FOUR RESPONSES TO CONSTITUTIONAL OVERLAP

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ABSTRACT

Sometimes government action implicates more than one constitutional right. For example, a prohibition on religious expression might be said to violate both the Free Speech Clause and the Free Exercise Clause, a rule regarding same-sex marriage might be said to violate both equal protection and substantive due process, an exercise of the eminent domain power might be said to violate both procedural due process and the Takings Clause, a disproportionate criminal sentence based on judge-found facts might be said to violate both the defendant's right to trial by jury and that defendant's right against cruel and unusual punishment, and so forth. In cases such as these, how should courts respond to the fact that multiple, rights-based rules bring themselves to bear on the constitutional validity of the government action under review?

This Essay describes four different doctrinal responses that courts might pursue when confronting such instances of "constitutional overlap." Specifically, where a single government action plausibly implicates the protections of multiple, rights-based rules, courts might: (1) *separate* the overlapping rules and apply each one without reference to any of the others; (2) *combine* the overlapping rules and find in their collective, cumulative force an independently sufficient basis for invalidating the action under review; (3) *consolidate* the overlapping rules to yield a single analytical framework said to effectuate the overlapping rules' redundant commands; or (4) *displace* all but one of the overlapping rules by identifying a single such rule as the exclusive ground for decision. With this descriptive taxonomy on the table, the Essay goes on to offer some tentative prescriptive suggestions, aimed at assisting courts in identifying the appropriate response to overlap in a given constitutional case.

INTRODUCTION 348
I. WHAT IS CONSTITUTIONAL OVERLAP? 351
II. FOUR RESPONSES TO CONSTITUTIONAL OVERLAP 356
A. Separation 356
B. Combination 358
C. Consolidation 363
D. Displacement 368

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III. CHOOSING THE RIGHT RESPONSE 373
A. Separation 373
B. Combination 374
C. Consolidation 376
D. Displacement 380
CONCLUSION 381

INTRODUCTION

Though billed as a book about the First Amendment, Timothy Zick's *The Dynamic Free Speech Clause* addresses much more than just that.[1] In discussing the First Amendment's relationship to other rights-based protections, Professor Zick ends up shedding valuable new light on the broader, trans-substantive phenomenon of "rights dynamism"[2]—namely, the family of processes through which constitutional rights (including but not limited to the free-speech right) "interact, associate, converse, and conflict with one another."[3] Here and elsewhere,[4] Zick has catalogued and analyzed the ways in which discretely defined areas of rights-based law end up informing one another's substance and influencing one another's application, thus rendering the overall development of rights-based doctrine sensitive to the many sorts of linkages and entanglements that bring together its (nominally) separate parts. By running with this holistic perspective on rights-based law, Zick manages to highlight problems and possibilities that our traditional, more atomized accounts of constitutional doctrine too often obscure.

Rights dynamism, as Zick's expansive treatment makes clear, can manifest itself in a variety of ways.[5] Here, however, I will focus my efforts on a subcategory of the

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[1] *See generally* TIMOTHY ZICK, THE DYNAMIC FREE SPEECH CLAUSE: FREE SPEECH AND ITS RELATION TO OTHER CONSTITUTIONAL RIGHTS (2018).

[2] This is a term that Professor Zick borrows from Jack Balkin, *see* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 55 (2004), although Zick ends up ascribing to the term a somewhat different and more specific meaning. *See* ZICK, *supra* note 1, at 18.

[3] ZICK, *supra* note 1, at 17.

[4] *See* Timothy Zick, *Rights Dynamism*, 19 U. PA. J. CONST. L. 791, 801 (2017) [hereinafter Zick, *Rights Dynamism*]; Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1, 3–4 (2014) [hereinafter Zick, *Rights Speech*]; Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 DUKE J. CONST. L. & PUB. POL'Y 13, 45, 75 (2016).

[5] *See generally* Zick, *Rights Dynamism*, *supra* note 4, at 797–801. For example, rights dynamism can emerge when one constitutional right draws on or otherwise makes reference to others; one need look no further than the Fourteenth Amendment's "incorporation" of most of the Bill of Rights for an example of this dynamic in action. *See id.* at 797. Relatedly, rights dynamism can emerge when doctrinal insights and innovations from one area of doctrine end up migrating to and influencing developments within others; one can see this dynamic at work in the lower courts' willingness to "borrow" tests long associated with the First Amendment in articulating frameworks for modern-day Second Amendment analysis. *See, e.g.*, Zick, *Rights*

phenomenon that I call "constitutional overlap."[6] Constitutional overlap arises whenever multiple, ostensibly separate rights provide resonant and mutually supportive rationales for invalidating the same government action. Sometimes the existence of an overlap is obvious and its scope is substantial (it is not hard to see, for instance, how the First Amendment's Free Speech and Free Press Clauses overlap with respect to the censorship of newspapers); at other times, its existence is subtle and its scope more particularized (the Fourth Amendment's right against unreasonable seizures may not seem to have much to do with the First Amendment's right to free expression, but the two rights might overlap with respect to arrests made in retaliation for expressive conduct). But across all instances of overlap, the same functional dynamic is at work: two or more rights-based protections come to occupy a shared territory, with the rights simultaneously speaking to the constitutionality of something the government has done. The question I want to consider here is how, if at all, courts might ascribe significance to the fact that multiple rules have overlapped.

The general phenomenon of constitutional overlap is by no means a new discovery on my part. Professor Zick's own work examines instances in which the free-speech right overlaps with other constitutional rights,[7] and other scholars have already been thinking about the ways in which the existence of overlap might carry significance across a wide range of doctrinal contexts.[8] But much of the existing work (my

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Speech, *supra* note 4, at 27–35. *See generally* Joseph Blocher & Luke Morgan, *Doctrinal Dynamism, Borrowing, and the Relationship Between Rules and Rights*, 28 WM. & MARY BILL RTS. J. 319 (2019); Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 463 (2010). Rights dynamism can also emerge when one constitutional right operates to facilitate the realization or expansion of others, as might happen, for instance, when the free-speech right empowers activists and social movements to push for equality rights. *See* Zick, *Rights Dynamism*, *supra* note 4, at 799; *see also* CARLOS BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY 1 (2017) (highlighting the "crucial role that the First Amendment has played in creating the political, social, and legal conditions that have permitted sexuality-based identities and communities to form and thrive while allowing the LGBT movement to achieve many of its objectives"). And, contrastingly, rights dynamism can emerge when constitutional rights end up in conflicts and clashes, as might occur, for instance, where two or more rights give rise to inconsistent-seeming doctrinal commands, *see, e.g.*, Locke v. Davey, 540 U.S. 712, 718 (2004) (noting that the Free Exercise Clause and the Establishment Clause "are frequently in tension"), or when one constitutional right empowers some private individuals to frustrate others' vindication of another such right, *see, e.g.*, ZICK, *supra* note 1, at 187 (highlighting circumstances in which anti-abortion protests protected by the First Amendment have operated to limit access to constitutionally guaranteed abortion services). These are but a few of the many different ways in which constitutional rights can interact and interrelate.

[6] *See* discussion *infra* Part I.

[7] *See, e.g.*, ZICK, *supra* note 1, at 128–35 (discussing the overlapping applicability of the Free Speech and Free Exercise Clauses).

[8] *See, e.g.*, BALL, *supra* note 5, at 1–2; Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1324–43 (2017); Blocher & Morgan, *supra* note 5; Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW.

own included) has viewed the phenomenon through a somewhat particularized lens, focusing on the specific question of whether overlapping rules can and should be "aggregated," "combined," or otherwise accorded "cumulative" force.[9] This is a move that courts and judges have sometimes endorsed and at other times rejected,[10] and their mixed pronouncements on the subject have thus left much room for both descriptive synthesis and normative evaluation. It is, therefore, not surprising that existing scholarship on constitutional overlap has focused primarily on the appropriateness and desirability of "combination analysis," treating the question of *what to do when rights overlap* as just another way of asking *whether or not the rights should be combined*.[11]

But on further reflection, and with the aid of Professor Zick's illuminating work, I have come to believe that the presence of overlap implicates more than just the prospect of combination. In fact, the menu of possible responses to constitutional overlap is lengthier and more complicated than the "to combine or not to combine" question would suggest, and we would therefore do well to develop a more complete accounting of the different means by which courts might work with overlapping, rights-based rules. I aim to begin that task in this Essay, by introducing and examining what I perceive to be four meaningful different doctrinal responses to constitutional overlap, each of which enjoys a real and substantial presence within modern-day constitutional law.

Specifically, when reviewing government action that simultaneously implicates two or more rights-based protections, courts might: (1) *separate* the overlapping rights and apply each one without reference to the other;[12] (2) *combine* the overlapping rights and find in their collective, cumulative force an independently sufficient basis for invalidating the action under review (even where neither right provides such a basis on its own);[13] (3) apply a single, *consolidated* rule that simultaneously implements

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U. L. REV. 641, 643–44 (1994) [hereinafter Faigman, *Madisonian Balancing*]; David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 755 (1994) [hereinafter Faigman, *Measuring Constitutionality*]; Scott W. Howe, *Constitutional Clause Aggregation and the Marijuana Crimes*, 75 WASH. & LEE L. REV. 779, 829–61 (2018); Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 48–53 (2012); Tebbe & Tsai, *supra* note 5, at 463.

[9] *See, e.g.*, Abrams & Garrett, *supra* note 8, at 1324–43; Coenen, *supra* note 8, at 1070; Faigman, *Madisonian Balancing*, *supra* note 8, at 643–44; Faigman, *Measuring Constitutionality*, *supra* note 8, at 755; Howe, *supra* note 8, at 829–61; Porat & Posner, *supra* note 8, at 48–53.

[10] For a sampling of real-world examples, see Coenen, *supra* note 8, at 1078–82.

[11] To be clear, I do not mean here to suggest that existing scholarship has been monolithic in its treatment of combination analysis itself—much to the contrary, several commentators have usefully distinguished between different sorts of *ways* in which courts accord aggregate or cumulative effect to overlapping constitutional rights. *See, e.g.*, Abrams & Garrett, *supra* note 8, at 1313 (distinguishing between "hybrid rights" claims, according to which a claimant "argues that the existence of partial violations of multiple constitutional provisions should be added together," and "intersectional rights" claims, according to which "the [overlapping] constitutional provisions are read to inform and bolster one another").

[12] *See* discussion *infra* Section II.A.

[13] *See* discussion *infra* Section II.B.

the protections derived from each individual right;[14] or (4) identify one of the overlapping rights as *displacing* all others and thus supplying the exclusively applicable ground for decision.[15] Thus, in my view, the question of how to respond to constitutional overlap reduces not so much to the question of *whether or not to combine*, but rather to the question of *whether to separate, combine, consolidate, or displace*.

In the pages that follow, I attempt to elaborate on this idea. Part I offers a more extended treatment of the concept of "constitutional overlap," by defining the phenomenon more specifically and distinguishing it from several other sorts of relational interactions that figure prominently within Zick's own work.[16] Part II develops the taxonomy of responses, by describing and illustrating the four basic ways in which courts might approach overlapping rules.[17] Finally, Part III begins to wrestle with the normative question of how courts ought to choose the right response, setting forth some prescriptive suggestions that might help to guide courts' choices among the four responses.[18]

Much of the ensuing analysis is tentative and preliminary. The taxonomy itself is certainly up for debate—perhaps there are other types of responses to constitutional overlap, and perhaps there is a better organizational framework for thinking through the responses I have described. In addition, the normative discussion leaves much unresolved: I lack both the page space and know-how to develop a comprehensive formula for responding to overlap, and my prescriptive suggestions aim more to highlight questions worth asking than to resolve those questions definitively. More work on these and other issues no doubt needs to be done. But my hope is that this discussion will at least make the case for thinking more systematically about the phenomenon of constitutional overlap and its relationship to the development of constitutional law.

