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ARTICLES

The Dignity of Voters—A Dissent

JAMES A. GARDNER†

I. INTRODUCTION: ELECTORAL PROCESS RIGHTS AND THE RIGHTS-STRUCTURE CRITIQUE

Since the waning days of the Burger Court, the federal judiciary has developed a generally well-deserved reputation for hostility to constitutional claims of individual right. This predisposition has manifested itself in several well-known ways: a profound reluctance to recognize new rights;[1] an antipathy toward many previously recognized rights, some of which have from time to time received a fairly severe pruning;[2] and a corresponding healthy new interest in constitutional structure as the proper basis for resolving constitutional disputes, particularly in the areas of federalism and separation of powers.[3]

In the field of democratic process, however, things stand very differently. First, the Supreme Court has in the last two decades affirmed, defended, and even in some instances expanded the applications of previously recognized rights. The Court has, for example, continued to stand by earlier decisions pressing to the limit the Fourteenth Amendment right to equally weighted voting under the one-person, one-vote

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1. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 472–76, 484–87 (1970) (declining to recognize a right to basic necessities); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 4–5, 40–41 (1973) (declining to recognize a right to education); Washington v. Glucksberg, 521 U.S. 702, 705–06 (1997) (declining to recognize a right to physician-assisted suicide).

2. The most prominent example is probably the Fourth Amendment, especially the exclusionary rule, which has been so riddled with exceptions as almost to cease to exist. *E.g.*, Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 757, 785–800 (1994).

3. *See, e.g.*, New York v. United States, 505 U.S. 144, 149, 155–69, 187–88 (1992); Printz v. United States, 521 U.S. 898, 902–04, 932–35 (1997); Alden v. Maine, 527 U.S. 706, 714–27 (1999) (all recognizing structural constraints on national power).

doctrine.[4] It continues to profess the unconstitutionality of partisan gerrymandering.[5] It has affirmed and continued to expand the First Amendment right to free speech in its campaign finance cases.[6] And it has wielded First Amendment associational rights to invalidate a growing number of state laws regulating the internal affairs of political parties.[7]

At the same time, the Court has regularly, if not necessarily frequently, recognized new individual rights in the democratic arena and has deployed them with considerable vigor. In a line of cases beginning with *Shaw v. Reno*, for example, the Court identified a previously unknown right of voters to be free from the indignity of being treated as bearers of a racial identity for purposes of assignment to election districts.[8] In *Bush v. Gore*, the Court identified a new right held by individual voters to have their votes counted under standards that apply uniformly across a jurisdiction holding an election.[9]

The latest manifestation of the federal judiciary's apparent receptivity to the recognition of new individual rights in the democratic arena appears to be the emergence of a new species of vote dilution claim that recognizes a constitutionally grounded right against having one's vote "cancelled out" by fraud or error in the casting and counting of ballots. Until the 2000 election, problems of fraud, error, and other forms of inaccuracy in vote tabulation had been thought to be matters largely committed to the routine discretion of low-level government administrators.[10] The movement to elevate these issues into matters of constitutional right has come from several directions. Commentators on the political right have begun to argue that the inclusion in vote totals of

4. *See, e.g.*, Cox v. Larios, 542 U.S. 947, 947, 949 (2004) (summary affirmance of lower court ruling denying that state election district population deviations of less than ten percent are immune from judicial scrutiny).

5. *See, e.g.*, Vieth v. Jubelirer, 541 U.S. 267, 274–77 (2004) (plurality opinion); League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 409, 439–42 (2006) (plurality opinion).

6. *See, e.g.*, Randall v. Sorrell, 548 U.S. 230, 236–37 (2006) (plurality opinion); FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 456, 468–82 (2007) (plurality opinion); Davis v. FEC, 128 S. Ct. 2759, 2765, 2773–75 (2008) (all invalidating restrictions on campaign spending or contributions).

7. *See, e.g.*, Tashjian v. Republican Party, 479 U.S. 208, 214–17, 229 (1986); Timmons v. Twin Cities Area New Party, 520 U.S. 351, 360, 369–70 (1997); Cal. Democratic Party v. Jones, 530 U.S. 567, 569–70, 572–82, 586 (2000) (all invalidating state restrictions on party nominating procedures).,

8. 509 U.S. 630 (1993).

9. 531 U.S. 98, 104–11 (2000).

10. The Court summarized this default principle of judicial deference to routine state election administration in an oft-repeated phrase: "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730 (1974). *See also* Burdick v. Takushi, 504 U.S. 428, 433 (1992) ("Election laws will invariably impose some burden upon individual voters.").

ineligible ballots violates the "civil rights" of voters "just as surely as if they were prevented from voting."[11] During the 2008 presidential campaign, John McCain, the Republican candidate, publicly characterized the counting of ineligible votes as an action that "cancel[s] out" ballots that have been "lawfully cast."[12]

Lower federal courts have recently begun to adopt this approach to thinking about inaccuracy in election administration. In *Ohio Republican Party v. Brunner*, the Sixth Circuit characterized efforts to improve vote tabulation as ensuring that "votes are not diluted by guarding against voter fraud. . . . Enabling the casting of one vote does little good if another voter fraudulently cancels it out."[13] In upholding Georgia's requirement that all voters show approved photographic identification at the polls—a requirement that, according to the plaintiffs, had the potential to prevent many eligible voters from casting ballots—the Eleventh Circuit characterized the state law as one designed to "*safeguard* one of our most fundamental civil rights: the right to vote."[14] A U.S. District Court in Florida ruled last summer that state measures to confirm the eligibility of voters served the purpose of "securing lawful votes from debasement by unlawful votes."[15]

The Supreme Court itself appears to be on the cusp of announcing such a right. In *Purcell v. Gonzalez*, the Court characterized the erroneous administrative counting of ineligible votes as a kind of "outweigh[ing]" of "legitimate votes" that will cause voters to "feel disenfranchised," and analogized the practice to the kind of "debasement or dilution of the weight of a citizen's vote" condemned in its malapportionment cases.[16] Most recently, the Court's lenient treatment of an Indiana law requiring voters to produce photographic identification at the polling place suggests the Court's continuing judgment that vote fraud is a severe problem and that severe remedies, including the collateral disenfranchisement of potentially large numbers of eligible voters, is a price worth paying for its eradication.[17]

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11. John Fund, *Voter Fraud Expected To Be Rampant*, N.Y. POST, Oct. 5, 2008, *available at* http://www.nypost.com/p/news/opinion/opedcolumnists/voter_fraud_expected_to_be_rampant_OyjbUQK86bAgtzKKmp9gUP.

12. Press Release, McCain–Palin Campaign, Election Day Irregularities in Battleground States (Nov. 4, 2008), *available at* http://thepage.time.com/mccain-memo-on-election-day-irregularities/.

13. 544 F.3d 711, 713 (6th Cir. 2008), *vacated on other grounds*, 129 S. Ct. 5 (2008).

14. Common Clause/Ga. v. Billups, 554 F.3d 1340, 1345 (11th Cir. 2009), *cert. denied*, 129 S. Ct. 2770 (2009) (emphasis added).

15. Fla. State Conference of NAACP v. Browning, 569 F. Supp. 2d 1237, 1252 (N.D. Fla. 2008).

16. 549 U.S. 1, 4 (2006).

17. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1613, 1623–24 (2008) (plurality opinion).

All this rights-related activity in the field of electoral law raises an obvious question. Why, during a period in which the Court has for the most part been either holding the line on existing rights or contracting them, has it so aggressively recognized and enforced rights in this particular area?

One possible explanation lies in an increasingly common critique of the Court's jurisprudence of democratic process: the "rights-structure" critique. The rights-structure critique begins from the premise that when courts review government regulation of democratic and electoral processes for consistency with federal constitutional limitations, they have available to them at least two distinct modes of constitutional oversight.[18] The first is a conventional jurisprudence of individual rights. On this model, laws and government actions that regulate democratic political processes are assessed according to whether those laws or actions violate the rights of individuals protected by constitutional provisions such as the Equal Protection Clause or the First Amendment. Democratic politics is not, on this view, treated differently from any other arena of governmental and citizen activity.[19] Individuals, regardless of what they do and where they do it, are bearers of individual rights, and they take those rights into the political arena in a manner no different from the way they might carry them into other important arenas of government regulation such as economic activity, social relations, or criminal justice.

