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## Constitutional Clause Aggregation and the Marijuana Crimes

Scott W. Howe

*Chapman University School of Law*

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# Constitutional Clause Aggregation and the Marijuana Crimes

Scott W. Howe\*

## *Abstract*

*An important question for our time concerns whether the Constitution could establish a right to engage in certain marijuana-related activities. Several states have now legalized cannabis, within strict limits, for recreational purposes, and that number will grow. Yet, some states will not promptly legalize but, instead, continue to criminalize, or only “decriminalize” in minor ways, and the federal criminalization statutes also will likely survive for a time. There currently is no recognized right under the Constitution to possess, use, cultivate, or distribute cannabis for recreational purposes, even in small amounts, and traditional, single-clause arguments for such a right are weak. Neither the Cruel and Unusual Punishment Clause, the Fourth Amendment, the Due Process Clause nor the Equal Protection Clause can justify such a protection, and that would remain true even when most states have legalized. But, could another theory justify this constitutional right?*

*A second important and topical legal question concerns when two or more rights-based clauses in the Constitution can combine to invalidate government action that none of the clauses could disallow on their own. The Supreme Court generally has declined to recognize multiple-clause rights. But, in the past, it occasionally seemed to endorse the approach. And, recently, in Obergefell v.*

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\* Frank L. Williams Professor of Criminal Law, Dale E. Fowler School of Law, Chapman University. My thanks to Robert Mikos for reviewing a previous draft of the Article and generously sharing his expertise on marijuana law and policy. My thanks also to my Chapman colleagues, Celestine McConville, Sherry Leysen, Wendy Seiden and Mike Lang for reviewing previous drafts and providing valuable assistance of various kinds and at various stages of this project. My deepest thanks to Jetty Maria Cascante Howe for assistance of the most important and pervasive kind, without which the Article would not have reached fruition.

Hodges, it gave new impetus to the idea by declaring the existence of a “synergy” between the Due Process and Equal Protection Clauses that it asserted had helped explain its acknowledgment of certain rights previously and that purportedly helped lead, in the case at hand, to its acknowledgment of a right to same-sex marriage. In consequence, enthusiasm has again intensified over the notion that rights-based clause aggregation can expand constitutional protections. But, is clause aggregation only rhetoric offered to justify something the Court would have done anyway under a single clause or can it sometimes really matter? And, if so, when?

*This Article puts both problems in play by asking this question: After a super-majority of states legalize, could multiple clauses together reveal a constitutional right to engage in certain recreational marijuana activities? The Article answers with cautious affirmance: Clause aggregation could help justify such a constitutional right, in tightly limited circumstances. But, the Article also notes that many of the contours remain undeveloped in the Supreme Court’s jurisprudence on rights-based clause aggregation, complicating any effort to predict whether and how the Justices would apply it in the future to recreational marijuana.*

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### I. Introduction

The movement to legalize cannabis, or marijuana, for recreational purposes is one of the important legal stories of our time. Through acts of direct democracy, eight states plus the District of Columbia since 2012 have “legalized,”<sup>1</sup> within tight limits, the possession, use, cultivation and distribution of marijuana for recreational purposes.<sup>2</sup> Many other states have recently created exceptions for medical use or have decriminalized first-time possession cases.<sup>3</sup> The rapidity of these developments suggests that a majority of states may fully legalize marijuana-related activities in limited circumstances in the years ahead. Yet, some states will surely resist the trend and even continue to criminalize possession of small amounts, because the use of cannabis is still widely viewed as immoral and somewhat dangerous,<sup>4</sup> and the survival of those perceptions will vary across the country. There is also doubt that Congress will soon legalize at the federal level,<sup>5</sup> and the absence of opportunities for direct

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1. I use the term “legalize” in a non-technical sense throughout the Article to denote only a state’s elimination of its own prohibitions on certain marijuana-related activities. The federal Controlled Substances Act, 21 U.S.C. §§ 801–904 (2012), criminalizes, among other things, possessing, cultivating, distributing and manufacturing cannabis, and those federal prohibitions continue to apply in states that have repealed their criminal prohibitions on certain marijuana-related activities. Under the Supremacy Clause of the Constitution, state laws cannot authorize what federal law prohibits. U.S. CONST. art. VI, cl. 2. For a discussion of state and federal laws governing marijuana-related activities, see ROBERT A. MIKOS, MARIJUANA LAW, POLICY AND AUTHORITY 35–194 (2017).

2. See *Marijuana Overview*, NAT’L CONF. ST. LEGISLATURES (Aug. 30, 2017), [www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx](http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx) (last visited Mar 5, 2018) [hereinafter NCSL, *Marijuana Overview*] (noting that “[e]ight States and the District of Columbia now have legalized small amounts of marijuana for adult recreational use” and, in every case, through an act of direct democracy by the populace) (on file with the Washington and Lee Law Review).

3. Thirteen states, beyond those that have legalized, have decriminalized the possession and use of small amounts of marijuana. *Id.* In addition, another eight states allow for the medical use of marijuana. *State Medical Marijuana Laws*, NAT’L CONF. ST. LEGISLATURES (Sept. 14, 2017), [www.ncsl.org/research/health/state-medical-marijuana-laws.aspx](http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx) (last visited Mar. 5, 2018) [hereinafter NCSL, *State Medical Marijuana Laws*] (on file with the Washington and Lee Law Review).

4. See *infra* notes 144–148 and accompanying text (indicating a trend against legalization of recreational marijuana in some states).

5. See Richard J. Bonnie, *The Surprising Collapse of Marijuana*

democracy in the federal arena confirms that the federal crimes could survive for several years.<sup>6</sup> This specter raises the question whether reformers could at some point successfully urge the judiciary to legalize certain marijuana-related activities under the federal Constitution.

Under any of the constitutional clauses that come to mind, the arguments for even tightly circumscribed legalization for recreational use are not compelling, even when a majority of states plus the District of Columbia have legalized recreational marijuana. The Cruel and Unusual Punishments Clause in the Eighth Amendment<sup>7</sup> probably would not work. With the federal government and many states still criminalizing the conduct, the Court would not likely find a sufficiently strong societal consensus against the minor marijuana crimes to hold that they violate the Eighth Amendment.<sup>8</sup> The Fourth Amendment would not work, although marijuana crimes have significantly reduced persons' freedom from police intrusions.<sup>9</sup> The essence of the Fourth Amendment is that searches and seizures must be reasonable,<sup>10</sup> and the existence of the marijuana crimes themselves has been

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*Prohibition: What Now?*, 50 U.C. DAVIS L. REV. 573, 592 (2016) (noting the “befuddling abdication of responsibility by Congress” in addressing the need for change to the federal marijuana laws).

6. See *infra* note 149 and accompanying text (explaining that Congress, unlike the states, has no referendum option to spur legislative change).

7. See U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

8. In the modern era, the Supreme Court has not invalidated the death penalty under the Eighth Amendment in circumstances when that punishment is allowed by federal civilian law, but has invalidated that punishment in several circumstances in which federal law and a majority of states disallow it. See Scott W. Howe, *The Federal Death Penalty and the Constitutionality of Capital Punishment*, 50 CRIM. L. BULL. 1388, 1390–91 (2014) (discussing three recent categories of offenders for which the Court rejected the death penalty—mentally disabled offenders, youthful offenders, and child rapists).

9. See, e.g., HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 282–84 (1968) (discussing how drug crimes, among other vice crimes, cause the police to become “snoopers” and “harassers,” especially among the urban poor).

10. See U.S. CONST. amend. IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

understood generally to authorize reasonable police invasions focused on cannabis.<sup>11</sup> The Due Process Clauses<sup>12</sup> probably would not work, because recreational marijuana use does not easily qualify as a “fundamental right.”<sup>13</sup> Likewise, the Equal Protection Clause<sup>14</sup> would not seem to work, because there is no suspect classification or improper discriminatory purpose involved and marijuana-related activities arguably will cause at least some risk of minor harm to the actor and to others,<sup>15</sup> which the criminalizing states—to demonstrate a “rational basis” for their statutes<sup>16</sup>—can argue they seek to prevent.

For civil-libertarians and those who hope to obtain and use cannabis legally in places where it will remain illegal, the troubling aspect of this clause-by-clause approach is that it fails to capture the force of the overall case for legalization. Gallup polls

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11. See, e.g., Susan F. Mandiberg, *Marijuana Prohibition and the Shrinking of the Fourth Amendment*, 43 MCGEORGE L. REV. 23, 39 (2012) (concluding that “at the Supreme Court level, marijuana has played a central role in cases where probable cause or reasonable suspicion was based at least in part on an officer’s ‘plain smell,’” and citing thirteen cases).

12. There are Due Process Clauses in both the Fifth Amendment, which applies against the federal government, and the Fourteenth Amendment, which applies against the states. The Fifth Amendment provides, in pertinent part, that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V. The Fourteenth Amendment provides, in pertinent part, that “[n]o State . . . shall deprive any person of life, liberty, or property, without due process of law.” U.S. CONST. amend. XIV.

13. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155 (1973) (recognizing the right to an abortion as a “fundamental right” protected by the Due Process Clause).

14. The Equal Protection Clause appears in the Fourteenth Amendment, which applies against the states. The relevant language provides that “[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV. The Supreme Court has declared that equal protection principles apply against the federal government through the Due Process Clause of the Fifth Amendment. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954) (finding that the Equal Protection Clause is enforceable against the District of Columbia because “discrimination may be so unjustifiable as to be violative of due process”).

15. See JONATHAN P. CAULKINS ET AL., *MARIJUANA LEGALIZATION: WHAT EVERYONE NEEDS TO KNOW* 34 (2012) [hereinafter CAULKINS ET AL., *MARIJUANA LEGALIZATION*] (discussing the risks of using marijuana and concluding that, while there are some, “[e]stimating the extent of marijuana-related damage to users, their families, their neighbors, and the wider public” is complex).

16. See *Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O’Connor, J., concurring) (describing the “rational basis” standard of review under the Equal Protection Clause).

already reveal super-majority support at the national level for legalization for recreational purposes.<sup>17</sup> Although repeal of minor marijuana crimes by a majority of states might not suffice under the Eighth Amendment without legalization at the federal level, the claim would still reveal a high level of societal consensus favoring legalization. Also, the criminalization of cannabis has played an outsize role in the modern obligation of the police to snoop, meddle, and harass,<sup>18</sup> in part because the Fourth Amendment cases do not define “reasonableness” differently when the search is for a mere “roach”<sup>19</sup> of marijuana rather than, for example, the bloody knife used in a murder.<sup>20</sup> Also, while engaging in marijuana-related activities may not appear, based on history, to qualify as a “fundamental” right for due process purposes, use of the drug is increasingly understood to bring substantial

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17. See Justin McCarthy, *Record-High Support for Legalizing Marijuana Use in U.S.*, GALLUP NEWS (Oct. 25, 2017), <http://news.gallup.com/poll/221018/record-high-support-legalizing-marijuana.aspx> (last visited Dec. 26, 2017) (noting that “64% [of Americans] now say[] its use should be made legal”) (on file with the Washington and Lee Law Review).

18. See PACKER, *supra* note 9, at 282–84 (observing that police are seen as harassing the urban poor more often than others for vice crimes, including drug offenses); see also CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 95–96 (discussing the reasons that criminalization of marijuana calls on police to be more intrusive in their search and seizure practices); Kevin B. Zeese, *Drug War Forever?*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 251, 254, 260–61 (Melvyn B. Krauss & Edward P. Lazear eds., 1991) (noting how governmental programs to discover marijuana cultivation after the war on drugs commenced in the 1970s led to increased intrusions on privacy); JOHN KAPLAN, MARIJUANA—THE NEW PROHIBITION 43–44 (1970) (noting that “the frequency of the hotly denied ‘furtive gesture’ or consent to search is reason for prosecutors as well as other observers to suspect that police perjury as to search-and-seizure issues in marijuana cases is not unknown”); Geoffrey Richard Wagner Smith, Note, *Possession of Marijuana in San Mateo County: Some Social Costs of Criminalization*, 22 STAN. L. REV. 101, 117 (1969) (“Since a search may be made incident to a lawful misdemeanor arrest, officers who desire to search for drugs may be tempted to make arrests for offenses they would ignore under other circumstances.”).

19. A “roach” is the mostly smoked butt of a marijuana cigarette. For discussion of cases that apply marijuana prohibitions to tiny amounts of the substance, see MIKOS, *supra* note 1, at 47, 76.

20. See Mandiberg, *supra* note 11, at 24 (concluding that “the Court could have developed virtually all of the same rules and standards” that it has developed [under the Fourth Amendment] through cases involving other types of evidence” than marijuana).



pleasure or benefit to a huge portion of the population.<sup>21</sup> In addition, while marijuana use is not risk-free, evidence does not suggest that it is more dangerous to the user or others than the consumption of alcohol and tobacco, which is not criminalized.<sup>22</sup> Indeed, the greatest dangers associated with cannabis for both the user and society seem to flow mostly from its criminalization.<sup>23</sup> And, the force of those arguments together, reformists would say, paints criminalization as such an unpopular effort, involving such

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21. See, e.g., Lester Grinspoon, *Marijuana in a Time of Psychopharmacological McCarthyism*, in SEARCHING FOR ALTERNATIVES: DRUG-CONTROL POLICY IN THE UNITED STATES 387 (Melvyn B. Krauss & Edward P. Lazear eds., 1991) (noting that “tens of millions of [our] citizens use cannabis,” because they “not only like to use the substance, but in many cases believe that it has enhanced their lives”).

22. See, e.g., Philip M. Boffey, *What Science Says About Marijuana*, N.Y. TIMES (July 30, 2014), <https://www.nytimes.com/2014/07/31/opinion/what-science-says-about-marijuana.html> (last visited Mar. 5, 2018) (summarizing various studies revealing that marijuana is “less dangerous than the highly addictive but perfectly legal substances known as alcohol and tobacco”) (on file with the Washington and Lee Law Review); Wayne Hall, Robin Room & Susan Bondy, *World Health Organization Project on the Health Implications of Cannabis Use: Comparative Appraisal of the Health and Psychological Consequences of Alcohol, Cannabis, Nicotine and Opiate Use* (Aug. 28, 1995), [www.druglibrary.org/schaffer/hemp/general/who-index.htm](http://www.druglibrary.org/schaffer/hemp/general/who-index.htm) (last visited Mar. 5, 2018) (discussing the lesser harmfulness of marijuana than tobacco or alcohol to both the user and others) (on file with the Washington and Lee Law Review).

Marijuana use, depending on frequency, will pose some risks to the user’s physical and mental health. See CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 54–80 (discussing the risks and medical effects of marijuana use). However, many experts believe that marijuana involves “less addictive risk than tobacco, alcohol, cocaine, stimulants or heroin, not only in terms of likelihood of dependence but also the degree of dependence.” *Id.* at 40. Also, the risk of fatal overdose for marijuana is minimal compared to the risk of fatal overdose for alcohol. See *id.* at 62–63 (noting research findings that, while the ratios of “average fatal dose to average recreational dose . . . for heroin, alcohol, methamphetamine and cocaine range from about six to fifteen,” there is “no known fatal dose of marijuana”). For a recent study that uses a “margin of exposure” approach (the ratio between toxicological threshold and estimated human intake) and concludes that alcohol and tobacco are more dangerous than cannabis, see Dirk W. Lachenmeier & Jurgen Rehm, *Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach*, in 5 SCI. REP. 1, 4–6 (2015).

23. See, e.g., CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 109 (noting that “an arrest, even if it never leads to a conviction, sometimes means spending a night or more in jail awaiting arraignment, and a night in jail is much more dangerous than an evening stoned”); see *id.* at 98 (discussing the high societal costs of incarceration and enforcement related to marijuana crimes).

substantial invasions of privacy, to prosecute such mildly-dangerous behavior, at such a high cost to the offender and society as to be irrational.

A conclusion of irrationality under this expanded inquiry, however, will not solve the problem of how to legalize cannabis under the Constitution. Apart from other difficulties posed by the individual-clause claims, for a court to pronounce marijuana legalized under one or more clauses separately could set down a problematic precedent or be misunderstood as having done so. If laws criminalizing marijuana possession and use were deemed to violate the Cruel and Unusual Punishments Clause without legalization at the federal level by Congress, the death penalty laws could soon seem cruel and unusual, too, despite the continued existence of a federal death penalty.<sup>24</sup> If those marijuana laws were deemed to infringe the Fourth Amendment, other drug crimes might also seem invalid, because they also spur many police intrusions on privacy and liberty.<sup>25</sup> If those laws were thought to violate substantive due process, opioid crimes might also seem invalid, because opioid use also brings pleasure and relief to many persons.<sup>26</sup> If those laws were thought to violate equal protection, crimes like polygamy, prostitution and bestiality would all seem vulnerable as well, given their lack of serious harm to participants or others. And if the Court tried to describe the cannabis cases as *sui generis* under any of those clauses, the decisions would justifiably be seen as unfaithful to the notion of principled decision-making.

How, then, could a court possibly understand the federal Constitution to legalize recreational marijuana activities in the face of continued federal criminalization, and without setting a

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24. For discussion of the federal death penalty laws and their importance to the continued view that the death penalty is not cruel and unusual, see Howe, *supra* note 8, at 1388–91.

25. See, e.g., Smith, *supra* note 18, at 106 (noting in one study that, in addition to marijuana, police searches frequently turned up amphetamines).

26. Evidence of this tendency appears in the large number of users despite not only criminalization but the high risk of fatal overdose. Largely due to opioid use, drug overdose deaths in the U.S. likely exceeded 59,000 in 2016. Josh Katz, *Drug Deaths in America Are Rising Faster Than Ever*, N.Y. TIMES (June 5, 2017), <https://www.nytimes.com/interactive/2017/06/05/upshot/opioid-epidemic-drug-overdose-deaths-are-rising-faster-than-ever.html> (last visited Mar. 5, 2018) (on file with the Washington and Lee Law Review).

broad precedent? The best approach would seem to involve a strategy of clause “aggregation.”<sup>27</sup> Using this technique, several clauses together could justify limited legalization even if none could justify that outcome on their own.<sup>28</sup> Because it would be multi-sourced among clauses, this approach could also help cabin the precedential sweep of the conclusion.<sup>29</sup>

A preliminary question, however, is whether this interpretive approach is valid. The answer is not entirely clear. While the Supreme Court generally has declined to employ clause aggregation to identify new rights,<sup>30</sup> occasionally it has seemingly endorsed the approach by using two or more constitutional provisions together to support the existence of a right<sup>31</sup> or by claiming that in past decisions this is what was really going on. For example, in *Griswold v. Connecticut*,<sup>32</sup> the Court famously (or infamously<sup>33</sup>) pointed to “penumbras, formed by emanations” from multiple clauses to justify a right of married couples to use contraception.<sup>34</sup> But, even earlier, in *West Virginia Board of*

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27. See Ariel Porat & Eric Posner, *Aggregation and Law*, 122 YALE L.J. 2, 48–49 (2012) (describing the idea of “hybrid rights” in constitutional law as an instance of “cross-claim normative aggregation”).

28. For “a systemic examination of combination analysis in U.S. constitutional law,” or what I am calling a “clause aggregation approach,” see Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1068 (2016).

29. See *id.* at 1104 (noting that “combination-based holdings will sometimes qualify as narrower than their clause-specific counterparts, furnishing courts with an effective means of limiting the precedential sweep of holdings they pronounce”).

30. See *id.* at 1069–70 (“When litigants assert claims arising under multiple areas of constitutional doctrine, the strengths or weaknesses of one clause-specific claim typically have no official bearing on the strengths or weaknesses of another.”).

31. See *infra* notes 32–35 and accompanying text (discussing Supreme Court decisions that utilized aggregating clauses).

32. 381 U.S. 479 (1965).

33. The approach has been harshly criticized. See, e.g., Robert G. Dixon, Jr., *The “New” Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84 (noting the *Griswold* Court’s “judicial power to declare new freedoms whether or not illumined by the constitutional document, its setting, or its easily inferred purposes”); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 9–10 (1971) (“*Griswold*, then, is an unprincipled decision, both in the way in which it derives a new constitutional right and in the way it defines that right, or rather fails to define it.”).

34. See *Griswold*, 381 U.S. at 484–86 (finding that married couples’ right to

*Education v. Barnette*,<sup>35</sup> the Court arguably did something similar. Without clearly relying on any particular clause in the First Amendment but possibly on principles underlying several of them,<sup>36</sup> the Court held that schoolchildren may not be required to salute the flag and recite the pledge of allegiance.<sup>37</sup> Also, after *Griswold*, in *Stanley v. Georgia*,<sup>38</sup> the Court seemed to use multiple clauses in the First Amendment, and perhaps others as well, to recognize a right to possess and view obscene pornography in the privacy of one's home.<sup>39</sup> A much more recent example is *Obergefell v. Hodges*,<sup>40</sup> in which the Court identified a "synergy"<sup>41</sup> between the Due Process and Equal Protection Clauses that it indicated had helped justify its previous recognition of several rights and, in the case at hand, its acknowledgment of a right to same-sex marriage.<sup>42</sup>

But, questions remain: Is this clause-aggregation approach simply a rhetorical strategy employed by the Court to help rationalize decisions post hoc that it would have reached under a single clause anyway? If not, has the use of the technique been applied with sufficient repetition and principle to reveal that it has prescriptive force? And, if so, might a court properly conclude that it could successfully work in the marijuana context?

This Article aims to answer those questions. Initially, I assume that there is a case to be made against rights-based clause aggregation on both descriptive and normative levels. I hypothesize that aggregation of two or more rights-based clauses has never been important in justifying any right under the federal

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use contraceptives is imbedded in the right to privacy, which is "created by several fundamental constitutional guarantees").

35. 319 U.S. 624 (1943).

36. See Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 26 (2015) (describing *Barnette* as relying "on no single clause of the Bill of Rights but on the broader postulates of our constitutional order").

37. *Barnette*, 319 U.S. at 642.

38. 394 U.S. 557 (1969).

39. See *id.* at 564–68 (holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime").

40. 135 S. Ct. 2584 (2015).

41. *Id.* at 2603.

42. See *id.* at 2602–03 (finding that "[t]he right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws").

Constitution, even if the Supreme Court may have cited two or more clauses when first recognizing the protection. I also hypothesize that rights-based clause aggregation (if it really matters) is such a rare and unprincipled approach for rationalizing new constitutional rights that it lacks normative power. However, on both points I concede a failure of proof. While clause aggregation is certainly under-theorized in the Court's opinions as a constitutional force, one cannot disprove that it sometimes has carried logical influence in the phenomenology of judicial decision-making.

Having failed to disprove the descriptive and normative cases for constitutional clause aggregation, the Article addresses whether the approach could work to support recreational marijuana rights after a super-majority of states have legalized that activity. The argument would be that clause aggregation makes sense in the unusual case, as here, where litigants might show that there are separate but aggregating harms associated with each of the clauses.<sup>43</sup> The harm from criminalization of cannabis is not only the stigma and loss of freedom involved with conviction and punishment (the cruel and unusual punishment concern)<sup>44</sup> but the substantial invasions of privacy that arise through the especially intrusive kind of policing required to ferret out cannabis violations (the Fourth Amendment concern)<sup>45</sup> and the loss of enjoyment and benefit from use by those who are deterred by prohibition (the substantive due process concern).<sup>46</sup> Those harms are enhanced by the discriminatory actions of government—by the non-prohibition of tobacco and alcohol, which are at least as dangerous as cannabis (the equal protection

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43. See, e.g., Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights* 20 (Univ. of Va. Sch. of Law Pub. Law and Legal Theory Research Paper No. 42, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2642640](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642640) (discussing the idea of “intersectionality” between clauses).

44. See *infra* Part III.A (evaluating the efficacy of the argument that the criminal punishment of marijuana use violates the cruel and unusual punishments clause).

45. See *infra* Part III.B (describing the potential Fourth Amendment claim to a constitutional basis for recreational marijuana because of frequent police interaction with marijuana users).

46. See Grinspoon, *supra* note 21, at 387 (noting the life-enhancing effects of recreational marijuana use).

concern).<sup>47</sup> The multiple nature of these harms can be acknowledged and weighed against a government interest in criminalizing cannabis only by a clause-aggregation approach. And, at least with respect to certain marijuana-related activities, although only some, this more expansive scrutiny allows the conclusion that government interests are inadequate to justify continued criminalization.

My project proceeds in four parts, with the first two providing background, and the third and fourth doing the central work. Part II summarizes the development and current state of the criminal laws regarding marijuana and the reasons to expect that, in the next decade or two, a majority of states, but not the federal Congress, will legalize it within limits for recreational purposes.<sup>48</sup> Part III assumes that this scenario will materialize and demonstrates why, when applied separately, neither the Cruel and Unusual Punishments Clause, the Fourth Amendment, the Due Process Clause nor the Equal Protection Clause would establish a right to engage in recreational marijuana activities, even in tightly limited circumstances.<sup>49</sup>

Part IV explores the validity of aggregating rights-based clauses to recognize a new constitutional right.<sup>50</sup> I discuss a variety of Supreme Court cases that arguably serve as precedent for such an approach, including the Court's recent decision in *Obergefell*, which has heightened interest in the subject.<sup>51</sup> And, despite

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47. See Boffey, *supra* note 22 (comparing the dangerousness of alcohol and tobacco versus marijuana and concluding that marijuana is no more dangerous than alcohol and tobacco).

48. *Infra* Part II.

49. *Infra* Part III.

50. *Infra* Part IV.

51. Prominent, recent commentary discussing the clause-aggregation aspect of *Obergefell* reflects this heightened enthusiasm. See, e.g., Coenen, *supra* note 28, at 1079 (“Justice Kennedy’s majority opinion cited to the Due Process and Equal Protection Clauses of the Fourteenth Amendment as mutually supportive of the case’s result.”); Abrams & Garrett, *supra* note 43, at 23–26 (analyzing Justice Kennedy’s summary of other cases that evoke both the Due Process and Equal Protection Clauses to rationalize his *Obergefell* opinion); Kenji Yoshino, Comment, *A New Birth of Freedom?: Obergefell v. Hodges*, 129 HARV. L. REV. 147, 171–79 (2015) (comparing *Lawrence v. Texas* and *Obergefell* and finding that, although there are differences in their analyses, the two cases implicate both liberty and equality); see also Tribe, *supra* note 36 and accompanying text (arguing “that *Obergefell*’s chief jurisprudential achievement is to have tightly wound the double helix of Due Process and Equal Protection into a doctrine of

skepticism, I demonstrate that one cannot disprove that clause aggregation sometimes carries influence in judicial decision-making. I also conclude that the approach arguably has been employed enough by the Court to suggest some patterns as to how its application could work in the future.

Part V then explores whether a clause-aggregation approach could help justify the judiciary in finding a constitutional right to engage in certain marijuana-related activities.<sup>52</sup> After a super-majority of states have legalized, I explain how clause aggregation might assist a court, without setting an expansive precedent, to conclude that the Constitution, by requiring a broader form of assessment than rational-basis inquiry, protects the freedom of persons to engage in certain core marijuana-related activities that those states have agreed should be legal. I also respond to several likely objections. As part of this discussion, I make the case that, despite recognition of such constitutional rights, the regulation or criminalization of recreational marijuana activities should continue to be widely, though not always, permitted. But, I also explain that many of the contours in the Supreme Court's application of rights-based clause aggregation remain undeveloped, complicating the effort to predict whether and how the Justices would apply it in the future to recreational marijuana activities.

## *II. The Past, Present, and Future of Marijuana Crimes*

The history of marijuana criminalization in the United States spans over a hundred years and reflects a complex story of racism, fear-mongering, widespread ignorance, politics, international relations and, ultimately, popular revolt.<sup>53</sup> Large parts of the story

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*equal dignity*").

52. *Infra* Part V. Part V contends that a clause-aggregation approach is the best methodology to support a limited, constitutional right to use and possess marijuana. I do not aim to resolve precisely what protections such a right would entail beyond that it would protect against a criminal conviction and sanction. The right could also protect against other burdens on use and possession, particularly civil bans and sanctions. At the same time, I do not propose that it would necessarily protect against all such burdens, for example, taxes or even criminal prohibitions on marijuana purchases and sales.

