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Identifying Super-precedents in an Era of Human Rights

Vincent J. Samar

Loyola University Chicago Law School

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IDENTIFYING SUPER-PRECEDENTS IN AN ERA OF HUMAN RIGHTS

Vincent J. Samar*

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Abstract

This Article discusses what a “super-precedent” is in American Constitutional Law. Additionally, it describes the current criteria used to identify super-precedents and the limitations of these criteria. It then mentions the various precedents that have been afforded this august title and suggests the need for an additional criterion to ensure the continued protection of those precedents most closely associated with the protection of human rights. Finally, the article identifies three additional precedents, beyond those usually recognized, that ought to be ranked super-precedents and provides a basis for ranking all precedents, grounded in autonomy, when they either conflict with one another or encounter a compelling state interest.

* Vincent J. Samar is Lecturer in Philosophy at Loyola University Chicago, Associate Faculty in the Graduate School, and Adjunct Professor of Law at Loyola University Chicago Law School.

I. INTRODUCTION

Recent stare decisis scholarship has discussed why certain precedents of the United States Supreme Court have more staying power than others. Those precedents are currently identified by how persuasive the current Justices of the Supreme Court, other government officials who carry out the decisions, and the public at large find these decisions. The label “super-precedent” has been applied to those opinions identified using the above criteria. Yet there is still much controversy as to which precedents fit the above criteria and whether the criteria themselves are too narrow and thus incapable of being persuasive over time. This article acknowledges the relevance of the current criteria to decide whether a past precedent ought to be labeled a “super-precedent” or a “super-duper precedent.” What follows is a discussion on what is necessary before a precedent should receive such a lofty title—both to avoid potential political dueling among Supreme Court Justices, and more importantly, to ensure that important precedents will be sustained, not so much by their current political acceptability, which can be in flux at any moment, but by how well they serve to protect basic human rights in perpetuity.

What is at stake is not just whether the precedent should carry weight when the Court decides future cases, but also, *how much* weight it carries. For example, should a future Supreme Court decision be allowed to diminish the authority of a prior precedent in a subject matter area? If so, ought there to be any limits to what extent the precedent can be diminished? This article intends to show that an additional requirement is needed to avoid important human rights precedents from being too easily overruled or distinguished, and to identify which past precedents are worthy of sustained respect. That additional requirement should invoke a sliding scale for determining the authoritativeness of any precedent from the weakest to strongest. One caveat: the additional requirement proposed here is not meant to undermine other relevant criteria currently being relied upon in determining the importance of past precedents. Rather, it is to establish a further basis—one outside conventional politics—for determining the weight of a precedent.

Section Two will discuss how respect for precedent, otherwise known as stare decisis, operates in American courts

generally, including how it may prevent new decisions of state and federal courts from veering too far from previous holdings. It will distinguish vertical stare decisis from horizontal stare decisis and compare the limited strength horizontal stare decisis provides to preserving past precedents against vertical stare decisis, which effectively governs lower court decisions. While the focus will be mostly on U.S. Supreme Court cases, it should be noted that the horizontal role of precedent also applies to state supreme court decisions concerning state law.

Section Three will discuss how super-precedents are currently identified, which Supreme Court precedents have been identified as such, what stability they offer, and what limits might still apply even when a precedent is identified as a “super-precedent.”

Section Four will discuss the role of freedom and well-being in normative democratic theory and as an ideal for recognizing human rights in the American constitutional ethos. It will then apply aspects of that theory to justify the important constitutional role for the Supreme Court in protecting fundamental rights and equality.

Section Five will show how a commitment to stare decisis in certain areas serves to protect human rights generally by providing a way to determine which constitutional precedents are most worthy of long-standing security.

Finally, Section Six will identify three additional super-precedents which should be acknowledged because of their central importance to protecting individual freedom, along with well-being and equality.

II. THE ROLE OF STARE DECISIS IN THE AMERICAN LEGAL SYSTEM

According to Black’s Law Dictionary, the Latin phrase “stare decisis” means “[t]o stand by decided cases; to uphold precedents; to maintain former adjudications.”¹ Stare decisis presents “[a] strong judicial policy that the determination of a point of law by a court will generally be followed by a court of the same or lower rank”² In a law review article by—then

1. *Stare Decisis*, BLACK’S LAW DICTIONARY (2d ed. 1910).

2. *Stare Decisis*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

Professor now Justice—Amy Coney Barrett, she points out that stare decisis “originated in common law courts” and has since become a fixture in U.S. federal courts.³ “[T]he strength of stare decisis is context dependent.”⁴ Stare decisis has two distinct forms: vertical and horizontal.⁵ An example of vertical stare decisis is when a state or federal appellate court’s holding on a point of law governs lower court decisions in future cases. “Horizontal stare decisis, by contrast, is a shape-shifting doctrine” that “is virtually nonexistent in district courts” but prohibits “one panel [in a federal circuit court] from overruling another, allowing only the rarely seated en banc court to overrule precedent.”⁶ Justice Barrett notes that at the U.S. Supreme Court level, stare decisis refers to three categories of precedent. “Statutory precedents receive ‘superstrong’ stare decisis effect, common law cases receive medium-strength stare decisis effect, and constitutional cases are the easiest to overrule.”⁷

Under this formulation, a question arises concerning the ongoing reliability of Supreme Court precedents founded upon past constitutional determinations. It appears that Justices who may have previously dissented or who have since changed their mind, or are newly installed but disagree with a prior decision, may now have the opportunity to overrule precedents with which they disagree, as long as they can form a majority. Such an approach may seem reasonable, as it does not bind the Court to past cases that presently appear to have been wrongly decided. On the other hand, if there are no limits on which precedents the Court will follow, other than which view of a prior holding may be favored by today’s Justices, a question arises concerning the Court’s legitimacy to operate as a nonpartisan branch of government. This is especially concerning to the co-equal nature of the three branches of Government, as the Court can judicially review and strike down based on constitutionality, acts adopted by Congress or actions taken by the president.

Justice Barrett acknowledges this problem by noting its

3. Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1712 (2013).

4. *Id.*

5. *Id.*

6. *Id.* at 1712–13.

7. *Id.* at 1713.

potential to undermine doctrines such as judicial restraint, the rule of law, and the legitimacy of judicial review.⁸ Indeed, she acknowledges that precedent should give the Justices pause when deciding whether to overrule a prior case holding but does not say how much pause. Paraphrasing a dissent by the late Justice Brandeis, she writes, a Justice who thinks differently from what a former Court ruled must decide “whether it is better for the law to be settled or settled right.”⁹ That concern is certainly important, but when stated without further criteria as to how the decision is to be made, it leaves every precedent open to a current Court’s willingness to overrule it.

Here, it might be questioned what it means for a case to be “settled right,” let alone how much salience should be afforded such a determination. Presumably, any forward-looking analysis must consider internally not just whether the original case decision was proper when decided, but also how other cases that were subsequently decided have either followed from it or relied upon it.¹⁰ This suggests that what is right is actually a much more complicated matter. For, in the first instance, it requires not that the original case be free of later interpretative criticisms, but also to be balanced against how the jurisprudence in the area has since developed in light of the original holding. For example, according to Ronald Dworkin, constitutional originalists will tend to follow one of two methodological approaches. “Semantic originalists” will pay close attention to the language the framers adopted in writing the Constitution, while “expectation originalists” are more concerned with what the framers likely thought would be the consequences of their

8. *Id.* at 1715.

9. *Id.* at 1714 (citing *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting) (“*Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”)).

10. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court undertook a reexamination of the principles in *Roe v. Wade*, 410 U.S. 113 (1973), which upheld a woman’s right to an abortion, and whether the central holding in *Roe* that protected a woman’s right to choose should be overruled. Justice O’Connor, writing for the majority, reaffirmed the Court’s earlier holding that afforded a woman’s right to choose, noting that “the Court’s judgment is informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling the holding with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling.” *Casey*, 505 U.S. at 834. For the considerations adopted by Justice O’Connor’s majority opinion, see *infra* Section Three.

writing.¹¹ On this reading, Dworkin places Justice Scalia's writings on the Eighth Amendment and its application to death penalty cases in the latter camp.¹² Should the decision in a prior case be interpreted according to the language adopted by the framers to state what the Constitution means, even though it may now encompass a far greater set of possibilities than might have been thought when the decision was actually adopted? Or should the language be confined to only what the framers likely expected it to include given their historical and social circumstances? Obviously, much of settled law could be affected if the expectation approach is followed, especially in regard to where the framers chose to use abstract, rather than concrete, language, most likely to signal their agreement that the law would continue to evolve.

Thus, this dual division of originalism leaves any decision, based on what the framers may have expected, open to the charge that the constitutional language should stand on its own, irrespective of the background legal context in which it was written. Additionally, expectation originalism runs the threat of too closely searching out a context that will likely straitjacket future generations into making use of the language the framers adopted when deciding novel issues the framers could not have imagined. Was the framers' choice to use abstract language at times, like with "cruel and unusual punishments" in the Eighth Amendment or "due process" in the Fifth and Fourteenth Amendments, meant to signal they foresaw a constitution that should evolve over time with society's changing understanding of its own political morality? Or are such questions to be decided by what was commonly understood at the time they wrote these words? If so, why did the framers not make clear that was their intention? After all, they could have restricted their choice of language to be far more concrete, as they did in Article II when they specified that the President be "a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution . . . [and] have attained to the Age of thirty-five Years, and been fourteen Years a resident within the United States."¹³

11. ANTONIN SCALIA, A MATTER OF INTERPRETATION 119 (1997).

12. *Id.* at 120.

13. U.S. CONST. art. II, § 1, cl. 6.

An alternative to the so-called “originalist” position is the “Living Constitution” approach, which would seek to treat constitutional interpretation even more broadly as an evolving understanding, capable of meeting changing needs and circumstances as they arise. Here, a deeper understanding of human psychology, the environment, the growth of international and domestic norms, both political and economic, not to mention the development of a far more interdependent world where the political and economic actions of one country will likely affect the material well-being of other countries, all can be taken into account.¹⁴ An obvious problem with this approach is that it leaves the document open to changes in meaning the framers not only may never have even imagined, but which, for some, would appear to make the Court into an unelected super legislature.¹⁵ Clearly at stake, with both points of view, is how the Constitution can continue to have authority in the present time, unless that authority can be found to support needed changes in our thinking about the role of government in the modern world.

Are there certain “human” rights, for example, not specifically enumerated in the Constitution, that the Constitution could nevertheless be interpreted to defend, regardless of whether they may have been expected by the framers? As discussed, a proper approach to this question would fall between the two approaches of originalism and living constitutionalism; it would justify bringing international human rights into the discussion, with the caveat that the justification for including such rights is at the apex when it extends existing constitutional norms, even if by adding significantly to them.¹⁶ For example, the Court has interpreted the Constitution to afford recognition of a right to privacy, arguably derived from various provisions of the Bill of Rights.¹⁷ Otherwise, there is

14. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 100 (2010).

15. See SCALIA, *supra* note 11, at 44.

16. Vincent J. Samar, *Rethinking Constitutional Interpretation to Affirm Human Rights and Dignity*, 47 HASTINGS CONST. L.Q. 83, 121–22 (2019).

17. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, a majority of the Court agreed this right to privacy was protected by the Constitution. They disagreed over exactly where it was to be found. Justice Douglas, writing for a plurality, believed it was located in the “penumbra” of the First, Third, Fourth, Fifth, and Ninth Amendments. *Id.* at 484. Justice Goldberg believed it to reside in the Ninth Amendment’s reservation of non-enumerated rights retained by the people. *Id.* at 499. Justice Harlan would locate it at a place the Court would eventually agree upon in *Roe v. Wade*, 410

little justification for affirming new rights when the proposed rights seem far distant from anything the text can be reasonably thought to represent. However there could be a strong public interest to amend the text or public opinion could be felt so strongly that it has, for all intents and purposes, already operated as an amendment.¹⁸ All of this is not meant to suggest the Supreme Court should be prohibited from overruling a past constitutional precedent that it no longer believes correct, but rather that in deciding whether to overrule a past precedent, various factors need be considered to protect the Court's legitimacy, which itself arises from the Constitution being continually seen as authoritative cross-generationally.

