EQUAL DIGNITY AND THE RIGHT TO DIE: THE OUTER BOUNDARIES OF DUE PROCESS

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ABSTRACT

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The Fourteenth Amendment's Due Process Clause is one of the most controversial provisions in the Constitution. Although it appears only to guarantee fair procedures, it has become the Court's primary vehicle for invalidating State laws that violate fundamental liberties—in the practice now known as "substantive due process." In recent years, though, a line of landmark Supreme Court decisions protecting gay rights, authored by Justice Kennedy, have signaled a new chapter for substantive due process—one where the Due Process Clause works in tandem with the Equal Protection Clause. I argue that the framework employed by Justice Kennedy in these cases differs from the standard substantive due process framework in important ways and constitutes an independent doctrine of equal dignity.

This doctrine of equal dignity has major implications for the next generation of substantive due process cases, as it equips the Court to strike down laws that institutionalize subordination. In particular, the Court's equal dignity precedents single out its 1997 decision in *Washington v. Glucksberg*, where the Court ruled that laws banning physician-assisted suicide were not unconstitutional. I argue, however, that the doctrine of equal dignity implies the existence of a "right to die with dignity." Consequently, *Glucksberg* should be overruled—granting terminally ill patients the right to physician-assisted suicide.

Introduction

Few justices in the history of the Supreme Court had the opportunity to shape American constitutional jurisprudence to the extent that Anthony Kennedy did. From his appointment in 1987 to his retirement in 2018, Kennedy left a bold mark on some of the Court's most high-profile decisions. As the swing vote in most of the Roberts Court's 5-4 cases, Kennedy ended up authoring many key majority opinions. These cases ranged from *Citizens United*, which paved the way for basically unlimited campaign spending by corporations, to *Obergefell v. Hodges*, which legalized gay marriage nationwide.

Looking back over a legacy like Kennedy's, one could pick any number of individual accomplishments as the one to define his time on the Court. Arguably the most significant, though, was his emphasis on human dignity. Noah Feldman, the Felix Frankfurter Professor of Law at Harvard Law School, argues as much in his article, "Justice Kennedy's Legacy Is the Dignity He Bestowed."[1] Fellow Harvard Law professor Laurence Tribe agrees—describing Kennedy's "chief jurisprudential achievement" as having "tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*."[2]

This doctrine of equal dignity, though, was not born overnight. It developed slowly, largely from the pen of Justice Kennedy, over decades. Its inception, modest but unmistakable, was in the Supreme Court's 1992 decision to uphold abortion rights in *Planned Parenthood v. Casey*. From that inconspicuous starting point, equal dignity grew in power and prominence

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[1] Noah Feldman, *Justice Kennedy's Legacy is the Dignity He Bestowed*, BLOOMBERG (June 27, 2018), https://www.bloomberg.com/opinion/articles/2018-06-27/anthony-kennedy-retirement-his-legacy-is-dignity-he-created.

[2] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

through the gay rights cases: *Lawrence v. Texas (2003), United States v. Windsor (2013),* and *Obergefell v. Hodges (2015).*

These cases invoked dignity with increasing frequency in varying ways. But the broad outlines of equal dignity became clearer and clearer. For one, equal dignity tied the previously separate considerations of the Due Process and Equal Protection clauses together, into what Tribe coined a "double helix."[3] It also accompanied (and perhaps entailed) a different type of substantive due process analysis—one much less strict and formulaic than the one the conservative members of the Court had been pushing. *Obergefell*, which legalized same-sex marriage nation-wide, articulated these aspects of equal dignity more clearly than any previous cases. Now that Justice Kennedy is no longer on the Supreme Court, though, the future of the doctrine remains up in the air. Many questions as to its scope and power are left to be answered.

In particular, *Obergefell* appears to be at odds with the Court's 1997 decision in *Washington v. Glucksberg*. In *Glucksberg,* the Court determined that there was no constitutionally protected liberty interest that would grant a terminally ill patient the right to physician-assisted suicide. In doing so, the Court's conservative members articulated a standard, formulaic process for approaching substantive due process cases. This approach involved carefully defining the alleged right in question and consulting history and tradition to see whether there was a basis for that right to be recognized.

The *Obergefell* decision, by contrast, decided to forego this formulaic approach. Justice Kennedy (despite joining the Court's majority opinion in *Glucksberg*) essentially admitted as

[3] *Id.*

much.[4] While acknowledging the incompatible approaches taken by the two cases, Kennedy elected not to overturn *Glucksberg*. At the same time, he did not endorse the *Glucksberg* decision or explain how to square the two approaches. Are the two approaches—the formulaic approach of *Glucksberg* and the dignity-based approach of *Obergefell*—fundamentally incompatible? Or is there space for them to co-exist?

This thesis will argue that the two approaches should operate in parallel. In cases that implicate only the Due Process Clause, the standard framework is appropriate. But in cases that operate at the intersection of due process and equal protection, involving liberty *and* equality, the *Glucksberg* methodology cannot provide an adequate remedy. The Court should turn to Justice Kennedy's dignity-based approach.

The argument will proceed in four chapters. The first chapter describes the history of Due Process jurisprudence before equal dignity ever made an appearance. To understand the role equal dignity would come to play in the revival of substantive due process, one must first understand why it needed reviving in the first place. The now-discredited *Lochner* era is the unavoidable backdrop to any expansion of substantive due process today.

The second chapter charts the development of equal dignity—from its inception in *Casey* to its explicit invocation in *Obergefell*. Understanding what equal dignity would grow to become requires an understanding of its roots. These roots do not always display a logical progression—and certainly not a premeditated one. But several common threads underlie each invocation of dignity.

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[4] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("*Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.")

The third chapter synthesizes the equal dignity cases, attempting to answer the difficult question: how does equal dignity operate? This analysis necessarily comes in two parts. First, *when* is equal dignity applicable? Second, when it is applicable, *what does it do*? I will argue that Justice Kennedy's methodology in the gay rights cases should replace the standard due process and equal protection frameworks when a case falls at the intersection of the two clauses.

The fourth chapter will look forward, to where equal dignity leads. It will address this question by imagining the Court were forced to square *Obergefell* and *Glucksberg*. Is *Glucksberg*, rightly understood, an equal dignity case? Does applying Justice Kennedy's framework result in a different outcome? These are difficult questions, but their answers will determine what equal dignity will entail for the next generation of Fourteenth Amendment cases.

Chapter One: The Death and Resurrection of Substantive Due Process

The question of what the Supreme Court should do when faced with a law that seems to violate fundamental principles of liberty and justice—but is not in clear violation of any Constitutional provision—is nearly as old as the Constitution itself. Just seven years after the passage of the Bill of Rights, Justice Chase advocated for a broad view of the role of the Court, in the case of *Calder v. Bull* (where the Court was asked to invalidate a Connecticut legislative act regarding wills). Justice Chase wrote:

> There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property, for the protection whereof the government was established. An ACT of the Legislature (for I cannot call it a law) contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.[5]

Chase was advocating for a "natural law" approach to judicial review, whereby certain laws should be invalidated by the Supreme Court—not because they violated any specific Constitutional provision—but because they were in violation of "certain vital principles" related to "personal liberty" and "private property."

Justice Chase's approach would not win the day. Justice Iredell's opinion in the same case explicitly addressed Justice Chase's natural law approach:

> Some speculative jurists have held that a legislative act against natural justice must, in itself, be void; but I cannot think that, under [a constitutional scheme allocating powers without explicit limitations], any Court of Justice would possess a power to declare it so. … In order, therefore, to guard against so great an evil, it has been the policy of the … people of the United States, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked

[5] Calder v. Bull, 3 U.S. 386, 388 (1798) (opinion of Chase, J.).

> and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably [void]. [6]

This rings true. Supreme Court justices are unelected and unrepresentative, selected for their capacity to interpret the law, to "call balls and strikes"[7]—not ascertain the will of the majority or divine abstract principles of natural law. After all, this is precisely what the Constitution is designed to do, to serve as a check on legislative power when it exceeds its prescribed boundaries. While judges' opinions of what "fundamental principles" should govern may change—over time and person to person—the words written in the Constitution do not.

If only it were that simple. The difficult question, it turns out, has less to do with whether judges should rely on natural law and more to do with how to interpret the written law. Most everyone can agree that the Supreme Court's job is to interpret the Constitution, as written. This is an easy task when, say, enforcing the requirement that the President must "have attained to the age of thirty five years."[8] It becomes more difficult when enforcing a clause banning "cruel and unusual punishments,"[9] which necessitates a level of subjectivity.[10] Are judges to only ban those forms of punishment which were considered "cruel and unusual" in 1791? Or perhaps, a bit more broadly, the *sorts of punishments* which were considered cruel and unusual two centuries ago? Or, is it possible that the framers of the Constitution left the clause intentionally vague, such that

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[6] *Id.* at 398-99 (opinion of Iredell, J.).

[7] *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Committee on the Judiciary United States Senate*, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).

[8] U.S. CONST. art. II, § 1.

[9] U.S. CONST. amend. VIII.

[10] *See* JOHN HART ELY, DEMOCRACY AND DISTRUST 13-14 (1980) (arguing that the Cruel and Unusual Punishments Clause is an example of a constitutional provision that requires the interpreter to reference sources beyond the text of the Constitution).

future generations could determine what sorts of punishments were "cruel" and "unusual"? There is no clear answer to this question, but at least in relation to the "cruel and unusual punishment" clause, the outer limits are clearly marked—by the words "cruel," "unusual," and "punishment." No one could plausibly use this clause to strike down, say, the law in *Calder v. Bull* regarding wills.

But what about when the clause in question paints in broader brushstrokes? Such is the case with the Fourteenth Amendment, which was ratified in the wake of the Civil War—and notably guaranteed "due process" and "equal protection" under the law. In the words of John Hart Ely, the Fourteenth Amendment

> contains provisions that are difficult to read responsibly as anything other than quite broad invitations to import into the constitutional decision process considerations that will not be found in the language of the amendment or the debates that led up to it.[11]

Indeed, over the past century, the Fourteenth Amendment has been the Court's chosen vehicle for invalidating laws which do not clearly fly in the face of any other amendment.[12]

Almost all the headline-grabbing Fourteenth Amendment cases have been based in one of two clauses: the Due Process Clause or the Equal Protection Clause. The Due Process Clause, however, has followed a much more tumultuous path. There are three, interlocking textual reasons for this winding and controversy-ridden path.

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[11] *Id.* at 14.

[12] *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954) (holding that segregating schoolchildren by race is unconstitutional); Loving v. Virginia, 388 U.S. 1 (1967) (holding that state prohibition on interracial marriage violated both equal protection prohibition against race discrimination and due process right to marry); Roe v. Wade, 410 U.S. 113 (1973) (holding that the right to abortion falls within the right to privacy); Bush v. Gore, 531 U.S. 98 (2000) (holding that to comply with the Equal Protection Clause, a state must employ adequate and uniform standards when conducting a recount of ballots); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that persons of the same sex have a constitutional right to marry).

First, the Clause paints in the broadest brushstrokes possible—making it a clear candidate for invalidating laws that do not fall under any other constitutional provision. The Due Process Clause states, "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." One can imagine Justice Chase's eyes lighting up as he reads these words. He had written of natural law rights to "liberty" and "property"—and now, in the Fourteenth Amendment, it's all there![13] Codified into the text of the document, available to invalidate any state law. For laws that seem to fly in the face of fundamental concepts of liberty and justice, the Due Process Clause is perhaps the most explicit textual basis to overturn them.

But a second textual reality strains against the first. The Due Process Clause, on its face, only requires fair procedures. After invoking life, liberty, and property, the Clause goes on to say that *all those things can be taken by the State*—so long as there is due process of law. There is no clear invitation in the text of the Clause for judges to review a law's substantive merits. And yet, the Court has used it to do just that. Due process jurisprudence is now generally split into two distinct lines of cases: *substantive* due process and *procedural* due process. This has resulted in heavy criticism from detractors and legal scholars, most memorably by John Hart Ely, who wrote that "we apparently need reminding that 'substantive due process' is a contradiction in terms—sort of like 'green pastel redness.'"[14] Ely's quip aside, the first-glance self-contradiction of "substantive due process" is not itself a death knell. Laurence Tribe points out that the words immediately following "due process" are "of law"—and "there is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase 'of law' was

[13] It should be noted that the Fifth Amendment, which contains a due process clause nearly identical to that of the Fourteenth Amendment—but in relation to the federal government—*was* in the Constitution at the time of *Calder v. Bull*. But it would not have been available to Justice Chase in the case in question, since the challenged law was a state law.

[14] ELY, *supra* note 10, at 18.

substantive."[15] Neither textual argument is dispositive, but the face-value oddness of using a clause guaranteeing fair *procedures* to invalidate a law based on its *substance* is a weapon that can be wielded by any who seek to argue against the Clause's use or expansion.

A third textual concern raises the stakes of due process inquiries. There are no clear guideposts in the text of the Due Process Clause that would limit the *scope* of the Clause's reach. Think back to the "cruel and unusual punishments" clause. No matter how broadly a judge decides to read the provision, no matter how many modern sentiments of what qualifies as "cruel" or "unusual" those judges decide to import—the subject, unavoidably, is punishments. In the Due Process Clause, by contrast, the possibilities are nearly endless. For the same reason that a judge eager to invalidate a state law is eager to turn to the Due Process Clause for a textual basis, a judge hesitant to open the door to widespread judicial activism shudders at the slippery slope each new expansion creates. After all, what law *does not*, to some extent, touch either life, or liberty, or property? This reality can generate fear that each further expansion of substantive due process is a step towards a judicial review free of any textual restraints—essentially giving the judiciary the power and deference that Justice Chase advocated for in the 18th century.

The Lochner Era

These three factors came into explosive collision for the first time in the early 20th century, in the series of cases now referred to under the umbrella of their poster child, *Lochner v. New York*.[16] The first of this line of cases to invalidate a state law came in 1897 with *Allgeyer v. Louisiana*, where the Court overruled a state law that prohibited individuals from obtaining

[15] LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1333 (3d ed. 2000).

[16] Lochner v. New York 198 U.S. 45 (1905), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

insurance from companies that did not comply with Louisiana law.[17] The Court found that the law violated the Fourteenth Amendment, because "it deprives the defendants of their liberty without due process of law."[18]

The Court's issue with the law was purely substantive, rather than procedural, and the liberty they identified was a broad "liberty of contract":

> The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.[19]

This paragraph demonstrates just how broadly the Due Process Clause can reach, for judges who believe it has a substantive component that protects against legislative violation of a particular strand of liberty. Here, that strain was economic liberty.

One can also see, though, just how quickly the exercise of substantive due process can become subjective, and necessary analysis untethered to the text of the Constitution. For example, the unanimous majority opinion above, authored by Justice Peckham, claims that the "liberty" invoked in the Fourteenth Amendment includes a person's right "to earn his livelihood by any lawful calling."[20] That is all well and good, until the Court is asked to invalidate a law that outlaws a certain calling—like, say, prostitution. How is the Court to determine whether a law violates Justice Peckham's right? If the alleged right is to have any teeth at all, then the mere

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[17] Allgeyer v. Louisiana, 165 U.S. 578 (1897).

[18] *Id.* at 589.

[19] *Id.*

[20] *Id.*

passage of a law outlawing a calling cannot be justification enough for its constitutionality. How else, though, is a Court to determine whether the law violates a man's right "to earn his livelihood by any *lawful* calling"? The unavoidable implication is that the Court must decide *which callings it thinks should be lawful and which should not*. Worst of all, there is now no textual basis in the Constitution to decide such a question. This reality finalizes the Court's supplanting of the legislature as the branch of government that decides which acts should be lawful and which acts should not, and it would characterize the Court's infamous rulings over the next forty years.

Following *Allgeyer*, the Court repeatedly struck down laws that violated this "liberty of contract." In *Lochner v. New York (1905)*, they struck down a law with a maximum-hours requirement for bakers.[21] In *Adair v. United States (1908)*[22] and *Coppage v. Kansas (1915)*,[23] the Court struck down laws banning "yellow dog" contracts (where agreeing not to join a union is a condition of employment). In *Adkins v. Children's Hospital (1923)*, the Court struck down laws prescribing a minimum wage for women.[24] All of these decisions were based in the Due Process Clause.

As the Court forged ahead, however, several members of the Court urged a reversal of course. Most notable among detractors was Oliver Wendell Holmes. In his famous *Lochner* dissent, Holmes wrote:

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[21] *Lochner*, 198 U.S. 45.

[22] Adair v. United States, 208 U.S. 161 (1908), *overruled by* Lincoln Union v. Northwestern Co., 335 U.S. 525 (1949).

[23] Coppage v. Kansas, 236 U.S. 1 (1915), *overruled by* Lincoln Union v. Northwestern Co., 335 U.S. 525 (1949).

[24] Adkins v. Children's Hospital, 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

> [This] case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. … I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they had been understood by the traditions of our people and our law.[25]

Holmes understood the magnitude of an unelected, unaccountable body overturning laws passed by representative majorities. Holmes raised and re-raised this critique with every new decision of the *Lochner* Court, until finally, the tides turned.

