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The H. Albert Young Distinguished Lecture in Constitutional Law, Constitutional Comparisons: Emerging Dignity Rights at Home and Abroad

Erin Daly

THE H. ALBERT YOUNG DISTINGUISHED LECTURE IN CONSTITUTIONAL LAW

CONSTITUTIONAL COMPARISONS: EMERGING DIGNITY RIGHTS AT HOME AND ABROAD

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Thank you for coming this afternoon. I'm delighted to have the opportunity to present the 2013 H. Albert Young Distinguished Lecture in Constitutional Law.

I am truly indebted to a number of people who have supported the work I've been able to do over the last couple of years as the H. Albert Young Fellow. First, of course, the H. Albert Young family. The Young Family's support provided me with time to do the research on comparative constitutional law that culminated in a book on Dignity Rights and will culminate in another book on global environmental constitutionalism that Professor James R. May and I are writing. The Young family's support was also essential in allowing me to travel around the country and abroad to share this and other work I've been doing.[2]

My comments tonight will focus on *United States v. Windsor*,[3] the Supreme Court case from June 2013 which struck down the essential provisions of the Defense of Marriage Act.[4] I'd like to talk about it in comparative perspective, not because the Supreme Court did, but because it didn't. And it should have. Looking at the constitutional law of other nations would have made this opinion stronger, more comprehensible, and, I think, more legitimate.

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2. I would also like to thank Linda Ammons, Dean of the Law School, for her support for this work over the years, as well as John Culhane my colleague whose insights and thoughtfulness have helped me think through some of the issues I'll be speaking about tonight. Thanks, also, to Connie Sweeney and Carol Perrupato -- a formidable team -- whose flawless and selfless work made it possible for us all to come together here tonight. I'd also like to express my gratitude to three fantastic research assistants Brittany Giusini, Katharina Earle, and Nadiia Loizides.

3. United States v. Windsor, 133 S. Ct. 2675 (2013).

4. Defense of Marriage Act, Pub. L. 104–199, 110 Stat. 2419.

I. WHAT THE SUPREME COURT DID, AND DID NOT DO

What the Supreme Court did was strike down the provision of the Defense of Marriage Act which defined marriage for federal purposes in exclusively heterosexual terms. But how?

Most people expected the Court to decide that same sex marriage is either protected, or not, under equal protection[5] or substantive due process[6] of the United States Constitution because for decades, these are the terms in which we have been talking about same sex marriage. We've been talking about same sex relations for decades either as a matter of due process or equality rights—never quite deciding whether the heart of the injury of laws that prohibit same sex intimacy and intimate relations is that they don't treat same sex couples the way heterosexual couples are treated, or whether it is that they trench on the kinds of close personal relations that we believe lie within a zone of privacy that resists regulation. But whether one or the other, the discourse has always been limited to these two constitutional provisions.

But in *Windsor*, the Supreme Court took neither path. Or maybe it took both paths. It's not exactly clear. It talked about liberty, but not about privacy;[7] it called the rights at issue fundamental, but never held that same sex marriage was a fundamental right. It talked about equality, but never discussed whether sexual minorities constitute suspect class or not, and there was no discussion of sexual orientation as a suspect classification;[8] as a result, we still do not know whether laws discriminating on the basis of sexual orientation should receive heighted scrutiny. Indeed, while the Court invalidated the law, it did not apply the familiar ends-means test under rational basis, strict scrutiny, or any intermediate standard. And while it used the term

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5. U.S. CONST. amend. XIV.

6. U.S. CONST. amend. V. As is well known, the earliest incarnations of substantive due process were embodied in Lochner v. New York, 198 U.S. 45, 53 (1905) and other similar decisions of that era, which have now been largely discredited. *See, e.g.*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937); Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2628-29 (2012) (Ginsburg, J., concurring in part and dissenting in part). More modern incarnations of economic interests can be found in BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996) and State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003), both concerning limitations on punitive damages.

