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OBERGEFELL AND THE DIGNITARY HARM OF IDENTITY-BASED MILITARY SERVICE EXCLUSION

Eric Merriam

Abstract

In *Obergefell v. Hodges*, the Supreme Court recognized the right of same-sex couples to be married.[1] In doing so, the Court remedied the demeaning exclusion of a historically disadvantaged minority group from a nationally cherished institution, noting the stigma and injury the exclusion caused. The sweeping language of the majority opinion in *Obergefell* and its focus on exclusionary harm suggested a new era of inclusion for lesbian, gay, bisexual, and transgender Americans.[2] This Article argues that the exclusion of transgender persons from military service constitutes the type of harm *Obergefell* and the Equal Protection Clause prohibit.

This Article first provides background on the pre-*Obergefell* landscape for constitutional challenges to military service exclusion. Second, the Article assesses *Obergefell*'s jurisprudential expansions of substantive due process and equal protection doctrines through its recognition of the exclusionary harm done to gay people by excluding them from the institution of marriage. The Article uses the Court's exclusionary harm analysis to assess the exclusion of a historically disadvantaged minority group from another nationally cherished institution: the Trump Administration's ban on transgender persons serving in the military. Third, the Article argues that *Obergefell* advanced a new equal protection

1. Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

2. While the opinion did not explicitly address transgender rights, the Court wrote, "[t]he Constitution promises liberty to all within its reach, [including the right] to define and express their identity." *Id.* at 2593. Some commentators observed this extended protections to transgender people. *See, e.g.*, Scott Skinner-Thompson, *How* Obergefell *Could Help Transgender Rights*, Slate (June 26, 2015), https://slate.com/human-interest/2015/06/obergefell-and-trans-rights-the-supreme-courts-endorsement-of-identity-expression-could-help-trans-activism.html [https://perma.cc/ZF3W-PVWP]; J. Courtney Sullivan, *What Marriage Equality Means for Transgender Rights*, N.Y. Times (July 16, 2015), https://www.nytimes.com/2015/07/16/opinion/what-marriage-equality-means-for-transgender-rights.html [https://perma.cc/23M3-T2NV].

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doctrine: the government may not demean a group by excluding it from an important positive right resulting in dignitary harm. The Article concludes that the transgender military ban constitutes the type of dignitary harm that *Obergefell* and the Equal Protection Clause prohibit.

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Introduction

The Supreme Court's pronouncement in *Obergefell v. Hodges* that the Constitution protects the "equal dignity [of same-sex couples] in the eyes of the law" suggested the arrival of constitutionally protected legal equality for non-heterosexual persons.[3] Some commentators and scholars argued that *Obergefell*'s protections also extended to transgender persons.[4] And yet, constitutional rights for members of the lesbian, gay, bisexual, and transgender community remain precarious.[5] This Article focuses on one such precarity—the exclusion of transgender people from military service, also known as the "transgender military ban"—and addresses *Obergefell*'s impact on claims that this exclusion violates their constitutional rights.

A case about marriage may seem like an odd place to concentrate a discussion of exclusion from the military, but the two issues are analogous.[6] Like the plaintiffs in *Obergefell*, opponents of the

3. *See Obergefell*, 135 S. Ct. at 2608.

4. *See, e.g.*, Note, *Equal Dignity—Heeding Its Call*, 132 Harv. L. Rev. 1323 (2019); Skinner-Thompson, *supra* note 2; Sullivan, *supra* note 2.

5. The Supreme Court has still failed to identify sexual orientation as a suspect classification, meaning any law that can be described as rationally related to accomplishing a legitimate state interest may discriminate on this basis. Moreover, though the Court has identified "gender" as a quasisuspect classification, it has yet to apply that to transgender persons' rights. *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

6. Given the similarities between the two issues, the near omission of *Obergefell* from early judicial opinions ruling in favor of plaintiffs challenging the transgender military ban is notable. It also calls into question this Article's claim that *Obergefell* both alters the analysis of discriminatory military service exclusion and other claims of exclusion. *See, e.g.*, Doe 1 v. Trump, 275 F. Supp. 3d 167, 207 (D.D.C. 2017) (no reference to *Obergefell* or to substantive due

transgender military ban are also challenging the exclusion of a historically disadvantaged minority group from a cherished institution. *Obergefell* also addressed two of the most common constitutional bases for challenging military service exclusion: due process and equal protection. Finally, the sweeping language of Justice Anthony Kennedy's majority opinion in *Obergefell* suggests the Court would consider similar due process and equal protection arguments outside the context of marriage. This Article examines *Obergefell*'s articulation of due process and equal protection rights, including the seeming convergence of these clauses in the Court's analysis, and assesses *Obergefell*'s applicability to the Trump Administration's transgender military ban.[7]

The Article proceeds in four parts. Part I discusses the pre-*Obergefell* constitutional landscape for military service eligibility challenges. This Part also describes how federal courts addressed exclusionary policies after *Lawrence v. Texas*, where the Court held a Texas statute prohibiting members of the same sex

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process, despite being pleaded by plaintiffs; "[T]he Court finds the framework applicable to the Due Process Clause's equal protection component most relevant."); Stone v. Trump, 280 F. Supp. 3d 747, 768 (D. Md. 2017) (no reference to *Obergefell*; "The Court finds that Plaintiffs are likely to succeed on their Equal Protection claim, as discussed below. Therefore, the Court finds it unnecessary to analyze separately the merits of the Substantive Due Process claim."); Karnoski v. Trump, No. C17-1297-MJP, 2017 WL 6311305, at *8 (W.D. Wash. Dec. 11, 2017) (cited *Obergefell* for proposition that fundamental interests include the right to make decisions concerning bodily integrity and self-definition central to an individual's identity; no discussion of *Obergefell*'s modification of *Glucksberg*); Stockman v. Trump, No. EDCV 17–1799 JGB (KKx), 2017 WL 9732572, at *15 (C.D. Cal. Dec. 22, 2017) (citing *Obergefell* for notion that stigma is not easily erased, but ruling only on plaintiffs' equal protection claim, not their substantive due process claim, in granting preliminary injunction).

7. On July 26, 2017, the President issued a statement via Twitter announcing:

> After consultation with my Generals and military experts, please be advised that the United States government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.

Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 5:55 AM), https://twitter.com/realDonaldTrump/status/890193981585444864 [https://perma.cc/FRP5-BTGH], Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472 [https://perma.cc/2B82-BETH], Donald J. Trump (@realDonaldTrump), Twitter (July 26, 2017, 6:08 AM), https://twitter.com/realDonaldTrump/status/890197095151546369 [https://perma.cc/5YF4-8XJ5] [hereinafter July 26, 2017 Twitter Announcement] (barring transgender persons from serving in the military). For more details regarding the ban, *see infra* Subpart III.A.

from engaging in certain intimate sexual acts was a violation of the due process clause.[8] Part I explains how *Obergefell* altered the substantive due process landscape by making it easier for courts to identify fundamental rights and increasing the level of scrutiny applied to violation of due process claims. Part II evaluates two scholarly interpretations of the link between due process and equal protection, before offering a new interpretation that, while *Obergefell* changed little in the traditional equal protection landscape, it established a new type of equal protection violation: selective exclusion from positive rights as a dignitary harm. Finally, Part III addresses *Obergefell*'s implications for military service eligibility challenges, analyzing how the new due process and equal protection landscapes could affect challenges to the transgender military ban. The Article concludes that the transgender military ban constitutes the type of dignitary harm that *Obergefell* and the Equal Protection Clause prohibit.

Before proceeding, I must acknowledge the first of two elephants in the room: military deference. When discussing constitutional rights in the context of national security and the military, courts often find the case nonjusticiable as a matter better left for the Executive or Legislative branches of government.[9] And where courts purport to decide national security or defense cases on the merits, they often defer to Congress, observing, constitutional rights are different in the context of the military.[10] Indeed, in one recent

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8. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

9. *See, e.g.*, Chappell v. Wallace, 462 U.S. 296, 305 (1983) ("courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have"); Rostker v. Goldberg, 453 U.S. 57, 70 (1981) ("judicial deference to [any] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged"); Parker v. Levy, 417 U.S. 733, 743 (1974) (military is "by necessity, a specialized society separate from civilian society"); Orloff v. Willoughby, 345 U.S. 83, 94 (1953) ("the judiciary [need] be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial Matters"); Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as Their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273 (1996).

10. *See e.g.*, Loving v. United States, 517 U.S. 748, 768 (1996) (noting that the Supreme Court gives Congress "the highest deference" in ordering military affairs); Weiss v. United States, 510 U.S. 163, 177 (1994) (quoting Solorio v. United States, 483 U.S. 435, 447–48 (1987)) (recognizing that the Supreme Court "[adheres] to [the] principle of deference in a variety of contexts [such as] where the constitutional rights of servicemen [are] implicated"); Cook v. Gates, 528 F.3d 42 (1st Cir. 2008) (applying in essence procedural deference to a claim of an infringement on a substantive due process right, finding Congress had fully considered "Don't Ask, Don't Tell" and thus the courts could not

case challenging the transgender ban, the D.C. Circuit Court of Appeals punted on the constitutional question and instead invoked military deference.[11] However, the nature, extent, and appropriateness of military deference has been examined elsewhere and is not the subject of this Article. Instead, the constitutional analysis in this Article addresses head-on the substantive constitutional issues presented by exclusion from the military.[12]

The second elephant is Justice Kennedy's departure from the Supreme Court. Because Justice Kennedy was replaced by Justice Brett Kavanaugh, a more ideologically conservative originalist, Kennedy's *Obergefell* approach to questions implicating the Due Process Clause may no longer garner a majority. Indeed, during his confirmation hearings, Justice Kavanaugh stated "all roads lead to the *Glucksberg* test as the test that the Supreme Court has settled on as the proper test" for determining unenumerated rights.[13] As demonstrated in this Article, and as has been noted elsewhere,[14]

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substitute their own judgment).

11. Jane Doe 2 v. Shanahan, 755 Fed App'x 19, 20 (D.C. Cir. 2019).

12. For a variety of reasons, I don't think this enterprise of temporarily ignoring deference is a fool's errand. First, the constitutional questions we address are of significance. Second, not all judges defer and not all military actions get deference, and when they don't, they have to do actual legal analysis. Third, judicial deference on military matters should treat congressional decisions differently than executive ones. Fourth, there's a fair argument that the circumstances normally raising military deference are not implicated in some modern exclusions (e.g., compare *Rostker* deference, which relied on fact that in "exercising the congressional authority to raise and support armies" Congress did not act "unthinkingly" or "reflexively and not for any considered reason," with the "Trump tweet" context of the transgender ban. *See Rostker*, 453 U.S. at 72. Finally, courts are not our only audience when considering constitutional questions.

13. Dahlia Lithwick & Mark Joseph Stern, *Brett Kavanaugh Is Cherry-Picking the Cases He Says Count as Precedent*, SLATE (Sept. 6, 2018), https://slate.com/news-and-politics/2018/09/kavanaugh-confirmation-hearings-on-abortion-and-same-sex-marriage-hes-cherry-picking-precedent.html [https://perma.cc/XLD8-4FW2]. The "*Glucksberg* test" for identifying whether the Due Process Clauses protect a right against infringement by the government involves two prongs. To be a "fundamental right," the asserted fundamental liberty interest must be "carefully described;" and that carefully described liberty interest must be objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice exist without them. Washington v. Glucksberg, 521 U.S. 702 (1997). The *Glucksberg* test is discussed in greater detail in Subpart I.B.1 below.

14. *See, e.g.*, Jamal Greene (@jamalgreene), TWITTER (Sep. 8, 2018, 8:46 PM), https://twitter.com/jamalgreene/status/1038589534483750913 [https://perma.cc/8G78-KW8G] (Greene noted "Kavanaugh also repeatedly said Glucksberg is the guiding opinion in substantive due process cases. Glucksberg is not mention[ed] in Lawrence (except Scalia's *dissent*) and is explicitly

Kavanaugh's characterization of *Glucksberg* as the "settled test" was wrong. Regardless, Kavanaugh's support for the *Glucksberg* test suggests at least five sitting Justices will avoid applying *Obergefell* to future substantive due process cases. Continued analysis of *Obergefell* is nonetheless important because, as of this Article's publication, its approach to substantive due process questions remains good law and it may again be the central issue in a future Supreme Court case.

I. The Pre-*Obergefell* Constitutional Landscape for Military Service Exclusion Challenges

A. *Pre-*Obergefell *Equal Protection and Military Exclusion*

Under equal protection jurisprudence, government actions that discriminate based on a suspect or quasisuspect classification are subjected to heightened scrutiny. These classifications are race, national origin, alienage, sex, and legitimacy of birth.[15] To withstand this heightened scrutiny, the government must provide a strong justification for its discriminatory act.[16] Notably, no court had applied equal protection analysis to the military's prior exclusion of women and racial minorities because the military stopped discriminating against these groups before those forms of discrimination were declared suspect or quasisuspect classifications by the Supreme Court and thus could be challenged as a violation of equal protection.[17]

Government actions that discriminate on the basis of other classifications, like age or disability, are scrutinized under rational basis review. This standard allows governments ample discretion to discriminate. Thus, the young, aged, or physically disabled could challenge as a violation of equal protection a policy that excludes them from military service, but such a challenge would fail because those classifications are not suspect and the government could provide a plausible reason for their exclusion.[18]

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disavowed in *Obergefell*").

15. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (strict scrutiny applied to suspect classification based on race); United States v. Virginia, 518 U.S. 515 (1996) (intermediate scrutiny applied to classification by gender); Trimble v. Gordon, 430 U.S. 762 (1977) (intermediate scrutiny applied to quasisuspect classification based on legitimacy); Graham v. Richardson, 403 U.S. 365 (1971) (strict scrutiny applied to classification based on alienage).

16. *Id.*

17. The author is unaware of any equal protection challenges to military policies regarding national origin or of any exclusionary policies based on legitimacy.

18. *See, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432

Equal protection challenges to exclusion from military service have routinely failed.[19] Modern challenges to military service exclusion have largely been in response to policies excluding people on the basis of their sexual orientation, specifically the policy of "Don't ask, don't tell" (DADT).[20] The Supreme Court has yet to hear a challenge to military exclusion on the basis of sexual identity. However, circuit courts, relying on Supreme Court decisions that did not apply heightened scrutiny to classifications based on sexual orientation, have applied only rational basis review.[21] For example, when the Ninth Circuit upheld a challenge to DADT on substantive due process grounds, it declined to consider the case on equal protection grounds because the relevant precedent, *Lawrence v. Texas*, did not rest on equal protection.[22] Not surprisingly, courts apply-

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(1985) (disability-based classification subject to rational basis review); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307 (1976) (age-based classifications subject to rational basis review).

