2023

# Judicial Federalization Doctrine

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# JUDICIAL FEDERALIZATION DOCTRINE

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*This Article explores the concept of "judicial federalization doctrine." The doctrine emanates from well-documented areas of federal constitutional law, including exactions, racially motivated peremptory challenges, the exclusionary rule, same-sex sodomy, marriage, and freedom of speech and press. The origin and development of these federal doctrines, however, is anything but federal. The U.S. Supreme Court has, on rare occasions, heavily consulted with or borrowed from state court doctrines to create a new federal jurisprudence. While the literature addressing the Court's occasional vertical dependence on state court doctrine is sparse, there is a complete absence of scholarly attention studying the Court's reluctance to horizontally consult, refer to, or cite, as persuasive authority, its own past caselaw federalizing of state court doctrine.*

*For example, in its 1985* Batson v. Kentucky *ruling, the Court established a new federal jurisprudence by adopting state court doctrines barring prosecutors' racially motivated peremptory strikes. But the Court, notably, omitted any reference to its 1961 case,* Mapp v. Ohio, *where it similarly borrowed state doctrine to nationalize the exclusionary rule. Likewise, the Court relied upon state court rulings on same-sex sodomy to develop a federal constitutional protection in* Lawrence v. Texas *in 2003. Yet, the Court neglected to cite its analogous practice of endorsing state doctrines to develop a federal exactions standard in* Nollan v. California Coastal Commission *and* Dolan v. City of Tigard *in 1987 and 1994. When the Court federalized same-sex marriage in* Obergefell v. Hodges *in 2014 by following the lead of state courts, it missed an opportunity to cite its 1964 ruling in* New York Times Co. v. Sullivan, *a case that modeled its new First Amendment "actual malice" test based on a version formulated by state courts.*

*Vice Dean, Associate Professor of Law, University of Pittsburgh School of Law. Thanks to workshop participants at the 2023 Global Summit on Constitutionalism at the University of Texas School of Law for comments and suggestions. Special thanks to the *Baylor Law Review* editors and staff for excellent guidance and production.

*The substantive rights and protections at play in each of these rulings have little, if anything, in common. But the practice of consulting state doctrine as the primary source for developing new federal jurisprudence is the same in all the cases. Indeed, with each subsequent ruling that embraced state doctrine, the Court did not cite any combination of these prior cases. In contrast, the Court has built a track record of horizontally citing to its legislative federalization cases; that is, cases where the Court consulted state law to inform federal constitutional law. Why, then, has the Court failed to articulate and organize its limited collection of judicial federalization cases into a coherent, recognizable, and authoritative doctrine? This Article explores this puzzling lacuna within the Court's citation practices and decision-making methods and offers a variety of reasons for the Court's preclusion of this citation method. The Article argues that the Court should formally announce a doctrine, called "judicial federalization doctrine," that establishes a consistent practice of vertically consulting state court doctrine and that demonstrates a regular method of horizontally citing its past precedent federalizing state doctrine.*

## INTRODUCTION

This Article explores "judicial federalization doctrine." The doctrine emanates from well-documented areas of federal constitutional law, such as exactions, racially motivated peremptory challenges, the exclusionary rule, same-sex sodomy, marriage, and freedom of speech and press. The origin and development of these federal doctrines, however, is anything but federal. The Supreme Court has, on rare occasions, developed new federal jurisprudence by heavily consulting and relying upon state court decisions as guidance when adopting novel federal doctrines. This morphing of state jurisprudence into federal doctrine is curious. While there is sparse literature addressing the Court's occasional vertical consultation of and citation to state court doctrine to guide its development of new federal doctrine, there is a complete absence of scholarly attention regarding why the Supreme Court has failed to horizontally consult, refer to, or cite as persuasive authority, its own past case law involving the federalization of state doctrine.

For example, in 1961, the Court decided *Mapp v. Ohio*, where it borrowed state doctrine to nationalize the exclusionary rule through incorporation doctrine.[1] Prior to *Mapp*, "[t]he contrariety of views of the States" was widespread.[2] The Court decided it could not "brush aside the experience of States" as a version of an exclusionary rule that had been adopted by over half the states at the time of the *Mapp* ruling.[3] The Court noted that the movement towards embracing the exclusionary rule across the states was gaining "inexorable" speed with "impressive" results.[4] Justice Clark was

[1] 367 U.S. 643, 651–53, 652 n.7, 655 (1961).

[2] Wolf v. Colorado, 338 U.S. 25, 29 (1949), *overruled by Mapp*, 367 U.S. 643.

[3] *Id.* at 31–32.

[4] *Mapp*, 367 U.S. at 660.

persuaded by California's state courts reasoning behind finding for an exclusionary rule. The Court followed the California state supreme court's lead through incorporation of the rule against the states.[5] Indeed, the Court was influenced by the "emerging [doctrinal] options" across the state courts.[6]

Twenty-five years later, the Court decided *Batson v. Kentucky*, where it copied state courts' racially motivated peremptory strike doctrines to create a federal version.[7] Prior to *Batson*, a minority of state courts, led by California and Massachusetts, had already prohibited racially motivated peremptory strikes under their state constitutions, notably the state analogs to the federal right to an impartial jury and federal Equal Protection Clause.[8] The petitioner urged the Court in *Batson* "to follow decisions of [the] States"[9] in determining whether the federal Equal Protection Clause prohibits prosecutors' racially motivated peremptory strikes. It chose to follow the lead of state courts who had independently interpreted the same protections under analogous state constitutions.[10] Yet, *Batson* never cites *Mapp* to justify its adoption and endorsement of the states' views of racially motivated peremptory strike challenges. The Court offers no other alternative basis for its decision to follow the lead of the states other than to say the substantive reasoning of the state courts' rulings, in and of itself, was persuasive enough.

Similarly, in 1987 and 1994, the Court developed a federal exactions standard under the Takings Clause in *Nollan v. California Coastal Commission*[11] and *Dolan v. City of Tigard*.[12] Justice Antonin Scalia, in *Nollan*, noted that the ruling was "consistent with the approach taken by every other [state] court that has considered the [exactions standard] question."[13] Chief Justice William Rehnquist, in *Dolan*, chose to reflect on and observe the diversity of state supreme court decisions crafting their own

[5] *See id.* at 652.

[6] JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 20 (2018).

[7] 476 U.S. 79 (1986).

[8] *Id.* at 83.

[9] *Id.*; *see also* Brief for Petitioner at 4, 26, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263) (stating that "Petitioner here proposes a remedy for improper use of peremptory challenges similar to that found in [California's] *People v. Wheeler*" decision and Massachusetts's *Commonwealth v. Soares* decision).

[10] *Batson*, 476 U.S. at 82 n.1.

[11] 483 U.S. 825 (1987).

[12] 512 U.S. 374 (1994).

[13] 483 U.S. at 839 (noting that California was the exception).

exactions jurisprudence under state constitutional provisions.[14] He said, "[s]ince state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."[15] Although he disagreed with the practice of borrowing specifically in *Dolan*, Justice John Paul Stevens acknowledged that, as a general practice, it is "certainly appropriate" for the Court to look to state courts where there is an absence of federal precedent or doctrine to guide the Court.[16] He also agreed that state court decisions can be "enlightening," may "provide useful guidance in a case of this kind,"[17] and "lend support to the Court's reaffirmance of *Nollan*'s reasonable nexus requirement."[18]

Over a decade later, the Court missed an opportunity to lend legitimacy to its federalization practice by citing its analogous practice of borrowing state doctrines in its 2003 *Lawrence v. Texas* ruling.[19] There, the Court looked to state court rulings on same-sex sodomy to develop a federal constitutional protection for same-sex sodomy. In overruling *Bowers v. Hardwick*[20] and choosing to find a federal constitutional right to same-sex sodomy, Justice Anthony Kennedy relied upon "[t]he courts of five different States" who had refused to "follow [*Bowers*] in interpreting provisions in their own state constitutions."[21] Why, then, did the *Lawrence* Court not cite or refer to, say, *Nollan* and *Dolan*, or perhaps *Batson* and *Mapp*, to reaffirm the basic interpretive principle and support the salient proposition of consulting and adopting state doctrine to guide a new federal rule?

Likewise, in its 1964 landmark ruling in *New York Times Co. v. Sullivan*, the Court modeled its new First Amendment "actual malice" test based on the versions adopted by the states.[22] In *Sullivan*, the Court was tasked with crafting a new "federal rule" that comported with the "constitutional guarantees" of the First and Fourteenth Amendments to provide safeguards

[14] *See Dolan*, 512 U.S. at 389–91; *see also* Julian R. Kossow, Dolan v. City of Tigard, *Takings Law, and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENV'T L.J. 215, 231, 231 n.86 (1995).

[15] *Dolan*, 512 U.S. at 389.

[16] *Id.* at 397 (Stevens, J., dissenting).

[17] *Id.* at 397, 400.

[18] *Id.* at 399.

[19] 539 U.S. 558 (2003).

[20] 478 U.S. 186 (1986), *overruled by Lawrence*, 539 U.S. 558.

[21] *Lawrence*, 539 U.S. at 576.

[22] *See* 376 U.S. 254, 279–80, 280 n.20 (1964).

for freedom of speech and press.[23] In adopting a new federal "actual malice" test, Justice William Brennan turned to "[a]n oft-cited statement of a like rule" used by the Kansas Supreme Court and that had been "adopted by a number of [other] state courts."[24] Decades later, in 2015, the Court federalized same-sex marriage protections in *Obergefell v. Hodges* by following analytical approaches embraced by the state courts.[25] In the same vein as Justice Brennan in *Sullivan*, Justice Kennedy in *Obergefell* explicitly recognized that "the highest courts of many States have contributed to this ongoing dialogue in [same-sex marriage] decisions interpreting their own State Constitutions."[26] Justice Kennedy proceeded to refer to the list of state judicial opinions cited in the appendix of the opinion.[27] Yet, Justice Kennedy failed to mention the *Sullivan* ruling's reliance on state constitutional precedent when adopting new federal rules.

The substance of the constitutional rights and protections at issue in *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, *Obergefell*, and *Sullivan* are distinguishable. In fact, upon first blush, none of these cases and their dispositions depend upon citation to each other. The rough proportionality and essential nexus tests in *Nollan* and *Dolan* have nothing to do with the analytical standard set forth in *Batson*.[28] The actual malice test adopted in *Sullivan* is not relevant to the same-sex sodomy protections under substantive due process in *Lawrence*.[29] Likewise, the Court could have cited any combination of these cases for the simple proposition that the Court will cite prior instances of federalization as persuasive authority as support for the practice. It did not.

In contrast to the Court's reluctance to horizontally cite its prior judicial federalization cases, the Court has built a track record of horizontally citing its prior legislative federalization cases—that is, cases where the Court consulted state law trends or borrowed the content of state legislation to inform federal constitutional law.[30] For example, the Court in *Atkins v. Virginia* relied heavily on state legislative trends regarding death sentences

[23] *See id.* at 278–80.

[24] *Id.* at 280.

[25] 576 U.S. 644, 662–63, 675–76 (2015).

[26] *Id.* at 663.

[27] *Id.*

[28] 476 U.S. 79 (1986).

[29] 539 U.S. 558 (2003).

[30] *See infra* Part IV.B.

for the mentally disabled.[31] The Court specifically noted that objective indicia of social standards, expressed through state legislative enactments and practices, may be demonstrative of a national consensus.[32]

The practice of horizontal citation to legislatively federalized cases was is found in *Burch v. Louisiana*, a right-to-jury trial decision.[33] The Court, resting its ruling heavily on the experience of the states, cited its prior decision in *Duncan v. Louisiana* to explain that "[o]nly in relatively recent years has this Court had to consider [in *Duncan*] the practices of the several States relating to jury size and unanimity."[34] Similarly, in *Tennessee v. Garner*, the Court, tasked with determining reasonableness standards, cited to its ruling in *United States v. Watson*,[35] explaining that "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment [in *Watson*], we have also looked to prevailing rules in individual jurisdictions."[36] In *Washington v. Glucksberg*, the Court upheld an assisted suicide statute, finding that it did not violate the Due Process Clause.[37] The Court practiced both vertical and horizontal legislative federalization in *Glucksberg* by horizontally citing to its prior ruling in *Stanford v. Kentucky* for the proposition that the Court had, similarly, relied upon the uniformity created by a pattern of enacted capital punishment state laws as "[t]he primary and most reliable indication of [a national] consensus."[38]

Why, then, has the Court been reluctant to thread together its judicial federalization cases—*Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Obergefell*, and *Lawrence*—as persuasive authority to support the interpretive method and practical application of federalization? Why has the Court failed to clearly articulate and organize its limited collection of federalization cases into a coherent doctrine? This Article explores this puzzling lacuna within the Court's citation practices and decision-making methods and offers a variety of reasons for the Court's preclusion of this citation method. The Article argues that the Court should formally announce a doctrine, called

[31] 536 U.S. 304 (2002).

[32] *Id.* at 316.

[33] 441 U.S. 130 (1979).

[34] *Id.* at 134.

[35] Tennessee v. Garner, 471 U.S. 1, 13–16 (1985) (citing United States v. Watson, 423 U.S. 411, 418–19 (1976)).

[36] *Id.* at 15–16.

[37] 521 U.S. 702, 705–06, 709 (1997).

[38] *Id.* at 711 (second alteration in original) (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989)).

"judicial federalization doctrine," that establishes a consistent practice of vertically consulting state court doctrine and that demonstrates a regular method of horizontally citing its past precedent federalizing state doctrine.[39]

One plausible explanation is the infrequency for which judicial federalization cases have been cited by the Court.[40] It may, in other words, simply result in the fact that the Court has such a limited pool of federalization cases available at its disposal that it does not need or want to recognize a more robust federalization doctrine. On the other hand, it may be a (lack of) numbers game. The frequency of cited opinions matters to the justices. Contrarily, perhaps the reason for the absence of the practice may simply be a matter of oversight.[41] While there is such a massive volume of cases for the Court to rely upon, that volume may simply make it impossible for justices and law clerks to identify the mere seven cases that federalized state doctrine. It could also merely be the case of legitimacy. Perhaps the Court does not find these instances of judicial federalization overly persuasive and finds that an emphasis on their authority through consistent citation threatens the legitimacy of the Court's stare decisis practices.[42] In other words, perhaps the Court is reluctant to cite its prior cases judicially federalizing a state court doctrine or state constitutional jurisprudence because the practice may call into question the Court's intellectual superiority and the perception that the Court is a "simple-minded dependent[]" of its more intelligent younger state court siblings.[43] While the low number of federalization cases may support the Court's decision not to cite those prior cases, the significance or prominence of those cases arguably supports the opposite conclusion—that the Court should cite those decisions for their strength as judicial federalization cases because the cases are held in high regard for different reasons.[44]

[39] *See infra* Part III.

[40] *See infra* Part III.A.

[41] *See infra* Part III.C.

[42] *See infra* Part III.C.

[43] *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 748 (2016) (noting that state courts have traditionally been viewed as simple-minded dependents of federal actors). *See also* Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993) (discussing the inferiority complex in the American tiered judicial system).

[44] *See infra* Part III.D.

The characteristic of the case may also have a lot to do with why the Court has not cited back to its prior judicial federalization cases.[45] The constitutional issues and substantive legal questions involved in the judicially federalized cases, such as *Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, and *Obergefell*, have little, if anything, to do with each other. Finally, it could also be the case that many of the Court's federalization cases were not the product of national consensus or uniformity across the States.[46] As a result, the Court may avoid citing to and referencing prior federalization precedent predicated on adopting state doctrine that did not have the support of most of the state courts. It is unclear which reason best explains the Court's reluctance to rely upon its prior federalization cases. Nonetheless, if the Court invoked the practice more regularly, there would be some implications that would need to be considered.[47]

The practice of judicial federalization shows a deep respect for the laboratories of democracy that Justice Louis Brandeis once coined.[48] While Brandeis was referring to state legislatures as laboratories, his vision could also be understood to include the state judicial laboratories that share the experimental responsibility in American federalism.[49] The horizontal citation practice of referencing prior judicial federalization cases may help entrench the Court's approval of those state court doctrines and the valuable contributions they make to state-federal dialogue. The practice also strengthens the respect and relationship between the two sovereign institutions—the state and federal courts. The Supreme Court's consistent citation to its prior precedent federalizing state court doctrine also signals that the state courts' innovations matter by playing a substantial role in guiding the Court in future cases where the Court is considering the federalization of a new state doctrine.

Further, when the Supreme Court agrees to adopt state doctrine, it acknowledges the cooperative nature of judicial federalism.[50] While the Court does not have to ask for the state courts' approval when adopting state courts' doctrines, there is an implicit acknowledgment that the federal and state courts are sharing the responsibility of enhancing and advancing

[45] *See infra* Part III.E.

[46] *See infra* Part III.F.

[47] *See infra* Part IV.C.

[48] *See infra* Part IV.C.1.

[49] Gerald S. Dickinson, *The New Laboratories of Democracy*, 1 FORDHAM L. VOTING RTS. & DEMOCRACY F. 261, 261–62 (2023).

[50] *See infra* Part IV.C.2.

American constitutional law, protecting fundamental and individual rights, and facilitating the function of judicial federalism collaboratively. Similarly, when the Supreme Court consistently cites its prior instances of judicial federalization, it strengthens a normative goal of creating a judicial system based on shared conceptions of constitutional construction, analytical tests, and the broader goal of finding justice in a dual sovereign. One could think of this as a "shared enterprise"[51] in which the state and federal courts cooperatively work together to find common ground on complicated constitutional questions, knowing that their work will be cited, referenced, and relied upon in subsequent cases on similar matters.