The second mode of judicial oversight is equally conventional, but draws on a different constitutional tradition of structural review exemplified by the Court's jurisprudence of federalism and separation of powers. Although the Constitution nowhere uses the terms "federalism" or "separation of powers," the Court has nevertheless developed these important concepts, and elevated them to a position of constitutional importance, through a process of inference and induction. Thus, for example, by reading the Constitution's allocation of power among the branches of government in light of a historically grounded understanding of the intentions of the Framers, the Court has inferred constitutional principles of interbranch competition within a structurally guided balance of power, principles which it has then gone on to deploy in separation of powers cases to determine the constitutional limits of executive,

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18. For purposes of narrative clarity I am going to oversimplify a bit, in the discussion that follows, by dividing judicial approaches starkly into two distinct classes that rely either on rights or on constitutional structure. Of course there is a significant gray area where the distinction is unclear. See on this point, for example, Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005).

19. *See, e.g.*, Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1805–19 (1999) (critiquing this position).

legislative, and judicial power.[20]

Similarly, although the Constitution never uses the term "democracy," it nevertheless contains many provisions that in essence construct an elaborate system of representative democracy.[21] By reading these provisions in their historical, functional, or philosophical contexts, courts might therefore be able to extract workable principles of democratic self-governance sufficient to resolve questions about the constitutionality of laws that structure and regulate the processes of democratic politics.[22]

For reasons that are obscure, the Supreme Court has for more than forty years favored the rights approach over the structural approach in cases dealing with the regulation of electoral democracy.[23] Increasingly,

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20. *See, e.g.*, INS v. Chadha, 462 U.S. 919, 946–59 (1983); Clinton v. City of New York, 524 U.S. 417, 438–49 (1998); Bowsher v. Synar, 478 U.S. 714, 721–32 (1986); Morrison v. Olson, 487 U.S. 654, 670–77, 693–97 (1988); Dames & Moore v. Regan, 453 U.S. 654, 660–62, 676 (1981) (all deducing limitations on executive or legislative power from principles inferred from structural provisions of the Constitution). For a recent analysis of the Court's structural approach in federalism cases, see John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003 (2009).

21. Examples might include the requirement that members of Congress be popularly elected, U.S. CONST., art. I, § 2, cl. 1 and amend. XVII, cl. 1; the grant of a congressional power to regulate the times, places and manner of holding elections, *id.* at art. I, § 4; and the guarantee of republican government to the states, *id.* at art. IV, § 4.

22. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 74–92 (1982) (describing the structural approach to constitutional interpretation). One prominent example of this approach in election law specifically is the "political markets" model developed by Issacharoff and Pildes. *See generally* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (inferring from constitutional structure and democratic commitments a principle of political competition). This approach is to be distinguished from what has been called "structural equal protection," an account that describes the Court's rights jurisprudence as being informed tacitly—though generally informed badly—by structural considerations. *See* Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from* Shaw v. Reno *to* Bush v. Gore, 79 N.C. L. REV. 1345, 1364–66 (2001). I am more concerned here with an approach that is structural on account of relying overtly on the Constitution's structural provisions rather than smuggling such considerations into a jurisprudence of otherwise conventional rights adjudication.

23. To the extent that members of the Court have said anything about this, they seem to believe that using a structural approach would inappropriately convert them from judges into political philosophers. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 299 (1962) (Frankfurter, J., dissenting) (federal courts should not be in the business of "choos[ing] among . . . competing theories of political philosophy" for the purpose of deciding "an appropriate frame of government" for the states); Holder v. Hall, 512 U.S. 874, 901 (1994) (Thomas, J., concurring) ("matters of political theory are beyond the ordinary sphere of federal judges. And that is precisely the point. The matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law"). This seems a flimsy excuse, as judges cannot avoid relying on an implicit conception of democratic politics when they apply individual rights to laws regulating political processes. Judges must still have a conception of what government interests count as adequate to satisfy constitutional standards of rights protection, and the adequacy of any asserted interest can only be evaluated against a background conception of what a properly functioning democracy ought to look like.

those who follow the Court's rapidly-growing body of decisions in this area have criticized this choice.[24] Their critique often goes something like this. The Court has improperly ignored constitutional structure in favor of a myopic focus on individual rights.[25] This is bad because the rights and structural approaches frequently conflict, and the Court's preference for a rights-based approach therefore often leads it to decisions that are not only substantively wrong, but ultimately at war with the requirements of a properly functioning democracy.[26] This problem has been exacerbated by the Court's blindness both to the distinction between the rights and structural approaches, and to the poor consequences of its insistence on deciding cases on the basis of rights when a structural ground would be more appropriate. In the end, the Court's misguided approach in this area has led to an extremely damaging and constantly growing incoherence in an entire body of law that has increased sharply in public importance during the very period in which

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24. Among the many, many works that have either made or expressed sympathy for the structural critique of the Court's rights-oriented election law jurisprudence are: Guy-Uriel Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 649–70 (2007); Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 686–701 (2008); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 505–13 (2004); Issacharoff & Pildes, *supra* note 22; Karlan, *Nothing Personal*, *supra* note 22, at 1364–66; Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 727–34 (1998); Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 41–55 (2004); Lori Ringhand, *Defining Democracy: The Supreme Court's Campaign Finance Dilemma*, 56 HASTINGS L.J. 77, 81–107 (2004); Frederick Schauer, *Judicial Review of the Devices of Democracy*, 94 COLUM. L. REV. 1326, 1341–47 (1994). Among the works arguing against or criticizing the structural approach are RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 138–56 (2003); Michael S. Kang, *When Courts Won't Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1097–1100 (2007); Daniel H. Lowenstein, *The Supreme Court Has No Theory of Politics—And Be Thankful for Small Favors*, *in* THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS 245, 254–63 (David K. Ryden ed., 2000).

25. *See, e.g.*, Issacharoff & Pildes, *supra* note 22, at 645 (the Court has made "awkward attempts to fold difficult questions of democratic politics and judicial review into the conventional regime of rights-based constitutional and statutory law;" this "formulaic technique has led to a jurisprudence comprised of an unsatisfying discourse about individual entitlements"), 646 (this "artificial narrowness" precludes the development of "any underlying vision of democratic politics that is normatively robust or realistically sophisticated.").

26. An aspect of the Court's election jurisprudence consistently criticized on this ground is its hostility toward restrictions on campaign spending. *See* Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). Whereas the Court claims that such restrictions are contrary to foundational principles of democratic freedom embodied in the First Amendment, critics have claimed for decades that restrictions on campaign spending in fact effectuate rather than thwart democratic values embedded in the structural Constitution. *See, e.g.*, J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1006, 1013–21 (1976); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1412–13, 1422–25 (1986); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 291–92, 304–07, 313–15 (1992); Schauer & Pildes, *supra* note 19.

the Court has been mismanaging it.[27]

Although the basic framework of this critique is, in my view, fundamentally sound, and the critique makes a useful first pass at the problem, it has some shortcomings. First, even though it identifies a highly specific methodological flaw in a broad field of federal jurisprudence, the rights-structure critique goes no further than to claim that this flaw leads to, or is somehow associated with, some kind of general incoherence in the body of law in question. After that, critics seem to throw up their hands. This seems to me inadequate. When courts make mistakes systematically, their decisions are likely to be mistaken systematically. We therefore ought not to be satisfied merely to say that the decisions are incoherent; we ought to be prepared to identify the way in which they are incoherent.[28]

Second, as I shall demonstrate below, despite its fundamental soundness, the rights-structure critique is not sufficiently fine-grained. In particular, it tends to lump all democratic process rights together and treat them in the same way. This, as it turns out, is precisely the mistake the Court itself makes. A closer look at the kinds of rights invoked by the Court reveals some important distinctions that help identify with greater precision the nature of the ills that afflict the federal jurisprudence.

I argue here that an important aspect of the problems that plague the law of democratic process is not simply the abuse of a jurisprudence of rights, but a specific kind of abuse: the building of a constitutionalized system of very strong individual rights on a conception of the dignity of voters. Rather than approach issues involving democratic process as problems of power or of the proper functioning of a system of representative democracy, as the rights-structure critique would require, the Court instead approaches such issues as problems of the maltreatment of individual voters. Just as importantly, the kind of maltreatment that counts is the kind that causes voters to experience their treatment at the hands of the state as insulting or degrading—that is, as undignified.

