The Analytic Aposteriori and a New Understanding of Substantive Due Process that Is Exhibited in the Lives of Those Seeking to Marry Someone of the Same Sex

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THE ANALYTIC APOSTERIORI AND A NEW UNDERSTANDING OF SUBSTANTIVE DUE PROCESS THAT IS EXHIBITED IN THE LIVED EXPERIENCES OF THOSE SEEKING TO MARRY SOMEONE OF THE SAME SEX

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The purpose of this essay is to suggest a new direction in our thinking about substantive due process that recognizes human rights in the lived experience of our fellow human beings. The applicability of the approach, at least for equal protection purposes, was hinted at by the Supreme Court’s majority opinion in Romer v. Evans, but it has never been given full consideration.¹ There, Justice Kennedy noted the very real impact of a state

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¹ See Romer v. Evans, 517 U.S. 620, 624 (1996). Romer involved a constitutional challenge to Amendment 2 to the Colorado constitution that “prohibits all legislative, executive or judicial action at any level of state or local government designed to protect . . . homosexual persons or gays and lesbians.” Id. In his majority opinion, Justice Kennedy hinted at an approach that takes the meaning of precepts from our lived experience when he relied on “the authoritative construction of Colorado’s Supreme Court” as to what the amendment does. Id. at 626. According to the Colorado Supreme Court:

The immediate objective of Amendment 2 is, at minimum, to repeal existing statutes, regulations, ordinances, and policies of state and local entities that barred discrimination based on sexual orientation. . . . The “ultimate effect” of Amendment 2 is to prohibit any governmental entity from adopting similar, or more protective statutes, regulations, ordinances, or policies in the future unless the state constitution is first amended to permit such measures.

Id. at 626–27 (citing Evans v. Romer, 854 P.2d. 1270, 1284–85 & n.25 (Colo. 1993) (citations omitted). Justice Kennedy understood this construction to mean:

Sweeping and comprehensive is the change in legal status effected by this law. So much is evident from the ordinances that the Colorado Supreme Court declared would be void
constitutional amendment prohibiting antidiscrimination legislation against a group of people. What he did not say is how such an amendment might also impact the self-impression gays and lesbians have of themselves, although this would certainly be part of such an amendment’s impact. Moreover, legal and philosophical research in this area suggests that there may be more here than previously thought. While I do not hope to resolve every philosophical question at the heart of my legal analysis, I do intend to bring forth enough substance to answer the indeterminacy charge levied by certain Supreme Court justices and others concerning which rights should count as “fundamental” under substantive due process in part by looking at the impact such rights have on individual self-esteem.

I. THE PROBLEM

Substantive due process is the term applied when American courts use the due process clauses of the Fifth or Fourteenth Amendments to identify unenumerated general rights in the Constitution “that reserve to the individual the power to possess or to do certain things, despite the government’s desire to

by operation of Amendment 2. Homosexuals, by state decree, are put in a solitary class with respect to transactions and relations in both the private and governmental spheres. The amendment withdraws from homosexuals, but no others, specific legal protection from injuries caused by discrimination, and it forbids reinstatement of these laws and policies.

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Justice O’Connor’s concurring opinion in Lawrence v. Texas, 539 U.S. 558 (2003), similarly follows along this same line. In Lawrence, a Texas statute had made it a crime for members of the same sex to engage in “deviate sexual intercourse,” being defined as “any contact between any part of the genitals of one person and the mouth or anus of another person.” Id. at 563 (citing TEX. PENAL CODE ANN. § 21.06(a) (West 2003)). In her concurring opinion, Justice O’Connor notes, with respect to the lived experience of persons in the petitioners’ position, that

[T]he effect of the Texas’ sodomy law is not just limited to the threat of prosecution or consequence of conviction. Texas’ sodomy law brands all homosexuals as criminals, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else. Indeed, Texas itself has previously acknowledged the collateral effects of the law, stipulating in a prior challenge to this action that the law “legally sanctions discrimination against [homosexuals] in a variety of ways unrelated to the criminal law” . . . .

Id. at 581–82 (O’Connor, J., concurring) (quoting State v. Morales, 826 S.W.2d 201, 203 (Tex. App. 1992)). Justice Kennedy’s majority opinion also picks up on this theme when he states:

The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged. The petitioners will bear on their record the history of their criminal convictions. Just this Term we rejected various challenges to state laws requiring the registration of sex offenders.

Id. at 575 (majority opinion).
the contrary."² The Fifth Amendment provides in pertinent part: “No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .”³ The Fourteenth Amendment similarly provides in pertinent part: “No state shall make or enforce any law . . . [to] deprive any person of life, liberty, or property, without due process of law . . . .”⁴ In instances where the courts determine that due process requires more than compliance with a particular procedure, but actual recognition of rights to liberty (including sexual liberty) or property, the argument’s basis is substantive rather than procedural. Obvious examples of the former include the right of a parent to direct the education of her child,⁵ the rights of married⁶ and unmarried⁷ couples to have access to contraception, the right of minors to receive contraceptives,⁸ and the right of a woman to choose whether to continue a pregnancy.⁹ It also includes the right of two adults to engage in private consensual same-sex, noncommercial, sexual activity in the home.¹⁰

The right to contract under the clause has been substantially diminished from its initial beginnings when the Supreme Court first ruled that under the contract clause, incorporated against the states via the Fourteenth Amendment, a state could not limit the number of hours a baker could work.¹¹ That decision would eventually be disavowed when the Court subsequently upheld minimum wage legislation in the State of Washington.¹² This latter change in the property area represented a significant retraction from the Court’s earlier libertarian view of property rights to a more social welfare construction in which the political branches could offset market anomalies to further the public welfare.¹³ But it also raises the question: how resilient are rights recognized under the due process clauses from later erosion? More importantly, it

³ U.S. CONST. amend. V.
⁴ U.S. CONST. amend. XIV, § 1.
⁵ In Meyer v. Nebraska, Justice McReynolds, writing for the majority, stated that the “liberty” protected by the Due Process clause of the Fourteenth Amendment “[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” 262 U.S. 390, 399 (1923).
¹² West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).
¹³ Id. at 391–93.
bespeaks the difficulty that some justices have had in determining exactly what substantive rights the due process clause encompasses, if any. If the due process clause protects only “fundamental rights,” then the question arises: which rights are fundamental?\textsuperscript{14} Here, one finds the Court in search of a method to delineate the importance of various rights.\textsuperscript{15}

It might be noted that I have not drawn a substantive distinction between the Fifth Amendment and the Fourteenth Amendment. This is because the distinction is less concerned with which rights are present and more concerned with which level of government those rights might be asserted against. The Fifth Amendment restricts the federal government; it was adopted as part of the compromise to adopt the Constitution of 1787 to prevent an overarching central government from intruding on the individual prerogatives of the states and rights of the citizens.\textsuperscript{16} The Fourteenth Amendment applies against state governments; it was adopted after the end of the Civil War and after the adoption of the Thirteenth Amendment, because of, among other things, a recommendation of a Joint Committee of Congress that “extensively cataloged the abuses of civil rights in the former slave states” and recommended that “adequate security for future peace and safety . . . can only be found in such changes of the organic law as shall determine the civil rights and privileges of all citizens in all parts of the republic.”\textsuperscript{17}

Since its adoption, the Court has, in a piece meal fashion, “incorporated”\textsuperscript{18} various provisions of the Bill of Rights to apply against the states, most recently the Second Amendment.\textsuperscript{19} Interestingly, because the Court has sometimes enunciated new unenumerated rights under the Fourteenth Amendment, not previously recognized as applying against the federal government under the Fifth Amendment, the Court has also used the Fifth

\textsuperscript{14} In \textit{McDonald v. City of Chicago}, Justice Thomas provided that “fundamental” is “a term the Court has long struggled to define.” 130 S. Ct. 3020, 3061 (2010) (Thomas, J., concurring).

\textsuperscript{15} In his majority opinion in \textit{McDonald}, Justice Alito stated: “The relationship between the Bill of Rights’ guarantees and the States must be governed by a single, neutral principle.” \textit{Id.} at 3048. “[W]e have never held a provision of the Bill of Rights applies to the States only if there is a ‘popular consensus’ that the right is fundamental, and we see no basis for such a rule.” \textit{Id.} at 3049. In this particular case, the majority paid particular note to the \textit{Amici} who contended “that the right [right to keep and bear arms] is especially important for women and members of other groups that may be especially vulnerable to violent crime.” \textit{Id.}


\textsuperscript{17} \textit{Substantive Due Process}, supra note 2; \textit{McDonald}, 130 S. Ct. at 3071 (Thomas, J., concurring) (citation omitted).

