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The *Obergefell* Marriage Equality Decision, with Its Emphasis on Human Dignity, and a Fundamental Right to Food Security

MAXINE D. GOODMAN*

Introduction

Many believe the United States Supreme Court's decision in *Obergefell v. Hodges*¹ reflects a new era of tolerance and decency in our country, with love winning out over politics and discrimination.² Our nation has progressed beyond the close-mindedness of the past, when same-sex couples were treated as second class citizens in our society, not entitled to the basic rights which all of us should enjoy. After the Court announced its decision, President Obama said from the Rose

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1. 135 S. Ct. 2584 (2015).

2. Byron Tau, *Obama Calls Supreme Court Decision a Victory for America*, WALL ST. J. (June 26, 2015), <http://www.wsj.com/articles/obama-calls-supreme-court-ruling-on-gay-marriage-a-victory-for-america-1435335722??mod=capitaljournalrelatedbox>; Marianne Williamson, *Marriage Equality: It's a Beautiful Thing When Democracy Prevails*, HUFFINGTON POST (June 30, 2015), http://www.huffingtonpost.com/marianne-williamson/marriage-equality-when-de_b_7678490.html; Andrew O'Hehir, *America is Changing and Marriage Equality is a Huge Victory – But We Need to Go So Much Further*, SALON (June 26, 2015), http://www.salon.com/2015/06/27/america_is_changing_and_marriage_equality_is_a_huge_victory_but_we_need_to_go_so_much_further/.

Garden, "Today we can say, in no uncertain terms, that we have made our union a little more perfect."³ As Justice Kennedy wrote in affirming petitioners' fundamental right to marry in *Obergefell*: "[t]hey ask for equal dignity in the eyes of the law. The Constitution grants them this right."⁴ Countless commentators applauded the Court's opinion for its commitment to essential human rights, reliance on human dignity, and affirmation of society's evolved sense of decency.⁵

In *Obergefell*, the Court described petitioners' constitutional argument as a "just claim to dignity."⁶ The Supreme Court's reliance on human dignity as the value underlying the due process and equal protection guarantees to which the petitioners were due in *Obergefell*, resembles the Court's reliance on human dignity in other Supreme Court decisions.⁷ At other times, the Court has ruled to affirm the human dignity of the mistreated prison inmate, the defendant who wants to avoid giving self-incriminating testimony in court, the alleged criminal whose stomach the police forcibly pumped to obtain evidence, the defendant who wants to represent herself, and the government detractor who objected in obscene language to the draft. In each case, the Court relied on human dignity to remedy a constitutional infraction.

Yet, with all the congratulations, pride, and gratefulness to the Supreme Court on the marriage equality decision,⁸ and the bountiful

3. Adam Liptak, *Supreme Court Ruling Makes Same Sex Marriage a Right Nationwide*, N.Y. TIMES (June 26, 2015), available at <http://www.nytimes.com/2015/06/27/us/supreme-court-same-sex-marriage.html>.

4. *Obergefell*, 135 S. Ct. at 2608.

5. Sara El Yafi, *Why the Supreme Court's Decision to Legalize Gay Marriage Will Benefit You Wherever You Are on the Planet*, HUFFINGTON POST (July 13, 2015), http://www.huffingtonpost.com/sara-elyafi/why-the-supreme-courts-decision-to-legalize-same-sex-marriage-will-benefit-you-wherever-you-are-on-the-planet_b_7749828.html (congratulating "all human beings" on the decision). The "evolving standards of decency that mark the progress of a maturing society" language comes from the Supreme Court's ruling in *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion).

6. *Obergefell*, 135 S. Ct. at 2596.

7. See discussion *infra* Part II.C.

8. This author wholeheartedly joins the "it's about time" refrain and excitement over the Court's decision.

commentary about the Court's emphasis on human dignity,⁹ this author finds it difficult not to take stock of where we are in terms of advancing the most essential needs of Americans, as part of protecting their dignity. The United States joined other developed nations in affirming marriage equality, recognizing, again, the fundamental right of all adults to marry. Yet, in our prosperous nation, in 2014, the Children's Defense Fund reported there are 14.7 million poor children and 6.5 million extremely poor children living in the United States.¹⁰ Countless commentators have decried the state of the poor in this country, calling for renewed efforts to combat poverty.¹¹ In a nation where the Court has acknowledged the right of all to marry, as a testament to their human dignity, the Court has never recognized the right of all to food security, and an end to poverty, as a testament to that same human dignity.

Obviously, the two issues present a host of differences in terms of constitutional analysis. The major difference is the positive versus negative rights distinction, which this Article addresses in Section III.A. Yet, the Court's willingness to advance human dignity provides a meaningful common thread between the right to marry and the right to

9. Jeffrey Rosen, *The Dangers of a Constitutional 'Right to Dignity'*, ATLANTIC (Apr. 29, 2015), <http://www.theatlantic.com/politics/archive/2015/04/the-dangerous-doc-trine-of-dignity/391796/> ("Justice Kennedy invoked the word 'dignity' five times in the oral arguments; and other lawyers invoked it 16 times. It was central to the opening statements of Solicitor General Don Verrilli. 'The opportunity to marry is integral to human dignity,' he began. 'Excluding gay and lesbian couples from marriage demeans the dignity of these couples.' It was also one of the first words uttered by the plaintiff's lawyer, Mary L. Bonuato."); Liz Halloran, *Explaining Justice Kennedy: The Dignity Factor*, NPR (June 28, 2013), <http://www.npr.org/sections/the-two-way/2013/06/27/196280855/explaining-justice-kennedy-the-dignity-factor> ("The [human dignity] concept appears no less than nine times in the landmark 26-page decision overturning the 1996 law blocking federal recognition of gay marriage.").

10. Marian Wright Edelman, *Foreword to Ending Child Poverty Now*, CHILDREN'S DEFENSE FUND 4 (2015), <http://www.childrensdefense.org/library/data/ending-child-poverty-now-1.html>.

11. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS* (2004); Evgeny Krasnov, Note: *Freedom from Food: on the Need to Restore FDR's Vision of Economic Rights in America, and How It Can Be Done*, 41 HOFSTRA L. REV. 735 (2013); Dennis D. Hirsch, *The Right to Economic Opportunity: Making Sense of the Supreme Court's Welfare Rights Decisions*, 58 U. PITT. L. REV. 109, 134 (1996).

food security. This Article links the Supreme Court's reliance on human dignity as a constitutional value most recently in *Obergefell* to the Court's ability to recognize a fundamental right to food security¹² under a Fourteenth Amendment Due Process or Equal Protection analysis. Ideally, at some point soon, commentators will proclaim, "It's about time" when the Court acknowledges food security as a fundamental right.

At one time, such a constitutional analysis and outcome seemed likely. In 1970, the Court ruled in *Goldberg v. Kelly*,¹³ that only *after* a fair hearing could social services terminate benefits of welfare recipients. Justice Brennan wrote with regard to the nation's provision of assistance to the needy that "from its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."¹⁴ The Court noted the inextricable link between human dignity and food security, describing welfare as the means of bringing "within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community."¹⁵ Around the same time, in the mid-60s, with the "War on Poverty," President Lyndon Johnson promised a right to food security, linking it to human dignity, when he said, "We have a right to expect a job to provide food for our families, a roof over their head, clothes for their body...."¹⁶ He described the impact of poverty: "Poverty not only strikes at the needs

12. For purposes of this article, food security means "access by people at all times to enough food for an active, healthy life." *Food & Nutrition Assistance*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance.aspx> (last updated June 8, 2015). Food insecurity thus means "access to adequate food is limited by a lack of money and other resources." Alisha Coleman-Jensen, Christian Gregory & Anita Singh, *Household Food Security in the United States in 2013*, U.S. DEP'T OF AGRIC. ECON. RES. REPORT NO. ERR-173, 1 (Sept. 2014).

13. 397 U.S. 254 (1970).

14. *Id.* at 264–65.

15. Scholars have supported the notion of a fundamental right to food security under the Fourteenth Amendment. See Peter B. Edelman, *The Next Century of our Constitution: Rethinking our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

16. President Lyndon B. Johnson, Remarks at Cumberland, Maryland City Hall (May 7, 1964) in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=26223>.

of the body. It attacks the spirit and it undermines human dignity.”¹⁷

However, since the mid-1970s, most Supreme Court opinions regarding welfare rights have favored the government, and the Court has routinely reversed lower court decisions favoring the poor.¹⁸ The welfare rights movement, once compared to the Civil Rights Movement,¹⁹ has lost steam. It is as though the legal community has, largely, left those in poverty behind. Unfortunately, the notion that human dignity means a right to food security on the part of every American, a bedrock principle of other nations’ constitutions and of international law,²⁰ and, arguably, necessary to liberty and general welfare, has lost traction.²¹ As Louis Henkin states, “[o]ur welfare state does not supply what human dignity requires today. There is no respect for human dignity in tolerating poverty and homelessness, de facto segregation, and the growth of an ‘underclass.’”²²

This Article proceeds in three parts. Section I provides a brief background of human dignity as a value in international law as well as the constitutional jurisprudence of the United States and other nations. This section also provides the various definitions that courts, nations, and legal documents have ascribed to the term. Then, Section II briefly discusses food insecurity in the United States and legislative efforts to provide for the needy. This Article uses “food insecurity” to mean “the lack of access to enough affordable, nutritious food to fully meet basic needs at all times due to lack of financial resources.”²³

17. Johnson, *supra* note 16.

18. *See infra* Section I.C.

19. *See* Hirsch, *supra* note 11.

20. The Universal Declaration of Human Rights provides that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care” G.A. Res. 217 (III) A, Article 25(1), Universal Declaration of Human Rights (Dec. 10, 1948). *See infra* part III.E.

21. *See* Hirsch, *supra* note 11 at 134.

22. Louis Henkin, *Dignity and Constitutional Rights*, THE CONSTITUTION OF RIGHTS, HUMAN DIGNITY AND AMERICAN VALUES 227 (Michael J. Meyer & William A. Parent eds., 1992).

23. *See Introduction: Hunger in the U.S.*, WHYHUNGER, <http://www.whyhunger.org/frontend.php/overlay/simpleIndex?id=2056>. *See also* U.S. DEP’T OF AGRIC., *supra* note 12.

The section also summarizes the Supreme Court's treatment of welfare cases²⁴ from the 1960s until the present time.

Section III provides five reasons the Supreme Court should acknowledge a fundamental right to food security for all American citizens. Fundamental means, just as with other liberty rights under a Due Process Clause analysis, that unless it is *necessary* for the government to interfere with the right to achieve a *compelling* government objective, the government action is prohibited. This Article does not describe the exact case that should be brought to get this question before the Supreme Court; rather, it encourages the legal community to reinvigorate the legal fight for this fundamental right, at a time when doing so just might succeed.

The five reasons the Court should establish this fundamental right are grounded in existing constitutional jurisprudence involving human dignity, viewed largely through the lens of *Obergefell*. Though many have written on human dignity in constitutional jurisprudence,²⁵ scholars have written little on the necessary connection between human dignity and food security and why the Supreme Court should acknowledge this link. As we applaud *Obergefell* as a reflection of the Court's commitment to human dignity, commentators should pause to consider a jurisprudence which affirms the right of all citizens to marry on Fourteenth Amendment due process and equal protection grounds but which fails to recognize a right to food security for all citizens. This Article strives to show why our evolved sense of decency and our existing Supreme Court jurisprudence support such a right.

24 "Welfare cases" mean lawsuits involving federal and state welfare programs, such as Aid to Families with Dependent Children, Food Stamps, and other safety net programs.

25. See Jordan Paust, *Human Dignity as a Constitutional Right: Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L.J. 145 (1984); Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Erin Daly, *Human Dignity in the Roberts Court: a Story of Inchoate Institutions, Autonomous Individuals, and the Reluctant Recognition of a Right*, 37 OHIO N.U. L. REV. 381 (2011).

I. Background of Human Dignity as a Value in International and Constitutional Law

This section briefly describes the philosophical and religious underpinnings of human dignity as a legal concept, as well as its meaning and use under international law, in United States Supreme Court jurisprudence, and as a value or right in other nations' constitutions.

