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## Horizontal Federalism

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**Article**

**Horizontal Federalism**

**Allan Erbsen<sup>†</sup>**

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The Constitution allocates sovereign power between governments along two dimensions: a vertical plane that establishes a hierarchy and boundaries between federal and state authority, and a horizontal plane that attempts to coordinate fifty coequal states that must peaceably coexist. Both vertical and horizontal federalism are fundamental elements of U.S. government. Yet most scholarship about constitutional “federalism” focuses on vertical federal-state interactions while neglecting horizontal state-state interactions. Vertically-oriented scholarship often transcends doctrinal boundaries to connect numerous discrete sources of federal-state friction, such as regulation under the Commerce Clause, incentives under the Spending Clause, sovereign immunity under the Eleventh Amendment, and protection of individual rights and liberties under the Fourteenth Amendment.<sup>1</sup> This broad approach presumes that distinct vertical federalism doctrines comprise a co-

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1. For examples of the many broad approaches to vertical federalism, see ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425 (1987). *Cf.* *Seminole Tribe v. Florida*, 517 U.S. 44, 64 (1996) (noting “established federalism jurisprudence”); *Printz v. United States*, 521 U.S. 898, 955 n.16 (1997) (Stevens, J., dissenting) (collecting examples of “recent federalism jurisprudence”).

herent field of study in which analysis of one component can influence approaches to others. In contrast, scholars rarely conceptualize horizontal federalism as an integrated field and have not developed theories and models linking its subsidiary elements.<sup>2</sup> Judicial regulation of interstate activity similarly lacks the broad perspective necessary to engage constitutional values animating and connecting strands of doctrine, leading to sprudence that is often unprincipled, unsatisfying, and unstable.<sup>3</sup>

This Article gives horizontal federalism the systemic scrutiny typically reserved for vertical federalism by viewing myriad forms of state regulation as subtle permutations of a single constitutional problem. Adopting this high level of abstraction weaves threads of constitutional text and jurisprudence that are undertheorized in academic literature and underdeveloped in case law into a more coherent pattern. Exploring that pattern can help explain, assess, and improve numerous seemingly distinct strands of constitutional doctrine governing such di-

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2. Some scholars have linked subsets of horizontal federalism. *See, e.g.*, Lea Brilmayer, *Liberalism, Community, and State Borders*, 41 DUKE L.J. 1 (1991) (discussing role of political theory in justifying states' exercise of coercive power over entities involved in interstate activity); Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353 (2006) (analyzing role of federal law and federal judicial forums in mitigating extraterritorial harms of state commercial regulations); Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992) (discussing constitutional status of states); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468 (2007) (focusing on federal power to authorize interstate discrimination); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 856 (2002) (considering extent of constitutionally permissible "legal pluralism" among states); *see also* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1021–292 (3d ed. 2000) (discussing "Union-Preserving Aspects of Federalism").

3. *See infra* Part IV.B; *see also* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 888 (1986) ("[T]he field [of federal common law] is one in which inconsistent and conflicting statements and formulations abound[.]"); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 789 (2001) (noting "unsettled and poorly understood" aspects of Dormant Commerce Clause jurisprudence); Laycock, *supra* note 2, at 259 (contending that "abdication" of the federal role in choice of law has led to "chaotic" results); James Weinstein, *The Federal Common Law Origins of Judicial Jurisdiction: Implications for Modern Doctrine*, 90 VA. L. REV. 169, 277 (2004) (suggesting need to "bring coherence to the Court's perpetually muddled personal jurisdiction jurisprudence"); Stephen F. Williams, *Severance Taxes and Federalism: The Role of the Supreme Court in Preserving a National Common Market for Energy Supplies*, 53 U. COLO. L. REV. 281, 288 (1982) ("[T]he Court has built up a rich, if not internally consistent, jurisprudence on tax apportionment . . .").

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verse subjects as personal jurisdiction, restraints on interstate commerce, choice of law, federal subject-matter jurisdiction, interstate compacts, federal common law, tax apportionment, interjurisdictional preclusion, and discrimination based on state citizenship.

The analysis has four steps. Part I focuses on why interstate friction is likely in theory, Part II on how it arises in fact, Part III on how the Constitution regulates it, and Part IV on how courts implement that regulatory framework.

