

# STATE REJECTION OF FEDERAL LAW

*Thomas B. Bennett\**

*Sometimes the United States Supreme Court speaks, and states do not follow. For example, in 2003, the Arizona Supreme Court agreed to “reject” a decision of the U.S. Supreme Court, because no “sound reasons justified] following” it. Similarly, in 2006, Michigan voters approved a ballot initiative that, according to the legislature that drafted it, sought “at the very least[] to ‘freeze’ the state’s . . . law to prevent” state courts from following a ruling of the U.S. Supreme Court. Surprising though this language may be, there is nothing nefarious about these cases. Cooper v. Aaron this is not. Unlike more notorious attempts by states to reject or nullify federal court decisions, these state laws and decisions remain in effect. How can this be?*

*The reason is simple enough: the Supremacy Clause is not a binary switch. Without complete preemption, our system of federalism leaves room for state law to supplement or stand alongside federal law. States often use that freedom to depart from federal law by passing laws or issuing judicial opinions that explicitly reject specific opinions issued by the U.S. Supreme Court.*

*This Article documents and analyzes that phenomenon of state rejection of federal caselaw, which has not received systematic scholarly attention. Analyzing states’ reactions to three federal cases—Illinois Brick Co. v. Illinois, Kelo v. City of New London, and Lujan v. Defenders of Wildlife—allows for a novel analysis of the causes and consequences of this phenomenon. These varied examples show that there is no single explanation for state law rejecting federal law, nor is it even always carried out by the same institutional actor. Similarly, the pathologies and virtues that result from divergent state and federal law vary considerably across legal contexts.*

*That states reject the decisions of federal courts has both practical and theoretical consequences for our understanding of federal courts’ influence on state law. As a practical matter, the examples comprise a playbook for state decisionmakers seeking to extend, supplement, or transcend the limitations of federal law. In an era of increasing and anticipated clashes between courts and legislatures, rejecting federal caselaw is one*

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\* Associate Professor and Wall Family Fellow, University of Missouri School of Law and Kinder Institute on Constitutional Democracy. I am grateful to Payvand Ahdout, Wilson Freyermuth, Barry Friedman, Erika Lietzan, Thom Lambert, Charles W. “Rocky” Rhodes, and participants at workshops at the NYU School of Law, the University of Kansas School of Law, and the University of Tennessee College of Law for thoughtful comments that improved this Article. Samantha Sweet provided exemplary research assistance. Thanks to Aiste Zalepuga, Henry Lay, and the editorial team at the *Notre Dame Law Review* for wise editing.

way that democratic majorities can reduce the practical impact of federal court decisions.

More broadly, this phenomenon resonates with theoretical accounts of how legal systems' rejection of precedent from other jurisdictions can shape domestic law. The act of defining law aversively to that of another sovereign leaves a lasting mark. States that reject the decisions of federal courts exhibit difference from federal law as an important strain of state law. Rejection of federal law therefore sows the seeds of its own future growth.

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## INTRODUCTION

Sometimes the United States Supreme Court speaks, and states do not follow. For example, in 2003, the Arizona Supreme Court “reject[ed]” a decision of the U.S. Supreme Court, because no “sound

reasons justif[ied] following” it.<sup>1</sup> Similarly, in 2006, Michigan voters approved a ballot initiative that, according to the legislature that drafted it, sought “at the very least[] to ‘freeze’ the state’s . . . law to prevent” Michigan courts from following a ruling of the U.S. Supreme Court.<sup>2</sup> Despite their apparent flouting of federal law’s supremacy, these decisions remain in effect.

That states may reject the decisions of federal courts challenges a basic view of federalism. Constitutional folklore tells a simple story about the relation between state and federal law. Federal law is supreme within its domain. State law is, at most, a junior partner. Even when state law supplements federal law, it does so on terms set by federal law.<sup>3</sup> Often these terms take metaphorical form as floors and ceilings. When federal law sets a floor, state law may go further and set a higher standard. On the other hand, where federal law sets a ceiling, state law is barred from imposing alternative or additional restrictions.

This simple view implies a truism: state law cannot trump federal law.

Or can it? Consider how press reports described Colorado’s Enhance Law Enforcement Integrity bill, a broad package of police reforms enacted in the wake of sustained activism against police violence during the summer of 2020. The *Denver Post* said the bill “removes the qualified immunity defense.”<sup>4</sup> *The Hill* said the law “includes the end of qualified immunity for officers.”<sup>5</sup> U.S. Representative Ayanna Pressley called on legislators in her state of Massachusetts to follow Colorado’s lead and “end qualified immunity.”<sup>6</sup> State legislators in

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1 Bunker’s Glass Co. v. Pilkington, PLC, 75 P.3d 99, 107 (Ariz. 2003) (en banc).

2 Michigan House Fiscal Agency, Ballot Proposal #4 of 2006, [https://www.house.mi.gov/hfa/Archives/PDF/Alpha/Ballot%20Prop4\\_2006.pdf](https://www.house.mi.gov/hfa/Archives/PDF/Alpha/Ballot%20Prop4_2006.pdf) [<https://perma.cc/T4PY-BTNZ>].

3 Cooperative federalism is the prime example of how classical models of federalism accounts for the role of state law. See Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695–1703 (2001) (describing dual federalism in the context of telecommunications regulation).

4 Saja Hindi, *Here’s What Colorado’s Police Reform Bill Does*, DENVER POST (June 13, 2020), <https://www.denverpost.com/2020/06/13/colorado-police-accountability-reform-bill/> [<https://perma.cc/4PJ3-MB6Y>].

5 Brooke Seipel, *Colorado Governor Signs Sweeping Police Reform Bill Ending Qualified Immunity, Banning Chokeholds*, THE HILL (June 19, 2020), <https://thehill.com/homenews/state-watch/503681-colorado-gov-signs-sweeping-police-reform-bill-ending-qualified-immunity> [<https://perma.cc/E2RD-ANQS>].

6 Press Release, Statement from Rep. Pressley on MA Senate Bill that Addresses Qualified Immunity, Congresswoman Ayanna Pressley, House of Representatives (July 11, 2020), available at <https://pressley.house.gov/media/press-releases/statement-rep-pressley-ma-senate-bill-addresses-qualified-immunity> [<https://perma.cc/FDF5-RLE5>].

New Mexico, New York, and Virginia similarly moved to “eliminat[e] qualified immunity.”<sup>7</sup>

Because the doctrine of qualified immunity is part of federal law, the simple view of federalism holds that states cannot “end” qualified immunity. In one sense this objection is correct. As some observers noted, Colorado’s bill does not purport to alter the application of qualified immunity as a matter of federal law.<sup>8</sup> Rather, the law creates

7 Rachel Knapp, *Legislation to Eliminate ‘Qualified Immunity’ Gets Reworked*, KQRE (Feb. 5, 2021), <https://www.krqe.com/news/politics-government/legislature/legislation-to-eliminate-qualified-immunity-gets-reworked/> [<https://perma.cc/Z9JA-R3MN>]; Denis Slattery, *NYS Sen. Myrie Wants to Strip Cops of ‘Qualified Immunity’ That Shields Officers from Civil Suits*, N.Y. DAILY NEWS (June 25, 2020), <https://www.nydailynews.com/news/politics/ny-qualified-immunity-zellnor-myrie-police-reform-accountability-20200625-vrxorxh245blllt2xschbhce3q-story.html> [<https://perma.cc/23S4-VFCK>]; Mel Leonor, *Bill to End Qualified Immunity for Police Clears the House, After Two Democrats Change Their Stances*, RICHMOND TIMES-DISPATCH (Sept. 8, 2020), [https://richmond.com/news/state-and-regional/govt-and-politics/bill-to-end-qualified-immunity-for-police-clears-the-house-after-two-democrats-change-their/article\\_5c001fc0-371b-563f-a82f-bf58b4783aab.html](https://richmond.com/news/state-and-regional/govt-and-politics/bill-to-end-qualified-immunity-for-police-clears-the-house-after-two-democrats-change-their/article_5c001fc0-371b-563f-a82f-bf58b4783aab.html) [<https://perma.cc/Q75L-FP4X>].

Other states, perhaps following Colorado’s lead, but in policy directions more dear to their hearts, have pushed versions of a “Second Amendment Preservation Act,” which would effectively repeal qualified immunity solely for violations of Second Amendment rights. See Rebecca Rivas, *Missouri GOP Push Bill to Discipline Officers Who ‘Infringe’ on Second Amendment Rights*, MO. INDEP. (Jan. 19, 2021), <https://missouriindependent.com/2021/01/19/missouri-senate-bill-proposes/> [<https://perma.cc/B58X-H42Y>]; Doug Randall, *Second Amendment Preservation Act Passes Wyoming Committee*, KGAB AM 650 (Mar. 18, 2021), <https://kgab.com/second-amendment-preservation-act-passes-wyoming-committee/> [<https://perma.cc/CC4S-6488>].

8 See Amanda Pampuro, *Colorado Blocks Qualified Immunity for Police*, COURTHOUSE NEWS SERV. (June 19, 2020), <https://www.courthousenews.com/colorado-blocks-qualified-immunity-for-police/> [<https://perma.cc/N3QZ-NULA>] (“Colorado didn’t necessarily revoke qualified immunity because the state can’t,” explained Ben Levin, associate professor at Colorado Law. “What Colorado did in this in this bill, which I think is really creative, it creates a state cause of action in Colorado State courts, for people whose rights have been violated under the Colorado State Constitution.”); Jay Schweikert, *Colorado Passes Historic, Bipartisan Policing Reforms to Eliminate Qualified Immunity*, CATO AT LIBERTY (June 22, 2020, 11:31 AM), <https://www.cato.org/blog/colorado-passes-historic-bipartisan-policing-reforms-eliminate-qualified-immunity> [<https://perma.cc/B6YQ-VR5F>] (“While many are summarizing SB-217 as ‘ending qualified immunity’ in Colorado, what the law formally does is permit individuals to bring claims against police officers who violate their constitutional rights under Colorado law. SB-217 is therefore a kind of ‘state analogue’ to Section 1983, our main federal civil rights statute.”); Ilya Somin, *States Can Reform Qualified Immunity on Their Own*, THE VOLOKH CONSPIRACY (June 26, 2020, 12:21 AM), <https://reason.com/volokh/2020/06/26/states-can-reform-qualified-immunity-on-their-own/> [<https://perma.cc/HKG2-R5GU>] (“SB-217 doesn’t technically eliminate qualified immunity as a defense to lawsuits charging violations of federal constitutional rights. But it effectively achieves the same goal by eliminating it as an obstacle to lawsuits under the state constitution, which provides much the same rights.”).

a state law cause of action analogous to the federal civil rights statute, 42 U.S.C. § 1983, and specifies that qualified immunity will be no defense to claims under that new provision of state law.<sup>9</sup>

Yet in nearly every way that matters, Colorado ended qualified immunity.<sup>10</sup> Colorado's constitution protects the same individual rights as the federal constitution, and its statutory scheme for enforcing those rights matches section 1983—minus qualified immunity. Anyone aggrieved by unconstitutional police practices in Colorado may now use state law to sue for money damages without worrying that qualified immunity will stand in the way. On the other side of the coin, police now face financial incentives to respect constitutional rights during their official duties.

This is more than just states going above the floor set by federal law. In adopting the qualified immunity defense, federal courts saw themselves as carefully balancing competing values to reach an ideal legal regime. The Supreme Court's reasoning rested on a belief that, absent qualified immunity, the threat of liability would deter police and other government officials from doing their jobs to the best of their abilities.<sup>11</sup>

States that reject qualified immunity thus challenge the policy balance struck by federal law in two ways. First, as a practical matter, those states disrupt the balance by creating a different set of rules and incentives for government officials within their borders. This disruption is a direct challenge to federal courts' wisdom in crafting the qualified immunity doctrine in the first place. Second, states that reject qualified immunity run an experiment to evaluate empirically that doctrine's necessity and efficacy. If those states toss the doctrine with no great damage to public safety, federal courts will find it harder to insist on a need to protect government actors through official

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9 See Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. L. REV. 1 (2021) (offering a comprehensive account of state law's rejection of qualified immunity doctrine).

10 Colorado's bill does not purport to alter qualified immunity for *federal* officials accused of unconstitutional conduct. Any attempt to impose tort liability on federal officers under state law would have to rely on a new understanding of the Westfall Act, which has been interpreted, perhaps wrongly, to bar suits for money damages that do not arise directly under the U.S. Constitution. See Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the Bivens Question*, 161 U. PA. L. REV. 509, 514 (2013) (explaining that the Westfall Act is commonly assumed "to have preempted all state tort remedies against federal officials acting within the scope of their authority" but challenging that view based on the Act's text and legislative history).

11 See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974); see also Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 223 (1963) (explaining a traditional justification for discretionary immunity: "if the officer is answerable, he may hesitate to do what should be done and the government will be the loser").

immunity. For those reasons, these states propose to do more than just exceed the floor for official liability set by federal law.

This phenomenon of states rejecting federal law is not new, nor is it limited to qualified immunity. For many years and across many areas of law, from eminent domain to antitrust, states have intentionally departed from federal law in ways that challenge the simple metaphor of floors and ceilings.

This Article documents and analyzes this phenomenon of state rejection of judge-made federal law, which has not received systematic scholarly attention. Because it sweeps broadly, this phenomenon resists easy categories. It manifests in every ideological direction. State actors choose to reject federal law because of personal ambition, institutional prerogatives, and genuine policy disagreements. Yet in all its forms, state rejection of federal law reminds us that simple accounts of federal judicial supremacy and judicial federalism cannot substitute for careful analysis of the complex interaction between state and federal law.

Clarifying the variety of roles that state law can play when it rejects federal law also provides descriptive grounding for a set of prescriptive conclusions. These conclusions have bite whether you think federalism matters only instrumentally to other goals or intrinsically as a constituent part of our structural constitutional order.

First, this phenomenon's breadth and importance is a reminder that there are considerable practical and functional limits to the federal judiciary's power to displace state law across many policy domains. For those who care about federalism only instrumentally because of its impact on policy, this is the key takeaway. It's old hat to say that federalism has only fairweather friends. What this Article shows is that even for fairweather federalists, a more nuanced view of the relationship between state and federal power will better serve their policy goals. Particularly in an era where politicians increasingly view the federal judiciary's role with skepticism, state law's ability to reject and circumvent federal-court rulings should be a primary option for those seeking to reduce the power of the federal judiciary.<sup>12</sup>

Second, there is a converse lesson for those with consistent ideological views about the best balance of federalism, because crafting ideal policy given the fact of judicial federalism demands attention to detail. Judicial opinions often try to set a policy balance between several competing goals. Yet unless judges are mindful of the

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12 Of course, not all celebrate states' ability to reject Supreme Court decisions. *See, e.g.,* Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 606 n.1 (1981) ("I must confess to some misgivings about the extent to which some of this commentary seems to assume that state constitutional law is simply 'available' to be manipulated to negate Supreme Court decisions which are deemed unsatisfactory.").

substantial but uncertain role that state law can play in determining governing legal rules, that balance can be quickly upset. As the examples documented below show, state law can variably lock in costs federal law sought to avoid, provide an end-run around the federal separation-of-powers scheme, and even effectively displace federal law altogether. Taking heed of not only the power of state law but also the uncertainty about how it will take shape should therefore be an important part of sensible judicial federalism.

To heed this injunction to focus on the details, this Article looks closely at states' reactions to three very different U.S. Supreme Court cases: *Illinois Brick Co. v. Illinois*, *Kelo v. City of New London*, and *Lujan v. Defenders of Wildlife*. These cases established antitrust law's indirect-purchaser rule, takings law's broad economic-use justification, and Article III standing doctrine's strict tripartite test, respectively. In each case, some states vigorously rejected the federal precedent, while others explicitly followed it. In *Illinois Brick's* wake, we can sort states tidily into "repealer" and "non-repealer" states.<sup>13</sup> After *Kelo*, we can tot states up based on whether they have rejected an expansive view of the economic-use justification for exercise of the eminent-domain power.<sup>14</sup> And post-*Lujan*, we can map states based on whether they adopt the tripartite enunciation of standing doctrine.<sup>15</sup> Each example thus shows how state law can either borrow or reject federal law.<sup>16</sup>

These examples also highlight the breadth of state law's rejection of federal law. The rejecting actor may be a court, a legislature, or the electorate; the federal provision may be constitutional or statutory; and the mechanism for rejection under state law may be constitutional or statutory. They also vary in the degree of similarity between the texts of the relevant federal and state laws. In some of these examples, the texts of the federal and state laws are effectively identical; in others, the

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13 See *infra* Section II.A.

14 See *infra* Section II.B.

15 See *infra* Section II.C.

16 The examples discussed here are not the only good illustrations of this phenomenon. For example, there is at least one other reaction to the Supreme Court's antitrust doctrines. See *infra* note 59 and accompanying text (discussing state efforts to "repeal" *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 887 (2007)). Beyond antitrust, there is an ongoing effort by advocates to student speech rights to enact state laws that reject the doctrine of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which held that student newspapers were not public forums for First Amendment purposes. See Daniel Teehan, *Breaking the Back of Hazelwood: A Press Lawyer's Decade-Long Campaign*, POYNTER (July 17, 2017), <https://www.poynter.org/business-work/2017/breaking-the-back-of-hazelwood-a-press-lawyers-decade-long-campaign/> [https://perma.cc/3ZV6-6QX8]. This campaign to "cure *Hazelwood*" has resulted in new state law in fourteen states. See STUDENT PRESS LAW CENTER, *New Voices*, <https://splc.org/new-voices/> (conducting national survey) [https://perma.cc/D6PZ-MF7A].

texts bear no resemblance. Yet despite these differences, across all these variables, the same phenomenon appears. Some states borrow federal law, but many other states reject it.

We can also see what motivates states to reject federal law. A naïve view might hold that states reject federal law to the extent that they disagree with federal courts on the meaning or purpose of the law in question. But the evidence collected here suggests a more nuanced story. Instead of simple legal or policy disagreement, state actors are motivated by a combination of political, legal, and institutional factors. Understanding these complex motivations helps uncover new detail about our political system.

This Article has three parts. Part I situates the phenomenon of state rejection of federal law into the disparate literatures on functional federalism, state constitutional law, and constitutional borrowing. Part II undertakes a close examination of state rejection of federal law in context, using reactions to three landmark Supreme Court cases—*Illinois Brick*, *Kelo*, and *Lujan*—to enrich the story. Part III analyzes the causes and normative implications of state rejection of federal law, offering lessons both for those who care about state law's difference only instrumentally for other goals as well as those who care about state policymaking authority for its own right.

## I. SUPREMACY AND METAPHOR

Despite its practical and theoretical importance, state rejection of federal caselaw has eluded systematic scholarly attention—perhaps because scholars so often take the Supreme Court's word as the last one. While scholars have noted the fact of state law's difference from federal law in individual areas of the law—gay rights, say, or civil procedure—there have been no attempts to describe this phenomenon transsubstantively. But such an account is critical because common tensions and explanations arise as states reject federal caselaw across different domains of substantive law.

