Ohio Northern University Law Review

Volume 37 | Issue 2 Article 4

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INTRODUCTION

From the very beginning, the Supreme Court of the United States has recognized that dignity is relevant to the interpretation and application of the Constitution. Indeed, the Court has referred to dignity almost 1,000 times in its 200-plus year history. With some notable exceptions, most of those references are fleeting and concern inchoate items such as the dignity of a contract, of an invention, or of a court.

Since the end of World War II, however, when the Universal Declarations of Human Rights influenced courts around the world to recognize "the dignity and worth of the human person"[1] and one national constitution after another made the right to human dignity fundamental, even some American Justices began to recognize how the value of human dignity underlies other constitutional rights. Indeed, since then Justices have interpreted the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments to rely in some part on the idea of human dignity.[2] That trend continues to this day and may even be expanding.

Moreover, the Court – since its inception – has found that dignity undergirds the principle of federalism and, in a series of cases since 1996 under the Tenth and Eleventh Amendments, the Court has raised the principle of dignity to constitutional (or even super-constitutional) status, holding that the dignity of the states immunizes them from private suits in their own or federal courts.[3]

Although some scholars have noted the emergence of state dignity as a constitutional value, and other scholars have noted the Court's failure to give individual dignity its constitutional due, this article argues, first, that the Supreme Court is inching toward a greater recognition of the

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1. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

2. *See infra* Part II.B.

3. *See infra* Part I.C.

constitutional value of human dignity and, second, that the state dignity cases are not so far apart from the individual dignity cases and may in fact provide a theoretical framework for enhancing constitutional protection for the right to individual dignity.[4]

This article, therefore, will proceed in three phases. First, it will analyze the theoretical foundations of the state dignity cases from the eighteenth century to the late twentieth century.[5] Second, it will describe the newer and less theoretically grounded individual liberty cases from World War II on, including how the concept of individual dignity has fared in the Roberts Court.[6] And, third, with attention to the reasons for the judicial reluctance to embrace individual dignity as a constitutional right or value, it will show how the theoretical foundations of the federalism cases and the interests in the individual rights cases actually converge so that the theory that justifies recognition of state dignity could also serve to give form to the constitutional right to human dignity.[7]

PART ONE: STATE DIGNITY AND THE VALUE OF IMMUNITY

A. The Chisholm Prologue

The Supreme Court of the United States has recognized since its inception that the concept of dignity is significant to constitutional interpretation. The first use of the term by the Supreme Court was in the celebrated – or notorious – case of *Chisholm v. Georgia*.[8] In that case, the Court was required to determine whether the state diversity clause of Article III, permitting suits between a state and a citizen of another state, permitted only suits *by* states against citizens or permitted suits by citizens *against* states as well.[9] The majority of the Court read the language plainly, notwithstanding the argument that the decision to mention the states first indicated an intention on the part of the Framers to permit suits in federal court only where the state was the plaintiff.[10] As Justice Blair explained, "A dispute between A. and B. assuredly [is] a dispute between B. and A. Both cases, I have no doubt, were intended; and probably the State was first named, in respect to the dignity of a State."[11] Justice Blair rejected Georgia's contention that "that very dignity seems to have been thought a

4. *See infra* Parts II, III.
5. *See infra* Part I.
6. *See infra* Part II.
7. *See infra* Part III.
8. 2 U.S. (2 Dall.) 419, 451, 453 (1793).
9. *Id*. at 430.
10. *See generally id.*
11. *Id*. at 450-51.

sufficient reason for confining the sense to the case where a State is plaintiff."[12]

We should have known then that dignity would be a difficult concept for the Court, for while the Court has had no reluctance to refer to it and even to rely on it, defining it and understanding it have almost completely eluded the Court's grasp. The *Chisholm* case suggests why. In *Chisholm*, as in many subsequent cases, the Court or individual Justices recognize that certain entities are imbued with dignity and that such dignity entitles them to certain respect or perhaps even presumptions.[13] But it is never clear exactly what dignity gets you. Does it merely get a state listed first in the diversity clause or does it in fact immunize it from all suits against it to which it does not consent? Although the *Chisholm* Court held that dignity had no real constitutional consequences, it was soundly reproached for its misinterpretation when, within a few years, the Constitution was amended to make clear that a state's dignity did in fact immunize it from law suits.[14] In fact, recent cases have insisted that *Chisholm*'s failure to recognize the dignity that was due States was met with shock and surprise by the nation.[15]

From the beginning, however, the Court has recognized the dual nature of dignity as a constitutional value. While the question before the Court

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12. *Id*. at 451.

13. *Chisholm*, U.S. (2 Dall.) at 450-79.

14. U.S. CONST. amend. XI ("The Judicial Power of the United States shall not be construed to extend to any case in law or equity against a state by a citizen of another state.").

15. *See, e.g.*, Alden v. Maine, 527 U.S. 706, 715 (1999) ("The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."). In 1854, Justice Campbell described the reaction to Chisholm as follows:

> One month after, January, 1794, the senate was moved . . . to adopt the eleventh amendment to the constitution, declaring that the constitution should not be construed to authorize such suits. Various attempts were made in both branches of congress to limit the operation of the amendment, but without effect. It was accepted without the alteration of a letter, by a vote of 23 to 2 in the senate, and 81 to 9 in the house of representatives, and received the assent of the state legislatures. Georgia ratified the amendment as 'an explanatory article,' her legislature 'concurring therewith, deeming the same to be the only just and true construction of the judicial power by which the rights and dignity of the several States can be effectively secured.'

Florida v. Georgia, 58 U.S. (17 How.) 478, 520 (1854) (Campbell, J., dissenting). But other cases have noted that the affront to dignity might have been a convenient way to present a more troublesome assault on state *treasuries* though not on the states themselves.

> When Chisholm dared to sue the 'sovereign state' of Georgia, all the states were so indignant that Congress moved with vehement speed to prevent subsequent affronts to the dignity of states. More than the dignity of a sovereign state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts. The states could therefore use the new amendment not only in defense of theoretical sovereignty but also in a more practical way to forestall suits by individual creditors!

Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 277 n.1 (1959) (quoting MARIAN D. IRISH & JAMES W. PROTHRO, THE POLITICS OF AMERICAN DEMOCRACY 123 (1965)).

was whether a "judgment by default, in the present stage of the business, and writ of enquiry of damages, would be too precipitate in any case, and too incompatible with the dignity of a State,"[16] several Justices acknowledged that not only states but individuals too have dignity. Moreover, as Justice Wilson expounded, the dignity of a state is inferior to that of man:

> *Man*, fearfully and wonderfully made, is the workmanship of his all perfect *Creator*: A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance. When I speak of a State as an inferior contrivance, I mean that it is a contrivance inferior only to that, which is divine.[17]

This religious patina over the concept of dignity may be contrasted with the adamantly civic version in the opinion of Chief Justice John Jay in the same case. Speaking of the Constitution, the Chief Justice said: "It is remarkable that in establishing it, the people exercised their own rights, and their own proper sovereignty, and conscious of the plenitude of it, they declared with becoming dignity, 'We the people of the United States, do ordain and establish this Constitution.'"[18] In Jay's view, dignity is not only a secular concept, but an evolving one as well.[19] And it is not only an individual attribute but a collective one.[20] The American people, he seems pleased to note, are gaining a dignity that is commensurate with their maturing political self-consciousness.[21] As this article will demonstrate, the concept of dignity has evolved and continues to evolve, not only with the political maturity of the Nation but with that of the whole world.

Notwithstanding these brief allusions to human dignity, the vast majority of references to dignity in the nation's first century and a half associate it with inanimate objects and abstract concepts or contrivances.

B. Pre-Modern Dignity

Throughout the eighteenth and nineteenth centuries, the vast majority of Supreme Court cases that refer in any way to dignity ascribe it to states, the United States, or foreign nations. Thus, from the earliest times, dignity has

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16. *Chisholm*, 2 U.S. (2 Dall.) at 452-53.
17. *Id*. at 455 (emphasis added) (explaining later, by quoting Cicero, that of all inferior contrivances, states are the most "'acceptable to that divinity'").
18. *Id*. at 470-71 (quoting U.S. CONST. pmbl.).
19. *Id*. at 469-73.
20. *Id*.
21. *Chisholm*, 2 U.S. (2 Dall.) at 469-73.

been associated with sovereignty.[22] And sovereignty has been associated with immunity, as presaged in *Chisholm*.[23]

In *Schooner Exchange v. McFaddon*,[24] Chief Justice John Marshall held that neither France (nor her emperor Napoleon) could be subject to the jurisdiction of the United States courts while the countries were at peace; an action to recover a ship that had been taken by the French could therefore not be maintained in the courts of the United States.[25] As Marshall explained, "A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to avoid this subjection that the license has been obtained."[26] France's sovereignty, her dignity, and her immunity from suit were inextricable.[27]

The theory is further developed in Justice Johnson's opinion in *L'Invincible*[28] in which he held that so long as France was neutral, the American courts had no jurisdiction over her or her duly commissioned privateer.[29] Johnson explained that, as

> a consequence of the equality and absolute independence of sovereign states . . . every sovereign becomes the acknowledged arbiter of his own justice, and cannot, consistently with his dignity, stoop to appear at the bar of other nations to defend the acts of his

22. For a recent example, see South Carolina v. North Carolina, 130 S. Ct. 854 (2010) (holding that South Carolina's sovereign dignity warranted a very high standard to determine the ability of Charlotte to intervene in a suit against South Carolina's objection, and North Carolina's sovereign dignity warranted a presumption that North Carolina would adequately represent Charlotte's interest, obviating the need for Charlotte to intervene).

23. *Chisholm*, 2 U.S. (2 Dall.) 419.

24. 11 U.S. (7 Cranch) 116 (1812).

25. *Id*. at 146-47.

26. *Id*. at 137-38. Elsewhere in the case, Marshall explained that a public armed ship (as distinguished from private property):

> constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity.

Id. at 144.

27. For more modern versions of this principle, *see* Nat'l City Bank v. Republic of China, 348 U.S. 356, 362 (1955):

> As expounded in *The Schooner Exchange*, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign sovereign from its 'exclusive and absolute' jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the 'power and dignity' of the foreign sovereign.

Id. (quoting *McFaddon*, 11 U.S. (7 Cranch) at 136-37, 143-44). *See also* Boos v. Barry, 485 U.S. 312, 324 (1988) (acknowledging the dignitary interests of foreign embassies and assuming the obligation of the United States to recognize such interest).

28. 14 U.S. (1 Wheat.) 238 (1816).

29. *Id*. at 238.

> commissioned agents, much less the justice and legality of those rules of conduct which he prescribes to them.[30]

Again, sovereignty establishes dignity, which justifies immunity from suit.[31] But Johnson's explanation of the source or nature of sovereignty is telling: it partakes of "equality and absolute independence."[32] Johnson further explains that to subject France to suit

> would have violated the hospitality which nations have a right to claim from each other, and the immunity which a sovereign commission confers on the vessel which acts under it; that it would have detracted from the dignity and equality of sovereign states, by reducing one to the condition of a suitor in the courts of another.[33]

Both absolute independence – or what would now be termed "autonomy" – and equality continue to the present day to undergird the judicial concept of dignity, as will be further discussed below.

In the meantime, it is simply worth noting that the Court's earliest conception of dignity is one that is closely tied to sovereignty and that results in immunity from suit, whether the dignified entity is a foreign nation or an American state.[34]

Some Dignity, Some Immunity

The relationship between sovereignty, dignity, and immunity may explain the *Chisholm* Court's failure to immunize American states from suit: the language of the Constitution, in Article III and elsewhere, seems to accord states some degree of sovereignty that is less than full, and their

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30. *Id.* at 254-55.
31. *Id.* at 256.
32. *Id.* at 254.
33. *L'Invincible*, 14 U.S. (1 Wheat.) at 256.
34. In *Craig v. Missouri*, an action for assumpsit was defended under the authority of a state law that was held, by a divided Court, to be an unconstitutional bill of credit. 29 U.S. (4 Pet.) 410 (1830). The majority noted that:

> [i]n the argument, we have been reminded by one side of the dignity of a sovereign state; of the humiliation of her submitting herself to this tribunal; of the dangers which may result from inflicting a wound on that dignity: by the other, of the still superior dignity of the people of the United States; who have spoken their will, in terms which we cannot misunderstand.

Id. at 437-438. *see also* United States v. Diekelman, 92 U.S. 520, 524 (1876):

> One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed.

Id.

dignity is therefore not sufficient to completely immunize them from unconsenting suits.[35] Years later, Chief Justice Marshall would express skepticism at the thought that it was a state's dignity that protected it against suit.[36] In *Cohens v. Virginia*, he posited that since the Eleventh Amendment prohibits jurisdiction only in cases brought *by individuals* against states, and not in cases brought by other states or foreign nations, "We must ascribe the amendment, then, to some other cause than the dignity of a State."[37] But he explained this quickly: "There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors."[38] In Marshall's view then, a state's dignity is not sufficiently talismanic to protect it from all litigious advances.[39] Indeed, the Constitution specifically allows for cases in which states shall be a party to suits brought in federal court, but only in the Supreme Court's original jurisdiction, which is consistent with the quantum of dignity that states have in the federal system.[40] As Justice Field explained in his concurrence in *Virginia v. Rives*,[41] the Constitution's

> framers seemed to have entertained great respect for the dignity of a State which was to remain sovereign, at least in its reserved powers, notwithstanding the new government, and therefore provided that when a State should have occasion to seek the aid of the judicial power of the new government, or should be brought under its subjection, that power should be invoked only in its highest tribunal.[42]

Were it otherwise, Justice Field opined, the Constitution would never have been ratified.[43]

To similar effect is the first Justice Harlan's dissent in *Ex Parte Young*,[44] in which the majority's sleight of hand avoided the Eleventh

35. *See* U.S. CONST. art. III; *see also Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793).
36. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 406 (1821).
37. *Id*.
38. *Id*.
39. *Id*.
40. U.S. CONST. art. III, § 2, cl. 2. *See* Virginia v. West Virginia, 206 U.S. 290 (1907) (stating that the Supreme Court has original jurisdiction over case involving debts owed by West Virginia to Virginia upon formation of the former as a state, notwithstanding the Eleventh Amendment).
41. 100 U.S. 313, 337 (1880).
42. *Id*. at 337.
43. *Id*.
44. 209 U.S. 123 (1908).

