Duke Law Journal Online

VOLUME 68 APRIL 2019

Note

EQUAL DIGNITY AND UNEQUAL PROTECTION: A FRAMEWORK FOR ANALYZING DISPARATE IMPACT CLAIMS

KYLE P. NODES†

ABSTRACT

The Supreme Court has long endorsed the theory of the "colorblind" Equal Protection Clause, viewing it as a mandate of only facial equality. Due to rigid doctrine that limits true protection to only a short, stagnant list of fundamental rights and suspect classifications and that requires proof of discriminatory intent, only the most blatant, purposeful inequality is within constitutional reach. Festering outside of this doctrinal sphere are powerful examples of state actions that impose disparate impacts on marginalized communities, such as the nationwide system of laws that disqualify individuals—disproportionately black men—with felony convictions from the jury pool.

However, the door to a new approach for combatting such issues may have recently opened. In Obergefell v. Hodges*, the Supreme Court embraced the interconnection between the Fourteenth Amendment's Due Process and Equal Protection Clauses to move beyond the restrictions of current equal protection doctrine and strike down same-sex marriage bans. This "equal dignity" approach embraces a different view of equality protection: antisubordination*

Copyright © 2019 Kyle P. Nodes.

† Duke University School of Law, J.D. expected 2019; Villanova University, B.A. 2016. Thank you to Professor Emily Strauss and the members of the Scholarly Writing Workshop for their helpful feedback on early drafts of this Note, and to my fellow editors of the *Duke Law Journal* for their immensely valuable edits and insight. Finally, thank you to my family for their unwavering support and encouragement.

theory, which focuses on ensuring substantive equality. This Note proposes a framework for applying equal dignity, utilizing the example of felon-juror exclusion to argue that it can serve as a principled approach for addressing disparate impact claims.

INTRODUCTION

In the early weeks of 2002, a fifty-four-year-old man named Sims was called for jury duty in an aggravated assault case.[1] He entered the courthouse that day prepared to join his fellow citizens in fulfilling their civic duty as part of "the spinal column of American democracy."[2] Upon arriving, however, he found himself challenged and removed from the jury pool for a surprising reason: under a Texas statute, he was disqualified from jury service because of a crime he had committed thirty-seven years earlier.[3] In 1965, Sims, then seventeen years old, was convicted of misdemeanor theft, a crime for which he served probation and paid a hundred-dollar penalty.[4] Now an adult running a retail store of his own, Sims was told by the trial court judge that "our law is so clear that . . . even a minor theft of a piece of bubble gum, if it got a conviction, it means you can't serve on a jury."[5]

Sims learned a startling fact that day—he was one of the many millions of Americans who are statutorily excluded from jury service. Currently, a federal statute prohibits individuals who have been convicted of a felony from being included in federal court jury pools.[6] This ban is lifelong and can only be abated by restoration of the individual's civil rights.[7] In addition, forty-nine states currently have laws disqualifying individuals with certain criminal convictions from jury pool eligibility, with Maine being the lone exception.[8] Thirty-one

---

1. Robertson v. State, No. 07-02-0109-CR, 2003 WL 1872934, at *1 (Tex. Ct. App. Apr. 11, 2003).

2. Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part).

3. *Robertson*, 2003 WL 1872934, at *1.

4. *Id*.

5. *Id.*

6. 28 U.S.C. § 1865(b)(5) (2012) (declaring ineligible for service on a grand and petit federal jury anyone who "has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored").

7. *Id.*

8. ME. REV. STAT. ANN. tit. 14, § 1211 (2013) (specifying qualifications for jury service without mentioning prior criminal conviction). Colorado has no restriction on felons serving on trial juries but does disqualify them from grand jury duty. COLO. REV. STAT. ANN. § 13-71-105(3) (West 2016) ("A prospective grand juror shall be disqualified if he or she has previously been convicted of a felony.").

of those states have lifelong bans on state court jury pool eligibility for individuals who have been convicted of a felony,[9] while eighteen states have juror-qualification laws that specify the length of bans placed on those with prior felony convictions, ranging from release from prison all the way to the obtainment of an official pardon.[10] Thirteen states even disqualify individuals with certain misdemeanor convictions.[11]

Given how widespread they are, these laws unsurprisingly disqualify a large percentage of the American population from jury service.[12] Although quantifying the exact number of felons in the United States is tricky,[13] a 2016 study put the number as high as 23 million people.[14] Even estimates on the lower end of the scale suggest that up to 16 million Americans may be statutorily banned from the federal jury pool as a result of convictions at both the state and federal levels.[15]

Perhaps more importantly, however, these exclusion laws have a malignant effect that might not be immediately apparent: they create a harsh, disparate impact on communities of color.[16] Although only

---

9. Brian C. Kalt, *The Exclusion of Felons From Jury Service*, 53 AM. U. L. REV. 65, 67 (2003); *see also* Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 419–24 (2016) (listing state laws).

10. Anna Roberts, *Casual Ostracism: Jury Exclusion on the Basis of Criminal Convictions*, 98 MINN. L. REV. 592, 596 (2013).

11. *Id.* at 597. Some states also disqualify those who have been charged with, but not yet convicted of, such offenses. *See, e.g.*, TEX. CODE CRIM. P. ANN. art. 35.16 (West 2018) (allowing challenge for cause for jurors convicted, indicted, or under "legal accusation" of either a felony or misdemeanor theft).

12. As described above, juror-eligibility laws often exclude both individuals convicted of a felony and individuals convicted of certain misdemeanors. Since felons are excluded by the federal government and by forty-nine states, this Note focuses on individuals convicted of felony offenses and refers to the impacted individuals as "felons" for internal consistency. The same arguments advanced below apply to individuals excluded from the jury pool due to misdemeanor convictions.

13. Kalt, *supra* note 9, at 168–69.

14. Nicholas Eberstadt, *Why is the American Government Ignoring 23 Million of its Citizens?*, WASH. POST (Mar. 31, 2016), https://www.washingtonpost.com/opinions/why-is-the-american-government-ignores-23-million-of-its-citizens/2016/03/31/4da5d682-f428-11e5-a3ce-f06b5ba21f33_story.html?noredirect=on&utm_term=.767ce57af9ef [https://perma.cc/R3Y4-T8AY].

15. Christopher Uggen, Jeff Manza & Melissa Thompson, *Citizenship, Democracy, and the Civic Reintegration of Criminal Offenders*, 605 ANNALS AM. ACAD. POL. & SOC. SCI. 281, 304 (2006).

16. *See* Kevin R. Johnson, Hernandez v. Texas*: Legacies of Justice and Injustice*, 25 CHICANO-LATINO L. REV. 153, 192 (2005) (describing the disparate impact on the Latino community); Kalt, *supra* note 9, at 67 (describing the disparate impact on the black community). In order to narrow its scope, and to rely on the best available statistics, this Note focuses on the disparate impact that juror exclusion has on the black community.

around 6 percent of nonblack Americans have been convicted of a felony,[17] around 20 percent of all black adults—and perhaps more than 33.3 percent of all black men—have been convicted.[18] Most would therefore be banned from the jury pool for life.[19] As a result, an estimated 29 to 37 percent of black men are currently excluded from the federal jury pool.[20] Because of this racially disparate exclusion, although only 12.6 percent of the American population is black,[21] one study suggests almost 30 percent of excluded potential jurors are.[22]

This imbalance likely has serious impacts on the American legal system. The historic social science findings have been inconsistent in assessing the impact of the racial composition of juries on trial outcomes,[23] but more recent research shows that white mock jurors in diverse groups are less convinced of a black defendant's guilt than white mock jurors in all-white groups.[24] The warping effect of all-white juries distorts many aspects of jury behavior; one study demonstrates that there are significant variations in the deliberations, openness to evidence, consideration of racial issues, and analytic behaviors of all-white juries as compared to their racially mixed counterparts.[25]

---

17. Sarah Shannon et al*., Growth in the U.S. Ex-Felon and Ex-Prisoner Population, 1948 to 2010*, at 7 (Working Paper, 2011), http://paa2011.princeton.edu/papers/111687 [https://perma.cc/CDL4-K3KM].

18. Uggen, Manza, & Thompson*, supra* note 15, at 283.

19. *See* Kalt, *supra* note 9, at 171 (stating that while these estimates might not perfectly describe the number of black men excluded from jury service, they are "consistent with other estimates in other contexts").

20. *Id*. at 113.

21. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, 2010 CENSUS: SUMMARY POPULATION AND HOUSING CHARACTERISTICS 4 (2013), https://www.census.gov/prod/cen2010/cph-1-1.pdf [https://perma.cc/D5NB-KY4Y].

22. Kalt, *supra* note 9, at 170.

23. *See* Samuel R. Sommers & Phoebe C. Ellsworth, *White Juror Bias: An Investigation of Prejudice Against Black Defendants in the American Courtroom*, 7 PSYCHOL. PUB. POL'Y & L. 201, 208 (2001) (summarizing research on racial composition of juries and on racial bias in jury results).

24. Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOCIAL PSYCH. 597, 603–04 (2006).

25. *See, e.g.*, Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 111–12 (1990) (discussing research indicating that all-white juries are likely to find that identical evidence is sufficient to convict a black defendant but insufficient to convict a white defendant); Samuel R. Sommers, Race and Juries: The Effects of Race Salience and Racial Composition on Individual and Group Decision-Making 97–107 (2002) (unpublished Ph.D dissertation, University of Michigan) (finding that racially mixed mock juries deliberated longer, discussed more potential issues, and considered racial issues more often than all-white juries).

A 2012 study analyzed the impact of the jury's racial composition on trial outcomes in Florida between 2000 and 2010, with unsurprising results. The researchers concluded that the "impact of the racial composition of the jury pool on trial outcomes is statistically significant," and that "there is a significant gap in conviction rates for black versus white defendants when there are no blacks in the jury pool . . . [which] is eliminated when there is at least one black member of the jury pool."[26] Specifically, when there were no potential black jurors in the pool, black defendants were convicted of at least one crime at a rate of 81 percent, as opposed to a conviction rate of only 66 percent for white defendants.[27] However, when there was at least one black juror introduced into the jury pool, conviction rates for black defendants dropped to 71 percent, a rate almost identical to that of white defendants.[28]

This system has helped to create a self-perpetuating cycle. Black adults, particularly black adult men, are convicted of crimes at higher rates due in part to racial disparities in policing, selective enforcement of the law, and different levels of success in navigating the complexities of the criminal justice system.[29] Once convicted, they are excluded from the jury pool, creating less diverse juries, which then convict black men at higher rates. This is a serious issue, especially given the already high level of distrust in the legal system generally and nondiverse juries in particular.[30] This cycle of juror exclusion poses a genuine threat to "the public's faith in the legitimacy of the legal system and its outcomes."[31]

---

26. Shamena Anwar, Patrick Bayer & Randi Hjalmarsson, *The Impact of Jury Race in Criminal Trials*, 127 Q.J. ECON. 1017, 1019–20 (2012).

