

# **Dignity, Substantive Due Process and the Right to a Safe Environment**

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## **Question Presented**

Under the *Obergefell v. Hodges*<sup>1</sup> decision, does the substantive due process clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendments create a new cause of action for violations to human dignity in the field of environmental justice?

## **Brief Answer**

Potentially. Existing jurisprudence from the U.S. Supreme Court all but forecloses legal claims under the Equal Protection Clause that challenge environmental policies that disproportionately and adversely affect communities of color, that is, claims advancing environmental justice. In *Obergefell*, the U.S. Supreme Court decided that the concept of human dignity is consequential in determining whether governmental bans on same-sex marriage contravene liberty interests protected by the Due Process Clause of the U.S. Constitution.<sup>2</sup> Accordingly, human dignity may play a role in vindicating other potential liberty interests protected by the Due Process Clause, such as a right to a healthy environment, and with it, environmental justice.

## **Introduction**

This paper examines the concept of human dignity in American jurisprudence in the context of environmental justice. Furthermore, the paper explores the potential for a new cause of action applying the principles of the 5<sup>th</sup> and 14<sup>th</sup> amendment's substantive due process clause to violations of environmental justice. The idea for a new cause of action within the particular field of environmental justice stems from the Supreme Court's decision in *Obergefell v. Hodges*, where the court overturned a ban on same sex marriage. Although the facts are not in accordance

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>2</sup> Id.

with one another, the legal principles the court applied in *Obergefell* may also apply to different contexts based upon similar violations.

The premise of the paper is founded upon human dignity. Dignity serves as a foundational concept in many constitutions but rarely is it applied in a concrete legal doctrine. The reason for dignity being elusive to legal doctrine is due to the character of the concept of dignity being amorphous and not easily definable. Dignity, however, draws many parallels to legal concepts that are already employed such as freedom, liberty and privacy. Therefore, this paper will define dignity by examining how it is employed in a legal context in other jurisdictions, then it will apply the definition of dignity to established legal concepts that are used in America to be able to apply dignity as a legal doctrine.

This paper attempts to apply the concept of dignity to the subject of environmental justice. This is necessary after a Supreme Court ruling that removed the equal protection cause of action against environmental justice violations. Applying the concept of dignity to environmental justice may provide an alternative substantive argument against violations of environmental justice.

**I. Environmental Justice Provides a Context for Understanding Why a Right to Dignity is Necessary.**

**A. Defining Environmental Justice**

The environmental justice cause provides a context for understanding violations to human dignity and identifies the necessity for defining dignity in a legal context. The Environmental Protection Agency defines environmental justice as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws,

regulations, and policies.<sup>3</sup> The underlying issue pertaining to environmental justice is the inequitable distribution of environmental hazards to communities of color or low-income communities.

Racial and economic inequalities are the substance of violations in environmental justice. In 1987 the United Church of Christ's Commission for Racial Justice published a report, *Toxic Wastes and Race in the United States*, showing that the racial composition of a neighborhood is the single most important factor in determining where a toxic waste facility is sited.<sup>4</sup> These communities are targeted by industries due to their lack of voice or political power. Commercial industries take advantage of impoverished communities by building waste disposals that pollute their immediate environment and subsequently jeopardize their health and safety.

Due to the Clean Air Act section 11r(2), a facility that creates the waste hazard site must submit a Risk Management Plan to the EPA.<sup>5</sup> This plan consists of a vulnerability zone that is the maximum possible area where people could be harmed by a worst-case release of certain toxic or flammable chemicals.<sup>6</sup> The vulnerability zone is a radius distance around the facility and the people outside these zones, which are enclosed by fences, are subject to a potential destructive event, or an on-going air, water and land pollution which compromises health and safety.<sup>7</sup>

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<sup>3</sup> <https://www.epa.gov/environmentaljustice>.

<sup>4</sup> <http://deohs.washington.edu/environmental-justice>.

<sup>5</sup> Environmental Justice and Health Alliance for Chemical Policy Reform, [Who's in Danger? Race, Poverty and Chemical Disasters: A demographic Analysis of Chemical Disaster Vulnerability Zones](#) (May, 2014).

<sup>6</sup> [Id.](#)

<sup>7</sup> [Id.](#) at 2.

