ARTICLES

CUMULATIVE CONSTITUTIONAL RIGHTS

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Cumulative constitutional rights are ubiquitous. Plaintiffs litigate multiple constitutional violations, or multiple harms, and judges use multiple constitutional provisions to inform interpretation. Yet judges, litigants, and scholars have often criticized the notion of cumulative rights, including in leading Supreme Court rulings, such as Lawrence v. Texas, Employment Division v. Smith, and Miranda v. Arizona. Recently, the Court attempted to clarify some of this confusion. In its landmark opinion in Obergefell v. Hodges,

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the Court struck down state bans on same-sex marriage by pointing to several distinct but overlapping protections inherent in the Due Process Clause, including the right to individual autonomy, the right to intimate association, and the safeguarding of children, while also noting how the rights in question were simultaneously grounded in equal protection. "The Due Process Clause and the Equal Protection Clause are connected in a profound way," Justice Kennedy wrote. The Court did not, however, explain the connection. To redress harms to injured plaintiffs without creating doctrinal incoherence, courts need to understand the categorically distinct ways in which cumulative constitutional harm can occur and how these forms affect constitutional scrutiny. We argue that cumulative constitutional rights cases can be categorized into three general types and that these types need to be analyzed differently. The first type, aggregate harm, occurs when multiple discrete acts, taken together, add up to a harm of constitutional magnitude, even if each individual act, taken alone, would not. The second type, hybrid rights, occurs where a plaintiff claims a single action has violated rights under multiple constitutional provisions. If a court were to apply the proper level of scrutiny to the claims individually, however, none would result in redress. As a result, hybrid rights cases should not ordinarily result in relief. The third type, intersectional rights, occur when the action violates more than one constitutional provision but only results in relief when the provisions are read to inform and bolster one another. Our aim in this Article is to provide a framework courts can use to analyze cumulative constitutional rights. While courts should be open to conducting a cumulative analysis, when constitutional rights are mutually reinforcing those relationships should be clearly set out and defined.

INTRODUCTION

It would be convenient if all constitutional cases were straightforward: a plaintiff complains that a single constitutional right has been violated by a single action. Life, however, is messy, and so is constitutional law. Often a plaintiff's claim is complex. Perhaps several discrete acts, taken together, have violated a constitutional right. Or perhaps a single act violated multiple constitutional provisions. In some cases, the harm alleged may not result in relief without considering the interplay of various constitutional provisions. All of these instances are examples of the litigation of what we term "cumulative constitutional rights."

Cumulative constitutional rights cases are everywhere, although they often go unnoticed as such. The right to a fair trial, for example, can be violated through a series of interrelated but separate, seemingly minor procedural irregularities. Sometimes activity that could be described as the free exercise of religion is also free speech or freedom of association. Litigants raising First Amendment or Fourteenth Amendment Equal Protection Clause claims also routinely assert a due process violation concerning the arbitrary denial of the underlying right. Indeed, many of the Supreme Court's most famous rulings, ranging from the

free exercise case *Employment Division v. Smith*[1] to the criminal procedure case *Miranda v. Arizona*[2] to the sexual liberty case *Lawrence v. Texas*,[3] are cases concerning cumulative constitutional harm.[4]

Despite their ubiquity, these cases are widely criticized and maligned as doctrinally incoherent. Scholars have critiqued the cases in formalist terms, cautioning that the Court should be more careful to distinguish between specific rights and to avoid blurring the lines between rights.[5] And judges, including some Supreme Court Justices, have proven wary of arguments about cumulative rights. Even when the Supreme Court appears to be engaging in a cumulative rights analysis, lower courts often attempt to disaggregate the rights when applying the precedent to new cases.[6] To many, decisions involving cumulative constitutional harm seem outrageous, arbitrary, or even lawless, and, at minimum, not to be taken seriously.[7]

The critics are not entirely wrong. After all, a cumulative approach could result in the paradox that a weak claim brought under a single constitutional provision would be denied relief, but the same weak claim would be granted relief if it could be pled using two constitutional provisions rather than just one. Commentators have thus characterized cumulative claims as creating a "two-for-one sale" where "two losers equal one winner."[8] In particular, scholars have

[1] 494 U.S. 872, 881-82 (1990).

[2] 384 U.S. 436, 510 (1966) (Harlan, J., dissenting).

[3] 539 U.S. 558, 575 (2003).

[4] *See infra* Part II discussing *Smith* and *infra* Part III discussing *Lawrence* and *Miranda.*

[5] *See, e.g.*, Heather K. Gerken, Lecture, Windsor*'s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587, 588, 591 (2015) (explaining that Justice Kennedy "blurs the lines between federalism, liberty, and equality, and he blurs the lines between structure and rights" in his *Windsor* opinion).

[6] *See, e.g.*, Megan Backer, Comment, *Giving* Lawrence *Its Due: How the Eleventh Circuit Underestimated the Due Process Implications of* Lawrence v. Texas *in* Lofton v. Secretary of The Department of Children & Family Services, 90 MINN. L. REV. 745, 745-46 (2006); *see also infra* Part I (discussing the failure of lower courts to properly apply cumulative rights doctrine in criminal procedure cases).

[7] *See, e.g.*, Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121-22 (1990) (arguing that "the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously," and instead "was created for the sole purpose" of distinguishing prior precedent); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 930 (1998) ("There is . . . the question of why it should matter that a claim implicates more than one fundamental right, as if the Constitution were limited to two-for-one sales."). For a backhanded defense of Justice Kennedy's approach in *Windsor* as "mad genius," and as not just combining "equality and liberty" "seemingly willy-nilly" but also applying "the principles of federalism," and therefore "pairing rights and structure," see Gerken, *supra* note 5, at 591.

[8] William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 219 (1998); *see also* Smolla, *supra* note 7, at 930.

criticized much of the Court's constitutional family jurisprudence—from the contraception cases such as *Griswold v. Connecticut*[9] and *Eisenstadt v. Baird*[10] to the more recent LGBT rights cases such as *Lawrence* and *United States v. Windsor*[11]—for failing to specify with adequate precision the constitutional right at stake.[12]

Recently, the Supreme Court made an attempt to clarify some of this confusion. In its opinion in *Obergefell v. Hodges*,[13] the Court struck down state bans on same-sex marriage by pointing to several distinct but overlapping protections inherent in the Due Process Clause, including the right to individual autonomy, the right to intimate association, and the safeguarding of children.[14] And although Justice Kennedy's opinion focused primarily on due process, it also acknowledged that the rights in question were simultaneously grounded in equal protection. "The Due Process Clause and the Equal Protection Clause are connected in a profound way," Justice Kennedy wrote.[15] "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."[16] In *Obergefell*, the Court has more definitively made the link between equal protection and due process that commentators have observed for decades.[17]

Although *Obergefell* gestures in the right direction, we believe that a clearer framework is necessary to give guidance to lower courts about how and when cumulative constitutional analysis is conducted. *Obergefell* itself does not go

[9] 381 U.S. 479, 483 (1964).

[10] 405 U.S. 438, 454-55 (1971).

[11] 133 S. Ct. 2675, 2695 (2013).

[12] *See, e.g.*, Cass R. Sunstein, Essay, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988) (arguing that, "[s]ince its inception, the Equal Protection Clause has served an entirely different set of purposes from the Due Process Clause").

[13] 135 S. Ct. 2584, 2604 (2015).

[14] *Id.* at 2599-600.

[15] *Id.* at 2603.

[16] *Id.*

[17] *See, e.g.*, Deborah Hellman, *Equality and Unconstitutional Discrimination*, *in* PHILOSOPHICAL FOUNDATIONS OF DISCRIMINATION LAW 51, 51-53 (Deborah Hellman & Sophia Moreau eds., 2013) (arguing that two approaches to discrimination, as a violation of equality and a violation of liberty, undergird American constitutional law); Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 136-37 (2007) (developing connection between equal protection and due process rights); Julie A. Nice, *Equal Protection's Antinomies and the Promise of a Co-Constitutive Approach*, 85 CORNELL L. REV. 1392, 1404 n.9 (2000) ("The Equal Protection Clause of the Fourteenth Amendment applies to the states . . . and the Due Process Clause of the Fifth Amendment includes an equal protection component that applies to the federal government."); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776-87 (2011) (discussing liberty-based dignity arguments).

nearly far enough to explain how the violation of equal protection combined with multiple facets of substantive due process protection leads to heightened scrutiny of the challenged law. In addition, *Obergefell* concerned a particular type of cumulative constitutional harm, so the opinion is unhelpful for evaluating other types, such as where a criminal defendant suffers from multiple violations of procedural due process rights.

Our aim in this Article is to provide a framework that courts can use to analyze claims involving cumulative constitutional rights. These claims pervade constitutional law, so courts have no choice but to deal with them. But in order to redress harms to injured plaintiffs without creating doctrinal incoherence, courts need to understand the categorically distinct ways in which cumulative constitutional rights cases can arise and understand how these different forms affect constitutional scrutiny.

We argue that cumulative constitutional rights cases can be categorized into three general types, and that these types need to be analyzed differently by courts. The first type, aggregate harm cases, occur when multiple discrete acts, taken together, add up to a harm of constitutional magnitude, even if each individual act, taken alone, would not, or would not be sufficient to obtain a constitutional remedy. The second type, hybrid rights, occurs where a plaintiff claims that a single action has violated her rights under multiple constitutional provisions. If a court were to apply the proper level of scrutiny to her claims individually, however, none would result in redress. She therefore argues that the existence of partial violations of multiple constitutional provisions should be added together. The third type, intersectional rights, occurs when the action in question violates more than one constitutional provision and when the constitutional provisions are read to inform and bolster one another, as in *Obergefell*.[18] Violations of intersectional rights might be difficult to understand

[18] This concept is similar to Pamela Karlan's idea of "stereoscopic" rights, although we argue that the category goes beyond the equal protection-due process scenarios in which she applies it. *See* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474 (2002) ("[T]his essay suggests that sometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."). The problem that we engage with is the same problem that David Faigman explored in two pieces in the 1990s, asking whether the ultimate question should be whether the entire, relevant "transaction" is unconstitutional. *See* David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 643 (1994) ("Madisonian Balancing begins with the premise that a constitutional injury caused by some government action cannot be described in a piecemeal fashion."); David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 755 (1994) ("The government's justification for infringements of individual liberty should be measured on a transactional basis rather than, as is now done, on an amendment-by-amendment basis."). Faigman described a burden-shifting scheme to weigh aggregate constitutional harm in litigation; we do not address such issues, outside the area we describe as aggregate harm cases in which we find such an approach most useful, but instead focus on distinguishing among

when presented as two separate violations, but when presented together, they come into focus as problems of constitutional magnitude. We argue that each of these circumstances calls for a different legal analysis and that courts sometimes fail to distinguish adequately between the three, thus engaging in the wrong analysis (or no analysis at all) and coming to the wrong result.

We contend that when considering cases involving the first category, aggregate harm, courts must hear evidence of multiple acts because many instances of constitutional harm occur in this manner—the harm comes in the form of "death by a thousand cuts" rather than a single blow. In the second category, hybrid rights, we argue that multiple constitutional violations might alert a court to particularly troubling behavior, but that two half violations do not make a whole: the court needs to actually find a violation of at least one constitutional right in order to grant relief. Finally, as to the third category, intersectional rights, we endorse Justice Kennedy's approach in *Obergefell*, which reads equal protection and due process as mutually reinforcing.

We critique Justice Kennedy's opinion, however, because we believe that in order to provide clarity and to keep "new" constitutional rights from blooming on every tree, these rights must be more clearly tethered to the relevant standard for establishing relief.[19] Once a court has established that harm has occurred through the violation of intersectional rights, it should then apply the appropriate standard to determine whether the harm suffered is justifiable. In *Obergefell*—which forwent analysis of the applicable tiers of scrutiny—the analysis may have been unnecessary, as the statutes in question would have failed intermediate scrutiny and likely even rational basis review; but that will not always be true. The Court's failure in *Obergefell* (as in prior decisions like *Windsor* and *Lawrence*) to provide guidance to subsequent courts about the appropriate standard of review or level of scrutiny may plague LGBT rights litigation for years to come. The problem we see with the opinion, however, lies in this particular failure of specificity, not in its blending of constitutional rights. In other cases, such as *Miranda* and many others lying outside of equal

types of interactions between constitutional rights. Finally, Michael Coenen has recently described how there are advantages and disadvantages to types of "combination analysis" of constitutional rights, including as to structural provisions that are beyond the scope of this Article. Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1068 (2016) ("In all of these cases, the Court has embraced (or at least tinkered with) forms of what I call 'combination analysis'—justifying judicial outcomes by reference to multiple clauses acting together, as opposed to individual clauses acting alone."). We discuss some of the "combination errors" and categories of useful "combination analysis" that Coenen identifies, and add some of our own. We share Coenen's broad goal to encourage but also better guide the uses of cumulative constitutional analysis.

[19] While it may help to add precision to explain constitutional analysis with reference to the traditional tiers of scrutiny, we do not suggest that all of the leading cases can be explained using those tiers, or that the use of such tiers is always the best way to screen for discrimination in violation of the Equal Protection Clause. See *infra* Section III.B for a discussion of these issues.

protection doctrine, the Court developed an entirely new constitutional test that is informed by multiple constitutional sources. In such cases, the appropriate level of review can be set out when defining the new constitutional standard, but it is important to specify the degree to which that new standard should be informed by each of its constitutive sources.[20]

One implication of our categorization is that courts must be careful to choose the right category and remain attentive to situations in which multiple categories might be operating. A criminal defendant claiming that a right to a fair trial was violated, for example, might also have a claim of ineffective assistance of counsel. For each claim, there might be multiple pieces of evidence, and for each claim, the doctrine requires that there be a harmless-error type analysis permitting relief only if the violations reasonably prejudiced the fairness of the entire trial. Under our framework, the court should aggregate the evidence and determine whether, taken together, the separate constitutional violations reasonably prejudiced the entire trial. This would be an aggregate harm analysis. Second, if there is not enough evidence for either constitutional claim, then the court would need to determine whether this was a hybrid rights or an intersectional rights case. If it is a hybrid rights case, then two partial harms don't lead to a constitutional violation—they are just two separate, unsuccessful claims. But if instead it is an intersectional rights case—one involving rights that, when read together, magnify each other—then the right to a fair trial and the right to effective assistance of counsel are mutually reinforcing and amplifying, and there could be a constitutional violation based on the totality of the circumstances even if neither right was violated on its own.