19. Here I offer doctrinal reasons why equal protection challenges have generally failed. Of course, other explanations exist. The ever-present concept of military deference can explain failing to fully evaluate equal protection challenges. For example, the D.C. Circuit did precisely that in its review of one of the cases challenging the transgender ban. Jane Doe 2 v. Shanahan, 755 Fed App'x 19 (D.C. Cir. 2019). Another explanation may be judicial unwillingness to "open the litigation floodgates" by holding that some of the military's numerous exclusionary classifications violate equal protection. Additionally, though today we focus on disfavored groups challenging the military's exclusionary policies, before the modern era, there were few military service cases where the plaintiff was someone trying to gain entrance into the military; more frequently, cases were about people being forced (conscripted) into the military against their will.

20. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-169, 107 Stat. 1547 (1993) (codified as 10 U.S.C.A. § 654 (repealed 2010)) prohibited military service by persons who engaged in "homosexual conduct," which was defined to include same-sex sexual acts and stating one was homosexual. Though President William J. Clinton's campaign included a promise to end the ban on service by lesbian, gay, and bisexual persons, objection by conservative Republicans and Democrats in the Democrat-controlled 103rd Congress and military leaders forced a compromise under which lesbian, gay, and bisexual persons could serve, but could not engage in same sex sexual conduct or admit their sexual orientation. *New President Faces Gay-Soldiers Conflict*, CQ Almanac, 1993, at 454–62, http://library.cqpress.com/cqalmanac/cqal93-1106232 [https://perma.cc/QX5J-UCSB].

21. *See, e.g.*, Cook v. Gates, 528 F.3d 42, 61 (1st Cir. 2008) (relying on Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003), neither of which explicitly applied heightened scrutiny to equal protection challenges based on sexual orientation); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126, 1136 (9th Cir. 1997); Philips v. Perry, 106 F.3d 1420, 1425–26 (9th Cir. 1997) (rejecting an Equal Protection Clause challenge to DADT under rational basis review).

22. Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008). The court held

ing rational basis review have held that military effectiveness is a legitimate government interest and excluding people who allegedly compromise its effectiveness is rationally related to accomplishing that legitimate goal.

Equal protection challenges based on the emerging doctrine of animus—sometimes referred to as "rational basis review plus"—may receive more traction.[23] As I have argued elsewhere, exclusions based on unit cohesion constitute impermissible animus.[24] And other indicators of animus, such as the circumstances surrounding President Trump's initial announcement of the transgender military ban, may cause courts to scrutinize more carefully the exclusions that appear to be motivated by a desire to harm the excluded group.[25] But in the past, federal courts have failed to find

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that when the government attempts to intrude upon the personal and private lives of lesbian, gay, and bisexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest. Importantly, the court did not hold that the personal and private lives of lesbian, gay, and bisexuals constituted a "fundamental right," noting that *Lawrence* had not so proclaimed, and had struck down the Texas criminal prohibition on same sex sodomy as violative of the Due Process Clause not with strict scrutiny, but with something akin to intermediate scrutiny.

23. Animus is the emerging equal protection doctrine through which the Court has asserted that discrimination based on dislike of a disfavored minority violates the Equal Protection Clause. As noted elsewhere, the Court's animus jurisprudence is yet incomplete. *See, e.g.*, Eric Merriam, *Fire, Aim, Ready! Militarizing Animus: "Unit Cohesion" and the Transgender Ban*, 123 Penn St. Dick. L. Rev. 57, 64 (2018). However, the Court has to this point identified four types of animus: animus based on private stereotype and prejudice (*see, e.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984); *Cleburne*, 473 U.S. at 432); animus demonstrated by legislative desire to harm (*see, e.g.*, U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)); animus demonstrated by structure (*see, e.g.*, *Romer*, 517 U.S. at 620); and dignitary injury as impermissible animus (*see, e.g.*, U.S. v. Windsor, 570 U.S. 744 (2013)).

24. "Unit cohesion" generally refers to a military group's mutual reinforcement of positive behaviors and attitudes toward group membership and commitment to a common goal and is widely considered an essential element of military effectiveness. Unit cohesion has been offered by some as a basis to exclude those whose presence might be considered detrimental to cohesion and thus military effectiveness. *See, e.g.*, Merriam, *supra* note 23, at 57.

25. In fact, one district court addressing the transgender military ban at least entertained the possibility that animus underlies the ban. Doe 1 v. Trump, 275 F. Supp. 3d 167, 211 (D.D.C. 2017) (citing *Moreno*, 413 U.S. at 528 and *Windsor*, 570 U.S. at 744 for the proposition that "'a bare . . . desire to harm a politically unpopular group cannot justify disparate treatment of that group," but not engaging a full analysis to determine whether such a bare desire to harm existed in the transgender ban's development).

that even so-called "rational basis review plus" bars military discrimination. In *Cook v. Gates*, plaintiffs asserted that DADT was based on irrational animus, but the court found that unit cohesion and resulting military effectiveness were a "non-animus-based explanation" for DADT.[26] Indeed, part of the "pre-*Obergefell*" equal protection landscape is a general apprehensiveness by district courts to rely on animus doctrine.[27]

In short, no Supreme Court precedent exists for the proposition that exclusion from military service eligibility violates the Equal Protection Clause, and appellate courts have largely rejected such challenges.[28]

B. *Pre-*Obergefell *Substantive Due Process and Military Service Eligibility*

1. Pre-*Obergefell* Substantive Due Process Generally

The Due Process Clauses of the Fifth and Fourteenth Amendments—which say that the government cannot deprive a person of life, liberty, or property without due process of law—provide not only a right to procedure, but also imply there are some rights so fundamental that the government cannot take them away "at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[29] Some liberty interests are so fundamental that the government's infringement on them warrants heightened scrutiny. Cases relying on substantive due process analysis have been exceedingly controversial,

26. *Cook*, 528 F.3d at 61–62.

27. District courts have long been wary of relying on animus, and have continued to be so, even in same-sex marriage cases after Windsor. *See, e.g.*, Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 Sup. Ct. Rev. 183, 184 n.3 (2013); Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1207 (D. Utah 2013) ("[T]he Supreme Court has not yet delineated the contours of such an approach . . . ."); De Leon v. Perry, 975 F. Supp. 2d 632 (W.D. Tex. 2014); Lee v. Orr, No. 13-cv-8719, 2014 WL 683680, at *1 (N.D. Ill. Feb. 21, 2014); Bourke v. Beshear, 996 F. Supp. 2d 542, 552 (W.D. Ky. 2014) ("Absent a clear showing of animus, however, the Court must still search for any rational relation to a legitimate government purpose"; the court struck down state's nonrecognition of valid same-sex marriages from out of state as lacking a rational basis); Bostic v. Rainey, 970 F. Supp. 2d 456, 460 (E.D. Va. 2014) (asserting that bans on same-sex marriage were "rooted in unlawful prejudice" but concluding that the laws lacked a rational basis); Bishop v. United States, 962 F. Supp. 2d 1252, 1278–79, 1296 (N.D. Okla. 2014); Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 995 (S.D. Ohio 2013).

28. *See, e.g.*, Richenberg v. Perry, 97 F.3d 256, 260–61 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996).

29. Reno v. Flores, 507 U.S. 292, 302 (1993).

with some ranking among the most reviled and debated Supreme Court opinions.[30]

The central difficulty is that because the fundamental rights implied by the Due Process Clauses are not explicitly identified in the Constitution, the judicial task is to identify which rights are, in fact, fundamental and thus entitled to something more than rational basis review. The Supreme Court crystallized the test for determining whether a right is fundamental in *Washington v. Glucksberg*.[31] In finding no fundamental right to physician-assisted suicide,[32] the majority articulated what has become later known as the "*Glucksberg* Test" for identifying fundamental rights:

> (1) The asserted fundamental liberty interest must be "carefully described;" and
> (2) That carefully described liberty interest must be objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice exist without them.[33]

This test set a high bar for recognizing fundamental rights. As opponents have long decried, this test is inherently conservative, protecting only longstanding interests, thereby curtailing the identification of new fundamental rights.

Before *Obergefell*, there was some debate among the justices regarding whether the right should be "carefully described" or "specifically described," or even perhaps "most specifically described."[34] The *Glucksberg* majority seems to have chosen the word "carefully" in order to secure the signatures of a majority of Justices. *Glucksberg* was a unanimous judgment, but only five justices joined the opinion of the Court. Justices Kennedy and O'Connor suggested they disagreed with describing a right at its most specific or least abstract, as Justice Scalia had advocated in *Michael H. v. Gerald D*.[35]

30. *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393 (1857); Lochner v. New York, 198 U.S. 45 (1905); Roe v. Wade, 410 U.S. 113 (1973).

31. Washington v. Glucksberg, 521 U.S. 702 (1997).

32. *Id.*

33. *Id.*

34. *See, e.g.*, Peter Nicolas, *Fundamental Rights in a Post-*Obergefell *World*, 27 Yale J.L. & Feminism 331 (2016).

35. For example, Justice Scalia had stated that courts should frame a right at "the most specific level at which . . . the asserted right can be identified," but Justices Kennedy and O'Connor did not join that portion of the opinion. Michael H. v. Gerald D., 491 U.S. 110, 127 n.6 (1989). In fact, they wrote separately to note that "most specific level" was inconsistent with prior decisions in earlier cases, such as Loving v. Virginia, 388 U.S. 1 (1967) ("right to marry," not "right to marry someone of a different race") and Turner v. Safley, 482 U.S. 78 (1987). Moreover, after *Michael H.*, Justices Kennedy and O'Connor again noted that

Under the *Glucksberg* test, the level of abstraction at which a right was described is almost always outcome-determinative. For example, if the right at issue is the "right to marry," the answer to whether that right is deeply rooted in the Nation's history will be much different than if the right at issue is "the right to marry someone of the same sex." In *Glucksberg* itself, the Court described the right at issue as "a right to commit suicide which itself includes a right to assistance in doing so" rather than more abstract alternatives, such as the "right to die," "right to bodily integrity," or "right to individual autonomy."[36]

Prior to *Obergefell*, if the government action infringed on a fundamental right, the inquiry was not over; the government's infringement was then subjected to some form of heightened scrutiny. This is often referred to as strict scrutiny, though the Supreme Court has repeatedly identified protected liberty interests and then applied scrutiny that appeared to be less than strict scrutiny and more than rational basis review.[37] Often, this has involved "balancing" infringements on liberty against asserted government interests.

2. Pre-*Obergefell* Substantive Due Process and Military Service Eligibility

The Supreme Court has never found that military service eligibility exclusions infringe on a fundamental right. Before *Obergefell*, federal appeals courts routinely denied due process

"most specific level" did not accurately describe the Court's jurisprudence. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992).

36. *Glucksberg*, 521 U.S. at 72.

37. *See, e.g.*, Sell v. United States, 539 U.S. 166, 179 (2003) (Court recognized a "constitutionally protected liberty interest [for a criminal defendant] in avoiding the unwanted administration of antipsychotic drugs" and then applied a standard of review lower than strict scrutiny by asking whether administering the drugs was "necessary significantly to further important governmental trial-related interests.") (citations omitted); *Casey*, 505 U.S. at 877 (Court reaffirmed a woman's fundamental right to choose to have an abortion but applied the "undue burden" test which balanced the state's legitimate interest in potential human life against the extent of the imposition on the woman's liberty interest); Troxel v. Granville, 530 U.S. 57, 67–75 (2000) (Court invalidated law based on due process interest in parental autonomy without applying rational basis or strict scrutiny); Riggins v. Nevada, 504 U.S. 127, 135–36 (1992) (balancing an individual's interest in refusing psychotropic drugs against the government's interest in trying a competent criminal defendant for a violent crime); Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278–79 (1990) (balancing "protected liberty interest" in refusing unwanted medical treatment against the government interest in promoting life). Even *Lawrence* arguably failed to apply strict scrutiny; in invalidating the convictions, the Court determined that there was no "legitimate" state interest that was adequate to "justify" the intrusion on liberty. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

challenges against military service exclusion.[38] The most recent and relevant litigation regarding exclusion from military service was in the context of DADT. DADT was upheld repeatedly by federal courts, which, save for one notable exception, found no fundamental right was implicated, and thus applied rational basis review to the due process challenge.[39]

Even after *Lawrence*, where the Supreme Court articulated a right to intimate association between consenting adults in the privacy of one's own home, DADT withstood a due process challenge.[40] The Second Circuit's reasoning in *Cook v. Gates* typifies the pre-*Obergefell* understanding of substantive due process that no fundamental right was implicated by military service exclusion.[41] There, the plaintiffs argued DADT was unconstitutional because *Lawrence* held that the Due Process Clause establishes protection for "certain decisions regarding sexual conduct [that] extend . . . beyond the martial relationship."[42] The Second Circuit acknowledged that *Lawrence* had recognized a protected liberty interest for adults to engage in consensual sexual intimacy in the home, and further that the *Lawrence* Court had applied some form of heightened scrutiny to Texas' infringement on that right.[43] Before ultimately dispensing with the challenge to DADT by giving deference to Congress's constitutional role in raising and supporting armies, the *Cook* Court recognized that the government's interest in preserving the military's effectiveness as a fighting force was "an exceedingly weighty interest and one that unquestionably surpasses the government interest that was at stake in *Lawrence*."[44] However, the *Cook* Court did not engage in the balancing test it had just divined from *Lawrence*. Rather, the Court asserted that "where Congress has articulated a substantial government interest

38. *See, e.g.*, Richenberg v. Perry, 97 F.3d 256, 260–61 (8th Cir. 1996); Thomasson v. Perry, 80 F.3d 915, 928 (4th Cir. 1996); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989); and Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980).

39. *Id.*

40. Cook v. Gates, 528 F.3d 42 (1st Cir. 2008); National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-169, 107 Stat 1547 (1993) (codified as 10 U.S.C.A. § 654 (repealed 2010)).

41. *Cook*, 528 F.3d at 42.

42. *Id.*

43. *Id.* at 56 (finding that *Lawrence* was "another in this line of Supreme Court authority that identifies a protected liberty interest and then applies a standard of review that lies between strict scrutiny and rational basis"). The court characterized *Lawrence's* heightened scrutiny as a balancing test that weighed the strength of the state's asserted interest in prohibiting immoral conduct against the degree of intrusion into the petitioners' private sexual life.

44. *Id.* at 60.

for a law, and where the challenges in question implicate that interest, judicial intrusion is simply not warranted."[45] This analysis reversed traditional due process analysis, which would first identify the existence of a fundamental right before determining whether the government's rationale for infringement of it was sufficient.