Waste facilities create dangerous environments for those who live within proximity to them. For example, PVC plants disburse approximately 500,000 pounds of vinyl chloride, which is a known carcinogen, and many other toxins into the atmosphere each year making communities around these plants more susceptible to air pollution.<sup>8</sup> Another well-known example of the danger these waste disposal sites can bring to a community was evident in the Chevron incident in Richmond California.<sup>9</sup> On August 6, 2012, the Chevron Refinery caught fire and more than 15,000 residents had to seek treatment at area hospitals with respiratory problems because of the smoke and toxic fumes.<sup>10</sup> Approximately eighty percent of people living within a mile of the Chevron refinery are people of color, and a quarter of them live below the poverty line.<sup>11</sup>

Environmental pollution and health are not the only factors to consider when assessing the substantial negative impact upon these communities. Social and economic considerations will also contribute to the loss of dignity. For instance, residents of the fence line zones have average home values 33% below the national average, household incomes are 22% below the national average and the poverty rate is 50% higher than the US average as a whole.<sup>12</sup> In terms of disparity, the percentage of blacks living in fence line zones is 75 % greater than the U.S. as a whole, and the percentage for Latinos is 60 % greater.<sup>13</sup>

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<sup>8</sup>[http://www.chej.org/pvcfactsheets/Environmental\\_Justice\\_and\\_the\\_PVC\\_Chemical\\_Industry.html](http://www.chej.org/pvcfactsheets/Environmental_Justice_and_the_PVC_Chemical_Industry.html).

<sup>9</sup> Environmental Justice and Health Alliance for Chemical Policy Reform, *supra* note 6.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *Id.* at 16.

<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

## B. Environmental Justice and the Law

The usual practice for filing a cause of action against a violator of environmental discrimination begins with title VI of the civil rights act of 1964. Section 601 of title VI provides that, “no person shall be subjected to discrimination under any covered program or activity on basis of race, color or national origin. . . .”<sup>14</sup> Thus, a person can claim they were discriminated against and seek relief such as an injunction or damages. In regards to environmental discrimination, an individual can submit a claim under Title VI against, for example, a corporation that only builds refineries in low income or minority neighborhoods. The impact of the disparity would be enough to submit a claim.

In 2001, the Supreme Court heard a case, *Alexander v Sandoval*, which addressed an issue of discrimination.<sup>15</sup> In *Sandoval*, the state of Alabama passed a law to declare English as the state official language.<sup>16</sup> Alabama’s Department of Public Safety implemented an official policy to only administer a driver’s license exam in English.<sup>17</sup> Sandoval brought a class action under title VI, which prohibits discrimination in covered programs and activities, and because the Alabama Department of Public Safety received federal assistance, they were subject to title VI.<sup>18</sup>

The Supreme Court, in reviewing Sandoval’s case, held that Congress did not intend for discrimination based upon disparity alone and thus a disparity discrimination claim was

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<sup>14</sup> 42 U.S.C.A. § 2000d (West).

<sup>15</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>16</sup> *Id.* at 278.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

insufficient for a private cause of action.<sup>19</sup> Rather, the person must base the private action upon intentional discrimination. A requirement to demonstrate intent presents a significant blow to the environmental justice cause.<sup>20</sup> Environmental justice is predicated upon evidence of disparity discrimination against racial minorities and low-income communities. On the other hand, when the threshold is intentional discrimination, as the Supreme Court determined it to be, cases will rarely make it to court because of the difficulty in proving a corporation intentionally built a refinery in a neighborhood based upon race, color or national origin.

The *Sandoval* decision immediately changed how environmental justice claims were adjudicated. In *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, a monumental win for the environmental justice cause was overturned because of the *Sandoval* decision.<sup>21</sup> South Camden Citizens in Action (SCCIA) were a group of minority activist from Camden, New Jersey that filed an injunction against the New Jersey Department of Environmental Protection (NJDEP) in an attempt to prohibit the construction of a cement facility. The SCCIA claimed the NJDEP violated its responsibility to enforce environmental laws by issuing a permit to St. Lawrence Cement Co. (SLC), to build the facility.

The construction of the facility presented environmental health risks to the citizens of South Camden. SLC's facility would emit certain pollutants in the air such as mercury, lead, manganese, nitrogen oxides, carbon monoxide, sulphur oxides and volatile organic compounds.<sup>22</sup>

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<sup>19</sup> Id. at 293.

<sup>20</sup> Id.

