

ARTICLES

RIGHTS DYNAMISM

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INTRODUCTION

Constitutional rights do not exist in splendid isolation, hermetically sealed off from one another. To the contrary, many constitutional rights are actively relational.¹ They intersect, associate, converse, and conflict with one another, in an ongoing and dynamic process of adjudication, scholarly examination, and public discourse.² These dynamic intersections affect constitutional remedies in individual cases.³ More broadly, they influence interpretations of individual constitutional rights and understandings of constitutional liberty.

For example, the Fourteenth Amendment's Due Process Clause and Equal Protection Clause have frequently intersected with one another, in ways that have illuminated the meaning of both clauses and created distinctive rights.⁴ In *Obergefell v. Hodges*,⁵ which recognized a constitutional right to marriage equality, the Supreme Court located the right in *both* the due process and equal protection guarantees. The Court observed that these provisions are "connected in a profound way, though they set forth independent principles," and observed that the relationship between these provisions "furthers our understanding of what freedom is and must become."⁶ As Laurence Tribe has observed, the Court "tightly wound the double helix of Due Process and Equal Protection into a doctrine of equal dignity."⁷ It excavated

1 See, e.g., Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1099 (2016) (arguing that the "democratic rights protected by the First Amendment are not independent points, but rather are deeply interrelated and overlapping").

2 See Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014) (observing that freedom of speech intersects with a number of constitutional rights, including abortion and Second Amendment rights); Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016) (examining judicial analysis where more than one constitutional rights provision is invoked); Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. __ (forthcoming 2017) (arguing that constitutional rights frequently intersect and combine in ways that inform constitutional remedies).

3 See Coenen, *supra* note 2, at 1077 (focusing on how combinations of constitutional clauses affect dispositions of cases); Abrams & Garrett, *supra* note 2 (focusing on remedial concerns).

4 See Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) (observing that "the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other").

5 *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

6 *Obergefell v. Hodges*, 135 S. Ct. 2584, 2586, 2603 (2015).

7 Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. FORUM 16, 17 (2015)

and relied upon decades of dynamic intersection between the two clauses.⁸

As *Obergefell* shows, constitutional rights are not isolated textual blots. They often relate to, and inform, one another through a process of dynamic interaction that places them in proximity to one another. Current understandings of the Fourteenth Amendment's Equal Protection Clause are the product, in part, of its intersection with (among other provisions) the Due Process Clause.⁹ Similarly, as anyone who has taught or taken a First Amendment course knows, we cannot truly understand the contemporary Free Speech Clause without considering its relationship to the Equal Protection Clause.¹⁰ So, too, modern understandings of the Free Exercise Clause and Establishment Clause only make sense when we consider their dynamic intersection with the First Amendment's Free Speech Clause. What is more, all of these relationships are bi-or multi-directional in the sense that the influences and effects run in more than one direction. In sum, in order to fully appreciate and understand constitutional rights, we must generally look in more than one direction.

This Article identifies and analyzes the dynamic process in which constitutional rights intersect and interact with one another. It refers to this process as "Rights Dynamism."¹¹ Rights Dynamism is related to, but distinct from, several existing theoretical and interpretive traditions. The first is intratextualism, which posits that constitutional meaning is a product of the connections between and among words and phrases in the Constitution.¹² A second tradition is the common law interpretive method, which generally shows how constitutional meaning changes or evolves primarily as a result of case-by-case adjudication.¹³ Rights Dynamism also shares some

(emphasis omitted).

⁸ See Kenji Yoshino, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 148–51 (2015) (describing the doctrinal journey that led to *Obergefell*).

⁹ See Karlan, *supra* note 4, at 474 (observing that "the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other").

¹⁰ See Timothy Zick, *The Dynamic Relationship between Freedom of Expression and Equal Protection*, 12 DUKE J. LAW & PUB. POL. 13 (2016) (examining in detail the relationship between First Amendment expressive rights and Fourteenth Amendment equality rights).

¹¹ My conception of Rights Dynamism differs from, but shares some major premises with, Professor Jack Balkin's conception. Balkin defines "rights dynamism" as "the claim that the nature, scope, and boundaries of rights, and in particular fundamental rights like speech, are continually shifting with historical, political, economic, and technological changes in the world." Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 55 (2004). Balkin's conception of rights dynamism is broader than my own, which focuses in particular on relationships between rights. But those relationships are, as Balkin suggests, contingent and continually subject to change—in part owing to historical, political, and other influences. Thus, while we share a major premise, my conception of Rights Dynamism focuses primarily on the active intersection of rights and rights provisions. My central claim is that one of the things that significantly influences the meanings of rights provisions is their relationship to other rights provisions.

¹² See generally Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

¹³ See generally DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

conceptual space with living originalism, which respects historical meanings but also teaches that changes in constitutional meaning are part of a dynamic, evolutionary, and public process.¹⁴ Finally, Rights Dynamism draws upon insights from the study of social movements and civic institutions, which have been critically important to constitutional change.¹⁵

Like intra-textualism, Rights Dynamism is distinctly and consciously relational. It focuses on and elaborates associations between and among different constitutional provisions. In some respects, Rights Dynamism's elaborative process resembles the common law tradition. For example, it focuses primarily on judicial construction of individual rights through case-by-case adjudication.¹⁶ Like living originalism, Rights Dynamism acknowledges and accounts for historical intersections and meanings.¹⁷ It also adopts the perspective that changes in constitutional meaning are part of a dynamic, evolutionary, and ongoing process that involves many different actors and influences—legislators, courts, litigants, civic institutions, and of course the people.¹⁸

Although it shares ideas and concepts with these approaches, Rights Dynamism is distinctive. It is not an abstract theory, or a method of constitutional interpretation that purports to resolve constitutional ambiguities. Nor does Rights Dynamism apply the specific methods or conclusions of any existing interpretive tradition, including those mentioned. Rather, it focuses on the real-world actions and forces that bring rights together and contribute over time to elaborations of their various meanings. Thus, Rights Dynamism is much closer to the ground than high—or even low—constitutional theory. As I explain, it is a messy, disorderly, and sometimes seemingly illogical process of constitutional interaction and elaboration.

Constitutional scholars have long taken note of certain links or connections between individual constitutional rights.¹⁹ However, they have not

¹⁴ See JACK M. BALKIN, *LIVING ORIGINALISM* 200–01 (2011).

¹⁵ See, e.g., Reva B. Siegel, *The Jurisgenerative Role of Social Movements in United States Constitutional Law*, at 11 (for publication with the papers of the Seminario en Latino América de Teoría Constitucional y Política (SELA), June 10–12, 2004, Oaxaca, México) available at https://law.yale.edu/system/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto Era*, 94 CAL. L. REV. 1323 (2006). See also DAVID COLE, *ENGINES OF LIBERTY* (2016) (examining the important role of civic institutions in the process of constitutional change).

¹⁶ See STRAUSS, *supra* note 13, at 36 (describing the common law as a system “in which precedents evolve, shaped by notions of fairness and good policy”).

¹⁷ See, e.g., AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 235 (1998) (observing that Reconstruction Republicans frequently mentioned and invoked expressive rights in debates concerning equality).

¹⁸ See BALKIN, *supra* note 14, at 3 (“In each generation the American people are charged with the obligation to flesh out and implement text and principle in their own time.”).

¹⁹ See, e.g., HARRY KALVEN, JR., *THE NEGRO AND THE FIRST AMENDMENT* (1965) (examining the relationship between expressive rights and racial equality).

systematically connected the relational dots. In particular, scholars have neither identified nor explained the wide-ranging process in which rights intersect and associate with one another over time. Rights Dynamism is a step in the direction of addressing this shortcoming.

As legal constructs, most constitutional rights share deep historical connections. Some even intersected during pre-ratification and ratification eras. However, the primary focus in this Article will be the modern era of constitutional adjudication—roughly the middle of the twentieth century to the present. During that era, rights first began to intersect on a frequent basis. This occurred as a result of the actions and strategic choices of litigants, social movements, and other actors who presented a wide variety of cumulative, alternative, aggregate, and hybrid rights claims in constitutional cases.²⁰ They sometimes strategically invoked particular constitutional rights, such as freedom of speech, in order to facilitate recognition of equal protection and other rights.²¹ As a result of these actions, courts were called upon to adjudicate and interpret at the intersections of constitutional rights. They had to make choices concerning which, if any, alternative constitutional rights claims to recognize or uphold. In the process of doing so, courts elaborated not just individual rights and remedies, but also the relationship between and sometimes among different constitutional rights.

Although it takes place most regularly and principally in the courts, Rights Dynamism also includes non-judicial actors and non-legal influences. Thus, governments have enacted laws and policies that have placed constitutional rights in connection or tension with one another. Scholars have developed theories concerning rights, and sometimes published commentaries on the relationships between and among different rights. The press reports on rights, and the public consumes information about and debates the contours of rights. These external forces are a less visible but still vital aspect of Rights Dynamism. They too can influence or alter the meanings of constitutional rights as they intersect with and relate to one another.

Part I of the Article introduces and explains the concept of Rights Dynamism. It examines the relational character of constitutional rights, and explains the various ways in which rights provisions can come to intersect with one another. Part I then turns to the mechanics of Rights Dynamism. In very broad terms, it identifies the influences that can affect when and how rights intersect, and explains how these intersections lead to bi-directional constitutional elaborations over time.

Part II examines Rights Dynamism in practice, through three detailed examples. It focuses on three different rights relationships: (1) equal protec-

²⁰ Abrams & Garrett, *supra* note 2 at 14.

²¹ See generally KALVEN, *supra* note 19 (describing civil rights advocates' strategic reliance on First Amendment claims).

tion and due process; (2) freedom of expression and equal protection; and (3) freedom of expression and free exercise of religion.²² These constitutional relationships have spanned many decades and eras. Thus, it is not possible to identify and discuss all of the details and nuances of their intersections. The more limited object in Part II is to provide a general sense of how Rights Dynamism works, and how bi-directional elaboration results from the dynamic intersection between and sometimes among rights provisions.

Part III explores the implications of Rights Dynamism for rights, rights-holders, and the study of rights. It offers a critical assessment of Rights Dynamism, based on the relationships examined in Part II. The assessment makes three general points. First, we ought to reconsider our perspective regarding “individual” rights. Many constitutional rights are actively relational—they ought to be conceptualized, taught, studied, and discussed as relational constructs, rather than as isolated individual protections.²³ Second, notwithstanding their relational character, it is important to maintain some conceptual and enforcement space between constitutional rights provisions. This separation helps to prevent rights subjugation (the dominance of one right by another) and rights redundancy (the treatment of constitutional text as redundant or meaningless). Third, and relatedly, we ought to work toward the goal of having a healthy and collaborative rights pluralism. As *Obergefell* and other examples show, constitutional rights are infinitely stronger and more liberty-enhancing when they can be invoked and engaged in collaborative and synergistic relationships. Part III concludes by identifying some additional rights relationships whose examination could further our understanding of Rights Dynamism and its relationship to constitutional construction.

I. RIGHTS RELATIONSHIPS AND RIGHTS DYNAMICS

This Part introduces and explains the concept of Rights Dynamism. It begins by highlighting the relational nature of constitutional rights. The Part then describes and explains the general process of Rights Dynamism,

²² References in the Article to “expressive” rights generally include not only freedom of speech but also related rights including freedom of association and freedom of press. The terminology reflects the Supreme Court’s treatment of these and other First Amendment rights as related to, ancillary to, or subsumed by the Free Speech Clause. Some scholars have been highly critical of this interpretation. *See, e.g.*, JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012); RONALD J. KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION GOVERNMENT FOR A REDRESS OF GRIEVANCES* (2012); Sonja R. West, *First Amendment Neighbors*, 66 *ALA. L. REV.* 357 (2014). The Article’s usage reflects the Court’s current characterization of the constellation of First Amendment rights that are related to or protect “expression.”

²³ *See* Coenen, *supra* note 2, at 1072 (claiming that as a doctrinal matter, the Supreme Court has often combined constitutional clauses—including rights provisions—in order to dispose of cases).

and its relationship to constitutional interpretation.

A. Rights as Relational

Constitutional rights are individual rights, in the fundamental sense that they belong to individual persons and protect personal interests.²⁴ However, constitutional rights do not exist in strict isolation from one another. To the contrary, they are connected by thick historical, precedential, and doctrinal tissues.²⁵ From inception to maturity, rights relate, associate, and intersect in a variety of interesting and dynamic ways. Their relationships profoundly shape and influence our understandings of individual rights and constitutional liberty more generally.

First, constitutional rights are connected by virtue of their common origins and shared histories. The rights in the Bill of Rights were subject to debate, adoption, and ratification through the same democratic processes—the “original” Rights Dynamism, one might say. Proponents of subsequent amendments relied on some of these original guarantees to gain recognition for new rights. For example, with regard to constitutional equality, Reconstruction Republicans vigorously resisted restrictions on freedom of speech and freedom of press that they knew would interfere with the recognition and exercise of racial equality rights.²⁶ The Fourteenth Amendment was later invoked to “incorporate” almost all of the Bill of Rights against states and localities.²⁷ In these and other respects, rights provisions have been closely and indelibly connected from inception.

Second, although individual rights are freestanding provisions, they also overlap in terms of their substantive protections. This is true, for example, of all of the First Amendment’s expressive guarantees—freedom of speech, freedom of the press, the right to peaceable assembly, the right to petition government for redress of grievances, and the right of association.²⁸ Freedom of speech and the free exercise of religion are distinctive rights, but they share a common core that protects freedom of conscience, belief, and expression.²⁹ Fourteenth Amendment due process and equality rights both

²⁴ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 202 (1995) (describing equal protection as a “personal” right).

²⁵ See, e.g., BALKIN, *supra* note 14, at 237 (explaining how subsequent amendments relating to the right to vote, including the Nineteenth, Twenty-fourth, and Twenty-sixth Amendments, “interact with” the Fifteenth Amendment).

²⁶ See AMAR, *supra* note 17, at 235 (observing that Reconstruction Republicans frequently mentioned and invoked expressive rights in debates).

²⁷ See, e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (stating that the Free Speech Clause was part of the “liberty” protected by the Fourteenth Amendment’s Due Process Clause).

²⁸ See Bhagwat, *supra* note 1 (observing that expressive rights are connected by a common concern with democratic participation).

²⁹ Cf. William P. Marshall, *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983).

protect against the threat of caste legislation.³⁰ Fourth Amendment and First Amendment rights protect a zone of privacy that limits governmental intrusions into certain intimate matters.³¹ Partly as a result of their shared cores, rights provisions can frame, facilitate, and illuminate one another.

Third, in terms of application and enforcement, constitutional rights have been brought into close and dynamic contact with one another. Once most of the guarantees in the Bill of Rights had been incorporated against the states, litigants, activists, and social movements increasingly relied on these provisions to remedy constitutional wrongs. Since their meanings were not firmly established, litigants frequently invoked multiple constitutional guarantees in search of a constitutional remedy. These cumulative and aggregated claims pushed different constitutional rights into direct contact with one another.³²

Thus, for example, during the 1930s and 1940s, Jehovah's Witnesses who challenged restrictions on public proselytizing and solicitation invoked the Free Exercise Clause, the Free Speech Clause, *and* the Free Press Clause.³³ In early challenges to social and economic regulations, litigants frequently relied on both Fourteenth Amendment equal protection and due process claims.³⁴ Similarly, for many decades, speakers challenging restrictions on expressive activity have relied on both the Equal Protection Clause and the Free Speech Clause.³⁵ Criminal defendants also began to accumulate or aggregate due process and Sixth Amendment ineffective assistance of counsel claims, in search of an effective remedy.³⁶ In some of these cases, the Supreme Court expressly relied on more than one constitutional right to reach its decision. In others, the Court's treatment of one rights provision indirectly affected others. In all of these instances, the Court was part of an ongoing process that helped to establish and define relationships between and among rights.

Fourth, constitutional claimants have sometimes invoked one individual right to gain recognition for, or to facilitate the effective exercise of, another

³⁰ See BALKIN, *supra* note 14, at 222 (explaining that Section One of the Fourteenth Amendment was originally intended to prohibit caste legislation).

³¹ See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (articulating a "penumbral" approach to privacy that relied on a number of different individual rights, including First Amendment rights).

³² See Coenen, *supra* note 2, at 1078–82 (discussing some examples of rights combinations in Supreme Court cases).

³³ See generally Daniel Hildebrand, *Free Speech and Constitutional Transformation*, 10 CONST. COMMENT. 133 (1993) (examining the Hughes Court decisions of the 1930s and 1940s, which elaborated on free speech, free press, and free exercise rights).

³⁴ See, e.g., *Ry. Express Agency, Inc. v. New York*, 336 U.S. 106 (1949) (raising both due process and equal protection challenges to municipal ordinance that restricted commercial advertising).

³⁵ See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 100 (1972) (invalidating restriction on picketing near schools under Equal Protection Clause).

³⁶ See *Abrams & Garrett*, *supra* note 2 (observing that due process and right to legal counsel provisions can operate in this way).

right. The First Amendment's Free Speech Clause has served this function with regard to a number of constitutional rights, including equal protection and free exercise of religion.³⁷ Similarly, Second Amendment proponents have invoked privacy rights to secure the right to bear arms.³⁸ In these contexts, a right can be used instrumentally to contribute to the recognition or enforcement of some other right.

Fifth, through laws, regulations, and official expression, government actors sometimes bring different rights provisions into contact with one another. For example, a legislature might regulate the speech of physicians in order to protect patients' Second Amendment rights.³⁹ Or it might seek to influence the exercise of abortion rights by requiring that physicians disclose certain information to women who seek abortions.⁴⁰ These and other regulations of "rights speech"—communications about or concerning the recognition, scope, or exercise of constitutional rights—bring different constitutional rights into contact with one another.⁴¹

Sixth, two or more rights-holders may bring constitutional rights into direct or indirect *conflict* with one another. For example, free speech rights may conflict with privacy rights or voting rights.⁴² The Sixth Amendment right to a fair trial might conflict with First Amendment free press rights.⁴³ Rights conflicts can also arise when parties invoke constitutional rights in a defensive or exclusionary manner. For example, judicial enforcement of First Amendment freedom of association or free exercise rights can negatively affect constitutional equality rights.⁴⁴ In these instances, courts sometimes weigh or balance two conflicting constitutional rights against one another.⁴⁵

37 See, e.g., *KALVEN*, *supra* note 19 (discussing the use of free speech claims to advance the civil rights equality agenda).

38 See Zick, *supra* note 2, at 27–28 (discussing Second Amendment privacy claims).

39 See *Wollschlaeger v. Governor of Florida*, 814 F.3d 1159 (11th Cir. 2015) (upholding provision prohibiting physicians from asking patients about firearms ownership unless medically appropriate).

40 See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion) (upholding compelled abortion disclosure provision).

41 See Zick, *supra* note 2, at 41–55 (discussing the constitutional implications of rights speech regulations).

42 See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 534 (2001) (holding that privacy interest in contents of private conversation gave way to public interest in dissemination of information of public concern); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 840–42 (1995) (holding provision of student funds to Christian publication did not violate Establishment Clause); *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality opinion) (upholding limits on campaign speech near polls).

43 See *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 560–61 (1976) (noting that free press and fair trial rights sometimes clash, and that press has an obligation to safeguard the fairness of trial proceedings).

44 See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 661 (2000) (invalidating anti-discrimination provision as applied to group that rejected homosexual members as part of its expressive message).

45 See generally Eugene Volokh, *Freedom of Speech and the Constitutional Tension Method*, 3 U. CHI.

Thus far, we have been considering rights primarily in pairings or dyads. However, sometimes more than two constitutional rights provisions actively intersect. Thus, as noted, during the 1930s and 1940s, Jehovah's Witnesses invoked the Free Exercise Clause, the Free Speech Clause, *and* the Free Press Clause to challenge restrictions on public activities. In some contexts, freedom of speech, free exercise of religion, and the Establishment Clause may also be implicated by the same set of facts.⁴⁶ Thus, rights relationships may involve intersections among more than two constitutional provisions.

In terms of history, substance, and application, many constitutional rights provisions have intersected and matured together in the various ways just suggested. As the Supreme Court recently recognized, these kinds of intersections continue to inform the recognition, enforcement, and interpretation of constitutional rights.