Amendment bar of suits against states by allowing suits against state officers.[45] Harlan, unlike his brethren, was troubled by the insult to a state's dignity caused by subjecting its officers to suit in federal court, particularly under the circumstances of this case, which included the imprisonment of Minnesota Attorney General Edward Young by federal officers for prosecuting in state court a state law limiting railroad fees in alleged violation of the federal constitution.[46] States' immunity from suits by other states is more limited. Because such a claim of immunity "necessarily implicates the power and authority of a second sovereign, its source must be found either in an agreement, express or implied, between the two sovereigns, or in the voluntary decision of the second to respect the dignity of the first as a matter of comity."[47]

C. Modern Times: The Dignity of State Sovereign Immunity

It would take until the end of the twentieth century for the Court to upgrade both the dignity and sovereignty of states to the point where immunity from suit would attach for almost all types of suits in state and federal courts and before administrative agencies.[48] In a series of cases

45. *Id.* at 204.

46. "I am justified . . . in now saying that the men who framed the Constitution and who caused the adoption of the 11th Amendment, would have been amazed by the suggestion that a State of the Union can be prevented by an order of a subordinate Federal court, from being represented by its attorney general in a suit brought by it in one of its own courts; and that such an order would be inconsistent with the dignity of the states as involved in their constitutional immunity from the judicial process of the Federal courts (except in the limited cases in which they may constitutionally be made parties in this court), and would be attended by most pernicious results."
Id. at 168-71, 204 (Harlan, J. dissenting).

47. Nevada v. Hall, 440 U.S. 410, 416 (1979).

48. For discussion of the operation of the Eleventh Amendment in federal court, *see* Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 52 (1994) (noting that the concerns that underpin the Eleventh Amendment are the solvency and dignity of the states). *See also* Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 262, 268 (1997):

> [T]he dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction . . . [t]he dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case.

Id.; see Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000). For discussion of the operation of the Eleventh Amendment in state court, *see Alden v. Maine*, 527 U.S. 706 (1999). For discussion of the operation of the Eleventh Amendment in federal administrative agencies, *see* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002):

> Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency, such as the [Federal Maritime Commission].

Id. But see Jennifer L. Greenblatt, *What's Dignity Got to Do with It?: Using Anti-Commandeering Principles to Preserve State Sovereign Immunity*, 45 CAL. W. L. REV. 1 (2008) (arguing that the anti-

beginning in 1996, the Court has held that the Eleventh Amendment (barring certain suits against states) is shorthand for a more general immunity for states from all suits.[49] The principal justification for this impressive degree of protection is the dignity of the states.[50] In *Idaho v. Coeur d'Alene Tribe*, for instance, the Court recognized "the dignity and respect afforded a State, which the immunity is designed to protect."[51] While the four Justices who dissented in these cases have consistently called the dignity rationale for state sovereignty "embarrassingly insufficient,"[52] it is nonetheless firmly entrenched in the law at this point and shows no signs of weakening.[53]

PART TWO: THE EMERGENCE OF INDIVIDUAL DIGNITY

The habit of assigning dignity to incorporeal things does not begin to wane until the turn of the nineteenth century when hints of human dignity began to emerge. Of course, the first people to be recognized as having

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commandeering principle of the tenth amendment, rather than the concept of state dignity, should justify state court preclusion of federal law claims).

49. "The generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity." *Alden*, 527 U.S. at 715. *See also Coeur d'Alene Tribe*, 521 U.S. at 262 ("The dignity and status of its statehood allows Idaho to rely on its Eleventh Amendment immunity and to insist upon responding to these claims in its own courts, which are open to hear and determine the case."). *See also S.C. State Ports Auth*., 535 U.S. at 760 ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

50. The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," *Hess*, 513 U.S. at 48. It also serves to avoid "'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 58 (1996) (quoting Puerto Rico Aqueduct & Sewer Auth. v. Met Calf & Eddy, Inc., 506 U.S. 139, 146 (1993)). While the Court was willing, in 1996, to acknowledge both these underpinnings for state immunity from suit, by 2002, it wrote that "the primary function of sovereign immunity is not to protect state treasuries, . . . but to afford the States the dignity and respect due sovereign entities." *S.C. State Ports Auth*., 535 U.S. at 769.

51. *Coeur d'Alene Tribe*, 521 U.S. at 268.

52. *S.C. State Ports Auth*., 535 U.S. at 770 (Stevens, J., dissenting) (quoting *Seminole Tribe of Fla.*, 517 U.S. at 97 (Stevens, J., dissenting)).

53. The principal exception to state sovereign immunity has been, and continues to be, suits brought by the United States. Other exceptions to state sovereign immunity include suits brought by other states. *See* California v. Nevada, 477 U.S. 125 (1980); *Florida v. Georgia*, 58 U.S. (17 How.) 478 (1854). Suits brought against officers of a state may also be considered an exception to state sovereign immunity. *See Ex Parte Young*, 209 U.S. 123 (1908) (though technically, these are not suits against the state per se). As Chief Justice Taney recognized when the United States sought to intervene in a boundary dispute brought by Florida against Georgia, "[n]or is this intervention of the United States derogatory to the dignity of the litigating States, or any impeachment of their good faith. It merely carries into effect a provision of the constitution, which was adopted by the States for their general safety." *Florida v. Georgia*, 58 U.S. (17 How.) at 495. Whether or not it was the states that adopted the constitution is, of course, open to debate, but Taney's basic point is that the dignity of the states is subordinate to none but the supremacy of federal authority.

dignity were dignitaries, sovereigns, and other highborn individuals.[54] A dissenting opinion by Justice Field is one of the first to suggest the sense of dignity in which we currently understand it. The question in *Brown v. Walker*[55] was whether a law requiring testimony relating to violations of the Interstate Commerce Act conflicted with the Fifth Amendment right against self-incrimination on the ground that it required testimony about facts that maybe detrimental to him or her, though not legally self-incriminating.[56] While the majority was content with a limited reading of the Fifth Amendment, Justice Field argued that "[t]he amendment also protects [an individual] from all compulsory testimony which would expose him to infamy and disgrace, though the facts disclosed might not lead to a criminal prosecution."[57] Field referred to the provenance of the constitutional amendment in the English common law by quoting Brown's counsel, who stated that:

> both the safeguard of the Constitution and the common law rule spring alike from that sentiment of personal self-respect, liberty, independence and dignity which has inhabited the breasts of English-speaking peoples for centuries, and to save which they have always been ready to sacrifice many governmental facilities and conveniences. . . . What can be more abhorrent . . . than to compel a man who has fought his way from obscurity to dignity and honor to reveal crimes of which he had repented, and of which the world was ignorant?[58]

But other than a sporadic mention here and there, most of the references to human dignity in the Supreme Court's case law accord it to men of high rank.[59] Typical is Chief Justice Taft's citation to Blackstone, who noted that at common law the King neither paid nor received costs in litigation because "it is the king's prerogative not to pay them to a subject and is

54. Attorneys and the legal profession have also been held to have dignity. *See* Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 647-48 (1985); *see also* Florida Bar v. Went For It, Inc., 515 U.S. 618, 639 (1995) (Kennedy, J., dissenting); Milton Lewis, *A Brief History of Human Dignity: Idea and Application*, *in* PERSPECTIVES ON HUMAN DIGNITY: A CONVERSATION 93, 93 (Jeff Malpas & Norelle Lickiss eds., 2007).

55. 161 U.S. 591 (1896).

56. *Id.* at 593-94.

57. *Id.* at 631 (Field, J., dissenting).

58. *Id.* at 632. To the same effect is the Court's decision in *U.S. v. White*: "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals. It grows out of the high sentiment and regard of our jurisprudence for conducting criminal trials and investigatory proceedings upon a plane of dignity, humanity and impartiality." 322 U.S. 694, 698 (1944).

59. *See Zauderer*, 471 U.S. at 647; *see also Went For It, Inc.*, 515 U.S. at 639 (Kennedy, J., dissenting).

beneath his dignity to receive them."[60] It would take many decades before the Court would attach dignity not only to the governors, but to the governed.[61]

A. Dignity Risen from War[62]

Not until World War II did the Court begin to take seriously the notion of human dignity in the sense in which Justice Field had imagined it. The first mention of dignity in an individual rights case is a fleeting reference in Justice Jackson's concurrence in *Skinner v. Oklahoma*.[63] He wrote, "There are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority – even those who have been guilty of what the majority define as crimes."[64] This brief reference contained several of the seeds of the Court's dignity jurisprudence as it would develop over the next half-century. First, Justice Jackson accorded dignity to all persons as an incident of being born human, not as a consequence of accomplishment, being highborn, or status.[65] Second, Justice Jackson recognized that certain actions may detract from the dignity of individuals: while it is innate and identified with "natural powers," it is nonetheless vulnerable to degradation.[66] Third, the Constitution may protect against such degradation.[67] He also stated that at some point efforts to diminish the dignity of another may contravene constitutional strictures.[68] Nevertheless, the underlying principle that inherent human dignity may have constitutional status, such that a court would be justified in intervening to

60. Tumey v. Ohio, 273 U.S. 510, 526 (1927).

61. *See* Mobile v. Bolden, 446 U.S. 55, 89 n.10 (1980) (Stevens, J., concurring) ("'The members of each [group] go to the polls with equal dignity and with an equal right to be protected from invidious discrimination.'" (quoting Cousins v. Chicago, 466 F.2d 830, 852 (1972) (Stevens, J., dissenting))).

62. Other scholars have also attempted to summarize the Supreme Court's post-war dignity jurisprudence. *See, e.g.*, Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006) (surveying post-war individual rights cases in eight categories).

63. 316 U.S. 535, 546-47 (1942) (Jackson, J., concurring).

64. *Id.* at 546 . *See also* Poe v. Ullman, 367 U.S. 497, 555 (1961) (Harlan, J., dissenting).

65. *Skinner*, 316 U.S. at 546.

66. *See id*.

67. *See id*. at 546-47.

68. *Id.* at 546. The point at which that happens is not necessarily where most of us would place it today. Although Justice Jackson would not allow the sterilization of certain classes of felons, he cited with apparent approval Justice Holmes's notorious language in *Buck v. Bell* allowing the sterilization of Carrie Buck. *Id.* (citing Buck v. Bell, 274 U.S. 200 (1927)). The difference seems to be not one of principle but one of the degree of the development of the scientific basis for such sterilization. *See* ROBERT L. HAYMAN JR., SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW 4-7 (2000) (explaining the science underlying the decision to sterilize Carrie Buck and the judicial decision to allow the sterilization). *See also Buck*, 274 U.S. at 207.

protect it, was a novel proposition in American jurisprudence up to that point.[69] In the 1940s and thereafter it would become more commonplace.[70]

Of all the Justices, it is perhaps Justice Frank Murphy who had the most developed theory of the dignity of man and of its constitutional implications. Many of his opinions expounding the importance of constitutional dignity were, however, written in dissent.[71] In *Korematsu v. United States*, he excoriated his brethren who had upheld the war-time exclusion (and by implication, the internment) of more than one hundred thousand individuals by comparing it to the tactics of the enemy.[72] The orders were based on a denial of the rule that individual guilt is the sole basis for the deprivation of rights, and to give constitutional sanction to that presumption, Murphy said, "is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to

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69. The principle had also been mentioned in a concurring opinion decided earlier in the same term. *See* Glasser v. United States, 315 U.S. 60, 89 (1942) (Frankfurter, J., concurring) ("The guarantees of the Bill of Rights are not abstractions. Whether their safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances," suggesting that both liberty (which is of course textually guaranteed in the Constitution) and dignity (which is not) must be constitutionally safeguarded.). The reference came in the context of a separate opinion arguing that a lawyer who was a defendant had not proven ineffective assistance of counsel; the comment about dignity was not central to Justice Frankfurter's opinion. *Id*. at 88-89. *See also* Carter v. Illinois, 329 U.S. 173, 175 (1946), stating:

> The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures.

Id.; Louisiana ex Rel. Francis v. Resweber, 329 U.S. 459, 468 (1947) (Frankfurter, J., concurring) (explaining the Fourteenth Amendment "did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom," (although agreeing with the Court that electrocuting a man twice for the same crime – the first did not result in death– did not violate due process)).

70. *See* McNabb v. United States, 318 U.S. 332, 343 (1943), setting aside a conviction where the defendants had not been brought before a judicial officer, the Court held that:

> The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment.

Id.; see also Gerstein v. Pugh, 420 U.S. 103, 118 (1975) (quoting same).

71. *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 242 (1944) (Murphy, J., dissenting) (stating "[r]acial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among free people who have embraced the principles set forth in the Constitution of the United States."); Screws v. United States, 325 U.S. 91, 137 (1945) (Murphy, J., dissenting) (punishing state officials for depriving an accused of his rights "is to uphold elementary standards of decency and to make American principles of law and our constitutional guarantees mean something more than pious rhetoric."); *In re* Yamashita, 327 U.S. 1, 26 (1946) (Murphy, J., dissenting) (stating "[t]he immutable rights of the individual, including those secured by the *due process clause of the Fifth Amendment*. . . belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs.") (emphasis in original).

