UNIVERSITY *of* PENNSYLVANIA
LAW REVIEW

Founded 1852

Formerly
AMERICAN LAW REGISTER

VOL. 164 APRIL 2016 NO. 5

ARTICLE

COMBINING CONSTITUTIONAL CLAUSES

MICHAEL COENEN†

Some constitutional questions implicate multiple, overlapping provisions of the Constitution's text. In resolving these questions, the Supreme Court typically addresses each of the relevant clauses in separate and sequential fashion, taking care not to let its analysis of one clause affect its analysis of any other. But every so often the Court takes a different approach, looking to the clauses in combination rather than in isolation. The Court has sometimes suggested, for instance, that two or more rights-based provisions might require the invalidation of government action, even where no single provision would do so on its own. The Court has also suggested that a federal law might fall too far outside the scope of Article I and too far within the scope of a rights-based

† Assistant Professor of Law, LSU Law Center. For helpful comments on earlier drafts, I am grateful to Anna Arkin-Gallagher, Joseph Blocher, Dan Coenen, Seth Davis, John Devlin, Ray Diamond, Brannon Denning, John Devlin, David Faigman, Richard Fallon, Brandon Garrett, Heather Gerken, Phil Hackney, Jeremy Golubcow-Teglasi, John Graebe, Michael Klarman, Daryl Levinson, Ashley Lott, Dina Mishra, Eric Posner, John Rappaport, Richard Re, Chris Sherman, and Susannah Barton Tobin. Thanks also to C.J. Murray for outstanding research assistance, and to Markus Brazill, Josephine Chen, Mike Keblesh, and their colleagues at the *University of Pennsylvania Law Review* for invaluable editorial assistance.

provision to withstand constitutional attack. And the Court has very occasionally suggested that a congressional enactment might qualify as a necessary and proper means of enforcing multiple enumerated powers at once. In all of these cases, the Court has embraced (or at least tinkered with) forms of what I call "combination analysis"—justifying judicial outcomes by reference to multiple clauses acting together, as opposed to individual clauses acting alone.

This Article presents a systematic examination of combination analysis in U.S. constitutional law. In so doing, it seeks to make four contributions to the burgeoning scholarly literature on the subject. First, the Article collects and taxonomizes existing examples of combination analysis in U.S. Supreme Court doctrine, demonstrating that combination arguments have enjoyed a wider range of application than has thus far been supposed. Second, the Article examines the conceptual structure of combination analysis, revealing some underappreciated functional similarities between combination-based constitutional reasoning and other more commonly accepted features of public law adjudication (including, for instance, arguments based on constitutional structure and arguments based on the constitutional avoidance canon). Third, the Article sorts through the practical pros and cons of combination analysis, shedding light on the questions of whether and (if so) when courts should advance combination arguments in the course of resolving a particular case. Finally, the Article offers some preliminary guidance regarding the implementation of combination analysis, identifying in particular four different types of "combination errors" that courts should strive to avoid. What emerges from the discussion is the conclusion that combination analysis represents a real and conceptually valid method of constitutional reasoning, which, at least under some circumstances, stands to benefit the development of constitutional law.

INTRODUCTION

Thumb through the pages of a constitutional law casebook, and you will likely notice an organizational structure that makes heavy use of the document's *clauses*. One section of the book will cover the Equal Protection Clause; another will cover the Due Process Clause; another the Commerce Clause; another the Taxing Clause; and so on. This organizational scheme reflects an important feature of the Supreme Court's doctrinal output. To a substantial (though not universal) degree, discrete and separate provisions of the Constitution's text have spawned discrete and separate bodies of constitutional law. Constitutional adjudication thus involves the tasks of identifying the constitutional provision most relevant to the case, looking up the clause-specific doctrinal rules associated with that provision, and then resolving the case in accordance with those rules. In this way do abstract questions of *constitutional validity* often reduce down to particularized assessments of *clausal consistency*.

That pattern remains in place even when government action implicates multiple, separate clauses at the same time. To decide these multiple clause cases, courts frequently apply the law of each provision in sequential and independent fashion, taking care not to intermingle the different clause-specific doctrines being applied. For instance, when the Supreme Court confronted the Violence Against Women Act, it first considered the law's validity as an exercise of the commerce power and then considered its validity as an exercise of the Fourteenth Amendment's enforcement power, taking care not to let its analysis of the Commerce Clause question influence its analysis of the Enforcement Clause question (and vice versa).[1] When the Court struck down a Texas antisodomy law as a violation of the Fourteenth Amendment, the

1 *See generally* United States v. Morrison, 529 U.S. 598 (2000).

Justices divided on whether to rest the decision on the Due Process Clause or on the Equal Protection Clause, with no Justice invoking the combined authority of the two clauses together.[2] Other cases reflect a similar approach.[3] When litigants assert claims arising under multiple areas of constitutional doctrine, the strengths or weaknesses of one clause-specific claim typically have no official bearing on the strengths or weaknesses of another.[4]

But the Court has not always toed this line. In several cases—some recent, some old—it has experimented with an alternative approach, one that traverses the boundary lines that mark the clauses' separate doctrinal territories. The Court, that is, has sometimes *combined constitutional clauses*, deriving an overall conclusion of constitutional validity (or invalidity) from the joint decisional force of two or more constitutional provisions. Most familiarly, the Court has indicated that multiple rights-based provisions of the Constitution might sometimes require the invalidation of government action that would be permitted if each provision were considered in isolation.[5] Somewhat less familiarly, the Court has held that congressional action can fall too far outside the scope of Article I and too far within the scope of a rights-based guarantee to withstand constitutional scrutiny.[6] And very occasionally, the Court has suggested that a congressional statute—though not expressly authorized by any single enumerated power—derives its validity from multiple enumerated powers acting in the aggregate.[7] In all of these instances, the Court has employed a form of "combination analysis," justifying constitutional outcomes by reference to collections of constitutional clauses, rather than one such clause in particular.

Combination analysis is not unknown to scholars of constitutional law. But most of the existing commentary on the subject takes the form of brief

2 *See* Lawrence v. Texas, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring) ("Rather than relying on the substantive component of the Fourteenth Amendment's Due Process Clause, as the Court does, I base my conclusion on the Fourteenth Amendment's Equal Protection Clause.").

3 *See, e.g.*, McBurney v. Young, 133 S. Ct. 1709, 1720 (2013) ("Because Virginia's citizens-only FOIA provision neither abridges any of petitioners' fundamental privileges and immunities nor impermissibly regulates commerce, petitioners' constitutional claims fail."); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 532 (2001) (asking first whether Massachusetts' smoking regulations were statutorily preempted, and second whether the nonpreempted portions of the statute were nonetheless invalid restrictions of commercial speech under the First Amendment); Fullilove v. Klutznick, 448 U.S. 448, 473 (1980) (opinion of Burger, C.J.) (asking first whether a federal race-based set-aside program fell "within the power of Congress" under the General Welfare Clause, and second whether the program "violate[s] the equal protection component of the Due Process Clause of the Fifth Amendment"), *overruled in part by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995).

4 *Cf.* Michael H. Shapiro, *Argument Selection in Constitutional Law: Choosing and Reconstructing Conceptual Systems*, 18 S. CAL. REV. L. & SOC. JUST. 209, 310-11 (2009) (suggesting that courts often choose only one among many potential legal grounds for deciding a case, while noting that courts "sometimes cumulate arguments for added persuasive effect").

5 *See infra* Section II.A.

6 *See infra* Section II.B.

7 *See infra* Section II.C.

and targeted discussions of particular examples, offering little in the way of thorough and detailed investigations of the method in its myriad forms.[8] The bulk of the existing commentary, in fact, concerns one and the same example: The Supreme Court's landmark Free Exercise decision in *Employment Division v. Smith*.[9] There, in denying requests for free exercise relief, the Court suggested that the Free Exercise Clause might elsewhere operate "in conjunction with other constitutional protections" to impose a stronger set of limits than what any single clause would impose on its own.[10] That suggestion, along with several other aspects of the *Smith* decision, provoked numerous—and mostly negative—responses, with judges and scholars dismissing *Smith*'s hybrid-rights rule as "unintelligible,"[11] "conceptually flawed,"[12] and (the ultimate barb) "completely illogical."[13] And on one level, these commentators had a point: various aspects

8 One notable exception is Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 48-55 (2012), whose relevance to the project I discuss further *infra* note 16. In addition, some constitutional scholars have explored different ways of thinking about cases involving multiple *rights-related* claims, and in the course of doing so, have considered various means by which those claims might be considered in a cumulative or aggregated manner. *See* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 661-64 (1994) [hereinafter Faigman, *Madisonian Balancing*] (proposing an idealized model of rights-based balancing, under which the strength of government interests is weighed against the sum total of the liberty interests implicated by government action); David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 772-78 (1994) [hereinafter Faigman, *Measuring Constitutionality*] (modifying the balancing model, while continuing to call for the aggregation of rights on the "liberty interest" side of the equation); Stephen Kanter, *The* Griswold *Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 624-25 (2006) (considering and developing various analytical frameworks "for the courts to use in looking for and finding fundamental individual rights that are not textually explicit"); Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights* 2 (Univ. of Va. Sch. of Law, Pub. Law and Legal Theory Research Paper Series 2015-42, 2015), http://ssrn.com/abstract=2642640 [https://perma.cc/K5JB-UC62] (highlighting the "categorically distinct ways in which cumulative constitutional rights cases can arise" and the various means by which "these different forms affect constitutional scrutiny"). That said, and to the best of my knowledge, this Article is the first to develop a systematic framework for thinking about and evaluating combination analysis as a general method of constitutional adjudication, whose application extends not only to cases involving multiple rights-related claims, but also to cases involving rights-related claims along with power-related claims, and to cases involving multiple power-related claims.

9 494 U.S. 872 (1990).

10 *Id.* at 881.

11 Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 119, 120 (2000).

12 Brian A. Freeman, *Expiating the Sins of* Yoder *and* Smith*: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 52 (2001).

13 Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993); *accord id.* ("We do not see how a state regulation would violate the Free Exercise Clause if it implicates other constitutional rights but would not violate the Free Exercise Clause if it did not implicate other constitutional rights."); Peter M. Stein, Note, Smith v. Fair Employment and Housing Commission*: Does the Right to Exclude, Combined with Religious Freedom, Present a "Hybrid Situation" Under* Employment Division v. Smith*?*, 4 GEO. MASON L. REV. 141, 174 (1995) ("If . . . the Free Exercise Clause only has meaning when combined with another constitutional interest, the Clause functions in a manner similar to Hamburger Helper."); *see also* Leebaert v. Harrington, 332 F.3d 134, 144 (2d

of *Smith*'s hybrid-rights reasoning raised vexing questions not adequately dealt with by the Court in *Smith* itself.[14] But insofar as the post-*Smith* commentary purported to address the topic of combination analysis more generally, its *Smith*-oriented focus limited its ability to shed full light on the subject as a whole.

This Article thus attempts to provide a broader and more systematic examination of combination analysis in constitutional law—one that includes, but also looks beyond, *Smith*'s well-known "hybrid rights" rule. In doing so, the Article seeks to enrich existing understandings of the phenomenon in at least four ways. First, it demonstrates as a *doctrinal* matter that combination analysis enjoys a stronger foothold in Supreme Court case law than has generally been suggested. This is true not only in the direct sense that the Court and its Justices have relied on combination-based reasoning in several constitutional cases, but also in the indirect sense that combination-based reasoning shares important analytical similarities with other types of arguments that courts and commentators routinely employ—specifically, arguments based on the canon of constitutional avoidance and arguments based on so-called

Cir. 2003) ("We . . . can think of no good reason for the standard of review to vary simply with the number of constitutional rights that the plaintiff asserts have been violated."); Hicks *ex rel.* Hicks v. Halifax Cnty. Bd. of Educ., 93 F. Supp. 2d 649, 661 (E.D.N.C. 1999) (characterizing the hybrid-rights exception as "seemingly impenetrable"); Eric A. DeGroff, *State Regulation of Nonpublic Schools: Does the Tie Still Bind?*, 2003 BYU EDUC. & L.J. 363, 378 n.69 (suggesting that the Court in *Smith* was "engaging in a form of new math, suggesting that 0 + 0 = 1"); James D. Gordon III, *Free Exercise on the Mountaintop*, 79 CALIF. L. REV. 91, 96, 98 n.49 (1991) (attributing to *Smith* a "Hamburger Helper" theory of the law).

Not everyone has been so dismissive of *Smith*'s foray into combination analysis. Professor Stephen Kanter in particular has pointed out that *Smith* shares much in common with several other rights-related cases, which "also rely on composite or hybrid rights as the basis for ruling in favor of the individual." Kanter, *supra* note 8, at 638; *see also* Faigman, *Measuring Constitutionality*, *supra* note 8, at 775 (discussing *Smith* in similar terms). And other scholars have already pushed back against the specific charge that the hybrid rights exception commits a basic error of mathematical logic. *See, e.g.*, Richard F. Duncan, *Free Exercise Is Dead, Long Live Free Exercise:* Smith*,* Lukumi*, and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850, 858 (2001) ("Although it is certainly true that zero plus zero does not equal one, it is equally true that the sum of a number of fractions—one-half plus one-half, for example—may equal one."); Porat & Posner, *supra* note 8, at 48-49.

14 The most powerful criticisms of *Smith*'s hybrid-rights rule focused on its shaky precedential foundations. *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) ("One suspects that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder* in this case."). Another line of criticisms targeted the Court's strange conclusion that *Smith* itself did not represent just such a "hybrid" case—the claimants in *Smith*, after all, had participated in a public and expressive religious ritual, thus seemingly bringing into play both free exercise and free association protections in addition to the free exercise protections on which they relied. *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (noting that "free speech and associational rights are certainly implicated in the peyote ritual"); McConnell, *supra* note 14, at 1122 (suggesting that "*Smith* itself" could qualify as a "'hybrid' case"). A third set of criticisms suggested that *Smith*'s "hybrid rights" language posited an exception that would swallow the rule, given the likelihood that most free exercise claims would involve conduct that simultaneously implicated other constitutional protections. *See Church of the Lukumi Babalu Aye*, 508 U.S. at 567 (Souter, J., concurring).

structural principles of constitutional law. Thus, an initial aim of the ensuing discussion is to collect and taxonomize existing examples of combination analysis, while also situating these examples within the broader universe of arguments that find frequent expression in operative constitutional doctrine.

Second, this Article attempts to demonstrate that the *conceptual* validity of combination analysis rests on a small and plausible set of interpretive premises. In a nutshell, the underlying claim is this: for combination analysis to make logical sense, we need only accept the notion that government action might qualify as "partially," "somewhat," or "barely" consistent with the dictates of a particular constitutional clause. By acknowledging this possibility—and rejecting the view that government action will always comply either fully or not at all with a clause's commands—we can easily arrive at the conclusion that collections of constitutional clauses might support outcomes that no single clause could support on its own. Put another way, if one provision "partially" prohibits (or authorizes) government action, and another provision does the same, then we cannot characterize as "unintelligible" or "completely illogical"[15] the conclusion that the two provisions might together prohibit (or authorize) that action in full.

Third, this Article attempts to shed light on the *normative* question of whether combination analysis is desirable. To say that combination analysis is doctrinally existent and logically valid is not to say that combination analysis should always be used. And in fact, as this Article suggests, the question of whether a court should engage in combination analysis requires a careful, pragmatic assessment of several variables. In one sense, as Professors Ariel Porat and Eric Posner have suggested, this question implicates the "familiar rules/standards tradeoff," pitting the pro-combination values of nuance and context sensitivity against the anti-combination values of simplicity, predictability, and ease of administration.[16] But the normative evaluation of combination analysis tees up other issues as well. For example, combination analysis can sometimes operate to clarify, rather than confuse, the organization of judicial

15 *See Kissinger*, 5 F.3d at 180; *see also supra* note 13.

16 Porat & Posner, *supra* note 8, at 9, 55-57. Porat and Posner set forth a general framework for examining the use of "aggregation techniques" across a wide range of legal contexts. Their work is impressive in scope, encompassing everything from the aggregation of *factual* elements in contract law disputes, *id.* at 28-30, to the aggregation of *person*-based elements in mass tort litigation, *id.* at 26-28, to the aggregation of *normative* elements in public law disputes (including, but not limited to, the use of combination arguments in constitutional law), *id.* at 46-53, to many other variations on the theme, *id.* at 26-57. But because their article surveys such a broad legal landscape from a high altitude, Porat and Posner understandably do not explore in detail the various ways in which these values bring themselves to bear on the particular task of adjudicating constitutional cases under existing doctrine. My analysis aims to complement their broad survey of *aggregation* writ-large with an in-depth analysis of what Porat and Posner call "cross-claim normative *aggregation*" in the particular field of constitutional law. *Id.* at 6 (emphasis added). In doing so, I hope to yield insights of interest to scholars and practitioners of U.S. constitutional law, while also shedding new light on the "aggregation puzzles" that Posner and Porat have addressed more generally. *Id.* at 4.

doctrine,[17] while also according partially binding (as opposed to totally binding) precedential status to some elements of a judicial holding.[18] On the other hand, combination analysis can give rise to tensions with (if not outright departures from) the constitutional text,[19] and it might also undermine values of judicial restraint.[20] Moreover, the desirability of combination analysis may carry a distinctively substantive valence, with particular types of combination analysis being more or less likely to promote certain results-oriented goals.[21] My analysis disaggregates and evaluates these different questions, offering a more complete accounting of the various costs and benefits that combination analysis brings to the table. The tentative conclusion is that the cost–benefit calculus is not sufficiently one-sided as to warrant a categorical, bright-line rule against the use of combination arguments in all multiple clause cases. Rather, I conclude that the utility of combination analysis is better evaluated on a basis that proceeds clause-by-clause and case-by-case.

Finally, this Article offers *prescriptive* guidance regarding the use of combination analysis in future constitutional cases. Specifically, it identifies four types of "combination errors" that courts should endeavor to avoid when considering the clauses' combined effects. For example, combination analysis can give rise to "non-counting errors," which occur when a court applies the rule of a previous combination-based holding to a case that does not implicate all of the clauses underlying the original holding. Combination analysis can also give rise to "double counting errors," which occur when a court gives artificially inflated effect to a clause whose values and commands have already been incorporated into another clause's decision rules. Combination errors might also arise from failures to recognize the negative implications that flow from affirmative grants of constitutional power, and they might further arise from a court's use of combination analysis to render a single constitutional holding about two "transactionally separate" events. I survey each of these errors and offer some targeted thoughts on the question of how courts should avoid them. In so doing, I hope to offer along the way some bigger picture observations about constitutional decisionmaking.

My discussion of these issues comprises five (uncombined) Parts. Part I offers definitional details. Part II catalogues examples of combination analysis in Supreme Court case law, aiming to show that it has arisen with surprising frequency across different doctrinal domains. Part III then turns to the structure of combination analysis, describing and defending its internal logic,

17 *See infra* Section IV.A.

18 *See infra* subsection IV.A.2.

19 *See infra* subsection IV.B.1.

20 *See infra* subsection IV.B.2.

21 *See infra* Section IV.C.

before relating the practice to two widely accepted techniques of constitutional decisionmaking. Part IV addresses the normative question of whether and to what extent courts should combine the clauses in constitutional cases. Finally, Part V concludes the analysis by highlighting the four above-mentioned errors and flagging some unresolved issues for further investigation.

Above all else, however, the Article aims to show that combination analysis is a phenomenon worthy of further investigation. Even if one concludes that courts should refrain from combining constitutional clauses under any and all circumstances, the journey to that conclusion remains a journey worth taking. Simply put, I aim to demonstrate that a careful examination of combination analysis in constitutional law—one that considers its existing doctrinal presence, its conceptual structure, and its practical upsides and downsides—furnishes much in the way of useful and interesting insights about constitutional adjudication more generally. Even if infrequently employed, combination analysis offers an illuminating window into the ever-present and always-daunting challenge of translating the barebones constitutional text into fair and effective rules of constitutional law.