In the 1934 case *Nebbia v. New York*, the Court was asked to overturn a law fixing the price of milk.[26] Holmes's argument finally won the day, the Court refused to overturn the law, and in the process articulated a much more deferential standard of review:

> [The] guaranty of due process [demands] only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained. … If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are [satisfied].[27]

While the Court did not disclaim *all* authority to review the substantive merits of legislation under the Due Process Clause, the standard of review they described was *very* deferential. So long as the reason behind the law was not arbitrary or capricious, and the law was reasonably related to achieving that interest—the law would withstand judicial review.

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[25] *Lochner*, 198 U.S. at 74 (Holmes, J., dissenting).

[26] Nebbia v. New York, 291 U.S. 502 (1934).

[27] *Id.* at 502-03.

The nail in the coffin for the *Lochner* line of cases came three years later, in *West Coast Hotel Co. v. Parrish*.[28] The Court reiterated the deferential standard of review used in *Nebbia* and overturned their previous ruling in *Adkins*. They also dismissed the notion of a "liberty of contract":

> [T]he violation [of due process] alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. [Liberty] under the Constitution [is] necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.[29]

Justice Hughes, writing for the majority, discredits the *Lochner* cases on two fronts. First, he suggests that "liberty" should not be read so broadly—at least not so as to include a "freedom of contract." While he does not propose an alternative way to determine what *would* constitute a deprivation of liberty, he implies that the word speaks for itself.

Second, Justice Hughes draws attention to the second half of the Due Process Clause—that liberty *can* be deprived by the law, so long as there is due process. Here, he describes the requirements of due process similarly to how the Court did in *Nebbia*.[30] Laws must only be "reasonable" and "adopted in the interests of the community." The Court would go on to affirm this deferential standard of review, now known as the "rational basis" standard.[31] At the time

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[28] *West Coast Hotel*, 300 U.S. 379.

[29] *Id.* at 391.

[30] *Compare Nebbia*, 291 U.S. at 503 ("If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are [satisfied]."), *with West Coast Hotel*, 300 U.S. at 391 ("[R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.").

[31] *See, e.g.*, United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) ("Even in the absence of [specific legislative findings], the existence of facts supporting the legislative judgment is to be presumed, for [legislation] is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the

West Coast Hotel was decided, this deferential standard was the only one the Court seemed willing to embrace—a "one size-fits-all" approach to Due Process jurisprudence which would invalidate only the most baseless state laws. The rational basis standard was the most direct way for the Court to ensure it would not repeat the mistakes of *Lochner*, striking down laws simply because they seemed unwise or overreaching.

The Revival of Substantive Due Process

The discrediting of *Lochner*, however, would not turn out to be the death of substantive due process, and the "rational basis" standard would not remain the Court's only standard forever. The second-half of the 20th century would see a revival of substantive due process, albeit in very different cases than the "economic liberty" cases of the *Lochner* Court. This revival would focus on privacy and autonomy—opening the door for "equal dignity" to emerge at the turn of the century.

Although the flurry of cases starting with *Nebbia* had overturned and discredited most of the substantive due process cases involving economic liberty, a few notable remnants survived, which dealt with non-economic strains of liberty. In *Meyer v. Nebraska*, the Court overturned a law that prohibited the teaching of foreign languages to young children.[32] The law was found to materially interfere with the liberty of modern language teachers to pursue their calling and the liberty of parents to control their children's education. In a similar case, *Pierce v. Society of*

knowledge and experience of the legislators."); Williamson v. Lee Optical Co., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

[32] Meyer v. Nebraska, 262 U.S. 390 (1923).

Sisters, the Court struck down an Oregon law that required parents to send their children to public schools.[33]

Although these cases remained good precedent, the Court did not invoke substantive due process again for several decades following *Nebbia* and *West Coast Hotel*, until they took on *Griswold v. Connecticut* in 1965. The Connecticut law being challenged banned the use of contraceptives, and the Court decided to invalidate it.[34] But the seven justices in favor of this result disagreed sharply on the constitutional basis. The majority opinion, authored by Justice Douglas, had the disgrace of *Lochner* top of mind. The majority expressly disclaimed a substantive due process basis:

> [W]e are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that [*Lochner*] should be our guide. But we decline that invitation. [W]e do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.[35]

Instead, the majority based their holding in an implied right to privacy found in the "penumbras" of the Constitution—citing the First, Third, Fourth, Fifth, and Ninth Amendments.[36]

Justice White, in concurrence, *did* invoke the Due Process Clause—but only with the deferential "rational basis" standard of review, articulated in the post-*Lochner* cases.[37] Justice White concluded that even under the most deferential standard, there was no rational basis for the law banning contraceptives.

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[33] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[34] Griswold v. Connecticut, 381 U.S. 479 (1965).

[35] *Id.* at 481-482.

[36] *See id.* at 484.

[37] *See id.* at 505 (White, J., concurring) ("I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships.").

Justice Harlan, though, advocated for reviving substantive due process—and giving the notion teeth again. Harlan rejected the notion that the Court had to find an express or implied right in some other part of the Constitution before invoking the Due Process Clause.[38] Instead, he said that the proper question is whether or not the statute "violates basic values 'implicit in the concept of ordered liberty.'"[39] Harlan recognized the danger of an unfettered judicial review but wrote that judicial self-restraint would come from "respect for the teachings of history" and "recognition of the basic values that underlie our society."[40]

Harlan also laid out a fairly comprehensive theory of how the Due Process Clause should operate. In doing so, he relied expressly on his dissent in *Poe v. Ullman* a few years prior.[41] The methodology Harlan spelled out in his *Poe* dissent has since been cited many times in substantive due process cases,[42] and the Court would go on to battle over whether it should be the controlling methodology.[43] Harlan wrote:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society, [having] regard to what history teaches are the traditions from which it

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[38] *See id.* at 500 (Harlan, J., concurring) ("While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.").

[39] *Id.*

[40] *Id.* at 501.

[41] *See id.* at 500 (citing Poe v. Ullman, 367 U.S. 497 (1961)).

[42] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494, 499 (1977); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992); Albright v. Oliver, 510 U.S. 266, 287 (1994); Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

[43] *Compare, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 752 (1997) (Souter, J., concurring in the judgment) (arguing that Justice Harlan's methodology in *Poe* should be controlling), *with id.* at 721-722 (majority opinion) (arguing that adopting Justice Harlan's methodology would mean "abandoning [the] restrained methodology" which is consistent with "the development of this Court's substantive-due-process jurisprudence").

> developed as well as the traditions from which it broke. That tradition is a living thing. [The] full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of [such specific guarantees as speech and religion]. It is a rational continuum which, broadly speaking, includes a freedom from all substantial and arbitrary impositions and purposeless restraints, and which also recognizes [that] certain interests require careful scrutiny of the state needs asserted to justify their abridgement.[44]

In this passage, Justice Harlan lays out something close to a full-bodied theory of substantive due process. There are five important elements to Justice Harlan's theory of substantive due process.

First, application of the Due Process Clause cannot be "reduced to any formula." Judicially-created tests and multi-step formulas are often helpful to facilitate consistent application of otherwise vague constitutional provisions. But Harlan suggests that no such formula is appropriate for substantive due process.

Second, Harlan frames the Due Process Clause as striking a "balance…between liberty and the demands of organized society." This is an explicitly substantive view of the Clause. Harlan is advocating for the Court to perform a weighing of sorts—between individual liberty and proper governmental interests. When a state law passed in furtherance of one of these interests infringes on a person's liberty, Harlan believes the Due Process Clause obligates the Supreme Court to scrutinize that law.

Third, Harlan posits that tradition should be the Court's guide in this endeavor. In determining tradition, the Court should look to "what history teaches" but also remember that "tradition is a living thing." Although Harlan does not clarify exactly what he means by saying that tradition is "living," he implies that narrow views of how America has operated historically may not always be appropriate to determine the requisite tradition.

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[44] Poe v. Ullman, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).

The fourth point is closely related to the third. The liberty referenced in the Due Process Clause is not "a series of isolated points" but instead "a rational continuum." This was in direct response to the dueling view at the time that the Due Process Clause only incorporated the specific guarantees of the rest of the Constitution against the states. But it also says something more basic about the Due Process Clause. Instead of reading "liberty" as referring to a collection of more specific rights (e.g. freedom of speech, freedom of religion, etc.), Harlan views liberty as a broad, stand-alone concept. Something either infringes liberty itself, or it does not.

Finally, Harlan determines that certain infringements of liberty necessitate "careful scrutiny" of the asserted state interest.[45] To understand what Harlan is referring to, one must understand the state of Equal Protection jurisprudence at the time Harlan was writing. By 1965, the Court had developed a system of "tiered scrutiny" in their application of the Equal Protection Clause. The default tier, like in Due Process cases, was the rational basis standard—a deferential level of scrutiny which almost always resulted in the validation of the state law.[46] However, a famous footnote in *United States v. Carolene Products Co.* suggested that certain considerations could necessitate "more exacting judicial scrutiny."[47] This idea gained traction, and by the time of *Griswold*, the Court had already ruled in equal protection contexts that laws based on certain classifications *did* demand heightened scrutiny.[48] In other words, the Court would be far more

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[45] *Id.*

[46] *See* TRIBE, *supra* note 15, § 16-2, at 1442-1443 ("The traditional deference *both* to legislative purpose *and* to legislative selections among means continues . . . to make the rationality requirement largely equivalent to a strong presumption of constitutionality.").

[47] United States v. Carolene Products Co., 304 U.S. 144, 153 (1938). The conditions which could call for heightened scrutiny included when legislation "appears on its face to be within a specific prohibition of the Constitution," or "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation," or is motivated by "prejudice against discrete and insular minorities."

[48] *See, e.g.*, Oyama v. California, 332 U.S. 633, 645–46 (1948) (subjecting a land-transfer statute that discriminated on the basis of national origin to heightened scrutiny).

skeptical of the alleged purpose of the law and the means selected to achieve that end. While the rational basis standard generally results in the Court upholding state laws, strict scrutiny has the opposite effect—nearly always invalidating the state law at issue.[49]

So when Justice Harlan wrote that "certain interests require careful scrutiny of the state needs asserted to justify their abridgement," he was arguing that the Court should adopt the same "tiers of scrutiny" approach in due process cases that they were already employing in equal protection cases. More specifically, Harlan contended that abridgements of "important fundamental liberties" should warrant heightened scrutiny.[50] When fundamental liberties are at stake, it should be insufficient to show that the statute is merely *rational*. In other words, the Court should give substantive due process bite again.

Justice Harlan's views, though they did not win the day in *Griswold*, did not fall on deaf ears. Eight years later, the Court signaled its willingness to revive substantive due process, in the landmark case of *Roe v. Wade*. While in *Griswold*, the Court expressly disclaimed a Fourteenth Amendment due process rationale, the Court in *Roe* would waffle a bit on this point. Building off *Griswold*, the majority determined that a woman's right to an abortion fell under the broader "right of privacy."[51] As for where that right was located in the Constitution, the Court wrote:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty [as] we feel it is, or, as the District Court determined, in the [Ninth

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[49] *See* Gerald Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) (describing strict scrutiny as "'strict' in theory and fatal in fact"); TRIBE, *supra* note 15, § 16-30, at 1089 (describing strict scrutiny as a "virtual death-blow").

[50] *See Poe*, 367 U.S. at 554 (Harlan, J., dissenting) ("[Since the law] marks an abridgement of important fundamental interests, [it] will not do to urge in justification [that] the statute is rationally related to the effectuation of a proper state purpose. A closer scrutiny and stronger justification than that are required.").

[51] Roe v. Wade, 410 U.S. 113 (1973).

> Amendment], is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.[52]

The majority wrote that they "feel" the right of privacy is based in the Due Process Clause, although they undercut that by also referencing the "penumbras" rationale of *Griswold*, plus the First, Fourth, Fifth, and Ninth Amendments.[53] The Court was not ready to *fully* embrace substantive due process again, yet.

Several justices, though, interpreted the majority opinion in *Roe* as doing just that. Justice Stewart, who had dissented in *Griswold*, wrote in his concurrence that *Griswold* could only reasonably be understood as a substantive due process decision, and that now he was ready to "accept it as such."[54] He also quoted at length from Justice Harlan's *Poe* dissent.[55] Justice Rehnquist, in dissent, also saw *Roe* as a revival of substantive due process—although he disagreed with it. He wrote that the Court should have employed a rational basis test, and that by not doing so, the Court was making the same mistake as the *Lochner* Court.[56]

The Court's momentum, however, would prove irreversible. Slowly, the Court began once again using substantive due process as a basis to invalidate state laws, for the first time since *Lochner*. They did so in a way that largely followed the blueprint Justice Harlan laid out in

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[52] *Id.* at 153.

[53] *See id.* at 152 (citing *Griswold*, as well as the First, Fourth, Fifth, and Ninth Amendments). *But see id.* at 165 (holding that the Texas law "is violative of the Due Process Clause of the Fourteenth Amendment").

[54] *Id.* at 168 (Stewart, J., dissenting).

[55] *See id.* at 168-69.

[56] *See id.* at 174 (Rehnquist, J., dissenting).

his *Poe* dissent—deeming liberty interests "fundamental" and applying strict scrutiny. This resulted in decisions protecting abortion rights,[57] marriage rights,[58] and family rights.[59]

The revival of substantive due process would pick up steam over the next fifty years, although not without its setbacks and attempts to slow its expansion. Its reincarnation, however, would prove to be of a noticeably different flavor than its *Lochner*-era predecessor. While the *Lochner* cases had focused on liberty of contract, the cases flowing from *Griswold* centered on privacy, autonomy, and ultimately, dignity.

[57] *See, e.g.*, Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1976) (holding that a blanket parental consent requirement for a minor to obtain an abortion is unconstitutional).

[58] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

[59] *See, e.g.*, Moore v. East Cleveland, 431 U.S. 494 (1977) (holding that a housing ordinance unduly restricting an extended family's right to live together in a single-family home violated due process).

Chapter Two: The Emergence of "Dignity" in Fourteenth Amendment Cases

Although dignity would come to center-stage a decade later in the gay rights cases, its first appearance would come as the Court was forced to reckon with its decision in *Roe v. Wade*. In 1992, the Court prepared to decide *Planned Parenthood v. Casey*, a direct challenge to *Roe*. The nation awaited a seismic overruling.[60] Over the intervening decades, the Court had slowly chipped away at abortion rights.[61] *Roe* had been sharply criticized both publicly[62] and as a matter of constitutional law.[63]

Planned Parenthood v. Casey

To the surprise of the nation, *Roe* survived.[64] A five-justice majority of O'Connor, Souter, Kennedy, Blackmun, and Stevens voted to uphold *Roe*, spearheaded by a joint opinion by O'Connor, Souter, and Kennedy. No author was listed on the opinion. Rather than giving the impression that any one justice was spearheading the opinion and its rationale, the three justices wanted it to be clear that they were speaking with one voice.

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[60] Leon Friedman, *Introduction* to THE SUPREME COURT CONFRONTS ABORTION at 12 (Leon Friedman ed., 1993).

[61] *See, e.g.*, Webster v. Reproductive Health Services, 492 U.S. 490 (1989) (upholding a law prohibiting the use of governmental facilities for abortions)

[62] *See generally* Nadine Brozan, *Abortion Ruling: 10 Years of Bitter Conflict*, N.Y. TIMES, Jan. 15, 1983, § 1, at 17.

[63] *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 943 (1973) (arguing that *Roe* "sets itself a question the Constitution has not made the Court's business"); Laurence H. Tribe, *The Supreme Court: 1972 Term*, 87 HARV. L. REV. 1, 7 (1973) (noting that "behind its own verbal smokescreen, the substantive judgment on which [*Roe*] rests is nowhere to be found"); CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION – A FIRSTHAND ACCOUNT 75-81 (1991) (describing *Roe* as "a prime example of twisted judging" and "a relentless series of non sequiturs and ipse dixits"); ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND THE AMERICAN DECLINE 173-185 (1996) (calling *Roe* a "radical deformation of the Constitution").

[64] Friedman, *supra* note 60, at 14.

As a matter of constitutional law, however, the joint opinion was much more explicit regarding its reasoning than the Court in *Roe*. Where *Roe* had cited the unenumerated "right to privacy" referenced in *Griswold* and determined that it was "broad enough to encompass a woman's decision to terminate her pregnancy,"[65] *Casey* grounded the right firmly in Fourteenth Amendment liberty. The authors of the opinion wrote:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, family relationships, child rearing, and education. … These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[66]

Law professor Noah Feldman writes that this paragraph "will be Kennedy's legacy."[67] The passage places a woman's right to an abortion firmly in the scope of the "liberty" protected by the Fourteenth Amendment. Instead of focusing on privacy, the passage points to the broader concepts of "personal dignity and autonomy."

The plurality opinion was fairly transparent about how different its reasoning was than that of *Roe.* In fact, the opinion would go on to explicitly reframe *Roe*:

> *Roe* stands at an intersection of two lines of decisions … The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut*. … *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.[68]

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[65] Roe v. Wade, 410 U.S. 113, 153 (1973).

[66] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

[67] Feldman, *supra* note 1.

[68] *Casey*, 505 U.S. at 857.