\textsuperscript{18} The “incorporations doctrine” advocated by Justice Black in \textit{Gideon v. Wainwright} was a theory of “selective incorporation” in which the due process clause would be used to incorporate particular rights against the states contained in the first eight amendments of the Bill of Rights as the Court would find them to be “fundamental.” 372 U.S. 335, 341 (1963).

\textsuperscript{19} \textit{See McDonald}, 130 S. Ct. at 3050.
Amendment in so-called “reverse incorporation” to ensure those rights also restricted the federal government, a needed result if the right is to be thought truly fundamental.\footnote{For example, in \textit{Bolling v. Sharpe}, a companion case to \textit{Brown v. Board of Education}, 347 U.S. 483 (1954), the Court reverse incorporated its desegregation rule to apply to the schools of the District of Columbia. 347 U.S. 497 (1954).}

Having identified the Court’s long-standing search for a theory of which rights are fundamental, the question we must now ask concerns how to identify those rights. One standard approach is to ask if the right “is fundamental to our scheme of ordered liberty, or . . . ‘deeply rooted in this Nation’s history and tradition.’”\footnote{\textit{McDonald}, 130 S. Ct. at 3036 (quoting \textit{Duncan v. Louisiana}, 391 U.S. 145, 149 (1968); \textit{Washington v. Glucksberg}, 521 U.S. 702, 721 (1997)); \textit{see also} \textit{Roe v. Wade}, 410 U.S. 113, 152 (1973) (quoting \textit{Palko v. Connecticut}, 302 U.S. 319, 325 (1937)) (“These decisions make it clear that only personal rights that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty’ are included in this guarantee of personal privacy.”).} Conservative justices, however, criticize some of the Court’s recent decisions for adopting “a far less measurable range of criteria” to encompass a “liberty of the person both in its special and its more transcendent dimensions.”\footnote{\textit{McDonald}, 130 S. Ct. at 3062 (Thomas, J., concurring) (citing \textit{Lawrence v. Texas}, 539 U.S. 558, 562 (2002)).} The controversy begs the question of whether the Court has determined an approach to discover the liberties protected under the due process clauses. Put another way, what is the concept of ordered liberty and what is it that is sought when asking whether a claimed right is “deeply rooted in this Nation’s history and tradition?”

In \textit{Palko v. Connecticut},\footnote{\textit{Palko}, 302 U.S. at 319–22.} the defendant claimed that a sentence of death for first degree murder, following a retrial after the state appealed his conviction for second degree murder, violated the due process clause of the Fourteenth Amendment by twice putting him in jeopardy of life or limb.\footnote{\textit{Id.}} In affirming the decision of the Supreme Court of Errors of the State of Connecticut, which had affirmed the conviction, Justice Cardozo referenced the different provisions of the Bill of Rights.\footnote{At this point, the Bill of Rights had not been firmly deemed fundamental. The Court stated the following: The Fifth Amendment provides, among other things, that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment or indictment of a grand jury. This court has held that, in prosecutions by a state, presentment or indictment by a grand jury may give way to informations at the instance of a public officer. The Fifth Amendment provides also that no person shall be compelled in any criminal case to be a witness against himself. This court has said that, in prosecutions by a state, the exemption will fail if the state elects to end it. The Sixth Amendment calls for a jury trial in criminal cases and the Seventh for a jury trial in civil cases at common law where the}
background organizing principle might still be identified from the traditions and conscience of the people:

The line of division may seem to be wavering and broken if there is a hasty catalogue of the cases on the one side and the other. Reflection and analysis will induce a different view. There emerges the perception of a rationalizing principle which gives to discrete instances a proper order and coherence. The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”

The passage suggests that Justice Cardozo was of two minds with regard to the Due Process Clause of the Fourteenth Amendment. On the one hand, he seems to be suggesting that what is essential to the scheme of ordered liberty is how we identify those rights, which the due process clause protects. On the other hand, because he fails to be more specific about how essentiality is determined, he insomuch accepts that many important rights, like the right to trial by jury, will not be considered essential. Still, he was insightful in first giving recognition to the fact that such a right would have to be at “the very essence of a scheme of ordered liberty.” And, second, that to be ranked fundamental, such a right must be connected to “a principle of justice . . . rooted in the traditions and conscience of our people.”

The debate that Justice Cardozo joined posited those justices, like himself, who believed in “selective incorporation” against those justices, like Black and Douglas, who supported “total incorporation.” Justice Frankfurter took a middle position. He believed due process prohibits practices that “offend those canons of decency and fairness which express the notions of justice of English-speaking peoples.” The debate on the Court ranged over three separate issues: first, over history and whether the framers of the Fourteenth Amendment intended the clauses of the First Amendment to apply to the states. This court has ruled that consistently with those amendments trial by jury may be modified by a state or abolished altogether . . . .

On the other hand, the due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by the Congress or the like freedom of the press, or the free exercise of religion, or the right of peaceful assembly, without which speech would be unduly trampled, or the right of one accused of a crime to the benefit of counsel.

Id. at 323–24 (citations omitted).

26. Id. at 325 (citations omitted).

27. Id. (emphasis added) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Brown v. Mississippi, 297 U.S. 278, 285 (1936)) (citing Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).


29. Id. at 67 (Frankfurter, J., concurring).
Amendment intended for it to apply all the Bill of Rights against the states; second, over federalism and whether “[a]pplying the Bill of Rights to the states imposes a substantial set of restrictions on state and local governments”; and third, over judicial restraint in furtherance of democracy in judging whether “selective incorporation gives judges far too much discretion in deciding what rights are fundamental.”30 Though I am not here considering the question of incorporation, the debate is relevant to uncovering the Court’s answer to the question of what kinds of rights are brought under the substantive due process clauses: the answer is those rights that are fundamental to our scheme of ordered liberty.

Relying on aspects of this debate, Justice Thomas was alone among recent justices in stating his view that the “Establishment Clause is a federalism provision, which for this reason, resists incorporation.”31 Under Justice Thomas’ view, if the Establishment Clause gives rise to a right against government establishment of religion, it is not a fundamental right because, by its language, it would seem to apply only against the federal government establishing religion, not against the state governments doing so.32

Previously, the Court had decided Washington v. Glucksberg,33 a case concerning whether a state statute prohibiting physician-assisted suicide offends the substantive due process clause of the Fourteenth Amendment. In holding that it does not, Chief Justice Rehnquist wrote:

We begin, as we do in all due process cases, by examining our Nation’s history, legal traditions, and practices. In almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States’ assisted-suicide bans are not innovations. Rather, they are longstanding expressions of the States’ commitment to the protection and preservation of all human life. Indeed, opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.34

What the Court seems to be suggesting here is that an indication of the status of a right is whether there has been a long standing and perhaps wide ranging

32. See id.
34. Id. at 710–11 (citing Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261, 280 (1990) (“[T]he States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.”); Stanford v. Kentucky, 492 U.S. 361, 373 (1989) (“[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws . . . ”)).
acceptance of the right, at least among Western democracies.\textsuperscript{35} Otherwise, it is not fundamental, even though it is recognized in some states, if other states are free to make laws that prohibit what the right protects and it is not generally recognized among Western democracies. Of course, the question remains how to ascertain whether there is a long-standing and perhaps wide-ranging acceptance of the right. Does one look to history, some widely understood view of what the right encompasses, perhaps by some form of conceptual analysis, or to still something else?

The problem is that no specific criteria emerge from these cases for determining whether a right is fundamental or not. This leaves recognition of particular unenumerated substantive due process rights open to various Justices’ interpretations—for example, Justice Scalia theorizing that they only exist if they are what the framers intended when they wrote this part of the Constitution.\textsuperscript{36} Or, from a different theoretical direction it would not be hard to imagine Justice Thomas impliedly asking—though he was only at the time talking about the Establishment Clause—if applying a certain right against the states would seriously offend other constitutional provisions. And, of course, if one approaches the matter empirically, to ask whether there has there been a long-standing philosophical, legal, or cultural opposition against this right, then we would be at a loss to explain, from a judicial perspective, the Court’s current acceptance of a fundamental right to contraception, abortion, etc. Of interest too is that these potential criteria should be empirical as opposed to being based on either some hierarchical moral system from which the right might derive, or even just some searching analysis of the concept of substantive due process.

II. THE DEBATE

The current debate over what rights are found within (or fall under) substantive due process is amply reflected in a recent set of judicial opinions from Justices Scalia and Stevens,\textsuperscript{37} as well as in scholarly writings by Gordon S. Wood, Laurence H. Tribe, Mary Ann Glendon, and Ronald Dworkin.\textsuperscript{38} For purposes of this discussion, I will be focusing primarily on the writings of Scalia and Dworkin.

