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THE GRAVITATIONAL FORCE OF FEDERAL LAW

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*In the American system of dual sovereignty, states have primary authority over matters of state law. In nonpreemptive areas in which state and federal regimes are parallel—such as matters of court procedure, certain statutory law, and even some constitutional law—states have full authority to legislate and interpret state law in ways that diverge from analogous federal law. But, in large measure, they do not. It is as if federal law exerts a gravitational force that draws states to mimic federal law even when federal law does not require state conformity. This Article explores the widespread phenomenon of federal law’s gravitational pull. The Article begins by identifying the existence of a gravitational force throughout a range of procedural and substantive law felt by a host of state actors, including state rulemakers, legislators, judges, and even the people themselves. It then excavates some explanatory vectors to help understand and appreciate why federal law exerts a gravitational force. Finally, the Article considers some normative concerns with state acquiescence to the federal gravitational pull.*

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## INTRODUCTION

Federalism promotes state autonomy in the development of legal norms, both as a matter of sovereignty and as a matter of experimentation. For the most part, states as sovereigns are entitled to design, implement, and interpret their respective state laws as they see fit. Their independence inures to the benefit of the whole, for state laws can be constructed to fit their particular local cultures, and the resulting diversity can offer opportunities for innovation and experimentation without damaging the whole.

Perhaps no one in the early modern era more forcefully pressed this vision of state autonomy than Justice Louis Brandeis. In a 1932 dissent challenging the *Lochner*-era Court's propensity to invalidate state laws on federal constitutional grounds, Brandeis famously wrote, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>1</sup> The premise was that states wanted to innovate. States wanted to exercise their sovereign independence, but the Supreme Court would not let them.

Six years later, Brandeis penned the even more famous opinion in *Erie Railroad v. Tompkins*, which prohibited federal courts from developing common law in diversity cases.<sup>2</sup> *Erie* overruled a previous case, *Swift v. Tyson*, which had allowed federal courts to develop their own substantive federal common

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<sup>1</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>2</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64, 79-80 (1938).

law. *Swift* was premised in part on the idea that state courts would follow federal law on common-law matters, and that states would follow federal common-law development not as a matter of command but as a matter of judgment.<sup>3</sup> In *Erie*, Brandeis decreed that history had repudiated that premise: state courts refused to be followers.<sup>4</sup> And he confirmed the sovereign prerogative of independent state lawmaking in a federalist system.<sup>5</sup>

In light of Brandeis's powerful vision—oft-repeated by scholars and courts—one might expect the states to take full advantage of their lawmaking independence to forge legal norms and regimes that reflect the whims and prejudices of their own citizenries, even when those norms and regimes differ profoundly from those of the nation as a whole.<sup>6</sup> But in fact, since *Erie*, states have routinely followed federal law even when adherence is not compelled. Rather than blaze their own paths, states tend to look to federal law as their starting points. It is as if federal law exerts a kind of gravitational pull on states. This gravitational pull expands beyond courts—to legislatures, rulemakers, and even the people themselves.

The Constitution's Supremacy Clause, of course, makes some state following of federal law mandatory.<sup>7</sup> But I mean to focus on following of a different nature, one that derives not from legal compulsion but rather from allurements. This kind of state following persists in a host of areas traversing both procedural and substantive law. In each area, states often follow federal law for woefully inadequate reasons, and sometimes for no reason at all.

To be sure, federal lawmaking and interpretation may reflect a common policy shared by states, such that states mirror federal pronouncements because both sovereigns share similar policy goals. But there is evidence that much state parallelism is not independent. As this Article documents, states follow even abrupt and counterintuitive changes in federal law. If the Pied Piper heads out of town in the direction of a candy store, it may be difficult to tell

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<sup>3</sup> See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842) (holding that federal courts do not need to follow state court common law in issues of general commercial law because court decisions are “only evidence of what the laws are; and are not of themselves law”).

<sup>4</sup> See *Erie*, 304 U.S. at 74 (“Persistence of state courts in their own opinions on questions of common law prevented uniformity . . .”).

<sup>5</sup> See *id.* at 78-79 (explaining that “Congress has no power to declare substantive rules of common law applicable in a State” and that interference in the judicial and legislative affairs of the state is an infringement of a state's independence).

<sup>6</sup> Even today, commentators advocate for limited national power on the assumption that states will fill the space with innovation, and that expansive national power stifles innovation. See, e.g., Myron T. Steele & Peter I. Tsoflias, *Realigning the Constitutional Pendulum*, 77 ALB. L. REV. 1365, 1369-70 (2013/2014) (emphasizing that the importance of federalism lies in the ability of states to implement policy on a gradual and piecemeal level, which allows for feedback and improved institutional learning).

<sup>7</sup> See U.S. CONST. art. VI, cl. 2 (establishing the supremacy of the Constitution and the “Laws of the United States”).

whether the children are being lured by the music or the sweets. But if the Piper abruptly turns ninety degrees and the children still follow, then the parents would be convinced that it was the music. Examples of such state following abound.

This Article's central thesis is that something more than independent parallel conduct is afoot: federal law exerts a widespread gravitational pull on state actors.<sup>8</sup> To be sure, the pull of federal law is not inexorable. State actors can and do resist and diverge from federal law. But these counterexamples are also a part of the story. Perhaps paradoxically, they help prove that the gravitational force exists, and they offer clues as to why it has such pull.

In Part I, I defend the descriptive claim that federal law's gravitational force affects a wide array of state actors (including state rulemakers, legislators, and courts) across various areas of nonpreemptive law (procedural rules, substantive statutes, and constitutional provisions). In these areas, state actors have authority to craft regimes and render interpretations different from—even contrary to—federal law, and one might expect states to exercise this authority with some frequency. But, in significant measure, they instead follow federal law. Even when they resist the impulse to follow, they muster tremendous effort to do so. Federal law is a Piper's song that captivates the states.

Part II theorizes explanations for the gravitational force of federal law and for states' tendencies to follow. Mimicking federal law may offer a relatively safe way to ease the cognitive, systemic, and resource pressures of independently developing and maintaining a workable legal system. Or perhaps intrastate vertical uniformity is of overriding importance. State actors might be more familiar with federal law than state law. Or elected state actors could believe federal law offers political cover for their enactments or decisions. And following begets more following, resulting in a habit that supplies its own compulsion.

Part III then considers the normativity of the gravitational force of federal law and stakes out some of its vices. Following comes at the expense of the salutary benefits of variation and experimentation. Following can distort state law in ways that cause state law to misalign with, and potentially undermine, the policies and preferences of the state electorate. By appearing to be a shortcut, following can mar the reputation of states as coequal sovereigns in a federalist system. And, perhaps most troubling, following can induce cyclical entrenchment of the very causes of following in the first place.

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<sup>8</sup> Others have used this or a related term in off-hand and narrower ways. *See, e.g.*, Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1186 (2005) (noting "the decreasing gravitational pull of the Federal Rules on the states"). However, I am the first to explore the concept systematically across various doctrines and legal actors.

I conclude with calls to action. I entreat states to seize their own empowerment and tackle state law with the attention to state interests that it deserves. At the same time, I urge federal actors to conduct their business with sensitivity to its shadow effect on states. I also seek others to join in a sociological and empirical effort to study and understand better the gravitational force of federal law.

## I. FEDERAL GRAVITY

In this Part, I stake out the descriptive claim that federal law exerts a gravitational pull on state actors. To defend the claim, I consider a number of examples of procedural and substantive law, and I study relationships among courts, rulemakers, and legislators.

### A. Procedure

In the post-1938 world, federal and state courts independently develop and apply their own procedures. Except in very limited contexts, forum procedure controls: federal procedure applies in federal courts, and state procedure applies in state courts.<sup>9</sup> Thus, states are free to adopt their own rules of procedure, and state courts are free to interpret their state rules independently of federal rules and federal judicial opinions.<sup>10</sup> Consequently, consideration of procedural rules presents an opportunity to study the gravitational effect of federal law on both state rulemakers and state courts.

#### 1. State Rulemakers

Before 1938, states had a long history of innovation and self-reliance in designing civil procedure. States had been doing so independently since the Revolutionary Era, and although they engaged in borrowing from English traditions and from sister states, they generally exhibited the willingness and freedom to develop the particular procedure that best fit their needs, even if that independence caused significant disuniformity among states. Conversely, federal procedure was largely derivative. The Process and Conformity Acts required federal courts to apply the applicable state court rules of procedure

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<sup>9</sup> See Kevin M. Clermont, *Reverse-Erie*, 82 NOTRE DAME L. REV. 1, 48 (2006) (noting that in our federal system an initial question is whether federal or state law applies—a question with a relatively clear answer in most cases).

<sup>10</sup> See Scott Dodson, *A Closer Look at New Pleading in the Litigation Marketplace*, JUDICATURE, Aug. 2015, at 11, 17 (noting that state courts are within their rights to reject the new federal pleading standards set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), because federal court interpretations of federal laws do not legally affect state procedural rules).

in the state in which they sat, effectively directing federal courts to follow state rules.<sup>11</sup>

In 1822, the Supreme Court adopted the Federal Equity Rules, derived from English equity tradition, to provide uniform equity procedure in federal courts.<sup>12</sup> Yet the states continued to exercise procedural independence in equity. Many states avoided the Federal Equity Rules and instead adopted New York's Field Code, which merged law and equity.<sup>13</sup> In both law and equity, states readily asserted their independence, divergence, and even leadership in matters of procedure.

The Federal Rules of Civil Procedure, adopted in 1938, ushered in a new era of federal procedural uniformity. Federal interstate uniformity made some sense, but the revolutionary procedural changes made by the Federal Rules seemed a poor model for states. The Rules were modeled on principles of equity, a dramatic historical change that most states had already rejected in favor of procedural regimes built on principles of the common law.<sup>14</sup> Meanwhile, the state benches and bars of the 1930s were highly provincial. Senator Thomas Walsh of Montana argued that the new Federal Rules, which he believed were designed for complex cases likely to be pursued in urban centers, would create tension with the code practice that worked well in many states.<sup>15</sup> He repeatedly admonished that the national legal community was

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11 See Conformity Act of 1872, ch. 255, § 5, 17 Stat. 196, 197 (declaring that "practice, pleadings, and forms and modes of proceeding" in federal district and circuit courts should conform "as near as may be" with the procedures of state court); Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (providing that "the forms of writs, executions, and other process" shall be the same in federal courts as those used in state court); Federal Judicial Act of 1789, ch. 21, § 2, 1 Stat. 93, 93-94 (declaring the forms of writs and executions in federal court be the same as the processes of the supreme court of the state where the federal court sits). For a history of the numerous statutes directing federal courts to apply state procedure, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1036-42 (1982) (describing the problems with and dissatisfaction over attempts to standardize federal and state procedural law through statutes like the Conformity Act of 1872).

12 See JAMES LOVE HOPKINS, *THE NEW FEDERAL EQUITY RULES*, at x-xii (Byron F. Babbitt ed., 8th ed. 1933) (providing an updated version of Federal Equity Rules that first went into effect in 1822). The Federal Equity Rules looked to English tradition rather than the states because state equity procedure was sparse and varied. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 931 (1987) (explaining the underdevelopment of equity in the states, which led to the application of historic equity law and effectively disengaged law and equity as companion systems in the federal courts).

13 See Subrin, *supra* note 12, at 932-33, 939 (stating that half of the states adopted the New York Field Code instead of the Federal Equity Rules).

14 See *id.* at 922, 926 ("The underlying philosophy of, and procedural choices embodied in the Federal Rules were almost universally drawn from equity rather than common law . . . . Until the twentieth century, however, the predominant mode of procedural thought, reinvigorated by Field and his Code, was still common law based.").

15 See *id.* at 996 ("Walsh's opposition was normally characterized by his unwillingness to force lawyers, particularly the 'small practitioner and the country lawyer,' to learn federal procedure that is different from the procedural rules of their homes states, accompanied by his fear that the simple

an amalgam of different local legal practices and cultures that should not be forcibly unified.<sup>16</sup>

Given the longstanding history of common law procedure in the states, the states' tradition in procedural independence, and the recognition that differing legal cultures demanded different procedural regimes, one might have expected states to greet the Federal Rules with indifference, or, at most, with curiosity tempered by independence. Yet, within a generation, most state legislatures and rulemakers substantially adopted the Federal Rules as a model for their own reforms. In 1960, Charles Wright surveyed state procedures and found a trend toward adoption of the federal rules.<sup>17</sup> John Oakley and Arthur Coon, conducting an important follow-up study in 1986, found that twenty-three state procedural regimes mirrored the federal rules to such a high degree as to be categorized as "replica" states.<sup>18</sup> Ten more were so similar to the Federal

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code procedure of Western states would be somehow prejudiced by the complex procedure used in metropolitan areas, such as New York.").

<sup>16</sup> See Burbank, *supra* note 11, at 1063-65, 1092 (discussing Walsh's concern that a uniform federal procedure would cause inconvenience and interpretive problems); Subrin, *supra* note 12, at 956 n.276, 998 (describing Walsh's argument that a large country whose regions had different customs and needs should not have uniform rules). Some drafters of the Federal Rules publicly predicted that states would adopt "mini-FRCPs" so as to create both interstate and intrastate uniformity. It is unclear, however, whether these were sincere beliefs or whether these were overly optimistic political rejoinders to those who, like Thomas Walsh, opposed the Federal Rules on grounds of intrastate disuniformity. See Koppel, *supra* note 8, at 1179 (describing the drafters' goal to provide uniform federal and state procedure); Stephen N. Subrin, *A New Era in American Civil Procedure*, 67 A.B.A. J. 1648, 1650 (1981) (presenting Walsh's argument that "the price of this interfederal court uniformity was the loss of intrastate uniformity"); see also Thomas Wall Shelton, *A New Era of Judicial Relations*, 23 CASE & COMMENT 388, 393 (1916) ("[A] simple, scientific, correlated system of rules, such as would be prepared and promulgated by the Supreme Court of the United States, would prove a model that would, for reasons of convenience as well as of principle, be adopted by the states."). Interestingly, many prominent reformers' states—including New York (William Mitchell and the ABA), Connecticut (Charles Clark), and Nebraska (Roscoe Pound)—adhered predominantly to the old code-based procedural system. See John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1378 (1986) (classifying six states as those "which have neither notice pleading nor a rules-based procedural system in common with the Federal Rules").

<sup>17</sup> 1 WILLIAM W. BARRON & ALEXANDER HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE §§ 9.1-.53, at 46-80 (Charles Alan Wright ed., 1960).

<sup>18</sup> Oakley & Coon, *supra* note 16, at 1377 (Alabama, Alaska, Arizona, Colorado, District of Columbia, Hawaii, Indiana, Kentucky, Maine, Massachusetts, Minnesota, Montana, New Mexico, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wyoming). Idaho, Mississippi, and Nevada, which also had notice pleading, and Arkansas, Delaware, and South Carolina, which had fact pleading, were considered to have modeled their regimes on the Federal Rules. *Id.* at 1377-78. Iowa, Michigan, and Wisconsin had adopted the notice pleading of the Federal Rules but otherwise had "[i]diyncratic [r]ules-[b]ased [p]rocedural system[s]"; New Hampshire had notice pleading but otherwise an "[i]diyncratic [p]rocedural [s]ystem"; Georgia, Kansas, North Carolina, and Oklahoma had notice pleading but a "[f]ederal [c]ode [p]rocedural [s]ystem"; Florida, Maryland, Missouri, New Jersey, Oregon, Pennsylvania, Texas, and Virginia had fact pleading and idiosyncratic rules-based procedural systems; and

Rules as to be considered “substantially conforming” systems.<sup>19</sup> Indeed, Oakley and Coon concluded that the Federal Rules of Civil Procedure exerted a “pervasive nationwide influence . . . in that [by 1977] *all* states had adopted federal procedure to some degree.”<sup>20</sup> Oakley and Coon were not alone in this observation; Charles Alan Wright and Mary Kay Kane noted, “[T]here is not a jurisdiction that has not revised its procedure in some way that reflects the influence of the federal rules.”<sup>21</sup>

Oakley and Coon were surprised by their findings, but not in the way one might expect. They were shocked that *only* twenty-three states were substantial conformists.<sup>22</sup> Thus, Oakley and Coon meant to tell a story of state resistance, a story that Oakley continued in a follow-up study in 2002.<sup>23</sup>

Of course, states can—and sometimes do—blaze their own trails,<sup>24</sup> and Oakley and Coon reveal intriguing instances of state divergence.<sup>25</sup> I explore this divergence in more detail in Part II. But Oakley and Coon’s study also tells an important and overlooked story about the gravitational pull of the Federal Rules on state lawmakers. Despite historical, procedural, and cultural reasons for states to react to the Federal Rules with diffidence, the adoption of the Federal Rules wrenched the states off their traditional courses. Most states’ rules now mirror the Federal Rules, and the rest have been pulled toward the Federal Rules in significant ways. In every state, federal rulemakers have exerted an extraordinary gravitational pull on state rulemakers.

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California, Connecticut, Illinois, Louisiana, Nebraska, and New York had fact pleading and code-based procedural systems. *Id.*

<sup>19</sup> See John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV. L.J. 354, 358 (2002).

<sup>20</sup> Oakley & Coon, *supra* note 16, at 1371 (emphasis added); see also Thomas O. Main, *Procedural Uniformity and the Exaggerated Role of Rules: A Survey of Intra-State Uniformity in Three States that Have Not Adopted the Federal Rules of Civil Procedure*, 46 VILL. L. REV. 311, 326-29 (2001) (finding summary judgment rules and discovery practices to be remarkably similar to the federal rules in Illinois, Pennsylvania, and Nebraska—states found by Oakley and Coon to have procedural systems least influenced by the federal model).