In *Witt v. Dep't of the Air Force*, the Ninth Circuit upheld a servicemember's challenge to DADT on substantive due process grounds.[46] Relying on *Lawrence*, the court applied heightened scrutiny but did not address why exclusion from military service was analogous to other established interests and infringements warranting strict scrutiny.[47] Such government intrusions have typically involved not only denial of a privilege like military service, but criminal sanctions, often with the potential to result in deprivation of actual physical liberty.[48] Moreover, the *Witt* court concluded that heightened scrutiny should be an as-applied analysis, rather than facial. In other words, whether DADT could survive heightened scrutiny was not based on the government's "hypothetical, posthoc rationalization in general" of the policy, but instead on whether a justification existed for the application of the policy as applied to the plaintiff.[49]

Planitiffs challenging military service exclusion as violating substantive due process have generally argued that the exclusion infringed on a fundamental right. However, they have articulated that right as something other than a positive "right to serve in the military." That is, plaintiffs have generally asserted the fundamental right to be free from government infringement on liberty—a "negative right" to be left alone, rather than a positive right to military service. For example, challenges to DADT argued the military's discriminatory service eligibility rules infringed on the right to engage in consensual sexual conduct in the privacy of one's home.[50]

45. *Id.*

46. Witt v. Dep't of Air Force, 527 F.3d 806 (9th Cir. 2008).

47. *Id. at* 817. The *Witt* court also cited another Supreme Court opinion for this heightened scrutiny balancing test. *See* Sell v. United States, 539 U.S. 166, 179 (2003) (forcible administration of antipsychotic medication on prisoners).

48. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Griswold v. Connecticut, 381 U.S. 479 (1965); Meyer v. Nebraska, 262 U.S. 390 (1923).

49. *Witt*, 527 F.3d at 819 (2008). The Court remanded to the district court to develop the record regarding this as-applied analysis.

50. *See, e.g.*, *id.* at 813.

II. What did *Obergefell* Do?

In short, *Obergefell* opened up the possibility that the Supreme Court would again articulate a new fundamental right.

A. *A New (Old?) Approach to Substantive Due Process and Fundamental Rights*

1. *Obergefell*'s Post-Glucksberg Approach to Identifying Fundamental Rights

The Court's opinion in *Obergefell* suggests the possibility of identifying new fundamental rights. Indeed, Justice Kennedy's approach to fundamental rights returns the Court to a common law approach, where judges "exercise reasoned judgment" rather than mechanically applying formulas.[51] The dissenters in *Obergefell* strenuously objected to Kennedy's common law methodology,[52] though numerous scholars have come to its defense.[53] Kennedy did not claim to abandon *Glucksberg* altogether, but instead suggested that *Glucksberg* was only one way to identify fundamental rights. In *Obergefell*, the Court unlocked both prongs of the *Glucksberg*

51. Justice Kennedy places this admonition at the beginning of his substantive explanation of due process:

> The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." Poe v. Ullman, *367* U.S. *497*, *542* (*1961*) (Harlan, J., dissenting) (parallel citations omitted). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must *accord* them its respect. That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements.

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

52. *See, e.g.*, *id.* at 2619–20 (Roberts, C.J., dissenting) ("It is revealing that the majority's position requires it to effectively overrule Glucksberg"). Some scholars had suggested that Justice Kennedy had already modified *Glucksberg* in *Lawrence v. Texas*. *Cf.*, Nicolas, *Fundamental Rights*, *supra* note 34 (arguing the *Obergefell* majority's analysis was consistent with *Glucksberg* and other precedent). In *Lawrence*, Justice Kennedy wrote in the majority opinion that the liberty interest protected by the Due Process Clause did not permit criminalization of adult consensual "intimate conduct." Lawrence v. Texas, 539 U.S. 558, 567 (2003). The question remained whether the Court's approach in *Lawrence* had modified the *Glucksberg* test. As Justice Scalia's dissent in *Lawrence* noted, the *Lawrence* majority did not overrule *Glucksberg* explicitly, so the only question was whether its approach implicitly overruled *Glucksberg*. *Id.* at 593 (Scalia, J. dissenting).

53. *See, e.g.*, Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 Harv. L. Rev. 147, 169–72 (2015); Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 20 Harv. L. Rev. F. 16, 17 (2015).

test.[54] In addressing the first prong, the *Obergefell* majority elucidated the "careful description" requirement of identifying the right at issue, clarifying that a right need not be identified at its most specific or lowest level of abstraction.[55] As explained above, the level of generality at which the Court articulates the right at issue can be outcome determinative for a substantive due process challenge.[56]

In discussing how to articulate the right at issue in a due process case, the *Obergefell* majority also observed that "if rights were defined by those 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." In other words, an exclusionary articulation of the right at issue necessarily remains exclusionary. The *Obergefell* majority thus argued that the correct articulation of the right at issue to be the "right to marry," not the more specific "right to marry someone of the same sex."[57] *Obergefell* stands for the proposition that the right at issue in substantive due process claims must be articulated more generally, such that the articulation does not necessarily include the discrimination at issue.

What remains unclear, however, is what other factors dictate the level of generality at which a right should be articulated. While *Obergefell* does not provide explicit guidance, we can look at how the Court describes rights to infer how they should be articulated. For example, the Court referred repeatedly to a "right to marry," which suggests a more general articulation of the implicated right.

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54. *Obergefell*, 135 S. Ct. at 2602 (citing Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) ("(1) The asserted fundamental liberty interest must be 'carefully described;' and (2) That carefully described liberty interest must be objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed.").

55. In *Obergefell*, the majority explained that, although the *Glucksberg* approach for defining rights in a "most circumscribed manner . . . may have been appropriate for the asserted right" of physician-assisted suicide, "it is inconsistent with the approach the Court has taken with other fundamental rights, including marriage and intimacy." *Obergefell*, 135 S. Ct. at 2602. This was no real departure from Justice Kennedy's prior jurisprudence regarding articulating the right at issue in due process cases. *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110, 132 (1989) ("[o]n occasion the Court has characterized relevant traditions protecting asserted rights at levels of generality that might not be the 'most specific level' available") (O'Connor, J., concurring in part (an opinion in which Kennedy, J., joined); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 847 (1992) (opinion of O'Connor, Kennedy, Souter, JJ.).

56. *See, e.g.*, Nicolas, *supra* note 34, at 337 (citing Latta v. Otter, 771 F.3d 456, 477 (9th Cir. 2014) (Reinhardt, J., concurring); Bostic v. Schaever, 760 F.3d 352, 389–90 (4th Cir. 2014) (Niemeyer, J., dissenting)).

57. *Obergefell*, 135 S. Ct. at 2602.

However, the Court also observed that the Due Process Clause protects "certain specific rights that allow persons . . . to define and express their identity" or "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs," suggesting a more specific articulation of the implicated right.[58] Thus, the Court itself does not provide a clear model for how to define the right.

The *Obergefell* majority also reframed *Glucksberg*'s second prong, the requirement to find fundamental rights only in "tradition and history." The *Obergefell* majority stated that "liberty" is evolutive and that "rights come not from ancient sources alone" but also "rise . . . from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[59] In other words, history and tradition do not establish the "outer boundaries" of potential fundamental rights, so new fundamental rights may be discovered.[60]

The *Obergefell* majority did not dismiss history altogether. The opinion elaborated four "principles and traditions" girding marriage's status as a fundamental right, relying heavily on history.[61] However, discussion of the four principles and traditions included a more sophisticated historical analysis that went beyond the originalist approach of asking "did our forefathers think one had a liberty to do X?" The majority acknowledged the historical importance of marriage and its evolution, providing an almost poetic accounting of why society and government attach such significance to marriage today.[62]

The *Obergefell* majority paid little attention to the latter part of *Glucksberg*'s second prong, which requires that to be fundamental, the asserted right must be "implicit in the concept of ordered liberty such that neither liberty nor justice exist in their absence." The *Obergefell* majority referred once to substantive due process rights as "implicit in liberty," but that was in the context of contrasting the Due Process Clause and the Equal Protection Clause. Justice Kennedy did not explain what the "concept of ordered liberty" means or how it applied to the asserted right to marry. This

58. Yoshino has offered the plausible expectation that removing the "careful description" requirement, Justice Kennedy moved the Court away from a jurisprudence focused on detailed unenumerated rights and toward a broader "enumerated right of liberty." Yoshino, *supra* note 53.

59. *Obergefell*, 135 S. Ct. at 2602.

60. *Id.*

61. *Id.* at 2599–602.

62. *Id.*

omission might suggest that this requirement has disappeared, though it perhaps remains a consideration.

The effect of loosening both prongs of the *Glucksberg* test in tandem is profound. If only the careful description requirement had been loosened, history still would have been a constraint in recognizing new fundamental rights.[63] And if only the tradition and history requirement had been loosened, finding evidence of any tradition supporting a right described at its most specific would still be difficult.[64] By loosening both prongs simultaneously, the *Obergefell* majority freed courts to look to the universe of principles and traditions that define which rights are fundamental.

2. *Obergefell* Suggested a New (Old) Form of Scrutiny When Protected Liberty Interests are Infringed

When government action infringes on a protected liberty, courts typically apply some form of heightened scrutiny.[65] Which level of scrutiny applies is not always clear or consistent. As discussed further below, the *Obergefell* majority did not resolve this issue, though it suggested a balancing test that requires judges to "assess the relative 'weights' or dignities of the contending interests"[66] and determine whether the government has provided "a sufficient justification for excluding the relevant class from the right."[67] Importantly, *Obergefell* provided no example of how this

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63. For instance, an abstractly drawn right would still be subject to whether such a right had been historically protected.

64. Indeed, in cases where new rights are asserted, and even more in cases where new groups seek inclusion in old rights, specific articulation of the right would nearly always mean lack of tradition's support for the right.

65. *See, e.g.*, Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 902, 904 (1986) (acknowledging that "[w]henever a state law infringes a constitutionally protected right, we [the court] undertake[s] intensified equal protection scrutiny of that law"); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (affirming that "where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized . . . .").

66. Washington v. Glucksberg, 521 U.S. 702, 766–67 (1997) (Souter, J., concurring in judgment). Justice Souter cited Harlan's *Poe* dissent to observe that "the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual." *Id.* at 762 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). Importantly, the Court cited the Souter and Breyer concurrences in *Glucksberg*, in which they state that the appropriate "test" is a "sufficient justification" balancing approach. *Obergefell*, 135 S. Ct. at 2602 (citing *Glucksberg*, 521 U.S. at 752–73, 789–92 (Souter, J., concurring in judgment) (Breyer, J., concurring in judgments)).

67. *Obergefell*, 135 S. Ct. at 2602.

"sufficient justification balancing" is to be conducted.[68] Moreover, it is unclear what level of liberty interest triggers the requirement to conduct a balancing analysis, rather than simply applying rational basis review.[69]

After *Lawrence*, two federal appellate courts addressing constitutional challenges to DADT noted that the liberty interest in *Lawrence* was not characterized as fundamental and yet received some level of heightened scrutiny.[70] *Obergefell* did not answer whether liberty interests that are "important," but not "fundamental" should receive some level of heightened scrutiny.[71]

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68. Without engaging explicitly in any balancing of contending interests, the majority characterized the right to marriage as fundamental and concluded that same-sex marriage bans violated the Due Process Clause. *Id.*

69. The *Obergefell* majority repeatedly mentioned the fundamentality of the right to marriage, which may suggest that a liberty interest is specially protected by substantive due process only when it is fundamental. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2597–99 ("the fundamental liberties protected by [the Due Process] Clause . . . extend to certain personal choices central to individual dignity and autonomy"; "the identification and protection of fundamental rights is an enduring part of the judicial duty"; courts must "exercise reasonable judgment in identifying interests of the person so fundamental that the State must *accord* them its respect;" the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples"). Supporters of this view can draw additional support from the fact that the majority cited Justice Harlan's *Poe* dissent, in which he proposed that the Due Process Clause requires courts to "exercise reasoned judgment in identifying interest of the person so fundamental that the State must *accord* them its respect." *Obergefell*, 135 S. Ct. at 2598 (citing *Poe*, 367 U.S. at 542) (Harlan, J., dissenting)). On the other hand, the Supreme Court has on numerous occasions applied what appeared to be heightened scrutiny to infringements on liberty interests that were not characterized as "fundamental." *See, e.g.*, Washington v. Harper, 494 U.S. 210, 221–23, 228 (1990) (a state prisoner "possesses *a significant* liberty interest" under the Due Process Clause to avoid the unwanted administration of certain drugs) (emphasis added); Parham v. J.R., 442 U.S. 584, 600 (1979) (describing a child's "*substantial* liberty interest" in not being confined unnecessarily for medical treatment) (emphasis added); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (Court described the interest as a "*protected* liberty") (emphasis added); Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 278 (1990) (describing the interest as a "*constitutionally protected liberty* interest") (emphasis added); Youngberg v. Romeo, 457 U.S. 307, 315–17 (1982).

70. *See, e.g.*, Cook v. Gates, 528 F.3d 42, 53 (1st Cir. 2008) ("It is . . . clear that the Supreme Court does not always use the word 'fundamental' when it wishes to identify an interest protected by substantive due process."); Witt v. Dep't of Air Force, 527 F.3d 806, 814–16 (9th Cir. 2008).

71. One explanation for this omission is that the obvious fundamentality of the right to marriage meant the question of whether heightened scrutiny should apply to liberties that are not fundamental was not before the Court.

B. *The Link Between Due Process and Equal Protection*

Though *Obergefell* has been widely interpreted as resting primarily on substantive due process, the decision also affected equal protection jurisprudence.[72] The majority referred to the "profound connection" between the Equal Protection and Due Process Clauses, writing, "[the] interrelation of the two principles furthers our understanding of what freedom is and must become." The Court thereby suggested that constitutional questions invoking both clauses may have different answers than those implicating only one.

While *Obergefell* is not a traditional equal protection analysis, equal protection plays a crucial role in the opinion. For example, consider the majority's discussion of equality and exclusion in the due process analysis:

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.[73]

The opinion further states:

> [W]hen sincere, personal opposition 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.[74]

That Justice Kennedy planted these seeds of equality in the due process section of his garden illustrates what may be *Obergefell*'s most salient rights-protecting feature: the link between the Equal Protection and Due Process Clauses in protecting against government-imposed dignitary harm.

Importantly, the majority began its discussion of equal protection by noting the relationship between due process and equal protection:

> 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. [T]he two

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72. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2635–37 (Thomas, J., dissenting) (arguing majority erred in using substantive due process to guarantee a positive right); Peter Nicolas, *Obergefell's Squandered Potential*, 6 Calif. L. Rev. Cir. 137, 142–44 (2015).

73. *Obergefell*, 135 S. Ct. at 2601–02.

74. *Id.* at 2602.

> 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.[75]

The majority's conclusion is that the two clauses converge to further our understanding of freedom, which is a principle that evokes the liberty of the Due Process Clause. But in the context of *Obergefell*, freedom is perhaps better understood as deriving from both the Due Process and Equal Protection Clauses, particularly when the freedom at issue is protection against government-imposed dignitary harm.

The *Obergefell* majority quoted *Loving v. Virginia* for the idea that the equal protection violation of anti-miscegenation statutes informed the due process violation:

With this link to equal protection, the Court proceeded to hold that the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.[76]

Here, the Court seems to assert that inequality can help identify important liberties. When government unequally provides a right, and that inequality serves to demean or stigmatize the excluded group, the asserted liberty interest can be viewed as fundamental for substantive due process analysis.[77] In other words, a right must be fundamental if exclusion from it really hurts.

Of course, the idea that equal protection and due process are related did not arrive with *Obergefell*. First, as the majority observed, previous cases had in some way acknowledged the

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75. *Id.* at 2603.

