

# CONCEPTUAL SCHEMES/FRAMEWORKS AND THEIR RELATION TO LAW: A NEW ARGUMENT FOR SEPARATION OF CHURCH AND STATE

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## *Abstract*

*A central question that arises when interpreting the U.S. Constitution is which theory of interpretation is the best? In his recent book, "How to Interpret the Constitution," Cass Sunstein reviews various theories of constitutional interpretation currently in vogue and then offers what he believes would be the best approach going forward. In this Article, I want to take up a more basic question presupposed by the very idea of a theory of interpretation. That is, whether it is even possible to arrive at more than a provisional understanding of what would be the best interpretation in any given area of study, including constitutional law. That said, I do believe some of the interpretations suggested by Cass Sunstein and elsewhere by myself and others to be more persuasive than most others, even if only partially so. For, as Sunstein himself points out, no theory seems perfect to figure out the Constitution's meaning in every possible world in which we could imagine it to exist. So, we best just focus on our own world or what we take to matter in our world. In keeping with this idea, I plan to begin by looking first at how we might interpret the world around us based on our past experiences by considering a somewhat imaginative recent experience of my own. Next, I consider some recent studies in the neurosciences and a previous but highly influential article by the philosopher Donald Davidson concerning conceptual schemes and whether we could ever hope to make any sense of a scheme radically different from our own. Here it should be pointed out that I will use the word "scheme" when referring to a very broad system of thought for which there may not be much outside, versus when I use the word "framework," as referencing something far narrower than a whole system of thought, even if what is referenced might purport to be a significant part of a still larger system. My goal is to eventually adopt John Rawls' public reason method to separate out non-workable systems of thought as might be part of a particular*

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*religious or philosophical tradition that cannot be easily tied to any other system of thought easily imagined within a pluralistic society. I plan to do this by relating how Rawls' public reason might allow for the creation of a moral interpretation of the Constitution adopting the moral theory of Alan Gewirth. The latter I adopt because its grounding does not presuppose any prior moral or religious framework. I then apply that interpretative method to five cases Sunstein believes are fixed points in our current constitutional understanding. In short, I plan to isolate out an area of human rights where even very different understandings of the world might be able to meet, while acknowledging that there will still be other areas that simply evade any common connection. I hope what I offer here to be of help for a theory of constitutional interpretation that focuses on morality, without having to compete with various religious frameworks going forward.*

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## INTRODUCTION

The idea for this Article manifested itself during a Labor Day holiday weekend to a gay resort in Michigan. The resort is quite nice, including a large pool, several cocktail bars, indoor dance floors, a fun cabaret often with hilarious drag performances, and 4 p.m. tea dances on Sundays and holidays. Also of relevance is that behind the motel part of the resort exists a wooded area that often gets attention late at night when people use it to meet one another. On an afternoon visit to that area, I noticed that some of the trees toward the back of the wooded area had apparently suffered serious burns, probably caused by a fire, because many of the branches were missing and none of their foliage was present. There were, of course, other trees toward the front with foliage, and a lot of foliage from the burned trees had apparently fallen to the ground.

On the first night following my afternoon visit, even without electrical lighting in the immediate area, you could visually make out other people present because, although it was pretty dark, there was enough ambient lighting from stars, the moon, and distant city and motel electrical sources, that so long as you paid attention as to where you were walking, you could safely transit the area. The next evening, however, was quite different. The sky was overcast, and ambient lighting from distant city and motel lights was almost nonexistent. Thanks to cell phones with flashlight attachments, one could still get around safely. Nevertheless, it was very dark when entering the wooded area, especially without the flashlight turned on. While I noticed that there were several people present, I perceived them as if they were sitting at tables, much as you might imagine in a darkened large restaurant. (No, I wasn't drinking.) I also perceived behind the tables the tall dead trees missing their branches from the fire, looking like pillars on the sides of several multilevel sets of windows, much as you might see columns supporting a vaulted ceiling in a Gothic cathedral. I knew these were illusions because I knew what the space really looked like from the previous day. However, I found it interesting that, amidst the darkness, my mind would take whatever incoming sense data it was receiving from the ambient light and recreate the scene to the closest analogy of previous places I had visited. Of course, because I knew what the space really looked like, I could discount that illusion, but it dawned on me that had I not had that earlier knowledge, I might have thought my hallucination was an accurate account of the space I was in.

Why do I mention this story in the context of an article on conceptual schemes and their relation to law? It is because, throughout history, and especially in earlier times, different conceptual schemes often based on religion or culture have dominated the legal landscape, affording justifications for slavery, caste systems, and wealth domination. Also, I

asked myself: How might the world have been different if a different set of cultural frameworks been present earlier? Today, it is not uncommon to ask how societies' current cultural and religious frameworks intervene to determine the way it is governed and what laws are adopted, along with whose rights are afforded protection. In this Article, I examine the notion of cultural schemes more fully with a particular focus on present interpretative constructions of the U.S. Constitution. Hostility toward changes to past frameworks may explain present challenges toward altering legal frameworks that no longer seem very relevant to current conditions, especially in a pluralistic society.

Section II investigates the way our perceptions provide us data for what the world is and how we come to make sense of what we perceive. Here, it is worth paying attention to recent understandings of how the mind works arising out of the Neuroscience Institute at Stanford University. But even accepting that some portion of reality is constructed by our minds, is there any intelligible way we might be able to evaluate what we perceive, or must we be forced to give into the dogma of conceptual relativism? In Section III, I engage the work of philosopher Donald Davidson in his article, *On the Very Idea of a Conceptual Scheme*, where he offers a way to understand how we might unpack seemingly incommensurable views about the world if not totally as schemes, at least in part by what I will call "frameworks," in effect narrowing our focus to only what we can translate from the various schemes we encounter.<sup>1</sup> Section IV will then consider the work of the philosopher John Rawls' on how public reason might provide a focus for coming together in a pluralistic society where citizens seek to find common ground notwithstanding that they often may perceive the world from within very different conceptual and religious frameworks. Section IV also considers how Professor Cass Sunstein would evaluate different theories of constitutional interpretation utilizing Rawls' notion of reflective equilibrium in political morality and what he thinks to be the strengths and weaknesses of the different views. Section V takes up the possibility of a universal system of human rights bringing together, at least partially, very different conceptual frameworks by narrowing the focus to only those human actions which can be described as voluntary and purposive. Section VI then seeks to apply this system of human rights to satisfy the normative part of a moral interpretation for constitutional law. In so doing, it will seek to judge how five cases Sunstein would consider as currently fixed points in our constitutional understanding might be explained using this moral framework.<sup>2</sup> The result of this approach can be seen to provide a new way

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<sup>1</sup> DONALD DAVIDSON, *On the Very Idea of a Conceptual Scheme*, in *INQUIRIES INTO TRUTH AND INTERPRETATION* 183 (2nd ed. 1984).

<sup>2</sup> CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* (2023).

to understand the separation of religion from constitutional law, even where morality is clearly present. A brief conclusion follows.

### I. IS REALITY CONSTRUCTED BY OUR BRAIN?

Recent research in the neuroscience area has given rise to the view that reality is constructed by our brain.<sup>3</sup> In a recent article by Brian Resnick, he points out that “[m]ost of the time, the story our brains generate matches the real, physical world—but not always. Our brains also unconsciously bend our perception of reality to meet our desires or expectations. And they fill in gaps using our past experiences.”<sup>4</sup> The issue is important because “[v]isual illusions present clear and interesting challenges for how we live[.]”<sup>5</sup> They make us challenge how we think we know what is real and, perhaps more importantly, what greater care we must apply to our own perceptions.<sup>6</sup> With these questions in mind, Resnick reviews research from a number of colleagues from various universities regarding how we perceive motion.<sup>7</sup> For example, how an object may appear to be moving diagonally, when in fact it is really moving up and down.<sup>8</sup> “[T]he classic checker-shadow illusion by Edward Adelson” provides another illustration.<sup>9</sup> Here, squares with the “exact same shade of grey when seen side by side” look lighter, “when cast in an apparent shadow and surrounded by apparently darker tiles.”<sup>10</sup> Similarly, the Japanese psychologist and artist Akiyoshi Kitaoka, shows that “[c]olor is an inference we make, and it serves a purpose to make meaningful decisions about objects in the world,” although it will not always reflect the wavelength of the light irritating our eyes, as, for example, when red light “is bathed in blue light.”<sup>11</sup> “Pascal Wallisch, a neurologist at New York University,” hypothesizes “that people make different assumptions about the quality of light that’s being cast,” say, on a dress, whether it is “in bright daylight” “[o]r under an indoor light bulb.”<sup>12</sup> “Wallisch says the disagreements around *The Dress*, as well as other viral illusions . . . arise

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<sup>3</sup> Anil K. Seth, *The Neuroscience of Reality*, SCI. AM. (Sept. 1, 2019), <https://www.scientificamerican.com/article/the-neuroscience-of-reality>.

<sup>4</sup> Brian Resnick, “*Reality*” is Constructed by Your Brain. Here’s What That Means, and Why It Matters., VOX (June 22, 2020, 8:30 AM), <https://www.vox.com/science-and-health/20978285/optical-illusion-science-humility-reality-polarization>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *See id.*

<sup>8</sup> *Id.* (citing research by Patrick Cavanagh, a research professor at Dartmouth College and a senior fellow at Glendon College in Canada).

<sup>9</sup> *See id.*

<sup>10</sup> *Id.*

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

<sup>12</sup> *Id.*

because our brains are filling in the uncertainties of these stimuli with different prior experiences.”<sup>13</sup> Another example would be the Kanizsa triangle, where “the Pac-Man-like shapes give the impression of triangles in our minds.”<sup>14</sup> “In 2003, the journal *Nature Neuroscience* published an article on the case of a man . . . who lost his vision at age 3 and had it restored by surgical intervention in his 40s” did not fall for the Kanizsa triangle illusion.<sup>15</sup> The suggestion was that he had never “[built] up a lifetime of visual experiences to make predictions about what he saw.”<sup>16</sup> All these examples go to show that “[t]he stories our brain tells are influenced by life experience.”<sup>17</sup>

Looking beyond illusions concerning movement or color, psychologist Emily Balcetis:

[F]ound that when she tells study participants to pay attention to either an officer or a civilian in a video of a police altercation, it can change their perception of what happened (depending on their prior experience with law enforcement and the person in the video with whom they most closely identified).<sup>18</sup>

This leads to a “different understanding of the nature of the altercation.”<sup>19</sup> As Balcetis describes it: “‘You can’t change the fact that we’ve all grown up in different worlds,’ . . . But you can encourage people to listen to other perspectives and be curious about the veracity of their own.”<sup>20</sup> This latter point is particularly important, for it suggests that the ways in which our brains operate to understand the world we are in are not so independent of another’s ways of thinking, as to undermine any possibility of being able to find common ground with another’s point of view. Neuroscience professor Martinez-Conde of the SUNY Downstate Medical Center noted: “Just as we can look at an image and see things that aren’t really there, we can look into the world with skewed perceptions of reality. Political scientists and psychologists have long documented how political partisans perceive the facts of current events differently depending on their political beliefs.”<sup>21</sup> But if this is true, where is the hope in a pluralistic society, which contains many different social, political, cultural, and religious points of view, to be able to come together to serve the common good, let alone individual human rights?

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* (bold type omitted).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

The problem concerns constitutional interpretation because it gives rise to how far one's personal or group-identified political and social beliefs separate them from being able to fully participate in a larger social and cultural reference frame. Put another way, if one's understanding of the world is always a product of some incoming sense-data, combined with a set of concepts they hold to be true, it may be impossible to find a middle position capable of harmonizing different belief systems. Take, for example the different religious views concerning sex and gender. To those who believe God created man and woman and set them up to live a certain lifestyle, challenges to laws that fail to recognize transgendered persons or persons of different sexual orientations would make little sense.<sup>22</sup> But if that is so, how would cooperation between groups (including those who are transgendered and non-transgendered) who may hold very different beliefs or concepts be possible or a common good be found? For it would appear that these very different individual and group beliefs are incommensurable with those who do not share the same social-cultural understanding. This would be especially concerning for a pluralistic society where strongly held different viewpoints are likely to be present. Here, it is worth asking, might the problem just described arise from a false sense that all that exists are individual and group-based perceptions composed of incoming sense-data and concepts connected to a specific set of beliefs with no overarching common framework in which they might be evaluated? But, if that is what is missing, where would we find such overarching common framework where the belief systems appear so different? Philosophy professor Donald Davidson's work regarding conceptual schemes may afford some insight as to how seemingly different conceptual schemes might be related to allow for at least some translations that could be honestly debated.<sup>23</sup>

## II. A WAY TO UNPACK SEEMINGLY INCOMMENSURABLE VIEWS ABOUT THE WORLD

In his article, *On the Very Idea of a Conceptual Scheme*, Davidson compares Thomas Kuhn's idea that "scientists operating in different scientific traditions (within different 'paradigms') 'work in different worlds'"<sup>24</sup> against Peter Strawson's view that we "imagine possible non-

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<sup>22</sup> Gregory A. Smith, *Views of Transgender Issues Divide Along Religious Lines*, PEW RSCH. CTR. (Nov. 27, 2017), <https://www.pewresearch.org/short-reads/2017/11/27/views-of-transgender-issues-divide-along-religious-lines>; see also Section 2: *Knowing Gays and Lesbians, Religious Conflicts, Beliefs about Homosexuality*, PEW RSCH. CTR. (June 8, 2015), <https://www.pewresearch.org/politics/2015/06/08/section-2-knowing-gays-and-lesbians-religious-conflicts-beliefs-about-homosexuality>.

