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At the Intersection of Due Process and Equal Protection: Expanding the Range of Protected Interests

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AT THE INTERSECTION OF DUE PROCESS
AND EQUAL PROTECTION:

EXPANDING THE RANGE OF PROTECTED
INTERESTS

Vincent J. Samar⁺

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INTRODUCTION

Several recent cases have suggested that Due Process and Equal Protection are interconnected such that in any particular case the one may inform the other.¹

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1. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1724 (2018) (holding that the Civil Rights Commission’s expression of hostility toward the baker’s religion violated the Free Exercise Clause); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015) (holding that under the Equal Protection and Due Process clauses of the Fourteenth Amendment, same sex couples may exercise their fundamental right to marry); *United States v. Windsor*, 570

The cases that suggest an interconnection do so in order to expand the range of protected interests, some of which have been recognized as fundamental, without exactly saying what the connection is. This raises some serious questions for future cases, since it is unclear how a future court will look at this material to decide cases under the Due Process or Equal Protection clauses, let alone cases involving their interconnection. For instance, might a court decide that both interests must be present in which case the range of protected rights might actually be contracted? This Article hopes to answer this question by offering a principled framework derived from a broader analysis of liberty and equality, grounded in the idea of “personhood,” understood collectively, for how Due Process and Equal Protection might be worked together to aid future courts in deciding cases. Since concerns in these areas are likely to raise issues of policy and principle, this Article will also call attention to the roles of legislative versus judicial bodies in the protection of important interests. In the end, the reader should comprehend that a true understanding of human liberty requires not just an understanding of the various liberty interests involved (some of which will be fundamental, some not), but also how those liberty interests are interpreted to not disadvantage classes of people.

Section I will describe the Court’s traditional approach to identifying fundamental rights under Due Process and Equal Protection, and present an example from case law where a claimed justification under Equal Protection may have been better founded under Due Process. Section II reviews the case *Plyler v. Doe*,² and how the Supreme Court attempted to relate Due Process and Equal Protection concerns together to broaden the range of protected interests under the Due Process clause. Section III more fully describes the problems that may arise from the majority opinion’s language in *Obergefell v. Hodges*³ regarding the connection between Due Process and Equal Protection. Section IV shows the relation of Due Process and Equal Protection in context of a broader philosophical discussion about the relationship of liberty and equality. Section V then attempts to resolve some of the concerns raised in Section III by setting forth a philosophical foundation for a collective conception of the person that affirms background human rights. This is followed by Section VI, which applies this philosophical conception to re-conceptualize the current way Due Process and Equal Protection should be seen by the courts as interconnected.

I. THE SUPREME COURT’S TRADITIONAL APPROACH TO IDENTIFYING FUNDAMENTAL RIGHTS

In an important article from the late 1980s entitled *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal*

U.S. 744, 774 (2013) (striking down the Defense of Marriage Act as an unconstitutional deprivation of the liberty of persons protected by the Fifth Amendment).

2. 457 U.S. 202, 211–13 (1982).

3. 135 S. Ct. 2584, 2607 (2015).

Protection,⁴ Professor Cass Sunstein describes a then-emerging view of Due Process and Equal Protection, which would operate both in *Washington v. Glucksberg*,⁵ the assisted suicide case, and the various Second Amendment cases,⁶ but would later be expressly repudiated in *Obergefell*,⁷ the same-sex marriage case. That now “traditional” view as described by Sunstein, notwithstanding the Court’s reluctance to recognize minority rights, is as follows:

From its inception, the Due Process Clause has been interpreted largely (though not exclusively) to protect traditional practices against short-run departures. The clause has therefore been associated with a particular conception of judicial review, one that sees the courts as safeguards against novel developments brought about by temporary majorities who are insufficiently sensitive to the claims of history.

The Equal Protection Clause, by contrast, has been understood as an attempt to protect disadvantaged groups from discriminatory practices, however deeply engrained and longstanding. The Due Process Clause often looks backward; it is highly relevant to the Due Process issue whether an existing or time-honored convention, described at the appropriate level of generality, is violated by the practice under attack. By contrast, the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and were expected to endure. The two clauses therefore operate along different tracks.⁸

With this insightful comment in mind, it is helpful to briefly describe in this Section a few Due Process and Equal Protection cases that arguably overlap and how these cases came to identify and protect fundamental rights.

Professor Erwin Chemerinsky noted “[t]he Supreme Court has held that some liberties are so important that they are deemed to be ‘fundamental rights’ and

4. Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1163–64 (1988).

5. 521 U.S. 702, 721 (1997).

6. *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (incorporating the Second Amendment right to bear arms against the states via the Due Process clause of the Fourteenth Amendment); *District of Columbia v. Heller*, 554 U.S. 570, 584 (2008) (interpreting the meaning of the Second Amendment, the Court stated that “[f]rom our review of founding-era sources, we conclude that this natural meaning was also the meaning that ‘bear arms’ had in the 18th century. In numerous instances, ‘bear arms’ was unambiguously used to refer to the carrying of weapons outside of an organized militia”). In *McDonald v. City of Chicago*, “[t]he Court clarified that the governing standard is whether a particular *Bill of Rights* protection is fundamental to our Nation’s particular scheme of ordered liberty and system of justice.” *McDonald*, 561 U.S. at 744 (citing *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)). “[O]r, as the Court has said in a related context, whether it is ‘deeply rooted in this Nation’s history and tradition.’” *Id.* at 744 (quoting *Glucksberg*, 521 U.S. at 721).

7. *Obergefell*, 135 S. Ct. at 2602.

8. Sunstein, *supra* note 4, at 1163.

that generally the government cannot infringe upon them unless strict scrutiny is met,” requiring the government to demonstrate a *compelling interest*.⁹ Among the various liberties Chemerinsky says the Court had in mind are a number of rights that are not specifically enumerated in the Constitution but still held to be fundamental under the Due Process clause.¹⁰ That clause appears in two distinct areas of the Constitution: the Fifth Amendment and the Fourteenth Amendment. The Fifth Amendment states in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law”¹¹ Part of the *Bill of Rights*, ratified in 1791, the amendment was originally meant to be a restriction on federal authority in order to guarantee states’ rights and individual liberties.¹² This limitation was expanded in 1868 to also limit states’ authority with the adoption of the Fourteenth Amendment, which similarly states in pertinent part: “[N]or shall any State deprive any person of life, liberty, or property, without due process of law”¹³ Given the similarity of the two clauses, rights found to be fundamental under either Amendment’s Due Process clause will generally apply against both federal and state governments.¹⁴ The clause (speaking collectively here) protects both “substantive due process” rights, which are those usually considered when talking about un-enumerated fundamental rights, as well as procedural Due Process rights.¹⁵ For purposes of this Article, the focus will be on substantive Due Process rights, as those are most likely to involve basic liberty interests.¹⁶

9. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 826 (5th ed. 2015).

10. *Id.*

11. U.S. CONST. amend V.

12. *Was the Bill of Rights Meant to Apply to the States?*, TENTH AMENDMENT CTR., <http://tenthamentcenter.com/2014/10/13/was-the-bill-of-rights-meant-to-apply-to-the-states/> (last visited Mar. 17, 2018).

13. U.S. CONST. amend XIV.

14. *Due Process Clause*, THE HERITAGE GUIDE TO THE CONSTITUTION, <https://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause> (last visited Mar. 19, 2018) (stating “[m]odern law interprets the Fifth and Fourteenth Amendments to impose the same substantive due process and procedural due process requirements on the federal and state governments”).

15. *See id.*

16. “Substantive due process is the notion that due process not only protects certain legal procedures, but also protects certain rights unrelated to procedure.” *Substantive Due Process*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Mar. 18, 2018). Initially, the Court’s acknowledgement of Substantive Due Process rights had a rather strained history in protecting the right to contract against a New York law that regulated the working hours of bakers. *See Lochner v. New York*, 198 U.S. 45, 57, 64 (1905). That view was mostly repudiated in *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937), in which the Court upheld the constitutionality of minimum wage requirements for women. Since *W. Coast Hotel Co.*, the Court has acknowledged a substantive right to non-economic freedom of choice. *See, e.g., Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–36 (1925) (holding that requiring public schooling interfered with parents’ rights to determine the appropriate education of their children); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (invalidating a Nebraska law prohibiting the teaching

The Fourteenth Amendment also provides “nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws.”¹⁷ This provision is important for two reasons: first, because it makes clear the scope and breadth of the Due Process freedoms that the Court has thus far identified, and second, because it protects various identifiable classes of individuals that the Court has recognized as uniquely susceptible to suffering invidious discrimination.

Among the various substantive Due Process rights the Court has deemed fundamental are rights protecting the autonomy of the family—the right to marry,¹⁸ rights with respect to procreation,¹⁹ sexual activity²⁰ (including private consensual homosexual activity),²¹ and medical care decision-making.²² Also fundamental are rights elsewhere enumerated in the Constitution, including the

of foreign languages as interfering with the “calling” of language teachers and parents to decide the education of their children). The Court has also acknowledged a fundamental substantive right to privacy. See *Carey v. Population Servs. Int’l*, 431 U.S. 678, 693–94, 699 (1977) (extending the right to privacy to obtain contraceptives to minors); *Roe v. Wade*, 410 U.S. 113, 153, 164, 166 (1973) (holding a woman has a constitutional privacy right to choose whether to bear or beget a child); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (extending the privacy right to use contraceptives to unmarried persons); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (holding that married persons had a constitutional privacy right to use contraceptives and physicians to advise on their use). In *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), the Supreme Court struck down state sodomy laws that criminalized same-sex sexual behavior between consenting adults as interfering with intimate consensual sexual conduct.

17. U.S. CONST. amend XIV.

18. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding Virginia’s miscegenation statutes that made interracial marriage involving a white person a crime violated the Due Process clause of the Fourteenth Amendment).

19. See *Eisenstadt*, 405 U.S. at 453 (striking down a state law banning the distribution of contraceptives to unmarried persons, noting “[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child”). In *Roe v. Wade*, the Court found a woman’s right to an abortion is encompassed within the constitutional right to privacy that it had first recognized in *Griswold v. Connecticut*, allowing her complete autonomy on the question in the first trimester and restricting the state’s interest in different ways in the second (to protect maternal health) and third (to protect prenatal life except where the life and health of the mother was at stake) trimesters. See also *Roe*, 410 U.S. at 152–53; *Griswold*, 381 U.S. at 483. That decision’s central holding of a constitutional right to abortion was reaffirmed in *Planned Parenthood v. Casey*, but the trimester system for limiting the state’s interest was replaced with an “undue burden” test. *Planned Parenthood v. Casey*, 505 U.S. 833, 845–46, 876–77 (1992); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598–99 (2015) (holding the fundamental Due Process right to marry, that had come to be recognized in several previous cases, extends to same-sex couples).

20. *Carey*, 431 U.S. at 693–94, 699 (holding that a state law that burdened a fundamental right by denying distribution of contraceptives to anyone under age 16 must be justified by a compelling state interest).

21. *Lawrence*, 539 U.S. at 578.

22. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 286 (1990).

freedom of speech,²³ the right to bear arms,²⁴ and religious freedom.²⁵ The latter three, while specifically provided for by the First and Second Amendments, have nevertheless been applied against the states by way of the Due Process clause of the Fourteenth Amendment.²⁶ Reverse incorporation, allowing Equal Protection to apply to the federal government, has also been held by the Court to be accommodated by the Fifth Amendment Due Process clause, as that Amendment has no express Equal Protection clause.²⁷

On the Equal Protection side are cases involving the fundamental right to travel²⁸ and, while never actually being deemed “fundamental,” a long assumed right to vote.²⁹ The latter is recognized by virtue of the protections afforded it by the Fifteenth, Nineteenth, and Twenty-Sixth Amendments, adopted in 1870,

23. *Gitlow v. New York*, 268 U.S. 652, 666 (1925). While upholding a state criminal anarchy statute, the Court noted:

For present purposes we may and do assume that freedom of speech and of the press—which are protected by the *First Amendment* from abridgment by Congress—are among the fundamental personal rights and “liberties” protected by the *due process clause* of the *Fourteenth Amendment* from impairment by the States.

Id. (emphasis added).

24. U.S. CONST. amend II.

25. *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961). The Court stated, while upholding a Sunday retail sale ban, that “[t]he freedom to hold religious beliefs and opinions is absolute.” *Id.*

26. See *Incorporation Doctrine*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited Mar. 18, 2018). “The incorporation doctrine is a constitutional doctrine through which the first ten amendments of the United States Constitution (known as the Bill of Rights) are made applicable to the states through the Due Process clause of the Fourteenth Amendment.” *Id.*

27. See *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954). The Court recognized for the first time “reverse incorporation,” so that Equal Protection, as understood under the Fourteenth Amendment, could be applied under the Fifth Amendment Due Process clause to include the District of Columbia, as it is under the authority of the federal government and not any state government. *Id.* In that case, the Court wrote, “We have this day held that the *Equal Protection Clause* of the *Fourteenth Amendment* prohibits the states from maintaining racially segregated public schools.” *Id.* (citing *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954)) (emphasis added). It further stated:

The legal problem in the District of Columbia is somewhat different, however. The *Fifth Amendment*, which is applicable in the District of Columbia, does not contain an *equal protection clause* as does the *Fourteenth Amendment* which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Id. at 498–99 (footnote omitted) (emphasis added).

28. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618, 627, 630 (1969) (holding “that the statutory prohibition of benefits to residents of less than a year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws”).

29. See, e.g., *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that the state’s poll tax was an unconstitutional violation of Equal Protection).

1920, and 1992 respectively.³⁰ Additionally, with respect to Equal Protection, the Court has recognized different classifications for distributing benefits or burdens, warranting different degrees of scrutiny in order to protect against systematic and invidious discrimination.³¹ For example, if the classification is based on race or ethnicity the Court will treat the classification as suspect,³² and will analyze the government's attempted restriction under strict scrutiny, which requires the government to show that the suspect classification is justified by a compelling state interest that is narrowly drawn to meet such interest.³³ If the classification is based on gender or illegitimacy—descriptions associated with impermissible stereotypes that unjustifiably burden receipt of benefits by members of particular groups—the Court will analyze any proposed restrictions based on heightened scrutiny and require the government to show that the classification “serve[s] important governmental objectives and must be substantially related to those objectives.”³⁴ In most other cases, it is usually enough that the classification be rationally related to a legitimate governmental purpose in order to pass Constitutional muster, which allows the government a great deal of freedom, provided that the government action is not deemed to be outside what is constitutionally permitted.³⁵ However, the Court has chosen in a few select cases to apply a “heightened rational basis test” that requires a greater showing of justification by the state than would otherwise be required under traditional rational basis review.³⁶ In both a case involving state denial of a special use permit for a mental health facility,³⁷ and a case in which the state barred by constitutional amendment its own legislature and local municipalities

30. The Fifteenth Amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV. The Nineteenth Amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.” U.S. CONST. amend. XIX. The Twenty-Sixth Amendment provides: “The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.” U.S. CONST. amend. XXVI.

