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ARTICLE

Dignity Disputed

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Abstract

Obergefell v. Hodges, the 2015 Supreme Court decision establishing a constitutional right for same-sex couples to marry, marked the first time in the Court's history that justices explicitly disagreed over the meaning and requirements of human dignity. In his dissenting opinion Clarence Thomas sought to reclaim rather than simply reject the language of dignity, advancing a conception of dignity that differed sharply from the conception embraced by the majority. Using this disagreement as a point of departure, this article demonstrates how dignity has served as an extra-textual value that underpins divergent visions of American constitutionalism that, in turn, inform interpretations of the Constitution's text and history.

Keywords: human dignity; constitutional law; constitutional interpretation; American constitutionalism; Clarence Thomas

Introduction

The future of human dignity in American constitutional law stands at a crossroads. Just a few years removed from arguably its most prominent use in American caselaw – *Obergefell v. Hodges*'s (2015) declaration of "equal dignity" in marriage for gay and straight couples – the prospects of a jurisprudence explicitly rooted in human dignity now seem uncertain. The 2018 retirement of Justice Anthony Kennedy marked the departure of the Court's leading contemporary expositor of dignity (Yankle and Tagliarina 2019). Moreover, Kennedy's succession by Brett Kavanaugh and the subsequent replacement of Ruth Bader Ginsburg by Amy Coney Barrett in 2020 seem to cast only further doubt on the future of what some had begun to call "the doctrine of equal dignity" (Tribe 2015, 17). The Court's new composition in turn gave rise to another relevant development. In June 2022, a 6-3 majority held in *Dobbs v. Jackson Women's Health Organization* that the Constitution did not guarantee a right to abortion. In the course of overturning *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992), the two key precedents for abortion rights, the Court took direct aim at the conception of due process rights that *Casey* had grounded in human dignity. Writing for the majority, Justice Samuel Alito asserted that, "Instead of seriously presenting the argument that the

abortion right itself has deep roots, supporters of *Roe* and *Casey* contend that the abortion right is an integral part of a broader entrenched right," described in *Casey* as "the freedom to make 'intimate and personal choices' that are 'central to personal dignity and autonomy.'" The contrast between dignity's treatment in *Obergefell* and *Dobbs* reflects a deeper disagreement over not just the scope of rights protected by the Constitution, but also the nature of American constitutionalism itself.

To better understand this disagreement and the contemporary significance of human dignity in American constitutional politics, this essay returns to a largely overlooked feature of *Obergefell*. Even as that case brought to fruition the social and legal movements for national recognition of same-sex marriage, it also occasioned the first direct confrontation in the Court's history over a value that had been at the center of those movements: human dignity (Fink 2016, 32–37). As a result, the case that recognized a constitutional right for same-sex couples to marry also included the most serious challenge to the commitment in which both that finding and its main precedents were rooted. In the course of doing so, *Obergefell* revealed the multiple meanings of dignity in the Supreme Court's gay rights decisions and how different meanings can underpin divergent accounts of American constitutionalism. As the following section discusses, despite a long history of use in Supreme Court opinions, no case featured a definitional conflict over dignity. No case, that is, until *Obergefell*. The third section thus turns to Justice Clarence Thomas's *Obergefell* dissent, in which he presented an alternative definition of dignity in order to contest the majority's argument that gay couples' claims to "equal dignity" in marriage warranted constitutional protection. As the subsequent section then explains, Thomas's conception of dignity underpinned a starkly different account of not only the interests and harms present in the case, but also the meaning of liberty under the Constitution. A comparison of these opinions thus reveals the extent and stakes of the disagreement over the meaning of human dignity, while also illustrating how dignity has served as an extra-textual value that informs the interpretation of the Constitution's text and history.

In the years since *Obergefell* was decided, the Court's uses of dignity in both the specific context of gay rights cases and its broader rights jurisprudence have been the subject of significant scholarly attention (Cooper 2015; Joshi 2015; Yoshino 2015; Haddad 2016; Hutchinson 2017). Notably, though, this attention has been largely driven by legal academics and the topic mostly neglected by political scientists, producing a bias in the resulting literature toward doctrinal analysis and normative policy considerations (but see Engel 2018; Engel and Lyle 2021, 223–297). While important questions remain on those fronts, this article does not aim to directly engage either. Rather, the focus here is decidedly more broad, pursuing what dignity – as it was used in *Obergefell* and the relevant precedents – meant and what its use by the contemporary Supreme Court reveals about both the interpretation and development of American constitutionalism. This inquiry is especially important given the role played by dignity in *Obergefell*, as a value appealed to in order to guide constitutional interpretation and to justify interpretive choices, particularly when fundamental constitutional commitments are in dispute. In this way, although dignity is extra-textual, it is not extra-constitutional. For both of the opinions discussed here, dignity was a foundational constitutional value whose meaning delimited the scope of lawful government action even as it structured divergent accounts of which interests warranted judicial solicitude. In this respect, the unprecedented dispute over the meaning of human dignity in *Obergefell* stands as evidence that, as George Thomas has argued, "*all* approaches to constitutional interpretation

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rest on unwritten ideas" and "some sort of political theory of the Constitution that frames how we should understand the constitutional text" (2021, 10). Moreover, while previous scholarship has recognized the centrality of dignity to Anthony Kennedy's jurisprudence (Addis, 2023.), the same cannot be said of Clarence Thomas (see, *e.g.*, Gerber 1999; Rossum 2014). This essay thus contributes to the growing literature on a justice whose views are now far more likely to shape majority opinions (Robin 2019). For all of these reasons, dignity merits recognition as a value that, while absent from the constitutional text, is central to competing visions of American constitutionalism. As the recently reconstituted Supreme Court proceeds to revisit precedents that were once thought immovable and begins to leave its mark on constitutional law, we would do well to better understand the multiple meanings of dignity and the constitutional visions they underpin.