III. HOW SUPER-PRECEDENTS ARE CURRENTLY IDENTIFIED, WHAT STABILITY DO THEY OFFER, AND WHAT ARE THEIR LIMITS?

In 1992, Justice Sandra Day O'Connor, writing for the Supreme Court majority, in the very contentious case, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁹ reaffirmed the essential holding of *Roe v. Wade*,²⁰ that the Constitution affords women a right to privacy to determine whether or not to continue a pregnancy before the fetus becomes viable.²¹ The case was contentious because four Justices dissented from the Court's reaffirmation of *Roe*'s earlier holding that a woman has a constitutional right to choose whether to continue a pregnancy.²² As a general guide, Supreme Court cases usually will not undermine a past precedent (horizontal stare decisis)

U.S. 113, 153 (1973), the Fourteenth Amendment Due Process Clause. *Griswold*, 381 U.S. at 500. It should be noted that the right to privacy, especially informational privacy, and states of affairs, are recognized by both the *Universal Declaration of Human Rights*, adopted by the U.N. in 1948 and the *International Covenant on Civil and Political Rights*. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 12, (Dec. 10, 1948); International Covenant on Civil and Political Rights art. 17, Dec. 19, 1966, 1976 U.N.T.S. 171; see *Right to Privacy under UDHR and ICCPR*, PRIVACYBYTES (Oct. 24, 2017), <https://privacy.sflc.in/universal/>.

18. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, 47–50 (1991).

19. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

20. *Roe v. Wade*, 410 U.S. 113 (1973).

21. *Casey*, 505 U.S. at 834.

22. *Id.* Chief Justice Rehnquist, along with Justices Scalia, White, and Thomas, dissented from the Court's holding to reaffirm *Roe*. *Id.* at 979.

unless a present majority of the Justices are ready and willing to overrule that earlier holding—although they may chip away at how comprehensive the past precedent was in subsequent cases.²³ This represents an internal point of view of legal decision-making designed to protect the legitimacy of court decisions. Its value is that in a society where the law and legal institutions are generally perceived to be just, relying on past precedent prevents an easy acceptance of arguments for change that might make the Court appear to be overly political and unable to distribute justice.²⁴

Justice Scalia's dissenting opinion in *Casey*, joined by Chief Justice Rehnquist and Justices White and Thomas, argued that the abortion decision in *Roe* had not been properly supported at the time *Roe* was decided because abortion was not a protected liberty interest under the Due Process clause of the Fourteenth Amendment.²⁵ The dissenting Justices noted that nowhere in the Constitution was such a privacy right to be found; in fact, the "longstanding traditions of American society" had allowed states to proscribe abortions.²⁶ In essence, these so-called originalist Justices were going beyond a semantic originalist approach by not just focusing on what the framers said, but looking at previous cases and what the states were allowed to do to decide whether a fundamental right exists.²⁷ Justice Scalia even suggested that the liberty interests protected by the Due Process clause of the Fourteenth Amendment are only those that were "protected against government interference by other rules of law when the Fourteenth Amendment was ratified."²⁸ His

23. See John Greabe, *Constitutional Connections: The Supreme Court and Constitutional Stare Decisis*, CONCORD MONITOR (Apr. 19, 2020, 6:00 AM), <https://www.concordmonitor.com/The-Supreme-Court-and-constitutional-stare-decisis-33880073>.

24. VINCENT J. SAMAR, JUSTIFYING JUDGMENT: PRACTICING LAW AND PHILOSOPHY 76 (1998) (providing "criteria from the internal point of view for determining when a judge should decide a case based on traditional legal materials [including case precedents] and the society's political morality and when she should appeal to a broader theory of natural law/natural rights").

25. *Casey*, 505 U.S. at 979–80 (Scalia, J., dissenting).

26. *Id.* at 980.

27. *Id.*

28. *Id.* at 981 (citing *Michael H. v. Gerald D.*, 491 U.S. 110). Justice Scalia argues: "The Court destroys the proposition, evidently meant to represent my position, that 'liberty' includes 'only those practices, defined at the most specific level, that were protected against government interference by other rules of law when the Fourteenth Amendment was ratified,' *ante*, at 2805. That is not,

expectation originalist interpretation seemed to allow him to suggest that the Court should not recognize any rights that could not be found to be part of this “longstanding tradition.”²⁹

At first, Justice O’Connor, writing for the majority, acknowledged, with the dissenters, that stare decisis was “not an ‘inexorable command.’”³⁰ However, she quickly added:

When this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a

however, what *Michael H.* says; it merely observes that, in defining ‘liberty,’ we may not disregard a specific, ‘relevant tradition protecting, or denying protection to, the asserted right,’ *ibid.* But the Court does not wish to be fettered by any such limitations on its preferences. The Court’s statement that it is ‘tempting’ to acknowledge the authoritativeness of tradition in order to ‘cur[b] the discretion of federal judges,’ *ante*, at 2804, is of course rhetoric rather than reality; no government official is ‘tempted’ to place restraints upon his own freedom of action, which is why Lord Acton did not say ‘Power tends to purify.’ The Court’s temptation is in the quite opposite and more natural direction—towards systematically eliminating checks upon its own power; and it succumbs.” *Id.* at 981.

29. *Id.*; see also *Obergefell v. Hodges*, 576 U.S. 644, 671 (2015). In *Obergefell*, The Supreme Court recognized that the fundamental right to marriage under the Due Process clause of the Fourteenth Amendment includes the right of same-sex couples to marry. *Id.* The Court was clear to note the presence of a longstanding tradition alone will not always determine whether a fundamental right exists. Writing for the majority, Justice Kennedy noted that: “Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg*, 521 U. S. 702, 721 (1997), which called for a “careful description” of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent “right to same-sex marriage.” Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* [v. Virginia, 388 U.S. 1 (1967)] did not ask about a “right to interracial marriage”; *Turner* [v. Safley, 482 U.S. 78 (1987)] did not ask about a “right of inmates to marry”; and *Zablocki* [v. Redhail, 434 U.S. 374 (1978)] did not ask about a “right of fathers with unpaid child support duties to marry.” Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg*, 521 U. S., at 752–773 (Souter, J., concurring in judgment); *id.* at 789–792 (BREYER, J., concurring in judgments).” *Id.* at 671.

30. *Casey*, 505 U.S. at 854.

prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.³¹

Original intent by itself may not be sufficient. Justice O'Connor then further provided various case examples where prudential and pragmatic tests played a role in the determination of whether a past precedent ought to be overruled. This goes beyond what the framers may have expected to consider as the practical effect an overruling might have on what had become a well-recognized rule of law. Justice O'Connor notes:

Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.³²

What these tests illustrate is that in determining whether a past precedent should be overruled, it is not sufficient to inquire solely into whether the past precedent would satisfy some modern understanding of original intent, be it semantic or expectation. This is especially true where the past precedent has not proved unworkable, where a significant part of the society (pro-choice in the case of the *Roe* decision) has come to rely upon it, and where now having to give up that reliance could cause undue hardship, especially when the holding has not been undermined by other related developments in the law.

Ideally, where responses to these other factors support continuing a past precedent, it takes on greater salience against

31. *Id.*

32. *Id.* at 855 (citations omitted).

being overruled than were they not present, or if they are present only to a slight degree. It is thus necessary to discuss *stare decisis* not as a static doctrine, but rather as a dynamic doctrine capable of keeping alive precedents that remain meaningful in society while allowing others to die off. Even with these standards in place, I would like to suggest more is needed. When rendering a constitutional decision, the Supreme Court is not merely deciding a particular case. It is affirming its role in a constitutional democracy that distinguishes and affirms “the higher law of the people from the ordinary law of legislative bodies.”³³ In such a situation, the Court must be able to identify, as Professor Ackerman has noted, when the political partisans of a movement have been first able to

convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness they do not accord to [normal] politics, after having allowed their opponents a fair opportunity to organize their own forces; [and still finding] that they have convince[d] a majority of their fellow Americans to support their initiative . . . in the deliberative fora provided for “higher

33. JOHN RAWLS, *POLITICAL LIBERALISM* 233 (1993). The specific role of the federal courts generally and the Supreme Court in particular in the United States was articulated in *FEDERALIST* No. 78 where Hamilton writes: “The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.” *THE FEDERALIST* NO. 78 (Alexander Hamilton). The view expressed by Hamilton would become the basis for the principle of judicial review adopted by the Court in *Marbury v. Madison*, where Chief Justice Marshall writes: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177–78 (1803).

lawmaking.”³⁴

Obviously, this understanding fits the ratification of a constitutional amendment. But it also fit a past Supreme Court precedent if the reliance were widespread and deemed to be very important, as Justice O’Connor suggested in *Casey* was true of *Roe*.

I do not mean to suggest that momentary politics may not intervene to encourage a president to nominate an individual holding a certain view of constitutional interpretation or a Senate to confirm that nomination. I do mean to suggest that a decision of higher lawmaking must transcend momentary politics about particulars and take its place on the side of individuals, some of whom may be in a crisis situation, who need to rely on what they have come to understand and expect the Constitution to guarantee.

Additionally, looking to the Court rather than trying to adopt an amendment provides opportunity for dealing with crisis situations and changing circumstances while avoiding disputes concerning an amendment’s language or the time it may take for an amendment to get adopted.³⁵ It also allows for the Court to try out a solution and even limit it in various ways that would be much harder to adjust were an amendment being considered. In such a context, where higher lawmaking is involved, I agree with Professor Ackerman that “the Justices [can] no longer content themselves with salvaging fragments of the old regime; they [need] try to integrate new principles added by the last transformation [of what the society had come to agree upon generally] into the older tradition in a comprehensive way.”³⁶

This effort by the Court to not be confined strictly by original intent might further keep the Constitution authoritative cross-generationally by allowing it to become part of a tradition that is itself capable of attending to important cultural, political, and

34. ACKERMAN, *supra* note 18, at 6.

35. See *The Amendment Process: Adding a New Amendment to the United States Constitution, Not an Easy Task!*, HARRY S. TRUMAN LIBR. & MUSEUM, <https://www.trumanlibrary.gov/education/three-branches/amendment-process> (last visited June 1, 2021).

36. ACKERMAN, *supra* note 18, at 161.

economic needs in an ever changing world.³⁷ One must consider whether the rights or benefits that may be affected when the Court overrules a previous precedent will not be easily adjusted or reconstructed by subsequent legislative acts. Such consideration is crucial if these rights or benefits are thought especially important to individual well-being, which is what the Constitution's preamble would seem to direct.³⁸ All this poses the question: is it incumbent on the Court, as the protector of the higher law, to ensure that its action to overrule a past precedent not appear unjust or strictly a consequence of partisan politics to a great majority of the people likely to be affected by it? That does not mean past precedents can never be reconsidered or distinguished. Rather, it means that in those situations where justice demands a deeper level of judgment, the judgment must not fail to consider, or be unmitigated by, what the best understandings of political morality and democratic theory provide.

This should be especially important where the past precedent is thought to protect an area of human rights that might otherwise be lost but for that protection.³⁹ For this reason, this Article suggests the need for an additional factor for

37. See Samar, *supra* note 16, at 103–12.

38. U.S. CONST. pmbl. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

39. In *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954), the Supreme Court unanimously held that “in the field of public education the doctrine of ‘separate but equal’ has no place,” and that segregated schools were “inherently unequal.” That change, overruling the Court’s previous precedent, in *Plessy v. Ferguson*, 163 U.S. 537 (1896), that separate public facilities are constitutionally allowed provided they were equal for blacks and whites, represented a major shift in the Court’s 14th Amendment equal protection jurisprudence. However, because the Court left open how desegregation would be accomplished, by asking for further briefs on the issue, it was not until 1955, in a second decision, *Brown v. Board Education of Topeka*, 349 U.S. 294, 301 (1955), that the Court would remand future cases to the lower courts to proceed with desegregation “with deliberate speed.” Even with this second ruling desegregation did not get accomplished until the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964), was passed, followed by the Voting Rights Act of 1965, 52 U.S.C. § 10101, and the Fair Housing Act of 1968, 42 U.S.C. § 3604. Thereafter, in *Runyon v. McCrary*, 427 U.S. 160 (1976), the Court ruled that even private, nonsectarian schools must desegregate if they are to avoid being in violation of federal law.

determining the staying power of past constitutional precedents. This factor will especially play a role when higher values, as may be thought to establish human rights generally, are involved. That factor is how well the precedent operates to affirm the basic freedom and well-being that underlies all human rights. Such rights include, perhaps most especially, those civil rights and liberties that the Constitution, along with its subsequent amendments, has recognized. Before addressing this question, it is necessary to address the philosophical foundation for human rights.