31. See, e.g., *Suspect Classification*, CORNELL L. SCH. LEGAL INFO. INST, https://www.law.cornell.edu/wex/suspect_classification.

32. *Id.*

33. See *Grutter v. Bollinger*, 539 U.S. 306, 326, 333 (2003); see also *Korematsu v. United States*, 323 U.S. 214, 216, 223 (1944) (applying strict scrutiny but still upholding the relocation of Japanese-American citizens during World War II).

34. See *Craig v. Boren*, 429 U.S. 190, 197 (1976); see also *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (holding intermediate scrutiny applies to classifications based on illegitimacy).

35. See, e.g., *Ry. Express Agency v. New York*, 336 U.S. 106, 109–10 (1949) (noting that public safety constitutes a legitimate governmental purpose); *Lindsley v. Nat. Carbonic Gas Co.*, 220 U.S. 61, 78–79 (1911) (holding that “[o]ne who assails the classification . . . must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary”).

36. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 442–43 (1985).

37. *Id.* (invalidating a zoning ordinance that prevented operation of a residence for the mentally disabled).

from affording protections against sexual orientation discrimination,³⁸ the Court, while still claiming to follow a rational basis form of review, found both state governments' actions violated federal Equal Protection because the actions were an illegitimate exercise of governmental power that was likely based on animus toward a particular group.³⁹ Indeed, in the latter case, it has been suggested that the Court seemed to be applying a per se test to undermine the challenged provision.⁴⁰ This suggests the Court regards the function of the Equal Protection clause to offset systemic biases that have previously gone unseen, preventing these biases from continuing to affect governmental decision-making. The Court has even done this while not always defining a unique level of scrutiny for its decision.

A possible overlap of Due Process and Equal Protection is *Zablocki v. Redhail*, a case where one of the justices agreed with the majority's decision that a law forbidding a non-custodial parent behind in child support obligations from marrying violated the Fourteenth Amendment, but questioned whether Equal Protection, as it was relied upon by the majority, was actually the correct analysis for the decision, or if the case should have instead been analyzed under the Due Process fundamental right to marry.⁴¹ Here the Court questioned the constitutionality of a Wisconsin statute that prevented residents with non-custodial children who were under a court order or judgment to make child support payments from obtaining a marriage license unless such residents first showed compliance with their child support obligation.⁴² In holding the statutory classification violated Equal Protection, the Court, per Justice Marshall, took particular note that the classification affected only persons with child support obligations, ignoring that Wisconsin law already permitted the court other avenues for enforcing support obligations, as might arise from a prior marriage or children born out of wedlock, such as "wage assignments, civil contempt proceedings, and criminal penalties."⁴³ Justice Marshall then offered

38. *Romer v. Evans*, 517 U.S. 620, 624 (1996).

39. *See id.* at 634 (finding no legitimate purpose in signaling out this particular group (gays, lesbians, and bisexuals) from using the normal political process).

40. *See id.* This possibility of a new per se doctrine is suggested by Justice Kenney's majority opinion, where he wrote:

[T]hat laws of this kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

Id. (citing *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)). Justice Scalia in his dissent acknowledges that this might be a new doctrine when he wrote, "[T]he Court today has [taken sides in a culture war], not only by inventing a novel and extravagant constitutional doctrine to take the victory away from traditional forces, but even by verbally disparaging as bigotry adherence to traditional attitudes." *Id.* at 652 (Scalia, J., dissenting).

41. *Zablocki v. Redhail*, 434 U.S. 374, 397 (1978) (Powell, J., concurring).

42. *Id.* at 375.

43. *Id.* at 389-90.

a seemingly Due Process kind of argument stating, “When a statutory classification significantly interferes with the exercise of a fundamental right [and the Court had reaffirmed marriage to be as part of the right to privacy], it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”⁴⁴ Not finding such a justification for a non-custodial parent who was merely behind in child support payments, the Court struck down the statute, not as a violation of Due Process, but instead as a violation of Equal Protection, in effect creating a new category of Equal Protection for violations of fundamental rights.⁴⁵ Justice Powell, in his concurring opinion, noted this when he argued that the right to marry could be regulated and traditionally had been; it was only the breadth of the statute’s requirements that violated Due Process, in effect questioning the majority’s position that treated the statutory classification as subject to an Equal Protection rather than a Due Process analysis.⁴⁶ In effect, the Court was claiming that it was because the *interest* was fundamental, and not the class being suspect, that brought this case under the Equal Protection clause.⁴⁷ Perhaps the Court thought this was necessary given that noncompliance for child support was hardly a recognized suspect or quasi-suspect classification.

II. *PLYLER V. DOE*

Plyler v. Doe raises a different but also very interesting and related question because it applied a higher level of scrutiny to a group that would otherwise not have been considered a suspect class.⁴⁸ This was a consolidated case involving undocumented Mexican children residing in the state of Texas who sought to enjoin the Tyler Independent School District from excluding them from the public schools following the Texas legislature’s decision to withhold public funds for the education of children who could not show that they were legally in the United States.⁴⁹ The issue before the Court was “whether, consistent with the *Equal Protection Clause of the Fourteenth Amendment*, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.”⁵⁰ In deciding the case, the Court seemed to apply heightened scrutiny by noting that any “denial must be justified by a showing that it furthers some substantial state interest.”⁵¹

What is of particular interest here is the rationale that the Court relied upon in reaching its decision. Writing for the majority, Justice Brennan began by noting

44. *Id.* at 388.

45. *Id.* at 390–91.

46. *Id.* at 399–400 (Powell, J., concurring).

47. *Id.* at 390.

48. *Plyler v. Doe*, 457 U.S. 202, 230 (1982).

49. *Id.* at 206.

50. *Id.* at 205 (emphasis added).

51. *Id.* at 230.

that “[s]heer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial ‘shadow population’ of illegal migrants—numbering in the millions—within our borders.”⁵² This, in turn, gives rise to “the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents.”⁵³ The Court then went on to state that “[t]he children . . . in these cases are special members of this underclass” because, unlike their parents who “‘have the ability to conform their conduct to societal norms’ and presumably the ability to remove themselves from the State’s jurisdiction,” these children do not.⁵⁴

At the same time, the Court wanted to make clear that while it was not deviating from a prior holding that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution[,] . . . neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”⁵⁵ The significance of this acknowledgement should not be too quickly passed over, for it opens a door to the idea that public education (because of its importance to both individual and societal well-being) might be rightly afforded a greater degree of protection under the Due Process clause, even if not characterized as a fundamental right. Where the Court viewed a higher level of protection to be warranted, the state is required to overcome more than a mere rational basis.

The normal Equal Protection route for the Court to take in this case would have been to inquire whether undocumented aliens might constitute a suspect class. If they were a suspect class, strict scrutiny would apply on the basis of that classification alone. But the Court would not go so far, stating, “Unlike most of the classifications that we have recognized as suspect, entry into this class, by virtue of entry into this country, is a product of voluntary action.”⁵⁶ Instead, the Court went on to say that “more is involved in these cases than the abstract question whether [this law] discriminates against a suspect class, or whether education is a fundamental right.”⁵⁷ In other words, neither a fundamental rights analysis *by itself*, nor recognition as a member of a suspect class *by itself*, was going to be the operant determinate of this case’s protection. Instead, the operant determinate, at least in this case, was what happens when a non-fundamental right, namely education, is distributed in a way that affects *a not quite suspect class* of innocent children.⁵⁸

52. *Id.* at 218.

53. *Id.* at 218–19.

54. *Id.* at 219–20.

55. *Id.* at 221 (holding there is no fundamental right to an education (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973))).

56. *Id.* at 219 n.19.

57. *Id.* at 223.

58. *See id.* at 244 (Burger, C.J., dissenting).

Here, the Court was taking into account certain salient facts. The law in question imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.⁵⁹

The Court found, notwithstanding the fact these children may not constitute a suspect class, that they nevertheless would likely suffer a great enduring harm if the law were to continue to deny them the public education other children are provided.⁶⁰ The Court was also implying that such a harm would not only be suffered by these children alone, but also by the Nation as a whole, which would likely deny the future productive potential of these children.⁶¹ The latter might be viewed as a policy question rather than a principled question, given that it is usually up to the legislature to decide what is good for society through lawmaking.⁶² Still, because this particular policy question was not independent of the harm caused to *innocent* children and was also not one they or their parents would likely have the political power to overcome (given that they and their parents are undocumented), it could not be left unabated by simply saying the children did not constitute a suspect class. So, the Court imposed a heightened scrutiny requirement holding that “[i]f the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest.”⁶³ In *Plyler*, Texas failed to satisfy such a showing, as its statute was not congruous with the intent of federal immigration law,⁶⁴ was unlikely to provide an effective method to discourage illegal immigration,⁶⁵ and alleged saving of resources was not shown to “provide high-quality public education.”⁶⁶ Instead, it would be more likely to create a subclass of unemployable illiterates, only “adding to the problems and costs of

59. *Id.* at 223.

60. *See id.* at 221.

61. *See id.*

62. *See* U.S. CONST. art. I, § 1. Professor Ronald Dworkin distinguishes policies from principles as follows:

I call a ‘policy’ that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a ‘principle’ a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.

Ronald Dworkin, *TAKING RIGHTS SERIOUSLY* 22 (1977).

63. *Plyler*, 457 U.S. at 230.

64. *Id.* at 226.

65. *Id.* at 228.

66. *Id.* at 229.

unemployment, welfare, and crime.”⁶⁷ The Court apparently thought this set of interrelated factors should make the policy choice subordinate to the principle concern of the unfairness of the harm being done to innocent children. This latter concern clearly raises a question of *material* justice.⁶⁸

In this regard, it is interesting to note that in his separate concurring opinion, joined by Justice Powell, Justice Blackmun wrote:

[C]lassifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values involving the State in the creation of permanent class distinctions. In a sense, then, denial of an education is the analogue of denial of the right to vote: the former relegates the individual to second-class social status; the latter places him at a permanent political disadvantage.⁶⁹

This language is important when juxtaposed against the majority’s comment that even if there is no fundamental right to an education, denial by the state of the opportunity to receive an education is not merely denial of “some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”⁷⁰ Moreover, as Justice Powell writes, “the exclusion of [these] children from state-provided education is a type of punitive discrimination based on status that is impermissible under the *Equal Protection Clause*.”⁷¹ The latter would not be of concern but for the underlying interest in public education that the Court implied was like the right to vote in importance, and thus warranted substantial protection.⁷²

There was an important dissent by Chief Justice Burger, joined by Justices White, Rehnquist, and O’Connor, which stated “the Court’s opinion rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases.”⁷³ The dissent questioned:

whether, for purposes of allocating its finite resources, a state has a legitimate reason to differentiate between persons who are lawfully within the state and those who are unlawfully there. The distinction the State of Texas has drawn—based not only upon its own legitimate interests but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional.⁷⁴

The dissent then went on to suggest that “by patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these

67. *Id.* at 230.

68. T.D. Campbell, *Rights Without Justice*, 83 OXFORD UNIV. PRESS 445, 445–46 (1974).

69. *Plyler*, 547 U.S. at 234 (Blackmun, J., concurring).

70. *Id.* at 221.

71. *Id.* at 240 (Powell, J., concurring).

72. *Id.* at 233–34.

73. *Id.* at 243 (Burger, C.J., dissenting).

74. *Id.* at 243–44.

cases.”⁷⁵ Most specifically, the dissenters were criticizing what they saw as judicial overreach into an area where the political branches are supposed to operate.⁷⁶ As the dissenters stated, “there are sound *policy* arguments against the Texas Legislature’s choice [but that] does not render that choice an unconstitutional one.”⁷⁷

On the surface what the majority did might indeed appear at first glance to be judicial overreach, as the dissent argued.⁷⁸ However, that may depend on whether the boundaries that the Constitution places on the political branches is circumvented on the liberty side only by a limited set of rights previously recognized as “deeply rooted in the Nation’s history and traditions.”⁷⁹ This would seem to accord with Supreme Court doctrine as previously described, although it raises a question whether such doctrine might be under-inclusive from a normative point of view. If other important rights are thought to exist, even if not “deeply rooted in the Nation’s history and traditions,” a different result might well be called for.⁸⁰ Additionally, the correctness of the majority’s opinion also depends on whether the existing categories for Equal Protection concerns should continue to be limited to only those previously recognized by the Court:⁸¹ race and ethnicity (strict scrutiny)⁸²; gender and illegitimacy (heightened or intermediate scrutiny)⁸³; and, with some exceptions,⁸⁴ everything else determined under a rational basis standard of review, founded upon a legitimate governmental interest.⁸⁵ Should it be the case that these specified classes are found to be too narrowly circumscribed, then that too should add support for the Court’s decision in *Plyler*.

Prima facie, it seems arbitrary to believe that these and only these suspect categories should bear significance, for each of these categories, at some point in the Court’s development of its Equal Protection jurisprudence, came to be recognized as areas where basic equality was being denied. Are these limitations

75. *Id.* at 244.

76. *See id.* at 243.

77. *Id.* at 253.

78. *Id.*

79. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (citing *Moore v. City of E. Cleveland*, 431 U.S. 494, 503 (1977)).

80. *Id.*; *see Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

81. *See United States v. Caroline Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the *Fourteenth Amendment* than are most other types of legislation.”) (emphasis added).

82. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 274 (1986); *Palmore v. Sidoti*, 466 U.S. 429, 432–33 (1984).

83. *See, e.g., United States v. Virginia*, 518 U.S. 515, 531–33 (1996); *Caban v. Mohammed*, 441 U.S. 380, 388 (1979).

84. *Plyler v. Doe*, 457 U.S. 202, 216–18 (1982).

85. *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

really then as rigid as some, like the dissenters in *Plyler*, seem to suggest?⁸⁶ What would be the normative argument for adopting that position? The rigidity of these limitations will depend, in fact, on what theory of Due Process and Equal Protection the Court adopts, not just for justifying its decisions in the future, but also, and perhaps more importantly, on how it sees the two doctrines operating together. For the present cases, it is sufficient that the Court was willing to acknowledge the overlap of Due Process and Equal Protection as jointly providing sufficient grounds for its decision. But how will its decision here implicate future cases, if at all?

III. WHERE THE COURT'S CURRENT APPROACH TO CONNECTING DUE PROCESS AND EQUAL PROTECTION MISSES A BEAT IN THEORY, IF NOT IN FACT

Having seen how the Court generally analyzes Due Process and Equal Protection cases, as well as some of the places where the justices disagree over which standard of review (if any) the Court should apply in its analyses, it is now worth affording some attention to a remark by Justice Kennedy in *Obergefell* regarding the doctrines' interconnection.⁸⁷ Kennedy's statement is particularly significant because nowhere does he directly cite *Plyler*, yet an idea stemming from that case may nevertheless be operative in the background of *Obergefell*, where Kennedy writes:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.⁸⁸

Justice Kennedy then discusses *Loving* and *Zablocki* to show how "the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution."⁸⁹ The possible significance of this comment should not be missed. Was Kennedy suggesting that in some cases the Court needs to investigate the way a right is defined or how it operates, as equality concerns may arise at any of these separate points? What, more precisely, should be made of his statement that each clause "may be instructive as to the meaning and *reach*

86. See *infra* notes 73–77 and accompanying text.

87. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

88. *Id.* (emphasis omitted) (citations omitted).