Instead, three distinct strains of literature, each bearing indirectly on this phenomenon, have stood apart from one another. First, the theoretical literature on federalism explores how state and federal decisionmakers promulgate, interpret, and enforce laws in overlapping spheres of jurisdiction. This literature has developed sophisticated ways of understanding the relationship between federal and state law and the officials who administer them. And it has shown ways in which state actors may not always act to support the goals of federal law. Yet this literature lacks an account of state lawmaking that seeks to reject federal decisional law.

Second, there is a growing literature describing state constitutional law as an underutilized repository of rights that remain



unrecognized under the federal constitution. This literature developing the “underutilization” thesis rightly recognizes the untapped power of state law to chart its own course. Yet by insisting on the extent of state constitutional law’s possible difference from federal constitutional law, it misses the important reasons why states craft their law in the shadow of federal law.

Third, there is a rich literature on the comparative phenomenon of constitutional borrowing. This vein of scholarship emphasizes how sovereigns rely on constitutions from other jurisdictions as models when framing their own basic law. The borrowing literature also describes constitutional “non-borrowing,” when sovereigns consider and reject constitutional provisions adopted by other sovereigns. This literature has much to teach about how jurisdictions shape their legal tradition and community by reference to external models. Yet because it focuses on constitutional drafting rather than interpretation and is mainly international in its focus, this literature’s application to the relationship between state and federal law remains unexplored.

This Part examines those three strains of literature in depth to reveal what conventional wisdom misses about the state law’s tendency to react to federal law, often by rejecting it.

### A. *Federalism*

The vast literature on American federalism has evolved in step with the changes in the constitutional allocation of power between states and the federal government during the twentieth century and beyond. Just as the constitutional doctrine moved from a belief that states were separate spheres circumscribing their own sovereign bailiwicks, to the idea that states are powerful political participants in the federal system, to the view that federal and state actors cooperate to implement shared policy—so too did the literature track these moves.

In recent decades, this literature has developed into two main camps, each characterized by whether it views the unavoidable interrelationship between state and federal governments as an evil to be mitigated or as a path to productive ends. One group, the process federalists, insists on the political autonomy of states to regulate independently within the federal system. This view rests, as Heather Gerken put it, on the premise that states and the federal government should, like toddlers, engage in “the governance equivalent of parallel play.”<sup>17</sup> Another group, the cooperative federalists, focuses on how

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17 Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695, 1699 (2017).

overlapping state and federal implementation of shared policy leads to better outcomes because federal and state actors can share notes, compete to outperform one another, and serve as mutual backstops.<sup>18</sup>

Recent work, perhaps prompted by new political realities, has recognized the many ways in which states can be *uncooperative* with federal law. As Jessica Bulman-Pozen and Heather Gerken have described it, this burgeoning literature rests on a realization that “states use regulatory power conferred by the federal government to tweak, challenge, and even dissent from federal law.”<sup>19</sup> An important strain of this literature—one that is particularly relevant here—sees states as “dissenters” and state forums as important sites of “dissenting by deciding.”<sup>20</sup> This work underscores the potential benefits of states rejecting federal law. Yet by casting state and local actors in the role of “dissenters,” this literature simultaneously minimizes not only states’ power to shape their own law but also the room that federal law leaves for states to do so.

Nor do updated accounts of process federalism tell the whole story. Process federalism is the idea that states have special political representation in our federal system, which allows them to protect their autonomy under federal law in real time. This approach pushes the analysis away from how much power states have as a matter of constitutional doctrine and federal law and toward the way law empowers states to protect their interests in the lawmaking process. That shift in emphasis is useful, but it is limited in that it is static.

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18 See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* 339–67 (2011); ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 92–120 (2009); Heather K. Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 19 (2009); Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863, 865 (2006) (“[I]n this growing universe of regulatory interactions, each agency’s pursuit of its mandate is shaped—in a non-trivial fashion—by the other entity’s acts of commission or omission.”).

19 Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1259 (2009).

20 See Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1750 (2005) (“Dissenting by deciding fuses the collective act with the public one, allowing electoral minorities to act collectively at the same moment they act on behalf of the polity.”); Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1290–91 (2004) (“[P]otential dissenters will surely have more of an impact if they have their own governmental institutions around which to organize their efforts, as well as their own constitutional space in which to implement and demonstrate the effectiveness of alternative policies.”); Matthew C. Porterfield, *State and Local Foreign Policy Initiatives and Free Speech: The First Amendment as an Instrument of Federalism*, 35 STAN. J. INT’L L. 1, 1–2 (1999).

Process federalism's focus trains on the legislative process; once a bill becomes law, process has run out.<sup>21</sup>

A richer view would paint the relationship between federal and state lawmaking as an ongoing process, with moves and countermoves. In other words, if Gerken is right that process federalism insists on the governance equivalent of parallel play, a sophisticated account would describe the moves in a sequential game. The next step, then, is an account of how states react to changes in federal law.

### B. *State Constitutional Law and the New Judicial Federalism*

The literature on state constitutional law treats state law's difference as an underutilized or even forgotten source of rights.<sup>22</sup> These laments typically focus on state constitutions as repositories of positive rights that can and should be used to expand individual

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21 Often, the outcome of the legislative settlement cannot be known until a particular statute is administered and applied, meaning that both cooperative federalism and process federalism recognize the sector-specific nature of federal-state arrangements. See, e.g., Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2128 (2009) ("[A] wise strategy would be to embrace the primacy of federal agencies and to focus on reforming them to ensure they can become a rich forum for participation by state governmental entities."); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2028 (2008) (arguing that administrative law is the best vehicle for courts to address federalism concerns).

22 See JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW 174–78 (2018) (arguing against "lockstepping," "the tendency of some state courts to diminish their constitutions by interpreting them in reflexive imitation of the federal courts' interpretation of the Federal Constitution"); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 339 (2011) (noting the same phenomenon decried by Judge Sutton); Helen Hershkoff & Stephen Loffredo, *State Courts and the Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN. ST. L. REV. 923, 970 (2011); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010) ("[S]tate constitutional law is a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution."); Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1839 (2001) (analyzing and praising the variation in state courts' justiciability rules) [hereinafter Hershkoff, *State Courts*]; Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132–35 (1999) [hereinafter Hershkoff, *Positive Rights*]; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 766 (1992) ("[T]o the extent that . . . a state constitutional discourse exists, its terms and conventions are often borrowed wholesale from federal constitutional discourse, as though the language of federal constitutional law were some sort of *lingua franca* of constitutional argument generally."); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

liberties and better achieve federalism's promise. State constitutions have rejected the federal constitution's failure to grant positive rights—this story goes—and that rejection is an important source of individual freedom.

Much of this literature focuses on the possibility that state constitutions do or could guarantee socioeconomic—or “positive”—rights.<sup>23</sup> For example, states recognize rights to education, welfare, housing, and a healthy environment.<sup>24</sup> One recent form of this argument suggests that state constitutions contain pro-democracy guarantees that can counter democratic decline.<sup>25</sup> These accounts see state constitutional law as potentially orthogonal to federal constitutional law. State constitutional rights could guarantee public goods that the federal constitutional does not cover, rather than protecting the same rights in a more expansive way.

Another vein of this literature sees state constitutions as a way to expand fundamental rights that exist in limited form under the federal constitution, most notably gay marriage, abortion access, and criminal procedure. This scholarship concerns itself with what it calls, now anachronistically, the “new judicial federalism.”<sup>26</sup> For example, before the Supreme Court's landmark decisions in *United States v. Windsor* and *Obergefell v. Hodges*,<sup>27</sup> scholars sought to understand why state constitutional law took a different approach to gay marriage than did

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23 See, e.g., Hershkoff & Loffredo, *supra* note 22, at 927–30 (cataloguing such rights in state constitutions).

24 See HELEN HERSHKOFF & STEPHEN LOFFREDO, *THE RIGHTS OF THE POOR* 3 & nn.29–31, 4 & nn.32–33 (1997).

25 See Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 861 (2021).

26 See JEFFREY M. SHAMAN, *EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW* (2008) (cataloguing the “new judicial federalism” in areas of equal protection and due process); G. Alan Tarr, *The Past and Future of the New Judicial Federalism*, 24 PUBLIUS 63 (1994) (setting out the history of the “new judicial federalism” but expressing agnosticism about its future); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863 (1991) (tackling the issue in the area of criminal procedure).

27 *United States v. Windsor*, 570 U.S. 744 (2013) (striking down Section 3 of the federal Defense of Marriage Act); *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that gay couples have a fundamental right to marry).

the federal constitution.<sup>28</sup> A similar literature seeks to analyze the role of state constitutional law in protecting reproductive freedom.<sup>29</sup>

This literature leaves open two big questions. First, because it looks only at state constitutional rights as interpreted by state courts, it overlooks how states can reject the decisions of federal courts through statutes or constitutional amendments. (Indeed, much of the state constitutional law and new judicial federalism literature sees the mutability of state constitutions as a limit on their promise of individual rights.<sup>30</sup>) And while state courts have an important role to play in rejecting federal caselaw, state legislatures and electoral constituencies have an equally important role to play.

Second, this literature's focus on state constitutional rights only makes sense if state law is in fact meaningfully different from federal law—a difference that rejection necessarily brings about. So a key premise of this literature is that state law does in fact vary substantially from federal law. After all, if state law largely resembled federal law, or followed it in lockstep, there would be nothing to gain from examining state law's experimentation or difference. A series of fundamental questions, then, centers on how much state law grows in the shadow of federal law. How often does state law explicitly borrow

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28 See, e.g., Arthur Lupia, Yanna Krupnikov, Adam Seth Levine, Spencer Piston & Alexander Von Hagen-Jamar, *Why State Constitutions Differ in Their Treatment of Same-Sex Marriage*, 72 J. POL. 1222 (2010) (providing empirical evidence that variation in state constitutional protections for gay marriage is best explained by a combination of local political preferences and institutional differences); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003 (2003) (arguing that recognition of individual rights by state courts serves as a check on the “tyranny” of overly restrictive U.S. Supreme Court rulings in several areas, including gay rights); Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833 (2004) (arguing that gay rights, among other individual rights, illustrate the importance of judicial federalism to personal liberty).

29 See, e.g., Richard E. Levy, *Constitutional Rights in Kansas After Hodes & Nauser*, 68 U. KAN. L. REV. 743 (2020) (tracing protections for abortion access under Kansas's constitution); Kathryn Kolbert & David H. Gans, *Responding to Planned Parenthood v. Casey: Establishing Neutrality Principles in State Constitutional Law*, 66 TEMP. L. REV. 1151 (1993); Linda J. Wharton, *Roe at Thirty-Six and Beyond: Enhancing Protection for Abortion Rights Through State Constitutions*, 15 WM. & MARY J. WOMEN & L. 469 (2009); Martha M. Ezzard, *State Constitutional Privacy Rights Post Webster—Broader Protection Against Abortion Restrictions?*, 67 DENV. U. L. REV. 401 (1990).

30 See, e.g., Fitzpatrick, *supra* note 28, at 1852–54 (“The relative ease in amending state constitutions to overturn unpopular state constitutional decisions reveals a fundamental paradox of state constitutional law: State constitutions are, in theory, supposed to provide fundamental rights, yet those rights often can be overridden by majority vote.”).

or reject federal law? What drives this relationship? Yet the literature lacks a systematic account of state law's rejection of federal law.<sup>31</sup>

### C. *Constitutional Borrowing*

Another vein of scholarship focuses on the obverse side of the rejection coin: "constitutional borrowing."<sup>32</sup> This branch of the comparative literature highlights ways in which constitutional drafters may look to, rely on, and explicitly incorporate other sovereigns' constitutional texts when framing their own founding documents. In so doing, it points up similarities across jurisdictions and emphasizes the shared project of constitutional drafting, even when drafters arrive at the task with different politics, legal cultures, and histories. To a limited extent, scholars in this vein have also called for greater attention to the practice of constitutional "nonborrowing": times when sovereigns consider and explicitly reject model constitutional text taken from another sovereign.<sup>33</sup> Central to this story of nonborrowing is the way that an oppositional stance to an alternate model becomes embedded in the interpretive norms of the nonborrowing sovereign.<sup>34</sup>

Though this literature is rich, it is limited in two ways because it focuses on *international* borrowing of constitutional *text*. First, because it focused first on borrowing across national boundaries, the constitutional borrowing literature needed adapting to the domestic context. Second, this literature focused on constitutional drafting rather than interpretation, text rather than doctrine. This limitation is significant because text underdetermines doctrine in many ways. We must give more focus to doctrinal borrowing.

To meet this need, scholars have sought to apply insights from the constitutional borrowing literature to the domain of domestic federal

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31 A rare but limited exception is Lupia et al., *supra* note 28 (analyzing state constitutional amendments regarding gay marriage after the Supreme Court decided *Bowers v. Hardwick*, but not analyzing whether state laws involved rejecting *Bowers*).

32 See Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196 (2003); Frederick Schauer, *On the Migration of Constitutional Ideas*, 37 CONN. L. REV. 907 (2005); Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993).

33 See Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT'L J. CONST. L. 296, 298 (2003) ("[R]ejecting a constitutional option may be in some ways *more* crucial to the development of a constitutional sensibility than positively adopting a particular institutional design or constitutional clause."); Wiktor Osiatynski, *Paradoxes of Constitutional Borrowing*, 1 INT'L J. CONST. L. 244, 250 (2003) (considering instances comparative constitutional "rejections": "when the drafters consider an idea or provisions and decide not to borrow").

34 See Scheppele, *supra* note 33, at 298.

constitutional doctrine.<sup>35</sup> Yet here too much of the focus is on borrowing doctrinal rules from one area of federal constitutional law and deploying them in another. This literature largely fails to consider borrowing of or by subconstitutional law, and its insights have rarely been applied to the relationship between federal and state law.<sup>36</sup>

Other scholars have focused on ways in which state constitutions model themselves upon and borrow from one another.<sup>37</sup> Though this literature treats state constitutional law as a mutual project among many states, it largely treats state and federal constitutional law as distinct domains. When scholars do link those two domains, it is typically to note that federal constitutional law shapes state constitutional law, as with the elegiac underutilization thesis.

In this vein, scholars have traced how state law borrows doctrine from federal law. Scott Dodson has called this phenomenon federal law's "gravitational force."<sup>38</sup> The idea here is that state actors are significantly more likely to adopt federal law than its underlying merit would suggest. This gravitational force, Dodson argues, is not overwhelming, but it is persistent and strong. Yet Dodson conceives of federal law's sway in purely *attractive* terms. For him, state law deviating from federal law ironically *proves* that federal law keeps state law in its orbit.<sup>39</sup> So here, too, we find no systematic treatment of state *rejection* of federal doctrine.

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35 See Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459 (2010); Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

36 Of course, attention has been given to the borrowing of common law rules across jurisdictions. But that is a different phenomenon because it is an exercise of direct lawmaking.

37 See Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CON. L.Q. 199, 207–08 (2000); see also G. ALAN TARR & MARY CORNELIA ALDIS PORTER, *STATE SUPREME COURTS IN STATE AND NATION* (1988); James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 790–94 (2003) (documenting the frequency of interstate citations regarding the meaning of state constitutional law); Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 794–810 (1981); Peter R. Teachout, *Against the Stream: An Introduction to the Vermont Law Review Symposium on the Revolution in State Constitutional Law*, 13 VT. L. REV. 13, 23 (1988).

As Bulman-Pozen and Seifter note, some state courts encourage litigants before them to cite to relevant out-of-state decisions. See, e.g., *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991); *State v. Jewett*, 500 A.2d 233, 237 (Vt. 1985); see also Bulman-Pozen & Seifter, *supra* note 25, at 867 n.9.

38 See Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 704, 705–06 (2016).

39 See *id.* at 717 (“Those state courts that follow simply go with the flow. State courts that resist struggle to do so. The reason is the same: the gravitational force of the Supreme Court’s decisions pulls them in.”).

An account of this phenomenon is critical to understanding the relation between federal and state law. By synthesizing both rejection *and* borrowing of federal law, we see a clearer picture of the relationship between state and federal law. This synthesis shows that the more appropriate metaphor for the relationship is not gravity but electromagnetism. Under normal conditions, gravity is a purely attractive force: it only ever draws objects together. By contrast, electromagnetic forces can either attract or repulse, depending on the matter's charge.<sup>40</sup>

Federal law, too, has a repellent force along with its attractive one, as this Article documents. States often enthusiastically reject federal laws or judicial opinions they do not like. To overlook this repulsive force of federal law on state law is to misunderstand the dynamic relationship between state and federal law. It is not the case that state law diverges from federal law only through great effort, like a rocket burning fuel to reach exit velocity.<sup>41</sup> As the evidence gathered here shows, state law can eagerly reject federal law.<sup>42</sup>

The possibility of rejection does not reduce the influence of federal law on state law, but reflects it in another way. That states are free to reject federal law does not mean they are free from the influence of federal law. In formal terms, federal law sets the agenda for state actors and forces them to take an up-or-down vote.<sup>43</sup> This Article shows that state actors have a real choice about whether to follow federal law, and they often exercise that choice by rejecting the federal model. Yet it also shows that state actors often do *not* have meaningful choice about whether to face the same doctrinal questions that federal courts have faced, because federal law forces the issue.

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40 Oppositely charged particles will attract under the influence of electromagnetic forces, much like two massive bodies will attract under the influence of gravity. But similarly charged particles repel one another. Stated in terms of fields, gravitational fields exhibit no polarity, while electrical and magnetic fields have polarity. Whereas both gravitational and electromagnetic fields can exert strong influence and rearrange matter under their sway, only electromagnetic fields exert that influence including by *repelling* matter.

41 *But see* Dodson, *supra* note 38, at 717.

42 In this way, the phenomenon is related to what Kim Lane Scheppele has called "cross-constitutional influence": the way in which new constitutional questions "can be influenced positively or negatively by constitutional regimes that have confronted those issues before." Scheppele, *supra* note 33, at 297.

43 *See* Peter Bachrach & Morton S. Baratz, *Two Faces of Power*, 56 AM. POL. SCI. REV. 947, 948 (1962) (theorizing that power inheres not only in A's ability directly to influence B's choices but also in A's ability to control the set of decisions considered by or presented to B); *see also* STEVEN LUKES, *POWER: A RADICAL VIEW* 16 (1st ed. 1974) (distinguishing between mobilization of bias that robs B of the power to set the agenda and mobilization of bias that transforms B's preferences altogether).



When federal law decides an issue, state actors can decide it differently—but they often cannot dodge it altogether.