72. *Korematsu*, 323 U.S. at 235-36 (Murphy, J., dissenting).

encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow."[73] Like Justice Jackson, Justice Murphy recognized that, although dignity inheres in all persons, judicial protection against its destruction was especially necessary for minorities. In *Steele v. Louisville & N. R. Co.*, he wrote, in concurrence, that "[t]he utter disregard for the dignity and the well-being of colored citizens shown by this record is so pronounced as to demand the invocation of constitutional condemnation."[74]

In the next couple of years, he would elaborate on the theory. In his dissenting opinion in *United States v. Screws*, Justice Murphy wrote:

> Robert Hall, a Negro citizen, has been deprived not only of the right to be tried by a court rather than by ordeal. He has been deprived of the right to life itself. That right belonged to him not because he was a Negro or a member of any particular race or creed. That right was his because he was an American citizen, because he was a human being. As such, he was entitled to all the respect and fair treatment that befits the dignity of man, a dignity that is recognized and guaranteed by the Constitution. Yet not even the semblance of due process has been accorded him. He has been cruelly and unjustifiably beaten to death by local police officers acting under color of authority derived from the state.[75]

A month and a half after the Court announced its opinion in *Screws*, the delegates to the United Nations Conference on International Organization signed the Charter of the United Nations, the preamble of which "reaffirms faith" in "the dignity and worth of the human person."[76] In particular, the preamble acknowledged that recognizing the dignity and worth of the human person is essential to achieving the other goals of the Charter, namely to "save succeeding generations from the scourge of war."[77]

This language and the sentiment behind it could not have escaped Justice Murphy's notice, who incorporated it into his extraordinary opinions in a series of cases involving military trials at the end of World War II. In the cases of *In re Yamashita*[78] and *Homma v. Patterson, Secretary of War*,[79]

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73. *Id.* at 240.
74. *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 208 (1944) (Murphy, J., concurring).
75. *Screws*, 325 U.S. at 134-35 (Murphy, J., dissenting).
76. U.N. Charter, preamble, *available at* http://www.un.org/en/documents/charter/preamble.shtml.
77. *Id.*
78. 327 U.S. 1, 5 (1946).
79. 327 U.S. 759, 759-60 (1946).

involving the trials, convictions, and speedy executions of commanders in the Imperial Japanese Army for atrocities committed in the Philippines, Justice Murphy was even more impassioned than he had been two years earlier in *Korematsu*.[80] The language is well worth attention. In *Yamashita*, he wrote:

> The immutable rights of the individual, including those secured by the *due process clause of the Fifth Amendment*, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the *due process clause of the Fifth Amendment* recognizes and protects when life or liberty is threatened by virtue of the authority of the United States.[81]

This is an elaboration on the concise expression of the U.N. Charter and an exhortation to those countries that believe in the rule of law to conform to the demands of human dignity – regardless of the political exigencies.[82] Justice Murphy wrote, "If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."[83] To Murphy, recognition of human dignity was not only a moral mandate but a political imperative. It was necessary in order for the world to move on from the savagery of war, and it was necessary for the United States to lead by example in the new world order.

In *Homma*, decided the following week, the Court dismissed the petition in a single sentence, citing *Yamashita*.[84] Again, Justice Murphy would have no part of it. His dissent bored into the issue of human dignity with single-minded tenacity. Two of the three paragraphs of his dissent are reproduced here:

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80. *See Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).
81. *Yamashita*, 327 U.S. at 26-27 (Murphy, J., dissenting) (emphasis in original).
82. *See* U.N. Charter, *supra* note 76.
83. *Yamashita*, 327 U.S. at 29.
84. *Homma*, 327 U.S. at 759.

> This case, like *In re Yamashita*, poses a problem that cannot be lightly brushed aside or given momentary consideration. It involves something more than the guilt of a fallen enemy commander under the law of war or the jurisdiction of a military commission. This nation's very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges. Apparently the die has been cast in favor of the latter course. But I, for one, shall have no part in it, not even through silent acquiescence.
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> . . . .
>
> Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow. No one can foresee the end of this failure of objective thinking and of adherence to our high hopes of a new world. The time for effective vigilance and protest, however, is when the abandonment of legal procedure is first attempted. A nation must not perish because, in the natural frenzy of the aftermath of war, it abandoned its central theme of the dignity of the human personality and due process of law.[85]

These dissents are all the more striking when one considers the crimes of which these men were convicted. Masaharu Homma's war crimes included the atrocities of the Bataan Death March in April 1942 that killed thousands of Filipino and American soldiers.[86] Yamashita commanded the army during the Manila Massacre, in which more than 100,000 Filipinos were killed when the Japanese retreated from the Philippines.[87] But even against the backdrop of these horrendous crimes, Justice Murphy thought

85. *Id.* at 759-61

86. Encyclopedia Britannica, Homma Massaharu, http://www.britannica.com/EBchecked/topic/270357/Homma-Masaharu (last visited Jan. 10, 2011).

87. PBS American Experience, MacArthur: People & Events: The Battle for Manila (February-March 1945), http://www.pbs.org/wgbh/amex/macarthur/peopleevents/pandeAMEX98.html (last visited Apr. 20, 2011). In both cases, although there was no doubt that the atrocities happened, and no doubt that the defendants commanded the military forces that committed the atrocities, there were serious questions about the legal responsibility that the defendants bore for the crimes. *See* RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY 80-82 (1982).

that respect for human dignity meant that every human being deserves a fair trial.[88] This conclusion – that human dignity thus imposes on the government certain obligations – will prove to be controversial as the notion of human dignity becomes more fully developed in the Supreme Court's jurisprudence.

In *Duncan v. Kahanamok*, decided the same month as *Yamashita* and *Homma*, Justice Murphy continued his campaign to have the Constitution comport with the demands of human dignity.[89] Here, he lambasted in particular the racist rationale that underlay the decision by Hawaiian authorities to use military tribunals to try civilians instead of civilian jury trials, which would have included Americans of Japanese descent in the panels.[90] Although a majority of the Supreme Court agreed that the closure of the civil courts violated *Ex Parte Milligan* (among other things),[91] Justice Murphy made his views clear in a long, separate concurrence.[92] He stated that there were no security reasons for avoiding multiracial juries and, even if there had been, eliminating all jury trials was not a reasonable response.

> Especially deplorable, however, is this use of the iniquitous doctrine of racism to justify the imposition of military trials. Racism has no place whatever in our civilization. The Constitution as well as the conscience of mankind disclaims its use for any purpose, military or otherwise. It can only result, as it does in this instance, in striking down individual rights and in aggravating rather than solving the problems toward which it is directed. It renders impotent the ideal of the dignity of the human personality, destroying something of what is noble in our way of life. We must therefore reject it completely whenever it arises in the course of a legal proceeding.[93]

Again, the Constitution (and the judges who interpret it) have an obligation to rout out threats to human dignity in whatever form they may take,

88. *See Homma*, 327 U.S. at 759-60 (Murphy, J., dissenting); *See also* Cox v. Louisiana, 332 U.S. 442, 458 (1947) (Murphy, J., dissenting) ("If respect for human dignity means anything, only evidence of a substantial nature warrants approval of the draft board classification in a criminal proceeding.").

89. Duncan v. Kahanamok, 327 U.S. 304, 334 (1946) (Murphy, J., concurring).

90. *Id.* at 307, 311 (majority opinion).

91. *Id.* at 324.

92. *Id.* at 324-25 (Murphy, J., concurring).

93. *Id.* at 334.

whether racism, war-time hysteria, or something else.[94] In *Johnson v. Eistrager*, a dissenting Justice Black assumed that "[o]ur nation proclaims a belief in the dignity of human beings as such" which precluded the denial of habeas corpus to "enemy aliens" captured overseas.[95]

By the end of the war, the concept of human dignity was firmly entrenched in the Court's constitutional jurisprudence, and it became accepted that federal and state governments must "observe those ultimate dignities of man which the United States Constitution assures."[96]

These war-related cases are remarkable in two respects that became important as the concept of dignity evolved. First, the Justices' willingness to recognize the dignity of war criminals indicated their embrace of the concept of dignity as embodied in the Universal Declaration of Human Rights, the United Nations charter, and other international instruments – that is, dignity is inherent in the nature of human beings and that no matter who they are or what they have done, human beings are entitled to have their dignity respected.[97] This, as will be shown, has become incontestable in modern American jurisprudence. The more difficult and still controversial question is what respect dignity entitles one to or, to put in directly constitutional terms, what obligations or restrictions does human dignity impose on the state? The definition or substance of dignity is still contested.

B. Dignity in the Era of Individual Rights

The Scope of Dignity

From the middle of the twentieth century onward, the concept of dignity arose most clearly in the context of the police state, as defendants and inmates argued forcefully that the investigative, prosecutorial, and punitive practices of the government violated their individual dignity. In many cases in which the majority ruled in the government's favor, individual dignity

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94. *See* Oyama v. California, 332 U.S. 633, 663 (1947) (Murphy, J., concurring), finding California's Alien Land Law unconstitutional, stating:

> The Constitution of the United States, as I read it, embodies the highest political ideals of which man is capable. It insists that our government, whether state or federal, shall respect and observe the dignity of each individual, whatever may be the name of his race, the color of his skin or the nature of his beliefs. It thus renders irrational, as a justification for discrimination, those factors which reflect racial animosity.

Id.

95. Johnson v. Eistrager, 339 U.S. 763, 798 (Black J., dissenting).

96. *Carter v. Illinois*, 329 U.S. 173, 175 (1946).

97. *See* U.N. Charter, The Universal Declaration of Human Rights, *available at* http://www.un.org/en/documents/udhr/index.shtml.

was raised only by the dissent.[98] In oft-quoted language, Justice Jackson set the stage in his dissent in *Brinegar v. United States*.[99] He wrote:

> And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police."[100]

Justice Douglas continued this thread, in a concurring opinion in *United States v. Carnignan*: "We in this country, however, early made the choice – that the dignity and privacy of the individual were worth more to society than an all-powerful police."[101] And yet, for much of the 1950s, individual dignitary interests prevailed only when the police conduct was so brutal as to shock the conscience.[102] By the end of the decade, however, the Court would be more willing to consider the constitutional significance of individual dignity – at least outside of the context of the Cold War.

It would not come as a surprise to anyone that the 1960s saw the first real flourishing of the concept of human dignity in Supreme Court jurisprudence, the most significant example of which is *Miranda v. Arizona*.[103] In prohibiting police from coercing confessions, the Court held that incommunicado and otherwise oppressive interrogations create an "atmosphere [that] carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity."[104] The policies enshrined in the Bill of Rights, the Court said, "point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government – state or federal – must accord to the dignity and integrity of its citizens."[105] Objecting to the majority's newfangled rule,

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98. *See, e.g.*, Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (stating "[a]mong deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart" when disagreeing with the holding that Fourth Amendment freedoms are "secondary rights.").

99. 338 US 160, 180-81 (1949) (Jackson, J., dissenting).

100. *Id.*

101. United States v. Carnignan, 342 U.S. 36, 46 (1951) (Douglas, J., concurring) (involving a Fifth amendment violation).

102. *See e.g.* Rochin v. California, 342 U.S. 165, 172 (1952) (holding "we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically. [The conduct of the police] is conduct that shocks the conscience.")

103. 384 U.S. 436, 439-42 (1966).

104. *Id.* at 457.

105. *Id.* at 460. The Court explained:

Justice White's dissent seized on just this characterization; he argued that "[m]ore than the human dignity of the accused is involved; the human personality of others in the society must also be preserved."[106] If the new rule was going to result in the release of criminals on technicalities, the dignity of all members of the public was at risk.[107] The consequence of increased crime rates would, according to Justice White, "not be a gain, but a loss, in human dignity."[108]

But *Miranda* was an extraordinary case, even in the 1960s, and many cases involving police practices and the rights of the accused came down squarely on the side of the state.[109] Still, individual dignity was kept largely to the confines of dissenting opinions.[110]

> To maintain a 'fair state-individual balance,' to require the government 'to shoulder the entire load,' 8 Wigmore, Evidence 317 (McNaughton rev. 1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.

Id. *See also* Schmerber v. California, 384 U.S. 757, 767 (1966) ("The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State," though upholding a compulsory blood test and the admission thereof); Kentucky Dep't of Corr. v. Thompson, 490 U.S. 454, 467 n.1 (1989) (Marshall, J., dissenting).

106. *Miranda*, 384 U.S. at 537 (White, J., dissenting).

107. *Id.* at 542.

108. *Id*.; *see also* Ashe v. Swenson, 397 U.S. 436, 469 (1970) (Burger J., dissenting), noting

> [n]o court that elevates the individual rights and human dignity of the accused to a high place – as we should – ought to be so casual as to treat the victims as a single homogenized lump of human clay. I would grant the dignity of individual status to the victims as much as to those accused, not more but surely no less.

Id.

109. *See, e.g.*, Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 613-14 (1989) (recognizing that the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction," but finding that unwarranted drug and alcohol tests of railroad workers were not sufficiently intrusive to violate their fourth amendment rights).

110. *See Schmerber*, 384 U.S. at 778-79 (Douglas, J., dissenting); Wainwright v. New Orleans, 392 U.S. 598, 607 (1968) (Warren, J., dissenting) ("[U]sing a minor and imaginary charge to hold an individual . . . is a technique which makes personal liberty and dignity contingent upon the whims of a police officer, and can serve only to engender fear, resentment, and disrespect of the police in the populace which they serve."); Osborn v. United States, 385 U.S. 323, 343 (1966) (Douglas, J., dissenting),

> These examples and many others demonstrate an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps. Taken individually, each step may be of little consequence. But when viewed as a whole, there begins to emerge a society quite unlike any we have seen– a society in which government may intrude into the secret regions of man's life at will.

Id.; United States v. Wade, 388 U.S. 218, 261-62 (1967) (Fortas J., concurring in part and dissenting in part),

> To permit [the insidious doctrine of *Schmerber*] to extend beyond the invasion of the body, which it permits, to compulsion of the will of a man, is to deny and defy a precious part of our historical faith, and to discard one of the most profoundly cherished instruments by which we have established the freedom and dignity of the individual. We should not so alter the

> balance between the rights of the individual and of the state, achieved over centuries of conflict.

Id.; Hurtado v. United States, 410 U.S. 578, 595 (1973) (Brennan, J., concurring in part and dissenting in part) (noting the severe assault on dignity of material witness held in custody for want of bail); Spinelli v. United States, 393 U.S. 410, 435 (1969) (Fortas, J., dissenting),

> We may well insist upon a sympathetic and even an indulgent view of the latitude which must be accorded to the police for performance of their vital task; but only a foolish or careless people will deduce from this that the public welfare requires or permits the police to disregard the restraints on their actions which historic struggles for freedom have developed for the protection of liberty and dignity of citizens against arbitrary state power.