89. *Id.* at 2604 (emphasis omitted).

of the other[?]"⁹⁰ Kennedy does not say. Still, on the surface, his language sounds like an appropriate use of Equal Protection to reveal biases that may be deeply hidden "within our most fundamental institutions that once passed unnoticed and unchallenged."⁹¹ At least, as seen from one point of view, Justice Kennedy's language affords a justification for correcting longstanding, existing institutional arrangements that may harbor biases not previously identified and challenged.⁹² However, especially if taken to suggest that any future violation must simultaneously implicate both Due Process and Equal Protection concerns, his language might also be construed to limit a more expansive recognition of Due Process rights, since Kennedy does not say exactly how each "may be instructive as to the meaning and *reach* of the other."⁹³ Thus, the problem with Justice Kennedy's language is less with what he said and more with how little he said. His discussion comes up short on exactly how, as a general matter, Due Process and Equal Protection are to work together in any given case. Consequently, when left without further comment, his language opens up more questions than it answers.

Professor Mark Strasser, noting the Court's earlier holding in *Zablocki*, criticizes Justice Kennedy's language for "leav[ing] open whether the due process analysis (holding that the interest in marriage is fundamental) is in some way dependent upon the finding that equal protection guarantees had been violated."⁹⁴ Was it not the question before the Court whether the fundamental interest in marriage included the right to marry someone of the same sex? Or

90. *Id.* at 2603 (emphasis added).

91. *Id.*

92. Professor Connor M. Ewing has suggested that the line of Supreme Court cases involving gays and lesbians from *Lawrence v. Texas* to *United States v. Windsor* to *Obergefell* suggests a partial convergence "between liberty and equality, on the one hand, and human dignity, on the other." Connor M. Ewing, *With Dignity and Justice for All: The Jurisprudence of Equal Dignity and the Partial Convergence of Liberty and Equality in American Constitutional Law*, 16 I-CON 753, 774 (2018) (I want to thank Professor Jona Goldschmidt of Loyola University Chicago for bringing this Article to my attention). Ewing criticizes Laurence Tribe's "legal double helix" characterization as providing only "a static snapshot of what is, in fact, a dynamic process and an incomplete convergence." *Id.* (referencing Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893 (2004) and Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. 16 (2015)). Connor also criticizes Kenji Yoshino's discussion of *Obergefell* in *A New Birth of Freedom?: Obergefell v. Hodges*, because it does not go far enough when it marginalizes the significance of dignity as it explains how the Court "shifts the emphasis away from *Glucksberg*." *Id.* at 772; Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147 (2015). My own view of the dignity issue or what Professor Ewing calls "equal dignity," which I will not be directly addressing in this Article, is that it supervenes on a collective sense of personhood that is achieved when due process and equal protection are aligned to allow for true human self-fulfillment. For then the person's own purpose fulfillment as a collective rational being, capable of making his or her own choices, is being acknowledged.

93. *Id.* (emphasis added).

94. Mark P. Strasser, *Obergefell's Legacy*, 24 DUKE J. GENDER L. & POLICY 61, 82–83 (2016).

was Kennedy suggesting, if the equality concern in *Obergefell* that gays and lesbians were denied the right to marry had been absent, the Court might have never extended the right to marry to include same-sex couples? This might have been the case if marriage as a fundamental right were perceived to be based solely on its history and tradition as a heterosexist institution. Moreover, Strasser notes that the Court's language in striking down "unjustified inequality . . . within our most fundamental institutions" also leaves open how it might act on inequality claims where a mere liberty interest is at stake and not a fundamental right.⁹⁵ Specifically, although the Court decided in *Obergefell* that both same sex and heterosexual couples have a fundamental right to marry, it left open the question of how to decide a case involving long-term, non-marital relationships, since there would be no Equal Protection trigger, provided gays and straights are being treated similarly. Especially, if a future conservative majority reads *Lawrence v. Texas* narrowly to only constitutionally undermine the criminalization of same-sex relationships, then the liberty to have an intimate, long-term, non-marital relationship might be afforded no special protection at all.⁹⁶

Of course, this cannot be construed for sure by anything Justice Kennedy said. Rather, the concern here is that a less sympathetic Court might be able to use Justice Kennedy's language both to refrain from any expansion of those fundamental rights recognized under the Due Process clause or to hesitate from elevating the level of scrutiny that might otherwise attach to groups invoking less than fundamental liberty interests. By the same token, a more liberal Court might use the same language to expand the liberty interests and equality concerns it is willing to protect. Such differing possibilities provide, however, little by way of prediction (let alone direction to lower courts) as to how future cases should be decided, let alone offer much assurance to the public that rights currently acknowledged will remain intact.

What is suggested by Professor Strasser's concerns is the need to set out a more robust theory of interpretation for how these two very different perspectives, Due Process and Equal Protection, can be harmonized. Strasser's article shows, that in the absence of a more robust theory, the basic rights people currently have may neither advance beyond their current state nor remain secure in their current status, at least where no fundamental right or suspect or quasi-suspect class is obviously present. Still, it should be remembered that the requisite Fourteenth Amendment clauses do not speak of time-honored traditions nor of statuses or even of basic rights generally but rather say, "nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."⁹⁷ What is clear from both of these clauses is the Amendment's focus on

95. *Id.* at 83–84 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015)).

96. *Lawrence v. Texas*, 539 U.S. 558, 562–64 (2003).

97. U.S. CONST. amend. XIV.

the person and the rights people may be deprived of or denied by the government.

This suggests a possible avenue for determining the range of protected interests that may arise from the apparent need to trigger heightened protection under both Due Process and Equal Protection. The matter gets tricky where the different choices appear equally satisfying to some members of the group affected, but afford very different results to other members. In that instance, numbers alone cannot resolve the issue since the matter is one of principle, not policy. For example, arguments protecting the constitutionally enumerated religious liberty right of a wedding cake baker to not make a wedding cake for a same-sex couple may seem very satisfying and quite fair to ardent believers in the sanctity of only opposite-sex marriage,⁹⁸ but equally dissatisfying and unfair to same-sex couples who are then denied this professional service because of another person's sincerely held religious belief. Nor would the result appear to either party any differently by simply having to find another baker without the same religious scruples. For the issue here is not just the denial of service by the ardent believing baker, but of what such a denial would represent when approved by society at large.⁹⁹ This is only one example of where an appeal to

98. For a different perspective on the issues presented in the *Masterpiece Cakeshop* decision, please see Kristen K. Waggoner, *Mastering Masterpiece*, 68. CATH. U. L. REV. (forthcoming 2019) (author was lead counsel for cakemaker). Ms. Waggoner's article will be part of a symposium edition on religious liberty.

99. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723 (2018). This case involved a cakemaker named Phillips who, in violation of the Colorado Antidiscrimination Act, refused to sell a same-sex couple a wedding cake because of his religious beliefs. *Id.* Justice Kennedy, writing for the Court, reversed the Court of Appeals judgment against *Masterpiece Cakeshop*, but only because of statements attributed to two Commissioners that appeared in the record, which made it appear that the "Commission's consideration of this case [when it first came up] was inconsistent with the State's obligation of religious neutrality." *Id.* However, Justice Kennedy did note two considerations that would likely be present in any future case. First, "the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods and services." *Id.* Second, "the right of all persons to exercise fundamental freedoms under the *First Amendment*, as applied to the States through the *Fourteenth Amendment*." *Id.* (emphasis added). Justice Kennedy addressed a point this Article is committed to with regard to how we think about fundamental rights, namely that the freedoms of speech and free exercise of religion raised in this case, are "an instructive example . . . of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning." *Id.* Justice Kagan, joined by Justice Breyer, filed a separate concurrence stating that she viewed the Court's remark about the authority of Colorado law as able to protect gay people from discrimination just as it protects other classes of people. *Id.* at 1734 (Kagan, J., concurring). Justice Gorsuch, joined by Justice Alito, disagreed, believing the product the vendor refused to sell was not a wedding cake per se but a cake "celebrating same-sex marriage" suggesting it might well warrant free exercise and free speech strict scrutiny protection. *Id.* at 1736–39 (Gorsuch, J., concurring). Justice Thomas also filed a concurrence expressing the view that Phillips's free speech claim with respect to a wedding cake was consistent with "our free-speech jurisprudence." *Id.* at 1746 (Thomas, J., concurring). Justice Ginsburg, joined by Justice Sotomayor, dissented, believing that Phillips's refusal to sell a wedding cake was distinguishable from two earlier cases involving cake refusals

some further criterion of personhood would be most helpful if it were able to assist in resolving conflict in an area of rights the law identifies (in this case, the right to same-sex marriage and the free exercise of religion). Regrettably, such a resolution is unlikely to be self-evident, since the conflict already implicates important but different interests in which people with very different points of view identify.

IV. THE INTERCONNECTION OF LIBERTY AND EQUALITY

Since the Fourteenth Amendment starts with similar wording to that of the Fifth Amendment—“nor shall any State deprive any person of . . . liberty . . .”¹⁰⁰—it is only reasonable to recognize the existence of a general right to liberty implicit in the constitutional order. The general nature of this right is implied by the language of both Amendments that protects *all* persons’ rights to liberty. Indeed, the philosopher H. L. A. Hart has noted the presumed existence of a general natural right to liberty arises whenever any moral right is asserted (which the Fourteenth Amendment does); this was evident when he said: “[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free.”¹⁰¹ Since the *Bill of Rights* and the Fourteenth Amendment both start with the premise of limiting the authority of the government to interfere with individual liberty and states’ rights, except under certain well-described circumstances (such as providing equal protection of the laws), it follows that both of these documents presuppose inviolability and liberty of the person.¹⁰² Indeed, if this were at all in doubt, both the Fifth Amendment and the Fourteenth Amendment say as much by stating that liberty may not be denied “without due process of law[.]”¹⁰³

After “saying that there is this [background natural] right [to be free],” Hart goes on to describe what limits this natural right implies regarding other people’s actions.¹⁰⁴ Hart’s language here is consistent with the limits implied by the

that the Commission had allowed because the baker in those cases had refused to put certain writings on *anybody’s* cake he felt would be derogatory of gay people and same-sex marriage. *Id.* at 1750 (Ginsberg, J., dissenting). Here, Phillips had refused to sell wedding cakes for same-sex couples. *Id.* at 1723. The dissenters also believed that there had been enough lower court review to attenuate any lack of neutrality by the Commission or that might be attributed to inappropriate statements by the two commissioners. *Id.* at 1751.

100. U.S. CONST. amend. XIV. The relevant Fifth Amendment provision states: “No person shall . . . be deprived of life, liberty, or property, without due process of law. U.S. CONST. amend. V.

101. H. L. A. Hart, *Are There Any Natural Rights?*, 64 *PHILOSOPHICAL REV.* 175, 175 (1955).

102. See *Bill of Rights*, BILL OF RIGHTS INST., <http://www.billofrightsinstitute.org/founding-documents/bill-of-rights/> (last visited Mar. 13, 2018); see also David J. Shestokas, *The Fourteenth Amendment to the US Constitution*, DAVID J. SHESTOKAS (Jan. 19, 2014), <http://www.shestokas.com/constitution-educational-series/the-us-constitutions-fourteenth-amendment/>; *U.S. Constitution—5th and 14th Amendments*, FINDUSLAW, <https://finduslaw.com/us-constitution-5th-14th-amendments> (last visited Mar. 13, 2018).

103. U.S. CONST. amends V, XIV.

104. Hart, *supra* note 101, at 175.

Ninth and Tenth Amendments for government (when no enumerated right of the people or power of the government is involved).¹⁰⁵ Hart explains:

I mean in the absence of certain special conditions which are consistent with the right being an equal right, any adult human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint and (2) is at liberty to do (i.e., is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons.¹⁰⁶

The acknowledgment by the Fifth Amendment and the Fourteenth Amendment that liberty cannot be removed without Due Process of law by itself should be sufficient to afford constitutional recognition of a background natural right to liberty, absent some special limitation required by Due Process or the existence of other enumerated rights or powers. Still, if any doubt remains, it is put to rest by the existence of both the Ninth and Tenth Amendments. The Ninth Amendment states: “The enumeration in this Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁰⁷ The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”¹⁰⁸ Together, these final two amendments of the *Bill of Rights* articulate the presumed existence of a general, constitutionally acknowledge natural right to liberty, even if not explicitly identified.

Given this analysis, it now makes sense to inquire under what conditions this natural right to liberty might be circumscribed. And, relatedly, for those specific enumerated liberties that are protected, are there any circumstances in which they too might properly be circumscribed for the sake of protecting background natural liberty more generally?¹⁰⁹ This is discussed below in the Section on conflict of rights. For now, the importance of raising Hart’s discussion of natural rights is to show that this is not strictly a positivist question to be resolved simply by what the framers might have expected at the time they drafted the amendments. That is because it draws a logical connection between moral language as described by Hart and specific constitutional provisions that cannot be easily ignored if the *Bill of Rights* and the Fourteenth Amendment are to be

105. The Ninth Amendment states: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. The Tenth Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” U.S. CONST. amend. X.

106. Hart, *supra* note 101, at 175.

107. U.S. CONST. amend. IX.

108. U.S. CONST. amend. X.

109. *Free Exercise of Religion: Rise of the Compelling State Interest Test*, EXPLORING CONST. CONFLICTS, <http://law2.umkc.edu/faculty/projects/ftrials/conlaw/freeexerciserise.html> (last visited Aug. 27, 2018).

thought of as creating ongoing normative obligations, separate from any obliging out of fear or compulsion.¹¹⁰

So, how should conflicts of rights, as described at the end of the last Section, get decided? Certainly, one way to decide the matter, at least where a fundamental right is involved, is to inquire whether the state has a compelling interest.¹¹¹ This can be problematic, such as when a state's compelling interest is merely to ensure the conditions by which another's right, such as the right of a same-sex couple to the benefits of marriage, is manifested against those who may have a religious, and arguably protected, reason for not wanting to afford recognition. In such a situation, it might appear that the state is arbitrarily supporting one fundamental right over another by its asserted compelling interest claim. In short, it may appear as if the state is just taking sides in a "culture war." To avoid this criticism, a common denominator should be found in such conflict of rights situations in order to determine which right should govern if the resolution adopted is to be accepted. The problem becomes even more acute, however, when the rights conflict is not between two liberty interests, which are likely to have common ground in affirming personal autonomy,¹¹² but rather pits interests in liberty against a separate interest in

110. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5–6 (2d ed. 1861). According to John Austin, positivism traditionally claimed that laws were commands backed by a threat of evil for nonconformance. *Id.* H. L. A. Hart would later amend this view to hold that laws create obligations, although not necessarily moral obligations. See H. L. A. HART, *THE CONCEPT OF LAW* 83 (2d ed. 1961). In his essay, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, Justice Scalia argues that in interpreting the Constitution he looks for the "original meaning of the text, not what the original drafters intended." ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 38 (1997). Professor Ronald Dworkin, however, takes exception to Justice Scalia's point. Dworkin claims that Justice Scalia's method of constitutional interpretation is not focused on "'semantic' originalism" but "'expectation' originalism," what the framers expected to be the results of what they wrote. Ronald Dworkin, *Comment*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 119 (1997). Indeed, had the framers meant constitutional interpretation to focus on what they expected, they would not have used the abstract language used in some parts of the *Bill of Rights*, like the Eighth Amendment's language of "'cruel and unusual' punishments," but would have limited themselves to more concrete language, like in Article II where they wrote that the president must be at least 35 years of age and "natural born." See *id.* at 120–22. Still, Justice Scalia argued back, "The Americans of 1791 . . . were embedding in the Bill of Rights *their* moral values, for otherwise all its general and abstract guarantees could be brought to naught." Antonin Scalia, *Response*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 146 (1997).