In *Obergefell v. Hodges*, the Court held that the right to marriage equality implicates *both* the Equal Protection Clause and the Due Process Clause.⁴⁷ It explained that the two clauses are “connected in a profound way, though they set forth independent principles.”⁴⁸ The Court elaborated on the relationship:

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.⁴⁹

The Court's observations apply to many individual guarantees. Freedom of speech and equal protection provide overlapping but distinctive coverage for expressive activities. For decades, courts relied on the Equal Protection Clause to invalidate content-discriminatory laws and regulations.⁵⁰ Free speech and equal protection “converge” and interrelate in a way that illuminates both the individual rights and their relationship.

Freedom of speech and (substantive) due process provide overlapping protection for individual thoughts, and a zone of freedom of intimate and expressive activities.⁵¹ In any particular case, the privacy right or free speech right may best capture the “essence of the right.” However, the interrelation of the two “furthers our understanding of what freedom is and

ROUNDTABLE 223 (1996) (discussing rights balancing).

⁴⁶ See, e.g., *Rosenberger*, 515 U.S. at 840 (invalidating exclusion of religious publication from student activity funding program, and rejecting claim that inclusion of publication would violate the Establishment Clause).

⁴⁷ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015).

⁴⁸ *Id.* at 2603.

⁴⁹ *Id.* (citations omitted).

⁵⁰ See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 100 (1972) (invalidating restriction on picketing near schools under Equal Protection Clause).

⁵¹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (“Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.”).

must become.” Another way of articulating the connection is to say that expressive rights, in particular freedom of speech, are essential to a fully realized right to privacy. At the same time, privacy rights protect important interests that facilitate and elaborate free speech rights. For example, they protect an “intellectual privacy” that prohibits government from interfering with the private accumulation of knowledge.⁵²

As discussed further in Part II, the Free Speech Clause and the Free Exercise Clause interact in a similar manner.⁵³ In many contexts, either right might be implicated by governmental action. For instance, religious expression and religious practices may both be covered by either provision.⁵⁴ In some contexts, these two clauses may “converge” with regard to the identification and definition of the right in question. However, this intersection of rights can provide a better and fuller understanding “of what freedom is and must become.”

In sum, constitutional rights intersect frequently, and in many different ways. Although not every constitutional right is actively relational in this sense, many fundamental rights are. At the very least, most rights provisions share a common history. Many overlap in terms of their core coverages. As well, rights often facilitate and illuminate one another—they influence each other’s recognition, scope, and enforcement. Constitutional rights can also combine, conjoin, and conflict. Far from being isolated guarantees, rights are part of a system of dynamic and ongoing intersection and elaboration. That system is reflected in, but not confined to, constitutional adjudication and rights doctrines. As I explain below, Rights Dynamism is a multi-facted and multi-actor enterprise.

B. *Rights Dynamics*

The right to marriage equality recognized in *Obergefell v. Hodges* did not arise overnight. In fact, the equal protection-due process right is the product of decades of interactions—in courts, scholarship, and public debate—concerning the relationship between equal protection and due process as they relate to marriage.⁵⁵

The process in which constitutional rights intersect and relate to one another has not received adequate scholarly or judicial attention.⁵⁶ This

⁵² See NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 73–74 (2015).

⁵³ See *infra* Part II.C.

⁵⁴ See, e.g., *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (involving a free speech and free exercise challenge to a rule that restricted the practice of Sankirtan, a form of religious proselytizing).

⁵⁵ See, e.g., Yoshino, *supra* note 8 (discussing the jurisprudential journey relating to the right to marriage equality).

⁵⁶ This is beginning to change. See, e.g., Abrams & Garrett, *supra* note 2; Coenen, *supra* note 2.

Section outlines the process in general terms. Part II examines the process as it relates to three exemplary rights relationships. I refer to the general process of intersection as “Rights Dynamism.”

As explained earlier, Rights Dynamism shares some conceptual space with certain existing methods of constitutional adjudication and interpretation—in particular, intratextualism, common law constitutional interpretation, and living originalism.⁵⁷ Studies of social and constitutional movements are also relevant to the process by which rights intersect with one another.⁵⁸ In general, these approaches or schools of thought acknowledge the relational and evolutionary character of constitutional rights. Together, they provide a theoretical backbone for Rights Dynamism.

However, Rights Dynamism is distinctive from these theories and traditions, as well as from the study of social and constitutional movements. Thus, Rights Dynamism is not a means of interpreting the Constitution, or a framework for interpreting its text in some holistic fashion. Rather, Rights Dynamism focuses on the relational dynamics between and sometimes among constitutional rights provisions. It highlights and examines a distinct, active, dynamic process in which the meanings of rights are elaborated over time. Lawyers, activists, judges, reporters, civic institutions, and constitutional movements are all part of this process.

As suggested earlier, all rights relationships, have an origination point—a time, we might say, when the provisions were formally “introduced” to one another for the first time. As I have already noted, we can trace the beginning of a rights relationship or association back to the origins of individual guarantees. Indeed, even *pre-ratification* events and influences can be part of the dynamic process by which rights intersect with one another. For instance, the relationship between free exercise of religion and freedom of speech began well before the First Amendment was proposed or ratified.⁵⁹ Similarly, the Fourteenth Amendment’s equal protection and due process provisions can both be traced to a pre-ratification concern with the evils of caste legislation.⁶⁰

Rights Dynamism does not exclude or ignore the original or historic aspects of the relational process. Indeed, early interactions in debates and other contexts inform our understanding of intersecting individual rights and the process of intersection. Historical interactions are an important

⁵⁷ See sources cited *supra* notes 10–11 and accompanying text.

⁵⁸ See sources cited *supra* note 14.

⁵⁹ See Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 16 (2000) (noting the connection between early struggles to publish religious tracts and freedom of the press); John H. Yoder, *Response of an Amateur Historian and a Religious Citizen*, 7 J.L. & RELIGION 415, 416–7 (1989) (“There was a long British Puritan history, from the age of Milton to the 1689 Bill of Rights, in the course of which the civil freedoms of speech, press, and assembly arose out of religious agitation, not the other way round.”).

⁶⁰ See BALKIN, *supra* note 14, at 222.

part of the dynamic process in which rights are recognized, defined, and ultimately enforced. However, although it includes historical interactions and original influences, Rights Dynamism is primarily concerned with interactions that post-date the ratification of individual rights provisions—and, indeed, with their dynamic intersection in the past six decades or so.

There are two primary reasons for this focus. First, the process of recognizing, defining, and actually applying provisions in the Bill of Rights did not begin in earnest until after—in some cases, well after—formal ratification.⁶¹ As a result, most of the “action” in Rights Dynamism has occurred during the modern era.⁶² Second, one of the primary goals for the study of Rights Dynamism is to better understand how *contemporary* understandings of constitutional rights are influenced by relational concerns. These modern influences are informed by historical materials and events. However, evolutionary and common law interpretation have been more important to contemporary understandings of constitutional rights such as freedom of speech, equal protection, and the free exercise of religion.⁶³ In sum, the process in which rights intersect involves myriad influences that include but extend well beyond original materials and understandings.⁶⁴

In the most general terms, Rights Dynamism begins when government action implicates more than a single constitutional right. In response and in search of effective relief, activists and litigants invoke multiple rights provisions. Activists and litigants repeatedly make strategic choices to couple, accumulate, or aggregate rights claims. These decisions, which are themselves influenced by a variety of social, political, and legal factors, initiate a dynamic relationship between and sometimes among constitutional rights. Cumulative, aggregative, and other constitutional claims connect rights provisions to and with one another. They initiate the process in which rights interact and by which their meanings will be debated and constructed.

This process, which occurs over the course of many decades, is active, iterative, and perpetual. Activists and litigants, many of them repeat players, rely on precedents established by their predecessors. For example, African-Americans benefitted from very early free speech precedents obtained by Jehovah’s Witnesses.⁶⁵ Later, gay men and lesbians benefitted signifi-

⁶¹ See generally AMAR, *supra* note 17.

⁶² See, e.g., STRAUSS, *supra* note 13, at 53 (“The central principles of the American system of freedom of expression . . . are not the product of a moment of inspired constitutional genius 200-plus years ago. We owe those principles, instead, to the living, common law Constitution.”).

⁶³ See *id.* at 62 (observing that the process of interpreting freedom of speech principles “developed over fifty years, often through trial and error”). See also BALKIN, *supra* note 14, at 229 (“Interpreting the equal protection clause today means interpreting it after the New Deal, after the civil rights revolution, and after the second wave of American feminism.”).

⁶⁴ See BALKIN, *supra* note 14 (observing that constitutional rights evolve in a broad-ranging process that includes original understandings, common law elaboration, and public debate).

⁶⁵ See generally Stephen M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the*

cantly from the First Amendment and Fourteenth Amendment precedents secured by African-Americans.⁶⁶

Activists and litigants may also seek to alter the understanding of previously established rights relationships. Moreover, new social and constitutional movements can arise, during which multiple constitutional rights provisions may be relied upon in distinctive ways.

As noted earlier, rights can also come into conflict or tension with one another. This occurs when rights-holders make separate rights-based claims, necessitating some balance or other resolution. This process is limited only by the creative energies and talents of activists, litigants, and other actors in the system. It is perpetual in the sense that rights relationships can change over time in response to new invocations, strategies, and theories. New rights associations may form, and new understandings of constitutional rights—both in individual and relational terms—continually develop.

Thus far I have focused on activists and litigants as primary actors in Rights Dynamism. Owing to their central interpretive function, courts obviously play a central role. They react to and adjudicate litigants' constitutional rights claims. In early test cases, courts must distinguish between or among constitutional rights—free speech and free exercise of religion, for example, or equal protection and due process. Through this process, courts sift through multiple rights claims. As explained further below, they define and interpret the scope and contours of both individual rights and rights relationships.

Rights Dynamism is influenced by a wide variety of actors and influences, which determine whether and how rights interact with one another. Thus, as noted earlier, through their official acts government officials can bring rights into contact with one another. Political officials also participate in discourses in which they associate or combine constitutional rights. Thus, government officials who favor strong protection of the right to bear arms might rely on a combination of Second Amendment, First Amendment, privacy, and property arguments.⁶⁷ Legislative and other officials who support abortion rights rely on due process, privacy, and equality-based arguments, while officials who oppose any extension of abortion rights rely on due process, equality, and free speech rights. Like litigants, political officials sometimes discuss constitutional rights in the aggregate, in the alternative, or as conflicting guarantees.

Social discourse regarding constitutional rights can also exhibit some of these same characteristics. Media outlets and the public at large discuss

Supreme Court Favor Free Expression Over Religious Freedom?, 8 U. PA. J. CONST. L. 431 (2006) (discussing Jehovah's Witnesses free speech precedents).

66 See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* 99–100 (1999) (discussing LGBT movement's reliance on civil rights First Amendment precedents).

67 See Zick, *supra* note 2, at 29–36 (discussing non-Second Amendment protections relating to arms).

and debate the tensions between freedom of expression and equality, privacy and the right to bear arms, and free exercise of religion and equality. As some commentators noted in the aftermath of the shooting death of Michael Brown, press coverage and public debates seemed to focus myopically on First Amendment expressive rights rather than other rights allegedly being violated in Ferguson, Missouri.⁶⁸ This sort of reporting can reflect or affect the public's perspective regarding the hierarchy of different rights.

Scholars also participate in, and sometimes significantly affect, rights dynamics. Despite the relative lack of attention to Rights Dynamism, constitutional scholars have commented on particular rights relationships. For example, some have offered substantive theories regarding the relationships between free speech and free exercise, free speech and equality, and due process and equal protection.⁶⁹ This work has contributed to judicial and public understandings of the relationship between and among constitutional rights.⁷⁰

In Rights Dynamism, the various players and participants can sometimes influence one another. Academic commentary regarding the relational aspects of constitutional rights can affect litigants' strategic choices as well as judicial interpretations and case outcomes. New theories and commentaries can lead to changes in the interpretation of rights relationships, or to further illumination of these relationships. Of course, it is not possible to establish causal relationships. However, the process suggests that these influences are indeed present. For example, prior to and during the civil rights movement, academic commentary on free speech rights may have affected litigants' and the Supreme Court's perception of the relationship between freedom of expression and racial equality.⁷¹ Similarly, long before Justice Kennedy discussed the illuminating relationship between due process and equality rights in *Obergefell*, constitutional scholars had already identified and discussed it.⁷²

In sum, Rights Dynamism is a broad and inclusive process that involves litigation, adjudication, public discourse, and scholarly commentary con-

⁶⁸ See Dahlia Lithwick & Daria Roithmayr, *Ferguson's Constitutional Crisis*, SLATE (Aug. 20, 2014), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/08/ferguson_s_constitutional_crisis_first_amendment_violations_are_only_part.html (lamenting lack of coverage of Fourth and Fourteenth Amendment violations).

⁶⁹ See, e.g., Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531 (1992) (explaining how law banning sodomy demonstrates link between substantive due process and equal protection); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (claiming that substantive due process is a retrospective analysis, whereas equal protection is forward-looking).

⁷⁰ See, e.g., Karlan, *supra* note 4, at 474–75 (describing scholars' contributions to the shift in LGBTQ cases from the Due Process Clause to the Equal Protection Clause).

⁷¹ See KALVEN, *supra* note 19 (examining contemporary civil rights cases in an attempt to clarify theoretical basis for free expression).

⁷² See Karlan, *supra* note 4, at 474 (observing that “the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other”).

cerning the relationships between and among constitutional rights. Although much of the action takes place in the courts, a variety of actors and influences participate in the dynamic process of defining and interpreting rights and their relationships to one another.

C. *Dynamic Elaboration*

Over time, the process of Rights Dynamism contributes to the elaboration and construction of individual rights and rights relationships. Through active intersections in which constitutional rights are mashed up, compared, contrasted, and sometimes balanced against one another, participants influence the meanings of rights both independently and in relation to one another.

In general, the elaborative process occurs over many decades and results from multiple rights interactions. As illustrated in Part II, as litigants invoke and rely upon individual rights provisions in various contexts and for a variety of purposes, courts interpret and elaborate the meanings of individual rights guarantees and the relationships between and sometimes among them.

Dynamic elaboration does not fully establish the meaning of any particular constitutional right or rights relationship. However, it can significantly affect the interpretation and meaning of constitutional rights. It is thus an integral part of the interpretive and constructive process.

With regard to many constitutional rights, meaning is derived not solely from individual text, history, and applications, but also from intersections and relationships between and sometimes among rights. Through this interactive process, courts and officials do more than shape the meaning of individual rights provisions. As they adjudicate and interpret at the intersection of freedom of expression and equality, freedom of expression and free exercise, equal protection and equality, etc., officials establish, influence, and define rights relationships.

As is true of Rights Dynamism, dynamic elaboration is primarily—though again not exclusively—the province of courts. When deciding cases at the intersection of neighboring, overlapping, and sometimes conflicting rights provisions, courts must often make difficult choices regarding (1) which claims to recognize or disfavor; (2) whether, and if so how, to combine constitutional rights or relate them to one another; and (3) the proper resolution of tensions and conflicts between constitutional rights.

As they answer these questions, courts do not generally discuss rights in explicitly relational terms.⁷³ *Obergefell*, in which the Supreme Court highlighted aspects of the relationship between due process and equal protection

⁷³ See Coenen, *supra* note 2, at 1069 (observing that the Supreme Court generally segregates rights provisions and constitutional doctrines).

rights, is a notable exception.⁷⁴ Nevertheless, even if they do not articulate their decisions in relational or cumulative terms, courts are engaged in a process of dynamic interpretation. When they adjudicate cumulative, aggregate, and other types of claims involving multiple rights, courts construct the meanings of individual rights in relation to one another. They illuminate, clarify, and sometimes unsettle rights relationships.

As noted, this elaborative process occurs over many decades. It involves adjudication of numerous controversies in which the subject rights intersect with one another. Moreover, like Rights Dynamism itself, dynamic interpretation continues in perpetuity. As activists and parties invoke rights, courts can return to specific intersections as new issues arise. They can affirm or alter the interpretation of rights and their relationships with one another. However, they can also leave things unsettled, thus providing litigants with future opportunities to combine or contrast rights provisions.

For the most part, the actual mechanics of dynamic interpretation are familiar to common law constitutional adjudication. Courts obviously rely on ordinary inputs such as briefs, amicus filings, and factual records. However, dynamic interpretation involves a complicating set of factors and influences. Cross-doctrinal developments and considerations play a larger and more important role in dynamic interpretation than they do in ordinary adjudication of individual rights claims. When courts actively engage with more than one rights provision at a time, the interpretive enterprise requires at least implicit recognition of doctrinal effects in more than one area. Even if courts do not consciously consider these effects, their decisions will often cross doctrinal boundaries.

For example, as explained below, in cases where Free Speech Clause and Free Exercise Clause claims are brought together, developments in *both* the free speech and religious liberty areas can impact the interpretive enterprise.⁷⁵ Courts interpreting the speech rights of religious adherents must at least be mindful or aware of changes to free exercise doctrines. They may interpret free speech rights in response to those changes, or owing to concerns about them. Similarly, as I also discuss below, changing notions of constitutional equality can influence judicial interpretation of expressive rights—and vice versa.⁷⁶ Courts may expand free speech rights in order to facilitate equal protection rights, or may interpret free speech claims in light of changes in equal protection doctrine. At intersection points, courts do

⁷⁴ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015) (discussing due process and equal protection components of the marital right). For other examples of explicitly cumulative reasoning in rights cases, see Coenen, *supra* note 2, at 1078–82.

⁷⁵ See discussion *infra*, Part II.C (arguing that the intersection of freedom of speech and free exercise of religion has influenced the court's concepts, doctrines, and principles).

⁷⁶ See discussion *infra*, Part II.B (recounting significant events in civil rights movements that influenced the Court's identification of certain rights).

not and indeed cannot always focus on singular constitutional provisions or doctrines. Rather, they are engaged in an elaborative process that implicates more than one right.

Other distinctive concerns arise when courts engage in dynamic elaboration. When courts adjudicate more than one right at a time, or when one right is used to facilitate another, the specter of constitutional balancing or trading rights off against one another can arise. For instance, when they hear cases concerning free speech rights near abortion clinics, judges might be influenced by perceptions of the relative strength or worth of rights such as freedom of speech or abortion.⁷⁷ When confronted with a tension or conflict between constitutional rights such as privacy and free speech, or free speech and free exercise, judges may confront similar tensions or conflicts. These can influence adjudication in situations where rights are presented in the alternative, or facilitate one another, or conflict.

Of course, as in other contexts, courts adjudicating cumulative or aggregate rights claims are subject to certain external influences. For instance, judicial receptivity to certain rights claims might be affected by changes in official or public attitudes regarding particular claimants or rights claims. Increased public recognition and support for a constitutional right may affect how that right is viewed not merely in isolation, but also *in relation to* other constitutional rights. At the same time, a decrease in support for a right, or sustained public conflicts regarding a particular right, may weaken its position vis-à-vis other rights.

For example, as discussed further below, the Supreme Court was initially more receptive to Jehovah's Witnesses' Free Speech Clause claims than their Free Exercise Clause claims.⁷⁸ Some have argued that the Court's preference for free speech over free exercise was related to significant changes in the American political system and Supreme Court Justices' personal biases regarding the constitutional claims of adherents to minority religions.⁷⁹

To take a more recent example, for many decades courts were more inclined to recognize free expression rights on behalf of LGBT claimants than

⁷⁷ See, e.g., Lee Epstein, Christopher M. Parker & Jeffrey A. Segal, *Do Justices Defend the Speech They Hate? In-Group Bias, Opportunism, and the First Amendment* 11–12 (2012) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2107425 (discussing whether judges favor litigants who share similar political or ideological commitments); Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Discrimination Test*, 51 AM. U. L. REV. 179, 198–99 (2001) (arguing that the Supreme Court sometimes favors anti-abortion speech).

⁷⁸ See *infra* Part II.C (finding that the first few Jehovah's Witnesses' cases did not even address the free exercise claims).