<sup>21</sup> CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 431 (7th ed. 2011).

<sup>22</sup> Oakley & Coon, *supra* note 16, at 1369.

<sup>23</sup> See Oakley, *supra* note 19, at 355 (finding “a general disinclination of states to conform to the ever-changing contours of the FRCP”).

<sup>24</sup> For example, Arizona, until recently a die-hard “replica” state, adopted unique discovery rules. See Koppel, *supra* note 8, at 1173 (noting that Arizona “took off on its own discovery reform trip, adopting a package of discovery reforms more aggressive than anything the federal rules have implemented”). And, sometimes, these state innovations are followed by federal rulemakers and courts. See *id.* at 1212 (explaining that following Arizona’s dramatic discovery reforms, the federal courts created similar discovery rules); see also Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2040-42 (1989) (identifying limitations on discovery practice as one example of state innovations that sparked federal rule revision). But federal following is rarer than state following.

<sup>25</sup> See Oakley & Coon, *supra* note 16, at 1426 (finding that the states with the highest levels of divergence tended to be the largest and most populous states); see also Oakley, *supra* note 19, at 383 (demonstrating that state rulemakers today are less likely to follow federal rule amendments).



## 2. State Courts

State rulemakers following federal rules is not the only procedural story. The federal gravitational pull also affects courts. I explore those effects in two contexts: state rules patterned after federal rules, and state rules that deviate from federal rules.

### a. *State Rules Patterned After Federal Rules*

State courts often follow federal courts when the applicable state rule mirrors the federal rule. To some degree, this kind of following should be expected. After all, the gravitational pull of the federal rule had its primary effect on the state rulemakers at the rulemaking stage. That pull brought the state rule so close to the federal rule that interpretations of each are likely to be similar.

But even here, the gravitational pull has an additional effect on state courts. Although rules may be textually similar, a federal court interpretation of the federal rule is not preemptive of the state rule or binding on state courts interpreting the analogous state rule. And while state rulemakers may have intended that state rules be interpreted in light of then-existing federal precedent, it is far more tenuous to infer that the state rulemakers intended for post-adoption federal precedent to be indicative of the state rule's meaning.

Indeed, there are good reasons why state courts should *not* follow federal courts on certain issues. Federal dockets have different cases and different caseloads. Federal judges have life tenure and are less sensitive to local pressures. State judges are under greater docket congestion and resource pressures than federal judges.<sup>26</sup> Different sets of attorneys appear in the different courts. These differences may suggest that a state rule should be interpreted in light of particular state contexts and norms, even if that results in an interpretation that diverges from the interpretation given in an identically worded federal rule.

Yet the typical state court in this scenario tends to treat a federal appellate opinion as presumptively controlling, or at least as highly persuasive authority, without regard to any state policy reason for adherence or divergence. As Oakley and Coon found, a substantial number of state courts reiterate that they give, *ipso facto*, great weight to federal court interpretations of analogous federal rules.<sup>27</sup> For example, the Rhode Island Supreme Court recently stated: “[W]here the Federal rule and our state rule are substantially similar, we will

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<sup>26</sup> See Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 563 n.123 (explaining that the borrowing of the Federal Rules by state courts “is especially problematic to the extent that state court judges are under greater docket and resource pressures than their federal colleagues, depriving them of the ability to use the tools in the Federal Rules for managing litigation”).

<sup>27</sup> Oakley & Coon, *supra* note 16, at 1381-424 (Alabama, Alaska, Arizona, Colorado, D.C., Hawaii, Indiana, Massachusetts, Minnesota, New Jersey, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, West Virginia, and Wyoming).

look to the Federal courts for guidance or interpretation of our own rule.”<sup>28</sup> Revealingly, state courts rarely look to sister states’ interpretations of analogous state rules; rather, their eyes are raised upward, looking to the federal system.

Pleading standards present a useful illustration. Rule 8 of the Federal Rules, which states that a claimant need set out only “a short and plain statement of the claim showing that the pleader is entitled to relief,”<sup>29</sup> was designed to liberalize pleading away from the old code-pleading standard requiring that the allegation of facts state a cause of action.<sup>30</sup> The new pleading standard was so revolutionary that lower federal courts resisted the new standard, often reverting back to code pleading in practice.<sup>31</sup>

In 1957, the Supreme Court put the debate to rest (at least for a time) in *Conley v. Gibson*, holding that Rule 8 was a strongly liberalizing force and directing lower courts to abide by it.<sup>32</sup> *Conley* interpreted Rule 8 to require only “a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”<sup>33</sup> *Conley* also glossed Rule 12(b)(6)—the rule allowing dismissal for “failure to state a claim upon which relief can be granted”<sup>34</sup>—with the following interpretation:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>35</sup>

States also have pleading rules, but *Conley* interpreted only Federal Rule 8. Further, it is not obvious that Rules 8 and 12 mean what *Conley* said they did.<sup>36</sup>

<sup>28</sup> *Hall v. Kuzenka*, 843 A.2d 474, 476 (R.I. 2004); *see also*, *Am. Suzuki Motor Corp. v. Burns*, 81 So.3d 320, 325 n.5 (Ala. 2011) (“As we have often stated, we look to the federal courts’ interpretation of the Federal Rules of Civil Procedure when those rules are similar to our own.”).

<sup>29</sup> FED. R. CIV. P. 8(a)(2).

<sup>30</sup> *See* SCOTT DODSON, *NEW PLEADING IN THE TWENTY-FIRST CENTURY: SLAMMING THE FEDERAL COURTHOUSE DOORS?* 19-23 (2013) (explaining that Rule 8 was intended to change the requirements of a complaint so that it had to recount only “the general nature of the cases and the circumstances or events upon which it is based . . . but not of details which he should ascertain for himself in preparing his defense”).

<sup>31</sup> *See id.* at 23-26 (discussing opposition to the changes to Rule 8 and how “opposition to the liberality of discovery and pleadings surged”).

<sup>32</sup> 355 U.S. 41, 44-48 (1957). Many courts adhered to the liberal *Conley* standard in name only. *See, e.g.*, Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 448-50, 492 (1986) (providing specific examples of post-*Conley* courts dismissing complaints for lack of specificity and asserting that “the new fact pleading is more restrictive” than intended).

<sup>33</sup> *Id.* at 47 (internal quotation marks omitted).

<sup>34</sup> FED. R. CIV. P. 12(b)(6).

<sup>35</sup> *Conley*, 355 U.S. at 45-46.

<sup>36</sup> *See* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1685 (1998) (“*Conley v. Gibson* turned Rule 8 on its head . . .”).

States with their own pleading rules patterned after Federal Rules 8 and 12, even with identical language, could reasonably have construed their rules differently, especially given the different docket loads and pressures facing state courts. Yet the states with replica rules universally adopted the *Conley* construction for their own pleading rules.<sup>37</sup> They heard the Piper's call, lined up, and followed for fifty years.

In 2007, the Supreme Court abruptly changed course. In the pair of decisions *Bell Atlantic Corp. v. Twombly*<sup>38</sup> and *Ashcroft v. Iqbal*,<sup>39</sup> the Court embraced a different normative model for pleading (one of restriction rather than access),<sup>40</sup> imposed two new pleading requirements (plausibility and nonconclusoriness),<sup>41</sup> and abrogated *Conley*'s famous "no set of facts" standard.<sup>42</sup> Importantly, the Court based its decisions in part on policy matters largely confined to federal courts: the perceived increase in the cost of discovery under the federal discovery rules, and the perceived inability of federal judges to control that cost.<sup>43</sup> Federal courts quickly got the memo after *Iqbal* and began applying the new pleading standard relentlessly, as required.<sup>44</sup> But the Supreme Court's new interpretation does not control state courts, which are free to interpret their rules independent of federal interpretation. What, then, would state courts do with this dramatic turn in federal pleading law?

One might think that a state court, empowered as a truly independent system interpreting its own sovereign's laws, would react to *Twombly* and *Iqbal* with some indifference. Notions of stare decisis, state rulemaking history, state policies, state practice, other state rules, and state institutional concerns should

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<sup>37</sup> See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 578 & n.5 (2007) (Stevens, J., dissenting) (describing how twenty-six states and the District of Columbia "[t]ak[e] their cues from the federal court[]" and utilize the *Conley* formulation as their standard for dismissal of a complaint).

<sup>38</sup> *Id.* (majority opinion).

<sup>39</sup> 556 U.S. 662 (2009).

<sup>40</sup> See A. Benjamin Spencer, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 368 (2010) ("The Supreme Court's capitulation to defendant requests for more stringent pleading standards [in *Twombly* and *Iqbal*] is the clearest evidence of procedure's tilt towards restrictiveness.").

<sup>41</sup> See DODSON, *supra* note 30, at 76 (explaining what the author calls "*Iqbal* Step One [where] a court should disregard all conclusory allegations" and "*Iqbal* Step Two [where] the court assesses the remaining well-pleaded factual allegations and their inferences to determine whether, in the judge's experience and common sense, the facts plausibly state entitlement to relief").

<sup>42</sup> *Twombly*, 550 U.S. at 562-63 (holding that the "no set of facts" language has been questioned, criticized, and explained away long enough . . . [It] is best forgotten as an incomplete, negative gloss on an accepted pleading standard").

<sup>43</sup> See *id.* at 559 ("[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases . . . . Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim."); see also *Iqbal*, 556 U.S. at 678-79 (warning that Rule 8 "does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions" (internal citations omitted)).

<sup>44</sup> See DODSON, *supra* note 30, at 80.

be far more relevant. Absent some state-specific reason for changing course, *Twombly* and *Iqbal*, nonpreemptive decisions based on federal policies, federal practices, and federal rules, ought not be particularly worthy of state attention.<sup>45</sup>

Yet several state supreme courts have followed *Twombly* or *Iqbal* for no apparent reason. In *Iannacchino v. Ford Motor Co.*, the Massachusetts Supreme Judicial Court simply quoted the Supreme Court's decisions and summarily adopted the new federal standard:

While we have concluded that the plaintiffs' complaint is insufficient [on other grounds], we take the opportunity to adopt the refinement of that standard that was recently articulated by the United States Supreme Court in [*Twombly*]. The Supreme Court ruled that the often-quoted language in [*Conley*]"a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"—had "earned its retirement." The Court pointed out that under *Conley's* "no set of facts" standard, "a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." As the Court stated, "While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions . . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief, in order to "reflect[] the threshold requirement . . . that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"

We agree with the Supreme Court's analysis of the *Conley* language . . . and we follow the Court's lead in retiring its use. The clarified

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<sup>45</sup> See A. Benjamin Spencer, Pleading in State Courts After *Twombly* and *Iqbal* 20 (July 1, 2010) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038349](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038349) [<http://perma.cc/HLV4-27KJ>] ("[I]f a notice-pleading jurisdiction has previously expressed its commitment to simplified pleading for various policy reasons such as promoting access to justice, it should not treat *Twombly* and *Iqbal* as undermining such policies in any way. Rather, those decisions reflect the Supreme Court's embrace of different policy concerns that states should feel free to discount when addressing pleading in their own systems."); see also Z.W. Julius Chen, Note, *Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity*, 108 COLUM. L. REV. 1431, 1455 (2008) (urging states without strong e-discovery regimes to consider their own state's institutional concerns before following *Twombly*).

standard for rule 12(b)(6) motions adopted here will apply to any amended complaint that the plaintiffs may file.<sup>46</sup>

This passage is remarkable. Before *Twombly*, Massachusetts courts had adhered to *Conley* and its “no set of facts” formulation for thirty years without deviation.<sup>47</sup> Yet the court in *Iannacchino* was so anxious to follow the Supreme Court that it adopted the momentous *Twombly* standard, without any consideration of stare decisis, state law, state policies, or state practices. For Massachusetts, the fact that the Supreme Court said it was enough.

The Wisconsin Supreme Court, in a case called *Data Key Partners*, also adopted the *Twombly* “plausibility” standard,<sup>48</sup> despite Wisconsin’s long previous adherence to the *Conley* “no set of facts” standard.<sup>49</sup> As in *Iannacchino*, the Wisconsin court recited the *Twombly* opinion and adopted it without engaging in a state-specific policy analysis.<sup>50</sup> In yet another example, the Supreme Court of South Dakota adopted the *Twombly* pleading standard merely because the federal rule and the state rule both require a “showing” of entitlement to relief but offered no reasoning based on state policy.<sup>51</sup>

These state courts were caught in the Supreme Court’s gravitational pull. They followed *Twombly* primarily because the Supreme Court decided it rather than because they exercised rigorous independent judgment in accordance with state law and policy.

Exercising rigorous independent judgment based on appropriate state considerations should not have been difficult. For example, the Supreme Judicial Court of Maine adopted the *Twombly* standard after noting that the federal and state rules were practically identical.<sup>52</sup> The court then determined that the rationale of *Twombly* applied to the kind of civil-perjury claims at

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<sup>46</sup> 888 N.E.2d 879, 889-90 (Mass. 2008) (alterations in original) (internal citations omitted).

<sup>47</sup> See Dodson, *supra* note 10, at 18 (noting that the Massachusetts courts “had followed the ‘no set of facts’ standard of *Conley* for more than 30 years” until *Iannacchino*).

<sup>48</sup> See *Data Key Partners v. Permira Advisers LLC*, 849 N.W.2d 693, 701 (Wis. 2014) (concluding that the *Twombly* standard is consistent with Wisconsin state law precedent and therefore requiring that plaintiffs allege facts that plausibly suggest they are entitled to relief).

<sup>49</sup> See, e.g., *Doe v. Archdiocese of Milwaukee*, 700 N.W.2d 180, 186-87 (Wis. 2005) (citing Wisconsin precedent that stands for the proposition that a court should not dismiss a plaintiff’s claims “unless it appears to a certainty” that the plaintiff cannot prove “any set of facts” that would entitle him to relief).

<sup>50</sup> The court suggested that *Twombly* was consistent with Wisconsin precedent, but that assertion rings hollow given the Wisconsin courts’ long adherence to *Conley* and the novelty of the “plausibility” standard. See *Data Key Partners*, 849 N.W.2d at 699-701.

<sup>51</sup> See *Sisney v. Best Inc.*, 754 N.W.2d 804, 808-09 (S.D. 2008) (pointing to the language of the South Dakota statute that contains the State’s pleading requirements, and based on two words in that statute, deciding to adopt the Supreme Court’s “new standards”).

<sup>52</sup> See *Bean v. Cummings*, 939 A.2d 676, 680 (Me. 2008) (explaining that the court will use constructions of a federal rule as aids in construing the state provision if a Maine Rule of Civil Procedure is identical to the federal rule).

issue and that the *Twombly* standard was needed to further the state policy of curbing abusive use of those claims.<sup>53</sup> And the Supreme Court of Nebraska offered a defensible assessment of federal pleading standards and their desirability in Nebraska courts.<sup>54</sup>

Yet although the Maine and Nebraska decisions did more than rely on the mere pronouncement of the Supreme Court, their timing suggests they were not truly independent. As I have written previously, “It is highly suspicious that, after 50 years of adherence to *Conley*, these state courts happened to conclude independently—just after the Supreme Court did—that their pleading rules require New Pleading strictures, too.”<sup>55</sup>

The gravitational force of federal law is not irresistible; several state supreme courts have rejected *Twombly* and *Iqbal*.<sup>56</sup> But these instances of resistance actually confirm the Supreme Court’s gravitational pull. Compare, for example, the perfunctory and facile adoption of the federal pleading change in Massachusetts, Wisconsin, and South Dakota,<sup>57</sup> with the rejection of the new federal standard by the Supreme Court of Tennessee in a discussion spanning a dozen pages in *Webb*.<sup>58</sup> That the Tennessee Supreme Court spilled so much ink resisting the Supreme Court shows the strength of the Court’s gravitational pull. Further, the Tennessee court’s opinion devotes several pages

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<sup>53</sup> See *id.* at 680 (adopting the *Twombly* standard for Maine civil perjury cases because “[o]n certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires”).

<sup>54</sup> See *Doe v. Bd. of Regents*, 788 N.W.2d 264, 274-78 (Neb. 2010) (explaining that “the Nebraska Rules of Pleading in Civil Cases are modeled after the Federal Rules of Civil Procedure,” and concluding, after discussion, that the *Twombly* standard provides a balanced approach for determining the sufficiency of a complaint).

<sup>55</sup> See *Dodson*, *supra* note 10, at 17. One exception is the District of Columbia, which is required by federal statute to follow federal precedent for like-worded rules. See D.C. CODE § 11-946 (2014) (requiring the District of Columbia’s Superior Court to conduct its business in accordance with the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure unless the District of Columbia Court of Appeals approves the Superior Court’s modification of those federal rules); see also *Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011) (following the Federal Rules of Civil Procedure pleading standard in light of D.C. Code § 11-946); *Behradrezaee v. Dashtara*, 910 A.2d 349, 356 n.8 (D.C. 2006) (“We construe rules that are substantially identical to the corresponding federal rule in light of the meaning given to the federal rule.”).

<sup>56</sup> See, e.g., *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344, 346-48 (Ariz. 2008); *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608-09 (Iowa 2012); *Walsh v. U.S. Bank, N.A.*, 851 N.W.2d 598, 603 (Minn. 2014); *Webb v. Nashville Area Habitat for Humanity, Inc.*, 346 S.W.3d 422, 430 (Tenn. 2011); *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1086 n.1 (Vt. 2008); *McCurry v. Chevy Chase Bank, FSB*, 233 P.3d 861, 863-64 (Wash. 2010); *Roth v. DeFeliccare, Inc.*, 700 S.E.2d 183, 189 n.4 (W. Va. 2010).