Dignity before the bar

In many accounts of constitutional democracy, human dignity is a foundational value. Distinguishing between substantive constitutionalism and mere adherence to the terms of a particular constitution, Murphy has written that constitutionalism "demand[s] adherence not to *any* given constitutional text or order but to principles that center on respect for human dignity and the obligations that flow from those principles" (2007, 16; see also Meyer and Parent 1992). One indication of the centrality of dignity to modern constitutionalism is its contemporary legal and political ubiquity (McCrudden 2008; Daly 2011; Barroso 2012;). Dignity is explicitly invoked in approximately three-quarters of the world's constitutions (Barak 2015, 34–65; Elkins and Ginsburg 2021). It also appears in numerous international agreements, covenants, and conventions, with its prominence in the domain of human rights signaled by the first article of the Universal Declaration of Human Rights, which proclaims that, "All human beings are born free and equal in dignity and rights." As former President of the Supreme Court of Israel Aharon Barak – himself a central figure in dignity's juridical ascendance – has put it, "Human dignity as a constitutional value is the factor that unites the human rights into one whole. It ensures the normative unity of human rights" (*id.*, 103). While the U.S. Constitution is among the minority of national constitutions that lacks a dignity provision, the American Supreme Court has nonetheless invoked the concept throughout its history, in contexts ranging from sovereign immunity to individual rights (Paust 1984; Henry 2011). Whereas the earliest usage mainly concerned the elevated rank of – and corresponding respect due – political actors, institutions, and processes, following World War II the Court began increasingly to refer to *human* dignity (Resnick and Suk 2003). Since then, dignity has become only more prevalent in the Court's decisions, playing an especially prominent role in cases involving the death penalty, procedural due process, and fundamental rights. In this vein, one Supreme Court justice, William J. Brennan, even went as far as to characterize the Constitution as "a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law" (1985, 8).

Perhaps surprisingly given its prominence, the repeated use of dignity in the Court's constitutional jurisprudence has elicited little resistance from those who disagreed with the opinions in which it appeared. To be clear, this is not to say that those opinions went uncontested. Far from it. The decisions of the Court in the

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relevant cases contain some of the most heated rhetoric to appear in Supreme Court opinions. From accusations of "scatter-shot rationales" and "legalistic argle-bargle" to fears of a "Court that is impatient of democratic change" – to draw from just two gay rights cases – these opinions have no shortage of pointed and passionate disagreement (570 U.S. at 799; 539 U.S. at 603). But this makes it only more surprising that not one of the fundamental rights cases in which dignity was invoked featured an objection to the majority's use or definition of human dignity. Given the wide range of possible and, one might even say, rather easy to anticipate critiques of dignity's use in constitutional decisions, this silence is striking. Whether it is the potential ambiguity of human dignity, its absence from the text of the Constitution, or its uncertain relationship to and meaning within traditional rights doctrines, the majorities' repeated invocation and increasing reliance on human dignity would seem to have presented natural targets for dissenting justices. This applies even more acutely to the "gay-rights triptych" of *Lawrence v. Texas*, *United States v. Windsor*, and *Obergefell v. Hodges*, in which, time and again over more than a decade, the Court's conservative justices found themselves in the minority (Tribe 2015, 22).[1] As even a cursory review of the philosophical and legal scholarship makes clear, there are more than a few objections to dignity's use in constitutional jurisprudence (Weinrib 2018). Many of these objections are applications of more general concerns about dignity's role in ethical – and especially *public* ethical – discourse (Rosen 2013). Indeed, many observers who have agreed with the results of cases in which dignity was employed remained skeptical of its use. Nonetheless, not a single fundamental rights case leading to *Obergefell v. Hodges* presented an objection to, much less a direct rejection of, the conception of human dignity advanced by the Court majority. In fact, the absence of explicit disagreement over the meaning of dignity seems to be true of the Supreme Court's opinions as a whole: no case in its history has featured a definitional conflict over dignity. No case, that is, until *Obergefell*.

Prior to the Court's decision in *Obergefell*, the closest the justices came to explicitly (and publicly) disagreeing over the meaning of dignity was a 2008 case concerning the Sixth Amendment right to self-representation. *Indiana v. Edwards* (554 U.S. 164) presented the question of whether the standard of competency for an individual to stand trial was the same as, or lower than, the standard for that individual to represent himself at trial. The Court held that the competency standards could differ and that a state could refuse a defendant's request for self-representation even though he had been found competent to stand trial. In the opinion for a 7-2 majority, Justice Stephen Breyer noted that, "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel" (*id.* at 176). This was a reference to the Court's previous decision in *McKaskle v. Wiggins* (1984), another Sixth Amendment case in which the Court held that human dignity was among the central values served by the constitutional right of self-representation. "The right to appear *pro se*," Justice O'Connor wrote in *McKaskle* for a six-member majority, "exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense" (465 U.S at 176–177).

[1]Justices Scalia and Thomas were among the dissenters in all three cases. They were joined by Chief Justice Rehnquist in *Lawrence*, and by Chief Justice Roberts and Justice Alito in both *Windsor* and *Obergefell*.

