

# THE DIGNITY CANON

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*Human dignity is not a freestanding constitutional right, but it is a strongly held constitutional value. To this point, however, human dignity has had no place in statutory interpretation. This Article argues that courts should create a dignity canon of interpretation, which would operate as a clear statement rule. If laws are to be construed to limit individual dignity, the legislature must expressly this plainly. By conducting re-dos of three Supreme Court cases in the areas of civil rights, criminal procedure, and personal health, the Article shows the promise of the dignity canon.*

INTRODUCTION .....	416
I. DIGNITY AS A CONSTITUTIONAL CONCEPT .....	418
A. <i>Dignity's Status</i> .....	419
B. <i>Dignity's Domain</i> .....	424
II. DIGNITY AS A CANON OF STATUTORY INTERPRETATION ...	430
A. <i>Should There Be a Dignity Canon?</i> .....	430
1. Arguments in Favor .....	431
a. The Idealized Drafting View of Statutory Interpretation .....	431
b. The Expressive Function of a Dignity Canon .....	436
c. The Dignity Canon Would Be Unremarkable .....	437
2. Three Counterarguments .....	438
a. The "Dignity is Ideological" Argument .....	438
b. The "Too Much Constitutional Law" Argument .....	440
c. The "Really, Another Canon?" Argument ...	442
B. <i>Dignity as a Clear Statement Rule</i> .....	443
1. Dignity is Under-Enforced in Constitutional Law .....	444
2. A Clear Statement Rule Would Have Preference- Eliciting Effects .....	447

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3. A Dignity Clear Statement Rule Would Better Protect Individual Liberties .....	448
4. The Counterargument: Clear Statement Rules Are Undemocratic .....	449
III. THE DIGNITY CANON IN PRACTICE .....	452
A. <i>Civil Rights</i> : Romer v. Evans .....	452
B. <i>Criminal Procedure</i> : Muscarello v. United States ....	454
C. <i>Personal Health</i> : Harris v. McRae .....	457
D. <i>Putting It Together: Lessons from the Case Studies</i> ..	459
IV. THE LIMITS OF THE DIGNITY CANON .....	462
CONCLUSION .....	467

## INTRODUCTION

On the final day of the October 2014 Term, the United States Supreme Court issued its decision in *Obergefell v. Hodges*.<sup>1</sup> This momentous decision, which enshrined into the Constitution an equal right to marry for homosexual and heterosexual couples,<sup>2</sup> based its reasoning on a synergistic combination of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.<sup>3</sup> However, as several scholars have noted, an even deeper value underlay the decision: human dignity.<sup>4</sup>

Dignity is a notoriously slippery concept.<sup>5</sup> It sounds in themes of equality, autonomy, and basic humanity.<sup>6</sup> It connotes something both airily ephemeral and deeply visceral. Yet the Court seems quite comfortable invoking this vague idea in its opinions. The *Obergefell* decision was freighted with nods to dignity; it cast gay marriage bans as “condemn[ing] [homosexuals] to live in loneliness, excluded from one of civilization’s oldest institutions.”<sup>7</sup> In its peroration, the Court said of the plaintiffs: “They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”<sup>8</sup>

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<sup>1</sup> 135 S. Ct. 2584 (2015).

<sup>2</sup> *Id.* at 2604–05.

<sup>3</sup> *Id.* at 2604.

<sup>4</sup> See, e.g., Elizabeth B. Cooper, *The Power of Dignity*, 84 FORDHAM L. REV. 3, 15 (2015); Jack B. Harrison, *At Long Last Marriage*, 24 AM. U. J. GENDER SOC. POL’Y & L. 1, 53 (2015); Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIRCUIT 107, 109 (2015); see also Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745, 1757 (2015) (saying that “[m]aybe today, ‘due process’ leads some of us to think in terms of ‘dignity,’” and citing *Obergefell*).

<sup>5</sup> See Hunter, *supra* note 4, at 109.

<sup>6</sup> See Rachel Bayefsky, Note, *Dignity as a Value in Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1739 (2014).

<sup>7</sup> *Obergefell*, 135 S. Ct. at 2608.

<sup>8</sup> *Id.*

A great many legal scholars have examined the concept of dignity as it appears in constitutional cases like *Obergefell*.<sup>9</sup> Dignity has even received attention as it relates to administrative law.<sup>10</sup> This Article asks a different question: should the courts incorporate dignity into their statutory interpretation jurisprudence?<sup>11</sup> And if so, how? The judiciary, I argue, not only *can* include dignitary concerns in its statutory interpretation decisions; it *should* do so. The most efficient and effective way to do this is to develop a new rule of interpretation: the dignity canon. This Article explores the notion of human dignity and explains how it can be applied to legislative interpretation.

Part I examines the idea of human dignity in constitutional law. Though not a constitutional *right* in and of itself, dignity has long been a settled constitutional *value*.<sup>12</sup> It has informed the interpretation of a wide range of constitutional issues, and its use has risen under the Roberts Court. Part I explores dignity's status in constitutional law, provides a definition of dignity, and examines the wide domain in which dignity operates.

Part II argues that this strong tradition of dignity jurisprudence should extend to statutory cases, through the creation of a dignity canon of interpretation. Like many other constitutionally derived canons, this proposed dignity canon would act as a clear statement rule. The rule would require that a legislature speak clearly if it wishes to pass a provision that would diminish individuals' intrinsic worth as human beings. Part II makes the case for this rule, and takes on several arguments against creating a new dignity canon.

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<sup>9</sup> See, e.g., 3 BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 137 (2014); AHARON BARAK, *HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* 185–208 (Daniel Karyos trans., 2015); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. Pa. L. Rev. 169, 171–73 (2011); Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1735–36 (2008); Kenji Yoshino, *The Anti-Humiliation Principle and Same-Sex Marriage*, 123 YALE L.J. 3076, 3082–88 (2014); sources cited *supra* note 4 and *infra* note 12.

<sup>10</sup> See Bayefsky, *supra* note 6, at 1735–41.

<sup>11</sup> A few scholars have begun nibbling around the edges of this question. See Johanna Kalb, *Litigating Dignity: A Human Rights Framework*, 74 ALB. L. REV. 1725, 1735 (2011) (discussing ways to “advance human rights-based dignitary claims” in statutory and common-law cases); William D. Popkin, *A Common Law Lawyer on the Supreme Court: The Opinions of Justice Stevens*, 1989 DUKE L.J. 1087, 1137 (1989) (explaining the jurisprudence of Justice Stevens, who, Popkin claimed, took “an approach to statutory interpretation that defer[ed] to legislative language, yet also show[ed] concern for case-by-case adjudication and individual dignity”).

<sup>12</sup> See Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331, 346–47 (2012); Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 93 (2011); Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934 (2003).

Part III lays out how the dignity canon would operate in real-world situations. A clear statement rule in favor of dignity could have a significant effect on issues ranging from criminal justice and the death penalty, to discrimination, to health care and abortion rights. Part III reimagines three important Supreme Court cases—*Romer v. Evans*,<sup>13</sup> *Muscarello v. United States*,<sup>14</sup> and *Harris v. McRae*<sup>15</sup>—to show how replacing the Court’s reasoning with a dignity canon analysis would affect the outcome. Through these case studies, Part III shows that a dignity canon can be applied in a principled manner, and that it is not merely an ideological tool for those on either side of the aisle.

Finally, Part IV discusses an important limitation on the proposed dignity canon: the contested idea of dignity itself. The dignity canon, based as it is on the constitutional commitment to dignity, is subject to the same vicissitudes of ideology that roil constitutional law. One prominent example of this limitation is affirmative action. Those who view affirmative action as dignity-affirming would read statutes so as to limit restrictions on the practice; those who see the Constitution as color-blind, on the other hand, would interpret statutes so as to limit affirmative action itself. Part IV recognizes this problem, but argues that judges can prevent its importation into statutory cases by following the contours of these very constitutional contests. Even with this potential pitfall, the dignity canon has the potential to transform many areas of statutory law—and transform them for the better.

### I. DIGNITY AS A CONSTITUTIONAL CONCEPT

The concept of dignity has an uncertain place in the constitutional firmament. It is not obvious from any particular provision of the Constitution that dignity plays a role in constitutional interpretation. Yet both courts and scholars have enmeshed the concept into their arguments, claiming that a concern for human dignity underlies certain constitutional rights—or even that “dignity is the motivating force behind the whole Constitution itself.”<sup>16</sup> Indeed, Justice Potter Stewart said that “the essential dignity and worth of every human being” is “a concept at the root of any decent system of ordered liberty.”<sup>17</sup> And Justice William Brennan described the Constitution as “a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law.”<sup>18</sup> Hyperbolic as some of these statements might appear,

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<sup>13</sup> 517 U.S. 620 (1996).

<sup>14</sup> 524 U.S. 125 (1998).

<sup>15</sup> 448 U.S. 297 (1980).

<sup>16</sup> Glensy, *supra* note 12, at 93.

<sup>17</sup> *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring).

<sup>18</sup> William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. TEX. L. REV. 433, 438 (1986).

they illustrate a broader truth: human dignity has become a foundational part of American constitutional jurisprudence.

This Part explores the controversy and the case law surrounding the Constitution's protection of human dignity. Part I.A will lay out the debate over dignity's legal status. As we will see, both Justices and scholars continue to contest the idea of human dignity and its proper scope in constitutional jurisprudence. However, dignity's existence as a key constitutional value is now a matter of settled law. Part I.A will also provide a working definition of human dignity, one that is tethered both to common usage and longstanding constitutional doctrine. Part I.B will then examine the areas of law in which the Court has most robustly embraced a dignity interest: civil rights and discrimination, criminal law and procedure, and personal health and privacy. By scrutinizing dignity's domain, we can see the three main ways in which the federal or state governments could unconstitutionally intrude on human dignity. In particular, we will see that legislatures may not pass statutes that (1) single out one group for worse treatment or lesser protection, (2) sanction treatment of individuals that fails to meet minimum adequacy standards, or (3) unduly limit individual autonomy.

### A. *Dignity's Status*

Over the past seven decades, Supreme Court opinions have advanced a steady—if at times “fragmented and undeveloped”—jurisprudence of human dignity.<sup>19</sup> The concept of dignity entered the constitutional lexicon in the early days of the Republic.<sup>20</sup> Since then, the Supreme Court has mentioned the word “dignity” in over 900 cases,<sup>21</sup> referring to everything from “the dignity of the court,”<sup>22</sup> to “the dignity of the sovereign,”<sup>23</sup> to “the dignity of records.”<sup>24</sup> But it was in the 1940s, in the shadow of World War II and the horrors of the Holocaust, that the Court truly began to embrace individual *human* dignity in

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<sup>19</sup> BARAK, *supra* note 9, at 193, 206.

<sup>20</sup> See *Chisholm v. Georgia*, 2 U.S. 419, 455 (1793) (Wilson, J.) (“A State; useful and valuable as the contrivance is, is the inferior contrivance of man; and from his native dignity derives all its acquired importance.”); see also *Brown v. Walker*, 161 U.S. 591, 632 (1896) (Field, J., dissenting) (“[B]oth the safeguard of the constitution and the common-law rule [against forced self-incrimination] spring alike from that sentiment of personal self-respect, liberty, independence, and dignity which has inhabited the breasts of English-speaking peoples for centuries.”).

<sup>21</sup> Resnik & Suk, *supra* note 12, at 1933. A Westlaw search on February 17, 2017 of Supreme Court opinions using the word “dignity” returned 945 cases—though some make no substantive use of dignity. See, e.g., *Hernandez v. Dignity Health*, 136 S. Ct. 873 (2016); *Hernandez v. Dignity Health*, 136 S. Ct. 526 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 249 (2006) (discussing Oregon Death with Dignity Act).

<sup>22</sup> *Harris v. United States*, 382 U.S. 162, 165 (1965).

<sup>23</sup> *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 123 (1812).

<sup>24</sup> *Hooper v. Scheimer*, 64 U.S. 235, 240 (1859).

constitutional interpretation.<sup>25</sup> Justice Brennan was a particularly prolific proponent of human dignity as a constitutional value, invoking the concept in thirty-nine opinions during his tenure on the Court.<sup>26</sup> Dignity has since remained a potent concept in constitutional interpretation: Justices Thurgood Marshall,<sup>27</sup> Sandra Day O'Connor,<sup>28</sup> and John Paul Stevens<sup>29</sup> occasionally paid homage to dignity in their opinions, and Justice Anthony Kennedy has championed its use in a range of cases.<sup>30</sup>

So where does dignity stand today? The first thing to note is that dignity is *not* a constitutional right. As Justice Clarence Thomas pointed out in his *Obergefell* dissent, “the Constitution contains no ‘dignity’ Clause.”<sup>31</sup> The Court has never recognized a direct right to dignity.<sup>32</sup> Yet it is just as clear that dignity *is* a constitutional *value*.<sup>33</sup> As Justice Stephen Breyer puts it: “*Values* are the constitutional analogue of statutory purposes.”<sup>34</sup> They are not in the text of the document, but they tell us why the text is there and what the text is meant to protect. And many parts of the Constitution, the Court has said, are meant to protect human dignity.

The Court has explicitly held that certain constitutional provisions, such as the Eighth Amendment, were designed as dignitary guarantees.<sup>35</sup> More broadly, the Court has spoken of “the *Constitution’s* protection of human dignity,”<sup>36</sup> acknowledging dignity as a fundamental value that is

<sup>25</sup> BARAK, *supra* note 9, at 193–94.

<sup>26</sup> Henry, *supra* note 9, at 171.

<sup>27</sup> *See, e.g.*, Skinner v. Ry. Labor Execs. Ass’n, 489 U.S. 602, 635–36, 640–41 (1989); Bell v. Wolfish, 441 U.S. 520, 576–77, 589–90 (1979) (Marshall, J., dissenting); Gregg v. Georgia, 428 U.S. 227, 240–41 (1976) (Marshall, J., dissenting).

<sup>28</sup> *See, e.g.*, Roper v. Simmons, 543 U.S. 541, 605 (2005) (O’Connor, J., dissenting); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992) (O’Connor, Kennedy, and Souter, JJ.); McKaskle v. Wiggins, 465 U.S. 168, 176–78, 181–82 (1984) (O’Connor, J.).

<sup>29</sup> *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 727, 743–44 (1997) (Stevens, J., concurring in the judgment); Casey, 505 U.S. at 916, 920; Wolfish, 441 U.S. at 589–90, 593–95 (Stevens, J., dissenting); Meachum v. Fano, 427 U.S. 215, 232–34 (1976) (Stevens, J., dissenting).

<sup>30</sup> For instance, Justice Kennedy wrote most of the recent decisions on homosexuality and the death penalty cited below. *See infra* notes 67–70, 92. Anne Jelliff attributes Justice Kennedy’s use of dignity at least in part to his Catholicism. *See* Anne Jelliff, *Catholic Values, Human Dignity, and the Moral Law in the United States Supreme Court: Justice Anthony Kennedy’s Approach to the Constitution*, 76 ALB. L. REV. 335, 349 (2013).

<sup>31</sup> *Obergefell v. Hodges*, 135 S. Ct. at 2639 (2015) (Thomas, J., dissenting).

<sup>32</sup> *Cf. id.* at 2616 (Roberts, C.J., dissenting) (“Petitioners do not contend that their States’ marriage laws violate an *enumerated* constitutional right, such as the freedom of speech protected by the First Amendment. There is, after all, no ‘Companionship and Understanding’ or ‘Nobility and Dignity’ Clause in the Constitution.”).

<sup>33</sup> *See, e.g.*, Henry, *supra* note 9, at 181.

<sup>34</sup> STEPHEN BREYER, MAKING OUR DEMOCRACY WORK: A JUDGE’S VIEW 162 (2010).

<sup>35</sup> *See, e.g.*, Hall v. Florida, 134 S. Ct. 1986, 1992 (2014).