On the flip side, there is a risk. The Court's legislative federalization cases have leaned heavily on determining whether there is a national consensus on the issue.[52] And the Court frequently cites to its legislatively federalized precedent to support its decisions in subsequent cases to nationalize constitutional issues where there is a national consensus. However, the drawback to this practice, if actively utilized by the Court, is that not all the prior decisions federalizing state legislation were predicated on a majority of state legislatures agreeing uniformly on an issue. In some instances, a substantial minority of state legislatures had come to an agreement on an issue; yet the Court still concluded that the minority rule was sufficient to conclude a national consensus. Lastly, another implication for formalizing the practice of citing prior judicial federalization cases is the potential for post hoc rationalization; post hoc rationalization is the Court's selective citation of certain federalized cases to meet the Court's subjective preferences on an issue.[53] That said, there is a strong argument that the Court should, at the very least, refer to these past cases to illuminate their value to the Court's federalization jurisprudence. Doing so brings the Court's legislative and judicial federalization practices into equilibrium.

This Article proceeds in four Parts.

Part I discusses how American constitutional law has become a top-down legal structure that encourages the supremacy of federal constitutional law even in non-preemptive areas and the vast and expansive influence it has over state courts. Part II explores the concept of judicial federalization. There are rare occasions when the Court reaches down to the state courts for guidance

[51] *See* Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 346 (2011).

[52] *See infra* Part IV.C.3.

[53] *See infra* Part IV.C.4.

on how to decide a federal constitutional matter where the Court has very little, if any, precedent to rely upon. However, while the Court has, in these instances, cited to state court doctrine to guide its decisions, the Court has subsequently failed to refer to or cite its own past caselaw that federalizes state court doctrine as an authoritative source of support. Part III explores why the Court has occasionally consulted or borrowed state court doctrine but then fails to subsequently rely upon, cite, or reference prior instances of judicial federalization. This Part offers some reasons and explanations for why the Court has been reluctant to practice a horizontal method of citation that consistently applies past instances of federalization to its reasoning in cases where the Court is deciding whether to adopt state court doctrine as persuasive authority for questions of federal constitutional law. Part IV explores practical applications and doctrinal implications were the Court to establish a more formal horizontal practice of citing prior judicial federalization cases as an identifiable doctrine. Using Justice Stevens's concurring opinion in *Moore* and his dissenting opinion in *Dolan*, this Part sets forth a practical example of how the Court has practiced judicial federalization doctrine by citing Justice Stevens's past efforts to federalize state court doctrine for support. This Part also explores the Court's legislative federalization cases, where the Court has far more frequently cited to its prior cases that federalized state legislation as a guide to inform federal constitutional law.

## I. DUAL SOVEREIGNTY AND FEDERAL CONSTITUTIONALIZATION

### *A. State Constitutionalism and State Court Laboratories*

Justice Brandeis coined the concept of states serving as laboratories of democracy.[54] He was curious about the role of states in our dual sovereign system, remarking that it is "one of the happy incidents . . . that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments."[55] The idea, of course, was to encourage states to create and implement independent state policies and rules that offered greater protections above the federal baseline without inflicting nationwide harm. While Brandeis was referring primarily to state legislatures as the

[54] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see, e.g.*, JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 180–275 (2005).

[55] *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

laboratories, state courts likewise play a significant role in the functioning of laboratories of democracy, especially the doctrines and jurisprudential experiments conducted by state courts that help develop and inform constitutional law without threatening doctrines nationwide. State courts that carve out their own independent constitutional path may engage in trial-and-error doctrines, such as adopting new analytical tests or tiers of scrutiny separate and distinct from that of the U.S. Supreme Court.[56] Yet, even in light of the virtues of judicial federalism, our dual sovereign system has become a hierarchical, top-down system that has been overshadowed by federal constitutional law and the Supreme Court's doctrines.

Federal constitutional law imposes a vast and expansive influence over state and local law, even in non-preemptive areas.[57] As Jeffrey Sutton explains, "[i]nstead of patiently allowing state courts to construe the same phrases . . . and instead of allowing winning and losing schools of thought to emerge [from state courts] over time, we tend to have a top-down model of judicial interpretation."[58] Federal constitutional law and the doctrines that the Supreme Court creates from it has become the default leader in our federalist system. A common consequence of this top-down dynamic is the tendency for the Supreme Court to hand down a ruling. State supreme courts then move to adopt and follow, blindly, by interpreting the Court's reasoning in the same or substantially the same manner under analogous state constitutional provisions or to exclusively follow the federal doctrine without reference to or an inquiry into state constitutional law.[59] And while there exists plenty of examples of state courts exercising independent application of rights under state constitutions, there is a universal habit across the states in which state actors excessively "borrow[] wholesale from federal constitutional discourse."[60] The consistency of state following of federal constitutional law is striking, and scholars have worked tirelessly to understand the inertia.[61] This top-down dimension of judicial dual sovereignty imposes an

[56] *See* Dodson, *supra* note 43, at 705.

[57] SUTTON, *supra* note 6, at 20.

[58] Jeffrey S. Sutton, *Courts as Change Agents: Do We Want More—or Less?*, 127 HARV. L. REV. 1419, 1427 (2014) (book review).

[59] *Id.*

[60] Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 928 (1993) (quoting James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992))

[61] *See* Blocher, *supra* note 51, at 325; *see also* Joseph Blocher, *What State Constitutional Law Can Tell Us About the Federal Constitution*, 115 PENN ST. L. REV. 1035, 1035 (2011).

"impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation."[62] This has left state courts and their constitutions "out in the cold" for no apparent reason other than sheer ignorance, fear, or laziness.[63]

Some scholars argue there exists a gravitational force of federal constitutional law that lures state courts into interpreting their state constitutions the same way the Supreme Court interprets the federal version. State courts "often use[] a lockstep approach . . . . routinely rely[ing] upon United States Supreme Court analysis" instead of their own.[64] There is a tendency "to follow whatever doctrinal vocabulary is used by the United States Supreme Court."[65] It is as if the states bow "to the nationalization of constitutional discourse."[66]

Indeed, there is a "relative infrequency" of state supreme courts ruling on state constitutional grounds.[67] The infrequency is due, in part, to a reluctance, and arguably a hesitancy, to turning their attention to and deciding a case on state constitutional grounds.[68] Infrequency aside, "state supreme court opinions reflect a general avoidance of analysis of the state constitution altogether."[69] The consequence of this behavior is that "many states do not have a tradition of using their state constitutions to provide rights greater"

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[62] *See* Linde, *supra* note 60, at 933.

[63] *See* Blocher, *supra* note 51, at 326.

> State constitutions, by contrast, have largely been left out in the cold. Why, in a system that claims to be committed to federalism and respect for the states, are state supreme courts' interpretations of parallel constitutional provisions so thoroughly ignored? If states have a constitutionally guaranteed role as laboratories for constitutional innovation, why does the Court discard the lab results?

*Id.* (footnote omitted).

[64] John Christopher Anderson, *The Mysterious Lockstep Doctrine and the Future of Judicial Federalism in Illinois*, 44 LOY. U. CHI. L.J. 965, 972–73 (2013) (citing two studies demonstrating the phenomenon when state high courts interpret their own constitutions).

[65] Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 186 (1984).

[66] *See* Blocher, *supra* note 51, at 339.

[67] Gardner, *supra* note 60, at 780.

[68] *See id.* at 781.

[69] Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and the Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 288 (1998).

than the federal constitutional minimum, even though they could.[70] This morphing of the roles of state and federal courts causes state courts to "adopt federal constitutional law as their own" as part and parcel of its assumed fealty to federal law.[71] Some of this dynamic is a result of status. State constitutional law has been considered by critics as "second-tier," lacking the prestige and authority that federal constitutional law enjoys.[72]

While some blame can certainly be pointed at the "second-tier" status, the blame has also been placed at the feet of lawyers who are arguably equally culpable because of how infrequently they wield state constitutional law as a source or grounds for addressing individual rights in their cases.[73] Some jurists have gone as far as to suggest that a lawyers reliance solely on federal constitutional law in state litigation is grounds for legal malpractice.[74] Some of this habitual following of federal constitutional law is also due to historical trends that have yet to dissipate. For example, the Warren Court "took such complete control of [constitutional law] that state judges could sit back in the conviction that their part was simply to await the next landmark decision."[75] This history has structured much of American constitutional jurisprudence in a manner where "state courts operate in the shadow of Supreme Court decision-making."[76] The influence of the Warren Court on states was similarly followed by another trend led by Justice Brennan, who urged state courts to step up to address areas of individual rights under state

[70] Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1700 (2010).

[71] *See* Blocher, *supra* note 51, at 339; *see also* Linde, *supra* note 65.

[72] *See* Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 U. HAW. L. REV. 63, 106 (2016).

[73] *See* Daniel Gordon, *Superconstitutions Saving the Shunned: The State Constitutions Masquerading as Weaklings*, 67 TEMP. L. REV. 965, 965 (1994); *see also* Jamison E. Colburn, Book Note, *Rethinking Constitutionalism*, 28 RUTGERS L.J. 873, 873 (1997).

[74] State v. Lowry, 667 P.2d 996, 1013 (Or. 1983) (Jones, J., concurring) ("Any defense lawyer who fails to raise an Oregon Constitution violation and relies solely on parallel provisions under the federal constitution . . . should be guilty of legal malpractice."); Commonwealth v. Kilgore, 719 A.2d 754, 757 (Pa. Super. Ct. 1998) (explaining that a failure to raise a state constitutional claim under the search and seizure clause was considered ineffective assistance of counsel).

[75] Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1637 (2010).

[76] *Id.* at 1638–39; *see also id.* at 1653 (explaining that "[t]hose who see state constitutionalism as a distinctive enterprise, most notably state supreme court justices, embrace 'the diversity that federalism allows,' emphasize that states 'espouse cultural values distinctively their own,' and call attention to 'the vast differences in culture, politics, experience, education, and economic status' between states and the framers of the U.S. Constitution."); *id.* at 1653 n.136.

constitutional law where the Burger Court contracted "federal rights and remedies on grounds of federalism."[77] The Supreme Court also plays a role in the extending the federal shadow over state constitutional law. The Court has consistently disregarded state rulings and doctrines "when constructing federal constitutional rules" where the Court has "never pronounced" a rule or doctrine under the Constitution.[78] State courts' excessive "construction of parallel federal provisions" under their state constitutions has created an arguably paternalistic feature within our federalism where state courts are lured into following federal constitutional law without a second thought as if they are children being parented into doing so.[79]

Part of this dynamic is also due to federal court restrictions on reviewing state supreme court decisions because the highest appellate courts of the states are final arbiters of authority on questions of state constitutional law. Thus, federal courts are precluded from reviewing those matters unless there is a clear federal question involved. Sometimes federal courts will wait for state claims and litigation to be exhausted under state grounds before intervening with any federal action.[80] However, even where a state high court has incorrectly ruled on a federal question, so long as the state ruling was also adequately decided on state constitutional grounds, then federal courts, including the Supreme Court, do not intervene. The reign of federal supremacy over the states does not necessarily diminish the importance of state courts in our dual sovereign system. Justice Brennan effectively called for the rights battle to be "waged on another front"—the states.[81] And some states had heeded Justice Brennan's call for a renewed judicial federalism and state constitutionalism centered on state-centered rights protections.

In this light, some state courts view their role as path breakers and laboratories for other states to study.[82] They have jurisdiction over matters

[77] William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986).

[78] Blocher, *supra* note 51, at 325–26.

[79] *Id.* at 327 ("But despite state courts' heavy reliance on the Supreme Court's construction of parallel federal provisions, there has been no corresponding call for the Court to look to state constitutional law for illumination of federal problems.").

[80] Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909).

[81] Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 421–22 (1996) (noting that "the continuing strength of this movement does not derive from a desire to continue, at the state level, the agenda of the Warren-Brennan Court. It derives from the aspiration of state court judges to be independent sources of law.").

[82] *See* Gregory A. Caldeira, *The Transmission of Legal Precedent: A Study of State Supreme Courts*, 79 AM. POL. SCI. REV. 178, 186 (1985).

within their state boundaries, and even though state courts lack jurisdiction over federal districts,[83] they may influence the highest courts of other sister states in developing state doctrine. Indeed, while lower state courts do not have the power to directly affect national constitutional law by virtue of their jurisdiction, "state supreme court decision-making increasingly defines the meaning of constitutional rights throughout the country."[84] Moreover, state courts can create "multiple avenues of relief," and provide "differing points of view," when addressing constitutional rights that may serve as a bulwark for other courts across the country.[85] Some state supreme courts garner "reputations for being pathbreakers . . . [to influence] subsequent courts in the same state to continue to operate as pathbreakers" or to persuade the highest courts of other states to adopt their jurisprudence.[86] But there is arguably "little reason for state courts to affirmatively pursue national objectives when interpreting their constitutions"[87] due to federal supremacy and the federalist limitations imposed on state courts in our dual sovereign system.

The Supremacy Clause requires states to operate above the federal constitutional baseline on matters of state importance. Some states grant greater protections above the federal minima based on a variety of interpretive readings of their state constitutions, but it is far less frequent. Federal supremacy does not mandate that the Supreme Court adopt, consult with, or rely upon state constitutional law. The Court could choose to study

[83] *See* Devins, *supra* note 75, at 1632 (explaining that "[s]tate supreme court justices have jurisdiction over a single state, not the entire nation. They are experts in the law and politics of their state. That is not to say that they cannot learn from the experiences of other states, nor is it to say that they do not care about their national reputation or about whether their decisions will advance favored policies throughout the country." (footnotes omitted)).

[84] *Id.* at 1635.

> State supreme courts decide more than ten thousand cases each year, roughly twenty percent of which involve state constitutional issues. The U.S. Supreme Court, by contrast, now issues around seventy-five decisions a year, around forty percent of which involve constitutional issues. To put these numbers into sharper focus, the California Supreme Court now issues more opinions about state constitutional law than the U.S. Supreme Court issues decisions about federal constitutional law.

*Id.* (footnotes omitted).

[85] Michael Lewis Wells, *Congress's Paramount Role in Setting the Scope of Federal Jurisdiction*, 85 NW. U. L. REV. 465, 476 (1991).

[86] Devins, *supra* note 75, at 1672 n.236.

[87] *Id.* at 1673.

and apply state constitutional law as it pleases, but generally, it does not. The Court has, instead, on the whole, discouraged indulgences in "needless dissertations on [state] constitutional law."[88] The typical response from the Court is that the states ought to be "left free and unfettered" in construing their own state constitutions without the Supreme Court's influence or intervention.[89] But while the Supremacy Clause does not require the Court to adopt, consult, or rely upon state constitutional law, it also does not require the Court to ignore, avoid, or completely disregard state law.

It does not have to be—and certainly has not always been—this way. The inertia of federal supremacy certainly makes "federal following . . . rarer than state following."[90] But federal [constitutional] law does not always lead.[91] There is another less understood and underappreciated dimension to judicial federalism. The Supreme Court, on rare occasions, is persuaded by state court doctrine and chooses to adopt the same or substantially the same doctrine under federal constitutional law. Indeed, there have been moments of federal constitutional dependency on state doctrine.

### *B. Dual Sovereigns and Reverse Judicial Polarity*

If state courts consistently borrow federal law, then, under our dual sovereignty system, it is perfectly permissible for the U.S. Supreme Court to return the favor by borrowing and drawing more on state doctrine.[92] State courts and their constitutional doctrines may serve, under our dual sovereign system of government, as "persuasive authority in federal cases" and "define federal standard doctrine."[93] Where the Supreme Court is "confronted with federal constitutional controversies," it may choose to call upon the

[88] Minnesota. v. Nat'l Tea Co., 309 U.S. 551, 557 (1940).

[89] *Id.*

[90] Dodson, *supra* note 43, at 710 n.24; *see* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 423 (1987); Linde, *supra* note 60, at 932; Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV., 491, 494 (1984); *see also* Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 966 (1982).

[91] *See* Dodson, *supra* note 43, at 745.

[92] *See* Blocher, *supra* note 51, at 326 ("[I]t is no more constitutionally impermissible for federal courts to borrow state doctrine than it is for state courts to rely on federal doctrine.").

[93] *See* Blocher, *supra* note 51, at 326, 371. *See also* Blocher, *supra* note 60 ("By contrast, federal courts tend not to look to state constitutional law, even for persuasive authority. Nor have scholars argued at any length that federal courts can or should look to state constitutional law for guidance in answering the many constitutional questions common to the federal and state systems.").

"expertise of state courts that have addressed parallel controversies under their own constitutions."[94] It is neither jurisdictionally nor jurisprudentially inappropriate for the U.S. Supreme Court to entertain, study, and adopt "state developments"[95] and "state innovations" as federal.[96] The Court may utilize countless state court doctrines to create new or enhance existing federal doctrine.[97] This intranational dimension places state courts, in some circumstances, as dominant players and national leaders in "articulating and protecting individual rights."[98]

This state-level "market of judicial reasoning" leads states to create and develop "innovative legal claims" that allow the Supreme Court, if it chooses, to "profit from the contest of ideas."[99] This "federaliz[ing]" of state doctrines addresses a unique or untested federal issue through a practice of reverse borrowing.[100] Instead of federal courts grappling with a legal question or doctrine within the vacuum of federal precedent, text, tradition, or history, the Supreme Court could wait for the results on how state courts "work their way through [similar] constitutional issues . . . assess the States' experiences," and then choose how to approach and address the federal issue by consulting those state courts' rulings.[101] Unlike the traditional top-down approach, this intranational practice respects a "ground-up approach to developing constitutional doctrine" and encourages the Supreme Court to learn from state doctrine and evolve federal constitutional law—at select moments and from the appropriate cases—based on state doctrine.[102]

The practice has been quite limited in comparison to other developed areas of American law. But while the practice is rare, "there are many areas in which the state courts . . . have been leaders, not followers, in recognizing countermajoritarian rights."[103] Indeed, few scholars would disagree that, on the whole, state courts have been at the forefront of many groundbreaking legal issues that were decided within the confines of state doctrine and state

[94] Blocher, *supra* note 51, at 327.

