 133 S.Ct. 2675, 2706 (2013) (Scalia, J., dissenting) ("The majority never utters the dreaded words, 'substantive due process,' perhaps sensing the disrepute into which that doctrine has fallen."); McDonald v. City of Chicago, Ill., 561 U.S. 742 (2010) (Thomas, J., concurring) (agreeing with the majority that the constitution included a right to gun ownership, but disagreeing that the right could be found within the Due Process Clause because the "notion that a constitutional provision that guarantees only 'process' before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words").

[22] Poe v. Ullman, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

[23] 198 U.S. 45 (1905).

[24] *See* Jules B. Gerard, *Capacity to Govern*, 12 HARV. J.L. & PUB. POL'Y 105, 111 (1989) ("The first period of substantive due process, called the Lochner Era after the Court's infamous decision in *Lochner v. New York*, lasted forty years, from *Allgeyer v. Louisiana* in 1897 to *West Coast Hotel v. Parrish* in 1937.). For a discussion of the *Lochner* decision and its impact on Constitutional law, see generally Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873 (1987); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1 (2003).

[25] *See* Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1934 (describing *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) as the "survivors" of the Lochner era and as "two sturdiest pillars of the substantive due process temple").

[26] *See* Rosalie Berger Levinson, *Reining In Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) (explaining that substantive due process is confusing and controversial, but that it is well established that the Due Process Clause has a substantive component).

part, the controversy arises from the "mushiness" of the doctrine—courts, including the Supreme Court, have struggled to demarcate the outer limits of the term "liberty," or to provide a way to determine which rights are protected.[27] Several justices on the Supreme Court have warned that the substantive reach of the clause should be limited.[28] In *Washington v. Glucksberg*, Chief Justice William H. Rehnquist attempted to provide a definitive objective framework for evaluating an asserted right and determining whether it is implicit in the Due Process Clause.[29] Under the *Glucksberg* framework, the analysis had two primary features. First, the Court would inquire whether the right was "objectively, 'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.'"[30] Second, the Court would require a "'careful description' of the asserted fundamental liberty interest."[31] Under this test, "the discovery of new rights was virtually foreclosed; fundamental status was preserved for only those rights that were firmly embedded in the nation's history and tradition."[32]

The *Glucksberg* approach has been popular among constitutional scholars because it provides lower courts with a "template" to dismiss claims, and some argue that the it continues

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[27] Richard B. Saphire and Paul Moke, *Litigating* Bush v. Gore *in the States: Dual Process Systems and the Fourteenth Amendment*, 51 VILL. L. REV. 229, 273–74 (2006); *see also*, Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) ("Without that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court[.]'") (quoting Moore v. City of E. Cleveland, Ohio, 431 U.S. 494, 502 (1977)).
[28] *See, e.g.*, *Moore*, 431 U.S., at 544 (White, J., dissenting).
[29] 521 U.S. 702 (1997).
[30] *Id.* at 720–21 (quoting *Moore,* 431 U.S., at 503, and Palko v. Connecticut, 302 U.S. 319, 325–26 (1937) (internal citations omitted)).
[31] *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993). This approach attempted to synthesize the analysis of several opinions that had evaluated the substantive rights under the Due Process Clause.
[32] Lisa K. Parshall, *Redefining Due Process Analysis: Justice Anthony M. Kennedy and the Concept of Emergent Rights*, 69 ALB. L. REV. 237, 241 (2005-2006).

to be the accepted standard by which claims for constitutional protection of substantive liberty interests should be evaluated.[33]

## B. The Consideration of Dignity as an Approach to Due-Process-Clause Liberty Analysis

*i. The Constitutional Right to Privacy and Its Transformation into a Dignity Interest*

Despite the attempts of Chief Justice Rehnquist, Justice Scalia, and their allies on the Court to ossify their "objective" approach to Due Process liberty interest analysis, other justices during the same period were gathering majority support for approaches that were less dedicated to originalist principles and to limiting the scope of the Constitution's protection of substantive rights.

In *Poe v. Ullman* the Supreme Court affirmed the constitutionality of a state law that criminalized the use of contraception by married couples.[34] Justice John Marshall Harlan II dissented from the majority opinion on the grounds that the law violated the Fourteenth Amendment's Due Process Clause because it was "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."[35] Four years later, in *Griswold v. Connecticut*, a majority of the justices agreed with Justice Harlan that privacy was a constitutionally protected interest, but failed to reach a consensus about the reason

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[33] *See* Brian Hawkins, *The Glucksberg Renaissance: Substantive Due Process Since Lawrence v. Texas*, 105 MICH. L. REV. 409, 442–43 (2006); *see also* Yale Kamisar, *Can Glucksberg Survive Lawrence? Another Look at the End of Life and Personal Autonomy*, 24 ISSUES L. & MED. 95, 107 (arguing that the *Glucksberg* ruling is "likely to remain unchanged for the foreseeable future"). As recently as 2010, Justice Alito, writing for the majority, applied the Glucksberg approach to questions about gun ownership rights. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010).

[34] 361 U.S. 497 (1961).

[35] *Id.* at 539 (Harlan, J., dissenting).

*why*.[36] In a line of cases following *Griswold*, beginning with *Eisenstadt v. Baird*[37] and *Roe v. Wade*,[38] the Court not only acknowledged that the right to privacy was constitutionally protected, but also wrote opinions suggesting that it had been for almost a century.[39] While the right to privacy may be generally present in the Bill of Rights' "zones of privacy," Justice Brennan made clear in *Carey v. Population Services International*, that the Fourteenth Amendment's Due Process Clause, by its own force, protected a right of personal privacy.[40] Furthermore, he made it clear that this right included much more than the right to be left alone in one's home; rather, the privacy implied by the term "liberty" included "the interest in independence in making certain kinds of important decisions . . . without unjustified government interference, such as decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education."[41]

This broad interpretation pushed against the limits of the word "privacy." For example, while a parent should have the right to make choices regarding the education of her child without undue interference, the nature of that choice is rarely considered "private" under common understandings of the word; the implications of the choice—where her child attends school every

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[36] 381 U.S. 479 (1965). Justice Douglas, writing for the majority, found the right of privacy in the "penumbras" of several constitutional provisions, including the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments, all of which established "zones of privacy." *Id*. at 484–85.
[37] 405 U.S. 483 (1972).
[38] 410 U.S. 113 (1973).
[39] *See, e.g.*, *id.* at 152–53 (identifying a line of cases beginning in 1891 that recognized the right to privacy). For a brief history of the constitutional right to privacy, see Jayne T. Woods, *Due Process Right to Privacy: The Supreme Court's Ultimate Trump Card*, 69 MO. L. REV. 831, 834–38 (2004). For an explanation of the gradual redefinition of the privacy interest as an autonomy interest, see Kristina R. Mukoski, *The Constraint of Dignity:* Lawrence v. Texas *and Public Morality*, 89 NOTRE DAME L. REV. 451, 463–67 (2013).
[40] 431 U.S. 678, 684 (1977) ("Although 'the Constitution does not explicitly mention any right of privacy,' the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment 'is a right of personal privacy, or a guarantee of certain areas or zones of privacy.'") (quoting *Roe v. Wade*, 410 U.S., at 152).
[41] *Id.* at 684–85 (1977) (internal citations omitted).