<sup>23</sup> See generally DONALD DAVIDSON, *INQUIRIES INTO TRUTH AND INTERPRETATION* (2nd ed. 1984).

<sup>24</sup> DAVIDSON, *supra* note 1, at 186-87 (citing THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 134 (1st ed. 1962)).

actual worlds, worlds that might be described, using our present language, by redistributing truth values over sentences in various systematic ways.”<sup>25</sup> The former “wants us to think of different observers of the same world who come to it with incommensurable systems of concepts.”<sup>26</sup> The latter “requires a distinction within language of concept and content: using a fixed system of concepts (words with fixed meanings) we describe alternative universes.”<sup>27</sup> As it will turn out, neither view provides much of an answer. The former is supported, following the viewpoint of philosopher W.V. Quine, by giving up the analytic-synthetic distinction.<sup>28</sup> Analytic statements, like “All bachelors are bachelors,” are those whose truth can be determined by virtue of their meanings alone. Synthetic statements, like “water is H<sub>2</sub>O,” require outside information, as one might learn from a chemical experiment. Quine argues that, except when a sentence is trivially true by its mere meaning alone, such as “All bachelors are bachelors,” most so-called analytic statements, like “All bachelors are unmarried men,” are true because of a “community-wide acceptance” or synonymy operating between the subject of the sentence and its predicate.<sup>29</sup> This empirical fact means that there is very little that is true by virtue of meanings alone—or, as Davidson prefers to put it, “[m]eaning, as we might loosely use the word, is contaminated by theory, by what is held to be true.”<sup>30</sup> Put another way, claims to an independent empirical reality outside all our concepts and beliefs are unintelligible. And so, what is true cannot be found from some seemingly neutral determination that stands outside of our belief system, since all such efforts would already have combined our sense-data with our beliefs or concepts.

In the case of culture and religion, what is held to be true may similarly be just “a collection of cultural systems, belief systems, and worldviews that relate humanity to spirituality and, sometimes, to moral values.”<sup>31</sup> Perhaps this explains how we oftentimes come to recognize different cultural or religious understandings of the world to be at the basis of our political disagreements. Still, should the appearance of such seeming incommensurability between persons and groups holding significantly different cultural and religious views be all that can be said to explain political disagreements, at least when the positions at stake appear to be totally incommensurable? Put another way, are the two systems truly “not

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<sup>25</sup> *Id.* at 187 (citing P.S. STRAWSON, *THE BOUNDS OF SENSE* 15 (1st ed. 1966)).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 187.

<sup>29</sup> W.V. QUINE, *Epistemology Naturalized*, in *ONTOLOGICAL RELATIVITY AND OTHER ESSAYS* 86 (1969).

<sup>30</sup> DAVIDSON, *supra* note 23, at 187.

<sup>31</sup> *Religion and Belief*, COUNCIL EUR., <https://www.coe.int/en/web/compass/religion-and-belief> (last visited Nov. 22, 2023).



intertranslatable”?<sup>32</sup> The issue is important if it means having to accept one system or another because they do not speak the same language of meaning and relevance. Relying on Davidson, it would seem that such a total incommensurability or cultural relativity would itself be unintelligible. For how could we ever come to recognize that so total a different system was even present? Wouldn't we have to at least recognize the other as having a language and not just producing noise, and, if so, wouldn't that entail at least some overlap in how we come to understand the other?

First of all, from what was said regarding the denial of the analytic-synthetic distinction, one might think our incoming sense-data alone should provide the common ground for resolving any dispute about meaning or which theory provided the actual truth about the world. If this were true, all would be settled. Unfortunately, empirical data by itself cannot provide commensurability or ensure intertranslatability. That is because such data cannot be understood absent a theory in which it is explained. Davidson cites B.L. Whorf, who wrote:

[L]anguage produces an organization of experience. We are inclined to think of language simply as a technique of expression, and not to realize that language first of all is a classification and arrangement of the stream of sensory experience which results in a certain world-order . . . In other words, language does in a cruder but also in a broader and more versatile way the same thing that science does . . . We are thus introduced to a new principle of relativity, which holds that all observers are not led by the same physical evidence to the same picture of the universe, unless their linguistic backgrounds are similar, or can in some way be calibrated.<sup>33</sup>

This does not, however, mean that languages associated with people from very different religious or cultural backgrounds are necessarily totally incommensurable. If they were, they could not even be recognized as a language at all. And so, it should not be understood to mean that people holding very different religious or cultural views will never be able to come together to resolve any differences that might be present, only that the way they come together will not necessarily represent any kind of overlapping conceptual scheme. Criticizing Strawson, Davidson wrote:

Philosophers have now abandoned hope of finding a pure sense-datum language . . . but many of them continue to assume that theories can be compared by recourse to a basic vocabulary consisting entirely of words which are attached to nature in ways that are unproblematic and, to the extent necessary, independent of theory . . . Feyerabend and I have argued at length

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<sup>32</sup> See DAVIDSON, *supra* note 23, at 190.

<sup>33</sup> *Id.* at 186-87 (citing BENJAMIN LEE WHORF, THE PUNCTUAL AND SEGMENTATIVE ASPECTS OF VERBS IN HOPE, IN LANGUAGE, THOUGHT AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF 55 (J.B. Carroll ed., 1956)).

that no such vocabulary is available. In the transition from one theory to the next words change their meanings or conditions of applicability in subtle ways. Though most of the same signs are used before and after a revolution [in science]—e.g., force, mass, element, compound, cell—the way in which some of them attach to nature has somehow changed. Successive theories are thus, we say, incommensurable.<sup>34</sup>

But notice what Davidson is not saying here. He is not saying successive theories are totally unrecognizable as Kuhn would seem to think, only that no fixed system of concepts, *à la* Strawson, might be present and so there may be no easy approach to how we come to recognize a very different conceptual framework.

Consider for a moment Wittgenstein's example of a primitive language game.<sup>35</sup> A builder has an assistant.<sup>36</sup> To make things easy, it is understood that when the builder shouts a word to his assistant, like the word "slab," the assistant will bring forth a flattened piece of concrete or stone for the builder to make use of.<sup>37</sup> Now consider a coroner following the same procedure. When she shouts "slab," the assistant is expected to bring forth a dead body on a gurney, perhaps for an autopsy; similarly, a butcher who shouts "slab" would expect the assistant to bring forward a side of meat. If the builder's assistant had brought forth a dead body, a modern-day builder would probably call 9-1-1, as would a butcher. The point Wittgenstein was making is that words do not have an atomic meaning; rather, their meaning is part of the social understanding in which they operate.<sup>38</sup> The social understanding in which the builder performs his job is quite different from that of the coroner and that of the butcher; hence, the meaning of the words will likely also be quite different. Still, we can make sense of this difference, realizing that all three people are performing a social function, provided we recognize the very different functions each is performing. Hence, despite what may at first appear to be a totally different understanding of what is expected, we can nevertheless make sense of their different responses.<sup>39</sup>

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<sup>34</sup> *Id.* at 186-87 (citing THOMAS S. KUHN, *Reflections on my Critics*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 255, 267 (Imre Lakatos & Alan Musgrave, eds., 1970)).

<sup>35</sup> See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 3 (G. E. M. Anscombe trans., 2d ed. 1958).

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

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> For example, a religious thinker, who accepts the creation of man to be as described in the Bible, may claim Darwin's theory of the evolution to be a product of the devil's attempt to deceive. And though Darwin would no doubt disagree with any such interpretation, he nevertheless would understand why the religious thinker might hold that view given the conceptual framework in which he is operating. See, e.g., David B. Wilson, *Did the Devil Make Darwin Do It? Historical Perspectives on the Creation-Evolution Controversy*, 89 *PROC. IOWA ACAD. SCI.* 46, 46-49 (1982).

What might this signify regarding how persons might come together, even when they start from very different social, cultural, or religious perspectives? First, it signifies that there will be no final truth from which one point of view can say with absolute certainty that this is how things really are. But that does not mean no common ground can ever be found or that persons coming from very different social perspectives can never agree on which perspective seems most correct in the particular circumstance. Davidson wrote:

In the common course of affairs, a theory may be borne out by the available evidence and yet be false. But what is in view here is not just actually available evidence; it is the totality of possible sensory evidence past, present, and future. We do not need to pause to contemplate what this might mean. The point is that for a theory to fit or face up to the totality of possible sensory evidence is for that theory to be true. If a theory quantifies over physical objects, numbers, or sets, what it says about these entities is true provided the theory as a whole fits the sensory evidence.<sup>40</sup>

Still, one needs to be cautious with phrases like the “notion of the totality of experience, like the notion of fitting the facts, or of being true to the facts” since this “adds nothing intelligible to the simple concept of being true.”<sup>41</sup> All this does is “express a view about the source or nature of evidence, but it does not add a new entity to the universe against which to test conceptual schemes.”<sup>42</sup> So, it may not provide a ground for determining which of very different schemes is the correct one. Still, if the best we can do in trying to understand any conceptual scheme is “by making essential use of the notion of translation into a language we know,” then why should it matter that we give up the hope of being able to make sense of a conceptual scheme radically different from our own.<sup>43</sup> “Neither a fixed stock of meanings, nor a theory-neutral reality, can provide, then, a ground for comparison of conceptual schemes.”<sup>44</sup> But this does not mean that we should have nothing to say where disagreements or conflicts arise.

Here, Davidson pointed out that we might adopt a modest turn that focuses more on “partial rather than total failure of translation.”<sup>45</sup> In this area, we might make intelligible changes or contrasts between different schemes “by reference to a common part” in which we make “no assumptions about [ultimate] shared meanings, concepts [as being fixed], or beliefs,” just

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<sup>40</sup> DAVIDSON, *supra* note 23, at 193.

<sup>41</sup> *Id.* at 194.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 195.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

the common part.<sup>46</sup> I refer to these narrower ways where common agreement might be found as “conceptual frameworks” rather than “conceptual schemes.” In other words, rather than saying which scheme is finally right, we instead seek to understand differences, perhaps of opinion or even some concepts, by focusing on what points of view we share in common. Take, for example:

[S]omeone who can interpret an utterance of the English sentence “The gun is loaded” must have many beliefs, and those beliefs must be much like the beliefs someone must have if he entertains the thought that the gun is loaded. The interpreter must, we may suppose, believe that a gun is a weapon, and that it is a more or less enduring physical object. There is probably no definite list of things that must be believed by someone who understands the English sentence “The gun is loaded,” but it is necessary that there be endless interlocked beliefs.<sup>47</sup>

Or consider the statement: “The moon is made of green cheese.” To make sense of this statement, even just to hold it false, requires agreement over such features of translatability as what “moon” represents, what we mean when we say something is “green,” and what “cheese” is. I point this out to show that incommensurability need not be so ramped as to make totally unintelligible what is being said, nor that any disagreement cannot be evaluated. But if that is true, then we should be able to entertain the hope of finding a mechanism for some overlap, even for strongly felt religious or cultural disagreements in law and politics.

### III. JOHN RAWLS ON PUBLIC REASON AND HOW TO KEEP TOGETHER A PLURALISTIC SOCIETY WITH VERY DIFFERENT COMPREHENSIVE DOCTRINES

In his earlier work, *A Theory of Justice*, Rawls argued that modern democratic societies are “characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines.”<sup>48</sup> However, since that work’s publication, it has become notably less realistic to suppose that incompatible yet reasonable comprehensive doctrines could provide the necessary overlap, let alone stability, to maintain a well-ordered

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 158. It is interesting to note that in *Smith v. United States*, the U.S. Supreme Court had to decide whether trading a firearm with a silencer for cocaine constituted the kind of use in connection with a drug trafficking crime for which 18 U.S.C. § 924(c)(1) required a thirty-year sentence. *Smith v. United States*, 508 U.S. 223 (1993). While the majority in a six-to-three decision held that it did, Justice Scalia dissented, claiming that the word “use” in this context meant what we normally think of as use of a firearm in connection with a crime, namely as a weapon. *Smith*, 508 U.S. at 241-47 (Scalia, J., dissenting); see also ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 23-24 (1997).

<sup>48</sup> JOHN RAWLS, *POLITICAL LIBERALISM* xviii (1993).

just society.<sup>49</sup> Thus, in *Political Liberalism*, Rawls asked: “How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?”<sup>50</sup> What would be “the structure and content of a political conception” capable of achieving “such an overlapping consensus?”<sup>51</sup> Although there are various aspects to Rawls’ attempt to answer these questions, for purposes of this article, I want to focus on how he differentiates public reason from non-public reason, and why he sees the former as especially pertinent to how a supreme court operating in a democratic society might achieve consensus.

Rawls stated that “in a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution.”<sup>52</sup> Rawls is not denying that other reasons may play some role in political discourse.<sup>53</sup> Rather, the role these other reasons might play should not override the essential elements of a democratic constitution concerning “who has the right to vote, or what religions are to be tolerated, or who is to be assured fair equality of opportunity, or to hold property.”<sup>54</sup> Here, Rawls believes the judiciary generally, and especially a supreme court with judicial review, needs to especially focus on public reason when deciding cases “because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents.”<sup>55</sup>

A similar argument can be made with respect to how citizens within a democracy should operate. One may ask: “[W]hen may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake?”<sup>56</sup> Rawls’ answer is “our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.”<sup>57</sup> Based on what was said above concerning incompatible doctrines that afford little to no overlap with any other view, public reason

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<sup>49</sup> See *id.* at xix (1993).