Part I defines horizontal federalism, explains how horizontal and vertical federalism overlap, and explores structural features of the Constitution that complicate horizontal interactions. This structural analysis demonstrates that the Constitution invites interstate friction by empowering coequal states in the aggregate without developing clear rules to allocate power between states. Sporadic or simmering interstate conflict is inevitable under this arrangement as parochial efforts by each state to exercise the full scope of its ostensibly insular powers risk infringing the other states' autonomy, frustrating the others' legitimate interests, or burdening the others' citizens.<sup>4</sup> The equal status and independence that states enjoy in theory can therefore be illusory in practice. If the states were independent nations, they could rely on custom, treaty, or force to address interstate disputes or individual grievances arising from the extraterritorial effects of local regulation. But in the federal system, the Constitution supplants international law and military power as a mechanism for interstate coordination. Parts II-IV examine the dynamics of this constitutional coordination mechanism.

Part II explores the underappreciated breadth of horizontal federalism by considering the many forms in which interstate conflict can manifest, ranging from private civil disputes infused with overtones of federalism to aggressive standoffs between armed state officials. The analysis groups seemingly unrelated examples of state action into eight categories: attempts

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4. The magnitude of the threat to national stability has varied over time, with volatility in the Founding and Civil War eras yielding to today's relatively staid encounters in which states exchange rhetoric rather than cannon balls. See *infra* notes 54, 56, 65, 87 (discussing fears of interstate violence during the Founding era). This deescalation is evidence of evolving interstate co-dependency and the effectiveness of the Constitution's antifriction mechanisms. See *infra* Part III. Nevertheless, interstate disagreements over social and economic policy continue to create tension, retaliation, and litigation in a wide variety of regulatory spheres. See *infra* Part II.

to exercise *dominion* over other states' officers or territory, creation of *havens* for conduct that other states would prefer to ban or limit, *exclusion* of activities that other states promote, *favoritism* for in-state actors at the expense of out-of-state actors, allowing in-state activity to generate negative out-of-state *externalities*, aggressive *rogue* behavior that fails to respect the interests of other states, mutually debilitating interstate *competition*, and *overreaching* of state borders through extraterritorial regulation. This transsubstantive typology highlights thematic connections between forms of state action that prevailing doctrine often treats separately. Viewing these seemingly disparate fact patterns as manifestations of a deeper pathology motivates the systematic approach in Parts III and IV to the Constitution's regulation of horizontal federalism.

Part III analyzes the Constitution holistically to identify the clauses that regulate horizontal federalism and consider how these fragments fit together to resolve, deter, or mitigate the problems discussed in Part II. This approach illuminates a potentially coherent field of law lurking amidst components usually viewed in isolation. Commentators often overlook connections between the constitutional mechanisms of horizontal federalism because they emerge from clauses scattered throughout the Constitution's text and regulate ostensibly distinct problems. A systemic approach to the text uncovers five methods that the Constitution uses to regulate interstate activity: creating *codependence* and *disability* among states by stripping them of powers that could instigate or escalate conflicts, establishing institutions to resolve interstate disputes and mechanisms to promote interstate *coordination*, imposing *first-in-time rules* to resolve competing claims of authority, *empowering individuals* to enforce rights that promote horizontal stability, and *enabling federal legislative and common law* to avoid or mitigate interstate conflict. Exploring these methods offers a richer understanding of horizontal federalism and aids Part IV's fresh reassessment of judicial doctrines governing interstate activity.

Part IV shifts focus from constitutional text to constitutional common law by suggesting a model for analyzing ostensibly unrelated lines of precedent addressing horizontal federalism. This approach reveals that doctrines implementing the constitutional provisions discussed in Part III rely on a varying combination of four concepts: *capacity* (the scope of a state's authority); *constraint* (rights or immunities that limit state pow-

