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## Reconceptualizing Hybrid Rights

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# RECONCEPTUALIZING HYBRID RIGHTS

DAN T. COENEN

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# RECONCEPTUALIZING HYBRID RIGHTS

DAN T. COENEN\*

**Abstract:** In landmark decisions on religious liberty and same-sex marriage, and many other cases as well, the Supreme Court has placed its imprimatur on so-called “hybrid rights.” These rights spring from the interaction of two or more constitutional clauses, none of which alone suffices to give rise to the operative protection. Controversy surrounds hybrid rights in part because there exists no judicial account of their justifiability. To be sure, some scholarly treatments suggest that these rights emanate from the “structures” or “penumbras” of the Constitution. But critics respond that hybrid rights lack legitimacy for that very reason because structural and penumbral interpretive approaches are intrinsically unprincipled and overreaching. As it turns out, however, both proponents and opponents of hybrid rights have taken a wrong turn in their efforts to identify and assess the source of these constitutional safeguards. In fact, hybrid rights are just like other rights in the key sense that each such right emanates from a single constitutional clause. The relevant clause, however, is marked by ambiguity, and courts must deal with that ambiguity as they apply the clause to specific cases. As courts do so, they put to work rules of interpretation, and one of those rules dictates that judges should consider the whole document in deciphering the meaning of any indeterminate text that the document includes. In hybrid-rights cases, courts do nothing more than apply this well-settled canon. They expound the meaning of one, and only one, contested clause by considering, among other things, informative companion provisions. This Article develops and defends this previously unrecognized single-text-viewed-in-light-of-the-whole-document theory of hybrid rights. Of no small significance, this understanding of hybrid rights undercuts all key challenges to their recognition, including that these rights are (1) non-originalist, (2) unduly activist, (3) unmanageable, and (4) counter-textual. Even more important, this new synthesis reveals why there is error—error perhaps attributable to the very nomenclature of “hybrid rights”—in assuming that these rights must reflect judicial usurpation because they seem, at first blush, to be exotic in nature. As this Article shows, hybrid rights are not exotic at all. They are simply rights—rights, just like other rights, rooted in a single constitutional provision, whose ambiguity courts address by consulting the whole document that is the Constitution itself.

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## INTRODUCTION

It is not surprising that, among constitutional analysts, hybrid rights are all the rage. In scores of decisions handed down over many decades, the Supreme Court has signaled that multiple constitutional clauses sometimes give rise to an enforceable right that no single provision by itself puts in place. These decisions account for doctrines that have far-reaching consequence. In cases that involve such important matters as the incorporation of Bill of Rights protections, the scope of criminal-appeal rights, and so-called “First Amendment due process,” the Court has held that constitutional limits can and do emanate from the synergistic interplay of two or more constitutional provisions.

This idea played a particularly prominent role in the Court’s ruling in *Employment Division v. Smith*.<sup>1</sup> There, a five-member majority concluded that generally applicable laws seldom, if ever, violate the Free Exercise Clause.<sup>2</sup> The Court also held, however, that generally applicable laws can offend the Constitution in “hybrid situations,” particularly when free-exercise concerns intersect with substantive due process limits on state control of parenting choices.<sup>3</sup> This aspect of *Smith* triggered some academic commentary, most of it negative.<sup>4</sup> That commentary, however, largely failed to dig beneath the surface.<sup>5</sup>

<sup>1</sup> See generally *Emp’t Div., Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

<sup>2</sup> *Id.* at 878–79.

<sup>3</sup> *Id.* at 881–82.

<sup>4</sup> See *infra* notes 106–114 and accompanying text (collecting negative commentary); see also William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 212 n.8 (1998) (examining lower courts’ application of the “hybrid situations” exception recognized in *Employment Division v. Smith*).

<sup>5</sup> For some of the treatments of the Supreme Court’s treatment of hybrid rights in *Smith*, 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 (2003) (critiquing the “hybrid situations” exception set forth in *Smith*); Alan E. Brownstein, *Constitutional Questions About Vouchers*, 57 N.Y.U. ANN. SURV. AM. L. 119, 120 (2000) (referring to the “hybrid situations” exception as “unintelligible”); Brian A. Freeman, *Expitiating the Sins of Yoder and Smith: Toward a Unified Theory of First Amendment Exemptions from Neutral Laws of General Applicability*, 66 MO. L. REV. 9, 52 (2001) (describing the hybrid-rights approach used in *Smith* as “conceptually flawed”); Eugene Gressman & Angela C. Carmella, *The RFRA Revision of the Free Exercise Clause*, 57 OHIO ST. L.J. 65, 90 (1996) (noting that “the new hybridized grouping of constitutional provisions” called for by *Smith* has “contours . . . which we cannot yet see”); Michael W. McConnell, *Free Exercise Revisionism and the Smith Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990) [hereinafter McConnell, *Free Exercise Revisionism*] (challenging the Court’s hybrid-situations concept of rights); Esser, *supra* note 4, at 218–19 (viewing *Smith* as allowing the combination of two clauses to “create an entirely new constitutional animal”); Peter M. Stein, Note, *Smith v. Fair Employment and Housing Commission: Does the Right to Exclude, Combined with Religious Freedom, Present a “Hybrid-Situation” Under Employment Division v. Smith?*, 4 GEO. MASON L. REV. 141, 172 (1995) (deeming it “particularly difficult to formulate a principled if not systematic approach” to hybrid rights). See generally *infra* notes 106–116 and accompanying text (collecting additional materials). The key point is that most of

Then came *Obergefell v. Hodges*.<sup>6</sup> In that watershed ruling, the Court again put hybrid-rights reasoning to work in invalidating all state restrictions on same-sex marriage. As Justice Kennedy wrote for a five-Justice majority:

The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always co-extensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses converge in the identification and definition of the right. This interrelation of the two principles furthers our understanding of what freedom is and must become.<sup>7</sup>

*Obergefell* touched off a tidal wave of criticism, much of it related to the subject of hybrid rights.<sup>8</sup> In a dissenting opinion, Chief Justice Roberts described

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these treatments addressed the normative questions presented by hybrid rights in only an abbreviated way, without extensively developing both sides of the issue. *But cf.* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474–77 (2002) (reflecting at length on the interactions of the Due Process Clause and Equal Protection Clause in a manner supportive of their hybridized treatment, but not focusing on *Smith*). One significant exception involves the work of Professors Ariel Porat and Eric Posner. *See* Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 48–50 (2012) (characterizing *Smith* as involving “cross-claim normative aggregation” and discussing that concept at length). Their discussion of *Smith*, however, came as only one relatively small part of a much wider ranging discussion of fact-based, party-based, and claim-based “aggregation” in both private and public law. In any event, Professors Porat and Posner did not pause to consider the subject that is the focal point of this Article—namely, the proper doctrinal source of hybrid rights.

<sup>6</sup> 135 S. Ct. 2584 (2015).

<sup>7</sup> *Id.* at 2602–03 (citations omitted). For a few of the treatments highlighting the hybrid-rights nature of the Court’s holding in *Obergefell v. Hodges*, see Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 819 (2014) (explaining *Obergefell*’s rationale as based on the “intertwin[ing] nature of due process and equal protection”); Ilya Somin, *A Great Decision on Same-Sex Marriage—But Based on Dubious Reasoning*, WASH. POST: VOLOKH CONSPIRACY (June 26, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/26/a-great-decision-on-same-sex-marriage-but-based-on-dubious-reasoning> [<https://perma.cc/VY4Q-FL6H>] (explaining that *Obergefell* “does not clearly conclude that either the Due Process Clause or the Equal Protection Clause by itself creates a right to same-sex marriage” because its “claim is that the combination of the two somehow generates that result, even if neither can do so alone”).

<sup>8</sup> *See, e.g.*, Michael Stokes Paulsen, *The Wreckage of Obergefell: An Analysis of the Supreme Court’s 2015 Term*, FIRST THINGS (Oct. 2015), <https://www.firstthings.com/article/2015/10/the-wreckage-of-obergefell> [<https://perma.cc/S2GE-QNWD>]; *see also infra* notes 9–16 and accompanying text (collecting authorities). *See generally* Gregg Strauss, *What’s Wrong with Obergefell?*, 40 CARDOZO L. REV. 631, 637 (2018) (noting “the breadth” of critical commentary); Eliza S. Walker, Note, “*Terms of Heart*”: *Judicial Style in Obergefell v. Hodges*, 61 B.C. L. REV. 1935 (2020) (discussing the reception of the *Obergefell* decision by the legal community).

the majority's reasoning as "quite frankly, difficult to follow."<sup>9</sup> Others decried Justice Kennedy's conjunctive treatment of the Due Process and Equal Protection Clauses as "dubious,"<sup>10</sup> "flawed,"<sup>11</sup> "extremely vague,"<sup>12</sup> "mushy,"<sup>13</sup> and "lacking . . . logical infrastructure"<sup>14</sup>—indeed, even as "[t]errible"<sup>15</sup> and "arrogant as hell."<sup>16</sup> Other analysts, however, saw *Obergefell* in a different light. They emphasized the Court's longstanding practice of "combining constitutional clauses" and explored the "costs and benefits" of this style of judicial decision making.<sup>17</sup> This body of work offers many useful insights. It is, however, marked by a major omission. Nothing in it addresses in depth the most basic question of all: Where do hybrid rights come from?<sup>18</sup>

What is more, to the extent that scholars have touched on this question, their ruminations are sure to leave many other legal analysts ill at ease. Kerry Abrams and Brandon Garrett, for example, posit the existence of so-called "intersectional rights," which they describe as "rights that, when read together, magnify each other," thus creating a "mutually reinforcing and amplifying"

<sup>9</sup> *Obergefell*, 135 S. Ct. at 2623 (Roberts, C.J., dissenting).

<sup>10</sup> Somin, *supra* note 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Charles C.W. Cooke, *A Few Thoughts on Today's Obergefell Supreme Court Decision*, NAT'L REV. (June 26, 2015), <https://www.nationalreview.com/corner/due-process-gay-marriage-gay-marriage-decision/> [<https://web.archive.org/web/20200305002959/https://www.nationalreview.com/corner/due-process-gay-marriage-gay-marriage-decision/>] (quoting Gabriel Malor (@gabrielmalor), TWITTER (June 26, 2015), <https://twitter.com/gabrielmalor/status/614459796444606464>).

<sup>14</sup> Timothy Sandefur, *Gay Marriage Decision: Right for the Wrong Reasons. Dissents: Wrong for Worse Reasons.*, FOUND. FOR ECON. EDUC. (June 26, 2015), <https://fee.org/articles/gay-marriage-decision-right-for-the-wrong-reasons-dissents-wrong-for-worse-reasons/> [<https://perma.cc/5D5C-HCGK>].

<sup>15</sup> *Id.* (adding that "[t]he problem comes at the confluence of the Due Process of Law and Equal Protection Clauses").

<sup>16</sup> Cooke, *supra* note 13 ("The bottom line? That the Court had an outcome to reach, and it set up the scaffolding accordingly. Is it a Due Process case? Is it an Equal Protection case? Who cares? We're doing change, man."). For other expressions of concern, see Mark P. Strasser, *Obergefell's Legacy*, 24 DUKE J. GENDER L. & POL'Y 61, 82 (2016) (describing the Court's opinion in *Obergefell* as "confusing"); Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 856 (2017) (viewing *Obergefell* as treating the interaction of equal protection and due process "cryptically"); see also Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1311 (2017) (suggesting that cases such as *Obergefell* "are widely criticized and maligned as doctrinally incoherent"); Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 326–27 n.232 (2015) (noting authorities that indicate "the gay rights cases defy conventional doctrinal logic").

<sup>17</sup> Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1074–75, 1104–20 (2016) (developing arguments pro and con); see also Abrams & Garrett, *supra* note 16, at 1330 (discussing so-called "intersectional" rights); Zick, *supra* note 16, at 81.

<sup>18</sup> See Zick, *supra* note 16, at 856 (emphasizing that "[i]nterpreters need to explain and defend rights relationships with more depth and clarity" and "elaborate relationships between rights more clearly and cogently").

effect.<sup>19</sup> Bruce Ackerman depicts hybrid rights as springing from a “reflective equilibrium” between “particular clauses” and “general principles.”<sup>20</sup> Michael Coenen describes these constitutional protections as “partially extratextual,” adding that they have something of a “metaphysical” character.<sup>21</sup> He also suggests that these rights may flow from “structural reasoning,”<sup>22</sup> even though the Supreme Court has generally limited this form of analysis—perhaps for the very reason that it stands in “contradistinction to textualism”<sup>23</sup>—to cases involving government powers, as opposed to individual rights.<sup>24</sup>

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<sup>19</sup> Abrams & Garrett, *supra* note 16, at 1315; *see also id.* at 1335–36 (describing *Obergefell* as a case in which “both constitutional sources inform a constitutional analysis that is more demanding”).

<sup>20</sup> Bruce Ackerman, *Robert Bork’s Grand Inquisition*, 99 YALE L.J. 1419, 1425–26 (1990) (book review).

<sup>21</sup> M. Coenen, *supra* note 17, at 1095, 1111. Professor Michael Coenen adverts, for example, to the possibility of understanding clause-combining analysis in terms of viewing one clause “as imposing a high enough number of unconstitutionality points” when added to the “number of constitutionality points” another provision would alone confer. *Id.* at 1098; *see also* Porat & Posner, *supra* note 5, at 49 (discussing hybrid rights in similar terms). In fairness, Michael Coenen’s treatment of the subject focuses on many matters, and along the way he does touch on the “single document” principle of interpretation that takes center stage in this Article. *See* M. Coenen, *supra* note 17, at 1111. He treats that canon only in passing, however, while acknowledging that hybrid rights “can give rise to tensions with . . . the constitutional text.” *Id.* at 1074; *see also* Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1346 (1992) (asserting, albeit in passing, that “penumbral reasoning” involves “a realistic application of textualism” based on “not simply . . . looking for a single relevant section . . . but . . . at the overall scheme” (citing Ackerman, *supra* note 20, at 1426)). In sharp contrast to Michael Coenen’s work, however, this Article does not depict hybrid rights as only “partially extratextual” and thus productive of “tensions” with the Constitution’s written terms. *See* M. Coenen, *supra* note 17, at 1074, 1111. Instead, this Article posits that hybrid rights are *wholly* textual and thus not in tension with the terms of the Constitution at all.

<sup>22</sup> M. Coenen, *supra* note 17, at 1098–1101 (suggesting that hybrid rights may stem from structural analysis of the Constitution as a whole).

<sup>23</sup> Akhil Reed Amar, *Architexture*, 77 IND. L.J. 671, 699 n.104 (2002); *see also* CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 11 (1969) (arguing that a governing constitutional principle can emerge from the structures of the federal system established by the Constitution even when one “can point to no particular text as its authority”).

<sup>24</sup> For the classic treatment of this subject, *see* BLACK, *supra* note 23, at 11 (describing this form of reasoning as “sounding in the structure of federal union, and in the relation of federal to state governments”). For some illustrative treatments of the Court’s modern structural-analysis cases, *see* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087, 1133 (2016) (asserting that, in the Court’s federalism rulings, “a lack of specific textual support is actually par for the course”), and Craig Green, *Erie and Problems of Constitutional Structure*, 96 CALIF. L. REV. 661, 685 (2008) (viewing rulings of this kind as based on “a vision of constitutional structure wherein respect for federalism and separation of powers transcends preoccupation with constitutional text”). Apart from the Court’s inclination to limit the operation of structural analysis to powers-defining—as opposed to rights-related—cases, there is the added difficulty that analysts have increasingly questioned whether structural reasoning has legitimacy in any field of constitutional law. *See, e.g.*, Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1325 n.176 (2019) [hereinafter Colby, *Originalism and Structural Argument*] (noting that “[n]otions of structure” are so “abstract” that they give judges “tremendous leeway to reach various results”).

Glenn Reynolds and Brannon Denning have drawn upon Justice Douglas's opinion in *Griswold v. Connecticut* to locate hybrid rights within the Constitution's "penumbras" and "emanations."<sup>25</sup> This line of justification highlights why many analysts tend to greet the use of hybrid rights with skepticism. After all, "[m]ost originalists properly scoff at the search for 'penumbras'"<sup>26</sup> and denounce the quest as "thoroughly unprincipled."<sup>27</sup> Many non-originalists likewise

<sup>25</sup> 381 U.S. 479, 484 (1965); see Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089, 1103–04 (1997); Reynolds, *supra* note 21, at 1335.

<sup>26</sup> Mark Pulliam, *Unleashing the "Least Dangerous" Branch: Quis Custodiet Ipsos Custodes?*, 22 TEX. REV. L. & POL. 423, 441 (2018) (quoting *Griswold*, 381 U.S. at 484); accord, e.g., John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 929 n.69 (1973) (criticizing the analysis in *Griswold* as "vague and openended"); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979) (describing the majority opinion in *Griswold* as a "magical mystery tour").

<sup>27</sup> Reynolds, *supra* note 21, at 1336; accord, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1569 (2004) (describing the penumbral reasoning of *Griswold* as "one of the most famously outlandish arguments in all of constitutional law"). Denunciations of *Griswold* among originalists dovetail with the view that "[t]oday's originalism . . . is all about the text of the Constitution." Colby, *Originalism and Structural Argument*, *supra* note 24, at 1298; see also Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127, 1136 (1998) ("The constitutional text is, therefore, the first and foremost consideration in judging."); Victoria Nourse, *Reclaiming the Constitutional Text from Originalism: The Case of Executive Power*, 106 CALIF. L. REV. 1, 7 (2018) ("[O]riginalism's most basic claim [is] that the text of the Constitution is the rule of law."). To be sure, Justice Douglas cited constitutional texts in his *Griswold* opinion. See *Griswold*, 381 U.S. at 484. But for analysts such as Judge Robert Bork, Justice Douglas's way of using the texts is "incoherent." ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 97 (1990) [hereinafter BORK, *TEMPTING OF AMERICA*]. For Judge Bork—and for many others, too—the Court in *Griswold* simply roamed too far away from the constitutional text in its effort to "invent a general right to privacy that the Framers had . . . left out." *Id.* at 98. It was, Judge Bork claimed, simply unavailing for Justice Douglas to point to "five or six specific rights that could, with considerable stretching, be called 'privacy'" when in fact the thus-created protection "is independent of and lies outside any right or 'zone of privacy' to be found in the Constitution" itself. *Id.* Judge Bork's approach is seen as requiring a focused attention on "each separate provision of the Bill of Rights," thus calling for a "'clause-bound' view" of interpretation. *Id.*; Ackerman, *supra* note 20, at 1425 (discussing Bork's method of constitutional interpretation). Professor Bruce Ackerman, for example, describes Bork's approach as rooted in viewing "each clause . . . as if it were a free-standing artifact." Ackerman, *supra* note 20, at 1425. Thus, "[i]n reading the establishment clause, we are to look at evidence of what concrete things the Framers meant to accomplish by enacting *that* clause; and so on, down the list of clauses . . ." *Id.* Ackerman reports, "[Bork] draws his line between orthodoxy and heresy at the point where the judge moves beyond the original understanding of one or another particular clause." *Id.* Such a view of things, to say the least, is hard to square with a view of hybrid rights rooted in structural or penumbral reasoning. See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 74 (1982) (contrasting structural reasoning with more traditional text-based reasoning because it proceeds "from the entire Constitutional text rather than from one of its parts"); Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U. ILL. L. REV. 1935, 1965 [hereinafter Solum, *Originalism and the Unwritten Constitution*] (characterizing styles of analysis exemplified by *Griswold* as "utterly implausible" because they amount to "one long primal scream," thus "transform[ing] individual clauses into meaningless concatenations of phonemes"). This problem may be exacerbated because the Court itself has given no serious attention to identifying a legitimating source for the recognition of hybrid rights. *Cf.*



take a dim view of the coat-of-many-clauses reasoning put to work in *Griswold*.<sup>28</sup> Of particular importance, recent appointees to the Supreme Court have made it crystal clear that they reject, both emphatically and entirely, Justice Douglas's penumbral approach.<sup>29</sup>

Put simply, existing accounts of the origins of hybrid rights are sure to alienate many judges, lawyers, and scholars. Self-described textualists will be especially unsettled by talk about "amplifying" effects,<sup>30</sup> "reflective equilibrium,"<sup>31</sup> and "[c]ombining . . . clauses."<sup>32</sup> And skeptics are likely to recoil even more upon encountering allusions to "kaleidoscopic,"<sup>33</sup> "stereoscopic,"<sup>34</sup> and "double helix"<sup>35</sup> rights.

Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 774 (1999) [hereinafter Amar, *Intratextualism*] (critiquing the majority opinion in *Roe v. Wade* in part because "Justice Blackmun seems almost uninterested in the precise textual location of the abortion right he announces").

<sup>28</sup> See Reynolds, *supra* note 21, at 1336 ("[M]any liberals have seemed to be far more comfortable with *Griswold*'s outcome than with Justice Douglas's methodology."); Mark Tushnet, *Two Notes on the Jurisprudence of Privacy*, 8 CONST. COMMENT. 75, 75 (1991) ("Justice Douglas's opinion . . . is widely regarded among law professors as fatally flawed." (footnote omitted)).

<sup>29</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 207 (2005) [hereinafter *Supreme Court Confirmation Hearing for Hon. John G. Roberts, Jr.*] (statement of then-Judge John G. Roberts) ("The Court since *Griswold* has grounded the privacy right discussed in that case in the liberty interest protected under the Due Process Clause . . . rather than in the penumbras and emanations that were discussed in Justice Douglas'[s] opinion. And that view of the result is, I think, consistent with the subsequent development of the law, which is focused on the Due Process Clause and liberty rather than Justice Douglas'[s] approach."); *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 453–54 (2006) (statement of then-Judge Samuel A. Alito) ("*Griswold* concerned the marital right to privacy, and when the decision was handed down, it was written by Justice Douglas, and he based that on his theories of—his theory of emanations and penumbras from various constitutional provisions, the Ninth Amendment and the Fourth Amendment, and a variety of others, but it has been understood in later cases as based on the Due Process Clause of the 14th Amendment, which says that no person shall be denied due process—shall be denied liberty without due process of law. And that's my understanding of it."); *Confirmation Hearing on the Nomination of Brett Kavanaugh to Be an Associate Justice on the Supreme Court Before the S. Comm. on the Judiciary*, 116th Cong. 126 (2018) (statement of then-Judge Brett Kavanaugh) (explaining that he "agree[s] with . . . Chief Justice Roberts and Justice Alito about [*Griswold*]"); see also *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 115th Cong. 323 (2017) [hereinafter *Supreme Court Confirmation Hearing for Hon. Neil M. Gorsuch*] (statement of then-Judge Neil M. Gorsuch) ("I agree [that the cases establishing the right to privacy] all grow out of the Fourteenth Amendment due process liberty component . . .").