7. Privacy has lain at the heart of substantive due process since Justice Harlan's concurrence in *Griswold v. Connecticut*. Griswold v. Connecticut, 381 U.S. 479, 500 (Harlan, J., concurring). In recent years, privacy has fallen out of favor as the Court has reoriented its liberty jurisprudence away from privacy in the context of abortion and same-sex relations. *See* Planned Parenthood v. Casey, 505 U.S. 833, 849 (1992); Lawrence v. Texas, 539 U.S. 558, 573-74 (2003).

8. Though applied more in the breach, the Court's jurisprudence insists that race and national origin are suspect classes warranting strict scrutiny—that is, laws that classify people on the basis of race or national origin may be upheld only if the government can prove that such classifications are necessary to accomplish a compelling governmental purpose. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). Other classifications, such as gender and alienage, warrant lesser but still some heightened scrutiny. *E.g.*, United States v. Virginia, 518 U.S. 515, 533-34 (1996); Craig v. Boren, 429 U.S. 190, 197 (1976).

"fundamental"—suggesting the applicability of strict scrutiny—it invalidated the law finding that there was no "legitimate reason" for it.

Instead, the Court protected what it called the "equal dignity of same sex marriage." In so doing, it introduced a new term into our constitutional vocabulary. It did so intentionally and emphatically, but it neither explained nor defined this new term of art. As a result, the Court left open innumerable questions. There are interpretive questions: What does "equal dignity" mean? Where does it come from in the Constitution? If it derives from the due process clause, is it any more legitimate than privacy or for that matter contract as a substantive interest that warrants constitutional protection? Is it any more "rooted in the traditions and conscience of our people as to be ranked as fundamental[?]"[9] Is part of what Justice Kennedy in *Lawrence v. Texas* had called each person's "search for greater freedom[?]"[10] And, if so, where does *that* come from? And then there are practical questions: to what interests does the right to "equal dignity" apply? Does it replace privacy? Does it protect abortion rights? Or economic rights? Or other interests that have not previously been constitutionally recognized? And even in this case, it is not clear whether it is the same sex "marriage" that is entitled to constitutional protection, or the people who seek to enter into such marriages who are protected. None of this is self-evident, or even very comprehensible from a simple reading of the opinion. And the court cites no relevant case law to elucidate or contextualize our understanding.

But it shouldn't be blamed for failing to cite precedent, because there are no precedents—at least not in American law. There is no jurisprudence at all on equal dignity and very little case law on dignity at all. In the annals of Supreme Court jurisprudence there are just around a thousand mentions of "dignity" in 223 years of case law. Most of these mentions barely deserve mention. The Court most often uses the term for inchoate things, such as the United States, Congress, and especially courts. Indeed, the entire area of contempt is based on the dignity of courts.[11] In the last twenty years, the Court has revived the term for states of the Union to explain why putative plaintiffs cannot sue states in their own or in any other courts, under the Tenth and Eleventh Amendments.[12] The term has also been useful to the Court in its Eighth Amendment jurisprudence, to define what does or does not constitute cruel

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9. Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784, 793-94 (1969).

10. *Lawrence*, 539 U.S. at 579.

11. *See* Bloom v. Illinois, 391 U.S. 194, 208 (1968).

12. *See, e.g.*, Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 287-88 (1997) ("The dignity and status of its statehood allow[s] Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."). *See also* Alden v. Maine, 527 U.S. 706, 714 (1999) (explaining that the Constitution reserves to the States "a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status[ ]").

and unusual punishment.[13] (Coincidentally, it is the Court's Eighth Amendment jurisprudence where references to foreign law are most often made.) But none of this adds up to a body of Supreme Court dignity jurisprudence or even to a recognized constitutional right to *human* dignity.

Where we do see a lot of discussion about the constitutional right to human dignity, though, is in the constitutions and case law of *other* countries. So while the opinion doesn't make much sense from the standpoint of *American* constitutional law, it makes a lot more sense if we see it as flowing from the corpus of comparative constitutional law. This is a case where we need comparative constitutional law to explain how the American court is developing American constitutional law.