[95] Dodson, *supra* note 43, at 753.

[96] *Id.* at 710 n.24.

[97] *See* Blocher, *supra* note 51, at 371–85.

[98] Gardner, *supra* note 60, at 763.

[99] SUTTON, *supra* note 6, at 20.

[100] *Id*; *see* Blocher, *supra* note 51, at 371–85.

[101] SUTTON, *supra* note 6, at 20.

[102] *Id.* at 216. As Sutton explains, the question is "who—not what—should be the leading change agents in society going forward." *Id.* at 136.

[103] Sutton, *supra* note 58, at 1444.

constitutions.[104] The same groundbreaking results could be replicated by directly influencing the Supreme Court to adopt state doctrine. Some scholars argue that the Supreme Court "can and sometimes should" look to state constitutional law for guidance in areas where it has very little, if any, precedent or experience resolving an issue.[105] Further, many federal constitutional issues are commonly found in both federal and state systems.[106]

Encouraging states to be "on the front lines . . . when it comes to rights innovation" reverses the traditional dual sovereignty equation of our top-down system of judicial federalism by allowing states to serve as the "leading change agents"[107] and "initial innovators of constitutional doctrines."[108] The Supreme Court would then have the ability to "pick and choose from the emerging" state doctrines.[109] The Court may, if it chooses, rely upon the "dominant majority position" across the states' courts to inform its decision.[110] Indeed, this doctrine of federalizing state constitutional law is predicated on the concept that state constitutionalism plays an integral role in shaping and evolving federal constitutional law.[111]

Indeed, this practice of "federal [constitutional] borrowing of state constitutional law" is not necessarily new, but it is long under-addressed and underappreciated.[112] Like state judges, who habitually borrow, copy, and mimic federal law when interpreting state constitutional law, the Supreme Court could, if it chose, adopt a similar practice of consistently looking to

[104] *See* Sanford Levinson, *Courts as Participants in "Dialogue": A View from American States*, 59 U. KAN. L. REV. 791, 799 (2011); *see generally* Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 815 (2010).

[105] Blocher, *supra* note 61; *see also* Blocher, *supra* note 51, at 327.

[106] Blocher, *supra* note 61.

[107] SUTTON, *supra* note 6, at 214.

[108] *Id.* at 20.

[109] *Id.* at 20.

[110] *Id.* at 216; *see also infra* Parts II–IV.

[111] SUTTON, *supra* note 6, at 208 (explaining that "[a] common thread . . . [for why] States have been leaders rather than followers . . . is the complexity of the problem at hand"); *see also id.* (stating that the "more likely state-by-state variation is an appropriate way to handle the issue and the more likely a state court will pay attention").

[112] Blocher, *supra* note 51, at 349, 347–48; Blocher, *supra* note 61, at 1036, 1038 (arguing that state doctrine may be used as persuasive authority in federal cases but may also be used to define federal law, and "[t]here is . . . no reason why federal courts could not engage in the same kind of borrowing when, for example, they confront constitutional issues on which state constitutional law is well-developed and federal constitutional law is not.").

state supreme courts for guidance on how to best interpret certain individual rights or analytical frameworks. Where there is "relatively uniform and well-developed jurisprudence on a question with which the federal courts have little or no experience," it would be reasonable for the U.S. Supreme Court to consult state doctrine.[113]

That said, the process of judicially federalizing state doctrine is a relatively rare phenomenon. The practice has limited examples and received very little academic or judicial attention. But the idea of federalization, in and of itself, is not without precedent. The Court has, similarly, on rare occasions, vertically consulted and referred to state legislation—what I call legislative federalization doctrine—more frequently than judicial federalization. The Court has also horizontally cited to its past legislative federalization cases as sources of persuasive authority. However, like the judicial federalization doctrine, there is a dearth of scholarship on the subject matter.[114] I will return to the legislative federalization doctrine in Part IV.

The intranational judicial practice of borrowing from and consulting with state courts was "once dominant, then forgotten, [but] now reemerging" in a way that reminds jurists and scholars that many constitutional rights

[113] Blocher, *supra* note 61, at 1038; *see, e.g.*, Blocher, *supra* note 51, at 348.

[114] *See infra* Part IV. There is, however, a consistent practice by the Supreme Court to develop "federal constitutional doctrine [based] on state [legislation]." *See* Roderick M. Hills, Jr., *Counting States*, 32 HARV. J.L. & PUB. POL'Y 17, 17 (2009). Roderick Hills points out that this practice entails relying upon state legislation to "inform the content of federal constitutional doctrine" and to evaluate state legislation collectively to determine "consensus." *Id.* That said, scholars have paid little attention to this phenomenon of state law influence on the Supreme Court. *See* LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993) (arguing state constitutionalism is relevant to federal constitutionalism); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1125–49 (2006). The most prominent areas of constitutional law where the Court has consulted and relied upon state legislation to guide its decision making is the Fourth Amendment, Sixth Amendment, Eighth Amendment, and Fourteenth Amendment. *See e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986); Washington v. Glucksberg, 521 U.S. 702 (1997); Hodgson v. Minnesota, 497 U.S. 417 (1990); Lawrence v. Texas, 539 U.S. 558 (2003); Troxel v. Granville, 530 U.S. 57 (2000); United States v. Watson, 423 U.S. 411 (1976); Payton v. New York, 445 U.S. 573 (1980); Tennessee v. Garner, 471 U.S. 1 (1985); Wolf v. Colorado, 338 U.S. 25 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); Penry v. Lynaugh, 492 U.S. 302 (1989); Ring v. Arizona, 536 U.S. 584 (2002); Williams v. Florida, 399 U.S. 78 (1970); Burch v. Louisiana, 441 U.S. 130 (1979); Duncan v. Louisiana, 391 U.S. 145 (1968); Stanford v. Kentucky, 492 U.S. 361 (1989); Tison v. Arizona, 481 U.S. 137 (1987); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Obergefell v. Hodges, 576 U.S. 644 (2015).

originated not from the federal constitution or federal courts but from state constitutions and state supreme courts.[115] Some scholars, such as Sutton, support the "return to a world" where state actors lead the charge and chart the roadmap to rights innovation.[116] A return to such a world would entail state Supreme Courts becoming active "path-breakers" whose rulings and the doctrines they create carve out a new direction for the Supreme Court to follow to expand or contract rights.[117]

While a renewed focus on state constitutionalism has plenty of advocates and opponents, there is at least some agreement that state courts remain an unrestricted, and perhaps untapped, source "for change in the twenty-first century."[118] Whether state courts should serve as the "lead change agents going forward"[119] is central to many debates about the role of state constitutionalism.[120]

The utility of state constitutional law reinforces the American commitment to federalism in which federal courts "learn from [state] lab experiments."[121] The state courts and their interpretations of both state and federal constitutions may, at times, be of greater persuasion than lower federal court or Supreme Court precedent. This precise dimension plays out in takings, where the Supreme Court purportedly lacked relevant precedent

[115] Sutton, *supra* note 58, at 1419.

[116] *Id.* at 1420; *see also id.* at 1421 ("And no one disputes that the role of the U.S. Supreme Court in facilitating change has likewise grown — so much so that it is fair to ask whether *the* leading change agent in American society in some years has been the Supreme Court.").

[117] Devins, *supra* note 75, at 1636 (explaining that "[s]tate supreme courts have also been path-breakers, paving the way for Supreme Court decisions expanding constitutional protections" including the exclusionary rule, anti-miscegenation, same-sex sodomy, and racially motivated peremptory challenges); *see also* Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues When Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1049–50 (1985); James A. Gardner, *Whose Constitution Is It? Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1269–70 (2005); Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1048–49 (1997).

[118] Sutton, *supra* note 58.

[119] *Id.*

[120] *Id.*; *see also id.* at 1442 ("[W]hen the Supreme Court contemplates nationalizing an issue in the future, it might do well to consider what the states have said about it.").

[121] Blocher, *supra* note 61, at 1038–39 ("Federal judges are therefore just as free as their state counterparts to use the other's law as guidance, and occasionally issues arise for which the states have a relatively uniform and well-developed jurisprudence on a question with which the federal courts have little or no experience."); *see also* Blocher, *supra* note 51, at 342–44.

or doctrine to address exactions and therefore borrowed from and consulted with a well-developed state court jurisprudence.[122] But there are, of course, limitations to using state courts and their rulings and doctrines as primary sources and guides for federal constitutional law.

The commingling of state and federal constitutional law by the Supreme Court could lead to confusion and unintended resentment.[123] For example, Justice Stevens has noted that certain analyses are "best suited to facilitating the independent role of state constitutions and state courts in our federal system."[124] There is concern that the blurring of state court-created doctrine with federal jurisprudence may engender "mutual trust" between the federal

[122] *See infra* Part II; Blocher, *supra* note 61, at 1038–39 ("Federal judges are therefore just as free as their state counterparts to use the other's law as guidance, and occasionally issues arise for which the states have a relatively uniform and well-developed jurisprudence on a question with which the federal courts have little or no experience."). *See also* Gerald S. Dickinson, *Takings Federalization*, 100 DENV. L. REV. (forthcoming 2023); Blocher, *supra* note 51, at 347–49; Blocher, *supra* note 61, at 1048 ("Like federal constitutional law, [state constitutional law] is an entrenched statement of a community's constitutional values, one that—though easier to alter than the federal version—is both a statement of principle and an enforceable provision of basic law.").

[123] Delaware v. Van Arsdall, 475 U.S. 673, 699, 701–04 (1986) (Stevens, J., dissenting) (noting that "this Court presumed that the judgment of the Montana Supreme Court did not rest on Montana's Constitution"); In a Montana Supreme Court case, Justice John C. Sheehy disagreed with the federal intervention and stated:

> In our original opinion in this case, we had examined the rights guaranteed our citizens under state constitutional principles, in the light of federal constitutional decisions. Now the United States Supreme Court has interjected itself, commanding us in effect to withdraw the constitutional rights which we felt we should extend to our state citizens back to the limits pr[e]scribed by the federal decisions. Effectively, the United States Supreme Court has intruded upon the rights of the judiciary of this sovereign state. Instead of knuckling under to this unjustified expansion of federal judicial power into the perimeters of our state power, we should show our judicial displeasure by insisting that in Montana, this sovereign state can interpret its constitution to guarantee rights to its citizens greater than those guaranteed by the federal constitution. . . . If a majority of this Court had the will to press the issue, we could put the question to the United States Supreme Court four-square, that this State judiciary has the right to interpret its constitution in the light of federal decisions, and to go beyond the federal decisions in granting and preserving rights to its citizens under its state constitution.

State v. Jackson, 672 P.2d 255, 260–61 (Mont. 1983) (Sheehy, J., dissenting). *See* Siler v. Louisville & Nashville R.R. Co., 213 U.S. 175, 193 (1909); Hagans v. Lavine, 415 U.S. 528, 546 (1974) (surveying state case law and noting that "[t]he Court has characteristically dealt first with possibly dispositive state law claims pendent to federal constitutional claims").

[124] *Van Arsdall*, 475 U.S. at 705.

and state courts.[125] Likewise, Justice Ruth Bader Ginsburg once explained that state supreme courts have a "unique vantage point" and the authority to grant greater relief under their state constitutions when the federal constitution fails to provide such relief.[126] That vantage point, however, may not be relevant or useful to federal constitutional questions. In fact, state supreme courts' experiences on similar questions of constitutional law may diminish the independence of not only state doctrine but also federal constitutional norms. Similarly, Justice Harry Blackmun has noted that states are "free *as a matter of its own law* to impose greater restrictions . . . than those this Court holds to be necessary upon federal constitutional standards."[127] This independent source of state constitutional law, some argue, should remain untethered to federal constitutional analysis and play no role in the outcome of a federal case nor inform the contours of federal constitutional generally.

Judicial federalization doctrine, nevertheless, has been hamstrung by the Supreme Court, so many of the arguments in support and opposition are in the abstract. The Court has increasingly become "less apt to nationalize constitutional protections."[128] With a general aversion to leaning into state court doctrine and state constitutional law as a source of federal constitutional analysis, the Court has made the prospect of instituting judicial federalization doctrine less likely. But, the question still remains from a scholarly perspective: "Why not do the reverse? That is the way other areas of the law traditionally develop, be it tort, property, or contract law."[129]

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[125] *Id.* at 699.

[126] Ohio v. Robinette, 519 U.S. 33, 40 (1996) (Ginsburg, J., concurring).

[127] Oregon v. Hass, 420 U.S. 714, 719 (1975).

[128] Devins, *supra* note 75, at 1636 n.30; *see also* James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1032–54 (2003).

[129] Sutton noted that it would be better to

> allow the state courts to work their way through the constitutional issues under their own similarly worded constitutions—developing their own tests and doctrines along the way—after which the National Court can assess the States' experiences and develop its own federal constitutional rules. Let the state courts be the initial innovators of constitutional doctrines if and when they wish, and allow the U.S. Supreme Court to pick and choose from the emerging options.

SUTTON, *supra* note 6; *see also* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501 (noting that "[p]rior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously

## II. JUDICIAL FEDERALIZATION DOCTRINE

Part II explores the few rare instances when the Court has reached down to the states for guidance on how to decide a federal matter where the Court had very little, if any, precedent to rely upon in developing the new federal doctrine.

### *A. Exactions*

Prior to the Court's *Nollan* and *Dolan* rulings that created a federal exactions standard, "state courts had [already] applied various state statutory and constitutional doctrines to develop differing standards of review for land use exactions."[130] The reasonable relationship test was relatively popular. Local governments required "impact fees" on landowners who sought development permits. Courts, in turn, required governments to demonstrate a reasonable relationship between the impact fee and the cost of the proposed development. California led the charge on this looser test.[131] The policy allowed governments to exact concessions from developers, which they could then use to create other benefits, such as community and public infrastructure. In fact, the Maryland and Missouri state supreme courts followed California, endorsing the doctrine that required some "reasonable relationship" between the activity and the impact fee.[132] But some states took a different approach.

The Illinois Supreme Court first adopted the "specifically and uniquely attributable" test in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*.[133] Under this test, the impact fee was permissible only if the government could show evidence that the fee was "directly proportional to

been protected in one or more state constitutions"); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 997 (1996) (explaining that "state Declarations of Rights were the primary origin and model for the provisions set forth in the Federal Bill of Rights.").

[130] Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 624 (2004).

[131] *See* Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673, 676 (N.Y. 1966); Billings Props., Inc., v. Yellowstone Cnty., 394 P.2d 182, 188–89 (Mont. 1964); Associated Home Builders of Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 610, 611–13, 613 n.7, 616 (Cal. 1971); Cal. Bldg. Indus. Ass'n v. San Joaquin Valley Air Pollution Control Dist., 100 Cal. Rptr. 3d 204, 214 (Cal. Ct. App. 2009).

[132] *See, e.g.*, State *ex rel.* Noland v. St. Louis Cnty., 478 S.W.2d 363, 366–67 (Mo. 1972); Home Builders Ass'n v. City of Kan. City, 555 S.W.2d 832, 834–35 (Mo. 1977); Krieger v. Plan. Comm'n, 167 A.2d 885, 888 (Md. 1961).

[133] *See* 176 N.E.2d 799, 801–02 (Ill. 1961).

the specifically created need."[134] These impact fees would only be valid if they required a developer to assume the costs solely for the improvements required as a result of the developer's activity.[135] This test arguably granted greater protections to developers and, in return, restrained local governments from abusing the impact fees.[136]

A third test also emerged from a number of other states. This test, namely the rational nexus test, was an intermediate and more moderated standard. The Wisconsin Supreme Court set forth this test in *Jordan v. Village of Menomonee Falls*.[137] The test was, prior to *Nollan* and *Dolan*, the most widely adopted standard across the states.[138] The test required governments to prove a "reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated" by the new development.[139] The government must also show there is a reasonable connection or rational nexus between the expenditures of the funds collected and the benefits accruing to the new development.[140] If the impact fee met these two prongs of the test, the fee would be authorized.[141] This moderated test sought to balance the interests of the landowner with the interests of the community. The Minnesota Supreme Court followed Wisconsin, California, and New York in consistently applying this test.[142]

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[134] N. Ill. Home Builders Ass'n v. Cnty. of Du Page, 649 N.E.2d 384, 389 (Ill. 1995) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994)).

[135] *See id.* at 393.

[136] *See* Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 355–56 (Ohio 2000).

[137] 137 N.W.2d 442 (Wis. 1965).

[138] *See* Thomas M. Pavelko, Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 287 (1983); Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 993–96 (1989); Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EXACTIONS, 70, 75 (James E. Frank & Robert M. Rhodes eds., 1987).

[139] Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983). *See also* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668, 675 (Colo. 1981); Town of Longboat Key v. Lands End, Ltd., 433 So.2d 574, 576 (Fla. Dist. Ct. App. 1983); Lampton v. Pinaire, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980); Howard Cnty. v. JJM, Inc., 482 A.2d 908, 920 (Md. 1984); Collis v. City of Bloomington, 246 N.W.2d 19, 25 (Minn. 1976); Briar West, Inc., v. City of Lincoln, 291 N.W.2d 730, 734 (Neb. 1980); Longridge Builders, Inc. v. Plan. Bd., 245 A.2d 336, 337 (N.J. 1968); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806 (Tex. 1984); Call v. City of W. Jordan, 614 P.2d 1257, 1259 (Utah 1980).

[140] *See* Note, *supra* note 138, at 994–95.

[141] *See id.* at 993–94.

[142] *Collis*, 246 N.W.2d at 26.