<sup>36</sup> *Id.* (emphasis added); *see id.* at 2001.

infused throughout our governing document. As we will see in Part II.B, this more diffuse existence—living implicitly in many clauses rather than explicitly in one—means that dignity remains under-enforced in constitutional law. This is a classic situation in which courts tend to create and use policy-based canons of statutory interpretation.<sup>37</sup>

Several conservative Justices, particularly Clarence Thomas and Antonin Scalia, have resisted the ever-growing jurisprudence on dignity. These Justices have repeatedly questioned the Court's very use of the term, as well as broader doctrines—such as the Eighth Amendment's "evolving standards of decency" test—that are rooted in dignity.<sup>38</sup> In *Obergefell*, Justices Thomas and Scalia rejected the very idea of constitutionalized dignity.<sup>39</sup> To them, dignity is an innate human characteristic: "The government cannot bestow dignity, and it cannot take it away."<sup>40</sup> Dignity is simply beyond the power of the legal system to protect or destroy. Some scholars have joined the Justices in their criticism.<sup>41</sup>

Yet even these Justices are willing to employ dignity when it suits them. For instance, Chief Justice Stephen Rehnquist and Justice Scalia joined the majority opinion in *McCleskey v. Kemp*, in the course of which the Court reaffirmed that the Eighth Amendment is rooted in the "dignity of man."<sup>42</sup> And Chief Justice John Roberts' opinion in *Parents Involved in Community Schools v. Seattle School District Number 1*, which Justices Scalia, Thomas, and Samuel Alito joined, said that the use of race in school assignment "demeans the dignity and worth of a person."<sup>43</sup> Even when they have opposed its use, the skeptics have been unable to convince the Court to abandon or confine its dignity jurisprudence. Indeed, dignity has not only been on the rise under the Roberts Court; it is also increasingly appearing in majority, as opposed to concurring or dissenting, opinions.<sup>44</sup> As the next Section lays out in greater

<sup>37</sup> See *infra* Part II.B.1.

<sup>38</sup> See, e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2749 (2015) (Scalia, J., concurring); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 983 (1992) (Rehnquist, J., dissenting) (calling the majority's use of the words "dignity and autonomy" part of an empty "collection of adjectives").

<sup>39</sup> *Obergefell v. Hodges*, 135 S. Ct. at 2639 (2015) (Thomas, J., dissenting).

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., Leon R. Kass, *Death with Dignity and the Sanctity of Life*, in *A TIME TO BE BORN AND A TIME TO DIE: THE ETHICS OF CHOICE* 117, 133 (Barry S. Kogan ed., 1991); Michael Rosen, *Dignity: The Case Against*, in *UNDERSTANDING HUMAN DIGNITY* 143, 146 (Christopher McCrudden ed., 2013); Jonathan Turley, *The Trouble With the 'Dignity' of Same-Sex Marriage*, *Wash. Post* (July 2, 2015), [https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55\\_story.html](https://www.washingtonpost.com/opinions/the-trouble-with-the-dignity-of-same-sex-marriage/2015/07/02/43bd8f70-1f4e-11e5-aeb9-a411a84c9d55_story.html); David Upham, *Symposium: A Tremendous Defeat for "We the People" and Our Posterity*, *SCOTUSBLOG* (June 26, 2015, 4:26 PM), <http://www.scotusblog.com/2015/06/symposium-a-tremendous-defeat-for-we-the-people-and-our-posterity>.

<sup>42</sup> *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987).

<sup>43</sup> 551 U.S. 701, 746 (2007).

<sup>44</sup> Henry, *supra* note 9, at 171–72.

detail, dignity plays a broad—and extremely durable—role in constitutional doctrine.

While dignity’s status as a constitutional value is essentially settled, its basic meaning is less clear. On the face of it, human dignity is an exceptionally malleable concept. It has elements of both equality and adequacy of treatment.<sup>45</sup> A violation of one’s dignity could consist of anything from humiliation, to a reduction of legal status, to the abstract idea of “being treated as a ‘mere means’ instead of an end in itself.”<sup>46</sup> This pliability suggests that dignity’s meaning evolves. Indeed, Justice Aharon Barak claims that “dignity is a relative concept, dependent upon historical, cultural, religious, social and political contexts.”<sup>47</sup>

But this does not mean that dignity is unusable in constitutional or statutory cases. In fact, dignity has maintained a relatively consistent meaning over at least the past century. For example, the 1933 edition of the *Oxford English Dictionary* defines “dignity” as “[t]he quality of being worthy or honorable; worthiness, worth, nobleness, excellence.”<sup>48</sup> The 2002 edition of *Webster’s Third* defines it as “[t]he quality or state of being worthy; intrinsic worth.”<sup>49</sup> A number of other dictionaries from the period in between give similar definitions.<sup>50</sup> All of these dictionaries focus on the concept of inherent *worth*—the idea that we all possess some quantum of spirit as human beings that commands a certain degree of respect. The Court’s view echoes these dictionary definitions: protecting dignity requires the State to “treat its members with respect for their intrinsic worth as human beings.”<sup>51</sup>

<sup>45</sup> Bayefsky, *supra* note 6, at 1739.

<sup>46</sup> *Id.*; see IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary Gregor ed. & trans., 1998) (1785) (“In the kingdom of ends everything has either a *price* or a *dignity*. What has a price can be replaced by something else as its *equivalent*; what on the other hand is raised above all price and therefore admits of no equivalent has a dignity.”).

<sup>47</sup> BARAK, *supra* note 9, at 6.

<sup>48</sup> *Dignity*, OXFORD ENGLISH DICTIONARY (reprint 1961) (1933).

<sup>49</sup> *Dignity*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED (2002).

<sup>50</sup> See, e.g., *Dignity*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1992) (“1. The quality or state of being worthy of esteem or respect. 2. Inherent nobility and worth.”); *Dignity*, FUNK & WAGNALLS STANDARD DICTIONARY OF THE ENGLISH LANGUAGE: INTERNATIONAL EDITION (1963) (fourth definition) (“The state or quality of being excellent, worthy, or honorable.”); *Dignity*, WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE: ENCYCLOPEDIA EDITION (1951) (“1. worthiness; nobility. . . . 3. the degree of worth, repute, or honor.”).

<sup>51</sup> *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring); see, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting) (equating “human dignity” with “inherent worth”); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000) (“[I]t demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (stating that “the essential dignity and worth of every human being” is “at the root of any decent system of ordered liberty”).



This gets us closer to a working definition of human dignity, but the idea of preserving one's intrinsic worth is not precise enough on its own to support a canon of statutory interpretation. This is where the Court's case law comes into play. As we will see in the next Section, the Court has employed dignity in a wide range of cases; from these cases we can delineate three core principles that give dignity a more definite shape. First, the Equal Protection and Due Process Clauses evince a commitment to "equal dignity."<sup>52</sup> This means that a government cannot single out groups for special burdens or lesser protections, or provide individuals with significantly unequal rights. Second, dignity contains an element of adequacy. There is a certain minimum level of treatment that the state and federal governments must provide to all human beings, including to suspected criminals and prisoners.<sup>53</sup> And third, the Court's substantive due process jurisprudence adds a liberty component to dignity. A government cannot pass laws that significantly intrude on traditional areas of personal autonomy or otherwise impede people's ability to make certain private decisions for themselves.<sup>54</sup>

These three principles make the otherwise vague concept of dignity more concrete. They also set needed limits on how courts could use dignity in statutory interpretation. I argue in Part II.B that dignity, like many other constitutional values, should enter statutory interpretation through the creation of a clear statement rule. Such rules require clear language in the text of a statute before courts will read it to intrude on important principles of judicial policy. A dignity clear statement rule, therefore, would provide a prophylactic that goes somewhat beyond the Constitution itself. However, it would *not* be able to go beyond the principles just articulated, unless the Court further broadens its constitutional dignity jurisprudence. Nor would it provide protection where the Court has explicitly ruled that the Constitution does not. For instance, one might assume that the concept of equal dignity would prevent states from providing more money to students in wealthy suburban school districts than to poor urban ones. But in *San Antonio Independent School District v. Rodriguez*, the Court ruled that the Constitution does not provide a right to education, and that it does not require equality of school funding on the basis of community wealth.<sup>55</sup> Courts might still interpret statutes to provide a minimum, adequate level of education;<sup>56</sup> but courts could not read ambiguous laws to require equality of funding. These limitations

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<sup>52</sup> See *infra* notes 61–73 and accompanying text.

<sup>53</sup> See *infra* notes 74–94 and accompanying text.

<sup>54</sup> See *infra* notes 95–106 and accompanying text.

<sup>55</sup> 411 U.S. 1, 35, 54 (1973).

<sup>56</sup> See *id.* at 36.

will keep in check what could otherwise be a worryingly expansive concept.

Finally, it should be noted that the constitutional dignity value directly enhances individual liberty, sometimes in unexpected ways. As we will see from the case studies in Part III, transferring dignity into the statutory realm does not necessarily serve a particular political agenda. The Court's dignity jurisprudence often expands individual rights in a traditionally "progressive" way,<sup>57</sup> but civil liberties are not inherently liberal as a political matter. The Roberts Court's First Amendment jurisprudence, for example, has embraced a form of "conservative libertarianism,"<sup>58</sup> even as it invokes "individual dignity" to justify loosening restrictions on speech.<sup>59</sup> Dignity means that we all have intrinsic worth, which the government cannot constitutionally deny or abridge. This is, one would hope, a nonpartisan idea.

### B. *Dignity's Domain*

As noted in the previous Section, the Court has not confined dignity to one particular constitutional provision, or to a single line of doctrine. To the contrary: dignity has played a role in a number of disparate areas of law. One scholar has determined that the Court has invoked dignity in relation to nine of the twenty-seven amendments to the Constitution.<sup>60</sup> This Section focuses on three areas: civil rights, criminal procedure, and personal health. These are the fields in which dignity jurisprudence is the most developed—and they will form the basis for the case studies in Part III.

On the civil rights front, the Court has found dignity lurking in a broad array of doctrines. It has declared that employing peremptory strikes on the basis of gender violates the dignity of the excluded jurors,<sup>61</sup> and that classifying individuals by race "is inconsistent with the dignity of individuals in our society."<sup>62</sup> It has said that robust First Amendment debate protects the "individual dignity and choice upon

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<sup>57</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015); *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

<sup>58</sup> Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 236 (2014).

<sup>59</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) (plurality opinion) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)).

<sup>60</sup> Henry, *supra* note 9, at 173.

<sup>61</sup> See *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994); *id.* at 153 (Kennedy, J., concurring in the judgment).

<sup>62</sup> *Parents Involved in Community Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 797 (2007) (Kennedy, J., concurring in part and concurring in the judgment); see *id.* at 746 (plurality opinion); *Rice v. Cayetano*, 528 U.S. 495, 517 (2000).

which our political system rests,”<sup>63</sup> and that the fundamental nature of the right to vote manifests itself in “the equal dignity owed to each voter.”<sup>64</sup> Justices have found that everything from free exercise of religion<sup>65</sup> to the Americans With Disabilities Act<sup>66</sup> enhances human dignity.

Within the field of civil rights, the Court has most consistently invoked dignity in its series of decisions on gay rights. These cases—beginning with *Lawrence v. Texas*<sup>67</sup> and continuing with *United States v. Windsor*<sup>68</sup> and *Obergefell v. Hodges*<sup>69</sup>—recognized the dignity of gay people as individuals, and the dignity that inheres in romantic and sexual relationships regardless of sexual orientation.<sup>70</sup> Both *Windsor* and *Obergefell* seem to focus as much on the dignity of marriage itself as on the dignity of the actual plaintiffs who sought marital recognition.<sup>71</sup> Whether future gay rights decisions will focus as much on dignity when something other than marriage is at stake, therefore, remains to be seen.<sup>72</sup> But the sexual orientation cases recognize as part of due process liberty “certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>73</sup> Taken as a whole, the Court’s civil rights cases view dignity in two ways: first, it protects people’s ability to determine their own place in the world; and second, it requires that government recognize the individual

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<sup>63</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) (plurality opinion) (quoting *Cohen v. California*, 403 U.S. 15, 24 (1971)); see also *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1636–37 (2014) (stating that America’s history of racial inequality “demands that we continue to learn, to listen, and to remain open to new approaches if we are to aspire always to a constitutional order in which all persons are treated with fairness and equal dignity”).

<sup>64</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000) (per curiam).

<sup>65</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2785 (2014) (Kennedy, J., concurring).

<sup>66</sup> See *Tennessee v. Lane*, 541 U.S. 509, 537–38 (2004) (Ginsburg, J., concurring).

<sup>67</sup> 539 U.S. 558 (2003).

<sup>68</sup> 133 S. Ct. 2675 (2013).

<sup>69</sup> 135 S. Ct. 2584 (2015).

<sup>70</sup> See *id.* at 2597, 2599; *Windsor*, 133 S. Ct. at 2692; *Lawrence*, 539 U.S. at 567. Unsurprisingly, Justice Kennedy wrote each of these opinions. Justice Kennedy’s one previous sexual orientation opinion rested mainly on political process doctrine and did not mention the dignity concept. See *Romer v. Evans*, 517 U.S. 620, 633 (1996) (“A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.”).

<sup>71</sup> See *Obergefell*, 135 S. Ct. at 2594 (“The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life.”); *Windsor*, 133 S. Ct. at 2692 (“Here the State’s decision to give this class of persons the right to marry conferred upon them a dignity and status of immense import.”).

<sup>72</sup> See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (U.S. argued Dec. 5, 2017) (asking whether a state law that prevents a cake maker from refusing to serve customers on the basis of sexual orientation violates the cake maker’s free speech and free exercise rights). *Lawrence* seems to provide at least some measure of comfort on this score. See 539 U.S. at 567, 575.

<sup>73</sup> *Obergefell*, 135 S. Ct. at 2597.

worth of each person, which means that everyone must, at least to a certain extent, be treated equally.

In addition to civil rights, the Court has infused dignity into nearly every step of the criminal justice system. First, it views arbitrary searches and seizures as violating the dignity of those the government targets.<sup>74</sup> Indeed, the Court has said that “[t]he *overriding function* of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”<sup>75</sup> Physically or visually invasive searches—such as blood tests or strip searches—are viewed as particularly offensive to dignity, just as they are particularly harmful to personal privacy.<sup>76</sup>

Second, coercive police interrogation environments are seen as “destructive of human dignity.”<sup>77</sup> In the Court’s view, the Fifth Amendment right against self-incrimination helps safeguard defendants’ dignity, by protecting their ability to remain silent in the face of hostile accusation.<sup>78</sup> This dignitary interest undergirds the *Miranda* warning requirement for custodial interrogations.<sup>79</sup>

Third, the Court has determined that the Sixth Amendment right to appear *pro se* “exists to affirm the accused’s individual dignity and autonomy.”<sup>80</sup> Thus, on the one hand, states can prevent those without the mental capacity to defend themselves from appearing *pro se*; this is seen as protecting individuals’ dignity, because it prevents public humiliation.<sup>81</sup> On the other hand, the Court has warned, stand-by attorneys appointed to aid *pro se* defendants must not “destroy the jury’s perception that the defendant is representing himself.”<sup>82</sup> This would be as harmful to the defendant’s self-worth as would be the humiliation of a deficient *pro se* defense.

Fourth, the interest in human dignity places limits on the sorts of punishments that government may impose on criminals. As with the Fourth Amendment, the Court has said that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”<sup>83</sup> The open-ended content of the dignity value, as well as the vague language of the Eighth Amendment itself, led directly to the Court’s “evolv-

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<sup>74</sup> See *Skinner v. Ry. Labor Execs. Ass’n*, 489 U.S. 602, 613–14 (1989).

<sup>75</sup> *Schmerber v. California*, 384 U.S. 757, 767 (1966).

<sup>76</sup> See *Florence v. Bd. of Chosen Freeholders of Cty. of Burlington*, 566 U.S. 318, 346 (2012) (Breyer, J., dissenting); *Schmerber*, 384 U.S. at 769–70.

<sup>77</sup> *Miranda v. Arizona*, 384 U.S. 436, 457 (1966).

<sup>78</sup> *Id.* at 460.

<sup>79</sup> *Id.*

<sup>80</sup> *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984).

<sup>81</sup> *Indiana v. Edwards*, 554 U.S. 164, 176 (2008).

<sup>82</sup> *McKaskle*, 465 U.S. at 178.

<sup>83</sup> *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

ing standards of decency” doctrine for cruel and unusual punishment claims.<sup>84</sup>

And fifth, dignity infuses even the post-conviction prison environment. The Court has determined that certain forms of treatment violate prisoners’ Fifth and Eighth Amendment rights, because “[p]risoners retain the essence of human dignity inherent in all persons.”<sup>85</sup> Prison overcrowding, for instance, is unconstitutional for this reason.<sup>86</sup>

As all of this shows, the desire to protect human dignity has permeated the Court’s criminal procedure jurisprudence. But nowhere has the concept of dignity been more powerfully or consistently invoked than in death penalty cases. Justice Brennan’s concurrence in *Furman v. Georgia*—the case that (for four years) outlawed the death penalty—provides a detailed argument connecting the Eighth Amendment to human dignity.<sup>87</sup> As Justice Brennan put it: “The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’ therefore, if it does not comport with human dignity.”<sup>88</sup> Examining the death penalty under a four-factor test, Justice Brennan concluded that “the deliberate extinguishment of human life by the State is uniquely degrading to human dignity.”<sup>89</sup>

This framing has since set the terms for the death penalty debate. When the Court reinstated the death penalty in 1976, the plurality defended the desire for retribution as not “inconsistent with our respect for the dignity of men,”<sup>90</sup> while the dissenters couched their responses in the same dignity-laced language.<sup>91</sup> More recently, the Court, led by Justice Kennedy, has begun cutting back on the categories of crimes or defend-

<sup>84</sup> *Id.* at 100–01; *see* *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (quoting *Trop*, 356 U.S. at 101).

