ARTICLE

THE JURISPRUDENCE OF DIGNITY

LESLIE MELTZER HENRY[†]

Few words play a more central role in modern constitutional law without appearing in the Constitution than "dignity." The term appears in more than nine hundred Supreme Court opinions, but despite its popularity, dignity is a concept in disarray. Its meanings and functions are commonly presupposed but rarely articulated. The result is a cacophony of uses so confusing that some critics argue the word ought to be abandoned altogether.

This Article fills a void in the literature by offering the first empirical study of Supreme Court opinions that invoke dignity and then proposing a typology of dignity based on an analysis of how the term is used in those opinions. The study reveals three important findings. First, the Court's reliance on dignity is increasing, and the Roberts Court is accelerating that trend. Second, in contrast to its past use, dignity is now as likely to be invoked by the more conservative Justices on the Court as by their more liberal counterparts. Finally, the study demonstrates that dignity is not one concept, as other scholars have theorized, but rather five related concepts.

The typology refers to these conceptions of dignity as institutional status as dignity, equality as dignity, liberty as dignity, personal integrity as dignity, *and* collective virtue as dignity. *This Article traces each type of dignity*

[†] Assistant Professor of Law, University of Maryland Francis King Carey School of Law; Associate Faculty, Johns Hopkins Berman Institute of Bioethics. J.D., Yale Law School; M.Sc., University of Oxford; B.A., University of Virginia. I am grateful to Anita Allen, Richard Boldt, James Childress, Danielle Keats Citron, Peter Danchin, Martha Ertman, George Fisher, Donald Gifford, Mark Graber, Deborah Hellman, Bill Richman, Max Stearns, David Super, and Greg Young for their thoughtful comments at various stages of this project, and to Kristin Lane for her indispensible assistance with the statistical material. I thank Anne Blackfield, Jennifer Cohen, Lauren Elfner, Diana Kugel, Nikola Nable-Juris, and Rebecca Spence for their excellent research assistance and Susan McCarty and Susan Herrick for their terrific library support.

to its epistemic origins and describes the substantive dignitary interests each protects. Importantly, the typology offers more than a clarification of the conceptual chaos surrounding dignity. It provides tools to track the Court's use of different types of dignity over time. This permits us to detect doctrinally transformative moments, in such areas as state sovereign immunity and abortion jurisprudence, that arise from shifting conceptions of dignity.

INTRODUCTION

Justice William J. Brennan, Jr., frequently emphasized that the fundamental value at the crux of American law is "the constitutional ideal of human dignity."[1] He believed that the Constitution, and particularly the Bill of Rights, expressed a "bold commitment by a people to the ideal of dignity protected through law."[2] Perhaps to give doctrinal heft to a word that appears nowhere in the Constitution, Justice Brennan invoked "dignity" in an astounding thirty-nine opinions during his tenure on the Court.[3] Despite the breadth of cases to which he applied the term,[4] Brennan's tireless efforts to advance a legal notion of dignity often were discounted either because the term appeared in his dissenting opinions,[5] or because when dignity appeared in the majority opinions Brennan authored, his opinions represented the "liberal wing" of the Court's jurisprudence.[6]

After a brief period of hibernation during the Burger and Rehnquist Courts, the use of dignity is once again on the rise. The Roberts Court has issued opinions that invoke dignity in thirty-four cases,[7] nearly half of those in the last two Terms alone.[8] We would be mista-

---

[1] Bernard Schwartz, *How Justice Brennan Changed America*, *in* REASON AND PASSION: JUSTICE BRENNAN'S ENDURING INFLUENCE 31, 41 (E. Joshua Rosenkranz & Bernard Schwartz eds., 1997); *see also In Search of the Constitution: Mr. Justice Brennan* (PBS television broadcast Apr. 16, 1987) (interview by Bill Moyers) (highlighting in an interview with Justice Brennan the importance of human dignity in constitutional jurisprudence).

[2] William J. Brennan, Jr., *My Life on the Court*, *in* REASON AND PASSION, *supra* note 1, at 17, 18.

[3] For a list of these opinions, see *infra* Appendix Tables 1a-1c. Several footnotes throughout this Article refer the reader to the Appendix, which includes tables listing cases. These cases have been culled from the Supreme Court Dignity Database, a database I created that includes all Supreme Court opinions invoking the word "dignity." After analyzing the use of dignity in each opinion, I created the typology and categorized the various uses accordingly. For each use of dignity, the database also tracks the Justice invoking the term; whether the opinion is a majority, dissent, or concurrence; the subject matter of the case; and the Court's final vote.

[4] *See, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 625 (1984) (finding that sex discrimination "deprives persons of their individual dignity"); Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (explaining that "from its founding" the United States has attempted "to foster the dignity and well-being of all persons within its borders," particularly the poor); Schmerber v. California, 384 U.S. 757, 767 (1966) (noting that the purpose of the Fourth Amendment "is to protect personal privacy and dignity").

[5] Fewer than one-third of Justice Brennan's invocations of dignity appear in majority opinions. *See infra* Appendix Table 1a.

[6] Schwartz, *supra* note 1, at 31.

[7] For a list of these cases, see *infra* Appendix Table 2.

[8] In the 2009 and 2010 Terms, Justices on the Court invoked dignity in sixteen cases. *See id.*

ken, however, to see this as a reascendance of Justice Brennan's "dignity." To the contrary, dignity is now more likely to appear in majority than in dissenting opinions,[9] and as likely to be invoked by Justice Scalia as by Justice Ginsburg.[10]

Dignity's increasing popularity,[11] however, does not signal agreement about what the term means. Instead, its importance, meaning, and function are commonly presupposed but rarely articulated. As a result, contrasting views about dignity's definition, usefulness, and ultimate purpose have emerged.[12]

For some commentators, dignity is nothing less than "the premier value underlying the last two centuries of moral and political thought,"[13] an essential "basis of human rights,"[14] and one of "those very great political values that define our constitutional morality."[15] Like Justice Brennan, legal theorist Ronald Dworkin has declared that "the principles of human dignity . . . are embodied in the Constitution and are now common ground in America."[16]

Indeed, few concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution.[17] The Supreme Court has invoked the term in connection with the

---

[9] *Compare infra* Figure 2 (showing that roughly three percent of dissenting opinions currently invoke dignity), *with infra* Figure 3 (demonstrating that nearly four percent of majority opinions currently invoke dignity).

[10] Since Justice Ginsburg joined the Court in 1993, she and Justice Scalia have each authored eleven opinions that invoke dignity.

[11] *See infra* Figure 1.

[12] *See, e.g.*, Leslie A. Meltzer, Book Review, 359 NEW ENG. J. MED. 660, 660-61 (2008) (reviewing HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS (2008)) (critiquing a collection of essays on dignity and calling for a less ideologically driven approach to defining dignity).

[13] Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 145, 145 (Michael J. Meyer & William A. Parent eds., 1992).

[14] Alan Gewirth, *Human Dignity as the Basis of Rights*, *in* THE CONSTITUTION OF RIGHTS, *supra* note 13, at 10, 28.

[15] William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS, *supra* note 13, at 47, 71.

[16] Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS, Sept. 21, 2006, at 24, 26; *see also* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 191-218, 255-75 (2011) (exploring the meaning of dignity).

[17] The Court invokes privacy frequently, but unlike its use of dignity, the Court has determined that the Constitution affirmatively protects a right of privacy. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding a right to marital privacy). Moreover, the privacy right established in *Griswold* has been extended by numerous Supreme Court cases, including *Roe v. Wade*, 410 U.S. 113, 153 (1973), wherein the Court held that the right to privacy encompassed the right to an abortion.

First,[18] Fourth,[19] Fifth,[20] Sixth,[21] Eighth,[22] Ninth,[23] Eleventh,[24] Fourteenth,[25] and Fifteenth Amendments.[26]

---

[18] *See, e.g.*, Cohen v. California, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116, 123 (1991) (holding a "Son of Sam" law unconstitutional as burdening speech based on subject matter and quoting *Cohen* to show that governmental restraint of free speech in the political arena is incompatible with individual dignity); Leathers v. Medlock, 499 U.S. 439, 448-49 (1991) (quoting *Cohen* for the proposition that dignity is at the root of First Amendment protections); *cf.* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757-58 (1985) (weighing First Amendment expression against the "essential dignity" of all persons to protect their reputation (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974))).

[19] *See, e.g.*, Hudson v. Michigan, 547 U.S. 586, 594 (2006) (explaining that one purpose of the knock-and-announce rule is to protect "dignity that can be destroyed by a sudden entrance"); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 613-14 (1989) (stating that the Fourth Amendment "guarantees the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government"); Winston v. Lee, 470 U.S. 753, 760, 766-67 (1985) (holding that a person cannot be compelled by the state to undergo surgery to remove a bullet linked to a crime because such an act would be an unwarranted intrusion on personal dignity); Rochin v. California, 342 U.S. 165, 174 (1952) (overturning a drug conviction on the basis that the police's decision to pump the defendant's stomach against his will to acquire evidence was "offensive to human dignity"); *cf.* United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (noting that "some level of suspicion in the case of highly intrusive searches of the person" is warranted due to "dignity and privacy interests," whereas searches of vehicles do not prompt the same concerns).

[20] *See, e.g.*, Heath v. Alabama, 474 U.S. 82, 88 (1985) (finding that successive prosecutions by two states do not violate the Double Jeopardy Clause because the defendant violated the "'peace and dignity' of two sovereigns" in one act (quoting United States v. Lanza, 260 U.S. 377, 382 (1922))); Hampton v. Mow Sun Wong, 426 U.S. 88, 107 (1976) (requiring, under the Due Process Clause, that "aliens be treated with the same dignity and respect accorded to other persons"); Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[T]he constitutional foundation underlying the privilege [against self-incrimination] is the respect a government . . . must accord to the dignity and integrity of its citizens.").

[21] *See, e.g.*, Indiana v. Edwards, 554 U.S. 164, 176 (2008) ("[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 v. Wiggins, 465 U.S. 168, 176-77 (1984))); *McKaskle*, 465 U.S. at 176-77 ("The right to appear pro se exists to affirm the dignity and autonomy of the accused . . . .") (emphasis omitted)); Faretta v. California, 422 U.S. 806, 834 (1975) (affirming the right to appear pro se but stating that it "is not a license to abuse the dignity of the courtroom").

[22] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 419-20 (2008) (restricting the imposition of capital punishment to a narrow range of cases based on "[e]volving standards of decency" that "express respect for the dignity of the person"); Roper v. Simmons, 543 U.S. 551, 560 (2005) (setting aside the death sentence of a juvenile under the age of eighteen and noting that "the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons"); Hope v. Pelzer, 536 U.S. 730, 738

Other scholars and jurists, however, view dignity as a concept in crisis.[27] Philosopher Ruth Macklin considers dignity "a useless concept" because it does nothing more than offer "vague restatements

(2002) (finding that handcuffing a prisoner to a hitching post in the sun for seven hours violated the "basic concept underlying the Eighth Amendment[, which] is nothing less than the dignity of man" (alteration in original) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)) (internal quotation marks omitted)); Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (plurality opinion) (prohibiting the execution of mentally ill persons and explaining that the Eighth Amendment "protect[s] the dignity of society itself from the barbarity of exacting mindless vengeance"); Gregg v. Georgia, 428 U.S. 153, 158, 173, 207 (1976) (plurality opinion) (upholding the death penalty of an individual convicted of murder but noting that the Eighth Amendment requires penalties to be in accord with "the dignity of man" (quoting *Trop*, 356 U.S. at 100) (internal quotation marks omitted)); Furman v. Georgia, 408 U.S. 238, 285 (1972) (Brennan, J., concurring) (commenting that "the State may not inflict punishments that do not comport with human dignity" under the Eighth Amendment).

[23] *See* Griswold v. Connecticut, 381 U.S. 479, 482-83 (1965) (granting the "same dignity," or status, to privacy as it had previously given to other "peripheral rights").

[24] *See, e.g.*, Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) (describing states as having "dignity that is consistent with their status as sovereign entities"); Alden v. Maine, 527 U.S. 706, 715 (1999) (recognizing that states "retain the dignity, though not the full authority, of sovereignty").

[25] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 567, 578-79 (2003) (overturning Texas's antisodomy statute on the ground that "adults may choose" to engage in same-sex relationships and still "retain their dignity as free persons"); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 129, 142 (1994) (ruling gender-based juror exclusion criteria unconstitutional and asserting that the criteria "denigrate[] the dignity of the excluded juror"); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (characterizing "personal decisions relating to marriage, procreation, contraception, family relationships, child-rearing, and education" as "central to personal dignity and autonomy"); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion) (determining that a minority set-aside program implicates the right "to be treated with equal dignity and respect"); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("Few decisions are . . . more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy."); 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.").

[26] *See* Rice v. Cayetano, 528 U.S. 495, 517 (2000) (invalidating a Hawaiian race-based voting statute because "it demeans the dignity and worth of a person to be judged by ancestry").

[27] For a review of the main criticisms of dignity, see Gerhold K. Becker, *In Search of Humanity: Human Dignity as a Basic Moral Attitude*, *in* THE FUTURE OF VALUE INQUIRY 53, 53 (Matti Häyry & Tuija Takala eds., 2001), which describes claims that dignity is an "empty formula without precise content," a "rhetorical device," and a "conversation stopper." Similar arguments have been leveled against the concept of equality. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 547 (1982) (arguing that the rhetoric of equality should be abandoned because the principle of equality lacks content).

of . . . more precise . . . notions."[28] Law and ethics professor John Harris echoes Macklin's concern, pointing out that the word is "universally attractive" because it is "comprehensively vague."[29] Meanwhile, philosopher Helga Kuhse contends that as long as dignity is invoked by people on opposite sides of a debate[30] it is "nothing more than a shorthand expression for people's moral intuitions and feelings."[31]

Despite deep disagreement about its normative, practical, and jurisprudential value, dignity's growing presence in Supreme Court decisions has received scant attention.[32] The literature on dignity is pri-

---

[28] Ruth Macklin, *Dignity Is a Useless Concept*, 327 BMJ 1419, 1419 (2003). *But see* Suzy Killmister, *Dignity: Not Such a Useless Concept*, 36 J. MED. ETHICS 160, 160 (2010) (challenging Macklin's claim that dignity is "a useless concept" and arguing that dignity can "serve as a guiding principle in medical ethics").

[29] John Harris, *Cloning and Human Dignity*, 7 CAMBRIDGE Q. HEALTHCARE ETHICS 163, 163 (1998) (Eng.).

[30] For example, people on both sides of the debate about the morality and legality of physician-assisted suicide appeal to dignity. Daniel P. Sulmasy, *Dignity and Bioethics: History, Theory, and Selected Applications*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 469, 469 (2008). Proponents argue that individuals with prolonged suffering at the end of life experience a loss of dignity that warrants physician-assisted suicide. *See, e.g.*, Jyl Gentzler, *What Is Death with Dignity?*, 28 J. MED. & PHIL. 461, 461-80 (2003) (exploring the ways in which advocates of physician-assisted suicide invoke dignity). By contrast, opponents contend that the practice fails to properly respect the dignity of human life in every form. *See, e.g.*, Leon R. Kass, *Defending Human Dignity* (explaining that those who reject physician-assisted suicide do so because "every still-living human being, regardless of condition" has dignity), *in* HUMAN DIGNITY AND BIOETHICS, *supra* at 297, 304-05.

[31] Helga Kuhse, *Is There a Tension Between Autonomy and Dignity?*, *in* 2 BIOETHICS AND BIOLAW 61, 72 (Peter Kemp et al. eds., 2000). Echoing a similar sentiment, South African law professor and judge Dennis Davis has remarked that dignity is "a piece of jurisprudential Legoland—to be used in whatever form and shape is required by the demands of the judicial designer." D.M. Davis, *Equality: The Majesty of Legoland Jurisprudence*, 116 S. AFR. L.J. 398, 413 (1999).

[32] Most scholarship on the Court's use of dignity focuses on the doctrine of sovereign immunity. *See* Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 250-56, 265 (2000) (criticizing the Court's use of dignity in justifying state sovereign immunity and arguing instead that the Court focus on practical liability concerns to defend the doctrine); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934-54, 1960-63 (2003) (discussing how dignity has increasingly been used in reference to personal dignity and how this trend challenges the use of institutional dignity to support state sovereignty); Peter J. Smith, *States as Nations: Dignity in Cross-Doctrinal Perspective*, 89 VA. L. REV. 1, 10, 51, 106-07 (2003) (claiming that the Court's state dignity jurisprudence maintains an "implicit reliance" on the doctrine of foreign state sovereign immunity and contending that the Court should make this reliance explicit). Notable exceptions, though, do exist. *See* Gewirth, *supra* note 14, at 10, 28 (examining whether there is a right to dignity in the United States); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under* Casey/Carhart, 117 YALE L.J. 1694, 1702 (2008) (illustrating the ways in which dignity "bridges communi-

marily written by philosophers and theologians, who discuss dignity as a moral value divorced from legal application,[33] or by international and comparative law scholars, who examine dignity's role in human rights declarations and in foreign laws.[34] The prominence of dignity in American constitutional law has gone largely unanalyzed. This leaves us without a comprehensive understanding of why the Court has embraced dignity, what types of actions threaten dignity, and how the Court weighs dignity in relation to other values. Most importantly, we lack a systematic account of dignity's varied meanings against which to ponder these questions.

This Article has two related ambitions, both directed at clarifying the conceptual chaos surrounding dignity's complicated usage. The first goal is to provide an approach that captures the range of ways in

---

ties" divided by the abortion debate); Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1612-14 (2010) (defending group defamation laws for the role they play in affirming the equal dignity of persons); Jeremy Waldron, *Dignity, Rank, and Rights* 10-12, 22-29 (N.Y. Univ. Sch. of Law, Pub. Law & Legal Theory Research Paper Series Working Paper No. 09-50, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1461220# [hereinafter Waldron, *Dignity, Rank, and Rights*] (presenting a conception of dignity that views all humans as possessing high status in relation to law).

[33] Over the years, philosophers have extensively examined dignity in this context. *See generally* THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY (1992); Aurel Kolnai, *Dignity*, 51 PHILOSOPHY 251 (1976) (Eng.); Michael J. Meyer, *Dignity, Rights, and Self-Control*, 99 ETHICS 520 (1989); Michael J. Meyer, *Kant's Concept of Dignity and Modern Political Thought*, 8 HIST. EUR. IDEAS 319 (1987); Michael S. Pritchard, *Human Dignity and Justice*, 82 ETHICS 299 (1972); Herbert Spiegelberg, *Human Dignity: A Challenge to Contemporary Philosophy*, 9 PHIL. F. 39 (1971); Gloria Zúñiga, *An Ontology of Dignity*, 5 METAPHYSICA 115 (2004).