Id.; Meachum v. Fano, 427 U.S. 215, 233 (1976) (Stevens, J., dissenting) (arguing in support of finding prisoner transfers violated the due process clause, stating that "even the inmate retains an unalienable interest in liberty - at the very minimum the right to be treated with dignity - which the Constitution may never ignore."); United States v. Leon, 468 U.S. 897, 979 (1984) (Stevens, J., dissenting) ("'[The] forefathers thought this was not too great a price to pay for that decent privacy of home, papers and effects which is indispensable to individual dignity and self-respect. They may have overvalued privacy, but I am not disposed to set their command at naught.'" (quoting Harris v. United States, 331 U.S. 145, 198 (1947) (Jackson, J., dissenting)); Segura v. United States, 468 U.S. 796, 840 n.31 (1984) (Stevens, J., dissenting) (quoting same); Colorado v. Connelly, 479 U.S. 157, 176 (1986) (Brennan, J., dissenting) (arguing that the right against self-incrimination "requires vigilant protection if we are to safeguard the values of private conscience and human dignity."); O'Lone v. Estate of Shabazz, 482 U.S. 342, 368 (1987) (Brennan, J., dissenting) (stating that "[t]o deny the opportunity to affirm membership in a spiritual community, however, may extinguish an inmate's last source of hope for dignity and redemption."); Doe v. United States, 487 U.S. 201, 219 n.1 (1988) (Stevens, J., dissenting),

> The forced execution of a document that purports to convey the signer's authority, however, does invade the dignity of the human mind; it purports to communicate a deliberate command . . . that the assertions petitioner is forced to utter by executing the document are false, causes an even greater violation of human dignity.

Id.; Walton v. Arizona, 497 U.S. 639, 675 (1990) (Brennan, J., dissenting)

> Even if I did not believe that the death penalty is wholly inconsistent with the constitutional principle of human dignity, I would agree that the concern for human dignity lying at the core of the *Eighth Amendment* requires that a decision to impose the death penalty be made only after an assessment of its propriety in each individual case.

Id. (emphasis in original); Bell v. Wolfish, 441 U.S. 520, 576-77, 589 (1979) (Marshall & Stevens, JJ., dissenting) (arguing that rules regarding body cavity searches, double-bunking, mail and access to books all violate individual dignity); Hudson v. Palmer, 468 U.S. 517, 554-55 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing against the ruling upholding searches in jail cells, on ground that such searches violate dignity and reduce prisoners to slaves); Hewitt v. Helms, 459 U.S. 460, 484 (1983) (Stevens, J., dissenting) (arguing against the decision upholding process accorded for administrative detention); Arizona v. Evans, 514 U.S. 1, 23 (1995) (Stevens, J., dissenting) ("The offense to the dignity of the citizen who is arrested, handcuffed, and searched on a public street simply because some bureaucrat has failed to maintain an accurate computer data base strikes me as equally outrageous."); Autry v. McKaskle, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting); Spaziano v. Florida, 468 U.S. 447, 490 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that a state must persuade a jury that the death penalty is appropriate, otherwise imposition of the death penalty violates human dignity); Stanford v. Kentucky, 492 U.S. 361, 392 (1989) (Brennan, J., dissenting), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005); Washington v. Harper, 494 U.S. 210, 258 (1990) (Stevens, J., concurring in part and dissenting in part) (stating "[a] competent individual's right to refuse psychotropic medication is an aspect of liberty requiring the highest order of protection under the *Fourteenth Amendment.*") (emphasis in original); Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646, 686 (1995) (O'Connor, J., dissenting) (arguing against the ruling upholding random drug testing for student athletes); United States v. Balsys, 524 U.S. 666, 713 (1998) (Breyer, J., dissenting) (arguing against the holding to make fifth amendment protection against self-incrimination unavailable with regard to foreign prosecution).

The Court has applied the concept of dignity to cases arising under the Fourth,[111] Fifth, Sixth,[112] and Seventh[113] Amendment, although usually the references to dignity are fleeting and there is no sustained effort to develop the nature or scope of the right.[114] For instance, over twenty years ago, the Court held that "[t]he right to appear pro se exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense[]"[115] without any elaboration of how or why or under what circumstances dignity might entail the right to appear pro se. This idea lay fallow for two decades until the recent case of *Indiana v. Edwards*,[116] in which the Justices sparred over the meaning of dignity.[117]

Perhaps the area in which the importance of human dignity is most clearly accepted is in Eighth Amendment cases as the Court extended the

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111. *See* John D. Castiglione, *Human Dignity Under the Fourth Amendment*, 2008 WIS. L. REV. 655 (proposing to bring dignity to the forefront of Fourth Amendment jurisprudence). *See* City of Ontario v. Quon, 130 S.Ct. 2619, 2627 (2010) ("'The [Fourth] Amendment guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government,' without regard to whether the government actor is investigating crime or performing another function.").

112. *See e.g.* Jones v. Barnes, 463 U.S. 745, 759, 763 (1983) (Brennan, J., dissenting), noting that the Sixth Amendment right to counsel:

> is predicated on the view that the function of counsel under the Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him, although counsel may be better able to decide which tactics will be most effective for the defendant [and recognizing] the values of individual autonomy and dignity central to many constitutional rights, especially those Fifth and Sixth Amendment rights that come into play in the criminal process.

Id.; *see also* Portuondo v. Agard, 529 U.S. 61, 76 (2000) (Stevens, J., concurring) ("The defendant's Sixth Amendment right 'to be confronted with the witnesses against him' serves the truth-seeking function of the adversary process. Moreover, it also reflects respect for the defendant's individual dignity and reinforces the presumption of innocence that survives until a guilty verdict is returned.").

113. *See* Irvin v. Dowd, 366 U.S. 717, 721 (1961) ("England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury."). *See also* Edmonson v. Leesville Concrete Co., Inc., 500 U.S. 614, 631 ("And if a litigant believes that the prospective juror harbors the same biases or instincts, the issue can be explored in a rational way that consists with respect for the dignity of persons, without the use of classifications based on ancestry or skin color.").

114. *See Irvin*, 366 U.S. at 721.

115. For instance, the Court has held that "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." McKaskle v. Wiggins, 465 U.S. 168, 176-177 (1984).

116. 554 U.S. 164 (2008).

117. *Compare id.* at 176 ("[A] right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel." (quoting *McKaskle*, 465 U.S. at 176-77)), *with id.* at 186 (Scalia, J., dissenting) ("While there is little doubt that preserving individual 'dignity' . . . is paramount among those purposes, there is equally little doubt that the loss of 'dignity' the right is designed to prevent is *not* the defendant's making a fool of himself by presenting an amateurish or even incoherent defense.").

concept of dignity beyond defendants to convicted inmates.[118] In one of the most important cases, the Court in *Trop v. Dulles*[119] held that denaturalization of native-born citizens violated the Eighth Amendment, saying simply that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[120] Soon, this crisp phrase would become the test by which Eighth Amendment claims were measured, and both the treatment of prisoners during their period of confinement as well as the death penalty would be upheld or invalidated based on their respect for human dignity as the Court understood it.[121]

In *Estelle v. Gamble*,[122] the Court held that "[d]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' . . . proscribed by the Eighth Amendment"[123] by contravening the "broad and idealistic concepts of dignity, civilized standards, humanity, and decency"[124] which the Eighth Amendment embodies.[125] And more recently, in *Hope v. Pelzer*,[126] the Court held that an inmate

> was treated in a way antithetical to human dignity – he was hitched to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous. This wanton treatment was not done of necessity, but as punishment for prior conduct.[127]

As the Court more recently explained, "By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[128]

In far more cases, however, the Court has held that the challenged conditions did not violate individual dignity, often over the strong objection of the dissenters. For instance, in *Hewitt v. Helms*, the Court held that the

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118. Dothard v. Rawlinson, 433 U.S. 321, 346 n.5 (1977) (Marshall, J., dissenting).

119. 356 U.S. 86 (1958).

120. *Id.* at 100; *see, e.g.*, *Autry v. McKaskle*, 465 U.S. 1090, 1091 (1984) (Brennan, J., dissenting) (arguing that the death penalty, particularly under the circumstances of this case, "inevitably amounts to an inexcusable affront to 'the dignity of man.'" (quoting *Trop*, 356 U.S. at 100))

121. *Trop*, 356 U.S. at 120; *But see* Atiyeh v. Capps, 449 U.S. 1312, 1315 (1981), where, in an opinion by Justice Rehnquist, the Court stayed an injunction ordering Oregon prisons to reduce prison population, and was dismissive of district court's reliance on this phrase.

122. 429 U.S. 97 (1976).

123. *Id.* at 104.

124. *Id.* at 102 (quoting Jackson v. Bishop, 404 F.2d 571, 579 (6th Cir. 1968).

125. *Id.* at 102-03; *see also* Hudson v. McMillian, 503 U.S. 1, 8-9 (1992).

126. 536 U.S. 730 (2002).

127. *Id.* at 745.

128. *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

process accorded for administrative detention satisfied procedural due process.[129] Justice Stevens agreed that due process applied to administrative detention, but disagreed that the prison had provided due process.[130] Writing at length about the implications of dignity,[131] Stevens argued that even in the context of imprisonment, an inmate "has a protected right to pursue his limited rehabilitative goals, or at the minimum, to maintain whatever attributes of dignity are associated with his status in a tightly controlled society."[132] Justice Scalia, along with Justice Stevens, echoed this idea in *National Treasury Employees Union v. Von Raab*[133] when he argued that excretory searches of Customs Service employees were "obvious[ly] . . . a type of search particularly destructive of privacy and offensive to personal dignity."[134]

In *Furman v. Georgia*,[135] the death penalty was invalidated insofar as it violated dignity,[136] but the modified death penalty was upheld in *Gregg v Georgia*[137] precisely because it did not violate dignity.[138] This last case gave rise to numerous dissenting opinions in which the more liberal Justices argued repeatedly that the death penalty in general and in specific cases was inconsistent with the notion of human dignity.[139] More recently, the Court

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129. *Hewitt v. Helms*, 459 U.S. 460, 472 (1983).

130. *Id.* at 479-81 (Stevens, J., dissenting).

131. *Id.* at 484-85.

132. *Id.* at 484 (quoting *Meachum v. Fano*, 427 U.S. 215, 234 (1976). Justice Stevens argued that due process must accompany changes in an inmate's status that are 'sufficiently grievous.' *Hewitt*, 459 U.S. at 484 (Stevens, J., dissenting) (quoting Vitek v. Jones, 445 U.S. 480, 492 (1980)). *See also Bell v. Wolfish*, 441 U.S. 520 (1979) (upholding four rules (body cavity searches, double-bunking, no packages and limited access to books) against dissenters' argument that the rules violate dignity); *Hudson v. Palmer*, 468 U.S. 517, 553 (1984) (upholding search in jail cells against Justice Stevens' argument in dissent that the rules violate dignity and reduce prisoners to slaves).

133. 489 U.S. 656 (1989).

134. *Id.* at 680 (Scalia, J., dissenting).

135. 408 U.S. 238 (1972).

136. *Id.* at 269-72 (Douglas, J., concurring).

137. 428 U.S. 153 (1976).

138. *Id.* at 182-83.

139. *See, e.g.*, Glass v. Louisiana, 471 U.S. 1080, 1093-94 (1985) (Brennan, J., dissenting) ("For me, arguments about the 'humanity' and 'dignity' of *any* method of officially sponsored executions are a constitutional contradiction in terms."); DeGarmo v. Texas, 474 U.S. 973, 974 (1985) (Brennan, J., dissenting):

> In my view, the constitutional infirmity in the punishment of death is that "it treats 'members of the human race as nonhumans, as objects to be toyed with and discarded" and is thus "inconsistent with the fundamental premise of the [Eighth Amendment] that even the vilest criminal remains a human being possessed of common human dignity."

(quoting *Gregg v. Georgia*, 428 U.S. 153, 230 (1976). (Brennan, J., dissenting))); Roach v. Aiken, 474 U.S. 1039, 1042 (1985) (Marshall, J., dissenting) ("Neither this Court nor the State of South Carolina is now in a position to ascertain whether Roach is indeed sufficiently competent to face his execution with the dignity that is the final right we allow even the most heinous criminals."); Campbell v. Wood, 511 U.S. 1119, 2127 (1994) (Blackmun, J., dissenting) ("A person who slowly asphyxiates or strangulates while twisting at the end of a rope unquestionably experiences the most torturous and 'wanton infliction

has considered whether the death penalty in certain special circumstances is unconstitutional. For instance, whether the death penalty violates the dignitary interests of people with mental retardation[140] or people who were not yet adults at the time of their crime.[141]

Although most of these cases do not emphasize human dignity, *Roper v. Simmons* – decided during the last year of the Rehnquist Court – did.[142] In *Roper*, the Court held that executing a person who was under eighteen at the time the capital crime was committed violates the Eighth Amendment.[143] As has been shown, there is nothing new in recognizing that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man[.]"[144] But *Roper* does break new ground in raising dignity to the level of an intrinsic constitutional value.

> The [Constitution] sets forth, and rests upon, innovative principles original to the American experience, such as federalism; a proven balance in political mechanisms through separation of powers; specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity. These doctrines and guarantees are central to the American experience and remain essential to our present-day self-definition and national identity. Not the least of the reasons we honor the Constitution, then, is because we know it to be our own.[145]

Apart from criminal procedural guarantees, the only general constitutional rights for individuals that the Court mentioned are those securing freedom and human dignity. All other constitutional rights seem to be subsumed thereunder.[146]

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of pain,' . . . while partial or complete decapitation of the person, as blood sprays uncontrollably, obviously violates human dignity." (quoting *Gregg*, 428 U.S. at 173)); Beard v. Banks, 548 U.S. 521, 542-53 (2006) (Stevens, J., dissenting); Davidson v. Cannon, 474 U.S. 344, 348 (1986) (holding that the due process clause was not violated by prison officials' failure to protect inmates from assaults by other inmates); *Id.* at 356 (Brennan, J., dissenting) ("[E]xcusing the State's failure to provide reasonable protection to inmates against prison violence demeans both the Fourteenth Amendment and individual dignity.").

140. Atkins v. Virginia, 536 U.S. 304, 321 (2002) (execution of people who are mentally retarded violates the Eighth Amendment).

141. *Roper v. Simmons*, 543 U.S. 551, 572 (2005); see *also* Woodford v. Ngo, 548 U.S. 81, 123 (2006) (Stevens, J., dissenting) (recognizing Congress's "constitutional duty 'to respect the dignity of all persons,' even 'those convicted of heinous crimes.'" (quoting *Roper*, 543 U.S. at 560)).

142. *Roper*, 543 U.S. at 578.

143. *Id.* At 573-74.

144. *Id.* at 589 (quoting *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958).

145. *Id.* at 578.