The Court here goes beyond simply affirming *Roe*. They also suggest to the reader of the opinion: *Reconsider the way you see Roe. It might be a different sort of case than you—or the authors of Roe—thought*. While the Court had been cautious in *Roe* and *Griswold* of reviving *Lochner* by grounding their decision in substantive due process, the Court in *Casey* signaled its willingness to invoke due process and simultaneously distinguish *Lochner*.[69]

The Court understood how significant this step was. They did not intend to revive *Lochner*; they also did not want to start a new line of Fourteenth Amendment jurisprudence out of whole cloth. Their solution was to invoke a wide variety of Fourteenth Amendment cases (including the surviving remnants of the *Lochner* era) and suggest a common thread. Look again at the first paragraph, in which Kennedy writes of "choices central to personal dignity and autonomy." He situates *Casey's* relevant choice (whether to terminate a pregnancy) as one such dignitary choice. But he does more than that. By referencing precedent involving "marriage, procreation, family relationships, child rearing, and education," the plurality opinion suggests that a wide assortment of Fourteenth Amendment cases—both Due Process and Equal Protection—have a common link to liberty. "Marriage" is an invocation of *Loving v. Virginia*.[70] "Procreation" of *Griswold*.[71] "Family relationships" of *Prince v. Massachusetts*.[72] "Child

[69] *See id.* at 861-62 (distinguishing *Roe* from *Lochner* by pointing out that in those cases "the clear demonstration that the facts of economic life were different than those previously assumed warranted the repudiation of the old law").

[70] Loving v. Virginia, 388 U.S. 1 (1967).

[71] Griswold v. Connecticut, 381 U.S. 479 (1965).

[72] Prince v. Massachusetts, 321 U.S. 158 (1944).

rearing" of *Pierce*.[73] "Education" of *Meyer*.[74] Could all these cases have some underlying principle? This passage in *Casey* suggests that they do: dignity.

Washington v. Glucksberg

Five years later, though, the Court declined to read *Casey* so broadly regarding dignity and autonomy, in the case of *Washington v. Glucksberg*.[75] The plaintiffs asked the Court to expand on its ruling in *Cruzan v. Director, Missouri Dept. of Health*—which had recognized "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment."[76] But in contrast with *Cruzan*, which had involved the refusal of life-sustaining medical treatment, *Glucksberg* dealt with terminally ill patients who wished to hasten their death.[77]

The Court refused to recognize such a right.[78] In doing so, the "dignity" paragraph of *Casey* came up directly. Chief Justice Rehnquist wrote for the majority:

> [Language in *Casey* suggesting that] many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and *Casey* did not suggest otherwise.[79]

The majority here displays a hesitancy to expand substantive due process—or read *Casey* in a way that would portend such expansion. Instead of reading that decision as uniting the Court's

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[73] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[74] Meyer v. Nebraska, 262 U.S. 390 (1923).

[75] Washington v. Glucksberg, 521 U.S. 702 (1997).

[76] Cruzan ex rel. Cruzan v. Director, Missouri Department of Health, 497 U.S. 261, 278 (1990) [hereinafter *Cruzan*].

[77] *See Glucksberg*, 521 U.S. at 707-08.

[78] *See id.* at 728.

[79] *Id.* at 727-28.

substantive due process precedents behind broad concepts of dignity and autonomy, Rehnquist interprets the paragraph as merely noting a common theme of substantive due process cases.[80]

The conservative majority knew that there was much more at stake in *Glucksberg* than the narrow (albeit important) question of physician-assisted suicide. By 1997, there was no undoing the Court's decision to revive substantive due process. But the approach they took in deciding *Glucksberg* was bound to have major implications for the next generation of substantive due process cases. Previous cases had left many questions up in the air. With this in mind, the majority opinion laid out a formulaic approach for dealing with substantive due process cases. It was not an entirely new approach, but the opinion did bring together and codify the formula more explicitly than in previous cases.[81]

The Court acknowledged that "[t]he Due Process Clause guarantees more than fair process and the 'liberty' it protects includes more than the absence of physical restraint,"[82] but framed its approach as one designed to "reign in the subjective elements that are necessarily present in due process"[83] since "guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."[84] Critics, though, saw the *Glucksberg* methodology as an attempt by the conservative majority to keep substantive due process alive in name but not in fact,

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[80] This is evident in Rehnquist's careful choice of words. He writes that "many of the right and liberties *sound in* personal autonomy" (emphasis added). If he had instead written that many fundamental liberties "are based in" or "derive from" personal autonomy, it would imply that there are potentially *other* rights that could be derived from the basic principle of personal autonomy—an implication Rehnquist made sure to avoid.

[81] *See generally* Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 151-158 (2015) (describing how *Glucksberg* combined various elements from previous substantive due process cases into a cohesive whole that was more than the sum of its parts).

[82] *Glucksberg*, 521 U.S. at 719.

[83] *Id.* at 722.

[84] Collins v. Harker Heights, 503 U.S. 115, 125 (1992).

describing it as "[nothing] more than a gambit toward hacking away not just at substantive due process but also at the nature of liberty itself."[85] The approach had two steps.

First, the Court was to provide a "careful description" of the asserted liberty interest.[86] This requirement is the consequence of a deeper reality of substantive due process cases—*whether or not the right in question is deemed fundamental often turns on the level of generality at which it is defined*. The more *abstractly* the right is described, the more likely it is to be deemed fundamental.[87] Think back to *Lochner v. New York*. What if the Court—instead of invoking a broad "liberty of contract"—had instead examined the more specific "right for a baker to work more than forty hours a week"? There likely would have been no basis, historical or otherwise, to deem such a specifically-defined right to be fundamental. This also holds true in the "second-wave" substantive due process cases. What if the Court in *Griswold* had eschewed the "right to privacy" for the more specific "right to use contraceptives"? The case may have turned out differently.[88]

What, then, of the *Glucksberg* requirement that the right in question had to be "carefully defined"? Kenji Yoshino, Professor of Constitutional Law at New York University School of Law, traces this requirement back to the 1989 case of *Michael H. v. Gerald D.*[89] The case involved a child born out of an adulterous relationship, whose biological father was asserting a

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[85] Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1923 (2004).

[86] *Glucksberg*, 521 U.S. at 721.

[87] Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990).

[88] The *Griswold* Court benefitted from formulating the right broadly as a "right to privacy"—which allowed them to infer that right's existence from the penumbras of various amendments. It would likely be more difficult to infer a "right to use contraceptives" from, say, the First Amendment's guarantee of freedom of speech.

[89] Yoshino, *supra* note 81, at 154.

substantive due process right to a relationship with the child. The case would turn on the level of generality with which the right was construed. A biological parent (of a child conceived in an adulterous relationship) was asserting parental rights, like visitation. Although there was no majority opinion, Justice Scalia, writing for a four-justice plurality, determined that there were no such rights for "the natural father of a child adulterously conceived."[90] Justice Brennan, in dissent, came to the opposite conclusion by framing the asserted rights more broadly, as arising from the "parent-child relationship."[91]

In a footnote, Justice Scalia attempted to justify his narrow framing of the right ("the rights of the natural father of a child adulterously conceived"): "Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[92] In other words, Scalia's preferred approach can be summed up as: *the most specific level of generality possible*. "Possible," in this case, is synonymous (for Scalia, at least) with there being a relevant tradition to analyze.

Notably, Justices Kennedy and O'Connor joined Justice Scalia's entire opinion *except* that footnote (leaving only Rehnquist to join Scalia in the footnote). Justice O'Connor wrote that Scalia's approach appears to be inconsistent with the Court's approach in other cases, like *Griswold*: "On occasion the Court has characterized relevant traditions protecting asserted rights

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[90] Michael H. v. Gerald D, 491 U.S. 110, 127 (1989) (plurality opinion).

[91] *Id.* at 142 (Brennan, J., dissenting).

[92] *Id.* at 128 n. 6 (joined only by Justice Rehnquist).

at levels of generality that might not be 'the most specific level' available."[93] Justice Kennedy joined in this comment.

Four years later, though, in *Reno v. Flores*, Justice Scalia was able to find five justices to sign on to a close relative of his "most specific level available" approach. Scalia wrote for the majority:

> "Substantive due process" analysis must begin with a careful description of the asserted right, for "[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field."[94]

Yoshino calls "careful description" a "transparent Trojan horse for 'specific description.'"[95]

This maneuver allowed Justice Rehnquist in *Glucksberg* to gather a majority of the Court—including O'Connor and Kennedy—to sign on to the requirement for a "careful description" of the asserted right, citing *Flores*.[96] Although "careful" is not synonymous with "specific," the intent behind the two is the same. When rights are defined too broadly, the thinking goes, due process judicial review becomes unfettered and unguided. Therefore, we must define the right *carefully*, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court."[97]

The Court in *Glucksberg* was once again faced with multiple framings of the right in question. Was this a case dealing with the "right to die" or "the right to physician-assisted suicide"? Or perhaps "the right to control the time and manner of one's imminent death"?

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[93] *Id.* at 132 (O'Connor, J., concurring in part).

[94] Reno v. Flores, 507 U.S. 292, 302 (1993) (alteration in original) (quoting Collins v. Harker Heights, 503 U.S. 115, 125 (1992)).

[95] Yoshino, *supra* note 81, at 157.

[96] Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[97] Moore v. East Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion).

Ultimately, the "careful" description that the majority chose was "the right to commit suicide which itself includes a right to assistance in doing so."[98] This led into the second step of the *Glucksberg* approach.

Once the right is carefully defined, according to *Glucksberg*, the Court must analyze whether the right in question is 1) "deeply rooted in this Nation's history and tradition,"[99] and 2) "implicit in the concept of ordered liberty" such that "neither liberty not justice would exist if they were sacrificed."[100] These formulations were borrowed from previous substantive due process cases, but *Glucksberg* was the first to make both of them essential to the analysis.[101]

The first case to use the two requirements together was *Bowers v. Hardwick*, decided eleven years earlier. The Court faced a challenge to a Georgia statute outlawing sodomy. Despite the fact that the law banned *all* sodomy (both same- and opposite-sex) and the fact that the record never specified which type the defendant had been engaged in,[102] the Court framed the right in question very narrowly, as a "right to engage in homosexual sodomy."[103] In a majority opinion authored by Byron White, the Court found that the Due Process Clause did not protect that right:

> Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v.*

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[98] *Glucksberg*, 521 U.S. at 723.

[99] *Moore v. East Cleveland*, 431 U.S. at 503.

[100] Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)

[101] Yoshino, *supra* note 81, at 152.

[102] *See* Tribe *supra* note 85, at 1900 (footnote 20). *See generally id.* at 1951-1955 (describing his experience litigating *Bowers* at the Supreme Court).

[103] Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

> *Connecticut (1937)*, it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland (1977)* (opinion of Powell, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.[104]

The Court found that the right in question failed *both* requirements, so there was no need to decide whether it would have been sufficient to meet only one. While it may seem trivial, the distinction is important—one can imagine any number of rights that are unsupported by tradition but are found to be "implicit in the concept of ordered liberty" (or vice-versa). The latter requirement is atemporal; the former is not. In *Glucksberg*, though, the Court found that *both* requirements must be met for a Fourteenth Amendment liberty interest to be deemed fundamental.

So the *Glucksberg* Court set out to apply these standards to physician-assisted suicide. Most of their analysis went to the tradition requirement. The Court laid out the long history of laws against suicide, and the more recent laws against assisting someone else's suicide—noting that these laws "never contained exceptions for those near death."[105] Unsurprisingly, the Court found no basis in tradition for the right to suicide, and thus decided that the alleged liberty interest was not a fundamental right necessitating strict scrutiny review.[106]

Applying the rational basis standard, the majority found a multitude of legitimate government interests. These included: 1) "an 'unqualified interest in the preservation of human

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[104] *Id.* at 191-92, (alteration in original) (citations omitted).

[105] Washington v. Glucksberg, 521 U.S. 702, 714 (1997).

[106] *Id.* at 728.

life,'"[107] 2) "an interest in protecting the integrity of the medical profession,"[108] 3) "an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes,"[109] 4) "protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and 'societal indifference,'"[110] and 5) "fear that permitting assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia."[111] All of these added up to one conclusion: the rational basis standard was clearly met in this case.[112]

Although the judgment was unanimous, the majority opinion penned by Justice Rehnquist was only joined by four other justices. Five justices wrote separately to note some departure from the majority. The Court understood how important the approach they took in *Glucksberg* would be to the future of substantive due process.

The most common theme in the concurrences was a disagreement over how to properly frame the right in question. Justice O'Connor, although she joined the majority opinion in full, wrote that *Glucksberg* did not resolve "the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."[113] She saw no reason to reach that

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[107] *Id.* (citing *Cruzan*, 497 U.S. at 282).

[108] *Id.* at 731.

[109] *Id.*

[110] *Id.* at 732 (quoting from Compassion in Dying v. Washington, 49 F.3d 586, 592 (9th Cir. 1995)).

[111] *Id.*

[112] *Id.* at 728.

[113] *Id.* at 736 (O'Connor, J., concurring).

question in *Glucksberg* because of the availability of pain medication designed to reduce end-of-life suffering (even if it hastened death).[114]

Other justices focused on how *Cruzan* and *Casey* could have served as better guides for framing the right. Justice Stevens wrote that the majority was reading those cases far too narrowly. *Cruzan*, in his view, involved not just Nancy Cruzan's right to refuse treatment but also "her more basic interest in controlling the manner and timing of her death"[115] and "her interest in dignity";[116] *Casey* involved "protection for matters 'central to dignity and autonomy.'"[117] Breyer expanded on Stevens' argument:

> I would not reject the respondents' claim without considering a different formulation, for which our legal tradition might provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical assistance, and the avoidance of unnecessary and severe physical suffering—combined.[118]

This focus on dignity would prove prescient. The Court would invoke dignity with increasing frequency over the next twenty years. While a constitutional challenge to a physician-assisted suicide law is trivial if the right is framed as a "right to commit suicide" and the tradition inquiry is dispositive, a dignity-based approach could lead to a different outcome.

Justice Souter's concurrence attacked the majority's approach more broadly. He understood that the *Glucksberg* approach, if cemented as the go-to framework for substantive due process review, likely spelled the end for significant expansions of Fourteenth Amendment

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[114] *See id.* at 737.

[115] *Id.* at 742 (Stevens, J., concurring).

[116] *Id.* at 743.

[117] *Id.* at 744.

[118] *Id.* at 790 (Breyer, J., concurring)

liberty. He took issue with the *Glucksberg* majority's formulaic approach, writing that the Court should have instead adopted Justice Harlan's approach in *Poe*[119] (which had stated that substantive due process could not be "reduced to any formula").[120]

The majority addressed this point head-on. They acknowledged that their approach was a significant departure from *Poe*.[121] But they disputed the precedential weight that should be given to the *Poe* dissent:

> [A]lthough Justice Harlan's opinion has often been cited in due process cases, we have never abandoned our fundamental-rights-based analytical method. Just four terms ago, six of the Justices now sitting joined the Court's opinion in *Reno v. Flores*; *Poe* was not even cited. And in *Cruzan v. Director, Mo. Dept. of Health*, neither the Court's nor the concurring opinions relied on *Poe* … True, the Court relied on Justice Harlan's dissent in *Casey*, but, as *Flores* demonstrates, we did not in so doing jettison our established approach. Indeed, to read such a radical move into the Court's opinion in *Casey* would seem to fly in the face of that opinion's emphasis on *stare decisis*.[122]

This passage makes one thing crystal clear. The majority in *Glucksberg* understood the significance of their approach—and the looming significance of the *Poe* dissent. Justice Rehnquist intended to establish the *Glucksberg* methodology as the definitive framework for substantive due process review, displacing the *Poe* dissent in the process.

Indeed, Yoshino frames the debate about substantive due process from this point on as a tug-of-war between these two approaches: the "open-ended common law approach" of *Poe* and the "more close-ended formulaic approach" of *Glucksberg*.[123] On one side fall *Griswold*, *Roe*,

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[119] *Id.* at 756 (Souter, J., concurring).

[120] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[121] *See Glucksberg*, 521 U.S. at 721-22 ("Justice Souter, relying on Justice Harlan's dissenting opinion in *Poe v. Ullman*, would largely abandon this restrained methodology").

[122] *Id.*

[123] Yoshino, *supra* note 81, at 149.

and *Casey*; on the other, *Bowers, Flores*, and of course, *Glucksberg*. The Court's next major decision between the two approaches would come as they were forced to reconsider their ruling in *Bowers*—through a challenge to a Texas statute banning homosexual sodomy.

Lawrence v. Texas

On September 17, 1988, four police officers in Harris County, Texas, entered the home of John Geddes Lawrence Jr. and observed him having consensual sexual intercourse with Tyron Garner, an acquaintance.[124] The officers decided to charge the two men with violating Texas's anti-sodomy statute, which made it a Class C misdemeanor if someone "engages in deviate sexual intercourse with another individual of the same sex."[125] The two men pleaded no contest and challenged the constitutionality of the Texas statute.

When the case reached the Supreme Court, there were several paths available for the Court to take. The State Court of Appeals had found that the Supreme Court's decision in *Bowers v. Hardwick* was controlling, and the law was not unconstitutional. The Texas law at issue in *Lawrence*, though, was different from the Georgia law upheld in *Bowers* in one key respect: where the Georgia law had banned *all* sodomy, no matter the sex of those involved, the Texas statute banned *only* homosexual sodomy.[126] This left the Court with three primary options. First, they could uphold the lower-court decision and find that the Texas law was constitutional using the same reasoning as *Bowers*. Second, they could distinguish the two cases—leaving

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[124] *See* Lawrence v. Texas, 539 U.S. 558, 562-63 (2003). *See generally* Sanford Levinson, *The Gay Case*, TEXAS MONTHLY, March 2012.