111. *Free Exercise of Religion*, *supra* note 109.

112. *Autonomy in Moral and Political Philosophy*, STANFORD ENCYCLOPEDIA OF PHIL. § 3.1 (Jan. 9, 2015), <https://plato.stanford.edu/entries/autonomy-moral/>.

The authors write:

The conception of the autonomous person plays a variety of roles in various constructions of liberal political theory Principally, it serves as the model of the person whose perspective is used to formulate and justify political principles, as in social contract models of principles of justice Also (and correspondingly) it serves as the model of the citizen whose basic interests are reflected in those principles, such as in the claim

equality, as in cases where Due Process and Equal Protection interests are both present. In such cases, the two interests do not appear readily reconcilable since they are not the same either in what they describe nor in how they operate. This gives rise, as Cass Sunstein has noted, to believe that the two interests operate on very different tracks.¹¹³

Still, the two interests may be reconcilable if they can be shown to operate, at least in some instances, together. It is true that Due Process may initially appear to look backward to history and tradition. Equal Protection, however, appears to look forward to removing hidden biases not previously recognized. Nevertheless, it is fair to say that concerns for protecting liberty and equality can also cross paths without necessarily opposing one another, provided that neither could fully operate without the attention of the other.¹¹⁴ In Hart's language, any limitations of a right must be "consistent with the right being an equal right."¹¹⁵ This is one important way, and certainly the way of most interest here, in which liberty and equality interests operate together. It also helps explain the Court's decision in *Obergefell*, where heterosexual couples would not lose the right to marry by extending the right to marry to same-sex individuals.¹¹⁶

A problem arises, however, where there is likely to be a loss felt by some party because another's right governs, as, for example, when religious freedom confronts a state sponsored non-discrimination public accommodations statute adopted in service to equality.¹¹⁷ Here, Due Process and Equal Protection may appear particularly difficult to interconnect because they seem to send different messages. Provided an appropriate foundation for the two rights can be found, even though the duties themselves operate in a somewhat different fashion, the deontological nature of both interests in looking backward to the duties people

that basic liberties, opportunities, and other primary goods are fundamental to flourishing lives no matter what moral commitments, life plans, or other particulars of the person might obtain.

Id.

113. See Sunstein, *supra* note 4, at 1163.

114. In *Loving v. Virginia*, the Court first held that Virginia's miscegenation statute violated Equal Protection by criminalizing a marriage between a white person and a nonwhite as "designed to maintain White Supremacy." 388 U.S. 1, 11–12 (1967). The Court then held marriage to be a fundamental right under the Due Process Clause of the Fourteenth Amendment. *Id.* at 12.

115. Hart, *supra* note 101, at 175.

116. Eric DuVall, *Same-sex Marriage Rate Lower than Rate for Straight Couples, Poll Shows*, UPI (June 23, 2017, 12:05 PM), https://www.upi.com/Top_News/US/2017/06/23/Same-sex-marriage-rate-lower-than-rate-for-straight-couples-poll-shows/8651498232582/.

117. Brief for Petitioner at 5, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief of the Colorado Civil Rights Commission in Opposition at 1, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111); Brief in Opposition at 1, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

are thought to have should provide a basis for determining which duties take precedence in any particular case.¹¹⁸

In other words, a right to religious freedom may at first appear to promote equality by allowing everyone with sincerely held religious beliefs to discriminate when providing services. That is until it confronts an existing right to service, such as a non-discrimination ordinance, that cannot be ignored if the underlying liberty (e.g., same-sex marriage) is to be sustained. If a right to be served exists, because without it the underlying liberty would not exist or only very narrowly exist, then, at the point where not everyone has access to be served, the two rights conflict and a choice has to be made. The issue for the deontologist is how to make the choice. It would be more simple if the matter could be handled by some utilitarian calculation, which is teleological in nature and generally forward looking toward some end or purpose thought to provide greater utility or happiness to all those who would likely be affected by the choice. Issues regarding the common good, at least when framed in economic, cultural, and political terms, are generally forward looking in this way, and are generally distinguishable from deontological claims involving justice, fairness, or the recognition of basic liberties.¹¹⁹ Even if one could make a utilitarian argument, a deontological claim might still arise if legislation initially thought to confer a benefit is seen as manifestly unfair because it denies some people access to the benefit at issue.¹²⁰ Additionally, while teleological claims in a democracy are generally thought to be under the purview of the legislature, and

118. Ethical theories get divided between those said to be deontological (like Divine Command Theory and Kantianism) and those that are teleological (like Natural Law and Utilitarianism). *Deontological and Teleological Assumptions in Normative Ethics*, REGIS UNIV. (Oct. 19, 2018), http://rhchp.regis.edu/hce/ethicsatagance/DeontologicalTeleological/DeontologicalTeleological_01.html; *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHIL. (Oct. 17, 2016), <https://plato.stanford.edu/entries/ethics-deontological/>. Deontological comes from the Greek word “*deon*” referring to origin or duty. *Deontological Ethics*, *supra* note 118. Teleological comes from the Greek word “*teleos*” referring to end or goal. *Deontological and Teleological Assumptions in Normative Ethics*, *supra* note 118. As a consequence, deontological theories are backward looking to the sources of the duty. *See Deontological Ethics*, *supra* note 118. Teleological theories are forward looking toward evaluating the results of the actions taken. *Deontological and Teleological Assumptions in Normative Ethics*, *supra* note 118.

119. As Brian Barry has noted:

[I]t is not an *accident* that we have different concepts; they really do have different jobs. We have one set which points out various distributive comparisons, such as justice, fairness, equity, equality And we have another set which points out the results of various methods of aggregation, such as the ‘public interest’, ‘common good’, and ‘general welfare’ (‘good’ and ‘interest’ for example require one to include different ways in which people are affected).

Brian M. Barry, *Justice and the Common Good*, 21 ANALYSIS 86, 89 (1961).

120. *See Plyler v. Doe*, 457 U.S. 202, 230 (1982) (holding “to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest”).

to be decided on an utilitarian aggregation¹²¹ as they are in service to the common good,¹²² principled claims—especially those involving justice and fairness, or the Constitution and its meaning, along with how the political departments might be restricted when fundamental rights are involved—are generally the province of the courts to resolve on a principled basis, often in terms of what serves personal autonomy generally.¹²³

Regarding where the deontologist might begin, it was noted earlier, following Hart, that a natural right to liberty—a right that presumably would apply equally to all—is presupposed by the existence of moral rights whose purpose is to limit some natural liberties.¹²⁴ Such moral rights may also occasionally set forth claims that appear to conflict with other moral rights. For example, claims of justice and fairness find their grounds in the distributions of benefits or detriments and may in some circumstances require limiting someone's freedom.¹²⁵ Since both moral rights generally, and justice and fairness as a particular kind of moral right, are backward looking to initiating conditions, neither is solely concerned with consequences, and any conflict between them must be resolved on their ability to promote mutual autonomy.¹²⁶ And this is where a common denominator might be found in a person's natural background right to liberty now properly understood as serving mutual

121. It is a utilitarian belief “that the purpose of morality is to make life better by increasing the amount of good things (such as pleasure and happiness) in the world and decreasing the amount of bad things (such as pain and unhappiness)” either by way of individual acts (Act Utilitarianism) or types of acts (Rule Utilitarianism). Stephen Nathanson, *Act and Rule Utilitarianism*, INTERNET ENCYCLOPEDIA OF PHIL., <https://www.iep.utm.edu/util-a-r/> (last visited Mar. 20, 2018). But one might ask how often legislatures have adopted, e.g., antiabortion laws aimed at making a moral statement without considering all the consequences of the legislation. See generally Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287, 289–302 (2017) (providing a brief history of the abortion debate).

122. Article 1, Section 8 of the Constitution provides a list of enumerated powers vested in Congress and also suggests implied powers by way of the Necessary and Proper Clause. See U.S. CONST. art. I, § 8.

123. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803). The case held:

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

Id. See also THE FEDERALIST NOS. 78, 81 (Alexander Hamilton), NO. 44 (James Madison); *The Court and Constitutional Interpretation*, SUPREME COURT OF THE U.S., <https://www.supremecourt.gov/about/constitutional.aspx> (last visited Mar. 13, 2018).

124. ALAN GEWIRTH, *REASON AND MORALITY* 27 (1978).

125. See, e.g., *Compelling-State-Interest-Test Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/c/compelling-state-interest-test/> (last visited Oct. 19, 2018).

126. VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 87 (1991). Samar writes, “By individual autonomy, I mean that the conditions that govern a person's participation in a rule-governed activity are only those conditions that are set by the activity itself.” *Id.* at 86–87.

autonomy.¹²⁷ In other words, Hart's language against using "coercion and restraint" applies just as equally to prevent background claims to natural liberty from ever being used as a constraint to undermine mutual autonomy as it does to undermining individual autonomy.¹²⁸ This is also the place where Due Process liberty rights and Equal Protection claims appear to cross hairs.

The fact that both Due Process and Equal Protection engage liberty and equality claims that are fundamentally deontological would seem to suggest that they might have a common basis for resolution by promoting overall individual autonomy for all concerned in the sense of promoting mutual self-fulfillment. However, because the messages that Due Process and Equal Protection send, as Sunstein notes, appear to operate on different tracks, resolving conflicts between the two may not be obvious. Perhaps, the problem Sunstein is identifying lies not with the difficulty of the resolution, but with how fundamental liberty claims have traditionally been described. As Sunstein states, Due Process claims address liberties thought to be long-standing.¹²⁹ By contrast, Equal Protection claims unearth biases that may only now be publicly recognized. In fact, both operate in common service to individuals being collectively able to fulfill their various ambitions, desires, and worthiest capacities, and therefore both may find the condition of their resolution not so much (or perhaps even at all) in history and tradition, which may serve only as a guide, but in what truly serves to create human self-fulfillment collectively understood.¹³⁰ But, if this is so, it raises the question: how should this notion of personhood's self-fulfillment now be exemplified to resolve actual conflicts of rights?

127. See, e.g., *id.* at 87. Samar argued, "All conflicts of rights involving privacy can be resolved by an appeal to maximal autonomy." *Id.* at 104. Also, "[t]he protection of autonomy is relevant to deciding whether an interest the state seeks to protect is truly more compelling than privacy." *Id.* at 112. This general claim about privacy can be applied to other "active" and "passive" rights in which the former "are those that permit the holder of the right to perform an action [free from outside interference], such as making a speech, publishing a newspaper report, or practicing a particular religious belief." *Id.* at 104. While the latter

are those that afford the subject a benefit, such as a trial by his or her peers, a speedy and public trial, the right to compulsory process to obtain the testimony of witnesses, and the right to the assistance of counsel. Passive rights involve positive freedom in the sense that the respondent of the right has the duty to afford the holder certain benefits.

Id. at 104–05. Together the two types of rights when put into the proper balance can serve to promote maximal autonomy and individual self-fulfillment.

128. Hart, *supra* note 101, at 175.

129. See Sunstein, *supra* note 4, at 1163.

130. One definition of self-fulfillment defines it as "the act or fact of fulfilling one's ambitions, desires, etc., through one's own efforts." *Self-Fulfillment*, DICTIONARY.COM, <http://www.dictionary.com/browse/self-fulfillment> (last visited Aug. 19, 2018). Alan Gewirth has noted:

[T]here is a general conception of it which can give an initial idea of why self-fulfillment has so often been highly valued as a primary constituent, or indeed as the inclusive content, of a good, happy human life. According to this conception, self-fulfillment consists in carrying to fruition one's deepest desires or one's worthiest capacities.

ALAN GEWIRTH, *SELF-FULFILLMENT* 3 (1998).

Personhood's self-fulfillment defies simple identification, as it encompasses by virtue of its ability when construed both individually and collectively, to include *both* liberty of the person and equal treatment of all those similarly situated, and is not necessarily limited by citizenship.¹³¹ This is manifested by personhood's failure to be just limited to maximizing individual liberty (the individualistic or libertarian position),¹³² but also includes the full range of interests that must be provided if liberty is to be extended (the more egalitarian position).¹³³ John Rawls's egalitarian view of justice identifies this latter claim.¹³⁴ In this sense, personhood's self-fulfillment engages two types of deontological claims in ongoing dialogue with one another. Due Process identifies the first of these two types of claims: liberties that may have been long valued, or perhaps are only now showing themselves to be strongly cared about because they attach to important aspects of human identity. Equal Protection identifies the second of these two types of claims, by comparing how fairly the Due Process liberties are actually distributed among individuals.¹³⁵ The two do operate on different tracks, but apparently only in opposition to one another until personhood's self-fulfillment takes on this collective sense.

131. See Linda Bosniak, *Persons and Citizens in Constitutional Thought*, 8 INT'L J. OF CONST. L. 9, 9 (2010).

132. Jan Narveson argues for the libertarian position that people "do have a general right to liberty and consequently do not have a fundamental right to equality, of any interesting kind." Jan Narveson, *Liberty and Equality—A Question of Balance*, in *ETHICS: THE BIG QUESTIONS* 271 (James Sterba ed., 2nd ed. 2002). Also, "A positive right to liberty would entail on all of us the duty to promote liberty—not just the duty to respect it." *Id.* at 276. Indeed, Narveson argues against claims of equal opportunity stating that "no one may intervene to prevent people from taking legitimate opportunities they have been, or are, freely offered." *Id.* at 282.

133. See Bosniak, *supra* note 131, at 25–29.

134. In his book *A Theory of Justice*, John Rawls sets out two principles of justice he believes would be chosen in an "original position of equality [that] corresponds to the state of nature in the traditional theory of the social contract." JOHN RAWLS, *A THEORY OF JUSTICE* 208 (1971). Rawls continues and states:

Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances.

Id. Under these circumstances, Rawls argues:

[T]he persons in the initial situation would choose two rather different principles: the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.

Id. at 210.

