NOTES

THE EVOLUTION OF MARRIAGE: THE ROLE OF DIGNITY JURISPRUDENCE AND MARRIAGE EQUALITY

Jasmine J. Haddad *

> *No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. . . . [M]arriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.*
>
> — Justice Kennedy, *Obergefell v. Hodges*[1]

* J.D. candidate, Boston University School of Law, 2016; B.A. Political Science, B.A. Sociology, Mount Holyoke College, 2012. I would like to extend my deepest gratitude to Professor Linda C. McClain for her valuable guidance and insight, to the Boston University Law Review staff for their editorial work, and to my partner Charlotte McDonnell and mother Sylvia Hasch-Haddad for their support.

[1] 135 S. Ct. 2584, 2608 (2015) (emphasis added).

INTRODUCTION

Whether same sex couples have a fundamental right to marry came to the forefront of national debate following the *United States v. Windsor*[2] decision in 2013. The *Windsor* opinion, written by Justice Kennedy, includes strong references to dignity, woven amongst language suggesting federalism concerns.[3] Following the *Windsor* decision, which struck down part of the federal Defense of Marriage Act[4] ("DOMA"), same-sex couples brought numerous federal constitutional challenges to state anti-recognition laws,[5] exclusionary state definitions of marriage, and state marriage bans across the country. Other than *Perry v. Schwarzenegger*,[6] these post-*Windsor* suits were the first same-sex marriage cases to rely on rights arising under the United States Constitution in the twenty-first century. Once these cases were decided—almost uniformly in favor of same-sex couples—they entered the appeals process.[7] These challenges came to an abrupt end in June of 2015 when the Supreme Court granted marriage equality to all such couples in *Obergefell v. Hodges*.[8] *Obergefell* and the myriad of post-*Windsor* same-sex marriage cases have explored and clarified the powerful role that dignity jurisprudence plays in Justice Kennedy's canonical *Windsor* opinion, and what dignity means for the modern institution of marriage and the citizens who take part in it. These cases demonstrate the astounding ability of the judiciary to modernize public perceptions of long-standing societal institutions.

Much of the scholarly and judicial interest in *Windsor* has focused on the role of federalism, substantive due process, and equal protection in the majority opinion. However, it is arguable, based on Kennedy's language and on past opinions, that dignity jurisprudence is inextricably tied to his due process and equal protection analysis and was integral to the outcome of *Windsor* and, later, *Obergefell*. While scholars gave the *Windsor* opinion criticism and praise alike, there is limited evaluation of *Windsor*'s use of dignity jurisprudence and how it led to marriage equality, and more broadly, a change in societal perception of marriage.[9] The *Windsor* opinion embraces and

---

[2] 133 S. Ct. 2675 (2013).

[3] *See infra* Part II.

[4] 1 U.S.C. § 7 (2012), *invalidated by Windsor*, 133 S. Ct. 2675. Section 3 of DOMA restricted the federal definition of "marriage" and "spouse" to heterosexual unions. *Id.*

[5] Anti-recognition laws are state statutes that stipulate that the state will not recognize same-sex couples status as legally married, even if they have been married in another state that does allow same-sex marriage.

[6] 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[7] Almost all of the federal cases discussed in this Note were appealed to the Supreme Court following rulings at the appellate level.

[8] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("[Same-sex couples] ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

[9] *But see generally* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243 (2014).

further solidifies the idea of dignity as a legal right intertwined with marriage, building upon the concept of dignity as used in earlier same-sex equality cases. *Windsor* promoted a more favorable view of same-sex marriage in lower courts and society at large, resulting in unprecedented success for same-sex couples within the judicial system.[10] Ultimately, Justice Kennedy drew upon his use of dignity jurisprudence in *Windsor* when authoring *Obergefell* and in granting same-sex couples the ultimate victory—marriage equality.[11]

Beyond changing the legal landscape, these rulings have resulted in a broadening of what "marriage" means in modern American society. Furthermore, this legal change has resulted in a growing decline in the demand for and existence of alternative unions, such as domestic partnerships and civil unions. A discussion of dignity in the aftermath of *Windsor* and *Obergefell* would be incomplete without a discussion of the subsequent implications for the institution of marriage and other unions in modern society. This focus is particularly important given that these cases prompted the expansion of marriage access and dignity to millions of couples. A decision with such large-scale effects is a novelty even for the Supreme Court.

Part I of this Note establishes the history of dignity jurisprudence in the context of the fight for LGBT equality, ending with a discussion of the most canonical cases preceding *Windsor* and *Obergefell*. Part II explores the expanded use of this dignity jurisprudence in *Windsor*, both in the majority and dissenting opinions, while Part III examines how courts have interpreted and applied the dignity jurisprudence of *Windsor*. This Part concludes with a discussion of *Obergefell*, which ultimately solidified the centrality of dignity in the same-sex marriage debate. Part IV examines what these cases mean for the future of marriage as an American institution. In this Part, I argue that with the expansion of same-sex marriage across the country, the institution of marriage will be radically modernized and connected with dignity, and that this dignity will be granted to previously denigrated members of society. Part V correlates the rise of marriage with the decline in alternative unions, such as domestic partnerships and civil unions—for as marriage welcomes previously excluded couples, the need for an alternative to marriage subsides. In short, I argue that dignity jurisprudence and the resulting marriage equality have led the institution of marriage to shift its focus from procreation and heteronormative gender-roles to an expression of mutual support and a public conferral of dignity. This shift negates the need for alternative unions by broadening the

[10] *Windsor* was decided in June, 2013. Just over one month later, the number of jurisdictions in the United States recognizing same-sex marriage or some other form of same-sex couple recognition had doubled. Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After* Windsor, 23 TUL. J.L. & SEXUALITY 17, 18 n.3 (2014) (detailing the explosive expansion of post-*Windsor* marriage equality). Two years later, full marriage equality was granted in *Obergefell*, 135 S. Ct. at 2585.

[11] O*bergefell*, 135 S. Ct. at 2608.

institution of marriage to accommodate same-sex couples. Finally, I demonstrate that this impact litigation has effectively conferred dignity upon members of society who were previously excluded from the enjoyment of such societal acceptance.

I. THE HISTORY OF DIGNITY JURISPRUDENCE

Dignity jurisprudence is not a new concept in the Supreme Court. Despite the absence of the word "dignity" in the Constitution,[12] language centering on a right to dignity and the injurious impact of deprivation of dignity appears in a myriad of cases, spanning well beyond the context of LGBT equality. Dignity has been evoked in multiple constitutional cases interpreting the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments.[13] These cases often base their holdings on the results of a balancing test between individual dignity and competing state interests, with the scales often tipping in favor of the former.[14] Equally common are holdings based on the implicit acknowledgement of a simple, constitutionally driven mandate to protect basic human dignity.[15] Dignity language can be found in majority opinions and dissents dealing with reproductive freedom and abortion access,[16] wartime issues,[17] racial segregation,[18] and abuse of incarcerated persons.[19] Even where the word

[12] *See generally* U.S. CONST.

[13] Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 757 (2006) (listing past categories of Supreme Court cases that expressly reference dignity); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1935-37 (2003) (detailing explicit use of dignity in past Supreme Court rulings).

[14] Goodman, *supra* note 13, at 757 ("The Court has expressly linked human dignity to certain constitutional claims, either by grounding the Court's decision in the need to advance human dignity or by expressly rejecting human dignity concerns in favor of competing state interests.").

[15] *Id*.

[16] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("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*." (emphasis added)); *see* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008) (asserting that dignity plays a central role in the abortion debate on both sides of the fence).

[17] Korematsu v. United States, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting) ("To give constitutional sanction . . . 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 . . . ." (emphasis added)).

[18] Brown v. Bd. of Educ., 347 U.S. 483, 494 (1954) ("To separate [black children] from others of similar age and qualifications solely because of their race *generates a feeling of inferiority* as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." (emphasis added)).

"dignity" does not explicitly appear in these opinions, the language used frequently insinuates a focus on dignity.[20] This Part will explore the development of both express and implied evocation of dignity specifically in cases addressing discrimination based on sexual orientation. Parts II and III will then discuss the use of dignity in *Windsor*, the subsequent barrage of federal constitutional challenges to state-level marriage bans, and, finally, *Obergefell*. These cases highlight the power of evoking dignity in support of expanding marriage equality, and changing the institution of marriage.

Dignity first surfaced in dissenting opinions of cases addressing LGBT rights, only appearing in the language of majority opinions in 2000. *Bowers v. Hardwick*[21] was one of the first cases where dignity appeared in a dissenting opinion.

In Justice White's 1986 majority opinion upholding an anti-sodomy law in Georgia, the word "dignity" does not appear once.[22] Rather, the opinion frames the issue narrowly: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[23] Justice White turns a blind eye to any harm anti-sodomy laws may cause to one's dignity by narrowly focusing on whether the Constitution grants a right to specific sexual conduct.[24] By framing the issue reductively and focusing on a sex act, the *Bowers* opinion left no room for discussion of the larger societal impact these laws may have on LGBT individuals, their relationships, and their dignity. However, despite this narrow presentation of the issue by Justice White, a concern for indignities connected with anti-sodomy laws appeared to weigh heavily on the minds of the dissenting justices in *Bowers*. Justice Stevens recognized that cases such as *Bowers* necessarily involve the judicial system's "tradition of respect for the *dignity* of individual choice in matters of conscience and the restraints implicit in the federal system."[25] However, this

[19] Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("[T]he law and the Constitution demand recognition of certain other rights. Prisoners retain the essence of human dignity inherent in all persons. *Respect for that dignity animates the Eighth Amendment* prohibition against cruel and unusual punishment." (emphasis added)).

[20] *Brown*, 347 U.S. at 494 (opining that racial segregation in schools is unconstitutional because it creates a "feeling of inferiority" that affects the "hearts and minds" of black youth).

[21] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[22] *See generally id*.

[23] *Id*. at 190.

[24] *Id*.

[25] *Id*. at 217 (Stevens, J., dissenting) (emphasis added) (quoting Fitzgerald v. Porter Mem'l Hosp., 523 F.2d 716, 720 (7th Cir. 1975)). In a separate dissent, Justice Blackmun discussed privacy as it relates to dignity and freedom of choice, suggesting he also believed that the majority minimized the issue at question in *Bowers*. *Id*. at 204, 206 (Blackmun, J., dissenting) ("The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to

concern for dignity did not resurface in any tangible way for several years after *Bowers* was decided.

