DOCTRINAL DYNAMISM, BORROWING, AND THE RELATIONSHIP BETWEEN RULES AND RIGHTS

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ABSTRACT

The study of "Rights Dynamism," exemplified in Timothy Zick's new book on the First Amendment's relationship with the rest of the Bill of Rights, can enrich our understanding of constitutional rights. It also opens a door to another potentially fruitful arena: what we call "Doctrinal Dynamism." Constitutional rights often interact and generate new meanings and applications by way of importing and exporting one another's doctrinal rules, even when the rights themselves do not intersect directly in the context of a single case. Focusing on these doctrinal exchanges can illuminate the strengths and weaknesses of various rules, the specific interests underlying different constitutional guarantees, and the sometimes inextricable relationship between particular rights and their constitutive doctrines. In this Article, we explore the definitional challenge—what is doctrine?—before identifying some lessons learned when doctrine migrates between rights and when it stays home.

INTRODUCTION

Scholarship about the relationships between U.S. constitutional rights has generated valuable insights about the nature of those rights, both individually and in concert.[1] Timothy Zick's new book—the centerpiece of this Symposium—is a powerful extension of this literature on what might be called intramural comparative constitutional law.[2]

Zick focuses on the legal interactions between the Free Speech Clause and other constitutional rights: how free speech can help enable the social movements that

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[1] *See generally* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY (2012); RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES (2012); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011).

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

generate doctrinal change, for example; or, perhaps less desirably, how the magnetism of the Free Speech Clause can overwhelm other rights like petition, press, and assembly, rendering them constitutional surplusage.[3] When courts (who are the major players in Zick's story[4]) engage in intratextualism,[5] borrowing,[6] combining,[7] and the like,[8] they both identify and *create* similarities and differences between particular bodies of law. As Zick notes, this can happen in many ways, including by analogy or by "borrowing or modeling in which . . . standards, principles, and values" from one right are used in the context of another.[9]

This is what Zick calls "Rights Dynamism,"[10] and it has significant implications for the rights involved. Though he is an astute and careful observer of rights' interactions, Zick's goals are not just descriptive or taxonomic, but also normative.[11] He argues, for example, that cross-pollination of First and Second Amendment doctrine could threaten the development of both rights.[12]

We contend that the study of Rights Dynamism can teach us something not only about rights, but about doctrine. This "Doctrinal Dynamism" is a way of reframing the inquiry, not replacing it. Our goal is to pick out a particular thread of Rights Dynamism and consider it in more detail, a task that we think is entirely complementary with the approaches taken by Zick and many other contributors to this Symposium. Rather than focusing on the traders (the rights themselves), we might instead consider what they trade—the characteristics, rules, principles, and so on that are borrowed or shared between distinct constitutional guarantees. Platonically speaking, this is a bit like studying the shadows on the cave wall, but we think it may hold significant insights for constitutional law.

The particular shadows that interest us are legal doctrines—the characteristics of a right that are likely relevant to the resolution of a formal legal dispute.[13] And

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[3] *Id.* at xii.

[4] *See, e.g.*, *id.* at 29 ("Owing to the interpretive powers and functions of judges, dynamic interpretation is most visible and recognizable in the courts.").

[5] *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

[6] Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 460 (2010) ("Our investigation, at bottom, concerns how separate bodies of legal knowledge are interconnected and managed.").

[7] Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1070 (2016) ("The Court . . . has sometimes *combined constitutional clauses*, deriving an overall conclusion of constitutional validity (or invalidity) from the joint decisional force of two or more constitutional provisions.").

[8] Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1309–10 (2017) (discussing "cumulative," "hybrid," and "intersecting" rights).

[9] ZICK, *supra* note 2, at 210.

[10] *Id.* at 5–6.

[11] *Id.* at 1–3.

[12] *Id.* at 203–04.

[13] *See id.* at 26–28 (distinguishing between "the action [that] takes place in courtrooms" on

our units of analysis are doctrinal rules: the particular statements of legal principle that are treated as relevant and necessary to resolve cases involving constitutional guarantees.[14] Doctrinal rules are among the building blocks of formal law, so essentially this means breaking law down into smaller constituent elements. But one way to get a handle on a larger phenomenon is to start with its smallest pieces.[15]

Beginning with doctrine, we can learn a great deal both about the rights that doctrines call home *and* about the usefulness and significance of different doctrinal rules. Sometimes a rule announced in a case involving one constitutional claim will crop up years later in another case involving a different claim.[16] What prompts that migration? Which rules tend to travel, and which stay tied to their initial home? What does that tell us about the rules themselves?

The tiers of scrutiny are one prominent example. After originating in the equal protection context,[17] the tiers found a ready home in the Court's free speech jurisprudence.[18] Now they are migrating yet again, as many courts find that they are a useful tool for analyzing Second Amendment claims.[19] What makes the tiers so migratory? What features do the First, Second, and Fourteenth Amendments share that allow the tiers to fit comfortably within their doctrine? And what is it about other rights,

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the one hand and "public advocacy," "references and invocations" by public officials, "[l]egal scholarship," and "national discourses" engaged in by "the general public" on the other).

[14] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989).

[15] The point is not that law needs its own Mendeleev to create a periodic table of law whereby doctrinal elements combine to create doctrinal molecules. Our much more limited claim is that some complex systems—law is one—can be broken down into constituent parts. *See, e.g.*, Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75, 75–76 (1991).

[16] *E.g.*, Jennifer E. Laurin, *Trawling for* Herring*: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670, 674 (2011) ("This Essay identifies three examples of that trend: the influence of municipal liability doctrine under 42 U.S.C. § 1983 on an emergent 'systemic' view of the exclusionary rule; *Hudson v. Michigan*'s adoption of an exclusionary rule causation framework that is resonant with that utilized in constitutional tort litigation; and the increasing tendency of the Court to consider the availability of constitutional tort remedies as a justification for denying the remedy of suppression.").

[17] *See* Korematsu v. United States, 323 U.S. 214, 215–16 (1944) (purporting to apply "the most rigid scrutiny" to the internment of American citizens of Japanese ancestry); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that legislation which targets "discrete and insular minorities . . . may call for a correspondingly more searching judicial inquiry").

[18] For early examples, see NAACP v. Button, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms."); McGowan v. Maryland, 366 U.S. 420, 449 (1961) (noting the "close scrutiny" demanded of the Court "when First Amendment liberties are at issue").

[19] Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 DUKE L.J. 1433, 1494–96 (2018) (noting "an increasing application of levels-of-scrutiny analysis" in Second Amendment cases between 2008 and 2016).

such as the Sixth Amendment right to confront one's accuser, that has caused the tiers to skip over them?

While the tiers of scrutiny provide a ready set of moves and non-moves to study—a set that we are not shy to take advantage of here—the significance of Doctrinal Dynamism inheres far beyond the tiers. Innumerable arguments advanced by scholars and litigants are really questions about Doctrinal Dynamism, or questions upon which Doctrinal Dynamism can bear. To provide just a few examples, honing in on doctrine can provide insight into whether the Free Speech Clause's content-neutrality doctrine can be usefully adopted in Second Amendment cases;[20] what accounts for the rise of animus doctrines across constitutional provisions;[21] why incidental burdens on protected activity trigger strict scrutiny in the free-speech context and essentially no additional review in the free-exercise context;[22] and why Free Exercise and Establishment Clause claims are not analyzed under the disparate-impact doctrine utilized in equal-protection cases.[23] These are not *new* questions; we merely submit that starting with the doctrine rather than the interpretations of the rights might provide new insight.

In this Article, we examine more closely the nature of doctrine and the ways in which focusing on doctrine is distinct from the broader study of Rights Dynamism. By highlighting illustrative doctrinal rules, we can ask: (a) where and why those rules originated, (b) where they are used now, and (c) why they have been adopted across substantive categories. So, for example, one might find that (a) strict scrutiny evolved in equal-protection cases to smoke out government animus,[24] and (b) now applies also to content-based speech restrictions, (c) because courts care about government animus when it comes to content-based restrictions.[25]

We do this in three parts. Part I explains and defends the focus on doctrine. Part II explores the processes of Doctrinal Dynamism, and the factors that make some

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[20] *Compare* Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49, 63–64 (2012) ("We cannot usefully identify 'content-based' gun regulations . . . ."), *with* Gary E. Barnett, Note, *The Reasonable Regulation of the Right to Keep and Bear Arms*, 6 GEO. J.L. & PUB. POL'Y 607, 623 (2008) (proposing a category of "Content-Based Gun Regulations").

[21] For an accounting of this phenomenon, see generally WILLIAM D. ARAIZA, ANIMUS (2017).

[22] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1200–11 (1996) (comparing the Court's treatment of incidental burdens in the free speech and free exercise contexts).

[23] *See, e.g.*, Kelsey Curtis, Note, *The Partiality of Neutrality*, 41 HARV. J.L. & PUB. POL'Y 935, 935 (2018) (arguing that the neutrality doctrines "in contemporary Establishment Clause and Free Exercise clause jurisprudence . . . do not achieve neutrality" and suggesting utilizing disparate impact doctrine in free exercise cases).