<sup>30</sup> Abrams & Garrett, *supra* note 16, at 1315.

<sup>31</sup> Ackerman, *supra* note 20, at 1426.

<sup>32</sup> M. Coenen, *supra* note 17, at 1110.

<sup>33</sup> Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1118 (2016).

<sup>34</sup> Karlan, *supra* note 5, at 488, 492.

<sup>35</sup> Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004); see also Karlan, *supra* note 5, at 474 (describing the

In sum, challenges to the grounding of hybrid rights in structural, penumbral, or similarly open-ended forms of reasoning are sure to find favor with many constitutional analysts. But these challenges, it turns out, take aim at the wrong target. The underlying problem is both curious and consequential: Earlier treatments have missed the boat—indeed, entirely missed the boat—in their efforts to identify the underlying source of hybrid rights. More specifically, both proponents and opponents of hybrid rights tend to assume that the Court’s decision-making approach in cases such as *Smith* and *Obergefell* was bold and inventive, if not exotic to the point of audaciousness. But that is not the case. Indeed, close study reveals that, in all the relevant cases, the Court acted as it routinely acts in dealing with rights-related disputes. It interpreted one, and only one, ambiguous rights-creating text in keeping with an accepted canon of constitutional interpretation—namely, the canon that requires courts to consider the “whole instrument” when expounding the meaning of a contested and indeterminate provision.<sup>36</sup>

Why has this confusion arisen? Perhaps, it is because the catchphrase “hybrid rights” itself has faked out critics of *Smith*, *Obergefell*, and the decision-making methodology those cases reflect. More particularly, the specialized terminology of hybrid rights, precisely because it is specialized phraseology, may have led observers to assume incorrectly that these rulings involve a form of judicial work far removed from the Court’s usual approach to constitutional interpretation. And this misunderstanding might, in turn, have caused analysts to make additional missteps, including by: (1) supposing that hybrid rights are much more extratextual than they really are; (2) overlooking the deep doctrinal connections between the Court’s work with hybrid rights and other well-settled methods of interpretation; and (3) viewing the Court’s hybrid-rights rulings as resting on an approach that opens the door to unbounded judicial activism.

Maybe the legal community should abandon use of the term “hybrid rights” altogether. But the term is already embedded in the lexicon of the law, and the key point made here does not concern that term’s continued deployment. Instead, it concerns the need to ensure that lawyers, judges, and legal academics come to understand the actual decision-making process that the term attempts to capture in a shorthand way.

Developing a proper understanding of where hybrid rights come from begins with recognizing that these rights, at bottom, are no different from other rights. More specifically, as with other rights, each of these so-called “hybrid

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Equal Protection and Due Process Clauses as “bi-directional” in a manner analogous to “M.C. Escher’s famous 1948 lithograph, *Drawing Hands*”).

<sup>36</sup> See *infra* Part II.

rights” is the product of one, and only one, identifiable textual source. To be sure, that textual source is indeterminate, and thus must be given meaning through judicial interpretation. Moreover, although courts in hybrid-rights cases do consult, among other things, related constitutional provisions in the process of defining the reach of the contested clause, this approach is neither surprising nor misguided. Indeed, courts routinely interpret ambiguous texts located within more expansive written instruments—whether those instruments are contracts, wills, statutes, treaties, or constitutions—with an attentiveness to other terms embodied in that same document.<sup>37</sup> Taking this approach does not remove the need for courts to make difficult decisions as to when and to what extent they should look to Constitutional Clause B as a source of guidance in interpreting Constitutional Clause A. But difficult choices are commonplace in constitutional interpretation. And in all fields of both public and private law, difficult choices of this very sort routinely arise as courts interpret contested terms within a larger writing by taking account of companion texts.

The bottom line is that hybrid rights are simply rights. Thus, cases such as *Smith* and *Obergefell* should not be seen as unorthodox, far less bizarre. Rather, these cases exemplify the common practice by which courts consider matter extrinsic to the text of a particular constitutional provision to resolve ambiguities that inhere in that text. And here, the extrinsic matter takes the form of information supplied by one or more other passages located within the Constitution itself.

This Article develops this new and clarifying theory of hybrid rights in five parts. Part I suggests that longstanding and uncontroversial decisions of the Supreme Court involve precisely this sort of look-at-the-whole-document approach to addressing a particular constitutional clause’s linguistic indetermi-

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<sup>37</sup> See, e.g., AKHIL REED AMAR, AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 6 (2012) [hereinafter AMAR, AMERICA’S UNWRITTEN CONSTITUTION] (describing the rule that requires courts to “read the document as a whole” as “old hat”). I use the term “ambiguous texts” both here and throughout the Article as an overarching, shorthand term that is meant to include texts that many analysts would describe as “vague.” There is an expansive and important literature on the difference between “ambiguity” and “vagueness,” and some observers might conclude that the concept of vagueness is more applicable to the set of interpretive problems that I address here. See, e.g., John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751, 773–76 (2009) (discussing the differences between ambiguity and vagueness in constitutional law). Even so, I have chosen to use the term “ambiguous” in its broad, across-the-board sense, primarily because it is routinely used this way by courts. In a related vein, careful analysts distinguish in this context between the *interpretation* of (that is, finding the best semantic meaning of) and *construction* of (that is, filling in interstices of meaning left behind by) legal texts. This distinction has some relevance here. See *infra* notes 187–188 and accompanying text (discussing judicial work in the “construction zone” of constitutional law). In keeping with the common practice of courts, however, I generally treat these two concepts together under the single rubric of “interpretation.”

nacy.<sup>38</sup> Particularly informative in this regard are decisions such as *Roaden v. Kentucky*, in which the Court took account of the government's targeting of materials "presumptively under the protection of the First Amendment" in assessing whether a challenged seizure was "unreasonable" for purposes of the Fourth Amendment.<sup>39</sup> Part II turns to *Smith* and *Obergefell*. More specifically, this Part develops the idea that the Court's recognition of hybrid rights in those cases was not functionally different from the Court's recognition of the Fourth Amendment right vindicated in *Roaden*.<sup>40</sup> In all these settings, so the argument goes, the Court plausibly resolved an ambiguity that lurked in a contested text by reading that text in light of neighboring constitutional clauses.

Part III directs attention to other hybrid-rights cases that many observers might initially view as having little, if any, relationship to *Roaden*, *Smith*, and *Obergefell*.<sup>41</sup> Included in this discussion are cases concerning incorporation, reverse incorporation, and equal-protection-based voting rights. Part III demonstrates that the Court's decisions in these areas—decisions that have stood at the center of constitutional law for many decades—do not differ in a functional way from the Court's other hybrid-rights rulings. Part IV turns to potential critiques of the single-text-read-in-light-of-the-whole-document theory of hybrid rights.<sup>42</sup> It addresses, in particular, claims that judicial vindication of these rights is (1) non-originalist, (2) unduly activist, (3) unmanageable, and (4) counter-textual. The key point is that each of these lines of attack on hybrid rights loses much of its sting when one comes to view these rights, as one should, as building on the look-at-the-whole-document canon of interpretation. This core idea is reinforced in Part V, which explores some practical, doctrine-confining implications of the theory developed in this Article.<sup>43</sup>

The Court's frequent recognition and vindication of hybrid rights suggests that they have an underlying legitimacy. In the pages that follow, I seek to explain why that legitimacy exists. My hope is that this account will contribute to a reframing of how the legal community conceptualizes hybrid rights. I suggest, among other things, that the text-respecting nature of these rights should give them heightened credence among constitutional analysts of all stripes, whether they are self-described textualists, originalists, pragmatists, or patrons of common-law constitutionalism. I also demonstrate how all the Court's existing hybrid-rights decisions fit comfortably within the single-clause-based interpretive framework outlined in this Article.

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<sup>38</sup> See *infra* Part I.

<sup>39</sup> 413 U.S. 496, 504 (1973).

<sup>40</sup> See *infra* Part II.

<sup>41</sup> See *infra* Part III.

<sup>42</sup> See *infra* Part IV.

<sup>43</sup> See *infra* Part V.

To be sure, the analysis I offer will not answer every critique that detractors might direct at any particular ruling of the Court that makes use of the hybrid-rights methodology. But skeptics who challenge the shared theoretical underpinnings of those decisions should at least take care to aim at the proper target. On that score, this Article posits that hybrid rights, when properly understood, are orthodox, if not banal, in nature. Simply put, hybrid rights are the product of judicial application of the long-accepted whole-document interpretive canon to a single, ambiguous constitutional text.

### I. NON-CONTROVERSIAL HYBRID RIGHTS: OF *ROADEN* AND *SPEISER*

The Supreme Court's decisions in *Smith* and *Obergefell* stirred intense criticism in large part because they involved the recognition of hybrid rights.<sup>44</sup> Attacking these decisions on this ground, however, is not easy to reconcile with an important, albeit little-noticed, feature of constitutional doctrine: In some contexts, the Court has recognized hybrid rights without generating any controversy at all. Of particular significance in this regard are cases that have looked to the First Amendment's protection of the freedom of expression in defining the scope of both Fourth Amendment government-search-related rights and procedural due process protections rooted in the Fifth and Fourteenth Amendments.<sup>45</sup>

The Fourth Amendment prohibits "unreasonable searches and seizures."<sup>46</sup> But how does one decide whether any particular search or seizure is "unreasonable"? The Supreme Court has addressed this question by forging an intricate body of doctrinal sub-rules. For example, strict Fourth Amendment limits apply to invasions of the home,<sup>47</sup> while much looser limits apply to searches of cars.<sup>48</sup> As the Court noted in *Payton v. New York*, this distinction finds support in "the adage that a 'man's house is his castle.'"<sup>49</sup> But if an adage can cast light on the meaning of the word "unreasonable," might not the actual words of the Constitution cast a light as well? In a long series of Fourth Amendment rulings, the Court concluded that they can, should, and do.

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<sup>44</sup> See *supra* notes 6–16 and accompanying text; *infra* notes 106–114 and accompanying text (discussing critiques of the Supreme Court's recognition of hybrid rights in *Employment Division v. Smith* and *Obergefell v. Hodges*).

<sup>45</sup> See *infra* notes 46–89 and accompanying text.

<sup>46</sup> U.S. CONST. amend. IV.

<sup>47</sup> See 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.6(a) (4th ed. 2019 Supp.) (observing, for example, "that the Fourth Amendment prohibits the police from making warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest" (quoting *Payton v. New York*, 445 U.S. 573, 576 (1980))).

<sup>48</sup> See *id.* § 3.7.

<sup>49</sup> 445 U.S. at 596 (quoting 2 LEGAL PAPERS OF JOHN ADAMS 142 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965)).

In *Roaden v. Kentucky*, for example, the Court confronted a criminal defendant's contention that a seizure of his property was "unreasonable" because the arresting officer made it without a warrant.<sup>50</sup> The defendant, however, faced a major obstacle because under pre-existing Fourth Amendment law the warrant requirement did not operate when the challenged search and seizure took place incident to a lawful arrest.<sup>51</sup> The defendant in *Roaden* argued, however, that a special rule should apply to his case because the seizure involved communicative materials—namely, the reel-to-reel film of an allegedly obscene movie.<sup>52</sup>

Noting the ambiguity of the term "unreasonable," a majority of the Justices agreed.<sup>53</sup> As Chief Justice Burger explained:

The seizure is unreasonable, not simply because it would have been easy to secure a warrant, but rather because prior restraint of the right of expression, whether by books or films, calls for a higher hurdle in the evaluation of reasonableness. The setting of the bookstore or commercial theater, each presumptively under the protection of the First Amendment, invokes such Fourth Amendment warrant requirements because we examine what is "unreasonable" in the light of the values of freedom of expression.<sup>54</sup>

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<sup>50</sup> *Roaden*, 413 U.S. at 501–02.

<sup>51</sup> See, e.g., *Chimel v. California*, 395 U.S. 752, 763–64 (1969) (holding that law enforcement personnel can search "the arrestee's person and the area 'within his immediate control'" without a warrant and seize evidence discovered in that process (quoting in part *Preston v. United States*, 376 U.S. 364, 367 (1964))).

<sup>52</sup> *Roaden*, 413 U.S. at 504.

<sup>53</sup> Chief Justice Burger wrote for the majority, and Justices White, Blackmun, Powell, and Rehnquist joined his opinion. Notably, no Justice disputed the majority's analysis. Rather, Justices Douglas, Brennan, Stewart, and Marshall voted to give relief to the defendant on other grounds.

<sup>54</sup> *Roaden*, 413 U.S. at 504. In *New York v. P.J. Video, Inc.*, the Court offered a summary of related authorities that both preceded and post-dated *Roaden v. Kentucky*, all of which recognized the interaction of the First and Fourth Amendments in the context of the seizure of communicative materials:

We have long recognized that the seizure of films or books based on their content implicates First Amendment concerns not raised by other kinds of seizures. For this reason, we have required that certain special conditions be met before such seizures may be carried out. In *Roaden v. Kentucky*, for example, we held that the police may not rely on the "exigency" exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a "prior restraint." In *A Quantity of Books v. Kansas* and *Marcus v. Search Warrant*, we had gone a step farther, ruling that the large-scale seizure of books or films constituting a "prior restraint" must be preceded by an adversary hearing on the question of obscenity. In *Heller v. New York*, we emphasized that, even where a seizure of allegedly obscene materials would not constitute a "prior restraint," but instead would merely preserve evidence for trial, the seizure must be made

This reasoning is not hard to grasp. It starts with the idea that the term “unreasonable” is ambiguous. In particular, that ambiguity arises because “[a] seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.”<sup>55</sup> Against this backdrop, it became sensible for the Court, in assessing reasonableness, to take into account the Free Speech Clause and the “values of freedom of expression” it embodies.<sup>56</sup>

To be clear, the Court in *Roaden* did not hold that the officer’s action violated the First Amendment. Rather, the Court declared that the challenged seizure was “unreasonable” under the Fourth Amendment after seeking and finding guidance on that point in the specialized treatment of expressive liberties in the First Amendment.<sup>57</sup> Of particular importance, in thus construing the Fourth Amendment, the Court did not perceive itself as “combining the clauses” or

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pursuant to a warrant and there must be an opportunity for a prompt postseizure judicial determination of obscenity. And in *Lee Art Theatre, Inc. v. Virginia*, we held that a warrant authorizing the seizure of materials presumptively protected by the First Amendment may not issue based solely on the conclusory allegations of a police officer that the sought-after materials are obscene, but instead must be supported by affidavits setting forth specific facts in order that the issuing magistrate may “focus searchingly on the question of obscenity.”

475 U.S. 868, 873–74 (1986) (citations omitted) (first quoting *Roaden*, 413 U.S. at 504; then quoting *id.*; and then quoting *Marcus v. Search Warrant*, 367 U.S. 717, 732 (1961)); see also *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 62–63 (1989) (“[T]his Court has repeatedly held that rigorous procedural safeguards must be employed before expressive materials can be seized as ‘obscene.’ . . . Thus, while the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and even without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.”); *Maryland v. Macon*, 472 U.S. 463, 468 (1985) (“The First Amendment imposes special constraints on searches for and seizures of presumptively protected material, and requires that the Fourth Amendment be applied with ‘scrupulous exactitude’ in such circumstances. Consequently, the Court has imposed particularized rules applicable to searches for and seizures of allegedly obscene films, books, and papers.” (citation omitted) (quoting *Stanford v. Texas*, 379 U.S. 476, 485 (1965))); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 n.5 (1979) (“[W]e have recognized special constraints upon searches for and seizures of material arguably protected by the First Amendment . . . .”); *Zurcher v. Stanford Daily*, 436 U.S. 547, 564–65, 567–68 (1978) (noting that “prior cases . . . insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search” and reiterating that, “whether or not the warrant would have been sufficient in other contexts,” it was impermissible here because it “presumptively protected materials . . . sought to be seized,” thus triggering the “scrupulous exactitude” requirement); *United States v. Ramsey*, 431 U.S. 606, 624 n.18 (1977) (reserving the question of whether First Amendment considerations might call for “the full panoply of Fourth Amendment requirements,” otherwise inapplicable in the customs-search context, if potential government action, such as the reading of correspondence, raises special risks that “speech would be ‘chilled’”).

<sup>55</sup> *Roaden*, 413 U.S. at 501.

<sup>56</sup> *Id.* at 504.

<sup>57</sup> *Id.*

otherwise taking some “long, strange trip” of interpretive exegesis.<sup>58</sup> Rather, from all appearances, the Court saw itself as simply following the age-old idea that a legal text should be viewed as a whole when courts determine the meaning of its ambiguous provisions.<sup>59</sup> At the very least, the Justices themselves saw their partial reliance on the First Amendment in interpreting the word “unreasonable” in the Fourth Amendment as entirely uncontroversial.<sup>60</sup>

Critics of other forms of hybrid-rights analysis might respond by saying that the Fourth Amendment presents a special case. On this view, the word “unreasonable” appears only once in the Constitution and has a singularly obscure quality. Thus, although *Roaden* and its companion cases might be defensible, they are best seen as embodying an exceptional, one-of-a-kind use of text-based constitutional cross-referencing.

The problem with this analysis is that many constitutional clauses are ambiguous. The entire law of procedural due process, for example, arises out of the Fifth Amendment’s thirteen-word command (essentially replicated in the Fourteenth Amendment for purposes of constraining state, as well as federal, action) that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>61</sup> And the word “due” is every bit as enigmatic as the word “unreasonable.”<sup>62</sup> More particularly, just as surely as what is “reasonable . . . in one setting may be unreasonable in a different setting” for Fourth Amendment purposes,<sup>63</sup> and what process is “due” varies—in fact, varies dramatically—from one context to another.<sup>64</sup>

So how does the Court assess the proper scope of procedural protections that must attend a Fourteenth-Amendment-triggering deprivation? Among other things, the Court has often paid heed to the First Amendment’s text-based protection of expressive liberty in identifying constitutionally mandated proce-

<sup>58</sup> GRATEFUL DEAD, *Truckin’*, on AMERICAN BEAUTY (Warner Records Inc. 1970).

<sup>59</sup> AMAR, AMERICA’S UNWRITTEN CONSTITUTION, *supra* note 37, at 6.

<sup>60</sup> Nor does it seem fair to say that *Roaden* reflected a bygone era during which even the most “conservative” members of the Court engaged in freewheeling, non-textual interpretation. Then-Justice Rehnquist, for example, aligned himself with the view that departures from original constitutional understandings raise serious concerns, while pointedly challenging the idea of a “living Constitution” as “a formula for an end run around popular government” and thus “corrosive of the fundamental values of our democratic society.” William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 706 (1976). Even so, he joined the majority opinion in *Roaden* without any expression of hesitancy.

<sup>61</sup> U.S. CONST. amend. V. The Fourteenth Amendment echoes this textual mandate, thus making it no less applicable to the states than to the federal government. *See id.* amend. XIV.

<sup>62</sup> *See Twining v. New Jersey*, 211 U.S. 78, 99–100 (1908) (noting in regard to the Fourteenth Amendment’s Due Process Clause that “[f]ew phrases of the law are so elusive of exact apprehension as this”).

<sup>63</sup> *See Roaden*, 413 U.S. at 501.

<sup>64</sup> *See infra* notes 73–75 and accompanying text (providing examples of the varying applications of the term “due” in different legal contexts).



dural rules.<sup>65</sup> Plaintiffs in defamation actions, for example, must satisfy an elevated burden of proof to recover damages if they are public officials or public figures.<sup>66</sup> The procedural safeguard of pre-deprivation notice embodied in the vagueness doctrine applies with added force when First Amendment liberties are at stake.<sup>67</sup> Licensing regimes designed to sort unprotected from protected speech must incorporate specialized procedural protections, including an opportunity for unusually prompt judicial review.<sup>68</sup> The leading authority on specialized rules of this kind has rightly described them as embodying principles of “first amendment due process.”<sup>69</sup>

Put another way, in determining what process is “due” under the Fifth and Fourteenth Amendments, the Court has considered the distinctive concerns that arise when government action threatens speech protected by the First Amendment. And this makes good sense. As the Court has long recognized, “due process is flexible and calls for such procedural protections as the particular situation demands.”<sup>70</sup> The Court’s seminal treatment of this subject came in *Mathews v. Eldridge*.<sup>71</sup> There, the Court declared that determining the “due-

<sup>65</sup> See *infra* notes 73–75 and accompanying text (providing examples of the Court’s identification of these constitutionally mandated procedural rules).

<sup>66</sup> See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974) (requiring in this context “clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth”).

<sup>67</sup> See, e.g., *Smith v. Goguen*, 415 U.S. 566, 573 (1974) (“Where a statute’s literal scope, unaided by a narrowing state court interpretation, is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.”).

<sup>68</sup> See, e.g., *Freedman v. Maryland*, 380 U.S. 51, 57–60 (1965) (holding that a film licensing system avoids “constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system,” including by ensuring expedited judicial review); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 514 (1984) (requiring de novo reconsideration by appellate courts “in reviewing a determination of actual malice” in defamation actions); *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (adopting a specialized burden-of-proof-shifting methodology for mixed-motive speech cases); *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 180 (1968) (imposing more exacting rules than otherwise would apply for the ex parte issuance of temporary restraining orders when they target parades or similar free-speech activities); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963) (requiring special procedural rules regarding state control of obscenity); *Yates v. United States*, 354 U.S. 298, 328 (1957) (endorsing “rigorous standards of review” in incitement-related Smith Act cases). See generally *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (plurality opinion) (noting that “we have often held some procedures . . . to be constitutionally required in proceedings that may penalize protected speech”); Robert P. Faulkner, *Evidence of First Amendment Activity at Trial: The Articulation of a Higher Evidentiary Standard*, 42 UCLA L. REV. 1, 13 (1994) (noting that First Amendment due process applies in “numerous areas”); Henry P. Monaghan, *First Amendment “Due Process,”* 83 HARV. L. REV. 518, 518 (1970) (observing that “[t]he Court has found itself developing a comprehensive system of ‘procedural safeguards designed to obviate the dangers of a censorship system’” (quoting *Freedman*, 380 U.S. at 58)).

<sup>69</sup> Monaghan, *supra* note 68, at 519.