What does the Constitution mean and how is it to be interpreted? In \textit{A Matter of Interpretation: Federal Courts and the Law}, Justice Scalia writes:

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\textsuperscript{35} See id.

\textsuperscript{36} \textsc{Antonin Scalia}, \textit{A Matter of Interpretation: Federal Courts and the Law} 45 (Amy Gutmann ed., 1997).

\textsuperscript{37} See, e.g., McDonald v. City of Chicago, 130 S. Ct. 3020, 3050–88 (2010) (Scalia, J., concurring); \textit{id}. at 3088–120 (Stevens, J., dissenting).

\textsuperscript{38} See, e.g., \textsc{Scalia}, \textit{supra} note 36, at 47.
If the Courts are free to write the Constitution anew, they will, by God, write it the way the majority wants; the appointment and confirmation process will see to that. This, of course, is the end of the Bill of Rights, whose meaning will be committed to the very body it was meant to protect against: the majority. By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.39

Justice Scalia describes the current debate over interpretation not as centered on the question of

Framers’ intent and objective meaning, but rather that between original meaning (whether derived from Framers’ intent or not) and current meaning. The ascendant school of constitutional interpretation affirms the existence of what is called The Living Constitution, a body of law that (unlike normal statutes) grows and changes from age to age, in order to meet the needs of a changing society. And it is the judges who determine those needs and “find” that changing law.40

According to Justice Scalia, The Living Constitution school of thought incorporates “a common-law way of making law, and not the way of construing a democratically adopted text.”41 In Justice Scalia’s view, the Constitution is best understood not as living but as enduring.42 And it is the attempt to change from this understanding that is its primary problem.

[I]f the people come to believe that the Constitution is not a text like other texts; that it means, not what it says or what it was understood to mean, but what it should mean, in light of the “evolving standards of decency that mark the progress of an enduring society”—well, then, they will look for qualifications other than impartiality, judgment, and lawyerly acumen in those who they select to interpret it. More specifically, they will look for judges who agree with them as to what the evolving standards have evolved to; who agree with them as to what the Constitution ought to be.43

40. SCALIA, supra note 36, at 38.
41. Id. at 40.
42. In First Things magazine, Justice Scalia wrote: “[T]he Constitution that I interpret and apply is not living but dead—or, as I prefer to put it, enduring. It means today not what current society (much less the Court) thinks it ought to mean, but what it meant when it was adopted.” Antonin Scalia, God’s Justice and Ours, 123 FIRST THINGS 17, 17 (2002), available at http://www.firstthings.com/article/2007/01/gods-justice-and-ours-32.
43. SCALIA, supra note 36, at 46–47.
Justice Scalia wants in the name of democratic principle to essentially freeze constitutional language to only what it meant at its origination and was understood to encompass by those who wrote it. In this way, he believes the Bill of Rights endures to protect rights—but only those rights—that would have been recognized at the time of its adoption. Of course, this would mean that the right to marry someone of a different race could not be a fundamental right, notwithstanding the Court’s decision in *Loving v. Virginia*. Questions concerning the constitutionality of the death penalty, a woman’s right to choose whether to continue a pregnancy, the right to marry someone of the same sex, and to receive an education or health care would be resolved by appeal to the expectations at the time the Bill of Rights was adopted. Similarly, whether limitations could alter previously understood rights to property and freedom of religion would also be based on the understandings of the Framers at the time of adoption. I do not mean to suggest that Justice Scalia would not consider any cases since that time, but the gloss by which new rights would be discovered or old rights extended would be limited by the expectations of the Framers.

Professor Ronald Dworkin challenges Justice Scalia’s view. Dworkin notes an important distinction between two forms of interpretativism, both of which comport with original intent. The first “‘semantic’ originalism... insists that the rights-granting clauses be read to say what those who made them intended to say, and [the second] ‘expectation’ originalism... holds that these clauses should be understood to have the consequences that those who made them expected them to have.” In other words, when looking at constitutional provisions, including those contained in the Bill of Rights, one notes that sometimes the original language is very *concrete*; other times, like with the words “cruel and unusual” in the Eighth Amendment, it is *abstract*. For instance, “the various provisions for criminal and civil process in the Fourth, Fifth, Sixth, and Seventh Amendments do not speak of ‘fair’, or ‘due’ [process] or ‘unusual’ procedures [as in the later part of the Fourth, Eighth, and Fourteenth Amendments] but lay down very concrete provisions,” such as the requirement that a warrant be issued based on probable cause before there can be a search of “persons, houses, papers or effects.” Similarly, concrete language is used “for the same offense [not] to be twice put in jeopardy of life or limb,” the guarantee of a “right to a speedy and public trial, by an impartial jury,” to confront witnesses against oneself, to “compulsory

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46. *Id.* at 121–22
47. U.S. CONST. amend. V.
48. U.S. CONST. amend. VI.
49. *Id.*
process,"50 and the right to trial by jury in a civil matter “where the value in controversy shall exceed twenty dollars.”51 Dworkin believes the choice of language signals an intent by the Framers that some provisions should hold fast over time while others should be subject to the changing moral sentiments of the society.52

Dworkin’s analysis brings us to the conclusion that “expectation originalism” is not a morally neutral view in constitutional interpretation, but a present desire to limit the rights founded, for example, under substantive due process to only those accepted at a much earlier time.53 This may have the benefit of guaranteeing previously accepted rights, but only at the cost of ignoring, what the Framers apparently did recognize, that the evolution of society’s understandings in certain areas ought to be given constitutional protection.54 Dworkin’s answer to Scalia’s concern that this would be the end of the Bill of Rights is: “History disagrees. Justices whose methods seem closest to the moral reading of the Constitution have been champions, not enemies, of individual rights . . . .”55 Justice Scalia’s only response to Dworkin’s history argument is to assert: “Well, there is not really much history to go on,” probably “only forty years.”56 Moreover, he may very well disagree with those whose rights recent history has recognized57 as itself a limitation on those whose rights he believes ought to be recognized—perhaps the rights of the unborn58 or those whose religious beliefs are offended by seemingly neutral policies at, for example, public universities requiring all recognized groups,
including religious groups, to grant equal access to all students who want to join. 59

III. EPISTEMIC AND LOGICAL IMPLICATIONS OF THE DEBATE

Philosophers draw two types of distinctions applicable to human understandings: the first is a conceptual/logical distinction concerning how the truth of a proposition is determined; the second is an epistemic distinction concerning how we go about justifying a proposition as true. The first distinction separates propositions that are analytic from those that are synthetic. The second separates how the truth of propositions is determined, either from empirical experience or outside of empirical experience.

Analytic propositions are true by virtue of their meanings alone. The principle of identity is what confirms them. 60 The idea is often stated that the meaning of the predicate term is encompassed within the meaning of the subject term. 61 An example of an analytic proposition is: “All squares are four equal sided figures.” The proposition is true given our definition of a square. Synthetic propositions are not true by virtue of their meanings alone. 62 The truth (or in this example falsity) of the statement “all two-legged creatures are mammals” cannot be determined from the meaning of its subject and predicate terms alone. Outside information is required, namely, information from biology and zoology. 63

If the truth of a proposition is justified by an appeal to experience we say the justification is a posteriori. 64 An example of an a posteriori proposition is: “The Willis Tower is the tallest building in Chicago.” Empirically measuring the height of the Willis Tower and comparing that measurement to the height of other buildings in Chicago determines its truth. In contrast, logical and mathematical propositions are not justified by experience. 65 The justification of these propositions is outside of experience, in which case we say the justification is a priori. 66 An example of an a priori proposition is: “Nothing can both be and not be in the same way at the same time.” What justifies the truth of this proposition is that we cannot think it false.

What is of interest to judgment in general is what happens when we cross the analytic-synthetic distinction with the a priori-a posteriori distinction.

61. Id.
62. See id. at 48–49.
63. See id.
64. See id. at 42–43.
65. Id. at 52.
66. KANT, supra note 60, at 52.
Immanuel Kant was the first to do this, while trying to resolve David Hume’s problem of trying to connect our many separate distinct experiences in personal identity. Kant recognized three interesting outcomes in crossing the logical distinction with the epistemic one. Some propositions were analytic-a priori like “all bachelors are unmarried men” because the meaning of the predicate was contained in the subject and the truth of the proposition was thus determined without appeal to empirical experience. Some others were synthetic-a posteriori. For example, eventually science showed that “water is H₂O.” At least at the time water was first chemically analyzed, this would have been a synthetic-a posteriori proposition. The predicate “is H₂O” would not have been part of the original definition of water because until that time it would not have been known. Through much of history and even today in many places, a parent might tell their child to go fetch some water without any understanding of its chemical nature. The proposition, “water is H₂O,” was justified by scientists’ discoveries in their laboratories while doing a chemical analysis. So far, this seems pretty non-controversial.