Rejection also matters in a more profound way. Avoiding bad models is a driving motivation of politics and lawmaking.<sup>44</sup> The U.S. Constitution sought to avoid the ills of the Articles of Confederation. Scholars argue that the Fourth Amendment is a repudiation of British use of writs of assistance during the colonial era.<sup>45</sup> Similarly, as Jamal Greene has shown, discredited cases can remain useful because of their ability to spark discourse about the future path of the law.<sup>46</sup>

Because rejection drives lawmakers, its residue is indelible. Rejection exerts an enduring influence on legal communities.<sup>47</sup> It structures future legal thinking, serves as touchpoint in legal debates, and demands distinguishing in legal arguments. And rejection offers insight into law's meaning regardless of one's preferred methodology, because it can go to the root of textual or original meaning. Understanding rejection, then, is key to understanding the path of the law.

## II. STATE REJECTION IN PRACTICE

To show more concretely how state law reacts both positively and negatively to federal judicial decisions, let us turn to a trio of examples.

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44 See William E. Connolly, *The Challenge to Pluralist Theory*, in *THE BIAS OF PLURALISM* 3, 22–24 (William E. Connolly ed., 1969) (defining “contrast-models” as those we use negatively to define our own); Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 113 (2005) (“Constitutions can also provide a basis for resistance to, or differentiation from, foreign law or practice.”); Scheppele, *supra* note 33, at 298 (“I want to call attention to the cases where rejection or refusal are significant in the sense that constitutional builders may have constructed an important notion of what the choice means around avoiding a particular alternative rather than being affirmatively drawn to a positive vision.”); see also David Alan Sklansky, *Anti-Inquisitorialism*, 122 HARV. L. REV. 1634, 1636 (2009) (“A lengthy tradition in American law looks to the Continental, inquisitorial system of criminal adjudication for negative guidance about our own ideals. Avoiding inquisitorialism is taken to be a core commitment of our legal heritage.”).

45 See, e.g., BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* 129–136 (1st ed. 2017) (documenting how the Fourth Amendment's warrant requirement was a response to general writs of assistance and their use in *Paxton's Case*).

46 See Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 461–62 (2011) (“The anticanon, then, is normatively unstable. It is a space in which diverse participants in constitutional debate work out mutually eligible but *competing* ethical commitments.”).

47 See *id.*; Sklansky, *supra* note 44. For an insightful take on the concept of “constitutional communities” in the context of state law, see Miriam Seifter, *Extra-Judicial Capacity*, 2020 WIS. L. REV. 385, 392 (2020) (“By shaping legal meanings and suggesting legal boundaries, experts might serve as a sort of stabilizing force in the law. It is experts who decide on a canon and anti-canon. It is experts who decide which ideas are ‘on the wall’ or ‘off the wall.’”) (internal footnote omitted).

These examples, taken from disparate areas of the law, reflect how the broad pattern of state rejection of federal law can manifest through different institutional actors interpreting or amending different types of legal provisions. These different contexts have important consequences for how we evaluate the costs and benefits of state rejection of federal law. In some cases, we may see state law's difference as a benefit, allowing experimentation and localization. In other cases, state law's difference creates idiosyncrasies and inconsistencies that undermine beneficial uniformity. The surprisingly similar causes of state law's rejection of federal law can obscure the varied costs and benefits that accrue in different contexts.<sup>48</sup> But those costs and benefits determine when and how we should deploy tools to encourage or limit state law to depart from federal law. For those reasons, it is important to evaluate the phenomenon of state law's rejection of federal law in context and in detail.

This Part does that job by considering three developments in federal doctrine that drove reactions in state law. First, it considers the Supreme Court's decision in *Illinois Brick Co. v. Illinois* to limit civil suits under the Clayton Act alleging an overcharge to only "direct purchasers" of goods and services. States widely rejected this decision, mostly legislatively but also judicially in a few cases. Second, this Part considers state responses to the Supreme Court's expansive reading of the economic-use justification for eminent domain in *Kelo v. City of New London*. State legislatures and courts rejected this decision too—even though the aggravating federal decision was a matter of federal constitutional (not statutory) law that was therefore applicable to states as well as the federal government. Finally, we turn to the Supreme Court's enunciation of a rigid tripartite test for standing to sue in *Lujan v. Defenders of Wildlife*. This decision, unlike *Illinois Brick* and *Kelo*, was popular among states, many of whom accepted it wholesale into state law despite the lack of analogous constitutional text. But in several states, that acceptance merely laid the groundwork for future rejection of the federal doctrine, showing how federal law can breed instability and relitigation of settled state precedent.

#### A. *Textual Congruence, Doctrinal Divergence: The Indirect-Purchaser Rule*

Text is not destiny. Rather, the text of a statute or constitutional provision is a starting condition in a function that determines legal meaning. That path-dependent function may include a range of other variables that influence the ultimate content of the law: legal

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48 See *supra* Part I.

interpretation, politics, and economic circumstances. That is why identical legal texts do not guarantee identical law.

State statutes patterned off federal statutes show well how text underdetermines legal meaning. Such state statutes are common, and include laws barring unfair and deceptive practices and anti-competitive conduct as well as laws authorizing whistleblower suits to combat fraud against the government. Because they highlight clearly how state law can reject federal judicial decisions, my focus here is on antitrust laws.

Antitrust laws exist at both the federal and state levels, and these statutes' text is surprisingly similar.<sup>49</sup> Many state antitrust laws follow either federal antitrust laws or uniform state model antitrust laws, and both federal and state antitrust laws borrow heavily from the earlier common law.<sup>50</sup> Because of that shared lineage, the text and meaning of many antitrust laws is identical.

But this similarity among state and federal antitrust laws emerges from contingent history, and allocative choices about who decides what the content of substantive antitrust law should be erode that similarity. Start with how the federal system divides up responsibility for enacting antitrust laws. Federal antitrust statutes come from Congress, while their state analogs come from state legislatures. Then consider who enforces these statutes. Federal antitrust laws have multiple enforcers: not only two different federal agencies—the Department of Justice and the Federal Trade Commission—but also private plaintiffs suing to remedy their own injuries. Likewise, state antitrust laws have multiple enforcers: not only the state's attorney general but also private plaintiffs. Finally, consider who interprets antitrust statutes and decides antitrust cases. Federal antitrust claims are exclusively within the purview of federal courts; state courts are barred by statute from hearing them. By contrast, plaintiffs can not only file state antitrust claims in state court, but also steer them to federal court by bundling them with federal claims or ensuring complete diversity exists.

Maintaining uniform interpretation of antitrust laws, even given identical statutory text, therefore requires one of two things: (1) a commitment to lockstep interpretation by state actors, including both legislators and judges; or (2) consensus among the relevant federal

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49 Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 379–84 (1983) (discussing how changes in federal legislative power under the Commerce Clause and changes in the subject matter and personal jurisdiction of state courts impact the scope of federal and state antitrust remedies).

50 See, e.g., UNIF. STATE ANTITRUST ACT (1973); see also, e.g., *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899) (exploring the relationship between state and federal antitrust law in the early period).

and state decisionmakers about what the best antitrust rules are. Neither is the case. Indeed, it is precisely because there is deep disagreement about ideal antitrust policy that there is unlikely to be a stable, long-term commitment to lockstep interpretation of the various antitrust laws.

To be sure, interpretation of state antitrust laws in lockstep with their federal counterparts is how this story starts. Many states explicitly codified their policy of hitching the interpretation of their own laws to the interpretation given to federal antitrust laws by federal judges.<sup>51</sup> And for many years, roughly from the Progressive Era through the collapse of the New Deal consensus, the lockstep continued.

*Illinois Brick* changed all that. That case asked whether a private antitrust plaintiff who was an indirect customer of the defendant and was injured by an alleged overcharge had a valid cause of action under section 4 of the Clayton Act.<sup>52</sup> In other words, may an ordinary consumer sue a manufacturer for violating antitrust laws if she bought the defendant's products from an intermediary rather than directly from the defendant?<sup>53</sup>

The case for allowing such suits is compelling. The text of the Clayton Act provides that “*any* person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor.”<sup>54</sup> No distinction between direct and indirect purchasers appears anywhere in the statute. There is also an economic reason—though a disputed one—to allow such suits: monopolies or cartels may pass on supracompetitive prices to their downstream retailers, who in turn will pass them onto consumers.<sup>55</sup>

The Supreme Court, however, answered the question in the negative, holding that only direct purchasers may sue under the federal antitrust laws. *Illinois Brick* reflects a desire to avoid duplicative damage awards and thorny disputes about how to apportion such awards among plaintiffs at different stages of the supply chain.<sup>56</sup> And to some extent, the outcome in *Illinois Brick* was compelled by a prior

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51 See, e.g., *infra* note 75 and accompanying text.

52 *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977).

53 In *Illinois Brick*, the consumer was the state of Illinois, who had purchased some of the defendants' concrete blocks through contractor intermediaries. See *id.*

54 15 U.S.C. § 15(a) (emphasis added).

55 See, e.g., *Illinois Brick*, 431 U.S. at 749 & n.3 (Brennan, J., dissenting) (“[I]n many instances, the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution.”) (citing RICHARD A. POSNER, *ANTITRUST: CASES, ECONOMIC NOTES, AND OTHER MATERIALS* 147–49 (1st ed. 1974)).

56 See *id.* at 737 (discussing, among other problems, the need for compulsory joinder of classes of potential plaintiffs at each stage of the supply chain).

decision that had barred defendants from raising as a defense the argument that a direct-purchaser plaintiff had passed on any supracompetitive prices to the end consumer.<sup>57</sup> Yet despite these reasons, the Court's reading of the Clayton Act contradicted not only the substantial agreement in lower courts and the academy but also the position of the United States as *amicus curiae*.<sup>58</sup>

After *Illinois Brick*, many state legislators and judges began to rethink the wisdom of lockstep interpretation of state and federal anti-trust laws. The ensuing state-law backlash to *Illinois Brick* continues: thirty-five states plus the District of Columbia have either altered or read state law to reject the direct-purchaser requirement in one form or another.<sup>59</sup> The Supreme Court has even blessed this broad rejection

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57 See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (holding invalid, in a case brought by a direct purchaser, the defense that indirect purchasers were the true parties injured by antitrust claims).

58 See *Illinois Brick*, 431 U.S. at 729 (acknowledging these contrary authorities); *id.* at 753 n.10 (Brennan, J., dissenting) (collecting scholarly support). The most devastating criticism of the *Illinois Brick* rule is that it assumes an incorrect measure of antitrust damages. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 16.6d (4th ed. 2011) (detailing the twin mistakes of equating the elasticity of substitution for direct and indirect purchasers, on the one hand, and believing that the measure of an indirect purchaser's damages would necessarily be derivative of the direct purchaser's damages). Professor Hovenkamp summarizes: "(a) the intermediary's injury is not measured by an 'overcharge' at all, but by lost profits; [and] (b) the indirect purchaser's damage can ordinarily be measured without reference to the amount 'passed on' by the intermediary." *Id.*; see also Thomas A. Lambert, *Tweaking Antitrust's Business Model*, 85 TEX. L. REV. 153, 185–87 (2006) (book review) (summarizing Hovenkamp's critique).

59 See STATE ILLINOIS BRICK REPEALER LAWS CHART, PRACTICAL LAW CHECKLIST 8-521-6152 (West 2021). There is a wide degree of variation in the scope and form of *Illinois Brick* repealer statutes and decisions. Some limit the right of recovery for harm to indirect purchasers to the state attorney general, while others allow indirect-purchaser recovery only under state Uniform Deceptive Trade Practices Act statutes (i.e., Baby FTC Acts). There is a related question whether states have amended their law to treat retail price maintenance as a *per se* violation of antitrust law, in direct rejection of the Supreme Court's decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling *Dr. Miles Med. Co. v. John D. Park & Sons*, 220 U.S. 373 (1911), which had imposed a *per se* rule). See Michael A. Lindsay, *Overview of State RPM, ANTITRUST SOURCE* (Apr. 2017), [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/lindsay\\_chart\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart_authcheckdam.pdf) [<https://perma.cc/2GDS-CMUQ>] (collecting and categorizing state antitrust provisions). This is a conceptually distinct example of state rejection of federal law, albeit one that did not progress as far as the reaction to *Illinois Brick* did. See Leiv Blad & Margaret Sheer, *A Look Back at the Attempts to Repeal Leegin*, CPI ANTITRUST CHRON., Nov. 2013, at 2, <https://www.competitionpolicyinternational.com/a-look-back-at-the-attempts-to-repeal-leegin/> [<https://perma.cc/D576-KKWS>].

of *Illinois Brick* by upholding one of these “repealer” statutes against a preemption challenge.<sup>60</sup>

These repealer statutes and decisions reveal concentric complexities about our federalism. Legislatures responding to court decisions by amending the text of statutes is a familiar story among the federal branches.<sup>61</sup> Think here of the Lilly Ledbetter Fair Pay Act of 2009, an explicit legislative override of a Supreme Court case decided two years earlier.<sup>62</sup> But the same phenomenon can play out across the federal-state barrier, especially when federal law explicitly reserves for states an important role in regulating a particular area of law.

The *Illinois Brick* saga shows us that state rejection need not be the end of the story. In the recent case of *Apple Inc. v. Pepper*, the Supreme Court relied upon the experience of states that rejected *Illinois Brick* in limiting that doctrine’s scope at the federal level.<sup>63</sup> While the dissent in that case criticized the Court for “whittling [*Illinois Brick*] away to a bare formalism,” this Section illustrates that it would be more accurate to level the accusation at state courts and legislatures.<sup>64</sup>

## 1. California

When the Supreme Court decided *Illinois Brick*, California’s state antitrust law—the Cartwright Act—was interpreted in lockstep with federal caselaw interpreting federal antitrust laws.<sup>65</sup> That lockstepping is no surprise given that state lawmakers patterned the Cartwright Act

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60 See *California v. ARC Am. Corp.*, 490 U.S. 93, 103 (1989) (“It is one thing to consider the congressional policies identified in *Illinois Brick* and *Hanover Shoe* in defining what sort of recovery federal antitrust law authorizes; it is something altogether different, and in our view inappropriate, to consider them as defining what federal law allows States to do under their own antitrust law.”).

61 See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 TEX. L. REV. 1317 (2014) (cataloguing this phenomenon empirically); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991).

62 See Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000a, 2000e-5); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007).

63 See *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1525 (2019) (citing Professors Areeda and Professor Hovenkamp’s treatise and canvassing the objections discussed); see HOVENKAMP, *supra* note 58.

64 *Id.* at 1531 (Gorsuch, J., dissenting).

65 See, e.g., *Chi. Title Ins. Co. v. Great W. Fin. Corp.*, 444 P.2d 481, 487 (Cal. 1968) (federal antitrust cases “applicable” to interpretation of the Cartwright Act); *Shasta Douglas Oil Co. v. Work*, 28 Cal. Rptr. 190, 195 (Cal. Dist. Ct. App. 1963) (federal antitrust cases “authoritative” to courts interpreting Cartwright Act).

after the federal Sherman Antitrust Act of 1890.<sup>66</sup> Many provisions of the Cartwright Act parroted the Sherman Act identically. In this sense, both the federal antitrust laws—including the Clayton Act of 1914, the statute that *Illinois Brick* purported to interpret—and the California Cartwright Act reflected the trust-busting sentiment of the era.<sup>67</sup> In the presidential election of 1888, for example, both major parties included anti-trust planks in their official platforms.<sup>68</sup>

Shared policy preferences at a moment in time can warrant adopting identical statutory text, and in turn identical text can lead to federal-state lockstepping. But the instability of such agreement creates pressure for one legislature or another to amend its laws as soon as policy disagreement manifests. So it was in California: whatever agreement or shared sympathy might have existed between the Congress of 1890 and the California legislature of 1907, it had disappeared by 1977. And because the California legislature disapproved of the decision in *Illinois Brick*, the lockstep approach posed a threat.

Recognizing this threat, the legislature acted almost immediately to amend the Cartwright Act by passing what we now call an *Illinois Brick* repealer statute.<sup>69</sup> The ensuing bill clarified that a cause of action existed under California antitrust law “regardless of whether [the plaintiff] dealt directly or indirectly with the defendant.”<sup>70</sup> The bill passed unanimously and became law the summer after the Supreme

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66 See *Marin Cnty. Bd. of Realtors, Inc. v. Palsson*, 549 P.2d 833, 835 (Cal. 1976) (“A long line of California cases has concluded that the Cartwright Act is patterned after the Sherman Act and both statutes have their roots in the common law. Consequently, federal cases interpreting the Sherman Act are applicable to problems arising under the Cartwright Act.”) (collecting cases).

67 The Sherman Act passed unanimously in the House and 52–1 in the Senate. See George J. Stigler, *The Origin of the Sherman Act*, 14 J. LEGAL STUD. 1, 5 (1985). The vigor for antitrust enforcement increased in the twenty years after its enactment. *Id.* at 4 (“My main focus is on the first twenty years of the Sherman Act. In that period, to repeat, the vigor of enforcement of the act grew . . .”).

68 Democratic Nat’l Comm., 1888 Democratic Party Platform, AM. PRESIDENCY PROJECT (June 5, 1888), <https://www.presidency.ucsb.edu/documents/1888-democratic-party-platform> [<https://perma.cc/SL6R-ZUWQ>]; Republican Nat’l Comm., Republican Party Platform of 1888, AM. PRESIDENCY PROJECT (June 19, 1888), <https://www.presidency.ucsb.edu/documents/republican-party-platform-1888> [<https://perma.cc/VCR4-K2ES>].

69 *Clayworth v. Pfizer, Inc.*, 233 P.3d 1066, 1082 n.18 (Cal. 2010) (stating that bill was designed “to prevent a federal case interpretation of the Sherman Act precluding an indirect purchaser’s standing to sue in antitrust actions being applied to actions under the Cartwright Act” (quoting S. COMM. ON THE JUDICIARY, Analysis of Assemb. Bill 3222 (1977–1978 Reg. Sess.), at 1 (Mar. 27, 1978))); see also *id.* at 2 (noting that the bill was necessary because federal caselaw was “considered ‘persuasive’ in interpreting the provisions of the Cartwright Act”).

70 See CAL. BUS. & PROF. § 16750(a); see also 1978 Cal. Stat. 1693.

Court decided *Illinois Brick*.<sup>71</sup> California thus became the first state to “repeal” (reject) *Illinois Brick* as a matter of state law.<sup>72</sup>

## 2. Arizona

While many other states followed California’s lead and repealed *Illinois Brick* by statute, other states did so by judicial interpretation of state antitrust statutes—despite textual similarities between their own state antitrust laws and the Clayton Act. This is an example of textual congruence but doctrinal divergence: different judiciaries walking different paths.

