



School of Law

# **ON THE USE AND ABUSE OF DIGNITY IN CONSTITUTIONAL LAW**

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# ARTICLES

## ON THE USE AND ABUSE OF DIGNITY IN CONSTITUTIONAL LAW

*Neomi Rao*\*

*Human dignity has developed into a core value of modern constitutionalism. In the United States, the Supreme Court has referred to human dignity only sporadically, but several justices and a number of scholars have advocated using the concept of human dignity to modernize American constitutional law and to keep in step with the international community. I argue in this Article that acceptance of the modern, largely European conception of human dignity would weaken American constitutional protections for individual rights.*

*Human dignity as a constitutional concept has drawn its meaning from a European cultural and social context that emphasizes communitarian values, rather than individual ones. In practice, modern constitutionalism prefers balancing and harmonizing rights with other political and social needs. The widespread acceptance of such tradeoffs minimizes the importance of rights because courts review rights as part of a political calculus. By focusing on values such as human dignity, modern constitutionalism deprives rights of their special force. The experience from abroad suggests caution before importing the European ideals of human dignity into American constitutional law.*

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In the wake of the horrors of World War II, the international community settled on “human dignity” as the focal point for human rights and constitutional protections. The elevation of human dignity in the Universal Declaration of Human Rights<sup>1</sup> provided the groundwork for protecting and developing human dignity in the constitutional law of countries such as Germany and South Africa. Whatever this lofty concept meant sixty years ago in the Universal Declaration, contemporary constitutional courts in Europe and elsewhere have developed a rich jurisprudence of dignity that reflects the communitarian and democratic preferences of modern European society.

In the United States, the Supreme Court has also invoked the concept of human dignity, but more tentatively. The United States Constitution does not explicitly mention dignity. In the course of American jurisprudence, the value of “human dignity” is a relative latecomer. References to human and individual dignity were first made in the 1940s in dissenting opinions arguing for a more robust conception of individual liberties.<sup>2</sup> Since that time, the Supreme Court has increasingly relied on concepts of personal and human dignity to explain, develop, and broaden various constitutional protections.<sup>3</sup>

The Supreme Court, however, has not provided a definition of dignity, and its meaning remains pliable. On occasion “human dignity” is linked to specific constitutional freedoms, such as those found in the Fourth, Fifth, and Eighth Amendments.<sup>4</sup> In other cases, the Court has treated dignity as an important component of the “liberty” protected by the Due Process Clauses of the Fifth and

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<sup>1</sup> Universal Declaration of Human Rights, G.A. RES. 217A, U.N. GAOR, 3d Sess., 1st. plen mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration of Human Rights].

<sup>2</sup> For example, Justice Murphy invoked the “dignity of the individual” in dissenting from the decision to uphold the Japanese exclusion program in *Korematsu v. United States*, 323 U.S. 214, 240 (1944) (Murphy, J., dissenting).

<sup>3</sup> See generally Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2005) (providing a detailed survey).

<sup>4</sup> See *infra* Part V.B.

Fourteenth Amendments.<sup>5</sup> Dignity is associated with different, and sometimes irreconcilable, principles such as autonomy, equality, and respect.

In the abstract, human dignity has inspiring connotations linked to the development and protection of human rights. Politicians and activists across the political spectrum invoke dignity as part of their rhetoric in advancing various goals both at home and abroad. Everyone is understandably in favor of dignity, even if they disagree about what it requires. Political discussion about personal dignity in the context of poverty, abortion, gay rights, assisted suicide, or the death penalty may seem natural in a pluralistic and free society. Giving constitutional status to such an amorphous concept, however, is problematic for American constitutional law.

Outside of the United States, the concept and value of human dignity has become inextricably intertwined with modern constitutionalism. Some conception of “dignity” may be part of American jurisprudence, but at least at present, this is not the same capacious and evolving conception of “human dignity” protected overseas. In general, human dignity remains a different concept with different applications in America than it does in Europe.<sup>6</sup>

Recognizing this disparity, a number of scholars have argued that the Supreme Court can and should learn from its European counterparts and reconceptualize constitutional rights by taking a broader view of the requirements of dignity.<sup>7</sup> Recent decisions by the Supreme Court have suggested a gradual evolution to a more open-ended and “European” conception of dignity, which has led some judges and scholars to hope that the Court will go even further.

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<sup>5</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 850 (1992); *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (asserting that individuals should be free to enter into a homosexual relationship and “still retain their dignity as free persons”).

<sup>6</sup> I use the term “European” constitutionalism in order to indicate points of similarity between European nations in their treatment of constitutional values and rights. While this glosses over some important differences between countries, Europeans are, at—at least at times—eager to establish a type of constitutionalism distinct from the American variety. For instance, the European Commission for Democracy through Law organized a seminar on “European and American Constitutionalism” in part to discuss whether a distinct “European constitutionalism” was beginning to emerge. Georg Nolte, *European and US Constitutionalism: Comparing Essential Elements*, in *EUROPEAN AND US CONSTITUTIONALISM* 3, 4 (Georg Nolte ed., 2005). Moreover, identifying commonalities among European countries serves well to highlight the exceptional nature of American constitutionalism. See, e.g., Daniel Halberstam, *Desperately Seeking Europe: On Comparative Methodology and the Conception of Rights*, 5 *INT’L J. CONST. L.* 166, 182 (2007) (“[W]e may well be dealing less with a distinctly European brand of constitutionalism and more with the unique approach to constitutionalism in the United States.”).

European constitutionalism also shares features with other constitutions drafted after the Second World War. It may be the “postwar conception of the constitution” that is distinguishable from the American conception. The postwar conception is not limited to Europe, but includes other countries such as Canada, South Africa, and India. See Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 15 (Vicki C. Jackson & Mark Tushnet eds., 2002) (“The rights-protecting instruments adopted in the aftermath of the Second World War invite comparative reflection and analysis because they rest on a shared constitutional conception that, by design, transcends the history, cultural heritage, and social mores of any particular nation-state.”).

<sup>7</sup> See *infra* Part I.C.

There are, however, difficulties and consequences of importing the modern, largely European, value of human dignity into our jurisprudence. The social and cultural concepts underlying these notions of human dignity have led to the development of values-based constitutionalism, which has minimized the importance of rights by conceiving of them as just another interest in the democratic balance. This Article seeks to demonstrate how values-based constitutionalism embraces a weak conception of rights by allowing rights to be traded off against other social and political needs. Despite its lofty appeal, human dignity as a constitutional principle may undermine individual rights and liberty.

Part I examines the open-ended and protean nature of human dignity and seeks to give context to this elusive concept by examining some of its historical and philosophical roots. Modern human dignity is conceived as an attribute of all individuals. This equal allocation means that in the abstract, human dignity will have little weight when courts must decide between competing dignities. For human dignity to count, courts will need to consider other cultural values that prioritize particular conceptions of human dignity. Since modern human dignity has drawn its meaning from European and not American conceptions of dignity, it may be undesirable and difficult to expand constitutional conceptions of human dignity in the United States, precisely because of deep-rooted cultural and historical differences in how rights are conceived here as opposed to Europe.

Part II examines the value of dignity protected by modern constitutions and explains how many countries have adopted values-based constitutionalism, in distinction to America's rights-based constitutionalism. "Human dignity" in modern constitutions is intimately linked with older values of communitarianism found in Europe. It reflects a particular conception of individual fulfillment within the broader social project of the state. Human dignity supports individual rights, but within a social community. In this context, rights are important, but can be limited by the needs of a democratic society.

Part III examines the differences between rights and values, and considers how rights can be weighed in relation to other non-rights-based interests. Most constitutional rights can be limited by political considerations, but the question is how much weight should be given to rights in the face of other pressing interests. By emphasizing social and community values, modern constitutions tend to equate or very nearly equate rights with other interests that are considered necessary or important in a democratic society. Constitutional values such as human dignity may be served by rights as well as by governmental policies that infringe on rights—the focus on values may thus obscure the extent to which state policies conflict with individual rights.

Part IV examines the concrete tradeoffs made between rights and other interests. Most modern constitutions explicitly place limitations on fundamental rights. These limitations clauses require balancing rights against other democratic priorities and express the preference in modern constitutions for harmonizing the demands of individual rights on the one hand and the creation of social community on the other. Values-ordered constitutionalism is generally unwilling to allow rights to consistently trump the other interests of the community. The clauses demonstrate a common understanding of the structure and scope of rights, i.e., that they must often

yield to other concerns. This conception of rights is also embodied in proportionality review, which is the dominant mode of rights interpretation in modern constitutional jurisprudence. When considering proportionality, courts balance competing interests, allowing rights to be infringed where there is sufficient state “justification” for doing so. The focus on government justifications further shifts the balance away from rights.

The remainder of the Article examines the problems of using modern human dignity in American constitutional interpretation. I consider the Supreme Court’s use of human dignity in constitutional decisions, focusing on *Lawrence v. Texas*, in which the Supreme Court invalidated Texas’s anti-sodomy law and in doing so advanced its most far-reaching conception of the respect and dignity found in the liberty protected by the Due Process Clause.<sup>8</sup> The Court’s reasoning strongly mirrors that found in modern adjudication both in substance and methodology.

Despite intimations in some Supreme Court decisions, American constitutionalism differs from the more modern varieties. The American Constitution protects rights—not values such as human dignity—limiting the grand scale theorizing possible by the Supreme Court. Moreover, constitutional adjudication continues to be viewed as fundamentally different from political decision making, making it harder to simply treat rights as commensurate with other democratic interests. Although balancing approaches are familiar in the United States, rights adjudication often depends on principles that cannot be balanced away.

As human dignity ascends in importance, it may be untimely to suggest that the modern forms of this concept will undermine what is most valuable in American constitutional law, including strong rights protections and the commitment to individual liberty. It is precisely because of the appeal of human dignity that this Article seeks to examine the practical consequences and potential dangers of human dignity as a constitutional value.

## I. THE MEANING AND CONSEQUENCES OF HUMAN DIGNITY

### A. *Origins of Modern Human Dignity*

Modern constitutionalism and human rights law both heavily rely on the concept of “human dignity,” but the precise definition of this concept is elusive. There is no universally accepted definition of the term. Instead, the value of human dignity comes in part from its evolving and plastic nature—its appeal, as well as its difficulties, lies in its amorphous content. Concepts of “dignity” have a long social, religious, and legal history that informs the modern usage of the term.

The notion of human dignity is often thought to originate in the Judeo-Christian tradition, which espouses the view that man was made in the image of God.<sup>9</sup> This

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<sup>8</sup> *Lawrence*, 539 U.S. 558. See *infra* Part V.

<sup>9</sup> See, e.g., Giovanni Bognetti, *The Conception of Human Dignity in European and US Constitutionalism*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 6, at 89; see also Kevin J. Hasson, *Religious Liberty and Human Dignity: A Tale of Two Declarations*, 27 HARV. J. L. & PUB. POL’Y 81, 85–87 (2003) (discussing the Second Vatican Council’s Declaration on Religious Freedom and its treatment of human dignity).

assumes that “there is a divine ‘spark,’ as it were, in human beings. This element establishes man’s humanity and grants him unique status among the creatures in God’s creation, or in other words, his dignity.”<sup>10</sup> The notion of *Imago Dei* in Genesis was a universal attribute shared by all human beings. Man’s connection to the divine imbued him with an inherent form of dignity, even if in practice such dignity was far from universally recognized. The law arising from this principle equated a life for a life, making the punishment for murder death of the murderer.<sup>11</sup> As Leon Kass explains, “Such equality can be grounded only in the equal humanity of each human being. Against our own native self-preference and against our tendency to overvalue what is our own, blood-for-blood conveys the message of universality and equality.”<sup>12</sup>

Political theorists in the natural law tradition also emphasized the importance of human dignity and autonomy. As Richard Tuck has explained, the rights of the individual were analogous to those of a national sovereign—both had the right to self-defense.<sup>13</sup> These ideas were developed further during the Enlightenment, particularly by Immanuel Kant, who grounded human rights in human dignity.<sup>14</sup> Kant’s theory of the autonomy of the individual, who must be treated always as an end in himself, served as a foundation for conceptualizing the respect due to every human being.<sup>15</sup> As Kant explained, “[A]utonomy is the ground of the dignity of human nature and of every rational nature.”<sup>16</sup> The Kantian view of autonomy was largely centered on individual morality, whereas the modern concept of “human dignity” as a human right and a constitutional value has a strong communitarian aspect and requires active involvement by the state to create the appropriate conditions for the realization of dignity.<sup>17</sup>

In a social sense, dignity has been historically regarded as a mark of individual or group distinction, related to nobility or particular strength of personal character.

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<sup>10</sup> Yair Loerbaum, *Blood and the Image of God: On the Sanctity of Life in Biblical and Early Rabbinic Law, Myth and Ritual*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE 56 (David Kretzmer & Eckart Klein eds., 2002); see also Dietrich Ritschl, *Can Ethical Maxims be Derived from Theological Concepts of Human Dignity?*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra*, at 87; Chana Safrai, *Human Dignity in a Rabbinical Perspective*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra*, at 99.

<sup>11</sup> *Genesis* 9:6 (“Whoever sheddeth man’s blood, by man shall his blood be shed; for in the image of God was man made.”).

<sup>12</sup> Leon R. Kass, *Defending Human Dignity* 29, AM. ENTERPRISE INST. (Feb. 5, 2007), available at [http://www.aei.org/docLib/20070206\\_DefendingHumanDignity1.pdf](http://www.aei.org/docLib/20070206_DefendingHumanDignity1.pdf).

<sup>13</sup> See RICHARD TUCK, THE RIGHTS OF WAR AND PEACE 82–84 (1999). See also MARTHA NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 36 (2006) (“Thus political theory begins from an abstract idea of basic entitlements, grounded in the twin idea of dignity (the human being as an end) and sociability. It is then argued that certain specific entitlements flow from those ideas, as necessary conditions of a life with human dignity.”).

<sup>14</sup> See IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 39–42 (James W. Ellington trans., 1981). See also Alan Gewirth, *Human Dignity as the Basis of Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 17 (Michael J. Meyer & W.A. Parent eds., 1992).

<sup>15</sup> KANT, *supra* note 14, at 40–41. See also A. I. Melden, *Dignity, Worth, and Rights*, in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES, *supra* note 14, at 29; Boggetti, *supra* note 9, at 89.

<sup>16</sup> See KANT, *supra* note 14, at 41.

<sup>17</sup> See *infra* Part II.B.

“Both historically and linguistically, ‘dignity’ has always conveyed something elevated, something deserving of respect. The central notion, etymologically, both in English and in its Latin root (*dignitas*), is that of worthiness, elevation, honor, nobility, height—in short, of excellence or virtue.”<sup>18</sup> In the past, respect and dignity were often reserved only for persons of a particular class or social standing.<sup>19</sup> Dignity in this sense related closely to the honor of an individual or group.<sup>20</sup> This meaning continues to have modern currency as well. Dignity is often associated with a particular mark of distinction, as reflected in modern definitions of “dignity,” which all convey some aspect of distinction or honor.<sup>21</sup>

Many scholars have noted that the centrality of “dignity” in European constitutions arose out of the horrors of Nazi Germany—a claim that is often repeated on both sides of the Atlantic.<sup>22</sup> As a rhetorical matter, the imperative of dignity is invoked as a response to the significant denial of human dignity in recent history.<sup>23</sup>

Contemporary constitutional law draws from the religious and Kantian conceptions of human dignity and embraces the inherent dignity of all individuals as a legal principle. This modern form of “dignity” necessarily conflicts with and rejects the traditional social view of dignity as a mark of distinction for particular individuals and groups. The endowment of human dignity entitles everyone in modern society to demand equal respect and consideration for his personality from the government as well as from other individuals. The claims of equal dignity are largely normative and serve to ground human rights. Therefore, regardless of whether individuals actually possess equal dignity in some traditional or social sense of being “dignified,” there may be practical reasons for asserting the equality of dignity in order to support basic human rights and avoid the most egregious violations of human rights.<sup>24</sup>

The modern constitutional invocation of human dignity is partially of this practical nature—it is a principle intended to serve as a common reference point for

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<sup>18</sup> Kass, *supra* note 12, at 14.

<sup>19</sup> See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L. J. 1151, 1165 (2003).

<sup>20</sup> See JAMES BOWMAN, HONOR: A HISTORY 41 (2006).

<sup>21</sup> See, e.g., OXFORD ENGLISH DICTIONARY 679 (5th ed. 2003) (defining “dignity” as “1. The quality of being worthy or honourable; true worth, excellence; 2. Honourable or high estate, degree of estimation, rank . . . ; 3. An honourable office, rank, or title; an official position; 4. A person who holds a high or official position, a dignitary; 5. Elevated manner, fit stateliness.”).

<sup>22</sup> Whitman, *supra* note 19, at 1165–66 (“[Europeans] assert that contemporary continental dignity is the product of a reaction against fascism, and especially against Nazism.”) (collecting numerous sources for this proposition).

<sup>23</sup> This continental concern for dignity, however, may be far more deeply rooted in the hierarchical and monarchial societies of Europe, as James Q. Whitman has persuasively argued. *Id.* at 1165; see also James Q. Whitman, ‘Human Dignity’ in Europe and the United States: *The Social Foundations*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 6, at 110. As such hierarchies began to crumble, over time there has been a certain “leveling up,” allowing people of all classes to enjoy the “dignity” and “honor” previously reserved for the nobility or the upper classes. James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 YALE L. J. 1279, 1384 (2000).

<sup>24</sup> Kass, *supra* note 12, at 21 (explaining the possible reasons for thinking that all human beings should be treated as if they had full and equal dignity, “The first—and perhaps best—ground remains practical and political, not theoretical and ontological.”).

establishing or reaffirming the equality of individuals before the law. Although modern constitutions and constitutional courts often treat the equality of human dignity with the highest moral overtones, in practice, the concept often serves as an open-ended legal term that can be filled with prevailing moral preferences. Courts invoking human dignity have generally allowed its meaning to rest on intuition. There is an underlying assumption that infringements of dignity have the quality of pornography, in that we are supposed to know them when we see them.

Dignity has come to be an influential concept, despite the difficulties of defining it. For many politicians, scholars, and judges the protection of dignitary rights is seen as a true and noble aspiration.<sup>25</sup> The obvious appeal and frequent invocation of human dignity makes it essential to understand what the concept might mean in modern constitutional law.

### *B. Choosing Between Competing Dignities*

Despite the centrality of human dignity to modern constitutionalism, many questions remain as to how such an open and protean concept can serve constitutional rights. As a baseline for recognizing our shared humanity, equal human dignity has a ringing appeal. But in concrete cases, human dignity will often fail to provide any specific guidance precisely because there are many different and conflicting conceptions of what dignity may require. For example, dignity may be considered part of autonomy, liberty, equality or respect—values that will often be irreconcilable.

Human rights documents and many modern constitutions are emphatic that all individuals are equally endowed with human dignity.<sup>26</sup> Cases adjudicating constitutional rights, however, regularly raise questions in which individuals have competing claims and in which individual dignity may be relevant on both sides. If every individual is equal in his “dignity,” dignity alone cannot resolve difficult individual rights claims. In practice, such claims will have to be answered by considering the priority of constitutional rights, as well as particular cultural values. This raises the question of whether dignity can be anything more than a rhetorical gloss on a judicial decision that rests on other legal and political factors.