Theologians have explored the concept of dignity in great depth as well. *See generally* CATECHISM OF THE CATHOLIC CHURCH ¶¶ 1700-15 (1994); Y. Michael Barilan, *From* Imago Dei *in the Jewish-Christian Traditions to Human Dignity in Contemporary Jewish Law*, 19 KENNEDY INST. ETHICS J. 231 (2009); Doron Shultziner, *A Jewish Conception of Human Dignity: Philosophy and Its Ethical Implications for Israeli Supreme Court Decisions*, 34 J. RELIGIOUS ETHICS 663 (2006); Thomas F. Torrance, *The Goodness and Dignity of Man in the Christian Tradition*, 4 MOD. THEOLOGY 309 (1988).

[34] *See, e.g.*, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 664-67 (2008) (examining the use of dignity in national constitutions, international texts, and the charter of the United Nations); Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848-49 (1983) (identifying where international agreements contain the term dignity); James Q. Whitman, *"Human Dignity" in Europe and the United States: The Social Foundations*, 25 HUM. RTS. L.J. 17, 17-23 (2004) (comparing the U.S. conception of human dignity to that in Europe primarily through the lens of criminal laws and attributing these varying conceptions of dignity to Europeans' emphasis on societal equality); James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1160-61 (2004) (asserting that the difference between Europe and America's view of privacy is due to the varying emphasis on liberty or dignity).

which the Court invokes dignity. The second is to explore dignity's judicial function in contemporary constitutional jurisprudence.

Part I of this Article critiques existing theories of dignity and proposes an alternative, Wittgensteinian approach to conceptualizing the term. Standard accounts contend that dignity is either reducible to another concept, such as autonomy, or has a core meaning that is applicable across all contexts. Although these views are tidy and attractive, they tend to draw dignity's boundaries too narrowly or too broadly.

This Article argues against a positivistic claim to dignity's core meaning and instead contends that dignity has multiple meanings that, in Wittgenstein's words, share "family resemblances" to each other.[35] While some dignitary harms can be completely described by one type of dignity, others admit of complementary meanings. Because this heterodox approach to conceptualizing dignity begins by exploring the use of dignity in practice, rather than in the abstract, it maintains a degree of coherence absent from the standard approaches.

Part II offers a typology of dignity that explores the compendium of pluralistic values that the Court embraces when it speaks of dignity. It provides the results of the first study to examine the use of dignity in every Supreme Court case from the last 220 years in which the word appears in an opinion.[36] This research reveals that while a single concept of dignity with fixed boundaries does not exist, five different conceptions of dignity emerge that, although distinct, admit of some similarities.

Part II proceeds to set forth these conceptions of dignity, which I refer to as *institutional status as dignity*, *equality as dignity*, *liberty as dignity*, *personal integrity as dignity*, and *collective virtue as dignity*. I first trace each conception to its epistemic origins in philosophy, theology, or political theory, and articulate its central features. Then, relying on the Court's opinions, I illustrate that each conception of dignity has a particular judicial function oriented toward safeguarding substantive interests against dignitary harm. Teasing out dignity's different threads permits us to see the work that each conception of dignity is performing for the Court. It also demonstrates why viewing dignity as only a "liberal" or "egalitarian" value is cramped and stultifying. In contrast, the typology I propose provides the tools to evaluate what is normatively

---

[35] LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 66 (G.E.M. Anscombe trans., 3d ed. 1968).

[36] The dataset for this project includes signed and per curiam opinions.

and doctrinally at stake in a variety of contexts[37] and equips us with a framework for future discussions.

I. A NOTE ON METHODOLOGY

This project will raise eyebrows among "dignity skeptics," those who fear the term is useless, and "antidignitarians," who are certain that it is. They are understandably wary of more "dignity talk."[38] But even if they recoiled as former President George W. Bush vaguely referred to "the non-negotiable demands of human dignity," in his second State of the Union Address,[39] or as former President Bill Clinton repeatedly emphasized the universal value of human dignity in his weekly radio addresses,[40] they cannot claim that the Supreme Court's reliance on dignity is inconsequential.

In the last 220 years, Supreme Court Justices have invoked the term in more than nine hundred opinions.[41] The Justices issued nearly half of these opinions after 1946,[42] when the phrase "human dignity" first appeared in an opinion,[43] with more than one hundred opi-

---

[37] For example, as discussed in subsection II.A.2, the Court's increasing use of institutional status as dignity connects with the expansion of state sovereign immunity doctrine. For a further example, see *infra* subsection II.E.2, which argues that the Court's recent emphasis in its abortion jurisprudence on collective virtue as dignity—in lieu of liberty as dignity—signals its growing willingness to take a more normative, and less doctrinal, approach to abortion regulation.

[38] *Cf.* MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 171-83 (1991) (asserting that the tendency in political debates to frame issues in terms of rights diverts political and legal discourse away from meaningful dialogue about responsibility and community).

[39] Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 135 (Jan. 29, 2002).

[40] *See, e.g.*, The President's Radio Address, 1 PUB. PAPERS 971 (May 21, 1994) (describing Social Security as a mechanism for allowing older Americans to "face retirement in old age with dignity"); The President's Radio Address, 1 PUB. PAPERS 569 (Apr. 2, 1994) (remembering Martin Luther King, Jr. for giving every American the "right to live and work in dignity"); The President's Radio Address, 1 PUB. PAPERS 556 (Mar. 26, 1994) ("[H]ealth care reform is about . . . bestowing dignity . . . ."); The President's Radio Address, 2 PUB. PAPERS 2205 (Dec. 25, 1993) ("When we restore dignity and security of work for all people, we'll go a long way toward restoring the fabric of life in all our communities."); The President's Radio Address, 2 PUB. PAPERS 1348 (Aug. 7, 1993) ("We want to end welfare . . . [to] restore dignity to millions . . . .").

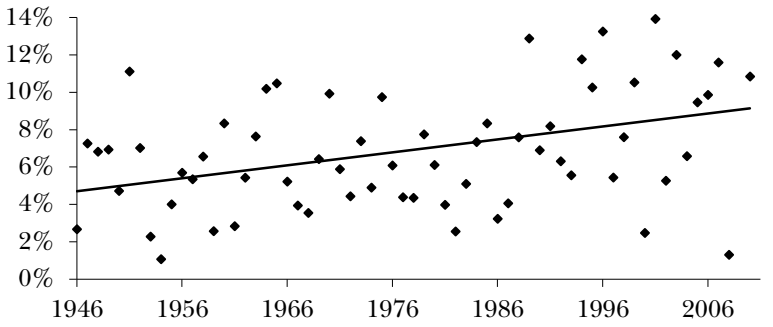
[41] At the time of writing, a Westlaw search for "dignity" returned 926 Supreme Court cases in which at least one opinion invoked dignity.

[42] At the time of writing, a Westlaw search for "dignity" returned 425 Supreme Court cases after 1946 in which at least one opinion invoked dignity.

[43] *See In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) ("If we are ever to develop an orderly international community based upon a recognition of human dig-

nions authored in the last twenty years alone.[44] As Figure 1 illustrates, the percentage of Supreme Court cases that invoke dignity per Term is increasing at a statistically significant rate (two-tailed p-value = 0.001), and the Roberts Court appears prepared not only to continue, but also to accelerate, this trend.[45]

Figure 1: Percentage of Supreme Court Opinions That Invoke Dignity per Court Term[46]



Notably, while the use of dignity in dissenting opinions has remained relatively stable during the last sixty-five years (Figure 2), the Court's reliance on dignity in majority opinions is increasing at a statistically significant rate (two-tailed p-value = 0.004) (Figure 3).

---

nity 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.").

[44] At the time of writing, a Westlaw search for "dignity" returned 109 Supreme Court cases after 1991 in which at least one opinion invoked dignity.

[45] Since Chief Justice Roberts took office in 2005, the Court has issued thirty-four opinions that invoke dignity, nearly half of them during the last two Terms alone. S*ee infra* Appendix Table 2.

[46] There is a statistically significant, positive relationship between Court Term and the percentage of opinions that use dignity ($r = 0.40$, $p = 0.001$). In other words, Court Term explains approximately sixteen percent of the variance in the percentage of opinions that use dignity, and an approximately one-in-one-thousand chance exists that these results would have been obtained if no relationship between Court Term and use of dignity existed. Figure 1 includes majority, concurring, and dissenting opinions.

Figure 2: Percentage of Dissenting Opinions That Invoke Dignity per Court Term[47]

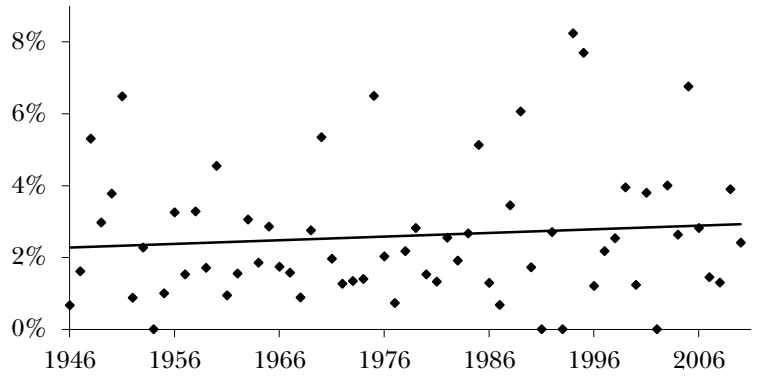
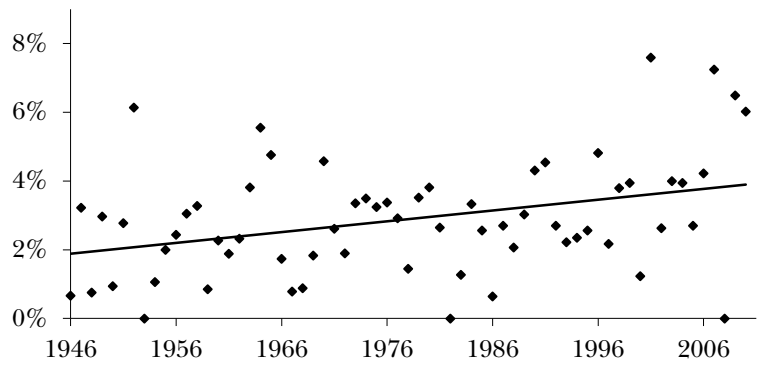


Figure 3: Percentage of Majority Opinions That Invoke Dignity per Court Term[48]



[47] In contrast to Figures 1 and 3, there is not a statistically significant increase in the appearance of dignity in the Court's dissenting opinions ($r = 0.10$, $p = 0.42$). The use of dignity in the Court's dissenting opinions has remained fairly flat during the time measured. The results controlled for the number of cases in which the Court issued an opinion per Term.

[48] There is a statistically significant, positive relationship between Court Term and the percentage of majority opinions that use dignity ($r = 0.35$, $p = 0.004$). In other words, Court Term explains approximately twelve percent of the variance in the percentage of majority opinions that use dignity, and there is less than a four-in-one-thousand chance that these results would have been obtained if no relationship between Court Term and use of dignity existed. The results controlled for the number of cases in which the Court issued an opinion per term.

Although the Court's frequent invocation of a word does not always signal increasing jurisprudential reliance on the underlying term, I argue that in this instance, the correlation holds. The Court's repeated appeals to dignity, particularly in majority opinions, appear to parallel its greater willingness to proffer dignity as a substantive value animating our constitutional rights. The Court has declared, for example, that the "overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State";[49] that dignity is "the constitutional foundation underlying" the Fifth Amendment privilege against self-incrimination;[50] that the "basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man'";[51] and that "choices central to personal dignity and autonomy . . . are central to the liberty protected by the Fourteenth Amendment."[52]

To be sure, dignity skeptics and antidignitarians can claim the word is overused and underspecified, but it is a serious mistake to ignore altogether the Court's increasing reliance on the term, because the Justices' invocation of dignity can signal a doctrinally transformative moment.[53] The question, then, is how do we understand the Court's use of dignity? And to the extent that its view of dignity is intertwined with constitutional rights, what exactly is the Court protecting when it recognizes the value of dignity?

A. *Reductionism and Essentialism: Deficiencies of the Standard Approach*

There have been few attempts to conceptualize dignity, and even fewer efforts to do so in the context of American law.[54] The theorists who have undertaken this task tend to take approaches I describe as either reductionist or essentialist.

The reductionists contend that dignity's features are so well aligned with some other concept that dignity is in fact reducible to

---

[49] Winston v. Lee, 470 U.S. 753, 760 (1985) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)).

[50] Miranda v. Arizona, 384 U.S. 436, 460 (1966).

[51] Hope v. Pelzer, 536 U.S. 730, 738 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)).

[52] Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion)).

[53] For example, see *infra* subsections II.A.2 and II.E.2, which illustrate dignity's role in the evolution of the Court's sovereign immunity doctrine and abortion jurisprudence, respectively.

[54] *See supra* note 32.

that concept. For example, philosopher Ruth Macklin famously claimed that "dignity seems to mean nothing other than respect for autonomy."[55] Since autonomy is already a respected societal value, Macklin argues that dignity, as used in medical ethics, "can be eliminated without any loss of content."[56] Likewise, psychologist Steven Pinker has stated that "[w]hen the concept of dignity is precisely specified, . . . ultimately it's just another application of the principle of autonomy" because "it amounts to treating people in the way that they wish to be treated."[57]

Essentialists, by contrast, begin by asking which features of dignity differentiate it from other concepts. They aim to distill dignity's meaning down to its fundamental core by searching for the root or basic meaning of dignity. In this vein, philosopher William Parent has argued that the essential value of dignity is "a negative moral right not to be regarded or treated with unjust personal disparagement."[58] Similarly, international law scholar Christopher McCrudden has proposed a "minimum core" of dignity, which recognizes that "every human being possesses an intrinsic worth[,] . . . that this intrinsic worth should be recognized and respected by others, and [that] some forms of treatment by others are inconsistent with, or required by, respect for this intrinsic worth."[59]

Though initially appealing for their apparent logic and coherency, the reductionist and essentialist approaches are problematic. First, they are unable to capture and explain the inconsistencies and nuances that pervade our thinking and speaking about dignity. Consider, for example, the following nonlegal ways in which we employ the term.

---

[55] Macklin, *supra* note 28, at 1419.

[56] *Id.* at 1420.

[57] Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC, May 28, 2008, at 28, 31.

[58] Parent, *supra* note 15, at 62.

[59] McCrudden, *supra* note 34, at 679.

Table 1: Nonlegal Uses of the Term "Dignity"

A	Dignity is inherent in every person.[60]
A'	Some people are more dignified than others.[61]
B	Dignity is an inviolable trait that can be affronted, but not diminished or destroyed.[62]
B'	Some acts can diminish or destroy dignity.[63]
C	Dignity is a human trait.[64]
C'	Dignity is possessed by *non*-human entities.[65]
D	Dignity is a matter of self-respect.[66]
D'	Dignity is dependent on respect by others.[67]

A reductionist view of dignity cannot account for the nuanced applications of the term. If dignity is reduced to autonomy, as Macklin contends, then the claim that dignity is inherent in all humans (claim A) falls flat because some people, such as infants and mentally disabled individuals, do not have rational capacities.[68] Nor does the re-

[60] *See, e.g.*, Sulmasy, *supra* note 30, at 473 ("Intrinsic dignity is the value that human beings have simply by virtue of the fact that they are human beings.").

[61] *See, e.g.*, Holmes Rolston III, *Human Uniqueness and Human Dignity: Persons in Nature and the Nature of Persons* (noting that dignity is a "relative concept" in that "[s]ome behaviors are more dignified than others"), *in* HUMAN DIGNITY AND BIOETHICS, *supra* note 30, at 129, 147.

[62] *See, e.g.*, Peter Augustine Lawler, *Modern and American Dignity* (positing that dignity "depends upon natural gifts, gifts that we can misuse or distort but not destroy"), *in* HUMAN DIGNITY AND BIOETHICS, *supra* note 30, at 229, 250.

[63] *See, e.g.*, Richard E. Ashcroft, *Making Sense of Dignity*, 31 J. MED. ETHICS 679, 679 (2005) (explaining that torture is often designed to destroy a torture victim's dignity).

[64] *See, e.g.*, Rolston, *supra* note 61, at 147 (stating that "[a]ll humans have [dignity]").

[65] *Cf.* Sara Elizabeth Gavrell Ortiz, *Beyond Welfare: Animal Integrity, Animal Dignity, and Genetic Engineering*, 9 ETHICS & ENV'T 94, 96 (2004) (acknowledging the argument that genetically reducing the capacities of animals infringes upon their dignity).

[66] *See, e.g.*, Martha Nussbaum, *Human Dignity and Political Entitlements* (arguing that "[h]aving the social bases of self-respect and non-humiliation" are "necessary conditions of a life worthy of human dignity"), *in* HUMAN DIGNITY AND BIOETHICS, *supra* note 30, at 351, 351, 378.

[67] *See, e.g.*, Sulmasy, *supra* note 30, at 473 (noting that dignity can be conferred upon others by placing worth on particular characteristics or attributes).

[68] Similarly, the reductionist view of dignity does not account for why we ascribe dignity to *non*-human entities, such as redwood trees, that clearly lack rationality (claim C'). *See* Nick Bostrom, *Dignity and Enhancement* (contending that dignity "is not necessarily confined to human beings" and sharing a quote from the author John Steinbeck which

ductionist approach cohere with our general view that others can diminish or destroy a person's dignity by disrespecting, demeaning, or degrading them (claim B'), even if the person does not have the ability to exercise autonomy. On the flip side, equating dignity with autonomy does not address situations where individuals make choices that demonstrate so little self-respect that we view their conduct as undignified (claim D). Although the reductionist approach correctly recognizes that dignity overlaps with particular concepts like autonomy, it ignores other aspects of the human experience that a richer conception of dignity would take into account.

Insofar as essentialist approaches define dignity by its most basic and consistent elements, they too fail to explain its more complicated and opposing features. For example, theories of dignity rooted in the intrinsic value of every person (claim A) do not shed light on why society considers some people more dignified than others (claim A'). Nor do these concepts of dignity explain whether disrespectful acts are dignity destroying and diminishing (claim B'), or merely dignity offending (claim B).

Second, reductionist and essentialist approaches tend to draw dignity's boundaries either too narrowly or too broadly. Consider the following activities and ideas that the Supreme Court has found to be antithetical to, or incompatible with, dignity:

1. Subjecting states or state actors to lawsuits by private parties;[69]
2. Voting laws that discriminate on the basis of race;[70]
3. Content-based restrictions on free speech;[71]
4. Regulations that interfere with a woman's decision to end her pregnancy;[72]

---

captures dignity as an attribute of redwood trees), *in* HUMAN DIGNITY AND BIOETHICS, *supra* note 30, at 173, 198.