[24] ARAIZA, *supra* note 21, at 3–4. Obviously this is only one way—albeit a plausible one—to account for strict scrutiny. Our goal here is not to defend a particular understanding of strict scrutiny, but to show how different doctrines might be understood as having particular purposes.

[25] Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 55–56 (1987).

doctrinal rules more likely than others to migrate from one right to another. Part III does the same for doctrinal rules that stay home.

I. WHY FOCUS ON DOCTRINE?

Zick's book adds to a rich existing body of scholarship regarding the interactions between various areas of constitutional law. Scholars have explored, for example, the ways in which constitutional clauses might be "combined,"[26] the ways in which textual clauses of the Constitution might be read in conjunction with one another,[27] and how rights claims can be "cumulative," "hybrid," or "intersecting."[28] In Zick's account and others, this has meant considering rights' political, rhetorical, and legal roles.[29]

Our more limited goal here is to focus on one specific way in which areas of constitutional *doctrine*—specifically, constitutional rights doctrine—interact with one another. In particular, we want to identify and track legal rules as they travel across domains. Doing so, we hope, will give us some insight, not only into the rules themselves, but also into the environments they inhabit.

In order for our project to succeed—in fact, in order for it to get off the ground at all—we must be able to identify and define our basic unit of analysis: doctrinal rules. This is no mean feat. Some units of doctrine worth examining do not appear to be "rules" in the usual sense of the word—that is, reasonably concise statements of principle that guide the resolution of legal disputes. We don't mean to limit ourselves to "rules" in the narrower sense of outcome-determinative principles triggered by certain factual scenarios;[30] standards count as "rules" for our purposes. The tiers of scrutiny, for example, are a kind of doctrinal methodology that generates case-determinative rules like the directive that race-based discrimination must be narrowly tailored to advance a compelling government interest.[31]

In this way, doctrine can be thought of as existing in tiers of increasing specificity, much like biological taxonomy. At the most generic level, there is "First Amendment doctrine," which is the collective body of First Amendment law.[32] That doctrine is composed more narrowly of certain methodologies, which generate rules, which generate binding precedent.[33] Doctrine migrates between rights at all levels of specificity,[34]

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[26] Coenen, *supra* note 7, at 1070.

[27] *See generally* Amar, *supra* note 5.

[28] Abrams & Garrett, *supra* note 8, at 1309–10.

[29] ZICK, *supra* note 2, at 9.

[30] *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992).

[31] *See* Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 310 (2013).

[32] *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 413 (1996).

[33] *See* Scalia, *supra* note 14, at 1176–77.

[34] Matthew D. Adler, Commentary, *Can Constitutional Borrowing Be Justified? A Comment on Tushnet*, 1 U. PA. J. CONST. L. 350, 351 (1998) (noting that the subject of borrowing "could

and so our use of "doctrinal rules" is meant to include both the more specific rules and the broader methodologies.

Using doctrinal rules as our unit of analysis should make the study of Rights Dynamism more tractable. Lawyers, after all, have a comparative advantage when it comes to studying legal doctrine. But even through the judicial lens, rights interact at different levels of abstraction—for example, in individual cases and in broader movements of shifting doctrine—with very different implications for the phenomenon of dynamism.[35]

Consider two extremes of the spectrum. A litigant in a particular case asserts multiple constitutional-rights claims, which might or might not interact with one another, such as the due-process and equal-protection claims in *Obergefell v. Hodges*.[36] Should her rights claims be considered serially, or in conjunction? If serially, and if one resolves the case, are the others moot? If in conjunction, do the claims strengthen one another? Do they merge into a single "hybrid" right, as discussed in *Employment Division v. Smith*?[37] Or are they so different and perhaps even incompatible that they are in tension? Many of Zick's examples exhibit this kind of case-level interactivity.[38] And at the level of the individual case, the questions about Rights Dynamism tend to revolve around whether particular claims, in the context of particular factual scenarios, either have synergies with one another or displace one another. For example, Zick shows how cases involving claims of both free speech and free exercise frequently have been resolved as the former.[39]

Judicial resolution of these individual cases, in turn, generates doctrine.[40] A rule may be announced by the Supreme Court more or less out of the blue—the rule of

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be any part, large or small, of the constitutional regime: a single sentence in the text of the constitution, a whole article in the constitution, a judicial doctrine interpreting some part of the constitution's text, a set of formal or informal understandings among legislators, the executive branch, or even among the population at large as to what the constitution requires").

[35] ZICK, *supra* note 2, at 17 (noting that the process of interaction between constitutional rights "affects constitutional remedies in individual cases[,] . . . [and] also influences interpretations of individual constitutional rights and, more broadly, understandings of constitutional liberty").

[36] *See* Brief for Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556), 2015 WL 860738, at *32, *38; ZICK, *supra* note 2, at 25.

[37] Emp't Div. v. Smith, 494 U.S. 872, 881 (1990) (holding that religious exemptions to neutral laws of general applicability can be granted only when the conduct involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . or the rights of parents . . . to direct the education of their children"); Michael W. McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1122 (1990) (criticizing the case and arguing that the hybrid rights exception is "not . . . to be taken seriously").

[38] *See* ZICK, *supra* note 2, at 114.

[39] *Id.*

[40] *See* Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 1, 18 (2008) (arguing that judges make changes in the law "through small steps in individual cases").

Smith, for example[41]—and constitute vertical precedent thereafter. Or that rule might develop through gradual adoption, like the use of intermediate scrutiny in some Second Amendment cases.[42] Whatever their origins, these rules can be combined into doctrinal frameworks, which then provide a baseline for broader and more generalized forms of "dynamism."[43] In their thorough and perceptive analysis of the phenomenon, Nelson Tebbe and Robert Tsai define constitutional borrowing as "the practice of importing doctrines, rationales, tropes, or other legal elements from one area of constitutional law into another for persuasive ends."[44] The first form of borrowing in Tebbe and Tsai's framework—"importing doctrines"[45]—is the kind of Doctrinal Dynamism that interests us here.

There are, of course, innumerable complications with the concepts (and conceptions) of rules and rule-following.[46] One might argue, for example, that doctrinal rules are simply labels for conclusions, not drivers of reasoning.[47] But law and legal practice are nonetheless constructed around them, and they often seem to do a reasonably good job of predicting how courts will decide cases.[48] We will, in other words, mostly be holding aside difficult questions about the nature of doctrinal rules and accepting for the sake of analysis that they matter.

We cannot, however, avoid the definitional problem—the challenge of *stating* rules. Nearly any rule can be stated at varying levels of specificity. For example, the tiers of scrutiny—in fact, a great deal of constitutional law[49]—can be described as a means-end test. At that level of generality, it will be impossible to get much traction on if and how rules can be borrowed from one doctrinal area to another, because they have essentially merged (or melted) into a single rule. We believe, however, that most constitutional rules can be stated in ways that have reasonably concrete and unique features. Most judges, lawyers, scholars, and students recognize that strict scrutiny

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41 *Supra* note 37 and accompanying text.

42 ZICK, *supra* note 2, at 211.

43 *See* Tebbe & Tsai, *supra* note 6, at 461.

44 *Id.*

45 *Id.*

46 *See, e.g.*, Scalia, *supra* note 14, at 1175–76; Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 645 (1991). This is one area where philosophers and legal scholars have much to learn from one another. *See generally* SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982).

47 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring) ("I am inclined to believe that what has become known as the two-tiered analysis of equal protection claims . . . rather is a method the Court has employed to explain decisions that actually apply a single standard in a reasonably consistent fashion.").

48 *See generally* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793 (2006).

49 *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

and rational basis review are significantly different, even though both are means-end tests, and one might dispute whether one or the other is "really" being applied in a particular case.[50]

Conversely, if rules are stated narrowly, as they sometimes must be, then there will be no way for them to apply in diverse contexts. Consider another example generated by the tiers of scrutiny. There is no concern with content discrimination in equal-protection analysis, and free speech does not bother itself with suspect classifications. But each could be reframed as merely a site-specific wrinkle of the generic "strict scrutiny" rule to which they belong. Staring too hard at the differences—"this rule is about racial classifications and that rule is about content discrimination"—masks the common genealogy.[51]

That said, there is no mystery about why, for instance, free exercise doctrine has not borrowed many rules from the Confrontation Clause.[52] Not only are the two rights quite different, but the latter right simply has no application outside the context of a legal proceeding.[53] Yet, there might still be room for useful doctrinal borrowing, even among seemingly disparate rights, when the problems they confront are similar.[54] And where rules are indeed non-transferable, that very fact might provide interesting insights about both the rules and the rights with which they are related.[55]

We cannot hope fully to articulate a solution to this broad class of level-of-generality problems. And yet judges, lawyers, professors, and students manage to

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[50] Jamal Greene, *Foreword: Rights as Trumps?*, 132 HARV. L. REV. 28, 33 (2018) ("We all have our favorite examples of the Court pretending to apply rational basis review but instead applying a heightened form of scrutiny, or vice versa.").