[125] *Lawrence*, 539 U.S. at 563.

[126] *See supra* pp. 30-31. *But cf.* Bowers v. Hardwick, 478 U.S. 186, 188-89 (1986) ("The only claim properly before the Court, therefore, is Hardwick's challenge to the Georgia statute as applied to consensual homosexual sodomy. We express no opinion on the constitutionality of the Georgia statute as applied to other acts of sodomy.") Regardless, the Georgia statute did not implicate Equal Protection in the same way that the Texas statute did—because the Georgia law was facially neutral.

Bowers in place but striking down the Texas law on Equal Protection grounds. Or finally, they could overrule *Bowers* and find the Texas law unconstitutional on Due Process grounds.

By a 6-3 decision, the Supreme Court struck down the law—opting to take the third (and most extreme) route.[127] The majority opinion was written by Justice Kennedy and joined by Justices Stevens, Souter, Ginsburg, and Breyer. Justices Scalia, Rehnquist, and Thomas dissented, arguing that the Court should have taken the first route and upheld *Bowers*.[128]

Justice O'Connor concurred in the judgment but employed a different reasoning than the majority opinion. She took the middle-ground approach, distinguishing *Bowers* and *Lawrence* and deciding the case on Equal Protection grounds.[129] Her rationale was simple: the State can either ban *all* sodomy or ban none. But banning an act only when certain people commit it amounts to a violation of the Equal Protection Clause. Since the only interest Texas gave for the law was moral disapproval, Justice O'Connor concluded that the law could not sustain even rational basis review, writing that "[m]oral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be 'drawn for the purpose of disadvantaging the group burdened by the law.'"[130]

The Court declined to take this narrow approach, however, opting instead to overrule *Bowers* and decide the case on Due Process grounds. In doing so, the Court also took a dramatic step away from the *Glucksberg* methodology. The majority opinion did not reference *Glucksberg*

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[127] *Lawrence*, 539 U.S. at 578-79.

[128] *See id.* at 586 (Scalia, J., dissenting).

[129] *See id.* at 579 (O'Connor, J., concurring in the judgment).

[130] *Id.* at 583 (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)).

once, instead relying on *Casey* and *Romer v. Evans*, an Equal Protection case. The Court's approach departed from *Glucksberg* in three important ways.

First, while *Glucksberg* had emphasized providing a "careful definition" of the right in question, *Lawrence* did not even name a specific right at issue. Instead it painted in broader brushstrokes, invoking "dignity," "autonomy," and most often simply "liberty." Ultimately, the majority concluded that framing the right at issue as a "right to engage in homosexual sodomy" was far too narrow:

> To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse. … When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.[131]

Instead of naming a specific right and consulting tradition to determine whether that right was a "fundamental right" deserving of substantive protection as a Fourteenth Amendment liberty interest, *Lawrence* invoked liberty directly.

The reasoning behind this move is clear. At a certain point, flattening liberty interests into specific named rights trivializes liberty itself. At their core, are *Lawrence* and *Bowers* really about specific configurations of body parts—any more than *Meyer* and *Pierce* were about teaching kids foreign language or sending them to public school? The majority determined they were not, writing that *Bowers*' framing of the right "discloses the Court's own failure to appreciate the extent of the liberty at stake."[132] Following the Court's decision, Tribe wrote that

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[131] *Lawrence*, 539 U.S. at 567.

[132] *Id.*

Lawrence could spell a general retreat from the focus on naming the right in question demonstrated in *Bowers* and *Glucksberg*:

> *Lawrence*'s focus on the role of self-regulating relationships in American liberty suggests that the "Trivial Pursuit" version of the due process "name that liberty" game arguably validated by *Glucksberg* has finally given way to a focus on the underlying pattern of self-government (rather than State micromanagement) defined by the rights enumerated or implicit in the Constitution or recognized by the landmark decisions construing it.[133]

Whether this shift was general like Tribe describes (in a way that invalidates the *Glucksberg* exercise entirely) or more case-specific (with some distinguishing feature present in *Lawrence* that makes naming inappropriate) is a question left open by *Lawrence*. Regardless, the Court signaled a clear willingness to forego the "careful description" requirement.

Second, the Court recast the role of history and tradition in substantive due process jurisprudence. While *Glucksberg* required that a right be "deeply rooted in this Nation's history and tradition," *Lawrence* defined a much more flexible role for tradition to play, one more in line with the *Poe* dissent's admonition that "tradition is a living thing." While the *Bowers* Court had found no historical basis for a "right to engage in homosexual sodomy," the *Lawrence* Court put the law, rather than the right, on trial: is there a strong tradition *against homosexual sodomy*? The answer, the Court acknowledged, is not a simple one. While there is a substantial history of laws against sodomy *generally* (like the law in *Bowers*), the Court noted that it "was not until the 1970's that any State singled out same-sex relations for criminal prosecution, and only nine States have done so."[134] But, the Court acknowledged, the broader tradition of moral disapproval of homosexual sodomy is still pertinent:

> [F]or centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right

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[133] Tribe, *supra* note 85, at 1936.

[134] *Lawrence*, 539 U.S. at 570.

> and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. "Our obligation is to define the liberty of all, not to mandate our own moral code."[135]

In this passage, the Court was able to acknowledge a long-standing tradition against a practice, while also recognizing that this tradition is not dispositive. As Justice Kennedy wrote in *County of Sacramento v. Lewis*, and quoted in *Lawrence*, "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[136]

The other half of this equation is which tradition is most relevant. Is it the longstanding common law tradition against non-procreative sex, generally? Or perhaps the more recent laws specifically banning same-sex intimacy? The Court determined (without much in the way of explanation) that the last half-century was "of most relevance here."[137] More specifically, they identified "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex." The Court concluded, "This emerging recognition should have been apparent when *Bowers* was decided."[138]

This is a much broader approach to history and tradition than that of *Bowers* and *Glucksberg*. It puts more emphasis on the Court's own due process rulings concerning liberty than on a broader American tradition of moral disapprobation. It keeps its eyes open to the trends of tradition—allowing for an "emerging awareness" to weigh more heavily than a long-standing,

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[135] *Id.* at 571 (quoting from Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)).

[136] County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998).

[137] *Lawrence*, 539 U.S. at 571-72.

[138] *Id.* at 572.

unenforced law.[139] It even allows for the consideration of extranational traditions.[140] Ultimately, Justice Kennedy paints a much more dynamic portrait of history and tradition than the cold, inflexible tradition depicted in *Glucksberg*.

Third, *Lawrence* never specified a formal standard of review. In the standard due process methodology, rights that are deemed "fundamental" trigger strict scrutiny. Non-fundamental rights only merit rational basis scrutiny, which simply requires that the law further some legitimate government interest. This "tiers of scrutiny" approach is a hallmark of Fourteenth Amendment jurisprudence.

But it is unclear which tier of scrutiny the Court is employing in Lawrence. There is evidence in the majority opinion that they could be employing either standard. On the one hand, the opinion concludes with the statement that "[t]he Texas statute furthers no legitimate State interest which can justify its intrusion into the personal and private life of the individual."[141] This certainly sounds like the rational basis standard. Justice Scalia, for one, read the opinion this way in his dissent.[142]

On the other hand, there is some evidence that the Court did think that it was dealing with fundamental rights—even if they were not framed so narrowly as "a fundamental right to

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[139] *See id.* at 572 (majority opinion). *But see id.* at 598 (Scalia, J., dissenting) ("In any event, an 'emerging awareness' is by definition not 'deeply rooted in this Nation's history and tradition[s],' as we have said 'fundamental right' status requires. Constitutional entitlements do not spring into existence because some States choose to lessen or eliminate criminal sanctions on behavior.").

[140] *See id.* at 572-73 (majority opinion) (pointing to steps taken by the British Parliament and the European Court of Human Rights to decriminalize consensual homosexual conduct). *But see id.* at 598 (Scalia, J., dissenting) ("Much less do [constitutional entitlements] spring into existence, as the Court seems to believe, because *foreign nations* decriminalize conduct.")

[141] *Id.* at 560 (majority opinion).

[142] *See id.* at 586 (Scalia, J., dissenting) ("[N]owhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'")

homosexual sodomy." For one, the Court goes to great lengths to parallel the liberty interest at stake in *Lawrence* and other rights that the Court *had deemed* fundamental: those regarding "marriage, procreation, contraception, family relationships, child rearing, and education."[143] Furthermore, although the Court never uses the magic words of "fundamental right," they do use many of the familiar words—just in a somewhat different order. Tribe, for one, argues that the Court in *Lawrence* is clearly framing the liberty interest at stake as a fundamental right:

> [Arguing otherwise] requires overlooking passage after passage in which the Court's opinion indeed invoked the talismanic verbal formula of substantive due process but did so by putting the key words in one unusual sequence or another—as in the Court's declaration that it was dealing with a "protection of *liberty* under the Due Process Clause [that] has a *substantive* dimension of *fundamental* significance in defining the rights of the person."[144]

Even so, the Court's decision not to state explicitly a formal standard of review is significant in and of itself. It marked just one more way that the Court was willing to depart from the *Glucksberg* formula and forge new ground in substantive due process.

But why? Was there something unique about *Lawrence* that distinguished it from other due process cases—some distinguishing feature that merited a wholly different type of due process review? The answer, woven through the majority opinion like an inscription on a tapestry, is that perhaps *Lawrence* is not, solely, a due process case. After all, the Court was asked to overturn the law on due process *and* equal protection grounds. Although they framed their decision as a due process ruling, they suggested that the Equal Protection Clause also had a role to play in their reasoning: "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important

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[143] *See id.* at 574 (majority opinion).

[144] Tribe, *supra* note 85, at 1917 (quoting from *Lawrence* at 565 (emphasis added by Tribe)).

respects, and a decision on the latter point advances both interests."[145] The Court went on to point out that a decision on Equal Protection grounds would invalidate a law *as enforced*, but it does not solve the more basic problem; criminalizing behavior closely associated with a particular group (e.g. sodomy and homosexuals) serves to *stigmatize* that group even if it is enforced equally, or not at all.

Although the decision was grounded in the Due Process Clause, its focus on equality of treatment and the removal of stigma might be more important than any of its other departures from the *Glucksberg* methodology—and perhaps underlies them all. Tribe writes that *Lawrence* is, at its core, a reframing of the *narrative* of the Fourteenth Amendment:

> It is a narrative in which due process and equal protection, far from having separate missions and entailing different inquiries, are profoundly interlocked in a legal double helix. It is a single, unfolding tale of equal liberty and increasingly universal dignity. … *Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The "liberty" of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.[146]

In *Lawrence*, the Court recognized that their decision lay at the intersection of two inter-related considerations: the Due Process Clause's protection of liberty and the Equal Protection Clause's promise of parity. At this intersection, binding the "double helix" together, lies a promise of equal dignity.

United States v. Windsor

The next chapter in this narrative would come as the Court was asked to determine the constitutionality of the Defense of Marriage Act (DOMA), which provided a uniform definition

[145] *Lawrence*, 539 U.S. at 575.

[146] Tribe, *supra* note 85, at 1898.

of marriage for all federal laws, as "only a legal union between one man and one woman."[147] When President Clinton signed DOMA into law in 1996, no states permitted same-sex marriage;[148] by the time it was challenged in 2013, though, twelve states recognized such marriages.[149] When Edith Windsor's spouse, Thea Spyer, died in February 2009, their marriage was a legally recognized one in New York, where the couple lived. Spyer's will specified that her entire estate should pass on to Windsor, but because their marriage was not *federally* recognized because of DOMA, Windsor was forced to pay over $300,000 in estate taxes (instead of qualifying for a spousal exemption). In turn, she challenged the constitutionality of DOMA under the Equal Protection Clause, as applied to the federal government under the Fifth Amendment.[150]

The Court sided with Windsor, by a 5-4 decision, striking down DOMA as unconstitutional. Justice Kennedy, once again, sided with the liberal wing of the Court and authored the majority opinion. But, like in *Lawrence*, his opinion did not give a single, clear rationale for why DOMA was unconstitutional. Instead, he tied in principles of federalism—along with elements of due process and equal protection—in an opinion centered on the dignity conferred by the State in recognizing their marriage, which could not be deprived by the federal government.

The dignity that Justice Kennedy wrote about in *Windsor*, though, was of a markedly different flavor than the dignity in *Lawrence*. In that opinion, dignity had been something

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[147] Defense of Marriage Act, 1 U.S.C. § 7 (2011).

[148] United States v. Windsor, 570 U.S. 744, 752 (2013).

[149] *Id.* at 764.

[150] *Id.* at 753.

inherent in a person—something that the State was not allowed to demean with intrusive laws regarding intimate relational decisions.[151] But in *Windsor*, dignity was something *conferred by the State* in its recognition of a couple's marriage. Justice Kennedy wrote:

> [T]he State's decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import. 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.[152]

Perhaps, though, this description of dignity is not as incompatible with the description in *Lawrence* as it might appear at first glance. Taking a step back, one can see that, taken together, *Lawrence* and *Windsor* actually paint a more holistic portrait of how human dignity operates with regard to the law. Dignity is something that can be both *granted* and *taken away* by the government.[153] In areas of life where regulation is not the norm (like private decisions regarding sexual intimacy), the State can deprive people of dignity by choosing to regulate there anyway. *In this area of life*, the message goes, *you are not given the same freedom as your fellow American to make these decisions for yourself.* But in privileged areas of life where regulation is not only the norm but the gatekeeper (like marriage), the State can *grant* dignity by allowing one into that privileged status. Likewise, by denying access, the State can inflict dignitary harm.

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[151] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567 (2003) (asserting 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") (emphasis added).

[152] Windsor, 570 U.S. at 768.

[153] *But see* Obergefell v. Hodges, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting) ("Human dignity has long been understood in this country to be innate. … [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 the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.").

Although this discussion of dignity as something conferred by the State appears to open the door to a decision based on principles of federalism, that is not the route that the Court chose to take.[154] Instead, like in *Lawrence*, the Court relied on a blend of substantive due process and equal protection considerations.[155] The exact role that each would play—as well as the precise basis for the Court's decision—was again unclear; once again, the two considerations did not operate on parallel tracks, but rather as intertwined considerations, with each informing and reshaping the other.

The core message of *Windsor* rested on both due process and equal protection grounds. From a due process perspective, DOMA deprived those with State-sanctioned marriages of dignity, and consequently liberty, by not recognizing their unions.[156] From an equal protection perspective, DOMA singled out same-sex couples, choosing to treat as unequal couples that the State had chosen to treat alike.[157] Justice Kennedy, tying these two considerations together, concluded:

> The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws. While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved. … 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

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[154] *See Windsor*, 570 U.S. at 768 ("Despite these considerations, it is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance. The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism.").

[155] *See id.* at 769 ("DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principles applicable to the Federal Government.").

[156] *See id.* at 768 ("[T]he resulting injury and indignity [of DOMA] is a deprivation of an essential part of the liberty protected by the Fifth Amendment.").

[157] *See id.* at 775 ("DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty.").

> treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.[158]

Dignity, once again, is the tie binding the Due Process and Equal Protection clauses.

The dissenting justices decried the Court's departure from standard Due Process and Equal Protection methodology. Justice Scalia, in particular, lambasted the majority opinion for not providing a single clear basis for its opinion and foregoing the standard tiers-of-scrutiny approach.[159] What he failed to recognize, though, or perhaps did not want to acknowledge, was that the majority's departure from the *Glucksberg* formula was not a lapse of memory. Rather, it was a calculated, deliberate advance of the *Lawrence* narrative, one in which the Due Process Clause and the Equal Protection Clause were getting wound ever tighter into the "double helix" Tribe had presciently described a decade earlier.

Obergefell v. Hodges

Marriage equality would prove to be the final, decisive chapter in this unfolding narrative. In *Obergefell v. Hodges*, the Court's landmark decision that made same-sex marriage the law of the land, Justice Kennedy pulled together all the familiar characters—the "living tradition" of the *Poe* dissent, the "choices central to personal dignity and autonomy" of *Casey*,

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[158] *Id.* at 774-775.

[159] *See id.* at 791-794 (Scalia, J., dissenting) ("There are many remarkable things about the majority's merits holding. The first is how rootless and shifting its justifications are. For example, the opinion starts with seven full pages about the traditional power of States to define domestic relations—initially fooling many readers, I am sure, into thinking that this is a federalism opinion. … Moreover, if this is meant to be an equal-protection opinion, it is a confusing one. The opinion does not resolve and indeed does not even mention what had been the central question in this litigation: whether, under the Equal Protection Clause, laws restricting marriage to a man and a woman are reviewed for more than mere rationality. … The majority opinion need not get into the strict-vs.-rational-basis scrutiny question, and need not justify its holding under either, because it says that DOMA is unconstitutional as 'a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution,'; that it violates 'basic due process' principles; and that it inflicts an 'injury and indignity' of a kind that denies 'an essential part of the liberty protected by the Fifth Amendment.' The majority never utters the dread words 'substantive due process,' perhaps sensing the disrepute into which that doctrine has fallen, but that is what those statements mean. Yet the opinion does not argue that same-sex marriage is 'deeply rooted in this Nation's history and tradition,' a claim that would of course be quite absurd. So would the further suggestion (also necessary, under our substantive-due-process precedents) that a world in which DOMA exists is one bereft of 'ordered liberty.'") (citations omitted).

the "right to demand respect" of *Lawrence*, the "dignity conferred by marriage" of *Windsor*—into a fitting end for a story written, largely, by him. While it could have been decided much more narrowly,[160] Kennedy instead decided to frame *Obergefell* as the sequel to another landmark marriage equality case, *Loving v. Virginia*, which had invalidated bans on interracial marriage. In doing so, the Court made explicit what had been suggested in ever clearer terms in the prior gay rights cases: the Due Process Clause and Equal Protection Clause are inseparably wound together—and at their intersection is a constitutional guarantee of equal dignity.