A. Philosophical and Religious Underpinnings of Human Dignity

The American concept of human dignity underlying human rights and constitutional guarantees is believed to have originated from the German philosopher Immanuel Kant,²⁶ who posited, "to treat people with dignity is to treat them as autonomous individuals able to choose their destiny."²⁷ He defined dignity as "a quality of intrinsic, absolute value, above any price, and thus excluding any equivalence."²⁸ Kant's "formula of ends" meant that people should behave in such a way "that you treat humanity, both in your person and in the person of each other individual, always at the same time as an end, never as a mere means."²⁹ Accordingly, human dignity, as opposed to something with a price, cannot be replaced by anything else, and it is not relative to anyone's desires.³⁰ As one scholar

26. "Thomas Paine eloquently invoked the natural dignity of man as the reason to protect individual rights that transcend authoritative rule. Paine's conception of dignity marked a distinct break from the British rule where dignity had more of an ancient Roman connotation and was reserved for the nobility or aristocracy. Thomas Jefferson and Alexander Hamilton shared Paine's views." See Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 77 (2011).

27. See Izhak Englard, *Uri and Caroline Bauer Memorial Lecture: Human Dignity: From Antiquity to Modern Israel's Constitutional Framework*, 21 CARDOZO L. REV. 1903, 1918–20 (2000).

28. *Id.*

29. *Id.*

30. Hugo Adam Bedau, *The Eighth Amendment, Human Dignity, and the Death Penalty*, Henkin, *supra* note 22, at 153–56.

describes Kant's theory, "the humanity in each of us is of infinite value, and this explains why we must respect the humanity of others as we respect the humanity in ourselves."³¹

Commentators also ascribe a religious source to human dignity as relied on in Supreme Court jurisprudence, stemming from the Judeo-Christian notion that all people are created in the image of God. The Book of Genesis provides that God created man in God's own image.³² As such, "there is a divine 'spark,' as it were, in human beings. This element establishes man's humanity and grants him unique status among the creatures in God's creation, or in other words, his dignity."³³ Professor George Fletcher equates this Biblical source with Kant's theory that each life has a dignity beyond price: "Kant's idea of universal humanity functions as the secular analogue to creation in the image of God."³⁴

Religions throughout the world are important sources for the conception of human dignity. In Catholicism, for example, "human life is sacred and [Catholicism professes] that the dignity of the human person is the foundation of a moral vision for society"; Pope Benedict XVI stated that "the dignity of man is the locus of human rights"; the Catechism of the Catholic Church teaches that man was created in God's image.³⁵ Many scholars attribute the commitment to human dignity shown by Justices Kennedy and Brennan to their religious upbringings and beliefs.³⁶ Some commentators contend the nation's

31. George Fletcher, Essay, *In God's Image: the Religious Imperative of Equality under Law*, 99 COLUM. L. REV. 1608, 1619 (1999).

32. *Genesis* 1:26. See Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 206 (2008) ("The notion of Imago Dei in *Genesis* was a universal attribute shared by all human beings.").

33. Rao, *supra* note 32, at 206.

34. Fletcher, *supra* note 31, at 1619.

35. *Life and Dignity of The Human Person*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/life-and-dignity-of-the-human-person.cfm> (last visited Oct. 7, 2015).

36. See Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. STATE L. REV. 665, 678 (2013) ("Brennan believed Catholic social teaching had adopted the concept of human dignity, which derived from the belief that man was created in the image of God. Justice Brennan echoed this thought in a speech to the Jewish Theological Seminary in 1964, stating

founding principles all originate in Judeo-Christian principles, which emphasize the man in God's image to human dignity connection.

Our nation's history provides overwhelming evidence that America was birthed upon Judeo-Christian principles. The first act of America's first Congress in 1774 was to ask a minister to open with prayer and to lead Congress in the reading of four chapters of the Bible. In 1776, in approving the Declaration of Independence, our founders acknowledged that all men "are endowed by their Creator with certain unalienable rights ..." and noted that they were relying "on the protection of Divine Providence" in the founding of this country. John Quincy Adams said, "The Declaration of Independence laid the cornerstone of human government upon the first precepts of Christianity."³⁷

Regardless of source, whether religious or philosophical, or the two combined, human dignity means every individual has intrinsic and equal worth.³⁸ Human dignity is another manner of referring to a person's worth, which differs from a person's merit: "human beings do not vary in their dignity or worth. Their dignity or worth is a kind of value that all human beings have equally and essentially."³⁹ Arthur Chaskalson, President of the Constitutional Court of South Africa from 1994 until his retirement as Chief Justice in 2005,⁴⁰ said, "respect for dignity implies respect for the autonomy of each person, and the

'the Old and New Testament teach that all men have rights – that every individual has Rights because as a child of God he is endowed with human dignity.'").

37. J. Randy Forbes, *Obama Is Wrong When He Says We're Not a Judeo-Christian Nation*, U.S. NEWS (May 7, 2009, 3:15 PM), <http://www.usnews.com/opinion/articles/2009/05/07/obama-is-wrong-when-he-says-were-not-a-judeo-christian-nation>.

38. Bedau, *supra* note 30, at 153–56.

39. *Id.* at 153.

40. Mandela made him the first president of the new Constitutional Court in 1994; Chaskalson had served on Mandela's defense team for treason in 1963 and was an ardent opponent of Apartheid. He wrote the opinion abolishing the death penalty. See Rebecca Davis, *Death of a Lion of the Law*, DAILEY MAVERICK, (Dec. 12, 2012, 2:44 AM), http://www.dailymaverick.co.za/article/2012-12-03-death-of-a-lion-of-the-law-arthur-chaskalson/#.VaA_KVzBwXA ("The day after the Constitutional Court was formally opened on 14 February 1995, the 11 green-robed judges heard their first case. Their first ruling was on the unconstitutionality of the death penalty, and they would go on to rule on a host of other vital issues, including the recognition of same-sex marriages and the right of all South Africans to a roof over their head.").

right of everyone not to be devalued as a human being or treated in a degrading or humiliating manner.”⁴¹ Commentators posit an emphasis on human dignity in international law arose from rejecting totalitarianism’s lack of respect and dehumanizing treatment of citizens.⁴²

B. Human Dignity in International Law

Human dignity became connected to human rights as the premier value of the New World Order in response to the atrocities of fascism and Nazism of World War II.⁴³ Governments and human rights groups sought to protect human dignity against the abuses of totalitarian regimes.⁴⁴ As such, international legal texts, such as the United Nations Charter and Universal Declaration on Human Rights, affirm the dignity of all men and women, with the Declaration’s Preamble recognizing the “inherent dignity and . . . the equal and inalienable rights of all members of the human family.”⁴⁵ Article One of the Declaration states: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁴⁶ The United Nations Charter affirmed faith in human rights and dignity and thus required a pledge to promote respect for, and observance of,

41. Arthur Chaskalson, *Human Dignity as a Constitutional Value*, in *THE CONCEPT OF HUMAN DIGNITY IN HUMAN RIGHTS DISCOURSE* 135 (David Kretzmer and Eckart Klein eds., 2002).

42. See Maxine D. Goodman, *In the Holocaust’s Shadow: Can German and American Constitutional Jurisprudence Provide a “New Guarantee” of Human Dignity?*, 4 *BRIT. J. AM. LEGAL STUD.* 303 (2015).

43. *Id.* at 133.

44. Julie Resnick & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 *STAN. L. REV.* 1921, 1939 (2003) (“Our review of the deployment of the term dignity of persons . . . documents.”).

45. G.A. Res. 217 (III), Universal Declaration of Human Rights (Dec. 10, 1948), http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf; MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS*, appendix 7 (2001).

46. *Id.*

human rights and fundamental freedoms.⁴⁷

Other international legal instruments and treaties treat human dignity as a preeminent value underlying human rights, with commentators frequently describing the connection between human dignity and human rights.⁴⁸ Human dignity “furnishes each one of us, whether strong or weak, politically powerful or disenfranchised, competent or inept, and whatever our race, religion, sex, or sexual orientation, with an infeasible moral standing to protest (or to have protested on our behalf) all insidious attempts to degrade our persons.”⁴⁹

In addition to the international community rallying around human dignity as protecting against the abuses of a totalitarian regime, individual nations included the value in their constitutions. Article I of Germany’s Basic Law, adopted by the West German states in 1949, proclaims “the dignity of man is inviolable. To respect and protect it is the duty of all state authority.”⁵⁰ Under German constitutional law, human dignity is not subject to balancing against other rights, such as freedom of expression.⁵¹ Rather, human dignity prevails as the value underlying fundamental rights and supporting the individual’s “free unfolding of personality.”⁵² After World War II, Japan, West Germany, and Italy were among the first to include human dignity in their constitutional documents.⁵³

Nations including France, Canada, Israel, and South Africa now rely heavily on human dignity as a lodestar constitutional value.⁵⁴

47. Glendon, *supra* note 45, at 78.

48. *See id.*

49. Henkin, *supra* note 22, at 48.

50. Ernest Benda, *Fifty Years of German Basic Law, The New Departure for Germany: the Protection of Human Dignity (Article I of the Basic Law)*, 53 S.M.U. L. REV. 443, 443 (2000) (citing Article 1, 1 of the German Constitution).

51. *Id.*

52. James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161 (2004).

53. Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises, and Dangers*, 62 AM. J. COMP. L. 461, 465 (2014).

54. *See* Luis 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 (2012) (describing how other nations’ included human dignity as a constitutional

Guy E. Carmi and Doron Shulztiner describe nations' use of the term in their constitutions, including a comprehensive description of what the term is meant to protect.⁵⁵ In South Africa, the right to human dignity is embedded as a discrete right in the Bill of Rights, with the Constitutional Court affording the right special weight.⁵⁶ As these commentators describe, nations differ both in terms of their reliance on human dignity as a fundamental value in constitutional jurisprudence, as well as on the value's meaning.⁵⁷ As shown below, the United States has developed its own constitutional jurisprudence of human dignity, despite the absence of an explicit guarantee in the United States Constitution.

C. Human Dignity as a Value in United States Constitutional Jurisprudence

Although the United States Constitution does not explicitly use the term human dignity,⁵⁸ the Supreme Court has repeatedly relied on the value, most often linked to the Bill of Rights. In *Miranda v. Arizona*, the Court held that "the constitutional foundation underlying the privilege [Fifth Amendment right against self-incrimination] is the respect a government must accord to the dignity and integrity of its citizens."⁵⁹ And, when describing the role of human dignity in death

value following the international human rights instruments and German constitution).

55. See Shulztiner & Carmi, *supra* note 53.

56. Arthur Chaskalson, *Dignity as a Constitutional Value: A South African Perspective*, 26 AM. U. INT'L L. REV. 1377, 1377 (2011). According to Chaskalson, the Constitutional Court stresses human dignity because of South Africa's history of Apartheid. He quotes this language from a court decision: "Respect for the dignity of all human beings is particularly important in South Africa. For apartheid was a denial of a common humanity. Black people were refused respect and dignity and thereby the dignity of all South Africans was diminished. The new Constitution rejects this past and affirms the equal worth of all South Africans."

57. Shulztiner & Carmi, *supra* note 53.

58. Some state constitutions, including Illinois, Louisiana, and Montana, actually enumerate dignity as protected under their constitutions. MONT. CONST. art II, § 4; LA. CONST. art. I § 3; ILL. CONST. art 1, § 20; see Burt Neuborne, *Forward: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-95 (1989).

59. *Miranda v. Arizona*, 384 U.S. 436, 460 (1996).

penalty jurisprudence under the Eighth Amendment, the Court has said that “even the vilest criminal remains a human being possessed of common human dignity”⁶⁰ The Court has repeatedly proclaimed, “The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”⁶¹

After World War II and the adoption of the Universal Declaration of Human Rights, “the Court embraced dignity as something possessed by individuals,” rather than just states and other entities, relying on the concept in its constitutional interpretation.⁶² Commentators opine it was in response to the war and adoption of international legal norms in the Universal Declaration of Human Rights that the Court “changed the content of U.S. constitutional law to name dignity as a distinct and core value.”⁶³

In 1944, Justice Frank Murphy⁶⁴ used the term “dignity” in his

60. *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (per curiam).

61. *Trop v. Dulles*, 356 U.S. 86 (1958); *Atkins v. Virginia*, 536 U.S. 304, 311 (2001) (quoting *Trop v. Dulles*).