In the case of the right to a fair trial and the specific right to effective assistance of counsel, one right is more specific and one more general, but they do not amplify each other. The ineffective assistance of counsel claim is a subset of the fair trial claim. In contrast, the third category of intersectional rights could be implicated if a distinct violation implicating another constitutional right occurred which magnified the ineffective assistance or fair trial claim. Consider, for example, a claim that a individual was being singled out for an unfair trial due to ethnicity or religious beliefs. The existence of free exercise, establishment, or equal protection concerns could amplify the harm resulting from the failure to use fair procedures in a trial, even if the unfairness of these procedures, standing alone, would not create a cognizable constitutional harm. Dismissing an "intersectional rights" case as a mere "hybrid rights" case would lead a court to undervalue the severity of the harm suffered by the plaintiff.

This Article proceeds in three parts. Part I describes the simplest category of cumulative constitutional rights: the aggregate harm cases. It shows how some courts have developed a doctrine of aggregate harm and how some courts have

[20] Our theory is distinct from Nelson Tebbe and Robert Tsai's expert illumination of "constitutional borrowing," in which a court borrows a standard from one area of constitutional law for use in another. *See* Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460 (2010).

resisted recognizing it. We argue that courts must recognize this type of harm or they will fail to protect the constitutional rights of litigants. To make this point, we consider the paradigm example of criminal defendants entitled to a fair trial and demonstrate how several constitutional claims can all potentially contribute to the same fair trial harm.

Part II explores the hybrid rights cases. We show why these cases have seemed doctrinally muddled. If a constitutional right has not been violated, it shouldn't matter that other constitutional rights have not been violated, either. We argue that allegations of multiple constitutional violations should serve as a warning to courts of potentially serious violations, but that they should not be added together unless they can be described fairly as intersectional.

Part III turns to the intersectional rights cases, including *Obergefell*. Here, we argue that the Court has repeatedly recognized that due process, equal protection, freedom of association, freedom of speech, free exercise, and other constitutional protections are overlapping and interrelated. The distinct situation in which a new constitutional standard is informed by multiple constitutional provisions is surprisingly common. However, many courts have failed to recognize intersectionality, and perversely see the inclusion of multiple rights claims as a weakness. Many constitutional violations, however, may only be remedied when these individual provisions are considered in tandem. Although the cases in which the Court has done this have been maligned, we argue that the criticism of these cases is often too formalist and misses the animating purpose behind these constitutional provisions.

I. AGGREGATE HARM

The first category of cumulative constitutional cases we identify are the cases we label "aggregate harm" cases. These cases are most commonly found in the world of criminal procedure, where there is open consideration of whether multiple constitutional violations, taken together, merit a remedy, even where each individual violation standing alone would not suffice. For example, the cumulative error doctrine arises chiefly during postconviction review of a criminal conviction. At this stage, a court considers whether any error might be harmless, and as a result, the question is whether to provide the remedy of a new trial where two constitutional violations that independently would lack a remedy under harmless error might jointly lead to a remedy. Frequently, a habeas petitioner will allege a range of violations, some distinct violations of the same right and some of different rights, in order to challenge a criminal conviction. The Supreme Court recognizes that cumulative harm is a helpful framework for sorting out such difficult problems.

A. *Cumulative Harmless Error*

Cumulative harmless error analysis in constitutional criminal procedure originated in the Supreme Court's decision in *Taylor v. Kentucky*.[21] There, the Court held that even though the trial judge failed to instruct the jury on the presumption of innocence, the "skeletal instructions" alone did not necessarily violate the Constitution.[22] However, the prosecutor had also committed borderline misconduct in closing arguments, leading to additional "potentially dangerous circumstances."[23] The Court ruled that the combination of these errors violated the Due Process Clause's guarantee of fundamental fairness due to their "cumulative effect."[24]

Thus, the analysis focused on the cumulative harm, not because single violations would otherwise be harmless, but because fundamental fairness at trial is only implicated when constitutional harm is serious, and the cumulative nature of the error in *Taylor* resulted in serious harm at the trial taken as a whole, even if one error related to closing arguments, and another related to jury instructions. One reason this doctrine has developed in the criminal procedure context is because trials are complex events. For example, it is quite common for a habeas petition to point to a range of deficiencies of the defense lawyer at trial as violating the Sixth Amendment. It is not generally considered a cumulative error analysis (which instead typically refers to consideration of different types of constitutional criminal procedure theories) to look to see whether each of the separate denoted "claims" of allegedly unconstitutional attorney ineffectiveness added up to a prejudicial and constitutionally deficient trial. However, in addition, multiple constitutional rights may apply to all or part of the criminal trial. Many of the rights implicate to one degree or another the due process requirement that the entire trial be fundamentally fair, but some rights also implicate specific Bill of Rights provisions. While *Taylor* involved two different types of due process violations, what of the situation where it is a general fair trial claim concerning prosecutorial misconduct, but also a specific claim concerning a confession, under the Fifth Amendment, or some other more specific constitutional provision?

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[21] 436 U.S. 478, 487 n.15 (1978) ("Because of our conclusion that the cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness in the absence of an instruction as to the presumption of innocence, we do not reach petitioner's further claim that the refusal to instruct that an indictment is not evidence independently constituted reversible error.").

[22] *Id.* at 487-88.

[23] *Id.* at 487 n.15.

[24] *Id.* at 487-88 & n.15.

B. *Cumulative Prejudice Under* Strickland *and* Brady

Notions of cumulative harm underlie one of the most important and frequently litigated criminal procedure doctrines—the *Strickland v. Washington*[25] standard governing ineffective assistance of counsel claims.[26] Under *Strickland*, courts ask not whether each individual act or decision by a defendant's counsel was deficient, but instead whether all of the lawyer's errors, taken together, amounted to a constitutionally deficient performance.[27] In turn, *Strickland* claims rely on not one but two constitutional interests: the Sixth Amendment, which guarantees the right to counsel in criminal cases, as well as the Due Process Clause of the Fifth Amendment, which guarantees a fair trial.[28] This area also involves a straightforward example of the first category of cumulative constitutional rights: aggregation. The aggregation of incidents of conduct when litigating *Strickland* claims has not been controversial. Instead this has been understood as reflective of the cumulative nature of ineffective lawyering at various stages of a criminal case: during the course of investigation, plea negotiations, trial, or appeal.[29] A single act by a lawyer cannot be seen in isolation; the failure to cross-examine a witness may not be significant, but the failure to respond by calling a rebuttal alibi witness may be devastating. To be sure, not all courts fully understand this function of *Strickland*. For example, two Circuits have rejected cumulation of attorney errors to determine prejudice under *Strickland*, oddly treating separate attorney errors as separate "claims" when they are all instances of attorney ineffectiveness.[30]

Strickland claims are also "umbrella" claims in another way, providing a separate vehicle to litigate other constitutional rights. They ask whether the

[25] 466 U.S. 668 (1984).

[26] *Id.* at 684.

[27] *Id.* at 695 ("In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.").

[28] *Id.* at 682 (holding that "the defendant must show that counsel's errors" resulted in "prejudice").

[29] For more on cumulative analysis of *Strickland* claims, see Ruth A. Moyer, *To Err Is Human; To Cumulate, Judicious: The Need for U.S. Supreme Court Guidance on Whether Federal Habeas Courts Reviewing State Convictions May Cumulatively Assess* Strickland *Errors*, 61 DRAKE L. REV. 447, 452 (2013). For rulings emphasizing the importance of investigating mitigating evidence to prepare for the sentencing phase of a capital trial, see, for example, Rompilla v. Beard, 545 U.S. 374, 380-81 (2005); Wiggins v. Smith, 539 U.S. 510, 522-27 (2003); Williams v. Taylor, 529 U.S. 362, 393 (2000). For rulings recognizing that ineffective assistance of counsel may be asserted regarding plea negotiations, see, for example, Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012); Padilla v. Kentucky, 559 U.S. 356, 368-69 (2010).

[30] Moyer, *supra* note 29, at 472-77 (describing how the Courts of Appeals for the Sixth and Eighth Circuits reject cumulation of *Strickland* errors, and the Court of Appeals for the Eleventh Circuit has not addressed the issue); *see also* Pryor v. Norris, 103 F.3d 710, 714 (8th Cir. 1997).

counsel's performance affected the trial, thus the inquiry can also include the situation in which counsel failed to adequately investigate, assert, or vindicate another constitutional right. Indeed, a *Strickland* claim can provide a vehicle to assert, for example, a constitutional right that would have otherwise been waived or, in the case of Fourth Amendment claims, that cannot be presented during federal habeas corpus review.[31] Of course, all rights incorporated under the Due Process Clause of the Fourteenth Amendment are rights that are litigated using the Due Process Clause as the procedural vehicle. Our focus, however, is on the joint interpretation of constitutional rights. To the extent that the Due Process Clause not only incorporates rights but also influences their development, however, the subject is one and the same.

The cumulative theory of constitutional harm lies at the center of criminal postconviction litigation. Ineffective assistance of counsel claims are far and away the most commonly litigated postconviction claims through federal habeas petitions.[32]

Similarly, the Supreme Court has emphasized in the context of prosecutorial misconduct that multiple violations of the *Brady v. Maryland*[33] rule—that the prosecution disclose exculpatory evidence to the defendant—have a cumulative effect. Thus, the Court has found that prosecutors have violated defendants' due process rights by suppressing exculpatory evidence in cases involving many small incidents of prosecutorial misconduct, each of which might not have been enough on its own to be a constitutional violation.[34] Instead of asking whether each piece of evidence suppressed led to an unfair trial, courts must ask whether all of the conduct taken together "so infected the trial with unfairness as to make the conviction a denial of due process."[35] Similarly, errors of state law may

[31] Kimmelman v. Morrison, 477 U.S. 365, 382 (1986) ("[A] good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . .").

[32] *See* NANCY J. KING ET AL., FINAL TECHNICAL REPORT: HABEAS LITIGATION IN U.S. DISTRICT COURTS: AN EMPIRICAL STUDY OF HABEAS CORPUS CASES FILED BY STATE PRISONERS UNDER THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996, at 28 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf [https://perma.cc/YB3T-JXBD] (finding in empirical study of habeas filings that eighty-one percent of the capital cases included an ineffective assistance of counsel claim); Joseph L. Hoffmann & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. REV. 791, 811 (2009).

[33] 373 U.S. 83, 86 (1963) ("We agree with the Court of Appeals that suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment.").

[34] *See, e.g.*, Kyles v. Whitley, 514 U.S. 419, 437-38 (1995) (examining materiality by looking to the "the cumulative effect of suppression").

[35] Darden v. Wainwright, 477 U.S. 168, 181 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).

violate the constitution if they "so infused the trial with unfairness as to deny due process of law."[36]

Recognition of cumulative harm, then, is alive and well in criminal procedure doctrine. Even here, however, courts are skeptical, and the doctrine has not always resulted in the far-reaching remedies that it might. In response to *Taylor*, for example, all circuits apply some version of a cumulative harm claim, but the Courts of Appeals for the Fifth and Eighth Circuits have largely dismantled the doctrine.[37] The chief fear expressed by judges on these courts is that cumulative error provides an "infinitely expandable concept."[38] Few habeas petitioners have received reversals under a cumulative error theory.[39] Moreover, there are few

[36] Lisenba v. California, 314 U.S. 219, 228 (1941).

[37] *See* Hall v. Luebbers, 296 F.3d 685, 692 (8th Cir. 2002) ("[A] habeas petitioner cannot build a showing of prejudice on a series of errors, none of which would by itself meet the prejudice test."); United States v. Martinez, 277 F.3d 517, 532 (4th Cir. 2002) (discussing cumulative harm doctrine in the context of plain error); Alvarez v. Boyd, 225 F.3d 820, 824 (7th Cir. 2000) ("To prevent the synergistic effect of these errors from escaping review, courts attempt to determine whether the whole is greater than the sum of its parts."); United States v. Ward, 190 F.3d 483, 491 (6th Cir. 1999) (citing United States v. Ashworth, 836 F.2d 260, 267 (6th Cir. 1988)) ("[E]rrors that might not be prejudicial when viewed alone, may together produce a fundamentally unfair trial."); United States v. Hurtado, 47 F.3d 577, 586 (2d Cir. 1995) (describing cumulative harm doctrine); United States v. Copple, 24 F.3d 535, 547 n.17 (3d Cir. 1994); United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993) ("Individual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect."); United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) ("A cumulative-error analysis merely aggregates all the errors that individually have been found to be harmless, and therefore not reversible, and it analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless."); United States v. Wallace, 848 F.2d 1464, 1472 (9th Cir. 1988) ("Even if each of these errors, by itself, is arguably harmless, their cumulative effect may well be prejudicial."); United States v. Canales, 744 F.2d 413, 430-31 (5th Cir. 1984); United States v. Jones, 482 F.2d 747, 749-50 n.2 (D.C. Cir. 1973) ("This court has indicated that although certain errors standing alone might be insufficient to overturn a verdict, these errors may exert a cumulative effect such as to warrant reversal."). Further, the Court of Appeals for the Sixth Circuit has in dicta suggested the doctrine might not apply across various types of claims. *See* Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002) ("The Supreme Court has not held that distinct constitutional claims can be cumulated to grant habeas relief.").

[38] Derden v. McNeel, 978 F.2d 1453, 1457 (5th Cir. 1992) (en banc) ("[A]n error that would not have risen to constitutional dimension by itself might suddenly, when aggregated with other non-constitutional errors, become worthy of habeas relief."); Rachel A. Van Cleave, *When Is an Error Not an "Error"? Habeas Corpus and Cumulative Error Analysis*, 46 BAYLOR L. REV. 59, 85 (1994).

[39] *Derden*, 978 F.2d at 1462 (Higginbotham, J., concurring) (calling cumulative error analysis "quite narrow—as evidenced by the majority's inability to locate more than two instances from our thousands of habeas cases in which a state petitioner has succeeded with the argument"). Courts also often focus on the strength of government evidence to hold that cumulative errors did not prejudice the trial. *See, e.g.*, United States v. Ollivierre, 378 F.3d

examples of courts granting relief and specifically stating that they would not have done so absent cumulative error.[40]

In cumulative error analysis, courts will only consider accumulating errors if each can independently be considered an error.[41] Some courts go further to impose additional limitations on the doctrine. For example, the Fifth Circuit will only accumulate procedurally preserved and prejudicial errors under cumulative error analysis.[42] Because those errors are already prejudicial, the cumulative error analysis adds nothing to the result. Courts have also refused to apply the doctrine because the defendant failed to raise the issue in either the federal district or state court.[43] These decisions are totally misplaced. The cumulative error doctrine is not itself a constitutional claim that must be exhausted or waived, but rather a theory for how to evaluate whether to provide a remedy.