<sup>21</sup> S. Camden Citizens in Action v. New Jersey Dept. of Envtl. Protec., 254 F. Supp. 2d 486, 489 (D.N.J. 2003).

<sup>22</sup> S. Camden Citizens in Action v. New Jersey Dept. of Envtl. Protec., 145 F. Supp. 2d 446, 450 (D.N.J. 2001), opinion modified and supplemented, 145 F. Supp. 2d 505 (D.N.J. 2001), rev'd, 274 F.3d 771 (3d Cir. 2001).

The operations of the cement facility would also disrupt the neighborhood by the ingress of 35,000 inbound delivery trucks arriving at SLC's proposed facility and the egress of 42,000 outbound truck deliveries departing from the facility.<sup>23</sup>

These environmental issues would add to the environmental problems the citizens of Camden were already facing. The neighborhood was already occupied by the Camden County Municipal Utilities Authority, a sewage treatment plant, the Camden County Resource Recovery facility, a trash-to-steam plant, the Camden Cogen Power Plant, a co-generation plant, and two United States Environmental Protection Agency ("EPA") designated Superfund sites.<sup>24</sup> The environmental issues presented by these facilities contributed to making Camden County a "Community of Concern" due its disproportionate rates of asthma and lung cancer.<sup>25</sup>

The district court granted the injunction to the SCCIA by finding the SCCIA had established a "reasonable likelihood that the operation of the proposed cement grinding facility which would emit various pollutants and require the annual ingress and egress of nearly 80,000 delivery trucks would have an adverse, disparate impact on the residents of the Waterfront South neighborhood based on their race, color, or national origin."<sup>26</sup> Five days after that decision, *Sandoval* essentially overruled the "disparate impact" discrimination and determined that, in order to state a claim, the plaintiff must claim intentional discrimination.

As a result of the heightened criteria for submitting a claim for violations based upon discrimination, violations of environmental justice will make getting into court nearly impossible when the claim is based upon discrimination. However, disparity discrimination is just one way

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<sup>23</sup> Id.

<sup>24</sup> Id. at 451.

<sup>25</sup> Id. at 461.

<sup>26</sup> SCCIA., 254 F. Supp. 2d at 490.

to approach environmental justice. It is true people of color and low income communities are more susceptible to the indignities that environmental justice highlights, but all human beings are afforded safe, healthy environments, not just when there is disparity discrimination in application of environmental policy. Therefore, all people are granted the right to live in clean environments as a fundamental right, which may introduce a new cause of action to prevent the indignity suffered by living in a polluted environment.

## II. Dignity

Dignity contains varying definitions dependent upon the culture that is defining the word. Although not consistently defined, dignity possesses underlying concepts that constitutions contain in various societies. The two main concepts of dignity that are ubiquitous are: 1) each individual possessing an intrinsic worth that is not defined by their social status or contributions to society and 2) due to that intrinsic worth, each person maintains a right to defining the meaning of their existence.<sup>27</sup> These two characteristics provide a working definition for dignity that is necessary when trying to convert an amorphous term into a more concrete concept.

The next question concerning defining dignity would be to what extent is a person's dignity violated? When is the line crossed whereas the violated would be justified in seeking justice from the violator? The first concept, each person possessing an intrinsic worth, draws that line. Intrinsic worth assigns a value to the person's existence, and if there is a value to their existence then one does not have the right to interfere with that right of existence.<sup>28</sup> Interference with the right of another's existence is not limited to interfering with the actual life but also

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<sup>27</sup> Rex D. Glensy, The Right to Dignity, 43 Colum. Hum. Rights L. Rev. 65 (2011).

<sup>28</sup> Elizabeth B. Cooper, The Power of Dignity, 84 Fordham L. Rev. 3 (2015).

interfering with the right of the person to define their life.<sup>29</sup> This interference upon defining existence is manifested in any form of oppression, subjugation, violations of privacy, or simply put, enforcing one's will upon another. Many will agree that people should respect dignity as a fundamental tenant just like liberty or justice. However, governments rarely codify dignity into law due to its vague perception. Therefore, the most effective way to define dignity is to examine what a situation looks like when dignity is removed and see how different courts will apply dignity when dignity is incorporated in their constitutions.