<sup>50</sup> *Id.* at xx.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 214.

<sup>53</sup> *Id.* at 214-15.

<sup>54</sup> *Id.* at 214.

<sup>55</sup> *Id.* at 216.

<sup>56</sup> *Id.* at 217.

<sup>57</sup> *Id.*

could be a helpful partial replacement for incommensurable comprehensive doctrines that not all can agree to. Put another way, in such circumstances where comprehensive doctrines collide, Rawls' approach imposes a moral duty of civility on each citizen "to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."<sup>58</sup>

Needless to say, if there is an overlapping consensus where reasonable comprehensive doctrines align, no issue arises.<sup>59</sup> However, where this is not the case, another way to avoid misalignment would be to narrow the question(s) being decided so as not to appeal "to the whole truth" of any overarching doctrine, but only to resolve the issue at hand as much as necessary.<sup>60</sup> In such situations, lesser agreements might be possible notwithstanding disagreements at the total schematic level. Rawls offers as an example "the rules of evidence [like those governing hearsay, which] limit the testimony which can be introduced" in a criminal trial, despite debates over the veracity of the particular testimony—"all this to insure the accused the basic right of a fair trial."<sup>61</sup> Similarly, "[i]n a democratic society nonpublic power, as seen, for example, in the authority of churches over their members, is freely accepted," provided that state authority (often referred to as "state action"<sup>62</sup>) is not involved;<sup>63</sup> this is because of a widespread belief favoring separation of church and state that has become the "ministerial exception" in constitutional law.<sup>64</sup>

The above are two examples where it is true that, "[i]n large part we affirm our society and culture, and have an intimate and inexpressible knowledge of it," yet may from time to time question whether we should leave the country to go live somewhere else, though maybe we reject such a

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 218.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 218, 221.

<sup>62</sup> "The state action requirement refers to the requirement that in order for a plaintiff to have standing to sue over a law being violated, the plaintiff must demonstrate that the government (local, state, or federal), was responsible for the violation, rather than a private actor." *State Action Requirement*, LEGAL INFO. INST., [https://www.law.cornell.edu/wex/state\\_action\\_requirement](https://www.law.cornell.edu/wex/state_action_requirement) (last visited Nov. 12, 2023).

<sup>63</sup> RAWLS, *supra* note 48, at 221.

<sup>64</sup> Adam Liptak, *Religious Groups Given 'Exception' to Work Bias Law*, N.Y. TIMES (Jan. 11, 2012), <https://www.nytimes.com/2012/01/12/us/supreme-court-recognizes-religious-exception-to-job-discrimination-laws.html>:

In what may be its most significant religious liberty decision in two decades, the Supreme Court on Wednesday [January 11, 2012] for the first time recognized a 'ministerial exception' to employment discrimination laws, saying that churches and other religious groups must be free to choose and dismiss their leaders without government interference.

*Id.* (referencing *Hosanna-Tabor Church v. Equal Employment Opportunity Commission*, 565 U.S. 171 (2012)).

move in favor of seeking political compromise.<sup>65</sup> This is because we recognize that “[t]he government’s authority” cannot:

[B]e freely accepted in the sense that the bonds of society and culture, of history and social place of origin, begin so early to shape our life and are normally so strong that the right of emigration (suitably qualified) does not suffice to make accepting its authority free, politically speaking, in a way that liberty of conscience suffices to make accepting ecclesiastical authority free, politically speaking.<sup>66</sup>

And this is shown when “over the course of life [we] come freely to accept, as the outcome of reflective thought and reasoned judgment, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject.”<sup>67</sup> All this goes to show, given what was earlier described as Davidson’s partial translation of seemingly incommensurable conceptual schemes that cannot truly be incommensurable because there may remain a conceptual place in such schemes to achieve consensus. And so now the question arises of how to actually make the adjustment(s) so as to achieve consensus.

In his book, *How to Interpret the Constitution*,<sup>68</sup> Professor Cass Sunstein reviews various theories that have been proposed for interpreting the American Constitution, including textualism,<sup>69</sup> semantic originalism,<sup>70</sup> original intentions,<sup>71</sup> original public meaning,<sup>72</sup> original expectations,<sup>73</sup>

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<sup>65</sup> RAWLS, *supra* note 48, at 222.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> SUNSTEIN, *supra* note 2.

<sup>69</sup> *Id.* at 22-24. Textualism is the belief that the words in the Constitution are binding and that judges need to be faithful to the text. *Id.* at 22.

<sup>70</sup> *Id.* at 24-26. This is the belief “that the text of the Constitution must be interpreted in a way that is consistent with the original *semantic* meaning of its words.” *Id.* at 24.

<sup>71</sup> *Id.* at 26-29. This is the view that one determines the meaning of a text by asking “*What did the authors intend?*” *Id.* at 26.

<sup>72</sup> *Id.* at 29-31. Original public meaning holds “that the Constitution must be interpreted in a way that fits” how it would be generally understood at the time it was written. *Id.* at 30.

<sup>73</sup> *Id.* at 36. “[T]he Constitution must be interpreted in a way that is consistent with the ratifiers’ expectations about *how it should be interpreted in particular cases.*” *Id.* at 36.

protecting democracy,<sup>74</sup> traditionalism,<sup>75</sup> moral reading,<sup>76</sup> Thayerism,<sup>77</sup> common-law constitutionalism,<sup>78</sup> and common-good constitutionalism.<sup>79</sup> In evaluating each of these theories' ability to interpret constitutional law, Sunstein adopts a variation of Rawls' reflective equilibrium taken from political morality to identify certain past Supreme Court decisions, like *Brown v. Board of Education*, which held unconstitutional racial segregation,<sup>80</sup> along with various cases striking down "laws that discriminate on the basis of sex,"<sup>81</sup> and *Griswold v. Connecticut*, which protected the right of married people to use contraceptives,<sup>82</sup> as essentially occupying "fixed points" in our current constitutional order<sup>83</sup> that ought not to be undermined by any theory of interpretation.<sup>84</sup> He also identifies certain constitutional values, like "*deliberative democracy*" and an "*anticaste principle*," that similarly must be protected.<sup>85</sup> Sunstein regards these two pillars of cases and principles as providing the outlines for how a theory of interpretation ought to be evaluated.<sup>86</sup> Sunstein had earlier set out how a good theory of interpretation needs to be able to reproduce these certain fixed points involving past decisions and basic constitutional values.<sup>87</sup> In short, he appeals to the need for "judges (and others) . . . to think about what would make our constitutional order better rather than worse."<sup>88</sup>

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<sup>74</sup> *Id.* at 37-41. This is a non-originalist approach connected to work by Professor John Hart Ely. It is the idea that the Constitution should be seen to promote "democracy-reinforcing judicial review." *Id.* at 37.

<sup>75</sup> *Id.* at 41-43. Traditionalism is the idea that the Constitution should be interpreted to be consistent with "long-standing traditions" that are part of the American ethos. *Id.* at 41.

<sup>76</sup> *Id.* at 43-47. A moral reading requires the Constitution's terms to be interpreted so as to make the "best moral sense of them, or that casts them in the best moral light." *Id.* at 43.

<sup>77</sup> *Id.* at 48-56. This is the view that, when faced with a constitutional challenge, "all reasonable doubts should be resolved favorably to Congress, in the sense that the Constitution should be interpreted in a way that gives the political process maximum room to maneuver." *Id.* at 48.

<sup>78</sup> *Id.* at 56-58. Here, the emphasis is to focus less on the Constitution's text or its original meaning and more to "reason from one case to another, perhaps with the assistance of low-level principles." *Id.* at 56. For example, if "the Constitution protects the right to use contraceptives within marriage" might it also protect "the right to use contraceptives outside of marriage." *Id.* at 57.

<sup>79</sup> *Id.* at 58-59. "[T]hat the Constitution should be interpreted in a way that is consistent with principles of 'the common good,' as those principles have been understood and elaborated over time." *Id.* at 58. I would note that this view has a utilitarian feel in a way that the moral reading is more deontological or possibly Kantian.

<sup>80</sup> *Id.* at 160.

<sup>81</sup> *Id.* at 160.

<sup>82</sup> *Id.* at 161.

<sup>83</sup> *Id.*

<sup>84</sup> *See id.* at 161-64.

<sup>85</sup> *Id.* at 162-64.

<sup>86</sup> *Id.* at 103-05 (citing JOHN RAWLS, A THEORY OF JUSTICE 17-19 (1971)).

<sup>87</sup> *Id.* at 158-59.

<sup>88</sup> *Id.* at 103.



While Sunstein does not claim any one of these theories of interpretation to be the right theory for interpreting the Constitution in all cases,<sup>89</sup> or that the Constitution itself proclaims any theory to be the correct one (with maybe the possible exception of textualism),<sup>90</sup> he takes particular aim at originalism, traditionalism, and Thayerism as definitely being wrong approaches.<sup>91</sup> Originalism, he believes, is wrong because it would *not* likely lead “to a system of institutions and rights that we should enthusiastically embrace.”<sup>92</sup> Traditionalism is wrong because many of “our complex traditions (which include slavery and segregation)” would not give rise to “the many rights that have emerged from careful scrutiny of traditions.”<sup>93</sup> And Thayerism presupposes that judges cannot be trusted to not be “systematically confused or malevolent,” but what about legislatures and the president?<sup>94</sup> Is it fair to say that these political branches are any more trustworthy to avoid bias and prejudice than the courts? Overall, Sunstein favors a moral approach that would make our constitutional order better rather than worse.<sup>95</sup> However, this too could create uncertainty if the moral approach adopted were to presuppose a metaphysical truth that could not be well-supported by reason and, even less, by human experience. This is perhaps the best explanation of why the First Amendment states: “Congress shall make no law respecting an establishment of religion; or prohibiting the free exercise thereof[.]”<sup>96</sup> While not wanting to undermine an individual’s freedom to believe, neither does the Constitution want to make religious beliefs binding for the whole country. So how should these two clauses be navigated?<sup>97</sup> For our purposes here, it is enough to say that any navigation will require finding a common basis to underlie how the two clauses might be able to complement one another in a pluralistic society.

Earlier, it was noted that truly incommensurable conceptual schemes would probably not even be recognized.<sup>98</sup> What will more likely be recognized and provide the basis for conflicts are conceptual frameworks where not every idea can be meaningfully transferred from one framework to the next. This gets at Rawls’ claim that “[t]he most intractable struggles,

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<sup>89</sup> *Id.* at 159.

<sup>90</sup> *Id.* at 157, n.1.

<sup>91</sup> *Id.* at 159-62.

<sup>92</sup> *Id.* at 159.

<sup>93</sup> *Id.* at 159-60.

<sup>94</sup> *Id.* at 159.

<sup>95</sup> *See id.* at 103, 107.

<sup>96</sup> U.S. CONST. amend. I.

<sup>97</sup> Elsewhere I have set out a formula for determining the proper boundary between these two First Amendment clauses. *See* Vincent J. Samar, *Finding the Correct Balance Between the Free Exercise of Religion and the Establishment Clauses*, 21 FIRST AMEND. L. REV. 109 (2023).

<sup>98</sup> *See supra* Section III.

political liberalism assumes, are confessedly for the sake of the highest things: for religion, for philosophical views of the world, and for different moral conceptions of the good.”<sup>99</sup> Most often, “religious and philosophical conceptions aspire to be both general and comprehensive.”<sup>100</sup> At times, however, such comprehensive doctrines will not appear to afford “a reasonable balance of public values,” even at the most minimal level, because those who oppose them will not be able to “understand how reasonable persons can affirm it.”<sup>101</sup> When this occurs, we have a conflict which, over time, could undermine the existence of a well-ordered society.<sup>102</sup>

In the United States, some people believe that the country should reflect a Christian culture and, as a result, should affirm Christian values, which are often too conservative even for some Christians to fully accept.<sup>103</sup> For example, some Christians are against government recognition of same-sex marriage, while others support it.<sup>104</sup> Here, differences of opinion will not be easily settled by reason or empirical evidence since they are differences of faith.<sup>105</sup> As a consequence, if the government takes a side in favor or against same-sex marriage based, for example, on Christian values, then the government is in a sense establishing a church, which the First Amendment forbids.<sup>106</sup> Perhaps more significantly than even the constitutional error, in a pluralistic culture where not all people are Christians, let alone not all Christians oppose same-sex marriage, such a position for the government to adopt gives rise to a kind of favoritism for one group’s set of beliefs over all others.

Some scholars have argued that government acceptance of Christian values is okay if the beliefs adopted can be rationally agreed to by most

<sup>99</sup> RAWLS, *supra* note 48, at 4.

<sup>100</sup> *Id.* at 113.

<sup>101</sup> *Id.* at 253.

<sup>102</sup> *Id.* at 253. Rawls identifies a “well-ordered society” as, first, “a society in which everyone accepts, and knows what everyone else accepts; the very same principles of justice; and second . . . [accepts the] main political and social institutions and how they fit together as one system of cooperation . . . [and] third . . . compl[ies] with society’s basic institutions, which they regard as just.” *Id.* at 35.