The path to developing the abovementioned standards was not straight and narrow. There was constant debate across the states. The Missouri Supreme Court, for example, "reviewed all of the out of state cases cited, but f[ou]nd none so similar."[143] The California Supreme Court weighed the competing exactions standards among the states and concluded that the "clear weight of [state] authority upholds the constitutionality of statutes similar to" the one adopted by California's lower appellate courts.[144] The Wisconsin Supreme Court closely examined Illinois's specifically and uniquely attributable test[145] and ultimately found the general statement of the test to be "acceptable."[146] However, after deliberation, the court then decided to embrace a "refinement" of the specifically and uniquely attributable test that had a less restrictive application to suit the needs of local governments. The Wisconsin high court also wanted to ensure that the standard was "not so restrictively applied as to cast an unreasonable burden of proof upon the" government.[147] Thus, the court embraced the looser version of a reasonable relationship standard. The Minnesota Supreme Court, similarly, weighed the competing states' approaches and "[i]n articulating [its] test, . . . decline[d] to follow the extreme approaches of the Illinois and Montana cases."[148] The court chose "instead to follow the lead of Wisconsin, California, and New York" in applying the looser reasonable relationship standard.[149]

When *Nollan* and *Dolan* finally reached the Court, a majority of the justices had determined that the best course moving forward for rendering a decision on the constitutional issue—such as the application of unconstitutional conditions in the context of exactions—was to "nationalize" the states' exactions doctrines, instead of looking to its other regulatory takings precedents, such as *Pennsylvania Coal Co. v. Mahon*,[150] *Penn Central Transportation Co. v. City of New York*,[151] or *Loretto v. Teleprompter Manhattan CATV Corp.*[152] The Court could have articulated a test from the

[143] State *ex rel.* Noland v. St. Louis Cnty., 478 S.W.2d 363, 367 (Mo. 1972).

[144] Associated Home Builders of Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 615 (Cal. 1971).

[145] *See* Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442, 447 (Wis. 1965).

[146] *Id.*

[147] *Id.*

[148] Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976).

[149] *Id.*

[150] 260 U.S. 393 (1922).

[151] 438 U.S. 104 (1978).

[152] 458 U.S. 419 (1982).

"more open-ended inquiry that resembled its ad hoc balancing test in *Penn Central*."[153] But, *Mahon*, *Penn Central*, and *Loretto* dwarfed in comparison to the decade's worth of doctrinal developments "by the state courts"[154] that had shaped a variety of analytical frameworks on land use impact fees and exactions. In other words, the Court had at its disposal only a handful of its own precedent to work from to craft a new federal exactions standard, or the Court had countless state court rulings and doctrines that provided a well-established state-created test ready to apply as a matter of federal constitutional law. The Court chose the latter.

Before the Court decided to federalize the states' exactions doctrines, the Court was careful to weigh the competing state "markets of judicial reasoning." Chief Justice Rehnquist noted that the "[t]ypical" application of the "reasonable relationship" had been articulated by the Nebraska Supreme Court and that "some form of the reasonable relationship test ha[d] been adopted in many other jurisdictions."[155] He was referring to the rational nexus test, even though he consistently recited the reasonable relationship inquiry. The Court also considered the experiences of "[o]ther state courts [that] require[d] a very exacting correspondence"[156] known as the specific and uniquely attributable test first adopted in Illinois.[157] But, the Court determined that the federal Constitution did not require "such exacting scrutiny."[158] Other state court standards, the Court said, were "too lax to adequately protect" rights under the federal Constitution.[159]

In *Nollan*, Justice Scalia endorsed, without explicitly naming, the judicial federalization of state exactions by assenting to the appropriation of the state standards that had long been employed by state supreme courts.[160] He noted that his opinion was "consistent with the approach taken by every other

[153] Fenster, *supra* note 130, at 629 n.91 (italics added).

[154] Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999 (Ariz. 1997); *see* Dickinson, *supra* note 122; John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 L. & CONTEMP. PROBS. 139, 146–56 (1987).

[155] *Dolan v. City of Tigard*, 512 U.S. 374, 390 (1994).

[156] *Id.*

[157] *See* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 391 (Ill. App. Ct. 1995); Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect, 176 N.E.2d 799, 801–03 (Ill. 1961).

[158] *Dolan*, 512 U.S. at 390.

[159] *Id.* at 389.

[160] *See* 483 U.S. 825, 841–42 (1987).

[state] court that has considered the [exactions standard] question."[161] Similarly, the *Dolan* ruling created a "newly minted second phase" of exactions in the "rough proportionality" test that was adopted by numerous state courts.[162] Due to the lack of federal precedent available at the time as well, Chief Justice Rehnquist, in *Dolan*, looked to the state supreme courts' decisions for guidance.[163] There, he found that state courts across the country had exercised independent interpretations of their state constitutions (and some state legislation) to adopt their own exactions jurisprudence as a matter of state constitutional law.[164] The Court acknowledged that "[s]ince state courts have been dealing with th[ese] question[s] a good deal longer than we have, we turn to representative decisions made by them."[165]

In doing so, the Court concluded that it was endorsing basically the "dual rationality" or "rational nexus" test used by the majority of the state courts,[166] even though the Court, in applying that standard, found that the government had failed to show the required reasonable relationship between the easement and the developer's new proposed building.[167] Ultimately, Chief Justice Rehnquist determined that the dual rationality or rational nexus standard "adopted by a majority of the state courts [wa]s closer to the federal constitutional norm than either of those previously discussed."[168] What Chief Justice Rehnquist was referring to was likely the rational nexus test—even though he referred to it as the reasonable relationship test—which the Court had noted was the "intermediate position" taken by a number of state courts. To address the potential for confusion, the Court said it would adopt the substance of the rational nexus standard but not the name. Instead, the Court chose to name its newly-minted second phase of its exactions test as the "rough proportionality" test.[169] This name, the Court said, "best encapsulates" the federal constitutional requirements.[170]

[161] *Id.* at 839.

[162] 512 U.S. at 398–99 (Stevens, J., dissenting).

[163] *Id.* at 397.

[164] *See id. But see* Kossow, *supra* note 14, at 231–32, 231 n.86.

[165] *Dolan*, 512 U.S. at 389.

[166] *See id.* at 391, 402 n.4.

[167] *Id.* at 394–95.

[168] *Id.* at 391.

[169] *Id.*

[170] *Id.*

Some scholars have noted that the Court's goal was to "reinforce the trend in the state courts toward use of the rational nexus test."[171] Chief Justice Rehnquist and Justice Scalia, in *Nollan* and *Dolan*, in other words, followed a process of reasoning through which the "market of judicial" decisions at the state-level provided a thoroughly examined and tested set of standards in multiple jurisdictions with distinct cultures, history, ideology, political preferences, and constitutional structures.[172] Ultimately, the Court was asked to intervene to decide whether and how to apply a similar exactions standard under the federal Takings Clause.[173] The Court, arguably, "profit[ed] from the contest of ideas"[174] between the states[175] as they competed and jostled to find the best-suited test and "innovative legal claims"[176] most appropriate for their jurisdictions. This marketplace, embedded in our dual sovereign judicial system, turns state supreme courts into "seasoned comparatists"[177] who work "their way through the constitutional issues . . . developing their own tests and doctrines along the way."[178] Some state courts followed stricter standards to conform to local and state norms, while other state courts go their "separate ways"[179] by adopting looser standards that better fit the values and on-the-ground facts of the state. For decades, the Supreme Court either unknowingly or intentionally "[l]et the state courts be the initial innovators of constitutional [exactions] doctrines."[180] Ultimately, the "market of judicial reasoning identifie[d] winners and losers" amongst the states, which resulted in the emerging consensus around the dual rationality test that the Court ultimately adopted.[181]

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[171] Bosselman & Stroud, *supra* note 138; *id.* add. at 4.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *See* Bradley C. Canon & Lawrence Baum, *Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines*, 75 AM. POL. SCI. REV. 975, 977–85 (1981) (examining and studying the distribution of state court doctrines across the states); *see also* Caldeira, *supra* note 82, at 179–80 (studying the relationship and interactions among state courts across the different states).

[176] SUTTON, *supra* note 6, at 20.

[177] Shirley S. Abrahamson & Michael J. Fischer, *All the World's a Courtroom: Judging in the New Millennium*, 26 HOFSTRA L. REV. 273, 285 (1997).

[178] SUTTON, *supra* note 6, at 20.

[179] *Id.*

[180] *Id.*

[181] *Id.*

California, Illinois, New York, and several other states were "on the front lines . . . when it [came] to rights innovation[s]"[182] in the context of land use exactions. They set the stage (or the floor) for other states to follow. California and Illinois, in particular, chose to "blaze their own [divergent] paths."[183] Indeed, these were relatively "diverse, experimental patchwork[s] of state law" where state courts established a fairly large body of law regarding the validity of development or impact fees by the time the *Nollan* and *Dolan* rulings were handed down.[184] In *Nollan* and *Dolan*, the Court chose to "federalize the issue *after* learning the strengths and weaknesses" of each of the three tests laid out by the states.[185] The Court, with little, if any, precedent to guide its decisions in *Nollan* and *Dolan*, decided to "assess the States' experiences [to] develop its own federal constitutional rule[]."[186] The Court could have simply chosen to "[a]dopt[] the predominant test developed by the state courts,"[187] but instead chose to sift through the various tests and select a test that was not merely the predominant test, but the test best suited for company among the Court's federal regulatory and eminent domain doctrines.

### *B. Racially Motivated Preemptory Challenges*

In *Swain v. Alabama*, the Supreme Court refused to adopt federal constitutional protections from race-based peremptory strikes.[188] In response to what some scholars and jurists saw as an abdication of its duty, "some [state] courts began sidestepping [federal precedent]" and instead relied on "their own state constitutions."[189] Other state courts "hinted" that they might consider the progressive peremptory doctrines that sister states were using to resolve what was a seemingly intractable problem of state prosecutors striking Black jurors on racially-motivated grounds. Prior to the Court's

[182] *Id.* at 214.

[183] Dodson, *supra* note 43, at 705.

[184] Fenster, *supra* note 130, at 626.

[185] SUTTON, *supra* note 6, at 20.

[186] *Id.* It is worth noting that some scholars and jurists, including Justice Stevens, were unconvinced that the Court suffered from a lack of federal precedent to guide its decision. *See, e.g.*, Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 STAN. ENV'T. L.J. 525, 564, 564 n.190 (2009) (arguing that the *Penn Central* test was readily available as a foundation to build on to develop a federal exactions test.).

[187] Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999 (Ariz. 1997).

[188] 380 U.S. 202, 227–28 (1965).

[189] Stanley v. State, 542 A.2d 1267, 1270 (Md. 1988).

seminal *Batson* ruling, the first trailblazing states to adopt prohibitions on prosecutorial use of racially-motivated peremptory strikes were California in *People v. Wheeler* and Massachusetts in *Commonwealth v. Soares*.[190] The state doctrines born from these decisions were colloquially known as the "*Wheeler-Soares*" doctrines, as they found that a prosecutor's use of racially motivated peremptory strikes was discriminatory under state constitutional analogs to the federal Fourteenth and Sixth Amendments' equal protection and right to a jury provisions.[191] Other state courts vowed not to be "shackled" to the Supreme Court's *Swain* precedent, and soon after the decision, states started to blaze new paths to justice in jury selection.[192]

For example, the Florida Supreme Court noted it had "followed the adoption of similar standards" in other states[193] and interpreted its own constitution to recognize protections against improper bias "that preceded, foreshadowed and exceed[ed] the current federal guarantees."[194] The New Jersey Supreme Court—known for grounding its decisions in themes of state constitutionalism and federalism—held that under the New Jersey Constitution, prosecutors had long been prohibited from exercising peremptory challenges to remove jurors based on race.[195] The court noted that state courts were places where issues like peremptory strikes can undergo "further study before [they are] addressed by [the United States Supreme] Court."[196] The New Mexico Supreme Court likewise accepted the rationale of California's "*Wheeler* Doctrine" and its progeny.[197]

There, the New Mexico Supreme Court looked to prior lower state court rulings in its analysis, explaining that some state courts acted as laboratories of democracy where issues, like peremptory strikes, could undergo additional study before being addressed by the United States Supreme Court.[198] Further, the New Mexico Supreme Court identified the state doctrinal origins of prohibiting racially-motivated peremptory strikes by citing directly to

[190] Batson v. Kentucky, 476 U.S. 79, 100 (1986); People v. Wheeler, 583 P.2d 748, 766 (Cal. 1978); Commonwealth v. Soares, 387 N.E.2d 499, 517–18 (Mass. 1979).

[191] *See Wheeler*, 583 P.2d at 766–67; *Soares*, 387 N.E.2d at 511, 511 nn.15 & 17.

[192] *See* State v. Slappy, 522 So. 2d 18, 21 n.1 (Fla. 1988).

[193] *Id.*

[194] *Id.* at 20–21.

[195] State v. Gilmore, 511 A.2d 1150, 1164 (N.J. 1986).

[196] *Id.* at 1155 (second alteration in original) (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

[197] State v. Aragon, 784 P.2d 16, 20 (N.M. 1989).

[198] *Gilmore*, 511 A.2d at 1155.

California's *Wheeler* Doctrine as well as interpreting the New Jersey constitutional protections as persuasive authority.[199] In fact, the New Jersey Supreme Court was not shy in celebrating a lower New Jersey court that "served as a laboratory in federalism" by prohibiting race-based peremptory strikes on state constitutional grounds before the Supreme Court's *Batson* ruling and recognizing that the New Jersey Constitution provided greater protections "against a prosecutor's discriminatory use of peremptory challenges" than the Supreme Court did under the federal constitution.[200] This explicit respect for state constitutionalism was followed by a nod to other state courts that had blazed a progressive path on peremptory strikes long before the Supreme Court intervened in *Batson*.[201]

By the time the question of the constitutionality of racially motivated peremptory strikes reached the Supreme Court in *Batson*, the Court had at its disposal a litany of state court rules, decisions, and doctrines to consult. In a nod to the practice of judicial federalization, one state court judge stated, "[i]t was, after all, State courts independently construing their State Constitutions that ultimately led the Supreme Court in *Batson* to . . . follow 'the lead of [a] number of state courts construing their State's Constitution.'"[202]

In *Batson*, the Supreme Court ruled that the Fourteenth Amendment Equal Protection Clause prohibited prosecutors from relying solely on race motivations to strike black jurors from juries.[203] This racially motivated peremptory practice was used frequently by prosecutors to gain a purported advantage at trial. The Court was urged "to follow decisions of other States"[204] in determining whether the federal Equal Protection Clause prohibited racially peremptory strikes. The Court did just that. It took cues from a handful of state courts, specifically California and Massachusetts, that had articulated a test to address peremptory strikes under both state and federal constitutional law.[205] The Court, in other words, seemed to have waited for the state courts to debate the matter to see where the chips fell. In

[199] *Aragon*, 784 P.2d at 19.

[200] *See Gilmore*, 511 A.2d at 1156.

[201] *See Id.*

[202] People v. Hernandez, 552 N.E.2d 621, 626 (N.Y. 1990) (Kaye, J., dissenting) (quoting Batson v. Kentucky, 476 U.S. 79, 82 n.1 (1986)).

[203] 476 U.S. at 89.

[204] *Id.* at 83; *see* Brief for Petitioner at 4, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263) ("Petitioner here proposes a remedy for improper use of peremptory challenges similar to that found in *People v. Wheeler* . . . .").

[205] *Batson*, 476 U.S. at 105–06 (Marshall, J., concurring).

doing so, the Court learned that there was increasingly a growing state judicial passivity to protect against discrimination in peremptory strikes. California's "*Wheeler* and its progeny . . . amply demonstrate[d] that such judicial passivity in the face of racial discrimination is both unnecessary and unwise."[206] Indeed, the petitioners in *Batson* argued that since it was unlikely that most states would adopt the California doctrine addressing discriminatory peremptory strikes, the Court "must act on this problem" by setting forth a federal prohibition as the "one legal and moral authority" under the federal constitution "to ensure the rights of the people."[207]

Unlike the *Nollan* and *Dolan* Courts, the *Batson* Court was not following the lead of the majority of state courts.[208] The *Wheeler-Soares* doctrines had been followed by only a minority of states such as Florida, Delaware, Massachusetts, New Jersey, and New Mexico.[209] The Court effectively followed the lead of the minority of state courts who had interpreted their state constitutions to prohibit race-based peremptory striking of black jurors.[210] The Court intervened to nationalize race-based protections from discriminatory peremptory strikes, not when there was a majority consensus amongst the states, but when there was only a minority of states that had done, according to the Court, the right thing to adopt a state doctrine to protect civil rights. There were risks, however, associated with doing so.

The choice to tinker with state doctrines and mechanically affix the doctrines employed by only a handful of states to a new nationwide federal doctrine was something the Court had rarely done in the past. The "stakes of its decision"[211] were raised because the Court was adopting a state doctrine that did not have the support of the majority of states. The Court's judicial federalization of *Wheeler* and *Soares* also risked confusion across the nation and arguably increased litigation due to the very nature of its conception in state courts. The jurisdictional origin of *Wheeler* in California and *Soares* in

[206] Brief of Michael McCray et al. as Amici Curiae at 60, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263).

[207] Brief for Petitioner, *supra* note 204, at 34.

[208] *Batson*, 476 U.S. at 99 n.24.

[209] *See id.* at 82 n.1 (referencing the following state court decisions: Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979), *cert. denied*, 444 U.S. 881; State v. Neil, 457 So.2d 481 (Fla. 1984); State v. Crespin, 612 P.2d 716 (N.M. Ct. App. 1980)); *see also* State v. Gilmore, 511 A.2d 1150 (N.J. 1986) (adopting the analysis in *People v. Wheeler* for the state of New Jersey).

[210] *Batson*, 476 U.S. at 82 n.1.

[211] SUTTON, *supra* note 6, at 216.