27. *Id.* at 1032.

28. *Id.*

29. *See infra* notes 171, 195–98 and accompanying text (discussing racial disparities in policing and outcomes within the criminal justice system).

30. HARVARD UNIVERSITY INSTITUTE OF POLITICS, *Survey of Young Americans' Attitudes Towards Politics and Public Service 29th Edition* (Apr. 25, 2016) [hereinafter *Harvard IOP Spring 2016 Poll*], http://iop.harvard.edu/youth-poll/harvard-iop-spring-2016-poll (almost two-thirds of 18- to 29-year-old black respondents had no confidence "in the U.S. judicial system's ability to fairly judge people without bias for race and ethnicity"); Hiroshi Fukurai & Darryl Davies, *Affirmative Action in Jury Selection: Racially Representative Juries, Racial Quotas, and Affirmative Juries of the Hennepin Model and the Jury De Medietate Linguae*, 4 VA. J. SOC. POL'Y & L. 645, 665 (1997) (discussing a poll in which 67 percent of respondents believed that racially diverse juries reach fairer decisions than single-race juries).

31. Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 CHI.-KENT L. REV. 1033, 1038 (2003); *see also* Johnson, *supra* note 16, at 158 ("Racially skewed juries undermine the perceived impartiality of the justice system and, at the most fundamental level, the rule of law.").

Despite a recent increase in scholarly attention given to this issue, the legal research and scholarship surrounding these bans has remained "scant."[32] And, significantly, traditional constitutional jurisprudence has not provided a means to challenge them; attempts to mount constitutional challenges to felon-juror exclusion have routinely failed.[33] Perhaps the most important roadblock has been the current jurisprudence interpreting the Fourteenth Amendment's Equal Protection Clause.[34] In recent decades, the Court has constrained the Equal Protection Clause by emphasizing the facial neutrality of challenged laws[35] and by requiring plaintiffs to demonstrate that discriminatory intent underlies seemingly neutral laws.[36] By relying on these constraints, the Court has enforced a particular theory of the constitutional harm that the Equal Protection Clause is meant to remedy: the "colorblind" equal protection theory. Making use of this theory, the Court has been reasonably consistent in recent decades in striking down state actions that are imbued with improper biases where intent to discriminate based on a suspect classification can be shown.[37] But when this intent is not provable, the Court has generally refused to intervene—even despite persuasive evidence of the disparate impact and genuine harm caused by the state action.[38]

An alternative approach, antisubordination theory, focuses on "whether a law advances substantive equality by analyzing 'the concrete effects of government policy on the substantive condition of the disadvantaged.'"[39] Courts making use of this theory would consider the tangible impact of government policy to determine whether true equality is being furthered, rather than simply concentrating on blatant, outright discrimination. The Court's decision to instead focus

32. James M. Binnall, *Summonsing Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 LAW & SOC. INQUIRY 4, 20–24 (2018).

33. *See* Kalt, *supra* note 9, at 75–99 (analyzing the failures of different challenges to felon-juror bans).

34. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

35. Elise C. Boddie, *The Indignities of Color Blindness*, 64 UCLA L. REV. DISCOURSE 64, 66–67 (2016).

36. *See* Washington v. Davis, 426 U.S. 229, 240–42 (1976) (establishing the discriminatory intent requirement).

37. *See infra* notes 74–78 and accompanying text.

38. *See infra* notes 83–87 and accompanying text.

39. Kimberly Jenkins Robinson, *The Constitutional Future of Race-Neutral Efforts to Achieve Diversity and Avoid Racial Isolation in Elementary and Secondary Schools*, 50 B.C. L. REV. 277, 320 (2009) (quoting Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1454 (1991)).

on suspect classifications and discriminatory intent has allowed inequality to fester, unchecked, throughout our society and legal system. The exclusion of felons from the jury pool is just one example of substantive equality being thwarted by overly constrictive constitutional doctrine.

However, a new approach to equality may have been laid out in *Obergefell v. Hodges*,[40] which declared state bans on same-sex marriage unconstitutional.[41] In an opinion that largely disregarded traditional Fourteenth Amendment jurisprudence, the Supreme Court focused on the interwoven nature of due process and equal protection within the Fourteenth Amendment.[42] The Court used this combined lens of two constitutional protections to analyze, and strike down, same-sex-marriage bans.[43] Through this recognition of the Amendment's interconnected clauses, *Obergefell*'s reasoning may finally provide an avenue for easing the colorblind theory's chokehold on the doctrine and rethinking the Court's approach to disparate impact claims.

This potential new approach, which this Note refers to as "equal dignity,"[44] firmly embraces the ideals of antisubordination.[45] In fact, Professor Laurence H. Tribe argues that "in recognizing that even *unintended* effects can render a traditional practice or definition inconsistent with the Fourteenth Amendment, *Obergefell* may well have laid the foundation for reexamining" the discriminatory intent requirement.[46] Although the equal dignity approach has not yet been applied outside of the gay rights context or explicitly acknowledged by the Supreme Court, and although the recent changes in the Court's composition raise questions about the continued viability of *Obergefell*'s reasoning, this explication of how equal protection and

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

41. *Id.* at 2607.

42. *Id*. at 2603.

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

44. This is the name given to it by Professor Laurence H. Tribe. *Id.* The name is presumably taken from *Obergefell*'s closing lines: "They ask for *equal dignity* in the eyes of the law. The Constitution grants them that right." *Obergefell*, 135 S. Ct. at 2608 (emphasis added). Other scholars have given it different labels. *See, e.g.*, William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1025 (2004) (describing it as a "jurisprudence of tolerance").

45. Kenji Yoshino, *A New Birth of Freedom?* Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015) [hereinafter Yoshino, *A New Birth*].

46. Tribe, *supra* note 43, at 19.

due process concerns coexist provides an opportunity for advocates and courts to approach racial inequality in a new way.[47]

This Note argues that *Obergefell*'s equal dignity approach can be utilized in analyzing disparate impact claims under the Equal Protection Clause, and that it provides a principled means for striking down laws like those excluding felons from jury service. Part I discusses the current state of equal protection doctrine and describes the ways in which it has failed to fully combat inequality. Part I also analyzes the failed attempts to combat exclusion laws in court. Part II discusses the *Obergefell* opinion, outlines a proposed framework for the equal dignity approach, and addresses the potential impact of recent changes in the Supreme Court's composition on equal dignity's future relevance. Finally, Part III provides an example of equal dignity analysis, applying it to laws excluding felons from the jury pool and concluding that the harshest of these laws violate the Fourteenth Amendment.

I. THE LIMITATIONS OF A COLORBLIND EQUAL PROTECTION DOCTRINE

The Fourteenth Amendment's Equal Protection Clause declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[48] The motive of the Amendment's authors was straightforward—their intent was to protect the rights of former slaves[49] and ensure the constitutionality of the Civil Rights Act of 1866.[50] Congressman Thaddeus Stevens, when introducing the Fourteenth Amendment in the House of Representatives, described its aspiration as nothing less ambitious than "the amelioration of the

47. *See, e.g.*, Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1122 (2017) (proposing "that equal dignity is one theory of Equal Protection that can explain when governmental stereotyping is unconstitutional").

48. U.S. CONST. amend. XIV, § 1.

49. *See* Paul Finkelman, *John Bingham and the Background to the Fourteenth Amendment*, 36 AKRON L. REV. 671, 686–87 (2003) (noting that the congressional Joint Committee on Reconstruction concluded that "nothing short of a constitutional amendment—what became the Fourteenth Amendment—would protect the rights of the former slaves").

50. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968); *see also* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1281 (1997) ("The clearest and most indisputable purpose of the Fourteenth Amendment was to provide constitutional authority for the Civil Rights Act of 1866, which outlawed the Black Codes."). The Fourteenth Amendment ensures this constitutionality by enshrining not only the protections embodied in the Due Process and Equal Protection Clauses, but also by ensuring that Congress has the authority to enforce those protections through legislation. *See* U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

condition of the freedmen."[51] The Amendment was passed as a way "to atone for our nation's own original sin and extend our Constitution's promises to all citizens."[52]

Put simply, the Fourteenth Amendment's Equal Protection and Due Process Clauses were adopted so that America might begin the process of making amends for the evil of slavery. State actions that inflict a disparate impact on nonwhite communities continue to perpetuate related racial stratification in America;[53] they should not be ignored by the courts simply because they are facially neutral. A more remedial Fourteenth Amendment jurisprudence is required—one that can effectively rectify the serious inequality that yet remains and that is consistent with the race-conscious approach of the Amendment's drafters.[54] As the *Obergefell* Court recognized, "when the rights of persons are violated, 'the Constitution requires redress by the courts,' notwithstanding the more general value of democratic decisionmaking."[55]

A. *Contemporary Equal Protection Doctrine*

Despite the race-conscious, remedial purpose of the Fourteenth Amendment, and despite the often heated debate over the true

---

51. Cong. Globe, 39th Cong., 1st Sess. 2459 (1866) (statement of Rep. Stevens).

52. Tribe, *supra* note 43, at 21. Admittedly, the Amendment's authors also had their continued political control in mind. Reconstruction Republicans were specifically worried that Southern Democrats would use their potentially increased numbers in the House of Representatives—a result of the Thirteenth Amendment causing freed slaves to be counted when determining representation—to take control of the national legislature, all while suppressing the actual ability of freed slaves to engage in the political process. These political concerns likely lead to the inclusion of Section 2 of the Fourteenth Amendment, which provides for the reduction of representation if a state improperly denies individuals the right to vote. WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE 45–49 (1988).

53. Reva B. Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129–30 (1997) [hereinafter Siegel, *Why Equal Protection No Longer Protects*].

54. *See* Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 988 (2012) ("The Congress that enacted the Fourteenth Amendment also enacted race-conscious measures designed to ameliorate the condition of former slaves."). For a detailed description of the decidedly not "colorblind" actions of Congress in the years immediately following the Fourteenth Amendment's enactment, see generally Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985) (describing various race-conscious programs enacted by Congress).

55. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (quoting Schuette v. BAMN, 134 S. Ct. 1623, 1637 (2014)).

meaning of equality,[56] the Court has consistently interpreted the Equal Protection Clause as mandating only formal, de jure equality.[57] Indeed, the Court has treated any "race-conscious government action [as] presumptively unconstitutional."[58] The Court has gone a step further than using this rule to attack harmful racial discrimination alone; rather, the foremost principle of the existing equal protection jurisprudence is the "commitment to protect individuals against *all* forms of racial classification, including 'benign' or 'reverse' discrimination."[59]

This rule of colorblindness is intended to eliminate the ability of the state to make any decisions based on race or other suspect classifications.[60] Though earlier equal protection cases like *Brown v. Board of Education*[61] did not mention colorblindness, it has long since come to dominate the Court's equal protection approach.[62] Despite thorough criticism, a majority of the Court has apparently viewed it as an effective standard.[63]

Within this colorblind approach, two doctrinal methodologies serve as additional hurdles to achieving true equal protection. First, the colorblindness approach analyzes discrimination through a system of suspect classifications and related tiers of scrutiny.[64] If a state action

56. Michael C. Dorf, *Equal Protection Incorporation*, 88 VA. L. REV. 951, 956–59 (2002); *see also* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 n.3 (1987) (providing examples of scholarly debate regarding the merits and weaknesses of *Washington v. Davis* and discriminatory intent requirements); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278, 1288 n.23 (2011) (providing examples of the antisubordination debate in equal protection doctrine).

57. Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 10 (2017).

58. William M. Carter, Jr., *Affirmative Action as Government Speech*, 59 UCLA L. REV. 2, 5 (2011).

59. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over* Brown, 117 HARV. L. REV. 1470, 1473 (2004) (emphasis added).

60. Boddie, *supra* note 35, at 66–67.

61. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

62. Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987–88 (2007) (describing the current equal protection jurisprudence as a colorblind approach).

63. *Compare* Ruth Colker, *Anti-Subordination Above All Else: Race, Sex, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1011 (1986) (discussing why the colorblind approach to equal protection is incorrect and should be replaced with antisubordination), *with* Siegel, *Why Equal Protection No Longer Protects*, *supra* note 53, at 1130 ("[T]he Court is confident that it has abolished segregation and granted African-Americans equal protection of the laws.").

64. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 717–23 (3d ed. 2009).

discriminates on the basis of a suspect classification or on the exercise of a fundamental right, it receives either strict or intermediate scrutiny. These forms of heightened scrutiny closely analyze the challenged state action and provide a significant chance of victory for the plaintiff.[65] However, if a particular state action "implicates neither a nonprotected classification, nor a fundamental right," it receives rational basis review,[66] the most lenient and government-friendly standard of scrutiny.[67] This tiered structure therefore both fails to protect plaintiffs who have been discriminated against in the exercise of a nonfundamental right, and fails to protect against discrimination that is not based on a previously recognized suspect classification.

Second, the Court has narrowly defined the forms of state action that it views as impinging upon equal protection, even where suspect classifications are implicated. The pivotal principle behind this move is the discriminatory intent requirement outlined in *Washington v. Davis*[68] and its progeny.[69] Under this rule, even substantial proof that state action disparately impacts members of a suspect classification is not enough to show an equal protection violation.[70] Instead, a plaintiff alleging an equal protection violation *must* provide evidence of either facial discrimination in the statute's language or discriminatory intent

---

65. *Id.* at 744.

66. Susannah W. Pollvogt, *Beyond Suspect Classifications*, 16 U. PA. J. CONST. L. 739, 743 (2014).

67. *See id.* at 743–44 (explaining that "plaintiffs overwhelmingly lose" under this deferential standard).

68. Washington v. Davis, 426 U.S. 229 (1976).

69. *Washington v. Davis*, on its own, did not necessarily spell the end of constitutional disparate impact claims. In fact, the Court there acknowledged that evidence of disparate impact *could* help demonstrate discriminatory intent, *id*. at 242, and in a case the next year, the Court included "the impact of the official action" on a list of factors to consider in determining discriminatory intent. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977). However, the Court reversed course two years later and "defined 'discriminatory purpose' so stringently that it made . . . disparate impact, almost irrelevant." Kenji Yoshino, *The New Equal Protection,* 124 HARV. L. REV. 747, 764 (2011) [hereinafter Yoshino, *The New Equal Protection*]. The Court held that:

> "Discriminatory purpose[]" . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group.

Pers. Admin'r v. Feeney, 442 U.S. 256, 279 (1979) (citations omitted).

70. The *Washington v. Davis* Court stated:

> Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing alone, it does not trigger the rule, *McLaughlin v. Florida*, 379 U.S. 184 (1964), that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.

Washington v. Davis, 426 U.S. at 242.

behind it.[71] As the Court stated shortly after *Washington v. Davis*, "[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose."[72]

Difficulties have arisen under this colorblind approach, perhaps most noticeably in the debates about racial considerations in education.[73] However, the colorblind approach has been effective in recent decades at combatting the more extreme examples of facial discrimination. From canonical cases like *Loving v. Virginia*[74] and *Brown*,[75] to more recent cases involving discrimination based on sex,[76] national origin,[77] and the ability to exercise a fundamental right,[78] outright discrimination based on protected classifications is struck down with reasonable consistency.

Nonetheless, these two hurdles have drastically limited the scope and reach of the Equal Protection Clause. The Court has only extended heightened scrutiny to five suspect classifications: race, national origin, alienage, sex, and nonmarital parentage.[79] In fact, the Court has not declared a new suspect classification since 1977,[80] and it has since consistently refused to accord this protection to other seemingly

---

71. *Id.* at 246–48 (declining to adopt Title VII's disproportionate impact basis for discrimination claims as the standard for analyzing constitutional equal protection claims).

72. *Feeney*, 442 U.S. at 272.

73. *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 706–07 (2007) (striking down a school district's decision to include race considerations in school admissions in a split 4-1-4 vote); Kimberly Jenkins Robinson, Fisher*'s Cautionary Tale and the Urgent Need for Equal Access to an Excellent Education*, 130 HARV. L. REV. 185, 185–88 (2016) (discussing the ongoing debates surrounding affirmative action and its current legal status).

74. Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that "the Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discrimination").

75. Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that racially segregated schools violate the Fourteenth Amendment's Equal Protection Clause).

76. Craig v. Boren, 429 U.S. 190, 197 (1976) (holding that sex discrimination must be subjected to intermediate scrutiny); Reed v. Reed, 404 U.S. 71, 76 (1971) (holding that the Equal Protection Clause forbids differential treatment based on sex).

77. Clark v. Jeter, 486 U.S. 456, 461 (1988) (explaining that national origin classifications are subject to strict scrutiny under equal protection).

78. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that Virginia's poll tax violated the Equal Protection Clause).

79. Yoshino, *The New Equal Protection*, *supra* note 69, at 756 (citing Trimble v. Gordon, 430 U.S. 762, 766–67, 769 (1977)).

80. *Id.* at 757 (citing *Trimble*, 420 U.S. at 766–76).

deserving groups.[81] Regardless of the reason for this reticence,[82] the decades since the last expansion of suspect-classification protection likely means that its scope is limited to the groups that are currently protected.

More important for this Note are the difficulties caused by the discriminatory intent rule. In practice, the Court has essentially required proof that the purpose underlying a state action is "tantamount to malice."[83] Predictably, this has been an extremely high barrier for litigants to cross. As the Court itself has acknowledged, "[p]roving the motivation behind official action is often a problematic undertaking,"[84] and "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make."[85] The discriminatory intent rule has therefore led courts to uphold a large variety of state actions that, though facially neutral, had undeniable disparate impacts.[86] In practice, constitutional protection is

---

81. *Id*. at 756–57 (listing age, physical and mental disability, and sexual orientation as some of the most notable examples of potential suspect classifications that have not been recognized, despite ample opportunity).

82. Professor Kenji Yoshino argues that this is a reaction to "pluralism anxiety" in which societal unease over the nation's expanding pluralism and the impacts of increasing formal protections of equality for more groups caused the Court to restrict constitutional protection to a very small and specific set of groups. *Id.* at 758–59. He provides an example of these concerns in action, where the Court refused to declare a new suspect classification:

> [I]f the large and amorphous class of the mentally retarded were deemed quasi-suspect for the reasons given by the Court of Appeals, it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

Id. (alteration in original) (quoting City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 445 (1985)).

83. Siegel, *Why Equal Protection No Longer Protects*, *supra* note 53, at 1113.

84. Hunter v. Underwood, 471 U.S. 222, 228 (1985) (citing Rogers v. Lodge, 458 U.S. 613 (1982)).

85. Miller v. Johnson, 115 U.S. 900, 916 (1995); *see also* Paul Brest, *The Supreme Court, 1975 Term — Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 28 (1976) (noting that "[i]f courts may grant relief only when plaintiffs have made a clear case on the record, many instances will remain where race-dependent decisions are strongly suspected but cannot be proved").

86. *See, e.g.*, United States v. Clary, 34 F.3d 709, 710–11 (8th Cir. 1994) (upholding federal sentencing guidelines that provide significantly harsher penalties for crack cocaine than for powder cocaine, despite national statistics showing that 92.6 percent of those convicted of crack cocaine charges were black). One of the most pressing examples of this indifference to disparate impact is *McCleskey v. Kemp*, 481 U.S. 279 (1987), where the Court rejected an equal protection challenge by a black man who had been sentenced to death, despite statistical evidence of racial bias in sentencing decisions. *Id.* at 297. Admittedly, the death penalty may more directly implicate the Eighth Amendment's bar on "cruel and unusual punishment." U.S. CONST. amend. VIII. However, if evidence of racial bias or disparate impact in sentencing is strong enough, the death

often simply unattainable if government legislators and actors are clever enough to hide any potentially discriminatory purpose behind the cover of a legitimate aim; they almost always are.[87]

B. The Failed Attempts to Challenge Juror Exclusion

The Court has admittedly taken some strides toward combatting the pernicious impact of racial discrimination in the jury box. In 1879, the Court held that under the Equal Protection Clause, states may not ban black jurors.[88] And more recently, in *Batson v. Kentucky*,[89] the Court instituted a framework that requires prosecutors to provide race-neutral explanations for using peremptory strikes to remove black jurors when the defendant has made a prima facie showing of racial discrimination.[90]

Despite this progress, litigants have been consistently unsuccessful in challenging juror-exclusion laws.[91] Numerous defendant-focused claims based in the Sixth Amendment's cross section requirement[92] and in procedural due process[93] have failed. But most important for

---

penalty—which involves the ultimate fundamental interest, life—would likely be struck down under the equal dignity approach to the Fourteenth Amendment.

87. Siegel, *Why Equal Protection No Longer Protects*, *supra* note 53, at 1135 ("[L]egislators do not make a practice of justifying legislation on the grounds that it will adversely affect groups that have historically been subject to discrimination."). Another scholar describes this as a "long tradition of Supreme Court decisions imposing unattainable burdens of proof in order to deny and avoid claims of racial discrimination under the Equal Protection Clause." David Baldus, George Woodworth, John Charles Boger & Charles A. Pulaski, McClesky v. Kemp*: Denial, Avoidance, and the Legitimization of Racial Discrimination in the Administration of the Death Penalty*, *in* DEATH PENALTY STORIES 229, 263 (John H. Blume & Jordan M. Steiker eds., 2009).

88. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

89. Batson v. Kentucky, 476 U.S. 79 (1986).

90. *Id.* at 97.

91. *See* James L. Buchwalter, *Disqualification or Exemption of Juror for Conviction of, or Prosecution for, Criminal Offense*, 75 A.L.R. 5th 295, §§ 3[b]–6 (2000) (summarizing failed constitutional challenges to felon-juror exclusion).