To provide a more concrete understanding of dignity, it is helpful to see how governments apply dignity in different jurisdictions. By seeing how different jurisdictions apply dignity, one can see an underlying cohesive theme or consistent traits that dignity, no matter who is defining the word, will contain. Then, with these consistent traits, dignity can be applied to new contexts (such as environmental law) to see if it is already being applied conceptually or if it is absent, then how can it best be applied to change the current situation. First, this paper explores how the state of Montana utilizes dignity in its constitution. Then, dignity as a constitutional right will be analyzed from an international perspective in Germany.

### **A. Montana**

"The plain meaning of the dignity clause commands that the intrinsic worth and the basic humanity of persons may not be violated."<sup>30</sup>

In 1972, the state of Montana ratified a new state constitution that recognized all human beings to possess dignity. Article II of the Montana state constitution provides:

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<sup>29</sup> *Id.* at 75.

<sup>30</sup> Walker v. State, 68 P.3d 872, 884 (Mont. 2003).

**Section 3. INALIENABLE RIGHTS.** All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.<sup>31</sup>

**Section 4. INDIVIDUAL DIGNITY.** The dignity of the human being is inviolable.

No person shall be denied the equal protection of the laws. Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas.<sup>32</sup>

Within Montana's constitution article two sections three and four emphasize a core concept of human beings possessing intrinsic value and the right to not have another infringe upon that value. More specifically, section three identifies the inalienable rights a person has; a right to a clean environment, pursuit of necessities, safety, health and happiness. There is also a duty placed upon the individual to recognize that others possess the same rights by stating, “[I]n enjoying these rights, all persons recognize corresponding responsibilities.” Montana has developed a constitution that defines dignity as an intrinsic value every human being possesses, and strictly prohibits another from interfering with the expression of that value. Intrinsic worth is assumed to all, even those that are not providing value to society which is most likely the best way to understand the significance of dignity as was seen in the Montana case *Walker v. State*.<sup>33</sup>

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<sup>31</sup> Mont. Const. art. II, § 3.

<sup>32</sup> Mont. Const. art. II, § 4.

<sup>33</sup> Walker, 68 P.3d 872.

*Walker v. State* provides a clear example of how the court in Montana applies dignity as a legal concept. In *Walker*, the Supreme Court of Montana held that prison officials violated a prison inmate's right to dignity by subjecting certain inmates to deplorable living conditions. The living conditions found to be in violation of human dignity consisted of, "filthy, uninhabitable cells. These inmates testified that the cells commonly had blood, feces, vomit and other types of debris in the cells they were forced to inhabit. One inmate recounted an instance where he was placed in a cell with human waste rubbed all over the walls and vomit in the corner. He claims the corrections staff ignored his complaints and told him to 'live with it.'"<sup>34</sup> Furthermore, the correctional officers passed food through the same hatch in which they passed toilet brushes and often placed the unwrapped food on the dirty hatch. The court also included the testimony of an inmate and the psychological burden this behavior presented, "My feeling of worth, you know, was just-I didn't feel worth anything, you know, I didn't want to-I didn't want to carry on. When I finally went to the mental health block [in Max], I didn't care whether I lived or died... It's-eating like a dog, eating your food off the ground, and really, you know, you don't even feel human after a while...."<sup>35</sup>

The living conditions the correctional officers subjected the inmates to violated Montana's dignity clause. Although they were inmates, they were still human beings, which qualifies them to maintain an intrinsic value. The intrinsic value allows the individual to "pursue life's basic needs" along with "seeking their safety, health and happiness." The correction officers treating the inmates as animals displayed a violation of the second concept of dignity,

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<sup>34</sup> Id. at 883.

<sup>35</sup> Id. at 884.

the right to define the meaning of your own existence. By treating the inmates as less than human, the officers ignored the inmates' intrinsic human worth and subjected them to their will, clearly against the will of the inmates and therefore interfering with the inmates right to define their own existence.

## **B. Germany**

After the events of World War II, Germany responded to the atrocities caused by the Nationalist party by drafting a constitution that made the concept of dignity a concrete legal principle. We are all aware of the indignities particular groups suffered at the will of the Nazis that provides the most powerful and clear example of what occurs in the absence of dignity. The events that occurred fit into the two-part concept of every human being possessing an intrinsic value, and then the interference upon that right of the individual to define their existence. Because of this experience and the desire to prevent it from occurring again, Germany defined dignity, as drafted in the German Basic Law, is not only a right to the individual but also a duty of the state to provide the basic requirements needed to insure everyone lives a dignified existence.<sup>36</sup> Article 1 of the German Basic Law states;

Art. 1 of the Basic Law of the Federal Republic of Germany

- i. Human dignity shall be inviolable. To respect and protect it shall be duty of all state authority.
- ii. The German people, therefore, acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- iii. The following basic rights are binding on legislature, executive, and judiciary as directly valid law<sup>37</sup>

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<sup>36</sup> <http://nuslslawreview.org/wp-content/uploads/2016/12/christoph-enders.pdf>

<sup>37</sup> German Basic Law, Article 1.