<sup>85</sup> *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011) (“A prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the concept of human dignity and has no place in civilized society.”). Justices have invoked dignity in other opinions seeking to regulate prison conditions, though their views did not carry the day. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 576–77 (1979) (Marshall, J., dissenting) (body-cavity searches of pretrial detainees); *id.* at 595 (Stevens, J., dissenting) (prohibition on receipt of books or packages, searches of prisoners’ possessions out of their presence, and body-cavity searches); *Meachum v. Fano*, 427 U.S. 215, 232 (1976) (Stevens, J., dissenting) (transfers to prisons with worse conditions without a hearing).

<sup>86</sup> *Plata*, 131 S. Ct. at 1928.

<sup>87</sup> *Furman v. Georgia*, 408 U.S. 238, 270–305 (1972) (Brennan, J., concurring).

<sup>88</sup> *Id.* at 270.

<sup>89</sup> *Id.* at 291; *see id.* at 305 (“When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity.”).

<sup>90</sup> *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion) (joint opinion of Stewart, Powell, & Stevens, JJ.).

<sup>91</sup> *Id.* at 229–30 (Brennan, J., dissenting); *id.* at 240–41 (Marshall, J., dissenting).

ants with which the death penalty can be associated.<sup>92</sup> Some of the Court's loftiest language on dignity comes from these opinions. *Roper v. Simmons* declared it a "duty of the government to respect the dignity of all persons," and elevated the preservation of dignity to the same level of constitutional importance as federalism and the separation of powers.<sup>93</sup> And, in *Hall v. Florida*, the Court declared that "[t]he Eighth Amendment's protection of dignity reflects the Nation we have been, the Nation we are, and the Nation we aspire to be."<sup>94</sup> These sentiments affirm how foundational the concept of dignity is to constitutional law, even if it does not represent a freestanding right. And, more generally, the Court's criminal procedure jurisprudence shows that dignity guarantees a minimum *adequacy* of treatment: even notorious criminals deserve basic rights.

Finally, the Court has recognized a dignity interest in making certain decisions about one's personal health and other, similarly private matters. These cases usually arise under the Due Process Clause of the Fourteenth Amendment.<sup>95</sup> In decisions dealing with abortion,<sup>96</sup> euthanasia,<sup>97</sup> and even gun rights,<sup>98</sup> Justices have described dignity (often paired with the word "autonomy") as "central to the liberty protected by the Fourteenth Amendment."<sup>99</sup> Just as this interest protects certain sexual and romantic relationship choices, so too does it guarantee the right to make certain personal health decisions. Chief among these is the right to terminate a pregnancy. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court declared that the right to choose an abortion is "central to personal dignity and autonomy."<sup>100</sup> However, the Court has also recognized a countervailing interest in protecting the dignity of the fetal life, at least in the situation of late-term abortion.<sup>101</sup>

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<sup>92</sup> See *Hall v. Florida*, 134 S. Ct. 1986, 2001 (2014) (defendants within margin of error of 70 on IQ tests); *Kennedy v. Louisiana*, 554 U.S. 407, 421 (2008) (child rape that was not intended to and did not result in death); *Roper v. Simmons*, 543 U.S. 541, 578 (2005) (defendants who were under 18 at time of crime); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (mentally retarded criminals); see also *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (outlawing death penalty for adult rape not leading to death).

<sup>93</sup> *Roper*, 543 U.S. at 560, 578.

<sup>94</sup> *Hall*, 134 S. Ct. at 1992.

<sup>95</sup> See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992) (joint opinion of O'Connor, Kennedy, & Souter, JJ.).

<sup>96</sup> See *Stenberg v. Carhart*, 530 U.S. 914, 920–21 (2000); *Casey*, 505 U.S. at 851.

<sup>97</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 727 (1997); *id.* at 779 (Souter, J., concurring in the judgment); *id.* at 743–44 (Stevens, J., concurring in the judgment); *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring).

<sup>98</sup> See *McDonald v. City of Chicago*, 561 U.S. 742, 879–80 (2010) (Stevens, J., dissenting).

<sup>99</sup> *Casey*, 505 U.S. at 851.

<sup>100</sup> *Id.*; see *id.* at 916, 920 (Stevens, J., concurring in part and dissenting in part).

<sup>101</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007); *Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting). This competing view of dignity has also been expressed in the political

This (somewhat) ambivalent treatment of abortion is (somewhat) similar to the Court's treatment of the right to die. In *Cruzan v. Director, Missouri Department of Health*, the Court upheld a state law requiring clear and convincing evidence of the patient's wishes before allowing surrogate decision-makers to withdraw artificial feeding tubes.<sup>102</sup> However, the entire Court found that patients have a due process right to refuse unwanted medical treatment—a right based on “the patient's liberty, dignity, and freedom to determine the course of her own treatment.”<sup>103</sup> Seven years later, in *Washington v. Glucksberg*, the Court found that this element of personal autonomy did not prevent states from banning assisted suicide.<sup>104</sup> Still, several Justices thought that the right to assisted suicide could be reformulated as the “right to die with dignity,”<sup>105</sup> and that in some cases this interest could be deemed fundamental.<sup>106</sup> These advances, though halting, did expand the reach of the dignity interest into the realm of end-of-life care.

These are but some of the ways in which dignity has found its way into constitutional law. This discussion matters to the statutory interpretation analysis to follow for three reasons. First, it shows that, while dignity is not a freestanding constitutional right, it *is* a fundamental constitutional value. Indeed, as we have seen, respect for human dignity is one of the motivating principles behind the Fourth and Eighth Amendments, as well as the Due Process Clause of the Fourteenth Amendment. That dignity is so deeply woven into America's legal fabric helps to legitimate its use in statutory interpretation. Second, dignity's grounding in constitutional law provides some direction as to the manner in which it may enter the statutory landscape. As we will see, constitutional values are usually imported into statutory interpretation through clear statement rules, presumptions that require explicit effort on the part of legislatures

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world. See Taylor Wofford, *Cruz on Trump Abortion Remarks: “Of Course We Shouldn't Be Talking About Punishing Women,”* Newsweek (Mar. 31, 2016, 12:14 PM), <http://www.newsweek.com/ted-cruz-donald-trump-abortion-comments-442752> (quoting presidential candidate Ted Cruz as saying, “in response to Donald Trump's suggestion . . . that women who have abortions should face [some] sort of punishment,” that “we shouldn't be talking about punishing women; we should affirm their dignity and the incredible gift they have to bring life into the world”).

<sup>102</sup> 497 U.S. 261, 286–87 (1990).

<sup>103</sup> *Id.* at 289 (O'Connor, J., concurring); see *id.* at 278–79 (majority opinion); *id.* at 302 (Brennan, J., dissenting); *id.* at 331 (Stevens, J., dissenting).

<sup>104</sup> 521 U.S. 702, 727–28 (1997).

<sup>105</sup> *Id.* at 790 (Breyer, J., concurring in the judgment).

<sup>106</sup> *Id.* at 779, 789 (Souter, J., concurring in the judgment); *id.* at 744–45, 788 (Stevens, J., concurring in the judgment); *id.* at 791 (Breyer, J., concurring in the judgment); see also *id.* at 736 (O'Connor, J., concurring) (“[R]espondents urge us to address the narrower question whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death. I see no need to reach that question in the context of the facial challenges . . . here.”).

to rebut. And third, this discussion illustrates the sheer number of areas in which dignity plays a strong role. Litigants and advocates are already coming to recognize dignity as an important legal value—one that may expand the rights of the downtrodden and disliked.<sup>107</sup> A dignity canon could tame a wide variety of harsh laws, and go at least some way toward advancing American society.

## II. DIGNITY AS A CANON OF STATUTORY INTERPRETATION

As the previous Part made clear, human dignity plays a strong role in constitutional law. But it is quite another thing to import dignity into the context of statutory interpretation. This Part will address the why and the how. Part II.A will lay out the case for a dignity canon of statutory interpretation, and refute several objections to creating such a canon. As with other substantive canons, the dignity canon is based on a particular vision of how courts interact with legislatures. The canon displays respect for the legislative branch, by assuming that it would not wish to intrude on constitutionally protected dignity values. At the same time, by focusing on specifics that a legislature likely did not contemplate, the dignity canon would both increase legislative awareness of the problem at issue and nudge the legislators toward a more dignity-friendly legal code. And it would do all this without the *indignity* of striking laws down.

Part II.B will then connect the dignity canon back to dignity's place as a constitutional value, asserting that this constitutional background suggests a specific form of canon: the clear statement rule. Dignity, like other diffuse constitutional values, is under-enforced in constitutional law; clear statement rules provide an alternative avenue for policing legislatures. A clear statement rule would also operate as a preference-eliciting mechanism, forcing legislators to grapple with the dignitary implications of the bills they debate and to consciously determine that other factors outweigh such concerns. It would also stand alone among clear statement rules as a protector of individual rather than structural rights.

### A. *Should There Be a Dignity Canon?*

Below the 30,000-foot-level battles of statutory interpretation theory lie the “more specific doctrines of statutory interpretation,” known as the canons.<sup>108</sup> These are judicially-created rules of thumb about how one

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<sup>107</sup> See, e.g., Laura Rovner, *Dignity and the Eighth Amendment: A New Approach to Challenging Solitary Confinement*, AM. CONST. SOC'Y 13–18 (2015), [https://www.acslaw.org/sites/default/files/Dignity\\_and\\_the\\_Eighth\\_Amendment\\_1.pdf](https://www.acslaw.org/sites/default/files/Dignity_and_the_Eighth_Amendment_1.pdf).

<sup>108</sup> See WILLIAM N. ESKRIDGE, JR. ET AL., STATUTES, REGULATION, AND INTERPRETATION: LEGISLATION AND ADMINISTRATION IN THE REPUBLIC OF STATUTES 447 (2015).



should interpret a statute, and are based on everything from linguistics to common law to constitutional theory. Judges may use one, or several, of these canons to parse a piece of text. There are three types of canons: *textual canons*, which infer meaning based on word choice, syntax, and the relationship of one set of words with other phrases in a statute;<sup>109</sup> *substantive canons*, which are presumptions about how statutes should behave, based on constitutional values and broader policy considerations;<sup>110</sup> and *extrinsic canons*, which lay out when and how judges should use sources from outside the statute itself,<sup>111</sup> such as precedent, legislative history, and agency interpretations.<sup>112</sup> Glancing at these options, it is clear that the dignity canon would fall within the set of substantive canons. Like many of the other substantive canons, the dignity canon would be based on constitutional values. It would reflect broad policy considerations, rather than grammar or extrinsic sources of meaning.

Before delving any further than this into the exact contours of the dignity canon, however, it is best to pause and ask a threshold question: should courts canonize dignity at all? This Section will lay out the main argument in favor of creating a dignity canon of interpretation, as well as two ancillary arguments. It will then respond to a number of counterarguments. Ultimately, this Section determines that dignity has as much of a place in statutory interpretation as it does in constitutional law. Indeed, in the next Section we will see that it deserves somewhat *more* of a place in statutory jurisprudence.

### 1. Arguments in Favor

There are three arguments in favor of creating a dignity canon of interpretation. The first is the main argument; the second and third are more minor. In Part II.B, where we consider the form that the dignity canon would take, we will find additional strong arguments, not only for making the dignity canon a clear statement rule, but also for creating a dignity canon in the first place.

#### a. The Idealized Drafting View of Statutory Interpretation

Substantive canons are not normally based on the empirical realities of how legislatures draft laws.<sup>113</sup> Congress's awareness of these canons

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<sup>109</sup> *Id.* at 447–48.

<sup>110</sup> *Id.* at 447.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 449.

<sup>113</sup> See Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 *Md. L. Rev.* 791, 819 (2010).

is mixed at best.<sup>114</sup> Instead, “[t]hey represent value choices by the Court.”<sup>115</sup> But the case for the dignity canon elides this distinction. The dignity canon is based on a certain view of the work that substantive canons do, or at least should be doing. In this telling, substantive canons are based on a normative vision, or an idealized view, of how legislatures *would* draft if they could devote the requisite attention to the issue at hand. They assume that legislatures do not want to infringe on important constitutional values. Not all substantive canons actually work this way; some are pure common-law policy judgments, like the rule that bankruptcy laws should be construed in favor of the debtor.<sup>116</sup> But the dignity canon *would* work this way—and it would push legislatures toward more liberty-protecting laws.

There is some evidence to suggest that reading statutes to comport with human dignity would conform with drafters’ expectations. Abbe Gluck and Lisa Bressman conducted a thorough survey of congressional drafters to determine their knowledge and use of different canons of interpretation.<sup>117</sup> As the dignity canon would attempt to enforce constitutional values, Gluck and Bressman’s findings on the constitutional avoidance canon provide some guidance as to how the dignity canon would likely fare with drafters. It turns out that, while drafters do not know the constitutional avoidance canon by name, they have internalized the idea that they should write legislation to minimize potential constitutional issues.<sup>118</sup> This suggests that drafters would want to avoid a subset of these constitutional concerns by making their laws conform to settled standards of human dignity.

While the empirics provide some support for a dignity canon, such a descriptive theory is not, on its own, the strongest reason to create the canon. One does not have to show evidence that legislatures actively consider constitutionality when drafting legislation; one only has to make the benign assumption that legislatures would rather avoid constitutional concerns than have their laws struck down. Certainly, this would be in a legislature’s self-interest: more of their statutes would remain on the books, essentially intact. But for the judiciary to make this assumption is also to display respect for a coequal branch of government. “Congress, like [the courts], is bound by and swears an oath to uphold the Constitution. The courts [should] therefore not lightly assume that Congress in-

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<sup>114</sup> Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940 (2013).

<sup>115</sup> William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 596 (1992).

<sup>116</sup> See Gluck & Bressman, *supra* note 114, at 940.

<sup>117</sup> *Id.* at 905–06.

<sup>118</sup> *Id.* at 948.

tended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”<sup>119</sup> This is at once a matter of judicial refereeing and a display of deference to the legislature’s assumed desire to follow the Constitution.

Thus, the dignity canon is based on a vision of statutory interpretation that combines attention to the realities of legislative drafting with a commitment to higher legal authority. In other words, the canons are about both what *is* and what *should be*. As Guido Calabresi argues, statutes will often emerge from the legislative process with less than complete clarity, as a means of ensuring majority approval.<sup>120</sup> This being the case, “the choice among such readings can ‘honestly’ be made to further other appropriate functions of the law as determined by courts guided by traditional principles of adjudication.”<sup>121</sup> Perhaps the most important of these functions is to avoid offending constitutional norms—especially those norms, like dignity, that appear as constitutional values rather than as concrete constitutional rights. As we will see in more detail in the next Section, dignity is diffused throughout the Constitution rather than tethered to one provision. This makes it less likely both that the courts will adequately enforce it and that legislatures will pay sufficient attention to it when drafting. A dignity canon would help “‘majoritarian’ bodies to face up to whether they really want to limit” what, like the right to privacy, could be seen as part of “the penumbra of constitutional guarantees.”<sup>122</sup>

We can also view the dignity canon as a tool to push legislatures toward a more perfect legal code. Ronald Dworkin’s “law as integrity” theory exemplifies this vision,<sup>123</sup> as does Justice Breyer’s pragmatic purposivism.<sup>124</sup> These theories view courts as partners with the legislative drafters. Judges must therefore do their part to make a statute the best version of itself that it can be, within the parameters of what the legislature has written.

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<sup>119</sup> *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

<sup>120</sup> GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 32 (1982).

<sup>121</sup> *Id.*

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

<sup>123</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 225 (1986). According to this theory, judges looking at a statute should see themselves as authors of a chain novel, in which the legislature has already written the first chapters. The legislature’s work is of greatest importance: the legislature is the author that develops the characters and gives the plot its shape. *Id.* at 313. All future chapters must follow the path set by, and stick to the parameters outlined in, those first chapters. A judge must then “see his own role as fundamentally the creative one of a partner continuing to develop, in what he believes is the best way, the statutory scheme [the legislature] began.” *Id.*

<sup>124</sup> BREYER, *supra* note 34, at 100.