[51] In fact, the genealogy may be basically linear. The Free Speech Clause's rule against content discrimination—which, along with the bar on prior restraints, is the core of the First Amendment's guarantee—seems traceable to an application of Equal Protection principles to the First Amendment, which first took place in *Carey v. Brown*. *See* 447 U.S. 455, 455, 460–62 (1980) (noting that a statute "prohibiting peaceful picketing on . . . public streets and sidewalks . . . regulates expressive conduct that falls within the First Amendment's preserve," then holding that "[w]hen government regulation discriminations among speech-related activities . . . *the Equal Protection Clause mandates* that the legislation be finely tailored to serve substantial state interests" (emphasis added)); *see also* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1681 (2015) (Scalia, J., dissenting) ("Among its other functions, the First Amendment is a kind of Equal Protection Clause for ideas."); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (citing *Carey* for the proposition that "content-based" regulations must be "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

[52] U.S. CONST. amend. VI.

[53] This is not to say that the boundaries of a legal proceeding will always be clear. *See, e.g.*, Lisa Kern Griffin, *State Incentives, Plea Bargaining Regulation, and the Failed Market for Indigent Defense*, 80 L. & CONTEMP. PROBS. 83, 83 (2017) (noting that "[t]he plea bargaining process receives minimal oversight from the courts and contains scarce regulatory protections").

[54] *See generally* Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 YALE L.J. 852 (2012).

[55] *See infra* Part III.

implicitly solve them every day when they cite a rule in a decision, or in a brief, or when they make outlines for their classes. All of these basic legal moves typically involve citing doctrinal rules, which are the basic elements of a doctrinal framework, and which are understood as coherent units that might be transplanted from one area to another. For example, as Zick describes, the Free Exercise Clause has borrowed "doctrines and rules" from the Free Speech Clause.[56] Similarly, some argue that Second Amendment doctrine should be modeled on that of the First.[57] The people who make this argument, as well as those (including Zick and us) who are more skeptical,[58] have a sense of what they are talking about. As a matter of legal practice, then, the concept of a "rule" seems to work well enough.

Another objection to our approach might be that, by focusing on doctrinal rules alone, we are missing the forest for the leaves. We certainly believe that there is more to constitutional rights than a series of court decisions. The political power of a right might ultimately be more significant than its power in court.[59] And yet courts and doctrine do play a particularly prominent role in Rights Dynamism, as Zick notes,[60] and we believe that focusing on doctrinal rules can help illuminate deep issues in constitutional rights law and adjudication—an effort we begin below.

A final potential objection is that the difference between "doctrine" and "right" is not a distinction worth teasing apart, and therefore that Doctrinal Dynamism is not a useful lens for thinking about Rights Dynamism. There is merit to this point. Below, we note ways in which certain doctrines and rights can be (or at least seem) mutually constitutive, making it all but impossible to separate them.[61] As Zick makes clear, though, there are important differences. Focusing solely on the First Amendment's *Doctrinal* Dynamism would miss the myriad other ways in which the Amendment

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[56] ZICK, *supra* note 2, at 10.

[57] *Id.* at 211 ("Some courts have suggested that judicial standards of review for Second Amendment rights ought to specifically track First Amendment free speech standards."); *see, e.g.*, Ezell v. City of Chicago, 651 F.3d 684, 697 (7th Cir. 2011); United States v. Chester, 628 F.3d 673, 682 (4th Cir. 2010). *See generally* David B. Kopel, *The First Amendment Guide to the Second Amendment*, 81 TENN. L. REV. 417 (2014).

[58] *See, e.g.*, Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375 (2009); Luke Morgan, Note, *Leave Your Guns at Home: The Constitutionality of a Prohibition on Carrying Firearms at Political Demonstrations*, 68 DUKE L.J. 175 (2018).

[59] Again, the Second Amendment provides a ready example. *See* Joseph Blocher, *Gun Rights Talk*, 94 B.U. L. REV. 813, 813–14 (2014) ("Even after the Supreme Court's decision in *District of Columbia v. Heller*, relatively few gun laws—all of them unusually stringent—have been struck down on Second Amendment grounds. The Amendment has, however, been an enormously effective tool for keeping those gun laws from taking root in the first place." (internal citations omitted)).

[60] *See* ZICK, *supra* note 2, at 22 ("Owing to the particular functions and powers of courts as they relate to intersecting constitutional rights, much of the action in Rights Dynamism occurs in judicial forums and results in the accumulation of precedents over time.").

[61] *See infra* Section III.C.

interacts with other constitutional rights.[62] Likewise, the ways in which we (perhaps dynamically) assign meaning and values to constitutional rights are distinct from the ways in which we implement those rights in doctrine.[63]

Consider, for instance, Zick's description of the "basic logic of constitutional borrowing":

> (1) Right X is similar to freedom of speech—in the sense that it is a "fundamental" right worthy of heightened protection, or bears some other general resemblance to freedom of speech. (2) As a result of two-plus centuries of adjudicating free speech claims, there is a well-developed doctrinal framework to draw upon. (3) Therefore, we ought to utilize the doctrines and principles developed to define free speech rights to determine the proper meaning, scope, and enforcement of Right X.[64]

In the first instance, there must be an *extra*-doctrinal connection between two rights—one relying on "some . . . general resemblance" between the two.[65] Only where that nondoctrinal similarity exists are conditions ripe for doctrine to migrate.[66] Studying the migration itself can tell us more about what travels, when, and why.

But what if doctrine is a poor proxy for the ways in which constitutional meaning and values are implemented? That is, what if the doctrinal tests we see cited are not *really* what drives the cases? These are difficult and important questions for law generally, and especially for a project like ours that takes doctrine seriously. It is of course not hard to find examples where judges or Justices dispute whether the test cited is the one being applied,[67] and we are not so naïve or reductive to think that doctrinal tests can be mechanically and determinatively reproduced in multiple areas. First Amendment strict scrutiny might well be different from Fourteenth Amendment strict scrutiny, for example.[68]

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[62] ZICK, *supra* note 2, at 29 ("The process [of Rights Dynamism] . . . . includes public advocacy, the work of civic institutions and constitutional movements, legal scholarship, policymaking relating to individual rights, and public discourse about rights."); *id.* at 37–70 (analyzing the impact of the Free Speech Clause on the ability to discuss other rights).

[63] *See generally* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001).

[64] ZICK, *supra* note 2, at 10.

[65] *Id.* Doctrinal borrowing may, of course, eventually become self-justifying, with earlier instances of doctrinal trade justifying later migrations.

[66] *See id.* at 10–11.

[67] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 380 (2003) (Rehnquist, C.J., dissenting) ("Although the Court recites the language of our strict scrutiny analysis, its application of that review is unprecedented in its deference.").

[68] *See* Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 827 (2007) (noting the difference in the First Amendment intermediate scrutiny test and the version of intermediate scrutiny applied to equal protection claims); Adam Winkler, *Fundamentally Wrong About Fundamental*

That, however, is a challenge for any study of borrowing, not just that involving doctrine—what appears to be dynamism might simply be justificatory rhetoric. We do not take that position, but neither can we disprove it. To the degree that one finds it convincing, though, the questions transform, rather than disappear. *Why* do judges invoke the same test in different areas if they are "actually" doing different things? If the nature of the borrowed doctrine is irrelevant and rights borrow from one another simply because of inertia or familiarity, is that really dynamic?

Again, our goal is not to offer a competing account to the study of rights. What we propose is an inquiry that would deepen one particular aspect of that analysis—its consideration of the doctrinal rules and standards that are themselves borrowed and transplanted between rights. This is in many ways a subset of the dynamism that Zick and others have described.[69] But we think that the shift in emphasis matters: focusing on the doctrine itself faces different challenges, and potentially yields different insights than foregrounding the rights themselves.

II. THE PROCESSES OF DOCTRINAL DYNAMISM: WHY DOCTRINES MIGRATE

Ideally, we would be able to place metaphorical radio collars on doctrinal rules and track their movements, observing them as they adapt to—or reject—new habitats. Doing so could help pinpoint what characteristics make some rules more adaptable than others. Equally crucially, it might tell us something about the habitats (i.e., legal contexts themselves). Lacking such surveillance, we can nonetheless identify at least a few basic predicates for Doctrinal Dynamism.

In prior work on borrowing, scholars have already identified some of the possible preconditions. In her study of the exclusionary rule, Jennifer Laurin explores two: "[*F*]*it*, meaning sufficient congruence between the source and target doctrines to satisfy minimum principles of legal reasoning and jurisprudential legitimacy; and *motive*, meaning some strategic impetus on the part of the Court to reach beyond doctrinal boundaries."[70] Tebbe and Tsai have a slightly different account, which is more focused on the use of borrowing as a tool of persuasion:

> How well different bodies of constitutional knowledge fit together turns on a number of factors, including: (1) whether linkages between the areas already exist (synergy), and the duration of any connections (novelty); (2) what the justifications for the appropriation are and how readily they might be embraced by specialists and average citizens (persuasiveness); (3) how the synthesized values are applied to the dispute at hand (practical yield); and (4) whether

Rights, 23 CONST. COMMENT. 227, 227–28 (2006) (noting that even fundamental rights vary in the scrutiny they receive).

[69] *See* ZICK, *supra* note 2, at 18.

[70] Laurin, *supra* note 16, at 674 (emphasis added).

> and how other background conditions underlie a combination of ideas (resource constraints, social environment, and the like).[71]

As both of these accounts suggest, some basic similarity between the rights is necessary but not sufficient for doctrinal borrowing to take place.