day—are often quite public. The Court eventually acknowledged (albeit implicitly) that "privacy" was a misnomer.[42] Writing for a plurality in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, Justice Sandra Day O'Connor referred to *Carey*'s collection of privacy interests and reframed them in her famous "mystery of life" passage:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to *personal dignity and autonomy*, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[43]

Justice O'Connor rejected the notion that a liberty interest must have been protected for centuries in order to achieve constitutional legitimacy, and focused more on the importance of the interest to the individual and her capacity for self-definition. This passage reverberated throughout the country[44] and has been subject to widespread criticism.[45] In spite of the criticism, the passage has also had an enormous doctrinal impact: the connection Justice O'Connor made between the constitutional right to privacy and the concept of personal dignity laid the foundation for a series of opinions penned by Justice Kennedy that have elevated the importance of considering dignity in Fourteenth Amendment analysis.[46]

*ii. Understanding "Dignity"*

*Casey* was the first case to label long-established privacy rights as dignity interests, but it was certainly not the first Supreme Court opinion to mention of the term "dignity." Supreme

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[42] *See*, Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 851 (1992).
[43] *Casey*, 505 U.S., at 851 (emphasis added).
[44] *See, generally*, Trent L. Pepper, *The "Mystery of Life" In the Lower Courts: The Influence of the Mystery Passage on American Jurisprudence*, 51 HOW. L. J. 335 (2008).
[45] *See, id.* at 335 (identifying scholars who have criticized the "mystery of life" passage, referring to it as a "faux philosophic argument" (quoting Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 1997 UTAH L. REV. 665, 669 (2008)) and as a "bad freshman philosophy paper" (quoting John H. Garvey, *Control Freaks*, 47 DRAKE L. REV. 1, 3 (1998)).
[46] *See* Part II.C, *infra.*

Court justices have invoked the term almost since the Court's inception,[47] but its application has accelerated since the *Casey* opinion was written in 1992.[48] Its prominence in Justice Kennedy's opinions in *Lawrence v. Texas*[49] and *United States v. Windsor*[50] has helped to spark a wave of scholarship trying to understand what the term means and its implications on various areas of constitutional law[51].

Dignity is one of the most pervasive concepts in constitutional jurisprudence, but Supreme Court justices have been notoriously vague about its contours.[52] In her 2011 article, *The Jurisprudence of Dignity*, Leslie Meltzer Henry addressed this lack of clarity head-on with an analysis of every Supreme Court opinion that has invoked the term "dignity" (there have been over 900 such opinions in the past 220 years).[53] Based on her analysis, Henry identified five conceptions of dignity: institutional status, equality, liberty, personal integrity, and collective virtue.[54]

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[47] *See* Chisholm v. Georgia, 2 U.S. 419, 451 (1793) (Justice Blair finding that, notwithstanding the "dignity of a state", the state of Georgia was not protected by sovereign immunity in a law suit brought by the citizen of another state).
[48] Leslie Metlzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178–79 (2011) (explaining that of over 900 Supreme Court opinions that had used the term before 2011, over 100 had been written between 1991 and 2011).
[49] 539 U.S. 538 (2003).
[50] 133 U.S. 2675 (2012).
[51] *See, e.g.*, Erin Daly, *Human Dignity in the Roberts Court: A Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381 (2011); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65 (2011); Maxine D. Goodman, *Human Dignity in the Supreme Court Constitutional Jurisprudence*, 84 Neb. L. Rev. 740 (2006); Mukoski, *supra* note 39; Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008); Tribe, *supra* note 25.
[52] Henry, *supra* note 48, at 171 ("Dignity's increasing popularity, however, does not signal agreement about what the term means. Instead, its importance, meaning, and function are commonly presupposed but rarely articulated.").
[53] *Id.* at 179.
[54] *Id.* at 189–90.

Institutional Status as Dignity:[55] In cases such as *Alden v. Maine*[56] and *Seminole Tribe of Florida v. Florida*,[57] the Court has often appealed to the dignity of a state in upholding the doctrine of sovereign immunity, even if its interpretation does not seem to harmonize with the Eleventh Amendment.[58] This was the first conception of dignity applied by the Court.[59] Beyond sovereign immunity, this conception of dignity is also invoked in the concept of "states' rights,"[60] and often comes into conflict with other laws passed to protect the dignity of individuals.[61] The Supreme Court has also accorded dignity to another type of institution: federal courts themselves.[62]

Equality as Dignity:[63] While the obvious constitutional context for the conception of equality as dignity might be the Fourteenth Amendment's Equal Protection Clause, the concept

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[55] For a more detailed explanation of Institutional Status as Dignity, see *id.* at 190–99; *see also*, Daly, *supra* note 51.
[56] 527 U.S. 706, 714 (1999) (holding that the "Constitution preserves the sovereign status of the States . . . with the dignity and essential attributes inhering in that status").
[57] 517 U.S. 44 (1996) ("The Eleventh Amendment . . . serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties[.]'") (quoting P.R. Aqueduct and Sewer Auth. v. Metcalf and Eddy, Inc., 506 U.S. 139, 146 (1993)).
[58] *See*, Matthew Mustokoff, *Sovereign Immunity and the Crisis of Constitutional Absolutism: Interpreting the Eleventh Amendment After* Alden v. Maine, 53 ME. L. REV. 81, 83 (arguing that the *Alden* court treated the Eleventh Amendment like a "doctrinal rubber band" and "stretched it to its outer limits," and noting that the Court even acknowledged that the text of the amendment did not support its ruling).
[59] See discussion of *Chisholm v. Georgia*, *supra* note 47.
[60] *See*, Timothy Zick, *Statehood as the New Personhood: The Discovery of Fundamental "States' Rights"*, 46 WM. & MARY L. REV. 213, 221–23 (2004).
[61] *See, e.g.*, Shelby County, Ala. v. Holder, 133 S. Ct. 2612, 2623 (2013) (relying on the "'integrity, dignity, and residual sovereignty of the States'" in finding Section V of the Voting Rights Act invalid) (quoting Bond v. United States, 131 S. Ct. 2355, 2364 (2011)).
[62] *See, e.g.*, Pounders v. Watson, 521 U.S. 982, 988 (1997) ("Where misconduct occurs in open court, the affront to the court's dignity is more widely observed, justifying summary vindication.").
[63] For a more detailed explanation of Equality as Dignity, see Henry, *supra* note 48, at 199–205.

has been applied much more broadly. In upholding the constitutionality of the Civil Rights Act[64] under the Commerce Clause,[65] Justice Goldberg noted in *Heart of Atlanta Motel, Inc. v. United States* that the "denial[ ] of equal access to public establishments [on the basis of race]" deprived a person of dignity.[66] The Court has similarly found that gender discrimination deprives a person of individual dignity.[67]

Liberty as Dignity:[68] This conception of liberty has its roots in Greek and Roman philosophy, and was most famously articulated by Immanuel Kant, who claimed that "human dignity derives from autonomy—the distinctively human ability to discern the moral law and live by it."[69] Henry explains that "this application of liberty appears most prominently in cases involving personal decisions, namely the choice to have an abortion or engage in same-sex intimacy,"[70] and also in cases involving First Amendment speech rights and Fourth and Fifth Amendment protections against self-incrimination[71]. Henry explains that commentators have noted that "the Court's use of liberty as dignity takes the Court further than in any previous decision and may presage a new jurisprudence."[72]

Personal Integrity as Dignity:[73] This conception also roots in the Aristotelian philosophy of virtue, and the idea that "humans cannot express this form of dignity unless they are