I. WHAT IS CONSTITUTIONAL OVERLAP?

An instance of "constitutional overlap" arises when multiple constitutional rules provide plausible and independent bases for concluding that a single government

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[14] *See* discussion *infra* Section II.C.

[15] *See* discussion *infra* Section II.D.

[16] *See* discussion *infra* Part I.

[17] *See* discussion *infra* Part II.

[18] *See* discussion *infra* Part III. One important caveat regarding the scope of the ensuing analysis: I am bracketing for purposes of this Essay the question of how, if at all, the presence of constitutional overlap ought to matter when it comes to assigning *remedies* for demonstrated constitutional violations. I am not here considering, for instance, whether courts might under certain circumstances accord different forms of prospective and/or retrospective remediation to actions that violate two constitutional rules independently, only one of the two rules, a redundant protection associated with both of the rules, a hybridized version of the two rules, or some other variation on the theme. The remedy-related issues concerning constitutional overlap strike me as deeply interesting and undoubtedly worthy of further research, but they are issues I do not take up here. Rather, this Essay deals with the antecedent question of how courts should respond to constitutional overlap for purposes of determining whether or not a constitutional violation has occurred.

action is unconstitutional.[19] The "zone of overlap" that exists across a collection of constitutional rules can thus be defined as the set of government actions that generate instances of overlap between or among those rules. Two constitutional rules might thus qualify as *highly* or *substantially* overlapping if those provisions are often simultaneously implicated by a single government action; two other provisions might qualify as *seldom* or *rarely* overlapping if they do not often come together in this way. We might say, for instance, that First Amendment–based protections of religious freedom enjoy a significant degree of overlap with First Amendment–based protections of expressive freedom, given that governmental restrictions on religiously motivated activity very often operate as restrictions on expressive activity as well.[20] By contrast, religious-freedom protections would have a lower degree of overlap with Second Amendment–based restrictions on gun control measures, given that restrictions on religiously motivated activity do not often affect an individual's ability to own or possess a firearm. That's not to say that free-exercise/free-speech overlaps are inevitable, or that free-exercise/right-to-bear-arms overlaps are impossible—some governmental restrictions on religious activity might implicate only non-expressive varieties of such activity, whereas other such restrictions might end up touching on gun-related activity. But in general, our definition would allow us to say that the degree of overlap between free-exercise rights and free-speech rights is greater than the degree of overlap between free-exercise rights and the right to bear arms. And this is so for the simple reason that we will more often encounter forms of government action that is constitutionally suspect on *both* free-speech and free-exercise grounds.[21]

Given that the degree of constitutional overlap depends on the frequency with which instances of overlap arise, we should further specify what an *instance* of overlap entails. Several features of the definition warrant elaboration. First is the requirement that the overlapping rules each create *plausible* grounds for invalidating a governmental action. Instances of overlap do not arise, in other words, simply because a claimant has asserted some set of frivolous claims. (Thus, for instance, our definition would exclude from its scope a case in which a claimant contends (plausibly) that a gun control measure violates her Second Amendment right to bear arms

[19] Note that constitutional overlap might also occur in the context of Congress's enumerated powers, each one of which might independently provide a plausible basis for *upholding* federal legislation as authorized by Article I. *See* Coenen, *supra* note 8, at 1086–89. Constitutional overlap might also arise between a rights-based rule and a power-based rule, as might occur, for instance, where Congressional action is simultaneously alleged to violate an individual right *and* also to fall outside the scope of Congress's enumerated powers. *See id.* at 1082–86. Given this Symposium's emphasis on rights-based protections, however, I will be focusing exclusively on cases in which constitutional rules function as potential grounds for *invalidating* the government action under review.

[20] *See, e.g.*, Joanne C. Brant, *"Our Shield Belongs to the Lord": Religious Employers and a Constitutional Right to Discriminate*, 21 HASTINGS CONST. L.Q. 275, 317 (1994) ("Rights of free speech and free exercise frequently overlap, and many of the Supreme Court's 'religion clause' cases can be equally well characterized as 'speech' cases.").

[21] *See* ZICK, *supra* note 1, at 129–32, 134; Brant, *supra* note 20, at 317.

and (implausibly) that it also abridges her Sixth Amendment right to counsel.) At the same time, the "plausibility" criterion encompasses more than only those claims that are definitively and self-evidently meritorious;[22] overlap can also arise when multiple rules each provide merely an "arguable," "potential," or even "colorable" basis for invalidating the same government action.

A second noteworthy feature of the definition is its reference to a "single government action." That qualifier operates to filter out cases in which *multiple* actions implicate *multiple*, respective claims. Consider, for example, a case in which a criminal defendant asserts a Fourth Amendment–based challenge to evidence introduced at trial followed by an Eighth Amendment–based challenge to the terms of the sentence ultimately imposed. This scenario, in my view, would not present an instance of constitutional overlap, because the two rights-based claims would each concern a different "government action": The Fourth Amendment claim goes to the validity of a search that investigators have conducted, and the Eighth Amendment claim goes to the validity of a sentence the court has imposed. That's not to say that the "singularity" of governmental action will always be self-evident; much to the contrary, the boundaries of "transactional unity" are hardly self-defining, and reasonable minds can often differ as to whether a case involves overlapping constitutional objections to a single governmental action or several, separate objections to a series of such actions.[23] (If, for instance, the severity of one's sentence was specifically based on a factual finding that the unlawfully acquired evidence helped to support, then there would be a stronger—though not necessarily overwhelming—basis for suggesting that the sentence itself implicated the overlapping protections of the Fourth and Eighth Amendments.[24]) There are, in short, likely to be cases in which it becomes very difficult to distinguish between a single government "action" that implicates

[22] This is, to be clear, a primarily expositional choice. One could simply define "constitutional overlap" as occurring only where multiple, rights-based rules each definitively demonstrate the unconstitutionality of government action. But then the question of how to respond to constitutional overlap would become largely beside the point; the result of the case is foreordained, and the fact that multiple clauses point to the same result carries no analytical significance. I have thus defined the concept so as to ensure that it encompasses those cases that I find the most interesting and/or challenging to resolve—i.e., those in which the chosen response to constitutional overlap might carry outcome-determinative effects.

[23] Related problems can arise in the absence of constitutional overlap. Thus, as Professors Abrams and Garrett have illustrated, some Eighth Amendment challenges to the conditions of one's confinement will depend on whether "the relevant transaction" is defined "broadly," to encompass the entirety of one's experience in custody, or "narrowly," so as "to require separate litigation of different acts." Abrams & Garrett, *supra* note 8, at 1322–23 (citing Wilson v. Seiter, 501 U.S. 294, 304 (1991)).

[24] To flesh out the point, the challenged action would be the imposition of the sentence, which, could be said to implicate the plaintiff's Fourth Amendment rights (on the theory that, absent the allegedly unlawful search, the sentence would have been lower) and Eighth Amendment rights (on the theory that the sentence might qualify as so excessive as to amount to a form of "cruel and unusual punishment").

multiple rights, on the one hand, and multiple government actions that each implicate a single right, on the other, and I'm afraid I don't have much to offer here in the way of useful clarifying criteria.[25] Outside these boundary cases, however, we should at least be willing to resist the suggestion that constitutional overlap arises whenever a single constitutional *case* involves multiple constitutional claims; rather, the presence of overlap should depend on whether those claims all concern the validity of one and the same "action" undertaken by the government.

Consider next the definition's reference to "multiple constitutional rules." As I understand it, a constitutional *rule* is different from a constitutional *clause*; a case can involve constitutional overlap even where government action implicates different doctrinal principles that stem from the same textual guarantee. Thus an instance of constitutional overlap would arise when, for instance, a claimant asserts that the government has violated both the "procedural" and "substantive" components of the Due Process Clause, or when a defendant contends that a warrantless search was not justified by "exigent circumstances" and that it was also unsupported by probable cause. Here too, to be sure, tricky characterization problems will sometimes arise: As the relevant doctrinal propositions become narrower and more fact-dependent in character, they may at some point start to look more like *statements about a single rule's application* rather than *multiple rules that each individually apply*.[26] What do we say, for instance, where a claimant relies on two different theories, each grounded on a different set of cases, in support of the conclusion that the government violated their right against compelled speech: Does the claimant now rely on two overlapping "sub-rules" concerning the right against compelled speech, or is the claimant simply pointing to two different reasons why the government has violated the single rule against compelled speech violation? Here again, I doubt there is a rigorous and airtight means of drawing such fine distinctions.[27] But I also do not think that the lack of a clear approach presents an especially significant problem for the analysis that follows. For now, we will simply concede that there is a hazy boundary-line between instances in which *rules* overlap and those in which *reasons* overlap, while confining our analysis to cases in which the overlap itself rather clearly involves distinctly identifiable rules.

Finally, note the definition's requirement that the overlapping rules provide *independent bases* for a given constitutional outcome. This criterion helps to distinguish

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[25] For further discussion of this issue, see Coenen, *supra* note 8, at 1128–30 (highlighting the problem of "transactional unity"). *See generally* Daryl J. Levinson, *Framing Transactions in Constitutional Law*, 111 YALE L.J. 1311 (2002) (highlighting a broad range of circumstances in which assessments of constitutional harm are sensitive to seemingly arbitrary choices about how to frame the relevant transaction whose harm is to be assessed).

[26] *See* Blocher & Morgan, *supra* note 5, at 325 (noting the "challenge of *stating* rules," which stems from the fact that "[n]early any rule can be stated at varying levels of specificity").

[27] *See* Michael Coenen, *Characterizing Constitutional Inputs*, 67 DUKE L.J. 743, 768–70 (2018) (highlighting, within the qualified immunity context, the various ways in which courts might characterize the relevant "rule" whose "clearly established" nature is at issue).

instances constitutional overlap from two other types of scenarios in which multiple constitutional rules might carry shared relevance to the outcome of a constitutional case. The first scenario is one in which the dictates of one rule incorporate by reference the dictates of another. Sometimes we need to know whether Rule A has been violated in order to reach a conclusion about Rule B. To take a trivial example, modern incorporation doctrine makes clear that a state violates the Fourteenth Amendment's Due Process Clause whenever it violates almost any provision of the Bill of Rights;[28] even so, I do not think it makes sense to say, for instance, that a claim that the state has violated a defendant's right against self-incrimination implicates the overlapping protections of the Fifth Amendment's Self-Incrimination Clause and the Fourteenth Amendment's Due Process Clause.[29] In these instances, Rule B does not so much "overlap" with Rule A as it simply applies because Rule A says it should apply.[30] That is, to be sure, an important and consequential form of rights-based interaction. But the formal incorporation of one right by another strikes me as analytically distinct from the category of problems that I am here attempting to consider.

The other type of scenario is one in which a claimant must satisfy multiple "sub-rules" in order to prevail on a particular constitutional claim. Consider, for instance, a free-speech challenge to an adverse employment action undertaken in response to a public employee's expressive conduct. To rule for the challenger, a court must conclude: (a) that the speech was not made pursuant to that employee's "official duties";[31] (b) that the speech was on a "matter of public concern";[32] *and* (c) that the employer lacked an "adequate justification" for its actions.[33] Under these circumstances, it would not make sense to say that the "no official duty," "public concern," and "no adequate justification" requirements overlap with one another, even though all three requirements could potentially have a bearing on the case's ultimate outcome. Rather, it would make more sense to say that each requirement functions as a necessary *element* or "component" of a single constitutional right—namely, the right of a public employee not to face adverse action for certain types of expressive conduct. What we are zeroing in on, in other words, are only those cases in which each one of the overlapping rules could on its own provide a plausible justification for invalidating the same government action, and that of course can never be the

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[28] *See* Timbs v. Indiana, 139 S. Ct. 682, 687 (2019) ("With only a handful of exceptions, this Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." (internal quotations omitted) (citing McDonald v. City of Chicago, 561 U.S. 742, 764–65 (2010))).