IV. WHAT IS THE ROLE OF FREEDOM AND WELL-BEING IN THE AMERICAN CONSTITUTIONAL ETHOS?

Here, I depart from the positivist school of jurisprudence which, early in its history, held that a law was a command backed by a threat issued from a sovereign to an independent political community.⁴⁰ Later it would substitute a normative obligation recognized by the people for its earlier focus on fear or threat.⁴¹ The problem with following a positivist view is that obligations involving matters of human rights and political morality cannot be reduced to what society might prefer at any given moment, because oftentimes the rights claimed may be contrary to an individual's *real* interests and a choice must be made.⁴² Likewise, we will be unsuccessful in protecting human rights if we try to ground them in comprehensive moral, religious, or metaphysical doctrines that "cannot support a reasonable balance of political values that all or most can

40. JOHN AUSTIN, LECTURES ON JURISPRUDENCE 90–91 (Robert Campbell ed., 4th ed. 1873).

41. See H.L.A. HART, THE CONCEPT OF LAW 80 (3d ed. 1961).

42. See Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511, 1542–43 (2003) (book review); see also Steven Strasnick, *Individual Rights and the Social Good: A Choice-Theoretic Analysis*, 10 HOFSTRA L. REV. 415, 416–17, 428, 440 (1982) (referencing first various "conceptions of justice that defends the interests of the individual against those of society" including Ronald Dworkin's, John Rawls's and Robert Nozick's, then arguing, contrary to Amartya Sen "that a society manifesting the properties of social choice analyzed in this work is fully capable of respecting individual rights in matters of personal preference. All that is required in addition to the formal properties that have been proposed is the acceptance by society of a principle akin to the privacy principle of entitlement.").

accept.”⁴³

Robert George’s idea that reasonable debate can go on in this area where comprehensive religious, moral, or metaphysical doctrines are likely to dominate is itself likely to undermine any real possibility for consensus to form, let alone to provide consistent protection of human rights.⁴⁴ Indeed, in a pluralistic society, whose members are oft to subscribe to very different comprehensive doctrines, George’s approach is unlikely to achieve anything more than a reduced form of lawmaking and even then only on fairly noncontroversial issues. By contrast, Rawls’s idea of public reason provides a more responsive choice, where the only obligations a court need consider are those features of political justice people can unite around to form an overarching constitutional consensus.⁴⁵ Such considerations, as

43. RAWLS, *supra* note 33, at 253.

44. In his article, *Public Reason and Public Conflict: Abortion and Homosexuality*, 106 YALE L.J. 2475, 2502 (1997), Robert George writes: “The question of one’s obligations toward fellow citizens with whom one disagrees is itself a moral question, indeed, a moral question which implicates, or may implicate, constitutional essentials and matters of basic justice such as questions of freedom of speech and the press, and the right to vote. Deliberation about one’s obligations to those who advocate policies which one believes to be seriously unjust will be informed by one’s general or “comprehensive” views about justice. There is, I believe, no reason to suppose that people can or should attempt to prescind from their “comprehensive views” in determining their obligations to those with whom they find themselves in morally charged political conflict.” This position he follows with: “A sound principle of public reason for a deliberative democracy would indeed require citizens and policymakers to justify their political advocacy and action by appeal to principles of justice and other moral principles accessible to their fellow citizens by virtue of their “common human reason.” It would, however, exclude no reasonable view in advance of its dialectical consideration “on the merits” in public debate. Nor would it exclude religious views as such. What it would exclude, rather, as grounds of public policymaking generally, are appeals to sheer authority (religious or otherwise) or to “secret knowledge,” or the putative truths revealed only to an elite (or the elect) and not available, in principle, to rational persons as such. A sound principle of public reason would, in short, be very wide. Its goal would be the “perfectionist” one of settling law and public policy in accordance with what is true as a matter of justice, human rights, and political morality generally.” *Id.* at 2504.

45. See RAWLS, *supra* note 33, at 233–34 (explaining how in a constitutional democracy a supreme court must operate as an exemplar of public reason). Rawls writes: “By applying public reason the court is to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-situated narrow interests skilled at getting their way. If the court assumes this role and effectively carries it out, it is incorrect to say that it is straight-forwardly antidemocratic. It is indeed antimajoritarian with respect to ordinary law, for a court with judicial review

would support an individuals' autonomy to decide for oneself what particular comprehensive approaches are suitable for living, provided they do not crossover into the realm of directly harming others, would seem to be the most that public reason can provide. While this approach opens the door to the kind of consideration the Court should afford past precedents thought to be essential to securing human rights, it still says too little about how those precedents might be determined.

Certainly, it is important for the Court to afford protection to its precedents which protect the basic liberties and rights set forth in the Bill of Rights and the Fourteenth Amendment, which otherwise could be open to challenge, not because they do not allow people in a society to live together, but because they are unlikely to be part of an overarching consensus when the only way consensus can be reached is by agreement over a set of comprehensive moral, religious, or metaphysical ideas. Interestingly, the two so-called super-precedents most often talked about, and which Justice Barrett identifies along with several others,⁴⁶ are *Brown v. Board of Education*⁴⁷ and *Marbury v. Madison*.⁴⁸ However, these may not be good examples, if only because the basis for that determination is that presently they have achieved widespread acceptance such that it is highly unlikely a case will be brought to directly challenge their holdings. This shows that widespread acceptance alone cannot be sufficient for protecting human rights if it does not also provide protection of individual autonomy in cases where no one else's basic interests are likely to be affected. Even this can

can hold such law unconstitutional. Nevertheless, the higher authority of the people supports that. The court is not antimajoritarian with respect to higher law when its decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations." *Id.*

46. In addition to *Brown* and *Marbury*, Justice Barrett also identifies the following cases as most often spoken of as super-precedents: *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816) (holding that the Supreme Court can exercise judicial review over state court matters); *Helvering v. Davis*, 301 U.S. 619 (1937) (upholding the constitutionality of the Social Security Act), the *Legal Tender Cases* (*Knox v. Lee*, 79 U.S. (12 Wall) 457 (1870)) (upholding the constitutionality of the government's issuance of paper money), *Mapp v. Ohio*, 367 U.S. 643 (1961) (holding the Fourteenth Amendment incorporates the Fourth Amendment to apply to the states), and the *Civil Rights Cases*, 109 U.S. 3 (1883) (holding the Fourteenth Amendment applies to state action). Barrett, *supra* note 3, at 1734–35.

47. *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

48. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

be problematic where the case may involve a conflict between autonomous claims. Remember, the First Amendment provision for having no law respecting the free exercise of religion might, depending on how it is interpreted, allow for a religious view to sometimes undermine individual autonomy.⁴⁹

The point of focusing on *basic interests*, which often encompass fundamental rights like freedom of expression, privacy, thought, and worship, in situations where no other fundamental right may be at stake, is to avoid an over-inclusive notion of an interest that could allow any intrusion on individual autonomy, provided only that it was distributed fairly. Indeed, it is not clear, even with respect to these poster-cases for super-precedents, that they would survive a challenge brought about by a changing political majority whose preferences have become dominant.⁵⁰ For this reason, I would want to bring into the aforesaid analysis a material criterion to go along with the kind of public reason Rawls talks about: to guarantee the precedents that should most be continued are those which support individual autonomy and well-being as a basic human right where no one else's interests are harmed in the bargain. The material condition along with the formal condition

49. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719, 1732 (2018), the Supreme Court set aside the Colorado Civil Rights Commission's cease and desist order against the baker who refused to make a wedding cake for a gay couple same-sex marriage because the baker claimed it violated his religious beliefs. The Court's decision, however, did not turn on its view of the merits of a civil rights law prohibiting public accommodations discrimination versus the baker's religiously based choice to not fashion a wedding cake for a same-sex wedding. Instead, the Court ruled against the Commission because it appeared to exhibit bias against religion. *Id.*

50. See, e.g., Lucas Guttentag, *Ongoing Court Challenges and the Future of Judicial Review*, 21 INT'L MIGRATION REV. 51 (1998). Moreover, one who, like John Finnis, adopts a natural law view of morality, see JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 14–15 (1980), will likely have difficulty accepting the premise of *Marbury v. Madison* that, “[i]t is emphatically the province and duty of the judicial department to say what the law is,” if what the courts are deciding appears to violate natural law. *Marbury*, 5 U.S. at 177. Nor will they be likely to accept that, “[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.” *Id.* All this is meant to suggest that unless morality is brought into the picture, the sustainability of even the most accepted of precedents cannot be assured. Of course, with that said the question now becomes what morality could be accepted that would be capable of identifying and sustaining basic human rights.

universalizability will also provide a basis for resolving conflicts of rights where different interests might collide. But first we need to say how human rights get justified.

In service to this cause, this discussion will focus on the work of the American philosopher, Alan Gewirth, whose argument begins by noting that all moral and practical precepts, which would certainly include constitutional principles by virtue of being prescriptive, presuppose that the persons addressed are voluntary purposive agents. As Gewirth writes:

Amid the immense variety of such precepts, they have in common that the intention of the persons who set them forth is to guide, advise, or urge the persons to whom they are directed so that these latter persons will more or less fashion their behavior along lines indicated in the precepts. Hence, it is assumed that the hearers can control their behavior through their unforced choice so as to try to achieve the prescribed ends or contents, although they may also intentionally refrain from complying with the precepts.⁵¹

Legal rules, principles, and rights, while it might be debated whether they are always grounded in moral precepts or not, certainly meet this criterion by way of their focus on the responsibility of the recipient for compliance. Indeed, Gewirth even implies this when he goes on to state:

From this it follows that action, in the strict sense that is relevant to moral and other practical precepts, has two interrelated generic features: voluntariness or freedom and purposiveness or intentionality. By an action being voluntary or free I mean that its performance is under the agent's control in that he unforcedly chooses to act as he does, knowing the relevant proximate circumstances of his action. By an action being purposive or intentional I mean that the agent acts for some end or purpose that constitutes his

51. ALAN GEWIRTH, *REASON AND MORALITY* 26–27 (1978).

reason for acting; this purpose may consist in the action itself or in something to be achieved by the action. Voluntariness and purposiveness hence comprise . . . the generic features of action, since they are the most general features distinctively characteristic of the whole genus of action, where 'action' consists in all the possible objects of moral and other practical precepts in the respects just indicated.⁵²

From this foundation in human action, Gewirth believes he can derive, by way of a dialectically sound method, a supreme principle of morality capable of providing a universal grounding for human rights to freedom and well-being and capable of resolving conflicts of rights when such conflicts occur. Such a grounding in human action would be logically prior, in the scheme of justification, to any court precedent affording constitutional recognition of a more particular right since it would not presuppose any legal tradition to already be in place.

More importantly, it would afford a basis for claiming that those constitutional precedents logically connected to protecting human rights, because they are designed to secure individual freedom and well-being, should be afforded higher value in comparison to other precedents more distantly removed from the protection of human rights. Put another way, Gewirth believes that such intermediate moral principles as might be found in a constitution or bill of rights logically share with more general human rights principles a common foundation in human action as voluntary and purposive. When these principles are directed toward securing individual freedom and well-being for all people on the most important of human affairs, they are properly designated human rights principles and should bear the same weight of importance as other human rights principles. So how does Gewirth attempt to justify the supreme principle of morality capable of protecting human rights?

Gewirth commences his dialectical argument for establishing his supreme moral principle from the internal point of view of an agent who acknowledges, "I do X for purpose E."⁵³

52. *Id.* at 27.

53. *Id.* at 49.