Arizona is a good example of this form of state rejection of *Illinois Brick*. In *Bunker’s Glass Co. v. Pilkington, PLC*, an antitrust defendant urged the Arizona Supreme Court to adopt *Illinois Brick*’s ban on indirect purchaser suits as a gloss on the Arizona Antitrust Act, whose text is “almost identical[]” to that of the Clayton Act.<sup>73</sup> In particular, the antitrust defendants in the case argued that by enacting a state antitrust law whose text was almost identical to that of the Clayton Act provision at issue in *Illinois Brick*, “the legislature expressed its desire that Arizona courts apply *Illinois Brick* and similarly preclude indirect purchasers from suing under the Arizona statute.”<sup>74</sup>

The Arizona Antitrust Act of 1974 became law three years before *Illinois Brick*.<sup>75</sup> It follows the Uniform State Antitrust Act of 1973 closely. Like the Uniform Act, the Arizona statute contained a harmonization clause, directing that it should be interpreted in harmony not only with other states’ antitrust laws but also with the federal antitrust laws.<sup>76</sup> Based on that harmonization clause, the defendants argued that the Arizona legislature had manifested intent that Arizona should

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71 See 1978 Cal. Stat. 1693 (statute filed with the Secretary of State Aug. 25, 1978).

72 Alabama was the first to pass a statute allowing indirect purchaser suits, but it did so two years before the Supreme Court’s decision in *Illinois Brick*. See ALA. CODE § 6-5-60(a) (1975) (allowing recovery of damages caused by “an unlawful trust, combine, or monopoly, or its effect, direct or indirect” (emphasis added)).

73 75 P.3d 99, 102 (Ariz. 2003) (en banc); see also ARIZ. REV. STAT. ANN. § 44-1408(B) (1974) (creating private cause of action for antitrust injury).

74 *Bunker’s Glass Co.*, 75 P.3d at 102.

75 *Id.*

76 See ARIZ. REV. STAT. § 44-1412 (“This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states that enact it. It is the intent of the legislature that in construing this article, the courts may use as a guide interpretations given by the federal courts to comparable federal antitrust statutes.”); see also UNIF. STATE ANTITRUST ACT, 7C U.L.A. § 12, at 369 (2000).



adopt future federal judicial interpretations of the Clayton Act, including *Illinois Brick*.<sup>77</sup>

The Arizona Supreme Court declined to do so and instead rejected *Illinois Brick* as a matter of state law. Its decision rested on both textual and policy arguments. As to text, the court noted that nothing in the provision creating a private cause of action purported to limit recovery to direct purchasers.<sup>78</sup> The court also reasoned that the harmonization clause pointed in different directions.<sup>79</sup> To harmonize the law with *state* antitrust laws would generally require allowing indirect-purchaser suits, while to harmonize it with *federal* antitrust laws would seem to require barring them. But even there, the text of the harmonization clause was permissive rather than mandatory (“the courts *may* use as a guide . . .”<sup>80</sup>). And in any event, the harmonization clause predated *Illinois Brick*, so divining legislative intent for that unforeseen development would have been especially difficult.<sup>81</sup>

Moving beyond text to policy, as is typical with common-law statutes like antitrust laws, the court was unpersuaded by the logic of *Illinois Brick*. The court rejected that case’s twin fears of complex damages questions and the specter of double recovery. Instead, the court agreed that lower courts were competent to manage the often-tricky questions that indirect-purchaser suits can pose.<sup>82</sup> In part, this confidence stemmed from time and experience. For example, the court recognized that “recent developments in multistate litigation show that plaintiffs may be able to produce satisfactory proof of damages.”<sup>83</sup>

The dissent argued that the legislature had manifested a preference for uniformity, and that the only possible and worthwhile type of uniformity is with federal law.<sup>84</sup> The majority’s decision to depart from federal caselaw, the dissent argued, rendered contestable a wide range of antitrust doctrines previously considered settled:

Apparently we now will interpret some provisions of the Arizona Antitrust Act consistently with federal law and, in other instances, disregard federal law, as we do today. The majority does not

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77 *Bunker’s Glass*, 75 P.3d at 102.

78 *See id.* at 107.

79 *See id.* at 105.

80 ARIZ. REV. STAT. ANN. § 44-1412 (2021) (emphasis added).

81 *See Bunker’s Glass*, at 103–07.

82 *Id.* at 107–09.

83 *Id.* at 109 (citing *In re S.D. Microsoft Antitrust Litig.*, 657 N.W.2d 668, 679 (S.D. 2003)).

84 *Id.* at 111 (McGregor, J., dissenting). In particular, the dissent noted that only three other states had adopted the Uniform Act, and that all had modified it in various ways so as to render them non-uniform from one another. *Id.*

[say] . . . how to discern which rule applies to any particular antitrust issue, a result that creates unnecessary and harmful uncertainty.<sup>85</sup>

The majority's response to the dissent emphasized a key factor driving state law's rejection of federal law: the different incentives and constituencies that guide federal and state judiciaries:

The concerns that motivate the federal government at times differ from those that motivate state legislatures. While the Supreme Court may have wished to protect federal courts from the burden of resolving nationwide class actions potentially involving hundreds of thousands of indirect purchaser plaintiffs, this court is confident that Arizona's courts are up to the task . . . .<sup>86</sup>

The disagreement between the majority and dissent in *Bunker's Glass* thus reflects several ways in which state law can reject federal law. First, it shows that state law can reject federal law even when state law directs harmonization between the two, and that rejection under those circumstances can come even at the hands of state court judges. Second, it shows how the different institutional concerns and constituencies can drive divergence between state and federal law. Finally, it highlights well how difficult the abstract concept of uniformity can be to apply in practice: uniformity with other states' laws arguably counted in favor of allowing indirect-purchaser suits, while uniformity with federal law would have required the opposite.

*B. Constitutional Congruence, Doctrinal Divergence: Eminent Domain for Economic Use*

Just as states can reject federal statutory precedent by expanding the regulatory sweep of their own state laws, so too can they reject federal *constitutional* precedent by setting more restrictive limits on their own governments than the federal Constitution does. That is the lesson of states' widespread rejection of the expanded doctrine of economic use in the Supreme Court's 2005 decision in *Kelo v. City of New London*.<sup>87</sup> That opinion decided a question of federal constitutional law that was directly applicable to states under the Fifth and Fourteenth Amendments to the U.S. Constitution. But because it set (or, depending on one's view, lowered) a *floor* for individual property rights against the states, state law was free to reject that rule by guaranteeing greater protections for property owners against the threat of eminent domain.

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85 *Id.* at 112 (McGregor, J., dissenting).

86 *Id.* at 109 (majority opinion).

87 545 U.S. 469 (2005).

*Kelo* involved the seizure of private property by the town of New London, Connecticut, for use as part of a downtown- and waterfront-revitalization project.<sup>88</sup> The question was whether the town's economic-use rationale qualified as a "public use" under the Takings Clause of the Fifth Amendment.<sup>89</sup> The property holders who challenged the taking argued that economic development can never qualify as a public use, because economic development benefits not the public but the developers.

By a narrow 5–4 majority, the Supreme Court upheld the taking and affirmed that economic development can constitute public use. It emphasized the many circumstances in which past cases had located public use, many of which were indistinguishable in principle from economic development because they, too, blended public and private benefits.<sup>90</sup> The Court also relied on the idea that it should defer to, rather than second-guess, the government's proffered rationales and beliefs about the need for eminent domain to achieve its goals.<sup>91</sup>

In conclusion, the majority recognized the role that state law might play in limiting the sweep of its holding.

We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power. Indeed, many States already impose "public use" requirements that are stricter than the federal baseline. Some of these requirements have been established as a matter of state constitutional law, while others are expressed in state eminent domain statutes that carefully limit the grounds upon which takings may be exercised.<sup>92</sup>

This recognition would prove prescient.

The reaction to *Kelo* was surprisingly negative.<sup>93</sup> In the wake of *Kelo*, around forty states enacted legislation to limit state eminent domain authority, while courts in several other states have limited the

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88 *Id.* at 472.

89 *See id.* at 475–77; U.S. CONST. amend. V. The Fifth Amendment is made applicable to the states by means of the Fourteenth Amendment. *See* *Chi., Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).

90 *Kelo*, 545 U.S. at 484–86.

91 *Id.* at 487–89.

92 *Id.* at 489 (footnote omitted).

93 *See* Dale A. Whitman, *Eminent Domain Reform in Missouri: A Legislative Memoir*, 71 MO. L. REV. 721, 726 (2006) ("[T]he outcome in *Kelo* struck many experienced observers as a minor change in the law, expanding only slightly the power of local governments under the 'public use' clause. The surprise was the reaction of the media and pundits, who generally tended to treat the case as a horrible example of a Supreme Court run amok.").

eminent domain power through judicial interpretation.<sup>94</sup> So many states amended their constitutions or passed statutes rejecting the rule that one commentator has noted that “*Kelo* has ultimately had the ironic effect of reducing takings authority.”<sup>95</sup>

The *Kelo* example adds other dimensions of state law rejecting federal law through: (1) constitutional as well as statutory means; and (2) ballot initiatives and referenda as well as ordinary legislation and judicial interpretation. And as with the antitrust examples considered in Section II.A, the pattern of state law rejection of *Kelo* played out in both legislatures and courts.

## 1. Missouri

Missouri’s reaction to *Kelo* shows how the existence of multiple pathways of state lawmaking can influence how states reject federal law. Missouri’s constitution, like that of many states, authorizes a process of citizen initiative petitions for enacting statutes or amending the state constitution.<sup>96</sup> In *Kelo*’s wake, law reform efforts proceeded along dual tracks: one in the state legislature, the other by an initiative petition that sought to amend the Constitution.

First, just five days after *Kelo*, then-Governor Matt Blunt created a task force aimed at reforming Missouri’s eminent domain laws.<sup>97</sup> He cited *Kelo* in the first sentence of his executive order.<sup>98</sup> The task force—which comprised attorneys, business owners, lobbyists, and lawmakers—issued its recommendations after a series of public

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94 See Marc Mihaly & Turner Smith, *Kelo’s Trail: A Survey of State and Federal Legislative and Judicial Activity Five Years Later*, 38 *ECOLOGY L.Q.* 703, 707 (2011); see also Ilya Somin, *The Limits of Backlash: Assessing the Political Response to Kelo*, 93 *MINN. L. REV.* 2100, 2102 (2009).

95 Gregory J. Robson, *Kelo v. City of New London: Its Ironic Impact on Takings Authority*, 44 *URB. LAW.* 865, 883 (2012); see also Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 *N.Y.U. L. REV.* 177, 193 (2007) (noting that *Kelo* “served as a catalyst for eminent domain reform at the state level”).

Of course, the federal government remains unconstrained by changes in state law. In the area of takings, this means that the federal government can take property for economic use. But in practice, it rarely does so. And under the Tucker Act, takings claims against the federal government can only be brought in the Court of Federal Claims absent legislative authorization to the contrary. See 28 U.S.C. § 1491; *Fed. Hous. Admin. v. Burr*, 309 U.S. 242 (1940) (recognizing validity of Congressional waiver of sovereign immunity and authorization of federal agency to be sued directly in federal district court).

96 See MO. CONST. art. III §§ 49–51.

97 Mo. Exec. Order No. 05-15 (June 28, 2003), [https://www.sos.mo.gov/library/reference/orders/2005/eo05\\_015](https://www.sos.mo.gov/library/reference/orders/2005/eo05_015) [<https://perma.cc/3AYA-VUZ4>].

98 *Id.*

meetings.<sup>99</sup> The chair of the task force opened the first meeting with remarks discussing *Kelo*, and then the task force received a briefing about the case from the chair of the Missouri Bar's Eminent Domain Law Committee.<sup>100</sup> At a subsequent meeting, the task force heard testimony from University of Missouri School of Law Professor Dale Whitman about the law of eminent domain in general and *Kelo* in particular.<sup>101</sup> In all, the task force's minutes record dozens of references to *Kelo* by more than ten witnesses.<sup>102</sup>

Even as the task force was proceeding, courts in Missouri were wrestling with how to apply *Kelo*'s holding to local disputes. In deciding an eminent domain dispute in favor of the government less than a month after *Kelo*, a Missouri trial judge noted that:

The United States Supreme Court has denied the Alamo reinforcements. . . . This muscular and sweeping federal interpretation of eminent domain exists in harmony with the similarly muscular and sweeping Missouri Supreme Court interpretation of eminent domain. . . . The rhetoric . . . about states putting narrower boundaries on eminent domain awaits an uncertain future in Missouri. Perhaps the people will clip the wings of eminent domain in Missouri, but today in Missouri it soars and devours.<sup>103</sup>

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99 MO. TASK FORCE ON EMINENT DOMAIN, FINAL REPORT AND RECOMMENDATIONS OF THE MISSOURI EMINENT DOMAIN TASK FORCE (2005), <https://www.eminentdomain.mo.gov/documents/finalrpt.pdf> [<https://perma.cc/Z9PA-KXRL>]; see Whitman, *supra* note 93, at 728 & nn.38–40.

100 MO. TASK FORCE ON EMINENT DOMAIN, EMINENT DOMAIN TASK FORCE MEETING MINUTES (Aug. 4, 2005), <http://web.archive.org/web/20080820213355/http://www.mo.gov/mo/eminentdomain/minutes/EDTFMeetingMinutes080405.pdf> [<https://perma.cc/8SW2-LLYY>].

101 MO. TASK FORCE ON EMINENT DOMAIN, EMINENT DOMAIN TASK FORCE MEETING (Sept. 29, 2005), <http://web.archive.org/web/20080820213554/http://www.mo.gov/mo/eminentdomain/minutes/EDTFMeetingMinutes092905.pdf> [<https://perma.cc/Y672-6ZJ2>].

102 See *id.*; see also MO. TASK FORCE ON EMINENT DOMAIN, EMINENT DOMAIN TASK FORCE MEETING (Sept. 29, 2005), <http://web.archive.org/web/20060930204437/http://www.mo.gov/mo/eminentdomain/minutes/transcript081805.pdf> [<https://perma.cc/6LZ2-Z7XW>]. One witness even noted that he had spoken to Ms. Kelo, the plaintiff in the Supreme Court case, and that she had volunteered to come to Missouri and speak to the task force. *Id.* at 65. There is no evidence Ms. Kelo ever came to Missouri or communicated with the task force.

103 *City of St. Louis v. Leggett*, No. 22052-01130 (Mo. Cir. Ct., July 18, 2005); see also Tim O'Neil, *Woman, Son in Path of Development Fight On*, ST. LOUIS POST-DISPATCH, Sept. 2, 2005, at C1.

Texas Senator John Cornyn later quoted this passage in remarks in the U.S. Senate decrying *Kelo's* holding.<sup>104</sup>

Against this backdrop, the task force recommended, among other reforms, defining “public use” to exclude “the public benefits of economic development,” a direct repudiation of the holding in *Kelo*.<sup>105</sup> Legislative sponsors bundled a rejection of *Kelo* with several of the task force’s other recommendations in a bill that attracted seventy co-sponsors in the Missouri House.<sup>106</sup> The bill passed both houses of the Missouri legislature by a combined vote of 176–4.<sup>107</sup> At the signing ceremony for the new law, Governor Blunt noted that he had been “concerned when the Supreme Court said that anytime you can create more revenue for the government, you can seize somebody’s land.”<sup>108</sup>

Unlike the success of the legislative reform effort, a separate proposed constitutional amendment never even made it on the ballot. The proposed amendment would have restricted eminent domain more sharply than the legislative reform did, including by banning the use of eminent domain for any private purpose, with certain exceptions for utilities, and by giving property owners a right to repurchase their property if not used by the government.<sup>109</sup> Indeed, one member of the Governor’s task force dismissed the petition as “extreme” and “unnecessary in light of the Legislature’s action.”<sup>110</sup> That the initiative petition went further than the legislative reform matches a systematic

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104 152 Cong. Rec., S6,449 (statement of Sen. John Cornyn), <https://www.govinfo.gov/content/pkg/CREC-2006-06-23/html/CREC-2006-06-23-pt1-PgS6449.htm> [<https://perma.cc/X4Z4-UNW2>].

105 MO. TASK FORCE ON EMINENT DOMAIN, *supra* note 99, at 7.

106 See H.B. 1944, 93rd Gen. Assemb., 2d Reg. Sess. (Mo. 2006) (as read first time March 2, 2006), <https://house.mo.gov/billtracking/bills061/hrbillspdf/4100L.04I.pdf> [<https://perma.cc/B565-BFEE>].

107 The initial vote in the House was 154–4, and after minor amendments, the bill passed in the Senate 31–1. MO. J. HOUSE, 93rd Gen. Assemb., 2d Reg. Sess., 1058–59 (April 13, 2006) (H.B. 93-1944); MO. J. SEN., 93rd Gen. Assemb., 2d Reg. Sess., 987 (May 3, 2006) (H.B. 93-1944). The conference bill was similarly popular, passing 144–3 and 32–1 in the House and Senate, respectively. MO. J. HOUSE, 93rd Gen. Assemb., 2d Reg. Sess., 1563–64 (May 5, 2006) (H.B. 93-1944); MO. J. SEN., 93rd Gen. Assemb., 2d Reg. Sess., 1073 (May 5, 2006) (H.B. 93-1944).

108 Mike Dwyer, *Governor Enacts Eminent-Domain Reform Law*, JOPLIN GLOBE (July 14, 2006), [https://www.joplinglobe.com/news/local\\_news/governor-enacts-eminent-domain-reform-law/article\\_eed7ca7c-5745-50e0-8844-e7d42f82e385.html](https://www.joplinglobe.com/news/local_news/governor-enacts-eminent-domain-reform-law/article_eed7ca7c-5745-50e0-8844-e7d42f82e385.html) [<https://perma.cc/7Q2W-G63X>].

109 See *2006 Initiative Petitions Approved for Circulation in Missouri*, MO. SEC’Y OF STATE, <https://www.sos.mo.gov/elections/2006petitions/ipEminentDomainI-34> [<https://perma.cc/9Z6G-GEH5>].

110 Jim Davis, *Carnahan Rejects Petitions on Eminent Domain*, K.C. BUS. J. (May 26, 2006), <https://www.bizjournals.com/kansascity/stories/2006/05/22/daily30.html> [<https://perma.cc/VZ52-UG2T>].

study of states' responses to *Kelo*, which found that post-*Kelo* citizen initiatives led to greater restrictions on the eminent domain power than did either purely legislative reforms or legislative referenda.<sup>111</sup>

Although the group sponsoring the proposed amendment raised over \$2 million to secure the requisite number of signatures—nearly all of which came from groups in New York and Idaho<sup>112</sup>—its efforts did not succeed. On the same day that the legislature sent its reform bill to Governor Blunt for his signature, the Secretary of State rejected the initiative petition for failing to garner the requisite number of verifiable signatures.<sup>113</sup>

Missouri's experience with eminent domain reform teaches two lessons. First, state lawmakers can react to federal caselaw swiftly, near unanimously, and largely independently of national political forces. Second, even if state rejection of federal law reads as motivated by out-of-state interests, it may face political headwinds because of perceived illegitimacy.

## 2. Florida

Florida was one of the first states to respond to *Kelo*. Unlike Missouri, Florida used both statutory and constitutional mechanisms to erect new limits on the state's eminent domain power. For that reason, eminent domain critics consider Florida one of the best examples of post-*Kelo* reform.