<sup>57</sup> See discussion *supra* notes 46-51.

<sup>58</sup> 346 S.W.3d at 425-37.

to exhaustively criticizing the Supreme Court's standard on its own terms.<sup>59</sup> This is curious because *Twombly* and *Iqbal* need not be wrong on their own terms for them to be wrong for Tennessee. Questioning the federal decisions on their own terms weakened their force and better enabled state court resistance.

The Minnesota Supreme Court's recent rejection of *Twombly* in *Walsh* is similar.<sup>60</sup> The court noted that the similarities between federal and state law made the Supreme Court's views "'instructive' but not binding" and proceeded to reject plausibility on state textual and policy grounds.<sup>61</sup> The analysis is thorough, careful, and exceptionally detailed. But, like the Tennessee case, *Walsh* is notable for how much effort it spends discussing, analyzing, and distinguishing the federal precedents.

Thus, even examples of state resistance reveal a federal gravitational force. Perhaps the only true exception comes from the Iowa Supreme Court, which simply put the burden on the party advocating for the federal change to demonstrate that the change was warranted.<sup>62</sup> In that case, the defendants had neither "presented this court with any evidence that our state court system is facing the sort of systemic pressures that contributed to the Supreme Court's decisions in *Twombly* and *Iqbal*," and neither party "addressed countervailing policy considerations that may exist" but instead "rel[ie]d only on the similarities between the federal rule and the Iowa rule."<sup>63</sup> The court concluded: "Based on this record, there is an insufficient basis to make such an important change in our rules."<sup>64</sup>

Iowa is a lone outlier in a set of examples that illustrates the substantial default effect that the Supreme Court's interpretation of federal rules has on state courts construing analogous state rules. 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.

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<sup>59</sup> See *id.* at 430-31 (concluding that the federal *Twombly* standard substantively departed from the Supreme Court's prior interpretation of this pleading standard, causing "a loss of clarity, stability, and predictability in federal pleadings practice").

<sup>60</sup> *Walsh*, 851 N.W.2d at 600.

<sup>61</sup> See *id.* at 603. The Minnesota Supreme Court had also favorably cited to *Twombly* and *Iqbal* previously. See *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (holding that "[a] plaintiff must provide more than labels and conclusions" and citing *Twombly* for that proposition); *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008) (citing *Twombly* for the proposition that a plaintiff's foundation for relief must be based on more than legal conclusions).

<sup>62</sup> *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 608 (Iowa 2012).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* I do not mean to express a normative preference for Iowa's approach. Indeed, Iowa could be criticized for failing to take the opportunity to engage the Supreme Court's opinions in an effort to approach its own state question with newly opened eyes. I only note that the very idea that a nonbinding Supreme Court decision should open state courts' eyes reflects the phenomenon that I mean to show.

b. *State Conformity Under Dissimilar Rules*

The gravitational pull of federal law can be so forceful that state courts follow federal courts even when the language of their state rules is different from the language of federal rules. Pleading standards again present a useful example, for Rule 8 and its federal interpretation have exerted a strong gravitational pull even on states that retained code pleading.<sup>65</sup>

A useful 2001 study by Thom Main illustrates this phenomenon. Main studied the way state courts in code-pleading states reacted to federal court interpretations of federal rules on pleading and summary judgment.<sup>66</sup> Main selected states whose rules were among those least influenced by the federal rules.<sup>67</sup> In Illinois, Main found “persuasive evidence of substantial intra-state uniformity, notwithstanding the fundamental differences between code pleading . . . and notice pleading,”<sup>68</sup> as well as evidence that Illinois state courts followed the Supreme Court’s interpretive gloss on pleading and summary judgment under the Federal Rules.<sup>69</sup> Main also found similar following in Pennsylvania.<sup>70</sup> Further, both states marched in tune—with relatively consistent lag times—with the federal changes to summary judgment after *Celotex*,<sup>71</sup> despite different summary-judgment rule texts.<sup>72</sup> And Edward Cavanaugh has reported that state appellate courts in New York—a code-pleading state—are using the Supreme Court’s “plausibility” standard even though it applies only to pleadings in federal court.<sup>73</sup>

Note how the Supreme Court’s gravitational pull on state courts compounds the overall gravitational effect of federal law. The federal rules pull state rulemakers toward parallel state rules in the first instance, resulting in rampant

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<sup>65</sup> See Chen, *supra* note 45, at 1440 & n.65 (noting the code-pleading states Florida, Louisiana, and Nebraska followed the pleading rules articulated by the Supreme Court in *Conley*).

<sup>66</sup> Main, *supra* note 20, at 326-29.

<sup>67</sup> *Id.* at 326-27.

<sup>68</sup> *Id.* at 344-45.

<sup>69</sup> *Id.* at 344.

<sup>70</sup> *Id.* at 353.

<sup>71</sup> *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

<sup>72</sup> *Id.* at 364-68. Main’s findings in a third code-pleading state, Nebraska, were different. There, both state and federal courts appeared to adhere to fact pleading even after *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). *Id.* at 359. In addition, Nebraska specifically rejected *Celotex* in 1995, even though the state rule was identical to the federal rule. *Id.* at 369-70. I discuss these implications in Part III.

<sup>73</sup> Edward D. Cavanaugh, *The Impact of Twombly on Antitrust Actions Brought in the State Courts*, ANTITRUST SOURCE, Feb. 2013, at 1, 7 (“Although the New York Court of Appeals did not cite *Twombly*, the decision is unquestionably *Twombly*-esque in two important respects. First, the court asserts that to survive a motion to dismiss, an antitrust claim must be ‘plausible.’ Second, the court undertook the kind of detailed vetting of the complaint that *Twombly* demands. While New York’s highest court has not specifically addressed the question of how *Twombly* bears on state court pleading requirements, *Equitas* would appear to put New York in the *Twombly* camp.”).



mimicry. Even when state rulemakers do resist, state courts are still drawn to interpret divergent state rules in a manner that approaches the interpretation of the federal rules. The overall effect amplifies the gravitational force of federal law.

### 3. Other Procedural Rules

The gravitational force of federal procedural law extends to other procedural regimes. More than forty states mimic the Federal Rules of Evidence,<sup>74</sup> and states often follow the Supreme Court's gloss on those rules, such as its controversial *Daubert* decision regarding the admissibility of expert testimony.<sup>75</sup> State following is pervasive in evidence law even in the few non-replica states.<sup>76</sup> Likewise, roughly half the states have modeled their own rules of criminal procedure on the Federal Rules of Criminal Procedure.<sup>77</sup> This broader landscape suggests that the same gravitational pull of federal law affects a wide swath of procedural rules.

#### B. *Substantive Areas*

The gravitational pull of federal law is not restricted to matters of procedure. I also find evidence of a gravitational pull in both statutory law and constitutional law. In using these examples, I do not mean to suggest that states *always* follow federal substantive law. As with procedure, such a position is manifestly

<sup>74</sup> See 6 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE, at T-1 (Joseph M. McLaughlin ed., 2d ed. 2011).

<sup>75</sup> *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Before *Daubert*, almost all of the states followed the seventy-year-old federal standard articulated in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Within six years, nineteen states had switched to the standard articulated in *Daubert*. See Stephen Mahle, *The Impact of Daubert v. Merrell Dow Pharmaceuticals, Inc., on Expert Testimony: With Applications to Securities Litigation*, FLA. B.J., Mar. 1999, at 3, 36.

<sup>76</sup> See, e.g., *People v. Falsetta*, 986 P.2d 182, 192-93 (Cal. 1999) (interpreting California's propensity-evidence bar for sex-crime prosecutions similarly to the Federal Rules of Evidence, despite textual dissimilarities). See generally Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 105-24 (2008) (arguing that state judges interpret state rules of evidence similarly to how the Supreme Court interprets the Federal Rules of Evidence in order to make what appears to be the correct decision and to further their reputation).

<sup>77</sup> See, e.g., *State v. Crowe*, 168 S.W.3d 731, 741 n.3 (Tenn. 2005) ("The Tennessee Rules were patterned after the Federal Rules of Criminal Procedure."). For surveys, see 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 1.2(f), at 50 (2d ed. 1999) ("Roughly half of the states have court rules of criminal procedure or statutory codes of criminal procedure that borrow heavily from the Federal Rules."); Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANN. AM. ACAD. POL. & SOC. SCI. 130, 138 n.18 (1996) (identifying Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, North Dakota, Ohio, Rhode Island, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming as states with court rules or statutory codes modeled on the Federal Rules of Criminal Procedure).

untenable; counterexamples abound.<sup>78</sup> But by documenting varied and unexpected instances of uncoerced state following, I bring to light the potential breadth of the gravitational pull of federal law.

### 1. Statutes: Employment Discrimination

Federal employment-discrimination law—primarily Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), and the Americans with Disabilities Act (ADA)—has inspired copycat state statutory regimes, and developments in federal case law quickly echo in state jurisprudence. That is true even though there are differences in the drafting histories of federal and state employment-discrimination laws, and even though state policies might differ markedly from federal policies.<sup>79</sup>

Of course, the social and legal push to outlaw employment discrimination was, in that era, made at both the federal and state levels, so it is unsurprising that this common cause would produce both federal and state employment-discrimination reform in roughly the same time period. But that explanation is satisfactory only at a general level. Even for a common cause such as the prohibition of employment discrimination, one would expect state-specific policy preferences and local cultures to affect both the timing and the details of how the states implemented their solutions.

Yet the degree of state following is surprising not only in timing but also in detail. States generally tended to act shortly after the federal statutes passed, and with a high level of mimicry. Prior to Title VII's passage in 1964, states were not very successful in combating employment discrimination.<sup>80</sup> After Title VII, most states swiftly and successfully enacted laws substantially mirroring Title VII's provisions.<sup>81</sup> States also quickly followed the federal ADEA (1967) and ADA (1990) with their own state protections drawn from the

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<sup>78</sup> See, e.g., Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 9 (1988) (acknowledging that “[u]nemployment compensation, minimum-wage laws, public financing of political campaigns, no-fault insurance, hospital cost containment, and prohibitions against discrimination in housing and employment all originated in state legislatures”); Steele & Tsoflias, *supra* note 6, at 1375 (identifying some states with broader constitutional protections of civil liberties, including free speech and privacy rights); Benjamin J. Beaton, Note, *Walking the Federalist Tightrope: A National Policy of State Experimentation for Health Information Technology*, 108 COLUM. L. REV. 1670, 1688-93 (2008) (surveying some of the various health information initiatives that states implemented in the absence of federal action).

<sup>79</sup> For an introduction to the relationship between state and federal employment-discrimination laws, see generally Alex B. Long, *“If the Train Should Jump the Track . . .”: Divergent Interpretations of State and Federal Employment Discrimination Statutes*, 40 GA. L. REV. 469 (2006); Sandra F. Sperino, *Revitalizing State Employment Discrimination Law*, 20 GEO. MASON L. REV. 545 (2013).

<sup>80</sup> See Long, *supra* note 79, at 477 (“State attempts to address employment discrimination were generally seen as failures at the time of Title VII’s enactment in 1964.”).

<sup>81</sup> See Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 91 (2002) (“After Title VII was enacted, all of the states that

federal provisions.<sup>82</sup> As one commentator put it, “[F]ederal law has traditionally set the standard for individual rights in the employment context, with state legislatures and courts taking their cues from federal law.”<sup>83</sup>

It is true that some states added greater protections,<sup>84</sup> and it is also true that most states modified at least some of the federal language in deliberate ways.<sup>85</sup> But the extent of the similarities is striking. Aside from isolated pockets of novelty, states have approached antidiscrimination lawmaking principally by plagiarizing the federal statutes,<sup>86</sup> with little legislative history revealing why Congress’s particular wording should be so perfectly and universally apt for different states.

Likewise, state judicial interpretations of state statutes have tended to track federal interpretations of the federal statutes.<sup>87</sup> One might expect some interpretive similarities when statutory texts, histories, and goals are similar.<sup>88</sup> But state courts typically conform to federal court interpretations of federal statutes with relatively paltry analysis of countervailing considerations.<sup>89</sup> Many states even adhere to an asserted principle of construction that federal opinions concerning federal law are highly persuasive, if not controlling, on the question of the proper interpretation of a parallel state law.<sup>90</sup> Indeed, “state courts

previously lacked antidiscrimination laws adopted them.”); Long, *supra* note 79, at 477 (“[I]t was not until Title VII became law that a majority of states adopted their own antidiscrimination statutes.”).

<sup>82</sup> See Goldfarb, *supra* note 81, at 91; Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 628 (2004) (describing the influence of the ADA on state antidiscrimination laws and concluding that “[t]he enactment of the ADA has clearly had a strong influence on state antidiscrimination statutes and interpretive regulations”). However, as Professor Sandra Sperino notes, there are differences in the processes of enactment of state and federal statutes (for example, most state statutes were passed as a part of omnibus bills). Sperino, *supra* note 79, at 558-61.

<sup>83</sup> Long, *supra* note 79, at 478.

<sup>84</sup> See Goldfarb, *supra* note 81, at 91 (noting that many state employment discrimination statutes are considerably more protective of employees rights than the federal version).

<sup>85</sup> See Sperino, *supra* note 79, at 561 (“[T]here is not a single state statute that contains the same statutory language as the federal statutes, even when confining such consideration to substantive, rather than procedural or administrative, problems.”).

<sup>86</sup> See Long, *supra* note 79, at 473 (“[F]ederal and state antidiscrimination laws typically ran parallel to one another. Indeed, in many instances, a state’s antidiscrimination statute was based upon or used language almost identical to federal law.”).

<sup>87</sup> *Id.* at 477. In addition, some state statutes require conforming interpretation with federal precedent. *Id.*

<sup>88</sup> See *id.*

<sup>89</sup> *Id.*

<sup>90</sup> See *id.* at 473 (asserting that, because state antidiscrimination statutes were often based on federal law and because “federal decisional law concerning a parallel statute is highly persuasive,” state appellate courts would often interpret their own state antidiscrimination statutes in the same manner that federal courts had interpreted the parallel federal statute); Sperino, *supra* note 79, at 582-83 (considering the reasons state courts may defer to federal courts when interpreting their own state antidiscrimination statutes, including the ideas that federal and state statutes in this area have a common

sometimes appear to bend over backwards in construing state antidiscrimination statutes in order to keep state and federal law on the same track.”<sup>91</sup>

For example, in 1973, the Supreme Court interpreted Title VII to require a unique burden-shifting framework for establishing a prima facie case of employment discrimination.<sup>92</sup> Despite the fact that the Court’s framework was pure judicial gloss on a federal statute, state courts promptly adopted the burden-shifting framework for their own state statutes.<sup>93</sup> A disagreement among lower courts—including state courts—then developed as to whether the framework involved a burden of production or a burden of persuasion.<sup>94</sup> In 1993, the Supreme Court answered that the framework under federal law involved a burden of production.<sup>95</sup> Again, states promptly and uniformly followed suit, even those that had previously imposed a burden of persuasion.<sup>96</sup>

Another example of state court following is the so-called “*Faragher/Elleerth*” defense. In those cases, the Court was asked whether an employer could be liable under Title VII to an employee harassed by coworkers.<sup>97</sup> Rejecting traditional common law agency principles as inconsistent with the policies and goals of Title VII, the Court created a two-part affirmative defense for the employer based on whether the employer exercised reasonable care to prevent and remedy any harassment, and whether the plaintiff unreasonably failed to take advantage of any preventive or remedial opportunities provided by the employer.<sup>98</sup> No part of this affirmative defense is in Title VII; the Court simply fashioned a new judicial rule of agency for the federal statutory term “employer.”<sup>99</sup> Yet despite this convoluted, federal-specific judicial gloss, and despite the availability of a trove of traditional agency rules already developed by the states, states have largely adopted the Court’s test for state Title VII analogues.<sup>100</sup>

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goal and purpose, that federal courts have had more opportunity to consider antidiscrimination issues, and that reading federal and state statutes together is the only practical method).

<sup>91</sup> Long, *supra* note 79, at 477.

<sup>92</sup> McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).

<sup>93</sup> See Long, *supra* note 79, at 487-88.

<sup>94</sup> See *id.*

<sup>95</sup> St. Mary’s Honor Ctr. v. Hicks, 509 U.S. 499, 506-07 (1993).

<sup>96</sup> Long, *supra* note 79, at 487-88.

<sup>97</sup> Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 746-47 (1998).

<sup>98</sup> Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765.

<sup>99</sup> See Sperino, *supra* note 79, at 573 (“The words ‘tangible employment action’ do not appear in Title VII; nor does the two-part affirmative defense created by the Supreme Court. *Faragher* and *Elleerth* do not represent pure statutory interpretation of Title VII. Rather, in these cases, the Supreme Court has created, using common law-type reasoning, a federal law of agency for Title VII that is not dependent on the statutory language.” (footnotes omitted)).

<sup>100</sup> See *id.* at 573 (“In cases where the federal courts are gap filling federal statutes using common law reasoning, there is greater reason to be skeptical about importing these concepts into state law. Nonetheless, courts interpreting state employment discrimination statutes have applied the agency analysis created in *Faragher* and *Elleerth*.”)

As with pleading rules, the lure of statutory following is powerful even when the text of the state statute differs meaningfully from the federal statute.<sup>101</sup> California's Fair Employment and Housing Act (FEHA) defines "disability" in a significantly different way than the federal ADA: the ADA requires that a disability "substantially limit[]" an individual while the FEHA requires only a limitation.<sup>102</sup> Federal courts concluded that the term "substantially" in the ADA imposed a meaningful restriction on the type of disability eligible under the ADA.<sup>103</sup> Yet despite the absence of "substantially" in the FEHA, California courts repeatedly interpreted the FEHA the same as the ADA, even relying on federal ADA cases for support.<sup>104</sup> Eventually, the California legislature had to pass a "we really meant it" amendment to the statute to make the proper standard—no substantiality was needed—clear.<sup>105</sup> Such was the strength of the gravitational pull of the ADA.