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27. *See, e.g.*, Gerken, *Lost in the Political Thicket*, *supra* note 24, at 505 (describing the Court's most recent election decisions as having reached "an intellectual dead end in election law"); Charles, *Democracy and Distortion*, *supra* note 24, at 654 (describing the individualist [rights-based] critique of the structural approach as resting on an "incoherent" view of representation); *see generally* Richard L. Hasen, *Beyond Incoherence: The Roberts Court's Deregulatory Turn in* FEC v. Wisconsin Right to Life, 92 MINN. L. REV. 1064 (2008) (describing both old and new judicial approaches to campaign finance as incoherent); Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1065–66 (2007) (noting widespread charges of incoherence of election law jurisprudence).

28. One exception is the careful analysis of judicial tendencies in Heather K. Gerken, *New Wine in Old Bottles: A Comment on Richard Hasen's and Richard Briffault's Essays on* Bush v. Gore, 29 FLA. ST. U. L. REV. 407, 415–23 (2001).

Thus, *Shaw* rights, *Bush v. Gore* rights, one-person, one-vote rights, "anticancellation" rights—all constitutionalize dignitary rights that voters may wield, as voters, to avoid treatment that they subjectively experience as insulting, undignified, or as relegating them to some kind of second-class citizenship.

This, I shall argue, is a serious mistake in two ways. First, the Court has failed to distinguish among different kinds of rights, and it therefore misuses them. Second, if the Court must use a rights approach instead of a structural approach, it ought not to conceive of voters as bearers of a kind of dignity equivalent to the dignity that all people enjoy in virtue of their humanity—the traditional basis for recognizing individual rights. Instead, I argue, voters are better treated for some constitutional purposes as public officials discharging a public duty, and as therefore entitled either to no particular dignitary rights, or to dignitary rights that are greatly diminished.

II. Three Kinds of Rights

A. *Dignitary Rights*

Constitutionally entrenched individual rights are most frequently understood to identify and recognize some set of basic, universal characteristics and activities that are closely connected in some way to human flourishing, and to protect these characteristics and activities from impairment at the hands of the state.[29] In the American tradition, one important source of this view is the social contract understanding of constitutional government. According to this theory, individuals possessing certain natural endowments and capacities give up some of their freedom in order to form a society and then a government, and precisely how much natural freedom they choose to surrender in this trade is up to them.[30] When creating a government to secure the collective benefits they desire, the participants rationally may take steps to restrain that government from impairing the enjoyment of liberties that have not been

29. *See, e.g.*, Ronald Dworkin, Taking Rights Seriously 198–99 (1977); Jack Donnelly, Universal Human Rights in Theory and Practice 13–17 (2d ed. 2003); Emile Durkheim, Professional Ethics and Civic Morals 3 (Cornelia Brookfield trans., The Free Press 1958) (1950); Alan Gewirth, *Human Rights and Conceptions of the Self*, 18 Philosophia 129, 132–38 (1988); H. L. A. Hart, *Are There Any Natural Rights?*, *in* Theories of Rights 61 (C. L. Ten ed., Ashgate Publishing Co. 2006) (1984); Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 Eur. J. Int'l L. 655, 656–63, 675–80 (2008); Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: "Perception" Against Lofty Formalism*, 121 Harv. L. Rev. 4, 10–16 (2007).

30. Locke is the best example, but the Declaration of Independence says much the same thing. *Compare* John Locke, Second Treatise of Government (C. B. Macpherson ed., Hackett Publishing Co. 1980) (1690), §§ 4, 87, 89, 95–99, *with* The Declaration of Independence para. 2 (U.S. 1776).

surrendered, and a constitutionally entrenched individual right is a potentially effective way to police the basic bargain. Rights, on this view, therefore protect the person as a political subject from impairment of certain aspects of the prepolitical self, and they function deontologically to preserve the fundamental humanity of the citizen. I shall call this kind of right a "dignitary" right.

B. *Structural Rights*

It is not essential to the concept of a right, however, that it be rooted in some ontology of the rights-bearing human being. It is also possible for constitutions to grant rights for purely instrumental reasons as a way of building and constitutionally entrenching a mechanism that is expected reliably to maintain some social or political arrangement, or to achieve some set of policy outcomes, that the polity creating the constitution happens to deem substantively good.[31] In this sense, a right functions more like a Coasean endowment.[32] It is a legal privilege granted systematically to certain actors to create a certain kind of social mechanism that will achieve certain anticipated results, and we grant such rights not because we believe rights-holders are in some deep, ontological sense "entitled" to hold the privilege that the right affords them, but because creating the privilege and awarding it to one set of actors rather than another produces results that we have some reason to desire independently of the dignitary benefits that might coincidentally accrue to those who contingently are designated to bear the right. I shall call this kind of right a "structural" right.

It has been argued—unnecessarily, I think—that all constitutional rights are at bottom structural because the act of granting rights to individuals cannot readily be understood apart from the set of legal consequences it sets into motion, and thus the structural mechanics that it presupposes.[33] Regardless of whether rights in other areas are properly conceived as structural rather than dignitary, it seems clear that constitutions are especially likely to contain structural rights relating to democratic processes. One of the principal purposes of a constitution is, after all, to establish a well-functioning, perpetual system of governance. To build a system that endures and operates permanently within appropriate bounds, constitutional designers might well create and distribute rights for purely instrumental reasons. To the extent that rights-holders are thereby placed in a position to frustrate, veto, or simply force public or judicial scrutiny of disfavored practices, the distribution of structural

31. Pildes, *Why Rights*, *supra* note 24 at 753–54.
32. *See* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 8–15, 19–28 (1960).
33. Pildes, *Why Rights*, *supra* note 24.

rights in democratic processes may help to keep constitutional democracy operating properly.[34]

Virtually every right that federal courts have identified in the electoral arena could easily be described in terms of its instrumental value in maintaining normatively desirable political arrangements. The rights to vote, to obtain a place on the ballot, to participate in campaigns, to speak on political topics, or to associate for the advancement of political ends, for example, all serve important functions in producing a system of representative government that is responsive to the electorate's policy preferences and democratically accountable. It is implausible to claim that being able freely to form a political party comprises a basic element of human dignity, but it is no stretch at all to say that conferring on citizens the right to form a party has instrumental value to the creation and maintenance of a well-functioning and publicly accountable system of republican democracy.[35]

Enforcement of structural rights, however, cannot proceed in precisely the same manner as enforcement of dignitary rights. Dignitary rights are paradigms of the Dworkinian conception of rights as trumps; they stand exactly against the unrestricted pursuit of collective preferences and when such a right exists, collective justifications sufficient to invade it must satisfy a difficult burden of urgency. Because human dignity is simply not negotiable—or at least it offers tough terms—dignitary rights are not easily overcome. Structural rights stand on a different footing. Because they are created and distributed for instrumental purposes, structural rights ought generally to be enforceable only when enforcement of the right produces outcomes that the right has been granted to secure. If in some set of circumstances assertion of the right thwarts rather than promotes the accomplishment of purposes for which the right exists, then enforcement should be unavailable.

C. *Second-Order Dignitary Rights*

Dignity can be universal and irreducible, but it can also be contextual. Even if it is true that human beings universally enjoy a certain kind

34. As Pildes puts it, "rights are . . . tools the law deploys for pragmatic reasons and aims; rights are techniques by which courts police the kinds of purposes government can offer to justify its action." Pildes, *Why Rights*, *supra* note 24, at 730. This view also finds a congenial home in the public choice literature of democracy. *See generally* RUSSELL HARDIN, LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY 103–40 (2003) (noting that a constitution's rule is to coordinate activity to achieve collectively desired results).

35. This is the theory behind the so-called Responsible Party Model of party democracy. *See* AUSTIN RANNEY, THE DOCTRINE OF RESPONSIBLE PARTY GOVERNMENT: ITS ORIGINS AND PRESENT STATE 8–22 (Univ. of Ill. Press 1962) (1954). For an account of the influence of this model on contemporary election law, *see* JAMES A. GARDNER, WHAT ARE CAMPAIGNS FOR? 58–70 (2009).

of dignity simply on account of their humanity, it is also possible to conceive of different kinds of dignity associated with the roles that human beings inhabit in particular societies. We might therefore recognize the dignity of the teacher or the school principal, of the soldier or the civil servant, of the employer or the worker, and so on, and we can imagine government conduct that would impugn these different kinds of dignity. A workplace regulation that prohibits government employees from publicly criticizing the performance of the agencies for which they work, for example, might impugn the dignity to which they are entitled as civil servants.