Again, Zick's account of the process of constitutional borrowing is illustrative.[72] As noted, that process of generalization and reasoning by analogy typically depends on identifying some kind of underlying *principle* that two rights or rules have in common.[73] When that connective tissue is present, legal interpreters will probably work harder (or, alternatively, will not have to work as hard) to shape or alter transplants so that they can "take." A person who believes that the First and Second Amendments are relevantly similar will take a longer look at whether First Amendment doctrines can or should be important in Second Amendment law.[74] As always, the question of relevant similarity (what Zick calls "general resemblance"[75]) is hard—perhaps impossible[76]—to articulate. Rights can be similarly important (i.e., "equally fundamental"), or exercised by similar groups of people,[77] or even just proximate to one another in the text of the Constitution. Perhaps, like family resemblance (in both the common and philosophical accounts[78]), there is no single similarity that justifies the borrowing, but rather a set of overlapping commonalities.

A particularly relevant similarity for the purposes of doctrinal borrowing may be whether the rights were designed to prevent similar constitutional problems. Rights that are similarly oriented will presumably be good candidates for borrowing. Matt Adler has argued that, in fact, this is the whole point—the "moral structure"—of American constitutional rights law: "*Constitutional rights are rights against rules.* A constitutional right protects the rights-holder from a particular rule (a rule with the wrong predicate or history); it does not protect a particular action of hers from all the rules

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[71] Tebbe & Tsai, *supra* note 6, at 495.

[72] *See supra* notes 50–55 and accompanying text.

[73] *See* ZICK, *supra* note 2, at 24–25 (discussing the common "coverage" of rights and this utilized in *Obergefell*).

[74] *See, e.g.*, Jordan E. Pratt, *A First Amendment–Inspired Approach to* Heller*'s "Schools" and "Government Buildings,"* 92 NEB. L. REV. 537, 542 (2013) (arguing "that lessons from First Amendment doctrine counsel in favor of a narrow interpretation of *Heller*'s schools and government buildings" exceptions).

[75] *See* ZICK, *supra* note 2, at 10.

[76] *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 584 (1987) ("Think about why power tools are sold in hardware stores rather than in electrical appliance shops. And think about why we most often group red bicycles with bicycles of other colors rather than with red ties and red meat.").

[77] District of Columbia v. Heller, 554 U.S. 570, 579–80 (2008) (analyzing the use of the phrases "right of the people" and "the people" throughout the Constitution).

[78] *See, e.g.*, LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31–32 (G.E.M. Anscombe trans., Blackwell Pub. 3d ed. 1967) (1953).

under which the action falls."[79] On one version of this reading, one does not actually have a "right" to do X, but rather, has a right against being prevented from doing X for certain forbidden reasons. For example, even though the First Amendment covers flag burning, there is no right to burn a flag free from legal sanction.[80] A person who does so can properly be fined for littering, or arson, or any number of other offenses.[81] What the right prevents is government sanctions imposed because of the content of the message communicated.[82] The relevant rule, then—that content discrimination is subject to strict scrutiny—targets the government action not the private action.[83]

Consider an example. It has sometimes been argued that the purpose of strict scrutiny is to "smoke out" invidious government purposes.[84] This argument was first made in the context of equal protection claims involving racial classifications—specifically, to justify the application of strict scrutiny even to affirmative action plans and other government programs designed to remedy or forestall racial discrimination and inequality.[85] By the time it was articulated, strict scrutiny had already ventured out of equal protection and into other areas, including free speech and some aspects of due process.[86]

But equal-protection cases are not the only ones that involve concerns about smoking out government animus.[87] It should be unsurprising, then, that strict scrutiny

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[79] Matthew D. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 3 (1998).

[80] *See generally* Texas v. Johnson, 491 U.S. 397 (1989).

[81] Adler, *supra* note 79, at 3–4.

[82] Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 CORNELL L. REV. 981, 1010 (2016).

[83] This is what Adler means by "rule," whereas we're generally using that word to refer to the doctrine. *See* Adler, *supra* note 79, at 4–5.

[84] *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1309–10 (2007) ("In recent years, the Supreme Court has sometimes asserted unequivocally that strict scrutiny aims to unmask forbidden motivations."); *see also id.* at 1310 ("The purpose of strict scrutiny, the Court said, was 'to "smoke out" illegitimate uses of race'" (quoting Gutter v. Bollinger, 539 U.S. 306, 326 (2003))). *But see id.* at 1310 ("Although it seems plain that the Supreme Court sometimes deploys strict scrutiny as a motive test, it also seems indisputable that the Court's inquiries do not always focus on governmental purposes.").

[85] *Grutter*, 539 U.S. at 326 ("We apply strict scrutiny to all racial classifications to '"smoke out" illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.'" (alteration in original) (quoting City of Richmond v. J.A. Croson Co. 488 U.S. 469, 493 (1989))).

[86] It is worth reiterating that the common refrain that strict scrutiny applies to restrictions on fundamental rights is simply incorrect. As Adam Winkler notes, "Fundamental rights do not trigger strict scrutiny, at least not all of the time. In fact, strict scrutiny—a standard of review that asks if a challenged law is the least restrictive means of achieving compelling government objectives—is actually applied quite rarely in fundamental rights cases." Winkler, *supra* note 68, at 227. Many fundamental rights, including the right to an abortion, do not receive the protections of strict scrutiny. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming that the right involved is fundamental, and yet applying an "undue burden" standard).

[87] *See generally* ARAIZA, *supra* note 21.

applies in other areas where the government's motivations may be suspect.[88] Depending on one's frame of reference, this tells us something about the rights themselves—that they are rights against being targeted by the government for an illegitimate reason—and something about the doctrinal rule—that courts have thought it to be a useful tool to smoke out such animus. This enables deeper normative analysis (is strict scrutiny well-suited for this task?) as well as a potential predictive theory about where the doctrine may travel next, if anywhere. For instance, perhaps the well-documented[89] (and in some quarters, much-maligned[90]) reluctance of courts to exercise strict scrutiny in Second Amendment cases is because those courts believe that the government motive in enforcing gun regulations truly is public safety, rather than anti-gun bias.

A. The Marketplace of Doctrine: Why Some Doctrines Dominate

Not all rights lend and borrow doctrinal rules at the same rates. Some, like the First Amendment, have generated many rules that were subsequently adopted and applied in other areas of constitutional law.[91] Others, like the Second, are importers only.[92] What accounts for the success of the First Amendment—and others like the Fourteenth—as exporters of doctrinal rules?[93] Conversely, do doctrines with trade deficits, like the Second Amendment, share common characteristics?

These are different questions than the one that scholars (including Zick[94]) have often asked—explicitly or implicitly—about what accounts for the First Amendment's magnetism.[95] The magnetism or dominance of the Free Speech Clause is undoubtedly on display when claims are coded as involving free speech when they might

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[88] *See* Kagan, *supra* note 32, at 414 ("[N]otwithstanding the Court's protestations in *O'Brien*, . . . First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."); Winkler, *supra* note 48, at 803 ("The hunt for improper motives has also animated strict scrutiny in the First Amendment . . . .").

[89] Ruben & Blocher, *supra* note 19, at 1495 (documenting that strict scrutiny was applied in 27 out of 1,153 analyzed Second Amendment cases).

[90] *See* Timothy Zick, *The Second Amendment as a Fundamental Right*, 46 HASTINGS CONST. L.Q. 621, 622 (2019) (documenting and analyzing claims that the Second Amendment is not being afforded the respect it deserves, including that "the absence of strict scrutiny is demonstrative of lower-class status").

[91] ZICK, *supra* note 2, at 205 (stating Free Speech has created "discourse regarding Second Amendment right").

[92] *Id.* at 206–07 (discussing how debate regarding the Second Amendment has been about internal interpretation and not about application to other rights).

[93] In one obvious sense—incorporation—the Fourteenth Amendment is probably the most prolific importer of doctrine in the Constitution.

[94] *Id.* at 7 ("[T]he Free Speech Clause is a uniquely *magnetic* rights provision.").

[95] *See generally* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613 (2015).

instead (and more properly) be treated as involving petition, assembly, or even free exercise.[96] Likewise, the tendency to invoke the First Amendment in political rhetoric both demonstrates and bolsters the status of free speech as first among equals within the Bill of Rights.[97] One might explain this kind of dominance in any number of ways: the fact that most Americans perceive themselves as exercising the right to free speech far more than basically any other constitutional right,[98] the strength of the cultural mythology involving speech,[99] and so on.

But we are looking at the phenomenon from a different angle: the transmission of *doctrinal rules* from one area to another, including the use in non-speech cases of rules that were created to adjudicate speech cases. This phenomenon might happen without the original home of the rule ever being invoked, or at least not invoked after the initial migration of the rule. In any event, since the transfer primarily occurs in case reporters rather than in public discourse, it is a bit harder to explain it using the same accounts of general public commitment. The fact that free speech is publicly celebrated may help account for its overall magnetism, but is less useful in exploring the tendency of judges to borrow its doctrines, which are not likely to have any particular valence in public discourse.