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[64] 42 U.S.C.A §§ 2000e *et seq.*
[65] U.S. CONST. art. I, § 8.
[66] 379 U.S. 241, 291–92 (1964) (Goldberg J., concurring).
[67] Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984).
[68] For a more detailed explanation of Liberty as Dignity, see Henry, *supra* note 48, at 206–12.
[69] *Id.* at 207 (citing IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC [*sic*] OF MORALS (1785), *reprinted in* THE MORAL LAW 114 (H.J. Paton trans. Routledge Classics 2005) (1948).
[70] *Id.* at 208–09.
[71] *Id.* at 209 n.196.
[72] *Id.* at 211 (internal citations omitted).
[73] For a more detailed explanation of Personal Integrity as Dignity, see *id.* at 212–20.

integrated, whole selves."[74] An important characteristic of this form of dignity is that it must be respected by others.[75] Therefore, it arises most often in Supreme Court jurisprudence in defamation cases,[76] in which the Court will find that an individual's interest in protecting his personal integrity as dignity may outweigh First Amendment principles of uninhibited speech.[77] In another case, the Court found that a mentally ill man's Sixth Amendment right to self-representation could be outweighed by his own dignity interests.[78]

Collective Virtue as Dignity:[79] This notion of dignity provides that "treating a person in a subhuman manner is wrong not only for the effect it has on that individual, but also for the consequences it has on collective humanity and society."[80] The Court has most often invoked this concept of dignity in the context of the Eighth Amendment's prohibition on cruel and unusual punishment,[81] but has also applied it in the context of reproductive rights.[82]

Professor Henry's analysis provides us with a useful typology for discussing the varying contexts in which the Supreme Court has invoked the concept of dignity in justifying its rulings.

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[74] *Id.* at 215.
[75] *Id.*
[76] *See, e.g.*, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990) (holding that a newspaper article falsely alleging that a wrestling coach had engaged in perjury was not protected by the First Amendment's guarantee of free speech because it infringed upon his interest in maintaining his own good reputation).
[77] Henry, *supra* note 48, at 217–18.
[78] Indiana v. Edwards, 554 U.S. 164, 176 (2008). The Court (perhaps patronizingly) assumed that if the man represented himself, the resulting spectacle would be an affront to his own dignity; *see also,* Henry, *supra* note 48, at 218.
[79] For a more detailed explanation of Collective Virtue as Dignity, see *id.* at 220–29.
[80] *Id.* at 221.
[81] *See*, *e.g.*, Atkins v. Virginia, 536 U.S. 304 (2002) (holding that the Eighth Amendment prohibits the execution of mentally retarded people); Roper v. Simmons, 543 U.S. 575 (2005) (holding that the Eighth Amendment prohibits the execution of people who were juveniles when they accused of committing a crime); Hope v. Pelzer, 536 U.S. 730 (2002) (holding that the Eighth Amendment renders unconstitutional the act of tying a prisoner to a post).
[82] *See* Gonzales v. Carhart, 550 U.S. 124 (2007) (upholding the constitutionality of the Partial Birth Abortion Act because it showed "respect for the dignity of human life," and finding that the state itself had an "interest in protecting the integrity and ethics of the medical profession").

But, by her own admission, the work is far from complete.[83] She seems to be the only person who has done a comprehensive analysis of all dignity mentions, but other scholars have endeavored to categorize the Supreme Court's concepts of dignity, and have come to different results.[84] Who is to say which grouping of conceptions, if any, best aligns with the opinions of the justices currently on the court? Which conception enjoys the highest standing in the opinions of the Supreme Court justices? What if there are competing dignity interests at stake?[85] Do the conceptions cross-pollinate? Ultimately, what are the components of a dignity-based argument that is most likely to convince the Court?

*iii. Developing a Fourteenth-Amendment Dignity Strategy*

Scholars have attempted to provide answers to some of these questions and they have constructed arguments for establishing a general right to dignity. For example, Erin Daly has suggested an approach that applies the theoretical foundations underlying the Supreme Court's recognition of the dignity of states to individual rights cases.[86] She claims this approach would be the best way to convince the court to recognize that individuals possess a constitutional right

[83] *See*, Henry, supra note 48, at 229.
[84] Rao, *supra* note 51, at 187–89 (identifying three concepts of human dignity: inherent dignity, substantive dignity, and dignity as recognition); Siegel, *supra* note 51, at 1737 (identifying three usages of dignity: dignity as life, dignity as liberty, and dignity as equality); Glensy, *supra*, note 51, at 71 (articulating four approaches to dignity jurisprudence the Supreme Court has taken or could take: a positive rights approach, a negative rights approach, a proxy approach, and an expressive approach).
[85] Henry does discuss one instance in which the court implicitly found one dignity interest to be subservient to another. *Id.* at 228 ("In short, *Carhart* illustrates that liberty as dignity, and the women who possess it, are playing an ever smaller role in the Court's abortion jurisprudence. In their place, the Court proffers collective virtue as dignity to vindicate what it views as our decency and humanity.").
[86] *See* Daly, *supra* note 51.

to dignity.[87] Others have suggested approaches based on dignity as a proxy for other rights,[88] or an approach that considers dignity as an inherent quality.[89]

In *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, Reva B. Siegel endeavored to understand Justice Kennedy's references to dignity in *Casey*[90] and *Gonzales v. Carhart*,[91] while drawing on other opinions in which he made explicit mentions of dignity in the context of the Fifth and Fourteenth Amendments.[92] Siegel identified three meanings of dignity (dignity as life, dignity as liberty, and dignity as equality) in an attempt to glean a coherent theory of the role of dignity in Justice Kennedy's opinions.[93] She then applied her theory to the "undue burden" framework established by Casey itself.[94]

Siegel's approach provides a model for my own analysis: I also aim to provide support for the recognition of a liberty interest under the Due Process Clause of both the Fifth and Fourteenth Amendment, and I will focus my analysis primarily on Justice Kennedy's treatment of dignity; Justice Kennedy applies concepts of dignity to his constitutional interpretation far

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[87] *Id.*
[88] Glensy, *supra* note 51, at 142 (suggesting that of the four approaches he explained, the "proxy approach is that with which the use of dignity best fits within presently framed constitutional, statutory, and common law standards").
[89] Rao, *supra* note 51, at 270 (concluding that, although the Supreme Court has occasionally "appealed to other conceptions of dignity," the conception she refers to as "inherent dignity," a conception that promotes liberty and autonomy, "accords with our constitution of negative rights and with an awareness of judicial limitations in articulating and protecting social norms and values of dignity").
[90] Justice Kennedy did not write the *Casey* opinion, but he was a signatory, and repeated the "mystery of life" passage in his *Lawrence* opinion. *See*, Lawrence v. Texas, 539 U.S. 558, 574 (2003).
[91] 550 U.S. 124 (2007).
[92] *See* Siegel, *supra* note 51.
[93] *See id.* at 1735–45.
[94] *See*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992).

more often that the other justices currently on the court.[95] Notwithstanding his relatively common reliance on dignity, contrary to other justices on the court,[96] Justice Kennedy does not espouse any single theory of constitutional interpretation (dignity-based or otherwise):

> I do not have an over-arching theory, a unitary theory of interpretation. I am searching, as I think many judges are, for the correct balance in constitutional interpretation. So many of the things we are discussing here are, for me, in the nature of exploration and not the enunciation of some fixed or immutable ideas.[97]