[29] *Cf.* Malloy v. Hogan, 378 U.S. 1, 6 (1964).

[30] *See* Coenen, *supra* note 8, at 1076 (distinguishing between circumstances in which multiple rules "carry[ ] decisional weight on account of a definitional linkage to another," and those in which "the *subject matter* of a constitutional issue . . . implicates—independently and in parallel—multiple constitutional provisions at the same time").

[31] *See, e.g.*, Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

[32] *See, e.g.*, Connick v. Myers, 461 U.S. 138, 146–47 (1983).

[33] *See, e.g.*, *Garcetti*, 547 U.S. at 418–22.

case where the relevant doctrinal propositions constitute conjunctive elements of the underlying right.

These various qualifications should not obscure the overall capaciousness of the definition we have employed: Instances of constitutional overlap *happen a lot*. They happen whenever a challenger attacks the same government action on multiple (plausible) constitutional grounds, and this is something that claimants frequently do. What is more: instances of overlap can arise across a varied and unpredictable set of circumstances—overlap is not a phenomenon exclusive to pairings of substantively similar clauses. The Second Amendment and the dormant Commerce Clause overlap insofar as they both have something to say about laws concerning the interstate transfer of firearms.[34] The "just compensation" requirement of Takings Clause doctrine and the "procedural" component of the Due Process Clause overlap insofar as they both potentially bear on the validity of various zoning decisions not preceded by a hearing.[35] Eighth Amendment–based proportionality protections overlap with free-speech protections insofar as governments impose especially punitive prohibitions on expressive conduct.[36] Many instances of overlap, to be sure, will feature some regular and predictable pairs, but others will feature collections of rights that—at first glance—seem to be substantively quite distinct from one another.

II. FOUR RESPONSES TO CONSTITUTIONAL OVERLAP

Having defined the phenomenon of constitutional overlap, we will now consider the different ways in which courts might respond to it. This Part identifies the four basic strategies that courts employ when reviewing government actions that implicate overlapping constitutional prohibitions: separation, combination, consolidation, and displacement.

A. Separation

The first and simplest response to an instance of constitutional overlap is to pay it no heed. Rather than take notice of the fact that the challenged government action simultaneously implicates multiple constitutional rules, a court applying the "separation"

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[34] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n v. City of New York, 883 F.3d 45, 48–49 (2d Cir. 2018).

[35] *See, e.g.*, Bowlby v. City of Aberdeen, 681 F.3d 215, 218 (5th Cir. 2012). *See generally* D. Zachary Hudson, Note, *Eminent Domain Due Process*, 119 YALE L.J. 1280 (2010) (analyzing due-process norms in the context of governmental exercises of the eminent domain power).

[36] *See* Michael Coenen, *Of Speech and Sanctions: Toward a Penalty-Sensitive Approach to the First Amendment*, 112 COLUM. L. REV. 991, 999 n.30 (2012); *cf.* Bowers v. Hardwick, 478 U.S. 186, 197 (1986) (Powell, J., concurring) (speculating, in the substantive due-process context, that a Georgia anti-sodomy law could give rise to "a serious Eighth Amendment issue" by permitting judges to sentence the participants in "a single private, consensual act" to a prison sentence of up to twenty years), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

approach would consider and apply each one of the overlapping rules without reference to any others. Where a challenger plausibly contends that government action violates Rule A and also Rule B, a court applying the separation approach would proceed on the assumption that the action counts as unconstitutional if and only if *either* Rule A *or* Rule B dispositively supports that outcome.[37] This approach, in other words, requires no direct response to the overlap itself; its only operative command is that the reviewing court apply each rule without reference to the others.

Although I lack quantitative data to this effect, my strong suspicion is that the separation approach reflects the most common judicial response to instances of constitutional overlap. The approach is on display in the myriad constitutional cases in which litigants argue about and courts work through the implicated rules sequentially rather than collectively, and it is reflected in the filings, briefs, and judicial opinions whose sections and subsections present self-contained analyses of each overlapping rule. Indeed, the approach is so embedded into the practice of constitutional litigation that courts and litigants seldom make explicit (much less justify) their choice to embrace it.[38] We can thus characterize separation as the default approach: Unless otherwise indicated, courts treat the existence of overlap as irrelevant to their analysis of each overlapping rule. Any other response amounts to a departure from this baseline norm.[39]

Two further points about the separation approach are worth highlighting here. First, the separation approach requires *truly independent application* of the overlapping rules; not only must a court purport to reach individual conclusions about individual rules, but the conclusions themselves must not in any way *depend* on the potential applicability of any other rule. Clearly, separation would not permit a court to conclude that government action violates "Rules A and B acting together," but it also would not permit the court to conclude that the action violates "Rule A in light of Rule B" or "Rule B in light of Rule A." Nor for that matter would the approach permit the court to treat the potential applicability of Rule B as "crowding out" or otherwise precluding a finding of unconstitutionality under Rule A.[40] As far as separation is concerned, these conclusions would each commit the cardinal sin of rendering one

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[37] "Or" here is meant to be nonexclusive; that is, the alternative grounds approach requires that at least one of the rules demonstrates unconstitutionality, not that one and only one such rule does so.

[38] *See* ZICK, *supra* note 1, at 30.

[39] *See* Porat & Posner, *supra* note 8, at 52 ("This [separation-based] approach is the norm . . . . Plaintiffs frequently argue constitutional rights violations in the alternative and . . . courts rarely address the possibility that individually weak claims may be jointly strong."); *cf.* ZICK, *supra* note 1, at 30 (noting that "courts do not generally discuss rights in explicitly relational terms").

[40] To be sure, a court applying the separation approach could permissibly conclude that a *definitive* finding of unconstitutionality under Rule A obviates the need to evaluate the action's constitutionality under Rule B as well. What I have in mind here, rather, is the conclusion that the fact of overlap operates to *prohibit* one or more of the overlapping rules from having any relevance to the outcome of the case. *See* discussion *infra* Section II.D.

rule's potential applicability relevant to another rule's application, in effect allowing the fact of overlap to influence the scope and substance of the underlying inquiry.

The other noteworthy feature of the separation approach has to do with the precedential effects of the holdings that it generates. Note that on the underlying logic of the separation approach, a court *must analyze* all of the overlapping prohibitions in order to justify a conclusion that the challenged action is *valid*. But the same is not true for conclusions of constitutional *invalidity*; the court need only analyze one such prohibition in order to justify a conclusion that the action violates the law.[41] In other words, the separation approach can yield asymmetries as between decisions that uphold and decisions that invalidate actions within the zone of overlap. Decisions that uphold necessarily will generate "law" that is relevant to all of the overlapping rules; decisions that invalidate will not necessarily do the same (and will at most have alternative holdings on each discrete claim). That is not to say that courts are *strictly prohibited* from working through every relevant rule when concluding that the government has acted unconstitutionally—especially at the lower-court level, courts often articulate multiple, alternative grounds for concluding that the government has violated the law. But the separation approach at least affords courts the opportunity to decline entertaining additional theories of unconstitutionality once one of the overlapping rules is shown to condemn the action under review.

What is more, even when the separation approach generates holdings about each overlapping rule, the precedential significance of those holdings is limited in a further and more subtle respect. Where the reviewing court applies each rule separately, it will generate nontransferable precedents concerning each of the separately applied rules. Even where the separation approach permits a court to hold that the government has violated Rule A and also Rule B, true separation requires that the holding's rule-specific precedents remain confined to the rules they purport to address—they cannot in any way cross paths. Thus, the Rule B aspects of the decision do not generate any precedent of relevance to Rule A and the Rule A aspects of the decision do not generate any precedent of relevance to Rule B, and that would remain true even for some future case in which the rules again turned out to overlap. In short, the separation approach keeps each overlapping rule confined to its own precedential lane.

B. Combination

Rather than disregard the existence of constitutional overlap, a second response both takes notice of the overlap's existence and treats it as a reason to ratchet up scrutiny of the government action under review. Embracing such a "*combination*

[41] To be clear, this is true only insofar as the overlapping rules articulate *prohibitions* on government conduct. If, by contrast, a court was reviewing a claim that Congress lacked the power under Article I to enact a particular law, the opposite relationship would hold: A conclusion of constitutional invalidity would require consideration of all the overlapping powers cited in support of the congressional act, whereas a conclusion of constitutional validity would require consideration of only one such power.

approach," courts effectively fuse together the prohibitions associated with the overlapping rules to produce an amplified or "hybridized" set of constitutional limits, limits that demand more of the government than does each overlapping rule on its own.[42] Unlike the separation approach, then, the combination approach rejects the premise that the government necessarily avoids a constitutional violation by satisfying the dictates of each applicable rule analyzed separately. Some rules in combination might suffice to demonstrate a violation that none of them could demonstrate in isolation.

The combination approach received perhaps its most well-known exposition in Justice Scalia's majority opinion in *Employment Division v. Smith*.[43] The Court there held that the Free Exercise Clause does not normally prohibit governments from imposing "incidental burdens" on religion through the enforcement of "neutral law[s] of general applicability,"[44] while at the same time suggesting that a stricter approach might apply when the generally applicable law burdens the free-exercise right alongside some other constitutional freedom(s).[45] Put in the parlance of our framework, *Smith* thus embraced the idea that in cases where the free exercise right overlaps with some other right, the normally deferential framework ought to be jettisoned in favor of a more demanding constitutional inquiry. *Smith* itself, to be sure, did not proceed along these lines, given the Court's (debatable) assumption that the claimant's conduct implicated only the free-exercise right.[46] But the Court did at least seem to validate the idea of combination-based reasoning, deeming it appropriate in at least some circumstances to treat the fact of constitutional overlap as a justification for heightened judicial scrutiny.[47]

Smith's suggestions about "hybrid rights" in free-exercise cases has not gained much traction in the lower courts,[48] but courts have elsewhere confronted instances of overlap in an explicitly combination-based manner. The Court itself has held, for instance, that due-process-based vagueness restrictions should apply with special force when the government criminalizes expressive conduct,[49] thus indicating that faithful application of the void-for-vagueness doctrine requires courts to take notice

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42 *See, e.g.*, Coenen, *supra* note 8, at 1075–77.

43 494 U.S. 878 (1990).

44 *Id.* at 879 (quoting United States v. Lee, 455 U.S. 252, 262 n.3 (1982) (Stevens, J., concurring)).

45 *Id.* at 881–82.

46 *See* Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121–22 (1990) (criticizing the majority opinion for not applying its own "hybrid" rights rule to "*Smith* itself").

47 *Smith*, 494 U.S. at 881–82.

48 *See* Coenen, *supra* note 8, at 1078–79 & nn.31–32 (highlighting differing lower-court approaches to *Smith*'s hybrid-rights language); *see also* Abrams & Garrett, *supra* note 8, at 1328–29 (similar); State v. Arlene's Flowers, Inc., 389 P.3d 543, 567 (Wash. 2017) (rejecting a hybrid rights claim on the ground that "the only fundamental right implicated in this case is the right to religious free exercise").