⁷⁹ See Feldman, *supra* note 65, at 474–75 (arguing that the development of a pluralistic democracy led to the favoring of free expression over religious freedom with the help of a protestant-controlled Supreme Court); cf. STRAUSS, *supra* note 13, at 67–70 (discussing the external influences that shaped modern free speech principles).

substantive equality claims.⁸⁰ Only after public attitudes regarding sexual orientation and sexual orientation equality changed dramatically—in part as a consequence of robust exercise of First Amendment rights of speech and association—did courts begin to recognize substantive LGBT equality and privacy rights.⁸¹

Like other forms of common law adjudication, the dynamic elaboration of individual rights is not linear—it does not progress in some sequential or orderly manner. Indeed, owing in part to the involvement of more than one right, dynamic elaboration may be even more reactive, unintentional, and unpredictable than common law counterparts.

The results or products of dynamic interpretation bear these observations out. There are myriad possibilities. For instance, the elaborative process might be truncated or short-circuited. Consider in this regard the present understanding of the relationship between the Free Speech Clause and other First Amendment rights—assembly, petition, press, and association. The Supreme Court has effectively merged all of these neighboring guarantees with the Free Speech Clause.⁸² That interpretation is not necessarily settled for all time. As part of the process of Rights Dynamism, scholars are actively re-examining these relationships—toward the end of convincing courts to independently interpret and enforce these rights.⁸³ But right now, there are few opportunities for doctrinal dynamics to develop between and among these First Amendment provisions.

The fate of the Free Speech Clause's immediate neighbors demonstrates that one right may ultimately be subjugated to another. Dynamic elaboration can potentially create rights redundancies, such that one right no longer serves any special or distinctive purpose. In the most extreme case, one right in a rights relationship may totally succumb to another and cease to have any independent meaning.⁸⁴

⁸⁰ See ESKRIDGE, *supra* note 66, at 98–137 (discussing early cases involving speech, association, and press).

⁸¹ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 563–78 (2003) (overruling prior precedent that allowed governments to punish homosexual sodomy); *United States v. Windsor*, 133 S. Ct. 2675, 2693–96 (2013) (invalidating federal Defense of Marriage Act on due process and equal protection grounds).

⁸² See Bhagwat, *supra* note 1, at 1098–99 (“The rest of the First Amendment—the Press, Assembly, and Petition Clauses—might as well not exist.”); INAZU, *supra* note 22, at 2 (noting that there is good reason to think that the right to freedom of association has been subsumed into the blanket freedom of speech provision); KROTOSZYNSKI, *supra* note 22, at 158 (discussing Supreme Court cases that decide issues that would theoretically fit under the Petition Clause under the Free Speech Clause); West, *supra* note 22, at 358 (finding that the Free Speech Clause has received significant attention while the freedom of the press has been largely ignored).

⁸³ See generally Bhagwat, *supra* note 1; INAZU, *supra* note 22; KROTOSZYNSKI, *supra* note 22; West, *supra* note 22.

⁸⁴ See, e.g., Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71 (2001) (discussing relationship between the Free Speech Clause and the Free Exercise Clause).

More typically, active intersection affects the meanings of individual rights in relation to one another.⁸⁵ As the Supreme Court suggested in *Obergefell*, constitutional rights may be interpreted such that they illuminate or clarify one another.⁸⁶ There the Court engaged in what Professor Michael Coenen recently described as “combination analysis”—the explicit justification of outcomes by reference to multiple rights provisions acting together.⁸⁷ Of course, rights do not always or necessarily support one another when adjudicated together. Rights provisions may also be interpreted in ways that complicate, restrict, or even undermine one another.⁸⁸

As a result of their various couplings and interactions, constitutional rights can also combine with one another in unique and sometimes confounding ways. For example, so-called “hybrid” rights conjoin two rights in a manner that seemingly produces a viable claim where one based on either right alone might fail. Thus, the Supreme Court has indicated that whereas a stand-alone Free Exercise Clause claim might fail, a “hybrid” claim involving free exercise and another right—such as the right to privacy or freedom of speech—might succeed.⁸⁹

Since dynamic interpretation cuts across two—and sometimes more—constitutional provisions, these resulting elaborations are typically bi- or multi-directional. Thus, when they intersect, the meanings of both freedom of expression and constitutional equality, both freedom of expression and free exercise, and both equal protection and due process can be affected. In the elaborative process, rights in active relation both influence and are influenced by one another.

This is why, to varying degrees, contemporary understandings and interpretations of constitutional rights are a function of their relationships to other rights. Thus, the meaning of the modern Equal Protection Clause is derived in part from its interactions with the Due Process Clause. Similarly, current understandings of the First Amendment’s Free Speech Clause are, in part, a function of their frequent and dynamic intersection with the Equal Protection Clause. The contemporary meaning of the Free Exercise Clause is linked to its interactions with the Free Speech Clause. As to all of these pairings, we can also say “vice versa”—the elaborative influence generally runs in both directions.

⁸⁵ See, e.g., Karlan, *supra* note 4 (examining relationship between the Due Process Clause and the Equal Protection Clause).

⁸⁶ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602–03 (2015) (discussing relationship between the Due Process Clause and Equal Protection Clause as it relates to marriage).

⁸⁷ See Coenen, *supra* note 2, at 1075–77 (explaining the concept of combination analysis).

⁸⁸ See Karlan, *supra* note 4, at 480–83 (suggesting that Due Process Clause and Equal Protection Clause have sometimes limited one another’s scope).

⁸⁹ See *Emp’t Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (recognizing the “hybrid” constitutional claim). See also Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) (criticizing the concept of “hybrid” rights).

Dynamic elaboration supplements our understanding of constitutional interpretation. It helps to illuminate the processes by which constitutional rights are subject to change. Along with original understandings, precedents, and other sources of constitutional meaning, dynamic elaboration contributes something important to the interpretive enterprise. As rights interact and socialize over extended periods of time, constitutional rights provisions can take on narrower, broader, or even distinctive new meanings.

II. EXAMPLES AND ILLUSTRATIONS

Part I discussed the relational nature of constitutional rights and described the dynamic processes in which rights intersect and are interpreted. Part II uses three rights relationships as examples and illustrations. Rather than examine all of the details relating to each rights relationship, the object is to show in broad terms how Rights Dynamism and dynamic elaboration operate. The first relationship considered is that between the Fourteenth Amendment's Due Process Clause and its Equal Protection Clause.⁹⁰ *Obergefell* is one product of the dynamic intersection of these clauses. However, it is only a single decision point in a long and complex relationship. The other two examples involve the Free Speech Clause and its intersection with other constitutional rights—namely, the Equal Protection Clause and the Free Exercise Clause. The object is not merely to describe the relationships, but rather to analyze the rights interactions and critically assess the processes and products of dynamic elaboration.

A. *Due Process and Equal Protection*

In *Obergefell v. Hodges*, the Supreme Court relied on the synergistic connections between the Due Process Clause and the Equal Protection Clause to recognize a right to marriage for gay men and lesbians.⁹¹ *Obergefell* was a culmination point in a dynamic process that began at the Fourteenth Amendment's framing and involved many decades of activism, litigation, doctrinal change, public debate, governmental action, and scholarly examination. This initial illustration briefly highlights some of the general aspects of Rights Dynamism and dynamic elaboration. The two other rights relationships are considered in greater detail.

⁹⁰ The discussion in this Part is limited to the *substantive* aspects of these guarantees, and does not consider their procedural dimensions.

⁹¹ See *Obergefell*, 135 S. Ct. at 2602–03 (discussing relationship between Due Process Clause and Equal Protection Clause as it relates to marriage).

1. *From Synergy to Separation*

The Fourteenth Amendment's Due Process Clause and Equal Protection Clause are close textual neighbors. Their relationship has deep textual and historical roots. The clauses are intimately connected in terms of their framing, ratification, and central purposes.

As a matter of their *original* dynamic, the two provisions intersected with and illuminated one another.⁹² As Jack Balkin has observed, “[e]vidence of the connection between due process and equality is everywhere in [the] Reconstruction-era debates.”⁹³ As concepts and then later as rights, due process and equal protection illuminated one another. Due process was a fundamental guarantee that included substantive equality rights.⁹⁴ Moreover, as Akhil Amar has explained, it was understood during early debates that “the Equal Protection Clause was in part a clarifying gloss on the due process idea.”⁹⁵

From the beginning, at least at a very broad level of abstraction, both clauses were about fundamental fairness. In their substantive dimensions, due process and equal protection prohibit governments from taking actions that single out, discriminate, or create castes. They offer important protections for personal dignity. This was the understanding before courts engaged regularly with the due process and equal protection guarantees in the twentieth century.

Likely with this understanding, in the modern era litigants frequently invoked the due process and equal protection guarantees together or cumulatively. This has occurred in a wide range of contexts, including cases involving socio-economic regulations, fundamental procreative rights, claims relating to access to courts, race discrimination, presidential elections, and marriage.⁹⁶ Due process and equal protection rights have also intersected in so-called “fundamental interest” or “substantive equal protection” cases.⁹⁷ In these and other cases, litigants sought relief under one or both provisions.

At the same time, legal scholars have also studied, and in some cases sought to influence, the manner in which due process and equal protection

⁹² See BALKIN, *supra* note 14, at 220 (discussing historical overlap between the Due Process and Equal Protection Clauses).

⁹³ *Id.* at 251.

⁹⁴ *Id.*

⁹⁵ Amar, *supra* note 12, at 772.

⁹⁶ See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (noting that both due process and equal protection had been invoked in a challenge to mandatory sterilization law, but relying on equal protection); *Ry. Express Agency v. New York*, 336 U.S. 106, 108–10 (1949) (rejecting due process and equal protection challenges to an advertising restriction); *Griffin v. Illinois*, 351 U.S. 12, 16–17 (1956) (relying on both due process and equal protection to invalidate denial of transcript for indigent defendant in direct appeal); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (invalidating a ban on interracial marriage under both equal protection and due process guarantees).

⁹⁷ See generally Karlan, *supra* note 4, at 473–82 (examining the relationship between the Due Process Clause and the Equal Protection Clause).

rights relate to one another. Some prominent scholarly accounts have emphasized the *distinctions* between due process and equal protection.⁹⁸ Thus, rather than focus on points of overlap or intersection, commentators have chosen to emphasize the distinctive characteristics of each right.⁹⁹ By contrast, other influential treatments have sought to integrate or combine the two provisions, such that they protect a single right—“equal citizenship,” for example.¹⁰⁰ However, as Pam Karlan has observed, one of the potential pitfalls of this approach is that “[t]he two clauses become, rather than inform, one another.”¹⁰¹

The Supreme Court has never taken a firm side in this debate. In its rulings, the due process-equal protection relationship has rarely been explicitly recognized or addressed (*Obergefell*, again, being an obvious exception). Despite having ample opportunities to do so, the Court has never elaborated a consistent approach to these provisions or a coherent account of their relationship to one another.

In fundamental interest and other special cases, the Court has occasionally relied on *both* the due process and equal protection provisions—without explaining what, if any, relationship they have to one another.¹⁰² In *Loving v. Virginia*, which invalidated a state miscegenation law, the Court relied almost exclusively on the Equal Protection Clause, but briefly stated at the end of the opinion that the law also violated the Due Process Clause.¹⁰³ However, far more typically the Court has explained decisions *either* in terms of due process or equal protection. In general, particularly if one looks at its most iconic decisions, the Court has essentially treated the Due Process and Equal Protection Clauses as fungible provisions.¹⁰⁴

Over time, the Supreme Court has developed separate doctrines relating to each clause. Equal protection is now commonly understood to pro-

⁹⁸ See Karlan, *supra* note 4, at 475–76 (discussing the work of constitutional scholars).

⁹⁹ See, e.g., Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 382–83, 385–86 (1985) (arguing the Court should have used the Equal Protection Clause to protect abortion rights).

¹⁰⁰ See, e.g., Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 4 (1977) (“The substantive core of the [14th] amendment . . . is a principle of equal citizenship, which presumptively guarantees to each individual the right to be treated by the organized society as a respected, responsible, and participating member.”).

¹⁰¹ Karlan, *supra* note 4, at 475.

¹⁰² See, e.g., *M.L.B. v. S.L.J.*, 519 U.S. 102, 107, 120 (1996) (invalidating a restriction on access to courts under both the Equal Protection Clause and the Due Process Clause). *But see id.* at 130 (Thomas, J., dissenting) (“Petitioner requests relief under both the Due Process and Equal Protection Clauses, though she does not specify how either Clause affords it. The majority accedes to petitioner’s request. But . . . the majority does not specify the source of the relief it grants.”).

¹⁰³ *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

¹⁰⁴ See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (relying on the Fourteenth Amendment’s Equal Protection Clause); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (relying on the Due Process Clause of Fifth Amendment).

tect against certain purposeful and invidious governmental classifications.¹⁰⁵ In its substantive aspects, due process protects certain “fundamental” rights.¹⁰⁶ Thus, modern doctrines segregate two constitutional provisions that, at least as an original matter, were closely bound together and acted as glosses upon one another.

Like the other rights pairings, due process and equal protection have a long history of active intersection and interaction. Nevertheless, litigants have generally sought relief under one or the other provision, while courts and scholars have generally ignored the relational dynamics between the clauses. Little attention has been paid to the manner in which due process and equal protection rights have actively intersected with and influenced one another over time.

2. “Stereoscopic” Elaboration

As *Obergefell* shows, due process and equal protection can be mutually illuminating guarantees. Rights Dynamism and the concept of dynamic elaboration can help explain how.

Rights Dynamism suggests that judicial and scholarly accounts of the due process–equal protection intersection are missing something important. When due process and equal protection are pressed together and mashed up over many decades, there are bound to be significant relational and elaborative effects. On closer examination, although they may be subtler in this relationship than in those discussed below, the influences are present.

As Pam Karlan has explained, we can discover these relational dynamics and effects only by viewing due process and equal protection rights “stereoscopically”—*i.e.*, through the lenses of both clauses.¹⁰⁷ Thus, instead of disaggregating or merging the provisions together, we ought to view these rights as dynamically relational. As Professor Karlan suggests, this approach reveals that the intersection between due process and equal protection leads to “synergistic effects, producing results that neither clause might reach by itself.”¹⁰⁸

As noted earlier, the Supreme Court’s due process/equal protection precedents generally rely on one provision or the other—they disaggregate, treating due process and equal protection as parallel, rather than intertwined, rights. However, in some contexts, the Court has developed doc-

¹⁰⁵ See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (explaining that classifications based on race, alienage, or national origin are subject to strict scrutiny).

¹⁰⁶ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 849 (1992) (plurality opinion (explaining the fundamental rights jurisprudence that has developed with respect to the Fourteenth Amendment’s Due Process Clause)).

¹⁰⁷ See Karlan, *supra* note 4, at 474.

¹⁰⁸ *Id.*

trines that at least implicitly bring the clauses together. These interactions highlight what is unique about rights dynamics and dynamic elaboration.

Consider the Supreme Court's decisions concerning the right to vote.¹⁰⁹ The decisions have generally been treated as resting on equal protection grounds. However, as Professor Karlan has shown, they are deeply influenced by due process-fundamental rights considerations.¹¹⁰ As mentioned earlier, due process doctrines and principles identify the liberties government cannot deny its citizens equal access to without compelling justification. The right to vote cases are thus an example of the kind of "innovation" that can occur when two related, but still distinct, clauses are invoked and adjudicated together.¹¹¹ This innovation is a product of dynamic elaboration. It has occurred over many decades, but largely beneath the surface in judicial opinions.

Rights dynamics can also impose *limits* on doctrinal innovation. In decisions involving access to courts, for example, due process principles provide positive content to the right of access but simultaneously constrain the scope of these access rights by limiting them to "fundamental" interests.¹¹² The dynamic process in which rights interact is not a one-way ratchet. As they intersect over time, rights may facilitate and illuminate one another. But they may also impose conceptual and doctrinal constraints on one another.

What is important is that due process and equal protection have not merely converged with one another. They have actively intersected and combined, in ways that have influenced and illuminated each right and their relationship to one another.¹¹³ Over time, these interactions have partially determined the meanings of due process and equal protection. The product of this intersection, particularly in the voting and court access cases, was a hybrid construction featuring bi-directional effects. Due process and equal protection sometimes facilitated one another, while in other contexts these rights limited one another's scope and utility. Only by looking in both directions, and specifically at the relational dynamics, can we fully understand the substance of the due process and equal protection provisions.

3. *Obergefell as/and Rights Dynamism*

Obergefell v. Hodges is most notable for its marriage equality holding. However, it is also a paradigm example of Rights Dynamism and dynamic elaboration. Plaintiffs challenged marriage bans on both due process and equal protection grounds. The Court could have disaggregated these

¹⁰⁹ See *id.* at 478–80 (discussing right to vote cases).

¹¹⁰ *Id.* at 480.

¹¹¹ *Id.* at 477.

¹¹² See *id.* at 480–83.

¹¹³ *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996).

claims and relied on either rights provision. Instead, the *Obergefell* Court wrote the following with respect to the relationship between the Fourteenth Amendment's two clauses:

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.¹¹⁴

This passage reflects an understanding of the dynamic relationship between due process and equal protection. What lies beneath it is a long history of dynamic intersection between these rights. *Obergefell* is an example of the sort of dynamic elaboration that occurs as a result of Rights Dynamism.

In a commentary on *Obergefell*, Professor Kenji Yoshino explains how cross-doctrinal developments ultimately “freed” liberty under the Due Process Clause, making it possible for the Court to break free of the constraints of “substantive due process” doctrine.¹¹⁵ Yoshino also demonstrates how, over the course of five decades, the Court's substantive due process doctrine underwent significant changes in areas ranging from abortion, to rights concerning death, to sexual liberty. As he observes, scholarly treatments of the due process and equal protection guarantees likely contributed to these changes.¹¹⁶

Rather than criticize the Court for not explicitly recognizing a single source for the right to marriage equality, Yoshino defends the Court's relational approach. He explains how the Court's own conception of the relationship between due process and equal protection changed over time, such that the Court's marriage equality rationale relied on a conception of liberty that was grounded in *both* due process and equal protection principles.

This “synthesis of liberty and equality” is one point in the evolutionary process.¹¹⁷ The passage quoted earlier, which emphasizes the convergence of liberty and equality and their mutual illumination, was a product of decades of activism, political and cultural changes, scholarly examination, and common law doctrinal development. The Court's elaboration of a right to “antisubordination liberty,” as Yoshino describes it, is based on the idea that due process and equal protection facilitate, illuminate, and in some respects cabin one another.¹¹⁸

Obergefell marks an important milestone in the relationship between due process and equal protection. The decision adopts and elaborates, although in relatively cryptic terms, a relational interpretation of the due pro-

¹¹⁴ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2603 (2015) (citations omitted).

¹¹⁵ See Yoshino, *supra* note 8, at 148–71 (2015) (discussing due process doctrine before and after *Obergefell*).

¹¹⁶ See *id.* at 156–57, 164 (discussing academic “backlash” to narrow conceptions of liberty).

¹¹⁷ *Id.* at 171–72.

¹¹⁸ *Id.* at 174; see also Tribe, *supra* note 7.

cess and equal protection guarantees. In some respects, that elaboration comes full circle—it returns to the framing-era recognition that the clauses are distinctive, yet mutually reinforcing.

As Professor Laurence Tribe argues, “*Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*—and to have located that doctrine in a tradition of constitutional interpretation as an exercise in public education.”¹¹⁹ As Tribe’s account recognizes, Rights Dynamism is a process that involves courts and the larger public—the people, the press, and commentators – in a discourse about the evolution of constitutional rights.

Obergefell will not be the last word with regard to the due process-equal protection relationship. What “antisubordination liberty,” or “equal dignity,” will ultimately become depends on how activists, courts, scholars, and the public invoke and interpret fundamental rights and equality in future cases. *Obergefell* is a single, but important, point in a perpetual process in which due process and equal protection rights dynamically intersect with one another.

B. *Freedom of Speech and Equal Protection*

This Section and the next discuss other constitutional rights relationships in somewhat greater detail. From their first introduction up to the present, the First Amendment’s Free Speech Clause and the Fourteenth Amendment’s Equal Protection Clause have frequently and actively intersected with one another.¹²⁰ Activists and litigants have pursued free speech claims (as well as right of association and free press claims) in order to facilitate a variety of equality movements and agendas. Litigants have invoked free speech and equality guarantees separately, in the alternative, and cumulatively. Courts and commentators have examined the connections and distinctions between free speech and equality rights, and articulated bidirectional constructions of both.