II. WHAT WE CAN LEARN FROM OTHER COUNTRIES' CONSTITUTIONAL JURISPRUDENCE

Comparative constitutional law refers to the practice of looking to the constitutional law of other countries to help resolve a domestic constitutional question. It's just a matter of looking around to see what other countries are doing. Comparative constitutional law is becoming more common around the world for practical and political reasons. First, technology is facilitating the instant availability of cases from around the world, along with technology-based translations. But there is more to the story than simple electronic innovations. The last few decades have seen an explosion in the number of constitutional democracies around the world, and in many of these countries, emerging courts with the power and obligation of judicial review are trying to develop a body of constitutional jurisprudence: they want to be seen as members of the community of nations, but they don't necessarily have enough constitutional history and practice to draw on if they limit themselves to their own domestic law. As a result, more and more courts around the world are looking to each other to enhance their own constitutional law. The constitutional world is, to coin Tom Friedman's phrase, getting flatter.[14]

In part, this is just a matter of common sense: if you are trying to solve a new problem, you'll look to see how other people in similar situations have solved it. It doesn't mean you have to follow them, or that you will be thrown off course if you consider their solutions. But it often helps to simply look around to see what is going on. There are, in fact, many examples from here and abroad of courts looking to what other countries are doing, and then not following them. A famous series of cases from Australia, dealing with defamation, is illustrative. In 1992, the High Court of Australia decided to adopt the American standard of reckless disregard in defamation cases

13. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

14. THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).

involving political speech,[15] but after a series of cases attempting to define the boundaries of the implied freedom of political communication, the Court ultimately abandoned the tie to the American landmark case of *New York Times v. Sullivan*.[16] To look at foreign law for comparative purposes is not to buy.

In fact, lower courts engage in comparative law all the time when they look to the jurisprudence of sister jurisdictions for authority that is *persuasive* if not binding on them. Even the United States Supreme Court routinely looks at arguments of the parties and their amici for their power to persuade, even though the Court is decidedly not bound by them.

But comparative constitutional law is controversial recently in the United State because it seems to tap into other larger contested issues like the proper role of judges, the meaning of the constitution, and even larger questions like the relationship between the United States and other countries—our own so-called constitutional exceptionalism.

To me, the controversy makes little sense. The Supreme Court has been looking abroad to learn from the experiences of others at least since *Marbury v. Madison*.[17] The Due Process Clause itself is borrowed from the Magna Carta, so it may not be entirely coherent to suggest that foreign sources are inimical to its interpretation.

And the United States' failure to engage with the constitutional law of other nations is more to the detriment of the United States than to its neighbors. The United States not only cites the cases of other countries less often; it is cited by others less often. And this, of course, limits the relevance of American jurisprudence to the constitutional law of other countries. Our courts are less influential than they would be if they stayed in the conversation.

In addition, the controversy is misguided because it misunderstands the purpose of comparative investigation. Courts don't and shouldn't look to other countries for the *results* they reach; we should not protect same sex marriage because another country does. And when there is a split, courts don't simply add up the wins and the losses and go with the winners. Rather, the purpose of the comparison is to understand the judicial reasoning, to satisfy judicial intellectual curiosity about how other courts have thought about similar problems, and to expand the range of possible solutions. As Justice Aharon Barak has said, "comparing oneself to others allows for greater self-knowledge. With comparative law, the judge expands the horizon and the interpretive field of vision. Comparative law enriches the options available to us."[18] Others have referred to the "international traffic in constitutional

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15. Nationwide News v. Wills (1992) 177 CLR 1, 32.

16. Lange v. Australian Broad. Corp. (1997) 189 CLR 520, 563 ("It makes little sense in Australia to adopt the United States doctrine so as to identify litigation between private parties over their common law rights and liabilities as involving 'State law rights.'").