Therefore, an attempt to anticipate which theoretical concept of dignity Justice Kennedy may apply in a Due Process liberty interest case could be unlikely to yield any reliable conclusions. However, tracing his application and consideration of dignity in the context of Due Process liberty interest analysis may shed light on his "exploration" for the "correct balance in constitutional interpretation." In *Education Rights and the New Due Process*, Areto A. Imoukhuede relies on several scholars for the premise that *Lawrence* establishes that dignity is a

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[95] Justice Kennedy has invoked the concept of dignity in majority and concurring opinions no fewer than thirteen times since 2005. *See, e.g.*, N. Carolina State Bd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1115 (2015); Hall v. Florida, 134 S. Ct. 1986, 1992 (2014); Schuette v. Coal. to Defend Affirmative Action, Integration & Immigrant Rights & Fight for Equal. By Any Means Necessary, 134 S. Ct. 1623, 1637 (2014); United States v. Windsor, 133 S. Ct. 2675, 2689 (2012); Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2672 (2011); Bond v. United States, 131 S. Ct. 2355, 2364 (2011); Brown v. Plata, 131 S. Ct. 1910, 1928 (2011); City of Ontario, Cal. v. Quon, 560 U.S. 746, 755–56 (2010); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008); Republic of Philippines v. Pimentel, 553 U.S. 851, 866 (2008); Gonzales v. Carhart, 550 U.S. 124, 157 (2007); Spector v. Norwegian Cruise Line Ltd., 545 U.S. 119, 130 (2005).

[96] Justice Scalia, for example, has described the originalist principles he applies when interpreting the Constitution. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989). Justice Breyer, on the other hand, has explained his guiding theme in interpreting the Constitution is enabling democracy, an approach he described in a book he authored. STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2006).

[97] *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 154 (1987) (statement of Judge Anthony M. Kennedy); *ee*, *also*, JOYCE A. BAUGH, THOMAS R. HENSLEY, AND CHRISTOPHER E. SMITH, THE CHANGING SUPREME COURT: CONSTITUTIONAL RIGHTS AND LIBERTIES 73, 75 (1997) ("Kennedy has not been a steady and predictable conservative voice on the Court in the nineties. . . . Kennedy does not appear to have a consistent judicial philosophy to guide his decision making.").

component of Due Process liberty interests, and then he articulates a convincing argument that education is both theoretically and empirically an essential component of human dignity.[98] However, with the exception of his references to *Lawrence*, he does not provide doctrinal reasons that the Court is likely to find his theoretical and empirical analysis to compel a finding that the Due Process Clause entitles every child to a quality education.

Justice Kennedy is reluctant to adhere strictly to tests or frameworks;[99] he allows his approach to constitutional interpretation to have the flexibility to respond and evolve. Working from the premise that, as part of this evolution, Justice Kennedy grounds each dignity holding on the precedents established by other dignity-based cases, I will present an argument tailored to Justice Kennedy's prior treatment of human dignity. First, I will identify the roots of the invocation of dignity in the context of the Fourteenth Amendment. Then I will analyze the Fourteenth Amendment cases in which Justice Kennedy himself has appealed to concepts of dignity. Although, this note intends to give further meaning to the dignity interest specifically grounded in the Due Process Clause, I will examine both Due Process Clause liberty-interest opinions and Equal Protection opinions; Justice Kennedy tends to cite to Equal Protection opinions in his Due Process Clause analysis.[100] My goal is not to distill my analysis into a single theory, framework, or test for recognizing dignity interests. Rather, I hope to identify the factors

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[98] Areto A. Imoukhuede, *Education Rights and the New Due Process*, 47 IND. L. REV. 467 (2014).

[99] *See, e.g.*, Romer v. Evans, 517 U.S. 620 (1996) (in which Justice Kennedy rejects the traditional two-tiered framework for Equal Protection analysis); Lawrence v. Texas, 539 U.S. 558 (2003) (in which Justice Kennedy grounded his majority opinion in the Due Process Clause, but did not even mention *Washington v. Glucksberg*, 521 U.S. 702 (1997), which had been decided only six years earlier and attempted to established a framework for determining if a right is "fundamental").

[100] *See, e.g.*, United States v. Windsor, 133 S. Ct. 2675 (2013) (Kennedy, J., relying on three cases—*Bolling v. Sharpe*, 347 U.S. 497 (1954), *Department of Agriculture v. Moreno*, 413 U.S. 528 (1973), and *Romer v. Evans*, 517 U.S. 620 (1996)—in his determination that DOMA violated the Fifth Amendment Due Process rights Edith Windsor).

Justice Kennedy considers when he determines that an action has unconstitutionally failed to respect a person or group's dignity, regardless of whether it is dignity as liberty, equality, personal integrity, or collective virtue.

The first mention of dignity in the context of the Due Process Clause occurred in *Skinner v. Oklahoma*.[101] In a short concurrence, Justice Jackson wrote, "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority - even those who have been guilty of what the majority define as crime."[102] Professor Daly has explained that this single sentence set the stage for the dignity jurisprudence to follow by introducing three basic premises into the constitutional doctrinal conversation: (i) dignity is inherent in all people; (ii) actions by government or other actors can infringe upon this dignity; and (iii) the Constitution protects against this infringement.[103] Two years later, Justice Murphy reaffirmed the constitutional status of individual dignity in his dissent in *Korematsu v. United States*, stating:

> To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.[104]

Justice Murphy's explanation of constitutional protection of individual dignity aligns with other dignity cases in its reliance on concepts of equality and anti-discrimination,[105] but another element of his dignity formulation stands apart from the pack: He expressly disconnects a violation of a dignity interest from the frame of mind of the actor infringing upon individual

[101] 316 U.S. 535 (1942).
[102] *Id.* at 546–47 (Jackson, J., concurring).
[103] Daly, *supra* note 44, at 391.
[104] 323 U.S. 214, 240 (Murphy, J., dissenting).
[105] See, *infra* notes 148–161 and accompanying text.

dignity. According to Justice Murphy, an action that infringes upon individual dignity is unconstitutional regardless of whether it is grounded in animus or good intentions.

Justice Murphy would continue his impassioned advocacy for constitutionally protected dignity interests in his concurrences and dissents in Fourteenth Amendment cases,[106] but the Amendment's protection of individual dignity would not be recognized as controlling doctrine for almost forty years, when Justice Sandra Day O'Connor, joined by Justice Kennedy, wrote her plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[107] By recognizing that matters involving "choices central to personal dignity and autonomy are central to the liberty protected by the Fourteenth Amendment," the Justices broadened the traditional "zones of privacy" inquiry into a "realm of personal liberty" inquiry,[108] with dignity playing a central role. This language, from the "mystery of life" passage,[109] is the only explicit mention of the term "dignity" in the *Casey* opinion, but it has become perhaps the opinion's most famous passage and has served as the foundation for the Fourteenth Amendment dignity opinions that have followed.