62. Resnick & Suk, *supra* note 45, at 1926, 1939 (“As a result of WWII when legal and political commentary around the world turned to the term dignity to identify rights of personhood . . . Dignity talk in the law of the United States is an example of how U.S. law is influenced by the norms of other nations, by transnational experiences, and by international legal documents.” “Our review of the deployment of the term dignity of persons in the constitutional law of the United States demonstrates that use of the word began during World War II and expanded as the term was embraced in the 1948 Universal Declaration of Human Rights and in other nations’ constitutive legal documents.”).

63. *Id.* at 1941.

64. Justice Murphy was vehemently opposed to discrimination of any type, and his opinions while on the Court were certainly informed by the events in Europe during his tenure on the bench. Commentators link Justice Murphy’s Catholic faith and concerns for labor to his strong interest in and reliance on human dignity. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT’L. L. 655 (2008); Theodore J. St. Antoine, *Essay: Justice Frank Murphy and American Labor Law*, 100 MICH. L. REV. 1900, 1924 (June 2002) (“He brought to the law and the art of judging some eminently worthy values. Among them was an unceasing determination to see realized in the daily lives of ordinary people such basic human rights as freedom of expression, fair and equal treatment, personal dignity, and the capacity to form organizations to promote their political, economic, and social well-being.”). Yet, arguably, the horrors of World War II, in response to which he formed

dissent in *Korematsu v. United States*.⁶⁵ Fred Korematsu was convicted of remaining in a designated military area in violation of the military requirement that persons of Japanese ancestry be excluded from that area.⁶⁶ The Court upheld the exclusion program based on military necessity. Justice Black, writing for the majority, said the Court “could not reject the finding of the military authorities” that the exclusion was necessary.⁶⁷

In his dissenting opinion, Justice Murphy opposed the race-based classification based on human dignity concerns:

To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.⁶⁸

Justice Murphy described the military orders as falling “into the ugly abyss of racism” and as going beyond the brink of constitutional power.⁶⁹ Justice Murphy again called forth the notion of dignity, this time “human dignity,” in his dissent in *Yamashita v. Styer*.⁷⁰ Tomoyuki

the group described herein, also contributed to his inclusion of this value in his jurisprudential decision-making.

65. 323 U.S. 214, 240 (1944). Justice Murphy also dissented in *Screws v. United States*, 325 U.S. 91, 135 (1945) (considering the constitutionality of police officers’ convictions under Section 20 of the Federal Criminal Code) (Justice Murphy stated that by beating an African-American man to death, police had deprived him of the “respect and fair treatment that befits the dignity of man, a dignity recognized and guaranteed by the Constitution.”).

66. *Korematsu*, 323 U.S. at 216. Korematsu’s residence was in San Leandro, California, one of the areas from where all persons of Japanese ancestry were excluded.

67. *Id.* at 219.

68. *Id.* at 240 (Murphy, J., dissenting).

69. Justice Murphy was the first to use the term “racism” in a Supreme Court opinion. *Frank Murphy Hall of Justice*, DETROIT: THE HISTORY AND FUTURE OF THE MOTOR CITY (Dec. 2012), <http://detroit1701.org/Frank%20Murphy%20Hall%20of%20Justice.html>.

70. 327 U.S. 1, 28 (1946).

Yamashita, a general of the Japanese army who was convicted by a military commission of violating laws of war, sought a writ of habeas corpus challenging the jurisdiction and legal authority of the military commission that convicted him. The Court denied the petition for certiorari.

In his dissent, Justice Murphy wrote:

[I]f we are ever to develop an orderly international community based upon a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."⁷¹

Justice Murphy ended his lengthy dissent with another reference to dignity: "While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others."⁷²

After this, human dignity continued to play a role in American constitutional jurisprudence. Several Supreme Court justices have referred to the concept at one time or another, while Justices Murphy,

71. *Yamashita*, 327 U.S. at 29 (Murphy, J., dissenting).

72. *Id.* at 41.

Frankfurter,⁷³ Brennan,⁷⁴ and Kennedy⁷⁵ have given the value the most “air time,”⁷⁶ relying on it to underlie protection against cruel and unusual punishment, privacy rights, and other explicit constitutional guarantees. The more conservative justices have also discussed the value and its role in the nation’s constitutional jurisprudence.⁷⁷

Commentators contend that, generally speaking, in American constitutional jurisprudence, human dignity is most closely tied to liberty; human dignity and liberty allow for individuals to live autonomously, without state interference.⁷⁸ As this Article will address later, many argue that the notion of human dignity as liberty is inconsistent with the Court acknowledging a fundamental right to food security, as this necessitates government interference. Others proclaim the opposite—that liberty cannot

73. In *McNabb v. United States*, Justice Felix Frankfurter used the term dignity in 1943 as part of the rationale for requiring that those who are arrested are taken before the committing authority without delay. 318 U.S. 332, 343 (1943) (“The purpose of this impressively pervasive requirement of criminal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process.”). He also used the term in his concurring opinion in *Glasser v. United States*, 315 U.S. 60, 89 (1942) (Frankfurter, J., concurring) involving a defendant’s Sixth Amendment rights: “Whether their [the Bill of Rights] safeguards of liberty and dignity have been infringed in a particular case depends upon the particular circumstances.”).

74. Justice Brennan, after serving in World War II as an Army JAG, served as a judge in New Jersey courts before joining the Supreme Court in 1956. He was Catholic, as was Justice Frank Murphy, who relied heavily on human dignity in his decision-making. See Deborah A. Roy, *Justice William J. Brennan, Jr., James Wilson, and the Pursuit of Equality and Liberty*, 61 CLEV. ST. L. REV. 665 (2013). According to Leslie Melzer Henry, Brennan “invoked ‘dignity’ in an astounding thirty-nine opinions during his tenure on the Court.” Henry *supra* note 25, at 171. See RAOUL BERGER, *Justice Brennan, ‘Human Dignity,’ and Constitutional Interpretation*; Henkin, *supra* note 22 at 10.; Stephen J. Wermeil, *Essay: Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL OF RTS. J. 223 (1998).

75. One commentator referred to Justice Kennedy as “the dignity whisperer.” Dahlia Lithwick, *An Argument for Dignity*, SLATE (Apr. 28, 2015, 6:16 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2015/04/gay_marriage_arguments_at_supreme_court_anthony_kennedy_on_dignity.html.

76. See Henry, *supra* note 25 (comparing frequency of use of the concept).

77. See *infra* Part III.D.

78. Whitman, *supra* note 52, at 1161.

exist for those who lack food security.⁷⁹

II. Food Insecurity in America, Government Assistance, and the Court's Decisions Regarding Welfare

According to the United States Department of Agriculture, in 2013, 14.3 percent of American households (17.5 million households) were food insecure.⁸⁰ These households “had difficulty at some time during the year providing enough food for all their members due to a lack of resources.”⁸¹ Fourteen percent of households in the United States were food insecure despite welfare and food stamp programs, meant to provide assistance to Americans in need.⁸² Approximately nine percent of these households had children.⁸³ In 2013, “49.1 million Americans lived in food insecure households, including 33.3 million adults and 15.8 million children.”⁸⁴ Present rates of poverty in the United States are higher than in several other industrialized nations.⁸⁵

In terms of reasons for food insecurity, according to the organization, WhyHunger, federal food programs face increasing resource cuts. The organization notes that some who are eligible for food assistance do not receive it, and, at times, the assistance provided is not sufficient to remedy food insecurity.⁸⁶ The organization also notes that circumstances like immigration status and income level can

79. For instance, Franklin D. Roosevelt said, “We have come to a clearer realization of the fact . . . that true individual freedom cannot exist without economic security and independence.” President Franklin D. Roosevelt, State of the Union Message to Congress (January 11, 1944) in THE AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=16518>.

80. *Hunger and Poverty Fact Sheet*, FEEDING AMERICA, <http://www.feedingamerica.org/hunger-in-america/impact-of-hunger/hunger-and-poverty/hunger-and-poverty-fact-sheet.html> (last visited Oct. 7, 2015).

81. *Food & Nutrition Assistance*, U.S. DEP'T OF AGRIC., <http://www.ers.usda.gov/topics/food-nutrition-assistance/.aspx> (last updated June 8, 2015).

82. *Id.*

83. *Hunger and Poverty Fact Sheet*, *supra* note 80.

84. *Id.*

85. See Helen Hershkoff, Forward: *Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 801 (2002).

86. WHYHUNGER, *supra* note 23.

affect an individual's right to assistance.⁸⁷

In 2013, food insecurity varied dramatically from state to state, with the percentage of food insecurity ranging from 8.7 percent in North Dakota to 21.2 percent in Arkansas.⁸⁸ Cities also see a great disparity in food insecurity, with Memphis, San Antonio, Washington, D.C., and San Francisco currently among the poorest American cities; in Memphis, twenty-six percent of its residents had been food insecure sometime during 2014.⁸⁹ Regardless of location, across the board, the nation's children suffer the most from food insecurity. During the 2012 to 2013 school year, fifty-one percent of pre-Kindergarten through twelfth grade students were eligible to receive free and reduced-price lunches, illustrating the striking level of poverty among this population.⁹⁰

The history of welfare in the United States reflects, at best, the lack of a national commitment to the plight of the poor and, at worst, a steady decline during the past fifty years in our commitment to caring for the needy. Welfare programs to provide cash assistance to the poor in the United States came about after the Great Depression, when the government undertook to better assist families with the necessities of food and shelter. In advancing his New Deal agenda, President Franklin Delano Roosevelt ("FDR") said, "If, as our Constitution tells us, our Federal Government was established among other things, to 'promote general welfare,' it is our plain duty to provide for that security upon which welfare depends."⁹¹ Congress enacted the Social Security Act in 1935 to provide unemployment and

87. WHYHUNGER, *supra* note 23.

88. Alex Henderson, *10 Cities Where an Appalling number of Americans are Starving*, SALON (Jan. 10, 2015, 5:00 AM), http://www.salon.com/2015/01/10/10_cities_where_an_appalling_number_of_americans.

89. *Id.*

90. Lyndsey Layton, *Majority of U.S. Public School Students are in Poverty*, WASH. POST (Jan. 16, 2015) https://www.washingtonpost.com/local/education/majority-of-us-public-school-students-are-in-poverty/2015/01/15/df7171d0-9ce9-11e4-a7ee-526210d665b4_story.html.

91. President Franklin Delano Roosevelt, Message to Congress on the Objectives and Accomplishments of the Administration, (June 8, 1934) in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=14690>.

old-age insurance, maternal and general health programs, and general economic assistance for the needy.⁹² The main purpose of these categorical assistance programs was to encourage state governments to provide “new and greatly enhanced welfare programs.”⁹³ Title IV-A of the Social Security Act established Aid for Families with Dependent Children (“AFDC”), a joint federal-state program. It was created to provide economic support for needy, dependent children and those who care for them.⁹⁴

During the period from adoption of AFDC through the 1960s, the number of families receiving support increased dramatically, from 162,000 to 1,875,000.⁹⁵ Critics challenged existing programs for not providing job training and opportunities. Accordingly, in May 1964, President Lyndon B. Johnson declared a “War on Poverty,” with the Economic Opportunity Act to provide job training and education. Johnson said, “We have a right to expect a job to provide food for our families, a roof over their head, clothes for their body and with your help and with God’s help, we will have it in America!”⁹⁶

Around the same time, Congress passed the first law creating a permanent food stamp program,⁹⁷ which allows eligible low-income

92. SUNSTEIN, *supra* note 11, at 51.

93. Shapiro v. Thompson, 394 U.S. 618, 644 (1969) (Warren, J., dissenting).

94. AFDC reimburses each participating state with a percentage of the funds it expends.

95. Eugene M. Lewit, Donna L. Terman & Richard E. Behrman, *Children and Poverty: Analysis & Recommendations*, 7 J. CHILD. & POVERTY (1997), <http://www.princeton.edu/futureofchildren/publications/journals/article/index.xml?journalid=53&articleid=284§ionid=1869>.

96. President Lyndon Baines Johnson, Remarks at Cumberland, Maryland City Hall (May 7, 1964), in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=26223>; see also WAR ON POVERTY (PBS 1998), <http://www.pbs.org/wgbh/americanexperience/features/bonus-video/presidents-economy-lbj/>.