er); *centralization* (express or implied federal preemption or authorization of state action); and *comity* (the need for states to respect each other even when capacity exists free from constraint or central control). Identifying these concepts exposes at least three sources of incoherence or instability within horizontal federalism jurisprudence. First, judicial decisions are often imprecise about which concept controls, leading to a lack of fit between reasoning and outcomes. Second, the role of the four concepts can vacillate within a line of precedent over time, leading to confusion about a doctrine's rationale and proper application. Finally, distinct lines of precedent can deploy the four concepts differently despite the lack of meaningful distinctions between the doctrines' underlying purposes or functions. Part IV discusses these three flaws both in the abstract and in the context of illustrative Supreme Court decisions. Examples include the invalidation of punitive damages for extraterritorial conduct in *BMW of North America, Inc. v. Gore*,<sup>5</sup> affirmance of successive state criminal prosecutions in *Heath v. Alabama*,<sup>6</sup> and acceptance of differential tax rates for in-state and out-of-state municipal bonds in *Department of Revenue v. Davis*.<sup>7</sup> The analysis suggests that a more rigorous approach to capacity, constraint, centralization, and comity arguments can affect the implementation, justification, and coordination of horizontal federalism doctrines. The model thus provides a foundation for future scholarship reevaluating vast swaths of constantly evolving law.

## I. THE CONTOURS OF HORIZONTAL FEDERALISM

This Part defines horizontal federalism, distinguishes it from vertical federalism (while noting overlapping attributes), and identifies structural features of the Constitution that make horizontal federalism problems intractable.

### A. DEFINITION AND SCOPE OF HORIZONTAL FEDERALISM

"Federalism" is a surprisingly amorphous concept given its importance and ubiquity within discourse about U.S. government. The term has an "I know it when I see it" character, exemplified in the Supreme Court's frustratingly opaque invocation of "our federalism" as a "slogan" for a deeper set of

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5. 517 U.S. 559 (1996).

6. 474 U.S. 82 (1985).

7. 128 S. Ct. 1801 (2008).

constitutional commitments.<sup>8</sup> Fully defining federalism is not necessary for this Article, but parsing the term can clarify which aspects of federalism are relevant here and which are not.

The concept of federalism encompasses a broad range of phenomena associated with the Constitution's division of "sovereignty"<sup>9</sup> between federal and state governments. From a normative perspective, federalism is a euphemism for at least four partially incompatible preferences: "diffusion" of authority from national to relatively local government units,<sup>10</sup> "centralization" of national authority,<sup>11</sup> "separation" of national and state au-

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8. *Younger v. Harris*, 401 U.S. 37, 44 (1970); *see also Alden v. Maine*, 527 U.S. 706, 748 (1999); *New York v. O'Neill*, 359 U.S. 1, 9 (1959); *La. Power & Light Co. v. Thibodaux*, 360 U.S. 25, 28 (1959).

9. I describe states as "sovereign" to emphasize their substantial independence and significant reservoir of authority, but do not take a position on precisely which aspects of sovereignty states possess. "Sovereign" is a term of art that the Supreme Court has employed inconsistently (or, to be less generous, haphazardly) over the centuries, such that different types of quasi-sovereigns possess different bundles of powers in different contexts. *See H. Jefferson Powell & Benjamin J. Priester, Convenient Shorthand: The Supreme Court and the Language of State Sovereignty*, 71 U. COLO. L. REV. 645 (2000) (identifying patterns in the Court's invocations of sovereignty). Labeling states as "sovereign" thus does not determine the scope of their authority in a system that divides sovereign control over U.S. territory between "the United States," "the States," and "the people," and then further subdivides it among fifty states. U.S. CONST. amend. X; *see also Randy E. Barnett, The People or the State?: Chisholm v. Georgia and Popular Sovereignty*, 93 VA. L. REV. 1729, 1741–58 (2007) (discussing concepts of sovereignty underlying Ninth, Tenth, and Eleventh Amendments). The semantic label for state power is in any event immaterial for my purposes. Whatever power states have, each has it in equal amounts and subject to some federal oversight, which leads to the coordination problems that this Article addresses. I also do not take a position on precisely what powers and immunities states *should* have. My project is to provide a framework for thinking about interstate disputes, which is a prerequisite for analysis of appropriate outcomes.

10. SHAPIRO, *supra* note 1, at 11 (distinguishing federalism from nationalism). A more formal permutation of diffusion is the notion of "subsidiarity" in the European Union, which favors national—rather than supranational—level action even when jurisdiction is concurrent:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Consolidated Version of the Treaty Establishing the European Community art. 5, July 24, 2002, O.J. (C325) 42.