53. An excellent source on the United States history of marijuana

have already been well-told in great detail and need not be repeated with as much detail here. For present purposes, an outline of the history of criminalization is relevant, along with the story of modern-day deterioration in marijuana criminalization and the path that the likely collapse will follow in the next few years.

### A. *The Past*

Marijuana was not always criminalized or even regulated in the United States.<sup>54</sup> The hemp plant, also known as marijuana or cannabis, was legally grown as a source of fiber in the United States beginning in the early seventeenth century<sup>55</sup> but was largely displaced for that purpose in the late 1800s in favor of cotton or imported jute.<sup>56</sup> By the mid-1800s, the plant remained legal in the U.S. and was used for medicinal purposes on a small scale.<sup>57</sup> “[T]here is evidence that George Washington cultivated it at Mount Vernon for that purpose.”<sup>58</sup> Until 1937, “it was [also] a prescription drug, listed in the official *Pharmacopoeia of the United States of America as Extractum Cannabis*, and was available from both large drug companies and vendors of patent medicines.”<sup>59</sup> It was also used recreationally in the form of hashish by the well-off in some American cities.<sup>60</sup> However, the practice of

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prohibition through the early 1970s is RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, *THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES* (1974). For a good, short summary of the United States history of marijuana prohibition from the early 1970s through 2016, see Bonnie, *supra* note 5, at 576–90.

54. See Smith, *supra* note 18, at 101 (noting that marijuana was not a crime in most states until 1937).

55. See *id.* (“The settlers of Jamestown planted the first crop in 1611 at the behest of King James I, who wanted hemp to be made into rope for the British navy.”).

56. See BONNIE & WHITEBREAD, *supra* note 53, at 1–3 (noting that hemp cultivation fell into disuse because of the importation of Indian jute and the difficulty of cultivating the plant as compared to cotton).

57. See *id.* at 4 (reporting that the health benefits of cannabis were recited in medical journals and sold at a pharmacy in Poughkeepsie, New York).

58. Smith, *supra* note 18, at 101.

59. *Id.* (citing COMM. OF REVISION, U.S. PHARMACOPOEIAL CONVENTION, *THE PHARMACOPOEIA OF THE UNITED STATES OF AMERICA* 155 (11th ed. 1936)).

60. See LARRY SLOMAN, *REEFER MADNESS* 22–28 (1979) (recounting the



smoking marijuana entered the country through immigrants from Mexico and the West Indies around 1900.<sup>61</sup>

In the subsequent quarter-century, “criminal prohibitions appeared on the statute books of nearly every state where the drug was used,”<sup>62</sup> mostly in the South, the Southwest, and the West.<sup>63</sup> By the mid-1930s, twenty-two states had criminalized its sale or possession.<sup>64</sup> These laws stemmed largely from racism and concern that use would spread.<sup>65</sup> Criminalizing states still appreciated the therapeutic benefits of marijuana, as the criminalization statutes during that period did not proscribe its medical use.<sup>66</sup> Nonetheless, stories circulated “of violent rampages by Spanish-speaking aliens crazed by marijuana,” and there apparently was a “substitution in the public mind of the effects” of other drugs that many people knew about, “like morphine and cocaine, for the effects of marijuana, since the actual properties of marijuana were generally unknown.”<sup>67</sup>

Well into the 1930s, the federal government did not regulate marijuana,<sup>68</sup> although it prohibited narcotics, such as opiates and

experiences of two early American upper-class explorers of recreational marijuana use in New York City).

61. See BONNIE & WHITEBREAD, *supra* note 53, at 32 (discussing the introduction of marijuana smoking in the United States “in the early years of the twentieth century . . . by Mexicans and West Indians”).

62. *Id.*

63. See *id.* at 37–38 (discussing the evolution of state laws in New Mexico, California, Louisiana, and Utah, among others).

64. Richard J. Bonnie & Charles H. Whitebread II, *Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 1010 (1970).

65. See Mandiberg, *supra* note 11, at 24–25 (examining the association between “Mexican immigrants and other ‘marginal’ populations” use of marijuana and its criminalization); Sean Hogan, *Race, Ethnicity, and Early U.S. Drug Policy*, in 1 THE PRAEGER INTERNATIONAL COLLECTION ON ADDICTION: FACES OF ADDICTION, THEN AND NOW 37, 46–49 (Angela Browne-Miller ed., 2009) (noting the link between Mexican immigrants’ introduction of marijuana to the U.S. and a concern that their use would spread from rural, farm areas to big cities).

66. See Bonnie & Whitebread, *supra* note 64, at 1026 (“[N]ational policy was steadfastly opposed to manufacture, sale and consumption of narcotics and alcohol except for medical purposes.”).

67. JAMES P. GRAY, WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT 23–24 (2001).

68. See BONNIE & WHITEBREAD, *supra* note 53, at 32 (“[T]he story of marihuana policy in the United States begins as a series of distinctly local tales.”).

cocaine, along with alcohol.<sup>69</sup> However, Harry J. Anslinger, Commissioner of the federal Bureau of Narcotics, “took an active role” during that era in spreading “fear and misinformation” about marijuana in the effort to secure criminalization by more states and by the federal government.<sup>70</sup> The Bureau collaborated, for example, in the production of the 1936 movie, *Reefer Madness*, which conveyed the view that “one puff of pot can lead clean-cut teenagers down the road to insanity, criminality, and death.”<sup>71</sup> The effort to convince Congress succeeded with the passage of the Marijuana Tax Act of 1937.<sup>72</sup>

The 1937 statute<sup>73</sup> only criminalized the “non-medical and unlicensed possession or sale of marijuana,”<sup>74</sup> but “the net effect was that simple possession now became a federal crime.”<sup>75</sup> In theory, the statute acknowledged the valid medical uses of marijuana, because it “provided for medical doctors and others to prescribe it, druggists to dispense it, and others to grow, import, and manufacture it, as long as each of those parties paid a small licensing fee.”<sup>76</sup> But there was “a cumbersome bureaucratic process” and an “exorbitant tax” that made even medical use prohibitive.<sup>77</sup> At the same time, “all nonmedical transfers, whatever the amount, circumstance or geographical nature,”

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69. Those substances had begun to be criminalized at the state level in the second half of the 19th century and at the federal level in the early 1900s. *See id.* at 13–31 (providing a history and chronology of marijuana criminalization). The manufacture, sale and transportation of alcohol (but not possession) was prohibited by the Eighteenth Amendment beginning in January, 1920, *see id.* at 25, until its repeal by the Twenty-first Amendment in December, 1933. *See* TERRY L. JORDAN, *THE U.S. CONSTITUTION AND FASCINATING FACTS ABOUT IT* 53 (7th ed. 2007) (setting forth the language of the 21st Amendment and noting that it was ratified on December 5, 1933).

70. GRAY, *supra* note 67, at 24.

71. *Id.*

72. Ch. 553, 50 Stat. 551 (1937) (repealed 1970).

73. Shortly before repeal and replacement of the Act by Congress in 1970, the Supreme Court declared it unconstitutional in substantial part because it compelled persons to expose themselves to a “real and appreciable risk” of self-incrimination. *Leary v. United States*, 395 U.S. 6, 16 (1969).

74. GRAY, *supra* note 67, at 25.

75. BONNIE & WHITEBREAD, *supra* note 53, at 175.

76. GRAY, *supra* note 67, at 25.

77. *Id.*

became federal crimes.<sup>78</sup> The effect was to blanket “existing state and local offenses with a coextensive range of federal offenses, all of these governing the same conduct.”<sup>79</sup>

Over the next three decades, U.S. politicians generally pursued a “get tough” approach to illicit drugs that lumped marijuana together with substances like heroin and cocaine.<sup>80</sup> An exception was made during World War II, when, faced with short supplies of fiber sources for producing materials essential to the war effort, the federal government encouraged the production of hemp by U.S. farmers.<sup>81</sup> After the war, however, hemp again became a prohibited substance without legitimate use, and Congress repeatedly passed more stringent sentencing laws against drug distribution and possession, including cannabis.<sup>82</sup> The Boggs Act of 1951<sup>83</sup> and the Narcotics Control Act of 1956<sup>84</sup> exemplified the trend.<sup>85</sup> In 1961, the U.S. government also played a central role<sup>86</sup> in securing the adoption by many nations of a new international treaty—the Single Convention on Narcotic Drugs—to prohibit the production and supply of a variety of substances, including cannabis.<sup>87</sup> In part to comply with that treaty,<sup>88</sup>

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78. BONNIE & WHITEBREAD, *supra* note 53, at 175.

79. *Id.*

80. See GRAY, *supra* note 67, at 27 (discussing drug scheduling of marijuana).

81. See *id.* at 26 (addressing exceptions made for marijuana used for hemp fibers).

82. See BONNIE & WHITEBREAD, *supra* note 53, at 204–21 (detailing the increased use of narcotics and, as a result, the escalation of penalties for marihuana throughout the 1950s).

83. Ch. 666, 65 Stat. 767 (1951) (repealed 1970).

84. Ch. 629, 70 Stat. 570 (1957) (repealed 1970).

85. See BONNIE & WHITEBREAD, *supra* note 53, at 206–21 (discussing how the Boggs Act “marked a significant shift in the rationale for marihuana’s illegal status”).

86. See WELLS C. BENNETT & JOHN WALSH, MARIJUANA LEGALIZATION IS AN OPPORTUNITY TO MODERNIZE INTERNATIONAL DRUG TREATIES 18 (2014), <https://www.brookings.edu/wp-content/uploads/2016/06/CEPMMJLegalizationv4.pdf> (describing the United States as “a—if not *the*—key protagonist”).

87. See GRAY, *supra* note 67, at 27 (noting that “the U.S. government somehow convinced many other countries to ratify” the treaty); BENNETT & WALSH, *supra* note 86, at 2 (discussing the implementation of the Single Convention on Narcotic Drugs by the 1970 Controlled Substances Act).

88. See BENNETT & WALSH, *supra* note 86, at 6 n.10 (“[C]ertain treaties require legislation before they can be enforced domestically. The United States passed, and subsequently enforced, just such legislation in the form of the CSA.”).

Congress also passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.<sup>89</sup> “[C]ommonly known as the Controlled Substances Act,”<sup>90</sup> Title II, which is still in effect, “explicitly prohibits the cultivation, distribution and possession of marijuana throughout the United States.”<sup>91</sup> There is no exception for medical use.<sup>92</sup> In the statute, marijuana is a schedule I drug, along with substances such as heroin and cocaine, reflecting a conclusion that it has “no currently accepted medical use.”<sup>93</sup>

Despite the passage of the 1970 federal statute, marijuana criminalization began unraveling during the following decade.<sup>94</sup> The original consensus favoring criminalization had rested on three conditions: (1) the widespread belief that use of marijuana led to abuse and ultimately to “mental deterioration, psychosis and violent crime;”<sup>95</sup> (2) the view that it was used “primarily by insulated ethnic minorities, Mexicans and blacks;”<sup>96</sup> and (3) a widespread ideological preference in the country for cultural homogeneity, fostered by “[t]wo world wars, the depression,

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Bennett & Walsh note that the Controlled Substances Act is important in fulfilling the United States’ obligations regarding marijuana under several treaties:

[The CSA] law also implements three drug control treaties to which the United States is a party: the 1961 Single Convention on Narcotic Drugs as Amended by the 1972 Protocol, the 1971 Convention on Psychotropic Substances, and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The first limits the use of marijuana “exclusively to medical and scientific purposes,” among other things; the third requires states to criminalize nearly all forms of marijuana activity, again apart from the medical and scientific.

*Id.* at 2. However, as this discussion reveals, there is no obligation under the treaties that marijuana be classified as a Schedule I drug, with no current medical use.

89. Pub. L. No. 91-513, 84 Stat. 1236 (codified in scattered sections of 21 U.S.C. and 42 U.S.C.).

90. Mandiberg, *supra* note 11, at 30.

91. BENNETT & WALSH, *supra* note 86, at 2.

92. See 21 U.S.C. § 812(b)(1)(B) (2012) (“The drug or other substance has no currently accepted medical use in treatment in the United States.”).

93. *Id.*

94. See Bonnie, *supra* note 5, at 578 (“The gradual unraveling of marijuana prohibition began in the late 60s, but the signal event was the Commission report in 1972 . . .”).

95. BONNIE & WHITEBREAD, *supra* note 53, at 222.

96. *Id.*

several recessions, the Korean conflict and a cold war,” that resulted in “little tolerance for personal deviance” and legislative tendencies to try to “compel sexual, sensual, and even intellectual orthodoxy.”<sup>97</sup> All three of those conditions “wobbled and fell away” during the 1960s, as marijuana became widely popular among an expanded group of users, especially university populations.<sup>98</sup> As a consequence, pressure for legislative change surfaced and ultimately resulted in the creation of a bipartisan National Commission on Marijuana and Drug Abuse in early 1971<sup>99</sup> that produced a somewhat surprising report the following year favoring “decriminalization” of possession of “up to an ounce” and “other consumption-related” activities.<sup>100</sup> While Congress did not follow the recommendation, “[b]etween 1973 and 1977, eleven states decriminalized marijuana in response to the Commission report.”<sup>101</sup>

Although the collapse of marijuana prohibition appeared inevitable at that point, “progress came to a sudden halt at the end of the [19]70s.”<sup>102</sup> There was widespread concern that adolescent use had increased, and Nancy Reagan, as First Lady, soon promoted a “just say no” campaign against drug use.<sup>103</sup> Due largely to the crack cocaine epidemic of the 1980s that also brought on increased violent crime, a new “drug war” was also “initiated during the Reagan period and intensified during the George H.W. Bush presidency.”<sup>104</sup> The result was a series of harsh drug statutes passed by Congress during the late 1980s and early 1990s.<sup>105</sup> For

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97. *Id.* at 223.

98. *Id.*

99. *See id.* at 255 (“[T]he House version of the Comprehensive Drug Abuse Prevention and Control Act provided for a bipartisan National Commission on Marihuana and Drug Abuse to be composed of thirteen members, nine to be appointed by the president and four by the Congress.”).

100. Bonnie, *supra* note 5, at 578.

101. *Id.*

102. *Id.* at 584.

103. *See id.* at 585 (“[T]he parents’ insistence on criminalization prevailed and marijuana law reform came to a halt. This perspective was later embraced by Nancy Reagan under the rubric of ‘just say no,’ . . .”).

104. *Id.* at 585.

105. *See* GRAY, *supra* note 67, at 27–28 (“U.S. presidents and Congress have continually reaped political benefits by passing a flood of ‘get tough’ laws, which lump all illegal substances together regardless of their properties or effects on the

example, “[t]he 1998 Higher Education Act disqualified young people from receiving federal aid for college if they had ever been convicted of marijuana possession, even though no such disqualification applie[d] to convictions of offenses like robbery, rape, or manslaughter.”<sup>106</sup> One leading scholar concluded that drug policy at that time “entered a very dark and regressive period, for which we continue to pay a very heavy price.”<sup>107</sup>

### B. The Present

The modern deterioration of the marijuana prohibition began with states’ legalization of marijuana for medical use.<sup>108</sup> The first such law was California’s Compassionate Use Act in 1996, the product of a voter initiative.<sup>109</sup> The act reflected widespread awareness among California voters that marijuana has several important therapeutic uses, a view now confirmed by scientific evidence.<sup>110</sup> Since passage of the California initiative, twenty-eight

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user.”).

106. *Id.*

107. Bonnie, *supra* note 5, at 586.

108. *See id.* at 588 (“[T]he states’ legalization of access to marijuana for medical use, starting with California’s Compassionate Use Act in 1996, has played a critically important role in the impending collapse of the prohibition against recreational use.”).

109. 1996 Cal. Legis. Serv. Prop. 215 (West 1996) (codified as amended at CAL. HEALTH & SAFETY CODE § 11362.5 (2009)).

110. In January 2017, the National Academies of Sciences, Engineering, and Medicine issued a report on the health effects of recreational and therapeutic cannabis use, based on a review of scientific research published since 1999. *See* NAT’L ACADS. OF SCIS., ENG’G, AND MED., THE HEALTH EFFECTS OF CANNABIS AND CANNABINOIDS: THE CURRENT STATE OF EVIDENCE AND RECOMMENDATIONS FOR RESEARCH REPORT HIGHLIGHTS 1 (2017), <http://nationalacademies.org/hmd/~media/Files/Report%20Files/2017/Cannabis-Health-Effects/Cannabis-report-highlights.pdf> (reviewing the most recent evidence regarding health effects associated with cannabis). The report identified conclusive or substantial evidence that cannabis or cannabinoids are effective for treating chronic pain in adults, chemotherapy-induced nausea and vomiting, and multiple sclerosis spasticity symptoms. The report also identified moderate evidence that cannabis or cannabinoids are effective for treating sleep disturbance associated with various causes. In addition, the report identified limited evidence that cannabis or cannabinoids are effective for treating decreasing weight loss associated with HIV/AIDS, symptoms of Tourette syndrome, anxiety symptoms in persons with social anxiety disorder and symptoms of posttraumatic stress disorder. At the same time, the report noted that conclusive evidence regarding the short-term

more states, the District of Columbia, Guam and Puerto Rico have also enacted laws legalizing marijuana for medical use.<sup>111</sup>

The movement to legalize cannabis for medical use created “political, social, and economic conditions that were conducive” to decriminalization and, ultimately, legalization for recreational use.<sup>112</sup> Several other social factors also spurred this movement, including the “growing political influence” of generations that have used marijuana with little ill effects,<sup>113</sup> an increasing “libertarian ascendancy,”<sup>114</sup> and public opposition to “excesses in criminal justice policy” and to the “heavy costs of the drug war.”<sup>115</sup> However, marijuana also became legitimized in a sense by the medical-use laws.<sup>116</sup> Governments that continued to criminalize it without regard to its therapeutic value lost credibility on the separate issue of whether marijuana could pose risks to health if unregulated.<sup>117</sup> The credibility problem continues to apply not only regarding the states that have failed to allow for medical use but at the federal level as well.<sup>118</sup> Congress continues to classify cannabis as a Schedule I drug in the federal Controlled Substances Act, with no exception for medical use, based on a purported conclusion that it

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and long-term health effects, positive and negative, of cannabis use remains elusive and warrants further study.

111. See NCSL, *State Medical Marijuana Laws*, *supra* note 5 (listing states that have allowed for the medical use of marijuana).

112. Bonnie, *supra* note 6, at 588.

113. See JONATHAN P. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION: INSIGHTS FOR VERMONT AND OTHER JURISDICTIONS 3 (2015), [https://www.rand.org/pubs/research\\_reports/RR864.readonline.html](https://www.rand.org/pubs/research_reports/RR864.readonline.html) [hereinafter CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION] (“One factor is generational turnover leading to a rise in the proportion of the adult population who have direct personal experience with marijuana; those who have used previously are more likely than those who have not to support legalization.”).

114. Bonnie, *supra* note 5, at 589.

115. *Id.*

116. See *id.* at 588 (“[T]he states’ legalization of access to marijuana for medical use, starting with California’s Compassionate Use Act in 1996, has played a critically important role in the impending collapse of the prohibition against recreational use.”).

117. See *id.* at 588 (discussing the IOM report in 1999 that bolstered political momentum for allowing medical marijuana use).

118. See *id.* at 588–89 (“If federal policymakers had been sensible, they would have facilitated lawful access for compassionate use in a tightly controlled system.”).

has no accepted medical value.<sup>119</sup> This view long ago ceased to be, if it ever was, plausible.<sup>120</sup>

Thirteen states have now decriminalized cannabis for recreational use, and eight more plus the District of Columbia have now legalized it, within limits, for those purposes.<sup>121</sup> Decriminalization connotes a variety of forms of liberalized prohibition, and, on this score, states that have only decriminalized vary.<sup>122</sup> Some make possession of small amounts only a civil infraction, while some make such possession a low-grade misdemeanor that carries no possible jail time.<sup>123</sup> The unifying characteristic among the decriminalizing states is that, while not a state crime, the possession of even small amounts is still prohibited.<sup>124</sup>

The eight states plus the District of Columbia that have now completely legalized some marijuana-related activities for recreational purposes account for twenty-one percent of the U.S. population.<sup>125</sup> Colorado and Washington were the first to legalize, in 2012, followed by Alaska, Oregon and the District of Columbia in 2014.<sup>126</sup> Voters in California, Maine, Massachusetts and Nevada approved legalization in November, 2016.<sup>127</sup>

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119. See *supra* notes 88–91 and accompanying text (discussing the implementation of the Controlled Substances Act).

120. See *Gonzales v. Raich*, 545 U.S. 1, 27 (2005) (describing the medical uses of marijuana). In 2005, the U.S. Supreme Court concluded that the Congress had the authority to prohibit the possession and use of even small amounts of marijuana under its authority under the Commerce Clause. *Id.* at 42.

121. See NCSL *Marijuana Overview*, *supra* note 3 (detailing the legalization of marijuana in certain states).

122. See *id.* (“Twenty-two states and the District of Columbia have decriminalized small amounts of marijuana.”).

123. See *id.* (“[C]ertain small, personal-consumption amounts are a civil or local infraction, not a state crime (or are a lowest misdemeanor with no possibility of jail time).”).

124. See *id.* (“[P]ossession or transfer without remuneration of one ounce or less of marijuana [is] a civil violation.”).

125. See Eli McVey, *Map: The Post-Election U.S. Marijuana Landscape*, MARIJUANA BUS. DAILY (Nov. 14, 2016), <https://mjbizdaily.com/chart-majority-of-u-s-embraces-legal-marijuana/> (last visited Mar. 6, 2018) (“21% of the U.S. population lives in states with adult-use laws.”) (on file with the Washington and Lee Law Review).

126. See NCSL *Marijuana Overview*, *supra* note 3 (detailing the legalization of marijuana).

127. See *id.* (detailing the legalization of marijuana).



Because federal law continues to criminalize even mere possession of cannabis in small amounts for any purpose, there is tension between federal and state enforcement efforts in those states that have legalized marijuana for recreational or even medical uses.<sup>128</sup> Some accommodations have been made by federal authorities on a temporary basis.<sup>129</sup> In 2013, the Justice Department announced<sup>130</sup> implicitly that it would not prosecute growers, sellers and users in Washington and Colorado as long as they strictly complied with the state regulations.<sup>131</sup> Likewise, in December 2014, and in succeeding years as well, Congress has enacted a rider in appropriations bills that prohibits the Justice Department from using appropriated funds to prevent states “from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>132</sup> In

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128. See BENNETT & WALSH, *supra* note 86, at 1 (“Two U.S. states have legalized recreational marijuana, and more may follow; . . . Such actions are in obvious tension with three international treaties that together commit the United States to punish and even criminalize activity related to recreational marijuana.”).

129. See *id.* (“Two U.S. states have legalized recreational marijuana, and more may follow; the Obama administration has conditionally accepted these experiments.”).

130. The announcement came in the form of a Memorandum issued by the Deputy Attorney General, James M. Cole. See Memorandum from James M. Cole, Deputy Attorney General, U.S. Dep’t of Justice (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> (announcing guidance regarding marijuana enforcement). In January, 2018, a few days after recreational marijuana sales began in California, Attorney General Jeff Sessions rescinded the Obama-era policy, although widespread doubt persisted that there would soon follow any prosecutorial crackdown on commercial growers, distributors and sellers in legalization states. See Charlie Savage & Jack Healy, *Justice Dept. Shift Threatens Legal Marijuana*, N.Y. TIMES, Jan. 5, 2018, at A1 (reporting the change in policy and noting that “Justice Department officials would not say whether they intended to carry out a crackdown and begin prosecuting . . . , or were instead merely trying to sow doubt and slow growth in the semilegal industry”).

131. See BENNETT & WALSH, *supra* note 86, at 3 (“Essentially, growers, sellers and users of marijuana could steer clear of the feds, provided they strictly hewed to the Washington or Colorado regulations.”).

132. Consolidated and Further Continuing Appropriations Act, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014); see also Brooke Staggs, *Medical Marijuana Gets Reprieve from Feds in Spending Bill*, ORANGE COUNTY REG., <https://www.ocregister.com/2017/05/01/medical-marijuana-gets-reprieve-from-feds-in-spending-bill/> (last updated May 17, 2017) (last visited Mar. 6, 2018) (noting that the amendment was included in appropriations acts in subsequent years) (on

2016, the U.S. Court of Appeals for the Ninth Circuit concluded that this statute foreclosed, on a temporary basis, an effort by the Justice Department to prosecute various persons involved with medical marijuana businesses in California.<sup>133</sup> Nonetheless, the fundamental conflict between the continuing criminalization of marijuana activities by the federal Controlled Substances Act and the effort of certain states to legalize some cannabis-related activities remains unresolved.<sup>134</sup>

### *C. The Future*

The legal status of recreational marijuana activity in the U.S. will likely continue to reflect major variances among jurisdictions for at least a couple of decades. The rapid movement by eight states and the District of Columbia toward limited legalization for recreational use since 2012<sup>135</sup> suggests that more states will also legalize recreational use on a limited basis within only a few years. Yet, there is not a strong basis to conclude that the movement will promptly proceed toward legalization across the country. Regarding even minor recreational marijuana activities, we can expect a period in which most states have legalized but Congress and a strong minority of states continue to criminalize.

The prompt spread of legalization probably will be throttled some by the limitations on direct democracy in many states. In every jurisdiction that has legalized to date, the source of law was

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file with the Washington and Lee Law Review).

133. See *United States v. McIntosh*, 833 F.3d 1163, 1176–77 (9th Cir. 2016) (“If the federal government prosecutes such individuals, it has prevented the state from giving practical effect to its law providing for non-prosecution of individuals who engage in the permitted conduct.”).

134. One commentator has urged that the Supreme Court should review the classification of marijuana as a Schedule I drug in the Controlled Substances Act under a “heightened scrutiny” standard, contending that this approach could result in the removal of marijuana from the federal statute altogether. See Sandra M. Praxmarer, Note, *Blazing a New Trail: Using a Federalism Standard of Review in Marijuana Cases*, 85 GEO. WASH. L. REV. ARGUENDO 25, 48–51 (2017) (“The same federalism principles that led to a heightened standard of review in *Windsor* can be applied in cases challenging marijuana’s classification.”).

135. See *supra* notes 121–124 and accompanying text (discussing state legalization of marijuana since 2012).

a ballot initiative.<sup>136</sup> The initiative process allows supporters, by securing the requisite number of signatures, “to bypass the legislature” and propose laws that voters can approve directly.<sup>137</sup> The possibility of a ballot initiative does not assure legalization for recreational purposes; Arizona voters rejected such an initiative in 2016.<sup>138</sup> However, the initiative process seems to provide a more likely route to passage in many states than does the normal legislative process. Several state governments have considered bills to legalize recreational marijuana in recent years but none have approved it.<sup>139</sup> There may be a widely-held sense among legislators and governors that legalization of recreational marijuana is not good policy, but there may also be a fear that it is not good politics. The ballot initiative provides a way around resistant or hesitant legislatures. However, only twenty-four states have the ballot initiative available to enact state laws.<sup>140</sup> This limitation will mean that reform will have to go through the legislature in most jurisdictions.

In states without the ballot initiative, there is still reason to think that legalization of recreational marijuana will eventually spread. First, all states allow for the “legislative referendum,” through which “the state legislature ‘refers’ proposed legislation to

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136. See NCSL, *Marijuana Overview*, *supra* note 2, at 1 (“No state legislature, to date, has legalized recreational marijuana separate from a voter initiative.”).

137. HENRY S. NOYES, *THE LAW OF DIRECT DEMOCRACY* 103 (2014).

138. See NCSL, *Marijuana Overview*, *supra* note 2, at 1 (“On Nov. 8, 2016, voters in four states, California, Maine, Massachusetts and Nevada, approved adult-use recreational marijuana, while voters in Arizona disapproved.”).

139. In May 2017, the Vermont legislature became the first to approve a bill legalizing recreational marijuana, but the governor vetoed it. See Reid Wilson, *Vermont Governor Vetoes Marijuana Legalization*, *THE HILL* (May 24, 2017, 1:47 PM), <http://thehill.com/homenews/state-watch/334958-vermont-governor-vetoes-marijuana-legalization> (last visited Mar. 6, 2018) (“Vermont Gov. Phil Scott (R) has vetoed legislation that would have legalized marijuana for recreational use, delivering a blow to legalization backers who hoped Vermont would be the next domino to fall.”) (on file with the Washington and Lee Law Review).