About ten years later, the Supreme Court again encountered the issue of LGBT discrimination in *Romer v. Evans*,[26] a challenge to a Colorado constitutional amendment that prohibited any "legislative, executive, or judicial action at any level of state or local government" designed to protect LGBT members of the community from discrimination.[27] The Court held the Colorado amendment unconstitutional.[28] While the *Romer* opinion did not explicitly discuss a concern of dignitary harm, the majority expressed concern over harms associated with isolating one class of people in relation to the law.[29] The majority opinion quotes from the dissent of *Plessy v. Ferguson*,[30] a civil rights case that upheld the constitutionality of "separate but equal," sharing the dissenter's sentiment that "the Constitution 'neither knows nor tolerates classes among citizens.'"[31] While the *Romer* Court based its holding on an equal protection rationale,[32] it is clear that, in an attenuated way, dignity was on the minds of the majority justices as it is a major injury associated with creating separate classes.

Four years later in 2000, in *Boy Scouts of America v. Dale*,[33] the Court found that a Boy Scout policy that excluded gay boys and men from membership and allowed for discharge based on sexual orientation was protected by freedom of expression.[34] While the majority opinion did not appeal to dignity jurisprudence, the dissenters once again allude to dignitary concerns. Dissenting, Justice Stevens laments: "Under the majority's reasoning, an openly gay male is irreversibly affixed with the label 'homosexual.' . . . [R]eliance on such a justification is tantamount to a constitutionally prescribed symbol of inferiority."[35] Steven's concern for inferiority caused by the Boy Scout policy reveals a concern for dignity. His reference to inferiority as a legally cognizable harm hinted at the larger role dignity would play in future opinions.

recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.").

[26] 517 U.S. 620 (1996).

[27] *Id*. at 624.

[28] *Id*. at 635-36.

[29] *Id*. at 627 ("The amendment withdraws from homosexuals, but no others, specific legal protection from the injuries caused by discrimination . . . .").

[30] 163 U.S. 537 (1896).

[31] *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

[32] *Id*. at 635-36 (conducting an equal protection analysis).

[33] 530 U.S. 640 (2000).

[34] *Id*. at 656 ("[W]e inquire whether the application of New Jersey's public accommodations law to require that the Boy Scouts accept Dale as an assistant scoutmaster runs afoul of the Scouts' freedom of expressive association. We conclude that it does.").

[35] *Id*. at 696 (Stevens, J., dissenting).

In 2003, the Court discussed dignity more directly in *Lawrence v. Texas*.[36] *Lawrence* is perhaps the most prominent LGBT-rights case in the pre-*Windsor* era to invoke dignity jurisprudence, and the second landmark LGBT opinion authored by Justice Kennedy.[37] In *Lawrence*, the Court overturned a Texas anti-sodomy law targeting gay men by drawing on a substantive due process right to liberty.[38] The opinion references this liberty right as one intertwined with and derived from a right to dignity,[39] a divergence from the narrow conception of the same issue espoused in *Bowers*.[40] *Lawrence* explicitly overruled *Bowers*,[41] framing the issue behind these bans as *more* than a mere right to engage in a specific sexual act.[42] Justice Kennedy's majority opinion asserts "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."[43] Justice Kennedy supports this right to dignity with in-depth reference to *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[44] which intertwined dignity with the judicially recognizable and constitutionally protected rights to liberty, privacy, and autonomy under the Due Process Clause.[45] In essence, "[t]he 'liberty' of which the [*Lawrence*] Court spoke was

[36] 539 U.S. 558 (2003).

[37] *Id*. at 578-79 (holding that it was unconstitutional for Texas to criminalize sexual relations between two men).

[38] *Id*. at 578 (holding that the "right to liberty under the Due Process Clause gives [the petitioners] the full right to engage in their conduct without intervention of the government").

[39] *Id*. at 574 ("[I]ntimate 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." (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992))).

[40] Bowers v. Hardwick, 478 U.S. 186, 190 (1986) ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . . .").

[41] *Lawrence*, 539 U.S. at 578 (explaining that Justice Stevens's rationale in his *Bowers* dissent should have controlled the opinion because "*Bowers* was not correct when it was decided, and it is not correct today").

[42] *Id*. at 582 ("This case raises a different issue than *Bowers*: whether, under the Equal Protection Clause, moral disapproval is a legitimate state interest to justify by itself a statute that bans homosexual sodomy, but not heterosexual sodomy.").

[43] *Id*. at 567 (emphasis added).

[44] 505 U.S. 833 (1992).

[45] *Lawrence*, 539 U.S. at 573-74 (explaining that *Casey* "reaffirmed the substantive force of the liberty protected by the Due Process Clause . . . and again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" (citing *Casey*, 505 U.S. at 851)).

as much about equal dignity and respect as it was about freedom of action—more so, in fact."[46]

Justice Kennedy further evokes dignity in *Lawrence* when rejecting the state's defense that the charge of sodomy constitutes only a minor crime with limited punishment.[47] Justice Kennedy rebuts this argument by asserting that despite minor criminal repercussions, "[s]till, it remains a criminal offense with all that imports for the *dignity* of the persons charged."[48] He concludes that "[t]he State cannot demean [homosexuals'] existence or control their destiny by making their private sexual conduct a crime."[49] This reference to demeaning dignity as a rationale for striking down a ban that inequitably harmed the LGBT community demonstrated a break with *Bowers* by acknowledging, in a majority opinion, that issues involving the rights of LGBT people are inextricably tied to a justiciable right to dignity. This was the first majority opinion of its kind to view the right to dignity as too significant for the Court to ignore or deem outside its purview.[50]

Finally, on the same day as *Windsor*, the Supreme Court held in *Hollingsworth v. Perry*[51] that proponents of a ballot measure banning same-sex marriage were private parties who did not have standing to appeal a lower court decision that found the ballot measure unconstitutional.[52] Vacating the Ninth Circuit affirmance of that decision, the Supreme Court ruling effectively allowed same-sex marriage in California to resume under the initial district court ruling.[53] While *Hollingsworth* dealt largely with the question of standing, the lower court decisions involved an extensive discussion of dignity.[54] In

[46] Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

[47] *Lawrence*, 539 U.S. at 575 (observing that despite the offense being a misdemeanor, "[t]he stigma this criminal statute imposes . . . is not trivial").

[48] *Id.* (emphasis added).

[49] *Id.* at 578.

[50] *Cf.* Tribe, *supra* note 46, at 1945 (describing *Lawrence*'s focus on "the right to dignity" as establishing "equal liberty of all" as the new "watchwords" for substantive due process).

[51] 133 S. Ct. 2652 (2013).

[52] *Id.* at 2668 ("We have never before upheld the standing of a private party to defend the constitutionality of a state statute when state officials have chosen not to. We decline to do so for the first time here.").

[53] *Id.*

[54] *See* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993 (N.D. Cal. 2010), *aff'd sub nom.* Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012). It is also noteworthy that an earlier decision regarding marriage rights from the California Supreme Court also invoked strong language concerning the dignity of same-sex couples. *See In re* Marriage Cases, 183 P.3d 384, 429 (Cal. 2008) ("In light of the evolution of our state's understanding concerning the equal dignity and respect to which all persons are entitled without regard to their sexual orientation, it is not appropriate to interpret these provisions in a way that, as a practical matter, excludes gay individuals.").

Perry v. Schwarzenegger, the district court wrote that the "[p]laintiffs seek to have the state recognize their committed relationships . . . [they] seek to be spouses; they seek the mutual obligation and honor that attend marriage."[55] The court's reference to honor and state recognition outside of the context of the provision of benefits suggests the recognition of a dignitary harm in the state marriage ban. When discussing whether the availability of domestic partnerships erases this dignitary harm, the court wrote that "domestic partnerships are distinct from marriage and do not provide the same social meaning as marriage. . . . [M]arriage is a culturally superior status."[56] Affirming *Perry v. Schwarzenegger* on appeal, the Ninth Circuit also associated the right to marriage with respect and dignity.[57] This line of cases left a legacy of judicial recognition that the institution of marriage confers a sort of cultural and social *dignity* upon its participants that is lacking in domestic partnerships and civil unions.

II. THE LANGUAGE OF DIGNITY IN *WINDSOR*

Ten years after *Lawrence* and on the same day *Hollingsworth* was decided, the Supreme Court issued a major victory for same-sex marriage in the canonical case *United Sates v. Windsor*.[58] Following the passing of her wife, Edith Windsor brought a challenge to the federal DOMA after being denied federal tax benefits regularly provided to opposite-sex surviving spouses.[59] Windsor and her wife, Thea Spyer, were married in Canada in 2007 and

[55] *Perry*, 704 F. Supp. 2d at 993.

[56] *Id*. at 994.

[57] The Ninth Circuit asserted that alternative unions offered by the state do not bestow dignity comparable to marriage, stating that "[t]he designation of 'marriage' is the status that we recognize. It is the principal manner in which the State attaches respect and *dignity* to the highest form of a committed relationship and to the individuals who have entered into it." *Perry*, 671 F.3d at 1079 (emphasis added), *vacated sub nom*. Hollingsworth v. Perry, 133 S. Ct. 2652 (2013). This holding clearly recognizes the dignity inherent in marriage as a justiciable right by discussing this right in connection with the constitutionality of California's ban on same-sex marriage. While the Supreme Court vacated the Ninth Circuit opinion, the decision appears to have left a lasting impact and is worthy of discussion, as *Perry* is still referenced in several post-*Hollingsworth* decisions. For example, the holding was discussed extensively in a concurrence by Judge Holmes of the Tenth Circuit in *Bishop v. Smith*. 760 F.3d 1070, 1106-08 (10th Cir. 2014) (Holmes, J., concurring) (discussing the rationale of *Perry* at length and concluding that "[t]he essential point to glean from *Perry* is that it properly recognized the key factor that brought Proposition 8 within the realm of *Romer*: that Proposition 8 *removed* from homosexuals a right they had previously enjoyed—marriage").

[58] 133 S. Ct. 2675, 2696 (2013) (striking down a federal ban on same-sex marriage recognition).