As an agent would not do an act she thought was bad in every respect, she must simultaneously acknowledge “E is good,” whereby “good” may be no more than a pro-attitude or reason to perform the action.⁵⁴ From this position, the agent also acknowledges her freedom and well-being are necessary goods.⁵⁵ This is required because without freedom and well-being, the agent could not act for any purpose she thought was good. A final step at this first tier of the argument is when the agent ultimately concludes, “I have rights to freedom and well-being.”⁵⁶

This latter step comes about because if the agent were to deny she had rights to freedom and well-being, she would also have to deny “[a]ll other persons ought at least to refrain from interfering with my freedom and well-being.”⁵⁷ That means she would have to acknowledge, from her own internal conative standpoint, “[i]t is not the case that all other persons ought at least to refrain from interfering with my freedom and well-being.”⁵⁸ Put another way, she “accepts that it is permissible that other persons interfere with or remove [her] freedom and well-being.”⁵⁹ This latter statement, when affirmed from the agent’s own point of view, contradicts “[m]y freedom and well-being are necessary goods,” and is inconsistent within her viewpoint.⁶⁰ Thus, the agent, knowing she must have freedom and well-being to do any action she regards as worth doing must also know that by acting she claims rights to freedom and well-being. Additionally, the agent must claim that she has rights to freedom and well-being or be “caught in a contradiction.”⁶¹

The above argument of the agent, when viewed by itself, would only establish that a rational agent seeking to do X for her own purposes would have to claim rights to freedom and well-being to be logically consistent with her doing X for purpose E. It does not establish that others would morally have to recognize those rights or claim the same rights for themselves. To move

54. *Id.* at 49–52.

55. *See id.* at 52–54.

56. *Id.* at 65.

57. *Id.* at 80.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

from an egoist or prudential rights claim to a truly moral rights claim that presumably all people would be obligated to abide by, and not just those living under a certain form of government, two additional factors need to be brought into the mix. First, the sole basis or sufficient reason upon which the agent made her rights claim was that she sought to do X for purpose E; no more particular or identifying factor was involved that might otherwise single out the agent for special treatment.⁶² Second, any agent who seeks to do X for purpose E could make this same claim.⁶³ This is where the universality of rights becomes most apparent. Thus, if the agent were to deny rights to other agents that on the same basis she affirms for herself, she would contradict herself.⁶⁴ As a result of this second tier analysis, Gewirth concludes that every agent is logically committed to a supreme principle of morality that he calls the “Principle of Generic Consistency” (“PGC”), which states: “*Act in accord with the generic rights [to freedom and well-being] of your recipients as well as yourself.*”⁶⁵ This is the point at which American constitutional law can be seen to be in agreement with both the agent’s claim to her own freedom and well-being, and also her necessary acknowledgement of the equal rights of all other persons to the same freedom and well-being.⁶⁶ The various

62. *Id.* at 127.

63. *See id.* at 133.

64. *See id.* at 133.

65. *Id.* at 135.

66. The First Amendment protects freedom of speech, free exercise of religion, right to a free press; the Second Amendment protects the right to own a firearm; the Third Amendment prohibits the state from quartering soldiers in times of war; the Fourth Amendment protects the privacy of persons’, papers, houses, and effects from governmental searches and seizures absent there being probable cause of a crime; the Fifth Amendment protects against double jeopardy, affords the right to cross-examine witnesses at a criminal trial, due process, and requires just compensation for the taking of property; the Sixth amendment provides that all criminal cases be speedy and in public trial, before an impartial jury, to be informed of the accusations against one, to be able to confront unfavorable witnesses and have compulsory process for obtaining favorable witnesses; the Seventh Amendment guarantees the right to trial by jury when the amount in controversy exceeds twenty dollars before one can be convicted of a crime; the Eighth Amendment protects against excessive fines and “cruel and unusual punishments”; the Ninth Amendment acknowledges the possibility of non-enumerated rights “retained by the people”; the Tenth Amendment acknowledges powers that have not been delegated to the federal government continue in the states and the people. U.S. CONST. amends. I–X. Together, these constitutional principles protect against

provisions of the Bill of Rights and the Fourteenth Amendment already support many important freedoms and provide support for, at least, some well-being for all persons living in America. That is, at least in part, due to the fact that these amendments are widely considered to represent a moral reading of the Constitution's background human rights principles.⁶⁷

Additionally, it is worth noting for completeness, that since every agent could have gone through the process Gewirth lays out, the PGC need not be thought only to bind dialectically specific agents engaged in the thought process, but can apply universally to all human agents as an assertoric moral truth.⁶⁸ Additionally, because the rights being claimed are not limited to only actions the agent seeks *to be free from*, but also consists of positive claims she seeks *to be free to* act upon, the result is a universal principle that affords a basis for asserting positive as well as negative rights claims.⁶⁹ In all instances, the rights claims that emerge must support human freedom and well-being

governmental intrusion while also providing much individual freedom and well-being as might be thought would be claimed by persons seeking to do X for purpose E. I would add the Fourteenth amendment guarantees these same rights to apply against state governments and further guarantees "equal protection of the laws." *Id.* amend. XIV; see *Incorporation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/incorporation_doctrine (last visited May 11, 2021).

67. See Ronald Dworkin, *The Moral Reading of the Constitution*, N.Y. REV. (Mar. 21, 1996), <https://www.nybooks.com/articles/1996/03/21/the-moral-reading-of-the-constitution/>.

68. See GEWIRTH, *supra* note 51, at 152–54.

69. As Deryck Beyleveld points out: "That the generic rights are positive as well as negative follows from the fact that the dialectically necessary argument is driven by an agent's categorical instrumental need for the generic conditions of agency. To ensure that this need is satisfied it is as necessary for Albert to be assisted in defending his generic conditions of agency when he cannot do so by his own unaided efforts as it is necessary for him not to be deprived of these conditions by others. Hence, the dialectical necessity of the PGC not only requires agents (negatively) not to interfere with the generic conditions of agency of others but (positively) requires them to assist needy agents to secure these conditions when they are able to do so. This requirement is, however, subject to the proviso that positive action to protect Albert's generic conditions of agency cannot be required of Brenda (assuming it falls to her to provide assistance) if her assistance conflicts with comparable or more important generic conditions of agency of Brenda. For reasons beyond the scope of this article, the discharge of many positive duties falls primarily on states and institutions, as representatives of collectivities of individuals, rather than directly upon individuals." Deryck Beyleveld, *The Principle of Generic Consistency as the Supreme Principle of Human Rights*, 13 HUM. RTS. REV. 1, 14 (2012); see ALAN GEWIRTH, *THE COMMUNITY OF RIGHTS* 4 (1996).

for all people. Thus, the list of rights that emerge on the freedom side are those needed to protect human freedom. They include expression, thought, worship, personal autonomy, privacy, and some sexual conduct, as several Supreme Court cases interpreting the Constitution and Bill of Rights already support.⁷⁰

On the well-being side, a more diagnostic approach is needed because different forms of well-being will affect purposiveness to varying degrees.⁷¹ Thus, basic well-being must include life, physical integrity, and mental equilibriums.⁷² This is then followed by non-subtractive well-being to prevent loss or reduction of purposive fulfillment as might occur by being lied to, cheated, or defrauded.⁷³ Finally, additive well-being is brought into the mix to enhance one's level of purposive fulfillment as would exist by the presence of adequate health care, along with education and a decent standard of living.⁷⁴ By way of an obvious analogy, these two sets of standards for human rights, namely, freedom and well-being, can be found in the Universal Declaration of Human Rights,⁷⁵ and respectively in the subsequent International Covenant on Civil and Political Rights,⁷⁶ and the International Covenant on Economic, Social and Cultural Rights,⁷⁷ among others treaties.⁷⁸ They also

70. GEWIRTH, *supra* note 51, at 256.

71. *See id.* at 62–63.

72. *See id.* at 63.

73. *See id.* at 230–31.

74. *See id.* at 240–41.

75. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1948).

76. Int'l Covenant on Civil and Political Rights, Dec. 19, 1966, 1976 U.N.T.S. 171.

77. Int'l Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 1976 U.N.T.S. 3.

78. *See, e.g.*, Slavery Convention, Sept. 25, 1926, 60 U.N.T.S. 253, as amended by Protocol Amending Slavery Convention, Dec. 7, 1953, 182 U.N.T.S. 1951; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention on Decent Work for Domestic Workers, June 16, 2011, ILO No. 189; Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, 6 I.L.M. 78; Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, 5 I.L.M. 350 (CERD); G.A. Res. 3068 (XXVIII), Convention on the Suppression and Punishment of the Crime of Apartheid (Nov. 30, 1973); Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; G.A. Res. 54/263, Optional Protocol to the Convention

comport with many of the liberties either enumerated in our Bill of Rights or interpreted by the Court to follow from it.⁷⁹

Also important, is that conflicts of rights can now be settled by whether they comport with the PGC's protection of purpose fulfillment. In cases where one uses one's freedom to deny another basic well-being a transactional inconsistency arises, and a court can restrict the use to ensure equal rights for all.⁸⁰ This is necessary to maintain the balance of ensuring equal human rights. More likely will be the case where differences in well-being are implicated, in which case basic well-being overrides non-subtractive well-being which overrides additive well-being.⁸¹ But note that this does not mean that a level of non-subtractive well-being based on an inequality will be judged superior to an important additive opportunity that would offset the inequality. In such circumstances, the alleged non-subtractive intrusion is already compromised by the inequality upon which it is based. Thus, a court should properly decide the case in favor of the additive opportunity to offset the inequality already present.

Turning back to the question of constitutional precedents, we can now say how the material element of well-being aids in deciding how strong a precedent is by how well it supports the freedom or well-being of those affected by it. Obviously, precedents that strongly support individual autonomy understood as self-rule, especially where no other basic interest is involved, should be afforded the strongest protection; they

on the Rights of the Child on the Involvement of Children in Armed Conflict, 2173 U.N.T.S. 222 (May 25, 2000); G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, (May 25, 2000); Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (CEDAW); G.A. Res. 39/46 (XXXIX) annex, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, 23 I.L.M. 1027 (Dec. 10, 1984), as modified, 24 I.L.M. 535 (Oct. 23, 1985); Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 (US signed but not ratified); International Convention for the Protection of All Persons from Enforced Disappearance, Dec. 20, 2006, 2716 U.N.T.S. 3.

79. See RAWLS, *supra* note 33, at 233–34; GEWIRTH, *supra* note 51, at 127.

80. See Alan Gewirth, *The Basis and Content of Human Rights*, in NOMOS XXIII: HUMAN RIGHTS (J. Roland Pennock & John W. Chapman eds., 1981), reprinted in ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 58 (1982).

81. *Id.* at 55–56.

represent the ideal case examples of where autonomy is to be valued.⁸² On the other hand, precedents that unnecessarily hinder another's autonomy (as, e.g., would occur by quarantining someone with HIV disease but perhaps be alright to quarantine someone with the Covid-19 virus) overshoot what is necessary to protect overall autonomy because they are not narrowly drawn. In such cases, because of the way each disease spreads, the state's interest to protect the health and safety of all the people must be weighed against the effect the particular method for doing so is likely to have on autonomy overall.⁸³ Where the solution to the problem is limited to only what is necessary to protect autonomy overall, like using a quarantine to limit the spread of a lethal airborne virus (like the Covid-19 virus), the method serves a compelling interest that is narrowly drawn.⁸⁴ The same would not be true for HIV disease, which spreads only in limited ways people can be advised to protect against.⁸⁵ In both cases, the limitation should be the minimum necessary to achieve the compelling interest.⁸⁶ Or, if two competing interests are both likely to support autonomy, but still conflict (like in instances where a right to privacy conflicts with a defendant's right to cross-examine witnesses at trial), the precedent which supports maximal autonomy for all people should be followed.⁸⁷

82. Gewirth's focus is on freedom and well-being. Whether one agrees with the final steps in Gewirth's argument to the PGC (this author does), there can be little doubt of his prior conclusion that every rational agent from his own point of view will claim rights to freedom and well-being. That should be enough when operating in a liberal democracy to engage limitations so individuals do not try to manipulate the system to deny fundamental human rights to others that have already been recognized but with which they may disagree. See VINCENT J. SAMAR, *THE RIGHT TO PRIVACY: GAYS, LESBIANS, AND THE CONSTITUTION* 205–07 (1991) (arguing that autonomy as a fundamental end of democratic government “must be a basic requirement of morality or, if not, then at least accepted as such in the tradition and culture of the society in which it is to operate”).