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Though the majority opinion in *Edwards* mentioned dignity just once, in dissent Justice Scalia, joined by Justice Thomas, made it a considerably more prominent part of his argument. Scalia's central point concerned the majority's interpretation of the *McKaskle* precedent. After clarifying his opposition to an approach to the self-representation guarantee that privileged the purpose of the right over the right itself, he rejected the majority's estimation of the right's purpose. More fundamentally, his disagreement focused on the relevance of human dignity to that purpose:

> While there is little doubt that preserving individual "'dignity'" (to which the Court refers) is paramount among those purposes, there is equally little doubt that the loss of "dignity" the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice. (554 U.S. at 186–187)

Scalia's objection thus drew attention to the significance of choice and subsumed that within the ambit of human dignity. In this rendering, dignity required autonomy, an understanding deeply rooted in the Court's decisions (Rao 2013). The autonomy of a decision was proven by its making and not by its consequences; what mattered was whether the choice was freely made, not if that choice might turn out badly for the chooser. To second-guess or overrule a freely made decision would be to violate an individual's autonomy and, for that reason, his or her dignity. Whether or not Scalia's argument was an accurate rendering of either the *Edwards* majority opinion or the Court's caselaw is a separate matter. It is significant, in this respect, that in the sentence immediately following the portion of *McKaskle* quoted by Breyer in *Edwards*, the Court said, "*Both of these objectives* can be achieved without categorically silencing standby counsel" (465 U.S. at 177, emphasis added). The identification of autonomy and dignity as distinct objectives furthered by the right of self-representation (and still realizable if that right is qualified) would seem to pose complications for Scalia's interpretation that they are united. Accordingly, the differences between Scalia's conception of dignity and that expressed by the *Edwards* majority may well have been more significant than the opinions let on. For this reason, the case may have been a missed opportunity for a direct confrontation over the meaning of human dignity in American constitutional law.

In sum, even though *Edwards* is indeed a case in which dignity figured in a disagreement between the majority and dissent, that disagreement concerned how a particular conception of dignity, rooted in the Court's precedents, should be applied to the case at hand and not the conception of dignity itself. The disagreement, in other words, involved how an agreed-upon commitment in a mutually acknowledged precedent should influence the case at hand; the two opinions were divided not over the meaning of dignity but the ends vindicated thereby. Scalia did not offer an alternative definition of human dignity, nor did Breyer make any effort to explain what exactly dignity meant in the context of either *Edwards* or *McKaskle.* This latter aspect of the case is broadly consistent with how dignity has been used throughout the Court's history. As Paust observes of the various formulations of dignity that appear in the Court's decisions, "it has often been assumed that these phrases reflect primary constitutional expectations that need little explanation or supplementation with case or other precedent" (1984, 158). While it may be the case that Scalia and Breyer had

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quite different understandings of dignity in mind in *Edwards*, such a substantive disagreement can at best be inferred from their opinions. Perhaps the most that can be said here is that Breyer and Scalia (and possibly other justices in different cases) assumed they were invoking the same thing when they referenced human dignity. As a result, although *Edwards* represents an important instance of dignity's salience in constitutional adjudication – one data point among many – it is nonetheless consistent with the Court's behavior in similar cases. When human dignity has been employed in a decision, the conception in question has gone uncontested. As already indicated, however, that pattern was broken in *Obergefell v. Hodges*, where the Court's dissenters explicitly rejected how dignity was used in the majority opinion and advanced an alternative conception.

Equal dignity's Doubting Thomas

Obergefell is the only case in American constitutional law that features a direct definitional objection to dignity's use and a counterargument addressing its requirements. While Justice Thomas's dissent is the most significant in this respect, it bears noting that Chief Justice Roberts's dissent also included an explicit criticism of the majority's use of dignity. Roberts's rejection was fairly dismissive and almost perfunctory. Leveraging the textualist grounds on which earlier arguments against dignity might have been mounted, the Chief Justice wrote that there is no "'Nobility and Dignity' Clause in the Constitution" (576 U.S. at 694). This was a reference to the majority's claim that "[t]he lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life" (*id.* at 656). Invoking a slippery-slope argument that had figured prominently in both public and legal disputes around same-sex marriage, Roberts also asked why, if "there is dignity in the bond between two men or women who seek to marry…there would be any less dignity in the bond between three people who" had the same objective (*id.* at 704).

In his separate dissent, which Scalia joined, Thomas went considerably further than Roberts. Though the relevant discussion spans just four paragraphs, it came as a coda to the central argument of his opinion, which was that the majority's analysis found no basis in the history and, therefore, meaning of the Constitution. Thomas devoted the first part of his dissent to chronicling the original meaning of the Due Process Clause and, in that context, the meaning of liberty under the Constitution. With references to Magna Carta, Blackstone, and unspecified framers of the Constitution, he stressed the limited scope of due process protections in the Anglo-American legal tradition. Of the Fifth Amendment Due Process Clause's historical development, Thomas concluded, "When read in light of the history of that formulation, it is hard to see how the 'liberty' protected by the Clause could be interpreted to include anything broader than freedom from physical restraint" (*id.* at 725). With remarkable brevity, he then conjoined this definition to the meaning of the Fourteenth Amendment's Due Process Clause. Acknowledging the possibility that the clauses may embrace more than "freedom from physical restraint," Thomas nonetheless drew a distinction between the meaning of liberty under the Constitution and what was at issue in *Obergefell*. "In the American legal tradition," he wrote, "liberty has long been understood as individual freedom *from* governmental action, not as a right *to* a particular governmental entitlement." Thomas later underscored this

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difference, summarizing the constitutional meaning of civil liberty as "those freedoms that existed *outside of* government" (*id.* at 726 and 727; emphases in original).

This was why Thomas was unpersuaded by the majority opinion. The petitioners' claim, as he saw it, amounted to an effort by same-sex couples to secure from government the benefits that attended marriage, giving as examples the "State's *imprimatur*" and "monetary benefits" (*id.* at 729). For Thomas these entitlements (as he called them) clearly existed apart from the Constitution's guarantees of both liberty and due process. If "liberty" referred to the freedoms that existed "*outside of* government," then it could not encompass the "privileges and benefits that exist solely *because of* the government" (*ibid.*). Otherwise, these liberties would be subject to the contingencies and exigencies of politics, raising the possibility that even as they could be gained through government action so could they be lost or rescinded. Returning to his analysis of the original meaning of the Constitution, Thomas made clear why this could not be so: "But 'liberty' is not lost, nor can it be found in the way petitioners seek. As a philosophical matter, liberty is only freedom from governmental action, not an entitlement to government benefits. And as a constitutional matter, it is likely even narrower than that, encompassing only freedom from physical restraint and imprisonment" (*id.* at 731).