49 *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 572–73 (1974).

of its overlap with the free-speech right.[50] The Court has characterized a right of free association as deriving from the "close nexus between the freedoms of speech and assembly."[51] In addition, the Court has recognized a special set of constitutional limits on criminal court filing fees and other wealth-based restrictions on procedural rights, reasoning that such restrictions—though not necessarily inconsistent with either the Due Process Clause or the Equal Protection Clause in isolation—nonetheless run afoul of the two clauses' collective demands.[52] The Court has also shown a willingness to combine different "sub-rules" derived from the same overarching clause, as it arguably did, for instance, when reasoning in *Plyler v. Doe* that a Texas prohibition on public schooling for undocumented children warranted heightened equal-protection review.[53] And the Court twice relied on combination-based logic in litigation concerning the constitutionality of same-sex marriage restrictions, with the

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[50] A related, though somewhat more difficult example involves the "content-discrimination" principle, which, as originally presented by the Court, was said to derive from an "intersection" between the First Amendment and the Equal Protection Clause. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 384 n.4 (1992) (noting that "[t]his Court itself has occasionally fused the First Amendment into the Equal Protection Clause in this fashion"); Carey v. Brown, 447 U.S. 455, 460 (1980) ("There can be no doubt that in prohibiting peaceful picketing on the public streets and sidewalks in residential neighborhoods, the Illinois statute regulates expressive conduct that falls within the First Amendment's preserve."); *id.* at 461–62 ("When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized."); Police Dept. of Chi. v. Mosley, 408 U.S. 92, 101–02 (1972); *see also id.* at 101 ("The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives."). At the same time, the Court has more recently presented the content-discrimination principle as a stand-alone component of Free Speech doctrine, whose force and vitality does not depend on equal-protection-based non-discrimination rules. *See, e.g.*, Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015) ("The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.' Under that Clause, a government, including a municipal government vested with state authority, 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (internal citations omitted)). If the latter proposition is true, then applications of the content-discrimination principle would not in fact reflect a combination-based response to instances of free-speech/equal-protection overlap; rather, and depending on precisely how they were articulated, such applications would be better characterized as involving either a consolidation of free-speech/equal-protection principles, *see* discussion *infra* Section II.C, or the displacement of an equal-protection rule by a more specifically applicable free-speech rule, *see* discussion *infra* Section II.D.

[51] NAACP v. Alabama, 357 U.S. 449, 460 (1958); *see also* Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

[52] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 107 (1996).

[53] 457 U.S. 202, 223 (1982) ("[M]ore is involved in these cases than the abstract question whether [the Texas law] discriminates against a suspect class, or whether education is a fundamental right. [The law] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."); *see also* Coenen, *supra* note 8, at 1089–91.

Justices initially invoking the combined force of federalism-based and rights-based restrictions as sufficient to warrant invalidation of the federal Defense of Marriage Act,[54] and then subsequently invoking the combined force of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause as sufficient to warrant invalidation of the states' own refusals to marry same-sex couples.[55] In these and other ways, the combination-based approach to overlap enjoys a substantial foothold within modern constitutional doctrine.

Combination analysis is also present when courts point to collections of enumerated rights as justifying recognition of a particular "unenumerated" right.[56] The obvious example here is Justice Douglas's majority opinion in *Griswold v. Connecticut*, which famously characterized the unenumerated "right to privacy" as emerging from the "penumbras" and "emanations" of the First, Third, Fourth, Fifth, and Ninth Amendments.[57] Whatever one's view of that conclusion on the merits of that particular argument, the important thing to notice for our purposes is its unmistakably combination-based character. The Court in *Griswold*, to be sure, did not expressly characterize the right to privacy as a "hybrid right," nor did it expressly characterize the cited constitutional provisions as interacting or intersecting with one another in a combination-like way.[58] But the underlying logic that drove the analysis was largely the same: like Justice Scalia in *Smith*,[59] Justice Douglas in *Griswold* was treating a collection of overlapping rules (in this case, the privacy-related provisions of the First, Third, Fourth, Fifth, and Ninth Amendments) as together sufficient to support an outcome that none of the rules alone would (apparently) have sufficed to support.[60]

As the above-mentioned examples help to reveal, combination-based responses to constitutional overlap need not always take the form of opinions that explicitly "add together" the prohibitions of multiple rules to produce an amplified hybrid of the two.[61] That is, of course, one way that combination analysis might work: Faced with government action that implicates both Rule A and also Rule B, the Court might recognize a new, hybridized "Rule A+B" that applies with greater force. But combination analysis might also assume other forms. For example, if a court highlighted

[54] *See* United States v. Windsor, 570 U.S. 744, 763–75 (2013).

[55] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–05 (2015).

[56] *See* Coenen, *supra* note 8, at 1098–101 (suggesting that combination arguments can be understood as a subspecies of structural arguments). Similar arguments have arisen in connection with non-rights-based limits on state power as well. *See id.* at 1099–100 n.132.

[57] 381 U.S. 479, 484–85 (1965).

[58] *Id.*

[59] Emp't Div. v. Smith, 494 U.S. 872, 881–82 (1990).

[60] *See* Stephen Kanter, *The* Griswold *Diagrams*: *Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 635–36 (2006) (considering *Griswold* in similar terms).

[61] *See* Coenen, *supra* note 8, at 1096–98 (suggesting that combination arguments can be analogized to constitutional-avoidance arguments, in the sense that the potential applicability of one constitutional right provides a reason to construe another such right in a *more protective* manner).

the potential applicability of Rule B as a reason to ratchet up its scrutiny of government action under Rule A (or vice versa), the decision would still derive from an additive combination of the two prohibitions, even without ever appealing to a discretely derived "hybrid" right. True, the ultimate holding of the case would take the form of an opinion "about" Rule A—but the holding would still reflect the critical feature of according prohibition-strengthening significance to the fact of overlap itself. Indeed, for our purposes here, we can assume that there is no significant difference between saying that: (i) Rule A applies more stringently than usual because the challenged action also implicates Rule B; (ii) Rule B applies more stringently than usual because the challenged action also implicates Rule A; and (iii) the overlapping incidence of Rules A and B should warrant application of a specialized "Rule A+B" that applies more stringently than does either Rule A or Rule B in isolation.[62] These three conclusions, though formally distinct, all share the critical feature of pointing to the fact of overlap as a reason to apply a more aggressive form of constitutional analysis than would apply in the overlap's absence.

Two final points about combination are worth highlighting here. First, although the rules generated by the combination approach must yield prohibitions that are in some sense "greater" than those of its component parts, courts might sometimes rely on a "combined" rule to generate results that also could have derived from one (or more) of the component parts on its own.[63] From the fact that Rule A+B applies more severely than does either Rule A or B, it does not follow that *all violations* of Rule A+B are necessarily *non-violations* of Rule A and also of Rule B. Some government actions that violate Rule A+B will also violate Rule A and/or Rule B as well, and we cannot therefore assume that any government action condemned by the combination-based rule would necessarily pass muster under any (or all) of the rule's component parts. To be sure, a particular combination-based holding could expressly acknowledge that the combination of Rules A and B was in fact *necessary* (and not just sufficient) to support a conclusion of constitutional invalidity, in which case we would be justified in assuming that substantially similar government actions would not violate Rule A or B in isolation. But the court can also treat a demonstrated violation of Rule A+B as obviating the need to consider whether a stand-alone violation of Rule A or Rule B has also occurred.[64] Courts, that is, can sometimes utilize combination for issue-avoidance purposes: a court can "narrowly" decide a

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[62] Indeed, there is a sense in which all three of these holdings—and not just the third—result in a new, hybridized "Rule A+B." True, the first two holdings are situated within the doctrines of Rule A and Rule B, respectively, but each such holding carves out a specialized subspace in which each such doctrine applies more forcefully in light of the other rule's potential applicability. *See* Abrams & Garrett, *supra* note 8, at 1344 n.174 (noting that the "intersectional analysis" of multiple rights results in the "creation of an entirely new constitutional standard, whether that standard is located in one or more constitutional clauses").

[63] *See, e.g.*, Coenen, *supra* note 8, at 1078–80.

[64] *See, e.g.*, *id.* at 1107–08.

case by reference to the combined effect of Rules A and B and thus steer clear of broader questions about Rules A and B themselves.[65]

Second, and relatedly, combination-based holdings can carry precedential influence even outside the zone of overlap to which those holdings apply. To take one example, a combination-based application of "First Amendment vagueness principles" will most directly bear on future "First Amendment vagueness" cases, but it might also exert some (albeit lesser) precedential force in cases outside the overlap—i.e., void-for-vagueness cases not involving free-speech issues (and/or free-speech cases not involving void-for-vagueness issues).[66] In such cases, to be sure, the significance of the holding must be to some degree "discounted" in light of that holding's combination-based character: that the prior case itself involved overlapping rights might well qualify as a basis for distinguishing away a present-day case that does not.[67] But at the same time, a combination-based holding could still end up saying things about each of the combined rules that would apply with equal force outside the zone of overlap (e.g., "the severe criminal penalties attached to this statute only heighten our concerns about the vagueness of its prohibitions"), and a combination-based holding might sometimes provide a fortiori support for a non-combination holding involving only one of the overlapping rules (e.g., "given that we have upheld similarly vague statutes even where they implicate the free-speech right, this statute—which implicates no free-speech concerns—obviously poses no void-for-vagueness problems"). All of which is simply to say that the present-day application of Rule A+B will contribute "law" not just to the fledgling, overlap-specific doctrine associated with "Rule A+B," but also (albeit less clearly) to the more established set of doctrines associated with Rule A in isolation and Rule B in isolation.

C. Consolidation

A third approach to constitutional overlap shares with the combination approach its willingness to merge multiple rules into one. But in contrast to the combination approach, which regards the existence of overlap as a reason to ratchet up constitutional scrutiny, this consolidation-based approach treats the overlap as an invitation to eliminate unwanted redundancy. Rather than add the overlapping rules together, the consolidation approach looks to subtract repetitive analyses away, thus permitting courts to dispose of multiple constitutional claims by applying a single, all-consuming rule. Put differently, whereas the combination approach might be seen as building a new and more robust rule out of two component parts, the consolidation approach can instead be seen as eliding those parts to form a single, but substantively

[65] *See id.* at 1104–06.

[66] *See id.* at 1081.

[67] *See id.* at 1121–22 (noting that "courts should take care to acknowledge the combination-based nature of the holdings they invoke and to explain why those holdings should continue to carry force in the absence of an analogous multiple clause situation").

identical, rule. Faced with a potentially applicable Rule A and another potentially applicable Rule B, courts apply in their stead not a combined, Rule A+B, said to derive from the two rules' cumulative effect, but rather a consolidated "Rule A|B," a rule whose analytical framework does not in any way differ from what either Rule A or Rule B would provide for on its own. Multiple rule-specific inquiries thus converge to yield a single such inquiry that captures singlehandedly what each rule would otherwise redundantly prescribe.

The consolidation approach is nicely illustrated by the Tenth Circuit's opinion in *Colorado Christian University v. Weaver*.[68] Colorado forbade "pervasively sectarian" educational institutions from participating in the state's "tuition assistance program," and a school challenged the law as violating the overlapping dictates of the Equal Protection, Free Exercise, and Establishment Clauses.[69] The district court analyzed the claims sequentially, and, finding no violation under any of the three clauses, proceeded to uphold the exclusion and dismiss the case.[70] On appeal, and in an opinion by then-Judge Michael McConnell, the Tenth Circuit took a different approach: Noting that the three clause-specific claims "draw on . . . common principles,"[71] the court chose not to proceed through each claim on its own, clause-specific terms.[72] Instead, the court interchangeably invoked Establishment Clause precedents, equal-protection precedents, and free-exercise precedents in support of its conclusion that the law failed to honor a basic component of "religious liberty"—namely,

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[68] 534 F.3d 1245 (10th Cir. 2008).

[69] At the district court, the institution argued that the exclusion violated the Free Exercise Clause by unjustifiably subjecting religious institutions to a distinctly non-neutral set of burdens, that it violated the Establishment Clause by "establishing a State preference for funding schools that are 'sectarian' but not 'pervasively' so," and that it violated the Equal Protection Clause by "treat[ing] similarly situated individuals or entities differently with respect to their religious beliefs." Brief in Support of Plaintiff's Motion for Summary Judgment and for Declaratory and Permanent Injunctive Relief at 27, 29, Colo. Christian Univ. v. Weaver, 2006 WL 2255900 (D. Colo. 2006) (No. 04-RB-2512), 2005 WL 3157140.

[70] Interestingly, the district court did refer back to its Establishment Clause analysis in separately rejecting the plaintiff's equal protection claim. *See* Colo. Christian Univ. v. Baker, 2007 WL 1489801, at *12 (D. Colo. May 18, 2007) (noting that the "preceding Establishment Clause analysis applies with equal force to [the] Equal Protection claim"). In that sense, then, the district court might at least be said to have consolidated its establishment-based and equal-protection-based inquiries.