On a practical level, this means that courts have to do a little bit of what we traditionally think of as common-law judging, even in the context of interpreting statutes. Of course, they should in no way ignore or subvert the legislature's clear intent, as expressed in the law itself. But when that intent is less than clear, courts must, to a certain extent, use their own judgment.<sup>125</sup> Contrary to Dworkin's idealized judicial Hercules,<sup>126</sup> real judges cannot plumb the depths of human thought and wisdom to determine the single best answer to this question in each case. But they do have the expertise, and the constitutional mandate, to complete a narrower task: determining how to read a particular statutory provision within the broader fabric of our legal system.<sup>127</sup>

What has this to do with the dignity canon? It has everything to do with the dignity canon.<sup>128</sup> One does not have to buy into Dworkin or pragmatist theory to see that judges must sometimes balance legal principles and policies when interpreting ambiguous statutory text. The substantive canons do this by bringing to bear "the interpretive conventions that [a legislature] is obligated to consider when drafting legislation"<sup>129</sup>—even if the legislature did not in fact consider them in a particular case. Constitutional commands are at the top of this list.<sup>130</sup> And, as we have seen, dignity is one of the most deeply rooted and trans-substantive values in our constitutional system.<sup>131</sup> Yet there is currently no mechanism by which dignity can be properly considered in statutory interpretation cases. The constitutional avoidance canon might provide protection, but it tends to hone in on potential violations of concrete constitutional rights.<sup>132</sup> Dignity, by contrast, is a constitutional *value* that lives in many provisions without finding a distinct textual home in any one of them. Thus, when courts try to determine "which combination of which principles and policies" best gives effect to a statutory provision,<sup>133</sup> dignity is left on the sidelines. By including it in the judicial calculus, courts can reach better-considered interpretations of statutes, and can push legislatures to consider dignity-based harms directly when drafting and debating bills.

Dignity also deserves a place in the statutory interpretation sphere so that we need not rely solely on constitutional cases to enforce it. The

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<sup>125</sup> DWORKIN, *supra* note 123, at 338.

<sup>126</sup> *Id.* at 313.

<sup>127</sup> See CALABRESI, *supra* note 120, at 98.

<sup>128</sup> Cf. *McCutcheon v. FEC*, 134 S. Ct. 1434, 1467 (2014) (Breyer, J., dissenting) ("What has this to do with corruption? It has everything to do with corruption.").

<sup>129</sup> Slocum, *supra* note 113, at 822.

<sup>130</sup> See Eskridge & Frickey, *supra* note 115, at 598.

<sup>131</sup> See Rovner, *supra* note 113.

<sup>132</sup> See, e.g., Alina Das, *Unshackling Habeas Review: Chevron Deference and Statutory Interpretation in Immigration Detention Cases*, 90 N.Y.U. L. REV. 143, 192 (2015).

<sup>133</sup> DWORKIN, *supra* note 123, at 338.

work of Jeremy Waldron perhaps best illustrates this advantage. Waldron argues that legislatures, because they are democratically elected and generally representative of the public, embody “the wisdom of the multitude of the citizen body considered as a collective.”<sup>134</sup> This wisdom, Waldron asserts, outshines that of any smaller, unelected group of elites—including the judiciary.<sup>135</sup> At first glance, this looks like an argument *against* the creation of a dignity canon. After all, one could argue, mucking about with the statutes that a legislature passed impugns the dignity of the decision the people made through their elected representatives. But this dignity interest is a derivative one. The legislature is a step removed from the people themselves; when comparing the dignity of a piece of legislation to the dignity of the actual human beings harmed by it, the latter wins out.

More importantly, however, the dignity canon would actually *serve* the legislature-centric view that scholars like Waldron seek to promote. To understand this counterintuitive claim, one must consider the dignity canon not in isolation but rather in combination with the power of judicial review. Some scholars believe that judicial review of legislation for constitutional defects is “politically illegitimate”; in their estimation, judicial review privileges “majority voting among a small number of unelected and unaccountable judges,” and thereby “disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights.”<sup>136</sup> Dissenting Justices have made the same argument in a number of recent dignity-laced constitutional cases, including on gay marriage,<sup>137</sup> the death penalty,<sup>138</sup> and voting rights.<sup>139</sup> Any time a court strikes down legislation on constitutional grounds—including as a violation of constitutional dignity values—it substitutes its own judgment for the people’s.

This does not mean, as these scholars and judges assert, that judicial review is illegitimate. However, the basic point—and it is an important one—is that our legal system must strike some sort of balance between the legislature’s judgment and the courts’. Creating a dignity canon of statutory interpretation would provide this balance in an area where there currently is none. As Waldron himself recognizes, “[i]t may not always

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<sup>134</sup> JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* 94 (1999).

<sup>135</sup> *Id.* at 93–95.

<sup>136</sup> Jeremy Waldron, Essay, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346, 1353 (2006); see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16–18 (2d ed. 1986).

<sup>137</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2611–12 (2015) (Roberts, C.J., dissenting).

<sup>138</sup> See, e.g., *Roper v. Simmons*, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting).

<sup>139</sup> See, e.g., *Shelby County v. Holder*, 133 S. Ct. 2612, 2636–39 (Ginsburg, J., dissenting).

be easy for legislators to see what issues of rights are embedded in a legislative proposal brought before them; it may not always be easy for them to envisage what issues of rights might arise from its subsequent application.”<sup>140</sup> By reading ambiguous text not to infringe on rights to dignity, the dignity canon would illuminate for the legislature the potential constitutional pitfalls of the statutory language it chose. This would give that legislature a chance to confront the issue, eyes open, and determine whether it favors other values over the potential for harm to dignity. The dignity canon would thus lead the legislative branch toward a more rights-conscious practice of statutory drafting, while encouraging greater deliberation.

This latter point is as important as the former. The theory behind legislative supremacy depends in part on “the existence of orderly discussion,” centered around “an agreed text.”<sup>141</sup> If the text is not clear as to whether it authorizes certain conduct, and that conduct could infringe on dignity interests, the legislature cannot properly determine whether it in fact wants to accept the cost of such infringements. The dignity canon is based on the assumption that, all things considered, a legislature would prefer *not* to do so. “The canon is thus a means of giving effect to [legislative] intent, not of subverting it.”<sup>142</sup> But, if a legislature *did* want to authorize the conduct at issue, the dignity canon—unlike a constitutional decision—would not stand in the way. The legislature could simply clarify the statute to cover that conduct, now fully aware of the risk that the law might be (though would not necessarily be) subject to constitutional challenge. As we will see below, there are downsides to this sort of interpretation-as-constitutional-avoidance method, but the positives outweigh the negatives.

The dignity canon, then, would serve a double purpose: it would be a valuable guarantor of rights at the statutory level, and it would also serve as a warning signal for legislatures—one that does not come with the indignity of constitutional invalidation.

#### b. The Expressive Function of a Dignity Canon

The vision of statutory interpretation outlined above provides the main theoretical justification for creating a dignity canon. However, it is not the only one. The canonization of human dignity would also have an expressive function: it would tell legislatures that the courts care about whether their laws affirm or deny dignity, and would tell individuals that courts will help guard their dignity at the statutory as well as the consti-

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<sup>140</sup> Waldron, *supra* note 136, at 1370.

<sup>141</sup> Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 664 (1995).

<sup>142</sup> Clark v. Suarez Martinez, 543 U.S. 371, 382 (2005); see BREYER, *supra* note 34, at 104.

tutional level. This provides a benefit beyond that of the preference-guiding and preference-eliciting mechanisms just discussed. Many laws serve an expressive purpose,<sup>143</sup> and “[m]any people support law because of the statements made by law.”<sup>144</sup>

For instance, some commentators have disparaged Justice Kennedy’s *Obergefell* opinion for its lofty language and its alleged doctrinal muddle.<sup>145</sup> Its actual holding could be seen as narrow,<sup>146</sup> even conservative.<sup>147</sup> Yet, for the LGBTQ community, the decision had immense expressive impact. Among other things, the opinion sent a message that “LGBT[Q] people have innate dignity that should be recognized and protected by force of law,” and that “failure to do so results in impermissible harm.”<sup>148</sup> Likewise, attitudes on the death penalty are often driven more by the values projected by maintaining or eliminating that punishment than by the legal or policy arguments for or against it.<sup>149</sup> A dignity canon would not be able to fulfill this expressive purpose as well as a direct constitutional right to dignity might, as it would be less salient to the public. But it could still help develop a norm of equal and adequate respect for individuals, which would in turn change behavior.<sup>150</sup>

### c. The Dignity Canon Would Be Unremarkable

Finally, a dignity canon would be in keeping with dignity’s spread across the legal landscape, and with the already-expanding range of substantive canons. As we saw in Part I, the Court has read a dignity value into various provisions of the Constitution. Dignity has also made its way

<sup>143</sup> See, e.g., Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022–24 (1996) (providing examples).

<sup>144</sup> *Id.* at 2022.

<sup>145</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2628–30 & n.22 (2015) (Scalia, J., dissenting); see also Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 16 & n.2 (2015) (describing and citing these commentators).

<sup>146</sup> See, e.g., Kyle C. Velte, *Obergefell’s Expressive Promise*, 6 HLR 157, 159 (2015).

<sup>147</sup> See, e.g., Noah Feldman, *A Momentous, Yet Conservative, Win for Gay Rights*, BLOOMBERG VIEW (Dec. 21, 2015, 5:46 PM), <https://www.bloomberg.com/view/articles/2015-12-21/a-momentous-yet-conservative-win-for-gay-rights>.

<sup>148</sup> Velte, *supra* note 146, at 164; see also Mark Walsh, *A “View” From the Courtroom: A Marriage Celebration*, SCOTUSBLOG (June 26, 2015, 6:13 PM), <http://www.scotusblog.com/2015/06/a-view-from-the-courtroom-a-marriage-celebration> (“By 10:07, several of the same-sex marriage advocates in the bar section are wiping away tears.”).

<sup>149</sup> See Sunstein, *supra* note 143, at 2022–23; Scott Vollum et al., *Death Penalty Attitudes in an Increasingly Critical Climate: Value-Expressive Support and Attitude Mutability*, 5 S.W. J. CRIM. JUST. 221, 224 (2009).

<sup>150</sup> See Sunstein, *supra* note 143, at 2031; cf. Sandhya Somashekhar, *Georgia Governor Vetoes Religious Freedom Bill Criticized as Anti-Gay*, WASH. POST (Mar. 28, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2016/03/28/georgia-governor-to-veto-religious-freedom-bill-criticized-as-anti-gay> (describing Georgia governor’s veto of a religious liberties bill, in part due to “outrage from Hollywood, sports leagues and corporations for what critics said was its discrimination against gay and transgender people.”).

into the administrative state: in 2012, the Obama Administration passed an executive order permitting agencies to take account of human dignity when conducting cost-benefit analyses of the rules they seek to promulgate.<sup>151</sup> Adding dignity to statutory interpretation would not be a radical innovation, but rather just another step along this existing path.

Nor is it radical to create new substantive canons. The Court does so itself,<sup>152</sup> and academics likewise have sought to swell the ranks.<sup>153</sup> Indeed, substantive canons are already in heavy use. There are over one hundred substantive canons in existence between the federal and state court systems.<sup>154</sup> In its first four Terms, the Roberts Court employed substantive canons in 28.9% of its statutory interpretation cases.<sup>155</sup> Given the important role that dignity plays in many areas of constitutional law, it deserves a place amongst the canons.

## 2. Three Counterarguments

While there are strong arguments in favor of creating a dignity canon, there are also reasons to be hesitant. This Subsection will tackle three of them, and explain why they should not worry judges who might wish to import dignity into statutory analysis.

### a. The “Dignity is Ideological” Argument

First, one could argue that dignity is a vague and complex concept, one that is difficult to define and that often exists in the eye of the beholder. This is a common critique of dignity as a legally enforceable value.<sup>156</sup> According to these skeptics, dignity is such an elastic concept that judges will inevitably use it to reach whatever preconceived result they like.<sup>157</sup> To make it a constitutional value is problematic enough, these skeptics would argue, but to attempt to interpret the work of legislatures based on such a vague concept would be to subject those legislatures to the whims of judges. In other words, “if the Court fails to enforce structural constitutional norms because the Constitution provides little

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<sup>151</sup> Exec. Order No. 13,563, 3 C.F.R. 215, 216 (2012); see Bayefsky, *supra* note 6, at 1736–37 (arguing that agencies should include dignity in cost-benefit analyses, but should not attempt to monetize the dignitary benefits or harms).

<sup>152</sup> See, e.g., *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–61 (2000) (major questions rule); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (federalism “plain statement rule”).

<sup>153</sup> See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 105 (2009) (arguing that federal courts should employ the Democracy Canon).

<sup>154</sup> Gluck & Bressman, *supra* note 114, at 940.

<sup>155</sup> Anita S. Krishnakumar, *Statutory Interpretation in the Roberts Court’s First Era: An Empirical and Doctrinal Analysis*, 62 HASTINGS L.J. 221, 236 tab. 1 (2010).

<sup>156</sup> See, e.g., ERIN DALY, DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON 3 (2012).

<sup>157</sup> *Id.*



guidance as to their content in specific cases, how does the Court expect to come up with [statutory interpretation] rules that are any more principled?”<sup>158</sup>

One response to this argument is that dignity *does* have a fairly well-defined application to particular areas of doctrine. Dignity underlies the “evolving standards of decency” test for Eighth Amendment claims, as well as the reasonableness requirement under the Fourth Amendment and the process for defining rights under the Due Process Clause. These tests can be, and have been, criticized on their own terms.<sup>159</sup> But they do show that dignity can undergird workable, substantive standards. Moreover, as we have seen, it is possible to determine what dignity means and how to apply its content. There is no reason to believe that it would be more difficult to employ dignity in statutory as opposed to constitutional analysis.

Additionally, this would be far from the only constitutionally inspired canon. In fact, as shown above, “[a] good many of the substantive canons of statutory construction are directly inspired by the Constitution.”<sup>160</sup> And many of these other canons deal with concepts as vague and complex as dignity—for instance, federalism,<sup>161</sup> separation of powers,<sup>162</sup> and the content of international law.<sup>163</sup> The federalism canon, for instance, asks whether a certain reading of a statute “would upset the usual constitutional balance of federal and state powers.”<sup>164</sup> The major questions rule asks whether Congress has “assign[ed] to an agency decisions of vast ‘economic and political significance.’”<sup>165</sup> These standards are hardly more concrete than the intrinsic worth standard that would apply to the dignity canon. They may not be perfect, but they are workable.

It is also true that the substantive canons, like other canons, are susceptible to selective usage by those who hope to bolster their favored readings of particular statutes.<sup>166</sup> To some extent, this is an inherent aspect of statutory interpretation as a whole, just as it is an aspect of other types of legal analysis. The possibility of bias based on preconceived

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<sup>158</sup> See Eskridge & Frickey, *supra* note 115, at 633.

<sup>159</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (Roberts, C.J., dissenting) (criticizing substantive due process doctrine); *id.* at 2631–32 (Thomas, J., dissenting) (same); *Roper v. Simmons*, 543 U.S. 551, 608–09 & n.1 (2005) (Scalia, J., dissenting) (criticizing evolving standards of decency test).

<sup>160</sup> Eskridge & Frickey, *supra* note 115, at 598.

<sup>161</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991).

<sup>162</sup> *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989).

<sup>163</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

<sup>164</sup> *Gregory*, 501 U.S. at 452.

<sup>165</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (citation omitted).

<sup>166</sup> James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 6–7 (2005).

philosophies is an inevitable side-effect of judging; there will always be cases in which “the law runs out” and in which judges must therefore *make* law.<sup>167</sup> If not decided on statutory interpretation grounds, questions about the dignitary effects of laws may well be decided on constitutional grounds instead, and similar objections about unmoored decision-making would likewise abound. The real question is not whether using dignity would empower judges. Almost any statutory review does. The question is whether dignity is at least as capable of principled canonization as other substantive values that have already received this treatment.<sup>168</sup>

As discussed above, there is a strong case to be made that it is. More importantly, the limitations discussed in Part I.A—especially the need to hew close to existing constitutional dignity doctrine—would rein judges in. In the United States and around the world, “courts interpreting the concept of dignity and applying it to concrete factual situations have developed a sense of the word that is coherent and substantive, and not merely a product of each judge’s idiosyncratic moral standards.”<sup>169</sup> As we saw in Part I, the Supreme Court has held that the Constitution protects three forms of dignity: equality, adequacy, and autonomy. Only violations of these principles, as informed by existing constitutional jurisprudence, could trigger the dignity canon in statutory cases. Judges could not simply gallivant into areas into which the Constitution does not extend. Particularly at the lower court level, where Supreme Court precedent is binding, judges would be more than capable of using the dignity canon in a principled manner.