Some examples might serve to demonstrate this point. In the criminal law context, a number of European countries have used the concept of human dignity to limit criminal sentences and provide greater respect for those who are incarcerated. For example, in a seminal decision, the German Federal Constitutional Court (“GFCC”) held that a person cannot be subject to life imprisonment without

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<sup>25</sup> See, e.g., [www.JohnMcCain.com](http://www.JohnMcCain.com) (John McCain’s 2008 presidential campaign website noting “human dignity” as a key issue in relation to, *inter alia*, abortion, marriage, stem cell research, and internet pornography); Commencement Address at the United States Military Academy in West Point, New York, 5 WEEKLY COMP. PRES. DOC. 947 (June 1, 2002) (President George W. Bush asserting that “[t]he 20th century ended with a single surviving model of human progress, based on nonnegotiable demands of human dignity, the rule of law, limits on the power of the state, respect for women, and private property and free speech and equal justice and religious tolerance.”). Consider Justice William Brennan’s numerous comments on the subject of human dignity, discussed in Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 223 (1998). See also the discussion of human dignity in *Lawrence v. Texas*, *infra* at Part V.

<sup>26</sup> See *infra* Part II.A.

possibility of parole.<sup>27</sup> Accordingly, life imprisonment would be consistent with the Basic Law only if the prisoner is given a realistic chance of regaining his freedom at some point. “The state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom.”<sup>28</sup>

In a subsequent case involving a former member of the *Schutzstaffel* (SS) sentenced to life imprisonment for sending fifty people, including children and pregnant mothers, to their deaths in the gas chambers, a lower court denied the release of this war criminal at the age of eighty-eight.<sup>29</sup> The GFCC upheld the decision, but made clear that courts must respect the human dignity of even a Nazi war criminal and “should not place too heavy an emphasis on the gravity of the crime as opposed to the personality, state of mind, and age of the offender.”<sup>30</sup> The GFCC also explained that after the age of eighty-nine, the lower court should give more weight to the prisoner’s personality traits. Thus, the GFCC made quite clear that the dignity of the war criminal would weigh heavier on the balance than, for instance, the competing dignities of holocaust victims.

These conflicting concerns of dignity can be seen in United States constitutional law as well. The Supreme Court has repeatedly recognized the dignitary rights of accused and convicted criminals, particularly in the context of the death penalty.<sup>31</sup> The Court has also recognized the importance of respecting the dignity of the victims of crime. *Miranda v. Arizona* demonstrates the conflicting dignity concerns in criminal cases. In *Miranda*, the Court described the interrogation environment as “destructive of human dignity.”<sup>32</sup> It also concluded that the privilege against self-incrimination has at its foundation the respect that a government “must accord to the dignity and integrity of its citizens.”<sup>33</sup>

The dissenting Justices disagreed with the Court’s focus on the dignity of the accused, explaining that the foremost role of the State is to provide for the security of the individual and his property and that “[w]ithout the reasonably effective performance of the task of preventing private violence and retaliation, it is idle to talk about human dignity and civilized values.”<sup>34</sup> The dissent also emphasized the dignity of potential victims of crime.<sup>35</sup> The recognition of a criminal’s or a victim’s dignity did not answer the question of which should receive priority in a particular context.

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<sup>27</sup> See Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 1977, 45 BVerfGE 187 (F.R.G.) [hereinafter Life Imprisonment Case], translated in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 306 (2d ed.1997).

<sup>28</sup> *Id.* at 309.

<sup>29</sup> KOMMERS, *supra* note 27, at 311-12 (discussing the *War Criminal Case* (1986)).

<sup>30</sup> *Id.* at 312.

<sup>31</sup> See, e.g., *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (“The 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.”).

<sup>32</sup> *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

<sup>33</sup> *Id.* at 460.

<sup>34</sup> *Id.* at 539 (White, J., dissenting).

<sup>35</sup> *Id.* at 540 (“[T]he swift and sure apprehension of those who refuse to respect the personal security and dignity of their neighbor unquestionably has its impact on others who might be similarly tempted.”).

*Miranda* exemplifies the recurring problem in criminal cases—promoting the dignity of the accused may greatly discount the dignity of the victims of crime.

Conflicting dignities can be found across a number of other areas of constitutional law, including free speech and privacy.<sup>36</sup> Varying cultural conceptions of human dignity have led to significantly different outcomes in cases touching on controversial social policies. For example, concepts of dignity are frequently invoked with regard to abortion. In the United States, *Roe v. Wade*<sup>37</sup> gave women a right to terminate pregnancy, a choice that was later explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to be central to the dignity and autonomy protected by the Fourteenth Amendment.<sup>38</sup> By contrast, in Germany, the GFCC held in 1975 that the Basic Law demanded respect and protection for the human dignity of the fetus and concluded that abortion must be criminalized.<sup>39</sup>

The United States Supreme Court and the GFCC assumed very different conceptions of the dignity interests at stake. The Supreme Court emphasized the dignity and autonomy of a woman's choice, and the GFCC emphasized the dignity of all life and the state obligation to protect fetal life. Again, the legal assertion of human dignity as an equal attribute of all people could not answer the hard questions of whose dignity will be respected or in what circumstances. Making a choice

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<sup>36</sup> See, e.g., Frederick Schauer, *Speaking of Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 14, at 179:

If the principle of freedom of speech is not the instantiation of a more general principle of dignity, then it should not be surprising that the two will frequently diverge in extension, with freedom of speech often producing deprivations of dignity, and the desire to promote dignity often suggesting restrictions on speech. If this is so, then resolving many hard issues by reference to dignity will be question-begging, and consequently it may be necessary at times to consider directly which of the values of free speech and dignity is more important.

See also Whitman, *supra* note 19.

<sup>37</sup> *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>38</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992):

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

*Id.* at 916 (Stevens, J., concurring in part and dissenting in part) (“The authority to make such traumatic and yet empowering decisions is an element of basic human dignity. As the joint opinion so eloquently demonstrates, a woman's decision to terminate her pregnancy is nothing less than a matter of conscience.”). *But cf.* *Gonzales v. Carhart*, 127 S.Ct. 1610, 1633-34 (2007) (recognizing that the Partial-Birth Abortion Ban Act of 2003 “expresses respect for the dignity of human life” and that “[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child”).

<sup>39</sup> *Abortion I Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1975, 39 BVerfGE 1 (F.R.G.), *translated in* KOMMERS, *supra* note 27, at 336. A number of commentators have compared the German and American abortion decisions. See, e.g., Donald Kommers, *Liberty and Community in Constitutional Law: The Abortion Cases in Comparative Perspective*, 1985 BYU L. REV. 371.

among competing dignities will often require minimizing opposing dignities—in the German decision a woman’s privacy or self-determination interests were largely subordinated to the right to life of the fetus;<sup>40</sup> and in the American cases the Court resisted determining the scope of fetal life interests, thus allowing greater emphasis on the woman’s privacy and autonomy interests.<sup>41</sup>

These examples demonstrate that standing alone, dignity cannot answer questions of how rights should be allocated in the common situation in which protecting one person’s dignity may compromise another’s. The indeterminacy of human dignity in the abstract may require that difficult questions of competing dignities be resolved by cultural understandings of what dignities should count. These judgments may have less to do with human dignity as such and more to do with particular conventional or cultural understandings of the meaning of dignity and the priority to be given to this value in different contexts. The principle of human dignity has little meaning in constitutional adjudication apart from external moral judgments about the varying weights to be given to competing dignities. The application of human dignity to determine the allocation of rights will depend on social, historical, and cultural factors that shape national values.<sup>42</sup>

Like all abstract values, human dignity will draw meaning from the ground in which it is planted. Constitutions are necessarily a product of various cultural and historic differences that reflect society’s most significant legal and social commitments.<sup>43</sup> In particular, Americans have different intuitions even from our close European counterparts about the protection of important rights. “We have intuitions that are shaped by the prevailing legal and social values of the societies in which we live . . . intuitions that reflect our knowledge of, and commitment to, the

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<sup>40</sup> *Abortion I Case*, *supra* note 39. In 1993, the GFCC reaffirmed the essential core of its first abortion decision, but gave greater weight to the conflicting interests of the pregnant woman, including her rights to dignity, physical integrity, and personal development. *Abortion II Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1993, 88 BVerfGE 203, *translated in* KOMMERS, *supra* note 27, at 349. *See also* MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 33–35 (1987); Gerald L. Neuman, *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, 43 AM. J. COMP. L. 273 (1995).

<sup>41</sup> The Supreme Court in *Roe* does not recognize the fetus as a fully human life. *See Roe*, 410 U.S. at 158 (“The word ‘person,’ as used in the Fourteenth Amendment, does not include the unborn.”); *see also id.* at 159 (“We need not resolve the difficult question of when life begins.”); *id.* at 162 (recognizing the state interest in “protecting the potentiality of human life”). Competing dignities can also be found in Justice Stevens’ opinion in *Casey*, which recognized a woman’s dignity in choosing, without recognizing equivalent dignity in the fetus. *See Casey*, 505 U.S. at 920 (Stevens, J., concurring in part and dissenting in part).

<sup>42</sup> *See* David N. Weisstub, *Honor, Dignity and the Framing of Multiculturalist Values*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE*, *supra* note 10, at 265 (It may be that “what is interesting about human dignity is how it colours differently, depending upon the social needs in question. Its centrality and attractiveness for global ethics may be, thereby, its malleability rather than the tightness of its logic.”).

<sup>43</sup> For example, the Framers of the American Constitution recognized this contingency and were acutely conscious that they were drafting a Constitution for an exceptional new nation. *See* Steven G. Calabresi, “A Shining City on a Hill”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1352–59 (2006) (discussing widespread notions of American exceptionalism during the founding era). The notion of American exceptionalism, identified both from within and without, is a longstanding one that has received renewed attention from a world pushing toward greater internationalism and transnational cooperation. *See generally* AMERICAN EXCEPTIONALISM IN HUMAN RIGHTS (Michael Ignatieff ed., 2005).

basic legal values of our culture.”<sup>44</sup> These intuitions are based on deep-rooted cultural differences that are at the foundation of constitutional rights.<sup>45</sup>

Over the last sixty years, the legal concept of human dignity has been firmly rooted in the soil of European constitutionalism and has drawn much of its meaning from the traditions found there—including communitarianism and a commitment to the social-welfare state.<sup>46</sup> Could there be an alternative “American” conception of human dignity suffused with different values? Perhaps, but that is a difficult question whose answer will depend upon a careful study of our Constitution, history, and legal traditions that is outside the scope of this Article.<sup>47</sup>

This Article analyzes the conception of “human dignity” found in modern constitutionalism, because it is this conception that proponents are trying to adapt to American constitutional law. As explored further below, the emerging and evolving understanding of “dignity” as a constitutionally protected right in Europe and elsewhere is part of a values-based constitutionalism that is largely at odds with American rights protection. Dignity is not only a particular value, but has been presented in many of the newer constitutions as the foundational value, one that animates all other rights and defines the obligations that run from the state to its citizens.<sup>48</sup> This emphasis on values in the texts of modern constitutions may also have significant consequences for how we think about rights in relation to other majoritarian needs and interests.<sup>49</sup>

### C. *The Aspirations of Human Dignity*

A number of scholars have probed the concept of human dignity in constitutional law, both as a descriptive and normative matter. Some have focused on whether human dignity is a fundamental value of American constitutional law by surveying the use of human dignity within American jurisprudence. Other scholars have examined dignity as part of the “postwar constitutional paradigm”<sup>50</sup> and considered whether and how this paradigm can inform and enrich American law. With a few exceptions, most of the scholarly work on this subject suggests that human dignity should be an American constitutional value and that the Supreme Court should work to promote and expand this ideal in new contexts.

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<sup>44</sup> Whitman, *supra* note 19, at 1160.

<sup>45</sup> See Carol Harlow, *Voices of Difference in a Plural Community*, 50 AM. J. COMP. L. 339, 346-47 (2002) (internal citations omitted):

[R]ules and concepts alone actually tell one very little about a given legal system. . . They may provide one with much information about what is apparently happening, but they indicate nothing about the deep structures of legal systems. Specifically, rules and concepts do little to disclose that legal systems are but the surface manifestation of legal cultures and, indeed, of culture tout court.

<sup>46</sup> See *infra* Part II.B.

<sup>47</sup> In a future article, I plan to examine what an American conception of human dignity might look like based on our constitutional history and traditions.

<sup>48</sup> See *infra* Part II.

<sup>49</sup> See *infra* Part III.B.

<sup>50</sup> See Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 87–88 (Sujit Choudry ed., 2007); Weinrib, *supra* note 6, at 5.

Considering the meaning of human dignity as a philosophical concept in American constitutional law, William Parent concludes that “moral dignity belongs to the family of those very great political values that define our constitutional morality.”<sup>51</sup> Parent explains that respecting human dignity means respecting the fundamental equality of individuals and groups.<sup>52</sup> Like Justice William Brennan, Parent suggests that the United States must continue “our ceaseless pursuit of the constitutional ideal of human dignity.”<sup>53</sup> From a somewhat different standpoint, Leon Kass explains that human dignity is not really part of the American discourse, but we care about it nonetheless because it underlies our commitment to furthering civil rights.<sup>54</sup>

Maxine Goodman conducted an extensive survey of the use of human dignity in Supreme Court decisions and concluded that human dignity is a “core value underlying express and un-enumerated constitutional rights and guarantees.”<sup>55</sup> Goodman’s descriptive claim leads to a normative one, as she recommends that the Court apply the principal of human dignity more consistently and to more circumstances.<sup>56</sup> Gerald Neuman similarly surveyed the use of human dignity in American constitutional law and concluded that “[E]ven originalists should recognize that belief in human dignity is inherent in the constitutional structure, particularly as corrected by the Fourteenth Amendment.”<sup>57</sup>

Other scholars have found American constitutional law lagging behind the emerging concern for human dignity in international law and foreign constitutional law. Louis Henkin explains that notions of human dignity are implicit in the Constitution, but that the Framers’ conception was “incomplete” by modern standards.<sup>58</sup> Henkin argues that the American conception of human dignity has not kept pace with the evolving and advancing standards in Europe. Although we were once a leader in protecting rights,

Now we refuse to go beyond where we are, to accept an international standard that reflects greater sensitivity to human dignity than our constitutional standards inherited from the eighteenth century. Perhaps that represents a further divergence between constitutional rights and human dignity; at least it reflects a divergence between what some justices

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<sup>51</sup> William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 14, at 71.

<sup>52</sup> *Id.* at 61.

<sup>53</sup> *Id.* at 71.

<sup>54</sup> Kass, *supra* note 12 (“[O]ur successful battles against slavery, sweatshops, and segregation, although fought in the name of civil rights, were at bottom campaigns for human dignity—for treating human beings as they deserve to be treated, solely because of their humanity.”).

<sup>55</sup> Goodman, *supra* note 3, at 743.

<sup>56</sup> *Id.* at 789 (“My goal in this article is to underscore the need for the Court to persist in relying on human dignity as part of existing constitutional standards by treating human dignity as a value of constant strength.”). See also Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 *HOW. L.J.* 145, 184–88 (1984) (arguing for broader applications of human dignity to serve particular policy goals, such as the provision of adequate clothing, housing, and medical care).

<sup>57</sup> Gerald L. Neuman, *Human Dignity in United States Constitutional Law*, in *ZUR AUTONOMIE DES INDIVIDUUMS* 271 (Dieter Simon & Manfred Weiss eds., 2000).

<sup>58</sup> Louis Henkin, *Human Dignity and Constitutional Rights in THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 14, at 225.

believe to be the American sense of human dignity and that of the world at large.<sup>59</sup>

Henkin concludes that if we do not modernize our Constitution, we should at least push for a greater political commitment to human dignity.<sup>60</sup> Similarly, Lorraine Weinrib has argued that although the United States, and the Warren Court in particular, established the groundwork for important rights protections, the United States has subsequently fallen behind the rest of the world. Consequently, we have much to learn from the postwar paradigm.<sup>61</sup> This view is also commonly expressed by foreign lawyers who lament America's move away from Warren-era methods to what they consider to be inward-looking debates on original meaning and textualism.<sup>62</sup>

Most scholars writing in this area advocate a progressive view of "human dignity." They seek to expand the use of the term within American constitutional jurisprudence and consider it helpful to import modern, international, and European notions of human dignity into United States constitutional law.<sup>63</sup> There is a general tendency to overlook the cultural contingency of this concept, in part because many comparativists hope to find certain universal truths that can transcend a particular time and place.<sup>64</sup>

I do not seek to negotiate a universal ideal of dignity in this Article. Rather, I seek to examine the different value systems underlying European and American

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<sup>59</sup> *Id.* at 228. Henkin elaborates, "[H]umanity's conception of human dignity has evolved, and there is more in it today than is contained in the concept of rights as defined in our Constitution, even in the Ninth Amendment. The Constitution reflects a conception of rights of liberty and equality, not of fraternity; rights in a liberal state, not in a welfare state." *Id.*

<sup>60</sup> *Id.* at 228. Jeremy Rabkin also argues that the Founders had a conception of human dignity different from that found in modern international law; unlike Henkin, however, Rabkin would not adopt the modern meaning of this term. See Jeremy Rabkin, *What We Can Learn About Human Dignity from International Law*, 27 HARV. J. L. & PUB. POL'Y 145, 146 (2003) ("[C]ontemporary ideas about the role of international law are grounded on a very misplaced notion of what human dignity is."). See also John O. McGinnis, *The Limits of International Law in Protecting Dignity*, 27 HARV. J. L. & PUB. POL'Y 137, 137–38 (2003) (explaining that the lack of popular consent means that "[i]nternational law . . . is likely to fail to advance human dignity").

<sup>61</sup> Weinrib, *The Postwar Paradigm and American Exceptionalism*, *supra* note 50, at 87–88.

<sup>62</sup> See, e.g., Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 560–61 (1988).

<sup>63</sup> See Paust, *supra* note 56, at 223 ("In the contemporary setting, human rights law provides a rich set of general criteria and content for supplementation of past trends in Supreme Court decisions about human dignity."); Weinrib, *The Postwar Paradigm and American Exceptionalism*, *supra* note 50, at 110.

<sup>64</sup> See, e.g., EDWARD J. EBERLE, *DIGNITY AND LIBERTY: CONSTITUTIONAL VALUES IN GERMANY AND THE UNITED STATES* xiv (2002) ("[T]he comparative perspective helps identify human traits or values that are transcendent, resonating across borders, and not dependent on a specific culture."); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1933 (2002) ("[A]s more constitutional democracies join together in transnational agreements using the term and exchange views on dignity by issuing opinions examining how the deployment and meaning of the term differs or overlaps, a shared understanding can develop of what the term dignity entails.").

constitutionalism. James Q. Whitman has taken a similar approach in his work on dignity and liberty in privacy law.<sup>65</sup>

Like Whitman, I believe that there are fundamentally different value commitments on either side of the Atlantic, even if these do not determine all of our legal differences.<sup>66</sup> I am also not sanguine about the universal possibilities of human dignity. Nonetheless, international law, the “transnational judicial dialogue,”<sup>67</sup> and scholarly work in this area all push toward constitutional recognition of the European values of human dignity in the United States. This Article seeks to explain how such recognition might be inconsistent with our constitutional values and our way of thinking about rights.