92. The cross section requirement, at its most general, mandates that "juries must be drawn from a broadly representative pool" of the community. Kalt, *supra* note 9, at 75. As the Court has explained, the requirement extends from the concept "that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." Taylor v. Louisiana, 419 U.S. 522, 528 (1975). However, the Court has more recently made clear that this requirement "is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does)." Holland v. Illinois, 493 U.S. 474, 480–81 (1990) (emphasis in original). Under this view of cross section analysis, challenges brought against felon-exclusion laws have been unsuccessful. Kalt, *supra* note 9, at 75–88 (describing the cross section requirement in the felon exclusion context, and surveying the results of cross section challenges).

93. *Id.* at 92–94 (describing the complications with procedural due process challenges and their usual connection with Sixth Amendment claims).

this Note is the failure of claims that juror-exclusion laws violate equal protection. These claims have generally been made in two manners: (1) juror-exclusion laws violate equal protection through their disparate impact on black potential jurors, and (2) they violate the equal protection rights of felons as a class.[94]

The failures of the first argument have been rather straightforward—the discriminatory intent requirement of *Davis* has served as a universal stumbling block,[95] with even the most persuasive statistics about the disparate impact of these juror-exclusion laws proving futile. The laws are facially neutral with regard to race,[96] and the common-law history of exclusion extends back "long before black people—felons or non-felons—had any chance to serve on juries,"[97] making it exceedingly difficult to show discriminatory intent. The similarly consistent failures of the second argument have rested on two simple bases: "[n]o court that has considered the question of whether being eligible for jury service is a constitutional right has answered in the affirmative,"[98] and felon status is not a suspect classification.[99] Therefore, courts have applied rational basis review, consistently holding that the laws are constitutional.[100] Given the Court's reticence toward declaring new rights and suspect classifications, neither of these roadblocks seems likely to move.[101]

II. *OBERGEFELL* AND EQUAL DIGNITY

State actions like the exclusion of felons from the jury pool can create widespread harm that current constitutional jurisprudence is simply incapable of remedying. However, *Obergefell* may have provided a new opportunity for advocates. This Part analyzes that holding and outlines the equal dignity approach that follows from its reasoning.

---

94. *Id.* at 88.

95. *See, e.g.*, United States v. Greene, 995 F.2d 793, 796 (8th Cir. 1993) (rejecting an equal protection claim due to the lack of proof of discriminatory intent).

96. *See, e.g.*, 28 U.S.C. § 1865(b)(5) (2012) (excluding any mention of race in a federal jury statute that provides that a person is unqualified to serve on a jury if he has a pending charge or conviction for a crime punishable by imprisonment for at least one year).

97. Kalt, *supra* note 9, at 91; *see also id.* at 172–76 (discussing the development of jury exclusion in the English legal system from the fourteenth century onward).

98. United States v. Conant, 116 F. Supp. 2d 1015, 1020 (E.D. Wis. 2000).

99. *E.g.*, Hilliard v. Ferguson, 30 F.3d 649, 652 (5th Cir. 1994).

100. *See, e.g.*, United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) (applying rational basis review and upholding a federal law that excludes felons from jury service).

101. *See supra* notes 79–82 and accompanying text.

A. Obergefell v. Hodges

The Court's decision in *Obergefell* did not occur in a vacuum. Over the previous quarter of a century, the Court had grappled with gay rights issues and with the concept of dignity in a series of cases. The most recent of these cases, *United States v. Windsor*,[102] was an important step in this process, but its holding was an idiosyncratic decision based in federalism concerns.[103] The two cases prior, however, help elucidate *Obergefell*'s approach.

The first of these cases, *Romer v. Evans*,[104] assessed the constitutionality of a Colorado referendum amending the state constitution to entirely forbid any governmental or judicial protection of gay, lesbian, or bisexual people on the basis of their sexual orientation.[105] Rather than declaring sexual orientation a suspect classification, the Court applied rational basis review and came to what was then a surprising conclusion—even under this most deferential standard of scrutiny, the Colorado referendum violated the Equal Protection Clause.[106] Apparently unwilling to extend the reach of equal protection, but equally unwilling to let such blatant discrimination stand, the Court arguably warped the rational basis standard to strike down the amendment.[107]

Six years later, the Court returned to the arena of gay rights in *Lawrence v. Texas*.[108] Faced with a Texas sodomy statute similar to one it had previously upheld in *Bowers v. Hardwick*,[109] the Court explicitly overruled that precedent and struck down the statute as a violation of due process.[110] In a passage that presaged the more expansive

---

102. United States v. Windsor, 570 U.S. 744 (2013).

103. *See id.* at 775 (explaining that the federal Defense of Marriage Act was invalid because it sought to disparage persons that a state had deemed worthy of protection).

104. Romer v. Evans, 517 U.S. 620 (1996).

105. *Id.* at 624.

106. *Id.* at 632.

107. This surprisingly stringent application of rational basis review has since been referred to as an example of "rational basis with bite." *E.g.*, Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 FORDHAM L. REV. 2769, 2770 (2005) (citing Gayle Lynn Pattinga, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 780 (1987)).

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

109. Bowers v. Hardwick, 478 U.S. 186 (1986).

110. *Lawrence*, 539 U.S. at 578.

explanation that would come twelve years later in *Obergefell*,[111] the Court stated that "[e]quality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects."[112]

Lawrence also illustrated the influence of the concept of dignity on the Court's reasoning. The opinion acknowledged the innate humanity of the impacted groups and confronted the "stigma" wrought by the challenged statute[113]—the validity of which hinged on *Bowers*, a case that the Court declared "demean[ed] the lives of homosexual persons" simply by existing as valid precedent.[114] Finally, the Court demonstrated its willingness to move beyond traditional, "colorblind" equal protection doctrine. Even though the issue lent itself easily to an equal protection opinion, and though the language utilized "sounds almost entirely in equal protection,"[115] the Court approached the question as a due process issue. This approach gave stronger protection to a historically subordinated group by forcing Texas to "level up" and affirmatively grant the pursued right to everyone.[116]

Against the backdrop of these precedents, the Court took up the constitutionality of the same-sex-marriage bans at issue in *Obergefell*. Before the opinion was released, legal analysts had theorized numerous ways the Court might strike down the bans, many of which focused on traditional applications of the Equal Protection Clause.[117] However, the Court followed none of these routes, and it mostly eschewed the traditional avenues for analyzing Fourteenth

111. *See* Yoshino, *A New Birth*, *supra* note 45, at 169 ("The *Obergefell* methodology is strikingly different from the *Glucksberg* methodology. It is much more akin to what Justice Kennedy did in *Lawrence*.").

112. *Lawrence*, 539 U.S. at 575.

113. *Id.*

114. *Id.*

115. Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 99 (2003).

116. *Id.*; Yoshino, *A New Birth*, *supra* note 69, at 173.

117. *See, e.g.*, Yoshino, *A New Birth*, *supra* note 45, at 147 (suggesting that the laws would not have survived even deferential review); Ariel Schneller, *How Justice Kennedy Could Have Baked a Better Fortune Cookie*, L.A. TIMES (June 29, 2015, 4:09 PM), http://www.latimes.com/nation/la-oe-0629-schneller-kennedy-20150629-story.html [https://perma.cc/XT8R-ZT3D] (proposing that the Court could have declared sexual orientation a suspect classification and applied heightened scrutiny); Ilya Somin, *A Great Decision on Same-Sex Marriage – But Based on Dubious Reasoning*, WASH. POST: VOLOKH CONSPIRACY (June 26, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning/?utm_term=.74f4b7fe0cee [https://perma.cc/CT2S-N7AY] (including among several alternative justifications that sexual orientation could be covered by the heightened scrutiny that is applied to gender discrimination).

Amendment claims, completely ignoring the conventional tiers of scrutiny.[118] Instead, the opinion focused on the concept of equal dignity, describing the challenged marriage laws as infringing on both due process and equal protection rights in an intertwined, rather than parallel, way.[119] Perhaps most importantly, the opinion did not ground its holding in the type of formalistic, colorblind equality requirements many expected, instead firmly embracing the values of antisubordination.[120]

The opinion began with a discussion of due process and the fundamental right of marriage.[121] In discussing the uniquely fundamental role marriage plays in American society,[122] however, the Court focused in particular on the inherent dignity in the bond forged between two people who make the choice to marry.[123] Revealingly, the opinion spoke at length about the effects of same-sex-marriage bans on the gay community, rather than on the simple fact of facial inequality. The opinion stated that the bans taught "that gays and lesbians are unequal in important respects."[124]

The Court then delved more directly into equal protection. After laying out the interconnected nature of liberty and equality within the Due Process and Equal Protection Clauses of the Fourteenth Amendment,[125] the Court continued to discuss the dignitary effects of the challenged laws. Strikingly, the Court openly embraced antisubordination, directly stating that "[t]he imposition of this disability on gays and lesbians serves to disrespect and *subordinate* them."[126] Importantly, the Court did not extend suspect-classification

118. The phrases "rational basis," "intermediate scrutiny," and "heightened scrutiny" do not appear in the opinion. The phrase "strict scrutiny" appears only once, and even then only in a description of a 1993 opinion by the Hawaiian Supreme Court. Obergefell v. Hodges, 135 S. Ct. 2584, 2596–97 (2015). This is less surprising than one might think; the gay rights cases leading up to *Obergefell*, as well as *Obergefell* itself, appear to show the Court drifting away from traditional tiers of scrutiny. Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527, 530 (2014).

119. *Obergefell*, 135 S. Ct. at 2603–05; Yoshino, *A New Birth*, *supra* note 45, at 172.

120. Boso, *supra* note 47, at 1133–34; *see Obergefell*, 135 S. Ct. at 2604–05 ("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.").

121. *Obergefell*, 135 S. Ct. at 2598.

122. *Id.* at 2601.

123. *Id.* at 2599.

124. *Id.* at 2602.

125. *Id.* at 2602–03.

126. *Id.* at 2604 (emphasis added).

status to sexual orientation.[127] Instead, the Court declared that the challenged laws both "burden the liberty of same-sex couples, and . . . abridge central precepts of equality," and that they therefore violate both the Due Process and Equal Protection Clauses.[128] This elucidation of the interwoven values of due process and equal protection serves as the basis for the equal dignity approach taken up in this Note.

B. The Equal Dignity Approach to Fourteenth Amendment Analysis

Although *Obergefell* and its methodology encountered significant opposition,[129] causing concern even among some supporters of the LGBT rights movement,[130] the equal dignity approach rooted in *Obergefell* provides a means for furthering the full freedom that the Fourteenth Amendment was designed to ensure. As the Court described:

> Rights implicit in liberty and rights secured by equal protection . . . may be instructive as to the meaning and reach of [each] other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[131]

This language is admittedly lacking clarity in terms of crafting a workable methodology—a problem this Note attempts to solve by providing a methodology for the equal dignity approach and by discussing the need for this evolution of Fourteenth Amendment doctrine.