Massachusetts would, critics argued, raise the question as to whether its application in other jurisdictions would have unforeseen or unintended consequences on racialized or non-racialized peremptory challenges. The *Wheeler* and *Soares* doctrines were also state court decisions, interpreted under both state and federal constitutional law and to be applied in specific state judicial systems, often at the trial level. How then could the Court expect the imposition of a few state court doctrines nationwide to work without creating disparate outcomes?

Nonetheless, the Court was convinced that, even if such concerns were true, the rights at issue and violations under the federal Equal Protection Clause could not be addressed solely by state courts on judicial federalism grounds. The failure to federalize, the Court intimated, risked thwarting the effective administration of the justice system locally *and* nationally.[212] The risks of failing to act to correct the passivity of the majority of states outweighed these burdens because doing nothing would effectively sanction the continued violation of federal constitutional rights.[213] The Supreme Court, thus, served as a dual sovereign arbiter, awaiting the results of the doctrinal battle across the states, before being asked to intervene and federalize the issue to ensure uniform compliance when it was apparent that any further delay would do more harm than good. As Steven R. Shapiro explained, "[a]ll of this scholarly and judicial analysis has done more than just reveal the flaws of *Swain*. It has demonstrated in the crucible of actual criminal trials that [a state] alternative to *Swain* is both feasible and fair."[214] The *Wheeler* and *Soares* doctrines were the "logical and constitutionally mandated culmination of [state] constitutional developments . . . . [t]he accuracy of that observation is confirmed by the experience of those states that ha[d] adopted" the California and Massachusetts rules.[215]

The judicial federalization of the states' racially-peremptory doctrines in *Batson* did not, however, end the role of the state courts. *Batson* and the nationalization of a constitutional protection was not an invitation to or license for "laboratories operated by leading state courts [to] now close up

[212] *See Batson*, 476 U.S. at 99 ("[T]he rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.").

[213] *See also id.* at 82 n.1 (stating that the *Wheeler* and *Soares* rules were rejected by Illinois, Kansas, Kentucky, New York, Pennsylvania, Rhode Island, and the District of Columbia, as well as some federal circuit courts).

[214] Brief of Michael McCray et al., *supra* note 206, at 42.

[215] Brief for the Lawyers' Committee for Civil Rights Under Law as Amicus Curiae at 6, 21, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263).

shop."[216] The Court's *Batson* opinion imbued a respect for judicial federalism and gave state courts ample room to adjust to the federalization of peremptory strike doctrine. The Court noted "that States do have flexibility in formulating appropriate procedures to comply with *Batson*,"[217] and the "variety of jury selection practices followed in our state . . . trial courts" advises against making attempts to instruct state courts on how to implement the *Batson* holding.[218]

Indeed, the states did not wait for the Supreme Court to come around on peremptory challenges, deciding to develop an authoritative body of law rather than "being held in suspense, case-by-case, over the next decade" as the Court "fleshe[d] out the newly recognized minimum equal protection right that will prevail across the Nation."[219] Ultimately, it was the "independent development of State law concerning peremptory challenges" that later benefitted the entire nation when the Court decided to follow the lead of the states in writing the *Batson* opinion.[220] The justices were able to "pick and choose from the emerging options"[221] of peremptory challenge doctrines and then, when appropriate, "nationalize" the state doctrine even though the *Wheeler-Soares* doctrines were not the "dominant majority position."[222]

### *C. Exclusionary Rule*

Prior to the Court's decision to incorporate the Fourth Amendment's exclusionary rule to the States through the Fourteenth Amendment, there was a "contrariety of views of the States" on the matter.[223] The Court was urged not to "brush aside the experience of States" in deciding its seminal case, *Mapp v. Ohio*.[224] Indeed, a version of an exclusionary rule had been adopted by over half the states by the time the question—whether the federal rule applied to the States by incorporation and thus, whether unconstitutionally

[216] State v. Gilmore, 511 A.2d 1150, 1157 (N.J. 1986).

[217] Johnson v. California, 545 U.S. 162, 168 (2005).

[218] 476 U.S. at 99 n.24.

[219] People v. Hernandez, 552 N.E.2d 621, 626 (N.Y. 1990) (Kaye, J., dissenting).

[220] *Id.*

[221] SUTTON, *supra* note 6, at 20.

[222] *Id.* at 216.

[223] Mapp v. Ohio, 367 U.S. 643, 651 (1961).

[224] *Id.* (quoting Wolf v. Colorado, 338 U.S. 25, 31 (1949), *aff'g* 187 P.2d 926 (Colo. 1947), *overruled by Mapp*, 367 U.S. 643).

seized evidence was inadmissible in state court—arrived at the Supreme Court. Before the *Mapp* decision, few states had generated a robust body of precedent articulating a state-focused search and seizure doctrine.[225] But, there were signs of "changing norms objectively" across the states regarding the application of exclusionary rules.[226] As a result, the decision to incorporate hinged less on the Court being "the key rights innovator in" criminal procedure, and more on how the states' experiences offered a roadmap.[227] And that roadmap was being shaped by a shifting landscape across the states adopting a judicially-imposed exclusionary rule. By 1949, twenty-seven states had refused to interpret their state constitutions to include an exclusionary rule, but that number was dwindling.[228] An increasing number of state courts had "recognized the validity of and necessity for the exclusionary rule long before the United States Supreme Court required states to apply it in state court proceedings."[229]

The rise of a state-led exclusionary rule doctrine was born from state experiences where alternative forms of constitutional protections of privacy had failed without the exclusionary rule. California, again, was the trailblazer on this front. In *People v. Cahan*, the California Supreme Court explained that both the federal and state constitutions "make it emphatically clear" that "the right of privacy guaranteed by these constitutional provisions be respected" with regards to the inadmissibility of unconstitutionally obtained evidence.[230] Further, the California Supreme Court, in adopting the exclusionary rule, noted that the federal version, which did not apply to the states at the time, had created "needless confusion" across the states, but that the problems of the federal rule should not preclude a state system from proceeding with the application of its own exclusionary rule.[231]

In *Mapp*, the Supreme Court ruled that evidence obtained by an unlawful search was inadmissible in state and federal courts for use by prosecutors

[225] Thomas K. Clancy, *Independent State Grounds: Should State Courts Depart from the Fourth Amendment in Construing Their Own Constitutions, and if so, on What Basis Beyond Simple Disagreement with the United States Supreme Court's Result?*, 77 MISS. L.J. i, iv (2007).

[226] SUTTON, *supra* note 6, at 69.

[227] *Id.* at 214.

[228] Jack L. Landau, *Should State Courts Depart from the Fourth Amendment? Search and Seizure, State Constitutions, and the Oregon Experience*, 77 MISS. L.J. 369, 377 (2007).

[229] State v. Johnson, 716 P.2d 1288, 1297 (Idaho 1986).

[230] 282 P.2d 905, 907 (Cal. 1955).

[231] *Id.* at 914–15.

under the Fourteenth Amendment.[232] In doing so, the Court incorporated the Fourth Amendment's right to privacy by enforcing those principles against the states through the Fourteenth Amendment.[233] Justice Clark was persuaded by California's line of reasoning. He agreed that the experience of the states militated against leaving them with "worthless" and "futile" remedies under solely the Fourth Amendment.[234] Enough time had passed, he noted, for states to have "adequate opportunity to adopt or reject the [federal] rule" and that the time had come to assess those results amongst the states.[235] The movement towards adopting the exclusionary rule had gained "inexorable" speed across the states.[236] The results of that movement, he noted, were "impressive" as more states adopted a similar rule to the federal version.[237]

The Court's decision to incorporate, and thus impose, the exclusionary rule on state courts through the Fourteenth Amendment was largely the result of the Court's consultation with and guidance from state doctrine. The ruling also turned on other federalism principles. Justice Clark explained that the patchwork of states that did not have exclusionary rules made for a senseless and needless conflict between state and federal courts where state and federal exclusionary rules disagreed.[238] The Court was persuaded and "deeply influenced" by the "emerging consensus" across the state courts which had, by then, thoroughly addressed the state exclusionary rules through a patchwork of state doctrines finding that suppression of illegally seized evidence was imperative to counter unconstitutional search and seizures.[239] Some scholars "heralded the federal constitutionalization of criminal

[232] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[233] *Id.*

[234] *Id.* at 652.

[235] *Id.* at 654.

[236] *Id.* at 660.

[237] *Id.*

[238] *Id.* at 657–58. Specifically, Justice Clark wrote:

> [A] federal prosecutor may make no use of evidence illegally seized, but a State's attorney across the street may, although he supposedly is operating under the enforceable prohibitions of the same Amendment. Thus the State, by admitting evidence unlawfully seized, serves to encourage disobedience to the Federal Constitution which it is bound to uphold.

*Id.* at 657.

[239] Gardner, *supra* note 128, at 1039.

procedure."[240] But, while *Mapp* arguably "may not [have] nationalize[d] the law of search and seizure," it did force state courts to reexamine evidentiary practices over search and seizure matters that were otherwise impermissible in federal courts.[241]

The judicial federalization of the exclusionary rule followed a rare path reversal. State court doctrinal innovations were "followed by federal rulemakers and courts."[242] The Court's *Mapp* decision ultimately reflected "a common policy [increasingly] shared by [many] states."[243] The Court arguably benefited "from the contest of ideas."[244] These ideas, formalized through judicial doctrines concerning exclusionary rules amongst the states, allowed the Court to "choose whether to federalize the issue after learning the strengths and weaknesses of the competing ways of addressing the problem."[245] Those state "tests and doctrines along the way" convinced the Court that incorporation was the most appropriate course of action.[246] The exclusionary rule was, thus, the result of the "States' experiences" that in turn helped the Court develop its "own federal constitutional rule[]" to be applied to the states.[247] State court leadership, and the broader notion of state constitutionalism, was the "key mechanism for prospectively shaping federal constitutional law."[248]

### *D. Freedom of Speech and Press*

Before the Supreme Court entered the fray over questions as to whether protections to speech and press limit government authority to award damages in libel actions, state courts had already developed a robust "actual malice"

[240] Joseph A. Grasso, Jr., *"John Adams Made Me Do It": Judicial Federalism, Judicial Chauvinism, and Article 14 of Massachusetts' Declaration of Rights*, 77 MISS. L.J. 315, 321 (2007). *See* Landau, *supra* note 228, at 377–78. It bears noting that this still meant that states could not provide protections below the federal guarantee. They always had to, at the very least, provide the same level of protection, and offer greater protections if they chose.

[241] Duncan v. State, 176 So. 2d 840, 851 (Ala. 1965).

[242] Dodson, *supra* note 43, at 710 n.24.

[243] *Id.* at 705.

[244] SUTTON, *supra* note 6, at 20.

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] Goodwin Liu, *State Courts and Constitutional Structure*, 128 Yale L.J. 1304, 1323 (2019) (book review).

doctrinal test under state constitutional free speech provisions.[249] The Kansas Supreme Court was "on the front lines . . . when it [came] to rights innovation"[250] around free speech and press. In *Coleman v. MacLennan*,[251] the state supreme court ruled that certain privileges to obtain damages for libel or defamation are available, especially in matters involving great public concern, but that the privilege is qualified.[252] Litigants, such as public officials, seeking to wield that privilege in a defamation claim must show "actual malice" on the part of the alleged perpetrator. The state supreme court's decision to impose an "actual malice" test[253] was the catalyst for the growth of "diverse, experimental patchwork[s] of state law"[254] where a minority of state courts followed suit with the "so-called 'liberal' rule."[255]

The states that followed this path included Arizona, California, Georgia, Iowa, Kansas, Minnesota, New Hampshire, North Carolina, Pennsylvania, South Dakota, Utah, Vermont, and West Virginia.[256] The Florida Supreme Court expressly "followed the adoption of similar standards,"[257] noting that a growing minority of states were following the lead of the actual malice test "enunciated" in Kansas's *Coleman* ruling.[258] California took the same approach. In *Snively v. Record Publishing Co.*, the California Supreme Court explained that while the "actual malice" test was "not the universal rule [at the time], . . . we think the prevailing and better opinion is" the Kansas Supreme Court's *Coleman* ruling and its progeny.[259] While the states had

[249] SUTTON, *supra* note 6, at 133.

[250] *Id.* at 214.

[251] 98 P. 281 (Kan. 1908).

[252] *Id.* at 285.

[253] *Id.* at 282.

[254] Fenster, *supra* note 130, at 626.

[255] Jeffrey Steven Gordon, *Silencing State Courts*, 27 WM. & MARY BILL RTS. J. 1, 6 (2018). *See, e.g.*, Ponder v. Cobb, 126 S.E.2d 67 (N.C. 1962); Lawrence v. Fox, 97 N.W.2d 719, 725 (Mich. 1959); Stice v. Beacon Newspaper Corp., 340 P.2d 396, 399–401 (Kan. 1959); Bailey v. Charleston Mail Ass'n, 27 S.E.2d 837, 843 (W. Va. 1943); Salinger v. Cowles, 191 N.W. 167 (Iowa 1922), *abrogated by* Barreca v. Nickolas, 683 N.W.2d 111 (Iowa 2004); Snively v. Rec. Publ'g Co., 198 P. 1, 3–5 (Cal. 1921); McLean v. Merriman, 175 N.W. 878 (S.D. 1920); Phx. Newspapers, Inc. v. Choisser, 312 P.2d 150, 154 (Ariz. 1957); Friedell v. Blakely Printing Co., 203 N.W. 974, 975 (Minn. 1925); Chagnon v. Union Leader Corp., 174 A.2d 825, 833 (N.H. 1961).

[256] Deckle McLean, *Origins of the Actual Malice Test*, 62 JOURNALISM Q. 750, 751 n.4 (1985).

[257] State v. Slappy, 522 So. 2d 18, 21 n.1 (Fla. 1988).

[258] *Bailey*, 27 S.E.2d at 843.

[259] *Snively*, 198 P. at 3.

carved out their own tests under state constitutional free speech provisions, there was no federal precedent applying the actual malice test.

In *New York Times Co. v. Sullivan*, "for the first time," the Court was tasked with determining the extent of free speech and press protections in libel actions brought by public officials.[260] The Court crafted its actual malice test on "a like rule, which ha[d] been adopted by a number of state courts" specifically drawing "upon [the] turn-of-the-century" Kansas Supreme Court decision.[261] The Court explained that "constitutional guarantees require . . . a federal rule" that requires actual malice like the "oft-cited statement of a like rule . . . found in the Kansas case of *Coleman*."[262]

Indeed, the "state courts played an important role in laying the foundations for a modern-day understanding of freedom of speech and of the press."[263] The *Sullivan* Court was persuaded by the "emerging consensus" across a minority of state courts to require actual malice as set forth by the Kansas Supreme Court.[264] As a result, this minority view amongst the states was the "key mechanism for prospectively shaping federal constitutional law"[265] when the Court handed down its *Sullivan* decision. The actual malice test for free speech and press doctrine was a "ground-up approach to developing constitutional doctrine [that] allow[ed] the Court to learn from the States."[266] This "front line[]" approach to First Amendment "innovation"[267] made state courts the "lead change agents" instead of the Court.[268] It was the Kansas state Supreme Court, alongside a few other states, that became the "initial innovators of constitutional doctrines."[269]

### *E. Same-Sex Sodomy*

Same-sex sodomy follows a similar path as other instances of judicial federalization. In *Lawrence v. Texas*, the Supreme Court overruled its prior

[260] 376 U.S. 254, 256 (1964).

[261] *Id.* at 280; Dairy Stores, Inc. v. Sentinel Publ'g Co., 516 A.2d 220, 226 (N.J. 1986).

[262] *Sullivan*, 376 U.S. at 279–80.

[263] THE FIRST AMENDMENT RECONSIDERED 43 (Bill F. Chamberlin & Charlene J. Brown eds., 1982); McLean, *supra* note 256, at 751–53.

[264] *See* Gardner, *supra* note 128, at 1039.

[265] Liu, *supra* note 248.

[266] SUTTON, *supra* note 6, at 216.

[267] *Id.* at 214.

[268] *Id.* at 216.

[269] *Id.* at 20.

decision in *Bowers*, finding no constitutional right to same-sex sodomy and permitting states to regulate the matter as they see fit.[270] The Court explained that in reaching its decision, it found that state courts in interpreting "provisions in . . . state constitutions parallel to the Due Process Clause of the Fourteenth Amendment," increasingly rejected the Court's *Bowers* ruling.[271] The Court could see from above that there was "substantial and continuing, disapproving of its reasoning in all respects" from the states below.[272] State constitutionalism and judicial federalism was instrumental in the Court's *Lawrence* decision, as the Court was persuaded by the "trend in the states toward decriminalization . . . driven by judicial federalism, worthy of consideration in its federal due process analysis."[273] As James Gardner argues, the *Lawrence* ruling and the Court's broader substantive due process doctrine "suggests strongly that state courts have the ability to influence indirectly the content of nationally guaranteed liberties through their rulings under cognate provisions of state constitutions."[274]

### *F. Marriage*

Long before the Supreme Court found a constitutional right to same-sex marriage in *Obergefell v. Hodges*, the Hawaii Supreme Court was the first state to call into question the legal foundations that established the rationality of bans on same-sex marriage.[275] There, the court found that sex-based classifications were fundamental rights that enjoyed a more exacting inquiry under a strict scrutiny test.[276] Although the court determined that same-sex marriages under that inquiry were impermissible as a matter of state constitutional law, the ruling provided a blueprint for other state courts to follow suit to apply a stricter standard of review.[277] The analysis specifically found that the law was based on gender classifications, and that it required a more exacting scrutiny rather than rational basis.[278] The Massachusetts

[270] 539 U.S. 558, 578 (2003).

[271] *Id.* at 576.

[272] *Id.*

[273] Robert K. Fitzpatrick, Note, *Neither Icarus Nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1855 (2004).