I. WHAT IS COMBINATION ANALYSIS?

Combination arguments share four key features. First, combination arguments invoke *multiple provisions* of the constitutional text. A combination argument does not emerge from the straightforward determination that a discriminatory statute violates the Equal Protection Clause, from the straightforward determination that a government censorship practice violates the First Amendment right to free expression, or from any other determination that government action either does or does not comport with the dictates of a single constitutional clause. Rather, combination arguments arise when courts resolve a constitutional case by reference to two or more provisions seen as having some independent relevance to a case's proper outcome.[22] Thus, for instance, if a government censorship practice also happened to operate in a racially

22 This condition may sound simple, but some nagging complexities lurk beneath the surface. The problem arises from determining whether judicial analysis rests on multiple constitutional provisions, as opposed to a single such provision. For example, imagine a claim that the First and Second Amendments together warrant invalidation of a state-law restriction on the three-dimensional printing of firearm-related materials. *See* Josh Blackman, *The 1st Amendment, 2nd Amendment, and 3D Printed Guns*, 81 TENN. L. REV. 479, 505-08 (2014). Technically speaking, the claim would rest on the single provision of the Fourteenth Amendment's Due Process Clause—one component of which incorporates the right to free speech and another component of which incorporates the right to bear arms. But the claim nonetheless seems combination-like in that it fuses together two traditionally discrete and differentiated areas of constitutional law, each closely associated with a separate provision of the constitutional text. Unless otherwise indicated, I will treat arguments of this sort as generally falling within the domain of my analysis, recognizing the important technical caveat that they ultimately concern the meaning of one and only one clause.

discriminatory fashion, a combination argument would arise from the claim that the practice violates the First Amendment and the Equal Protection Clause acting together. But the same case would not implicate combination analysis if a court simply held that the practice violated one of the two clauses on its own.

The second distinguishing feature of combination arguments concerns the nondispositive effect of each of the clauses being combined. A combination argument does not assert that more than one constitutional provision independently supports a particular judicial outcome; rather, it asserts that two or more clauses support that same outcome in conjunction with one another.[23] This criterion helps distinguish combination analysis from the practice of asserting arguments in the alternative. A lower court might conclude, for instance, that a law violates both the Equal Protection Clause and also violates the First Amendment. But that is different from concluding that the law violates the Equal Protection Clause and the First Amendment working together. The first argument offers two independent rationales for a single holding, whereas the second argument offers a single such rationale, which draws its strength from the doctrines' combined decisional force.

Third, the constituent clauses of a combination argument relate to one another in a coordinate, rather than derivative, manner. Combination arguments do not necessarily arise when one clause incorporates by reference the contents of another. The Court might, for instance, uphold a congressional statute by reference to the combined force of the Necessary and Proper Clause and some other enumerated power of Article I, Section 8,[24] just as it might uphold a civil rights enforcement measure by reference to the combined effect of Section 5 of the Fourteenth Amendment[25] and an individual provision of the Bill of Rights. But in these cases, multiple clauses acquire relevance only because the text of one clause functions as a sort of "gateway" into the domain of another clause. With combination analysis, by contrast, it is the *subject matter* of a constitutional issue that implicates—independently and in parallel—multiple constitutional provisions at the same time. None of the combined provisions, in other words, carries decisional weight on account of a definitional linkage to another.[26]

---

23 The Court does not often invoke two separate clauses as independently sufficient bases for a particular constitutional outcome. But the trend is not entirely uniform. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that "restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause" and "*also* deprive[s] the Lovings of liberty without due process of law in violation of the Due Process Clause" (emphasis added)).

24 U.S. CONST. art. I, § 8, cl. 18.

25 U.S. CONST. amend. XIV, § 5.

26 That is not to say that "incorporative" arguments cannot operate alongside combination arguments. In fact, many examples I consider are best viewed as involving both arguments at the same time. When, for instance, the Court invalidates a state-level practice by reference to the combined force of two separate provisions of the Bill of Rights, it is actually invoking the combined force of two different *components* of the Fourteenth Amendment's Due Process Clause, each of which acquires

Finally, combination analysis focuses on the decisional force rather than the linguistic meaning of the clauses being combined. Combination arguments group clauses together for the purpose of creating reasons for judicial results, not for the purpose of clarifying matters of semantic uncertainty. In this respect, combination arguments might be distinguished from *in pari materia* or intratextual arguments regarding ambiguous words or phrases in the constitutional text.[27] Like combination arguments, these arguments invoke the authority of multiple constitutional provisions to defend propositions that are less well supported by any single provision. But the defended propositions are different. An *in pari materia* argument articulates a proposition about what a term means (e.g., "Term *A* signifies *X* rather than *Y* because Term *A* appears in other provisions where reading it to mean *Y* would make no sense"), whereas a combination argument articulates a conclusion about how to dispose of a case (e.g., "This case should come out this way because Clause *A* and Clause *B* together provide a strong reason for that result"). Combination analysis, in other words, looks to multiple clauses not for the purpose of discovering and drawing inferences from their shared semantic features, but rather for the purpose of aggregating the reasons they provide for resolving a case in one way or another.[28]

II. COMBINATION ANALYSIS IN CONSTITUTIONAL LAW

With these definitional criteria on the table, let us now turn to the task of identifying existing examples of combination analysis in the Supreme Court's case law. The examples can be sorted into three overarching categories:

its content by virtue of the Clause's *incorporation* of the Bill of Rights. Somewhat more trickily, when a Court upholds a congressional enactment on the theory that it constitutes a "necessary and proper" means of effectuating a group of enumerated powers, we might characterize the ruling as grounded in a single constitutional provision (i.e., the Necessary and Proper Clause), but in a manner that incorporates the combined force of several indirectly related provisions (i.e., the various enumerated powers of Article I). For simplicity's sake, it will often be useful to abstract away incorporative elements of decisions that also involve combination-based reasoning. But we should not forget that many arguments combining clauses are simultaneously incorporating the combined clauses' content into that of another.

27 *See* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

28 Of course, the distinction between decisional force and linguistic meaning is itself subject to uncertainty. It is not always easy to determine whether a constitutional dispute concerns the meaning of a particular textual provision or instead concerns the application of a provision whose meaning has already been established. This question, however, is not new to this Article—rather, it is a recurrent feature of constitutional scholarship more generally. For instance, the meaning–application distinction has recently received attention from adherents to the "New Originalism," who treat the task of discerning a clause's semantic content as different from the task of giving that clause concrete legal effect. *See, e.g.*, Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 468 (2013) (distinguishing between interpretation, which "refer[s] to the activity of discovering the linguistic meaning or communicative content of the constitutional text," and construction, which "refer[s] to the activity of determining the legal effect given to the text"). The distinction I draw here may be understood as tracking the same underlying idea.

(1) "right/right" combinations, (2) "right/no-power" combinations, and (3) "power/power" combinations. Briefly stated, right/right combinations find a reason to invalidate government action in the combined operation of two or more rights-related provisions. Right/no-power combinations, meanwhile, find a reason to invalidate federal action in the combined operation of a rights-related provision that arguably prohibits the action, and a power-related provision that arguably authorizes it. Finally, power/power combinations find a reason to validate congressional action in the combined operation of two or more constitutional grants of lawmaking authority. This Part works through each of these examples in turn. It then considers a fourth set of roughly analogous arguments involving the combination of different decision rules pertaining to a particular constitutional provision. All of these examples help to demonstrate the presence of combination-based reasoning within operative constitutional doctrine.

A. *Right/Right Combinations*

We have already seen a straightforward example of right/right combination analysis stemming from Justice Scalia's majority opinion in *Employment Division v. Smith*.[29] In that case, recall, the Court suggested that claims implicating only the Free Exercise Clause of the First Amendment should receive less rigorous constitutional scrutiny than claims implicating both the Free Exercise Clause and some other rights-based provision.[30] Although some courts have dismissed this suggestion as unhelpful dicta,[31] other courts have taken it seriously, setting forth a special doctrinal framework for cases that raise colorable claims involving the free exercise right along with a separate rights-based constitutional guarantee.[32] For these courts, in other words, a right/right combination of clauses sometimes yields a more restrictive set of limits on government action than what would exist in the combination's absence.

---

29 494 U.S. 872 (1990).

30 *Id.* at 881-82.

31 *See, e.g.*, Knight v. Conn. Dep't of Pub. Health, 275 F.3d 156, 167 (2d Cir. 2001) ("Appellants' reliance on *Smith* is misplaced, as the language relating to hybrid claims is dicta and not binding on this court."); Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993) ("[U]ntil the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard . . . .").

32 *See, e.g.*, Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 702-07 (9th Cir. 1999) (announcing that, in order to receive the benefit of *Smith*'s hybrid rights language, a "free exercise plaintiff must make out a 'colorable claim' that a companion right has been violated"), *rev'd on other grounds*, 220 F.3d 1134 (9th Cir. 2000) (en banc); Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998) (permitting hybrid rights claims based on "a colorable showing of infringement of recognized and specific constitutional rights"); Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1216 (5th Cir. 1991) (noting that *Smith* specifically recognizes a "religion-plus-speech" hybrid right); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997) (similar).

The Court arguably deployed similar logic when it recognized in *Obergefell v. Hodges* a constitutional right to same-sex marriage.[33] Justice Kennedy's majority opinion cited to the Due Process and Equal Protection Clauses of the Fourteenth Amendment as mutually supportive of the case's result.[34] Although the Court was not altogether clear as to how it envisioned the two clauses to be interacting with one another, some of its language suggested a combination-based understanding:

> Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.[35]

Shorn of its lofty rhetoric, the passage conveys a relatively simple idea: the Due Process Clause alone might fail to resolve the question of whether a ban on same-sex marriage is unconstitutional, but once the Equal Protection Clause is added to the picture, the question can come out only one way. The two clauses together support an outcome that might not be sustained by either clause alone.[36]

Other examples of right/right combination analysis are not difficult to find. In an important line of cases, the Court has recognized a heightened set of constitutional restrictions for indigent criminal defendants seeking access to post-trial proceedings. Even though the Equal Protection Clause generally permits the use of wealth-based classifications,[37] and even though the Due Process Clause affords states significant leeway in providing for post-trial relief,[38] the Court has reasoned that states may not condition access to post-trial

---

33 135 S. Ct. 2584, 2604-05 (2015).

34 *Id*.

35 *Id*. at 2603 (citations omitted).

36 Professors Abrams and Garrett characterize *Obergefell*, along with the broader line of fundamental rights-based equal protection cases, as involving claims of "intersectional rights," which arise when the implicated constitutional provisions are understood to "inform and bolster one another." Abrams & Garrett, *supra* note 8, at 4. As they point out,

> The key to Obergefell and the other marriage cases is the bundling of multiple, substantial government benefits into a legal status of cultural heft called "marriage," and then denying some but not all people from accessing that status. The discrimination claim and the fundamental rights claim, standing alone, are simply not as strong. However, both constitutional sources inform a constitutional analysis that is more demanding than a due process or equal protection analysis conducted separate and apart.

Id. at 23-24 (footnotes omitted).

37 *See* Harris v. McRae, 448 U.S. 297, 323 (1980) (noting that "poverty, standing alone, is not a suspect classification").

38 *See* McKane v. Durston, 153 U.S. 684, 688-89 (1894) (holding that the Constitution does not guarantee a right to appeal from a criminal conviction).

proceedings on the basis of unduly restrictive wealth-based criteria.[39] The rationale for this line of cases lies in the combined protections of the Due Process and Equal Protection Clauses; as far back as *Griffin v. Illinois*, various Justices have accepted the proposition that the "constitutional guaranties of due process and equal protection *both* call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons."[40] And today the Court continues to recognize the combination-based provenance of *Griffin* and its progeny, acknowledging that "[d]ue process and equal protection principles converge in . . . the analysis in these cases."[41]

Griffin and *Obergefell* both fall within a larger line of Fourteenth Amendment cases concerning the "fundamental rights" of constitutional claimants. The Court has struck down, for instance, various ballot access restrictions as running afoul of the First and Fourteenth Amendments, citing to both free association interests and equality interests as warranting a more robust set of limits on state laws that burden a candidate's ability to run.[42] It has struck down various restrictions on familial arrangements as simultaneously implicating both the protections of substantive due process doctrine and equal protection doctrine.[43] And it has

39 *See* Griffin v. Illinois, 351 U.S. 12, 18 (1956) (plurality opinion) (holding that states that grant appellate review of criminal proceedings may not do so "in a way that discriminates against some convicted defendants on account of their poverty"); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996) (holding that under "the Due Process and Equal Protection Clauses of the Fourteenth Amendment," a state "may not deny [a claimant], because of her poverty, appellate review of the sufficiency of the evidence on which the trial court found her unfit to remain a parent").

40 *Griffin*, 351 U.S. at 17 (emphasis added); *see also* Douglas v. California, 372 U.S. 353, 356-57 (1963) (requiring, on similar grounds, that states provide appointed counsel to indigent defendants exercising their right to a criminal appeal).

41 Bearden v. Georgia, 461 U.S. 660, 665 (1983); *see also* Halbert v. Michigan, 545 U.S. 605, 610 (2005) ("Cases on appeal barriers encountered by persons unable to pay their own way, we have observed, 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' Our decisions in point reflect 'both equal protection and due process concerns.'" (quoting *M.L.B.*, 519 U.S. at 120)); Ross v. Moffitt, 417 U.S. 600, 608-09 (1974) ("The precise rationale for the *Griffin* and *Douglas* lines of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment.").

42 *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 786 n.7 (1983) (noting that "[i]n this case we base our conclusions directly on the First and Fourteenth Amendments" and invoking the "'fundamental rights' strand of equal protection analysis"); Williams v. Rhodes, 393 U.S. 23, 30 (1968) (determining that state laws violated the First and Fourteenth Amendments because they "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively"); *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("The rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.").

43 *See, e.g.*, Turner v. Safley, 482 U.S. 78, 94-100 (1987) (citing to both equal protection and due process precedents in concluding that a rule restricting the marital rights of inmates is "constitutionally infirm"); Zablocki v. Redhail, 434 U.S. 374, 378 (1978) (holding that a state statute preventing individuals with prior child support obligations from marrying without a court approval order violates the Equal Protection Clause); *see also* KATHLEEN M. SULLIVAN & NOAH FELDMAN, CONSTITUTIONAL LAW

reviewed with similar skepticism various state-based attempts to deny welfare assistance to newly arrived residents, reasoning, for instance, that a D.C. residency-duration requirement violated the equal protection component of the Fifth Amendment in part because the law affected "the fundamental right of interstate movement."[44]

Other cases have yielded similar results. In *Stanley v. Georgia*, the Court invoked the combined effect of the right to free expression and substantive due process protections in invalidating the criminal conviction of an individual charged with possessing obscene material in his home.[45] In *Richmond Newspapers, Inc. v. Virginia*, a plurality of Justices characterized the right of public access to criminal trials as "assured by the amalgam of the First Amendment guarantees of speech and press" and perhaps several others.[46] In *Griswold v. Connecticut*, the Court concluded that a Connecticut anti-contraceptive statute infringed on a "zone of privacy created by several fundamental constitutional guarantees"—namely, the First, Third, Fourth, Fifth and Ninth Amendments.[47] On multiple occasions, the Court has suggested that the void-for-vagueness doctrine, though rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments, "demands a greater degree of specificity" when an allegedly vague statute also implicates the First Amendment right to free expression.[48]

---

529 (18th ed. 2013) (noting that "[a]lthough the majority [in *Zablocki*] ultimately analyzed the case in terms of the 'fundamental rights' strand of equal protection, it was strongly influenced by substantive due process precedents treating the 'right to marry' as 'fundamental'").

44 Shapiro v. Thompson, 394 U.S. 618, 638 (1969). After *Saenz v. Roe*, 526 U.S. 489 (1999), most right-to-travel cases rest primarily on the Privileges or Immunities Clause of the Fourteenth Amendment. Yet, as Professor Stephen Kanter has pointed out, the right recognized in *Saenz* has a "multi-source, composite character," with roots in the Privileges and Immunities Clause of Article IV, the Equal Protection Clause, the First Amendment right to petition the government for a redress of grievances, and the Citizenship Clause of the Fourteenth Amendment. *See* Kanter, *supra* note 8, at 639-40 ("[T]he strength of the right to travel or migrate is greatly enhanced by its multi-source composite character, as evinced by the declaration in *Saenz* that the right may be even more powerful than a fundamental right protected by strict scrutiny.").

45 *See* 394 U.S. 557, 564 (1969) ("[I]n the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right [to free expression] takes on added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.").

46 448 U.S. 555, 577 (1980) (plurality opinion). The right to free association has similarly been recognized as stemming from "the close nexus between the freedoms of speech and assembly." NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460 (1958); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) ("The Constitution guarantees freedom of association of this kind as an indispensable means of preserving other individual liberties.").

47 381 U.S. 479, 484-85 (1965); *see also* Faigman, *Madisonian Balancing*, *supra* note 8, at 662-63 (discussing *Griswold* in similar terms).

48 *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 573 (1974) ("Where a statute's literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts."); Smith v. California, 361 U.S. 147, 151 (1959) ("[T]his Court has intimated that stricter standards of permissible

Bearing some relation to these "First Amendment vagueness" cases is Justice Stevens's dissenting opinion in *Bethel School District No. 403 v. Fraser*.[49] *Fraser* involved a public school's decision to suspend a student for regaling his classmates with some not-so-subtle sexual innuendo during a speech at a school assembly.[50] Challenging his suspension, the student raised two constitutional claims: (1) that the school had violated the First Amendment by punishing him for engaging in a protected form of speech; and (2) that the school had violated the Due Process Clause for failing to afford him prior notice of the disciplinary policy under which he was punished.[51] The majority rejected both claims in clause-specific fashion, holding first that the First Amendment did not prevent the school from punishing "offensively lewd and indecent speech,"[52] and second that the Due Process Clause did not impose stringent notice requirements on school administrators.[53] For Justice Stevens, however, it was the combination of the two constitutional protections that vindicated Fraser's position. Although the First Amendment permitted school officials to "regulate the content as well as the style of student speech in carrying out its educational mission," the Due Process Clause and the Free Speech Clause still combined to produce the requirement that "if a student is to be punished for using offensive speech, he is entitled to fair notice of the scope of the prohibition and the consequences of its violation."[54]

B. *Right/No-Power Combinations*

A second category of combination analysis merges arguments about powers with arguments about rights. Specifically, the Court and its individual Justices have sometimes questioned the constitutionality of a government practice on the ground that it simultaneously falls too far outside the scope of a power-related provision and too far within the scope of a rights-related provision. I call these right/no-power combinations: a claim that a federal law arguably violates an individual right combines with a claim that the law is arguably not authorized by an enumerated power to produce an overall conclusion that the law cannot stand.

Justice Breyer, for instance, has relied on right/no-power arguments to explain his dissenting position in two different cases concerning the validity

statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

49 478 U.S. 675, 691-96 (1986) (Stevens, J., dissenting).

50 *Id.* at 677-79.

51 *Id.* at 679.

52 *Id.* at 685.

53 *Id.* at 686.