1. *Textual and Historical Connections*

When the Fourteenth Amendment was debated, Reconstruction Republicans vigorously resisted restrictions on First Amendment freedom of speech and freedom of press rights. They understood that freedom of speech, in particular, was critically important to the recognition and effective exercise of equal protection rights.¹²¹ Like the due process and equal protection guarantees, freedom of speech and equal protection were closely

¹¹⁹ Tribe, *supra* note 7, at 17.

¹²⁰ I have discussed this relationship at length elsewhere. See generally Zick, *supra* note 10.

¹²¹ See AMAR, *supra* note 17, at 235 (observing that Reconstruction Republicans frequently mentioned and invoked expressive rights in debates).

linked from the beginning.

During the 1930s, the Supreme Court relied on the Fourteenth Amendment's Due Process Clause to "incorporate" the Free Speech Clause and other First Amendment rights.¹²² Incorporation was itself a dynamic process, one that occurred in fits and starts until nearly all of the Bill of Rights guarantees had been applied to state and local governments. This second major intersection significantly broadened the scope and potential power of the First Amendment's various provisions. Owing to the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause, the First Amendment would be applied not just to the federal government but also to states and localities.¹²³

The Fourteenth Amendment's Equal Protection Clause was ratified so that newly freed slaves, and oppressed racial minorities more generally, would be protected from discriminatory state action.¹²⁴ At their respective cores, however, freedom of speech and equality rights share a common concern with the evil of governmental discrimination. Both the Free Speech Clause and the Equal Protection Clause were enacted so that minorities, outsiders, and dissidents would be protected from political majorities represented by the state.

These historical and substantive connections have influenced the relationship between freedom of speech and constitutional equality from the beginning. As these clauses have matured in proximity to one another, their meanings and relationship have changed dramatically.

2. *Facilitative and Cumulative Claims*

As I have indicated, it is not possible to follow each and every twist and turn with respect to the dynamic intersection between freedom of speech and equal protection. Painting with broader strokes, however, we can see Rights Dynamism at work and trace the general developments in terms of dynamic elaboration.

In the modern era, particularly after the process of incorporation, First Amendment and Fourteenth Amendment rights have been joined in two distinct, but related, ways. Equality advocates of many stripes have invoked First Amendment rights in order to facilitate the recognition and eventual enforcement of substantive Equal Protection Clause rights.¹²⁵ Litigants

¹²² See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the Free Speech Clause and Free Press Clause).

¹²³ *Id.*

¹²⁴ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (explaining that the clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States).

¹²⁵ See, e.g., *KALVEN*, *supra* note 19 (discussing use of First Amendment expressive claims to facilitate

have also invoked these rights cumulatively, demanding relief under either or sometimes both guarantees.¹²⁶

The first type of invocation, which we can call a *facilitative* claim, uses First Amendment rights as a means of obtaining substantive equality rights.¹²⁷ The primary purpose of invoking the Free Speech Clause is to obtain basic protections for the group in terms of rights to speak, publish, and associate—in other words, to gain recognition of a right to “equal expression” or “expressive equality.”¹²⁸ This hybrid form of right is then used to communicate in public, distribute information about minority groups, and associate for the purpose of advancing the cause of equality.

In the second type of invocation, which we can label a *cumulative* claim, activists and litigants invoke *both* the Free Speech Clause and the Equal Protection Clause to challenge discriminatory governmental action. Courts must then decide which, if either, constitutional right best “fits” the stated claim and whether that specific right has been violated. In order to do so, judges must consider and elaborate the meanings of freedom of speech and equal protection. And they must do so in contexts where the two rights are both present and potentially viable sources for constitutional claims.

Under both approaches, notice that litigants bring First Amendment and Fourteenth Amendment rights into close and frequent contact with one another. They seek expressive equality rights, test the boundaries of existing doctrines under both clauses, and sometimes press for recognition of new rights under one or the other. Facilitative and cumulative claims have highlighted overlapping constitutional protections under the clauses. They have also provided courts with countless opportunities to elaborate on the meanings of free speech and equal protection, and to consider the relationship between freedom of speech and constitutional equality.

Facilitative claims have deepened our understanding of the connections between First Amendment and Fourteenth Amendment rights. Religious adherents, labor activists, feminists, race equality advocates, and LGBT activists have all relied upon First Amendment rights like freedom of speech, association, and press to facilitate equal protection agendas. In doing so, these movements have contributed significantly to a distinctive elaboration of the relationship between freedom of expression and equality. They have

racial equality agenda); Zick, *supra* note 10 (discussing ways in which African-Americans and LGBT persons used freedom of speech and other First Amendment rights to facilitate constitutional equality movements); CARLOS A. BALL, *THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY* (2017) (examining the use of First Amendment claims by—and against—LGBT persons).

¹²⁶ See, e.g., *Carey v. Brown*, 447 U.S. 455, 460–61 (1980) (observing that a discriminatory picketing law implicated both the First Amendment and Fourteenth Amendment).

¹²⁷ See ESKRIDGE, *supra* note 66, at Ch. 3 (discussing use of expressive rights claims during the early eras of the LGBT equality movement).

¹²⁸ See Zick, *supra* note 10, at 18–21 (discussing expressive equality concept).

demonstrated and strengthened the synergies between these rights.

Consider for example the constitutional movement for racial equality. *Brown v. Board of Education* did not actually secure constitutional equality—even in the public schools.¹²⁹ Significant progress toward racial equality required a lengthy campaign of legal and political agitation. As Harry Kalven, Jr. observed, during the 1950s and 1960s, the NAACP focused significant energy and resources on First Amendment litigation.¹³⁰ The NAACP invoked freedom of speech and other First Amendment rights to challenge state efforts to suppress criticism of government, limit private association, restrict public protest, and exclude African-Americans from public accommodations.¹³¹ Not all of these challenges were successful. However, collectively, they created critical breathing space for the civil rights movement. That space protected public protests and other forms of contention, which in turn facilitated the enactment of civil rights legislation.¹³²

Advocates of sexual orientation equality, to take another example, followed a very similar path.¹³³ Particularly during the earliest stages of agitation, gay men and lesbians relied extensively on expressive rights in order to facilitate public acceptance and equal treatment under law.¹³⁴ Although courts were not willing or prepared to recognize equality rights on behalf of gays and lesbians, they were willing to recognize and enforce their basic expressive rights.¹³⁵ The First Amendment thus offered an early path to a form of constitutional equality that did not entail demonstrating suspect classification status under the Equal Protection Clause.

First Amendment agitation did not always produce results for advocates of gay and lesbian equality.¹³⁶ However, as was the case regarding racial

¹²⁹ 347 U.S. 483 (1954).

¹³⁰ See generally KALVEN, *supra* note 19 (describing civil rights advocates' reliance on First Amendment claims).

¹³¹ See *Cox v. Louisiana*, 379 U.S. 536, 545 (1965) (invalidating conviction of the leader of a group wishing to protest racial segregation); *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964) (establishing the high burden for public official libel plaintiffs in a case involving criticism of actions taken by Southern officials against civil rights activists); *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963) (invalidating breach of peace convictions against civil rights protesters); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (holding that an Alabama order requiring the NAACP to disclose its membership list violated the group's First Amendment right of association). See also KALVEN, *supra* note 19, Ch. 3 (discussing free speech challenges to segregated lunch counters).

¹³² See BRUCE ACKERMAN, *WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION* 95 (2014) (noting that “television made all the difference, transforming the terrible scenes into an ugly symbol that shocked viewers throughout the nation”); MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 440–41 (2004) (noting the rise in public sympathy for civil rights causes after violent scenes were televised).

¹³³ See Zick, *supra* note 10 (discussing LGBT equality movement); BALL, *supra* note 125 (same).

¹³⁴ See ESKRIDGE, *supra* note 66, Ch. 3 (discussing early free speech, association, and free press cases).

¹³⁵ See BALL, *supra* note 125.

¹³⁶ See Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 63 (1996) (“As an all-

equality, free speech and other expressive claims helped secure critically important space for the gay equality movement. Perhaps most importantly, recognition of basic expressive rights facilitated gay and lesbian political agitation. As Dale Carpenter has observed, in this and other respects, “[t]he First Amendment created gay America.”¹³⁷

As courts decided expressive claims brought by equality advocates, they simultaneously elaborated both free speech and equality rights. Each free speech victory communicated basic respect for at least expressive equality, and perhaps for a more substantive equality down the line. For equality advocates, successful First Amendment claims have generally been the first formal evidence that they enjoy any form of equality rights. Indeed, for extended periods of time, recognition of expressive equality was the only real sense in which African-Americans, gays and lesbians, and other suppressed minorities were considered “equal” citizens. Like *Obergefell*'s recognition of “equal dignity” rights, judicial recognition of “expressive equality” rights fashioned a distinctive liberty from the principles and values of two constitutional guarantees. Acting as background principles, expressive rights influenced the recognition and enforcement of equality rights.¹³⁸

We have been focusing on the courts. However, this synergistic and stereoscopic process occurred not only in courthouses, but in the streets, at lunch counters, in newspapers and other publications, in academic circles, and in homes and workplaces. Press coverage of public protests and other expressive activities put racial equality on the national agenda.¹³⁹ Iconic images of the events at Selma, Stonewall, and other places of conflict altered public opinion and eventually helped to produce legislative reforms.¹⁴⁰ Legal academics highlighted the connection between freedom of expression and constitutional equality, and published sophisticated First Amendment arguments against laws that denied equal expressive rights.¹⁴¹ Recognition and respect for expressive rights emboldened private and public coming out,

encompassing metaphor or a complete theory of constitutional rights for gays, lesbians, and bisexuals, [freedom of expression] falls short.”); ESKRIDGE, *supra* note 66, at 196 (observing that the First Amendment “performed unevenly” during the gay equality movement).

¹³⁷ Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1525 (2001).

¹³⁸ See Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1716 (1993) (“Expression, equality, and privacy coexist as components of rights claims that are mutually dependent.”).

¹³⁹ See generally ACKERMAN, *supra* note 132 (discussing connection between public contention and the Civil Rights Act of 1964).

¹⁴⁰ See KLARMAN, *supra* note 132, at 440–41 (discussing television’s role in the racial equality movement).

¹⁴¹ See, e.g., KALVEN, *supra* note 19; David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319 (1994); William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327 (2000).

social and political organizing, and demands for equal treatment.¹⁴²

First Amendment rights, doctrines, and principles have also facilitated constitutional debate and discourse concerning constitutional equality. This discourse is a condition precedent to the elaboration and extension of constitutional equality rights.¹⁴³ Civil rights legislation was the culmination of a decades-long national conversation about racial equality.¹⁴⁴ Similarly, in *Obergefell*, the Supreme Court emphasized that the nation had been engaged in a decades-long discourse about sexual orientation and equality.¹⁴⁵ According to the Court, this national debate had led to significant changes in our collective understanding of constitutional equality, which in turn supported recognition of a right to marital equality.

As they relate to *cumulative* (as opposed to facilitative) claims, the dynamics between First Amendment expressive rights and Fourteenth Amendment equality rights have followed a distinct path. Prior to the 1980s, the Supreme Court generally treated free speech and equality as fungible rights. Civil rights and other speakers challenged laws and ordinances that restricted picketing, protests, and other expressive activities on *both* First Amendment and Fourteenth Amendment grounds.¹⁴⁶ As the Court observed in one such case:

Because Chicago treats some picketing differently from others, we analyze this ordinance in terms of the Equal Protection Clause of the Fourteenth Amendment. Of course, the equal protection claim in this case is closely intertwined with First Amendment interests; the Chicago ordinance affects picketing, which is expressive conduct; moreover, it does so by classifications formulated in terms of the subject of the picketing.¹⁴⁷

Note that the Court treats the “claim” as arising under the Equal Protection Clause, but acknowledges that “First Amendment interests” are also implicated. These things, the Court says, are “intertwined.” What it does not explain, in any depth or detail, is that in such cases First Amendment and Fourteenth Amendment guarantees provide overlapping, but still distinctive, constitutional coverage. The ordinance regulated “expressive

¹⁴² See ESKRIDGE, *supra* note 66, at 145 (observing that Warren Court decisions in the equal protection, free speech, and other areas “facilitated the explosion of coming out stories, gay rights organizations, and political and social activism immediately following Stonewall”); *id.* at 141 (noting the connection between coming out and legal gains for homosexuals).

¹⁴³ See Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2030 (2003) (observing that “the First Amendment ensures that all Americans can express their beliefs about the Constitution”).

¹⁴⁴ See generally ACKERMAN, *supra* note 132 (examining the complex political and judicial processes that led to civil rights advances during the twentieth century).

¹⁴⁵ See *Obergefell v. Hodges*, 135 S.Ct. 2584, 2605 (2015) (describing public and official discourse concerning same-sex marriage issue).

¹⁴⁶ See, e.g., *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 94 (1972) (challenge to an ordinance that prohibited most picketing outside schools, but exempted labor picketing).

¹⁴⁷ *Id.* (footnote omitted).

conduct” (picketing), and thus implicated rights under the Free Speech Clause (and the Assembly Clause). The ordinance also set up a classification that distinguished between types of individual picketers, which is what triggered the Equal Protection Clause. In such cases, expressive and equality rights act in concert and as related or cognate guarantees. They protect against similar but distinctive types of governmental discrimination.

Today, litigants continue to bring cumulative or alternative claims similar to the one described above. However, over time, the Court has clarified the doctrinal boundaries between freedom of speech and equality in a manner that generally produces a fairly strict segregation of rights claims. Modern-day litigants have the best chance of success when they challenge content-based restrictions affecting picketing and similar activities on First Amendment grounds. The doctrinal calculus here is straightforward. Under the Equal Protection Clause, classifications not based on suspect or quasi-suspect differences are subject only to rational basis review, while under the First Amendment content-based speech regulations are subject to strict scrutiny.¹⁴⁸ In essence, as a result of doctrinal development, separate doctrines now channel claims regulating expression based on content into a First Amendment framework, while claims challenging other types of discriminatory state action are channeled into a Fourteenth Amendment framework.

This channeling and segregation resembles the modern treatment of claims under the Due Process and Equal Protection Clauses, as described earlier. In both contexts, courts have segregated rights rather than elaborated the synergies between them. In both contexts, doctrinal clarity has come at the potential cost of eliminating rights synergies or at least serious consideration of the connections between rights.

To highlight just one example, owing to the constraints of the Equal Protection Clause, gay men and lesbians relied heavily—and largely unsuccessfully—on the Free Speech Clause in challenges to the military’s Don’t Ask, Don’t Tell policy and in employment discrimination cases.¹⁴⁹ Rather

¹⁴⁸ See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (noting that the First Amendment stands for the proposition that the government may not prohibit expression even if it finds it offensive or disagreeable); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446 (1985).

¹⁴⁹ For federal courts of appeals cases rejecting the First Amendment argument, see *Able v. United States*, 155 F.3d 628, 631 (2d Cir. 1998) (overturning the district court’s ruling that the first amendment was violated); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (holding that the First Amendment is not implicated when the discharge was on the basis of conduct); *Richenberg v. Perry*, 97 F.3d 256, 263 (8th Cir. 1996) (rejecting the First Amendment argument against the DOD directive); *Able v. United States*, 88 F.3d 1280, 1296 (2d Cir. 1996) (rejecting the argument that the First Amendment is violated); *Thomasson v. Perry*, 80 F.3d 915, 931 (4th Cir. 1996) (en banc) (holding that because the statute only targets acts the First Amendment is not implicated); *Steffan v. Perry*, 41 F.3d 677, 693 (D.C. Cir. 1994) (en banc) (rejecting a facial challenge under the First Amendment because the directive does not exclusively apply to speech); *Pruitt v. Cheney*, 963 F.2d 1160, 1163 (9th Cir. 1991) (rejecting plaintiff’s First Amendment argument because she was not discharged because of her speech); *Woodward v. United*

than viewing government actions in these cases as implicating *both* free speech and equality rights, courts focused myopically on freedom of speech. In doing so, they did not generally perceive any connection between expressive and equality rights—even in cases involving the explicit singling out of gay and lesbian communicative activities.¹⁵⁰

Despite judicial segregation, facilitative and cumulative claims have significantly contributed to individual and relational understandings of expressive and equality rights. Facilitative claims supported a right to expressive equality that was critical to the advancement of constitutional equality and civil rights. Cumulative claims highlighted the similarities and common purposes of First Amendment and Fourteenth Amendment rights. Prior to their doctrinal separation, these rights served as intersecting grounds for challenging discriminatory enactments that restricted or suppressed expressive activity. Doctrinal dynamics eventually pulled the rights apart, with important implications for both Fourteenth Amendment and First Amendment rights.

3. *Dissent, Exclusion, and Conflict*

Rights Dynamism is not a static process. Activists and litigants can re-purpose constitutional rights to serve new and distinctive ends. During the 1950s and 1960s, race equality advocates obtained recognition for the important right to associate for the purpose of expressing support for equal protection and other rights.¹⁵¹ In ensuing decades, civic organizations invoked—largely unsuccessfully—the First Amendment as a ground for *excluding* women and African-Americans from membership positions.¹⁵² Later, expressive organizations successfully invoked free speech and expressive association rights to exclude gay men and lesbians from membership—despite public accommodations laws that prohibited discrimination on these grounds.¹⁵³

States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (finding the Navy's discriminatory practice against homosexual conduct was rationally related to a permissible government purpose); Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989) (holding that there was "absolutely no First Amendment violation").

¹⁵⁰ See Cole & Eskridge, *supra* note 141, at 319, 335.

¹⁵¹ See NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462–63 (1958) (holding that an Alabama order requiring the NAACP to disclose its membership list violated the group's First Amendment right of association).

¹⁵² See New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 13–14 (1988) (upholding as constitutional a New York law which forbids membership organizations from excluding women and minorities); Board of Directors of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987) (holding that women could not be excluded on expressive grounds because of the State's compelling interest to eliminate discrimination); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (holding that women could not be excluded from organization on expressive grounds).

¹⁵³ See Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) (application of anti-discrimination law to require Scouts to admit leader who was openly gay violated Scouts' right of expressive association); Hurley v. Irish-Am. Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557, 566 (1995)

These conflicts and precedents have contributed something important to our understanding of the expressive-equality relationship. As I have discussed, equality movements have greatly benefitted from First Amendment dissenters' rights. Civil rights and equality advocates have relied heavily on free speech, association, and free press rights to challenge an array of official repression and discrimination. However, the exclusionary cases demonstrate that the relationship between First Amendment expressive rights and Fourteenth Amendment equality rights is not always, or necessarily, synergistic and collaborative. Expressive rights, including the right to speak and the right to associate, are quintessentially dissenters' rights. As such, they can be invoked not only by equality advocates, but also by those who resist the expansion of equality rights or state orthodoxy regarding those rights.

These particular invocations and the resulting precedents created a new dynamic between freedom of speech (and expressive association) and equal protection—including a new interpretive dynamic. Because they placed expressive and equality rights squarely in tension with one another, exclusionary invocations of the First Amendment pressed courts to balance expressive rights against rights to equal treatment. In some instances, particularly with respect to exclusion of gay men and lesbians, that balancing produced an interpretation of the First Amendment as a formal limit on, rather than a facilitator of, equal protection rights.¹⁵⁴

The exclusionary cases highlight some of the basic mechanics and interpretive effects of Rights Dynamism. Litigants and activists invoked an expressive right in a new manner and for a new purpose—one that was consistent with traditional values of dissent and associative freedom, to be sure, but that also complicated understandings of the relationship between expressive and equality rights.¹⁵⁵ Instead of working toward the shared goal of equality, in this context the relationship between expressive and equality rights became far more tense and strained.

As noted, Rights Dynamism is not merely an internal, court-centric process. As Professor Carlos Ball has recently shown, gay rights and First Amendment rights have a long and contentious social and political history.¹⁵⁶ Many cultural and political forces influenced the turn from First Amendment shield to First Amendment sword. Broad public debates

(application of anti-discrimination law to require parade organizers to allow gay group to march in parade violates organizers' right not to be compelled to speak); BALL, *supra* note 125 (focusing on the use of First Amendment expressive and religious liberty rights to oppose LGBT inclusion and equality).