146. As will be explained in Part III, the Court intimates that the recognition of the constitutional right to human dignity is grounded in the original (Madisonian) vision of the Constitution, while reflect-

The scope of dignity

Eventually, the concept of dignity would outgrow the confines of criminal law and attach itself to various other societal interests. In the early 1960s, Justice Douglas explicitly expanded his conception of the constitutional right of dignity to apply to poor people[147] and "suspect minorities."[148] And in the 1970s, dignity explicitly extended to the criminally insane[149] and aliens.[150] Then in the 1980s, dignity expanded to include women, to older Americans,[151] and to people with disabilities.[152] In

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ing the evolution of constitutional rights "from one generation to the next," and that it is grounded in the "American experience" while being consistent with the weight of authority from other countries. *Id.* at 578. *Roper* recognized that many foreign courts have found the death penalty (and particularly the juvenile death penalty) to violate human dignity and, moreover, that congruence between American jurisprudence and that of the rest of the Western world should not be grounds for disqualification. *Id.* at 577-78. The Court explained "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." *Id.* at 578.

147. *See* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty."); *see also* Wyman v. James, 400 U.S. 309, 340 (1971) (Marshall, J., dissenting) (acknowledging the "severe intrusion upon privacy and family dignity" effected by welfare visits to the home).

148. Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 561 (1963) (Douglas, J., concurring):

> Today review of both federal and state action threatening individuals' rights is increasingly important if the Free Society envisioned by the Bill of Rights is to be our ideal. For in times of crisis, when ideologies clash, it is not easy to engender respect for the dignity of suspect minorities and for debate of unpopular issues.

Id.

149. Wiseman v. Massachusetts, 398 U.S. 960, 962 (1970) (Harlan, J., dissenting) (acknowledging the dignitary interests of individuals who lived at Bridgewater State Hospital for the criminally insane, the subjects of the film "Titicut Follies." While appreciating the societal interest in the documentary about the conditions in the Hospital, Justice Harlan wrote "[a]t the same time it must be recognized that the individual's concern with privacy is the key to the dignity which is the promise of civilized society." *Id.*); *see also* Whisenhunt v. Spradlin, 464 U.S. 965, 969 (1983) (Brennan, J., dissenting) ("The requirement that the government afford reasonable notice of the kinds of conduct that will result in deprivations of liberty and property reflects a sense of basic fairness as well as concern for the intrinsic dignity of human beings.").

150. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 107 (1976)

> [I]t must be acknowledged that in 1883 there was no doubt a greater inclination than we can now accept to regard 'foreigners' as a somewhat less desirable class of persons than American citizens. A provincial attitude toward aliens may partially explain the assumption that they would not be employed in the federal service by the new Civil Service Commission. But since that attitude has been implicitly repudiated by our cases requiring that aliens be treated with the dignity and respect accorded to other persons . . . [.]

Id.; *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 572-73 (1976) (Brennan, J., dissenting) (objecting to unwarranted stops at border checkpoints in part because of insult to dignity of Mexican-Americans who are targeted).

151. *See* W. Air Lines, Inc. v. Criswell, 472 U.S. 400, 410 (1985) ("Such limits, the President declared, have a devastating effect on the dignity of the individual[.]").

Lawrence v. Texas,[153] the Court recognized the dignity of gays and lesbians as well.[154] Indeed, Justice Jackson's dissent in *Brinegar v. United States*[155] would come to represent the standard: "So a search against Brinegar's car must be regarded as a search of the car of Everyman [or Everywoman]."[156] But none of this answers the question of what, exactly, it means to have a constitutional right to dignity.

The substance of dignity

Throughout the twentieth century and on into the twenty-first century, individual members of the Court began to think of what dignity looks like in constitutional garb. As the controversy over incorporation raged, dignity found a home in the Fourteenth Amendment Due Process Clause and, concomitantly, in the Fifth Amendment Due Process Clause.[157] But the concept was still amorphous, too ill-defined even to provide content in the search for selective incorporation.[158] While some Justices would have confined due process (and the dignitary interests that it implied) to narrow limits so as to keep sight of its outer boundaries, others were more comfortable with a more free-form concept.[159]

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152. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 467 (1985) (Marshall, J., dissenting), acknowledging the dignity of people who are mentally retarded by noting that

> [f]or the retarded, just as for Negroes and women, much has changed in recent years, but much remains the same; out-dated statutes are still on the books, and irrational fears or ignorance, traceable to the prolonged social and cultural isolation of the retarded, continue to stymie recognition of the dignity and individuality of retarded people.

Id.

In Olmstead v. L.C. *ex rel* Zimring, 527 U.S. 581, 605 (1999), the Court (with the help of the Americans with Disabilities Act) finally assumed that dignity attaches, or should attach, to people with mental disabilities; s*ee, e.g., id*. at 609 (Kennedy, J., concurring) ("The so-called 'deinstitutionalization' has permitted a substantial number of mentally disabled persons to receive needed treatment with greater freedom and dignity."); *see also* Tennessee v. Lane, 541 U.S. 509, 536 (2004) (Ginsburg, J., concurring) ("Legislation calling upon all government actors to respect the dignity of individuals with disabilities is entirely compatible with our Constitution's commitment to federalism, properly conceived.").

153. 539 U.S. 558 (2003).

154. *Id*. at 567, 574-75.

155. 338 U.S. 160 (1949).

156. *Id*. at 181 (Jackson, J., dissenting).

157. *La. ex rel. Francis v. Resweiber*, 329 U.S. 459, 468 (Frankfurter, J., concurring) ("The Fourteenth Amendment did not mean to imprison the States into the limited experience of the eighteenth century. It did mean to withdraw from the States the right to act in ways that are offensive to a decent respect for the dignity of man, and heedless of his freedom.").

158. Adamson v. California, 332 U.S. 46, 65 (1947), *overruled by* Malloy v. Hogan, 378 U.S. 1 (1964), (Frankfurter, J., concurring) ("If the basis of selection is merely that those provisions of the first eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test.").

159. Irvine v. California, 347 U.S. 128, 146 (1954) (Frankfurter, J., dissenting)

> The cases in which coercive or physical infringements of the dignity and privacy of the individual were involved were not deemed sports in our constitutional law but applications of

Equality

As the scope of the Court's dignity gaze widened and the Court slowly began to focus on race discrimination, it would see Jim Crow as a "political and economic system that had denied [African Americans] the basic rights of dignity and equality that this country had fought a Civil War to secure."[160] The Court would also see the Civil Rights Act of 1964 as "the vindication of human dignity and not mere economics."[161] Likewise, it would see gender discrimination as depriving persons of their individual dignity because it is "based on archaic and overbroad assumptions about the relative needs and capacities of the sexes [and] forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities."[162]

> a general principle. They are only instances of the general requirement that States in their prosecutions respect certain decencies of civilized conduct. Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice."

Id. (quoting *Rochin v. California*, 342 U.S. 165, 173 (1952),).

160. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982).

161. Heart of Atlanta v. United States, 379 U.S. 241, 291 (1964) (Goldberg, J., concurring). Justice Souter has more recently argued that Title VII "arguably vindicates an interest in dignity as a human being entitled to be judged on individual merit." United States v. Burke, 504 U.S. 229, 247 (1992) (Souter, J., concurring).

162. Roberts v. United States Jaycees, 468 U.S. 609, 625 (1984). Trammel v. United States, 445 U.S. 40, 52 (1980) (quoting Stanton v. Stanton, 421 U.S. 7, 14-15 (1975):

> The ancient foundations for so sweeping a privilege have long since disappeared. Nowhere in the common-law world -- indeed in any modern society -- is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being. Chip by chip, over the years those archaic notions have been cast aside so that '[no] longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas.'

Id. Unlike in many other countries, the American Court does not distinguish between race- or gender-based decisions made for the purpose of exclusion and oppression or for the purpose of remedying prior discrimination. *See generally* City of Richmond v. Croson, 488 U.S. 469 (1989); Adarand Constructors v. Peña, 515 U.S. 200 (1995). In a case involving the allocation of land to ancestral Hawaiians, Rice v. Cayetano, 528 U.S. 495, 517 (2000), the Court explained:

> The ancestral inquiry mandated by the State implicates the same grave concerns as a classification specifying a particular race by name. One of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities. An inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses, a respect the Constitution itself secures in its concern for persons and citizens.

Id. Thus, in the 1990s when the Court began earnestly invalidating affirmative action provisions, it did so repeatedly on the ground that *any* race-based decision making violated the dignitary interest in being dealt with as an individual.

Privacy and liberty

Justice Douglas's understanding of the intertwining nature of dignity, privacy, and liberty would, of course, culminate in his opinion in *Griswold v. Connecticut*,[163] though he had already been playing with these ideas in the criminal law context (as seen above) and in several cases in the preceding years.[164] And yet, his opinion in *Griswold v. Connecticut* does not mention human dignity at all. The right to privacy expounded upon in all the opinions in *Griswold* is significantly narrower than Douglas's conception of dignity, limited as it may be to marital relations and to the "sacred precincts of marital bedrooms" and grounded as it is in the penumbras of the first ten amendments.[165]

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163. 381 U.S. 479 (1965).

164. In a case involving a man's refusal to let the city health inspectors into his apartment (to check for rats), Justice Douglas wrote in dissent that "The commands of our First Amendment (as well as the prohibitions of the Fourth and the Fifth) . . . are indeed closely related, safeguarding not only privacy and protection against self-incrimination but conscience and human dignity and freedom of expression as well." Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting). He relied on his dissent in *Ullman v. United States*, where the Court had upheld the Immunity Act which required a witness to testify even if it would subject him to severe penalties (such as loss of employment and citizenship), so long as it did not subject him to criminal prosecution. 350 U.S. 422, 449 (1954) (Douglas, J., dissenting). Linking dignity and conscience, Justice Douglas had dissented.

> [T]he Fifth Amendment was written in part to prevent any Congress, any court, and any prosecutor from prying open the lips of an accused to make incriminating statements against his will. The Fifth Amendment protects the conscience and the dignity of the individual, as well as his safety and security, against the compulsion of government.

Id. Douglas also wrote:

> The guarantee against self-incrimination contained in the Fifth Amendment is not only a protection against conviction and prosecution but a safeguard of conscience and human dignity and freedom of expression as well. My view is that the Framers put it beyond the power of Congress to *compel* anyone to confess his crimes. The evil to be guarded against was partly self-accusation under legal compulsion. But that was only a part of the evil. The conscience and dignity of man were also involved. So too was his right to freedom of expression guaranteed by the First Amendment. The Framers, therefore, created the federally protected right of silence and decreed that the law could not be used to pry open one's lips and make him a witness against himself.

Id. In yet another case, Justice Douglas had written:

> At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as "one of the most valuable prerogatives of the citizen."

Slochower v. Bd. of Higher Educ., 350 U.S. 551, 557 (1954) (prohibiting New York and other states from terminating public employees because of their refusal to testify before Congress).

In *Watkins v. United States*, the only dignity recognized, however, was that of Congress, which demanded that witnesses answer questions (so long as they are notified of the subject matter of the investigation). 354 U.S. 178, 187-88, 214-15 (1957). *See also* Stanford v. Texas, 379 U.S. 476, 484-85 (1965) (Justice Stewart's opinion for the Court adopting this language); Walter v. United States, 447 U.S. 649, 655 n.6 (Justice Stevens' judgment of the Court adopting this language).

165. *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965).

But just as Justice Douglas's focus on privacy would bear fruit in the later abortion cases, so too would his recognition that state intrusion into the private sphere of the individual might threaten his or her dignity.[166] In *Thornburgh v. American College of Obstetricians & Gynecologists*, the Court wrote that "[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in *Roe* – whether to end her pregnancy."[167]

This would find slightly fuller expression in *Planned Parenthood v. Casey*, where a plurality (comprising of Justices O'Connor, Kennedy, and Souter) jointly reaffirmed the principle that a woman's right to terminate a pregnancy receives some degree of constitutional protection.[168] As in many other cases since *Griswold*, the plurality groups abortion with other decisions dealing with family, procreation, marriage, and raising children.[169] What is new in *Casey* is the turn in the language from privacy to dignity:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define

166. This concern also had a cognitive dimension. As the information age dawned, the Court became increasingly aware of the effect on individual dignity of government efforts to learn more about citizens. *See* Tarver v. Smith, 402 U.S. 1000 (1971) (Douglas, J., dissenting from denial of certiorari) ("The ability of the Government and private agencies to gather, retain, and catalogue information on anyone for their unfettered use raises problems concerning the privacy and dignity of individuals."); United States v. White, 401 U.S. 745, 763 (1971) (Brennan, J., dissenting),

> The sheer numbers in our lives, the anonymity of urban living and the inability to influence things that are important are depersonalizing and dehumanizing factors of modern life. To penetrate the last refuge of the individual, the precious little privacy that remains, the basis of individual dignity, can have meaning to the quality of our lives that we cannot foresee. In terms of present values, that meaning cannot be good.

Id.

In Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75, 76-77 (1998), Justice Scalia, in an opinion for the Court, declined to set out in detail the factual basis of a male employee's same-sex sexual harassment claim "in the interest of both brevity and dignity."

167. Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986). The Court continued: "A woman's right to make that choice freely is fundamental. Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all." *Id.*

168. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion).

169. *Id.* at 851.

> the attributes of personhood were they formed under compulsion of the State.[170]

The right here is expounded in terms of dignitary interests, not privacy interests. Three aspects of the plurality's conception of dignity are worth mention. First, the equation of dignity and autonomy which will prove integral to the theory of dignity as it develops.[171] Second, the connection of dignity to issues that are at the core of who we are as individuals, compared with, say, how dignity is characterized in the speech cases (as limitations on what we can express or what our social reputation is) or in the criminal law cases (as limitations on how we are treated).[172] And third, the recognition that compulsion by the state on such important matters infringes on human dignity because dignity lies in the very capacity or right to make those decisions.[173] An individual who cedes control of the decision to another has lost her dignity to that extent. As Justice Stevens wrote in his separate opinion, "The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience."[174] On the other hand, the Court has also held that the "dignity to the family" justified a parental consent requirement, which the Court viewed as a "reasonable step . . . to ensure that, in most cases, a young woman will receive guidance and understanding from a parent."[175]

The Court followed the feel of *Casey* in *Lawrence v. Texas*[176] in vindicating the rights of gays and lesbians. The Court had earlier upheld laws discriminating on the basis of sexual orientation in 1986 in *Bowers v. Hardwick*, but by 2003 the Court changed its mind.[177] The change was explained in terms of dignity: "It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons."[178]

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170. *Id*.