54 *Id.* at 691 (Stevens, J., dissenting); *see also id.* at 692 ("The interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require this conclusion.").

of federal copyright laws. In both *Golan v. Holder*[55] and *Eldred v. Ashcroft*,[56] Breyer pointed to both the limited grant of power reflected in the Copyright Clause and the right to free speech protected by the First Amendment as reasons to limit Congress's authority to enact expansive copyright legislation. In *Golan*, Justice Breyer reasoned that the challengers' First Amendment interests were "important enough to require courts to scrutinize with some care the reasons claimed to justify the Act [under the Copyright Clause]."[57] Likewise in *Eldred*, he argued for "consider[ing] rationality in light of the expressive values underlying the Copyright Clause, related as it is to the First Amendment, and given the constitutional importance of correctly drawing the relevant Clause/Amendment boundary."[58] Both cases, in his view, yielded the ultimate conclusion that the "Copyright Clause, interpreted in the light of the First Amendment, does not authorize Congress to enact this statute."[59]

Similar combination-based thinking drove the Court's reasoning in *Hampton v. Mow Sun Wong*.[60] The Court struck down a U.S. Civil Service Commission (CSC) policy that denied noncitizens the opportunity to apply for federal job positions. Though ostensibly grounded in equal protection principles, the

55 132 S. Ct. 873 (2012) (Breyer, J., dissenting).

56 537 U.S. 186 (2003) (Breyer, J., dissenting).

57 132 S. Ct. at 908 (Breyer, J., dissenting).

58 537 U.S. at 264 (Breyer, J., dissenting); *see also id.* at 243-44 ("[I]n assessing this statute . . . I would take into account the fact that the Constitution is a single document, that it contains both a Copyright Clause and a First Amendment, and that the two are related.").

59 *Golan*, 132 S. Ct. at 912 (Breyer, J., dissenting); *see also Eldred*, 537 U.S. at 266-67 (Breyer, J., dissenting) ("The statute falls outside the scope of legislative power that the Copyright Clause, read in light of the First Amendment, grants to Congress."). Justice Harlan relied on somewhat analogous reasoning in his separate opinion in *Roth v. United States*, 354 U.S. 476 (1957), when he suggested that especially stringent limits on obscenity regulation should apply against the federal government. Harlan emphasized that "Congress has no substantive power over sexual morality," and thus may regulate obscene speech only in a manner that is "incidental to its other powers." *Id.* at 504 (Harlan, J., concurring in part and dissenting in part); *see also* Beauharnais v. Illinois, 343 U.S. 250, 294-95 (1952) (Jackson, J., dissenting) (arguing, with respect to criminal libel, that "[t]he inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms"). Congress's reduced "power" over obscenity thus militated in favor of a more receptive approach to the free speech claims of individuals facing federal obscenity prosecutions.

60 426 U.S. 88, 116 (1976). Some commentators have described *Mow Sun Wong* as reflecting a fundamental constitutional principle of "structural due process." *See, e.g.*, Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1370 (2002); Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 197 (1976); Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269 (1975). This is not surprising, as structural due process analysis focuses on the extent to which "the *processes* by which laws are enacted affect their validity under seemingly *substantive* constitutional provisions like the First Amendment and the Equal Protection Clause." Coenen, *supra* note 60, at 1281. In that sense, structural due process analysis might be understood as a special category of combination analysis, which combines procedure-related clauses with substance-related clauses to impose a heightened set of restrictions on government action. I raise the possibility only tentatively, however, recognizing that structural due process analysis may rest on something more (or something other) than clauses acting in combination.

decision also pointed to the absence of presidential or congressional involvement in the development of the CSC's alienage restrictions; indeed, the Court expressly left open the possibility that "an explicit determination by Congress or the President to exclude all noncitizens from the federal service" might pass constitutional muster.[61] This aspect of the majority's reasoning led then-Justice Rehnquist to characterize the decision as "engraft[ing] notions of due process onto the case law from this Court dealing with the delegation by Congress of its legislative authority to administrative agencies."[62] Put somewhat differently, the majority seemed to suggest that whereas alienage restrictions for federal employment did not violate equal protection principles standing alone, and whereas the exercise of delegated authority by the CSC did not violate nondelegation principles standing alone, the CSC's exercise of delegated authority to implement alienage restrictions violated equal protection and nondelegation principles standing together.[63]

Right/no-power combination analysis was most recently employed in *United States v. Windsor*.[64] In striking down portions of the Defense of Marriage Act (DOMA), the Court drew on not only equal protection and substantive due process principles, but also principles of federalism.[65] DOMA was problematic, Justice Kennedy reasoned, in part because "the definition and regulation of marriage . . . has been treated as being within the authority and realm of the separate States."[66] The statute, by injecting a one-size-fits-all definition of marriage into federal law, thus reflected a "federal intrusion on state power."[67] It was ultimately "unnecessary to decide," however, whether this intrusion alone sufficed to secure the statute's doom. Instead, the Court took notice of the statute's "depart[ure] from th[e] history and tradition of reliance on state law to define marriage" when it turned to the challengers' rights-based claims,[68] deeming the "State's power in defining the marital relation" to be "of central relevance" to those issues as well.[69] To be sure, the invocation of federalism values

61 *Mow Sun Wong*, 426 U.S. at 116.

62 *Id.* at 122 (Rehnquist, J., dissenting).

63 *Cf.* Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1714 (2002) (characterizing the holding in *Mow Sun Wong* as partially derived from nondelegation principles).

64 133 S. Ct. 2675, 2692 (2013).

65 More accurately, then, *Windsor* employed a right/right/no-power combination, or, as Justice Scalia less charitably put it, a holding that DOMA was invalid "maybe on equal-protection grounds, maybe on substantive-due-process grounds, and perhaps with some amorphous federalism component playing a role." *Id.* at 2707 (Scalia, J., dissenting).

66 *Id.* at 2689-90.

67 *Id.* at 2692.

68 *Id.*

69 *Id.*; *see also* William D. Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 391 (2014) (noting that

in *Windsor* did not necessarily imply that state-level same-sex marriage prohibitions posed no constitutional problems; indeed, *Obergefell* itself would subsequently confirm that those prohibitions too were invalid.[70] But before *Obergefell* came down, *Windsor* gave rise to debates within lower courts as to what the opinion meant with its Article I aspects subtracted away.[71] And *Windsor* at least suggested that its holding might have depended on the combined operation of the Constitution's limits on federal power and its protections of individual rights.

Although most of the Court's right/no-power cases impose heightened constitutional restrictions on the federal government, right/no-power analysis might occasionally push in the opposite direction, supporting the imposition of heightened restrictions on state and local governments. Consider in this respect the Court's approach to alienage classifications under the Equal Protection Clause. Notwithstanding the special set of nondelegation rules reflected in *Mow Sun Wong*, the Court has in this context tended to review state action more strictly than federal action. Why? Because, as the Court observed in *Mathews v. Diaz*, "It is the business of the political branches of the Federal Government, rather than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."[72] In other words, Congress's "broad power over naturalization and immigration" implies a limit on the power of states to make rules about aliens, and this limit operates in tandem with the rights-based protections of the Equal Protection Clause to subject state-level alienage restrictions to a relatively stricter form of constitutional scrutiny.[73] Where the federal government is concerned, by contrast, the "no-power" component of the equation fades from view, thus resulting in a more lenient form of rights-based analysis overall. Thus, just as Article I–based limits on federal action can operate to strengthen rights-based protections against the federal government, so too—as the alienage cases

"Justice Kennedy's analysis in *Windsor* combined concepts of due process, equality, and federalism to render a much more direct verdict on the constitutionality of section 3 of DOMA").

70 *Compare Windsor*, 133 S. Ct. at 2696 (Roberts, J., dissenting) (reading the opinion as indecisive on whether states may prohibit same-sex marriage), *with id.* at 2709-11 (Scalia, J., dissenting) (reading the opinion as decisive on the question).

71 *Compare, e.g.*, Bostic v. Schaefer, 760 F.3d 352, 379 (4th Cir. 2014) ("*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights . . . ."), *with id.* at 398 (Niemeyer, J., dissenting) ("The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism.").

72 426 U.S. 67, 84 (1976); *see also* Brian Soucek, *The Return of Noncongruent Equal Protection*, 83 FORDHAM L. REV. 155, 180 (2014) (noting that, from a federalism perspective, the Court's alienage cases present a "mirror image" to the Court's *Windsor* decision, in that the alienage cases effectively provide for "strict scrutiny when [laws are] passed by states and rational basis review when passed by Congress").

73 *Diaz*, 426 U.S. at 79-80, 85; *see also* Graham v. Richardson, 403 U.S. 365, 378 (1971) ("State laws that restrict the eligibility of aliens for welfare benefits merely because of their alienage conflict with these overriding national policies in an area constitutionally entrusted to the Federal Government.").

illustrate—might preemption-based limits on state action help to strengthen rights-based protections against the state government. In both circumstances, an argument about an individual's rights joins forces with an argument about the absence of a government's power to produce an overall conclusion that a government actor has exceeded the scope of its authority.

C. *Power/Power Combinations*

A third type of combination argument appeals to the validating force of multiple constitutional powers. Consider, for example, Chief Justice Marshall's opinion in *McCulloch v. Maryland*.[74] *McCulloch* famously established Congress's authority to charter a national bank, notwithstanding the absence of an enumerated Article I provision on the subject.[75] No such provision was needed, Marshall explained, because Article I vested in Congress the implied authority to enact a range of "incidental" measures related to the exercise of the powers it enumerated.[76] With that proposition established, however, Marshall still needed to identify a particular enumerated power from which to imply the power to incorporate a bank. And here, rather than cite to one particular clause within Article I, Section 8, he invoked five:

> Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are entrusted to its government.[77]

Marshall thus concluded that a national bank could be characterized as "beneficial" to the exercise of multiple enumerated powers, rather than one such power in particular.[78]

---

74 17 U.S. (4 Wheat.) 316 (1819).

75 *Id.* at 405-12.

76 *Id.* at 406.

77 *Id.* at 407.

78 To be clear, it is uncertain whether this passage was intended to assert a series of arguments in the alternative as opposed to a bona fide power/power combination argument. Perhaps, that is, Marshall meant to suggest only that each of the five powers mentioned independently supported an implied legislative authority to charter a national bank. Or perhaps the conclusion was even more complicated, with some powers being independently sufficient to support a bank and others exerting mutually dependent support for that conclusion. All we know for sure is that the five powers together provided a strong enough textual basis for upholding the bank. And to the extent that no one of these five powers could alone have provided the same, Marshall would have been relying on a power/power combination argument of some sort.

Some fifty years after *McCulloch*, the Court found a federal power to issue paper money in a similarly diverse conglomeration of Article I clauses.[79] In *Knox v. Lee*,[80] one of the so-called *Legal Tender Cases*, the Court deemed it "allowable to group together any number of [enumerated powers] and infer from them all that the power claimed has been conferred."[81] With that principle in mind, the Court concluded that the Legal Tender Act constituted a permissible means of "carry[ing] into execution the powers created by the Constitution."[82] Among other things, the issuance of paper money made it easier to pay soldiers, expanded public credit, and helped to alleviate "the overhanging paralysis of trade" occasioned by the Civil War—all regulatory tasks falling comfortably within the ambit of different Article I powers.[83] This was enough, in the Court's view, to demonstrate the Legal Tender Act's constitutionality,[84] and the *Legal Tender Cases* would thus stand for the proposition that a "broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress."[85]

Not much has happened since then in the world of power/power combination analysis.[86] Even the expansive power-based rulings of the New Deal era did

79 In *Hepburn v. Griswold*, 75 U.S. (7 Wall.) 603 (1869), a 4-3 majority had previously denied the existence of a paper-money authority, concluding that it did not derive from the power to "coin money," the power to "declare and carry on a war," or the powers to regulate commerce and borrow money, among others. *Id.* at 616-22.

80 79 U.S. (12 Wall.) 457 (1870).

81 *Id.* at 534; *see also id.* (noting that implied powers could "be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined").

82 *Id.* at 543.

83 *Id.* at 540-41.

84 As in *McCulloch*, the Court in *Knox* never precisely described the mechanism by which the clauses combined to establish the constitutional validity of paper money. Muddying things further, *Julliard v. Greenman* combined a different set of clauses to produce the same basic conclusion, holding that the power to issue paper money derived from the powers to coin and borrow money "taken together," while also emphasizing deference to Congress on the question of the law's constitutionality. 110 U.S. 421, 448 (1884); *see also* Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the* Legal Tender Cases, 95 GEO. L.J. 119, 150-53 (2006) (characterizing *Julliard* as grounded largely in the political-question doctrine).

85 Norman v. Balt. & Ohio R.R., 294 U.S. 240, 303 (1935).

86 Power/power combination arguments have occasionally surfaced in connection with executive powers as well. Most notably, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Solicitor General unsuccessfully advanced a power/power combination argument in defense of President Truman's wartime seizure of steel mills, contending that "[p]residential power to act on a particular occasion may derive from more than one of the grants contained in Article II" and that Truman's "power to act . . . [had] sprung from all the available clauses." Brief for Petitioners at 99-100, 343 U.S. 579 (1952) (No. 745). More recently, Justice Thomas advanced a roughly analogous defense of the President's authority to try "enemy combatants" by military commission. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting) ("[T]he Constitution vests in the President '[t]he executive Power,' Art. II, § 1, provides that he 'shall be Commander in Chief' of the Armed Forces, § 2, and places in him the power to recognize foreign governments, § 3. This Court has observed that *these provisions* confer upon the President broad constitutional authority to protect the Nation's security in the manner

not expressly rest their decisions on the combined effect of multiple enumerated powers; rather, those decisions invoked individual powers—most often the commerce power—as independently sufficient to sustain the federal enactment under review.[87] These decisions, in turn, may have obviated the need for power/power combination analysis in the modern era: why bother combining the Commerce Clause with another power-related provision when the Commerce Clause will most likely suffice to uphold an enactment on its own? But now that the Court has begun to rein in the commerce power, rendering it something less than a "blank check" for congressional authority,[88] power/power combination analysis might prove a more relevant and viable option for government attorneys to consider in future Article I cases.[89] If so, some of the Court's early federal-power cases may provide a useful blueprint for the making of such claims.

---

he deems fit." (emphasis added)). Finally, Professors Posner and Porat have suggested that something akin to power/power combination analysis drove the Court's determination in *Dames & Moore v. Regan* that President Carter was both statutorily and constitutionally authorized to suspend legal claims against the Iranian government during the Iran hostage crisis. *See* Porat & Posner, *supra* note 8, at 47.

87 *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

88 United States v. Lopez, 514 U.S. 549, 602 (Thomas, J., concurring); *see also* United States v. Morrison, 529 U.S. 598, 617 (2000) (holding that the Commerce Clause does not permit Congress to "regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

89 Consider in this respect Chief Justice Roberts's controlling opinion in *National Federation of Independent Business (NFIB) v. Sebelius*, 132 S. Ct. 2566 (2011). Though ostensibly voting to uphold the law as a valid exercise of the taxing power, Roberts reached this conclusion by way of a circuitous, three-step route. First, he established that the *commerce power* did not authorize enactment of the mandate. *Id.* at 2585-93 (opinion of Roberts, C.J.). Second, he applied a "saving construction" to the mandate, under which it operated not as a simple command to purchase health insurance, but rather as a special tax imposed on the non-purchasers of health insurance. *Id.* at 2593-94. Finally, he demonstrated that the mandate, so construed, was sustainable under the Taxing Clause. *Id.* at 2594-95. The three-step argument thus combined a Commerce Clause claim with a separate Taxing Clause claim: the Commerce Clause validated a saving construction of the law that Roberts otherwise would have rejected, and the Taxing Clause established that the law, as read under the saving construction, reflected a valid exercise of constitutional power. *See id.* at 2600 ("[T]he statute reads more naturally as a command to buy insurance than as a tax, and I would uphold it as a command if the Constitution allowed it. It is only because the Commerce Clause does not authorize such a command that it is necessary to reach the taxing power question."). The Chief Justice's reasoning thus reflected not so much a form of power/power combination analysis as it did a form of "power/no-power" combination analysis—perhaps the first of its kind ever to grace the U.S. Reports.

My point, to be clear, is not to suggest that the Chief Justice's opinion in *NFIB v. Sebelius* employed a straightforward form of power/power combination analysis akin to what we encountered in *McCulloch* and the *Legal Tender Cases*. Rather, it is simply to suggest that the Court's recent limiting of the commerce power raises new and interesting questions regarding the interactions between Congress's enumerated powers—questions of the sort that the Chief Justice grappled with in *Sebelius* itself.

D. *Subclausal Combinations*

I have thus far considered combination arguments that operate across constitutional clauses. But combination arguments can also arise *within* the confines of a single clause. Invoking what I call "subclausal combinations," the Court has sometimes merged analytically separate decision rules governing different aspects of a particular clause's operation. A single constitutional clause, in other words, can generate multiple doctrinal subrules, which can merge together to support combination arguments of their own.

In *Plyler v. Doe*, for instance, the Court considered an equal protection challenge to Texas's practice of denying public education to the children of undocumented immigrants.[90] Then-existing doctrine did not look good for the challengers: the Court had previously held that education did not qualify as a fundamental interest[91] and that undocumented immigrants did not qualify as a suspect class.[92] But the Court applied heightened scrutiny nonetheless. Emphasizing the importance of education and the vulnerable position of children with undocumented status, the Court faulted the law for failing to further a "*substantial* goal of the state" (thus applying something stronger than the mere "legitimate state interest standard" associated with rational basis review).[93] Critically, the Court never declared that children of undocumented immigrants themselves constituted a suspect class for any and all purposes, nor did it revisit its earlier determination that burdens on educational interests would generally fail to trigger strict scrutiny in future equal protection cases. But the Court could at least say that the Texas law at issue, which involved both a refusal to educate and the targeting of children of undocumented immigrants, merited heightened equal protection review.[94]

---

90 457 U.S. 202 (1982).

91 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 1 (1973).

92 *See Plyler*, 457 U.S. at 223 ("Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'").

93 *Id.* at 223-24 (emphasis added). "More is involved in these cases," the Court explained, "than the abstract question whether [the Texas law] discriminates against a suspect class, or whether education is a fundamental right. [The law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status." *Id.* at 223; *see also* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 8 (2014) ("By asking for a substantial goal, the Court signaled that its analysis might be closer to what is called 'intermediate scrutiny'—more than a rational basis but less than strict scrutiny. The Court did not so label its analysis, but it seemed to require that Texas show something more than a rational basis."). For similar combination-based reasoning in a similar context—albeit on the dissenting side of a constitutional decision—see *Rodriguez*, 411 U.S. at 110 (Marshall, J., dissenting) ("[I]f the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the *interest and classification* present in this case, the unconstitutionality of that scheme is unmistakable." (emphasis added)).

94 *See* Linda E. Carter, *Intermediate Scrutiny Under Fire: Will* Plyler *Survive State Legislation to Exclude Undocumented Children from School?*, 31 U.S.F. L. REV. 345, 376 (1997) ("Ultimately, the Court focused on the combination of a status over which the children had no control and the nature of the deprivation.").