¹⁵⁴ See, e.g., *Dale*, 530 U.S. at 659 (holding that Boy Scouts of America had a First Amendment right to exclude gay men and lesbians from membership).

¹⁵⁵ See generally BALL, *supra* note 125, Chs. 6, 7 (examining the use of First Amendment rights as exclusionary weapons during the LGBT equality movement).

¹⁵⁶ See *id.* Ch. 6 (discussing the cultural and political background for exclusionary invocations of the Free Speech Clause).

about free speech protection played a role. Among other things, the exclusionary cases were decided at roughly the same time that courts, scholars, and the public were considering the regulation of hateful and derogatory speech directed in particular at African-Americans.¹⁵⁷

The upshot of that conversation, in judicial fora and more generally, was a strong re-affirmation of First Amendment anti-orthodoxy principles that prohibit government from suppressing speech on the ground that it is hateful, derogatory, or exclusionary.¹⁵⁸ First Amendment rights are not always a trump; however, in American culture and jurisprudence they exert powerful moral and constitutional influence.¹⁵⁹

Cross-doctrinal influences also played a role in ushering in and sustaining this new phase of the expression-equality relationship. Particularly in cases involving exclusion of gay men and lesbians, the success of the expressive claims related, in part, to the perceived weakness of the equality interest being asserted. Under equal protection doctrine, government actions that discriminate on the basis of sexual orientation are reviewed under a forgiving rational basis standard.¹⁶⁰ Under that standard, governments are not precluded from taking sexual orientation into account. Thus, in contrast to race and gender equality rights, LGBT equality rights were not robust enough to overcome some expressive association claims.

Rights Dynamism is an ongoing and perpetual process. The Court's First Amendment decisions preserved limited organizational rights to exclude persons on expressive grounds, but also allowed the broader social and political debate concerning LGBT rights to continue. Moreover, the Supreme Court's exclusionary decisions were not the final word. Indeed, as public and official perceptions of LGBT persons and their rights evolved, some organizations—most notably the Boy Scouts of America—eventually reversed their policies excluding gays and lesbians.¹⁶¹

Further, *Obergefell* signals that classifications based on sexual orientation

¹⁵⁷ See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381 (1992) (invalidating local “hate speech” ordinance). For critical analysis of the expressive and equality values implicated by hate speech regulation, see, for example, JEREMY WALDRON, *THE HARM IN HATE SPEECH* (2012); RICHARD DELGADO & JEAN STEFANCIC, *MUST WE DEFEND NAZIS? HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997); Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 134–35 (1982).

¹⁵⁸ See *R.A.V.*, 505 U.S. at 394 (holding that governments cannot single out for regulation “messages of racial, gender, or religious intolerance”).

¹⁵⁹ See, e.g., Frederick Schauer, *First Amendment Opportunism*, in LEE C. BOLLINGER & GEOFFREY R. STONE, *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* (2002) (noting the popularity and influence of the First Amendment—particularly the free speech guarantee—in American social, political, and legal cultures).

¹⁶⁰ See, e.g., *Romer v. Evans*, 517 U.S. 620, 632–33 (1996) (applying rational basis scrutiny to a Colorado constitutional amendment that discriminated against gay men and lesbians).

¹⁶¹ See Erik Eckholm, *Boy Scouts End Ban on Gay Leaders, Over Protests by Mormon Church*, N.Y. TIMES, Jul. 27, 2015, at A1.

might receive more rigorous scrutiny in some cases.¹⁶² Litigants and activists will continue to examine and test the boundaries of the First Amendment right to exclude.¹⁶³ Courts will elaborate this right, and the relationship between expressive and equality rights, in future cases. And all of this will occur against a backdrop of changing cultural, political, and legal influences regarding the rights of gay men, lesbians, and other minorities.

Civil rights and equality activists fought for and obtained expressive rights that protected and facilitated political mobilization on behalf of equal protection. These rights later enabled organizations opposed to inclusion to preserve what they considered an important form of organizational and expressive autonomy. In turn, these new invocations of expressive rights gave rise to dynamic elaboration in the courts—both of expressive rights and of the relationship between expressive and equality rights. A new phase of tension and conflict changed the tenor and substance of this relationship. This is generally what Rights Dynamism and dynamic elaboration look like as they occur on the ground.

4. *Bi-Directional Elaboration*

Rights Dynamism leads to dynamic elaboration of constitutional rights. Over time, as rights intersect and find themselves in conversation with varying degrees of frequency, the meanings of individual textual provisions are elaborated. This elaboration is bi-directional, in the sense that the meanings of both rights in the relationship are affected by their interactions. Dynamic forces also affect interpretations and understandings of the relationships between rights.

We have already seen how understandings of the Due Process Clause and Equal Protection Clause have been affected by their intermittent intersections.¹⁶⁴ In the case of freedom of speech and equal protection rights, the bi-directional effects are even clearer and stronger. Indeed, owing to the frequency and significance of their interactions, we cannot fully understand modern conceptions of either Equal Protection Clause or First Amendment rights without reference to the dynamic intersection between them.

Early movement cases involving African-Americans, gay men, and lesbians established what I have called a right of “expressive equality.”¹⁶⁵ The combination of freedom of speech and equal protection requires, at a min-

¹⁶² *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (stating that gay men and lesbians are entitled to “the full promise of liberty”).

¹⁶³ *See, e.g., Elane Photography, LLC v. Willock*, 309 P.3d 53, 59 (N.M. 2013) (rejecting the claim that application of an anti-discrimination law to compel a photographer to render services to a gay couple violated First Amendment).

¹⁶⁴ *See supra* Part II.A.

¹⁶⁵ *See Zick, supra* note 10, at 18–21.

imum, that individuals be granted basic rights to speak, associate, and publish information. This is a more limited form of equality than civil rights advocates wished to obtain. Nevertheless, it was an important antecedent to a more robust conception of equal treatment under law. Expressive equality protected the rights of despised minorities to do what others were freely able to do under the law's protection—to express identity, to openly criticize government, to assemble together, and to disseminate information.

Expressive equality has been an important precursor to substantive equality. Indeed, without expressive rights, some equality claims would have been significantly delayed or perhaps even denied altogether. Absent public agitation, judicial and legislative elaboration of racial equality rights would have been suppressed or stymied. Some equality rights have sprung from or originated in free speech principles and concepts. Thus, in the opening lines of the decision in *Obergefell*, the Supreme Court observed that the Due Process Clause and Equal Protection Clause protect “a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity.”¹⁶⁶ The passage recognizes a special link between expressive equality and substantive equality. The right to freely define and express one's sexual identity is a right grounded in equal protection principles.

More generally, early claims by civil rights advocates established that equal protection provided an effective and independent ground for challenging certain forms of expressive discrimination. Through this aspect of the dynamic intersection of equality and free speech or expression we learned that a central function of equality rights is to police and remedy discriminatory classifications of *all types*. As noted earlier, equal protection doctrine now does this largely through skeptical review of suspect and quasi-suspect classifications, with rationality review applied to socio-economic classifications. As the intersection with expressive claims demonstrated, however, equality rights and expressive rights serve the same basic function of imposing formal neutrality requirements on government.

At the same time, contemporary understandings of the First Amendment's expressive guarantees—particularly freedom of speech and expressive association—can be traced to equality advocates' invocation of expressive rights and to equality principles more generally. The frequent interactions of the free speech and equality guarantees have profoundly shaped contemporary understandings of the First Amendment.

As Harry Kalven, Jr. observed, the race equality movement worked profound changes in the law of free speech, press, privacy, and association. As Kalven presciently stated: “[W]e may come to see the Negro as winning

¹⁶⁶ *Obergefell*, 129 S. Ct. at 2593 (emphasis added).

back for us the freedom the Communists seem to have lost for us.”¹⁶⁷ Kalven was referring to a series of early free speech cases in which the convictions of radicals, anarchists, and communists who had advocated overthrow of government had been upheld by the Supreme Court.¹⁶⁸ During the Warren Court era, by contrast, the Supreme Court frequently ruled in favor of civil rights activists who were engaged in peaceful public protests and other forms of equality agitation.¹⁶⁹

Over time, civil rights precedents would become part of the First Amendment’s bedrock. Free speech precedents expanded access to public fora, protected robust criticism of government officials, imposed rigorous content-neutrality and anti-orthodoxy principles, and established strong associative rights.¹⁷⁰ The rights recognized in these cases have been invoked not only by subsequent equality movements, but also by a long and ever-expanding list of political, social, and cultural dissenters.

During the 1950s and 1960s, the judicial, political, and cultural attention to equality rights ultimately influenced the Supreme Court to interpret the Free Speech Clause as including a “neutrality” principle.¹⁷¹ As we have seen, during the civil rights era content neutrality rules became a central component of the modern conception of freedom of speech. The free speech neutrality principle revolutionized free speech doctrine by importing equality values into the Free Speech Clause.¹⁷²

As a result of their dynamic intersection with equality rights, we have also learned something about the *limits* of the Free Speech Clause. For example, civil rights advocates successfully invoked the Due Process Clause, not the Free Speech Clause, to negate the use of trespass laws to remove African-Americans from lunch counters and other public places.¹⁷³ Decades later, courts similarly rejected First Amendment challenges by gay men and lesbians to discriminatory employment dismissals and enforce-

¹⁶⁷ KALVEN, *supra* note 19, at 7.

¹⁶⁸ *See, e.g.*, *Dennis v. United States*, 341 U.S. 494, 516–17 (1951).

¹⁶⁹ *See, e.g.*, *Cox v. Louisiana*, 379 U.S. 536, 544–45 (1965) (invalidating the conviction of a leader of a civil rights group seeking to protest racial segregation); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

¹⁷⁰ *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131, 143 (1966) (invalidating a conviction for disturbing the peace based on the free speech right to be present in a public library reading room); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (observing that debate regarding matters of public concern, including commentary on the behavior of public officials, should be “uninhibited, robust, and wide-open”); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958) (recognizing the right of anonymous association).

¹⁷¹ *See* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975) (observing that there is a “principle of equal liberty of expression . . . inherent in the first amendment”); *see also* Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 274–80 (noting a similar connection).

¹⁷² I should note that not all commentators have greeted this as a salutary event. *See, e.g.*, Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997).

¹⁷³ *See* KALVEN, *supra* note 19, Ch. 3 (discussing free speech claims in sit-in cases).

ment of the U.S. military's Don't Ask, Don't Tell regulations.¹⁷⁴ During the early phases of the LGBT equality movement, First Amendment doctrines relating to sexually explicit speech sometimes failed to protect forms of sexual dissent.¹⁷⁵ These cases and conflicts suggested that despite its strong legal and moral force, the Free Speech Clause, as interpreted, did not protect all forms of equality speech.

Further, as discussed earlier, the LGBT experience indicated that First Amendment rights can be invoked for defensive and exclusionary purposes. The Supreme Court recognized a right *not* to associate, at least for certain expressive organizations. As articulated by the Court, this right not to associate is potentially broad enough to threaten many anti-discrimination laws.¹⁷⁶ The exclusionary right of expressive association, which was recognized in cases involving exclusion of gay men and lesbians, could have far-reaching effects across a range of disadvantaged classes. At the same time, the right to exclude based on expressive grounds is critically important to individual and organizational autonomy.¹⁷⁷

Rights Dynamism has also revealed something about the relative weights or values of First Amendment and Fourteenth Amendment rights. In *R.A.V. v. City of St. Paul*, the Supreme Court held that officials could not single out derogatory words or actions for punishment—even if they were part of a category of expression that was not covered by the First Amendment.¹⁷⁸ *R.A.V.* reaffirms the First Amendment's strong content-neutrality requirement. However, the Court's ruling was also a direct response to the city's claim that protection of racial dignity and equality deserve special protection. *R.A.V.*'s holding elaborates a principle under which expressive rights cannot be sacrificed to equality or dignity interests. The decision could have broad consequences with regard to future efforts to regulate threats, fighting words, libel, and other harmful speech.¹⁷⁹

In sum, Rights Dynamism is a process in which constitutional rights are

¹⁷⁴ See, e.g., *Rowland v. Mad River Local School Dist.*, 730 F.2d 444 (6th Cir. 1984) (overturning a damages award for a bisexual employee terminated for disclosing the nature of her sexuality); *Acanfora v. Board of Educ.*, 359 F. Supp. 843, 853–57 (D. Md. 1973), *aff'd*, 359 F.3d 498 (4th Cir. 1974) (upholding dismissal of a public school teacher who disclosed that he was gay and commented in the media on his subsequent dismissal); *supra* note 112.

¹⁷⁵ See *Ward v. Illinois*, 431 U.S. 767, 772 (1977) (applying liberal interpretation of obscenity law to regulation of “lesbianism, and sadism and masochism”); ESKRIDGE, *supra* note 66, at 203 (arguing that “*Miller's* [obscenity] framework has encouraged censorship of harmless gay pornography while allowing violently misogynistic straight pornography.”).

¹⁷⁶ See, e.g., *Elane Photography, LLC v. Willock*, 284 P.3d 428, 440 (N.M. Ct. App. 2012) (rejecting an argument by a wedding photographer who refused service to a gay couple that application of state anti-discrimination laws violated her First Amendment speech and association rights).

¹⁷⁷ See generally INAZU, *supra* note 22.

¹⁷⁸ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992).

¹⁷⁹ See Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected Expression in Anti-abortion Protests*, 29 U.C. DAVIS. L. REV. 553 (1996).

elaborated over time, partly as a consequence of their frequent intersection. This elaboration is bi-directional. Thus, we must ask not only what expressive rights have done *for* equality rights, but also what equality agitation has done *to* expressive rights. More generally, we cannot fully understand the modern scope, recognition, and protection of either equal protection or freedom of expression without accounting for their frequent intersections across time.

C. *Freedom of Expression and Free Exercise of Religion*

The First Amendment's Free Speech Clause and Free Exercise Clause have frequently intersected. These rights have greatly facilitated, reinforced, and illuminated one another.¹⁸⁰ However, over a long period of time, Rights Dynamism has produced significant changes in their relationship. Most notably, in some respects the Free Speech Clause has come to dominate and subordinate the Free Exercise Clause. This has led some commentators to wonder whether the Free Exercise Clause might now be "redundant."¹⁸¹ As with the other relationships, this one is multi-dimensional. The intersection between freedom of speech and free exercise of religion has affected interpretation of the Free Exercise Clause and, to a lesser extent, the Establishment Clause. It has also influenced the articulation of a number of expressive concepts, doctrines, and principles.

1. *Early Synergy and Mutual Illumination*

The origins of the free speech-free exercise intersection can be traced to *pre-ratification* practices and concepts.¹⁸² Religious adherents have always relied heavily on free speech and free press activities to proselytize and practice religion.¹⁸³ Ultimately, the Constitution's Framers provided overlapping, yet distinctive, protections for both expressive and religious rights. Although expressive guarantees are broader in scope, freedoms of belief, conscience, and expression are covered by both provisions.

As in other cases, the Framers did not make explicit—either in their deliberations or the text itself—what the relationship between these rights was or ought to be. Like others discussed in this Article, the relationship between free speech and free exercise rights has largely been worked out over time, through the process of Rights Dynamism. In the modern era, the process began during the 1930s and 1940s, when Jehovah's Witnesses

¹⁸⁰ See John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 791 (2014) ("The First Amendment's freedoms of speech, press, religion, and assembly once reinforced each other.").

¹⁸¹ See Tushnet, *supra* note 84, at 73 (2001) ("Contemporary constitutional doctrine may render the Free Exercise Clause redundant.").

¹⁸² See McConnell, *supra* note 59.

¹⁸³ Yoder, *supra* note 59.

brought a raft of constitutional challenges to restrictions on proselytizing, soliciting, and other public activities.¹⁸⁴ America was becoming more pluralistic in terms of faiths and religious practices. The Witnesses were frequently targeted and discriminated against by forces that saw religious pluralism as a threat to American culture.

The Witnesses did something fateful in terms of litigation strategy. They brought cumulative claims, in which they typically invoked free expression (speech, press, and assembly) and free exercise rights.¹⁸⁵ These claims provided the Supreme Court with an early opportunity to consider both the independent substance and relational qualities of these rights.

The Hughes Court responded, in part, by labeling *both* expressive and free exercise rights “fundamental” and “preferred.”¹⁸⁶ Thus, from an early point in their jurisprudential relationship, the Court treated freedom of speech and free exercise of religion as critical individual rights and components of a powerful framework for individual liberty.

Not much is known about the internal dynamics of the Hughes Court, including its consideration of early free expression and free exercise cases.¹⁸⁷ As Rights Dynamism suggests, the Court’s understanding of the relationship between these rights appears to have evolved over time.

In the first few cases, the Supreme Court did not even address independent free exercise claims that had been raised along with free speech and free press claims.¹⁸⁸ However, as the Witnesses continued to pursue their agenda in the courts, the Court gradually began to separately address some of the free exercise claims.¹⁸⁹ This led to early interpretations of both Clauses and of the relationship between them.

What emerged was a synergistic and bi-directional rights relationship, similar in many respects to others we have considered. Although it frequently grounded its decisions in free speech and other expressive principles, the Hughes Court also articulated the core substance of what would later become modern free exercise rights. And, of course, the Court handed down some of the earliest interpretations of free speech and other expressive rights.

Applying free speech principles, the Hughes Court concluded that religious

¹⁸⁴ For a description of the cases, see Feldman, *supra* note 65, at 443–51; Hildebrand, *supra* note 33, at 150–59.

¹⁸⁵ See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

¹⁸⁶ See *Murdock v. Pennsylvania*, 319 U.S. 105, 115 (1943) (“Freedom of press, freedom of speech, freedom of religion are in a preferred position.”).

¹⁸⁷ Court records from this era have only recently been made available. See Barry Cushman, *The Hughes Court Docket Books: The Early Terms, 1929–1933*, 40 J. SUP. CT. HIST. 103 (2015).

¹⁸⁸ See, e.g., *Schneider v. New Jersey*, 308 U.S. 147 (1939); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

¹⁸⁹ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

adherents had a right to access the streets, a public resource, on equal terms and for the express purpose of exercising religion.¹⁹⁰ The Court also shielded religious proselytizing and recruiting from a variety of repressive state and local laws.¹⁹¹ It barred government from discriminating against or targeting religion or religious practices, invalidated prior restraints on religious exercise, and invalidated tax schemes that effectively suppressed religious practices.¹⁹²

Even when the grounds for decision were based on expressive doctrines or concepts, the Hughes Court simultaneously elaborated the broad contours of religious liberty under the Free Exercise and, to a lesser extent, the Establishment Clause. Thus, when it granted religious adherents access to public streets based upon freedom of speech and assembly principles, the Court established that religious observers were entitled to enjoy at least some public resources on an equal basis.¹⁹³ Applying free speech principles, the Court observed that religious adherents were not generally entitled to exemptions from neutral and generally applicable laws such as content-neutral permit requirements.¹⁹⁴ At the same time, the Court held that government was prohibited from discriminating against religion or singling it out for special burdens.¹⁹⁵ The Court held that governments were prohibited from imposing unconstitutional conditions—i.e., forcing one to choose between practicing a chosen religion and receiving government resources—on religious adherents.¹⁹⁶ Finally, it ruled that government officials were not empowered to determine whether a religious belief was sincere, or whether an activity in some sense “counted” as religious in its nature or purpose.¹⁹⁷

Many decades later, after much doctrinal churn, these early interpretations would become central premises of the modern Free Exercise Clause. To be sure, the Hughes Court did not fully elaborate all Religion Clauses doctrines. However, as it processed cumulative expressive and religious claims, the Court began to articulate the basic outlines of the scope of religious freedom in the nascent regulatory state. Although expressive rights were the primary vehicle for this early elaboration, the recognition and enforcement of expressive rights—rights to access public resources, protections against discrimination, etc.—benefitted and illuminated religious rights as well.

As the discussion suggests, the relationship between these rights has always been bi-directional. I have explained how free expression principles

¹⁹⁰ See, e.g., *Schneider*, 301 U.S. at 160 (holding that municipality had to allow religious speakers to access public streets on equal terms with other speakers).

¹⁹¹ See *Lovell*, 303 U.S. at 451 (invalidating restrictions on distribution of literature in public places).