76. *Id.* (quoting *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

77. The *Obergefell* majority cited another marriage in which the equal protection violation was selective exclusion from a fundamental right. In Zablocki v. Redhail, 434 U.S. 374, 383 (1978), where fathers who were behind on child support were barred from marrying without judicial approval, the majority rested its analysis on the Equal Protection Clause. The *Obergefell* Court summarized *Zablocki*, noting "The equal protection analysis depended in central part on the Court's holding that the law burdened a right 'of fundamental importance.'" It was the essential nature of the marriage right, discussed at length in *Zablocki*, that made apparent the law's "incompatibility with requirements of equality." *Obergefell*, 135 S. Ct. at 2603 (quoting and citing *Zablocki*, 434 U.S. at 383–87).

relationship between the two.[78] Scholars, too, had explored the interrelationship long before *Obergefell*.[79] Kenji Yoshino noted that even before *Obergefell*, Justice Kennedy had illustrated the relationship between the Equal Protection and Due Process Clauses in *Lawrence*.[80] Specifically, the Court's decision to strike down not only the sex-specific antisodomy law in *Lawrence*, but to simultaneously overrule *Bowers v. Hardwick*,[81] in which the Court had upheld Georgia's prohibition of all sodomy, demonstrated that the issue in *Lawrence* was not just equality.

Following *Obergefell*, scholars have attempted to explain the relationship between due process and equal protection in the opinion. We now turn to two such explanations: (1) Kenji Yoshino's antisubordination liberty; and (2) Peter Nicolas's positive-negative rights distinction.[82]

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78. *Obergefell* 135 S. Ct. at 2603 (citing *Loving*, 388 U.S. at 12; *Zablocki*, 434 U.S. at 383; M.L.B. v. S.L.J., 519 U.S. 102, 119–24 (1996) (acknowledging that sometimes "due process and equal protection principles converge"); Eisenstadt v. Baird, 405 U.S. 438, 446–54 (1972); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 538–43 (1942); Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

79. *See, e.g.*, Pamela S. Karlan, *Equal Protection, Due Process, and The Stereoscopic Fourteenth Amendment*, 33 McGeorge L. Rev. 473, 492 (2002) (observing that a stereoscopic understanding of the two clauses, where understandings of liberty and equality inform each other, lead to "fuller and more just answers" to constitutional questions); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 Mich. L. Rev. 981, 985 (1979) (arguing the Court had tangled the Equal Protection and Due Process Clauses in a "thick, almost impenetrable, knot," because the Court had uncritically substituted one for the other, blurring liberty and equality as constitutional ideals); Nicolas, *supra* note 34, at 348–49 (noting *Skinner* found a fundamental right to procreate in the Equal Protection Clause, likely in an attempt to distance itself from *Lochner*).

80. Yoshino, *supra* note 53 (explaining that the law in *Lawrence* could have been considered on equal protection grounds alone, but the law in *Bowers*, which was a sex-neutral antisodomy provision, could not).

81. 478 U.S. 186 (1986).

82. A third "theory" has received some attention. In a brief essay published shortly after *Obergefell*, Larry Tribe acknowledged that the "anti-subordination principle" played an important role in *Obergefell's* "doctrinal achievement," but he saw *Obergefell's* meaning in "more expansive terms." Tribe, *supra* note 53. Tribe argued *Obergefell's* "chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity." Unfortunately, though Tribe celebrated the arrival of equal dignity, he did little to describe what equal dignity doctrine is and how it works. Moreover, discussion of a constitutional doctrine of equal dignity does not appear anywhere in the *Obergefell* majority opinion. Justice Kennedy employs the phrase "equal dignity" three times and never to announce the constitutional doctrine Tribe suggests. Accordingly, I do not consider it further here.

1. Antisubordination Liberty

Kenji Yoshino has argued that *Obergefell* differed from *Lawrence* in that it invoked both due process and equal protection, rather than solely due process. He thus views *Obergefell* as the culmination of a doctrine of "anti-subordination liberty."[83] Under this theory, combining due process and equal protection rights means that courts analyzing the existence of a fundamental right should consider the effect on subordinated groups if the liberty were granted or denied to all.[84] On the question of same-sex marriage, Yoshino observes that *Obergefell*'s due process-based ruling protected the equality interests of gays and lesbians better than an equal protection-based decision would have, because it prevented states from "leveling down" and refusing to grant marriage licenses to all couples.[85] Yoshino argues that, post-*Obergefell*, judges cannot invent fundamental rights without limitation; they can only articulate fundamental rights in situations in which selective exclusion from the right would subordinate a group.[86]

Additionally, Yoshino found the majority bridged the positive-negative rights divide. Traditionally, the Due Process Clause has protected fundamental rights *from* government intrusion rather than provide a positive or affirmative right to something.[87] In *Obergefell*, Justice Kennedy wrote, "full promise of *liberty*" not the "full promise of *equality*."[88] This suggests that liberty, as analyzed under substantive due process, can provide *positive* rights.[89]

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83. Yoshino, *supra* note 53.

84. *Id.* at 174.

85. *Id.* at 173 (noting "an individual could hold the principled view that the state should be out of the marriage business," yet have qualms if the reason for shutting down civil marriage is the threat of same-sex couples entering the institution).

86. *Id.* at 174–75 (citing *Glucksberg* as an example of the Court not finding a fundamental right, in part due to respecting the state's "interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes" (Washington v. Glucksberg, 521 U.S. 702, 731 (1997)).

87. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 126–27 (1992) (affirming that the Due Process Clause of the Fourteenth Amendment is "a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security"); Harris v. McRae, 448 U.S. 297, 317–18 (1980) (arguing that while "the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom").

88. Obergefell v. Hodges, 135 S. Ct. 2584, 2600 (2015) (emphasis added).

89. Yoshino, *supra* note 53, at 168.

For example, the liberty interest in *Lawrence* was freedom from government intrusion in intimate association between consenting adults in the privacy of their home. Indeed, most of the substantive due process canon has involved such negative liberties, including fundamental rights of contract,[90] procreative autonomy,[91] privacy,[92] privacy that includes a right to be free from undue burdens on abortion,[93] and parental control of education.[94] The aforementioned fundamental rights were articulated in cases in which the right at issue was to be free from government intrusion (negative liberties), rather than a demand that the government provide or do something (positive liberties).

The *Obergefell* dissenters argued that *Lawrence* was distinguishable because it arose in the context of negative rights.[95] The majority responded that, although *Lawrence* had confirmed a "dimension of freedom to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[96] Beyond this solitary assertion, the majority opinion did not address positive versus negative rights. It is thus unclear which view *Obergefell* represents. Does substantive due process now serve as a basis for positive *and* negative rights? Or is this another example of "marriage exceptionalism," such that *Obergefell*'s approach to the reality that marriage includes both positive and negative rights has no application regarding the question of positive and negative rights beyond marriage?

2. Fundamental Rights as Equal Protection-Guaranteed Gateways

Peter Nicolas has provided an alternative explanation of equal protection's role in *Obergefell*.[97] Nicolas argues that the rea-

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90. Lochner v. New York, 198 U.S. 45 (1905).

91. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942). Note that *Skinner* found the fundamental right of procreative autonomy in the Equal Protection Clause, but the Supreme Court subsequently reinterpreted *Skinner* as articulating a right deriving from the Due Process Clause. *See, e.g.*, Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 846–51 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); Carey v. Population Services Int'l, 431 U.S. 678, 685 (1977); Roe v. Wade, 410 U.S. at 152–53.

92. Griswold v. Connecticut, 381 U.S. 479 (1965).

93. *Roe*, 410 U.S. 113; *Casey*, 505 U.S. 833.

94. Meyer v. Nebraska, 262 U.S. 390 (1923).

95. Obergefell v. Hodges, 135 S. Ct. 2584, 2620 (2015) (Roberts, C.J., dissenting).

96. *Id.* at 2600.

97. Nicolas, *supra* note 34, at 348.

son the *Obergefell* majority wove due process and equal protection together was because of the positive-negative rights issue implicated by a right to marry.[98] Nicolas suggests the majority used due process to protect the negative rights at issue and equal protection to protect the positive rights.[99] Furthermore, Nicolas notes that the Court has "not always been careful about distinguishing those substantive rights protected by the Due Process Clause and those protected by the Equal Protection Clause."[100]

Importantly, Nicolas recognizes that fundamental rights derived from the Due Process Clause may differ from those derived from the Equal Protection Clause.[101] He argues that, in contrast to enforcing rights with formulaic tests under the Due Process Clause, the Court has failed to explain its criteria for finding rights fundamental for the purpose of equal protection analysis.[102] Nicolas observes that there are three lines of cases in which fundamental rights have relied in whole or in part upon the Equal Protection Clause, even after the Court recharacterized equal protection cases, like *Skinner v. Oklahoma*[103] and *Griswold v. Connecticut*,[104] as due process cases.[105] These three lines are the asserted fundamental rights to vote,[106] to marry,[107]

98. *Id.* Nicolas has further argued that as a matter of due process, the right to marry is not its own distinct fundamental right but is rather derivative of the negative fundamental right to procreative and nonprocreative sexual activity without state interference. In other words, because of the historic nature of marriage as the only gateway to lawful sexual activity (in light of the prohibition of fornication), the "right to marry" under the Due Process Clause was actually the negative right to sex without criminal sanction.

99. *Id.* at 343–52 (arguing the Court was on solid precedential ground when it opted to invoke the Equal Protection Clause in tandem with the Due Process Clause in declaring that the same-sex marriage bans interfered with the fundamental right to marry).

100. *Id.*

101. *Id.* at 351 (noting the criteria for a right being denominated under the Equal Protection Clause is somewhat opaque in contrast with the structured formula for recognizing fundamental rights under the Due Process Clause).

102. *Id.*

103. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (holding compulsory sterilization of criminals unconstitutional where the sterilization law treats similar crimes differently).

104. Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a constitutional right for married couples to use contraception).

105. *Id.* at 349–52.

106. Nicolas, *supra* note 34, at 349 (citing Bush v. Gore, 531 U.S. 98, 104–05 (2000); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973); Dunn v. Blumstein, 405 U.S. 330, 336 (1972); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627–28 (1969); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966); Reynolds v. Sims, 377 U.S. 533, 566 (1964)).

107. Nicolas, *supra* note 34, at 350 (citing Zablocki v. Redhail, 434 U.S. 374, 381–87 (1978); Turner v. Safley, 482 U.S. 78, 94–95 (1987); Obergefell v. Hodges,

and to a base level of education.[108] In these equal protection cases, the Court considered or applied heightened scrutiny, not because of the nature of the classification—none involved suspect or quasisuspect classifications—but rather, because of the fundamental nature of the impacted right. Nicolas argues these cases are tied together not only because they involved a targeted denial of fundamental rights, but also because they each involved positive rights.

Believing that *Obergefell*'s equal protection jurisprudence is well-grounded in precedent, Nicolas theorizes that the Court will identify a right as fundamental for the purposes of equal protection:

> [W]hen a government-created right serves as a precursor to a sufficiently large array of rights, then denial of the government-created "gateway" right is tantamount to denying a class of persons what is in effect a cornerstone of modern citizenship, effectively relegating them to a second-class status. Under those circumstances, the "gateway" right will be denominated fundamental under the Equal Protection Clause.[109]

To Nicolas, government-induced relegation is the very dignitary harm referenced and deemed unconstitutional in *Obergefell*. This differs from Yoshino's antisubordination doctrine in that Yoshino views antisubordination as a liberty derived from the Due Process Clause. Here, Nicolas considers antisubordination to be an equal protection issue.

Nicolas observes that the two rights the Court has identified as positive fundamental rights protected by the Equal Protection Clause—the right to vote and the right to marry—both serve as gateways to the exercise of other constitutional rights.[110] Nicolas also acknowledges that the Court's conclusion in *San Antonio Independent School District v. Rodriguez*,[111] that education was not a fundamental right for equal protection purposes, indicates that the relative importance of a right does not render it fundamental for equal protection purposes.[112] But, Nicolas offered little explanation as to why voting rights and marriage rights constitute protected gateways, while education does not. The *Rodriguez* Court explicitly

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135 S. Ct. 2584, 2597–604 (2015)).

108. Nicolas, *supra* note 34, at 349–50 (citing *Rodriguez* and Papasan v. Allain, 478 U.S. 265, 284–85 (1986)).

109. Nicolas, *supra* note 34, at 351.

110. *Id.* at 351–52 (e.g., "those denied the franchise for a given office likewise lack the ability to influence the political process that in turn effects the entire panoply of civil and political rights within a polity").

111. 411 U.S. 1 (1973).

112. *Id.* at 30 ("the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause").

rejected the contention that education is a fundamental personal right because it "bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution."[113] The Court opined:

> the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.[114]

The Court found no such explicit or implicit right in the Constitution.

Importantly, *Rodriguez* was not about selective exclusion from education, but about funding for schools. The Court refused to find equality of funding for education a fundamental right, but, as Nicolas notes, the Court left open the possibility that there may be a right to some "base level" of education.[115] Ostensibly, selective exclusion from a base level of education could potentially violate equal protection, but those facts were not before the Court in *Rodriguez*.[116]

Recognizing that fundamental rights protected by equal protection can be different than fundamental rights protected by due process allows courts to protect equality in government-provided privileges (positive rights) without mandating that government provide those privileges. For example, an equal protection right to basic education does not impose upon government a requirement to provide basic education to all children; it simply requires that when the government does provide it, it be provided equally. This approach avoids judicial creation of positive rights, which is especially important given the universality inherent in declaring a right to be fundamental.

Guaranteeing negative rights involves no resource limitations—the government can provide a limitless supply of "leaving

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113. *Id.* at 35–36 (holding that though education is related to the exercise of First Amendment and voting rights, the Court cannot guarantee to the citizenry the most effective speech or the most informed electoral choice).

114. *Id.* at 33.

115. Nicolas, *supra* note 34, at 350 (citing Papasan v. Allain, 478 U.S. 265, 284–85 (1986); *Rodriguez*, 411 U.S. at 36–37) ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short").

116. *Rodriguez*, 411 U.S. at 36–37.

citizens alone" as they exercise their right to privacy,[117] abortion,[118] and direct the upbringing of their child.[119] By contrast, positive rights—the right *to* something—may require the provision of a finite or limited resource, thus limiting the government's ability to provide it. For example, a positive right to education would require government to fund education for all, whether or not it had the resources to do so.