What Kant proposed was that certain propositions might be neither analytic-a priori nor synthetic-a posteriori but, instead, synthetic-a priori. Here, the predicate would not be contained in the subject; nevertheless its truth would be established outside of experience. Two examples Kant used were: “7 + 5 = 12” and “[t]he shortest distance between two points is a straight line.” In the former case, 12 is not contained in 7, 5, or our understanding of “+”. That is to say, if we were able to count only up to 10, we could understand the placement on the number line of 5 and 7. We also could presumably understand “+”, at least insofar as we could add numbers whose sum was 10 or less, without suggesting that 12 be contained in our understanding of any of these prior terms. In the latter case, the idea of a straight line is not contained in “the shortest distance between two points.” On a sphere, the shortest distance would be a geodesic. However, Kant

67. David Hume was an empiricist who believed all our knowledge of matters of fact arose from impressions. David Hume, A Treatise of Human Nature 4 (L.A. Selby-Bigge ed., Oxford Univ. Press 2d ed. 1978) (1740). However, when Hume tried to account for the cause/effect relation, he had no impression of the force or necessary connection. Id. at 77. This led him to conjecture that the cause/effect relation was imposed on experience by habit of the mind. Id. at 93. However, when he then turned his attention to how the mind connects its many discrete impressions, he had no impression that would allow him to account for personal identity. Id. at 635–36. In the Appendix to the Treatise on Human Nature, Hume confesses accounting for personal identity may be a problem for “[o]thers, perhaps, or myself, upon more mature reflection.” Id. at 636.

68. KANT, supra note 60, at 52–53.

69. Id.

70. Id. at 53.

71. Id.
thought that no propositions would satisfy the analytic-a posteriori crossover, “[f]or, before appealing to experience, I have already in the concept . . . all the conditions required for my judgment.”

Because I believe Kant may be wrong on this last point, I will propose an analytic-a posteriori approach to further our understanding of judgments, without denying what may already be understood about the crossover of the logical and epistemic, or how it might apply to unraveling concerns of substantive due process. I do not intend disagreement with the more synthetic-a priori Kantian approach I have taken elsewhere; instead, I intend to show that a bottom-up (analytic-a posteriori) approach that meets at the same point as my earlier top-down (synthetic-a priori) approach provides even greater persuasive support for the validity of a rights claim capable of satisfying both positions.

Before beginning that process, however, I should fully explain Kant’s understanding of the synthetic-a priori in respect to moral philosophy because it is relevant to the normative language of law. The other approaches, such as the analytic-a priori or the synthetic-a posteriori, can also be used to identify the legal/normative meanings of already existing terms or to note what norms society currently attaches to an existing legal doctrine such as due process. But these approaches are inherently non-normative in that they merely describe existing understandings, even if some may be subtle and complex.

Here, it is important to recognize that Kant took “the highest principles and fundamental concepts of morality” to be synthetic-a priori because, although they do not lay at the foundation of their precepts the concepts of pleasure and pain, of the desires and inclinations, etc., all of which are of empirical origin, yet in the construction of a system of pure morality these empirical concepts must necessarily be brought into the concept of duty, as representing either a hindrance, which we have to overcome, or an allurement, which must not be made into a motive.

That is to say these motives must be brought under the authority of the categorical imperative, as a pure concept of our reason, before they can become a basis for action. Although I do not intend to follow a synthetic-a

72. Id. at 49.


74. KANT, supra note 60, at 61.

75. Here, the idea of the categorical imperative is a synthetic-a priori idea for it derives out of what we mean by a perfectly good will, which acts independent of desire or concern for particular outcomes but just because doing the act is right. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 9–10 (Lewis W. Beck trans., Bobbs-Merril Co. 1959) (1785). Still, the idea of a perfectly good will cannot be found in any analysis of the concepts of good or
priori approach in this article (I have done so elsewhere\textsuperscript{76}), I point out its significance to ethics because discussions of substantive due process rights is often thought to presuppose—though not necessarily—rights that are part of an already existing, longstanding moral tradition, and all the aforementioned four approaches can be utilized to attempt an unraveling of such tradition.\textsuperscript{77}

As previously stated, Kant doubted the value of an analytic-a posteriori proposition.\textsuperscript{78} Kant's concern was that before any appeal to experience would be made, all conditions for the judgment would have been satisfied by an analysis of the concept.\textsuperscript{79} In an article, Analytic A Posteriori Propositions, Professor Virgil C. Aldrich explains:

Consider the proposition, 'This is white', where he who makes this statement holds up in full view and broad daylight, say, a white candle. His companion sees what is being talked about. Well, we agreed above that the subject of a proposition is that about which something is said. In the case then of this bedrock sort of singular proposition, the subject is not a concept [to be analyzed] but something that both speaker and listener are looking at. It is a precept. Even if neither of them know that what they are looking at is a candle, which would be true if neither had heard about or experienced candles before, this would not prevent them from understanding perfectly the proposition, 'This is white'.\textsuperscript{80}

will but merges to capture what it is that determines a situation to be morally right. See id. at 13–14, 16–18. I often use two examples with students. The first is of two friends playing when one reaches for a gun he believes to be a toy and ends up shooting his friend to death. The other is of two people fighting when one reaches for a gun he believes to be real but because it is a toy only shoots water in the other’s face. Almost instantly, everyone agrees that although the former has the graver consequence, it is the latter that is fundamentally wrongful. And this is not found by an analysis of the concepts or situation as such but by how the concepts come together to prove us a notion of a good intention.

\textsuperscript{76} Samar, supra note 73.

\textsuperscript{77} Although Kant will later in the Foundations of the Metaphysics of Morals try to establish how the imperative might be proved provided we can not disavow freedom of the will, earlier he notes that even if it cannot be proved, it is central to our idea of morality as something real. See KANT, supra note 75, at 63–64. As he puts it:

How such a synthetical practical a priori proposition is possible and why it is necessary is a problem whose solution does not lie within the boundaries of the metaphysics of morals. Moreover, we have not here affirmed its truth, and even less professed to command a proof of it. We showed only through the universally received concept of morals that autonomy of the will is unavoidably connected with it, or rather that it is its foundation. Whoever, therefore, holds morality to be something real and not a chimerical idea without truth must also concede its principle which has been adduced here.

Id.  

\textsuperscript{78} See supra notes 68–72 and accompanying text.

\textsuperscript{79} See KANT, supra note 60, at 49.

\textsuperscript{80} Virgil C. Aldrich, Analytic A Posteriori Propositions, 28 ANALYSIS 200, 200 (1968).
What Professor Aldrich is saying might perhaps be better understood if we think of how we come to identify a painting, photograph, or other image with a particular experience, perhaps some past memory or present sensation of a particular person, landscape, or thing. Here, the experience provides the data that gives rise to our recognition in viewing the image. Our recognition arises because the image contains elements in its depiction that correlate with the data of our experience. Thus, the recognition is analytic but, at the same time, a posteriori because it derives from our experience. It appears, at least for empirical propositions, analytic-a posteriori knowledge is possible. However, it remains a question whether this could extend to necessary propositions, although the recognition of the very process itself might constitute, at least, a necessary assertoric true proposition. I believe Professor Aldrich had this in mind when he goes on to say:

In short, having a concept of the subject of such singular propositions is not necessary to their intelligibility or to their completeness, as long as their subjects are clearly in view—or as long as the communicants see that of which the predicate is predicated. They would be incomplete for one who hears the statements and does not see what is being talked about, since in that circumstance they virtually have no subjects.

Some may question whether the mind itself, in its recognition of the truth of the proposition, plays an independent role such as making the proposition appear analytic. I disagree because the mind also plays a perhaps similar role in the recognition of analytic-a priori propositions when it understands the meaning of the subject term.

In similar fashion, one can envision many subjects, including life situations, in which the communicants can discern what is being predicated of the subject without specific conceptual analysis of the subject. If that is the case, then perhaps many of our precepts of what life includes can be identified by how they correlate with the lived experiences we associate with them. And if this is true, then perhaps our idea of what might make a right fundamental for substantive due process purposes also can be gleaned from how the object of the right is experienced by those most affected by it.
Herein lies how I see these four types of propositional judgments lining up to unravel various meanings to substantive due process. The synthetic-*a posteriori* proposition fits the scheme of one who seeks to find in the nature of things a real connection, which is then assigned moral priority because it contributes to the natural order, the so-called Natural Law position. Justice Clarence Thomas’ view of law, and specifically substantive due process, seems to follow this pathway, although perhaps at other times might seem a bit more Kantian.85

I understand the crucial part of Aldrich’s argument to run as follows: The subject of P [propositions of this sort] is not a concept but a ‘precept’, ‘something that both speaker and listener are looking at’. P is about ‘its subject term, and this is the shown thing, not a verbal term appearing in the sentence and expressing a concept’. The predicate however is ‘a verbal term “white”’ and what it ‘perceptibly denotes’ is contained or included in the subject. Thus P is analytic. ‘But does this mean that it is necessarily true? Certainly not in the sense that the candle has to be white. But that it is white, there and then, is necessarily true, *ex vi terminorum* of “This is white” used in these circumstances.