[274] Gardner, *supra* note 128, at 1042.

[275] *See* Baehr v. Lewin, 852 P.2d 44, 69–70 (Haw. 1993) (Burns, C.J., concurring), *abrogated by* Obergefell v. Hodges, 576 U.S. 644 (2015).

[276] *Id.* at 68 (majority opinion).

[277] *Id.* at 67.

[278] *Id.* at 65.

Supreme Judicial Court then went a step further than the Hawaii Supreme Court, finding same-sex marriage guarantees under the state constitution in *Goodridge v. Department of Public Health*.[279] Justice Kennedy, writing for the Court in *Obergefell*, noted that "[t]he new and widespread discussion of [same-sex marriage] led other States to a different conclusion."[280] He acknowledged that "the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions."[281]

*Obergefell* arguably followed in the footsteps of *Loving v. Virginia*, where the Court struck down anti-miscegenation laws as unconstitutionally infringing on the right to marriage and violating equal protection. Like Justice Kennedy's reliance, in part, on state courts rulings, Chief Justice Earl Warren cited—alongside states that had repealed anti-interracial marriage laws—to the first state supreme court ruling invalidating anti-miscegenation laws, noting that the "first state court to recognize that miscegenation statutes violate the Equal Protection Clause was the Supreme Court of California" in *Perez v. Sharp*.[282]

## III. OBSERVATIONS AND EXPLANATIONS

Parts I and II explored the vertical practice of judicial federalization doctrine—that is, the Court's consultation with or adoption of state court doctrine as federal. Judicial federalization derives from federal constitutional protections and rights such as exactions, racially motivated peremptory challenges, the exclusionary rule, same-sex sodomy, same-sex marriage, and freedom of speech and press. What is curious about these federal doctrines, as mentioned in Part II, is that they do not stem directly from prior federal precedent or the Court's existing jurisprudence. These judicial federalization cases do not originate horizontally within the Court's own precedent or vertically from the lower federal courts. Instead, the doctrines created by the Court emerged from the development of state court doctrines long before the Court took up the specific constitutional right or protection as federal. This morphing of state jurisprudence into federal doctrine is curious because the

[279] 798 N.E.2d 941 (Mass. 2003); *see, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Griego v. Oliver, 316 P.3d 865 (N.M. 2013); Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013).

[280] 576 U.S. at 662.

[281] *Id.* at 663.

[282] Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967).

opposite is historically and doctrinally true. State courts are more likely to adopt federal doctrine rather than the other way around.

Part III explores and observes this phenomenon and offers some explanations. It finds that in light of the Court's willingness to occasionally reach vertically downward to consult and borrow state doctrines as federal, the Court has failed, unequivocally, to horizontally reach within its precedent to consistently cite or refer to its past judicial federalization cases as persuasive authority for subsequent instances of judicial federalization.

There are two things that *Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, and *Obergefell* have in common: the adoption of state doctrine as federal and the omission of reference to each succeeding case as persuasive authority for the practice of federalization. This is curious. Why would the Court fail to organize its limited collection of precedent federalizing state doctrine into a coherent, recognizable, and authoritative jurisprudence? For example, in 1961, the Court decided *Mapp*, where it embraced state doctrine to nationalize the Fourth Amendment's exclusionary rule through Fourteenth Amendment incorporation. Before reaching the Court, "[t]he contrariety of views of the [exclusionary rules across] States" was widespread.[283] The Court "could not 'brush aside the experience of States,'" since a state-version of an exclusionary rule had been adopted by over half the states at the time of the *Mapp* ruling.[284] The Court noted that the movement towards embracing the exclusionary rule across the states was gaining "inexorable" speed with "impressive" results. [285] The Court was influenced by the California state supreme's interpretation of the exclusionary rule, and thus concluded that the rule was applicable against the states through the Fourteenth Amendment.[286]

Twenty-five years later, the Court decided *Batson*, where it acquired the state courts' racially motivated peremptory strike doctrines as a blueprint for establishing a federal version. Prior to *Batson*, a minority of state courts had already prohibited racially motivated peremptory strikes under their state constitutions. Litigants in *Batson* asked the Court to explicitly "follow decisions of [the] States"[287] to hand down a federal equal protection ruling

[283] Mapp v. Ohio, 367 U.S. 643, 651 (1961) (first alteration in original) (quoting Wolf v. Colorado, 338 U.S. 25, 29 (1949), *overruled by Mapp*, 367 U.S. 643).

[284] *Id.* (quoting *Wolf*, 338 U.S. at 31).

[285] *Id.* at 660.

[286] *Id.* at 651–53, 655.

[287] 476 U.S. 79, 83 (1986); *see* Brief for Petitioner at 4, Batson v. Kentucky, 476 U.S. 79 (1986) (No. 84-6263) (stating that "Petitioner here proposes a remedy for improper use of peremptory challenges similar to that found in *People v. Wheeler*"); *id.* at 26 ("To a large extent, the remedy to

that prohibited prosecutors' racially motivated peremptory strikes. Notably, the Court chose to follow the lead of state courts who had independently interpreted the same protections under analogous state constitutions.[288] Yet, *Batson* never cites *Mapp* for the simple proposition that the Court has, in prior case law, reached down to the states for guidance and adopted state doctrine to legitimize its practice of relying upon the states' views of racially-motivated peremptory strike challenges. Why not provide additional horizontal caselaw support for the practice of federalizing doctrine?

Similarly, in 1987 and 1994, the Court developed a federal exactions standard under the Takings Clause in *Nollan* and *Dolan*. Justice Scalia, in *Nollan*, noted that the ruling was "consistent with the approach taken by every other [state] court that has considered the [exactions standard] question."[289] The Court struggled to find within its own precedent the appropriate analytical test to address unconstitutional conditions claims in the land use context as a matter of federal law. Likewise, Chief Justice Rehnquist, in *Dolan*, chose to reflect on and observe the diversity of state supreme court decisions crafting their own exactions jurisprudence under state constitutional provisions.[290] He said "[s]ince state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them."[291] Although he disagreed with the practice of borrowing the specific state case law considered by the majority in *Dolan*, Justice Stevens acknowledged that, as a general practice, it is "certainly appropriate" for the Court to look to state courts where there is an absence of federal precedent or doctrine to guide the Court.[292] He also agreed that state court decisions can be "enlightening," may "provide useful

be applied in this and similar cases is suggested by two state court cases, *People v. Wheeler* and *Commonwealth v. Soares*. These cases, relying on state constitutional grounds, held that the use by a prosecutor of peremptory challenges to remove prospective jurors solely on the ground of group bias, violates the right to a jury drawn from a representative cross-section of the community." (citations omitted)).

[288] *Batson*, 476 U.S. at 82 n.1 (citing Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *vacated*, 478 U.S. 1001 (1986); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986)). *See generally* People v. Wheeler, 583 P.2d 748 (Cal. 1978); Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); State v. Crespin, 612 P.2d 716 (N.M. Ct. App. 1980).

[289] 483 U.S. 825, 839 (1987) (identifying California as the exception).

[290] 512 U.S. 374, 390–91 (1994). *But see* Kossow, *supra* note 14, at 231–32, 231 n.86.

[291] *Dolan*, 512 U.S. at 389.

[292] *Id.* at 397 (Stevens, J., dissenting).

guidance in a case of this kind,"[293] and "lend support to the Court's reaffirmance of *Nollan*'s reasonable nexus requirement."[294]

But, over a decade later, the Court in *Lawrence* neglected to cite *Nollan* and *Dolan* for the premise that *Nollan* and *Dolan* were compelling analogs in so far as the Court had, similarly, drawn upon state doctrines to guide the resolution. In *Lawrence*, the Court looked to state court rulings on same-sex sodomy to develop a federal constitutional protection for same-sex sodomy.[295] In overruling *Bowers* to find a federal constitutional right, Justice Kennedy relied upon "[t]he courts of five different States" who had refused to "follow [*Bowers*] in interpreting provisions in their own state constitutions."[296] Why, then, did the *Lawrence* Court not cite or refer to, *Nollan* and *Dolan*, or even perhaps *Batson* and *Mapp*, to reaffirm the basic interpretive principle of consulting and adopting state doctrine to guide a new federal rule?

Likewise, in its 1964 landmark ruling in *Sullivan*, the Court modeled its new First Amendment "actual malice" test, as mentioned in Part II, based on the versions adopted by the states.[297] In *Sullivan*, the Court was tasked with crafting a new "federal rule" that comported with "constitutional guarantees" of First and Fourteenth Amendments to provide safeguards for freedom of speech and press.[298] In adopting a new federal "actual malice" test, Justice Brennan turned to "[a]n oft-cited statement of a like rule" used by the Kansas Supreme Court and that had been "adopted by a number of [other] state courts."[299]

Decades later, in 2014, the Court federalized same-sex marriage in *Obergefell v. Hodges* by following the lead of state courts. In the same vein as Justice Brennan in *Sullivan*, Justice Kennedy, in *Obergefell*, explicitly recognized that the "highest courts of many States have contributed to this ongoing dialogue in [same-sex marriage] decisions interpreting their own State Constitutions."[300] Justice Kennedy proceeded to refer to the long list of state judicial opinions cited in the appendix of the opinion to justify his

[293] *Id.* at 397, 400.

[294] *Id.* at 399 (noting his disagreement with the view that the Court was adopting the test employed by the vast majority of state courts).

[295] 539 U.S. 558, 577 (2003).

[296] *Id.* at 576.

[297] 376 U.S. 254, 267, 284 (1964).

[298] *Id.* at 279.

[299] *Id.* at 280.

[300] 576 U.S. 644, 663 (2015).

decision to establish a federal iteration of same-sex marriage protections.[301] Yet, Justice Kennedy failed to pay heed to and make mention of the *Sullivan* ruling; again, for the idea that reliance on state constitutional precedent to adopt new federal rules was an authoritative practice the Court endorsed and had practiced in the past. Likewise, Justice Kennedy's *Obergefell* opinion did not point, specifically, to Chief Justice Warren's reliance on a state court ruling invalidating anti-miscegenation laws in *Loving* to bolster his citations to state court rulings invalidating same-sex marriage bans. In other words, this was not a one-off occasion of leaning into state doctrine to help guide federal rulemaking.

Indeed, the substance of the constitutional rights and protections at issue in *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, *Obergefell*, and *Sullivan*, are distinguishable. In fact, upon first blush, none of these cases and their dispositions depend or rely upon citation to each other as authority. The essential nexus test in *Nollan*, for example, has nothing to do with the analytical standards set forth in *Mapp*. The rough proportionality test in *Dolan* is unrelated to the peremptory challenge doctrines in *Batson*. The actual malice test adopted in *Sullivan* is irrelevant to the same-sex sodomy and marriage protections under substantive due process in *Lawrence* or *Obergefell*. However, as argued, each decision engages in an interpretive practice of copying and borrowing state doctrine. Indeed, with each subsequent ruling that embraced state doctrine, the Court could have cited any combination of these prior cases to provide precedential support for the Court's practice of borrowing state constitutional law doctrines to inform federal constitutional law rulings. It did not. The Court's inexplicable reluctance to thread these federalization cases together in its opinions is striking. Why is this?

While there is already sparse literature addressing the Court's periodic consultation of and citation to state doctrine to guide its development of new federal doctrine, there is equally scant literature addressing the Court's failure to consult an obvious source of precedential authority when the Court considers federalizing a state court doctrine. But what is also curious is that the Court has practiced a similar method of federalization in the state legislative context. There, the Court has not only periodically consulted and adopted state legislative enactments as persuasive authority for deciding federal constitutional issues, but the Court has regularly cited its prior caselaw federalizing state legislation as a citation method to support the

[301] *Id.* at 676.

practice in subsequent cases where the Court is deciding whether to follow the states. Despite this, there is a complete absence of scholarly attention regarding why the Court has failed to consult, refer to, or cite as persuasive authority its own past caselaw involving the judicial, as opposed to legislative, federalization of state doctrine. Let us proceed to explore some reasons behind the Court's citation practices. Although there have been several studies that have explored why the Court cites prior opinions, overall, there is "very little empirical study" generally on citations practices of the Court.[302] This has made for limited authority to determine the "implications those citations have for the future development of law."[303]

### *A. Frequency*

Perhaps the Court's omission of a method of horizontally citing its past judicial federalization cases is nothing more than a question of frequency. The reason may come down to numbers. One plausible explanation, then, is simply that the Court has such a limited pool of federalization cases available at its disposal that it does not need or want to recognize a more robust federalization doctrine. The frequency of cited opinions matters to the justices. The frequency of a type of case also matters. Even if justices are aware of past federalization cases and consider citing to those decisions, the Court may be less inclined given the infrequent application of federalizing state doctrine. In other words, the menu of options includes merely seven cases—*Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, and *Obergefell*.[304] Scholars are not necessarily in the business of head counting, but seven seems to be about right, yet still a small number. That is an extremely small percentage of Supreme Court precedent that may weigh against placing too much precedential weight, or even a simple citation, to those prior rulings as persuasive authority in future federalization cases.

[302] Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 491 (2010). *See* Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying the Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1157 (2005) (noting that one of the "most important, yet understudied, area[s] of legal research involves precedent").

[303] Cross et al., *supra* note 302. *See* Yonatan Lupu & James H. Fowler, *Strategic Citations to Precedent on the U.S. Supreme Court*, 42 J. LEGAL STUD. 151, 156 (2013).

[304] There may be others. I do not purport to headcount in this Article. These, however, are the most prominent examples.

On average, a majority Supreme Court opinion cites seven prior Supreme Court decisions.[305] Over several decades, "the Court has gradually increased its propensity to cite its own precedents."[306] Indeed, "[a]fter 1805, Supreme Court citations to its own prior opinions doubled," because there was a growing need for legitimacy and "citations in fact serve[d] a constraining role at the Court."[307] Justices also cite a plethora of other sources, including nonbinding precedent, "to enhance the legitimacy of their opinions."[308] Some scholars argue that there is such a large volume of cases at the disposal of the Court "that it is easy . . . to find precedential support for any decision they might prefer."[309] As Lee Epstein and Thomas Walker explain, "the Supreme Court has generated so much precedent that it is usually possible for justices to find support for any conclusion."[310] Indeed, there is a "choice of precedents" available to the Court that seems limitless.[311] It is unclear why citations by justices have increased over time, but some explanations include the "larger number of available cases or a greater professionalization or institutionalization of the Court in society."[312] It is important to note "that sheer *numbers* of citations are only the roughest indicator of legal style or breadth of research" and the practice of citing many cases does not necessarily mean a Justice or her law clerks have done more research "than a judge who cites only a few."[313]

But the fact is the Supreme Court has cited its own opinions to support new decisions. In fact, citations to prior cases and rulings are the most common form of citation practice by the Court.[314] Indeed, there is ample evidence of the Court's adherence to stare decisis based on the Court's

[305] Cross et al., *supra* note 302, at 530.

[306] *Id.*

[307] *Id.* at 508.

[308] Lupu & Fowler, *supra* note 303, at 162.

[309] Cross et al., *supra* note 302, at 504.

[310] LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE 38 (7th ed. 2017).

[311] HENRY J. ABRAHAM, THE JUDICIAL PROCESS: AN INTRODUCTORY ANALYSIS OF THE COURTS OF THE UNITED STATES, ENGLAND AND FRANCE 325 (1993).

[312] Cross et al., *supra* note 302, at 532.

[313] Lawrence M. Friedman et al., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 804 (1980).

[314] Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 590 (1991).

reliance on its precedent.[315] It is now the general rule for the Court to cite past opinions as the primary basis for which the Court comes to a decision. This practice includes, of course, citing numerous cases to lend support to its reasoning. The result is that the "choice of precedents to cite" may affect the "course of the law, as reflected by later decisions."[316] Indeed, many past opinions "directed the[ Court's] opinion[s]" by citing to and analyzing the cases in a manner to show how the past precedent guides their current holding in the existing body of law.[317]

Of course, the nature and "legal characteristic[s]" of the case before the Court matter when deciding what cases to cite and what citation practice to follow.[318] On the flip side, justices who cite cases that "have no relationship to the present case may damage"[319] a justice's "reputation with respect to his or her colleagues and to analysts of the Court."[320] It is noteworthy that studies have shown that citations to precedent as a means to minimize and cabin ideological and political preferences is not sustained by the evidence.[321] Some have argued that justices will intentionally manipulate the Court's precedent to achieve a particular ideological result, masking the ideology behind the methodical application of citations.[322]

### *B. Oversight*

Perhaps the absence of citations to prior judicial federalization cases is simply the result of an oversight. While there is such a massive volume of cases for the Court to rely upon, that volume may simply make it impossible for the justices and the law clerks to identify the mere seven cases that federalized state doctrine. The law clerks and justices simply may not have known or realized that there was available caselaw precedent that supported the subsequent practice of judicial federalization. As Richard Posner argues, there are costs involved in citation research for judicial opinions.[323] It takes time, energy, and labor to conduct the thorough search of precedent within a

[315] *Id.* at 589 tbl.1, 590; Cross et al., *supra* note 302, at 495, 507–08, 532 fig.1.

[316] Cross et al., *supra* note 302, at 492.

[317] *Id.* at 493.

[318] *See id.* at 545.

[319] Lupu & Fowler, *supra* note 303.

[320] *Id.*

[321] *See* Cross et al., *supra* note 302, at 504.

[322] *Id.* at 501.

[323] Lupu & Fowler, *supra* note 303, at 157.

constrained period of time. And since the Court rarely, if ever, federalizes state doctrine in its opinions each term, there is not a readily available habit or citation culture of specifically looking for such cases.