97. *A Short History of SNAP*, U.S. DEP’T OF AGRIC. FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/short-history-snap> (last visited Oct. 2, 2015) (“On Jan. 31, 1964, President Johnson requested Congress to pass legislation making the FSP permanent. Secretary Orville Freeman submitted proposed legislation to establish a permanent FSP on April 17, 1964.”).

individuals to purchase food.⁹⁸ The food stamp program, despite sustaining significant funding cuts and then rebounding from those cuts with changing political climates, serves as one of the most enduring and effective parts of the “social safety net.”⁹⁹ It has at times served as the “gap filler” where other programs have failed; of those who receive food stamps, eighty percent receive other types of benefits as well.¹⁰⁰ Today, the Supplemental Nutrition Assistance Program (“SNAP”) continues to provide monthly benefits for eligible families.

Yet, during the 1970s, with growing inflation, the rate of benefits decreased significantly and, according to Cass Sunstein, “Nixon’s appointees stopped an unmistakable trend in the direction of recognizing social and economic rights.”¹⁰¹ In the 1980s the welfare program came under increased, bipartisan criticism for its inability to properly and effectively assist those in need.¹⁰² The Reagan Administration expressed disdain for welfare programs not linked to jobs. In describing his desired welfare reforms, which would emphasize work and jobs, Reagan quoted President Roosevelt from his State of the Union address on January 4, 1935, warning that welfare was “a narcotic, a subtle destroyer of the human spirit” and

98. *A Short History of SNAP*, U.S. DEP’T OF AGRIC. FOOD AND NUTRITION SERVICE, <http://www.fns.usda.gov/snap/short-history-snap> (last visited Oct. 2, 2015) (“On Jan. 31, 1964, President Johnson requested Congress to pass legislation making the FSP permanent. Secretary Orville Freeman submitted proposed legislation to establish a permanent FSP on April 17, 1964.”). The program’s mission is “providing relevant, vital help to boost nutrition, economic security and health among seniors, children, people with disabilities, and unemployed or low-income working families.”

99. R. SHEP MELNICK, *BETWEEN THE LINES, INTERPRETING WELFARE RIGHTS* 183 (1994).

100. *Id.* at 185.

101. SUNSTEIN, *supra* note 11, at 169 (describing Nixon as “the anti-Roosevelt” in terms of social and economic rights). Sunstein also describes how Nixon’s Supreme Court appointee, Warren Burger, and Burger’s Court, “nipped these developments [social and economic rights] in the bud, and by 1975 the whole idea of minimum welfare guarantees had become implausible.”

102. *Id.*

that “we must now escape the spider’s web of dependency.”¹⁰³

In the first two years of Reagan’s presidency, the food stamp program sustained \$6 billion in budget cuts.¹⁰⁴ Reagan believed in a welfare system that imposed norms of work and certain family values, whereby a man living in a household should provide for the family as husband and father, rather than allowing government support for those in other types of family and household relationships.¹⁰⁵

In 1996, President Bill Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”), abolishing the AFDC and presumably “reforming” the welfare state.¹⁰⁶ Clinton stated he wanted to “end welfare as we know it.”¹⁰⁷ At the time, most of those relying on the welfare cash benefits were women with children, and the idea was that because of the healthy economy, those women could find jobs.¹⁰⁸ The statute replaced existing programs with a cash welfare block grant called the Temporary Assistance for Needy Families (“TANF”) program.¹⁰⁹ Some of the goals were to end welfare as an entitlement program,¹¹⁰ require recipients to work, place a lifetime limit of five years on cash benefits, discourage out-of-wedlock births, and enhance enforcement of child support.¹¹¹

The program gave states fixed amounts (limited to five years) in

103. Robert Pear, *Reagan Seeks Welfare Plan to Free Poor From Government Dependency*, N.Y. TIMES, Feb. 5, 1986, <http://www.nytimes.com/1986/02/05/us/reagan-seeks-welfare-plan-to-free-poor-from-government-dependency.html>.

104. Melnick, *supra* note 99, at 230.

105. *Id.* at 129.

106. *Cf.* Peter Edelman, *The Worst Thing Clinton Has Done*, ATLANTIC, Mar. 1997, <http://www.theatlantic.com/magazine/archive/1997/03/sun3/the-worst-thing-bill-clinton-has-done/376797/>.

107. *Id.*

108. Ed Koch, *It’s Time to Reexamine The Welfare Reform Law of 1996*, HUFFINGTON POST, (Apr. 19, 2012), http://www.huffingtonpost.com/ed-koch/Welfare-reform_b_1428284.html.

109. *Id.*

110. See Jennifer E.K. Kendrex, *Punishing the Poor Through Welfare Reform: Cruel and Unusual?* 64 DUKE L.J. ONLINE 121 (2015).

111. *Id.*

the form of block grants designed to establish programs of temporary assistance.¹¹² The act does not require states to provide any specific assistance to the poor.¹¹³ Instead, it added time limits and work rules and capped federal spending. Critics claimed that the reforms allowed states to stop providing cash assistance to the poor, most of whom could not find jobs because they were competing with skilled and semi-skilled middle-class workers, thus exacerbating the nation's poverty challenges.¹¹⁴ Those who supported the new program praised the decreased dependency by the needy.¹¹⁵

Many contend that the end of AFDC, along with the 2007 to 2009 Great Recession, worsened the plight of America's poor.¹¹⁶ Present rates of poverty in the United States are higher than in several other industrialized nations.¹¹⁷ Several recent studies find that as many as one in every four low-income single mothers is unemployed and lacking cash aid—approximately four million women and children.¹¹⁸

The Supreme Court's role with regard to Congress and these programs in terms of advancing human dignity concerns related to food security, though inconsistent, has generally favored the government, against the interests of the poor and food insecure. Initially, in the late 1960s and early 1970s, the Supreme Court appeared willing to acknowledge a fundamental right to food security. In *Goldberg v. Kelly*,¹¹⁹ *King v. Smith*,¹²⁰ and *Shapiro v.*

112. Edelman, *supra* note 106.

113. Again, as described above, the poor can still turn to food stamps and Medicaid for some relief.

114. *Id.*

115. Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 7, 2012), http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html?_r=1.

116. See Hershkoff, *supra* note 87, at 801 ("Since 1996, . . . about two and a half million former welfare recipients have entered the labor market, earning, on average, only seven dollars an hour for a thirty hour work week—yielding an income below that of the poverty level for a household of two or more individuals.").

117. *Id.*

118. DeParle, *supra* note 115.

119. 397 U.S. 254 (1970).

120. 392 U.S. 309 (1968) (deciding Alabama's "substitute father" regulation, which denied AFDC benefits to the children of a mother who "cohabits" in or outside

Thompson,¹²¹ the Court ruled in favor of welfare recipients in cases challenging provisions that would lessen or stop their benefits. For instance, in *Goldberg*, petitioners challenged the procedures New York used to terminate mothers' welfare benefits.¹²² Under that state's law, welfare benefits could be denied based on a caseworker's mere doubts as to a recipient's eligibility.¹²³ A recipient could seek review of the caseworker's justifications by way of a hearing, but only after the state had terminated the benefits.¹²⁴ The Court held that because welfare benefits were like property, the government had to provide due process before taking them away.¹²⁵

Despite these early cases, the early 1970s showed a weakening of Supreme Court support for rights of welfare recipients, a change scholars attribute to "the rising hegemony of the 'moral majority,' which argued that entitlement to basic rights should be predicated on behavioral prescriptions unrelated to actual need."¹²⁶ In *Dandridge v. Williams*, the Court rejected the notion that the "maximum grant" provision of Maryland's AFDC, by which families, no matter the number of children, could receive only a certain amount of benefits, violated the Equal Protection Clause.¹²⁷ The Court applied a rational basis test to the constitutional analysis rather than treating the classification (families with greater numbers of children) as a

her home with any single or married able-bodied man, was inconsistent with the Social Security Act; the Court did not decide the constitutionality of the regulation.).

121. 394 U.S. 618 (1969) (striking down durational residency requirements as part of welfare benefits. Specifically, the Court addressed the 1992 part of the California statute regarding Aide to Families with Dependent Children limiting maximum welfare benefits during a resident's first year of residency in California to the amount the resident was receiving in his prior residence. For the California residents who sued, the statute resulted in substantially lower welfare benefits than they would have received, absent the statutory provision. The Court held the statute unconstitutional because it infringed on the resident's "right to travel," a right "firmly embedded in our jurisprudence.").

122. *Goldberg*, 397 U.S. at 257.

123. *Id.* at 258.

124. *Id.* at 256.

125. *Id.*

126. Bridgette Baldwin, *In Supreme Judgment of the Poor: The Role of the United States Supreme Court in Welfare Law and Policy*, 23 WIS. J.L. GENDER & SOC'Y 1, 13 (2008).

127. 397 U.S. 471, 486 (1970).

protected or suspect class requiring strict scrutiny standard of review and a compelling state interest; thus, the Court rejected the argument that the cap violated a fundamental right to welfare.¹²⁸ In their dissent, Justices Brennan and Marshall chided the majority for using the same constitutional test used for business regulations for “the literally vital interests of a powerless minority—poor families without breadwinners”¹²⁹

A decade later, the Court again failed to affirm the poor’s human dignity in *Harris v. McRae*.¹³⁰ In *Harris*, a class of pregnant women sued, claiming the Hyde Amendment of the Medicaid program violated the equal protection guarantees of the Due Process Clause by denying them funding for medically necessary abortions.¹³¹ At issue was whether the Medicaid program, which subsidizes a woman’s medically necessary services, could fail to subsidize a medically necessary abortion.¹³² The Court rejected the plaintiffs’ constitutional claim, holding that due process does not confer entitlement to federal funds for the protected right to have an abortion.¹³³ The Court held as follows:

[R]egardless of whether the freedom of a woman to choose to terminate her pregnancy for health reasons lies at the core or the periphery of the due process liberty recognized in *Wade*, it simply does not follow that a woman’s freedom of choice carries with it a constitutional entitlement to the financial resources to avail herself of the full range of protected choices.¹³⁴

While human dignity prevailed in allowing women the freedom to

128. *Williams*, 397 U.S. at 487 (“By the early 1970s, however, the Court had rejected the view that the federal Constitution guarantees any right to minimal subsistence, declaring instead that ‘the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.’”).

129. *Id.* at 520 (Brennan, J., dissenting).

130. 448 U.S. 297 (1980).

131. *Id.* at 332.

132. *Id.* at 301.

133. *Id.* at 318.

134. *Id.* at 316.

choose whether to terminate a pregnancy, human dignity was outweighed when the government had to get involved by paying for that freedom.

Justice Marshall, dissenting in *McRae*, referred to the Hyde Amendment as “the product of an effort to deny to the poor the constitutional right recognized in *Roe v. Wade*.”¹³⁵ Justice Marshall linked the outcome to the Court’s “unwillingness to apply the constraints of the Constitution to decisions involving the expenditure of governmental funds.”¹³⁶ While not using the term human dignity, Justice Marshall reflected on a welfare recipient’s dilemma to either have the child or obtain a “back-alley” abortion.¹³⁷ Justice Blackmun, in his dissent, described as “condescension” the Court’s statement that a Medicare recipient needing a medically necessary abortion “may go elsewhere for her abortion.”¹³⁸

In the late 1980s, the Court continued to rule in favor of the government in a series of cases in which petitioners challenged the constitutionality of certain eligibility requirements in welfare statutes.¹³⁹ In *Luckhard v. Reed*, the Court ruled that personal injury awards should be counted as income for purposes of determining welfare eligibility.¹⁴⁰ In that case, the petitioner received a lump sum

135. *McRae*, 448 U.S. at 338 (Marshall, J., dissenting).

136. *Id.* at 347.

137. *Id.* at 346.

138. *Id.* at 348 (Blackmun, J., dissenting).

139. See *Lyng v. Int’l Union, UAW*, 485 U.S. 360 (1988); *Bowen v. Gilliard*, 483 U.S. 587 (1987) (The Court used a rational basis analysis to affirm constitutionality of the provision at issue, which authorized AFDC to require that a family’s eligibility for benefits take into account, with certain exceptions, the income of all parents, brothers, and sisters living in the same home, which would include child support payments for one of the children from a non-custodial parent.). In his dissenting opinion, Justice Brennan discusses the government’s infringement of a fundamental right: “the Government “‘directly and substantially’ interfere[s] with family living arrangements, and thereby burden[s] a fundamental right. The infringement is direct, because a child whose mother needs AFDC cannot escape being required to choose between living with the mother and being supported by the father. It is substantial because the consequence of that choice is damage to a relationship between parent and child.” *Id.* at 624.