Such egregious examples exist throughout employment law. After the Supreme Court held that Title VII's statute of limitations began to run when the discriminatory act occurred,<sup>106</sup> Congress abrogated the Court's decision by amending the statute of limitations to begin to run when the individual is affected.<sup>107</sup> Nevertheless, courts of several states whose legislatures failed to enact a similar amendment interpreted their state statutes of limitations as if they had been amended like Title VII.<sup>108</sup> Even in the face of nonconforming state law, federal law pulls the states.

Of course, the gravitational force of federal law is not irresistible, and state courts have not always blindly followed federal antidiscrimination precedent.<sup>109</sup> For example, although many state courts followed the controversial Supreme Court decision in *Sutton v. United Air Lines, Inc.*,<sup>110</sup> which held that a person

<sup>101</sup> See Long, *supra* note 79, at 495 (documenting state court interpretations that "finesse the textual differences where they exist").

<sup>102</sup> See *id.* at 509-10 ("Rather than defining disabilities in terms of *substantial* limitations, the FEHA simply spoke of limitations of major life activities. As numerous federal courts had concluded that Congress's inclusion of the word 'substantially' worked to limit dramatically the scope of the ADA's definition, this difference should have been significant.").

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See *id.* at 509 ("Ultimately, the California legislature stepped in with an amendment that restated the obvious in no uncertain terms: notwithstanding any inconsistent interpretation, the legislature intended state law to require a limitation rather than a *substantial* limitation.").

<sup>106</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 622 (2007).

<sup>107</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

<sup>108</sup> See, e.g., *Summy-Long v. Penn. St. Univ.*, No. 1:06-cv-1117, 2010 WL 1253472, at \*11 (M.D. Pa. Mar. 24, 2010) ("PHRA should still be interpreted consistently with Title VII despite Title VII's change in language."), *rev'd on other grounds*, 2010 WL 4514312 (M.D. Pa. Nov. 2, 2010).

<sup>109</sup> See Long, *supra* note 79, at 473-74 (admitting that "a number of state appellate courts in recent years have declined to follow federal court interpretations of employment discrimination statutes when dealing with their own parallel state statutes").

<sup>110</sup> 527 U.S. 471 (1999).

with a disability that could be corrected (such as by wearing eyeglasses) was not disabled within the meaning of the ADA, a few state courts have diverged.<sup>111</sup> In *Dahill v. Police Department of Boston*,<sup>112</sup> the Massachusetts high court refused to follow *Sutton* because: (1) the state legislative history was different from the ADA's legislative history; (2) the Massachusetts agency charged with interpreting and enforcing the state law had concluded that corrective measures should not be considered, and that interpretation was entitled to substantial deference by state courts; and (3) the state statute specifically directed courts to construe the statute liberally in favor of disabled persons.<sup>113</sup> But, as in other areas, even counterexamples like *Dahill* are suggestive of the gravitational pull of federal law. To reach its decision—a pure question of state law—the Massachusetts court need not have cited *Sutton* at all; yet it felt compelled to spend considerable effort to distinguish and distance *Sutton*.<sup>114</sup>

## 2. Constitutions: *Bowers*

Federal constitutional law has long exerted a pervasive pull on state constitutional law.<sup>115</sup> However, given the nature of constitutional law, state constitutional following is particularly puzzling. Constitutional law often involves sensitive and important policy matters, on which local preferences tend to be stronger, more unified, and more extreme than national preferences.<sup>116</sup>

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<sup>111</sup> See Long, *supra* note 79, at 510-17 (describing how some state courts followed *Sutton*, while others diverged).

<sup>112</sup> 748 N.E.2d 956 (Mass. 2001).

<sup>113</sup> *Id.* at 959-64.

<sup>114</sup> *Id.* at 963.

<sup>115</sup> See, e.g., Lawrence Friedman, *Path Dependence and the External Constraints on Independent State Constitutionalism*, 115 PENN. ST. L. REV. 783, 783 (2011) (asserting that the promise of independent state constitutionalism “has gone largely unfulfilled”); Robert F. Williams, *Methodology Problems in Enforcing State Constitutional Rights*, 3 GA. ST. U. L. REV. 143, 165 (1986-1987) (recognizing the “often unstated premise that United States Supreme Court interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions”). Of course, the earliest constitutional law follower was the federal Bill of Rights, which drew from various state constitutions and colonial experiences. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501-02 (1977) (“[T]he drafters of the federal Bill of Rights drew upon corresponding provisions in the various state constitutions . . . . And prior to the adoption of the fourteenth amendment, these state bills of rights, independently interpreted, were the primary restraints on state action since the federal Bill of Rights had been held inapplicable.”). For more information, see generally JAMES A. GARDNER, *INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM* (2005), LEONARD W. LEVY, *ORIGINS OF THE BILL OF RIGHTS* (1999); DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* (1988); ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS, 1776-1791* (1962). But, since then, state constitutions have tended to follow the U.S. Constitution rather than vice versa.

<sup>116</sup> See Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 52 (2006) (noting the theory “that state constitutions are the repositories of the authoring community’s fundamental values”). *But see* GARDNER, *supra* note 115, at 53-79 (contesting the theory that state values have

Further, state constitutions have a different history and erect a different governmental structure than the federal Constitution. Finally, constitutional governance is the most prominent feature of popular sovereignty, a cherished American ideal.<sup>117</sup> These factors suggest that states should exercise independence in state constitutionalism, relying on the preferences of their particular populaces, with sensitivity to the nuances of their state governmental structures.

Yet state constitutional autonomy has not materialized.<sup>118</sup> Instead, all states have declarations of rights that track the federal Bill of Rights,<sup>119</sup> sometimes with a startling degree of mimicry.<sup>120</sup> Likewise, state court interpretations of state constitutions have tended to follow federal court interpretations of the U.S. Constitution,<sup>121</sup> even to the point of adopting the Supreme Court's tests

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sufficient intrastate homogeneity and interstate heterogeneity to be strong forces of constitutional variation); James A. Gardner, *Southern Character, Confederate Nationalism, and the Interpretation of State Constitutions: A Case Study in Constitutional Argument*, 76 TEX. L. REV. 1219, 1227 (1998) (concluding that cultural distinctions between the South and the rest of America make no difference for state constitutional interpretation).

<sup>117</sup> See GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 340-80 (1969) (discussing the transformation of the American political system between the Declaration of Independence and the U.S. Constitution).

<sup>118</sup> See James A. Gardner, *Autonomy and Isomorphism: The Unfulfilled Promise of Structural Autonomy in American State Constitutions*, 60 WAYNE L. REV. 31, 34 (2014) (noting that "state constitutions tend to converge strongly with one another and with the U.S. Constitution").

<sup>119</sup> See Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 332-33 (2011) ("Every state has a bill of rights, and almost all of them reproduce in some form or another the full list of rights protected by the federal Bill of Rights."). It is true that states also have constitutionalized rights that the U.S. Constitution does not, such as the right to a public education. See JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2006) (presenting a comprehensive study of the 114 state constitutional conventions with recorded debates); A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 917 (1976) (noting that at the time of publication, "forty-two state constitutions direct the legislature to establish a system of schools"). State constitutions are also frequently amended and highly detailed charters of state government. See Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641, 1644-45 (2014). But when state constitutions speak to rights also protected by the U.S. Constitution, they usually follow the U.S. Constitution. Counterexamples tend to be in constitutional criminal law. See, e.g., Brennan, *supra* note 115, at 500 (citing California's and Hawaii's greater search protections, Michigan's broader right to counsel, and South Dakota's and Maine's broader jury-trial right). Yet even in criminal procedure, other states have been known to follow federal constitutional interpretation. See, e.g., *Rhoades v. State*, 233 P.3d 61, 65-66 (Idaho 2010) (listing state cases that follow the Supreme Court's non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989)).

<sup>120</sup> Compare, e.g., CAL. CONST. art. 1, § 4 ("The Legislature shall make no law respecting an establishment of religion."), with U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . ."). See generally Friedman, *supra* note 115, at 790 ("Textual variations in individual rights provisions are often slight").

<sup>121</sup> See ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 194-95 (2009) (analyzing the nature and function of state constitutions by contrast to the federal Constitution, including the judicial interpretation issues that arise under state constitutions and the processes for their amendment and revision); Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002) ("[S]ystematic studies demonstrate

and interpretive methodologies.<sup>122</sup> For example, nearly all states have interpreted their equal protection guarantees to incorporate the same tiers of scrutiny that the U.S. Supreme Court has developed for the federal Equal Protection Clause.<sup>123</sup> To be sure, pockets of state independence exist, such as discrete areas of constitutional criminal law.<sup>124</sup> But, for the most part, state courts construe their own state constitutional protections in lockstep with the Supreme Court's interpretation of analogous federal provisions, slavishly incorporating the Supreme Court's doctrinal standards and buzzwords.<sup>125</sup>

The result is an epidemic pathology in state constitutional law in which state courts routinely choose to follow the reasoning of the U.S. Supreme Court,<sup>126</sup> even when the state constitution purports to protect rights more broadly than the U.S. Constitution.<sup>127</sup> Some state courts even follow the U.S. Supreme

that most state courts, when presented with the opportunity, have chosen *not* to depart from federal precedents when interpreting the rights-granting provisions of state constitutions. In other words, the majority of state courts, on most issues, engage in an analysis in lockstep with their federal counterparts." (citations omitted)).

<sup>122</sup> Blocher, *supra* note 119, at 334 ("Despite their formal interpretive independence, state courts have generally followed the Supreme Court's lead, adopting its tests and doctrines as their own."). The impetus of state court following is, for the most part, judicially *sui generis*, though it is constitutionally mandated in a few states. See Thomas C. Marks, Jr., *Federalism and the Florida Constitution: The Self-Inflicted Wounds of Thrown-Away Independence from the Control of the U.S. Supreme Court*, 66 ALB. L. REV. 701, 701-05 (2003) (noting that Florida's constitution directs its state courts to follow the Supreme Court's interpretation of the U.S. Constitution's Fourth and Eighth Amendments, even when the state courts are adjudicating claims solely under the Florida constitution).

<sup>123</sup> See, e.g., *Robotham v. State*, 488 N.W.2d 533, 539 (Neb. 1992) ("The Nebraska Constitution has identical requirements [to the Equal Protection Clause]."). See generally JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 15-44 (2008) (discussing states' application of "the federal model of equality"); Christopher R. Leslie, *Embracing Loving: Trait-Specific Marriage Laws and Heightened Scrutiny*, 99 CORNELL L. REV. 1077, 1086 (2014) (noting that most state courts apply the Supreme Court's tiers of scrutiny in evaluating equal protection claims).

<sup>124</sup> See Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 KY. L.J. 873, 873-75 (1975) (discussing the trend of state courts evading Supreme Court review through the "doctrine of adequate state grounds" by "basing [their] judgment[s] on [] state right[s] which [are] coextensive with or broader than rights afforded by federal law").

<sup>125</sup> See Blocher, *supra* note 119, at 339 ("[E]ither from force of habit, mistaken belief that they were bound by the federal rules, lack of expertise, or simply because they agreed with the Burger Court's reasoning, most state courts continued to apply their own constitutional provisions in lockstep with federal analogues.").

<sup>126</sup> See Williams, *supra* note 115, at 165 (asserting that the "often unstated premise that United States Supreme Court interpretations of the federal Bill of Rights are presumptively correct for interpreting analogous state provisions . . . exerts a significant amount of intuitive force upon lawyers and judges grappling with problems of state constitutional interpretation"); *id.* at 152 (arguing that when a state constitution mirrors the U.S. Constitution, a Supreme Court interpretation of the federal provision "cast[s] a confusing 'shadow' over the interpretation of the analogous state constitutional provision").

<sup>127</sup> See Jason Mazzone, *When the Supreme Court is Not Supreme*, 104 NW. U. L. REV. 979, 1059-60 (2010) (citing JEFFREY M. SHAMAN, EQUALITY AND LIBERTY IN THE GOLDEN AGE OF STATE CONSTITUTIONAL LAW 243 (2008)) (arguing that while there are times when courts expand rights



Court's reasoning as an express matter of course. For example, the Nebraska Supreme Court has stated that the guarantee of freedom of speech is the same under both the Nebraska Constitution and the U.S. Constitution, and it adopted the policy of following the reasoning and analytical framework of the Supreme Court to interpret the guarantee under its own state constitution.<sup>128</sup>

Other state courts recognize their ability to depart from federal court reasoning but erect doctrinal barriers to exercising that ability. For example, Washington presumptively follows nonbinding federal court decisions unless contrary considerations override that presumption, such as differing text, differing history, differing structure, preexisting state law, and matters of particular state or local concern.<sup>129</sup> This model essentially codifies the federal gravitational pull: go with the flow unless some countervailing force enables resistance.

Consider the implications of the U.S. Supreme Court's 1986 opinion in *Bowers v. Hardwick*, which upheld the constitutionality of a Georgia statute criminalizing sodomy.<sup>130</sup> The Court found no fundamental right to engage in sodomy and therefore found Georgia's statutory prohibition valid under the Fourteenth Amendment's Due Process Clause.<sup>131</sup> By rejecting a rights-expansive construction of the U.S. Constitution, *Bowers* left state courts free

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based on state constitutions, this remains outside of the norm); see also Ronald L.K. Collins, *Rebirth of Reliance on State Charters; A Fresh Look at Old Issues*, NAT'L L.J., Mar. 12, 1984, at 25-32 (cataloguing several hundred state cases between 1974 and 1984 where state courts provided more rights under their state constitutions than had been provided under the U.S. Constitution). For a comparison of the protections provided by state constitutions versus the protections provided by the federal Constitution, see WILLIAMS, *supra* note 121, at 113-34.

<sup>128</sup> *Pick v. Nelson*, 528 N.W.2d 309, 317 (Neb. 1995) (“[W]e do not distinguish between the two constitutions in our analysis of this issue.”); cf. *Robotham v. State*, 488 N.W.2d 533, 539 (Neb. 1992) (treating the state and federal rights to privacy as indistinguishable because “[n]o Nebraska case recognizes a right to privacy, based on our Constitution, broader than the narrow federal constitutional right”).

<sup>129</sup> See Linda White Atkins, Note, *Federalism, Uniformity, and the State Constitution*—*State v. Gunwall*, 106 *Wh. 2d* 54, 720 *P.2d* 808 (1986), 62 *WASH. L. REV.* 569, 578-80 (1987) (listing the six criteria the *Gunwall* court used to decide when outcomes should be different based on a state constitution: textual language, significant differences in provisions, state constitutional and common law history, preexisting state law, differences in the structure of Constitutions, and matters of particular state or local concern). This paradigm is the inverse of that urged by Justice Brennan:

[S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees.

Brennan, *supra* note 115, at 502.

<sup>130</sup> 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). In using *Bowers* as an illustration, I in no way mean to imply that all of constitutional law can be reduced to this particular, or even some other particular, issue. *Bowers* merely illustrates how the general phenomenon of the federal constitutional gravitational force operates.

<sup>131</sup> *Id.*

to construe their own state constitutions more broadly in ways that would invalidate state sodomy statutes on state constitutional grounds. But, by and large, states did not. Rather, in the immediate aftermath of *Bowers*, states tended to hew closely to the Supreme Court's reasoning in *Bowers* when interpreting their own constitutions.

States' preference for following the Supreme Court's reasoning had interesting implications in Georgia because Georgia's constitution confers state privacy rights that are greater than those of the federal Constitution.<sup>132</sup> Thus, Georgia courts were free—even encouraged—to invalidate on state grounds the very statute *Bowers* upheld on federal grounds. Yet in *Christiansen v. State*, the Georgia Supreme Court upheld the constitutionality of Georgia's sodomy-solicitation statute on state constitutional grounds.<sup>133</sup> The state court could have found the statute constitutional simply by relying on the Georgia constitution and state court precedent. Instead the relatively short opinion relies primarily on *Bowers* to find that “the proscription against sodomy is a legitimate and valid exercise of state police power in furtherance of the moral welfare of the public. Our constitution does not deny the legislative branch the right to prohibit such conduct.”<sup>134</sup> Other state courts construing sodomy statutes in the immediate aftermath of *Bowers* treated it with similar gravitas.<sup>135</sup>

A few states did reject *Bowers*. In *Commonwealth v. Wasson*, the Kentucky Supreme Court held Kentucky's sodomy statute unconstitutional under its state constitution.<sup>136</sup> But even *Wasson* is evidence of *Bowers*'s pull. The Kentucky

<sup>132</sup> GA. CONST. art. I, § 1, para. I; *Christiansen v. State*, 468 S.E.2d 188, 189 (Ga. 1996) (“[W]e have determined that certain provisions of the 1983 Georgia Constitution confer greater rights and benefits than the federal constitution.”).

<sup>133</sup> *Christiansen*, 468 S.E.2d at 190 (“[The sodomy statute] does not violate the right to privacy under the Georgia Constitution.”).