### *C. Legitimacy*

As the theorem goes, judges decide cases based on the law. This principle requires the justices to utilize appropriate legal authority to resolve a dispute.[324] The citation practice is therefore the foundational authority that undergirds the justices' decision-making power and legitimacy. Some scholars view citations "as serving a primary function of legitimation."[325] Scholars have further argued that the "best guidance—and the best legitimation— . . . come[s] from [recent] case law which presents *concretely* similar problems."[326] The idea is that citations serve to mask and constrain justices' ideological and political predilections has some intellectual and judicial currency.[327]

Justices try to "maintain an illusion of adherence" to citations to precedent to preserve a sense of legitimacy.[328] The more citations to specific past precedent, the more legitimation the Court and its past rulings may garner.[329] Some scholars argue that citations, therefore, are "necessary to *legitimize* the Court's holding[s]."[330] The public may be more likely to "respect and adhere to decisions grounded in the law but not those based on the justices' ideologies."[331] Scrupulous use of citations may help to reaffirm that perception in the eyes of the public. As Justice Stevens notes, citing to and following precedent "obviously enhances the institutional strength of the judiciary."[332] It would seem that citing to prior instances of judicial federalization would, indeed, enhance the perception of legitimacy and strength of the Court in its rulings. Doing so arguably comports with stare decisis.

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[324] *See* Friedman et al., *supra* note 313, at 793.

[325] David J. Walsh, *On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases*, 31 L. & SOC'Y REV. 337, 339 (1997).

[326] Friedman et al., *supra* note 313, at 808.

[327] *See* Cross et al., *supra* note 302, at 504, 510.

[328] Frank B. Cross, *The Justices of Strategy*, 48 DUKE L.J. 511, 530 (1998) (book review).

[329] *See id.* at 531.

[330] Cross et al., *supra* note 302, at 502.

[331] *Id.*

[332] *Id.* at 509 (quoting John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 2 (1983)).

Indeed, stringing a handful of important precedential opinions together—*Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, and *Obergefell*—based on the value that each opinion serves as an example of the Court's consultation with and adoption of state court doctrine may further strengthen the Court's legitimacy. As some scholars note, "[t]he use of precedent is thus often depicted as an analogical reasoning process by which the Justices determine which cases are factually most similar to the present dispute and apply those cases."[333] While the Court's handful of judicial federalization cases are not all factually similar, the bottom-up method for which they were decided is, which arguably makes those cases important sources for legitimizing the Court's federalization practices. The norm of stare decisis does not suggest that judges should cite any case but that they should cite the most legally relevant and authoritative cases for a dispute.

### *D. Significance*

While the low number of federalization cases may support the Court's decision not to cite those prior cases, the significance or prominence of those cases arguably support the opposite conclusion—that the Court should cite those decisions for their strength as federalization cases because the cases are held in high regard in multiple ways for multiple reasons. For example, *Obergefell* established a new constitutional right. *Mapp* incorporated the Fourth Amendment's right to privacy principles against the States. *Nollan* and *Dolan* added a brand new takings jurisprudence. *Lawrence* overruled decades of discriminatory statutes banning homosexual sodomy. *Sullivan* was a landmark decision that changed the trajectory of the First Amendment. These were not, in other words, obscure cases that have, over time, received little attention. Instead, they are prominent cases in the Court's history of constitutional rulings. Thus, given the significance of the cases, an argument could be made that if there were cases to cite for their federalization value, these cases would be strong candidates.

### *E. Characteristics*

The nature and "legal characteristics" of a case before the Court matter when deciding what cases to cite and what citation practices to follow.[334] The characteristic of the case may have a lot to do with why the Court has not

[333] *Id.* at 518.

[334] *See id.* at 545.

cited horizontally to its prior judicial federalization cases. The Court's practice of legislative federalization, which I will turn to shortly in Part IV, involved citing to cases that had the same or similar substantive legal questions under constitutional provisions.[335] The Court's judicial federalization cases—*Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, and *Obergefell*—have little in common. The characteristics of the cases are not necessarily relevant to each other. The constitutional provisions involved in these cases range from the First Amendment, Fourth Amendment, Fourteenth Amendment, to the Fifth Amendment Takings Clause. Thus, the characteristics differ enough to make citation to each subsequent decision arguably inapplicable.

### *F. Uniformity*

It could also be the case that many of the Court's federalization cases were not the product of national consensus or uniformity across the state courts. The Court may avoid citing to and referencing prior judicial federalization precedent because the consulted or borrowed doctrines did not have the support of a majority of the state courts. The Court did not have a majority of state courts following the exclusionary rule, banning racially motivated peremptory strikes, adopting the actual malice test, permitting same-sex sodomy, or approving of same-sex marriage in *Mapp*, *Batson*, *Sullivan*, *Lawrence*, and *Obergefell*. Only in the *Nollan* and *Dolan* decisions did the Court choose to consult and adopt the standard followed by a majority of state courts.

This explanation is certainly plausible. In many of the Court's legislative federalization cases, discussed at length in Part IV, the Court consistently cites to its prior federalization practices where there was a majority of state legislatures in agreement.[336] Indeed, while the Court felt compelled to adopt what it believed was the best doctrine from a select few states over the consensus of the majority of states, then it might be reluctant to rely upon such prior federalization practices for fear that the adoption of the minority view may weaken the argument.

[335] *See infra* Part IV.

[336] *See infra* Part IV.

## IV. PRACTICAL APPLICATIONS & IMPLICATIONS

The extensive history of strategic citations based on precedent, policy, and ideology suggests that some justices would have or should have considered, during some Terms, searching horizontally within its precedent to find case law that would help support its decisions to borrow state doctrine, consult state court decisions, or embrace specific state supreme court dicta. There are few examples where members of the Court have clearly considered previous attempts to justify an opinion based substantially on a prior commitment to respecting and adopting state court interpretations of analogous constitutional questions. In fact, there is one example, in particular, that offers a glimpse into how the Court could approach the horizontal method of judicial federalization doctrine.

### *A. Justice Stevens's* Moore *Concurrence and* Dolan *Dissent*

Take *Moore v. City of East Cleveland*, where the Court found a constitutional right to family integrity under the Fourteenth Amendment.[337] Justice Stevens, however, wrote a concurring opinion, noting that the "case-by-case development of the constitutional limits on the zoning power has not . . . taken place in this Court" but instead has been "applied in countless situations by the state courts."[338] Those state court cases, Justice Stevens noted, "shed a revelatory light on the character of the single-family zoning ordinance challenged in this case."[339] Justice Stevens elaborated on the value of relying upon state doctrine to inform federal constitutional law:

> The state courts have recognized a valid . . . character of residential neighborhoods which justifies a prohibition against transient occupancy . . . . [and] in well-reasoned opinions, the courts of Illinois, New York, New Jersey, California, Connecticut, Wisconsin, and other jurisdictions, have permitted unrelated persons to occupy single-family residences notwithstanding an ordinance prohibiting, either expressly or implicitly, such occupancy.[340]

Justice Stevens concluded that these state court cases persuasively "delineate the extent to which the state courts have allowed zoning

[337] 431 U.S. 494, 503 (1977).

[338] *Id.* at 514–15 (Stevens, J., concurring).

[339] *Id.* at 515.

[340] *Id.* at 515–17 (footnotes omitted).

ordinances to interfere with the right of a property owner to determine the internal composition of his household" and argued that the Court should endorse the same approach in federal due process matters involving zoning.[341] In other words, Justice Stevens believed that a zoning ordinance excluding extended family from occupying the premises constituted a "taking of property without due process and without just compensation."[342]

Decades later, Justice Stevens authored a dissenting opinion in *Dolan*. *Moore* dealt with questions of occupancy in the zoning context, and the ruling turned on the Court finding a fundamental right to family integrity under the Fourteenth Amendment, as opposed to following Justice Stevens's takings and due process argument. *Dolan* involved an unconstitutional conditions claim brought in the context of an impermissible land use permit condition under the Takings Clause. There, Justice Stevens cited back to his concurring opinion in *Moore* for the proposition that his previous emphasis of and reliance on state court doctrine guided his concurring opinion in *Moore*.[343] In other words, Justice Stevens cited his previous effort to federalize state court doctrines regarding zoning as persuasive authority in a future case. He argued, "[c]andidly acknowledging the lack of federal precedent for its exercise in rulemaking, the [*Dolan* majority] purports to find guidance in 12 'representative' state court decisions. *To do so is certainly appropriate*."[344] Justice Stevens then cited directly to his concurring opinion in *Moore* explaining the relevance, value, and persuasive authority of the development of state doctrine regarding zoning and due process.[345] In other words, Justice Stevens was emphasizing the value of the method and practice of reaching horizontally within the Court's (and his own) precedent to find guidance to inform the Court's decision.

Here, Justice Stevens is actively engaging in what I call the horizontal method of judicial federalization doctrine by consulting prior Supreme Court federalization caselaw (albeit a prior concurring opinion) to justify the value of finding "guidance in 12 'representative' state court decisions."[346] But for Justice Stevens, the strategy arguably legitimizes his rather rare and obscure effort to consult and rely upon state court zoning doctrine to argue that the

[341] *Id.* at 518–21.

[342] *Id.* at 521.

[343] *See* Dolan v. City of Tigard, 512 U.S. 374, 397 (1994) (Stevens, J., dissenting) (citing *Moore*, 431 U.S. at 513–21 (Stevens, J., concurring)).

[344] *Id.* (emphasis added).

[345] *See id.* at 397 n.1.

[346] *See id.* at 397.

Court should have adopted a similar analytical approach. Justice Stevens's judicial federalization argument does not stand merely in the vacuum of his dissent in *Dolan* but rather finds a prior case (*Moore*) where he employed the same practice, further legitimizing and supporting his reasoning. In the absence of a citation to his concurring opinion in *Moore*, Justice Stevens's *Dolan* dissent acknowledging the appropriateness of adopting state doctrine avoids the perception that the practice is a one-off occasion and shows that it is building upon prior opinions that practiced the same consultative method.[347]

### *B. Legislative Federalization*

As discussed throughout this Article, federalizing state doctrine is a rare phenomenon. The practice of the Supreme Court copying and adopting state court doctrine as federal has, as discussed in Part II, limited examples. The practice has likewise received very little attention from scholars. However, one way to ascertain the implications of judicial federalization and to better understand the absence of this horizontal citation practice by the Court in cases involving state doctrine is to compare it with legislative federalization. That is, whether the Court consults or relies upon state legislation as a guide to determining federal constitutional questions. And, indeed, it does periodically consult state legislative enactments to inform federal constitutional law. But more important for this Article's inquiry is that the Court also tends to cite back to its prior legislative federalization caselaw to support similar interpretive practices in new cases.

For example, the Court in *Atkins v. Virginia* relied heavily on state legislative trends regarding capital punishment for the intellectually disabled.[348] The Court specifically noted that objective indicia of social standards, expressed through legislative enactments and state practice, may be demonstrative of a national consensus.[349] Notably, the *Atkins* majority, in overruling *Penry v. Lynaugh*, cited *Penry* numerous times for the simple proposition that the Court had, previously, relied upon and consulted state

[347] It is worth emphasizing that Justice Stevens's instance of horizontally practicing judicial federalization was in the context of a dissenting opinion validating a prior concurring opinion advocating for the adoption of state doctrine. It was not a precedential opinion citing to a prior precedential opinion. The point, nonetheless, is that the Court could, and some justices have, reached horizontally within its case law to find support for the idea of consulting and borrowing state court doctrines.

[348] *See* 536 U.S. 304, 313–15 (2002).

[349] *See id.* at 315–16.

law to guide its reasoning.[350] There, Justice Stevens was persuaded of the changing tides in the number of states outlawing capital punishment for the intellectually disabled and the "national attention received" that spurred "state legislatures across the country" to address capital punishment.[351]

Chief Justice Rehnquist, in his dissent, agreed, but noted that "the work product of legislatures . . . ought to be the *sole* indicators by which courts ascertain the contemporary American conceptions of decency."[352] However, Chief Justice Rehnquist also warned that the "assessment of the current legislative judgment[s]" used by the majority in *Atkins* was merely a rationale to achieve the majority's preferred policy result.[353] He explained that its prior ruling in *Stanford* set forth an objective set of factors to follow, including the "statutes passed by society's elected representatives."[354] But Chief Justice Rehnquist was adamant that the Court should not accept public opinion or public sentiment as persuasive unless and until those opinions were ultimately expressed through state legislation.[355] This is because, according to Chief Justice Rehnquist, state "legislation is the 'clearest and most reliable objective evidence of contemporary values.'"[356] Likewise, Chief Justice Rehnquist cited back to the Court's previous legislative federalization case in *Tison v. Arizona*, upholding a state law permitting the death penalty, for the proposition that the Court had consulted *Tison* to compare against the minority of states that did prohibit such laws.[357]

In a similar fashion, the Court's decision in *Roper v. Simmons*, invalidating statutes permitting the execution of juveniles, exercised a similar legislative federalization practice. Justice Kennedy cited to *Atkins*, *Penry*, and *Stanford* for the proposition that those prior cases consulted state legislation to help guide its decision.[358] Justice Scalia, however, disagreed with the horizontal interpretive practice, noting that the Court would be "mistaken" for its reliance on state law interpreting the Eighth Amendment.[359] However, Justice Sandra Day O'Connor took a slightly

[350] *See id.* at 314–16, 321.

[351] *Id.* at 314.

[352] *Id.* at 324 (Rehnquist, C.J., dissenting) (emphasis added).

[353] *Id.* at 322.

[354] *See id.* at 341 (quoting Stanford v. Kentucky, 492 U.S. 361, 370 (1989)).

[355] *See id.* at 325–26.

[356] *Id.* at 322–23 (quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)).

[357] *See id.* at 343–44.

[358] Roper v. Simmons, 543 U.S. 551, 564 (2005).

[359] *Id.* at 608–09 (Scalia, J., dissenting).

different tact, noting that adherence to foreign law for a national consensus was inappropriate if state legislation evidenced the opposite.[360] Similarly, in *Stanford v. Kentucky*, the Court cited back to *Tison*—surveying the majority and minority state legislatures to guide its ruling upholding the death penalty—to show that in prior cases the Court looked to state legislation, the "most reliable indication of consensus," and other factors to determine the evolving standards of decency.[361]

The act of horizontal citation to legislatively federalized cases was also practiced in *Burch v. Louisiana*. The Court, in resting its ruling heavily on the experience of the states, cited *Duncan v. Louisiana* to explain that "[o]nly in relatively recent years has this Court had to consider [in *Duncan*] the practices of the several States relating to jury size and unanimity."[362] Justice Rehnquist noted that *Duncan* "marked the beginning of our involvement with such questions"[363] and that the prior case supports the conclusion that a "near-uniform judgment of the [states] provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not."[364] In *Williams v. Florida*, the Court addressed the number of jury members required.[365] The Court cited to and referenced *Duncan*, surveying the history of state jury trial laws, explaining that "[w]e had [the] occasion in *Duncan* . . . to review briefly the oft-told history of the development of trial by jury in criminal cases."[366] Indeed, in *Duncan*, the Court had surveyed the history of juries and determined that the "laws of every State guarantee a right to jury trial in serious criminal cases; no State has dispensed with it; nor are there significant movements underway to do so."[367]

But the Court does not always resuscitate its prior legislative federalization practices in every case. For example, in *Ring v. Arizona*, Justice Ginsburg wrote that "the great majority of States responded . . . by

[360] *See id.* at 604 (O'Connor, J., dissenting).

[361] *See* Stanford v. Kentucky, 492 U.S. 361, 369, 371–73 (1989), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

[362] Burch v. Louisiana, 441 U.S. 130, 134 (1979).

[363] *Id.*

[364] *Id.* at 134–35, 138 (citing its ruling in *Williams v. Florida*, where the Court had canvassed common-law developments of juries in its opinion).

[365] 399 U.S. 78, 86 (1970).

[366] *Id.* at 86–87 (italics added).

[367] 391 U.S. 145, 151–54 (1968).

entrusting those determinations to the jury" through state legislation.[368] But Justice Ginsburg did not cite to or reference any precedent that similarly addresses the consensus of state legislatures. Nonetheless, this practice of legislative federalization is not without its critics on the Court. In *Michigan v. Long*, Justice O'Connor argued the "[t]he process of examining state law is unsatisfactory because it requires us to interpret state laws with which we are generally unfamiliar."[369] Likewise, Justice Stevens's dissent in the same case noted that the issue "raise[d] profoundly significant questions concerning the relationship between two sovereigns."[370]

In *Tennessee v. Garner*, the Court, tasked with determining reasonableness standards, cited to its ruling in *United States v. Watson*, explaining that "[i]n evaluating the reasonableness of police procedures under the Fourth Amendment [in *Watson*], we have also looked to prevailing rules in individual jurisdictions."[371] *Watson*'s prior survey of state legislation helped guide the *Garner* Court in concluding that the "long-term movement has been away from the rule that deadly force may be used against any fleeing felon, and that remains the rule in less than half the States."[372] The Court in *Payton v. New York* contrasted the fact that a "majority of the States . . . permit warrantless" home arrests with the fact that there was a "declining trend" away from the "virtual unanimity" and "clear consensus among the States" when the Court decided *Watson* permitting warrantless arrests in public places.[373]

The practice of horizontally citing to prior caselaw that heavily consults state legislation is most prominent in cases where the substantive protection or right at issue is similar to or falls under the same federal constitutional provision. Many of the instances of citation to previous cases involved criminal procedure and criminal law in the Fourth, Sixth, Eighth, and Fourteenth Amendment contexts, and there is very little, if any, cross-over. For example, *Ring*, *Long*, *Duncan*, *Williams*, and *Burch* were Sixth Amendment jury trial cases that cited each other's prior study of state legislative consensus. *Payton*, *Watson*, and *Garner* all involved Fourth

[368] 536 U.S. 584, 607–08, 608 n.6 (2002).

[369] 463 U.S. 1032, 1039 (1983).

[370] *Id.* at 1065 (Stevens, J., dissenting).