135. See *id.*

Due Process remains relevant and substantive in that it discovers specific rights people might need to obtain self-fulfillment.¹³⁶ Equal protection operates comparatively to ensure the rights Due Process identifies are fairly distributed.¹³⁷ In this sense, equal protection operates by comparing rights holders without necessarily identifying the right being held. However, because the right being held may itself be described in a manner that hides an unfair distribution, like when marriage is identified as operating only between same race or opposite-sex persons, Equal Protection can invalidate the limitation to ensure a fair distribution.¹³⁸ In this sense, Equal Protection prevents descriptions of rights that on their face would prevent, absent adequate justification, a fair distribution of the essential aspects of the liberty to which all are entitled.¹³⁹ It may also invalidate penalties designed to restrict liberty by denying benefits where the only purpose for the denial is to maintain a “neutral rule” of general applicability that is claimed to be in service to the common good, but in fact may not be so.¹⁴⁰ Such neutral rules raise concerns when they appear to impinge upon areas of personal privacy or religious liberty with little or no evidence showing how they implicate the greater good of society, such as might be the case where one makes use of a drug as part of a religious or artistic ritual under circumstances where its effect is unlikely to burden the society at large.¹⁴¹ That personhood in this collective sense might be helpful to afford greater liberty even against society’s neutral rules of general applicability, is especially important to recognize when no issue of equality is likely to arise but personal autonomy and the desire to live a self-fulfilled life may still be very much at stake.

V. CONFLICTS OF RIGHTS

Now arises the practical question: how do we relate personhood’s self-fulfillment to resolving actual conflicts of rights where the real debate is between

136. See *Substantive Due Process*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/substantive_due_process (last visited Mar. 13, 2018).

137. See, e.g., *Baker v. Carr*, 369 U.S. 186, 187–88 (1962) (finding that the plaintiffs had standing to bring an Equal Protection challenge to a 1901 Tennessee statute that unfairly apportioned seats in the General Assembly).

138. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595–96 (2015) (describing how the understanding of the institution of marriage has changed with the end of coverture, among other changes).

139. See *id.* at 2603. Justice Kennedy, referring to the holding in *Zablocki v. Redhail*, stated, “the Court invoked the *Equal Protection Clause* as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval.” *Id.* (emphasis added).

140. See *Emp’t. Div. v. Smith*, 494 U.S. 872, 879 (1990).

141. See *id.* at 881. As a result of this decision, both Congress and many state legislatures adopted Religious Freedom Restoration statutes to ensure religious liberty is only impinged upon where a compelling state interest is present and the intrusion is narrowly drawn. See generally *Federal Religious Freedom Restoration Act Overview*, FINDLAW, <http://civilrights.findlaw.com/discrimination/federal-religious-freedom-restoration-act-overview.html> (last visited Mar. 13, 2018).

individual liberty and equality for all? Professor Alan Gewirth has argued that the prescriptive nature of morality presupposes that any moral theory addresses moral agents in the sense of being voluntary purposive actors.¹⁴² Indeed, if these features were not part of moral agency, moral theories would be at a loss in explaining moral responsibility, since such claims presuppose that the persons addressed are capable of making choices.¹⁴³ Indeed, central to claims of criminal responsibility, certainly in most American jurisdictions, is the assurance that individual choices are voluntary, and not just the consequence of some mental illness.¹⁴⁴ Elsewhere, Gewirth has argued that the notion of moral agency better explains the sense of person in debates over the moral and legal status of abortion, at least, if one resides in a pluralistic society that follows no single moral or religious doctrine.¹⁴⁵ What is of significance for the discussion here is to recognize how personhood in the collective sense, as coextensive with the aforesaid definition of moral agents, can aid the resolution of conflicts between Due Process and Equal Protection concerns.

Moral agency operates to identify normal adult human beings as voluntary, purposive human actors, who make choices to act for their own benefit because they see their choice as affording some level of self-fulfillment.¹⁴⁶ Consequently, such choices necessarily presuppose that the person is both free to act and has the capacity to perform and carry out at least some actions.¹⁴⁷ Specifically, on the voluntary side of personhood, freedom from outside interference is essential as “it concerns the way actions are controlled as ongoing events.”¹⁴⁸ Here, human freedom operates procedurally to allow human beings the greatest range of action.¹⁴⁹ This notion of human freedom also accords with the purposiveness side as the other identifying ingredient of human action. Purposiveness plays a substantive role in that it “comprises the object or goal of the action in the sense of the good [the agent] wants to achieve or have through this causation.”¹⁵⁰ Thus, freedom to choose where one’s physical, mental, or economic abilities prevent actually carrying out the choice is not much of a freedom of choice. This suggests that well-being, physical, mental, and economic abilities are equally essential to any action that one might

142. See GEWIRTH, *supra* note 124, at 27.

143. See *id.* at 26–27.

144. See, e.g., *The ‘Model Penal Code’ Test for Legal Insanity*, FINDLAW, <http://criminal.findlaw.com/criminal-procedure/the-model-penal-code-test-for-legal-insanity.html> (last visited Mar. 13, 2018).

145. See Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287, 320–21 (2017).

146. See GEWIRTH, *supra* note 124, at 27.

147. See *id.* at 27–28.

148. *Id.* at 41.

149. See *id.* at 31, 41.

150. *Id.* at 41.

undertake.¹⁵¹ Such well-being might be said to first require the absence of external impediments to one's choice.¹⁵² As such, this is as much about ensuring the voluntariness of the action as it is about the individual purposes that give it rise. Beyond this, there will be situations where the possibility of choice will need assistance from education, health care, a decent standard of living, and more for purposes to even emerge.¹⁵³ What duties are there to provide this assistance and what obligations are there to be free of external interference are what one would hope that a good moral theory and a good theory of political liberalism would make clear. This is also the place where libertarian and egalitarian views of the person must cease being at odds and find common ground in order for personhood to truly become self-fulfilling.

Gewirth's derivation for a supreme principle of morality can provide an analogous set of solutions for resolving Due Process and Equal Protection claims, whether one adopts his supreme principle of morality or not.¹⁵⁴ Of particular significance in Gewirth's derivation are his arguments for relating liberty and equality concerns in a way that might well define the relationship between Due Process and Equal Protection.¹⁵⁵ This is made clear by the argument he sets forth for the derivation of the principle of morality and the way it works to resolve conflict of rights cases. Gewirth's arguments for the derivation of a supreme principle of morality, which he calls the "Principle of Generic Consistency," or "PGC" for short, starts from within the internal conative standpoint of the agent (that is, any voluntary purposive actor), and proceeds to explicate what the agent *qua agent* would logically have to agree to, from her own point of view, on pain of contradiction.¹⁵⁶ His argument is summarized as follows:

1. Every agent by performing any voluntary act presupposes the action is good for some purpose of her own.¹⁵⁷
2. Since performing any such action necessarily presupposes that the agent has the freedom and well-being to perform it, from the agent's point of view she claims rights to freedom and well-being, as necessary to her action being voluntary and purposive respectively.¹⁵⁸
3. Indeed, since the rights being asserted are claim rights, if the agent were to deny she had these rights, then from within her own internal

151. Gewirth takes particular note "that the agent [must] act in accord with the generic rights of his recipients and not all of mankind[.]" *Id.* at 201. In doing so, he must "take favorable account of his recipients' wishes, since the recipient normally does not want to be coerced or to undergo deterioration of his abilities to have basic, nonsubtractive, and additive goods." *Id.* at 202-03.

152. *See id.* at 207-08.

153. *See id.* at 208-10.

154. *See generally id.* at 206-07.

155. *Id.*

156. *See id.* at 44-45 (discussing the "Dialectically Necessary Method").

157. *Id.* at 48.

158. *Id.*

connotative standpoint she would be admitting other persons are permitted to prevent her from having these same rights and that consequently she may not have these rights at all.¹⁵⁹

4. But such an admission would be in contradiction to the agent's own action, since the agent's performance implies she must have freedom and well-being. Thus, at least from within the agent's point of view, the rights to freedom and well-being are necessarily being claimed whenever she performs any action for any purpose of her own.¹⁶⁰

But this is not the end of the story according to Gewirth. If it were, all he would have achieved is an egoistic/prudentialist view for rights claims in which prudential claims are set out, but in no way could resolve likely conflicts between claims of different persons.¹⁶¹

Next, as a rational actor the agent realizes that any other agent, that is, any other person wanting to do some action for some purpose, would claim these same rights and there is nothing special to distinguish her from any other agent insofar as she is an agent.¹⁶² Here is where the collectivist notion of personhood begins to assert itself. If there is nothing to distinguish this agent from any other agent, then presumably any agent seeking to perform any action for any purpose would be just as entitled to make these same rights claims.¹⁶³ Consequently, if the agent denied her fellow agents' rights on the same basis she affirms for herself, she would be impliedly saying, "I have rights because I am a prospective purposive agent; you don't have rights, even though you are a prospective purposive agent, where the sufficient reason for having these rights is just being a prospective purposive agent."¹⁶⁴ That position, Gewirth points out, would also be a contradiction; so, Gewirth believes that logically any agent is compelled to accept, as the supreme principle of morality, "Act in accord with the generic rights [to freedom and well-being] of your recipients as well as yourself."¹⁶⁵ In further describing his principle, Gewirth notes that it is categorically necessary because an agent who has gone through this dialectically necessary procedure

159. *Id.* See also Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YALE L. SCH. LEGAL SCHOLARSHIP REPOSITORY 710, 716 (1964) (arguing that the word "right" in the law, when used nominatively, can apply to claim rights, liberties, powers, or immunities, and so it is important to ensure the sense of any particular use); Hart, *supra* note 101, at 183.

160. See GEWIRTH, *supra* note 124, at 78–82.

161. See generally *id.* at 107–08.

162. *Id.* at 109–10.

163. *Id.* at 112.

164. *Id.* at 115–19 (dealing with the individuality objection by way of a direct discourse illustrating a first-person perspective)); see generally DERYCK BEYLEVELD, *THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY* (1991); GEWIRTH'S ETHICAL RATIONALISM: CRITICAL ESSAYS WITH A REPLY BY ALAN GEWIRTH (Edward Regis Jr. ed., 1984).

165. GEWIRTH, *supra* note 124, at 135 (emphasis omitted).

would come to exactly the same conclusion on pain of contradiction.¹⁶⁶ For this reason, he states, it is fair to describe the PGC not just as a dialectically derived principle, but also as an assertoric principle or, in other words, a statement of moral fact.¹⁶⁷

Putting aside possible philosophical debates over whether Gewirth has, by his method, finally achieved a supreme categorical principle of morality, he has certainly explained why *any* agent from within her own point of view cannot rationally claim rights to freedom and well-being for herself without also recognizing that all other agents could rationally make these very same rights claims.¹⁶⁸ Moreover, because Gewirth's argument proceeds without begging any questions, as would likely happen if his argument were grounded in a particular religious or cultural tradition, it can legitimately claim a greater universality than more particularistic religious or culturally-based moralities. For this reason, the argument provides a rational *foundation for human rights* generally, and the civil liberties afforded by the U.S. *Bill of Rights* and the Fourteenth Amendment particularly.¹⁶⁹

The argument logically requires that each agent views herself and every other agent as similarly situated. This in particular should make it attractive as a useful guide in discussions concerning Equal Protection jurisprudence where being similarly situated is a key concern. Even if it were the case that the theory somehow failed to logically compel the mutual recognition of agents' rights, certainly the idea of "rule of law" as binding generally on all persons, including when grounded on principles recognized by the international community, implies a general public equality and the recognition of equal rights among all persons.¹⁷⁰ This also fits within Hart's argument that a background, general,

166. *Id.* at 133.

167. *Id.* at 161.

168. *See generally id.* at 109–10.

169. Allen Buchanan writes:

It is often said that the Universal Declaration of Human Rights and the various human rights treaties that followed it wisely avoided attempting a justification for the norms they asserted. To paraphrase the philosopher Jacques Maritain, it was possible to agree on a list of human rights only on the condition that almost nothing was said about how they are grounded.

. . .

In the end, whether such a justification becomes available will depend not only upon the further development of the moral foundations of the idea of human rights—a task which until recently most contemporary moral and political philosopher, like most internationalist legal theorists, have avoided—but also upon improvements in the global public deliberative processes that occur within the complex array of institutions within which human rights norms are articulated, contested, and revised over time.

Allen Buchanan, *The Legitimacy of International Law*, in *THE PHILOSOPHY OF INTERNATIONAL LAW* 96 (Samantha Besson & John Tasioulas eds., 2010).

170. The United Nations defines "rule of law" as follows:

The term rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are

natural, and *equal* right to liberty exists whenever any moral right is claimed.¹⁷¹ Consequently, the rights that arise out of claims by moral agents as voluntary, purposive actors, are just as relevant to issues involving conflicts related to the Due Process and Equal Protection clauses, as they are to resolving moral conflicts between liberty and equality. While the argument might not be the whole truth of how constitutional questions are decided because constitutional interpretation is fraught with debates over history and tradition,¹⁷² nevertheless, it should provide a valuable resource for resolving rights conflicts between Due Process and Equal Protection generally.

Between private individuals, Gewirth describes the way to handle conflicts involving freedom claims by noting that the freedom component of the PGC involves personal consent, autonomy, and privacy of all persons as “equal rights” holders.¹⁷³ These three features, which are also features that play a role

publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

James Goldston, *Three Principles to Strengthen the Rule of Law*, OPEN SOCIETY FOUNDATIONS. (Jan. 26, 2012), <https://www.opensocietyfoundations.org/voices/three-principles-to-strengthen-the-rule-of-law>.

171. HART, *supra* note 110, at 183.

172. Constitutional law scholars, like the justices themselves, have long debated what the various constitutional provisions mean and how they are to be interpreted. *See, e.g.*, WILLIAM N. ESKRIDGE JR., *INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION* 361–405 (2016) (discussing the various canons and norms that distinguish constitutional from statutory interpretations); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 136 (2001) (arguing “that the United States, as a matter of fact and law, has an unwritten as well as a written constitution. The unwritten constitution mediates the written Constitution and, among other functions, substantially defines and ‘legitimizes’ the Court’s role in constitutional implementation.” Thus, it eliminates the Justices betraying their duty when they “sometimes propound doctrines that result in ‘overenforcement’ and, more typically, in judicial ‘underenforcement’ of constitutional norms”); *see generally* SCALIA, *A MATTER OF INTERPRETATION*, *supra* note 110 (accompanying commentaries by Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin arguing for and against Scalia’s originalist interpretation of constitutional norms being like statutory norms). Philip Bobbit demands, based on an earlier work:

[T]hat “Constitutional law must be able to provide good reasons, rather than mere preferences, for choosing among alternative outcomes generated by the operation of the various forms of argument” [prudential, structural, ethical and historical]. But is this reasonable sounding demand really necessary? I think it depends upon a frequent confusion between how we know that we know something (the subject of epistemology) and what in fact we know when we know something (the subject matter of ontology).

PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* xvi (1991).