<sup>103</sup> Gregory A. Smith, Michael Rotolo & Patricia Tevington, 3. *Views of the U.S. as a ‘Christian Nation’ and Opinions About ‘Christian Nationalism’*, PEW RSCH. CTR. (Oct. 27, 2022), <https://www.pewresearch.org/religion/2022/10/27/views-of-the-u-s-as-a-christian-nation-and-opinions-about-christian-nationalism>.

<sup>104</sup> *See generally* *A Clash of Rights? Gay Marriage and the Free Exercise of Religion*, PEW RSCH. CTR. (May 21, 2009), <https://www.pewresearch.org/religion/2009/05/21/a-clash-of-rights-gay-marriage-and-the-free-exercise-of-religion>.

<sup>105</sup> *See* Kevin DeYoung, *What Should Christians Think About Same-Sex Marriage?*, CROSSWAY (Nov. 28, 2022), <https://www.crossway.org/articles/what-about-same-sex-marriage>.

<sup>106</sup> The First Amendment states, “Congress shall make no law respecting an establishment of religion[.]” U.S. CONST. amend. I.

Americans.<sup>107</sup> But what would it mean to say the beliefs adopted can be rationally agreed to? Certainly, the fact that a particular view is appealing only to those favoring a certain comprehensive moral or philosophical doctrine will not be satisfying.<sup>108</sup> Moreover, recent polling shows that only forty-five percent of Americans say that the United States should be a Christian nation,<sup>109</sup> while two-thirds of adults in that group also say “churches should keep out of politics.”<sup>110</sup> All this goes to what Rawls points out as an important consideration for a pluralistic society to follow in order to be well-ordered, namely, that debates over more deeply-rooted philosophical or moral differences need to give way to a standard of public reason all can adopt.<sup>111</sup> But if that is the case, what kind of standard should be applied when the question to be resolved raises a serious moral concern? Put another way, what kind of morality can be sustained within a pluralistic society committed to following a form of public reason that is not dependent on acceptance of any arguably incommensurable moral or philosophical framework? Use of constitutional essentials like “free exercise” and “establishment of religion” will play some role, especially when the histories behind their inclusion in the First Amendment are examined, but that can only go so far, when the meaning of these words must be related to the concerns of twenty-first century America.<sup>112</sup>

Here, I propose an answer to this question, drawing on the writings of Alan Gewirth, whose major work, *Reason and Morality*, sought to rationally

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<sup>107</sup> For instance, Professor Robert George has argued, in opposition to Rawls’ public reason, that “[t]he broad tradition of natural law thinking, for example, proposes what amounts to its own principle of public reason when it asserts that questions of fundamental law and basic justice ought to be decided in accordance with natural law, natural right, natural rights, and/or natural justice.” Robert George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2482 (1997). Robert George then argues in a footnote that “[i]n Aquinas’s natural law theory, something is good, right, or just ‘by nature’ insofar as it is reasonable.” *Id.* at 2482, n. 36.

<sup>108</sup> In an important criticism of John Finnis’ book, Professor David A.J. Richards argues:

It is important to be clear that there is an alternative conception of the good available [to Aquinas], one much more sensitive to argument and evidence precisely at the points that Finnis’ account suspiciously ignores. This conception is familiar from Aristotle to Kant to Sidgwick to Rawls, namely, that the good is the object of rational choice and deliberation . . . . In the case of basic goods, this conception would call for investigation of the facts of the aims of persons, the circumstances of their lives, and the ways rationally to realize their ends.

David A.J. Richards, *Natural Law and Natural Rights*, 93 ETHICS 169, 170 (1982) (reviewing JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).

<sup>109</sup> Gregory A. Smith, Michael Rotolo & Patricia Tevington, *45% of Americans Say U.S. Should Be a ‘Christian Nation’*, PEW RSCH. CTR. (Oct. 27, 2022), <https://www.pewresearch.org/religion/2022/10/27/45-of-americans-say-u-s-should-be-a-christian-nation>.

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

<sup>111</sup> See RAWLS, *supra* note 48, at 217.

<sup>112</sup> U.S. CONST. amend. I.

justify a supreme principle of morality from a morally neutral starting point that would then provide a set of universal human rights.<sup>113</sup> Gewirth's idea was to derive a set of human rights that all could agree to on rational grounds, connected only to our own nature as human agents, that is, to ourselves as persons who act voluntarily for our own purposes.<sup>114</sup> Nowhere does his argument presuppose the prior acceptance of any fixed moral or religious values.<sup>115</sup> The initial attachment to human nature as voluntary and purposive is founded solely on what all moral theories presuppose by being prescriptive and not descriptive.<sup>116</sup> This is not to say that a person may not hold moral or religious convictions separate from what the theory puts forth, provided no violation occurs against the human rights the theory does set forth for everyone's protection.<sup>117</sup>

That said, the value of introducing Gewirth's work at this point in the discussion is hopefully to establish a common foundation all could agree to in a pluralistic society where there is likely to be great differences of opinion over matters especially concerning morality and religion. The point here is to fill that space in our moral interpretation of the Constitution, what Cass Sunstein proffered in his recent work, and which, in my judgment, should follow Rawls' notion of public reason. So, with that said, here is how Gewirth's argument goes forward.

#### IV. A UNIVERSAL SYSTEM OF HUMAN RIGHTS FOR BRINGING TOGETHER VERY DIFFERENT CONCEPTUAL FRAMEWORKS OF LAW AND MORALITY

Gewirth begins by noting what every moral theory presupposes, namely, that the individuals being addressed are presumed to be voluntary purposive agents.<sup>118</sup> This is a necessary presupposition because a moral theory directs what should and should not be done on the assumption that the persons addressed will have some degree of choice in determining what to do. From this he believes he can derive a supreme principle of morality by way of what he calls a dialectically necessary method.<sup>119</sup> Under this method, the agent, "in acting and thinking as he does . . . uses or makes judgments that can be expressed in words."<sup>120</sup> Those words, in turn, can be the basis of

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<sup>113</sup> See ALAN GEWIRTH, *REASON AND MORALITY* (1978) [hereinafter *REASON AND MORALITY*].

<sup>114</sup> *Id.* at 24-27.

<sup>115</sup> *Id.* at 357.

<sup>116</sup> *See id.*

<sup>117</sup> See ALAN GEWIRTH, *SELF-FULFILLMENT* 142 (1998) [hereinafter *SELF-FULFILLMENT*].

<sup>118</sup> GEWIRTH, *supra* note 113, at 26-27.

<sup>119</sup> *Id.* at 42-47.

<sup>120</sup> *Id.* at 42.

an argument the agent has with him or herself as to how to act. We can imagine, for example, a dialectically contingent method to be operating when one protagonist engages with another interlocutor over some contested issue, as was the case when Socrates engaged various participants at a dinner party in Plato's *Republic*.<sup>121</sup> For Gewirth, this type of contingent dialectical method would not be adequate, however, to found a supreme moral principle since the argument would vary depending on the particular beliefs and attitudes of one's interlocutors.<sup>122</sup> Thus, for Gewirth, the method he draws upon needs to be "dialectically necessary," as being what every agent, that is, what every person who does some action for some purpose, would have to accept on pain of contradiction.<sup>123</sup>

Here it is important to understand that the agent is operating from within an internal point of view, representing his own conative standpoint as to the action he or she is thinking of undertaking. Additionally, the theory is necessary in that it claims to represent "what is conceptually necessary to being an agent who voluntarily or freely acts for purposes he wants to attain."<sup>124</sup> This it does by focusing upon "the objectivity and universality reason achieves through the conceptual analysis of [human] action," which is both voluntary and purposive.<sup>125</sup> Gewirth describes the way the dialectically method proceeds as follows: "every actual or prospective agent logically must hold or accept that he and all other prospective agents have certain rights: namely, rights to the necessary conditions of action and successful action in general."<sup>126</sup>

From within one's own conative standpoint, when an agent acts, he or she can perceive what is happening as "*I do X for purpose E*."<sup>127</sup> The statement signifies that the action is voluntary ("I do X") and purposive ("for purpose E"). In this respect, it represents a neutral starting point for the agent's action in that it does not presuppose any value for doing the action. Putting quotes around the statement means the statement is from the agent's own point of view. From this statement, Gewirth claims the agent asserts "*E*

<sup>121</sup> *Id.* at 43. See, e.g., PLATO, *THE REPUBLIC OF PLATO* (Allan Bloom ed. & trans., 2d ed. 1991).

<sup>122</sup> GEWIRTH, *supra* note 113, at 43.

<sup>123</sup> *Id.* at 43-44.

<sup>124</sup> *Id.* at 44.

<sup>125</sup> *Id.*

<sup>126</sup> Alan Gewirth, *Why There are Human Rights*, 11 *SOC. THEORY & PRAC.* 235 (1985). Elsewhere, Gewirth states:

Even if persons' having rights cannot be logically inferred in general from the fact that they make certain claims, it is possible and indeed logically necessary to infer, from the fact that certain objects are the proximate necessary conditions of human action, that all rational agents logically must hold or claim, at least implicitly, that they have rights to such objects.

Alan Gewirth, *The Basis and Content of Human Rights*, 23 *HUM. RTS.* 119, 124 (1981).

<sup>127</sup> REASON AND MORALITY, *supra* note 113, at 49 (italics added).

is good,” not necessarily a moral good, just any motivation the agent has for his action.<sup>128</sup> From here, the agent further claims “*My freedom and well-being are necessary goods.*”<sup>129</sup> By being necessary goods, all that is meant is “*I must have freedom and well-being,*” if I am to do any action for any purpose.<sup>130</sup> At this point, Gewirth argues that the agent implicitly claims “*I have rights to freedom and well-being.*”<sup>131</sup>

Here, Gewirth acknowledges that there may be a concern as to whether claiming rights adds something unjustified into the premises.<sup>132</sup> To show that this is not the case, he asks what would happen from the internal point of view if the agent were to deny “*I have rights to freedom and well-being.*”<sup>133</sup> In that instance, since the rights claim is correlative with duty, the agent would have to deny, “*All other persons ought at least to refrain from interfering with my freedom and well-being.*”<sup>134</sup> But this, in turn, means that the agent would have to accept, “*It is not the case all other persons ought at least to refrain from interfering with my freedom and well-being.*”<sup>135</sup> But this would contradict the agent’s earlier claim, “*My freedom and well-being are necessary goods*”<sup>136</sup> or more personally, “*I must have freedom and well-being.*”<sup>137</sup> Thus, the agent in claiming “to do X for purpose E” must claim rights to freedom and well-being. But here it is important to understand that the claim to rights is only from the agent’s own point of view in seeking to do X for purpose E. It is strictly a prudential claim, not yet a moral claim, since it doesn’t require any other person to recognize, let alone accept, the agent’s rights claim.

To make this a moral claim, it is necessary for the agent to further show why all other agents would have to recognize the agent’s rights as well as their own.<sup>138</sup> Here, we take note that the only basis upon which the rights claim was made was that it was necessary to do X for purpose E.<sup>139</sup> Nothing unique about the agent played any role in making that claim. This is an example of the *Principle of Sufficient Reason* being operative in this

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<sup>128</sup> *Id.* at 49-51.

<sup>129</sup> *Id.* at 54, 57.

<sup>130</sup> *Id.* at 57, 81. The fact/value gap is here connected when one goes from what is the case to what one believes to be necessary.

<sup>131</sup> *Id.* at 64.

<sup>132</sup> *Id.* at 66, 68-69, 75-76.

<sup>133</sup> *Id.* at 80.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

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

<sup>137</sup> *Id.* at 81.

<sup>138</sup> *See id.* at 129-30.

<sup>139</sup> *Id.* at 133.

analysis.<sup>140</sup> But this in turn means that any agent who seeks to do X for purpose E could make this exact same claim.<sup>141</sup> This is an example of the *Principle of Universalizability* operating.<sup>142</sup> Thus, the rational agent must recognize that denying a fellow agent rights that on the same basis he or she claims for oneself would be a contradiction.<sup>143</sup> Based on this analysis, Gewirth argues that the agent must accept as categorically obligatory the principle: “Act in accordance with the generic rights of your recipients and yourself.”<sup>144</sup> Generic rights are just the rights to freedom and well-being.<sup>145</sup> Indeed, it is at this point Gewirth’s theory shows that the principle becomes moral because it now affirms the need to recognize the equal rights of others as well as oneself. Gewirth calls this the “*Principle of Generic Consistency*” (“PCG”).<sup>146</sup> For Gewirth, this is the supreme principle of morality as it does not beg any question as might arise by presupposing another moral principle at the outset and only relates to a foundation that every moral theory, by virtue of being prescriptive, must presuppose. Additionally, once the principle is established by way of the dialectically necessary method, it can be held as binding assertorically since anyone using that same method would reach the same result.<sup>147</sup>

At this point, it is worth acknowledging some other matters relevant to how the principle is articulated. First, the above argument has already referenced how the PGC applies negatively to protect the rights of others in the same way one would not want their own rights taken away. But it also applies positively to affirm rights due other agents in the same way the agent

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<sup>140</sup> Yitzhak Y. Melamed & Martin Lin, *Principle of Sufficient Reason*, STAN. ENCYC. PHIL., <https://plato.stanford.edu/entries/sufficient-reason/#WhatSuffReas> (last revised June 14, 2023):

When Leibniz insists that every truth or fact requires a sufficient reason, what does he mean by “sufficient reason?” In some texts he suggests that sufficient reason is an “*a priori* proof”. This should not be understood in Kantian terms as a proof that doesn’t require any input from sense experience. Rather, Leibniz uses the term “*a priori*” in its original pre-Kantian meaning, which means an argument from causes to effects. An *a priori* proof is a proof that reflects the causal order. Thus, a sufficient reason would be a proof that is both a demonstration—a set of premises and a conclusion such that the former necessitate the later—and a causal explanation—a statement of the causal antecedents of some truth or event.