<sup>70</sup> *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

<sup>71</sup> See 424 U.S. 319, 334–35 (1976).

ness” of procedural protections requires a judicial balancing of multiple considerations, beginning with the “private interest that will be affected” by the challenged government action.<sup>72</sup> Without question, a variety of considerations should factor into gauging the salience of the relevant “private interest” at stake in any particular case. But one consideration that seems obviously worthy of judicial attention is whether the Constitution itself singles out the relevant interest as deserving of special recognition. And that is exactly what the Court has concluded in its wide-ranging First Amendment due process jurisprudence.<sup>73</sup>

*Speiser v. Randall*<sup>74</sup> illustrates this point. That case arose because California afforded a tax exemption to military veterans, but denied the exemption to veterans who so aggressively advocated an overthrow of the government that their speech became susceptible to prohibition notwithstanding the First Amendment.<sup>75</sup> In addition, governing statutes provided that “throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption.”<sup>76</sup> The Court in *Speiser* accepted the proposition that the state could exclude the identified class of veterans from eligibility for the exemption despite the First Amendment—not surprisingly, because the statutory definition of members of the disadvantaged group focused directly on the constitu-

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<sup>72</sup> As more fully stated in *Mathews*:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

*Id.* at 334–35.

<sup>73</sup> To be sure, the Court itself has not always spoken of the protections discussed here as emerging from the Due Process Clause. To the contrary, it sometimes has not specifically identified their source, and it sometimes has suggested that they are attributable to the First Amendment. But this point makes no difference for purposes of the analysis put forward here. The First Amendment’s reference to “the freedom of speech,” after all, is itself deeply ambiguous. In giving meaning to that provision, it thus is no less appropriate to look to the textual protections of procedural “due process” than it is to look to the Free Speech Clause in defining the contours of procedural “due process.” Both roads lead to the same place, and each road is built upon a single provision’s underlying linguistic opacity.

<sup>74</sup> 357 U.S. 513 (1958).

<sup>75</sup> *Id.* at 514–16.

<sup>76</sup> *Id.* at 522.

tionally unprotected character of their expressive activity.<sup>77</sup> Thus, the only question presented by the case was “whether this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of the requirements of due process.”<sup>78</sup> The key point for present purposes is that, in thereafter identifying the “requirements of due process” as to the burden-of-proof question, the Court focused directly on ensuring adequate protection of “speech which the Constitution makes free.”<sup>79</sup>

In the end, the Court concluded that “the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process.”<sup>80</sup> To be sure, the state, as a rule, could “regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.”<sup>81</sup> In addition, “the fairness of placing the burden of proof on the taxpayer in most circumstances is recognized” by governing law.<sup>82</sup> But the Court in *Speiser* nonetheless insisted—in terms directly portending the private-rights component of the *Mathews* test<sup>83</sup>—that “the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.”<sup>84</sup> And the circumstances of this case dictated that the state—and not the taxpayer—had to bear the burden of persuasion because “the transcendent value of speech is involved,”<sup>85</sup> and the state’s rules thus raised a threat to “constitutionally protected rights . . . which we value most highly.”<sup>86</sup>

The bottom line is clear: In grappling with the textual question of what process qualified as “due” for Fourteenth Amendment procedural due process purposes, the Court in *Speiser* took account of the First Amendment. The majority in that case, in effect, went down exactly the same analytical pathway that a very different set of Justices would later travel in *Roaden*.<sup>87</sup> In both in-

<sup>77</sup> *Id.* at 519–20; *see also id.* at 542 (Clark, J., dissenting) (agreeing with the majority that denying tax exemptions to veterans whose anti-government speech is criminally punishable would not run afoul of the First Amendment).

<sup>78</sup> *Id.* at 523 (majority opinion).

<sup>79</sup> *Id.* at 526.

<sup>80</sup> *Id.* at 529.

<sup>81</sup> *Id.* at 523 (adding that the state ordinarily has broad discretion in this regard unless its choice of rules “offends some principle of justice so rooted in the traditions and conscious of our people as to be ranked as fundamental” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

<sup>82</sup> *Id.* at 524–25.

<sup>83</sup> *See supra* note 72 and accompanying text.

<sup>84</sup> *Speiser*, 357 U.S. at 520–21.

<sup>85</sup> *Id.* at 526.

<sup>86</sup> *Id.* at 521; *see also id.* at 528–29 (“[W]hen the constitutional right to speak is sought to be deterred by a State’s general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition.”).

<sup>87</sup> Notably, there was only one dissenter in *Speiser v. Randall*. *Id.* at 538 (Clark, J., dissenting). Six Justices joined the majority opinion, which was authored by Justice Brennan. *Id.* at 514 (majority

stances—one involving the meaning of the word “unreasonable” in the Fourth Amendment and the other involving the meaning of the word “due” in the Fourteenth Amendment—the Court did not hesitate to look to the First Amendment and the values it reflects to find one source of interpretive guidance.

The key point to be extracted from *Speiser*, *Roaden*, and their progeny is this: One well-accepted form of rights-related hybridism involves nothing more than resolving an ambiguity in a particular constitutional clause by considering, among other things, relevant language located elsewhere in the same document. And that is as it should be because this approach honors, rather than dishonors, the text of the Constitution.

Indeed, it honors that text in three ways. First, this methodology directs attention to the dictates of a particular textual command set forth in the Constitution. Second, this methodology honestly acknowledges the ambiguity that inheres in that textual passage. Finally, this methodology does not call on courts to look hither and yon for interpretive guidance, but instead directs them to seek guidance in the text of the Constitution itself. This last step comports with longstanding rules of statutory, contract, and trust and will interpretation, as well as other forms of interpretation, because it directs judges to consider “the instrument as a whole” as they labor to resolve clause-specific ambiguities.<sup>88</sup> And courts, including the Supreme Court, have not hesitated to apply this interpretive principle in a wide variety of contexts over many years.<sup>89</sup>

In light of this history, there is no apparent reason to question the Court’s consideration of the First Amendment in interpreting the word “unreasonable” in the Fourth Amendment or the word “due” in the Fifth and Fourteenth Amendments. The First Amendment, after all, is most assuredly a part of the whole instrument that is the Constitution, within which the Fourth, Fifth, and Fourteenth Amendments are enshrined.

Indeed, this look-at-the-whole-document way of dealing with textual ambiguities will strike many observers as uncontroversial—just as it struck the Court itself as uncontroversial in both *Speiser* and *Roaden*. Yet once this style of ambiguity-informing hybridism is accepted as legitimate, thoughtful analysts must consider its implications in assessing other cases in which the Court has recognized hybrid rights. Close analysis along these lines ends up giving rise to critical conclusion: It reveals that what might seem at first glance to be

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opinion). Justice Burton concurred only in the result (without explaining why), and Chief Justice Warren did not participate in the case. *See id.* at 529; *see also id.* at 532 (Black, J., concurring, joined by Douglas, J.) (expressing “full agreement” with the majority that, if the state “may tax the expression of certain views,” then “the procedures it has provided . . . violate the requirements of due process”).

<sup>88</sup> *See Markman v. Westview Instruments*, 517 U.S. 370, 389 (1996) (describing this approach as a “standard construction rule”).

<sup>89</sup> *See infra* notes 240, 249 and accompanying text.

very different forms of interpretive hybridism—in particular, the oft-maligned techniques of constitutional decision making put to work in *Smith* and *Obergefell*—turn out to involve exactly the same form of interpretive hybridism that the Court put to work in its long-accepted rulings in *Speiser* and *Roaden*.

## II. CONTROVERSIAL HYBRID RIGHTS: OF *SMITH* AND *OBERGEFELL*

As detailed earlier, *Smith* and *Obergefell* triggered intense criticism of the Supreme Court's reliance in those cases on hybrid-rights-based reasoning. Part I also shows, however, that the recognition of hybrid rights in cases such as *Speiser* and *Roaden* triggered no controversy at all. This Part explores whether the very different receptions these different pairs of cases have received makes sense as a matter of logically consistent legal analysis. On this point, this Part shows that in fact the analytical approach taken in both sets of cases was, on close inspection, exactly the same. More specifically, in all these cases, the Court's recognition of hybrid rights comported with the longstanding and non-controversial judicial practice of looking at the whole document in interpreting ambiguous clauses that the document includes.<sup>90</sup>

In *Speiser* and *Roaden*, the Court relied on the protection of freedom of expression lodged in the First Amendment in interpreting other rights-creating clauses of the Constitution. The First Amendment, however, does not safeguard only communicative liberty. It also bars the government from enacting laws “prohibiting the free exercise” of religion.<sup>91</sup> This text gives rise to a vexing conundrum: How should courts deal with facially neutral laws, enacted with no hostility to religion, when they operate in particular instances to punish conduct undertaken in an effort to comply with the dictates of one's faith?<sup>92</sup> The Court grappled with this question in *Smith*.<sup>93</sup>

The specific issue presented in that case was whether the state could enforce a broad ban on peyote use against a sincere religious practitioner who ingested the substance as a sacramental act.<sup>94</sup> A five-Justice majority concluded that the First Amendment did not stand in the way of applying the statutory prohibition, even to send the peyote user to prison, notwithstanding the severe burden it placed on religiously motivated behavior in these particular circumstances.<sup>95</sup> The essential reason offered for this result had its roots in the constitutional text. As Justice Scalia explained for the Court, it was wrong to say that

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<sup>90</sup> See *infra* notes 91–148 and accompanying text.

<sup>91</sup> U.S. CONST. amend. I.

<sup>92</sup> See McConnell, *Free Exercise Revisionism*, *supra* note 5, at 1111 (noting this issue and its significance to free-exercise law).

<sup>93</sup> *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

<sup>94</sup> *Id.* at 874.

<sup>95</sup> *Id.* at 882.

such a generally applicable ban “prohibit[s]” the free exercise of religion when it was not meant to target religious practices at all.<sup>96</sup>

To reach this result, however, the Court had to navigate its way around a major obstacle. The problem was that, from all appearances, the Court already had rejected this very interpretive position in earlier free-exercise cases. Most notably, in *Wisconsin v. Yoder*, the Court confronted a challenge to a generally applicable state statute that required children younger than sixteen to attend school.<sup>97</sup> The attack on this law did not come, however, from a truant student. Instead, the challengers were Amish parents whose faith required them to put their children to work during the day on the family farm, and thus remove them from school, even though those children were not yet sixteen.<sup>98</sup> The Court in *Yoder* recognized the obvious—namely, that this compulsory education law was generally applicable because it neither reflected hostility toward religion nor singled out sectarians for disadvantageous treatment.<sup>99</sup> Even so, the Court subjected the law to strict scrutiny and held that the state’s interest in fostering educational proficiency did not “overbalance legitimate claims to the free exercise of religion” that the Amish parents asserted.<sup>100</sup>

Not surprisingly, the challenger of the peyote law in *Smith* relied heavily on *Yoder*, and Justice Scalia had no choice but to deal with that precedent as he fashioned his opinion. He did so in the following terms:

The 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, such as freedom of speech and of the press, or the rights of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children, see *Wisconsin v. Yoder*.<sup>101</sup>

According to Justice Scalia, *Smith* itself “d[id] not present such a hybrid situation.”<sup>102</sup> Instead, it involved “a free exercise claim unconnected with any communicative activity or parental right.”<sup>103</sup> Thus, he concluded, *Yoder* was beside the point.<sup>104</sup>

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<sup>96</sup> *Id.* at 879–81.

<sup>97</sup> 406 U.S. 205, 207 (1972).

<sup>98</sup> *Id.* at 207.

<sup>99</sup> *Id.* at 220.

<sup>100</sup> *Id.* at 215, 234–36.

<sup>101</sup> *Smith*, 494 U.S. at 881 (citations omitted).

<sup>102</sup> *Id.* at 882.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

The Court in *Smith* in effect reclassified *Yoder* as a case that implicated not only the Free Exercise Clause, but both free-exercise and substantive due process, right-to-parent concerns.<sup>105</sup> This reclassification, however, proved to be highly controversial. Many observers criticized the Court's case-distinguishing maneuver as inconsistent with the reasoning of *Yoder* itself.<sup>106</sup> One leading authority went so far as to suggest that Justice Scalia did not really believe what he wrote about *Yoder* in his *Smith* opinion.<sup>107</sup> But the words are now there on the pages of the United States Reports, and those words did not embody some offhand dictum. Instead, they set forth a key aspect of the majority's treatment of a potentially controlling precedent as it worked its way toward issuing a seminal constitutional ruling.

The Court in *Smith* could have overruled *Yoder*. But it chose not to. Rather, it declared that *Yoder* involved a "hybrid situation," in which the First Amendment's Free Exercise Clause was rightly seen as acting "in conjunction with" the Fourteenth Amendment's Due Process Clause. In short, these two provisions gave rise to a constitutional right that lacked support in the Free Exercise Clause standing alone.<sup>108</sup>

*Smith's* treatment of *Yoder* illustrates, in a powerful way, the Court's endorsement of the concept of hybrid rights. But what kind of hybrid rights? Many observers have decried *Smith's* treatment of *Yoder* as reflecting a dramatic and extraordinary analytical move. For them, the Court's action was so "illogical"<sup>109</sup> and "impenetrable"<sup>110</sup> that it left only "bafflement" in its wake.<sup>111</sup> The image brought to mind is one of Harry Potter-like wizards, clad in judicial robes, magically levitating two separate texts off the pages of the Constitution, and then causing them to whirl about until their gyrations mystically produce a

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<sup>105</sup> See *id.* at 881–82.

<sup>106</sup> E.g., McConnell, *Free Exercise Revisionism*, *supra* note 5, at 1120 (discussing the precedent of generalized free-exercise protection established in *Yoder* and noting that until *Smith* the Court consistently followed it). It might also be argued that, even under this hybrid-rights approach, the religious practitioner involved in *Smith* itself should have prevailed in that case on the theory that engaging in a shared sacrament simultaneously involves the participant in both religious conduct and a communicative activity within the orbit of the Free Speech Clause. *Id.* at 1122. The Court in *Smith*, however, did not pause to address this line of argument.

<sup>107</sup> See *id.* at 1121 (suggesting "that the notion of 'hybrid' claims was created for the sole purpose of distinguishing *Yoder*").

<sup>108</sup> See *Smith*, 494 U.S. at 881–82.

<sup>109</sup> *Kissinger v. Bd. of Trs. of the Ohio State Univ.*, 5 F.3d 177, 180 (6th Cir. 1993).

<sup>110</sup> *Hicks ex rel. Hicks v. Halifax Cty. Bd. of Educ.*, 93 F. Supp. 2d 649, 661 (E.D.N.C. 1999).

<sup>111</sup> Kyle Still, Comment, *Smith's Hybrid Rights Doctrine and the Pierce Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 409 (2006).

third, freestanding, non-text-based doctrine destined to lurk in the document's "penumbras."<sup>112</sup>

Critics of *Smith's* treatment of *Yoder* challenge this seemingly hocus-pocus approach to rights. They argue that combining a non-right under the Free Exercise Clause and a non-right under the Due Process Clause cannot somehow produce a new right not lodged in either clause standing alone.<sup>113</sup> The treatment of hybrid rights in *Smith*, they say, does not add up because it cannot be that "zero plus zero equals one."<sup>114</sup>

Others see things a different way. According to them, courts sometimes should "combine the clauses" so as to recognize rights not established by any single constitutional mandate in and of itself.<sup>115</sup> As one of them has explained: "Just as my limited desire to see a movie and my limited desire to buy clothes might together yield an overwhelming desire to go to the mall, so too might clauses providing limited individual support for a judicial result operate together to generate strong collective support for that result."<sup>116</sup>

This way of looking at existing law finds some support in the past rhetoric and rulings of the Court. For example, the Court's horizontal and vertical separation-of-powers jurisprudence suggests that constitutional rules can find their origins in the "structures" of the Constitution, as opposed to its discrete textual passages.<sup>117</sup> And if the Court can find rules regarding "states' rights" in the Constitution's structures, why not individual rights as well? An additional point is that the Court often speaks of honoring "constitutional values," thus suggesting that specific words in a specific clause may be less significant than

<sup>112</sup> See *supra* notes 25–27 and accompanying text. The idea of levitation connects with the not uncommon (and pejorative) description of some judicially recognized rights as "free-floating." BORK, *TEMPTING OF AMERICA*, *supra* note 27, at 120.

<sup>113</sup> See, e.g., *Hicks*, 93 F. Supp. 2d at 661 (expressing skepticism with respect to the logic of the Court's hybrid-rights analysis in *Smith*); see also Stein, *supra* note 5, at 174 (collecting sources that criticize *Smith's* hybrid-rights exception and adding that it operates as a "Hamburger Helper" decisional rule insofar as the Free Exercise Clause "only has meaning when combined with another constitutional interest").

<sup>114</sup> Note, *The Best of a Bad Lot: Compromise and Hybrid Religious Exemptions*, 123 HARV. L. REV. 1494, 1505 (2010); accord Esser, *supra* note 4, at 218–19 (questioning the idea that "two losers equal one winner"). In a similar vein, see Abrams & Garrett, *supra* note 16, at 1314 (positing that "two half violations do not make a whole").

<sup>115</sup> See *supra* note 24 and accompanying text (collecting the authorities).

<sup>116</sup> M. Coenen, *supra* note 17, at 1092 (footnote omitted); see also Richard F. Duncan, *Who Wants to Stop the Church: Homosexual Rights Legislation, Public Policy, and Religious Freedom*, 69 NOTRE DAME L. REV. 393, 430–31 (1994) ("Clearly, what the Court must have meant [in *Smith*] is that a less than sufficient free exercise claim, plus a less than sufficient claim arising under a different part of the Constitution, together trigger the compelling interest test.").

<sup>117</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) ("We turn next to consideration of the structure of the Constitution, to see if we can discern among its 'essential postulate[s]' a principle that controls the present cases." (citation omitted) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 332 (1934))).



principles or themes given impetus by constitutional texts.<sup>118</sup> Drawing on these past judicial practices, perhaps the Court should not hesitate to construct rights-creating rules by aggregating multiple values borne of multiple clauses. One might even say that an “anomaly” will arise if a losing litigant’s case implicates constitutional value A at the ninety-nine percent level and constitutional value B at the ninety-nine percent level, although a winning litigant’s case implicates only constitutional value A at a level just barely exceeding one hundred percent.<sup>119</sup>

As we have seen, however, there is a major problem with justifying hybrid rights in this way—namely, that rationales of this sort are sure to drive away most analysts who view themselves as high-specificity, and perhaps even low-specificity, constitutional textualists. For text-centered thinkers after all, arguments based on constitutional structures and values, whatever meaning one gives to those terms, are deeply different from, and far more problematic than, arguments rooted in the Constitution’s actual declarative commands.<sup>120</sup> Likewise, arguments about avoiding anomalous results will themselves strike many observers as anomalous if those arguments stray away from the constitutional text itself. In short, existing arguments in favor of hybrid rights, however attractive they may be to some analysts, are likely to alienate many others, especially analysts drawn to the core idea that “[w]hat matters . . . is what the constitutional text says.”<sup>121</sup> As a result, a key question arises: Is there any *textualist* basis for the Court’s treatment of *Yoder* in *Smith*?

The answer is yes. We saw in Part I that there was and is a sound textualist basis for the Court’s rulings in *Roaden* and *Speiser*.<sup>122</sup> In the former case, the Court deemed it uncontroversial to look in part to the Free Speech Clause

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<sup>118</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 242 (1973) (quoting *Tehan v. United States ex rel. Shott*, 382 U.S. 406, 416 (1966)). In the same vein, the Court sometimes recognizes seemingly non-textual “prophylactic” rules—that is, rules not so much rooted in the text itself as in the goal of ensuring that a right more readily connected to the text is not undermined as a practical matter. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 462–71 (1966) (establishing prophylactic warning rules to safeguard the right against self-incrimination); *see also* David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195 (1988) (“‘Prophylactic’ rules are, in an important sense, the norm, not the exception. Constitutional law is filled with rules that are justified in [this] way[] . . .”).

<sup>119</sup> *See* M. Coenen, *supra* note 17, at 1101–04 (developing this idea); *see also* Mark Tushnet, *Public and Private Education: Is There a Constitutional Difference?*, 1991 U. CHI. LEGAL F. 43, 71–72 (urging that different “‘interests’ related to values protected by the Constitution . . . can be added together to yield the equivalent of a constitutional right”).

<sup>120</sup> *See* Colby, *Originalism and Structural Argument*, *supra* note 24, at 1314 (questioning “reasoning [that] is from the structure of the governmental system established by the text, not the text itself”).

<sup>121</sup> *Supreme Court Confirmation Hearing for Hon. Neil M. Gorsuch*, *supra* note 29, at 2 (statement of Lawrence B. Solum, Professor, Georgetown University Law Center).

<sup>122</sup> *See supra* Part I.

in giving meaning to the term “unreasonable” in the Fourth Amendment.<sup>123</sup> In the latter case, the Court likewise did not hesitate to consider the First Amendment in deciding what process was “due” for procedural due process purposes.<sup>124</sup>

So, what about the so-called substantive due process, parenting-related rights brought into view by *Smith* and *Yoder*? The idea that the Due Process Clauses protect substantive values is anathema for some text-minded constitutional analysts.<sup>125</sup> Whether they like it or not, however, their view on this matter has not prevailed.<sup>126</sup> Members of the Court, spanning many years and many outlooks—including John Roberts, Samuel Alito, and Brett Kavanaugh—have recognized that substantive due process is an accepted feature of the constitutional landscape.<sup>127</sup> There are, no doubt, many ways to define the nature and scope of substantive due process protections. But a shorthand formulation of the Court’s past work might well go something like this: The textual prohibition on deprivations “without due process of law” dictates that the government may not take away one’s life, liberty, or property in a way that rises to the level of being “fundamentally unfair.”<sup>128</sup>

<sup>123</sup> See *supra* notes 56–60 and accompanying text.

<sup>124</sup> See *supra* notes 79–87 and accompanying text.

<sup>125</sup> See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“[S]ubstantive due process’ is a contradiction in terms—sort of like ‘green pastel redness.’”); Bambauer & Massaro, *supra* note 16, at 310 n.154 (noting Justice Thomas’s argument along these lines for not incorporating substantive rights into the Due Process Clause and Justice Scalia’s position that the Due Process Clause, if it were properly interpreted, would not protect substantive, as opposed to procedural, rights).

<sup>126</sup> Bambauer & Massaro, *supra* note 16, at 282 (noting that, despite criticisms, the “existence and function” of substantive due process rights “are broadly accepted”).