But what does dignity mean in German Basic Law? Dignity also incorporates the principles of intrinsic worth that prohibits any actor from violating. Germany prioritizes dignity to an extent not commonly experienced as was seen when the German legislature passed the German Aviation Security Act. The German Aviation Security Act permitted the German armed forces to shoot down hijacked airplanes, containing innocent individuals that had the potential to be used as weapons. Challengers to the law filed a complaint and the Court held;

§ 14.3 of the Aviation Security Act is incompatible with the fundamental right to life and with the guarantee of human dignity to the extent that the use of armed force affects persons on board the aircraft who are not participants in the crime. By the state's using their killing as a means to save others, they are treated as mere objects, which denies them the value that is due to a human being for his or her own sake<sup>38</sup>

The German courts put a higher emphasis on the intrinsic worth concept of dignity than displayed by most other courts. The court refused to quantify the value of life in a pragmatic, utilitarian manner. Furthermore, the court did not want to contribute to the second concept of defining violations of dignity by interfering with the right of the innocent individuals to define their existence. People can make reasonable moral arguments for or against the court's holding, which highlights the difficulties that can arise when applying dignity as a legal concept.

Moving forward with this brief analysis of defining dignity was necessary to understand how dignity can be applied to American jurisprudence when dignity is not applied to an already established legal principles that maintain a similar two-part concept of dignity. If we are to assume every human being possesses intrinsic worth, then we are to also assume they have a right to define their existence without undue interference.

### **III. Dignity and Substantive Due Process**

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<sup>38</sup> <http://nujslawreview.org/wp-content/uploads/2016/12/christoph-enders.pdf>

The due process clause of the fourteenth amendment protects against infringement upon an individual's personal liberties by a state action. More specifically the language of the fourteenth amendment reads,

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>39</sup>

The equal protection clause of the fourteenth amendment protects an individual's dignity by ensuring that a government entity will not infringe upon their rights in a manner that intentionally discriminates upon them. On the other hand, the Supreme Court interprets the due process clause in two different manners. The first involves a procedural right that ensures the state will not deprive an individual of life, liberty or property without due process. The other, substantive due process, is not as easily defined.

#### **A. The Substantive Due Process Clause**

The substantive due process clause protects an individual's fundamental rights from state interference.<sup>40</sup> Fundamental rights are rights that are intrinsic to humanity that the government cannot infringe upon without a compelling reason.<sup>41</sup> These rights highlight the concepts of freedom of autonomy and privacy, to make decisions regarding choices that are personal and intimate, such as decisions regarding procreation and child rearing.<sup>42</sup> More specifically,

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<sup>39</sup> U.S. Const. amend. XIV.

<sup>40</sup> Obergefell, 135 S. Ct. at 2616.

<sup>41</sup> Id. at 2616.

<sup>42</sup> Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

examples of fundamental rights protected by the substantive due process clause include a woman's right to choose an abortion and a right to marriage.

The Supreme Court explained the concept of a substantive right to due process in *Griswold v. Connecticut*.<sup>43</sup> There, the issue the Court faced was the state of Connecticut's law banning the use of contraceptives.<sup>44</sup> The Supreme Court held this ban violated a right to privacy that is not explicitly stated in the constitution.<sup>45</sup> The Court reasoned there was a right to privacy implied throughout the constitution, emanating from the bill of rights and the first, fourth, fifth and ninth amendments.<sup>46</sup>

The Court next applied the substantive due process right to privacy to issues related to procreation. In *Roe v. Wade* and *Planned Parenthood v. Casey*, the Court recognized a woman's right to choose whether she wanted to have an abortion was a fundamental right protected by the fourteenth amendment's substantive due process clause.<sup>47</sup> The court also applied the right to privacy in sexual relations between two consenting adults and struck down state anti-sodomy laws.<sup>48</sup>

The history of the Court and the 14<sup>th</sup> amendment substantive due process clause has evolved in recognizing a right to privacy and a right to make personal choices regarding matters that are intimate and personal in nature. The most recent and significant Supreme Court case involving fundamental rights is the *Obergefell v. Hodges* decision. This case is known for granting same sex couples the right to marry, however, the Court's analysis and recognition of

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<sup>43</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 483-85.