In the few instances in which the Supreme Court has identified a positive fundamental right protected by the Equal Protection Clause—specifically, the right to marry and the right to vote—the resources required to provide the right to all, rather than to a few, do not make provision of the right practically impossible. So, judicial enforcement of equality does not require the political branches to use excessive resources in order to provide the right. In the marriage context, there are some arguable resource limitations, such as staffing sufficient clerks for administrative processing, issuing marriage licenses, and providing judicial resources to address marriage-related legal disputes (including marriage dissolution). However, when the Court has declared that the fundamental right to marriage requires inclusion of a new group, the burden on related governmental resources has been marginal.[120]

C. Obergefell's *Equal Protection*

1. The Absence of "Traditional" Equal Protection

While the *Obergefell* majority made explicit modifications to substantive due process analysis, its changes to equal protection were largely implicit. In discussing equal protection, the majority did not mention any of the traditional tiers of scrutiny nor the requirements for satisfying them. This omission of traditional equal protection analysis may seem curious because equal protection seemed an obvious basis for deciding *Obergefell*. The Court could have reached the same conclusion with one of the many traditional equal protection tools available.[121]

117. Griswold v. Connecticut, 381 U.S. 479 (1965).

118. Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Roe v. Wade, 410 U.S. 113 (1973); *Casey*, 505 U.S. 833 (1992).

119. Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925). Notably, this does not include the right to government-funded abortion. *See* Maher v. Roe, 432 U.S. 464 (1977).

120. For example, Virginia could absorb the number of interracial marriages after Loving, California could absorb the few additional marriages by prisoners after *Safley*, and all states can absorb the same-sex marriages following *Obergefell*.

121. For instance, the majority could have decided: (1) that rational basis

But Kennedy's equal protection approach in *Obergefell* is less surprising given the broader trends in equal protection jurisprudence at the time and given Kennedy's focus on due process, rather than equal protection, in *Lawrence v. Texas*.[122] As Justice O'Connor urged in her *Lawrence* concurrence, equal protection was an obvious basis for deciding that a state could not selectively punish only one group of people for engaging in sodomy.[123] Nevertheless, the *Lawrence* majority instead focused on due process.[124]

There are several plausible explanations for why *Obergefell* and *Lawrence* acknowledged equal protection but did not include traditional equal protection analysis. First, the omission may be evidence of the Court's general shift away from the traditional equal protection jurisprudence that focuses on classifications and tiers of scrutiny.[125] Second, the majorities in *Lawrence* and *Obergefell*

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review applies to the classification but that marriage bans were not rational because their exclusions were based on animus; (2) that sexual orientation classifications are suspect or quasisuspect classifications and that such an exclusion would not pass intermediate or strict scrutiny; (3) that same-sex marriage bans constitute sex discrimination and that such a ban could not pass intermediate scrutiny; or (4) that a fundamental right based on the Equal Protection Clause was being selectively infringed and that the infringement could not pass strict scrutiny. Each of these approaches would have yielded the same judgment, and yet the Court used none of them. Instead, the Court noted the existence of equal protection concerns with same-sex marriage bans, discussed the relationship between equal protection and due process (addressed in *infra* Subpart II.B), and then arrived at a conclusory assertion that same-sex marriage bans violated the Equal Protection Clause. Obergefell v. Hodges, 135 S. Ct. 2584, 2602–04 (2015).

122. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 Harv. L. Rev. 747 (2011) (arguing *Lawrence* was consistent with the Court's new approach to equal protection, which prefers liberty-based dignity claims in order to avoid pluralism anxiety); William D. Araiza, *Amicus and Its Discontents* (unpublished manuscript) (last visited Aug. 30, 2018) (on file with the University of Indiana School of Law) (noting that animus—the idea that classifications based on government dislike of a particular group are impermissible—has been the only significant equal protection jurisprudence development in decades and that traditional, political process-based equal protection analysis has disappeared).

123. Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

124. *Id.* at 578 (holding petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."). In *Obergefell*, Kennedy unconvincingly attempted to recast his opinion in Lawrence as also being based on equal protection ("*Lawrence* . . . drew upon principles of liberty and equality to define and protect the rights of gays and lesbians."). *Obergefell*, 135 S. Ct. at 2604.

125. For instance, the Court has repeatedly declined to use heightened scrutiny in cases with sexual orientation classifications, even though sexual orientation seems deserving of special protection through heightened scrutiny. The majorities in *Romer*, *Lawrence*, *Windsor*, *Obergefell*, all failed to identify classifications based on sexual orientation as suspect or quasisuspect, despite

may have eschewed traditional equal protection analysis because an equal protection-based holding does not sufficiently guarantee a right. Specifically, an equal protection-based holding in those cases would have permitted states to "level down" by banning all sodomy or all marriage, which would have only perpetuated the special harm to same sex couples.[126] By relying on equal protection *and* on the implicated liberty interests, the Court in *Lawrence* and

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strong arguments that such classifications meet the traditional criteria courts use to determine whether a classification should receive some form of heightened scrutiny: 1. Whether classification is based on an immutable characteristic possessed by a discrete and insular minority; 2. Whether there is a long history of discrimination based on that characteristic; 3. Whether the characteristic upon which the discrimination occurs bears any relationship on the ability to contribute to/participate in society; and 4. Whether the group being discriminated against has relative political powerlessness. *Obergefell*, 135 S. Ct. at 2603–04; *Lawrence*, 539 U.S. at 574–75; *see, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985). Scholars have identified this trend. *See, e.g.*, Yoshino, *supra* note 122, at 776–78 (arguing *Lawrence* was consistent with the Court's new approach to equal protection, which prefers liberty-based dignity claims in order to avoid pluralism anxiety); Yoshino, *supra* note 122, at 757 (noting that "[a]t least with respect to federal equal protection jurisprudence, th[e] canon [of suspect class analysis] has closed," and arguing *Lawrence* was consistent with the Court's new approach to equal protection, which prefers liberty-based dignity claims in order to avoid pluralism anxiety); Yoshino, *supra* note 53, at 173 (arguing that an equal protection basis alone would have permitted states to "level down" and prohibit all sodomy rather than "level up" to permit sodomy regardless of the sexual orientation of its participants"); Lawrence Tribe, *Lawrence v. Texas: The Fundamental Right That Dare Not Speak Its Name*, 117 Harv. L. Rev. 1893, 1945 (2004) (noting the "inadequacy of equal protection" to decide *Lawrence*, and advocating a view of the relationship between equal protection and due process similar to that the Court had adopted in *Lawrence* and would employ again in *Obergefell*); Araiza, *supra* note 122 (noting that animus—the idea that classifications based on government dislike of a particular group are impermissible—has been the only significant equal protection jurisprudence development in decades and that traditional, political process-based equal protection analysis has disappeared).

126. This interpretation is supported by Kennedy's discussion of *Loving*. He notes that the *Loving* Court first declared Virginia's anti-miscegenation statute's unequal treatment of interracial couples to violate the Equal Protection Clause, but then continued to hold that that inequality also violated the Due Process Clause in that it deprived *all* citizens in the state of liberty. *Obergefell*, 135 S. Ct. at 2603 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)). *See also, e.g.*, Yoshino, supra note 53, at 173 ("by basing its ruling on the Due Process Clause . . . the Obergefell Court required the equality of the vineyard" rather than the "equality of the graveyard"); Tribe, *supra* note 125, at 1907–15 (equal protection alone would have permitted states to ban all sodomy, continuing to subordinate and stigmatize gays and lesbians, denying them equal respect and equal dignity).

Obergefell required states to "level up" and protect the right to consensual sodomy and marriage.[127]

Additionally, we might take Justice Kennedy at his word when he concluded that, despite the interconnectedness of the Equal Protection and Due Process Clauses, "[i]n any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way . . . ."[128] In *Lawrence*, Kennedy explicitly acknowledged that relying on liberty rationale to overturn the statute advanced the interests of both liberty and equality.[129] And in *Obergefell*, the primacy and relative length of Kennedy's due process discussion suggests he believed that the Due Process Clause "captured the essence of the right," thus obviating the need for traditional equal protection analysis.

Finally, the reliance on equal protection principles without a traditional equal protection analysis may have intentionally cleared the way for *Obergefell*'s most salient constitutional advancement: the idea that dignitary harm through selective exclusion is prohibited by the Equal Protection Clause.

2. Dignitary Harm as a Constitutional Violation

In focusing on the selective exclusion that was at issue before the Court, *Obergefell* stands for the proposition that a demeaning or stigmatizing selective exclusion from a sufficiently important right violates the Equal Protection Clause.[130] Critics of this position may argue that *Obergefell* did not break new constitutional ground because it addressed marriage, a right long-deemed fundamental. But the majority went further, declaring that laws imposing stigma and injury are themselves prohibited:

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127. As Yoshino has noted, this means that the equality concerns implicated in the case were, "against intuition, better served under the Due Process Clause than under the Equal Protection Clause." Yoshino, *supra* note 53, at 173.

128. *Obergefell*, 135 S. Ct. at 2603.

129. Liberty advanced both interests, because by articulating the right to engage in private consensual sex as a protected liberty interest, *all* people enjoyed the right, and the state could not diminish the right for anyone. By contrast, had the Court relied on equality alone, the liberty interest might not have been protected. For example, the state could have prohibited sodomy for all. *Lawrence*, 539 U.S. at 575 (concluding that equality as the foundational principle might not remove stigma of making protected conduct criminal for all).

130. To be sure, *Obergefell* was not the first case in which the Court recognized the stigmatizing injury—the "deprivation of personal dignity"—that accompanies denial of equality. *See, e.g.*, Roberts v. US Jaycees, 468 U.S. 609, 625 (1984) (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 250 (1964)) (finding that the fundamental object of the Civil Rights Act of 1964 was to "vindicate 'the deprivation of personal dignity that surely accompanies denials of equal access to public establishments'").

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.[131]

Here, the Court asserts that the Constitution prohibits exclusionary laws that impose stigma and injury. The *Obergefell* majority repeatedly referenced the stigmatic and demeaning effect of same-sex marriage bans, focusing on the inequality of exclusion in both the due process and equal protection portions of the opinions.

First, within the apparent due process section of the opinion, the majority asserted, "Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty."[132] This assertion explains why *Lawrence*'s mere decriminalization of same sex sodomy was insufficient to achieve the liberty same sex couples sought and suggests that, when the government's actions effectively "outcast" a group, liberty is infringed. But the "outcasting" government action in *Obergefell* was not the denial of marriage to all, which might implicate Yoshino's antisubordination liberty.[133] Instead, only same-sex couples were outcast, because only persons desiring to marry someone of the same sex were denied the marriage right. Thus, the only thing that effectively outcast same-sex couples seeking to marry was deliberate exclusion by the government.

The Court provided additional substance to its observation that selective exclusion from a fundamental right imposes unconstitutional stigma and injury when it noted:

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.[134]

This suggests that the government's decision to elevate a privilege, while simultaneously excluding some from that right, has a constitutionally prohibited demeaning effect on those who are excluded.

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131. *Obergefell*, 135 S. Ct. at 2602.

132. *Id.* at 2600.

133. As discussed in Subpart II.B.1 above, Yoshino's theory of antisubordination liberty is that the Due Process and Equal Protection Clauses combine to guarantee a right to not be subordinated, even by a law that is equally applied to all. Thus, denial of marriage to all would implicate the antisubordination liberty because of its purpose: denial of marriage to same-sex couples.

134. *Obergefell*, 135 S. Ct. at 2601–02.

The final sentence of the due process section serves as a transition to its equal protection analysis and reinforces the idea that selective exclusion from a fundamental right is itself a demeaning government action. The Court observed that "when . . . sincere, personal opposition 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."[135] This quote recalls the Supreme Court's prior equal protection admonition in *Palmore v. Sidoti* that "[p]rivate biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[136]

In its equal protection discussion, the *Obergefell* majority focuses primarily on the right to not be demeaned by one's government and tries to recast *Lawrence* as based on equal protection: "*Lawrence* . . . drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State 'cannot demean their existence or control their destiny by making their private sexual conduct a crime.'"[137] Whether or not this is ultimately persuasive, it nonetheless illustrates the Court's belief that demeaning one's existence through selective exclusion violates equal protection. Further, the *Obergefell* majority asserted:

> 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. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.[138]

Once again, the Court was concerned with the inequality, disrespect, and subordination borne of selective exclusion, especially in the context of a "long history of disapproval."

Kennedy's use of "dignity" at oral argument in *Obergefell* sheds further light on his understanding of the term and its constitutional significance. In questioning the attorney representing the states imposing same-sex marriage bans, Kennedy asserted, "I thought [dignity] was the whole purpose of marriage. It bestows

135. *Id.* at 2602.

136. Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

137. *Obergefell*, 135 S. Ct. at 2604 (quoting Lawrence v. Texas, 539 U.S. 558, 578 (2003)).

138. *Id.*

dignity on both man and woman in a traditional marriage . . . . It's dignity-bestowing and [gay and lesbian couples] say they want to have that . . . same ennoblement." This framing suggests that, for Kennedy, dignity is achieved through provision of the fundamental right at issue, not that dignity is a constitutionally protected right itself. The Constitution does not confer or guarantee dignity; the state confers it through the institution of marriage. And equal dignity is the notion that when the state bestows dignity, it must bestow it equally. Equal dignity is thus an equality-focused principle.

As explained above, the *Obergefell* majority observes that when the government attaches great significance to a right that it provides, exclusion from that right can be demeaning. Thus, the degree of importance attached to the positive right informs the degree of dignitary harm caused by the exclusion. *Obergefell*'s equal protection advancement is this: protected rights for equal protection purposes include those privileges (positive rights) to which the government attaches such significance and importance that selective exclusion from them demeans or stigmatizes the excluded.[139] When this occurs, the government must provide a compelling justification for the exclusion. That is, the Equal Protection Clause guarantees a right to not be demeaned by one's government through unjustified selective exclusion from an important privilege the government has decided to bestow.

Obergefell suggests that the Equal Protection Clause protects not only the positive rights that have attained "gateway status,"[140] but also those positive rights to which the government has attached great significance. The right must be so significant that exclusion demeans or stigmatizes those excluded. Thus, it is both the relative importance of a right and the demeaning and stigmatizing effect of selective exclusion from that right that makes the exclusion worthy of increased judicial attention under the Equal Protection Clause.

In *Rodriguez*, the Supreme Court was clear that "importance" alone is insufficient to make a right "fundamental" under equal protection. Despite the Court's prior recognition of the importance of education, the *Rodriguez* majority explicitly found that differences in funding in different districts did not deprive students of a fundamental right to education.[141] However, the *Rodriguez* dissenters

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139. *Id.* at 2602.

140. *Id.*; *See supra* Subpart II.B.2.

141. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments"); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972) ("(p)roviding public schools ranks at the very apex of the function of a State").

recognized the nexus between asserted positive rights and constitutionally guaranteed rights:

> "[F]undamentality" is, in large measure, a function of the right's importance in terms of the effectuation of those rights which are in fact constitutionally guaranteed. Thus, "(a)s the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly." Here, there can be no doubt that education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.[142]

The *Rodriguez* majority and dissent simply could not agree that education was sufficiently related to other constitutionally guaranteed rights and thus fundamental.

Though *Obergefell* does not address *Rodriguez* explicitly, it nevertheless suggests a subtle shift from *Rodriguez*. In his dissent, Chief Justice Roberts recognized this shift, citing *Rodriguez* for the proposition that "[o]ur cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State."[143] But this misapprehends the nature of the protection of a fundamental right under the Equal Protection Clause rather than under the Due Process Clause. Under the view presented here, plaintiffs seeking equality in provision of rights do not seek to turn a due process-provided right into an entitlement; rather, they seek equality in provision of a privilege that the government has decided to provide and to which the government has attached significance.