#### b. The “Too Much Constitutional Law” Argument

Second, some have argued that importing constitutional values into statutory interpretation allows judges “to make constitutional law on the cheap.”<sup>170</sup> Resolution through substantive canons, critics argue, allows judges to treat decisions of enormous importance as “mere” statutory in-

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<sup>167</sup> William N. Eskridge, Jr., *Nino’s Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Norms*, 57 St. Louis U. L.J. 865, 874 (2013); see H.L.A. HART, *THE CONCEPT OF LAW* 272 (1994). Legal positivists dispute this view, Eskridge, *supra*, at 874, as does Dworkinian theory, HART, *supra*, at 272–73, as both believe that the grounds of law are ultimately objective. As a practical matter, however, it is difficult to argue that conflicting moral philosophies are *not* involved in judicial decision-making when existing law cannot answer a question.

<sup>168</sup> See Hasen, *supra* note 153, at 96.

<sup>169</sup> DALY, *supra* note 156, at 5.

<sup>170</sup> John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 449 (2010). There are legitimate reasons, rooted both in legal theory, *id.* at 449–50, and the empirical reality of how legislatures draft, Gluck & Bressman, *supra* note 154, at 940, to consider folding the constitutionally derived substantive canons into the general canon of constitutional avoidance and requiring a potential violation of a specific constitutional doctrine before reading a statute a different way. But we are not yet living, and may never live, in such a world.

terpretation cases. The result is a counter-majoritarian system in which courts can drastically change the law without the same salience that would accompany constitutional decisions.<sup>171</sup> Substantive canons also let courts combine numerous specific constitutional texts into free-floating constitutional “values,” which judges can then impose on legislatures in a way that they might not be able to do through constitutional analysis.<sup>172</sup> To a textualist, such attempts to “flatten out the complexity of constitutional law” would appear illegitimate.<sup>173</sup>

These arguments, however, have to be weighed against the potential damage to both the judiciary’s reputation and the legislative process of instead nullifying entire statutes. The same salience that makes constitutional decisions seem at least marginally more majoritarian also makes them more controversial. The courts’ legitimacy—really the only weapon in their arsenal when it comes to compelling public compliance with their rulings—can be severely lessened when they invoke the Constitution to strike down laws.<sup>174</sup> Moreover, as discussed above, employing a dignity canon would still leave legislatures room to override court decisions if legislators feel strongly enough about the issue.<sup>175</sup> Only the courts or a constitutional amendment, on the other hand, can overrule constitutional decisions.

A dignity canon may thus “provide a gentler alternative to *Marbury*-style judicial review.”<sup>176</sup> It would allow courts to police the panoply of constitutional rights that are based in dignitary concerns without striking down entire statutes. This rationale is common to all of the constitutionally derived substantive canons.<sup>177</sup> While statutory cases do not have the same salience as constitutional ones, the price for such heightened salience is unreviewable constitutional invalidation of duly passed statutes. A dignity canon, on the other hand, could avoid this problem while still calling attention to dignitary harms. It “may even be democracy-*enhancing* by focusing the political process on the values enshrined in the Constitution.”<sup>178</sup>

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<sup>171</sup> Eskridge & Frickey, *supra* note 115, at 636; Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 598 (2010).

<sup>172</sup> Manning, *supra* note 170, at 449.

<sup>173</sup> *Id.* at 450.

<sup>174</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 865–67 (1992); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 27 (1975).

<sup>175</sup> Eskridge & Frickey, *supra* note 115, at 637.

<sup>176</sup> Manning, *supra* note 170, at 450.

<sup>177</sup> See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 176 (2010); Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 962 (2001).

<sup>178</sup> Eskridge & Frickey, *supra* note 115, at 631 (emphasis added).

c. The “Really, Another Canon?” Argument

Finally, one might ask, simply: do we really need yet another canon? After all, there are already over one hundred substantive canons in existence.<sup>179</sup> And some of these canons already seem to encroach on what would be the dignity canon’s domain—in particular, the constitutional avoidance canon,<sup>180</sup> the canons protecting suspect classes,<sup>181</sup> and the canon that “remedial statutes should be liberally construed.”<sup>182</sup> Is the creation of a new dignity canon really worth the hassle?

The answer, I would argue, is yes. The dignity canon would fill a space that is currently left unoccupied in statutory jurisprudence, protecting values that normally are only considered in constitutional cases. As discussed more in the next Section,<sup>183</sup> the dignity canon would go further than the canon of constitutional avoidance. It would also provide greater expressive value and preference-eliciting effects: the rule would be geared toward a specific subject—dignity—as opposed to being a broad constitutional avoidance canon, and it would further a diffuse constitutional value that the avoidance rule’s focus on specific rights causes it to overlook. Unlike the suspect-class canons, a dignity canon would focus on harms to the dignity of *any* group. And, while the remedial statutes canon only allows for the expansion of laws providing positive rights, a dignity canon would also restrict the reach of laws that deny rights.

As for the sheer number of canons, this proliferation is due at least in part to the many canons that govern individual issue areas.<sup>184</sup> It would be passing strange<sup>185</sup> to deny dignity a place among the ranks because too many other topics are already represented there. Moreover, while the *total* number of canons is quite large, the number applicable in a given case is much smaller. The value of the dignity canon is much greater than the small additional muddle it might create in any particular case. On the other side of the ledger, meanwhile, creating a dignity canon would engender almost no transaction costs. Indeed, all a court would have to do is announce it. This is because the canons fall somewhere between mere rules of thumb and judicial common law.<sup>186</sup> A court must obviously provide sufficient justification for developing a canon, but legal legitimacy is the only necessary criterion for canon formation.

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<sup>179</sup> See *supra* note 154 and accompanying text.

<sup>180</sup> *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

<sup>181</sup> *Eskridge & Frickey*, *supra* note 115, at 602–03.

<sup>182</sup> *Peyton v. Rowe*, 391 U.S. 54, 65 (1968).

<sup>183</sup> See *infra* notes 242–244 and accompanying text.

<sup>184</sup> See *ESKRIDGE ET AL.*, *supra* note 108, at 1111–14 (listing canons).

<sup>185</sup> See *WILLIAM SHAKESPEARE*, *OTHELLO* act 1, sc. 3.

<sup>186</sup> See *Abbe R. Gluck*, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 *YALE L.J.* 1898, 1912 (2011).

The major questions doctrine provides a prominent example of this. Sometimes conflated with the related “elephants in mouseholes” canon, the major questions doctrine did not really exist until the mid-1990s.<sup>187</sup> Then, in *MCI Telecommunications Corp. v. AT&T Co.*<sup>188</sup> and *FDA v. Brown & Williamson Tobacco Corp.*,<sup>189</sup> the Court suddenly thrust it upon the country. In *MCI*, the Court had to determine whether a statute authorized the Federal Communications Commission to exempt certain telephone companies from having to file tariff rates.<sup>190</sup> The Court determined, based solely on its own intuition, that “[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion.”<sup>191</sup> Six years later, in *Brown & Williamson*, the Court held that the FDA did not have the power to regulate tobacco, in part because it thought “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.”<sup>192</sup> To support this new major questions canon, the Court cited only two sources: *MCI*, and a law review article by Justice Breyer.<sup>193</sup> The Court simply used its understanding of separation of powers to fashion a new rule of statutory interpretation.<sup>194</sup> The dignity canon, grounded even more firmly in constitutional principles than the major questions rule is, can be created just as easily.

### B. *Dignity as a Clear Statement Rule*

Having (hopefully) convinced you that human dignity is worthy of canonization, we must still ask: what form would this canon take? This Section will argue that the dignity canon should act as a clear statement rule, a requirement that a legislature speak clearly if it wishes to infringe on individuals’ dignity.

There are three different ways in which canons are structured. First, some canons operate as tiebreakers: if a statute remains ambiguous after the application of other canons, the courts will read the law in a particular way. The rule of lenity is one example of a tiebreaker canon;<sup>195</sup> *Chev-*

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<sup>187</sup> See Steve R. Johnson, *Elephants, Mouse Holes, Non-Barking Dogs, and Statutory Interpretations* 911, TAX ANALYSTS: INTERPRETATION MATTERS (June 25, 2012), <http://taxprof.typepad.com/files/64st0911.pdf>.

<sup>188</sup> 512 U.S. 218 (1994).

<sup>189</sup> 529 U.S. 120 (2000).

<sup>190</sup> *MCI*, 512 U.S. at 220.

<sup>191</sup> *Id.* at 231.

<sup>192</sup> 529 U.S. at 160.

<sup>193</sup> *Id.* at 159–60.

<sup>194</sup> *Id.* at 159.

<sup>195</sup> See *Lockhart v. United States*, 136 S. Ct. 958, 968 (2016).

ron deference to agency interpretations of their operating statutes is another.<sup>196</sup>

Second, many canons act as “presumptions,” assuming that the legislature intended to do something unless evidence from the text, legislative history, or the overall statutory scheme suggest otherwise.<sup>197</sup> Examples of presumptions include the whole act rule, which “assumes that identical words used in different parts of the same act are intended to have the same meaning”;<sup>198</sup> *ejusdem generis*, which “limits general terms which follow specific ones to matters similar to those specified”;<sup>199</sup> and the presumption against extraterritoriality, which assumes that statutes do not apply abroad.<sup>200</sup> These canons can all be defeated by contextual or other clues.

And third, some canons are clear statement rules, which “requir[e] statutory text to be unambiguous if it is to overcome canonical presumptions in particular areas of policy.”<sup>201</sup> In *Pennhurst State School & Hospital v. Halderman*, for instance, the Court said that “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.”<sup>202</sup> Legislative history or general purpose is not enough to overcome a clear statement rule; the text itself must be explicit. Clear statement rules are “government-structuring canons”<sup>203</sup>—canons meant to enforce the values instilled by our constitutional system. It is in this category that the dignity canon belongs. The rest of this Section will explain why.

## 1. Dignity is Under-Enforced in Constitutional Law

There are a number of reasons to formulate the dignity canon as a clear statement rule. The first and most important is that dignity is inadequately enforced as a legal value. Legislatures are unlikely to consider the full consequences of individual bills for the dignity of those affected. Public choice theory shows why this is so. Legislators prefer to avoid what they consider to be unnecessary risks, and they organize their agen-

<sup>196</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

<sup>197</sup> Eskridge & Frickey, *supra* note 115, at 597.

<sup>198</sup> *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted).

<sup>199</sup> *United States v. Powell*, 423 U.S. 87, 91 (1975) (quoting *Gooch v. United States*, 297 U.S. 124, 128 (1936)).

<sup>200</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010).

<sup>201</sup> ROBERT A. KATZMANN, *JUDGING STATUTES* 53 (2014). Eskridge & Frickey, *supra* note 115, at 595 n.4, add a category of “super-strong clear statement rules,” which “require very specifically targeted ‘clear statements’ on the face of the statute to rebut a policy presumption.” I do not differentiate between normal versus “super-strong” clear statement rules.

<sup>202</sup> 451 U.S. 1, 17 (1981).

<sup>203</sup> KATZMANN, *supra* note 201, at 51.

das and their vote patterns accordingly.<sup>204</sup> At its most cynical, public choice theory envisions legislation as a form of rent-seeking, in which interest groups use their political and economic clout to redistribute wealth and power their way.<sup>205</sup> One need not hold such a dark view of our political system, however, to agree that certain groups have more influence than others, and that this can lead to unequal fights in the legislative process. Sometimes, public-regarding motives manage to defeat self-interested ones; but oftentimes interest groups can twist the process to their own purposes, or at least crowd out other, disadvantaged groups.<sup>206</sup>

The desire to protect dignity is one of the public-regarding motives that other interests often drown out. After all, the dignity-based harms that statutes create often fall on relatively powerless individuals: minorities, criminals, and the poor, among others.<sup>207</sup> In such cases, “where a statute establishes ‘asymmetrical’ obligations and benefits (i.e., the beneficiaries of the law have either more or less political clout than the cost payers), there is a danger of legislative or administrative dysfunction.”<sup>208</sup> This danger is compounded by dignity’s unusual status. Dignity is a constitutional *value* rather than a constitutional *right*. It is not directly tied down to a particular constitutional provision or amendment, and sometimes is not directly enforceable by any specific provision.<sup>209</sup> It is relatively easy to tell that a law might attempt to authorize searches without probable cause, or that it might infringe on free speech rights. Costs to human dignity, however, do not float so close to the surface. This makes it even less likely that legislators will consider the effects of their laws on dignity unprompted; they may not even be aware that there is a constitutional norm to be protected in the first place.

Nor have the courts fully corrected this imbalance. Although it has made its way into many areas of constitutional law, there is no enforceable constitutional right to dignity.<sup>210</sup> And, even on the issues in which

<sup>204</sup> Karen M. Gebbia-Pinetti, *Statutory Interpretation, Democratic Legitimacy and Legal-System Values*, 21 SETON HALL LEGIS. J. 233, 310 n.211 (1997).

<sup>205</sup> Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 230 (1986).

<sup>206</sup> *Id.* at 228.

<sup>207</sup> Cf. Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 3 & n.5 (2017) (noting that scholars have argued that “dignity-based claims can . . . produce good outcomes for plaintiffs who suffer from racial inequality” and have discussed a “dignity-based approach to individuals’ post-incarceration lives”) (quoting Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U.L. REV. 457, 526 (2010)).

<sup>208</sup> William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 279 (1988).

<sup>209</sup> See *supra* Part I.A.

<sup>210</sup> Cf. Hasen, *supra* note 153, at 98 (arguing in favor of the democracy canon in part because “one cannot constitutionally enforce a ‘right to vote’”).

dignity plays a role, the Court has been less than full-throated in its defense of individual rights. The Fourth Amendment protects against intrusive searches on dignity and privacy grounds;<sup>211</sup> yet the exceptions to the warrant requirement have threatened to swallow the general rule.<sup>212</sup> The Cruel and Unusual Punishments Clause no longer prohibits the death penalty;<sup>213</sup> a recent call to reexamine the constitutionality of the death penalty received only two votes and was derided as an abolitionist “Groundhog Day.”<sup>214</sup> The Court has limited abortion rights,<sup>215</sup> refused to recognize the right to die,<sup>216</sup> and come up short in providing equal protection of voting rights.<sup>217</sup> This is not to belittle the wide array of dignity-based case law discussed in Part I. It is merely to suggest that the Court has not enforced the constitutional dignity value to its fullest extent.

Clear statement rules provide a powerful alternative way to enforce otherwise under-enforced constitutional norms.<sup>218</sup> Dignity, like other constitutional values—such as federalism, separation of powers, and even due process—suffuses itself throughout many constitutional provisions. Because they often appear *sub rosa*, constitutional values do not create the same sorts of direct restrictions on legislative activity that the more concrete rights do.<sup>219</sup> However, leaving these protections to the political process alone is dangerous, because there is no incentive to enact laws that benefit the diffuse and politically powerless groups these constitutional values are designed to defend.<sup>220</sup>

The Court has said, therefore, that judges must provide extra protection at the level of statutory interpretation: a court “must be absolutely certain that [the legislature] intended” to impinge on constitutional values before reading a statute to do so.<sup>221</sup> For this reason, under-enforced constitutional norms are usually formulated as clear statement rules.<sup>222</sup>

<sup>211</sup> See *supra* notes 74–76 and accompanying text.

<sup>212</sup> See *Florida v. White*, 526 U.S. 559, 569 (1999) (Stevens, J., dissenting); *California v. Acevedo*, 500 U.S. 565, 582 (1991) (Scalia, J., concurring); Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 383 (2001).

<sup>213</sup> *Gregg v. Georgia*, 428 U.S. 153, 187, 207 (1976) (plurality opinion) (joint opinion of Stewart, Powell, & Stevens, JJ.); *id.* (White, J., concurring in the judgment).

<sup>214</sup> *Glossip v. Gross*, 135 S. Ct. 2726, 2746 (2015) (Scalia, J., concurring); see *id.* at 2755 (Breyer, J., dissenting).

<sup>215</sup> See, e.g., *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007). But see *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2320 (2016).

<sup>216</sup> See *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997).

<sup>217</sup> See Hasen, *supra* note 153, at 99.

<sup>218</sup> Barrett, *supra* note 177, at 171–72; Hasen, *supra* note 153, at 96.