<sup>47</sup> *Casey*, 505 U.S. at 851.

<sup>48</sup> See, *Lawrence v. Texas*, 539 U.S. 558 (2003).

dignity throughout the opinion may provide a more expansive application to privacy and dignity rights.

### **B. Obergefell v. Hodges**

The Court has interpreted the fourteenth amendment to protect rights that not only relate to issues of sex, intimacy and marriage, rather it takes a broader interpretation as protecting liberties that are fundamental such as “. . . certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>49</sup> Throughout time, what the Court defines as a fundamental right has taken a broader definition, not just to incorporate certain acts such as sex and marriage, but principles of liberty, dignity and autonomy that are intrinsic to all human beings’ right to privacy or a right to live without a state entity infringing upon that privacy. The most recent and significant development in the application of substantive due process was the *Obergefell v. Hodges* case. Here, the Court held a state cannot proscribe same sex marriage by consenting adults.<sup>50</sup> The court recognized a person’s right to make certain decisions that are intimate and personal in nature, decisions that shape a person’s sense of self and identity, but the question is how does this decision broaden the definition of fundamental rights? Or, is this opinion just another strictly defined application of a fundamental right to address what has been an evolving social justice movement that was bound to happen?

To answer either question, one must look at the language used within the opinion and the Court’s application of the facts to the legal principles. The *Obergefell* case consists of James

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<sup>49</sup> *Obergefell*, 135 S. Ct. at 2597.

<sup>50</sup> Id.

Obergefell and his partner, John Arthur. They were together for more than two decades until Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. The couple wanted to marry before Arthur passed, therefore they traveled from Ohio to Maryland, where same sex marriage was legal. Three months after the marriage Arthur died, and Ohio law does not permit listing of Obergefell as the surviving spouse on Arthur's death certificate.

Before the Court forwards its legal analysis, it addresses the history of the issue, marriage, which may be just as significant as the opinion itself when understanding how the Court defines fundamental rights. In this brief historical overview of marriage in the United States, the Court focuses upon the relationship between the two individuals and the social status' in relation to one another. For example, the Court begins its historical depiction of marriage by defining the status of women; "marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman."<sup>51</sup> Then, the Court recognizes that as the role of women changed in society, so did the institution of marriage as a "single male-dominated legal entity."<sup>52</sup> The role continued to evolve as women gained legal and political rights, and more significantly, society began to "understand that women have their own equal dignity of law as coverture was abandoned."<sup>53</sup> Marriage was no longer seen as one person maintaining dominion over the other, it was individuals expressing and defining the terms of their life on their own terms. A woman was no longer subjected to the will of her father and then her husband, she has an independence and a right to define her existence, a private right to determine how she will live. The Court then states the development of the institution of marriage

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<sup>51</sup> Id. at 2595.

<sup>52</sup> Id.

<sup>53</sup> Id. at 2597.

in a context of women having dignity in society "have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process."<sup>54</sup>

The significance of the Court to describe the evolution of marriage in conventional man woman arrangement terms is to then draw a parallel between that and same sex marriage. Homosexuality was seen as immoral and sinful; thus society did not consider not only the act of homosexuality but also the act of same sex marriage to be contrary to the morals and values of American society. Therefore, just as society did not consider women as equals to men in their status within society, homosexuals were also not afforded the dignity to define their existence, being subjected to another's will. The Court then describes the changes to the social status of homosexuals, the political and cultural movements and their eventual acceptance in society. As tolerance for homosexuals grew, so did the movement for a fundamental right to marriage. Marriage, in the context of heterosexual marriage, was an institution that benefited from giving one group (women) dignity and a right to define their existence, therefore, using this same logic, the institution of marriage will also benefit from providing homosexuals access to what is already a fundamental right.