A fitting sequel it was, too. After all, *Loving* was also—many years before—decided on dual equal protection and due process grounds.[161] But where *Loving* had based its holding primarily on equal protection and pulled in due process as a supplement, *Obergefell* made it clear that the two examinations were interwoven:

> The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[162]

This passage is the most explicit statement of the synergy between the two clauses (a word the opinion itself would use to describe the relationship later on),[163] and it also names some of the

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[160] *See, e.g.*, Yoshino, *supra* note 81, at 147 ("[C]onsider how much more narrowly the opinion could have been written. It could have invoked the equal protection and due process guarantees without specifying a formal standard of review, and then observed that none of the state justifications survived even a deferential form of scrutiny. The Court had adopted this strategy in prior gay rights cases.").

[161] *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

[162] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

[163] *See id.* at 2603.

specific ways in which the two considerations interact with each other. The first and most explicit way is in the "identification and definition of the right." Less explicit is the statement that their interrelation "furthers our understanding of what freedom is and *must become*";[164] this sentence hints at the unique role that tradition must play when both liberty and equality are at stake. *Obergefell*'s handling of each of these two considerations—the definition of the right and the role of tradition—give clues as to how the interplay of the two clauses affects each.

The first lesson comes from *Obergefell*'s framing of the right in question. Once again, the Court's choice of how to frame the right would do much to determine the outcome of the case. Those against same-sex marriage asked the Court to consider the claim as an asserted "right to same-sex marriage"; those in favor preferred the broader "right to marry."[165] The *Glucksberg* requirement for a "careful description" of the right in question would seem to necessitate the former definition, and the respondents made that precise argument.[166] The Court chose the broader "right to marry"—but addressed the *Glucksberg* argument directly:

> Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, which called for a "careful description" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and non-existent "right to same-sex marriage." *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case

[164] Emphasis added.

[165] *See id.* at 2602.

[166] Brief for Respondent at 8, *Obergefell*, 135 S. Ct. 2584 (No. 14-556).

> inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right.[167]

Here, Justice Kennedy acknowledges an explicit departure from the *Glucksberg* methodology (an opinion he had joined in full). Yoshino, though, notes that this passage "is open to at least two interpretations."[168] By stating that the *Glucksberg* approach "*may have* been appropriate," the opinion leaves it open for a future Court to decide either 1) *Glucksberg* relied on an improperly narrow definition of the right in question or 2) there exists some principle that distinguishes *Glucksberg* from *Obergefell*, such that the "careful definition" approach was appropriate there but inappropriate here. Which of these answers is more fitting will be the subject of future analysis in this thesis. Regardless, the Court in *Obergefell* established one thing for certain: the "careful definition" requirement is far from a silver bullet for those seeking to slow the expansion of substantive due process. The only question left is whether it is a blank.

The second lesson closely follows the first. Once the right is defined, what role do history and tradition have to play in determining whether it is fundamental? *Obergefell*'s guiding principle in this endeavor is actually found at the end of the paragraph quoted above. All those prior marriage equality cases proceeded by "asking if there was a sufficient justification for excluding the relevant class from the right." This goes hand-in-hand with the more general definition of the right in question. Under the *Glucksberg* approach, the Court was to take its specific framing of the right (here, the "right to same-sex marriage") and consult history and tradition to determine whether they supported the alleged fundamental right. But with a more general framing of the right (here, the "right to marry"), the analysis is flipped. First, the Court is

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[167] *Obergefell*, 135 S. Ct. at 2602.

[168] Yoshino, *supra* note 81, at 165.

to determine whether the broadly-defined right is fundamental by consulting principles from history and tradition. Then, given those principles, the Court should ask: do these principles reveal any reason why the group in question should be *excluded* from the asserted right?

This is precisely the approach the Court took in *Obergefell*. The Court identified four "reasons marriage is fundamental under the Constitution."[169] First, "the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[170] Second, "the right to marry…supports a two-person union unlike any other in its importance to the committed individuals."[171] Third, marriage "safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[172] Fourth, "marriage is a keystone of our social order."[173] The Court determined that these four principles and traditions formed the foundation of marriage; taken together, they are the reason the "right to marry" is fundamental. Because these four traditions "apply with equal force to same-sex couples," the Court concluded that same-sex couples must be allowed to exercise the right to marry.[174]

This exercise allows history and tradition to play a markedly different role than *Glucksberg* would have them play. It enables the Court to look past historical exclusions of marginalized groups from general rights to see the core principles that make the right fundamental in the first place—and whether those core principles merit the group's exclusion.

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[169] *Obergefell*, 135 S. Ct. at 2599.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 2600.

[173] *Id.* at 2601.

[174] *Id.* at 2599.

Broadly defined rights may not apply to every group who would assert them.[175] But if the central reasons the right is fundamental apply equally to the group in question, the question becomes: *why not?*

The Court grounded this approach in Justice Harlan's *Poe* dissent,[176] which had framed tradition as a "living thing" and emphasized that substantive due process "has not been reduced to any formula."[177] The Court's discussion of the role of history and tradition clearly echoed the decision in *Lawrence* a decade earlier. The *Obergefell* majority wrote:

> History and tradition guide and discipline this inquiry but do not set its outer boundaries. That method respects our history and learns from it without allowing the past alone to rule the present. The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[178]

The themes of *Lawrence* are unmistakable. History is the starting point of due process inquiry, but not its ending point.[179] The framers were modest, and they did not presume to know the full extent of liberty.[180] An "emerging awareness" or "new insight" should weigh heavily on the

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[175] For example, can polygamous unions exercise the "right to marry"? Can siblings? Or minors?

[176] *See Obergefell*, 135 S. Ct. at 2599 ("[I]n assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has long been protected.") (citing Poe v. Ullman, 367 U.S. 497, 542-553 (1961) (Harlan, J., dissenting)).

[177] *Poe*, 367 U.S. at 542 (Harlan, J., dissenting).

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

[179] *Compare Obergefell*, 135 S. Ct. at 2598 ("History and tradition guide and discipline this inquiry but do not set its outer boundaries."), *with* Lawrence v. Texas, 539 U.S. 558, 572 (2003) ("[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.") (quoting from County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

[180] *Compare Obergefell*, 135 S. Ct. at 2598 ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning."), *with Lawrence*, 539 U.S. at 578-79 ("Had those who drew and ratified the Due Process Clauses of the Fifth

Court's mind in this process.[181] However, by not overruling *Glucksberg* (or even referencing it in regard to history and tradition), the Court does leave the door cracked open, as to whether there might still be a place for the *Glucksberg* tradition requirements. What is undeniable is that the *Glucksberg* requirements, if not completely displaced, are severely cabined and undermined.

These two lessons illuminate how the Court deals with fundamental rights cases at the intersection of due process and equal protection. One final takeaway from *Obergefell*, however, must be noted before proceeding further. Not only does *Obergefell* provide a vivid picture of how the Court's analysis should operate at that intersection, it also provides clues for how to determine whether a particular case lies at that intersection.

In short, cases that implicate both due process and equal protection considerations center on what Yoshino terms "antisubordination liberty."[182] In other words, deprivations of liberty from historically subordinated groups necessarily implicate both Clauses. Justice Kennedy advanced this idea, although not in the same terms, in all the gay rights cases—particularly in his discussions of human dignity. In each case, he referenced not only the face-value impact of the laws, but also the *stigma* imposed on homosexuals as a group.[183] In *Obergefell*, after describing

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Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress.").

[181] *Compare Obergefell*, 135 S. Ct. at 2598 ("When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed."), *with Lawrence*, 539 U.S. at 571-72 ("In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

[182] *See* Yoshino, *supra* note 81, at 174.

[183] *See, e.g.*, *Lawrence*, 539 U.S. at 575 (arguing that laws banning sodomy can stigmatize homosexuals even if unenforced); United States v. Windsor, 570 U.S. 744, 770 (2013) (stating that the purpose and effect of DOMA is to stigmatize those who enter into same-sex marriages); *Obergefell*, 135 S. Ct. at 2600 (describing the stigma that children of same-sex parents suffer when states exclude same-sex marriages).

once again the stigmatizing and demeaning effect of the laws,[184] Justice Kennedy explicitly ties subordination concerns to the intersection of due process and equal protection:

> It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them.[185]

This is a critical piece of the puzzle. Even if the Due Process and Equal Protection clauses are intertwined, certainly not *every case* that implicates one implicates the other. The Court itself acknowledged that fact, in its assurance that rights secured by the two clauses "are not always co-extensive."[186] This passage helps clarify the would-be Venn diagram of the two considerations by defining a key characteristic of their area of intersection: antisubordination.

Justice Kennedy capped off the majority opinion in *Obergefell* with a rhetorical flourish fitting for a book's final pages. He doubtless knew the significance of his vote and the opinion he authored—both what the decision meant for the soon-to-be newlyweds across the country and for the next generation of Fourteenth Amendment cases. He ended the majority opinion by invoking the dignity which had served as the theme of his narrative, writing of the plaintiffs: "Their hope is not to be condemned to live in loneliness, excluded from one of civilizations'

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[184] *See Obergefell*, 135 S. Ct. at 2602 ("But when that sincere, personal opposition [of those who oppose same-sex marriage as a moral matter] becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon *demeans* or *stigmatizes* those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.) (emphasis added).

[185] *See id.* at 2604.

[186] *Id.* at 2602.

oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right."[187]

[187] *Id.* at 2608.

Chapter Three: How Equal Dignity Operates

We find ourselves now with Justice Kennedy's book closed in front of us. *Obergefell* was the last major decision in the string of gay rights cases. Kennedy no longer sits on the Court. As any reader knows, though, a good book leaves the reader changed. The final words are never really the end; in fact, often, the reader is left with more questions than answers. Such is the case with Kennedy's narrative of equal dignity. Many questions remain. The most important, overarching of which is: *where exactly does this leave us?* Just how different are we than when this all began?

On the one hand, perhaps the narrative is self-contained. One could argue that Justice Kennedy's markedly different approach to Fourteenth Amendment jurisprudence in the gay rights cases owes to some distinguishing feature of gay rights, making those cases unique and their lessons bounded. On the other hand, perhaps Justice Kennedy was doing nothing less than rewriting the status quo in these cases. This line of interpretation would frame equal dignity as the label for the new normal in Fourteenth Amendment cases. Due process and equal protection now operate in tandem; the formulaic *Glucksberg* approach is a relic with no use for today's due process cases.

Perhaps, though, the answer is neither. I will argue that there is still a place for the *Glucksberg* approach, and for the more rigid tiers of scrutiny analyses associated with the Due Process and Equal Protection clauses. In cases where only due process or equal protection are implicated (and such cases do exist), these frameworks are appropriate—necessary, in fact. But there is another class of cases, which includes but is not limited to the gay rights cases, where these standard frameworks are inappropriate. Specifically, cases that lie at the intersection of the

Due Process and Equal Protection clauses—cases that deal with antisubordination—are positioned at a "blind spot" of the standard approaches. These cases necessitate a different sort of framework, one that draws in elements of both clauses. These cases demand the framework laid out by Justice Kennedy in the equal dignity cases.

Due Process and Equal Protection – The Traditional View

Before diving into the nuts and bolts of this synthesized Due Process/Equal Protection framework, though, it is worth describing the traditional view of the two clauses. Obviously, the development of the Court's jurisprudence was not deterministic; if several close decisions had gone the other way, the "traditional" understanding of the two clauses might have turned out quite differently. But, before the gay rights cases, the Court's precedents painted a fairly cohesive picture of the different roles the Due Process and Equal Protection clauses should play. This traditional understanding is best captured by Cass Sunstein in his 1988 article, *Sexual Orientation and the Constitution*, written in the wake of *Bowers v. Hardwick*:

> From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.
>
> The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure. The two clauses therefore operate along different tracks.[188]

[188] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, U. CHI. L. REV. 1161, 1163 (1988).

Put simply, the Due Process Clause looks backward; the Equal Protection Clause looks forward. The Due Process Clause is meant to maintain the historical status quo; the Equal Protection Clause is meant to disrupt it.

This view of the two clauses is consistent with the Court's Fourteenth Amendment jurisprudence up until the gay rights cases. Indeed, it is this view of the Due Process Clause that the conservative members of the Court intended to crystallize in *Bowers* and *Glucksberg*. Under this view, both decisions are understandable, even unavoidable. Purely looking backwards, there can be no basis for a "right to suicide" or a "right to homosexual sodomy." The traditional view also matches cases like *Prince*,[189] *Michael H.*,[190] and *Moore v. East Cleveland*,[191] which dealt with family relationships of various sorts. Each of these cases proceeded by measuring the state law at issue against history and tradition regarding familial rights. This was also the structure of analysis used in the *Lochner*-era due process cases (despite consensus that the *outcome* of those cases was incorrect).[192] Even *Roe* reinforces this view of the Due Process Clause, despite its revolutionary character. The majority opinion spent nearly twenty pages covering the history of abortion from ancient times to now.[193] The Court understood that history and tradition were the unavoidable backdrop of any Due Process case.

Likewise, the traditional view of the Equal Protection Clause matches the Court's jurisprudence in this area. The Court has used equal protection as the rationale for many of its

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[189] Prince v. Massachusetts, 321 U.S. 158 (1944).

[190] Michael H. v. Gerald D, 491 U.S. 110 (1989).

[191] Moore v. East Cleveland, 431 U.S. 494 (1977).

[192] *See, e.g.*, Sunstein, *supra* note 188, at 1172 (arguing that the structure of the Court's reasoning in the *Lochner* cases matches this backwards-looking view of the Due Process Clause).

[193] *See* Roe v. Wade, 410 U.S. 113, 130-147 (1973).

most disruptive decisions—those regarding racial discrimination,[194] gender equality,[195] and voting rights.[196] In all these cases, *history* was not the measuring stick—instead, it was *equality*. For this reason, the Equal Protection Clause has been the Court's weapon of choice when it comes to disrupting the status quo.

Equal protection jurisprudence, however, has hit a roadblock. Historically, the primary mechanism the Court has used to break new ground in equal protection is to declare new "suspect classes." This traces back to the famous *Carolene Products* footnote four, which noted that prejudice against certain "discrete and insular minorities" might merit heightened scrutiny.[197] The Court decided to go down this route, identifying certain classifications which would immediately trigger strict scrutiny. Today, there are four suspect classes triggering strict scrutiny (race,[198] national origin,[199] alienage,[200] and nonmarital parentage)[201] and one more

[194] *See, e.g.*, Brown v. Board of Education, 347 U.S. 483 (1954).

[195] *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996) (holding that a military institution's refusal to admit women is intentional gender discrimination in violation of the Equal Protection Clause).

[196] *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (holding that the Equal Protection Clause requires the apportionment of seats in a state legislature on a population basis).

[197] United States v. Carolene Products Co., 304 U.S. 144, 153 (1938).

[198] *See* Loving v. Virginia, 388 U.S. 1 (1967).

[199] *See* Oyama v. California, 332 U.S. 633 (1948).

[200] *See* Graham v. Richardson, 403 U.S. 365 (1971) (holding that states cannot restrict the eligibility of lawfully admitted resident aliens for welfare benefits under the Equal Protection Clause).

[201] *See* Trimble v. Gordon, 430 U.S. 762 (1977) (holding unconstitutional a statute that permitted a child born out of wedlock to inherit only from his or her mother).

(sex)[202] which triggers "intermediate scrutiny." However, the Court has not added to this list since 1977,[203] even though litigants have continued to urge them to do so.[204]

The reason for this is obvious and seems unavoidable. There is no clear standard for what should qualify a minority to become a suspect class—and consequently, no clear end in sight to how lengthy and granular the list could become.[205] Nearly every expansion would appear to open the door to ten *new* expansions, and so on.[206] Eventually, this exercise of distinguishing between distinctions would effectively transform the Court into a countermajoritarian super-legislature, whose job is to question the merits of legislative distinctions. After all, group distinctions are

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[202] *See* United States v. Virginia, 518 U.S. 515 (1996).

[203] Nonmarital parentage was the last suspect classification identified by the Court. *See Trimble*, 430 U.S. at 766-76. *See generally* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 755-63 (arguing that "the canon has closed on heightened scrutiny classifications" but that this reality "must be tempered by acknowledging the Court's use of a more aggressive form of rational basis review").

[204] *See, e.g.*, Brief of the National Lesbian & Gay Law Association et al. as Amici Curiae in Support of Petitioners at 3-4, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102) (arguing that classification based on sexual orientation should draw heightened scrutiny); Brief of Appellant at 40-46, United States v. Watson, 483 F.3d 828 (D.C. Cir. 2007) (No. 04-3090) (arguing for application of heightened scrutiny to peremptory challenges of blind jurors); Appellant's Reply Brief at 2, Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth., 386 F.3d 1148 (D.C. Cir. 2004) (No. 03-7149) (arguing that youth as a class should be accorded intermediate scrutiny).