[69] *See* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."); 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.").

[70] *See* Rice v. Cayetano, 528 U.S. 495, 517 (2000) ("One of the principal reasons race is treated as a forbidden classification is because it demeans the dignity and worth of a person to be judged by ancestry . . . .").

[71] *See* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (noting that the First Amendment's approach to protecting speech comports "'with the premise of individual dignity and choice upon which our political system rests'" (quoting Leathers v. Medlock, 499 U.S. 439, 448-49 (1991))).

5. Permitting a mentally incapacitated defendant to represent himself at trial;[73]
6. Forcefully pumping a person's stomach to collect evidence of illegal drug possession;[74]
7. Executing juveniles or people who are mentally incapacitated;[75]
8. Partial-birth abortion.[76]

A reductionist view is too narrow to fully account for the Court's decisions. For example, if dignity is simply a placeholder for autonomy, then we can explain the Court's use of dignity in cases 3 and 4, and partly account for its decision in case 6; however, in the remaining cases, autonomy does not animate the Court's decision or its use of dignity.

Some essentialist approaches also draw the concept of dignity too narrowly. Even if we generously apply Parent's view—that people have a "right not to be regarded or treated with unjust personal disparagement"[77]—it does not cover case 1 (which involves the dignity of a nonhuman entity), case 3 (which involves the protection of a positive rather than a negative right), or case 5 (which involves an individual potentially disparaging himself). Like Macklin's concept of dignity, Parent's view of dignity applies only to certain persons or particular problems. Consequently, some people are prevented from vindicating their dignitary claims, while others face uncertain or uneven redress.

McCrudden's "minimum core"[78] suffers from the opposite ailment. The concept could conceivably encompass all of the cases

---

[72] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (describing family-planning and child-rearing decisions as "central to personal dignity and autonomy" and thus protected under the Fourteenth Amendment).

[73] *See* Indiana v. Edwards, 554 U.S. 164, 176 (2008) (noting that if a defendant "who lacks the mental capacity to conduct his defense without the assistance of counsel" is allowed to represent himself, the resulting "spectacle . . . is at least as likely to prove humiliating as ennobling" and will not "'affirm the dignity'" of such a defendant (quoting McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984))).

[74] *See* Rochin v. California, 342 U.S. 165, 174 (1952) (characterizing the forced pumping of a person's stomach as "brutal and . . . offensive to human dignity").

[75] *See* Roper v. Simmons, 543 U.S. 551, 560, 578 (2005) (declaring that the execution of juveniles violates the Eighth Amendment, which "reaffirms the duty of the government to respect the dignity of all persons"); Ford v. Wainwright, 477 U.S. 399, 401, 406 (1986) (holding that the execution of mentally incapacitated individuals is unconstitutional due to the Eighth Amendment's protection of "fundamental human dignity").

[76] *See* Gonzales v. Carhart, 550 U.S. 124, 157 (2007) (upholding the Federal Partial-Birth Abortion Ban Act and describing the statute as "express[ing] respect for the dignity of human life").

[77] Parent, *supra* note 15, at 62.

[78] McCrudden, *supra* note 34, at 679-80.

listed above (with the exception of case 1). While his work addresses the use of dignity in the context of international human rights and not American judicial opinions, the notion that dignity is about humans treating each other in a manner consistent with their intrinsic worth could be viewed as protean in any setting. Without further explication of what types of treatment violate intrinsic human worth, this essentialist conception of dignity does not give sufficient guidance to address the complexities of actual cases.

Standard approaches to conceptualizing dignity may be the very reason that dignity skeptics and antidignitarians have long opposed the word. Although reductionist and essentialist conceptions highlight some aspects of dignity, by suggesting either that dignity is a placeholder for other concepts or a discrete and universal value across all contexts, these approaches promise too much and deliver too little.

B. *Reconceptualizing Dignity: A Wittgensteinian Approach*

Typical approaches to conceptualizing dignity "fall[] short" in large part because they are overly bounded.[79] They draw clear lines around dignity to demonstrate either that it is the same as another concept (e.g., autonomy)[80] or that it is distinct from all other concepts.[81] In imposing such boundaries, dignity becomes either too exclusive or too inclusive. The result is that the law either ignores relevant dignitary problems or lacks the specific tools to recognize and resolve such problems. At the very least, the law cannot distinguish dignitary concerns from others that touch our humanity.

In contrast to these approaches, I propose a new method of conceptualizing dignity that draws on philosopher Ludwig Wittgenstein's view that sharp definitions of words in natural languages often distort their meaning.[82] Wittgenstein rejected the view that a word has an essential, core meaning that applies to all uses of the word. Instead, he claimed that "the meaning of a word is its use in the language,"[83] not an abstract link between the word and what it signifies. To determine

---

[79] HANS-GEORG GADAMER, TRUTH AND METHOD 300 (John Weinsheimer & Donald G. Marshall trans., Continuum 2d rev. ed. 2004) (1960).

[80] *See supra* notes 55-57 and accompanying text.

[81] *See supra* notes 58-59 and accompanying text.

[82] Wittgenstein's linguistic theory differentiates natural languages, like English, from purely referential languages, like geometry. WITTGENSTEIN, *supra* note 35, ¶ 91. In geometry, words can have fixed, core meanings. A "circle," for example, is a set of co-planar points equidistant from a single point.

[83] *Id.* ¶ 43.

a word's meaning and function, Wittgenstein famously wrote, "[D]on't think but look!"[84]

Wittgenstein's insight occasionally appears in Supreme Court opinions. For example, in *Guaranty Trust Co. v. York*, Justice Frankfurter adopts something like it to reject an essentialist analysis of the substance/procedure distinction:

> Matters of "substance" and matters of "procedure" are much talked about in the books as though they defined a great divide cutting across the whole domain of law. But, of course, "substance" and "procedure" are the same keywords to very different problems. Neither . . . represents the same invariants. Each implies different variables depending upon the particular problem for which it is used. And the different problems are only distantly related at best . . . .[85]

By and large, however, lawyers tend to be semantic essentialists, perhaps because of their early indoctrination into the concept of the "elements" (individually necessary and jointly sufficient conditions) of a crime or tort. Rejecting semantic essentialism, though, can yield dividends even in the law.

Once we abandon the purely referential notion that the meaning of a word is fixed and uniform, and turn to its actual use in language, we begin to see—as Wittgenstein and Frankfurter did—that the same word often has different meanings in different contexts. Consider the word "game," Wittgenstein's primary example. There is not a single definition that tells us what counts as a game and what does not. If you consider "board-games, card-games, ball-games, Olympic games, and so on . . . you will not see something that is common to *all*, but similarities, relationships, and a whole series of them at that."[86] Wittgenstein calls the similarities between different kinds of games a "family resemblance."[87] The absence of a single family-defining characteristic does not prevent us from observing that family members resemble each

---

[84] *Id.* ¶ 66.

[85] 326 U.S. 99, 108 (1945) (citation omitted). I am grateful to Bill Richman for drawing my attention to Justice Frankfurter's opinion in this case.

[86] WITTGENSTEIN, *supra* note 35, ¶ 66. There are "many common features," *id.*, between chess and the children's game "Go Fish"—both involve rules and include an element of winning or losing—but there are also key differences. Chess involves skill; "Go Fish" arguably does not. "Go Fish" is amusing; chess arguably is not. As my colleague Max Stearns rightly pointed out to me, one might also consider "game theory," which unlike the other examples, does not include any sense of recreation or fun. The game of "chicken," for instance, is anxiety provoking and deadly.

[87] *Id.* ¶ 67.

other.[88] The same is true of words like "game" that operate in a multiplicity of ways but nevertheless retain a resemblance to each other.

Wittgenstein's understanding of language importantly demonstrates that standard approaches to conceptualizing dignity, which search only for its "necessary and sufficient" features, risk distorting or circumscribing the word's meaning. Rather than seeking exact definitions with clear and rigid boundaries, he implores us to conceptualize words by exploring the "overlapping and criss-crossing" meanings they have in practice.[89] To conceptualize dignity, we therefore must observe how the word is employed in our discourse.

The Supreme Court's published opinions are a rich resource for this enterprise because they document how a politically and religiously diverse group of Justices has invoked dignity in a variety of circumstances over time. The conceptualization of dignity that I set forth is the result of examining the various ways in which Supreme Court Justices have invoked dignity in their opinions, with particular attention to the years since 1946, when the word "human dignity" first appeared in an opinion.[90] It is attentive to the contexts in which the term has arisen and the variety of meanings the Court has ascribed to dignity.

This approach views dignity not as a concept, but as many conceptions. Dignity is not a fixed category, but rather a series of meanings that share a Wittgensteinian family resemblance. The types of dignity I discerned from examining the Court's opinions are as distinct as individual family members are unique, but like siblings, they have overlapping characteristics. In contrast to the standard approach to conceptualizing dignity, these types cannot be combined to form a Venn diagram with an unchanging central core. The types are context sensitive, and an overlap that appears in one situation may not appear in another.

One can imagine an objection to the proposed approach on the grounds that its vision is too contingent to serve as a long-term tem-

---

[88] Members of a family may share certain features such as eye color or build, but the family is not defined by any single characteristic.

[89] WITTGENSTEIN, *supra* note 35, ¶ 66.

[90] *See In re* Yamashita, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting). The year 1946 also serves as a useful benchmark because it closely correlates with the end of World War II, after which many foreign countries incorporated the word "dignity" into their national constitutions, and the United Nations placed respect for human dignity at the core of the Universal Declaration of Human Rights. *See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBL. I, art. 1(1) (Ger.) (stating that "human dignity shall be inviolable" under German law); Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 1 (Dec. 10, 1948) (stating that "[a]ll humans are born free and equal in dignity and rights").

plate for addressing dignity issues because it derives dignity's meanings from experience, context, and usage. To the contrary, one advantage of the proposed approach lies in its flexibility. As law professor Daniel Solove explains in his ongoing efforts to conceptualize privacy, the theory I put forth here

> is but a snapshot of one point in an ongoing evolutionary process. Theories are not lifeless pristine abstractions but organic and dynamic beings. They are meant to live, breathe, and grow . . . [as well as] be tested, doubted, criticized, amended, supported, and reinterpreted. Theories, in short, are not meant to be the final word, but a new chapter in an ongoing conversation.[91]

A context-driven view of dignity develops with societal change; it does not hold society to static meanings, but rather is responsive to evolving attitudes, structures, and beliefs. Moreover, it recognizes that understanding is, to use Hans-Georg Gadamer's words, "a historically effected event."[92] Temporal, cultural, political, and technological changes can create new dignity issues and even erase old ones. Dignity, therefore, cannot be defined in a permanent way, but must instead remain open to revision.

Critics also may argue that dignity's fluidity makes it incoherent; that because it applies in multiple contexts to address a plurality of problems, it lacks the consistency that makes unified, standard definitions of dignity so attractive. But traditional approaches to conceptualizing dignity have proven unable to address the distinct but related issues that we use dignity to describe.[93] By jettisoning universal notions of dignity in favor of particularized types, we can speak about dignity more clearly. The proposed typology provides a more coherent framework against which to contemplate discrete legal issues precisely because it was created contextually, not abstractly.

II. FIVE CONCEPTIONS OF DIGNITY

When we move away from a vague notion of dignity and toward the more specific contexts in which dignity issues arise, five conceptions of dignity appear in the dataset. I refer to these as *institutional*

---

[91] DANIEL J. SOLOVE, UNDERSTANDING PRIVACY, at ix (2008); *see also* Danielle Keats Citron & Leslie Meltzer Henry, *Visionary Pragmatism and the Value of Privacy in the Twenty-First Century*, 108 MICH. L. REV. 1107, 1109-10 (2010) (reviewing *id.*) (embracing Solove's pluralistic vision of privacy, rejecting the "quest for a singular essence of privacy" as a "dead end," and suggesting revisions to Solove's approach).

[92] GADAMER, *supra* note 79, at 299.

[93] *See supra* Section I.A.

status as dignity, *equality as dignity*, *liberty as dignity*, *personal integrity as dignity*, and *collective virtue as dignity*. Each type has a distinct epistemic story that elucidates its philosophical, religious, or political underpinnings. I connect the origins of each type of dignity to its modern-day central features and then link each type back to Supreme Court opinions that invoke the term.

In so doing, I suggest that dignity's primary judicial function is to give weight to substantive interests that are implicated in specific contexts. For instance, the Court invokes *institutional status as dignity* to give heightened respect to U.S. states in sovereign immunity cases; *equality as dignity* to justify its antidiscrimination jurisprudence; *liberty as dignity* to protect individuals' personal choices with regard to abortion and same-sex sodomy; *personal integrity as dignity* to safeguard people's reputations and bodies from disgraceful or humiliating intrusions; and *collective virtue as dignity* to advance notions of a decent society in contexts as diverse as the death penalty and partial-birth abortion. As this Part demonstrates, each type of dignity is associated with a legal interest the Court deems valuable in a plurality of contexts.

A. *Institutional Status as Dignity*

1. Aristocracy and the Recognition of Rank

It is not coincidental that today the cognate *dignitary* applies to people who hold high-ranking positions in politics, government, and the judiciary. The word "dignity" is derived from the Latin word *dignitas*.[94] In ancient Rome, *dignitas* denoted the honor attached to elevated social status and the consequent respect owed to people of high standing.[95] The Roman political aristocracy had *dignitas*, while the

---

[94] 4 THE OXFORD ENGLISH DICTIONARY 656 (2d ed. 1989); *see also* OXFORD LATIN DICTIONARY 542 (1982) (listing related meanings of *dignus*).

[95] *See* Teresa Iglesias, *Bedrock Truths and the Dignity of the Individual*, LOGOS: J. CATHOLIC THOUGHT & CULTURE, Winter 2001, at 114, 120-21 (2001) ("[*D*]*ignitas* was . . . closely related to the meaning of honor. Political *offices*, and as a consequence the *persons holding them*, like that of a senator, or the emperor, had *dignitas*. . . . The office or rank . . . carried with [it] the obligation to fulfil the duties proper to the rank."). Julius Caesar used this notion of *dignitas* to explain that he partly fought the Roman Civil War to restore men to their proper rank and title. He wrote that he aimed "to restore . . . [the] dignity [of] the tribunes," who were the titular leaders driven out of Rome during the war. JULIUS CAESAR, THE CIVIL WAR bk. I, ¶ 22 (J.M. Carter ed. & trans., Aris & Phillips 1991) (c. 45 B.C.E.).

lower-ranking plebeians did not.[96] Similarly, men could possess *dignitas* in ancient Rome, while women could not.[97]

When "dignity" entered the English language in 1225, it maintained its connection to rank and hierarchy, most notably in reference to the British monarchy. Blackstone's *Commentaries* explains, for example, that because the King is the titular head of state, "it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions . . . ."[98] All criminal offenses in England are "either against the king's peace, or his crown and dignity; and are so laid in every indictment."[99] Blackstone comments that even the "ancient jewels of the crown . . . are necessary to . . . support the dignity of the sovereign."[100]

From the thirteenth century until the Enlightenment, the predominant view was that dignity is an attribute reserved for high-ranking positions and the people who occupy them.[101] Kings, bishops, and noblemen possessed dignity; commoners did not.[102] As Thomas Hobbes wrote in 1651, "the publique worth of a man, which is the

---

[96] Iglesias, *supra* note 95, at 120-21. In ancient Rome, the term *dignitas* was also applied to exemplary poets, orators, and politicians. *See, e.g.*, 2 QUINTILIAN, INSTITUTES OF THE ORATOR 409 (J. Patsall trans., B. Law 1774) (c. 95 C.E.) (commenting on "the dignity of Messala," a particularly impressive orator); Cicero, Speech in Defence of the Proposed Manilian Law (explaining that Pompeius alone has the dignity to be put in supreme command), *in* ORATIONS 125, 134-50 (Charles Duke Yonge trans., New York, Colonial Press rev. ed. 1899).

[97] *See* CICERO, ON DUTIES bk. I, ¶ 130 (M.T. Griffin & E.M. Atkins eds., Cambridge Univ. Press 1991) (44 B.C.E.) ("There are two types of beauty: one includes gracefulness, and the other dignity. We ought to think gracefulness a feminine quality and dignity a masculine one.").

[98] 3 WILLIAM BLACKSTONE, COMMENTARIES *98.

[99] 1 *id.* at *258.

[100] 2 *id.* at *428.

[101] Dictionaries published before the Enlightenment substantiate this usage. *See, e.g.*, NATHAN BAILEY, DICTIONARIUM BRITANNICUM 265 (London, T. Cox 1736) (defining dignity as "office or employment in church or state"); 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (Philadelphia, Moses Thomas 1818) (defining dignity as "rank of elevation"). Dignity also was invoked on occasion as a noun to denote a public office. The 1669 Fundamental Constitutions of Carolina state, for example, that "[n]o one person shall have more than one dignity," or public position. FUNDAMENTAL CONSTS. OF CAROLINA of 1669, art. XIII, *reprinted in* 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOR OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 2772, 2774 (Francis Newton Thorpe ed., 1909); *see also id.* art. IX, at 2773 (granting members of parliament "hereditary nobility of the province . . . by right of their dignity . . . [as] members").

[102] *See, e.g.*, EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 60 (Anchor Books 1973) (1790) (ascribing dignity to the nobility and denying it to the common person); JOHNSON, *supra* note 101 (under "dignitary") (describing clergymen as possessing dignity).

Value set on him by the Common-wealth, is that which men commonly call DIGNITY."[103] A person's dignity, or worth, was simply a function of social status.

This notion of dignity, which I call *institutional status as dignity*, has several defining characteristics. As a starting point, it is not intrinsic.[104] Since it is grounded in, and depends on, the existence of social hierarchy, only select individuals or institutions will ever acquire it. Nor is institutional status as dignity a permanent trait. It is held only as long as others deem the person or institution worthy of its respect. Consequently, this form of dignity can be gained or lost as a person is promoted to or demoted from a given position in society.

Institutional status as dignity is, by virtue of these defining qualities, both inegalitarian and contingent. It presupposes, and indeed requires, a power differential, which in turn creates an obligation of vertical respect. Institutional status as dignity is therefore "centrally an experience of [h]eight."[105] Those who rank below people and institutions that have dignity owe them respect, a "bowing gesture" of sorts.[106] Because people deserve respect only in relation to their variable dignity or social merit, the respect that dignity garners is contingent, rather than necessary.[107] Simply stated, not all human beings or institutions deserve respect under this framework.