Four years after *Casey*, Justice Kennedy penned another building block for the dignity cases: *Romer v. Evans*.[110] Although this case was decided on Equal Protection grounds, it

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[106] *See* Daly, *supra* note 51, at 391–96 (providing excerpts discussing dignity from five of Justice Murphy's opinions, including *Duncan v. Kahanamok*, 327 U.S. 304, 334 (1946) (Murphy, J., concurring), *Homma v. Patterson, Secretary of War*, 327 U.S. 759, 759 (1946) (Murphy, J., dissenting), *In re Yamashita*, 327 U.S. 1, 5 (1946) (Murphy, J., concurring), *Screws v. United States*, 325 U.S. 91, 134 (1945) (Murphy, J., dissenting), and *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring).
[107] 505 U.S. 833 (1992).
[108] *Id.* at 847.
[109] *Id.* at 851; *see also* Part II.B(i), *supra*.
[110] 517 U.S. 620 (1996).

invoked concepts of dignity[111] and has been cited in the two most important dignity cases to follow.[112] In *Lawrence v. Texas*,[113] dignity truly took center stage, not only by echoing the language and ideas from *Casey*[114] but also by introducing several other references to 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."[115] In *Parents Involved in Community Schools v. Seattle School District No. 1*, Justice Kennedy wrote a concurring opinion that found race-conscious school assignment policies invalid on the grounds that forcing upon a student " a state-mandated racial label is inconsistent with the dignity of individuals in our society."[116] Finally, in 2012, Justice Kennedy wrote the majority opinion in *United States v. Windsor*, which used the term "dignity" ten times.[117] After reviewing the context and analysis of each of these cases, I have identified the following seven factors that Justice Kennedy seems to consider in his determination of whether a dignity-based liberty interest has been infringed upon: the novelty of the action; the existence of an identifiable group or class; whether the action infringes upon the autonomy or the capacity to self-define of persons within the group; whether a group has been treated unequally; whether the state action is

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[111] *See* Rao, *supra* note 51, at 257, n.308 (noting that although the Court in *Romer* "did not refer to dignity specifically," it "sounded the related themes of inclusion and belonging within the community"); Daly, *supra* note 51, at 418 (pointing out that *Romer* involved questions of dignity); *id.* at 424 (arguing that Romer is among a handful of cases that suggest that "dignity lies at the junction of equal protection and due process).

[112] Lawrence v. Texas, 539 U.S. 558, 560–61 (citing *Romer*, 517 U.S., at 624); *id.* at 573 (citing *Romer*, 517 U.S. 620); *id.* at 575 (citing *Romer*, 517 U.S., at 632–33); *id.* at 580 (citing *Romer*, 517 U.S., at 632); *id.* at 582 (citing *Romer*, 517 U.S., at 634–35); *id.* at 584 (citing *Romer*, 517 U.S., at 633); United States v. Windsor, 133 S. Ct. 2675, 2692 (citing *Romer*, 517 U.S., at 633); *id.* at 2693 (citing *Romer*, 517 U.S., at 633).

[113] 539 U.S. 558 (2003).

[114] Justice Kennedy quoted the entire "mystery of life" passage verbatim in his *Lawrence* opinion. *Lawrence*, 539 U.S., at 574 (quoting *Casey*, 505 U.S., at 851).

[115] *Id.* at 567.

[116] 551 U.S. 701, 797 (2007).

[117] 133 S. Ct. 2675 (2012).

accompanied by animus and/or imposes a stigma on the identifiable group; and whether the action causes or will likely cause tangible injury to the identifiable group.

## C. The Dignity Factors

*i. Novelty*

*Romer* also set the stage for the novelty component of the dignity inquiry. Justice Kennedy found the peculiarity[118] and absence of precedent for Colorado's amendment to be cause for suspicion.[119] In *Romer* the novelty of the statute was merely considered as evidence of animus,[120] but it has been discussed much more broadly in the dignity cases that have followed. A statute can be novel both vertically (in terms of history), and horizontally (by comparison to other jurisdictions).

In *Windsor*, the Court considered the vertical novelty of DOMA, and relied on *Romer* in finding that "DOMA, because of its reach and extent, departs from this history and tradition of reliance on state law to define marriage."[121] The *Lawrence* opinion also analyzes the vertical novelty of the Texas sodomy statute, framed as reasons for not relying on the *Bowers v. Hardwick*[122] opinion, which had relied heavily upon the "longstanding criminal prohibition of homosexual sodomy."[123] Justice Kennedy pointed out that most sodomy laws considered in

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[118] Romer v. Evans, 517 U.S. 620, 632 (1996) (" First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group, an exceptional and, as we shall explain, invalid form of legislation.").
[119] *Id.* at 633 (1996) ("The resulting disqualification . . . is unprecedented in our jurisprudence. The absence of precedent for Amendment 2 is itself instructive; "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision.") (quoting Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 37–38 (1928)).
[120] *Id.*
[121] United States v. Windsor, 133 S. Ct. 2675, 2692 (2012).
[122] 478 U.S. 186 (1986).
[123] Lawrence v. Texas 539 U.S. 558, 570 (2003) (discussing the majority opinion in *Bowers v. Hardick*, 478 U.S. 186 (1986)).

*Bowers* had not specifically targeted same-sex couples, and that "not until the 1970's [did] any State single[] out same-sex relations for criminal prosecution."

Although the *Windsor* opinion did acknowledge that the discrimination in DOMA was at odds with a dozen states and the District of Columbia,[124] horizontal novelty played a much more prominent role in *Lawrence* than it did in *Windsor*, with Justice Kennedy making both domestic and international comparisons. Domestically, the Court merged horizontal and vertical novelty, pointing out that "[t]he 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct."[125] Justice Kennedy did not only illustrate the relative isolation of Texas's statute with regard to other states. He also pointed out that *Dudgeon v. United Kingdom*,[126] a European Court of Human Rights case that invalidated a British law prohibiting consensual homosexual on the grounds that it violated the European Convention on Human Rights, had authority in 45 European countries.[127] Justice Kennedy further found the holding in *Bowers* to be invalid because it was at odds with actions taken in many other countries, where "the right of homosexual adults to engage in intimate, consensual conduct" had been "accepted as an integral part of human freedom."[128]

None of these opinions draws a direct connection between a statute's departure from historic standards or its contrast to peer jurisdictions and the infringement of dignity. However, the primary role novelty plays in these three prominent Fourteenth Amendment dignity cases

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[124] *Windsor*, 133 S. Ct. at 2689 ("New York, in common with, as of this writing, 11 other States and the District of Columbia, decided that same-sex couples should have the right to marry and so live with pride in themselves and their union and in a status of equality with all other married persons.").
[125] *Lawrence*, 539 U.S., at 573.
[126] 45 Eur. Ct. H.R. (1981).
[127] *Lawrence*, 539 U.S., at 576.
[128] *Id.* at 576–77.

suggests it cannot be ignored by an advocate framing a dignity-based Due Process argument. Novelty may be a threshold inquiry to engage in before considering whether a law infringes upon human dignity. On the other hand, a law's relative novelty could merely be a persuasive factor to be considered in a dignity-balancing test.