---

127. *Id.*

128. *Id.*

129. *See id.* at 2630 (Scalia, J., dissenting) (describing the majority's "showy profundities" as "profoundly incoherent" and "couched in a style that is as pretentious as its content is egotistic"); *id.* at 2639 (Thomas, J., dissenting) ("The majority's musings [on dignity] are . . . deeply misguided."); Schneller, *supra* note 117 (calling the majority's analysis "laughable"). Interestingly, Justice Thomas has himself approvingly referenced dignitary effects in the Fourteenth Amendment context. Zelman v. Simmons-Harris, 536 U.S. 639, 678 (2002) ("[T]he Fourteenth Amendment 'added greatly to the dignity and glory of American citizenship . . . .'" (quoting Plessy v. Ferguson, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting))).

130. *See, e.g.*, Brian Beutler, *Anthony Kennedy's Same-Sex Marriage Opinion Was a Logical Disaster*, NEW REPUBLIC (July 1, 2015), https://newrepublic.com/article/122210/anthony-kennedys-same-sex-marriage-opinion-was-logical-disaster [https://perma.cc/NPX8-YAGW] ("It was the correct ruling, but John Roberts's dissent completely outmatched him."); Somin, *supra* note 117 ("Today's Supreme Court decision on same-sex marriage is a great result, but based on dubious reasoning.").

131. *Obergefell*, 135 S. Ct. at 2603 (citations omitted).

1. *Equal Dignity: Approach and Methodology*. Perhaps the most important aspect of the equal dignity approach in *Obergefell* was the Court's apparent embrace of the antisubordination principle. Traditionally, the Court has analyzed equal protection questions through a narrowly structured, colorblind approach that focuses less on ensuring true equality, and more on ensuring that the government does not make decisions based on impermissible classifications.[132] Likely due to concern over expanding this protection too far, the Court, over time, stringently limited the classifications that were off-limits to the government, focusing on a specific list of suspect classifications that are analyzed under a tiers-of-scrutiny structure.[133] In *Obergefell*, the Court had an easy out—expand the list of classifications to include sexual orientation.

The *Obergefell* Court, however, took a different route, embracing the remedial purpose behind the Fourteenth Amendment's interconnected clauses. The Court essentially ignored the suspect-classifications barrier that had been constructed under the traditional, colorblind approach. Instead, the Court apparently decided that, in light of the antisubordination concerns before it, the listed classifications and associated tiers of scrutiny simply *did not matter*—and accordingly did not even mention them.[134] The Court instead analyzed the question under this antisubordination-based approach and determined that the discrimination in question simply could not stand.

This approach, taken a step further, can be applied with similar effect to the discriminatory intent rule. In *Obergefell*, discriminatory intent was not at issue—it was irrelevant because the same-sex-marriage bans were facially discriminatory. But to see how *Obergefell* would deal with the rule, consider its treatment—or omission—of suspect classifications. Under the *Obergefell* equal dignity approach, focusing on only a short list of specific suspect classifications cannot advance the vision of true equality embodied in the antisubordination theory. Accordingly, doctrinal requirements that do not fit this conception of equality should not limit the ability to ensure it. It follows that the equal dignity approach would have a similar impact on the discriminatory intent rule—a feature of the traditional, colorblind approach that serves only to limit constitutional protection. Equal

---

132. *See supra* Part I.A (describing the colorblind equal protection approach and its difference from the more remedial antisubordination view).

133. *See supra* notes 79–82 and accompanying text.

134. *See supra* note 118 and accompanying text.

dignity, with antisubordination values at its core, is a remedial approach for combatting serious inequality in all its forms. Even if the government did not intend them, sufficiently harmful disparate impacts continue to perpetuate inequality throughout American society, including the exact racial inequality that spurred the enactment of the Equal Protection Clause.

However, this approach is far from a wholesale endorsement of disparate impact claims. Rather, a claim based on equal dignity requires three elements: (1) significant, persuasive evidence of a disproportionate impact on (2) a historically subordinated group,[135] which (3) either infringes on a fundamental liberty right or implicates substantial liberty interests.[136] A disparate impact claim that presents evidence of these factors should then be weighed against the government's interests in sustaining the challenged practice or law. The court should then determine whether the challenged law infringes on substantive equality severely enough to overcome the government's interests and thus warrant being struck down.

The first two elements of this equal dignity claim are centered in the antisubordination principle. In the simplest terms, the antisubordination theory mandates that when a court attempts to determine the scope of the Fourteenth Amendment's protections and rights, "one of the major inputs into any such analysis will be the impact of granting or denying such [protection] to historically subordinated groups."[137] By acknowledging that rectifying this historical inequality inherently works to fulfill the Amendment's purpose and promise, the antisubordination theory provides an avenue for the Court to move beyond the discriminatory intent requirement in special circumstances.[138] It is also in keeping with the Court's prior history, a history in which antisubordination ideals have long been embraced

135. One admitted difficulty will be determining how courts should establish what constitutes a historically subordinated group and what makes this calculation different from the already defunct process by which the Court identifies suspect classifications. Yoshino attempts to solve this through examples like polygamists, which he thinks would *not* qualify as a subordinated group. Yoshino, *A New Birth*, *supra* note 45, at 177–79. For now, it suffices to say that the definition of "historically subordinated" groups is clearly broader than that of suspect classifications because its origins in the gay rights cases show that it necessarily includes sexual orientation.

136. For an explanation of equal dignity's specific focus on liberty interests, see *infra* notes 139–45 and the accompanying discussion.

137. Yoshino, *A New Birth*, *supra* note 45, at 174.

138. Tribe, *supra* note 43, at 19.

outside the equal protection context[139] and in which dignity-based reasoning has been prevalent.[140]

This background helps explain the third element of equal dignity analysis. As Professor Kenji Yoshino highlights, the Court has a long history of implicitly utilizing the interconnectedness of the Due Process and Equal Protection Clauses' liberty and equality protections. Listing cases going back a century, he outlines examples of where the Court has leaned on due process liberty analysis to "further equality concerns [for] indigent individuals, national origin minorities, racial minorities, religious minorities, sexual minorities, and women,"[141] and of where the Court has relied on equal protection to "protect certain liberties, such as the right to travel, the right to vote, and the right to access the courts."[142] As part of acknowledging the remedial purpose of the Fourteenth Amendment,[143] the *Obergefell* Court simply went one step further. By explicitly and specifically recognizing the connection between "rights implicit in liberty and rights secured by equal protection,"[144] the Court demonstrated that the interwoven

139. As Yoshino highlights, the Court has maneuvered around the limits of equality doctrine: "[Recent equal protection cases] signal the end of equality doctrine as we have known it. The end of traditional equality jurisprudence, however, should not be conflated with the end of protection for subordinated groups." Yoshino, *The New Equal Protection*, *supra* note 69, at 748. Instead, "the Court has shut doors in its equality jurisprudence . . . and opened doors in its liberty jurisprudence to compensate." *Id.* at 750. See also Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 115 (2007), arguing that the Warren Court's incorporation of the Bill of Rights through the Due Process Clause was an extension of its civil rights jurisprudence, in which the Justices recognized the racial and wealth disparities of the era, and Yoshino, *A New Birth*, *supra* note 45, at 174, saying, "What emerges from *Lawrence* and *Obergefell* is a vision of liberty that I will call 'antisubordination liberty.'"

140. Justice Brennan invoked dignity in thirty-nine of his opinions on the Court, Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 171 (2011), and he asserted that the Constitution proclaims a "bold commitment by a people to the ideal of dignity protected through law." William J. Brennan, *My Life on the Court*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 17, 18 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997). Justice Kennedy also infused the opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992), and his concurring opinion in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring), with the language and emphasis of human dignity, a sign that Kennedy's view of the concept within Fourteenth Amendment jurisprudence was not limited to gay rights. Tribe, *supra* note 43, at 22–23.

141. Yoshino, *The New Equal Protection*, *supra* note 69, at 749–50 (citing to examples of such cases) (citations omitted).

142. *Id.* at 750 (citing to examples of such cases) (citations omitted). *See also id.* at 788–92 (describing this history in greater detail).

143. *See supra* notes 48–52 and accompanying text (describing the intent of the Fourteenth Amendment's authors).

144. Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015). While an argument could be made that the Due Process Clause's protections for life and property should also be included, the

relationship between the two Clauses provides a doctrinal basis for "compensat[ing] for judicial retrenchment under the [traditional] equal protection" doctrine.[145]

What comes from this interconnection is an understanding that inequality is most damaging when it occurs in connection with the liberty interests that are central to American life. The most obvious examples of such interests are fundamental rights, such as the right to marriage that was at the core of *Obergefell*. However, an explicitly recognized fundamental right may not be necessary for an equal dignity claim if the inequality is great enough. Just as the Court has recognized the potency of such hybrid, cumulative claims in the First Amendment context,[146] so too should strong enough evidence of inequality lessen the need for a previously declared right in the equal dignity context. Instead, being able to point to substantial liberty interests—such as jury participation, which is central to the American justice system—should be enough to make out an equal dignity claim where the disparate impact is exceptionally strong.

Helpfully, the antisubordination theory also provides a built-in limiting principle.[147] Because equality concerns for historically subordinated groups would be a necessary but not sufficient factor in the court's balancing, any argument for extending equal dignity protection would have to overcome the government's oftentimes important interests and the counterarguments of the opponents of expansive constitutional protections.[148] To tip the scale in favor of the rare decision to strike down state action, parties would have to identify serious inequality and specific liberty interests. They should fail,

Obergefell Court specifically mentions only this interconnection between liberty rights and equality rights.

145. Yoshino, *The New Equal Protection*, *supra* note 69, at 792.

146. The Court has previously recognized the power of "hybrid" claims of constitutional protection, even where one claim on its own might not suffice. *See, e.g.*, Employment Div. v. Smith, 494 U.S. 872, 881–82 (1990) (discussing the potential for reinforcing a possibly unsuccessful Free Exercise Clause claim with other First Amendment challenges, such as freedom of association, speech, or the press). Given this acceptance of explicitly hybrid claims based on different clauses of the First Amendment, the interwoven application of equality and liberty ideals seems to be within the judiciary's capabilities.