¹⁹² See, e.g., *Cantwell*, 310 U.S. at 307–08 (invalidating solicitation ban on free exercise grounds); *Follett v. McCormick*, 321 U.S. 573, 576 (1944) (invalidating tax on religious activities).

¹⁹³ *Schneider*, 301 U.S. at 160.

¹⁹⁴ *Cantwell*, 310 U.S. at 304.

¹⁹⁵ *Id.* at 307.

¹⁹⁶ *Id.*

¹⁹⁷ See *id.* at 305–06.

and doctrines led to early interpretations of religious freedoms. The early dynamic between freedom of expression and free exercise of religion had an even more pronounced effect on expressive doctrines and principles.¹⁹⁸ Most of the fundamental concepts and principles of modern free speech doctrine were first articulated during the 1930s and 1940s, in the Witnesses cases. Indeed, it may only be a slight exaggeration to say that one could teach nearly *all* of the fundamental principles of modern freedom of expression doctrine through the early Hughes Court decisions.

For example, efforts to suppress religious expression and practices helped the Court identify and elaborate central Free Speech Clause concepts. Prior to the Witnesses cases, courts had generally adopted the view that public streets and parks were under the exclusive and plenary control of the governments that held title to them.¹⁹⁹ However, starting in the 1930s, the Court began to recognize that “public forum” properties such as public streets had “immemorially” been open to the public for the purpose of expressive activities and were held in trust by government for the benefit of all speakers.²⁰⁰ Through their challenges to restrictions on the ability to distribute literature and otherwise engage with citizens in the public streets, the Witnesses forged the first real breathing space for public debate and information flow in public places.²⁰¹ Decades later, the civil rights movement and many other causes would rely heavily on the principles and precedents of this early dynamic.

In its rulings striking down solicitation bans, discriminatory license taxes, prior restraints, and permit schemes, the Hughes Court emphasized that *all* speakers, including religious ones, had a right to access public streets and parks.²⁰² The Court allowed state and local governments to regulate the time, place, and manner of expression and to attend to other public order concerns.²⁰³ However, it struck down facially discriminatory laws, permit schemes that were based upon the unbridled discretion of public officials, and discriminatory taxes and penalties.²⁰⁴ The Court also indicated that some speech is not covered, as a categorical matter, by the First Amendment’s Free Speech Clause—thus anticipating the modern categorical approach to free speech coverage.²⁰⁵ Finally, the Court held that officials

¹⁹⁸ See Hildebrand, *supra* note 33, at 133 (observing “that a coherent First Amendment tradition honoring the centrality of rich public debate began as early as the 1930s . . .”).

¹⁹⁹ See *Davis v. Massachusetts*, 167 U.S. 43 (1897).

²⁰⁰ *Hague v. CIO*, 307 U.S. 496, 515 (1939).

²⁰¹ See *Schneider v. New Jersey*, 301 U.S. 147, 163 (1939) (observing that “the streets are natural and proper places for the dissemination of information and opinion”).

²⁰² See Hildebrand, *supra* note 33, at 156–58.

²⁰³ See *Cox v. New Hampshire*, 312 U.S. 569, 576 (1941).

²⁰⁴ See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940).

²⁰⁵ See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (discussing the “fighting words” category).

could not suppress speech merely because it offended a public audience.²⁰⁶

And there was much more to these precedents in terms of elaboration of expressive rights. With regard to freedom of speech and press, the early Hughes Court decisions also: (1) held that speech restrictions based on the content of speech or the identity of the speaker were presumptively unconstitutional;²⁰⁷ (2) recognized a First Amendment right of willing audiences to *receive* information;²⁰⁸ (3) held that audiences who were captive in their homes had the right to decide whether to receive unwanted expression;²⁰⁹ (4) recognized that even false statements of fact could be valuable to public debate;²¹⁰ (5) rejected governmental efforts to characterize speech as “commercial,” and thus outside the First Amendment’s coverage, on the ground that the publisher might receive some remuneration for her materials;²¹¹ and (6) held that the Free Speech Clause protects a right not to speak or be compelled to communicate.²¹² All of these concepts and principles are now central aspects of contemporary First Amendment doctrine.

As importantly, the discriminatory treatment and explicit exclusion of religious speakers encouraged the Court to think about the reasons or justifications for protecting expressive rights. Long before the Warren Court made its storied turn toward liberal protection for free speech rights, the Hughes Court drew connections between public religious speech and concepts such as the marketplace of ideas and democratic self-government.²¹³ The Court also recognized the autonomy interests of religious speakers, and the importance to individual self-fulfillment of communicating religious ideas.²¹⁴

The product of this deliberation appeared explicitly in the Court’s deci-

²⁰⁶ See *Cantwell*, 310 U.S. at 310 (noting that there was no assault or threat of bodily harm or abuse, but only an effort to persuade the listener).

²⁰⁷ See *Schneider v. New Jersey*, 301 U.S. 147, 164 (1939) (discussing prohibition on suppression of certain views).

²⁰⁸ See *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (noting how freedom to distribute information “necessarily protects the right to receive it”).

²⁰⁹ See *id.* at 147 (noting that householders have “the full right to decide whether [they] will receive strangers as visitors”).

²¹⁰ See *Cantwell*, 310 U.S. at 310 (noting that speakers sometimes resort “even to false statement” in political and religious debates).

²¹¹ *Jamison v. Texas*, 318 U.S. 413, 416 (1943) (noting that the prohibition was permissible because the money contained an invitation to contribute to the support of purchasing books).

²¹² *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943) (declaring that the Free Speech Clause invalidates government efforts to compel individuals to communicate official orthodoxies).

²¹³ See *e.g.*, *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting) (discussing marketplace justifications for free speech); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 3 (1948) (articulating a theory of self-government focused on political speech).

²¹⁴ See *Cantwell*, 310 U.S. at 310 (“The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed.”).

sion in *Cantwell v. Connecticut*,²¹⁵ which invalidated—on both free speech and free exercise grounds—a permit scheme targeting religious solicitation. The Court stated:

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.²¹⁶

In general, the Hughes Court decisions reflect an appreciation both for the independent significance of distinctive expressive and religious rights as well as for their potential to mutually reinforce and illuminate one another. The Court often relied exclusively on expressive claims.²¹⁷ This explains why the cases from this early era are typically regarded as important precedents concerning First Amendment free speech, free press, and assembly rights. However, as I have shown, the decisions were also critical to the recognition and interpretation of free exercise rights. In addition to recognizing First Amendment rights as fundamental and “preferred,” the Court interpreted them in a manner that highlighted their synergistic and collaborative relationship. Similar to the expression-equality dynamic, recognition and enforcement of expressive rights created public breathing space for the free exercise of religion. In turn, recognition of free exercise rights helped to create a stronger foundation for expressive rights.

The early Witnesses cases highlighted the commonalities and synergies between fundamental and “preferred” free speech and free exercise rights. Separately and together, these individual rights forged a strong framework for constitutional liberty. As the Court considered claims based on both expressive and free exercise rights, it began to elaborate doctrines and principles in both areas. This process of elaboration would continue in subsequent decades. However, as governments and religious adherents absorbed the lessons of the initial intersection, and as social, political, and legal circumstances changed, the relationship between freedom of expression and free exercise rights would undergo some important changes.

²¹⁵ *Id.* at 300–01 (1940) (invalidating statute on free speech and exercise grounds).

²¹⁶ *Id.* at 310.

²¹⁷ See Feldman, *supra* note 65, at 448 (observing that the Hughes Court typically relied on expressive grounds).

2. *A Preference for Expressive Rights and Rationales*

Although it elaborated both free expression and free exercise principles in early cases, the Hughes Court generally preferred to ground decisions in free speech and press principles rather than free exercise rationales. As noted earlier, the Hughes Court rarely analyzed free exercise claims independently. The most common disposition was to hold that the statute or ordinance being challenged violated freedom of speech, press, *and* religion, with little or no separate consideration given to the free exercise claim.²¹⁸ Even *Cantwell*, which involved the Hughes Court's most specific analysis of a freestanding free exercise claim, appeared to rest primarily on free speech and free press principles relating to prior restraints and state censorship.²¹⁹ Thus, although the Court was fleshing out both expressive and free exercise rights and highlighting synergies between them, in terms of its explications freedom of expression was already doing the lion's share of the work.

Commentators have suggested that the Hughes Court favored or "preferred" free speech rights over free exercise rights, and that this preference was rooted in external social and political changes.²²⁰ For instance, Stephen Feldman has argued that the transformation of American democracy in the 1920s and 1930s, from a republican to a more pluralistic system, helps to explain why the Court typically granted relief based on free speech rather than free exercise rationales.²²¹ According to Feldman, the Justices may have perceived the Witnesses' religious liberty claims as being in tension with American democratic ideals.²²² He suggested that the mostly Protestant jurists may have viewed the Witnesses as "outsiders" pursuing *special* religious rights, rather than broad-based democratic values like those at the core of freedom of speech and press.²²³ As Feldman summarized his argument:

One reason, then, that the Protestant-controlled Supreme Court favored free expression over religious freedom during the 1930s and 1940s was that the religious freedom claims were more likely than the free expression claims to intensify the salience of the Justices' separation from the claimants as outsiders.²²⁴

As noted, we still know very little about the Hughes Court's internal de-

²¹⁸ *Id.* at 448 ("Without the support of free expression, a religious freedom claim inevitably failed.").

²¹⁹ See ERIC MICHAEL MAZUR, *THE AMERICANIZATION OF RELIGIOUS MINORITIES: CONFRONTING THE CONSTITUTIONAL ORDER* 30 (1999) (offering a similar interpretation of *Cantwell*).

²²⁰ See *e.g.*, Feldman, *supra* note 65, at 477 (noting that the Court often linked free expression and religious freedom).

²²¹ See *id.* at 432 (arguing that "the transition from republican to pluralist democracy practically turned the First Amendment concepts of free expression and religious freedom on their heads").

²²² *Id.* at 455 (arguing that free expression is integral to democracy and the democratic process but religious freedom is not).

²²³ *Id.* at 470 (describing the Witnesses as "religious outsiders" in the context of free expression).

²²⁴ *Id.* at 473.

liberations.²²⁵ In terms of Rights Dynamism, it is certainly possible that social and political conceptions of pluralism and democracy partially shaped the Court's approach to the cumulative rights claims before them. However, as discussed earlier, the Hughes Court adopted a constitutional framework that actually extended significant protections to *both* freedom of expression *and* free exercise of religion. Even when it did not rest decisions explicitly on free exercise grounds, the Court reasoned in a way that suggested a synergy and collaboration between expressive and religious liberties. At the least, in most cases, ruling in favor of expressive rights significantly facilitated the Witnesses' free exercise rights as well. Although Feldman's thesis might help to explain a "preference" for expressive frameworks and principles, the Hughes Court was hardly anti-free exercise.

Nevertheless, it is true that the Hughes Court generally preferred to explain its rulings in expressive terms. Rights Dynamism suggests some additional or perhaps alternative explanations for this early and ultimately fateful preference.

For one thing, the activities in question—speaking, distributing literature, soliciting, and gathering in public—very closely resembled speech, press, and assembly activities. In this sense, as a matter of both conceptual familiarity and historical experience, the Witnesses' grievances were the natural province of the First Amendment's free speech, press, and assembly guarantees. By the 1930s, public streets had already been the focus of free speech battles involving labor agitators, political dissenters, and others.²²⁶ The Witnesses' claims were a natural extension of the fundamental issue raised by these early conflicts—namely, whether government had the authority to declare public streets and other venues speech-free zones. In terms of its own agenda, the Hughes Court's primary goal may have been to address the matter of speakers' access to the public forum generally rather than to articulate religious rights.

Further, at this very early stage, cross-doctrinal issues may have affected the preference for expressive frameworks and rationales. When the Hughes Court first encountered the Witnesses' claims, the Free Exercise Clause had been interpreted quite narrowly—principally as a protection for religious *beliefs* rather than religious activities.²²⁷ The extent to which the free exercise guarantee extended beyond conscience and belief was at that point unclear. By contrast, even at this early stage, it was clear that the Free Speech Clause extended to at least some expressive conduct.²²⁸ Moreover, the Court had issued several decisions under the Free Speech Clause protecting

²²⁵ See Cushman, *supra* note 187.

²²⁶ See generally DAVID M. RABAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* (1999).

²²⁷ See *Reynolds v. United States*, 98 U.S. 145, 166–67 (1878) (holding that religious beliefs cannot be superior to the law of the land).

²²⁸ See *e.g.*, *Stromberg v. California*, 283 U.S. 359, 369–70 (1931) (invalidating a flag desecration law).

offensive solicitation and proselytizing.²²⁹ Expressive rights claims were thus both more familiar and better established than their Free Exercise Clause counterparts.

In sum, as Rights Dynamism posits, a multitude of factors—the litigation strategies of claimants, the nature and substance of their claims, the identity of the claimants, judicial attitudes and agendas, societal and political influences, and doctrinal developments—all likely influenced the Court’s earliest approach to the relationship between expressive and free exercise rights. For a variety of reasons, in the beginning the Court was more comfortable communicating its rulings in expressive terms. Later, that comfort would morph into something else—the substitution of free speech rights for religious free exercise rights.

3. *Subordinating the Free Exercise Clause*

As we have seen, rights relationships change over the course of time. Rights dynamics are affected by many influences and forces, both within and outside the judicial branch. By the early 1980s, the relationship between freedom of speech and the free exercise of religion was undergoing a significant transformation. During the next phase of the relationship, the Free Speech Clause would become the dominant partner in the relationship. In fact, the subordination of free exercise rights to free speech rights would lead some commentators to wonder whether the Free Exercise Clause had essentially become “redundant.”²³⁰

Beginning in the 1980s, religious adherents began once again to turn to the Free Speech Clause—this time, mainly in challenges to what they alleged were discriminatory exclusions from public facilities and subsidies. Concerns about separation of church and state had led some localities to adopt policies that singled out religious adherents for exclusion. In response, like civil rights advocates during the 1950s and 1960s, during the 1980s and 1990s religious liberty activists turned to the courts for relief.

In deciding the equal access cases, the Rehnquist Court relied *exclusively* on the Free Speech Clause—even when the Free Exercise Clause was also invoked, and even where free exercise was an equally plausible ground for decision.²³¹ To be sure, during the equal access era, some litigants still pur-

²²⁹ See *e.g.*, *Bridges v. California*, 314 U.S. 252, 259 (1941) (holding that courts generally may not hold speakers in contempt for commenting on pending litigation and criticizing judges).

²³⁰ See Tushnet, *supra* note 84.

²³¹ See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 121 (2001) (challenging restrictions on religious proselytizing on Free Speech Clause grounds); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 841 (1995) (same); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (same); *Widmar v. Vincent*, 454 U.S. 263 (1981) (challenging exclusion on Free Speech Clause grounds); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (same); see also Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech*

sued cumulative free speech and free exercise claims. But for a number of reasons, religious adherents came increasingly to rely on free speech claims to the eventual exclusion of free exercise claims. By the 1990s, the Hughes Court preference for rationalizing decisions involving both free exercise and free speech claims in expressive terms had been replaced by full reliance on the Free Speech Clause—even where the central claim involved explicit discrimination against religious adherents.

The dynamics that brought about this transformation were complex and multi-faceted. One important shift occurred at the level of constitutional advocacy. Beginning in the 1980s, religious liberty activists began to pursue a strategic litigation agenda that facilitated religious rights through free speech claims.²³² As one student of this strategy explained: “After several years of frustrating losses in the courts arguing the religion clauses, New Christian Right lawyers turned to the free speech clause with a vengeance in the late 1980s.”²³³

The free speech strategy, which was borrowed from civil rights, labor, and other movements, was both a reaction to what religious liberty advocates perceived as the public marginalization of religion and a means of protecting religious proselytization from governmental suppression.²³⁴ The free speech strategy was no secret. Indeed, leaders of the religious liberty movement publicly touted it. As one of the principal architects of the strategy commented: “[T]he free speech strategy has proven effective with judges across the ideological spectrum against opponents who rely on the First Amendment’s clause against the establishment of religion.”²³⁵

As this statement suggests, the legal strategy was driven in part by doctrinal concerns relating to the religion clauses—in particular, the Establishment Clause, which prohibited government from aiding religion in certain ways.²³⁶ Free speech claims appeared to avoid or sidestep possible Establishment Clause complications associated with providing public benefits to religious adherents. Under the free speech rationale, religious adherents were merely demanding *equal* treatment as speakers—not special benefits as religious persons or institutions. This approach was more attractive

Doctrine and Formal Neutrality, 18 J.L. & POL. 119, 131–33 (2002) (observing that equal access restrictions plainly violated the Free Exercise Clause).

²³² See generally STEVEN P. BROWN, TRUMPING RELIGION: THE NEW CHRISTIAN RIGHT, THE FREE SPEECH CLAUSE, AND THE COURTS (2002) (examining Christian Right’s free speech litigation strategy).

²³³ *Id.* at 58.

²³⁴ See *id.* at 59.

²³⁵ Gustav Niebuhr, *Conservatives’ New Frontier: Religious Liberty Law Firms*, N.Y. TIMES (July 8, 1995), <http://www.nytimes.com/1995/07/08/us/conservatives-new-frontier-religious-liberty-law-firms.html?pagewanted=all>.

²³⁶ See BROWN, *supra* note 232, at 67–74 (discussing the Supreme Court’s treatment of the relationship among the Free Speech Clause, the Free Exercise Clause, and the Establishment Clause).

to judges across the ideological spectrum.

Developments in free speech doctrine also help to explain the dynamic that led to a strong turn in the direction of the Free Speech Clause. In the decades between the Hughes Court's decisions and the Rehnquist Court's re-consideration of the free speech-free exercise relationship, free speech doctrine had become far more stable and robust relative to free exercise doctrine. Thus, by the 1980s, the Court had developed the core of its public forum doctrine, which extended free speech protections to public properties other than public streets and parks.²³⁷ Further, aided in part by an abundance of academic commentary on free speech doctrine and theory, the Court had elaborated strong content-neutrality rules.²³⁸

Under free speech doctrine as it stood in the 1980s, laws and regulations that discriminated based on the content of speech were subject to strict scrutiny and were presumptively invalid.²³⁹ Moreover, as interpreted, the Free Speech Clause was capacious enough to encompass not only religious discussions but perhaps too a great many religious *practices*. These broad free speech protections had assisted speakers seeking access to a wide variety of public properties and programs. In sum, between the Hughes Court's minimal access decisions and the Rehnquist Court's equal access decisions, the Free Speech Clause had become an increasingly robust and reliable guarantee of equal access and equal treatment for all speakers.

In contrast, by the 1980s, the Court's free exercise framework, which purported to apply heightened scrutiny even to laws that incidentally burdened religious beliefs or practices, was considered by some to be unworkable and unstable.²⁴⁰ Moreover, the Court's decisions striking down school prayer and certain public religious displays suggested that at least *some* religious speech was not covered by the Free Exercise Clause and/or might be barred by the Establishment Clause.²⁴¹

The Court's 1990 decision in *Employment Division v. Smith*, which held that religious adherents were not entitled to constitutional exemptions from neutral and generally applicable laws, suggested a considerable weakening of the Free Exercise Clause as a guarantor of equal access and equal treatment.²⁴² Although the Court clarified after *Smith* that explicit forms of discrimination against religion could still be challenged under the Free Exer-

²³⁷ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) (summarizing public forum doctrine).

²³⁸ See e.g., Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 196 (1983).

²³⁹ See *Carey v. Brown*, 447 U.S. 455, 461–63 (1980).

²⁴⁰ See CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 42 (2007) (observing that courts were not actually applying strict scrutiny in religious rights cases).

²⁴¹ See e.g., *Engel v. Vitale*, 370 U.S. 421, 424–25 (1962) (invalidating state-imposed official prayers).