*Id.*

<sup>141</sup> See REASON AND MORALITY, *supra* note 113, at 133.

<sup>142</sup> “Judgments or principles of which it can be said that everyone should judge or act in the same way, are universalizable judgments or principles. In other words, they are independent of any particular point of view.” *Universalizability*, SEVEN PILLARS INST. GLOB. FIN. & ETHICS (Aug. 26, 2017), <https://sevenpillarsinstitute.org/glossary/universalizability>.

<sup>143</sup> REASON AND MORALITY, *supra* note 113, at 133.

<sup>144</sup> *Id.* at 135.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 153-54.

would want them for him or her or themselves.<sup>148</sup> So, where it is possible to help others at no comparable harm to oneself, the help should be provided.<sup>149</sup> Second, while the PGC applies to guarantee the rights of all full-fledged agents—persons who can act with knowledge of relevant circumstances for their own purposes—it also applies through a separate principle of proportionality<sup>150</sup> to those who may not be full-fledged agents either because of immaturity or because of some mental challenge.<sup>151</sup> In those instances, the PGC affirms the rights of the individual agents to the extent they have the powers of agency.<sup>152</sup> That means that a parent, for example, can legitimately limit their young child’s actions, including where the child might go, because they do not yet have sufficient knowledge of relevant circumstances to be able to safely travel. Additionally, a court can appoint a *guardian ad litem* to prevent an adult suffering a mental challenge from being defrauded or coerced.<sup>153</sup> The case of a fetus is more problematic. Since the fetus is only a potential agent, without the capacity to act on its own and without knowledge of relevant circumstances, especially prior to birth, laws that burden a woman’s physical or mental health by forcing her to bring the pregnancy to term are in fact imposing the needs of only a potential agent against those of a full-fledged agent.<sup>154</sup> For a fetus, especially at an early stage of a pregnancy, is in no way morally comparable to the mother, who is a full-fledged agent in the sense of being able to act voluntarily with knowledge of relevant circumstances for purposes of her own.<sup>155</sup>

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<sup>148</sup> *Id.* at 135-36.

<sup>149</sup> *Id.* at 218.

<sup>150</sup> Because the sufficient reason upon which an agent claims “rights must adduce simply the characteristic of being a prospective purposive agent,” a question arises as to what the PGC requires for those who are not (yet) agents. *See id.* at 119-20. In these instances, a “*Principle of Proportionality*” applies:

[W]hen some quality Q justifies having certain rights R, and the possession of Q varies in degree in the respect that is relevant to Q’s justifying the having of R, the degree to which R is had is proportional to or varies with the degree to which Q is had.

*Id.* at 120.

<sup>151</sup> *See id.* at 122, 141-42.

<sup>152</sup> *Id.* at 120.

<sup>153</sup> In Illinois, for example:

A Guardian ad Litem (GAL) is a legal advocate for a “ward.” A ward is a person legally under the care of the courts. This can be a minor child or an adult with a disability. The GAL protects the ward’s best interests during a court case. GALs are often called “the eyes and ears of a judge” because they investigate situations to help the judge make a decision.

*Guardian ad Litem (GAL) Basics*, ILL. LEGAL AID ONLINE, <https://www.illinoislegalaid.org/legal-information/guardian-ad-litem-gal-basics> (last visited Feb. 24, 2024).

<sup>154</sup> *See* REASON AND MORALITY, *supra* note 113, at 142-43. *See also* Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287 (2017).

<sup>155</sup> REASON AND MORALITY, *supra* note 113, at 143. Here it is worth noting that, although a fetus should not be thought of as an agent with a mind and capacities of its own, it is not nothing. Assuming it



Two other factors need to be drawn out, both as they apply individually but, most importantly for our purposes, as they apply institutionally to the government and especially courts. These concern what objects the rights to freedom and well-being attach to. Under the freedom component, we think of consent, personal autonomy, and privacy.<sup>156</sup> And so, an agent's freedom is compromised when forced to be part of an institution to which the agent has not consented.<sup>157</sup> One thinks here of being forced to join a professional organization or a labor union, or a political party; however, in some of these instances, the justification for requiring membership might properly proceed because of its "contribution to well-being" or "by making more alternatives available for choice by the workers," including "alternatives, bearing on wages, working conditions, and other important matters."<sup>158</sup> Analogously, since pretty much everyone will reside in an area with an existing government, when applied to government, the PGC requires some kind of constitutional format where each person's civil liberties are protected because "each person is able if he chooses, to discuss, criticize, and vote for or against the government and work actively with other persons in groups of

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is carried to term, it is likely that at some future time it will become a full-fledged agent. This should give rise to a concern that human life is valuable. Consequently, it is reasonable that a pregnant woman would have a stronger reason for terminating a late-stage pregnancy than she need have at an earlier stage. However, in no case should that concern limit a mother from terminating a pregnancy if she is likely to suffer serious physical or emotional harm by carrying the fetus to term. *Id.* at 143. The idea here is not that the fetus' agency is equivalent to that of the mother. It is not. The fetus is not an agent, even in the most minimal sense. Here it is also worth noting that a fetus, especially at an early stage of pregnancy, is at best a potential agent as its mental structure is not yet sufficiently developed as would be the case of a prospective agent who is merely asleep or in a temporary coma. See Xavier Symons, *Ethically Speaking, Is a Fetus a Person?*, O&G MAG., Winter 2018 (available at: <https://www.ogmagazine.org.au/20/2-20/ethically-speaking-is-a-fetus-a-person>). What is at stake for a mother that warrants having a greater reason to terminate a late-stage fetus is the idea that human life is valuable and, thus, all else being equal, the fetus's life should be sustained where no serious harm to the mother is likely to be present. However, all else is frequently not equal. A woman's well-being in deciding whether to carry on a pregnancy is likely to be affected by serious mental, physical, and other factors, including financial considerations. Moreover, because only the mother can know how the pregnancy is or will be affecting her, the abortion decision must finally be hers and not someone else's or for the government to decide. Consider the right to vote. At age eighteen a U.S. citizen has the right to vote under the Twenty-Sixth Amendment to the U.S. Constitution. Before that age, even if only by a day, the not-yet-old-enough voter does not have a right to vote as the person is not yet a full-fledged voter. Still, at age seventeen the not-yet-voter has a stronger claim on their high school to provide civics courses to understand how government works and why voting is important. This claim is stronger than if the person were sixteen, and stronger still than if the person were fifteen or younger. Yet, the claim is not absolute as the school may suffer from conditions (financial or otherwise) that limit its ability to provide the requisite course(s). Here, it should also be noted that the aforesaid analysis allowing abortion would not similarly give rise to infanticide since, in that instance, there would be "no comparable threat to the mother's generic rights and the infant already has its own desires and purposes stemming from its separate physical existence." REASON AND MORALITY, *supra* note 113, at 143. See also Samar, *supra* note 154, at 287.

<sup>156</sup> REASON AND MORALITY, *supra* note 113, at 256.

<sup>157</sup> *Id.* at 27-71, 284-85.

<sup>158</sup> *Id.* at 289.

various sizes to further his political objectives, including the redress of his socially based grievances.<sup>159</sup> In other words, there needs to be a process operating within any territory by which the residents living there can gain the right to have “one and only one vote.”<sup>160</sup> Similarly, everyone needs to have a right to privacy to aid in their determination of how to vote. A right to privacy is undermined when the agent’s thoughts, beliefs, and personal actions are revealed where no harm to others is likely to be present.<sup>161</sup> Needless to say, each of these matters can raise very complicated factual concerns which would need a close examination by an impartial third party. And this is why the PGC must apply to all governmental institutions possessing coercive power over all those subject to its power.

On the well-being side, an agent is harmed when their basic well-being to life is threatened, because they are subject to physical attack, or their mental ability is challenged, perhaps by dangerous drugs or propaganda.<sup>162</sup> Additionally, the agent’s purpose-fulfillment is threatened when the agent’s non-subtractive well-being is also challenged by being lied to, cheated, defrauded, or having promises broken.<sup>163</sup> Non-subtractive well-being refers to an agent’s interest to retain and not lose “whatever he already has that he regards as good.”<sup>164</sup> Finally, because agents act for purposes which they intend to achieve, they will necessarily also regard increases to their level of purpose-fulfillment as good.<sup>165</sup> Such increases constitute an agent’s additive well-being.<sup>166</sup> Examples of additive well-being include adequate education, health care, a decent standard of living, and the availability of legal services, among other things.<sup>167</sup> Generally, the goods of well-being apply in the order of their degree of service to purpose-fulfillment, which usually means basic

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<sup>159</sup> *Id.* at 308-09.

<sup>160</sup> *See id.* at 309.

<sup>161</sup> In *Reason and Morality*, Gewirth discusses “having a right to be let alone” that “includes having a sphere of personal autonomy and privacy.” *Id.* at 256. This right to be let alone encompasses “a vast area of protected actions of [the agent’s] own, including physical movement, speech and other forms of expression, assembly, religion, and sexual conduct.” *Id.* This right had been previously discussed by the philosopher John Stuart Mill. *See* JOHN STUART MILL, *ESSENTIAL WORKS OF JOHN STUART MILL* (Max Lerner ed. 1971). However, Gewirth’s approach to understanding the right differs in important justificatory respects from that of Mill in that Mill sought an aggregative (utilitarian) basis for the right, whereas Gewirth grounds the right in the PGC’s protection of distributive freedom, thus avoiding the possibility of overriding the right to serve the common good. *REASON AND MORALITY*, *supra* note 113, at 326-27. For a more detailed discussion of the right to privacy in American law and how privacy of information and places can be found to be an outcome of protecting private action, see generally VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* (1991).

<sup>162</sup> *REASON AND MORALITY*, *supra* note 113, at 54.

<sup>163</sup> *Id.* at 233.

<sup>164</sup> *Id.* at 54-55.

<sup>165</sup> *Id.* at 56.

<sup>166</sup> *Id.*

<sup>167</sup> *See id.* at 57.

first, followed by non-subtractive, followed by additive.<sup>168</sup> However, corrections of past discrimination or the creation of a safe working environment with decent pay may give rise to situations where additive well-being trumps non-subtractive well-being, as with affirmative action programs, progressive tax rates based on financial worth, and the adoption of rules that impose health care requirements, mandate social security payments, or prohibit various forms of unjust discrimination.<sup>169</sup> This is allowed, provided that the arrangement is able to affect a “sizable number of persons” in a way that effectively meets the need, and is itself not biased.<sup>170</sup> Since the goal of this part of the Article is to provide a suitable moral framework for interpreting the U.S. Constitution, I will limit the remainder of what I say to how the framework would relate to several fixed points Sunstein has identified in our current constitutional understanding.

#### V. INTERPRETING THE U.S. CONSTITUTION UTILIZING A MORAL FRAMEWORK COMPATIBLE WITH JOHN RAWLS’ PUBLIC REASON

The aforesaid discussion involving the writings of Alan Gewirth was meant to address how a moral interpretation of the U.S. Constitution’s various provisions (including amendments) might be put together, notwithstanding that we live in a society whose members hold very different moral and religious beliefs. The idea was never to replace the different belief frameworks the members held, but rather to provide a basis in which people from very different value perspectives might arrive at common solutions to the meaning and application of constitutional provisions. Obviously, for such a possibility to be present, the different conceptual frameworks cannot be so different that they could not even be recognized, let alone that their terms and understandings could not be shared. For this reason, I have further argued that the focus must really be on different conceptual frameworks, which are decidedly less than full schemes where no possibility of translation would ever be possible. That said, even different frameworks may not be completely understandable, let alone capable of being fully adopted in a pluralistic society where very different values are held. Still, the likelihood is that there would be elements of the frameworks, most likely not at the ultimate moral or philosophical level, where differences regarding

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<sup>168</sup> *Id.* at 62-63.

<sup>169</sup> *Id.* at 312-14. At this point, I would note that many of these conditions are already acknowledged by the international community in such documents as the International Convention on Civil and Political Rights, and to the extent the government has the means by the International Convention on Economic, Social and Cultural Rights. *See* International Convention on Civil and Political Rights, 999 U.N.T.S. 171 (1967); International Convention on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (1967).

<sup>170</sup> REASON AND MORALITY, *supra* note 113, at 315.

constitutional interpretation might be worked out. This is where I believe Rawls' idea of public reason would play a significant role. For one thing, it acknowledges that the issues most likely to create difficulties are moral and religious issues and not simply the kinds of formalistic concerns that are oft present in debates over textualism, originalism, traditionalism, or Thayerism.<sup>171</sup> This may be even more true of a form of constitutional interpretation that acknowledges moral issues than one which perhaps tries to escape any moral consideration. But if that is true, then in a society with very different moral and religious perspectives, it will be especially necessary that any interpretation be grounded in objective reasoning, as opposed to metaphysical underpinnings that cannot be finally evaluated. My use of Gewirth's theory was to provide this sort of intermediate moral foundation to operate where final claims cannot be determined but people might still come together.