2. Bestowing Respect on Government and Its Accoutrements

Historically, the law has reinforced institutional status as dignity, taking steps where necessary to protect individuals whose dignity is associated with elevated political or social rank.[108] The Magna Carta, for example, exempted earls and barons from being tried by the jury system that governed commoners,[109] and the 1689 English Bill of Rights

---

[103] THOMAS HOBBES, LEVIATHAN 63 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651).

[104] The case of a hereditary monarchy provides what looks to be an exception since the person is born with titular dignity; however, this dignity is not intrinsic to their humanity, but rather to their rank.

[105] Kolnai, *supra* note 33, at 252 (internal quotation marks omitted).

[106] *Id.* (internal quotations marks omitted).

[107] Gewirth, *supra* note 14, at 17. This dichotomy is commonly drawn in ethics literature as well. *See, e.g.*, Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36, 38-39 (1977) (suggesting that there is a difference between "appraisal respect" and "recognition respect").

[108] Waldron, *Dignity, Rank, and Rights*, *supra* note 32, at 34-35.

[109] MAGNA CARTA ch. 21 (1215), *reprinted in* THE ESSENTIAL BILL OF RIGHTS 8, 12 (Gordon Lloyd & Margie Lloyd eds., 1998).

granted special legal respect to the "Crown and royal dignity."[110] The early American colonies also took steps in the form of sumptuary laws to maintain the divide between those who possessed dignity and those who did not.[111]

When George Washington addressed Congress in 1793, however, and suggested that the dignity of the nobility be replaced by the "dignity of the United States,"[112] he set the modern-day application of institutional status as dignity in motion.[113] For the last two hundred years, the Supreme Court has consistently invoked dignity to protect and vindicate the institutional status of governments and their accoutrements.[114] Among other functions, the Court has employed dignity to describe the heightened respect owed to judges and courtrooms, foreign nations, and American states.[115]

As anyone who has been to court, or even watched *Law and Order* knows, courtrooms are characterized as hallowed places governed by certain formalities, all of which emphasize the court's authority and the respect it commands. Court sessions generally commence when the bailiff says, "All rise for the Honorable . . . ." The judge then enters the room wearing judicial robes and takes his or her seat on an elevated platform; the gallery is seated; and the parties' first words to the court or judge are, "May it please the court" or "Your Honor." In this setting,

---

[110] An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1689, 1 W. & M., c. 2 (Eng.). Also, while defamation of a commoner was considered libel or slander under early English law, defamation of a member of the British nobility was punished as *scandalum magnatum*, both a crime and a tort, enforced by the King's Council. Waldron, *Dignity, Rank, and Rights*, *supra* note 32, at 34-35.

[111] The General Laws of Massachusetts famously prohibited anyone but large landholders from wearing gold, silver, lace, silk, boots, ruffles, capes, or other signifiers of high social status. The General Laws of the Massachusetts Colony, Apparel, at A.51, p.5 (1651), *reprinted in* THE COLONIAL LAWS OF MASSACHUSETTS 5 (Boston, Rockwell & Churchill City Printers 1887).

[112] George Washington, Fifth Annual Message to Congress (Dec. 3, 1793), *in* 7 THE WRITINGS OF GEORGE WASHINGTON 36, 39 (Jared Sparks ed., Boston, American Stationer's Co. 1837).

[113] Washington's application of dignity was consistent with its function in the Federalist Papers, in which every use of the word dignity is tied to the heightened standing of the government, the nation, or the offices thereof. Jeremy Rabkin, *What We Can Learn About Human Dignity from International Law*, 27 HARV. J.L. & PUB. POL'Y 145, 156 (2003). The word dignity, according to Rabkin, appears seventeen times in the Federalist Papers. *Id.*

[114] *See infra* notes 121-23, 135-49, and accompanying text.

[115] *See infra* notes 117-53 and accompanying text.

the aristocratic tradition of according dignity, and thus deference, to high-ranking institutions and officers, finds modern expression.[116]

When individuals fail to appropriately respect the dignity of the proceedings, judges may respond with contempt orders.[117] Chief Justice Taft explained in *Cooke v. United States* that "[t]he power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice[,] and in maintaining the authority and dignity of the court[,] is most important and indispensable."[118] Throughout

---

[116] The Supreme Court has also invoked institutional status as dignity to express the respect owed to another symbol of democracy, the American flag. In *Texas v. Johnson*, the Court declined to condemn the burning of a U.S. flag, instead arguing that its dignity was venerated best by permitting individuals to act with the freedom the flag symbolizes. 491 U.S. 397, 420 (1989). As Justice Brennan, writing for the Court, explained:

> We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

Id. As in the judicial contempt cases, the Court's invocation of dignity in *Texas v. Johnson* reinforces the typology's claim that institutional status as dignity is contingent. The flag, like the courtroom, derives its status from the freedom and justice it represents, but if those values are undermined, its institutional status as dignity is threatened.

[117] In most cases, contempt orders or the threat thereof give judges sufficient power to curb improper courtroom behavior that could unfairly affect the outcome of a case. In rare cases, in which serious misconduct takes place unchecked by the trial judge, the Supreme Court has vacated the decision and remanded the case on grounds that the proceedings lacked proper dignity. For a particularly egregious example, see *Wellons v. Hall*, a recent federal habeas case in which the Court vacated the judgment below and remanded because, in addition to other potentially improper ex parte exchanges between the jurors and the judge, "some jury members gave the trial judge chocolate shaped as male genitalia and the bailiff chocolate shaped as female breasts." 130 S. Ct. 727, 729, 732 (2010) (per curiam). Explaining that "judicial proceedings conducted for the purpose of deciding whether a defendant shall be put to death must be conducted with dignity and respect," *id.* at 728, the Court held that the Eleventh Circuit should "consider, on the merits, whether petitioner's allegations, together with the undisputed facts, warrant discovery and an evidentiary hearing." *Id.* at 732. *But see, e.g.*, Carey v. Musladin, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring) (agreeing with the majority holding that buttons displaying a murder victim's image worn by family members during the defendant's trial were not prejudicial and did not run afoul of the "general rule to preserve the calm and dignity of a court").

[118] 267 U.S. 517, 539 (1925); *see also* Mayberry v. Pennsylvania, 400 U.S. 455, 463-65 (1971) (citing *Cooke* approvingly in a case in which the Court contended that a state trial judge should have found an individual who had routinely disrupted the courtroom with outbursts in contempt of court in the first instance rather than letting the defendant's antics destroy the "fair administration of justice"); United States v. Barnett, 376 U.S. 681, 696-97 (1964) ("'It has always been one of the attributes—one of the powers necessarily incident to a court of justice—that it should have this power of vin-

the last century, the Court repeatedly has articulated its view that contempt orders are proper when offense is made "against [a judge's] dignity and authority."[119] Even when the judge's dignity is not at issue, the Court has upheld contempt orders issued to individuals who engage in conduct considered contemptuous, discourteous, or disruptive to the dignity of judicial proceedings.[120]

The Supreme Court also has a long history of employing the language of institutional status as dignity to describe the heightened level of respect owed to foreign nations. In the classic 1812 case, *The Schooner Exchange v. McFaddon*, the Court considered whether an American citizen in an American court could assert title to an armed French vessel "found within the waters of the United States."[121] Drawing on principles of the law of nations, Chief Justice Marshall concluded that it would be incompatible with the "dignity" of the foreign sovereign to submit to the authority of the United States because doing so would undermine the foreign state's own rank and authority.[122] Since deciding *The Schooner Exchange*, the Supreme Court has consistently invoked dignity to protect the institutional status of other nations in foreign sovereign immunity cases.[123]

The most noteworthy judicial function of institutional status as dignity has been to dramatically expand the doctrine of *state* sovereign immunity. Institutional status as dignity has long played a part in state sovereign immunity cases, as it has in foreign sovereign immunity cases. But in recent decades the Court has thrust dignity into the spot-

---

dicating its dignity, of enforcing its orders, of protecting itself from insult . . . .'" (quoting Eilenbecker v. Dist. Court, 134 U.S. 31, 36 (1890))); Sacher v. United States, 343 U.S. 1, 30 (1952) (Frankfurter, J., dissenting) (contending that *Cooke* states the proper justification for contempt orders).

[119] *Sacher*, 343 U.S. at 12.

[120] *See* United States v. Wilson, 421 U.S. 309, 316 n.8 (1975) ("In order to constitute an affront to the dignity of the court the judge himself need not be personally insulted.").

[121] 11 U.S. (7 Cranch) 116, 135 (1812).

[122] *Id.* at 137-38; *see also* Smith, *supra* note 32, at 39-50 (offering a detailed discussion of dignity in the context of foreign state sovereign immunity).

[123] *See, e.g.*, First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 769 (1972) (plurality opinion) (explaining that after *The Schooner Exchange* the law "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" (quoting Nat'l City Bank v. Republic of China, 348 U.S. 356, 362 (1955))); *Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943) (noting that the "judicial seizure of a vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our friendly relations with it, that courts are required to accept and follow the executive determination that the vessel is immune").

light and relied on it as the central reason to grant states immunity from suit. The effect has been a considerable expansion of the doctrine of sovereign immunity.[124]

Significantly, the now-dominant view that it is an "indignity" to subject "a State to the coercive process of judicial tribunals at the instance of private parties"[125] has not always been the Court's position. For the first seventy years of its tenure, the Court held the opposite perspective and recognized the superior dignity of the sovereign people as the primary reason for allowing citizen suits.

Just five years after the Constitution was ratified, the Court in *Chisholm v. Georgia* considered whether a citizen of one state could bring suit against another state in the United States Supreme Court.[126] The plaintiff was a merchant from South Carolina who had entered into a contract to purchase war supplies from the State of Georgia. In a 4-1 decision, the Court decided that although a full sovereign nation like the United States might enjoy immunity, the same accommodation was not available to Georgia.[127]

The opinion is replete with invocations of dignity, almost all of which refer to the dignity of the American people, not the dignity of the state or nation.[128] Expressing his view of popular sovereignty, Justice Wilson wrote that "[a] State . . . useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all of its acquired importance."[129] He concluded that because "a State . . . [is] subordinate to the people," it is susceptible to citizen suits.[130] In agreement, Chief Justice Jay explained that because the people established the Constitution "with becoming dignity" and "proper sovereignty" that "a State may be sued."[131] In distinguishing the American principle of popular sovereignty from the English common law, which granted impenetrable power and jurisdiction in

---

[124] *See* Smith, *supra* note 32, at 28-36 (commenting on the Court's growing use of the concept "dignity of the *states*" to justify a more robust doctrine of sovereign immunity).

[125] *In re* Ayers, 123 U.S. 443, 505 (1887).

[126] 2 U.S. (2 Dall.) 419, 430-32 (1793).

[127] *Id.* at 480.

[128] *But see id.* at 452-53 (opinion of Blair, J.) (noting that it would be "incompatible with the dignity of a State" to issue a default judgment against Georgia for its refusal to appear in this case).

[129] *Id.* at 455 (opinion of Wilson, J.) (emphasis omitted).

[130] *Id.* (emphasis omitted).

[131] *Id.* at 471-73 (opinion of Jay, C.J.).

the office of the King,[132] the Court in *Chisholm* firmly rejected the view that states have institutional status as dignity.

States responded to *Chisholm* with "outrage," and within a day of the Court's decision, Congress considered the proposal that led to the Eleventh Amendment's adoption.[133] The Court has subsequently demonstrated both in its commentary and through its holdings that the decision in *Chisholm* deviated from the Founders' view that "immunity from private suits [is] central to sovereign dignity."[134]

In the past fifteen years, the Court has referred to institutional status as dignity as the "'central,' 'preeminent,' and 'primary' justification" for expanding states' immunity from suit.[135] In *Seminole Tribe of Florida v. Florida*,[136] the Court overruled its earlier holding in *Pennsylvania v. Union Gas Co.*, which had acknowledged congressional authority under the Commerce Clause to abrogate states' Eleventh Amendment sovereign immunity.[137] Explaining that the Eleventh Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties,'"[138] the Court in *Seminole Tribe* held that Congress lacks power under Article I to abrogate states' sovereign immunity from suit in federal courts.[139]

---

[132] The opinions of Justices Iredell, Wilson, and Jay go to particular lengths to contrast the American and English views of sovereign immunity. *See id.* at 443-44, 448 (opinion of Iredell, J.) (placing the King's role in determining whether to continue proceedings against his sovereign body in contradistinction to that of a state, which "derives its authority from . . . [t]he voluntary and deliberate choice of the people" (emphasis omitted)); *id.* at 458 (opinion of Wilson, J.) (echoing Justice Iredell in explaining that the King obtained sovereignty over everything, but that nothing, in turn, had sovereignty over him, while in the United States "the sovereign . . . must be found in the man" (emphasis omitted)); *id.* at 471-72 (opinion of Jay, C.J.) (distinguishing between European sovereignties, which were premised on "feudal principles," and American sovereignty, which "devolved on the people" (emphasis omitted)).

[133] Alden v. Maine, 527 U.S. 706, 720-21 (1999); *see also* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.").

[134] *Alden*, 527 U.S. at 715. *See generally id.* at 715-27 (explaining why the Eleventh Amendment better reflects the Framers' intentions with regard to state sovereignty than does the decision in *Chisholm*).

[135] Smith, *supra* note 32, at 5 (quoting Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760, 765, 769 (2002)).

[136] 517 U.S. 44 (1996).

[137] Pennsylvania v. Union Gas Co., 491 U.S. 1, 23 (1989) (plurality opinion), *overruled by Seminole Tribe*, 517 U.S. 44.

[138] *Seminole Tribe*, 517 U.S. at 58 (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993)).

[139] *Id.* at 72-73.

In *Alden v. Maine*, the Court expanded its jurisprudence to hold that Article I legislation cannot abrogate states' immunity from suit in state courts.[140] Again invoking the language of dignity to justify its decision, the Court noted that "[t]he generation that designed and adopted our federal system considered immunity from private suits central to sovereign dignity."[141] Compelling a state to appear in its own courts is "offensive" to its stature and "denigrates" its sovereignty.[142]

The Court's subsequent decision in *Federal Maritime Commission v. South Carolina State Ports Authority* is arguably its most brazen use of dignity in this context. In concluding that state sovereign immunity bars a federal agency from adjudicating a claim against a state, the Court did not consider anything other than the state's dignitary interest.[143] The Court justified its finding as follows:

> [I]f 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 FMC. The affront to a State's dignity does not lessen when an adjudication takes place in an administrative tribunal as opposed to an Article III court.[144]

The Court's efforts to safeguard states from what seems like disrespectful behavior by citizens is further elucidated by the majority's suggestion that

> [o]ne, in fact, could argue that allowing a private party to haul a State in front of such an administrative tribunal constitutes a greater insult to a State's dignity than requiring a State to appear in an Article III court presided over by a judge with life tenure nominated by the President of the United States and confirmed by the United States Senate.[145]

Last Term, in *Sossamon v. Texas*, the Court reaffirmed its reasoning from *Seminole Tribe*, *Alden*, and *Federal Maritime Commission* to again

---

[140] 527 U.S. 706, 732-33 (1999).

[141] *Id.* at 715.

[142] *Id.* at 749.

[143] Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760-61 (2002).

[144] *Id.* at 760 (citations omitted).

[145] *Id.* at 760 n.11; *cf.* Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1640 (2011) (dismissing as flawed the argument that the state's dignity would be diminished if a federal court adjudicated disputes between state components). In *Stewart*, Justice Scalia, writing for the Court, distinguished the case from *Federal Maritime Commission* by explaining that "[d]enial of sovereign immunity . . . offends the dignity of a State; but not every offense to the dignity of a State constitutes a denial of sovereign immunity." *Id.* at 1640.

preclude a lawsuit against a state.[146] At issue in *Sossamon* was whether Texas, by accepting federal funds, consented to waive its sovereign immunity to suits for money damages under the Religious Land Use and Institutionalized Persons Act of 2000.[147] Holding that it did not, the Court viewed the question as long settled. Dating back to "the time the Constitution was drafted,"[148] the Court explained, state sovereign immunity doctrine has been "central to sovereign dignity."[149]

For many scholars, the reemergence of institutional status as dignity to describe states "as if they were natural persons that could experience hurt feelings beyond those of their residents"[150] is enough to "strain[] credulity."[151] The Court's dissenting Justices would not disagree. In rejecting the holdings in *Seminole Tribe* and *Alden*, Justice Stevens and Justice Souter, respectively, called the Court's reliance on dignity "embarrassingly insufficient,"[152] and noted that "[w]hatever justification there may be for an American government's immunity from private suit, it is not dignity."[153] Just how far the Court will go in expanding its state sovereign immunity jurisprudence remains to be seen, but its increasing reliance on institutional status as dignity to do so will be controversial.

B. *Equality as Dignity*

1. Egalitarianism and Universal Human Worth

As a theoretical and practical matter, institutional status as dignity met its earliest and harshest critics during the Enlightenment. Pro-revolutionary activists sought to supplant aristocracy with democracy, and a new, more egalitarian dignity surfaced. Edmund Burke's view that man's dignity was simply a function of his place in the social hie-

---

[146] 131 S. Ct. 1651, 1655 (2011).

[147] 42 U.S.C. §§ 2000cc to cc-5 (2006).

[148] *Sossamon*, 131 S. Ct. at 1657.

[149] *Id.* (quoting Alden v. Maine, 527 U.S. 706, 715 (1999)) (internal quotation marks omitted).

[150] Michael C. Dorf, *The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998).

[151] Henry Paul Monaghan, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 132 (1996).

[152] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 97 (1996) (Stevens, J., dissenting) (quoting P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 151 (1993) (Stevens, J., dissenting)) (internal quotation marks omitted).

[153] Alden v. Maine, 527 U.S. 706, 802-03 (1999) (Souter, J., dissenting).

rarchy[154] was forcefully countered by Thomas Paine's call for the recognition of "the natural dignity of man."[155]

In America, this shift coincided with the ratification of the Constitution, which banned titles of nobility.[156] Thomas Jefferson held the view that "the dignity of man is lost in arbitrary distinctions" based on "birth or badge,"[157] and Alexander Hamilton agreed, arguing that a constitutional democracy was the "safest course for your liberty, your dignity, and your happiness."[158] Change was afoot, and the rallying cry was one that recognized the equal worth of all human beings.[159]

Just what characteristics imbued all human beings with dignity was less often articulated, but two explanations based on theology and philosophy can be confidently posited. The Judeo-Christian traditions believe that the dignity of human beings is derived from their creation in the image of God.[160] While the theological claim has been interpreted

---

[154] *See* BURKE, *supra* note 102, at 60.