Just as a court might combine discrete decision rules concerning the application of a single clause, so too might it combine "considerations" or "arguments" related to the operation of that clause in a particular case. In *United States v. Comstock*, for instance, the Court upheld a federal civil commitment statute as authorized by the Necessary and Proper Clause.[95] Justice Breyer's majority opinion in *Comstock* relied on "five considerations" which, "taken together," established "that the Constitution grants Congress legislative power sufficient to enact [the statute]."[96] In outlining these five considerations, Justice Breyer appealed to various propositions of Necessary and Proper Clause doctrine—including the proposition that "the Necessary and Proper Clause grants Congress broad authority to enact federal legislation";[97] the further proposition that a longstanding history of congressional regulation within a particular field can be "helpful in reviewing the substance of a congressional statutory scheme";[98] and the even further proposition that, "[as] the custodian of its prisoners," the federal government "has the constitutional power to act in order to protect nearby (and other) communities from the danger federal prisoners may pose."[99] None of these propositions, to be sure, bore the formal label of a subrule or subprinciple concerning the scope of the Necessary and Proper Clause, but each proposition drew support from a different set of cases while bearing relevance to a different feature of the challenged statutory scheme. In that sense, the Court's conclusion in *Comstock* also rested on a sort of subclausal combination analysis, which looked to various aspects of Necessary and Proper Clause doctrine in the aggregate, rather than considering each in isolation.[100]

Finally, we might identify even subtler variations of subclausal combination arguments in numerous Supreme Court cases that appeal to combinations of prior precedents. Each individual precedent sets forth a subclausal decision rule of its own, reducible to the form of "Where the facts are *X*, the outcome should be *Y*." And once we accord decision-rule status to the discrete holdings of individual cases, we start to see subclausal combination arguments popping up all over the landscape of constitutional doctrine. In *Kelo v. City of New London*, for instance, the Court sequentially described three prior Takings Clause decisions—*Berman v. Parker*,[101] *Hawaii Housing Authority v. Midkiff*,[102]

95 560 U.S. 126 (2010).
96 *Id.* at 133.
97 *Id.*
98 *Id.* at 137 (quoting Gonzales v. Raich, 545 U.S 1, 21 (2005)).
99 *Id.* at 142 (citing Youngberg v. Romeo, 457 U.S. 307, 320 (1982)).
100 *Id.* at 149.
101 348 U.S. 26 (1954).
102 467 U.S. 229 (1984).

and *Ruckelshaus v. Monsanto Co.*[103]—before concluding that the decisions "*[v]iewed as a whole*" demonstrated the validity of the governmental taking under review.[104] Similarly, in *U.S. Railroad Retirement Board v. Fritz*, the Court quoted seven cases to support the proposition that "the Court . . . has consistently refused to invalidate on equal protection grounds legislation which it simply deem[s] unwise or unartfully drawn."[105] And in a bevy of other cases, the Court has appealed to such phenomena as the "force of our precedents,"[106] the "thrust of our . . . jurisprudence,"[107] and "the weight of our decisions,"[108] while also relying on string cites to signal high levels of precedential support for a particular doctrinal rule.[109] In this way, the mundane, workaday business of citing to collections of precedents turns out to resemble the more unusual and infrequent practice of citing to collections of constitutional clauses. What distinguishes the two practices is not so much the structure of the argument itself as it is the nature of the units being combined.

III. The Legitimacy of Combination Analysis

Having introduced some examples of combination arguments in constitutional law, this Article now turns to their analytical structure. The aim of this Part is twofold: (1) to suggest that logical validity of combination analysis depends on a small number of plausible and straightforward premises; and (2) to suggest that the practice bears important structural similarities to other widespread and well-accepted types of constitutional arguments—namely, arguments based on the constitutional avoidance canon and arguments that appeal to considerations of constitutional structure. More specifically, the discussion here is intended to push back against the claim that combination analysis is simply too tenuous or radical a method of decisionmaking to warrant any further legitimation from the courts. That is not to say that combination analysis *should* in fact be utilized—the next Part will consider that question in further detail.[110] But it is to suggest that the practice should not be dismissed on legitimacy-based grounds alone.

---

103 467 U.S. 986 (1984).

104 545 U.S. 469, 480-82 (2005) (emphasis added).

105 449 U.S. 166, 175-77 (1980).

106 Ashcroft v. ACLU, 542 U.S. 656, 670 (2004).

107 Kansas v. Marsh, 548 U.S. 163, 175 (2006).

108 Paul v. Davis, 424 U.S. 693, 702 (1976).

109 *See, e.g.*, Hollingsworth v. Perry, 133 S. Ct. 2652, 2662 (2013) (citing four cases to support the proposition that "[w]e have repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing").

110 *See infra* Part IV.

A. *The Additive Logic of Combination Analysis*

Combination arguments can be modeled mathematically. Simply put, courts combine the clauses by adding up or summing together separate conclusions of partial clausal consistency (or inconsistency) to produce an overall conclusion of total constitutionality (or unconstitutionality). Just as my limited desire to see a movie and my limited desire to buy clothes might together yield an overwhelming desire to go to the mall,[111] so too might clauses providing limited individual support for a judicial result operate together to generate strong collective support for that result.

Before developing that idea further, let us first consider a model of constitutional decisionmaking under which combination analysis *would not* in fact make much sense. Suppose, for instance, that the Court confronts the question of whether some act of Congress falls within the scope of its enumerated powers. The most familiar way of conducting the inquiry is to walk through the individual clauses of Article I, Section 8, and to ask in binary fashion whether each such clause *does* or *does not* authorize the enactment in question. Constitutional invalidity is connoted by the number 0, and constitutional validity by the number 1, with each enumerated power capable of contributing a score of either 0 or 1. And, indeed, with such a model in place, combination analysis should never make a difference. If the Court identifies an enumerated power that authorizes the statute, the constitutional inquiry is over; once a law garners the one "constitutionality point" that it needs, we have no reason to keep looking for other authorizing powers.[112] Conversely, if no power authorizes the statute, then combining the powers together will not change the result, with 0 plus 0 continuing to equal 0. On this simple binary model of constitutional adjudication, combination analysis will prove to be redundant on the one hand or fruitless on the other—pointless either way.

There is, however, another way of conceptualizing the inquiry. Suppose instead that each enumerated power is capable of conferring partial values between the fully unconstitutional score of 0 and the fully constitutional score of 1.[113] It still remains possible for a single enumerated power to sustain a

111 *See* Porat & Posner , *supra* note 8, at 4 (discussing in similar terms the aggregation of reasons to decline a dinner invitation).

112 *Cf.* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (noting that "if a hybrid claim is one in which a litigant would actually obtain an exemption from a formally neutral, generally applicable law under another constitutional provision, then there would have been no reason for the Court in what *Smith* calls the hybrid cases to have mentioned the Free Exercise Clause at all").

113 In many ways, the mechanism I describe here mirrors what Professor James G. Dwyer has called "the additive view of rights." James G. Dwyer, *The Good, the Bad, and the Ugly of* Employment Division v. Smith *for Family Law*, 32 CARDOZO L. REV. 1781, 1786 (2011) ("One would need, in at least a rough sort of way, to assign some value to each single right, establish some threshold value for a

congressional enactment on its own—if, for instance, a law scores a 1 out of 1 under the power to coin money, then a court can proceed to uphold the law without considering the effect of any other enumerated powers. But in other circumstances, combination analysis *will* make a difference. If, for instance, a law garners a score of, say, 0.6 out of 1 under one enumerated power, we now would be interested to know whether it managed to garner additional support from some other power.[114] Circling back to the *Legal Tender Cases*, for instance, one might understand the Court's reasoning as follows: the Legal Tender Act received 0.5 constitutionality points from the Commerce Clause, 0.3 points from the Spending Clause, and perhaps another 0.3 from the Coinage Clause, yielding an overall score that exceeded the necessary threshold of 1.[115]

But wait! If a law receives only 0.5 points out of 1 under the Spending Clause and 0.5 points out of 1 under the Commerce Clause, should it really be upheld? Should we validate a law that registers a paltry score of 1 total point out of the 2 possible points available to it? (A score of 1 out of 2, after all, is mathematically equivalent to a score of 0.5 out of 1, which, *ex hypothesi*, should not warrant an outcome in the government's favor.) Think carefully, however, about what this add-the-denominators approach would portend. A law regulating the interstate shipment of milk, for instance, might receive a full score of 1 out of 1 under the Commerce Clause, but it would also receive scores of 0 out of 1 under the Militia Clause, 0 out of 1 under the Bankruptcy Clause, 0 out of 1 under the Piracy and Felonies Clause, and so on, thus giving it a tiny fraction of the total number of constitutionality points that the powers have to offer. Adding the denominators together would thus accord huge

right's triggering heightened review, and assume that the value of each single right is below this threshold, but then find that adding two such rights together creates a sum that is above the threshold. It is difficult to know even where to begin with such quantification and calculation."). It bears emphasizing, however, that what I am suggesting is only a model. I am not proposing that courts actually start quantifying constitutionality points and measuring their summations against a predetermined numerical threshold. Consequently, I part ways with Professor Dwyer insofar as he implies that an additive model of combination analysis illustrates the *infeasibility* of the practice. In my view, the additive model helps to demonstrate its logical validity. As the next Sections demonstrate, there are ways of conducting this analysis that do not require the Court to resort to complicated mathematical calculations of the sort this Section has proposed.

114 For the sake of simplicity, I am omitting reference to the Necessary and Proper Clause throughout this Section. But, it might figure into the analysis either by determining the number of constitutionality points that *each* individual clause confers (i.e., "This law scores a 0.2 out of 1 as a necessary and proper means of implementing the commerce power"), or as a means of "bumping up" the sum total of points that the clauses together confer (i.e., "This law would receive 0.7 constitutionality points total under the Commerce and Spending Clauses, and an additional 0.5 constitutionality points from the Necessary and Proper Clause").

115 Here I am bracketing the possibility of double counting errors—that is, the possibility that adding together the constitutionality points conferred by multiple clauses impermissibly magnifies the significance of a single feature of the law that both clauses deem to be constitutionally significant. In a subsequent Section, I will consider that possibility in further detail. *See infra* Section V.B.

significance to the widespread presence of nonauthorizing powers throughout the constitutional text, converting each into a reason not to validate a law that one such power clearly authorizes. Taken to its extreme, this approach would yield the absurd result of permitting only those exceedingly rare forms of congressional action that effectuate all of Congress's enumerated powers at once. If that absurdity is to be avoided, a combining court must keep the "constitutionality threshold" constant, unaffected by the number of clauses on which a combination argument relies.

It does not take much work to explain right/right combination arguments in similar terms: replace the constitutionality points conferred by powers with the unconstitutionality points conferred by rights and one easily arrives at the same result.[116] As to right/no-power arguments, some adjustments are required, but the takeaway remains largely the same. Specifically, rather than stipulate that each enumerated power is capable of conferring on a federal law only the bare minimum number of constitutionality points necessary to sustain its validity under Article I (e.g., up to 1 point where 1 point is needed), we would now have to entertain the possibility that each power could contribute a constitutionality score that would be *more than sufficient* to validate the law (e.g., up to, say, 1.5 constitutionality points, where only 1 point is needed). If so, an arguably valid exercise of congressional power might receive from one enumerated power a score of, say, 1.2 out of 1.5 constitutionality points. But an individual right could enter the picture and contribute a sufficient number of negative constitutionality points (say, 0.5) to bring the overall score back below the 1-point minimum threshold. Right/no-power arguments make sense, that is, on the added assumption that some constitutionally valid enactments under Article I might qualify as more valid than others, even when both enactments are valid enough to pass muster under a power-based clause in isolation.[117]

---

116 Indeed, some commentators have characterized *Smith*'s hybrid rights exception in much the same terms. *See* Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 430-31 (1994) (arguing that the Court in *Smith* reasoned that "the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim"); Stein, *supra* note 13, at 172-75 (offering an additive interpretation of hybrid rights under *Smith*).

117 There remains one final assumption lurking within this account of combination analysis: namely that the constitutionality or unconstitutionality points associated with each particular clause can in fact be added together. Even if we understand one clause partially to authorize a congressional enactment and another clause to do the same, we might nonetheless resist combination analysis on the ground that the clause-specific conclusions invoke incommensurable units of constitutional measurement. Saying that 0.5 points under the taxing power plus 0.5 points under the commerce power equals 1 full point under Article I, on this view, would be just as absurd as saying that 0.5 ounces plus 0.5 inches equals 1 full liter. For the math to work, the units need to line up. And perhaps when we are trying to add one clause-specific conclusion to another, the units simply do not.

I cannot definitively prove that clause-specific conclusions of partial constitutionality (or unconstitutionality) are in fact commensurable. But I can at least observe that modern legal practice

B. *Doctrinal Analogues*

It remains to be asked whether we should accept the premises that make combination analysis work. Can we sensibly claim that a law "kind of," "partially," or "barely" complies with the dictates of a particular constitutional clause, or must we always reach the conclusion that the law either fully does or fully does not comply? I do not have a definitive answer to this question, and, in some sense, no such answer may exist. We are all free to adopt whatever metaphysical picture of the clauses we want to adopt, and it is hard for me to think of any objective criteria by which one such picture would qualify as more conceptually valid than any another. Some of us might prefer to compare the clauses to on/off switches, whereas others might prefer to compare them to sliding scales. We may have good practical arguments for favoring one conception over the other, but I suspect that any further conceptual debating of the issue would prove fruitless. There is, I suspect, no "right" or "wrong" view of the clauses' metaphysical structure; there are only different metaphors that we may or may not choose to employ.

What I can point out, however, is that a sliding scale conception of the clauses' applicability appears to underlie much of the Court's constitutional work. That fact suggests that the key underlying premises of combination analysis—whatever their abstract conceptual merit—enjoy strong *doctrinal* support. At one level, this point should be obvious from Part II of this Article: the Court's occasional willingness to use combination analysis necessarily reveals some level of judicial receptivity to the assumptions that drive it forward. But the doctrinal support runs deeper than that. For one thing, the Court and its individual Justices sometimes "talk" about constitutional provisions in terms that are difficult to square with a strictly binary (and hence combination-unfriendly) approach to clause-specific questions, conceding, for example, that some clause-specific questions qualify as close or nonobvious and that fine-grained distinctions between different forms of conduct can

routinely ascribes additive significance to the different sorts of *reasons* that courts and litigants marshal in support of various constitutional conclusions. Adding together reasons for results is a widespread and well-accepted feature of constitutional argument (recall, for instance, my earlier discussion of *subclausal* combination arguments), and constitutional combination analysis fits comfortably within this practice. *See supra* Section II.D. And that point should suggest, as a doctrinal matter, that combination analysis faces no great commensurability-related obstacles. If it is logically permissible to say that two considerations—each grounded in the Due Process Clause—together indicate that a law is unconstitutional, then should it not also be logically permissible to say that two considerations—one grounded in the Due Process Clause and one grounded in the Equal Protection Clause—do the same? I do not see, in other words, anything special about the clauses qua clauses that would render the arguments about one clause impossible to assert in combination with the arguments about another clause. That observation alone, of course, does not conclusively rebut any commensurability-based objections to combination analysis. But it does at least suggest that the objection seems to run up against a set of assumptions that are elsewhere regularly embraced.

translate into fine-grained distinctions as to the conduct's consistency with a given constitutional command.[118] More importantly, combination analysis shares significant functional features with two widely utilized tools of constitutional decisionmaking: namely, the constitutional avoidance canon and arguments based on constitutional structure. As the remainder of this Section will demonstrate, the Court's frequent invocation of avoidance and structural arguments further bolsters the legitimacy of combination analysis itself.

1. Constitutional Avoidance

The constitutional avoidance canon provides that courts should disfavor statutory constructions that would potentially run afoul of a constitutional command.[119] Thus, when statutory text can accommodate two or more plausible readings, and when one of those readings triggers constitutional doubts, the avoidance canon advises courts to reject the constitutionally problematic reading in favor of a constitutionally unproblematic alternative. Critically for our purposes, an avoiding court need not conclude that a disfavored statutory reading would render the statute definitively unconstitutional; instead, the court need only conclude that such a reading would potentially cause constitutional problems in order to favor the alternative reading instead.

On initial inspection, avoidance arguments and combination arguments may seem unrelated. In fact, however, an avoidance argument turns out to be its own kind of combination argument—one that combines a tentative conclusion that a reading of a statute conflicts with its text with a tentative conclusion that the same reading would conflict with the Constitution to produce a definitive

118 The Justices do not always describe their work in this way. Instead, as Professor Eric Berger has pointed out, they often employ absolutist rhetoric in defense of their respective positions, even in cases "lacking obvious answers." Eric Berger, *The Rhetoric of Constitutional Absolutism*, 56 WM. & MARY L. REV. 667, 683 (2015). Even so, the Court's tendency toward absolutist language is not uniform, and the Justices sometimes offer less absolutist characterizations of the various degrees to which different constitutional clauses can support different constitutional results. *See, e.g.*, Navarette v. California, 134 S. Ct. 1683, 1692 (2014) (rejecting a defendant's Fourth Amendment claim, while acknowledging that "this is a 'close case'" (quoting Alabama v. White, 496 U.S. 325, 332 (1990))); NFIB v. Sebelius, 132 S. Ct. 2566, 2646 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) (referencing the "outer edge of the commerce power"); Clinton v. City of New York, 524 U.S. 417, 496 (1998) (Breyer, J., dissenting) (noting that "the Act before us is novel" and that "it skirts a constitutional edge"); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991) ("While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria."); Edelman v. Jordan, 415 U.S. 651, 667 (1974) ("[T]he difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night."); *see also* Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting) ("The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other.").

119 For a helpful overview of the canon, see Richard L. Hasen, *Constitutional Avoidance and Anti-avoidance by the Roberts Court*, 2009 SUP. CT. REV. 181, 184-89.

ground for rejecting that reading. The statutory text, by being unclear, provides some reason not to apply it in a particular way. The constitutional text, by creating potential grounds for a constitutional violation, provides a separate reason for doing the same. The constitutional provision and the statutory provision thus combine to produce an overarching reason for prohibiting the government from applying the text in a manner that would be both constitutionally and statutorily contestable.[120]

Put another way, avoidance arguments do with a constitutional provision and a statutory provision what full-on combination arguments do with one constitutional provision and another constitutional provision. And that in turn suggests that many constitutional combination arguments can be both framed and understood in avoidance-like terms. Consider in this respect Justice Breyer's efforts to read the Copyright Clause "in the light of the First Amendment" so as to prohibit expansive grants of copyright protection.[121] One might understand the argument as follows: The Copyright Clause, read alone, is unclear as to whether it permits the enactment of statutes like the ones at issue in *Golan v. Holder* and *Eldred v. Ashcroft*. These statutes might be valid under a broader reading of the Clause, but they might also be invalid under a narrower reading. But the broader reading, unlike the narrower reading, gives rise to an *additional* set of constitutional problems involving the Free Speech Clause of the First Amendment. Those additional problems, while perhaps not strong enough to warrant straightforward invalidation of the law on First Amendment grounds, are enough to tip the scale in favor of the narrower reading of the Copyright Clause—thereby producing the conclusion that the "Copyright Clause, interpreted in the light of the First Amendment," forbids enactment of expansive copyright statutes.[122]

---

120 This account of the avoidance canon holds true regardless of whether one views the canon as a *descriptive* canon grounded in empirical presumptions about legislative intent, *see, e.g.*, Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 466 (1989) (refusing to ascribe to Congress the intent "to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils"), or as a *normative* canon designed to create and enforce "constitutional rules that raise obstacles to particular governmental actions without barring those actions entirely." Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1585 (2000). On both accounts, the Court determines (a) that a statute *potentially* offends a constitutional norm and (b) that the statute can be plausibly read in a way that does not create constitutional difficulties. The canon-inspired conclusion therefore depends on the combined impact of findings (a) and (b), regardless of whether the conclusion is framed in terms of a backward-looking claim about congressional intent or a forward-looking claim about the enforcement of constitutional resistance norms.

121 *See supra* notes 55–59 and accompanying text.

122 Golan v. Holder, 132 S. Ct. 873, 912 (2012) (Breyer, J., dissenting); *cf.* John O. McGinnis & Michael B. Rappaport, Essay, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 347 (1997) ("[W]henever a provision is ambiguous, we properly read it in light of the rest of the document.").

In short, it is not difficult to recast so-called avoidance arguments in combination-like terms, and vice versa. Instead of imagining the Legal Tender Act as deriving its validity from the sum total of constitutionality points it received from multiple Article I powers, we might instead imagine Congress's spending power, commerce power, and war-related powers as all providing reasons to construe the coinage power in a permissive, rather than preclusive way. Conversely, instead of viewing the First Amendment as providing a reason to prefer one construction of the Copyright Clause over another, we might instead view it as imposing a high enough number of unconstitutionality points on expansive copyright laws to offset the barely sufficient number of constitutionality points that the Copyright Clause would otherwise confer. The descriptions are different, but the underlying mechanics are largely the same.