[59] *Id*. at 2682-83 (detailing Windsor's struggles following her partner's death, including denial of tax benefits available to married opposite-sex couples).

returned to reside in New York shortly thereafter.[60] Spyer passed away in 2009, leaving her estate to Windsor.[61] When Windsor sought to utilize the estate tax exemption for surviving spouses, she was prevented from doing so by a federal law, DOMA, which "exclude[d] a same-sex partner from the definition of 'spouse' as that term is used in federal statutes."[62] In essence, DOMA prohibited the federal government from recognizing her marriage, even though she was residing in a state that recognized same-sex marriage and treated Windsor and Spyer as legally married.[63]

Windsor brought a constitutional challenge to this unjust result under DOMA, winning in both the federal district[64] and appellate[65] courts. Because the Department of Justice was no longer defending the legality of DOMA, the Bipartisan Legal Advisory Group of the House of Representatives intervened to appeal, and the Supreme Court granted certiorari.[66] The Supreme Court held DOMA unconstitutional, affirming lower court decisions striking down the federal law.[67] In making this decision, the Court drew upon the emerging dignity jurisprudence evidenced in earlier cases dealing with LGBT equality, such as *Lawrence*.[68] In the majority *Windsor* opinion, authored by Justice Kennedy, the word "dignity" appears nine times.[69] While the opinion references other rationales, "dignity" is instrumental in the holding. Justice Kennedy writes, "the Fifth Amendment itself withdraws from Government the power to *degrade* or *demean* in the way this law does, [and] the equal

[60] *Id*.

[61] *Id*.

[62] *Id*.

[63] 1 U.S.C. § 7 (2012) (establishing that, for the federal government's purposes, "the word 'marriage' means only a legal union between one man and one woman as husband and wife"), *invalidated by Windsor*, 133 S. Ct. 2675.

[64] Windsor v. United States, 833 F. Supp. 2d 394, 406 (S.D.N.Y. 2012) ("The Court declares that section 3 of the Defense of Marriage Act . . . is unconstitutional as applied to Plaintiff.").

[65] Windsor v. United States, 699 F.3d 169, 188 (2d Cir. 2012).

[66] *Windsor*, 133 S. Ct. at 2683-84.

[67] *Id*. at 2696 ("By . . . treating those persons as living in marriages less respected than others, the federal statute [DOMA] is in violation of the Fifth Amendment."). Notably, while Justice Kennedy affirmed the Second Circuit's holding, he rejected their use of intermediate scrutiny and instead utilizes an ambiguous standard that is not clearly delineated in the opinion.

[68] *Id*. at 2692-96 (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003), in support of the idea that intimacy is one part of a significant bond between all partners, and holding that DOMA may not prohibit a state's efforts to "give further protection and dignity to that bond").

[69] It should be noted that this count only refers to explicit use of the word "dignity." Dignity jurisprudence is evoked beyond these nine explicit references. *See, e.g.*, *id*. at 2694 ("The differentiation [under DOMA] demeans the couple, whose moral and sexual choices the Constitution protects.").

protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved."[70] By recognizing that the Constitution prohibits the federal Government from *degrading* or *demeaning* citizens, Justice Kennedy essentially asserts that the Constitution offers protection for one's dignity. By drawing this conclusion in a same-sex marriage case, he ultimately equates marriage with dignity.

The connection between marriage, dignity, and the Constitution is pervasive throughout Justice Kennedy's opinion, and appears in several contexts. Even when, on first read, the opinion seems focused on federalism or other formulaic equal protection and due process rationales, the diffuse use of dignity indicates a less traditional basis for the holding. While the idea of dignity is often intertwined with other concepts such as federalism, Justice Kennedy still imparts the importance of "dignity" as central to the holding. When explaining how DOMA violates federalism principles by prohibiting states from individually defining marriage, for example, Justice Kennedy remarks that the "State's decision to give this class of persons the right to marry conferred upon [same-sex couples] a *dignity and status of immense import*."[71] He further comments 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. It was its essence."[72] Finally, he expresses concern over the humiliation children of same-sex couples face under DOMA.[73] Rather than simply holding that DOMA infringes on the state's traditional power to define marital and familial relationships and ending there, Justice Kennedy instead relies heavily on dignity language and discusses the magnitude of harm DOMA causes to such dignity.

The *Windsor* opinion recognizes that marriage endows upon its participants rights and responsibilities, and that these "[r]esponsibilities, as well as rights, enhance the *dignity* and integrity of the person. And DOMA contrives to deprive some couples . . . of both rights and responsibilities."[74] Kennedy looks beyond federalist concerns of the state to the consequences the statute has for the dignity of same-sex couples and their children.[75] By frequently invoking

[70] *Id*. at 2695 (emphasis added).

[71] *Id*. at 2692 (emphasis added).

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

[73] *Id*. at 2694 ("[DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.").

[74] *Id*. (emphasis added).

[75] *Id*. Douglas Broyles aptly recognizes that "[d]espite his spilling a considerable amount of ink on the federalism question, Justice Kennedy ultimately—and somewhat

the idea of harm to individual dignity, he acknowledges that this is an issue courts can and should consider in cases involving same-sex marriage equality.

When Justice Kennedy raises equal protection and due process issues with DOMA, he continues to identify concerns of dignitary harm. Explaining that DOMA violates equal protection, he comments that it "places same-sex couples in an unstable position of being in a second-tier marriage. The differentiation demeans the couple, whose moral and sexual choices the Constitution protects . . . and whose relationship the State has sought to dignify."[76] Kennedy cites *Lawrence v. Texas* as the source of this constitutional protection.[77] Thus, he recognizes that the "moral and sexual choices" *Lawrence* found to be protected by the Constitution are inextricably connected with marriage, which affords a further level of such protection and recognition.

In his closing, Justice Kennedy states: "[T]he State, by its marriage laws, sought to protect . . . personhood and dignity. By seeking to displace this protection and treat[] those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment."[78] This closing blurs the lines between federalism, due process, equal protection, and a right to dignity. However, it is clear that Justice Kennedy suggests the invalidation of DOMA is based on *more* than federalism. In effect, he concludes that the statute is unconstitutional *because* it treats same-sex marriages with less dignity than heterosexual marriages.

The importance of dignity in the *Windsor* holding did not go unnoticed by other members of the Court. The opinions of the various dissenting Justices highlight the importance the majority places on dignity jurisprudence in their own opinions. Justice Scalia explicitly laments that the "Court which finds it so horrific that Congress irrationally and hatefully robbed same-sex couples of the 'personhood and dignity' which state legislatures conferred upon them, will of a certitude be similarly appalled by state legislatures' irrational and hateful failure to acknowledge that 'personhood and dignity' in the first place.[79] Justice Scalia does not attempt to mask his concern (which proved to be well-founded in light of post-*Windsor* lower court rulings and, ultimately, *Obergefell*) that the value placed on dignity in Justice Kennedy's opinion will soon be applied outside the federal context to strike down state bans as well.[80]

surprisingly—rejects federalism as the appropriate constitutional grounds for overturning . . . DOMA," instead using substantive due process. Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged a New Doctrine of Substantive Due Process? An Examination of* McDonald v. City of Chicago *and* United States v. Windsor, 1 TEX. A&M L. REV. 129, 146-48 (2013).

[76] *Windsor*, 133 S. Ct. at 2694.

[77] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 567 (2003), as establishing protection for moral and sexual choices).

[78] *Id.* at 2696.

[79] *Id.* at 2710 (Scalia, J., dissenting).

[80] Neil S. Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS 87, 89 (2014) (stating that Justice Scalia's *Windsor* dissent

In his dissent, Chief Justice Roberts takes a different approach that leads to the same conclusion. The Chief Justice goes to great lengths to convince readers that the rationale of the majority opinion is confined to the issue of federalism.[81] However, in doing so he makes a strained effort to consciously "[i]gnor[e] the many references in the majority opinion to the equality, liberty, and dignity of same-sex couples and their children . . . [and] insist[] that the majority opinion did not threaten the authority of states to prohibit same-sex marriage."[82] The Chief Justice makes a futile effort to stress that the rationale of the majority opinion is not intended to extend to challenges against state marriage bans: "[W]hile I disagree with the result to which the majority's analysis leads it in this case, I think it more important to point out that its analysis leads no further."[83] Ironically, the emphasis that Chief Justice Roberts places on explaining that the majority opinion is not based on dignity jurisprudence signifies that one can read the *Windsor* opinion to reach that conclusion. By focusing on the federalism element of the majority opinion, Chief Justice Roberts effectively exposes his concern that the majority opinion lays the foundation for successful use of dignity jurisprudence to strike down state bans on same-sex marriage and state refusals to recognize out of state, same-sex marriages. As we now know from *Obergefell*, that concern was well founded.

III. *WINDSOR*'S DIGNITY INTERPRETED

Shortly after *Windsor* was decided, many scholars asserted that "the impact of *Windsor* on future marriage equality litigation will depend very much on what other courts take the case to stand for."[84] Professor Broyles theorized that, while "[a]t this point it is unclear what constitutional doctrine Justice Kennedy is invoking [in *Windsor*], [it is clear] that it in some manner involves 'liberty' interests similar to those usually analyzed under substantive due process, equal protection interests, and understandings of both liberty and equality that are part of an evolving American understanding."[85] Subsequent

essentially "declared that the sky is falling for those seeking to limit marriage to opposite-sex couples").

[81] *Windsor*, 133 S. Ct. at 2697 (Roberts, C.J., dissenting) ("The dominant theme of the majority opinion is that [of] the Federal Government's intrusion into an area 'central to state domestic relations law applicable to its residents and citizens' . . . .").

[82] Siegel, *supra* 80, at 89-90; *see also* Marcus, *supra* note 10, at 21 (asserting that Robert's statements attempting to limit the holding to federalism are "misleading").

[83] *Windsor*, 133 S. Ct. at 2696 (Roberts, C.J., dissenting).

[84] Susannah W. Pollvogt, Windsor*, Animus, and the Future of Marriage Equality*, 113 COLUM. L. REV. SIDEBAR 204, 205 (2013), http://columbialawreview.org/windsor-animus_pollvogt/ [https://perma.cc/E4EL-UVP9].