[155] THOMAS PAINE, RIGHTS OF MAN 41 (Gregory Claeys ed., Hackett Publ'g Co., 1992) (1791–1792).

[156] *See* U.S. CONST. art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States . . . ."); *id.* art I, § 10, cl. 1 ("No State shall . . . grant any Title of Nobility.").

[157] Thomas Jefferson, Observations on Démeunier's Manuscript (June 22, 1786), *reprinted in* THOMAS JEFFERSON: WRITINGS 575, 587 (Merrill D. Peterson ed., 1984).

[158] THE FEDERALIST NO. 1, at 14 (Alexander Hamilton) (E.H. Scott ed., 1898). Notably, Hamilton was an illegitimate child and may have had a personal stake in avoiding titles linked to hereditary status. *See* RON CHERNOW, ALEXANDER HAMILTON 226-27 (2004) (explaining that Hamilton's illegitimacy may have influenced his views on certain political issues, such as a bill that would have in essence forced unwed mothers to disclose having an illegitimate child).

[159] However, it should be noted that most calls for equal dignity in the eighteenth and nineteenth centuries were not concerned with dignity for all people, but rather with dignity for all white men. As Thurgood Marshall noted,

> For a sense of the evolving nature of the Constitution we need look no further than the first three words of the document's preamble: "We the People." When the Founding Fathers used this phrase in 1787, they did not have in mind the majority of America's citizens. "We the People" included, in the words of the framers, "the whole Number of free Persons." On a matter so basic as the right to vote, for example, Negro slaves were excluded, although they were counted for representational purposes—at three-fifths each. Women did not gain the right to vote for over a hundred and thirty years.

Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987) (footnote omitted) (quoting U.S. CONST. art. I, § 2, cl. 3); *cf.* MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF WOMAN ch. IV (Charles W. Hagelman, Jr. ed., W.W. Norton & Co. 1967) (1792) (arguing in the eighteenth century that women were not simply "a part of man," but "whole" and rational individuals worthy of equal respect).

[160] *See* Barilan, *supra* note 33, at 233 (noting the theological view that "all humans are equal in terms of their *imago Dei*," and thus, dignity).

in different ways, the central premise is that humans have a unique worth derived from God's excellence.[161] Since all people are made in God's image, "there is no Greek or Jew, circumcised or uncircumcised, barbarian, Scythian, slave or free."[162] The community under God is not divided by differences, but united by its creation in God's image. Those who deny God's existence, or who otherwise reject the creation story, will not find this view of dignity's origins plausible and may opt to anchor human dignity in a philosophical theory.

Philosophical approaches to universal human dignity argue that all humans have dignity because they possess a common trait worthy of recognition. The metaphysical conundrum that divides philosophers is determining which human characteristic denotes equal human dignity. Philosophers have attempted to ground dignity in what some see as humans' unique ability to reason, experience pain, form culture, teach collaboratively, have meaningful life projects, and engage in self-reflection.[163] The challenge posed by pinning dignity to any of these qualities, however, is that some humans may not be able to express the dignity-denoting trait. People with severe mental disabilities, for example, may not have the capacity to express most of these characteristics, yet we would surely include them in a vision of dignity based on universal human worth.[164]

One response to this problem is to claim that, despite inter- and intra-human variability, all humans have dignity because, as a class, humans have the capacity to express the relevant characteristic.[165] An

---

[161] *See* Kass, *supra* note 30, at 323-24 (explaining that "[h]uman life is to be respected more than animal life . . . because man is more than an animal; man is said to be god-like").

[162] *Colossians* 3:11 (New International).

[163] For a discussion of which distinctively human characteristics might be considered dignity denoting, see Rolston, *supra* note 61, at 129-50. Rolston also discusses the possibility, strengthened by advances in evolutionary biology, that some primates may have characteristics traditionally understood as human characteristics. *Id.* at 131.

[164] If we place those humans who do not have the particular quality that defines one as a dignity-bearer outside of the moral community, the result would be an inegalitarian view of human dignity that is inconsistent with equality as dignity.

[165] Importantly, the theological and philosophical approaches share an evolutionary outlook. They understand humans as the highest life form, either as God's chosen creatures or as creatures with characteristics superior to plants and other animals. Notably, this form of dignity as equality is for humans only; by its very definition, it renders *non*-humans inferior. For this reason, well-known philosopher and animal rights activist Peter Singer has claimed that the idea of according special dignity to humans is "speciesist" because it discriminates on the basis of whether a being belongs to a certain species. PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 7-10 (1975). For a different, but related perspective, see Wal-

alternative response is to argue that "the trait by virtue of which humans deserve moral respect is the trait of being human, nothing more and nothing less."[166] In this view, all people equally possess dignity because they are representatives of humanity.[167]

Though they differ in significant ways, both the theological and philosophical explanations contribute to a better understanding of what I term *equality as dignity*.[168] This type of dignity is defined by three central elements. First, dignity is universal. It is an intrinsic quality of all human beings, bestowed upon individuals not by social rank, but simply by nature of being human. Human existence, whether derived from God's image or as an icon of humanity, confers dignity. Second, dignity is permanent. Unlike institutional status as dignity, equality as dignity does not wax and wane, but instead remains constant. Third, as a consequence of these two features, dignity functions as a horizontal and relational value. Guided by the idea of reciprocity, all humans owe re-

---

dron, *Dignity, Rank, and Rights*, *supra* note 32, at 26-29, which hypothesizes that our society has evolved by transferring the dignity and respect once accorded only to nobility downwards to every human being.

[166] Avishai Margalit, *Human Dignity Between Kitsch and Deification*, HEDGEHOG REV., Fall 2007, at 7, 17.

[167] The United Nations Universal Declaration of Human Rights seemingly articulates this perspective. Historical accounts of the Declaration's drafting suggest that while the relevant delegates all agreed that equal human dignity was important, they disagreed as to what substantively made such equality paramount. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 226 (2001) (observing that "there was remarkably little disagreement regarding [the Declaration's] substance, despite intense wrangling over some specifics"). Their agreement—that all humans possess dignity, without further philosophical or theological explanation—exemplifies what Cass Sunstein calls an "incompletely theorized agreement." Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735-36 (1995); *see also* Paul Weithman, *Two Arguments from Human Dignity* (positing that "the fact that the notion of human dignity is at home in a number of moral traditions makes it an especially useful 'second-level concept,'" in that it serves to express "moral agreement among those who may differ about what first-order ethical vocabulary best explains *why* human beings merit respect"), *in* HUMAN DIGNITY AND BIOETHICS, *supra* note 30, at 435, 437.

[168] The German word *menschenwürde* comes closest to referring to the kind of dignity that all humans inherently possess because they are human. *See generally* Dieter Birnbacher, *Ambiguities in the Concept of Menschenwürde* ("To respect Menschenwürde means to respect certain *minimal* rights owned by its bearer irrespective of considerations of achievement, merit and quality and owned even by those who themselves do *not* respect these minimal rights in others."), *in* SANCTITY OF LIFE AND HUMAN DIGNITY 110, 110 (Kurt Bayertz ed., 1996); Damian P. Fedoryka, *The Ontological and Existential Dimensions of Human Dignity* (characterizing ontological dignity as "dynamic," rather than "static," and claiming that this dignity can only be "actualized" by "a free, conscious and personal act"), *in* MENSCHENWÜRDE: METAPHYSIK UND ETHIK 119, 141 (Mariano Crespo ed., 1998).

spect to, and deserve respect from, each other as beings of equal worth. Whether young or old, sinner or saint, mentally high-performing or mentally disabled, each person deserves the same basic respect.

2. Shielding People from Unequal Treatment

In the 1940s, the Supreme Court's use of dignity began to shift from its nearly exclusive focus on institutional status as dignity to a broader vision that included personal and collective types of dignity.[169] The Civil Rights Era further cemented this change by focusing the Court's attention on equality as dignity in antidiscrimination cases. Today, the Court's equal protection jurisprudence continues to rely on equality as dignity to give substance to its egalitarian mandate.[170]

The first Civil Rights Era case in which the Court employed equality as dignity was *Heart of Atlanta Motel, Inc. v. United States*.[171] The case involved a motel operator who violated Title II of the Civil Rights Act of 1964 by refusing service to African Americans on the basis of their race.[172] In rejecting the motel operator's constitutional challenge to the Act's public accommodations provision, the Court noted that the purpose of the Act was to "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establish-

---

[169] This change coincided with the end of World War II, which prompted several nations that had committed wartime atrocities to incorporate respect for human dignity into their constitutions. *See, e.g.*, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [BASIC LAW], art. 1(1) (stating that "human dignity shall be inviolable" under German law). It also overlapped chronologically with the adoption of the Universal Declaration of Human Rights, which gave a central place to the equal dignity of human beings. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), art. 1 (Dec. 10, 1948) (stating that "[a]ll humans are born free and equal in dignity and rights"). Although one can only speculate that these events prompted the Court to pay greater attention to individual and collective dignity, its shift in that direction is unmistakable. For a more detailed discussion of the incorporation of dignity into foreign constitutions and the Universal Declaration of Human Rights, see McCrudden, *supra* note 34, at 664-67.

[170] *Cf.* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776-81 (2011) (exploring the evolving role of "liberty-based dignity" in equal protection law). In rare instances, the Court has also invoked equality as dignity outside of the equal protection doctrine. *See, e.g.*, Trammel v. United States, 445 U.S. 40, 52 (1980) (modifying the traditional spousal privilege rule, which did not allow women a choice in testifying, because "[t]he 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.").

[171] 379 U.S. 241 (1964).

[172] *Id.* at 243-44.

ments."[173] In upholding Congress's power to prohibit racial discrimination in interstate commerce, the Court accepted the view that exclusion from public accommodations on the basis of race denies individuals the equal dignity and respect they merit as human beings.[174]

The Court repeated this language in *Roberts v. United States Jaycees*, a case upholding a Minnesota statute that prohibited gender discrimination in public accommodations.[175] Writing for the majority, Justice Brennan explained that gender discrimination similarly "deprives persons of their individual dignity," as it is an injury that "is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race."[176] Following *Heart of Atlanta*, the Court recognized that people suffer dignitary harms when they are categorized in a manner that ignores their shared equality as dignity with others.[177]

More recently, the Court has extended its use of equality as dignity to prohibit jury selection based on race or gender. In *Powers v. Ohio*, the Court considered whether a prosecutor's use of peremptory challenges to exclude otherwise qualified jurors on the basis of race violated the Equal Protection Clause and concluded that "racial discrimination in the qualification or selection of jurors offends the dignity of persons and the integrity of the courts."[178] The Court warned that by actively engaging in racial discrimination, the prosecutor's be-

---

[173] *Id.* at 250 (internal quotation marks omitted).

[174] *Id.* at 257.

[175] 468 U.S. 609, 623-29 (1984).

[176] *Id.* at 625.

[177] *Id.* The Court reiterated the nature of this harm in *Rice v. Cayetano*, which involved a Hawaiian citizen who challenged a statute that barred him from voting because he was neither a "native Hawaiian[]" nor a descendant of inhabitants of the Hawaiian Islands. 528 U.S. 495, 499 (2000). In holding that the statute violated the Fifteenth Amendment because it used ancestry as a proxy for race, the Court explained 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." *Id.* at 517. Chief Justice Roberts further emphasized this point in the recent plurality decision in *Parents Involved in Community Schools v. Seattle School District No. 1* when he explained that racial classifications in schools are particularly demeaning to individual dignity. 551 U.S. 701, 746-47 (2007) (plurality opinion); *see also id.* at 797 (Kennedy, J., concurring) ("[A] state-mandated racial label is inconsistent with the dignity of individuals in our society.").

[178] 499 U.S. 400, 402 (1991); *accord* Georgia v. McCollum, 505 U.S. 42, 44 (1992) ("For more than a century, this Court consistently and repeatedly has reaffirmed that racial discrimination by the State in jury selection offends the Equal Protection Clause."); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 616 (1991) ("Recognizing the impropriety of racial bias in the courtroom, we hold that race-based exclusion violates the equal protection rights of challenged jurors.").

havior may even cast "doubt upon the credibility or dignity of a witness" merely because of the color of his or her skin.[179]

In articulating its use of equality as dignity, the Court rejected the suggestion that

> no particular stigma or dishonor results if a prosecutor uses the raw fact of skin color to determine the objectivity or qualifications of a juror. We do not believe a victim of the classification would endorse this view; the assumption that no stigma or dishonor attaches contravenes accepted equal protection principles. Race cannot be a proxy for determining juror bias or competence.[180]

Similar reasoning animated the Court's decision in *J.E.B. v. Alabama ex rel. T.B.*, in which the Court held that gender, like race, is an unconstitutional basis for juror selection.[181] Invoking the notion of equality as dignity, the Court explained that eliminating jurors solely because of their gender "is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.' . . . It denigrates the dignity of the excluded juror, and, for a woman, reinvokes a history of exclusion from political participation."[182] In each of these decisions, the Court relied on equality as dignity to direct attention to the nature of the harm that marginalized individuals or groups experience as the result of differential treatment.[183]

---

[179] *Powers*, 499 U.S. at 412.

[180] *Id.* at 410.

[181] 511 U.S. 127, 130 (1994).

[182] *Id.* at 142 (quoting Strauder v. West Virginia, 100 U.S. 303, 308 (1880)).

[183] The Court has invoked equality as dignity when deciding other cases. *See, e.g.*, NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918 (1982) (supporting the NAACP's right to a peaceful boycott, even though the targeted white businesses suffered damages, in part because the boycotters were challenging "a political and economic system that had denied them the basic rights of dignity and equality that this country had fought a Civil War to secure"). *But cf.* Bush v. Gore, 531 U.S. 98, 104 (2000) (asserting that "[w]hen the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter"). In *Bush v. Gore*, the Court's emphasis on dignity is not aimed at protecting traditionally marginalized individuals or groups. Instead, the Court is concerned with mathematical, formal equality. It explained that while states need not confer the vote, once they do, they "may not, by later arbitrary and disparate treatment, value one person's vote over that of another." *Id.* at 104-05. Unlike the individuals in the antidiscrimination cases, who suffered humiliation and stigmatization, the voters at issue in *Bush v. Gore* may not even have been aware of the disparity.

C. *Liberty as Dignity*

1. Liberalism and Individual Self-Determination

The notion that humans deserve respect as free, autonomous, sovereign, and self-determined agents is so entrenched in American political liberalism that it appears self-evident.[184] Its origins can be traced back to ancient Greece and Rome, where the Stoics were among the first thinkers to connect humans' unique capacity for moral reasoning with their dignity.[185] This view was subsequently taken by Pico della Mirandola during the Renaissance[186] and John Locke during the Enlightenment,[187] both of whom maintained that human dignity was derived from a natural freedom that should not be infringed without appropriate justification.[188]

The ultimate advocate of the connection between human liberty and human dignity was the eighteenth-century German philosopher

---

[184] Although liberalism can encompass a variety of positions (e.g., "new," "old," "revisionist," "welfare state," or "social justice" liberalism), *see* Gerald F. Gaus, *The Diversity of Comprehensive Liberalisms*, *in* HANDBOOK OF POLITICAL THEORY 100, 100-14 (Gerald F. Gaus & Chandran Kukathas eds., 2004), it is only relevant for the purposes of this Article that liberty is at the crux of all liberal theory. The central belief that freedom is normatively basic and restrictions on freedom therefore require justification is found in the work of modern liberal theorists, such as Joel Feinberg and John Rawls, and in the work of their predecessors, John Locke and John Stuart Mill. *Compare* JOEL FEINBERG, HARM TO OTHERS 9 (1984) (noting that "most writers on our subject have endorsed a kind of 'presumption in favor of liberty'" and that "[l]iberty should be the norm," while "coercion always needs some special justification"), *and* JOHN RAWLS, JUSTICE AS FAIRNESS 44, 112 (Erin Kelly ed., 2001) (contending that "basic liberties have a special status in view of their priority"), *with* JOHN STUART MILL, ON LIBERTY 6 (Longmans, Green, & Co. 1913) (1859) ("[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection."), *and* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287 (Peter Laslett ed., Cambridge Univ. Press 1963) (1690) (claiming that "all Men are naturally in . . . a State of perfect Freedom" and that they should be able to do whatever they want "within the bounds of the Law of Nature" (emphasis omitted)).

[185] MARVIN PERRY ET AL., WESTERN CIVILIZATION: IDEAS, POLITICS, AND SOCIETY 112-14 (9th ed. 2009).

[186] *See generally* Pico della Mirandola, Oration on the Dignity of Man (1486) (claiming that man's dignity resides in his ability to direct his future), *reprinted in* ON THE DIGNITY OF MAN 2, 2-34 (Charles Glenn Wallis et al. eds., Hackett Publ'g Co. 1998) (1965).

[187] *See* LOCKE, *supra* note 184, at 287.

[188] The notion that one's liberty should not be disturbed without proper political authority and justification appears in social contract theory as well. *See* HOBBES, *supra* note 103, at 145-54 ("It is manifest, that every Subject has Liberty in all those things, the right whereof cannot by Covenant be transferred."); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND DISCOURSES 186-89 (G.D.H. Cole trans., J.M. Dent & Sons 1973) (1762) ("Each man alienates . . . by the social contract, only such part of his powers, goods, and liberty as it is important for the community to control . . . .").

Immanuel Kant, who wrote that "humanity so far as it is capable of morality, is the only thing which has dignity."[189] Kant claimed that human dignity derives from autonomy[190]—the distinctively human ability to discern the moral law and live by it.[191] In his view, people deserve respect because their capacity for moral direction makes them ends in themselves.[192] The well-known Kantian maxim that people ought to be treated as ends and not simply as means demonstrates the level of respect that Kant believed dignity warranted. For Kant, dignity generated not only an obligation to respect people's free will, but also the concomitant obligation not to abrogate it by treating them as an instrument of another's free will.[193] Although Kant's work contin-

---

[189] IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS (1785), *reprinted in* THE MORAL LAW 114 (H.J. Paton trans., Routledge Classics 2005) (1948) [hereinafter KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS]; *see also* IMMANUEL KANT, THE METAPHYSICAL PRINCIPLES OF VIRTUE 127 (James Ellington trans., Bobbs-Merrill Co. 1964) (1797) (stating that "[h]umanity itself is a dignity").

[190] Autonomy is derived from the ancient Greek words, *auto* and *nomos*, which translate respectively to mean "self" and "law." Autonomy literally means to give the law to oneself.