[205] Even before the Court was finished adding suspect classes, then-Justice Rehnquist expressed this concern. *See* Sugarman v. Dougall, 413 U.S. 634, 657 (1973) ("Our society, consisting of over 200 million individuals of multitudinous origins, customs, tongues, beliefs, and cultures is, to say the least, diverse. It would hardly take extraordinary ingenuity for a lawyer to find 'insular and discrete' minorities at every turn in the road. Yet, unless the Court can precisely define and constitutionally justify both the terms and analysis it uses, these decisions today stand for the proposition that the Court can choose a 'minority' it 'feels' deserves 'solicitude' and thereafter prohibit the States from classifying that 'minority' differently from the 'majority.' I cannot find, and the Court does not cite, any constitutional authority for such a 'ward of the Court' approach to equal protection.").

[206] The Court itself has expressed concern at this potentially slippery slope. *See, e.g.*, Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) ("[I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.").

present in *most* legislation—and nearly every law can be challenged on the basis of some alleged inequality.[207] The Court's fear of going down this path seems justified.

Thus we see that the traditional view of the two clauses leads almost inevitably to where the Court found itself at the turn of the century. For substantive due process, fear of an unfettered judicial review led to the *Glucksberg* requirements. For equal protection, fear of an unending parade of suspect classes led to that list being closed for new entries. This is not to say that these results were *wrong*. On the contrary, the fears behind them are valid—and the Court's responses reasonable. But both approaches are predicated on the traditional view of the two clauses: that they operate on separate tracks, one "looking backwards" and the other "looking forwards."

Viewing the two clauses this way is not incorrect—it's just incomplete. For cases that fit neatly into one category or the other, this interpretation is appropriate, and the standard approaches are as well. But antisubordination cases, which involve the deprivation of a fundamental liberty interest from a historically marginalized group, fall at the intersection of the two provisions. As I will attempt to demonstrate, both standard frameworks of analysis, due process *and* equal protection, are inadequate to remedy such harms on their own.

The Inadequacy of Due Process

The best lens for seeing the inadequacy of due process is *Obergefell*. Imagine that the Court had decided the case solely under the Due Process Clause, using the traditional interpretation of the provision. The Court would likely have followed the *Glucksberg* formula and carefully defined the asserted right as "a right to same-sex marriage." Then, they would have

[207] *See* ELY, *supra* note 10, at 32 ("[A]ny case, indeed any challenge, can be put in an equal protection framework by competent counsel. If you wish to challenge the fact that you're not getting good *X*, (or are getting deprivation *Y*) it is extremely probable that you will be able to identify someone who *is* getting good *X* (or is not getting deprivation *Y*).").

looked backwards at history and tradition and found no justification for the asserted right.[208] The challenge to traditional marriage definitions would die there—as it should, under this view! After all, the Due Process Clause is not *supposed* to reverse deeply entrenched practices. Same-sex marriage bans are by no means "short-run departures" from traditional values.

The *Obergefell* majority understood why this approach was woefully inadequate. If the Due Process Clause is only allowed to look backwards, then long-running deprivations of fundamental liberties—ones so deeply engrained as to become fixtures of history and tradition—could *never* be struck down under the Due Process Clause. In the words of Justice Kennedy, "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."[209] This gets to the core of the problem. The Due Process Clause, under the traditional interpretation, is *incapable* of protecting the fundamental rights of historically disenfranchised minorities—because the historical fact of their disenfranchisement can act as its own justification.

The Inadequacy of Equal Protection

But perhaps, as Sunstein argues, this is precisely the way it should be. Maybe it's not the job of the Due Process Clause to right these wrongs. A screwdriver should not be criticized for its ineptitude at hammering nails. One might think the Equal Protection Clause is precisely the tool we seek when a law deprives minorities of fundamental rights. Unfortunately, it too proves an inadequate remedy—for two reasons.

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[208] This is precisely the framework that the dissenting justices argued should have been used. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2619 (2015) (Roberts, C.J., dissenting); *id.* at 2627-28 (Scalia, J., dissenting); *id.* at 2640 (Alito, J., dissenting).

[209] *Id.* at 2602 (majority opinion).

First, the equal protection analysis will all too often be condemned to rational basis territory, because the challenge does not involve a suspect class or a fundamental right. To see why, imagine the Court had decided to analyze *Lawrence* on solely Equal Protection grounds. While the Court was asked to identify sexual orientation as a suspect classification,[210] they obviously declined. Likewise, the Court would have no basis for deciding that the case implicated a fundamental interest. For one, doing so would run into the same problems described above in the due process context.[211] Additionally, as a practical matter, the Court has been even more reticent to declare fundamental rights in the equal protection context.[212] Although it is very unlikely that the Court declares new suspect classifications, it is perhaps even *less* likely that they declare new fundamental interests in the equal protection context. Both chapters of equal protection jurisprudence appear to be closed—forcing all but a few specific categories of challenges to fight a losing battle under the rational basis standard.

But there is a second reason equal protection is inadequate to remedy subordination on its own. This second inadequacy is best illustrated by examining the rationale Justice O'Connor used in her concurrence.[213] O'Connor, after all, argued that the case *should have been decided* on solely equal protection grounds—invalidating the law even under the rational basis standard. She

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[210] *See supra* note 204.

[211] *See supra* pp. 60-61.

[212] *See* NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 805 (20th ed. 2019) (noting that "the Court has developed this line of cases in only a very few areas" and almost exclusively during the time of the Warren Court).

[213] *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring in the judgment).

reasoned that the ban on same-sex sodomy was unconstitutional because it singled out homosexuals—unlike the law that banned *all* sodomy in *Bowers*.[214]

If the decision followed Justice O'Connor's reasoning, lawmakers in Texas would have the standard two options available when a law is struck down due to equal protection: either ban all sodomy or ban none. Justice O'Connor thought only the latter was a realistic possibility. She wrote in her concurrence that she was confident that "so long as the Equal Protection Clause requires a sodomy law to apply equally to the private consensual conduct of homosexuals and heterosexuals alike, such a law would not long stand in our democratic society."[215] O'Connor, in other words, was confident that an equal protection ruling would be just as strong a remedy, effectively, as a due process one.

This confidence, however, might have been misplaced. As Tribe points out, the fact that anti-sodomy laws were rarely if ever enforced means that heterosexuals—even when faced with a generally-applicable anti-sodomy law—would have little real incentive to advocate for its repeal.[216] This, in turn, would leave in place the *true harm* of the laws, which was never really criminal prosecution in the first place.[217] The mere *fact* of criminalization—even in the absence of any enforcement—serves to demean and stigmatize homosexuals and same-sex relationships. This is the case for both sex-neutral and same-sex sodomy bans.

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[214] This sort of decision would be in line with the "rationality with bite" standard of review which the Court has employed instead of defining new suspect classes in more recent years. *See generally* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987); Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769 (2005); Yoshino, *supra* note 203, at 760-63.

[215] *Lawrence*, 539 U.S. at 584-85 (O'Connor, J., concurring in the judgment).

[216] *See* Tribe, *supra* note 85, at 1910.

[217] *See id.* at 1896 (noting that anti-sodomy laws "have notoriously been honored in the breach and, almost from the start, have languished without enforcement").

This is the understanding the majority came to in *Lawrence*. The Court wrote:

> If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.[218]

This is the second reason the equal protection clause alone is inadequate to address deprivations of fundamental liberties. When the State deprives a group of a fundamental liberty, which it grants to everyone else, a key component of the harm—in some cases, the *primary* component—is *what the law says*. It is the message that you do not deserve the same rights as everyone else. And that message remains, even if the law is never (and can never) be enforced. Even if laws are unenforceable or forced to be facially neutral by an equal protection decision, the underlying subordination remains intact.

Antisubordination Concerns – The "Blind Spot" of the Traditional Frameworks

At this point, it has been demonstrated that when minority groups are deprived of fundamental liberties, neither traditional framework alone is a sufficient remedy. The Due Process Clause will allow historical deprivation to be its own justification; the Equal Protection Clause often will as well, and risks leaving the stigma of facially neutral laws in place.

The essence of this practice, depriving minorities of their fundamental rights, is subordination.[219] Justice Kennedy's methodology in the gay rights cases was steeped in the recognition that subordination cannot be adequately remedied by traditional application of either

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[218] *Lawrence*, 539 U.S. at 575 (majority opinion).

[219] *See* Tribe, *supra* note 2, at 18 ("[T]he freedom to marry championed in Obergefell was understood by all to directly redress the subordination of LGBT individuals."); Yoshino, *supra* note 81, at 174 ("[O]ne of the major inputs into [substantive due process] analysis will be the impact of granting or denying such liberties to historically subordinated groups.").

clause in isolation. Instead, he tied the two considerations together into a doctrine of equal dignity. This doctrine of antisubordination operates in the blind spot of the other two approaches.

Although it came to life in the gay rights cases, the reach of antisubordination is far wider. The equal dignity methodology (which will be summarized later in this chapter) should be used whenever a case involves a minority group alleging historical deprivation of fundamental liberties. Looking back over the course of the Court's substantive due process cases, one can see many cases that do not deal with antisubordination, and a few that might. For example, *Griswold* clearly does not involve minority rights. Such a case can be (and should be) addressed using the traditional due process methodology. The same goes for other *Lochner*-era cases, like *Meyer* and *Pierce*. [220] The abortion cases, though, are more debatable. *Roe* was decided on due process grounds, but many scholars have argued that it *should* have been decided on equal protection grounds, as a sex discrimination case.[221] Seeing *Roe* as an antisubordination case might actually provide the legal basis for framing the right generally (as a right to privacy or bodily autonomy).[222] But perhaps the most pressing question (which Chapter Four will tackle with

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[220] It should be noted that the law at issue in *Meyer*, which banned the teaching of foreign languages in schools, was motivated by anti-German sentiment in the wake of World War I. *See generally* CHRISTOPHER CAPOZZOLA, UNCLE SAM WANTS YOU: WORLD WAR I AND THE MAKING OF THE AMERICAN CITIZEN 190-97 (2008). However, the law itself was facially neutral (banning the teaching of *any* foreign language) and was found to violate generally-applicable fundamental liberty interests (related to children's education and upbringing more broadly). On the one hand, it seems reasonable that when a law violates a generally-applicable fundamental liberty, the Court should decide the case on solely Due Process grounds. However, one could also argue that, post-*Glucksberg*, a case like *Meyer* could have turned out quite differently. The Court in *Meyer*, after all, relied on very abstract fundamental liberties, which may not have been deemed "careful" enough definitions. If the right had instead been framed as a "right to teach foreign languages in public schools," would it still be deemed fundamental? Perhaps *Meyer* would be viewed as an anti-subordination case today, and the equal dignity framework would give a justification for generalizing the right in question. *See infra* pp. 66-69.

[221] *See e.g.* TRIBE, *supra* note 15, at 1353-56; Catharine MacKinnon, *Feminism Unmodified* ch. 8 (Harvard, 1987); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977); Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 431-32 n. 83 (1985); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v Wade*, 63 N.C. L. REV. 375 (1985).

[222] *See infra* pp. 66-69.

respect to physician-assisted suicide) is whether the doctrine of equal dignity should warrant reconsideration of any failed Fourteenth Amendment challenges.

If *Obergefell* was not the last antisubordination case, then it is important to determine how the equal dignity approach differs from the traditional approach. Synthesizing the lessons of the gay rights cases, there are two major differences between the standard due process approach (aka the *Glucksberg* approach) and the dignity-based approach.

Generalizing Upward

The first methodological shift that equal dignity triggers involves the definition of the right in question. As demonstrated, this is a crucial step in the analysis.[223] The *Glucksberg* approach requires a "careful definition" of the right in question. In normal substantive due process cases, this requirement is good and necessary; it keeps the Court's analysis grounded in tradition and keeps the Due Process Clause from becoming a blank check. But in cases that involve subordination, specific framings of the asserted right will inevitably handicap minorities and prevent the Court from overturning deeply entrenched wrongs. In these cases, the Court must eschew the requirement for a careful definition and instead generalize upward.

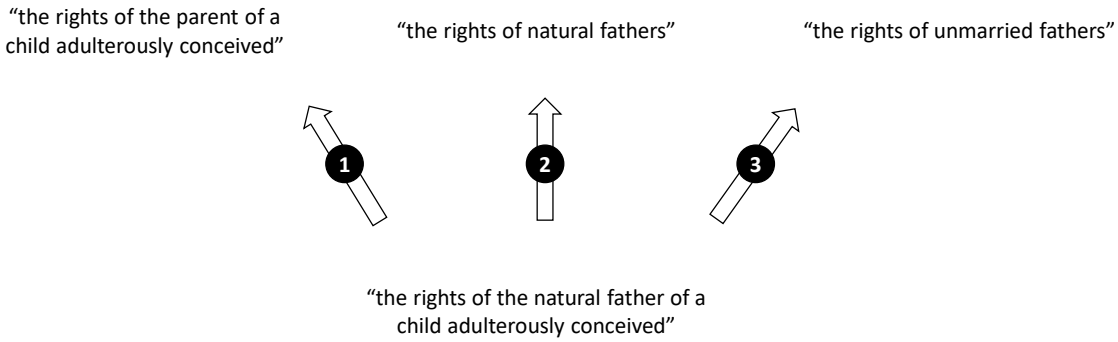
This exercise in generalization, however, is neither unguided nor unbounded. The Court's apprehension of broadly-defined rights is prudent, and Kennedy understood that. His approach to defining rights in the equal dignity cases reveals the guiding principles the Court should follow going forward. The Court must be careful to generalize in the *right direction* and to the *right extent*.

First, the Court must generalize in the right direction. As Tribe points out, generalization is not a one-dimensional exercise—moving left and right on a single line, from specific to

[223] *See supra* notes 87-88 and accompanying text.

increasingly general.[224] A right can be narrow in one dimension, while broad in another. Consequently, one can theoretically generalize across *any of those dimensions*. Think back to the case of *Michael H. v. Gerald D.*, where Justice Scalia argued that rights should be defined at the most specific level possible. There, he chose to define the asserted rights as "the rights of the natural father of a child adulterously conceived," but noted that if it were not possible to use that framing, then the Court "would have to consult, and (if possible) reason from, the traditions regarding natural fathers in general."[225] The problem is, that is only one of *multiple possible abstractions*.[226] When abstracting from Scalia's narrowly-defined right, one could easily abstract out either 1) the sex of Michael H., 2) the adultery (as Scalia did), or 3) the presence of *Gerald D.* (See *Figure 1* below.)

Figure 1 – Generalizing Across Different Dimensions



These rights are all more general than the initial right, but they generalize away different aspects. Simply asserting that the Court should "generalize upward" does not answer *in which direction* to generalize. This is the first challenge to overcome.

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[224] Tribe & Dorf, *supra* note 87, at 1077 (noting that "[a] right may be broad along one dimension, while narrow along another.")

[225] Michael H. v. Gerald D, 491 U.S. 110 (1989) at 128 n. 6.

[226] Tribe & Dorf, *supra* note 87, at 1077.

Second, the Court must make sure not to go too far in its generalization. Doing so causes the inquiry to become inaccessibly abstract and cloaks tangible actions in lofty principles. The Court recognizes this danger. For this reason, while the Court often cites the general *principles* of dignity and autonomy in substantive due process cases, they have stopped short of establishing a "fundamental right to autonomy."[227] After all, what would such a right protect? Laws, by their very nature, limit autonomy. Establishing a right so broad unhinges the inquiry from tradition and puts the Court in the position of determining what deprivations of autonomy are tolerable. For this reason, the Court must ensure that it does not generalize too far, even in cases involving equal dignity.

Three guiding principles will help the Court generalize in the right direction and to the right extent. First, the Court must use precedent as its guide. When considering possible generalizations, the Court should keep its existing due process precedents top of mind. This is seen most clearly in *Obergefell*, where the Court referenced the "right to marry."[228] This right was firmly grounded in precedent, which the Court made sure to point out.[229] When a higher-level right has already been recognized by the Court, that provides a strong basis for choosing it as the appropriate generalization.

Second, the Court should only accept generalizations that have accessible tradition. This requirement was one aspect of Justice Scalia's *Michael H.* rights-definition methodology, and for

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[227] *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846 (1992) (affirming a woman's right to an abortion); *Cruzan*, 497 U.S. at 279 (assuming the existence of a "right to refuse lifesaving hydration and nutrition"); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (referencing "autonomy" but declining to identify a "right to autonomy").

[228] Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

[229] *Id.* at 2602 (referencing *Loving*, *Turner*, and *Zablocki*).

good reason.[230] In the next step of the inquiry, the Court must analyze history and tradition, so there needs to be some tradition available to analyze. Scalia was concerned that overly-specific rights (like "the right for two 35-year-old women in New York to get married") are impossible to analyze historically. But actually, this is true at both ends of the spectrum. It is also impossible to find tradition when rights are defined too broadly. Consider a Court trying to find a historical basis for a "right to autonomy." Any tradition the Court could find in favor (or against) such a right would be far more specific than the asserted right; this is a red flag that the right is defined too broadly.