[85] Broyles, *supra* note 75, at 147. Note that Broyles' idea of liberty is similar to the conception of "dignity" espoused in this paper. Broyles argues that *Windsor* was actually about a right to liberty—dignity—under substantive due process doctrine. *Id*. at 147-50.

litigation quickly proved Justice Kennedy's opinion, with its dignity language, to be an effective tool to combat state-level same-sex marriage bans and refusals to recognize out-of-state same-sex marriages. Following *Windsor*, four of five federal appeals courts[86] deciding same-sex marriage cases affirmed lower court rulings that struck down state same-sex marriage bans and anti-recognition laws by drawing on substantive due process and equal protection analysis and invoking dignity as a connected, constitutionally protected right.[87] In *Obergefell*, the Supreme Court reversed the sole opinion upholding a marriage ban by the Sixth Circuit.[88] In doing so, the Court, in an opinion written by Justice Kennedy, explicitly situated dignity within the culture of this evolving understanding of dignity jurisprudence.

A. *Post-*Windsor *Dignity Jurisprudence in the Appellate Courts*

The first post-*Windsor* decision at the federal appellate level came out of the Tenth Circuit. In *Kitchen v. Herbert*,[89] same-sex couple plaintiffs challenged a state statutory and constitutional ban on same-sex marriage in Utah.[90] After a district court ruled in favor of the plaintiffs, the case was appealed to the Tenth Circuit, where the court held that the same-sex marriage ban violated substantive due process and equal protection under the Fourteenth Amendment.[91] The court utilized the framework of a substantive due process right to dignity as developed in *Windsor*:

> [The *Windsor*] Court framed the dispositive question as "whether the resulting injury and indignity is a deprivation of an essential part of the liberty protected by the Fifth Amendment." . . . [T]he [*Windsor*] Court's

[86] *See infra* Section III.A (discussing the rulings by Courts of Appeal between *Windsor* and *Obergefell*). For the purpose of this Note, I will focus on rulings at the federal appellate level and the Supreme Court's decision in *Obergefell*.

[87] District court rulings that struck down marriage bans were upheld on appeal in the Fourth, Seventh, Ninth, and Tenth Circuits. *See id*. The Sixth Circuit was the only appellate court to reverse a district court ruling against marriage bans. Lyle Denniston, *Sixth Circuit: Now, a Split on Same-Sex Marriage*, SCOTUSBLOG (Nov. 6, 2014, 4:50 PM) www.scotusblog.com/2014/11/sixth-circuit-the-split-on-same-sex-marriage/ [https://perma.cc/3EDT-VF44].

[88] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (reversing Sixth Circuit opinion that upheld state marriage bans).

[89] 755 F.3d 1193 (10th Cir. 2014).

[90] *Id*. at 1198-1200 (detailing the Utah Legislature's choice to amend their constitution and statutes in 2004 to enact bans on same-sex marriage and recognition, which were challenged by the plaintiffs).

[91] *Id*. at 1229-30 (overturning the ban because "under the Due Process and Equal Protection Clauses of the United States Constitution, those who wish to marry a person of the same sex are entitled to exercise the same fundamental right").

> description of the issue indicates that its holding was not solely based on the scope of federal versus state powers.[92]

The Tenth Circuit explicitly recognizes that Justice Kennedy's opinion set a precedent that reaches beyond federalism doctrine. The court embraces the powerful tool of dignity jurisprudence, concluding that "[w]e must reject appellants' efforts to downplay the importance of the personal elements inherent in the institution of marriage . . . . [S]uch freedoms support the dignity of each person, a factor emphasized by the *Windsor* Court."[93] Less than one month later, in affirming a challenge to Oklahoma's marriage laws, the Tenth Circuit issued a similar opinion in *Bishop v. Smith*,[94] holding that it would adhere to the "core holding [in *Kitchen*] that states may not, consistent with the United States Constitution, prohibit same-sex marriages."[95]

The next federal circuit to tackle this issue was the Fourth Circuit in *Bostic v. Schafer*.[96] Once again, the court upheld a lower court decision striking down state constitutional provisions prohibiting same-sex marriage and denying recognition of same-sex marriages conducted out-of-state.[97] The appellate court dropped any possible pretense of understanding *Windsor* as a narrow federalism decision, instead drawing upon the discussion of substantive due process in *Windsor* as the basis for its holding.[98] Early in the opinion, the Fourth Circuit references "[t]he [Supreme] Court's development of its due process and equal protection jurisprudence" and notes that, "[o]n the Due Process front, *Lawrence v. Texas* and *Windsor* are particularly relevant."[99] The court writes of the public centrality of marriage, referring to exclusion from such an institution as "segregation" and stressing the magnitude of exclusion from civil marriage:

> Civil marriage is one of the cornerstones of our way of life. It allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships, which provide unparalleled intimacy, companionship, emotional support, and security . . . . Denying same-sex couples this choice prohibits them from participating fully in our society,

[92] *Id*. at 1206 (quoting United States v. Windsor, 133 S. Ct. 2675, 2692 (2013)).

[93] *Id*. at 1212-13.

[94] 760 F.3d 1070 (10th Cir. 2014).

[95] *Id*. at 1082.

[96] 760 F.3d 352, 384 (4th Cir. 2014) ("Denying same-sex couples this choice prohibits them from participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.").

[97] *Id*. (upholding a lower court decision mandating marriage equality for same-sex couples).

[98] *Id*. at 378 (stating that "injury to same-sex couples served as the foundation for the [*Windsor*] Court's conclusion that section 3 violated the Fifth Amendment's Due Process Clause").

[99] *Id*. at 374.

> which is precisely the type of segregation that the Fourteenth Amendment cannot countenance.[100]

This language, while not explicitly evoking dignity, nonetheless suggests that same-sex marriage bans impinge upon a set of intangible rights, which can collectively be referred to as dignitary rights.

About one month after *Bostic*, the Seventh Circuit affirmed a district court's decision to enjoin anti-marriage equality laws in Indiana and Wisconsin, using equal protection doctrine.[101] In *Baskin v. Bogan*, authored by Judge Richard Posner, the Seventh Circuit places precedential significance on the fact that the *Windsor* Court weighed the importance of dignity when balancing the personal interests of same-sex couples against governmental interests in preserving opposite-sex marriage. The court observes that "[i]n its parting sentences, *Windsor* explicitly announces . . . : 'The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.'"[102] Here, the court takes *Windsor* as an indication that dignity deserves a central role in equal protection analysis. The Seventh Circuit goes on to find that the harm caused to a same-sex couple's dignity by a marriage ban undoubtedly outweighs any state interest in the ban.[103]

Following *Windsor*'s domino effect in the Tenth, Fourth, and Seventh Circuits, the Ninth Circuit ruled for marriage equality shortly thereafter. The Ninth Circuit issued this ruling in *Latta v. Otter*[104] despite defendant's protestations that the issue was not appropriate for judicial review.[105] The court cites *Windsor* in support of its conclusion that the Supreme Court has

---

[100] *Id.* at 384.

[101] Baskin v. Bogan, 766 F.3d 648, 672 (7th Cir. 2014) (upholding a lower court ruling in favor of marriage equality).

[102] *Id.* at 671 (emphasis omitted).

[103] *Id.* at 658 ("The harm to homosexuals (and, as we'll emphasize, to their adopted children) of being denied the right to marry is considerable. Marriage confers respectability on a sexual relationship; to exclude a couple from marriage is thus to deny it a coveted status.").

[104] 771 F.3d 456 (9th Cir. 2014).

[105] The *Latta* defendants put forth an argument that the Supreme Court's decision in *Baker v. Nelson*, 409 U.S. 810, 810 (1972), remained good law and established that challenges to same-sex marriage bans are not justiciable. *Latta*, 771 F.3d at 466. In *Baker*, the Supreme Court denied certiorari on a ruling that upheld a same-sex marriage ban in Minnesota. *Baker*, 409 U.S. at 810 (dismissing appeal "for want of a substantial federal question"), *overruled by* Obergefell v. Hodges, 135 S. Ct. 2584 (2015). However, the *Latta* court asserted that that Supreme Court's willingness to take on subsequent same-sex marriage cases indicates that the Court has broken from *Baker* and now recognized such cases as justiciable. *Latta*, 771 F.3d at 466-67.

designated such issues fully justiciable and urgent.[106] After a brief survey of contemporary cases addressing LGBT issues, the Ninth Circuit concludes that, "[a]s any observer of the Supreme Court cannot help but realize, this case and others like it present not only substantial but pressing federal questions."[107] In its reference to same-sex marriage equality as "pressing," this court implicitly acknowledges the dignitary harm that marriage bans cause.[108]

In addition to recognizing that *Windsor* opened the door for marriage equality, the Ninth Circuit lists a myriad of tangible and *intangible* rights that are unconstitutionally denied by way of marriage bans. The court states that "marriage is not simply about procreation . . . . '[M]arital status often is a precondition to . . . other, less tangible benefits (e.g., legitimation of children born out of wedlock).'"[109] Here in its equal protection analysis, the court considers the intangible harm marriage bans cause. By suggesting that justiciable harm may include the indignity of raising children born out of wedlock, the court recognizes that marriage bans injure a specific group's dignity in a way that is unacceptable under the Constitution. In an eloquently worded concurrence, Justice Reinhardt, who also authored the majority opinion, reinforces this idea: "[Our Constitution] demands not merely toleration; when a state is in the business of marriage, it must affirm the love and commitment of same-sex couples in equal measure. Recognizing that right *dignifies* them; in so doing, we dignify our Constitution."[110] While the aforementioned cases may not be unified in their use of the Equal Protection or Due Process Clause as the grounds for striking down state marriage bans, the idea of dignity harm as an appropriate issue for judicial consideration is universally accepted across these circuits.

The last appellate court to decide the issue of same-sex marriage before *Obergefell* broke rank with the string of earlier decisions from its sibling courts. In *DeBoer v. Snyder*,[111] the Sixth Circuit reversed a district court's decision to overturn state bans on same-sex marriage in Kentucky, Michigan, Ohio, and Tennessee, temporarily[112] reinstating marriage inequality in those states.[113] Diverging from the Ninth Circuit, the court cited *Baker v. Nelson*[114]

[106] *Latta*, 771 F.3d at 473 ("Windsor makes clear that the defendants' explicit desire to express a preference for opposite-sex couples over same-sex couples is a categorically inadequate justification for discrimination.").