After briefly canvassing the potential consequences of the majority's decision, particularly in the area of religious liberty, Thomas came to the matter of human dignity. While this analysis began a new section of the opinion, his argument on this point can be understood as a higher-level synthesis of the doctrinal and historical critique he previously offered, one that pivoted from his concern with original constitutional meaning to the nature of American constitutionalism more broadly. Indeed, this passage of Thomas's opinion presents as concise and forceful a statement of negative constitutionalism as can be found in the Supreme Court's decisions (Murphy 2007, 6–8; Barber 2018, 2–6). Though Thomas began this section of his dissent by echoing the Chief Justice's dismissal of the majority's reliance on a term that did not appear in the Constitution, he did so in a way that introduced a substantive critique of one understanding of human dignity. After attributing the majority's invocation of dignity to a possible recognition that the Court's precedents did not support their understanding of liberty, Thomas wrote, building on Roberts's dissent, "The flaw in that reasoning, of course, is that the Constitution contains no 'dignity' Clause, and even if it did, the government would be incapable of bestowing dignity" (*id.* at 735). This is because, like liberty, "Human dignity has long been understood in this country to be innate," a consequence of the founders' "vision of mankind in which all humans are created in the image of God and therefore of inherent worth. That vision is the foundation upon which this Nation was built." And just as liberty cannot be lost, "human dignity cannot be taken away by the government" (*ibid.*). This is the essence of Thomas's objection to the majority: because dignity is innate, it cannot be conferred by government; as a corollary, dignity cannot be withdrawn by government.

To illustrate the difference between the understanding of dignity he was endorsing and the one he was rejecting, Thomas included a provocative set of examples:

> Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because

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> the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away. (*ibid.*)

These are striking examples, not least because they were offered by the only African American on the Court at the time. But even more so, to claim that dignity is not just innate but also unaffected by a complete denial of freedom, internment by executive order, or (maybe less controversially) the denial of public benefits implies that government action – whether positive or negative – has no bearing on human dignity. Given these examples, it is unsurprising that this was among the few passages from a dissenting opinion in *Obergefell* that drew much public attention. Perhaps the most notable response came from actor and activist George Takei, a Japanese American who had himself been interned in multiple detention camps across California and Arkansas as a child. In an opinion piece published days after the *Obergefell* decision was announced, he wrote, "To deny a group the rights and privileges of others, based solely on an immutable characteristic such as race – or as in *Obergefell*, sexual orientation – is to strip them of human dignity and of the liberty to live as others live" (2015). Thomas rejected this conception of dignity. For him, human dignity was something distinctly and innately *human*, which is to say not involving and to be understood without reference to government. Thus construed, human dignity is beyond the reach of government – for good or for ill. Furthermore, to reject this understanding, Thomas argued, was tantamount to rejecting the fundamental commitments of American constitutionalism. The majority opinion, he wrote in the first paragraph of his dissent, "rejects the idea – captured in our Declaration of Independence – that human dignity is innate and suggests instead that it comes from the Government. This distortion of our Constitution not only ignores the text, it inverts the relationship between the individual and the state in our Republic" (576 U.S. at 721).

In his discussion of dignity, Thomas did not reference a single precedent. As a result, it may at first seem that his argument could be subject to the same criticism he leveled at the majority, namely that it finds little support in the Court's previous decisions. But this would be a mistake. For one thing, there is the potent fact that *Korematsu v. United States*, the 1944 case that upheld the internment of Japanese Americans, was among the first Supreme Court cases to cite *human* dignity, as opposed to the institutional and governmental conceptions that have much deeper roots in American caselaw (Daly 2011, 382–389; Henry 2011, 192–199). There Justice Frank Murphy argued in dissent that accepting the government's proffered justification of military necessity entailed sanctioning the attribution of group disloyalty from instances of individual disloyalty. This, Murphy argued as the Second World War still raged, amounted to following the practices of the very "dictatorial tyrannies which this nation is now pledged to destroy" (323 U.S. at 240). Allowing individual guilt to serve as the basis for discrimination against entire ethnic groups, he concluded, "is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow" (*ibid.*).

Additionally, Thomas did not make use of the resources offered by Anthony Kennedy himself in earlier opinions that advanced human dignity as a value relevant to constitutionally protected rights. In his recent study of the Court's "dignity doctrine," Engel (2018) identifies a conservative potential in Kennedy's dignity-invoking arguments in both abortion and affirmative action cases. While Engel

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focuses on the shift – or the *potential* shift – from the protection of suspect classes to the rejection of any classifications in the Court's equal protection jurisprudence, the cases he adduces are broadly consistent with the conception of dignity advanced by Thomas in his *Obergefell* dissent. Thus, for example, in *Stenberg v. Carhart*, the 2000 case that struck down Nebraska's law prohibiting late-term abortion, Kennedy authored a dissent arguing (in part) that the law threatened the dignity of both the medical professionals involved in the procedure and the fetus (530 U.S. at 961–963). By the time the Court had occasion to return to the question of partial-birth abortion in 2007, personnel changes made possible a contrary holding. In *Gonzales v. Carhart*, the Court upheld the Federal Partial-Birth Abortion Act by a 5-4 margin. Now writing for the majority, Kennedy amplified his *Stenberg* dissent, arguing that the federal law "expresses respect for the dignity of human life" (550 U.S. at 157). In both of these cases, Kennedy cast dignity as something that was innate to human beings and that existed independent of government action.