## II. THE CONSTITUTIONAL VALUE OF HUMAN DIGNITY

A number of modern constitutions protect human dignity as part of the effort to create a social and political community committed to particular values. When faced with concrete disputes, constitutional courts have taken the abstract ideal of dignity and made it concrete by associating it with the contemporary values of European society. In particular, constitutional decisions have emphasized the communitarian aspect of dignity, which embeds the individual within a network of social and political solidarity. This association of human dignity with a broader social good is not easily reconcilable with American constitutional values that focus on rights and emphasize individual autonomy.

### A. *The Constitutional Commitment to Human Dignity*

The Universal Declaration of Human Rights established dignity as the centerpiece of modern human rights protection. The Declaration provides in its Preamble that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world,” and also that the peoples of the United Nations have “in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth

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<sup>65</sup> Whitman, *supra* note 19, at 1220 (“We have to identify the fundamental values that are at stake in the ‘privacy’ question as it is understood in a given society. The task is not to realize the true universal values of ‘privacy’ in every society.”). See also Robert Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 735 (1986) (explaining the conflict between the concept of autonomy and the concept of reputation as dignity).

<sup>66</sup> Whitman, unlike most other scholars discussed, does not think that the value systems will converge any time soon; nor does he advocate convergence.

[T]here is little reason to suppose that Americans will be persuaded to think of their world of values in a European way any time soon; American law simply does not endorse the general norm of personal dignity found in Europe. Nor is there any greater hope that Europeans will embrace the American ideal; the law of Europe does not recognize many of the antistatist concerns that Americans seem to take for granted.

Whitman, *supra* note 19, at 1221. *But cf. id.* at 1214 (expressing some hope that the concept of “respect” used in *Lawrence v. Texas* has a future in American law).

<sup>67</sup> See Melissa A. Waters, *Mediating Norms and Identity: The Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 Geo. L. J. 487 (2005).

of the human person and in the equal rights of men and women.”<sup>68</sup> Article 1 of the Declaration also posits that “All human beings are born free and equal in dignity and rights.”<sup>69</sup> Dignity is thus intimately linked with the protection of individual rights and liberties.

Other major international human rights documents similarly posit the centrality of dignity to the protection of rights. For example, the International Covenant on Civil and Political Rights provides in its Preamble, “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world . . . [and] these rights derive from the inherent dignity of the human person.”<sup>70</sup>

Following from the Universal Declaration as well as other human rights documents, a number of modern constitutions have established dignity as their central value. The most influential of these has been the German Basic Law, which places dignity at the forefront of the government’s obligations toward its citizens. Article 1 states: “The dignity of man is inviolable. To respect and protect it is the duty of all state authority.”<sup>71</sup> Article 1 links human dignity with human rights and makes clear that dignity stems from certain inalienable human rights that apply not only in Germany, but also serve as the basis for peaceful and just communities everywhere.<sup>72</sup> “Human dignity is thus a constituent part of humanity in the German view, and its guarantee is the essence of the German social order. In this sense, dignity is the highest legal value in Germany.”<sup>73</sup>

As discussed above, in Germany, the Federal Constitutional Court has held that it was inconsistent with human dignity to impose life imprisonment without possibility of parole.<sup>74</sup> Human dignity has also been used to protect informational privacy and the right to have birth records reflect the results of a sex-change operation.<sup>75</sup> David Currie explains that several cases connect the requirement of “human dignity” in Article 1(1) of the Basic Law with other requirements, such as Article 2’s requirement to “the free development of [one’s] personality.” These provisions have been interpreted in tandem to require the state to affirmatively protect human dignity against third persons.<sup>76</sup>

The South African Constitution similarly provides, “Everyone has inherent dignity and the right to have their dignity respected and protected.”<sup>77</sup> The Constitutional Court of South Africa has interpreted the inherent right to dignity in a

<sup>68</sup> Universal Declaration of Human Rights, *supra* note 1, Preamble.

<sup>69</sup> *Id.* art. 1.

<sup>70</sup> International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Preamble, U.N. Doc. A/6316 (Dec. 16, 1966). *See also* International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), Preamble (using identical language), U.N. Doc. A/6316 (Dec. 16, 1966).

<sup>71</sup> Grundgesetz für die Bundesrepublik Deutschland (federal constitution) May 23, 1949, Bundesgesetzblatt [BGBl] I, as amended, art. 1(1) [hereinafter German Basic Law].

<sup>72</sup> *Id.* art. 1(2).

<sup>73</sup> EBERLE, *supra* note 64, at 42.

<sup>74</sup> *See* Life Imprisonment Case, *translated in* KOMMERS, *supra* note 27, at 306.

<sup>75</sup> DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 314–15 (1994).

<sup>76</sup> *Id.* at 310; *see supra* notes 39–40.

<sup>77</sup> S. AFR. CONST. 1996, §10.

number of contexts, including gay marriage,<sup>78</sup> juvenile beating,<sup>79</sup> and gender equality.<sup>80</sup> Human dignity can be invoked in less obvious contexts as well. In a recent decision, the Constitutional Court upheld legislation prohibiting prostitution and brothel-keeping, finding that neither law infringed on the right to human dignity.<sup>81</sup>

In France, “human dignity” has been judicially recognized as a fundamental value,<sup>82</sup> even though there is no explicit constitutional protection for dignity. For example, a 1995 decision upheld a ban on dwarf-throwing as a violation of “human dignity,” despite the opposition of the dwarf who lost his livelihood.<sup>83</sup> A French court also held that constitutional norms of “dignity” were violated by private actors when a retail store required its employees to display a receipt proving they had paid for goods they wanted to take home.<sup>84</sup> Once French courts recognized the value of dignity as a constitutional value, they have not hesitated to apply it in a variety of contexts.

The Canadian Charter of Rights and Freedoms does not specifically mention “human dignity;” however, this concept has been considered part of the protection of a “free and democratic society” protected in Section 1 of the Charter.<sup>85</sup> Accordingly, courts must consider the value of human dignity when evaluating whether legislation that infringes on individual liberties is justified.

The lengthy Indian Constitution mentions dignity only in its Preamble.<sup>86</sup> The Indian Supreme Court, however, has held that the Preamble encompasses the fundamental aspects of the Indian Republic and may be invoked to determine the scope of fundamental rights.<sup>87</sup> Moreover, dignity has been used in Indian

<sup>78</sup> *State v. Kampher* 1997 (9) BCLR 1283 (CC) (S. Afr.) (finding that the constitutional right to personal dignity required the court to “acknowledge the value and worth of all individuals as members of our society”).

<sup>79</sup> *State v. Williams* 1995 (3) SA 632 (CC) ¶ 45 (S. Afr.) (finding whipping unconstitutional because the degree of pain inflicted is arbitrary and because the whipping itself is “a severe affront to [the juvenile’s] dignity as [a] human being.”).

<sup>80</sup> *Brink v. Kitshoff NO* 1996 (6) BCLR 752 (CC) (S. Afr.).

<sup>81</sup> *State v. Jordan* 2002 (11) BCLR 1117 (CC) (S. Afr.).

<sup>82</sup> Bognetti, *supra* note 9, at 85–86 (citing a French case that found “dignity” based on the Preamble to the 1946 Constitution).

<sup>83</sup> Conseil d’Etat [CE Ass.] [highest administrative court], Oct. 27, 1995, Rec. Lebon 372 (Fr.).

<sup>84</sup> See Gabrielle S. Friedman & James Q. Whitman, *The European Transformation of Harassment Law: Discrimination Versus Dignity*, 9 COLUM. J. EUR. L. 241, 260 (2003) (citing French decision).

<sup>85</sup> See Can. Const. (Constitution Act, 1982), Pt. I (Canadian Charter of Rights and Freedoms), § 1 [hereinafter Canadian Charter]. See also *R. v. Oakes*, [1986] 1 S.C.R. 103, ¶ 67 (Can.) (naming “respect for the inherent dignity of the human person” to be one of the “underlying values and principles of a free and democratic society”).

<sup>86</sup> INDIA CONST., Preamble:

WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of thought, expression, belief, faith and worship; EQUALITY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

<sup>87</sup> *Keshavananda Bharati v. State of Kerala*, A.I.R. (1973) S.C. 1461 (India).

jurisprudence to give meaning to the right to life, which has been interpreted to encompass a right to life with dignity.<sup>88</sup>

Similarly sweeping statements of the role of dignity can be found in many postwar constitutions in Europe,<sup>89</sup> as well as other countries, such as Israel.<sup>90</sup> Although the content varies, constitutional courts around the world have acknowledged and applied human dignity as a fundamental value when adjudicating constitutional rights and deciding how those rights relate to other democratic interests.

### *B. Conceptualizing Human Dignity: Courts and Community*

Modern constitutions give human dignity an important place and it has fallen largely to constitutional courts to give meaning to the protections of dignity and to explain how dignity interacts with other rights and liberties. The open-ended nature of dignity provides few constraints on judicial decisionmaking. Nonetheless, there has been widespread popular and scholarly acceptance of courts applying dignity to particular cases, interpreting this value in a judicial context rather than a political one. This acceptance may be due in large part to the fact that constitutional courts have frequently interpreted human dignity in a manner consistent with prevailing European values of socialism and communitarianism. In countries such as Germany, South Africa, and Canada, for example, courts have managed to incorporate human dignity into the general social and political fabric of modern society.

It may be surprising that countries with strong notions of parliamentary sovereignty and civil law traditions that breed suspicion of courts now tolerate and often celebrate broad judicial pronouncements on constitutional values and rights.<sup>91</sup>

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<sup>88</sup> See *Mullin v. Administrator, Union Territory of Delhi*, (1981) 1 S.C.C. 608, 618–19 (India).

<sup>89</sup> See, e.g., Regeringsformen [RF] (The Instrument of Government) 2:1 (Swed.) (“Public power shall be exercised with respect for the equal worth of all and for the freedom and dignity of the individual.”); Tekst Konstytucji Rzeczypospolitej Polskiej [Pol.] [Constitution] ogłoszono w Dziennik Ustaw [Dz. U.] (Official Gazette) 1997, NR 78 poz. 483, art. 30 [hereinafter Polish Constitution] (“The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable.”).

<sup>90</sup> See Basic Law: Human Dignity and Liberty, art. 1(a) (Isr.) (“The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.”).

<sup>91</sup> Although judicial review of legislation under constitutional standards is a relatively recent development in Europe, it has in some ways become more accepted than in the United States. See Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 6, at 165. One reason for this may be that constitutional review has been explicitly provided for in many new constitutions. The German Basic Law specifies that the Federal Constitutional Court is the authoritative interpreter of the constitution. German Basic Law, *supra* note 71, art. 93; see also KOMMERS, *supra* note 27, at 55–57. In France, which has limited a priori abstract review of constitutional matters, the French Constitution provides that the rulings of the Constitutional Council will be final and binding on government authority. See 1958 CONST. 61 (Fr.).

By contrast, the U.S. Constitution confers the “judicial power” on Article III courts, but does not explicitly confirm the extent or authoritativeness of Supreme Court review. The scope and reach of judicial review in the United States continues to be debated. See generally ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); Barry Friedman, *The Road to Judicial Supremacy (The History of the Countermajoritarian Difficulty, Part One)*, 73 N.Y.U. L. Rev. 333 (1998). It may be counterintuitive

But the creation of new constitutional courts has brought more wide-ranging judicial review to a number of countries.<sup>92</sup> These new constitutional courts have assumed an academic and philosophical function in Europe—they are trusted with articulating and applying constitutional values such as human dignity.<sup>93</sup>

Judicial review of legislation for compatibility with particular constitutional values may be less controversial in Europe and Canada than in the United States, because many modern constitutions explicitly order values and principles to which citizens are expected to be committed.<sup>94</sup> For example, the preeminent place of human dignity in the German Basic Law reflects the widespread agreement that the Basic Law is a values-oriented document: “There is no debate in Germany . . . as there is in the United States, over whether the Constitution is primarily procedural or value-oriented. Germans no longer understand their constitution as the simple expression of an existential order of power. They commonly agree that the Basic Law is fundamentally a normative constitution embracing values, rights, and duties.”<sup>95</sup> The South African Constitutional Court has made similar statements.<sup>96</sup> The encouragement for articulating values in constitutional review allows courts to render broad pronouncements about social values embodied in constitutional text.<sup>97</sup>

In the process of adjudicating constitutional rights and considering them in light of the values of human dignity, constitutional courts have connected the meaning of human dignity to numerous aspects of human flourishing, and in particular, flourishing under the protective guidance of the State. Dignity requires that all

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given the long history of judicial review in the United States, but constitutional review may have a relatively stronger textual and structural basis in many European countries.

<sup>92</sup> In most civil law countries, constitutional issues may be considered only by centralized constitutional courts.

<sup>93</sup> See Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why it May Not Matter*, 101 MICH. L. REV. 2744, 2771 (2003) (“European constitutional courts were designed as relatively pure oracles of the constitutional law. Their express function is to interpret the constitution and thereby to resolve disputes about the meaning of the constitution, rather than to preside over concrete ‘cases’ in the American sense.”). One commentator has gone so far as to explain: “Constitutional experts, where there are entrenched rights, have become the modern philosophers of values for their societies. . . . Constitutionalism has taken up the space of the clarifier of fundamental values.” David N. Weisstub, *Honor Dignity and the Framing of Multiculturalist Values*, in THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE, *supra* note 10, at 271.

<sup>94</sup> By contrast, decisions of the U.S. Supreme Court that explicitly rest on particular moral judgments are often met with significant controversy, for example in the areas of the death penalty, abortion, or gay rights.

<sup>95</sup> KOMMERS, *supra* note 27, at 32; see also Rosenfeld, *supra* note 91, at 197 (“[T]he most important difference between the countries is the far greater consensus in Germany concerning the fundamental values behind, and inherent in, constitutional rule under the guidance of the constitutional adjudicator. It is an attitude encapsulated in the German citizenry’s commitment to ‘constitutional patriotism.’”).

<sup>96</sup> The South African Constitutional Court has explained, “Our constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system.” *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 ¶ 54 (CC) (S. Afr.). See also Evadne Grant, *Dignity and Equality*, 7 HUM. RTS. L. REV. 299, 310–11 (2007) (explaining the place of values such as human dignity in the South African legal order); Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 612–13 (1999) (discussing the Canadian Supreme Court’s treatment of constitutional values).

<sup>97</sup> This judicial boldness, however, will not necessarily be more protective of individual rights. See *infra* Part IV.

individuals be given an opportunity to participate in a political and social community supported by the state.

The German Federal Constitutional Court (“GFCC”) has articulated these principles in a number of decisions. For instance, in the *Mephisto Case*, which addressed the conflict between dignity and freedom of speech, the GFCC explained that the right of artistic liberty is “based on the Basic Law’s image of man as an autonomous person developing freely within the social community.”<sup>98</sup> In the seminal *Life Imprisonment Case*, discussed above, the GFCC articulated the relationship between the individual and the community:

This freedom within the meaning of the Basic Law is not that of an isolated and self-regarding individual but rather [that] of a person related to and bound by the community. . . . The individual must allow those limits on his freedom of action that the legislature deems necessary in the interest of the community’s social life; yet the autonomy of the individual has to be protected.<sup>99</sup>

The GFCC has sought to strike a balance between preserving individual autonomy and respecting the demands of a broader society. “[W]e can see that the community envisioned by the Basic Law is one where individuality and human dignity are to be guaranteed and nourished, but with a sense of social solidarity and responsibility. . . Individual self-determination is offset by concepts of ‘participation, communication and civility.’”<sup>100</sup>

Canadian constitutional jurisprudence and commentary have also recognized similar communitarian principles.<sup>101</sup> Section 1 of the Canadian Charter of Rights and Freedoms refers to a “free and democratic society,”<sup>102</sup> which has been interpreted against the unique social mores of what the Canadian Supreme Court has called a “communitarian culture.”<sup>103</sup> In upholding hate speech laws, the Canadian Supreme Court has been particularly concerned with balancing the individual right to

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<sup>98</sup> *Mephisto Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1971, 30 BVerfGE 173 (F.R.G.), translated in KOMMERS, *supra* note 27, at 428.

<sup>99</sup> *Life Imprisonment Case*, translated in KOMMERS, *supra* note 27, at 307-08.

<sup>100</sup> EBERLE, *supra* note 64, at 45; see also Frank I. Michelman, *Reflection*, 82 TEX. L. REV. 1737, 1758 (2004) (explaining that the doctrine of objective dignity “identifies citizens—their sentiments, their sensibilities, their dignities—with the values of the constitution.”); EBERLE, *supra* note 64, at 44 (“[H]uman beings are spiritual-moral beings who are to act freely, but their actions are to be bound by a sense of social need, personal responsibility, and human solidarity.”).

<sup>101</sup> A Canadian Supreme Court justice explains:

[T]he [Canadian] *Charter* and other twentieth-century human rights instruments are more concentrated on balancing the rights of individuals and those of society, and on recognizing the importance of group identity and group values. Rather than being documents whose primary purpose is to protect individuals from infringements of their freedom by the state, the goal of other human rights documents is to protect the dignity and equality of all people, and to ensure that the attributes of democratic societies are respected.

Claire L’Heureux-Dube, *The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court*, 34 TULSA L. J. 15, 35–36 (1998).

<sup>102</sup> See Canadian Charter, *supra* note 85, § 1.

<sup>103</sup> *R. v. Keegstra*, [1990] 3 S.C.R. 697, 713 (Can.).

free speech against broader social concerns of creating a racially neutral public space.<sup>104</sup>

In Israel a Basic Law<sup>105</sup> protects liberty and human dignity, but the Israeli Supreme Court has made clear that these rights are not absolute and must exist within the context of the larger community:

The rights of a person to his dignity, his liberty and his property are not absolute rights. They are relative rights. They may be restricted in order to uphold the rights of others, or the goals of society. Indeed, human rights are not the rights of a person on a desert island. They are the rights of a person as a part of society. . . . [H]uman rights and the restriction thereof derive from a common source, which concerns the rights of a person in a democracy.<sup>106</sup>

The socialist aspect of human dignity is also reflected in the positive rights set forth in many modern constitutions. These positive rights are linked to the protection of dignity and may include rights to work, decent housing, healthcare, and a clean environment.<sup>107</sup> While many of these positive rights are not judicially enforced, their inclusion in modern constitutions further reinforces dignity as a social or communitarian ideal.

As the above examples demonstrate, many postwar constitutional systems are committed to viewing individual rights within broader social goals and values. Modern constitutional law serves as more than just a political compact; it identifies and establishes the core values of the social order. The identification and elevation of these values has significant roots in the European philosophical tradition, specifically in Germany. In this view, there is a rational or best way to achieve

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<sup>104</sup> See *id.*; Lorraine Weinrib, *Canada's Charter: Rights Protection in the Cultural Mosaic*, 4 CARDOZO J. INT'L & COMP. L. 395, 408–09 (1996).