Similarly, we might conceive of citizens as being entitled to a certain kind of dignity in virtue of their status as citizens. There might even be a heightened variety of dignity associated with citizenship in a democracy, as some modern theories of democracy seem to suggest.[36] And because people vote in a democracy, there might well be another kind of dignity associated with being an eligible voter, and with participation, as a voter, in the electoral process.[37] In the United States, where voting has been constitutionally decoupled from citizenship,[38] this might especially be the case. As Judith Shklar has written, the right to vote in America

> separated the free man from the slave. . . . The ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity. . . . [P]eople who are not granted these marks of civic dignity feel dishonored, not just powerless . . . . The struggle for citizenship in America has, therefore, been overwhelmingly a demand for inclusion in the polity, an effort to break down excluding barriers to recognition, rather than an aspiration to civic participation as a deeply involving activity.[39]

What links all these different kinds of dignities is that they arise

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36. The dignity of the democratic citizen appears to be a reasonable inference from modern theories of deliberative democracy. *See, e.g.*, AMY GUTMANN & DENNIS THOMPSON, DEMOCRACY AND DISAGREEMENT 199–229 (1996); JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 118–31, 295–304, 315–28 (William Rehg trans., The MIT Press 1996) (1992); JOHN RAWLS, *The Idea of Public Reason Revisited*, *in* THE LAW OF PEOPLES 129, 131–140 (1999). More specifically, *see* DENNIS F. THOMPSON, JUST ELECTIONS 21–34 (2002) (arguing that voting is constitutive of citizen identity wholly apart from its role in controlling representatives, and that it allows citizens to express themselves publicly).

37. *See, e.g.*, Jimmy Carter, President, Farewell Address to the Nation 2890, 2892 (Jan. 14, 1981), *in* BOOK III PUB. PAPERS, 1982, at 2890 ("Good evening. In a few days I will lay down my official responsibilities in this office, to take up once more the only title in our democracy superior to that of President, the title of citizen.").

38. Minor v. Happersett, 88 U.S. 162, 178 (1874).

39. JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 2–3 (1991).

only in specific social and political contexts. They are not universal, in the sense that they are intrinsic to every conceivable society capable of promoting human flourishing. Instead, these varieties of dignity come into existence only following the creation of social and political structures, and they are available only to individuals who are already embedded within those structures. I may enjoy, and even be entitled to, a certain kind of dignity as a lawyer and a professor, but these are dignities available only to people who live in societies containing social institutions that create those specific roles. For these reasons, I will call this kind of dignity "role dignity," or "second-order" dignity, to distinguish it from the "first-order" dignity that all persons universally enjoy in virtue of their basic humanity.

The existence of some species of second-order dignity raises the question of whether second-order varieties of dignity might be protected by constitutionally grounded rights—second-order dignitary rights, we might call them. I believe that they might be, but that there are good reasons to be skeptical of the existence of such rights, and even more reason to be skeptical about the vigor with which such rights, if they exist, ought to be enforced.

First, there is an important difference between constitutional protection of pre-constitutional and post-constitutional dignity. If we assume that one of the basic purposes of a constitution is to identify and protect through rights the basic dignity to which all humans are entitled—pre-constitutional dignity—we cannot simply go on also to presume that a constitution necessarily identifies and protects role-dependent, second-order dignity. Second-order dignity is post-constitutional: second-order dignitary interests can arise only *after* the constitution has created the society's basic political structure and assigned to members of the polity the political roles that they will or might thereafter occupy. Thus, the constitution functions differently in the cases of first-order and second-order dignitary rights. In the latter case, the constitution is not protecting something antecedent to itself that is intrinsically worth preserving, but instead might or might not police the integrity of various choices made by the polity at the constitutional level. Whether a constitution does so is thus contingent upon the peculiarities of the specific legal regime it happens to institutionalize.

Second, there are important limitations on the degree to which claims based on invasions of second-order dignity can be referred to or grounded in the constitution. The constitution itself defines the political and social roles in which post-constitutional occupants of those roles might then acquire a form of role-dependent dignity. It follows that the constitution also specifies the content of that dignity, or at least sets

limits on its boundaries, and in consequence sets limits on the dignitary offenses that could conceivably be constitutionally recognized. For example, if the constitution specifies that citizenship is acquired at birth but the right to vote is acquired at age twenty-one, then twenty-year-old citizens cannot claim that any constitutionally grounded dignity as citizens is infringed by denying them the franchise, no matter how insulted or politically alienated they may in fact feel. If the constitution provides that the legislature shall be elected at large, then members of a political minority who are repeatedly outvoted by the majority, and consequently elect no representatives to the legislature, cannot plausibly look to the constitution for vindication of a claim that their dignity as voters has been actionably infringed. To the contrary, their dignity as voters is defined in large part by the constitutional prescription of voting methods. No one, in other words, is entitled to feel ill-used by the constitutional structure itself; by definition, it establishes the baseline against which any claims of undignified treatment must be measured.[40]

For these reasons, I think it unlikely that constitutions ordinarily will contain grants of second-order dignitary rights. However, if a constitution should happen to grant such rights, it is clear that those rights must be treated, paradoxically, as structural rights rather than dignitary rights in spite of the fact that they enforce a kind of dignity. This is because the purpose of a second-order dignitary right can only be instrumental. Such rights by definition do not purport to protect the inherent dignity possessed at all times by all humans, but only the contingent dignity with which occupants of a certain constitutional order may happen to be invested. But the main reason to grant individuals a right to enforce the post-constitutional dignity they acquire by inhabiting constitutionally defined roles is surely nothing other than to provide a mechanism to ensure that constitutionally established structures are properly observed and maintained by their occupants.

For example, legal claims to preserve the "dignity of Congress"[41] or the "dignity of the states"[42] are not rooted in any kind of ontological commitment to the actual dignity of these institutions or their inhabitants. Rather, such claims are recognized for the instrumental purpose of

40. Concededly, this way of putting the problem obscures an important historical trend: the migration of norms from second-order to first-order status as conceptions of human nature and human dignity evolve—that is, their eventual inclusion within the pantheon of fundamental, first-order dignitary rights. Much of the contemporary constitutional jurisprudence of race under the Fourteenth Amendment might well fit this description. Of course, this account requires acknowledgment of the reality of nonoriginalist constitutional interpretation.

41. *E.g.*, Watkins v. United States, 354 U.S. 178, 187 (1957).

42. Alden v. Maine, 527 U.S. 706, 748–49 (1999); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002).

maintaining in good working order the constitutionally-mandated structures of separated powers and federalism, so that they can continue adequately to perform their constitutionally assigned functions. Because democratic processes are similarly defined contingently by the constitution in order to achieve other purposes, it is very likely that any right granted by the constitution to voters or other political actors to protect their dignity as inhabitants of those constitutionally defined roles, is also instrumental, and thus in actuality a structural rather than a dignitary right.

It follows that if a constitution grants second-order dignitary rights, those rights must be applied in the same way as any other structural right. Claims of invasion of such rights must, that is to say, be viewed doubtfully by reviewing courts, and applied deferentially. Moreover, because structural rights are instrumental, they should be applied only in circumstances where invocation of the right will achieve the purposes for which the right exists.[43] Thus, second-order dignitary rights, if they exist, must ordinarily be enforced gently and respectfully rather than aggressively and skeptically.

III. Democratic Process Rights

Understood in this light, the Supreme Court's biggest mistake in developing a jurisprudence of democracy has not been primarily its reliance on rights instead of structure as the dominant mode of constitutional review, problematic as that may be. Instead, the Court's error lies in conflating the various kinds of rights, and applying and enforcing all rights, including structural and second-order dignitary rights, as though they were first-order dignitary rights. As a result of this error, the Court has examined infringements of relatively weak rights with all the aggressive skepticism and stringent scrutiny that are more appropriately applied to the examination of infringements of robust, first-order dignitary rights.