The Court moves forward in its opinion to determine if a state by proscribing same sex marriage violates the substantive due process clause. The analysis of the right to marriage is based upon four principles that consist of the following; first, the right to personal choice

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<sup>54</sup> Id. at 2595.

regarding marriage is inherent in the concept of individual autonomy; second, the right to marriage is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals; third, protecting the right to marry safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education; and finally, the Nation's traditions make clear that marriage is a keystone of our social order.<sup>55</sup>

How does marriage as a fundamental right relate to dignity? There are parallels between the concept of dignity as a person possessing an intrinsic worth that provides them a right to define their own existence without interference or infringement from another and the substantive due process right to privacy. The fourteenth amendment guarantees a right to privacy, intimacy, matters that are personal in nature such as who to marry and child rearing. These are basic, fundamental rights that define a person's existence. When a governmental entity interferes upon or allows another to interfere with this right, it strips the individual of their dignity by subjecting the person to the will of another. Obergefell, by the state proscribing who he can or cannot marry, defined his existence and therefore, it stripped him of his sense of intrinsic worth that all human beings are afforded.

The manner in which the infringement occurs is only a factor when determining if a person's right to dignity has been violated. The concerning issue is that an affront to human dignity can take many forms, it is not limited to particular actions such as a law banning same sex marriage, nor does the violation have to be the most egregious act in order to make a valid

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<sup>55</sup> Obergefell, 135 S. Ct. at 2599–601.

claim. The focus is when a state actor takes actions that interfere with another's right to define their existence and therefore offends the intrinsic value that every human being possesses.

#### **IV. Infringement Upon Environmental Justice is a Violation Upon Substantive Due Process Rights**

Can violations upon environmental justice infringe upon a fundamental right to a safe environment? Fundamental rights are rights derived from the substantive due process clause of the 5<sup>th</sup> and 14<sup>th</sup> amendments. The rights protected are enumerated in the bill of rights but also extends to “personal choices that are central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>56</sup> The Court has incorporated new fundamental rights when there are infringements to individual dignity and autonomy such as rights regarding choices concerning procreation, marriage and sexual intimacy.

As previously discussed, the court has recognized a new fundamental right in *Obergefell v. Hodges*. When the Court recognizes a new fundamental right, it does not have a set formula to determine if a right is fundamental, rather the Court “exercise(s) reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect.”<sup>57</sup> The reasoned judgment the court applied to find same sex marriage as a fundamental right consisted of four principles; marriage is inherent in the concept of individual autonomy, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals, marriage safe guards children and families and thus draws meaning from related rights of child rearing, procreation, education and marriage is a part

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<sup>56</sup> *Obergefell*, 135 S. Ct. at 2597.

<sup>57</sup> *Id.* at 2598.

of the nation's history and tradition which makes it a keystone of social order.<sup>58</sup> These guided principles provide a framework for analysis that can be applied to other rights, such as environmental justice, to determine if a right is fundamental and thus protected by the constitution's substantive due process clause. The second principle, the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals, will not be applied to environmental justice because it is particular to the context of marriage alone.

Applying the legal framework to environmental justice will determine if there is a fundamental right to a healthy and safe environment. The first principle, the right being inherent in the concept of individual autonomy, is the most significant principle due to its relationship to human dignity. In *Obergefell*, the Court found same sex marriage to be inherent in the concept of individual autonomy due to it being among the most intimate choices an individual can make.<sup>59</sup> The premise of autonomy in the Court's explanation is privacy. A choice to marriage is private because the choice to marry "shapes an individual's identity."<sup>60</sup> The Court further describes this private and intimate choice shaping the identity because it allows the person to choose the person he or she wants to form an enduring bond with and the two persons together "can find other freedoms, such as expression, intimacy, and spirituality."<sup>61</sup>

Violations to environmental justice violate human dignity and therefore do not afford the person a right to autonomy and a choice in making decisions that are private, intimate and personal. Dignity defined involves the recognition of everyone possessing intrinsic worth and

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<sup>58</sup> Id. at 2599-601.

<sup>59</sup> Id. at 2599.

<sup>60</sup> Id.

<sup>61</sup> Id.

that intrinsic worth affords the individual a right to define their existence without that definition being subjected to another's will. This definition is synonymous with the Supreme Court's right to autonomy because of the Courts' emphasis on a person's right to "shape their identity." When the state banned same sex marriage, the state took away the person's right to shape their identity. When the government issues a permit to a corporation that allows them to build a facility that pollutes the environment, it will also prohibit a person from shaping their identity and therefore infringing upon their substantive right to due process. Disasters that result from explosive chemical facilities, health issues caused from toxic air, water pollution from chemical dumping, can result in a variety of health issues that interfere with health and biological development thus intervening with making an autonomous decision upon the most important issue of a person's life; the issue of health and safety for the individual and their family.