147. Yoshino, *A New Birth*, *supra* note 45, at 175.

148. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., dissenting in part) ("The Court . . . comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." (quoting Bowers v. Hardwick, 478 U.S. 186, 194 (1986))).

regardless of how convincing their arguments may be, if they cannot fully elucidate how the antisubordination principle is being violated.[149]

2. *The Need for Equal Dignity.* The focus on human dignity that sits at the core of the antisubordination principle, and therefore the equal dignity approach, embodies and furthers substantive equality.[150] As described above, the direct purpose of the Fourteenth Amendment and its clauses was to protect black Americans from horrific societal and legal treatment.[151] In the wake of *Lawrence*, Professor Christopher A. Bracey discussed the implications of the Court's emphasis on human dignity for racial jurisprudence, proclaiming that "[d]ignity remains the core aspirational value in the struggle for racial justice."[152] Running through the words and works of black thinkers from Frederick Douglass and Martin Luther King, Jr., to Claude McKay and Tupac Shakur, Bracey asserted that the fight for racial justice in this nation is, at its core, a fight for the full recognition of human dignity.[153]

Equal dignity thus forces Americans to reckon with slavery and its legacy. The Supreme Court itself made clear the pre–Civil War legal status of the black community, declaring that the question whether dignitary concerns applied to black Americans had a simple answer: "[T]hey had no rights which the white man was bound to respect."[154] It

149. This is the tool through which Tribe and Yoshino attack Justice Roberts's argument that the *Obergefell* majority repeated the sins of *Lochner*. Tribe, *supra* note 43, at 17–18; Yoshino, *A New Birth*, *supra* note 45, at 175. In *Lochner*, the Court depended on a "right of contract" in striking down a labor statute that limited the working hours of bakers. Lochner v. New York, 198 U.S. 45, 53 (1905). This decision merely demonstrates the extent to which that Court erred: *Lochner* was simply mistaken about the true vulnerability of the groups involved, and the opinion was grossly misguided in its attempt to provide protection and equality. Yoshino, *A New Birth*, *supra* note 45, at 175. Similarly, under equal dignity, a court necessarily must give genuine weight to the government's interests, which in the case of the New York minimum-hours law challenged in *Lochner* was a distinctly persuasive worker-protection argument. *Lochner*, 198 U.S. at 51 (quoting Julius M. Mayer, Att'y Gen. of the State of N.Y.). Such strong government interests should win out under equal dignity analysis.

150. *See* Reva B. Siegel, *Dignity and the Politics of Procreation: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1736 (2008) ("[C]onstitutional protections for dignity vindicate, often concurrently, the value of life, the value of liberty, and the value of equality.").

151. *See supra* notes 48–52 and accompanying text.

152. Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 669 (2005).

153. *Id.* at 669–72.

154. Dred Scott v. Sanford, 60 U.S. 393, 408 (1857). A particularly evocative example is the process by which racial identity was determined in court, in which a racially ambiguous individual was often forced to present "himself to the jury for 'inspection,' turning in all directions, taking off his shoes for examination of his feet, opening his mouth to reveal his teeth, removing his shirt, [and] showing his fingernails." Ariela Gross, *Beyond Black and White Cultural Approaches to Race and Slavery*, 101 COLUM. L. REV. 640, 652 (2001).

was these infamous words, proclaimed by Chief Justice Roger Taney in one of the Court's most reviled decisions,[155] against which the Reconstruction Amendments were reacting. It is this history of purposeful, focused efforts to dehumanize black Americans and deny them dignity that should influence our reading and application of those Amendments.[156] Similar accounts could, and have, been given of America's historical treatment of Native Americans,[157] Chinese and Japanese Americans,[158] women,[159] the LGBT community,[160] and more. Through equal dignity, the courts can continue the process of righting these wrongs.

Finally, it must be acknowledged that many of the criticisms of this equal dignity approach—and of the Court's reliance on lofty ideals and vague, honorable-sounding values—are valid. *Obergefell* truly does lack the clear doctrinal lines and limitations that the Court has attempted to build into its Fourteenth Amendment jurisprudence, and its reasoning simply is not as straightforward or as predictably replicable as the dissents' narrower reasoning would have been. But this does not mean that the equal dignity approach is incorrect, indefensible, or unworthy of a place in the larger constitutional scheme. The goals of the Fourteenth Amendment do not always lend

---

155. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 380 (2011) ("There is a stock answer to the question [of the Supreme Court's worst decisions] . . . . We know these cases by their petitioners: *Dred Scott*, *Plessy*, *Lochner*, and *Korematsu*." (citations omitted)).

156. *See generally* Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1373 (2009) (arguing "that our understanding of the basic rights set out in the Reconstruction Amendments should be contextualized by an appreciation of the Amendments' anti-slavery origins").

157. *See generally* DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1971) (providing a historical account of American western expansion and of the concentrated governmental efforts to subordinate Native tribes).

158. *See generally* Dean Masaru Hashimoto, *The Legacy of* Korematsu v. United States*: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72 (1996) (discussing the history and legacy of the internment of Japanese Americans); Hrishi Karthikeyan & Gabriel J. Chin, *Preserving Racial Identity: Population Patterns and the Application of Anti-Miscegenation Statutes to Asian Americans, 1910-1950*, 9 ASIAN L.J. 1 (2002) (discussing the application of antimiscegenation laws to Asian Americans); Charles J. McClain, Jr., *The Chinese Struggle For Civil Rights In Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984) (describing civil rights abuses of Chinese Americans in the nineteenth century).

159. *See generally* Sandra L. Rierson, *Race and Gender Discrimination: A Historical Case for Equal Treatment Under the Fourteenth Amendment*, 1 DUKE J. GENDER L. & POL'Y 89 (1994) (describing the historical discrimination against women and comparing it to racial discrimination for Fourteenth Amendment purposes).

160. *See generally* SUSAN STRYKER, TRANSGENDER HISTORY (2008) (describing the history of the transgender community); Ralph Slovenko, *The Homosexual and Society: A Historical Perspective*, 10 U. DAYTON L. REV. 445 (1985) (describing the history of discrimination against gay and lesbian people).

themselves to such a constrained reading or interpretation. Its authors were attempting to establish true racial equality, something that the men who had just finished fighting the Civil War would have been perfectly aware would not be as simple as establishing a three-part tiered-scrutiny structure.

The Court's attempt to create simple tests for vague Constitutional clauses is noble, but that does not mean that that is *always* the correct path forward.[161] Clear doctrinal lines and blunt reasoning are worthwhile goals, but they are not necessarily the right means for achieving some of our predecessors' loftier aims. Equal dignity is not as straightforward or easily applicable as current equal protection jurisprudence, and its potential for abuse as an even broader version of substantive due process is real. These are reasons to invoke equal dignity sparingly, and they help explain why the same-sex-marriage bans were the first time the approach was so openly utilized. But in the rare case of true injustice, of a law or legal structure that promotes the type of lasting and damaging inequality that the Fourteenth Amendment is specifically designed to combat, equal dignity is a valid legal doctrine.

Admittedly, the future of this view of the Fourteenth Amendment has recently been thrown into some doubt. The retirement of *Obergefell*'s author, Justice Kennedy, has generated genuine concerns regarding the future of the jurisprudence he spearheaded.[162] Beyond the loss of the Justice who wrote each of the most relevant recent opinions, the confirmation process for his replacement, Justice Kavanaugh, raised concerns that Kavanaugh, despite having clerked for Kennedy, will diverge from this part of his legacy.[163] And, notably,

---

161. Even Chief Justice John Roberts has questioned the routine adoption of such tests. During oral argument for *District of Columbia v. Heller*, he responded skeptically to arguments regarding transporting traditional scrutiny standards into a new area of constitutional doctrine:

> Well, these various phrases under the different standards that are proposed, "compelling interest," "significant interest," "narrowly tailored," none of them appear in the Constitution . . . .
>
> . . . I mean, these standards that apply in the First Amendment just kind of developed over the years as sort of baggage that the First Amendment picked up.

Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290).

162. *See, e.g.*, *Did Justice Kennedy Just Destroy His Own Legacy?*, POLITICO MAG. (June 27, 2018, 8:10 PM), https://www.politico.com/magazine/amp/story/2018/06/27/anthony-kennedy-legacy-supreme-court-218900? [https://perma.cc/KV6W-5MEC] (reporting legal scholars' arguments that Kennedy's retirement "has undermined much of the good he has done" and that his legacy "might very well amount to dust").

163. *See, e.g.*, Eugene Scott, *In Kavanaugh's Non-Answer on Same-Sex Marriage, Many Heard a Troubling Response*, WASH. POST: THE FIX (Sept. 7, 2018),

none of the other current members of the Court's conservative wing ever joined one of Kennedy's gay rights opinions.[164]

Another central question is whether, without Kennedy utilizing his position as the Court's swing Justice, there remains *any* genuine support for his approach. Given the narrow majorities in the gay rights cases, the liberal Justices had little choice but to sign on to Kennedy's reasoning. Had there been a genuine liberal majority, a more expansive view of equal protection—and the declaration of a new suspect classification—might have carried the day.[165] In fact, it seems genuinely likely that an opinion written by one of the current Court's four liberal Justices would have been based in a more explicit declaration of sexual orientation as a suspect classification, which would have provided a more concrete basis for protecting the LGBT community.

For now, it is impossible to predict whether we have seen the last of equal dignity and its reasoning. But the criticisms of *Obergefell* are exactly why this Note was written: to help provide a greater level of workability and applicability to a deeply humane yet frustratingly unclear opinion so that this dignity-based approach can have staying power. Simply put, Kennedy's view of dignity has been infused into much of our constitutional doctrine. Those looking to continue extending equality protections may view the existing doctrine of *Obergefell*, *Lawrence*, and *Romer* as a more likely route than expanding our long-stagnant colorblind approach to equal protection. Predicting the future development of law in this field is a tricky and

---

https://www.washingtonpost.com/politics/2018/09/07/kavanaughs-non-answer-same-sex-marriage-many-heard-troubling-answer/?utm_term=.da66ac7441d2 [https://perma.cc/6SNS-6VQB] (arguing that Kavanaugh's confirmation hearing "likely reaffirmed the fears of gay Americans" that "judges would allow for further discrimination against gay people under the guise of religious objections").

164. Chief Justice Roberts and Justice Alito dissented in both cases for which they were on the Court: *Obergefell* and *Windsor*. Obergefell v. Hodges, 135 S. Ct. 2584, 2611 (2015) (Roberts, C.J., dissenting); *id.* at 2640 (Alito, J., dissenting); United States v. Windsor, 570 U.S. 744, 775 (2013) (Roberts, C.J., dissenting); *id.* at 802 (Alito, J., dissenting). Justice Thomas has dissented in all four of the gay rights cases. *Obergefell*, 135 S. Ct. at 2631 (Thomas, J., dissenting); *Windsor*, 570 U.S. at 778 (Thomas, J., dissenting); Lawrence v. Texas, 539 U.S. 558, 605 (2003) (Thomas, J., dissenting); Romer v. Evans, 517 U.S. 620, 636 (1996) (Thomas, J., dissenting). And Justice Gorsuch—though not on the Court for any of the four cases—appears to have a very narrow view of the actual reach of *Obergefell*. Despite *Obergefell*'s holding that same-sex couples are entitled to "civil marriage on the same terms and conditions as opposite-sex couples," *Obergefell*, 135 S. Ct. at 2605, Gorsuch dissented from a subsequent per curiam decision holding that both members of a same-sex married couple have the right to have their names on a child's birth certificate; he argued that *Obergefell* did not even speak to the issue. Pavan v. Smith, 137 S. Ct. 2075, 2079 (2017) (Gorsuch, J., dissenting).