<sup>219</sup> Eskridge & Frickey, *supra* note 115, at 597.

<sup>220</sup> Macey, *supra* note 205, at 231.

<sup>221</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991).

<sup>222</sup> Eskridge & Frickey, *supra* note 115, at 597.



The federalism canon,<sup>223</sup> the presumption against preemption,<sup>224</sup> the major questions rule preventing delegation of important issues to agencies,<sup>225</sup> the presumption against abrogation of sovereign immunity,<sup>226</sup> the presumption against retroactivity,<sup>227</sup> the presumption of consistency with international law,<sup>228</sup> and the presumption against abrogation of treaties<sup>229</sup> are just some of the many constitutionally derived clear statement rules. Dignity, as another under-enforced constitutional value, should receive similarly strong protection in statutory cases.

## 2. A Clear Statement Rule Would Have Preference-Eliciting Effects

The second reason to consider a dignity clear statement rule is that it would have positive feedback effects. We have already explored this in Part II.A, but it is as relevant to the form the dignity canon should take as it is to the question of the canon's existence. Indeed, it is one of the Court's central justifications for clear statement rules. As the Court has put it: "Implied limitation rules avoid applications of otherwise unambiguous statutes that would intrude on sensitive domains in a way that [the legislature] is unlikely to have intended had it considered the matter."<sup>230</sup> This statement hearkens back to the two-pronged vision of statutory interpretation outlined in the previous Section. A dignity clear statement rule would respect the idealized view of legislative drafting, which assumes that the legislature would not want to violate constitutional values. Yet it would still allow legislatures to go back and revisit statutes, instead of taking issues completely out of the legislative arena through judicial review.

A dignity clear statement rule would also be "preference-eliciting,"<sup>231</sup> in that it could force legislatures to deliberate and choose statutory text with greater precision to avoid accidentally infringing on individual dignity.<sup>232</sup> "[T]he requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the

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<sup>223</sup> See *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 208–09 (1998) (citation omitted) (overall constitutional structure).

<sup>224</sup> See *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal citation marks omitted) (overall constitutional structure).

<sup>225</sup> See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000) (separation of powers).

<sup>226</sup> See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (Eleventh Amendment).

<sup>227</sup> See *Landgraf v. USI Film Products*, 511 U.S. 244, 265–68 (1994) (due process).

<sup>228</sup> See *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Supremacy Clause).

<sup>229</sup> See *Cook v. United States*, 288 U.S. 102, 120 (1933) (Supremacy Clause).

<sup>230</sup> *Spector v. Norwegian Cruise Line Ltd.*, 545 U.S. 119, 139 (2005) (plurality opinion).

<sup>231</sup> See Hasen, *supra* note 153, at 100.

<sup>232</sup> See Eskridge & Fickey, *supra* note 115, at 598.

critical matters involved in the judicial decision.”<sup>233</sup> A dignity clear statement rule would help ensure that legislatures pay close attention to potential dignitary harms and consciously decide that other factors outweigh dignity-based concerns. It helps that the statutes that would be most affected by a dignity canon deal with controversial issues like abortion, discrimination, and criminal justice; such laws would capture greater than average attention from legislators and would lead to highly salient court decisions.<sup>234</sup> The dignity canon is thus particularly likely to have a preference-eliciting effect on legislatures. If one believes that greater respect for dignity is a good thing, then forcing legislatures to pay more attention to the effects of their laws on dignity would be a positive development. Formulating the dignity canon as a clear statement rule would allow courts to “open[ ] a dialogue with [the legislative branch], but one in which the factor of inertia is now on the side of individual liberty.”<sup>235</sup>

### 3. A Dignity Clear Statement Rule Would Better Protect Individual Liberties

Finally, a dignity clear statement rule would be valuable because of the substantive nature of dignity itself. Dignity is, at bottom, a value based in individual liberty. By ensuring a degree of equality, autonomy, and adequacy of treatment, dignity acts directly to protect human freedom. Most clear statement rules, however, are not of this nature—even though most theorists mention individual rights-protecting norms as those most likely to be under-enforced.<sup>236</sup> Indeed, the Court has tamped down its protection of individual rights in statutory interpretation over the past few decades.<sup>237</sup> Instead, the Court has moved toward creating clear statement rules that are designed to protect *structural* norms.<sup>238</sup> The federalism canon from *Gregory* and the major questions rule from *Brown & Williamson* are two prominent examples of these structural clear statement rules.<sup>239</sup> As the Court has pointed out, these structural protections are ultimately meant to check government power in order to ensure more individual liberty.<sup>240</sup> However, they do this through a rather indirect route, and often end up merely shifting the balance of power from federal

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<sup>233</sup> *United States v. Bass*, 404 U.S. 336, 349 (1971).

<sup>234</sup> *Cf. Hasen*, *supra* note 153, at 102–03 (arguing that the Democracy Canon meets these same criteria and therefore would likely be preference-eliciting).

<sup>235</sup> Monaghan, *supra* note 174, at 29 (footnote omitted).

<sup>236</sup> Eskridge & Frickey, *supra* note 115, at 632.

<sup>237</sup> *See id.* at 597.

<sup>238</sup> *Id.* at 632.

<sup>239</sup> 501 U.S. 452 (1991); 529 U.S. 120 (2000).

<sup>240</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991).

to state government rather than from either government to the people.<sup>241</sup> A dignity clear statement rule, on the other hand, would directly protect individual freedom.

A clear statement rule also would provide utility above that of the general constitutional avoidance canon. The constitutional avoidance canon holds that, “when deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail.”<sup>242</sup> As dignity is a constitutional protection,<sup>243</sup> this canon would apply to at least some cases in which statutes impose harms to dignity. But constitutional avoidance is not a clear statement rule; “[i]t is a tool for choosing between competing plausible interpretations of a statutory text.”<sup>244</sup> It therefore can only operate if the language at issue has at least two plausible constructions. A dignity clear statement rule, however, would be more aggressive: unless there is clear language to rebut the presumption, courts must read the statute at issue so as to maintain human dignity. There is thus a zone of cases in which a dignity clear statement rule would provide more protection than would constitutional avoidance alone.

#### 4. The Counterargument: Clear Statement Rules Are Undemocratic

Of course, there are also downsides to formulating the dignity canon as a clear statement rule. Perhaps the strongest argument against the idea looks something like this: clear statement rules reflect a hardheaded textualist viewpoint that canons of interpretation are meant to force legislatures to follow certain rules of drafting.<sup>245</sup> By reading a statute to avoid harms to dignity when the language is less than clear, judges risk the very real danger of reading that statute differently from—or even in opposition to—how the legislature intended the law to operate. Clear statement rules are out of sync with purposive interpretation, critics claim, because they do not look beyond the text of a law to determine whether a particular reading would better comport with the enacting body’s understanding of that law.<sup>246</sup> Even under textualist theory, clear statement rules are problematic because they move courts away from examining

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<sup>241</sup> See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204, 211 (2009); *Gregory*, 501 U.S. at 470, 473.

<sup>242</sup> *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

<sup>243</sup> *Hall v. Florida*, 134 S. Ct. 1986, 1992 (2014).

<sup>244</sup> *Clark*, 543 U.S. at 381.

<sup>245</sup> See, e.g., *Finley v. United States*, 490 U.S. 545, 556 (1989) (“What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.”), *superseded by statute*, Judicial Improvements Act of 1990, Pub. L. 101-650, tit. III, § 310(a), 104 Stat. 5089, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

<sup>246</sup> See KATZMANN, *supra* note 201, at 31.

what the text *does* say and toward judge-based policy presumptions about what the text *should* say. Clear statement rules thus transform the judiciary from the legislature's partner or agent into its master.

There are both textualist and purposivist responses to this counterargument. From a textualist standpoint, what clear statement rules lose in terms of nuanced textual interpretation, they make up for with a clearer communication to legislatures of what is expected of them. Such rules can thereby create a feedback loop with the legislatures: by allowing them "to legislate against a background of clear interpretive rules," clear statement requirements ensure that lawmakers "know the effect of the language [each statute] adopts."<sup>247</sup> In this way, clear statement rules would eventually shape how legislatures write statutory text, while also enforcing important constitutional values.

Clear statement rules are also arguably more respectful of legislative supremacy than are mere presumptions, because they tell legislatures not only what the rule is but also how it will be applied (*i.e.*, alone, before other canons, rather than as one among many presumptions).<sup>248</sup> As of now, most congressional drafters are unaware of the existence of clear statement rules, making it rather difficult to legislate in their shadow.<sup>249</sup> But, if the courts could open greater channels of communication with legislative drafters, this problem would be surmountable.

As for purposivism, the argument against clear statement rules is stronger for those not derived from *constitutional* values. But a dignity clear statement rule would be used to infuse constitutional principles into statutory interpretation. As higher law, the Constitution's commands can override the legislature's intent. This idea has formed the basis for constitutional analysis of statutes since *Marbury v. Madison*.<sup>250</sup> The power of the greater—in this case, to strike down an entire statute as unconstitutional—may fairly be said to include the lesser—to avoid sanctioning a burden on constitutional values by reading a less-than-unambiguous statute as conforming to those values. Far better to read a statute in this way, and then allow the legislature to override the decision if it feels strongly enough, than to decide a constitutional issue unnecessarily.

Another way to think about this is that purposivism requires judges to look beyond the subjective purpose the legislature gave a particular law. They "also should integrate [the law] into the legislative system as a whole by giving expression to the fundamental values of the system."<sup>251</sup>

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<sup>247</sup> *Finley*, 490 U.S. at 556.

<sup>248</sup> WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 282–83 (1994).

<sup>249</sup> See Gluck & Bressman, *supra* note 114, at 945.

<sup>250</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

<sup>251</sup> AHARON BARAK, PURPOSIVE INTERPRETATION IN LAW 340 (trans. Sari Bashi, 2005).

This gibes with Dworkinian theory, as well.<sup>252</sup> Judges should pay attention to constitutional values regardless of whether the legislature did in a particular case, but it is also fair to think that legislators prefer constitutionally sound to constitutionally unsound laws. Like the constitutional avoidance canon, then, a dignity clear statement rule reflects “the reasonable presumption that Congress did not intend [to draft a statute] which raises serious constitutional doubts.”<sup>253</sup> By keeping the legislature’s statute intact, such a rule also helps avoid unnecessary friction between the branches.<sup>254</sup>

Of course, to circumvent the dignity canon, legislatures would have to draft statutes that *unambiguously* abrogate human dignity. This could then invite constitutional challenges to those statutes. But, in cases where these laws are struck down, the clear statement rule’s only purpose would be to show that Congress cannot try to mandate vaguely what it cannot mandate directly. And, because clear statement rules tend to sweep further than would pure constitutional analysis, a law that could be subject to the dignity canon when ambiguous may not actually be subject to constitutional scrutiny if later rid of ambiguity. This is true of other clear statement rules, as well. For instance, in *Gregory v. Ashcroft*, the Court determined, as a matter of federalism in statutory interpretation, that the Age Discrimination in Employment Act did not apply to state judges.<sup>255</sup> Yet, in *EEOC v. Wyoming*, the Court had ruled it constitutional to extend the ADEA to state government employers.<sup>256</sup> Therefore, if Congress had responded to *Gregory* by applying the ADEA to state judges, there would not have been any more of a constitutional federalism problem than there would have been with the rest of the law.<sup>257</sup>

There is one other, perhaps more cynical response to the argument against a dignity clear statement rule. The horse is out of the barn: clear statement rules are here to stay. Several other constitutional values have been transformed into clear statement rules. As we have seen, however, these canons tend to protect *structural* rather than *individual* rights.<sup>258</sup> It might do more good than harm to add a clear statement rule that protects fundamental individual rights.

Putting together the foregoing Sections, we can formulate the dignity canon and its standards in the following way:

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<sup>252</sup> See *supra* Part II.A.1.

<sup>253</sup> *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

<sup>254</sup> BREYER, *supra* note 34, at 104–05.

<sup>255</sup> 501 U.S. 452, 470 (1991).

<sup>256</sup> 460 U.S. 226, 243 (1983).

<sup>257</sup> Indeed, the Court intimated as much in *Gregory*. 501 U.S. at 470.

<sup>258</sup> ESKRIDGE, *supra* note 248, at 287–89.

A court will not read a statute to affect the rights of the people or of a particular group in a way that exhibits disrespect for their intrinsic worth as human beings, unless the statute contains clear language to that effect. By “exhibits disrespect for their intrinsic worth,” we mean statutory language that: (1) saddles certain groups with special burdens or provides them with lesser protections, or else provides unreasonably differential treatment to individuals; (2) fails to meet, in regard to any person, the minimum adequate level of treatment required by civilized society; or (3) unduly encroaches on areas of personal autonomy. These standards are to be determined in accordance with existing law.

With this canon now assembled, we can see how it would apply in concrete situations. The next Part takes up that task.

### III. THE DIGNITY CANON IN PRACTICE

We have now seen how the dignity canon would work in theory: it would require a clear statement from the legislature before reading a statute to lessen individuals’ intrinsic worth. This Part will examine how the dignity canon would apply in the three areas of law discussed in Part I—civil rights, criminal procedure, and personal health. While these are not the only areas in which the dignity canon would operate, they are perhaps the most prominent and provide ready examples. By conducting a “re-do” of three important cases, this Part will show that the dignity canon would lead to results different from those to which the majority came.

#### A. *Civil Rights: Romer v. Evans*

Discrimination cases illustrate that the protection of human dignity requires a basic equality of treatment. The Court has enforced this through a concept of “equal dignity.”<sup>259</sup> To deny people of a certain class a benefit available freely to others, or to impose a penalty on a class not imposed on others, is to express the government’s refusal to recognize the intrinsic worth of those affected. The dignity canon thus includes an element of equality in it: a statute could become subject to the dignity canon if it disrespects the dignity of a specific group.

The use of such a canon could have greatly changed the Court’s decision in *Romer v. Evans*.<sup>260</sup> In that case, the Court confronted a Colorado constitutional amendment, passed by referendum, that stated:

<sup>259</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015).

<sup>260</sup> 517 U.S. 620 (1996).

Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons *to have or claim any minority status, quota preferences, protected status or claim of discrimination*.<sup>261</sup>

The amendment was designed to preempt several municipal ordinances that had banned discrimination based on sexual orientation.<sup>262</sup>

There are three ways to read this amendment. First, it could be read to prohibit only the enactment of special privileges for gay people that are not granted to the rest of the population. Second, it could be read to forbid gay people from taking advantage of more general anti-discrimination statutes that protect other traditionally marginalized groups. Or third, it could prohibit gay people from taking advantage of generally applicable laws—say, the ability to claim self-defense in a criminal case, or the right to register to vote. This third reading would almost certainly be unconstitutional under even rational basis review, as there is no rational reason to differentiate between homosexuals and others for these purposes. The battle, therefore, lay mainly between the first and second readings of the amendment.

The Colorado Supreme Court had given an interpretation of the law, which under federal precedent was entitled to deference; the Justices, however, disagreed as to what the Colorado court had actually said. Justice Scalia's dissent in *Romer* saw the decision below as adopting the "special privileges" reading.<sup>263</sup> Justice Scalia, therefore, subjected the amendment only to rational basis review, and found the desire not to favor homosexual conduct to be legitimate under *Bowers v. Hardwick*.<sup>264</sup> Justice Kennedy's majority opinion, however, read the Colorado Supreme Court as having adopted the second, anti-antidiscrimination reading of the amendment.<sup>265</sup> The Court found that the amendment, so read, "declar[ed] that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government," and thereby

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<sup>261</sup> *Id.* at 624 (emphasis added).

<sup>262</sup> *Id.* at 623–24.

<sup>263</sup> *Id.* at 637–38 (Scalia, J., dissenting).

<sup>264</sup> *Id.* at 640–43.