171. *Id*.; *see generally* Carol Sanger, *New Scholarship on Reproductive Rights: Decisional Dignity: Teenage Abortion, Bypass Hearings, and the Misuse of Law*, 18 COLUM. J. GENDER & L. 409 (2009) (elucidating the relevance of women's dignity in the context of abortion).

172. *Casey*, 505 U.S. at 851.

173. *Id.*

174. *Id.* at 916. *See also* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008) (arguing that dignity as autonomy and dignity as equality are both relevant in the context of abortion rights).

175. Ohio v. Akron Ctr. for Reproductive Health, 497 U.S. 502, 520 (1990).

176. 539 U.S. 558, 578 (2003).

177. *See* Bowers v. Hardwick, 478 U.S. 186, 195-96 (1986).

178. *Lawrence*, 539 U.S. at 567.

The Court described the changes that had taken place since *Bowers* in terms of two cases. One, *Romer v. Evans*, was directly on point as it concerned legislation discriminating on the basis of sexual orientation.[179] The other was *Casey*, which was relevant only in that it recognized the interest in human dignity. The *Lawrence* Court cited the above-quoted language in *Casey* about dignity and autonomy that, it said, explained the "respect the Constitution demands for the autonomy of the person in making" personal choices dealing with family and intimate relationships.[180]

At the other end of the life cycle, dignity has also found its way into the Court's jurisprudence on death. Typically, laws allowing people to control the manner and timing of their death are called "death with dignity" acts.[181] In *Washington v. Glucksberg*, the Court recognized that comatose patients retain dignity in how they are remembered after they die – suggesting that dignity actually survives death.[182] The law may even allow people to determine "the character of the memories that will survive" them.[183]

It is noteworthy, though, that with a very few exceptions, the Court has so far *not* focused on the ways in which the concept of dignity can elucidate and give content to the constitutionally recognized right to privacy. In most cases, it has merely noted that the two interests are interrelated.[184]

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179. Romer v. Evans, 517 U.S. 620, 635-36 (1996).

180. *Id*. at 573-74. I have elsewhere written about *Lawrence*'s reference to dignity, *see* Erin Daly, *The New Liberty*, 11 WIDENER L. REV. 221 (2005), as have others. *See generally* Christopher A. Bracey, *Race Jurisprudence and the Supreme Court: Where Do We Go from Here?: Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 705-710 (2005); Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006).

181. "Public concern and democratic action are therefore sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect." Washington v. Glucksberg, 521 U.S. 702, 716 (1997). *See generally* Gonzales v. Oregon, 546 U.S. 243 (2006) (considering the constitutionality of Oregon's Death with Dignity Act).

182. *Id.*

183. As Justice Stevens wrote:

> the source of Nancy Cruzan's right to refuse treatment was not just a common-law rule. Rather, this right is an aspect of a far broader and more basic concept of freedom that is even older than the common law. This freedom embraces, not merely a person's right to refuse a particular kind of unwanted treatment, but also her interest in dignity, and in determining the character of the memories that will survive long after her death. In recognizing that the State's interests did not outweigh Nancy Cruzan's liberty interest in refusing medical treatment, *Cruzan* rested not simply on the common-law right to refuse medical treatment, but--at least implicitly--on the even more fundamental right to make this "deeply personal decision."

Glucksberg, 521 U.S. at 743-44 (Stevens, J., concurring) (quoting Cruzan v. Missouri Dep't of Health, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring)).

184. For a discussion of the inter-relatedness of equality, liberty, and dignity, *see* Susanne Baer, *Dignity, Liberty, Equality: a Fundamental Rights Triangle of Constitutionalism*, 59 U. TORONTO L.J. 417 (2009) (arguing that the three interests are better conceptualized as the points of a triangle, rather than in a disconnected or hierarchical way).

Speech

One final area in the Constitution in which the Justices of the Court have found dignity to be relevant is in the First Amendment's protection of freedom of speech. In the First Amendment area, dignity operates both as a sword – by insisting on the right to express oneself freely and the right to information to make such expression meaningful – and as a shield – by protecting against defamatory and other harmful speech. [185] Since the earliest days of its First Amendment jurisprudence, the Court has recognized that freedom of speech enhances dignity in both its identity and conscience dimensions. However, in the American cases, unlike in many of their foreign counterparts, the link between dignity and speech is not often explicit, nor is the theoretical basis for protecting the dignitary interests relating to speech well developed. But the seeds are definitely there.

In his brilliant First Amendment opinion in *Whitney v. California*, Justice Brandeis wrote that "it is the final end of the state to make men free to develop their faculties."[186] Although he didn't mention dignity, the connection between dignity and the development of one's faculties is there.[187] In its classic articulation, Justice Harlan wrote that "One man's vulgarity is another's lyric."[188] In *Cohen v. California*, which upheld the right to wear a jacket embroidered with the words "Fuck the Draft," Justice Harlan explained his reasons for protecting this untoward expression by braiding together ideas of political discourse, individual autonomy, and human dignity.

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would

185. This would include a right *not* to express oneself as well, as in cases involving the tortious infringement of the right to publicity. *See* Roberta Rosenthal Kwall, *A Perspective on Human Dignity, The First Amendment, and the Right to Publicity*, 50 B.C. L. REV 1345 (2009). And it would also include relying on the dignity of individual or group of targets of hate speech to suppress the speech. *See generally* Alexander Tsesis, *Dignity and Speech: the Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497 (2009).

186. Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J, concurring)

187. The point has been made more explicitly in some foreign cases dealing with the right to education. *See infra*, note 242 and accompanying text.

188. Cohen v. California, 403 U.S. 15, 25 (1971).

> comport with the premise of individual dignity and choice upon which our political system rests.[189]

The Court has also recognized that dignity may also *interfere* with rights because of the assault on dignity that some speech may produce. If speech harms reputation, diminishes self-esteem, or threatens the peace of a community, the dignity of the audience (or target) may augur limitations on free speech.[190] Thus, restrictions on defamatory speech as well as hate speech, fighting words, and other speech "which by its very utterance inflict[s] injury"[191] might in fact *promote* individual dignity. The Court has accepted this argument in the context of defamation but less so in the context of these other forms of speech. In *Gertz v. Robert G. Welch, Inc.*, Justice White (in dissent) captured the tension: "Freedom and human dignity and decency . . . [b]oth exist side-by-side in precarious balance, one always threatening to overwhelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension."[192] He went on to identify the civil law of libel as one mechanism that accommodates these competing forces.[193] At roughly the same time, Justice White (as noted above) was also recognizing that dignity cuts both ways in the context of criminal law: if suspects, defendants, and prisoners have dignitary interests that the Constitution must recognize, so too should the public's interest in dignity protect it from assault. In both situations, dignity justifies *limiting* individual freedom. In other cases, the Court has been even more explicit in noting that defamation laws are directed to the worthy objective of ensuring the "essential dignity and worth of every human being."[194] In *Estes v. Texas*, the Court held that televising a defendant's trial would impair his dignity, furnishing another example of the tension between First Amendment values and dignitary interests.[195]

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189. *Id.*, 403 U.S. at 24 (1971) (citing *Whitney*, 274 U.S. at 375-77 (Brandeis, J., concurring)). *See also* Herbert v. Lando, 441 U.S. 153, 186 (1979) (Brennan, J., dissenting) ("Freedom of speech is . . . intrinsic to individual dignity. This is particularly so in a democracy like our own, in which the autonomy of each individual is accorded equal and incommensurate respect.") *See also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991).

190. Guy E. Carmi, *Dignity – The Enemy from Within*, 9 U. PA. J. CONST. L. 956 n.84 (2007).

191. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)

192. Gertz v. Robert Welch, 418 U.S. 323, 403 (1974).

193. *Id. See also* Miami Herald v. Tornillo, 418 U.S. 241, 262 (1974).

194. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J, concurring). *See also* Time v. Firestone, 424 U.S. 448, 471-72 (1975) (Brennan, J., dissenting); Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 757-58 (1985); Philadelphia Newspapers v Hepps, 475 U.S. 767, 781 (1986) (Stevens, J., dissenting); Milkovich v. Lorain Journal, 497 U.S. 1, 22 (1990) (citing same).

195. Estes v. Texas, 381 U.S. 532, 549 (1965).

C. Dignity in the Roberts Court: A Review in Real Time

Since John Roberts assumed the Chief Justiceship, the Court's attitude toward dignity has been commensurate with its past practice. Of more than 400 cases, only thirty even mentioned the word "dignity." Sixteen of those associate it with inchoate ideas[196] or institutions, such as courts and judicial proceedings[197] or states, Indian tribes, and foreign nations in their claims of immunity.[198] Of the remaining fourteen cases in the last six years that even mention *human* dignity, most refer to it somewhat inattentively as if by rote[199] and often in conjunction with other seemingly important values, as if dignity cannot carry its weight on its own.[200] In the Roberts Court cases,

196. *See* Watters v. Wachovia Bank, N.A., 550 U.S. 1, 32 (2007) (Stevens, J., dissenting) (Noting that a particular interpretation would "give Congress' silence greater statutory dignity than an express command."); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 308 (2006) (Souter, J., dissenting) (referring to two statutory provisions as having equal dignity); *Gonzales v. Oregon*, 546 U.S. 243, 248 (2006) (discussing Oregon's Death With Dignity Act).

197. *See* Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring) (referring to the calm and dignity of a court); Baze v. Rees, 553 U.S. 35, 57 (2008) (Referring to the dignity of the lethal injection procedure, not of the individual, "especially where convulsions or seizures could be misperceived as signs of consciousness or distress"); Wellons v. Hall, 130 S. Ct. 727, 728 (2010) ("From beginning to end, judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect."); Beard v. Kindler, 130 S. Ct. 612, 620 (2009) (Kennedy, J., concurring) ("There is no justification for an unlawful escape, which "operates as an affront to the dignity of [a] court's proceedings."); Holingsworth v. Perry, 130 S. Ct. 705, 714 (2010) (noting that broadcasts of trials are generally forbidden "unless 'there is no interference with the due process, the dignity of litigants, jurors and witnesses, or with other appropriate aspects of the administration of justice.'" (quoting Hamilton v. Accu-Tek, 942 F. Supp. 136, 138 (E.D.N.Y. 1996)).

198. Dignity of Indian tribes: *See* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 121 (2005) (referring to an Indian tribe's independence and dignity); Plains Commerce Bank v. Long Family Land & Cattle Co., 554 U.S. 316, 344 (2008) (Ginsburg, J., concurring) (referring to tribal self-rule and dignity). Dignity of states: Massachusetts v. EPA, 549 U.S. 497, 519 (2007) (Noting that the states "retain the dignity, though not the full authority, of sovereignty" (quoting *Alden v. Maine*, 527 U.S. 706, 715 (1999)); *South Carolina v. North Carolina*, 130 S. Ct. 854, 863 (2010) (referring repeatedly to the "sovereign dignity" of states). Dignity of foreign nations: Philippines v. Pimentel, 553 U.S. 851, 866 (2008) ("Giving full effect to sovereign immunity promotes the comity and dignity interests that contributed to the development of the immunity doctrine.").

199. *See* Hudson v. Michigan, 547 U.S. 586, 594 (2006) (finding the exclusionary rule inapplicable to a violation of the "knock-and-announce" rule, noting that the rule "protects those elements of privacy and dignity that can be destroyed by a sudden entrance."); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008) (Invalidating the death penalty for non-fatal crimes, noting that "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule" and citing *Trop v. Dulles*); Virginia v. Moore, 553 U.S. 164, 174 (2008) (noting that the state chose to protect "privacy and dignity"); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 746 (2007) (quoting *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (noting that "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.").

200. *See* e.g. McDonald v. Chicago, 130 S. Ct. 3020, 3101 (2010) (Stevens J. dissenting) ("Self-determination, bodily integrity, freedom of conscience, intimate relationships, political equality, dignity and respect -- these are the central values we have found implicit in the concept of ordered liberty").

dignity is most often found in dissent[201] and, in the first five years, by Justice Stevens who is the only member of the Roberts Court who regularly referred to human dignity.[202]

Justice Stevens most articulately referred to dignity in the First Amendment context. In *Beard v. Banks*, his dissent argued that a prison ban on photographs and books (with very limited exceptions) did not comport "with the sovereign's duty to treat prisoners in accordance with 'the ethical tradition that accords respect to the dignity and worth of every individual.'"[203] Justice Stevens was most troubled because "the rule comes perilously close to a state-sponsored effort at mind control."[204] Quoting *Wooley v. Maynard*, in which the court invalidated the requirement that all New Hampshire drivers adopt the slogan "Live Free or Die," Justice Stevens wrote that "[t]he state may not 'invade the sphere of intellect and spirit which it is the purpose of the First Amendment of our Constitution to reserve from all official control.'"[205] He wrote that the near-complete prohibition on secular reading material "prevents prisoners from 'receiv[ing] suitable access to social, political, esthetic, moral, and other ideas,' which are central to the development and preservation of individual identity, and are clearly protected by the First Amendment[.]"[206] More recently, in *Citizens United v. FEC*, Justice Stevens argued that there is no basis for extending free speech rights to corporations because:

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201. See e.g. Herring v. United States, 129 S. Ct. 695, 709 (2009) (Ginsburg, J., dissenting); Gonzales v. Carhart, 550 U.S. 124, 170 (2007) (Ginsburg, J., dissenting) (citing the "dignity and autonomy" language of *Planned Parenthood v. Casey*).

202. *See* e.g. *Woodford v. Ngo*, 548 U.S. 81, 123 (2006) (Stevens, J., dissenting).

203. *Beard v. Banks*, 548 U.S. 521, 552-53, (2006) (Stevens, J., dissenting) (quoting Overton v. Bazzetta, 539 U.S. 126, 138 (2003)).

204. *Id.* at 552 (citing Woodley v. Maynard, 430 U.S. 705, 715 (1977)).

205. *Id.* (quoting *Wooley*, 430 U.S. at 715).