*ii. Group*

Each of Justice Kennedy's five Fourteenth Amendment dignity opinions involves some sort of identifiable group. Unsurprisingly, the two Equal Protection cases involved a class. In *Parents Involved*, the state had made decisions based on race, the archetypal suspect class.[129] In *Romer*, Justice Kennedy broke what many scholars considered to be new constitutional ground by applying a heightened level of scrutiny to a classification made on the basis of sexual orientation.[130] He found it troubling that an amendment to the Colorado constitutional had "the peculiar property of imposing a broad and undifferentiated disability on a single named group"[131] and put homosexuals "in a solitary class with respect to transactions and relations in both the private and governmental spheres."[132]

Due Process Clause cases generally consider which rights are fundamental and held by all persons,[133] but, notably, Justice Kennedy's dignity-based Due process opinions have all involved allegations that an identifiable group has been denied such a fundamental right. The

[129] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 501 U.S. 701, 782 (2007) ("In my view the state-mandated racial classifications at issue, official labels proclaiming the race of all persons in a broad class of citizens—elementary school students in one case, high school students in another—are unconstitutional as the cases now come to us.").
[130] *See, e.g.*, Tobias Barrington Wolff, *Principled Silence*, 106 YALE L.J. 247, 252 (arguing that the *Romer* Court claimed to apply rational basis review, but did not sincerely consider the rational bases offered by Colorado, and paved the way for a "future determination that gay people require heightened judicial protection).
[131] Romer v. Evans, 517 U.S. 620, 632 (1996).
[132] *Id.* at 627.
[133] *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (finding a fundamental right to bodily integrity under the Due Process Clause).

*Casey* opinion considered the contours of the right to privacy and autonomy shared by all people that had been denied to an identifiable group: women. The Court acknowledged that "the liberty of the woman is at stake" in holding that "the destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society."[134] In *Lawrence*, while Justice Kennedy drew on cases such as *Griswold* and *Casey* that established a general right to privacy, and rejected the attempts in *Bowers* to narrowly frame the right to engage in same-sex sodomy, he still "concluded that the provision was 'born of animosity toward the *class of persons* affected,'" and was unconstitutional because it had no rational relationship to its purpose.[135] Finally, in *Windsor*, Justice Kennedy and the court invalidated the Defense of Marriage Act largely because it sought "to injure the very *class* New York seeks to protect."[136] While all of these Due Process cases address harms done to identifiable groups, none of them requires that the group be among the select few classes that receive the highest protection under the Equal Protection Clause.[137]

*iii. Control*

The meaning and influence of the "mystery of life" passage[138] has evolved and matured through two of Justice Kennedy's other dignity opinions: *Lawrence* and *Parents Involved.* The passage made three moves that are important to the dignity doctrine. First, it reframed the well-established Fourteenth Amendment right to privacy as a broader interest involving personal

[134] Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 852 (1992).
[135] Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting *Romer*, 517 U.S., at 634) (emphasis added).
[136] U.S. v. Windsor, 133 S. Ct. 2675, 2693 (2012) (emphasis added).
[137] The fives characteristics are race, national origin, alienage, sex, and nonmarital parentage. *See*, Yoshino, *supra* note 17, at 756; see also United States v. Carolene Products Co., 304 U.S. 144, 783, n.4 (1938) (explaining that legislation discriminating against "discrete and insular minorities should be subjected to heightened judicial scrutiny").
[138] *Casey*, 505 U.S., at 852; *see also* Section II.B(i), *supra*.

choices.[139] Second, it drew a direct connection between personal dignity, autonomy, and the Due Process Clause's liberty guarantee.[140] Third, it explicitly framed these choices—those protected by the Court's personal-autonomy conception of liberty—as those choices required for self-definition and exploration, for defining ones own "attributes of personhood."[141] The liberty protected by the Fourteenth-Amendment, so framed, means that the state, through its action, may not intrude upon a person's capacity to determine her own course in life, because to do so would be an affront to her dignity.

The Court reaffirmed this commitment to self-definition later in the *Casey* opinion,[142] and it was solidified in Supreme Court doctrine when Justice Kennedy reprinted the entire "mystery of life passage" in his majority opinion in *Lawrence*.[143] Justice Kennedy stated explicitly that the pursuit of autonomy for the purposes outlined in the "mystery of life" passages was a *right* protected by the Fourteenth Amendment[144] and explained that the "Constitution demands" respect "for the personal autonomy of the person . . . ."[145] Importantly, Justice Kennedy continued to explore the contours of the autonomy right and give it more definition, explaining that liberty and autonomy of self include "freedom of thought, belief, expression, and certain

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[139] *See id.*
[140] *Id.* ("These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.")
[141] *Id.* ("At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.")
[142] *Id.* ("The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.").
[143] Lawrence v. Texas, 539 U.S. 558, 574 (2003).
[144] *Id.* ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in Bowers would deny them this *right*.") (emphasis added); *id.* at 565 ("*Roe* recognized the *right* of a woman to make certain fundamental decisions affecting her destiny. . . .") (emphasis added).
[145] *Id.* at 575.

intimate conduct."[146] Four years later, Justice Kennedy made clear that he finds the constitutional interest in control over self-definition to be relevant in equal protection cases as well, writing in *Parents Involved* that "[u]nder our Constitution, the individual, child or adult, can find his own identify, can define her own persona, without state intervention that classifies on the basis of his race or the color of her skin."[147] This passage demonstrates that the autonomy inherent in the liberty protected by the Fourteenth Amendment—and tied to dignity by *Casey*—is constitutionally protected not only for adult women and same-sex couples, but also for individual children.

*iv. Unequal Treatment*

Unsurprisingly, the unequal treatment of homosexual people in Colorado played a central role in the *Romer* opinion, which was decided on Equal Protection grounds.[148] With echoes of decades of Equal Protection doctrine prohibiting state action[149] that discriminates against class of people without rational explanation,[150] the Court found Colorado's amendment invalid on the grounds that it put, "[h]omosexuals, by state decree," into "*a solitary class* with respect to transactions and relations" and that it "withdr[ew] from homosexuals, *but no others*, specific legal protection from the injuries caused by discrimination."[151] Furthermore, because the amendment "classifie[d] homosexuals not to further a proper legislative end but to make them unequal to everyone else," the Court found that it violated the Fourteenth Amendment.

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[146] *Id.* at 562.
[147] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 501 U.S. 701, 797 (2007).
[148] Romer v. Evans, 517 U.S. 620 (1996).
[149] *See* Civil Rights Cases, 109 U.S. 3, 11 (1883) ("It is state action of a particular character that is prohibited [by the Fourteenth Amendment]. Individual invasion of individual rights is not the subject-matter of the amendment."). *Cf.* Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967) (generally criticizing the state-action doctrine).
[150] *See,* Yoshino, *supra*, note 17, at 755–56.
[151] *Romer*, 517 U.S., at 627.

Notions of equality have been slowly—but significantly—merging into the Supreme Court's Due Process Clause doctrine.[152] In his opinions, Justice Kennedy has suggested that the two are strongly related. His *Lawrence* opinion "both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty."[153] In that opinion, Justice Kennedy wrote that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[154]

Justice Kennedy further articulated his notions of the bond between notions of equality and liberty in *Windsor*, writing that the Due Process Clause's guarantee of liberty, on its own, invalidated DOMA, but that "the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[155] While Justice Scalia sharply criticized this passage as vague and unfounded,[156]

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[152] *See*, Yoshino, *supra* note 10, at 748–49 (Arguing that the Supreme Court has been moving closer to an intertwined doctrine of equality- and liberty-based civil rights claims, as had "long been apprehended" by academic commentary, and identifying several articles that scholars have written about the merging of the two doctrines: Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002); William N. Eskridge, Jr., *Destabilizing Due Process and Evolutive Equal Protection*, 47 UCLA L. REV. 1183, 1216 (2000); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 380-81 (1985); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 106 (2007); Siegel, *supra* note 51, at 1696; Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 Stan. L. Rev. 261, 276-77 (1992); and Tribe, *supra* note 25, at 1897-98 (2004)).