173. *See* GEWIRTH, *supra* note 124, at 256. Privacy, here in context to both a private act and a private state of affairs, provides respectively the ideal case examples of where individual freedom should not be interfered without further inquiry because, *prima facie*, no interest of another appears to be infringed. *See also* SAMAR, *supra* note 126, at 68–69, 97, 103.

in substantive Due Process considerations, define a level of freedom in a most basic sense where no other interest is presupposed.¹⁷⁴ Similarly, on the well-being side, Gewirth defines three levels of well-being in their respective order of importance to purpose-fulfillment.¹⁷⁵ The first and most essential level of well-being, which Gewirth calls “basic,” involves life, physical integrity, and mental equilibrium.¹⁷⁶ This is the most essential aspect of well-being because without these features, a person could not be an agent, that is, a voluntary purposive actor.¹⁷⁷ The second most important level is “non-subtractive” well-being.¹⁷⁸ Here, the concern is with the abilities and conditions necessary for maintaining one’s current level of purpose fulfillment.¹⁷⁹ An agent’s non-subtractive well-being is affected when she is lied to, promises are broken, or she is defrauded.¹⁸⁰ The third level of well-being Gewirth calls “additive.”¹⁸¹ In this level, the abilities and conditions required to increase one’s level of purpose fulfillment are provided.¹⁸² Additive well-being is denied when one is not provided decent health care, education, or a reasonable opportunity to improve his economic wherewithal to advance from his current level of purpose fulfillment.¹⁸³ Thus, implied by the well-being component, are important elements in service to guaranteeing equality beyond the existence of an “equal right,” insofar as everyone needs to have these elements as they seek to manifest their basic freedoms toward purpose-fulfillment.

Gewirth also points out how differences between freedom and well-being might work to resolve conflicts of rights issues where liberty and equality might appear to be in conflict.¹⁸⁴ For example, in the case where a person would use his freedom to attack the basic well-being of another, he necessarily creates a transactional inconsistency by illogically implying his rights override those of the other, even though, as an agent, his rights are no different from those of another.¹⁸⁵ Under such circumstances, the recipient is certainly justified in using

174. *Id.* at 67–68.

175. GEWIRTH, *supra* note 124, at 53.

176. *Id.* at 54.

177. *See id.* at 211–13. Gewirth takes note that there are three distinct kinds of goods, which he designates “as *basic goods*, *nonsubtractive goods*, and *additive goods*[.]” and states that [e]ach of these is necessarily involved in all purposive action as viewed by the rational agent, the first kind as its preconditions, the other two kinds as constitutive of his purposes. Each of the three kinds of good is hence also involved in the value-judgments that express his view of the goodness of the purposes for which he acts.

Id. at 54.

178. *Id.* at 230.

179. *Id.*

180. *Id.* at 238–39.

181. *Id.* at 240.

182. *Id.*

183. *Id.* at 240–49.

184. Alan Gewirth, *The Basis and Content of Human Rights*, 23 NOMOS 119, 125–28 (1981).

185. *Id.*

all reasonable self-defense measures to protect his own well-being, provided his actions are proportionate to the threat he seeks to overcome.¹⁸⁶ But what about conflicts of rights involving different levels of well-being, such as lying to protect the basic rights of innocent people?¹⁸⁷ In that case, because basic well-being is more important to being an agent than non-subtractive well-being, lying to protect an innocent person is justified where there is no other way to guarantee the person's protection, such as by way of an impartial trial with Due Process guarantees.¹⁸⁸ A historical example of such a situation would be lying to the Gestapo as to where a Jewish family might be hiding. Gewirth sees these two resolutions of conflict of rights as where the PGC applies directly on individuals to guide actions.¹⁸⁹ For purposes of this Article, however, it is important to focus on Gewirth's third relevant area of conflict resolution, where he promotes the construction and engagement of impartial governmental institutions, as defined by the rule of law, to assist in the resolution of conflicts of rights more generally.¹⁹⁰

Because human agents are often biased by their own perspective, the creation and use of impartial institutions, like courts and various forms of arbitration, the PGC acknowledges, provided due process concerns are met, are better suited to resolving conflicts that arise from personal self-interest.¹⁹¹ Here the freedom component operates to provide protections for consent, privacy, and personal autonomy. For example, this is done by protecting against forced membership in voluntary organizations and by requiring existing governments, if they are to be morally justified, to provide a means for consent to their decision procedures by those subject to their law.¹⁹² On the well-being side, the PGC requires governments and international organizations to work together to protect against violations of basic rights wherever they might occur.¹⁹³ It also requires that governments do as much as possible to increase the well-being of their own people to the maximum degree possible within their own means, as well as for wealthier governments to aid poorer governments in developing the well-being of their subjects, since all agents are morally the same in that they are voluntary purposive human agents.¹⁹⁴ Thus, one finds by way of the indirect applications

186. *See id.* at 137.

187. *See id.* at 138.

188. *See id.*

189. *See id.* at 139.

190. *See id.* at 139–40.

191. *See id.* at 139.

192. *See id.*

193. *See id.* at 140.

194. *See* ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 206–208 (1982). *See also* ALAN GEWIRTH, THE COMMUNITY OF RIGHTS 353 (1996) (arguing that “[w]here governments do not have the will or the resources to fulfill the rights, they must be helped by other governments, especially through facilitating processes of democratization and developing in their own members the abilities of productive agency whereby they can provide the needed resources for themselves”); *see also* IMMANUEL KANT, CRITIQUE OF PURE REASON A548/B576

of the PGC moral grounds to support the original aspirations of the United Nations' *Universal Declaration of Human Rights*,¹⁹⁵ but also for the subsequent adoptions of the legally obligatory covenants to protect civil, political,¹⁹⁶ economic, social, and cultural rights,¹⁹⁷ as well as those involving the elimination of discrimination based on race¹⁹⁸ or gender.¹⁹⁹ Here, international law provides, by way of formal treaty,²⁰⁰ custom, and practice²⁰¹ (that is, state practice and *opinio juris*²⁰²), the ground for universalization between individual and collective notions of the person at the international level. This latter recognition is embodied in explicit and implied roles of equality as a separate comparative means that international courts, like the International Court of Justice, can use for evaluating liberty across cultures, at least where specific treaty reservations, which themselves may sometimes be morally suspect, have not been invoked.²⁰³

The liberty interests found under the PGC are interests presumably any agent could advance because, facially, they do not interfere with the equal liberty of other agents' same basic rights or other highly valuable interests.²⁰⁴ Such basic liberty interests, especially if they involve important roles that human beings are inclined to identify with as a basis of their self-fulfillment, should be deemed fundamental; particularly is this the case when these interests could not otherwise be accommodated or could only be accommodated by alternative means and only at great effort and expense.²⁰⁵ This is especially true on the

(1998) (noting "the action must be possible under natural conditions if the *ought* is directed to it" (emphasis added)).

195. G.A. Res. 217 (III) (Dec. 10, 1948).

196. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171.

197. International Covenant on Economic, Social and Cultural Rights, Jan. 3, 1976, 993 U.N.T.S. 3.

198. G.A. Res. 2106 (XX), International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (Jan. 4, 1969).

199. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

200. *Statute of the International Court of Justice*, 1945 I.C.J. Acts & Docs 21.

201. *Id.* art. 38(1)(b).

202. See *Opinio Juris (International Law)*, CORNELL L. SCH. LEGAL INFO. INST, https://www.law.cornell.edu/wex/opinio_juris_international_law (last visited Mar. 15, 2018).

203. Article 2(1)(d) of The Vienna Convention defines a reservation as "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State[.]" Vienna Convention on the Law of Treaties art. 2(1)(d), Jan. 27, 1980, 1155 U.N.T.S. 331.

204. See GEWIRTH, *supra* note 124, at 206.

205. Before the Supreme Court's decision in *Obergefell v. Hodges*, to constitutionally protect same-sex marriages in states where such marriages were not recognized, such protections could only be obtained limitedly by powers of attorney, wills, and some other legal documents, but this would never alter statutes affording benefits to only opposite-sex married couples. In some states, Domestic Unions statutes were adopted that offered some marital rights; some other states eventually adopted Civil Unions statutes where all the rights of marriage under state law were

liberty side, where a particular liberty, like the right to marry, might be described so as to deny access to the same right, or to deny what fundamentally makes it of value to others. Consequently, as Hart has noted, imbedded in the idea of a right, especially a liberty right, is the idea that it cannot be generally denied.²⁰⁶ But again, one has to be cautious, for the liberty right might be so described that on the surface, it might appear to be generally accessible based on what the right is, but in reality it limits those who would seek to make use of its essential qualities because of how it is being defined. For example, if the right to marry is defined to only include same-race or opposite-sex couples, then access by interracial and same-sex couples to fundamental aspects of marriage—that normally attach to couples with rights and duties to one another—will be denied where a less restrictive definition would otherwise make these same aspects available.²⁰⁷ In this instance, essential ingredients that make the marriage right desirable, and not just attractive, are what is being denied, even though access to the right is seemingly open to all.²⁰⁸

The other place in Gewirth's system where equality takes root is where he describes resolving conflict of rights involving different levels of well-being.²⁰⁹ Prevention or removal of transactional inconsistency when one person or group attempts to use its rights to deny those same rights to another person or group is an obvious case. Another place is where a tradeoff is offered between denying a lesser good of well-being (such as, in the moral area, not lying) to offset a greater good (such as life).²¹⁰ Obviously, in the case of basic well-being, these goods always trump non-subtractive or additive well-being; similarly, non-subtractive well-being will usually trump additive well-being, although there

available but not its status and, of course, not any marital rights under federal law, which itself prohibited recognition of same-sex marriage. *What is a Domestic Partnership?*, FINDLAW, <http://family.findlaw.com/domestic-partnerships/what-is-a-domestic-partnership> (last visited Oct. 26, 2018). As a consequence, these statutes failed to provide all the protections of marriage since they didn't apply to the federal government and didn't afford the same social status as marriage. See Vincent J. Samar, *Privacy and the Debate over Same-Sex Marriage Versus Unions*, 54 DEPAUL L. REV. 783, 785–91 (2005). The Supreme Court in *United States v. Windsor*, 570 U.S. 744, 752 (2013), relied on Equal Protection grounds to strike down Section 3 of the federal Defense of Marriage Act, which provided:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.

Defense of Marriage Act, 1 U.S.C. §7 (2012), *invalidated by* *United States v. Windsor*, 570 U.S. 744 (2013).

206. See Hart, *supra* note 101, 188–991.

207. The list of important aspects of marriage denied encompass matters of inheritance, family law, health care decisions, adoption, spousal immunity, statutory entitlements (based on being married), and more. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

208. See Samar, *supra* note 205, at 785.

209. GEWIRTH, *supra* note 124, at 241.

210. *Id.* at 240.

might be occasions where small amounts of non-subtractive well-being are overcome by great improvements in additive well-being, such as by taxing all citizens, regardless of whether they have children, to support public education and thus enhance purpose fulfillment.²¹¹ Here the point is Kantian, not utilitarian, in ensuring what is needed for basic autonomy and self-fulfillment is not denied to the least advantaged.²¹²

At the societal, legislative level, differences of degree must account for the possibility that the degree of sacrifice of a seemingly greater degree of well-being may be comparatively small, if it applies to fewer persons on less than fundamental issues and when juxtaposed against a far greater increase of additive well-being involving many people on very important issues directly affecting agency. Here, one might set the choice from behind a Rawlsian veil of personal ignorance and ask whether, as rational beings, not knowing how it will affect them personally, one would consent to the adjustment assuming a statistical average amount of risk aversion as is appropriate to people living in a given society?²¹³ All of this suggests that a correct understanding of rights to freedom and well-being, in the sense of adding to individual self-fulfillment collectively, should help in the development of a framework where Due Process and Equal Protection concerns can reasonably be reconciled. The two considerations need not be posited as operating against one another, but instead can be seen to operate together through a collective recognition in which individual persons acknowledge the equal standing of one another in order to achieve maximum self-fulfillment for all.²¹⁴ This is the collective sense of personhood that was sought after earlier, as necessary to resolve conflicts of rights.²¹⁵

VI. RE-CONCEPTUALIZING THE RELATIONSHIP BETWEEN DUE PROCESS AND EQUAL PROTECTION

Given the forgoing, how might this philosophical background understand the relationship of Due Process and Equal Protection? Recall that traditionally it was thought that Due Process is backward looking toward discovering “an existing or time-honored convention, described at the appropriate level of

211. Gewirth, *supra* note 184, at 141.

212. See JOHN RAWLS, A THEORY OF JUSTICE 53 (2009) (arguing that “social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be everyone’s advantage, and (b) attached to positions and offices open to all” under conditions of fair equality of opportunity). Rawls claims that the original position from which these principles derive “may be viewed, then, as a procedural interpretation of Kant’s conception of autonomy and the categorical imperative.” *Id.* at 226.

213. See generally *id.* at 15–18.

214. For Gewirth, “self-fulfillment is a maximizing conception; it consists in superlatives of desire and achievement; it subsumes all other values of human life and is the ultimate goal of human striving.” GEWIRTH, *supra* note 130, at 3. It is best understood not historically but rather dialectically, analytically, and systematically. See *id.* at 5–6.

215. *Id.* at 3.

generality.”²¹⁶ By contrast, Equal Protection is forward looking “to invalidate practices that were widespread at the time of its ratification and that were expected to endure.”²¹⁷ In light of the discussion regarding liberty and equality, both of these views should now be seen as somewhat misleading. What makes the Due Process analysis work is not that the right described has a longstanding history. Slavery had a longstanding tradition; that does not mean Due Process should recognize a right to own slaves even absent the Thirteenth Amendment’s adoption. While a longstanding history might aid the right’s recognition, a failure to have a longstanding history should not mean the right does not exist. If that were the case, both the Court’s decision in *Loving*, insofar as it was a Due Process case, and *Obergefell*, would have been wrongly decided, for the issues in those cases were not whether marriage was a fundamental right (though there is case evidence to suggest that had long been believed),²¹⁸ but whether state marriage laws could limit the interpretation of marriage for whites to only marry whites or for everyone (white or nonwhite) to only marry people of the opposite-sex.²¹⁹ Nor is this conclusion altered by saying that the Court’s determination of the constitutionally appropriate level of generality for the right to marry disallowed states from imposing these limitations. For the Court offered no definite criteria for deciding what the appropriate level of generality is, at least not before considering Equal Protection.²²⁰ And indeed, the level of generality the Court was willing to consider may have changed over time.²²¹

What makes the decision in these cases correct is that the fundamental right involved, namely marriage, is unfettered from certain previous conventions that had defined the institution of marriage. As such, the fundamental right described

216. Sunstein, *supra* note 4, 1163.

217. *Id.*

218. *14 Supreme Court Cases: Marriage is a Fundamental Right*, AM. FOUND. FOR EQUAL RTS. (July 19, 2012), <http://afer.org/blog/14-supreme-court-cases-marriage-is-a-fundamental-right/>.

219. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). Justice Kennedy stated:

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U.S. 702, 721, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997), which called for a “careful description” of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the *Due Process Clause* must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy.

Id.

220. *Id.* at 2598.