11. SHAPIRO, *supra* note 1, at 137; *see also Ernest A. Young, The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 97 (2004) ("[T]hroughout the



thority,<sup>12</sup> and “empowerment” of both state and national governments.<sup>13</sup> These norms can aid in allocating power between tiers of government,<sup>14</sup> but have little to say about allocating power within a tier among competing states that each have a plausible entitlement to regulate local entities or activity. This Article’s analysis of how states exercise their concurrent authority therefore does not require accepting any particular normative position about how broad or narrow that collective authority should be.<sup>15</sup>

From a descriptive perspective, federalism is a shorthand moniker for a complex set of political, legal, and economic relationships within a system of divided sovereignty. For example, congressional deliberations about whether to regulate an activity traditionally subject to state oversight are aspects of political federalism, judicial decisions about whether Congress has the power to regulate are aspects of legal federalism, and the implications of such regulation in a national market are aspects of economic federalism. Political, legal, and economic issues may of course blur. For instance, the prospect that political negotiations will resolve intergovernmental disputes might be relevant to determining the scope of legal constraints on the disputing entities.<sup>16</sup> Despite the blurring, considering federalism on a more granular level can reveal useful insights.

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Nineteenth Century judicial enforcement of federalism primarily took the form of enforcing constitutional limits on state power.”) (emphasis omitted).

12. *Printz v. United States*, 521 U.S. 898, 921 (1997) (“[S]eparation of the two spheres is one of the Constitution’s structural protections of liberty.”).

13. CHEMERINSKY, *supra* note 1, at 4; *see also id.* at 10 (“[U]ltimately the issue of federalism is about what allocation of power provides the best governance with the least chances of abuse.”). Mutual empowerment does not necessarily mean that federal and state governments will pursue shared interests, and leaves room for both cooperation and conflict. *See* Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. (forthcoming 2009).

14. Allocation of a particular power can follow one of three broad models: exclusive federal authority, exclusive state authority, or various forms of concurrent authority with shades of federal supremacy and federal-state equality that defy easy categorization. *See* Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1048 (1977) (noting that models infected with the “lawyer’s disease of sovereignty” often obscure “conflict and indeterminacy” in the allocation of shared power between tiers of the federal system).

15. However, the extent to which one perceives interstate squabbling as undesirable may influence the extent to which one supports broad federal power to preempt state law or otherwise intervene. *See infra* Part III.E.

16. *See Garcia v. Metro. Transp. Auth.*, 469 U.S. 528, 550–54 (1985). Similarly, when a question of legal federalism hinges on an assessment of economic

I focus here primarily on legal federalism, especially on how the existence of multiple states limits the power of each when interacting with the others or with the others' citizens.<sup>17</sup> Legal federalism itself fractures into distinct components, including mandatory constitutional principles that structure intergovernmental relations, statutory and common law restraints that governments voluntarily impose on themselves,<sup>18</sup> and rules governing private conduct that allow individuals to contract around federalism's complexities.<sup>19</sup> My interest lies in the constitutional foundation on which all other aspects of legal federalism rest.

Constitutional federalism has two distinct dimensions: the federal government must interact with the states, and states must interact with each other. The Supremacy Clause<sup>20</sup> makes federal/state interactions hierarchical—and thus in a sense “vertical”—while state/state interactions are between entities on an equal plane of constitutional status, and are thus “horizontal.” This taxonomy of vertical and horizontal federalism

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federalism, the problem may become political. *See* *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1819 (2008) (rejecting Dormant Commerce Clause challenge to state tax in part because “an elected legislature is the preferable institution for incurring the economic risks of any alteration in the way things have traditionally been done”).

17. For a survey of scholarship addressing other aspects of interaction between local, state, federal, and international tiers of government, see Robert B. Ahdieh, *From Federalism to Intersystemic Governance: The Changing Nature of Modern Jurisdiction*, 57 EMORY L.J. 1, 4 (2007) (discussing “cross-jurisdictional regulatory engagement”).

18. *See, e.g.*, *K.D.F. v. Rex*, 878 S.W.2d 589, 594 (Tex. 1994) (recognizing sovereign immunity of the Kansas Public Employees Retirement System as a matter of comity rather than constitutional obligation); Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness*, 154 U. PA. L. REV. 257 (2005) (considering whether state sentencing guidelines for recidivists and registration systems for sex offenders should recognize out-of-state criminal sanctions); *infra* note 268 (discussing common law presumption against interpreting statutes to apply extraterritorially).