Thus, while some courts agree that "[i]ndividual efforts, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect,"[44] the cumulative harm doctrine has not been adequately

412, 422 (4th Cir. 2004); Darks v. Mullin, 327 F.3d 1001, 1018-19 (10th Cir. 2003); United States v. Meserve, 271 F.3d 314, 332 (1st Cir. 2001) (comparing the strength of the Government's case against the errors complained of by defendant); United States v. Adams, 74 F.3d 1093, 1099-100 (11th Cir. 1996); *Copple*, 24 F.3d at 547 n.17; *Jones*, 482 F.2d at 754-55 (listing particular errors and finding them "harmless in a cumulative sense").

[40] United States v. Wood, 207 F.3d 1222, 1237 (10th Cir. 2000) ("A cumulative error analysis aggregates all the errors that individually might be harmless."); Harris v. Wood, 64 F.3d 1432, 1439 (9th Cir. 1995) ("By finding cumulative prejudice, we obviate the need to analyze the individual prejudicial effect of each deficiency."); United States v. Parker, 997 F.2d 219, 222 (6th Cir. 1993) ("The combined effect of these four errors was so prejudicial as to strike at the fundamental fairness of the trial."); United States v. Necoechea, 986 F.2d 1273, 1282 (9th Cir. 1993) ("In reviewing for cumulative error, the court must review all errors preserved for appeal and all plain errors.").

[41] Alvarez v. Boyd, 225 F.3d 820, 825 (7th Cir. 2000); Moore v. Reynolds, 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."); United States v. Rogers, 89 F.3d 1326, 1338 (7th Cir. 1996) (citing United States v. Akinsanya, 53 F.3d 852, 859 (7th Cir. 1995)); Wainwright v. Lockhart, 80 F.3d 1226, 1233 (8th Cir. 1996) ("Errors that are not unconstitutional individually cannot be added together to create a constitutional violation.").

[42] Hood v. Dretke, 93 F. App'x 665, 671-72 (5th Cir. 2004) (citing Westley v. Johnson, 83 F.3d 714, 726 (5th Cir. 1996)) ("Claims that are not prejudicial, however, cannot be cumulated, regardless of the number raised.")); *Derden*, 978 F.2d at 1454; United States v. Birdsell, 775 F.2d 645, 654 (5th Cir. 1985) ("Because none of these alleged improprieties has been found to be prejudicial, their consideration in combination cannot change that conclusion.").

[43] Lorraine v. Coyle, 291 F.3d 416, 447 (6th Cir. 2002). Treating cumulative error as a separate claim, in a sense, the Court of Appeals for the Second Circuit in *Jimenez v. Walker*, 458 F.3d 130 (2d Cir. 2006), ruled that the petitioner must exhaust a cumulative error theory in the state courts. *Id.* at 133; *see also* United States v. Salameh, 152 F.3d 88, 157 (2d Cir. 1998).

[44] United States v. Fernandez, 145 F.3d 59, 66 (1st Cir. 1998) (quoting United States v.

recognized in the lower courts. John Blume and Christopher Seeds argue that prejudice from all errors affecting reliability should be cumulated.[45] For example, both prosecutorial misconduct and ineffectiveness of defense counsel should be considered together.[46] Because the cumulative error "doctrine is inconsistently and rarely applied,"[47] it has not always been used to look across errors by both prosecution and defense lawyers. Sometimes, if the prosecutor concealed evidence from the defense, courts will rule that the conduct was not fully prejudicial because the defense lawyer could have suspected there was inadequate discovery and failed to press an investigation into the matter.

A few scattered courts view the errors together. Even the Supreme Court has, perhaps without realizing it, engaged in the sensible cumulative analysis of both prosecution and defense prejudice to the defendant.[48] As a result of the failure to properly apply cumulative harm, a truly unreliable verdict—one where the errors occur across different types of constitutional claims—may not be remedied. Cumulative harm should be more broadly remedied in criminal cases.

C. *Cumulative Eighth Amendment Claims*

These constitutional criminal procedure examples are not the only examples of rights in which multiple barriers to realizing a common constitutional right are considered together when deciding whether to grant a remedy. There are still more constitutional rights where a violation may implicate multiple separate acts, and therefore, within the right, violations may be accumulated. For example, the Supreme Court has held that some "conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need."[49] The relevant transaction for a given constitutional violation can be defined broadly, to constitute a single "claim," or narrowly, to require separate litigation of different acts. Aggregation can be seen as simply broadening the concept of the relevant constitutional harm

Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993)).

[45] John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating* Bagley *Materiality,* Strickland *Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1154 (2005) (arguing that "the impact of all errors that potentially affect the reliability of a verdict be taken into account").

[46] *Id.* at 1154-55.

[47] *Id.* at 1154.

[48] Banks v. Dretke, 540 U.S. 668, 699 n.17 (2004) (noting in addition to evidence concealed by the prosecution, evidence that the defense failed to develop regarding who started the fight); *see also* Blume & Seeds, *supra* note 45, at 1182 n.112. For a state court example, see State v. Gunsby, 670 So. 2d 920, 924 (Fla. 1996). For a federal court example, although ultimately denying relief, see Gonzales v. McKune, 247 F.3d 1066, 1078 (10th Cir. 2001), *vacated in part*, 279 F.3d 922 (10th Cir. 2002) (en banc).

[49] Wilson v. Seiter, 501 U.S. 294, 304 (1991) (rejecting the contention that "no claim can be found to fail that test in isolation").

to include multiple acts that may violate a single constitutional right, but also multiple acts that may violate more than one constitutional provision.

D. *Procedural Due Process*

Due process cases involving deprivation of access to a right, whether it is access to courts, voting, marriage, or welfare, or the fair trial rights just discussed, commonly consider multiple types of procedural barriers to the underlying constitutionally cognizable interest in life, liberty, or property. For example, when examining procedural due process claims challenging denial of welfare benefits, courts conduct a cost-benefit balancing test under *Mathews v. Eldridge*[50] and examine a range of features relating to the notice and opportunity to be heard provided by the agency regarding planned termination of benefits.[51] In a case like *Mathews*, the lack of a right to a pretermination of benefits hearing was found constitutional due to the presence of notice and plaintiff's ability to challenge the pending decision through submissions to the agency;[52] in contrast, in a case like *Goldberg v. Kelly*,[53] the cumulative lack of notice detailing the reasons for the termination of benefits and hearing procedures including a right to counsel, a right to impartial adjudication by a neutral decision-maker, and a right to cross-examine witnesses, caused the Court to find the entire process to have been violative of due process.[54] When conducting a due process analysis, the entire process is examined, with the court asking whether it is fundamentally fair, or whether it satisfies the distinctive *Mathews* balancing test.

The key to understanding this category is that the things being aggregated are the individual acts of harm against the individual, not the number of constitutional provisions or theories under which she could seek redress. As with "hostile environment" work harassment claims, sometimes one event will be so severe that it creates a hostile environment, but in other instances the accrual of many relatively small instances of harassment can amount to the same thing.[55] Thus, procedural due process cases necessarily involve both a deprivation of a constitutionally cognizable underlying life, liberty or property interest, and in addition, a consideration of the totality of the procedures used in connection with the deprivation.

[50] 424 U.S. 319 (1976).

[51] *Id.* at 334.

[52] *Id.* at 349 ("We conclude that an evidentiary hearing is not required prior to the termination of disability benefits and that the present administrative procedures fully comport with due process.").

[53] 397 U.S. 254 (1970).

[54] *Id.* at 263-64.

[55] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) ("A recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" (citation omitted)).

II. HYBRID RIGHTS

In sharp contrast to cases of aggregate harm are cases of hybrid rights. In these cases, rather than alleging that multiple individual harms, taken together, add up to a constitutional violation, the plaintiff alleges that a single action violates multiple constitutional provisions. Obviously, there is nothing wrong with pleading a case using multiple theories. Litigants do this all the time because they cannot know precisely what facts will be uncovered in discovery or what theories will most persuade a judge, and they also need to preserve their arguments for appeal. The problem that concerns us here arises if none of these claims is a winning claim on its own, and none introduces additional actions or harms not present in the other claims (as with the aggregate situation just discussed). Faced with that problem, some plaintiffs nevertheless argue that the existence of partial violations of multiple provisions should lead to victory. We are skeptical of such claims.

A. *Hybrid Rights in* Fiallo

As a practical matter, this argument usually arises when plaintiffs are seeking a higher level of constitutional scrutiny than their claims would otherwise receive. Consider, for example, *Fiallo v. Bell*,[56] a case in which U.S. citizens challenged the denial of visas to their children.[57] Under the then-current immigration statute, the definition of "child" did not include a nonmarital child seeking preference through his biological father.[58] Cleophus Warner, one of the plaintiffs in the case, argued that the statute discriminated against him in two ways—as a man and as a nonmarital father.[59] Ordinarily, either of these claims would have resulted in the application of heightened scrutiny.[60] Because *Fiallo* was an immigration case, however, the Court applied the "plenary power doctrine," which required the Court to be highly deferential to Congress in matters concerning foreign affairs and national security, and it therefore applied only a very deferential form of rational basis review.[61] Rather than taking on the

[56] 430 U.S. 787 (1977).

[57] *Id.* at 790 ("Appellants are three sets of unwed natural fathers and their illegitimate offspring who sought, either as an alien father or an alien child, a special immigration preference by virtue of a relationship to a citizen or resident alien child or parent.").

[58] *Id.* at 788-89 (explaining Section 101(b)(1) of the Immigration and Nationality Act of 1952).

[59] *Id.* at 794.

[60] *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532 (1996) (describing how the Court "has carefully inspected official action that closes a door or denies opportunity to women (or to men)"); Clark v. Jeter, 486 U.S. 456, 461-63 (1988) (applying intermediate scrutiny to illegitimacy discrimination claim); Trimble v. Gordon, 430 U.S. 762, 767 (1977) ("Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' . . . the scrutiny 'is not a toothless one' . . . ." (citations omitted)).

[61] *Fiallo*, 430 U.S. at 792 n.4 ("[D]ue process places some limitations on congressional power in the immigration area . . . [b]ut that the formulation of these policies is entrusted

plenary power doctrine, Warner's lawyers argued that the "double-barreled" discrimination based on gender and illegitimacy should lead to a higher level of scrutiny.[62] Warner lost.[63]

Although there are excellent arguments that the Court decided the case wrongly,[64] we do not think that its failure to recognize the "double-barreled" discrimination of sex and illegitimacy is one of them. Why should the fact that Warner was discriminated against as a man who had fathered a child outside of marriage mean that he was more deserving of constitutional redress than, say, a man excluded from entry into the United States simply because he was a man, or a nonmarital child excluded simply as a nonmarital child? All of these examples involve invidious discrimination of various types; the sex-plus-illegitimacy fact pattern simply manifests that discrimination in a way that links two quasi-protected classes. Indeed, historically, discrimination against nonmarital children *was* a manifestation of sex discrimination: men could choose whether to take legal responsibility for their children by marrying, while women were given parental authority and responsibility only if unmarried.[65]

In other words, one of the reasons why illegitimacy discrimination receives heightened scrutiny is that it is *already* a species of sex discrimination. The central problem of *Fiallo* was whether the government should be able to exercise

exclusively to Congress has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government . . . ." (quoting Galvan v. Press, 347 U.S. 522, 531 (1954))). For a more detailed discussion of the plenary power doctrine in the immigration context, see Kerry Abrams, *Plenary Power Preemption*, 99 VA. L. REV. 601, 615-17 (2013).

[62] *Fiallo*, 430 U.S. at 794.

[63] *Id.* at 793-94 (rejecting the suggestion to adopt a "more searching judicial scrutiny").

[64] *See, e.g.*, Kristin A. Collins, *Deference and Deferral: Constitutional Structure and the Durability of Gender-Based Nationality Laws*, *in* THE PUBLIC LAW OF GENDER: FROM LOCAL TO GLOBAL 73, 79-85 (Kim Rubenstein & Katharine Young eds., 2016); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 649-50 (1980) (critiquing *Fiallo* for focusing on harm to parent rather than harm to children); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 607 (1990) ("The Court [in *Fiallo*] rejected an equal protection attack on two classifications in the statute—gender and legitimacy—that usually trigger something more than casual scrutiny."); Debra L. Satinoff, *Sex-Based Discrimination in U.S. Immigration Law: The High Court's Lost Opportunity to Bridge the Gap Between What We Say and What We Do*, 47 AM. U. L. REV. 1353, 1375 (1999) (opining that *Fiallo* Court overemphasized its "limited authority to review Congress's decisions with regard to immigration than it did on examining the discriminatory sex-based classification"); Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 15-17 (1984) (questioning the basis for juridical deference in *Fiallo* and other cases).

[65] *See* Kristin Collins, Note, *When Fathers' Rights Are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE L.J. 1669, 1685-93 (2000) (discussing the intersection of coverture and citizenship law).

such broad discretion when its actions cut so deeply into family life.[66] As we will argue in Part III, a more satisfying understanding of *Fiallo* (and one that might have led to a better outcome for the plaintiffs) would have been to understand it as an intersectional rights case, where the plaintiffs' rights to family reunification were violated in a way that was magnified by invidious discrimination.

B. *The* Smith II *Hybrid Rights Doctrine*

Perhaps the most famous—and most criticized—instantiation of hybrid rights in U.S. constitutional law is the Supreme Court's endorsement of a hybrid rights approach in *Employment Division v. Smith (Smith II)*.[67] *Smith II* marked a substantial change in the Court's free exercise of religion jurisprudence, overruling a series of prior cases applying heightened scrutiny and a "compelling interest" test in such cases.[68] *Smith II* discarded that approach by holding that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[69] While finding a regulation valid without applying heightened scrutiny, the majority did not explicitly overrule the Court's prior decisions applying heightened scrutiny.

Instead, Justice Scalia, who authored the opinion, distinguished prior cases by noting that all such cases had happened to involve not just religious speech, but also other behavior that implicated other constitutional protections in conjunction with the Free Exercise Clause.[70] Justice Scalia explained that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections."[71] The Court called such cases ones involving a "hybrid situation," where a free exercise claim was conjoined

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[66] *Cf.* Moore v. East Cleveland, 431 U.S. 494, 513 (1977) (invalidating city zoning ordinance prohibiting grandmother to live with her grandson).