<sup>134</sup> *Id.* at 190. *But cf. id.* at 191 n.1 (Sears, J., dissenting) (chastising the court for “incorrectly consider[ing] Christiansen’s right to privacy argument in light of . . . *Bowers*”). Two years later, the Georgia Supreme Court revisited the issue and held its sodomy statute to violate the state constitutional right of privacy. *See Powell v. State*, 510 S.E.2d 18 (Ga. 1998). But, by then, the U.S. Supreme Court had decided *Romer v. Evans*, 517 U.S. 620 (1996), which expanded gay rights, indicating a shift in the Supreme Court’s jurisprudence with which *Powell* was more consistent. For a post-*Bowers* discussion, see *infra* text accompanying notes 210–23.

<sup>135</sup> *See, e.g., State v. Gray*, 413 N.W.2d 107 (Minn. 1987) (relying on *Bowers* to find Minnesota’s commercial-sodomy statute constitutional under the Minnesota constitution); *In re Opinion of the Justices*, 530 A.2d 21, 27 (N.H. 1987) (“The third question posed by the legislature is whether the proposed bill [banning same-sex couples from adopting] would violate any substantive right to privacy under either the State or Federal Constitution. We answer that it would not, resting our determination upon the United States Supreme Court’s decision in *Bowers* . . . .”); *cf. State v. Smith*, 766 So.2d 501, 508–10 (La. 2000) (relying on *Bowers* to find Louisiana’s sodomy-solicitation statute constitutional under the Louisiana constitution). Of course, instances of true state independence exist. *See, e.g., Campbell v. Sundquist*, 926 S.W.2d 250, 259–61 (Tenn. Ct. App. 1996) (holding Tennessee’s prohibition on “Homosexual Acts” unconstitutional under the Tennessee Constitution while relying primarily on state law and appropriately asserting that *Bowers* does not control).

<sup>136</sup> 842 S.W.2d 487 (Ky. 1993).

court discussed or quoted *Bowers* a dozen separate times throughout its decision, both to distinguish the case and to attack it as wrongly decided.<sup>137</sup> Further, the two dissents in *Wasson* extensively engage *Bowers* for support.<sup>138</sup> The takeaway is that *Bowers* cast a long shadow in all three opinions. *Wasson* purportedly was decided under the Kentucky state constitution, but the court struggled mightily to adhere to state law and policy in the face of *Bowers*.

*Bowers*, of course, was not the last word on gay rights, and I will address some of the post-*Bowers* developments in Part II.<sup>139</sup> But *Bowers* was the last rights-restrictive decision on gay rights issued by the Supreme Court, and, despite its nonpreemptive status, for a decade it exerted a powerful force against state expansion of gay rights.<sup>140</sup>

States' voluntarily following of federal constitutional law, federal statutory law, and federal procedural law illustrates the gravitational force of federal law. In Part II, I theorize some explanatory vectors behind that gravitational force.

## II. EXPLANATORY VECTORS

This Part considers the reasons behind federal law's gravitational force and why it is so persistent across different areas of the law and institutional actors. The most benign explanation is that federal law gets the law right first, and state actors, realizing this, follow as a matter of agreement and judgment. Were this *Swiftian* ideal true,<sup>141</sup> perhaps first-year law students (not to mention distinguished federal judges) might be saved from the many tribulations of the *Erie* doctrine.<sup>142</sup>

But common sense, localism, and history all undermine confidence that federal law frequently gets things correct for the states. Further, states often follow federal law without much explanation of their reasoning.<sup>143</sup> When states do explain, their explanation is almost always "because federal law says so."<sup>144</sup>

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<sup>137</sup> *Id.* at 489-91, 493, 497-99 ("We view [*Bowers*] as a misdirected application of the theory of original intent."). The court purported to "discuss *Bowers* in particular, and federal cases in general, not in the process of construing the United States Constitution or federal law, but only where their reasoning is relevant to discussing questions of state law." *Id.* at 489. But in fact, the court's extensive analysis of *Bowers* suggests that the court went far beyond what was necessary to decide the case under the state constitution.

<sup>138</sup> *Id.* at 503-09 (Lambert, J., dissenting); *id.* at 509-20 (Wintersheimer, J., dissenting).

<sup>139</sup> See *infra* text accompanying notes 210-23.

<sup>140</sup> See Matthew Coles, *The Meaning of Romer v. Evans*, 48 HASTINGS L.J. 1343, 1357 (1997) (explaining how *Bowers* became the "five hundred pound gorilla of constitutional law and sexual orientation" because of its status as governing law and its pervasive "tone"); Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817, 832-34, 844-45, 851-57 (2014) (giving a broader overview of the gay rights movement beginning in the 1990s).

<sup>141</sup> *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

<sup>142</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

<sup>143</sup> See *supra* Part I.

<sup>144</sup> See *supra* Part I.

This heavily contrasts with states' detailed analyses for rejecting federal law.<sup>145</sup> As a result, explanations for state isomorphism generally, and in specific instances, need deeper theorizing.<sup>146</sup> This Part unearths a number of practical and political explanations for federal law's gravitational pull on the states.<sup>147</sup>

#### A. Resource Conservation

Maintaining a workable legal system, which is a role co-performed by the courts, can be both difficult and time consuming. Why reinvent the wheel? If a federal institution adopts a workable (or at least defensible) regime or interpretation of federal law, states could co-opt that solution with little effort and expense. It is cognitively easier and simpler for states to follow a trodden path of federal law than to blaze a new trail. Further, federal models offer a non-diminishing public good that can be consumed equally and without rivalry by all states. In a world where states have scarce resources, piggybacking on the efforts and insights of federal actors seems sensible and even economically desirable.

These practical pressures increase exponentially as they trickle down through the legislation-interpretation process. If state lawmakers and rulemakers ride on the coattails of the rigorous and detailed work of Congress and federal rulemakers, they are likely to record less debate, perform less independent factfinding, and produce less legislative and rulemaking history. When state courts then confront interpretive questions, they lack the useful tools of legislative or rulemaking study and history to which federal courts routinely have access.<sup>148</sup> The lack of independent state-based interpretative guidance

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<sup>145</sup> See *supra* Part I.

<sup>146</sup> The sociological literature defines isomorphism as the tendency of like institutions to adopt like organizational structures, often mimetically. For seminal work on non-optimizing isomorphism, see Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147 (1983). The literature focuses on organizational structure rather than the legal pronouncements of state and federal institutions, though at least one study of horizontal state differentiation exists. See Frederick J. Boehmke & Richard Witmer, *Disentangling Diffusion: The Effects of Social Learning and Economic Competition on State Policy Innovation and Expansion*, 57 POL. RES. Q. 39 (2004) (highlighting that economic competition diffusion affects both policy innovation and expansion).

<sup>147</sup> I do not hazard guesses about specific explanations for specific instances of state following, nor do I undertake the very complicated analyses for why some states follow a specific federal law and others resist, or for establishing the conditions under which a specific state might follow. But one aim of this Article is to set the theoretical framework for thinking about how further empirical research might tackle those questions.

<sup>148</sup> See Michael Esler, *State Supreme Court Commitment to State Law*, JUDICATURE, July–August 1994, at 25, 31 (“[T]he general lack of historical records on the events and forces that shaped state constitutions creates problems for judges who wish to develop state laws.”); Mazzone, *supra* note 127, at 1061 (“State judges have largely lacked the tools to develop an independent body of state

increases the burdens on state courts to conduct independent analysis. At the end of the day, perhaps state courts are simply relieved to have the opportunity to crib from a learned and detailed federal opinion, even if the federal opinion speaks only to federal law.

Further, because state courts are able to adjudicate matters of federal law,<sup>149</sup> plaintiffs can join analogous state and federal claims in one action. A state judge confronting a case requiring adjudication of both federal and analogous state law will find it far easier to dispose of both claims on the same grounds than to differentiate between them, doubling time and effort. Of course, savvy defendants may remove a state court action containing both state and federal claims to federal court, or a plaintiff may file in federal court originally.<sup>150</sup> But the pressures on state judges to adjudicate analogous claims under like standards will push federal judges in the same way: to apply federal standards to analogous state claims. Either way, state law gets pulled into the shadow of analogous federal law.

Resource conservation may help explain a great deal of state following in the statutory and constitutional arenas.<sup>151</sup> Because the Supreme Court is the last and official word on the scope of the U.S. Constitution and on the constitutionality, validity, and meaning of federal statutes, its interpretative decisions on matters of federal law can be perceived by states to create a presumption of validity for analogous state court decisions. In *Bowers*, for example, the Supreme Court concluded that because homosexual sodomy was not a “fundamental” right “deeply rooted” in the traditions of society, it was not a right subject to “heightened scrutiny” by the U.S. Constitution.<sup>152</sup> It is no surprise that the Georgia Supreme Court took advantage of the ease of applying this line of reasoning to its state sodomy-solicitation statute under the Georgia Constitution.<sup>153</sup> The *Bowers* opinion served up an easily traceable pattern stamped with the Supreme Court’s approval. To write differently—as the dissenting Georgia justices did—would have required much more effort

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constitutional law.”). *But see* WILLIAMS, *supra* note 121, at 319 (contending that some “state constitutional history is . . . much more available than federal constitutional history”).

<sup>149</sup> Congress has excluded state jurisdiction in only a few areas of federal law. *See, e.g.*, 28 U.S.C. § 1338 (2012) (granting exclusive original jurisdiction to federal district courts over civil suits on patents, copyrights, and trademarks).

<sup>150</sup> *See* 28 U.S.C. § 1441(a) (2012) (permitting defendants to remove a suit from state court to federal court if the federal court has original jurisdiction over the suit).

<sup>151</sup> *See generally* GARDNER, *supra* note 115, at 50 (arguing that the costs of state constitutional following are low); Friedman, *supra* note 115, at 797 (theorizing that the costs of independent state constitutional interpretation may be dauntingly high).

<sup>152</sup> *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>153</sup> *See* *Christiansen v. State*, 468 S.E.2d 188 (Ga. 1996).

(as their much longer opinion suggests it did).<sup>154</sup> The same cost-avoidance tendency holds true for matters of statutory law.

This resource-conservation theory of state following might also explain some instances of state procedural divergence. The states that least incorporate the Federal Rules of Civil Procedure are primarily large, resource-rich, independently minded states that can more easily absorb the cost of promulgating their own rule systems.<sup>155</sup> Even for traditional followers, the cost of repeat following might exceed the cost of standing still if federal law changes too rapidly. This may explain why replica states have not kept pace with the frequent changes in the Federal Rules;<sup>156</sup> it is easier for rulemakers to remain inert than to issue conforming amendments every year.

### B. Vertical Uniformity

An obvious rationale for state following is to reap the benefits of uniformity. At the horizontal federal level, uniformity has long played a powerful role in shaping federal institutional structure and jurisprudence.<sup>157</sup> As Richard Fallon argues, uniform treatment, interpretation, and application of federal law are closely tied to notions of legal and governmental legitimacy.<sup>158</sup> In perhaps an overstatement, Thomas Wall Shelton, seeking passage of a bill to provide for federal procedural uniformity, said, “[Uniformity is] so splendid, so beautiful and so beneficial in every respect, as to command unstintedly the loving labor, time and treasure of the best men of this marvelous age in which we live.”<sup>159</sup>

Vertical uniformity stands on somewhat different footing. Uniformity within a single legal regime has a stronger case than uniformity across two independent regimes. Nevertheless, vertical uniformity has long been considered a jurisprudential virtue because it offers: (1) predictability within a particular

<sup>154</sup> See *id.* at 190-99 (Sears, J, dissenting and Hunstein, J, dissenting).

<sup>155</sup> Oakley & Coon, *supra* note 16, at 1426 (highlighting that states with large populations are “less likely to have systematically modeled their civil procedures on the Federal Rules”).

<sup>156</sup> Oakley, *supra* note 19, at 355. Still, it is noteworthy that even given the pressure to keep pace, Oakley found that 66% of the five selected amendments to the Federal Rules of Civil Procedure from 1980 to 1991, and more than 25% of the 1993 federal amendments, were adopted by the states studied. *Id.* at 382.

<sup>157</sup> See Anthony J. Bellia Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1553 (2006) (arguing that federal law should be uniformly interpreted in state and federal courts); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 BYU L. REV. 67, 83-84 (arguing that federal courts should strive for “uniformity in the interpretation and application of federal law”); Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1812 n.451 (1991) (“[W]e do have a single federal judicial system in which uniformity is a prominent aspiration.”). *But see generally* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (questioning the virtues of horizontal federal uniformity).

<sup>158</sup> Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1794-96 (2005).

<sup>159</sup> Thomas W. Shelton, *Uniformity of Judicial Procedure and Decision*, LAW STUDENT’S HELPER, Oct. 1914, at 5, 9.

geographic region; (2) simplicity, clarity, and efficiency by reducing variation; (3) the appearance of neutrality; and (4) the enhancement of reputation by evincing unanimity and consistency.<sup>160</sup> Indeed, the prevalence of “uniform” codes, “model” codes, and “restatements” designed to encourage uniformity across fifty different sovereigns is a manifestation of law’s push toward uniformity across independent regimes.<sup>161</sup>

In the procedural context in particular, “uniformity enjoys virtually universal approval,”<sup>162</sup> and one possible explanation for state procedural following is the desire to promote vertical procedural uniformity within a state. States have no power to change the procedure followed by federal courts in their states, and federal actors are unlikely to dismantle the horizontal uniformity of federal procedure in ways that allow federal procedure to mirror the various state procedures.<sup>163</sup> So a state that considers vertical uniformity important might rationally seek to adopt state procedures that mimic federal procedures.

Vertical procedural uniformity surely has its benefits.<sup>164</sup> Attorneys practicing within a state need only learn one kind of procedure. The breadth of concurrent subject-matter jurisdiction ensures that there will be some overlap between the set of attorneys appearing before state courts and the set of attorneys appearing before federal courts in their state. It is simpler and easier for attorneys, and cheaper and less risky for clients, for the procedural rules among state and federal courts within a single state to be uniform.<sup>165</sup>

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<sup>160</sup> See Main, *supra* note 20, at 311-12; see also Chen, *supra* note 45, at 1462-64 (justifying procedural uniformity for reasons of “[p]redictability of result,” “[c]onsistent administration of justice,” “[r]efinement and quality,” and “[c]ost and efficiency”).

<sup>161</sup> For example, most states have modeled their professional ethics rules on the American Bar Association’s nonbinding Model Rules of Professional Conduct. See MARGARET RAYMOND, *THE LAW AND ETHICS OF LAW PRACTICE* 11 (2009) (noting that the ABA’s goal was to create a useful template for jurisdictions and encourage uniformity). According to the ABA, “California is the only state that does not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct.” *Model Rules of Professional Conduct*, ABA, [http://www.abanet.org/cpr/mrpc/model\\_rules.html](http://www.abanet.org/cpr/mrpc/model_rules.html) [<http://perma.cc/V37E-HVYB>] (last visited Nov. 21, 2015).

<sup>162</sup> Main, *supra* note 20, at 312.

<sup>163</sup> Despite recognition that local rules and court discretion allow the uniformity of federal procedure, see *infra* note 173, and despite calls for limited rethinking of the transsubstantivity of federal procedure, see, e.g., Stephen N. Subrin, *Fudge Points and Thin Ice in Discovery Reform and the Case for Selective Substance-Specific Procedure*, 46 FLA. L. REV. 27 (1994), and despite sporadic instances in which federal procedure incorporates state procedural rules, see, e.g., *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), no one advocates for a return to the era of the Conformity Acts, which generally required a federal court to apply the state procedure applicable in the state in which it sat, see Conformity Act of 1872, ch. 255 § 5, 17 Stat. 196, 197.

<sup>164</sup> See Koppel, *supra* note 8, at 1174 (arguing that intrastate uniformity of discovery rules is a desirable goal achievable through states’ willingness to follow federal procedure); Subrin, *supra* note 24, at 2001 (noting that the primary goal of uniform rules should be to resolve similar cases in an efficient manner).

<sup>165</sup> See, e.g., Koppel, *supra* note 8, at 1194 (“Civil litigation in state and federal courts is increasingly national and international in scope, crossing state lines as well as national boundaries.

Vertical procedural uniformity also inhibits vertical forum shopping. In cases of concurrent subject-matter jurisdiction, either party usually can select to litigate in federal court.<sup>166</sup> Although the substantive law generally will be the same in either forum, each forum applies its own procedure, which may induce forum shopping for the most favorable procedure.<sup>167</sup> The greater the degree of uniformity between federal and state procedures, the less likely procedural rules will be the basis for vertical forum-shopping by the parties.

The promise of these benefits offers some explanation for the state procedural following observed in Part I. The proliferation of state procedural rules mirroring the Federal Rules in the decades immediately following the Federal Rules' adoption is consistent with a desire to promote intrastate procedural uniformity to simplify matters for the local bar and dissuade vertical forum shopping. These goals are also consistent with the effort of state courts that have followed the Supreme Court's new pleading standards and with Professor Main's finding that state courts attempt to conform state procedural practice to federal procedural practice, even when state rules differ textually from federal rules.<sup>168</sup>

The realities of procedural uniformity also help explain some state divergence from the federal lead. Vertical procedural uniformity is relatively easy to achieve if federal procedure is static, or at least changes gradually and predictably; it is far more difficult to maintain, as a practical and political matter, if federal procedural changes are rapid, are numerous, are novel, or themselves erode uniformity. Federal rulemakers are active; despite the difficulty of

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For this reason, the aesthetic of the national procedural uniformity that produced the Federal Rules in 1938 is even timelier today than it was in the first third of the Twentieth Century and is applicable to both state and federal procedure." (footnotes omitted)). *But see* Frost, *supra* note 157, at 1600 (arguing that "predictability and uniformity need not go hand-in-hand" and are not necessarily compromised by variation in procedure).