165. *See, e.g.*, Beutler, *supra* note 130 ("[T]he price of admission for the Court's four liberals was to join a muddled, unconvincing opinion.").

perhaps impossible task; in the years after *Bowers*, one would have been hard-pressed to believe that an opinion like *Obergefell* was coming. But given the precedential value of *Obergefell* and its predecessors, attempting to develop a clearer approach for applying its reasoning to new cases is a necessary and worthwhile task.

III. APPLYING EQUAL DIGNITY TO JUROR-EXCLUSION LAWS

In the short time since *Obergefell* was decided, scholars have advocated for a bevy of new rights and protections.[166] Although many of those arguments have persuasive reasoning, they also demonstrate the pandora's box concerns that animated the Court's earlier doctrinal decisions.[167] A more sensible application, and one that is more in line with the Fourteenth Amendment's purpose, focuses on certain disparate impact claims. This Part provides an example of such equal dignity analysis, applying the framework outlined above to the exclusion of felons from the jury pool.

A. The Antisubordination Concerns of Exclusion Laws

The first step under equal dignity analysis is necessarily an analysis of the three requirements outlined above. The first requirement is easily met in this context. A highly disproportionate[168] 30 percent of felons come from a group that comprises only 12.6 percent of the total population,[169] and possibly more than 33 percent of all black adult males are disqualified from federal jury service for life.[170] Given this, there is little question that juror-exclusion laws have a significant disparate impact. There is an obvious aspect of personal choice to engage in criminalized behavior, but the reality is that the elevated

166. *See, e.g.*, Jill E. Adams & Melissa Mikesell, *And Damned If They Don't: Prototype Theories to End Punitive Policies Against Pregnant People Living in Poverty*, 18 GEO. J. GENDER & L. 283, 312 (2017) ("By urging us to consider the discriminatory effects of government practices on particular groups, [*Obergefell*'s] articulation of 'equal dignity' provides a new way to challenge Medicaid abortion coverage bans . . . ."). *See generally* Maxine D. Goodman, *The* Obergefell *Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security*, 13 HASTINGS RACE & POVERTY L.J. 149 (2016) (arguing that *Obergefell* can serve as the basis for a fundamental right to food security); Joshua E. Weishart, *Reconstituting the Right to Education*, 67 ALA. L. REV. 915 (2016) (outlining *Obergefell*'s impact on a potential fundamental right to education).

167. *See supra* note 82 (discussing the Court's concerns regarding expansive constitutional protection).

168. *See supra* notes 17–22 and accompanying text (describing disproportionate racial statistics regarding felon status and exclusion from jury pools).

169. Kalt, *supra* note 9, at 171.

170. *Id.* at 114.

focus on black communities and black men in policing plays an inescapable role in felon statistics and racial disparities in criminal convictions.[171]

Second, the black community is perhaps the single clearest example of a historically subordinated group. Beyond this, just as the same-sex-marriage bans in *Obergefell* had subordinating impacts on gay and lesbian people,[172] so too does felon-juror exclusion impact the black community, regardless of the intent underlying it. Polling shows that nearly two-thirds of black Americans between the ages of eighteen and twenty-nine have *no confidence* in the ability of the legal system to judge people without racial bias.[173] It may be impossible to separate out the factors that contribute to this lack of confidence, but the racial makeup of juries seems likely to play a role.[174] And as discussed above, studies have repeatedly demonstrated the powerfully negative impact that less-diverse juries can have on trial outcomes,[175] impacts that appear inevitable so long as laws continue to exclude massive percentages of minority communities from juror eligibility. Juror-exclusion laws work to further distance the black community from a criminal justice system that many already do not trust.

Research also supports the argument that felon-juror exclusion leads to people distrusting their government and doubting their own self-worth in society. One study has found that exposure to the criminal justice system, and the lifelong impacts it brings, leads many to "become deeply distrustful of political authorities, have little faith that the state will respond to the will of the people, and believe they are not 'full and equal'"[176]—attitudes that are antithetical to true rehabilitation. Alternatively, research conducted in Maine, the only state without a felon-exclusion law, suggests that *inclusion* in the jury pool actually has beneficial impacts, with the felons in that study

---

171. As civil rights lawyer and scholar Michelle Alexander notes:

> A black kid arrested twice for possession of marijuana may be no more of a repeat offender than a white frat boy who regularly smokes pot in his dorm room. But because of his race and his confinement to a racially segregated ghetto, the black kid has a criminal record, while the white frat boy, because of his race and relative privilege, does not.

MICHELLE ALEXANDER, THE NEW JIM CROW 132 (2010).

172. Obergefell v. Hodges, 135 S. Ct. 2584, 2605 (2015).

173. *Harvard IOP Spring 2016 Poll*, *supra* note 30.

174. Fukurai & Davies, *supra* note 30, at 665 (discussing polling that found that 67 percent of respondents believed racially diverse juries reach more fair decisions than single-race juries.).

175. *See supra* notes 23–28 and accompanying text (describing the impact of racial diversity on jury deliberations).

176. AMY E. LERMAN & VESLA M. WEAVER, ARRESTING CITIZENSHIP: THE DEMOCRATIC CONSEQUENCES OF AMERICAN CRIME CONTROL 15 (2014).

reporting that jury eligibility helped them feel more included in society after their release.[177] In fact, the results demonstrated "that juror eligibility facilitates changes in convicted felons' self-concepts, promoting prosocial identity transformation, tempering the stigma of a felony conviction and prompting the discovery of self-worth."[178]

With the first two equal dignity elements established, the analysis then moves to the liberty interests impacted by juror exclusion. Although the lower courts have never recognized a fundamental right to jury service[179] and the Supreme Court has never addressed the issue, the sacrosanct position of the jury in both the American legal system and civic life is undeniable. When the Founders chose to declare their independence from the British Empire, they specifically included among the complaints levied against King George III his "depriving us in many cases, of the benefits of Trial by Jury."[180] The Framers of the Constitution viewed the jury as such a foundational aspect of the legal system that they included it twice in the Bill of Rights, in both the Sixth[181] and Seventh[182] Amendments.

The Supreme Court has acknowledged the indispensable nature of the jury, declaring it "essential for preventing miscarriages of justice."[183] Juries are viewed as a central part of our civic community and as a safeguard of liberty[184] that works to prevent government oppression.[185] The views of the American public reflect this history: two-thirds of Americans regard jury service a "part of what it means to be a good citizen."[186] Just as importantly, it has long been believed that "a jury verdict in a criminal case is fair because it is the decision of the defendant's peers."[187] Juror-exclusion laws remove a quarter of all

177. James M. Binall, *Summonsing Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 LAW & SOC. INQUIRY 4, 20–24 (2018).

178. *Id.* at 21.

179. Kalt, *supra* note 9, at 88.

180. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

181. U.S. CONST. amend. VI (guaranteeing criminal defendants the right to trial by "an impartial jury").

182. U.S. CONST. amend. VII (guaranteeing a right to jury trial in civil suits).

183. Duncan v. Louisiana, 391 U.S 145, 158 (1968) (incorporating the Sixth Amendment against the states).

184. Jason Mazzone, *The Justice and the Jury*, 72 BROOK. L. REV. 35, 47 (2006).

185. Williams v. Florida, 399 U.S. 78, 100 (1970).

186. John Gramlich, *Jury Duty Is Rare, But Most Americans See It as Part of Good Citizenship*, PEW RES. CTR. (Aug. 24, 2017), http://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/ [https://perma.cc/KJK7-S5QS].

187. Mazzone, *supra* note 184, at 39.

black adults from this communal American civic duty and ensure that black defendants often do not receive the same judgment of their peers. Even without a declared fundamental right, bans as sweeping as the current juror-exclusion laws inherently implicate strong liberty interests.

B. The Government's Interests in Sustaining Juror-Exclusion Laws

Having established a prima facie equal dignity claim, the next step is assessing the government's interests in sustaining laws that ban felons from jury service. The government's main interests in such laws have been threefold: protecting the probity of the jury,[188] avoiding antiprosecution bias on the part of felon jurors,[189] and sustaining a legal practice that has a long-standing historical basis in the British common-law jury tradition.[190] These interests are legitimate; the government undoubtedly has an interest in ensuring that juries are as fair, unbiased, and moral as they can be. Unsurprisingly, these interests have consistently been successful under the rational basis review they have encountered.[191] However, under the equal dignity approach, the question is whether the government's stated justifications for banning felons from serving on juries truly outweigh the constitutional concerns raised.

The argument that banning felons will help protect the jury's probity runs into a basic problem. Though individuals convicted of crimes might be innately less moral or less law abiding, that assumption is less persuasive in a criminal justice system run through with racial inequality. The American system is one in which black drug possessors are almost four times more likely to be arrested for possession of certain drugs than whites, despite nearly identical usage rates across racial lines.[192] Whites are also consistently "more successful than

188. *See, e.g.*, United States v. Arce, 997 F.2d 1123, 1127 (5th Cir. 1993) ("The government has a legitimate interest in protecting the probity of juries.").

189. *See, e.g.*, United States v. Greene, 995 F.2d 793, 796 (8th Cir. 1993) ("We believe, furthermore, that it is rational to assume that persons currently facing felony charges may be biased against the government . . . .").

190. *See, e.g.*, Kalt, *supra* note 9, at 91 ("[F]elon exclusion was practiced at common law, long before black people—felons or non-felons—had any chance to serve on juries. Thus, imputing racial animus to the *historical* practice of felon exclusion is difficult." (citation omitted)).

191. *See, e.g.*, Carle v. United States, 705 A.2d 682, 686 (D.C. Cir. 1998) (upholding a felon-exclusion law on the grounds of felons' inherent bias); *Arce*, 997 F.2d at 1127 (upholding the federal felon-exclusion law on grounds of probity).

192. *E.g.*, Dylan Matthews, *The Black/White Marijuana Arrest Gap, in Nine Charts*, WASH. POST: WONKBLOG (June 4, 2013), https://www.washingtonpost.com/news/wonk/wp/2013/06/04/the-blackwhite-marijuana-arrest-gap-in-nine-charts/?utm_term=.0a4ca9958d1a

nonwhites 'at virtually every stage of pretrial negotiation'"[193] with "[b]lacks . . . convicted more frequently than whites for the same crime."[194] In fact, the Supreme Court felt compelled to overturn a criminal conviction that was tainted by improper considerations of race in the jury-selection process just two years ago.[195]

Given this reality, the connection between prior convictions and morality seems more tenuous. In fact, some of the key aspects of the criminal justice system push against using prior criminal history as a proxy for moral judgment.[196] Although retribution, deterrence, and incapacitation are similarly considered legitimate theories of punishment,[197] rehabilitation is the basic goal underlying the parole system[198] that oversees nearly 80 percent of released state prisoners.[199] Research also suggests that "[a]fter an ex-offender evidences sufficient rehabilitation, the criminal record largely loses its relevance as an accurate predictor of contemporary behavior."[200]

This does not mean that it is illogical to assume that one who has committed previous felonies is less likely to respect the moral and legal norms of the community; with recidivism rates being as high as they are,[201] it is reasonable for a legislature to conclude that it is more efficient to ban all felons from jury participation and only pick from

---

[https://perma.cc/7SAC-92YM]. As Professor James E. Coleman, Jr., explains, if our drug laws were neutrally applied, "most arrests likely would take place on college campuses . . . rather than [in] poor minority neighborhoods." Will Doran, *In a New Survey, Powerful North Carolinians Agree on Weed But Not Guns*, CHARLOTTE OBSERVER (Oct. 22, 2018, 6:00 AM), https://www.charlotteobserver.com/news/politics-government/influencers/article220314765.html [https://perma.cc/8ZNL-UW74].