17. 5 U.S. 137, 163 (1803) ("In Great Britain[,] the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.").

18. Aharon Barak, *Response to* The Judge as Comparatist*: Comparison in Public Law*, 80 TUL. L. REV. 195, 196 (2005).

ideas,"[19] the "cross-fertilization of decisions"[20] and foreign "sources of inspiration."[21] Some American scholars have argued that comparative constitutional law "help[s] us see our own practices in a new light[,]"[22] and helps us avoid "false necessities."[23] In the present context, the purpose of comparative constitutional law would not be to decide that we should protect it because others do (or that we shouldn't because others don't) but to engage in the international discourse, to open up the constitutional imagination, to see what possibilities exist out there, and to see how really smart people from around the world have thought about these issues. There is much to learn from others.

III. HUMAN DIGNITY IN COMPARATIVE PERSPECTIVE

If the court had considered what other jurists have said about same sex marriage, it would have surely noticed that increasingly courts around the world are thinking about same sex marriage, and a lot of other issues, in terms of human dignity. More and more, dignity is the frame courts are using to think about the rights of individuals and the relationship between the individual and the state. The idea of dignity is helping courts decide what kinds of things can be regulated and what must be left to individual choice or discretion, what respect is owed the individual from the government and from others in society.

Had the United States Supreme Court looked to other countries to see specifically how they had addressed same sex marriage in particularly, it would have seen a consensus that a recognition of human dignity requires protection of marriage choices.

In addressing the issue in 2004, the Constitutional Court of South Africa analogized prohibitions on same sex marriage to the racial discrimination that characterized that country's apartheid past: "[t]he denial of equal dignity and worth" that characterized both racial discrimination and discrimination based on sexual orientation, "all too quickly and insidiously degenerated into a denial of humanity and led to inhuman treatment by the rest of society in many other ways."[24]

The "equal dignity" language is instructive because it is identical to the term adopted by the *Windsor* Court. It derives from the Universal Declaration of

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19. A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 7 (2009).

20. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1116 (2000).

21. Christos L. Rozakis, *The European Judge as Comparatist*, 80 TUL. L. REV. 257, 268-70 (2005).

22. Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1236 (1999).

23. Vicki C. Jackson, *Methodological Challenges in Comparative Constitutional Law*, 28 PENN ST. INT'L L. REV. 319, 320-21 (2010).

24. Minister of Home Affairs v. Fourie, 2006 (3) BCLR 355 (CC) at para. 50.

Human Rights which affirms that "All human beings are born free and equal in dignity and rights."[25]

But it articulates limits on the kinds of discriminations that are constitutionally offensive: not all inequalities are invidious, the Court says. It is only those that deny a person's "equal dignity and worth." Perhaps this is what the United States Supreme Court has been trying to get at for the eighty years since Justice Stone first tried to set forth a theory of equal protection in terms of the burdens borne by "discrete and insular minorities[,]"[26] but the American Court has never articulated it in terms of equal dignity and worth—not even in the cases, such as *Brown v. Board of Education*,[27] that would seem to go most to the heart of human dignity and its deprivations under Jim Crow. The American Court has never found that a law was unconstitutional because it *denied a person's humanity*, the way the South African court did of laws that discriminate on the basis of race and sexual orientation.

Moreover, the South African court found that part of the harm wrought by such laws is that they invite *private harms "by the rest of society" not only by the government*.[28] These harms, while not reached by American constitutional law, nonetheless are relevant because they affect how a person relates to others in the community, even if they don't alter the relationship between the individual and the government. This is echoed in a 2010 case from Mexico, allowing same sex couples to adopt. Here, the right at stake was characterized as "the right to be considered by others as a human being, as a person, in their eminent dignity."[29] In these cases, dignity goes not only to one's official relationships but also to how one feels, or is, as well as to how others see us -- how we are *in relation to others*. "This right," the Mexican court said, the right "to human dignity -- encompasses all of the other rights, because it is necessary for the integral development of a person's personality."[30] Here, the right to dignity is directly linked to the full development of the personality -- the fount of all other rights. And this is in fact a very common way for courts to think about dignity.