83. *Id.* at 112.

84. *Id.* at 112–13; see *How Covid-19 Can Spread by Airborne Transmission*, WEILL CORNELL MED. (Oct. 8, 2020), <https://weillcornell.org/news/how-covid-19-can-spread-by-airborne-transmission>.

85. *HIV Transmission*, CTRS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hiv/basics/transmission.html> (last visited June 5, 2021).

86. SAMAR, *supra* note 82, at 113.

87. *Id.* at 104. The conflict illustrated here is meant to be between two active rights. Other concerns involving a fair trial may involve passive rights,

Together, these two additional criteria for determining a compelling state interest and resolving a conflict of rights, along with what constitutes a human right help should rank which precedents become super-precedents, as well as how any human rights precedent should be evaluated in particular cases of conflict. They may also have application in criminal cases by allowing a court to assess the damage caused when privacy, for example, is undermined in order to support a criminal investigation.⁸⁸ Thus, one sees that weighing previous precedents first by their importance to human rights overall and, then, by their relationship to equally important other interests (which might include other human rights) that also support autonomy, can itself provide a material ordering for just how significant the precedent is, without any consideration of its enduring popularity politically.

V. SUPER-PRECEDENTS AS A WAY TO PROTECT HUMAN RIGHTS BY ASSIGNING VALUE TO SUPREME COURT PRECEDENTS

Not every precedent should be maintained, especially if the background theory establishing the precedent itself violates universal human rights. The United States Constitution, while making important structural changes in the way the United States would operate compared to the way it had operated under the prior Articles of Confederation, nevertheless fails as a human rights document. When the Constitution was originally adopted in 1789 slavery was permitted,⁸⁹ and women did not have the right to vote.⁹⁰ Indeed, only white property-owning men were afforded rights under the Constitution.⁹¹ This pattern would continue until adoption of the Thirteenth Amendment ending slavery; and the latter adoption of the Nineteenth

which do not challenge privacy. *Id.* at 104–05.

88. *Id.* at 105–06.

89. See U.S. CONST. art. I, § 9, cl. 1 (prohibiting the federal government from prohibiting the importation of persons understood at the time to mean slaves); *id.* art. 1, § 2, cl. 3 (containing the Three-fifths Compromise referring to unemancipated African slaves).

90. U.S. CONST. amend. XIX, § 1 (giving women the right to vote).

91. *The Founders and the Vote*, LIBR. CONG., <https://www.loc.gov/classroom-materials/elections/right-to-vote/the-founders-and-the-vote/> (last visited May 11, 2021).

Amendment affording women the right to vote. During this period, the Supreme Court would also decide *Dred Scott v. Sandford*, which held that black people were not intended to be included as American citizens under the Constitution.⁹² That holding would eventually cease to continue as a precedent not by any Court decision, but because it had been effectively nullified by passage of the Thirteenth and Fourteenth Amendments.⁹³ Indeed, it was not until the adoption of the Fourteenth Amendment, initially passed to provide equal protection of the laws for the former slaves, that equality begins to enter the picture; but even then, only after a significant period of time were the Amendment's protections interpreted to apply to other marginalized groups, including women, gays and lesbians, and transgendered people.⁹⁴

At the turn of the twentieth century, libertarianism was the dominant constitutional theory under which the Court operated. That theory, as opposed to a more welfare-equality approach, became manifest with the Court's decision in *Lochner v. New York*, which, claiming to protect freedom of contract, struck down a New York statute limiting the number of hours bakers could work.⁹⁵ Indeed, it would take another thirty years and the Great Depression before the Court would back-off this libertarian view of the Contract Clause⁹⁶ to begin to allow the government to set regulations on industries to protect individual welfare, beginning with constitutionally upholding a minimum wage regulation for women in *West Coast Hotel v. Parrish*.⁹⁷ That decision effectively ended the *Lochner* era and the Court's seemingly exclusive focus on property rights.

Perhaps it was the time period between these two events and what was occurring in the country with the Great Depression that allowed the Court the conceptual space to rethink and redirect its attention toward protecting other individual rights, as might fall under the First and Fourteenth

92. *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857) (undermining the human rights of African-Americans held in bondage).

93. U.S. CONST. amends. XIII, XIV.

94. See generally *14th Amendment*, HIST. (Jan. 11, 2021), <https://www.history.com/topics/black-history/fourteenth-amendment>.

95. *Lochner v. New York*, 198 U.S. 45 (1905).

96. U.S. CONST. art. I, § 10, cl. 1.

97. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

Amendments, such as privacy, beginning with its now famous footnote four in the *Carolene Products* case.⁹⁸ This change from a libertarian outlook toward a more progressive welfare point of view is probably more related to what the country was demanding rather than any other concern.⁹⁹ Liberty and equality are not true opposites. Both arguably can coexist without contradiction depending on how each is defined.¹⁰⁰ The Constitution itself, in its preamble, makes room for this possibility with its reference to “promot[ing] the general welfare” before “secur[ing] the Blessings of Liberty to ourselves and our Prosperity,”¹⁰¹ which will arguably place that document on the side of equality when an overzealous view of liberty is likely to undermine the common good.

This section and the one preceding it provide a set of criteria for determining the strength and durability of Supreme Court precedents. A system of stare decisis that operates horizontally at the Supreme Court level needs to allow for these sorts of criteria. Specifically, it needs to allow for them to protect the Court’s legitimacy, to avoid the Court from appearing to be nothing more than a partisan political institution when the

98. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

99. ACKERMAN, *supra* note 18, at 103–04. Professor Bruce Ackerman has noted: “There is a better way to make sense of the New Deal, one that finds a deeper meaning in the struggle between the Roosevelt Presidency and the Supreme Court during the Great Depression. Within the mythic framework of rediscovery, the Old Court’s challenge [coming out of *Lochner*] to the New Deal from 1932 to 1937 only revealed the arbitrary character of the interpretative exercise the Justices had attempted over the preceding sixty years. Apparently, it would have been better for the Constitution and the country if the Court had made it plain, from 1933 on, that Franklin Roosevelt and the Democratic Congress were not engaged in normal politics in demanding a New Deal for the American people, but were instead speaking in the authentic higher lawmaking accents of We the People of the United States.” *Id.*

100. See Danielle Allen, *Liberty, Equality Aren’t Mutually Exclusive*, WASH. POST (Oct. 17, 2014), https://www.washingtonpost.com/opinions/liberty-equality-arent-mutually-exclusive/2014/10/17/d9df36ba-55fb-11e4-809b-8cc0a295c773_story.html; George Buskell, *The ‘Freedom vs. Equality’ Debate Is a False Dichotomy*, INCITE (Nov. 6, 2018), <http://incitejournal.com/opinion/the-freedom-vs-equality-debate-is-a-false-dichotomy/>.

101. U.S. CONST. pmbl.

Justices, who are not elected and have life tenure, start questioning the continued validity of prior Court decisions.¹⁰² It is also necessary to affirm stability in the way constitutional law unfolds.

Practical workability is one such prudential criterion, as mentioned by Justice O'Connor.¹⁰³ This criterion is important because the Supreme Court will likely be called upon in future cases to render decisions that will need to operate with its earlier precedents. Another criterion involves the reliance interests that will likely have developed as a result of the earlier precedent. If society has come to expect, as the Court found in *Casey*, that women have certain rights and whole industries have formed around that expectation, it is disconcerting, not-to-mention grossly unfair, to cut that reliance off at the knees. This is essentially what would happen if a precedent, built on a reliance interest that supports human rights, is arbitrarily overruled. Furthermore, such a step would only strengthen the public's belief that the Court is just a political tool of whoever was in power when the Justices were appointed, as it is the president with the advice and consent of the Senate who appoints the Justices to the Court.¹⁰⁴ Put another way, the Court would suffer a loss of its original legitimacy to be independent of partisan politics and to be able to think on its own if this became the public's view.¹⁰⁵

Similarly, as has already been discussed, even wide scale support of the public may not protect a Supreme Court precedent if that is the only factor considered. This is because it is in the nature of our politics for citizens to often side with those who share their own interests, even when it may go against the common interests.¹⁰⁶ When this occurs, and the citizenry do not all share the same comprehensive doctrines regarding religion,

102. See U.S. CONST. art. III, § 1.

103. See *supra* Section Three.

104. Adam Liptak, *Supreme Court Says Judges Are Above Politics. It May Hear a Case Testing That View*, N.Y. TIMES (Sept. 16, 2019), <https://www.nytimes.com/2019/09/16/us/politics/supreme-court-judges-partisanship.html>.

105. See generally THE FEDERALIST NO. 78 (Alexander Hamilton).

106. Joshua Zeitz, *Does the White Working Class Really Vote Against Its Own Interests?*, POLITICO (Dec. 31, 2017), <https://www.politico.com/magazine/story/2017/12/31/trump-white-working-class-history-216200>.

morality, and metaphysics, conflicts arise and politicians will make use of those conflicts to champion causes they believe will get them elected.¹⁰⁷ This last comment should not be surprising. People and organizations who hold fervent religious views and have the means to protect them are inclined to file appropriate lawsuits under the Free Exercise clause of the First Amendment or the Equal Protection clause of the Fourteenth Amendment.¹⁰⁸ This is proper because it assumes that judges who evaluate the views can operate neutrally in their assessment of all the relevant arguments. Such neutrality can be undercut, however, when those who would seek a particular outcome in a case limit those who they vote for in an election based on a promise to only appoint judges who already share their particular religious views.¹⁰⁹

Consequently, it is not so clear that the Court's practical and prudential concerns for a precedent's workability, reliance, and expectation will be enough to protect it against a serious effort to undermine its legitimacy. Out of practicality, these considerations should play a significant role in any review of past precedents before being considered for overturning. They should not, by themselves, be thought sufficient to overturn any precedent that would arguably protect human rights. An additional normative criterion should be required that is capable of determining whether the human rights concern is truly being afforded adequate consideration. Thus, attention in the area of seeming human rights precedents should not focus on how supportive the public is of the precedent being considered for possible overruling, but instead focus on whether the central holding of the precedent affirms a human right that would otherwise likely not be protected to the same degree or at all, if the precedent were overruled. One way to do this would be to ask if the precedent affords a powerful protection of the freedom

107. See *Americans Have Positive Views About Religion's Role in Society, but Want it Out of Politics*, PEW RSCH. CTR. (Nov. 15, 2019), <https://www.pewforum.org/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/>.

108. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018); *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019), *cert. granted*, 140 S. Ct. 1104 (2020) (No. 19-123).

109. See Frank Newport, *Religious Identity and the 2020 Presidential Election*, GALLUP (Aug. 14, 2020), <https://news.gallup.com/opinion/polling-matters/317381/religious-identity-2020-presidential-election.aspx>.

and well-being of a particular group whose human rights are unlikely to be protected if the precedent were overruled. An additional concern is whether the right being protected represents a basic interest that should stand on its own, even before considering institutions and the practices of the society that may afford it further meaning and enforcement.¹¹⁰ If the precedent protects a basic human right in the sense just described, it is at the apex of its strength and should be left alone as to its central holding.¹¹¹ It is a super-precedent.

Aspects of a precedent that support but are nevertheless conceptually severable from its central holding may be adjusted, as seen in *Casey*, but only to meet changing circumstances in light of the precedent's workability and consistency with other precedents. The central holding, of course, should be considered invulnerable to such change if it supports a basic human right. One caveat that should be noted is when people treat super-precedents as if they were static. The position expressed in this Article is more that super-precedents are at the apex of a gradient, where precedents are ranked in survival value based on how well they conform to the various criteria discussed above. This is illustrated most clearly by conflicts of rights cases, particularly if both sides are each claiming governing support from a different super-precedent. If both parties claim to be following a super-precedent that supports human rights, then the Court will have to decide which precedent should govern the case by determining which precedent is most likely to have the greatest impact on individual freedom and the well-being of all those affected. It should not overrule the precedent but merely adjust it in context to the particular case. In this sense, Gewirth's PGC provides the end or goal of treating the rights of one's recipients and oneself as the ultimate outcome that should be sought. That will only work to resolve a conflict of rights, however, if the Court frames the issue to determine which precedent is most likely to protect the human autonomy of all as a fundamental value in the long run.