<sup>105</sup> Basic Laws in Israel are laws enacted by the Knesset on various subjects, including: The President and the State (1964); The Judiciary (1984); Human Dignity and Liberty (1992); and Freedom of Occupation (1994). The State of Israel website explains that when all basic laws are enacted they will constitute the constitution of the State of Israel. Whether Basic Laws are superior to other laws remains an open question in Israeli law. See [http://www.knesset.gov.il/description/eng/eng\\_mimshal\\_yesod.htm](http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm).

<sup>106</sup> HCJ 7015/02 Ajuri v. IDF Commander in West Bank [2002] Is. L. Rep. 1.

<sup>107</sup> For example, the South African Constitution affirms, *inter alia*, the right to join a union, and the right to have a clean and healthful environment, adequate housing, health care services, sufficient food and water, and social security. S. AFR. CONST. 1993, §§ 23, 24, 26 & 27. See also Regeringsformen [RF] (The Instrument of Government) 2:1 (Swed.):

Public power shall be exercised with respect for the equal worth of all and the liberty and dignity of the private person. The personal, economic and cultural welfare of the private person shall be fundamental aims of public activity. In particular, it shall be incumbent upon the public institutions to secure the right to work, housing and education, and to promote social care, social security, and a good living environment.

COST. art. 4 (Italy) (recognizing the right to work); *id.* art. 32 (safeguarding health and guaranteeing free medical care to the indigent); *id.* art. 38 (giving workers the right to be provided for in cases of accidents, illness, disability and old age).

freedom and self-realization—the state can help guide an individual to achieve freedom within society.<sup>108</sup>

Human dignity as a constitutional value is one of the latest manifestations of this general impulse to create closer social associations based on a particular morality. Modern constitution drafters consciously emphasized principle and abstract ideals because they sought to create a higher moral order, not just a legal order.

### III. COLLAPSING RIGHTS AND VALUES

What is notable about many modern constitutions that elevate “human dignity” to a core or animating ideal is that they place an undefined *value* at the center of the constitutional regime. Individual rights and liberties are largely conceived of in light of broader values such as human dignity.<sup>109</sup> The emphasis on values can limit the application of rights, because rights can be circumscribed by social and political interests. This tradeoff between rights and interests in modern constitutionalism minimizes the importance of rights and makes them more commensurate to other goals. In practice, this may ultimately deprive rights of their particular force against government practices or policies that infringe on individual liberties.

#### A. *A Continuum of Rights and Interests*

Modern constitutions have chosen to emphasize values, not a strong liberal view of rights. While values may undergird rights and rights can be seen to serve particular values, there are fundamental differences between constitutional values and rights.

At a simple level, a value is a concept or standard considered worthwhile or desirable.<sup>110</sup> Legal and social values are often associated with goals and purposes—they establish a direction for policymaking and may place demands and limitations on state action. Broadly phrased values rarely require specific actions, but they serve as guidelines or goals to be met either by individuals or the state. As a constitutional

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<sup>108</sup>The state “represents, in Kant, the perfect synthesis between individual freedom and the objective authority of law, and, in Hegel, a moral organism in which individual liberty finds perfect realization in the unified will of the people. . . . [The German state] is considered to be a superior form of human association, a uniting of individuals and society in a higher synthesis.” KOMMERS, *supra* note 27, at 32–33.

<sup>109</sup>For example, the German Constitutional Court applies human dignity as a principle or value that animates all fundamental rights. See KOMMERS, *supra* note 27, at 47:

Every basic right in the Constitution—for example, freedom of speech, press, religion, association . . . — has a corresponding value. A basic right is a negative right against the state, but this right also represents a value, and as a value it imposes a positive obligation on the state to ensure that it becomes an integral part of the general legal order.

See also Craig T. Smith & Thomas Fetzer, *The Uncertain Limits of the European Court of Justice’s Authority: Economic Freedom Versus Human Dignity*, 10 COLUM. J. EUR. L. 445, 450 (2004).

<sup>110</sup>One dictionary defines values in this sense as “[t]he principles or moral standards of a person or social group; the generally accepted or personally held judgment of what is valuable and important in life; The quality of a thing considered in respect of its ability to serve a specified purpose or cause an effect.” OXFORD ENGLISH DICTIONARY 3500 (5th ed. 2003).

value, human dignity places a general obligation on the government to protect and promote human dignity, which may translate into any number of policy implications.

By contrast, a right typically defines relationships between the individual and the state and constitutes a set of entitlements, either to be free from interference (in the negative sense) or to demand particular goods or services (in the positive sense). In the traditional liberal view, an individual right is often juxtaposed to the demands of the community in that a right can serve as “a protective shield against moral demands in the name of the well-being of others.”<sup>111</sup> Rights are often provided for with greater specificity in order to place both citizens and the government on notice as to what is required.

The difference between a right and a value is similar to the familiar distinction Ronald Dworkin draws between rules and principles.<sup>112</sup> Dworkin explains that “[r]ules are applicable in an all-or-nothing fashion,”<sup>113</sup> whereas principles “do not set out legal consequences that follow automatically when the conditions provided are met.”<sup>114</sup> Thus, when the relevant facts are present a rule will dictate a particular outcome. A principle, on the other hand, will direct considerations of an appropriate outcome, but the outcome cannot be predicted in advance.

Constitutional “values” such as human dignity are really principles that set out general guidelines or possibly aspirations for action by the state and also for the interpretation of rights. Such principles, however, do not have a specific content, but rather may have different applications depending on the circumstances. By contrast, rights operate more like rules in that when certain circumstances are satisfied, they establish a person’s right to be free from state interference (or, in the affirmative sense, their right to demand specific goods or services from the state). Despite the modern tendency to conflate values and rights, they retain important differences.

Values reflect social and political concerns that are distinct from individual rights. The relation between rights and values thus pertains to one of the most difficult questions in constitutional theory: how rights should be conceived in relation to non-rights-based interests. These interests include any public policy goals that do not directly pertain to rights. In most liberal democracies, the political branches debate and enact such policies.

Although it is a common feature of constitutional rights that they place limits on majoritarian decision making, in practice, constitutional rights do not entirely disable such decision making. Indeed, even in the United States, which has very strong and robust constitutional rights, the Supreme Court has interpreted many rights to be subject to balancing and therefore capable of limitation by compelling public policy objectives.<sup>115</sup>

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<sup>111</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 250 (1990).

<sup>112</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 22 (1977).

<sup>113</sup> *Id.* at 24.

<sup>114</sup> *Id.* at 25.

<sup>115</sup> See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 *YALE L. J.* 943, 965–70 (1987) (providing examples of this in the First, Fourth, and Fourteenth Amendment contexts, as well as for procedural due process, equal protection, and the dormant commerce clause).

Stephen Gardbaum provides a very thorough description of this phenomenon and argues that even in American constitutional law there exists an implied legislative power to limit rights that is frequently overlooked.<sup>116</sup> Gardbaum explains that “the practice of limiting rights by balancing them against conflicting public policy objectives is in fact a near-universal feature of the structure of constitutional rights through the contemporary world.”<sup>117</sup> Other scholars have similarly described this as being part of the deep structure of rights adjudication.<sup>118</sup> Reading cases from constitutional courts around the world, it is difficult to dispute that this accurately describes much of what constitutional courts do.<sup>119</sup>

Nonetheless, the priority of rights and what can count as a reasonable limitation on rights differs significantly from country to country. While this Article does not purport to establish a comprehensive theory of rights, examining the relationship between rights and interests is necessary in order to highlight the conception of rights found in modern constitutions and to compare this with the conception of rights found in the United States.

It may be useful here to envision a continuum between rights and interests. On one extreme we find the view of rights as “trumps”<sup>120</sup>—meaning that rights, when implicated, will always take precedence over other non-rights-based interests. On the other end of the spectrum would be a system in which there are no constitutional rights, or alternatively a system in which constitutional rights have no special weight against other political interests. In such a system, any government interest would be sufficient to infringe upon rights. Most constitutional regimes, of course, fall somewhere in between these two extremes. They recognize and enforce rights against majoritarian policies, but rights might sometimes yield to government needs or compelling policy interests.

Although constitutional regimes exist on this sliding scale, there are important differences between them. In practice there is a wide range of acceptable practice, even among modern constitutional democracies, as to the appropriate weight to be given to rights and as to what types of interests will be sufficient to override rights. The importance and weight given to specific rights differs substantially from country to country, as does the process of balancing rights against other interests.

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<sup>116</sup> For example, Gardbaum formulates the First Amendment right to free speech as “The right to be free from intentional, content-based regulation of noncommercial speech or expressive conduct that does not constitute fraud, obscenity, fighting words, or a clear and present danger *unless* the regulation is necessary to promote a compelling governmental interest.” Stephen Gardbaum, *Limiting Constitutional Rights*, 54 UCLA L. REV. 789, 807 (2007).

<sup>117</sup> *Id.* at 792.

<sup>118</sup> See Frederick Schauer, *A Comment on the Structure of Rights*, 27 GA. L. REV. 415, 416 (1992) (discussing the relationship between rights and interests and observing that “it is frequently the case that rights can be and are outweighed by (mere) interests”); Richard H. Pildes, *Dworkin’s Two Conceptions of Rights*, 29 J. LEGAL STUD. 309, 312 (2000); Matthew J. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 43 (1998).

<sup>119</sup> Whether this is desirable as a normative matter is another question, one partially addressed *infra* at Part VI.

<sup>120</sup> See Ronald Dworkin, *Rights as Trumps*, in THEORIES OF RIGHTS 153 (Jeremy Waldron ed., 1984). See also Pildes, *supra* note 118, at 310–11 (explaining the common association of Dworkin with a strong view of rights); Jeremy Waldron, *Pildes on Dworkin’s Theory of Rights*, 29 J. LEGAL STUD. 302 (2000) (criticizing the association of Dworkin with the strong immunities conception of rights).

If rights are capable of being balanced against other interests, this suggests a number of questions for the relationship between rights and interests. Does the fact that rights can be overridden by some interests make rights fully commensurate to other interests? What special weight, if any, do rights have if they can sometimes be overridden by other interests? At a theoretical level, even those who recognize that rights can be circumscribed by various non-rights-based interests have different answers to these questions. For instance, Richard Fallon has argued that rights and interests are drawn from the same place because even fundamental moral rights can be overridden by other interests.<sup>121</sup> He also notes that balancing approaches clearly demonstrate the “conceptual interdependence of individual rights and governmental powers.”<sup>122</sup> In this view, rights are and can be balanced and weighed against other interests, with no necessary priority given to rights.

Frederick Schauer agrees that rights can be overridden by interests, but resists the conclusion that rights and interests are commensurate as a consequence. Rather, he argues that rights can be seen as “shields against governmental interests. And thus rights, like shields can be thought of as having genuine force even though they may not be absolute.”<sup>123</sup> Although rights can be circumscribed, they still have a special status and genuine heft in adjudication. Ronald Dworkin also acknowledges that rights may sometimes yield to other interests, but still maintains that rights must be given extra weight against even pressing social goals.<sup>124</sup>

The relationship between rights and interests will have important consequences for the strength and robustness of rights. The greater the weight given to majoritarian interests, the weaker the protection for rights. Accordingly, where a constitutional regime settles on the continuum between rights and interests will impact the protection for individual liberty.

### *B. Equating Rights and Interests*

The focus in modern constitutions on values such as human dignity affects the balance between rights and other interests. A constitution centered predominantly on values will necessarily consider rights, as well as other interests, in light of those values. Most modern constitutions are deliberately ambiguous as to where a central value such as human dignity fits into the balance between rights and interests. Human dignity is considered the basis for many rights, but is also part of the overarching social order, with various political and policy consequences. Human dignity pertains to rights, but it also relates to non-rights-based interests. By emphasizing values, modern constitutions resist a stark divide between private rights and public interests because the constitutional order protects rights but also, in many instances, establishes (or at least aspires to establish) a public moral and economic community.

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<sup>121</sup> Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 350 (1993).

<sup>122</sup> *Id.* at 360.

<sup>123</sup> Schauer, *supra* note 118, at 429.

<sup>124</sup> Dworkin explains, “Rights may also be less than absolute; one principle might have to yield to another, or even to an urgent policy with which it competes on particular facts. We may define the weight of a right, assuming it is not absolute, as its power to withstand such competition.” DWORKIN, *supra* note 112, at 92.

Just as rights and interests draw closer together in values-based constitutions, so do law and politics. If constitutional rights are understood to be shaped by values that are defined by social and political forces, then it is hard to maintain a separation between constitutional rights and other political imperatives. Indeed, modern constitutions and constitutional culture quite consciously have sought to erase, or at least substantially blur, this distinction.<sup>125</sup> In this view, constitutional rights are not separate from political needs, rather rights are to be part of the political calculus, including all the relevant and various needs of the political community.<sup>126</sup>

This view is greatly at odds with what American constitutionalism has been traditionally.<sup>127</sup> In the United States we are accustomed to thinking of law and politics as distinct, our constitutional rights as being something separate from the day-to-day needs of the democratic society.<sup>128</sup> This distinction, although often dismissed by American legal scholars, is arguably taken quite seriously in the popular legal culture.<sup>129</sup>

By contrast, open-ended values such as human dignity may be defined both legally and politically because they pertain to individual rights as well as to collective interests. If rights and other interests are regularly thought to serve the same values, it becomes easier to make trade-offs between them. Given the centrality of values such as human dignity, it should not be surprising that rights and interests are often considered relatively commensurate in modern constitutional adjudication, or at least more commensurate than in the United States.

Although it may be difficult to demonstrate in anything like an empirical fashion, equating rights with other interests may undermine the commitment to rights protection.<sup>130</sup> In practice, human dignity and other constitutional values often minimize the importance of individual rights because these values are defined by political interests that reflect the collective good of society. The extent to which

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<sup>125</sup> See *supra* notes 71–90 and accompanying text.

<sup>126</sup> These needs are explicitly set forth in limitations clauses that circumscribe most constitutional rights and are a common feature of modern constitutions. See *infra* Part IV.A.

<sup>127</sup> See *infra* Part VI.

<sup>128</sup> See, e.g., Larry Kramer, *Generating Constitutional Meaning*, 94 CAL. L. REV. 1439, 1444 (2006):

What makes our constitutional culture “constitutional,” in other words, is first that it recognizes that there is a distinction between law and politics, between what our Constitution does or can plausibly be read to do and what we might like to do; and second that the members of this culture know, understand, and respect the distinction.

See also David J. Richards, *Constitutional Liberty, Dignity, and Reasonable Justification*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES*, *supra* note 14, at 92 (“The most innovative feature of American constitutionalism is the conception of constitutional argument (that is, the justification and interpretation of these structures) as, in principle, quite distinct from arguments in ordinary politics.”).

<sup>129</sup> See Kramer, *supra* note 128, at 1444–45.

<sup>130</sup> See *infra* Part IV. Frederick Schauer similarly argues, “Although it is possible, both in theory and practice, for balancing methodologies to be highly protective of individual rights against the claims of non-rights-based interests, it is plausible to suppose that thinking of individual rights and public interests in roughly the same terms could produce less solicitude of individual rights than might otherwise be the case.” Frederick Schauer, *Commensurability and Its Constitutional Consequences*, 45 HASTINGS L. J. 785, 798 (1994).

rights are sidelined by majoritarian concerns will often turn on the legal culture and the strength of constitutional review.

#### IV. BALANCING RIGHTS AGAINST VALUES

Concerned with harmonizing individual rights with various public needs, many postwar constitutions establish a balance between rights and fundamental values. Modern constitutions regularly qualify rights with limitations or reservation clauses, explicitly indicating that rights can give way to other considerations in a democratic society. Moreover, courts interpret these circumscribed rights through proportionality review, which requires weighing the importance of the threatened right against the government's justifications.

Taken together, limitations clauses and proportionality review emphasize accommodation between rights and democratic needs, leaving modern constitutional courts greater room for ad hoc, case-by-case balancing of rights and interests. Because this process replicates to a large extent the policymaking process, it may tend to diminish the weight given to rights and furthermore may encourage courts to defer to the political branches about the necessity of infringing on rights.<sup>131</sup>

##### A. *Limitations Clauses*

The qualified and circumscribed protection given to rights in modern constitutions reflects the concern with dignity and communitarianism as opposed to liberty and individualism. Values-based constitutions place rights alongside other pressing social concerns, giving them less priority than they are given in the United States Constitution. Modern national constitutions, as well transnational conventions such as the European Convention on Human Rights, place explicit limitations on the protection of important individual rights. Rights are important, but they can be circumscribed by legislation in specified circumstances.

Limitations on fundamental rights are built into constitutional documents, and often the limiting language is facially so far-reaching that rights seem to afford little protection. The limitations clauses explicitly provide for a relationship between rights and other non-rights-based interests, allowing rights to be overridden by certain democratic needs or policy goals. These limitations clauses express the preference in modern constitutions for obtaining a balance between the demands of individual rights on the one hand and the creation of social community on the other.

The balancing clauses found in modern constitutions come in two basic forms: (1) a general limitations clause that applies to all or most constitutional rights; and (2) a set of particular limitations attached to a specific right. These limitations clauses are sometimes linked to balancing against the demands of human dignity, or have been interpreted to allow legislative accommodation for the principles of human dignity. These limitations clauses, which stand in sharp contrast to the terse

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<sup>131</sup> On a methodological point, the examples I have chosen from different constitutions and constitutional cases are not intended to be an exhaustive survey of modern, non-American practice. Rather, they are being used to demonstrate a theoretical point about the conception of rights found in newer constitutions. This conception is found in constitutions and case law, as well as the academic literature, which together explain how foreign judges and scholars view their constitutional systems.

and often categorical language of the United States Constitution, further demonstrate the different emphasis of modern constitutionalism.

The Canadian and South African Constitutions contain two influential examples of general limitations clauses. The Canadian Charter of Rights and Freedoms provides at the outset in Section 1: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>132</sup> The Supreme Court of Canada has interpreted a “free and democratic society” to include certain “values and principles,” including “respect for the inherent dignity of the human person.”<sup>133</sup>

Thus, every right and freedom in the Charter can be circumscribed by “reasonable limits” established by law, and such limits must take into account the values underlying the Charter, including that of human dignity. The Canadian Supreme Court has explained that Section 1 strikes a balance between the protection of rights and legislative demands: “The rights and freedoms guaranteed by the Charter are not, however, absolute. It may become necessary to limit rights and freedoms in circumstances where their exercise would be inimical to the realization of collective goals of fundamental importance.”<sup>134</sup>

The South African Constitution places specific limitations on a few rights, and also contains a general “Limitation of Rights” provision.<sup>135</sup> The text of the South African Constitution specifically links the limitation on rights with human dignity—judging what is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.”<sup>136</sup>

Many national constitutions provide for limitations on important rights. For example, the German Basic Law circumscribes a number of rights, allowing the demands of the democratic or constitutional order to trump individual rights in certain contexts.<sup>137</sup> The Basic Law protects freedom of association; however, it

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<sup>132</sup> Canadian Charter, *supra* note 85, § 1.

<sup>133</sup> *R v. Oakes*, [1986] 1 S.C.R. 103, ¶ 67 (Can.) (opinion of Dickson, C.J.).