The Court's error did not materialize suddenly, but has instead evolved gradually as one generation of democratic rights has given way to others. In its earliest cases subjecting state regulation of the political process to judicial review, the Court frequently and appropriately invoked first-order dignitary rights, often to invalidate racial restrictions

43. *See, e.g.*, L.W. Sumner, The Moral Foundation of Rights 177 (1987) ("If a right is to be grounded in a goal then the goal must justify constraints on its own pursuit"); T. M. Scanlon, *Rights, Goals, and Fairness*, *in* Theories of Rights, *supra* note 29, at 189 (for any kind of rights, even nonconsequentially grounded ones, "we must invoke what looks very much like the consideration of consequences in order to determine what they [rights] rule out and what they allow.").

on political participation. In *The White Primary Cases*, for example, the Court invoked the Fifteenth Amendment to invalidate the exclusion of blacks from primary elections held by the Democratic Party.[44] In *Gomillion v. Lightfoot*, the Court invalidated a blatantly racial gerrymander under the Fifteenth Amendment.[45] In taking an uncompromising approach in these cases, the Court clearly and appropriately recognized the practices at issue for what they were: attempts to perpetuate a form of political servitude profoundly offensive to the basic human dignity of black Americans.[46]

Later, however, the Court began to apply the same uncompromising approach in cases involving constitutional rights that are better thought of as structural rather than dignitary, or that have both structural and dignitary applications, but in settings that implicated their structural rather than their dignitary functions. A critically important case in this evolution was the Court's 1976 decision in *Buckley v. Valeo*[47] invalidating limits placed on campaign spending by the Federal Election Campaign Act. In *Buckley*, the Court read the First Amendment right of free speech aggressively to encompass a virtually absolute right not merely to speak for or against candidates for elective office, but to spend money to pay for such speech.[48]

There is no reason to suppose that the Court was wrong to conclude that the U.S. Constitution grants individuals a right to spend money in campaigns to promote the fortunes of candidates for elective office. Such a right, however, fits poorly within the basic dignitary model. It is impossible, for example, to characterize a right to undertake some specific action in democratic politics as rooted in the inherent dignity of the prepolitical individual. A right to act in democratic politics is, to the contrary, by definition post-political; indeed, it is post-constitutional, for no plausible political ontology demands that humans live in societies that are governed democratically. Only an impoverished ontology, moreover, would understand the dignity of human beings as connected in any fundamental way to the spending of money, an entirely contingent social invention.

In contrast, as countless critics have argued, a constitutional right to

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44. Smith v. Allwright, 321 U.S. 649, 666 (1944); Terry v. Adams, 345 U.S. 461, 469–70 (1953).

45. 364 U.S. 339, 346 (1960).

46. *E.g.*, *Terry*, 345 U.S. at 469–470 ("The effect of the whole procedure . . . is to do precisely that which the Fifteenth Amendment forbids—strip Negroes of every vestige of influence in selecting the officials who control the local county matters that intimately touch the daily lives of citizens.").

47. 424 U.S. 1, 58–59 (1976).

48. *Id.* at 48–49.

spend money in election campaigns is very comfortably understood in its structural context, as one aspect of a complex constitutional system of egalitarian democracy.[49] In such a system, competitive elections make officials responsive to public opinion and accountable to their constituents, and the spending of money to advance or impair the electoral fortunes of candidates serves a valuable function. The creation of a right to spend held by individuals thus makes sense once members of society have constitutionally embedded themselves in a system of representative democracy. The instrumental device of an individually held right in this circumstance may usefully trigger official review of government actions that threaten to undermine the structure of representative government that the Constitution seeks to preserve. However, because the right granted is structural rather than dignitary, and its purpose is instrumental, regulation of campaign expenditures that promotes equality of influence among participants in the democratic process is a strong candidate for respectful treatment on the ground that it promotes rather than undermines the values that the right to spend money in politics might plausibly be thought to advance.[50]

A similar story might be told about a good deal of the federal jurisprudence surrounding the application of rights of speech and association in an electoral setting. Freedom of conscience and the associated rights to formulate opinions autonomously and to express them to others might plausibly be understood as aspects of the inherent dignity of human beings; certainly, they are so understood in the arena of international human rights.[51] Speech for or against specific candidates for elective office, on the other hand, clearly serves an important function within a democratic electoral system, whatever dignitary benefits it may incidentally produce, and might therefore very plausibly be treated in many circumstances as a structural rather than a dignitary right. Thus, laws prohibiting communication of the results of exit polls,[52] or banning

49. *See* sources cited *supra* note 26, as well as, among many others, Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 635–56 (2008); David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1375–80 (1994); David A. Strauss, *What Is the Goal of Campaign Finance Reform?*, 1995 U. CHI. LEGAL F. 141,158–60 (1995).

50. *See, e.g.*, Owen M. Fiss, *Money and Politics*, 97 COLUM. L. REV. 2470, 2478 (1997) ("[T]he limitation on expenditures, like the one on contributions, should have been understood to satisfy the First Amendment, indeed to further its democratic aspirations.").

51. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, arts. 18, 19, at 74–75, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 10, 1948) (recognizing freedoms of thought, conscience, opinion, and expression).

52. *See* Daily Herald Co. v. Munro, 838 F.2d 380, 382, 388–89 (9th Cir. 1988) (invalidating ban on exit polling).

Election Day newspaper editorials,[53] or prohibiting the deliberate telling of lies about candidates[54]—none of which are generally seen elsewhere in the world as intrinsically bound up with the dignity of political subjects[55]—might be understood to require the kind of deferential scrutiny afforded by structural rights rather than the uncompromisingly skeptical review usually reserved for laws invading dignitary rights.

Similarly, the right to build a life by associating freely with others might have dignitary aspects,[56] but the application of that right in the setting of democratic politics is better characterized as structural. The dignity of human life simply is not implicated by laws that require the nominee of a political party to be selected by one method or another. By the time we have reached the point at which party nominees are chosen by closed, semi-closed, or blanket primaries, we are deeply into the realm of political structure, and choices made in this area are entitled to considerable deference to the extent that they attempt to institutionalize one particular permissible structure of democratic politics rather than another.

The newest generation of democratic process rights takes the enforcement of individual rights even further from its origins by recognizing and aggressively enforcing a wide variety of second-order dignitary rights. This development likely has its roots in the Court's early one-person, one-vote decisions, *Wesberry v. Sanders*[57] and *Reynolds v. Sims*.[58] In these cases, the Court for the first time identified malappor-

53. *See* Mills v. Alabama, 384 U.S. 214, 215–16, 220 (1966) (striking down ban on election day political endorsements by newspapers).

54. *See* Vanasco v. Schwartz, 401 F. Supp. 87, 89–90, 100 (S.D.N.Y. 1975) (three-judge court) (striking down statute prohibiting false statements about candidates); *see generally* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285 (2004).

55. *See, e.g.*, R. v. Bryan, [2007] 1 S.C.R. 527 (Can.) (upholding provision of Canada Elections Act, prohibiting communication of election results before polls have closed in all time zones, against challenge that it infringed freedom of expression guaranteed by Canadian Charter of Rights and Freedoms); Kyu Ho Youm, *Freedom of Expression and the Law: Rights and Responsibilities in South Korea*, 38 STAN. J. INT'L L. 123, 128 (2002) (South Korea's Act on Election of Public Officials and Prevention of Election Malpractices "bans the computerized dissemination of both falsehoods and personal facts about candidates that could be construed as slander. The Election Act [also] prohibits publication of public opinion polls throughout the campaign period and on the day of the election."). Commercial purchasing of broadcast time for political advertisements is prohibited in Britain, *see* Jacob Rowbottom, *Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media*, *in* PARTY FUNDING AND CAMPAIGN FINANCING IN INTERNATIONAL PERSPECTIVE 77, 77–79 (K.D. Ewing & Samuel Issacharoff eds., 2006), though a similar ban in Switzerland was invalidated by the European Court of Human Rights in 2002. *See* Verein Gegen Tierfabriken Schweiz v. Switzerland (No. 2) 34 Eur. Ct. H.R. 4 (2009).

56. *See* George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION, 35 (Amy Gutmann ed., 1998). *See generally* FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998).

57. 376 U.S. 1 (1964).

58. 377 U.S. 533 (1964).

tionment as a constitutional harm on the theory that it dilutes the vote of citizens who live in more populous districts. "To the extent that a citizen's right to vote is debased," the Court explained, "he is that much less a citizen."[59] The right to an equally weighted vote is best characterized as a structural right—it provides a mechanism for policing the equality among democratic citizens that is necessary to the proper functioning of a genuinely responsive and accountable democratically elected legislature.

In later cases, however, the Court pressed the right to equally weighted voting much further, demanding a degree of equality of population across districts so extreme that it began invalidating districting plans containing population deviations so trivial that they could not possibly have affected in any meaningful way the responsiveness or accountability of the legislature.[60] Indeed, the Court by the 1980s began to insist on a degree of population equality that is actually impossible to achieve, and therefore fictional.[61] Here, I believe, we begin to see the slide from structural rights to second-order dignitary rights. Once the right to an equally weighted vote is pushed beyond the point where it serves any meaningful structural function, it is better explained as being pressed into service in aid of some conception of voter dignity—the idea that citizens whose votes are weighted less than the votes of other citizens, even by a trivially fractional amount, nevertheless suffer an indignity against which the Constitution protects them.