110. For the difference between basic and derivative interests, see SAMAR, *supra* note 82, at 67–68.

111. Elsewhere, I have argued that “international human rights [that] would provide a similar interpretation to what might be provided by a fundamental principle recognized in the United States, even though it should add something more, its relevance is at the apex” for being part of a constitutional interpretation. Samar, *supra* note 16, at 121.

Before leaving this section, another caveat needs to be considered. The precedents previously addressed in this article are those that prevent the government from violating the civil and human rights of the people, and those that afford the blessings of basic liberty to the people. What about those precedents most associated with entitlement programs like Social Security,¹¹² the Affordable Care Act (“ACA”),¹¹³ and other similar programs the government produces to benefit the people? The Constitution provides the ability for the government to create such programs, either under the Commerce Clause or the Tax and Spend Clause.¹¹⁴ In many of these instances, the government, in establishing entitlements, supports important aspects of human welfare.¹¹⁵ Still, what happens if the government or any of these special programs runs out of money? Or if Congress deems further taxation unfair or unreasonable and further raising of the National Debt too costly to future generations?¹¹⁶

Obviously, such decisions could potentially have great consequences on peoples’ lives, as we saw when Congress discontinued the mandate under the Affordable Care Act.¹¹⁷ Moreover, the Constitution places the sole power of these choices in the hands of Congress.¹¹⁸ Does this mean the courts have no responsibilities in such matters? This problem arose last year

112. Social Security Act, 42 U.S.C. §§ 301–1305.

113. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

114. U.S. CONST. art. I, § 8, cl. 3; *see* Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

115. *See Entitlement Programs*, FED. SAFETY NET, <http://federalsafetynet.com/entitlement-programs.html> (last visited May 11, 2021).

116. *See Social Security and Health Care Entitlement Reform*, HERITAGE FOUND. (May 20, 2019), <https://www.heritage.org/blueprint-balance/policy-agenda/social-security-and-health-care-entitlement-reform>; Robert Greenstein et al., *Would an Entitlement Cap Be a Wise Idea*, CTR. ON BUDGET & POL’Y PRIORITIES (Mar. 2, 2005), <https://www.cbpp.org/research/would-an-entitlement-cap-be-a-wise-idea>; David Stuart Koitz, *The Entitlements Debate*, EVERYCRSREPORT (Jan. 28, 1998), <https://www.everycrsreport.com/reports/97-39.html>.

117. *See* Christine Eibner & Sarah Nowak, *The Effect of Eliminating the Individual Mandate Penalty and the Role of Behavioral Factors*, COMMONWEALTH FUND (July 11, 2018), <https://www.commonwealthfund.org/publications/fund-reports/2018/jul/eliminating-individual-mandate-penalty-behavioral-factors>.

118. U.S. CONST. art. I, § 9, cl. 7.

when the Supreme Court was again asked to consider whether the ACA was unconstitutional because a Congress, later from the one that passed the Act, had decided to remove the mandate provision that provided financial support and served as the Act's enforcement mechanism.¹¹⁹ That provision had required everyone who could afford to buy health insurance to either have health insurance or pay a fine.¹²⁰ Previously, the Court had twice found the Act to be constitutional on other challenges.¹²¹ So how should this new problem be looked at? As arguments both for and against the constitutionality of the Act are currently before the Court, I will limit my remarks here to what I had said about the proper constitutional standing of prior cases on entitlement programs such as the ACA.¹²²

When Congress and the president approve an entitlement program, designed to ensure health care as a human right and make it available to all who want it, but a later Congress does not provide adequate funding or removes the funding provision they had been previously provided, the Act legally continues to exist, although it may not be fully enforceable. This is because Congress, either the present or a future Congress, can easily step back into the arena and provide the necessary funding by whatever constitutionally accepted method it chooses or, otherwise, fully repeal the law. In other words, absent other constitutional problems, as long as the Act remains on the books, it should be afforded as much respect as possible to safeguard the democratic process the Constitution has set up. Here the prior precedents are operating but only to limit the Court from overstepping into the domain that the Constitution has set for

119. See *Texas v. California*, 945 F.3d 355 (5th Cir. 2019), *cert. granted*, 140 S. Ct. 1262 (2020) (No. 19-1019).

120. See RYAN J. ROSSO, CONG. RSCH. SERV., R44438, *THE INDIVIDUAL MANDATE FOR HEALTH INSURANCE COVERAGE: IN BRIEF* (updated 2020).

121. See Zach Buck, *While the Supreme Court Deliberates on the Affordable Care Act, Congress and the White House May Act*, CONVERSATION (Nov. 12, 2020), <https://theconversation.com/while-the-supreme-court-deliberates-on-the-affordable-care-act-congress-and-the-white-house-may-act-149891>; Valarie Blake, *The Constitutionality of the Affordable Care Act: An Update*, AMA J. ETHICS (Nov. 2012), <https://journalofethics.ama-assn.org/article/constitutionality-affordable-care-act-update/2012-11>.

122. On June 18, 2021, the Supreme Court left in place the Affordable Care Act finding the petitioners (states) did not suffer a direct injury that would have provided them Article III standing to bring the case. *California v. Texas*, No. 19-840, slip op. (U.S. June 17, 2021).

Congress.

VI. ABORTION, SODOMY, AND SAME-SEX MARRIAGE

This section will discuss three precedents where it has been suggested the Court may undermine certain basic human rights by overruling past precedents.¹²³ One set of cases is also presented to show when the Court did overrule a past precedent—where the effect of its choice was actually to secure a human right that should now receive strong protection.

a. Abortion

Following President Trump's nomination and the Senate's confirmation of Amy Coney Barrett as his third appointed Justice on the U.S. Supreme Court, concerns were raised over whether *Roe v. Wade*, the case recognizing a woman's constitutional privacy right to decide whether or not to continue a pregnancy before viability, would continue to be affirmed or whether the Court might soon overrule it.¹²⁴ The question arises because now at least five of the nine members of the Court tend to follow a conservative approach of deciding constitutional cases based on what they believe the framers would have intended when they wrote the Constitution.¹²⁵ It also is particularly poignant because President Trump has said, on more than one occasion, he prefers to appoint Justices who believe human life begins at conception.¹²⁶ With various states passing laws limiting a woman's access to an abortion, it is likely a case

123. See Tom McCarthy, *Justice Alito Takes Aim at Abortion Rights, Gay Marriage and Covid Rules*, GUARDIAN (Nov. 13, 2020, 12:47 PM), <https://www.theguardian.com/law/2020/nov/13/justice-samuel-alito-supreme-court-liberty>.

124. See Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court to the Right*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html>.

125. See Sarah McCammon, *A Look At Amy Coney Barrett's Record On Abortion Rights*, NPR (Sept. 28, 2020, 5:18 PM), <https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights>.

126. *Id.*

concerning overturning the *Roe* holding will reach the Supreme Court in the next year.¹²⁷ Obviously, if the *Roe* holding were deemed a super-precedent, its continued status in the law would be difficult to overturn. Should *Roe* be treated as a normal Supreme Court precedent, then its survival, given the current makeup of the Court, is questionable. Justice Clarence Thomas has written in other cases that attempted to limit *Roe*'s viability that he favors overturning *Roe*.¹²⁸ This question will likely remain a serious concern in the background as new cases find their way to the Court.¹²⁹ While there may be alternative means to limit any harm that might result, provided the Congress and president would go along, what could be the effect of overturning *Roe* itself?¹³⁰

When *Roe* was decided, the Court also decided how it would delineate when the state's interest in protecting prenatal life would begin and the woman's interest in terminating a pregnancy, except to save her own life, would end. *Roe* addressed that issue with the trimester system in which in the first and second trimesters, the decision was the woman's, in consultation with her physician.¹³¹ At the end of the first trimester, the state may regulate abortions, but only to protect maternal health.¹³² Only at the beginning of the third trimester, the point where it is believed the fetus could survive as an independent being outside the womb, does the state's interest in preserving prenatal life become compelling.¹³³ This system would continue for a number of years against various challenges

127. *Id.*; see, e.g., Adam Liptak, *Supreme Court to Hear Abortion Case Challenging Roe v. Wade*, NY TIMES (May 17, 2021), <https://www.nytimes.com/2021/05/17/us/politics/supreme-court-to-hear-abortion-case-challenging-roe-v-wade.html>.

128. *Gonzales v. Carhart*, 550 U.S. 124, 168–69 (2007) (Thomas, J., concurring) (stating again his view that “the Court’s abortion jurisprudence, including [its decisions in] *Casey* and *Roe* ha[d] no basis in the Constitution”).

129. See Laurie Sobel et al., *Abortion at SCOTUS: A Review of Potential Cases this Term and Possible Rulings*, WOMEN’S HEALTH POL’Y (Oct. 30, 2020), <https://www.kff.org/womens-health-policy/issue-brief/abortion-at-scotus-a-review-of-potential-cases-this-term-and-possible-rulings/>.

130. See Elizabeth Warren, *Congressional Action to Protect Choice*, TEAM WARREN (May 17, 2019), <https://medium.com/@teamwarren/congressional-action-to-protect-choice-aaf94ed25fb5>.

131. *Roe v. Wade*, 410 U.S. 113, 163 (1973).

132. *Id.*

133. *Id.*

in part because *Roe*'s holding, recognizing the woman's right of choice to bear and beget a pregnancy was thought to be fundamental, warranting strict scrutiny by the Court of any efforts by the government to interfere with the right.¹³⁴ That approach, however, would change in 1992 when the Court, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, reaffirmed its earlier decision in *Roe* but limited their affirmance to apply only to *Roe*'s central holding regarding a woman's right to have an abortion prior to viability.¹³⁵ Beyond that, the Court in *Casey* severed the trimester system as nonessential to *Roe*'s central holding and replaced *Roe*'s requirement that strict scrutiny be applied with an "undue burden" test that would allow the states some restrictions on access to abortions provided they did not fully undermine a woman's right to an abortion with burdensome prevention tactics.¹³⁶

Now, it is held that the state's interest in protecting fetal life, as set out in the Pennsylvania Abortion Control Law,¹³⁷ may begin at conception, although the state's expression of its interest cannot place an undue burden on the woman's right to choose.¹³⁸ States like Pennsylvania could constitutionally mandate, as it did, that the woman considering having an abortion be required to wait twenty-four hours before making her decision based on the state's preference for life.¹³⁹ Additionally, these states could mandate that parental approval would be necessary if the woman was a minor, although the child could seek a judicial bypass to prevent significant threats against her.¹⁴⁰ In *Casey*, the only restriction not allowed was the requirement that the woman inform her husband, as this might lead to serious physical harm directed at the woman.¹⁴¹ Thus, while on the one hand *Casey* reaffirmed *Roe*, on the other hand, it loosened the degree of protection *Roe* had afforded women in

134. See Vincent J. Samar, *Personhood Under the Fourteenth Amendment*, 101 MARQ. L. REV. 287, 289–302 (2017) (discussing the background of the abortion debate).

135. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

136. *Id.* at 878.

137. See Abortion Control Act, 18 PA STAT. AND CONS. STAT. ANN. §§ 3203–3220 (West 1992).

138. *Casey*, 505 U.S. at 872–73.

139. *Id.* at 884–885.

140. *Id.* at 899.

141. *Id.* at 893–94.

accessing abortions. Looking to the future and the current membership of the Court, it is by no means out of the question that *Roe* could be overruled.

Still, having said that overruling *Roe* is not out of the question does not mean *Roe* ought to be overruled. While there may have been some concerns expressed as to *Roe*'s original timetable for when a state could prohibit an abortion, no serious challenge on this point was ever made, and it is unlikely it would be made absent the creation of a totally artificial womb which would certainly mean that the fetus was not living on its own. So, the *Roe* trimester system was not unworkable, even if its alleged rigidity may have undermined states from expressing their desire to protect a fetus's life before viability.¹⁴² More importantly for preserving *Roe*'s central holding was Justice O'Connor's acknowledgement of how women in society had come to rely on the holding.