140. *Luckhard v. Reed*, 481 U.S. 368, 381 (1987).

personal injury payment, which disqualified her from AFDC funds.¹⁴¹ If the government had treated the payment as an asset, the petitioner would have lost benefits for only the month in which she received the award.¹⁴² The Court affirmed the state's treatment of the award as income, thus disqualifying the permanently disabled mother from AFDC benefits.¹⁴³ The Court also ruled against welfare benefits in *Lynn v. UAW*, upholding the state's denial of food stamps to a striking employee who was losing income because of the strike.¹⁴⁴ The Court agreed with the state that participation in the strike made petitioner ineligible for food stamps.¹⁴⁵

In 1995, the Court in *Anderson v. Edwards*, upheld a California provision of the AFDC that groups into a single "assistance unit" all needy children living in the same household, including non-siblings, if one adult cares for them.¹⁴⁶ Petitioner, who was caring for her minor granddaughter and two grandnieces in the same household, sued because the California rule resulted in a \$200.00 decrease in her AFDC benefit (she had a higher amount of benefits when caring for only her granddaughter).¹⁴⁷ The Ninth Circuit Court of Appeals ruled the California provision violated federal law, but the Supreme Court disagreed.¹⁴⁸

As shown, human dignity has proven frail as a constitutional value in cases involving the government's provision of economic assistance. This is so despite the strong ties between liberty, which the Court has routinely ruled to protect, and food security. Cass Sunstein highlights FDR's vision of a second Bill of Rights, premised on the notion that "necessitous men are not free men," saying: "[u]nlike the Constitution's framers, 'we have come to a clear realization of the fact that true individual freedom cannot exist

141. *Reed*, 481 U.S. at 373.

142. *Id.* at 371.

143. *Id.* at 383.

144. 485 U.S. 360, 369 (1988).

145. *Id.*

146. *Anderson v. Edwards*, 514 U.S. 143, 145 (1995).

147. *Id.* at 148.

148. *Id.* at 149.

without economic security and independence.”¹⁴⁹ In light of the Court’s advancement of human dignity in *Obergefell*, reasons for the Court’s failure to acknowledge a right to food security have become increasingly fragile.

III. Five Reasons the United States Supreme Court Should Establish a Fundamental Right to Food Security

The Court should affirm human dignity in welfare rights cases by acknowledging a fundamental right to food security under the Fourteenth Amendment Due Process or Equal Protection Clauses. The Court’s existing jurisprudence regarding liberty and human dignity, and international and foreign legal standards relating to food security evidences this conclusion. This section provides five arguments as to why the Court should acknowledge this right; each argument also provides a response to the counterargument as to why the Court has not and should not recognize such a right.

A. The Positive/Negative Rights Distinction Lacks Merit in View of Supreme Court Human Dignity Jurisprudence.

In his dissenting opinion in *Obergefell*, Justice Thomas emphasizes his position that human dignity serves as a constitutional value with regard to only negative rights: “Our Constitution—like the Declaration of Independence before it—was predicated on a simple truth: One’s liberty, not to mention one’s dignity, was something to be shielded from—not provided by—the State.”¹⁵⁰

Justice Thomas linked the foundational principles of this country, as reflected in the Declaration of Independence’s “all men are created equal” proclamation, to its religious underpinnings that all men are created in the divine image “and therefore [are] of inherent worth.”¹⁵¹

149. SUNSTEIN, *supra* note 11.

150. *Obergefell*, 135 U.S. at 2639 (Thomas, J., dissenting).

151. *Id.*

Justice Thomas then concluded that because of all citizens' innate human dignity, the government cannot advance nor impede the value.¹⁵²

Commentators posit the Court relies on human dignity only to affirm negative rights, not positive ones that create obligations on the part of the State.¹⁵³ One commentator describes this distinction as follows: "[n]egative rights comprise defensive claims against invasion by the state; the citizen can assert a negative right against the government, ... positive rights extend a sword, entailing affirmative claims that can be used to compel the state to afford substantive goods or services" based on the Constitution.¹⁵⁴

Despite the distinction, which many commentators reject as groundless with regard to a fundamental right to food security,¹⁵⁵ this argument lacks merit for several reasons. First, the government's commitment already exists. Our nation has already obligated itself to provide assistance to families in need, through programs such as TANF, WIC,¹⁵⁶ and food stamps. Arguably, the Court's present role is to ensure the government does not unfairly and without due process deprive citizens of access to these resources.¹⁵⁷ Yet, for the

152. *Obergefell*, 135 U.S. at 2639 (Thomas, J., dissenting).

153. See Whitman, *supra* note 52, at 1161.

154. See Hershkoff, *supra* note 85.

155. *Id.* at 810 (questioning the validity of this distinction in view of constitutional challenges involving, for instance, denial of a parade permit; the commentator asks whether this challenge involves interference with a right or right to provision of police and other governmental services); Krasnov, *supra* note 11, at 737.

156. The United States Department of Agriculture Food and Nutrition Service describes WIC as a nutrition program for women, infants, and children ("WIC") that "provides Federal grants to States for supplemental foods, health care referrals, and nutrition education for low-income pregnant, breastfeeding, and non-breastfeeding postpartum women, and to infants and children up to age five who are found to be at nutritional risk." *Women, Infants, and Children (WIC)*, U.S. DEP'T OF AGRIC., <http://www.fns.usda.gov/wic/women-infants-and-children-wic> (last visited Oct. 5, 2015).

157. See Kendrex, *supra* note 110, at 138 ("Neither Congress nor the states can deny welfare benefits in a way that violates an individual's freedom of association or freedom to travel, and welfare cannot be denied without a full and fair hearing. Likewise, welfare cannot be instituted or revoked in a way that violates the Eighth Amendment.").

past forty-five years, the Court has routinely ruled in favor of the government and against the poor.

With regard to obligations toward the poor, the Court has, in the past, relied on human dignity to rule in favor of a fundamental right to assistance under the Fourteenth Amendment Due Process and Equal Protection Clauses. In *Goldberg v. Kelly*, Justice Brennan linked the petitioner's constitutional claim to living with human dignity,¹⁵⁸ stating, "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders."¹⁵⁹ Justice Brennan went on to describe the impact of the state's failure to provide public assistance.

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹⁶⁰

Goldberg,¹⁶¹ *Shapiro*,¹⁶² *United States Department of Agriculture v. Moreno*,¹⁶³ and *Boddie v. Connecticut*¹⁶⁴ reflect the Court embracing

158. *Goldberg v. Kelly*, 397 U.S. 254, 264–65 (1970).

159. *Id.*

160. *Id.*

161. *Goldberg*, 397 U.S. 254 (1970).

162. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

163. 413 U.S. 528, 543 (1973) (holding an amendment to the Food Stamp Act that excluded from eligibility any household containing someone unrelated to the others in the household, and thus discriminated against "hippies," violated the Fifth Amendment).

164. 401 U.S. 371, 382 (1971) (holding that due process prohibits the State from denying opportunity to dissolve a marriage because of inability to pay courts costs from indigence).

economic rights regarding the poor.¹⁶⁵ In *Goldberg*, Justice Brennan commenced a path in which the Court, looking through the due process lens, relied on a national “commitment” to assure the human dignity of all citizens by providing a minimum standard of life.¹⁶⁶

Additionally, in other circumstances, the Supreme Court has relied on human dignity to satisfy constitutional guarantees, even when doing so requires an affirmative obligation on the government’s part. For instance, in Eighth Amendment jurisprudence with regard to prison conditions, the Court has ruled that the government must take steps to ensure the fair treatment of incarcerated individuals.¹⁶⁷ As Justice Kennedy said in *Brown v. Plata*, a prison overcrowding case involving inmates’ claims of inadequate health care: “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.”¹⁶⁸ Accordingly, once the government takes on the obligation to incarcerate, it must do so fairly based largely on human dignity concerns.

Public schooling provides another example. In *Brown v. Board of Education*, the Court sought to advance the human dignity of African-American children by striking down the “separate but equal” doctrine.¹⁶⁹ The Court never used the term human dignity; yet, the Court emphasized the demeaning impact on African-American children of having to attend a separate school from their white counterparts: “To separate them from others of a similar age and qualification solely because of their race generates a feeling of insecurity as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”¹⁷⁰ This ruling

165. SUNSTEIN, *supra* note 11, at 159–62 (“By the late 1960s, the Court seemed to be moving toward recognition of a robust set of social and economic rights.”).

166. *Goldberg*, 397 U.S. at 265 (“From its founding, the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.”).

167. *Brown v. Plata*, 131 S. Ct. 1910, 1929 (2011).

168. *Id.* at 1928.

169. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *see Plessy v. Ferguson*, 163 U.S. 537 (1896).

170. *Brown*, 347 U.S. at 494.

created an affirmative obligation on the government's part to ensure the children's access to equal schools: "Today, education is perhaps the most important function of state and local governments ... such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."¹⁷¹ As Cass Sunstein notes, many of our "negative rights" cost the government money and require the government's affirmative steps.¹⁷²

In the 1960s, under President Johnson, the Government commenced an "unconditional" War on Poverty, with state and the federal government undertaking programs to provide resources for the needy.¹⁷³ Arguably, as with public education, Social Security, Medicare, and conditions on incarceration, the Court's current role is to strike down government attempts to unfairly interfere with individuals' access to the assistance (like denying benefits without a hearing). However, the welfare cases of the past fifty years reflect the Court doing just the opposite: affirming the government's attempts to lessen and chip away at access to government resources.¹⁷⁴

B. The Court's Conception of Human Dignity, with its Strong Ties to Liberty is Consistent with a Right to Food Security.

Liberty enjoys a paramount role in our constitutional jurisprudence based on the Founding Fathers' distrust of government and need to ensure against tyranny and government intrusion.¹⁷⁵ Many argue that since liberty serves as this nation's lodestar value, as

171. *Brown*, 347 U.S. at 493.

172. SUNSTEIN, *supra* note 11, at 200.

173. The War on Poverty was part of President Lyndon Johnson's "Great Society." President Lyndon B. Johnson, Annual Message to Congress on the State of the Union (Jan. 8, 1964), <http://www.presidency.ucsb.edu/ws/?pid=26787>.

174. *See infra* Part III.

175. Edward Eberle, in one of his many comprehensive articles comparing Germany and the U.S., summarizes the key difference between the two nations' constitutional jurisprudence as "the vision of the Constitution they are pursuing, an American constitution of liberty as compared to a German constitution of dignity." Edward J. Eberle, *Equality in Germany and the United States*, 10 S.D. INT'L L.J. 63, 120 (2008).

opposed to human dignity, the preeminent value in other nations,¹⁷⁶ the Court's reliance on human dignity is limited to those instances that involve freedom from government interference and affirm privacy and autonomy. As Neomi Rao, who has written extensively on the contours and various meanings of human dignity, explains, "The positive, communitarian dignity at the heart of the welfare state is not the prevailing one in the United States. In American political and legal discourse, dignity is primarily associated with individual rights, a classical liberal understanding of freedom from interference."¹⁷⁷

Some argue that economic rights are inconsistent with civil rights and liberty.¹⁷⁸ For instance, the Reagan administration¹⁷⁹ sought to "recast the vocabulary of the human rights debate" to eliminate economic rights.¹⁸⁰ The administration posited that human rights include "only 'political rights and civil liberties.'"¹⁸¹ According to those who hold this view, "by recognizing economic rights, the government 'waters down' civil and political rights and undermines individual liberty."¹⁸²

However, as with the Patient Protection and Affordable Care Act,¹⁸³ Social Security, Medicare, and public schooling, human dignity

176. See Goodman, *supra* note 42 (comparing German and American notions of human dignity in constitutional jurisprudence); see Marc Chase McAllister, *Human Dignity and Individual Liberty in Germany and the United States as Examined Through Each Country's Leading Abortion Case*, 11 TULSA J. COMP. & INT'L L.J. 491, 491 (2004) (positing that securing civil liberties, not protecting human dignity, is the lodestar value of the American Constitution).

177. Neomi Rao, *American Dignity and Healthcare Reform*, 35 HARV. J.L. PUB. POL'Y 171, 174 (2013), http://www.harvard-jlpp.com/wp-content/uploads/2013/10/35_1_171_Rao.pdf.