An additional case that Thomas might have cited is Kennedy's 2014 opinion in *Burwell v. Hobby Lobby* (573 U.S. 682). In that case the Court struck down the Affordable Care Act's contraceptive coverage requirement on the grounds that such a regulation impermissibly violated certain corporations' religious free exercise rights under the First Amendment. In a concurring opinion Kennedy argued that, for those individuals who use their freedom to "believe in a divine creator and a divine law… free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts" (573 U.S. at 736). Though Kennedy stopped short of making the connection in his *Hobby Lobby* opinion, this passage provided a religious gloss to the oft-cited section of his joint opinion in the 1992 case *Planned Parenthood v. Casey*. There, in an opinion that reformulated and entrenched constitutional protections for abortion rights, Kennedy argued that the Fourteenth Amendment protected certain categories of decision making, namely those "choices central to personal dignity and autonomy" (505 U.S. at 851). These decisions, the opinion continued, were at the core of the liberty protected by the Constitution, ensuring "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" (*ibid.*). Though this passage has been the subject of intense criticism, the passage from *Hobby Lobby* reveals a connection to concerns associated more frequently with the Court's conservative members. The shared point of contact between sexual and relational autonomy, on the one hand, and religious free exercise, on the other, is the dignity accorded humans as autonomous and self-defining beings – capacities innate to human beings.

In all four of these cases – *Stenberg*, *Gonzales*, *Hobby Lobby*, and *Casey* – Kennedy associated human dignity with human life as such, identifying it as the source of claims *against* government invasion or coercion. So, too, with Murphy's dissent in *Korematsu*. While the full implications of the arguments in those cases might point in directions Thomas would not ultimately follow, they nonetheless could have bolstered his argument in *Obergefell* that human dignity was something that, as far as Supreme Court precedent was concerned, existed independent of government recognition or action. Further, as a basis of human value and worth, this dignity gave rise to restrictions on government power and standards of legitimate public conduct. Even as he rejected what he took to be Kennedy's definition of human dignity, Thomas nonetheless cast dignity as a foundational value of American constitutionalism, one that ultimately justified limitations on government action while emphasizing the distinct nature of human beings.

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The salience of human dignity in the argument Thomas advanced reveals its centrality to his account of the American constitutional order. While his *Obergefell* dissent reprises a familiar jurisprudential refrain about governmental limitations, Thomas's emphasis on dignity underscores and, in so doing, further clarifies his vision of constitutional liberty and human freedom. That vision is rooted in a form of radical independence—in the belief that true freedom entails self-determination, self-help, and self-reliance. The need for external support or provision, such as the "governmental entitlement[s]" he spurned, would render an individual fundamentally *dependent*. Thus understood, the grounds of human status and distinctiveness are insusceptible to derogation or loss. Government, in turn, exists to protect and preserve this vision of liberty and the natural rights that follow from it. This understanding renders coherent Thomas's proposition that enslaved or interned humans did not lose their dignity in virtue of their condition, because on Thomas's account of dignity they could not lose their dignity in virtue of their circumstances or externally imposed conditions. To be human is to possess a dignity beyond the reach of government. For Thomas, this understanding of dignity served as the foundation for a vision of limited and constrained government predicated on the preservation of individual freedom, particularly freedom from dependence on government intervention.

Thomas's account of liberty and its connection to human dignity evokes elements of his jurisprudence in the areas of racial preferences and affirmative action, which others have fruitfully analyzed in the context of Black nationalist influences on Thomas's political and legal philosophies (Tushnet 2003–2004; Smith 2009). The most developed such account is Robin's revisionist rendering of Thomas, which portrays the Justice as "a black nationalist whose conservative jurisprudence rotates around an axis of black interests and concerns" (2019, 8). Central to all of these treatments is Thomas's embrace of the strain within Black nationalism that emphasizes empowerment and progress through self-reliance, rather than via the separatism that characterized earlier Black nationalist discourse (Peller 1990; Moses 1996). Self-reliance is undermined by dependence, which for Thomas is borne out in the belief that preferential treatment, whether in the form of affirmative action or heightened judicial solicitude, demeans the intended beneficiaries and makes them victims of their circumstances rather than masters of their own destiny (Thomas 1987, 403 n. 3). Consider, for example, his opinion in *Adarand v. Peña*, a 1995 case concerning racial preferences in federal government contracting. Concurring in the Court's judgement that such classifications must be reviewed under the Court's strictest standard of review, Thomas wrote separately to emphasize that there was not "a racial paternalism exception to the principle of equal protection" (515 U.S. 200, 240). Though the concurrence does not explicitly invoke human dignity, it features a similar argument to the one Thomas advanced in his *Obergefell* dissent: the government could only "recognize, respect, and protect" the essential attributes of human beings; it could not alter them (*ibid.*). One implication of this constitutional vision is that the state bears limited responsibility to address harms caused by private parties, a result suggested by Thomas's assertion that enslaved persons did not lose their dignity when "the government *allowed* them to be enslaved." Because dignity could not be protected by positive government action and no constitutionally guaranteed rights were abridged, no judicial intervention was warranted, much less required. With its opposition to compensatory and ameliorative policies, Thomas's constitutional vision fits comfortably within the

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contemporary conservative legal movement while also providing legal resources for that movement's continued progress (Teles 2008).