To eliminate the issue of reliance that easily, however, one would need to limit cognizable reliance to specific instances of sexual activity. But to do this would be simply to refuse to face the fact that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.¹⁴³

Justice O'Connor then goes on to say how well the *Roe* decision

142. *Id.* at 875.

143. *Id.* at 856 (citation omitted).

was able to operate without disturbance in two lines of cases in which it had application.

It will be recognized, of course, that *Roe* stands at an intersection of two lines of decisions, but in whichever doctrinal category one reads the case, the result for present purposes will be the same. The *Roe* Court itself placed its holding in the succession of cases most prominently exemplified by *Griswold v. Connecticut*. When it is so seen, *Roe* is clearly in no jeopardy, since subsequent constitutional developments have neither disturbed, nor do they threaten to diminish, the scope of recognized protection accorded to the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child. *Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection. If so, our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims.¹⁴⁴

Justice O'Connor's analysis here was crucial to the *Casey* decision to uphold *Roe*'s essential holding. To elaborate, it was crucial because it spoke to the important role the Court assigns the practical and prudential criteria when deciding whether or not to overrule a case that a significant number of people found to be contrary to their comprehensive religious, moral, and metaphysical beliefs. It also shows the importance of the criteria the Court relied upon in its examination of the fallout that would likely occur if *Roe* were overruled. At this point, I would like to go beyond what the *Casey* Court held to note the importance of my additional criterion in establishing that *Casey* was right, and

144. *Id.* at 857 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

that the essential holding of *Roe* should continue into the future.

Remember my added criterion would ask whether upholding *Roe* was essential to protecting human rights, specifically the human rights of women. Here, we need to ask who else may have implicated rights. These could include the father's rights, as well as the rights of the fetus. With regard to any rights claimed by the father, there is certainly an interest because the fetus was the result of his sperm that would now be destroyed. But that interest is pretty far removed from his current involvement, because after being placed in the mother, it has no direct connection with the father but is wholly dependent for its life and continued existence on the mother's body and her choices. So, one would be hard pressed to find much of an interest of the father from having placed his sperm in the mother to override the mother's interest in discontinuing the pregnancy early. Obviously, his interest will become more apparent and significant if the mother gives birth to a child, but that is a future interest rather than a present interest.

As to a possible interest of the fetus, both the writings of Alan Gewirth and myself should offer some needed direction. Gewirth notes that the PGC, when combined with a Principle of Proportionality, makes clear why "the fetus, while of course having no right to freedom, have such right to well-being as is required for developing its potentialities to purpose-fulfillment."¹⁴⁵ However, this latter right will not be of the same degree as the mother's rights given that the fetus is not a full-fledged agent.

When there is a conflict, however, the mother's generic rights should take priority. The Principle of Proportionality together with the PGC makes clear why this is so. The justifying criterion for having the generic rights is that one is a prospective agent who has purposes he wants to fulfill. When someone is less than a full-fledged prospective agent, his generic rights are proportional to the degree he approaches having the generic abilities constitutive of such agency, and the reason for this proportionality is found in

145. GEWIRTH, *supra* note 51, at 142.

the relation between having the rights and having the generic abilities required for acting with a view to purpose-fulfillment. The fetus, of course, lacks the abilities except in remotely potential form. In addition, it also lacks any purposes of even the most rudimentary sort, because of its lack of any physically separate existence and of even an initial acquisition of memories. Hence, its generic rights by comparison with the rights of the mother, are minimal.¹⁴⁶

Gewirth goes on to explain that the fetus's stage of development should give pause to the mother to have a stronger reason for terminating a later term pregnancy than an earlier one, but that in any case, such a pause should never be used to threaten "the mother's physical, psychological, or social circumstances."¹⁴⁷ And the state should never be the one assessing her interest, at least not before viability as it is her interest that is dominant. Additionally, Gewirth notes that any decision "for the fetus's right to life be matched by concern for its right to adequate nutrition and other components of basic well-being."¹⁴⁸ This would, of course, be a legislative matter. Still, it imposes an obligation on the part of the state; if it wishes to promote prenatal life, it must ensure availability of the resources to further its own purposive goal.

In a recent article in the *Marquette Law Review*, I argue that moral agency is both a necessary and sufficient condition for the fetus to be considered a person. That proving such agency would require "a test of reasonable objectivity as would be required to establish the desired protection [under the Fourteenth Amendment] in a pluralistic society."¹⁴⁹ Such a test would obviously be connected to at least a minimal degree of conscious autonomous action. I note, following the approach of Gewirth, that the fetus cannot pass such a test, certainly not at an early stage of the pregnancy, as it certainly has no purposes of its own. Yet, absent such a test, all we are left with is a fight among different comprehensive religious, moral, and metaphysical

146. *Id.*

147. *Id.* at 144.

148. *Id.*

149. Samar, *supra* note 134, at 331.

doctrines over whether the fetus should or should not be considered a person. There is no similar dispute over whether the pregnant woman is a moral agent. Talk about life in the abstract, natural law, or God's will only serves to distract from the fundamental question of whether, in a pluralistic society holding many different and inconsistent comprehensive doctrines, the Court can take a side in what might be best termed a religious fight where fundamental human rights of the woman could end up being nullified. Justice Blackmun in his majority opinion in *Roe* made this clear when he opined that the Court, under the Fourteenth Amendment, had never recognized the fetus as a person.¹⁵⁰ Thus, the decision is properly left up to the woman to decide in conformity with her own conscience and comprehensive doctrines what she believes. "[I]f the different positions [regarding the fetus' status and whether human life itself should be thought sacred] are to be reconciled, clarity of both the language used and justifications for the assumptions made is essential."¹⁵¹ Not providing such clarity and justifications, because the Court is asked to recognize certain comprehensive doctrines that cannot be fully justified, is to leave the Court and women everywhere in the United States at the behest of those in power. Thus, the essential holding of *Roe v. Wade* that women have a right to choose abortion prior to a fetus becoming viable should continue as a super-precedent.

b. Sodomy

Michael Hardwick, a bartender at a gay bar in Atlanta, was issued a citation by a passing police officer for violating a local ordinance prohibiting public drinking after he tossed an empty bottle into a trashcan immediately outside the bar.¹⁵² The citation had a date for Michael to pay the fine or appear in court; however, because of a clerical error, a different date appeared on the court calendar.¹⁵³ An arrest warrant was issued for Michael's

150. *Roe v. Wade*, 410 U.S. at 156–58.

151. Samar, *supra* note 134, at 331.

152. Melvin I. Urofsky, *Bowers v. Hardwick*, BRITANNICA, <https://www.britannica.com/event/Bowers-v-Hardwick#ref311842> (last visited June 1, 2021).

153. *Id.*

failure to pay the requisite fine or appear in court.¹⁵⁴ The warrant was invalid as Michael had actually paid the fine.¹⁵⁵ After Michael failed to appear on the calendar date, the officer acted on the arrest warrant and went to Michael's home.¹⁵⁶ The officer then went upstairs to Michael's bedroom where he witnessed Michael and another man engaged in sex acts.¹⁵⁷ The officer then arrested Michael for violating Georgia's sodomy law.¹⁵⁸ In response, Michael brought suit in federal court "challenging the constitutionality of the state statute insofar as it criminalized consensual sodomy" performed in private.¹⁵⁹ After the district court dismissed the case, the Eleventh Circuit in a divided opinion reversed, remanding the case for trial on whether the state could show a compelling interest narrowly drawn for the prohibition. The Supreme Court granted certiorari to resolve the issue after other Courts of Appeal had decided the issue contrary to the way the Eleventh Circuit decided it.¹⁶⁰

Early in the case, the Court stated the issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time."¹⁶¹ The majority opinion, written by Justice White, goes on to disagree with the Court of Appeals that its prior case law confers such a right.¹⁶² It then discusses the test for recognition of fundamental rights to be either (a) "those that are 'implicit in the concept of ordered liberty'"¹⁶³ or (b) "are 'deeply rooted in this Nation's history and tradition.'"¹⁶⁴ The Court then holds, "[i]t is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy."¹⁶⁵ In

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Bowers v. Hardwick*, 478 U.S. 186, 189 (1986).

160. *Id.*

161. *Id.* at 190.

162. *Id.*

163. *Id.*

164. *Id.* at 192.

165. *Id.*

effect, the Court found that there was no constitutional protection for the behavior in which Michael Hardwick was involved. In a concurring opinion, Chief Justice Burger further writes, “[t]o hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching.”¹⁶⁶ However, there was an important dissent by Justice Stevens that would become the controlling law in this area seventeen years later. Justice Stevens 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 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.¹⁶⁷

The argument at the Court was not unfamiliar. Nor did the Court attempt to justify its position by claiming the law was necessary to support the freedom or well-being of the people. If anything, the Court clearly expressed disinterest in this concern. Instead, what the Court did was follow a now infamous argument by Lord Patrick Devlin in his response to the 1957 Wolfenden Report which recommended decriminalization of same-sex consensual conduct in England.¹⁶⁸ There, Devlin wrote:

166. *Id.* at 197 (Burger, C.J., concurring).

167. *Id.* at 216 (Stevens, J., dissenting) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

168. DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, REPORT TO THE SECRETARY OF STATE AND THE HOME DEPARTMENT (“THE WOLFENDEN REPORT”) 24, ¶ 61 (1957) (“Unless a deliberative attempt is made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.”).

[A]n established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more frequently than they are broken up by external pressures. . . . The suppression of vice is as much the law's business as the suppression of subversive activities, it is no more possible to define a sphere of private morality than it is to define one of private subversive activity.¹⁶⁹

Lord Devlin's argument was met by a response at the time from H.L.A. Hart, a highly influential Anglo-American legal philosopher. Hart's response, which would later be reflected in Justice Stevens's dissent in *Bowers* and become part of the majority opinion in *Lawrence v. Texas*,¹⁷⁰ argued:

No doubt we would all agree that a consensus of moral opinion on certain matters is essential if society is to be worth living in. Laws against murder, theft, and much else would be of little use if they were not supported by a widely diffuse conviction that what those laws forbid is also immoral. So much is obvious. But it does not follow that everything to which the moral vetoes of accepted morality attach is of equal importance to society; nor is there the slightest reason for thinking of morality as a seamless web. . . . First, we must ask whether a practice which offends moral feeling is harmful independently of its repercussion on the general moral code. Secondly, what about repercussion on the moral code? Is it really true that failure to translate this item of general morality into criminal law will jeopardize the whole fabric of morality and so society?¹⁷¹

Hart's argument and the Wolfenden Report were influential

169. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 13 (1965).

170. *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003).

171. H.L.A. Hart, *Immorality and Treason*, 62 *LISTENER* 162 (1959).

on the development of the American Model Penal Code in 1980.¹⁷² That Code excluded penal sanctions for nontraditional sexual practices by married couples and unmarried couples.¹⁷³ It also recommended removal of the crime of consensual sodomy in private as applied to homosexuals.¹⁷⁴ The authors of the Model Penal Code noted, “[i]n the words of the Wolfenden Report, the decisive factor favoring decriminalization of the laws against private homosexual relations between consenting adults ‘is the importance which society and the law ought to give individual freedom of choice and action in private matters.’”¹⁷⁵

Lawrence v. Texas would be the case that ended state proscriptions against private consensual homosexual conduct among consenting adults. In that case, Harris County, Texas police officers responding to a call of a weapons disturbance observed Lawrence and another man engaged in anal sex in Lawrence’s home.¹⁷⁶ The couple were arrested and charged with violating a Texas statute prohibiting “deviate sexual intercourse,” which is defined to include “any contact between any part of the genitals of one person and the mouth or anus of another person.”¹⁷⁷ The case was certified to the U.S. Supreme Court on three separate questions:

Whether petitioners’ criminal convictions under the Texas ‘Homosexual Conduct’ law—which criminalizes sexual intimacy by same-sex couples, but not identical behavior by different-sex couples—violate the Fourteenth Amendment guarantee of equal protection of the laws.

Whether petitioners’ criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment.