<sup>127</sup> See generally *supra* note 29 and accompanying text (collecting statements made by these Justices on this point at their confirmation hearings). Illustrative is the statement of then-Judge John Roberts: “I think there is a right to privacy protected as part of the liberty guarantee in the Due Process Clause,” in keeping with the idea that the Clause operates “not simply procedurally.” *Supreme Court Confirmation Hearing for Hon. John G. Roberts, Jr.*, *supra* note 29, at 147, 372. Other Justices, of many ideological stances, have endorsed this same position. Chief Justice Rehnquist, for example, pointed to the Due Process Clause in asserting that “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions.” *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278 (1990); see also *Roe v. Wade*, 410 U.S. 113, 168, 170 (1973) (Stewart, J., concurring) (“*Griswold* stands as one in a long line of . . . cases decided under the doctrine of substantive due process, and I now accept it as such . . . . Clearly, therefore, the Court today is correct in holding that the right asserted by Jane Roe is embraced within the personal liberty protected by the Due Process Clause of the Fourteenth Amendment.”).

<sup>128</sup> *Doyle v. Ohio*, 426 U.S. 610, 618 (1976); see, e.g., *United States v. Russell*, 411 U.S. 423, 431–32 (1973) (rejecting defendant’s claim of unconstitutional entrapment because government agents did not act inconsistently with “fundamental fairness” as required to establish a Due Process Clause violation). More particularly, as to substantive rights, this formulation is meant to capture, in a shorthand way, the commonly stated proposition that the Due Process Clause safeguards such rights if, but only if, they qualify as “fundamental.” See, e.g., *McDonald v. Chicago*, 561 U.S. 742 (2010)

It bears noting that this prohibition on fundamentally unfair deprivations is not any more amorphous than a number of text-based restrictions set forth in the Constitution itself—a point well-illustrated by the Fourth Amendment touchstone of “unreasonable” state behavior.<sup>129</sup> In addition, the substantive due process principle has stronger historical moorings than many of its critics recognize.<sup>130</sup> No less important, precisely because this principle has operated within constitutional law for so long, it has generated a body of doctrine that serves to shape and limit the range of cognizable substantive due process rights.<sup>131</sup>

All of this brings us back to *Smith* and *Yoder*. As we have seen, many analysts view *Smith*'s treatment of *Yoder* as a textual embarrassment.<sup>132</sup> But why? If the Fourteenth Amendment protects individuals from fundamentally unfair deprivations of substantive interests, courts must find ways to determine what actions qualify as fundamentally unfair. And if the Court can and should look to the First Amendment to help it determine whether a seizure is “unreasonable,” why should it not do the exact same thing in interpreting the Constitution's “due process of law” terminology that underlies the “fundamental fairness” test? Even more to the point, if the Court can look to the First Amendment in determining the meaning of “due process of law” for purposes of identifying procedural due process rights, as it did in *Speiser*, why should it not be able to look to the First Amendment in interpreting exactly this same constitutional language in determining the scope of substantive due process protections?

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(broadly reviewing the Court's fundamental-rights approach to incorporation on its way to applying the substantive Second Amendment right to bear arms to the states); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating into the Fourteenth Amendment the First Amendment protection of the right of peaceful assembly because that protection safeguards a “fundamental right”); *see also* *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) (“We have long recognized that the Amendment's Due Process Clause, like its Fifth Amendment counterpart, ‘guarantees more than fair process.’ The Clause also includes a substantive component . . .” (citation omitted) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997))); *Duncan v. Louisiana*, 391 U.S. 145, 154 (1968) (canvassing the Court's earlier incorporation of both substantive and procedural Bill of Rights protections before deeming the right to jury trial to be “fundamental” and thus incorporated into the Fourteenth Amendment Due Process Clause).

<sup>129</sup> *See* U.S. CONST. amend. IV. Consider, in the same vein, the constitutional bans on “cruel and unusual punishments” and “excessive fines.” *Id.* amend. VIII.

<sup>130</sup> *See, e.g.*, Randy E. Barnett & Evan D. Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 WM. & MARY L. REV. 1599, 1604–05 (2019) (citing earlier work suggesting “that the case for some form of judicial review of the content of legislation under the Due Process of Law Clauses is weightier than initially supposed”); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 415 (2010) (arguing, from an originalist perspective, that the Fourteenth Amendment's Due Process Clause encompasses substantive protections).

<sup>131</sup> *See Glucksberg*, 521 U.S. at 720 (noting that the Supreme Court takes a cautious approach to expanding substantive due process rights).

<sup>132</sup> *See supra* notes 105–114 and accompanying text.

Common sense confirms the soundness of viewing the Constitution's textual treatment of free exercise as one proper source of guidance in deciding whether a challenged state action abridges the "fundamental" right to parent one's children. Let us say, for example, that Parent X sees it as useful in fostering her fourteen-year-old's maturation to permit him to drink wine on occasion. Next, let us say that a central tenet of Parent Y's religion dictates that that she must require her fourteen-year-old daughter to drink wine from time to time as the family engages in the most central sacramental ritual of the family's faith. Is it not clear that a law prohibiting under-age drinking interferes to a greater degree with the liberty of Parent Y than Parent X? Put another way, is not the state's interference with Parent Y's choice as a parent far more severe precisely because it strips that parent of the power to engage her child in the deepest and most central elements of directing that child's life? To be sure, we might reach this conclusion even if the Free Exercise Clause were not in the Constitution. But the Free Exercise Clause is in the Constitution, and its presence there offers support for the conclusion that Parent Y's claim of parenting liberty fits into a different constitutional category than the claim of Parent X.

To be clear, a person often will have multiple reasons for making parental choices. It might be, for example, that Parent X not only thinks it is generally helpful to let her fourteen-year-old son drink wine on occasion but that she also feels pushed in this direction because other parents in the neighborhood let their youngsters hit the bottle. Under these circumstances, one might say that there is an added interference with Parent X's liberty because the legal ban on serving alcohol to her child deprives her not only of the ability to shape her child's maturation, but also of the ability to conform to local parenting norms. But so what? The decisive point is that nothing in the text of the Constitution says anything about the special salience of neighborhood custom-keeping.

When it comes to faith-based conduct, however, the First Amendment's specialized treatment of "the free exercise" of religion leaps into view, together with the distinctly American commitment to religious liberty that the First Amendment reflects. The point is this: On close examination, consulting the First Amendment in interpreting the scope of substantive due process rights is no different in its nature from consulting the First Amendment in assessing procedural due process rights or in giving meaning to the term "unreasonable" in the Fourth Amendment. In other words, even though *Smith*, in its treatment of *Yoder*, might seem at first blush to involve a highly unorthodox and controversial hybrid-rights decision-making methodology, that methodology turns out to be no different in substance from the orthodox and noncontroversial approach to hybrid rights taken by the Court in *Roaden* and *Speiser*. In all these cases, the Court drew on one constitutional text in the process of working through an ambiguity presented by another text, thus adhering to the consult-

the-whole-document canon of interpretation that long has guided the work of courts.<sup>133</sup>

*Obergefell* illustrates the same point. The Fourteenth Amendment ensures that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”<sup>134</sup> The profound difficulty presented by this terse formulation stems from the fact that all laws, in a very real sense, deny equal protection. Murder laws discriminate against murderers. Property tax laws discriminate against property owners. One might say that such laws are intrinsically equal because they set forth across-the-board rules, not marked on their face by any differentiation among regulated persons. But even if that is so, many laws that are not equal on their face present no problem whatsoever under the Equal Protection Clause. Property tax laws, for example, might exempt charitable entities.<sup>135</sup> Laws that render contracts made by minors unenforceable include exceptions for the purchase of necessities.<sup>136</sup> Progressive income tax laws create a variety of categories and treat persons in different categories in very different ways.<sup>137</sup> Indeed, laws that create exceptions and categories pervade statutory codes. Very few of these enactments, however, violate the command of “equal protection of the laws.” In sum, the term “equal protection” is ambiguous—indeed, about as ambiguous as a legal text can get. As a result, judges have had to develop sorting mechanisms to distinguish between laws that discriminate in constitutionally prohibited and permissible ways.

One key sorting device developed by the Court renders laws that discriminate on the basis of race subject to a powerful presumption of invalidity.<sup>138</sup> The text of the Equal Protection Clause, however, leaves no doubt that its prohibition reaches beyond laws that draw lines based on race. Judges thus have had no choice but to identify additional sorting mechanisms.<sup>139</sup>

Much of the Court’s work in constitutional law has involved constructing these mechanisms. One part of this process comports with common understanding. It suggests that, as we gauge whether particular instances of unequal

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<sup>133</sup> See *supra* notes 37, 59, 88 and accompanying text.

<sup>134</sup> U.S. CONST. amend. XIV, § 1.

<sup>135</sup> See 71 AM. JUR. 2D STATE AND LOCAL TAXATION § 269 (2020).

<sup>136</sup> See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.04 (Zachary Wolfe ed., 4th ed. 2020).

<sup>137</sup> See I.R.C. § 1 (2018) (establishing differing rates for differing levels of income).

<sup>138</sup> See, e.g., *Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013) (endorsing this view, including for affirmative-action programs).

<sup>139</sup> For example, the Court has also deemed discrimination on the basis of ethnicity to be subject to strict scrutiny. See *id.* at 310; see also *Trimble v. Gordon*, 430 U.S. 762, 777 (1977) (Rehnquist, J., dissenting) (referring to discrimination on the basis of ethnicity as the “first cousin” of race discrimination and thus properly subject to strict scrutiny). But that conclusion is hardly self-evident. Notably, Professor Amar suggests that this extrapolation, and other extrapolations like it, draw support from reading the document as a whole. Amar, *Intratextualism*, *supra* note 27, at 769–70.

treatment qualify as constitutionally cognizable, it makes sense to give special attention to “fundamental interests” rooted, albeit outside the Equal Protection Clause, within the Constitution itself.

By way of example, in *Griffin v. Illinois* the Court held that states that make criminal appeals available to convicted defendants may not deny access to appellate review based on a convicted defendant’s indigency.<sup>140</sup> The source of the right laid down in *Griffin* is not the Due Process Clause because “a State is not required . . . to provide . . . a right to appellate review at all” under due process principles.<sup>141</sup> Nor does the right spring from any status-based anti-discrimination principle because the Court has long held that laws that disadvantage the poor in practical effect (in contrast, for example, to laws that purposefully discriminate on the basis of race) do not, as a rule, present equal protection problems.<sup>142</sup> So where did this constitutional rule of *Griffin* come from? According to the Court itself, *Griffin* and its progeny “reflect both equal protection and due process concerns.”<sup>143</sup>

And why not? Access to a direct criminal appeals—even if not mandated by any single clause of the Constitution when viewed in isolation—is a matter of profound real-world importance to convicted defendants in those states that choose to permit such appeals. It is one thing if, for example, a state requires that all persons, including cash-strapped citizens, pay the same fixed fee when they visit a public campground. It is a very different thing, however, if a state denies indigent individuals sentenced to go prison any and all appeal rights. So it is because in the latter case the idea of “due process of law” enters the scene. Indeed, it does so with a special measure of constitutional force because the core purpose of pursuing criminal appeals often is to vindicate the very protections afforded to criminal defendants by the textual commands of the Constitution itself.<sup>144</sup>

At the heart of the American legal system lies the idea of “Equal Justice Under Law”—a principle that is not easily reconciled with affording appellate review of serious criminal convictions only to those who can afford to pay a

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<sup>140</sup> 351 U.S. 12, 18 (1956).

<sup>141</sup> *Id.*

<sup>142</sup> See, e.g., *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (examining requirement of a filing fee to appeal a denial of benefits under the rational-basis standard because “[n]o suspect classification, such as race, nationality, or alienage, is present”).

<sup>143</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (noting that in this setting “[d]ue process and equal protection principles converge” (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983))).

<sup>144</sup> See *Griffin*, 351 U.S. at 19 (“Thus to deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside.”). Notably, those protections are made operative against the states primarily by the Due Process Clause of the Fourteenth Amendment, particularly insofar as it incorporates Bill of Rights protections, which likewise are located in the whole document that is the Constitution.

fee.<sup>145</sup> To be sure, the phrase “Equal Justice Under Law” does not appear within the four corners of the Constitution. But the idea comes into plain view when the Equal Protection Clause is read with attentiveness to the Due Process Clauses and their commitment to procedural justice. To repeat: The Due Process Clauses, by themselves, might well not require the state to afford defendants a criminal appeal.<sup>146</sup> But those clauses help to show that, when the government does afford a process so tied to ensuring basic legality as the chance to pursue the overturning of a serious criminal punishment attributable to reversible trial-court errors, the requirement of “equal protection” dictates that this opportunity be made available to the rich and the poor alike.

First impressions might suggest that the style of equal protection analysis set forth in *Griffin*—with its focus on equal procedural justice—has little, if anything, to do with the claim of substantive liberty vindicated in *Obergefell*. But first impressions can be deceiving. To begin with, just as was the case in *Griffin*, the marriage-limiting law at issue in *Obergefell* did not apply to a group of individuals (there, gays and lesbians) previously identified as belonging to a suspect class.<sup>147</sup> Nor did the Court in *Obergefell* declare that, from that day forward, gays and lesbians would constitute a protected or quasi-protected group for equal protection purposes. Instead, the Court chose to interpret the guarantee of “equal protection” by focusing on the special importance of the marital relationship—a matter that was salient not only because of the deeply rooted social significance of the marital institution, but also because of its constitutional status, as established in the Court’s prior substantive due process cases.<sup>148</sup>

In sum, as in *Griffin*, the Court in *Obergefell* took account of the Fourteenth Amendment’s Due Process Clause—albeit, here, in its substantive dimension—in the process of giving meaning to the opaque textual safeguard of “equal protection.” No less important, in both *Griffin* and *Obergefell*, just as in *Smith*, the Court proceeded, as a functional matter, in exactly the same way it had proceeded in *Speiser* and *Roaden*: In interpreting an ambiguous rights-creating provision (here, the Fourteenth Amendment Equal Protection Clause), it relied in part on another clause (here, the Fourteenth Amendment Due Process Clause) located within the same whole document that is the Constitution of the United States.

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<sup>145</sup> Indeed, the phrase “Equal Justice Under Law” appears on the façade of the Supreme Court Building itself.

<sup>146</sup> See *supra* note 141 and accompanying text.

<sup>147</sup> See RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.28(c)(ii) (5th ed. 2012 & 2020 Supp.).

<sup>148</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (relying on “the fundamental right to marry” recognized in earlier substantive due process rulings).

### III. THE COMMONALITY OF HYBRID RIGHTS: OF VOTING, INCORPORATION, REVERSE INCORPORATION AND MORE

Parts I and II discuss cases in which the Supreme Court's vindication of hybrid rights was easy to recognize. In each such case, the Court dealt with only two provisions of the Constitution that opinion-readers could readily see as operating in tandem, however controversial those provisions' joint operation might be. As it turns out, there exist many more hybrid-rights rulings, and some of those rulings involve more complicated instances of hybrid-rights analysis. These additional cases—especially those involving incorporation, reverse incorporation, and equal-protection-based voting rights—merit especially close attention, in part because, just like *Speiser* and *Roaden*, they constitute long-settled features of the constitutional landscape.<sup>149</sup> Moreover, careful inspection reveals that, again just like with *Speiser* and *Roaden*, the Court's use of the hybrid-rights methodology in these cases differed not at all, as a matter of substance, from its use of that methodology in *Smith* and *Obergefell*.

Some cases that involve hybrid-rights analysis present a special complication because, in interpreting a disputed constitutional provision, the Court looks at not just one other clause set forth in the Constitution, but at multiple other texts that the Constitution includes. The Court's many voting-related equal protection rulings exemplify this approach. In *Harper v. Virginia Board of Elections*, for example, the Court held that state poll taxes violate the Equal Protection Clause on the ground that these exactions discriminate against the poor with regard to the “fundamental political right” to vote.<sup>150</sup> But where did this “fundamental political right” come from? More specifically, how could the Justices find it to exist when “the right to vote in state elections is nowhere expressly mentioned” in the constitutional text?<sup>151</sup>

The best answer is that the special status of voting springs from a variety of constitutional provisions, all of them connected to the centrality of republicanism in the American system of government.<sup>152</sup> Particularly important in this

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<sup>149</sup> See *infra* notes 150–173 and accompanying text.

<sup>150</sup> 383 U.S. 663, 667–68 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

<sup>151</sup> *Id.* at 665.

<sup>152</sup> Particularly illuminating in this regard is the heavy reliance placed by the majority in *Harper* on its earlier and seminal one-person-one-vote reapportionment ruling, founded on the Equal Protection Clause, in *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). There, the Court pointed directly to the “Fifteenth, Seventeenth, Nineteenth, Twenty-third, and Twenty-fourth Amendments” in emphasizing that “history has seen a continuing expansion of the scope of the right of suffrage in this country,” while also observing that “restrictions on that right strike at the heart of representative government,” which obviously finds its legal basis in the many election-centered provisions of both the original Constitution and its amendments. *Id.* at 555 & n.28. In addition, the Court in *Reynolds* squarely drew on its earlier ruling in *Gray v. Sanders*, 372 U.S. 368 (1963), which had deemed the one-person-one-vote principle applicable to statewide gubernatorial races in part by relying on the American “concep-



regard is the Republican Form of Government Clause.<sup>153</sup> But also in the picture is the presupposition that popular elections will lead to the selection of members of lower state legislative chambers and, consequently, members of the House of Representatives.<sup>154</sup> Of similar salience are recurring references to “Electors,” “Election,” and “Elections” throughout Article I.<sup>155</sup> And especially telling is the striking reality that no fewer than six of the sixteen still-operative post-Bill of Rights amendments focus specifically on blocking state interference with the right to vote.<sup>156</sup>

In short, in *Harper* and its progeny, the Court interpreted the Equal Protection Clause—just as it did in both *Griffin* and *Obergefell*—by looking at the Constitution as a whole. The only difference was that the Court in *Griffin* and *Obergefell* focused on just one companion clause in fleshing out the meaning of the term “equal protection,” while in the line of authority launched by *Harper*, the Court found interpretive guidance in more than one provision. For our purposes, however, this difference involves nothing more than an inconsequential detail. The overarching point is that the voting rights cases, no less than the cases discussed earlier in this Article, involved consultation of material lodged elsewhere in the whole constitutional document as the Court interpreted a single, ambiguous, and controlling constitutional text. Nor is the *Harper* line of cases unique. In other contexts, too, the Court has pointed to multiple provisions of the whole text in the process of discerning the scope of a hard-to-penetrate constitutional provision.<sup>157</sup>

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tion of political equality” supported in no small measure by “the Fifteenth, Seventeenth, and Nineteenth Amendments.” *Reynolds*, 377 U.S. at 558 (quoting *Gray*, 372 U.S. at 381).

<sup>153</sup> U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

<sup>154</sup> *Id.* art. I, § 2.

<sup>155</sup> *Id.* §§ 2–5.

<sup>156</sup> *Id.* amend. XIV, § 2 (penalizing states with reduced representation when they disenfranchise males at least twenty-one years old); *id.* amend. XV, § 1 (barring discrimination in state voting rules based on “race, color, or previous condition of servitude”); *id.* amend. XVII (providing for popular election of United States Senators); *id.* amend. XIX (barring vote-related discrimination “on account of sex”); *id.* amend. XXIV (outlawing poll taxes for federal elections); *id.* amend. XXVI (outlawing denial of voting rights to citizens “who are eighteen years of age or older”); *see also* *Shelby County v. Holder*, 570 U.S. 529, 567 n.2 (2013) (Ginsburg, J., dissenting) (“The Constitution uses the words ‘right to vote’ in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.”). Additional work in expanding the franchise was done by the Twenty-Third Amendment, which provided for participation by residents of the District of Columbia in presidential elections. U.S. CONST. amend. XXIII, § 1.

<sup>157</sup> *See* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995) (considering jointly (1) Article I, Section 5, Clause 1, (2) Article I, Section 6, (3) Article I, Section 4, Clause 4, and (4) Article II, Section 1, Clause 2 of the Constitution in concluding that the right to elect “representatives to the National Legislature was a new right” and thus not reserved to the states by the Tenth Amendment); *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 149 (1967) (“It is significant that the guarantee of freedom of speech and press falls between the religious guarantees and the guarantee of the right to petition for

Another form of rights hybridization—one that initially might seem to have nothing to do with *Smith* and *Obergefell*—involves incorporation. In seminal rulings handed down not long after adoption of the Fourteenth Amendment, the Court made it clear that the Amendment’s Privileges or Immunities Clause did not subject the states to the many safeguards directed against federal invasion by the Bill of Rights.<sup>158</sup> In later cases, however, the Court saw fit to apply to questions of incorporation the same fundamental-fairness test that it deemed operative in evaluating other claims brought forward by litigants under the banner of the Due Process Clause.<sup>159</sup> In the incorporation cases, however, the fundamental-fairness test developed a distinctly text-tied, hybrid-rights quality.

The organizing idea found expression in *Duncan v. Louisiana*, where the Court held that states must afford to criminal defendants the same jury-trial right that the Sixth Amendment made operative in federal prosecutions.<sup>160</sup> As the Court put the critical point in that case: “The Fourteenth Amendment denies the States the power to ‘deprive any person of life, liberty, or property without due process of law.’ In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance . . . .”<sup>161</sup>

The result of rulings such as *Duncan* is that a special sub-rule regarding application of the fundamental-fairness principle rooted in the text of the Fourteenth Amendment now operates in incorporation cases.<sup>162</sup> This rule dictates that states presumptively violate the guarantee of “due process of law” whenever they fail to afford the text-based protections directed against the federal government by the Bill of Rights. Put another way, the Court in the incorporation cases—just like in other hybrid-rights cases—has looked to the whole document in construing a highly ambiguous term. More specifically, it has relied heavily on terms lodged outside the Fourteenth Amendment in defining

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redress of grievances in the text of the First Amendment, the principles of which are carried to the States by the Fourteenth Amendment. It partakes of the nature of both, for it is as much a guarantee to individuals of their personal right to make their thoughts public and put them before the community, as it is a social necessity required for the ‘maintenance of our political system and an open society.’” (citation omitted) (quoting *Time, Inc. v. Hill* 385 U.S. 374, 389 (1967)).

<sup>158</sup> See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 94–96 (1908) (relying on the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873)).

<sup>159</sup> See *supra* note 128 and accompanying text. See generally *Bambauer & Massaro*, *supra* note 16, at 310–11 (“Within the category of fundamental rights are two sub-types of rights: those derived from enumerated rights set forth in the Bill of Rights . . . and ‘unenumerated’ rights deemed to be fundamental to ordered liberty.”).

<sup>160</sup> 391 U.S. 145, 153–54 (1968).