Two years earlier, the Supreme Court of Nepal had come to a similar conclusion. After canvassing international and foreign law on the issue of same sex marriage, the Court said that "Any provision that hurt the reputation and self-dignity as well as the liberty of an individual is not acceptable from the human rights' point of view. The fundamental rights of an individual should not be shrunk on any grounds like religion, culture, customs, values etc."[31] In this interpretation, which is also fairly common in the jurisprudence of dignity, dignity rights trump other rights because they encompass all human rights. In

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25. U.N. Universal Declaration of Human Rights, Article 1.

26. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

27. 347 U.S. 483 (1954).

28. *Fourie*, 2006 (3) BCLR at para. 50.

29. Acción de Inconstitucionalidad 2/2010 (Mexico, 2101).

30. *Id.*

31. Sunil Babu Pant v. Nepal Gov't, 2064 BS (2007 AD), *available at* http://www.bds.org.np/publications/pdf_supreme_eng.pdf.

fact, when the Mexican Supreme Court returned to this issue in 2012, it again relied on human dignity to invalidate a Oaxacan law prohibiting same sex marriage. The court said that a law is not legitimate if it constituted an unconstitutional discrimination, based on "the principle of equality and the fundamental right to human dignity, from which is derived the free development of the personality. . . ."[32] Here, the Court cited *Romer v. Evans*,[33] *Baker v. Vermont*,[34] and several Canadian cases on same sex marriage.

The transnational case law on human dignity is by no means limited to cases about same sex relations. Courts have relied on human dignity to explain the legitimacy of laws restricting abortion, the imposition of the death penalty, the scope of criminal procedural rights, and the depth of socio-economic rights including the right to health, to education, to a proper pension, and to water, as well as the availability of civil and political rights including the right to free speech and association, and the right to vote and the right political participation. In short, courts have been using the idea of human dignity to help define what is essential to personhood, to demarcate the boundary between the individual and the government, to decide what kinds of issues are within the autonomous authority of the individual and what is within the regulatory power of the state or the majority to decide. And of course, this is exactly what the *Windsor* court did with dignity, only without expressly tapping into the bountiful global dignity jurisprudence.

As we look more closely at this global jurisprudence of dignity, *other nuances emerge.* Dignity has both inward and outward looking features: it is both who we are and how we want to be perceived. Courts around the world recognize that the individual exists in the context of a community; individual liberty or dignity isn't worth much except insofar as it's recognized by others. Thus, dignity is at once individual and collective. The corollary to this is Hannah Arendt's insight that dignity means being a part of a community, participating (as the Casey plurality said), in the social and economic life of the nation. In fact, some constitutional courts have recognized "civic dignity" -- the dignity-based right of individuals to participate in the political community.

Thus, as a constitutional matter, the right to dignity guarantees certain liberal civil rights. In one Argentine case—where activists were demonstrating for the rights of sexual minorities—the Supreme Court said that individuals have a right, rooted in human dignity, to engage in political protests.[35] Other courts have recognized the dignity-based rights to information and to participation in government decisionmaking, including *but not limited to the* dignity-based right to vote. The cases reveal that dignity seems to transcend every category of rights, including individual and collective, civil and political

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32. Amparo En Revisión 581/2012 (Derivado De La Facultad De Atracción 202/2012) (invalidating a prohibition on same-sex marriage).

33. 517 U.S. 620 (1996).

34. 744 A.2d 864 (Vt. 1999).

35. EXP.N.° 02005-2009-PA/TC, Lima ONG, "Acción De Lucha Anticorrupcion, para 6 (Peru Constitutional Tribunal (2009).

as well as socio-economic and cultural rights. In many countries, it is the foundational right. In Germany it is eternal, unamendable. In Israel, it is the parent-right that gives life to daughter rights. In Colombia, it is a general personality right. In India, it is implied from the right to life -- that is, the right to live is the right to live in dignity.