<sup>166</sup> There are some exceptions, such as substantive areas of exclusive jurisdiction and areas of removal asymmetry. *See, e.g.*, 28 U.S.C. § 1338 (2012) (providing exclusive federal jurisdiction for patents); *id.* § 1441(b) (prohibiting a forum defendant from removing a diversity case); *Ankenbrandt v. Richards*, 504 U.S. 689, 701-03 (1992) (discussing states' exclusive jurisdiction for the issuance of marriages and divorces).

<sup>167</sup> *See, e.g.*, *Shady Grove Orthopedic Assocs. v. Allstate Ins.*, 559 U.S. 393 (2010). *But cf.* John Hart Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 710 (1974) ("[F]orum shopping is not an evil per se. It is evil only if something evil flows from it . . .").

<sup>168</sup> *See* Main, *supra* note 20, at 370-71 (theorizing that intrastate procedural uniformity may arise despite differing rule texts because of the force of "local legal culture," the "composite of shared norms, experiences, expectations and values of lawyers, judges and other institutional forces . . . that, while not necessarily reflected in the textual rules, nonetheless inhere in the standards that are applied"); *see also* Oakley, *supra* note 19, at 384 ("It may be that the role of formal rules has been exaggerated, and that 'local legal culture' is more important in determining how procedure works at the grass roots level, whether in a federal courtroom or a state one.").



implementing dramatic rule amendments,<sup>169</sup> the Federal Rules of Civil Procedure are amended almost every year, often in numerous ways, and some of the amendments represent significant innovation (such as the waiver rule for service under Rule 4 and the “safe harbor” provision of Rule 11).<sup>170</sup> States are hard-pressed to keep up, especially if interest groups with localized lobbying power contest the procedural issues under consideration.<sup>171</sup> States also may genuinely wish to delay adopting proposed rules for a time to see how such experimental rules play out, especially in today’s data-driven society. Further, federal amendments have tended to favor judicial discretion and flexibility, resulting in judge-specific and case-specific application of the rules in federal court.<sup>172</sup> The widespread adoption of local rules has eroded horizontal uniformity on the federal level.<sup>173</sup> As federal procedure moves away from its origins, and as it cultivates disuniformity even among federal cases, the states’ ability to mimic federal procedure flags.<sup>174</sup> The practical difficulty of keeping up may help explain why, in recent years, state following at the rule level has subsided. Like gravity itself, the linguistic and structural closeness of procedural regimes within the same state exert attractive force. As the distance of space and time widens, the attraction abates.<sup>175</sup>

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<sup>169</sup> See Mark R. Kravitz, *To Revise, or Not to Revise: That Is the Question*, 87 DENV. U. L. REV. 213, 216-17 (2010) (noting that amendments to the Federal Rules of Civil Procedure are products of time-consuming research, conferences, and hearings).

<sup>170</sup> See, e.g., FED R. CIV. P. 4; FED R. CIV. P. 11.

<sup>171</sup> See Koppel, *supra* note 8, at 1188 (observing the localized political influence of the plaintiffs’ bar in state legislatures); Roger Michael Michalski, *Tremors of Things to Come: The Great Split Between Federal and State Pleading Standards*, 120 YALE L.J. ONLINE 109, 113 (2010) (“Interest groups lobby rulemakers and legislators to create or preserve procedural advantages. The political successes of these interest groups further undermined national procedural uniformity.”).

<sup>172</sup> See generally Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561 (2003).

<sup>173</sup> Scholars have observed and lamented this fracturing of federal procedure. See Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 937-38 (1996) (noting increased “erosion of the final decision requirement” in federal courts that adopt local rules); Koppel, *supra* note 8, at 1171-72 (recognizing widespread scholarly criticism of the “movement to location” in federal procedure); Michalski, *supra* note 171, at 113 (detailing the detriment caused by the divergence of pleading standards in state and federal courts); Subrin, *supra* note 24, at 2024-26 (suggesting that the adoption of local discovery limitations by federal courts may result in disparate treatment of parties); Carl Tobias, *A Civil Discovery Dilemma for the Arizona Supreme Court*, 34 ARIZ. ST. L.J. 615, 615 (2002) (observing the accelerating number of procedural changes and growing inconsistency of requirements caused by “the growing balkanization of federal civil procedure”); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 579 (2002) (calling on the legislature to restore “the primacy of all federal rules that govern civil, appellate, bankruptcy, criminal, and admiralty procedure”); see also WRIGHT & KANE, *supra* note 21, at 433 (arguing that the proliferation of local rules is a “threat to uniformity throughout the country”).

<sup>174</sup> See Michalski, *supra* note 171, at 114 (observing that because uniformity is a path-dependent good, initial state divergence makes further divergence more likely).

<sup>175</sup> Cf. Oakley, *supra* note 19, at 355 (finding, in a 2002 survey of state procedural following in the wake of FRCP amendments made between 1990 and 1993, that state rulemakers were less and less likely to adopt state analogues to federal rule amendments). Still, it is noteworthy that even

For these reasons, state interest in vertical procedural uniformity likely plays some role in explaining both the general tendency of state actors to mimic federal procedures and the increasing disinclination of state rulemakers to follow recent federal procedural rule amendments.

For similar reasons, the quest for vertical uniformity may help explain states' tendency to follow substantive law. Statutory conformity avoids imposing conflicting directives for primary actors and simplifies understanding of rights and obligations.<sup>176</sup> For example, Pennsylvania's Human Relations Act contains a term of art—"bona fide occupational qualification," or BFOQ—which is also found in Title VII.<sup>177</sup> Pennsylvania state courts quickly decided to read the act's BFOQ definition in harmony with Title VII, though that conclusion was not compelled by the text, explaining, "This is the only reasonable, workable method, through hand-in-hand working of the state and federal government, that will carry us to a practical interpretation of this important exception."<sup>178</sup>

Vertical uniformity also shows commitment to a common cause in both statutory and constitutional law.<sup>179</sup> Thus, for example, in employment discrimination, state legislatures might choose to mimic Congress not because they believe the precise language of a federal statute is the best approach, but because mimicry enables states to claim equal footing with federal law. Finally, state legislatures and judges might seek substantive vertical uniformity in order to reduce forum shopping.<sup>180</sup>

For these reasons, state interest in vertical uniformity likely provides some explanation for the gravitational force of federal law.

### C. Familiarity and Focus

American legal traditions historically have focused on federal law at the expense of state law. This skewed focus toward federal law manifests itself in several ways.

First, judges and lawyers are trained in federal law.<sup>181</sup> Outside doctrinal areas without federal analogues like contract law and tort law, law schools

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given these pressures, 66% of the 1980 to 1991 federal amendments, and more than 25% of the 1993 federal amendments, were adopted by the states studied. *Id.* at 382.

<sup>176</sup> Long, *supra* note 79, at 478, 505-06.

<sup>177</sup> 43 PA. CONS. STAT. § 955; 42 U.S.C. § 2000(e)-2(e) (2012).

<sup>178</sup> *City of Philadelphia v. Pa. Human Relations Comm'n*, 300 A.2d 91, 101 (Pa. Commw. Ct. 1973).

<sup>179</sup> Goldfarb, *supra* note 81, at 90 (stating that, in civil rights law, "both federal and state law play leading roles").

<sup>180</sup> Long, *supra* note 79, at 505-06.

<sup>181</sup> Organizational sociology recognizes the normalizing force of common schooling. See DiMaggio & Powell, *supra* note 146, at 152 ("Universities and professional training institutions are important centers for the development of organizational norms among professional managers and their staff . . . . Such mechanisms create a pool of almost interchangeable individuals who occupy similar positions across a range of organizations and possess a similarity of orientation and

typically require or emphasize federal law courses. Schools require federal civil procedure and federal constitutional law, and offer courses in employment discrimination, tax, evidence, administrative law, environmental law, and many other areas focus on federal law.<sup>182</sup> The multistate bar exam requires knowledge of federal civil procedure, federal evidence, and federal constitutional law,<sup>183</sup> and more than a dozen states have adopted the Uniform Bar Exam to reduce or even replace the need to test state-specific law.<sup>184</sup> Federal judges hire students and recent graduates as interns and judicial clerks. Once in practice, all but the most local practices have interactions with federal law, and even attorneys focusing solely on state law continue to receive federal-law schooling through continuing legal education courses and interactions with federal practitioners and federal judges in their local bar associations.<sup>185</sup> In short, few members of the state bench and bar are not well-versed in the federal law analogues of state law.<sup>186</sup>

Second, lawyers often frame claims under federal law rather than state law in order to take advantage of the national application of federal law. It is a

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disposition that may override variations in tradition and control that might otherwise shape organizational behavior.”). For an exploration of how this idea applies to state constitutional law, with a discussion of the special role of political parties, see Gardner, *supra* note 118, at 59-60.

<sup>182</sup> See, e.g., Arthur Earl Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95, 99 (1982) (“[M]ost professors of administrative law study only federal law, write only on federal law, and teach only federal law.”); Jennifer Friesen, *Adventures in Federalism: Some Observations on the Overlapping Spheres of State and Federal Constitutional Law*, 3 WIDENER J. PUB. L. 25, 32 (1993) (criticizing law schools for the lack of state law education); Mazzone, *supra* note 127, at 1063 (advocating for increased recognition of the important role of state courts in advancing federal constitutional law); Williams, *supra* note 115, at 164 (“Very few courses on state constitutional law are offered, and the basic federal constitutional law courses do not highlight state constitutions.”). Bonfield blames this pedagogical focus on “a public fascination with the role of the national government in public law,” a “prevalent but rarely expressed assumption that federal law is inherently superior to state law in the administrative law area,” and law professors’ limited experiences practicing state law. Bonfield, *supra*, at 98. But see Richard J. Pierce, Jr., *How Much Should an Administrative Law Course Accomplish?: A Response to Schotland’s Five Easy Pieces*, 43 ADMIN. L. REV. 123, 124 (1991) (asserting that he “learned nothing” from studying state administrative decisionmaking that is “generalizable” or that was “not available through study of federal agencies”). One notable exception is criminal law, which has strong state-law representation in law schools.

<sup>183</sup> See 2016 MBE Subject Matter Outline, MULTISTATE B. EXAMINATION, <http://www.ncbex.org/about-ncbe-exams/mbe/overview-of-the-mbe> [<http://perma.cc/LRE8-K6GL>] (last visited Nov. 21, 2015).

<sup>184</sup> See *Uniform Bar Examination*, NAT’L CONF. B. EXAMINERS, <http://www.ncbex.org/exams/ube> [<http://perma.cc/8SK8-P9V8>] (last visited Nov. 21, 2015).

<sup>185</sup> Main, *supra* note 20, at 374 (“Federal and state bar associations within a locality are—if not the same attorneys—members of the same law firms, committees and organizations; they are graduates of the same law schools; they attend the same continuing legal education classes; and they navigate through the same social circles . . . . After all, federal and state judges were likely drawn from the local bar and thus, may share those similarities of culture already discussed.”).

<sup>186</sup> Possible exceptions include state prosecutors and criminal-defense attorneys, but they must also contend with federal constitutional law. See U.S. CONST. amends. V-VIII (offering federal constitutional rights to state criminal defendants).

bigger, and potentially easier, win for a cause to succeed at the national level in one fell swoop than to have to litigate state claims in all fifty states.<sup>187</sup> For example, disability-rights groups have focused on federal statutory law, to the marginalization of state law.<sup>188</sup> The result of this focus is that both state and federal judges become more accustomed to construing controversial matters of federal law than state law.<sup>189</sup> Any state law issues that arise enter a conversation so steeped in federal terms that lawyers and jurists tend to raise and address those state issues in federal terms.<sup>190</sup>

Third, expansive doctrines of federal subject-matter jurisdiction give federal judges ample, at times even primary, opportunity to interpret state law from a federal-law focus. I have already discussed the efficiency and cognitive-simplicity pressures on judges to decide analogous claims similarly. Federal judges are particularly likely to approach analogous state claims with federal law in mind, and the law gives them much opportunity to do so. The Supreme Court's *Grable* doctrine makes state claims with certain embedded federal issues eligible for federal-question jurisdiction.<sup>191</sup> Supplemental jurisdiction gives federal courts subject-matter jurisdiction over any state claim that is substantially related to a joined federal claim.<sup>192</sup> And if plaintiffs do not file such mixed cases in federal court, defendants are likely to remove them to federal court.<sup>193</sup> Siphoning state claims away from state courts has the additional effect of placing the primary burden of developing precedent for those claims on federal courts, leaving state court precedent underdeveloped and dependent upon federal court precedent.

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<sup>187</sup> See WILLIAMS, *supra* note 121, at 130-31 (describing the difficulty of applying state as opposed to federal constitutional arguments).

<sup>188</sup> See Michael E. Waterstone, *Disability Constitutional Law*, 63 EMORY L.J. 527, 529 (2014) (“[T]oday the key tool for disability rights is litigation under federal statutes.”).

<sup>189</sup> Causes tend to be advanced by repeat players, and that repetition might be a non-gravitational factor. For example, the U.S. Chamber of Commerce is commonly known to be a repeat litigant in many state and federal courts, and a repeat lobbyist before both state legislatures and Congress, and its message is relatively consistent. No doubt the consistency of such repeat players' efforts results in pressure on lawmakers and courts to resolve issues in a similar way. Lawrence Hurley, *Insight: Chamber of Commerce Turns to Small Courts for Big Wins*, REUTERS, (Sept. 23, 2013), <http://reuters.com/article/2013/09/23/us-usa-legal-chamber-insight-idUSBRE98M04P20130923> [<http://perma.cc/9CJW-DJBB>].

<sup>190</sup> Cf. Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 403 (1984) (“[T]he dominance of the federal constitutional law point of view, and more specifically, Supreme Court decisions, in present thought about constitutional law. State constitutional law questions continue to be filtered almost exclusively through the federal constitutional law perspective.”).

<sup>191</sup> *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

<sup>192</sup> 28 U.S.C. § 1367(a) (2012).

<sup>193</sup> See Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 581 (1998) (explaining that one incentive for removal is that it defeats “plaintiffs' forum advantage . . . [and] thereby shift[s] the biases, inconveniences, court quality, and procedural law in [the defendants'] own favor”).

Fourth, federal law gets attention because it is viewed as more prestigious. News agencies cover federal law. Legal academics focus on federal law, to the scholarly impoverishment of state law.<sup>194</sup> State judges position themselves for appointment to the federal bench. State legislators run for Congress. Governors hope to be President. Practitioner prestige centers around big, interstate firms with national practices. Law students prefer federal clerkships to state clerkships. Today, in virtually every legal position, state-focused lawyers look to move *up* to federal-focused positions. The U.S. Constitution has achieved almost religious significance.<sup>195</sup> And at the pinnacle of legal prestige is the U.S. Supreme Court, which commands the utmost gravitas.<sup>196</sup> Federal law is prestigious, pervasive, and highly visible.<sup>197</sup> It exhibits high expressive value.<sup>198</sup> It is no wonder then that state actors are drawn to it.

#### D. Political Cover

Compared to the justices on the Supreme Court, state judges are in a precarious position. State court opinions can be overturned by the Supreme Court, by federal law, or by state law. Most state constitutions are easier to amend than the U.S. Constitution, and some are notoriously easier.<sup>199</sup> These situations present a substantial risk that a state judge's decision will be nullified or, worse, reversed as wrongly decided.<sup>200</sup> Further, state court decisions

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<sup>194</sup> See Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1105 n.228 (1981) (“[D]espite the increasing activism of some courts, the state judiciary remains at the periphery of the scholars’ vision.”).

<sup>195</sup> See Justin R. Long, *Are State Constitutions Un-American? Book Review*, Jeffrey M. Shaman, *Equality and Liberty in the Golden Age of State Constitutional Law* (2009), 40 RUTGERS L.J. 793, 793 (2009) (“Our secular scripture, the federal Constitution, retains a stranglehold on the constitutional imagination of the bench, bar, academy, and public.”); *id.* at 802-03 (describing federal ratification of “a set of symbols and ideas which, together, form a civic religion” of which the Constitution is the foremost relic).

<sup>196</sup> See WILLIAMS, *supra* note 121, at 185 (asserting that the Supreme Court’s interpretations of individual constitutional rights have an “overwhelming gravitational pull”); *cf.* Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380, 382 (1988) (“[W]e are becoming accustomed to the idea that the direction, the emphasis, even the mood of Supreme Court opinions is a kind of official orthodoxy binding on everyone else in the society.”).

<sup>197</sup> See Goldfarb, *supra* note 81, at 92 (“[E]ven aside from supremacy, federal law has a degree of visibility and persuasiveness that state law lacks.”); *see also* Susan Welch & Kay Thompson, *The Impact of Federal Incentives on State Policy Innovation*, 24 AM. J. POL. SCI. 715, 718 (1980) (exploring “pressures placed on states to conform to . . . national policy”).

<sup>198</sup> See generally RICHARD H. MCADAMS, *THE EXPRESSIVE POWERS OF LAW: THEORIES AND LIMITS* (2015).

<sup>199</sup> *Cf.* Mazzone, *supra* note 127, at 1063 (observing that state constitutions are “more likely to be amended in response to an adverse state court ruling”).

<sup>200</sup> For example, in *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981), the Florida Supreme Court interpreted the Florida Constitution more liberally than the U.S. Supreme Court had interpreted the federal Fourth Amendment. *Compare id.*, with *United States v. White*, 401 U.S. 745 (1971). Florida voters amended the Florida Constitution to require state courts to follow the Supreme Court’s interpretation of the federal Fourth Amendment (voters also amended the Florida Constitution to require state judges to

on state-law matters tend to implicate state-law concerns that resonate with state citizens and state officials. Even if not overturned, state court decisions may face intense criticism from these constituencies.