<sup>161</sup> *Id.* at 147–48 (quoting U.S. CONST. amend. XIV, § 1).

<sup>162</sup> See *supra* notes 128–131 and accompanying text (discussing the fundamental fairness principle).

what rights qualify as “fundamental” for Fourteenth Amendment purposes. Indeed, the Court’s cross-clause method of dealing with a single text’s ambiguity in the incorporation cases has been particularly transparent because the Court in this context, as illustrated by *Duncan*, often states explicitly that it is looking to separate constitutional provisions in deciphering the meaning of the Fourteenth Amendment’s case-dispositive, but ambiguous, terminology.<sup>163</sup> The only special characteristics of the incorporation rulings are that: (1) there a lot of them, and (2) each one follows the same interpretive pattern because of the common character, including with regard to textual location, of the Constitution’s Bill of Rights provisions.

These two distinct features of the incorporation decisions, however, do not alter their essential commonality with *Speiser*, *Roaden*, *Smith*, and *Obergefell*. To be sure, there are many incorporation decisions, and in each one the Court assimilated into the Due Process Clause an elsewhere-located textual protection of rights in “jot for jot” fashion.<sup>164</sup> But so what? The relevant point is that, in each of the incorporation cases, the Court looked to other features of the whole constitutional instrument in addressing an ambiguity—here, an ambiguity built into the Fourteenth Amendment’s “due process of law” linguistic command, which the Court has interpreted to protect “fundamental” rights.

In sum, the incorporation cases fit hand-in-glove with the overarching text-based account of hybrid rights developed in this paper. To repeat: In each case in which the Court incorporated a Bill of Rights protection into the Fourteenth Amendment, it drew upon one text (namely, a particular clause of the Bill of Rights) to help resolve an ambiguity presented by the case-controlling text (namely, the Fourteenth Amendment’s safeguard of “due process of law”). And the whole-document-based ambiguity-addressing interpretive method put to use in the incorporation context in this way is the same interpretive method that underlies each of the Court’s other—and oftentimes much more harshly maligned—hybrid-rights precedents.

A final, less-than-obvious form of hybrid-rights decision making involves reverse incorporation. As the preceding discussion reveals, the Court in its many incorporation rulings drew upon the text of the Bill of Rights to help resolve a nettlesome ambiguity that lurks in the Fourteenth Amendment’s Due Process Clause. Notably, the reverse-incorporation cases concern essentially the same problem—that is, how to deal with an ambiguity embedded in the term “due process of law,” albeit as that term is used in the Fifth Amendment.

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<sup>163</sup> See *supra* note 161 and accompanying text.

<sup>164</sup> On the subject of “jot for jot” incorporation, see ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 6.3.3, at 531–32 (5th ed. 2015) [hereinafter CHERMERINSKY, CONSTITUTIONAL LAW] (noting that the Supreme Court’s approach has been to incorporate rights in such a way that they “apply to the states exactly as they apply to the federal government”).

This problem has arisen because the Constitution includes no freestanding Equal Protection Clause that operates against the federal government.<sup>165</sup> Accordingly, the Court has had to consider the extent to which it should look for guidance, in interpreting the Fifth Amendment's deeply ambiguous text-based command of "due process" (as fleshed out by the fundamental-fairness standard), by consulting Equal Protection Clause-based protections made applicable, though only against the states, by the Fourteenth Amendment.<sup>166</sup> And in a series of highly consequential rulings, the Court has determined that all (or at least essentially all) of these text-based protections do apply to the federal government by way of the Fifth Amendment's Due Process Clause.<sup>167</sup>

Many commentators claim that the Court's reverse-incorporation jurisprudence has made mincemeat of the constitutional text.<sup>168</sup> Perhaps they are right, but that line of critique has no bearing on the key point made here. The point is that, at bottom, the Court's recognition of hybrid rights in the reverse-incorporation cases has operated in exactly the same way as its recognition of hybrid rights in all the other authorities this Article has examined. As a practical matter, the Court has had to determine the extent to which the Fifth Amendment's Due Process Clause, by way of its demand for fundamental fairness, guards against race discrimination and other forms of unequal treatment. And in the end, the Court has made this determination by looking at the whole constitutional document, which includes the Equal Protection Clause.

Put simply, the Court's reverse-incorporation jurisprudence is all about the recognition of a "hybrid right." Indeed, the reverse-incorporation principle involves a particularly straightforward, rather than complex, form of hybridization. This is so because—just like *Speiser*, *Roaden*, *Smith*, and *Obergefell*—the reverse-incorporation cases involve interpreting only one contested constitutional text (here, the Fifth Amendment Due Process Clause) in light of only one other constitutional text (here, the Fourteenth Amendment Equal Protection Clause). Indeed, the only thing that stands out about the Court's reverse-incorporation jurisprudence is that—much like the Court's incorporation juris-

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<sup>165</sup> See, e.g., Bambauer & Massaro, *supra* note 16, at 317 (noting this point).

<sup>166</sup> See *id.* at 318 (explaining that, when it comes to the federal government, "[i]nequality thus is a *due process* liberty problem, as a matter of current constitutional grammar").

<sup>167</sup> *Id.* at 317 (adding that the Court's extension of protections rooted in equality made applicable to the federal government by way of the Fifth Amendment Due Process Clause stem from "its dynamic relationship to the Fourteenth Amendment."); see, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (describing the "Court's approach to Fifth Amendment equal protection claims" as "precisely the same as to equal protection claims under the Fourteenth Amendment").

<sup>168</sup> See, e.g., Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 977 n.7 (2004) (noting that reverse incorporation of Fourteenth Amendment equal protection rules into the Fifth Amendment Due Process Clause clashes with the separate textual protection of equal protection rights and due process rights in the Fourteenth Amendment).

prudence—it has an exceptionally far-reaching practical impact. That fact, however, does not alter the single-clause-interpreted-in-light-of-the-whole-document-based, hybrid-rights character of the reverse-incorporation principle.

But wait! Some observers might claim that the Court's work with incorporation and reverse incorporation is different from, and less textually ambitious than, its more-often-criticized fiddling with multiple clauses in cases such as *Smith* and *Obergefell*.<sup>169</sup> This claim has its origin in two propositions: (1) that “incorporation by reference” is commonplace in legal documents;<sup>170</sup> and (2) that, as a practical matter, the incorporation and reverse-incorporation doctrines involve—as their very names suggest—nothing more than this sort of “incorporation.” As a result, so the argument goes, the incorporation and reverse-incorporation rulings are very much unlike *Smith* and *Obergefell*—indeed, very much unlike *Speiser* and *Roaden*, too—because that quartet of cases did not involve any interpretive work remotely akin to incorporation by reference. Instead, each of those four cases involved what might be called cross-clause illumination, and that—so the argument continues—is very different from cross-clause incorporation.

There is, however, a fatal flaw in this effort to fence off the Court's incorporation and reverse-incorporation rulings from these other hybrid-rights precedents: It simply is not true that the Fourteenth Amendment Due Process Clause incorporates *by reference* the Bill of Rights or that the Fifth Amendment Due Process Clause incorporates *by reference* the protections of the Equal Protection Clause. After all, neither of the Due Process Clauses makes any reference whatsoever to any other constitutional provisions. Any effort to single out the incorporation and reverse-incorporation cases as textually distinct instances of incorporation by reference thus stumbles right out of the starting blocks.<sup>171</sup>

To be sure, in cases such as *Duncan*, the Court made use of whole-document interpretive canon in a way that differs from how the Court utilized

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<sup>169</sup> See *supra* notes 25–29, 112 and accompanying text.

<sup>170</sup> See, e.g., *Incorporation by Reference*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as referring to “making a secondary document part of a primary document by including in the primary document a statement that the secondary document should be treated as if it were contained within the primary one”).

<sup>171</sup> To be sure, if the text of the Due Process Clauses did incorporate by reference protections set forth elsewhere in the document, that might place these cases in a very different category. Notably, some analysts have viewed the text of the Fourteenth Amendment as in effect incorporating by reference all Bill of Rights protections by way of its use of the term “privileges or immunities of citizens of the United States.” See *McDonald v. Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring) (arguing that “the right to keep and bear arms is a privilege of American citizenship that applies to the States through the Fourteenth Amendment’s Privileges or Immunities Clause”). The Due Process Clauses, however, are not the same thing as the Privileges or Immunities Clause, and the Court has approached their operation in a very different way.

this same canon in cases such as *Roaden*. Thus, in *Duncan*-type cases the Court has incorporated rights into the Fourteenth Amendment, even though the Amendment does not incorporate those rights by reference. In contrast, in *Roaden*-type cases, the Court did not incorporate into one open-ended provision a spelled-out list of protections established by companion texts. But so what? Nothing in the whole-document canon of interpretation suggests its only proper use lies in resolving textual ambiguities by way of cross-clause rights-incorporation, as opposed to cross-clause illumination. Indeed, across the full range of cases in which courts have looked to the whole-document canon of interpretation, the Court has not often used it to “incorporate” into a general textual command a mixed bag of specific rights established elsewhere in a document. This manner of relying on companion provisions in actuality is rare, rather than the interpretive norm.

In sum, all the cases discussed in Parts I, II, and III involve the same interpretive method. In *Roaden*, the Court interpreted the ambiguous terms of the Fourth Amendment in light of the Free Speech Clause of the First Amendment. In the reverse-incorporation cases, the Court interpreted the ambiguous terms of the Fifth Amendment in light of the Equal Protection Clause of the Fourteenth Amendment. And in all the cases discussed in between—from *Speiser* to *Smith* to *Obergefell* to *Harper* to *Duncan*—the Court wielded exactly the same look-at-the-whole-instrument canon of interpretation.

What is more, the extended list of hybrid-rights decisions canvassed in the preceding pages is itself far from complete. Other commentators have suggested that hybrid-rights rulings have “arisen with surprising frequency across different doctrinal domains.”<sup>172</sup> A more accurate description is that cases of this kind are legion.<sup>173</sup> Moreover, many of these cases—such as the incorporation and re-

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<sup>172</sup> M. Coenen, *supra* note 17, at 1074; *see also* Abrams & Garrett, *supra* note 16, at 1316 (describing these cases as “surprisingly common”); Deborah Hellman, *Two Concepts of Discrimination*, 102 VA. L. REV. 895, 950 (2016) (asserting that such “intermingling of the clauses . . . is increasingly common”).

<sup>173</sup> There are, for example, dozens of cases that have built on the principles of *Harper* and *Griffin* to provide equal treatment to persons in both the voting context and criminal law (and criminal-law-like) settings, as well as large numbers of other cases that apply the Equal Protection Clause with an eye to fundamental-rights principles rooted in substantive due process. The Court’s use of the hybrid-rights methodology, however, hardly stops there. *See, e.g.*, *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (relying on the Equal Protection and Due Process Clauses to limit state power to revoke probation based on a parolee’s inability to pay his fine and restitution); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 577 (1980) (plurality opinion) (noting the right of access to criminal trials protected by First Amendment guarantees of speech press together with the right of assembly); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (invalidating a wholesale ban on legal-alien service in the federal civil service based not only on equal protection principles, but also proper-lawmaker procedural due process concerns); *Stanley v. Georgia*, 394 U.S. 557, 566–68 (1969) (relying on both First Amendment free-expression principles and Fourteenth Amendment right-to-privacy principles to invalidate state laws to the extent they proscribed the possession of obscene materials in one’s home);

verse-incorporation cases—long have stood as key pillars of constitutional law, relied on for decades in thousands of judicial rulings. Previous accounts of hybrid rights, however, have failed to focus on the underlying kinship that exists between the Court’s many incorporation and reverse-incorporation rulings and cases such as *Smith* and *Obergefell*. Yet, recognizing this kinship drives home a point of central importance: It helps to show how hybrid rights have played both a central and widely accepted role—rather than only a peripheral and tenuous one—in the Supreme Court’s decision making over many years.

#### IV. RESPONDING TO CRITIQUES OF HYBRID RIGHTS

So, has the Supreme Court’s recurring use of the hybrid-rights methodology taken it, time and time again, in a wrong direction? This Part considers that question.<sup>174</sup> Section A responds to concerns that judicial vindication of these rights is non-originalist.<sup>175</sup> Section B addresses the criticism that this approach to rights recognition is unduly activist.<sup>176</sup> Section C takes on the claim that the hybrid-rights methodology is unmanageable.<sup>177</sup> Section D considers

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Boyd v. United States, 116 U.S. 616, 622, 630 (1886) (invalidating a statute that created a rebuttable presumption that wrongdoing had occurred—characterized as involving a “confession”—based on a defendant’s refusal to turn over papers concerning that conduct, and reasoning that in such a case “the Fourth and Fifth Amendment run almost into each other” even though the effectively “compulsory production” of documents lacked “certain aggravating incidents of actual search and seizure”); see also *Sause v. Bauer*, 138 S. Ct. 2561, 2563 (2018) (per curiam) (“When an officer’s order to stop praying is alleged to have occurred during the course of investigative conduct that implicates Fourth Amendment rights, the First and Fourth Amendment issues may be inextricable.”); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (describing the Court’s earlier ruling in *Lawrence v. Texas* as one in which the Court “drew upon principles of liberty and equality” (citing *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))); *United States v. Windsor*, 570 U.S. 744, 774–75 (2013) (relying on interaction of substantive due process and equal protection protections, coupled with federalism values, to invalidate federal law that differentiated between same-sex and opposite-sex married couples); *Abrams & Garrett*, *supra* note 16, at 1314–15, 1347 (asserting that the Court’s *Miranda* ruling was “informed by multiple constitutional sources,” particularly the Fifth Amendment Self-Incrimination Clause and the Sixth Amendment’s protection of the right to counsel). A particularly expansive set of cases that involve a type of hybrid rights addresses how “the *processes* by which laws are enacted affect their validity under seemingly *substantive* constitutional provisions like the First Amendment and the Equal Protection Clause.” Dan T. Coenen, *The Rehnquist Court, Structural Due Process, and Semisubstantive Constitutional Review*, 75 S. CAL. L. REV. 1281, 1281 (2002); see also Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1860 n.1143 (2001) (collecting numerous semisubstantive-review cases and noting their linkage to the Court’s hybrid-rights jurisprudence).

<sup>174</sup> See *infra* Part IV.A–D.

<sup>175</sup> See *infra* Part IV.A.

<sup>176</sup> See *infra* Part IV.B.

<sup>177</sup> See *infra* Part IV.C.

and rejects the contention that judicial recognition of hybrid rights is counter-textual.<sup>178</sup>

#### A. Criticism One: Hybrid Rights Are Non-Originalist

Many originalists take a dim view of rights derived from the “penumbras” or “structures” of the Constitution.<sup>179</sup> Yet, that is precisely where existing theories of hybrid rights tend to locate them.<sup>180</sup> As we have seen, however, these theories miss the mark because, on the better view, every previously recognized hybrid right is best understood as having its origin in a discrete clause of the Constitution. It thus would seem that originalists should be no more inclined to discard hybrid rights than they are ready to discard any other rights that derive from a particular constitutional provision.<sup>181</sup>

Or should they? Some originalists might say that relevant ratifying communities would never have expected the sort of cross-clause interpretive approach undertaken in cases such as *Speiser* and *Roaden*. Each clause, they might say, must rest entirely on its own bottom, including because the Framers took care to lodge constitutional commands in separately enumerated articles and sections. These analysts might see it as especially dubious to discover hybrid rights in the Constitution’s amendments. After all, both the Bill of Rights itself and each of its successor amendments came into the Constitution through highly individualized decision-making processes that occurred in an uncoordinated fashion at points in time removed from one another.

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<sup>178</sup> See *infra* Part IV.D.

<sup>179</sup> See, e.g., Colby, *Originalism and Structural Argument*, *supra* note 24, at 1317 (“A method of constitutional argument that does not seek to determine and apply the original meaning of the text of a particular constitutional provision is not a form of public meaning originalism as that theory is generally understood.”); see also Solum, *Originalism and the Unwritten Constitution*, *supra* note 27, at 1967 (noting that “[s]ome originalists may believe that the spirit of originalism is fundamentally inconsistent with the notion of freestanding extratextual fundamental law”). To be sure, there are cross-currents in the law on this score. See *supra* note 117 and accompanying text. But even those originalists who are open to endorsing structural or penumbral reasoning in support of non-textual federalism and separation-of-powers rules may be far less enthusiastic about using that methodology in the service of identifying individual rights. See Reynolds, *supra* note 21, at 1344–45 (noting this distinction).

<sup>180</sup> See *supra* note 25 and accompanying text.

<sup>181</sup> See Colby, *Originalism and Structural Argument*, *supra* note 24, at 1324 (contrasting “principles that are allegedly implicit in the constitutional design as a whole,” and thus problematically untethered to a particular text, with constructions—even if informed by constitutional themes and surrounding texts—that “give effect to particular ambiguous constitutional provisions”); see also *id.* at 1317 (citing the work of Professors Lawrence Solum, Kurt Lash, and Michael Ramsey as tying originalism to deciphering “the original meaning of a constitutional provision,” but noting that this process permits courts to use “‘the constitution in all its parts’ to illuminate the meaning of a particular part” (first quoting Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 926 (2009); then quoting Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 972 (2008) (quoting BLACK, *supra* note 23, at 7)).



This critique, however, ignores the key point that there exists a well-settled norm of addressing textual ambiguities that lurk in any legal document by considering the document as a whole.<sup>182</sup> Indeed, because this norm reaches back centuries, it seems entirely wrong from an originalist perspective to ignore companion provisions in dealing with ambiguities that particular provisions of the Constitution present.<sup>183</sup> In particular, if lawyers, legislators, or even “intelligent and informed people of the time”<sup>184</sup> made up the core of relevant ratifying communities, those citizens surely would have known of the interpretive practice of reading legal documents as a whole.<sup>185</sup> In addition, even ordinary-citizen members of those communities would have grasped this general idea based on common practice. Who wouldn’t, for example, look at surrounding textual passages to help discern the meaning of an obscure phrase in a letter or newspaper column? Put simply, it comports with historical understanding to deal with ambiguous constitutional texts by looking at companion provisions in the same document.<sup>186</sup>

An important line of originalist thought supports this same conclusion. According to theorists such as Professor Lawrence Solum, there oftentimes comes a point beyond which it is impossible to discern the operative original

<sup>182</sup> See Jarrod Shobe, *Enacted Legislative Findings and Purposes*, 86 U. CHI. L. REV. 669, 674–75 (2019) (collecting authorities); *infra* note 240 and accompanying text (collecting Supreme Court authorities where Justices cross-referenced constitutional provisions in the interpretive process, including provisions put in place at different times).

<sup>183</sup> See Colby, *Originalism and Structural Argument*, *supra* note 24, at 1313 (suggesting that “using the structure of the document to help determine the original meaning of otherwise vague or ambiguous provisions of the constitutional text” reflects “the sort of holistic textual analysis that ought not be concerning to originalists”); Solum, *Originalism and the Unwritten Constitution*, *supra* note 27, at 1964 (explaining that public-meaning originalism requires judges “to read individual clauses in the context of the whole Constitution”); John O. McGinnis, *Originalism Encompasses Text and Structure*, LAW & LIBERTY (Aug. 21, 2018), <https://lawliberty.org/originalism-encompasses-textual-and-structural-modalities-pamela-karhan/> [<https://perma.cc/PYA7-W9HU>] (endorsing, from an originalist perspective, use of the whole-document canon in constitutional interpretation). The work of Professors McGinnis and Rappaport, among others, supports (quite understandably) using ratification-era interpretive canons—including the whole-text canon—as part of the originalist methodology. See, e.g., John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 372 (2007) [hereinafter McGinnis & Rappaport, *Original Interpretive Principles*] (suggesting that originalists “should follow the principles of interpretation that a reasonable person at the time of the framing and ratification thought would be applied to the Constitution”).

<sup>184</sup> ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Amy Gutmann ed., 1997).

<sup>185</sup> See McGinnis & Rappaport, *Original Interpretive Principles*, *supra* note 183, at 374–75 (arguing that “the enactors would have believed that [ambiguous provisions’] future application would be based upon the interpretive rules accepted at the time”).

<sup>186</sup> See, e.g., McGinnis, *supra* note 183 (“There is nothing about originalism in general that suggests that terms should be read in isolation from others and original methods confirms [sic] that they were not so interpreted.”).

meaning of intrinsically vague constitutional terms.<sup>187</sup> When courts confront this situation, they accordingly must go to work in the “construction zone,” building on general principles and pragmatic considerations to determine the proper application of contested passages.<sup>188</sup> If one embraces this refinement of the originalist approach, it seems especially defensible for courts to look at surrounding text as one source of guidance in giving meaning to constitutional provisions. To take one example, in determining when equal protection has been denied, why should courts not look at background principles, grounded in a variety of clauses that presuppose the centrality of voting within our republican system? Is it not fair to say that those clauses help establish the meaning of equality by signaling that broad-based participatory republicanism lies at the heart of the constitutional plan?<sup>189</sup>

The work of well-credentialed originalists further evidences why whole-text-based hybridism coheres with the originalist philosophy. For example, it was Justice Scalia, “original meaning textualism’s patron saint,” who in *Smith* identified the “hybrid situation” free-exercise/due process right seen as properly undergirding the Court’s protection of the religion-practicing parents in *Yoder*.<sup>190</sup> Nor did Justice Scalia’s hybrid-rights work in *Smith* stand alone. He also openly endorsed First Amendment due process rights,<sup>191</sup> and joined in making use of specialized voting-rights principles rooted in the Equal Protection Clause as informed by other clauses.<sup>192</sup>

<sup>187</sup> See generally Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453 (2013) [hereinafter Solum, *Original and Constitutional Construction*].

<sup>188</sup> See *id.* at 458 (observing that “the actual text of the U.S. Constitution contains general, abstract, and vague provisions that require constitutional construction for their application to concrete constitutional cases”); *id.* at 472 (adding that “construction is essentially driven by normative concerns”); *id.* at 523 (asserting that “[c]onstitutional construction is ubiquitous in constitutional practice”); *id.* at 530 (noting that this is so because “discernable original meaning underdetermines some constitutional questions”); see also Colby, *Originalism and Structural Argument*, *supra* note 24, at 1322 (noting the need to move into “the construction zone” when “multiple possible rules of decision . . . are each consistent with the vague, open-ended, or ambiguous original meaning” (quoting *id.* at 458)).

<sup>189</sup> See, e.g., AMAR, *AMERICA’S UNWRITTEN CONSTITUTION*, *supra* note 37, at 183–87.

<sup>190</sup> Vasani Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 *GEO. L.J.* 1113, 1139 (2003).