<sup>265</sup> *Id.* at 626–27 (majority opinion). The Court hinted that the amendment might even enact the third reading, but did not decide this because the Colorado Supreme Court had not done so. *Id.* at 630.

constituted “a denial of equal protection of the laws in the most literal sense.”<sup>266</sup> This, combined with evidence that the amendment was motivated by animus toward gay people, meant that the law could not pass rational basis review.<sup>267</sup>

The dignity canon could have changed the outcome in *Romer*. Given that the Court could not agree on how the Colorado Supreme Court interpreted the amendment,<sup>268</sup> it could have looked to the text of the amendment itself. On the face of it, the amendment does not provide a ready answer as to whether it has a narrow or a broad scope. The phrase “claim of discrimination,” in particular, seems ambiguous. The other phrases are also unclear, and lean in opposing directions: the phrase “quota preferences” is suggestive of a special privileges view of the amendment, while “minority status” and “protected status” lean toward an interpretation that excludes sexual orientation from general antidiscrimination laws. Since the amendment does not contain a *clear* statement that it denies homosexuals the protections of general anti-discrimination laws, the dignity canon would kick in. The Court would read the statute in the way least likely to show disrespect for the equal dignity of homosexuals as compared to other groups. This would mean reading the amendment to only prohibit special privileges for homosexuals (for instance, affirmative action or quotas) not given to other groups. Rather than being struck down, as it was in *Romer*, the amendment would likely be upheld as constitutional under this reading.<sup>269</sup>

### B. *Criminal Procedure: Muscarello v. United States*

While discrimination cases reflect the equality aspect of human dignity, criminal procedure cases show that dignity requires a minimum *adequacy* of treatment. A dignity clear statement rule would prove a strong force for adequacy in the criminal justice system. One obvious issue to which it would apply is the death penalty, which is “uniquely degrading

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<sup>266</sup> *Id.* at 633.

<sup>267</sup> *Id.* at 634–35.

<sup>268</sup> Normally, “state courts are the ultimate expositors of state law,” and federal courts “are bound by their constructions except in extreme circumstances.” *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). However, this is not always the case; there is some precedent to suggest that federal courts can reject state court interpretations of state law if they “impermissibly distort[] them beyond what a fair reading require[s].” *Bush v. Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring); *id.* at 114–15 & n.1 (discussing cases). Regardless, given that both the majority and dissent in *Romer* aired their own views about which reading the amendment’s language more naturally fit, *see* 517 U.S. at 626, 638 (Scalia, J., dissenting), and given that they disagreed on which reading the Colorado court gave to the law, *see supra* notes 263–265 and accompanying text, it would not be out of place to apply the dignity canon and find that a “fair reading” of the law requires a narrow scope.

<sup>269</sup> *See, e.g., Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion) (upholding a state constitutional amendment banning the use of “racial preferences” in public education, employment, and contracting).



to human dignity.”<sup>270</sup> A dignity canon would be of particular use in reading statutes that define capital crimes. Such statutes would be read narrowly, to allow as few actions to be subject to the death penalty as possible. But the dignity canon would also apply to criminal statutes across the board, essentially acting as a stronger version of the rule of lenity. To see how this would work, we will reexamine the case of *Muscarello v. United States*.<sup>271</sup>

In *Muscarello*, three defendants were prosecuted under a federal law that “imposes a 5–year mandatory prison term upon a person who ‘uses or carries a firearm’ ‘during and in relation to’ a ‘drug trafficking crime.’”<sup>272</sup> The catch? None of the defendants actually had the guns on their persons during the trafficking crimes for which they were convicted. Instead, all three kept their guns in the glove compartments or trunks of their cars.<sup>273</sup> The defendants argued that the word “carries” in the statute did not clearly apply to keeping a gun in a car, and that therefore the rule of lenity required the court to read the statute in their favor.<sup>274</sup>

During the Burger Court years, the rule of lenity was treated as a presumption, or even something close to a clear statement rule.<sup>275</sup> However, the rule seesawed somewhat in its form, and, by the 1980s, the Court both used lenity less often<sup>276</sup> and started to frame it as a mere tiebreaker.<sup>277</sup> In *Muscarello*, the Court confirmed the stingier version of lenity. Instead of being a presumption, lenity applies “only if, after seizing everything from which aid can be derived, . . . we can make no more than a guess as to what Congress intended”—in other words, only if “there is a grievous ambiguity or uncertainty in the statute.”<sup>278</sup> As the *Muscarello* Court framed it, “this Court has never held that the rule of

<sup>270</sup> *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring).

<sup>271</sup> 524 U.S. 125 (1998).

<sup>272</sup> *Id.* at 126 (emphasis added) (quoting 18 U.S.C. § 1924(c)(1)).

<sup>273</sup> *Id.* at 127.

<sup>274</sup> *Id.* at 138.

<sup>275</sup> See Eskridge, & Frickey, *supra* note 115, at 600.

<sup>276</sup> *Id.* at 612.

<sup>277</sup> See, e.g., *United States v. Wells*, 519 U.S. 482, 499 (1997); *Staples v. United States*, 511 U.S. 600, 619 n.17 (1994). The change was partially due to selective readings of earlier cases. Compare, e.g., *Huddleston v. United States*, 415 U.S. 814, 831 (1974) (“Although penal laws are to be construed strictly, they ‘ought not to be construed so strictly as to defeat the obvious intention of the legislature.’ . . . We perceive no grievous ambiguity or uncertainty in the language and structure of the Act.” (citations omitted)), with *Chapman v. United States*, 500 U.S. 453, 463 (1991) (“The rule of lenity, however, is not applicable unless there is a ‘grievous ambiguity or uncertainty in the language and structure of the Act’.” (quoting *Huddleston*, 415 U.S. at 831)).

<sup>278</sup> *Muscarello*, 524 U.S. at 138 (internal quotation marks omitted).

lenity automatically permits a defendant to win.”<sup>279</sup> The majority upheld the defendants’ convictions.<sup>280</sup>

The dignity canon, by contrast, would require a clear textual statement before deciding that a statute authorizes criminal punishment—punishment that deprives individuals of their liberty and places upon them the lifetime mark of a conviction record. It would therefore prove at least as strong as the version of lenity used during the Burger Court years. Employing the dignity canon, the Court would have sided with the *Muscarello* dissent, which read the word “carries” to mean “not merely keeping arms on one’s premises or in one’s vehicle, but bearing them in such manner as to be ready for use as a weapon.”<sup>281</sup>

To avoid such a reading, a legislature would have had to add explicit language to the statute that would cover the circumstance of keeping a gun in a vehicle during a drug trafficking crime. Such a statute might create a five-year prison sentence for anyone who, “during and in relation to any crime of violence or drug trafficking . . . uses, carries, or transports a firearm.” The addition of the word “transports” would be sufficiently clear to cover the defendants’ activity. Otherwise, however, the dignity canon would read the statute not to apply when criminals keep guns in their cars but not on their physical person.

At first blush, the idea of using a clear statement rule in criminal cases may seem frightening. If employed indiscriminately, one might think, a dignity clear statement rule could essentially eliminate *any* crime or punishment that is not clearly expressed. But this concern is unwarranted. Prior to the 1980s, the Court treated the rule of lenity as a clear statement rule. It required legislatures to “plainly and unmistakably”<sup>282</sup> make particular conduct a crime, using “language that is clear and definite.”<sup>283</sup> Thus, a dignity clear statement rule would operate the same way the rule of lenity did for decades. Rather than a new, uncontrollable monster, the dignity canon would be a familiar, manageable beast.

Moreover, even clear statement rules are rebuttable. The Court’s description of the old rule of lenity would apply alike to the dignity canon: “Although penal laws are to be construed strictly, they ‘ought not to be construed so strictly as to defeat the obvious intention of the legislature.’”<sup>284</sup> If the text and structure of a law clearly show that the legislature criminalized the sort of conduct in question, this would overcome

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<sup>279</sup> *Id.* at 139.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 140 (Ginsburg, J., dissenting).

<sup>282</sup> *United States v. Bass*, 404 U.S. 336 (1971).

<sup>283</sup> *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 222 (1952). Other scholars have called for a return to this sort of standard. *See, e.g.*, Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 580, 581–82 (2012).

<sup>284</sup> *Huddleston v. United States*, 415 U.S. 814, 831 (1974).

the canon. This standard is more forgiving than that of what Bill Eskridge and Philip Frickey have termed “super-strong clear statement rules,” which “can be rebutted only through unambiguous statutory text targeted at the specific problem.”<sup>285</sup> Particularly in the realm of criminal law, where statutes must use broader language to encompass the untold potential varieties of criminal conduct, the dignity clear statement rule would not require this degree of targeting. “[W]hen words have a clear definition, . . . canons cannot properly defeat [a legislature’s] decision to draft broad legislation.”<sup>286</sup> The dignity clear statement rule would thread the required needle, providing greater protection than today’s rule of lenity without placing every criminal statute in danger.

### C. *Personal Health: Harris v. McRae*

In addition to ensuring minimum adequacy and equality of treatment, the dignity canon would help create and defend substantive rights that are tied to personal *autonomy*. Health rights provide one example of this latter function. Statutes that are asserted to deny access to life-saving (or, in some cases, suicide-assisting) drugs would be read narrowly absent clear statements to the contrary.<sup>287</sup> Conversely, laws providing positive rights to health care, such as the Medicare Act or the Affordable Care Act, would be read broadly to allow for greater coverage.<sup>288</sup> The dignity canon would also limit otherwise ambiguous statutory barriers for women seeking abortions. A re-do of *Harris v. McRae*<sup>289</sup> illustrates how the dignity canon would operate in this sphere.

In *Harris*, the Court considered a challenge to the Hyde Amendment, which prohibits federal funding for abortion services.<sup>290</sup> As part of the challenge, the Court had to determine whether the Medicaid Act requires states participating in Medicaid to provide abortion services despite the lack of federal funding.<sup>291</sup> The Act says that “State plan[s] for medical assistance *must*” make certain forms of medical assistance—including inpatient and outpatient hospital services, family planning services, and physician’s services—available to those who meet statutory criteria of need.<sup>292</sup> The plaintiffs argued that the Hyde Amend-

<sup>285</sup> Eskridge & Frickey, *supra* note 115, at 611–12.

<sup>286</sup> *Yates v. United States*, 135 S. Ct. 1074, 1097 (2015) (Kagan, J., dissenting).

<sup>287</sup> *Cf. Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (holding that the Attorney General lacks power under the Controlled Substances Act to “bar dispensing controlled substances for assisted suicide in the face of a state medical regime permitting such conduct”).

<sup>288</sup> *Cf. King v. Burwell*, 135 S. Ct. 2480, 2496 (2015) (holding that federal subsidies are available for individuals on federal health exchanges under the ACA).

<sup>289</sup> 448 U.S. 297 (1980).

<sup>290</sup> *See id.*

<sup>291</sup> *Id.* at 301.

<sup>292</sup> 42 U.S.C. §§ 1396a(a)(10), 1396d(a)(1)-(5) (2015) (emphasis added); *Harris*, 448 U.S. at 301–02.

ment withdrew federal funding for, but not the states' obligation to provide, medically necessary abortion services.<sup>293</sup>

The Court, employing mainly structural arguments, read the statute to relieve states of their obligation to provide services for which the federal government revoked funding.<sup>294</sup> The Court noted that Medicaid was a product of cooperative federalism, requiring payments from both the federal and state governments.<sup>295</sup> Additionally, “[n]othing . . . suggest[ed] that Congress intended to require a participating State to assume the full costs of providing any health services in its Medicaid plan.”<sup>296</sup> The Court thus presumed that states would not have to provide unfunded services, unless it could discern a legislative intent otherwise.<sup>297</sup> Because the Hyde Amendment did not contain such an indication, the Court concluded that states did not have to provide abortion services under Medicaid.<sup>298</sup>

The dignity canon would flip this presumption on its head. On the face of the statute, not only are states *not* exempted from providing federally unfunded services, they “*must*” provide medically necessary treatment that falls within the statutory categories.<sup>299</sup> The Hyde Amendment, meanwhile, removes federal funding for abortion services, but says nothing about whether states must provide abortion services.<sup>300</sup> Thus, neither law explicitly relieved the states of the obligation to provide a set of healthcare services that is otherwise required under Medicaid. In this situation, the dignity clear statement rule would outweigh the general structural arguments the Court used to read the Medicaid statute the opposite way.

Nowadays, the Court has another weapon it could use to oppose the dignity canon: the federalism clear statement rule. As mentioned in the previous Part, the Court perfected this rule in *Gregory v. Ashcroft*, requiring a clear textual statement to alter the traditional federal-state balance.<sup>301</sup> The Medicaid statute requires states to provide medical care that they otherwise would not; this is exactly the sort of alteration to the federalist system to which the *Gregory* rule was meant to apply. Theoretically, this could lead to the sort of canon clash that often occurs in

<sup>293</sup> *Harris*, 448 U.S. at 307–08.

<sup>294</sup> *Id.* at 310.

<sup>295</sup> *Id.* at 308.

<sup>296</sup> *Id.*

<sup>297</sup> *Id.* at 309 & n.13.

<sup>298</sup> *Id.* at 310–11.

<sup>299</sup> 42 U.S.C. §§ 1396a(a) (2015).

<sup>300</sup> *Harris*, 448 U.S. at 302.

<sup>301</sup> 501 U.S. 452, 460–61 (1991).

statutory interpretation cases.<sup>302</sup> But in this case, the statute provides a very clear statement that states “must” pay for family planning services—perhaps clear enough to satisfy *Gregory*—with no corresponding clear statement in the Hyde Amendment to counter the dignity canon.<sup>303</sup>

To be sure, Congress may not have thought that it was issuing an unfunded mandate to provide abortions. And a ruling reading the statute as creating such a mandate would have significant political consequences. Such an interpretation, however, would create a powerful incentive for Congress either to refrain from Hyde Amendment-like additions to Medicaid or to more explicitly exempt any unfunded services from the statute. The former would directly increase people’s positive rights, while the latter would make more salient Congress’s decision to deny those rights to Medicaid patients.

#### D. *Putting It Together: Lessons from the Case Studies*

The previous three Sections outlined concrete examples of how a dignity clear statement rule would operate in real cases. Analyzing these case studies as a group, we can also glean two important lessons about the dignity canon. The first lesson is that, while the dignity canon has great power to decide individual cases, this power is neither undirected nor unlimited. Rather, the results in the case studies are tethered to dignity’s place in constitutional law. Recall that the dignity canon, like the constitutional value of dignity, has three components: equality, advocacy, and autonomy. This creates specific limitations on the sorts of statutory language against which the canon can act. It can read statutes to prevent three forms of indignity: (1) placing special burdens on or giving lesser protections to a particular group—or, equivalently, using significantly different standards for different individuals (equality); (2) treating people in a manner that does not comport with the minimum standards of a civilized society (adequacy); or (3) unduly intruding on personal decision-making in spheres considered to be core to individual liberty (autonomy). Courts have no freestanding authority to go beyond these three forms of indignity, or to read statutes to forbid what the Court has already explicitly held that the Constitution allows.

In the *Muscarello* case study, for instance, there is a clear constitutional interest at stake. The blow that criminal convictions inflict on individuals’ dignity requires statutes to provide proper notice before criminalizing conduct; to put someone in prison for actions that were not clearly illegal is to deny that person the minimum level of due process

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<sup>302</sup> See, e.g., *Lockhart v. United States*, 136 S. Ct. 958, 964–65 (2016) (determining that the last antecedent rule trumps the series qualifier canon as the best way to read the statute at issue); *id.* at 969–70 (Kagan, J., dissenting) (arguing the opposite).

<sup>303</sup> See *supra* notes 299–300 and accompanying text.

required by our legal system.<sup>304</sup> Similarly, in *Romer*, reading the Colorado amendment to exclude gay people from general anti-discrimination laws would both place a special burden on gay people—unlike other groups, they would have to pass another constitutional amendment to give them access to anti-discrimination laws—and give gay people lesser protection than other groups. The case study of *Harris* also comports with these limitations on the dignity canon, though the analysis is slightly more complicated. Since the 1970s, the Court has treated abortion as central to women’s autonomy;<sup>305</sup> reading the Medicaid statute to require provision of medically necessary abortions helps protect the dignity of economically disadvantaged women. The Court found it constitutional for Congress to cut off federal abortion funding through the Hyde Amendment,<sup>306</sup> so using the dignity canon to require *funding* of abortions would raise questions about how far beyond the Constitution itself the canon could reach. In *Harris*, however, the dignity canon would only require access to, not federal funding of, abortions.

The case studies show that the dignity canon is limited in another way. Like other canons, including the other clear statement rules, the dignity canon cannot strike laws down. This means that legislatures can ultimately override courts’ interpretations; they would simply have to clarify the statutory language to cover what the dignity canon caused the courts to assume it did not. This does not necessarily mean that the statutory ambiguities the dignity canon clarifies would be held unconstitutional if clearly expressed. It may well be constitutional for a statute to punish the transportation of a gun during a drug deal, but the dignity canon could still read the ambiguous statute in *Muscarello* not to cover this crime. There is no constitutional requirement for states to provide abortion services,<sup>307</sup> but in *Harris* the dignity canon could still read the Hyde Amendment not to cut off the requirements of the Medicaid statute. Even in a case like *Romer*, in which the statutory language at issue *would* be unconstitutional if clearly expressed,<sup>308</sup> the use of the dignity clear statement rule shows sufficient respect for the legislative branch. In such cases, the canon’s only effect is to tell legislatures that they cannot do through unclear language what they would not be able to do directly. Ultimately, it may be better to force legislatures to clarify statutes and then face the constitutional issue directly, if there is one, than to allow

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<sup>304</sup> See *United States v. Lanier*, 520 U.S. 259, 266 (1997); see also *Lawrence v. Texas*, 539 U.S. 558, 575 (2003) (discussing the effects of criminal conviction on “the dignity of the persons charged”).