One way to conceptualize the inquiry is as a kind of "marketplace of doctrine"—a competitive environment in which judges are basically the consumers and will select rules that best answer the questions they confront. Perhaps, for example, strict scrutiny has spread across doctrinal domains because it does a good job capturing a widely shared judicial belief that some kind of stringent means-end scrutiny is appropriate for any potential infringement on a fundamental right. Its pervasiveness is a demonstration of its value.

Because judges are the ones ultimately responsible for selecting doctrinal rules for application in new cases,[100] their preferences determine the value of doctrinal

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[96] ZICK, *supra* note 2, at 1.

[97] On the first page of his book, Zick quotes the Supreme Court's statement that freedom of speech "is the matrix, the indispensable condition, of nearly every other form of freedom." *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 327 (1937)). Other rights have laid claim to that title, however. Some gun rights supporters call the Second Amendment "America's First Freedom." That is, in fact, the title of the NRA's magazine. *See* Kaley v. United States, 134 S. Ct. 1090, 1107 (2014) (calling the right to counsel "the most precious right a defendant has, because it is his attorney who will fight for the other rights the defendant enjoys").

[98] Indeed, we suspect—though this is not the place to explore—that the varying reach and strength of constitutional rights might be explained in large part by the degree to which they are, or understood to be, either exercised by many people (free speech) or at least exercised for the benefit of the whole (bearing arms to deter a tyrannical government, in some conceptions). As Zick notes, the "sheer prevalence of communicative activity" may help account for the fact that the Free Speech Clause is a "uniquely *magnetic* rights provision." ZICK, *supra* note 2, at 7.

[99] *See generally* Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157 (2005) (reviewing GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004)).

[100] *See* Scalia, *supra* note 14, at 1176–77.

rules. This suggests that, in considering the likelihood and success of constitutional borrowing, attention must be paid to the jurisprudential preferences of judges. This is different from focusing on their *interpretive* philosophies, which are generally understood to involve the process of finding meaning in constitutional provisions.[101] To oversimplify a bit, the interpretive debates are about inputs: how much to rely on history, precedent, social movements, and the like.[102] The debate about originalism is, among other things, a debate about interpretive philosophy.

The kind of preferences we have in mind involve outputs: the doctrines that judges design to implement constitutional meaning. The debate about rules and standards, for instance, is a debate about doctrinal preferences.[103] Of course, interpretation and implementation may be closely related, and certain philosophical inclinations are likely to correlate to certain doctrinal preferences.[104] Still, doctrinal design may be influenced by a different set of considerations, including judges' comfort with discretion, their commitment to "minimalism," their confidence about their interpretive conclusions, and so on.[105]

Of course, we cannot rule out the possibility that such transplantation occurs simply as a matter of reflex—judges cite the rules with which they are familiar (like the tiers of scrutiny, perhaps) without any particular consideration of whether those rules perform their job well.[106] The same could be said of rights themselves; judges rely on the First Amendment to interpret the Second because the former is familiar. Still, we think that the familiarity—the very fact that the tiers have been used in so many contexts—suggests something about their perceived utility for specific tasks, as does the fact that they are *not* borrowed in other areas.

Another way to understand the "market" is as one where *litigants* are the consumers. After all, judges can—within limitations—select doctrines to resolve cases,[107] but they have little control over the cases that they will hear, or the claims that will be involved. Litigants' preferences about doctrine are more straightforward than that

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[101] *See* ZICK, *supra* note 2, at 7.

[102] *See id.*

[103] *See, e.g.*, Scalia, *supra* note 14, at 1179 (arguing that adopting clear rules constrains judges from acting on their political preferences in future cases based on balancing); Schauer, *supra* note 46 (contrasting rules- and content-based approaches to decision-making); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 398 (1985) ("The dialectic here [of rules v. standards] traces the so-called balancing v. absolutism debate.").

[104] *See* Michael C. Dorf, *The Undead Constitution*, 125 HARV. L. REV. 2011, 2026 (2012) (reviewing JACK M. BALKIN, LIVING ORIGINALISM (2011); DAVID A. STRAUSS, THE LIVING CONSTITUTION (2010)) (noting "expected-application originalism's substitution of rules for standards and principles").

[105] *See generally* Greene, *supra* note 50.

[106] *See* Transcript of Oral Argument at 44, District of Columbia v. Heller, 554 U.S. 570 (2008) (No. 07-290) (Chief Justice Roberts stating that the phrases utilized in tiers of scrutiny analysis do not "appear in the Constitution" and "just kind of developed over the years as sort of baggage that the First Amendment picked up").

[107] *See* Scalia, *supra* note 14, at 1176–77.

of judges because in nearly every instance their overriding goal is simply to win.[108] They will therefore seek out and claim whatever doctrinal mantle is most likely to help them prevail.[109]

For constitutional plaintiffs, this generally means invoking the highest level of scrutiny (i.e., the most stringent rule), regardless of whether doing so is intuitive in other ways. Free exercise claims are an obvious example here.[110] Owing in part to *Employment Division v. Smith*,[111] the Free Exercise Clause is not always an attractive tool for plaintiffs. Thus, as Zick notes, "starting in the 1980s, in both their general advocacy and litigation of specific cases, religious liberty advocates started to abandon the Free Exercise Clause in favor of the Free Speech Clause."[112] The story is complicated, of course, but the motivation is relatively simple: litigants prefer winning doctrines, which generally means those that would subject government action to the most demanding standards.[113]

Over time, this kind of preferencing can have ill effects, not least because it can stunt the doctrinal growth of the less-stringently protected right—shifting attention and doctrinal development to the Free Speech Clause instead of the Free Exercise Clause, for example.[114] In doing so, it can also distort the very meaning of the subsumed right. Take, for instance, the assembly clause of the First Amendment.[115] Scholars have convincingly argued (and some have bemoaned the fact) that the intended right—a broad protection for peaceable flesh and blood assemblies of persons—has in practice been repealed and replaced with a narrower but perhaps stronger right of expressive association.[116]

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[108] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1795 (2004).

[109] *See id.*

[110] U.S. CONST. amend. I.

[111] 494 U.S. 872 (1990).

[112] ZICK, *supra* note 2, at 33. Schauer adds that litigants are drawn to the Free Speech Clause for its rhetorical power *as well as* it being a winner. *See* Schauer, *supra* note 108, at 1795 (referencing the First Amendment's magnetism).

[113] As Carlos Ball's contribution to this symposium illustrates, the choice can be especially hard for a movement that invokes principles and doctrines which might also, in other contexts, be adverse to its interests. *See* Carlos A. Ball, *Gender-Stereotyping Theory, Freedom of Expression, and Identity*, 28 WM. & MARY BILL RTS. J. 229 (2019); *see also* Elizabeth Sepper, *Sex Segregation, Economic Opportunity, and* Roberts v. U.S. Jaycees, 28 WM. & MARY BILL RTS. J. 489 (2019).

[114] Whether or not a case "should" have been analyzed under the Free Exercise Clause or the Free Speech Clause, if only one, is of course a matter of debate. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263 (1981) (holding that a public university policy excluding religious groups from open forum policy violated the Free Speech Clause).

[115] U.S. CONST. amend. I.

[116] *See, e.g.*, John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566 (2010); John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 174 (2010); Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 159 (2013).

B. The Necessity of Doctrinal Diversity

Other contexts that can involve "borrowing"—whether financial or cultural—often raise the question of whether such borrowing can or will lead to homogeneity and the domination of weak or minority characteristics.[117] This is a particular concern when it comes to Zick's muse, the Free Speech Clause, because it has such a tendency to dominate other rights. As Zick notes, "[I]n all of its various forms, expansionism tends to *standardize* constitutional rights. . . . This standardization reduces or eliminates the conceptual space between constitutional rights, which in turn reduces or eliminates opportunities for synergy and mutual illumination."[118]

That said, there might be something to celebrate about a vision of law in which the same rules can be deployed in various legal contexts. Few people complain about the law being too simple, after all. Anything that reduces the dizzying area of multi-factor tests and context-specific exceptions might be welcome, either because it makes legal doctrine more accessible and manageable,[119] or because it represents a distillation of some essential characteristics of rights.

But convergence of doctrine has downsides, inasmuch as it can lead to flat standardization and the merging of conceptually distinct rights.[120] After all, the marketplace metaphor only works when there are enough *different* products, ideas, or doctrines to generate competition. A doctrine-monopsony in which the First Amendment is the only producer would not be much of a "market." At the doctrinal level, dynamism depends on some kind of diversity. This is consistent with what Zick calls "Rights Pluralism," which "is based on the simple premise that liberty is more secure insofar as governments are subject to multiple, independent, and substantively robust constitutional limitations."[121]

One possible path to maintaining Rights Pluralism in a world of standardized doctrine would be to increase the total weight given to the liberty interests at stake when multiple rights are at issue, as David Faigman has suggested.[122] Under such a regime, a law that threatens both free speech and free exercise would therefore be less likely constitutional than one that reached just one or the other.[123] And even if

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[117] *See* ZICK, *supra* note 2, at xiii.

[118] *See id.* at 247.

[119] *Cf.* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

[120] Along the same lines, Laurin distinguishes between the initial act of borrowing and what she calls convergence—"the merging, functionally if not formally, of two previously independent remedial paths into one." Laurin, *supra* note 16, at 674.