Unlike the situation in *Obergefell*, *Rodriguez* was not about complete exclusion from the asserted fundamental right. Indeed, the *Rodriguez* Court explicitly recognized a clear distinction

142. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 63 (1973) (Marshall, J., dissenting). Justice Marshall further noted that because the majority suggested that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejected the contention that public education is fundamental, it followed that the Court concludes that public education is not constitutionally guaranteed. Marshall agreed the Court had never deemed the provision of free public education to be required by the Constitution, but asserted "the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values."

143. *Obergefell*, 135 S. Ct. at 2620 (Roberts, CJ, dissenting (citing, inter alia, *Rodriguez*, 411 U.S. at 35–37)).

between unequal distribution of a privilege and an absolute exclusion from a privilege, conceding the case may have been different had the plaintiffs been excluded altogether from education.[144] The *Rodriguez* formula for finding a fundamental right to be protected by the Equal Protection Clause might be articulated as:

Importance of Right + Constitutional Nexus = Fundamental Right.

Obergefell offers an additional formula for finding a fundamental right protected by the Equal Protection Clause:

Importance of Right + Demeaning or Stigmatic Effect of Exclusion = Fundamental Right.

Because nearly all laws assert what behavior is and is not acceptable, and thus pose the risk of imposing stigma, it is difficult to determine when selective exclusion from a positive right rises to the level of constitutionally prohibited stigma and injury. The *Obergefell* majority offers no means of determining when the demeaning effect of inequality rises to the level of sufficient stigma and injury such that the right is fundamental. But this is consistent with the majority's readoption of Justice Harlan's common law approach to evaluation of due process-based fundamental rights claims: courts will have to determine the demeaning effect of selective exclusion as cases arise.[145]

Though the *Obergefell* majority did not offer a formula or test for assessing alleged dignitary harms, it provided some clues regarding appropriate considerations. First, the Court was particularly concerned with the role of the state in attaching significance to a right that not everyone was permitted to enjoy. The Court repeatedly noted "all the benefits" states afford married couples.[146] And beyond the practical benefits, Justice Kennedy suggested that the

144. *Rodriguez*, 411 U.S. at 20 (noting that in prior cases where the Court had invalidated wealth discrimination, the members of the disadvantaged class "shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an *absolute deprivation of a meaningful opportunity to enjoy that benefit*"); *Id.* at 36–37 (noting that the facts of the case were not that plaintiffs suffered "absolute denial of educational opportunities," but rather "only relative differences").

145. *Obergefell*, 135 S. Ct. at 2602; *See supra* Subpart II.A.1.

146. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2602, 2604. The Court identified the governmentally provided rights, benefits, and responsibilities of marriage, including: "taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision-making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules."

state confers dignity and ennoblement on married couples through the institution of marriage.[147] Thus, to determine whether dignitary harm through exclusion is prohibited by the Constitution, one may first ask whether it is the government's attachment of significance to the right that causes the dignitary harm.

Second, the Court suggests that judges look at history and context to assess whether selective exclusion from a right constitutes prohibited disrespect and subordination. The Court asserts that exclusion from a fundamental right is a constitutionally prohibited harm to same sex couples, "[e]specially against a long history of disapproval of their relationships." When a selective exclusion aligns with longstanding societal discomfort with, or discrimination against, those who are excluded, that context suggests stigma.[148] And identity-based exclusions are more suspect because, unlike ability-based or behaviorally-based exclusions, they often bear little relationship to the purported purpose of the exclusion.[149]

Finally, the *Obergefell* majority's conclusion that the "Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement"[150] suggests an additional procedural step and consideration when assessing whether a government-imposed dignitary harm is constitutionally prohibited: there must be an opportunity for the government to justify the infringement. The majority opinion's relative lack of discussion of government justifications for same-sex marriage bans might suggest that selective exclusions from fundamental rights are per se void. But the majority's own words explicitly afford the government the opportunity to demonstrate that what appears to be a stigmatic exclusion is not; or, if it is, to demonstrate why excluding in a demeaning way is necessary. Moreover, in balancing the individual's right to not be demeaned against the government's interest, courts' analyses of government justifications for the selective exclusion can both help measure the extent of dignitary harm and then determine whether the dignitary harm is necessary. While all exclusions are clearly demeaning to those excluded, when the government's justification for the exclusion is founded on sound, noninvidious bases,

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147. Transcript of Oral Argument at 72, *Obergefell*, 135 S. Ct 2584 (2015) (No. 14-556).

148. This is consistent with a longstanding concern of traditional classification-oriented equal protection jurisprudence, which included the history of discrimination in its list of factors to determine whether to apply heightened scrutiny. *See, e.g.*, City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432 (1985).

149. *Id.*

150. *Obergefell*, 135 S. Ct. at 2604.

the dignitary harm of the exclusion is weaker and the government infringement on the fundamental right may be justified.

Obergefell provided an example of this kind of analysis when it discussed the fundamental nature of marriage and found the states' exclusion of same-sex couples to be unjustified. The Court identified four principles and traditions that demonstrated why the marriage right was fundamental and determined that none of the four justified the exclusion of same-sex couples, thereby concluding that the states had failed to justify the same-sex marriage bans.[151]

III. *Obergefell* Applied to Transgender Military Ban

A. *The Transgender Ban*

On July 26, 2017, the President issued a statement via Twitter announcing:

> After consultation with my Generals and military experts, please be advised that the United States government will not accept or allow . . . [t]ransgender individuals to serve in any capacity in the U.S. military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.[152]

These tweets were followed by a Presidential Memorandum to the Secretaries of Defense and Homeland Security (Presidential Memorandum I) about one month later.[153] The tweet and Presidential Memorandum I contravened an announcement issued in June 2016 by then-President Barack Obama's Department of Defense[154] allowing openly transgender individuals to enlist in the military and

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151. The Court noted the right to marry is fundamental because: 1) the right to personal choice regarding marriage is inherent in the concept of individual autonomy; 2) marriage supports a two-person union unlike any other in its importance to the committed individuals; 3) marriage safeguards children and families (and thus draws meaning from related rights of childrearing, procreation, and education); and 4) marriage is the keystone of the social order and the "foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 2599–602.

152. *See, e.g.*, July 26, 2017 Twitter Announcement, *supra* note 7 (barring transgender persons from serving in the military).

153. Memorandum on Military Service by Transgender Individuals, 2017 Daily Comp. Pres. Doc. 587 (Aug. 25, 2017) [hereinafter Presidential Memorandum I].

154. *See* DoD I 1300.28, In-service Transition for Service Members Identifying as Transgender (June 30, 2016); Directive-type Memorandum (DTM) 16–005, Military Service of Transgender Service Members (June 30, 2016).

prohibiting the discharge of service members based solely on their gender identities.

Presidential Memorandum I effected the following changes. First, it indefinitely extended the prohibition on transgender individuals entering the military.[155] Second, Presidential Memorandum I required the military to authorize the discharge of transgender service members no later than March 23, 2018.[156] Third, the President directed the Secretaries to return to the pre-June 2016 policy until "a sufficient basis exists upon which to conclude that terminating that policy and practice would not have the negative effects discussed above."[157] The Secretaries were given until February 21, 2018, to submit a plan to revert to the pre-June 2016 policy, which Presidential Memorandum I described as a policy that "generally prohibited openly transgender individuals" from serving in the military.[158]

On February 22, 2018, the Secretary of Defense issued a memorandum (SecDef Memo)[159] to the President relaying his findings and decision regarding military service by transgender individuals. The Secretary of Defense also attached a report on military service by transgender persons (DoD Report).[160] The SecDef Memo defines "transgender" as "those persons whose gender identity differs from their biological sex."[161] The Secretary of Defense recommended the disqualification from military service of transgender persons who "require or have undergone gender transition."[162] He also recommended the disqualification from military service of transgender persons with "a history or diagnosis of gender

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155. PRESIDENTIAL MEMORANDUM I, *supra* note 153.

156. *Id.*

157. *Id.* Further, the memorandum directed the Secretaries to "maintain the currently effective policy regarding accession of transgender individuals into military service beyond January 1, 2018, until such time as the Secretary of Defense, after consulting with the Secretary of Homeland Security, provides a recommendation to the contrary that [the President finds] convincing . . . ."

158. *Id.*

159. MEMORANDUM FROM SEC'Y OF DEF. JAMES M. MATTIS TO PRESIDENT DONALD J. TRUMP: MILITARY SERVICE BY TRANSGENDER INDIVIDUALS (2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF [https://perma.cc/JP62-E54J] [hereinafter SECDEF MEMO].

160. *Id.*; DEPARTMENT OF DEF., DEFENSE REPORT AND RECOMMENDATIONS ON MILITARY SERVICE BY TRANSGENDER PERSONS (2018), https://partner-mco-archive.s3.amazonaws.com/client_files/1521898539.pdf [perma.cc/VF9X-P3QT] [hereinafter DOD REPORT].

161. SECDEF MEMO, *supra* note 159.

162. *Id.*

dysphoria."[163] The SecDef Memo claimed "[a] subset of transgender persons diagnosed with gender dysphoria experience discomfort with their biological sex, resulting in significant distress or difficulty functioning. Persons diagnosed with gender dysphoria often seek to transition their gender through prescribed medical treatments intended to relieve the distress and impaired functioning associated with their diagnosis."[164] The SecDef Memo suggests allowing individuals with a history or diagnosis of gender dysphoria to serve, but only under the following circumstances:

> (1) if they have been stable for 36 consecutive months in their biological sex prior to accession; (2) Service members diagnosed with gender dysphoria after entering into service may be retained if they do not require a change of gender and remain deployable within applicable retention standards; and (3) currently serving Service members who have been diagnosed with gender dysphoria since the previous administration's policy took effect and prior to the effective date of this new policy, may continue to serve in their preferred gender and receive medically necessary treatment for gender dysphoria.[165]

The SecDef Memo prohibits transgender people—including those who have neither transitioned nor been diagnosed with gender dysphoria—from serving, unless they are "willing and able to adhere to all standards associated with their biological sex."[166] For military members, this would include wearing uniforms consistent with those assigned to members of their biological sex, referring to oneself on official documents as being of their biologically assigned sex, and meeting physical fitness standards of their biologically assigned sex. The SecDef Memo also notes that exempting transgender persons from the mental health, physical health, and sex-based standards that apply to all service members, including transgender service members without gender dysphoria, "could undermine readiness, disrupt unit cohesion, and impose an unreasonable burden on the military that is not conducive to military effectiveness and lethality . . . . "[167]

After receiving the Secretary of Defense's recommendation, the President issued a new memorandum (Presidential Memorandum II) revoking Presidential Memorandum I and authorizing the Secretaries of Defense and Homeland Security to "implement

163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.*; *see also Karnoski v. Trump*, 2018 WL 1784464, at *6, *21 (W.D. Wash. 2018), *vacated and remanded by* 926 F.3d 1180 (9th Cir. 2019).
167. SecDef Memo, *supra* note 159.

any appropriate policies concerning military service by transgender individuals."[168] Thus, Presidential Memorandum II effectively approved the Secretary of Defense's implementation plan.

B. *Obergefellian Due Process and the Transgender Ban*

1. *Obergefell*'s Approach to Identifying the Fundamental Right Implicated by Military Service Exclusion

a. Articulating the Right at the Appropriate Level of Generality

As discussed, *Obergefell* enshrined Justice Harlan's common law approach, in which courts exercise "reasoned judgment in identifying interests of the person so fundamental that the State must *accord* them its respect."[169] While this liberates the judiciary to identify new fundamental rights, it is difficult to predict whether judges will exercise greater discretion in the context of military service exclusion. Using lessons from cases challenging DADT and military exclusion cases currently being litigated, this Subpart details how courts can use *Obergefell* to identify the fundamental right to military service.

To assess the fundamentality of an asserted liberty interest, the interest at issue must first be identified. *Obergefell*'s clarification that a right does not need to be articulated "carefully" opens the door to the recognition of new fundamental rights, some of which might apply to military service. Whether an exclusion from the military constitutes an infringement on a fundamental right will rely on a fact-intensive analysis of the military exclusion and the asserted liberty interest. Given the myriad bases for exclusion from military service, from childhood asthma to bedwetting to various physical and mental health concerns, and the ways in which those exclusions may be articulated, it is difficult to discuss comprehensively what specific liberty interests might be infringed by a particular exclusion. However, exclusions that are currently being litigated can serve as a helpful way to understand the tools *Obergefell* offers to excluded individuals who wish to challenge the exclusion.

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168. Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals, 83 Fed. Reg. 13,367 (Mar. 23, 2018), https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals [perma.cc/HG93-PSTZ] (hereinafter Presidential Memorandum II).

169. Obergefell v. Hodges, 135 S. Ct. 2584, 2589 (2015) (citing Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

DADT was challenged and litigated after *Lawrence*, but before *Obergefell*. In two prominent cases, federal circuit courts addressed claims that DADT violated liberty interests protected by the Due Process Clause. In *Witt v. Dep't. of the Air Force*, the plaintiff challenging DADT asserted that the policy infringed on the right to engage in private, consensual, same sex sexual conduct. This articulation rested directly on *Lawrence*, which held that the Texas statute banning same sex sodomy impermissibly infringed on the right to engage in private, consensual same sex sexual conduct. This articulation of the right at issue had the added benefit of responding directly to the infringement by DADT: that same sex sexual conduct served as the basis for exclusion. Without stating that this was the appropriate articulation of the right at issue, or whether that right was "fundamental," the Ninth Circuit allowed the substantive due process claim to move forward, requiring the district court to apply heightened, but not strict, scrutiny.[170] In *Cook v. Gates*, the Second Circuit settled on a similar articulation of the liberty interest established in *Lawrence*: "we are convinced that *Lawrence* recognized that adults maintain a protected liberty interest to engage in certain 'consensual sexual intimacy in the home.'"[171]

In both cases, the plaintiffs' focus on actions rather than identity is consistent with prior substantive due process jurisprudence. This line of jurisprudence has generally focused on one's right to engage in actions that are consistent with one's identity, not on the person's identity itself. For example, the right at issue in *Loving* was not articulated as a right to be a different race than one's spouse, but rather a right to select and marry one's spouse, regardless of their race.[172] The right at issue in *Planned Parenthood of Southeastern Pennsylvania v. Casey* was not the right to be someone who does not want a baby or to be nonpregnant, but rather the right to have an abortion without undue burden imposed by the government.[173] The right at issue in *Glucksberg* was not the right to be dead, but rather the right to kill oneself with assistance.[174] The right in *Lawrence* was not the right

170. Witt v. Dep't of Air Force, 527 F.3d 806, 819 (9th Cir. 2008) (holding that "when the government attempts to intrude upon the personal and private lives of homosexuals, in a manner that implicates the rights identified in *Lawrence*, the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest. In other words, for the third factor, a less intrusive means must be unlikely to achieve substantially the government's interest.").