[67] 494 U.S. 872, 878-82 (1990) (distinguishing case from others involving "the Free Exercise Clause in conjunction with other constitutional protections").

[68] *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1120-28 (1990) (arguing that *Smith II* is inconsistent with the Court's precedents); James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1409 n.15 (1992) (collecting the scholarly criticisms of *Smith II*).

[69] *Smith II*, 494 U.S. at 879. To be sure, some might argue that the break was not so dramatic, if prior cases claiming to apply heightened review had in practice applied a less demanding and more deferential standard.

[70] *See id.* at 881-82 (listing precedents that involve both a free exercise claim and other constitutional protections).

[71] *Id.* at 881.

with "communicative activity or parental right."[72] For example, *Wisconsin v. Yoder*,[73] a case involving Amish parents who wished to homeschool their children, implicated not just free exercise, but also a fundamental right of parents to supervise their children's upbringing.[74] Thus, the Court implied that the parents in *Yoder* had a losing free exercise claim, but that this claim, combined with their Fourteenth Amendment fundamental right claim, was enough to demonstrate constitutional harm.[75]

Commentators have termed this a "hybrid rights" exception, based on Justice Scalia's suggestion that a free exercise claim that otherwise would not receive heightened scrutiny under *Smith II* does receive heightened scrutiny under a "compelling interest" test in the "hybrid situation" where another constitutional right is implicated by the state action.[76] The presence of another constitutional violation serves to elevate the scrutiny applied.

Justice Scalia did not further explain this hybrid rights exception in *Smith II*. Some commentators treat the use of prior precedent and the hybrid rights discussion as merely a disingenuous and strained effort to distinguish individual cases that were problematic for the majority's new holding.[77] Indeed, Justice Scalia's repeated repudiation of the parental rights cases, most recently in his plurality opinion in *Kerry v. Din*[78] and his dissent in *Obergefell*, further supports the theory that his treatment of them in the *Smith II* decision was a means for deciding against the plaintiffs there.[79] If the discussion of the situation (not

[72] *Id.* at 882 ("The present case does not present such a hybrid situation, but free exercise claim unconnected with any communicative activity or parental right.").

[73] 406 U.S. 205 (1972).

[74] *Smith II*, 494 U.S. at 882 (citing *Yoder*, 406 U.S. at 234-36).

[75] *Smith II*, 404 U.S. at 881-82 (citing *Yoder*, 406 U.S. at 234-36) ("The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right.").

[76] *See, e.g.*, Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 431 (1994) ("In other words, the cumulative effect of two or more partial constitutional rights equals one sufficient constitutional claim."); Heather M. Good, *"The Forgotten Child of Our Constitution": The Parental Free Exercise Right to Direct the Education and Religious Upbringing of Children*, 54 EMORY L.J. 641, 654-60 (2005) (investigating hybrid rights doctrine); Esser, *supra* note 8, at 211-12 (categorizing and analyzing lower court's application of hybrid rights exception).

[77] *See, e.g.*, Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 902 (1994) ("Justice Scalia had only five votes. He apparently believed he couldn't overrule anything, and so he didn't. He distinguished everything away instead."); William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) ("[*Smith II*'s] use of precedent borders on fiction."); McConnell, *supra* note 68, at 1122 (arguing that "a legal realist would tell us . . . that the *Smith* Court's notion of 'hybrid' claims was not intended to be taken seriously").

[78] 135 S. Ct. 2128 (2015) (plurality opinion).

[79] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2630 (2015) (Scalia, J., dissenting) ("The

present in *Smith II*) in which additional constitutional rights led to heightened scrutiny under the First Amendment was not only dicta, but highly results-oriented dicta that perhaps explains in part why the account in *Smith II* was so thin. The consequences of not explaining why it mattered, in the cases being distinguished, that additional constitutional rights were implicated, would then be felt in the lower courts.

Smith II's doctrinal incoherence has made it a very difficult precedent to apply, at least in cases potentially raising the hybrid rights theory articulated. In response to the case, plaintiffs began to assert claims under the theory that courts should apply heightened scrutiny where free exercise interests were circumscribed in a context that implicated another right, most commonly due process rights relating to childrearing.[80] In such cases, the First, Seventh, Eight, Ninth, Tenth, and D.C. Circuits all recognize heightened scrutiny for hybrid rights.[81] The remaining circuits have rejected the doctrine.[82] Even in those circuits that ostensibly recognize the hybrid rights doctrine, courts frequently invoke the exception as simply another basis to support a holding that is already based upon an independent constitutional violation.[83] Some courts are quite

opinion is couched in a style that is as pretentious as its content is egotistic . . . . Of course the opinion's showy profundities are often profoundly incoherent."); *Din*, 135 S. Ct. at 2134 (characterizing the Court's previous parental rights opinions as exhibiting a "propensity for grandiloquence when reviewing the sweep of implied rights" and rejecting these previous holdings as "dicta").

[80] *See, e.g.*, Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 655-56 (10th Cir. 2006) (rejecting Appellant's claim on hybrid rights exception). Meanwhile, a political reaction to the holding in *Smith II* led Congress to pass the Religious Freedom Restoration Act of 1993, which the Court held to overturn *Smith II* as applied to federal government action. *Smith II*, however, still applies to nonfederal government action and the doctrine of hybrid rights is still invoked by plaintiffs in an attempt to trigger heightened review. San Jose Christian Coll. v. City of Morgan Hill, 360 F.3d 1024, 1030 n.3 (9th Cir. 2004).

[81] *See Grace*, 451 F.3d at 655-56; *San Jose Christian Coll.*, 360 F.3d at 1031-32; Axson-Flynn v. Johnson, 356 F.3d 1277, 1301 (10th Cir. 2004); Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752, 764-65 (7th Cir. 2003); Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999); Swanson v. Guthrie Indep. Sch. Dist., 135 F.3d 694, 699-700 (10th Cir. 1998); McDonough v. The Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996); Brown v. Hot, Sexy, and Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995) (rejecting plaintiffs' contention that their free exercise claim falls under the hybrid rights exception); Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 472-73 (8th Cir. 1991).

[82] Leebaert v. Harrington, 332 F.3d 134, 143-44 (2d Cir. 2003); Kissinger v. Bd. of Trs. of the Ohio State Univ., 5 F.3d 177, 180 (6th Cir. 1993).

[83] *See* Soc'y of Separationists, Inc. v. Herman, 939 F.2d 1207, 1216 (5th Cir. 1991) (holding that the plaintiff's claim succeeds under the free exercise clause and is consistent with the hybrid rights exception); Chalifoux v. New Caney Indep. Sch. Dist., 976 F. Supp. 659, 671 (S.D. Tex. 1997) (holding a school prohibition of rosaries invalid because it violated plaintiff's free speech rights, was void for vagueness, and did not pass heightened scrutiny under the hybrid exception in *Smith II*); Ala. & Coushatta Tribes of Tex. v. Trs. of the Big

explicit that the hybrid rights theory is surplusage, used to bolster an already successful non-free exercise constitutional violation.[84] Only the Ninth and Tenth Circuits have addressed the question of how strong an independent constitutional right would need to be to assert a cognizable hybrid rights claim.[85] They require plaintiffs, in addition to asserting a free exercise claim, to "assert at least a 'colorable' claim to an independent constitutional right,"[86] and "a 'fair probability' or a 'likelihood' . . . of success on the [companion claim]."[87] But this approach still remains largely theoretical because there does not appear to be a single case where a plaintiff has prevailed on such a hybrid rights claim.[88]

This experience in the lower courts reflects an understandable reluctance to recognize a hybrid right. Unlike the aggregate harm cases discussed previously, hybrid rights cases do not involve situations in which multiple claims address a

Sandy Indep. Sch. Dist., 817 F. Supp. 1319, 1332 (E.D. Tex. 1993) (avoiding the application of *Smith II* and applying the hybrid exception just because the plaintiffs "have alleged a hybrid claim").

[84] Rader v. Johnston, 924 F. Supp. 1540, 1550 n.21 (D. Neb. 1996) (stating that hybrid rights claims are not independent but rather are used to "bolster [a] Free Exercise claim by demonstrating [a] violation of another fundamental constitutional right"); Jane L. v. Bangerter, 794 F. Supp. 1537, 1547 (D. Utah 1992) (holding that the hybrid rights exception does not apply because the plaintiffs have not alleged a "violation of another constitutional protection"); Kissinger v. Bd. of Trs. of the Ohio State Univ., 786 F. Supp. 1308, 1313 (S.D. Ohio 1992) (stating that the hybrid rights exception only applies when a plaintiff is "entitled to relief based on more than one constitutional theory"); *see also* Esser, *supra* note 8, at 242-43 ("[W]hen a court allows a hybrid to 'win' by applying strict scrutiny to the claim, it never does so as the primary basis for the decision.").

[85] *See Grace*, 451 F.3d at 656 ("[L]itigant is required to assert at least a 'colorable' claim to an independent constitutional right to survive summary judgment.").

[86] *Id.*

[87] Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999).

[88] *See* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN. ST. L. REV. 573, 578-79 (2003) (collecting cases). In cases where the hybrid rights claim fails, the court often finds that the plaintiff has not met the burden of showing a colorable claim. *See, e.g.*, *Grace*, 451 F.3d at 656 ("[Appellant] has not presented a colorable independent constitutional claim."); *Miller*, 176 F.3d at 1208 (holding the plaintiff's companion constitutional claims were meritless); Christian Legal Soc'y v. Kane, No. 04-04484, 2006 WL 997217, at *26 (N.D. Cal. May 19, 2006) ("Because the Court finds that none of CLS's claims for violations of their constitutional rights have merit, there is no basis for their alleged 'hybrid-rights' claim."); Jacobs v. Clark Cty. Sch. Dist., 373 F. Supp. 2d 1162, 1188 (D. Nev. 2005) ("The Court has found . . . that Plaintiffs do not have a viable Freedom of Expression claim."); Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch, 406 F. Supp. 2d 507, 520 (D.N.J. 2005) ("[S]uch a 'hybrid rights' claim fails because plaintiffs' other constitutional law claims fail."). Even in cases where a plaintiff has made a colorable claim, their case fails because the government action meets the requirements of any heightened scrutiny. Vineyard Christian Fellowship of Evanston, Inc. v. City of Evanston, 250 F. Supp. 2d 961, 989 (N.D. Ill. 2003).

single constitutional harm. Nor do they involve rights that stem from multiple constitutional sources, as do the claims in the intersectional rights category to which we next turn.

III. INTERSECTIONAL RIGHTS

In contrast with the purely additive nature of the hybrid rights doctrine, many constitutional cases involve multiple constitutional claims that gain meaning when heard together and amplify the cognizable harm. Many of the cases that could be dismissed as "two-for-one sales" may actually be intersectional cases that deserve to be heard. It is thus crucial that courts understand how to distinguish hybrid rights cases from intersectional ones.

The notion of intersectional harm has long been a feature of employment discrimination scholarship, most notably associated with writers in the late 1980s and early 1990s who observed that claims of discrimination brought by women of color were often misunderstood by courts because they were cognizable only as either sex discrimination or race discrimination claims.[89] Coined by Kimberlé Crenshaw, the term "intersectionality" sought to bring courts' attention to the ways in which black women's claims of discrimination often fell through the cracks. They were not discriminated against as women, nor were they discriminated against as black; instead, they were discriminated against in a more particularized way, one that drew on both identities and magnified the discrimination. Having to characterize particular events as

[89] *See* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40 (criticizing the "single-axis framework dominant in antidiscrimination law"). Other legal scholars also contributed to the development of intersectionality theory. *See, e.g.*, Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539, 539 ("[Decrying [the dearth of writings on the legal problems of minority women and urg[ing] minority feminist legal scholars to focus their professional energies on filling the gap."); Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 395-96 (urging courts to consider "the interactive relationship between racism and sexism" in antidiscrimination law); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) (arguing that "gender essentialism" neglects the voice of black women). Scholars working in fields such as philosophy and sociology simultaneously developed the idea in those fields. *See, e.g.*, PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 299 (2d ed. 2000) (explaining intersectionality); ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 1-9 (1988) (arguing that feminist theory reflects a white and middle-class bias). Intersectionality has continued to be an important theory in employment discrimination literature; it has made some inroads into court decisions, and it has been the subject of scholarship in a range of disciplines. *See, e.g.*, Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994); Hae Yeon Choo & Myra Marx Ferree, *Practicing Intersectionality in Sociological Research: A Critical Analysis of Inclusions, Interactions, and Institutions in the Study of Inequalities*, 28 SOC. THEORY 129, 130 (2010).

evidence of *either* race or sex discrimination diluted the force of their claims and failed to account for the harm they experienced.[90]

This concept can be applied with equal force in the constitutional context. In the constitutional context, however, the theory is not limited to cases involving two types of discrimination. Thus, although it is certainly possible to think of intersectional claims involving multiple types of invidious discrimination that work together to cause constitutional harm, in many other instances, the intersectionality often will flow not from harm based on multiple subordinated identities but from the interaction of multiple constitutional rights.

Although our application of intersectionality theory to constitutional law is new, the recognition of intersectional rights is not. This recognition has periodically emerged in constitutional doctrine in various guises—as "penumbras" emanating from a litany of distinct constitutional rights in *Griswold*,[91] as "fundamental rights equal protection" in cases such as *Zablocki v. Redhail*,[92] and, more recently, in Justice Kennedy's LGBT rights jurisprudence in *Romer v. Evans*,[93] *Lawrence*,[94] *Windsor*,[95] and *Obergefell*,[96] in which substantive due process and equal protection claims operate in tandem. In all of these instances, we believe that the Court was grasping to express why the simultaneous violation of multiple distinct constitutional rights can result in cognizable constitutional harm. We argue that rights can augment each other and that the Court has been correct in recognizing a violation in many of these cases.

In subsequent sections, we will also develop how an additional right may perform a different function: an *evidentiary* function, helping judges to better understand the nature of a violation; a *unifying* function assisting in the development of a new constitutional standard separate from that used in either constitutional claim; and conversely, a *limiting* function, constraining another right and encouraging a court to proceed more cautiously.

A. *Equal Protection and Substantive Due Process*

The idea of intersectional constitutional rights has been well developed in a particular context: cases in which equal protection and substantive due process rights are both at issue. Traditionally, substantive due process has protected a limited menu of "fundamental rights" from government intrusion, while equal

[90] For an excellent example, see the treatment of the *Jew* case in Sumi K. Cho, *Converging Stereotypes in Racialized Sexual Harassment: Where the Model Minority Meets Suzie Wong*, 1 J. GENDER RACE & JUST. 177, 195-99 (1997) (describing a hostile working environment case created by "[g]ender stereotypes with racial overtones").