[121] *See* ZICK, *supra* note 2, at 15.

[122] *See generally* David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753 (1994).

[123] *See id.* at 773 ("If the full effect of the constitutional infringement is assessed against the government interest . . . the action would be deemed unconstitutional.").

two applicable rights involve the same doctrinal rule, there might be marginal differences in how that rule applies: what counts as a "compelling" government interest for purposes of due process might not count for purposes of equal protection claims, and vice versa.[124]

With these exceptions and caveats, however, it is worth considering the ways in which doctrinal borrowing can effectively limit Rights Dynamism by facilitating the colonization of one right by another. Sometimes a court must decide whether a case should be treated as involving Right X or Right Y or both.[125] Those decisions can have significant impacts both in particular cases and, over time, the gradual but now almost-complete displacement of the rights of petition and assembly by free speech is one particularly notable example that Zick explains in detail.[126]

But that is not the only way that one right can displace another. A right can "colonize" without actual annexation, simply by exporting its own doctrine.[127] The colonized right will continue to be invoked, but it will look and act like the colonizer.[128] Again, the First Amendment provides a particularly good illustration of the difference between these two modes of doctrinal imperialism.[129] Many scholars and commentators have described or bemoaned what they see as First Amendment expansionism[130] or weaponization.[131] For many, the concern is that cases involving economic regulations are instead being classified as involving free speech, leading to a kind of "Lochnerization" in which basic financial and safety regulations are subject to heightened scrutiny and struck down.[132] This is fundamentally a concern about *coverage*—about what kinds of cases fall within the First Amendment.

But what if, instead of pulling cases within it, the First Amendment simply exported its doctrines to other areas? Would the Lochnerization concern be allayed

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[124] *See id.* at 770.

[125] It seems unlikely that rights can borrow doctrinal tests when it comes to questions of coverage—those tests are likely to be completely unique to particular rights, to the degree that they can be articulated at all. *See* Schauer, *supra* note 108. Thus, as we argue *infra* Section III.C, citations to coverage doctrines from another right are not truly "borrowing," because nothing of content is being borrowed; the citation is rhetorical.

[126] *See* ZICK, *supra* note 2, at 71.

[127] *See id.* at 9 (describing how the Free Exercise Clause has been litigated through the framework of Free Speech).

[128] *Supra* note 127 and accompanying text.

[129] The metaphor is not ours alone; Zick himself argues that "the Free Speech Clause has effectively colonized constitutional territory that rightfully belongs to non-speech guarantees." ZICK, *supra* note 2, at 8.

[130] *See generally* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015).

[131] Janus v. Am. Fed'n of State, City, & Mun. Emps., Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[132] *See, e.g.*, Jeremy K. Kessler, *The Early Years of First Amendment Lochnerism*, 116 COLUM. L. REV. 1915 (2016).

if, say, the Court declined to treat a credit card surcharge labeling requirement as a content-specific speech restriction subject to heightened scrutiny,[133] but reached the same conclusion under due process (which, after all, applies to economic transactions, albeit not with such bite[134])? If two rights have the same triggers and the same doctrinal apparatus—a blending that could potentially be achieved through doctrinal borrowing alone, and not just through explicit expansion of a dominant right's domain—in what meaningful sense are they legally distinct?

III. WHEN DOCTRINES STAY HOME

Good comparative work—especially work on borrowing—must consider not only what is taken, but also what is not. It is easy, Lee Epstein and Jack Knight point out, to focus only on successful legal transplants, thereby falling victim to selection bias.[135] In order to have a complete picture, one must also attend to the transplants that were never made. For our purposes, that means identifying doctrinal rules that one might expect to travel from one area to another but have not, or which are in extreme cases uniquely tied to a single constitutional right.

We can then ask the same basic question: why *don't* these rules travel? Some might be relevant only to limited factual situations (the criminal procedure rights, for example), or might target a limited kind of government wrong (the chilling effect, perhaps[136]), and so on. But contextual differences, while important, cannot alone account for all doctrinal immobility. The reasons that doctrine stays put are as varied as the reasons it moves.

A. Purposes

Some doctrinal rules address concerns that are more or less unique to a particular right. Consider the First Amendment's prohibition on prior restraint—a rule that is specific to free-speech doctrine.[137] It says that the government generally cannot prohibit speech, but can only punish it.[138] This rule is deeply rooted in the particular

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[133] *See* Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1147 (2017) (holding that credit card surcharge labeling requirements regulated commercial speech).

[134] *See id.* at 1147, 1152 (remanding case to decide free speech issue, but holding law did not violate Due Process Clause as unconstitutionally vague).

[135] Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196, 197 (2003) ("[M]any studies of constitutional borrowing . . . 'select on the dependent variable,' that is, they typically focus on when the phenomenon *occurs*—when and why society B 'borrows' a formal constitutional provision, a court precedent, and so on from society A—and ignore when and why it does *not occur* . . . .").

[136] *See* ZICK, *supra* note 2, at 235 (doubting relevance of expressive "chill" arguments in Second Amendment cases).

[137] *See, e.g.*, Near v. Minnesota *ex rel.* Olson, 283 U.S. 657, 722–23 (1931).

[138] *Id.*

history of the First Amendment,[139] and is mostly designed to address speech-specific concerns: the chilling effect of sanctions, the likelihood of viewpoint discrimination, the need for speech to check the government, and so on.[140]

Recently, some gun-rights advocates have argued that prior restraint rules should be imported into Second Amendment doctrine.[141] If accepted, such a rule would effectively render licensing of any kind constitutionally suspect, and perhaps even impermissible.[142] But courts have universally rejected the argument on precisely the basis described here: the rule serves purposes that simply are not present in the context of the Second Amendment.[143] As Zick puts it, the Amendments "pertain to very different activities, serve distinct purposes, and raise disparate regulatory concerns."[144]

But others argue that the Amendments *do* share relevant similarities.[145] Both protect fundamental rights after all, and some argue that they both protect "tools of political dissent."[146] In keeping with this comparison, some claim that the Second Amendment is being treated as "second class."[147] Among their main complaints is the refusal of courts to apply strict scrutiny to Second Amendment claims.[148]

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[139] *See* Jeffery A. Smith, *Prior Restraint: Original Intentions and Modern Interpretations*, 28 WM. & MARY L. REV. 439, 459–61 (1987) (noting that the original interpretation of the First Amendment's guarantee was "freedom from prior restraint but not from postpublication punishment," as derived from the reasoning of Sir William Blackstone).

[140] *See generally* Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 L. & CONTEMP. PROBS. 648 (1955).

[141] *E.g.*, Kachalsky v. Cty. of Westchester, 701 F.3d 81, 91 (2d Cir. 2012) ("Plaintiffs . . . suggest that we apply First Amendment prior-restraint analysis in lieu of means-end scrutiny to assess the proper cause requirement" of a gun licensing scheme.).

[142] *See id.*

[143] *E.g.*, *id.* at 92.

[144] ZICK, *supra* note 2, at 203.

[145] David B. Kopel, *Trust the People: The Case Against Gun Control*, 3 J. ON FIREARMS & PUB. POL'Y 77, 103 (1990) (referring to guns); *see also* Kopel, *supra* note 57, at 418 ("[T]he First and Second Amendments both protect fundamental aspects of individual autonomy against government suppression.").

[146] *See supra* note 145 and accompanying text.

[147] Friedman v. City of Highland Park, 136 S. Ct. 447, 450 (2015) (Thomas, J., dissenting from the denial of certiorari) ("I would grant certiorari to prevent the Seventh Circuit from relegating the Second Amendment to a second-class right."); *see also* Silvester v. Becerra, 138 S. Ct. 945, 945 (2018) (Thomas, J., dissenting from the denial of certiorari) (claiming that the decision below was "symptomatic of the lower courts' general failure to afford the Second Amendment the respect due an enumerated constitutional right" and that "the Second Amendment is a disfavored right in this Court").

[148] *See, e.g.*, Lawrence Rosenthal & Joyce Lee Malcolm, McDonald v. Chicago*: Which Standard of Scrutiny Should Apply to Gun Control Laws?*, 105 NW. U. L. REV. 437, 455 (2011) ("Since fundamental rights are not to be separated into first- and second-class status, the strict scrutiny applied to the First Amendment freedom of the press and freedom of speech should also be applied to Second Amendment rights."). Again, it is worth emphasizing that the freedom of press is generally absorbed by the freedom of speech, *supra* note 3 and accompanying text, and that strict scrutiny does *not* apply to all free speech claims. *Supra* note 19.

One response to this argument is that strict scrutiny is ill-suited to Second Amendment claims because it would overprotect gun rights. But that argument rests on the same normative premise that is in dispute: the extent to which gun rights *should* be protected. An alternative answer, founded in doctrinal analysis and not premised on a normative assumption about gun rights, lies in the fact that strict scrutiny is designed for particular tasks that are not relevant in the gun rights context, such as smoking out government animus,[149] or correcting political process failure.[150]

Here, too, there might be push-back, but the disagreement is more tractable. Some opponents of gun regulation believe that there is widespread bias against guns[151]—comparisons to Nazi Germany are uncommon,[152] but apocalyptic rhetoric is not.[153] As an empirical matter, however, it is hard to find support for the notion that gun rights are truly under attack in politics, let alone in courts.[154] The vast majority of Americans support *Heller*'s interpretation of the right to keep and bear arms,[155] as do both major political parties and powerful advocacy organizations.[156] To be sure, some Americans still support extreme gun control like handgun bans, but their numbers are relatively small.[157] And, perhaps more relevantly, they were politically weak even

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[149] ARAIZA, *supra* note 21, at 3–4.