[191] *See* KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS, *supra* note 189, at 114-15 ("*Autonomy* is . . . the ground of the dignity of human nature and of every rational nature."). *But cf.* B.F. SKINNER, BEYOND FREEDOM AND DIGNITY 41-55 (Bantam Books rev. ed. 1990) (1971) (denying that people have the capacity to be morally responsible in their decisions and that human action cannot be the basis of human dignity because it is determined by factors beyond individual control).

[192] This justification for liberty can also ground claims for equality. For example, some philosophers argue that Kant's maxim is as much about equality as liberty by citing the fact that Pufendorf's *De Officio* influenced Kant. *See, e.g.*, John Laird, *The Ethics of Dignity*, 15 PHILOSOPHY 131, 131-32 (1940) (Eng.) (asserting that Kant was "very well acquainted" with Pufendorf and thus likely "influenced" by him). Pufendorf wrote:

> In the very name of man a certain dignity is felt to lie, so that the ultimate and most effective rebuttal of insolence and insults from others is "Look, I am not a dog, but a man as well as yourself." Human nature therefore belongs equally to all and no one would or could gladly associate with anyone who does not value him as a man as well as himself and a partner in the same nature.

SAMUEL VON PUFENDORF, ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW 61 (James Tully ed., Michael Silverthorne trans., Cambridge Univ. Press 1991) (1673). For a modern view of the connection between equality and liberty, see, for example, MARTHA C. NUSSBAUM, SEX & SOCIAL JUSTICE (1999). Nussbaum contends that the "idea of equal worth is connected to an idea of liberty: to respect the equal worth of persons is, among other things, to promote their ability to fashion a life in accordance with their own view of what is deepest and most important." *Id.* at 5.

[193] *See* KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS, *supra* note 189, at 105 ("Now I say that man, and in general every rational being, *exists* as an end in himself, *not merely as a means* for arbitrary use by this or that will: he must in all his actions, whether they are directed to himself or to other rational beings, always be viewed *at the same time as an end.*"). Isaiah Berlin's notion of "positive liberty" is analogous. He describes a person's "wish to be a subject, not an object . . . deciding, not being decided

ues to be dissected, contested, and reconfigured by contemporary philosophers,[194] he is nevertheless considered by many to be "the father of the modern concept of human dignity."[195]

Given America's deeply held values of freedom, individualism, and autonomy, it is unsurprising that a type of dignity I call *liberty as dignity* resonates powerfully with the Court. Unlike equality as dignity, this form of dignity is neither intrinsic nor universal. A person has liberty as dignity only insofar as he can make autonomous choices. Because it is capacity driven, dignity of this kind is contingent—one can gain or lose it over a lifetime. For example, young children and mentally incapacitated individuals do not qualify for liberty as dignity, but it is not foreclosed to them if and when they gain mental competence.

Liberty as dignity commands respect at two levels: first, respect for individual choice, and second, respect for individuals because they have the capacity for choice. These two forms of respect are mutually reinforcing. Since exercising our free will is the mechanism through which we express our liberty as dignity, it is especially important that we encourage and support autonomous decisions. At the same time, because people have the unique ability to shape their future through their actions, they must not be treated strictly as objects of others' needs or desires. Unlike equality as dignity, liberty as dignity can be violated, diminished, or even destroyed by actions that fail to appropriately respect human self-determination.

2. Securing the Conditions for Self-Realization

The Court's application of liberty as dignity appears most prominently in cases involving personal decisions, namely the choice to have

---

for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human rule, that is, of conceiving goals and policies of my own and realising them." ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958), *reprinted in* LIBERTY 166, 178 (Henry Hardy ed., 2002).

[194] Kant's influence is evident in the work of many of his strongest critics. *See, e.g.*, ROBERT B. PIPPIN, HEGEL'S IDEALISM: THE SATISFACTIONS OF SELF-CONSCIOUSNESS 16-24 (1989) (explaining that Hegel's concerns about Kant's philosophy shaped Hegel's own account of morality); 1 ARTHUR SCHOPENHAUER, THE WORLD AS WILL AND REPRESENTATION 415-534 (E.F.J. Payne trans., Dover Publ'ns 1966) (1958) (rejecting rationalistic, Kantian conceptions of the world but also acknowledging Kant's critical contributions in this area); Ayn Rand, *Brief Summary*, OBJECTIVIST, Sept. 1971, at 1, 4 (opposing Kantian liberalism in favor of her own theory of objectivism).

[195] Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 85, 89 (Georg Nolte ed., 2005).

an abortion or engage in same-sex intimacy.[196] In these contexts, liberty as dignity has played a critical role in securing the choices that individuals make to further their identity and personal goals, and it appears poised to have an even greater influence in the future.

The Court first invoked the language of liberty as dignity in the abortion context in the 1986 case, *Thornburgh v. American College of Obstetricians and Gynecologists*.[197] *Thornburgh* involved a challenge to certain provisions of the Pennsylvania Abortion Control Act[198] that related to informed consent, dissemination of material about abortion, physician reporting, and post-viability abortions.[199] After citing cases where the Court had previously cordoned off individual decisions from government interference,[200] the Court placed liberty as dignity at the crux of its decision striking down the provisions as unconstitutional.

Justice Blackmun, writing for the Court, maintained 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 . . .

---

[196] The Court also has invoked liberty as dignity to uphold First Amendment speech rights and Fourth and Fifth Amendment protections against self-incrimination. In the landmark case *Cohen v. California*, the Court reasoned that no approach, except freedom of speech, "would comport with the premise of individual dignity and choice upon which our political system rests." 403 U.S. 15, 24 (1971); *see also* Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (holding as unconstitutional a statute that provided disincentives for particular speech by felons). In *Stanford v. Texas*, the Court stated that the First Amendment, along with the Fourth and 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." 379 U.S. 476, 485 (1965) (quoting Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting)); *cf.* Indiana v. Edwards, 554 U.S. 164, 176 (2008) (restricting an incompetent individual's right to represent himself in court so as to protect his personal integrity as dignity); Milkovich v. Lorain Journal Co., 497 U.S. 1, 3, 22-23 (1990) (restricting a newspaper's use of defamatory speech in order to affirm an individual's right to protect his personal integrity as dignity). For further discussion of the intersections between dignity and speech rights, see Roberta Rosenthal Kwall, *A Perspective on Human Dignity, the First Amendment, and the Right of Publicity*, 50 B.C. L. REV. 1345, 1350-55 (2009), and Frederick Schauer, *Speaking of Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 13, at 178, 178-91.

[197] 476 U.S. 747, 772 (1986), *overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (plurality opinion).

[198] 18 PA. CONS. STAT. §§ 3201–3220 (1982), *invalidated in part by Thornburgh*, 476 U.S. 747.

[199] *Thornburgh*, 476 U.S. at 750.

[200] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 440, 454-55 (1972) (upholding the right of unmarried couples to access contraception); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (prohibiting the state from interfering with married couples' right to use contraception); Meyer v. Nebraska, 262 U.S. 390, 400-03 (1923) (recognizing the right to direct the education and upbringing of one's children).

whether to end her pregnancy. A woman's right to make that choice freely is fundamental."[201] In so holding, the Court highlighted that "measures seemingly designed to prevent a woman . . . from exercising her freedom of choice" were inconsistent with liberty as dignity.[202]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of the Court again employed liberty as dignity in the abortion context.[203] The constitutionality of provisions of the Pennsylvania Abortion Control Act was again the material issue in *Casey*.[204] As amended in 1988 and 1989, the Act, in relevant part, stipulated a twenty-four hour waiting period before an abortion procedure, parental consent with the option of judicial bypass for minors, spousal notification for married women, and physician reporting requirements.[205] Unlike in *Thornburgh*, the Court upheld all of the statutory provisions except the spousal notification requirement, which violated the Court's newly proffered undue burden standard.[206]

The plurality was careful to note that although the undue burden test was a step away from *Roe v. Wade*'s framework, the Court's interest in protecting liberty as dignity was unwavering.[207] As in *Thornburgh*, the opinion placed abortion on the same legal plane as "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[208] but then took a significant step in a new direction. In the now famous "mystery of life" passage, Justice O'Connor, writing for the controlling plurality, announced that

> [t]hese 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 the attributes of personhood were they formed under compulsion of the State.[209]

Just how far the Court is willing to press liberty as dignity to safeguard individuals' life choices remains to be seen, but the Court's

---

[201] *Thornburgh*, 476 U.S. at 772.

[202] *Id.* at 759.

[203] 505 U.S. 833, 851 (1992) (plurality opinion).

[204] *Id.* at 844.

[205] 18 PA. CONS. STAT. §§ 3203–3220 (1990).

[206] *Casey*, 505 U.S. at 879-901.

[207] *Id.* at 874-79. *But see infra* notes 302-14 and accompanying text (illustrating how this commitment to liberty is shifting in the abortion context).

[208] *Casey*, 505 U.S. at 851.

[209] *Id.*

opinion in the landmark case *Lawrence v. Texas* hints at an answer. In a decision invalidating Texas's antisodomy statute, the Court defended "choices central to personal dignity and autonomy."[210] Writing for the majority, Justice Kennedy explained 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. . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice."[211]

The most telling use of dignity in *Lawrence*, however, appears in the Court's recitation of the so-called "mystery of life" passage from *Casey*. Confirming that "our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,"[212] the Court went on to restate that substantive due process protects "choices central to personal dignity . . . . [such as] the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[213]

As some commentators have noted in analyzing *Lawrence*, the Court's use of liberty as dignity takes "the Court further than in any previous decision"[214] and "may presage a new jurisprudence"[215] that forbids states from restricting any activity that is "somehow connected with efforts 'to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"[216]

---

[210] *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Casey*, 505 U.S. at 851). Although the Court mentions privacy, at least one commentator has claimed that liberty as dignity "is doing all the work." Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002-2003 CATO SUP. CT. REV. 21, 34 (2003).

[211] *Lawrence*, 539 U.S. at 567. Importantly, the Court also invokes personal integrity as dignity in its claims that individuals have a right to be free from the demeaning nature of a law that condemns their homosexual activity. The Court explains that because the Texas statute required the state to add individuals convicted of same-sex sodomy to its registry of sex offenders, it stigmatizes and demeans the very "existence" of homosexual individuals. *Id.* at 576-78. Although the Court ultimately grounded its decision in liberty as dignity, its awareness of personal integrity as dignity in this context is unmistakable.

[212] *Lawrence*, 539 U.S. at 573-74.

[213] *Id.* (quoting *Casey*, 505 U.S. at 851).

[214] Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 241 (2008).

[215] Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1583 (2004); *see also* Yoshino, *supra* note 170, at 778-81 (arguing that the Court's decision reveals a hybrid liberty-equality claim that may have force in future cases).

[216] Lund & McGinnis, *supra* note 215, at 1583 (quoting *Lawrence*, 539 U.S. at 574).

If this analysis is correct, then one could imagine the Court revisiting issues like physician-assisted suicide, which it struck down before *Lawrence* under a narrower reading of substantive due process that made no normative use of dignity.[217] There is surely an argument that competent individuals who opt for a physician's assistance in ending their lives are defining their existence and unraveling "the mystery of human life." While it is unclear whether this position would succeed,[218] Justice Scalia was not understating the case when he observed that the Court's reasoning in *Lawrence* "will have far-reaching implications."[219]

D. *Personal Integrity as Dignity*

1. Aristotelian Virtue and the Dignified, Whole Self

In a pluralistic, liberal democracy that values equality and liberty as dignity, it may seem anachronistic to suggest that humans are more or less dignified on the basis of how they conduct themselves and how they are treated. Nevertheless, we say that people who persevere in the face of adversity, maintain composure in spite of fear, and display self-control despite great suffering are *dignified*. In contrast, people who become vulnerable to their circumstances, express unharnessed appetites, and expose their bodily nakedness or mental fragility are *undignified*. Most people live at a baseline between the two extremes, with few achieving the highest level of human virtue,[220] and some falling intermittently into disrepute.

---

[217] *See* Washington v. Glucksberg, 521 U.S. 702, 705-06 (1997) (upholding Washington State's statutory prohibition against physician-assisted suicide as constitutional under the Fourteenth Amendment).

[218] In *Lawrence*, the Court appears open to an expansive interpretation of substantive due process:

> [T]hose who drew and ratified the Due Process Clauses . . . knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.

539 U.S. at 578-79. *But see* Yale Kamisar, *Foreword: Can* Glucksberg *Survive* Lawrence*? Another Look at the End of Life and Autonomy*, 106 MICH. L. REV. 1453, 1466-67 (2008) (concluding that the Court is unlikely to overrule *Glucksberg* because physician-assisted suicide, among other things, does not involve a "politically vulnerable group," nor does it have an "emerging [societal] awareness").

[219] 539 U.S. at 586 (Scalia, J., dissenting).

[220] As a matter of law, most states do not require individuals to engage in supererogatory behavior. For example, the vast majority of states do not compel bystanders to provide emergency aid to people in need, or even call 911. *See, e.g.*, MASS. ANN.

This modern use of dignity is part of a discourse on excellence and virtue that dates back to the ancient philosophers of Greece. Aristotle, and the moral theorists before him,[221] employed the Greek word *arête*, meaning virtue or excellence, to describe a natural or artificial object that has become the best example of the thing that it is.[222] The *arête* of a knife, for example, is its sharpness; the *arête* of a race horse is its speed. While human *arête* could be exemplified by the Athenian statesman or the Homeric warrior,[223] Aristotle instead understood that a variety of human characteristics—deliberation, wisdom, self-respect, courage, and self-control, among others—could make humans fitting, or excellent, examples of their kind.[224]

Drawing on this view of *arête*, the Roman philosopher Cicero subsequently adopted the language of dignity to describe the quality of achieving human excellence. In his famous work, *De Officiis*, Cicero invoked the word *dignitatem* to explain that "[w]e must empty ourselves of every agitation of the spirit . . . in order to gain that tranquility of spirit . . . which ensures both constancy and standing."[225] In another passage from the same treatise, he employs *dignitas* to explain that if humans "wish to reflect on the excellence and worthiness of our nature, we shall realize how dishonourable it is to sink into luxury and to live a soft and effeminate lifestyle, but how honourable to live thriftily,

---

LAWS ch. 112, § 12B (LexisNexis 2004) (providing legal immunity to physicians, physician assistants, and nurses who choose to provide emergency medical services); N.Y. PUB. HEALTH LAW § 3000-a(1) (McKinney 2007) (preventing legal suits against people who provide emergency medical services, but not requiring such behavior). Exceptions to that general standard include Minnesota and Vermont, both of which have Good Samaritan laws that require any person at the scene of an emergency to provide reasonable assistance to another person in need. *See* MINN. STAT. ANN. § 604A.01 (West 2000) (mandating that people provide "reasonable assistance" to someone who "is exposed to or has suffered grave physical harm," so long as the person does not endanger himself in the process); VT. STAT. ANN. tit. 12, § 519(a) (2002) (requiring "reasonable assistance" by a person who is aware that another is in "grave physical danger" and who can help without endangering himself).

[221] Socrates, for example, suggests that wisdom is the most important human virtue because it allows man to make the best use of his other assets, such as health, wealth, justice, and courage. 2 PLATO, *Euthydemus* (c. 390 B.C.E.), *in* LACHES PROTAGORAS MENO EUTHYDEMUS 373, 411-13 (W.R.M. Lamb trans., Harvard Univ. Press 1977).

[222] Richard Parry, *Ancient Ethical Theory*, STANFORD ENCYCLOPEDIA PHIL. (Aug. 7, 2009), http://plato.stanford.edu/entries/ethics-ancient.

[223] *Id.*

[224] *See generally* ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE bks. III-IV, at 54-115 (R.W. Browne trans., London, George Bell & Sons 1889) (c. 384 B.C.E.) (setting forth the variety of moral virtues).

[225] CICERO, *supra* note 97, ¶ 69.

strictly, with self-restraint, and soberly."[226] Together, these excerpts call on humans to express those characteristics befitting the excellence of human nature.[227]

Importantly, Aristotle and his philosophical progeny believed that people's personal circumstances may affect, or even limit, their ability to express the dignity associated with human excellence and virtue. For instance, to display perseverance, one must face adversity; to exhibit courage, one must confront fear; and to express fortitude, one must resist fatigue.[228] Conversely, some lives are so *dis*-integrated that individuals do not have the opportunity to exercise or develop the capacities for human excellence or dignity.[229] In these latter cases, people cannot become virtuous or dignified examples of humanity

---

[226] *Id.* ¶ 106.

[227] A humorous exposition of this use of dignity can be found in the works of the ancient Roman dramatist Plautus, who applied this form of dignity in a number of his slapstick comedies. *See, e.g.*, PLAUTUS, *Pseudolus* (191 B.C.E.) (explaining that it is fitting, "*dignum*," to send letters of good wishes to people they befit, "*dignis*," but concluding that because his interlocutor is not worthy, "*dignum*," of such a letter, he will not bother sending him one), *in* THE POT OF GOLD AND OTHER PLAYS 217, 255 (E.F. Watling trans., 1965); PLAUTUS, *The Slip-Knot* (192 B.C.E.), *in* THREE PLAYS OF PLAUTUS 51, 164 (F.A. Wright trans., 1925) (commenting that one character's form is fitting, "*digna forma*," of his profession—that he looks like the beggar he is).

[228] Cicero explained that it is "a great and admirable distinction to have borne adversity wisely, not to have been crushed by misfortune, and not to have lost dignity in a difficult situation." CICERO, DE ORATORE bk. II, ¶¶ 346-47 (H. Rackham ed., E.W. Sutton trans., Harvard Univ. Press 1959) (55 B.C.E.). Accordingly, actions that are extraordinary in one context may be unremarkable in others. The fact that Nelson Mandela completed his law degree from the University of London while he was a political prisoner in South Africa suggests he possesses an extraordinary amount of mental strength, courage, and perseverance. We would not say the same thing about his fellow graduates who completed their degrees in residence.

[229] Martha Nussbaum's excellent work on human capabilities expresses this Aristotelian view. *See* MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 159-60 (2006) (describing the capabilities approach to dignity, which "sees rationality and animality as thoroughly unified"); NUSSBAUM, *supra* note 192, at 39-47 (exploring the "central human functional capabilities" and contending that if a life lacks any of these capabilities that it "will fall short of being a good human life" and thus deprive one of his "dignity"); MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 70-73 (2000) ("We judge, frequently enough, that a life has been so impoverished that it is not worthy of the dignity of the human being, that it is a life in which one goes on living, but more or less like an animal, unable to develop and exercise one's human powers."); Nussbaum, *supra* note 66, at 351-80 (describing "ten core capabilities" that "are necessary conditions of a life worthy of human dignity" (internal quotation marks omitted)).

because, to put it in Aristotelian terms, they lack the basic "wholeness" that one needs as a baseline from which to excel.[230]

I refer to the type of dignity that applies both to people who convey a constellation of virtuous characteristics and to those who are prevented by circumstance from expressing such characteristics as *personal integrity as dignity*. This form of dignity has several features.