²⁴² *Emp't Div. v. Smith*, 494 U.S. 872, 878–79 (1990).

cise Clause, the scope of constitutional free exercise rights appeared to be narrower and somewhat uncertain relative to free speech protections.²⁴³

Note that *Smith* was an important event in the free speech turn, but does not fully explain it. Reliance on the Free Speech Clause started very early in the Rehnquist Court era—in some instances, well before *Smith* was decided. In some cases, religious adherents abandoned seemingly viable free exercise claims in favor of the Free Speech Clause.²⁴⁴

Nevertheless, *Smith* certainly added to the appeal of a free speech strategy already being embraced by religious freedom advocates. Once religious adherents began to win equal access cases in the Supreme Court on free speech grounds, the die was effectively cast. Even in cases where a Free Exercise Clause claim was viable and indeed supported heightened scrutiny—i.e., where the government expressly targeted religion for exclusion—religious adherents litigated claims based on the Free Speech Clause rather than the Free Exercise Clause.²⁴⁵

Internal Court dynamics, including judicial agenda-setting, may also have influenced the turn toward the Free Speech Clause. Reliance on the Free Speech Clause resulted in constitutional protection for *both* freedom of speech and the free exercise of religion. Moreover, it allowed the Court to extract itself somewhat from difficult questions regarding the scope of the Free Exercise Clause—not to mention, as indicated earlier, the implications under the Establishment Clause of granting religious adherents access to public places and funds.

From this perspective, the Rehnquist Court cleverly positioned itself as a champion of freedom of speech that also protected the participatory and other rights of religious adherents. Moreover, the Free Speech Clause focus may have been attractive as a partial antidote to religious adherents' concerns in the wake of *Smith*. Their success in public forum and free speech cases deflected charges that the Supreme Court was hostile or insensitive to religious adherents' rights, or that the Constitution no longer protected religious rights in any meaningful way. Granting equal access to religious adherents was not the same thing as granting religious accommodations—i.e., exemptions from generally applicable laws. Religious adherents would gain some of that ground back under federal and state religious freedom laws.²⁴⁶ However, in the short term, granting access

²⁴³ See generally *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (invalidating a law targeting a religious group's central practice, animal sacrifice, under the test articulated in *Smith*).

²⁴⁴ See *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 652–54 (1981) (discussing abandonment of free exercise claim and relying on Free Speech Clause framework).

²⁴⁵ See *Brownstein*, *supra* note 231, at 129–133 (observing that all of the challenged laws in the equal access cases targeted religion for discriminatory treatment).

²⁴⁶ See *e.g.*, Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb–2000bb-4; Religious

to religious speakers under the Free Speech Clause facilitated religious participation in public programs and public life.

All of these external and internal dynamics pointed toward increased and, ultimately, exclusive reliance on the Free Speech Clause in equal access cases. By the end of the 1990s, the Free Exercise Clause had effectively been supplanted by the Free Speech Clause. In the Rehnquist Court's 1990s equal access cases, the Free Exercise Clause was not even cited as a supporting provision, much less an independent basis for decision.

4. *Multi-Directional Elaboration*

In many respects, the dynamics in the free speech-free exercise relationship have tracked those in other rights relationships. For example, freedom of speech and other expressive rights have obviously facilitated the free exercise of religion. The frequent intersection of freedom of speech and free exercise of religion has influenced our understanding of both guarantees. However, this particular rights relationship has also been distinctive in some respects. The extent to which the Free Speech Clause has displaced the Free Exercise Clause is one important distinction. Moreover, unlike the other relationships under consideration, the presence of a third clause—the Establishment Clause—also has to be accounted for.²⁴⁷ In this particular context, the relationship has produced some *multi-directional* elaboration of freedom of speech, free exercise, and establishment principles. Insofar as religious rights are concerned, the dynamic intersection between freedom of speech and free exercise has generated both synergy and redundancy. As discussed below, it has also created complications like “hybrid” free exercise claims. Freedom of speech has also been significantly affected by this intersection.

As the decisions of the Hughes Court showed, when rights relate in synergistic and collaborative ways they can illuminate and strengthen one another. As I explained earlier, the intersection between freedom of expression and free exercise of religion during the 1930s and 1940s led to the elaboration of core free exercise rights *and* produced much of the modern framework for expressive rights. Although the Court clearly preferred to articulate its decisions in expressive terms, it nevertheless elaborated upon the relationship between First Amendment expressive and free exercise rights in a manner that strengthened both guarantees. During this early period, the Establishment Clause, whose meaning and implications were not well understood, remained mostly in the background.

Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (prohibiting state action imposing a substantial burden on an institutionalized person's free exercise rights unless such action is the least restrictive means of achieving a compelling governmental interest).

²⁴⁷ See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . .”).

Decades later, a preference for expressive rationales was replaced with a free speech supremacy framework in which the Free Exercise Clause largely faded from view. The early synergy and collaboration between the clauses also disappeared. Despite the virtual abandonment of the Free Exercise Clause, some religious practices found shelter under the Free Speech Clause.

With the equal access victories, the Free Exercise Clause was effectively subjugated to the Free Speech Clause. Under this approach, religious adherents became part of a homogenized mass of *speakers*, all claiming equal access to public properties. Although they were protected from discriminatory exclusion on expressive grounds, religious adherents were not entitled to any accommodations based on religious creeds, commands, or beliefs.

In other words, under free speech supremacy religious *exercise* is protected—but only insofar as it can be characterized and treated as religious *expression*. Like other speakers, religious adherents must demonstrate that they are communicating some message that is likely to be understood by an audience.²⁴⁸ The faith-based nature of religious practices, such as proselytizing and worship, is not relevant to this constitutional inquiry. Access is granted not because of the special religious nature of these activities, but in spite of their distinctive character.

Taken to its logical conclusion, this conception of free exercise-as-speech would consolidate or merge two separate and distinct rights. Public forum doctrines and free speech content-neutrality principles would crowd out consideration of the religious nature of practices and rituals. As noted, even where the government expressly targets religion for discriminatory treatment, the Free Exercise Clause has not been relied upon. If religion *is* merely speech or speech acts, then the Free Exercise Clause is surplus language.²⁴⁹

This is not the only interpretive complication that has arisen at the intersection of freedom of speech and free exercise. When it narrowed the free exercise guarantee, *Smith* also created a so-called “hybrid” rights claim.²⁵⁰ The hybrid rights invention appears to save free exercise claims, but only if they are attached to some other fundamental rights claim—such as a claim that free speech rights have *also* been violated. Even assuming that we are to take this invention seriously,²⁵¹ in hybrid free expression-free

²⁴⁸ See *Spence v. Washington*, 418 U.S. 405, 409–11 (1974) (requiring for purposes of Free Speech Clause coverage that a speaker intend to communicate a message through action and that an audience be likely to understand the message).

²⁴⁹ See Tushnet, *supra* note 84, at 72–73 (suggesting the limited scope of free exercise protection, coupled with the robust degree of free speech protection, renders the Free Exercise Clause redundant); cf. Inazu, *supra* note 180, at 789–90 (claiming the “unified distinctiveness” of the First Amendment guarantees of freedom of speech, assembly, press, and religion has been replaced by an “undifferentiated free speech framework” that disadvantages the rights of private groups in civil society).

²⁵⁰ See *Emp’t Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (recognizing “hybrid” rights).

²⁵¹ See, e.g., McConnell, *supra* note 89, at 1122 (criticizing the concept of “hybrid” rights).

exercise claims, the Free Speech Clause again appears to be doing all of the work. In this respect, hybrid claims are simply another vestige of the subordination of the Free Exercise Clause. In hybrid claims, a litigant without an expressive claim (or some other fundamental rights claim) cannot vindicate her constitutional free exercise rights.

As noted, the relationship between free expression and free exercise has affected a third provision—the Establishment Clause. Thus, in the course of deciding the equal access cases, the Rehnquist Court indirectly elaborated upon aspects of the relationship *among* the Free Speech Clause and the two Religion Clauses.

The interaction between freedom of speech and free exercise implicated, and in some cases complicated, anti-establishment principles and baselines. Those principles are notoriously complicated in their own right.²⁵² In the simplest terms, it does not violate the Establishment Clause when religious adherents benefit from generally and neutrally available forms of public support.²⁵³ However, the Establishment Clause does impose some limitations on official support for religion, including direct forms of financial aid.²⁵⁴

Using the First Amendment’s public forum doctrine, the Supreme Court’s equal access cases adopted a very broad interpretation of permissible governmental subsidies for religion.²⁵⁵ Again, to simplify matters, if *all* government programs that are open to a diversity of speakers and views are treated as public fora, and if access to public fora is the sort of incidental benefit to religion the Establishment Clause permits, then it would seem to follow that *any* form of subsidy that can be characterized as a public forum must be made available to religious as well as secular individuals.

This indeed was the Court’s reasoning in cases such as *Rosenberger v. Rector and Visitors of the University of Virginia*,²⁵⁶ which invalidated the exclusion of a religious student publication from a university’s student activities fund. The exclusion of religion, said the Court, discriminated against religious editorial viewpoints and thus violated the rules relating to regulation of speech

²⁵² See *Tilton v. Richardson*, 403 U.S. 672, 678 (1971) (plurality opinion) (“[C]ompels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.”).

²⁵³ See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 3 (1993) (allowing a public school district to provide a sign-language interpreter for a student at a Catholic high school under a federal program for the disabled).

²⁵⁴ See, e.g., *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 780 (1973) (“In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.”).

²⁵⁵ See, e.g., *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 391–93 (1993) (analyzing access by a religious group to public school property under public forum doctrine).

²⁵⁶ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995).

in a limited public forum.²⁵⁷ The Court concluded that providing public funds to the expressly religious publication would not violate the Establishment Clause.²⁵⁸ It reasoned that the student activities funding policy was neutral with regard to religion, the religious speech would not be attributed to the university, and no funds flowed directly to the religious organizations.²⁵⁹ The Court concluded that any benefit to religion from neutral access to the university's public forum was merely an indirect benefit to religion and not an establishment of religion.²⁶⁰

In dissent, Justice Souter argued that the Court had, for the first time, approved "funding of core religious activities by an arm of the State."²⁶¹ He claimed that the provision of student activities funds to a religious publication violated the rule that "direct aid to religion is impermissible."²⁶² Justice Souter also contended that the equal access precedents, which allowed access to speakers for traditional expressive activities in public fora, could not be stretched to cover things like the provision of printing funds to religious publications.²⁶³ The public forum cases, Justice Souter wrote, "cannot be lifted to a higher plane of generalization without admitting that new economic benefits are being extended directly to religion in clear violation of the principle barring direct aid."²⁶⁴

Rosenberger suggested that under the free speech framework adopted in the equal access cases, public forum doctrine had effectively become a new Establishment Clause baseline. During the same term, in *Capitol Square Review and Advisory Board v. Pinette*,²⁶⁵ the Court held that the Ku Klux Klan could erect a Latin cross in a public plaza next to the Ohio capitol building. A plurality concluded that communication of private religious speech "cannot violate the Establishment Clause where it is (1) purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms."²⁶⁶ The plurality refused even to apply the Establishment Clause's "endorsement" test, which asks whether a reasonable observer would perceive the unattended cross as governmental support for or favoritism toward religion.²⁶⁷

²⁵⁷ *Id.* at 831.

²⁵⁸ *Id.* at 840.

²⁵⁹ *Id.* at 840–42.

²⁶⁰ *Id.* at 843.

²⁶¹ *Id.* at 863 (Souter, J. dissenting).

²⁶² *Id.* at 884–85.

²⁶³ *Id.* at 889.

²⁶⁴ *Id.*

²⁶⁵ *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995).

²⁶⁶ *Id.* at 770 (emphasis added).

²⁶⁷ *See id.* at 768 (refusing to apply the endorsement test, arguing doing so would "disrupt the settled principle that policies providing incidental benefits to religion do not contravene the Establishment Clause").

The Court's injection and application of public forum principles demonstrates how the interaction of free speech principles with the religion clauses can result in new constructions of both. In *Rosenberger*, as in other equal access cases, the Court essentially equated public forum principles with establishment baselines. In *Pinette*, the Court was one vote shy of carving out a public forum exception for the Establishment Clause's endorsement test.²⁶⁸ Reliance on the Free Speech Clause altered not just the relationship between freedom of speech and free exercise of religion, but also the interplay among the First Amendment's free speech, free exercise, and establishment provisions.

As in other relationships, elaboration has occurred in more than one direction. I have discussed how religious rights have been affected by their interaction with the Free Speech Clause. But to a degree that has thus far been underappreciated, the intersection has also significantly affected interpretations of the Free Speech Clause. While this has been true in many respects, I will limit the discussion to a few of the most notable interpretive effects.

Four free speech or expressive complications are particularly noteworthy. First, religious speech cases have significantly affected judicial elaboration of the public forum doctrine. The early Hughes Court decisions, as well as the Rehnquist Court equal access decisions, established and reaffirmed the core concept of the public forum and the requirement of content-neutrality within public fora.²⁶⁹ However, religious claimants were not always successful in claiming access to public properties. As we have seen in other contexts, invocation of the Free Speech Clause sometimes leads to negative precedents.

For example, free speech claims involving proselytizing and soliciting in public places have sometimes been denied, resulting in a possible *narrowing* of public forum definitions and access rights. In cases involving Hare Krishnas' efforts to engage in religious solicitation, the Court has denied access to some important public properties.²⁷⁰ These precedents have affected the free speech rights of a variety of speakers seeking access to similar

²⁶⁸ In subsequent cases, the Court has refused to extend this public forum-establishment framework to contexts in which no public forum is present or public forum principles are deemed out of place. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 478–79 (2009) (holding a municipality was permitted to select permanent monuments for a public park without regard to public forum principles); *Locke v. Davey*, 540 U.S. 712, 719–21 (2004) (holding the state was not required to permit individuals to use public funds for religious education).

²⁶⁹ See, e.g., *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109 (2001) (concluding that government had discriminated against religious group's speech in a limited public forum based on viewpoint); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (noting that religious speaker was "upon a public street, where he had a right to be, and where he had a right peacefully to impart his views to others").

²⁷⁰ See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (holding airport terminals are not public fora); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981) (holding fairground thoroughfares are not open expressive fora); .

public properties.

To be sure, in other religious speech cases, the Court has recognized “metaphysical” fora and described a “limited public forum” category that at least facially appears to expand speakers’ access rights.²⁷¹ However, in application, these principles seem primarily to benefit religious speakers in particular settings, as opposed to private speakers more generally.²⁷²

Further, owing in part to Establishment Clause concerns, in some religious speech cases the Court has determined that public forum principles are “out of place” and do not apply at all—even, for example, in traditional public fora such as public parks.²⁷³ In *Pleasant Grove City v. Summum*, the Supreme Court held that although town officials had accepted a Ten Commandments monument for display in a public park they were not obligated under the Free Speech Clause to accept another religious monument offered by a minority religion.²⁷⁴ The Court held that the government communicated through the monuments it accepted, and when it engaged in communication rather than regulation it was not required to comply with Free Speech Clause access and neutrality rules.²⁷⁵ The Court held that public forum principles were not applicable—even though the place in question was a public park.²⁷⁶

Thus, religious speech precedents have contributed both to the construction of the public forum doctrine and to some of its notable ambiguities, complications, and limitations. These effects are not uncommon when rights intersect with one another. In dynamic elaboration, courts flesh out rights relationships by means of the common law tradition. This often leads to ad hoc and even unintended results.

Second, interpretive complications have arisen with regard to the conceptualization of religious speech. The Rehnquist Court’s equal access cases raised fundamental questions about the definition and concept of “speech” itself. Some commentators have criticized the Court’s categorical treatment of all forms of religious activity—solicitation, proselytizing, prayer, teaching, and perhaps even worship—as covered speech.²⁷⁷ Others

²⁷¹ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (describing a student activities fund as a “metaphysical” public forum).

²⁷² See *id.* at 837. But see *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 696–97 (2010) (applying the limited public forum concept and denying an access claim by religious student group).

²⁷³ See *Summum*, 555 U.S. at 478–80 (“[I]f public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.”).

²⁷⁴ See *id.* at 481.

²⁷⁵ *Id.* at 473–74.

²⁷⁶ *Id.* at 480.

²⁷⁷ See Steven G. Gey, *When is Religious Speech not “Free Speech”?*, 2000 U. ILL. L. REV. 379, 381 (challenging the “routine assumption that religious speech should always be treated the same as other

have taken issue with the Court's insistence, in the equal access cases, that the exclusion of religion or religious speech is always and necessarily a form of *viewpoint* discrimination.²⁷⁸ Among other things, this insistence seems to elevate religious speech above even political content, which can sometimes be excluded from certain public fora.²⁷⁹ As with its public forum interpretations, the Court's elaborations of "speech" and "viewpoint-neutrality" are not confined to laws regulating religious speech. Thus, they may create potential complications in a variety of unforeseen contexts.

Third, the intersection between free speech and free exercise rights has complicated, and in some cases limited, expressive association rights. In *CLS v. Martinez*, for example, the Supreme Court upheld a state law school's requirement that the Christian Legal Society, which based membership decisions on certain creedal commitments, accept "all comers" into its organization.²⁸⁰ The Court concluded that the organization's associational rights effectively "merged" with its free speech rights, and applied public forum doctrine to reject the free speech claim.²⁸¹ In *Martinez*, free speech supremacy displaced not only free exercise rights but associational ones as well.²⁸²

Fourth, and finally, *Sumnum* shows how the intersection of religious speech and public forum doctrine has contributed to the Court's articulation of the principle of government speech. Although the Court has stated that the Establishment Clause limits governmental communications to some degree, it has been far less clear about whether there are other constitutional limits on government speech.²⁸³ Indeed, even the Establishment Clause limitation is somewhat uncertain; in some contexts, it apparently permits government officials to adopt sectarian monuments.²⁸⁴

These are just a few notable highlights, intended to demonstrate the kinds of complications that can arise when free speech and free exercise rights intersect with one another. More generally, the discussion demonstrates that intersections between constitutional rights can produce significant interpretive changes in many directions. The study of Rights Dynamism alters understandings of intersecting individual rights provisions and associated doc-

types of speech").

²⁷⁸ See, e.g., Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697, 697 (1996) ("The core of the Court's opinion is unconvincing because it fails to elaborate a plausible account of what constitutes viewpoint discrimination.").

²⁷⁹ See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–04 (1974) (upholding a public transit rule barring political advertisements from city bus advertising spaces, but allowing commercial advertisements).

²⁸⁰ *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697–98 (2010).

²⁸¹ *Id.* at 680.

²⁸² See, e.g., Inazu, *supra* note 180, at 821–23 (arguing that *Martinez* undermines both free association and free exercise rights of groups).

²⁸³ See, e.g., *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 468 (2009) (discussing potential limits on government speech, including Establishment Clause-based limits).

²⁸⁴ *Id.*

trines, as well as perceptions of the relationships between and among different rights. It reveals a constructive process that is perpetual, subject to many influences, and often ad hoc. Freedom of speech, free exercise, and anti-establishment principles have been and will remain in perpetual conversation with one another, with important interpretive effects for all three.

III. RIGHTS, RELATIONSHIPS, AND REDUNDANCIES

Studying individual rights in active relation to one another, rather than as isolated provisions, leads to a deeper and more comprehensive understanding of constitutional rights and constitutional liberty. The study of Rights Dynamism also demonstrates the importance of avoiding rights subjugation (the dominance of one right over another) and rights redundancy (treating text as redundancy or surplusage). Notwithstanding their dynamic and relational nature, however, this study also shows that we need to maintain some conceptual and doctrinal space between constitutional rights. As the examples discussed in Part II show, constitutional liberty is best facilitated when robust individual guarantees intersect in dynamic and synergistic ways. The observations in this final Part are intended to begin, rather than conclude, a discussion of Rights Dynamism. In that spirit, the Article concludes by identifying additional rights *and* structural relationships that may be worthy of more systematic study.

A. *Situating Rights Relationally*

In the legal academy, as well as in broader public discourse, there is a tendency to separate and balkanize constitutional rights. Law students often study constitutional rights in separate courses. For example, freedom of expression and freedom of religion are often taught in separate courses. Even when constitutional guarantees are taught together, instruction tends to focus on separate doctrines rather than the dynamic intersection between and among different constitutional rights.

There are of course pedagogical justifications for this rights separatism. Doctrinally, as well, separation can simplify analysis and facilitate doctrinal clarity.²⁸⁵ However, Rights Dynamism demonstrates that this approach is incomplete and problematic.