[107] *Id*. at 467.

[108] *Id*. (referring to the issue as "pressing").

[109] *Id*. at 471-72 (quoting Turner v. Safley, 482 U.S. 78, 95-96 (1987)).

[110] *Id*. at 479 (Reinhardt, J., concurring) (emphasis added).

[111] 772 F.3d 388 (6th Cir. 2014).

[112] The ban was only reinstated until the following year, when the Supreme Court reversed the *DeBoer* holding in *Obergefell*.

[113] *DeBoer*, 772 F.3d at 421 (holding that the court would not rule against a state ban on marriage, opting to allow the political process to resolve the issue on marriage equality), *rev'd sub nom*. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

in support of the premise that the issue of same-sex marriage is *not* justiciable, and should be decided outside of the courtroom in the political and public spheres.[115] The opinion goes on to discuss the merits of allowing same-sex marriage to develop through the democratic process rather than in the courtroom.[116] In addition, the court attempts to read *Windsor* more narrowly than its predecessors by claiming that the case was decided solely on the basis of federalism doctrine.[117]

Even in declining to invalidate a same-sex marriage ban, however, this court seems to acknowledge the value of dignity conferred by *Windsor*. The specific word "dignity" appears twelve times in the relatively short majority opinion.[118] Of the plaintiffs, the court states that "[a]ll seek dignity and respect, the same dignity and respect given to marriages between opposite-sex couples. And all come down to the same question: Who decides?"[119] Even while declining to rule for marriage equality, the court frames the marriage equality question as one concerning dignity. The Sixth Circuit's decision may appear to be a step backward in the ultimately successful march toward marriage equality, but it is noteworthy that the court concedes that marriage equality is connected with dignity.[120] Furthermore, Judge Daughtrey's strongly worded dissent summarizes earlier decisions in the Supreme Court and other federal appellate courts, concluding that

> [b]ecause the correct result is so obvious, one is tempted to speculate that the majority has purposefully taken the contrary position to create the circuit split . . . that could prompt a grant of certiorari by the Supreme Court and an end to the uncertainty of status and the interstate chaos that the current discrepancy in state laws threatens.[121]

She theorizes that *Windsor* so clearly mandates the unconstitutionality of same-sex marriage bans that the Sixth Circuit must have reached the opposite conclusion with the strategic intention of provoking appeal to the Supreme

---

[114] 409 U.S. 810 (1972). See *supra* note 105 and accompanying text for an overview of the *Baker* holding.

[115] *DeBoer*, 772 F.3d at 400 (asserting that *Nelson* binds the court to reject the challenge to same-sex marriage before it as non-justiciable).

[116] *Id*. at 421 ("Better in this instance, we think, to allow change through the customary political processes, in which the people, gay and straight alike, become the heroes of their own stories by meeting each other not as adversaries in a court system but as fellow citizens seeking to resolve a new social issue in a fair-minded way.").

[117] *Id*. at 414 (explaining that "federalism permeates both parts of . . . the [*Windsor*] opinion").

[118] *See generally id*.

[119] *Id*. at 396.

[120] While the majority in *DeBoer* does not view dignity as a justiciable right, it does acknowledge that dignity is the right central to the same-sex marriage debate.

[121] *DeBoer*, 772 F.3d at 430 (Daughtrey, J., dissenting).

Court.[122] While likely sarcastic, this prediction was proved correct when the Supreme Court granted certiorari and ultimately reversed *DeBoer* within a year.[123]

B. Obergefell*: Dignity Solidified in the Supreme Court*

In an opinion saturated with the language of dignity, *Obergefell v. Hodges* reversed the holding in *DeBoer* by ruling that both the Due Process and Equal Protection Clause guarantee same-sex couples the fundamental constitutional right to marry. James Obergefell, an Ohio resident and the named plaintiff in the case, which consolidated the six separate cases reversed by the Sixth Circuit in *DeBoer*, met his husband John Arthur in 2003.[124] Arthur was diagnosed with ALS in 2011, and the couple decided to wed shortly thereafter.[125] Because same-sex marriage was not legal in Ohio and it was difficult for Arthur to travel due to his illness, the couple flew to Maryland and married on the tarmac.[126] Three months later, Obergefell lost his husband.[127] Despite the fact that Obegefell and Arthur were legally married in Maryland, Ohio would not list Obergefell on Arthur's death certificate because of a state law banning recognition of out-of-state same-sex marriages.[128] The plaintiffs in the other cases consolidated with Obergefell's faced similar hardships. These plaintiffs all challenged the Sixth Circuit *DeBoer* decision that reversed their favorable district court rulings, and the Supreme Court consolidated the cases and granted certiorari.[129]

Justice Kennedy's majority opinion in *Obergefell* begins and ends with references to dignity. The majority opinion opens with a reflection on the importance of marriage: "[T]he annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons . . . ."[130] It concludes with a statement that the plaintiffs "ask for equal dignity in the eyes

---

[122] *Id*.

[123] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) ("[The plaintiffs] ask for equal dignity in the eyes of the law. The Constitution grants them that right. The judgment of the Court of Appeals for the Sixth Circuit is reversed.").

[124] *Id*. at 2594-95 (providing background stories for several of the plaintiffs).

[125] *Id*. at 2594.

[126] *Id*.

[127] *Id*.

[128] *Id*. at 2594-95 ("By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems 'hurtful for the rest of time.'").

[129] Bourke v. Beshear, 135 S. Ct. 1041 (2015) (mem.) (consolidating cases and granting certiorari); DeBoer v. Snyder, 135 S. Ct. 1040 (2015) (mem.) (same); Tanco v. Haslam, 135 S. Ct. 1040 (2015) (mem.) (same); Obergefell v. Hodges, 135 S. Ct. 1039 (2015) (mem.) (same).

[130] *Obergefell*, 135 S. Ct. at 2593-94.

of the law. The Constitution grants them that right."[131] Interspersed between these beginning and concluding sentences is an opinion clearly shaped by dignity jurisprudence. Justice Kennedy writes that "[t]he identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. . . . [and this duty] requires courts to exercise reasoned judgment[132] in identifying interests of the person so fundamental that the State must accord them its respect."[133] In short, he demonstrates an evolving understanding of these fundamental rights that requires the recognition of dignity as an ancillary right necessary to secure their complete protection.

Justice Kennedy identifies four principles behind *Obgerfell*'s holding that marriage is a fundamental right and connects each of these principles to the basic human right to dignity. The first such principle is autonomy.[134] Justice Kennedy recognizes that much of the value personal autonomy holds lies in the sense of dignity one gains from exercising autonomy. He states that "[t]here is dignity in the bond between two men or two women who seek to marry *and* in their autonomy to make such profound choices."[135] Autonomy is necessarily tied to dignity, because the value in personal autonomy is the ability to make the choices that shape one's life and confer *dignity*.

The second principle Justice Kennedy identifies is the right to intimacy—the ability to form a "two-person union unlike any other in its importance to the committed individuals."[136] This right was established in several earlier cases,

[131] *Id*. at 2608.

[132] This concept of the Court's "reasoned judgment" has also been invoked by Justice Harlan in dissent in *Poe v. Ullman* and by the joint opinion in *Casey*, which Justice Kennedy co-authored. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 834 (1992) ("[T]he adjudication of substantive due process claims may require this Court to exercise its reasoned judgment in determining the boundaries between the individual's liberty and the demands of organized society."); Poe v. Ullman, 367 U.S. 497, 543, 549 (1961) (Harlan, J., dissenting) ("[A] reasonable and sensitive judgment must[] [recognize] that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."). For a discussion of Justice Harlan and the role of reasoned judgment, see JAMES E. FLEMING & LINDA C. MCCLAIN, ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES 237-72 (2012).

[133] *Obergefell*, 135 S. Ct. at 2598.

[134] *Id*. at 2599 ("A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.").

[135] *Id*. (emphasis added) (citing Loving v. Virginia, 388 U.S. 1, 12 (1967)). Justice Kennedy cites *Loving* extensively in support of this connection between marriage and liberty. *See id*. at 2598-99 ("Th[e] abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause." (citation omitted)).

[136] *Id*. at 2599.

the most relevant of which is *Lawrence*.[137] However, the right to such intimacy loses part of its meaning if the union is not recognized by society. Citing *Windsor*, Justice Kennedy writes that "[t]he right to marry thus dignifies couples who 'wish to define themselves by their commitment to each other.'"[138] In essence, the value of forming an intimate, two-person union lies partially in the dignity that comes from public formation and recognition of the union. Harkening back to *Lawrence*, Justice Kennedy writes that "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there" as shifting from "[o]utlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[139] Merely permitting same-sex intimacy is not enough, because such "tolerance" does not confer dignity and allow for equal, public exercise of liberty. Such liberty can only be achieved through equal access to marriage—an institution that publicly establishes the intimate bond created between two people.

Justice Kennedy's third principle relates to the protection of children and the family.[140] He expresses concern that children of same-sex couples will experience a deprivation of dignity as a result of the knowledge that their parents cannot marry like other, opposite-sex couples. He writes, "[b]y giving recognition and legal structure to their parents' relationship, marriage allows children 'to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.'"[141] In essence, this principle can be translated into a concern for the dignity of same-sex parents and their children. He concludes that this dignity can only be bestowed by marriage, and, therefore, the Court must grant marriage equality.

The final principle recognized in *Obergefell* is that marriage is a "keystone of our social order."[142] Here, Justice Kennedy reasons that it is not only inequitable to deny same-sex couples the state and federal entitlements that come with marriage, but also that it subjects these couples to the less tangible harm of being perceived as unequal by society.[143] Said another way, same-sex

[137] Lawrence v. Texas, 539 U.S. 558, 567 (2003) ("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.").

[138] *Obergefell*, 135 S. Ct. at 2600 (citing United States v. Windsor, 133 S. Ct. 2675, 2689 (2013)).

[139] *Id*. ("But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there.").

[140] *Id*.

[141] *Id*. (citing *Windsor*, 133 S. Ct. at 2694-95).

[142] *Id*. at 2601.