[153] Tribe, *supra* note 25, at 1898.

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

[155] United States v. Windsor, 133 S. Ct. 2675, 2695 (2013).

[156] *See*, *id.* at 2705–06 (Scalia, J., dissenting) ("Equally perplexing are the opinion's references to 'the Constitution's guarantee of equality.' Near the end of the opinion, we are told that although the 'equal protection guarantee of the Fourteenth Amendment makes [the] Fifth Amendment [due process] right all the more specific and all the better understood and preserved'—what can *that* mean?—'the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does.' The only possible interpretation of this statement is that the Equal Protection Clause, even the Equal Protection Clause as incorporated in the Due Process

four justices joined the opinion, at least one of which has discussed in other contexts how the concepts of equality and liberty are theoretically joined.[157]

The merging of the Equal Protection and Due Process doctrines in *Lawrence* and *Windsor* suggests that a state's unequal treatment of an identifiable group would be relevant to any claim brought alleging the violation of a right implicit in the substantive liberty of the Due Process Clause. In *Windsor*, Justice Kennedy makes clear that unequal treatment is particularly significant to the inquiry of whether a state has infringed upon the dignity interests. He wrote that marriage in New York was "a relationship deemed by the State worthy of dignity in the community *equal with all other marriages*[,]"[158] and that "the history of DOMA's 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."[159]

These two passages depart from dignity scholarship and theory in two ways. First, some scholars have suggested that dignity as liberty and dignity as equality are conceptually distinct,[160] but Justice Kennedy has treated them more like two sides of the same coin. This suggests that Justice Kennedy may have a broader concept of dignity that may not be so easily categorized, and that the unequal treatment of a particular group, vis-à-vis another group or society in general,

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Clause, is not the basis for today's holding. But the portion of the majority opinion that explains why DOMA is unconstitutional (Part IV) begins by citing [exclusively to] equal-protection cases.") (internal citations omitted).

[157] *See, e.g.*, Ruth Bader Ginsburg & Linda Greenhouse, *A Conversation with Justice Ginsburg*, 122 YALE L.J. ONLINE 283, 284–85 (2013) (discussing Justice Gisburg's opinion in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)) ("The opinion employs an amalgam of due process and equal protection, comparing first what was at stake for M.L.B., loss of her parental rights, and what was at stake for a petty offender who did not even face jail time.").

[158] United States v. Windsor, 133 S. Ct. 2675, 2692 (2013) (emphasis added).

[159] *Id.* at 2693 (emphasis added).

[160] *See, e.g.*, Henry, *supra* note 51, at 199–212; Siegel, *supra*, note 51, at 1736–45.

is not an affront to a particular type of dignity, but is evidence that a more general affront to human dignity has occurred.

Second, Justice Kennedy's suggestion in this passage that a relationship can be "deemed by the State worthy of dignity" or that dignity can be "conferred by the States" is in tension with contemporary human rights discourse, where it is generally agreed upon that human dignity is inherent in all people and could never be conferred by a state.[161] The court's use of the term dignity in most of the conceptions articulated by Henry also suggest that dignity is not something to be given or taken away by the state: dignity as liberty suggests that all people have substantive rights and that a state damages their dignity if it imposes upon them. Dignity as equality, by definition suggests that dignity is inherent. Justice Kennedy may have been careless with his writing; perhaps he meant that, where a state has determined to give legal recognition to the dignity of people in a particular context, the federal government cannot pass legislation to negate that recognition.

Regardless of the conceptual tensions in Justice Kennedy's treatment of dignity, his opinions in *Romer*, *Lawrence*, and *Windsor*, make clear that a state's unequal treatment of an identifiable group is persuasive evidence that the state has failed to respect the dignity of the individuals within the group.

*v. Harm – Stigma and Animus*

When *Romer* was decided in 1996, the common understanding of equal protection doctrine dictated that legislation making classifications based on race, national origin, religion,

[161] *See,* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, 71 (1948), *available at* http://www.un.org/en/documents/udhr/ (accessed May 11, 2016) (operating on the premise that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world," and declaring that "All human beings are born free and equal in dignity and rights").

or alienage would be carefully scrutinized by the court and most likely held invalid,[162] but legislation making a classification on the basis of any other status or characteristic would pass constitutional muster so long as the state could articulate any rational legislative purpose.[163] Justice Kennedy surprised many scholars by departing from the traditional two-tiered framework,[164] and invalidated Colorado's constitutional amendment partially on the grounds that "the disadvantage imposed [was] born of *animosity* toward the class of persons affected. . . . '[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.'"[165]

Since considering animus in *Romer*, an Equal Protection case, Justice Kennedy has transposed animus consideration into his Due Process analysis, where it has been coupled with stigma and transformed into a conception of animus that stretches the meaning of the term. In *Lawrence* and *Windsor*, Justice Kennedy found the animus behind the contested legislation to be persuasive evidence that the laws had infringed upon a dignity interest. In both of these cases, he took animus a step further by adding a companion component: stigma. After articulating the *Romer* "bare desire to harm" standard, Justice Kennedy made sure to distinguish *Lawrence* as different because it was *not* an Equal Protection case.[166] Justice Kennedy found it necessary to evaluate the substance of the statute itself, and not only whether it might be unequally applied,

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[162] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (explaining that "[a]t the very least, the Equal Protection Clause demands that racial classifications, especially suspect in criminal statutes, be subjected to the 'most rigid scrutiny'") (citing Korematsu v. United States, 323 U.S. 214, 216 (1944)).

[163] *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) ("A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.")

[164] *See*, Barrington Wolff, supra note 130.

[165] Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Department of Argiculture v. Moreno, 413 U.S. 528, 534 (1973)).

[166] Lawrence v. Texas, 539 U.S. 538, 574–75 (2003).

because, "its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[167] Justice Kennedy drew a direct connection in *Lawrence* between stigma and dignity. He acknowledged that although the criminal statute at issue was minor,[168] "[t]he stigma this criminal statute imposes [ ] is not trivial…. [I]t remains a criminal offense with all that imports for the dignity of the persons charged. [169]

In *Windsor*, Justice Kennedy once again cited the *Romer* animus standard while clearly asserting that the case was not decided on Equal Protection grounds.[170] Justice Kennedy invalidated DOMA partially on the grounds that its "avowed purpose and practical effect are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States."[171] The stigmatic purpose and effect of DOMA proved to be dispositive in *Windsor*, requiring the Court to hold it "unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution."[172]

In both *Lawrence* and *Windsor*, Justice Kennedy found that the disputed laws had been written with intent to harm or stigmatize a particular group; therefore, it remains unclear whether the stigmatic effect of a piece of legislation would alone be enough to invalidate legislation. However, in *Romer*, *Lawrence*, and *Windsor*, Justice Kennedy pointed to very little direct

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[167] *Id.* at 575.
[168] Those who violated the criminal statute at issue in Lawrence could be charged with a Class C misdemeanor. *See id.*
[169] *Id. See also*, *id.* at 578 ("The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").
[170] See United States v. Windsor, 133 S.Ct. 2675, 2692 (2012) (articulating the Romer standard); *id.* at 2695 (clarifying that the Fifth Amendment's due process clause was independently sufficient to invalidate the Defense of Marriage Act).
[171] See *id.* at 2693.
[172] *Id.* at 2695.