[71] *Colo. Christian Univ.*, 534 F.3d at 1258.

[72] *See id.* at 1257–58. For a similar approach to a similar collection of claims, see Olsen v. DEA, 878 F.2d 1458, 1459, 1463 n.5 (D.C. Cir. 1989) (Ginsburg, J.) (considering a claim of religious discrimination under an "establishment clause–equal protection rubric" while noting that, "in cases of this character, establishment clause and equal protection analyses converge"); *cf.* Hassan v. City of New York, 804 F.3d 277, 307–08 (3d Cir. 2015) (noting that plaintiffs had brought Free Exercise and Establishment Clause claims "under the theory that the First Amendment demands strict governmental neutrality among religious sects" and consolidating the claims for purposes of rejecting arguments that the city had asserted on a motion to dismiss).

the requirement that governments provide "equal treatment of all religious faiths without discrimination or preference."[73]

At first glance, *Colorado Christian University* (*CCU*) might be mistaken for a straightforward example of the combination approach: the court, after all, started with three "building-block" rules and finished with a single "super-rule" attributable to all three of the building blocks. But in fact, the opinion was doing something different, as the court in *CCU* itself made clear. Rather than attribute its religious discrimination analysis to the cumulative impact of the three rules working together, the court described its analysis as simultaneously capturing each one of those rules' individual commands.[74] Neither the underlying analysis nor the bottom-line conclusion would have changed in the event that only one or even two of the three rules had been invoked by the plaintiff.[75] And that was so because, as applied to religiously discriminatory government action, the three rules merely reflected different ways of saying the same thing: namely, that religiously discriminatory action could pass muster only if it satisfied heightened means/ends scrutiny.[76] Thus, having extracted a single, shared instruction from each of the three overlapping rules, the court found a way to apply them all together in a single fell swoop.[77]

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[73] *Colo. Christian Univ.*, 534 F.3d at 1257–58; *see also id.* at 1258 ("[W]hile the Establishment Clause frames much of our inquiry, the requirements of the Free Exercise Clause and Equal Protection Clause proceed along similar lines."); *id.* at 1266 ("From this we conclude that statutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny whether they arise under the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause." (citations omitted)). Complicating matters somewhat, the Tenth Circuit did consider an alternative theory of unconstitutionality beyond the baseline claim of religious discrimination. This theory, which was based squarely on Establishment Clause limits on government entanglement, was considered separately from the consolidated set of religious-discrimination claims. *See id.* at 1261–66. Thus, viewed as a whole, the *CCU* opinion can be understood as applying: (1) a consolidated, "non-discrimination" rule attributed to the overlapping protections of the Free Exercise, Establishment, and Equal Protection Clauses; and (2) a separately applicable "anti-endorsement" rule, attributed exclusively to the Establishment Clause. *See id.* at 1266–67.

[74] *See id.* at 1257–58.

[75] *See id.* at 1257 (noting that "[t]he Court has called neutral treatment of religions '[t]he clearest command of the Establishment Clause,'" that "[s]uch discrimination is forbidden by the Free Exercise Clause *as well*," and that "[t]he Court has suggested that the Equal Protection Clause's requirement *is parallel*" (emphasis added)); *see also id.* at 1266 (holding that "statutes involving discrimination on the basis of religion, including interdenominational discrimination, are subject to heightened scrutiny *whether they arise under* the Free Exercise Clause, the Establishment Clause, or the Equal Protection Clause" (citations omitted) (emphasis added)) (quoted in Trump v. Hawaii, 138 S. Ct. 2392, 2441 (2018) (Sotomayor, J., dissenting)).

[76] *See id.* at 1266.

[77] The court did acknowledge some "uncertainty about the level of scrutiny," owing to some unclear language from the Supreme Court's opinion in *Locke v. Davey*. *Id.* at 1267 (discussing Locke v. Davey, 540 U.S. 712, 720 (2004)). But it ultimately sidestepped the issue by noting that "the State scarcely has any justification at all." *Id.* In other words, the Court

The Supreme Court has also made use of the consolidation approach. In *Christian Legal Society v. Martinez*, for instance, the Justices considered a set of overlapping claims concerning a public law school's requirement that registered student organizations not restrict membership on the basis of a student's "status or beliefs."[78] The challengers to this "all-comers" policy contended that it violated two different constitutional rights: it abridged the right to "free speech," by restricting the messages that organizations could express with their membership criteria,[79] and it also abridged the right to "expressive association," by restricting students' ability to assemble with like-minded peers.[80] But rather than "engage each line of cases independently," the majority instead opted *not* "to treat CLS's speech and association claims as discrete."[81] The better approach, it reasoned, was to recognize that "[t]he same ground rules . . . govern both speech and association challenges in the limited-public-forum context."[82] And applying that approach, the Court thus reached the conclusion that its own "limited-public-forum precedents supply the appropriate framework for assessing both CLS's speech and association rights."[83] Thus, much as the Tenth Circuit managed to consolidate three ostensibly separate religious discrimination claims by applying a single iteration of heightened means/ends scrutiny, the Court in *Christian Legal Society* managed to resolve two, ostensibly separate expression-related claims by applying a single iteration of the limited public forum test.

For one final example of consolidation in action, consider the not-uncommon scenario in which government action, though neither discriminatory on the basis of a suspect classification nor an abridgement of a "fundamental right," is alleged to violate both equal protection and substantive due process. Under these circumstances, the overlapping rules each call for application of rational basis review, with both doctrines purporting to permit the challenged action as long as it relates rationally to a legitimate government interest.[84] That redundancy invites consolidation; rather than apply the same rational basis test twice, asking first whether the government

made clear that the challengers would have won even in the event that the consolidated constitutional analysis required something less than a "compelling" governmental interest. *Id.*

[78] 561 U.S. 661, 671 (2010). I am grateful to Professor Zick for bringing this example to my attention.

[79] *Id.* at 668.

[80] *Id.* at 680.

[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 305 (1993) (noting for substantive-due-process purposes that "[t]he impairment of a lesser [i.e., non-fundamental] interest . . . demands no more than a 'reasonable fit' between governmental purpose . . . and the means chosen to advance that purpose"); Heller v. Doe, 509 U.S. 312, 319–20 (1993) ("[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (citations omitted)).

action's equality-reducing elements are rationally related to a legitimate interest and then again whether its liberty-reducing elements are also so related, courts can instead just ask once whether the government has a rational basis for what it has done, applying a consolidated "rational basis" test as a substitute for the two separate (but functionally equivalent) tests that would otherwise apply.[85] There again, then, one single inquiry suffices to resolve two different rights-based claims—not because the claims fuse together to form a more potent basis for constitutional attack, but rather because the claims are understood as requiring indistinguishable doctrinal inquiries.

As these examples help to reveal, consolidation works only to the extent that the overlapping rules really are coextensive with one another. A consolidated version of Rules A and B cannot operate as a reliable substitute for *both* Rule A *and* Rule B unless Rules A and B themselves each call for the same analysis; otherwise, the consolidated inquiry will not always reflect what each of the two rules prescribe. Consolidation would not have worked in *Colorado Christian University* if the court had first determined that the applicable free-exercise limits on religious discrimination were more exacting than the limits imposed by the other two clauses; had that been so, any attempt at a consolidated test would have sometimes misfired, occasionally yielding constitutional conclusions that at least one of its underlying clauses did not in fact support.[86] Nor would consolidation have worked in *Martinez* if the Court had concluded that the free-association claim warranted higher scrutiny than the free-speech claim. And, to revisit our final example, courts cannot "consolidate" equal-protection and substantive due-process limits on government action where those limits call for different standards of means/ends scrutiny; there is no shared substitute, for instance, that is capable of simultaneously mirroring rational basis review and the intermediate scrutiny test. In sum, when two or more overlapping rules require functionally different constitutional analyses, courts will be unable to identify a shared, common analysis that adequately substitutes for each one of the overlapping rules.[87]

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[85] *See, e.g.*, Newman v. Consol. Dispatch Agency, 737 F. App'x 956, 958–59 (11th Cir. 2018) ("Where no fundamental rights are involved, the test is essentially the same for both equal protection and substantive due process analysis."); Powers v. Harris, 379 F.3d 1208, 1215 (10th Cir. 2004) ("[B]ecause a substantive due process analysis proceeds along the same lines as an equal protection analysis, our equal protection discussion sufficiently addresses both claims."); Lockary v. Kavfetz, 917 F.2d 1150, 1155 (9th Cir. 1990) ("Scrutiny under equal protection analysis is essentially equivalent to scrutiny under due process doctrine."); *cf.* Washington v. Glucksberg, 521 U.S. 702, 755 n.3 (1997) (Souter, J., concurring) ("The doctors also rely on the Equal Protection Clause, but that source of law does essentially nothing in a case like this that the Due Process Clause cannot do on its own.").

[86] To be sure, a court could *jointly attribute* a single, elevated inquiry to a set of overlapping rules, but the court would then be *combining* rather than *consolidating* the rules.

[87] Consolidation thus differs in an important respect from the practice of doctrinal borrowing, whereby courts "import[ ] doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends." Tebbe & Tsai, *supra* note 5, at 461. Borrowing might suffice to create similarities across two different areas of doctrine, but the similarities do not in and of themselves achieve the sort of consolidation I am describing

This final point carries important implications for the precedential significance of a consolidation-based holding. Recall our earlier observations about the uncertain precedential relationships that exist between a combination-based application of two rules and the law associated with each individual rule: Any opinion concerning the application of a hybridized "Rule A+B" will have a contingent, context-specific bearing on subsequent cases involving only Rule A or only Rule B.[88] The precedential implications of a consolidation-based decision should in fact be more straightforward. Unlike a combined "Rule A+B," which purports to do something more than its constituent parts, a consolidated "Rule A|B" purports to do *precisely what* its constituent parts would in any event do. That being so, all future applications of "Rule A|B" should be fully attributable to the "law" of Rule A and the "law" of Rule B, just as all future applications of Rule A and of Rule B should be fully attributable to the law of "Rule A|B." Beyond that, a decision to consolidate Rules A and B might also have the effect of rendering past applications of Rule A automatically relevant to the "law" of Rule B, and vice versa. Consolidation thus ought to give rise to a sort of "precedential interoperability" within the zone of overlap; once the overlapping rules are said to provide for one and the same test, then everything of relevance to one rule ought to be of immediate relevance to the other rule as well.

D. Displacement

Like the combination and consolidation approaches, the final approach to constitutional overlap begins with a collection of overlapping rules and concludes with a single applicable inquiry. But this "displacement" approach does not achieve that result through any explicit intermingling of the overlapping rules. Rather, the reviewing court simply identifies *one and only one* of these rules as providing the exclusive avenue of constitutional inquiry. Thus, given some form of government action that plausibly implicates the protections of Rule A and also of Rule B, this approach might simply dictate that Rule A "occupies the field" and that Rule B should therefore be ignored.

The Supreme Court's decision in *Graham v. Connor* offers the clearest example of this "displacement" approach in action.[89] The case stemmed from police officers' use of violence while conducting an arrest—government action that, under the law at the time, plausibly implicated both (1) Fourth Amendment–based reasonableness limits on arrests made with "excessive force";[90] and (2) Fourteenth Amendment–based substantive due-process protections of bodily autonomy.[91] The Court could have

here. Rather, consolidation would occur only after a court, recognizing that two overlapping rules provide for the same essential analysis, simply dictates that a single application of that shared analysis will govern the disposition of both rules.

[88] *See supra* notes 43–55 and accompanying text.

[89] 490 U.S. 386 (1989).

[90] *See, e.g.*, Tennessee v. Garner, 471 U.S. 1, 7 (1985).