Henze wants to say that propositions of the P-type, whose subject is the word “this”, should not be construed as precepts versus propositions. *Id.* In this he seeks to limit Ludwig Wittgenstein’s statement that “'[t]he demonstrative ‘this’ can never be without a bearer’” to be just a “grammatical (logical) fact.” *Id.* (quoting LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 21 (G. E. M. Anscombe trans., 3d ed. 1958)). I, however, believe Henze is being too shortsighted in claiming that “this is white” is true because “this” is used in these circumstances and would not necessarily be true in other circumstances. As I try to show with my painting (image) example, I believe much if not all of human recognition operates in this way. In his reference to Wittgenstein, he ignores what Wittengenstein went on to say:

> It might be said: “so long as there is a *this*, the word ‘this’ has a meaning too, whether *this* is simple or complex.”—But that does not make the word into a name. On the contrary: for a name is not used with, but only explained by means of, the gesture of pointing. WITTGENSTEIN, supra note 84, at 21. Wittgenstein suggests that there is no thing the “this” need refer to, but when it does refer to a thing, as when held up as Aldrich does when he says “this is white”, it *has to be* white for the statement to be true.


Thomas replies in his dissent that if racial preferences of the kind the law school employs will be illegal in 25 years, they are “illegal now,” for the Constitution, if it means anything, “means the same thing today as it will in 300 months.” For Thomas, what is at stake is the question of whether the Constitution has an unchanging meaning to which we are obliged to adhere, or whether, on the other hand, the Constitution is a dynamic, living document that adjusts to circumstances and the emergence of problems the founders never contemplated.
In contrast, the synthetic-\textit{a priori} and analytic-\textit{a posteriori} seems more related to a living constitution in which abstract language allows for moral growth, which in turn furthers our understanding of important constitutional provisions.\footnote{1} Justice Stevens seems to have been more in this camp, although his often-pragmatic approach makes it unclear whether he is always starting from broad concepts of liberty and equality or sometimes from a narrower view of the implications of various decisions on different people’s lives.\footnote{2}


\footnote{1}{See Dworkin, supra note 45, at 120.}


\begin{quote}
[In his concurring opinion in \textit{Thornburg}, Justice Stevens chastised Justice White for failing to recognize that a woman must have control over her own body [a form of autonomy] if she is to be free to define and pursue her ends in life:

If Justice White were correct in regarding the postconception decision of the question whether to bear a child as a relatively unimportant, second-class sort of interest, I might agree with his view that the individual should be required to conform her decision to the will of the majority. But if that decision commands the respect that is traditionally associated with the “sensitive areas of liberty” protected by the Constitution, . . . no individual should be compelled to surrender the freedom to make that decision for herself simply because her “value preferences” are not shared by the majority.

\textit{Id.} (citing \textit{Thornburgh v. American College of Obstetricians and Gynecologists}, 476 U.S. 747, 777 (1986) (Stevens, J., concurring)).

But Fisher’s comments are not confined to any particular justice. Later in that same piece, Fisher remarks that:

In the eight years between the original decision in \textit{Griswold} \textit{v. Connecticut} and the explosive ruling in \textit{Roe} \textit{v. Wade}, the focus of the Court’s concern gradually shifted from the protection of privacy in the traditional sense of “freedom from surveillance or disclosure of intimate affairs” to the protection of autonomy, that is, the right to make certain sorts of choices free from private or governmental interference. In his opinion for the Court in \textit{Carey v. Population Services International}, Justice Brennan explained the change in orientation as follows:

\textit{Griswold} did state that by “forbidding the use of contraceptives rather than regulating their manufacture or sale,” the Connecticut statute . . . had “a maximum destructive impact” on privacy rights. This intrusion into “the sacred precincts of marital bedrooms” made the statute particularly “repulsive.” But subsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on that element. \textit{Eisenstadt v. Baird}, 405 U.S. 438 (1972), holding that the protection is not limited to married couples, characterized the protected right as the “decision whether to bear or beget a child.” Similarly, \textit{Roe v. Wade}, 410 U.S. 113 (1973), held that the Constitution protects “a woman’s decision whether or not to terminate a pregnancy.” These decisions put \textit{Griswold} in proper perspective. \textit{Griswold} may no longer be read as holding only that a State may not
The third approach, the analytic-\textit{a priori}, fits the idea that the Constitution is a dead (or enduring) document whose meaning is discerned by strictly asking what expectation the Framers would have had for its various provisions.\textsuperscript{88} This is the view of Justice Scalia\textsuperscript{89} and exposes why historicism is so central to his analysis of constitutional texts. The fourth approach, the analytic-\textit{a posteriori}, is a view that I believe is held at times by Justice Kennedy and former Justices Stevens and O’Connor, insofar as they attempt to fit constitutional language to the real experiences of actual human beings.\textsuperscript{90} It is the approach that focuses on the \textit{lived experiences} of real people and the way those experiences fundamentally affect them.\textsuperscript{91} It essentially is a phenomenological approach because it focuses on what our experiences teach us.\textsuperscript{92} My concern in also claiming it to also be analytically aposteriori is to undercut any possible criticism that such phenomenological approaches might arise from a misunderstanding of what is before us.

As stated above, I am not seeking to question the synthetic-\textit{a priori} approach, but rather suggest that approach is made even more persuasive when its outcome is consistent with the lived experiences of actual human beings in more than a synthetic way. Indeed, the persuasiveness of this combined approach is illustrated from the analytic-\textit{a posteriori} side in a recent district court opinion addressing the question of whether there is a substantive due process right to same-sex marriage. In the next section, I will be presuming that one can derive from even a minimally robust notion of liberty a justification for same-sex marriage, so that the focus there can be on whether same-sex marriage might also be found from our experience of marriage today.

\section*{IV. The Lived Experience of Same-Sex Couples}

The constitutionality of bans on same-sex marriage provides an excellent opportunity to examine the interface of the synthetic-\textit{a priori} with the analytic-\textit{a posteriori}. Our understanding of marriage has so changed over the centuries that any attempt to limit it to a particular understanding from a particular time—the so-called “historicist position”—will be inadequate.\textsuperscript{93} The same problem does not arise for the synthetic-\textit{a priori}, since there the questions are

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\textsuperscript{88}. See Scalia, \textit{supra} note 36.
\textsuperscript{89}. See Scalia, \textit{supra} note 36, at 47; Dworkin, \textit{supra} note 44, at 119.
\textsuperscript{91}. \textit{Id}.
\textsuperscript{92}. \textit{Id}.
\textsuperscript{93}. See Scalia, \textit{supra} note 36, at 36, 47.
not analytic; they are not limited to what marriage means nor to any set of empirical conditions that some may regularly associate with marriage, such as procreation and child rearing. 94  To the contrary, the synthetic-a priori would search for an understanding of the conditions that make it possible for marriage to operate at all. 95  So, I begin with the synthetic-a priori approach to see if what I subsequently find from the analytic-a posteriori approach reaches the same conclusion.