While dignity does not figure prominently in any of the works that evaluate Thomas's jurisprudence, Thomas himself has suggested its centrality to his broader worldview. For example, in 1995, at the end of his fourth year on the Court, he delivered an address to the Federalist Society in which he assailed the pernicious effects of "blaming circumstances for one's situation rather than taking responsibility for changing things for the better" (1996, 671). "In so doing," Thomas argued at the end of his speech, "we deny the very attributes that are at the core of human dignity – freedom of will, the capacity to choose between good and bad, and the ability to endure adversity and to use it for gain" (*id.*, at 682). Thomas has arguably been even more direct on the topic of affirmative action. In a footnote to an article written while he was still chairman of the Equal Employment Opportunity Commission, he argued, "Class preferences are an affront to the rights and dignity of individuals" (403 n. 3). As one account of Thomas's jurisprudence observes, this assertion anticipated his later opinions in cases such as *Adarand* (Gerber 1999, 196). Finally, a vignette from Thomas's personal life provides an example that, while perhaps more trivial, illustrates with striking clarity the exact conception of dignity he advanced in his *Obergefell* dissent. After separating from his first wife in 1981, Thomas moved in with Gil Hardy, his closest friend since their undergraduate years at Holy Cross. As he got ready for work each morning, Hardy would listen to music. Despite hearing it many times before, one song in particular stood out to Thomas, George Benson's "The Greatest Love of All." Thomas's 2007 memoir, *My Grandfather's Son*, notes the lyrics from the song that struck him most: "I decided long ago, never to walk in anyone's shadows/If I fail, if I succeed/At least I'll live as I believe/No matter what they take from me/They can't take away my dignity" (136–137). Understood this way, human dignity is "so innate that no act of humiliation, degradation, or oppression by the state could deprive a person of it" (Robin 2019, 59 and n.53). It was this conception of invincible dignity that Thomas cited as the foundation of American constitutionalism. Thomas's *Obergefell* dissent thus reveals a common thread connecting his jurisprudence in race-related cases and his broader understanding of liberty in the American constitutional tradition. Moreover, the dissent illustrates the centrality of a particular conception of human dignity to his account of American constitutionalism, a conception that undergirds the meaning of constitutional liberty and delimits lawful exercises of political power. At least as far as his *Obergefell* dissent was concerned, for Thomas dignity was the inviolable core of humanity that could neither be enhanced nor diminished by the actions of government.

Deciphering equal dignity

While more could be said about Justice Thomas's dissent in *Obergefell*, what is most important for present purposes is its relationship to the majority opinion. After all, Thomas directed his rejection of the majority's treatment of human dignity at a particular argument, specifically the claim that dignity is conferrable by government and therefore subject to removal or denial. It was *that* understanding of dignity, according to Thomas, that was at such odds with the theory, history, and meaning of the U.S. Constitution. However, contrary to Thomas's framing of the case, the majority portrayed dignity as possessed by individuals and the relationships they

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entered through autonomous, self-defining choices. The significance of this dignity – for gay and straight couples alike – demanded equal treatment by government. Indeed, not one use of dignity in the majority opinion identified the government as the principal source or origin of dignity. Under the majority's conception of dignity, the Constitution required that the rights and privileges of marriage be granted to gay and straight couples on the same terms, and that the states be compelled to recognize this liberty and equality. For Thomas, the dignitary harm that the majority redressed with the recognition of a constitutional right of same-sex marriage was not even a legible harm that government could redress. For constitutional purposes, dignity simply was not implicated by the inability of gay couples to marry or have their marriages recognized in different jurisdictions. In this way, the divergent conceptions of dignity underpinned two drastically different accounts of what was at stake in the case while also supporting two starkly different visions of American constitutionalism. An examination of the majority's argument on this front thus reveals both the extent and the significance of the disagreement over the meaning of human dignity.

The most well-known use of dignity in the majority opinion served as the basis for the *New York Times*' front-page headline the day after *Obergefell* was handed down: "[The petitioners] ask for equal dignity in the eyes of the law. The Constitution grants them that right" (576 U.S. at 682). While it may seem as though this conclusion identified government as the agent empowered to grant equal dignity to those who seek it, usage elsewhere in the opinion makes clear that this is not quite the case. Earlier in the opinion, Kennedy observed that over time "society began to understand that women have their own equal dignity" (*id.* at 660). Women's rights and state regulations of marriage – most conspicuously the law of coverture – were altered or abandoned to take account of this reality, which Kennedy depicted as operative even before it was recognized legally or politically. Similarly, citing the appellant's brief in *Reed v. Reed* (404 U.S. 71), he described the unequal treatment of men and women in the regulation of marriage as "classifications [that] denied the equal dignity of men and women" (576 U.S. at 674). Just like the law of coverture, sex-based classifications in marriage withheld recognition of women's dignity – dignity that existed prior to and independent of government action.

While government may not be the source of dignity, it most certainly could harm one's dignity and, in that sense, diminish it. In the course of acknowledging and justifying the significance of judicial review in this area, the *Obergefell* majority addressed the aftermath of *Bowers v. Hardwick* (478 U.S. 186), the 1986 case that upheld criminalization of same-sex sexual intimacy. Though *Bowers* was overturned seventeen years later in *Lawrence v. Texas*, the *Obergefell* majority opinion explained, "Dignitary wounds cannot always be healed with the stroke of a pen" (576 U.S. at 678). The threat of harm to the dignity of those seeking to marry warranted judicial solicitude, even to the point of requiring states to recognize what many of them had to that point only denied through their own legislative processes. The closest the *Obergefell* majority came to suggesting that government may bestow or confer dignity, as Thomas alleged in his dissent, was in the description of the nature of marriage. As indicated earlier, Kennedy wrote in this connection, "There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices" (*id.* at 666). But even here it was the "union" and the "bond" that were the sources of dignity, not any action of government. Put another way, it was the relationship itself that, when entered into by individuals' autonomous

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and self-defining choices, was dignity-bearing. State recognition of these relationships simply acknowledged what already existed. To withhold recognition would be to fail to do justice to the dignity of individuals and the relationships they sought to enter, relationships that were equal in dignity to opposite-sex relationships that those state governments already recognized.