[91] *See, e.g.*, Rochin v. California, 342 U.S. 165, 168 (1952). Technically speaking, of course, both limits stemmed from the Due Process Clause: the "Fourth-Amendment-based" claim

responded to this overlap by treating the two "rules" as alternative grounds for relief, asking first whether the officers' conduct amounted to an unreasonable seizure under excessive force doctrine and next whether the officers' conduct violated substantive due process. Or, following the combination approach, the Court might have resolved the case by reference to an elevated set of safeguards said to arise from the combined interaction of the overlapping constitutional protections against violent police behavior. Or, following the consolidation approach, the Court could have treated the two protections as coextensive within the zone of overlap, applying a single constitutional test said to effectuate both guarantees simultaneously. But the Court did none of those things. Rather, it simply stipulated that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims."[92] Or, as Justice Blackmun would put it in a separate opinion, the majority made clear that "prearrest excessive force claims are to be analyzed under the Fourth Amendment *rather than* under a substantive-due-process standard."[93] Thus, without even reaching the merits of the substantive-due-process claim, the Court simply waved it away, concluding that the Fourth Amendment safeguard had crowded out its substantive-due-process counterpart.[94]

Though ostensibly a case about arrest-related use-of-force claims, *Graham* has been understood to require displacement in other substantive contexts as well. The Supreme Court itself has attributed to *Graham* a "more-specific-provision" rule,[95] according to which "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process."[96] And various lower courts have relied on this rule to hold, among

stemmed from that portion of the Due Process Clause that "incorporated" the Fourth Amendment's protections against the states, and the "substantive-due-process" claim derived from the residual portion of the Fourteenth Amendment that conferred some further set of "unenumerated" rights against the states. *Id.* at 168–69.

[92] *Id.* at 395.

[93] *Id.* at 399–400 (Blackmun, J., concurring in judgment and in part). *But see* Cty. of Sacramento v. Lewis, 523 U.S. 833, 843–44 (1998) (treating a substantive-due-process challenge to police conduct as not barred by *Graham*, given that the conduct at issue did not "amount to a 'seizure' within the meaning of the Fourth Amendment" and that the case was therefore not "covered by" the Fourth Amendment).

[94] Notably, the Court in *Graham* also went on to suggest that claimants could not rely on substantive due process in challenging postarrest uses of force against "convicted prisoners," treating such claims as displaced by the Eighth Amendment. *See Graham*, 490 U.S. at 395 n.10 (citing Whitley v. Albers, 475 U.S. 312, 327 (1986) ("Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment.")).

[95] *Lewis*, 523 U.S. at 833.

[96] United States v. Lanier, 520 U.S. 259, 272 n.7 (1997); *see also* Albright v. Oliver, 510

other things, that the Takings Clause displaces the Equal Protection and Due Process Clauses as applied to various types of land-use decisions,[97] that the Sixth Amendment right to counsel displaces the due-process right as applied to claims involving the attorney-client relationship in criminal cases,[98] that the Eighth Amendment's right against cruel and unusual punishment displaces substantive-due-process rights in cases challenging the actions of prison administrators,[99] and so forth.[100]

The displacement required by the more-specific-provision rule is the product of a direct, explicit instruction concerning the proper approach to a particular type of overlap. But displacement-like results might also be achieved indirectly as well. Specifically, courts might simply define two constitutional rules in such a way that ensures, within the zone of overlap, that any violation of one rule would automatically constitute a violation of the other (but not necessarily vice versa). In other words, rather than mandate that courts apply Rule A and not Rule B, a court might instead simply render the two rules "partially redundant" with one another, such that the protections established by Rule B were "all-encompassed" or "subsumed" by the protections established by Rule A.[101] Though formally different from a displacement-requiring

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U.S. 266, 275 (1994) (contending that claims of prosecution without probable cause are to be evaluated exclusively by reference to the Fourth Amendment and not substantive due process).

[97] *See* Bateman v. City of W. Bountiful, 89 F.3d 704, 709 (10th Cir. 1996) (holding that the plaintiff's "due process and equal protection claims are subsumed within the more particularized protections of the Takings Clause" (internal quotations, citations and alterations omitted)); Miller v. Campbell Cty., 945 F.2d 348, 352 (10th Cir. 1991) ("Because the Just Compensation Clause of the Fifth Amendment imposes very specific obligations upon the government when it seeks to take private property, we are reluctant in the context of a factual situation that falls squarely within that clause to impose new and potentially inconsistent obligations upon the parties under the substantive or procedural components of the Due Process Clause. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause.").

[98] United States v. Hernandez, 333 F.3d 1168, 1174 (10th Cir. 2003) (declining to consider a Fifth Amendment–based due-process claim related to government interference with a criminal defendant's attorney-client relationship on the ground that the claim was cognizable only by reference to the Sixth Amendment right to counsel).

[99] *See, e.g.*, Beahm v. Burke, 982 F. Supp. 2d 451, 460–61 (E.D. Pa. 2013) (noting that "[w]ith regard to her substantive due process claim, the defendants assert that because of the 'more specific provision rule,' the plaintiff can only make out a claim under the Eighth Amendment for the assertion that the plaintiff was released past her scheduled release date" and expressing "agree[ment] with the defendants that [the court is] bound by the 'more specific provision rule' and must analyze the plaintiff's claim under the Eighth Amendment, not the substantive due process rubric").

[100] *See, e.g.*, People v. Uribe, 132 Cal. Rptr. 3d 102, 125–26 (Cal. Ct. App. 2011) (noting that because a prosecutor's "misconduct . . . related to defendant's procedural due process rights . . . defendant is precluded under the more-specific-provision rule from asserting a substantive due process claim").

[101] *See Bateman*, 89 F.3d at 709; *Miller*, 945 F.2d at 352.

decision, any such recognition of partial redundancy would likely end up generating a functionally similar set of results.

Why would partial redundancy yield displacement-like effects? The answer is that, once Rule B becomes logically subsumed by Rule A, then Rule B becomes irrelevant to (and Rule A always dispositive of) the constitutional analysis of actions that implicate both of the two rules at once. Under such circumstances, one of two things can be true: (1) the action violates Rule A, in which case it is unconstitutional; or (2) the action *does not* violate Rule A, in which case, by definition, the action does not violate Rule B either. For any government action that simultaneously implicates Rules A and B, the court can thus reach a definitive conclusion as to that action's validity by simply applying Rule A and Rule A alone. The substantive relationship between the two rules thus gives the Court every reason to apply Rule A and to ignore Rule B—thus, in effect, displacing the latter with the former.

The point of this comparison is not to insist that the Court would officially mandate displacement by making the presence of one constitutional violation depend on the presence of another. Technically speaking, such a decision would remain compatible with a separation-based approach to constitutional overlap, leaving future courts free to continue applying the "effectively displaced" Rule B even when it is no longer necessary to do so. But when viewed through a more functionalist lens, the creation or recognition of partially redundant rules would *operate much like* a decision that explicitly mandates the elevation of one rule and the displacement the other.

That point leads me to a final observation about displacement and partial redundancy: Just as it might sometimes be useful to think of formally substantive decisions in displacement-like terms, so too might it sometimes be useful to think of formally displacement-like decisions in substantive terms. We have shown, after all, that courts can achieve something similar to displacement by creating a sort of "partial" redundancy across two rules: a decision that predicates a violation of Rule B on a separate violation of Rule A (but not necessarily vice versa) may effectively render Rule B irrelevant to the future resolution of cases within the zone of overlap. But if that is true, then what does it tell us about the substantive implications of a decision like *Graham*? One answer to that question might be nothing. Perhaps the displacement-based holding of *Graham* reflects nothing more than a "procedural" instruction about the appropriateness of adjudicating substantive-due-process claims in arrest-related cases—a holding that says nothing about what substantive-due-process doctrine does and does not allow. But another answer might be that *Graham* establishes the same sort of partial redundancy that other cases might make explicit: One could, in other words, understand *Graham*'s displacement rule as codifying the conclusion that substantive due process prohibits only those arrests that the Fourth Amendment already prohibits, and that it is therefore never possible for an arresting officer to violate substantive due process without also violating the Fourth Amendment.[102] So

[102] Some commentators have understood *Graham* in such terms. *See, e.g.*, Jill I. Brown, Comment, *Defining "Reasonable" Police Conduct:* Graham v. Connor, 38 UCLA L. REV. 1257,

understood, the displacement approach would end up linking the content of the two rules in a substantively significant way.

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The next part of this Essay will begin to consider how courts ought to choose between the four responses to overlap that the foregoing analysis has identified. But before we turn to that issue, let me offer a more concise summary of the four responses themselves.

Specifically, in the event that government action "*X*" is plausibly alleged to violate Rule A and also Rule B, a reviewing court might plausibly respond in one of four ways:

(1) *Separation*: *X* is unconstitutional if and only if *X* violates Rule A *or* Rule B. It is possible that *X* could violate both Rule A and Rule B, or one, or the other, or neither, but the fact of overlap itself is irrelevant to the analysis of each claim.
(2) *Combination*: *X* is unconstitutional if it violates Rule A *or* Rule B, but *X* may also be unconstitutional even if it does not violate Rule A or Rule B. In particular, *X* might also violate a combination of the two rules (call it "Rule A+B") even if it violates neither Rule A nor Rule B in isolation.
(3) *Consolidation*: *X* is unconstitutional if and only if *X* violates Rule A *or* Rule B, but because those rules are coextensive within the zone of overlap, it will never be possible for *X* to violate Rule A without violating Rule B, and vice versa. Thus, we can streamline our analysis by simply applying the single form of analysis that Rules A and B each independently prescribe (call it 'Rule A|B') and asking whether that analysis condemns the action under review.
(4) *Displacement*: *X* is unconstitutional if and only if it violates Rule A. *X* may also violate Rule B, but that question is immaterial to our analysis, because the outcome of this case should depend exclusively on the application of Rule A.[103]

1286 (1991) ("By designating the fourth amendment as the exclusive source of constitutional protection against excessive force during arrest, *Graham* brings potential clarity to a confused area of section 1983 litigation. Because the fourth amendment specifically applies to seizures of persons, substantive due process analysis is at best redundant in this context."). Interestingly, the Court in *Graham* appeared to draw an explicit linkage between redundancy and displacement when alluding to the possibility that the Eighth Amendment might also displace postarrest substantive-due-process claims. *See* Graham v. Connor, 490 U.S. 386, 395 n.10 (1989) ("Any protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment.").

[103] These descriptions all envision instances in which precisely two rules overlap. But as more rules enter the picture, additional possibilities can emerge. For instance, if *X* is plausibly

III. CHOOSING THE RIGHT RESPONSE

So, how should courts respond to instances of constitutional overlap? Not surprisingly, I lack a simple answer to this question. The problem is variegated and complex, and I doubt there exists a tidy formula for identifying the objectively correct way of dealing with each and every collection of overlapping rights-based rules. That is especially so given that the choice among different responses often implicates difficult substantive judgments about each of the overlapping rights: one cannot disentangle the question of how two rules ought to interrelate from the question of what each of those rules ought respectively to provide; thus, disagreement about the content of individual rules can bleed into disagreement about the appropriate means of navigating their overlapping territory. In short, reasonable minds can and often will disagree about the rightness or wrongness of separating, combining, consolidating, or displacing within a given case; the best we can do is to try and make clear the sorts of considerations and value judgments that ought to figure into this choice.

A. Separation

We'll begin with the separation approach. As we have already seen, courts rarely pause to justify, let alone acknowledge, the assumption that two or more overlapping rules should operate as separate and independent bases for constitutional relief. As a descriptive matter, separation thus tends to prevail over its competing approaches by default; unless anyone puts an alternative approach on the table, courts will respond to constitutional overlap in a separation-based manner.