First, personal integrity as dignity starts with the Aristotelian notion that humans cannot express this form of dignity unless they are integrated, whole selves. I use the word integrity to define this form of dignity because it is derived from the Latin word *integritas*, meaning "wholeness" or "undivided or unbroken state."[231] A person who has personal integrity as dignity can excel because he is morally, mentally, and physically intact, whereas a person who has fallen below a certain human baseline is "in pieces." We might colloquially say that they have "fallen apart," "broken down," or "dis-integrated."

Second, personal integrity as dignity commands internal and external respect. It can be destroyed by one's own actions—as when a person acts "beneath his dignity"—or it can be destroyed by the actions of others—as when a person is "robbed of his dignity." In either sense, a person can be rendered undignified by acts that degrade, debase, or diminish the individual's appearance as a collected, unified self.

Third, the language we use to describe dignified and undignified states illustrates that personal integrity as dignity is presentational and expressive. How a person conducts himself publicly matters; whether a person speaks, walks, and carries himself with a sense of dignity counts. A slave, who has been deprived of equality and liberty as dignity, can nevertheless possess personal integrity as dignity by expressing his sense of moral worth and self-respect in the face of oppression. In so doing, the slave is expressing that despite what his owner has taken from him, he remains whole, complete, and dignified.

By contrast, how others treat a person also has expressive implications for personal integrity as dignity. Recall the internationally televised capture of Saddam Hussein by U.S. forces in Iraq. Stripped of his military uniform and subjected to a public delousing, Hussein was reduced to a pale specter of his former self.[232] The expressive and

---

[230] *See* MICHAEL A. SMITH, HUMAN DIGNITY AND THE COMMON GOOD IN THE ARISTOTELIAN-THOMISTIC TRADITION 6-15 (1995) (describing Aristotle's theory of the "one" or "whole" person).

[231] 5 THE OXFORD ENGLISH DICTIONARY 368 (1961).

[232] *See After the Euphoria*, ECONOMIST, Dec. 20, 2003, at 79, 79-80 (describing the capture of Saddam Hussein and explaining that "[s]ome Iraqis felt that the sight of

public function of the televised photos was to demonstrate that American military forces had "broken" Hussein. They had destroyed his personal integrity as dignity by "dressing him down," both literally and figuratively, and demonstrating that the undignified, debased, and degraded *sub*-human on television no longer posed a world threat.

Fourth, as the presentational and expressive nature of personal integrity as dignity suggests, there is often an aesthetic element to this form of dignity. People who appear poised, graceful, polished, and stately exude "an air of dignity." They can present themselves as a strong, unified whole. By contrast, people who look unsightly, unseemly, uncomely, inelegant, disgraceful, or even revolting appear undignified. The latter have lost their self-respect—in many cases, it has been taken from them—and they have "fallen apart"[233] under conditions that are aesthetically unsettling, embarrassing, humiliating, shameful, disgraceful, demeaning, and self-destructive.[234]

2. Protecting Individuals from *Dis*-Integration

Personal integrity as dignity can be threatened in two contexts. The first circumstance occurs when people are judged on the basis of a single, personal trait that others deem inconsistent with human virtue or excellence. The second case arises when people are unable to present themselves as composed, dignified, whole selves capable of human virtue. The Supreme Court has invoked personal integrity as dignity in both situations to protect individuals from views or activities that are damaging to the integrated self.

Saddam looking so unkempt and submissive made those who cowered in his shadow seem slightly pathetic").

[233] Pritchard, *supra* note 33, at 301 (internal quotation marks omitted). Pritchard explains that "whether one can 'hold himself together'" is central to the notion of personal integrity. *Id.*

[234] Shaming and humiliation occur in a variety of settings and create negative externalities. *See, e.g.*, MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 172-221 (2004) (criticizing the use of stigmatization, shame, and humiliation as a cure for criminal wrongdoing and perceived social degeneracy); DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET 76-102 (2007) (demonstrating the individual and social costs of unconstrained gossip, slander, and rumor in cyberspace); Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075-76 (2006) (concluding that shaming punishments are not acceptable to a significant segment of society and therefore recanting his previous argument that shaming sanctions are expressively equal to imprisonment).

a. *When the Self Is Reduced to a Single Trait*

Society frequently judges people on the basis of one particular characteristic. In some cases, attention is drawn to a trait because possessing it is what makes someone a particularly virtuous or excellent (*arête*) example of that which they do.[235] For example, an opera singer is commended for a strong voice, a surgeon for steady hands, and a ballet dancer for graceful feet. In other cases, a particular characteristic is singled out to suggest that people who possess it are not, or cannot become, exemplars of humanity. Society frequently characterizes alcoholics, drug addicts, and thieves, for instance, on the basis of a trait that others believe prevents them from achieving human excellence. The defining trait or characteristic is considered so shameful as to disqualify the people who possess or express it from a trajectory of human excellence or virtue.

The Court has relied on personal integrity as dignity to describe and prevent the harm that results when a personal trait of this kind is thrust into the public arena, causing all other personal features to fade into the background. Examples can be found in the Court's First Amendment defamation and Sixth Amendment self-representation cases.

In defamation suits, the Court has opined that when one alleged negative fact about a person (whether true or false) becomes all that a person's social group sees and knows of that person, his personal integrity as dignity is at risk. In *Milkovich v. Lorain Journal Co.*, the Court explored whether a newspaper article, which implied that the petitioner had lied under oath during a judicial proceeding, was constitutionally protected speech.[236] The article, in relevant part, suggested that Milkovich, a high-school wrestling coach, had knowingly committed perjury during a hearing to investigate an altercation between his team and a team from another high school that resulted in injuries to several people.[237] Milkovich maintained that the attack on his veracity damaged his reputation and his lifetime occupation as a coach and teacher.[238]

Although the Court had previously recognized the First Amendment's "vital guarantee of free and uninhibited discussion of public issues" for defendants in defamation actions,[239] it chose instead to rec-

---

[235] It is not accidental that we refer to people who are technically gifted in the fine arts as virtuosos.

[236] 497 U.S. 1, 3 (1990).

[237] *Id.* at 3-5.

[238] *Id.* at 6-7.

[239] *Id.* at 22; *cf.* Cohen v. California, 403 U.S. 15, 20 (1971) (rejecting the notion that the petitioner's decision to display a vulgar four-letter word on his jacket

ognize another side to the equation; namely, a strong interest in protecting people against affronts to their personal integrity as dignity. Quoting an earlier opinion by Justice Stewart, the Court explained that "'[t]he right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential *dignity* and worth of every human being.'"[240] In restricting the newspaper's speech, the Court gave greater weight to Milkovich's interest in protecting his personal integrity as dignity than the journalist's or public's interest in liberty as dignity.[241]

The Court similarly has invoked personal integrity as dignity to prevent an individual from ruining his own reputation. The decision in *Indiana v. Edwards* is a rare case in which the Court limits individual autonomy to protect personal integrity as dignity.[242] The case involved a mentally ill man who was judged competent to stand trial and who invoked his constitutional right to self-representation.[243] In a 7-2 decision, the Court held that the Sixth Amendment right to self-representation can be abrogated when exercising that right would not "affirm the dignity" of the defendant.[244]

In the Court's view, although liberty as dignity underlies the self-representation right, the "spectacle that could well result from [the defendant's] self-representation at trial is at least as likely to prove humiliating as ennobling."[245] Whether the attack on a person's reputation is external (as in *Milkovich*) or inadvertently internal (as in *Edwards*), the Court's opinions suggest that when a single negative attribute is permitted to overshadow an entire persona, personal integrity as dignity is diminished.

---

amounted to "fighting words" likely to incite violence). In contrast to the Court in *Milkovich*, the majority in *Cohen* focused on the speaker's interest in liberty as dignity. Justice Harlan, writing for the Court, reasoned that although freedom of expression can create "verbal tumult, discord, and even offensive utterance," there is "no other approach [which] would comport with the premise of individual dignity and choice upon which our political system rests." *Id.* at 24-25.

[240] *Milkovich*, 497 U.S. at 22 (emphasis added) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

[241] *Cf. Cohen*, 403 U.S. at 21 (noting that a decision to close off discourse to prevent others from hearing it requires a showing of intolerable invasion of substantial privacy interests).

[242] 554 U.S. 164, 176 (2008).

[243] *Id.* at 167.

[244] *Id.* at 176 (quoting McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984)) (internal quotation marks omitted).

[245] *Id.*

b. *When the Self Cannot Express Its Wholeness*

Members of the Court also have invoked personal integrity as dignity to describe situations in which a person is only able to present himself as a part of his full self, rather than a unified, composed, or collected whole. Justice Scalia proffers such a notion of personal integrity as dignity four times in his dissenting opinion in *National Treasury Employees Union v. Von Raab*.[246] In *Von Raab*, the Court held that the U.S. Customs Service's drug-screening program, which compelled employees to submit to urinalysis, was reasonable as applied to certain employees because the testing furthered a compelling government interest in safeguarding the nation's borders.[247]

Rejecting the Court's reasoning, Justice Scalia asserted that demanding an employee "perform 'an excretory function traditionally shielded by great privacy,'"[248] "while 'a monitor of the same sex . . . remains close at hand to listen for the normal sounds'"[249] is "offensive to personal dignity."[250] What makes it an "affront to [the employees'] dignity"[251] is not just that the drug test is involuntary, but that it is intrusive, embarrassing, and undignified.[252] Justice Scalia depicted the drug testing in this way to illustrate that it is an "immolation of . . . human dignity"[253] tied to the "coarsening of our national manners"[254] and our failure to respect people's desire to present themselves as dignified, composed, and complete.

The idea that personal integrity as dignity is implicated when the state observes individuals engaged in less-than-savory activities before

---

[246] 489 U.S. 656, 680-81, 686-87 (1989) (Scalia, J., dissenting).

[247] *Id.* at 672 (majority opinion).

[248] *Id.* at 680 (Scalia, J., dissenting) (quoting Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 626 (1989)).

[249] *Id.* (alteration in original) (quoting *id.* at 661 (majority opinion)).

[250] *Id.*

[251] *Id.* at 686.

[252] *Id.* at 686-87. In his dissent in *Skinner v. Railway Labor Executives' Ass'n*, a drug-testing case decided the same day as *Von Raab*, Justice Marshall, joined by Justice Brennan, concluded that compelled drug testing "significantly intrudes on the 'personal privacy and dignity against unwarranted intrusion by the State' against which the Fourth Amendment protects." 489 U.S. 602, 644 (1989) (Marshall, J., dissenting) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)). Justice Marshall noted that in "[o]ur culture the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem." *Id.* at 646 (quoting Charles Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

[253] *Von Raab*, 489 U.S. at 681 (Scalia, J., dissenting).

[254] *Id.* at 687.

they have a chance to collect themselves is not one held only by Justice Scalia. Writing for the full Court in *Hudson v. Michigan*, a case involving the failure of the police to announce adequately their presence before conducting a warrantless search,[255] Justice Scalia explained one dignity-related purpose of the knock-and-announce rule:

> [T]he knock-and-announce rule protects those elements of privacy and dignity that can be destroyed by a sudden entrance. It gives residents the "opportunity to prepare themselves for" the entry of the police. "The brief interlude between announcement and entry with a warrant may be the opportunity that an individual has to pull on clothes or get out of bed." In other words, it assures the opportunity to collect oneself before answering the door.[256]

In *Hudson*, as in Scalia's dissenting opinion in *Von Raab*, the search that affronted personal integrity as dignity involved exposing an individual to others when he was indecent, improper, undressed, ungraceful, or uncollected—in short, undignified.[257] Like circumstances that reduce a whole individual to a solitary trait, situations that prevent an individual from expressing his wholeness are *dis*-integrating and function as an affront to personal integrity as dignity.

E. *Collective Virtue as Dignity*

1. Communitarianism and Humanity's Excellence

Thus far we have traced institutional status as dignity to aristocracy, equality as dignity to egalitarianism, liberty as dignity to political liberalism, and integrity as dignity to Aristotelian-virtue theory. The final type of dignity, *collective virtue as dignity*,[258] finds its roots in communitarianism, but also expresses some elements of other concepts. Collective virtue as dignity addresses how members of civilized socie-

---

[255] 547 U.S. 586, 588 (2006).

[256] *Id.* at 594 (citations omitted) (quoting Richards v. Wisconsin, 520 U.S. 385, 393 n.5 (1997)).

[257] *Cf.* United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (distinguishing searches of vehicles, which do not implicate personal integrity as dignity, from searches of individuals, and stating that "the reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles").

[258] Although there is not a single brand of communitarianism, most political philosophers labeled as communitarian thinkers reject the Rawlsian view that the principal purpose of government is to protect individual liberty interests. *See, e.g.*, MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982) (arguing that Rawlsian liberalism is overly individualistic to the detriment of society).

ties ought to behave and ought to be treated in order to respect the collective dignity of humanity. It is less concerned with individual dignity per se than with how a society values the totality of human life.

Collective virtue as dignity has several defining characteristics. Notably, it extends the Aristotelian notion of personal excellence to the human community writ large. Instead of distinguishing one person from another on the basis of individual virtue, collective virtue as dignity refers to the excellence of the human species. This excellence recognizes humans as the best example (*arête*) of the animal kingdom.[259] Accordingly, collective virtue as dignity is expressed when people behave and are treated in ways worthy of humans, not beasts.[260] When society treats people in ways that are *in*-humane, or when people engage in activities that are *de*-humanizing, collective virtue as dignity diminishes.

Collective virtue as dignity is therefore both iconographic and expressive. Treating a person in a subhuman manner is wrong not only for the effect it has on that individual, but also for the consequences it has on collective humanity and society. For example, critics of torture seek to prohibit the practice not simply because it violates the autonomy of the tortured individuals and subjects them to extreme pain and suffering, but also because torture is anathema to civilized societies bound by law.[261] People ought to rule with laws rather than with brutality and savagery unfitting even for beasts.[262] Torture, on that view, undermines collective virtue as dignity.

---

[259] There are a variety of perspectives on what renders humanity unique among creatures. *See, e.g.*, Rolston, *supra* note 61, at 135 (considering the biological distinctiveness of humans as compared to animals); *see also* Bostrom, *supra* note 68 at 196-98 (discussing human dignity and possible implications of human cloning); Gilbert Meilaender, *Human Dignity: Exploring and Explicating the Council's Vision* (stating that dignity characterizes humans as the rational species), *in* HUMAN DIGNITY AND BIOETHICS, *supra* note 30, at 253, 253.

[260] *See, e.g.*, Leon Kass, *Human Dignity* (introducing a set of readings highlighting the many facets of humanity), *in* BEING HUMAN: CORE READINGS IN THE HUMANITIES 568 (Leon Kass ed., 2004).

[261] Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1709-34 (2005).

[262] Several international laws prohibit torture. *See* International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171 ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85 (requiring states to "ensure that all acts of torture are offences under its criminal law"). For further discussion of the view that participating in

Conversely, when individuals engage in undignified conduct, their acts may threaten humanity's collective virtue as dignity. Consider the famous French dwarf-tossing case. In that case, the French Conseil d'État granted police power to prevent any public activities that failed to respect human dignity. Accordingly, two municipalities banned the spectacle of dwarf-tossing in local clubs.[263] Manuel Wackenheim, one of the dwarfs, challenged the ban by arguing that he freely participated in the activity, was paid, and that the ban would result in his unemployment. The Conseil d'État ruled that using humans as projectiles was degrading to all members of society because it violated an overriding sense of human dignity (i.e., collective virtue as dignity).[264]

As the dwarf-tossing case demonstrates, collective virtue as dignity may overcome arguments for autonomy and often serves to constrain individual behavior for the good of society. In a community that believes prostitution is an affront to women's collective dignity, it is irrelevant that individual women find the practice empowering or view it as an exercise of their liberty as dignity. Similarly, "slavery is a wrong even if it is not experienced as negative by the slave and even if the slave maintains a substantial amount of de facto autonomy" because the practice offends collective virtue as dignity.[265]

Whether we are discussing the legality of torture, dwarf-tossing, or prostitution, the community defines collective virtue as dignity. This is consistent with the communitarian view that moral judgment depends on the actual beliefs, practices, and institutions that create communities at specific times and places. Prohibited conduct considered offensive and degrading in one society might not be in another.

2. Advancing Notions of a Decent Society

The Supreme Court invokes collective virtue as dignity to stop or limit activities that do not comport with how a decent society should respect the dignity of human life. This approach is evident in the Court's Eighth Amendment jurisprudence, which limits the death penalty to mentally competent adults[266] and precludes certain forms of

---

torture harms liberal institutions, see David Luban, *Liberalism, Torture, and the Ticking Bomb*, 91 VA. L. REV. 1425, 1425-61 (2005), and Waldron, *supra* note 261, at 1709-34.

[263] CE Ass., Oct. 27, 1995, Rec. Lebon 372, http://www.utexas.edu/law/academics/centers/transnational/work_new/french/case.php?id=1024.

[264] *Id.*

[265] Kent Greenawalt, *Dignity and Victimhood*, 88 CALIF. L. REV. 779, 781 (2000).

[266] *See* Roper v. Simmons, 543 U.S. 551, 560 (2005) (setting aside the death sentence of a juvenile under the age of eighteen); Atkins v. Virginia, 536 U.S. 304, 318-21

punishment,[267] and in the Court's search and seizure decisions, which exclude evidentiary material obtained in a manner that would "shock[] the conscience."[268] The Court's use of collective virtue as dignity is also powerfully evident in its recent abortion jurisprudence.

In limiting the reach of the death penalty to mentally competent adults, the Court looked beyond its standard tests to conclude that civilized societies do not execute the mentally insane,[269] the mentally retarded,[270] or juvenile convicts.[271] The Court in *Ford v. Wainwright* considered whether inflicting the death penalty on a prisoner who is mentally insane violates the Eighth Amendment.[272] Observing the "natural abhorrence civilized societies feel" at executing an insane prisoner, as well as the national "intuition that such an execution simply offends humanity," the Court ruled the practice unconstitutional.[273] In so holding, the Court aimed "to protect the dignity of society itself from the barbarity of exacting mindless vengeance."[274]

Confronted with the impending execution of a mentally retarded prisoner, the Court in *Atkins v. Virginia* similarly invoked collective virtue as dignity.[275] Emphasizing that the Eighth Amendment draws on "the 'evolving standards of decency that mark the progress of a maturing society,'"[276] the Court explained that whether the execution of a mentally retarded person violates the Amendment "is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."[277] After observing widespread condemnation of the practice by state legislatures, the Court held that ex-

---

(2002) (holding as unconstitutional the execution of mentally retarded prisoners); Ford v. Wainwright, 477 U.S. 399, 409-10 (1986) (plurality opinion) (finding the execution of mentally ill persons unconstitutional).