2. Structural Arguments

A second doctrinal analogue to combination analysis involves the use of so-called structural arguments in constitutional law. These arguments, as described by Charles Black, eschew "the method of purported explication or exegesis of the particular textual passage" in favor of "the method of inference from the structures and relationship created by the constitution in all its parts or in some principal part."[123] By examining the document holistically, Black argued, we can identify principles reflecting the big picture purposes and objects of the framers' design.[124] These background principles, in turn, might operate to influence the outcomes of some constitutional cases, even when the principles themselves cannot be derived from a lone provision of the constitutional text.

Courts and commentators have employed a variety of techniques to derive structural principles of constitutional law, with some emphasizing history, others emphasizing precedent, and others emphasizing intuition and common sense.[125] But there is yet a further, text-based method of identifying structural principles, which should by now look quite familiar. The idea, in short, is to point to

123 CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 7 (1969).

124 *See id.* at 7-31; *see also* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 80 (1982) ("[T]he structural approach, unlike much doctrinalism, is grounded in the actual text of the Constitution. But, unlike textualist arguments, the passages that are significant are not those of express grants of power or particular prohibitions but instead those which, by setting up structures of a certain kind, permit us to draw the requirements of the relationships among the structures."). *But see* Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 835-36 (2004) (suggesting that Black has been misread to endorse "a holistic interpretation of the Constitution," when in fact his approach focuses principally on "the structure of the government of the United States of America").

125 Michael Coenen, *Species of Structural Argument*, CONCURRING OPINIONS (July 31, 2014), http://www.concurringopinions.com/archives/2014/07/species-of-structural-argument.html [https://perma.cc/K9QK-8UFX].

collections of clauses—rather than one single clause—as giving rise to the structural principle under consideration. The clauses come together to demonstrate a textual basis for a structural principle that carries its own constitutional force.

In *Alden v. Maine*, for example, the Court extended sovereign immunity protections to cover actions brought under federal law against states in their own court systems.[126] The Court was explicit in rejecting the Eleventh Amendment as the textual basis for its decision; that provision would not work, it explained, because its terms applied only to suits in *federal* court.[127] Instead, the Court characterized its holding as grounded in "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[128] But where did the Constitution recognize this aspect of state sovereignty? Not in one single clause, but in many different clauses understood together. There were, for instance, the "[v]arious textual provisions" that "assume the States' continued existence and active participation in the fundamental processes of governance,"[129] the "limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government,"[130] and finally the "Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of the national power."[131] These provisions together, as the Court understood them, sufficed to establish that "the founding document 'specifically recognizes the States as sovereign entities.'"[132]

---

126 527 U.S. 706, 712 (1999).

127 *Id.* at 730.

128 *Id.* at 713.

129 *Id.* (citing U.S. CONST. art. III, § 2; *id.* art. IV, §§ 2–4; *id.* art. V).

130 *Id.* (citing U.S. CONST. art. I, § 8; *id.* art. II, §§ 2–3; *id.* art. III, § 2).

131 *Id.* at 713-14.

132 *Id.* at 713 (quoting Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 71 n.15 (1996)). Similar reasoning appears in other structural decisions. For example, in *Printz v. United States*, the court stated that

> [i]t is incontestible that the Constitution established a system of "dual sovereignty." . . . This is reflected throughout the Constitution's text, including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights." Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

521 U.S. 898, 918-19 (1997) (omission in original) (citations omitted); *see also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802-05 (1995) (citing several provisions of Article I to support the proposition that "the power to add qualifications [for members of Congress] is not part of the original

Another rich vein of structural argument runs through the Court's separation-of-powers case law, which establishes what Professor John Manning has described as "a freestanding . . . doctrine that transcends the specific meaning of any given provision of the Constitution."[133] "Freestanding," however, may not always be the right term; in some separation-of-powers cases, the Court has attempted to base its structural principles on multiple clauses of the text at once. In *Bowsher v. Synar*, for instance, the Court cited to, among others, the Incompatibility Clause of Article I, Section 6, the Appointments Clause of Article II, Section 2, and the Impeachment Clauses of Article I, Section 3 and Article II, Section 4 as collectively reflecting a strong constitutional presumption against congressional encroachments on law-execution responsibilities.[134] With that prohibition established, the Court could then go on to explain why the budget-sequestration provisions of the Gramm-Rudman-Hollings Act "violate the command of the Constitution that the Congress play no direct role in the execution of the laws."[135]

In a very real sense, the structural reasoning of cases like *Alden* and *Bowsher* might qualify as mega-combination arguments in their own right. Large numbers of clauses with only limited relevance to a legal issue coalesce to form a structural principle that carries direct and authoritative relevance to the case at hand. Article V's rules governing the amendment of the Constitution may not tell us much about the proper scope of state sovereign immunity, but they chip in alongside various provisions of Articles I, II, III, and IV to establish a broad principle of state sovereignty with central relevance to the question presented

---

powers of sovereignty that the Tenth Amendment reserved to the States"). *See generally* John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2004 (2009) ("Because multiple clauses assume the continued existence of states and set up a government of limited and enumerated powers, the Court has inferred that such provisions collectively convey a purpose to establish federalism and to preserve a significant degree of state sovereignty.").

133 John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1950 (2011).

134 478 U.S. 714, 722 (1986); *see also* Manning, *supra* note 133, at 1963 (noting that "the Court [in *Bowsher*] gleaned the purpose of strict separation from the overall structure of, and relationship among, the Vesting Clauses"). For similar examples, see *Buckley v. Valeo*, 424 U.S. 1, 271-72 (1976) (White, J., concurring in part and dissenting in part) and *INS v. Chadha*, 462 U.S. 919, 946 (1983).

135 *Bowsher*, 478 U.S. at 736 (Stevens, J., concurring). Arguments of this sort, though not explicitly purporting to apply the structural method, appear in constitutional scholarship as well. *See, e.g.*, Vicki C. Jackson, *Holistic Interpretation:* Fitzpatrick v. Bitzer *and Our Bifurcated Constitution*, 53 STAN. L. REV. 1259, 1284 (2001) (calling for a "holistic approach" to constitutional interpretation that "relies on a trajectory, or vector that begins with the more recent [constitutional] text, and examines how it affects understandings of what existed before"); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 960 (2002) (justifying constitutional prohibitions on sex discrimination by reference to a "synthetic" reading of the Fourteenth and Nineteenth Amendments and their respective enactment histories); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342, 354 n.58 (2009) (advocating for judicial recognition of an "anti-corruption principle" in constitutional law and deriving that principle, in part, from at least twenty separate provisions of the Constitution that "were animated by a corruption concern").

in *Alden v. Maine*.[136] The Incompatibility Clause may not have much to say about Congress's ability to reserve for itself the authority to remove executive branch officials, but it makes its own small contribution to a bigger picture suggestion concerning the limited congressional role in the execution of federal law—a suggestion of sufficient power to invalidate the legislation at issue in *Bowsher v. Synar*.[137] What the clauses lack in relevance, they make up for in numerosity—a constitutional principle lacking express textual articulation can still materialize out of a multitude of thematically related clauses.

The point of this discussion, to be clear, is not to suggest that the Court engages in argument by combination whenever it invokes considerations of constitutional structure, or vice versa. Instead, it is simply to highlight an important point of resonance between combination analysis and structural reasoning about constitutional law. Combining the clauses, on this account, involves nothing more than (a) noticing and responding to the fact that the clauses relate to one another in a thematically salient way and (b) translating that observation into a newfound constitutional principle that carries authoritative decisional force. Many of the examples discussed in Part II can be understood as doing just that.

IV. The Pros and Cons of Combination Analysis

The discussion thus far has attempted to show that combination analysis qualifies as a doctrinally familiar and conceptually coherent method of constitutional decisionmaking. But determining that combination arguments are allowed is not the same thing as determining that they are good. This Part thus turns to this next question: *Should* courts utilize combination analysis as a means of deciding constitutional cases? It begins by sorting out several "results-neutral" reasons that militate for and against the use of combination analysis in constitutional cases, the force of which should not depend on one's prior commitments to a particular set of constitutional outcomes. The analysis then turns to the results-oriented dimensions of the problem, asking whether and to what extent different forms of combination analysis might align with different substantive visions of constitutional law.

A. *Reasons to Combine*

1. Avoiding Anomalous Results

Imagine two tort cases, the first involving the negligent operation of a motor vehicle and the second involving the negligent publication of a defamatory

136 *See supra* notes 126–32 and accompanying text.

137 *See supra* notes 133–35 and accompanying text.

statement. In the car crash case, the defendant collects $100,000 in compensatory damages and $1.5 million in punitive damages. In the defamation case, the defendant collects $100,000 in compensatory damages and $1.2 million in punitive damages. Outsized ratios between punitive and compensatory damages render both judgments susceptible to invalidation under due process doctrine, which disfavors punitive-to-compensatory ratios in excess of ten-to-one.[138] But the defamation case, unlike the car crash case, also presents a potential First Amendment problem, as the Court has read the Free Speech Clause to limit recovery in some cases involving negligent acts of defamation.[139]

Now, let us suppose that an honest, all-things-considered application of the Court's punitive damages case law ultimately yields the conclusion that the $1.5 million punitive damages award in the car crash case violates the Due Process Clause, while also yielding the conclusion that the $1.2 million award in the defamation case barely passes muster. Thus, on a purely clause-specific approach to the problem, the defamation judgment is unconstitutional if and only if it violates the First Amendment. That analysis will in turn depend on whether the plaintiff qualifies as a "public figure" or whether the defamatory statement involved an issue of "public concern."[140] And let us suppose on that score that a comprehensive application of free speech doctrine yields the conclusions that (a) the defamation plaintiff, though bearing some of the hallmarks of a public figure, does not qualify as such; and (b) the subject of the defamatory publication, though bearing some of the hallmarks of a public issue, does not qualify as such. Consequently, the defamation judgment counts as constitutionally permissible as a First Amendment matter, constitutionally permissible as a due process matter, and hence constitutionally permissible overall.

An anomalous result thus arises: The damages award in the car crash case presented one and only one constitutional problem. The damages award in the defamation case was only slightly less problematic from a due process perspective, but far more problematic from a First Amendment perspective. That makes the defamation case *seem* constitutionally worse overall than does the car crash case, meaning that the invalidity of the defamation judgment ought to follow *a fortiori* from the invalidity of the car crash judgment. Yet, a clause-specific application of Supreme Court case law produces the result that

138 *See* State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003) ("[F]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.").

139 *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

140 *See id.* at 279-82 (prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'"); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 348-50 (1974) (permitting private-figure plaintiffs to collect compensatory damages—but not punitive or presumed damages—in cases involving negligently uttered falsehoods on matters of public concern).

the car crash judgment warrants constitutional invalidation whereas the defamation judgment does not. Such an outcome would strike many individuals as improvident, counterintuitive, and unfair. And it is only by combining the clauses that the apparent anomaly can be avoided; only by adding together the free speech and due process difficulties with the defamation judgment can one demonstrate that it in fact qualifies as constitutionally worse (rather than better) than its car crash counterpart.[141]

Generalizing from this example, we reach the central point: combination analysis facilitates improved forms of analogical reasoning. When deciding a case in light of previous precedents, courts can compare the *overall* constitutional picture of the former with the *overall* constitutional picture of the latter. Clause-specific analysis, by contrast, forces the Court to construct precedential walls that obscure important features from view: if a court cannot combine the First Amendment with the Due Process Clause when seeking guidance from past First Amendment *and* due process precedents, then its evaluation of the case will be distorted. It must ignore the First Amendment features of the case when applying due process precedents, and it must ignore the due process features of the case when applying First Amendment precedents. And that, in turn, increases the likelihood that the Court will render a judgment that seems to be at odds with common sense, either by validating government action that seems constitutionally

141 Professor Faigman identifies an analogous sort of anomaly as arising from the Court's decision in *McCleskey v. Kemp*, in which the claimant challenged a capital sentence on both Eighth Amendment and Equal Protection grounds. 481 U.S. 279 (1987). In deciding *McCleskey*, as Professor Faigman notes, "the Court divided the two amendments and found the Georgia capital sentencing scheme constitutional as against each." Faigman, *Measuring Constitutionality*, *supra* note 8, at 776. So constructed, however, the Court's analysis failed to offer an "accurate gauge" of the extent of the petitioner's true injury. *Id.* Under the clause-specific approach, McCleskey's death sentence was "divided into its constituent parts," where in fact "it is hard to imagine how the injury felt by the challenger could be suffered in any way other than in toto." *Id.* Put somewhat differently, it is unrealistic to think that the overall constitutional harm suffered by McCleskey would have been qualitatively less significant than the overall harm suffered by an individual with a somewhat stronger Eighth Amendment claim and a nonexistent equal protection claim or by an individual with a somewhat stronger equal protection claim and a nonexistent Eighth Amendment claim. But the clause-specific reasoning of *McCleskey* implausibly suggested otherwise.

Consider also Professor Kimberlé Crenshaw's suggestion that courts marginalize the experiences of women of color when they separately and sequentially examine the race and gender dimensions of employment discrimination claims. Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139. By failing to "combine these categories," courts systematically overlook an "intersectional experience" that "is greater than the sum of racism and sexism." *Id.* at 140, 151. Put differently, by refusing "to acknowledge that Black women encounter combined race and sex discrimination," courts undervalue the harms associated with a variety of discriminatory practices. *Id.* at 142-43. Here, too, the absence of combination-based reasoning yields a set of distorted and seemingly anomalous judicial results. *See* Abrams & Garrett, *supra* note 8, at 19-20 (discussing Crenshaw's work in similar terms).

worse than past actions it has invalidated, or by invalidating government action that seems constitutionally better than past actions it has allowed.[142]

2. Narrowness and Transparency

Combination analysis might also prove useful to a court wishing to *narrow* the scope of a doctrinal holding. This point may seem counterintuitive: combination analysis, after all, both draws from and contributes to multiple doctrinal areas at once and would thus seem to amplify, rather than diminish, the precedential implications of a given judicial holding. The breadth of a decision, however, cannot be measured solely in terms of the number of different clauses whose decision rules it affects; of no less importance is the range of different *fact patterns* for which the holding will carry force.[143] And on this metric, combination-based holdings will sometimes qualify as narrower than their clause-specific counterparts, furnishing courts with an effective means of limiting the precedential sweep of the holdings they pronounce.

Recall Justice Black's opinion in *Griffin v. Illinois*, which concluded that the Equal Protection Clause and the Due Process Clause together prohibited Illinois from requiring defendants to pay a transcript fee as a condition of filing a criminal appeal.[144] The reasoning of the opinion may not have been narrow in an absolute sense, but it was likely narrower than it would have been if Justice Black had invoked *only* the Equal Protection Clause or *only* the Due Process Clause as the basis for the Court's decision. Why? Because each of the two clauses helped in its own way to make a particular aspect of the case's fact pattern relevant to the Court's legal reasoning. The Equal Protection Clause rendered relevant the fact that the Illinois transcript fee imposed disparate burdens on the basis of wealth.[145] And the Due Process Clause rendered relevant the fact that the transcript fee limited access to procedural rights in the criminal setting.[146] By relying on both clauses, the *Griffin* plurality could and did construct an opinion about *both* wealth-based classifications *and* the criminal justice system together, rather than a broader "equal protection–only" opinion about wealth-based classifications inside and outside of the criminal justice

142 *See* Porat & Posner, *supra* note 8, at 57 (noting, with respect to private law, that "[n]ormative aggregation should improve the substantive law, in the sense of vindicating values and policy choices that are already found in the law, but which defendants can violate if claims are not aggregated").

143 *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 10-11 (1999).

144 351 U.S. 12, 17 (1956) (plurality opinion); *see also* M.L.B. v. S.L.J., 519 U.S. 102, 110 (1996) ("Concerning access to appeal in general, and transcripts needed to pursue appeals in particular, *Griffin* is the foundation case.").

145 *Griffin*, 351 U.S. at 16 ("Providing equal justice for poor and rich, weak and powerful alike is an age-old problem.").

146 *Id.* at 17 ("Such a law would make the constitutional promise of a fair trial a worthless thing.").

system, or a broader "due process–only" opinion about discriminatory and nondiscriminatory rules of criminal procedure. Put differently, by grounding its reasoning in two clauses rather than one, the plurality in *Griffin* helped to confine the precedential scope of the opinion to the narrowed zone of overlapping territory that the two clauses shared.

None of this means that combination analysis is necessary to the issuance of narrow doctrinal holdings: the clauses certainly can give rise to highly fact-specific holdings on their own. And even in cases that might lend themselves to combination-based reasoning, a pro-minimalism but anti-combination court could still render a narrow holding by dictating that additional factual features of a case do in fact bear relevance to the application of a seemingly unrelated clause. The Court might have held in *Griffin*, for instance, that the Equal Protection Clause carries special force in cases involving criminal appeals, while taking pains not to mention the Due Process Clause. Alternatively, it could have said that the Due Process Clause carries special force when the government discriminates on the basis of wealth, while taking pains not to mention the Equal Protection Clause. If the Court is determined enough to narrow without combining, it can always do so by simply specifying that its holding should extend no further than the particular factual scenario to which it applies.

But while this alternative strategy can certainly produce narrowness, it will often do so at the expense of introducing new problems related to the overall coherence of the doctrine writ large. If, for instance, the Court were to render an "equal protection–only" holding emphasizing the special procedural value of the right to appeal, it would be introducing into its equal protection doctrine a set of orphaned, quasi–due process precedents with an uncertain connection to the lion's share of access-to-justice cases. Likewise, if the Court were to render a "due process–only" holding that emphasized equality-related values, it would be introducing into its due process doctrine a set of quasi–equal protection precedents with an uncertain connection to the lion's share of cases dealing with wealth-based classifications. By invoking *both* of the clauses and precedents associated with these values, by contrast, the Court can more precisely situate its holding within the existing universe of its prior cases—explicitly drawing from, and contributing to, all the relevant lines of doctrine with thematic relevance to the case under review.[147]

147 Consider in this respect the conclusion—shared by Chief Justice Roberts and the four joint dissenters in *NFIB v. Sebelius*—that the Commerce Clause did not authorize enactment of the so-called individual mandate of the Affordable Care Act. 132 S. Ct. 2566 (2012) (opinion of Roberts, C.J.); *see also id.* at 2647 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting). These Justices repeatedly alluded to the values of individual autonomy and economic liberty in rendering a decision about Congress's power to regulate interstate commerce. *See, e.g.*, *id.* at 2589 (opinion of Roberts, C.J.) (noting that the government's position would "authorize[] Congress to . . . compel citizens to act as the Government would have them act" and that "[t]his is not the country the Framers of our Constitution envisioned");

This observation in turn supports one further conclusion related to the transparency of judicial decisionmaking. Judges may sometimes decide cases in at least partial reliance on values not directly linked to the particular constitutional issue they have been asked to decide (e.g., "I intend to strike down this law under the Equal Protection Clause in part because I do not like the way it undermines an important procedural value"). They may simultaneously be loath to draw attention to these aspects of their reasoning, dismissing such value-driven thinking as irrelevant to the actual *legal* question presented by the case. But constitutional doctrine already operationalizes a wide range of value-based judgments. And when judgments of this sort are inwardly motivating a judge's reasoning, clause-based combination analysis provides a means of expressing those judgments in a manner that is both doctrinally grounded and publicly available for everyone else to see. The point, in other words, is that judicial decisions might sometimes turn on hidden, value-driven arguments that instead could take the form of open, clause-based combination arguments. If that is true, increased acceptance of combination analysis might carry with it the salutary, transparency-promoting effect of better aligning the public reasoning of judges' opinions with the internal thought processes of the judges themselves.