<sup>134</sup> *Id.* See also Gerard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211, 214–15 (1994) (explaining that the text and structure of the Charter reflect Canada’s “greater communitarian, less individualistic traditions” by allowing for the balancing and limitation of rights).

<sup>135</sup> S. AFR. CONST. 1996, § 36:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including a. the nature of the right; b. the importance of the purpose of the limitation; c. the nature and extent of the limitation; d. the relation between the limitation and its purpose; and e. less restrictive means to achieve the purpose.

See also *id.* § 7 (“The Rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.”).

<sup>136</sup> *Id.* art. 36.

<sup>137</sup> German Basic Law, *supra* note 71. Some rights in the Basic Law are explicitly stated to be “inviolable,” such as “human dignity” (art. 1(1)); “freedom of faith and of conscience, and freedom to profess a religion” (art. 4(1)); and the right to equality of the law (art. 3).

prohibits associations that are “directed against the constitutional order.”<sup>138</sup> Freedom of speech is similarly protected, but must be weighed against dignitary interests such as “the right to respect for personal honor.”<sup>139</sup> And while research and teaching “shall be free,” “[f]reedom of teaching shall not release anyone from his allegiance to the constitution.”<sup>140</sup> These provisions protect rights so long as individuals respect their commitment to the grand constitutional project.

The German Basic Law limits rights by providing that some rights are “inviolable,” but may be violated by an appropriate statute. These provisions suggest that the Basic Law takes a relatively accommodating view of legislative infringements on rights, which might be distinguished from other government violations of rights. For example, Article 2 provides: “The liberty of the individual is inviolable. These rights may only be encroached upon pursuant to a law.”<sup>141</sup> Similarly, the “[p]rivacy of letters, posts and telecommunications shall be inviolable.”<sup>142</sup> And yet, “Restrictions may only be ordered pursuant to a statute.”<sup>143</sup> The Basic Law thus affirms that the inviolability of certain rights is not compromised by the passage of appropriate legislation that restricts those rights. As a formal matter, such provisions suggest a very weak view of rights.

Rights might seem to be bolstered by the guarantee in the Basic Law, which provides, “In no case may the essential content of a basic right be encroached upon.”<sup>144</sup> This provision, however, is rarely referred to in judicial decisions.<sup>145</sup> Although even limitations clauses have certain limits, the strength of rights against other interests depends largely on how the GFCC applies proportionality review in a particular case.

The European Convention for the Protection of Human Rights and Fundamental Freedoms reflects many national European constitutions in that it places explicit

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<sup>138</sup> German Basic Law, art. 9(2) (“Associations, the objects or activities of which conflict with the criminal laws or which are directed against the constitutional order or the concept of international understanding, are prohibited.”).

<sup>139</sup> *Id.* art. 5 (“These rights find their limits in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honor.”).

<sup>140</sup> *Id.* art. 5(3).

<sup>141</sup> *Id.* art. 2(2).

<sup>142</sup> *Id.* art. 10(1).

<sup>143</sup> Privacy is further limited because:

Where a restriction serves to protect the free democratic basic order or the existence or security of the Federation, the statute may stipulate that the person affected shall not be informed of such restriction and that recourse to the courts shall be replaced by a review of the case by bodies and auxiliary bodies appointed by Parliament.

*Id.* art. 10(2). The inviolability of the home may also be violated in a number of circumstances for reasons specific, such as to “alleviate the housing shortage,” and alarmingly general, to prevent danger to public security and order. *See id.* art. 13 (explaining that this principle “may be encroached upon or restricted only to avert a common danger or a mortal danger to individuals, or, pursuant to a law, to prevent imminent danger to public security and order, especially to alleviate the housing shortage, to combat the danger of epidemics or to protect endangered juveniles”).

<sup>144</sup> *Id.* art. 19(2).

<sup>145</sup> *See* CURRIE, *supra* note 75, at 306–07.

limitations on a number of important individual rights.<sup>146</sup> For example, the limitations in Article 11 on the freedom of assembly and association are fairly typical. There may be no restriction on such rights,

[O]ther than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.<sup>147</sup>

These provisions provide ample grounds to justify virtually any infringement of important rights. Similar limitations are placed on many fundamental rights.<sup>148</sup>

The provisions cited above are not unusual or peculiar to a specific country, but rather similar limitations on important rights can be found in most postwar constitutions.<sup>149</sup> Even if they are interpreted in different ways, these clauses reflect a common understanding of the structure and scope of rights against other interests. There has been a conscious decision in many postwar constitutions to delineate a balance between individual rights and other democratic needs.

Upon reading these clauses, an American might question whether there are any “rights” present at all. Rights amenable to so many exceptions and limitations may hardly deserve the name. As Dworkin has argued:

It follows from the definition of a right that it cannot be outweighed by all social goals. We might, for simplicity, stipulate not to call any political aim a right unless it has a certain threshold weight against collective goals in general; unless, for example, it cannot be defeated by appeal to any of the ordinary routine goals of political administration but only by a goal of special urgency.<sup>150</sup>

Some of the limitations clauses indicate that a right can be outweighed by almost any social goal, suggesting that the threshold weight, if any, to be given to rights, is very slight indeed.<sup>151</sup>

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<sup>146</sup> See generally Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The European Convention protects a few rights categorically, including the prohibition against torture and inhuman or degrading treatment, *id.* art. 3, and the prohibition against slavery and servitude, *id.* art. 4(1).

<sup>147</sup> *Id.* art. 11.

<sup>148</sup> For other examples of limitations clauses, see *id.* art. 8 (right to respect for private and family life); *id.* art. 9 (freedom of thought, conscience, and religion); and *id.* art. 10 (freedom of expression).

<sup>149</sup> To provide a few additional examples, the Italian Constitution protects the freedom to practice religion provided the religious beliefs are “not offensive to public morality.” COST. art. 19 (Italy). The Polish Constitution guarantees the freedom of association to everyone, but “Associations whose purposes or activities are contrary to the Constitution or statutes shall be prohibited.” Moreover, “Statutes shall specify types of associations requiring court registration, a procedure for such registration and the forms of supervision of such associations.” Polish Constitution, *supra* note 89, art. 58.

<sup>150</sup> DWORKIN, *supra* note 112, at 92.

<sup>151</sup> At a minimum because limitations clauses admit of so many explicit exceptions, the protection given to rights will depend very much on the commitment of individual judges and courts to protecting rights.

The explicit inclusion of both specific and open-ended limitations demonstrates a conception of rights as relatively commensurate to other interests. Limitations clauses very frankly place rights alongside other interests—which gives other interests significant constitutional weight. Indeed, the importance of a right in a particular case will depend inversely on the weight given to the countervailing interests.

Of course, modern constitution drafters likely intended this result. The limited conception of rights corresponds with the overall understanding of constitutionalism as pertaining to a social and political community, not just to individual rights.<sup>152</sup>

Moreover, the limitations clauses express a number of aspects of the prevailing modern European legal culture. In transnational documents like the European Convention, limitations might be seen as affording an appropriate “margin of appreciation” to the choices of nations within the European Union.<sup>153</sup> In national constitutions, limitations clauses can be seen as an accommodation to European traditions of legislative or parliamentary supremacy. These limitations clauses reflect an old distrust of courts and a preference for accommodation of rights by the legislature. These clauses also demonstrate one aspect of a values-oriented constitutionalism that conceives of fundamental values as socially and democratically grounded and therefore more amenable to legislative determination.

Limitations clauses implicitly focus on the democratic legitimacy of other interests and respond to the concern that rights can frustrate keenly felt democratic needs. As Stephen Gardbaum has argued, “It is unnecessarily and unjustifiably restrictive of the democratic decision making procedure for constitutional rights to have such a totally disabling effect.”<sup>154</sup> In the modern view, constitutional rights serve the values of democratic society, not just individual liberty. This conception gives the legislature greater leeway to abrogate rights when necessary to meet society’s needs. Non-rights-based interests often have strong majoritarian origins that give them a substantial weight of their own.

Rights and other policy interests may not be fully commensurate, but limitations clauses make it clear that both have important pedigrees—individual liberty on the one hand and democracy on the other—allowing for a more probing trade-off between them.<sup>155</sup>

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<sup>152</sup> See *supra* Part III.B.

<sup>153</sup> See Dinah Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 DUKE J. COMP. & INT’L L. 95, 129–30 (2003) (explaining the importance and operation of the margin of appreciation).

<sup>154</sup> See Gardbaum, *supra* note 116, at 818; *id.* (“[B]y rejecting the preemptory status of constitutional rights, constitutional rights as shields acknowledge the democratic weight attaching to other competing claims asserted by the majoritarian institutions.”). See also Weinrib, *supra* note 6, at 21.

<sup>155</sup> By contrast, the United States Constitution contains no explicit limitations clauses. See *infra* note 240. Accordingly, the Supreme Court generally treats democratic needs as insufficient to override important rights. Where the other potential interests are not explicitly laid out, rights remain the focus of adjudication. See Schauer, *supra* note 118, at 432 (“Especially in the domain of rights with deontological foundations, judicial protection seems both descriptively and normatively far more focused on the right and its contours, and far less on the interests that might conceivably outweigh it, than either a balancing or statecraft model would suggest.”).

“Human dignity” as a constitutional value is connected to these limitations clauses, even if it is not the only explanation for them. As discussed above, dignity as a constitutional value relates to a complex conception of personhood and the creation of a community of shared values and goals. Human dignity also undergirds the system of rights protections. The limitations clauses suggest that rights can yield to other majoritarian concerns, including ones that promote dignity or other values. Because human dignity has been interpreted by many constitutional courts to have an evolving and socially grounded meaning,<sup>156</sup> the fundamental protection of this value may vary over time and may more properly be left to legislative judgments rather than judicially enforced constitutional limitations.

### B. Proportionality Review

The limitations clauses in modern constitutions set out the formal and abstract balance between rights and other social and political goals. Courts interpret this constitutional balance largely through proportionality review, which has become the *sine qua non* of constitutional interpretation around the world.<sup>157</sup> The method is commonly used in Canada, Germany, India, Israel, South Africa, and a number of other countries. Some have even argued that it is incoherent to have constitutional review without a proportionality standard.<sup>158</sup>

Some type of proportionality or balancing review seems required by the limitations clauses in modern constitutions. These clauses explicitly state that courts must balance or weigh individual rights against governmental or social interests. A concern with the proportionality of government action is also consistent with the values-centered, more communitarian approach of modern constitutionalism because of the widespread understanding that the protection of rights must be consistent with the social order.<sup>159</sup>

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<sup>156</sup>A number of constitutional courts adjudicating the meaning of human dignity have interpreted the meaning of “human dignity” and other constitutional values to change over time. For example, in the *Life Imprisonment Case*, the GFCC stated, “Any decision defining human dignity in concrete terms must be based on our present understanding of it and not on any claims to a conception of timeless validity.” *Life Imprisonment Case*, translated in KOMMERS, *supra* note 27, at 308. See also EBERLE, *supra* note 64, at 34; CURRIE, *supra* note 75, at 315 (“The open-endedness of the dignity provision is compounded by the Court’s explicit conclusion that the meaning of human dignity may change over time.”).

South African cases expounding the constitutional value of human dignity have also acknowledged the changing nature of the content of such judgments. See, e.g., *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 (12) BCLR 1517 (CC) (S. Afr.) (recognizing that there may be religious views about criminalizing sodomy, but emphasizing that changing attitudes, such as the greater acceptance of homosexuality, deserved judicial recognition). See also Paust, *supra* note 56, at 147 (“The full meaning of human dignity must perforce be tied to an evolving social process wedded, as law, to dynamic patterns of human expectation and interaction.”).

<sup>157</sup>See DAVID M. BEATTY, *THE ULTIMATE RULE OF LAW* 162 (2004); Sweet, *supra* note 93, at 2779 (explaining that the structure of European rights provisions require proportionality standards).

<sup>158</sup>See BEATTY, *supra* note 157, at 162:

Proportionality is a universal criterion of constitutionality. It is an essential part of every constitutional text. . . . A constitution without some principle to resolve cases of conflicting rights would be incoherent; it just wouldn’t make any sense. . . . The idea that a constitution could exist without some standard of proportionality is a logical impossibility.

<sup>159</sup>The state’s justification for infringing on a right must always account for the overarching values of the constitutional regime, such as a commitment to human dignity. For example, in Canada, the

This Part will examine proportionality review and seek to demonstrate how it treats rights and interests as relatively commensurate. In cases involving constitutional rights, usually some state action is being challenged—typically a case will have a private rights holder on one side and the state on the other. The tests used to gauge proportionality and the analysis adopted by many modern constitutional courts focus closely on the state’s justifications, evaluating all of the non-rights-based interests offered in defense of the state action. Individual rights are often not the emphasis of judicial review. This approach may ultimately weaken protections for rights because courts focused on political and social interests, rather than rights, may be more inclined to defer to legislative judgments about whether a right should be overridden in a particular circumstance.

The hallmark of proportionality review is means-end analysis. The proportionality test usually has several aspects. For instance, in Germany proportionality requires that limitations on fundamental rights meet three criteria: “They must be adapted . . . to the attainment of a legitimate purpose, necessary . . . to that end, and not excessive . . . in comparison to the benefits to be achieved.”<sup>160</sup> The Supreme Court of Canada has articulated a similar test:

First, the measures adopted must be carefully designed to achieve the objective in question. . . . In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair “as little as possible” the right or freedom in question. . . . Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of “sufficient importance.”<sup>161</sup>

The Canadian formulation has been particularly influential around the world.<sup>162</sup>

In practice, proportionality review has often collapsed into a two-stage process. Courts will consider first whether a right has been infringed and second whether the government can justify the infringement.<sup>163</sup> Often the first stage of analysis is just

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Supreme Court has explicitly said that proportionality review will incorporate the values found in a “free and democratic society.” *R. v. Oakes*, [1986] 1 S.C.R. 103, ¶ 67 (Can.). See also Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 612 (1998) (noting that in Canada “justices explicitly identify competing constitutional values and make comparative normative assessments about those values”).

Similarly, in Germany the Constitutional Court has emphasized that rights must be considered alongside other rights as part of the overall value structure of the Basic Law. “[A]n individual basic right can only be regarded in relation to the entire body of values. It can never be absolute or have ‘preferred position’, because its scope depends on that of other constitutional rights and values.” NICHOLAS EMILIOU, *THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY* 19 (1996).

<sup>160</sup> CURRIE, *supra* note 75, at 309–10. Currie also notes that the proportionality principle, which is explicitly required by a number of Lander constitutions, is not explicitly mentioned in the Basic Law. The Federal Constitutional Court, however, has assumed the existence of the proportionality review from the outset. *Id.* at 309.

<sup>161</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103, ¶ 74 (Can.).

<sup>162</sup> See Vicki C. Jackson, *Being Proportional About Proportionality*, 21 CONST. COMMENT. 803, 805 & n.4 (2004) (citing cases that demonstrate the influence of the *Oakes* test in other countries).

<sup>163</sup> See, e.g., *State v. Walters* 2002 (4) SA 613 (CC) (S. Afr.) (explaining the “two-stage exercise” to determine whether a statute justifiably limits a right). Some have described this as a universal feature

*pro forma*, because constitutional courts tend to define rights broadly and easily find that the government has infringed on a right. The real assessment of proportionality turns on a detailed assessment of the government's justifications in a particular circumstance. "The state is invited to bear the burden of establishing in a court of law that its impugned legislation or action is, despite the breach of the particular right or freedom, nonetheless justified."<sup>164</sup> Indeed, some proponents of proportionality review have argued that constitutional courts should dispense with "interpretation" altogether and instead emphasize the broader normative question of justification.<sup>165</sup>

As with limitations clauses, proportionality review shifts the focus away from rights and directs scrutiny toward the state's justifications, which pertain to the intensity of social and political needs. It is common for constitutional courts applying proportionality review to find a "violation" of a right at the outset with little commentary, but then consider at greater length whether such violation was "justified" either under general proportionality standards or within the language of a specific limitations clause.

For example, in *State v. Walters*,<sup>166</sup> the Constitutional Court of South Africa considered whether a statute that allowed the use of force when making an arrest violated the arrestee's rights to dignity and liberty. The case involved the prosecution of a father and son who shot and killed a burglar fleeing their bakery.<sup>167</sup> The Court explained that in the two-step analysis it must first determine whether the statute imposed a limitation on constitutional rights.<sup>168</sup> In two paragraphs, the Court simply concluded that the statute limited rights to dignity and liberty.<sup>169</sup> The Court next considered whether such a violation was justified and engaged in a detailed analysis of common law principles as well as precedent. It eventually concluded that the limitation on rights was not justified, but that its decision would apply only prospectively.<sup>170</sup>

Similarly, in *Murphy v. Ireland*, the European Court of Human Rights considered a challenge to an Irish broadcasting law that prohibited advertising directed toward religious or political ends.<sup>171</sup> The applicant, a pastor in a Christian ministry, sought to broadcast an advertisement for a video about the resurrection of Christ, and was prevented from doing so under the Irish law. The Court briefly

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of all rights adjudication. See Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture*, in EUROPEAN AND US CONSTITUTIONALISM, *supra* note 6, at 68 ("[A] process in which the scope of the right is decided at the first stage, without reference to the reasons for overriding it, and in which the arguments for override are considered at the second stage, simply reflects the deep structure of all rules and all principles."); Gardbaum, *supra* note 116, at 792.

<sup>164</sup> Weinrib, *supra* note 6, at 17.

<sup>165</sup> BEATTY, *supra* note 157, at 170.

<sup>166</sup> *State v. Walters* 2002 (4) SA 613 (CC) (S. Afr.).

<sup>167</sup> *Id.* ¶ 8.

<sup>168</sup> *Id.* ¶ 26.

<sup>169</sup> *Id.* ¶ 30 (explaining that "arrest of a person by definition entails deprivation of liberty and some impairment of dignity and bodily integrity" and therefore that "[t]he extent to which [the statute] limits the rights in question is therefore obvious").

<sup>170</sup> *Id.* ¶ 77.

<sup>171</sup> *Murphy v. Ireland*, 2003–IX Eur. Ct. H.R. 352.

concluded in two paragraphs that there was an interference with the applicant's Article 10 freedom of expression rights.<sup>172</sup> In the remainder of the decision, the Court conducted an extensive evaluation of whether the law was "necessary in a democratic society" by assessing whether it corresponded to a "pressing social need" and whether it was "proportionate to the legitimate aim pursued."<sup>173</sup> In evaluating these factors, the Court considered the reasonableness of Ireland's proffered justifications, including "the particular religious sensitivities in Irish society" which meant that "broadcasting of any religious advertising could be considered offensive."<sup>174</sup> It also accepted Ireland's rationale that even a limited freedom for advertising "would benefit a dominant religion more than those religions with significantly less adherents and resources."<sup>175</sup> The Court concluded that there were "relevant and sufficient" reasons to justify Ireland's interference with the Article 10 right.<sup>176</sup>

These examples are typical of how proportionality review works in practice. Rights may be conceived broadly at the initial stage of review and a rights violation may be found with little discussion, but then the court will focus on weighing the state's asserted policy interests. Proportionality review turns not so much on rights, but on the interests that might outweigh them.<sup>177</sup> With attention directed away from rights, it may be easier for courts to allow rights to be overridden by other interests.