Finally, the Court should prioritize removing the minority group's identity from the framing of the right. This will prevent the historical subordination from dominating the tradition analysis. This is precisely what the Court did in *Obergefell* (and, less explicitly, in *Lawrence).* Instead of choosing a "right to same-sex marriage," the Court generalized to a "right to marry."[231] Accordingly in *Lawrence*, while the Court avoided any specific naming of the right, they refocused the analysis from a "right to homosexual sodomy" to more basic principles of autonomy in choices of sexual intimacy.[232] The core principle behind the generalization should be removing the minority group's identity from the right in question. In some cases, this may be the only generalization necessary.

A New Role for History and Tradition

The second methodological shift triggered by equal dignity involves the use of history and tradition. Because the asserted right has been generalized, the standard framework is not

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[230] *See Michael H.*, 491 U.S. at 128 n. 6.

[231] *See Obergefell*, 135 S. Ct. at 2602.

[232] *See Lawrence*, 539 U.S. at 566-67.

probing enough. Simply establishing that a general right is fundamental is not enough to determine that the group in question should have access to the general right. Some deprivations may be for legitimate reasons, and the Court's analysis needs to leave room for that possibility. The solution is to use a three-step framework, modeled after Justice Kennedy's approach in *Obergefell*.[233]

First, the Court should ask *if the asserted right is fundamental*. This is the same analysis demanded by *Glucksberg*. The Court should follow its standard process for determining if rights are fundamental—analyzing whether the asserted right is "deeply rooted in this Nation's history and tradition" and "implicit in the concept of ordered liberty."[234] It is important to note, though, that this will be an easier bar to clear because the right is defined more abstractly.[235] In fact, in some cases (like *Glucksberg*) this first question will already be answered by precedent. The "right to marry" was already firmly established as a fundamental right by a number of the Court's prior decisions.[236] This allowed the Court in *Obergefell* to skip over this first step of the analysis entirely.[237]

Second, the Court should ask *why the asserted right is fundamental*. In equal dignity cases, the Court must dig deeper—to determine the specific reasons a right is fundamental (if it is). The Court did this explicitly in *Obergefell*, identifying "four principles and traditions" that

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[233] *See Obergefell*, 135 S. Ct. at 2599.

[234] *See supra* pp. 30-31.

[235] *See supra* note 87 and accompanying text.

[236] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978).

[237] *See Obergefell*, 135 S. Ct. at 2598 ("Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause.").

form the basis for marriage's status as a fundamental right.[238] (One, for example, was that "marriage is a keystone of our social order."[239]) This second step leads directly into the third.

Finally, the Court should ask *whether the reasons the asserted right is fundamental justify excluding the group in question from enjoying it.* This was the test that the Court used in *Obergefell*,[240] and it makes sense why. Sometimes, deprivations may be reasonable—and related to the core principles behind the right itself. But if the reasons why the right is fundamental "apply with equal force" to the minority in question, there can be no reason to exclude them from its protection.

This step of the analysis could also provide a response to a slippery-slope argument raised in the Chief Justice Roberts's dissent. The Chief Justice asked why the two-person element of marriage should endure if the man-woman element should not.[241] Several of the majority's "principles and traditions," though, could provide a basis for excluding polygamous unions from the right to marry—one of which is that marriage "supports a two-person union unlike any other in its importance to the committed individuals"[242] and another of which is that marriage "safeguards children and families."[243] Even the tradition that marriage is central to our social order could provide a reason to exclude polygamous unions. This step of the analysis pits historical traditions regarding general rights against historical deprivations from minority

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[238] *See id.* at 2599.

[239] *Id.* at 2601.

[240] *See id.* at 2599 ("[Our] analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions [identified] demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.").

[241] *See id.* at 2621 (Roberts, C.J., dissenting).

[242] *Id.* at 2599 (majority opinion).

[243] *Id.* at 2600.

groups—to determine whether the deprivation is justified or whether it is simply baseless subordination.

In equal dignity cases, this three step process[244] should replace the traditional tiers of scrutiny framework. The gay rights cases were each ambiguous about what standard of review they employed, and it is difficult to see this omission as anything but intentional. The rigid tiers of scrutiny approach has been the subject of sharp criticism by both members of the Court[245] and legal academics.[246] Justice Kennedy knew what it would mean to name a clear standard of scrutiny in each case, and he knew what it would mean to decline to do so. He (and thus, the Court) declined to do so. The rigid tiers of scrutiny approach still has a place, but that place is not in equal dignity cases.

These variations on the traditional substantive due process framework are necessary when subordination is afoot. The standard due process and equal protection frameworks are inadequate to remedy long-entrenched deprivations of fundamental liberties. Justice Kennedy recognized this, and his equal dignity framework operates at the intersection of the Due Process

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[244] 1) Is the asserted right fundamental? 2) If so, what are the reasons it is fundamental? 3) Do the reasons the asserted right is fundamental justify excluding the group in question from enjoying it?

[245] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 211-12 (1976) (Stevens, J., concurring) (arguing that "[t]here is only one Equal Protection Clause," and that "[i]t does not direct the courts to apply one standard of review in some cases and a different standard in other cases"); San Antonio School District v. Rodriguez, 411 U.S. 1, 93 (1973) ("So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination—whatever the standard of equal protection analysis employed.")

[246] *See, e.g.*, Tribe, *supra* note 85, at 1916 (noting that the tiered scrutiny approach "is of relatively recent vintage, is often more conclusory than informative, has frequently been subjected to cogent criticism, and has not shown itself worthy of being enshrined as a permanent fixture in the armament of constitutional analysis"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action* 49 STAN. L. REV. 1111 (1997) (arguing that the tiered scrutiny approach fails to remedy facially neutral laws that perpetuate racial stratification); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481 (2004) (arguing that the problems with the three-tiered framework for judicial scrutiny are sufficient to warrant immediate consideration of an alternative standard for review).

and Equal Protection clauses to ensure that liberty and equality are both protected by the Constitution.

Chapter Four: Where Equal Dignity Leads

If the Court adopts the notion of equal dignity described in the last chapter, then the doctrine's scope cannot be limited to issues of gay rights. To start, a single, interwoven guarantee of liberty and equality could provide a clearer path forward for similarly-situated plaintiffs, like those seeking recognition of transgender rights. But its reach could be even farther—to cases and issues quite different on their face from those presented in *Lawrence* and *Obergefell*. It could even provide the basis for the Court to reconsider prior rulings which have been eroded by the equal dignity cases.

The clearest example of such a case is *Glucksberg*. A constellation of different factors point to the Court's 1997 decision as a prime candidate for reconsideration. For one, *Glucksberg* was explicitly singled out in *Obergefell*—where the majority wrote that the Court's approach in *Glucksberg* only "may have" been appropriate.[247] Yoshino reasoned that this qualified language was likely the Court "taking the familiar step of isolating a precedent before overruling it altogether."[248] Although I have argued that there is still a place in Fourteenth Amendment jurisprudence for the *Glucksberg* approach,[249] that does not mean that *Glucksberg* was the place for the *Glucksberg* approach.

In fact, there are reasons to believe that *Glucksberg* should have been viewed as an equal dignity case. Notably, it was one of *two* cases regarding physician-assisted suicide that the Court decided simultaneously in 1997; the other was *Vacco v. Quill*. While *Glucksberg* considered

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[247] *Id.* at 2602. *See also id.* at 2620 (Roberts, C.J., dissenting) ("[T]he majority's position requires it to effectively overrule Glucksberg").

[248] Yoshino, *supra* note 81, at 165.

[249] Namely, when there are not subordination concerns and only the Due Process Clause is implicated.

whether laws banning assisted-suicide violated the Due Process Clause, *Quill* considered whether identical laws in New York violated the Equal Protection Clause.[250] Could physician-assisted suicide fall into that same blind spot that *Lawrence* and *Obergefell* were situated in—where only a synthesized notion of the two clauses can adequately remedy the harm?

Aditionally, the precedential weight of *Glucksberg* and *Quill*—even apart from intervening cases—is likely not as substantial as it might appear at first glance. Although both cases were decided by unanimous decision, a closer look at the opinions shows that many of the most important questions were left unanswered. A number of justices wrote separately to note that they were only deciding that the laws were not *facially* unconstitutional (i.e. unconstitutional in all applications)—leaving future Courts to decide whether the laws were unconstitutional *as-applied* (to the class of terminally ill, mentally competent patients).[251]

All these considerations suggest that, if the Court faced the issue of physician-assisted suicide again, the doctrine of equal dignity could entail a very different sort of analysis—and potentially, a different outcome. In this chapter, I will consider whether *Glucksberg* should be overruled in light of intervening precedent, by answering two questions. First, is *Glucksberg* an equal dignity case? And second, if so, does applying the doctrine of equal dignity result in a different outcome?

Physician-Assisted Suicide as an Issue of Equality

To determine whether physician-assisted suicide should be analyzed as an equal dignity case, one must first understand the issues of fairness present in end-of-life scenarios, which were

[250] Vacco v. Quill, 521 U.S. 793, 797 (1997).

[251] *See, e.g.*, *id.* at 809 (O'Connor, J., concurring); *id.* at 809-10 (Stevens, J., concurring in the judgments); *id.* at 750 (Ginsburg, J., concurring in the judgments).

considered by the Court in *Glucksberg*'s sister case, *Vacco v. Quill*. Just seven years earlier, in *Cruzan*, the Court had recognized a right to refuse life-sustaining treatment.[252] However, in most states, it was still a crime to assist suicide, which includes physicians prescribing lethal doses.[253]

The Second Circuit determined that these two conflicting realities were unjustifiable under the Equal Protection Clause. The easiest way to see the inequity is via a hypothetical.[254] Consider two married couples, driving together in a car. Another car runs a red light and hits them, leaving all four passengers in critical condition. At the hospital, Husband A elects to have a feeding tube implanted, since his injuries have made it very painful for him to eat normally. Husband B does not need a feeding tube, but he takes serious pain medication to mitigate his extreme pain. The next morning, the two husbands each learn two things. Overnight, both of their wives have passed away; on top of that, they are both terminally ill with no chance of recovery. Husband A decides he no longer wants to live any longer and, rather than dying painfully over a matter of weeks, asks that the feeding tube be removed—which he knows will quickly result in his death. This choice is protected by his right to refuse medical treatment. Husband B makes the same decision, that he does not want to live any longer, but he does not have a machine with a switch that can be flipped. New York law prohibits his doctor from prescribing lethal medication, so Husband B is forced to live out his final, painful weeks.

The Second Circuit ruled that there was no rational basis for drawing this distinction[255]—allowing Husband A to ask his physician to take an action that he knew would end his life, but

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[252] *See Cruzan*, 497 U.S. at 278.

[253] *See* Washington v. Glucksberg, 521 U.S. 702, 725 (1997).

[254] The hypothetical that follows borrows some aspects from various situations described by Laurence Tribe at oral argument in *Quill*.

[255] Quill v. Vacco, 80 F.3d 716 (2d Cir. 1996).

not allowing Husband B to do the same. In doing so, they rejected multiple alleged reasons for drawing a distinction between the two cases. In response to the assertion that removing life-support systems was merely "allowing nature to take its course,"[256] the Second Circuit responded that

> there is nothing "natural" about causing death by means other than the original illness or its complications. The withdrawal of nutrition brings on death by starvation, the withdrawal of hydration brings on death by dehydration, and withdrawal of ventilation brings about respiratory failure. … It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or the condition from which the patient suffers.[257]

In other words, dying from the removal of life-sustaining treatment is just as unnatural as dying from taking lethal medication. In both cases, the reason for death is separate from the underlying terminal illness. The Second Circuit also rejected the action/inaction distinction (i.e. that removing life-sustaining treatment is "inaction" whereas taking lethal medication is "action"). To this claim, the Second Circuit wrote:

> [T]he writing of a prescription to hasten death involves a far less active role for the physician than is required in bringing about death through asphyxiation, starvation, and/or dehydration.[258]

Having explained away these two supposed distinctions, the Second Circuit concluded that there was *no* principled basis for distinguishing between refusing life-sustaining treatment and requesting life-ending medication.

The Supreme Court, however, overruled the Second Circuit's decision.[259] Chief Justice Rehnquist wrote for the majority that "[t]he distinction comports with fundamental legal

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[256] Quill v. Koppell, 870 F. Supp. 78, 84 (S.D.N.Y. 1994).

[257] Quill v. Vacco, 80 F.3d 716, 729 (2d Cir. 1996).

[258] *Id.*

[259] Vacco v. Quill, 521 U.S. 793 (1997).

principles of causation and intent."[260] As for causation, he argued that when a patient refuses life-sustaining treatment, their subsequent death is caused by their underlying condition; when a patient ingests lethal medication, their death is caused by the medication. As for intent, the Chief Justice wrote that a doctor who removes life-sustaining treatment is primarily attempting to honor their patient's wishes; a doctor who prescribes lethal medication primarily seeks to end their patient's life.[261] Since the case did not involve suspect classifications, the Court determined that these two justifications satisfied the rational basis level of scrutiny, and reversed the Second Circuit's decision.

Antisubordination and the Terminally Ill

The contrasting decisions by the Second Circuit and the Supreme Court illustrate the difficulty in trying to justify a distinction between refusing life-sustaining treatment and requesting lethal medication. Notably, though, both decisions were based on a traditional, purely Equal Protection analysis. This meant that those challenging the law had to fight an extremely uphill battle—because the laws only had to satisfy rational basis scrutiny.[262]

Glucksberg and *Quill* completely partitioned the Due Process and Equal Protection analyses. But, in light of the equal dignity cases, should they have? I have argued that cases that involve subordination—where a group is deprived of fundamental rights that are generally granted to those outside the group—demand a different analytical framework. Are *Glucksberg* and *Quill*, rightly viewed, subordination cases?

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[260] *Id.* at 801.

[261] *Id.* at 802.

[262] Because there was no suspect class and the right to suicide was not deemed to be fundamental

On the one hand, if banning physician-assisted suicide amounts to subordination, it would seem to be a somewhat different *flavor* of subordination than that present in the gay rights cases. Justice Kennedy spoke of the "stigma" that those laws created—the message to children of gay parents that their families were somehow "lesser."[263] Do laws banning assisted suicide really impose stigma, similar in any meaningful way to the stigma imposed by laws banning homosexual intimacy?

If one takes a step back, similarities start to emerge. Subordination occurs when the law does not afford a particular group the same fundamental freedom that it gives to those similarly situated to them. Such legislation has a clear message—that members of that group are not entitled to the same autonomy as their fellow man. This demeaning message constitutes an independent harm that can sometimes outweigh the harm of the deprivation itself—in the same way that revoking privileges from an employee says less about the privilege and more about the employee.

In this case, the group in question is the mentally incompetent, terminally ill—who do not have the ability to flip a switch or remove a medical mechanism to end their life. The freedom in question (which the next section will more carefully define) involves the liberty to choose to hasten their imminent death. This freedom is granted to those on life-support mechanisms, but not to other terminally ill patients. Think back to the hypothetical of the two husbands—one can see that laws banning assisted suicide also carry with them a demeaning message and stigmatizing effect. While the law permitted Husband A to say goodbye to his friends and family before asking his doctor to withdraw life support and end his life, it did not afford Husband B the

[263] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015).

same freedom. He was forced to live out his final days or weeks in uncertainty—sure of the imminent result but unsure how long or painful the time in between would be.

The choices left to patients in this state are often few and bleak. Opioids may help to ease a patient's severe pain, but at a certain point a person's agony can become so extreme that opioids are no longer going to work.[264] At this point, a person likely only has two options. Either live out one's final days in excruciating pain—or resort to barbiturates or benzodiazepines to put the patient in a comatose state, where they will remain as they slowly die and their families see them gradually deteriorate.[265]

In these cases, the law imposes a stigma on the patients that constitutes an independent harm, separate from the actual pain and suffering they are forced to endure. Although one may argue that *laws* do not stigmatize—*people* do—it is never that simple. Societal attitudes and laws are related in complex ways. Neither is wholly downstream from the other. Changing societal understandings can result in changed laws, but—as the gay rights cases indicate—changing laws can also hasten changes in societal attitudes. Laws have a way of confirming our priors; when they are struck down or repealed, it forces us to reexamine our (sometimes subconscious) beliefs about right and wrong, proper and improper, sacrilegious and sacred. When the law allows one terminally ill patient to end his life and forces another who would do the same to slowly deteriorate, that *says something* about the two men's choices. One choice it valorizes, the other it calls "suicide."

When compared to another terminally ill patient—maybe just one hospital room over—whose only meaningful difference is a tube that can be removed or a plug that can be pulled,

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[264] Transcript of Oral Argument at 45, *Quill*, 521 U.S. 793 (No. 95-1858).

[265] *Id.*

patients not given the freedom to make this choice do seem to suffer a dignitary harm. While the law grants one terminally ill patient the right to die with dignity, it denies it to another. One patient is granted autonomy in his final days; the other is forced to choose between agony and unconsciousness. The final, lasting image of these two patients in the hearts and minds of their loved ones may—through no fault of their own—be quite different. While this subordination is concededly different than that of the gay rights cases, and here may even be justified—it is subordination nonetheless. Both liberty and equality are at stake. The equal dignity framework is the only suitable one to analyze laws banning assisted suicide.