140. The states that allow for initiatives are: Alaska, Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Maine, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming. See *State-by-State List of Initiative and Referendum Provisions*, UNIV. S. CAL. INITIATIVE & REFERENDUM INST., [www.iandrinstitute.org/states.cfm](http://www.iandrinstitute.org/states.cfm) (last visited Mar. 6, 2018) (detailing which states have the initiative and referendum process) (on file with the Washington and Lee Law Review).

the ballot for a popular vote.”<sup>141</sup> Some state legislatures that are unwilling to approve of legalization through legislation may be willing to put the question to voters by authorizing a referendum, and, in some of those states, voters may approve. Also, the pressures toward legalization could well increase enough in some states that state government will approve it through the normal legislative process. In addition to the push from voters, based on support for individual liberty, there might be some revenue benefits to states that legalize,<sup>142</sup> particularly if neighboring states have not yet done so.<sup>143</sup>

There is good reason to doubt, however, that legalization of recreational marijuana will soon extend to all states. Many persons continue to believe that even moderate cannabis use is risky and immoral.<sup>144</sup> For example, the current Attorney General of the United States reportedly believes that cannabis “is dangerous” and that “[g]ood people don’t smoke marijuana.”<sup>145</sup> Moreover, there are real risks associated with cannabis, particularly when used by adolescents, when used excessively by adults, or when used at times that might influence one’s driving on the public roadways.<sup>146</sup> Due to inadequate study, some of the possible risks are also still unknown.<sup>147</sup> Because the prevalence of these concerns will vary among the states, we can expect some

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141. NOYES, *supra* note 137, at 69.

142. For a discussion of the complex nature of the taxation considerations and other possible revenue sources from legalization, see CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION, *supra* note 113, at 75–100 (discussing the ways in which a state might be able to keep revenue from marijuana sales).

143. *See id.* at 156 (noting that, if one state legalizes marijuana and other neighbors do not for a number of years, the legalizing state could “generate a substantial amount of revenues in the meantime”).

144. *See id.* at 27 (introducing moral arguments against the use of marijuana, namely “concerns about the inherent rights and wrongs of using a mind-altering substance”).

145. *See, e.g.,* Sharon LaFrancier & Matt Apuzzo, *A Bond Over Bucking the Establishment*, N.Y. TIMES, Jan. 9, 2017, at A1 (noting that Attorney General, Jeff Sessions, while a senator, said of marijuana, “This drug is dangerous,” and added, “Good people don’t smoke marijuana”).

146. For a summary of the risks, see CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION, *supra* note 113, at 31–38 (describing the health consequences of marijuana consumption).

147. *See* CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 54 (“As for research on the effect of marijuana use on employment and worker productivity, the findings vary dramatically.”).

jurisdictions to resist the trend toward legalization for a long period and even continue to criminalize minor marijuana activities.<sup>148</sup>

The federal government also will probably not legalize recreational marijuana soon. First, there is no opportunity for direct democracy because neither the initiative nor the legislative referendum is available.<sup>149</sup> Second, there are treaties in force that Congress and the President would violate if they approved legislation to legalize marijuana for recreational use even on a tightly limited basis.<sup>150</sup> The federal government would first have to secure modifications to those treaties before it could properly legalize, a task that could easily take several years.<sup>151</sup> Finally, there are political forces operating that would otherwise make such reform difficult.<sup>152</sup> Many federal legislators will harbor reluctance, “given the political risks that will still attach to marijuana legalization in many jurisdictions.”<sup>153</sup> As long as many states still resist, there will be resistance among many federal legislators.<sup>154</sup> On this score, it is noteworthy that Congress has been unable even to agree to move marijuana from Schedule I to a lower level in the Controlled Substances Act to acknowledge that it has therapeutic value.<sup>155</sup> These considerations suggest that we

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148. In Arizona, for example, voters rejected a legalization initiative in 2016. See *supra* note 138 and accompanying text (discussing the rejection of marijuana legalization in Arizona). Even possession of small amounts, except for medical use, remains subject to criminal sanction. See AZ. REV. STAT. ANN. § 13-3405(A)(1) (2010) (“A person shall not knowingly: possess or use marijuana.”).

149. See NOYES, *supra* note 137, at 4 (“For the most part, the use of direct democracy in the United States has been limited to state and local governments. There is no federal recall.”).

150. See *supra* note 88 and accompanying text (emphasizing the importance of the Controlled Substances Act “in fulfilling the United States’ obligations regarding marijuana under several treaties”).

151. See BENNETT & WALSH, *supra* note 86, at 1 (“[The United States] and other drug treaty partners should begin now to discuss options for substantive alterations that create space within international law for conditional legalization and for other policy experimentation that seeks to further the treaties’ ultimate aims of promoting human health and welfare.”).

152. See *id.* at 22 (discussing how domestic politics would create difficulties in reforming the treaty).

153. *Id.*

154. See *id.* (“Domestic politics will make treaty reform hard.”).

155. See *supra* note 91–93 and accompanying text (discussing the lack of permitted medical marijuana use at one point).

can expect to see a period when Congress and a strong minority of states continue to criminalize recreational marijuana even after a majority of states have legalized it.

*III. The Absence of Constitutional Protection for Marijuana Activity Based on Clauses Considered Separately*

This Part assumes that the scenario described at the end of Part II will materialize and asks a traditional sort of constitutional law question: Could persons charged with minor marijuana crimes in states that continue to criminalize recreational marijuana successfully claim a right to engage in the activity under any constitutional clause considered individually?<sup>156</sup> To make the scenario more concrete, let's hypothesize that the defendants are casual, non-dependent users of marijuana charged based on knowing and voluntary behavior—either use of marijuana in a non-public setting or possession of less than an ounce in public. Assume also that the maximum possible punishment is incarceration for up to six months. Let's also suppose that thirty states plus the District of Columbia (but not the federal government and the twenty other states) have legalized recreational marijuana. In claiming a right to engage in the activity, the defendants make alternative arguments under the Cruel and Unusual Punishments Clause, the Fourth Amendment, the Due Process Clause and the Equal Protection Clause. Could they prevail? In what follows, I explain why their arguments using

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156. I do not view incorporation against the states under the Due Process Clause of the Fourteenth Amendment of a right recognized under one of the specific clauses in the first eight Amendments—here, either the Cruel and Unusual Punishments Clause or the Fourth Amendment—as clause aggregation, although the view is arguable. If incorporation of that sort were viewed as clause aggregation, it would, nonetheless, be a special form of it, for there is no aggregation of harms or synergy of concerns occurring. Rather, incorporation follows automatically based on Supreme Court decree. Long ago, the Supreme Court declared that incorporated Bill of Rights provisions “are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.” *Malloy v. Hogan*, 378 U.S. 1, 10 (1964). The Court reaffirmed this identical-application approach when it incorporated the Second Amendment right to bear arms in self-defense. See *McDonald v. City of Chi.*, 561 U.S. 742, 788 (2010) (concluding that a “two-track” approach is now impractical).

this clause-by-clause approach, even with the best of presentations, would likely fail.

### A. *The Cruel and Unusual Punishment Argument*

Under the Cruel and Unusual Punishments Clause,<sup>157</sup> the defendants should expect to lose because they engaged in affirmative, voluntary conduct that society has not yet sufficiently condoned. The Supreme Court has used this clause only once to invalidate a conviction (as opposed to a punishment), in *Robinson v. California*.<sup>158</sup> However, that case, we will see, would not seem to protect voluntary use or possession of marijuana.<sup>159</sup> The Court also has invalidated some criminal punishments (as opposed to convictions) under the clause when a societal consensus has developed suggesting that they are grossly excessive.<sup>160</sup> However, our defendants would probably also have a losing argument on that score, given that we are hypothesizing that the federal government and twenty states would continue to criminalize their behavior.

The *Robinson* case, in which the Court invalidated not just a punishment but a conviction, involved illegal drugs, but laid down a very narrow protection against prosecution.<sup>161</sup> The Court

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157. U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

158. See *Robinson v. California*, 370 U.S. 660, 667 (1962) (“We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.”).

159. See *infra* notes 161–168 and accompanying text (detailing the *Robinson* Court’s narrow protection against prosecution).

160. See *infra* notes 172–178 and accompanying text (discussing when the death penalty and other punishments will be found grossly excessive). The Supreme Court has also asserted that the Cruel and Unusual Punishments Clause “prohibits the imposition of inherently barbaric punishments under all circumstances.” *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010). However, there is only one decision from the Court invalidating a punishment that arguably falls into this category. In *Trop v. Dulles*, 356 U.S. 99 (1958), a plurality of four Justices concluded that the Eighth Amendment forbids the imposition of loss of citizenship as a punishment for crime. See generally *id.* at 103.

161. See *Robinson*, 370 U.S. at 667 (“We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth

confronted a state statute that California courts had construed to criminalize mere addiction to narcotics—in Robinson’s case, heroin.<sup>162</sup> The statute could have been construed to apply only where there was proof that the defendant had voluntarily and illegally used the drug in California, but the trial court did not so instruct Robinson’s jury, and the state appellate court agreed with the trial court’s interpretation.<sup>163</sup> In those odd circumstances, the Supreme Court invalidated the conviction itself, because the law, as interpreted, covered a mere status rather than culpable conduct.<sup>164</sup> Addiction could arise without any illegal use of drugs in California, the Court noted.<sup>165</sup> One could be addicted based on use outside of the state, on use pursuant to prescription or on merely being born to an addicted mother.<sup>166</sup> Addiction alone, the Court suggested, was like having “a common cold.”<sup>167</sup> To criminalize that status was cruel and unusual punishment, whatever the punishment actually imposed.<sup>168</sup>

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Amendment.”).

162. *See id.* at 660 n.1

The statute is § 11721 of the California Health and Safety Code. It provides: “No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail . . . .”

163. *See id.* at 665 (“It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State’s jurisdiction. But the California courts have not so construed this law.”).

164. *See id.* (“The appellant could be convicted, [the jury] were told, if they found simply that the appellant’s ‘status’ or ‘chronic condition’ was that of being ‘addicted to the use of narcotics.’”).

165. *See id.* at 666 (“California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State . . . .”).

166. *See id.* at 667 n.9 (discussing how a person could have “innocently” become addicted to the narcotics).

167. *Id.* at 667.

168. *See id.* at 667–68 (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”).



While the *Robinson* case could invalidate governmental efforts to criminalize certain conditions beyond drug addiction, such as mental illness, leprosy or venereal disease,<sup>169</sup> it would not protect our hypothetical defendants. Knowingly and voluntarily, they either possessed cannabis in public or smoked it at home recreationally. That is affirmative conduct, not a mere status or condition.<sup>170</sup>

Our defendants also could not likely prevail under the Court's decisions invalidating criminal punishments (as opposed to convictions) as disproportional under the Cruel and Unusual Punishments Clause.<sup>171</sup> Putting aside that those cases do not support a right to engage in conduct, they also do not apply to the situation of our hypothetical defendants for a separate reason—the absence of sufficient evidence of a societal consensus condoning their behavior. Except in the death penalty context,<sup>172</sup> the Court

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169. See *id.* at 666 (“It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease.”).

170. Even if they were heavy users, the defendants likely could not successfully claim an addiction to marijuana of sufficient force to render their activity protected under the Eighth Amendment. Only a few years after the *Robinson* decision, in *Powell v. Texas*, 392 U.S. 514 (1968), the Court rejected an Eighth Amendment claim that alcoholism could prevent the application of a criminal statute that applied to public intoxication. *Id.* at 535. The Court concluded that alcohol did not produce an addiction sufficiently strong to invalidate the conviction of the alcoholic defendant for intoxicated appearance in a public place. *Id.* at 535. Marijuana poses less addictive and withdrawal risks than alcohol or heroin. See CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 38–39 (comparing addition from marijuana use to comparable alcohol and drug addiction rates).

171. See *infra* note 173 and accompanying text (discussing the four situations, besides *Robinson*, in which the Supreme Court has given substantive or procedural protection based on disproportionality under the Cruel and Unusual Punishment Clause).

172. For Eighth Amendment purposes, the Court has declared that “death is different” from any other punishment that may be imposed in this country both because of its severity and its irremediable nature, and, thus, that more demanding requirements will apply. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357–58 (1977) (rejecting procedure that allowed a capital sentencer to impose death penalty based in part on information not disclosed to the defense); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (invalidating statute that did not allow a capital sentencer to reject death penalty based on mitigating evidence concerning defendant’s character, record and crime). This idea is also implicit in the invalidation of standardless capital sentencing in *Furman v. Georgia*, 408 U.S. 238, 289 (1972) (“The unusual severity of death is manifested most clearly in its

has rejected criminal punishments only in a few, extreme circumstances under the clause.<sup>173</sup> Those cases boil down to the

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finality and enormity.”).

In the last four decades, the Court has repeatedly relied on the “death is different” idea to invalidate a death sentence on *procedural* grounds that would not apply in the non-death penalty context. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 112–13 (1982) (rejecting the death sentence imposed under a statute interpreted by state courts to foreclose consideration of defendant’s emotional disturbance and violent and tumultuous childhood); *Skipper v. South Carolina*, 476 U.S. 1, 5–6 (1986) (invalidating a death sentence where the sentencing judge had declined to consider evidence of the defendant’s good behavior while incarcerated and awaiting trial); *Hitchcock v. Dugger*, 481 U.S. 393, 397–99 (1987) (overturning a capital sentence based on statutory interpretation by state courts that the sentencer could only consider mitigating factors appearing on a statutory list); *Sumner v. Shuman*, 483 U.S. 66, 83–85 (1987) (rejecting a mandatory death penalty for intentional murder by an inmate serving a prison sentence of life without the possibility of parole); *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989) (overturning a death sentence on the grounds that governing Texas statute did not allow the sentencing jury sufficient opportunity to reject the death penalty based on the mitigating evidence of retardation and childhood abuse); *McCoy v. North Carolina*, 494 U.S. 433, 439–44 (1990) (rejecting the requirement that the jury find mitigating circumstances unanimously).

On the substantive side, the Court has prohibited the death penalty on proportionality grounds in five circumstances:

In 1977, in *Coker v. Georgia*, 433 U.S. 584 (1977) for the rape of an adult victim not involving the taking of human life. *Id.* at 600.

In 1982, in *Enmund v. Florida*, 458 U.S. 782 (1987), against a felony-murderer who did not intend to kill or actually kill, *id.* at 788, unless, as the Court later made clear in *Tison v. Arizona*, 481 U.S. 137 (1987), he was a major participant in the felony and displayed reckless indifference to human life. *Id.* at 158.

In 2002, in *Atkins v. Virginia*, 536 U.S. 304 (2002), against a retarded offender. *Id.* at 321.

In 2005, in *Roper v. Simmons*, 543 U.S. 551 (2005) against an offender who was under age 18. *Id.* at 578; *see also* *Thompson v. Oklahoma*, 487 U.S. 815, 857 (1988) (O’Connor, J., concurring) (prohibiting a death sentence for persons who offended when under sixteen years of age, and the relevant capital-punishment statute specified no minimum age requirement).

In 2008, in *Kennedy v. Louisiana*, 554 U.S. 407 (2008), for the rape of a child victim not involving the taking of human life. *Id.* at 412.

The *Coker* and *Kennedy* decisions, involving rape, probably mean that the death penalty violates the Eighth Amendment for all offenses against individuals that do not involve the taking of human life. In *Kennedy*, the Court declined to address whether the death penalty might still apply to “crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the state.” *Id.* at 437.

173. In the non-capital context, the Court has conferred substantive or procedural protection based on disproportionality under the Cruel and Unusual Punishment Clause in four circumstances other than the situation presented in

idea that the Court will on rare occasion invalidate what it sees as grossly excessive punishment.<sup>174</sup> Before reaching such a conclusion, the Court has required objective evidence, which can be legislation or its absence in other U.S. jurisdictions, revealing a societal consensus against the punishment in the particular context.<sup>175</sup> However, the Court has never invalidated a punishment in a context in which it is authorized by twenty states and the federal government, which is the situation of our hypothetical defendants. In those circumstances, there is not enough assurance that the punishment is grossly excessive.

Granting the defendants protection under the Cruel and Unusual Punishments Clause would also set down a precedent with provocative implications. If the Eighth Amendment supported a right to possess or use marijuana when twenty states and the federal government still criminalize that behavior, other crimes and punishments would seem in danger of constitutional invalidation. For example, the death penalty could soon be at risk. Currently, nineteen states plus the District of Columbia have

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the *Robinson* case.

In 1910, in *Weems v. United States*, 217 U.S. 349 (1910), to invalidate a sentence of hard incarceration and permanent loss of civil liberties for minor offenses involving document falsification by a government employee. *Id.* at 382.

In 1983, in *Solem v. Helm*, 463 U.S. 277 (1983), to reject a sentence of life imprisonment without parole for a seventh, non-violent felony involving uttering a bad check for \$100. *Id.* at 281.

In 2010, in *Graham v. Florida*, 130 S. Ct. 2011 (2010), to foreclose a sentence of life imprisonment without parole for a non-homicide crime by a juvenile. *Id.* at 2030.

In 2012, in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), and a companion case, *Jackson v. Hobbs*, 132 S. Ct. 2455 (2012), to disallow a *mandatory* sentence of life imprisonment without parole for any offense committed by a juvenile, absent special findings in the case of a juvenile defendant whose “crime reflects irreparable corruption.” *Id.* at 2469 (quoting *Roper v. Simmons*, 543 U.S. 551, 573 (2005)).

174. See *Harmelin v. Michigan*, 501 U.S. 957, 1000–01 (1991) (Kennedy, J., concurring) (stating that the controlling opinion concludes that the Eighth Amendment contains a “narrow proportionality principle,” that “does not require strict proportionality between crime and sentence” but instead “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime”).

175. See *Graham v. Florida*, 130 S. Ct. 2011, 2022 (2010) (explaining that, in rare cases where the court infers gross disproportionality, it “should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions”).

abolished capital punishment,<sup>176</sup> and the trend is toward abolition by more states.<sup>177</sup> This movement poses difficulty for our hypothetical defendants. They are probably less likely to prevail under the Eighth Amendment if their success would soon seem to require the categorical invalidation of capital punishment for all ordinary crimes even when a strong minority of states and the federal government retain it.<sup>178</sup>

### *B. The Fourth Amendment Argument*

The defendants also would not prevail under the Fourth Amendment, because they possessed a contraband substance as defined by criminal law. To claim a Fourth Amendment right to possess and use marijuana, the defendants would be arguing essentially that the amendment's command that searches and seizures be "reasonable" categorically forecloses the police from invading their privacy to find and seize marijuana. Indeed, the claim would have to be even more extreme to provide a right to engage in the activity—that the government could not use the evidence to prosecute a person even if the person or another gave it to the police voluntarily and voluntarily reported the crime! This general sort of claim—that the Amendment protects certain kinds of evidence from any police search and seizure—has some foundation in old Fourth Amendment decisions of the Supreme Court.<sup>179</sup> However, given that marijuana would be criminal

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176. See *States With and Without the Death Penalty*, DEATH PENALTY INFO. CTR. (Nov. 9, 2016), <https://deathpenaltyinfo.org/states-and-without-death-penalty> (last visited Mar. 6, 2018) (comparing states with and without the death penalty) (on file with the Washington and Lee Law Review).

177. See *id.* (demonstrating how seven states have abolished the death penalty since 2007: New Jersey (2007), New York (2007), New Mexico (2009), Illinois (2011), Connecticut (2012), Maryland (2013), and Delaware (2016)). Among the states retaining the death penalty, four have also recently experienced gubernatorial moratoria on executions, suggesting that they could also soon move toward abolition. *Id.* These states are: Oregon (2011), Colorado (2013), Washington (2014) and Pennsylvania (2015). *Id.*

178. For the argument, nonetheless, that given the dearth of federal executions over a substantial period, the retention of a federal death should be discounted in assessments of the continued propriety of the death penalty for murder under the Eighth Amendment, see Howe, *supra* note 8, at 1427–28.

179. See *infra* notes 181–194 and accompanying text (detailing the early search and seizure case law).

contraband in any state that would prosecute the defendants, it would not be the kind of evidence that would have been immune from search and seizure as an historical matter.<sup>180</sup> More importantly, under modern Fourth Amendment law, there are no categories of ordinary criminal evidence that are recognized as immune from police search and seizure.<sup>181</sup>

Early cases in which the Court construed the Fourth Amendment reflected a strong “libertarianism” that demarcated “both the zone of constitutionally protected interests and the limits on investigative authority.”<sup>182</sup> The line began with *Boyd v. United States*,<sup>183</sup> in which the Court addressed the constitutionality of a statute authorizing a judicial order to the defendant to produce records in a proceeding for forfeiture of goods allegedly imported without payment of duties.<sup>184</sup> The Court ruled the order improper and the records inadmissible as evidence.<sup>185</sup> The records were effectively immune from “a search and seizure, or, what is equivalent thereto, a compulsory production . . . .”<sup>186</sup> Any such search and seizure “of a man’s private papers” merely for “the purpose of using them in evidence against him in a criminal case, or in a proceeding to enforce the forfeiture of his property” was deemed unreasonable.<sup>187</sup> The outcome would have differed, the Court asserted, if there had been a “search and seizure of articles and things which it is unlawful for the person to have in his possession for the purpose of issue or disposition, such as counterfeit coin, lottery tickets, implements of gambling,

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180. See *infra* note 195 and accompanying text (discussing how there were no protections in early case law for items the defendant was not entitled to possess).

181. See *infra* note 190 and accompanying text (stating the holding of *Boyes*).

182. Lawrence Rosenthal, *Binary Searches and the Central Meaning of the Fourth Amendment*, 22 WM. & MARY BILL OF RTS. L. REV. 881, 888 (2014).

183. 116 U.S. 616 (1886).

184. See *id.* at 618 (addressing the issue in the case).

185. See *id.* at 638 (“We think that the notice to produce the invoice in this case, the order by virtue of which it was issued, and the law which authorized the order, were unconstitutional and void . . . .”).

186. *Id.* at 622.

187. *Id.* at 622–23; see also *id.* at 626–30 (discussing *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066 (C.P. 1765), which purportedly helped justify the Fourth Amendment, and concluding that “any forcible and compulsory extortion of a man’s . . . private papers to be used as evidence to convict him . . . or to forfeit his goods, is within the condemnation of that judgment”).

[etc.] . . . .”<sup>188</sup> But, Boyd’s papers were seized as mere evidence of his offense, which was not acceptable.<sup>189</sup> *Boyd* seemed to mean “that items to which the owner has a legitimate right to possess under the law of property are immune from search or seizure even on a warrant or other compelling justification.”<sup>190</sup>

This view of *Boyd* was solidified in the Court’s 1921 decision in *Gouled v. United States*.<sup>191</sup> There, the police had obtained search warrants for the defendant’s office and, on that authority, had searched for and seized some of his papers, which were later admitted against him in a trial for fraud.<sup>192</sup> The Court held that those actions violated Gouled’s rights under the Fourth Amendment,<sup>193</sup> because the government could assert no right to the papers that was greater than Gouled’s.<sup>194</sup> The Court noted that the outcome would have differed if Gouled had possessed the papers unlawfully, which would have been true, for example, if they had been “stolen or forged” or were themselves fraudulently executed contracts.<sup>195</sup> But because Gouled’s papers were mere “evidence” of his crimes, they were immune from search and seizure when in his possession.<sup>196</sup> The Fourth Amendment

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188. *Id.* at 624.

189. *See id.* at 623 (describing how the evidence was obtained merely to use against the defendant).

190. Rosenthal, *supra* note 182, at 889.

191. *See Gouled v. United States*, 255 U.S. 298, 303 (1921)

It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in *Boyd v. United States*, 116 U.S. 616, in *Weeks v. United States*, 232 U.S. 383, and in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments.

192. *See id.* at 304–05 (discussing the material facts of the case).

193. *See id.* at 309 (“[Search warrants] may not be used as a means of gaining access to a man’s house or office and papers solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding . . .”).

194. *See id.* at 309–11 (“The Government could desire its possession only to use it as evidence against the defendant and to search for and seize it for such purpose was unlawful.”).

195. *See id.* at 309–10 (discussing when papers may be obtained for evidentiary purposes).

196. *See id.* at 309 (determining that search warrants cannot be used to seize papers merely to use them as evidence in a proceeding against the defendant).

prohibited the actions to secure them or their use at trial, although the government had discovered and seized them pursuant to warrants that Gouled had not otherwise challenged.<sup>197</sup>

While *Boyd* and *Gouled* underscore that some items once were immune from searches and seizures, those decisions would not have helped our hypothetical defendants even had they been charged with marijuana possession or use in 1921. Marijuana is contraband where its possession is a crime or civil offense. In those circumstances, the government could assert a right to seize the substance that would be superior to the possessor's claim to it, meaning that the immunity would not have applied. *Boyd* and *Gouled* both noted that there was no protection as to items the defendant was not entitled to possess.<sup>198</sup>

The *Boyd* and *Gouled* rulings also would not help our modern-day defendants for a second, more fundamental reason: The Supreme Court has abandoned the notion that the Fourth Amendment renders some categories of ordinary criminal evidence immune from police search and seizure.<sup>199</sup> In *Warden v. Hayden*,<sup>200</sup> the Court upheld the introduction in an armed robbery trial of clothing matching that worn by the robber that was seized during a search incident to arrest of the defendant in his home.<sup>201</sup> Although the clothing was “mere evidence,” the Court found that point irrelevant: “Nothing in the language of the Fourth Amendment supports the distinction between ‘mere evidence’ and instrumentalities, fruits of crime, or contraband.”<sup>202</sup> As for the *Boyd* and *Gouled* holdings, the Court overruled them.<sup>203</sup>

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197. See *id.* at 303 (“It was objected on the trial, and is here insisted, that it was error to admit these papers in evidence because possession of them was obtained by violating the rights secured to the defendant by the Fourth and Fifth Amendments to the Constitution of the United States.”).

198. See *Boyd v. United States*, 116 U.S. 616, 624 (1886) (describing how the laws of the Fourth Amendment do not apply to things that are unlawful for a person to have in their possession); *Gouled*, 255 U.S. at 309 (same).

199. See *Warden v. Hayden*, 387 U.S. 294, 312 (1976) (overturning the *Boyd* and *Gouled* decisions).

200. 387 U.S. 294 (1976).

201. See *id.* at 296–97 (reversing the Court of Appeals’ decision that the clothing items had “evidentiary value only” and therefore could not be admitted).

202. *Id.* at 301.

203. See *id.* at 310 (rejecting *Boyd* and *Gouled* by holding that, “[t]here is no viable reason to distinguish intrusions to secure ‘mere evidence’ from intrusions

The *Hayden* opinion reveals that, although our defendants could correctly assert that marijuana criminalization has increased the number and the intensity of privacy invasions by police, those facts imply no cognizable Fourth Amendment claim for legalization. Doubtless, the sheer number of Fourth Amendment challenges to searches and seizures involving marijuana underscore the large role that cannabis plays in modern search-and-seizure activity.<sup>204</sup> Criminalization also has likely produced invasions of privacy that are especially intrusive, because marijuana can be possessed in tiny amounts,<sup>205</sup> its criminal use is “generally committed in private”<sup>206</sup> and governments intensified their efforts after the war on drugs commenced to discover marijuana cultivation.<sup>207</sup> Legalizing marijuana surely would help ameliorate the number and nature of the police invasions.<sup>208</sup> Nonetheless, the *Hayden* opinion indicates that a claim for legalization is not within the province of existing

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to secure fruits, instrumentalities, or contraband”).

In *Andresen v. Maryland*, 427 U.S. 463 (1976), the Court also rejected a second idea reflected in the *Boyd* and *Gouled* decisions—that the seizure of a person’s private papers can violate a person’s Fifth Amendment privilege against compelled self-incrimination. *Boyd*, 116 U.S. at 630; *Gouled v. United States*, 255 U.S. 298, 311 (1921). In *Andresen*, the Court upheld the introduction, in a trial for fraud, of certain private papers seized pursuant to a search warrant of the defendant’s law office. *Andresen*, 427 U.S. at 477. The Court clarified that the Fifth Amendment does not prevent a search for testimonial papers that is properly conducted under the Fourth Amendment, because there is no “compulsion” in such a case. *Id.* at 471–77.