The day after the decision in *Kelo* came down, the Speaker of the Florida House of Representatives announced the creation of a Select Committee to Protect Private Property Rights chaired by then-Representative Marco Rubio.<sup>114</sup> The committee's purpose was "to identify areas of ambiguity and recommend changes to ensure

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111 See Somin, *supra* note 94, at 2105, 2143, 2148 ("The contrast is not so much between legislative reform and referendum initiatives, but between referenda enacted without the need for approval by the state legislature and every other type of reform that does involve state legislators.").

112 See MISSOURIANS IN CHARGE COMMITTEE SUMMARY, MISSOURI ETHICS COMMISSION, [https://mec.mo.gov/MEC/Campaign\\_Finance/CommInfo.aspx?mecid=C061044](https://mec.mo.gov/MEC/Campaign_Finance/CommInfo.aspx?mecid=C061044) [https://perma.cc/R9VK-F3RY]; see also Steve Scott, *Don't Let Outsiders Call Shots in Missouri*, COLUM. DAILY TRIB., Dec. 3, 2006.

113 See MO. HOUSE J., 93rd Gen. Assemb., 2d Reg. Sess., 1975 (May 26, 2006) (H.B. 93-1944); Press Release, Mo. Sec. of State, Two Initiative Petitions Deemed Insufficient for November Ballot (May 26, 2006), <https://www.sos.mo.gov/default.aspx?PageID=5160> [https://perma.cc/VRW4-SXX4].

114 FLA. HOUSE OF REPRESENTATIVES STAFF ANALYSIS, HB 1567 CS, at 2 (Mar. 28, 2006), <https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h1567b.JC.doc&DocumentType=Analysis&BillNumber=1567&Session=2006> [https://perma.cc/5ZR2-HM6S].

appropriate protections of property rights.”<sup>115</sup> The eventual statute passed both houses of the Florida legislature by a combined margin of 150–3.<sup>116</sup> Eminent domain critics have praised the law as a strong bulwark against eminent domain abuse.<sup>117</sup>

But Florida legislators went further. Again led by Representative Rubio, the legislature proposed an amendment to the state constitution that sought even stronger limits on government’s eminent domain power.<sup>118</sup> That proposed amendment required a supermajority vote in the legislature before any property acquired by the state under its eminent domain power could go to a private party. The referendum passed with 69% of the vote, easily clearing the 60% threshold needed for passage.<sup>119</sup>

Florida’s example thus underscores that state rejection of federal caselaw can be popular with many constituencies, and state lawmakers can reject federal law by either statutory or constitutional law.

### C. *Textual Divergence, Doctrinal Convergence: Injury-in-Fact*

The examples considered thus far have showed how state law often rejects federal caselaw despite textual similarity. Yet states can also accept or reject federal caselaw despite textual divergence. Indeed, there are other examples of this phenomenon in the literature. For example, Scott Dodson has illustrated how state rules of civil procedure are often interpreted in harmony with the Federal Rules of Civil Procedure, despite very different text.<sup>120</sup> Those examples of state law being caught in federal law’s sway are an important part of the phenomenon described here.

What this Part adds is the observation that state law’s seemingly voluntary and uncompelled adherence to federal precedent is often but a prelude to a dramatic and contentious fight over whether to reject federal doctrine. When a state decides to adopt federal caselaw and doctrine into state law, it effectively creates the same conditions

115 *Id.*

116 *HB 1567 (2006) – Eminent Domain*, FLA. HOUSE OF REPRESENTATIVES, <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=33829> [https://perma.cc/6DJ8-QHRL].

117 *See, e.g., Somin, supra* note 94, at 2139 (“[T]he new Florida law is probably the most important post-*Kelo* legislative victory for property rights activists.”).

118 *H.J.R. 1569 (2006) – Eminent Domain*, FLA. HOUSE OF REPRESENTATIVES, <https://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=33830>.

119 FLA. CONST. art. XI, § 5(e); Div. of Elections, Fla. Dep’t of State, *November 7, 2006 General Election: Official Results*, ELECTION REPORTING SYS., <https://results.elections.myflorida.com/Index.asp?ElectionDate=11/7/2006&DATAMODE=/CB5H-HVZL> [https://perma.cc/CB5H-HVZL].

120 *See* Dodson, *supra* note 38, at 718.



that made state rejection of federal law surprising in the cases of antitrust and takings. Once state and federal law fall in lockstep, any departure from federal doctrine proves conspicuous and potentially destabilizing. That is so because it not only marks an identifiable departure of state law from federal law but also signals a potential willingness by state actors to depart from federal law in a broader set of future cases, which may be difficult to identify in advance.

These examples also reveal how a state's acceptance or rejection of federal precedent is not necessarily the last word. So long as the dynamics causing the initial choice remain, the battle can rage again in the future. Even after a years-long battle over whether to accept or reject federal doctrine, state decisionmakers often lack the institutional and doctrinal tools to reach a durable compromise that could create stable doctrine. In these cases, then, we see especially the potentially destabilizing influence that federal law has on state law.

The cases in this Part focus on standing to sue. Under federal law, this is a constitutional and subject-matter-jurisdictional requirement derived from the case-or-controversy language of Article III. In *Lujan v. Defenders of Wildlife*,<sup>121</sup> the Supreme Court offered its clearest and sharpest formulation of standing doctrine to date. The case concerned the standing of plaintiffs who sued under the Endangered Species Act, which contained a "citizen suit" provision authorizing "any person" to enforce its terms. Despite this legislative grant of a statutory cause of action, the question in *Lujan* was whether plaintiffs had suffered an "injury-in-fact" to satisfy Article III's requirement of a case or controversy.<sup>122</sup>

In a 5–4 opinion, the Court held that the plaintiffs lacked standing to sue.<sup>123</sup> *Lujan* thus stands in part for the proposition that Congress cannot create standing by conferring a cause of action, but that Article III requires some personal, particularized connection between the plaintiff and the harm alleged.<sup>124</sup> Because this conclusion marked a break from earlier Supreme Court precedent, and because many states looked to federal precedent in crafting their own standing doctrines,<sup>125</sup> *Lujan* forced states to grapple with whether to follow or reject its doctrinal restatement.

To prove the point, this Part traces judicial battles over standing doctrine in Texas, Michigan, and Oregon. Before *Lujan*, Texas followed its own idiosyncratic precedent on standing doctrine. But in the

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121 504 U.S. 555 (1992).

122 *Id.* at 560, 571–73.

123 *Id.* at 556–57.

124 *Id.* at 560.

125 State courts are not bound by standing requirements derived from Article III. See *ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

wake of *Lujan*, the Texas Supreme Court strained to find a basis in Texas law to adopt the doctrine announced by *Lujan*. Like Texas, Michigan and Oregon were at first persuaded to adopt federal standing doctrine. After doing so, however, future courts in those states reversed course and developed a new set of standing rules in explicit rejection of the federal model. Taken together, then, these examples suggest answers to four questions. First, how do state courts come to consider federal precedent when deciding cases under state law? Second, how do state courts reconcile federal caselaw with their own constitutional text and history? Third, what kinds of jurisdictional gaps can states' departure from federal rules create? And finally, why is state law adopted in the wake of federal law unstable over time and therefore prone to overruling?

These examples also show the limits of formal legal principles in explaining state courts' decisions about whether to borrow federal law. State judicial elections and retirements—which in some cases are compelled at a certain age—inject another layer of unpredictability into the process. In short, these cases highlight how institutional dynamics, politics, and ideology play important roles in federal law's influence on state law.

## 1. Texas

The cases analyzed so far have tended to show how state actors find room to reject federal law despite textual similarity between analogous legal provisions. Texas's standing decisions show the converse: how a textual hook for *borrowing* federal standing doctrine can be found even when the text of the relevant federal and state constitutional provisions are different. In particular, the Texas Supreme Court took a sharp turn toward following federal standing doctrine in 1993, when it retconned<sup>126</sup> federal standing doctrine into Texas law by marrying it to an unlikely pair of state constitutional provisions that bear little resemblance to Article III's case-or-controversy provision. Texas thus represents the purest form of federal doctrine being inscribed identically into state law under the guise of sharply divergent constitutional text.

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126 *Words We're Watching: A Short History of 'Retcon,'* MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/retcon-history-and-meaning> [https://perma.cc/W6DF-R3Y4] (“*Retcon* is a shortened form of *retroactive continuity*, and refers to a literary device in which the form or content of a previously established narrative is changed.”); *Retcon*, WIKTIONARY (last updated Oct. 15, 2019) (“A situation, in a soap opera or similar serial fiction, in which a new storyline explains or changes a previous event or attaches a new significance to it.”).

Before 1993, Texas standing doctrine was prudential, flexible, and liberal. We know that it was prudential because earlier cases held that standing was waivable. In a 1982 case, the Texas Supreme Court held that “[a] party’s lack of justiciable interest must be pointed out to the trial court . . . and a ruling thereon must be obtained or the matter is waived.”<sup>127</sup> Indeed, the case even held that the lower court’s *sua sponte* consideration of the standing issue constituted legal error.<sup>128</sup> Nor was that a stray holding: in a 1966 case, the Texas Supreme Court held that *sua sponte* dismissal for lack of standing was reversible because a waived challenge to a party’s standing could not deprive a trial court of subject-matter jurisdiction.<sup>129</sup> Earlier cases also demonstrated Texas courts’ willingness to entertain suits under broad citizen-suit provisions or under the guise of much more liberal taxpayer standing rules than prevail in federal court.<sup>130</sup>

Then, in 1993, the Texas Supreme Court recast its standing doctrine to be both constitutional and subject-matter jurisdictional. In *Texas Ass’n of Business v. Texas Air Control Board*, the state chamber of commerce, on behalf of its members, sought a declaration that the statutory basis for certain administrative penalties was invalid under the Texas Constitution.<sup>131</sup> Although the court ultimately upheld plaintiff’s standing to sue on behalf of its members, it did so only after raising the issue *sua sponte* and requesting more briefing on the question.<sup>132</sup> No party challenged the plaintiff’s standing to bring the suit: the strange bedfellows in agreement on that score included not only the chamber of commerce and two state regulatory agencies but also intervenors the League of Women Voters and the Sierra Club.<sup>133</sup>

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127 *Tex. Indus. Traffic League v. R.R. Comm’n of Tex.*, 633 S.W.2d 821, 823 (Tex. 1982) (per curiam).

128 *See id.* at 822–23.

129 *See Coffee v. William Marsh Rice Univ.*, 403 S.W.2d 340, 347–48 (Tex. 1966) (“The intervenors were permitted to come into the case without opposition and to assume the status of the fighting defendants. The place to have challenged their interest and their right to intervene was in the trial court.”).

130 *See Scott v. Bd. of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966) (“Inasmuch as they are suing as taxpayers, it was not necessary for them to prove particular damage which would be required if they were suing as ‘persons aggrieved.’”); *Spence v. Fenchler*, 180 S.W. 597, 602, 608 (Tex. 1915) (holding to be justiciable a citizen suit pursuant to Texas statute that authorized “any citizen” to sue to enjoin “[t]he habitual, actual, threatened or contemplated use of any premises, place, building or part thereof, for the purpose of keeping . . . a bawdy or disorderly house”).

131 852 S.W.2d 440, 441 (Tex. 1993).

132 *Id.* at 443–48.

133 *See id.* at 467 (Doggett, J., concurring in part and dissenting in part) (“The issue of standing is a stranger to this litigation. No party before this court has ever asserted that the Texas Association of Business lacked capacity to challenge the actions of state government.

Moreover, and in any event, all parties agreed that the defendants had waived the issue in the trial court below.<sup>134</sup>

Even so, in an opinion written by then-Justice (and now-U.S. Senator) John Cornyn, the Texas Supreme Court found it necessary to reach the question of standing on its own. Despite the precedent, discussed above, that standing was waivable in Texas courts, the majority concluded that standing was subject-matter jurisdictional—a holding it attributed to two separate provisions of the Texas Constitution when read together with federal standing doctrine.

First, the court traced standing doctrine to the Texas Constitution's separation of powers provision and federal caselaw affirming the importance of standing to separation of powers in the federal system.<sup>135</sup> The majority reasoned that because the separation-of-powers provision bars "advisory opinions,"<sup>136</sup> and because opinions that issue in disputes when the plaintiff lacks standing are perhaps advisory,<sup>137</sup> the separation-of-powers provision provides a constitutional hook for standing doctrine as well.

Second, and more ironically, the court read Texas's constitutional open-courts provision to impose a constitutional requirement that a plaintiff show injury to have standing to sue in Texas courts. That provision, which Texas's Constitution shares in substance with those of thirty-nine other states,<sup>138</sup> provides that "[a]ll courts shall be open, and

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How rare the occasion when all litigants agree on the proper resolution of an issue, but how truly extraordinary is such unanimity when the parties are two state regulatory agencies, the Texas Association of Business, the Sierra Club and the League of Women Voters.").

134 See *id.* at 443 (majority opinion) ("In response, the parties insist that any question of standing has been waived in the trial court and cannot be raised by the court for the first time on appeal.").

135 See *id.* at 444. The majority's citations for this proposition were Article II, § 1 of the Texas Constitution of 1876. TEX. CONST. of 1876 art. II, § 1 ("The powers of the government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted."). As well as *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 471–74 (1982), *Warth v. Seldin*, 422 U.S. 490, 498 (1975), and Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 18 SUFFOLK U. L. REV. 881, 889 n.69 (1983).

136 See *Texas Ass'n of Bus.*, 852 S.W.2d at 444 (first citing *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1969); and then citing *Morrow v. Corbin*, 62 S.W.2d 641, 644 (Tex. 1933)).

137 For this proposition, the court cited federal rather than Texas precedent. See *id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

138 See CHARLES W. "ROCKY" RHODES, *THE TEXAS CONSTITUTION IN STATE AND NATION* 114 (2014) (noting that Texas is one of forty with similar open-courts provisions in their

every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law.”<sup>139</sup> Such provisions—which trace their lineage to the Magna Carta through Sir Edward Coke<sup>140</sup>—typically operate to *expand* access to state courts, either by guaranteeing the existence of at least one court able to redress a plaintiff’s grievances or by barring unreasonable financial barriers to suit.<sup>141</sup> Yet the majority in *Texas Ass’n of Business* read the open-courts provision as a *restriction* on the subject-matter jurisdiction of Texas courts only to disputes brought by plaintiffs who have suffered an “injury.” As the majority explained, “standing is implicit in the open courts provision, which contemplates access to the courts only for those litigants suffering an injury.”<sup>142</sup>

After identifying two ostensible bases in state constitutional text for standing doctrine, the majority switched back to relying on federal precedent. “Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.”<sup>143</sup> Ultimately, the court held that the chamber of commerce had standing to sue under federal associational standing principles and therefore proceeded to the merits.<sup>144</sup> In so holding, the court noted explicitly that it overruled one prior case that held standing to be waivable.<sup>145</sup>

Then-Justice (now-U.S. Representative) Doggett dissented under the following epigraph:

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state constitutions); Thomas R. Phillips, Chief Justice, Supreme Court of Texas, *The Constitutional Right to a Remedy*, Address at William J. Brennan Lecture on State Courts and Social Justice (Feb. 28, 2002), in 78 N.Y.U. L. REV. 1309, 1310 & n.6 (2003).

139 TEX. CONST. art. I, § 13.

140 RHODES, *supra* note 138, at 364; Phillips, *supra* note 138, at 1320 (tracing historical pedigree).

141 *See, e.g.*, *Runge & Co. v. Wyatt*, 25 Tex. Supp. 291, 294 (1860); *Dillingham v. Putnam*, 14 S.W. 303, 304 (Tex. 1890).

142 *Texas Ass’n of Bus.*, 852 S.W.2d at 444.

143 *Id.*

144 *See id.* at 448. On the merits, the majority relied again on the open-courts provision, this time for the proposition that an agency’s imposition of forfeiture penalties before a defendant can seek judicial review violates the right of court access. *See id.* at 450 (“We conclude that the forfeiture provision is an unreasonable restriction on access to the courts.”).

145 *See id.* at 446 (“The analysis that leads us to the conclusion we reach here, however, compels us to overrule *Texas Industrial Traffic League* and disapprove of all cases relying on it to the extent that they conflict with this opinion.”).

## “Don’t Mess With Texas”

—A motto that captures the Texas spirit.<sup>146</sup>

Suffused throughout the dissent is the view that both the text of the Texas Constitution and the precedent interpreting it differed significantly from their federal analogs, and that the majority opinion adopted federal law at the expense of state precedent. On the standing issue, Justice Doggett noted that, to reach the issue of standing at all, “the majority [had to] overcome what, until recently, was viewed as a considerable obstacle—Texas law.”<sup>147</sup> The dissent characterized the majority’s approach to the Texas precedent deeming standing to be waivable as “simple”: “overrule only one case, making it today’s abrupt change in the law appear less drastic, while ignoring the rest,” which it counted as another five cases from the Texas Supreme Court.<sup>148</sup> The dissent also challenged the majority’s decision to “write[] into our Texas law books the confused and troubling federal standing limitations.”<sup>149</sup> The weight of the dissent’s objection to the majority’s approach was that it represented “another unthinking embrace of federal law,” “[r]ather than a careful consideration of our Texas precedent and our unique Texas Constitution.”<sup>150</sup>

*Texas Ass’n of Business* planted federal standing doctrine in the foreign soil of Texas constitutional text, where it has now taken root. The case’s holding endures: Texas standing doctrine is subject-matter jurisdictional and traceable to the separation-of-powers and open-courts provisions of the Texas constitution.<sup>151</sup> Indeed, Texas courts have cited the case over 2500 times in twenty-seven years. And Texas courts continue to cite and rely on federal standing cases in reaching results under state law.<sup>152</sup>

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146 *Id.* at 452 (Doggett, J., concurring in part and dissenting in part).

147 *Id.* at 468.

148 *Id.* at 469.

149 *Id.* at 473.

150 *Id.* at 475.

151 *See, e.g.,* *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex. 2004); *Brown v. Todd*, 53 S.W.3d 297, 302 (Tex. 2001); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001); *see also* RHODES, *supra* note 138, at 113 (“The supreme court and the courts of appeals have repeatedly reaffirmed since *Texas Ass’n of Business* that Texas standing doctrine is premised on both these provisions.”).

152 *See, e.g.,* *Brown*, 53 S.W.3d at 305 (Tex. 2001) (“[W]e may look to the similar federal standing requirements for guidance.”); *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878, 880–82 (Tex. Ct. App. 2010) (relying on federal precedent).

## 2. Michigan

If Texas shows how an ideologically salient issue like standing can cause state actors to strain to adopt federal law despite an apparent lack of any textual basis for doing so, Michigan shows how that process can go awry. Like Texas, Michigan at first adopted *Lujan* as a matter of state law without an obvious constitutional basis for doing so. But not long after it did so, a newly constituted Michigan Supreme Court revisited the issue and reversed course. The cleavages wrought by this whipsawing reversal remain to this day, and they have supported insinuations of bad constitutional history, naked partisanship, and bad faith.