Proportionality review functions by assigning comparative weights to rights and other interests. This type of weighing activity is a familiar aspect of policymaking, which regularly trades off the costs and benefits of government action. Choices on policy matters will reflect a variety of different values as well as other policy-related concerns. Values and policies inherently have this aspect of weightiness.<sup>178</sup>

Proportionality review treats rights like values or policies by assigning them a weight—some rights are more important or weighty than others, and rights may also

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<sup>172</sup> *Id.* ¶¶ 60–61. See ECHR, *supra* note 146, art. 10 (protecting the freedom of expression, subject to certain limitations "prescribed by law and . . . necessary in a democratic society in the interests of . . . public safety, for the prevention of disorder or crime, for the protection of health or morals. . .").

<sup>173</sup> *Murphy v. Ireland*, 2003–IX Eur. Ct. H.R. 352, ¶ 68.

<sup>174</sup> *Id.* ¶ 71.

<sup>175</sup> *Id.* ¶ 78.

<sup>176</sup> *Id.* ¶ 82.

<sup>177</sup> Some have argued that such an approach is more honest or transparent than the approach adopted in the United States, where rights may be the nominal focus, but really courts are implicitly evaluating the underlying interests at stake. See Gardbaum, *supra* note 116, at 808; Jackson, *supra* note 159, at 617.

<sup>178</sup> Ronald Dworkin makes an analogous point with regard to the difference between rules and principles. See DWORKIN, *supra* note 112, at 26:

Principles have a dimension that rules do not—the dimension of weight or importance. When principles intersect . . . one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgment that a particular principle or policy is more important than another will often be a controversial one. Nevertheless, it is an integral part of the concept of a principle that is has this dimension, that it makes sense to ask how important or weighty it is.

have more or less force in particular circumstances.<sup>179</sup> In practice, Canadian and European courts have developed a sort of hierarchy of rights—favored rights receive more judicial protection than others.<sup>180</sup> This hierarchy reflects a judgment that some rights are of less importance and therefore will be more likely to be outweighed by policy interests.

Such a hierarchy seems to develop naturally under proportionality review. The weight given to rights in opposition to other interests will necessarily be a matter of judicial discretion, and discretion that is invited and expanded by the explicit exceptions in the limitations clauses. It is largely for the courts to determine whether the government has a legitimate purpose of sufficient importance and whether the purported benefits of the government action are sufficient to undermine a fundamental liberty. In this contextual analysis, some rights will more often withstand challenge than others.

Indeed, constitutional courts have struggled to give rights some priority while also recognizing the weight of other interests. In modern constitutional democracies, rights can usually be limited only by an important policy objective,<sup>181</sup> even if courts disagree what type of objective will be sufficient. For example, in the Canadian Charter an infringement on a right must be “demonstrably justified,”<sup>182</sup> which the Canadian Supreme Court has interpreted to mean that the limitation on a right must satisfy “a preponderance of probability test” that is “applied rigorously.”<sup>183</sup>

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<sup>179</sup> In particular, the GFCC often weighs the value of one right against another. In the *Mephisto Case*, the GFCC explained the balance between free speech and dignitary rights:

[T]he guarantee of freedom of the arts can conflict with the constitutionally protected sphere of personality because a work of art can also produce social effects. Because a work of art acts not only as an aesthetic reality but also exists in the social world, an artist’s use of personal data about people in his environment can affect their rights to societal respect and esteem.

*Mephisto Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1971, 30 BVerfGE 173 (F.R.G.), translated in KOMMERS, *supra* note 27, at 302.

<sup>180</sup> In Germany, the Federal Constitutional Court has repeatedly made clear that the Basic Law contains a particular ordering of values. See *Luth Case*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 1958, 7 BVerfGE 198 (F.R.G.), translated in KOMMERS, *supra* note 27, at 363 (“[T]he basic Law is not a value-neutral document. . . . Its section on basic rights establishes an objective order of values, and this order strongly reinforces the effective power of basic rights.”). See also Gardbaum, *supra* note 116, at 836:

[I]t appears that the ECtHR is developing a hierarchy of rights with those at the top—such as political expression, the right to private life (at least regarding “a most intimate part of an individual’s private life”) and freedom of association to form political parties—provoking less deference and requiring “particularly serious” and “convincing and weighty reasons,” while those lower down, such as property and freedom of commercial speech, provoke more deference.

See also *Emiliou*, *supra* note 159, at 32–33.

<sup>181</sup> Gardbaum, *supra* note 116, at 825 (explaining that “it is not any public policy objective that is capable of overriding a right, but only certain, especially significant ones”).

<sup>182</sup> Canadian Charter, *supra* note 85, § 1.

<sup>183</sup> *R v. Oakes*, [1986] 1 S.C.R. 103, ¶ 71 (Can.). It is not clear, however, what exactly this test means for the implementation of rights. The Court explains that it cannot be as stringent as “beyond a reasonable doubt” but nonetheless requires a serious inquiry into the “reasonableness” of the justification.

Similarly, the GFCC made clear in an early decision that although general laws can circumscribe rights, the laws “must be interpreted in recognition of the value-setting significance of this right in a free democratic state, and thus their limiting effect on the basic right must itself be restricted.”<sup>184</sup> These formulations acknowledge the weight of rights, but hardly provide them emphatic support

Modern constitutions and constitutional rhetoric have given rights an important place, but they exist alongside other concerns. It may be the character of constitutional rights that they are always weighed to some extent against other interests, but proportionality review has focused explicitly and openly on non-rights-based interests. Evaluating a government’s justification for infringing on a right will necessarily require going through the state’s various rationalizations for its actions.<sup>185</sup> Modern constitutional adjudication, therefore, often turns on policy debates, rather than the definition and interpretation of rights.

Moreover, the transparency of these tradeoffs draws attention to the limited institutional competence of courts to make or reevaluate what are essentially policy determinations. A number of courts that regularly use proportionality review appear mindful of these limitations.<sup>186</sup> They recognize the difficulty of second-guessing legislative judgments as to when rights should be overridden, which often has led courts to defer substantially to legislatures under proportionality review.

The result may not be unintentional. Weighing various policy concerns and evaluating their importance or urgency will be a judgment more suited to the legislature, which has democratic legitimacy. If the adjudication of rights is really about balancing various policy interests, then courts—mindful of their limited institutional competence and their minimal democratic pedigree—will be more cautious about weighing in. This deference to legislative calculation can be seen in practice in the Canadian Supreme Court, the European Court of Human Rights, and a number of other constitutional courts that have begun to accord greater deference to the legislature in interpreting and applying rights.<sup>187</sup>

As a practical matter, proportionality review may give rights only weak priority. Both critics and proponents of proportionality approaches have noted that this analysis rejects the view of rights as “trumps,” because rights become primarily

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<sup>184</sup> Luth Case, 7 BVerfGE at 208–09 (cited in CURRIE, *supra* note 75, at 178).

<sup>185</sup> Mattias Kumm, *Political Liberalism and the Structure of Rights: On the Place and Limits of the Proportionality Requirement*, in LAW, RIGHTS, DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXANDER 140 (George Pavlakos ed., 2007) (explaining that “proportionality analysis provides little more than a structure which functions as a checklist for the individually necessary and collectively sufficient conditions that determine whether the reasons that can be marshaled to justify an infringement of a right are good reasons under the circumstances” and that therefore proportionality reasoning “shares important structural features with rational policy assessment”).

<sup>186</sup> See BEATTY, *supra* note 157.

<sup>187</sup> See generally Gardbaum, *supra* note 116, at 830–843 (comparing levels of deference in different constitutional courts). It is a different normative question as to whether courts should defer once they conclude that rights and interests are interrelated. Compare Fallon, *supra* note 121, at 376–77 (explaining why courts face a “comparative competence difficulty” when trying to assess the weight of rights against government interests), with Barry Friedman, *Trumping Rights*, 27 GA. L. REV. 435, 461 (1993) (arguing that “[i]f rights and powers are interdependent and cannot be assessed independently of one another, then courts necessarily must be required to scrutinize the strength of government interests. Anything else would be an abdication of the judicial role with regard to defining rights.”).

another interest to be accounted for in the means-end analysis.<sup>188</sup> While in the United States there is recurring skepticism toward balancing approaches, in modern constitutional systems balancing has been embraced and accepted with little controversy. The observation that rights are weaker (because more commensurate with political interests) under proportionality review may hardly be a problem for modern constitutionalism. This conception and application of rights may be troubling from an American perspective because our constitutional jurisprudence places greater weight on individual rights.

## V. THE SUPREME COURT'S USE OF HUMAN DIGNITY

The previous Parts have sought to tease out some of the implications of centering modern constitutionalism on human dignity. These implications are important because of the United States Supreme Court's growing interest in human dignity as a constitutional value, as well as the push by many scholars to adopt a modern European concept of human dignity when interpreting American rights. This Part examines the Supreme Court's use of human dignity in constitutional cases, considering in particular *Lawrence v. Texas*,<sup>189</sup> in which the Court has gone furthest in articulating the protection of human dignity as a constitutional requirement.

Although there is no mention of "dignity" in the United States Constitution, the Supreme Court has referred to this value on numerous occasions. References to "dignity" in the Nineteenth and early Twentieth Centuries related primarily to the dignity of institutions or the dignity of sovereignty possessed by a government or its entities. For the Framers, dignity as a legal or political concept pertained to government actors and institutions and the structure of the Constitution was designed to ensure this dignity and respect.<sup>190</sup> Following from this traditional understanding, the Supreme Court repeatedly referenced the "dignity" of the States, the courts, and foreign nations in decisions from the founding to the present.<sup>191</sup> In fact, many

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<sup>188</sup> See BEATTY, *supra* note 157, at 171 (explaining with approval that "[w]hen rights are factored into an analysis organized around the principle of proportionality they have no special force as trumps. They are really just rhetorical flourish."); Aleinikoff, *supra* note 115, at 987 (explaining that early critics of balancing were concerned about the impact on the protection of constitutional rights and that "viewing constitutional rights simply as 'interests' that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a 'right.'"); Kumm, *supra* note 185, at 139-140.

<sup>189</sup> 539 U.S. 558 (2003).

<sup>190</sup> See THE FEDERALIST No. 62 (James Madison) (discussing the respect to be built up by the new nation of America); THE FEDERALIST No. 55 (James Madison) (explaining that the requirements for the federal judiciary were designed to ensure that it does not fall "into hands less able and less well qualified to conduct it with utility and dignity"). As Jeremy Rabkin has explained, every reference to "dignity in *The Federalist* refers to the dignity of an office or of the government or the nation and the point is always that proper constitutional arrangements must be made to assure the 'dignity' of the office, the government, and the nation as a whole." Rabkin, *supra* note 60, at 156; see also BEATTY, *supra* note 157, at 157 (explaining the importance of securing the dignity of a government because "[i]f we cannot respect the dignity of a government that secures our rights, we will not have secure rights").

<sup>191</sup> Resnik & Suk, *supra* note 64, at 1941 (explaining and surveying the Supreme Court's development of institutional dignity).

contemporary references to “dignity” in Supreme Court decisions still relate to institutional dignity.<sup>192</sup>

In the 1940s, the Supreme Court began to refer to human dignity in cases involving individual rights.<sup>193</sup> Other scholars have already described much of the case law in this area, so I will not go over that ground here.<sup>194</sup> For the purposes of this Article, what emerges from the existing case law on human dignity is a relatively incoherent and inconsistent view of the concept.<sup>195</sup> The Supreme Court has invoked human dignity in passing in a number of decisions involving criminal rights, racial equality, gender equality, and privacy rights, but has not given human dignity the sort of independent weight found in countries such as Germany and South Africa.<sup>196</sup> It is fair to say that the concept of human dignity has played a relatively limited role as a separate constitutional value in the United States. Moreover, the Supreme Court has (so far at least) refused to place affirmative obligations on the States arising from the requirements of human dignity.

Litigators, however, frequently invoke concepts of dignity in their briefs to the Supreme Court. Dignity has been used to convey moral force in a variety of cases. For example, in cases dealing with euthanasia statutes, parties frequently invoked concepts of dying with dignity.<sup>197</sup> Similarly, in the death penalty context, parties have drawn upon the Supreme Court’s own capital punishment jurisprudence, which refers frequently to the dignity of those sentenced to death.<sup>198</sup> The concept of dignity regularly presents itself to the highest Court in a variety of cases.

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<sup>192</sup> For example, the Supreme Court continues to reference the dignity of states, but not without controversy. *See, e.g., Alden v. Maine*, 527 U.S. 706, 714–15, 749 (1999) (“Federalism requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the nation’s governance.”); *id.* at 801 (Souter, J., dissenting) (criticizing the majority’s use of “dignity” in this context, noting that it was an “anomalous” appeal to dignity, inconsistent with Blackstone, and that “[w]hatever justification there may be for an American government’s immunity from private suit, it is not dignity”). *See also Fed. Mar. Comm’n v. S. C. State Ports Auth.*, 535 U.S. 743, 760 (2002) (recognizing that the “preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities”); *id.* at 783 (Breyer, J., dissenting) (arguing that “[p]ractical pressures such as these, however, cannot sufficiently ‘affront’ a State’s ‘dignity’ as to warrant constitutional ‘sovereign immunity’ protection”).

<sup>193</sup> *See, e.g., Resnik & Suk, supra note 64*, at 1926 (“[T]he word dignity was not used in reference to personal constitutional rights in the Supreme Court’s jurisprudence until the 1940s in the wake of World War II, when legal and political commentary around the world turned to the term dignity to identify rights of personhood.”).

<sup>194</sup> *See id.*; Goodman, *supra note 3*; Paust, *supra note 56*.

<sup>195</sup> *See, e.g., Neuman, supra note 57*, at 250 (“[T]he principle of human dignity has been employed in United States constitutional law, but not always with the same content, and not always with sufficient specificity to make clear the content intended.”).

<sup>196</sup> *See supra* Part II.B.

<sup>197</sup> The theme of dignity ran throughout party and amicus briefs filed with the Supreme Court in *Gonzales v. Oregon*, 546 U.S. 243 (2006); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997); and *Cruzan v. Director, MDH*, 497 U.S. 261 (1990). *See, e.g.,* Brief of 52 Religious and Religious Freedom Organizations and Leaders as Amici Curiae Supporting Respondents, *Gonzales v. Oregon*, 546 U.S. 243 (2006) (No. 04-623), 2005 WL 1687166 (“At its core, this case is about social policy, religious freedom, and preserving the right to pursue one’s individual beliefs about human dignity, personal autonomy, and spirituality.”).

<sup>198</sup> *See, e.g.,* Brief of Respondent, *Kennedy v. Louisiana*, No. 07-343 (U.S. March 12, 2008), 2008 WL 727814; Brief for the United States Conference of Catholic Bishops and Other Religious

Despite opportunities to do so, the Supreme Court often steers clear of considering the scope of dignitary rights.<sup>199</sup> One recent exception was *Lawrence v. Texas*,<sup>200</sup> in which the Supreme Court suggested a substantial opening for the development of a European conception of human dignity, demonstrating both the possibilities and the problems of using such a concept to determine constitutional rights. In *Lawrence*, the Supreme Court invoked concepts of dignity and respect more fully than in any previous decision, finding that the liberty under the Due Process Clause of the Fourteenth Amendment included the right to engage in sodomy without government intervention.<sup>201</sup>

The Supreme Court explicitly relied on human dignity and emphasized the point made in *Casey* that “These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”<sup>202</sup> The Court also explained that individuals must be free to make choices about intimate relationships and “still retain their dignity as free persons.”<sup>203</sup> Freedom to engage in particular sexual acts without criminal sanction was determined essential to an individual’s human dignity.

The Court also conceived of dignity in a broader sense—as a right to be free from the demeaning or insulting aspect of a law *condemning* homosexual acts. This freedom from being stigmatized runs throughout Justice Kennedy’s opinion for the Court, even if it does not specifically use the word “dignity” in this context.<sup>204</sup> For example, the Court states that the “stigma” of anti-sodomy laws might persist even if such laws were not enforced for equal protection reasons.<sup>205</sup> Moreover, the Court was at pains to emphasize that the “stigma” of the statute in *Lawrence* is not trivial and has serious consequences, including “state-sponsored condemnation.”<sup>206</sup> Concepts of stigma and concern about demeaning individuals directly relate to dignitary interests.<sup>207</sup>

The dignity emphasized in *Lawrence* includes the right to demand recognition of one’s essential nature. Justice Kennedy explains that human dignity includes the right to demand respect *from the State* for personal choices: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty gives them the full right to engage in their conduct without intervention of the

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Organizations as Amici Curiae Supporting Respondent, *Roper v. Simmons*, 543 U.S. 551 (2005) (No. 03-633), 2004 WL 1617400.

<sup>199</sup> See, e.g., *Boos v. Barry*, 485 U.S. 312, 322 (1988) (refusing to recognize protection of “dignity” interests as compelling under the First Amendment).

<sup>200</sup> 539 U.S. 558 (2003).

<sup>201</sup> *Id.* at 578. I am not criticizing the policy outcome in *Lawrence*, but rather the constitutional reasoning and methodology of the decision. See *id.* at 605 (Thomas, J., dissenting).

<sup>202</sup> *Id.* at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

<sup>203</sup> *Id.* at 567.

<sup>204</sup> See *id.*

<sup>205</sup> *Id.* at 575.

<sup>206</sup> *Id.* at 575-76.

<sup>207</sup> In Europe, preserving individual dignity often requires precisely this type of freedom from insult or humiliation. See generally *Whitman*, *supra* note 23.

government.”<sup>208</sup> The State thus cannot interfere with choices about intimate sexual acts, and, moreover, it cannot demean or express condemnation of such choices. Although the Court steps back, at least rhetorically, from demanding that the State give formal recognition to the homosexual relationship,<sup>209</sup> it places an obligation on the State to refrain from condemning or demeaning a person’s sexual relationships.

While themes of dignity linked to individual autonomy have been expressed in other substantive due process cases, the focus on human dignity and the freedom from stigma emphasized in *Lawrence* takes the Court further than in any previous decision. This expansion of an already expansive doctrine has been noted by both supporters and critics of the decision. Robert Post explains: “Themes of respect and stigma are at the moral center of the *Lawrence* opinion, and they are entirely new to substantive due process doctrine. They signal that the Court is concerned with constitutional values that have not heretofore found their natural home in the Due Process Clause.”<sup>210</sup> Nelson Lund and John McGinnis criticize the novelty of this approach that focuses on respect for sexual conduct, which “may presage a new jurisprudence in which governments are forbidden from doing anything that might convey disapproval of any sexual practices that the Court believes are somehow connected with efforts ‘to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’”<sup>211</sup>

By applying extra-legal values regarding the content and weight to be given to human dignity, *Lawrence* follows the lead of constitutional courts in Europe and elsewhere that have assumed broad powers to articulate the content of “human dignity” and to define and weigh the values in that term. In *Lawrence*, the Court states that it is expounding what is “of fundamental significance in defining the rights of the person.”<sup>212</sup> The Court explicitly imbues the liberty interests of the petitioner with particular cultural values,<sup>213</sup> and asserts that these interests are of particular constitutional importance.<sup>214</sup>

The liberty interest protected in *Lawrence* reflects not only European conceptions of dignity, but also European judicial methodology. For example, the

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<sup>208</sup> *Id.* at 578–79. See also Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1583 (2004) (“[I]t appears that *Lawrence* may have created a constitutional right, not just to engage in sodomy, but to enjoy the government’s respect for engaging in sodomy.”).