[91] Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion.").

[92] 434 U.S. 374, 386 (1978) (reaffirming the fundamental character of the right to marry).

[93] 517 U.S. 620 (1996).

[94] Lawrence v. Texas, 539 U.S. 558 (2003).

[95] United States v. Windsor, 133 S. Ct. 2675 (2013).

[96] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

protection has protected individuals against discrimination by the government.[97] But in some cases, these rights have merged.

The doctrine of "fundamental rights equal protection" is a good example. Under this doctrine, even rights that might not have received protection under the Due Process Clause standing alone can be vindicated when they are infringed in unequal ways. For example, the right to marry, the right to travel, the right to procreate, and the right to vote have all been rights that have been understood in this manner.[98] These rights may not exist independently as either enumerated rights or as due process protections, but once the government grants or denies them in a discriminatory manner it must justify its discrimination at the level of heightened scrutiny. In other words, under the fundamental rights equal protection doctrine, the discrimination augments the harm of governmental intrusion into or denial of a right.

Pamela Karlan has used the apt phrase "stereoscopic harm" to show that equal protection analysis and substantive due process norms can influence each other: "the ideas of equality and liberty expressed in the equal protection and due process clauses each emerge from and reinforce the other."[99] In particular, Karlan observes that "looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself."[100] Similarly, Kenneth Karst approves of the Court's "integration of appeals to equality and liberty" in constitutional privacy cases because "the two Clauses . . . are expressions of the substantive core of the Fourteenth Amendment, which is a guarantee of equal citizenship."[101]

One important intersectional rights case highlighted by Karlan is *M.L.B. v. S.L.J.*[102] There, Justice Ginsburg's majority opinion struck down a statute terminating a mother's parental rights based on her financial inability to pay a fee, relying on both the Equal Protection and Due Process Clauses of the Fourteenth Amendment.[103] The Court emphasized that a long line of prior

[97] Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing how substantive due process provides "heightened protection against government interference with certain fundamental rights and liberty interests" (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997))).

[98] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (right to travel); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); United States v. Guest, 383 U.S. 745, 757 (1966) (right to travel); Reynolds v. Sims, 377 U.S. 533, 554 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (right to procreate).

[99] Karlan, *supra* note 18, at 474.

[100] *Id.*; *see also* Karst, *supra* note 17, at 99 ("[T]he right of equal citizenship . . . has also found notable expression in substantive liberties protected by the Due Process Clause.").

[101] Kenneth L. Karst, *Those Appealing Indigents: Justice Ginsburg and the Claims of Equal Citizenship*, 70 OHIO ST. L.J. 927, 938 (2009); *see also* Karst, *supra* note 17, at 137-38 (observing a trend away from equal protection categories).

[102] 519 U.S. 102 (1996).

[103] *Id.* at 113-15, 120.

decisions concerning access to courts "reflect both equal protection and due process concerns," implicating equal protection by singling people out "based solely on their inability to pay" but also the due process concern regarding "the essential fairness" of such action.[104] In contrast, Justice Clarence Thomas in dissent objected that the majority did not sufficiently "specify the source of the relief" it granted and that its reasoning was "ambiguous."[105] Karlan observes that the result in *M.L.B.* "can be explained only by importing due process into the equal protection theory."[106] It was well established that litigants in civil cases do not have a right to appeal at state expense, and that poverty alone does not produce a due process violation. Only by demonstrating her interest in having a continued relationship to her child was "far more precious than any property right"[107] was M.L.B. able to demonstrate that her lack of access to the courts violated equal protection. As Karlan puts it, "[e]qual access was required because the right being adjudicated in the underlying proceeding was a fundamental one."[108] *M.L.B.* provides a preview to the Court's recent adoption of an intersectional rights approach in a much more widely noted case in *Obergefell.* There, Justice Kennedy described the harm suffered by gays and lesbians primarily as a violation of their due process liberty rights. He noted, however, that the right derives also from equal protection: "The Due Process Clause and the Equal Protection Clause are connected in a profound way," the opinion explains, "though they set forth independent principles."[109] In a nod to those who believe the two clauses protect distinct rights, the opinion notes that "[i]n 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."[110]

The opinion then spends a substantial amount of space working through previous cases in which equal protection and substantive due process have converged. *Loving v. Virginia*,[111] the case in which the Court invalidated a ban on interracial marriage, for example, rested on both equal protection and substantive due process principles.[112] The *Obergefell* opinion acknowledges *Loving*'s conceptual merging of the two clauses; *Loving* held that "[t]o deny this fundamental freedom [of marriage] on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely

[104] *Id.* at 120.

[105] *Id.* at 130 (Thomas, J., dissenting).

[106] Karlan, *supra* note 18, at 483.

[107] *Id.* at 482.

[108] *Id.* at 482-83.

[109] Obergefell v. Hodges, 135 S. Ct. 2584, 2602-03 (2015).

[110] *Id.* at 2603.

[111] 388 U.S. 1, 12 (1967).

[112] *Id.* at 12 (citing the Equal Protection Clause first, and then the Due Process Clause as the foundation for the Court's invalidation of the ban).

to deprive all the State's citizens of liberty without due process of law."[113] "The reasons why marriage is a fundamental right," *Obergefell* explains, "became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions."[114]

Obergefell continues to tell the story of the "synergy" between equal protection and due process claims by discussing several additional cases. These include: *Zablocki*, a case decided on equal protection grounds but rooted in the "fundamental right" to marry;[115] *M.L.B.*, which struck down "a statue requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights";[116] *Eisenstadt*, in which the Court invalidated "a prohibition on the distribution of contraceptives to unmarried" women;[117] and *Skinner v. Oklahoma*,[118] which invalidated a law that allowed the sterilization of criminals.[119] Justice Kennedy even his own opinion in *Lawrence*, which struck down an anti-sodomy law under the Due Process Clause, as having drawn on "principles of liberty and equality to define and protect the rights of gays and lesbians."[120]

Having configured the Court's precedents in a way that highlighted the linkages between equal protection and substantive due process, the opinion then considers the principle of same-sex marriage. The opinion could be read as simply striking down the state same-sex marriage bans separately under the Due Process and Equal Protection Clauses: "It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality."[121] But Justice Kennedy went further, implying there is something particularly offensive and harmful about denying marriage to this particular group of people: "Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them."[122]

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[113] *Obergefell*, 135 S. Ct. at 2603 (quoting *Loving*, 388 U.S. at 12).

[114] *Id.*

[115] Zablocki v. Redhail, 434 U.S. 374, 390-91 (1977) (striking down a law that barred fathers who were behind on child support payments from marrying). In *Obergefell*, Justice Kennedy noted that "[t]he synergy between the two protections is illustrated further in *Zablocki*"—where "[t]he equal protection analysis depended in central part on the Court's holding that the law burdened a right 'of fundamental importance.'" *Obergefell*, 135 S. Ct. at 2603 (quoting *Zablocki*, 434 U.S. at 383).

[116] *Obergefell*, 135 S. Ct. at 2598 (citing M.L.B. v. S.L.J., 519 U.S. 102, 119-24 (1996)).

[117] *Id.* at 2604 (citing Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1972)).

[118] 316 U.S. 535 (1942).

[119] *Obergefell*, 135 S. Ct. at 2604 (citing *Skinner*, 316 U.S. at 538-43).

[120] *Id.* (citing Lawrence v. Texas, 539 U.S. 558, 575 (2003)).

[121] *Id.*

[122] *Id.*

Although *Obergefell* states that equal protection and due process can inform one another explicitly, it fails to completely flesh out the way in which harms to liberty that might not reach constitutional magnitude if suffered by everyone take on a different case when inflicted in a discriminatory way. Imagine, for example, that a state, rather than banning same-sex marriage, simply banned marriage.[123] Standing alone, a ban on marriage might not deny individuals their due process rights to liberty if marriage brought with it only limited government benefits. Surely, there is no due process right to be exempt from the estate tax, or to get access to health insurance, or to own a home through tenancy in the entirety—all privileges currently enjoyed by married couples in some states. There might be a due process liberty interest in living with the adult partner of one's choosing, or living with one's genetic relatives.[124] The key to *Obergefell* and the other marriage cases is the bundling of multiple substantial government benefits into a legal status of cultural heft called "marriage," and then denying some but not all people from accessing that status.[125] The Court implied that the discrimination claim and the fundamental rights claim, standing alone, were not as strong. Whether the Court should have instead recognized, for example, that a discrimination claim standing alone sufficed is another important question.[126] *Obergefell* instead held that both constitutional sources inform a constitutional

[123] This is not a merely academic exercise: some lawmakers have recently come out in favor of banning marriage altogether in the wake of the legalization of same-sex marriage. *See, e.g.*, Nicole Flatow, *Oklahoma Lawmaker Wants to Ban All Marriages*, THINKPROGRESS.ORG (Jan. 25, 2014), http://thinkprogress.org/justice/2014/01/25/3205541/oklahoma-lawmaker-ban-marriages-revival-jim-crow-tactic/ [https://perma.cc/72CU-Q49G].

[124] *Cf. Lawrence*, 539 U.S. at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places."); Moore v. City of East Cleveland, 431 U.S. 494, 504-06 (1977) ("The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."); Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1720-21 (2016) (suggesting that "the remaining laws against cohabitation are obsolete and likely unconstitutional").

[125] *See* Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 40-44 (2012) (developing how the administrative state has transformed the institution of marriage by using marital status for the purpose of benefits eligibility determinations); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1377 (2010) (describing an "equal access" requirement grounded in equal protection jurisprudence).

[126] We nevertheless believe that *Obergefell* should have been a winning case for the plaintiffs regardless of whether the intersectional rights doctrine was invoked. As pure sex discrimination claims or claims of discrimination against LGTB individuals, the restriction should still have fallen. Indeed, there are good reasons why such an approach would have been preferable. The choice of an intersectional approach, without making the underlying violations explicit, can avoid necessary discussion of important harms.

analysis that is more demanding than a due process or equal protection analysis conducted separate and apart.[127]

Thus, *Obergefell* recognizes the continuing vitality of fundamental rights equal protection doctrine, stretching back from early cases such as *Meyer v. Nebraska*,[128] decided in 1923, and *Skinner*, decided in 1942, to more recent cases including *Turner v. Safley*,[129] decided in 1987, *M.L.B.*, decided in 1996, and the Court's most recent opinions in *Lawrence* and *Windsor*. Many scholars had not appreciated the strength of that doctrine; some had dismissed the line of cases (despite more recent cases like *Turner* and *M.L.B.*, even putting to one side *Lawrence* and *Windsor*) as a relic of earlier willingness to consider substantive theories of equal protection, which had been displaced by a more process-oriented view.[130] To be sure, the Court did slow its expansion of the doctrine when it declined to recognize a range of potential categories for fundamental rights status.[131] *Obergefell* is a vindication of the view, reflected in that body of case law, that discrimination can be categorically worse when the discrimination concerns a government benefit that is of real social and practical importance, and not simply benign or remedial government action. Further, *Obergefell* is also a vindication of Karlan's and Karst's theories, respectively, of stereoscopic harm and the equal citizenship foundation of both equal protection and due process, theories which validate the basis for fundamental rights equal protection doctrine.[132] We agree with Karlan and Karst that the link between due process and equal protection is particularly deep and salient, and it has been and is likely to continue to be one of the most prominent areas in which intersectional rights claims can be recognized. Neglecting the equality dimension of a government act can mean neglecting discrimination, but equally problematic can be neglecting the due process dimension of a government act. Such neglect could result in the arbitrary denial of very important rights, such as the right to vote.

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[127] *Obergefell*, 135 S. Ct. at 2602-03 (explaining that the Equal Protection and Due Process Clauses can "be instructive as to the meaning and reach" of each other).

[128] 262 U.S. 390 (1923).

[129] 482 U.S. 78 (1987).

[130] *See, e.g.*, Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 217, 285 (1991) (describing the Burger Court's hostility to fundamental rights equal protection as "a judicial overreaction to what many regarded as the dangerously open-ended potential" of the doctrine, as well as a concern that it could have the "potential for judicial wealth redistribution"). Without disagreeing at all with that characterization, we believe the doctrine remains important for understanding the structure of equal protection doctrine. For criticism of the doctrine's potential for wealth redistribution, see, for example, Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 58.

[131] *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 13 (1972) (describing the Supreme Court's "aversion to expansions of the new equal protection" doctrine to include new fundamental rights).

[132] *See generally* Karlan, *supra* note 18; Karst, *supra* note 17.

Karlan describes how a series of the Court's voting rights cases emphasized a substantive right to vote, not just equality because it would not be permissible to deny voting rights to all citizens.[133]

Obergefell is an important step toward recognition of this longstanding but perhaps insufficiently defined connection between equality and due process protections.[134] As we will discuss further, however, what *Obergefell* did not sufficiently do was to define what the intersectional right entails. The Court did not define the test or the standard, beyond stating that the result was informed by the "synergy" between the due process concern with denying access to marriage, combined with the subordination of equal protection. As we will describe, in a range of other contexts, the Court has more clearly explained the legal standard that results from an intersectional constitutional analysis.

Obergefell is relatively rare in its express embrace of an intersectional equal protection-due process approach. Some cases that appear doctrinally muddled come into sharper focus when viewed through an intersectional rights lens (and might have been written more clearly had the Justices adopted this view). Consider, for example, *Plyler v. Doe*,[135] a particularly messy opinion. In *Plyler*, the Court struck down a Texas law that withheld from local school districts state funds for the education of any children were not "legally admitted" to the United States, and allowed local school districts to deny these children enrollment in school.[136] In his majority opinion, Justice Brennan candidly acknowledged that the case did not fit easily into a typical equal protection framework. "Undocumented aliens," he explained, "cannot be treated as a suspect class because their presence in this country in violation of federal law is not a 'constitutional irrelevancy.'"[137] Similarly, "education" is not "a fundamental right" and "a State need not justify by compelling necessity every variation in the manner in which education is provided to its population."[138] Yet the Court required Texas to demonstrate that its law was justified by a showing that it

[133] Karlan, *supra* note 18, at 490 ("The Fourteenth Amendment has simply evolved beyond the point at which a state can strip citizens of their right to participate in choosing the president.").