The story begins with the 1995 case *Detroit Fire Fighters Ass'n v. City of Detroit*.<sup>153</sup> Detroit's firefighters' union<sup>154</sup> sued the city for failing to spend certain appropriated funds intended to expand the fire department.<sup>155</sup> The threshold question was whether the firefighters had a particularized interest in their claims, or whether their interest was identical to that of other Detroit taxpayers. The intermediate court had reversed the trial court on standing, ruling 2–1<sup>156</sup> that the firefighters' claimed "risk" of "physical and emotional injury" could not confer standing.<sup>157</sup> There was no mention of *Lujan*.

On appeal to the Michigan Supreme Court, the plaintiff firefighters pressed the same argument, and the result was again a split decision rendered by a deeply divided court.<sup>158</sup> There were four separate opinions representing the views of seven justices. No opinion garnered a majority on the question of standing (or, for that matter, any of the merits issues). Yet despite their inability to agree on a rationale, a bare 4–3 majority held that the firefighters had standing to sue. Of the four separate opinions, two found standing and two would have held that standing was lacking. The opinions varied markedly in their degree of reliance on federal standing caselaw.

Three justices concluded that the firefighters lacked standing. The lead opinion for Justice Weaver alone concluded that plaintiffs lacked standing and relied exclusively on Michigan caselaw, which she

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153 537 N.W.2d 436 (Mich. 1995).

154 Along with some of its individual members.

155 See *id.* at 437.

156 The majority opinion was written by then-President Judge Taylor, while the dissent was written by then-Judge Kelly. Both judges would later be elected to the Michigan Supreme Court. Their disagreement about standing would extend to their tenure together on the high court, as we will see. See *infra* nn.158–64 and accompanying notes.

157 *Detroit Fire Fighters Ass'n v. City of Detroit*, 501 N.W.2d 202, 204 (Mich. Ct. App. 1993).

158 *Detroit Fire Fighters Ass'n*, 537 N.W.2d at 437.

read to require particularization.<sup>159</sup> The opinion of Justice Riley concurring, joined by Justice Brickley, also would have held that the firefighters lack standing, even if on different grounds.<sup>160</sup> In particular, besides reasoning that Michigan's prudential (rather than constitutional) standing rules require particularization, Justice Riley relied on *federal* prudential—i.e., statutory—standing doctrine requiring a plaintiff to show that she falls within the “zone of interest” the statute covers.<sup>161</sup> Relying on, among other cases, *Data Processing*, Justices Riley and Brickley thus would have ruled against the plaintiffs on standing.<sup>162</sup> Perhaps surprisingly, none of the justices arguing for a lack of standing relied on or even cited *Lujan*.

Four justices concluded that the requirement of standing was satisfied. Like their dissenting colleagues, however, they diverged in their degree of reliance on federal rather than state cases. Chief Justice Cavanagh<sup>163</sup> (joined by Justice Boyle) would have found standing because the plaintiffs had satisfied the tripartite doctrinal test from *Lujan*, which the opinion block-quoted in full.<sup>164</sup> Finally, Justice Mallett (joined by Justice Levin) would have found standing based almost exclusively on Michigan caselaw.<sup>165</sup>

Counting noses reveals that there was disagreement on two axes: whether the plaintiffs had standing and whether federal cases were relevant to the standing issue. On that latter issue, the split was also 4–3, with the majority concluding that such federal precedent was indeed relevant (and perhaps dispositive). But even among that majority, there was disagreement about whether to incorporate the earlier rule

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159 *Id.* at 438 (lead opinion).

160 *Id.* at 441 (Riley, J., concurring).

161 *Id.* at 443–44.

162 *Id.* Further illustrating the prudential nature of standing under Michigan law, however, all three of the justices in the minority on the question of standing agreed it was prudent to proceed to the merits in virtue of the importance and potentially recurrent nature of plaintiffs' claims.

163 Interestingly, Chief Justice Cavanagh's older brother, Jerome, was mayor of Detroit for eight years in the 1960s. See Kevin Grasha, *Justice Cavanagh Ending Long Tenure on State High Court*, DETROIT FREE PRESS, Dec. 26, 2014, <https://www.freep.com/story/news/local/michigan/2014/12/26/justice-cavanagh-ending-long-tenure-state-high-court/20909493/>. [<https://perma.cc/G2S5-43KU>]. Chief Justice Cavanagh therefore had a unique perspective on the issues raised in the suit.

164 *Detroit Fire Fighters Ass'n*, 537 N.W.2d at 445–46 (Cavanaugh, C.J., dissenting in part and concurring in part) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

165 *Id.* at 450–52 (Mallett, J., concurring in the result only). This opinion contains one citation to *Flast v. Cohen*, 392 U.S. 83, 88 (1968), for the proposition that “[i]t is necessary and appropriate to examine the substantive issue and determine whether there is a logical nexus between the plaintiffs' status and the substantive claim.” *Id.* at 450.



of *Data Processing* and its progeny or whether to follow the new doctrinal test crystallized in *Lujan*. Michigan courts had neither recognized nor rejected any of the federal tests as controlling. The fractured court in *Detroit Fire Fighters Ass'n* thus guaranteed further litigation about not only standing under Michigan law but also the relationship between federal precedent and Michigan law.

It would be another six years before the next major case addressing standing under Michigan law, but the intervening years did nothing to resolve the disagreements made plain in *Detroit Fire Fighters Ass'n*. Like that earlier case, the 2001 case *Lee v. Macomb County Board of Commissioners*<sup>166</sup> led to a sharply divided 4–3 court and multiple separate opinions (in this case, three). And in *Lee* as in *Detroit Fire Fighters Ass'n*, the dispute concerned not only whether the plaintiffs had standing but also whether to adopt federal doctrine in deciding that question.

The plaintiffs in *Lee* sued to require their county governments to levy a tax required by statute to fund veterans' relief.<sup>167</sup> The standing question in the case was whether the plaintiffs, who were eligible to apply for payments from the veterans' relief fund but had not done so, had suffered a legally sufficient injury.<sup>168</sup> The defendants argued that even if the county had assessed the tax, the plaintiffs would not have been any better off, because they never applied for payments from the fund.<sup>169</sup> The plaintiffs argued that the defendants' failure to levy the tax made it pointless to apply for payments from an empty fund.<sup>170</sup>

Justice Taylor wrote the opinion for the four-justice majority, which sought to incorporate the rule of *Lujan* fully into Michigan law and to use that rule to limit standing.<sup>171</sup> The opinion's analysis of the standing issue presented general standing principles and federal caselaw and then tried to show that Michigan caselaw was not inconsistent with those alternate sources. In that vein, the standing analysis began with the claim that “[i]t is important, initially, to recognize that in Michigan, *as in the federal system*, standing is of great consequence so that neglect of it would imperil the constitutional

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166 629 N.W.2d 900 (Mich. 2001).

167 *Id.* at 902–03.

168 *Id.* at 904.

169 *Id.* at 904–05.

170 *Id.*

171 *Id.* at 908. Taylor was a member of the Court of Appeals panel that heard *Detroit Fire Fighters*, and his was the majority opinion that was ultimately overruled by the Supreme Court. *Lee* was thus Justice Taylor's opportunity to vindicate his view, expressed in that earlier opinion, that standing doctrine is as restrictive under Michigan law as it is under federal law.

architecture whereby governmental powers are divided between the three branches of government.”<sup>172</sup> It then quoted from Article III and several federal standing and separation-of-powers cases—some of which related only tangentially to standing.<sup>173</sup> The opinion then claimed that “In Michigan, *standing has developed on a track parallel to the federal doctrine*, albeit by way of an additional constitutional underpinning.”<sup>174</sup> In fusing these two sources of authority, the opinion did not mention the Michigan constitution’s lack of any analog to the federal constitution’s “case” or “controversy” language, but emphasized the Michigan constitution’s general separation-of-powers provision.<sup>175</sup> The majority also invoked Justice Cavanagh’s separate opinion in *Detroit Fire Fighters Ass’n*, which relied on *Lujan*, and adopted it as the law of Michigan, “supplementing the holding in” the court’s prior standing cases.<sup>176</sup> Applying *Lujan*, the majority held that the plaintiffs’ injury was either not concrete or had not yet come to pass.<sup>177</sup> The majority opinion thus at least superficially grappled with the theoretical basis for standing doctrine, the reasoning of *Lujan* and other federal standing cases, as well as the compatibility of *Lujan* with Michigan precedent.

Justice Weaver, writing only for himself, concurred in the judgment but disagreed with the decision both to inscribe *Lujan* into state law and to deny that plaintiffs had standing. The concurrence began by denying the majority’s assumed similarity between Michigan and federal law of standing: “Unlike constitutional cases in federal courts, the Michigan standing requirements have been based on prudential, rather than constitutional, concerns.”<sup>178</sup> The opinion also noted that federal standing rules do not bind Michigan courts.<sup>179</sup> On that basis, the concurrence found it “unnecessary” to adopt *Lujan* and concluded that plaintiffs had standing under existing Michigan law.<sup>180</sup>

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172 *Id.* at 905 (emphasis added).

173 *See id.* at 905–06. Among the cases quoted are *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–60 (1992); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219–25 (1995); and *Raines v. Byrd*, 521 U.S. 811, 818, 820 (1997).

174 *Lee*, 629 N.W.2d at 906 (emphasis added).

175 *See id.* (citing MICH. CONST. art III, § 2). That provision reads: “The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.” MICH. CONST. art III, § 2.

176 *Lee*, 629 N.W.2d at 907.

177 *See id.* at 908.

178 *Id.* at 909 (Weaver, J., concurring).

179 *Id.* at 909 & n.2.

180 *Id.*

Justice Kelly, joined by Justice Cavanagh, dissented on the merits.<sup>181</sup> Although she would have affirmed, she urged *Lujan's* adoption as a matter of Michigan law.<sup>182</sup> In explaining her disagreement, Justice Kelly too relied on federal caselaw: *Warth v. Seldin*.<sup>183</sup> The dissent also organized its analysis of the standing issue around *Lujan's* three steps: injury, causation, and redressability.<sup>184</sup>

Across the three opinions, then, the justices disagreed 4–3 about whether plaintiffs had standing. But there was much more agreement that *Lujan* should be the law of Michigan: six justices endorsed that view. That represented a marked increase from *Detroit Fire Fighters Ass'n*, in which only two justices endorsed *Lujan* as the operative test under Michigan law.<sup>185</sup> In the intervening years, because of a combination of factors—including changes in court composition and the continued consolidation of federal standing doctrine—Michigan's judiciary had become much more receptive to adopting federal standing doctrine. *Lee* thus shows that state-court receptivity to federal doctrine largely hinges on facts other than state constitutional text and pre-existing state law.

While *Lee* showed that state courts can become more receptive to federal law over time, the next case in the sequence—*Lansing Schools Education Ass'n v. Lansing Board of Education*<sup>186</sup>—shows that state courts can reject federal law just as fast as they adopted it. *Lansing Schools Education Ass'n* is an example of liberal judges seeking to expand standing under Michigan law. This feature of the case was evident even before merits briefing. In its order granting leave to appeal, the Michigan Supreme Court not only accepted the appeal but also directed the parties, *sua sponte*, to brief (1) whether the plaintiffs had standing; and (2) whether it should overrule *Lee*.<sup>187</sup> That order was controversial enough that Justice Young *dissented* from that part of it

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181 Like Justice Taylor, Justice Kelly was a member of the Court of Appeals panel in *Detroit Fire Fighters Association* and had since been elected to the Supreme Court. However, then-Judge Kelly's opinion in that earlier case was in dissent. *Detroit Fire Fighters Ass'n v. City of Detroit* 501 N.W.2d 202, 205 (Mich. Ct. App. 1992) (Kelly, J., dissenting).

182 See *Lee*, 629 N.W.2d at 912–13 (Kelly, J., dissenting) (“While I agree with the majority's adoption of the *Lujan* test, I cannot agree that plaintiffs lack standing.”).

183 *Id.* at 913 (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)).

184 See *id.* at 913–14.

185 Only one, Justice Cavanagh, endorsed *Lujan* in both *Detroit Fire Fighters Association* and *Lee*.

186 792 N.W.2d 686 (Mich. 2010).

187 *Lansing Schs. Educ. Ass'n, MEA/NEA v. Lansing Bd. of Educ.*, 774 N.W.2d 689, 689 (Mich. 2009).

directing briefing on the vitality of *Lee*.<sup>188</sup> Justice Young described the order as “yet another installment in Chief Justice Kelly’s promise to ‘undo a great deal of damage that the Republican Court has done.’”<sup>189</sup> Justice Young also noted the broad, six-justice agreement to adopt *Lujan* in *Lee* and the later change-of-heart by Justices Kelly and Cavanagh.<sup>190</sup> Whether to retain the rule of *Lujan* was an ideologically charged and politically salient issue to the justices of the Michigan Supreme Court.

By the time the Michigan Supreme Court decided *Lansing Schools Education Ass’n*, its outcome was unsurprising: a narrow 4–3 majority held that *Lujan* was no longer the test for standing in Michigan.<sup>191</sup> Justice Cavanagh—a supporter of the *Lujan* test in *Lee*—wrote the opinion for the court. In a sweeping opinion that canvassed the “consistency of the historical development of the standing doctrine in Michigan” before *Lee* and the fundamental differences between the federal and Michigan constitutions, the court announced that “Michigan standing jurisprudence should be restored to a limited, prudential doctrine that is consistent with Michigan’s long-standing approach to standing.”<sup>192</sup>

The separate opinions took direct aim at the merits of *Lujan*. Justice Weaver concurred and wrote separately to elaborate his reasons for rejecting the *Lujan* test.<sup>193</sup> The majority also spurred a blistering dissent. The dissent accused the court of “rewrit[ing] the entire constitutionally based legal doctrine governing standing in Michigan” by “jettison[ing] years of binding precedent on the basis of four justices’ current estimation that the public would be better served by opening the courts to all manner of challenges to acts of the legislative and executive branches.”<sup>194</sup>

188 *Lansing Schs. Educ. Ass’n, MEA/NEA v. Lansing Bd. of Educ.*, 780 N.W.2d 751 (Mich. 2009) (Young, J., dissenting).

189 *Id.* at 751 (quoting Brian Dickerson, *Justices Gird for Gang of 3 ½*, DETROIT FREE PRESS, Jan. 11, 2009, at 1B).

190 *See id.*; *see also* Nat’l Wildlife Fed. v. Cleve. Cliffs Iron Co., 684 N.W.2d 800, 839 (Cavanagh, J., concurring) (“*Lujan* should not be used to determine standing in this state.”); *id.* at 847 (Kelly, J., concurring) (“It is improper to hold the plaintiffs in this case to the *Lujan* judicial test for standing.”).

191 *Lansing Schs. Educ. Ass’n*, 792 N.W.2d at 688 (“Therefore, we overrule *Lee* and its progeny and hold that Michigan standing jurisprudence should be restored to a limited, prudential approach that is consistent with Michigan’s long-standing historical approach to standing.”).

192 *Id.* at 692–93, 699.

193 *See id.* at 702–03 (Weaver, J., concurring).

194 *Id.* at 708 (Corrigan, J., dissenting).

Even if one is unpersuaded by the dissent, it makes a larger point about the effects of federal caselaw on state law. Not only is a state's adopting federal law contingently based on such factors as judicial elections and retirements,<sup>195</sup> but also a state court adopting federal doctrine into state law lacks the power to make the incorporation stick, given the possibility of subsequent overruling. Thus, particularly in view of the rancor of the court's opinions and the later change in partisan composition of the court, *Lansing Schools Education Ass'n* is unlikely to be the last word on the matter.<sup>196</sup>

### 3. Oregon

Oregon's experience adds another complexity to the lessons taught by Michigan: the role of intermediate appellate courts. In most cases, the first state actors to respond to new federal caselaw will be *intermediate* state appellate courts, not state supreme courts. That first opinion deciding whether to accept or reject federal law may give an impression of settled law that belies the way federal law renders state law especially contestable.

We join the development of Oregon standing doctrine already in progress with the case of *Utsey v. Coos County*,<sup>197</sup> decided by the intermediate Court of Appeals in 2001—nine years after *Lujan*. The facts of the case involved an attempt by two Coos County residents to obtain permission to use their land, zoned for farming, as a motocross racetrack.<sup>198</sup> Oregon law required racetrack permits from a state administrative agency, which was granted. The local League of Women Voters organization, which had opposed the rezoning before the administrative agency, petitioned for review of the decision as a purported intervenor in the case under an Oregon statute authorizing any party to a land-use proceeding to seek judicial review.<sup>199</sup> The

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195 Michigan law requires Supreme Court Justices to retire at age 70. MICH CONST. art. VI, § 19.

196 See Kenneth Charette, Note, *Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of Standing Doctrine*, 116 PENN. ST. L. REV. 199, 221 (2011) (“Only time will tell if this new majority will seek to overturn the litigation[-]friendly test for standing that the Michigan Supreme Court created when it decided *Lansing*.”).

197 32 P.3d 933 (Or. Ct. App. 2001) (en banc).

198 *Id.* at 935.

199 See *id.*; see also OR. REV. STAT. § 197.850(1) (“Any party to a proceeding before the Land Use Board of Appeals under ORS 197.830 to 197.845 may seek judicial review of a final order issued in those proceedings.”). The statute provided for review by petition directly to the Court of Appeals. See OR. REV. STAT. § 197.850(3)(a).

landowners moved to dismiss the petition as “nonjusticiable” because the outcome of the dispute would not affect the League.<sup>200</sup>

The Court of Appeals framed the question as “whether a legislative conferral of standing is sufficient to establish the justiciability of a claim” or, “said another way, . . . whether the constitution imposes limits on the authority of the legislature to confer a right to seek judicial review.”<sup>201</sup> So framed, the question presented in *Utsey* was very similar to that in *Lujan*: can the legislature create a provision that allows any citizen to challenge the legality of an administrative action?<sup>202</sup>

As it was in Michigan, whether *Lujan* applied as a matter of state law was deeply divisive even in Oregon’s intermediate appellate court. The nine-member en banc court divided 5–4, producing a majority opinion, a concurring opinion, and three separate dissents. Together, the opinions spanned forty pages of the Pacific Reporter.<sup>203</sup>

The majority began by observing the sole feature of Oregon’s justiciability doctrine on which the entire court agreed: “the cases . . . are murky at best; at times, they are flatly contradictory.”<sup>204</sup> From that fundamental ambiguity in state law, the majority took license to “return to first principles,”<sup>205</sup> and to rely on federal caselaw, including the foundational cases of *Hayburn’s Case*,<sup>206</sup> *Marbury v. Madison*,<sup>207</sup> and *The Correspondence of the Justices*.<sup>208</sup> The court also analyzed or quoted liberally from other U.S. Supreme Court cases<sup>209</sup>: *Muskrat v. United*

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200 *Utsey*, 32 P.3d at 935.