<sup>191</sup> *Waters v. Churchill*, 511 U.S. 661, 669 (1994) (Scalia, J., concurring) (“I do not doubt that the First Amendment contains within it some procedural prescriptions . . .”).

<sup>192</sup> See *Bush v. Gore*, 531 U.S. 98, 110 (2000) (applying specialized equal protection principles applicable in voting cases). Indeed, one might fairly say that Justice Scalia’s originalist interpretations of the constitutional provisions in all instances—including in identifying protected (and unprotected) rights—stem from the decision to resolve constitutional ambiguities in light of whole-document-based interpretation. So, it is because a core feature of his overarching originalist approach to interpretation is rooted in lessons gleaned from the constitutional document taken as a whole. More specifically, Justice Scalia expressed the view that courts must reject an “aspirational” reading of each of the document’s most opaque provisions because (1) judges must read each of those provisions in context; (2)

Justice Hugo Black, perhaps the most celebrated of all Supreme Court textualists,<sup>193</sup> likewise supported the First Amendment due process methodology. Indeed, he did so from the very outset by endorsing the majority's position in *Speiser*.<sup>194</sup> No less important, it was Justice Black who authored the lead opinion in *Griffin v. Illinois*, thus launching the entire hybrid-rights jurisprudence that affords indigent persons equal access to criminal appeals and kindred forms of judicial redress.<sup>195</sup>

Well-credentialed academic originalists also have shown enthusiasm for reading rights-creating constitutional provisions in light of companion texts. In an article published shortly after the Court handed down *Obergefell*, for example, Steven Calabresi and Hannah Begley advanced “an originalist argument for the right to same-sex marriage.”<sup>196</sup> A key step in the development of that argument involved asserting that the Fourteenth Amendment Equal Protection Clause broadly outlaws sex-based discrimination.<sup>197</sup> For some originalists, this claim might seem farfetched, given the pervasiveness of sex discrimination at the time of the Amendment's ratification in 1868.<sup>198</sup> Calabresi and Begley found their way past this difficulty, however, by insisting that the Fourteenth Amendment must be read “through the lens of the Nineteenth Amendment,” which drew women into the political community by affording them the right to vote.<sup>199</sup> In other words, once “the Nineteenth Amendment was ratified in 1920, any logical synthesis of these two Amendments required that laws that discrim-

the whole constitutional document provides a key part of the context in which to read those provisions; and (3) in that regard, “[t]he context suggests that the abstract and general terms, like the concrete and particular ones, are meant to nail down current rights, rather than aspire after future ones.” SCALIA, *supra* note 184, at 135.

<sup>193</sup> Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 842 (2004) (asserting that “[t]he most celebrated textualist Supreme Court Justice is not Antonin Scalia or Clarence Thomas, but Hugo Black”); Michael J. Gerhardt, *A Tale of Two-Textualists: A Critical Comparison of Justices Black and Scalia*, 74 B.U. L. REV. 25, 28–37 (1994) (showing how Justices Black and Scalia shared similar interpretive ideologies).

<sup>194</sup> See *supra* note 87 and accompanying text.

<sup>195</sup> See 351 U.S. 12 (1956). In a similar fashion, then-Chief Justice Rehnquist voiced profound concerns about constitutional interpretation that strayed from original meaning. Rehnquist, *supra* note 60, at 706. But he signed on, with no expression of consternation, to decisions such as *Roaden v. Kentucky* and *Employment Division v. Smith*.

<sup>196</sup> Steven G. Calabresi & Hannah M. Begley, *Originalism and Same-Sex Marriage*, 70 U. MIAMI L. REV. 648, 649 (2016).

<sup>197</sup> *Id.* at 699.

<sup>198</sup> E.g., CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA 66 (2005) (noting that, among ratifiers of the Fourteenth Amendment, “[d]iscrimination on the basis of sex was generally thought to be reasonable”).

<sup>199</sup> Calabresi & Begley, *supra* note 196, at 648. For a more thorough development of this point, see Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1, 66–96 (2011).

inate on the basis of sex be seen as generally forbidden” by the Fourteenth Amendment.<sup>200</sup>

Much can be said about the case for gay-marriage rights made by Calabresi and Begley.<sup>201</sup> But one thing is crystal clear. In support of their originalist argument, the authors made an unabashedly ambiguity-resolving, hybrid-rights move. In their view, the Fourteenth Amendment did not bar state-based sex-discrimination prior to 1920. Thereafter, however, the Equal Protection Clause had to be read in light of the Nineteenth Amendment. One constitutional provision thus helped to clarify the reach of another—as has been the case in all the hybrid-rights rulings discussed in Parts I, II, and III of this Article.<sup>202</sup>

The bottom line is this: Properly understood, hybrid rights stem from applying the whole-document canon of interpretation, which itself has deep originalist roots, to a single and ambiguous text. What is more, leading originalists have endorsed the recognition of hybrid rights, thus providing telling evidence that the hybrid-rights methodology, whatever one might say about particular applications of it, falls as a general matter within the originalist tradition.<sup>203</sup>

### *B. Criticism Two: Hybrid Rights Are Unduly Activist*

Some observers assail the Supreme Court for overriding too freely and too often choices made by the people’s elected representatives. Because many of these critics bemoan the Justices’ invalidation of laws based on such open-textured constitutional provisions as the Equal Protection, Due Process, and Free Speech Clauses, it is not surprising that they would find even more problematic the Court’s weaving together of these and other constitutional texts on its way to striking down legislation put in place by the popular branches of government.<sup>204</sup> *Obergefell* is “Exhibit A” for their case.<sup>205</sup> There, after all, the Court invalidated the duly enacted laws of thirty-one separate states.<sup>206</sup>

<sup>200</sup> Calabresi & Begley, *supra* note 196, at 699.

<sup>201</sup> See, e.g., Orin Kerr, *Is There an Originalist Case for a Right to Same-Sex Marriage?*, WASH. POST: VOLOKH CONSPIRACY (Jan. 28, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/28/is-there-an-originalist-case-for-a-right-to-same-sex-marriage/> [<https://perma.cc/2DYB-desv>] (critiquing the Calabresi and Begley analysis, largely on problematic-level-of-generality grounds).

<sup>202</sup> See *supra* Parts I–III.

<sup>203</sup> See *supra* note 24 and accompanying text.

<sup>204</sup> See, e.g., Zick, *supra* note 16, at 856 (pointing out the risk of “judicial activism” raised by recognizing hybrid rights).

<sup>205</sup> See Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 26 (2015) (noting the dissenters’ charge of activism by the majority in *Obergefell v. Hodges*).

<sup>206</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (2015) (Roberts, C.J., dissenting); Brief of 57 Members of U.S. Congress as *Amici Curiae* in Support of Respondents at 4, *id.*, 135 S. Ct. 2584 (Nos. 14-556, 14-562, 14-571, 14-574).

Justice Joseph Story captured the first difficulty with this challenge to hybrid rights in *Martin v. Hunter's Lessee*: "It is always a doubtful course, to argue against the use or existence of a power, from the possibility of its abuse," for wherever any power "may be vested, it is susceptible of abuse."<sup>207</sup> There is a power of judicial review, and that power requires judges to enforce rights set forth in the constitutional text. Hybrid rights, as we have seen, are set forth in that text just as surely as other rights. Therefore, judges must enforce them.

Another difficulty with the judicial-activism critique is that it fails to recognize that the hybridization of rights sometimes operates as a tool of judicial restraint. Consider *Smith*.<sup>208</sup> Prior to that decision, First Amendment doctrine required courts to subject generally applicable laws to the strictest form of scrutiny whenever those laws substantially burdened a challenger's free exercise of religion.<sup>209</sup> In *Smith*, however, the Court retreated from this activist stance by reconceptualizing *Yoder* and related cases as establishing a much narrower set of protections.<sup>210</sup> The Court, in short, made use of the hybrid-rights methodology in the cause of judicial self-abnegation.

*Obergefell* illustrates much the same point. The challengers of the state law in that case urged the Court to rule that state discrimination against gays and lesbians always triggers an elevated standard of scrutiny under the Equal Protection Clause.<sup>211</sup> The Court, however, chose not to reach this far. Instead, it decided the case on a narrower ground—that is, by holding that the Equal Protection Clause, as illuminated by preexisting substantive due process principles, justified judicial intervention in the specialized context of marriage.<sup>212</sup> The Court thus took a far less expansive view of equal protection rights than it otherwise might have embraced.<sup>213</sup>

In a rich and provocative body of work, Professor Cass Sunstein has led the charge in trumpeting the advantages of judicial "minimalism" in constitu-

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<sup>207</sup> 14 U.S. (1 Wheat.) 304, 344–45 (1816).

<sup>208</sup> See generally *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872 (1990).

<sup>209</sup> See, e.g., *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) ("The state may justify an inroad on religious liberty [only] by showing that it is the least restrictive means of achieving some compelling state interest.").

<sup>210</sup> See *supra* notes 97–104 and accompanying text.

<sup>211</sup> Brief for Petitioners at 45, *Obergefell*, 135 S. Ct. 2584 (No. 14-556) (arguing that, because "the broad medical and scientific consensus is that sexual orientation 'is . . . immutable,'" restrictions based on this trait are properly subject to "heightened scrutiny" (quoting *Baskin v. Bogan*, 766 F.3d 648, 657 (7th Cir. 2014))).

<sup>212</sup> *Obergefell*, 135 S. Ct. at 2598–99 (majority opinion).

<sup>213</sup> See, e.g., *Huntington*, *supra* note 205, at 23 n.4 ("If the Court had seen discrimination in marriage as part of a larger question about equal citizenship, all LGBT individuals would have benefited. A more robust LGBT rights agenda would include protection from discrimination in employment, housing, and much more.").

tional decision making.<sup>214</sup> Minimalism eschews activism, and *Obergefell* had a minimalist quality in the sense that the Court did not go nearly as far as it might have gone in affording constitutional protections to gays and lesbians. What is more, the Court's marriage-centered, half-a-loaf approach sprang from its use of hybrid-rights reasoning. Put simply, the Court's capacity to recognize hybrid rights sometimes permits it to issue rulings that are "narrow" and "shallow" as opposed to rulings that are "broad" and "deep."<sup>215</sup> And to the extent that this is true, hybrid rights operate—in keeping with minimalist theory—to rein in judicial adventurism, as opposed to letting it run free.<sup>216</sup>

No less important, the effect of viewing one clause in light of another is sometimes counter-activist in a direct and obvious way. In *Graham v. Connor*, for example, a detainee made separate and alternative arguments that his arrest violated both (1) objectively defined Fourth Amendment limits on unreasonable seizures, and (2) more subjectively defined substantive due process limits on wrongful detention.<sup>217</sup> The Court, however, rejected the latter claim by holding that the detainee could not invoke the due-process-based safeguard because only the more "explicit" Fourth Amendment protection should control such a case.<sup>218</sup> The Court thus read the Fifth and Fourteenth Amendment Due Process Clauses, as effectively informed by the Fourth Amendment's specialized treatment of searches and seizures, in a manner that negated any protections those Amendments otherwise might provide in the recurring context of claimed improper arrests.<sup>219</sup>

*Graham* reveals a key point about the purportedly counter-majoritarian character of the whole-document-based, hybrid-rights methodology. And other cases do so as well.<sup>220</sup> This body of judicial work shows that, depending on

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<sup>214</sup> *E.g.*, CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 61–63 (1999).

<sup>215</sup> *Id.* at 16–19.

<sup>216</sup> *Accord, e.g.*, Karlan, *supra* note 5, at 477 (noting, for example, how "fundamental rights analysis can provide a limiting principle for claims of equality"). Notably, this point may take on powerful "real life" significance because of the recent replacement of Justice Kennedy by Justice Kavanaugh on the Supreme Court bench. On this view, Justice Kennedy never missed a chance to strike down laws that disadvantaged the LGBTQ community. But Justice Kennedy no longer sits on the Court, and the "narrow" nature of the precedent he crafted in *Obergefell* leaves room for a new majority coalition, potentially including Justice Kavanaugh, to decline to take the law farther down this rights-recognizing road. Depending on one's point of view, that prospect may be good or bad. But one thing is certain: This state of affairs highlights how the use of hybrid rights can restrain, and not just activate, judicial work that involves overturning legislative judgments.

<sup>217</sup> 490 U.S. 386, 394–95 (1989).

<sup>218</sup> *Id.* at 395.

<sup>219</sup> *See, e.g.*, Toni M. Massaro, *Reviving Hugo Black? The Court's "Jot for Jot" Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1096–98 (1998) (highlighting this effect of *Graham*).

<sup>220</sup> *See, e.g.*, *Albright v. Oliver*, 510 U.S. 266, 273–75 (1994) (extending application of the *Graham* principle to bar plaintiff's substantive-due-process-based malicious-prosecution claim). Inter-

context, viewing one constitutional provision in light of another can lead courts to embrace a less activist, rather than a more activist, set of rights-defining rules.<sup>221</sup> In sum, when it comes to formulating hybrid rights, courts stand at a door that can swing both ways.

Finally, the single-clause-based theory of hybrid rights developed in this Article holds the potential to reduce the risks of judicial overreaching by heightening the chances that judges will act transparently. Central to the promotion of rule-of-law values is the idea that judges should openly disclose the reasoning process that supports their decisions.<sup>222</sup> Courts, however, may balk at freely disclosing lines of analysis that subject them to the dreaded charge of judicial penumbralism.<sup>223</sup>

Penumbral thinking, however, simply falls out of the picture when one embraces the proper single-clause-viewed-in-light-of-the-whole-document approach to hybrid rights. This approach thus heightens the likelihood of judicial transparency by inviting—indeed, requiring—courts to fit hybrid-rights decision making into a structured and familiar juridical framework. In addition to enhancing transparency, the regularized use of this methodology should constrain judicial activism by disciplining judicial work. Simply put, the danger of runaway judging diminishes when governing doctrine requires courts to issue rulings pursuant to a reason-guiding structure. And that is all the more true when the operative reason-guiding structure displaces an alternative structure that involves searching in shadows for penumbral “postulates that limit and

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twined with these authorities is *Nieves v. Bartlett*, in which the plaintiff asserted a violation of his First Amendment speech rights under 42 U.S.C. § 1983 on the theory that police officers arrested him in retaliation for his speech. 139 S. Ct. 1715, 1720 (2019). The Court rejected this claim. *Id.* at 1728. It reasoned that because the officers had probable cause under the Fourth Amendment to put the plaintiff in custody based on his aggressive physical conduct, no speech-based-retaliation claim could be asserted even if the plaintiff’s unwanted, but protected, First Amendment activity-motivated the action of the officers. *Id.* at 1727–28. In short, at least as a practical matter, the Court’s treatment of the First Amendment in light of the Fourth Amendment operated to defeat the plaintiff’s otherwise-available speech-retaliation claim. *Id.* at 1723–25. In a similar vein, Professor Amar has argued that the primary rights-restricting rule established in *Smith*—to the effect that free-exercise challenges are unavailable when one attacks a generally applicable law—is itself supported by reading the First Amendment in light of the Tenth Amendment. Amar, *Intratextualism*, *supra* note 27, at 819; *see also id.* at 815 (advocating a reading of the Free Speech Clause that limits protection for nonpolitical communication, despite the clause’s generalized textual reference to “speech,” because the Speech and Debate Clause of Article I, Section 6, provides an “analytic[al] link” that offers a “clue” that “[p]olitical speech is the core idea”).

<sup>221</sup> See Amar, *Intratextualism*, *supra* note 27, at 787 (“[I]ntratextualism can often be used on both sides of contested questions . . . .”); M. Coenen, *supra* note 17, at 1104–06 (discussing how courts may use “[c]ombination analysis . . . to narrow the scope of a doctrinal holding”).

<sup>222</sup> See, e.g., Zick, *supra* note 16, at 855–56 (“[C]ourts and other interpreters must do a better job of explaining how rights facilitate and illuminate one another. . . . Interpreters need to explain and defend rights relationships with more depth and clarity.” (footnote omitted)).

<sup>223</sup> See *supra* notes 25–29 and accompanying text.

control.”<sup>224</sup> The single-clause-centered, whole-document framework for deciding hybrid-rights cases thus has a double appeal. It offers the prospect of both heightening judicial transparency and constraining judicial excesses by disciplining the courts’ decision-making work.<sup>225</sup>

### C. Criticism Three: Hybrid Rights Are Unmanageable

Critics of hybrid rights do not worry only about unbridled judicial activism. They also fear that the task of identifying this set of rights presents courts with an impossible task—that is, a task that is simply too hard to undertake given the inevitable difficulties of determining whether, when, and how to consult Constitutional Clause B in interpreting Constitutional Clause A. Accordingly, so the argument goes, courts should abandon the project altogether.

We have just seen, however, that the whole-text approach to hybrid rights holds the potential of bringing to judicial decision making a form of analytical discipline that alternative theories fail to supply.<sup>226</sup> We also have seen that the

<sup>224</sup> *Principality of Monaco v. Mississippi*, 292 U.S. 313, 332 (1934); see Solum, *Originalism and the Unwritten Constitution*, *supra* note 27, at 1965 (indicating that structural or penumbral reasoning “prevents us from assigning meaning at the level of particularity required to do the work of constitutional practice,” and advocating for a “focus” in constitutional decision making on individual clauses, albeit with an openness to assessing “the interaction between clauses”).

<sup>225</sup> See Zick, *supra* note 16, at 853 (observing that “[w]hen rights intersect, it is imperative that they not merge completely or lose their separate identities” and that “[t]extual and doctrinal boundaries can add a degree of clarity and precision to rights analysis”). Notably, there is a flipside to the just-rebuffed argument based on risks of undue activism. In particular, there may well be defenders of hybrid rights who will argue that only more open-ended approaches can give all constitutional protections their full due. Put differently, these analysts may worry that the text-specific approach to hybrid rights advocated here will in some cases prove to be too constraining, thus hampering the ability of judges to honor appropriately the complex and rich intersectionality of rights. Cf. Denning & Reynolds, *supra* note 25, at 1091 (urging that “penumbral reasoning provides a corrective to the exceedingly narrow ‘clause-bound’ focus of past Supreme Courts”). Even if this concern has some merit, however, it poses no obstacle to viewing the whole-text approach as the proper way to handle the vast majority of hybrid-rights cases. And it is telling on this score that the analysis offered here comports with the results reached in all the Court’s prior hybrid-rights rulings, including those rulings that have struck analysts as the most controversial. In any event, advocates of the not-activist-enough position should be careful what they wish for. Why? Because as we have seen, adherents of textualist and originalist schools of interpretation are sure to look askance at penumbra-like theories of hybrid rights, as will some (perhaps many) supporters of more accommodating interpretive traditions. Most important, a negative view of penumbral-rights reasoning, including with regard to recognizing hybrid rights, is sure to turn off many, if not most, members of the current Supreme Court. See *supra* note 29 and accompanying text. In the end, I leave it to others to explore whether there might exist reasons to recognize some truly-extraordinary-case “penumbral” supplement to the single-clause-focused approach to hybrid rights set forth in these pages. My current suspicion is that no such supplement is needed. But even more important, those who advocate on behalf of hybrid rights should take care not to let their conception of what is perfect become the enemy of what is good.

<sup>226</sup> See, e.g., Dorf, *supra* note 193, at 841 (highlighting that open-ended structuralism, despite efforts made to defend it, “remains vulnerable to the charge of indeterminacy”). Put another way, a



Supreme Court has recognized many hybrid rights in the past without generating significant controversy, including in rulings that long have stood as centerpieces of our nation's constitutional law.<sup>227</sup> Even so, critics may remain unpersuaded. How else might one answer their unmanageability-based line of attack?

One response takes the form of confession and avoidance. It may be that assessing hybrid-rights claims—even within the structured framework put forward here—often will require tricky exercises of interpretive judgment. But what else is new? Constitutional law is loaded with doctrines that are difficult to apply because that state of affairs is inevitable in a world laden with complexity.<sup>228</sup> The Court, for example, has recognized and applied a number of federalism-related doctrines that are wholly non-textual in nature.<sup>229</sup> Some horizontal separation-of-powers principles likewise have their origins in “various structural characteristics of the document” not tethered to any particular clause.<sup>230</sup> The methodology of means-ends analysis pervades constitutional law. Yet the questions this methodology presents—whether an interest is “compelling,” “important,” or only “legitimate,” and whether a challenged law is “rationally related,” “substantially related,” or “narrowly tailored” to gov-

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shift away from a structural or penumbral view of hybrid rights to the single-text-based, whole-document approach should neutralize concerns not only about judicial activism, see *supra* notes 223–225 and accompanying text, but also manageability. See, e.g., Zick, *supra* note 16, at 850 (noting that “separation [in the analysis of rights] can simplify analysis and facilitate doctrinal clarity”).

<sup>227</sup> See *supra* notes 172–173 and accompanying text (listing some of the many cases decided on hybrid-rights theories).

<sup>228</sup> See, e.g., *Rochin v. California*, 342 U.S. 165, 169 (1952) (“In dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unusual or even regrettable attribute of constitutional provisions.”).

<sup>229</sup> See, e.g., *Printz v. United States*, 521 U.S. 898, 918 (1997) (drawing on the Constitution’s “essential postulates”); see also Edward Cantu, *The Roberts Court and Penumbral Federalism*, 64 CATHOLIC U. L. REV. 271, 274 (2015) (exploring the “penumbral federalism” approach of the Roberts Court); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2005 (2009) (referring to the Court’s modern federalism rulings as recognizing “unenumerated states’ rights”).

<sup>230</sup> Reynolds, *supra* note 21, at 1340, 1343 (observing that reasoning from “overall constitutional structure” is “nothing radical” and “has been around for a long time”); see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535, 1582 (2000) (“It is a classic lawyer’s trick—and an especially easy trick to play with separation-of-powers structural arguments—to take a text, series of texts, or asserted relationship between texts, discern some ‘principle’ within it (formulated at a sufficiently high level of generality), and then read that principle back into the Constitution . . .”); Ernest A. Young, Alden v. Maine and the Jurisprudence of Structure, 41 WM. & MARY L. REV. 1601, 1637 (2000) (asserting that “a sufficiently skillful structuralist can justify any result he pleases”). By way of example, Professor Reynolds highlights the structural character of the law of standing. Reynolds, *supra* note 21, at 1339. As he puts it, the key aspect of standing under which a “federal court may exercise power ‘only in the last resort’ and ‘as a necessity’ does not appear anywhere in *my* copy of Article III” and can be seen as “rather dubious” considering the Article’s actual phrasing. *Id.*

ernmental ends—border on the imponderable.<sup>231</sup> No less important, judges have no choice but to address these questions by relying on practical considerations, as to which the constitutional text itself gives no guidance whatsoever.<sup>232</sup> Why then should the Court, when it seeks to interpret an ambiguous rights-granting provision, be blocked from seeking guidance from companion texts that do appear in the Constitution?