<sup>209</sup> *Lawrence*, 539 U.S. at 578.

<sup>210</sup> Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 97–98 (2003).

<sup>211</sup> Lund & McGinnis, *supra* note 208, at 1583. See also Joan L. Larsen, *Importing Constitutional Norms from a ‘Wider Civilization’: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L. J. 1283, 1283 (2004) (“It would be an understatement in the extreme to call the Supreme Court’s decision in *Lawrence v. Texas* revolutionary.”).

<sup>212</sup> *Lawrence*, 539 U.S. at 577.

<sup>213</sup> Commentators differ as to the desirability of such intervention. Compare Post, *supra* note 210, at 96, with Lund & McGinnis, *supra* note 208, at 1555.

<sup>214</sup> *Lawrence* can be read in a number of ways, but its emphasis on human dignity opens the door for an expansion of substantive due process along dignitary lines. See Randy E. Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, 2003 CATO S. CT. REV. 21 (arguing that *Lawrence*’s focus on “liberty” could extend beyond sexual conduct and create a more widespread “presumption of liberty”).

Court avoids using the traditional language of either rational basis review or strict scrutiny. Instead, the Court adopts something very close to a proportionality standard by examining the State's justifications for its statute: "The Texas statute furthers no legitimate state interest which can *justify its intrusion* into the personal and private life of the individual."<sup>215</sup> Throughout the opinion, the Court explicitly balances the interests of the state against the interests of the individual.

This is exactly the approach taken by the European Court of Human Rights ("ECtHR") in *Dudgeon v. United Kingdom*,<sup>216</sup> which *Lawrence* cites favorably.<sup>217</sup> In *Dudgeon*, the ECtHR, with little comment, readily found that Northern Ireland's prohibitions on sodomy interfered with the applicant's right to respect for his private life.<sup>218</sup> It then went on at length to examine whether there was a "justification" for the interference. The ECtHR was very clear that it had the final word in making this evaluation.<sup>219</sup>

The Supreme Court's methodology also mirrors that found in Europe in that it favors an evolving approach to constitutional law. *Lawrence* explicitly eschews older traditions in favor of an "emerging awareness" of the meaning and scope of liberty.<sup>220</sup> In *Lawrence*, the substantive due process inquiry evolves based on changing—and presumably better—awareness of the liberty interests at stake. The Court makes clear that it is moving from darkness into light, from oppression into freedom.<sup>221</sup> "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."<sup>222</sup>

While *Lawrence* furthers one type of individual liberty by invalidating state criminalization of private sexual acts, the method used by the majority does not necessarily relate to a greater expansion of individual liberty in general.<sup>223</sup> The

<sup>215</sup> *Lawrence*, 539 U.S. at 578 (emphasis added). See also Barnett, *supra* note 214, at 21 (noting that the Court did not focus on whether the liberty at issue was "fundamental" but rather "took the much simpler tack of requiring the state to justify its statute, whatever the status of the right at issue").

<sup>216</sup> *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981).

<sup>217</sup> *Lawrence*, 539 U.S. at 573.

<sup>218</sup> *Dudgeon*, 45 Eur. Ct. H.R. ¶ 41.

<sup>219</sup> *Id.* ¶ 59 ("[I]t is for the Court to make the final evaluation whether the reasons it has found to be relevant were sufficient in the circumstances, in particular whether the interference complained of was proportionate to the social need claimed for it."). Very similar reasoning can be found in the South African Constitutional Court's decision about sodomy. See *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1998 CCT 11/98 (S. Afr.).

<sup>220</sup> *Lawrence*, 539 U.S. at 571-72 ("In all events we think that that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.")

<sup>221</sup> *Id.* at 578-79:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the component of liberty in its manifold possibility, they might have been more specific. . . . They 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.

<sup>222</sup> *Id.* at 579.

<sup>223</sup> But see Barnett, *supra* note 214, at 19 (arguing that *Lawrence* developed a "presumption of liberty").

result in *Lawrence* depends in large part on the Court's conclusion that sexual autonomy is an important aspect of personal freedom and thus that the State's intrusion into this sphere of autonomy cannot be justified. The Court, however, does not provide a framework for future cases raising different liberty interests. The Supreme Court abandons a traditional strict scrutiny evaluation in favor of an ad hoc and contextual balance. Consequently, the results in future cases will depend heavily on the subjective view of the existing Justices, rather than on any consistently applied doctrine. Future cases undertaking a similar analysis may well lead to conclusions against liberty. *Lawrence* expresses a strong preference for certain values but fails to articulate a coherent constitutional principle.

There is little necessary connection between the Court's invocation of "human dignity" in *Lawrence* and constitutional support for greater individual liberty. Indeed, principles of "stigma" and "dignity" have been used in many countries to curtail other individual liberties, such as the freedom of speech. Human dignity can be used to uphold state action that seeks to protect particular groups from offensive language or defamatory statements—all at the cost of the dignity or liberty of the speaker of such words.<sup>224</sup> Because of the pliability of dignity and the fact that it is part of an evolving search for freedom, we cannot predict how it will be used in other contexts and whether or not it will further individual liberty. This uncertainty undermines the rule of law by generating unpredictability about important individual rights.

It is unclear whether the Supreme Court will go further in this direction, but if it does, the reception will be very different from that experienced in Europe. Supreme Court cases that develop constitutional "values" outside of enumerated rights often create substantial political opposition and disagreement among Americans, not widespread commitment to the constitutional order. They also often generate disagreement about the role of judicial review. One can compare the well-accepted place of "human dignity" in Germany with the rights or values of "privacy" and "autonomy" in the United States—the latter are deeply contested.<sup>225</sup> Bitterly divided decisions on controversial matters demonstrate that in the United States at least, the courts can rarely create a social consensus where there are deep political and moral divisions.<sup>226</sup>

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<sup>224</sup> See, e.g., Schauer, *supra* note 36.

<sup>225</sup> Rosenfeld, *supra* note 91, at 218:

In the American context, values and policies cannot be directly linked to the Constitution but, rather, emerge in the broader context of the Constitution as law embedded in the American rule-of-law tradition. Moreover, because of the complexity, tensions and the multiplicity of sources of law characteristic of the rule of law, the place of values and policies is bound to be much more contested and murkier. Compare, for example, the place of human dignity in the German constitutional order with that of human autonomy in the American . . . while human dignity is explicitly grounded in Article 1 of the German Basic Law, the sources of human autonomy in America are far from obvious, since it has textual roots in the Constitution, unenumerated rights roots, common law roots and also fairness roots.

<sup>226</sup> While I focus here on the recent decision in *Lawrence*, similar arguments could be made regarding cases involving the death penalty and abortion, as well as other contested areas of the law.

## VI. AMERICAN RIGHTS AND VALUES

The foregoing has sought to demonstrate how modern constitutionalism has minimized the importance of rights and narrowed the differences between political reasoning and constitutional adjudication. This Part considers how and to what extent American constitutionalism differs from the modern varieties.

A. *Constitutional Rights, Political Values*

As discussed above, values-based constitutionalism emphasizes human dignity. By contrast, American constitutionalism is rooted in individual liberty and rights. In these differences, many scholars and litigators, as well as some judges, have identified opportunities for the United States to benefit from some lessons from abroad.<sup>227</sup> There is a belief in some quarters that the American emphasis on structural and individual rights may be inadequate for dealing with complex problems, and that modern constitutionalism—with its emphasis on values—may provide a more sensitive approach to contemporary political and social needs.<sup>228</sup> Despite the obvious appeal of human dignity as a theoretical concept, incorporating the European value of human dignity into our jurisprudence would be difficult and unwise.

To begin with, the European or postwar conceptions of human dignity are unlikely to occupy a central place in the United States because there is no explicit textual commitment to “human dignity” in the United States Constitution. In a constitutional system that generally favors textualism and still has a strong formalist tradition, this is an infirmity for the principle. The lack of a textual hook will make it more difficult for the Supreme Court to develop “human dignity” as a free standing right and to retain legitimacy with regard to the creation or development of such a right.

Of course, protection or respect for human dignity could be developed as an unenumerated right similar to “privacy.”<sup>229</sup> Human dignity could be “discovered” in “emanations” from various constitutional provisions. One could plausibly argue, following the reasoning in precedents on unenumerated rights, that most constitutional rights recognize and protect human dignity.

Even such judicial willfulness, however, may be insufficient to sustain a right to human dignity because of the truly open-ended nature of the concept. The judicially recognized unenumerated rights are fairly limited, and precedents based on this type of reasoning are subject to significant criticism. Moreover, even if the Supreme Court were to recognize a more robust form of human dignity as a “right,” the lack of textual grounding will pose recurring questions of legitimacy. Longstanding precedent in the United States supports the dignity of sovereignty and government

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<sup>227</sup> See *supra* Part I.C.

<sup>228</sup> See *supra* Part I.C.

<sup>229</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). See also James E. Fleming, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY 91 (2006) (providing a list of unenumerated rights recognized in modern constitutional law).

institutions—but this is not the communitarian form of individual dignity advanced by modern constitutions.<sup>230</sup>

Not only does the United States Constitution lack explicit protection for human dignity, but it more generally protects rights, not values. Human dignity as a modern constitutional value has shaped how constitutional courts view fundamental rights within the context of a larger social project based on shared values.<sup>231</sup> By contrast, the United States Constitution does not explicitly establish a hierarchy of values; rather it creates a structure of government created for the protection of individual freedom and liberty.<sup>232</sup>

Of course, the United States Constitution was ratified in large part to protect certain deeply held values of freedom and liberty, and values may be implicit in the structure of government and specific rights protections provided by the Constitution. But these values *qua* values were not explicitly set forth in the Constitution. For example, there is no general right to liberty or government obligation to protect liberty. Rather the Fifth Amendment forbids the deprivation of liberty without due process of law.<sup>233</sup> The Preamble to the Constitution seeks to “secure the Blessings of Liberty to ourselves and our Posterity,”<sup>234</sup> but this security comes from ordaining and establishing the Constitution and the specific government structure and rights therein.

Moreover, in the American way of thinking, values are often conceived of within the “negative” liberty of the United States Constitution,<sup>235</sup> which leaves

<sup>230</sup> See *supra* note 47.

<sup>231</sup> See *supra* at Part II.B.

<sup>232</sup> The founders of the American Constitution were certainly no strangers to universal abstractions and to a commitment to certain ideals of freedom and liberty. These values are explicit in the Declaration of Independence: “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.” THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). In part because of its lofty content, the Declaration of Independence has been very influential overseas and is regularly treated as a constitutional document. See, e.g., George A. Billias, *American Constitutionalism and Europe 1776–1848*, in AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY (George A. Billias ed., 1990) (explaining that “[t]he Declaration ranks in the eyes of most foreigners as the most important public paper ever published in the United States” even though most American lawyers and scholars do not consider it a constitutional document).

<sup>233</sup> U.S. CONST. amend. V.

<sup>234</sup> U.S. CONST. pmb.

<sup>235</sup> The United States Constitution is traditionally characterized as a charter of negative, not positive liberties. As Judge Posner has explained, “The men who wrote the Bill of Rights were not concerned that Government might do too little for the people but that it might do too much to them.” *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir.), cert. denied 465 U.S. 1049 (1983). Recent Supreme Court decisions have confirmed this understanding. See, e.g., *DeShaney v. Winnebago County*, 489 U.S. 189 (1989).

David Currie has observed that this characterization has persuasive support in both the text and history of the Constitution, even if the United States Supreme Court has nonetheless read some arguably “positive” rights into the Constitution. David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 864–65, 886–88 (1986). See also Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2308 (1990) (challenging the view of the Constitution as a charter of negative rights but acknowledging the long history and tradition of this conception based in constitutional text and the common law).

significant space for individuals to pursue their personal values and goals, rather than adhere to a particular social order. The Constitution recognizes the dignity of citizens largely by securing their rights and leaving them as free as possible from state encroachment. By contrast, modern European values-centered constitutionalism protects negative liberties, but also broadly defines the positive obligations of its central values. The dignity protected by newer constitutions requires individuals to be embedded within and committed to a specific social project.<sup>236</sup>

This is not the dignity of American individualism. As Frank Michelman states:

Let the one rule be that people are to be treated with due regard for their dignity, while at the same time glossing over dignity in a certain way, so that it is not an invasion of dignity to be drafted into participation in the grand, socially transformative project of your country's constitution.<sup>237</sup>

Michelman's comment directly points to the conflict that can arise between negative and positive conceptions of liberty: in the positive view the State defines the core values of liberty, whereas negative liberty emphasizes the freedom of the individual to pursue his own notion of the good.<sup>238</sup>

The resistance to grand scale constitutional theorizing about values in the United States keeps the focus primarily on rights. This is not to say that the Supreme Court always excludes morals and values from its decisions, only that there are textual and cultural constraints on the extent to which such moralizing is possible and will be accepted by the American public. By contrast, in countries such as Germany, South Africa, and Canada, constitutional courts are encouraged to engage with and enforce the values of the constitutional order.

### *B. Resisting Democratic Tyranny*

American constitutional law has a long history and tradition of emphasizing the protection of rights against democratic interests. This strong, even if not absolute,

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<sup>236</sup> The German Basic Law provides the clearest example of this. See *supra* text accompanying notes 98–100. For an interesting and critical discussion of this development in Europe, see Michael Oakeshott, *The Masses in Representative Democracy*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 377–78 (1991).

<sup>237</sup> Frank I. Michelman, *Reflection*, 82 *TEX. L. REV.* 1737, 1760 (2004).

<sup>238</sup> See Post, *supra* note 60, at 735:

The concept of autonomy and the concept of reputation as dignity rest on opposing views of individual identity. The concept of reputation as dignity assumes that the identity of an individual is in significant ways the product of the social connections by which he is embedded in and attached to a community. . . . The concept of autonomy, on the other hand, assumes that the significant aspects of individual identity are those that are authentically self-created, even if what is created contradicts community values.

See also Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW*, *supra* note 6, at 64 (“The notion of dignity inherent in the new constitutionalism of the postwar era has a core meaning that seems to differ from the core meaning of what we Americans understand by liberty, and these meanings are often found in the different images of society and personhood that they project.”).

view of rights has been expressed from the time of our founding through to the present. In the *Federalist Papers*, Alexander Hamilton articulated the innovation of the Constitution, which was to protect rights against government action. He explained that rights alterable by legislative will were not, properly speaking, constitutional protections.<sup>239</sup> The Founders considered the very essence of the Constitution to be that it would serve as the paramount law of the land and would not yield to ordinary legislative action or the passing desires of the majority.

Explicit and open-ended limitations clauses are incoherent under this conception of the Constitution. The United States Constitution lacks the limitations and reservations clauses found in most modern constitutions, and generally protects individual rights and liberties in categorical language.<sup>240</sup> This stands in stark contrast to the newer constitutions that explicitly allow important fundamental rights to be circumscribed and balanced in the legislative process.<sup>241</sup> The new constitutions often allow exactly what Chief Justice John Marshall, following Hamilton, decried in *Marbury v. Madison*,<sup>242</sup> that is, prescribing limits on

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<sup>239</sup> Hamilton noted that the New York Constitution contained a provision adopting the common and statutory law of Great Britain, but that establishment of this law was “expressly made subject ‘to such alterations and provisions as the legislature shall from time to time make concerning the same.’” Because of this express reservation, Hamilton criticized that “They are therefore at any moment liable to repeal by the ordinary legislative power, and of course have no constitutional sanction. . . . This consequently can be considered as no part of a declaration of rights, which under our constitution must be intended as limitations of the power of the government itself.” THE FEDERALIST No. 84 (Alexander Hamilton).

<sup>240</sup> See, e.g., U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . .”). Even when rights have some limitations, such as the Grand Jury Clause, they are very specific. U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.”).

<sup>241</sup> See *supra* Part IV. The differences may reflect in part the Eighteenth Century vintage of our Constitution, but modern constitution drafters found the American model unsuitable precisely because they did not want such strong protections for rights against democratic interests.

<sup>242</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803):

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must lose their eyes on the constitution, and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. . . . It would be giving to the legislature a practice and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

Similarly, Hamilton stated:

Where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental.

THE FEDERALIST No. 78 (Alexander Hamilton).

government but then simultaneously declaring that those limits may be passed essentially at the legislature's pleasure.

Perhaps because of the Constitution's text and America's particular constitutional history and culture, there continues to be a pervasive understanding that rights are different and incommensurate with policy interests. Even if rights sometimes yield, as they must, to other concerns, we maintain that rights are different in important and substantial ways. Most Americans—not to mention judges and scholars—hope that rights are often trumps, or at least shields against majoritarian politics. This view of rights as shielding individual liberty from majoritarian forces is a powerful one, both in constitutional theory as well as in popular conceptions of constitutional law.

By contrast, modern constitutionalism begins from a different starting point. Newer constitutions set forth social values that are protected by both rights and policy interests. Moreover, these constitutions explicitly (through limitations clauses) allow rights to be overridden by certain majoritarian interests. As discussed above, these clauses are one way in which human dignity and other abstract values can be weighed against fundamental rights.<sup>243</sup>

Limitations clauses require courts to weigh the relative value of rights against social necessity, emergency, or other democratic needs. Under proportionality review, courts must engage in complex assessments of the weight of rights in particular contexts. Rights generally do not act as trumps and can be traded off against other interests, or interpreted specifically in light of other constitutional values. These limitations clauses reflect how constitutional rights, even at their textual roots, are considered as part of a compromise with other political and social interests.

Modern constitutions in Europe, Canada, South Africa and elsewhere have explicitly rejected the strong American view of rights in favor of a more communitarian and democratic perspective.<sup>244</sup> This new constitutional paradigm assumes that democracy will often provide adequate protection for individual rights. This assumption may be justified at present in postwar liberal democracies in Europe, as well as countries such as Canada, South Africa, and India. But democracy has often proved illiberal in some of these same places in the past, as well as today in Palestine, Pakistan, and Russia. It seems so obvious as to hardly need mention, but recent history suggests much caution before leaving the guarantee of individual liberties to majoritarian politics.

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<sup>243</sup> See *supra* Part IV.A.

<sup>244</sup> See Kommers, *supra* note 238, at 66:

The other approach—dominant in Europe, Canada, and South Africa—emphasizes balance and equilibrium in constitutional interpretation, the harmonization of conflicting rights and values, and a perspective that envisions the constitution as a unified structure, requiring a holistic approach to interpretation. These differing methodologies are important because they project alternative visions of the human person, society, community, equality, and democracy.

### C. Principled Rights

Values-based constitutional adjudication has naturally developed alongside proportionality analysis, which is widely accepted in other countries and considered to be the essential interpretive tool for evaluating rights claims. As discussed above, proportionality review balances rights against the government's justifications for an infringement.<sup>245</sup> The United States has not adopted proportionality as the dominant mode of rights interpretation. Rights are only sometimes subject to balancing, because they continue to be closely associated with principles that cannot easily be balanced away.