206. *Id.* (quoting Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969)). Justice Stevens continued:

> Similarly, the ban on personal photographs, for at least some inmates, interferes with the capacity to remember loved ones, which is undoubtedly a core part of a person's "sphere of intellect and spirit." Moreover, it is difficult to imagine a context in which these First Amendment infringements could be more severe; LTSU-2 inmates are in solitary confinement for 23 hours a day with no access to radio or television, are not permitted to make phone calls except in cases of emergency, and may only have one visitor per month. They are essentially isolated from any meaningful contact with the outside world. The severity of the constitutional deprivations at issue in this case should give us serious pause before concluding, as a matter of law, that the challenged regulation is consistent with the sovereign's duty to treat prisoners in accordance with "the ethical tradition that accords respect to the dignity and worth of every individual."

Id. at 552-53 (quoting *Overton*, 539 U.S. at 138 (Stevens, J., concurring) (citation and internal quotation marks omitted).

> Freedom of speech helps "make men free to develop their faculties," it respects their "dignity and choice," and it facilitates the value of "individual self-realization." Corporate speech, however, is derivative speech, speech by proxy. . . . Take away the ability to use general treasury funds for some of those ads, and no one's autonomy, dignity, or political equality has been impinged upon in the least.[207]

Justice Stevens's argument was that dignity is so closely linked to self-realization and "choice" or autonomy that it has no application to corporations.[208] Dignity is inherent in every member of the human family, but does not extend beyond the human family.

These cases continue the leitmotif of the dignity cases since the days of *Chisholm v. Georgia*. First, by referring to dignity without explanation, the cases decided in the first six years of Chief Justice Roberts's tenure reiterate that dignity is in some ways relevant to constitutional interpretation, though it is nowhere explicit.[209] Second, the cases exemplify the protean character of constitutional dignity: it can be attributed to states, courts, statutes, and people – both those traditionally thought of as dignitaries, and the rest of us as well. And it can be associated with people's interests in privacy, equality, and access to information.[210] There seems to be no unifying theme – no central meaning – that explains the true significance of dignity. And, last, while the Justices of the Court, both individually and collectively, seem committed to recognizing the relevance of dignity to constitutional interpretation, they do not seem particularly interested in defining or expounding it.[211]

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207. Citizens United v. FEC, 130 S. Ct. 876, 972 (2010) (citations omitted).

208. *See id*.

209. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 32 (2007) (Stevens, J., dissenting); *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 308 (2006) (Souter, J., dissenting); *Gonzales v. Oregon*, 546 U.S. 243, 248 (2006).

210. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 344 (2008) (Ginsburg, J., concurring); *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007); *South Carolina v. North Carolina*, 130 S. Ct. 854, 863 (2010). *See also Hudson v. Michigan*, 547 U.S. 586, 594 (2006); *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007).

211. *See* Peggy Cooper Davis, *Symposium*: *The Second Founding: Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1376 (2009):

> The Court has never related this idea about human dignity and human rights to our national history of slavery, emancipation, and constitutional reconstruction. Still, if we were to read, in light of our history, the guarantees contained in our Reconstruction Amendments, we would see a notion of individual worth and the accompanying belief in a right of self-definition intentionally, and responsively, implanted.

Id.

Out of all of these cases, in only one instance do the Justices attempt to develop a meaning or a coherent conception of how the Constitution protects human dignity. In *Indiana v. Edwards*, the Court held, over the dissents of Justices Scalia and Thomas, that "a right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel."[212] This sparked the most extensive debate about the meaning human dignity in Supreme Court cases in recent years. While Justice Breyer, speaking for the Court, was concerned that "the spectacle that could well result from [self-representation at trial by a person with mental disabilities] is at least as likely to prove humiliating as ennobling,"[213] the dissent argued that this ignored the true reason why human dignity is constitutionally protected. Writing for the dissent, Justice Scalia explained that it is not to avoid "the defendant's making a fool of himself by presenting an amateurish or even incoherent defense. Rather, the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice."[214] And this, in his view, ought to apply equally to those whose mental competence is beyond question as well as to those whose competence is in doubt. Justice Scalia concluded that, "In sum,if the Court is to honor the particular conception of 'dignity' that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made."[215] This is the clearest statement to be found in any recent case about the values undergirding the fledgling conception of human dignity in American constitutional cases. As we shall see below, it joins neatly with the Court's understanding of institutional dignity as developed in the state sovereignty cases.

PART THREE: A CONSTITUTIONAL CONVERGENCE OF INSTITUTIONAL AND INDIVIDUAL DIGNITY

A. Jurisprudential Challenges to the Right to Dignity

Notwithstanding these myriad invocations of human dignity throughout the Supreme Court's individual rights jurisprudence, it cannot be denied that the Court has so far declined to embrace human dignity as the definition of

212. *Indiana v. Edwards*, 554 U.S. 164, 176 (2008) (quoting *McKaskle v. Wiggins*, 465 U.S. 168, 176-77 (1984)).
213. *Id.* at 176.
214. *Id.* at 186-87.
215. *Id.* at 187.

any judicially recognized constitutional right.[216] In fact, perhaps more interesting than the cases in which dignity has been invoked are the cases that involve questions of human dignity in which the Court did not even mention it, including *Brown v. Board of Education*,[217] *Roe v. Wade*,[218] *Griswold v. Connecticut*,[219] *Romer v. Evans*,[220] *Atkins v. Virginia*,[221] and *Virginia v. Black*.[222] While various Justices have invoked the concept in one context or another, there is no area in which the Court as a whole has used individual dignity as the measure of the constitutional right. Indeed, in some instances, the Court has explicitly rejected a "dignity standard."[223] This contrasts markedly not only with the use of dignity in foreign courts, but with the United States Supreme Court's own eagerness to give constitutional stature to state dignity as evidenced in the Rehnquist Court's Tenth and Eleventh Amendment cases.[224]

So it is worth asking why the Court has stopped short of taking the step of embracing human dignity as the definition of a judicially recognized constitutional right. The answer may lie precisely in dignity's broad appeal: it is the right that can be all things to all people. Ronald Dworkin has called it "vague but powerful."[225] The Court in *Estelle v. Gamble* called it "broad

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216. As a judge on the Seventh Circuit, Justice Stevens argued that privacy was an unfortunate misnomer for that class of cases.

> The character of the [c]ourt's language in these cases brings to mind the origins of the American heritage of freedom - the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable. Guided by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases.

Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 719-20 (1975) (7th Cir. 1975).

217. 347 U.S. 483 (1954) (holding that racial segregation in schools violated the Equal Protection Clause of the Fourteenth Amendment).

218. 410 U.S. 113 (1973) (upholding a woman's right to choose to continue or terminate a pregnancy under the Fourteenth Amendment).

219. 381 U.S. 479 (1965) (holding that legislation prohibiting the use of birth control by married couples violated their right to privacy).

220. 517 U.S. 620 (1996) (invalidating a state constitutional amendment that discriminated on the basis of sexual orientation).

221. 536 U.S. 304 (2002) (invalidating the death penalty for people with mental retardation).

222. 538 U.S. 343 (2003) (authorizing state prohibition of cross-burning in certain circumstances).

223. *Boos v. Barry*, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine v. Falwell, 485 U.S. 46, 56 (1988)) ("A 'dignity' standard, like the 'outrageousness' standard that we [previously rejected] is so inherently subjective that it would be inconsistent with 'our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience'").

224. *See supra* Part I.C.

225. According to Ronald Dworkin:

> The institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the Government's job of securing the general benefit more difficult and more expensive, and it would be a frivolous and wrongful practice unless it served some point. Anyone who professes to take rights seriously, and who praises our Government for respecting them, must have some sense of

and idealistic."[226] As the quotations throughout this article illustrate, in the cases in which dignity is invoked, there is precious little discussion about how dignity is defined: what it encompasses, and – perhaps more significantly – what it excludes. Peggy Cooper Davis has suggested that "[t]he concept of respect for human dignity has . . . been best understood in the process of contemplating its lack."[227] Thus, dignity's very breadth may entail a standardlessness that utterly fails to cabin judicial discretion.[228] For a Court that has always been more or less obsessed with at least the appearance of judicial limits, an appeal to dignity is not very appealing.

While courts around the world are embracing the right to human dignity as a foundational value of their constitutional systems, the United States Supreme Court is standing by the edge, watching the action, but apparently unwilling to do more than tentatively dip in its toe. In the last part of this article, I will show how the work that the Court has already done in the federalism cases may actually provide the grounding for a meaningful right to human dignity.

B. Autonomy at the Confluence

The United States Supreme Court is just beginning to develop an understanding of the concept of human dignity that will be useful in deciding the cases that come before it. The *Casey-Lawrence-Roper* line of cases suggest that at least some members of the Court are interested in exploring the utility of using dignity to characterize and operationalize the liberty that is protected in the Due Process Clause. Justice Stevens tried to do this in his dissent in *McDonald v. Chicago* where he cited the liberty clause's "'promise' that a measure of dignity and self-rule will be afforded

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> what that point is. He must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity. This idea, associated with Kant, but defended by philosophers of different schools, supposes that there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and holds that such treatment is profoundly unjust.

Delaware v. Van Arsdall, 475 U.S. 673, 698 n.9 (1986) (Stevens, J., dissenting) (quoting RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198-99 (1977). According to Denise Reaume, "Kant tied the notion of respect for humanity to the capacity for rationality." Denise G. Reaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEEN'S L.J. 61, 84 (2002) (arguing for the development of a dignity-based tort cause of action).

226. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976).

227. *Symposium: The Second Founding: Responsive Constitutionalism and the Idea of Dignity*, *supra* note 211 at 1374.

228. *See* Roberts v. Louisiana, 431 U.S. 633, 646 n.1 (1977) (Rehnquist, J., dissenting) (where the plurality invalidated mandatory capital punishment for those who kill police officers, Rehnquist accused the plurality of separating "standards of decency" from "dignity of man," thereby arrogating to itself (rather than to society) the role of the arbiter of the "dignity of man").

to all persons."[229] The *Edwards* case approaches human dignity from a different perspective but reinforces the conclusion that the current Justices are not afraid to recognize in the Constitution an interest in protecting human dignity.[230] And at first blush, it may make perfect sense to look to these cases to develop a theory of constitutional human dignity,[231] but ironically it is the cases on *institutional* dignity that are most likely to inform how the Court should and already does think about human dignity.

As shown from the earliest cases up through to the present, the idea of dignity that the Court is most comfortable with is associated with inchoate constructs like sovereigns and is intricately connected to the idea of immunity. In most of the cases, the specific form of immunity is immunity from suit. In its recent Eleventh Amendment jurisprudence, the Court, as noted earlier,[232] has specifically explained that the reason states are immune from suit is that suits against states constitute an *indignity* to the state.[233] But the Court has entirely failed to explain either why immunity from suit is inherent in the sovereignty of the state or why violation of the principle of state sovereign immunity implicates the states' dignitary interests. This needs to be extrapolated from the cases.

Focusing on enforcement provides at least some clues regarding the Court's thinking that, as explained in *Edelman v. Jordan*, "the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment."[234] But to understand the full implications of this, we need to go even further back in the Court's history. In *Great Northern Life Insurance Co. v. Read*, the Court explained that allowing such suits would mean that a state was "controlled by courts in the performance of its

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229. 130 S. Ct. 3020, 3092 (2010) (Stevens J. dissenting)

230. *Indiana v. Edwards*, 554 U.S. 164, 176-78 (2008).

231. *But see* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201 (2008) (arguing that to import the European values-based conception of dignity into American jurisprudence would require a balancing of social values that would ultimately dilute the protection of constitutional rights).

232. *See supra* Part I.C.

233. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 58 (1996) (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48 (1994); *Puerto Rico Aqueduct and Sewer Auth. v. MetCalf*, 506 U.S. 139, 146 (1993):

> We think it follows *a fortiori* from this proposition that the type of relief sought is irrelevant to whether Congress has power to abrogate States' immunity. The Eleventh Amendment does not exist solely in order to "preven[t] federal-court judgments that must be paid out of a State's treasury," it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties"

Id.

234. Edelman v. Jordan, 415 U.S. 651, 663 (1974) (citing Great Northern Life Ins. v. Read, 322 U.S. 47 (1944); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573 (1946)).

political duties[,]" and that "[e]fforts to force, through suits against officials, performance of promises by a state collide directly with the necessity that a sovereign must be free from judicial compulsion in the carrying out of its policies within the limits of the Constitution."[235] Thus, the problem with suits against states is that they function as a sort of exogenous control over the state, preventing it from pursuing policies that it would otherwise choose, thereby interfering with its autonomy – or dignity.[236]

The Court is particularly concerned with the impact that private suits have on a state's ability to set its own priorities – should it spend money on schools and roads or on complying with federal welfare regulations?[237] As the Court said in *Edelman*, quoting *Great Northern*, "When we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found."[238] A state's sovereignty – just like a foreign nation's – entitles it to choose and express its policy priorities without interference.

At its root, this is the same problem underlying federal laws that "commandeer" state legislative and executive action as the Court has held in its revived Tenth Amendment jurisprudence. In both *New York v. United States* and *Printz v. United States*, the Court held that "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs[,]" because doing so requires the state to follow federal policy rather than the state's own policy.[239] Though neither case mentions states' dignitary interests as the Eleventh Amendment cases do, they are temporally and conceptually linked to those cases.

Viewed in this way, the already-developed case law of institutional dignity gives some definition to the still fledgling concept of individual dignity.[240] Dignity, in both senses, protects against the forced surrender of

235. *Great Northern Life Ins*., 322 U.S. at 51.

236. This also distinguishes the states from their political subdivisions. "The States thus retain 'a residuary and inviolable sovereignty.' They are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden v. Maine*, 527 U.S. 706, 715 (1999) (quoting THE FEDERALIST NO. 39 (James Madison).

237. *Id.* at 750-51.

238. *Edelman*, 415 U.S. at 673 (quoting *Great Northern Life Ins*., 322 U.S. at 54).

239. Printz v. United States, 521 U.S. 898, 925 (1997); *see also* New York v. United States, 505 U.S. 144, 161 (1992) (citing Hodel v. Virginia Surface Mining & Reclamation Ass'n., 452 U.S. 264, 288 (1981)).