Were state judges to hold life tenure like federal judges, they might not care so tangibly about reactions to their decisions. But state judges do not have such job security. Political and institutional conditions keep them close to state politics.<sup>201</sup> Most state judges are elected by state voters; others are term appointed and reappointed by elected state officials.<sup>202</sup> From a career standpoint, state judges may care very deeply about how their decisions are perceived. State judges have been voted off the bench because of the opinions they signed.<sup>203</sup> Political and public backlash, then, is a real concern for many state judges.<sup>204</sup>

Following federal law and federal courts offers some cover against potential backlash.<sup>205</sup> Deciding an issue in tune with federal law allows state courts to shift responsibility to federal law or the U.S. Supreme Court.<sup>206</sup> State law decisions that deviate from federal law are more likely to be overruled than those that conform to federal law.<sup>207</sup> Part of the reason may be the belief among state courts that the Supreme Court's decision on an important or policy-laden matter of

follow Supreme Court federal Eighth Amendment precedent). See Marks, *supra* note 122, at 703-04, 711-12. California has experienced similar events. See Mazzone, *supra* note 127, at 1055.

<sup>201</sup> See David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 267-68 (2008).

<sup>202</sup> *Id.*

<sup>203</sup> See, e.g., Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 737 n.144 (1995) (documenting the 1986 defeat of Chief Justice Rose Bird and two associate justices of the California Supreme Court in a retention election for setting aside death penalties); A. G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES (Nov. 3, 2010), [http://www.nytimes.com/2010/11/04/us/politics/04judges.html?\\_r=0](http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=0) [<http://perma.cc/5QPA-JWJK>] (recounting the story of three Iowa justices voted off the bench in reaction to their decision allowing same-sex marriage).

<sup>204</sup> See Mazzone, *supra* note 127, at 1051-53. It can be difficult to predict when voter or political backlash against judicial opinions might occur. See SHAMAN, *supra* note 123, at 252 (noting the absence of voter backlash to state constitutional interpretations expanding abortion and same-sex rights in some states). All the more reason for the risk-adverse state judge to seek political cover whenever possible.

<sup>205</sup> See Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 247 (2014) ("Adopting a right-restrictive position might also be seen [by state judges] as the 'safest' position . . ."); Mazzone, *supra* note 127, at 1053-54.

<sup>206</sup> If state courts decide an issue without making clear that the opinion is based on state law, the Supreme Court will have appellate jurisdiction to review it as if the opinion were based on federal law. See *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) ("[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."). State courts thus must walk a fine line between blame shifting and opening themselves up to the threat of Supreme Court reversal. However, the Supreme Court's limited docket makes reversal highly unlikely, and, even if reversal occurs, the state court still escapes blame for the substantive result.

<sup>207</sup> See Williams, *supra* note 190, at 357.

federal law can reflect public sentiment in a way that gives state courts confronted with a similar issue comfort that their analogous resolution of state law will be politically safe. This explanation is especially powerful if the national sentiments reflected in the Supreme Court's opinion are mirrored in the particular state in which the state court sits.

Another part of the reason may be the political cost of rejecting the Supreme Court's view. In other words, even when the Supreme Court does not reflect public opinion—or at least the public opinion of a particular state court's state—the Supreme Court commands a level of gravitas that seems to generate an expectation of following absent compelling reasons for deviation. If a dropped rock falls to the ground, one needs no explanation, but if it defies gravity, one wonders what the hell is going on. Similarly, it is far easier for a state judge to tell voters that her opinion follows the reasoning of the Supreme Court than to try to explain why she diverged.<sup>208</sup>

These explanations seem to fit particularly well in certain matters of constitutional and statutory law. Recall the story of gay rights and *Bowers v. Hardwick* told in Part I.<sup>209</sup> Following *Bowers*—a rights-restrictive decision holding a state statute criminalizing consensual, private, adult sodomy valid under the Due Process Clause of the U.S. Constitution<sup>210</sup>—many state courts interpreted their state constitutions accordingly.<sup>211</sup> Indeed, despite its nonpreemptive and narrow holding,<sup>212</sup> *Bowers* was a major factor in the stagnation of gay rights over the next ten years.<sup>213</sup> In 1996, Congress passed, and President Bill Clinton signed, the Defense of Marriage Act (DOMA), which defined marriage for purposes of federal law as between one man and one woman and allowed states to refuse to recognize same-sex marriages validated elsewhere.<sup>214</sup> Immediately following the federal government's lead,

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208 This idea is roughly analogous to the theory in organizational sociology that isomorphism generates legitimacy for and enhances the reputation of the copier. See, e.g., DiMaggio & Powell, *supra* note 146, at 151-52 (theorizing that organizational isomorphism is a cheap way to gain legitimacy); Mark C. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, 20 ACAD. MGMT. REV. 571, 593-94 (1995) (arguing that imitation failures can decrease organizational legitimacy). For foundational work on organizational legitimacy, see generally TALCOTT PARSONS, *STRUCTURE AND PROCESS IN MODERN SOCIETIES* (1960); MAX WEBER, *ECONOMY AND SOCIETY* (Guenther Roth & Claus Wittich eds., Ephraim Fischhoff et al. trans., 1978).

209 See *supra* subsection I.B.2.

210 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

211 For my earlier discussion of *Bowers*, see *supra* text accompanying notes 130-40.

212 *Bowers*, 478 U.S. at 190 (noting that the case does not require a judgment about whether a state court may invalidate similar laws on state law grounds).

213 See, e.g., Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (“After *Hardwick* it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm.”).

214 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1996)), *invalidated in part by* United States v. Windsor, 113 S. Ct. 2675 (2013).

most states enacted mini-DOMAs restricting marriage under state law to opposite-sex couples.<sup>215</sup>

States that diverged by expanding gay rights under state law tended to be quickly reined in,<sup>216</sup> and, until very recently, significant popular backlash, both generalized and targeted, to state advances of gay rights was a real threat.<sup>217</sup> For example, in a widely reported retention election, three justices of the Iowa Supreme Court were voted down for retention primarily on the basis of an opinion they joined that required Iowa to recognize same-sex marriage. This was the first time an Iowa Supreme Court justice had ever been rejected for retention.<sup>218</sup>

It was not until the Supreme Court decided *United States v. Windsor*,<sup>219</sup> holding the federal Defense of Marriage Act unconstitutional under the Fifth Amendment, that states felt protected enough to begin advancing gay-marriage equality with vigor.<sup>220</sup> *Windsor*, of course, was purely an interpretation of federal law and went out of its way to note the federalism underpinnings that give states different prerogatives on defining marriage.<sup>221</sup> Yet even when not controlling, Supreme Court decisions offer states political cover. The Supreme Court of New Mexico, for example, relied on *Windsor* (and *Romer*, *Lawrence*, and *Loving*<sup>222</sup>) in construing its own state constitution to guarantee marriage

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<sup>215</sup> See *Same-Sex Marriage Laws*, NAT'L CONF. ST. LEGISLATURES (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx> [<http://perma.cc/BP97-NS3Q>] (noting that before October 6, 2014, thirty-one states had statutory or constitutional provisions that defined marriage as between a man and a woman).

<sup>216</sup> See, e.g., *Baehr v. Lewin*, 852 P.2d 44, 68 (Haw. 1993) (holding restrictions on gay marriage presumptively unconstitutional under the Hawaii constitution), *superseded by* HAW. CONST. art. I, § 23 (abrogated 2015). Exceptions include *Goodridge v. Massachusetts Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), and *Baker v. State*, 744 A.2d 864 (Vt. 1999), which are decisions from liberal states whose polls showed meaningful support for gay marriage. See Carlos A. Ball, *The Backlash Thesis and Same-Sex Marriage: Learning from Brown v. Board of Education and Its Aftermath*, 14 WM. & MARY BILL RTS. J. 1493, 1501, 1529 (2006) (explaining that support for same-sex marriage in Massachusetts and Vermont was greater than in the rest of the country). But even Massachusetts felt political backlash. See *id.* at 1500-01 (describing the response of social conservatives in the federal government and the Massachusetts state government as "immediate and forceful"). The Massachusetts court in *Goodridge*, perhaps anticipating that backlash, relied heavily on whatever support it could find from the Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), even though those decisions did not, on their face, speak to state-law recognition of gay marriage. *Goodridge*, 798 N.E.2d at 948, 953, 958-59, 961-62.

<sup>217</sup> See Ball, *supra* note 216, at 1500-05, 1511-16, 1523; Franklin, *supra* note 140, at 844-45. For a seminal study of backlash, see MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004).

<sup>218</sup> Sulzberger, *supra* note 203.

<sup>219</sup> 133 S. Ct. 2675 (2013).

<sup>220</sup> See *Same-Sex Marriage Laws*, *supra* note 215.

<sup>221</sup> *Windsor*, 133 S. Ct. at 2691-92, 2696.

<sup>222</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).



equality.<sup>223</sup> Those Supreme Court cases did not demand the result the state court reached—indeed, they expressly disavowed any implications for it—but, as high-profile Supreme Court decisions, they no doubt gave the state court more security in reaching it.

The same scenario plays out in matters of statutory law that focus on sensitive policy issues. As one commentator has argued,

Simply stated, a state judge, despite having the inherent authority to construe a state statute in a manner inconsistent with federal law, may hesitate to announce to the world that a majority of the country's highest court got the issue wrong, either because the judge wants to avoid charges of judicial activism or out of respect for the reputation of the Supreme Court.<sup>224</sup>

Procedure cases offer a counterpoint. Much of procedure is apolitical.<sup>225</sup> Procedural choices often escape the attention of the lay public—and often of legislators. Rulemakers have, at least until very recently, been insulated from the kind of politics that dominate legislation.<sup>226</sup> States were procedural leaders for centuries before the adoption of the 1938 Federal Rules of Civil Procedure, so political cover is not a strong impetus for state following of federal procedure.<sup>227</sup> Of course, where federal procedure takes a decidedly provocative turn, such as through the revolutionary changes of 1938 or the widely maligned *Twombly* and *Iqbal* decisions, acceptance of those federal changes can offer political cover for states that follow them.<sup>228</sup> Political cover may thus offer some explanatory value for the following of replica states or those that have adopted *Twombly* and *Iqbal*.

In the run-of-the-mill procedure choices, however, there is far less political effect. Federal procedural law has no preemptive effect, and the Supreme Court cannot reverse a state court on an issue of state procedural

<sup>223</sup> See *Griego v. Oliver*, 316 P.3d 865, 870-72, 883-86 (N.M. 2013).

<sup>224</sup> Long, *supra* note 79, at 479.

<sup>225</sup> I mean this relatively. Politics can influence procedure but usually less frequently and less strongly than substantive law.

<sup>226</sup> See Richard Marcus, *Procedural Polarization in America?* (“One activity that might escape [political polarization] is the process of making procedure rules. In the U.S. federal courts, that process has been somewhat insulated from political pressures, and that insulation has largely been respected in recent decades.”), in 18 *ZZPINT: ZEITSCHRIFT FÜR ZIVILPROZESS INTERNATIONAL: JAHRBUCH DES INTERNATIONALEN ZIVILPROZESSRECHTS* 303, 303 (2013).

<sup>227</sup> See *id.* at 304 (explaining that until the adoption of the federal rules Congress directed those courts to follow the procedure used by the states in which they sat).

<sup>228</sup> This may help explain Oakley and Coon's findings that replica states tend to be less populous, while the most divergent states tend to be larger and more populous. See Oakley & Coon, *supra* note 16, at 1426. Legislators of big states, because of geographic dispersion and voter dilution, are less accountable to any particular faction and thus have greater political freedom to diverge.

law.<sup>229</sup> Procedural choices do not often generate front-page news.<sup>230</sup> I thus infer only weak explanatory power of political cover for the gravitational pull of federal procedure on states.

### E. *Force of Habit*

A final explanation for state following is behavioral path dependence.<sup>231</sup> In essence, following becomes a habit; following for a while makes following easier and more acceptable.

The history of state following is long. It is no surprise that state law, courts, and practice have always looked roughly the same (certainly compared to other countries). The common-law tradition in particular, in which states have been steeped for centuries, looks to build by horizontal following.<sup>232</sup> The famous 1928 “proximate cause” opinion *Palsgraf v. Long Island Railroad*,<sup>233</sup> for example, has been followed by nearly every state.<sup>234</sup> In procedural circles, the New York Field Code, adopted in 1848, quickly became the model for most states.<sup>235</sup>

The late 1930s marked a new era of following: vertical following. For the first time, federal courts had an independent, comprehensive, and uniform procedure. Federal statutory law exploded.<sup>236</sup> And the Supreme Court mounted a robust campaign of expanding federal regulatory power and federal constitutional rights, shutting out and constraining the states. On all fronts, federal law was flexing its muscles. These historical efforts shifted the balance of power and preeminence to the federal government and, particularly, to the Supreme Court. Federal law became the new leader.<sup>237</sup>

<sup>229</sup> See *Sun Oil Co. v. Wortman*, 486 U.S. 717, 722 (1988) (“Since the procedural rules of its courts are surely matters on which a State is competent to legislate, it follows that a State may apply its own procedural rules to actions litigated in its courts.”).

<sup>230</sup> See Marcus, *supra* note 226, at 303.

<sup>231</sup> For a sample of studies of behavioral path dependence in organizational sociology, see generally DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990); Jörg Sydow & Jochen Koch, *Organizational Path Dependence: Opening the Black Box*, 34 *ACAD. MGMT. REV.* 689 (2009).

<sup>232</sup> Williams, *supra* note 115, at 152.

<sup>233</sup> 162 N.E. 99, 99 (N.Y. 1928).

<sup>234</sup> See W. Jonathan Cardi, *The Hidden Legacy of Palsgraf: Modern Duty Law in Microcosm*, 91 *B.U. L. REV.* 1873, 1890 (2011).

<sup>235</sup> Subrin, *supra* note 12, at 939.

<sup>236</sup> See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 42-44 (1991).

<sup>237</sup> That is not to say that federal law always leads. See, e.g., *Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961) (incorporating the Fourth Amendment’s exclusionary remedy against the states based in part on a recognition that the California Supreme Court had adopted the exclusionary rule and deemed it to have been highly successful); see also *Atkins v. Virginia*, 536 U.S. 304, 313-17 (2002) (surveying states to determine when a right has been deemed so “fundamental” as to be protected under the federal Due Process Clause); *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989) (surveying states to determine when a punishment is so “cruel and unusual” as to be prohibited by the Eighth Amendment).

As part of this shift, the states found themselves with very little room to diverge from the advancement of federal substantive law. Under the Supremacy Clause, the Court's aggressive expansion of federal law and federal rights was binding on the states, such that the states had little more to do other than to rotely follow the Supreme Court.<sup>238</sup> This era inculcated a culture of following that led to the atrophy of the motivation of states to use state law independently.<sup>239</sup>

In the 1970s, the Burger Court began scaling back federal power and progressives like William Brennan turned to the states to urge independent enforcement of rights.<sup>240</sup> Yet after more than thirty years, the states were not used to developing state law independently.<sup>241</sup> As a result, "[t]he degree to which state courts have answered the call to action remains debatable" and seems, even today, to be characterized by default state following with pockets of exceptions.<sup>242</sup>

The force of habit may help explain why some states blindly followed the procedural decisions of *Twombly* and *Iqbal*. After 1938, when federal procedure came to the fore, state rulemakers followed the Federal Rules, and state courts followed the Supreme Court's *Conley* decision for decades.<sup>243</sup> The Supreme Court's shifts in *Twombly* and *Iqbal* were just new bends in a long-traveled road. Old habits can be hard to break.

Yet there is some evidence that those habits are cracking in certain places. Some state courts have resisted *Twombly* and *Iqbal*.<sup>244</sup> State rulemakers are less and less likely to adopt federal rule amendments.<sup>245</sup> States break more readily from constitutional decisions of the Supreme Court. It is unclear whether the gravitational pull of federal law is weakening or the willingness of states to resist is strengthening. For whatever reason, another watershed moment looms on the horizon: an opportunity to consider more fully the implications of state following, with the potential for meaningful implementation. It is to that question I now turn.

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<sup>238</sup> See Mazzone, *supra* note 127, at 1061 ("[A] legacy of historical trends . . . has turned state judges into expert and busy administrators of the Federal Constitution.").

<sup>239</sup> See Brennan, *supra* note 115, at 495 ("I suppose it was only natural that when during the 1960s our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions."). See generally Howard, *supra* note 119 (providing an overview of state activity on a number of rights).

<sup>240</sup> See, e.g., 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). A good summary of this history is provided in Blocher, *supra* note 119, at 335-37.

<sup>241</sup> See generally Howard, *supra* note 119.

<sup>242</sup> Blocher, *supra* note 119, at 338.

<sup>243</sup> See *supra* subsection I.A.2.a.

<sup>244</sup> See *supra* note 56.

<sup>245</sup> See, e.g., Oakley, *supra* note 19, at 355.

## III. NORMATIVE CONCERNS

This Part sketches some normative downsides of federal law's gravitational force, including its effects on interstate variation and fidelity to state law, sovereign reputation, and cyclical entrenchment. I do not mean to say that these downsides will or should always carry the day. Rather, I only identify them as necessary considerations in any normative debate about the gravitational force of federal law.