---

id. at 2602 (opinion of Roberts, C.J.) (expressing the concern that "individual liberty would suffer" from a decision that embraced "a system that vests power in one central government"); *id.* at 2646 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("Congress has impressed into service third parties . . . who could be but are not customers of the relevant industry . . . ."); *id.* (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting) ("If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power . . . ."). The liberty-laden language of their opinions caught the eye of Justice Ginsburg, who accused her colleagues of "plant[ing] . . . in the Commerce Clause" arguments and considerations more generally associated with the Due Process Clause. *Id.* at 2623 n.8 (Ginsburg, J., concurring in part and dissenting in part). Chief Justice Roberts and the four joint dissenters, in other words, had managed to invoke the values of substantive due process, but not the *law* of substantive due process, as a reason to hold that the mandate exceeded Congress's power to regulate interstate commerce.

To the extent that these Justices were attempting to make an argument of this sort, they were asserting a value-based but not clause-based combination argument analogous to what we have considered in this Section. Not surprisingly, their reliance on such reasoning presages doctrinal confusion down the road. Did the Justices really intend, as Justice Ginsburg suggested, to embed a set of substantive due process protections within the law of the Commerce Clause? If so, what, if any, connection did they see between these new protections and the wide range of other autonomy-based protections that the Court has already recognized exclusively in the substantive due process context? The Justices likely had good *political* reasons for omitting reference to the Due Process Clause in their decision. *See* Jamal Greene, *What the New Deal Settled*, 15 U. PA. J. CONST. L. 265, 280-84 (2012) (identifying several such reasons). But as a doctrinal matter, the Justices would have rendered a more coherent and persuasive opinion if they had grappled with the liberty-related *precedents* of the Due Process Clause when voicing their liberty-based objections to the mandate itself.

3. Decisional Foreshadowing

I earlier suggested an analogy between combination analysis and the constitutional avoidance canon, noting that combination arguments and avoidance arguments can both be understood as citing to one legal provision as a reason to apply another provision in a particular way.[148] It should come as no surprise that combination arguments—like constitutional avoidance arguments—sometimes enable courts to avoid resolving a contested issue of constitutional law. To be sure, the avoidance achieved by combination analysis is by no means complete, as combination arguments still require courts to produce a definitive judgment of a constitutional nature. But the type of constitutional judgment rendered can at least partially avoid deciding once and for all how a particular *clause* might bear on a given constitutional question. And that feature of combination analysis might sometimes prove useful to a court looking to offer provisional, non-definitive guidance regarding an open constitutional issue. Call this the value of *decisional foreshadowing*.

Decisional foreshadowing may help to explain the Court's use of combination-based reasoning in *United States v. Windsor*.[149] Why did the Court resolve the case by reference to the combined effect of rights-based and "no-power"-based arguments? A likely explanation involves the majority's twin desires to (a) highlight its constitutional doubts regarding the validity of state-level same-sex marriage bans and (b) leave ultimate resolution of that issue for a future case.[150] If these were the Court's aims, then neither the Fifth Amendment nor Article I alone would have provided an adequate basis for the Court's holding. As to the Fifth Amendment, the Court has generally interpreted both equal protection and substantive due process principles to apply coextensively across federal and state regimes,[151] meaning that any attempt to strike down DOMA as a standalone violation of the equal protection or substantive due process components of the Due Process Clause (or even those two protections in combination) would have carried direct implications for analogous state-law issues, including those related to the validity of state-level

148 *See supra* subsection III.B.1.

149 133 S. Ct. 2675, 2689-96 (2013); *supra* Section II.B.

150 *See, e.g.*, Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same-Sex Marriage into the Public Arena*, 39 L. & SOC. INQUIRY 449, 456 (2014) ("[T]he Court's opinion with respect to DOMA indicated that while a majority of the justices were sympathetic to the cause of same-sex marriage, they were not yet ready to guarantee a nationwide right to it."); Linda C. McClain, *From* Romer v. Evans *to* United States v. Windsor*: Law as a Vehicle for Moral Disapproval in Amendment 2 and the Defense of Marriage Act*, 20 DUKE J. GENDER L. & POL'Y 351, 461 (2013) ("*Windsor* is a combination of judicial minimalism and avoidance, on the one hand, and, on the other, a robust (or more maximalist) vision of equality and the status of equal citizenship.").

151 *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 217 (1995).

same-sex marriage bans.[152] And while an exclusively Article I–based holding would have left the state-level question undisturbed, it would have prevented the majority from satisfying its apparent desire to signal openness to the possibility of establishing a more general prohibition on both state-based and federal-based infringements on the marital rights of same-sex couples.[153] By combining its Article I concerns with its Fifth Amendment concerns, the Court managed to have its cake and eat it too, offering powerful rhetorical ammunition to the challengers of state-level same-sex marriage bans, while insulating itself against the charge of having decided too much too soon.

Might the Court in *Windsor* have achieved these goals in another way? Could the Court, for instance, have invalidated DOMA under Article I alone, while then going on to offer dicta about the likely unconstitutionality of state-level same-sex marriage bans? One senses that superfluous musings about the Fourteenth Amendment would not as effectively have served the aims of the *Windsor* majority, precisely because such language could have been dismissed as mere dicta in future cases. What the Court put in place instead was a rights-based argument that was neither fully superfluous to nor fully dispositive of the judgment itself. And it was able to do this by relying on a right/no-power argument. Lower courts (and a future Court) could not automatically dismiss *Windsor*'s rights-based analysis as unnecessary to the case's result; rather, its rights-based analysis appeared to have played a nearly, but not quite, dispositive role, pushed along by the added "oomph" supplied by the Court's Article I concerns. And for anyone who takes the dicta–holding distinction seriously, that point makes all the difference. Because the Court's discussion of the Fifth Amendment actively contributed to the result in *Windsor*, its discussion had to carry at least some precedential force in future Fourteenth Amendment cases—including, most importantly, cases concerning the constitutionality of state-level same-sex marriage bans. And, sure enough, *Windsor* managed to do just that, with the Court itself in *Obergefell* frequently citing to *Windsor* as supportive of its ultimate rights-based conclusion.[154]

To be sure, combination arguments need not always foreshadow future decisions in a *Windsor*-like way; it all depends on how a court frames its discussion of the clauses being combined. The Court in *Windsor*, for instance,

---

152 *Windsor*, 133 S. Ct. at 2705 (Scalia, J., dissenting) ("My guess is that the majority, while reluctant to suggest that defining the meaning of 'marriage' in federal statutes is unsupported by any of the Federal Government's enumerated powers, nonetheless needs some rhetorical basis to support its pretense that today's prohibition of laws excluding same-sex marriage is confined to the Federal Government (leaving the second, state-law shoe to be dropped later, maybe next Term)." (footnote omitted)).

153 It might also have resulted in unduly restrictive limits on Congress's ability to promulgate laws related to the institution of marriage more generally. *Cf. id.* at 2705 n.4 (Scalia, J., dissenting) (suggesting that a federalism-only rationale for the decision would have been "impossible, given the Federal Government's long history of making pronouncements regarding marriage").

154 *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2590, 2597, 2599-2601 (2015).

could have held that DOMA was unconstitutional only because Article I operated in conjunction with the Fifth Amendment to condemn the law. That holding would have decided considerably more than the actual holding of *Windsor*, establishing that the Court's equal protection and due process concerns did *not* provide a sufficient basis for invalidating DOMA. That point, in turn, would have implied that the Fourteenth Amendment on its own did not condemn state-level analogues to DOMA, at least without the assistance of some other constitutional command. But the Court did not frame its analysis in this way; rather, it merely claimed that Article I helped to demonstrate DOMA's invalidity as a matter of rights-based doctrine, while remaining cryptic as to whether that rights-based doctrine on its own could have produced the same result. The difference, in other words, is between (a) citing a combination of clauses as *sufficient* to support a given result and (b) citing a combination of clauses as *both necessary and sufficient* to support that result. The former holding leaves open the possibility that one of the combined clauses might generate the same outcome on its own, whereas the latter holding definitively forecloses that possibility.

A final observation bears mentioning: Not everyone will agree that the decision-foreshadowing technique represents an unambiguous good. Indeed, precisely because it offers an intermediate path between avoiding an issue altogether and deciding that issue definitively, decisional foreshadowing can be attacked by minimalists and maximalists alike. For instance, advocates of a robust same-sex marriage right could have attacked *Windsor* for needlessly postponing a doctrinal development that would have provided immediate benefits to many same-sex couples. Conversely, proponents of minimalism and/or issue avoidance might have criticized the *Windsor* opinion for bothering to bring up the Due Process and Equal Protection Clauses at all, given the alternative possibility of deciding the case exclusively on federalism grounds. The arguments I have offered here do not purport to address these potential criticisms; rather, they merely assume that courts might sometimes have good reason to signal future results without fully etching them into stone. But ultimately, the strength of this last reason to combine—and perhaps even the question of whether it is better classified as a reason not to combine—depends on varying sensibilities regarding the proper role of judges in a constitutional system.

B. *Reasons Not to Combine*

1. Textual Fidelity

An initial reason not to combine stems from concerns about potential disconnects between the rules created by combination analysis and the rules enshrined in the text of the Constitution itself. This "fidelity"-based objection shares much with Professor John Manning's critique of structural arguments

in constitutional law.[155] When a court extracts high-generality constitutional principles from a series of low-generality textual provisions it ignores "an important element of the lawmaker's choice"—namely, the decision to embed within the text a series of specific provisions, rather than a general statement of constitutional purpose or principle.[156] The generality level of each clause is itself the product of pre-enactment bargains and compromises—bargains and compromises that helped to secure the public support necessary to endow the document with legally binding effect. Combining these clauses, the argument goes, displaces the intended arrangement of bargains and compromises with alternative propositions that have not themselves been codified. Just as it would be problematic for the Court to decide a case by reference to an imaginary Twenty-Eighth Amendment of its own creation, so too, the argument goes, would it be problematic for the Court to enforce abstract principles of constitutional law that operate at a higher level of abstraction than the concrete and specific stipulations we see in the text itself. Combination arguments warrant rejection, the argument concludes, because they support unfaithful readings of the text.

Even conceding that the premises of this objection are accurate,[157] we must take care not to overstate its reach. Worries about textual fidelity carry maximum force when the number of combined clauses is high, the level of generality of those clauses is low, and the result of the combination is a broad and widely applicable proposition of constitutional law. (Some plausible targets of criticism might include, for instance, Justice Douglas's efforts to derive a constitutional right to privacy from the combined force of the First, Third, Fourth, Fifth, and Ninth Amendments,[158] or Justice Kennedy's reliance on various provisions of Articles I, II, III, IV, and V to establish a broad principle of state immunity from suit.[159]) But most of the combination arguments we have considered are less ambitious, invoking only two (or maybe three) high-generality provisions for the purpose of resolving cases that implicate each individual provision in a relatively straightforward manner. These arguments do not so much create new constitutional principles out of thin air as they merely take notice of and respond to genuine areas of textual convergence. Does it really displace or ignore the constitutional text to suggest that the Equal Protection and Due Process Clauses together subject rules of criminal procedure to heightened nondiscrimination requirements—requirements that plausibly raise

155 *See generally* Manning, *supra* note 132 (discussing the use of structural arguments in federalism cases); Manning, *supra* note 133 (discussing the use of structural arguments in separation-of-powers cases).

156 Manning, *supra* note 132, at 2040.

157 That is to say, let us take for granted that fidelity to the constitutional text is in fact a desirable objective for judges to pursue. *But see* Michael J. Klarman, *Antifidelity*, 70 S. CAL. L. REV. 381 (1997).

158 Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

159 Alden v. Maine, 527 U.S. 706, 713-14 (1999).

both due process and equal protection concerns? What about when a court suggests that the First Amendment and Copyright Clause together limit Congress's authority to remove works from the public domain? There certainly may be instances in which combination arguments end up looking too much like revisions or additions to the constitutional text, but that is a far cry from saying that combination arguments are intrinsically prone to produce such results.

The fidelity-based critique must also confront some potentially combination-friendly signals that lurk within the text itself. The Necessary and Proper Clause of Article I, Section 8, for instance, vests in Congress the power to make "all laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution."[160] Might that Clause's reference to "the foregoing Powers" (as opposed to, say, "each of the foregoing Powers") lend textual support for combination-based measures of the sort the Court considered in *McCulloch v. Maryland* and the *Legal Tender Cases*? Many right/right combination arguments, moreover, involve provisions of the Bill of Rights that apply against the states by virtue of the Fourteenth Amendment's Due Process Clause.[161] Does combining one incorporated element of a Clause with another such element create any obvious tension with the singular nature of the Clause itself? And what of the Ninth Amendment? Even if the Court has rejected the idea that the provision gives rise to judicially enforceable constitutional rights,[162] might it still provide some textual basis for enforcing only partially extratextual rights—that is, rights whose content derives from the clauses' combined effects?[163]

Finally, the fidelity-based critique of combination analysis may face difficulties posed by the unitary structure of the Constitution itself. If, in other words, courts are to read the Constitution "as a single document" that reflects a coherent set of principles and purposes,[164] then the value of textual fidelity might sometimes favor rather than disfavor a combination-friendly approach. Rigid clause specificity, on this view, would sometimes yield unfaithful and unduly blinkered readings of the text, rendering judges unresponsive to important textual resonances that exist across the document's constituent parts. With combination analysis, by contrast, judges can generate results that better comport with the text understood as a whole.

---

160 U.S. CONST. art. I, § 8, cl. 18.

161 *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3034 (2010) (noting that the Court has incorporated "almost all of the provisions of the Bill of Rights" into the Fourteenth Amendment).

162 *But see Griswold*, 381 U.S. at 492 (Goldberg, J., concurring) (invoking the Ninth Amendment as a potential source of unenumerated rights).

163 *See* Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1345 (1992) ("[W]e should read the Ninth Amendment, in part, as a command to use penumbral reasoning in the rights area since only by doing so can we avoid 'denying or disparaging' rights not explicitly mentioned in the Constitution . . . .").

164 Golan v. Holder, 132 S. Ct. 873, 908 (2012) (Breyer, J., dissenting).

Whatever the strength of these text-based claims, the central point is that combination analysis, though certainly capable of producing extra-textual principles of constitutional law, is by no means guaranteed to do so. Combination arguments do not always require the construction of high-generality structural principles out of low-specificity textual building blocks. Instead, combination arguments can, and very often do, reflect the simpler, more textually grounded insight that multiple, high-generality clauses each provide some, but not overwhelming, support for a particular constitutional result. And when that is the case, textual fidelity provides no good reason against—and may even provide a good reason for—examining these conclusions collectively rather than in isolation. In sum, considerations of textual fidelity may require a tempering of combination analysis in its most expansive and creative forms, but they do not require an eschewal of combination analysis in any and all cases.

2. Judicial Restraint

A related objection would suggest that combination analysis threatens values of judicial restraint. This objection would concede that combination arguments—if properly executed—can sometimes cohere with permissible readings of the constitutional text. But still, the objection would continue, such arguments present an intolerable invitation to judicial usurpations of power. By ignoring bright-line boundaries between and among the clauses, the argument goes, we would make it too easy for creative judges to inject their policy preferences into constitutional law. The widespread aversion to Justice Douglas's combination-based reasoning in *Griswold*, for instance, reflects worries that analogous reasoning could be used to justify or repudiate virtually any conceivable set of unenumerated individual rights.[165] Proponents of federalism might similarly worry that power/power combination arguments (analogous to what we saw in *McCulloch v. Maryland* and the *Legal Tender Cases*) would enable ultra-nationalist judges to uphold every conceivable congressional enactment against Article I attack.[166] And that is to say nothing of the various structural principles and purposes that might lurk in hyper-combinations of

165 *See, e.g.*, Jamal Greene, *The So-Called Right To Privacy*, 43 U.C. DAVIS L. REV. 715, 722 (2010) ("'Penumbras and emanations' has become an in-joke around the law schools as shorthand for activist constitutional adjudication, an invitation for the Court 'to protect those activities that enough Justices to form a majority think ought to be protected and not activities with which they have little sympathy.'" (quoting ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 99 (1991))).

166 *Cf.* Knox v. Lee, 79 U.S. (12 Wall.) 457, 582 (1870) (Chase, C.J., dissenting) ("[W]e reject wholly the doctrine, advanced for the first time, we believe, in this court, by the present majority, that the legislature has any powers under the Constitution which grow out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted by it. If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited.").

ten, fifteen, or fifty different constitutional provisions. It may not be too difficult, for instance, for a cagey economoid to derive from all the Constitution's clauses a single, superseding instruction to maximize the social welfare of "We the People," thus reducing all acts of constitutional adjudication to the case-by-case application of cost–benefit analysis.

These arguments reflect legitimate concerns, but they too likely overstate the added degree of judicial mischief that combination arguments enable. We already place significant trust in judges when we empower them to enforce open-ended textual provisions like the First Amendment, the Equal Protection Clause, the Necessary and Proper Clause, and other clauses whose broad language could accommodate a virtually unlimited range of bad-faith, results-oriented outcomes. How much further leeway for bad-faith judging is really afforded by permitting reliance on combination arguments—arguments that, like their clause-specific counterparts, remain subject to evaluation and criticism by outside observers? It seems inconsistent, in other words, to accept the significant risk of judicial abuse that comes with the power of judicial review, while at the same time invoking the specter of judicial abuse as a reason for rejecting all combination arguments outright—a bit like equipping one's army with powerful weapons while worrying about what would happen if it also had knives.

3. Doctrinal Complexity

Combination arguments, we have seen, can promote judicial outcomes that seem more nuanced and consistent in light of one another.[167] But that sort of decisionmaking tends to carry with it the concomitant cost of a more intricate body of doctrinal rules.[168] The Constitution contains a small number of clauses, meaning that a strictly clause-specific approach to adjudication should also yield a small number of different bodies of law. When combination arguments enter the picture, however, courts and litigants must confront an expanded set of operative constitutional principles, rooted in the exponentially large number of combinations that can be assembled from the constituent clauses of the text.[169] And even where an absence of combination-based reasoning has left the case law finite and simple for the time being, the threat of further complexity looms on the horizon. In a combination-permissive world, it is not enough for a government lawyer to defend a law by demonstrating that it comports with the restrictions of Clause *A*, the restrictions of Clause *B*, and and the restrictions of Clause *C*. That same lawyer must now worry about the

167 *See supra* subsection IV.A.1.

168 *Cf.* Porat & Posner, *supra* note 8, at 56 (noting that normative aggregation can "create an unacceptable level of difficulty and uncertainty").

169 Specifically, if the Constitution has N clauses, it is capable of yielding 2^N-1 different combination-based arrangements (including the set of standalone rules associated with each individual clause).

possibility that a court will find a constitutional violation in the combined operation of Clauses *A* and *B*, Clauses *B* and *C*, Clauses *A* and *C*, or perhaps even in a new doctrinal principle emerging from the collective force of all three clauses together. Only a hard-and-fast prohibition on the use of combination arguments would suffice to eliminate these additional contingencies.

Real as they may be, however, concerns about complexity do not provide a compelling reason for rejecting combination analysis out of hand. For one thing, we must be careful not to overstate the baseline simplicity of clause-specific law. It is an oversimplification to say that a Constitution with *N* clauses would yield no more than *N* bodies of clause-specific doctrine. These bodies of doctrine subdivide, and their subdivisions inject substantial complexity into legal doctrine. We do not often speak of a single body of rules concerning, say, the Equal Protection Clause, or the Takings Clause, or the Commerce Clause. Rather, we speak of many different sub-areas of Equal Protection Clause doctrine, Takings Clause doctrine, and Commerce Clause doctrine, each with its own contested principles and uncertain boundaries. Within the "single" body of equal protection case law, we have cases dealing with race-based classifications,[170] sex-based classifications,[171] purposeful and nonpurposeful discrimination,[172] class-of-one claims,[173] voting rights,[174] peremptory challenges,[175] and the U.S. presidential election of 2000.[176] Within the single category of Takings Clause doctrine, we have cases dealing with, among other topics, total regulatory takings,[177] partial regulatory takings,[178] permanent physical takings,[179] conditional permits,[180] and public–private development partnerships.[181] And within the single category of Commerce Clause doctrine, we have cases dealing with the regulation of items in interstate commerce,[182] the regulation of activities that substantially affect interstate commerce,[183] the regulation of the channels of interstate commerce,[184] and the mandated purchasing of commercial products,[185]

170 *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967).