Collectively, these cases form a significant body of law that gives content and a definite form to this abstract notion of human dignity, as a legal right. Two central themes emerge from this global body of law? The first is the recognition of the equal value of each human being -- recalling the language of the Universal Declaration of Human Rights. As the South African case suggested, dignity is what defines an unconstitutional discrimination: discrimination is those practices that violate human dignity. The second theme is perhaps paradoxical, given the first. It is the recognition of each person's unique value. Dignity means that each person can develop his or her personality in accordance with own will, not measured by any objective standard of what a person should be. There are still standards of behavior (that is, law still regulates behavior) but it does not determine what a person *should be*. This can be characterized as an individuation principle. This is why many courts tend to see the notion of human dignity as relevant to sexual orientation.

IV. DIGNITY IN *WINDSOR*

As we've seen, the Supreme Court in *Windsor* declined to cite any foreign law, or any sources at all on the constitutional meaning of human dignity. While it announces the arrival of this new right to equal dignity, it provides no context, no framing for it. And yet, its use of the concept of human dignity, or equal dignity, is steeped in this global jurisprudence. The *Windsor* Court describes dignity as protecting against the economic injuries borne by the Defense of Marriage Act (including discriminatory taxes and inheritance laws), as providing some protection against legal obstacles unequally borne (such as in the areas of immigration, spousal rights in the military), and as protecting each individual's unique and personal definition of self while at the same time, recognizing that the individual exists only in community with others. Unusually for American law—though not inimical to global dignity jurisprudence—the Court emphasizes the stigmatic injuries borne by DOMA. The discrimination, the Court said, made them second class citizens not only in the eyes of the government but in the eyes of their fellow citizens, and in demeaning their marriages, DOMA injured people as members of their communities.

The idea of stigma—or what it means to be demeaned—is more important to the *Windsor* Court than it has been to any decision since *Brown v. Board of Education*—a case close to the hearts of many here because of H. Albert Young's close association with it, and with its aftermath. To fight racial discrimination in the 1950s was to recognize not just that inequality was unjust

at an abstract level. It was to understand the real, felt impact of discrimination on what the Supreme Court called the hearts and minds of the children who were seeking a decent education. The Brown decision did not mention dignity, but recognized that discrimination's worst injury is that it demeans people. It not only erodes their rights, but hurts their hearts and encourages others to see them as less important, less valuable. In doing that, it marginalizes them, isolates them, and takes them out of the political community, as Arendt would say at exactly the same time.

Brown said that education was fundamentally important because it provides not only the tools for reading and writing, but awakens the child to "cultural values," and helps him "adjust normally to his environment."[36] Education here is not just an individual right but a right that enhances a person's relationship to his or her community and his or her place in the community. It's a civic right.

I think that Justice Kennedy was concerned about the same thing in the DOMA case. Kennedy contrasts state recognition of same sex marriage with the federal government's non-recognition. "When the State used its historic and essential authority to define the marital relation in this way, its role and its power in making the decision enhanced the recognition, dignity, and protection of the class in their own community."[37] But by treating their marriages as less valuable, DOMA made lesbians and gays outsiders in their communities, in their social and emotional communities, and also in their political communities. This, it turns out, is not so much a case about sexual orientation (which is why the court doesn't talk about suspect classifications) or about marriage (which is why the court doesn't talk about fundamental rights). Rather, it is a case about who is within and who is outside the political community. To have dignity is to be within a political community. It is the right to have rights.

If the government demeans you, it encourages others to do the same, and the result is to make it more difficult if not impossible for you to participate equally in your civic & political community.

And what the court is doing here, what courts all over the world have been doing for the last few decades, is to recognize that a constitution that protects every person's right to dignity is thereby expanding the compass of the political community.

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36. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).
37. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).