171. Cook v. Gates, 528 F.3d 42, 53 (1st Cir. 2008).

172. 388 U.S. 1, 12 (1967).

173. 505 U.S. 833 (1992).

174. 521 U.S. at 723.

to be gay, but rather the right to engage in intimacy in the privacy of one's home, whether the intimacy is with another person of the same or different sex. Importantly, the right at issue in *Obergefell* was not the right to be gay, but rather whether the right to marry includes the right to marry someone of the same sex.

When articulating the right being infringed by government action, it is critical to define the behavior the government is prohibiting or limiting. In the case of the revised transgender ban, persons are prohibited from military service if they undergo physical gender transition or have experienced gender dysphoria within the past 36 months. Additionally, members are required to serve in their biologically assigned gender, which includes compliance with a number of gender-specific regulations. Thus, the transgender ban infringes on one's ability to physically alter one's body via surgical and medical treatments, to dress and appear as one chooses, to be held to physical standards consistent with one's self-identified gender, and to live with others of the same gender.

Thus far in the litigation of the transgender ban cases, plaintiffs have articulated the infringed fundamental right in similar ways:

(1) The right to "live authentically in *accord* with their gender identity."[175]

(2) The right to "live in *accord* with one's gender."[176]

(3) The right to "personal autonomy," which "includes the right of every person, including those who are transgender, to live in *accord* with their gender identity."[177]

The plaintiffs' articulation of the infringed fundamental rights conforms with the *Obergefell* majority's understanding of how asserted rights should be articulated: while the plaintiffs do not articulate the rights with the highest level of specificity, they "carefully" describe the rights.[178] That is, plaintiffs have avoided articulations of the right that are too specific and too broad.

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175. Pls.' Mot. for Prelim. Inj. at 14, Karnoski v. Trump, No. C17-1297-MJP (W.D. Wash. 2018). Plaintiffs also assert that "[a] person's gender identity—their internalized, inherent sense of what their sex is—is fundamental."

176. Pls.' Appl. for Prelim. Inj. at 22, Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17-1597).

177. Pls.' Notice of Mot. and Mot. for Prelim. Inj.; Mem. Of P,& A. in Supp. Thereof at 22, Stockman v. Trump, No. EDCV 17–1799 JGB (C.D. Cal. Dec. 22, 2017).

178. Of course, in *Glucksberg*, the Court had already insisted that rights be "carefully" articulated, but *Obergefell* clarified that *Glucksberg* required a "careful" articulation of rights, not what some had argued *Glucksberg* required, which was articulation of rights at their most specific level of generality/abstraction. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015). In the transgender ban cases, the plaintiffs have articulated the infringed right broadly enough to

At the lowest level of generality, the right at issue may have been articulated as the right to express the gender opposite of one's assignment and the right to transform one's body to conform with one's sense of gender identity. But articulated that way, the right clearly would have run into trouble with the second prong of the traditional *Glucksberg* test, which requires that the right be one protected as fundamental in the view of history and tradition. But this is precisely the approach that the *Obergefell* majority rejects, noting that "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."[179] In other words, the most specific articulation of the right is inherently circular, answering its own question.

The right could also be articulated more generally than plaintiffs have, as the fundamental right to identity. The *Obergefell* majority notes constitutionally protected liberties "extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[180] The majority also asserted that the liberty protected by due process "allow[s] persons, within a lawful realm, to define and express their identity."[181]

This broad language was not lost on the plaintiffs in one recent case challenging the military transgender ban. Citing *Obergefell*, the plaintiffs noted that the Supreme Court has consistently held that "the ability independently to define one's identity" is "central to any concept of liberty."[182] However, though "autonomy of self" and a right to identity were principles underlying the liberty interests identified in *Obergefell* and in prior cases like *Lawrence*[183] and *Roberts v. US Jaycees*,[184] the Supreme Court has never specifically

encompass the various ways in which the transgender ban infringes on more specific rights. Notably, the plaintiffs' version of the affected right is unitary, though arguably "the ban" is multifaceted and the infringed rights are, too. While the ban has the effect of prohibiting military service by nearly all transgender individuals, it operates through more specific prohibitions. Ostensibly, a court could evaluate each prohibition individually, possibly finding only some of the prohibitions infringe on a fundamental right.

179. *Obergefell*, 135 S. Ct. at 2602.

180. *Id.* at 2597. Though we can catalog which "certain personal choices central to individual dignity and autonomy" have been identified by the Court in the past, the catalog remains perpetually incomplete.

181. *Id.* at 2593.

182. *Stockman*, 2017 WL 9732572, at *15 (2017) (citing Roberts v. US Jaycees, 468 U.S. 609, 619 (1984)).

183. *Obergefell*, 135 S. Ct. at 2593; Lawrence v. Texas, 539 U.S. 558, 562 (2003).

184. 468 U.S. at 618 (protecting personal relationships from unwarranted

held that there is "a fundamental right to identity." In fact, the *Obergefell* majority carefully characterized the precedent regarding fundamental rights as protecting "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs" and "certain specific rights that allow persons, within a lawful realm, to define and express their identity."[185] The inclusion of the qualifying phrase "certain specific rights" recognizes there is a difference between specific rights that flow from identity—rights the Court has previously identified—and a broader, more abstract, "right to identity." Articulating a right to identity takes the principle underlying previously held rights and makes the principle itself the right. This goes well beyond what Justice Harlan supported in *Poe* and *Griswold*,[186] what Justice Souter counseled in *Glucksberg*,[187] and what the majority did in *Obergefell*.

Far from being "carefully described," a "right to identity" is the most abstract articulation of the right at issue. This articulation of the right violates Justices Souter's and Harlan's warnings, that were imported by the *Obergefell* majority: the asserted liberty interest should be described in a manner that is sufficiently broad to cover the claim at hand, but not so broad as to threaten all government regulation in the area.[188]

In addition to numerous practical problems with formally declaring an overly broad "right to identity,"[189] asserting a "right to

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state interference "safeguards the ability independently to define one's identity that is central to any concept of liberty").

185. *Obergefell*, 135 S. Ct. at 2593.

186. Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

187. Washington v. Glucksberg, 521 U.S. 702, 766–67 (1997) (Souter, J., concurring in judgment). Justice Souter cited Harlan's *Poe* dissent to observe that "the kind and degree of justification that a sensitive judge would demand of a State would depend on the importance of the interest being asserted by the individual." *Poe*, 367 U.S. at 543 (Harlan, J., dissenting).

188. For example, Justice Harlan explained that the marital right to use contraceptives within the privacy of the marital bedroom was supported by a principle that distinguished of its own force between areas in which government traditionally had regulated (extramarital sexual relations) and those in which it had not (private marital intimacies). And even in *Obergefell*, the majority offered reasons why the right to marry was fundamental; they were not premised on identity, but rather on the importance of marriage. *Obergefell*, 135 S. Ct. at 2594.

189. First, many laws impact a broadly claimed right to identity, which would lead to an explosion of fundamental rights litigation that the Supreme Court is unlikely to permit. Second, distinguishing genuine identity claims (e.g., gender identity) from feigned or unimportant identity claims (e.g., the right to drive at whatever speed one wishes due to one's identity as a "fast driver") would require courts to engage in a near-impossible genuineness inquiry.

identity" as a basis for entering the military runs counter to a central feature of the military, which prides itself on training members *not* to view themselves as individuals, but as part of a cohesive unit. Indeed, the military's practice of repressing individual identity has been upheld by the Supreme Court.[190] Thus, asserting a broad right to identity as the basis for a right to military service would permit the government to rely on traditional defenses of military exceptionalism and military deference to justify the exclusion.

Fortunately, the plaintiffs in the transgender ban cases have settled on the optimal articulation of the right at issue: the right to live in accordance with one's identity. This right strikes a balance between the circularity of the most specific articulation and the overinclusiveness of the broadest. Moreover, it focuses on behavior rather than identity, which is the proper focus of liberty claims. Finally, it aligns with *Obergefell*'s holding that certain expressions of identity may be fundamental.

b. Evaluating the Importance of the Asserted Right in Light of History and Tradition

As discussed above, the second prong of the *Glucksberg* test was also loosened in *Obergefell*. Though history and tradition were not entirely discarded, the Court maintained that "rights come not from ancient sources alone."[191] The majority entirely ignored the *Glucksberg* requirement that rights be "implicit in the concept of ordered liberty," suggesting it is a permissible, though not a mandatory, consideration. In place of a formalistic history and tradition test, the *Obergefell* majority explored the societal importance of marriage, with significant grounding in history and tradition.

Even without the history and tradition constraint, it is easy to see how the articulation of the implicated right can determine its fundamentality. The most specific articulations of the asserted right would be hard to defend as important. For example, it is hard to find significant evidence of societal importance attached to the

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Attaching legal significance to asserted identities is complicated because of the potential that asserted identities may conflict with the underlying purposes of many laws. For example, accepting for legal purposes one's asserted "age identity," rather than biological age, would have significant consequences for the safety of minors, the elderly, and all affected by their actions. If living in accordance with one's identity is in fact a fundamental right, it is easy to imagine identity-based exceptions to myriad laws.

190. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 743 (1974) (restrictions on military speech did not violate the First Amendment because the Court "has long recognized that the military is, by necessity, a specialized society separate from civilian society"); Goldman v. Weinberger, 475 U.S. 503 (1986) (military officer could be ordered not to wear religious headgear while on duty and in uniform).

191. *Obergefell*, 135 S. Ct. at 2602.

"right of a transgender person to surgically alter their reproductive organs to be those of the opposite biological sex." With just a slightly more abstract articulation of the issue, however, the right's fundamentality becomes clear. For example, the right to bodily integrity and the right to make physical choices regarding one's body are already recognized as "fundamental," as some of the key cases in the substantive due process pantheon make clear.[192]

2. Applying *Obergefell*'s New (Old) Form of Heightened Scrutiny

Just as it is difficult to predict how or whether judges will exercise greater discretion in identifying fundamental rights, it is difficult to predict what heightened scrutiny will entail under *Obergefell*'s new due process approach. As noted above, military service exclusion cases have already explored whether heightened scrutiny applied to "important," rather than "fundamental" interests, and what that heightened scrutiny looked like. *Obergefell* did not answer these questions.

Assuming an exclusionary policy infringes on a fundamental liberty interest, under the new *Obergefell*-Harlan approach, the government must provide "sufficient justification" to withstand whichever level of scrutiny the court applies.[193] In the transgender ban litigation, the government has asserted the following interests:

> (1) "At least some transgender individuals suffer from medical conditions that could impede the performance of their duties."
> (2) Certain medical conditions "may limit the deployability of transgender individuals as well as impose additional costs on the armed forces."
> (3) The presence of transgender individuals in the military would harm "unit cohesion."[194]

Thus, under an *Obergefell* approach, a court should examine the proffered justifications for the exclusions and determine whether they are "sufficient" to justify infringement on a fundamental right. This could prove to be the plaintiffs' greatest hurdle, as most reasons for exclusion from military service rely on these bases: military readiness, deployability, and cost. Moreover, as noted above, judicial deference in the realm of national security might lead a court to accept any "national defense" justifications put forth by the military. For example, the military accession regulations identify

192. *See, e.g.*, Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016); Cruzan v. Missouri Dep't of Health, 497 U.S. 261; *Casey*, 505 U.S. 833 (1992).

193. *Obergefell*, 135 S. Ct. at 2602.

194. *See* Defs.' Mot. to Dismiss and Opp'n to Pls' Appl. for Prelim. Inj. at 31–33, Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17-1597).

medical conditions that are service disqualifying on the bases of military readiness, deployability, and cost.[195] However, the evidence available when the transgender ban was instituted runs contrary to the readiness, deployability, and cost justifications offered by the government for the ban.[196] Because the government's evidence supporting the transgender ban is weak, the level of scrutiny a court applies will likely be dispositive. That is, if a court applies heightened scrutiny, the government would be forced to provide real evidence, rather than hypothetical assertions, to support its claims, a burden it is unlikely to be able to meet.

C. *"Obergefellian Equal Protection" and the Transgender Military Ban*

As noted above, *Obergefell* does little to change understanding of traditional equal protection analysis. Scholars,[197] plaintiffs,[198] and judges[199] have advanced strong arguments that the ban violates equal protection using traditional equal protection jurisprudence. These arguments include: (1) military service exclusions based on gender identity are suspect or quasisuspect; (2) classifications based on gender identity are actually sex-based classifications, warranting

195. *See* Dep't of Def., Instruction NO. 6130.03, Medical Standards For Appointment, Enlistment, Or Induction Into The Military Services (2018).

196. Agnes Gereben Schaefer, et al., Assessing the Implications of Allowing Transgender Personnel to Serve Openly (RAND Corporation) (2016), https://www.rand.org/pubs/research_reports/RR1530.html [https://perma.cc/HP96-LR7B] (government-requested study that concluded permitting transgender persons to serve in the military would not adversely affect military readiness or deployability and would not involve significant cost to the government).

197. *See, e.g.*, Merriam, *supra* note 23, at 57 (arguing the ban is unconstitutional animus); John Culhane, *Trump's Transgender Ban is a Legal Land Mine*, Politico (July 26, 2017), https://www.politico.com/magazine/story/2017/07/26/trump-transgender-troops-ban-legal-landmine-215425 [https://perma.cc/HUM9-QDFR].

198. *See, e.g.*, Pl.'s Mot. for Prelim. Inj., Karnoski v. Trump, No. C17-1297-MJP (W.D. Wash. 2018); Pls.' Appl. for Prelim. Inj. at 22, Doe 1 v. Trump, 275 F. Supp. 3d 167 (D.D.C. 2017) (No. 17-1597); Pls' Notice of Mot. And Mot. for Prelim. Inj.; Mem. of P. & A. in Supp. Thereof, Stockman v. Trump, No. EDCV 17–1799 JGB (C.D. Cal. Dec. 22, 2017).

199. This is precisely what the District Court did in *Doe 1 v. Trump*, ultimately concluding that intermediate scrutiny was warranted and that though the government's asserted interests of maximizing military effectiveness, lethality, unit cohesion, and budgetary considerations were important, the transgender ban was not substantially related to accomplishing that interest. *Doe 1*, 275 F. Supp. 3d at 217. As noted above, similar equal protection analysis was also the basis of plaintiffs' early successes in *Karnoski*, 2017 WL 6311305, at *7; Stone v. Trump, 280 F. Supp. 3d 747, 768–72 (D. Md. 2017); and *Stockman,* 2017 WL 9732572, at *13–14.

intermediate scrutiny; and (3) the transgender ban constitutes impermissible animus.

However, the *Obergefell* majority's avoidance of traditional equal protection arguments cautions against relying solely on those arguments. Instead, plaintiffs challenging the transgender military ban would benefit from relying on *Obergefell*'s equal protection development: that the government may not demean a group by excluding it from an important positive right when such exclusion results in dignitary harm.