The use of dignity by the *Obergefell* majority thus painted a picture in which government could not originate dignity but could most certainly disparage, deny, and even damage it by failing to recognize the differential enjoyment of dignity-bearing interests among similarly situated individuals. This is, admittedly, a fine distinction, and it is not one the majority took time to explain. While dignity's definition was at the center of Thomas's argument in dissent, for Kennedy and the majority dignity went largely unexamined despite its centrality. Nonetheless, the disagreement between the two turns on this relationship between the actions of governmental institutions, including courts, and the dignity interests of citizens. For Thomas, as we have seen, human dignity was innate and inviolable. Humans were endowed with dignity *qua* humans, and no action of government – even the comprehensive deprivation of freedom – could affect that endowment. While not denying this conception of innate dignity, the majority recognized a further dimension that acknowledged the social and relational aspects of dignity. It was not enough for one's dignity to be enjoyed merely as an ontological status; it was also necessary for the implications of that dignity to be recognized in law. This was especially the case when certain dignities, like those associated with marriage, were enjoyed by some but not by others. On this understanding, even innate, individual dignity required legal recognition for its significance to be realized. Merely *having* dignity was not sufficient. Rather, government was implicated in the recognition and protection of individuals' dignity.

The majority's acknowledgment of the need for dignity to be meaningfully recognized affords a response to one prong of Thomas's argument about the scope of constitutionally protected liberties. Despite limiting the Constitution's due process guarantees to the absence of physical restraint, Thomas stopped short of acknowledging the realities of life for same-sex couples who were married before *Obergefell* was decided. Despite *having* dignity in the sense urged by Thomas, those couples were unable to move to jurisdictions that did not recognize their marriages without losing legal recognition of their relationship's status, along with the myriad rights, benefits, and protections that status conferred. For married same-sex couples, even temporary travel to states that did not recognize their marriages posed similar risks, exposing them to the loss of legal privileges conferred only to marital relationships recognized by the state. Acknowledging the dignity of these couples and their relationships – the focal point of the majority opinion – required recognition of their marriages on equal terms with straight couples. The majority's conception of dignity was predicated on ensuring that dignity was meaningfully possessed, that its requirements were recognized and protected. Indeed, this example shows how, even apart from considerations of dignity, Thomas's argument arguably fails on its own terms. Prior to *Obergefell*, same-sex couples were effectively denied the full enjoyment of basic rights of travel and movement, a situation of immense physical restraint. What for the majority was a constitutionally compelled response to a discrepancy in dignity between similarly situated individuals – itself the result of significant social and political change – was for Thomas an attempt to do the impossible. Under Thomas's conception of dignity, gay couples who were unable to marry or have their marriages

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recognized in all U.S. states simply had not suffered a constitutionally cognizable harm, much less one that could be redressed by the Court.

As just suggested, central to the majority's argument was the claim that the meaning and requirements of freedom are progressively realized – while the concept remains the same, the conception changes "as new dimensions of freedom become apparent to new generations" (576 U.S. at 660). This is a common theme of Justice Kennedy's opinions in the area of constitutional liberties and is among the distinguishing features of his legal philosophy (Colucci 2009, 8–37; Knowles 2009). As far back as his confirmation hearing, Kennedy had expressed his belief that "the enforcement power of the judiciary is to insure that the word liberty in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it" (1987, 122). Even in those hearings, he was clear about the role of dignity. In response to a question about how judges were to determine which rights were fundamental and judicially enforceable, Kennedy replied,

> [E]ssentially, we look to the concepts of individuality and liberty and dignity that those who drafted the Constitution understood. We see what the hurt and the injury is to the particular claimant who is asserting the right. We see whether or not the right has been accepted as part of the rights of a free people in the historical interpretation of our own Constitution and the intentions of the framers. (*id.*, at 170)

Taken together, these commitments justified the extension of rights to those who were once excluded from the limited scope of legal protections. For Kennedy and the Court majority in *Obergefell*, this was not only the nature of the American Constitution, but also the duty of those who sought its continuing efficacy. As the Court held in the concluding lines of its *Casey* decision, in a joint opinion by Justices O'Connor, Kennedy, and Souter:

> Each generation must learn anew that the Constitution's written terms embody ideas and aspirations that must survive more ages than one. We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all of our precedents. We invoke it once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty. (505 U.S. at 901)

If the full meaning and requirements of liberty are disclosed only with the passage of time, then the legal definitions and barriers constructed at earlier moments must give way to new, fuller understandings. This conviction was echoed by the *Obergefell* majority's assertion that, "The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right" (576 U.S. at 677).

In the arguments advanced in the Court's gay rights decisions, and especially in *Obergefell*, dignity serves as a sign and marker of individual, relational, and sociopolitical value. That is, dignity identifies sources of value, meaning, and worth that transcend time-bound codifications of legal protection or sanction. So, for example, in *Lawrence*, dignity inhered in the choice to engage in sexual intimacy, irrespective of the identity of one's partner. Similarly, in *Obergefell* the dignity of an opposite-sex

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relationship was equal to that of a same-sex relationship, no matter the regulatory choices of individual states. In both cases, government recognition and policy were made to bow to the underlying dignity interests of individuals and the relationships they entered. In these cases, dignity marked the broader significance and value of behaviors, practices, and relationships that were only partially recognized by prevailing law.[2] By connecting the dignity interests of legally protected individuals with those of legally excluded individuals, the Court's "equal dignity" framework provided for the "upwards equalization" of legal entitlements, statuses, and protections (Waldron 2012, 33). In this way, "dignity does the work of tradition without the requirement of time" (Ewing 2018, 772). The result is a methodology that at once acknowledges the partiality of liberty's legal codification while providing a mechanism for progressively identifying liberties that warrant constitutional protection.