178. Krasnov, *supra* note 11, at 756 (citing Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: the Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365, 385 (1990)).

179. Ronald Reagan was President from January 1981 to January 1989.

180. WILLIAM F. FELICE, *THE GLOBAL NEW DEAL: ECONOMIC AND SOCIAL HUMAN RIGHTS IN WORLD POLITICS* 238 (2010).

181. *Id.*

182. Krasnov, *supra* note 11, at 745.

183. Congress passed the Affordable Care Act, which President Obama then signed into law on March 23, 2010. On June 28, 2012, the Supreme Court upheld key

as liberty can certainly coexist with (and be enhanced by) the government's provision of resources. Many argue the government's provision of health care/insurance enhances liberty, just as public education provides freedom and opportunity to those who partake of it.¹⁸⁴ As FDR said, with regard to his "Second Bill of Rights,"¹⁸⁵ and the inadequacy of the first Bill of Rights, "We have come to a clearer realization of the fact ... that true individual freedom cannot exist without economic security and independence."¹⁸⁶ Arguably, the 14.7 million children living in poverty in the United States lack the same freedom and opportunities to participate in democracy as their counterparts who are food secure or enjoy "freedom from want."¹⁸⁷

Regarding the differences between European and American notions of human dignity, commentators describe European nations' conception of human dignity as advancing the free unfolding of personality—the individual's right to develop and flourish.¹⁸⁸ In Germany and other nations, this right to flourish necessitates the government providing the basics of education, work, and food.¹⁸⁹ In Germany, the *Sozialstaat*, or social state principle, along with the promise of human dignity obligate the state to act on behalf of its citizens to secure their welfare and freedom.¹⁹⁰

provisions of the health care law. 42 U.S.C. § 300gg-11 (2010), <http://housedocs.house.gov/energycommerce/ppacacon.pdf>.

184. See SUNSTEIN, *supra* note 11, at 217–18.

185. *Id.*

186. FDR's third freedom, from his famous "Four Freedoms" speech, was freedom from want: "economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world." President Franklin D. Roosevelt, Annual Message to Congress on the State of the Union (Jan. 6, 1941), <http://www.fdrlibrary.marist.edu/pdfs/fftext.pdf>.

187. *Goldberg*, 397 U.S. at 265 (1970) (Justice Brennan expressly tied welfare and providing for those in need to "securing the Blessings of Liberty.").

188. Edward J. Eberle, *Human Dignity, Privacy, and Personality in German and American Constitutional Law*, 1997 UTAH L. REV. 963, 966 (1997).

189. *See id.*

190. Human dignity arises from Article 1 of the Basic Law and the social state principle arises out of Article 20, which provides at section (1): "The Federal Republic of Germany is a democratic and social federal state." DEUTSCHER BUNDESTAG, BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY 27 (2012), https://www.bundestag.de/blob/284870/ce0d03414872b427e57fccb703634dcd/basic_law-data.pdf.

The German Constitutional Court (“GCC”) has held that human dignity, with other constitutional guarantees, “imposes an obligation on the state to provide at least minimal subsistence to every individual.”¹⁹¹ The GCC has used the promise of human dignity “to give meaning to the ‘existential minimum’ of social welfare in the German Basic Law, by which society is obliged to provide everyone with the socioeconomic conditions adequate for a dignified existence.”¹⁹²

Fundamentally, the *Sozialstaat* obligates the state to act on behalf of its citizens to secure their dignity, welfare, and freedom. Certainly the obligation to enact social welfare measures is part of this. But so is the idea that the state has a moral duty to act on behalf of its citizens over a wide range of measures such as education, protection of human life, human security, and achievement of social justice. Further, the state is to respect and guarantee individual freedom and protect against violations of personal rights. The proactive duties associated with the state reflect a vision of man as not just an isolated, sovereign individual, but a person bound to, and defined within, a community. The idea of *Sozialstaat* obligates the state to create and maintain necessary social conditions so that man can thrive.¹⁹³

Thus, the German idea of freedom suggests freedom *with* help from the government, rather than freedom *from* the government.¹⁹⁴ As Erin Daly explains the GCC’s interpretation of human dignity and the social state principle: “dignity means that people must have some control over their lives, must not be forced by circumstance to devote their lives to finding food or protection from the elements.”¹⁹⁵

The GCC’s *Hartz IV* judgment illustrates the *Sozialstaat* principle. In *Hartz IV*, the GCC ruled the federal legislature had failed to properly determine social welfare benefits based on the legislature’s

191. McCrudden, *supra* note 64.

192. Katherine G. Young, *The Minimum Core of Economic and Social Rights*, 33 YALE J. INT’L L. 113, 134 (2008).

193. Edward J. Eberle, *The German Idea of Freedom*, 10 OR. REV. INT’L L. 1, 52–53 (2008).

194. *Id.*

195. ERIN DALY, DIGNITY RIGHTS 155 (2013).

lack of underlying statistical investigation.¹⁹⁶ In reaching its decision, the GCC relied on the guarantee of human dignity, which provides an enforceable right to a subsistence level of benefits. This right “guarantees the whole subsistence minimum by a uniform rights guarantee[,] which encompasses both the physical existence of the individual that is food, clothing, household goods . . . and a minimum of participation in social, cultural and political life.”¹⁹⁷ Again, the state is not *giving* people dignity, but “merely enables every individual to lead a life that is consistent with human dignity, and uphold[s] the possibility of self-determination and autonomy.”¹⁹⁸

American constitutional jurisprudence reflects a strong liberty component tied to human dignity, where state interference is a catalyst for dignity concerns, as in cases involving the right to choose (autonomy), and right to privacy (right to be left alone).¹⁹⁹ In *Roe v. Wade*²⁰⁰ and the other cases involving abortion, the Court emphasized the right to choose. In 1992, in revisiting its abortion jurisprudence from *Roe v. Wade*, the Court in *Planned Parenthood v. Casey*,²⁰¹ described a woman’s right to choose:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, its meaning, of the universe, and of the mystery of human life.²⁰²

196. See Stefanie Egidy, Casenote, *The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Constitutional Court*, VOL 12, NO. 11 GERMAN L.J. 1961 (2011).

197. *Hartz IV* 125 BVerfGE 175 (2010); DONALD P. KOMMERS AND RUSSELL A. MILLER, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 50 (3d ed. 2012).

198. *Id.* at 1970.

199. KOMMERS AND MILLER, *supra* note 197, at 1970.

200. 410 U.S. 113 (1973).

201. 505 U.S. 833 (1992) (plurality opinion) (reaffirming *Roe*’s basic holding, yet holding the legislature could constitutionally limit the right to abortion).

202. *Id.* at 851 (plurality opinion).

In *Casey*, Justice Stevens, concurring in part and dissenting in part in the opinion, described a woman's "authority" to choose whether to have an abortion as "an element of basic human dignity."²⁰³ Commentators note the "intertwining nature of dignity, liberty, and privacy"²⁰⁴ in these cases.

Our existing constitutional jurisprudence in criminal law,²⁰⁵ racial and gender discrimination,²⁰⁶ free speech,²⁰⁷ and right to marriage equality²⁰⁸ all reflect a conception of human dignity aligned with liberty as allowing the individual to flourish within society, not despite society. For instance, in *Cohen v. California*, the Court overturned Paul Cohen's arrest for wearing a jacket that said "f**k the draft."²⁰⁹ Justice Harlan noted the purpose of preserving human dignity in striking down the government's case.²¹⁰ Citing the concurring opinion by Justice Brandeis in *Whitney v. California*,²¹¹ Justice Harlan noted that freedom of expression "will ultimately produce a more capable citizenry and more perfect polity and . . . no other approach would comport with the premise of individual dignity

203. *Casey*, 505 U.S. at 916 (Stevens, J., concurring in part, dissenting in part).

204. Daly, *supra* note 179; see Rao, *supra* note 32, at 204 ("Individual liberty and freedom from interference emphasize the primacy of the individual, a being who chooses his own life. When courts invoke dignity in the context of holding off the government, they are invoking the idea that dignity rests in individual agency, the ability to choose without state interference.").

205. See *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense.").

206. See *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (noting the "deprivation of personal dignity that surely accompanies equal access to public establishments" (quoting *Heart of Atlanta Hotel, Inc. v. U.S.*, 379 U.S. 241, 250 (1964))).

207. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 503 (1984) ("The First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole.").

208. See *United States v. Windsor*, 133 S. Ct. 2675, 2689 (2013).

209. *Cohen v. California*, 403 U.S. 15, 26 (1971).

210. *Id.* at 24.

211. 74 U.S. 357, 375–77 (1927).

and choice upon which our political system rests.”²¹²

In *Roberts v. United States Jaycees*, a gender discrimination case, Justice Brennan described the effect of discrimination on the individual’s ability to thrive in society: “It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.”²¹³ In these cases, the Court protected an interest much like the European free unfolding of personality, an interest that involves an individual’s identity and ability to flourish in society. Without food security and the accompanying dignity, an individual lacks the ability to participate in political, economic, and cultural life. As one commentator notes: “Rhetorically speaking, how can people exercise their free choice if they have no food on the table, or if they are unable to treat their sicknesses? Thus, positive dignity mandates state action to alleviate these conditions.”²¹⁴

And, in *Obergefell*, Justice Kennedy described what liberty provides:

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.²¹⁵ In addition[,] these liberties extend to certain “personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”²¹⁶

212. *Cohen*, 403 U.S. at 24.

213. *Roberts*, 468 U.S. at 625.

214. Glensy, *supra* note 26, at 66.

215. *Obergefell*, 135 U.S. at 2593.

216. *Id.* at 2597.

C. The Supreme Court Has Ruled to Affirm Fundamental Rights Not Expressly Provided in the Constitution.

The Supreme Court has often relied on values and rights not expressly found in the Constitution. Human dignity itself is a value not mentioned in the Constitution; yet the Court has routinely relied upon it, though, as commentators often note, without providing its contours or definition.²¹⁷ Accordingly, while the Justices quibble over its meaning,²¹⁸ with some leaning on it much more heavily, and commentators continue to debate its relevance and definition, most agree the value plays a role in our constitutional jurisprudence.²¹⁹

Some argue human dignity is among the nation's founding principles. In the Federalist Papers, Alexander Hamilton mentions human dignity as a lodestar value, arguing for adoption of the Constitution as "the safest course for your liberty, your dignity, and your happiness."²²⁰ FDR called the Bill of Rights, "the great American charter of personal liberty and dignity."²²¹ As Judge Walter Mansfield wrote, in a case involving welfare benefits, the General Welfare

217. See Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006); Rao, *supra* note 32, at 206 (2008); Henry, *supra* note 25, at 171; Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

218. See *infra* Part III.D.

219. See Paust, *supra* note 25; Henkin, *supra* note 22. In terms of the nation's Founders, the Declaration of Independence of 1776 states as a "self-evident truth" that "all men are created equal, that they are endowed by their Creator with certain inalienable Rights, that among these, are Life, Liberty, and the Pursuit of Happiness." THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). The Declaration goes on to state that government's purpose is "to secure these rights." Accordingly, the Court has repeatedly tied human dignity to Liberty.

220. THE FEDERALIST NO. 1 (Alexander Hamilton); Glensy, *supra* note 26, at 77; Parent, *supra* note 50, at 69 (noting that Alexander Hamilton, in the Federalist Papers, stated: "Yes, my countrymen, I own to you, that, that after having given in my attentive consideration, I am clearly of the opinion, it is your interest to adopt it. I am convinced, that this is the safest course for your liberty, your dignity, and your happiness.").

221. President Franklin D. Roosevelt, 131 Proclamation 2524, Bill of Rights Day (November 27, 1941), in U.C. SANTA BARBARA AMERICAN PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=16046>.