[150] *Id.*

[151] *See, e.g.*, JOHN R. LOTT, JR., THE BIAS AGAINST GUNS: WHY ALMOST EVERYTHING YOU'VE HEARD ABOUT GUN CONTROL IS WRONG (2003).

[152] Uncommon, but not unheard of. *See, e.g.*, *Today's Gun Owners: Parallels to Jews in Germany in the 1930s*, GUNSSAVELIFE.COM (Jan. 27, 2013), http://www.gunssavelife.com/?p=5239 [https://perma.cc/S4RJ-9RLS] ("Propaganda about gun owners has reached a fever pitch in America today, leaving American gun owners feeling like the Jews in Germany before the Second World War."). *See generally* Bernard E. Harcourt, *On Gun Registration, the NRA, Adolf Hitler, and Nazi Gun Laws: Exploding the Gun Culture Wars (a Call to Historians)*, 73 FORDHAM L. REV. 653 (2004) (exploring the longstanding argument made by gun-rights advocates that gun control led to the Holocaust).

[153] Blocher, *supra* note 59, at 819–25 (collecting examples).

[154] Again, Zick's work is instructive. *See* Zick, *supra* note 90, at 622. To be sure, it is also hard to empirically show that gun rights are *not* treated as second class. *Compare* Ruben & Blocher, *supra* note 19, at 1496 (suggesting that low success rates of Second Amendment claims are primarily due to their weakness), *and* Adam M. Samaha & Roy Germano, *Is the Second Amendment a Second-Class Right?*, 68 DUKE L.J. ONLINE 57, 58–59 (2018) (concluding that data do not support the "second class" argument), *with* David B. Kopel, *Data Indicate Second Amendment Underenforcement*, 68 DUKE L.J. ONLINE 79 (2018) (generally supporting underenforcement thesis), *and* George A. Mocsary, *A Close Reading of an Excellent Distant Reading of* Heller *in the Courts*, 68 DUKE L.J. ONLINE 41, 43 (2018) (noting "evidence of judicial underenforcement").

[155] Jeffrey M. Jones, *Public Believes Americans Have Right to Own Guns*, GALLUP (Mar. 27, 2008), https://news.gallup.com/poll/105721/public-believes-americans-right-own-guns.aspx [https://perma.cc/H9XR-N3B5].

[156] JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT: RIGHTS, REGULATION, AND THE FUTURE OF *HELLER* 183–91 (2018).

[157] Lydia Saad, *Americans Want Stricter Gun Laws, Still Oppose Bans*, GALLUP (Dec. 27,

before *Heller* took such preferences off the table[158]—D.C. and Chicago were the only notable cities with handgun bans,[159] and they were struck down in *Heller* and *McDonald*.[160] Some have called for these cases to be overturned,[161] or the Second Amendment to be repealed,[162] but the position commands little support[163]—not even the major gun violence prevention groups have staked out such a position.[164] In short, it is hard to identify either the kind of political process failure or government animus towards guns and gun owners that might justify strict scrutiny or anything like it.[165]

Of course, the government must respect the individual right set forth in *Heller*, which limits its ability to regulate.[166] But overzealousness in pursuing a legitimate regulatory goal is not the same as bias or intolerance, and the paradigm cases in the gun rights arena will involve mere incompetence in understanding constitutional limits. And in those situations, some kind of proportionality review is generally to be favored.[167] It is thus appropriate and unsurprising that courts are more frequently

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2012), http://news.gallup.com/poll/159569/americans-stricter-gun-laws-oppose-bans.aspx [https://perma.cc/RAS9-VGXU] (finding that twenty-four percent of Americans favor banning the possession of handguns).

[158] Jones, *supra* note 155.

[159] Steve Chapman, Opinion, *Chicago's Pointless Handgun Ban*, CHI. TRIB. (Mar. 4, 2010), https://www.chicagotribune.com/news/ct-xpm-2010-03-04-ct-oped-0304-chapman-20100304-column-story.html [https://perma.cc/5LCC-LH7Y].

[160] McDonald v. City of Chicago, 561 U.S. 742, 748 (2010); District of Columbia v. Heller, 554 U.S. 570, 636 (2008).

[161] *See, e.g.*, Richard Aborn & Marlene Koury, *Toward a Future, Wiser Court: A Blueprint for Overturning* District of Columbia v. Heller, 39 FORDHAM URB. L.J. 1353 (2012).

[162] *See, e.g.*, Bret Stephens, Opinion, *Repeal the Second Amendment*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/opinion/guns-second-amendment-nra.html [https://perma.cc/NK4T-B8AU]; John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), https://www.nytimes.com/2018/03/27/opinion/john-paul-stevens-repeal-second-amendment.html [https://perma.cc/45SJ-R7MF].

[163] Christopher Ingraham, *One in Five Americans Wants the Second Amendment Repealed, National Survey Says*, WASH. POST (Mar. 27, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/27/one-in-five-americans-want-the-second-amendment-to-be-repealed-national-survey-finds/ [https://perma.cc/8UQ4-WM47].

[164] *See id.*

[165] Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 260 (2008) ("There is no special reason for an aggressive judicial role in protecting against gun control, in light of the fact that opponents of such control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process."); Richard Posner, *In Defense of Looseness*, NEW REPUBLIC (Aug. 27, 2008), https://newrepublic.com/article/62124/defense-looseness [https://perma.cc/X6D2-3849] ("The proper time . . . to enlarge constitutional restrictions on government action is when the group seeking the enlargement does not have good access to the political process to protect its interests, as abortion advocates, like gun advocates, did and do.").

[166] District of Columbia v. Heller, 554 U.S. 570, 570 (2008).

[167] Greene, *supra* note 50, at 127.

relying on intermediate scrutiny than strict scrutiny in addressing Second Amendment claims.[168]

At a broader level, what this suggests is that the more generalized the concern (i.e., government animus) that a right is designed to address, the more likely its doctrine is to be borrowed—the doctrine is a tool for a common task. Conversely, rights designed to address unique or narrow concerns are less likely to engage in Doctrinal Dynamism, and will do so only when those narrow concerns are found elsewhere.

B. Predicates and Context

There is another way in which an examination of rule design may explain a lack of doctrinal migration: not because of differences in purpose, but because of narrow or even unique predicates for a rule's application. It may not be that the rights serve different principles or values, but that the rights serve those principles or values in unique contexts, and that the right's doctrine reveals that distinction by not migrating. It makes no sense, for instance, to ask why the Confrontation Clause has had little impact on the Establishment Clause. The right to confront one's accuser, like the right against double jeopardy, cannot be made generic. The contexts are just too different to sensibly imagine moving doctrines from one to the other.

For example, the Fourth Amendment's guarantee against unreasonable search and seizure could be characterized as a protection against animus, in that it protects against searches motivated by ill intent.[169] At the very least, the good faith exception means that the Amendment generally permits evidence to be presented so long as there is *not* ill intent.[170] But strict scrutiny has never been applied to the Fourth Amendment, despite some scholarly urging.[171] Strict scrutiny, as a tool, might just not work for the Fourth Amendment right; after all, the government's need to obtain evidence to prosecute a crime is almost certainly "compelling," and a search is likely the only, let alone the most narrowly tailored, way to get that evidence.[172] Whether a particular *kind* of

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[168] Ruben & Blocher, *supra* note 19, at 1496 ("Intermediate scrutiny has been the most prevalent form of scrutiny, no matter which category of court one considers. . . . [W]hen levels-of-scrutiny analysis is applied, federal appellate courts select intermediate scrutiny 79 percent of the time.").

[169] *See* Utah v. Strieff, 136 S. Ct. 2056, 2063 (2016) (declining to suppress evidence and noting a lack of flagrantly unlawful police misconduct).

[170] *See* United States v. Leon, 468 U.S. 897, 897–99 (1984).

[171] *See, e.g.*, Christopher Slobogin, *Let's Not Bury* Terry*: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053, 1089 (1998) (arguing that "Fourth Amendment analysis should mimic equal protection rationality review 'with bite,' if not strict scrutiny"); Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 386 (1988) (arguing for "replac[ing] the Court's vague reasonableness balancing test with a strict scrutiny standard" in Fourth Amendment cases).