But even if separation does operate as the default approach to constitutional overlap, the question remains as to whether it ought in fact to do so. And on this issue, I will confess to some ambivalence. On the one hand, instances of constitutional overlap generally require more analysis and deliberation than courts typically accord

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alleged to violate Rule A, Rule B, and Rule C, a reviewing court might choose to combine Rules A and B and then to treat Rule A+B and Rule C as alternative grounds for decision. But a court might also choose to combine all three rules, allowing for the possibility that *X* is unconstitutional if it violates Rule A+B+C. Or, a court might decide that Rule B is displaced by Rule A, but not Rule C, thus treating the question of constitutionality as dependent on the question whether *X* violates Rule A or Rule C. Or, a court might decide that Rule A+B is equivalent to Rule C and consolidate accordingly (applying, in effect, a Rule (A+B)|C). In sum, when more than two rules enter the picture, the baseline responses to constitutional overlap can themselves mix and match to yield additional, more complex possibilities. I lack the time and space to canvass exhaustively the myriad ways in which four "baseline" responses to overlap might function as the building blocks for a more complex set of approaches. Instead, I will confine the remainder of my analysis to the simplest instances of overlap—i.e., those in which only two rules bear on the constitutionality of the government action under review. The hope is that by clarifying the nature of the choice where $n = 2$, we can provide some basis for thinking through the more complex set of options that present themselves when $n > 2$.

to them, and I would thus disfavor any rule that permitted application of any approach by reference to the existing (and to my mind unsatisfying) status quo. Put another way, if applying the separation approach requires no affirmative argument in its favor, then courts are more likely to continue applying that approach without thinking seriously about the relative merits of its alternatives.

On the other hand, separation's "default" status *does* make sense insofar as the best reasons to pursue separation can very often be restated as reasons *not* to pursue combination, consolidation, and/or displacement. Given that separation reflects something of a "non-response" to constitutional overlap—a means of effectively ignoring the overlapping incidence of multiple, rights-based claims—the simplest and most straightforward means of evaluating separation's appropriateness may well boil down to a process of eliminating its three competing alternatives: If a court cannot identify a good reason for pursuing combination, consolidation, or displacement, then that fact in itself might militate in favor of pursuing separation instead. Indeed, I am hard pressed to identify any special reasons for embracing separation that does not itself involve the comparative disadvantages of some other approach. Separation might sometimes make sense, for instance, when combination would create too much doctrinal complexity. Separation might sometimes make sense where the overlapping rules lack the sort of substantive redundancy that would otherwise justify consolidation. And so forth. The best arguments in favor of the separation approach very often turn out to be arguments against one or more of its alternatives.

Overall, then, there is something to be said for treating separation as the "default" approach to constitutional overlap. But by that I do not mean to characterize separation as an approach that courts should unthinkingly embrace. A default rule need not function as a rule that demands (or even permits) reflexive adherence; it can just as easily operate as a rule that requires careful thinking about the non-default options before the default is utilized. And because separation's appropriateness can often be defended by reference to the inappropriateness of its alternatives, I think courts have good reason to accord it default status.

B. Combination

I have elsewhere addressed at length the "to combine or not to combine" question,[104] and I will not rehash the entirety of my prior arguments and conclusions. What I will say here is that the question can usefully be understood to depend on two different sets of judgments: (1) *interpretive* judgments about the specific pairing of rules whose combinability is at issue; and (2) a broader set of *pragmatic* judgments about the system-wide effects of increasing the presence of combination analysis within the law.

As to the first set of judgments, we can imagine various reasons why different collections of rules might or might not invite a combination-based fusion of their

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[104] *See* Coenen, *supra* note 8, at 1101–20.

protections. One especially salient feature, in my view, involves the rules' relative specificity: If Rules A and B each articulate highly particularized, crisply defined, and mechanically applicable protections across a wide range of cases, then any recognition of an amplified, Rule A+B would risk running contrary to the detailed stipulations of each component part.[105] By contrast, when either Rule A or Rule B articulates open-ended and indeterminate, subsequent clarifications of its uncertain scope might plausibly draw insight from other, overlapping rules.[106] And that might be especially so where the relevant rules resonate with and relate to one another in a salient manner. (Recall, for instance, Justice Kennedy's suggestion in *Obergefell* that the Due Process and Equal Protection Clauses had a "synergy" and were "connected in a profound way."[107]) To be sure, combination's appropriateness need not *always* depend on the existence of such a clearly identifiable "synergy"; some rules might warrant combination even where they lack a "profound" connection between themselves.[108] But thematic or substantive resonance might at least be said to strengthen the case for combining two rules.

Other interpretive considerations might also apply across broader categories of rules. I have previously suggested, for instance, that the rule of construction outlined in the Ninth Amendment lends an extra degree of textual legitimacy to the combination of rights-based requirements derived from the Bill of Rights.[109] We might have fewer scruples about combining two sub-rules that derive from a single constitutional clause than we would about combining two different clauses from two different parts of the

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[105] *See id.* at 1109–12.

[106] *See id.* at 1115–16.

[107] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–05 (2015); *see also* Abrams & Garrett, *supra* note 8, at 1349–53 (highlighting other areas in which pairings of rules substantively intersect in revealing and informative ways).

[108] To some extent, the answer to this question boils down to whether one adopts what Professor Hellman has characterized as an "additive" view of combination-based reasoning, as compared to an alternative, "synergistic"-based view. *See* Deborah Hellman, *The Epistemic Function of Fusing Equal Protection and Due Process*, 28 WM. & MARY BILL RTS. J. 383, 386–90. On an additive view, combination's permissibility would not depend on the existence of salient thematic connections between the constituent rules; it would be enough for a court to infer from the fact that each rule "partially" prohibits the government action under review the further fact that the two rules together prohibit that action in full. *See* Coenen, *supra* note 8, at 1092. *But see id.* at 1122–25 (contending that courts should not combine rules when doing so would have the effect of "double-counting" values and considerations that are already baked into at least one of the rule's substantive protections). On a synergistic view, by contrast, combination's permissibility would depend on whether the two clauses "interrelate" in a particular manner. *See* Hellman, *supra*, at 386; *see also* Abrams & Garrett, *supra* note 8, at 1330–43. Professor Hellman herself proposes a third, "epistemic" conception of combination-based reasoning, according to which multiple rights-based rules each help to "guide us as to the meaning of the other." *See* Hellman, *supra*, at 392. Insofar as this is the operative conception of combination-based reasoning, then the permissibility of the combination approach would depend on the extent to which each constituent rule helps to elucidate the other rule's meaning.

[109] *See* Coenen, *supra* note 8, at 1111.

document.[110] Relatedly, we might be more willing to combine rules derived from the Bill of Rights when they apply against the states, on the theory that, as applied against the states, the rules actually all derive from the same, Due Process Clause of the Fourteenth Amendment.[111] And beyond all of that, there may sometimes arise potential concerns about distortion and double-counting; it might not make sense, for instance, to combine Rule A with Rule B when Rule A already furthers the values associated with Rule B; and it certainly would not make sense to "recombine" Rule A with an already-combined Rule A+B, the latter of which already purports to implement and effectuate Rule A's individual protections.

As for the pragmatic considerations, I have highlighted several in my previous work, but the primary concern goes to doctrinal complexity.[112] Combination, by definition, injects *more rules and categories* into operative constitutional doctrine, leaving courts and litigants with more questions to argue about (and eventually resolve) in future constitutional cases. Increases in doctrinal complexity may be tolerable to some extent, but too many combinations of too many rules could start to pose a problem for the efficient, predictable, and consistent resolution of cases over time. That is especially so when zones of constitutional overlap involve more than just two potentially applicable rules, some of which might themselves be a product of earlier combination-based decisions. Courts might therefore sensibly decline to combine two rules even where the pairing of rules in isolation might seem to invite it; the broader doctrinal environment itself might no longer be able to accommodate the additional doctrinal tests, frameworks, and categories to which additional combination-based decisions would give rise.

C. Consolidation

We have already seen that the decision whether to consolidate Rules A and B reflects and operationalizes a judgment that the rules are "totally redundant" (i.e., that everything prohibited by Rule A is also prohibited by Rule B and everything prohibited by Rule B is also prohibited by Rule A.) In some cases, then, the question whether to consolidate should be easily resolvable. If the overlapping rules diverge in scope and substance, then the overlapping rules should not—indeed, really cannot—be consolidated. (For example, the dormant Commerce Clause and the Second Amendment might sometimes overlap in cases involving state-law prohibitions on interstate gun sales, but there is not much of a "shared substance" to be jointly extracted from and

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[110] *Cf. id.* at 1089.

[111] *See id.* at 1111 ("Many right/right combination arguments, moreover, involve provisions of the Bill of Rights that apply against the states by virtue of the Fourteenth Amendment's Due Process Clause. Does combining one incorporated element of a Clause with another such element create any obvious tension with the singular nature of the Clause itself?").

[112] *See id.* at 1109–16 (canvassing various practical problems associated with the proliferation of combination analysis).

attributed to these two rules across a broader category of cases.[113]) By the same token, if the overlapping rules are identical in scope and substance, then the case for consolidation becomes considerably more compelling.[114] (To the extent that equal-protection

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[113] In a technical sense, this is not necessarily true. Imagine, for instance, the following scenario: In an initial case, the court holds that the government action *X* violates neither the dormant Commerce Clause nor the Second Amendment. In a later case, the government confronts a government action *Y* that is in all material respects identical to government action *X* and is again challenged under the dormant Commerce Clause and the Second Amendment. The court could simply apply the two rules separately and end up at the same constitutional result. But it might instead take a shortcut and issue the following holding: "Government action *Y* is identical to government action *X*, which we have already upheld under the dormant Commerce Clause and also the Second Amendment. Therefore, government action *Y* also comports with the dormant Commerce Clause and the Second Amendment." That holding could be characterized as stemming from a "unified proposition of dormant Commerce Clause/Second Amendment doctrine—namely, a proposition of the form: "*Where the challenged government action looks a lot like government action* X*, it is constitutionally valid.*" Thus, if one characterizes the relevant rules at a low enough level of generality, one might be able to find common denominators that exist across seemingly unrelated areas of doctrine. At the same time, one could also plausibly maintain that what is being consolidated here is not so much a generally applicable "rule" of dormant Commerce Clause and Second Amendment doctrine as it is a set of fact-specific holdings from a single, prior case.

[114] I am rather confident in stating that two non-redundant rules should never be consolidated. I am less confident in stating that two redundant rules *must be consolidated*. The reason why has to do with the availability of another potential response to redundant doctrinal rules, namely *combination*. In my view, that is, multiple, overlapping rules might still qualify as "combinable" even where those rules turn out to mirror one another in scope and application.

Suppose, for instance, that the government has imposed a set of severe and racially discriminatory prohibitions on the right to vote. Under operative equal-protection doctrine, the "fundamental" nature of the burdened right would require the application of strict scrutiny, *see, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966), and so too would the "suspect nature of the race-based classification, *see, e.g.*, Adarand Constructors, Inc., v. Pena, 515 U.S. 200, 227 (1995). The two rules might thus be thought to qualify as "totally redundant" in a consolidation-worthy sense: both rules call for "strict scrutiny," and so a court might simply rely on a single application of the "strict scrutiny" test to dispose of both claims. But that is not the only possible response to the overlapping (and arguably redundant) rules: One might also, I think, treat the overlap as a reason to apply something more akin to "super strict scrutiny," reasoning that government action that *twice* implicates strict scrutiny is qualitatively more constitutionally suspect than government action that does so only once. That's not to say, of course, that courts should *always* embrace *combination* in response to an overlapping set of redundant rules: certainly we can imagine instances in which the combination approach might not make sense. *See, e.g.*, Abrams & Garrett, *supra* note 8, at 1324–25 (suggesting that where the government simultaneously discriminates on the basis of both sex and the marital status of one's parents, courts *should not*—on that basis alone—apply anything higher than the "intermediate" level of means/ends scrutiny that each form of discrimination would on its own require, given that "one of the reasons why illegitimacy discrimination receives heightened scrutiny is that it is *already* a species of sex discrimination"). But courts ought at least to be able to entertain that possibility before treating total redundancy as a categorical reason to consolidate.

and substantive-due-process doctrine each call for rational basis review of the same government action, it would be silly to apply and then reapply the same inquiry.)