Clause of the Constitution's Preamble requires economic security:

Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to "insure domestic tranquility" and "promote general Welfare." Implicit in these phrases are certain basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both state and federal, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence without which our expressed constitutional rights and liberties frequently cannot be exercised and therefore become meaningless.²²²

At the same time, the Court has acknowledged fundamental rights not expressly mentioned in the Constitution, the most famous among them being privacy. Although the Constitution does not mention privacy, the Supreme Court has acknowledged a right to privacy, based on human dignity, beginning in the 1960s with *Griswold v. Connecticut*, which involved the dispensing or use of birth control devices.²²³ In *Griswold*, the Court first recognized the right to personal privacy under the Fourth and Fifth Amendments, made applicable to the states by the Fourteenth Amendment. The Court ruled unconstitutional a Connecticut statute prohibiting the dispensing or use of birth control devices to or by married couples.²²⁴ In an opinion by Justice Douglas, the Court relied on penumbras emanating from the specific guarantees of the Bill of Rights.²²⁵

The opinion emphasized the sanctity of marriage, stating:

We deal with a right of privacy older than the Bill of

222. *Rothstein v. Wyman*, 303 F. Supp. 339, 346–47 (S.D.N.Y. 1969).

223. *Griswold v. Connecticut*, 381 U.S. 479, 481–82 (1965).

224. *Id.* at 485.

225. *Id.* at 484 ("The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").

Rights—older than political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred.²²⁶

In *Eisenstadt v. Baird* in the 1970s, and coming to the forefront more recently in *Lawrence v. Texas*, the Supreme Court has acknowledged the right to privacy “emanating” from the express guarantees, grounded in human dignity; it protects individuals against unwarranted government intrusion in their homes, bedrooms, and private affairs.²²⁷

The Court affirmed the “right to marry” in *Zablocki v. Redhail*, striking down as an equal protection violation, a law that prevented fathers who were behind on their child support payments from marrying.²²⁸ The Court noted in *Loving v. Virginia*, primarily an equal protection decision, that “the freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”²²⁹ And recently in *Obergefell*, the Court applied, as its second principle, that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”²³⁰

Not only has the Court ruled in favor of rights to privacy and to marriage but the Court has also struck down the constitutionality of statutes based on the “right to travel,” a right certainly not mentioned

226. *Griswold*, 381 U.S. at 486; *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (establishing the right of unmarried people to possess contraceptives); *Lawrence v. Texas*, 539 US 558, 575–78 (2003) (Justice Kennedy discusses the stigma “all that imports for the dignity of the persons charged. The State cannot demean their existence or control their destiny by making their private conduct a crime”). *Bowers v. Hardwick*, 478 U.S. 186 (1986).

227. *Eisenstadt*, 405 U.S. at 453; *Lawrence*, 539 U.S. at 578.

228. 434 U.S. 374 (1978) (“Since our past decisions make clear that the right to marry is of fundamental importance, and since the classification at issue here significantly interferes with the exercise of that right, we believe that ‘critical examination’ of the state interests advanced in support of the classification is required.”).

229. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

230. *Obergefell*, 135 S. Ct. at 2599.

in the Constitution. In both *Shapiro v. Thompson*²³¹ and *Saenz v. Roe*,²³² the Court struck down durational residency requirements as part of welfare benefits. Specifically, the Court addressed the 1992 part of the California statute regarding AFDC that limited maximum welfare benefits during a resident's first year of residency in California to the amount the resident was receiving in his prior residence.²³³ For the California residents who sued, the statute resulted in substantially lower welfare benefits than they would have received, absent the statutory provision.²³⁴ The Court held the statute unconstitutional because it infringed on the resident's "right to travel," a right "firmly embedded in our jurisprudence."²³⁵

Similarly, in *Boddie v. Connecticut*, the Court advanced "a right to be heard" by striking down Connecticut's procedures for commencing a divorce action; the procedures required welfare recipients to pay court fees and costs for service of process, which restricted their access to the courts when suing for divorce.²³⁶ Justice Harlan, writing for the Court, acknowledged "the right to be heard:" "No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals."²³⁷

Each of these rights, none of which is expressly guaranteed in the Constitution and some of them fundamental based on the Court's analysis, arise out of the Court's role in preserving individuals' human dignity. Likewise, the Fourteenth Amendment Due Process and Equal Protection Clauses or a "penumbra" arising from a specific

231. 394 U.S. 618, 642 (1969) (conurrence) (citing *United States v. Guest* for the notion that "the constitutional right to travel from one State to another ... has been firmly established and repeatedly recognized.").

232. 526 U.S. 489 (1999).

233. At the time of the decision, California, according to Justice Stevens, was one of the most generous states in terms of welfare benefits under the Aid to Families with Dependent Children programs. It had the sixth highest benefit levels. *Saenz*, 526 U.S. at 492.

234. *Id.* at 506–07.

235. *Id.* at 498.

236. 401 U.S. 371, 377–78 (1971).

237. *Id.* at 379.

guarantee, when aligned with human dignity concerns, should provide for a constitutional right to food security in the United States.

D. The Supreme Court Should Rule in Favor of a Fundamental Right to Food Security Because Poverty Shames, Demears, and Humiliates, and the Court Has, in the Past, Ruled to Remedy Shame and Humiliation.

As Tevya, the milkman from Anatevka says to God at the beginning of “If I Were a Rich Man,”²³⁸ in *Fiddler on the Roof*: “Dear God, you made many, many poor people. I realize, of course, that it’s no shame to be poor. But it’s no great honor either!”²³⁹ Commentators routinely link poverty to shame, in addition to poverty’s link to poor health and lack of education.²⁴⁰ Regarding the humiliating impact of being poor, one commentator discussing poverty in England writes, “poverty is inextricably linked to shame across societies; it suggests that to ignore stigma is potentially to miss out on some of the most corrosive effects of poverty.”²⁴¹

In discussing the earned income tax credit, a commentator recently praised it for providing a benefit to the poor without stigma: “While decades of research has shown that other anti-poverty programs tend to confer stigma, isolating the poor from mainstream society, this tax credit generates strong feelings of inclusion and hope for upward mobility.”²⁴²

The Court has routinely ruled in favor of petitioners seeking redress for constitutional infractions stemming from government

238. From *Fiddler on the Roof*, a musical by Jerry Bock and Sheldon Harnick.

239. *If I Were a Rich Man lyrics*, LYRICSMANIA.COM, http://www.lyricsmania.com/if_i_were_a_rich_man_lyrics_fiddler_on_the_roof.html (last visited Nov. 12, 2015).

240. Caroline Gregorie, *Study Reveals Sad Link Between Poverty and Children’s Brain Development*, HUFFINGTON POST (Mar. 30, 2015), http://www.huffingtonpost.com/2015/03/30/brain-development-poverty_n_6968758.html.

241. Declan Gaffney, *The Missing Dimension of Poverty: Stigma*, *New Statesman*, (Feb. 15, 2013), <http://www.newstatesman.com/economics/2013/02/missing-dimension-poverty-stigma>.

242. Laura Tach & Kathryn Edin, *When Taxes Aren’t a Drag*, *N.Y. TIMES* (Apr. 13, 2105), http://www.nytimes.com/2015/04/13/opinion/when-taxes-arent-a-drag.html?_r=0.

treatment that demeans or humiliates. Search and seizure and prisoner treatment cases illustrate when the Court finds it necessary to step in to strike down whatever government action results in humiliation.²⁴³ For instance, in *Hope v. Pelzer*, the Court struck down as unconstitutional an Alabama prison's practice of handcuffing misbehaving prisoners to a hitching post.²⁴⁴ In describing the humiliating nature of the hitching post punishment (in the sun, without adequate water or bathroom breaks), the Court emphasized that what underlies the Eighth Amendment "is nothing less than the dignity of man."²⁴⁵

Regarding Fourth Amendment due process protection against unreasonable searches and seizures, the Court's language suggests an unwavering commitment to human dignity, in terms of avoiding shame and humiliation (however, the results at times belie this unwavering commitment).²⁴⁶ In *Rochin v. California*,²⁴⁷ after his arrest for allegedly possessing morphine in violation of California law, Mr. Rochin was forcibly taken to a hospital. Once there, under a police officer's direction, "a doctor forced an emetic solution through a tube

243. See Goodman, *supra* note 217, at 767–76.

244. *Hope v. Pelzer*, 536 U.S. 730, 730 (2002).

245. *Id.* at 738.

246. See *Skinner v. Railway Labor Executives' Ass'n*, 482 U.S. 602 (1989) in which the Court affirmed the constitutionality under the Fourth Amendment of mandatory blood and urine tests for railroad employees under regulations promulgated by the Federal Railroad Administration. The Court held no warrants or reasonable suspicion were required before the testing because, in the balance, the government had a strong interest in obtaining the test results to ensure public safety. The employees had a diminished expectation to privacy because the test's intrusiveness was minimal. Justices Marshall and Brennan dissented in *Skinner v. Railway Labor Executives' Ass'n*, emphasizing the indignity and humiliation suffered by employees at having the sample taken. Urination is "among the most private of activities," according to the dissenting Justices, especially with a monitor listening at the door. *Id.* at 645. Justice Marshall likened the assault on personal dignity in *Skinner* to the World War II relocation-camp and McCarthy-era cases in terms of the denials of liberty in times of perceived necessity. *Id.* at 635. He wrote of the danger of sacrificing fundamental freedoms in the name of exigency: "History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure." *Id.*

247. 342 U.S. 165 (1952) (the "shocks the conscience" decision).

into Rochin's stomach against his will. This 'stomach pumping' produced vomiting. In the vomited matter were found two capsules which proved to contain morphine."²⁴⁸

The Court, in an opinion by Justice Frankfurter, held that police violated Mr. Rochin's due process rights, describing the force used against him as brutal and "offensive to human dignity."²⁴⁹ In 1984, the Court again struck down as unconstitutional a bodily intrusion where police sought to compel a criminally accused individual to undergo surgery to remove a bullet that might implicate the accused in criminal proceedings.²⁵⁰ In applying the Fourth Amendment protection, the Court described the "extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity."²⁵¹

In *Lawrence v. Texas*,²⁵² the Supreme Court relied on human dignity when describing how the Texas anti-sodomy law at issue demeaned those subject to its prohibition.²⁵³ The Court overturned *Bowers v. Hardwick*,²⁵⁴ holding that a Texas law prohibiting homosexual sodomy violated the Equal Protection Clause of the Fourteenth Amendment in part because it was demeaning.²⁵⁵ The Court further explained, "The State cannot demean their existence or control their destiny by making their private conduct a crime."²⁵⁶ Justice Kennedy described the privacy interest at stake as follows: "It

248. *Rochin*, 342 U.S. at 166.

249. *Id.* at 174. *But see* *Schmerber v. California*, 384 U.S. 757 (1966), in which the Court reached the opposite result, holding the intrusion constitutional, for mandatory testing of a criminally accused's blood for alcohol content. The Court, in an opinion by Justice Brennan, described the Fourth Amendment as protecting "personal privacy and dignity against unwanted intrusion by the State." *Id.* at 767. The blood tested passed constitutional muster only because the test chosen to measure blood-alcohol was reasonable under the circumstances and was performed in a reasonable manner.

250. *Winston v. Lee*, 470 U.S. 753 (1984).

251. *Id.* at 761.

252. 539 U.S. 558 (2003).

253. *Id.* at 575-78 (Justice Kennedy discusses the stigma "all that imports for the dignity of the persons charged. The State cannot demean their existence or control their destiny by making their private conduct a crime.").

254. 478 U.S. 186 (1986).

255. *Lawrence*, 539 U.S. at 558.

256. *Id.* at 578.

suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.”²⁵⁷ Accordingly, the Court has repeatedly treated human dignity as the antidote to laws and government acts that demean and humiliate.

The *Windsor* Court noted that the Fifth and Fourteenth Amendments “withdraw . . . from Government the power to degrade or demean”²⁵⁸ In *Obergefell*, the Court discussed the “stigma” ascribed to the children of same sex couples who are unable to marry.

Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.²⁵⁹

This language resembles the language found in *Brown v. Board of Education*,²⁶⁰ written sixty years ago, in which the Court described the impact of separate but equal on children as follows: “To separate them from others of a similar age and qualification solely because of their race generates a feeling of insecurity as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”²⁶¹ In both cases, the Court leans heavily on human dignity as the value underlying the constitutional guarantees at stake and the need to redress “institutionalized humiliation.”²⁶²

Likewise, the Court should acknowledge a fundamental right to

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

258. *Windsor*, 133 S. Ct. at 2695.

259. *Obergefell*, 135 U.S. at 2593 (Much of the opinion is written in terms of protecting children).

260. 347 U.S. 483 (1954).

261. *Brown*, 347 U.S. at 494.