In the final analysis, what separates Kennedy's and Thomas's arguments in *Obergefell* is the acknowledgment that human dignity makes positive claims on public power and public authorities, and, as a corollary, that to withhold or offer unequal recognition of an individual's dignity affects a dignitary harm. Whereas Thomas denied these claims, insisting instead on the prohibitions arising from the innate human dignity he believed was rooted in human nature and American constitutional history, they were basic premises in Kennedy's analysis. On the terms of Kennedy's argument, a government's refusal to recognize the marriage of a same-sex couple would not negate the dignity of those individuals, nor of the bond they shared. But such a refusal would devalue same-sex relationships relative to opposite-sex relationships, just as it would disrespect gay citizens relative to straight citizens. In this way, while government action or recognition was not the sole source of dignity, governments could affect the dignity interests possessed by citizens. Through their actions, governments influence endowments of dignity. These actions, in turn, affect the relative standing and broader perception of the individuals and couples who bear those endowments. Despite Thomas's insistence that the majority failed to recognize that dignity was inviolable and beyond deprivation by the state, the majority's analysis suggests that in the absence of official recognition the dignity of homosexual individuals and relationships would nonetheless exist. In this sense, for the majority dignity was also beyond the reach of government at some point – inviolable and immune from complete derogation. Though it may be denied, it cannot be destroyed. Hence, the dispute in *Obergefell* over the meaning of human dignity includes a significant, though unacknowledged, area of agreement. Both sides affirmed that some dignity interests inhere in individuals as such and the relationships they undertake, develop, and maintain. Ultimately, though, the conceptions of dignity invoked by the majority and dissent in *Obergefell* are fundamentally at odds, with Kennedy and the majority seeking to redress a denial of dignity that, for Thomas, was not possible because dignity could be neither denied nor conferred.

[2]In other work, I have attempted to identify, distinguish, and account for the development of discrete conceptions of dignity in the Court's gay rights jurisprudence (Ewing, 2023.). There I term the dignity deployed in *Lawrence v. Texas* "dignity-as-autonomy," in *United States v. Windsor* "variable dignity," and in *Obergefell v. Hodges* "democratic dignity." Because there is not sufficient room here to develop the full argument, I refrain from both using those labels and addressing the role of dignity in *Windsor*.

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Conclusion

As *Obergefell v. Hodges* revealed, human dignity's absence from the constitutional text has not prevented it from being invoked as a foundational constitutional value, one employed to illuminate both the Constitution and its history. Moreover, as the disagreement between Justice Kennedy's majority opinion and Justice Thomas's dissent demonstrates, the consequences of divergent conceptions of dignity are profound. For Kennedy and the *Obergefell* majority, dignity required that citizens and their relationships be treated equally in the eyes of the law. This equality built on the dignity of autonomous choice, particularly in areas of intimate and consequential decision-making, for it is these decisions that gave form and substance to an individual's self-conception. In dissent, Clarence Thomas advanced a markedly different conception of human dignity. In so doing, he occasioned the Supreme Court's first explicit disagreement over the meaning and constitutional significance of this value. For Thomas, dignity inhered in human beings as such and was insusceptible to enhancement or diminution by government. As a result, it was not implicated by the differential treatment of gay and straight relationships. Rather, dignity was an innate feature of humans that served as a justification for limiting the scope of government action. These two conceptions of dignity not only gave rise to sharply different accounts of the harms and interests at stake in *Obergefell*, but they also underpinned divergent visions of the nature, requirements, and limitations of American constitutionalism.

The sharp disagreement between the majority and dissent in *Obergefell* underscores the polysemic nature of human dignity and its still uncertain place in American constitutionalism. This uncertainty was further accentuated by the Court's 2022 decision in *Dobbs*. There a 6-3 majority not only overturned *Roe* and *Casey* on the way to holding that there was no constitutional right to abortion, but also rejected the reliance on dignity for the identification of fundamental rights. In the course of overruling the precedents in which abortion rights were rooted, the *Dobbs* majority repudiated *Casey*'s emphasis on choices "central to personal dignity and autonomy," casting it as an unreliable – even unserious – guide for judicial inquiry into which rights warranted constitutional protection. The fact that the Court's central gay rights decisions (among numerous other rights precedents) are grounded in *Casey*'s conception of dignity was not lost on the *Dobbs* majority, who sought to reassure the public that "[n]othing in this opinion should be understood to cast doubt on precedents that do not concern abortion." Clarence Thomas, however, made no such effort. In his separate concurrence he called on his colleagues to "reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*." While many observers found Thomas's opinion startling, his argument follows directly from both his *Obergefell* dissent and the conception of dignity he advanced there. In addition to demonstrating the relevance of dignity to issues beyond those at stake in *Obergefell*, this episode further illustrates the controversy surrounding invocations of dignity in American constitutional politics – controversy reflecting the stakes of the questions dignity is adduced to answer.

In addition to its legal and doctrinal significance, human dignity's place in American politics should be of interest to those concerned with how political actors, including but not limited to judges, interpret American constitutionalism and their own roles therein. The episode evaluated in this article is but one part of a much broader discourse within American politics about the nature of the American

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constitutional order, the purposes of and limitations on political power, and the scope of rights meriting constitutional protection. Future scholarship should thus address the broader sweep of arguments in American politics and political history that draw on, deploy, and repurpose human dignity. In this respect, it is important to acknowledge that Thomas's and Kennedy's dignity-inspired accounts of American constitutionalism do not exhaust the range of possibilities. Here, more work should be done to assess the relevant arguments of Kennedy and Thomas alongside other figures who developed distinct approaches to human dignity, including Justices William Brennan, William O. Douglas, and Frank Murphy (Paust 1984; Wermiel 1998). This, in turn, would facilitate further connections to figures in American politics beyond the domain of the judiciary (see, *e.g.*, Buccola 2017). Finally, this inward focus on dignity's use and evolution in American politics should be accompanied by a renewed comparative research agenda oriented toward assessing how dignity's American usage relates to usage in other constitutional systems. While there is a rich literature analyzing and comparing dignity's use in countries such as South Africa, Canada, and Germany (O'Connell 2008; Botha 2009), the United States is only rarely included in such work (but see Daly 2012; Finck 2016). Including the United States as a case within such comparative studies would further enrich our understanding of the nature and development of global constitutionalism, while also clarifying the ways in which American constitutionalism may – and may not – be distinct. As *Obergefell* revealed, such studies are especially important given the drastically different accounts of constitutional government for which human dignity can serve as a foundation.

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