204. See, e.g., Mandiberg, *supra* note 11, at 31 (“Since 1970, the number of marijuana-related search-and-seizure opinions issued by state and lower federal courts has increased so dramatically that the task of reading them all is overwhelming.”).

205. On this score, see *supra* note 19 and accompanying text (detailing how small a “roach” of marijuana is); MIKOS, *supra* note 1, at 47, 76 (discussing cases in which courts have applied marijuana prohibitions to tiny amounts of the substance).

206. KAPLAN, *supra* note 18, at 42.

207. See Zeese, *supra* note 18, at 254, 260–61 (describing strategies taken by the federal government to discover the growth of marijuana).

208. The reduction in police intrusions on privacy would not equate, however, with the number of marijuana arrests or citations that occurred before legalization. Professor John Kaplan once noted that the police “[v]ery often . . . discover marijuana possession with very little effort.” KAPLAN, *supra* note 18, at 364. He pointed out that “[o]ften young people, arrested or searched on other grounds, are found in possession of a marijuana cigarette.” *Id.*



Fourth Amendment doctrine.<sup>209</sup> Although criminalization “does enlarge the area of permissible searches,” the Fourth Amendment limits those searches by generally requiring that the police have an antecedent justification for any given intrusion, and, in some cases, also judicial approval.<sup>210</sup> The Amendment does not define what is permissible evidence and certainly does not define what is a crime.<sup>211</sup>

To grant the defendants protection under the Fourth Amendment would also create a problematic precedent. If the Fourth Amendment supported a right to possess or use marijuana simply because marijuana criminalization produces many police invasions of privacy, other drug crimes, for example, might also seem invalid. Police searches for other drugs, including heroin, cocaine and amphetamines, can also produce substantial and especially intrusive invasions of privacy.<sup>212</sup> Those other drugs are substantially more dangerous than marijuana,<sup>213</sup> but that would have no relevance to the number and nature of the police intrusions to find them.<sup>214</sup> As a logical matter, constitutional doctrine might also have to endorse the legalization of those other drugs.<sup>215</sup> This point only confirms that the defendants are unlikely to prevail.

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209. *See* *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (“The Fourth Amendment allows intrusions upon privacy under these circumstances, and there is no viable reason to distinguish intrusions to secure ‘mere evidence’ from intrusions to secure fruits, instrumentalities, or contraband.”).

210. *Id.* at 309.

211. *See id.* at 310 (describing how the Fourth Amendment does not distinguish between intrusions to obtain “mere evidence” versus intrusions to obtain contraband).

212. These drugs share many characteristics of marijuana that make the number and nature of police invasions of privacy to discover them especially intrusive. *See supra* notes 205–207 and accompanying text (discussing the characteristics of marijuana).

213. *See* CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 59 (discussing the risks of driving under the influence of marijuana compared to alcohol).

214. *See supra* notes 200–207 and accompanying text (“[A]lthough our defendants could correctly assert that marijuana criminalization has increased the number and the intensity of privacy invasions by police, those facts imply no cognizable Fourth Amendment claim for legalization.”).

215. *See supra* note 179 and accompanying text (presenting the Fourth Amendment argument).

*C. The Due Process Argument*

Our hypothetical defendants would probably also lose their due process argument, although this one would present their best chance of prevailing on a single-clause claim. The defendants would likely lose because possession or ingestion of marijuana for recreational purposes probably would not amount to a “fundamental right,” and, thus, would not trigger close scrutiny of the state’s purposes in criminalizing the behavior.<sup>216</sup> On this view, states could criminalize as long as they had a “rational basis,”<sup>217</sup> and they could easily satisfy that standard. Marijuana use carries enough small risks of minor harm to the user and others to give states a rational reason to criminalize the activity.<sup>218</sup> At the same time, the defendants would have their best chance of prevailing on the due process claim because the methodology for identifying a fundamental right involves substantial subjectivity,<sup>219</sup> which leaves room for argument.

The Supreme Court has construed the Due Process Clauses in the Fifth and Fourteenth Amendments to contain a “substantive” element that safeguards certain liberty interests against state infringement regardless of the process provided.<sup>220</sup> The idea is that

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216. See 2 RONALD D. ROTUNDA & JOHN D. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 15.7, at 807–21 (4th ed. 2007) (reviewing the Supreme Court’s fundamental substantive due process right jurisprudence and its use of strict scrutiny).

217. See, e.g., *Califano v. Aznavorian*, 439 U.S. 170, 176–77 (1978) (finding that international travel, as distinguished from inter-state travel, was not a fundamental right, so that only a rational-basis test applied).

218. See *infra* note 480 and accompanying text (reviewing risks of marijuana use).

219. See 2 ROTUNDA & NOWAK, *supra* note 216, § 15.7, at 808–09 (“Despite claims to the contrary, there has never been a period of time wherein the Court did not actively enforce values which a majority of the Justices felt were essential in our society even though they had no specific textual basis in the Constitution.”); see also ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.1.2, at 829 (5th ed. 2015) (noting that, even under a test that looks to history and tradition, the Court can manipulate the level of abstraction at which it states the asserted right to make it either consistent with or unsupported by history and tradition).

220. See, e.g., *Reno v. Flores*, 507 U.S. 292, 302 (1993) (“Respondents’ . . . claim relies upon our line of cases which interprets the Fifth and Fourteenth Amendments’ guarantee of ‘due process of law’ to include a substantive component, which forbids the government to infringe certain ‘fundamental’ liberty interests *at all*, no matter what process is provided . . . .”);

some liberties are so important “as to be ranked as fundamental,” and consequently cannot be denied, unless the infringement is narrowly tailored to serve a compelling state interest,<sup>221</sup> an often (although not always)<sup>222</sup> impossible standard for a state to satisfy.<sup>223</sup> The rights that are fundamental for this purpose are not co-extensive with those specifically enumerated in the Bill of Rights.<sup>224</sup> The Court has determined that some enumerated rights are not fundamental, such as the right to indictment by a grand jury,<sup>225</sup> and that some unenumerated rights are fundamental, such

Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) (reviewing substantive due process).

221. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934), *abrogated in part by* Malloy v. Hogan, 378 U.S. 1 (1964).

222. See, e.g., Jacobson v. Massachusetts, 197 U.S. 11, 38–39 (1905) (upholding state law that required vaccinations because of the government’s compelling interest in deterring the spread of contagious diseases).

223. See CHEMERINSKY, *supra* note 219, § 10.1.2, at 831 (noting that “the government has the burden of persuading the Court that a truly vital interest is served” and that “it could not attain the goal through any means less restrictive of the right”).

224. See *id.* § 10.1.1, at 826 (“Almost all of these [fundamental] rights are not mentioned in the text of the Constitution.”).

225. Enumerated rights in the first eight amendments that are not deemed “fundamental” are not part of due process and, for that reason, do not apply against the states. See *id.* § 6.3.3, at 525–29 (describing incorporation and listing the incorporated rights, including provisions of the First, Second, Fourth, Fifth, Sixth, and Eighth Amendments). As for enumerated but unincorporated rights, the Court has never overruled its conclusion that the Fifth Amendment right to indictment by a grand jury does not bind the states. See *Hurtado v. California*, 110 U.S. 516, 538 (1884) (“[W]e are unable to say that the substitution for a presentment or indictment by a grand jury . . . is not due process of law.”), *limitation of holding recognized by* *Albright v. Oliver*, 510 U.S. 266, 272 (1994) (“*Hurtado* held that the Due Process Clause did not make applicable to the States the Fifth Amendment’s requirement that all prosecutions for an infamous crime be instituted by the indictment of a grand jury.”). Also, while concluding that the Sixth Amendment demands unanimous jury verdicts in federal criminal trials, the Court has not incorporated this right against the states. See *Johnson v. Louisiana*, 406 U.S. 366, 370–75 (1972) (Powell, J., concurring) (finding that while history demands unanimity among the jury in federal trials, incorporation of the Sixth Amendment does not require unanimity among state juries). Some of the provisions included in the first eight Amendments also remain unincorporated through lack of decision, particularly the Third Amendment protections against the quartering of soldiers and the Eighth Amendment prohibition on excessive fines. See *McDonald v. City of Chi.*, 561 U.S. 742, 765 n.13 (2010) (“We have never decided whether the Third Amendment or the Eighth Amendment’s prohibition of excessive fines applies to the States through the Due Process Clause.”). The Ninth and Tenth Amendments also have not been incorporated against the states,

as the right of a woman to choose to terminate her pregnancy prior to viability of the fetus on its own outside the womb.<sup>226</sup>

In identifying unenumerated rights that rank as fundamental, the Court's modern approach, under *Washington v. Glucksberg*,<sup>227</sup> has generally reflected great self-restraint, limiting recognition to those rights "deeply rooted in this Nation's history and tradition."<sup>228</sup> This approach reflects an effort to avoid repeating the sins of the *Lochner* era, in which the Court used substantive due process to implement its vision of economic liberty.<sup>229</sup> To further the self-restraint,<sup>230</sup> the Court also has generally emphasized the

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apparently on the view that they only reaffirm that the federal government is one of enumerated powers and reserve to the states any authority not given by the Constitution to the federal government or denied by it to the states, and, thus, could not plausibly limit the states. See 2 ROTUNDA & NOWAK, *supra* note 216, § 14.2, at 658 ("Under their own terms the Ninth and Tenth Amendments seem inapplicable to the states."). The Court has long hinted that it does not contemplate incorporation for these two Amendments. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 99 (1908) (restricting commentary on the possibilities for incorporation to the rights protected by "the first eight Amendments"), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964); see also *McDonald*, 561 U.S. at 765 n.13 (omitting mention of the Ninth and Tenth Amendments as among those unincorporated through lack of decision, suggesting a view that they could not plausibly apply against the states).

226. See *Roe v. Wade*, 410 U.S. 113, 154 (1973) ("[F]reedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment . . . . That right necessarily includes the right of a woman to decide whether or not to terminate her pregnancy.").

227. 521 U.S. 702, 721 (1997).

228. See *United States v. Salerno*, 481 U.S. 739, 751 (1987) ("Under these circumstances, we cannot categorically state that pretrial detention 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

229. See, e.g., *Lochner v. New York*, 198 U.S. 45, 57 (1905) ("There is no reasonable ground for interfering with the liberty of person or the right of free contract, by the determining the hours of labor, in the occupation of a baker."), *abrogated* by *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); see also 2 ROTUNDA & NOWAK, *supra* note 216, § 14.6, at 673 ("The Supreme Court used the substantive due process test to control a wide variety of legislation during the period from 1885 to 1937.").

230. The Court has also less formally articulated a third aspect of restraint, which is that it is more likely to recognize a negative fundamental right (the right to be free from governmental restraint) than a positive fundamental right (the right to a government benefit). See *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels

need to provide a “careful description of the asserted right”—meaning a description at a very specific level of abstraction—so as generally not to “break new ground in this field.”<sup>231</sup> Thus, for example, in a suit challenging the detention of immigrant juveniles pending deportation hearings, the Court carefully described (and rejected as not fundamental) the asserted right as not a “freedom from physical restraint” but rather “the right of a child who has no available parent, close relative, or legal guardian, and for whom the government is responsible, to be placed in the custody of a willing-and-able private custodian rather than of a government-operated or government selected child-care institution.”<sup>232</sup>

Despite this general approach involving “utmost care”<sup>233</sup> to show restraint, the Court will sometimes identify a new fundamental right. The notion that there is room for exceptions is embodied in the assertion that the responsibility to identify unenumerated rights “has not been reduced to any formula.”<sup>234</sup> This idea takes precedence when the Court decides not to allow “the past alone to rule the present.”<sup>235</sup>

While the Court’s approach to recognizing unenumerated rights is easily manipulated to produce desired outcomes,<sup>236</sup> the recreational use of marijuana is somewhat different from the vast majority of activities that the modern Court has protected with the label, “fundamental.” Our defendants’ asserted right could be described broadly as one of personal autonomy, or bodily integrity,<sup>237</sup> but there is a good chance that a court would instead

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of safety and security.”); *see also* Yoshino, *supra* note 51, at 159–62 (discussing this third, less formal aspect of the *Glucksberg* strictures). However, the right to be free from the criminalization of marijuana-related activities is a negative right, which means this point would not pose a problem for the defendants.

231. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992).

232. *Reno v. Flores*, 507 U.S. 292, 302 (1993).

233. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

234. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

235. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

236. *See supra* note 219 and accompanying text (describing how abstraction and subjectivity can be used to manipulate a due process inquiry).

237. *See, e.g.,* Matthew J. Routh, *Re-Thinking Liberty: Cannabis Prohibition and Substantive Due Process*, 26 KAN. J. L. & PUB. POL’Y 143, 145 (2017) (arguing that “cannabis’ classification and prohibition as a Schedule I narcotic” in the federal Controlled Substances Act “violates an individual’s fundamental right to

describe it “carefully”<sup>238</sup> as something like “the right to publically possess and privately ingest marijuana to enjoy the benefits and pleasure of its effects.” When described this way, the activity appears self-indulgent. Use of marijuana is increasingly understood to bring substantial enjoyment, even benefit, to a huge proportion of the population. Indeed, shortly before any state legalized recreational use, almost thirty million Americans reported consuming marijuana in the previous year.<sup>239</sup> Nonetheless, the activities the Court has protected as unenumerated, fundamental rights generally have involved an avoidance of a serious burden—such as restrictions on the right to travel or migrate throughout the country<sup>240</sup>—or a liberty that also involves an assumption of responsibility: the right to contract,<sup>241</sup> the right to engage in the common occupations of life,<sup>242</sup> the right to marry,<sup>243</sup> the right to procreate,<sup>244</sup> the right to custody of one’s children,<sup>245</sup> or the right to control the upbringing of one’s

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bodily integrity”).

238. See *supra* notes 231–232 and accompanying text (providing an example of the specificity approach).

239. See CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 19 (writing first in 2012, “[t]he 33 million Americans who report use in the past year far outnumber the users of all the other illicit substances combined”).

240. See, e.g., *United States v. Guest*, 383 U.S. 745, 757 (1966) (“The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized.”); *Crandall v. Nevada*, 73 U.S. 35, 43–44 (1867) (codifying the fundamental right to move about the country).

241. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (identifying the right to contract, among others, as a fundamental right).

242. See *id.* (noting that “the right of the individual . . . to engage in any of the common occupations of life” is protected under due process).

243. See, e.g., *Turner v. Safley*, 482 U.S. 78, 95–96 (1987) (recognizing the right even of a prison inmate to marry, although allowing the government to infringe the right if the action is reasonably related to legitimate penological interest); see also *Boddie v. Connecticut*, 401 U.S. 371, 380–81 (1971) (recognizing the right of indigent persons to fee waiver in judicial action to secure divorce).

244. See *Skinner v. Oklahoma*, 316 U.S. 535, 536–37, 541 (1942) (declaring invalid a state statute that allowed judicially ordered sterilization of persons convicted of two or more crimes of “moral turpitude”).

245. See *Santosky v. Kramer*, 455 U.S. 745, 758–59 (1982) (rearticulating the basic right to “the companionship, care, custody, and management of [one’s] children”).

children.<sup>246</sup> When considered against these kinds of activities, the claim of our hypothetical defendants seems less convincing.

Their claim might carry more force if it focused on medical marijuana use to relieve debilitating pain or symptoms.<sup>247</sup> When presented with such a case in 2007, after eleven states had legalized medical marijuana, the Ninth Circuit rejected even medical use as a fundamental right, but acknowledged that, as more states followed California's path, the outcome could change.<sup>248</sup> The Ninth Circuit was stark in its conclusion: "[F]ederal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering."<sup>249</sup> The Supreme Court could easily adopt a different view on that issue now that more states have legalized.<sup>250</sup> As we have seen, marijuana has a long, although interrupted, history of legalized medical use,<sup>251</sup> and, when consumed to relieve "excruciating pain and suffering," it becomes fundamentally important to one's well-being.<sup>252</sup>

246. See *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534–35 (1925) (identifying "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 399 (stating a right to "establish a home and bring up children").

247. For an example of such a case, see *Raich v. Gonzales*, 500 F.3d 850 (9th Cir. 2007). There, the Ninth Circuit acknowledged that Raich's use of marijuana to treat the effects of numerous medical conditions was potentially necessary not only to avoid intolerable suffering but to stay alive. See *id.* at 855 ("Marijuana . . . has proven to be of great medical value for Raich."). One can reasonably question whether recreation is any less important than treatment of a medical condition or whether we can properly distinguish between recreational or medical use of marijuana. See MIKOS, *supra* note 1, at 212–13 (noting relevant commentary on the problems and asking those questions).

248. See *id.* at 865–66 ("We agree . . . medical and conventional wisdom that recognizes the use of marijuana for medical purposes is gaining traction in the law. . . . But that legal recognition has not yet reached the point where . . . the right to use medical marijuana is 'fundamental' and 'implicit in the concept of ordered liberty.'").

249. *Id.* at 866.

250. See *supra* note 110 and accompanying text (providing modern evidence for the benefits of marijuana use that could support the recognition of a fundamental right).

251. See *supra* Part I.A (reviewing marijuana's history in the United States).

252. See *Raich*, 500 F.3d at 855 ("Raich has been using marijuana as a medication for nearly eight years, every two waking hours of every day. Dr. Lucido states that, for Raich, foregoing marijuana treatment may be fatal. As the district court put it, '[t]raditional medicine has utterly failed [Raich].'" (citation

Nonetheless, the vast majority of marijuana consumers are recreational,<sup>253</sup> like our hypothetical defendants, and the conclusion that the Due Process Clauses should protect that kind of use, even on a limited basis, is not as clear.

To confer a protected liberty interest on the defendants under the Due Process Clauses would also set down a troubling precedent. Avoiding any semblance of re-*Lochner*izing the due process inquiry is a serious concern for the Court.<sup>254</sup> Yet, if the Due Process Clauses supported a right to possess or use marijuana because its use provides substantial pleasure, history and tradition would have to be ignored. Recreational marijuana use may have been legal before the turn of the twentieth century, but so was use of much more dangerous drugs, like heroin and cocaine, and all of those activities have now been federal crimes for many decades.<sup>255</sup> A court could try to draw various distinctions to limit the precedential effect of a ruling that marijuana use is a fundamental right. The court could emphasize, for example, the lesser dangerousness of marijuana, the growing trend among states to legalize its use, and the non-criminalization of other drugs that are at least as dangerous, particularly alcohol and tobacco. However, those kinds of distinctions have little to do with history and tradition. Consequently, such a ruling could rightfully be seen as significantly redefining the measure of what constitutes a fundamental right.

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omitted)).

253. See *supra* note 239 and accompanying text (outlining prevalence and recreational benefits of marijuana); CAULKINS ET AL., MARIJUANA LEGALIZATION, *supra* note 15, at 19 (“20 million Americans say they’ve used marijuana in the past month . . . About 7 million of those 20 million report using marijuana daily or near daily, and more than 4 million meet the clinical criteria for marijuana abuse or dependence.”).

254. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“[W]e decline the invitation [to follow *Lochner v. New York*, 198 U.S. 45 (1905), as the standard for interpreting the Due Process Clauses] . . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.”).

255. See *supra* note 69 and accompanying text (recounting drug history in the United States).



*D. The Equal Protection Argument*

The defendants would surely lose their equal protection argument if they lost their due process argument, because using marijuana would not be a fundamental right and, further, criminalizing marijuana activity involves no discrimination based on a suspect classification or improper purpose.<sup>256</sup> Defendants might try to claim that the original criminalization of marijuana in the early twentieth century was based on improper discrimination, and, thus, that continuing criminalization should be judged as improper. They might also try to claim that the criminalization of marijuana use is irrationally discriminatory when more dangerous drugs, particularly alcohol and tobacco, are not criminalized. However, neither argument as the basis for a constitutional right to possess or use marijuana would likely persuade.

The Equal Protection Clause directs that persons in an equal position should be treated equally.<sup>257</sup> The command depends on some external substantive standard that defines who is equal to determine its operational value.<sup>258</sup> In this sense, it is like a command to treat people “fairly” or “justly;” it has little, if any, meaning until the meaning is added.<sup>259</sup> The Supreme Court has tried to give the command some content through a few basic rules that call for levels of heightened scrutiny of government action rather than “rational basis” review.<sup>260</sup> The first rule tracks an idea that the Court also uses to try to give meaning to the Due Process

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256. See *infra* notes 261–266 and accompanying text (listing the key aspects of an equal protection claim).

257. See *Plyer v. Doe*, 457 U.S. 202, 216 (1982) (“The Equal Protection Clause directs that ‘all persons similarly circumstanced shall be treated alike.’”).

258. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543–47 (1982) (discussing the difficulty of defining equality); Bork, *supra* note 33, at 11 (noting that “[t]he bare concept of equality provides no guide for courts” but that “because of its historical origins,” the Equal Protection Clause “does require that government not discriminate along racial lines”).

259. See Westen, *supra* note 258, at 547 (noting that once the external standard is determined, the equality idea is “superfluous,” because the external standard tells us all that we need to know about how to treat people).

260. See 2 ROTUNDA & NOWAK, *supra* note 216, § 18.3(a)(ii)–(iv), at 306–14 (outlining the three standards of review: rational-basis, strict scrutiny, and intermediate scrutiny); CHEMERINSKY, *supra* note 219, § 9.1.2, at 697–98 (noting that different classifications result in different standards of review).

Clause—that government cannot impinge on certain persons’ (or in a due process claim, everyone’s) exercise of a “fundamental right” unless the discriminatory infringement is narrowly tailored to serve a compelling state interest.<sup>261</sup> The second focuses on certain classifications of persons that the Court has identified as suspect or the existence of a discriminatory purpose against such a group. These include race,<sup>262</sup> national origin,<sup>263</sup> alienage,<sup>264</sup> non-marital child status,<sup>265</sup> and gender.<sup>266</sup> Under this second category of decisions, government discrimination against those groups, either on the face of the law or through a law’s discriminatory purpose and impact, will be subjected to either strict or intermediate scrutiny.<sup>267</sup> The practical import of these doctrines is that where there is government action that interferes with a fundamental right or discriminates based on a suspect classification, the action will often be unconstitutional, while other government sponsored discrimination is more likely to be upheld.

Having concluded that possession or use of recreational marijuana is unlikely to constitute a fundamental right under the Due Process Clauses,<sup>268</sup> the same conclusion would apply for

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261. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (state statute that allowed judicially ordered sterilization of persons convicted of two or more crimes of “moral turpitude” held to violate Equal Protection Clause).

262. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 273–74 (1986) (applying strict scrutiny test to racial classifications).

263. See *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (explaining that classifications based on national origin are subject to strict scrutiny).

264. See *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (noting that strict scrutiny applies to alienage classifications).

265. See *Clark*, 486 U.S. at 461 (finding intermediate scrutiny applies to discriminations against non-marital children).

266. See *Craig v. Boren*, 429 U.S. 190, 197 (1976) (finding that, with respect to gender, “classifications must serve important governmental objectives and must be substantially related to achievement of those objectives”).

267. Strict scrutiny will require the government to prove that the discrimination is necessary to achieve a compelling governmental purpose that it cannot achieve through a less discriminatory manner. See *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“[T]hey must be justified by a compelling governmental interest and must be ‘necessary . . . to the accomplishment’ of their legitimate purpose.”). Intermediate scrutiny will require the government to prove that the discrimination is substantially related to an important governmental objective. See *Craig*, 429 U.S. at 197 (articulating the intermediate scrutiny standard).

268. See *supra* Part II.C (reviewing the outcome of a potential Due Process claim).

purposes of the Equal Protection Clause. The Supreme Court has not differentiated in its determination of what is a fundamental right under one clause versus the other.<sup>269</sup> Because we have determined that there probably is no fundamental right involved, the rational basis test would apply. As we saw in the due process context, the criminalization of even minor marijuana would meet the rational-basis standard.<sup>270</sup>

Our defendants would also lose their equal protection argument that marijuana criminalization involves a suspect classification or an improper purpose to discriminate. Crimes against marijuana use or possession involve no facially suspect classification, because they apply to all persons. Our defendants could try to argue that marijuana laws originated in the early 1900s based on an improper purpose to discriminate against Hispanics and Blacks. However, such arguments would likely not persuade courts in the modern era, because marijuana usage is widespread among the races and the defendants probably could not establish a governmental purpose to discriminate against a protected group through the enforcement of the marijuana laws today.<sup>271</sup> In an equal protection claim against the federal marijuana crimes, the challenger would also be hard-pressed to persuade that Congress had a discriminatory purpose at the time that marijuana was re-criminalized in the 1970 Controlled Substances Act.

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269. See *Clark*, 486 U.S. at 461 (“[C]lassifications affecting fundamental rights . . . are given the most exacting scrutiny.”); *supra* notes 227–235 and accompanying text (describing how the Court identifies fundamental rights).

270. See *supra* note 218 and accompanying text (describing the legitimate interest states might invoke to satisfy rational-basis).

271. Evidence exists, however, that marijuana laws are enforced in ways that produce racially disparate outcomes. See *Smoking Marijuana While Black*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/opinion/smoking-marijuana-while-black.html> (last visited Mar. 8, 2018) (discussing recent study showing that, while “African-Americans and Latinos make up about half of the population” of New York City, “they make up about 85 percent of those arrested for low-level marijuana offenses”) (on file with the Washington and Lee Law Review); Justine McDaniel, *Black Adults 8 Times as Likely to be Arrested for Pot in Pa. as Whites, Study Shows*, PHILA. INQUIRER, <http://www.philly.com/philly/business/cannabis/black-adults-8-times-as-likely-to-be-arrested-for-pot-in-pa-as-whites-study-shows-20171016.html> (last updated Oct. 16, 2017) (last visited Mar. 8, 2018) (showing racially disparate arrest records for marijuana use in 2016, despite marijuana use being equal among races) (on file with the Washington and Lee Law Review).

Our defendants also would not likely prevail on a claim that marijuana crimes discriminate unconstitutionally against them because alcohol and tobacco are legal.<sup>272</sup> As we have noted, alcohol and tobacco use are more dangerous in various ways than marijuana use.<sup>273</sup> The problem for the defendants is that this kind of differing treatment by government of marijuana users versus alcohol and tobacco users would only invoke rational-basis review. Moreover, the governmental rationale for criminalizing marijuana to avoid the dangers from its use would suffice to meet rational-basis review even if this action implies that government should also have concerns about the dangers of other legal substances. The government need not attempt to solve all similar problems in order to act rationally in trying to solve one of them.<sup>274</sup>

Claims by our defendants about unfair discrimination between marijuana use versus alcohol and tobacco use would also seem double-edged. If marijuana laws were held to violate equal protection, crimes like polygamy, prostitution and bestiality would also seem infirm. Those crimes also involve little risk of serious harm to the participants or others. Unless those crimes are also to fall, our defendants are unlikely to prevail.

#### *IV. Aggregating Rights-Based Clauses*

While no single clause could readily justify a constitutional right to possess and use recreational marijuana even when a super-majority of states have legalized it, proponents might

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272. Professor John Kaplan expressed the policy argument for consistency in the treatment of marijuana and alcohol by noting the reduced respect for law that arises when marijuana is criminalized and alcohol is not. *See* KAPLAN, *supra* note 18, at 291 (“For a criminal law to be effective, it must . . . have a solid moral base . . . . The problem with the argument that marijuana, though no worse than alcohol, should nonetheless be made illegal, is that it abandons an appeal to morality or to reason . . .”).

273. *See supra* notes 22, 213 and accompanying text (presenting findings showing that marijuana use is less risky than other forms of drug use).