A number of scholars have argued that proportionality is essentially the same inquiry as the balancing tests that are familiar in American constitutional law. They conclude from this that the American structure of rights mirrors that found in modern constitutional courts.<sup>246</sup> A full-scale comparison of these two forms of constitutional adjudication is beyond the scope of this Article,<sup>247</sup> but I will venture a few general observations.

Balancing and proportionality usually have a different structure for evaluating rights. Formally, at least, balancing and proportionality stress a different relationship between rights and other social interests. Under proportionality review it is possible for a court to find a right "violated," but simultaneously uphold the state action as "justified." The legal framework allows the state to be *excused* from violating rights in particular circumstances.

The balancing tests in the United States Supreme Court, however, seek to determine whether or not the state has violated a constitutional right. In the American approach, a finding of unconstitutionality is usually the end of the story.<sup>248</sup> A conclusion that a constitutional right has been infringed means precisely that the government's actions were not justified. These formal differences reflect an underlying conception of rights in a democratic society.

The differences between American balancing and proportionality review should not be overstated, because there are practical similarities between them, in so far as

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<sup>245</sup> See *supra* at Part IV.B.

<sup>246</sup> See BEATTY, *supra* note 157, at 162–63; David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 696 (2005) (explaining that generic constitutional interpretation involves both balancing and means-end analysis). See also Gardbaum, *supra* note 116, at 797–98.

<sup>247</sup> Among other difficulties, the tests are subject to different verbal formulations and applications by courts. For example, in the United States, balancing tests include different levels of scrutiny (strict, intermediate, and rational basis), general balancing tests (see *Mathews v. Eldridge*, 424 U.S. 319 (1976)), and even tests that specifically refer to "proportionality" (see *City of Boerne v. Flores*, 521 U.S. 507 (1997)). Similarly, formulations of proportionality review also may be about means-end fit exclusively, or also contain various degrees of balancing. Proportionality may have three steps or two, or essentially be about evaluating state justifications.

<sup>248</sup> Cases involving qualified immunity and liability under 42 U.S.C. §1983 reflect a structure of decisionmaking similar to proportionality review, because the court must first resolve the threshold question of whether a constitutional right was violated, and then will consider whether the right was clearly established. See *Scott v. Harris*, 127 S.Ct. 1769, 1774 (2007). The Supreme Court, however, has decided to review whether to abandon this two-step process. See *Callahan v. Millard County*, 494 F.3d 891 (10th Cir.2007), *cert. granted*, 76 U.S.L.W. 3316 (U.S. March 24, 2008) (No. 07-751).

both methods evaluate the relative weights of various state interests.<sup>249</sup> Even under strict scrutiny review the Supreme Court acknowledges that there may be “compelling government interests” that can override rights. One could argue that American courts decide whether a government action may be excused while determining whether there has been a rights violation.<sup>250</sup>

While there are functional similarities between proportionality review and constitutional review in the United States, the formal differences persist and may account for the limited nature of balancing methodologies in the United States. Despite the familiarity of balancing approaches, American constitutional law is very far from developing the type of universal proportionality test found in most European countries, Canada, South Africa, and other modern constitutional regimes. Even particular balancing tests, which exist in a number of different doctrinal areas, are hardly ubiquitous.<sup>251</sup> American courts can meaningfully differentiate rights from other democratic interests because they are not always weighed on the same scales.

Supreme Court decisions, as well as the scholarly literature, reflect the constant tension in the United States between fact-specific balancing and other more

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<sup>249</sup> For example, in his important and insightful article criticizing balancing, Alexander Aleinikoff defines “balancing” as being a judicial opinion that “analyzes a constitutional question by identifying interests implicated by the case and reaches a decision or constructs a rule of constitutional law by explicitly or implicitly assigning values to the identified interests.” Aleinikoff, *supra* note 115, at 945. Like proportionality review, balancing tests often focus on the reasonableness of the government’s conduct and whether the infringement on a right has sufficient “justification.” *Id.* at 987; *see also id.* at 958. Balancing and proportionality review thus both seek to identify various values or interests at stake in order to determine whether there has been a violation of a constitutional right.

A number of scholars have emphasized the similarity between proportionality review and constitutional review in the United States. *See* Jackson, *supra* note 159, at 609:

While the language of “proportionality” is not generally used in the United States, the underlying questions—involving the degree of fit between the claimed objective and the means chosen, and a concern for whether the intrusion on rights or interests is excessive in relation to the purpose—are already an important part of some fields of U.S. constitutional law.

*See also* Law, *supra* note 246, at 698 (“The heuristics available to the legal mind in the face of normative conflict are few. Though there exist verbal formulae that purport to define the tasks of balancing and means-end analysis, these definitions—and the variations among them—may not make much practical difference.”).

<sup>250</sup> *See* Gardbaum, *supra* note 116, at 807.

<sup>251</sup> Compare Aleinikoff, *supra* note 115, at 945, with Louis Henkin, *Infallibility Under Law: Constitutional Balancing*, 78 COLUM. L. REV. 1022, 1026 (1978) (“[B]alancing is not as widespread as believed, and is hardly the dominant theme of constitutional jurisprudence. It is uncommon in the interpretation or application of express constitutional provisions and rare where such provisions are specific—and most of the clauses in the Constitution are specific.”); and Richard H. Pildes, *Avoiding Balancing, The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L. J. 711, 711–712 (1994):

[B]alancing does not describe the actual process operating in large areas of constitutional decision making. Contrary to the connotations suggested by the balancing metaphor, constitutional adjudication is often a qualitative process, not a quantitative one. It is about defining the kinds of reasons that are impermissible justifications for state action in different spheres.

categorical or principled approaches to constitutional interpretation. These recurrent disagreements underlie many Supreme Court decisions on controversial issues. For example, Justices have continued to disagree about whether so-called benign racial classifications (such as affirmative action) that are intended to assist a minority group should be subject to strict scrutiny or to a lesser standard of scrutiny.

Justice Brennan's opinion in *University of California Regents v. Bakke*<sup>252</sup> argued that an "overriding statutory purpose" could be found to "justify racial preferences" when such preferences were benign or designed to combat racial stigma.<sup>253</sup> He also explained that although the standard for review should be called "strict," it would be fatal only if a program stigmatizes a group or singles out those lacking political power.<sup>254</sup> He essentially argued that the level of scrutiny should depend on the type of racial preference at issue. Justice Brennan emphasized what he considered to be the good reasons for allowing benign racial preferences programs, even though by definition such programs do not treat racial groups equally.

Justice Powell's opinion, however, rejected this reasoning, explaining that the plurality "offer[s] no principle for deciding whether preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification."<sup>255</sup> Given the difficulty and subjectivity of evaluating what classifications are benign, Justice Powell argued for subjecting all racial classifications to the same standard.<sup>256</sup>

This debate continues in recent cases as well. In *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>257</sup> the Supreme Court reaffirmed that all racial classifications must be reviewed under strict scrutiny.<sup>258</sup> Chief Justice Roberts explained: "Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny."<sup>259</sup> In dissent, Justice Breyer would have undertaken a more contextual inquiry taking into account "relevant differences" between "fundamentally different situations."<sup>260</sup> Justice Breyer argued for a more deferential level of scrutiny because, as he optimistically explains, the program at issue had "racial limits that seek, not to keep the races apart, but to bring them together."<sup>261</sup> In fact, Justice Breyer effectively proposed a review of the proportionality between the purposes of the program and use of race-conscious criteria.<sup>262</sup>

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<sup>252</sup> *Univ. of Cal. Regents v. Bakke*, 438 U.S. 265 (1978).

<sup>253</sup> *Id.* at 355 (Brennan, J., concurring in part and dissenting in part).

<sup>254</sup> *Id.* at 361–62.

<sup>255</sup> *Id.* at 294, n.34 (opinion of Powell, J.).

<sup>256</sup> *See id.* at 298.

<sup>257</sup> *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 127 S.Ct. 2738 (2007).

<sup>258</sup> *Id.* at 2751–52 ("racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification") (internal quotation marks omitted).

<sup>259</sup> *Id.* at 2765 (plurality opinion).

<sup>260</sup> *Id.* at 2817 (Breyer, J., dissenting) (internal quotation marks omitted).

<sup>261</sup> *Id.* at 2818.

<sup>262</sup> *Id.* at 2819 (explaining that a judge could "carefully examine the program's details to determine whether the use of race-conscious criteria is proportionate to the important ends it serves"); *see also id.* (noting that the law does not require a traditionally "strict" standard of review but still must be

The diverse opinions expressed in almost all racial classification cases over the last thirty years highlight the recurring disagreements among Justices on how to evaluate such contested constitutional issues.<sup>263</sup> They also exemplify the practical differences that exist between applying strict scrutiny to all racial classifications on the one hand, and in conducting a more contextual approach to judicial review based on an evaluation of the type of program at issue.

Supreme Court Justices similarly disagree about whether the Eighth Amendment contains a proportionality principle. In a recent case challenging California's three-strikes law, the Court applied a "narrow proportionality principle" and upheld the sentence,<sup>264</sup> but the Justices strenuously disagreed over the scope of the proportionality to be applied. In separate opinions concurring in the judgment, Justice Scalia maintained that the Eighth Amendment's proportionality principle is reserved for capital punishment,<sup>265</sup> whereas Justice Thomas argued that there was no proportionality principle in the Eighth Amendment.<sup>266</sup> By contrast, Justice Stevens argued in dissent that he would have applied a "broad proportionality principle," which the Eighth Amendment required for assessments of "all forms of punishment."<sup>267</sup> Opinions in the case articulated four different positions regarding the appropriateness and scope of proportionality review, even in an area of the law in which some proportionality analysis has been recognized in the past.<sup>268</sup>

These examples demonstrate that fact-specific balancing approaches are often opposed by assertions of basic constitutional principle.<sup>269</sup> These conflicts emphasize fundamental differences in methods of constitutional interpretation. In newer constitutional courts such disputes are rarely seen—most disagreement occurs not over whether balancing or proportionality review is appropriate, but rather over how a court should strike the balance.<sup>270</sup> Balancing in the United States is not ubiquitous precisely because our constitutional text and history continue to provide arguments

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"careful"). It is interesting in this context that Justice Breyer, who commonly refers to foreign examples, does not cite to constitutional decisions from other countries, as he would have found significant support for the proposition that benign racial classifications designed to help historically disadvantaged groups should be treated in a fundamentally different manner from exclusionary classifications. See, e.g., *State of Kerala v. Thomas*, A.I.R. 1976 S.C. 490 (India) (holding that affirmative action was, in some circumstances, required by the equality guarantees of the Indian constitution); *Brink v. Kitshoff NO 1996 (6) BCLR 752 (CC) (S. Afr.)* (allowing policies to correct previous discrimination and promote equality).

<sup>263</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *City of Richmond v. Croson*, 488 U.S. 469 (1989).

<sup>264</sup> *Ewing v. California*, 538 U.S. 11 (2003).

<sup>265</sup> *Id.* at 31 (Scalia, J., concurring in the judgment).

<sup>266</sup> *Id.* at 32 (Thomas, J., concurring in the judgment).

<sup>267</sup> *Id.* at 33 (Stevens, J., dissenting).

<sup>268</sup> See generally Sara J. Lewis, Note, *The Cruel and Unusual Reality of California's Three Strikes Law: Ewing v. California and the Narrowing of the Eighth Amendment's Proportionality Principle*, 81 DENV. U. L. REV. 519 (2003). The United States Supreme Court has specifically referred to a "proportionality" test in several recent cases. For example, in *City of Boerne v. Flores*, the Court held that there must be a "congruence and proportionality" between Congress' exercise of its enforcement power under Section 5 of the Fourteenth Amendment and the constitutional violation sought to be remedied. 521 U.S. 507, 520 (1997). This decision was met by substantial scholarly criticism. See Jackson, *supra* note 159, at 602–03 (citing a number of sources of criticism).

<sup>269</sup> For example, Chief Justice Roberts stated, "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race." *Parents Involved in Cmty. Schs.*, 127 S.Ct. at 2768.

<sup>270</sup> See *supra* note 262 (citing cases from India and South Africa).

from principle that are not about weighing rights against other interests. It may in fact be that such principled decisions represent our highest and best forms of constitutional adjudication.<sup>271</sup>

In the United States the tension between principled or categorical rights enforcement and balancing gives greater protection to individual rights. The strenuous arguments from principle keep rights much closer to trumps than in constitutional systems that have accepted proportionality as the dominant mode of interpretation. If rights are strong shields against infringing government action then courts have a serious role to play in protecting rights. They are not simply replicating the legislative balance or deferring to the government's proffered justifications.

The United States Supreme Court has evaluated only some constitutional questions on the balancing scales. More widespread use of balancing or the adoption of a general proportionality standard could weaken the privileged place of constitutional adjudication in the United States. Furthermore, although it may be difficult to prove in an empirical fashion, there is a risk of diminishment, both real and perceived, of rights within a proportionality framework. Proportionality review highlights the near-equivalent status of rights with other interests. Because the test for proportionality has generally been whittled down to the fundamental question of government justification, rights are often present only on the sidelines.

Moreover, because rights can often be limited, they have come to be at least functionally commensurate with other interests. Although the degree of commensurability will vary based on the constitutional court, proportionality creates a framework that equates rights with other interests and in practice requires courts to make tradeoffs between them.

Furthermore, balancing approaches may ultimately undermine the ability of constitutional law to check legislative power. As Alexander Aleinikoff has argued, "If constitutional decisions and normal political decisions examine similar variables in similar ways, then constitutional answers ought not to 'trump' non-constitutional answers; the constitutional process simply serves as an arithmetic 'check' on the non-constitutional process."<sup>272</sup> By focusing largely on the interests at stake and the justifications offered, proportionality review pushes courts toward checking the policymaking process, rather than adjudicating constitutional rights.

Judges are not policymakers and lack both institutional competence and democratic legitimacy to make social policy tradeoffs. If policy-based interests are seen as commensurate with or nearly commensurate with rights, then the balancing between rights and interests should be left to legislatures rather than courts. A determination of what interests are sufficiently important to override rights or what limitations are appropriate in a particular context requires complex political assessments better left to the political branches.<sup>273</sup> As Aleinikoff has quipped,

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<sup>271</sup> See Aleinikoff, *supra* note 115, at 971.

<sup>272</sup> *Id.* at 991.

<sup>273</sup> It is revealing that Gardbaum and Fallon, who both argue in part for the commensurability of rights and interests, conclude that balancing rights with other interests should primarily be a legislative activity. Gardbaum, *supra* note 116, at 845 ("In essence, the only standard of review that coheres with the

“constitutional adjudication is not simply an exercise in reasonable decision making.”<sup>274</sup>

The institutional advantage of courts arises largely in the counter-majoritarian context, in which rights are often a matter of constitutional principle. If rights are mostly commensurate with other interests, then weighing rights against such interests is really an exercise in political judgment that arguably belongs with the democratically accountable branches.<sup>275</sup> If rights have no particular weight, or only slightly more weight, compared with corresponding interests, then it would be reasonable to expect judicial review to be more deferential in considering the balance struck by the political branches.<sup>276</sup>

The United States Supreme Court sometimes determines that political necessities must outweigh rights, but our legal culture treats these cases as exceptions that do not shake our faith in the strength and importance of rights as a bulwark against majoritarian policies. There is a difference between allowing rights to be overridden sometimes in particularly pressing circumstances and in conceiving of rights as part of a general compromise with other political interests. The very real gap between these approaches reflects cultural differences in how we think about constitutional rights as well as practical differences in how we enforce them.<sup>277</sup> Adopting modern conceptions of human dignity as a constitutional value, or more generally moving toward values-based constitutionalism, would close this gap and weaken the protection we have for rights.

## VII. CONCLUSION

In concluding this Article, I understand Nietzsche’s concern in his *Untimely Meditation* on the “Use and Abuse of History for Life.” As with Nietzsche’s essay, perhaps this Article is “out of touch with the times because here I am trying for once to see as a contemporary disgrace, infirmity, and defect something of which our age is justifiably proud,”<sup>278</sup> namely human dignity. Post-war constitutionalism has embraced human dignity as the foundation for the protection of rights, seeing in this concept an irreducible minimum of recognition for all individuals. Quibbling with human dignity may well be out of touch with the times.

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basic reason for the override power is one that is relatively deferential to the underlying legislative judgment. The substitution of judicial for reasonable legislative judgment fails to accommodate the democratic basis for the override.”); Fallon, *supra* note 121, at 376 (“Courts can make a plausible claim of special sensitivity to the interests underlying constitutional rights, but surely they have no comparable general expertise in assessing the weight of the interests that underlie assertions of government power.”).

<sup>274</sup> Aleinikoff, *supra* note 115, at 1002.

<sup>275</sup> Modern constitutional structures favor precisely this type of deference. *But cf.* Friedman, *supra* note 187, at 437 (agreeing that rights and interests are interdependent, but concluding that, as a consequence, “courts must be more, not less, attentive to the claimed necessity of government power”).

<sup>276</sup> A number of constitutional courts have justified their significant level of deference on democratic grounds. *See* Gardbaum, *supra* note 116, at 834.

<sup>277</sup> The size of the gap may be difficult to demonstrate or measure in anything like an empirical fashion—nonetheless I hope that the discussion in this Article demonstrates that a real gap exists.

<sup>278</sup> Friedrich Nietzsche, *On the Use and Abuse of History for Life*, in *THE UNTIMELY MEDITATIONS* 60 (R.J. Hollingdale trans., 1983).

Nonetheless, the particular manifestations of human dignity in modern constitutionalism raise the possibility for significant abuse in American constitutional law. Human dignity now stands for a values-centered constitutionalism, one that emphasizes the needs of the community over the individual, and that protects rights, but only alongside other interests and values. Few values sound as noble as equal human dignity, but constitutional adjudication cannot implement such abstractions. Instead, human dignity is a verbal vessel that contains the preferences and ideological commitments of modern European politics. While such politics remain broadly liberal, rights may not suffer significantly, but rights dependent on the liberalism of an electoral majority rest on shaky ground. Modern constitutionalism perhaps reflects an unwarranted confidence that legislative or democratic accountability will usually be sufficient to protect rights.

By emphasizing values such as human dignity, modern constitutionalism conceives of rights as limited and constrained by democratic needs. The widespread acceptance of proportionality review has deprived rights of some of their principled and moral force because rights can easily be traded off against other political and social needs. In the United States, the Supreme Court sometimes balances rights, but such balancing is not nearly as widespread, and there continues to be significant room for arguments about individual rights based on principle.

Perhaps we should direct our attention to developing an American conception of human dignity based on the Constitution as well as on our legal traditions. This American value might emphasize individual liberty and the dignity of self-determination, rather than the newer communitarian dignity found abroad. It may be that human dignity is best served by firm protections for individual rights, rather than by balancing these rights with other political interests. Seeing how human dignity has been implemented and applied overseas may give us a better appreciation of the unique American conceptions of individual liberty that support our strong protection for rights.