221. See *Baker v. Nelsen*, 409 U.S. 810 (1972) (holding there was no federal question raised by marriage being an opposite-sex institution), *overruled by Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Naim v. Naim*, 350 U.S. 985 (1956) (in which the Court refused to hear a challenge to Virginia’s miscegenation statute), *overruled by Loving v. Virginia*, 388 U.S. 1 (1967).

here is derived from the basic interest in freedom as autonomy combined with the existing institution of marriage.²²² Moreover, what makes the right to marry or any right fundamental is its impact on *basic* well-being compared to its nonexistence or circumscribed application where the reasons are not in service to maximize overall well-being. Although the right to marry is fundamental, it is not basic in the sense of being a basic freedom because it is not independent of institutional facts or social conventions.²²³ Consequently, when it becomes apparent over time that some of the conventions that may have previously gone unnoticed when describing the institution may now be regarded as discriminatory, equality becomes important to rid the institution of its discriminatory elements. This is where Equal Protection instructs the meaning and reach of the liberty. Not allowing access by various groups to the essential ingredients that make the institution self-fulfilling, such as the ability to make more efficient health care and property decisions among spouses, or the self-fulfillment from public identification as a fully committed unit, are reasons to alter the institution's description, absent a compelling reason for maintaining the existing description.²²⁴ For it is these essential elements that describe the basic liberty interest behind the institution and shows what makes the institution attractive.

Foremost among the self-fulfilling interests that explain why marriage is fundamental is the role it plays for the couple and society at large by publicly affirming the couple's decision to be seen and treated both legally and socially as a unit.²²⁵ That factor should be seen as central to the Due Process liberty aspect that gives rise to the fundamental right once it is recognized that other factors, such as the ability to naturally procreate, are not necessary to the determination of this fundamental right.²²⁶ History and tradition may play a role here, but only in serving to bring into the foreground this important self-fulfilling

222. See SAMAR, *supra* note 126, at 68–69.

223. See *id.*

224. *Obergefell*, 135 S. Ct. at 2599. Justice Kennedy states the four “reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.” *Id.* First, “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.” *Id.* Second, “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.” *Id.* The next reason “is that it safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education.” *Id.* at 2600. Finally, “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.” *Id.* at 2601.

225. See Samar, *supra* note 205, at 791–97.

226. See Jamal Green, *Divorcing Marriage from Procreation*, 114 YALE L. J. 1988, 1989, 1994, 1996 (2005) (arguing that the Supreme Court’s unanimous decision in *Turner v. Safely*, 482 U.S. 78 (1987), holding unconstitutional a Missouri prison regulation that denied inmates “the right to marry except for ‘compelling reasons’”—“generally only pregnancy or birth of a child[,]” with “no procreation justification” and “the ‘conception’ variable . . . eliminated by the restrictions of prison life”—“demonstrates . . . that marriage is fundamental under the U.S. Constitution not because it provides a setting for heterosexual procreation but because it solemnizes a social relationship that individuals regard as fundamentally important”).

factor once other considerations are no longer found to be material. Since other considerations may have at one time been thought to be material, this also means that history and tradition are only guides to discovering why the institution might have originally been thought to be fundamental, not the basis for its fundamentalism. History and tradition do not provide normative grounds even if they do provide a factual background for racial or sex-based discrimination, let alone establish such discrimination as fundamental. What makes the right to marry fundamental, then, is its special connection to the basic, natural background liberty interest in freedom that most people identify as important to their own self-fulfillment, and without which would otherwise be very difficult to fully obtain.

A separate question concerns biases that might limit whose basic liberties the law will protect in any given situation. Here, Equal Protection as a form of comparative equality analysis, can be seen to borrow from a kind of Gewirthian analysis to protect against classifications that are deemed invidious.²²⁷ Gewirth noted that “the PGC requires a general respect for all other prospective purposive agents with regard not only to the external effects of their agency but also, and primarily, to the factors of rational personhood and aspiration that support and generate these effects.”²²⁸ He points out that “[i]n consequence of such respect, each person must refrain from feelings or exhibiting contempt toward others; persons must not be insulted, belittled, or patronized, nor must they be discriminated against on grounds of race, religion, or nationality.”²²⁹ Obviously, “the factors of rational personhood and aspiration” are closely linked to the basic, non-subtractive, and additive goods of well-being, all of which are important to human self-fulfillment.²³⁰ As such, it is fair to say that a similar link should exist between these goods and the safeguards of equality that Equal Protection affords. Such safeguards include, beyond affording some rational basis protection for additive goods, an application of strict scrutiny for any denial of fundamental rights likely to impact basic liberties. These safeguards should also apply when the government classifies a group based on race or ethnicity, as such classifications are highly likely (given past history and experience) to be discriminatory and thus denying of the full range of human agency.²³¹ And even in those cases where a short-term racial bias might be justified to offset presently existing effects of past racial discrimination—because the nature of the de facto discrimination is so endemic to existing social structures as to provide no other alternative for resolution—Equal Protection, as

227. See *Equal Protection Analysis Under Both the Equal Protection Component of the Fifth Amendment Due Process Clause and the Fourteenth Amendment Equal Protection Clause*, WESTERN NEW ENGLAND SCHOOL OF LAW, <https://www.wneclaw.com/conlaw/epreview2013.html> (last visited Apr. 2, 2018).

228. GEWIRTH, *supra* note 124, at 242.

229. *Id.*

230. *Id.*

231. See *id.* at 170–71.

an operant of fair equality, requires that the ability to discriminate be narrowly tailored so as not to sweep too broadly into what otherwise would be a protected area of background liberty rights.²³²

Additionally, governmental classifications that are likely to be pursued simply because of some underlying stereotype involving gender or illegitimacy should be subject to heightened scrutiny to ensure they are indeed supported by “an important governmental interest,” and only attained by “means that are substantially related to that interest.”²³³ This set of categories should also include forms of invidious discrimination based on sexual orientation, as these too would be just as likely to be irrelevant as classifications involving race, religion, nationality, or sex (including trans-sex). Here, one sees that such classifications only appear to pit one’s ability to be an agent against another’s, whose apparent purpose-fulfillment may be masking a hidden claim to superiority.

For most other classifications, however, it is usually enough that the government show a rational connection “to a legitimate governmental interest,” regardless of how well the connection actually serves that interest.²³⁴ This latter can be seen as a way well-being might also be advanced by recourse to the freedoms associated with the normal democratic processes, provided they are available and operative. However, as mentioned earlier, some classifications brought under rational basis, involving mental health²³⁵ or denial of a legislative remedy to prevent sexual orientation discrimination without first obtaining a state constitutional amendment,²³⁶ were properly afforded a heightened form of rational basis review because it appeared that the government action may have been the result of prejudice or antipathy against a politically powerless group.²³⁷

232. *See id.*

233. *See Loving v. Virginia*, 388 U.S. 1, 11 (1961) (stating a Virginia statute based on race should be subject to strict scrutiny, whereas gender and illegitimacy are subject to intermediate scrutiny).

234. In other words, the liberties that rational basis traditionally concerns itself with are usually not the kind likely to be thought fundamental or even quasi-suspect when denied and, therefore, from a Gewirthian perspective, may not present themselves as challenging basic well-being. Where they do so present themselves, usually only after a period of consciousness raising, as with the marriage cases, the liberties deserve greater scrutiny to ensure basic well-being is not being denied.

235. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (vacating the lower court’s judgment that mental illness was a quasi-suspect class, but still holding that zoning ordinances were invalid as applied to respondent).

236. *See Romer v. Evans*, 517 U.S. 620, 635–36 (1996) (enjoining the amendment to the Colorado Constitution prohibiting all legislative, executive, or judicial action at any level of state or local government).

237. *See City of Cleburne*, 473 U.S. at 449 (holding that the City’s denial of a special use permit for a home for the mentally ill, where other apartment buildings, fraternity and sorority houses, and hospitals were free to locate, was based on a prejudice against the “mentally retarded”); *see also Romer*, 517 U.S. at 634 (writing for the majority, Justice Kennedy held “that the disadvantage [created by Colorado’s Amendment 2] imposed is born of animosity toward the class of [lesbians, gays, and bisexual] persons affected”).

In these instances, the government had to show more than just a rational connection to a legitimate governmental interest, something more substantial to acknowledge the likely potential for harm that might affect these individuals' basic well-being.²³⁸ Exactly how much more the government has to show has not yet been made clear by the Court, although under one test, it must be strong enough to offset a per se violation of Equal Protection.²³⁹ Certainly, this is an area where further work needs to be done to ensure the basic liberties of affected groups are protected.

On its face, the current classification scheme makes sense, but only as a starting point, given how biases that may have gone previously unrecognized become discovered through increased social awareness, as indicated by the aforesaid cases. As such, there necessarily needs to be greater fluidity in the determination of levels of scrutiny that courts will consider, as aspects of social life not previously thought to be biased are now brought into public perception. Here, it is important to take such perceptions into account, while at the same time critically evaluating them, to ensure that courts do not mistake what might be simply the result of a political choice by a legislature (such as creating a graduated income tax) as giving rise to a new discriminated class or to a change in the level of scrutiny, unless the legislation represents an obviously irrational or unjustified bias, that is systemic in society, and degrading of human dignity.²⁴⁰ This latter limitation is necessary to prevent new forms of discrimination from taking hold that are likely to undermine the above framework of liberties and equality that need to be protected if human autonomy and overall purpose-fulfillment is to advance.

At the strict scrutiny level, this concern is accounted for when the class is identified as a "suspect class" because it has suffered historical discrimination

238. See *City of Cleburne*, 473 U.S. at 441 (holding zoning ordinances were invalid because they were quasi-suspect as applied to the mentally ill).

239. *Romer*, 517 U.S. at 633 (Justice Kennedy writes, "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense").

240. See *Justice Stevens's Equal Protection Jurisprudence*, 100 HAR. L. REV. 1146, 1153–54 (1987). The author argues:

Justice Stevens has developed an alternative to the three-tiered approach of the Court. Rather than focusing on abstract categorizations of classifications, Justice Stevens conducts a case-by-case inquiry into the "relevance" of the classification to a valid public purpose. In his equal protection lexicon, the requirement of relevance to a valid public purpose means that the characteristic or trait or behavior singled out to identify a group for legislative benefit or burden must "provide a justification for treating [the members of the two classes] differently." Of course, relevance alone can be understood to be a tautological concept. Justice Stevens' approach, however, is given direction through incorporation of normative premises that reflect a social vision of equality, providing his inquiry into relevance with substantive content. Although this content does not promise mechanical consistency of result, it would enable other judges to apply Justice Stevens' method with shared direction.

Id.

for reasons irrelevant to its ability to perform and contrary to the ideals of Equal Protection, and the class is generally thought to be politically powerless to correct the discrimination by access to the political branches.²⁴¹ Under such circumstances, Equal Protection should operate to protect against unwarranted bias against any group, since the nature of the bias itself will affect basic well-being of how people are viewed, as it will likely prevent opportunity for correction by the normal political process. By and large, the concerns least needed for such strict or even heightened scrutiny involve distributions of benefits or detriments thought to impact only comparatively minor liberty interests or interests that are likely to be handled by the normal political process, and certainly only ones that have never been thought to be fundamental.²⁴²

What should be the criteria for determining whether the interest is fundamental? In *Plyler*, the Court held that “[p]ublic education is not a ‘right’ granted to individuals by the Constitution.”²⁴³ Perhaps this should now be reconsidered, given how important access to educational opportunities are for advancing individual well-being and full participation in a free society, as the Court in *Plyler* itself admitted.²⁴⁴ Indeed, education itself, even aside from its obvious usefulness in obtaining a job and living a full life, will provide the tools for discovering forms of discrimination not traditionally recognized but, when recognized, serve the overall good of society by protecting the basic well-being of all society’s members.²⁴⁵ So, even when not considered a fundamental right, access to education is certainly a liberty interest of upmost importance both to the individual and society.²⁴⁶ Indeed, one could speculate, though probably mistakenly, that the only reason for education not being a fundamental right is because its importance to society is well recognized, although not necessarily in the same way or for the same purposes that one would expect the political branches to take it adequately into account.²⁴⁷ Of course, how little this is true is easily seen if one examines the different views political parties have about

241. See *Suspect Classes: Defining Suspect Classes*, L. IN CONTEMP. SOC’Y (Jan. 22, 2013), <http://moglen.law.columbia.edu/twiki/bin/view/LawContempSoc/MarcLegrandFirstPaper>.

242. *Know Your Constitution (4): What is Equal Protection?*, NAHMOD LAW, <https://nahmodlaw.com/2013/01/31/know-your-constitution-4-what-is-equal-protection/> (last visited Feb. 20, 2019). “When government discriminates or classifies in connection with *economic regulation and business*, then the Court uses ‘rational basis review.’” *Id.*

243. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

244. *Id.* at 221. “The ‘American’ people have always regarded education and [the] acquisition of knowledge as matters of supreme importance.” *Id.* (citing *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923)).

245. *Id.* at 221–22. In *Plyler*, the Court also stated: “We have recognized ‘the public schools as a most vital civic institution for the preservation of a democratic system of government.’” *Id.* at 221 (citing *Abington Sch. District v. Schempp*, 374 U.S. 203, 230 (1963)).

246. See *id.* at 221–22 (explaining that public education is not a right but emphasized its value to individuals and society where a state legislature passed a statute authorizing local school districts to deny enrollment in public schools to children who were not legally admitted to the country).

247. Peter Cunningham, *Why Isn’t Education a Voting Issue?*, EDUC. POST, <http://educationpost.org/why-isnt-education-a-voting-issue/> (last visited Apr. 2, 2018).

education and how few political contests are actually determined on the basis of educational issues.²⁴⁸

However, the importance of education to the individual should also be considered when particular groups are denied access to education because they are politically powerless. This was the issue in *Plyler*.²⁴⁹ There, the concern that undocumented Mexican children might be systematically denied an education stood out as an equality-based reason for the Court to hold that such denial placed the state in the position of likely creating a “subclass of [unemployable] illiterates[.]” among persons who, because of their young age, had done no wrong by being in the country.²⁵⁰ Nevertheless, these children would suffer throughout their life by being denied access to the same public education documented children would automatically be entitled to.²⁵¹ Since undocumented children had not been identified by the Court as a suspect class directly warranting heightened scrutiny under Equal Protection, the Court, nevertheless, could see the unfairness and effect on basic well-being that would result when innocent children brought into the country are denied an education necessary to become productive members of society wherever they might live.²⁵² But if this is not just a policy choice, as courts are not supposed to make policy, the principle behind it must be made clear.

It is true that policies, like those involving public school funding, insofar as they concern the economic, social, and political goals of the society, have generally been left to be decided by the political branches of the states and not to be resolved by the federal courts.²⁵³ Indeed, this is seen to be consonant with a person’s ability to express her autonomy through the democratic process. However, these policies must be subject to judicial review, usually by state courts under state constitutional restrictions in order to protect against policy choices that might be fundamentally unfair.²⁵⁴ This is not an invasion of a

248. See *The Quick Guide to America’s Political Parties Stances on Education Issues*, ISIDEWITH, <https://www.isidewith.com/political-parties/issues/education> (last visited Oct. 26, 2018); see also *The Big Issues of the 2016 Campaign and Where the Presidential Candidates Stand on Them*, FIVETHIRTYEIGHT (Nov. 19, 2015), <https://fivethirtyeight.com/features/year-ahead-project/#part1> (showing that although the different political parties and candidates have different educational stances, only 4% of the public rate education as America’s most important problem).

249. *Plyler*, 457 U.S. at 216 n.14.

250. *Id.*

251. *Id.* at 207, 230.