Constitutional rights are best thought of in relational terms: i.e., as “cognate,” combined, “kaleidoscopic,” or “stereoscopic.”²⁸⁶ As I have shown, many rights share historical ties and originating experiences. In the modern era, they have been joined together through litigation, adjudica-

²⁸⁵ See Coenen, *supra* note 2, at 1130 (arguing against removing doctrinal boundaries altogether).

²⁸⁶ Bhagwat, *supra* note 1; Karlan, *supra* note 4, at 474.

tion, academic discourse, and public debate. Many of our most cherished constitutional rights are actually amalgams and mash-ups—products of active intersections and conversations with neighboring provisions.

Although they are the primary actors engaged in adjudicating intersecting rights claims, courts often ignore or miss these connections. They seek comfort in doctrinal silos. Doctrinal clarity and precision are important to constitutional litigation and constitutional remedies. However, the study of Rights Dynamism shows that rights are often a product of their relationships.

As Jack Balkin has observed:

Rights are not simply a fixed set of protections that the state affords or fails to afford. Rights are a terrain of struggle in a world of continuous change—a site of ongoing controversies, a battleground where the shape and contours of the terrain are remade with each victory. Rights, and particularly fundamental rights, far from being fixed and immovable, are moving targets. They are worth fighting over because the discourse of rights has power and because that discourse can be reshaped and is reshaped through intellectual debate and political struggle.²⁸⁷

Rights Dynamism highlights the fact that that part of the “terrain of struggle” consists of the active intersection of rights and the resulting elaborative effects. An important part of the change we must take into account relates to the perpetual interaction of rights in a world that is itself changing—socially, politically, and constitutionally.

For example, as *Obergefell* teaches, due process and equal protection are not merely, or always, alternative bases for the same constitutional injury. These rights, like others, can inform, illuminate, and facilitate one another. Decisions like *Obergefell* highlight the intersecting and evolutionary nature of constitutional rights. Through a decades-long intersection, due process and equal protection produced a new and potentially powerful right to “equal dignity.”²⁸⁸ *Obergefell* is no aberration in this regard. The decision simply makes explicit what is usually a more implicit part of the process by which the meanings of rights provisions are worked out—through intersection, combination, and association of rights provisions.

Narrowly construed, constitutional rights are text-based limitations, with varying degrees of specificity, on the actions of governments. They are the formal means by which individuals remedy constitutional wrongs. This often leads litigants, courts, and commentators to look for the best “fit” between the alleged injury and the constitutional text.

Rights Dynamism points toward a deeper and more complex understanding of what rights are and, as importantly, can become. Individual rights provisions are part of a system of rights protections that can be com-

²⁸⁷ Balkin, *supra* note 11, at 57.

²⁸⁸ Tribe, *supra* note 7, at 17.

bined in ways that lead to new understandings of individual rights. Rights are like atoms, perpetually in motion. On a larger scale and broader time horizon, rights guarantees act as tectonic plates that push in various directions—sometimes in tandem, and sometimes in opposition to one another.

It is impossible to fully understand modern conceptions of constitutional equality without considering the role that freedom of speech (as well as press and association) has played in constructing the equal protection guarantee. What I have called “expressive equality” both facilitated and changed First and Fourteenth Amendment rights. As well, First Amendment equal access rights under the public forum doctrine and free speech content neutrality rules significantly influenced modern conceptions of free exercise of religion. This relationship has also significantly affected understandings of Establishment Clause baselines.

Studying rights relationally, rather than in isolation, informs not only the scope and substance of individual constitutional guarantees, but also in a broader sense the nature of constitutional rights and constitutional liberty. Rights Dynamism shows that constitutional wrongs frequently implicate not individual textual provisions, but pairings or combinations of rights. When rights are brought into contact with one another, a dynamic process is set in motion in which they facilitate, innovate, and transform one another. This can lead to remedies that are not available when a single right is invoked. Rights can also come into conflict, or become effectively estranged from one another. As the examples in Part II show, the evolution of any particular rights relationship is not a pre-determined course; it is a function of a dynamic process that includes social, technological, political, and constitutional change.

We ought to study rights relationships systematically, rather than in response to isolated conflicts or developments in discrete areas. A systematic and relational approach will yield several important benefits. It will clarify the remedial implications of cumulative and other types of combined rights claims.²⁸⁹ It will highlight doctrinal ambiguities and inconsistencies in the treatment of related provisions. For example, First Amendment expressive and religious freedom doctrines diverge in various respects, including their treatment of symbolic conduct, funding conditions, and government speech. Studying these divergences *together*, side-by-side, may produce valuable insights concerning these rights and their dynamic relation to one another.

Further, comparing different rights pairings can lead to a better understanding of how constitutional rights intersect and converse with one another. Insofar as the relationship between due process and equality is concerned, neither provision has exhibited any dominant or distortive tendencies. Freedom of speech and equal protection have also generally managed to intersect

²⁸⁹ See generally Abrams & Garrett, *supra* note 2.

synergistically in many respects. In contrast, however, the Free Speech Clause has largely subjugated its textual neighbors, including the Free Exercise Clause. What accounts for this difference? Are some rights more or less susceptible to subjugation? If so, why? Is the subjugation of the Free Exercise Clause different in kind or degree from the subjugation of the Free Speech Clause's other neighbors, the Assembly Clause, the Petition Clause, and the Press Clause? If so, what accounts for these differences?

Studying rights relationally will also enhance our understanding of the process of constitutional interpretation and construction. In Rights Dynamism, original or initial rights dynamics are supplemented by intersections and associations that occur over long periods of time. Substantive changes are not the result of any grand or purposeful theory of constitutional change. Rather, they are (again, in part) the product of dynamic interactions influenced by litigation strategies, adjudication, academic commentary, and public discourse. The process of elaboration is diffuse, messy, and sometimes erratic. Over long periods of time, Rights Dynamism produces new understandings of constitutional rights. In sum, Rights Dynamism contributes to the study of how and why rights change by explicitly accounting for how rights interact, associate, and converse with one another.

B. *Dynamism and Pluralism*

In thinking through relationships between and among constitutional rights, we should consider how best to leverage negative limits on government. Although constitutional law has many possible goals, let us assume that the goal with regard to rights is to maximize constitutional liberty. In order to achieve this goal, two things are necessary: first, individual rights must retain their independent and distinctive characters and, second, relationships between and among rights must be identified, developed, and clearly elaborated. Simply put, in order to achieve an effective form of rights pluralism, we need to foster a Rights Dynamism in which rights can combine together in facilitative and mutually illuminating ways.²⁹⁰

Recognizing and addressing the relational nature of rights does not entail minimizing or ignoring the differences between them. Even at their most collaborative, constitutional rights are not an undifferentiated mass of liberty. When rights intersect, it is imperative that they not merge completely or lose their separate identities.

We must maintain conceptual and doctrinal space between and among constitutional rights. Textual and doctrinal boundaries can add a degree of clarity and precision to rights analysis. This is not to suggest that rights

²⁹⁰ Cf. Inazu, *supra* note 180, at 791 (arguing that First Amendment rights—speech, press, religion, and assembly—function most effectively as part of a pluralistic system of protections).

doctrines are a model of clarity—they aren't—but rather that analyzing rights claims is sometimes fostered by channeling them through a particular framework or set of principles.

More pragmatically, constitutional liberty rests upon a surer footing insofar as claimants can invoke multiple negative limitations on government. A government forced to defend its actions against a panoply of related but distinctive rights limitations operates in a more constrained environment. Rights dynamics that lead to a situation in which one right subordinates or supplants another confuse constitutional analysis and undermine constitutional liberty.

As importantly, this sort of dynamic cuts off opportunities for developing and understanding the relationships between and among rights. For instance, the Free Speech Clause has so dominated some of its “expressive” neighbors—i.e., press, assembly, and petition—that they are now essentially considered redundant.²⁹¹ This has effectively reduced four negative limitations to one. Treating four rights as one reduces overall constitutional liberty. By cutting off further exploration of the relationships between distinctive, but related, provisions this interpretation misses important synergies that might result from their dynamic intersection.

Similarly, as explained in Part II, the Free Exercise Clause now operates under the long shadow of the Free Speech Clause.²⁹² In early interactions, freedom of speech and free exercise provisions offered robust protection for *both* individual rights, and also contributed to a strong foundation for constitutional liberty.²⁹³ Over-reliance on the Free Speech Clause has undermined this relationship. Adherents seeking to practice their religious principles have now been transformed into *religious speakers* seeking to communicate religious viewpoints. This conception of the free speech-free exercise relationship eliminates critical conceptual and doctrinal space between these overlapping but distinctive rights. It also prevents or discourages further development of synergistic connections and combinations between them.

To be sure, reliance on free speech doctrines and frameworks has produced equal access to public fora for religious adherents. However, this access has been purchased at a significant price. Public forum and content-neutrality doctrines do not capture the essence of harm to religion from certain kinds of governmental regulation.²⁹⁴ Indeed, they standardize religion by making it like everything else in the public forum. As one commentator

²⁹¹ See Bhagwat, *supra* note 1.

²⁹² See *supra* Part II.C.

²⁹³ See *id.*

²⁹⁴ See Inazu, *supra* note 180, at 789 (lamenting that the “unified distinctiveness” of expressive and religious rights have been replaced “with an undifferentiated free speech framework”).

has observed, “destroying a religion is much more than stifling a message. It often involves the destruction of a community and a way of life.”²⁹⁵

Some have argued that particularly after *Smith*, religious adherents may be better off under a free speech framework.²⁹⁶ Free speech doctrines provide protection for an array of expressive conduct, and require meaningful scrutiny of generally applicable laws that incidentally burden expression.²⁹⁷ However, there are significant questions regarding the extent of protection religious adherents can expect under a free speech regime.²⁹⁸ For example, treating religion as a viewpoint may make it impossible to provide specific accommodations to religious adherents.²⁹⁹ Indeed, *any* singling out of religion arguably would violate free speech content-neutrality rules.³⁰⁰ Public forum and free speech doctrines may also provide religious adherents *less* protection against governmental funding conditions than do the First Amendment’s religion clauses.³⁰¹ And of course, a free speech framework offers no protection at all to religious practices that cannot plausibly be characterized as expressive, or to expression that originates with or is controlled by government itself.

To some extent, arguments about the relative protections afforded by the Free Speech Clause to religious practices miss the most important point. We ought not to be choosing *between* free expression and free exercise rights when it comes to religious liberty. The possible redundancy of the Free Exercise Clause would significantly undermine constitutional liberty by preventing the dynamic intersection of expressive and free exercise rights. Under the current approach, free speech and free exercise principles no longer collaborate and inform one another. By treating the Free Exercise Clause as redundant text, the Court has effectively short-circuited its dynamic interaction with the Free Speech Clause.

If rights relationships are to be preserved and their synergies leveraged in the pursuit of liberty, courts and other interpreters must do a better job of explaining how rights facilitate and illuminate one another. In this respect, it is not enough to say that two (or three) rights are better than one.³⁰²

²⁹⁵ Brownstein, *supra* note 231, at 185.

²⁹⁶ See, e.g., Robert W. Tuttle, *How Firm a Foundation? Protecting Religious Land Uses After Boerne*, 68 GEO. WASH. L. REV. 861–62 (2000) (arguing the Free Speech Clause protects rights of religious adherents in land use area).

²⁹⁷ See *United States v. O’Brien*, 391 U.S. 367, 376 (1968) (applying intermediate level of scrutiny to laws that incidentally burden expression).

²⁹⁸ See Brownstein, *supra* note 231, at 147–64 (examining application of free speech standards to religious zoning, expression, and conduct).

²⁹⁹ *Id.* at 169.

³⁰⁰ *Id.* at 167–68 (discussing RLUIPA).

³⁰¹ See *id.* at 175–76.

³⁰² See Coenen, *supra* note 2, at 1117 (observing that rights combinations “carry the predictable effect of strengthening negative constitutional limits on government action”).

Interpreters need to explain and defend rights relationships with more depth and clarity.

For instance, as the Supreme Court cryptically suggested in *Obergefell*, due process and equal protection focus on separate but overlapping concerns. Each provision adds something distinctive to the constitutional mix. The evil of discriminatory laws, whether they are anti-sodomy laws, bans on same-sex marriage, or racially discriminatory enactments, can be fully addressed only through a combination of due process dignity and equal protection anti-subordination concerns.³⁰³ Courts need to recognize this overlap, elaborate relationships between rights more clearly and cogently, and more closely examine how rights operate in tandem to remedy constitutional harms.

Among other things, this kind of analysis would provide a more accurate understanding of how independent constitutional rights are often interpreted—relative to one another, or at intersection points that touch more than one right at a time.³⁰⁴ Making Rights Dynamism and dynamic interpretation more explicit would give us a sense of the relative influences of different rights provisions in terms of case dispositions. For example, it would better communicate what “work” the due process, equal protection, freedom of speech, and other provisions are doing in cases where two or more of these rights are in play.

Of course, actively combining separate rights provisions does not automatically or always produce valuable synergies. As Rights Dynamism shows, some interactions produce conflicts between rights while others can limit or even undermine certain rights. In a complex system of overlapping and intersecting rights, some such tensions are to be expected. Moreover, we must consider the possibility that the combination of rights provisions could lead to judicial activism or doctrinal complexities that might not arise if courts relied on a single rights provision.³⁰⁵ However, the risk that these potential costs will come to pass ought not to be overstated.³⁰⁶ Rights already operate in relation to one another. Working to define and explicate rights relationships would not only openly acknowledge this fact, but would also allow us to openly assess its effects on our system of constitutional rights.

In sum, to achieve a functioning rights pluralism we must both preserve independent rights provisions and work to facilitate synergistic interactions between and among them. Constitutional rights ought to be conceived of

³⁰³ See Karlan, *supra* note 4, at 483–88 (observing that reliance on both due process and equal protection would have led to a fuller explanation of the constitutional harms in cases involving discrimination against gay men and lesbians).

³⁰⁴ See Coenen, *supra* note 2, at 1103–06 (considering contextual, transparency, and other benefits of analyzing rights claims cumulatively).

³⁰⁵ See *id.* at 1109–16 (discussing potential complications associated with combining rights and other constitutional clauses in judicial analysis).

³⁰⁶ *Id.* at 1113–14.

as independent but “cognate,” “kaleidoscopic,” and “stereoscopic” provisions that operate within a pluralistic system of rights.³⁰⁷

C. Other Rights Relationships

In terms of the systematic examination of Rights Dynamism, the Article has focused on three distinctive rights relationships. These pairings are merely exemplary and illustrative. Other pairings and intersections are also worthy of examination. In addition, dynamic processes and principles could also help to explain the relationships between the Constitution’s structural and individual rights provisions.

We might fruitfully begin by re-considering the suite of rights in the First Amendment. As Professor Ashutosh Bhagwat has observed, free speech supremacy has created a situation in which independent rights to assemble, petition, associate, and publish “might as well not exist.”³⁰⁸ Scholars have sought to resurrect or reclaim these rights. However, they have tended to do so as freestanding provisions rather than as relational guarantees. We ought to conceptualize and study these rights not as separate but related, “kaleidoscopic” guarantees, bound together, as Professor Bhagwat argues, by a concern for broad democratic or other values.³⁰⁹

As a distinctively social right, freedom of speech intersects with a variety of constitutional rights. In addition to the equality and free exercise guarantees discussed in Part II, freedom of speech intersects with abortion rights, property rights, privacy rights, Second Amendment rights, the right to vote, and even the Eighth Amendment’s ban on cruel and unusual punishments. Scholars could focus useful attention on the relational dynamics of these rights, and the resulting bi- or multi-directional interpretations. Moreover, by comparing and contrasting these pairings, we can further our understanding of individual rights, relational dynamics, and dynamic constitutional interpretation.

The relationship between the Free Exercise Clause and the Equal Protection Clause is receiving increased attention, particularly in the wake of the *Obergefell* decision.³¹⁰ Rights Dynamism and dynamic elaboration can provide frameworks for examining the progression and construction of this relationship as it continues to evolve.

Rights Dynamism’s framework and insights could also pay dividends

³⁰⁷ Bhagwat, *supra* note 1; Karlan, *supra* note 4, at 474.

³⁰⁸ Bhagwat, *supra* note 1, at 1097.

³⁰⁹ *See id.*; *see also* Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 383–84 (2012) (urging that rights of free speech and assembly be studied as interrelated, rather than separate, guarantees).

³¹⁰ *See, e.g.*, Ira C. Lupu, *Moving Targets: Obergefell, Hobby Lobby, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L. L. REV. 1 (2015).

with regard to certain criminal procedure rights. Rather than study the Fourth, Fifth, and Sixth Amendments in isolation, scholars could consider the dynamic process in which these rights have interacted and influenced one another. Studying these dynamic intersections might produce better understandings regarding how litigants, courts, and others have construed and elaborated these rights over time. Rights Dynamism could also supplement originalist and intratextualist understandings of these rights.

Obergefell was a single but important turning point in the relationship between the Due Process Clause and the Equal Protection Clause. Like all rights relationships, the relationship between due process and equal protection continues to develop and evolve. For example, in the criminal justice context, advocates for the poor have invoked due process and, increasingly, equal protection rights in challenges to bail and other monetary requirements.³¹¹ These new invocations could lead to further elaboration of the relationship between due process and equal protection rights.

Finally, dynamic principles can inform our understanding of how *structural* constitutional provisions intersect with constitutional rights.³¹² As Professor Laurence Tribe observes, *Obergefell* is partly the product of the intersection between LGBT rights and structural principles of federalism.³¹³ He argues that prior decisions, which rested in part on structural considerations, set in motion a “cascade” in which courts and states began to reconsider a right to “equal dignity.”³¹⁴ Eventually, as Tribe notes, the Court “recognized that the time had come to jettison the federalism scaffolding with which [it] had earlier surrounded that core right.”³¹⁵ Thus, in the case of equal dignity and perhaps other rights as well, constitutional rights and constitutional structure may be intricately connected in ways we have not yet fully appreciated.

In sum, Rights Dynamism has considerable range in terms of assessing, explaining, and elaborating the Constitution’s rights and structural provisions. We can profit by first conceptualizing and then studying constitutional provisions as engaged in dynamic relation and conversation with one another.

CONCLUSION

This Article identifies and describes a process in which various constitu-

³¹¹ See Shaila Dewan, *Court by Court, Lawyers Fight Policies That Fall Heavily on the Poor*, N.Y. TIMES (Oct. 23, 2015), <https://www.nytimes.com/2015/10/24/us/court-by-court-lawyers-fight-practices-that-punish-the-poor.html>.

³¹² See Coenen, *supra* note 2, at 1083–88 (considering combinations of rights and powers, as well as combinations of multiple power provisions).

³¹³ See Tribe, *supra* note 7, at 28.

³¹⁴ *Id.* at 29.

³¹⁵ *Id.*

tional rights provisions participate in dynamic intersections that affect constitutional interpretation over time. The process of Rights Dynamism involves many actors and influences—activists, litigants, civic organizations, the press, scholars, and the people themselves. It typically occurs over the course of many decades and is perpetual.

Rights Dynamism is not an interpretive theory. It does not purport to develop or defend normative outcomes. Rather, Rights Dynamism provides a partial description and explanation of how constitutional construction occurs as the result of the dynamic intersection of constitutional rights. Intratextualists and originalists have identified the deep textual and historical tissues that connect rights to one another. Rights Dynamism recognizes and respects these connections. However, it focuses on more contemporary intersections and on the places and contexts in which constitutional meaning is currently being produced. This occurs in judicial pleadings, adjudication, legislative enactments, academic commentary, and public discourse.

A principal thesis of this Article is that constitutional rights are in fact, and should be conceptualized as, *relational* constructs. Rights of due process and equal protection, freedom of speech and equality, and freedom of speech and free exercise cannot be understood in isolation. These and other rights have all been affected and defined, in significant part, with reference to their dynamic and ongoing relationships with other provisions.

We ought to study, teach, and discuss constitutional rights with careful attention to their relational character. To that end, the study of Rights Dynamism could develop into a separate field or discipline. However, the primary goal of this Article is far more modest. It provides a framework or perspective for understanding how rights relate to one another and perhaps also to structural provisions, by focusing on the processes in which constitutional provisions collaborate, illuminate, and sometimes conflict with one another. By systematically studying this process, we can come to a better understanding of the nature of constitutional rights and the concept of constitutional liberty.