As a start for how this might work, I want to investigate how a moral interpretation making use of Gewirth's theory of morality might respond to some of the so-called possible "fixed points" that Sunstein looks to.<sup>172</sup> In particular, I would like to see how well a moral theory of constitutional interpretation using Gewirth's theory would arrive at the Supreme Court's results in *Brown v. Board of Education*,<sup>173</sup> *Bolling v. Sharpe*,<sup>174</sup> *Griswold v.*

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<sup>171</sup> Samuel R. Freeman, *Democracy, Religion & Public Reason*, 149 DAEDALUS 37 (2020) (available at: <https://www.amacad.org/publication/democracy-religion-public-reason>):

A convention of democracy is that government should promote the common good. Citizens' common good is based in their shared civil interests, including security of themselves and their possessions, equal basic liberties, diverse opportunities, and an adequate social minimum. Citizens' civil interests ground what John Rawls calls "the political values of justice and public reason." These political values determine the political legitimacy of laws and the political constitution, and provide the proper bases for voting, public discussion, and political justification. These political values similarly provide the terms to properly understand the separation of church and state, freedom of conscience, and free exercise of religion. It is not a proper role of government to promote religious doctrines or practices, or to enforce moral requirements of religion. For government to enforce or even endorse the imperatives or ends of religion violates individuals' freedom and equality: it encroaches upon their liberty of conscience and freedom to pursue their conceptions of the good; impairs their equal civic status; and undermines their equal political rights as free and equal citizens.

*Id.* But see Matthew J. Franck, *The Unreasonableness of Secular Public Reason*, PUB. DISCOURSE (Aug. 28, 2015), <https://www.thepublicdiscourse.com/2015/08/14619>.

<sup>172</sup> See SUNSTEIN, *supra* note 2, at 110-16, 160-61.

<sup>173</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding state laws allowing racial discrimination in public schools to be unconstitutional).

<sup>174</sup> *Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that the Due Process Clause of the Fifth Amendment reverse incorporates the EPC, making racial discrimination in the public schools of the District unconstitutional).

*Connecticut*,<sup>175</sup> *Lawrence v. Texas*,<sup>176</sup> and *Obergefell v. Hodges*.<sup>177</sup> If the interpretative theory put forth would arrive at the same, or nearly the same, results as the Court in these cases, that would suggest that any better form of interpretation, if such were possible, would have to be able to show that the decisions in these cases were fundamentally wrong or, at least, why it was not enough to simply say these cases had been correctly decided. This does not mean that there cannot be some disagreements about particular cases, which is why I avoid comparing *Dobbs v. Jackson Women's Health Organization*<sup>178</sup> and *Roe v. Wade*,<sup>179</sup> since those cases raised a question about the status of the unborn, which may involve less certainty than the cases that came before them. Although I believe, for reasons beyond this Article, that *Roe* was correctly decided and *Dobbs* was not, I will not delve further into that discussion here.<sup>180</sup> Similarly, I will not consider the cases of *District of Columbia v. Heller*<sup>181</sup> or *Brandenburg v. Ohio*,<sup>182</sup> not because these cases were or were not correctly decided, but because, in both cases, there are other issues that will need further elaboration. For example, the Court in *Heller* affirmed a Second Amendment right to carry a gun for self-defense.<sup>183</sup> But does that right extend to possessing and carrying an AK-47 or an AR-15, which have little use outside of a combat situation?<sup>184</sup> And should age or mental health be relevant to who has access to guns?<sup>185</sup> *Brandenburg* set the terms for when speech might create a clear and present danger,<sup>186</sup> but does it

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<sup>175</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Constitution protects the rights of married persons to buy and use contraceptives and physicians to prescribe their use).

<sup>176</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding most criminal punishments for adult consensual same-sex sexual activities unconstitutional).

<sup>177</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that the DPC and EPC guarantee a fundamental right for same-sex couples to marry).

<sup>178</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) (holding that the Constitution does not confer a right to abortion), *overruling* *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>179</sup> *Roe*, 410 U.S. at 113 (holding that the Constitution provides a pregnant woman with a right to decide whether to terminate a pregnancy in the first two trimesters), *overruled by Dobbs*, 142 S. Ct. 2228.

<sup>180</sup> See Vincent J. Samar, *Limiting Fundamental Rights to Only Those Founded Upon Longstanding History and Tradition Undermines the Court's Legitimacy and Disavows Individual Human Dignity*, 22 CONN. PUB. INT. L.J. 1, 42-50 (2023).

<sup>181</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>182</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>183</sup> *Heller*, 554 U.S. at 628, 635.

<sup>184</sup> *AK-47 vs. AK-15*, DIFFEN, [https://www.diffen.com/difference/AK-47\\_vs\\_AR-15](https://www.diffen.com/difference/AK-47_vs_AR-15) (last visited Nov. 16, 2023).

<sup>185</sup> Jeffrey W. Swanson, E. Elizabeth McGinty, Seena Fazel & Vickie M. Mays, *Mental Illness and Reduction of Gun Violence and Suicide: Bringing Epidemiologic Research to Policy*, 25 ANNALS EPIDEMIOLOGY 366, 368, 374-75 (2014).

<sup>186</sup> *Brandenburg*, 395 U.S. at 447-48. *Brandenburg* is an evolution of the clear and present danger test set forth by Justice Oliver Wendell Holmes in *Schenck v. United States*, 249 U.S. 47 (1919), but the final test set forth in *Brandenburg* is quite different—it is where the “advocacy is directed to inciting or

account for speech that might give rise to an insurrection against the U.S. Capitol where a mob has been subjected to an onslaught of false claims and challenges from those in authority to “fight like hell”?<sup>187</sup> What about the potential harm of racial or ethnic slurs on young children who may be particularly vulnerable?<sup>188</sup> Obviously, if there is widespread disagreement over the scope of a seemingly morally justified right, then perhaps more is needed to elaborate where differences lie. But, that does not mean the moral interpretation would have no significant role to play, only that other concerns may need to be brought into the mix to determine exactly the content of the right to which the moral interpretation operates. In no event need there be an appeal to a higher level of abstraction, absent common agreement, as to how that higher-level framework is justified. Remember, the public reason goal for limiting the level of abstraction is to avoid running into ultimate metaphysical, moral, or religious issues that could not be subscribed to by most members in a pluralistic society.<sup>189</sup>

*A. Brown v. Board of Education (Brown I)*<sup>190</sup>

The case involved four states: Kansas, South Carolina, Virginia, and Delaware.<sup>191</sup> In each case, “minors of the Negro race” sought “admission to the public schools in their communities on a nonsegregated basis.”<sup>192</sup> But they were “denied admission to schools attended by white children under laws permitting segregation according to race.”<sup>193</sup> The schools argued that they were allowed to segregate by race under the Court’s earlier 1896 holding in *Plessy v. Ferguson*.<sup>194</sup> In *Plessy*, the Court had ruled that racial segregation laws did not violate the Fourteenth Amendment requirement of “equal protection” so long as the facilities used by each race were relatively equal.<sup>195</sup>

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producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg*, 395 U.S. at 447.

<sup>187</sup> Brian Naylor, *Read Trump’s Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial>.

<sup>188</sup> Julia Kansok-Dusche, Cindy Ballaschk, Norman Krause, Anke Zeißig, Lisanne Seemann-Herz, Sebastian Wachs & Ludwig Bilz, *A Systematic Review on Hate Speech Among Children and Adolescents: Definitions, Prevalence, and Overlap with Related Phenomena*, 24 *TRAUMA, VIOLENCE, & ABUSE* 2598 (2023).

<sup>189</sup> RAWLS, *supra* note 48, at 217-18.

<sup>190</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 486 (1954).

<sup>191</sup> *Id.* at 486.

<sup>192</sup> *Id.* at 487.

<sup>193</sup> *Id.* at 488.

<sup>194</sup> *Id.* See also, *Plessy v. Ferguson*, 163 U.S. 537 (1896), *overruled by Brown*, 347 U.S. 483.

<sup>195</sup> *Plessy*, 163 U.S. at 540:

The doctrine [of separate but equal] apparently originated in *Roberts v. City of Boston*, 59 Mass. 198, 206 (1850), upholding school segregation against attack as being violative of a

In *Brown*, the schools argued “that the Negro and white schools involved have been equalized, or are being equalized.”<sup>196</sup> However, the Court chose to look beyond the physical facilities of the schools in question to inquire about “the effect of segregation itself on public education.”<sup>197</sup> The Court noted “the importance of education to our democratic society . . . in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment.”<sup>198</sup> It then asked: “Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other ‘tangible’ factors may be equal, deprive the children of the minority group of equal educational opportunities?”<sup>199</sup> Applying information gleaned from an *amicus curiae* brief, known as a “Brandeis brief,” submitted in support of the plaintiffs, the Court concluded “[t]o separate [Black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.”<sup>200</sup> The Court then “conclude[d] that in the field of public education the doctrine of ‘separate but equal’” was unconstitutional.<sup>201</sup> It then went on to “hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of equal protection of the laws guaranteed by the Fourteenth Amendment.”<sup>202</sup> There were no dissents, nor

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state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass. Acts 1855, c. 256. But elsewhere in the North segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

*Brown*, 347 U.S. at 491, n.6.

<sup>196</sup> *Brown*, 347 U.S. at 492. However, it should be noted that the Supreme Court of Delaware had “ordered that plaintiffs be admitted to the white schools because of their superiority to the [Black] schools.” *Id.* at 488.

<sup>197</sup> *Id.* at 492.

<sup>198</sup> *Id.* at 493.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 494. The so-called “Brandeis brief,” named after William Brandeis who first used the strategy in *Muller v. Oregon*, 208 U.S. 412 (1908), “detailed the views of social scientists on the educational harm of racial segregation in schools.” *Brandeis Brief*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/brandeis-brief> (last visited Oct. 7, 2023). That brief was used in the *Brown* case. See Philippa Strum, *American Sage*, BRANDEIS MAG., Winter 2015-2016 (available at: <https://www.brandeis.edu/magazine/2016/winter/featured-stories/ldb100.html>); see also *A Revealing Experiment: Brown v. Board and “The Doll Test”*, LDF, <https://www.naacpldf.org/brown-vs-board/significance-doll-test> (last visited Feb. 1, 2024).

<sup>201</sup> *Brown*, 347 U.S. at 495.

<sup>202</sup> *Id.*

any Justices that recused themselves.<sup>203</sup> Thus, by unanimous vote, the Court held segregation laws to be unconstitutional.<sup>204</sup>

Looking at the Court's decision through a moral interpretative lens and applying the Gewirthian morality, discussed above, as the basic moral standard, one can see that the Court's holding was totally proper as a matter of public reason. To begin with, it is worth noting that "[a]pplications of the PGC, unlike those of other principles appealing to consistency or universalizability, cannot be immoral because they cannot be tailored, in their antecedents, to the agent's varying inclinations or ideals without regard to the generic rights of their recipients."<sup>205</sup> Thus, in its application, the PGC guarantees "reciprocal fairness both to agents and to recipients."<sup>206</sup>

The PGC is a principle not only of judicial or legislative impartiality but also of constitutional impartiality. Unlike principles of simple and of appetitive-reciprocal consistency, the PGC does not provide merely for impartiality in the application of specific rules regardless of their contents, and not merely for impartiality in the contents of such rules insofar as they must be acceptable to the agent qua recipient; it provides also for impartiality in the more complete and substantive sense that the contents of the rules must be in accord with the generic rights of all their recipients.<sup>207</sup>

Applying the PGC to how we interpret the Equal Protection Clause ("EPC"), one sees immediately that the EPC must be interpreted "to disjustify, any forms of racism or tyranny that involve the unqualified infliction of coercion and harm on innocent people—that is, of coercion and harm that take no positive account of the generic rights of the persons affected."<sup>208</sup> "Majoritarian empirical consent" cannot be considered a morally justified basis for laws and policies that would violate the requirements of distributive justice understood as treating everyone fairly in respect to any distribution of either benefits or burdens.<sup>209</sup> Thus, the Court's determination to look beyond claims related only to equal facilities or other tangible factors to also take account of how segregation in the public schools would make the children perceive "a sense of inferiority as to their status in the community" was not only permitted under the PGC's analysis, but mandatory.

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<sup>203</sup> *Id.* at 483.

<sup>204</sup> *Id.*

<sup>205</sup> REASON AND MORALITY, *supra* note 113, at 170.

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

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*; *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>209</sup> REASON AND MORALITY, *supra* note 113, at 322; *Bolling*, 347 U.S. 497.



*B. Bolling v. Sharpe*<sup>210</sup>

This case, decided on the same day as *Brown I*, concerned racial segregation in the District of Columbia's ("District") public schools.<sup>211</sup> Because the District was a federal territory and not part of any state, it was subject to the Bill of Rights, but not the Fourteenth Amendment, which applies to the states.<sup>212</sup> The Fifth Amendment provides a due process provision much as the Fourteenth Amendment,<sup>213</sup> but it does not provide an equal protection provision, which was used in *Brown I* to declare state laws requiring segregated public schools unconstitutional.<sup>214</sup> In a number of previous cases, the Court incorporated various provisions of the Bill of Rights to apply to the states via the Due Process Clause of the Fourteenth Amendment ("DPC").<sup>215</sup> But as to equal protection, the closest case involving due process that the Court referred to was one where "a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law" under the Fourteenth Amendment.<sup>216</sup> Thus, in *Bolling v. Sharpe*, the issue was whether the Due Process Clause of the Fifth Amendment might reversely incorporate the EPC use of the Fourteenth Amendment. In holding that it does, the Court stated:

[T]he 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 mere 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 . . . Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.<sup>217</sup>

The Court then went on to hold: "In view of our decision that the Constitution prohibits the states from maintaining racially segregated public

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<sup>210</sup> *Bolling*, 347 U.S. 497.