[143] *Id*. at 2601-02 ("[E]xclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects.").

couples are denied dignity by their exclusion from "a central institution of the Nation's society."[144]

All four of the principles upon which the *Obgerfell* opinion rests tie back to an unconstitutional denial of dignity as inextricably connected with marriage. The end result is the majority holding that same-sex couples may exercise the right to marry in every state. In effect, all couples otherwise eligible are entitled to the dignity of marriage, regardless of gender.

IV. THE IMPLICATIONS FOR MARRIAGE AS AN INSTITUTION

Windsor and *Obergefell*, as well as the federal appellate cases decided in the interim, have major implications outside of the courtroom. Prompted by the increasing number of same-sex marriages and the judicial and cultural coupling of marriage with dignity and love, the overall societal perception of "marriage" will continue to broaden beyond the traditional focus on heteronormative gender roles and natural procreation, building upon the foundation laid during judicial battles over contraceptive access and coverture. In this Part, I argue that modern same-sex marriage litigation has effectively perpetuated a transformation of the long-established institution of marriage. Modern same-sex marriage litigation and its aftermath have demonstrated great judicial potential to liberalize a traditionally exclusive, heteronormative societal fixture laden with misogyny, transforming it into a more inclusive and dignity-conferring institution. In essence, "same-sex marriage [has caused] a dramatic shift in the way western culture thinks about marriage and gender roles."[145] As Professor Nan Hunter theorized, marriage equality will "destabilize the cultural meaning of marriage" in a positive way.[146] As the acceptance of interracial marriage granted greater dignity to people of color and the end of coverture granted greater autonomy and dignity to women, the end of same-sex marriage bans will expand dignity to couples previously denigrated because of their sexuality and gender.[147]

---

[144] *Id*. at 2602.

[145] William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1361 (2010).

[146] Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 L. & SEXUALITY 9, 17 (1991).

[147] While beyond the scope of this Note, the modernization of marriage has potential to confer dignity beyond the LGBT context—for example, to single parents and others in blended family structures. For one discussion of this broad potential, see Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1250 (2016) ("By affirming the equal worth of same-sex couples' family formation and by mainstreaming same-sex parenting, marriage equality can function as an important precedent for the growth of intentional and functional parenthood for all families, not only inside but also outside marriage.").

A. *Make Way for Same-Sex Couples*

Now that same-sex couples have been granted unrestricted access to marriage, the institution must grow and change to accommodate its newest participants as well as the coupling of marriage and dignity that has become prominent in the courtroom. The institution of marriage must become broader and less reflective of the traditional, heteronormative assumptions of the past so as to make sense of the inclusion of same-sex couples.[148] In his scholarship, Professor Douglas NeJaime argues that the work the LGBT community has done with alternative unions,[149] combined with subsequent holdings like that in *Windsor*, has transformed the institution of marriage.[150] He writes that "the movement itself . . . change[d] that institution."[151] Said another way, judicial emphasis on the role of dignity in the institution of marriage and the inherent need for the institution to accommodate a new set of participants necessarily broadens marriage.

What was once viewed as an institution designed to reinforce heteronormative, gender-based marital roles and to encourage the creation of biological offspring has morphed into an institution designed to accommodate non-heteronormative familial variations[152] and broadcast a couple's mutual commitment and love—thereby conferring dignity to the individuals separately and as a couple. Justice Kennedy recognizes the malleability of marriage when he writes that "[t]he history of marriage is one of both continuity and change."[153] Same-sex marriage was once considered so starkly different from traditional marriage that it was often referred to as *same-sex* marriage, rather than just marriage—a practice that still lingers today. However, as more same-

[148] Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 165-70 (2014) ("When courts rule in favor of marriage equality, they articulate a model of marriage that looks in many ways like domestic partnership and that is equally applicable to same-sex and different-sex relationships.").

[149] Douglas NeJaime, Windsor*'s Right to Marry*, 123 YALE L.J. ONLINE 219, 222 (2013), http://www.yalelawjournal.org/pdf/1205_3mchpr78.pdf [https://perma.cc/78C8-4HQV] ("LGBT advocacy has contributed in significant ways to the constitutional dimensions of marriage.").

[150] NeJaime, *supra* note 148, at 165-70 (stating that increased access to marriage through activism and litigation has fundamentally changed the institution).

[151] *Id*. at 172 ("Through LGBT contestation, as well as through challenges wrought by other forces, marriage grew more conducive to same-sex relationships. And as marriage now slowly moves to include same-sex couples, we see shifting articulations of marriage's core attributes.").

[152] Notably, this liberalized version of marriage accommodates two-spouse families—it does not extend so far as to welcome multi-spouse arrangements.

[153] Obergefell v. Hodges, 135 S. Ct. 2584, 2595 (2015) ("[Marriage] has not stood in isolation from developments in law and society."). Justice Kennedy goes on to discuss earlier shifts away from the law of coverture as additional evidence of the massive evolution marriage has undergone. *Id*.

sex couples partake in the institution of marriage and force institutional changes to accommodate their influx, same-sex marriage is no longer so different from traditional marriage that it needs an addendum or qualifier. In a recent interview, Edie Windsor stopped her interviewer: "'Could I suggest that you don't say same-sex marriage anymore? . . . . Because it's not. It's *marriage*.'"[154] This linguistic shift is indicative of an immeasurably larger change.[155] The focus has become more about conferring dignity and less about heteronormative gender roles.[156] As Professor William Eskridge writes: "[T]he display of two women married to one another carries significance. Every day and in public view at least one of the women performs in ways that do not fit with women's traditional roles."[157] This not only has implications for gender roles but also revolutionary implications for marriage as an institution. By definition, this new institution, designed to accommodate both same-sex and opposite-sex couples, can no longer symbolize and reinforce traditional gender roles.

Douglas NeJaime argues that as marriage is extended to same-sex couples, their "participation in marriage may continue to direct the meaning of marriage away from one rooted in procreative sex and gender differentiation and toward one rooted in adult romantic affiliation and mutual emotional and economic support."[158] NeJaime traces the start of this trend back to Supreme Court litigation that occurred long before same-sex marriage became a judicial hot topic, to *Griswold v. Connecticut*.[159] In *Griswold*, when the Court struck down a ban on contraceptive use for married couples, it implicitly endorsed non-

[154] Richard Wolf, *Heroine of Gay Marriage Movement Feels Pride in Progress*, USA TODAY (Dec. 28, 2014), http://www.usatoday.com/story/news/nation/2014/12/28/edie-windsor-gay-marriage/20967397/ [https://perma.cc/D5BJ-77ES] (emphasis added).

[155] I refer to marriage between two people of the same sex as "same-sex marriage" in this Note for the purpose of clarity.

[156] For example,

> [i]n a woman-woman marriage, where tasks are divided up along traditional gender lines, a woman will be doing the accustomed male role of working outside the home. In a man-man marriage where tasks are divided up along traditional lines, a man will be doing the accustomed female role of keeping house.

Eskridge, *supra* note 145, at 1361.

[157] *Id.* at 1362.

[158] NeJaime, *supra* note 148, at 171; *see also* United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (recognizing that "modern cultural changes have weakened the link between marriage and procreation in the popular mind"); NeJaime, *supra* note 149, at 226 (pointing to the invalidation of a contraception ban for married couples in *Griswold v. Connecticut*, 381 U.S. 617 (1965), as a sign of this change and stating that "[o]ver the second half of the twentieth century, the connection between marriage, procreation, and sex had been unraveling" (footnote omitted)).

[159] *Griswold*, 381 U.S. at 485 (holding that a ban on contraceptives for married couples is "repulsive to the notions of privacy surrounding the marriage relationship").

procreative sex within the institution of marriage.[160] This endorsement extended beyond the courtroom and changed public perception of sex and morality. It signified the beginning of a shift away from the old idea of marriage with its focus on "gender differentiation, procreative sex, and biological, male-female parenting."[161] Rejecting arguments that managing responsible procreation is the primary purpose of marriage in contemporary society, many courts now recognize that responsible procreative sex is no longer the sole or even a central aspect of the institution of marriage, but merely one important component among many.[162]

This idea first became prominent in same-sex marriage litigation in the Massachusetts case, *Goodridge v. Department of Public Health*,[163] in which the court pointed to permanent, exclusive commitment, rather than procreation, as the central purpose of marriage, proclaiming that "[f]ertility is not a condition of marriage."[164] Justice Kennedy later conveyed the same message in *Obergefell*: "The constitutional marriage right has many aspects, of which childbearing is only one."[165] While the dignity of children belonging to same-sex couples is part of the analysis in many of the cases discussed in this Note, it is only one rationale among many for recognizing same-sex marriage. Furthermore, when children are of concern in these cases, they are typically not the product of procreative sex by the couple in question, but were conceived during an earlier relationship with a third party, or (as is becoming increasingly more common) adopted or conceived using artificial reproductive technologies.

---

[160] NeJaime, *supra* note 149, at 226 (explaining that the *Griswold* Court "articulated a view of marriage that did not turn on its connection to procreation").

[161] NeJaime, *supra* note 148, at 91.

[162] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) (listing matters of procreation and childrearing as only one of several important aspects of marriage); Kitchen v. Herbert, 755 F.3d 1193, 1210 (10th Cir. 2014) (refusing to give weight to arguments conflating marriage and procreation); Latta v. Otter, 771 F.3d 456, 472 (9th Cir. 2014) ("[S]tates give marriage licenses to many opposite-sex couples who cannot or will not reproduce . . . ."); Bishop v. Smith, 760 F.3d 1070, 1081 (10th Cir. 2014) ("As with opposite-sex couples, members of same-sex couples have a constitutional right to choose against procreation."); Baskin v. Bogan, 766 F.3d 648, 661 (7th Cir. 2014) ("[I]f channeling procreative sex into marriage were the only reason that Indiana recognizes marriage, the state would not allow an infertile person to marry. Indeed it would make marriage licenses expire when one of the spouses (fertile upon marriage) became infertile because of age or disease.").

[163] 798 N.E.2d 941 (2003) (holding that denying same-sex couples the right to marry violates the Massachusetts Constitution).

[164] *Id*. at 331-32 ("While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to one another, not the begetting of children, that is the sine qua non of civil marriage.").

[165] *Obergefell*, 135 S. Ct. at 2601 ("[T]he right to marry is [no] less meaningful for those who do not or cannot have children.").