274. *See* *Ravin v. State*, 537 P.2d 494, 512 (Alaska 1975) (“Assuming some degree of control of marijuana use is permissible, it does not follow that the political obstacles to placing controls on alcohol and tobacco should render the legislature unable to regulate other substances equally or less harmful.”); *cf.* *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955) (asserting that government can choose to move forward “one step at a time”).

contend that aggregated clauses together would provide support. I take a skeptical view, which begins in this Part with a critical exploration of the basic validity of rights-based clause aggregation. I acknowledge that there are Supreme Court cases that suggest that sometimes two or more clauses can substantiate a right that none of the clauses alone could validate.<sup>275</sup> However, I hypothesize that clause aggregation has not actually mattered in the Court's recognition of new rights under the Constitution. I also hypothesize that clause aggregation (if it really matters) is such an uncommon and unprincipled approach for rationalizing new constitutional rights that we should view it as unimportant. However, on both points I concede failure. One cannot disprove that clause aggregation sometimes has carried influence in judicial decision-making and that it has mattered often enough to suggest some patterns in which its application might help justify new constitutional rights in the future.

#### A. Supreme Court Endorsements

There is ostensible support in Supreme Court opinions for the notion that two or more rights-based clauses in the Constitution can come together to invalidate government action that none of the clauses could disallow on their own. The Court typically has declined to recognize multiple-clause rights,<sup>276</sup> apparently taking

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275. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015) (asserting that the Court's cases regarding the right to marry reflect a "synergy" between "the Equal Protection Clause and the Due Process Clause"); *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (asserting that the Court's decisions regarding access to appeal by criminal defendants reflect "both equal protection and due process concerns").

276. See Coenen, *supra* note 28, at 1067 (noting that "the Supreme Court typically addresses each of the relevant clauses in separate and sequential fashion, taking care not to let its analysis of one clause affect its analysis of any other"); Porat & Posner, *supra* note 27, at 51 (asserting that "outside these [aforementioned] settings [of rights-based clause aggregation,], courts rarely respond sympathetically to hybrid claims"); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 661 (1994) (explaining that typical constitutional rights adjudication involves "an individual balancing of each right against the interests that justify the government action"). *But see* Abrams & Garrett, *supra* note 43, at 1 (asserting, based in part on the existence of tacit clause aggregation, that "[c]umulative constitutional rights are everywhere").

the view in such cases that a failing argument under one clause counts for zero and that adding one zero to another will not increase the sum.<sup>277</sup> But, the Court occasionally has seemingly endorsed the approach by using two or more constitutional provisions together to support the existence of a right or by claiming that in past decisions this is what was really going on.<sup>278</sup> This kind of clause aggregation to create a new right should be distinguished from certain forms of aggregation that are undoubtedly permissible and not at issue here. First, courts automatically apply against the states' rights that come from certain "incorporated" clauses applicable against the federal government by using the Due Process Clause of the Fourteenth Amendment.<sup>279</sup> In such cases, the right already theoretically exists in relation to the federal government,<sup>280</sup> and, rather than being created by the "joint interpretation"<sup>281</sup> of two clauses, is merely being applied in exactly the same way against the states.<sup>282</sup> Second, courts can cumulate the harm to a litigant and thereby grant relief based on a series of constitutional errors that individually would be harmless.<sup>283</sup> This action involves adding

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277. For examples of such cases, see *infra* notes 410–413 and accompanying text (collecting cases).

278. See *infra* Parts III.A.1–10 (reviewing aggregation with respect to various rights).

279. See, e.g., *McDonald v. City of Chi.*, 561 U.S. 742, 750 (2010) (incorporating the Second Amendment against the states).

280. "Reverse incorporation" also amounts to a form of clause aggregation in which there is no "joint interpretation" going on, which is dissimilar from the kind of clause aggregation at issue here. Under reverse incorporation, the Court applies the mandate of equal protection, explicitly applicable against the states under the Fourteenth Amendment, against the federal government through the Due Process Clause of the Fifth Amendment. See *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954) ("We hold that racial segregation in the public schools of the District of Columbia is a denial of the due process of law guaranteed by the Fifth Amendment to the Constitution.").

281. *Abrams & Garrett*, *supra* note 43, at 9.

282. The Court articulated this same-standards approach beginning in the 1960s. See *Malloy v. Hogan*, 378 U.S. 1, 10 (1964) (declaring that incorporated Bill of Rights provisions "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment"). In recent years, the Court has continued to endorse this approach. See, e.g., *McDonald*, 561 U.S. at 788 (asserting that a "two-track alternative is now impractical").

283. See, e.g., *Taylor v. Kentucky*, 436 U.S. 478, 488 n.15 (1978) (finding that the "cumulative" harm from combination of constitutional errors warranted

harms from conceded errors, not creating a new right by combining two clauses. Third, where a certain level of harm is necessary to establish a constitutional violation,<sup>284</sup> courts can cumulate the harms to a litigant from a series of acts to establish a cognizable violation.<sup>285</sup> This approach also involves adding harms rather than combining clauses to establish the right and its infringement.<sup>286</sup> In contrast to those kind of aggregations, we are focused on whether “partial violations of multiple provisions”<sup>287</sup> can establish a right that would not otherwise exist. While a more controversial idea,

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reversal of conviction under “the due process guarantee of fundamental fairness” although none would individually warrant reversal).

284. Examples include violations of the Sixth Amendment right to effective assistance of counsel, see *Strickland v. Washington*, 466 U.S. 668, 682 (1984) (finding that “the defendant must show that counsel’s errors ‘resulted in actual and substantial disadvantage to the course of his defense’” to establish a constitutional violation), violations of the due process right to have the prosecution disclose material exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment”), and violations of the Eighth Amendment right against prison conditions amounting to cruel and unusual punishment, see *Wilson v. Seiter*, 501 U.S. 294, 303–05 (1991) (finding that state officials engage in cruel and unusual punishment if they act with “deliberate indifference” regarding conditions that deprive a prisoner of an “identifiable human need, such as food, warmth, or exercise”); *Helling v. McKinney*, 509 U.S. 25, 35 (1993) (describing impermissible conditions that expose a prisoner to “an unreasonable risk of serious damage to his future health”).

285. See *Abrams & Garrett*, *supra* note 43, at 8 (noting that “[t]he aggregation of incidents of conduct when litigating *Strickland* claims has not been controversial” but rather “has been understood as reflective of the cumulative nature of ineffective lawyering at various stages of a criminal case”); *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995) (determining “materiality” of prosecution’s failure to disclose exculpatory evidence by considering “the cumulative effect of suppression”); *Wilson*, 501 U.S. at 304 (noting that “conditions of confinement may establish an Eighth Amendment violation ‘in combination’ when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need”).

286. While permissible and sensible, lower courts often have not aggregated harms, particularly where they are of different types. For the view that courts should aggregate the prejudice from all errors affecting reliability, see John H. Blume & Christopher Seeds, *Reliability Matters: Reassociating Bagley Materiality, Strickland Prejudice, and Cumulative Harmless Error*, 95 J. CRIM. L. & CRIMINOLOGY 1153, 1154 (2005) (noting that violations “are generally divided” and proposing “that courts should consider the impact of . . . violations together”).

287. *Abrams & Garrett*, *supra* note 43, at 14.

the Court arguably has sometimes endorsed such hybrid or multiple-clause rights.<sup>288</sup>

### *1. Avoiding Compulsory Production of Private Papers*

An early example of arguable clause aggregation by the Supreme Court occurred in *Boyd v. United States*, a case previously noted in connection with the Fourth Amendment.<sup>289</sup> As we saw, in *Boyd*, the Court found unconstitutional a judicial order, issued in conformance with a statute, directing Boyd to produce records in a proceeding for forfeiture of merchandise allegedly

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288. To avoid unduly cluttering the text in this section, I mention here a few more examples of arguable clause aggregation by the Supreme Court. The first concerns ballot access. As Professor Michael Coenen notes: “The Court has struck down . . . various ballot access restrictions as running afoul of the First and Fourteenth Amendments, citing to both free association interests and equality interests as warranting a more robust set of limits on state laws that burden a candidate’s ability to run.” Coenen, *supra* note 28, at 1080.

Another example concerns the right to travel or migrate between the states. Beginning with *Saenz v. Roe*, 526 U.S. 489 (1999), the Court has grounded this right “primarily on the Privileges or Immunities Clause of the Fourteenth Amendment.” Coenen, *supra* note 28, at 1081 n.44. However, as Professor Stephen Kanter has noted, the source of this right is “one of the better examples of a composite/hybrid right that clearly reflects a Super-Penumbral or Whole is Greater than the Sum of Its Parts approach.” Stephen Kanter, *The Griswold Diagrams: Toward a Unified Theory of Constitutional Rights*, 28 CARDOZO L. REV. 623, 639 (2006). Professor Kanter explains that “[t]he elements of this right come from many sources,” including “the penumbral Dormant Commerce Clause, the Commerce Clause itself . . . the First Amendment right to ‘petition the Government for a redress of grievances[,] Equal Protection, the Citizenship Clause of the Fourteenth Amendment, together with the Privileges and Immunities Clause of Article IV, § 2, or with the Fourteenth Amendment Privileges or Immunities Clause.” *Id.* (footnotes omitted).

Various other arguable instances of tacit clause aggregation exist. For example, Professors Kerry Abrams and Brandon Garrett contend that the right to effective assistance of counsel, recognized in *Strickland v. Washington*, 466 U.S. 668 (1984), is grounded in both the Sixth Amendment right to counsel and the Due Process Clause. See Abrams & Garrett, *supra* note 43, at 31 (“[T]he . . . claim . . . vindicates both Sixth Amendment right to counsel and Fourteenth Amendment due process concerns.”). They note that the Sixth Amendment text does not guarantee an “effective” lawyer and argue that this aspect of the right is grounded in due process. See *id.* (“Th[e] right to effective assistance of counsel . . . itself goes further than the Sixth Amendment text . . . . This is therefore also an example of an intersectional claim . . . .”).

289. See *supra* notes 183–190 and accompanying text (discussing *Boyd*).



imported without payment of duties.<sup>290</sup> The Court arguably relied on a combination of the Fourth Amendment and the privilege against compelled self-incrimination in the Fifth Amendment. Justice Bradley, for the majority, asserted that at least regarding a compulsory production of a person's "private papers to be used as evidence to convict him of crime or to forfeit his goods," the "[F]ourth and [F]ifth [A]mendments run almost into each other."<sup>291</sup> Bradley identified "the intimate relation between the two amendments" and concluded that "[t]hey throw great light on each other."<sup>292</sup> He asserted that unreasonable searches and seizures "are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the [F]ifth [A]mendment" and that the prohibition on compelling one to be a witness against himself in a criminal case "throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the [F]ourth [A]mendment."<sup>293</sup> The Court's ruling in Boyd's favor could be understood as declaring the existence of a hybrid protection that rested on the two clauses together.<sup>294</sup>

## 2. *Avoiding Flag Salutes and Pledges of Allegiance*

Another more modern but still early example of arguable clause aggregation occurred in *West Virginia State Board of*

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290. See *Boyd v. United States*, 116 U.S. 616, 626–30 (1886) (reviewing legal canon to find that forcing one to forfeit "his private papers . . . is within . . . condemnation"), *abrogated by* *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294 (1967).

291. *Id.* at 630.

292. *Id.* at 633.

293. *Id.*

294. At one point, the Court said that the state's actions violated each provision, but, given its preceding discussion, could have meant that each took its meaning from the other when applied to Boyd's case, involving his private papers:

[W]e are further of the opinion that a compulsory production of the private books and papers of the owner of goods sought to be forfeited in such a suit is compelling him to be a witness against himself, with the meaning of the [F]ifth [A]mendment to the [C]onstitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the [F]ourth [A]mendment.

*Id.* at 634–35.

*Education v. Barnette*.<sup>295</sup> The case arose when two sisters were expelled from a West Virginia public school for refusing to salute the United States flag and to recite the pledge of allegiance.<sup>296</sup> A Board of Education resolution, prompted by a recently-enacted state law aimed at fostering the “spirit of Americanism,” had made such a refusal grounds for expulsion, among other consequences.<sup>297</sup> The sisters were Jehovah’s Witnesses, and, believing the flag salute and pledge sinful, challenged the state’s actions as a “denial of religious freedom and freedom of speech.”<sup>298</sup> They brought their claims under the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment.<sup>299</sup> The Court ruled in the girls’ favor, declaring that a state cannot “prescribe what shall be orthodox in politics, nationalism, religion, or matters of opinion, or force citizens to confess by word or act their faith therein.”<sup>300</sup> For the majority, Justice Jackson made clear that the protection was not limited to those with religious objections.<sup>301</sup> The opinion gave prominence to the First Amendment,<sup>302</sup> although it cited no particular clause as the basis for the ruling. Arguably, the support came from a combination of several provisions.<sup>303</sup> Professor Laurence Tribe has described *Barnette* as resting “on no single

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295. 319 U.S. 624 (1943).

296. *See id.* at 630 (“Children . . . have been expelled from school and are threatened with exclusion for no other cause [than refusing to salute the flag for religious reasons].”).

297. *Id.* at 625–26.

298. *Id.* at 629–30.

299. *See id.* (“The Board . . . moved to dismiss the complaint . . . alleging that the law and regulations . . . are invalid under the ‘due process’ and ‘equal protection’ clauses of the Fourteenth Amendment.”).

300. *Id.* at 642.

301. *See id.* at 634 (“Nor does the issue as we see it turn on one’s possession of particular religious views or the sincerity with which they are held.”).

302. *See id.* at 642 (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

303. The Court later described the decision as one of several that were “decided exclusively upon free speech grounds,” but that “also involved freedom of religion.” *Emp’t Div., Dept. of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 882 (1990), *superseded by statute*, Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb to 2000bb-4 (1993), *invalidated by City of Boerne v. Flores*, 521 U.S. 507 (1997).

clause of the Bill of Rights but on the broader postulates of our constitutional order.”<sup>304</sup> The ruling perhaps could be viewed as an example of tacit clause aggregation.

### 3. Accessing Post-Trial Proceedings by Indigents

Clause aggregation also arguably helped the Court to ensure access by indigent litigants to post-trial proceedings. Due process gives states great latitude on whether to provide for criminal appeals.<sup>305</sup> At the same time, equal protection typically allows the government to impose financial requirements on litigants, since indigence is not a suspect classification.<sup>306</sup> Nonetheless, in *Griffin v. Illinois*,<sup>307</sup> the Court ruled that a state that provides for criminal appeals of right may not condition appeals by indigent defendants on their payment for trial transcripts.<sup>308</sup> The rationale arguably rested on the *combination* of the Due Process Clause and the Equal Protection Clause: “[B]oth call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.”<sup>309</sup> Likewise, in *Douglas v. California*,<sup>310</sup> the Court found that a state may not require indigent criminal defendants to pay for their own counsel on appeals of right.<sup>311</sup> In this case as well, the Court cited the ideals of both due process and equality in support of the right.<sup>312</sup> In subsequent years,

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304. Tribe, *supra* note 36, at 26.

305. See, e.g., *McKane v. Durston*, 153 U.S. 684, 688–89 (1894) (finding that the Constitution does not require the opportunity to appeal a criminal conviction because “whether an appeal should be allowed . . . [is] for each state to determine for itself”).

306. See *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[P]overty, standing alone is not a suspect classification.”).

307. 351 U.S. 12 (1956).

308. See *id.* at 18 (finding that as Illinois provides for appeals, “at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons [who are indigent] from invidious discrimination”).

309. *Id.* at 17.

310. 372 U.S. 353 (1963).

311. See *id.* at 357–58 (finding that “[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of [counsel] . . . while the indigent . . . is forced to shift for himself”).

312. See *id.* at 356–58 (referencing both maxims).

the Court also looked back on those cases as ones in which due process and equal protection converged to provide the right.<sup>313</sup>

#### 4. Using Contraception

Probably the most well-known example of explicit clause aggregation occurred in *Griswold v. Connecticut*, where the Court identified a right of married couples to use contraception.<sup>314</sup> Justice Douglas, for the majority, eschewed reliance on the notion of substantive due process so as to avoid any suggestion of *Lochner*izing.<sup>315</sup> Instead, he found the right in the protection of “privacy surrounding the marriage relationship”<sup>316</sup> created by “penumbras, formed by emanations”<sup>317</sup> from the First Amendment, the Third Amendment, the Fourth Amendment, the Fifth Amendment, and the Ninth Amendment.<sup>318</sup> As for unmarried couples, the Court later extended the protection through the Equal Protection Clause.<sup>319</sup>

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313. See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 610 (2005) (asserting that the Court’s prior decisions regarding indigent access to appeals reflect “both equal protection and due process concerns”); *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (“We observe . . . that the Court’s decisions concerning access to judicial processes, commencing with *Griffin* . . . reflect both equal protection and due process concerns.”); *Bearden v. Georgia*, 461 U.S. 660, 665 (1983) (asserting that principles from the two clauses “converge” in the “analysis in these cases”); *Ross v. Moffitt*, 417 U.S. 600, 608–09 (1974) (asserting that the rationale for *Griffin* and *Douglas* was clause aggregation, “some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment”).

314. See *id.* at 484–86 (finding that with respect to a marital couple’s privacy, “[s]uch a law [criminalizing contraception use] cannot stand”).

315. See *id.* at 481–82 (rejecting “the invitation” to use Due Process with *Lochner* as a guide).

316. *Id.* at 486.

317. *Id.* at 484.

318. See *id.* (listing sources giving rise to “zones of privacy”).

319. See *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (“We hold that by providing dissimilar treatment for married and unmarried persons who are similarly situated, [the laws criminalizing contraceptive distribution, except to married couples] violate the Equal Protection Clause.”).

### 5. Viewing Obscene Pornography Privately at Home

In *Stanley v. Georgia*, the Court explicitly averred to clause aggregation in justifying a right to view obscene pornography privately at home.<sup>320</sup> The Court had previously held, without qualification, that obscenity is not protected by the First Amendment.<sup>321</sup> However, in *Stanley*, the Court created a narrow exception that built on two previously recognized fundamental rights, each purportedly also derived through clause aggregation.<sup>322</sup> First, the Court asserted that “[i]t is now well established that” there is a “right to receive information and ideas” that is grounded on two clauses in the First Amendment: the freedom “of speech and press.”<sup>323</sup> Likewise, the Court noted that “also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy.”<sup>324</sup> In support of this privacy right, the Court cited *Griswold*,<sup>325</sup> which, as we have seen, relied itself on clause aggregation.<sup>326</sup> The effect of the aggregation was both to support the new right and to narrowly limit its scope.<sup>327</sup>

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320. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (“We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.”); *infra* notes 323–327 and accompanying text (reviewing the *Stanley* application of clause aggregation).

321. See *Roth v. United States*, 354 U.S. 476, 485 (1957) (holding that “obscenity is not within the area of constitutionally protected speech or press”).

322. See *infra* notes 323–327 and accompanying text (explaining the Court’s methodology).

323. See *Stanley*, 394 U.S. at 564 (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943), among other cases).

324. *Id.* at 564.

325. See *id.* (referencing *Griswold*, among other cases).

326. See *supra* notes 314–319 and accompanying text (examining clause aggregation in *Griswold*).

327. The opinion was not always thoroughly transparent. In its statement of the holding at the end, the Court said that “the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime.” *Stanley*, 394 U.S. at 568. This was not entirely accurate, because the decision was actually based on multiple clauses both in the First Amendment and beyond. See *supra* notes 323–325 and accompanying text (detailing the actual grounds, based on clause aggregation).

### 6. *Engaging in Intimate Associations*

In *Roberts v. United States Jaycees*,<sup>328</sup> “the Court derived a right of intimate association (such as noninterference in family life) from the right to association in the First Amendment and the right to due process in the Fourteenth Amendment.”<sup>329</sup> The case involved a Minnesota statute that aimed to eliminate gender bias and that the Minnesota courts had applied to require a private, national organization with thousands of members to admit women to full membership.<sup>330</sup> The Supreme Court ultimately ruled that the organization was not the sort that involved intimate association.<sup>331</sup> However, in the process of recognizing the existence of such a right, the Court noted cases decided under the First Amendment and under the Due Process Clause that protected various aspects of family life.<sup>332</sup> The Court seemed to view the right to intimate association as a hybrid-clause right.<sup>333</sup>

### 7. *Engaging in Expressive Associations*

The Court arguably combined clauses to recognize a right of “expressive association” in *Boy Scouts of America v. Dale*.<sup>334</sup> At issue was a New Jersey law that required the Boy Scouts to readmit Dale to adult membership after the group’s leadership

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328. 468 U.S. 609 (1984).

329. Porat & Posner, *supra* note 27, at 50–51 (citing *Roberts*, 468 U.S. at 618–19).

330. *See Roberts*, 468 U.S. at 612–16 (addressing a conflict between the State’s effort to eliminate gender-based discrimination and the freedom of association of members of a private organization).

331. *See id.* at 620–22 (concluding that the organization lacked the distinctive characteristics that might afford constitutional protection to the decision to exclude women).

332. *See id.* at 619 (“Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one’s identity that is central to any concept of liberty.”).

333. *See Marcum v. Catron*, 70 F. Supp. 2d 728, 733–34 (E.D. Ky. 1999) (interpreting *Roberts* as having acknowledged intimate association as a “hybrid right”).

334. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000) (determining that the New Jersey Supreme Court’s interpretation of a New Jersey public accommodations law violated the Boy Scouts’ First Amendment right of expressive association).

dismissed him upon learning of his status as a gay person and of his gay-rights activism.<sup>335</sup> The Supreme Court rejected the application of the New Jersey law to the Boy Scouts, concluding that the group was engaged in expressive association and that one of the group's desires was not to condone homosexual conduct as a legitimate form of behavior.<sup>336</sup> Readmitting Dale to membership would have unduly burdened the group's expression of this view.<sup>337</sup> This right of expressive association<sup>338</sup> "might be taken as a hybrid of the right to free speech and the right to association."<sup>339</sup>

#### *8. Acting on Religious Beliefs Connected with Communicative Rights or Parenting Rights*

In several cases, the Court has invalidated even neutral, generally applicable laws based on the Free Exercise Clause in conjunction with another constitutional protection, such as the right of parents to direct the education of their children<sup>340</sup> or the freedom of speech or of the press.<sup>341</sup> For example, in *Wisconsin v.*

335. *See id.* at 644–45 (“New Jersey’s public accommodations statute prohibits, among other things, discrimination on the basis of sexual orientation in places of public accommodation.”).

336. *See id.* at 648–53 (“Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express.”).

337. *See id.* at 661 (“[P]ublic or judicial disapproval of a tenant of an organization’s expression does not justify the State’s effort to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.”).

338. The Court had previously recognized the right of “expressive association” in *Roberts v. United States Jaycees*, 468 U.S. 609, 618, 622–23 (1984), involving a Minnesota statute that the state had interpreted to require the Jaycees to admit women to membership. In *Roberts*, the Court had found that the state statute as applied to the Jaycees narrowly served a compelling interest of the state and imposed little burden on the expressive freedom of the Jaycees’ members. *Id.* at 623–29.

339. Porat & Posner, *supra* note 27, at 50.

340. *See, e.g., Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (determining that legislation that required children to attend public schools unreasonably interfered with parental rights).

341. *See Cantwell v. Connecticut*, 310 U.S. 296, 304–07 (1940) (concluding that a state statute that forbids any person from soliciting money or valuables for any alleged religious cause is a previous restraint upon the free exercise of religion and a deprivation of liberty without due process of law in violation of the

*Yoder*,<sup>342</sup> the Court invalidated compulsory school-attendance laws as applied to Amish parents who declined on religious grounds to send their children to public schools.<sup>343</sup> The *Barnette* case, as we have already seen, also arguably relied on both free speech and the free exercise clauses, if not others as well, to invalidate a compulsory flag salute and pledge of allegiance law when challenged by religious objectors.<sup>344</sup> In *Employment Division v. Smith*<sup>345</sup> the Court looked back on those cases, “in denying requests for free exercise relief,” and “suggested that the Free Exercise Clause might elsewhere operate ‘in conjunction with other constitutional protections’ to impose a stronger set of limits than what any single clause would impose on its own.”<sup>346</sup>

### 9. Engaging in Private Sexual Conduct

The Court’s decision in *Lawrence v. Texas*,<sup>347</sup> protecting the right of persons to engage in intimate sexual conduct, including with a person of the same sex, arguably reflected clause aggregation.<sup>348</sup> A Texas statute made it a crime for two persons of the same sex to engage in “deviate sexual intercourse with another

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Fourteenth Amendment).

342. 406 U.S. 205 (1972).

343. See *id.* at 233 (“[W]hen the interests of parenthood are combined with a free exercise claim . . . more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required to sustain the validity of the State’s requirement under the First Amendment.”).

344. See *supra* notes 295–304 and accompanying text (arguing that *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) is an example of tacit clause aggregation).

345. 494 U.S. 872, 881 (1990).

346. Coenen, *supra* note 28, at 1071. The *Smith* decision has been criticized for creating a “free exercise jurisprudence devoid of strict scrutiny except in ‘hybrid situations’ where free exercise claims are joined by colorable claims arising under another part of the Constitution.” Ming Hsu Chen, Note, *Two Wrongs Make a Right: Hybrid Claims of Discrimination*, 79 N.Y.U. L. REV. 685, 686 (2004); see also Coenen, *supra* note 28, at 1071–72 (noting that many commentators have criticized the decision for a variety of reasons, including its failure to explain how the combination analysis should function).

347. 539 U.S. 558 (2003).

348. See *id.* (invalidating a Texas statute that made it a crime for two persons of the same sex to engage in certain intimate sexual conduct).



individual of the same sex.”<sup>349</sup> The Court, through Justice Kennedy, decided the case under the Due Process Clause to make clear that it was overruling *Bowers v. Hardwick*,<sup>350</sup> a decision seventeen years earlier in which the Court upheld a Georgia statute that criminalized sodomy, whether committed with a person of the same or opposite sex.<sup>351</sup> By deciding *Lawrence* on due process rather than equal protection grounds, the Court clarified that even a facially non-discriminatory statute, like the one at issue in *Bowers*, was no longer constitutional.<sup>352</sup> Yet, the *Lawrence* opinion also noted the equal protection concerns involved and suggested that seeing the inequality at play helped the Court understand the importance of the liberty interest of all persons to engage in intimate sexual conduct.<sup>353</sup> Justice Kennedy said, at one point: “Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects,” and he emphasized that “a decision on the latter point advances both interests.”<sup>354</sup> Because Justice Kennedy also did not assert a “fundamental right,” but nonetheless invalidated the Texas statute, he seemed to employ a non-traditional analysis that rested on the convergence of both

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349. TEX. PENAL CODE ANN. § 21.06(a) (West 2003), *invalidated by Lawrence*, 539 U.S. at 579.

350. 478 U.S. 186 (1986).

351. *See* GA. CODE ANN. § 16-6-2 (1984)

A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . . .

A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years . . . .

352. Professor Pamela Karlan had suggested this approach, based on the asserted “synergistic” relationship of the two clauses, the year before in an article published in the *McGeorge Law Review*, a journal associated with the law school where Justice Kennedy taught constitutional law before ascending to the Supreme Court. *See* Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 474, 485–87 (2002) (“[S]ometimes looking at an issue stereoscopically—through the lenses of both the due process clause and the equal protection clause—can have synergistic effects, producing results that neither clause might reach by itself.”).

353. *See Lawrence*, 539 U.S. at 575 (“If protected conduct is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.”).

354. *Id.*

clauses. Indeed, the Court itself later looked back on *Lawrence* in those terms, asserting that the decision “drew upon principles of liberty and equality to define and protect the rights of gays and lesbians.”<sup>355</sup>

### 10. Entering Into Same-Sex Marriage

The constitutional right to enter into same-sex marriage also seems to rest on clause aggregation. In *Obergefell v. Hodges*, the Court invalidated statutes from several states that defined marriage as a union between one man and one woman and denied same-sex couples marriage licenses.<sup>356</sup> In seriatim discussions, Justice Kennedy, for the Court, referred to both the Due Process Clause and the Equal Protection Clause as the bases for the ruling.<sup>357</sup> Yet, he also asserted a relevant “synergy” between the two provisions.<sup>358</sup> Purportedly, this synergy also helped explain several earlier marriage-right decisions<sup>359</sup> and others, such as

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355. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015).

356. *See id.* at 2593, 2608 (“These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman.”).

357. *See id.* at 2604 (“It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality.”).