By the 1990s, the Court began to rely more frequently on second-order dignitary rights. In a series of cases beginning with *Shaw v. Reno*,[62] the Court identified a new individual right held by voters grounded in the premise that voters who are assigned to election districts on the basis of their racial identity suffer a constitutionally prohibited injury to their dignity as voters.[63] As the Court explained in *Miller*, when the state "assigns voters on the basis of race," it behaves in a way that voters quite properly find "offensive and demeaning."[64] Such assignments rest on a governmental "assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'"[65] This kind of

59. *Id.* at 567.

60. *E.g.*, Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969) (holding that only "unavoidable" population variances are permissible).

61. In Karcher v. Daggett, 462 U.S. 725, 741–44 (1983), the Court held that deviations in population across congressional districts must be minimized to a degree smaller than the margin of error of the best available data).

62. 509 U.S. 630 (1993).

63. *Id.* at 657–58.

64. Miller v. Johnson, 515 U.S. 900, 911–12 (1995).

65. *Id.* at 912 (quoting *Shaw*, 509 U.S. at 647).

treatment insults voters because it is based on "'stereotypes that treat individuals as the product of their race,'" thereby diminishing implicitly "'their very worth as citizens.'"[66]

Since then, the Court's jurisprudence of second-order dignitary rights has expanded from apportionment and redistricting into the technical aspects of election administration. In *Bush v. Gore*,[67] the Court once again identified a new, constitutionally grounded right held by individual voters, in this case a right to have their votes counted under standards that are applied uniformly across a jurisdiction conducting an election. Now, if nonuniformity in vote counting standards is harmful, one would think that the harm lies in its potential to obscure rather than clarify the question that an election is designed to answer: whom does the electorate prefer? The victim of this harm, it seems to follow, is the general public, which has a dominant interest in ensuring that it is ruled by officials who have in fact been chosen by the electorate.

Instead, the Court in *Bush v. Gore* chose to treat the relevant harm as one inflicted on individual voters, a harm that the Court analogized to the kind of "'vote debasement or dilution'" condemned in its malapportionment cases.[68] Here, the dilution occurs when one election official in the jurisdiction administratively decides to disqualify a ballot that another official in the same jurisdiction, if confronted with the same ballot, might accept. This disparity, the Court claimed, rises to constitutional dimensions not because it impairs the electorate's ability to identify a winner, but because it subjects the voter whose ballot is set aside to a kind of indignity arising from the jurisdiction's failure to provide to that voter a suitable "opportunity to have his vote count."[69]

The emerging new right against having one's vote "cancelled" by fraud or error in the tabulation of votes, discussed above, takes another significant step down the path charted in *Shaw* and *Bush* toward the identification and strict enforcement of second-order dignitary rights. Proponents of an anticancellation right generally invoke one or more of three related justifications. The most forceful claim is that every vote cast by an ineligible voter is tantamount to the outright, one-for-one invalidation of a ballot lawfully cast by an eligible voter.[70] By this rea-

66. *Id.* (quoting Metro Broad., Inc. v. FCC, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)).

67. 531 U.S. 98, 107–11 (2000) (per curiam).

68. *Id.* at 105 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

69. *Id.* at 108.

70. *See* Ohio Republican Party v. Brunner, 544 F.3d 711, 713 (6th Cir. 2008), *vacated*, 129 S. Ct. 5 (2008); Fund, *supra* note 11; Press Release, McCain–Palin Campaign, *supra* note 12. Some idea of the political valence of this claim can be gleaned by comparing it to one of the standard popular arguments against affirmative action in employment: affirmative action gives *my* job—the one *I* would have gotten—to someone else; it cancels out *my* employment opportunity, thus doing

soning, your ineligible vote for Obama literally renders a nullity my lawful vote for McCain. Second, it is sometimes claimed that the casting of unlawful votes dilutes the weight or value of votes lawfully cast.[71] On this view, the ability of eligible voters to influence the outcome of the election is diluted by the inclusion in the election calculation of ineligible votes. Voters who live in districts where ineligible votes are counted are thus in a position similar to those who live in malapportioned districts with excess population, and suffer a similar dignitary injury. Third, the claim is sometimes made that less than fully accurate administration of elections insults the dignity of eligible voters directly, and that this feeling of insult alienates voters from politics, threatening to drive down participation in the electoral process.[72]

In all these characterizations, the problem with inaccurate counting is said to lie primarily not in its harm to the general public, but in the harm it causes to individual voters. In a way pioneered in *Bush*, the nature of the harm inflicted on voters lies in the fact that the possibility of inaccurate counting of votes insults the dignity of each and every voter to whom these shoddy and potentially inaccurate procedures are applied by denying to each such voter a constitutionally adequate "opportunity to have his [or her] vote count."[73]

IV. The Dignity of Voters

But is the dignity of voters an appropriate concept around which to build a constitutional jurisprudence—indeed, a constitutional jurisprudence of such immense power and consequence? I suggest that it is not. The problem is not that voters have no dignity, or that such dignity as they possess is not entitled to some kind of constitutional protection. The problem, rather, is that any dignity that voters possess *on account of their status as voters* is by definition a role-specific kind of dignity, and that this dignity and the protections that the Constitution might provide it are therefore best conceived as diminished, highly circumscribed, and much less likely than the Court seems to think to serve as the basis for

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me an *individual* harm. *See, e.g.*, Michele S. Moses, *Affirmative Action and the Creation of More Favorable Contexts of Choice*, 38 Am. Educ. Res. J. 3, 10 (2001) (citing Manning Marable, Beyond Black and White: Transforming African-American Politics 84–85 (1995) referencing "a 1995 *USA Today*/CNN/Gallup poll" reporting that fully 15% of the white men surveyed felt that they personally had "'lost a job because of affirmative action'" hiring).

71. Purcell v. Gonzalez, 549 U.S. 1, 4 (2006) (per curiam); *Ohio Republican Party*, 544 F.3d at 713; Fla. State Conference of NAACP v. Browning, 569 F. Supp. 2d 1237, 1252 (N.D. Fla. 2008).

72. *See Purcell*, 549 U.S. at 4 (voters will "feel disenfranchised").

73. Bush v. Gore, 531 U.S. 98, 108 (2000) (per curiam).

routinely invalidating state laws and practices that voters find insulting to the dignity they believe they acquire on account of voting.

The contemporary practice of democracy frequently comes clothed in an exalted rhetoric of self-congratulation. Some democratically self-governing peoples seem to feel that the societies in which they live are superior to societies that do not practice democratic self-governance.[74] Even if these claims are true—even if democracy is not merely a very good form of government but objectively the best—it is still necessary, even in the liberal tradition from which modern democracy itself springs, to acknowledge that there is a meaningful difference between persons and systems of government—that there is a difference, in other words, between being human and being a citizen of a democracy.

It follows that any dignity people possess as voters is not the dignity that they possess on account of being human. Whatever its virtues, democratic self-governance is not an aspect of intrinsic human dignity. Human flourishing can occur, has occurred, and to this day does occur, in many societies that do not happen to fit the prevailing modern, western template of representative democracy accompanied by universal adult suffrage. Voters may indeed possess some kind of dignity that is entitled to some manner of respect, but it is necessarily the dignity associated with a specific, contingent, socially constructed role.

What, then, is the dignity of voters in the contemporary model? Because voting is an activity rather than an attribute, this question can only be answered by reference to the nature of the activity itself. So what is voting, if it is not an activity that is somehow inseparable from a person's basic humanity? Let us say provisionally that voting is a civic function that, in certain human societies, takes on a great deal of importance on account of the way in which such societies happen to be organized. We might then say that any dignity voters have in their role as voters is thus the dignity of someone who performs an important civic function.