A. *Interstate Variation and Fidelity to State Law*

Whatever the virtues of vertical uniformity, they come at the expense of the countervailing virtues of variation, a system benefit.<sup>246</sup> States are, in Brandeis's words, laboratories of experimentation,<sup>247</sup> allowing a small part of the nation to experiment—risking potential failure for the accumulation of knowledge and the possible rewards of success—without damaging the whole. Unsure whether heightened pleading imposes too high of a hurdle for certain plaintiffs? A state can test it first. Think that society will be improved with greater abortion rights than federal law currently mandates? A state can try it out. Believe in expanded rights for disabled workers? A state can offer them. For those who find heterogeneity stimulating and beautiful, variation is its own reward. For those convinced by the virtues of homogeneity, allowing temporary, controlled, and collaborative variation may help achieve uniformity in a better form.<sup>248</sup>

Acceding to federal law's gravitational pull gives up on these system benefits. Federal law is nationally uniform. If each state pursues intrastate uniformity by following federal law, then state law will mimic federal law in all states, stagnating experimentation and evolution at both the intra- and interstate levels.

Variation also enhances fidelity to state law, akin to what Richard Fallon calls "legal legitimacy."<sup>249</sup> Because individual states are unrepresentative of

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<sup>246</sup> See DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 75-106 (1995) (arguing that some state autonomy in policymaking results in economic, political, and social benefits); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213-15 (1998) (describing the benefits of federalism as identified in scholarly literature on constitutional federalism and new jurisprudence).

<sup>247</sup> See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[A] single courageous State may . . . serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>248</sup> See Koppel, *supra* note 8, at 1176 ("I propose that state judicial systems continue to develop their independent rulemaking capabilities, but not by competing with each other. Rather than *competing* as laboratories, I propose that states *cooperate* as laboratories through a mechanism of controlled experimentation designed to inform a collaborative rulemaking process leading to a model code of state civil procedure.").

<sup>249</sup> Fallon, *supra* note 158, at 1794-96.

the nation as a whole, state following of federal law may lead to disconnects between state policies, state law, and state judicial interpretation.

In substantive areas, the lawmaking stage is meant to create state laws that reflect the peculiar policies and preferences of the state electorate. Blind state following may cause state law to map poorly onto those policies and preferences, to the ultimate detriment of that segment of the nation. This is particularly true for constitutional law, which embodies the most important and fundamental values of a polity. At the interpretative stage, state courts eager to track nonpreemptive federal law may misinterpret state law, resulting in further distance between the preferences of state citizens and the laws that govern them. The California courts' difficulty resisting the impulse to treat state disability law differently from federal disability law is just one example.<sup>250</sup> The drift of state law away from its popular or legislative moorings erodes the legal legitimacy of the state law-speaking institutions.

Procedural law is no different. State dockets differ from federal dockets in both the number and the type of cases.<sup>251</sup> State courts often have fewer resources in terms of technology, judicial clerks, magistrate judges, or other support personnel. Differences in structures, resources, and policy goals may demand different procedures.<sup>252</sup> Inattention to these differences can lead to state procedural rules that are inapt or costly for the local bench and bar. The gravitational force of federal law risks pulling state law in directions it ought not go.

It may well be that vertical uniformity is, on balance, worth pursuing for certain states in certain areas of the law. Vertical uniformity may be especially warranted when social mores within a particular state reflect with specificity the social mores of the nation, and when the state legislature, in responding to the state citizenry's preferences, enacts laws that mimic federal laws. It may even be warranted as an independent interpretive tool when its values are overwhelmingly beneficial. But states ought not overpraise it uncritically or demand rote adherence to it. Instead, when a state considers whether to follow

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<sup>250</sup> See *supra* text accompanying notes 101–05.

<sup>251</sup> See, e.g., Roger Michalski & Abby K. Wood, *Twombly and Iqbal at the State Level* 4 (USC Law Legal Studies, Working Paper No. 14-30, 2015), <http://papers.ssrn.com/sol3/papers.cfm?abstractid=2468864> [<http://perma.cc/4QZ8-7V88>] (“Litigants in state courts tend to litigate smaller claims, have fewer litigation and pre-suit investigative resources available to them, and conclude cases more quickly than litigants in federal courts. State judges, similarly, typically face higher caseloads than their federal counterparts and frequently are democratically accountable.”).

<sup>252</sup> See, e.g., Koppel, *supra* note 8, at 1187–88 (describing arguments against using federal procedures in state courts); Stephen N. Subrin, *Uniformity in Procedural Rules and the Attributes of a Sound Procedural System: The Case for Presumptive Limits*, 49 ALA. L. REV. 79, 83 (1997) (noting that uniformity “may not make sense” on account of the federal courts’ caseload and access to resources); see also Subrin, *supra* note 16, at 1650 (discussing the motivations behind the evolution of the Federal Rules of Civil Procedure).

federal law, the justifications for uniformity should be judged on a case-by-case basis and contrasted with the competing benefits of variation.

### B. *Sovereign Reputation*

The Supreme Court has insisted that states exist in the federalist system as quasi-independent sovereigns, not as mere dependencies or appendages of the federal government.<sup>253</sup> But the Court's own gravitational force undermines this view. When states follow federal law without independent consideration of state structures and values, they risk appearing to be secondary afterthoughts of the federal government rather than intellectual equals.<sup>254</sup> The parity debate that Burt Neuborne began decades ago persists,<sup>255</sup> and, though that debate's focus on state competence to enforce controlling federal law is orthogonal to my thesis, uncritical state following of noncontrolling federal law lends credence to the position that states are just not as good at being sovereign as the federal government is.<sup>256</sup> States risk being seen as simple-minded dependents of their smarter older sibling.<sup>257</sup>

Such a reputational hit would implicate a number of federalism doctrines that depend upon the assumption that states are equally competent to create and interpret their law independently and competently. For example, in the abstention case of *Railroad Commission v. Pullman Co.*,<sup>258</sup> the Court adopted a policy of avoiding federal constitutional questions when a state might resolve a

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<sup>253</sup> See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) ("States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union with their sovereignty intact.").

<sup>254</sup> See Dodson, *supra* note 10, at 17.

<sup>255</sup> See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that the assumption of parity between state and federal courts is false). See generally MICHAEL E. SOLIMINE & JAMES L. WALKER, RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM (1999); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1981); Burt Neuborne, *Toward Procedural Parity in Constitutional Litigation*, 22 WM. & MARY L. REV. 725 (1981); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HAST. CONST. L.Q. 213 (1983). Of course, rote state following of *controlling* federal law could be seen as consistent with the core parity argument that states are faithful appliers and enforcers of federal law.

<sup>256</sup> This concern is related to, though not identical to, Richard Fallon's idea of "sociological legitimacy," or public acceptance of a law pronouncement. Fallon, *supra* note 158, at 1794-96. For attempts to quantify the legitimacy of the Supreme Court and its opinions, see generally Dion Farganis, *Do Reasons Matter? The Impact of Opinion Content on Supreme Court Legitimacy*, 65 POL. RES. Q. 206 (2012), and James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354 (2003).

<sup>257</sup> Cf. Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 845 (1993) (making an analogous point regarding lower federal courts in relation to the Supreme Court).

<sup>258</sup> 312 U.S. 496 (1941).

dispute on state-law grounds, in part because of “scrupulous regard for the rightful independence of the state governments.”<sup>259</sup> The Court explained:

The law of Texas appears to furnish easy and ample means for determining the Commission’s authority . . . . In the absence of any showing that these obvious methods for securing a definitive ruling in the state courts cannot be pursued with full protection of the constitutional claim, the district court should exercise its wise discretion by staying its hands.<sup>260</sup>

Similarly, in *Burford v. Sun Oil Co.*,<sup>261</sup> the Supreme Court resisted intruding on intricate matters of state law because the state of Texas had established a comprehensive and effective regulatory regime.<sup>262</sup> The Court stated:

The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission’s decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts . . . . Under such circumstances, a sound respect for the independence of state action requires the federal equity court to stay its hand.<sup>263</sup>

And in *Ankenbrandt v. Richards*,<sup>264</sup> the Court interpreted the federal diversity-jurisdiction statute to exempt certain domestic-relations issues from federal jurisdiction, in part because “state courts are more eminently suited to work of this type than are federal courts” and “because of the special proficiency developed by state tribunals over the past century and a half in handling [those] issues.”<sup>265</sup> In other cases declining federal jurisdiction, the Court relies on the same assumption.<sup>266</sup>

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<sup>259</sup> *Id.* at 501.

<sup>260</sup> *Id.*

<sup>261</sup> 319 U.S. 315 (1943).

<sup>262</sup> *Id.* at 320-32.

<sup>263</sup> *Id.* at 333-34; *see also id.* at 332 (“These questions of regulation of the industry by the State administrative agency . . . so clearly involve[] basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them.”).

<sup>264</sup> 504 U.S. 689 (1992).

<sup>265</sup> *Id.* at 704.

<sup>266</sup> *See, e.g.*, *Ill. Commerce Comm’n v. Thomson*, 318 U.S. 675 (1943) (declining equity jurisdiction to aid a railroad that has an adequate state remedy); *Beal v. Mo. Pac. R.R. Corp.*, 312 U.S. 45 (1941) (refusing to grant a federal injunction of a state criminal statute in the absence of irreparable injury to the plaintiff); *Atlas Life Ins. Co. v. W.I. S., Inc.*, 306 U.S. 563, 573 (1939) (“The guiding principle is that the federal court should proceed . . . without needlessly interfering with the determination of the plaintiff’s rights in the state court.”).

Relatedly, the doctrine of supplemental jurisdiction generally allows, for practical and efficiency reasons, a federal court hearing one claim over which it has original jurisdiction to hear related nondiverse state claims that otherwise would be relegated to state court.<sup>267</sup> Underscoring the assumption that state courts are more competent to adjudicate matters of state law, however, the supplemental-jurisdiction statute gives federal courts the discretion to decline to hear supplemental state claims.<sup>268</sup> In practice, federal courts routinely decline to hear supplemental state claims when no original-jurisdiction claims remain on the ground that state courts are equally competent as—if not more competent than—federal courts at resolving issues of state law.<sup>269</sup>

Another effect implicates the Court's longstanding refusal to accept issues of state law on appeal from state courts. In *Murdock v. Memphis*, the Court wrote:

The State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. And it is not lightly to be presumed that Congress acted upon a principle which implies a distrust of their integrity or of their ability to construe those laws correctly.<sup>270</sup>

On a larger scale, state sovereign competence underlies the very idea of a limited national government that leaves most regulation to state governments.<sup>271</sup> It is in large part because the states are deemed to be capable of “perform[ing] many of the vital functions of modern government”<sup>272</sup> that even within areas of concurrent federal and state power, the assumption has always been that locally accountable state governments should create and administer the laws—i.e., *state* law—that most concern the lives and liberties of their citizens.<sup>273</sup> Faith

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<sup>267</sup> See 28 U.S.C. § 1367(a) (2012).

<sup>268</sup> See *id.* § 1367(c).

<sup>269</sup> See, e.g., *Horne v. Wells Fargo Bank, N.A.*, 969 F. Supp. 2d 1203, 1210 (C.D. Cal. 2013) (declining jurisdiction over state law claims when state courts are “equally competent and more familiar with the governing law”). As the seminal case on then-called “pendent” jurisdiction reasoned, “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

<sup>270</sup> *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1874).

<sup>271</sup> See generally *United States v. Morrison*, 529 U.S. 598 (2000) (limiting the reach of federal authority under the Commerce Clause for activity deemed a classic use of a state's police power); *United States v. Lopez*, 514 U.S. 549 (1995) (limiting the reach of federal authority under the Commerce Clause in a case involving general police powers normally retained by the states).

<sup>272</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012).

<sup>273</sup> Cf. THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) (noting that the powers delegated to the federal government will be exercised primarily on external objects, while those delegated to the states will extend to the objects concerning the lives, liberties, and property of the people of the state).



in state governance has justified the presumption against federal preemption, leaving space for states to regulate effectively.<sup>274</sup>

Each of these examples depends upon state competence to create, interpret, and adjudicate state law faithfully and autonomously as an independent sovereign. Our dual federalism depends upon some level of sovereign parity; without it, the nation is susceptible to deficiency and imbalance.<sup>275</sup> The gravitational force of federal law threatens that parity by undermining state sovereign reputation.

To be clear, some state parallelism preserves sovereign reputation. If a state court interpreting state law follows federal law or federal reasoning because it is consistent with state-codified law and policy, then the state court fulfills the sovereign judicial function of using independent judgment to reach a conclusion that just happened to mirror a different court's.<sup>276</sup> But slavishly following nonpreemptive federal law without considering state variables degrades both state law and state courts.

Of course, a divergent interpretation could *undermine* sovereign reputation if seemingly inconsistent interpretations lead the public to conclude that one (or each) sovereign is unprincipled or incompetent, or that the law is unjustly indeterminate.<sup>277</sup> I recognize this issue, but in a dual-sovereign system in which sovereigns are fully permitted to adopt inconsistent legal paradigms,<sup>278</sup> the conclusion that state divergence from federal law must be the product of incompetency or illegitimacy can only be premised on the very gravitational pull identified in Part I.

### C. Cyclical Entrenchment

Following breeds following beyond mere habit. Just as a black hole attracts more mass, making its gravitational pull ever stronger, following's effects inculcate institutional norms that then compound the lure of following.

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<sup>274</sup> See *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (“[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action.”).

<sup>275</sup> Cf. *Gregory v. Ashcroft*, 501 U.S. 452, 458-59 (1991) (explaining that the Framers contemplated “a healthy balance of power between the States and the Federal Government”).

<sup>276</sup> See *Dodson*, *supra* note 10.

<sup>277</sup> Cf. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 39-40 (1994) (stating in the context of intra-federal inconsistencies that “divergent judicial interpretations seem both irrational and unfair”). For a possible example, see Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a)(4), 119 Stat. 5 (2005) (justifying expanded federal jurisdiction over class actions on the ground that state courts hearing class actions are “sometimes acting in ways that demonstrate bias against out-of-State defendants”).

<sup>278</sup> See Ely, *supra* note 167, at 710 (arguing that “forum shopping is not an evil per se”); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1249-51 (1978) (describing examples of inconsistent legal paradigms between state and federal governments and highlighting how such diversity is “often consider[ed] . . . a virtue”).

If states routinely mimic federal law rather than innovate, then all eyes will train on the federal leader. Lawyers and judges will focus on and familiarize themselves with federal law. Law schools will teach, and bar exams will test, federal law at the expense of state law. Federal actors will command more prestige. Federal-law arguments will dominate state-law development. These effects—the very explanatory vectors discussed above—create a feedback loop in which the results of state following cycle back to strengthen federal law’s gravitational effect.

The cycle is not unbreakable, and there may be enough inherent faith in states that the cycle merely perpetuates an imbalanced equilibrium rather than spiraling uncontrollably. But appreciating the feedback effect helps explain both the present state of the primacy of federal law and the difficulty of freeing state autonomy from its clutches.

#### CONCLUSION

This Article tells a story of federal law’s gravitational force on the states. I make the case that a gravitational force operates across the law, including procedural law, statutory law, constitutional law, and interpretations of each. State actors of all stripes—from rulemakers to legislators to judges—feel the gravitational pull. I offer some theoretical explanations for why states might follow federal leads, including practical and political reasons. And I offer some normative commentary on the effects of federal law’s gravitational force on state sovereign reputation and efficacy.

My aim is primarily to urge greater introspection and transparency. I mean to empower, not disparage. State legislators and judges can be strong leaders in matters of analogous state and federal law. They should do more to assert and demonstrate that leadership. Exercising independence and leadership does not mean always diverging. Perhaps independent and sound judgment will dictate state results that mirror federal results, and, even if not, perhaps the cost savings of state mimicry more than offset the costs of infidelity to state law. Here, reasoning matters more than results. And when states feel compelled to mimic, they should not forget their long tradition of horizontal borrowing; sister-state law may have just as much to say as federal law.

To federal lawmakers and judges, I urge sensitivity to their own gravitational power. Congress, in the first instance, should respect both the primacy of the states and the ways in which even nonpreemptive federal statutes inhibit state

innovation.<sup>279</sup> The Court, for its part, can send signals in many ways,<sup>280</sup> and one way is by expressly reminding states of their independence in nonpreemptive matters.<sup>281</sup> Another way is by undercutting the hegemony of federal leadership. The modern Court has, in rare instances, taken cues from state developments, and it has sporadically looked to foreign precedents and norms. A culture of leadership breeds followers; alloying that leadership with instances of following may spawn a more inclusive and instructive conversation.

This methodological approach of the descriptive portion of this Article has been primarily anecdotal, and no doubt others will point to counterexamples illustrating state independence and resistance. To reiterate, my claim is that a gravitational force exists, not that it is inexorable. Nor do I claim that the gravitational force is uniform for all states, over time, among various actors, or across subject-matter areas. To the contrary, it seems highly likely that a complicated set of conditions informs the strength of the gravitational force. That does not undermine my thesis, but it does mean that much more work needs to be done. My hope is that this Article provokes commentators to excavate other examples of state following or state resistance. Only with a more detailed record of when states follow and when they diverge can we better appreciate and understand the full scope and effect of the gravitational force of federal law.

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<sup>279</sup> Cf. *United States v. Lopez*, 514 U.S. 549, 577-78 (1995) (Kennedy, J., concurring) (reminding Congress of its “grave constitutional obligation” to maintain the balance between federal and state power).

<sup>280</sup> See Richard M. Re, *Supreme Court Signals*, RE’S JUDICATA (Nov. 11, 2014, 8:28 AM) <https://richardresjudicata.wordpress.com/2014/11/11/supreme-court-signals> [<http://perma.cc/N6K5-8F86>] (discussing the “Supreme Court’s ability to send non-precedential signals to lower courts”).

<sup>281</sup> The spectre of preemption can undermine even such express reminders. See Franklin, *supra* note 140, at 871-72 & 871 n.248 (arguing that *Windsor*, despite emphasizing the states’ presumed authority in matters of marriage, could be read to compel marriage equality for the states).