358. *See id.* at 2603 (“The synergy between the two protections is illustrated further in *Zablocki*.” (citing *Zablocki v. Redhail*, 434 U.S. 374 (1978))).

359. The Court pointed, for example, to *Loving v. Virginia*, 388 U.S. 1 (1967), in which it had struck down Virginia miscegenation statutes that criminally punished marriage between a white person and a non-white person. *See Obergefell*, 135 S. Ct. at 2603 (“In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause.”). Despite the Court’s effort to portray *Loving* as reflecting this dynamic, the hybrid-clause nature of the ruling there was not as clear as in *Obergefell*. *Id.* In *Loving*, the Court had declared the Virginia statutes to violate the Equal Protection Clause. *Loving*, 388 U.S. at 12. The Court then concluded that the prohibition offended the Due Process Clause *because* it denied equality: “To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State’s citizens of liberty without due process of law.” *Id.* While this language suggested some inter-connectedness between the two clauses, the decision in *Loving* was easily justified under the Equal Protection Clause alone, particularly because the statutes were “designed to maintain White Supremacy.” *Id.* at 11. Under that clause, a “racially discriminatory purpose is always enough to subject

*Lawrence*. In *Obergefell*, as in *Lawrence*, Justice Kennedy shifted the focus to the word “liberty” in the Due Process Clause and contended that liberty was intertwined with equality.<sup>360</sup> He asserted, for example: “Each concept—liberty and equal protection—leads to a stronger understanding of the other.”<sup>361</sup> He did not explain the interconnectedness at length in theoretical terms. But, in practical terms, the importance of the combination for identifying new constitutional rights was two-fold. First, it arguably limited the precedential value of the ruling to cases involving a claim for equal dignity by a group of persons who, because of what Justice Kennedy described as an “immutable”<sup>362</sup> characteristic, were previously subordinated, although they were not necessarily within a “suspect classification” under equal protection doctrine.<sup>363</sup> Second, that limitation, in turn, enabled the Court to avoid the “history and tradition” plus “careful delineation of the right” requirements<sup>364</sup> for identifying a “fundamental right.”<sup>365</sup> Because Justice Kennedy’s discussion under each of the clauses incorporated these departures from the Court’s traditional approaches, the ostensible influence of clause-aggregation was readily discernible.<sup>366</sup>

### *B. Has Clause Aggregation Actually Mattered?*

Despite the ostensible support in Supreme Court cases for the notion of rights-based clause aggregation, one could plausibly

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a law to strict scrutiny.” *Lawrence v. Texas*, 539 U.S. 558, 600 (2003) (Scalia, J., dissenting) (citing *Washington v. Davis*, 426 U.S. 229, 241–42 (1976)).

360. See *Obergefell*, 135 S. Ct. at 2604 (explaining that the Court has, on multiple occasions, confirmed the relation between liberty and equality); *Lawrence*, 539 U.S. at 575 (same).

361. *Obergefell*, 135 S. Ct. at 2603.

362. *Id.* at 2596.

363. See Yoshino, *supra* note 51, at 174 (arguing that the antisubordination principle constrains the precedential effect).

364. See *supra* notes 227–231 and accompanying text (explaining the Court’s approach to identifying a non-enumerated right that ranks as fundamental).

365. See Yoshino, *supra* note 51, at 162–66 (arguing that restrictions based on tradition will be more difficult to invoke after *Obergefell*).

366. See *id.* at 162–66, 174–76 (explaining potential effects of the *Obergefell* decision).

question whether it has actually been outcome-determinative in the creation of new constitutional rights. I hypothesize in this section that it has not mattered—that the Court would have created the same new constitutional rights by using single clauses were clause aggregation deemed an inappropriate rhetorical technique. Yet, I ultimately concede failure in proving this hypothesis. While clause aggregation is under-theorized in the Court’s opinions as a constitutional force, one cannot disprove that it sometimes has influenced decisions to recognize new constitutional protections.

### 1. *The Hypothesis of Non-Influence*

There are reasons to doubt that rights-based clause aggregation has mattered in producing constitutional rights. First, one could nitpick with some of the examples, such as *Boyd*,<sup>367</sup> because it was later overruled,<sup>368</sup> and *Barnette*, because the clause aggregation there was especially ambiguous.<sup>369</sup> But, putting aside

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367. See *supra* notes 183–190 and accompanying text (explaining that *Boyd v. United States*, 116 U.S. 616 (1886), was an early case wherein the Court began to examine “the zone of constitutionally protected interests and the limits on investigative authority” (quoting Rosenthal, *supra* note 183, at 888)).

368. As we have seen, the Court later rejected the whole idea that the Fifth Amendment privilege ever combines with the Fourth Amendment to protect certain kinds of evidence from compulsory production or search and seizure in a greater way than those provisions would afford protection on their own. See *supra* notes 199–203 and accompanying text (explaining that the Court overturned *Boyd* in *Warden v. Hayden*, 387 U.S. 294 (1976)).

369. While *Barnette* could have been based on multiple provisions in the First Amendment and beyond, it also seems plausible that it merely reflected an interpretation of the Free Speech Clause. On that view, the Free Speech Clause would have to protect not only the right of persons to affirmatively express their views but also their right not to be “forced to . . . make any statements when they would rather be silent or express different views.” Leora Harpaz, *Justice Jackson’s Flag Salute Legacy: The Supreme Court Struggles to Protect Intellectual Individualism*, 64 TEX. L. REV. 817, 818 (1986). Justice Kennedy’s strategic reference to *Barnette* in *Obergefell* hints perhaps that the ruling and its descendants should now be understood as reflecting a more expansive right, some qualified form of human “dignity.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2606 (2015). See generally Tribe, *supra* note 36, at 26 n.73. Nonetheless, one could still conclude that *Barnette*, while not resting explicitly on any single clause, was simply a freedom of expression case until given a much broader meaning later. See Harpaz, *supra*, at 20 (asserting that *Barnette* “was the first Supreme Court decision establishing that the free speech guarantee also secures the right to

those small concerns, the central challenge to clause aggregation is that it is irrelevant. In all of the purported examples, one can reasonably doubt that there is any aggregated or “synergized” harm greater than that which the Court could easily have acknowledged under the Fifth or Fourteenth Amendment Due Process Clauses. On this view, the use of multiple clauses was simply a way to *limit* the precedent, something that could also have been accomplished under a Due Process Clause with a bit of nuanced explanation.

Consider the group of cases involving the Due Process and Equal Protection Clauses—*Griffin* and *Douglas* along with *Lawrence* and *Obergefell*. In these cases, the Court viewed the individual interest at stake as highly important, whether or not called “fundamental.” In *Griffin* and *Douglas*, it was the opportunity to appeal a criminal conviction.<sup>370</sup> In *Lawrence*, it was the interest in engaging in intimate sexual activity.<sup>371</sup> In *Obergefell*, it was the interest of same-sex couples in entering into marriage, which the Court actually characterized as “fundamental.”<sup>372</sup> Given the Court’s view as to the importance of those interests, one could reasonably conclude that it would have decided all of those cases the same way under the Due Process Clause alone were clause aggregation deemed an improper rationalizing technique. On this view, the emphasis the Court gave in each of the cases to the vulnerable or subordinated experience of the class of persons to which the petitioners belonged (the equality concern) was primarily a way to limit the precedent. Only indigents, for example, had a right to a free trial transcript and government supplied counsel, not people who could pay.<sup>373</sup> Only

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remain silent in the face of a government effort to coerce expression”).

370. See *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (determining that States must provide adequate appellate review to all defendants, regardless of their ability to pay); *Douglas v. California*, 372 U.S. 353, 355 (1963) (same).

371. See *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (concluding that homosexuals have the right to engage in consensual sexual activity in the home without government intervention).

372. See *Obergefell*, 135 S. Ct. at 2604–05 (“[T]he right to marry is a fundamental right inherent in the liberty of a person, and . . . couples of the same-sex may not be deprived of that right and that liberty.”).

373. See *Griffin*, 351 U.S. at 18–19 (determining that States must provide adequate appellate review to all defendants, regardless of their ability to pay); *Douglas*, 372 U.S. at 355 (1963) (same).

gay or lesbian intimate sexual intimacy was protected, not adult incest or bestiality. And the right between two gay people to marry was newly protected, but not the right of three or more people to a plural marriage.<sup>374</sup> While clause aggregation was convenient for emphasizing the narrowing constraints, the Court could have accomplished the same limiting effect merely by carefully describing the boundaries of each holding under the Due Process Clause.<sup>375</sup>

For *Griswold* and cases in which the Court combined provisions from the First Amendment with the Due Process Clause, the aggregation is also reasonably viewed as not crucial to the outcomes. The *Griswold* use of penumbras from multiple clauses to identify a “privacy” right has been harshly criticized for a variety of reasons, including the failure to adequately explain “how a series of specified rights combined to create a new and unspecified right.”<sup>376</sup> Yet, the fact that “almost no one believes that the contraception decisions should now be overruled”<sup>377</sup> implies that the Court could have simply decided *Griswold* the same way directly under the Due Process Clause. Likewise, cases in which the Court recognized rights to intimate or expressive associations or rights to religious exercise in connection with an associational right could all have been grounded on the Due Process Clause. “The process of aggregating rights merely asks the ultimate constitutional question: To what degree has the challenged action infringed liberty?”<sup>378</sup> This ultimate question could have been asked

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374. See Yoshino, *supra* note 51, at 177 (“[T]he antisubordination principle likely provides a strong constraint on recognition of polygamous unions as a fundamental right.”).

375. Suspicion that the Court would have done the same thing in the absence of an Equal Protection Clause easily builds on the Court’s incorporation against the federal government through the Fifth Amendment Due Process Clause of equal protections rulings promulgated against the states. See generally *Bolling v. Sharpe*, 347 U.S. 497, 498–500 (1954). However, such “reverse incorporation” rulings, could also be seen as more essential in the Fifth Amendment context, based on the need to hold the federal government to the same standards as the states. See *supra* note 280 and accompanying text (“In such cases, the right already theoretically exists in relation to the federal government . . .”).

376. Bork, *supra* note 33, at 9.

377. RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 103 (1996).

378. David L. Faigman, *Measuring Constitutionality Transactionally*, 43 HASTINGS L.J. 753, 778 (1994).

and answered the same way under the Due Process Clause in those cases as under some amalgamation of provisions.

The same critique would apply to all of the other examples. Rights-based clause aggregation is merely a way to ask whether the challenged governmental action infringes a liberty that should be protected under the Constitution. That same question can always be asked under the Due Process Clause. The Court also has some room to manipulate what qualifies as a “fundamental right” or the standard of review to be applied in its due process cases to allow it usually to reach the result that it desires.<sup>379</sup> Thus, in the end, it is not logical that the answers it will provide should differ when it employs clause aggregation versus a direct due process analysis.

## 2. Countering the Hypothesis

The central difficulty with the hypothesis that rights-based clause aggregation doesn't really matter in constitutional adjudication is that it cannot be proven. Despite reasons for doubt, rights-based clause combination may well have been (and continue to be) outcome-determinative in the identification of constitutional rights. When the Court has turned to the clause aggregation approach, there was probably a reason.

In the cases involving the Due Process and Equal Protection Clauses, aggregation enabled the Court to depart from the *Glucksberg* strictures that governed the recognition of “fundamental rights,” and, thus, to find rights that it could not as easily have recognized under either clause alone.<sup>380</sup> In *Griffin* and *Douglas*, the Court apparently did not want to say there was a “fundamental right” to an appeal. It also did not want to say, given the implications, that indigence constitutes a “suspect classification.” Likewise, in *Lawrence*, the Court did not want to say there was a “fundamental right” to engage in the sexual acts

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379. See *supra* notes 191, 236–239 and accompanying text (explaining that the Court's approach to recognizing a fundamental right is manipulated to produce desired outcomes).

380. See *Griffin v. Illinois*, 351 U.S. 12, 18–19 (1956) (determining that States must provide adequate appellate review to all defendants, regardless of their ability to pay); *Douglas v. California*, 372 U.S. 353, 355 (1965) (same).

involved. And, it was not prepared to say that the petitioners, as gay or lesbian persons, were subject to a “suspect classification.” Nonetheless, in all three cases the Court was able to consider both clauses together and find a need for protection. It also applied these provisions against the states without declaring the existence of a “fundamental right.” If clause aggregation somehow had been deemed an unavailable rhetorical approach, perhaps the Court would have reached the same outcomes anyway, by simply identifying a “fundamental right” to an appeal or to intimate sexual activity. However, given the *Glucksberg* strictures,<sup>381</sup> that conclusion seems far from certain.

The same could be said about *Obergefell*. If there were no Equal Protection Clause, we cannot be sure that the Court would have reached the same result, even if we strongly suspect it. The complexity of dual violations that the Court introduced into the case by emphasizing that an unfairly subordinated group was being unfairly subordinated again—a problem the Court could express as a violation of equality—provided an especially strong confining effect on the ruling. The Court could “respond to the *Lochner* bugaboo by invoking the theme of antisubordination.”<sup>382</sup> The ability to tightly wind “the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*”<sup>383</sup> allowed Justice Kennedy to break out of the *Glucksberg* constraints with less concern that the rulings would have unduly expansive implications.<sup>384</sup> On this view, clause aggregation might have mattered.

As for cases in which the Court combined provisions from the first eight Amendments with the Due Process Clause and others as well, we also cannot be sure that the aggregation did not influence outcomes. Consider again *Stanley*, where the Court cited multiple clauses to recognize a right to view obscene pornography privately at home and, ultimately, to declare it a “fundamental”

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381. See *supra* notes 227–233 and accompanying text (discussing that the Court’s modern approach has limited the recognition of fundamental rights to those “deeply rooted in this Nation’s history and tradition”).

382. Tribe, *supra* note 36, at 19 nn.19–20.

383. *Id.* at 17 n.11.

384. See Yoshino, *supra* note 51, at 171 (asserting that the Court provided the principle for distinguishing *Lochner* “in its synthesis of liberty and equality”).



right.<sup>385</sup> If clause aggregation was an improper methodology, would the Court have reached the same outcome directly under the Due Process Clause? Perhaps, yet viewing obscene pornography seems rather sybaritic, and we should not forget that obscenity is generally excluded from First Amendment protection.<sup>386</sup> The reluctance of the Court to endorse obscene pornography more broadly hints that the majority might only have been able to get to its conclusion by combining the “right to receive information and ideas,” which was itself grounded on two clauses in the First Amendment—the freedom “of speech and press,”<sup>387</sup>—with “the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one’s privacy,”<sup>388</sup> which was grounded on *Griswold*’s multi-clause penumbral emanations.<sup>389</sup> Clause aggregation helped limit the precedent so as not to protect, on the one hand, public displays of obscene pornography, or, on the other hand, injecting heroin or possessing a sawed-off shotgun or shoulder-mounted missile launcher in the privacy of one’s home.<sup>390</sup> It also helped avoid claims of *Lochner*izing, which was harder to do “within the confines of the due process clauses,” because they “expressly list life, liberty and property as interests subject to due process protections.”<sup>391</sup> In the end, despite doubt, we cannot be certain that clause aggregation did not influence the outcome.

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385. See *supra* notes 321–329 and accompanying text (explaining that the Court relied on the First and Fourteenth Amendments in *Stanley*).

386. See *supra* note 321 and accompanying text (citing *Roth v. United States*, 354 U.S. 476, 485 (1957), wherein the court determined that obscenity is not constitutionally protected speech or press). The Court continued to maintain this view after *Stanley*. See *Miller v. California*, 413 U.S. 15, 23 (1973) (“[O]bscene material is unprotected by the First Amendment.”).

387. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)).

388. *Id.*

389. See *supra* notes 318, 378 and accompanying text (stating that the Court found that married couples have a right to use contraception by “penumbras, formed by emanations” from the First, Third, Fourth, Fifth, and Ninth Amendments (citation omitted)).

390. See *Stanley*, 394 U.S. at 568 n.11 (“What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime.”).

391. Kanter, *supra* note 288, at 672.

Even regarding *Griswold*, clause aggregation may have moved forward a ruling that would not otherwise have come until later. The Court at that time clearly was concerned about not re-*Lochnernizing* substantive due process.<sup>392</sup> The *Griswold* Court never mentioned the words “fundamental right,” even though it applied the protection against a state. The worry over *Lochner* was further evidenced by the majority’s failure even to mention the Due Process Clause as one of those from which a zone might also emanate and contribute to the liberty protection that it identified as surrounding contraception.<sup>393</sup> Nonetheless, the *Griswold* idea that multiple clauses, through overlapping zones emanating from their core and penumbral rights, can give rise to a new right not covered by the core or penumbra of any clause alone is not insensible.<sup>394</sup> The *Griswold* Court did not explain this idea well, but it is comprehensible, as Professor Stephen Kanter has demonstrated.<sup>395</sup> It is even plausible to see the core of particular clauses in the first eight amendments as falling within the core of the Due Process Clause, and yet see overlapping zones emanating from one or more of those clauses and from the larger Due Process Clause that give rise to rights that no single clause, through its core or penumbra, could support.<sup>396</sup> While the *Griswold* opinion

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392. See CHEMERINSKY, *supra* note 219, at 850 (“In an attempt to avoid substantive due process, Douglas, who had lived through the *Lochner* era, found privacy in the ‘penumbra’ of the Bill of Rights.”).

393. See *id.* at 849 (“Douglas, however, expressly rejected the argument that the right was protected under the liberty of the due process clause.”).

394. See Kanter, *supra* note 288, at 624 (“[T]here is legitimacy and vitality to this theory, even though it was rather vaguely and poorly explained in *Griswold*.”).

395. See *id.* at 625–40 (discussing the analytical approach to finding fundamental rights in the majority opinion in *Griswold*).

396. Professor Michael Coenen insightfully expressed the underlying problem:

Can we sensibly claim that a law “kind of,” “partially,” or “barely” complies with the dictates of a particular constitutional clause, or must we always reach the conclusion that the law either fully does or fully does not comply? I do not have a definitive answer to this question, and, in some sense, no such answer may exist. We are all free to adopt whatever metaphysical picture of the clauses we want to adopt, and it is hard for me to think of any objective criteria by which one such picture would qualify as more conceptually valid than any other. Some of us might prefer to compare the clauses to on/off switches, whereas others might prefer to compare them to sliding scales. We may have

was problematic for several reasons,<sup>397</sup> the Court majority apparently was not ready to find a fundamental right to protect marital contraceptive use directly under the Fourteenth Amendment. Even if the majority's thinking was illogical or ill-formed, the clause aggregation alternative may have helped one or more of those Justices to get to the *Griswold* holding.

In the end, if my allegation about the invalidity of rights-based clause aggregation was true, it would also perhaps prove too much. The idea that clause aggregation has been irrelevant would mean that the Court's modern substantive due process approach, as represented by *Glucksberg*, would have blown up long ago if it ever got off the ground. For, without the route for recognizing and protecting new rights offered by clause aggregation, the Court would have to have somehow recognized and protected those same rights, and in each case from the very start, directly through the Due Process Clause, which would not have been possible while maintaining any allegiance to the *Glucksberg* framework.

This reality points us back to the meaning of *Obergefell*, which used clause aggregation but also found a "fundamental right" to same-sex marriage by circumventing *Glucksberg*. Professors Kenji Yoshino and Laurence Tribe have concluded that *Obergefell* has now effectively blown up the *Glucksberg* strictures<sup>398</sup> and

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good practical arguments for favoring one conception over the other, but I suspect that any further conceptual debating of the issue would prove fruitless. There is, I suspect, no "right" or "wrong" view of the clauses metaphysical structure; there are only different metaphors that we may or may not choose to employ.

Coenen, *supra* note 28, at 1095.

397. See, e.g., Bork, *supra* note 33, at 9

Justice Douglas called the amendments and their penumbras "zones of privacy," though of course they are not that at all. They protect both private and public behavior and so would more properly be labelled 'zones of freedom' . . . . We are left with no idea of the sweep of the right of privacy.

See also CHEMERINSKY, *supra* note 219, at 850 (asserting that the opinion also does not seem to achieve Douglas's goal of avoiding substantive due process because the Bill of Rights is applied to the states as a matter of due process, so that "the penumbral approach is thus ultimately a due process analysis").

398. See Yoshino, *supra* note 51, at 162 ("After *Obergefell*, it will be much harder to invoke *Glucksberg* as binding precedent."); Tribe, *supra* note 36, at 16 n.4 (asserting that the *Obergefell* decision "represents the culmination of a decades-long project that has revolutionized fundamental rights jurisprudence" and "has definitely replaced *Washington v. Glucksberg*'s wooden three-prong

reconstructed substantive due process analysis based heavily on *Obergefell*'s emphasis on "anti-subordination" or "equal dignity."<sup>399</sup> I am not as sure, particularly because the anti-subordination principle offers little help in explaining some of the fundamental rights the Court has previously recognized, such as the one recognized in *Stanley*. I suggest that an important question to ask about *Obergefell* is whether it should be understood primarily to have constructed a grand new approach to substantive due process or primarily to have given a new bit of impetus to clause aggregation. I contend that these two ideas are not the same thing and that we should consider whether the latter view might be the more salient one.

*C. Is Clause Aggregation Principled Enough To Matter?*

Although rights-based clause aggregation may sometimes affect outcomes in Supreme Court decision-making, one could still doubt that it has mattered often enough and in a sufficiently principled way to have any normative force for the future. Indeed, I hypothesize in this section that rights-based clause aggregation is too rarely important and too unprincipled in its application for litigators ever to anticipate that it would succeed. Yet, while this hypothesis might actually be true, I reject the view that litigators should not focus more on aggregation arguments, especially after *Obergefell*. Most of the contours remain undeveloped in the Supreme Court's jurisprudence on rights-based clause aggregation. Yet, those who aim to foresee how constitutional rights will advance must try to find bases to understand how that approach could contribute to the recognition of new constitutional rights in the future.

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test").

399. See Yoshino, *supra* note 51, at 174 ("What emerges from *Lawrence* and *Obergefell* is a vision of liberty that I will call 'antisubordination liberty.'"); Tribe, *supra* note 36, at 20 nn.25–26 (asserting that "the rubric under which fundamental rights should be evaluated going forward is what I will call the doctrine of equal dignity").

1. *The Hypothesis of Unpredictably Rare Application*

The principal reasons to doubt that the Court's rather atypical use of rights-based clause aggregation has been principled enough to carry predictive power are of two sorts. First, the Court has never articulated rules or standards that help resolve when such aggregation is appropriate, and those measures are not obvious from the decisions. Second, the Court has failed to use clause aggregation in plenty of situations in which commentators have argued that it would have been warranted. Based on these omissions, a litigator could reasonably conclude that offering an argument based on rights-based clause aggregation—like a claim calling for recognition of a new “fundamental right” under the Due Process Clause alone—will *always* be akin to a Hail Mary. The best bet will almost always will be on failure.

In none of the cases in which the Court has employed rights-based clause aggregation has it provided a decent explanation for why, when or how the approach should apply. The *Griswold* opinion has been ridiculed for its vacuity on this score.<sup>400</sup> The Court did make a bit of effort at explanation way back in *Boyd*, but the assertions were more confounding than illuminating,<sup>401</sup> and, of course, *Boyd* was overruled both as to its holding and its rationales after the Fourth Amendment was incorporated and became important.<sup>402</sup> Look for a good explanation of the rules or standards governing clause aggregation in the opinions in *Barnette*, *Griffin*, *Stanley*, or any other Supreme Court case, and you will come up empty-handed. Even in *Obergefell*, Chief Justice Roberts's dissent was charitable in describing Justice Kennedy's explanation of a “profound” connection and “synergy”<sup>403</sup> between liberty and equality as “difficult to follow.”<sup>404</sup> Justice Kennedy's

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400. See, e.g., Dixon, *supra* note 33, at 84 (“Douglas . . . skipped through the Bill of Rights like a cheerleader—‘Give me a P . . . give me an R . . . give me an I . . .,’ and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right.”).

401. See *supra* notes 289–296 and accompanying text (arguing the Court's use of the Fourth and Fifth Amendments in *Boyd v. United States*, 116 U.S. 616 (1886) was an early example of clause aggregation).

402. See *supra* notes 199–203 and accompanying text (explaining that the Court overruled *Boyd* in *Warden v. Hayden*, 387 U.S. 294 (1976)).

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

404. *Id.* at 2623 (Roberts, C.J., dissenting).

explanation never penetrated the superifice. He said, for example: “The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial marriage.”<sup>405</sup> Here is another example: “Each concept—liberty and equal protection—leads to a stronger understanding of the other.”<sup>406</sup> Those sorts of statements were reiterations of the conclusion, not explanations, and Justice Scalia’s response was never refuted: “If the opinion is correct that the two clauses ‘converge in the identification and definition of [a] right,’ that is only because the majority’s likes and dislikes are predictably compatible.”<sup>407</sup> In the end, the problem for those trying to understand the “synergy” asserted in *Obergefell* is that, if there was one, “the Court did not define what the intersectional right consists in.”<sup>408</sup>

There are also plenty of instances in which commentators have noted that the Court could have but did not use clause aggregation,<sup>409</sup> and I will offer another. In *McCleskey v. Kemp*,<sup>410</sup> the petitioner challenged his death sentence under the Cruel and Unusual Punishments Clause and the Equal Protection Clause, using rather compelling statistical evidence to claim that the Georgia death penalty system unconstitutionally discriminated against him as a black defendant convicted of killing a white

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405. *Id.*

406. *Id.*

407. *Id.* at 2630 (Scalia, J., dissenting).

408. Abrams & Garrett, *supra* note 43, at 26.

409. See, e.g., *id.* at 39–40 (pointing to *Whren v. United States*, 517 U.S. 806 (1996), where the Court “famously deemed irrelevant to its Fourth Amendment analysis whether there was also racial targeting”); Porat & Posner, *supra* note 27, at 51–53 (pointing to *Wilkie v. Robbins*, 551 U.S. 537 (2007), involving two Fifth Amendment claims brought by a rancher against the Bureau of Land Management, alleging a taking and an illegal form of retaliation); David D. Meyers, *Gonzales v. Carhart and the Hazards of Muddled Scrutiny*, 17 J.L. & POLY. 57, 84 (2008) (pointing to *Gonzales v. Carhart*, 550 U.S. 124 (2007), where the Court upheld the federal Partial Birth Abortion Act of 2003, without taking account of the equality implications for women); Faigman, *supra* note 276, at 663 (noting “the Court has never specifically explained its failure to aggregate rights, even in cases where it would seem necessary to do so,” and pointing to *Ross v. Moffitt*, 417 U.S. 600 (1973), involving denial of a claim for appointment of counsel for state discretionary appeals in criminal cases).

410. 481 U.S. 279 (1987).

victim.<sup>411</sup> The Court could have chosen to employ a clause-combination approach that would have helped it rule in McCleskey's favor without setting a precedent that extended beyond the death penalty context. Instead, the Court chose to uphold his death sentence, addressing separately the Equal Protection Clause,<sup>412</sup> and the Cruel and Unusual Punishments Clause.<sup>413</sup> Why this seriatim approach? The answer is mysterious. Cases like *McCleskey* help confirm that the Court *chooses* when to employ clause aggregation from among the cases where it is plausibly employed, and the factors that influence that choice are unspoken by the Court and typically non-evident to the observer.

## 2. Countering the Hypothesis

The very idea of rights-based clause aggregation means that claims for new, unenumerated rights are judged at times more like figure skating than pole vaulting. In pole vaulting, one's score depends entirely on whether one gets over the still-standing bar, and there are no partial points for nice tries. Figure skating, by contrast, is not about such "all or nothing" leaps but about the overall quality of a presentation, in which a win may come from partial points for several jumps that were each imperfect but together were impressive. There is nothing theoretically wrong with this latter scoring approach. The rules for constitutional construction are not part of the natural order. And, as Professor Michael Coenen notes, the accumulation of partial points through clause aggregation is logical in theory: "Just as my limited desire to see a movie and my limited desire to buy clothes might together yield an overwhelming desire to go to the mall, so too might clauses providing limited individual support for a judicial result operate together to generate strong collective support for the result."<sup>414</sup>

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411. For a summary of the study, see DAVID C. BALUDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 40–228, 306–69 (1990).

412. *See id.* at 291–99 (addressing McCleskey's claim that the statute violates the Equal Protection clause).