171 *See, e.g.*, United States v. Virginia, 518 U.S. 515 (1996).

172 *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

173 *See, e.g.*, Engquist v. Or. Dep't of Agr., 553 U.S. 591 (2008).

174 *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181 (2008).

175 *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986).

176 *See* Bush v. Gore, 531 U.S. 98 (2000) (per curiam).

177 *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992).

178 *See, e.g.*, Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

179 *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

180 *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994).

181 *See, e.g.*, Kelo v. City of New London, 545 U.S. 469 (2005).

182 *See, e.g.*, Shreveport Rate Cases, 234 U.S. 342 (1914).

183 *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

184 *See, e.g.*, United States v. Darby, 312 U.S. 100 (1941).

185 *See, e.g.*, NFIB v. Sebelius, 132 S. Ct. 2566, 2587-91 (2012) (opinion of Roberts, C.J.); *id.* at 2644-50 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

to say nothing of the huge body of dormant Commerce Clause cases and the many subdivisions they reflect.[186] Different types of fact patterns, in short, trigger different sets of decision rules, even where the different fact patterns themselves implicate the same provision of the constitutional text.

All of this suggests that the complexity of constitutional doctrine depends primarily on the level of fact-specificity with which the Court pitches its holdings—not on the total number of clauses (or combinations of clauses) that the Court is permitted to invoke.[187] Combination arguments, to be sure, can contribute to this complexity precisely because they tend to promote the fact-specific resolution of cases.[188] But courts can and very often do render highly fact-specific judgments without any assistance from combination-based reasoning. And even when they do combine the clauses, courts can still limit the fact-specificity of their reasoning and thus, by extension, the magnitude of a decision's complexity-increasing effects. (Doctrinal complexity would only marginally increase, for instance, on account of the Court's holding that two clauses together required application of a bright-line decision rule in an easily identifiable set of cases.) If complexity is the relevant evil, then combination analysis is not the primary evildoer: removing all combination arguments from the doctrine seems neither necessary nor especially likely to reduce doctrinal complexity in a significant way.

But what about the related set of concerns stemming from the mere possibility of a combination argument carrying weight in future cases? What do we tell the unfortunate government lawyer who must consider all seven possible permutations of Clauses *A*, *B*, and *C* when anticipating a challenge to a law that is independently vulnerable under each provision? This is a fair concern, but there is reason to wonder how much combination analysis is itself contributing to the government lawyer's plight. Even without combination analysis in the picture, the lawyer must consider any number of different contingencies—perhaps the court will emphasize one set of facts over another when applying Clause *A*, or perhaps it will emphasize one line of precedents over another when applying Clause *B*. Perhaps it will apply a heightened standard of review when applying Clause *B* but still sustain the law. Perhaps it will apply a more lenient standard of review when applying Clause *C* but still strike down the law. And perhaps it will overrule, or strain hard to avoid, a prior precedent along the way. Combination arguments do add further possibilities to the range of analytical methods a case might invite. But this

186 *See, e.g.*, W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186 (1994).

187 *Cf.* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1, 14 (1992) (characterizing the use of fact-specific interest-balancing in constitutional law as a "decision methodolog[y] that vastly complexif[ies] the system").

188 *See supra* subsection IV.A.2.

added complexity must be understood in relation to the large number of contingencies that the lawyer must anticipate already.

To be clear, the suggestion is not that problems of complexity and unpredictability should be irrelevant to the question of whether to combine the clauses in a particular case, or even, perhaps, to the question of whether a particular set of clauses should ever be combined. A court might reasonably cite complexity concerns, for instance, in declining to hold that a large punitive damages award in a defamation case triggers a combined violation of the Due Process Clause and First Amendment. "The constitutional law of defamation [or of punitive damages]," a court might say, "is complex and unpredictable enough as it is, so we are not going to consider the clauses' combined effect in this case, period." That may well be a sensible judgment as far as it goes, and nothing in my analysis should be taken to suggest otherwise. But the complexity and unpredictability costs that arise from the combination of clauses are not so great as to warrant a complete prohibition on their use. Those costs are better dealt with at the retail level, acting as concerns worth attending to when considering whether, when, and how to incorporate a particular instance of combination-based reasoning into a particular area of constitutional doctrine.

C. *Visions of the Constitution*

The analysis thus far has appealed to values that do not directly relate to a particular substantive vision of what the U.S. constitutional regime ought to look like. Regardless of how one feels about, say, the development of robust, federalism-based limits on national power, one will likely regard the potential avoidance of anomalous results as a positive rather than negative consequence of combination analysis. Similarly, regardless of whether one takes a strongly libertarian stance toward the protection of economic freedom, bodily autonomy, neither, or both, one will likely regard the increased complexity of judicial doctrine as a negative rather than positive consequence of combining the clauses. To be sure, some of the values discussed thus far may not carry an entirely results-neutral flavor: at the margins, for instance, the relative desirability of decisional foreshadowing, textual fidelity, and judicial restraint, may depend in part on one's prior commitments to a particular set of substantive constitutional outcomes.[189] But none of the values discussed thus far are explicitly results-based in their orientation.

189 To take one example, if an individual identifies as a strict textualist *because* one believes that textualism best prevents the Court from transgressing constitutional separation-of-powers principles, then one's fidelity-based objections to combination analysis cannot be characterized as entirely results neutral.

In this Section, by contrast, I examine the propensity of combination analysis to further or frustrate various substantive agendas that a constitutional decisionmaker may wish to pursue. The question, in short, is whether combination analysis ought to be more or less attractive to individuals based on their big picture views as to what sorts of structures, rights, and institutional relationships they understand the Constitution to create. Before deciding whether to embrace combination analysis, a judge may wish to know whether one or another set of substantive consequences is likely to follow from its adoption. If the judge favors these consequences, then she will have an additional reason to combine the clauses. If she disfavors the consequences, then she will have an additional reason not to do so. And if she views the consequences as neutral, then she will have identified no substantively informed preference one way or the other.

So, what substantive consequences are likely to follow from adding combination analysis to one's methodological toolkit? This question, as we will soon see, becomes difficult to answer if combination analysis is viewed as a single, undifferentiated whole. It is more easily addressed by separating out the three types of combination arguments that were introduced in Part I: right/right arguments, right/no-power arguments, and power/power arguments. Each type of argument, it turns out, conduces to a different set of substantive priorities.

First, right/right combination analysis will carry the predictable effect of strengthening negative constitutional limits on government action, thus promoting a *libertarian* vision of U.S. constitutional law. Right/right combinations enable courts to invalidate government actions that would pass muster under a purely clause-specific approach—thereby amplifying the protective effects of the Constitution's rights-based constraints. Two rights combined, simply put, yield *more* in the way of individual liberty than does each right on its own. Thus, for judges and scholars who believe that the paramount goal of constitutional law should be helping individuals to "secure the blessings of liberty,"[190] right/right combination analysis should be warmly embraced. All

190 U.S. CONST. pmbl; *see also, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014). To this point, however, we should add one caveat: Insofar as the Constitution's rights-based obligations impose positive duties on government actors, *see, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (requiring states to provide appointed counsel to indigent criminal defendants), right/right combination arguments would not necessarily yield obviously libertarian results. But given the generally negative thrust of most of the Constitution's rights-based guarantees, I believe it's fair to say that right/right combinations will tend to enhance rather than detract from pro-libertarian features of the U.S. constitutional order. *See, e.g.*, EMLIY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 5 (2013) (noting that litigation movements seeking to establish a federal "constitutional mandate for a more robust welfare state . . . have met with extremely limited success, and the Supreme Court has generally declined to

else equal, a doctrinal regime that combines rights-based arguments with other rights-based arguments should be friendly to the libertarian cause.

A similar point holds for right/no-power combination arguments, which, like their right/right counterparts, also tend to strengthen the document's negative, clause-based restrictions on government action. But there is an important difference: whereas right/right combinations heighten the Constitution's restrictions on both federal and state action, right/no-power arguments will tend to do so only with respect to federal action, offering no special aid to rights-based attacks on state-level action.[191] In that sense, right/no-power combinations might hold a special appeal for individuals seeking to limit federal power while at the same time leaving state power unchecked.[192] Thus, whereas right/right arguments will often prove friendly to the libertarian cause, right/no-power arguments will often prove friendly to the *federalist* cause.

Of course, federalism and libertarianism need not reflect a mutually exclusive set of commitments. Indeed, their relationship may be more mutually reinforcing than anything else.[193] If so, then both right/right and right/no-power combination arguments might win over both committed libertarians and federalists alike. But the calculus grows considerably more complex once power/power combination arguments enter the picture. Power/power combinations, after all, differ from both right/right and right/no-power combinations in a crucial respect: they *expand* rather than constrict the zone of authorized government conduct, thus yielding a set of national powers that sweep *more* rather than less broadly than would otherwise be the case. Power/power combination arguments are thus explicitly *anti*-federalist—and arguably *anti*-libertarian—in their outlook,

---

read either the Equal Protection or Due Process clause as a mandate for active government intervention").

191 For ease of exposition, I am focusing here on right/no-power arguments that combine conclusions about the absence of an *enumerated federal power* with conclusions about the applicability of an individual right. That being said, and as illustrated by *Mathews v. Diaz*, 426 U.S. 67 (1976), right/no-power analysis might also operate to treat the federal government more favorably than the states, at least insofar as the "no-power" limits being combined derive from preemption-based restrictions on state-level action. Although the former category of cases would likely outnumber the latter, the mere existence of right/no-power cases at the state and local level requires us to qualify the claim that right/no-power analysis will always redound to the benefit of dyed-in-the-wool federalists.

192 Consider the example of Chief Justice Rehnquist, who, as Michael Dorf has recently argued, "was strongly committed to federalism but, in rights cases, more of a statist than a libertarian." Michael C. Dorf, *What Really Happened in the Affordable Care Act Case*, 92 TEX. L. REV. 133, 136 (2013) (reviewing ANDREW KOPPELMAN, THE TOUGH LUCK CONSTITUTION AND THE ASSAULT ON HEALTH CARE REFORM (2013)).

193 *See, e.g.*, Bond v. United States, 131 S. Ct. 2355, 2364 (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.").

supporting values of nationalism and effective governance at the expense of values of federalism and limited government.[194]

In sum, different forms of combination analysis accord with different—and sometimes starkly conflicting—visions of constitutional law.[195] Right/right combination analysis fits most comfortably with a rights-centered, libertarian vision, which prioritizes the development of strong negative checks on government power. Right/no-power combination analysis fits most comfortably with a federalist-centered vision of the Constitution, which prioritizes the development of strong negative checks on federal, but not state, power. Finally, power/power combination analysis fits most comfortably with a nationalist vision, which prioritizes the development of robust national powers. Each type of combination analysis tends to promote a set of results that at least one other type will discourage, and vice versa.

Thus, it is unclear as a descriptive matter what overall substantive consequences are likely to follow from a wholesale embrace of combination analysis across all three of these categories. If combinability is a package deal, applicable to either all types or no types of constitutional clauses, then a judge's decision whether to embrace combination analysis will depend on a complex calculation of substantive tradeoffs. The nationalist judge, for instance, will need to determine whether the pro-nationalist effects of power/power combination analysis are likely to outweigh the pro-federalist effects of right/no-power combination analysis, just as the federalist judge will need to confront the same question from the opposite end of the spectrum. But if combinability is not a package deal—if a judge may legitimately embrace, for example, power/power combination analysis while simultaneously rejecting right/right combination analysis—then the substantive dimensions of the choice become more clear.

The critical question thus becomes whether it would in fact be proper for a judge to choose one form of combination analysis but not another. I can think of no abstract, conceptual basis for drawing such a distinction. I do not see, for example, anything metaphysically distinctive about rights as opposed to powers that would render rights combinable but not powers, or vice versa. Nor do I see an especially strong textual basis for accepting one type of combination analysis but not another.[196] Even in the absence of such

194 It is probably not a coincidence that power/power combination arguments have appeared most prominently in *McCulloch v. Maryland* and the *Legal Tender Cases*, two cases that have been frequently associated with nationalist, effective-governance values. *See supra* Section II.C.

195 To be clear, I do not mean to suggest that all substantive visions of constitutional law can be neatly categorized as "libertarian," "federalist," or "nationalist." The reality is more complicated, with most individuals adhering to substantive understandings that—appropriately enough—*combine* different strands of libertarian, federalist, and nationalist thought, among others. The model here is artificially simplified, but it still helps to elucidate some analytical connections with real-world relevance.

196 *But see* Reynolds, *supra* note 163, at 1345 (suggesting that the Ninth Amendment might make rights-related claims especially amenable to combination-based reasoning).

arguments, however, a judge might still justify her partial acceptance of combination analysis by invoking substance-based reasoning of the sort that this Section has employed. What if, for instance, a libertarian judge reasoned that only right/right combinations should be permitted in light of the special need to safeguard individual liberty against government intrusion? What if a federalist judge reasoned that only right/no-power combinations should be permitted in light of the special need to protect state sovereignty against the threat of an expansive federal government? Would such a judge be committing the cardinal sin of results-oriented judging, or would she be offering a sound justification for a particular methodological choice?

Different readers, I suspect, will reach different answers to these questions. Their answers will depend largely on their receptiveness to the more general practice of letting substantive considerations affect choices about decisionmaking methodology. Should decisions about *how* to apply the Constitution precede, succeed, or proceed alongside decisions about *what* the Constitution should be read to achieve? We might well condemn the judge who reasons backwards from a desired result in an individual case, but what of the judge who derives a methodological conclusion from big picture substantive postulates about the overall aims, purposes, and objectives of U.S. constitutional law? That is the central question that this inquiry leaves us with, and it is a question warranting far more attention than I am able to offer here. It is certainly true that different types of combination arguments support different substantive agendas, but the question remains whether this truth should matter when it comes to evaluating the desirability of combination-based decisionmaking.

D. *Summing Things Up*

Combination analysis presents tradeoffs. On the one hand, combining the clauses allows courts to avoid anomalous outcomes, to enhance jurisprudential transparency, to narrow judicial holdings, and to foreshadow clause-specific decisions. On the other hand, combining the clauses can result in departures from the constitutional text, the aggrandizement of judicial power, and the exacerbation of doctrinal complexity. Combination arguments, in short, can do both good and bad, with the ultimate normative payoff largely dependent on the context and circumstances in which such arguments are put to use. That in turn suggests to me that combination analysis should be neither categorically required nor categorically prohibited in all multiple clause cases. Rather, its overall utility is better evaluated on an individualized, case-by-case basis.

What is less clear is whether combination analysis should be permitted or prohibited based on the *types* of clause-based arguments being combined. That question, I have tried to suggest, implicates a deeper point of jurisprudential debate—namely, the question of whether courts may permissibly invoke

substantive, results-oriented reasoning in defense of large-scale methodological choices about how to interpret and apply the law. If the answer to that question is yes, then courts might legitimately choose to combine some types of arguments (i.e., rights based, no-power based, or power based) but not others. If no, then decisions about combinability should proceed in a manner that draws no categorical distinction among right/right, right/no-power, and power/power varieties.

V. COMBINATION ERRORS

Let us now turn to the final line of inquiry, which concerns the means by which a court might *misapply* combination analysis and combination-based precedents. Here, I introduce four potential "combination errors," each of which highlights a different way in which combination-based reasoning can go awry. Although relatively easy to describe in the abstract, these errors raise difficult questions of their own, bearing not just on the nature of combination analysis itself, but also on constitutional adjudication more generally. The purpose of the discussion is thus twofold: first, to offer some prescriptive suggestions regarding the use of combination arguments in future cases, and second, to highlight some unresolved issues meriting further scholarly research.

A. *Non-Counting Errors*

The simplest and most straightforward type of combination error occurs when a court fails to notice the combination-based origins of a precedent on which it relies. Call this the error of "non-counting." A court erroneously non-counts the combination-based aspects of a prior holding when it applies that holding to a subsequent case that fails to implicate the same combination of clauses. The consequence of that decision is an artificial expansion of the prior holding's scope, one that attributes to the prior holding a greater degree of precedential significance than its issuing court likely intended.

Non-counting of this sort arguably occurred in *United States v. Salisbury*.[197] *Salisbury* involved a void-for-vagueness challenge to a federal prohibition on "voting more than once."[198] The Sixth Circuit vindicated the challenge, relying heavily on the Supreme Court's earlier decision in *Smith v. Goguen*.[199] But *Goguen*, as the Sixth Circuit failed to note, was a combination-based decision, stemming from a challenge to a flag burning statute that involved *both* void-for-vagueness *and* First Amendment claims.[200] The Court's decision in *Goguen*, moreover, explicitly relied on the clauses' combined effect, explaining that

197 983 F.2d 1369 (6th Cir. 1993).

198 *Id.* at 1373-74 (citing 42 U.S.C. § 1973i(e)).

199 *Id.* at 1378-79. The majority opinion includes ten separate citations to *Goguen*. *See id.*

200 415 U.S. 566 (1974).

where a law "is capable of reaching expression sheltered by the First Amendment, the [void-for-vagueness] doctrine demands a greater degree of specificity than in other contexts."[201] The court in *Salisbury*, by contrast, did not confront a First Amendment claim; it considered *only* whether the allegedly vague double-voting prohibition ran afoul of the Due Process Clause.[202] Thus, a Supreme Court precedent that derived from due process and First Amendment concerns took on binding precedential force in a decision that implicated due process *but not* First Amendment concerns. In this way, then, the Sixth Circuit in *Salisbury* failed to "count" the free speech aspects of the Supreme Court's previous decision in *Goguen*, demanding of the government the "greater degree of specificity" that the Court had purported to require in a narrower category of cases.[203]

To be clear, my claim here is not that the Sixth Circuit reached the wrong result in *Salisbury*. Perhaps, for instance, the court would still have found a fatal vagueness problem in the law even without relying on *Goguen*; maybe it could have shown that the defendant's prosecution in *Salisbury* implicated First Amendment interests analogous to what the Court confronted in *Goguen*; or maybe it could have provided some other justification for adhering to *Goguen*'s instructions even in the absence of a First Amendment claim. But *Salisbury* is at least illustrative of the problems that can arise from an unthinking reliance on combination-based precedents to decide ostensibly clause-specific cases. At a minimum, courts should take care to acknowledge the combination-based nature of the holdings they invoke and to explain why those holdings should continue to carry force in the absence of an analogous multiple clause situation.

B. *Double Counting*

A second type of combination error can be seen as the flipside of the first. Just as courts might undervalue the combination-based elements of a prior decision, so too might they overvalue these elements, by combining constitutional clauses that have already been combined. Call this the error of "double counting."[204]

Suppose, for instance, that a court has enjoined the popular magazine *Military Secrets Monthly* from publishing and distributing its upcoming issue. Lawyers for the magazine challenge the order as a free speech violation, citing several

---

201 *Id.* at 573.

202 983 F.2d at 1378-79. That is not to say that the voting prosecution in *Salisbury* did not in fact implicate First Amendment concerns. Perhaps the Court could have reasoned that by prohibiting the act of voting more than once, the United States was at least touching on some (marginally protected) form of political expression. But the Sixth Circuit's opinion itself provides no indication that the court was entertaining or acting upon any arguments to that effect. *See id.*

203 For a related discussion as to why distortions of this sort can be bad for the doctrine writ large, see Michael Coenen, *Spillover Across Remedies*, 98 MINN. L. REV. 1211 (2014).

