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The trouble with the ‘dignity’ of same-sex marriage

by [Jonathan Turley](#)

Like many people at the Supreme Court last month, I was deeply moved by the historic ruling in *Obergefell v. Hodges* recognizing [the constitutional right of same-sex couples to marry](#). At such a transcendent moment, it is difficult to do anything but celebrate the triumph of what Justice Anthony Kennedy [called](#) the “dignity” and “profound hopes and aspirations” of the many loving couples who had been denied the recognition of marriage.

But Kennedy’s moving language was more than just aspirational thoughts on dignity. He found a right to marriage based not on the status of the couples as homosexuals but rather on the right of everyone to the “dignity” of marriage. The uncertain implications of that right should be a concern not just for conservatives but also for civil libertarians. While *Obergefell* clearly increases the liberty of a historically oppressed people, the reasoning behind it, if not carefully defined, could prove parasitic or invasive to other rights. Beware the law of unintended constitutional consequences.

For the record, I have long advocated the recognition of same-sex marriage. But the most direct way the justices could have arrived at their conclusion would have been to rely on the 14th Amendment’s equal protection clause. It, along with the civil rights legislation of the 1960s, holds that all citizens are entitled to the same treatment under the law, no matter their race, sex, religion or other attributes known as “protected classes.” Kennedy and his allies could have added “sexual orientation” to the list of protected classes, making the denial of marriage licenses an act of illegal discrimination. This approach would also have clarified the standard in a host of other areas, such as employment discrimination and refusal of public accommodations.

Instead, Kennedy fashioned the opinion around another part of the 14th Amendment, holding that denial of marriage licenses infringed on the liberty of gay men and women by restricting their right to due process. As Justice Clarence Thomas correctly [pointed out](#), liberty under the Constitution has largely been defined as protection against physical restraints or broader government interference — “not as a right to a particular governmental entitlement.” While Kennedy makes a powerful case for an expansive new view of due process, he extends the concept of liberty far beyond prior decisions.

In reality, he has been building to this moment for years, culminating in what might now be called a right to dignity. In his 1992 *Casey* decision, he upheld *Roe v. Wade* on the basis of “personal dignity and autonomy [that] are central to the liberty protected by the Fourteenth Amendment.” Kennedy wove this concept of protected dignity through a series of cases, from gay rights to prison lawsuits, including his historic 2003 *Lawrence* decision striking down the criminalization of homosexuality. These rulings on liberty peaked with *Obergefell*, which he described as an effort of the petitioners to secure “equal dignity in the eyes of the law.” He used the word “dignity” almost a dozen times in his decision and laid down a jurisprudential haymaker: “The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”

These words resonate with many of us, but it is not clear what a right to dignity portends. As Justice Antonin Scalia predicted in an earlier dissent to *Lawrence*, it signals “the end of all morals legislation.” Some of us have [long argued](#) for precisely that result, but the use of a dignity right as a vehicle presents a new, unexpected element, since it may exist in tension with the right to free speech or free exercise of religion.

Dignity is a rather elusive and malleable concept compared with more concrete qualities such as race and sex. Which relationships are sufficiently dignified to warrant protection? What about couples who do not wish to marry but cohabit? What about polyamorous families, who are less accepted by public opinion but are perhaps no less exemplary when it comes to, in Kennedy’s words on marriage, “the highest ideals of love, fidelity, devotion, sacrifice, and family”? The justice does not specify. It certainly appears as if *Obergefell* extends this protection because same-sex unions are now deemed [acceptable by the majority](#). The courts may not be so readily inclined to find that other loving relationships are, to quote the opinion, a “keystone of the Nation’s social order” when they take less-orthodox forms. But popularity hardly seems like a proper legal guide to whether a relationship is dignified.

With the emergence of this new right, we must now determine how it is balanced against other rights and how far it extends. For example, it is clearly undignified for a gay couple to be denied a wedding cake with a homosexual theme. Yet for a Christian or Muslim baker, it might also feel undignified to be forced to prepare an image celebrating same-sex marriage. Should the right to dignity trump free speech or free exercise?

Other groups outside the lesbian, gay, bisexual and transgender community could invoke this precedent, since the reasoning does not concern a protected sexual-orientation class but rather a citizen’s right to dignity. Could employees challenge workplace dress codes as intruding upon their right to “define and express their identity”? Could those subject to college admissions preferences raise claims that race or gender classifications deny their individual effort to “define and express their identity”? Kennedy’s approach has only deepened the uncertainty over how courts will handle such cases.

Some of the greatest attacks on dignity are often found in the exercise of free speech. Europe and Canada, for example, protect broader dignity rights through laws that [penalize statements](#) deemed degrading, hateful or insulting to different groups, including homosexuals. In Britain, for example, a Baptist street preacher was charged with causing “harassment, alarm or distress” by stating on a street corner that he viewed homosexuality to be a sin. In Canada, comedian Guy Earle was found guilty of violating the human rights of a lesbian couple after he got into a trash-talking exchange during an open-mike night at a nightclub. In France, comedian Dieudonné M’Bala M’Bala has been arrested and prosecuted for jokes deemed anti-Semitic. In Greece, another jokester was arrested for insulting a famous monk by making his name sound like a pasta dish. In Italy, comedian Sabina Guzzanti was investigated for joking that “in 20 years, the pope will be where he ought to be — in hell, tormented by great big [gay] devils.”

In the United States, such efforts have been largely stymied by the express protection of free speech in the First Amendment and expansive interpretations by the courts. Nevertheless, pressure is rising to criminalize forms of “hate speech” or speech that is viewed as discriminatory or degrading to certain groups. Universities increasingly warn students and faculty not just against comments deemed racist but also against an ever-expanding list of “[microaggressions](#),” such as the use of “[melting pot](#)” and other terms considered insensitive. This year, [a Montana prosecutor](#) sought to punish speech that exposes religious, racial or other groups “to hatred, contempt, ridicule, degradation, or disgrace.” Such laws could now be justified as protecting the dignity rights of groups and balancing the “danger” of free speech.

Obergefell would be a tragic irony if it succeeded in finally closing the door on morality and speech codes only to introduce an equally ill-defined dignity code. Both involve majoritarian values, enforced by the government, regarding what is acceptable and protectable. Substituting compulsory morality with compulsory liberalism simply shifts the burden of coercive state power from one group to another.

None of these concerns take away from the euphoria of this liberating moment. And the justices can certainly tailor their new right in the coming years. But if we are to protect the dignity of all citizens, we need to be careful that dignity is not simply a new way for the majority to decide who belongs and who does not in our “Nation’s social order.”

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