413. *See id.* at 299–313 (addressing McCleskey's claim that the capital sentencing system violates the Eighth Amendment).

414. Coenen, *supra* note 28, at 1067.

Admittedly, the Court has not developed a method for deciding when to award and cumulate partial credit under each of multiple clauses, nor any method for deciding how many partial points to award for each of multiple imperfect constitutional contentions. Yet, these problems may be largely unavoidable. Clause-aggregation problems represent a series of unusual, if not one-off, conundrums that are not easily handled by a set of rules, standards or balancing tests.

Despite the uncertainties, there are some factors that probably influence the judicial use of rights-based clause aggregation that no interested litigants or observers should ignore. Obviously, a court is most likely to use the technique when the court has difficulty justifying the requested unenumerated protection as a “fundamental right” based on history and tradition but still finds the request compelling. “[J]udicial decision precedes articulate theory.”<sup>415</sup> That point is banal, but remembering it leads to another point that is more important. A court is more likely to use clause aggregation where the proponent of the right uses the approach to make the requested right appealing. Clause aggregation can sometimes assist in such an effort by enabling the full presentation of the various aspects of the harm involved with a challenged government action. If the litigant doesn’t use the strategy in a case where it could help persuade, the court is less likely to be persuaded. The court will then probably see the harm as it has been presented—divided into pieces—and think about the pieces separately.

A few patterns to be gleaned from the Supreme Court’s use of rights-based clause aggregation may also help predict its future application. First, as with claims addressed singularly under the Due Process Clause, the Court has more often recognized negative fundamental rights (the right to be free from governmental restraint) than positive fundamental rights (the right to a government benefit).<sup>416</sup> There are exceptions to this pattern, such as the provision of transcripts and counsel in *Griffin* and *Douglas*. However, in the vast majority of multiple-clause cases, including *Boyd*, *Barnette*, *Griswold*, *Stanley*, *Roberts*, *Dale*, *Yoder*, and *Lawrence*, the right recognized was one involving freedom from

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415. RICHARD A. POSNER, *OVERCOMING LAW* 194 (1995).

416. *Supra* note 230 and accompanying text.



government intrusion. We could also understand *Obergefell* as falling in the latter group, but marriage is a mixed bag, because its provision “creates a zone of privacy into which the state cannot intrude,” but also “requires the state to grant the parties recognition and benefits.”<sup>417</sup> Still, on the whole, the cases suggest that a request for recognition of a negative rather than a positive right is probably more likely to prevail.

The cases on clause aggregation also reveal a particular concern by the Court with “privacy.” *Griswold* purported to vindicate privacy by combining various clauses from the first eighth amendments to protect marital use of contraception.<sup>418</sup> *Stanley* also demonstrated a special concern with protecting privacy by relying on *Griswold* to protect private viewing of obscene pornography.<sup>419</sup> *Lawrence*, while purporting to protect the right of gay and lesbian persons to engage in intimate sexual contact under the Equal Protection Clause, relied heavily on *Griswold* and the right to privacy.<sup>420</sup> Although the claim to privacy will not shield all private conduct from government intrusion, it will favor the proponent of the right, at least where the conduct involved involves no harm to others.<sup>421</sup>

Claims involving “somewhat-suspect” discrimination along with “semi-fundamental” rights also seem to gain traction with the Court. This is what Justice Kennedy may have been referencing through the “synergy” idea in *Obergefell*. There, the synergy notion seemed like surplusage, because the Court earlier asserted that it already had identified same-sex marriage as a “fundamental”

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417. Yoshino, *supra* note 51, at 168.

418. See *supra* notes 314–319 and accompanying text (stating that in *Griswold v. Connecticut*, 381 U.S. 479 (1965) the Court found married couples have a right to use contraception by “penumbras, formed by emanations” from the First, Third, Fourth, Fifth, and Ninth Amendments).

419. *Supra* notes 324–328 and accompanying text.

420. See *Lawrence v. Texas*, 539 U.S. 558, 564–65 (2003) (discussing *Griswold* as “the beginning point in our decision”); *id.* at 578 (noting that the case “does not involve public conduct” and declaring that “[t]he petitioners are entitled to respect for their private lives” and that “[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime”).

421. See *id.* (emphasizing that “[t]he present case does not involve minors” or “persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused”).

right.<sup>422</sup> However, where that is not true, the idea has more allure. To demonstrate, imagine that we are picking coffee for ten millibits per basket. Most of us would be annoyed, even mad enough to complain, if the farm manager for the public owner paid eighty percent of the pickers (not us) two extra millibits per basket because they were good-looking. Assuming there were no minimum wage established, a court might conclude that, while “less-than-good-looking” persons is not a suspect classification, and while the manager’s discrimination has a rational basis (the manager prefers being around attractive people and thinks everyone else is happier and works harder), there ought to be a prohibition against this. A living wage is semi-fundamental to one’s existence, and discrimination based on good looks versus bad looks amounts to a somewhat-suspect classification. So, what should the court do? On this set of facts, the court might say there ought to be a right to a living wage of twelve millibits per basket.<sup>423</sup> It’s not because twelve millibits per basket is a fundamental right or because “less-than-good-looking” is a suspect classification. It’s because of the *combination* of a semi-fundamental interest and somewhat-suspect classification. This is the idea represented in cases like *Griffin*, *Douglas*, and *Lawrence*. The right rests on two clauses that neither alone would support it. While avoiding the *Glucksberg* strictures, the combination also confines the precedent based on the complexities.

The cases also reveal that the combined clauses should not double-count injury to create a new right.<sup>424</sup> This requirement can

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422. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“[T]he reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.”).

423. This outcome is not, however, compelled by the facts or by anything inherent in notions of liberty, equality or their combination. The court could decide that everyone should get just ten millibits per basket. The court could decide that everyone should get eleven and six-tenths millibits per basket. The Court could decide that good-looking people should get one but not two extra millibits per basket. Or, the Court could decide that nobody is getting paid enough and that everyone should receive at least fourteen millibits per basket. That none of these possibilities is necessarily wrong coincides with the view that the notion of a “synergy” between liberty and equality doesn’t lead to particular answers about “fundamental rights.”

424. *Fiallo v. Bell*, 430 U.S. 787 (1977), exemplifies this idea in an immigration case involving two claims of discrimination. One of the petitioners, a U.S. citizen, challenged the denial of a visa to his biological son born out of

sometimes present “difficult value judgments”<sup>425</sup> that can “mask what are at their core normative debates about what the substance of the doctrines should be.”<sup>426</sup> Yet, clearly some combination claims would only seek double credit for harm already fully encompassed by one of the clauses.<sup>427</sup> For example, suppose a federal criminal defendant claimed a denial of both the right to effective assistance of counsel and the right to due process from defense counsel’s failure to object to improper comments by the prosecutor in closing argument. If the argument is not a winner because of inadequate prejudice under either clause alone, it does not become a winner when the claim is brought as a hybrid. Each clause would already take account of whatever prejudice was involved, and that harm would either be enough to constitute a violation or it would not.<sup>428</sup> Separate clauses should account for separate aspects of an injury

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wedlock. *Id.* at 790. Under then-existing law, the child of a non-married father was not entitled to a visa based on the father’s status as a citizen. *Id.* Petitioner claimed the statute discriminated against him both as a man and as a non-marital father. *Id.* Because of the “plenary power” doctrine, only rational-basis review would normally apply. *Id.* Petitioner’s counsel argued that the dual nature of the discrimination justified heightened scrutiny. *Id.* Yet, this was an effort to have the Court double count the same injury to create a special right, and the Court rejected it. *See id.* at 794 (“[T]his Court has resolved similar challenges to immigration legislation based on other constitutional rights of citizens, and has rejected the suggestion that more searching judicial scrutiny is required.”).

425. Coenen, *supra* note 28, at 1124.

426. *Id.* at 1125.

427. *See id.* at 1122–25 (“Just as courts might undervalue the combination-based elements of a prior decision, so too might they overvalue these elements, by combining constitutional clauses that have already been combined.”); Faigman, *supra* note 276, at 662 (“To be sure, certain specific constitutional values can be found implicit in both the Fifth and Fourteenth Amendments and so, double counting must be avoided when aggregating rights.”).

428. Professors Kerry Abrams and Brandon Garrett would make the case, I believe, that the right to effective assistance of counsel already vindicates both the Sixth Amendment right to counsel and the due process right to a fair trial. *See Abrams & Garrett, supra* note 43, at 31 (“The right to *effective* assistance of counsel at trial and during pre-trial representation, itself goes further than the Sixth Amendment text, which guarantees a right to a lawyer, but not an effective one.”). This insight would help illuminate why trying to create a hybrid-clause claim for relief on these facts would amount to double counting and should be rejected. However, even if the right to *effective* assistance of counsel is viewed as grounded solely in the Sixth Amendment, there would still be double-counting going on.

the aggregation of which none of the clauses would encompass alone.<sup>429</sup>

The cases also reveal that the harms aggregated under multiple clauses must cohere around a relatively specific right for it to receive recognition. Otherwise, the grievant could simply point to various constitutional clauses in combination to support a “right to be treated fairly” or a “right to a fair trial,” and, to establish a violation, offer a series of scattered complaints each with some substance but none amounting to a constitutional violation. This will not do. The Supreme Court has not clarified how specific the right must be to receive recognition through clause aggregation. Nonetheless, one can see from reviewing the Court’s decisions that the recognized rights are generally quite specific. Even when the Court has expressed the right in overly-broad terms, such as the right to “privacy,” the liberty actually protected could be defined narrowly.

If the past is prologue, clause aggregation will not work very often to promote the recognition of new constitutional rights. Yet, it is important to try to envision situations in which the approach might apply. That brings us back to recreational marijuana activities. Could clause aggregation at some point help make the case for a constitutional right to use and possess marijuana in limited circumstances? We now turn to that question.

#### *V. The Clause Aggregation Case for a Right To Possess and Use Marijuana for Recreational Purposes*

The case for a federal constitutional right to engage in recreational marijuana activities in states that continue to criminalize that conduct is for the future. At present, there are strong arguments favoring a constitutional right to possess and use marijuana for therapeutic purposes in jurisdictions that do not yet permit even medical use.<sup>430</sup> There are also plausible arguments, based in part on federalism concerns, to support a

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429. See Faigman, *supra* note 276, at 662 (“[D]ouble counting must be avoided when aggregating rights.”).

430. See *supra* notes 247–253 and accompanying text (arguing that marijuana becomes fundamentally important to one’s well-being when consumed to relieve “excruciating pain and suffering”).

constitutional challenge to federal prosecutions of minor marijuana crimes in states that have stopped criminalizing such conduct.<sup>431</sup> However, for recreational marijuana activities, the time probably has not arrived for recognition of a federal constitutional right, regardless of how proponents frame the argument. There is not a sufficient national consensus to support the claim, as demonstrated by the still small number of states that have legalized recreational marijuana and the continuing criminalization at the federal level.<sup>432</sup> While we have seen grounds to anticipate that a solid majority of states will legalize for recreational purposes within a decade or two,<sup>433</sup> we have also seen that single-clause arguments for a constitutional right would not likely succeed even then.<sup>434</sup> But, could proponents of a right prevail at that point using a clause aggregation approach? In this Part, I explain why that is a better strategy. As to whether it could succeed, I answer with cautious affirmance, focusing on adults only and on use only in private settings and on possession in public only of small amounts. I limit consideration to those scenarios, because they present the best possibilities for success.

#### *A. The Clause Aggregation Approach Applied*

Clause aggregation, as opposed to a single clause approach, would favor proponents of the right in three ways. First, it would allow them to present, for balancing against the state's interests, a more complete picture of the harms caused by the marijuana prohibition. Second, it would allow a court to use the greater complexity of considerations involved to better confine the

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431. See *supra* note 134 and accompanying text (suggesting that marijuana could be removed from the federal Controlled Substances Act, thus resolving a federalism concern).

432. See *supra* notes 125–134 and accompanying text (noting that only eight states plus D.C. have legalized marijuana and that tension remains between federal and state law enforcement).

433. See *supra* notes 135–143 and accompanying text (suggesting that more states will legalize recreational marijuana use on a limited basis within only a few years).

434. See *supra* Part II (examining why alternative arguments under the Cruel and Unusual Punishments Clause, the Fourth Amendment, the Due Process Clause, and the Equal Protection Clause would likely fail).

precedential effect of a ruling in their favor. Third, the first two effects could encourage the Court to apply a higher level of scrutiny to the state's asserted rationales for prohibition and, ultimately, to produce a ruling in the proponents' favor. To understand how these effects would play out, let's hypothesize persons similar to those we imagined in Part II, adult defendants charged in criminal cases with minor marijuana offenses. We are again assuming that thirty states have legalized minor marijuana activity. Let's also imagine now that the defendants are among a broader group of civil plaintiffs that includes users or would-be users of marijuana who are suing for declaratory relief against the enforcement of a state's marijuana laws, by claiming a federal constitutional right.<sup>435</sup> Exploring the interests of the individual that these plaintiffs could emphasize by employing a clause aggregation approach can help us see why they are more likely to prevail than our hypothetical litigants in Part II, who focused on single clause arguments.

### *1. Bringing to Light the Individual Interests*

As we saw in Part II, a single clause approach to challenging the cannabis laws based on the existence of a constitutional right never requires the reviewing court to consider the balance of interests involved between individuals and the state. A categorical challenge under the Cruel and Unusual Punishment Clause alone can be tossed as quickly as the court concludes that there is not enough evidence of a national consensus against marijuana prohibitions.<sup>436</sup> A categorical challenge under the Fourth Amendment will be rejected out of hand on the view that such

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435. Attacking federal marijuana crimes through a civil action for declaratory relief was the approach followed by the unsuccessful plaintiffs, medical marijuana users, and their marijuana providers in *Gonzales v. Raich*, 545 U.S. 1 (2005). See also *Raich v. Gonzales*, 500 F.3d 850, 854 (9th Cir. 2007) (following, on remand, the Supreme Court's decision, affirming the district court's denial of motion for preliminary injunction). To meet constitutional standing requirements, "the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable decision.'" *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (citation omitted). Our hypothetical plaintiffs could meet this standard. See generally *Raich*, 500 F.3d. at 857.

436. See *supra* Part II.A (concluding that the hypothetical defendants should expect to lose because they engaged in affirmative, voluntary conduct that society has not yet sufficiently condoned).

claims are not contemplated by that provision.<sup>437</sup> A challenge under the Due Process Clause, since there is no “fundamental right” based on history and tradition, will only require the government to show a rational basis for its marijuana crimes, something it can accomplish merely by stating a few plausible concerns associated with marijuana usage.<sup>438</sup> The same is true under the Equal Protection Clause, once the court finds that the challengers are not subject to a suspect classification.<sup>439</sup> The various interests of the individual with regard to the marijuana laws do not even make it to the surface to be acknowledged under this single-clause approach. They are essentially irrelevant.

What about under a clause aggregation approach? First, let’s consider what interests are at stake in relation to the marijuana prohibition for our hypothetical litigants. At the highest level of abstraction, they would allege that it is about their liberty or autonomy to experience their life as they please as long as they do no significant harm to others, which also encompasses the idea that they do no major harm to themselves. In more specific terms, for those arrested and charged, the interest is in avoiding punishments, fines, fees, and stigma related to their potential criminal convictions for what they would say is essentially non-culpable behavior, as demonstrated by its legalization in a super-majority of states. For those who want to use marijuana or want to use it more than they do but have been deterred by the law, it would be the loss of the benefits of use, a similar loss of autonomy in their efforts to endure the vicissitudes of life. In addition to its therapeutic benefits for many users,<sup>440</sup> marijuana brings a feeling of well-being and pleasure to many others,<sup>441</sup> which

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437. See *supra* Part II.B (noting that, under modern Fourth Amendment law, there are no categories of ordinary criminal evidence that are recognized as immune from police search and seizure).

438. See *supra* Part II.C (noting that states can easily satisfy the “rational basis” standard of review).

439. See *supra* Part II.D (stating that criminalizing marijuana activity involves no discrimination based on a suspect classification or improper purpose).

440. See *supra* note 110 and accompanying text (identifying conditions which cannabis or cannabinoids are effective for treating).

441. See *Ravin v. State*, 537 P.2d 494, 506 (Alaska 1975) (stating that “[t]he immediate psychological effects of marijuana are typically a mild euphoria and a relaxed feeling of well-being,” and many users also experience “a heightened sensitivity to taste and to visual and aural sensations”).

is why, before 2014, 111 million Americans had tried marijuana, despite its widespread illegality.<sup>442</sup> For many of the plaintiffs, there would also be the loss of privacy and security in their persons, homes and effects from the actual or feared intrusion by the police to discover the marijuana. For many of the plaintiffs, there would also be the added injury of realizing that they are being treated differently in their own state than similarly situated persons who possess or use alcohol or tobacco, substances that are more dangerous to the user or others than cannabis, but not prohibited.<sup>443</sup>

The Bill of Rights and Fourteenth Amendment encompass these concerns sufficiently to conclude that considering and weighing them seems relevant in asking whether a marijuana prohibition is *constitutionally* sensible. The Cruel and Unusual Punishments Clause is concerned with over-punishing conduct or, according to *Robinson v. California*, making something criminal that is not sufficiently culpable to merit criminalization.<sup>444</sup> The Fourth Amendment is concerned with protecting the privacy of one's home and the security of one's person and effects against governmental invasion. According to *Griswold v. Connecticut* and *Stanley v. Georgia*, the First, Third, Fifth, and Ninth Amendments also come together with the Fourth Amendment to provide an especially strong "privacy" protection for the home.<sup>445</sup> Further, the liberties protected in a substantive sense by the Due Process Clause extend to "certain personal choices central to individual dignity and autonomy,"<sup>446</sup> and decisions regarding what to consume or ingest into one's body come near the core of those libertarian concerns. Finally, the Equal Protection Clause focuses on troubling disparities in the treatment of persons,<sup>447</sup> which our

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442. See Boffey, *supra* note 22, at A22 (reporting that, despite its illegality, marijuana is less dangerous than alcohol and tobacco).

443. See *id.* (positing that marijuana's "downsides are not reasons to impose criminal penalties on its possession, particularly not in a society that permits nicotine use and celebrates drinking").

444. See *supra* notes 162–169 and accompanying text (deciding that a California law could not criminalize a mere status in lieu of actual culpable conduct).

445. See *supra* notes 257–259 and accompanying text (finding privacy protection in the "penumbras" of these amendments).

446. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

447. See *supra* notes 257–258 and accompanying text (directing that persons



plaintiffs allege occurs between marijuana users and users of alcohol and tobacco. While none of these clauses alone would give rise to a right to possess and use marijuana, they can be understood to come together to make relevant the individual interests at stake in determining whether *the Constitution*, through its “broader postulates,”<sup>448</sup> creates such a right.

To focus on this broader set of individual interests in assessing the constitutional question is not to engage in judicial legislating. The constitutional propriety of such an inquiry is highlighted by recognizing that clause aggregation would not make relevant all of the evidence and arguments that proponents of the right might want to offer against the marijuana laws in a legislative context. For example, proponents of the right might wish to present evidence and argument that our marijuana prohibitions have negatively affected Mexico, by fomenting a black market that has helped sustain illegal Mexican drug cartels that, in turn, have spurred violence and corruption in that country.<sup>449</sup> Indeed, prior to the beginning of legalization in the United States, marijuana accounted for about one and one-half billion dollars per year for those cartels, approximately twenty percent of their annual

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in an equal position should be treated equally).

448. Tribe, *supra* note 36, at 18 n.16. Although I do not aim to resolve the precise contours of the right, a clause-aggregation approach could readily confer more than mere freedom from criminal sanctions. Consider that a state might impose civil bans and sanctions, including property forfeitures, on minor marijuana activity. For a discussion of civil sanctions on marijuana activity, see MIKOS, *supra* note 1, at 92. Civil bans and sanctions would not implicate the same injury to one’s liberty that arises with a criminal conviction and sentence, but could still raise similar concerns to criminal bans, including widespread invasions of privacy. Some states empower law enforcement to conduct searches for civil as well as criminal contraband. *See id.* at 166–70 (presenting contrasting state-court cases that allow and disallow searches for marijuana as civil contraband). Thus, a clause-aggregation approach seemingly could justify striking down civil bans and sanctions if it justified striking down criminal bans and sanctions. At the same time, I propose a right to use and possess marijuana only as a negative right against state interference. Moreover, I do not propose that it would necessarily entail freedom from all state-imposed burdens on use and possession, such as taxes or even criminal prohibitions on marijuana transactions.

449. See Elisabeth Malkin & Azam Ahmed, *Ruling in Mexico Sets Into Motion Legal Marijuana*, N.Y. TIMES, Nov. 5, 2015, at A1 (noting the political corruption and violence fomented in Mexico by the drug cartels, explaining the importance of marijuana to their revenues, and asserting that legalization of U.S. marijuana production could dry up demand for Mexican marijuana in the U.S.).

revenues.<sup>450</sup> While the consequences for our neighboring country might be another policy reason to favor legalization, it is an argument for legislative reform and not properly part of the *constitutional* calculus.<sup>451</sup>

Considering the various interests of the right proponents also arguably makes sense here. As we have seen, there are no established criteria that define when a court is to view as a unified whole some set of individually imperfect claims that each tie to different clauses.<sup>452</sup> However, we have also seen patterns that appear in the Supreme Court cases involving multi-clause rights,<sup>453</sup> and the claims of our defendant fit the patterns. Although not an absolute requirement, the defendants seek a negative liberty rather than a positive one, meaning they seek only to be left alone by government rather to gain an entitlement. The rights for which they seek recognition also can be understood as fairly specific—the right to possess and use marijuana—rather than as only a highly abstract one, such as a right to be treated fairly. Likewise, the harms they seek to aggregate are separate in the sense that combining them would not involve merely a ruse of double-counting. At the same time, the harms they allege logically tie together as the individual interests at stake when a government criminalizes even minor marijuana activity.

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450. See BEAU KILMER, JONATHAN P. CAULKINS, BRITTANY M. BOND & PETER H. REUTER, REDUCING DRUG TRAFFICKING REVENUES AND VIOLENCE IN MEXICO: WOULD LEGALIZING MARIJUANA IN CALIFORNIA HELP? 3 (2010), [www.rand.org/content/dam/rand/pubs/occasional\\_papers/2010/RAND\\_OP325.pdf](http://www.rand.org/content/dam/rand/pubs/occasional_papers/2010/RAND_OP325.pdf) (estimating gross revenues from moving marijuana across the border into the United States and selling it to wholesalers).

451. A variety of other concerns might also affect the legislative question but not the constitutional question. For example, states could allocate law enforcement and correctional resources that are dedicated to marijuana to other problems, and could also tax marijuana sales, producing resources for supporting the enforcement of laws against more dangerous drugs. See KAPLAN, *supra* note 18, at 349 (“Licensing the sale of marijuana . . . might also have the desired effect of restricting the underground drug market that today makes available, and even encourages, the use of drugs far more harmful than marijuana.”).

452. See *supra* notes 400–410 and accompanying text (noting that the Court has not provided a decent explanation for why, when, or how the approach should apply).

453. See *supra* notes 414–432 and accompanying text (arguing that a court is more likely to use clause aggregation where the proponent of the right uses the approach to make the requested right appealing).

For a court to aggregate, some claims may need to be “colorable” on an individual basis, and our litigants also arguably meet that standard. Their claim would not likely prevail under the Due Process Clause alone, but their due process contention is also one that a court would likely have trouble rationalizing away as clearly without merit. After all, given that viewing obscene pornography at home was declared a “fundamental right” in *Stanley*,<sup>454</sup> why is it so obvious that using marijuana at home (or even having a small amount in one’s pocket in public) should not qualify? Perhaps there is more harm from marijuana use than from viewing obscene pornography, but a court would probably struggle some to justify the differing treatment. Likewise, the claim of our hypothetical litigants under the Cruel and Unusual Punishment Clause is inadequate by itself to justify their proposed right, but arguably still a colorable contention. That is so because we are assuming that a super-majority of states have legalized recreational marijuana under their own laws, which implies that a societal consensus has nearly developed that the conduct is non-culpable.<sup>455</sup> The litigants’ aggregation strategy may depend on whether this claim is colorable. We can see its importance by imagining how a court would view their clause-aggregation claim if they presented it today, when only a small number of states have legalized. A court might well reject the approach and analyze the case under single clauses, separately.

## 2. Limiting the Precedent

A second important consequence of employing a clause-aggregation approach is to increase the complexity of the rationale for a ruling favoring the existence of the right. The added

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454. See *Stanley v. Georgia*, 394 U.S. 557, 568 (1969) (finding that the “right to read or observe what he pleases” is fundamental to our scheme of individual liberty).

455. If almost all states plus the federal government had legalized recreational marijuana, the litigants would have a colorable claim under the Cruel and Unusual Punishments Clause alone—maybe a “near-miss.” See *supra* notes 158–175 and accompanying text (suggesting that if society had sufficiently condoned the use of marijuana, the litigants would have a better Cruel and Unusual Punishments argument). With only a super-majority of states having legalized, their claim would be less strong but arguably still colorable.

complication would actually favor the right proponents. The multi-sourced basis for a ruling in their favor would help confine the scope of the holding. A court could try to introduce the same sort of complexity under a single clause by merely stating that the holding was limited by various factors. However, that approach would either alter existing doctrine under those clauses or, if the court stated that the marijuana case was *sui generis*, appear as an unjustified departure from the doctrine. Clause aggregation would allow the court to *justifiably* confine the holding, without changing existing, single-clause jurisprudence.

We have already seen the consequences of an effort by a court to rule for our right proponents under any single clause. A ruling for them under the Cruel and Unusual Punishments Clause alone would imply that the death penalty could also soon become categorically unconstitutional.<sup>456</sup> A ruling for them under the Fourth Amendment or under the Due Process Clause would imply that using or possessing dangerous drugs, like heroin, cocaine, and methamphetamines, should also receive protection.<sup>457</sup> A ruling for them under the Equal Protection Clause would imply that crimes like polygamy, prostitution, and bestiality are all vulnerable, because they also involve matters of personal autonomy that arguably cause only minor social harm and minimal harm to the defendant.<sup>458</sup> Were a court tempted to find a right to pursue minor marijuana activities under any of the single clauses, the prospect of those kinds of collateral consequences would provide cause for second thoughts.

Through clause aggregation, a court could rule for our right proponents without such concerns. For example, because a ruling in their favor would rest in part on the liberty under due process to make “certain personal choices central to individual dignity and

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456. See *supra* notes 176–178 and accompanying text (arguing that if the Eighth Amendment supported a right to possess or use marijuana, the death penalty would seem in danger of constitutional invalidation).

457. See *supra* notes 212–215, 254–256 and accompanying text (arguing that if the Fourth Amendment supported a right to possess or use marijuana, other drug crimes might also seem invalid).

458. See *supra* note 274 and accompanying text (arguing that if marijuana laws were held to violate equal protection, crimes involving little risk of serious harm to the participants or others might become vulnerable).

autonomy,”<sup>459</sup> the validity of the death penalty would not be put in question by also basing the ruling on the Cruel and Unusual Punishments Clause. Few persons would conclude that “individual dignity and autonomy” encompass the right to commit a capital crime. Likewise, because a ruling in their favor would rest in part on the Cruel and Unusual Punishments Clause, the validity of dangerous drug-possession crimes would not be put in doubt by also basing the ruling on the Due Process Clause or the Fourth Amendment. Doubt over the societal consensus as to the permissibility of minor marijuana activity would not extend to injecting heroin or ingesting crack cocaine, even if conducted privately in one’s home.

Clause aggregation would also allow a court to justifiably rebuff claims that it was re-Lochnerizing substantive due process. This was the concern of the Supreme Court in *Griswold*,<sup>460</sup> that helps explain why the Court used clause aggregation there.<sup>461</sup> The same benefit would accrue in using clause aggregation to recognize a right to engage in minor marijuana activities. By relying on multiple clauses rather than due process alone, the Court would not have to declare the existence of a “fundamental” right to use and ingest marijuana. It could simply find the right to exist under multiple clauses, and the protection would apply automatically to the states because several of those clauses have already been incorporated. This was the Court’s approach not only in *Griswold* but in several other clause aggregation decisions declaring new rights and applying them against the states, such as *Lawrence v. Texas* and *Boy Scouts of America v. Dale*.