evidence in legislative history or elsewhere that the laws were founded solely in explicit animus. Rather, he considered evidence that might *suggest* animus was present.[173]

Professor Susannah W. Pollvogt has explained that majority and dissenting opinions in *Windsor* include four different models of animus, and that the prevailing model in Justice Kennedy's opinion requires no direct evidence animus.[174] Pollvogt argues that in *Windsor* Justice Kennedy "placed more emphasis on the improper function of DOMA (deprivation of rights and dignity) than on the direct evidence of improper motive."[175] This broader model sees animus "as an unjustified deprivation of liberty . . . . [A]nd the presence of animus defeats the challenged law regardless of whether other, purportedly neutral justifications for it are offered."[176] Justice Kennedy's circular willingness to infer animus from the "improper function" of legislation, and to treat that animus as evidence that the legislation is improper, essentially writes the animus component out of the dignity analysis. Indeed, Pollvogt defines Justice Kennedy's model of animus as the deprivation of dignity: "Animus is present where a law functions to deprive a group of rights and dignity." Justice Kennedy's lax use of the term 'animus' and his consistent pairing of animus with stigma in his dignity analysis suggest a gradual transition toward stigma as a defining component of dignitary harm. Justice Kennedy's concurrence in *Parents Involved* seems to support this model of animus in the dignity context, by finding that placing state-

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[173] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 ("[Amendment 2's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects . . . ."). Although the *Windsor* opinion contains evidence of the House of Representatives' professed "moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality," it does not present evidence that the moral disapproval was the express purpose of DOMA. *Windsor*, 133 S. Ct., at 2693 (quoting H.R. Rep. No. 104–664, pp. 12–13 (1996).

[174] Susannah W. Pollvogt, Windsor, *Animus, and the Future of Marriage Equality*, 113 COLUMBIA L. REV. SIDEBAR 204, 212 (2013). For a table summarizing Pollvogt's four models of animus, *see also id.* at 216.

[175] *Id.*

[176] *Id.*

mandated labels on students could deprive them of dignity, even though the labels were not born of any identifiable animus underlying the school assignment program.[177]

*vi. Harm – Tangible Injury*

Stigmatic harm plays an important role in dignity analysis, and, under contemporary notions of dignity, would be sufficient to establish dignitary injury, but Justice Kennedy has also considered more tangible harms to varying degrees. He has treated the practical implications of contested laws and the resulting injuries to the targeted group—such as economic or legal harm—as evidence of an affront to dignity. Justice Kennedy went into the most detail in *Windsor*, when he considered "injury and indignity" as an invalid constitutional combination.[178] From "among the over 1,000 statutes and numerous federal regulations that DOMA control[ed],"[179] Justice Kennedy selected a few to illustrate the injuries suffered by same-sex couples, including the loss of healthcare benefits, the deprivation of protections in bankruptcy, tax burdens, and even the prevention of joint burial in veterans' cemeteries.[180] Justice Kennedy also identified parts of the federal penal code that were affected by DOMA and had negative implications for same-sex married couples.[181] Finally, he discussed the financial harm brought by DOMA to the children of same-sex married couples.[182]

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[177] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 501 U.S. 701, 797 (2007). This conception of animus also aligns with Justice Murphy's dissent in *Korematsu v. United States*, 323 U.S. 214 (1944) (Murphy, J., dissenting), in which he wrote that an affront to dignity was unconstitutional no matter how "well-intentioned may have been the military command."
[178] *Windsor*, 133 S. Ct. at 2692 ("[DOMA's imposition of restrictions and disabilities against a state-defined class] requires this Court now to address whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment.").
[179] *Windsor*, 133 S. Ct. at 2694.
[180] *Id.* at 2694 (citing 5 U.S.C. §§8901(5), 8905; 11 U.S. §§ 101(14A), 507(a)(1)(A), 523(a)(5), 523(a)(15), Technical Bulletin TB–55, 2010 Vt. Tax LEXIS 6 (Oct. 7, 2010), and National Cemetery Administration Directive 3210/1, p. 37 (June 4, 2008)).
[181] *Id.* at 2694–95.
[182] *Id.* at 2695.

The *Romer* opinion identified harms with no less specificity, identifying several state laws[183] and local ordinances[184] that had prohibited discrimination on the basis of sexual orientation, which were rendered invalid by the Colorado constitutional amendment. Justice Kennedy described in detail the types of discrimination the amendment would subject homosexual people to in public accommodations,[185] "all transactions in housing, sale of real estate, insurance, health and welfare services, private education, and employment,"[186] state government employment,[187] and potentially other areas of state law.[188] Justice Kennedy criticized the amendment because it " withdr[ew] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination…."[189]

The collateral consequences of criminal conviction were the most relevant non-stigmatic injury in *Lawrence*. Justice Kennedy explained that conviction under the Texas sodomy statute would require registration as a sex offender in at least four states, which he considered further evidence of "state-sponsored condemnation."[190] He detailed other injuries with less specificity, mentioning in passing "other collateral consequences…such as notations on job application forms, to mention but one example[,]" that would accompany conviction.[191]

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[183] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 629 (1996) (citing Colo. Rev. Stat. §§24-34-401 to 24-34-707.
[184] *See, e.g.*, *id.* at 628 (citing Boulder Rev. Code § 12-1-1(j)).
[185] *Id.* (explaining that a local ordinance, rendered invalid by the Colorado constitutional amendment, applied to "hotels, restaurants, hospitals, dental clinics , theaters, beanks, common carriers, travel and insurance agencies, and 'shops or stores dealing with goods or services of any kind'") (quoting Denver Rev. Mun. Code, Art. IV, § 28-92).
[186] *Id.* at 629.
[187] *Id.* at 629–30.
[188] *Id.* at 630.
[189] *Id.* at 627.
[190] Lawrence v. Texas, 539 U.S. 558, 575–76 (2003).
[191] *Id.* at 576.

Although Justice Kennedy's often detailed enumeration of the tangible harm that would be imposed by contested statutes in dignity cases suggests that he finds it to be a relevant factor to consider, his writing in these and other cases suggests its absence may not be fatal to a claim of an unconstitutional affront to dignity. The students in *Parents Involved* whose dignity Justice Kennedy sought to protect could arguably have received a tangible *benefit* from the school assignment system;[192] indeed, Justice Kennedy did not identify any tangible harms those students would have suffered in his concurrence.[193] Furthermore, to defend his decision to invalidate the sodomy statute at issue in *Lawrence* under the Due Process Clause instead of the Equal Protection Clause, Justice Kennedy relied primarily on stigmatic injury. He explained that a law prohibiting conduct that is protected by the Due Process Clause's substantive guarantee of liberty illegal could impose a stigma that alone would render law constitutionally invalid, even if the law were made unenforceable on equal protection grounds.[194]

## III. THE DIGNITY FACTORS AND QUALITY EDUCATION

[ . . . ]

## IV. CHALLENGES

[ . . . ]

## CONCLUSION

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[192] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 501 U.S. 701, 786–87 (2007) (Kennedy, J., concurring in part and concurring in the judgment) (describing the district's articulated purposes of the school assignment system as promoting "educational benefits of diverse school enrollments," reducing of the "harmful effects of racial isolation," and ensuring that "racially segregated housing patterns did not prevent non-white students from having equitable access to the most popular over-subscribed schools").
[193] *See*, *id.* at 782–98.
[194] *Lawrence*, 539 U.S., at 575.