[134] *Obergefell* is a far from perfect opinion. In addition to its failure to adequately, in our view, develop the equal protection harm caused by discrimination against LGTB individuals, it includes deeply troubling language that some believe is likely to encourage legal doctrines that can marginalize unmarried people. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016). Our focus here is on the opinion's use of an intersectional constitutional analysis; to the extent that the Court's failure to specify the content of the intersection it relied upon, however, the intersectional analysis may have helped to elide important discriminatory harms.

[135] 457 U.S. 202 (1982).

[136] *Id.* at 205.

[137] *Id.* at 223.

[138] *Id.*

served a "substantial state interest"—an intermediate scrutiny analysis.[139] It did so by considering another factor—the cost to the nation of producing a class of uneducated people who would not be able to participate fully in civic life.[140]

At first glance, *Plyler* appears to be misapplying the state interest in its analysis. A traditional equal protection analysis would first ask whether a fundamental right or suspect class was at issue, and, if so, then hold the state to a higher level of scrutiny of its interest and the fit between the interest and the law. Instead, *Plyler* considers the long-term interests of the state in having an educated population as part of the question of what level of scrutiny to apply.[141] Read instead as an intersectional rights case, *Plyler* takes on a different cast. Although the state has an interest in an educated population, the real interest at stake is the interest of the children themselves. *Plyler* goes to great lengths to emphasize the "innocence" of children brought illegally to the United States by their parents,[142] and the lasting harm they will suffer if deprived of an education.[143] The opinion views children as particularly vulnerable, and particularly in need of state protection. What might constitute "due process" for an adult might not for a child. *Plyler* can be read as a case in which the equal protection interest of undocumented children is read intersectionally with the due process interest in obtaining an education, even while neither interest on its own would merit heightened scrutiny.

In short, many of the most famous equal protection and substantive due process cases can be understood as "intersectional rights" cases. The names of the doctrines have changed over time, from "penumbras" to "fundamental rights equal protection" to "rational basis with bite," but the common theme in these cases has been the understanding of courts that some forms of discrimination are particularly invidious because of the importance of the interest being denied.

B. *Intersectionality Beyond Equal Protection and Due Process*

Intersectional equal protection-substantive due process cases are fairly common. One might say that these two rights "travel well together," perhaps in part because of their common history and constitutional context. But we think it is a mistake to limit the intersectional rights theory to due process-equal protection or fundamental rights-equal protection cases. There are many other instances in which rights can operate intersectionally.

For example, as Julie Nice has observed, although the plaintiffs lost in *Christian Legal Society v. Martinez*,[144] Justice Ginsburg recognized that their claims—expressive association and free speech—"merge[d]" and were "closely

[139] *Id.* at 229.

[140] *Id.* at 223.

[141] *Id.*

[142] *Id.* at 224, 230.

[143] *Id.* at 222-24.

[144] 561 U.S. 661, 697 (2010).

linked."[145] The Supreme Court, as it put it in *R.A.V. v. City of St. Paul*,[146] "has occasionally fused the First Amendment into the Equal Protection Clause," in its analysis of speech claims that combine a restriction of speech with evidence of discriminatory enforcement.[147] There is nothing "occasional," of course, about the relevance of content and viewpoint discrimination to First Amendment analysis.[148]

It is also common, of course, for constitutional standards to be informed not just by rights provisions, but also by structural provisions or concerns, such as when federalism concerns temper and inform constitutional interpretation. It is well understood that Supreme Court rulings often narrow the potential scope of constitutional rights by citing federalism concerns. Similarly, in rulings interpreting the reach of congressional or executive power, the Supreme Court may be far less deferential in its analysis if individual rights are implicated.[149] Less appreciated are rulings involving intersectional rights in which a separate federalism or structural provision buttresses an individual right. *Windsor*, as commentators have discussed, incorporates federalism concerns in its analysis, alongside liberty and equality concerns.[150] Federalism concerns often animate decisions that recognize fundamental rights, and those aspects of such decisions are particularly prominent in cases like *Windsor*, in which the Supreme Court surveys emerging consensus in the states.[151] There are also cases in which rights are primarily drawn from multiple structural provisions. *Boumediene v. Bush*,[152]

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[145] *See* Julie A. Nice, *How Equality Constitutes Liberty: The Alignment of* CLS v. Martinez, 38 HASTINGS CONST. L.Q. 631, 665-66 (2011) (quoting *Christian Legal Soc'y*, 561 U.S. at 663) (analogizing this linkage to Justice Kennedy's linkage of equal protection and liberty interests in his *Lawrence* opinion).

[146] 505 U.S. 377 (1992).

[147] *Id.* at 384 n.4.

[148] *Id.*; *see also, e.g.*, Saenz v. Roe, 526 U.S. 489, 504-05 (1999) (discussing right to travel and the right to equal protection); Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 94-95 (1972) (examining ordinance that exempted certain labor picketing from the city's general prohibition on picketing next to a school under an analysis that recognized the "intertwined" nature of the First and Fourteenth Amendments in the case). *But see, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 54 (1983) (declining to impose heightened scrutiny under an equal protection analysis after finding no First Amendment violation had occurred).

[149] *E.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (Jackson, J., concurring) (stating that where seizure of steel mills implicated Fifth Amendment due process rights concerning property, "One gives a governmental authority that reaches so far as there is law, the other gives a private right that authority shall go no farther"); *see also* Christopher Bryant & Carl Tobias, Youngstown *Revisited*, 29 HASTINGS CONST. L.Q. 373, 414 (2002).

[150] *See, e.g.*, Gerken, *supra* note 7 (explaining how Justice Kennedy "blurs the lines between federalism, liberty, and equality, and he blurs the lines between structure and rights" in his *Windsor* opinion).

[151] *See* United States v. Windsor, 133 S. Ct. 2675, 2690 (2013).

[152] 553 U.S. 723 (2008).

in which the Court held that habeas corpus privilege must be extended to detainees at the Guantanamo Bay detention camp, can be viewed as a decision attempting to reconcile conflicting executive, legislative, and judicial powers in a context in which individual rights were implicated.[153] While the Court used the Due Process Clause to inform its analysis in that case, it formally relied only upon the Suspension Clause and separation of powers concerns.[154] The relevance of structural considerations to an intersectional constitutional analysis is a broader topic that we cannot adequately treat in this Article.[155]

The Sixth Amendment and other substantive criminal procedure rights share the same type of intersectional relationship. For example, we have discussed effectiveness of counsel cases, where if the defense lawyer failed to prevent another constitutional violation at trial, the defense lawyer may have been particularly ineffective.[156] A range of due process claims work the same way. The Supreme Court's decision in *Panetti v. Quarterman*[157] involved the failure to provide an adequate set of procedural rights at a competency hearing in a death penalty case; competency hearings are themselves required by the Eighth Amendment before an execution can occur.[158] As a result, the Court explained that both "the Eighth and Fourteenth Amendments of the Constitution," entitled the inmate to those procedures.[159] A range of other rights may also involve a due process component if the deprivation of the constitutional right is accompanied by arbitrary or inadequate procedures; for example, many of the Court's First Amendment rulings focus on government procedures in the application of regulations to speech, including, of course, the law of prior restraints on speech.[160] When the problem involves a set of government procedures, the

[153] *Id.* at 732.

[154] *See id.* at 771 ("The separation-of-powers doctrine, and the history that influences its design, therefore must inform the reach and purpose of the Suspension Clause."); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision Making*, 91 B.U. L. REV. 2029, 2050-52 (2011) (discussing how the adequacy of the procedures for detainees at Guantanamo Bay guided the *Boumediene* Court's Suspension Clause analysis); Brandon L. Garrett, *Habeas Corpus and Due Process*, 98 CORNELL L. REV. 47, 82-87 (2012) (discussing how the *Boumediene* Court both "disclaimed a due process analysis" while also engaging in a discussion of due process principles that informed its analysis).

[155] Such situations are carefully explored in Coenen's excellent article. Coenen, *supra* note 18, at 1086-88 (arguing that a governmental action may be more easily justified when multiple enumerated powers are referenced to support the action).

[156] *See supra* Section I.B (discussing ineffective counsel cases).

[157] 551 U.S. 930 (2007).

[158] *See id.* at 935 (finding that the State of Texas had failed to follow the constitutionally required procedures at the hearing).

[159] *Id.* at 948 (explaining that the state court had failed to provide due process during the petitioner's competency determination).

[160] *See* George Anastaplo, *Justice Brennan, Due Process and the Freedom of Speech: A Celebration of* Speiser v. Randall, 20 J. MARSHALL L. REV. 7, 19-20 (1986) (describing "how

inquiry may be readily situated in multiple constitutional sources, and the harm of multiple violations may demand a distinct and more searching constitutional analysis.

In some cases, intersectional rights serve to enhance the constitutional claim in an evidentiary manner: the presence of the additional claim helps the judge to "see" the more complete constitutional problem. For example, in fundamental rights equal protection cases, the added equal protection claim may help the judge to "see" animus by making relevant to the analysis whether the fundamental right was being denied selectively to only members of a disfavored group.

Several constitutional cases point to an additional way that intersectional constitutional analysis can function by making new evidence relevant to the Government's asserted interest. Thus, the additional constitutional right may not just reveal enhanced harm to the plaintiff, but it may also undercut the Government's defense. Rather than reinforcing another right, the added right may instead negate the government interest asserted. Thus, as in *Obergefell*, the Government may assert an interest in encouraging procreation and childrearing, but an equal protection claim calls into question why the Government is not asserting an interest in procreation and childrearing by same-sex couples.

Similarly, in *Skinner*, the State asserted an interest in sterilizing offenders who committed three or more crimes of "moral turpitude" but the law laid "an unequal hand on those who have committed intrinsically the same quality of offense," because white collar felonies like embezzlement were not included in the coverage of the statute.[161] The equal protection claim called into question the degree of the State's interest in limiting procreation of felons who had exhibited "moral turpitude," if the State was only interested in applying its policy of eugenics to sterilize lower-class felons and not the financial criminals. The rights were mutually reinforcing where the second claim made relevant additional evidence that undercut the government interest asserted.

C. *Distinguishing Hybrid from Intersectional Cases*

Perhaps the most challenging task judges must undertake in cases involving cumulative constitutional rights is determining which cases are hybrid rights cases and which are intersectional cases—separating the wheat from the chaff, if you will. In many cases, this will be easy. A plaintiff who claims two independent constitutional violations, neither of which has anything to do with the other, will need to prevail on at least one, independently of the other, in order to win her case. But in many other cases, the line between a (losing) hybrid case and a (winning) intersectional case may be thin, and may come down to effective

much the freedom of speech and of the press has always depended upon a considerable respect for due process"); Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1427 (2014) (arguing that the Eighth Amendment includes an implicit due process right to know the details of a lethal injection procedures a state plans to use).

[161] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

lawyering. Some cases that courts have rejected because of a plaintiff's hybrid rights theory might actually have been very strong intersectional claims if the plaintiff's lawyer or the judge had understood them that way.

Consider again the progeny of the *Smith II* case. Many scholars have ridiculed *Smith II* for relying on a "bad claim + bad claim = good claim" mathematical formula.[162] But as Ming Chen has argued, there are many instances in which restrictions on free exercise coexist with racial or ethnic discrimination. Perhaps—because of the independent commitment to equality inherent in the Equal Protection Clause—minorities who are subject to otherwise "neutral" laws that suppress their free exercise of religion suffer a distinctive harm not experienced by those in the majority.[163] If that is so, then the way to make sense of *Smith II* is to treat it going forward as requiring a showing not just of two unrelated constitutional harms but a specific showing in particular cases of intersectional harm flowing from multiple constitutional sources.

Or consider again *Fiallo*. Sex plus illegitimacy should no more lead to heightened scrutiny than either sex or illegitimacy alone.[164] But what if instead, the plaintiffs could have shown that they had a fundamental right to family unity, which was being impinged upon in a discriminatory manner? The *Fiallo* decision is frustrating, to our ears, not because it denies the double-barreled discrimination of sex and illegitimacy, but because it does not recognize the separate fundamental importance of family life, and its intersectional relation to equal treatment.[165]

Compare *Fiallo* to *Din*, where the plaintiff tried to ground her claim both in her liberty interest in marital unity and her procedural due process rights as a U.S. citizen.[166] Although Justice Scalia's plurality opinion failed to recognize her claim and garnered a majority for that outcome,[167] the concurring opinion of Justices Kennedy and Alito would not have reached the question of a liberty interest,[168] while Justice Breyer's dissent reached and recognized the

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[162] *See supra* notes 78-86 and accompanying text (discussing the Court's "incoherent" reasoning in *Smith II*).

[163] Ming Hsu Chen, Note, *Two Wrongs Make a Right: Hybrid Claims of Discrimination*, 79 N.Y.U. L. REV. 685, 687 (2004) (arguing that the hybrid rights exception is justifiable using intersectionality theory).

[164] Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (denying petitioner's claim that refusing to grant illegitimate son's visa on the basis of their relationship does not violate his constitutional rights).

[165] Recently, the Court again reaffirmed it does not respect that right, but in *Din*, only a plurality of three unequivocally held that there is no such right. Kerry v. Din, 135 S. Ct. 2128, 2136 (2015) (plurality opinion).

[166] *Id.* at 2131 (denying petitioner's claim that she had a constitutional right to reside in the United States with her husband, who was denied a visa).

[167] *Id.*

[168] *Id.* at 2139 (Kennedy, J., concurring in the judgment).

intersection of these two rights.[169] Justice Breyer wrote, "the institution of marriage, which encompasses the right of spouses to live together and to raise a family, is central to human life, requires and enjoys community support, and plays a central role in most individuals' 'orderly pursuit of happiness.' . . . Similarly, the Court has long recognized that a citizen's right to live within this country, being fundamental, enjoys basic procedural due process protection."[170]

Justice Scalia's plurality opinion misconstrued Din's claim as a "double-barreled" right similar to the one made in *Fiallo*: "The dissent supplements the fundamental right to marriage with a fundamental right to live in the United States in order to find an affected liberty interest."[171] What we find compelling about Din's claim is its nuanced understanding that procedural interests can affect substantive liberty interests. Din claimed not that she was entitled to family reunification because of her liberty interest in her marriage, but rather that her liberty interest in her marriage, coupled with her rights as a U.S. citizen, entitled her to sufficient due process to understand the reasons why her husband was being excluded from the United States.[172] The way in which the two independent constitutional provisions of liberty and equal protection interacted in her particular case led to a very specific constitutional claim. Understanding the claims made in *Fiallo* in this way might not have been enough in that case, where the plaintiffs were seeking actual visas rather than procedural due process in applying for visas.[173] But a claim that family unity is an important liberty interest, coupled with gender and illegitimacy discrimination in the allocation of family unity, seems to us a much stronger claim than simple gender and illegitimacy discrimination taken together.