[267] *See* Hope v. Pelzer, 536 U.S. 730, 737 (2002) (stating that if true, petitioner's allegations that he was handcuffed to a hitching post for seven hours in the sun with almost no breaks would establish an Eighth Amendment violation).

[268] Rochin v. California, 342 U.S. 165, 172 (1952).

[269] *Ford*, 477 U.S. at 410.

[270] *Atkins*, 536 U.S. at 321.

[271] *Roper*, 543 U.S. at 560.

[272] 477 U.S. at 399.

[273] *Id.* at 409-10.

[274] *Id.* at 410.

[275] 536 U.S. 304.

[276] *Id.* at 311-12 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

[277] *Id.* at 311.

ecuting mentally retarded prisoners violates the "'dignity of man'" at the root of the Eighth Amendment.[278]

In *Roper v. Simmons*, the Court went one step further, asking not only whether the execution of juveniles offended national opinion, but also whether it faced international condemnation.[279] Drawing attention to the fact that the United States was the only country that sanctioned the death penalty for juveniles, the Court noted that foreign laws confirm the Court's view that certain acts must be prohibited to "secure individual freedom and preserve human dignity."[280] These values, the Court explained, "are central to the American experience and remain essential to our present-day self-definition and national identity."[281] To permit states to execute juveniles not only would be out of step with international consensus, but also would diminish the nation's collective virtue as dignity.

The Court's invocation of collective virtue as dignity is not limited to its death penalty jurisprudence. In *Hope v. Pelzer*, the Court concluded that state prison guards violated an inmate's Eighth Amendment rights when they handcuffed him to a hitching post for seven hours in the sun, shirtless, and with no access to a bathroom as punishment for disruptive conduct.[282] Describing Hope's treatment as "antithetical to human dignity"[283] and reiterating that the "basic concept underlying the Eighth Amendment . . . is nothing less than the dignity of man,"[284] the Court concluded that modern understandings of collective decency and human dignity preclude the use of hitching posts.[285]

As in *Atkins* and *Roper*, the Court in *Hope* examined societal standards to determine the degree to which the punishment at issue is out of sync with "'contemporary concepts of decency.'"[286] Its determination that "[t]he obvious cruelty inherent in this practice"[287] is imper-

---

[278] *Id.* (quoting *Trop*, 356 U.S. at 100).

[279] 543 U.S. 551, 575-78 (2005).

[280] *Id.* at 578.

[281] *Id.*

[282] 536 U.S. 730, 738 (2002). The Court noted in particular that the punishment "subjected him to a substantial risk of physical harm, to unnecessary pain caused by the handcuffs . . . , to unnecessary exposure to the heat of the sun, to prolonged thirst and taunting, and to a deprivation of bathroom breaks that created a risk of particular discomfort and humiliation." *Id.* at 738.

[283] *Id.* at 745.

[284] *Id.* at 738 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)).

[285] *Id.* at 745-46.

[286] *Id.* at 742 (quoting Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974)).

[287] *Id.* at 745.

missible "under 'precepts of civilization which we profess to possess'"[288] demonstrates that collective virtue as dignity is at the crux of the Court's decision.

Just last Term, the Court used similar reasoning in *Brown v. Plata*, a case involving Eighth Amendment violations suffered by California's prison population as the result of severe and pervasive prison overcrowding.[289] The majority, which affirmed the order of a three-judge panel directing the Governor to reduce the prison population, did not hesitate to call California's prison conditions "grossly inadequate."[290] In describing the constitutional violations suffered by prisoners needing mental health treatment, the Court noted that overcrowding caused California prisoners to have a suicide rate eighty percent higher than the national prison population average, and that due to bed shortages at least one suicidal prisoner was "held in . . . a cage for nearly 24 hours, standing in a pool of his own urine, unresponsive and nearly catatonic."[291]

The Court explained that while "prisoners may be deprived of rights that are fundamental to liberty," they nevertheless "retain the essence of human dignity inherent in all persons . . . [that] animates the Eighth Amendment prohibition against cruel and unusual punishment."[292] When a state facility deprives its citizens of basic sustenance, be it food or medical care, it acts in a manner "incompatible with the concept of human dignity and has no place in civilized society."[293] The Court's invocation of collective virtue as dignity reaffirms its view in *Hope* that certain prison conditions violate the Eighth

---

[288] *Id.* at 742 (quoting *Gates*, 501 F.2d at 1306). The Court's decision relies heavily on its earlier opinion in *Trop*, in which it held that revoking a U.S. soldier's citizenship as punishment for wartime desertion would drastically alter our collective conception of appropriate punishment and our collective virtue as dignity. 356 U.S. at 87-88, 103-04. Writing for the majority, Chief Justice Warren explained that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Id.* at 100.

[289] 131 S. Ct. 1910, 1923 (2011).

[290] *Id.*

[291] *Id.* at 1924. The Court also highlighted the abysmal medical care in California prisons. In particular, the majority referenced data that, due to inadequate medical care and unsafe conditions, a "preventable or possibly preventable death occurred once every five to six days" in California prisons between 2006 and 2007. *Id.* at 1925 n.4.

[292] *Id.* at 1928.

[293] *Id.*

Amendment because they are inconsistent with how "decent" societies treat even their most abhorred members.[294]

The Court's reasoning in so-called shock-the-conscience cases illustrates its commitment to collective virtue as dignity in yet another context. In *Rochin v. California*, the Court held a search unconstitutional when police officers directed a physician to forcibly pump a suspect's stomach to collect evidence that the suspect was a narcotics dealer who had swallowed his stash to avoid arrest.[295] Justice Frankfurter, delivering the Court's opinion, described the police conduct in securing the evidence as "so brutal and so offensive to human dignity"[296] that it went beyond

> some fastidious squeamishness or private sentimentalism about combating crime too energetically. This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities.[297]

At first, Justice Frankfurter appeared primarily concerned with the suspect's liberty as dignity, which police violated when they intruded into his home and manipulated his body without his consent. But this gave way to a deeper concern about the implications of the State's actions for collective virtue as dignity.[298] As the opinion continues,

---

[294] Justice Ginsburg reiterated this view most recently in *Ashcroft v. al-Kidd*, wherein she noted that the harsh custodial conditions in which al-Kidd was kept were "a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times." 131 S. Ct. 2074, 2089 (2011) (Ginsburg, J., concurring).

[295] 342 U.S. 165, 174 (1952).

[296] *Id.* at 174.

[297] *Id.* at 172.

[298] In *Winston v. Lee*, the Court prohibited a search that would have forced a robbery suspect to undergo surgery requiring general anesthesia to remove a bullet that might have implicated him in a crime. 470 U.S. 753, 755 (1985). Writing for the majority, Justice Brennan noted that "'[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.'" *Id.* at 760 (alteration in original) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)). In explaining the Court's position that the suspect's "dignitary interests in personal privacy and bodily integrity" outweighed the state's interest in collecting evidence, *id.* at 761, Justice Brennan wrote that "drug[ing] this citizen . . . with narcotics and barbiturates into a state of unconsciousness, and then . . . search[ing] beneath his skin for evidence of a crime . . . involves a virtually total divestment of respondent's ordinary control over surgical probing beneath his skin." *Id.* at 765 (citations omitted) (internal quotation marks omitted). In contrast to Justice Frankfurter's concern in *Rochin* that the extraction of evidence violated both liberty as dignity *and*

Frankfurter famously said that there is little difference between forcing a confession from a suspect's lips and forcing evidence from his stomach.[299] Both methods, he said, are "too close to the rack and the screw to permit of constitutional differentiation."[300] In comparing the State's actions to torture, Frankfurter took care to point out that the brutality inflicted on Rochin violated "the general requirement that States in their prosecutions respect certain decencies of civilized conduct."[301] In short, forcibly pumping Rochin's stomach, like handcuffing Hope to a hitching post, threatens collective virtue as dignity by suggesting that the civility we associate with our society and its members is unwarranted.

As noted at the outset of this section, however, the Court's most striking use of collective virtue as dignity appears in its recent abortion jurisprudence. In *Gonzales v. Carhart*, the Court considered whether the Partial-Birth Abortion Ban Act of 2003, which prohibits a certain method of performing late-term abortions,[302] is constitutional.[303] The Court upheld the constitutionality of the Act on the grounds that it shows "respect for the dignity of human life" without unduly burdening a woman's choice to seek abortion.[304] In reaching this decision, the Court not only conferred unprecedented influence on collective virtue as dignity, but it also employed arguments to negate pregnant women's claims to liberty as dignity, on which prior abortion jurisprudence had largely rested.[305]

En route to its conclusion, the Court detoured through an extensive and graphic depiction of the abortion procedure at issue. The opinion described the procedure both as having "disturbing similarity to the killing of a newborn infant"[306] and as "gruesome and inhumane."[307] To defend its view that the banned procedure "devalue[s]

---

collective virtue as dignity, Justice Brennan relies only on liberty as dignity to deem the search in *Winston* unconstitutional.

[299] *Rochin*, 342 U.S. at 173.

[300] *Id.* at 172.

[301] *Id.* at 173.

[302] 18 U.S.C. § 1531 (2006). The term "partial-birth abortion" is not a medical term, but a political one crafted by anti-abortion advocates with the intent to incite opposition to abortion generally. Siegel, *supra* note 32, at 1707-08. The medical term for the procedure banned by the Act is "intact D&E" or "dilation and extraction." Gonzales v. Carhart, 550 U.S. 124, 137 (2007).

[303] 550 U.S. 124, 132 (2007).

[304] *Id.* at 157.

[305] *See supra* subsection II.C.2.

[306] *Carhart*, 550 U.S. at 158 (quoting 18 U.S.C. § 1531 note (2000)).

[307] *Id.* at 141 (quoting 18 U.S.C. § 1531 note).

human life,"[308] the Court approvingly cited congressional findings that "such a brutal and inhumane procedure . . . will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life."[309]

As in the Court's Eighth Amendment jurisprudence, *Carhart* invoked collective virtue as dignity to prohibit an activity that it concluded was out of sync with how a decent society demonstrates "respect for the dignity of human life."[310] Unlike the *Casey* plurality, the *Carhart* majority did not weigh a woman's liberty as dignity against the state's interest in respecting potential life to determine whether the Act was constitutional. Instead, the Court embraced a strategy aligned with its Eighth Amendment jurisprudence to give priority to claims grounded in our *collective* human dignity.

The Court's separate discussion of whether pregnant women can make rational decisions about abortion only further subordinates the value of liberty as dignity. From the outset, *Carhart* had a different focus than the Court's prior abortion decisions. References to women do not appear until the fourth page of the *Carhart* opinion,[311] and then only as passive actors in medical procedures. Not until well over ten pages into the opinion do women become participants in their medical care.[312] When the Court does turn to a woman's decision, it concludes (after admitting that it has no reliable data) that women may "come to regret their choice to abort the infant life they once created and sustained" and may suffer "severe depression and loss of esteem."[313]

In short, *Carhart* illustrates that liberty as dignity, and the women who possess it, are playing an ever smaller role in the Court's abortion jurisprudence. In their place, the Court proffers collective virtue as dignity to vindicate what it views as our decency and humanity. This shift in the Court's emphasis serves as a reminder that "the content of human dignity is a corollary of . . . cultural, political, constitutional, and other

---

[308] *Id.* at 158.
[309] *Id.* at 157.
[310] *Id.*
[311] *Id.* at 135-36.
[312] *Id.* at 144.
[313] *Id.* at 159. As Professor Reva Siegel has powerfully argued in her recent work, there are good reasons to question why the Court cites affidavits suggesting that the state ought to protect women from making uninformed decisions about abortion, particularly when those considerations did not weigh into Congress' decision to enact the ban. Siegel, *supra* note 32, at 1698-99.

conditions, which can evolve and change in the course of history."[314] Having a typology of dignity that can track these nuances offers the opportunity to better understand the doctrinal changes they produce.

CONCLUSION

This typology of dignity is not, to quote Wittgenstein, a "final analysis of our forms of language."[315] In contrast to standard approaches to defining dignity, the proposed framework does not offer a core, fixed, or lasting concept of the term. Instead, it utilizes empirical data to recognize that dignity's conceptions and functions are dynamic and context-driven. Understanding how the Court invokes dignity in practice, rather than in the abstract, serves as the basis of this typology and allows it to maintain the flexibility to respond to evolutions and changes in dignity's usage.

In mapping the terrain of our current dignity discourse, the typology brings dignity's judicial functions into greater relief. It reveals the contexts in which the Court employs dignity to protect substantive interests, and conversely, highlights the ways in which the Court's view of dignitary harms reshapes certain legal doctrines. By illustrating that a set of pluralistic values often stand behind the Court's use of dignity, it gives coherence to what might otherwise appear to be vague, imprecise, and even ambiguous uses of the word. Most importantly, the typology provides us with the tools to evaluate what is at stake, normatively and doctrinally, in a variety of contexts; it allows us to detect dignity's role in doctrinally transformative moments; and it equips us with a framework for future discussions.

---

[314] Doron Shultziner, *Human Dignity—Functions and Meanings*, 3 GLOBAL JURIST TOPICS 1, 5 (2003).

[315] WITTGENSTEIN, *supra* note 35, ¶ 91.

APPENDIX

Table 1a. Justice Brennan's Majority Opinions Invoking the Word "Dignity"

Date	Case Name	Citation
1989	Texas v. Johnson	491 U.S. 397
1985	Winston v. Lee	470 U.S. 753
1984	Roberts v. U.S. Jaycees	468 U.S. 609
1978	Monell v. Dep't of Soc. Servs.	436 U.S. 658
1977	Califano v. Goldfarb	430 U.S. 199
1974	Steffel v. Thompson	415 U.S. 452
1971	Rosenbloom v. Metromedia, Inc.	403 U.S. 29
1970	Goldberg v. Kelly	397 U.S. 254
1966	Schmerber v. California	384 U.S. 757
1965	Dombrowski v. Pfister	380 U.S. 479
1964	N.Y. Times Co. v. Sullivan	376 U.S. 254
1959	Abbate v. United States	359 U.S. 187

Table 1b. Justice Brennan's Concurring Opinions Invoking the Word "Dignity"

Date	Case Name	Citation
1988	City of St. Louis v. Praprotnik	485 U.S. 112
1987	United States v. Stanley	483 U.S. 669
1987	Goodman v. Lukens Steel Co.	482 U.S. 656
1981	Rhodes v. Chapman	452 U.S. 337
1979	Herbert v. Lando	441 U.S. 153
1973	Hurtado v. United States	410 U.S. 578
1972	Furman v. Georgia	408 U.S. 238
1970	Illinois v. Allen	397 U.S. 337
1963	Ker v. California	374 U.S. 23

Table 1c. Justice Brennan's Dissenting Opinions Invoking the Word "Dignity"

Date	Case Name	Citation
1990	Lewis v. Jeffers[316]	497 U.S. 764
1990	Walton v. Arizona	497 U.S. 639
1990	Cruzan v. Dir., Mo. Dep't of Health	497 U.S. 261
1989	Stanford v. Kentucky	492 U.S. 361
1989	Florida v. Riley	488 U.S. 445
1987	O'Lone v. Estate of Shabazz	482 U.S. 342
1986	Colorado v. Connelly	479 U.S. 157
1986	Goldman v. Weinberger	475 U.S. 503
1985	United States v. Montoya de Hernandez	473 U.S. 531
1985	Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.	472 U.S. 749
1983	Jones v. Barnes	463 U.S. 745
1976	United States v. Martinez-Fuerte	428 U.S. 543
1976	Gregg v. Georgia	428 U.S. 227
1976	Estelle v. Williams	425 U.S. 501
1976	Paul v. Davis	424 U.S. 693
1976	Time, Inc. v. Firestone	424 U.S. 448
1975	United States v. Wilson	421 U.S. 309
1971	Harris v. New York	401 U.S. 222

[316] The Supreme Court decided *Lewis v. Jeffers* and *Walton v. Arizona* on the same day. While Justice Brennan's dissent can be found in *Walton*, it also applies to *Lewis*.

Table 2. Opinions Invoking the Word "Dignity" During the Tenure of the Roberts Court

Date	Case Name	Citation
2011	Sorrell v. IMS Health Inc.	131 S. Ct. 2653
2011	Bond v. United States	131 S. Ct. 2355
2011	Ashcroft v. al-Kidd	131 S. Ct. 2074
2011	Brown v. Plata	131 S. Ct. 1910
2011	Sossamon v. Texas	131 S. Ct. 1651
2011	Va. Office for Prot. & Advocacy v. Stewart	131 S. Ct. 1632
2010	McDonald v. City of Chicago	130 S. Ct. 3020
2010	Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez	130 S. Ct. 2971
2010	City of Ontario v. Quon	130 S. Ct. 2619
2010	Barber v. Thomas	130 S. Ct. 2499
2010	Alabama v. North Carolina	130 S. Ct. 2295
2010	Samantar v. Yousuf	130 S. Ct. 2278
2010	Citizens United v. FEC	130 S. Ct. 876
2010	South Carolina v. North Carolina	130 S. Ct. 854
2010	Wellons v. Hall	130 S. Ct. 727
2010	Hollingsworth v. Perry	130 S. Ct. 705
2009	Beard v. Kindler	130 S. Ct. 612
2009	Herring v. United States	555 U.S. 135
2008	Kennedy v. Louisiana	554 U.S. 407
2008	Plains Commerce Bank v. Long Family Land & Cattle Co.	554 U.S. 316
2008	Indiana v. Edwards	554 U.S. 164
2008	Republic of Phil. v. Pimentel	553 U.S. 851
2008	Virginia v. Moore	553 U.S. 164

Date	Case Name	Citation
2008	Baze v. Rees	553 U.S. 35
2007	Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1	551 U.S. 701
2007	Gonzales v. Carhart	550 U.S. 124
2007	Watters v. Wachovia Bank, N.A.	550 U.S. 1
2007	Massachusetts v. EPA	549 U.S. 497
2006	Carey v. Musladin	549 U.S. 70
2006	Beard v. Banks	548 U.S. 521
2006	Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy	548 U.S. 291
2006	Woodford v. Ngo	548 U.S. 81
2006	Hudson v. Michigan	547 U.S. 586
2005	Wagnon v. Prairie Band Potawatomi Nation	546 U.S. 95