19. For example, contracting parties who wish to avoid uncertainty otherwise inherent in multijurisdictional activity can often specify the forum that will hear disputes and the law that will apply. *See generally* 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 15.15 (4th ed. 2007); 8 *id.* § 19.6. More extreme circumvention of conflicting state regulatory approaches can occur in class action settlements that construct compensation mechanisms which resemble state administrative agencies but are not required to conform to any one state's law. *See* RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 269 (2007) (“[Mass tort litigation] is less a form of litigation and more an occasion for a series of miniaturized, privatized workers' compensation programs.”).

20. U.S. CONST. art. VI, cl. 2.

does not exist in Supreme Court decisions,<sup>21</sup> and has only recently started to appear prominently in legal scholarship.<sup>22</sup> Nevertheless, the distinction provides a helpful framework for conceptualizing recurring constitutional dilemmas.

Academic analysis of vertical federalism often obscures problems of horizontal federalism. Scholars typically concentrate on determining how power is or should be allocated between the federal and state tiers of government, and how to prevent the federal and state governments from encroaching on each other's prerogatives. The essential question is how to determine the tier(s) of government at which particular types of power "belong." Analysts can assess the concept of belonging through various prisms, such as constitutional text, constitutional structure, original understanding, economic efficiency, and political accountability, among many others. These questions about vertical power allocation are important, but elide an equally important dynamic of horizontal power allocation. Vertical federalism inquiries end when the inquirer reaches a conclusion about how much (if any) power "states" possess relative to the federal government. That endpoint is where analysis of horizontal federalism should begin, but is usually missing. States do not exist in the aggregate; the whole is a sum of fifty parts, and those parts must each share the power that the Constitution allocates to them as a group. Such sharing creates the possibility of interstate friction because there is no bright-line rule capable of fully confining the effects of a state's regulation within its borders. When people, products, and natural resources are mobile, neither problems nor solutions are fully local. Activities and regulations may overlap or cause ripples in other states, which can create interstate conflict or tension.<sup>23</sup> This friction can flare out of control if left unchecked, and thus

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21. Opinions in 562 Supreme Court cases use the word "federalism," but only one opinion uses "vertical federalism" and none use "horizontal federalism." (These counts are based on searches of Westlaw's SCT database on October 24, 2008.)

22. See Judith Resnik, *Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism*, 57 EMORY L.J. 31, 44 (2007) ("Horizontal federalism—state-to-state interactions of a variety of kinds—is coming into view as a subject for the legal academy."); *id.* at 44 n.35 (citing examples of recent scholarship addressing interstate relations); see also Scott Fruehwald, *The Rehnquist Court and Horizontal Federalism: An Evaluation and a Proposal for Moderate Constitutional Constraints on Horizontal Federalism*, 81 DENV. U. L. REV. 289 (2003).

23. See *infra* Part II.B.

a framework must exist to manage conflict before it undermines national stability.

The foregoing analysis suggests a rough definition of horizontal federalism in the context of constitutional law. In most cases, we can think of horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating interstate friction that may arise from the out-of-state effects of in-state decisions.<sup>24</sup> This definition requires an addendum, however, to encompass situations where a local regulation might not have any substantial extraterritorial effect, but is nevertheless troubling because of its lack of respect for limits on state authority that flow from the multi-state structure of the Union. Some individual rights and liberties that constrain state power—often framed in terms of due process<sup>25</sup> and equality<sup>26</sup>—therefore fit within horizontal federalism. Disputes implicating horizontal federalism thus can involve both states and individuals. What matters in the calculus of horizontal federalism is not who is making a claim against whom, but rather whether some aspect of that claim implicates an interest that is constitutionally protected (if at all) because of the equivalent and overlapping powers of multiple states.<sup>27</sup> The range of po-

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24. Scholars sometimes use the term “horizontal federalism” in a different (and in my view incongruous) context to describe a methodology by which a court in State *A* interprets a provision in State *A*’s constitution with reference to how a court in State *B* interpreted a similar provision in State *B*’s constitution. See James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783, 783–84 (2003). This kind of interpretative borrowing does not seem uniquely federalist in nature—indeed, state courts can apply the same methodology with reference to constitutions in foreign nations. The approach might more appropriately be classified as a species of common law reasoning rather than an incident of federalism. (Federalism might be a factor in the unlikely scenario where a state borrows reasoning from other states because it believes that interstate consistency is a virtue of the federal system.)