<sup>211</sup> *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954); *Bolling*, 347 U.S. at 497.

<sup>212</sup> *Bolling*, 347 U.S. at 499.

<sup>213</sup> *See id.*; U.S. CONST. amend. XIV, § 1.

<sup>214</sup> *See Bolling*, 347 U.S. at 499; *Buchanan v. Warley*, 245 U.S. 60 (1917).

<sup>215</sup> *See* Cong. Rsch. Serv., *Overview of Incorporation of the Bill of Rights*, CONST. ANN., [https://constitution.congress.gov/browse/essay/amdt14-S1-4-1/ALDE\\_00013744](https://constitution.congress.gov/browse/essay/amdt14-S1-4-1/ALDE_00013744) (last visited Oct. 8, 2023).

<sup>216</sup> *Bolling*, 347 U.S. at 499 (citing *Buchanan*, 245 U.S. 60, a due process case under the Fourteenth Amendment).

<sup>217</sup> *Id.* at 500.

schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.”<sup>218</sup>

In *Bolling*, the Court clearly applied a moral interpretation to what it claimed was “our American ideal of fairness.”<sup>219</sup> This is certainly consistent with the view of justice which the PGC represents. Like many “traditional principles of formal justice,” the PGC supports “impartiality, mutuality, and reciprocity.”<sup>220</sup> “The main logical feature of all such principles is interpersonal consistency as comprised in universalizability: ‘what is right for one person must be right for any relevantly similar person.’”<sup>221</sup> Violations occur when “a mode of action or treatment that is right in one case, as determined by a rule one accepts, is not right in a relevantly similar case, where this relevant similarity is also determined by the rule.”<sup>222</sup> Had the Court in *Bolling* simply treated the District public school case as operating outside the constitutional prohibition against racially segregated schools, it would have left the children attending those schools with less protection against the harms caused by racial segregation than their similarly situated counterparts in state-run public schools across the country. Nor would it be a sufficient justification to say the situations were not the same because the applicable constitutional provisions were not the same. As the Court noted, relying on a previous state case under the DPC, but perhaps even more importantly from the nature of the discrimination here at stake, “[s]egregation in public education is not reasonably related to any proper governmental objective.”<sup>223</sup> Nor can such segregation just be overlooked nor set aside because one amendment speaks to equal protection while the other does not. If liberty is likely to be diminished because one is made to feel inferior by having to attend a racially segregated school, due process is affected in the balance. A moral reading of the DPC cannot sustain such a threat. To the contrary, it requires bringing into the analysis the very missing concern for equality in the emotional environment to guarantee liberty.

### C. *Griswold v. Connecticut*<sup>224</sup>

This case was brought on behalf of married couples and their physicians challenging two Connecticut statutes.<sup>225</sup> The first statute made it a crime for any person to use “any drug, medicinal article or instrument for the purpose

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<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

<sup>220</sup> REASON AND MORALITY, *supra* note 113, at 161-62.

<sup>221</sup> *Id.* at 162.

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

<sup>223</sup> *Bolling*, 347 U.S. at 500.

<sup>224</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>225</sup> *Id.* at 480.

of preventing contraception,” with a possible fine of fifty dollars or imprisonment of “not less than 60 days . . . or . . . both[.]”<sup>226</sup> The second statute punished “[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense[.]”<sup>227</sup> The plaintiffs argued that the statutes violated the DPC.<sup>228</sup> In a six-to-three decision, the Court found that the statutes in question violated married couples rights to privacy in deciding whether or not to use a contraceptive and physicians rights to advise on their use.<sup>229</sup> However, at the time, the Justices in the majority could not agree on where this right to privacy could be found within the Constitution. Justice Douglas thought it was located in the penumbra formed by the First, Third, Fourth, Fifth and Ninth Amendments.<sup>230</sup> Justice Goldberg believed it to fall “within the meaning of the Ninth Amendment.”<sup>231</sup> Justices Harlan and White found it “implicit in the concept of ordered liberty,” protected by the DPC.<sup>232</sup> Dissenting Justices Black and Stewart argued that the Constitution does not refer to a general right to privacy.<sup>233</sup>

In his dissent, Justice Stewart adopted a strictly textualist response, not all that different from Justice Black’s response, in which he said:

As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual’s moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual’s choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.<sup>234</sup>

However, as it appeared to the six Justices in the majority, a mere textualist response was not the best approach. Justice Harlan’s concurring opinion, which relied on his earlier dissent in *Poe v. Ullman*,<sup>235</sup> which also attempted to invalidate Connecticut’s anti-contraception statute, made this point clear. There, Harlan wrote:

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 480-81.

<sup>229</sup> *Id.* at 485.

<sup>230</sup> *Id.* at 484.

<sup>231</sup> *Id.* at 499 (Goldberg, J., concurring).

<sup>232</sup> *Id.* at 500 (Harlan, J., concurring) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *see also id.* at 502 (White, J., concurring).

<sup>233</sup> *Id.* at 508-09 (Black, J., dissenting); *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>234</sup> *Griswold*, 381 U.S. at 527 (Stewart, J., dissenting); *Poe*, 367 U.S. 497.

<sup>235</sup> *Poe*, 367 U.S. 497.

In sum, the statute allows the State to enquire into, prove and punish, married people for the private use of their marital intimacy. The statute must pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale. The enactment involves what, by common understanding throughout the English-speaking world, must be granted to be a most fundamental aspect of “liberty,” the privacy of the home in its most basic sense, and it is this which requires that the statute be subject to “strict scrutiny.”<sup>236</sup>

Clearly, Justice Harlan and most of the Justices in the majority saw this case as involving a very important moral concern. Why else would Justice Douglas have said:

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or worse, hopefully enduring, and intimate to the degree of being sacred. The association promotes a way of life, not causes; a harmony of living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.<sup>237</sup>

All this goes to show that the Court itself viewed its decision in *Griswold* fundamentally as a moral interpretation of the Constitution. But it also shows more than that. Although not necessarily intended by the Justices writing in the majority, the decision illustrates the importance of liberty to morality as described within Gewirth’s theory of morality. For, as was quoted earlier, the PGC supports “having a right to be let alone” that “includes having a sphere of personal autonomy and privacy.”<sup>238</sup> This would encompass “a vast area of protected actions of [the agent’s] own, including physical movement, speech and other forms of expression, assembly, religion, and sexual conduct.”<sup>239</sup>

#### *D. Lawrence v. Texas*<sup>240</sup>

Following a reported weapons disturbance, officers of the Harris County Police Department arrived at the residence of John Lawrence, where they found him and another adult male engaged in an anal sex act.<sup>241</sup> The police arrested the two men, as their act was in violation of a Texas law which stated: “A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex;” “[d]eviate sexual

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<sup>236</sup> *Id.* at 548; *Griswold*, 381 U.S. at 548.

<sup>237</sup> *Griswold*, 381 U.S. at 486.

<sup>238</sup> REASON AND MORALITY, *supra* note 113, at 256; *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>239</sup> REASON AND MORALITY, *supra* note 113, at 256; *Lawrence*, 539 U.S. 558.

<sup>240</sup> *Lawrence*, 539 U.S. 558.

<sup>241</sup> *Id.* at 563.

intercourse” here was defined as “[a]ny contact between any part of the genitals of one person and the mouth or anus of another person.”<sup>242</sup> The question before the Supreme Court was whether “a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct” violated the DPC or EPC.<sup>243</sup> A prior case from seventeen years earlier, *Bowers v. Hardwick*,<sup>244</sup> upheld under the DPC, a Georgia statute that made adult consensual homosexual sodomy (in that case, oral sex) a crime.<sup>245</sup> And so the Court had to decide whether the Texas statute then violated either the DPC or the EPC, and, if the former, to overrule *Bowers*.<sup>246</sup>

In an opinion written by Justice Kennedy, the Court first engaged in the history of “laws prohibiting sodomy,” noting that very few were ever enforced—only nine states had done so since the 1970s<sup>247</sup>—and that many states followed Illinois’ lead in adopting the 1955 American Law Institute (“ALI”)’s promulgation of the “Model Penal Code,” in which the ALI “made it clear that it did not recommend or provide for ‘criminal penalties for consensual sexual relations conducted in private.’”<sup>248</sup> The Court also noted that “almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today’s case.”<sup>249</sup> In that case, “[a]n adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in homosexual conduct. The laws of Northern Ireland forbade him that right[.] The court held that the laws proscribing the conduct were invalid under the European Convention of Human Rights.”<sup>250</sup> Justice Kennedy then went on to consider other cases, both foreign and domestic, and various academic writings, finding that “[t]o the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* has been rejected elsewhere,”<sup>251</sup> and that “[t]he right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries.”<sup>252</sup> For example, one can glean from both *Planned Parenthood of*

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 562.

<sup>244</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by *Lawrence*, 539 U.S. 558; *Lawrence*, 539 U.S. 558.

<sup>245</sup> *Bowers*, 478 U.S. at 186; *Lawrence*, 539 U.S. 558.

<sup>246</sup> *Lawrence*, 539 U.S. at 564.

<sup>247</sup> *Id.* at 570.

<sup>248</sup> *Id.* at 572; *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981).

<sup>249</sup> *Lawrence*, 539 U.S. at 573 (italics added).

<sup>250</sup> *Id.* (citing *Dudgeon*, 45 Eur. Ct. H.R. at ¶ 52).

<sup>251</sup> *Lawrence*, 539 U.S. at 576.

<sup>252</sup> *Id.* at 577.

*Southeastern Pennsylvania v. Casey*<sup>253</sup> and *Romer v. Evans*<sup>254</sup> that the Court's earlier holding in *Bowers* is now quite doubtful.<sup>255</sup> In *Romer*, the Court relied on the EPC in striking down an amendment to the Colorado State Constitution which blocked "a solidary class [of] persons who were homosexuals, lesbians, or bisexual" from any state or municipal anti-discrimination protections; the Court described the amendment as being "born of animosity."<sup>256</sup>

At this point, it should also be noted that Justice O'Connor, who was in the majority in *Bowers*, concurred in stating that the Texas statute was unconstitutional, but only under the EPC, because it "makes sodomy a crime only if a person 'engages in deviate sexual intercourse with another individual of the same sex.'"<sup>257</sup> However, Justice Kennedy's opinion did not want to so limit the decision to only equal protection, noting, "[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently say, to prohibit the conduct both between same-sex and different-sex participants."<sup>258</sup> Moreover, finding that the *Bowers* decision had "not induced detrimental [individual] or societal reliance . . . of the sort that counsel against overturning its holding" as a matter of stare decisis, the Court accepted Justice Stevens' dissent in *Bowers*, in which he wrote:

Our prior cases make two propositions abundantly clear. First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice; neither history nor tradition could save a law prohibiting miscegenation from constitutional attack. Second, individual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of "liberty" protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.<sup>259</sup>

Justice Kennedy then went on to state, "Justice Stevens' analysis, in our view, should have been controlling in *Bowers* and should control here. *Bowers* was not correct when it was decided and is not correct today. It ought

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<sup>253</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022), on other grounds.

<sup>254</sup> *Romer v. Evans*, 517 U.S. 620 (1996); *see also Lawrence*, 539 U.S. 558.

<sup>255</sup> *Lawrence*, 539 U.S. at 573.

<sup>256</sup> *Id.* at 574.

<sup>257</sup> *Id.* at 579, 581; *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>258</sup> *Lawrence*, 539 U.S. at 575.

<sup>259</sup> *Id.* at 577-78 (citing *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

not remain binding precedent, *Bowers v. Hardwick* should be and now is overruled.<sup>260</sup>

In his dissent, Justice Scalia argued the originalist view that:

The Fourteenth Amendment expressly allows States to deprive their citizens of “liberty,” so long as “due process of law” is provided. Our opinions applying the doctrine known as “substantive due process” hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest.<sup>261</sup>

However, “only fundamental rights qualify for this so-called ‘heightened scrutiny’ protection—that is, rights which are ‘deeply rooted in this Nation’s history and tradition.’”<sup>262</sup> “The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are ‘immoral and unacceptable’—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity.”<sup>263</sup> Today’s decision “effectively decrees the end of all morals legislation.”<sup>264</sup> Justice Thomas, who also dissented, simply noted that he could not find in either the Bill of Rights or the Constitution a “general right of privacy”<sup>265</sup> or, as the Court terms it today, “‘the liberty of the person both in its spatial and more transcendent dimensions.’”<sup>266</sup>

The majority’s position in *Lawrence* clearly illustrates that it was adopting a moral interpretation of the Constitution. It would not have challenged its earlier holding in *Bowers* as to the way homosexuality had been previously viewed in Western civilization if it were not ready to engage in a moral debate, nor would it have adopted Justice Stevens’ dissenting position that “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>267</sup> None of this would have likely been part of the majority opinion if it were unwilling to face a now renewed but different moral challenge to the Court’s earlier opinion. Even less would the Court have made it a basis for undermining nationwide criminal sanctions for what should now be seen as a natural part of human freedom. This latter point is made clear toward the end of the opinion, where Justice Kennedy wrote: “The case does involve two adults who, with full and mutual consent

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<sup>260</sup> *Lawrence*, 539 U.S. at 578.