262. See Bruce Ackerman, *Dignity is a Constitutional Principle*, N.Y. TIMES (Mar., 29, 2014), http://www.nytimes.com/2014/03/30/opinion/sunday/dignity-is-a-constitutional-principle.html?_r=0.

food security because, among other ills involving health and education, poverty shames. Dissenting in *Wyman v. James*,²⁶³ Justice Marshall noted the “severe intrusion upon privacy and family dignity” arising from welfare visits to a family’s home.²⁶⁴ This anti-shame conception of human dignity is certainly controversial. Justice Scalia challenges this “anti-shame” conception of human dignity in *Indiana v. Edwards*,²⁶⁵ a case involving whether a state that insists a defendant, whom the court deems competent to stand trial, not represent himself (for competency concerns) violates that defendant’s right to self-representation.²⁶⁶ The Court, in an opinion by Justice Breyer, explained that the right of self-representation will not preserve a defendant’s human dignity (as it is meant to do) if the defendant lacks the mental capacity to conduct his defense without the assistance of counsel.²⁶⁷

The dissenting justices questioned the Court’s conception of human dignity as remedying conduct that demeans and shames.²⁶⁸ Rather, according to Justice Scalia, human dignity means “being master of one’s fate rather than a ward of the State—the dignity of individual choice.”²⁶⁹ He goes on to say “if the Court is to honor the particular conception of ‘dignity’ that underlies the self-representation right, it should respect the autonomy of the individual by honoring his choices knowingly and voluntarily made.”²⁷⁰ Thus, the State should never step in to interfere with individual choice even if that choice leads to humiliation on the part of the petitioner.²⁷¹ Scalia suggested the government actually impedes an individual’s

263. 400 U.S. 309 (1971).

264. *Id.* at 340 (Marshall, J., dissenting).

265. 554 U.S. 164 (2008).

266. In *McKaskle v. Wiggins*, 465 U.S. 168 (1984), the Court affirmed the constitutional right of self-representation with Justice O’Connor saying, “The right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.” *Id.* at 176-177.

267. *Id.*

268. *James*, 400 U.S. at 347 (Marshall, J., dissenting).

269. *Edwards*, 554 U.S. at 187.

270. *Id.*

271. *Id.*

dignity by insisting on the use of counsel.²⁷²

In *Obergefell*, Justice Thomas provided a different definition of human dignity. Justice Thomas wrote that because dignity is innate, the government can never advance it or deprive an individual of it.²⁷³ In his dissenting opinion, which many commentators criticize for its reference to the dignity of slaves,²⁷⁴ Justice Thomas described the “corollary” of human dignity as follows:

Human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved. Those held in internment camps did not lose their dignity because the government confined them. And those denied governmental benefits certainly do not lose their dignity because the government denies them those benefits. The government cannot bestow dignity, and it cannot take it away.²⁷⁵

Thus, unlike Justice Scalia, Justice Thomas defined the notion as something immutable, inherent in each person regardless of state action or inaction. Justices Scalia and Thomas have conceded that human dignity serves as a value; the differences come in what the value means and requires. According to Justices Thomas and Scalia, human dignity will never serve as a reason for the Court to rule on a constitutional issue because it is immutable—everyone has it, all the time, so the State cannot infringe on it or fail to afford it. Yet, as shown here, the Court, international and foreign law, the federal government, and state governments have all (at times) taken the

272. *Edwards*, 554 U.S. at 187.

273. *Obergefell*, 135 S. Ct. at 2639 (Thomas, J., dissenting).

274. Scott Eric Kaufman, *Thomas’ Offensive Comparison: Same-Sex Marriage Opponents are Like Slaves—Defeated but Still Possessing Dignity*, SALON.COM (Mar. 26, 2015), http://www.salon.com/2015/06/26/thomas_offensive_comparison_same_sex_marriage_opponents_are_like_slaves_defeated_but_still_possessing_dignity/. See Jamil Smith, *Clarence Thomas’s Disgraceful Definition of Human Dignity*, NEW REPUBLIC (June 26, 2015), <http://www.newrepublic.com/article/122178/clarence-thomas-marriage-equality-dissent-all-about-him>.

275. *Obergefell*, 135 S. Ct. at 2639.

opposite approach, applying the need to protect, preserve, restore, and at times advance human dignity to remedy individualized, institutional humiliation and shame.

E. The Court has Often Relied on International Legal Standards and Foreign Law,²⁷⁶ Both of Which Require Food Security.

With regard to food security in the international arena, the United States “increasingly finds itself an outlier to an emerging global consensus.”²⁷⁷ It has “ratified fewer major human rights treaties than any other economically developed democracy....”²⁷⁸

Under international law, all citizens have a right to food security based largely on the promise of human dignity. Article 25 of the Universal Declaration of Human Rights provides as follows:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care[,] and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.²⁷⁹

And, the International Covenant on Economic, Social, and Cultural Rights (“ICESCR”) provides at Article 11:

276. See Rex. D. Glensy, *The Use of International Law in U.S. Constitutional Adjudication*, 25 EMORY INT’L L. REV. 197 (2011) (identifying the differences between international legal standards and foreign law).

277. See Bruce Porter, *Judging Poverty: Using International Human Rights Law to Refine the Scope of Charter Rights*, 15 J. LAW & SOCIAL POL’Y 117, 122 (2000) (“On the other hand, our [Canada’s] approach to human rights protections has not incorporated this fundamental difference and has tended to conform more to a U.S. style rights regime in which social and economic rights have been accorded little recognition.”).

278. Aaron X. Fellmeth, *Leading from (a Bit) Behind: the United States and International*, 40 N.C. J. INT’L L. & COM. REG. 977, 988 (2014).

279. UNIVERSAL DECLARATION OF HUMAN RIGHTS, http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf; Glendon, *supra* note 47, at xv-xvi.

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed....²⁸⁰

The United States has signed but not ratified the Covenant, thus it is not bound to adhere to it.²⁸¹ There are 164 parties to the ICESCR, but only 6 signatories.²⁸² One commentator notes the United States' refusal to ratify the Convention, *and* its refusal, along with only one other country, to ratify the Convention on the Rights of the Child.²⁸³ The United States has maintained this position of failing to affirm these covenants despite these treaties being based on the fundamental notion that "[a]ll human beings are born free and equal in dignity and rights."²⁸⁴

Other nations' constitutions provide for a fundamental right of food security, tied to human dignity. The South African Bill of Rights²⁸⁵ provides that everyone has a right to sufficient food and water,

280. United Nations, Office of the High Commissioner for Human Rights, Status of Ratification, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

281. *Id.* at 754 ("The President's signature indicates at least a political willingness to be bound by the Covenant . . . thus, should the U.S. government decide to start systematically depriving its citizens of basic economic rights, it would be in breach of the ICESCR.").

282. United Nations, Office of the High Commissioner for Human Rights, Status of Ratification, <http://indicators.ohchr.org/>; Krasnov, *supra* note 11, at n. 6.

283. Porter, *supra* note 277, at 123.

284. UNIVERSAL DECLARATION OF HUMAN RIGHTS, *supra* note 279.

285. See SUNSTEIN, *supra* note 11, at 217 (describing the South African Constitution as "the world's leading example of a transformative constitution" because so much of it was aimed at eliminating the system and effects of apartheid).

and the State must take “reasonable legislative and other measures within its available resources, to achieve the progressive realization of that right.”²⁸⁶ The Bill of Rights in the South African Constitution “enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”²⁸⁷

The landmark case involving socioeconomic rights, particularly the right to housing, *Government of the Republic of South Africa v. Grootboom*²⁸⁸ acknowledged the interrelatedness of the socioeconomic rights with the civil and political rights in its reading of the Constitution. The Constitutional Court proclaimed, “[T]here can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter.”²⁸⁹ Affording socioeconomic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2.”²⁹⁰ *Grootboom* focused on the right to adequate housing; however, the Constitutional Court acknowledged that the socioeconomic rights included in the Constitution cannot only exist on paper but must actually be implemented.²⁹¹ The Court held the basic necessities of life are provided to all to affirm the promise of a society based on human dignity.²⁹² According to the Court, the state must take affirmative steps to remedy the plight of those living in poverty, the homeless, or those residing in inhabitable dwellings.²⁹³

Similarly, the German Basic Law contains both objective and subjective rights; the objective rights *obligate* the government to fulfill the objective values outlined in the Basic Law.²⁹⁴ Objective rights are described as forming “part of the legal order, the order public, [and]

286. *Bill of Rights*, S. AFRICAN CONST., Ch. 2, Section 27(1)(b), (2), <http://www.justice.gov.za/legislation/constitution/chp02.html>.

287. *Id.* at Section 7(1).

288. *Gov’t of the Republic of S. Afr. v. Grootboom*, 2000 1 (CC), <http://www.saflii.org/za/cases/ZACC/2000/19.html>.

289. *Id.*

290. *Grootboom*, *supra* note 288, at para. 23.

291. *Id.* at para. 20.

292. *Id.* at 34.

293. *Id.* at 20 (para. 24).

294. DEUTSCHER BUNDESTAG, *supra* note 190.

thereby taking their place among the governing principles of German society.”²⁹⁵ Accordingly, the state has affirmative obligations to secure certain rights, including the rights to basic necessities to live, as described in the *Hartz IV* decision.²⁹⁶

The Supreme Court has certainly relied on both international law standards as well as the standards of individual nations as persuasive authority for its decisions. The *Miranda* decision relies on English and Scottish law for the warnings police must provide those whom they plan to interrogate and the results of those procedures.²⁹⁷ In *Miranda*, Justice Warren explained:

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure, since 1912 under the Judges’ Rules, is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion....²⁹⁸

In *Roper v. Simmons*,²⁹⁹ a 2005 decision striking down capital punishment for juvenile offenders, Justice Kennedy wrote: “The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”³⁰⁰ Justice Kennedy cited the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.³⁰¹ Likewise, in Justice Kennedy’s opinion in *Lawrence v. Texas*,³⁰² he cited three decisions of the European Court of Human Rights, noting that homosexual conduct was accepted as “an integral part of human freedom.”³⁰³

295. DEUTSCHER BUNDESTAG, *supra* note 190, at 969.

296. *See supra* Part III.B.

297. *Miranda v. Arizona*, 384 U.S. 436, 468–88 (1966).

298. *Id.* at 486.

299. 125 S. Ct. 1183 (2005).

300. *Id.* at 578.

301. *Id.* at 576.

302. 539 U.S. 558 (2003).

303. *Id.* at 577.

The Court's practice of relying on this persuasive authority to bolster its analysis is certainly controversial, with certain justices showing more of a willingness to do so.³⁰⁴ Justice O'Connor encouraged courts' continued reliance on foreign and international law as a way "to innovate, to experiment, and to find new solutions to the new legal problems that arise each day; they offer much from which we can learn and benefit."³⁰⁵ The Court has certainly shown its willingness to benefit from these authorities in its prior constitutional analysis, and therefore, it should once again look to other nations and international law standards to acknowledge food security as a fundamental right in this country.

Conclusion

Lawyers and academics should restore efforts to persuade the Court that just as the Constitution protects human dignity by allowing Americans to marry, to travel, to make private decisions about personal issues like contraception, and, if incarcerated, to receive adequate health care, so too should all Americans enjoy a right to food security. Today, approximately 17.5 million households in the United States live without this very basic necessity, and many of those living without food are children. Certainly, the promises of general welfare, ordered liberty, and living with dignity, all of which the Court has relied on, are diminished for those who lack sufficient food and nutrition. This Article seeks to reignite the necessary discussion about the challenges of a Supreme Court jurisprudence in which human dignity requires a right of all to marry but, up until this point, does not acknowledge a fundamental right to food security for all.

304. See Diane Marie Amann, Cynthia R.L. Fairweather & Vivian Rhoe, *Using International Law to Defend the Accused*, 1 CAL. CRIM. L. REV. 1, 13 (2000). See David T. Hutt & Lisa K. Parshall, *Divergent Views on the Use of International and Foreign Law: Congress and the Executive Versus the Court*, 33 OHIO N.U. L. REV. 113 (2007).

305. SANDRA DAY O'CONNOR, *THE MAJESTY OF THE LAW, REFLECTIONS OF A SUPREME COURT JUSTICE* (2003) 234–35 (discussing reasons American judges should increase their reliance on foreign and international law).