The third principle – how marriage safeguards children and families and thus draws meaning from related rights of childrearing, procreation and education – can also be applied to a safe environment. Marriage, the Court explains, provides children with “permanency and stability,” which are “important to the children’s best interest.”<sup>62</sup> The Court also emphasizes the importance of same sex couples and their ability to provide nurturing homes to their children. Hence, by excluding same sex marriage, the state produces harm by not providing stability to the family unit and potentially humiliating the children of same sex couples.<sup>63</sup>

Polluted environments are unsafe and that contravenes the Court’s principle of providing stability for family units. As previously discussed, families that live outside of vulnerability zones suffer from having lower property values, lower household incomes, and have higher

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<sup>62</sup> Id. at 2600

<sup>63</sup> Id.

poverty rates. The social and economic impact upon family structure that these waste and chemical facilities produce put an unnecessary strain upon the families that live-in neighborhoods outside of vulnerability zones.

The final principle – that marriage is a part of the nation’s history and tradition, which makes it a keystone of social order – is more so applicable to a safe environment than is marriage.<sup>64</sup> The most significant explanation the Court provides is cited from *Maynard v. Hill*, that quoted Alexis de Tocqueville’s statement that marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress.”<sup>65</sup> American law has supported this view by providing married couple rights to support the family structure such as taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; and birth and death certificates.<sup>66</sup>

Without the stability of a safe environment, social order becomes compromised. A safe environment is the foundation upon what other fundamental rights are derived from. For example, the fundamental rights of marriage, procreation, and child rearing cannot be realized without health and stability. Those secondary rights will not be as significant to an individual that is exposed to toxins throughout their life and thus potentially develops a medical infirmity or to the community that is exposed to a disaster such as what happened at the Chevron facility. The secondary rights are social constructs we use to define our existence and exercise our right to

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<sup>64</sup> Id. at 2601

<sup>65</sup> Id.

<sup>66</sup> Id.

dignity, however, the right to a safe environment is primary in maintaining safety of the individual and community and therefore maintaining social order.

Modern Courts are beginning to recognize a fundamental right to a safe environment. In a recent case, *Juliana v. United States*, a federal district court recognized a fundamental right to a climate system capable of sustaining human life. The plaintiffs claimed the federal government's policies regarding greenhouse gas emissions produced by burning fossil fuels created an environment unsustainable for human life. When confronted with the question of whether such a right exists the court reasoned;

In this opinion, this Court simply holds that where a complaint alleges governmental action is affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem, it states a claim for a due process violation. To hold otherwise would be to say that the Constitution affords no protection against a government's knowing decision to poison the air its citizens breathe or the water its citizens drink. Plaintiffs have adequately alleged infringement of a fundamental right.<sup>67</sup>

The court in Juliana recognized the significance of a stable environment as the foundation upon what all other fundamental rights are based upon. Without a safe, healthy environment, the right to marriage becomes less significant if the environment maintains risks to health or safety.

The court in Juliana did not dismiss the claims. The argument against the government in this case is broad in regards to the potential harms it presents by the policies that endanger the environment. Environmental justice claims, on the other hand, provided a more direct claim at the harm presented and the people affected by the harm. The neighborhoods and the people affected by chemical waste are clearly identified as is the party that is causing the harm. This will

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<sup>67</sup> Juliana v. U.S., 6:15-CV-01517-TC, 2016 WL 6661146, at \*16 (D. Or. Nov. 10, 2016).

provide a more concrete case for an infringement upon substantive due process in cases involving environmental justice than the parties involved in *Juliana*, which made general claims of potential harms against the federal government.

## **V. Conclusion**

While dignity per se may not have a concrete application in American law, due to its amorphous nature it can be applied in legal concepts that are already in use. The intrinsic value that every human being possess grants them a right to define their own existence without being subject to the will of another. This definition of dignity is already applied to cases involving substantive due process but in a subtle manner that the Court is recognizing and applying as a result of the evolving perceptions of dignity and rights in American society as was evident in *Obergefell v. Hodges*. This broadening of the application of dignity may provide new causes of action in violations of dignity, especially in the field of environmental justice.

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