Here, questions concerning the autonomy of the person, and the possibility that there could exist a capacity by which a person would be able to make choices that are mutually beneficial, all become particularly relevant. The investigation of these questions would not limit itself to a mere analysis of the meaning of specific words like “marriage,” but would also take into account the real life conditions necessary to claim one is married. Obviously, some of these are legal, but others are internal to the persons. 96  They are the frameworks that make marriage valuable to them and why most would treat marriage to elicit moral significance regardless of the particular moralistic aspects often associated with religious teaching. This moral significance encompasses Kant’s condition that maxims we set for ourselves be capable of being applied universally irrespective of any consequences to, or aspirations or sentiments of, the person. 97

But the moral significance of marriage is not limited to its ability to be a universal moral standard, for the moral significance of marriage, according to another moral theorist, Alan Gewirth, must also provide a material connection to human welfare or well-being. 98  This proposition derives from the fact that

94. See Wittgenstein, supra note 84.
95. See Kant, supra note 60, at 52–53.
97. In Foundations of the Metaphysics of Morals, Kant writes:
Thus the moral worth of an action does not lie in the effect which is expected from it or in any principle of action which has to borrow its motive from this expected effect. For all these effects (agreeableness of my own condition, indeed even the promotion of the happiness of others) could be brought about through other causes and would not require the will of a rational being, while the highest and unconditional good can be found only in such a will. Therefore, the pre-eminent good can consist only in the conception of the law in itself (which can be present only in a rational being) so far as this conception and not the hoped-for effect is the determining ground of the will.
Kant, supra note 75, at 20.
98. In Reason and Morality, Alan Gewirth states:
Although agents often identify their well-being with their possessing certain particular goods, in such cases the well-being characterizes them not simply as agents but in some more restricted capacity. It is also true that in some respects no sharp line can be drawn between the general capabilities and the particular goods because the former are exercised for the sake of the latter; and an agent who seldom or never achieved his particular
all human action is purposive. 99 Thus, when an action is undertaken voluntarily, such as entering into a marriage, it must be understood to be done for some purpose that the agent takes to be good or has some positive regard for doing. What transforms the agent’s particular purpose into a moral good is the Kantian requirement that it must at the same time be an action that all humans could engage without contradiction. 100 This account is synthetic and not analytic because the purposes are not founded in any definition or image of the agent or his action, but in what motivates a person to act. It is also a priori because the conditions that make the action moral are not based on there being empirical desires or motives of the moment, even if the desires or motives were universally held, but rather on the fact that all human beings could perform them without contradiction. 101 Thus, the conditions are essential to humans being able to engage in voluntary purposive action, without which there would be no morality at all. 102

purposes would also probably not have the general capabilities for achieving them. Well-being in the inclusive sense is hence to be understood as a continuum that comprises having the general capabilities and successfully exercising them. Since, however, agency is the condition of pursuing particular goods, the agent’s well-being is to be identified primarily even if not exclusively with the general abilities and conditions required for attaining any of his purposes. It is these abilities that are necessary goods for the agent [qua agent], and they are states or dispositions of the agent himself as they impinge on his purposive pursuits. Although the conditions of these pursuits may include circumstances that are distinct from the agent, such circumstances are for his well-being and hence are a part of his well-being.


99. See id. at 39.

100. See KANT, supra note 75, at 47–48.

101. Were the conditions limited to just the empirical desires or motivations being present, the synthesis would be a posteriori, not a priori.

102. In laying the basis for what he will come to show as the relation between the generic features of action and human rights, Gewirth writes:

In the broad senses in which each of them has been explicated here, voluntariness and purposiveness exhaust the generic features of action. This can be seen by noting some of the ways in which they have been or may be distinguished, despite their close interrelation as concerned with reasons for acting. Voluntariness involves a procedural aspect of actions in that it concerns the way actions are controlled as ongoing events. Purposiveness, on the other hand, in addition to having the distinct procedural aspect mentioned above [of allowing the agent to make “an implicit value judgment about them”], also involves the substantive aspect of actions, the specific contents of these events. Voluntariness refers to the means, purposiveness to the end; voluntariness comprises the agent’s causation of his action, whereas purposiveness comprises the object or goal of the action in the sense of the good he wants to achieve or have through his causation. Thus voluntariness is a matter of initiation or control while purposiveness is at least in part a matter of consummation. Other candidates for generic features of action, such as adherence to rules or principle, deliberation or calculation of the consequences,
So, from a synthetic-\textit{a priori} moral perspective, the conditions for marriage are not based simply on the meaning of particular words or even depictions of specific events often associated with marriage, but on the role marriage plays in fulfilling the lives of those participating in it.\textsuperscript{103} In this sense, the right to marry satisfies the conditions for a moral right in the Kantian/Gewirthian sense because, as I have argued elsewhere, when full attention is paid to these conditions, they provide a kind of self-fulfillment that would otherwise be unobtainable.\textsuperscript{104} And in this respect, reason shows that same-sex couples stand no differently from opposite-sex couples with respect to the human right to marry a person of one’s own choice.\textsuperscript{105}

It is perhaps important to note how choice also operates to prevent marriage recognition from being assigned to certain kinds of relationships.\textsuperscript{106} The parties to a marriage must be capable of acting voluntarily with knowledge of relevant circumstances.\textsuperscript{107} Accordingly, age is likely to be relevant insofar as it provides an index to establishing voluntariness. Similarly, consanguinity may be relevant if the parties intend to have children or if an existing relation is too close to insure that the decision to marry was freely entered into.\textsuperscript{108} Our image of same-sex relationships can now be investigated both in terms of how the parties might see themselves as well as how others might see them.

\begin{itemize}
\item and so forth, either do not characterize all actions or else are derivative from and subsumable under one or the other of the two features discussed above.
\item GEWIRTH, \textit{supra} note 98, at 41.
\item 103. The conditions that make moral action possible at all, such as voluntariness and purposiveness, are presupposed by morality; they are not, strictly speaking, merely a matter of its definition in which case they need have no effect on human action at all. \textit{Id.} at 53.
\item 104. In another article, I describe the self-fulfillment that follows out of marriage this way: Marriage allows for the self-development of the moral virtues of justice, beneficence, temperance, and courage based on the excellence by which one participates intimately in the marital relationship. Marriage is not just a collection of rights or a celebration of events, but rather a form of daily living encompassing the mundane and the extraordinary of the people whose bond it is. Its contribution to human self-fulfillment thus sets it out as a unique practice among existing social institutions. Marriage exhibits no difference when the institution is formed between persons of the same-sex as against persons of opposite-sex.
\item Samar, \textit{supra} note 73, at 33 (discussing how same-sex marriage affirms human dignity).
\item 105. \textit{Id.}
\item 106. \textit{Id.} at 31–32.
\item 107. \textit{Id.} at 21.
\item 108. Obviously, these are important questions and would need to be explored more fully before they could be answered in any definitive way, but for purposes of this essay it is enough that they be acknowledged.
\end{itemize}
The moral approach I have just described essentially identifies a scheme for a top-down synthetic-a priori argument for a human right to marry.\textsuperscript{109} As I have provided a fuller account of this approach elsewhere, I will not provide more detail on that matter here.\textsuperscript{110} Instead, I will argue, as I suggest at the end of the preceding paragraph, for a bottom-up analytic-a posteriori argument that makes same-sex marriage part and parcel of our understanding of the lived experience of gay and lesbian couples today. To do this, however, I will need to turn around the question from the previous paragraph. Instead of asking whether faithfulness to human dignity requires interpreting the substantive due process clause to recognize same-sex marriage, I ask here instead: Do the lived experiences of same-sex couples not afford us an image of marriage as it has come to be recognized in the late 20th and early 21st centuries?

To answer this question, I will not, in the first instance, be focusing on the concept of marriage, as that term has been traditionally defined. Nor will I be attempting to derive a right to marry based on human dignity. Instead, I will engage the real life experiences of persons who are engaged in relationships that appear to them as a marriage from their point of view. Is this not what our current understanding of marriage is really about? For those who think otherwise, I suggest they try viewing the image of marriage they hold from behind a Rawlsian veil of ignorance concerning the parties’ sex, just to insure that their image is not constructed out of animus or bias.\textsuperscript{111} Under this constraint, I would suspect even those most opposed to same-sex marriage could conjure up an image of married (or soon-to-be married) persons—when the narrative presented focuses on the love the parties have for one another, as displayed by mutually supportive interactions—without providing any information about the parties’ sex.\textsuperscript{112} I further suspect that even the most ardent proponent of bans for same-sex marriage would find it difficult to

\begin{itemize}
\item \textsuperscript{109} See Samar, supra note 73, at 27–39, 43–55 (arguing that a Gewirthian human rights approach would provide moral legitimacy for recognition of same sex-marriages under international and domestic law).
\item \textsuperscript{110} Id.
\item \textsuperscript{111} In \textit{A Theory of Justice}, John Rawls describes the function of the “veil of ignorance” in setting up a just society as follows:
\begin{quote}
Among the essential features of [the original position] is that no one knows his place in society, his class position or social status, nor does any one [sic] know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain.
\end{quote}
\item \textsuperscript{112} Id.
\end{itemize}
differentiate same-sex from opposite-sex couples by any criterion other than gender. 113

Since the narrative provides the pathway to our vision of the relationship, it is important that I say something more specifically about what that narrative would likely contain. A fortiori, since the narrative we construct for same-sex legal marriage will likely be more open than for traditional religious marriage, it is particularly important that we construct our picture relying on what the law envisions as a marriage since the law is not confined to any religious view. To assist in this effort, I will rely on the findings of fact from the federal district court for the Northern District of California in the recent case, Perry v. Schwarzenegger. 114 The court took pains, when writing its decision that bans on same-sex marriage violate the Equal Protection Clause of the Fourteenth Amendment, to establish a basis in evidence for its finding. 115 As a prelude to this discussion, it should be understood that I am using the word “lived” to refer:

[T]o the way that a person experiences and understands his or her world as real and meaningful. Lived meanings describe those aspects of a situation as experienced by the person in it. For example, a teacher wants to understand how a child meaningfully experiences or lives a certain situation even though the child is not explicitly aware of these lived meanings. 116

A. Background to the Case

Following voter adoption of Proposition 22 in 2000, amending California’s Family Code to make marriage only between one man and one woman, the California Supreme Court ruled in 2008 that Proposition 22 violated the equal protection provision of the California constitution. 117 Thereafter, a second voter initiative (“Proposition 8”) was adopted in November 2008, this time amending the California constitution, stating, “Only marriage between a man and a woman is valid or recognized in California.” 118 Opponents of Proposition 8 challenged the initiative as violating the rules for amending the California constitution, along with other arguments. 119 However, this time the Supreme Court of California upheld the initiative as to all new marriages,

113. Remember, at least with respect to legal marriage, the law does not require opposite-sex couples to promise to have children, and in several states same-sex couples do have children either by adoption, previous marriage, or surrogacy.
115. Id. at 953–73.
118. Id. at 927.
119. Id.
although the court allowed the 18,000 people, who had already gotten married, to remain married. The case of Perry v. Schwarzenegger, which is a focus of this section, was then brought by two same-sex couples in federal court who wanted to get married but couldn’t, challenging the constitutionality of Proposition 8 under both the Due Process and Equal Protection clauses of the Fourteenth Amendment to the U.S. Constitution. The significance of this case for the purposes of this article is not just the holding in favor of the opponents of Proposition 8, but also Judge Walker’s careful elaboration of the impact this law was having on the social relations and human psychology of those prevented from marrying.

B. Legal Issues

The elaboration of the impact of this law arose out of both opponents trying to show why Proposition 8 violated both the Due Process and Equal Protection clauses, and the proponents trying to show that the law violated neither of these provisions. In particular, the opponents of Proposition 8 sought to show:

1. It prevents each plaintiff from marrying the person of his or her choice;
2. The choice of a marriage partner is sheltered by the Fourteenth Amendment from the state’s unwarranted usurpation of that choice; and
3. California’s provision of a domestic partnership—a status giving same-sex couples the rights and responsibilities of marriage without providing marriage—does not afford plaintiffs an adequate substitute for marriage and, by disabling plaintiffs from marrying the person of their choice, invidiously discriminates, without justification, against plaintiffs and others who seek to marry a person of the same sex.

While proponents argued that Proposition 8:

1. Maintains California’s definition of marriage as excluding same-sex couples;
2. Affirms the will of California citizens to exclude same-sex couples from marriage;
3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and

120. Id. at 928.
121. Id. at 927.
122. Id. at 991–1003.
123. Perry, 704 F. Supp. 2d at 929.
4. Promotes “statistically optimal” child-rearing households; that is, households in which children are raised by a man and a woman married to each other.\textsuperscript{124}

Based on the legal issues raised by the parties, the court identified the following three questions to guide its understanding and evaluation of the evidence presented:

1. \textsc{whether any evidence supports california’s refusal to recognize marriage between two people because of their sex;}
2. \textsc{whether any evidence shows california has an interest in differentiating between same-sex and opposite-sex unions; and}
3. \textsc{whether the evidence shows proposition 8 enacted a private moral view without advancing a legitimate government interest.}\textsuperscript{125}

Because the evidence will implicate the lived experiences of many of California’s gay and lesbian couples, I will follow the court’s structure and take frequent quotes from the trial proceedings and summary of evidence in Judge Walker’s decision.

\textit{C. The Evidence}

With regard to the question of “whether any evidence supports California’s refusal to recognize marriage between two people because of their sex,” the plaintiff Zarrillo testified that he wished “to marry Katami because marriage has a ‘special meaning’ that would alter their relationships with family and others.”\textsuperscript{126} Zarrillo described going to the bank with his partner to open a joint

\begin{enumerate}
\item Denial of marriage to same-sex couples preserves marriage;
\item Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;
\item Denial of marriage to same-sex couples protects children;
\item The ideal child-rearing environment requires one male parent and one female parent;
\item Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple’s marriage is superior to a same-sex couple’s marriage; and
\item Same-sex couples’ marriages redefine opposite-sex couples’ marriages.
\end{enumerate}

\textit{Id.} at 931. The proponents actually toned down their assertions at trial from what the trial court recognized were their broader assertions to the public in getting Proposition 8 passed. Those earlier assertions stated:

\begin{enumerate}
\item Denial of marriage to same-sex couples preserves marriage;
\item Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;
\item Denial of marriage to same-sex couples protects children;
\item The ideal child-rearing environment requires one male parent and one female parent;
\item Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple’s marriage is superior to a same-sex couple’s marriage; and
\item Same-sex couples’ marriages redefine opposite-sex couples’ marriages.
\end{enumerate}

\textit{Id.} at 930.

\textit{Id.} at 932 (capitalization in original).

\textit{Id.}
account, and being asked, “Is it a business account?”[127] Katami testified, “[M]arriage to Zarrillo would solidify their relationship and provide them the foundation they seek to raise a family together, explaining that for them, ‘the timeline has always been marriage first, before family.’”[128]

Plaintiff Perry stated “that marriage would provide her what she wants most in life: a stable relationship with Stier, the woman she loves and with whom she has built a life and family.”[129] As she put it, “I’m a 45-year-old woman. I have been in love with a woman for 10 years and I don’t have a word to tell anybody about that.”[130] Stier, in turn, said:

[M]arrying Perry would make them feel included “in the social fabric.” Marriage would be a way to tell “our friends, our family, our society, our community, our parents . . . and each other that this is a lifetime commitment . . . we are not girlfriends. We are not partners. We are married.”[131]

Historian Nancy Cott testified, “that marriage is ‘a couple’s choice to live with each other, to remain committed to one another, and to form a household based on their own feelings about one another, and their agreement to join in an economic partnership and support one another in terms of the material needs of life.’”[132] On the proponents’ side, think tank founder David Blankenhorn stated: “[M]arriage is ‘a socially-approved sexual relationship between a man and a woman’ with a primary purpose to ‘regulate filiation.’”[133] Cott, who “explained that marriage encompasses a socially approved sexual union and an effective relationship and, for the state, forms the basis of stable households and private support obligations,” broadened that view.[134]

The two experts disagreed over whether “historical changes in the institution of marriage” added to or deinstitutionalized marriage, with Cott emphasizing “removal of racial restrictions,” “elimination of coverture and other gender-based distinctions,” and Blankenhorn emphasizing “an increase in births outside of marriage and an increase in divorce rates.”[135] But even Blankenhorn admitted “that marriage would benefit same-sex couples and their children, would reduce discrimination against gays and lesbians and would be

127. Id. at 933 (citing Transcript of Proceedings Volume 1 at 84:8–12, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), ECF No. 528).
128. Id. (citing Transcript of Proceedings Volume 1, supra note 127, at 89:17–18).
129. Perry, 704 F. Supp. 2d at 933.
130. Id. (citing Transcript of Proceedings Volume 1, supra note 127, at 154:21–23).
131. Id. (citing Transcript of Proceedings Volume 1, supra note 127, at 175:22; 172:8–12).
132. Id. (citing Transcript of Proceedings Volume 1, supra note 127, at 201:9–14).
134. Id.
135. Perry, 704 F. Supp. 2d at 934.
'a victory for the worthy ideas of tolerance and inclusion,' although he continued to worry that same-sex marriage would weaken marriage. Psychologist Letitia Anne Peplau stated: "[T]he desire of same-sex couples to marry illustrates the health of the institution of marriage and not, as Blankenhorn testified, the weakening of marriage." That testimony was further collaborated by economist Lee Badgett who "provided evidence that same-sex couples would benefit economically if they were able to marry and that same-sex marriage would have no adverse effect on the institution of marriage or on opposite-sex couples." On the question of whether California has an interest in differentiating between same-sex and opposite-sex couples, plaintiffs presented Psychologist Gregory Herek who described and defined sexual orientation as: 

[A]n enduring sexual, romantic, or intensely affectional attraction to men, to women, or to both men and women. It’s also used to refer to an identity or a sense of self that is based on one’s enduring patterns of attraction. And it’s also sometimes used to describe an enduring pattern of behavior. Herek further testified "that homosexuality is a normal expression of human sexuality; the vast majority of gays and lesbians have little or no choice in their sexual orientation; and therapeutic efforts to change an individual’s sexual orientation have not been shown to be effective and instead pose a risk of harm to the individual."