193. Daniel S. Goldman, *The Modern-Day Literacy Test?: Felon Disenfranchisement and Race Discrimination*, 57 STAN. L. REV. 611, 629 (2004) (quoting MARC MAUER, RACE TO INCARCERATE 138 (1999)).

194. *Id.*

195. *See* Foster v. Chatman, 136 S. Ct. 1737, 1755 (2016) (holding that the prosecutor's striking of two black prospective jurors violated the defendant's constitutional rights).

196. *See, e.g.*, Roberts, *supra* note 10, at 610–14 (describing the tensions between felon-juror exclusion and American reintegrative goals for former prisoners).

197. *E.g.*, Graham v. Florida, 560 U.S. 48, 71–72 (2010).

198. *See, e.g.*, *id.* at 73 (describing rehabilitation as "a penological goal that forms the basis of parole systems").

199. *Reentry Trends in the U.S.*, BUREAU OF JUST. STAT. (Jan. 6, 2019), https://www.bjs.gov/content/reentry/releases.cfm#methodr [https://perma.cc/J72D-ZV36].

200. T.W. Brown, Note, *An Argument for Easing Felony Expungement in Arkansas*, 65 ARK. L. REV. 751, 753 (2012).

201. *See, e.g.*, MATTHEW R. DUROSE, ALEXIA D. COOPER & HOWARD N. SNYDER, BUREAU OF JUSTICE STATISTICS, SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 30 STATES IN 2005, at 1 (2014), https://www.bjs.gov/content/pub/pdf/rprts05p0510.pdf [https://perma.cc/JJC3-MTBL] (showing that over three-quarters of released prisoners are rearrested within five years).

the rest of the population. However, the Court itself has firmly established that "the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."[202]

Although the government's second interest in juror-exclusion laws, avoiding antiprosecution bias, presents a slightly more complex argument, it is similarly unpersuasive. In fact, many courts have seemed surprisingly unconcerned when it is revealed that seated jurors should have been disqualified due to prior criminal history.[203] Such individuals end up on juries with at least some frequency, oftentimes due to their failure to properly disclose criminal history.[204] But when faced with such a scenario, numerous state courts,[205] as well as the Eighth[206] and Ninth Circuits,[207] have decided that the inclusion of such a person does not always create a genuine issue. The Michigan Supreme Court recently made this determination explicitly, stating, "we fail to see how a juror's mere *status* as a convicted felon can be considered sufficient" for determining impartiality or bias, despite Michigan's clear felon-exclusion law.[208] If the very courts these laws are meant to protect have little problem with the inclusion of felons on their juries, the bias justification for the laws does not carry much weight.

Actual rates of bias also do not seem to support full exclusion. Although researchers have found that "few if any juror characteristics are good predictors of juror verdict preferences,"[209] there has been little specific research into the presence of bias in jurors with prior

---

202. INS v. Chadha, 462 U.S. 919, 944 (1983).

203. Kalt, *supra* note 9, at 162.

204. *Id.*

205. *See, e.g.*, White v. State, 225 S.W.3d 571, 574–75 (Tex. Crim. App. 2007) (holding that the presence of two jurors who should have been disqualified by statute due to pending criminal charges did not amount to "significant harm" on its own); State v. Neal, 550 So. 2d 740, 745 (La. Ct. App. 1989) (holding that a juror's failure to disclose a prior felony conviction was not cause for a new trial).

206. *See* United States v. Humphreys, 982 F.2d 254, 260–61 (8th Cir. 1992) (affirming a conviction where an embezzler sat on a jury that convicted the defendant of income tax evasion, and reasoning that there was a lack of evidence of actual bias on the part of the juror).

207. *See* Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1059 (9th Cir. 1997) (affirming a conviction due to a lack of evidence of "actual bias" on the part of a felon juror).

208. People v. Miller, 759 N.W.2d 850, 859 (Mich. 2008) (emphasis in original).

209. Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmy Seying & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL., PUB. POL'Y, & L. 622, 673 (2000).

criminal history. One study does admittedly point to a noticeable antiprosecution bias demonstrated by about one-third of felons.[210] However, this research also suggests that taken as a whole, felons are not overly biased. In fact, almost one-third of felons were either neutral or favorable to the prosecution.[211] And the level of antiprosecution bias that felons do demonstrate is identical to that of other nonbanned groups; the bias rate is particularly similar to that of law students.[212] These results may not entirely refute the bias argument, but the lack of a stronger correlation between felon status and bias does undermine the justification for the lifetime bans that much of the country utilizes.[213] Prosecutors are also fully capable of discovering prospective jurors' biases by direct questioning, just as they root out other forms of potential bias or conflicts of interest.[214]

Finally, though it is certainly true that historical practice has at times played some role in upholding challenged laws,[215] courts and legislatures have also consistently excised practices that introduced unfairness and prejudice into the legal system.[216] It is also important to note that the American criminal justice system—including the rate and total number of felony convictions—has changed dramatically even within recent decades; the number of state felony convictions increased 24 percent between 1994 and 2004,[217] and researchers have estimated that the percentage of felons more than doubled between 1968 and 2000.[218] Accordingly, felon-juror-exclusion laws have a larger, more widespread impact now than at any other point in American history. When dealing with human lives and the malignant force of racial bias, the existence of a long legal history is simply not enough.

---

210. James M. Binnall, *A Field Study of the Presumptively Biased: Is There Empirical Support for Excluding Convicted Felons from Jury Service?*, 36 LAW & POL'Y 1, 17–19 (2014).

211. *Id.* at 12.

212. *Id*.

213. Kalt, *supra* note 9, at 106.

214. *See, e.g.*, Johnson, *supra* note 9, at 407 (arguing that prosecutors can discover prospective jurors' bias, such as antipolice bias, "through explicit questions about such biases").

215. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 795 (1983) (upholding legislative prayer under the Establishment Clause in light of the long historical tradition of this practice).

216. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 444–45 (1966) (establishing the *Miranda* warnings to protect individuals from abusive and coercive police questioning); Mapp v. Ohio, 367 U.S. 643, 659–60 (1961) (incorporating the exclusionary rule against the states to protect defendants from illegally obtained evidence); FED. R. EVID. 412 (protecting victims of sexual assault from having their sexual history paraded in court).

217. Darren Wheelock, *A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia*, 32 JUST. SYS. J. 335, 337 (2011).

218. Kalt, *supra* note 9, at 169 (citation omitted).

C. *Results: The Harshest Felon-Juror Exclusion Laws are Unconstitutional*

Ultimately, the pressing constitutional concerns raised by excluding felons from the jury pool outweigh the government's unconvincing justifications, and the lifelong bans currently enforced by the federal government and thirty-one states violate equal dignity and should not stand. Whether shorter term bans or other temporary forms of exclusion could survive equal dignity challenges is a question requiring more in-depth analysis than this Note can provide. But America is an organized society with a robust criminal justice system that has the power to imprison and execute those it deems deserving. In such a society, surely a belief in the idea that "*all individuals* are deserving in equal measure of personal autonomy"[219] requires ensuring the dignity and respect granted by a criminal justice system that is generally representative and fair toward every community.

Simply striking down felon-juror-exclusion laws may not be enough. The jury selection process is too idiosyncratic to ever fully ensure that prosecutors will not use peremptory strikes and challenges for cause to remove all felons, and such tactics can be utilized by clever attorneys as a work-around for discriminatory motives.[220] However, forcing prosecutors to use their limited peremptory challenges[221] rather than broadly banning felons up-front may help to alleviate some of the problem. Courts could also go a step further by formulating protections against challenges based on criminal history; these protections could mirror those formulated in *Batson v. Kentucky*, where the Court both required attorneys to provide race-neutral reasons for using preemptive strikes on potential jurors during voir dire and created a structure for addressing claims of improper motivation for preemptive strikes.[222] Issues like these are neither insurmountable nor beyond the capabilities of the judiciary to address, and they should not stand in the way of upholding constitutional promises.

---

219. Tribe, *supra* note 43, at 22.

220. *See* Melynda J. Price, *Performing Discretion or Performing Discrimination: Race, Ritual, and Peremptory Challenges in Capital Jury Selection*, 15 MICH. J. RACE & L. 57, 95 (2009) ("The removal of African Americans for either familiarity with the criminal justice system or hostility to the state and its agents is, most arguably, not race neutral.").

221. *See, e.g.*, FED. R. CRIM. P. 24(b) (describing limits for peremptory challenges in federal criminal prosecutions).

222. Batson v. Kentucky, 476 U.S. 79, 93–98 (1986). A similar rule in this situation could require attorneys to provide a more direct link between the crime the potential juror was convicted of and the issues at stake in the instant case, rather than allowing broad strikes based on the mere existence of a criminal record.

The Fourteenth Amendment's goal of fighting racial discrimination makes it the correct tool for combatting this issue. In theory, this includes fairness in policing, the charging of crimes, pretrial negotiations, and sentencing; in reality, the murky, sometimes unconscious nature of racial bias is such that there may be no foolproof means for ensuring its absence from proceedings that include an inevitable and necessary amount of discretion.[223] But when it can be demonstrated that an unnecessary practice is systematically and disproportionally excluding up to one-third of a particular race from an important aspect of American life, that is an inequality that *can* be tackled.

CONCLUSION

In *Obergefell*, the Supreme Court opened the door to a new way of approaching questions of equal protection—an approach that both provides an effective method for bringing disparate impact claims and reinvigorates the Fourteenth Amendment's remedial roots. Admittedly, the harm inherent in excluding felons from the jury pool would not have been recognized by the Amendment's authors, who were surrounded by racial injustice on a scale that is hard for modern Americans to comprehend. However, the Court predicted and forcefully addressed these concerns:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.[224]

Fortunately, we have that new insight—the understanding that the exclusion of felons from the jury pool exacerbates the exact racial imbalances our predecessors hoped to stamp out. Despite obvious detours and backward steps, the overall course of the American justice system is one of recognizing and attempting to excise racial bias and inequality. Rather than being a wild expansion away from the previous path Fourteenth Amendment jurisprudence has taken, equal dignity,

---

223. *See* Roberts, *supra* note 10, at 619–21 (discussing the large number of discretionary decisions necessary in the criminal justice system and the risk of implicit bias in these decisions).

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

and this particular application, follows that clear direction. With each passing year and generation, we try to move another step closer to true equality. Striking down juror-exclusion laws, while far from solving these problems, helps move us that next step.