Total redundancy, however, will very often be in the eye of the beholder, meaning that consolidation's appropriateness will depend to a large extent on what one understands the overlapping rules respectively to protect. The presence or absence of total redundancy can often represent a contested and contingent feature of a pair of overlapping rules—a feature that courts actively choose to recognize, create, ignore, and/or destroy. And where that is the case, simply instructing courts to "consolidate when the rules are redundant" doesn't really move the ball forward. On its own, that instruction leaves unresolved the critical and more difficult question of when, if ever, it makes sense to *construe the* overlapping rules in such a way that renders them redundant in the total, consolidation-worthy sense.

This latter question requires further investigation, but I will offer three preliminary thoughts. First, by recognizing (or not recognizing) doctrinal redundancy, judges can further their own substantive and ideological goals. For example, faced with a favored and well-defined Rule A and a less-favored and less-well-defined Rule B, courts can effectively redefine Rule B in terms of Rule A by simply insisting that the two rules are in fact the same. (Recall, for instance, the Court's maneuver in *Martinez*, whereby it managed to avoid applying "strict scrutiny" to the all-comers policy by treating the claimants' expressive-association right as totally redundant with its free-speech right.[115]) By "declaring" Rule B to be redundant with Rule A, the court could effectively make it so, thus preventing Rule B from subsequently generating results that Rule A itself could not plausibly support on its own. By the same token, if the court favors the amorphous and vaguely defined Rule B while disfavoring the crisp and constraining Rule A, it may strive to avoid linking the two rules together: by keeping them separate, after all, the court gives Rule B the independence to evolve in a different and preferred direction.[116]

Second, and from a less substance-specific point of view, the formal recognition of doctrinal redundancy implicates a familiar set of rules/standards tradeoffs. All else equal, consolidation should yield decisional frameworks that are simpler, more predictable, and easier to apply, at least as compared to frameworks in which multiple, similar seeming rules both separately apply: When a court consolidates multiple rules into a single rule, it reduces the total number of rules on whose applicability a constitutional inquiry will depend, while also reducing the extent of cross-doctrinal confusion and incoherence. At the same time, subtle but potentially significant variations

[115] *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 680 (2010).

[116] A similar stratagem likely undergirded the Court's displacement decision in *Graham*: By displacing substantive-due-process analysis with Fourth Amendment analysis in arrest-related use-of-force cases, the court managed to clip the wings of a disfavored doctrinal rule before it could ever become a source of robust protections against arrest-related conduct.) *See* Abrams & Garrett, *supra* note 8, at 1351 (noting that the Court's decision in *Graham* can be seen as "expressing reluctance to adopt expansive views of substantive due process").

across the overlapping rules get abstracted away, calibration and error-correction become more difficult to achieve, and the reduced set of potentially applicable rules otherwise limits a court's freedom to resolve a case in the manner it best sees fit.[117] These tradeoffs are as familiar to lawyers and judges as they are difficult to resolve, and I harbor no illusions that the choices are (or will be) any easier to navigate as applied to the problem we have considered here. (Indeed, the one definitive proposition about rules and standards that I *am* willing to embrace is that the choice between rules and standards ought itself to be governed by a standard and not a rule.) But in recognizing that the decision whether to consolidate implicates the rules/standards tradeoff, courts might usefully be able to draw on the wealth of insights and analyses concerning the nature of that tradeoff itself.

Finally, where a court harbors uncertainty as to whether two or more rules qualify as totally redundant (and where the court has otherwise concluded that the rules should not be combined), the court should err on the side of separating rather than consolidating. This is so because, all else equal, the costs of erroneously consolidating non-redundant rules are ultimately more significant than the costs of erroneously separating redundant rules. Suppose, for instance, that a judge (or group of judges) cannot decide whether two rules qualify as sufficiently coextensive to warrant adoption of the consolidation approach. (The court, that is, has already ruled out combination, but it is stuck on the question of whether to consolidate them.) In my view, uncertainty on this score ought to militate in favor of separation and against consolidation. The reason why has to do with the future implications of each decision: Consolidating the rules for now would, in effect, register a definitive conclusion that the rules are indeed redundant, yoking them together so as to ensure that subsequent decisions within the zone of overlap will never permit those rules to generate divergent results. Leaving the rules separated, by contrast, requires no strong commitment in the opposite direction. Even if Rule A and Rule B turn out to mirror one another in scope and substance, treating them as separate and alternative grounds for constitutional relief does not force those rules to yield divergent results; the rules, rather, could continue to evolve and develop in the same general way. All of which is to suggest that it is likely more difficult for a court to reverse course after consolidating two rules that really ought to be separated than to do so after separating two rules that really ought to be consolidated. And that being so, a court should err on the side of not consolidating potentially redundant rules unless it is strongly committed to the proposition that the two rules are and should be treated as fully duplicative of one another.

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[117] *Cf.* John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 709 (2016) (noting that a redundant doctrine can sometimes operate as a sort of "backstop or safety valve" for other rules); F. Andrew Hessick, *Doctrinal Redundancies*, 67 ALA. L. REV. 635, 658 (2016) (noting that "[r]edundant [but separately applicable] doctrines expand the opportunity for experimentation by potentially curtailing the effects of [precedential] constraints").

D. Displacement

We earlier observed that courts can approximate the effects of a displacement-based decision by declaring one overlapping rule to be "partially redundant" with another. ("Partial redundancy," as we have defined it, exists where, within the zone of overlap, it is impossible to violate one rule without also violating the other.) Here, too, descriptive observation inspires normative prescription. Specifically, I want to suggest that displacement is appropriate only when the overlapping rules qualify as partially redundant in precisely this way. Put differently, if, within the zone of overlap, Rules A and B each turn out to prohibit forms of government conduct that the other rule does not, then courts *should not displace* one rule with the other. Rather, courts should displace only where they can confidently proclaim that everything prohibited by the displaced rule is (or at least should be) already prohibited by the rule that does the displacing.

According to this proposition, the rightness or wrongness of a case like *Graham v. Connor* would depend on what one understands each of the two overlapping rules in *Graham* to prescribe. If one is prepared to maintain that arrest-related conduct can never violate substantive due process without also violating the Fourth Amendment, then displacement makes sense: it avoids inefficient and duplicative decisions while sacrificing nothing in the way of diminished constitutional effectiveness. But if one believes (or at least leaves the door open to the possibility) that the two clauses might not be partially redundant—i.e., that some Fourth Amendment–compliant arrests might nonetheless pose problems under substantive due process—then *Graham*'s holding ought to be rejected. Under those circumstances, calling for displacement is tantamount to calling for the non-enforcement of a relevant and at least sometimes difference-making constitutional guarantee.

Put another way, displacement in the absence of partial redundancy will sometimes result in the explicit non-enforcement of meritorious constitutional claims. That is, to be sure, not a fatal defect in and of itself: We can think of lots of procedural and remedial rules that cause courts to "underenforce" constitutional guarantees—Article III standing, the political question doctrine, qualified immunity doctrine, and equity-based limits on injunctive relief all immediately come to mind.[118] But at least with those rules the Court puts its rights-withholding cards directly on the table, identifying the relevant pragmatic and institutional reasons why under-enforcement makes sense—apart from the merits of the claim—and making it clear to everyone that under-enforcement is indeed the outcome being prescribed. With displacement, by contrast, one rule is said not to apply because and only because some other constitutional rule happens to exist. That justification makes sense if in fact the rules are partially redundant; a Court can plausibly choose to ignore Rule A when a separate

[118] *See, e.g.*, Michael Coenen, *Right-Remedy Equilibration and the Asymmetric Entrenchment of Legal Entitlements*, 61 B.C. L. REV. (forthcoming 2020) (manuscript at 2–3) (highlighting these numerous doctrinal barriers to the judicial remediation of constitutional wrongs).

Rule B already covers everything that Rule A would render actionable. But if the rules are not in fact redundant in this sense, the rationale for displacing becomes considerably more tenuous: at bottom, the suggestion would be that a potentially meritorious claim under Rule B cannot be vindicated simply because a similar but non-identical Rule A also exists. At the end of the day, we may have good reasons for acknowledging the unrealistic demands of Chief Justice Marshall's famous stipulation that "where there is a legal right, there is also a legal remedy."[119] But we need not similarly abandon the altogether different (and far less demanding) idea that where there is a legal right, there is a legal right.

This conclusion casts doubt on the validity of the "more specific provision" rule to which *Graham* has given rise.[120] On the logic of that rule, recall, when two or more rules overlap and one is "more specific" than the others, the "specificity" of that rule provides sufficient reason for its exclusive application. But relative specificity strikes me as the wrong guiding criterion: When a "more specific" rule overlaps with a "more general" rule, the heightened specificity of the former should not automatically render the latter irrelevant to the inquiry: It is, much to the contrary, quite possible that the more general rule might, by virtue of its broader scope, end up prohibiting forms of conduct that the more specific rule allows.[121] (If one rule prohibits me from driving speedily and another rule prohibits me from driving recklessly, should the relative specificity of the "no-speeding" rule really give me a free pass to engage in slow-but-reckless driving?) All of which is simply to say that, if the displacement rule of *Graham* is to carry continued significance, *partial redundancy*—and not relative specificity—really ought to be its lodestar. Displacement makes good sense where the rule being displaced is best understood as prohibiting nothing more than the rule doing the displacing. Outside that set of circumstances, however, adherence to the "more specific provision rule" can result in opaque and unjustified constrictions of substantive rights.

CONCLUSION

Constitutional overlap arises when multiple, rights-based provisions simultaneously (and plausibly) bear on the constitutionality of the same government action. Courts can respond to the presence of overlap not just by "combining" together the overlapping rules, but also by consolidating them into a single rule that captures their shared, redundant commands, or by simply stipulating that one of the rules should apply in lieu of all others. And, of course, courts can choose to ignore the overlap altogether, treating each of the overlapping rules as setting forth a totally

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[119] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

[120] Graham v. Connor, 490 U.S. 386, 393–94 (1989).

[121] It is perhaps for this reason that, as Professors Abrams and Garrett have noted, the "more specific provision rule" is often simply ignored. *See* Abrams & Garrett, *supra* note 8, at 1351 (highlighting "countless examples of the Court taking the opposite approach").

separate and independent basis for invalidating its decision. I have further suggested that courts should work through the choice of response in a systematic and methodical way, and I have offered a non-exhaustive set of guiding principles to assist in that endeavor. Among other things, courts should treat the separation approach as the default response, they should consider the appropriateness of "combining" two rules before considering the appropriateness of consolidating the rules or displacing one of the rules with another, and they should evaluate the appropriateness of displacement not by reference to the relative specificity of overlapping rules, but rather by reference to the question of whether one of the overlapping rules logically subsumes the others.

Much remains to be filled in, but I hope for now to have persuaded the reader that: (a) some sort of framework is needed for thinking through responses to constitutional overlap, given the frequency with which instances of overlap occur; (b) the categories underlying the framework reflect meaningfully different responses that carry meaningfully different consequences; and (c) the prescriptive suggestions concerning the framework provide at least a useful starting point for bringing some structure and coherence to what will otherwise remain an incoherent hodgepodge of choices. Short of that, however, my even less ambitious hope is to have persuaded the reader that constitutional overlap is worthy of further study—study that addresses itself to more than just the question of when, if ever, rights can and should be "combined." There remains much to be said about where constitutional overlap comes from, what it really looks like, and how the doctrine ought to handle it. Judges, litigants, and scholars would thus do well to think carefully and systematically about its interpretive and methodological dimensions. In so doing, they will be harvesting from one of the many fertile fields that Professor Zick has been tilling.