Although the proponents offered no testimony to contradict Herek, they did cross-examine him on whether "some individuals report fluidity in their sexual orientation." Herek’s response was that the vast majority of people are consistent in their sexual orientation. Peplau also noted that "despite stereotypes suggesting gays and lesbians are unable to form stable relationships, same-sex couples are in fact indistinguishable from opposite-sex couples in terms of relationship quality and stability." And social epidemiologist Ilan Meyer testified "that Proposition 8 stigmatizes gays and lesbians because it informs gays and lesbians that the State of California rejects their relationships as less valuable than opposite-sex relationships."

137. Id.
138. Id.
139. Id.
141. Perry, 704 F. Supp. 2d at 934–35.
142. Id. at 935.
143. Id.
144. Id.
145. Id.
According to Meyer, “Proposition 8 also provides state endorsement of private discrimination,” which “increases the likelihood of negative mental and physical health outcomes for gays and lesbians.”

With respect to children, the “[p]sychologist Michael Lamb testified that all available evidence shows that children raised by gay or lesbian parents are just as likely to be well-adjusted as children raised by heterosexual parents; and that the gender of a parent is immaterial to whether an adult is a good parent.” To proponent studies claiming that married couples provide an ideal child-rearing environment, Lamb responded that these studies compared not families headed by same-sex couples versus opposite-sex couples, but rather families headed by single parents or step-parents versus opposite-sex couples. The experts, Lamb and Blankenhorn, “disagreed on the importance of a biological link between parents and children.” However, as the court noted, “none of the studies Blankenhorn relied on isolates the genetic relationship between a parent and a child as a variable to be tested.”

A number of experts testified that both the State of California and its “gay and lesbian population suffer because domestic partnerships are not equivalent to marriage.” Badgett explained that because “gays and lesbians are less likely to enter domestic relationships than to marry,” fewer gays and lesbians have the protection of a state-recognized relationship. Both she “and San Francisco economist Edmund Egan testified that states receive greater economic benefits from marriage than from domestic partnerships.”

Meyer testified that domestic partnerships actually stigmatize gays and lesbians even when enacted for the purpose of providing rights and benefits to same-sex couples. Cott explained that domestic partnership cannot substitute for marriage because domestic partnerships do not have the same social and historical meaning as marriage and that much of the value of marriage comes from its social meaning. Peplau testified that little of the cultural esteem surrounding marriage adheres to domestic partnerships.

146. Id.
147. Perry, 704 F. Supp. 2d at 935.
148. Id.
149. Id.
150. Id.
151. Id at 936.
152. Id.
153. Perry, 704 F. Supp. 2d at 936.
154. Id. Herek referenced a letter from the California Secretary of State to registered domestic partnerships that informed “them of upcoming changes to the law and [suggested] dissolution of their partnership to avoid any unwanted financial effects.” Id. (citing Transcript of Proceedings Volume 9, supra note 140, at 2047:15–2048:5). Herek pondered whether a similar letter would have been sent to married couples suggesting divorce. Id. (citing Transcript of Proceedings Volume 9, supra note 140, at 2048:6–13).
This expert testimony was consistent with Stier’s testimony. \textsuperscript{155} Stier has a registered domestic partnership with Perry, but, as she explained, “there is certainly nothing about domestic partnership . . . that indicates the love and commitment that are inherent in marriage.”\textsuperscript{156}

As to the question whether the evidence shows Proposition 8 enacts a private moral view, the court noted that “[t]he testimony of several witnesses disclosed that a primary purpose of Proposition 8 was to ensure that California confer a policy preference for opposite-sex couples over same-sex couples based on a belief that same-sex pairings are immoral and should not be encouraged in California.”\textsuperscript{157}

The historian George Chauncey testified that “the Proposition 8 campaign emphasized the importance of protecting children and relied on stereotypical images of gays and lesbians.” The “campaign did not need to explain what children were to be protected from; the advertisements relied on a cultural understanding that gays and lesbians are dangerous to children. “Chauncey noted that stereotypes of gays and lesbians as predators or child molesters were reinforced in the mid-twentieth century and remain part of current public discourse.”\textsuperscript{158}

On the effect of these moral views for political change, political scientist Gary Segura “testified that negative stereotypes about gays and lesbians inhibit political compromise with other groups,” and he “identified religion as the chief obstacle to gay and lesbian political advances.”\textsuperscript{159} However, “[p]olitical scientist Kenneth Miller disagreed with Segura’s conclusion . . . pointing to some successes [that gays and lesbians have made] on the state and national level.”\textsuperscript{160} That said, proponent Hak-Shing William Tam testified that he “operates the website ‘1man1woman.net’,”\textsuperscript{161} which “encouraged voters to support Proposition 8 on grounds that homosexuals are twelve times more likely to molest children, . . . and because [non-passage of] Proposition 8 will cause states one-by-one to fall into Satan’s hands.”\textsuperscript{162}

\begin{itemize}
  \item \textsuperscript{155} \textit{Id.}
  \item \textsuperscript{156} \textit{Id.} (quoting Transcript of Proceedings Volume 1, supra note 127, at 171:8–11).
  \item \textsuperscript{157} \textit{Id.}
  \item \textsuperscript{158} \textit{Id. at 937.}
  \item \textsuperscript{159} \textit{Perry}, 704 F. Supp. 2d at 937 (citing Transcript of Proceedings Volume 7 at 1565:2–4, 1561:6–9, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), ECF No. 507 (“It’s very difficult to engage in the give-and-take of the legislative process when I think you are an inherently bad person.”)).
  \item \textsuperscript{160} \textit{Id.} at 936 (citing Transcript of Proceedings Volume 10 at 2482:4–8, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), ECF No. 529).
  \item \textsuperscript{161} \textit{Id.} at 937 (citing Transcript of Proceedings Volume 8 at 1916:3–24, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C 09-2292 VRW), ECF No. 524).
  \item \textsuperscript{162} \textit{Id.} (citing Transcript of Proceedings Volume 8, supra note 161, at 1919:3–1922:21).
  \item \textsuperscript{163} \textit{Id.} (citing Transcript of Proceedings Volume 8, supra note 161, at 1928:6–13).
\end{itemize}
Explaining the effect of these campaigns on their well-being, plaintiff Katami stated that “he was angry and upset that children needed to be protected from him, . . . ‘it just demeans you.’”\(^\text{164}\) As the mother of four children, Steir felt:

[T]he campaign messages were “used to sort of try to educate people or convince people that there was a great evil to be feared and that evil must be stopped and that evil is us, I guess. . . . And the very notion that I could be part of what others need to protect their children from was just—it was more than upsetting. It was sickening, truly. I felt sickened by that campaign.”\(^\text{165}\)

Economically, “Egan and Badgett testified that Proposition 8 harms the State of California and its local governments,” and “Egan explained that San Francisco lost and continues to lose money because Proposition 8 slashed the number of weddings performed in San Francisco.”\(^\text{166}\) The proponents challenged their testimony only as to “the magnitude and not the existence of the harms Egan identified.”\(^\text{167}\) Based on the testimony and other evidence presented, including the lack of credibility of proponents’ experts’ testimony, the court determined that “the evidence presented at trial fatally undermines the premises underlying proponents’ proffered rationales for Proposition 8.”\(^\text{168}\) Furthermore,

[the evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in [conjecture, speculation, fears and moral] disapproval. As such, Proposition 8 is beyond the constitutional reach of the voters or their representatives.\(^\text{169}\)

V. CONCLUSION

In this article, I have sought to present a new direction for arguments concerning substantive due process rights. In addition to the more familiar analytic-\textit{a priori}, synthetic-\textit{a posteriori}, and synthetic-\textit{a priori} type arguments, I have sought to present an argument emphasizing the phenomenological lived experience of real people, which I designated an analytic-\textit{a posteriori} argument. I then sought to apply that argument to the recent same-sex marriage case rising from the Northern District of California to show how it might enlighten the findings of fact in that case and its significance for the lives of gay and lesbian couples generally.

My point throughout has been to bolster the persuasive legitimacy of substantive due process rights claims when they can be founded on more than a
single methodological approach. In the California case, I suggested that the
decision reached by Judge Walker would be consistent with both a synthetic-a
priori approach and an analytic-a posteriori approach. As such, it should be
held in high esteem because now two very different methodological
approaches have essentially reached the same result.

If I am correct in my suggestion of using a second approach to bolster a
substantive due process rights decision in this particular case, perhaps the same
methodology might be used more broadly to consider the persuasiveness of
other claims that are likely to come before the Court. At least at this point, this
methodological approach would seem worthy of further investigation.