Whether *Bowers v. Hardwick* should . . . be

172. MODEL PENAL CODE § 213.2 cmt. 2 (AM. L. INST. 1980).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Lawrence v. Texas*, 539 U.S. 558, 563 (2003).

177. *Id.*

overruled?¹⁷⁸

In deciding to strike as unconstitutional the Texas statute and overrule its prior decision in *Bowers v. Hardwick*, the Court, per the opinion by Justice Kennedy, stated: “When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring.”¹⁷⁹ This is important because contrary to the way the Court in *Bowers* had phrased the issue, “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy,” Justice Kennedy’s opinion in *Lawrence* began by noting that “[t]he question before the Court is the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct.”¹⁸⁰ The change in language bespoke a change in not only tone but direction as to how this case would unfold. Now the issue was one about intimate contact which, when consensual, represents an ideal case example of a private act, because clearly no other interests are involved.¹⁸¹

Kennedy went on to write, “[t]he liberty protected by the Constitution allows homosexual persons the right to make this choice.”¹⁸² The Court noted that laws prohibiting sodomy have not generally been enforced,¹⁸³ that the Model Penal Code had made clear it did not recommend continuation of such laws,¹⁸⁴ in England the British Parliament had ten years earlier adopted the recommendation of the Wolfenden Report,¹⁸⁵ and that by the time the *Bowers* Court rendered its decision, the European Court of Human Rights, on a similar issue, had ruled in *Dudgeon v. United Kingdom* that North Ireland’s proscription of sodomy violated the European Convention on Human Rights.¹⁸⁶

One other point is worth noting. The Court chose not to address the issue under the equal protection clause but rather

178. *Id.* at 564.

179. *Id.* at 567.

180. *Id.* at 562.

181. See SAMAR, *supra* note 82, at 167–72.

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

183. *Id.* at 569.

184. *Id.* at 572.

185. *Id.* at 573.

186. *Id.*

under due process as it previously had done in *Bowers*. Noting that its earlier decision in *Bowers* led to discrimination in other areas, it feared only addressing the issue as an equal protection concern would allow states to continue making certain nonprocreative forms of sexual conduct criminal (which would also likely have a disparate impact on gay people), provided the conduct was prohibited for both opposite as well as same-sex couples.¹⁸⁷ In particular, the Court drew attention to an earlier case in which it had struck down as a violation of equal protection Colorado's attempt to restrict, by way of a state constitutional amendment, any effort to legislatively protect homosexuals, as a class, from discrimination for reasons of animus.¹⁸⁸ As a consequence, it would now make use of due process to correct its earlier wrong in a way that it hoped would also avoid future discrimination. As Kennedy stated:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons. When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. The central holding of *Bowers* has been brought in question by this case, and it should be addressed. Its continuance as precedent demeans the lives of homosexual persons.¹⁸⁹

Part of the ground for the Court's mixing of equality of treatment with due process was based on a recognition it

187. *Id.* at 575.

188. *Id.* at 574 (citing *Romer v. Evans*, 517 U.S. 620 (1996)).

189. *Id.*

attributed to its earlier decision in *Casey* that “matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”¹⁹⁰

From these arguments, it was a straightforward move for the Court to find that “[t]he rationale of *Bowers* does not withstand careful analysis.”¹⁹¹ It found that Justice Stevens’s analysis in *Bowers* should have controlled in that case, “and should control here.”¹⁹² “*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”¹⁹³

What is also interesting to note by the Court’s overruling of *Bowers* is that contrary to what was decided in *Casey*, no reliance interests in favor of protected rights would be offset. If anything, a lack of such reliance interests giving rise to fear of prosecution and affording a justification for discrimination would now be ended. This gave the case a focus on human dignity in which basic rights are presumably invested to protect.¹⁹⁴ If that is the case, then the kind of fundamental protection of freedom and well-being the case provided, which is most central to individual autonomy because no one else’s basic interest was involved, is the very kind of reason that should shore up the Court’s decision in *Lawrence* as a super-precedent capable of withstanding the breath of time.

Lastly, in looking at what constitutes ordered liberty or what may have deep roots in the nation’s history and tradition, equal protection concerns need to be considered to inform whether past prejudice and bias, and not a true liberty interest, was what was being previously secured. The *Bowers* Court, unattenuated by equal protection concerns, treated history and tradition to avoid any claim that intimate consensual sexual relations among consenting adults could ever qualify as a

190. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

191. *Id.* at 577.

192. *Id.* at 578.

193. *Id.*

194. *Id.* at 578; see also Samar, *supra* note 16, at 141–44 (arguing that human dignity supervenes on the recognition of human rights).

fundamental right. Overruling *Bowers v. Hardwick* allowed recognition of this fundamental basic right.

c. Same-Sex Marriage

Interestingly, it was Justice Scalia, in his dissent in *Lawrence v. Texas*, who pointed out the likelihood of a case coming forth to recognize same-sex marriage in the near future. At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”¹⁹⁵

Do not believe it. . . . Today’s opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned. If moral disapprobation of homosexual conduct is ‘no legitimate state interest’ for purposes of proscribing that conduct, and if, as the Court coos (casting aside all pretense of neutrality), ‘[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be one element in a personal bond that is more enduring,’ what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising ‘[t]he liberty protected by the Constitution?’¹⁹⁶

Justice Scalia’s prediction was on the mark, although obviously he was not pleased to express it because he would dissent from the Court’s later recognition of same-sex intimacy as a liberty interest protected by the due process clause of the Fourteenth Amendment in *Obergefell v. Hodges*.¹⁹⁷

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

196. *Id.* at 604–605 (Scalia, J., dissenting).

197. *Obergefell v. Hodges*, 576 U.S. 644 (2015).

In *Obergefell*, same-sex couples from four states: Michigan, Kentucky, Ohio, and Tennessee had sought the right to marry, although the law of these states had defined “marriage as a union between one man and one woman.” After winning in the district courts, the states appealed, and the Sixth Circuit reversed.¹⁹⁸ The questions before the Supreme Court were first, “whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex,” and second, “whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.”¹⁹⁹ The second question may be resolved without additional argument if the first question gets answered favorably.

Justice Kennedy, writing for the majority, began the opinion by stating that the Court “has long held the right to marry is protected by the Constitution.”²⁰⁰ He then further identified four principles and traditions that demonstrated the right to marry was a fundamental right.²⁰¹ First, he noted that the right to marry was “inherent in the concept of individual autonomy.”²⁰² Second, the Court stated that “the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”²⁰³ A third basis for believing the right to marry is fundamental is that

198. *Id.* at 653–54.

199. *Id.* at 656; see also U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof.”). The last phrase of the Full Faith and Credit clause, allowing Congress to proscribe the “Effect thereof,” gave it, in the Defense of Marriage Act, authority to allow states that banned same-sex marriage to not have to recognize an out-of-state same-sex marriage that was legal where it was performed. Defense of Marriage Act, Pub. L. No 104–199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. §7 (1997), 28 U.S.C. §1738C (1997)).

200. *Obergefell*, 576 U.S. at 664 (2015). In support of this proposition, the Court cited *Loving v. Virginia*, 388 U.S. 1, 12 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is “one of the vital personal rights essential to the orderly pursuit of happiness by free men.” The Court also cited *Zablocki v. Redhail*, 434 U.S. 374, 384 (1988), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. *Obergefell*, 576 U.S. at 664.

201. *Obergefell*, 576 U.S. at 665–69.

202. *Id.* at 665.

203. *Id.* at 666.

it “safeguards children and families and thus draws meaning from related rights of childbearing, procreation, and education.”²⁰⁴ “Without the recognition, stability, and predictability marriage offers, [the children of homosexual couples] suffer the stigma of knowing their families are somehow lesser.”²⁰⁵ Finally, the Court stated that its “cases and the Nation’s traditions make clear that marriage is a keystone of our social order.”²⁰⁶ From this vantage point of seeing marriage as a fundamental right under the due process clause of the Fourteenth Amendment, Justice Kennedy went on to reason:

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, 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. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects.²⁰⁷

Here, it is important to see how Justice Kennedy is using an equal protection analysis to shore-up a due process analysis that would place same-sex marriage within the fundamental framework that opposite-sex marriage already occupies. What Justice Kennedy wanted to avoid were past practices that may harbor forms of prejudice making it impossible for new groups to enjoy the benefits of what had been previously recognized. The approach of merely looking to what may have been recognized in the Nation’s long-standing traditions would thus not be enough, “[i]f rights were defined by who exercised them

204. *Id.* at 667.

205. *Id.* at 668.

206. *Id.* at 669.

207. *Id.* at 670.

in the past, [because] then received practices could serve as their own continued justification and new groups could not invoke rights once denied.”²⁰⁸ In essence, what Kennedy and the majority were acknowledging was a role for equal protection to inform due process and vice versa, even when the case was being decided primarily as a due process case. Kennedy writes:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances they 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.²⁰⁹

With this instruction in mind, the Court would go on to hold that “same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them.”²¹⁰ State laws which exclude same-sex couples from civil marriage by, e.g., defining marriage only between opposite sex are now invalid. It should be noted that in arriving at this holding, the Court overruled an earlier precedent that had dismissed a same-sex marriage challenge against the state of Minnesota “for want of a substantial federal question.”²¹¹

Beyond its obvious significance as a fundamental human rights case, *Obergefell* is important because it shows that liberty and equality are not totally independent, nor are they totally

208. *Id.* at 671 (distinguishing *Washington v. Glucksberg*, 521 U.S. 702 (1997), calling “for a ‘careful description’ of fundamental rights,” noting “while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy”).

209. *Obergefell*, 576 U.S. at 672.

210. *Id.* at 675.

211. *Baker v. Nelson*, 409 U.S. 810 (1971), overruled by *Obergefell*, 576 U.S. 644 (2015).

opposite. To have freedom, one needs well-being and the equality associated with it. This is true whether the freedom is achieved by virtue of one's status (as with marriage now being available to either same or opposite sex couples) or because the law assigns benefits based on status. But this also means that if the law is going to require a certain status to access a fundamental right, it is equally necessary that different groups should have access to that status and not be defined out of it, absent a compelling state interest to the contrary. Put another way, the well-being that provides the anchor for equal treatment must include a principle of equality to ensure equal access to liberty. Marriage is one such example of a fundamental basic right. What had begun in *Lawrence v. Texas* as a way for liberty and equality to work together should now become a pillar of constitutional interpretation going forward, as it was in *Obergefell v. Hodges*. Thus, the freedom that longstanding rights represent, and which was acknowledged in *Obergefell* with regard to marriage, should continue into the future, and not be limited by past bias, even less by prejudice against any particular group, but be available to all persons for whom this right would be fundamental. The Court's holding in *Obergefell* affirms the human rights proposition that human dignity comes about only when individual freedom, especially when closely connected to individual well-being, is not sacrificed to less than the most compelling of concerns.²¹² *Obergefell* is for these reasons truly a super-precedent.

VII. CONCLUSION

This article has sought to answer the stare decisis question of how to rank precedents to certify those cases which should be recognized to have long-lasting effect against other precedents. I have argued that the standard approaches of looking to acceptance, workability, reliance, and the ability to fit with other

212. *Obergefell*, 576 U.S. at 675 ("Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.").

precedents may be jointly helpful, even necessary, but not sufficient to ensure that human rights are being protected. People and politicians can often vary, if not alter, their views on the salience of past precedents, even when they appear to be of the greatest importance to other peoples' individual freedom and well-being, let alone their dignity. Therefore, more than mere acceptance is especially required.

I have argued, in addition to respecting the standard criteria for precedents, that an additional criterion be considered, which focuses specifically on human freedom and well-being. This additional criterion is necessary to protect the most basic liberties people have by virtue of being persons or human agents. Thus, it should be in terms of this additional criterion that any precedent likely to affect human dignity be examined to see if it actually services that need. The right of a woman to choose whether to continue a pregnancy prior to the fetus' viability, the right of any person to engage in private adult consensual intimate contact with another, and the right of two people of the same sex to marry are just three examples of recent cases worthy of being labeled super-precedents. *Stare decisis* needs to acknowledge and pay attention to these and other similar cases because they further the freedom and well-being that are associated with our most basic liberties and human dignity.