The performance of an important civic function is, to be sure, no small achievement. People who perform socially obligatory duties clearly provide valuable public service, and public service surely is, or ought to be, in some sense dignified. But the kind of dignity to which the performance of a civic role is entitled, and its extent, and its manifestations, are necessarily circumscribed by the contours of the role and its function. Furthermore, the role and its function are creations of the collective public, not the individual who occupies the role. Consequently, subjective beliefs and feelings about the nature of the role and the treat-

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74. This appears to have been a premise of foreign and military policy during the administration of President George W. Bush.

ment it deserves are largely irrelevant; the particular dignity associated with a social role is determined collectively, not individually. The role of nurse is dignified, but the dignity of the nurse is not the dignity of the physician. Someone who feels that cleaning the bodies of very sick people is undignified ought not to go into nursing; it is, by universal social convention, part of the job.

So what, then, is the social role of "voter"? I would suggest that a voter is, in most relevant respects, a public officer discharging a public function.[75] Just as it does for other kinds of public offices, a democratic society identifies voters according to a set of predetermined qualifications, and it authorizes those who possess the requisite qualifications to assume the role and status of voters. The public collectively decides who may qualify as a voter, when the office of voter may be discharged, and how it is to be discharged. In this sense, the office of voter is not much different from a very similar socially constructed and widely distributed civic office, the office of "juror."[76] Indeed, the position of voters is not in principle much different from the position of civil servants who hold other offices—file clerk, typist, computer technician—that are not as widely distributed. To be sure, it is easier in a democracy to confuse holding the office of voter with the status of being human than it is to confuse holding the office of file clerk with being human because, under a regime of universal suffrage, virtually every human holds the office of voter and few are file clerks. But that should not matter; the office of voter is still just an office, no matter how widely it may be held.

For these reasons, the judicial practice of identifying and enforcing dignitary rights of voters as voters—rights that allow individual voters to lodge successful complaints against governments for insulting the dignity they claim to enjoy as voters—needs to be viewed with some skepticism. Does it make sense to think that the Constitution would allocate such rights to voters? Even if we conclude that there are reasons why the Constitution might do so, such rights, for reasons explained earlier, ought to be treated as low-intensity structural rights, not high-

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75. *See, e.g.*, Pamela S. Karlan, *Not by Money but by Virtue Won? Vote Trafficking and the Voting Rights System*, 80 VA. L. REV. 1455, 1466 (1994) ("[P]rohibiting voters from selling their votes resembles prohibiting officials from selling their offices. Voters also occupy a position of public trust, and . . . . voting is a public function."); *cf.* Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 377–79 (2009) (describing citizenship as a public office).

76. The two roles are often treated as different aspects of democratic practice. *See, e.g.*, Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1111–21 (2005); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. Rev. 312, 359–60, (1997). A leading exponent of deliberative democracy, James Fishkin, uses "deliberative juries" to provide democratically legitimated policy advice to public officials. *See* JAMES S. FISHKIN, THE VOICE OF THE PEOPLE (1997). Court-maintained jury pools are themselves often generated from voter registration lists.

impact, first-order dignitary rights. That is, any dignitary rights that voters possess in virtue of holding the public office of voter ought to be understood to function solely as structural mechanisms for monitoring the proper operation of a constitutionalized system of representative democracy. Such an approach would, I think it is safe to say, result in much greater judicial deference to the regulatory choices that governments routinely make.[77]

For purposes of comparison, it is useful to imagine what the world would be like if jurors held strong individual rights, grounded in some conception of the "dignity of jurors," that permitted them to play rights as trumps to invalidate government actions that they deemed insulting to their dignity. Suppose jurors were entitled to a constitutional right, individually held, to an opportunity to "have their [jury] vote count" of the kind recognized by the Court in *Bush v. Gore*.[78] Would it be insulting to jurors, and therefore potentially subject to constitutional invalidation on that ground, for a judge to set aside or modify a jury verdict? What if jurors had a right not to have their vote in the jury room "cancelled out" by the misbehavior of another juror? Would declaring a mistrial and discharging the jury not only inconvenience and demoralize the other jurors but also violate their constitutional rights? Suppose jurors considered it insulting to their dignity to have to endure long periods of waiting, or sequestration, or faulty jury equipment, or confusing verdict forms, or post-verdict polling in open court by the judge?

Clearly, giving such rights to jurors would be extremely disruptive to the administration of justice as it has been historically and constitutionally understood. Even more importantly, the real parties in interest in jury proceedings are well understood by legal actors to be the public and the defendant, not the jurors. The same is true, it seems to me, when we are talking about elections instead of judicial proceedings, and voters instead of jurors. In democratic proceedings, the real party in interest is

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77. I want to be clear here that I am not suggesting that *citizens* have no first-order dignitary rights that might be relevant to regulation and administration of democratic processes. As I conceive it, the office of voter is taken up very briefly and temporarily by an eligible citizen, and discharge of the official duties of the office consists of going to the polls and casting a ballot. It does not include, for example, the free and autonomous formulation of political opinion that precedes the casting of a vote. That I conceive as a job for the citizen. My job as a voter begins after my duty as a democratic citizen to arrive at electorally salient political opinions has been discharged. Thus, I am not arguing that general freedoms of thought and speech should be treated as second-order dignitary rights when they concern politics. However, I might be willing to make a distinction between *campaign* speech and speech that occurs *between* campaigns on the theory that people occupy the office of voter not just when they physically go to the polls, but during the official campaign season as well. But at other times, I would consider rights of free thought and speech to fall more naturally into the category of first-order dignitary rights. I address some of these issues in GARDNER, *supra* note 35.

78. Bush v. Gore, 531 U.S. 98, 108 (2000) (per curiam).

the public, not the individual voter. Courts simply are not free to remake the office and function of voter at the behest of its present occupants, no matter how numerous they may be, and no matter how strongly they might feel about the nature of the respect owed them.

V. The Right Against Vote "Cancellation"

The harm that can result from a proliferation of second-order dignitary rights is well-illustrated by the emerging new right not to have one's vote "cancelled" by fraud or error. As indicated earlier, a social and judicial consensus appears to be forming around the idea that individual voters possess a dignitary right not merely to have *their own* votes counted accurately, but to an entire system of vote tabulation that unerringly prevents the counting, and perhaps even the casting, of ballots *by others* who are ineligible to vote. The problems of fraud and error in voting are, to be sure, ones that require the diligent attention of the state, and indeed every state has attended to the task not only by criminalizing fraudulent voting but also by deploying procedures of some complexity to ensure that votes are recorded and tabulated accurately. The problem of error in vote tabulation is not, however, one that is best addressed through the judicial application and enforcement of a robust individual right.

In the first place, error in vote counting is inevitable. An election is an administrative task of monumental proportion; short of large-scale military operations or the nationwide processing of income tax returns, there is probably no public endeavor of comparable scale undertaken on a regular basis.[79] No enterprise of this complexity can be accomplished without the introduction of some degree of error; perfection is quite simply unachievable.[80] To recognize a right against that which is inevitable is absurd—one might as well claim a right against the blowing of the wind.

Second, the recognition of an individual right to an error-free vote count provides no basis for deciding when error is justifiable, or to what degree error and fraud are tolerable. No right is absolute. Unless the emerging right to a system of error-free vote tabulation is unlike any other right previously recognized in American constitutional law, at least some errors in some circumstances will survive constitutional scrutiny.

79. These are, moreover, two areas notorious for their uncongeniality to claims of constitutional right.

80. Courts routinely recognize this obvious truth. *See, e.g.*, Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003) ("No balloting system is perfect."); Black v. McGuffage, 209 F. Supp. 2d 889, 891 (N.D. Ill. 2002) ("Neither the federal courts, nor likely anyone, can guarantee to every eligible voter . . . a perfect election with 100% accuracy.").

But what kinds of errors, and in what circumstances? Even the most robust dignitary right possesses implicitly some *telos* that permits courts to determine the limits of the right by reference to its purposes or to the kinds of justifications that suffice to sustain limitations on its exercise.[81] But a right to have a complex administrative task conducted without error bears no such internal limitations because it is, by definition, a right that cannot be effectuated if it is granted to any degree less than completely. If the erroneous counting of an ineligible ballot "cancels out" my vote, then clearly the counting of even a single ineligible ballot violates my right regardless of whether the vote tabulation is in every other respect accurate and democratically legitimate.