By focusing on the right to *not* be demeaned by one's government through exclusion from an important, government-bestowed privilege, plaintiffs challenging the ban will be able to make persuasive arguments that excluding certain individuals from military service may be unconstitutional. An equal protection-based fundamental right can be identified by first examining the importance the government has placed on the positive right and then assessing the demeaning effect of exclusion from that right.

Notably, *Obergefell*'s commentary regarding the importance of marriage is related to the importance of military service eligibility. In discussing the fundamental nature of the right to marriage, the majority observed that marriage:

> "Promises nobility and dignity to all persons, without regard to their station in life;[200]
> Is an institution that has existed for millennia and across civilizations;
> Transformed strangers into relatives, binding societies together;
> Lies at the foundation of government;
> Is referenced in untold religious, philosophical texts and art and literature in all their forms;
> Has a history of both continuity and change;
> Is a right older than the Bill of Rights; and
> Dignifies persons who wish to define themselves by their commitment to each other."[201]

It is striking how many of the above qualities apply to both marriage and military service.

Furthermore, the *Obergefell* majority opinion cited four reasons for its conclusion that marriage is a fundamental right. The applicability of these four reasons to military service is less clear. First, the Court noted that the right to personal choice regarding marriage is inherent in the concept of individual autonomy because decisions concerning marriage are among the most intimate an

200. *Obergefell*, 135 S. Ct. at 2594.
201. *Id.* at 2594–95, 2599.

individual can make.[202] Citing the Supreme Judicial Court of Massachusetts, the majority noted "the decision whether and whom to marry is among life's momentous acts of self-definition."[203] To be sure, joining the military is a momentous act that, for many, becomes an act of self-definition. On the other hand, the majority's second reason for the fundamentality of marriage—that marriage supports a two-person union unlike any other—is clearly inapplicable to military service. Third, the majority claims that marriage is fundamental because it "safeguards children and families" and thus draws meaning from related rights of childrearing, procreation, and education. Marriage allows for material protection of children and families, but also provides recognition and structure that allows children to "understand the integrity and closeness of their own family and its concord with other families in their community."[204] While military service does not help children better understand their family, it does, in a broad sense, safeguard children and families through protection of the nation. Fourth, the Court explained that marriage was fundamental because it is the keystone of our social order. The Court noted that marriage is the "foundation of the family and of society, without which there would be neither civilization nor progress." Marriage is thus a "building block of our national community."[205] Similarly, the national security provided by the military is foundational to social order, though not part of the social fabric itself.

The *Obergefell* Court was particularly concerned with the government's attachment of importance to marriage and ultimately held that the Equal Protection Clause protects against demeaning selective exclusions from government-bestowed privileges. Recall the Court's concern that:

> As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society.[206]

To demonstrate the significance the State attached to marriage, the Court recited the list of benefits accorded married couples, including:

202. *Id.* at 2599.
203. *Id.* (citing Goodridge v. Department of Public Health, 798 N.E.2d 941, 955 (Mass. 2003)).
204. *Id.* at 2600.
205. *Id.* at 2601.
206. *Id.* at 2601–02.

> taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.[207]

Likewise, the government has attached great significance to military service through significant, and potentially lifelong, benefits that include pensions, disability benefits, medical care, educational benefits, hiring preferences, citizenship status, tax incentives, and others.[208]

Society, too, accords many benefits to active servicemembers and veterans in a variety of forms, including commercial discounts, public and private gestures of appreciation, and general proclamations of respect for veterans and their military service.[209] The public's reverence for the military is not just anecdotal. Polls repeatedly show that the public trusts and respects the military more than nearly all other institutions.[210] Furthermore, voters continue to value military service by their elected representatives.[211]

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207. *Id.* at 2601.

208. *Military Benefits At a Glance*, MILITARY.COM, https://www.military.com/join-armed-forces/military-benefits-overview.html [https://perma.cc/3BGP-7UWQ] (listing many pecuniary benefits of military service); *Tax Breaks for the Military*, INTERNAL REVENUE SERVICE (July 15, 2016), https://www.irs.gov/newsroom/tax-breaks-for-the-military [https://perma.cc/D44H-8UEZ] (explaining tax benefits available to military personnel).

209. Mara Leighton, *50 Stores that Offer Military Discounts All Year Long*, BUSINESS INSIDER (May 26, 2019), https://www.businessinsider.com/military-discounts [https://perma.cc/8EE5-TXQN]; James Fallows, *The Tragedy of the American Military*, THE ATLANTIC (Jan.-Feb. 2015), https://www.theatlantic.com/magazine/archive/2015/01/the-tragedy-of-the-american-military/383516 [https://perma.cc/VJC7-352H] (arguing that the general public's expressions of gratitude, political figures' gestures and proclamations of respect, and the public's overall confidence in the military is tragically misguided).

210. *See, e.g.*, Ashley Bunch, *Poll: Americans Respect All Military Branches, but Air Force Takes the Lead*, MILITARY TIMES (May 30, 2017), https://www.militarytimes.com/news/your-military/2017/05/30/poll-americans-respect-all-military-branches-but-air-force-takes-the-lead [https://perma.cc/74QL-ZNHC]; Courtney Johnson, *Trust in the Military Exceeds Trust in Other Institutions in Western Europe and U.S.*, PEW RESEARCH CENTER: FACTTANK (Sep. 4, 2018), https://www.pewresearch.org/fact-tank/2018/09/04/trust-in-the-military-exceeds-trust-in-other-institutions-in-western-europe-and-u-s [https://perma.cc/6SEN-V8GR]; Jonathan M. Ladd, et al., *2018 American Institutional Confidence Poll*, http://aicpoll.com [https://perma.cc/W7LJ-BV9N].

211. Barbara Goldberg, *U.S. House Freshman Class Includes Most Veterans in Nearly a Decade*, REUTERS (Nov. 7, 2018), https://www.reuters.com/article/us-usa-congress-veterans/u-s-house-freshman-class-includes-most-veterans-in-

The benefits the government and society attach to military service demonstrate its importance and, simultaneously, the demeaning effect of exclusion. *Obergefell* instructed that the more benefits the government and society heap on marriage, the more the exclusion from that status serves to demean.[212] And as the government heaps benefits on military servicemembers, it confers dignity upon them in the way Justice Kennedy understood states confer dignity on married couples. So too, the benefits that government and society have placed on military service have the effect of demeaning those who are locked out, precisely because the government and society have established military service as being at the apex of participation in and contribution to the nation. Barring certain groups from military service has the same demeaning effect as barring some couples from the privilege of marriage.

In positive and negative ways, military service has historically been tied to being American. The government and society laud military service in the ways identified above. Especially important are the ways in which military service has been directly linked to being both culturally and legally American. Military service can lead to a quicker path to United States citizenship, and failure to serve can diminish one's citizenship status. Indeed, for nearly 100 years, the United States literally and legally equated military service and citizenship. Through the three largest military conflicts in American history—the Civil War,[213] World War I, and World War II[214]—desertion from the military meant loss of citizenship, rendering the disgraced veteran stateless.[215] Importantly, one could regain

nearly-a-decade-idUSKCN1NC2LW [https://perma.cc/UB6R-U8WE] (noting increase in number of veterans and some politicians' use of their military service as demonstrating suitability for office).

212. *Obergefell*, 135 S. Ct. at 2602.

213. Act of March 3, 1865, ch. 79, § 21, 13 Stat. 487, 490 (1865).

214. *See, e.g.*, Nationality Act of 1940, Pub. L. No. 76-853, § 401, 54 Stat. 1137, 1169 (1940) *amended by* Pub. L. No. 221-78, § 401, 58 Stat. 4 ("A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . . "[d]eserting the military or naval forces of the United States in time of war, provided he is convicted thereof by a court martial . . . .").

215. *See, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958) (ruling the practice of loss of citizenship due to military desertion an unconstitutional excess of executive power and a violation of the Eighth Amendment); Joshua E. Kastenberg et al., In A Time Of Total War: The Federal Judiciary and National Defense 1940–1954, 239–40 (Ashgate Press 2016); Joshua E. Kastenberg, Law in War, Law as War: Brigadier General Joseph Holt and the Judge Advocate General's Department in the Civil War and Early Reconstruction, 1860–1868 (Carolina Academic Press 2011); John P. Roche, *Loss of American Nationality—The Development of Statutory Expatriation*, 99 U. Pa. L. Rev. 25, 60–62 (1950).

lost citizenship—and thus one's legal status as an American—through renewed military service during war.[216]

Clearly, military service confers status, and the corresponding exclusion from military service serves to demean. Society's conferral of status on those who serve in the military as American, and the demeaning effect of exclusion from that status is, tellingly demonstrated by treatment of black veterans following WWI and WWII.[217] Indeed, in the Jim Crow South, no one was more at risk of experiencing violence and targeted racial terror than Black veterans.[218] Precisely because of their military service and its concomitant benefits and dignity, Black veterans were seen as a particular threat to continued racial subordination. Thousands of Black veterans were assaulted, threatened, abused, or lynched following military service. Especially irritating to their tormentors were Black veterans who had the audacity to wear their military uniforms.[219] Throughout America, and especially in the South, whites accosted Black veterans, often with the express purpose stripping them of their uniforms.[220]

The fear that Black veterans would point to their military service as a basis for equality was not just the sentiment of unhinged lynch mobs. Mainstream newspapers also expressed concern that Black veterans would believe they were equal because of their military service.[221] This sentiment was even articulated on

216. To amend the Nationality Act of 1940, Pub. L. No. 221-78, § 401, 58 Stat. 4 ("[Notwithstanding loss of nationality or citizenship or civil or political rights under the terms of this or previous Acts by reason of desertion committed in time of war, restoration to active duty with such military or naval forces in time of war or the reenlistment or induction of such a person in time of war with permission of competent military or naval authority, prior or subsequent to the effective date of this Act, shall be deemed to have the immediate effect of restoring such nationality or citizenship and all civil and political rights heretofore or hereafter so lost and of removing all civil and political disabilities resulting therefrom . . . .").

217. *Lynching in America: Targeting Black Veterans*, EQUAL JUSTICE INITIATIVE (2017), https://eji.org/reports/online/lynching-in-america-targeting-black-veterans [https://perma.cc/SMX6-8U2M].

218. *Id.*

219. *Id.*

220. CHAD L. WILLIAMS, TORCHBEARERS OF DEMOCRACY: AFRICAN AMERICAN SOLDIERS IN THE WORLD WAR I ERA 239 (The University of North Carolina Press 2010).

221. *See, e.g.*, *Lynching in America: Targeting Black Veterans*, *supra* note 217 (citing *Nip It in the Bud*, TRUE DEMOCRAT (Dec. 21, 1918)) (asserting that military service had "probably given [black veteran] men more exalted ideas of their station in life than really exists, and having these ideas they will be guilty of many acts of self-assertion, arrogance, and insolence . . . there will be much friction before they sink back into their old groove, and accept the fact that

the floor of the U.S. Senate. Arguing that reintroduction of Black servicemen would "inevitably lead to disaster," Senator James K. Vardaman cautioned:

> Impress the negro with the fact that he is defending the flag, inflate his untutored soul with military airs, teach him that it is his duty to keep the emblem of the Nation flying triumphantly in the air, it is but a short step to the conclusion that his political rights must be respected.[222]

When we recognize that government and society confer on servicemembers and veterans the status of "*bona fide* American" and that service members are entitled to equality, the demeaning and stigmatic effect of being denied military service eligibility becomes clear. Courts have noted the demeaning effect of exclusion from military service. For instance, the *Obergefell* majority itself noted that exclusion from marriage conflicted with the "just claim to dignity" of LGB people.[223] And in denying the government's request for an emergency stay of a district court's injunction against implementation of the transgender ban, the Court of Appeals for the D.C. Circuit noted the demeaning effect of the transgender ban:

> [I]n the balancing of equities, it must be remembered that all Plaintiffs seek during this litigation is to serve their Nation with honor and dignity, volunteering to face extreme hardships, to endure lengthy deployments and separation from family and friends, and to willingly make the ultimate sacrifice of their lives if necessary to protect the Nation, the people of the United States, and the Constitution against all who would attack them.[224]

Indeed, the demeaning effect of exclusion from military service eligibility can be poignantly articulated in this way: "you're not worthy of dying for your country."

All exclusions, including ability-based exclusions, have the potential to demean. But there is a constitutionally significant difference between identity-based exclusions and ability-based exclusions: the Equal Protection Clause demands that similarly situated people be treated equally. When exclusion is based on identity rather than ability, the likelihood that the government's exclusion

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social equality will never be accepted in the South.").

222. Williams, *supra* note 220, at 31.

223. Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015). The majority opinion also notes the irony that one of the plaintiffs in the case served in the military to defend the freedoms the Constitution provides, while not being given the same freedom. *Id.* at 2595.

224. Order, Doe 1 v. Trump, No. 17-5267 (D.C. Cir. 2017), 2017 WL 6553389, at *3.

is impermissibly demeaning increases. This is for the same reason that courts are suspicious of government classifications that bear little relationship to the affected group's ability to participate in or contribute to society: law's purpose is to govern behavior, and laws that focus on identity rather than behavior tend to be based on irrational prejudice. This requires careful judicial consideration of the underlying rationale for exclusion. Military service exclusions should be carried out in the same way that all performance-based unit cohesion exclusions are carried out—by enforcing the capability requirements rather than imposing a complete ban on all people with a particular characteristic that might affect ability.[225]

In relying on *Obergefell* to assess whether exclusion from military service eligibility is impermissibly demeaning, a court should ask: does rejection from the military have the same functional effect as rejection from the institution of marriage? The institution of marriage is foundational to the nation and society. Similarly, the institution of the military is foundational to the nation's history and existence. Participation in that institution takes on an increasingly fundamental character, as exclusion from that institution demeans the excluded.

Conclusion

Obergefell v. Hodges not only vindicated the rights of same sex couples to marry, it promised a new era of inclusion. Much post-*Obergefell* analysis has focused on its importance and promise in expanding fundamental rights based on substantive due process. But the *Obergefell* majority was largely focused on stigmatic exclusion, a government infringement best addressed through the Constitution's guarantee of equal protection. *Obergefell* ushered in a new understanding that the government may not, without sufficient justification, hold out important positive rights while selectively excluding some from those rights, when such exclusion serves to demean the excluded.

With the military transgender ban, the federal government has attempted the same demeaning exclusion that many states attempted with same-sex marriage bans: barring a group from participating in an important positive right based on their identity rather than their ability. While due process and traditional equal

225. For example, the "inability to adapt to the military environment" during training, which can be based on the inability to complete training requirements, can serve as a basis for discharge, as can repeated fitness test failures. *See, e.g.*, Dep't of Army Reg. No. 635–200 (2016); Dep't of Air Force, AFI 36–3208 ¶ 5.65 (2004).

protection arguments advance plaintiffs' challenges to the transgender ban, so too does *Obergefell*'s admonition: government may not treat its citizens unequally by excluding some from important government-provided rights when the inequality serves to demean. Transgender persons interested in military service hope not to be relegated to second-class status, excluded from one of the nation's most cherished institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.