<sup>261</sup> *Id.* at 592-93 (Scalia, J., dissenting).

<sup>262</sup> *Id.* at 593 (Scalia, J., dissenting).

<sup>263</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at 605-06 (Thomas, J., dissenting).

<sup>266</sup> *Id.* at 606 (Thomas, J., dissenting).

<sup>267</sup> *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting).

from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.”<sup>268</sup> But if that is true, how are we to understand Justice Scalia’s comment in his dissent that the decision “effectively decrees the end of all morals legislation”?<sup>269</sup>

Clearly, Justice Scalia is referencing the idea that, following *Lawrence*, moral points of view, no matter how widely accepted, will no longer automatically provide a rational basis for a legislative decision. But this does not translate that no moral arguments should ever be considered. Indeed, considering what has been said above, some, and perhaps many, moral arguments are based on metaphysical and/or religious assumptions that are not objectively verifiable, even if deeply and seriously held by members of society. Therefore, they ought not to play a central role in legislative decision-making that will likely affect the lives of people holding to very different moral frameworks. But it would be a grave overstatement to suggest that this means moral argument is necessarily removed from constitutional concern. As argued above, moral frameworks, such as the one established by Gewirth, do not all presuppose any prior moral or religious framework, let alone any nonobjective metaphysical starting point that would not likely gain acceptance in a pluralistic society. Indeed, the argument of the majority in this case illustrates just how a less controversial moral framework could operate to ensure that past biases do not undermine rights which people ought to possess, notwithstanding that they may not have been previously recognized or thought worthwhile. Neither history nor originalist claims need undermine their adoption. Failing to follow this more deferential approach to where society’s political morality may be at present only serves to leave its members in the precarious position of having to toe a line in which they may find little basis to believe. This certainly would not express any serious constitutional commitment to human freedom.

#### *E. Obergefell v. Hodges*<sup>270</sup>

This case raised two questions: “[W]hether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex” and “whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.”<sup>271</sup> The petitioners in these cases “are [fourteen] same-sex couples and two men whose same-sex partners are deceased.”<sup>272</sup> They claimed that

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<sup>268</sup> *Lawrence*, 539 U.S. at 578.

<sup>269</sup> *Id.* at 599 (Scalia, J., dissenting).

<sup>270</sup> *Obergefell v. Hodges*, 576 U.S. 644 (2015).

<sup>271</sup> *Id.* at 656.

<sup>272</sup> *Id.* at 654-55.



respondent, state officials, “violated the right to marry or to have their marriages, lawfully performed in another State, given full recognition.”<sup>273</sup> One male couple journeyed to Baltimore, Maryland, to get married because Ohio law did not allow same-sex marriages; because one partner was too ill to move, the couple “were wed inside a medical transport plane as it remained on the tarmac in Baltimore.”<sup>274</sup> To add to the difficulty, several months after returning to Ohio, the surviving spouse could not be listed on his deceased partner’s death certificate because Ohio law refused to recognize their out-of-state marriage in Maryland as valid.<sup>275</sup>

Another same-sex lesbian couple had three young children that had to be individually adopted because Michigan law did not allow same-sex couples to adopt jointly, and “so each child can have only one woman as his or her legal parent;” this gave rise to serious concerns as to who could make decisions on behalf of the child in emergencies.<sup>276</sup> Still, another couple was married in New York prior to one spouse’s deployment to Afghanistan in the Army Reserve; upon returning to Tennessee to work for the Army Reserve, the couple’s legal marriage was effectively stripped of all significance while residing in the state.<sup>277</sup> These cases, and many others like them which split the circuit courts, gave rise to the Supreme Court granting certiorari to resolve the issue of whether the EPC protects same-sex couples’ right to marry.<sup>278</sup>

Justice Kennedy wrote the majority opinion in this five-to-four decision.<sup>279</sup> First, the Court reviewed some of the history of marriage, from its ancient beginnings “as an arrangement by the couple’s parents based on political, religious, and financial matters,” to its evolution into a voluntary contract between a man and a woman by the time of the Nation’s founding, to more recent changes away from a “male-dominated legal entity,” as “women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity.”<sup>280</sup> The Court also noted changes in societal attitudes toward homosexuality, which had slowly turned away from seeing it “as a mental disorder” in the first half of the twentieth century, to “same-sex couples [beginning] to lead more open and public lives and to establish families.”<sup>281</sup> All this was noted, along with the Court’s earlier rejection in *Lawrence v. Texas* of legal proscriptions against

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

<sup>274</sup> *Id.* at 658.

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 658-59.

<sup>277</sup> *Id.* at 659.

<sup>278</sup> *See generally id.*

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

<sup>280</sup> *Id.* at 659-60.

<sup>281</sup> *Id.* at 661.

adult consensual same-sex intimacy, and the fact that Congress, and an increasing number of state and federal courts, were taking up the question of same-sex marriage with different determinations, as well as the U.S. courts of appeal that based their decisions on principled reasons and neutral discussions.<sup>282</sup>

The Court then cited a number of earlier cases, including *Eisenstadt v. Baird*<sup>283</sup> and *Griswold v. Connecticut*,<sup>284</sup> in which fundamental liberties protected by the DPC were held to “extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”<sup>285</sup> The Court stated, obviously contrary to the historical and traditionalist interpretative methods, that “[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries,” essentially leaving open the space to be governed perhaps by a moral interpretative approach.<sup>286</sup> Indeed, never more was this made clear than when the Court stated:

The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.<sup>287</sup>

With respect to marriage, this form of interpretation shows itself in *Loving v. Virginia*,<sup>288</sup> in which a unanimous Court “invalidated bans on interracial unions,”<sup>289</sup> as well as *Zablocki v. Redhail*<sup>290</sup> and *Turner v. Safley*.<sup>291</sup>

From this analysis, the Court presented “four principles and traditions” it thought to be constitutionally relevant.<sup>292</sup> First, “that the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”<sup>293</sup> Second, that “this Court’s jurisprudence [held] that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”<sup>294</sup> Third, that marriage

<sup>282</sup> *Id.* at 661-63; *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>283</sup> *Obergefell*, 576 U.S. at 663.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* at 664.

<sup>287</sup> *Id.*

<sup>288</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>289</sup> *Obergefell*, 576 U.S. at 645.

<sup>290</sup> *Zablocki v. Redhail*, 343 U.S. 374 (1978).

<sup>291</sup> *Turner v. Safley*, 482 U.S. 78 (1987).

<sup>292</sup> *Obergefell*, 576 U.S. at 646.

<sup>293</sup> *Id.* at 665.

<sup>294</sup> *Id.* at 666.

“safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education.”<sup>295</sup> And finally, that “this Court’s cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”<sup>296</sup> These four principles which Justice Kennedy outlined show that “[t]here is no difference between same- and opposite-sex couples with respect to this principle.”<sup>297</sup> And so, when “same-sex couples are denied the constellation of benefits that the States have linked to marriage, this harm results in more than just material burdens[,]”<sup>298</sup> for “[s]ame-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives.”<sup>299</sup> Their exclusion “has the effect of teaching that gays and lesbians are unequal in important respects.”<sup>300</sup>

Justice Kennedy set up a new way to interpret the DPC that would not be confined to what had previously been followed in *Washington v. Glucksberg*,<sup>301</sup> an assisted suicide case. In that case, the Court “called for a ‘careful description of fundamental rights’” in which, as the respondents claimed, “must be defined in a most circumscribed manner, with central reference to specific historical practices.”<sup>302</sup> By contrast, at least with respect to decisions affecting fundamental personal liberties, the majority in *Obergefell* emphasized that:

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 co-extensive, 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.<sup>303</sup>

What Justice Kennedy was saying here was that due process operated to capture the nature of marriage as a fundamental right, but equal protection also operated to ensure that how we define marriage must not presuppose past biases that can no longer be sustained with why marriage is still considered a fundamental right. This is clearly a moral argument. While it acknowledges history and tradition to sustain that marriage is a fundamental

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<sup>295</sup> *Id.* at 667.

<sup>296</sup> *Id.* at 669.

<sup>297</sup> *Id.* at 670.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>302</sup> *Obergefell*, 576 U.S. at 671.

<sup>303</sup> *Id.* at 672.

right, it goes further to bring in the Fourteenth Amendment's concern for equality to ensure that the right should not be biased.<sup>304</sup> In essence, the majority was reaffirming a point made just prior to the aforesaid quote where Justice Kennedy wrote: "If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied."<sup>305</sup> The Court was also recognizing the importance of equal protection to our understanding of due process, in which it had previously held, under the Fifth Amendment's Due Process Clause, that the Internal Revenue Service had to recognize when a state legally recognized a same-sex surviving spouse as a legitimate spouse for purposes of federal estate taxation.<sup>306</sup>

Thus, the Court held "that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same sex may not be deprived of that right and that liberty."<sup>307</sup> The case stands for the proposition "that same-sex couples may exercise the fundamental right to marry . . . [a]nd the state laws challenged by the petitioners in these cases are now held invalid[.]"<sup>308</sup>

It should be noted that there were four dissents. Chief Justice Roberts argued that the majority made a strong policy argument, but this is a court, not a legislature.<sup>309</sup> Courts are supposed to decide matters on principle, and so it would appear that the Chief Justice's view of the majority's moral

<sup>304</sup> As Justice Kennedy put it:

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the *imprimatur* of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

*Id.* at 671-72.

<sup>305</sup> *Id.* at 671.

<sup>306</sup> *United States v. Windsor*, 570 U.S. 744 (2013). In *Windsor*, the Court struck down section 3 of the federal Defense of Marriage Act, which defined marriage for purposes of federal law as "a legal union between one man and one woman." See Defense of Marriage Act, Pub. Law 104-199, 110 Stat. 2419. Interestingly, Ohio's argument in *Obergefell* to not recognize the out-of-state marriage was based on section 2 of the same Act, which allowed States not to have to recognize an out-of-state same-sex marriage under Article IV of the U.S. Constitution in which States are required, absent a provision by Congress to the contrary, to grant "Full Faith and Credit to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1.

<sup>307</sup> *Obergefell*, 576 U.S. at 675.

<sup>308</sup> *Id.* at 675-76.

<sup>309</sup> *Id.* at 687 (Roberts, C.J., dissenting).

argument was not a matter of principle. A related argument was made by Justice Scalia, essentially claiming that the Court was operating as a legislature.<sup>310</sup> Justice Thomas offered an originalist argument for disagreeing with the majority, arguing that what the Court did in this case would not have been recognized by the Framers.<sup>311</sup> Finally, Justice Alito argued that the Constitution leaves the matter of same-sex marriage to the states.<sup>312</sup>

From what has already been said, it is clear the Court in *Obergefell* was adopting a moral interpretation of the Fourteenth Amendment with respect to the marriage issue. The only thing perhaps left to add is how this might fit within the Gewirthian interpretation of morality. It is worth noting what Gewirth said about the right to marry. He wrote:

[A] marital couple is a kind of voluntary association or grouping that, like other voluntary associations, is justified by the universal right to freedom[.] Thus we have here a reason-based justification of particularist morality through universalist morality. The justification may be summarized in three steps. First, the universalist moral principle of human rights, in its freedom component, justifies the general moral subprinciple that voluntary associations . . . may be established. Second, this subprinciple justifies the formation of families with their special purposes. Third, these purposes in turn, justify the particularist, preferential concern that family members have for one another's interest. Thus, through the universal right to freedom, persons have rights to form families and to have the concomitant preferential concerns.<sup>313</sup>

## CONCLUSION

It will no doubt have been noticed that much of this Article's focus on conceptual frameworks has been in the context of matters usually thought to involve racial or sexual discrimination or personal morality. This should not be surprising, as it is in just these areas that broad philosophical and moral frameworks are most likely to collide. This is not to say that collisions never occur elsewhere in constitutional interpretations, but rather to point out that, if this area of constitutional attention can be ironed out and made responsive to a kind of public reason as expressed above, other arguably less sensitive areas should be able to follow suit more easily. Obviously, what has been argued for here is not a final, nor even less an ultimate, solution to constitutional interpretation. But it is a solution that I hope will gain some serious traction in a pluralistic society where very different moral and religious views are likely to be present. Absent even this more moderate

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<sup>310</sup> *Id.* at 714 (Scalia, J., dissenting).

<sup>311</sup> *Id.* at 721 (Thomas, J., dissenting).

<sup>312</sup> *Id.* at 736 (Alito, J., dissenting).

<sup>313</sup> SELF-FULFILLMENT, *supra* note 117, at 143.

solution to the problems of this area of constitutional law, society's ability to remain constitutionally stable over time while still attending to new concerns not previously recognized or afforded sufficient attention is not promising. Therefore, I would hope from what I have said above that serious attention be given to establishing a kind of moral interpretation of the Constitution that is not biased to any particularist moral position, be it religious or philosophical, even when claimed to be comprehensive, but instead represents a kind of universalist moral thinking appropriate to recognizing universal human rights in a pluralistic society. That at least is my hope.