Defining the Right in Question

Now, to apply that framework to the issue of physician-assisted suicide. The first step in the equal dignity approach, as in the traditional approach, is to define the right in question. Because of the equality concerns, though, the right should be generalized to better capture the fundamental liberty at stake.[266] In *Glucksberg*, the Court defined the right as a "right to suicide" which included a right to assistance in doing so.[267] Multiple justices took issue with this framing of the right at the time,[268] however, and it is inappropriate in the equal dignity context for several reasons.

[266] *See supra* pp. 66-69.

[267] Washington v. Glucksberg, 521 U.S. 702, 723 (1997).

[268] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 736 (1997) (O'Connor, J., concurring) (writing that the broad framing of the right is appropriate given the facial challenges to the laws at issue); *id.* at 750 (Stevens, J., concurring in the judgments) (arguing that "a more particularized challenge" could succeed in the future, with a different framing of the write); *id.* at 781 (Souter, J., concurring in the judgment) (contending that the respondents "base their claim on the traditional right to medical care and counsel"); *id.* at 790 (Breyer, J., concurring in the judgments) (noting that he "would not reject the respondents' claim without considering a different formulation, for which our legal tradition may provide greater support").

For one, in *Glucksberg*, the Court viewed the challenge as facial. Because the law in question simply banned assisting another's suicide, it made some sense to frame the right as the Court did. After all, the only way a law banning assisting suicide could be *facially unconstitutional* is if there were a fundamental right to have someone assist your suicide. But here, the challenge is as-applied—to the class of terminally ill, mentally competent patients. These patients are surely not asserting a broad "right to commit suicide." Many of them may well have moral objections to suicide in other contexts; even those who do not still may object to a hypothetical "right to commit suicide." No, this class of patients seeks something substantially different. They seek the same right that terminally ill patients who are on life-support are granted.

But what exactly *is* the right that this class of patients would assert? In *Cruzan*, the right the Court recognized was narrow: "the right of a competent individual to refuse medical treatment."[269] That narrow framing, obviously, is not any help to patients who wish to hasten their imminent death but do not have life-sustaining treatment to refuse. By generalizing, however, one can arrive at a broader "right"[270] which these patients *are* asserting. In his concurrence, Justice Breyer, musing over the potential for a future as-applied challenge, traced the outlines of what such a right might look like:

> I would not reject the respondents' claim without considering a different formulation, for which our legal tradition might provide greater support. That formulation would use words roughly like a "right to die with dignity." But irrespective of the exact words used, at its core would lie personal control over the manner of death, professional medical

[269] *Cruzan*, 497 U.S. at 277.

[270] NB: We have not yet established that our alleged "right" is an actual right at all—much less a fundamental right. Hence the quotation marks.

> assistance, and the avoidance of unnecessary and severe physical suffering—combined.[271]

In this passage, Justice Breyer gets at the core of the right that such patients would *really* be seeking. The formulation of a "right to die with dignity" is apt. There is dignity in having autonomy over one's final days. This formulation (along with the detail added by Justice Breyer) gets at the core of what is being denied to terminally ill patients who are not on life support.

This framing of the right raises a point discussed earlier.[272] Rights are multi-dimensional. Hence, they can be broad in one respect and narrow in another. Defining the asserted right as a "right to die with dignity" is one example of this reality; in some senses, this framing is actually *narrower* than a "right to suicide," although in other senses it is broader.[273] This is instructive to the rights-definition exercise. Although it will generally be appropriate to perform some amount of generalization in equal dignity cases, it is also important to frame the right *correctly*. This may actually require being *specific* in certain ways. For example, here, the fact that the patients raising the claim are terminally ill is *central* to their asserted right. Including this feature in the framing of the right will, indeed, make the right more specific. But it must be included to capture the freedom they seek. In certain cases, like this one, generalizing the right in certain ways (e.g. as a "right to commit suicide") can turn out to be just as misguided as framing it specifically.

Is the "Right to Die with Dignity" Fundamental?

After defining the right—in this case, as a "right to die with dignity"—the next step is to determine whether that right is a fundamental liberty interest. The Court should consider, like in

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[271] *Glucksberg*, 521 U.S. at 790 (Breyer, J., concurring in the judgments).

[272] *See supra* note 224 and accompanying text.

[273] For example, a "right to suicide" would also apply to depressed, otherwise healthy 20-year-olds. A "right to die with dignity" would not. But on the other hand, the former right would not apply to those on death row who wish to have some say in their method of execution. The latter right well could.

standard Due Process cases, whether the right is "implicit in the concept of ordered liberty" and "deeply rooted" in our country's history. Four interlocking principles, grounded in tradition and precedent, indicate that such a right *is* fundamental.

First, a right to die with dignity comports with other fundamental liberty interests rooted in bodily autonomy. The Court's clearest statement of this aspect of liberty came in *Casey*. There, Justice Kennedy pointed out that abortion rights have "doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or bar its rejection."[274] The common thread, according to Kennedy, is the notion of "personal autonomy and bodily integrity."[275]

A right to die with dignity—whether applied to patients hooked up to respirators or those who are not—is an exercise of bodily autonomy. While perhaps not all medical choices are of fundamental importance, some unquestionably are. As Justice Kennedy famously wrote:

> [Matters] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[276]

When terminally ill patients make decisions about their medical care in their final days, those decisions are undeniably "choices central to personal dignity and autonomy." Such choices, the Court has ruled, "are central to the liberty protected by the Fourteenth Amendment." This is the first principle indicating that a right to die with dignity is fundamental.

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[274] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992).

[275] *Id.*

[276] *Id.* at 851.

Second, the right to die with dignity is an expression of a person's interest in avoiding pain in his final moments. This principle relates to a point that multiple justices touched on in their *Glucksberg* concurrences. Even in states that ban physician-assisted suicide, patients can still "obtain palliative care, even when doing so would hasten their deaths."[277] In other words, doctors *are permitted* to prescribe medication that hastens a patient's death—so long as the primary intent of the prescription is to limit pain. The American Medical Association even "unequivocally endorses" this practice, to protect patients from excruciating pain.[278] Although it may seem difficult to draw a meaningful moral distinction between prescribing dosages of pain medication high enough to hasten a patient's time of death (i.e. the *legal* practice of terminal sedation) and prescribing medication specifically designed to achieve that same result (i.e. the typically-*illegal* practice of physician-assisted suicide), some argue that there is a very important one—the principle of double effect.[279] Essentially, the double effect doctrine sets forth specific conditions under which a person may morally commit an action from which two effects will follow—one good and one bad.[280] Taking actions that produce bad effects can be morally permissible, so long as one does not *intend* those effects (even if one foresees them). This arguably justifies the use of extreme dosages of pain medication. The doctor, arguably, is acting with the *intent* of diminishing pain (the good effect)—even though he knows that his action will

[277] Washington v. Glucksberg, 521 U.S. 702, 738 (1997) (O'Connor, J., concurring).

[278] *Id.* at 751 (Stevens, J., concurring in the judgments).

[279] *See, e.g.*, NEIL M. GORSUCH, THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA § 4.3 (2006). *But see* Timothy E. Quill et al., *The Rule of Double Effect — A Critique of Its Role in End-of-Life Decision Making*, 337 NEW ENG. J. MED. 1768 (1997).

[280] *See* GORSUCH, *supra* note 279, at 54.

also hasten the patient's death (the bad effect). Whereas a doctor who prescribes lethal medication must, first and foremost, intend to hasten their patient's death.

The doctrine sets forth multiple conditions which must be met for an act to be morally permissible—one of which is that the good effect must be *at least* as important as the bad effect (to compensate for causing the bad effect).[281] The logical consequence of this argument (which is arguably accepted by all 50 states, since terminal sedation is legal in every state)[282] is that the *elimination of pain is of at least equal importance as the hastening of death*. Otherwise, the doctrine of double effect would not permit the practice, since the bad effect would outweigh the good. This reality underscores a more basic one—the prevention of severe pain at the end of life is incredibly important, and universally respected by state law.[283]

Another, disparate area of law further demonstrates the fundamental nature of the pain-avoidance principle. The Cruel and Unusual Punishments Clause, while it does not guarantee a painless death for death row inmates, *does* provide certain rights for death row inmates to choose less painful methods if they are available. Under the *Baze-Glossip* test, an inmate has the right to choose an alternative method of execution if it substantially reduces the risk of severe pain (and if two other conditions are met).[284] Although this right is not based in the Fourteenth Amendment, it points to the deep importance ascribed to the prevention of severe pain in one's final moments.

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[281] 4 THE CATHOLIC UNIVERSITY OF AMERICA, NEW CATHOLIC ENCYCLOPEDIA 880 (2d ed. 2002).

[282] Michael Ollove, *Palliative Sedation, an End-of-Life Practice That is Legal Everywhere*, STATELINE (July 2, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/02/palliative-sedation-an-endoflife-practice-that-is-legal-everywhere.

[283] "Universally respected," because every state allows this practice.

[284] *See* Bucklew v. Precythe, 139 S. Ct. 1112, 1121 (2019).

Third, the right to die with dignity is an outgrowth of the doctor-patient relationship, a dignified zone of decision-making. This principle also traces back to the Court's abortion rights precedents, but more pertinently to *Roe* than *Casey*. While *Casey* focused on abortion as an exercise of a *woman's* right to bodily autonomy, *Roe* had emphasized the role of the physician:

> [Our] decision vindicates the right of the physician to administer treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[285]

Although this aspect was downplayed in *Casey*, it remains good precedent—and supports the notion that the doctor-patient relationship represents an important decision-making nexus. Insofar as a mentally competent patient comes to care decisions with the counsel of their physician, there are important privacy concerns in coming to those decisions without state intervention. *Roe* validates those concerns. The right to die with dignity, likewise, draws meaning from them.

Fourth and finally, the right to die with dignity represents a patient's basic interest in controlling the manner of their imminent death. This principle draws on multiple sources already mentioned. The decision of how to face one's imminent death must be encompassed by what Justice Kennedy referred to as "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[286] One could argue—it fits that description even *more* obviously than the decision of whether or not to terminate a pregnancy. The *Cruzan* decision, of course, also supports this principle, as does the right of a prisoner on death row to choose her own method of execution.

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[285] Roe v. Wade, 410 U.S. 113, 165-66 (1973).

[286] Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

But perhaps most salient to this principle is not Supreme Court precedent—but state recognition. In 1994, Oregon became the first state to legalize physician-assisted suicide, with the passage of its Death with Dignity Act after a ballot initiative.[287] Although Oregon remained alone in legalization for nearly fifteen years, the last fifteen years have seen a wave of states join Oregon. Next came Washington in 2008.[288] Followed by Montana[289] (2009), Vermont[290] (2013), California[291] (2015), Colorado[292] (2016), Washington D.C.[293] (2016), Hawaii[294] (2018), Maine[295] (2019), and New Jersey[296] (2019). But what should be the Court's takeaway from this wave of state legalization? On the one hand, the Court might point to it as evidence that the legislative process is working exactly as it should! The Court ended its opinion in *Glucksberg* by writing:

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[287] *See* Timothy Egan, *Assisted Suicide Comes Full Circle, to Oregon*, N.Y. TIMES, Oct. 26, 1997.

[288] *See* William Yardley, *First Death for Washington Assisted-Suicide Law*, N.Y. TIMES, May 22, 2009.

[289] *See* Baxter v. State, 354 Mont. 234 (Mont. 2009). This legalization came via a state supreme court decision—not legislatively.

[290] *See* Paris Achen, *Permanent Version of Vt. Assisted Suicide Bill Signed*, USA TODAY (May 20, 2015, 6:30 PM), https://www.usatoday.com/story/news/nation/2015/05/20/permanent-version-of-vt-assisted-suicide-bill-signed/27675289/.

[291] *See* Lisa Aliferis, *California to Permit Medically Assisted Suicide as of June 9*, NPR (March 10, 2016, 6:58 PM), https://www.npr.org/sections/health-shots/2016/03/10/469970753/californias-law-on-medically-assisted-suicide-to-take-effect-june-9.

[292] *See* Paula Span, *A Deliberate End*, N.Y. TIMES, Jan. 17, 2017, at A1.

[293] *See* Fenit Nirappil, *A Year After D.C. Passed its Controversial Assisted Suicide Law, Not a Single Patient Has Used It*, WASH. POST (Apr. 10, 2018, 12:15 PM), https://www.washingtonpost.com/local/dc-politics/a-year-after-dc-passed-its-assisted-suicide-law-only-two-doctors-have-signed-up/2018/04/10/823cf7e2-39ca-11e8-9c0a-85d477d9a226_story.html.

[294] *See* Sophia Yan, *Medically Assisted Suicide Becomes Legal in Hawaii*, U.S. News (Apr. 15, 2018), https://www.usnews.com/news/news/articles/2018-04-05/hawaii-legalizes-medically-assisted-suicide.

[295] *See* Paula Span, *Making the Ultimate Decision*, N.Y. TIMES, July 9, 2019, at D1.

[296] *See id.*

> Throughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.[297]

Perhaps this remark was prescient—and now more than ever, the Court should leave the issue in the public forum where it belongs.

But on the other hand, this was also the case in *Obergefell*—where many states were in the process of taking legislative action to legalize gay marriage, and several already had. But there, the Court decided to rule anyways, at the behest of the dissenting justices.[298] In fact, the Court's opinion indicated that it was not ruling *in spite of* the legislative movement; the legislative action was further proof that it was time for the Court to recognize a right to gay marriage. Justice Kennedy wrote that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[299] In an equal dignity context, legislative momentum must take on a different significance. When states begin to grant groups fundamental rights that were once denied, the Court's response cannot be: *let's let this play out*. If fundamental liberties are truly at stake, then the country's "emerging recognition"[300] of deep inequity should only further drive the Court to declare it so. While many issues ought to be left to the state legislatures, the recognition of fundamental rights is not among

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[297] Washington v. Glucksberg, 521 U.S. 702, 735 (1997).

[298] *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2615 (2015) (Roberts, C.J., dissenting) (noting the legislative momentum of gay marriage and arguing that the decision should be left "in the hands of state voters"); *id.* at 2627 (Scalia, J., dissenting) ("Until the courts put a stop to it, public debate over same-sex marriage displayed American democracy at its best."); *id.* at 2637 (Thomas, J., dissenting) ("The majority apparently disregards the political process as a protection for liberty."); *id.* at 2640 (Alito, J., diseenting) ("Until the federal courts intervened, the American people were engaged in a debate about whether their States should recognize same-sex marriage. … The Constitution leaves that question to be decided by the people of each State.").

[299] *Id.* at 2603 (majority opinion).

[300] Lawrence v. Texas, 539 U.S. 558, 572 (2003).

them. States removing bans on physician-assisted suicide should provide the Court with further evidence of the fundamental importance of a right to die with dignity.

These four principles come together to establish why the right to die with dignity is fundamental. Examining each principle in turn shows—just as was the case in *Obergefell*—that these four principles "apply with equal force" to terminally ill patients who are not on life support. 1) Requesting lethal medication to hasten one's imminent death is an exercise of personal autonomy and bodily integrity. 2) It gives a person the opportunity to avoid pain in his final moments. 3) It is the outcome of the end-of-life decision-making process between a doctor and her patient. 4) It gives the dying person control over the manner of his death. The reasons the right is fundamental give no reason to exclude terminally ill, mentally competent patients. These patients deserve the same right that is granted to those on life-support mechanisms.

Conclusion

In many ways, the doctrine of equal dignity is the defining mark of the Court over the past twenty years. It is at the heart of its most high-profile cases. But the future of the doctrine is incredibly uncertain. Its primary author, Justice Kennedy, no longer sits on the Court. Now its future lies in the hands of a Court whose conservative majority never embraced the concept to begin with—and who perhaps now hold the power to render it obsolete.

The Court would do well, though, to see the doctrine of equal dignity for what it is, and continue to employ it as such. Dignity is not a standalone, catch-all, unenumerated right—a blank check to an activist Court. Instead, it is a recognition that the Court's traditional Due Process and Equal Protection frameworks have a blind spot at their intersection. Neither can adequately remedy baseless subordination.

I have argued in this thesis that laws banning physician-assisted suicide for the terminally ill constitute one such form of subordination. Although the Court's recent substantive due process precedents have signaled a willingness to depart from—and perhaps even overrule—*Glucksberg*, the new makeup of the Court might mean otherwise. If the doctrine of equal dignity is to follow the logical trajectory set for it in the gay rights cases, however, then *Glucksberg* should be overturned.

Substantive due process can invoke fear in those who dread "judicial activism" and the prospect of a Court untethered to the actual words in the Constitution, and there may be a tendency to react similarly to a notion of equal dignity. The Court should resist this temptation. Rightly understood, the doctrine of equal dignity can clarify the boundaries of due process inquiries. When only the Due Process Clause is implicated in a case, the Court should utilize the

standard framework laid out in *Glucksberg*, along with its rigid requirements. This approach keeps the requisite analysis grounded in history and tradition, rather than in abstract philosophy or the policy preferences of the members of the Court.

But when liberty and equality are both at stake—in cases involving subordination—the standard frameworks are an insufficient remedy. Although judicially-invented frameworks may not provide an adequate remedy, the Constitution promises one. The Due Process and Equal Protection clauses guarantee liberty *and* equality. Where these two guarantees meet, the Constitution promises equal dignity. Justice Kennedy, perhaps more than anyone else, recognized this, and beneath the soaring rhetoric in his majority opinions lies a comprehensive framework of equal dignity steeped in this recognition. The Court would do well to embrace it.

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