### 3. Scrutinizing and Balancing Government Rationales

Clause aggregation potentially produces a third effect that is a consequence of the first two. Acknowledging the individual

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459. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015).

460. See CHEMERINSKY, *supra* note 219, at 850 (“In an attempt to avoid substantive due process, Douglas, who had lived through the *Lochner* era, found privacy in the ‘penumbra’ of the Bill of Rights.”).

461. See *supra* notes 392–395 and accompanying text (noting how the majority’s worry over *Lochner* emanated from its failure to mention the Due Process Clause as contributing to the liberty protection surrounding contraception).

interests at stake and seeing the limiting effect of a multi-sourced ruling favoring a right can encourage the court to apply a higher level of scrutiny to the state's asserted rationales for prohibition. The very act of taking into account the individual's interests at stake contemplates that they also should weigh against the state's competing rationales in the calculus over if and when the marijuana prohibitions are constitutional. Yet, the rational basis test, which would apply if our proponents made their claim under the Due Process or Equal Protection Clauses alone, would not allow this.<sup>462</sup> That test would focus only on whether the state could offer some plausible reason for criminalizing minor marijuana activity, without regard to the competing interests of the rights proponents.<sup>463</sup> To allow scrutiny of those interests, a more demanding test would have to apply. It need not be "strict scrutiny," which would demand the showing by the state of a "compelling" purpose.<sup>464</sup> A form of "intermediate scrutiny" that asked about whether the state's marijuana prohibition is substantially related to an important government purpose would suffice.<sup>465</sup> Application of such an approach could lead a court to rule in favor of our right proponents regarding private use of marijuana in one's home and even public possession of small amounts of marijuana in public.

To see how the analysis would proceed, let's assume that the government would assert four kinds of interests in justifying laws criminalizing minor marijuana activity. Those interests include preventing immoral conduct, promoting productive behavior by the populace, preventing harm to the user and, finally, avoiding social harm to non-users. While these asserted interests, singularly or together, would easily satisfy the rational basis test, they would

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462. *See supra* notes 217–219 and accompanying text (explaining that the rational basis test does not include a balancing of individual versus state interests).

463. *See supra* note 16 and accompanying text (noting that, because marijuana-related activities arguably will cause at least some risk of minor harm to the actor, the state can easily meet the rational basis test).

464. *See, e.g.,* *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (explaining that racial classifications are subject to the most exacting scrutiny).

465. *See, e.g.,* *Lehr v. Robertson*, 463 U.S. 248, 266 (1983) (applying intermediate scrutiny to discrimination based on non-marital, parent-child relationships); *Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny to gender discrimination).

not so obviously overcome heightened scrutiny, particularly when applied to private use of marijuana at home and probably not when applied to possession of small amounts in most public settings.

Consider first the interest in preventing immoral conduct. This is not an insubstantial concern of government, and some crimes find justification largely on this basis. Bestiality and prostitution are examples. A significant portion of the population becomes upset knowing that others are engaged in activities that they deem immoral and particularly upset if the government gives license to the immorality.<sup>466</sup> Government must choose whether to inflict unhappiness on those persons with high moral standards or, instead, on those who want to pursue the arguably unethical behavior,<sup>467</sup> and often governments have chosen to disfavor the latter group. For much of the twentieth century, using marijuana was widely viewed as depraved,<sup>468</sup> and it will still be so viewed by many persons in the future.<sup>469</sup> Yet, while this concern is a good enough reason to justify criminalizing the behavior under a rational-basis test, it would almost surely not work under heightened scrutiny. Viewing obscene pornography is immoral to many persons, but the Court rejected Georgia's effort to criminalize it in *Stanley*.<sup>470</sup> Same-sex sodomy is immoral to many persons, but the Court rejected Texas' effort to criminalize it in *Lawrence*.<sup>471</sup> Under heightened scrutiny, the effort to promote

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466. See Bork, *supra* note 33, at 9–10 (“Where the Constitution does not embody the moral or ethical choice, the judge has no basis other than his own values upon which to set aside the community judgment embodied in the statute.”).

467. See *id.* (“Every clash between a minority claiming freedom and a majority claiming power to regulate involves a choice between the gratifications of the two groups.”).

468. See *supra* Part I.A (providing the example that by the mid-1930s, twenty-two states had criminalized the sale or possession of marijuana).

469. See *supra* notes 145–149 and accompanying text (discussing how many persons continue to believe that even moderate cannabis use is risky and immoral).

470. See *supra* notes 320–329 and accompanying text (averring explicitly to clause aggregation in justifying a right to view obscene pornography privately at home).

471. See *supra* notes 347–356 and accompanying text (protecting the right of persons to engage in intimate sexual conduct, including with a person of the same sex).

morality could not sustain the criminalization of minor marijuana activity.

The effort to promote productivity among the populace also probably would not survive heightened scrutiny. Many would agree that the government has an interest in “form[ing] and sustain[ing] the character of its citizenry.”<sup>472</sup> However, studies have not found that marijuana, except in a tiny percentage of heavy users, produces chronic or long-term demotivation. More than forty years ago, in *Ravin v. State*,<sup>473</sup> the Alaska Supreme Court relied on a privacy protection grounded in the state constitution to find a right to use marijuana in one’s home.<sup>474</sup> The Alaska court subsequently applied an intermediate scrutiny test to the state’s rationales for criminalizing marijuana possession and rejected the “amotivational syndrome” argument.<sup>475</sup> Indeed, the court found “no adequate justification for the state’s intrusion into the citizen’s right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home.”<sup>476</sup> The right has existed there as a matter of state constitutional law for more than four decades, and there is no study that indicates that a significant portion of the Alaska citizenry has become more apathetic or indolent due to marijuana use.<sup>477</sup> Arguably undermining any such hypothesis, Alaska is one of the states that legalized minor marijuana activities in 2014.<sup>478</sup>

Arguments about harm to the marijuana user are also of questionable force in the face of heightened scrutiny, although they

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472. James Q. Wilson, *Drugs and Crime*, in *DRUGS AND CRIME* 521, 524 (Michael Tonry & James Q. Wilson eds., 1990).

473. 537 P.2d 494 (Alaska 1975).

474. *See id.* at 500–01, 511 (noting the effect of an Alaska amendment was to place privacy among the specifically enumerated rights in Alaska’s constitution).

475. *See id.* at 507 (relying on the National Commission’s conclusion that “long-time heavy users do not deviate significantly from their social peers in terms of mental functioning”).

476. *Id.* at 511.

477. *See* Jason Brandeis, *Ravin Revisited: Alaska’s Historic Common Law Marijuana Rule at the Dawn of Legalization*, 32 *ALASKA L. REV.* 309, 309 (2015) (discussing the *Ravin* opinion and the subsequent survival of the state constitutional right to use marijuana in one’s home in more depth).

478. *See supra* note 126 and accompanying text (noting the states which have legalized marijuana use).



would easily satisfy rational-basis review.<sup>479</sup> Our right proponents could not credibly contend that marijuana poses no risks for the user, as there is plenty of evidence that it can have some ill-effects on long-term health and mental functioning when consumed heavily for long periods.<sup>480</sup> Young persons are the most vulnerable to long-term, adverse effects on brain functioning,<sup>481</sup> as “the brain undergoes active development until about age 21.”<sup>482</sup> This concern would justify prohibiting marijuana use by young persons, but not by adults. The problems with marijuana pale when compared to the health consequences associated with alcohol and tobacco, which are legal for adults to consume.<sup>483</sup> Marijuana produces dependence only among a small portion of heavy users, and, even then, the physical dependence is much lower than that associated with alcohol or tobacco.<sup>484</sup> The risks of fatal overdose of marijuana are also minimal.<sup>485</sup> “[T]he myth that it leads users to more

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479. Under a rational-basis review, courts in the past consistently rejected claims to a right to possess and use marijuana by finding, in part, that states had a legitimate goal of avoiding harm to the user and to others. *See, e.g.*, *Commonwealth v. Leis*, 243 N.E.2d 898, 902–03 (Mass. 1969) (finding that the legislature acted “rationally and reasonably”); *Raines v. State*, 225 So. 2d. 330, 330 (Fla. 1969) (“This drug is within the category of injurious substances which the Legislature may regulate and prohibit in the exercise of its police power.”); *cf.* *People v. McKenzie*, 458 P.2d 232, 234 (Colo. 1969) (upholding a state law that classified marijuana as a narcotic drug against due process and equal protection challenges).

480. *See, e.g.*, Nora D. Volkow, Ruben D. Baler, Wilson M. Compton & Susan R.B. Weiss, *Adverse Health Effects of Marijuana Use*, *NEW ENG. J. MED.* (June 5, 2014), <http://www.nejm.org/doi/full/10.1056/NEJMra1402309> (last visited Apr. 14, 2018) (noting various risks, including some disease risks but conceding substantial uncertainties, such as the lack of a clear connection to lung cancer, unlike for smoking tobacco) (on file with the Washington and Lee Law Review).

481. *See* AM. SOC’Y OF ADDICTION MED., *WHITE PAPER ON STATE-LEVEL PROPOSALS TO LEGALIZE MARIJUANA* 6 (2012) (“Of greatest concern regarding the brain is use of marijuana during adolescence—a time of ongoing brain development.”).

482. Boffey, *supra* note 22, at A22.

483. *See id.* (“Marijuana cannot lead to a fatal overdose. There is little evidence that it causes cancer. Its addictive properties, while present, are low, and the myth that it leads users to more powerful drugs has long since been disproved.”).

484. *See* CAULKINS ET AL., *MARIJUANA LEGALIZATION*, *supra* note 15, at 25 (“Regular marijuana use does not necessarily indicate dependence.”).

485. *See* Lachenmeier & Rehm, *supra* note 22, at 4–6 (concluding that cannabis is “low risk”).

powerful drugs has long since been disproved.”<sup>486</sup> Admittedly, uncertainty exists about some of its short-term and long-term effects, because the consequences of its use have not been studied to the same degree as with alcohol and tobacco. For example, concerns exist that marijuana use may tend to promote greater use of tobacco.<sup>487</sup> There are also concerns that marijuana has been bred in recent decades to be more potent in its primary psychoactive ingredient, Delta9-tetrahydrocannabinol (THC),<sup>488</sup> and that it could be bred to be even more potent in future years, with unknown consequences for the user.<sup>489</sup> However, despite those uncertainties, a court could easily conclude, as did the Alaska Supreme Court, in *Ravin*, that “mere scientific doubts will not suffice” for the state to “demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.”<sup>490</sup> For the vast majority of users what appears certain is that the greatest danger from marijuana use where it is a crime is the prospect of being arrested, jailed, punished and stigmatized as a law-breaker, injuries that disappear when cannabis is legalized.<sup>491</sup>

Concern about injury to others from driving under the influence of marijuana is probably the most powerful reason for a state to limit even minor marijuana activity by adults.<sup>492</sup> Marijuana use does not lead to violent or aggressive behavior.<sup>493</sup>

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486. Boffey, *supra* note 22, at A22.

487. See CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION, *supra* note 113, at 128 (noting that “interactions with tobacco” could matter greatly).

488. See *Ravin v. State*, 537 P.2d 494, 505 (Alaska 1975) (“Other cannabis derivatives with a higher THC content, such as hashish, are available in the United States . . .”).

489. See, e.g., CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION, *supra* note 113, at 13 (“While there’s not much dispute that potency has increased, there is dispute over how much it matters.”).

490. *Ravin*, 537 P.2d at 511.

491. On this score, see *supra* note 23 and accompanying text (exploring the societal costs of incarceration and enforcement related to marijuana crimes).

492. See INST. OF MED., MARIJUANA AND MEDICINE: ASSESSING THE SCIENCE BASE 4 (Janet E. Joy, Stanley J. Watson, Jr., & John A. Benson, Jr. eds., 1999) (noting that “for most people the primary adverse effect of *acute* marijuana use is diminished psychomotor performance” and that, therefore, it is “inadvisable to operate any vehicle or potentially dangerous equipment while under the influence of marijuana”).

493. See Boffey, *supra* note 22, at A22 (“Its effects are mostly euphoric and mild, whereas alcohol turns some drinkers into barroom brawlers, domestic

However, marijuana does “reduce[] psychomotor performance in ways that increase overall risk of accidents and, in particular, impairs driving.”<sup>494</sup> The effect of alcohol on driving appears to be much worse. Studies have shown that “the overall risk of involvement in an accident increases by a factor of about 2 when a person drives soon after using marijuana” while “the overall risk of a vehicular accident increases by a factor of almost 5 for drivers with a blood alcohol level above 0.08%, the legal limit in most countries.”<sup>495</sup> Despite the lesser danger of marijuana compared to alcohol from driving impairment, the problem with marijuana, unlike alcohol, is the absence of reliable, well-accepted breathalyzer tests for determining promptly and accurately whether one is under the influence according to a legally specified threshold.<sup>496</sup> New devices are being developed and used to measure recent marijuana use, but they remain controversial in part because it is not clear how to determine the point at which impairment occurs.<sup>497</sup> Whether states can solve this problem in the next decade remains uncertain. In the meantime, however, we should not exaggerate the problem. Police officers currently can still offer substantial evidence of driving under the influence of marijuana, based on their observations and field tests, plus the strong odor associated with burned marijuana.<sup>498</sup> Likewise, in

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abusers or maniacs behind the wheel.”).

494. CAULKINS ET AL., CONSIDERING MARIJUANA LEGALIZATION, *supra* note 113, at 33 (citing J.G. Ramaekers, G. Berghause, M. van Laar & O.H. Drummer, *Dose Related Risk of Motor Vehicle Crashes after Cannabis Use*, 73 DRUG & ALCOHOL DEPENDENCE 109 (2004); J.G. Ramaekers, M.R. Moeller, P. van Ruitenbeck, E.L. Theunissen, E. Schneider & G. Kauert, *Cognition and Motor Control as a Function of Delta9-THC Concentration in Serum and Oral Fluid: Limits of Impairment*, 85 DRUG & ALCOHOL DEPENDENCE 114 (2006)).

495. Volkow et al., *supra* note 480, at 2223 nn.37, 39.

496. See David Downs, *Don't Hold Your Breath for a Marijuana "Breathalyzer" Test*, SCI. AM. (Nov. 7, 2016), <https://webcache.googleusercontent.com/search?q=cache:25uwfSDD7CcJ:https://www.sciencescientificam.com/article/don-t-hold-your-breath-for-a-marijuana-breathalyzer-test/+&cd=1&hl=en&ct=clnk&gl=us> (last visited Mar. 9, 2018) (noting that obtaining data “could cost millions of dollars in human trials, and the effects of the drug vary tremendously between users”) (on file with the Washington and Lee Law Review).

497. See *id.* (“[S]cience still lacks data correlating the presence of THC and actual impairment.”).

498. See, e.g., Mandiberg, *supra* note 14, at 40–42 (discussing the importance of the distinctive odor of burned or burning marijuana and the odor of marijuana

cases involving accidents, “a combination of sobriety checks and tests of blood, urine or hair for marijuana metabolites . . . can be enough to convict impaired drivers.”<sup>499</sup>

While a state purpose to deter drivers from operating under the influence could justify limits on possession and use of marijuana, a total prohibition would not substantially relate to that purpose. The Alaska Supreme Court reached that conclusion in the *Ravin* case.<sup>500</sup> The court upheld the criminalization of possession of marijuana in public based on “the need for control of drivers under the influence” and “the potential for serious harm to the health and safety of the general public” from such drivers.<sup>501</sup> However, relying on the right to “privacy,” the court found that there was no “close and substantial relationship between public welfare and control of ingestion of marijuana or possession of it in the home for personal use.”<sup>502</sup> A similar conclusion would seem to follow under a clause aggregation approach. However, because clause aggregation would not focus so heavily on the privacy right, even some public possession of cannabis would seem to warrant protection. Being in public places outside of an automobile with marijuana would not present a serious problem. Indeed, even possession of a small amount of cannabis in the trunk of one’s car arguably would not be sufficiently problematic. Under heightened scrutiny, even concern over impaired driving should only justify prohibitions on public possession that are substantially related to that concern, such as possession in the passenger area of a vehicle.

### *B. Objections*

Opponents of the right would surely object to the application of heightened scrutiny here, and I review some of the probable criticisms that I have not already addressed. First, some opponents

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lingering on a subject’s clothing as evidence that a driver has recently smoked the substance).

499. Downs, *supra* note 496.

500. See *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975) (concluding that “no adequate justification for the state’s intrusion into the citizen’s right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown”).

501. *Id.*

502. *Id.*

would likely offer a general broadside against the further use of rights-based clause aggregation to recognize any non-textual, constitutional right, on grounds that the approach arrogates too much power to the courts. Also, opponents would likely offer a series of more specific objections to the recognition of even a limited marijuana right, focusing on symbolic messages, drug treaties, international cooperation against serious drugs, and mission creep on marijuana. As we have seen, the Supreme Court has exercised substantial discretion over when to employ rights-based clause aggregation, and it has not used it on numerous occasions when commentators contend the approach would appropriately have applied.<sup>503</sup> I do not contend that there is a special reason to think that the Court would use it to uphold a marijuana right in the future. At the same time, I contend that neither a general broadside against rights-based clause aggregation nor the more specific objections that I will review are good reasons to avoid using the approach to protect minor marijuana activity.

The general broadside against rights-based clause aggregation that some opponents might lodge would likely rest on an originalist view of how courts should interpret the Constitution. Originalists typically oppose the idea that courts can recognize non-textual rights as a matter of substantive due process, if only because it gives too much power to judges to constitutionalize protections according to their own values.<sup>504</sup> Some opponents might lodge the same kind of objection against rights-based clause aggregation as a way to recognize new rights. Yet, such an objection would lack merit. Clause aggregation at least builds on the text of clauses (something arguably not true of “substantive” due process)<sup>505</sup> and puts the concerns they embody together. As Professor Michael Coenen has contended, this approach parallels other interpretative techniques that are standard in constitutional construction, such as interpretations based on structure or on the

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503. See *supra* notes 409–414 and accompanying text (exploring cases in which the Court could have applied clause aggregation).

504. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632–37 (2015) (Thomas, J., dissenting) (opposing on originalist grounds the recognition of a right to same-sex marriage as a matter of substantive due process).

505. See *id.* at 2631 (arguing against substantive due process doctrine as “straying from the text of the Constitution”).

limiting effect of one clause on another.<sup>506</sup> Moreover, even ardent originalists have not objected to rights-based clause aggregation when they think the outcome appropriate. A good example is the *Dale* case,<sup>507</sup> in which a five Justice majority used clause aggregation to recognize a right to expressive association that enabled the Boy Scouts to exclude gay persons from membership, despite a state prohibition.<sup>508</sup> The most originalist-oriented Justices, Thomas and Scalia, joined Chief Justice Rehnquist's opinion for the Court without expressed concern that it was anti-originalist.<sup>509</sup>

As for specific objections to a judicial opinion declaring a marijuana right, opponents would likely contend that it would send the wrong message about marijuana. Particularly if it were the Supreme Court that were to uphold the right, they might contend that the public would infer that there is nothing risky about consuming the drug. This is a legitimate concern, although I contend that it is not sufficiently weighty that it should influence the judicial outcome. A court upholding the right could take pains to clarify that the use of marijuana carries risks and is not recommended. The Alaska Supreme Court in the *Ravin* case demonstrated how to do this. That court emphasized at length that it opposed the use of marijuana or any "psychoactive" drug and that every person should "consider carefully the ramifications for himself and for those around him of using such substances."<sup>510</sup> At the same time, we should remember that recognition of the right by the federal Supreme Court would not likely happen before a super-majority of states had already legalized recreational marijuana and that the level of illicit use in states in which

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506. See Coenen, *supra* note 28, at 1095–1101 (arguing that "combination analysis shares significant functional features with two widely utilized tools of constitutional decision-making: namely, the constitutional avoidance canon and arguments based on constitutional structure").

507. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647 (2000) (pointing out the freedom of association in precedent).

508. See *supra* notes 334–341 and accompanying text (reciting that one of the group's desires was not to condone homosexual conduct as a legitimate form of behavior).

509. See *Dale*, 530 U.S. at 642 (recording that Justices Thomas and Scalia joined the majority opinion).

510. *Ravin v. State*, 537 P.2d 494, 511 (Alaska 1975).

marijuana is prohibited has for decades been quite high.<sup>511</sup> These points suggest that use would likely only increase modestly after a Supreme Court recognition of the right. Moreover, states opposing marijuana use could commence an education campaign with resources saved from the elimination of marijuana enforcement and resources gained from taxes on marijuana sales to launch an educational campaign against marijuana consumption.<sup>512</sup> In these circumstances, there is not a compelling reason to believe that a judicial declaration of the right would contribute much to undermining public health.

Opponents might also assert that a judicial declaration of the right to use and possess marijuana would violate our international obligations. The United States is committed under the 1961 Single Convention on Narcotic Drugs as Amended by the 1972 Protocol to restrict the use of marijuana “exclusively to medical and scientific purposes.”<sup>513</sup> Further, the United States is committed under the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances to criminalize even minor forms of marijuana activity other than for medical or scientific purposes.<sup>514</sup> These are not self-executing treaties but they have been implemented by the federal Controlled Substances Act,<sup>515</sup> and by the expectation that states would continue to criminalize minor

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511. See *supra* notes 239, 442 and accompanying text (reporting the number of Americans who have partaken in marijuana); KAPLAN, *supra* note 18, at 23–29 (summarizing the extent of marijuana use).

512. See KAPLAN, *supra* note 18, at 349 (“Such taxation could serve the . . . purpose of providing revenue for use in combating the drug problem generally.”).

513. 1961 Single Convention on Narcotic Drugs as Amended by the 1972 Protocol art. 4., Aug. 8, 1975, 26 U.S.T. 1439; see also Bennett & Walsh, *supra* note 86, at 15 (delving into how the United States is obligated to criminalize minor marijuana activity under this treaty).

514. See 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 3, Dec. 20, 1988, 1988 U.S.T. LEXIS 194 (representing a significant development in the effort to combat illicit trafficking in drugs at the international level). For discussion of how the language of this treaty obligates the U.S. to criminalize marijuana activity, see Bennett & Walsh, *supra* note 86, at 15–16 (explaining how the drug treaties “plainly obligate signatories to enact laws punishing participants in recreational marijuana markets”).

515. See *supra* notes 88–93 and accompanying text (discussing how the Controlled Substances Act is important in fulfilling the United States’ obligations regarding marijuana under several treaties).

marijuana activities.<sup>516</sup> Yet, there are two answers to an argument that the Supreme Court should weigh these treaty obligations in deciding whether there is a constitutional right to possess and use marijuana. First, the United States has arguably already violated those treaties<sup>517</sup> now that eight states plus the District of Columbia have legalized minor recreational marijuana activities under their state laws and the federal government has essentially deferred.<sup>518</sup> We would even more clearly violate them when a super-majority of states legalize. Second, international treaties cannot obligate the United States Supreme Court to uphold legislation that violates the United States Constitution.<sup>519</sup> Therefore, as difficult as it will be, the federal executive branch, with the required super-majority approval by the Senate, must work with other countries to amend the treaties (which the United States originally championed)<sup>520</sup> to allow for recreational use of marijuana.<sup>521</sup>

Critics of the right might lodge the closely related charge that a Supreme Court declaration of a right to use marijuana will eliminate any pretense that we are in compliance with our international treaty obligations (assuming they are not amended) and thereby spur a reduction in international cooperation against more dangerous drugs, such as heroin and cocaine. As part of this argument, they might contend that we can at least maintain the

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516. See Bennett & Walsh, *supra* note 86, at 2 (noting the “predicament” created for the federal government under the treaties when Colorado and Washington legalized recreational marijuana in 2012).

517. See *id.* at 17 (asserting in 2014, after only two states had legalized recreational marijuana, that “if more states take a legalize-and-regulate approach, a federal-level decision not to prosecute . . . could start to look like a blanket non-enforcement of implementing legislation—something that, in our view, the drug treaties do not contemplate”).

518. For more on the deference by the federal government, see *supra* notes 129–134 and accompanying text (explaining how some accommodations have been made by federal authorities on a temporary basis).

519. See *Reid v. Covert*, 354 U.S. 1, 16 (1957) (asserting that “there is nothing” in the language of the Constitution “which intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution.”).

520. See Bennett & Walsh, *supra* note 86, at 18 (“[T]he United States has for decades been widely and correctly viewed as the treaties’ chief champion and defender.”).

521. See *id.* at 21–24 (arguing for the United States to take a leading role in amending the treaties regarding marijuana).



appearance of compliance if the marijuana prohibitions in the federal Controlled Substances Act remain technically in force along with criminalization in a strong minority of states. However, by the time a super-majority of states have legalized, the International Narcotics Control Board, which is the international body that determines whether member states comply, will have publicly declared our non-compliance.<sup>522</sup> Such a ruling by the Board already will have dealt a serious blow to the credibility of the United States on international drug treaty matters. A ruling of our Supreme Court protecting a limited right to use and possess marijuana will not do much further damage on the international front.

A final objection might well focus on the purported illogic of declaring a right to use and possess marijuana but no right to produce it for sale or to sell it. More specifically, the objection might be that, inevitably, the right will extend to commercial marijuana activity for recreational purposes. The answer is that the same kind of argument was made but did not turn out true regarding *Stanley*, where the Court upheld the right to view obscene pornography privately in one's home.<sup>523</sup> Commentators noted that granting the right to view obscene pornography in one's home strongly suggested that one had the right to acquire it outside the home, which, in turn, suggested that others had the right to produce and sell it.<sup>524</sup> Otherwise, how would the average consumer secure the obscene pornography for private viewing? However, the Supreme Court subsequently maintained the constitutional line that it had drawn in *Stanley*, rejecting arguments that the right to view obscene pornography extended to public theaters or to the right to distribute the material.<sup>525</sup> The Supreme Court could do the

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522. See *id.* at 8–9 (noting that the 2013 Board report, which was released in 2014, concluded that the approach of legalization and regulation in Washington and Colorado was not in conformity with the treaties).

523. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (reaffirming that “the Constitution protects the right to receive information and ideas”).

524. See, e.g., Gene R. Hoellrich, Note, *Stanley v. Georgia: First Amendment Approach to Obscenity Control*, 31 OHIO ST. L.J. 364, 368–69 (1970) (“If all production and distribution of obscene material were banned, in the obscenity context, the reception right would also be effectively banned.”).

525. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (holding that “there are legitimate state interests at stake in stemming the tide of commercialized obscenity”); *United States v. Orito*, 413 U.S. 139, 143 (1973)

same with cannabis. The right to use marijuana in the home or to possess small amounts in public need not extend to public distribution. The Court could plausibly find that the interests of states in regulating the commercial production and sale of cannabis is sufficient to justify restrictions on those activities but not the more basic right of the individual to use it privately or to possess small amounts of it in public.

### *VI. Conclusion*

This Article began by asking two questions about constitutional law, one substantive and the other methodological. The substantive question is whether the Constitution in the foreseeable future could provide a limited right to use and possess cannabis for recreational purposes. The methodological question is whether the Supreme Court, after *Obergefell*, will use rights-based clause aggregations to recognize more constitutional rights that it would not recognize under any clause considered singularly. My answer to both questions, despite some skepticism, is a qualified yes. But, the larger idea of the article is that there is a benefit in exploring these two problems together. There seems little chance in the foreseeable future that the Supreme Court would recognize a right to possess and use marijuana for recreational purposes under any single clause in the Constitution. However, the idea becomes more plausible with clause aggregation. Likewise, it is difficult to identify with confidence many new rights that the Court will acknowledge and protect through clause aggregation that it could not fairly easily acknowledge and protect through a single-clause analysis. However, a limited right to possess and use a small amount of marijuana recreationally might be that kind of liberty.

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(rejecting constitutional protection for obscene material outside the home); *United States v. 12,200-Ft. Reels*, 413 U.S. 123, 128 (1973) (refusing to “extend the precise, carefully limited holding of *Stanley* to permit importation of admittedly obscene material simply because it is imported for private use only”).