Third, and for these very reasons, the emerging right against vote "cancellation" poses a serious threat to a well-established doctrine that has long played a useful and even necessary role in the practice of American democracy: the doctrine of harmless error in election administration. All American elections are conducted for the most part subject to rules and procedures established by the states, and all states accordingly have developed detailed election codes that regulate virtually every aspect of electoral procedure. One of the mainstays of state election administration has long been a harmless error rule providing that the presence of fraud or error during an election is insufficient to justify judicial intrusion unless it is sufficiently widespread to alter the final tally. For example, Delaware's Election Code provides:

> Nothing in this chapter shall be so construed as to authorize an election to be set aside or annulled on account of illegal votes unless it shall appear that an amount of illegal votes has been given to the person whose right to the office is contested which, if taken from the person, would reduce the number of the person's legal votes below the number of votes given to some other person for the same office . . . .[82]

Wisconsin's election code similarly provides that its chapters dealing with election administration "shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwith-

81. For example, the limits of the First Amendment's protection of free speech have been said to be deducible from its purpose to achieve meaningful self-government, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 29–47 (1948), or to create a functioning marketplace of ideas, Abrams v United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

82. DEL. CODE ANN. tit. 15, § 5943 (2007). Numerous state election codes apply a similar rule even to *official* misconduct by election judges—a kind of fraud much more capable than retail-level illegal voting by ineligible individuals to influence the results. *See, e.g.*, GA. CODE ANN. § 21-2-527 (2008); IDAHO CODE § 34-2103 (2008); IOWA CODE ANN. § 57.4 (1999) (all providing that misconduct by election officials will not void an election unless sufficient to alter the outcome).

standing informality or failure to fully comply with some of their provisions."[83]

Like state legislatures, state courts routinely adhere to the same general principle. Texas courts, for example, explicitly recognize a "de minimus exception" when reviewing the failures of officials to comply with state election procedures.[84] Illinois courts have adopted a rule under which "mere irregularities in conducting an election or counting the votes which did not involve any wrongful intent, did not deprive any legal voter of his vote, or did not change the result of the election, will not vitiate the election."[85] In Ohio, "an election result will not be disturbed unless it is shown [by outcome-changing errors] to be 'contrary to the will of the electorate.'"[86]

These doctrines recognize a salutary principle to the effect that errors in vote counting are to be regretted but nevertheless ignored as a matter of law when they do not actually change, or at least put in significant doubt, the final result.[87] Mild and isolated problems, under a harmless error standard, are routinely tolerated because they are understood to be a constant, inevitable feature of election administration that does not in the end impugn either the accuracy or the democratic legitimacy of the ultimate outcome. This approach, it seems to me, properly places the law's emphasis on the electoral process as a whole and on the accuracy of the final result—not on the subjective experience of individual participants. An election, on this view, is a complex, collective enterprise whose legitimacy depends not on how closely it achieves perfection but on how well it manages, at the end of the day, to express with some rough degree of accuracy the *collective* will of all the voters. The erroneous counting of ineligible votes—along with every other kind of procedural error—is thus demoted in importance to the extent that it lacks the capacity to put in doubt the winner's ability legitimately to claim the mantle of democratic authority. This may set the bar low, but at a level that takes appropriate account of the actual point of elections.

83. WIS. STAT. § 5.01(1) (2008).

84. *E.g.*, Des Champ v. Featherston, 886 S.W.2d 536, 540 (Tex. App. 1994).

85. Engel v. Caputo, 380 N.E.2d 537, 538 (Ill. App. Ct. 1978) (applying Hodge v. Linn, 100 Ill. 397 (1881)).

86. Maschari v. Tone, 811 N.E.2d 555, 559 (Ohio Ct. App. 2004) (quoting Mehling v. Moorehead, 14 N.E.2d 15 (Ohio 1938)).

87. Courts sometimes distinguish between irregularities that cast sufficient doubt on the outcome of an election to make determination of the winner impossible, and those that can be shown to have changed the outcome. *E.g.*, Carlson v. Oconto County Bd. of Canvassers, 623 N.W.2d 195, 198–99 (Wis. Ct. App. 2000). Both of these standards, properly applied, afford enormous deference to election administrators because the mathematical chances of unsystematic errors affecting or even casting doubt on an election result are vanishingly small. *See* Michael O. Finkelstein & Herbert E. Robbins, *Mathematical Probability in Election Challenges*, 73 COLUM. L. REV. 241, 242, 245 (1973).

The judicial trend toward recognizing an individually held right against vote "cancellation" through fraud or error puts at risk this entire edifice by threatening to toss a powerful rights-bomb into the final stages of election administration. By elevating administrative errors to violations of individual right, such a doctrine converts all errors, no matter how routine, innocent, or unavoidable, into official inflictions of serious harm to countless individuals. And it does so at just the point in the electoral process when the need for finality and prompt conferral of a collective imprimatur of democratic legitimacy is greatest—at the point, that is to say, where dilatory adjudications of individual rights claims ought to be least welcome.[88]

The Supreme Court's embrace of the rights approach over its structural alternative is especially damaging in this situation. By refusing to consider constitutionally grounded democratic processes in their structural context, the Court deliberately cuts itself off from any knowledge of the ultimate point of the electoral enterprise. Yet by refusing to consider just this question, the Court disables itself from contemplating what democratic elections are meant to accomplish, and consequently what kinds of errors in democratic processes might properly be considered harmless in light of the ultimate goals of the enterprise. If the Court holds true to form here, the predictable result will likely be to steer it to an unfortunately familiar kind of technical formalism: lacking a structurally or functionally derived end, the Court in these situations tends to substitute the only end it permits itself to have in sight—a dignitary end. This is exactly what happened in the one-person, one-vote cases. Protection of the right to an equally weighted vote became an end in itself rather than merely a means to an end, a mistake that has proven extremely costly to American representative democracy in the form of endless—and often pointless—litigation during every redistricting cycle over trivial interdistrict deviations in population.[89]

In light of these considerations, it seems to me that the proper constitutional treatment of fraud and error in vote tabulation boils down to two choices. First, we might consider the routine, ordinary process of

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88. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 991–99 (2005) (describing the dangers of election-eve legal challenges and arguing for an aggressive judicial application of laches where pre-election challenges are possible).

89. Criticism of the Court's unguided formalism is legion. *See, e.g.*, Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 107–13 (2000); Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 127 (2000); Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411, 1464, 1466–67 (2002); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 230–36 (2003).

vote tabulation to implicate no constitutional right at all and to treat it instead as a procedure embedded in a constitutionalized structure of democratic self-governance.[90] On such a structural approach, errors in vote tabulation would be adjudicated by reference to constitutionally grounded structural parameters that constrain, by reference to their purpose and function, the ways in which elections may be conducted. Alternatively, we might decide that end-stage vote tabulation is a legitimate arena in which to introduce some kind of individual right that would trigger judicial review of the adequacy of vote-counting procedures. If so, we should treat any such right as a structural and instrumental rather than a deontological right, and therefore apply it lightly and with great deference to state decisions about best how to structure and implement electoral processes. That seems to me the best way to manage the right so as to prevent its application and enforcement from doing more harm than good.

CONCLUSION

Voters in a democracy are not self-contained sovereigns who bestride the earth like democratic demigods whom mere government officials dare not offend through inadvertent maltreatment. Quite to the contrary, voters are little more than worker bees in a complex, collective enterprise the only point of which is to register, as accurately as may reasonably be expected given the scale and complexity of the process, decisions made by the collectivity. It is therefore a mistake to invest each voter individually with a robust dignity interest that may be offended by some slight lack of perfection in any and all democratic procedures to which voters must by law submit. Doing so risks conferring upon an entire class of individuals the authority to disrupt elections at a crucial stage, and thereby inappropriately transfers significant authority from the public, whose interest in elections is dominant and critical, to individuals whose investment in and perception of the process may be idiosyncratic or unduly self-interested.

To be sure, much that is important about democratic electoral institutions occurs during the end-stage of the election process, when eligible citizens actually come forward to make their preferences officially known, and the Constitution may well have something to say about how this phase of the democratic process may or must be conducted. Nevertheless, it does not follow that a robust individually held right is the

90. I do not mean to suggest, in any formulation, that there ought in no circumstances to be a judicially recognized right to have *one's own* vote counted. The discarding of validly cast ballots is an all-too-familiar method of discrimination in American political history. I speak here of rights triggered by the treatment of the ballots of other voters.

proper vehicle for vindicating the relevant constitutional values. Either a purely structural approach to judicial management, or a lightly and deferentially applied individual right, would produce better results than those toward which we appear to be headed—a strong individual right against the "cancellation" of individual votes through fraud or error. In the end, the limited and merely instrumental dignity of voters—if such a thing even exists—ought not to be converted into a tool to disrupt the actual function that voters perform as minor public functionaries in a complex, collectively undertaken socio-political process.