IV. INTERSECTIONAL RIGHTS IN ACTION

An intersectional right can lead, as described in the sections above, to a court's application of more stringent constitutional scrutiny. Sometimes, however, intersectional rights can operate differently. Sometimes courts respond to recognition of intersectional rights by fashioning new constitutional standards with tests of their own. When this occurs, lower courts may be less tentative in applying the doctrine because articulating it as an independent "test" gives it a heft that a highly fact-specific analysis would not have. Conversely, intersectional analyses can sometimes lead to a tightening up of doctrine that a purely expansive approach would not take. The application of the second right can constrain the expansion of the first.

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[169] *Id.* at 2142 (Breyer, J., dissenting).

[170] *Id.* (citations omitted).

[171] *Id.* at 2134 (plurality opinion).

[172] *See id.* at 2132 (borrowing from the Ninth Circuit's conclusion that the petitioner "ha[d] a protected liberty interest in marriage that entitled [her] to review of the denial of [her] spouse's visa").

[173] Fiallo v. Bell, 430 U.S. 787, 791 (1977).

A. *Fashioning New Constitutional Standards*

There are numerous examples of the Court's willingness to fashion a new constitutional standard once it has undertaken a constitutional analysis.[174] For example, in *Strickland*, discussed above, the right to *effective* assistance of counsel at trial and during pretrial representation reached further than the Sixth Amendment text, which guarantees a right to a lawyer but not an effective one.[175] Grounded in an intersection of the Sixth Amendment right to counsel and Fourteenth Amendment due process rights, the test outlined in *Strickland* is now routinely applied in cases independently—a new doctrine emerging from an intersectional analysis. More recently, some commentators have viewed *Obergefell* as establishing a new doctrine: Laurence Tribe calls it "the doctrine of equal dignity."[176]

Another prominent ruling that arose from the intersection of constitutional claims is *Batson v. Kentucky*,[177] in which the Court ruled that prosecutors may not use peremptory challenges to exclude jurors solely because of their race.[178] The Court developed the *Batson* test as one that was not solely supported by Fourteenth Amendment doctrine, nor by the Sixth Amendment right to a jury trial in a criminal case, but rather by both.[179] Other equal protection claims have that flavor, including, of course, the right to marry decisions already discussed. The list goes on and on, and in each context the extension of prior precedent in a given area may be explained by the relevance of more than one constitutional source. However, in each area, there may be additional controversy about the implications of drawing on more than one constitutional source, and particularly whether the Court is doing full justice to the distinctive constitutional concerns raised by the implicated constitutional rights.

[174] Coenen terms this type of interaction a form of "combination analysis." Coenen, *supra* note 18, at 1075. One minor departure from this characterization is that we view the salient feature of this form of intersectional analysis as the creation of an entirely new constitutional standard, whether that standard is located in one or more constitutional clauses.

[175] Strickland v. Washington, 466 U.S. 668, 684-86 (1984) ("The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment . . . .").

[176] Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 20 (2015). Tribe also describes this new doctrine as one that fuses equal protection and due process rights. *Id.*

[177] 476 U.S. 79 (1986).

[178] *Id.* at 100 (requiring the prosecutor to provide a neutral explanation for a decision to peremptorily strike all black persons from the jury).

[179] *Id.* at 83 (considering argument from defense counsel that prosecutor's discriminatory use of peremptory strikes violated "petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross section of the community, and under the Fourteenth Amendment to equal protection of the laws").

To provide one more example, in *Bearden v. Georgia*,[180] a case cited in *Obergefell*,[181] the Supreme Court held that the sentencing court could not revoke the defendant's probation for failure to pay a fine and restitution to the victim, without supported findings that he was responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence.[182] Justice O'Connor's opinion, citing a long line of cases, particularly the line of access to courts cases that include *Griffin v. Illinois*,[183] emphasized: "This Court has long been sensitive to the treatment of indigents in our criminal justice system . . . . Due process and equal protection principles converge in the Court's analysis in these cases.[184] However, the bringing together of equality and due process analysis was not an entirely comfortable one. Justice O'Connor noted that "Justice Harlan in particular has insisted that a due process approach more accurately captures the competing concerns," but in other decisions the Court had tried to keep the concerns distinct.[185] In *Bearden*, the Court ultimately reached its conclusion by stating that the procedures in question violated "fundamental fairness," but emphasized that "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis, but rather requires a careful inquiry into" the government ends, the means, and the affected individual interests.[186] Perhaps such multifactored balancing tests can more readily accommodate multiple constitutional interests, since they are designed to handle a particular type of government action, and can include factors that reflect more than one constitutional concern. The resulting new formulation of a constitutional right need not choose between competing values, either, if the constitutional sources are compatible.

Still other constitutional rights involve the formulation of a new constitutional standard that is premised on the failure of officials to adhere to pairs or sets of constitutional rights. The Supreme Court's well-known ruling in *Miranda* requiring police to give the famous warnings before proceeding with a custodial interrogation, lest the resulting confession statements be suppressed in-court, focused on the Fifth Amendment right to be free from compelled incrimination.[187] Yet, the *Miranda* ruling has puzzled scholars and engendered

[180] 461 U.S. 660 (1983).

[181] Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

[182] *Bearden*, 461 U.S. at 674.

[183] 351 U.S. 12, 17 (1956).

[184] *Bearden*, 461 U.S. at 664-66 (citing *Griffin*, 351 U.S. at 17).

[185] *Id.* at 664-65 ("As we recognized in *Ross v. Moffitt*, . . . we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." (citation omitted)).

[186] *Id.* at 666, 674.

[187] Miranda v. Arizona, 384 U.S. 436, 473 (1966).

real controversy because it regulates not compelled self-incrimination on the witness stand at trial, but a question of trial evidence and waiver during pretrial questioning by police. One of the authors has argued that *Miranda* can be better understood as a case regulating the intersection of constitutional law and the law of evidence, where the constitutional right necessarily touches on questions of admissibility.[188] The *Miranda* right is also more fully understood as a cumulative constitutional right. The Court's analysis was informed by the Sixth Amendment right to counsel. After all, one of the key warnings to be given in the interrogation room was the right to counsel. As the Court put it, a suspect facing interrogation must be warned of the "the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him."[189] The dissent argued that the *Miranda* opinion "fails to show that the Court's new rules are well supported, let alone compelled, by Fifth Amendment precedents. Instead, the new rules actually derive from quotation and analogy drawn from precedents under the Sixth Amendment, which should properly have no bearing on police interrogation."[190]

Justice Harlan, in his dissent, seemed to assume that to draw on constitutional authority outside the Fifth Amendment was an obvious error rather than a strength of the ruling.[191] Justice Harlan argued that the Sixth Amendment was in reality the "linchpin" of the *Miranda* ruling, and that the concern with interrogating a suspect who had not spoken to a lawyer relied more on Sixth Amendment rulings[192] like *Gideon v. Wainwright*.[193] The dissent was not off the mark. The majority in *Miranda* had emphasized, "[d]enial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal."[194]

Where the Justice Harlan missed the mark was to suggest that the Court was wrong to focus on the interplay between both constitutional rights. The Sixth

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[188] Brandon L. Garrett, *Constitutional Law and the Law of Evidence*, 71 CORNELL L. REV. 57, 62 (2015).

[189] *Miranda*, 384 U.S. at 473.

[190] *Id.* at 509 (Harlan, J., dissenting).

[191] *Id.* at 510 ("I turn now to the Court's asserted reliance on the Fifth Amendment, an approach which I frankly regard as a *trompe l'oeil*.").

[192] *Id.* at 513 ("[T]he Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court but whose judicial precedents turn out to be linchpins of the confession rules announced . . . .").

[193] 372 U.S. 335, 345 (1963) (interpreting the Sixth Amendment to require that indigent criminal defendants in state court proceedings be provided counsel).

[194] *Miranda*, 384 U.S. at 472-73 (first citing *Gideon*, 372 U.S. 335 (1963); then citing Douglas v. California, 372 U.S. 353 (1963)); *see also* Michigan v. Jackson, 475 U.S. 625, 639 n.2 (1986) (Rehnquist, J., dissenting) ("Even under *Miranda*, the 'right to counsel' exists solely as a means of protecting the defendant's Fifth Amendment right not to be compelled to incriminate himself.").

Amendment right to counsel is centrally related to the waiver of other rights, like the Fifth Amendment privilege. A criminal suspect may only be able to intelligently waive certain rights after consulting with a lawyer.[195] The rights are intersectional, and the result was a new standard—the *Miranda* right—which combines a Sixth Amendment concern for a right to counsel and adequate waiver of that right, with the Fifth Amendment privilege against self-incrimination.[196] Later cases developed the contours of that right, in rulings such as *Edwards v. Arizona*,[197] holding that questioning must cease if the right to counsel is invoked during custodial questioning, and where the litigated asserted rights under the "Fifth, Sixth, and Fourteenth Amendments," but the Court simply noted that *Miranda* protects a "right to counsel."[198]

We also raise a cautionary lesson regarding formulation of new constitutional standards addressing multiple constitutional rights. In the wake of *Miranda* and *Edwards*, later cases have also had to work out more complex issues surrounding the intersection of Sixth Amendment and Fifth Amendment claims, such as when police initiate questioning after the state automatically appoints counsel. The Supreme Court has arguably misunderstood the intersectional nature of the *Miranda* right and used that right in a way that erodes separate Sixth Amendment rights.[199] The intersectional right should be understood as an independent constitutional standard; otherwise there is the danger that it can be misread to influence the interpretation of the underlying protections when analyzing separate rights.[200]

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[195] *Miranda*, 384 U.S. at 467 ("[T]o permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.").

[196] *Id.* at 478-79 (holding certain procedural warnings, including the suspect's right to consult with an attorney, are necessary to meaningfully protect the privilege against self-incrimination).

[197] 451 U.S. 477 (1981).

[198] *Id.* at 478, 485.

[199] *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 786-87 (2009) (holding that courts need not presume waivers of the right to counsel during interrogation are invalid, even if counsel was appointed at arraignment, and rejecting the "wholesale importation of the *Edwards* rule into the Sixth Amendment"). Scholars have criticized the Court's handling of the intersection of Fifth and Sixth Amendment concerns in that ruling, arguing that *Montejo* was wrong to suggest "that the formal waiver procedure established by *Miranda* and its progeny provides sufficient protection of a defendant's Sixth Amendment right to counsel." Eda Katherine Tinto, *Wavering on Waiver*, Montejo v. Louisiana *and the Sixth Amendment Right to Counsel*, 48 AM. CRIM. L. REV. 1335, 1335 (2011).

[200] Coenen discusses a type of error termed a "non-counting error," in which a subsequent court fails to understand the joint-origins of a precedent upon which it relies. Coenen, *supra* note 18, at 1074. This situation involves something still more complex and problematic: error in the application of a prior precedent involving joint-rights to a context involving only one of the rights.

B. *Cumulative Rights as Constraints*

Conversely, intersectional rights cases can act as a constraint on the unbridled expansion of rights jurisprudence. Sometimes, the fact that an analysis is intersectional *prevents* it from being applied in future cases. For example, some view the equal protection analysis in cases such as *Obergefell* as potentially narrowing the analysis, by making it permissible to deny a good, such as access to marriage, to all individuals.[201] In prior rulings, including *Lawrence* and *Windsor*, the Court did not identify whether a specific tier of scrutiny should apply, and therefore avoided addressing whether it was protecting LGBT individuals from discrimination, or instead focusing on the fundamental right to sexual autonomy or marriage at hand.[202]

An intersectional analysis may result in a form of constitutional minimalism under that view. As Karlan observed of *M.L.B.*, the substantive due process aspect of the opinion "provided the majority with a response to the dissent's claim that the decision would open the floodgates to all sorts of litigation-access claims: the nature of the interest involved, and the severity of the state impairment of that interest" set the case apart from other civil actions.[203] In contrast, Kenji Yoshino offers a strong reading of *Obergefell*, suggesting that the opinion supports a view that the Court did more by reinvigorating the equal protection and antisubordination aspect of the analysis, making the equal protection aspect far less of a constraint than in prior cases.[204]

The presence of an additional potentially applicable right may enhance the Government's interest in an area, rather than undercut its asserted interest. The Government may have compelling state interests in the area of equal protection law that would not constitute a defense to a due process claim. Or the additional claim may make additional facts relevant that provide additional support for the Government's theory. The Government may also benefit from the ability to rely on multiple enumerated powers to support federal legislation.[205]

Outright conflict between rights claims raises still more complex and distinct issues beyond the scope of this Article. One area that is already becoming an active arena for challenges to *Obergefell* involves the assertion of religious liberty rights in order to challenge same-sex marriage rules; such cases involve potentially conflicting constitutional rights and questions concerning whether rules adequately accommodate any conflict.[206] The Supreme Court generally

[201] *See* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 173 (2015) ("[I]n *Obergefell*, a standard equal protection ruling would have permitted the states either to level up by granting both same-sex couples and opposite-sex couples marriage licenses or to level down by refusing to grant licenses to both sets of couples.").

[202] *See id.* at 147.

[203] Karlan, *supra* note 18, at 483.

[204] Yoshino, *supra* note 201, at 179.

[205] *See* Coenen, *supra* note 18, at 1086-88.

[206] Carl Tobias, *Implementing Marriage Equality in America*, 65 DUKE. L.J. ONLINE 25,

seeks to avoid such conflicts, but the potential conflicts raise analogous questions regarding whether protections are in fact compatible or incompatible, and whether government interests weigh differentially across rights.[207]

V. REIMAGINING INTERSECTIONAL RIGHTS

Reimagining constitutional claims as intersectional can, we believe, highlight the shortcomings in some lines of constitutional cases. In the equal protection setting, the tiers of scrutiny that the Court often ostensibly relies upon are geared towards handling much the same problem that intersectional rights are designed to address: the fact that costs of error are higher when there are multiple reasons to think that a group is being specially targeted, or that the government's asserted interests are particularly flimsy. Indeed, an intersectional approach may at times be more descriptive of what the Court is doing, or what courts should be doing, than the traditional equal protection tiers of scrutiny, which scholars have increasingly observed do not function clearly. For example, William Araiza has described how the Court has relied in recent decisions on congruence and proportionality tests in examining the government's interests, rather than using tiers of scrutiny.[208] That type of interest analysis may be more amenable to the type of cumulative constitutional analysis that we have described, both where the harm to plaintiffs is mutually reinforcing and where a separate right undercuts the government's asserted interest.