A second point is that there is good reason to believe that courts can formulate workable principles to structure the application of the single-clause theory of hybrid rights defended in this Article. Indeed, the Court's existing hybrid-rights rulings may already support a synthesis that centers on the recognition of process-related and equality-related protections, as opposed to non-equality-based fundamental substantive rights. This subject is sufficiently complex to require its own separate treatment.<sup>233</sup> But the key point for present purposes is that developing decision-informing guideposts in this area of law is far from a hopeless task. To be sure, applying these principles will not always generate clear-cut answers in concrete cases. But in constitutional law, that is par for the course. To recognize that applying hybrid-rights-law principles will sometimes be difficult is not to establish the sort of intractable unmanageability that might, in rare instances, justify judicial abandonment of an entire field of constitutional decision making. Rather, conscientious judges who encounter hybrid-rights claims should do what they always do—that is, they should devise and refine overarching organizing principles in the process of resolving case-specific disputes.<sup>234</sup>

#### *D. Criticism Four: Hybrid Rights Are Counter-Textual*

The final argument against hybrid rights is that they are counter-textual. From one vantage point, this argument is simple while, from another vantage point, it is complex. On the simple view, hybrid rights fail to give proper

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<sup>231</sup> See generally CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 164, § 7.3.2, at 586–89 (discussing differing levels of means-ends scrutiny).

<sup>232</sup> In interpreting the Equal Protection Clause, for example, the Court has signaled that the pursuit of administrative inconvenience is neither a compelling nor a substantial state interest. See, e.g., *Craig v. Boren*, 429 U.S. 190, 198 (1976) (holding the pursuit of administrative inconvenience interest insufficient in applying intermediate scrutiny); *Shapiro v. Thompson*, 394 U.S. 618, 633–36 (1969) (concluding that the pursuit of administrative inconvenience was not compelling in applying strict scrutiny). But that proposition has no grounding at all in the text of the Constitution.

<sup>233</sup> See generally Dan T. Coenen, Guiding Principles for Hybrid-Rights Decision-Making (working paper) (on file with author) (suggesting that the Court's past hybrid-rights rulings tend to align with John Hart Ely's process-centered representation-reinforcement theory).

<sup>234</sup> M. Coenen, *supra* note 17, at 1116 (concluding that “the complexity and unpredictability costs that arise from the combination of clauses are not so great as to warrant a complete prohibition” and “are better dealt with at the retail level”).

meaning to the constitutional text because they contort that text by weirdly fusing together separate and freestanding clauses.<sup>235</sup> The analysis set forth in this Article debunks this claim by showing that hybrid rights do not work this way. Rather, their formulation involves three steps that courts take routinely in the case-deciding process: (1) addressing an argument that a particular text has a particular meaning, (2) determining that the thus-cited text is ambiguous on that point, and (3) looking, in the process of addressing that ambiguity, for guidance in companion provisions pursuant to the whole-document principle of interpretation. This approach is not counter-textual in even the slightest degree. Indeed, its essential feature is to address problems of textual ambiguity by consulting the text itself.<sup>236</sup>

The more elaborate text-based challenge goes something like this:

When a court extracts . . . constitutional principles from a series of . . . textual provisions it ignores “an important element of the lawmaker’s choice”—namely, the decision to embed within the text a series of specific provisions, rather than a general statement of constitutional purpose or principle. The generality level of each clause is itself the product of pre-enactment bargains and compromises—bargains and compromises that helped to secure the public support necessary to endow the document with legally binding effect. Combining these clauses . . . displaces the intended arrangement of bargains and compromises with alternative propositions that have not themselves been codified. . . . [Thus, hybrid-rights] arguments warrant rejection . . . because they support unfaithful readings of the text.<sup>237</sup>

The sophisticated tenor of this argument may lend it a veneer of credence. With regard to the particular theory of hybrid rights developed in this Article, however, the argument fails for the simple reason that it proves too much. In

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<sup>235</sup> See *supra* notes 26–29 and accompanying text.

<sup>236</sup> See, e.g., Michael D. Ramsey, *Missouri v. Holland and Historical Textualism*, 73 MO. L. REV. 969, 972 (2008) (“Nothing in the idea of textualism is inconsistent with the idea of looking throughout the entire text for clues to meaning of particular clauses; to the contrary, that is a core component.”).

<sup>237</sup> M. Coenen, *supra* note 17, at 1110 (footnotes omitted) (setting forth this argument but then critiquing it). It merits emphasis that Michael Coenen articulates this potential critique of hybrid rights (and does so both powerfully and eloquently) without himself endorsing it. It also bears emphasis that his Article sets forth both this critique and his evaluation of it at significantly greater length than is captured by the truncated quotation set forth in the text. Finally, it is noteworthy that the quoted passage, as Michael Coenen himself highlights, builds on “Professor John Manning’s critique of *structural* arguments,” as opposed to any preexisting challenge that targets directly the *hybrid-rights* methodology. *Id.* at 1109 (emphasis added). In sum, the quoted passage is not meant (to say the least) to capture the views of Michael Coenen—or of John Manning—when it comes to hybrid rights. Instead, it is offered simply to encapsulate in an abbreviated form one nuanced style of text-based, clause-bound critique that some skeptics might direct at judicial recognition of such rights.

the abstract, one might condemn interpreting one ambiguous clause by advertising to another clause on the ground that doing so improperly “extracts . . . constitutional principles from a series of . . . textual provisions.”<sup>238</sup> But if that is true, then courts may never use the whole-document canon of interpretation because doing so always involves looking beyond “each clause . . . itself” in the interpretive process.<sup>239</sup> As we have seen, however, the whole-document interpretive canon is a longstanding and entirely sensible feature of our law.<sup>240</sup> Thus, there is every reason to view the “bargains and compromises” that produced our Constitution as including an expectation that courts would honor this canon, rather than brush it aside, in the process of dealing with textual ambiguities.<sup>241</sup>

Close attention to the quoted text reveals another point too. No one can doubt that the “bargains and compromises” argument has some legitimacy when directed at wide-open efforts to derive hybrid rights (or other limiting principles) from constitutional “structures” or “penumbras.”<sup>242</sup> As we have seen, however, there is a game-changing difference between the textually problematic “structural” or “penumbral” theory of hybrid rights and the textually grounded read-one-text-in-light-of-another theory that is set forth here. Precisely because the latter theory posits that any given hybrid right has its origin in a single constitutional clause, it makes no sense to say that such a right reaches beyond (to use the language of the above-quoted passage) the proper “generality level” of that very clause.<sup>243</sup> When courts combine constitutional clauses in a “metaphysical” way, concerns about “unfaithful readings of the text” understandably arise.<sup>244</sup> But fidelity to the text is simply not an issue when a court genuinely focuses on interpreting a single ambiguous constitutional clause by applying to it a long-accepted interpretive canon.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *See, e.g.*, *United States v. Heirs of Boisidoré*, 49 U.S. (8 How.) 113, 122 (1850) (“In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.”). *See generally* McGinnis, *supra* note 183 (discussing how the court in *Kemper v. Hawkins*, 3 Va. (1 Va. Cas.) 20 (1793), drew on “a general separation of powers provision” in the Virginia Constitution to help it interpret “clauses that were more specific but not nevertheless completely clear” and asserting that this form of interpretive reasoning was “likely alive and well at the Founding”). For one of many modern articulations of the rule, see *Samantar v. Yousuf*, 560 U.S. 305, 319 (2010) (“In sum, “[w]e do not . . . construe statutory phrases in isolation; we read statutes as a whole.” (quoting *United States v. Morton*, 467 U.S. 822, 828 (1984))).

<sup>241</sup> M. Coenen, *supra* note 17, at 1110.

<sup>242</sup> Notably in this regard, it turns out that the quoted passage set forth in the text accompanying *supra* note 237 was itself built on work that challenged, and challenged only, so-called “structural” rules. *See id.* at 1109–10 (discussing the work of Professor John Manning).

<sup>243</sup> *Id.* at 1110.

<sup>244</sup> *Id.* at 1095, 1110.

How might sophisticated textualists respond to this your-argument-proves-too-much critique? They might say that, although some uses of whole-document interpretation are fine, the type of whole-document interpretation defended here is not. According to this line of thinking, the only proper purpose of whole-document interpretation is to ensure linguistic consistency, and thus linguistic accuracy, within the document as a whole. Courts, for example, might rightly look at the Framers' use of the term "the people" in other provisions of the Constitution to determine the meaning of that same term in the Second Amendment.<sup>245</sup> In similar fashion, courts can and should interpret the word "necessary" not to mean "absolutely necessary" in light of the contrasting uses of these two terms in Article I, Section 8, Clause 18 and Article I, Section 10, Clause 2.<sup>246</sup> These examples of whole-text-based interpretation do not—so textualist critics might say—support the recognition of hybrid rights. The derivation of hybrid rights, after all, does not involve merely fostering semantic harmony. Instead, it involves interpreting the contested textual provision by looking to values linked up with another text. This form of whole-document interpretation, so the argument concludes, is not something that a proper application of the whole-document canon allows.<sup>247</sup>

But why not? To begin with, nothing in the constitutional text states that reading one constitutional provision in light of another can only take the form of ensuring linguistic parallelism.<sup>248</sup> Moreover, many considerations support the adoption of an embracing view of whole-text interpretation, rather than a tightfisted, semantics-only approach. It is telling, for example, that courts often have interpreted ambiguous statutory provisions by drawing on values—not just word usages—connected with companion provisions.<sup>249</sup> This tendency is

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<sup>245</sup> See *District of Columbia v. Heller*, 554 U.S. 570, 579–81 (2008); see also Amar, *Intratextualism*, *supra* note 27, at 774–75 (discussing how Justice Blackmun in *Roe v. Wade* properly used this technique in identifying the proper meaning of the term "person" in the Fourteenth Amendment).

<sup>246</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 388 (1819) (contrasting U.S. CONST. art. I, § 8, cl. 18, which empowers Congress to enact all laws "necessary and proper" for carrying other powers into execution, and *id.* § 10, cl. 2, which prohibits states from imposing imposts or duties on exports or imports without congressional approval unless "absolutely necessary" to fund inspection programs).

<sup>247</sup> M. Coenen, *supra* note 17, at 1077 (noting the possibility of applying the whole-text canon with the aim of discovering "shared semantic features").

<sup>248</sup> Zick, *supra* note 16, at 831 ("[T]he Framers did not make explicit—either in their deliberations or the text itself—what the relationship between these rights was or ought to be.").

<sup>249</sup> Illustrative of the point is *State by Cooper v. French*, 460 N.W.2d 2 (Minn. 1990), a case highlighted in ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 253–54 (2012). That case required the Minnesota Supreme Court to determine whether a statutory prohibition on housing discrimination based on "marital status" barred discrimination against only married couples or against both married and "unmarried cohabiting couples." *French*, 460 N.W.2d at 5. The court concluded that the housing law should be read to prohibit discrimination only against married couples because the substantive public policy reflected in a separate ban on fornication

far from surprising because courts often look to “public policy considerations” in interpreting ambiguous statutes,<sup>250</sup> and this practice has deep historical roots.<sup>251</sup> Yet, if drawing on public policy considerations to interpret a contested text would ever seem to make sense, it is when such public-policy considerations stem not only from their intrinsic worthiness, but also from their reification in companion clauses located in the very same instrument that includes the ambiguous provision.<sup>252</sup>

Whatever conclusions one might draw about the interpretation of statutes, there are special reasons to take a capacious view of applying the whole-text canon in constitutional cases. “[W]e must,” after all, “never forget, that it is a *constitution* we are expounding”—not a document with “the prolixity of a legal code,” but one as to which “only its great outlines should be marked.”<sup>253</sup> In

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tion supported that result. *Id.* at 6–7; see also *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288–89 (1957) (“That § 8(d)(4) [of the Taft-Hartley Act] is susceptible of various interpretations is apparent when § 8(d) is read as a whole. . . . [There is] a ‘dual purpose’ in the Taft-Hartley Act. . . . A construction which serves neither of these aims is to be avoided unless the words Congress has chosen clearly compel it.” (citation omitted) (quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 284 (1956))); *Mastro Plastics Corp.*, 350 U.S. at 285, 287 (“If the above words are read in complete isolation from their context in the Act, such an interpretation is possible. . . . [But] [t]he result would . . . [be] contrary to the purpose of the Act.”).

<sup>250</sup> *Pritchett v. Office Depot, Inc.*, 420 F.3d 1090, 1097 (10th Cir. 2005). This point corresponds with the more general point that the operation of so-called substantive canons is commonplace in statutory law. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U.L. REV. 109, 109–10 (2010) (detailing “substantive canons [of construction that] advance policies independent of those expressed in the statute”). Nor is an attentiveness to public-policy concerns limited to interpretation in the public-law context. Reading ambiguous contract terms in light of public policy, for example, is a common practice. See, e.g., *Clarkeies Mkt., L.L.C. v. Estate of Kelly (In re Clarkeies Mkt., L.L.C.)*, Nos. 01-10700, 03-1310-JMD, 2004 WL 2745651, at \*1, \*6 (Bankr. D.N.H. Nov. 29, 2004) (reading a covenant not to compete narrowly in light of the policy that favors freedom to pursue one’s trade).

<sup>251</sup> See Solum, *Original and Constitutional Construction*, *supra* note 187, at 505 (compiling statutory interpretation cases from the late eighteenth and early nineteenth centuries declaring that ambiguous terms should be interpreted (1) in a way “conducive to the public good and the public convenience,” (2) to establish justice when doing so comports with “[t]he general intent of the Legislature,” and (3) to avoid “inconvenience” and pursue the “equity of the case” (first quoting *Board v. Cronk*, 6 N.J.L. 119, 120 (1822); then quoting *Greenhow v. Buck*, 19 Va. (5 Munf.) 263, 272 (1816); and then quoting *Braxton v. Winslow*, 1 Va. (1 Wash.) 31, 32 (1791))); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*90–91 (“Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.”).

<sup>252</sup> Related to the idea that courts can draw on public-policy considerations in interpreting ambiguous terms is the well-settled principle that courts should consider the “underlying purposes” of a law in interpreting its ambiguous provisions. *Doherty v. United States*, 404 U.S. 28, 36 (1971) (Douglas, J., concurring). Deciphering such purposes would seem to invite consultation of companion texts, at least to the extent that a court seeks to honor purposes that underlie the document as a whole. See *supra* note 249 and accompanying text (noting the appropriateness of underlying-purpose-based interpretation in connection with the whole-document canon).

<sup>253</sup> *McCulloch*, 17 U.S. (4 Wheat.) at 407.

this respect, the Constitution contrasts sharply with many statutory texts, especially because it ranges across a wide array of important subjects in a necessarily brief and thematic way.<sup>254</sup> As others have recognized, this difference supports the conclusion that courts should be particularly open to applying the whole-text canon broadly, rather than narrowly, when they work with the Constitution.<sup>255</sup> What is more, the case for doing so may be at its highest ebb when courts deal with constitutional rights, as opposed to issues of federalism and separation of powers.<sup>256</sup>

Longstanding practices of the Supreme Court also support the case for applying the whole-text canon in a way that reaches beyond simply ensuring

<sup>254</sup> See SCALIA, *supra* note 184, at 37 (“In textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail . . .”).

<sup>255</sup> See, e.g., AMAR, AMERICA’S UNWRITTEN CONSTITUTION, *supra* note 37, at 47 (noting that “[s]ometimes the key clause in isolation is simply indeterminate,” so that “[t]he rule of holistic construction” must be applied, and adding that, although this rule “is itself unwritten,” it is “deeply faithful to the written Constitution”); Amar, *Intratextualism*, *supra* note 27, at 801 n.204 (highlighting the potentially different roles of “intratextualism” in statutory and constitutional cases by “focusing on the Constitution as a compact, cleanly bounded, and easily accessible document, written for ordinary people and designed to endure over centuries” and noting that these considerations “may not readily transfer to the realm of statutory interpretation”); Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 635 (2006) (drawing on *McCulloch v. Maryland* in concluding that “[t]here is even more reason to view a constitution as a unified whole and to try to give effect to as many of its policies and values as possible”); see also Young, *supra* note 230, at 1632 (noting that whole-text interpretation can include an “attempt to situate the term in question within a broader set of constitutional purposes and principles”).

<sup>256</sup> Perhaps this is so, for example, because there is a greater need for clarity and certainty regarding basic rules of government operation than the scope of human rights. See *supra* note 228 and accompanying text (noting that the Court referenced this point in the *Rochin v. California*). The Ninth Amendment also provides a possible basis for reaching this same conclusion. That Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX. Courts and commentators have hesitated to root freestanding individual rights in the Ninth Amendment, in part because—as Judge Bork famously observed—its text can be seen as providing no more illumination than an “ink blot.” BORK, TEMPTING OF AMERICA, *supra* note 27, at 166. *But see*, e.g., AMAR, AMERICA’S UNWRITTEN CONSTITUTION, *supra* note 37, at 6–22 (arguing in effect that the recognition of nontextual rights was intended by the Framers and is functionally inescapable). Whatever one concludes about a judicial decision to “deny” supposed “ink blot” rights, however, the Ninth Amendment separately requires that the textual recognition of “certain rights . . . not “disparage” such “other[]” rights that are “retained by the people.” U.S. CONST. amend. IX. This anti-disparagement language might be seen as touching on whole-document hybrid rights in an important way. On this view, it is fair to say that wholly foreclosing courts, for example, from consulting the First Amendment in interpreting the Fourth Amendment (as the Court consulted the First Amendment in *Roaden*) is to “disparage” the First Amendment because doing so would deny the First Amendment the full effect it otherwise would have pursuant to the whole-document canon of interpretation. See AMAR, AMERICA’S UNWRITTEN CONSTITUTION, *supra* note 37, at 99 (“The Ninth Amendment . . . instructs us precisely *not* to read the Sixth Amendment (or any other constitutional listing of rights, for that matter) in a stingy negative-implication, rights-denying fashion . . .”); see also Reynolds, *supra* note 21, at 1344–45 (relying on the Ninth Amendment in arguing for judicial openness to engage in structural reasoning no less in rights cases than in federalism-based sovereign immunity cases).

linguistic parallelism. As we have seen, for example, the Court often derives governing doctrines from a generalized treatment of the “structures” of the Constitution even though that treatment is not “tied to any particular clause of the Constitution”<sup>257</sup> and, most assuredly, does not involve anything like interpreting a “particular clause” to achieve only semantic tidiness.<sup>258</sup> The Court’s structural-reasoning cases thus support *a fortiori* the similarly value-sensitive, but far more textually grounded and analytically disciplined, identification of hybrid rights pursuant to whole-document interpretation.<sup>259</sup>

Readily derived from the Court’s past practice is another key point too. Even the most casual inspection of the Justices’ work reveals that interpreting the Constitution involves a rich process that reaches well beyond merely honoring semantic conventions. For example, the Court often emphasizes the value of fostering legal clarity and judicial workability as it builds out the meaning of contested textual commands.<sup>260</sup> Clarity and workability are wonderful

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<sup>257</sup> Manning, *supra* note 229, at 2004; see also John F. Manning, *The Supreme Court 2013 Term: Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4, 31 (2014) (emphasizing that these doctrines, in their operation, “have repeatedly invalidated statutory programs, but not because those programs violated some particular constitutional provision,” but instead because they have involved “freestanding principles” that are not “ultimately tied to the understood meaning of any particular constitutional text” (footnote omitted)).

<sup>258</sup> See *supra* notes 248–251 and accompanying text.

<sup>259</sup> Some analysts might challenge this line of reasoning by claiming that the Court’s structural-reasoning cases have dealt only with separation-of-powers and federalism problems. Thus, so the argument goes, these cases tell us nothing whatsoever about the judicial identification of individual rights, including hybrid rights. Any such argument, however, confronts two problems. First, its underlying premise is dubious because the Court in the past sometimes *has* used structural reasoning to protect individual rights. See, e.g., *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44–45 (1867) (recognizing the right of interstate travel). Second, there is no apparent reason—and certainly no text-based reason—why structural reasoning should be confined to federalism and separation-of-powers cases. See generally Denning & Reynolds, *supra* note 25, at 1102–03, 1108, 1114 (reiterating this argument); Reynolds, *supra* note 21, at 1338–40 (making this argument at length). Indeed, it seems entirely fair to ask: if courts can use structural reasoning to protect states’ rights, why not individual rights too? Along these same lines, Judge Robert Bork (like many others) challenged the Court’s substantive due process jurisprudence by observing that “[w]here constitutional materials do not clearly specify [a] value to be preferred, there is no principled way to prefer any claimed human value to any other.” Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8 (1971). This line of reasoning, however, has not prevailed in the Supreme Court. See *supra* notes 125–126 and accompanying text. But even if Judge Bork’s point has merit, it would seem to support—rather than undermine—the whole-document account of hybrid rights presented here. This is the case because, at least by implication, his theory aligns with the taking of judicial action when the “constitutional materials *do* . . . clearly specify [a] value to be preferred,” as when (it would seem) the Court looks to the value of free speech, as supported by the text of the First Amendment, in interpreting the ambiguous term “unreasonable” in the Fourth Amendment. Bork, *supra*, at 8 (emphasis added).

<sup>260</sup> E.g., *Arizona v. Roberson*, 486 U.S. 675, 681–82 (1988) (highlighting the value of the “bright-line rule” that requires all questioning to cease immediately once an accused person in custody requests counsel and emphasizing that the rule “has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation” and that the “gain in speci-



things to be sure, but attending to them in the process of interpreting the Constitution has nothing to do with adhering to rules of linguistic usage. Rather, clarity and manageability are values—values that focus largely on promoting judicial efficiency, providing guidance to government decisionmakers, and helping to legitimize the distinctive work of courts. And this example presents only the tip of the iceberg. Why? Because, in gauging the scope of constitutional protections, the Court frequently takes account of fairness-based and instrumentalist considerations that exist independently of the constitutional text.<sup>261</sup>

Policy-based considerations of this kind might have to do with ensuring the capacity of government to adapt to changing conditions,<sup>262</sup> helping law enforcement authorities make use of effective investigatory tools,<sup>263</sup> or guarding against the creation of a permanent underclass of individuals in the United States.<sup>264</sup> These examples—and countless others, too—demonstrate that judges routinely consider substantive values as they interpret ambiguous constitutional commands. Yet, if courts interpreting a disputed provision can draw on non-text-based values of this kind, why should they be foreclosed from drawing on values that inhere in other clauses located within the very same document that they are expounding?<sup>265</sup>

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ficity . . . has been thought to outweigh the burdens” that can result from excluding probative evidence (quoting *Fare v. Michael C.*, 442 U.S. 707, 718 (1979))). Notably, Justice Scalia often laid weight on this consideration as he dealt with problems of constitutional interpretation. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) (criticizing the majority’s replacement of a “clear constitutional prescription” with a “balancing test”).