201 *Id.*

202 This framing of the question is also quite similar to that presented in the petition for certiorari to the U.S. Supreme Court in *Spokeo, Inc. v. Robins*: whether “Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.” Petition for Writ of Certiorari at i, *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) (No. 13-1339). The resulting opinion framed the question more narrowly: “whether respondent Robins has standing to maintain an action in federal court against petitioner Spokeo under the Fair Credit Reporting Act of 1970.” *Spokeo v. Robins*, 578 U.S. 330, 333 (2016). For more on the relationship between *Spokeo* and state courts, see Thomas B. Bennett, *The Paradox of Exclusive State-Court Jurisdiction over Federal Claims*, 105 MINN. L. REV. 1211 (2021).

203 See *Utsey*, 32 P.3d at 933–72.

204 *Id.* at 936 (majority opinion).

205 *Id.*

206 *Id.* (citing *Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 409 (1792)).

207 *Id.* at 937 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

208 *Id.* (citing Letter to George Washington (July 20, 1793), in 3 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 487 (Henry P. Johnston ed. 1891)).

209 *Id.* at 937–39.

*States*,<sup>210</sup> *Massachusetts v. Mellon*,<sup>211</sup> *Ex Parte Levitt*,<sup>212</sup> *Coleman v. Miller*,<sup>213</sup> *Flast v. Cohen*,<sup>214</sup> *Bennett v. Spear*,<sup>215</sup> *Lujan*,<sup>216</sup> *Allen v. Wright*,<sup>217</sup> and *Warth v. Seldin*.<sup>218</sup> The opinion also looked to the scholarly literature discussing the historical pedigree of federal constitutional standing,<sup>219</sup> including leading articles by Robert J. Pushaw Jr., Raoul Berger, Henry P. Monaghan, Louis L. Jaffe, Martin H. Redish, Cass R. Sunstein, Bradley S. Clanton, Gene R. Nichol, Helen Hershkoff, and even a young John G. Roberts Jr.<sup>220</sup>

After canvassing that federal precedent and scholarly literature, the majority turned abruptly to Oregon precedent with the observation that “Oregon justiciability doctrine followed a similar path of development,” despite Oregon’s lack of a case-or-controversy textual hook.<sup>221</sup> Instead, the majority traced justiciability doctrine to the state constitution’s grant of “judicial power.”<sup>222</sup> It then sought to draw a through-line across the state cases in a way that conformed to the development of standing doctrine in federal courts—with underwhelming persuasiveness. Perhaps to bolster its reading of indeterminate precedent, the majority returned repeatedly to federal precedent and law review articles throughout its analysis of state law.<sup>223</sup> Ultimately, the majority concluded that the statutory provision at issue amounted to a “conferral of the right to obtain an advisory opinion, which is beyond the authority of the legislature to grant,” and that the League of Women Voters otherwise lacked injury sufficient to grant standing.<sup>224</sup>

The dissenting justices all criticized the majority’s reliance on federal caselaw. Chief Judge Deits, for example, criticized the majority for “believ[ing] that its conclusion is driven by federal, as well as Oregon, case law,” noting that “Oregon courts . . . have never adopted

210 *Id.* at 937 (citing *Muskrat v. United States*, 219 U.S. 346 (1911)).

211 *Id.* at 938 (citing *Massachusetts v. Mellon*, 262 U.S. 447 (1923)).

212 *Id.* (citing *Ex Parte Levitt*, 302 U.S. 633 (1937)).

213 *Id.* (citing *Coleman v. Miller*, 307 U.S. 433 (1939)).

214 *Id.* (citing *Flast v. Cohen*, 392 U.S. 83 (1968)).

215 *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 162 (1997)).

216 *Id.* at 939 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

217 *Id.* (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

218 *Id.* (citing *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

219 *Id.* at 937.

220 *See id.* at 937 & n.4, 939 n.6, 943 n.9.

221 *Id.* at 939.

222 *Id.*

223 *See id.* at 941 n.8, 944, 945.

224 *Id.* at 948.

the federal approach” to standing.<sup>225</sup> Indeed, Chief Judge Deits quoted the Oregon Supreme Court’s admonition against the use of “standing” as a “generic concept,” lest its “contours . . . be drawn indiscriminately from decisions interpreting diverse statutes *or U.S. Const. art. III, § 2, or from the academic literature.*”<sup>226</sup> Judge Armstrong went further: “[F]ederal standing law is analytically and doctrinally incoherent and constitutes a body of law that we should reject rather than embrace under the Oregon Constitution.”<sup>227</sup> And Judge Brewer took aim at *Lujan* itself, quoting the leading treatise on federal administrative law for the proposition that the decision in that case “is more accurately characterized as abdication of judicial responsibility to enforce the policy decision of a politically accountable Branch.”<sup>228</sup>

The Oregon Supreme Court did not issue a decision on the merits in *Utsey*. Though it at first allowed review—i.e., it granted discretionary appeal—it later dismissed the petition as moot.<sup>229</sup> That left the intermediate court’s decision in *Utsey* as the presumptive law of Oregon, at least until the Supreme Court found an appropriate vehicle to decide whether to adopt *Lujan* into state law.

That opportunity arose more than five years later, in *Kellas v. Department of Corrections*.<sup>230</sup> That case involved a challenge to Oregon Department of Corrections’ administrative rules that operated to deprive the petitioner’s incarcerated adult son of the benefit of time served as a credit against his sentence. The prisoner’s father sued under an Oregon statute that authorized “any person” to challenge “[t]he validity of any rule” by petition to the Court of Appeals.<sup>231</sup> The Court of Appeals, consistent with its decision in *Utsey*, raised standing *sua sponte* and dismissed the petition for lack of standing. The state petitioned the Oregon Supreme Court for review, arguing that the legislature may authorize any person to “challenge the validity of a governmental action” no matter if such a challenge would have any

225 *Id.* at 954 (Deits, C.J., dissenting).

226 *Id.* at 954–55 (quoting *Strawberry Hill 4 Wheelers v. Benton Cnty. Bd. of Comm.*, 601 P.2d 769, 779 n.8 (1979)) (emphasis added).

227 *Id.* at 963 n.9 (Armstrong, J., dissenting).

228 *Id.* at 969 (Brewer, J., dissenting) (quoting KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., 3 ADMINISTRATIVE LAW TREATISE § 16.16 at 95 (3d ed. 1994)).

229 *See Utsey v. Coos Cnty.*, 32 P.3d 933 (Or. 2002) (granting petition of Department of Land Conservation), *petition granted* 45 P.3d 449 (Or. 2002) (unpublished table decision) (League of Women Voters of Coos County), *vacating as moot* 65 P.3d 1109 (Or. 2003) (unpublished table decision) (dismissing petitions for review and denying League of Women Voters’ motion to vacate the decision below); *see also Kellas v. Dep’t of Corrections*, 145 P.3d 139, 141 n.2 (Or. 2006) (noting that the dismissal was for mootness).

230 145 P.3d 139 (Or. 2006).

231 *Id.* at 140 (emphasis omitted) (quoting OR. REV. STAT. § 183.400).



“practical effect” on the challenger himself.<sup>232</sup> In other words, the state asked the Supreme Court to overrule *Utsey*.

The Oregon Supreme Court did just that, ruling unanimously that the Oregon Constitution imposes no limitations on the legislature’s ability to confer standing on the public. In so ruling, the court grappled with the logic and reasoning of *Utsey*, including the federal precedent and scholarly material it relied on. The court began by cataloging the fundamental differences between the federal and Oregon Constitutions on the question of standing: the lack of a case-or-controversy provision in the latter, the differing lines of caselaw in their respective courts, and that Oregon courts are free from the restrictions of Article III.<sup>233</sup> To support its claim of constitutional divergence, the court quoted extensively from a recent law review article penned by former Oregon Supreme Court Justice Hans Linde,<sup>234</sup> and cited approvingly Helen Hershkoff’s landmark work on standing in the state courts.<sup>235</sup> In the end, though, the court devoted only two paragraphs to whether federal constitutional law had any bearing on standing in Oregon courts. The opinion concluded simply: “[W]e cannot import federal law regarding justiciability into our analysis of the Oregon Constitution and rely on it to fabricate constitutional barriers to litigation with no support in either the text or history of Oregon’s charter of government.”<sup>236</sup>

Like Michigan, Oregon’s courts took a circuitous path to rejecting *Lujan*: incorporating it at first; rejecting it later. In each case, whether state courts adopted federal standing doctrine was highly contingent on the ideological composition of the relevant courts and the availability of suitable vehicles for deciding the question. But Oregon adds the wrinkle of long-running uncertainty, in two ways. First, as the courts in both *Utsey* and *Kellas* explicitly acknowledged, the state of Oregon’s standing doctrine was “murky at best”<sup>237</sup> or “not always . . . consistent.”<sup>238</sup> That ambiguity left the state’s courts somewhat unconstrained in their choice whether to adopt federal doctrine. Second, because Oregon’s *intermediate* appellate court made the initial decision to incorporate federal doctrine into state law, Oregon’s standing doctrine existed in a state of limbo, prolonged by the half-decade span between *Utsey* and *Kellas*.

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232 *Id.* at 142.

233 *Id.* at 142–43.

234 *Id.* at 143 (quoting Hans A. Linde, *The State and the Federal Courts in Governance: Vive La Différence!*, 46 WM. & MARY L. REV. 1273, 1287–88 (2005)).

235 *Id.* (citing Hershkoff, *State Courts*, *supra* note 22, at 1905).

236 *Id.*

237 *Utsey v. Coos Cnty*, 32 P.3d 933, 936 (Or. 2001).

238 *Kellas*, 145 P.3d at 143.

Taken together, the cases from Texas, Michigan, and Oregon teach three lessons. First, federal precedent no doubt exerts an agenda-setting power on state law as developed by state appellate courts. In states that reject federal doctrine, the choice whether to accept such rules structures and influences the development of state law. On the other hand, in states that adopt federal doctrine despite dramatically different constitutional text, the attractive force of federal doctrine is plain to see.

Second, state courts typically lack the institutional ability to accept or reject federal law in a given area wholesale and for all time, meaning that federal law renders state law perpetually contestable between two poles. A state's decision whether to adopt *Lujan* does not necessarily decide whether they should adopt future Supreme Court standing precedent. Such a decision also cannot decide whether the state should *continue* to adopt *Lujan*. Oregon and Michigan show concretely how parties litigate standing in state courts in the shadow of federal precedent.

Third, they highlight the role that ideology and politics play in forcing states to grapple with federal caselaw. It is likely no coincidence that the authors of the principal opinions in *Texas Ass'n of Businesses* were judges who would later be a U.S. Senator and a U.S. Representative, respectively. Nor is it likely a coincidence that the intermediate appellate judge who favored restrictive standing—but was overruled in *Detroit Firefighters*—later adopted federal standing doctrine into Michigan law after his elevation to the Michigan Supreme Court. Nor should you be surprised at this point to learn that the author of the intermediate appellate opinion adopting *Lujan* into Oregon law later won election to the Oregon Supreme Court. Standing is a salient and ideologically charged issue, and therefore state actors may use it to signal their commitments or may simply feel genuinely strongly about it.

### III. THE DETERMINANTS OF STATE REJECTION

This Part explores the causal explanations and normative implications of state law's rejection of federal law. First, Section A traces the factors that cause—and those that do not cause—state law to reject federal law. Section B turns to practical lessons and normative implications for federal courts, on the one hand, and legal reformers, on the other.

#### A. *Determinants of Rejection*

By analyzing this evidence of state rejection of federal law in comparative context we can see the similarities and common causes

that drive this phenomenon across different areas of the law. Broadly there are two key sets of reasons why states can and do reject federal caselaw. One set is the residue of structural features of our system of federated and separated powers. The other set stems from political dynamics.

The two causal factors I focus on are: (1) the relevant federal laws, which determine how free states are to reject federal law; (2) the political motivations of the relevant state actors. Just as important to this story, however, are the *non-causes*—that is, factors you might expect to matter but that in fact do not. These are (3) the degree of similarity between the texts of the federal and state laws; and (4) the identity of the state actor deciding whether to follow or reject federal law.

### 1. Conflicts and Supremacy

State law is not always free to depart from federal law. Indeed, the history of states' attempts to reject or otherwise nullify federal law is fraught with conflict and bloodshed.<sup>239</sup> The longstanding interpretation of the Supremacy Clause<sup>240</sup>—often challenged but never upended—is that federal law always trumps state law whenever they conflict, and that decisions of the U.S. Supreme Court constitute the definitive and final interpretation of federal law. Given this constitutional settlement, state law can depart from federal law by two factors: the structural limits on the scope of federal law (i.e., the principle of enumerated powers) and federal actors' forbearance from creating law that would preempt state law.

The Supremacy Clause does not mean, however, that states lack the power to reject federal law *as a model*. It is merely to say that states may only do so when federal law leaves states room to set their own

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239 See, e.g., Resolutions Adopted by the Kentucky General Assembly, Nov. 10, 1798 in 30 THE PAPERS OF THOMAS JEFFERSON 550–56 (Barbara B. Oberg ed. 2003) (proposing doctrines of nullification and interposition); Virginia Resolutions, Dec. 21, 1798 in 17 THE PAPERS OF JAMES MADISON 185–91 (David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook eds., 1991) (same); United States v. Peters, 9 U.S. (5 Cranch) 115 (1809) (rejecting doctrine of nullification); Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824) (rendering unconstitutional state law in direct opposition to Supreme Court constitutional ruling); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (holding unconstitutional state law contradicting federal authority over Indian affairs); JOHN C. CALHOUN, SOUTH CAROLINA EXPOSITION AND PROTEST (1828); Prigg v. Pennsylvania, 41 U.S. (14 Pet.) 539 (1842); Ableman v. Booth, 62 U.S. (15 How.) 506 (1858); DECLARATION OF THE IMMEDIATE CAUSES WHICH INDUCE AND JUSTIFY THE SECESSION OF SOUTH CAROLINA FROM THE FEDERAL UNION (1860) (citing northern states' attempts to nullify fugitive slave laws as a reason for purported secession); Cooper v. Aaron, 358 U.S. 1 (1958) (again rejecting doctrine of nullification).

240 U.S. CONST. art. IV, § 2.

rules. The Supremacy Clause is a rule of conflicts that teaches us to look first to federal law when resolving apparent disagreements with state law. But when federal law runs out, state law is authoritative within its domain.

At one extreme, federal preemption in any of its guises robs states of the power to set any substantive law. In these cases, state law cannot depart from federal law. Indeed, federal preemption negates the very possibility of independent state law. This end of the spectrum includes, among other subjects, patents and admiralty law. At this extreme, then, state law can neither follow nor reject federal law.

At the other extreme are cases in which states' freedom to depart from federal law will be obvious and uncontroversial. Federal law allows capital punishment, but many states do not. Federal law has an income tax, but several states do not. Federal law permits sports gambling, but many states do not. These are all cases in which the separate spheres of federal and state regulation are well defined and largely nonproblematic.

In other cases, the path left for states to chart their own courses will be more obscure. Consider antitrust. Federal antitrust law commits to the exclusive original jurisdiction of the federal courts all civil actions arising under the federal antitrust laws.<sup>241</sup> Yet states remain free to pass their own antitrust laws, so long as they do not conflict with their federal analogs.<sup>242</sup> Because of these ostensibly separate spheres, even when states did depart from federal law historically, they did so *only* for purely intrastate cases—i.e., cases that federal law did not reach.<sup>243</sup> As the scope of the federal Commerce Clause power expanded at the same time as the extraterritorial regulatory power of state law did, there was increasing overlap in the substantive reach of state and federal antitrust laws. As we saw in Part II, it was that overlap that gave states a meaningful opportunity to reject federal antitrust doctrine in a meaningful way.

Once federal law grants states the autonomy to reject federal caselaw, they face the pragmatic question of whether they should do so. Many state courts have developed doctrinal tests to decide when to reject interpretations of federal constitutional provisions that are

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241 28 U.S.C. § 1337(a).

242 See *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1981); see also *California v. ARC Am. Corp.*, 490 U.S. 93, 101, 103–06 (1988) (upholding state *Illinois Brick* repealer statute over preemption challenge).

243 Herbert Hovenkamp, *State Antitrust in the Federal Scheme*, 58 IND. L.J. 375, 379 (1983) (analyzing the importance of the extent of sovereignty and the relationship between federal and state antitrust law).

similar to those of the state constitution.<sup>244</sup> Other states' apex courts treat U.S. Supreme Court precedent no differently "than opinions from sister states construing a similar clause."<sup>245</sup> Still others adhere to a rigid lockstep approach, even in the face of divergent constitutional or statutory text.<sup>246</sup>

The lesson here is that the extent and nature of federal law enables and structures state law's attempts to grapple with that same body of federal law. When federal law preempts state law across the board both substantively and jurisdictionally (as it does with, say, patents), state law simply has nothing to say in response to federal law. But where federal law falls short of complete preemption, states have room to set a different course by interpreting their own laws in contradiction to federal doctrine. Exactly how much room, however, will be set by federal law.

## 2. Politics

Candor requires recognizing another factor driving federal law's influence on state law: politics. Much law and doctrine has an ideological valence and salience. Sometimes that salience is strongest among partisan actors, while other times it is most acute among discrete but powerful interest groups. Other provisions of law are salient and meaningful to the public at large. In these cases, political dynamics or simple political disagreement may drive state law to reject federal doctrine.

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244 See, e.g., *State v. Hunt*, 450 A.2d 952, 965–67 (N.J. 1982) (Handler, J., concurring) (announcing seven factors to be considered); *State v. Williams*, 459 A.2d 641, 653–59 (N.J. 1983) (adopting the *Hunt* factors by a majority).

Robert F. Williams has identified several other states in addition to New Jersey—Washington, Vermont, Pennsylvania, Illinois, and Connecticut—as adopting similar “divergence factors.” See Robert F. Williams, *In the Glare of the Supreme Court: Continuing Methodology and Legitimacy Problems in Independent State Constitutional Rights Adjudication*, 72 NOTRE DAME L. REV. 1015, 1021–39 (1997); *State v. Gunwall*, 720 P.2d 808 (Wash. 1986); *State v. Jewett*, 500 A.2d 233 (Vt. 1985); *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991); *People v. Tisler*, 469 N.E.2d 147 (Ill. 1984); *State v. Geisler*, 610 A.2d 1225, 1232–34 (Conn. 1992).

Williams rightly criticizes the “divergence factors” approach on the grounds that it challenges the legitimacy of state constitutions: “it is not a valid argument to say that a *state* constitution *should not be interpreted* to provide against . . . warrantless searches *because* the United States Supreme Court has already held that the *Federal Constitution* is not violated by such searches, based on its national view of ‘reasonableness.’” Williams, *supra* note 244, at 1046.