As an additional example of how existing jurisprudence could be reconsidered, take the Court's abortion jurisprudence. Many scholars over the years have found *Roe v. Wade* to be doctrinally unsatisfying.[209] Many have been

37-38 (2015).

[207] For example, on one view, by not recognizing the fetus as a person, the Court may have avoided a conflict between substantive due process privacy rights and life interests of a fetus. *See* Roe v. Wade, 410 U.S. 113, 158 (1973). By referring to competing state interests, and not a competing right, the Court can generally avoid the notion that a right might conflict with another right. The Court explicitly resolved such a potential conflict in *Estes v. Texas*, 381 U.S. 532 (1965), ruling that the defendant's fair trial right to due process trumped the public First Amendment interest in a public trial, where the trial was televised. *Id.* at 539; *see also* Bartnicki v. Vopper, 532 U.S. 514, 518 (2001) ("[T]hese cases present a conflict between interests of the highest order—on the one hand, the interest in the full and free dissemination of information concerning public issues, and, on the other hand, the interest in individual privacy and, more specifically, in fostering private speech."). *See generally* Ofer Raban, *Conflicts of Rights: When the Federal Constitution Restricts Civil Liberties*, 64 RUTGERS L. REV. 381 (2012).

[208] *See* William Araiza, *After the Tiers:* Windsor*, Congressional Power to Enforce Equal Protection, and the Challenge of Pointillist Constitutionalism*, 94 B.U. L. REV. 367, 370 (2014) ("[T]he Court's Enforcement Clause jurisprudence has . . . relied heavily on a group's suspect class status when determining whether enforcement legislation benefitting that group satisfies the congruence and proportionality test.").

[209] *See, e.g.*, John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 947 (1973) (offering a series of criticisms of the Court's opinion in *Roe* and

frustrated by the fact that the Court's focus on privacy appeared to come at the expense of a focus on equality. The equality argument, that in order to exercise equal citizenship women need access to abortion, has been popular with scholars[210] and less so with the Court (Justice Ginsburg excepted[211]).

But perhaps there is a third way, in which the Supreme Court could have relied cumulatively on both equal protection and due process protections. The result would have created even more robust protections for women seeking reproductive autonomy. As David Meyer has observed of *Gonzales v. Carhart*,[212] in which the Court upheld the federal Partial Birth Abortion Act of 2003,[213] the Court "pointedly ignored the equality implications of its understanding of women's substantive liberties."[214] Meyer contrasts this treatment with *Lawrence*, where the Court did understand that the due process right to liberty enables equality, and did not choose one theory at the expense of the other.[215]

In still other situations, the Supreme Court has outright rejected any connection between related constitutional rights. In one view, the Court would be correct to do so if constitutional rights conflict and would each call for inconsistent analysis. In that situation, there simply is not an intersectional right.

The broadest statement of a principle against intersectionality was in *Graham v. Connor*,[216] in which the Court stated that where there is an explicit source of constitutional protection, that provision and not more generalized protection applies to claims: "[t]he validity of the claim must then be judged by reference

ultimately calling it "bad constitutional law").

[210] *See, e.g.*, Neil S. Siegel & Reva B. Siegel, *Equality Arguments for Abortion Rights*, 60 U.C.L.A. L. REV. DISC. 160, 163 (2013) (discussing the argument that "abortion restrictions deprive women of control over the timing of motherhood and so predictably exacerbate the inequalities in educational, economic, and political life engendered by childbearing and childrearing"); Reva B. Siegel, *Siegel, J., Concurring*, *in* WHAT ROE V. WADE SHOULD HAVE SAID 63, 64-65 (Jack M. Balkin ed., 2005); Robin West, *West, J., Concurring in the Judgment*, *in* WHAT ROE V. WADE SHOULD HAVE SAID, *supra*, at 121, 141-42.

[211] Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 383 (1985).

[212] 550 U.S. 124 (2007).

[213] *Id.* at 167-68.

[214] David D. Meyer, Gonzalez v. Carhart *and the Hazards of Muddled Scrutiny*, 17 J.L. & POL'Y 57, 84, 86 (2008) (noting only Justice Ginsburg's dissent recognized the case was not only about "some generalized notion of privacy" but also about women's "equal citizenship").

[215] *Id.* at 86 (suggesting *Carhart* signals a change in substantive due process rights announced in *Lawrence*, but not a complete disavowal); *see also* Deborah Dinner, *Recovering the* LaFleur *Doctrine*, 22 YALE J.L. & FEMINISM 343, 345-46 (2010) ("Today, women's rights to sex equality and to reproductive liberty constitute distinct doctrinal categories. The jurisprudence recognizing a right to privacy in reproductive decision-making does not take into account the multiple sex equality interests at stake. Equal protection jurisprudence, likewise, does not address the implications of reproductive liberty for women's equality.").

[216] 490 U.S. 386 (1989).

to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard."[217] In that case, involving an allegation of excessive force during a police chase, the Court held that the analysis should proceed under the Fourth Amendment, and not a Fourteenth Amendment substantive due process theory.[218] The Court added, "Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[219] That statement is clearly wrong, although it reflects the Court's typical aversion to reaching substantive due process questions when it is not necessary to do so. The language can be seen as expressing reluctance to adopt expansive views of substantive due process.[220] However, there is no more general principle than that to be found in the Court's rulings. The more specific enumerated right is not one that "must" apply at the expense of another applicable rights provision. We have discussed countless examples of the Court taking the opposite approach, including, in the criminal procedure context, by applying Sixth Amendment rights alongside due process rights, and even permitting ineffective assistance claims as a means to litigate separate Fourth Amendment claims.[221]

Yet, the statement cannot be so neatly cabined from still other Fourth Amendment cases similarly displaying a formalistic desire not to take into account other potentially compounding constitutional violations. In its decision in *Whren v. United States*,[222] the Supreme Court famously deemed irrelevant to its Fourth Amendment analysis whether there was also racial targeting.[223] Justice Scalia, writing for the Court, explained:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth

[217] *Id.* at 394.

[218] *Id.* at 395.

[219] *Id.*

[220] The most dramatic statement of such a view is Justice Scalia's well-known footnote in his opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), which argued that substantive due process claims should be judged based on the "most specific" and narrowly defined sources in history and tradition. *Id.* at 127 n.6 (plurality opinion); *see also* Laurence Tribe & Michael Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1065-66 (1990).

[221] *See supra* Sections I.A-B (discussing cumulative harmless error and cumulative prejudice in ineffective assistance of counsel jurisprudence).

[222] 517 U.S. 806 (1996).

[223] *Id.* at 814-15. *See generally* Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land:* United States v. Brignoni-Ponce *and* Whren v. United States *and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005 (2010).

> Amendment. Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.[224]

The Court was correctly concerned with potentially opening the door to new breeds of constitutional claims. A "hybrid" claim that would make a separate equal protection violation relevant, even if there was no Fourth Amendment violation, would be troubling. However, that passage did not address the possibility of an intersectional claim. If the officer not only lacked probable cause, but the plaintiff could show discrimination based on race, the combined Fourth Amendment and equal protection concerns would provide far greater cause for a constitutional remedy in a criminal case.

Scholars have criticized the Court's unwillingness to consider the more serious harm engendered when police not only potentially violate the Fourth Amendment, but in a manner that is racially discriminatory.[225] Devon Carbado has explored the "racial insensitivity" of the Court's Fourth Amendment rulings, and its impact on race-based policing practices.[226] A more generous reading of the reasoning in *Whren* would be that the Supreme Court was faced with conflicting constitutional demands, and it could not accommodate the interests or analysis of both equal protection and Fourth Amendment claims. One claim called for an examination of discriminatory intent, while the other required an objective evaluation of the police officer's probable cause supporting the search. The Court might have found the intersection too doctrinally difficult to handle.

Yet, the Court could have treated the claims differently while giving each meaning, using the categories we have described in this Article. First, the Court could have treated the problem as an aggregated harm, where a separate analysis and a separate constitutional violation meant that relief was more deserved. Second, the Court could have treated the problem as intersectional, demanding greater scrutiny of the probable-cause determination by police due to the evidence of racial targeting. Instead, the Court disregarded the evidence of race discrimination.[227] The result means that to challenge police conduct as racially discriminatory one cannot argue that a particular search or seizure was in part

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[224] *Whren*, 517 U.S. at 813.

[225] Akhil Amar has argued generally that "Fourth Amendment reasonableness" should trigger heightened concerns when other constitutional violations are also implicated, including equal protection violations and others. Amar argues that in cases, for example, involving the search of a newspaper: "What was missing was a way of integrating First Amendment concerns explicitly into the Fourth Amendment analysis . . . . The First Amendment lesson can be generalized. For example, searches of attorneys' offices implicate special concerns of attorney-client privilege protected by the Sixth Amendment." AKHIL AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 35, 37 (1977).

[226] *See generally* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 967-68 (2002) ("[T]he Supreme Court's construction and reification of race in Fourth Amendment cases legitimizes and reproduces racial inequality in the context of policing.").

[227] *Whren*, 517 U.S. at 811-13 (refusing to consider the police officer's ulterior motives in determining the reasonableness of the search where probable cause otherwise exists).

unreasonable due to racial targeting. Instead, one must target an entire pattern of selective enforcement in a civil case, which can require data that is prohibitively difficult to obtain, and where the remedy would be of little use to a defendant who primarily seeks to avoid conviction based on an unconstitutional search and seizure.[228] The case, therefore, raises a different selective enforcement concern: that the Court selectively recognizes cumulative constitutional rights.

CONCLUSION

Aggregation of constitutional rights is a pervasive feature of constitutional litigation. Litigants would not neglect to include an additional or alternative constitutional theory in a complaint. Nor should judges be reluctant to consider the additional impact of an additional constitutional right on the analysis. To be sure, for many rights, the interpretive analysis is correctly contained within a single provision. We do not mean to downplay in any way the concerns with misuse of cumulative constitutional analysis, including concerns with textual fidelity, judicial restraint, avoiding undue doctrinal complexity, and other questions of compatibility with models of constitutional interpretation and judicial review.[229] However, where multiple constitutional provisions do apply, it is not necessarily salutary judicial restraint to treat each constitutional right as an island unto itself. Indeed, there are real perils to ignoring a second constitutional dimension to a problem. Real incoherence in constitutional doctrine can flow from ignoring that a due process problem is accompanied by discriminatory treatment in violation of equal protection, or that a violation of a right is compounded by arbitrary treatment in violation of due process.

We have also highlighted how even in the situations in which a court recognizes that more than one constitutional right applies, it is not enough to simply note the fact when granting relief. Doing so provides poor guidance to litigants and judges. Courts should provide particular guidance on *how* the presence of more than one potential constitutional violation affects the analysis. At times, that may mean noting that the analysis is unchanged regardless of which harms are implicated in a given case. Or, it may mean explaining in detail how the presence of more than one violation changes the factors to be considered regarding the harm to the plaintiff, or in negating an asserted government interest.

Thus, we reject the "sui generis" critique of the Supreme Court's rulings in cases such as *Lawrence* and *Windsor* and *Obergefell*. It may not be possible to anticipate how rights will interact in cases going forward. That may not be a

[228] United States v. Armstrong, 517 U.S. 456, 459, 470 (1996); Johnson, *supra* note at 223, at 1064 ("The inability to exclude the fruits of a stop based on impermissible factors under the Equal Protection Clause make any such claim of limited utility to criminal defendants like Whren and Brown, who wanted to avoid conviction and imprisonment, not to recover damages in a civil action . . . .").

[229] For an extended treatment of criticism of cumulative or combination constitutional analysis, see generally Coenen, *supra* note 18.

weakness of the approach, if by considering multiple constitutional sources the rulings comprehensively address the entire constitutional harm, rather than vacillating between addressing one constitutional dimension and another. Simply citing to multiple constitutional sources is not enough, however. Courts should explain what they mean and in doing so they will hopefully avoid the problems raised in the "hybrid rights" situations, in which on closer examination, the notion that two separate non-violations could create a violation does not hold water.

Instead, the three types of cumulative analysis should be specified and should motivate careful constitutional analysis. We contend that when considering cases involving the first category, aggregated harm, courts should be open to hearing evidence of multiple acts because many instances of constitutional harm occur in the form of "death by a thousand cuts" rather than a single blow. In the second type, hybrid rights, we argue that multiple constitutional violations might alert a court to particularly troubling behavior (because they constitute an aggregated harm or undercut the government's interest), but that two half violations do not make a whole: the court needs to actually find a violation of at least one constitutional right in order to grant relief. Finally, as to intersectional rights, we agree that rights addressing closely related harms can be viewed as mutually reinforcing, as for example, equal protection and due process violations can be.

Critics of *Obergefell*, together with the dissenters, are right to raise the concern that without identifying the level of scrutiny, or how it matters that both due process and equality concerns are implicated, the ruling does not provide guidance to lower courts, and it raises the risk that two non-violations could somewhat add up to a violation. However, they overstate their case to suggest that there is anything problematic about jointly analyzing two closely related, if not intertwined and mutually reinforcing, constitutional violations. *Obergefell* highlights the continuing vitality of fundamental rights equal protection doctrine, but it is no outlier; any number of the most commonly litigated constitutional theories involve cumulative theories, particularly intersectional rights. We have also argued that aggregate harm is underused in cases, including in criminal cases, where the doctrine exists for the good reason that a fair trial can be undermined by multiple violations.

Raising two separate but compatible constitutional violations is not "having it both ways," or ignoring some necessary decision or trade-off between asserting one constitutional harm versus another. Rather, as the Supreme Court recognized in *Obergefell*, there can be a "synergy" between separate constitutional provisions.[230] Sometimes the result is considered as a new right, requiring a distinct analysis informed by two constitutional sources, as under our intersectional category. Sometimes the judge should offer relief where the violations would not independently require a remedy, but where the additive harm or weakened government interest demands relief. Formally cabining

[230] Obergefell v. Hodges, 135 S. Ct. 2584, 2603 (2015).

analysis to one "claim" at the expense of larger constitutional purposes across provisions can lead to incoherent and incorrect rulings. When courts cumulate constitutional rights, though, they should be clear about what interests are mutually reinforcing or not, why, and how this affects the analysis or the scrutiny. Cumulative constitutional rights doctrine has long been at the core of constitutional interpretation and if conducted properly, analyzing the mutually reinforcing provisions of the constitution can give greater meaning to the Constitution as a whole.