<sup>305</sup> See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 687 (1977).

<sup>306</sup> *Harris v. McRae*, 448 U.S. 297, 317–18 (1980).

<sup>307</sup> *Id.*

<sup>308</sup> *Romer v. Evans*, 517 U.S. 620, 635 (1996).

governments to keep enforcing ambiguous laws that may unconstitutionally infringe on individual dignity.

The second lesson from these case studies is that the dignity canon confounds any expectations we might have about its ideological valence. The concept of dignity, so common in progressive international human rights discourse,<sup>309</sup> could easily be seen as a way to smuggle liberal results into judicial opinions.<sup>310</sup> Yet we can see from the case studies that this is not necessarily so. The *Harris* result would certainly hearten progressives, but the other two case studies do not line up with political liberalism. In *Romer*, employing the dignity canon would read the Colorado amendment in a more humane manner: it would only prohibit affirmative action or other special privileges for gay people, rather than preventing them from accessing general anti-discrimination laws.<sup>311</sup> It should not be forgotten that this was *exactly* the reading that Justice Scalia's dissent (joined by Chief Justice Rehnquist and Justice Thomas) supported.<sup>312</sup> The conservative wing of the Court, nearly two decades later, affirmed that statutes prohibiting such special treatment are constitutional even as applied to race.<sup>313</sup> The *Romer* majority took the stereotypically "liberal" position; the dignity canon, by contrast, would lead to a relatively "conservative" interpretation of the amendment. Using the dignity canon in *Romer* would also have been conservative in a different sense: in this case, at least, it would have promoted judicial minimalism.<sup>314</sup> Rather than striking down the amendment by announcing a broad new constitutional rule, as the *Romer* majority did,<sup>315</sup> a dignity-canon-based *Romer* opinion would have upheld the amendment on statutory grounds.

The result of the *Muscarello* case study is more complex, but can also be seen as conservative. At first glance, reversing the Court's decision in *Muscarello* seems only like a victory for criminal defendants—a stereotypically liberal outcome. And, indeed, it *is* a pro-criminal-defense ruling. (This is true of any case employing the rule of lenity, and would be so of any dignity canon case in the criminal realm.) But one could just as easily think of *Muscarello* as a gun rights case, and of the dignity-

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<sup>309</sup> See John R. Wallach, *Dignity: The Last Bastion of Liberalism*, 4 HUMANITIES 313, 314 (2013).

<sup>310</sup> See, e.g., Nick Brommel, *Beyond Freedom and Equality: The Democratic Value of Dignity*, BOS. REV. (Feb. 8, 2016), <https://bostonreview.net/books-ideas/nick-brommel-dignity-obergefell>.

<sup>311</sup> See *supra* notes 268–269 and accompanying text.

<sup>312</sup> *Romer*, 517 U.S. at 638 (1996) (Scalia, J., dissenting).

<sup>313</sup> *Schuette v. Coalition to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014) (plurality opinion).

<sup>314</sup> Cass R. Sunstein, *Beyond Judicial Minimalism 2* (Harvard Public Law Working Paper No. 08-40, 2008), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1274200](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1274200).

<sup>315</sup> 517 U.S. at 635–36.

canon-based result as a victory for gun rights. The federal statute at issue created a new crime, with a five-year mandatory minimum, whenever one “‘uses or carries a firearm’ ‘during and in relation to’ a ‘drug trafficking crime.’”<sup>316</sup> The Court’s decision condemned Frank Muscarello to jail simply because he had transported a handgun, locked in the glove compartment of his car, while driving to sell marijuana.<sup>317</sup> But in *District of Columbia v. Heller*, the Court held that the Second Amendment “guarantee[s] the individual right to possess and carry weapons in case of confrontation.”<sup>318</sup> Some of the more conservative Justices have shown concern about criminalizing the mere possession of firearms, even when the possessors commit other crimes.<sup>319</sup> By reading the drug trafficking statute to prohibit only the carrying of firearms on one’s person, the dignity canon would vindicate Muscarello’s Due Process rights *and* his Second Amendment rights. As the case studies show, the dignity canon provides workable standards based on settled constitutional values, and it is devoted to protecting individual liberty rather than assuring either liberal or conservative outcomes.

#### IV. THE LIMITS OF THE DIGNITY CANON

A dignity clear statement rule could have significant effects across a variety of substantive areas of law. Three major Supreme Court cases—and likely a good many more—would have come out quite differently. However, there are limitations to the canon’s effectiveness. In particular, it is possible for a single case to pit two dignity interests against one another, a situation exacerbated by the occasional contests over dignity’s constitutional scope. However, there are two solutions to this problem. First, despite the vigorous debates over dignity-based constitutional issues, the Court generally *does* resolve these disputes. When a Court majority chooses one entity’s dignity over another, or strikes a certain balance between them, the matter is also decided for purposes of statutory interpretation. Second, if this method cannot dictate how to use the dignity canon in a particular case—if a court encounters two irreconcilably conflicted dignity interests—then the canon simply will not apply.

Like other constitutionally derived canons, the dignity canon is dependent at least in part on judges’ views about the scope of the constitutional value involved. Judges often disagree about which rights, or whose

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<sup>316</sup> *Muscarello v. United States*, 524 U.S. 125, 126 (1998).

<sup>317</sup> *Id.* at 127.

<sup>318</sup> 554 U.S. 570, 592 (2008).

<sup>319</sup> *See, e.g.*, *Caetano v. Massachusetts*, 136 S. Ct. 1027, 1028–29 (2016) (Alito, J., concurring in the judgment); *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015) (Kennedy, J., concurring in the judgment); *id.* at 2565–66 (Thomas, J., concurring in the judgment); Transcript of Oral Argument at 37–38, *Voisine v. United States*, No. 14-10154 (Feb. 29, 2016).



rights, are covered by the Constitution's protection of dignity. Some view abortion through the lens of the potential mother's dignity,<sup>320</sup> while others elevate the dignity of the unborn fetus.<sup>321</sup> Some see striking down gay marriage bans as affirming the dignity of the couples,<sup>322</sup> while others see it as an affront to the dignity of those who voted for the bans.<sup>323</sup> Some find that laws allowing punitive damages for defamation of private individuals serve a dignity interest more powerful than the First Amendment interests of the press;<sup>324</sup> others do not.<sup>325</sup> A dignity canon could import these ideological fights over dignity, along with the concept of dignity itself, from constitutional law into statutory interpretation. It is also possible to find dignity interests on both sides of the same case—a less-than-ideal situation for judges attempting to use the dignity canon. We encountered this issue in Part II.B: it was one of the arguments counseling against creating a dignity canon in the first place.

To illustrate this problem in greater detail, let us consider the issue of affirmative action. Some Justices view the use of race in public school admissions as both illegal and offensive. In their view, “it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities.”<sup>326</sup> These jurists operate on a color-blind vision of the Constitution, which requires that government treat people similarly regardless of race. In this worldview, affirmative action causes government to see people simply as members of a group, rather than as individuals. This can be summed up in Chief Justice Roberts' statement: “The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”<sup>327</sup>

Other Justices, by contrast, believe the Constitution allows affirmative action under multiple theories. First, affirmative action helps “remedy[ ] past discrimination.”<sup>328</sup> Under this model, it is not color-blindness that respects the individual dignity of minority applicants; rather, color-blindness denies the unique history minorities have faced in this country solely because of their status as members of a particular racial or ethnic group. It is only by taking that history into account that we can get a full picture of each applicant as an individual. Rather than rejecting a student because of lower test scores, for instance, a college might recognize that

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<sup>320</sup> See *supra* notes 96, 100.

<sup>321</sup> See *supra* note 101.

<sup>322</sup> See *supra* note 7.

<sup>323</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2639 (2015) (Thomas, J., dissenting).

<sup>324</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 400–02 & n.42 (1974) (White, J., dissenting).

<sup>325</sup> See *id.* at 341–42, 349 (majority opinion).

<sup>326</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 746 (2007).

<sup>327</sup> *Id.* at 748.

<sup>328</sup> *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003).

a student grew up as an African-American student in a school district or in a city in which adults did not treat African-American students as capable of attending (or likely to attend) college because of a legacy of discrimination. Delving more deeply beyond what, at first glance, appears to be merely an unimpressive SAT score would do greater service to the individual *behind* the numbers. Affirmative action, then, might better serve human dignity than would color-blindness.

Alternatively, one can view affirmative action as a means of pursuing schools' "compelling interest in attaining a diverse student body."<sup>329</sup> In particular, positive dignity effects arise out of attempts to produce *intra-group* diversity. Only by reaching a "critical mass" of minority students or workers can a school or employer provide enough unique examples of minority peers for the majority to see that those peers are not so different from them, and that there are in fact greater differences between individuals of a particular minority group than there are between those individuals and the overall majority group.<sup>330</sup> This realization "diminish[es] the force of [ ] stereotypes," something that schools and employers "cannot accomplish with only token numbers of minority students" or workers.<sup>331</sup> Affirmative action thereby fuels the treatment of minority peers as individuals, rather than as members of a strange and exogenous group—which shows greater respect for dignity than would color-blindness.

The Justices in the middle, including Justice O'Connor and Justice Kennedy, have straddled the dignity divide. They agree that remedying past discrimination and increasing diversity are both compelling state interests that can justify the use of race.<sup>332</sup> However, they oppose anything that looks like racial quotas or "crude system[s] of individual racial classifications."<sup>333</sup> The government must therefore be cautious when employing racial categories. This position is likewise defended on dignity grounds. As Justice Kennedy puts it: "To be forced to live under a state-mandated racial label is inconsistent with the dignity of individuals in our society."<sup>334</sup> This middle position, mostly by virtue of belonging to the swing Justices, has essentially become the law of the land.<sup>335</sup>

These different conceptions of constitutional dignity could well be imported into statutory interpretation. In this and other areas, the canon

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<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 332

<sup>331</sup> *Id.* at 333.

<sup>332</sup> *Parents Involved*, 551 U.S. at 783 (Kennedy, J., concurring in the judgment); *Grutter*, 539 U.S. at 328; *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

<sup>333</sup> *Parents Involved*, 551 U.S. at 789; *Gratz v. Bollinger*, 539 U.S. 244, 271–72 (2003).

<sup>334</sup> *Parents Involved*, 551 U.S. at 798.

<sup>335</sup> *See, e.g., Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633 (5th Cir. 2014), *aff'd*, 136 S. Ct. 2198 (2016).

would point in opposite directions depending on the prevailing ideology. For instance, some judges would read ambiguous statutes as prohibiting affirmative action, in order to preserve minority students' or employees' dignity. Other judges would read those same statutes to *allow* affirmative action, based on the same premise. If one finds these battles problematic in constitutional law, the prospect of seeing them expand to statutory interpretation might be distressing.

However, as the discussion in Part I.B shows, dignity has a settled place in constitutional jurisprudence. Despite strong resistance, the Court has extended its use of dignity to protect homosexual relationships,<sup>336</sup> allow early-stage abortions,<sup>337</sup> and outlaw the death penalty in a number of situations.<sup>338</sup> In these cases we find an enduring, if at times narrow, majority in favor of one view of dignity over another. The dignity of gay marriage defeats the dignity of the legislatures that banned it and the individuals who opposed it; the dignity of a mother deciding how to control her body defeats the dignity of a pre-viability fetus; the dignity of death row inmates defeats the dignity of the politics that decided their conduct made them deserving of death. Even in more complex areas, such as affirmative action, the swing Justices have carved out consensus positions balancing the dignity values at issue, and lower courts must follow these intermediate views.<sup>339</sup>

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<sup>336</sup> *Compare, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584, 2608 (2015) (“They ask for equal dignity in the eyes of the law. The Constitution grants them that right.”), *with id.* at 2612 (Roberts, C.J., dissenting) (“The majority’s decision is an act of will, not legal judgment. The right it announces has no basis in the Constitution or this Court’s precedent.”), *and id.* at 2631 (Thomas, J., dissenting) (“[The Court’s decision] rejects the idea—captured in our Declaration of Independence—that human dignity is innate and suggests instead that it comes from the Government.”).

<sup>337</sup> *Compare, e.g., 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.”), *and id.* at 870 (“We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy.”), *with id.* at 983 (Scalia, J., dissenting) (“[T]he best the Court can do to explain how it is that the word ‘liberty’ *must* be thought to include the right to destroy human fetuses is to rattle off a collection of adjectives that simply decorate a value judgment and conceal a political choice.”).

<sup>338</sup> *Compare, e.g., Roper v. Simmons*, 543 U.S. 551, 560 (2005) (“By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.”), *and id.* at 578 (“The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed.”), *with id.* at 608 (Scalia, J., dissenting) (“Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.”).

<sup>339</sup> *See, e.g., Fisher v. Univ. of Tex. at Austin*, 758 F.3d 633, 642–44 (5th Cir. 2014), *aff’d*, 136 S. Ct. 2198 (2016).

Similarly, a court in a statutory interpretation case must adhere to the dignity interest, or balance of interests, privileged by the Supreme Court's constitutional precedent. The problems posed by the dignity canon are far from unique in statutory interpretation. Canon "duels," in which the majority and dissent use the same canon to come to opposite conclusions, are common at the Supreme Court level. The early Roberts Court dueled over substantive canons in 6.8% of non-unanimous cases, and it dueled over text and plain meaning—a category that appears to include clear statement rules—in a whopping 42.7% of such cases.<sup>340</sup> Yet, in each of these instances, the Court ultimately decided the issue. The majority's reading of a canon won the day. Because the dignity canon is firmly rooted in constitutional norms, the Court's constitutional cases provide a firmer rule of decision than one can hope for with most other canons. Thus, even if competing dignity interests present themselves, the dignity canon will favor one over the other. If one respects the basic legitimacy of the Supreme Court majority decisions—even sometimes-shifting, five-to-four decisions—then one can easily resolve these rare statutory fights.

Of course, appeals to precedent will not always solve the problem. Sometimes a statutory case will wade into an area that the Court has not specifically addressed, with valid dignity interests on both sides. And, in a very small percentage of cases, one will find that the Court *has* addressed the issue, but has struck a balance between dignity interests that could be difficult for the dignity canon to sort out. Late-term abortions provide a ready example of this sort of case. In *Gonzales v. Carhart*, the Court rejected a facial challenge to the Partial-Birth Abortion Act.<sup>341</sup> In the process, it balanced the dignity interest inherent in the abortion right, as described in *Planned Parenthood v. Casey*, against "the dignity of human life" represented by the fetuses that were killed during the procedure the statute banned.<sup>342</sup> This is a complicated standard that must take into consideration whether a particular method is necessary to protect the woman's health, and whether there are alternative procedures available.<sup>343</sup>

While it may be possible to use a dignity clear statement rule in areas like this, the competing dignity interests are strong and relatively equally matched. In these situations, the dignity canon would simply "run out." Like an algebraic equation in which one discovers that the same variable appears on both sides, one dignity interest would cancel out the other. When this occurs, courts would have to use other canons to

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<sup>340</sup> Anita S. Krishnakumar, *Dueling Canons*, 65 DUKE L.J. 910, 929 tab.1 (2016).

<sup>341</sup> 550 U.S. 124, 156 (2007).

<sup>342</sup> *Id.* at 157–58.

<sup>343</sup> *Id.* at 166–67.

interpret the statute; the dignity canon could not apply. This situation, however, would be quite rare. In the vast majority of cases, the dignity canon would operate as normal.

#### CONCLUSION

This Article has laid out the case for a dignity canon of statutory interpretation. It has shown that the protection of human dignity suffuses constitutional law, and that this strong constitutional value can be imported into statutory cases as a clear statement rule. By requiring legislatures to draft laws in the shadow of dignitary interests, the canon could play a major role in legislative activity. As the examples in Part III show, it would certainly play a major role in litigation, with the power to change outcomes in major cases. After the structural revolution of the Rehnquist and Roberts Courts, the focus on the individual that drove so many statutory cases in the Warren and Burger Court years has diminished. It is my hope that judges, clerks, and members of the legal academy will consider this Article's modest proposal, and bring a long-needed focus on individual rights and freedoms back to the interpretation of statutes.