While a 2001 poll by the Pew Research Center showed that 57% of Americans *opposed* same-sex marriage, support for such marriages has since greatly increased.[166] A 2015 poll by the same organization revealed that 55% of Americans—a majority—*supported* same-sex marriage.[167] Because a view of marriage with heterosexual procreation as the central feature typically precludes inclusion of same-sex couples, this statistical change serves as an indicator that Americans no longer view heterosexual procreation as inextricable from marriage, but rather identify marriage with other values. This evolved vision of marriage focuses more on romantic relationships (love), economic interdependence, a myriad of familial structures, and the conferral of dignity in a universally recognized form. As courts grant marriage to same-sex couples who typically cannot engage in procreative sex, further alteration in marriage is necessary to accommodate these couples. If couples are unable to procreate naturally but are able to marry, natural procreation and marriage must not be inextricably intertwined. This shift is further perpetuated by the fact that same-sex couples do not assume traditional gender-based marital and parenting roles within their union, thus recasting the typical male-female roles within marriage.[168]

B. *The Cyclical Impact of the Opinion*

It is not just inclusion of same-sex couples that has furthered the modernization of the institution of marriage—discussion of marriage within the courtroom has also had an impact.[169] Opinions such as *Windsor* and *Obergefell*, full of vivid language describing a modern view of marriage, both reflect societal changes in the way marriage is perceived and further shape contemporary marriage in a cyclical manner.[170] Rather than focusing on procreation and gender roles as the basis for marriage, many recent marriage equality cases have emphasized the growing importance of societal status, community recognition of the union, and individual dignity.[171] As these cases

[166] *Changing Attitudes on Gay Marriage*, PEW RESEARCH CTR. (July 29, 2015), http://www.pewforum.org/2015/07/29/graphics-slideshow-changing-attitudes-on-gay-marriage/ [https://perma.cc/84DU-PJRF] (surveying Americans on their views toward same-sex marriage).

[167] *Id*.

[168] Notably, labor may still be divided between same-sex spouses in "traditional" ways (i.e., breadwinner and caretaker), but there are no exclusive *gender*-based roles within these marriages (i.e., breadwinner *male* and caretaker *female*).

[169] NeJaime, *supra* note 149, at 223 ("[T]he Court has internalized the changing meaning and content of marriage.").

[170] *Id*. at 221 ("The view of marriage that we observe in constitutional doctrine reflects the contemporary legal and cultural consciousness around marriage, revealing a model of marriage that is defined by norms capable of encompassing same-sex couples.").

[171] *See, e.g.*, Latta v. Otter, 771 F.3d 456, 474 (9th Cir. 2014) (refusing to even consider gender-role-based arguments involving marriage, because of the "constitutional restraints the Supreme Court has long imposed on sex-role stereotyping").

are often quoted in media and read by students, supporters of the LGBT community, and politicians, this modern view of marriage will concurrently become more pervasive in our culture and society.

In *Windsor*, Justice Alito acknowledges this modern view of marriage in his dissent by recognizing that the "'consent-based' vision of marriage, a vision that primarily defines marriage as the solemnization of mutual commitment—marked by strong emotional attachment and sexual attraction—between two persons . . . now plays a very prominent role in the popular understanding of the institution."[172] Justice Kennedy also alerts readers to this "modern" view of marriage in *Windsor*.[173] He recognizes that modern marriage has the power to grant "dignity and status of immense import" upon couples.[174] *Obergefell* goes a step further and explicitly discusses the evolution of marriage.[175] Justice Kennedy first recognizes that marriage was traditionally thought of as a heteronormative union between one woman and one man, a view still held by proponents of retaining the definition of marriage as exclusively heterosexual.[176] However, he then goes on to assert that along with societal attitudes and the law, the institution of marriage must evolve, stating that "[t]he history of marriage is one of both continuity *and change*. That institution—even as confined to opposite-sex relations—has evolved over time."[177] To cite this proposition, he points to that fact that married women used to be viewed as a mere extension of their husband but are now viewed as autonomous entities.[178] Justice Kennedy suggests that traditional gender roles within a marriage have already shifted toward a more egalitarian partnership based on love, commitment, and the conferral of "nobility and dignity to all persons."[179] His repeated descriptions of marriage as such reinforce this evolution, ending

[172] United States v. Windsor, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). Justice Alito contrasts this with a "conjugal" view of marriage, in which marriage is seen "as an exclusively opposite-sex institution and as one inextricably linked to procreation and biological kinship." *Id*.

[173] NeJaime, *supra* note 149, at 230 ("[Justice Kennedy's] descriptions of marriage throughout the majority opinion reflect . . . the public, dignitary dimensions of marriage.").

[174] *Windsor*, 133 S. Ct. at 2692 ("When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community.").

[175] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[176] *Id*. at 2594.

[177] *Id*. at 2595 (emphasis added).

[178] *Id*. ("As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned." (citations omitted))

[179] *Id*. at 2594.

with a reference to marriage as "embod[ying] the highest ideals of love, fidelity, devotion, sacrifice, and family."[180]

Other cases, such as *Perry v. Brown*,[181] have further reinforced a "modern view" of marriage as the predominant view.[182] *Perry* juxtaposes domestic partnerships and marriage, asserting that "[t]he designation of 'marriage' is the status that we recognize. It is the principal manner in which the State attaches respect and dignity to the highest form of a committed relationship and to the individuals who have entered into it."[183] The *Perry* court appears to find the grant of dignity and status the *most* important aspects of marriage—trumping procreative sex and institutionalized gender roles. *Windsor*, *Obergefell*, *Perry*, and other lower court decisions all reflect the evolving institution or marriage and further perpetuate its evolution.

Marriage has been altered by a myriad of strong forces. It has been reshaped into a modern, evolved institution that is more accommodating to all couples, regardless of sex or natural procreative abilities. The focus has shifted from procreative sex and heteronormative gender roles to societal recognition of a couple's love and commitment to one another—culminating in the conferral of dignity. The inclusion of same-sex couples has changed marriage, as the institution must necessarily grow in order for same-sex unions to make sense. The language, jurisprudence, and societal views espoused by courts and disseminated by mass media have further changed the institution. However, regardless of the exact source of change, it is clear that marriage has transformed at least partly as a result of *Windsor* and *Obergefell*—and that this change is largely evidenced in the greater enjoyment of dignity as connected to marriage.

V. THE RISE OF MARRIAGE AND DEMISE OF CIVIL UNIONS

Early in the push for marriage equality, critics of the marriage movement alleged that the LGBT community was attempting to assimilate into the narrow, heteronormative ideal of marriage, ignoring the need for a more flexible, alternative form like the domestic partnership.[184] Some still adhere to

[180] *Id.* at 2608.

[181] 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom.*, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

[182] *Id.* at 1079. Even though *Perry* was vacated by the Supreme Court, the language and rationale of the case still appear to hold some weight and influence other courts. *See supra* note 57 and accompanying text. Furthermore, in terms of influencing the public, the *Perry* opinion reached the eyes and ears of many people—and this impact is not negated by the Supreme Court's later ruling.

[183] *Perry*, 671 F.3d at 1079.

[184] NeJaime, *supra* note 148, at 90 (summarizing the general argument of critics of the same-sex focus on attaining marriage equality); *see also* Eskridge, *supra* note 145, at 1360 ("Most post-liberals writing about same-sex marriage are highly critical of the idea, because it normalizes an institution many radicals loathe . . . .").

this nonconformist ideology today, disputing assertions that marriage is the only or best way to confer dignity upon a couple. However, it is arguable that with the recent shift in the institution of marriage, there is no longer a need for alternative unions—marriage has become flexible enough to accommodate and dignify *all* couples.[185] The old, patriarchal, procreation-centric version of marriage that many critics of traditional marriage find unattractive is rapidly transforming into a more progressive institution. The newly liberalized model of marriage that takes the place of the older model makes the need for alternative unions difficult to explain. This is particularly true when one considers that most alternative unions were adopted specifically to remedy the exclusion of same-sex couples from marriage. Some scholars argue that "widespread recognition of nonmarital relationship statuses would provide individuals with greater autonomy and more meaningful choice in structuring their relationships."[186] However, the existence of a modern model of marriage that has expanded to welcome same-sex couples invites the question: Why do we still need an alternative? By plain language, there is no need for an alternative if the primary institution is fitting. Modern marriage has broadened to allow greater flexibility and autonomy. If same-sex couples can now comfortably fit into a newly broadened and flexible institution, why do they still need a second choice?

In early 2012, John Culhane reported on a survey conducted with opposite-sex couples that opted for civil unions over marriage in states that made that status available both to same-sex and opposite-sex couples.[187] Almost half of the respondents cited "perceived objections to the institution of marriage" as their rationale.[188] Some mentioned wanting to avoid the gender role implications inherent in marriage, while others cited the injustice of exclusion of opposite-sex couples as an explanation for not choosing marriage.[189] The changes marriage has undergone in recent years, particularly following *Windsor* and *Obergefell*, make these reasons largely obsolete. Marriage is no longer stringently tied to opposite-sex gender roles, procreation, or religion. Nor does heterosexual participation in the institution still invoke guilt at the thought of enjoying a benefit that same-sex couples cannot. Ultimately, it is likely that the changing legal and societal landscape will lessen the need and

[185] *See infra* Section V.B (discussing the ways in which marriage has changed following *Windsor*).

[186] Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 47 (2014).

[187] John Culhane, *No to Nuptials: Will Opposite-Sex Civil Unions Spell the End of Traditional Marriage?*, SLATE (Jan. 3, 2012, 1:41 PM), www.slate.com/articles/news_and_politics/jurisprudence/2012/01/are_states_that_experiment_with_opposite_sex_civil_unions_offering_a_way_to_opt_out_of_oppressive_ideas_about_marriage_.html [https://perma.cc/89XM-JXWR].

[188] *Id.*

[189] *Id.*

demand for alternative unions by broadening marriage to comfortably accommodate a greater variety of couples.[190] Alternative unions, created specifically because same-sex couples could not marry, will become a relic of a past time when same-sex couples were denied equal dignity under the law. This projected disappearance of alternative unions is, in fact, already underway and thus serves as evidence of the transformation of marriage.