[371] Tennessee v. Garner, 471 U.S. 1, 15–16 (1985) (citing United States v. Watson, 423 U.S. 411, 421–22 (1976)).

[372] *See id.* at 15–18.

[373] Payton v. New York, 445 U.S. 573, 590, 598, 600 (1980).

Amendment matters. *Roper*, *Atkins*, *Penry*, *Stanford*, and *Tison* all entailed Eighth Amendment inquiries.

In *Hodgson v. Minnesota*, the Court struck down a statute that required both parents to be notified of a minor's decision to pursue an abortion.[374] The Court weighed the national trend of parental notification laws in its decision. Justice Kennedy, in his concurrence, engaged in quintessential vertical legislative federalization by noting that "the current trend among state legislatures is to enact joint custody laws" where parents share the responsibility in decision-making for the child.[375] He further explained that the "Minnesota [state] Legislature, like the legislatures of many States, has found it necessary to address the issue of parental notice in its statutory laws."[376] Then, Justice Kennedy turned to horizontal federalization by noting that "[l]egislatures historically have acted on the basis of the qualitative differences in maturity between children and adults."[377] He then cited to Justice Brennan's dissenting opinion in *Stanford* where he recited the nature and substance of the capital punishment laws for minors across state jurisdictions to determine whether there was a national consensus.[378]

In *Washington v. Glucksberg*, the Court upheld an assisted suicide statute, finding it did not violate the Due Process Clause.[379] The Court practiced both vertical and horizontal legislative federalization. It first vertically found that a majority of States had passed "laws imposing criminal penalties on one who assists another to commit suicide."[380] This was evidence of national consensus and that the Court could look to the language of the majority states to craft a federal doctrine. Further, to support this national consensus data, Chief Justice Rehnquist cited horizontally to *Stanford* for the proposition that the Court had, similarly, relied upon the uniformity created by a "pattern of enacted [capital punishment] laws" as "[t]he primary and most reliable indication of [a national] consensus."[381] While the issue of capital punishment and its relation to cruel and unusual punishment under the Eighth Amendment in *Stanford* was separate and distinct from the issue of assisted

[374] 497 U.S. 417, 479 (1990) (Marshall, J., concurring in part, concurring in the judgment in part, and dissenting in part).

[375] *Id.* at 487 (Kennedy, J., concurring in the judgment in part and dissenting in part).

[376] *Id.* at 491.

[377] *Id.* at 482.

[378] *See id.* at 483.

[379] 521 U.S. 702 (1997).

[380] *Id.* at 711.

[381] *Id.* (third alteration in original) (quoting Stanford v. Kentucky, 492 U.S. 361, 373 (1989)).

suicide in *Glucksberg*, Chief Justice Rehnquist was compelled to substantiate its reliance on state laws in prior case law to advance the Court's majority opinion.

### *C. Implications*

A judicial federalization doctrine that includes both vertical and horizontal citation to precedent creates numerous implications that warrant consideration. This section explores some of those implications for the adoption of a more formalized practice of judicial federalization doctrine.

#### 1. Laboratories

Justice Brandeis urged states to activate their laboratories to enhance American democracy.[382] He argued that it was "one of the happy incidents . . . that a single courageous state may . . . serve as a laboratory; and try novel social and economic experiments."[383] State courts can and do play a role as laboratories of democracy, even though Justice Brandeis's call to action was focused on state legislatures. If the Court reaches down to the state courts, copies and then pastes state doctrines into federal doctrine, then the Court is signaling to the state courts that their judicial laboratories are valued and helpful sources for federal constitutional law; that they are useful legal machinations that churn out doctrines and interpretive methods that will help the national dialogue on major federal questions.

In the same vein, it would seem obvious that the Supreme Court would cite past references to cases adopting state doctrine. Why would the Court not seek to thoroughly support its decision to rely upon multiple iterations of the findings of the laboratories of the states with citations and references to those prior practices? It shows a deep respect for the laboratories of democracy that Justice Brandeis speaks of. The horizontal citation practice entrenches the Court's approval of the state court's doctrines and the value of their contributions. The practice also results in a strengthening of respect and relationship between the two sovereign institutions of the state and federal courts. That the Supreme Court consistently cites back to its prior precedent federalizing state court doctrine sends a message that the state courts' innovations matter, not in isolation of specific Supreme Court rulings,

[382] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see, e.g.*, GARDNER, *supra* note 54.

[383] *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting).

but play a substantial role in guiding the Court in future cases where the Court is considering federalization of new state doctrine.

### 2. Polyphonic Federalism

The practice of judicial federalization also serves as a signal or acknowledgment that the sharing of jurisprudential ideas is valued not only vertically with the state courts but horizontally respected across the Court's federalization precedent. Under our current dual sovereign conception of federalism, states have engaged in the disproportionate share of borrowing from federal courts. The federal courts, and specifically the Supreme Court, have not balanced the responsibilities by borrowing state constitutional doctrine. The sharing of jurisprudential ideas is a conception that fits neatly with the idea of cooperative federalism or "polyphonic federalism."[384] Instead of conceiving of federalism as a system of separate dual sovereigns with bright lines drawn between the powers of state versus federal courts, we could, alternatively, understand the system as cooperative, rather than combative, and interactive, rather than separated. As Lawrence Sager explains, "[t]he idea that constitutional judges throughout the United States are engaged in a common enterprise, are colleagues in the effort to shape and explicate a common tradition . . . is an attractive one."[385] Although the state courts may not always be speaking explicitly to the Supreme Court in crafting its new and innovative doctrine, they are often implicitly signaling to the Court that something new is brewing across the majority (or minority) of state judicial systems, and that the Court should pay adequate heed to those developments. The result is a sharing of jurisprudential ideas.

When the Supreme Court agrees to adopt state doctrine, it acknowledges the cooperative nature of judicial federalism. While the Court does not have to ask for approval from the state courts in adopting their doctrines, there is an implicit acknowledgment that the federal and state courts are sharing the responsibility of enhancing and advancing American constitutional law, protecting rights, and upholding the rule of law in tandem. More importantly, when the Supreme Court consistently cites its prior instances of federalization, it strengthens a normative goal of creating a judicial system based on shared conceptions of constitutional construction, analytical tests,

[384] *See* Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 301–02, 316 (2005).

[385] Lawrence Gene Sager, *Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law*, 63 TEX. L. REV. 959, 973 (1985).

and the broader goal of finding justice in a dual sovereign. One could think of this as a "shared enterprise"[386] in which the state and federal courts cooperatively work together to find common ground on complicated constitutional questions, knowing that their work will be cited, referenced, and relied upon in subsequent cases on similar matters. It is the entrenchment of those values in periodic or consistent citation in subsequent rulings involving federalization that strengthens this cooperative judicial federalism relationship, rather than treating the isolated episodes of federalization as one-off moments.

Indeed, if the "vision of federalism as a shared constitutional enterprise"[387] is to work effectively, the Supreme Court should consider, as it has done with its legislative federalization cases, consistently citing to its prior precedent adopting state doctrine. Indeed, these shared projects are the essence of cooperative federalism, and they are strengthened by the Court's regular emphasis of its historical use of prior federalization cases to advance new and difficult questions of federal constitutional law. And as Gardner alludes, the "more state courts agree among themselves, the more influence their collective position may have upon federal reasoning in cases arising under the U.S. Constitution."[388] Further, the more reliance on and consistent citation to federalization cases, the more likely it is that the practice influences later Court decisions on similar matters. The consequence is a positive image of federalism that reaches vertically to state doctrine and horizontally in the Court's application of stare decisis and respect for precedent. The same could be said for horizontal reference. The more the Supreme Court cites its own precedent that was influenced by state doctrine, the more influence (and legitimacy) those cases have on building upon and strengthening federal doctrine. Further, state courts can not only cite to the Court's specific decision to adopt its approach, but also can point to subsequent instances when the Court has adopted doctrines in other cases and contexts. A state supreme court that can point to multiple instances of the Court's federalizations of state doctrine may bolster its use of a particular case in an opinion.

[386] *See* Blocher, *supra* note 51.

[387] *Id.*

[388] Gardner, *supra* note 128, at 1037.

### 3. National Consensus

The Court's legislative federalization cases have leaned heavily on determining a national consensus. And the Court frequently cites to its federalization precedent to support its decisions in cases before it to nationalize constitutional issues where there is national consensus. In *Atkins*, the Court formalized this horizontal citation practice by explaining that "in cases involving a consensus, our own judgment is 'brought to bear,' by asking whether there is reason to disagree with the judgment reached by the citizenry and its legislators."[389]

The drawback to mimicking this practice with the current slate of judicial federalization cases, however, is that not all the prior decisions federalizing state legislation were predicated on a majority of state legislatures agreeing uniformly on an issue. In fact, the Court has, in some instances, concluded a national consensus based on a substantial minority of state legislatures' positions on a particular issue. Thus, the practice risks undermining the Court's argument for federalizing any constitutional question addressed by state courts or state legislatures because many critics would argue that a national consensus cannot be drawn from even a bare majority of states, never mind a substantial minority.

For example, in *Atkins*, Justice Stevens set forth guidelines to determine a national consensus and whether the Court should follow the lead of state legislatures in interpreting similar constitutional questions.[390] He said, "[i]t is not so much the number of these States that is significant, but the consistency of the direction of change."[391] Here, the raw number of states following a particular path is not demonstrative, according to Justice Stevens. Instead, it is about a trend and the "direction of [the] change."[392] Thus, in *Atkins*, a "large number of States prohibiting the execution"[393] of mentally disabled persons, in tandem with the fact that States who did authorize such executions by statute rarely, if ever, legally pursued such executions, "provide[d] powerful evidence" of a national consensus.[394] But, as Justice Scalia points out in his dissent, a "large" number of states—eighteen jurisdictions making up forty-

[389] 536 U.S. 304, 313 (2002) (citation omitted) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977)).

[390] *See id.* at 314–16.

[391] *Id.* at 315.

[392] *Id.*

[393] *Id.*

[394] *Id.* at 316.

seven percent of the capital punishment jurisdictions—that ban such executions cannot possibly be indicative of a national consensus.[395]

The other problem that arises if the Court places too much emphasis on the national consensus of the states is the inconsistency, or unevenness, of its application. For example, in *Stanford*, the Court found no national consensus forbidding the execution of juvenile offenders at sixteen years of age because *only* fifteen states refused to impose the policy on offenders sixteen years of age and twelve declined to implement the policy for those at seventeen years of age.[396] These statistics, the Court wrote, "do[] not establish the degree of national consensus" typically required by the Court.[397] The distinction in numbers and the ultimate dispositions in *Stanford* and *Atkins* certainly raises potential criticisms for the Court if it chooses to apply the same horizontal citation and methodological practices in cases involving federalizing state court doctrine.

In the context of judicial federalization, this practice becomes somewhat murky. In only two cases—*Nollan* and *Dolan*—did the Court choose to follow the majority of state courts' adoption of the rational nexus test. But, even there, the Court was selecting from three different judicial tests utilized across the states. Further, the Court did not purport to rest its decision to federalize explicitly on following a national consensus, even though Chief Justice Rehnquist and Justice Scalia noted that it was following the "majority" jurisdictions. Justice Stevens's dissent argued that when one drills down at the nature of those state court rulings, the state court decisions do not amount to a true consensus and they do not accurately provide the support the majority was seeking to establish in citing those state court cases.[398] Apart from *Nollan* and *Dolan*, the Court adopted state court doctrines in *Mapp*, *Batson*, *Sullivan*, *Lawrence*, and *Obergefell* where the majority of state courts did not follow the exclusionary rule, ban racially motivated peremptory strikes, adopt the actual malice test, permit same-sex sodomy, or approve of same-sex marriage. Jurists might be cautious and careful to adopt a federalization practice of citing past precedent on national consensus grounds given the unevenness in majority jurisdictions in such cases.

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[395] *See id.* at 343 (Scalia, J., dissenting).

[396] *See* 492 U.S. 361, 370–71 (1989).

[397] *Id.*

[398] Dolan v. City of Tigard, 512 U.S. 374, 397–99 (Stevens, J., dissenting) (referencing "the Court's reaffirmance of *Nollan*'s reasonable nexus requirement," stating that the Court's "constitutional inquiry [in *Nollan*] [wa]s remarkably inventive").

### 4. Post Hoc Rationalization

Another implication for formalizing the practice of citing prior judicial federalization cases is the potential for post hoc rationalization; that is, the selective citation of federalized cases to reach the subjective preferences of the Court. For example, take a hypothetical case as to whether solitary confinement satisfies cruel and unusual punishment in violation of a state's constitutional analog to the federal Eighth Amendment. There may be a substantial minority, but not a definitive majority, of state courts that have concluded solitary confinement is unconstitutional as a matter of state constitutional law. Justices who subjectively disagree with solitary confinement and would prefer to see the practice struck down as unconstitutional under the federal Constitution, might conveniently find citation to *Mapp*, *Batson*, *Sullivan*, *Lawrence*, and *Obergefell* advantageous in arguing that there is, in the words of Justice Stevens, a "large number" of state courts and a "consistency of the direction of change" that weighs in favor of adopting the doctrine followed by the minority states.[399] On the other hand, justices who subjectively prefer to see the punishment of solitary confinement fail to meet the requisite categories under the Court's Eighth Amendment jurisprudence might cite *Nollan* and *Dolan* for the proposition that the Court, in determining whether to adopt a new federal jurisprudence, should only do so if there is a majority of state supreme courts, like in *Nollan* and *Dolan*, that have adopted the same position.

## CONCLUSION

This Article explored the concept of "judicial federalization doctrine." The absence of scholarly attention studying the Court's reluctance to consult, refer to, or cite, as persuasive authority, its own past caselaw federalizing of state doctrine, is curious. While the substantive rights and protections at play in *Sullivan*, *Mapp*, *Batson*, *Nollan*, *Dolan*, *Lawrence*, and *Obergefell* have little, if anything, in common, the practice of consulting state doctrine as the primary source for developing new federal jurisprudence is the same in all the cases. The citation practice is not without precedent. The Court has cited back to its caselaw where heavy consultation of state legislation, as opposed to state court doctrine, guided its ruling. Why, then, has the Court failed to articulate and organize its limited collection of judicial federalization cases into a coherent, recognizable, and authoritative doctrine?

[399] *See Atkins*, 536 U.S. at 315–16.

There are several reasons why the Court has decided not to horizontally cite any combination of these past federalization cases. One plausible explanation is simply that the Court has such a limited pool of federalization cases available at its disposal that it does not need or want to recognize a more robust federalization doctrine. It may be a (lack of) numbers game. The frequency of cited opinions matters to the justices. Perhaps the absence of citations to prior federalization cases is simply the result of an oversight. While there is such a massive volume of cases for the Court to rely upon, that volume may simply make it impossible for the justices and the law clerks to identify the mere seven cases that federalized state doctrine. Or, it may simply be that the Court does not find these instances of federalization overly persuasive and that an emphasis on their authority through consistent citation threatens the legitimacy of the Court's stare decisis practices.

While the low number of federalization cases may support the Court's decision not to cite those prior cases, the significance or prominence of those cases arguably support the opposite conclusion—that the Court should cite those decisions for their strength as federalization cases because the cases are held in high regard in multiple ways. The characteristic of the case may have a lot to do with why the Court has not cited back to its prior judicial federalization cases. The substantive issues at play in the Court's federalization cases have little to do with each other.

It could also be the case that many of the Court's federalization cases were not the product of national consensus or uniformity across the States. As a result, the Court may avoid citing to and referencing prior federalization precedent predicated on adopting state doctrine that did not have the support of most of the state courts. It is unclear which reason best explains the Court's reluctance to rely upon its prior federalization cases. Nonetheless, if the Court were to invoke the practice more regularly, there would be some implications that should be considered.

Judicial federalization practice shows a deep respect for the laboratories of democracy that Justice Brandeis spoke of. The horizontal citation practice entrenches the Court's approval of the state court's doctrines and the value of their contributions. The practice also results in a strengthening of respect and relationship between the two sovereign institutions of the state and federal courts. That the Supreme Court consistently cites back to its prior precedent federalizing state court doctrine sends a message that the state courts' innovations matter, not in isolation of specific Supreme Court rulings, but play a substantial role in guiding the Court in future cases where the Court is considering federalization of new state doctrine.

Further, when the Supreme Court agrees to adopt state doctrine, it acknowledges the cooperative nature of judicial federalism. While the Court does not have to ask for approval from the state courts in adopting their doctrines, there is an implicit acknowledgment that the federal and state courts are sharing the responsibility of enhancing and advancing American constitutional law, protecting rights, and upholding the rule of law in tandem. Similarly, when the Supreme Court consistently cites its prior instances of federalization, it strengthens a normative goal of creating a judicial system based on shared conceptions of constitutional construction, analytical tests, and the broader goal of finding justice in a dual sovereign. One could think of this as a "shared enterprise"[400] in which the state and federal courts cooperatively work together to find common ground on complicated constitutional questions, knowing that their work will be cited, referenced, and relied upon in subsequent cases on similar matters.

On the flip side, there is a risk. The Court's legislative federalization cases have leaned heavily on determining a national consensus. And the Court frequently cites to its federalization precedent to support its decisions in cases before it to nationalize particular constitutional issues where there is national consensus. The drawback to this practice, however, is that not all the prior decisions federalizing state legislation were predicated on most state legislatures agreeing uniformly on an issue. Lastly, horizontal citation to prior judicial federalization cases may contribute to post hoc rationalization, which is citing specific cases to satisfy a jurist's preferred outcome. That said, there is a strong argument that the Court should, at the very least, refer to these past cases to illuminate their value to the Court's federalization jurisprudence. Doing so brings the Court's legislative and judicial federalization practices into equilibrium.

[400] *See* Blocher, *supra* note 51.