245 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES 1–43 (2006) (collecting cases).

246 See *id.* at 1-45–1-46 (citing *Press, Inc. v. Veran*, 569 S.W.2d 435, 442 (Tenn. 1978)).

This seemingly obvious fact derives from a surprisingly large number of variables. Let us focus on three of the most important ones: constituency, independence, and ambition. First, even if the U.S. Supreme Court has a constituency, it is national rather than regional.<sup>247</sup> By contrast, state legislatures and courts have constituencies that include, at most, the individual state.<sup>248</sup> Individual states have considerably different demographics and political preferences from the nation, and state politicians and judges will reflect those differences. Differing constituencies alone can drive state law to reject federal doctrine, such as when the Supreme Court is relatively liberal, and a state is relatively conservative. It can also explain divergence in the more limited case when the powerful interest groups that sway opinion on the Supreme Court differ from the powerful interest groups that sway the votes of state legislators or judges.

Second, the political independence of state actors varies considerably from that of federal actors. This is particularly true in the cases of judges, who in the federal system enjoy independence bred not only of a system of appointment rather than election but also life tenure. By contrast, most state judges both lack life tenure and must stand for regular election. But it is also true of state legislators, whose terms in office are generally shorter than those of U.S. Senators,<sup>249</sup> whose salaries are much lower than federal legislators, and who generally rely on outside groups for much of their work product

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247 See, e.g., BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (arguing that the Supreme Court is politically responsive to national political preferences); Geoffrey C. Hazard, Jr., *The Supreme Court as Legislature*, 64 *CORNELL L. REV.* 1, 25–26 (1978) (theorizing that the Supreme Court’s constituency comprises lower courts, academics, intelligentsia, the organized bar, administrative agencies, interest groups, and elective officeholders).

248 Of the states that use elections as a mode of judicial selection or retention, most (Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Montana, Nevada, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming) hold at-large elections, in which each seat is filled by the statewide electorate. A minority (Illinois, Kentucky, Louisiana, Maryland, Mississippi, Nebraska, Oklahoma, and South Dakota) use at least some district elections, in which each justice represents a geographical subdivision of the state. See National Center for State Courts, *Methods of Judicial Selection*, NAT’L CENT. STATE CTRS. [http://www.judicialselection.us/judicial\\_selection/methods/selection\\_of\\_judges.cfm](http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm) [<https://perma.cc/Q8PX-LCSK>].

249 The longest term for any state’s senate is four years. See *Length of Terms of State Senators*, BALLOTPEDIA [https://ballotpedia.org/Length\\_of\\_terms\\_of\\_state\\_senators](https://ballotpedia.org/Length_of_terms_of_state_senators) [<https://perma.cc/DK2J-EHW4>]. Fifteen states also have term limits for legislative seats. See *State Legislatures with Term Limits*, BALLOTPEDIA, [https://ballotpedia.org/State\\_legislatures\\_with\\_term\\_limits](https://ballotpedia.org/State_legislatures_with_term_limits) (surveying such limits, which vary from six years to sixteen years, with eight years being most common) [<https://perma.cc/7HXN-ZKLG>].

because they lack the institutional resources to legislate without that assistance. And in any event, the relevant comparison is between state legislators and the U.S. Supreme Court, and there the relative gap in political independence is even starker. This comparative lack of independence has the practical effect of making states more likely to reject federal doctrine when that doctrine is politically unpopular either with electoral majorities in the state or among powerful interest groups at the state level.

Third, state actors' ambition to win federal office or appointment to the federal bench may make them especially likely to reject federal doctrine to signal to partisan groups their ideological sympathies in national political battles. Even for actors who seek higher state office, this sort of ideological signaling can help. This dynamic is especially apparent in the battles over state standing to sue, where many of the state judges debating the wisdom of adopting federal doctrine later held federal elective office or higher state judicial posts. For example, in the Texas Supreme Court, as we saw, the judges who wrote the principal opinions on this issue then became a U.S. Senator and a U.S. Representative, respectively.<sup>250</sup> In Oregon and Michigan, judges who grappled with this issue as intermediate appellate judges would vindicate their earlier lower-court opinions after they assumed positions as state supreme court judges. In these cases, state law provided a forum to relitigate federal issues, serving as a signal to potential political patrons and constituencies of state judges' ideological sympathies. Similarly, it was an ambitious young legislator who drove Florida's legislative reaction to *Kelo*: Marco Rubio. Here too we can reasonably link the desire to reject federal law with future political ambition.

Of course, politics can only provide an external explanation, not an internal legal reason, for why states reject federal law. Indeed, many state courts and scholars reject the idea that state law should be used as a "cute trick" to evade the U.S. Supreme Court.<sup>251</sup> But even without impugning the motivations of state court judges, we can recognize that there may not be a clear line between judicial politics and interpretive method. And in any event, no such insistence on the separation of law and politics exists in state legislatures or the ballot box, where many instances of state rejection play out.

The political dimension of state rejection of federal law also has important consequences for the stability of state law. If state law is

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250 See *infra* subsection II.C.5.

251 See Williams, *supra* note 244, at 1016–17; H.C. Macgill, *Upon a Peak in Darien: Discovering the Connecticut Constitution*, 15 CONN. L. REV. 7, 9 (1982) ("There probably remains some feeling on the bench as well as in the bar that a state constitutional holding is something of a cute trick, if not a bit of nose-thumbing at the federal Supreme Court, and not 'real' constitutional law at all.").

merely a means for state actors to telegraph their future political positions, it will tend to be unstable and perpetually contested. And because states often see themselves as facing a binary choice between the extremes of accepting or rejecting federal doctrine wholesale, that instability can result not in moderation but in cycling between extremes. That sort of instability can be particularly costly where we think the law ought to provide a stable backdrop against which private actors can plan their affairs.

### 3. Textual Convergence and Divergence

Unlike the first few causal factors identified above, consider the next two factors: *non-causes*. Though one might expect them to matter, *a priori*, the case studies examined here show they have surprisingly little effect on whether states reject federal precedent.

Consider the first non-cause: the degree of similarity between the text of relevant laws. Many state laws mirror federal statutes to varying degrees. At one extreme, many states have Unfair and Deceptive Acts and Practices statutes modeled explicitly after the Federal Trade Commission Act—so much so that they are colloquially known as “baby FTC acts.”<sup>252</sup> Similarly, many states have passed whistleblower statutes that mirror the federal False Claims Act.<sup>253</sup> In these cases, it should be no surprise that the state laws are often interpreted in lockstep with their federal analogs. Indeed, in some cases state statutes direct state courts to so interpret them.<sup>254</sup>

Yet ironically, textual similarity can also be a key driver of state rejection of federal law. It is in these cases in which the text and interpretive history is identical that a state’s departure from federal law becomes most obvious, and therefore most important. If federal and state law have followed the same path for decades, their divergence becomes a watershed. As we saw in Part II, this exact pattern played

252 See, e.g., Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes*, NAT’L CONSUMER L. CTR. INC. (2009), [https://www.nclc.org/images/pdf/udap/report\\_50\\_states.pdf](https://www.nclc.org/images/pdf/udap/report_50_states.pdf) [<https://perma.cc/Q9GQ-XVCD>]; Alex Brown, *FTC’s Ability to Regulate Data Security Potentially Limited in FTC v. LabMD*, ALSTON & BIRD: PRIVACY, CYBER & DATA STRATEGY BLOG (Nov. 19, 2015), <https://www.alstonprivacy.com/ftc-jurisdiction-in-data-security-regulation-potentially-limited-in-ftc-v-labmd/> [<https://perma.cc/8GJA-LGH>].

253 See Tim Barnett, *Overview of State Whistleblower Protection Statutes*, 43 LABOR L.J. 440 (1992).

254 See, e.g., CAL. BUS. & PROF. CODE § 16721.6 (West 2021) (“It is the intent of the legislature that [relevant provisions of California’s Cartwright Act, its state antitrust statute] be interpreted and applied so as not to conflict with federal law with respect to transactions in the interstate or foreign commerce of the United States . . .”); see also Lindsay, *supra* note 59 (collecting cases and statutes directing state courts to harmonize interpretation of state antitrust statutes with that of federal antitrust statutes).



out in the context of antitrust's indirect-purchaser rule and eminent domain's economic use doctrine. The fact that antitrust laws are treated as "common law" statutes only further underscores the point.

If textual similarity can prove a surprising wellspring of state law departures from federal law, textual dissimilarity can prove an equally unlikely source of doctrinal *convergence* between state and federal law. In these cases, state law chooses to borrow federal doctrine even with no textual license for doing so. Of course, this is a pattern more of borrowing than of rejection—but it reveals that text underdetermines whether states reject federal models.

But even when the texts of the relevant federal and state law are different, rejection is still possible and notable. Indeed, once a state yokes itself to federal law, it creates the very conditions that make its rejection of federal law notable and important. Just as with identical statutory text, voluntary lockstepping of state law to federal law creates a shared path, and it is the knowing departure from that shared path that generates salient difference. This is an important lesson of the experiences of Oregon and Michigan in grappling with the Supreme Court's precedent in *Lujan v. Defenders of Wildlife*.

#### 4. Sites of Decision: Courts Versus Legislatures

Another non-cause is whether the relevant state actor tasked with deciding whether to follow or reject federal law is a court, a legislature, or the electorate at large. When the Supreme Court elaborates some aspect of federal law—whether constitutional or statutory—states often have the latitude to accept or reject that federal doctrine by statute, judicial interpretation, or ballot initiative.<sup>255</sup> When the Supreme Court restricts the availability of a private cause of action alleging violations of federal antitrust law, states can reject that restrictive turn either through: (a) legislatures, by amending their state antitrust statutes; or (b) courts, by interpreting their state antitrust statutes not to include any such restrictive statutory standing requirement. Similarly, when the Supreme Court loosens restrictions on local governments' ability to seize private property through eminent domain under the Fifth Amendment to the U.S. Constitution, states can reject that expansive reading within their own borders either through (a) legislatures, by passing statutes that bar state actors from using eminent domain in that way; (b) courts, by interpreting Takings Clause analogs found in most state constitutions not to countenance sweeping economic-use justifications for eminent domain; or (c) electorates, by passing ballot

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255 See *supra* Section I.C. As discussed in Part I, the freedom to reject federal doctrine depends on the structure and form of that supreme law; states are free to reject federal law only to the extent permitted by federal law.

initiatives, including constitutional amendments, that enact similar limits. In each of these examples, both the impetus (federal doctrine) and the result (rejection of federal doctrine) are the same—despite the important institutional differences between the relevant state decisionmakers.

Of course, depending on which actor undertakes the decision, the form of the resulting rejection of federal law will differ slightly. State legislatures have the power only to enact statutory law, while state courts have the final power to declare state constitutional doctrine. As a result, when courts do reject federal doctrine, they can insulate the rejection from override by the state legislature. Yet courts are also somewhat more constrained by state precedent and constitutional text, while legislatures are mostly free to legislate as they see fit. And where legislatures have mandated that state statutes be interpreted in lockstep with federal interpretations of analogous federal laws,<sup>256</sup> only legislatures have the power to reject federal doctrine in statutory cases.

Yet the examples assayed above reflect similarities across state rejections of federal law, no matter if it is legislatures or courts who do it. Indeed, in some cases, different states will reject the same federal doctrine either by legislation or court decision, proving that a similar dynamic is in play regardless of the state institution that carries it out.

### B. *Lessons of State Rejection of Federal Law*

With this broader picture of the factors that lead states to reject federal caselaw, it is possible to draw lessons for decisionmakers. This Section takes up that task, suggesting takeaways for both federal courts and legal reformers.

#### 1. Lessons for Federal Courts

Because federal courts are the ones who spur state rejection in the first place, this phenomenon teaches them two key lessons.

First, when federal courts invite states to respond to their decisions by charting their own course, states often do so. In *Kelo*, the Supreme Court “emphasize[d] that nothing in [its] opinion preclude[d] any State from placing further restrictions on its exercise of the takings power.”<sup>257</sup> And as we have seen, many states did so. Similarly, in *ASARCO v. Kadish*, the Court reminded state courts that they are “not bound by the limitations of a case or controversy or other

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<sup>256</sup> See, e.g., *supra* note 65 and accompanying text (discussing lockstepping provision of California’s Cartwright Act).

<sup>257</sup> *Kelo v. City of New London*, 545 U.S. 469, 489 (2005).

federal rules of justiciability” like standing.<sup>258</sup> And as we have seen, many state courts took that reminder to heart by rejecting federal caselaw elaborating on standing doctrine. Finally, in *California v. ARC America Corp.*, the Court made clear that the indirect-purchaser rule of *Illinois Brick* did nothing to preclude states from allowing indirect-purchaser suits under state antitrust laws.<sup>259</sup> And as we have seen, many more states responded to the Court’s invitation in *ARC America* by passing new *Illinois Brick* repealer statutes. So if federal courts see value in leaving significant room for state law to stand alongside federal law, they would be wise to include explicit statements to that effect in judicial opinions.

Second, because many sensitive legal and policy areas require balancing many competing considerations under conditions of uncertainty, state rejection of federal law allows federal courts to gather information about the best rule. For example, a primary motivation for *Illinois Brick* was the concern that allocating damages between different classes of plaintiffs would be difficult and costly. But the Court was largely speculating, as it could not predict with confidence whether that difficulty would manifest. The experience of *Illinois Brick* repealer states gives federal courts new information about how difficult and costly such damages calculations are in real-world cases, including cases in federal court. Should the Supreme Court revisit the *Illinois Brick* rule, it will have the benefit of those states’ experience, which may enable it to make a better-informed decision.<sup>260</sup> This factor therefore suggests that federal courts should consider whether the prospect of state rejection may offer important benefits for the development of sound law and policy.

## 2. Lessons for Legal Reformers

For those who despair of losses in federal courts, the lesson here is simple. In many areas, state law has considerable flexibility to reject federal caselaw. The examples discussed in Part II show the breadth of this phenomenon, which spans individual liberties (*Kelo*), private causes of action (*Illinois Brick*), and jurisdiction (*Lujan*). For those

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258 490 U.S. 605, 617 (1989).

259 490 U.S. 93, 105–06 (1989) (“When viewed properly, *Illinois Brick* was a decision construing the federal antitrust laws, not a decision defining the interrelationship between the federal and state antitrust laws. The congressional purposes on which *Illinois Brick* was based provide no support for a finding that state indirect purchaser statutes are pre-empted by federal law.”).

260 Such an overruling is not unfathomable. Indeed, the dissenting opinion in the Supreme Court’s recent decision in *Apple Inc. v. Pepper*, accused the majority of “whittling [*Illinois Brick*] away to a bare formalism.” 139 S. Ct. 1514, 1531 (2019) (Gorsuch, J., dissenting).

pursuing legal change despite obstacles under federal law, then, state law offers a promising path forward.

The idea here is not that state law somehow holds more promise than federal law. Neither federal law nor state is inherently more rights protective than the other. The key is that each is an independent site of political and legal contestation, and that narrow focus on only the federal forum obscures how state law can bring about legal change.

Recent efforts to reject the doctrine of qualified immunity as a matter of state law make the point well. Most of these efforts, including Colorado's recent SB-217, achieve their goal in two steps. First, they create a cause of action under state law that guarantees individual rights at least capacious as those found under the U.S. Constitution.<sup>261</sup> Second, they explicitly state that qualified immunity is no defense to that new cause of action.<sup>262</sup>

As noted in the introduction, as a formal or technical matter, this two-step process does not repeal qualified immunity. Yet as a practical matter, this state law rejection of the body of federal caselaw that created qualified immunity doctrine does almost everything that a repeal of qualified immunity would do. First, and most importantly, it ensures that victims can recover for their injuries. Second, it provides a financial disincentive for violating the law. Third, it prompts courts to delineate and define individual rights rather than avoiding those hard issues by dismissing on qualified immunity grounds.

Just as with the other examples explored above, state *courts*, along with legislatures, have also shown willingness to reject qualified immunity. For example, the California Court of Appeals has held that the defense of qualified immunity is unavailable when plaintiffs sue state and local officials under California Civil Code § 52.1,<sup>263</sup> which resembles § 1983 in many ways.<sup>264</sup> In concluding that the defense was

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261 In Colorado's case, the law created a cause of action for money damages for any violation of Colorado's Bill of Rights. *See* COLO. REV. STAT. § 13-21-131(1) (2021); *see also* COLO. CONST. art II. Colorado's Bill of Rights contains many individual rights that are identical to their federal analogues, as well as additional rights not found in the U.S. Constitution. *See id.* An alternative would be to create a state law cause of action for money damages for any violation of federal rights, including federal constitutional rights. This would guarantee that the law would be at least as protective as the rights under the U.S. Constitution without requiring any amendment of the state constitution.

262 COLO. REV. STAT. § 13-21-131(2)(b) (2021) ("Qualified immunity is not a defense to liability pursuant to this section.").

263 *See Venegas v. Cnty. of Los Angeles*, 63 Cal. Rptr. 3d 741, 751-54 (Cal. Ct. App. 2007).

264 Importantly, however, section 52.1 covers both public and private conduct, but only does so to the extent that a defendant attempts to or in fact "interferes by threat, intimidation, or coercion . . . with the exercise or enjoyment . . . of rights . . ." CAL. CIV.

unavailable, the court focused on the different enacting history, text, and subsequent judicial gloss to find reason to reject the federal doctrine.<sup>265</sup> Though some state courts have embraced qualified immunity even as a matter of state law,<sup>266</sup> their very grappling with the issue suggests the issue may not be settled.<sup>267</sup> And, of course, legal reformers can take their case directly to state legislatures if they lose in the courts.

This is not an exhaustive playbook for reformers looking to use state law to push back on the retrenchment of federal remedies for violating civil rights. But it does set out a few key plays that may be useful: focus on both rights and remedies, make the case both in courts and in legislatures, and an initial loss is not the end.

### CONCLUSION

The folklore of federal law's supremacy has impoverished the collective imagination about state law's potential. By documenting many ways in which state law has rejected federal judicial opinions, this Article sought to challenge that folklore and replace it with a more sophisticated account of judicial federalism. At the same time, the changes in state law documented here teach concrete lessons for federal courts and reformers alike not to overlook the possible reaction that state law may have to federal judicial opinions.

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CODE § 52.1(b)–(c) (West 2021). Additionally, it provides a cause of action for interference with rights guaranteed *either* by federal law *or* California law. *See id.*

265 *Venegas*, 63 Cal. Rptr. 3d at 751–54.

266 *See, e.g., Duarte v. Healy*, 537 N.E.2d 1230, 1232 (Mass. 1989) (reasoning that by patterning the Massachusetts Civil Rights Act after § 1983, the Massachusetts legislature intended to incorporate the immunities available under § 1983 into the state law cause of action).

267 *See supra* nn.4–11 and accompanying text (explaining how state law that is defined by relation to federal law is difficult to settle once and for all).