204 *See* Faigman, *Madisonian Balancing*, *supra* note 8, at 662 (noting that "double counting must be avoided when aggregating rights").

cases for the proposition that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[205] But the magazine's lawyers then make an interesting move: they argue that the prior restraint rule should apply with special force in this case, because the magazine should also receive the benefit of the First Amendment's Press Clause. *Military Secrets Monthly* is claiming, in other words, that the Speech Clause *and* the Press Clause of the First Amendment should together impose on the government a nearly insuperable justificatory hurdle to sustain its injunction—a hurdle even higher than what the prior restraint rule would normally require.

The magazine's argument should be rejected. But why? The answer has to do with double counting. A moment's perusal of the relevant case law reveals that the protections of the Press Clause have already been baked into the Court's strong presumption against prior restraints. Indeed, in *Near v. Minnesota*, the Court drew an explicit connection between the guarantees of the Press Clause and the dictates of the prior restraint rule, associating the rule with "the historic conception of the liberty of the press" and characterizing it as necessary to protect "the essential attributes of that liberty."[206] Subsequent prior-restraint cases, moreover, have made clear the continuing relevance of the Court's Press Clause concerns.[207] Thus, while the Court has sometimes prohibited prior restraints on speakers lacking journalistic affiliations,[208] it nevertheless remains true, as Professor Sonja West has put it, that "the language and logic of the [Court's prior restraint] cases are clearly press-focused."[209] *Military Secrets Monthly* is thus trying to pull a fast one on us, pointing to the Press Clause as a reason to bolster a set of protections that the Press Clause has already bolstered.

The Press Clause argument of *Military Secrets Monthly* presents an obvious instance of invalid double counting. Other instances, however, may be more difficult to identify. Does the fundamental-rights prong of equal protection

---

205 Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

206 283 U.S. 697, 709 (1931).

207 Various Justices in the landmark *Pentagon Papers Case*, for instance, referenced the "essential role" played by the press "in our democracy," *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring), explained that "without an informed and free press there cannot be an enlightened people," *id.* at 728 (Stewart, J., concurring), and expressly invoked the "extraordinary protection against prior restraints enjoyed by the press under our constitutional system," *id.* at 730-31 (White J., concurring). And the Court would later note in *Nebraska Press Ass'n* that the "liberty of the press, and of speech . . . afford special protection against orders that prohibit the publication or broadcast of particular information or commentary." 427 U.S. at 556.

208 *See, e.g.*, Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 130 (1992) (invalidating as an unlawful "prior restraint on speech" a municipal ordinance requiring individuals to obtain a permit before holding a protest or parade on public property); *see also* Morse v. Republican Party of Va., 517 U.S. 186, 244 (1996) (Scalia, J., dissenting) ("Our cases have heavily disfavored all manner of prior restraint upon the exercise of freedoms guaranteed by the First Amendment.").

209 Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 742 (2014).

jurisprudence already reflect the influence of substantive due process doctrine,[210] or might litigants sometimes strengthen a fundamental-rights-based equal protection claim by invoking the Due Process Clause as a further basis for relief?[211] Does the content-discrimination principle of free speech doctrine already incorporate the teachings of the Equal Protection Clause, or might some acts of speech-related discrimination be subject to an especially rigorous set of rules stemming from the First Amendment and Equal Protection Clause together (such as when, for instance, a particular set of content-based rules impose a special burden on a "discrete and insular minority")?[212] These and other areas of doctrine may or may not already incorporate the teachings of another constitutional clause. Consequently, determining whether or not they do so will affect subsequent determinations as to whether future combinations of these clauses reflect erroneous forms of double counting.

The identification of double counting errors also implicates difficult value judgments. Consider in this respect the Court's recent Copyright Clause decisions in *Eldred v. Ashcroft*[213] and *Golan v. Holder*.[214] In both cases Justice Breyer argued for invalidating a federal expansion of copyright protections as inconsistent with a right/no-power combination of the First Amendment and the Copyright Clause.[215] But Justice Ginsburg (writing for the majority in

---

210 *See, e.g.*, Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" that Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004) (noting that in this context, "due process and equal protection . . . are profoundly interlocked in a legal double helix").

211 The Court itself has sometimes suggested that its fundamental-rights equal protection cases already reflect the combined operation of the Equal Protection Clause and other constitutional guarantees. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (noting that the key to discovering whether a right is fundamental for equal protection purposes "lies in assessing whether [it is] explicitly or implicitly guaranteed by the Constitution"). If this is correct, then any attempt to combine a substantive due process claim with a fundamental-rights-based equal protection claim would give rise to double counting problems.

212 United States v. Carolene Prods., 304 U.S. 144, 152 n.4 (1938). On the relationship between the content-discrimination principle and the Equal Protection Clause, see Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 286-96 (2012) (suggesting that "the two doctrines have informed each other in certain ways"). *See also* Police Dep't v. Mosley, 408 U.S. 92, 95 (1972) (noting that "the equal protection claim in this case is closely intertwined with First Amendment interests").

Similarly, one might wonder about the variety of procedural safeguards built into First Amendment doctrine—for example, the prior restraint rule, the overbreadth rule, the requirement of a clear and convincing evidence standard in certain defamation proceedings and so forth. *Cf.* Henry P. Monaghan, *First Amendment "Due Process*,*"* 83 HARV. L. REV. 518, 518 (1970) (noting that, in shaping these safeguards, the Court "has placed little reliance upon the due process requirements of the fifth and fourteenth amendments, but instead has turned directly to the first amendment as the source of the rules"). Questions remain as to whether these requirements already reflect the influence of the Due Process Clause, and whether a court might permissibly combine them with other elements of due process doctrine to produce an even more stringent set of procedural limitations on speech-infringing government action.

213 537 U.S. 186 (2003).

214 132 S. Ct. 873 (2012).

215 *See supra* notes 55–59 and accompanying text.

both cases) offered a different take on the First Amendment's role. The Copyright Clause, she explained, was intended from the beginning to serve as an "engine of free expression," giving Congress the lawmaking tools it needed to "suppl[y] the economic incentive to create and disseminate ideas."[216] What is more, she continued, copyright law already contained "built-in First Amendment accommodations"—namely, the idea–expression distinction and the fair use defense—both of which safeguarded the speech-related interests associated with federal copyright restrictions.[217] Therefore, "[g]iven the 'speech-protective purposes and safeguards' embraced by copyright law," there was no need to apply heightened review to the laws at issue in *Eldred* or *Golan*.[218] Or to put it differently, any attempt to cite the First Amendment for purposes of limiting existing Copyright Clause protections would artificially inflate the First Amendment's decisional effect: copyright law, Justice Ginsburg reasoned, already enjoyed the benefit of First Amendment safeguards. On her view, adding more safeguards to the existing ones would have amounted to a double counting of the First Amendment's influence.

That Justices Breyer and Ginsburg reached different conclusions regarding the permissibility of reading the Copyright Clause in light of the First Amendment suggests that descriptive debates over the presence of double counting errors will sometimes mask what are at their core normative debates about what the substance of the doctrine should be. Ultimately, the Breyer–Ginsburg debate boiled down to competing value judgments on the question of how much influence the First Amendment *should* carry in copyright cases: for Justice Ginsburg, the First Amendment had done enough work in creating free speech safeguards for copyright law, whereas for Justice Breyer, more such work was needed. Not all double counting errors, then, will be as easy to detect as in the example of *Military Secrets Monthly*. In difficult cases, whether a combination argument double counts the prescriptive command of a constituent clause will depend—at least in part—on how much influence one thinks that command should bring to bear.

C. *Ignoring Negative Implications*

A further type of combination error stems from a court's failure to honor the negative implications created by one of the clauses it combines. As far back as *Marbury v. Madison*, the Court has recognized that "[a]ffirmative words are often, in their operation, negative of other objects than those affirmed."[219]

---

216 *Golan*, 132 S. Ct. at 890 (quoting Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 558 (1985)); *see also Eldred*, 537 U.S. at 219 ("[C]opyright's purpose is to *promote* the creation and publication of free expression.").

217 *Golan*, 132 S. Ct. at 890 (quoting *Eldred*, 537 U.S. at 219-20).

218 *Id.* (quoting *Eldred*, 537 U.S. at 219).

219 5 U.S. (1 Cranch) 137, 174 (1803).

When applicable, this principle poses complications for the combination of clauses, especially with respect to power-related provisions, several of which have been said to carry with them "external limits" on the scope of *all* other powers enumerated in the constitutional text.[220] The Copyright Clause, for example, authorizes Congress to "secur[e] *for limited Times* to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[221] This language, many commentators have argued, would render invalid not just the exercise of the copyright power to create a permanent copyright regime, but also the exercise of any other enumerated power (such as, for instance, the power to regulate interstate commerce) to do the same.[222] Analogous claims might be made of the Bankruptcy Clause's requirement that laws of bankruptcy be uniform[223] and the Militia Clause's stipulation that Congress "provide for calling forth the militia to execute Laws of the Union, suppress Insurrections, and repel Invasions."[224] These and other provisions describe enumerated powers in a way that might imply the existence of a negative, Constitution-wide check on how other powers may be exercised.[225]

When we associate negative implications with positive enumerations, we throw a wrench into the mechanics of combination analysis. Just as it might be problematic to ground a perpetual grant of copyright protection in the Commerce Clause alone, so too might it be problematic to ground such a grant in the Commerce and Copyright Clauses acting together. If the Copyright Clause does in fact create an "external limit" on the exercise of other powers, it no longer makes sense to say that the hypothetical law qualifies as even partially valid under the Copyright Clause. Rather, the argument goes, the Copyright Clause would *totally* prohibit the law, thus defeating any and all attempts to identify some other source of constitutional power to enact the

220 *See* Jeanne C. Fromer, *The Intellectual Property Clause's External Limitations*, 61 DUKE L.J. 1329, 1338-45 (2012).

221 U.S. CONST. art. I, § 8, cl. 8 (emphasis added).

222 *See, e.g.*, Rochelle Cooper Dreyfuss, *A* Wiseguy*'s Approach to Information Products: Muscling Copyright and Patent into a Unitary Theory of Intellectual Property*, 1992 SUP. CT. REV. 195, 230; Fromer, *supra* note 220; Lawrence B. Solum, *Congress's Power to Promote the Progress of Science:* Eldred v. Ashcroft, 36 LOY. L.A. L. REV. 1, 13-14 (2002). *But see* Thomas B. Nachbar, *Intellectual Property and Constitutional Norms*, 104 COLUM. L. REV. 272, 277 (2004) ("The somewhat counterintuitive but inescapable conclusion is that, if it can find another power to support the legislation, Congress may grant exclusive rights without regard to the limits set out in the Intellectual Property Clause.").

223 U.S. CONST. art. I, § 8, cl. 4; *see also* Ry. Labor Execs. Ass'n v. Gibbons, 455 U.S. 457, 468-69 (1982) ("[I]f we were to hold that Congress had the power to enact nonuniform bankruptcy laws pursuant to the Commerce Clause, we would eradicate from the Constitution a limitation on the power of Congress to enact bankruptcy laws.").

224 U.S. CONST. art. I, § 8, cl. 15; *see also* Solum, *supra* note 222, at 19 (noting that the Militia Clause "grants the power to use a means and qualifies that power by specifying the ends for which it may be exercised").

225 *See also* U.S. CONST. art. 1, § 8, cl. 1 (granting the power to impose "Duties, Imposts, and Excises" while requiring that such exactions be "uniform throughout the United States").

law. Combining the Copyright Clause with the Commerce Clause to sustain a permanent grant of copyright protection would thus constitute a combination error—one that ignores the *negative* restrictions on indefinite-copyright creation that the Copyright Clause impliedly creates.

Debates over the role of negative implications surfaced in the *Legal Tender Cases*.[226] In *Knox v. Lee*, recall, the Court upheld the Legal Tender Act by reference to the combined operation of several constitutional provisions.[227] To Justice Field in dissent, however, this argument overlooked the distinctively limiting aspects of one enumerated power in particular—namely, the *Coinage* Clause. This clause, Field argued, not only failed to authorize, but in fact, affirmatively prohibited, the issuance of paper money by the federal government: as Field put it, the Coinage Clause signified that "the *only* standard of value authorized by the Constitution was to consist of metallic coins struck or regulated by the direction of Congress, and that the power to establish any other standard *was denied by that instrument*."[228] Several of his colleagues, of course, disagreed: to them, the Coinage Clause simply provided a modicum of support—though by no means sufficient support—for the derivation of a general federal power to issue a national currency consisting of both coins and pieces of paper.[229] Their debate thus boiled down to the question of whether the Coinage Clause imposed a negative limit on the issuance of paper money, or whether it simply required the government to seek additional support for that power from other enumerated sources.

As the foregoing discussion should reveal, work still needs to be done in sorting out precisely whether and, if so, when we should read a positive grant of power to impose negative, Constitution-wide limits on the exercise of all other powers granted. I have not purported to answer those questions here; rather, I have simply suggested that *if* enumerated powers can give rise to Constitution-wide limits on government action—as has been supposed by many commentators (and, at times, the Court itself)—then any attempt at power/power combination analysis must take care not to ignore the powers' negative implications.

---

226 *See supra* notes 74–85 and accompanying text.

227 79 U.S. (12 Wall.) 457 (1870).

228 *Id.* at 660 (Field, J., dissenting) (emphasis added).

229 *See id.* at 547 ("We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.").

D. *Disregarding Transactional Unity*

The final type of combination error is also the most mysterious, implicating deep and difficult issues related to the framing of transactions in constitutional law.[230] The underlying idea is that separate and distinct constitutional events merit separate and distinct constitutional conclusions. If that proposition is correct, then there exists a further limit on the proper scope of combination analysis—a limit that would prohibit the combination of multiple clause-specific claims that each concern a transactionally separate event.

To see the point, imagine a variation on the facts of *Bethel School District No. 403 v. Fraser*.[231] Suppose in particular that the claimant has asserted that an entendre-laden speech he delivered at school deserved First Amendment protection. Suppose further, however, that the claimant has raised an altogether different due process claim, which stems from a later punishment the school imposed on him for taking part in a nondisruptive senior prank. Our hypothetical claimant's contention, in other words, is that the school district violated his First Amendment rights when it punished him for delivering the allegedly offensive speech and then subsequently violated his due process rights when it punished him for participating in the senior prank.

Whatever the merits of these two claims, any attempt at combination analysis in the modified version of *Fraser* would strike most readers as problematic.[232] But why should that be so? The answer has to do with what we might call the variable of *transactional unity*. In the actual case of *Fraser*, both the due process and First Amendment claims stemmed from a single constitutional transaction—namely, the speech that Fraser delivered. In our modified version, by contrast, the two claims relate to two separate and seemingly discrete transactions, with the First Amendment claim stemming from the claimant's speech and the due process claim stemming from the subsequent senior prank. The two claims in the actual version of *Fraser* itself thus shared a transactional unity that the two claims in the modified version do not.

Strong intuitions support the proposition that transactionally separate events deserve separate constitutional conclusions. But it is difficult to articulate why this should be so. What is the problem with concluding that the school district violated the Constitution by imposing on our hypothetical claimant two punishments, each of which was constitutionally problematic in its own

---

230 *See* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311, 1313 (2002) (noting that "in constitutional law we quickly lose our intuitive grasp on what counts as a transaction for purposes of identifying harm").

231 478 U.S. 675 (1986).

232 *Id.* at 692 (Stevens, J., dissenting) (contending that "[t]he interest in free speech protected by the First Amendment and the interest in fair procedure protected by the Due Process Clause of the Fourteenth Amendment combine to require th[e] conclusion" that Fraser's punishment was invalid).

way? Perhaps the answer has to do with the value of finality—the worry is that once we allow for the possibility of deriving a single constitutional violation from the partial violations reflected in various events, all past government actions, even if previously adjudged to be constitutionally permissible, might later become the basis of a combination-based finding of constitutional invalidity. Or perhaps the concern is rooted in considerations of complexity and arbitrariness—if we discarded the requirement of transactional unity, how would we know (and who would get to decide) what particular set of events would be eligible for combination in a given case?[233] Or perhaps there is some other set of persuasive considerations lurking beneath our intuitive discomfort with multiple-event combinations. I am not sure. All I can say for now is that the intuition is there.

Further difficult questions attend the task of actually distinguishing between transactionally separate and transactionally unified constitutional claims.[234] Transactional separateness may be easy to identify in the modified version of *Fraser*, just as transactional unity may be easy to identify in many of the examples considered in Part II.[235] But a hazy middle ground occupies the area in between the easy cases.[236] If, for instance, government agents conduct an allegedly unlawful search of my house, leading to my conviction under an allegedly unconstitutional criminal statute, do the search and conviction each individually count as separate transactions, or can they both be viewed as elements of an ongoing single transaction involving the prosecution of my case? If a trial judge denies three different evidentiary motions over the course of my trial, is the relevant transactional unit the trial itself or each unsuccessful motion? If I identify potential constitutional defects in two separate provisions of the same congressional statute, is the relevant transactional unit the enactment

233 *But see* Levinson, *supra* note 230, at 1320 (noting that in some cases, a "broader transactional frame could at least have the advantage of economizing on administrative costs").

234 Similar difficulties can arise in cases involving the same constitutional provision. As Professors Abrams and Garrett note, for instance, the Supreme Court has recognized that discrete and separate "conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone." *See* Abrams & Garrett, *supra* note 8, at 12 (quoting Wilson v. Seiter, 501 U.S. 294, 304 (1991)). But as Abrams and Garrett point out, the potency of this rule depends largely on how one characterizes the transactional frame. *See id.* ("The relevant transaction for a given constitutional violation can be defined broadly, to constitute a single 'claim,' or narrowly, requiring separate litigation of different acts."). For example, does the rule permit the combination of defective conditions in one building with defective conditions in another building to support the conclusion that the prison itself is in violation of the Eighth Amendment? Would it permit combination of defective conditions at separate prisons to demonstrate an Eighth Amendment violation by an entire prison system? Could past defective conditions be combined with present defective conditions to reach similar conclusions? And so forth.

235 For example, a strong argument can be made that any facial challenge to a statute or regulation, regardless of how many different claims it involves, concerns the single transactional event of the law's enactment by a legislature. *Cf.* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1238 (2010) ("[A] 'facial challenge,' in particular, is a challenge to the action of a *legislature*.").

236 Levinson, *supra* note 230, at 1314.

of the statute as a whole, or the enactment of each of the statute's provisions? Or what about *Fraser* itself: Might the school's decision of *whether to punish* Fraser for delivering his speech actually qualify as a separate transaction from the school's decision of *how* to punish him?

These may all seem like silly questions, but to the extent that the fusion of multiple constitutional transactions does indeed qualify as a combination error, we have no choice but to try to answer them as best we can. For some, that point may strike the decisive blow against transactional unity as a limit on combination analysis. If we simply allow courts to employ combination arguments across any and all constitutional events, then we do not have to figure out when we are dealing with one event and when we are dealing with several events. But for others, the intuition will persist: transactionally separate events require transactionally separate judgments, and that will remain the case even if it requires us to work through some tricky conceptual puzzles.

Conclusion

So should we rewrite the constitutional law casebooks, scrapping their clause-based organizational approaches and relying instead on something entirely different? No. The clauses, after all, do play a major role in delineating internal boundaries of constitutional doctrine, and those boundaries lend helpful measures of simplicity and clarity to the field of constitutional law.[237] The organizational virtues of clause specificity are all to the good, and they would not long remain in place if we insisted on deciding each and every case by reference to all of the clauses understood together.

But the simplifying benefits of a clause-based approach do not provide a reason for dismissing combination analysis out of hand. Doctrinally speaking, it is there. Conceptually speaking, it makes sense. And normatively speaking, it has much to be said on its behalf. Some constitutional cases really do implicate the protections of multiple clauses at the same time. The resolution of those cases, moreover, often benefits from a decisional approach that accords significance to that fact. And when that is so, courts should indeed consider the clauses' combined effects.

237 *See* Porat & Posner, *supra* note 8, at 56.