[172] *See* Cynthia Lee, *Package Bombs, Footlockers, and Laptops: What the Disappearing Container Doctrine Can Tell Us About the Fourth Amendment*, 100 J. CRIM. L. & CRIMINOLOGY 1403, 1491 (2010) ("If all Fourth Amendment claims are subject to strict scrutiny, either all

search is the least intrusive means available is a question with a little more *there* there, but that requirement has been repeatedly rejected by the Court.[173] Context dictates: it might simply be too much to ask for investigators to always craft the least intrusive means. And so the Fourth Amendment retains a reasonableness test, despite the theoretical applicability of strict scrutiny.[174]

The context limitations of rights and doctrine should not be taken too far, however. In keeping with the point about levels of generality described above,[175] many rules can be stated or restated in ways that make them applicable in a broader set of contexts. Even rules that might seem rooted to one doctrine might nonetheless be used—perhaps through analogy—either directly or indirectly to build rules in another.[176]

The ability of a doctrine to migrate therefore depends in great part on the level of specificity at which that doctrine can be articulated. It also depends on which principles are foregrounded and which are backgrounded, and at what level of specificity the principles can be articulated.

For example, instead of asking why the tiers of scrutiny have not been imported to the criminal procedure rights, one could also ask why those rights have not exported their doctrines. The absence of doctrinal importation does not necessarily explain the absence of exports from those rights. Many predicates of doctrinal migration are present in those rights: generalizable principles, apparent attractiveness to judges, and a body of doctrine no less developed (and no less coherent[177]) than active exporters like the First Amendment. And yet, for instance, there is no First Amendment version of the exclusionary rule.

Dan Coenen thinks that there should be, or at least that there should be something like one.[178] He argues for "judicial recognition of a new set of First Amendment

but a few government searches would be deemed unreasonable or strict scrutiny would not end up being very strict.").

[173] City of Ontario v. Quon, 560 U.S. 746, 763 (2010) ("This Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment.") (internal quotation marks omitted).

[174] *See supra* notes 171–73 and accompanying text.

[175] *See supra* notes 46–56 and accompanying text.

[176] *See, e.g.*, Miller, *supra* note 54. To pick just one further example, scholars have argued persuasively that the Establishment Clause can provide a guide for freedom of speech cases—especially those involving government speech. *See, e.g.*, Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CALIF. L. REV. 1104 (1979); Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (2013). To be clear, the argument here is that free speech doctrine should import the Establishment Clause's neutrality requirement, not that religious government speech violates the Establishment Clause—which it might, of course.

[177] *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1270 (1995) ("In fact I would go so far as to say that the Court's First Amendment jurisprudence, which is a lively and growing area of constitutional law, dances now macabrely on the edge of complete doctrinal disintegration.").

[178] Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639, 639 (2019).

protections that operate whenever challenged past-speech evidence involves expression on a matter of public concern."[179] In fact, Coenen provides persuasive evidence that the First Amendment and the Fourth Amendment *must* take each other into account: the Supreme Court's instruction to "examine what is 'unreasonable'" in the Fourth Amendment context "in the light of the values of freedom of expression."[180] For our purposes, this would represent a potentially useful instance of Doctrinal Dynamism.

C. Rights-Constitutive Rules

If it is true that rights with identical triggers and rules are functionally identical, that suggests something important about the relationship between rules and rights: doctrinal rules not only implement rights, but help constitute them. Some rules are, in other words, so deeply intertwined with particular rights that they must be understood, for all intents and purposes, as being "part" of that right.[181] This has implications for the theory and practice of constitutional rights.

Any taxonomy—whether involving rights and rules or flora and fauna—must reckon with the relationship between characteristics and the things that possess those characteristics. Some characteristics and similarities may be cosmetic, in the sense that they could be changed without forcing a reclassification. A rose can be pink, or red, or yellow, and still be a rose. Other characteristics (thorns, etc.) might be essential.

A natural implication of any approach that sees rights and their enforcement as distinct,[182] is that the right is the "thing" (the rose, as it were) and doctrine is just one of its characteristics (the color, for example). On this account, doctrine is basically a cosmetic feature—it can change without really altering anything fundamental about the right. The freedom of speech is what it is, whether protected by strict scrutiny or intermediate scrutiny or a test based purely on historical analogy.

But this clear division between right and doctrine is unsatisfying because some rules are so tightly bound up with rights that they cannot be changed without violating the essence of the right. This is true, for example, of the rules that are themselves textually specified. A Fifth Amendment that permitted takings without just compensation would be a fundamentally different right.[183]

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[179] *Id.*; *see also* Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 176 (2007) (arguing "that First Amendment criminal procedure is both justified and necessary to prevent the infringement of First Amendment rights in the course of government investigations").

[180] Coenen, *supra* note 178, at 680 n.188 (quoting Roaden v. Kentucky, 413 U.S. 496, 504 (1973)).

[181] *See infra* note 183 and accompanying text.

[182] *See, e.g.*, Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978); *see also* H. Jefferson Powell, *Reasoning About the Irrational: The Roberts Court and the Future of Constitutional Law*, 86 WASH. L. REV. 217, 234 (2011); Ernest A. Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 L. & CONTEMP. PROBS. 157 (2012).

[183] *Cf.* Jacobs v. United States, 290 U.S. 13, 16 (1933) ("The form of the remedy did not

But there are other doctrines that might be essential to a right without necessarily being textually specified. Would the First Amendment still be the First Amendment without a requirement of viewpoint neutrality?[184] Would equal protection still be equal protection if suspect racial classifications were not subject to strict scrutiny?[185] These are judge-made doctrines, but many would regard them as essential to our understanding of those particular rights.

The answers to these questions have serious implications for theories of constitutional interpretation. Some scholars have posited a difference between "interpretation" and "construction."[186] The former refers to the process of determining the meaning of a constitutional provision,[187] the latter to the creation of doctrines with which to implement it.[188] But if some doctrinal rules are so inextricably intertwined with rights that they cannot be separated, then the line between interpretation and construction will collapse. Doctrinal borrowing (or lack thereof) might be a uniquely useful way to identify and illustrate the phenomenon. Where a particular right does *not* borrow doctrines, it might be because its home-cooked doctrines are tightly interwoven with its meaning, such that altering them would effectively mean reinterpreting the right.

On the other side of the spectrum, there may be some doctrinal tests that are essential to the very nature of rights adjudication. Courts applying these tests in a novel context might cite earlier cases involving different rights, but doing so is not truly borrowing. For example, Schauer has noted that questions about coverage and protection are inherent in any constitutional guarantee.[189] In order to litigate a right, litigants and judges have to know what the right covers and what it does not, and what the strength of its coverage is. For example, although coverage questions are rarely debated in the Sixth Amendment context, what counts as a "criminal prosecution" in which a person is entitled to effective assistance of counsel is a coverage inquiry.[190]

Similarly, it is not hard to imagine coverage questions coming up with respect to even inert rights like the one guaranteed in the Third Amendment: what counts as "in time of peace" versus "in time of war," what counts as a "house," who is the "Owner," what counts as "consent," who are "Soldier[s]" prohibited from being quartered?[191]

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qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment.").

[184] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[185] *See, e.g.*, Korematsu v. United States, 332 U.S. 214, 216 (1944).

[186] *See, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM 3–6 (2011); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1, 4–5 (1999).

[187] *See, e.g.*, BALKIN, *supra* note 186, at 3–6; WHITTINGTON, *supra* note 186, at 1, 4–5.

[188] *See, e.g.*, BALKIN, *supra* note 186, at 3–6; WHITTINGTON, *supra* note 186, at 1, 4–5.

[189] *See* Schauer, *supra* note 95, at 1617–18 ("Like any other rule, the First Amendment does not regulate the full range of human behavior.").

[190] *See, e.g.*, Texas v. Cobb, 532 U.S. 162 (2001) (holding that the right to counsel under the Sixth Amendment does not attach until prosecution is commenced).

[191] *See* U.S. CONST. amend. III.

But because the right is inert, no doctrine has developed. If and when the right creaks and groans to life, courts might cite the First Amendment, since the question of coverage has been so prominent there. Or they might cite to the growing body of coverage decisions about which "arms" are protected by the Second Amendment.[192] But the citation would not really be load-bearing—the court would have to perform the same analysis (i.e., determine the Amendment's coverage) even without the First or Second Amendment precedents.[193] Some doctrinal borrowing, it turns out, is not borrowing at all.

CONCLUSION

As Tim Zick's new book explains, the First Amendment provides a ready lynchpin for a discussion of Rights Dynamism because of the myriad ways in which it acts dynamically with other rights.[194] The Free Speech Clause is an aggressor, expanding its reach into the domain of other rights.[195] It is also an enabler, fostering an environment generative of important discussions about those rights.[196]

In this Article, we focus on another role the First Amendment plays, as an active participant in the "Marketplace of Doctrine"—the arena in which judges and litigants choose whether to apply the tests and rules developed in one right to another. We think that splitting the atom of rights and doctrine and focusing on the minutiae of doctrinal rules can provide valuable insights into the bigger picture questions of constitutional law. Recognizing when doctrine has or has not moved, and theorizing why it did or did not do so, has implications for the very meaning of the rights that doctrine seeks to implement. Studying Doctrinal Dynamism can help to answer questions about why judges and litigants behave in certain ways. And it can offer new tools of analysis for those hoping to preserve a system of robust, overlapping guarantees of constitutional rights.

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[192] *See id.* amend. II.

[193] Put another and even more parochial way, some apparent borrowing is really in the nature of a "*cf.*" than a full citation.

[194] ZICK, *supra* note 2, at 5–6.

[195] *Id.*

[196] *See id.*