A. *The Bureaucratic Elimination of Civil Unions*

From a less theoretical standpoint, as marriage has been broadened to extend to same-sex couples, many states have converted preexisting civil unions and domestic partnerships into marriages and ceased offering alternatives.[191] This has occurred partially because a single institution eases the administrative burden on the state. In addition, alternative unions add additional complexity and delay to ordinary daily activities, such as applying for a license or visiting a partner in the hospital.[192] There is also a presumption that in modern circumstances, same-sex couples no longer need alternative unions to receive benefits. In most states, alternatives to marriage are seen as interim solutions that have fallen by the wayside now that marriage equality is reality.[193] Connecticut, Delaware, New Hampshire, and Rhode Island are among several states that have converted civil unions into marriages and no longer offer civil unions following the legalization of same-sex marriage.[194] One can assume

[190] *But see* Daniel D'Addario, *Gay Marriage's Gay Holdouts: The Progressive Who Thinks This Is the Wrong Fight*, SALON (Mar. 27, 2013, 12:33 PM), http://www.salon.com/2013/03/27/gay_marriages_gay_holdouts_the_progressive_who_thinks_this_is_the_wrong_fight/ [https://perma.cc/W4CN-S4SQ] (suggesting that the focus should be on "new definitions of legally recognized unions that are less binding, or less restrictive [than marriage]").

[191] *Civil Union and Domestic Partnerships Statutes*, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 18, 2014), http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx [https://perma.cc/Y8CH-CFUL] [hereinafter NCSL] (detailing the statutory history of domestic partnerships and civil unions in the United States).

[192] John Culhane provides the example of a man trying to visit his domestic partner in the hospital. Culhane details the struggle this entails—from having to provide paperwork to explaining to hospital staff the status of his relationship. John G. Culhane, *Civil Unions Reconsidered*, 26 J. C.R. & ECON. DEV. 621, 635 (2012).

[193] Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 293 (2013) ("Throughout the country, efforts to secure marriage equality have necessarily focused on marriage as the paradigm model. In so doing, they have characterized marriage alternatives, like domestic partnerships and civil unions, as cut-rate counterfeits that may serve as interim measures in the struggle to secure marriage equality, but not as ends unto themselves.").

[194] *See* NCSL, *supra* note 191 (listing states that have removed alternative union options).

that, in most instances, since same-sex marriage is now available in all states, civil unions and domestic partnerships will face a similar end.[195]

B. *Praising Marriage and Dismissing Alternatives*

Criticism of civil unions, coupled with judicial praise of marriage as the preferable institution and pinnacle conferral of dignity, has further degraded alternative unions. As the language in *Windsor*, *Obergefell*, and other rulings solidify marriage as an aspirational institution for opposite *and* same-sex couples alike, the demise or demotion of civil unions and domestic partnerships will logically follow. Civil unions and domestic partnerships were once considered by many to be palatable same-sex alternatives to the dominant, heteronormative institution of marriage. However, following the wave of recent decisions praising the institution of marriage, it is clear that marriage has won out as the predominant, default union for same-sex couples seeking to solidify their love and commitment.

Marriage litigation and legal scholarship have done a great deal to suggest that alternative unions are inferior compared to marriage, equivalent to a dreaded "separate but equal" offering for same-sex couples that is incapable of dignifying those relegated to its ranks.[196] *Windsor* focuses on the unique, unparalleled dignity conferred by marriage,[197] implying that "civil unions and domestic partnerships do not have the same heft, the same resonance."[198] *Obergefell* further reinforces marriage as the aspirational form of a union between two people. Justice Kennedy writes, "marriage is essential to our most profound hopes and aspirations."[199] In later parts of the opinion, he refers to marriage as "sacred,"[200] "central[] . . . to the human condition,"[201] and "a two-person union unlike any other in its importance."[202] Justice Kennedy clearly frames marriage as the pinnacle of a relationship, implicitly relegating alternative union forms to a lower status. The vacated *Perry v. Brown* opinion speaks even more directly to the inferiority of domestic partnerships. In the majority opinion, the court compares the two institutions:

> We need consider only the many ways in which we encounter the word "marriage" in our daily lives and understand it, consciously or not, to

[195] Notably, several states continue to offer alternative unions, including Illinois, Hawaii, and Nevada. *Id*. I simply mean to suggest that in the post-*Obergefell* world, this list of states will dwindle.

[196] Culhane, *supra* note 192, at 626-27 (explaining how creating "a separate name really does stand as an exercise in separate but equal—which, of course, it never is").

[197] *See supra* Part II (providing a comprehensive overview of how dignity is discussed and utilized in *Windsor*).

[198] Culhane, *supra* note 192, at 635.

[199] Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

[200] *Id*.

[201] *Id*.

[202] *Id*. at 2599.

> convey a sense of significance . . . . We are excited to see someone ask, "Will you marry me?" . . . Certainly it would not have the same effect to see "Will you enter into a registered domestic partnership with me?"[203]

Even when a state bestows the legal benefits of marriage upon its residents in an alternative form, such as a domestic partnership or civil union, the alternative does not import the same status or sense of dignity as marriage.[204] Put another way: "[E]quality is equality. Labels matter."[205] For example, even if the South had maintained separate but "equal" schools for whites and blacks, there would have been some fundamental difference between "Black School" and "White School," if only for the sign hanging outside.

Despite successfully bestowing the same or comparable benefits upon same-sex couples, "[t]he civil union attempted to do the impossible: grant same-sex couples all of the rights and benefits, and impose the same obligations, that are granted to married couples, but without the label."[206] Because the importance of marriage partially lies within the label and status of being "married," no substitute can fully suffice.[207] This view, evidenced in the courtroom, society, and the scholarly community, indicates that marriage is seen by most as the superior institution—the *ultimate* goal for same-sex couples. In fact, marriage has likely *always* held the utmost import in the LGBT community, for "the very impulse to prioritize relationship recognition reflects marriage's power [within the community]."[208]

The expansion of marriage and the judicial and social connection drawn between marriage and dignity will delegitimize alternatives to marriage, such as civil unions and domestic partnerships, making these options less desirable. The broadening of the institution of marriage and a growing, bureaucratic

---

[203] Perry v. Brown, 671 F.3d 1052, 1078 (9th Cir. 2012) (musing over the import of marriage as compared to domestic partnerships, and positing: "Had Marilyn Monroe's film been called *How to Register a Domestic Partnership with a Millionaire*, it would not have conveyed the same meaning as did her famous movie, even though the underlying drama for same-sex couples is no different. The *name* 'marriage' signifies the unique recognition that society gives to harmonious, loyal, enduring, and intimate relationships").

[204] *Id.* at 1078-79 ("*The incidents of marriage, standing alone, do not, however, convey the same governmental and societal recognition as does the designation of 'marriage' itself.* We do not celebrate when two people merge their bank accounts; we celebrate when a couple marries. The designation of 'marriage' is the status that we recognize." (emphasis added)); Murray, *supra* note 193, at 292 ("Though domestic partnership, like marriage, conveys important benefits and obligations, according to the *Perry* courts, it lacks marriage's cultural and social heft.").

[205] John G. Culhane, *The Short, Puzzling(?) Life of the Civil Union*, 19 B.U. PUB. INT. L.J. 1, 2 (2009).

[206] *Id.*

[207] "The error is in reducing marriage to a set of legal benefits and entitlements and then constructing a parallel entity to mimic that fictional creation." Culhane, *supra* note 192, at 622.

[208] NeJaime, *supra* note 148, at 172.

tendency to streamline by eliminating alternative unions since marriage equality has been granted will further contribute to the decline in alternative unions. While some scholars and LGBT advocates suggest that marriage is still too narrow and limited of an institution to negate the need for alternatives,[209] it is clear that the institution is expanding and changing[210]—perhaps becoming more flexible like alternative unions and thus undermining their role.

CONCLUSION

Windsor's holding extended beyond a mere mandate that the federal government respect the states' ability to regulate marriage. The holding, in plain language, concluded:

> The federal statute is invalid, for 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. *By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment*.[211]

This holding clearly rests upon something more than federalism. As clarified by *Obergefell*, the dignity associated with the status of marriage was the true heart of the *Windsor* opinion. By defining marriage in a way that acknowledged and perpetuated its liberal transformation, and by drawing from the dignity jurisprudence central to *Windsor*, *Obergefell* further paved the path for marriage equality while also changing the institution of marriage and implicitly denigrating alternative forms of romantic unions. Writing again for the majority in *Obergefell*, Justice Kennedy concluded that same-sex couples "ask for equal dignity in the eyes of the law [and] [t]he Constitution grants them that right."[212]

These opinions, their grant of marriage equality for same-sex couples, and the invocation of dignity will necessarily change the institution of marriage. The social meaning of marriage has already expanded beyond a tool for facilitating procreation and solidifying heteronormative gender roles within a relationship. Modern marriage now confers dignity and communal recognition of a couple's love, dedication, and mutual contribution to the partnership. The true power of this modernized conception of marriage is its ability to bestow dignity upon a greater group of people—serving an important purpose in the

---

[209] Feinberg, *supra* note 186, at 45 ("Many people likely would benefit from the introduction of a third option; namely, a state-based nonmarital relationship status that offered a true alternative to marriage and was recognized by the federal government."); Murray, *supra* note 193, at 305 ("Marriage equality need not and should not be the end of innovation and experimentation around the issue of relationship recognition.").

[210] *See supra* Section IV.B (discussing the changes marriage has undergone following the expansion of marriage litigation at the hands of the judicial system).

[211] United States v. Windsor, 133 S. Ct. 2675, 2696 (2013) (emphasis added).

[212] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

advancement of human rights. With modernized marriage, the need for alternative, remedial "separate but equal" unions has fallen by the wayside.[213] All couples are now welcome to enjoy marriage and its accompanying dignity. *Windsor*, *Obergefell*, and the dignity jurisprudence utilized in these and other modern marriage cases have led to a broadening of the institution of marriage to accommodate same-sex couples and a consequent expansion of access to dignity—serving as a model for future human rights litigation.

[213] I do not mean to suggest that different types of non-romantic relationships (such as that between siblings, a parent and adult child, or companions) would not benefit from a co-designated beneficiary option unrelated to marriage. For an example of such an option, see Colorado's Designated Beneficiary Agreement Act. COLO. REV. STAT. §§ 15-22-101 to -112 (2015). However, such arrangements are outside the scope of this Note, which focuses on romantically involved same-sex couples and alternatives to marriage.