<sup>261</sup> *See* DAVID STRAUSS, *THE LIVING CONSTITUTION* 36 (2010) (documenting how the constitutional system parallels the common-law system “in which precedents evolve, shaped by notions of fairness and good policy”). *See generally* *Reeves, Inc. v. Stake*, 447 U.S. 429, 436 (1980) (endorsing the market-participant exception to the dormant Commerce Clause in part because it reflects both “good sense and sound law”).

<sup>262</sup> *See, e.g.*, *McCulloch*, 17 U.S. (4 Wheat.) at 415 (favoring flexible interpretation of the Necessary and Proper Clause in part because “[t]his . . . [C]onstitution [is] intended to endure for ages to come, and . . . to be adapted to the various crises of human affairs”).

<sup>263</sup> *See, e.g.*, *United States v. Washington*, 431 U.S. 181, 187 (1977) (noting the importance to society of law enforcement efforts to secure confessions in the absence of compulsion).

<sup>264</sup> *See, e.g.*, *Plyler v. Doe*, 457 U.S. 202, 218–19 (1982) (relying in part on policy concerns about creating “a permanent . . . underclass” of residents if tuition-free public education were denied to undocumented alien children (footnote omitted)).

<sup>265</sup> Noteworthy in this regard is the observation made long ago by Justice Story: “In construing the constitution of the United States, we are, in the first instance, to consider, what are its nature and objects, its scope and design, as apparent from the structure of the instrument, viewed as a whole, and also viewed in its component parts.” 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 183, at 136 (1833). Put simply, resolving textual ambiguity by considering important “objects” of the Constitution, as made “apparent” by “its component parts” is the mode of “instrument, viewed as a whole” interpretation endorsed in this Article. *Id.*

In any event, when it comes to the values-based use of the whole-document canon, the precedents reviewed in this Article leave no doubt that the Court has already crossed the Rubicon. In every case considered here—from *Speiser* to *Roaden* to *Smith* to *Obergefell* and on and on—the Court has done more than consider the semantic relationship of multiple clauses. It has considered how different clauses interact in light of both their texts and the underlying values to which they give voice.

In the end, perhaps the most serious claim that a textualist critic of this reading-one-clause-in-light-of-another theory of hybrid rights can make is that the Court itself never has explicitly endorsed this approach. Even that claim, however, is inaccurate, or at least not close to being entirely correct.<sup>266</sup> Indeed, in *Obergefell* itself the Court wrote—almost as if it were specifically anticipating the theoretical approach offered here—about how one right “may be instructive as to the meaning and reach of the other.”<sup>267</sup> No less important, this criticism is beside the point. Courts, after all, often distill from past rulings a proper set of organizing concepts that thereafter serve to guide decision mak-

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<sup>266</sup> The single-clause basis of the Court’s Fourth Amendment ruling in *Roaden*, for example, has been noted earlier. *See supra* notes 55–60 and accompanying text. In similar fashion, the Court has explained that, although due process concerns have helped to give rise to its criminal-appeal-right line of cases, “[m]ost decisions in this area have rested on an equal protection framework.” *Bearden v. Georgia*, 461 U.S. 660, 665 (1983); *see also* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (deeming anti-picketing law violative of the Equal Protection Clause because “in this case [it] is closely intertwined with First Amendment interests”). Of particular significance, in *Golan v. Holder*, Justice Breyer, joined by Justice Alito, applied in essentially express terms the whole-text approach sketched out here. 565 U.S. 302, 359 (2012) (Breyer, J., dissenting). The issue presented in that case was whether Congress could afford copyright protection to certain forms of foreign works based on the power granted to it by the Article I, Section 8 Intellectual Property Clause. *Id.* at 307–08 (majority opinion). In construing that text to deny such authority, the dissenters saw no need to “decide whether the harms to [the alleged infringer’s] interest show a violation of the First Amendment.” *Id.* at 359 (Breyer, J., dissenting). Nonetheless the “importance of interpreting the Constitution as a single document” dictated that the Court read the grant of the copyright power narrowly so as to avoid putting it and “the First Amendment at cross-purposes.” *Id.* at 359–60. The majority rejected this analysis—but only on focused, clause-specific grounds—because of its conclusion that the Framers had already factored free-expression concerns into the Intellectual Property Clause, thus rendering Justice Breyer’s analysis an impermissible form of double-counting. *Id.* at 327–28 (majority opinion). The important point is that the majority thus did not in any way reject the appropriateness of applying the whole-document canon of interpretation in other contexts. For one earlier majority opinion of the Court that resonates with Justice Breyer’s approach in *Golan*, see *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15–20 (1955) (taking a narrow view of Article I congressional power to regulate military forces with regard to post-service court-martial proceedings, free from federal judicial involvement, in light of companion constitutional provisions regarding federal court jurisdiction, the independence of federal judges, and various Bill of Rights procedural safeguards).

<sup>267</sup> *Obergefell*, 135 S. Ct. at 2603 (making this observation in the assessing the interplay of the Due Process and Equal Protection clauses).

ing in a particular field of law.<sup>268</sup> The preceding pages offer just such a distillation of the overarching principles of hybrid-rights law.<sup>269</sup> And once one grasps what a “hybrid right” really is—that is, a right that emanates from a single ambiguous constitutional text whose meaning is informed by a related provision or related set of provisions located in the same whole document—it becomes counter-factual to describe such a right as counter-textual. To the contrary, hybrid rights spring from one text, as clarified by another text, and thus they are not counter-textual at all.

## V. PRACTICAL IMPLICATIONS

A final question looms over our subject: Does this new way of understanding hybrid rights make any practical difference? Part IV suggests that this single-clause-viewed-in-light-of-the-whole-document approach to hybrid rights should both constrain judicial activism and inject greater manageability into this field of judicial work.<sup>270</sup> Skeptics, however, may want more. How, they might ask, will this whole-text approach matter as real-world judges decide real-world cases? Limitations of time and space preclude a full-blown

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<sup>268</sup> See, e.g., *Benton v. Maryland*, 395 U.S. 784, 793–94 (1969) (justifying incorporation of the Fifth Amendment Self-Incrimination Clause based primarily on an increasingly discernible approach detected in prior cases that broadly supported incorporation of most protections afforded by the Bill of Rights).

<sup>269</sup> Some textualists might also assert that the theory advanced here is nothing but a clever ploy to convert what are really “freestanding structural arguments” into “holistic textual arguments” by making use of so-called “textual hooks.” Colby, *Originalism and Structural Argument*, *supra* note 24, at 1319; see also Zephyr Teachout, *The Anti-corruption Principle*, 94 CORNELL L. REV. 341, 402 (2009) (“Efforts to ground the separation-of-powers principle in particular phrases, instead of in the spirit of the document, end up sounding warped and feeling disingenuous.”); Young, *supra* note 230, at 1624 (claiming that these efforts in fact involve “structural considerations,” as opposed to “meaningful textual analysis”). In this vein, thoughtful commentators have questioned past efforts of text-invoking analysts to squeeze what seem to be free-floating doctrinal limits into a single ill-fitting word used by the Framers, such as the word “state,” or to find within the Tenth Amendment restraints on federal action that range far beyond its truism-stating textual dictate that the states reserve all powers not delegated to Congress. See *United States v. Darby*, 312 U.S. 100, 124 (1940); see, e.g., Colby, *Originalism and Structural Argument*, *supra* note 24, at 1320–21 (collecting relevant materials). In contrast, the express constitutional commands discussed here—which center on terms such as “unreasonable,” “due process,” and “equal protection”—cry out for contextual interpretation, so that reading these terms with an attentiveness to companion provisions is light-years away from proceeding in a manner that is “awkward,” far less “absurd.” BOBBITT, *supra* note 27, at 76; Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1130 (2013). Notably, Professor Thomas Colby distinguishes between (1) those analysts who take a structural conclusion and seek to squeeze it into the most suitable text that those analysts can find, and (2) those analysts who start with a genuine problem of textual ambiguity and then conscientiously make use of the whole-document canon of interpretation to help resolve it. Colby, *Originalism and Structural Argument*, *supra* note 24, at 1319. This Article seeks to show, if nothing else, that work in hybrid-rights cases, if done correctly, falls comfortably in the latter category.

<sup>270</sup> See *supra* Part IV.

answer to this question. This Part, however, offers the beginnings of a response by noting five points—related in large measure to the Supreme Court’s seminal rulings in *Griswold*, *Yoder*, and *Smith*<sup>271</sup>—that illustrate how this reconceptualization of hybrid rights can operate to influence on-the-ground judicial decision making.

*First*, placing hybrid rights on a long-accepted justificatory footing renders them less susceptible to judicial displacement. The Court has expressed a willingness to overrule precedents shown not to rest on a stable, underlying theoretical foundation.<sup>272</sup> But this Article shows why hybrid rights do not, even remotely, merit this description, and the implications of that conclusion are significant. In particular, as we have seen, one account of hybrid rights attributes their recognition to judicial extrapolations from the “penumbras” of the Constitution. But many jurists view this theory of rights as nothing less than nonsensical.<sup>273</sup> To the extent that such jurists come to sit on the Supreme Court, the possibility arises that its many past hybrid-rights rulings will become subject to outright overruling, a presumptive vulnerability to overruling, or at least a line-in-the-sand resistance to any form of rights-expanding development.<sup>274</sup> And this is all the more the case if, as some have posited, the present-day Court has become distinctly open to overturning past pronouncements, especially when they are seen as unsupported by originalist principles.<sup>275</sup>

The single-clause-based theory of hybrid rights advanced in this Article, however, disconnects these rights from the much-maligned theory of penumbral-rights recognition. Instead, the single-clause-based theory conjoins hybrid rights with a long-accepted mode of constitutional interpretation, the widespread acceptance of which should significantly reduce the risk that the Court

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<sup>271</sup> See *supra* notes 25, 90–133 and accompanying text.

<sup>272</sup> See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854–55 (1992) (recognizing that, although “the very concept of the rule of law” dictates that “a respect for precedent is, by definition, indispensable,” reconsideration of a past ruling may be warranted when changed times “have robbed the old rule of significant . . . justification”).

<sup>273</sup> See *supra* notes 26–29 and accompanying text.

<sup>274</sup> See, e.g., *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 209–10 (1994) (Scalia, J., concurring) (taking the position, in light of the perceived incompatibility of the dormant Commerce Clause principle with original understandings, to apply that principle in only two limited scenarios as a result of *stare decisis*—that is, in any case either involving outright facial discrimination against interstate commerce or with facts indistinguishable from those of a past ruling in which the law was declared unconstitutional).

<sup>275</sup> Erwin Chemerinsky, *Does Precedent Matter to Conservative Justices on the Roberts Court?*, A.B.A. J. (June 27, 2019), <https://www.abajournal.com/news/article/chemerinsky-precedent-matters-little-to-conservatives-on-the-roberts-court> [<https://perma.cc/E764-5EZG>] (asserting, based on decisions handed down during the October 2018 Supreme Court term, that “[s]tare decisis matters little to the conservative justices” and that “[r]ecent decisions of the Roberts Court indicate that the five conservative Justices will give little deference to precedents that they want to overrule”).

will repudiate these rights or work hard to constrain their operation in the future. It may be that the Court will abandon some hybrid-rights precedents down the line. But the analysis offered here establishes, if nothing else, that the Court should not overturn these precedents—or even be inclined to overturn them—simply because they establish so-called hybrid rights.

*Second*, the analysis set forth here demonstrates why the reasoning of the majority opinion in *Griswold* does not provide a proper model for future rights-related decision making.<sup>276</sup> Put simply, it will not do simply to throw a variety of rights-related texts against the wall with the aim of extracting from the resulting Rorschach-like pattern some other right that is not itself set forth in the Constitution. The whole-document-based approach set forth here provides a better way for assessing the interaction of multiple clauses because this approach is more structured, more manageable, more restrained, and more deeply rooted in our Constitution's text and traditions.<sup>277</sup>

*Third*, a key step in applying this whole-text-based approach is to distinguish between the single “informed” clause—out of which alone the claimed right emanates—and the separate “informing” clause, which merely helps illuminate the informed clause's meaning. Critics might worry that the analytical discipline this method purportedly promotes is illusory because courts, even while claiming to adhere to it, can simply mix and match constitutional clauses however they might like in manipulative, self-serving ways. But that is not true.

In *Smith*, for example, Justice Scalia argued, at least on a very plausible view of his analysis, that the text of the Free Exercise Clause foreclosed its application to strike down generally applicable laws.<sup>278</sup> In turn, this reading of the Free Exercise Clause meant that it could not operate as the “informed” clause that undergirded the hybrid right attributed to *Yoder* precisely because that right does allow litigants to attack generally applicable laws based on their incidental effects. In other words, the Free Exercise Clause could at most serve only as an “informing” text that helped give meaning to the “informed” text of another constitutional provision—in this case the Fourteenth Amendment's Due Process Clause. And this clarification of the source of the *Yoder* principle has significant practical consequences.

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<sup>276</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); see *supra* notes 26–29 and accompanying text (noting the critiques of the reasoning in *Griswold v. Connecticut* with respect to penumbral rights).

<sup>277</sup> This is not to say that the Supreme Court, despite the majority's problematic analysis in *Griswold*, reached the wrong result in that case. Indeed, as we have seen, even present-day Justices commonly described as “conservative” have indicated that they view the case as rightly decided, albeit based on the separate line of analysis put forward in it by Justice Harlan. See *supra* note 29 and accompanying text.

<sup>278</sup> See *supra* notes 94–96 and accompanying text.

In particular, many constitutional analysts have argued that the Court should abandon the substantive due process principle altogether.<sup>279</sup> And if substantive due process were to go out the window, the post-*Smith* rule of *Yoder* would have to go out the window too. After all, on a proper view, that rights-protecting rule must emanate from the Due Process Clause rather than the First Amendment according to Justice Scalia's textual analysis. No less important, even if the substantive due process methodology remains a part of our law, the Justices surely will look, as they apply that methodology in the hybrid-rights context, to the same analytical guideposts they consult in other substantive due process cases. And one of those guideposts suggests that courts should proceed with special caution in building out substantive due process protections.<sup>280</sup>

*Fourth*, this revised understanding of *Yoder* in the post-*Smith* world casts a shadow over the Court's seminal free-exercise ruling in *Sherbert v. Verner*.<sup>281</sup> In *Sherbert*, the Court held that a state could not deny unemployment compensation to a claimant who left her job because it required reporting to work on the Sabbath-day of her faith.<sup>282</sup> The state law that foreclosed most job-quitters from claiming unemployment benefits, however, was not designed to target religious practitioners. In fact, religious practitioners made up only a tiny fraction of the disadvantaged job-quitter group.<sup>283</sup>

As the Court in *Smith* dealt with *Sherbert*, it thus faced much the same question it confronted in dealing with *Yoder*—namely, whether the rule of *Sherbert* could survive promulgation of a new principle that dictated that generally applicable laws are broadly exempt from Free Exercise Clause attack. In the end, the Court in *Smith* salvaged *Sherbert*, just as surely as it salvaged *Yoder*, but it did so based on a very different rationale. *Sherbert*, Justice Scalia explained, fell into a special category because the administration of unemployment-compensation programs requires an “individualized governmental assessment” of each claimant’s “particular circumstances” in making case-specific “eligibility” determinations.<sup>284</sup> And given the case-by-case-decision-making basis of these programs, the state could “not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.”<sup>285</sup> There is a major problem, however, with this line of analysis if one accepts Justice Scalia's underlying textual analysis of the Free Exercise Clause. Justice Scalia's

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<sup>279</sup> See *supra* note 125 and accompanying text.

<sup>280</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (asserting that the Court has “always been reluctant to expand the concept of substantive due process” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992))).

<sup>281</sup> 374 U.S. 398 (1963).

<sup>282</sup> *Id.* at 404.

<sup>283</sup> *Id.* at 408.

<sup>284</sup> *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 884 (1990).

<sup>285</sup> *Id.* (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

textual analysis, after all, indicates that, in order for a law to be one “*prohibiting* the free exercise” of religion within the meaning of the First Amendment, that law must specifically target religion for disadvantageous treatment.<sup>286</sup> Yet, the law in *Sherbert* involved no such targeting, and it also involved no affront to due-process-based parenting rights, as did the facts of *Yoder*.

In sum, neither *Sherbert* nor *Yoder* seemed to be reconcilable with the textual analysis of the Free Exercise Clause put forward in *Smith*. And only *Yoder*, because it implicated parenting rights, could plausibly be reconceptualized as a substantive due process case pursuant to the hybrid-rights methodology developed here. The practical consequence is that, going forward, *Sherbert* will be far more vulnerable to a future overruling than *Yoder*, at least if the Court locks onto the text-based rationale of *Smith* itself. Another possibility is that the intrinsic textual tension between *Smith* and *Sherbert*, brought into focus by the Due Process Clause-rooted-hybrid-rights nature of *Yoder* developed here, will in time help lead the Court to abandon *Smith* altogether.

*Fifth* and finally, the post-Scalia Court may someday reject the rights-narrowing textual analysis of the First Amendment set forth in *Smith* and return to viewing the *Yoder* rule as rightly rooted in the Free Exercise Clause, rather than the Fifth and Fourteenth Amendments. If the Justices were to take this tack, however, new questions related to the whole-document theory of hybrid rights would soon arise. The central question would concern the proper role, if any, that substantive due process principles should play in the Court’s reframing of *Yoder* as a free-exercise case. On the one hand, the Court might take a crabbed view of the newly resituated *Yoder* principle—that is, by continuing to treat *Yoder* as a hybrid-rights case, but with the Free Exercise Clause now acting as the operative “informed” clause and the Due Process Clauses, insofar as they vindicate parental liberty, now having a more limited “informing” role. On the other hand, the Court might abandon its hybridized treatment of *Yoder* altogether, in essence returning free-exercise law in full-scale fashion to its pre-*Smith* state.<sup>287</sup>

The key point is that the difference between these two approaches would be of great consequence. Take, for example, a challenge directed by a local Amish community to an ordinance that bars horse-drawn farm equipment from city streets. If the Court’s revised, free-exercise-centered approach to *Yoder* permitted challenges by religious practitioners to the application of any generally applicable law, this challenge might well succeed. But if the Court’s new approach to *Yoder* focused instead on reading the Free Exercise Clause in light of the whole text of the Constitution—with the rooting of parental rights in the

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<sup>286</sup> *Id.* at 877 (emphasis added) (quoting U.S. CONST. amend. I).

<sup>287</sup> See *supra* notes 93–100 and accompanying text.

Due Process Clauses playing a key “informing” role in justifying the *Yoder* decision—then the challenge to the farm-equipment law would likely fall flat because such a law does not implicate parental rights at all.

These five examples shine a light on why the source of hybrid rights matters and, in some cases, matters greatly. The underlying point corresponds with one of the great aphorisms of the law: “[T]he rule follows where its reason leads; where the reason stops, there stops the rule.”<sup>288</sup> In constitutional law, the foundational reason—the source—of all, or at least virtually all, governing rules is the text of the founding charter itself.<sup>289</sup> And a constitutional rule that is ultimately rooted in a single, even if ambiguous, constitutional clause—a clause with its own linguistic structure, history, and body of precedent—will inevitably take courts to places that differ from where a free-flowing mish-mash of multiple clauses might lead.

### CONCLUSION

In law, as in life, less is often more. So it is with hybrid rights. Critics are sure to decry theories of such rights founded on claims of structural or penumbral inference as convoluted, confusing, and counter-textual—and understandably so. As Professor Donald Regan has observed, “[j]ust as ‘nature abhors a vacuum,’ so we are taught to abhor constitutional principles without a specific textual grounding.”<sup>290</sup> Whatever abstract and lofty theories of law might have to say on this subject, the derivation of meaning from particular legal texts is the coin of the realm in the actual practice of law. Nor is this surprising. A focus on the operation of identifiable rules derived from identifiable texts—as opposed to a jumble of “everything that is out there”—seems central to giving legal work its distinctly legal quality.<sup>291</sup>

This Article builds on these ideas by offering a clarifying theory of hybrid rights—a theory that conceives of any such right as rooted in a particular constitutional provision whose meaning is informed by application of the whole-document canon of interpretation. This theory coheres with all of the Supreme Court’s past decisions in this field. It also serves to respond to arguments

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<sup>288</sup> KARL N. LLEWELLYN, *THE BRAMBLE BUSH: THE CLASSIC LECTURES ON THE LAW AND LAW SCHOOL* 174 (Steve Sheppard ed., 2008) (emphasis omitted).

<sup>289</sup> See *infra* notes 290–291 and accompanying text.

<sup>290</sup> Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1889 (1987); see Zick, *supra* note 16, at 850 (“In the legal academy, as well as in broader public discourse, there is a tendency to separate and balkanize constitutional rights.”).

<sup>291</sup> See Dorf, *supra* note 193, at 843 (“In our legal culture . . . interpretive arguments unmoored from text are always vulnerable to being attacked as illegitimate.”).



against the recognition of hybrid rights rooted in concerns about non-originalism, judicial excess, unmanageability, and counter-textualism.

The theory offered here posits that every hybrid right—just like every “ordinary” constitutional right—emanates from one specific and identifiable constitutional text. To be sure, this approach requires drawing on the Constitution as a whole in determining the meaning of that text. But it also requires that this interpretive work take place in a specialized and disciplined way. In other words, it is wrong to discover hybrid rights in the whole document without more—that is, by way of a highly generalized drawing of inferences about rights that stand apart from any particular clause pursuant to a full-bore “structural” or “penumbral” methodology.

Instead, when a court considers a hybrid-rights claim, it should look at the whole constitutional text with the focused goal of finding within it genuinely illuminating guidance as to the meaning of a particular, but ambiguous, rights-creating provision. Hopefully, this approach will cause courts and lawyers to view hybrid rights in a new way, relocating them from the jurisprudential frontiers to the heartland of constitutional law. For hybrid rights at bottom are simply rights—nothing more, but also nothing less.