240. Thus, the conflict between what Resnick and Chi-hye Suk call "role dignity" and individual dignity may be more apparent than real. Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1927-28 (2003). Nonetheless, from a political perspective, it may be hard to reconcile the two, as conservatives (on and off the Court) would typically favor institutional dignity claims while liberals (both on and off the Court)

control by one to another. A person who is forced into a particular sexual orientation or forced to carry a pregnancy to term can no more control her destiny or express her identity than can a state forced to implement federal policy.

This notion of dignity as protection against forced surrender of control over the course of one's life is consistent with the global jurisprudence that equates dignity with autonomy. In Germany, the Federal Constitutional Court has understood dignity largely in terms of a prohibition against objectification and commodification, influenced by Kant's categorical imperative based on the idea of human dignity to: "Act in such a way that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means."[241] This is illustrated perhaps most vividly in a recent case in which the German court invalidated the Air Transport Security Act, which would have "empowered the minister of defense to order that a passenger airplane be shot down if it could be assumed that the aircraft would be used against the life of others and if the downing is the only means of preventing this present danger."[242] This violated the right to dignity of the passengers because, according to one commentator, it "neglects the constitutional status of the individual as a subject with dignity and inalienable rights. When the law takes their death into account as unavoidable damage for the benefit of other objectives, the [Federal Constitutional] Court explained, it transforms persons into things and delegalizes them (*verdinglicht und zugleich entrechtlicht*)."[243] The German court contrasted the deprivation of dignity of the passengers with the situation of the hijackers whose dignity the court did not feel the need to protect precisely because the hijackers – unlike the passengers – had *chosen* their fate.[244]

In a more social context, the Indian Supreme Court has said that the aim and objective of the struggle for liberation was

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would tend to be more sympathetic to individual dignity claims. True to form, the jurisprudence of Justices O'Connor and Kennedy sits happily on the fence, embracing state claims of sovereign immunity as well as individual claims of human dignity. *Compare Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), *and Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), *with Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *and Lawrence v. Texas*, 539 U.S. 558 (2003).

241. Izhak Englard, *Human Dignity: from Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1919-21 (2000); *see also* Oscar Schachter, *Human Dignity as a Normative Concept* 77 AM. SOC'Y INT'L L. 848, 849 (1983).

242. Oliver Lepsius, *Human Dignity and the Downing of Aircraft: The German Federal Constitutional Court Strikes Down a Prominent Anti-terrorism Provision I the New Air-Transport Security Act*, 7 GERMAN L.J. 761, 762 (2006).

243. *Id.* at 767.

244. *See id.*; *see also* Guy E. Carmi, *Dignity Versus Liberty: the Two Western Cultures of Free Speech*, 26 B.Y.U. INT'L L.J. 277, 308-09 (2008) (noting that "American law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity").

> to build a new social order where man will not be a mere plaything in the hands of the State or a few privileged persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured.[245]

In Hungary, this is expressed in terms of the "general personality right"; that is, "[t]he right to human dignity means that the individual possesses a core of autonomy and self-determination beyond the reach of all others."[246]

Likewise, the American cases evince a deep connection between dignity and autonomy. The Supreme Court's privacy jurisprudence, from *Meyer v. Nebraska*[247] and *Pierce v. Society of Sisters*[248] to the present, has always circled around this idea without ever zeroing in on it.[249] Since the beginning, the Court has recognized that liberty would have to mean more than simply freedom from bodily restraint, but it has never been able to articulate in any kind of principled way exactly what beyond freedom from bodily restraint would be protected. Its focus on the language of choice (as in reproductive choice) was, politically, an unfortunate detour, particularly in the post-Warren days when choice implied lack of responsibility. By the time *Casey* was decided, it was becoming clear that what it had meant all along (or should have meant all along)[250] was that the choice of how an individual ought to live must be made by the individual. It was not so much about the right to choose to terminate a pregnancy as about the right to choose how to live. This is the core of "personal dignity and autonomy" of which the critical opinions in *Casey* and *Lawrence* speak.[251] At the other

245. Maneka Gandhi v. Union of India (1978) 2 S.C.R. 621, 692 (India). In this regard, it is worth recalling Justice Brandeis's view that "the final end of the state was to make men free to develop their faculties." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

246. Alkotmánybíróság (AB) [Constitutional Court] Dec. 3, 2001, MK.2001/138 (Hung.) (regarding change of names), *available at* http://www.mkab.hu/admin/data/file/716_58_2001.pdf.

247. 262 U.S. 390 (1923).

248. 268 U.S. 510 (1925).

249. *See Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 534-35.

250. To suggest that the abortion decisions have always been about autonomy and dignity flies in the face of the language and tone of *Roe* which was more concerned with the physician's autonomy than the woman's. In *Roe*, the Court stated that:

> This means, on the other hand, that, for the period of pregnancy prior to this 'compelling' point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

Roe v. Wade, 410 U.S. 113, 163 (1973). Other substantive due process cases more strongly support the claim that the Court had all along been concerned with autonomy.

251. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

end of the spectrum are the "Death With Dignity" cases which fundamentally address the right to choose how to die.[252]

Understanding dignity in this way also ensures that the link between equality and dignity will not be broken since each person has the same right against forced surrender of control as any other, whether the exogenous agent would be the state, a court, or another person. Thus, as cases such as *Casey*, *Romer*, and *Lawrence* suggest, dignity lies at the junction of equal protection and due process: I must have dignity to control my own life and I must have no less dignity than any other person. All people must have their dignity respected on equal terms, just as all states come to the Union on equal footing.[253]

But equality's coattails come with their own complications: just as the Court can eviscerate the right to equality by treating it as a purely formal legal concept, it can do the same with dignity, as the Scalia-Breyer exchange in *Edwards* makes clear.[254] Justice Scalia's notion of dignity is consistent with his formal understanding of the right to equality. In both contexts, he would invalidate laws that *interfere* with what he views as the normal private ordering, but would not use the law to promote equality or dignity as a factual matter. Thus, in his view, the Equal Protection Clause prohibits any race-based discrimination, but it is not relevant to promoting equality among all citizens; that is the job of the private sector.[255] Likewise, his conception of dignity as briefly articulated in *Edwards* is that the law should not interfere with Edwards's decision to be the "master of [his] fate,"[256] but there is no room for state action that seeks to enhance Edwards's sense of dignity.[257] In Justice Breyer's hands, however, the law is relevant not only to avoiding *de jure* violations, but also to promoting the values that the constitutional rights represent: the law must not only avoid interfering with a person's right to control her destiny, it should also help to ensure that individuals can make meaningful choices about their lives.[258]

This conception of dignity also links to equality in another way, by prohibiting state action that classifies on the basis of characteristics over which the person has no control. In American jurisprudence, classifications

252. *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006).

253. *See Casey*, 505 U.S. at 851; *Romer v. Evans*, 517 U.S. 620, 633-36 (1996); *Lawrence*, 539 U.S. at 873-74.

254. *See Indiana v. Edwards*, 554 U.S. 164, 179-90 (2008) (Scalia, J., dissenting); *id*. at 167-79 (majority opinion).

255. *See* Adam Cohen, *Justice Scalia Mouths Off on Sex Discrimination*, TIME, Sep. 22, 2010, *available at* http://www.time.com/time/nation/article/0,8599,2020667,00.html.

256. *Edwards*, 554 U.S. at 186 (Scalia, J., dissenting).

257. *See id*. at 186-87.

258. *See id*. at 170-78 (majority opinion).

based on "immutable characteristic[s]" are often suspect simply because the individual has no control over these traits and therefore bears no responsibility for them and should not be burdened because of them.[259] Such a law might be said to offend a person's dignity as it impinges on her power to control her own actions. Understood this way, it also becomes clear that dignity has both a private face and a public face; that is, dignity may describe one who is in control of one's destiny and may also describe one who *appears* to be in such control. It therefore has both subjective and objective aspects.[260] There is a dignity interest in being able to say what we want, how we want to say it, as well as a (sometimes competing) dignity interest in protecting our reputation to ensure that others think well of us.[261] To demean someone is to insult their dignity by lowering them in the eyes of others.[262] Dignity is not only what we choose to do, but how we choose to present ourselves to others. Peggy Cooper Davis suggests that this "is what we mean when we say that human life is valued for its expressive, as well as its natural, qualities. We respect human dignity in order to give reign to human expressive capacities and desires."[263]

Dignity in this way is linked to the old-fashioned notion of dignity as a badge of honor[264] or nobility. Those who have political and social power are more likely to have control over their own destiny. By contrast, guaranteeing the right to human dignity is more problematic in situations of dependency, whether material, brought on by abject poverty or lack of education, or physical, due to incarceration or other forms of custody or due to bodily attributes such as age or disability, as in the *Edwards* case.[265] In

259. Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

260. *See generally* David Feldman, *Human dignity as a legal value – Parts I and II*, in English Public Law 682-702 (David Feldman ed., Oxford University Press 2000).

261. See *supra* notes 186-95.

262. *See* Hope v. Pelzer, 536 U.S. 731, 738, 745 (2002).

263. Peggy Cooper Davis, *Responsive Constitutionalism and the Idea of Dignity*, 11 U. PA. J. CONST. L. 1373, 1374-75 (2009). In this way, it is perhaps connected to the African notion of *ubuntu*, popularized by Archbishop Desmond Tutu in the course of the South African Truth and Reconciliation Commission. *See, e.g.*, ERIN DALY & JEREMY SARKIN, RECONCILIATION IN DIVIDED SOCIETIES: FINDING COMMON GROUND 68, 178 (2007).

264. It was in this sense that dignity is used in the French Declaration of the Rights of Man and of the Citizen: "Tous les citoyens étant égaux à ses yeux, sont également admissibles à toutes dignités, places et emplois publics, selon leur capacité et sans autre distinction que celle de leurs vertus et de leurs talents." ["All citizens, being equal in the eyes of the law, are equally eligible to all dignities and to all public positions and occupations, according to their abilities, and without distinction except that of their virtues and talents."], Art. 6 (1789), *available in French at* http://www.droitsenfant.com/droitshomme.htmhttp://www.droitsenfant.com/droitshomme.htmhttp://www.textes.justice.gouv.fr/textes-fondamentaux-10086/droits-de-lhomme-et-libertes-fondamentales-10087/declaration-des-droits-de-lhomme-et-du-citoyen-de-1789-10116.html, *available in English at* http://avalon.law.yale.edu/18th_century/rightsof.asp.

265. *See Indiana v. Edwards*, 554 U.S. 164, 174 (2008).

these situations, there has already been some degree of surrender, some inability to control one's own "policies," and the question in the cases is how much more can be asked of the person. To say that such conditions do not violate human dignity is to accept uncritically the idea of the neutrality of the state and the dissociation between public power and private power.[266] As Justice Thomas's dissent in *Olmstead v. L. C. ex rel Zimring* recognized, the policy underlying the Americans with Disabilities Act was "driven by, *inter alia*, 'respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities,' 'respect for the privacy, rights, and equal access,' and 'inclusion, integration, and full participation of the individuals.'"[267] This ties together many of the facets of dignity that the Court has mentioned throughout its individual rights and federalism cases. It is all about autonomy: laws or customs made by oneself, not surrendering to anyone else's policy.[268] This is a distinctly American conception of dignity.

CONCLUSION

I have argued in this article that human dignity may be an important constitutional value in America if it is conceived of as a protection against surrendering control to another. While this view of dignity is consistent with many foreign cases that have understood dignity in terms of autonomy, its roots are in the Supreme Court's longstanding commitment to recognizing the dignity of institutions and other inchoate things. Understanding dignity in this way may be a helpful way of giving content to an important but insufficiently theorized constitutional value.

This argument does not resolve all the questions surrounding the right to dignity. In particular, it is consistent both with Justice Breyer's view in *Edwards* that the state has a role in promoting and supporting the exercise of the right to dignity as well as with Justice Scalia's view to the contrary.[269] Nor does it solve the question of consent, which has dogged the court in its federalism cases and will do so in its individual dignity cases in the

266. "During the past thirty-five years, the Court has typically reversed lower court decisions favoring the poor. These rulings reflect that, constitutionally speaking, the state need not take affirmative steps to protect and preserve human dignity." Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 786 (2006) (citation omitted).

267. *Olmstead v. L. C. ex rel Zimring*, 527 U.S. 581, 622 (1999) (Thomas, J., dissenting).

268. It may need to be reiterated that however it is used, dignity is never an absolute right. Like other fundamental rights, it may warrant strict scrutiny or some kind of weighted proportionality test, but it cannot be said that the individual's right to resist surrendering her own destiny to the state or to others invariably trumps the state's or the others' interests.

269. *See Edwards*, 554 U.S. at 170-78, *see also id*. at 186-87 (Scalia, J., dissenting).

future.[270] Nor does it resolve the inevitable tension when one form of dignity (or one's claim to dignity) conflicts with another, as in the speech cases.[271] Perhaps the primary value of recognizing dignity as a constitutional value is not that it resolves specific cases, but that it focuses judicial attention on the important issues.[272] Just as the turn to dignity in Canadian equality jurisprudence has helped give substance, and not just form, to the concept of equality,[273] incorporating the requirement of human dignity into American constitutional law might encourage jurists to consider not only whether a particular law violates the text or original intent of the Constitution's language, but the impact it has on a person's human dignity.

270. See *supra* notes 13-15. For a vivid discussion of the problem of consent in the context of an autonomy-based understanding of dignity, see Vera Bergelson, *The 2008 David J. Stoffer Lecture: Autonomy, Dignity, and Consent to Harm*, 60 RUTGERS L. REV. 723 (2008).

271. *See also Gonzales v. Carhart*, 550 U.S. 124 (2007). This was a recent abortion case wherein the Court refers to dignity twice: once in the majority opinion, citing the Partial Birth Abortion Ban Act of 2003's reference to the dignity of human life, *id*. at 157, and once in the dissent, citing *Casey*, *id*. at 170 (Ginsburg, J., dissenting). *Cf.* Stenberg v. Carhart, 530 U.S. 914, 920 (2000) ("Other millions fear that a law that forbids abortion would condemn many American women to lives that lack dignity, depriving them of equal liberty and leading those with least resources to undergo illegal abortions with the attendant risks of death and suffering.").

272. *See, e.g.*, Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REFORM 201 (1987-1988); Christopher A. Bracey, *Dignity in Race Jurisprudence*, 7 U. PA. J. CONST. L. 669, 705-10 (2005).

273. *See* Denise G. Reaume, *Discrimination and Dignity*, 63 LA. L. REV. 645 (2003).