252. See *id.* at 223 (explaining that education is not a fundamental right and that undocumented immigrants cannot be treated as a suspect class where a state statute authorized local officials to deny public school enrollment to undocumented students).

253. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (White, B., dissenting). (holding “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected”). This decision allowed the Court to leave the matter of how schools get funded to state authorities.

254. See *The State Role in Education Finance*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/education/state-role-in-education-finance.aspx> (last visited Oct. 26, 2018).

legislative prerogative by the judicial branch. If anything, it is quite the opposite. It is protection of the fairness rights of individuals against legislative inattention. The legislature, to secure some economic or political benefit of its own, ignores principles of justice and fairness essential to basic well-being just because it can do so with little or no consequence to itself.

What the Court did in *Plyler* was the opposite of what it did in *Obergefell* and *Loving*, where it extracted from the definition of marriage limitations that made it less than generally accessible as a desirable institution.²⁵⁵ In *Plyler*, the Court imputed into education, which it said was not a fundamental right, a degree of importance as a matter of basic liberty because it was that importance that was being systematically denied to a whole group of people who had no real say in their being present in the United States.²⁵⁶ The Court was affirming the value of education as a basic liberty interest because of its likely effect on a future class of persons whose voice to the political branches would likely go unheard.

Where the liberty interest is fundamental, Equal Protection should operate to ensure that any state interference is justified by a compelling interest that is narrowly tailored, but that would include that the liberty interest not undermine other equally fundamental rights. Such a compelling interest may sometimes come about in the form of protecting another fundamental right that might otherwise be seriously curtailed if the original fundamental interest in question is treated as absolute. Since the two interests would both be deemed fundamental, the question has to be asked which interest provides the greater respect, or least harm, to overall purpose-fulfillment as an essential ingredient to human well-being.²⁵⁷ For example, allowing a baker of wedding cakes to refuse to make a cake for a same-sex wedding—because it would violate the baker’s sincerely held religious convictions—is an example of where choosing to enter the wedding cake business (itself a less than fundamental liberty interest)²⁵⁸ must be accompanied by a commitment to serve the public as a whole. If not so viewed, the denial could negatively implicate the fundamental right to marry as a socially established institution that has a wide-ranging effect on human self-fulfillment, and for which the government (if it allowed businesses to discriminate) would be complicit in disavowing. Here is where the liberty interest to become a wedding cake-maker, florist, or operator of a reception hall,

255. Compare *Plyler*, 457 U.S. at 221 (finding that although education is not a fundamental right, the state interest argued for by Texas was insufficient to justify the denial of rights), with *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (holding same-sex couples have the same fundamental right to marry as heterosexual couples), and *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (declaring unconstitutional Virginia’s miscegenation statute).

256. *Plyler*, 457 U.S. at 220.

257. ALAN GEWIRTH, *supra* note 124, at 54. Recall the earlier discussion of Gewirth’s three distinct kinds of goods that make up human well-being and the order a rational actor would place them. *Id.*

258. See generally *Lochner v. New York*, 198 U.S. 45, 53 (1905) (holding that a New York labor law limiting the working time for bakers violated the liberty to contract protected under the Fourteenth Amendment Due Process Clause).

must not be allowed to limit the freedom of others to exercise their fundamental rights in a society, especially when such exercise is protected by a public accommodations laws.²⁵⁹ This is made especially poignant (but only in fact, not in principle) if the couple resides in an area where only a single cake maker, florist, or operator of a reception hall exists. So, the point is general.

The collective well-being that same-sex couples experience when they make use of the cultural symbols that express their marriage is likely to be a part of the essential self-fulfillment that accompanies the marriage, and without which they might feel that their marriage is not as good as others. Thus, when businesses that are supposed to be serving the public without discrimination are allowed to deny access to these important symbols of marriage because of personal religious beliefs, the result is likely to have a greater negative impact on the self-fulfillment of the discriminated group because it bears societal approval.²⁶⁰ The same degree of lack of self-fulfillment does not need to be experienced in the reverse. The individual baker in satisfying his or her own religious tenets could still be consonant with his sincerely held religious beliefs either by not being in the wedding cake business at all, or by pursuing other avenues (such as the presentation of his own values in appropriate public forums) that do not deny a particular culturally relevant good or service to a specific class of persons. Indeed, the situation of the baker who refuses to provide a cake for a same-sex wedding is no different from that of another baker who, on religious grounds, might refuse to make a wedding cake for an interracial couple whose interracial marriage his religion did not recognize.²⁶¹

The same would not be true, however, if a clergyperson chose not to marry a same-sex couple and was told by the government that she must do so. In that case, the fundamental right of free exercise of religion overrides any claim of access because the government is not complicit in the religious operation and in fact, under the First Amendment, is barred from being so involved, and also because choice of religion is generally regarded as a personal right that traditionally has been thought to not affect others.²⁶² Indeed, Justice Kennedy's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* can be seen to reflect this private view of religion insofar as his criticism was directed at the Civil Rights Commissioners who made disparaging remarks

259. See Vincent J. Samar, *Toward a New Separation of Church and State: Implications for Analogies to the Supreme Court Decision in Hobby Lobby by the Decision in Obergefell v. Hodges*, 36 B.C.J.L. & SOC. JUST. 1, 27 (2016) (arguing that “*Obergefell v. Hodges* provides a powerful justification for a state court to find that its laws do bar private sector discrimination of same-sex marriages”).

260. See generally James M. Oleske, Jr., *The Evolution of Accommodation: Comparing the Unequal Treatment of Religious Objections to Interracial and Same-Sex Marriages*, 50 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 99, 104 (2015).

261. *Id.* at 101–02.

262. See generally *Free Exercise of Religion*, JUSTIA, <https://law.justia.com/constitution/us/amendment-01/03-free-exercise-of-religion.html> (last visited Oct. 26, 2019).

about the cakemaker's religious beliefs.²⁶³ And insofar as anyone's beliefs are private, those beliefs do not, on their own, invite intrusion by the state because they are truly a *self-regarding* mental act in which no one else's interest is involved, regardless of whether others would agree or disagree with them.²⁶⁴

That said, focusing on the baker's sincerely held religious beliefs as the reason for him not making a wedding cake and not his lack of action, as was arguably done by the Commission, confuses the issue because it invites the question whether a cakemaker may be required to compromise his beliefs in order to conform to laws that require public accommodations not to discriminate against same-sex couples.²⁶⁵ Moreover, it opens the door to a *different* question: whether, under the First Amendment, the state can legitimately criticize the baker's religious belief which, as Justice Kennedy pointed out, it clearly cannot. Even if there exists a causal connection between the belief and the inaction, the two issues are not necessarily connected. Presumably, the belief could have still been held by the cakemaker, even expressed in other forums without failing to provide the business accommodation. Were, however, the cakemaker asked to

263. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1729 (2018). Justice Kennedy notes two interpretations of what the commissioners meant when they "endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain" at a public hearing on May 30, 2014. *Id.* Under the first interpretation "they might mean simply that a business cannot refuse to provide services based on sexual orientation." *Id.* Under the second interpretation, "they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips's free exercise rights and the dilemma he faced." *Id.* However, at a subsequent meeting on July 25, 2014, one commissioner said religion has been used to justify slavery and the holocaust and called it, "one of the most despicable pieces of rhetoric," leading Justice Kennedy to adopt the latter interpretation. *Id.*

264. John Stuart Mill describes one kind of self-regarding act "the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological." JOHN STUART MILL, *ON LIBERTY* ch. 1 (P.F. Collier & Son 1909). See also SAMAR, *supra* note 126, at 68. Samar wrote that "[a]n action is self-regarding (private) with respect to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interests of the actor and not on the interests of the specified class of actors." *Id.* By "in the first instance" it is meant that the description of the action would not include "any additional facts or causal theories[.]" such that a prima facie claim to privacy would be possible. *Id.* at 67. Here the basic interests are freedom and well-being in which the first category "includes interests in freedom of expression, privacy, freedom of thought, worship, and so on." *Id.* at 68. Samar goes on to note that "well-being includes interests in preserving one's life, health, physical integrity (as in not being assaulted), and mental equilibrium." *Id.* The other important concern is that "[i]n neither of these two categories are particular conceptions about facts or social conventions presupposed." *Id.* Clearly under this view shared by Mill and Samar, religious beliefs in themselves are private.

265. It may very well be that the sincerely held beliefs caused the baker to refuse to make the wedding cake. The philosopher, Donald Davidson argues "that rationalization is a species of causal explanation." DONALD DAVIDSON, *ESSAYS ON ACTIONS AND EVENTS* 3 (1980). But the issue is not what caused the refusal, which might be (and in this case is) private, but whether the refusal itself, which is clearly public, is justified. That is a different matter because public acts may often come about because of private beliefs that are themselves unassailable.

write a statement (such as one regarding the kind of marriages Christianity supports), portray a symbol (such as swastika), or depict an action (such as fellatio), that *he would not write or portray on any customer's cake*, the situation would be quite different because it asks him to go beyond what he would do for any customer in the same situation, thus bringing the action outside Equal Protection guarantees and indeed implicating what beliefs he feels comfortable expressing in violation of First Amendment speech and free exercise protections.²⁶⁶

The belief itself is private insofar as it is the mental acceptance of an idea as true, and thus its protection is a basic liberty interest. It is the failure to provide the accommodation *to all* on the same basis that is not private and thus also undermines a basic well-being interest in the equal right of others to access the institution of marriage in all its cultural aspects. In *Masterpiece Cakeshop*, had the Commission focused on the failure to provide the accommodation and not the cause of the failure (the private belief), its decision would and should have been upheld.²⁶⁷ Then, the question would properly be whether the failure to provide the accommodation was truly an *other-regarding* act that society's fundamental concern to preserve equality provides a justification to prevent. The failure of the Commission to focus its criticism on the baker's unwillingness to provide its business service to the general public, instead of focusing on the Commission members' disagreement with the religious belief of the individual cake maker, grounded Justice Kennedy's narrow opinion in favor of the Cakeshop.

This analysis also provides support for where to draw the line on appeals to religious beliefs when individuals and organizations enter into the provision of public services in the 20th/21st centuries—such as hospitals, adoption agencies, social service agencies, employers, insurance payors, and more.²⁶⁸ Operators of these institutions are not similarly situated with clergy, because while religion is highly personal in its self-fulfillment, control over commerce, including public accommodations and health provisioning, is normally an area of government responsibility.²⁶⁹ The government might allow some religious-based limitations

266. See *Masterpiece Cakeshop*, 138 S. Ct. at 1735–36. Justice Kennedy's majority opinion describes approvingly “at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text.” *Id.* at 1730.

267. *Id.* at 1734. At the end of his opinion in *Masterpiece Cakeshop*, Justice Kennedy writes: The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market. *Id.* at 1732.

268. Andrew Copson, *Services Must Stay Secular*, GUARDIAN (Dec. 5, 2007), <https://www.theguardian.com/society/2007/dec/05/guardiansocietysupplement.comment>.

269. U.S. CONST. art. 1, § 8, cl. 3 (stating Congress shall have the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”).

in these areas for delivery of goods and services by not-for-profit organizations, insofar as these may have little impact on the public, since they are thought to be more closely associated with particular groups who already share the provider's beliefs.²⁷⁰ However, especially in the for-profit commercial area, the issue becomes more problematic if the religious organization operates a business that serves the public; for then, in respect to that operation, the business should not be immune from charges of discrimination in employment, housing, or public accommodations.²⁷¹

This suggests that persons or organizations who would find themselves at odds with their own sincerely held beliefs by complying with public accommodations laws when providing a good or service, generally should not be operating as a for-profit business, and instead limit those products or services to which they associate special symbolism to private or not-for-profit activities that the law does not in the same respect restrict. The baker in the wedding cake example, where a public accommodation law prohibited discrimination based on sexual orientation, could by operating as a non-profit, limit his making of wedding cakes only for opposite-sex couples because now he would no longer be operating as a business serving the public as a whole. Of those products, he might wish to not make available to the public as a whole, he could continue to provide as a non-profit operation connected to a particular religious view, so long as he did not, at the same time, hold himself out to the public as a business providing wedding cakes unavailable to everyone. Equality in service to supporting collective self-fulfillment must therefore be part of any decision regarding such a conflict of rights. It may not just be set aside whenever an individual's liberty interest might give rise to a conflict, or the equality concern will be lost in its entirety and the natural right to equal liberty itself will be endangered of evisceration.

If the right to enter a business is a protected liberty interest, it certainly should not be construed to undermine fundamental liberty rights of anybody, for that would undercut the overarching protection of the person, understood collectively, on which this analysis has been based.²⁷² Indeed, if the ultimate goal is to protect basic liberty in its fullest sense, as the cases mentioned suggest,

270. In *On Liberty*, Mill also noted "from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived." MILL, *supra* note 264; see generally Susannah Camic Tahk, *Tax-Exempt Hospitals and Their Communities*, 6 COLUM. J. TAX L. 33, 35–37 (2014) (discussing the need for lawmakers to grapple with how these hospitals define their communities).

271. See generally *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 192 (2012) (holding unanimously that a "teacher" was a minister and, as such, was not entitled to file an Americans with Disabilities lawsuit against the school where she was employed).

272. In *West Coast Hotel Co.*, the Court, while not explicitly overruling *Lochner*, upheld the State of Washington's minimum wage law, in effect signaling an end of the *Lochner* era in which the Supreme Court invalidated laws designed to regulate business. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 400 (1937).

then instances where a rights conflict initiated by a lesser protected liberty interest might interfere with a basic liberty or fundamental right, strict scrutiny must be applied to ensure that the interference is truly in service to securing maximal liberty for all. This should be the goal regardless of whether the business owner(s) also can claim a protected classification based on religion, for that claim can be alternatively handled without violating a fundamental right. Personhood, in this collective sense, requires no less of the Court nor of democracy. Indeed, when personhood is understood in the way just described, it can serve as the ground for how the democracy is to operate in regard to protecting fundamental rights.

VII. CONCLUSION

This Article suggests that at the intersection of Due Process and Equal Protection, a place Justice Kennedy identifies in *Obergefell*, there is need for further clarification if lower courts are to be provided direction in deciding future cases involving either doctrine, and especially in cases where the two doctrines intersect. As it stands right now, exactly how such cases will be decided is unclear, although the language in *Obergefell* and *Plyler* (the latter because of the Court's willingness to raise the level of scrutiny), when read together, suggest a direction of where the law might be going. That direction is consistent with subsuming fundamental rights doctrine and Equal Protection analysis under a broader ethical theory of the person, understood collectively, that utilizes personhood's centrality of freedom and well-being to further clarify how the two doctrines might operate together. Within that frame of reference, the relationship between the two areas becomes clear as criteria begin to emerge for deciding future cases where the doctrines intersect. Indeed, if this Article is successful, it will be because it takes the reader to the next higher level of ethical consideration, beyond mere legal doctrine, to finding a framework for providing maximal autonomy and human self-fulfillment for all people.²⁷³

273. See generally VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY 31–35, 76–78 (1998) (discussing the need for a philosophical foundation for law).