25. See *infra* notes 266, 281–84, 304, 310 (discussing due process challenges to personal jurisdiction and choice of law).

26. Constitutional prohibitions against discrimination based on state residency create equality rights that serve two distinct purposes: they are a tool for enforcing structural aspects of horizontal federalism and preserving national stability, and they shield individuals from burdens that might be undesirable regardless of their effect on interstate harmony. This Article focuses primarily on the instrumental rather than intrinsic value of equality rights. See *infra* Part III.D.

27. For discussion of how nominally private disputes can generate interstate friction, see *infra* text accompanying notes 96, 155–67, 189–200.

tential conflict-inducing behavior is vast, as explained below in Part II.<sup>28</sup>

#### B. INTERSECTIONS BETWEEN HORIZONTAL AND VERTICAL FEDERALISM

Although I distinguish horizontal and vertical federalism, a complete analytical separation is impossible because federal power is a mechanism for restraining state power. First, federal institutions play a coordinating role in the exercise of concurrent state authority. This role is evident, for example, in constitutional provisions authorizing congressional oversight of interstate compacts and creating federal jurisdiction over interstate disputes.<sup>29</sup> Second, some grants of exclusive or preemptive power to the federal government serve both a vertical allocation function and a horizontal conflict avoidance function.<sup>30</sup> For example, Congress's power to regulate interstate commerce both establishes federal supremacy over a national market and allows Congress to intervene when regulation of regional markets by multiple states creates a possibility of excessive friction.<sup>31</sup> Likewise, Congress's constitutional pow-

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28. My definition of horizontal federalism and discussion of interstate conflicts assumes that all entities subject to state regulation are federal or state citizens or instrumentalities. This assumption is oversimplified: states also regulate tribal and foreign actors in ways that trigger constitutional scrutiny. However, the Constitution's incongruous treatment of tribes—which the Supreme Court classifies as “domestic dependent nations,” *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)—and additional questions of federal and international law relevant to foreign actors warrant carving them out for separate study and focusing on constitutional regulation of a closed state-federal system.

29. See *infra* Part III.B and text accompanying notes 226–37.

30. Integration of vertical and horizontal federalism theories was strikingly evident shortly before the Civil War, when the intensity of federal-state and state-state conflict fused multiple rationales for invoking the Constitution as a limit on state authority. For example, in *Abelman v. Booth*, 62 U.S. (21 How.) 506, 510–11 (1858), the Supreme Court rejected the power of a northern state court to issue a writ of habeas corpus freeing a federal prisoner convicted of aiding a fugitive slave. The opinion can be understood as relying on vertical federalism principles to immunize supreme federal actors from interference from inferior state actors. See *id.* at 514–20. However, there is also an undercurrent of horizontal federalism because the Court sought to prevent what it viewed as “injustice by one state upon the rights of another” in the form of northern interference with the interests of southern slaveholders. *Id.* at 517. The Court thus claimed to be preventing states from aggrandizing themselves at the expense of both the federal government and each other. The holding was of course not neutral with respect to competing state interests because it implicitly prioritized the concerns of states where slavery was legal.

31. See *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) (“The few simple

er to raise navies and the concurrent prohibition against states maintaining navies during peacetime can be read as avoiding both vertical and horizontal conflict among federal and state fleets,<sup>32</sup> while the limited ability of states to arrest congressional representatives en route to or from a legislative session can be read as both preserving federal supremacy and avoiding conflicts that would arise if one state arrested another's delegates.<sup>33</sup>

Horizontal and vertical federalism are thus both distinct and entangled, merging into a hybrid "triangular federalism" that encompasses the area between the horizontal base and the elevated federal point floating above it. Within this triangle, efforts to divide sovereignty along a vertical dimension create horizontal conflicts, and efforts to address those conflicts by federal intervention create vertical conflicts.<sup>34</sup> Observers therefore cannot fully understand either of the two dimensions of federalism in isolation.<sup>35</sup> However, distinguishing horizontal and vertical federalism is still analytically useful even though they are not mutually exclusive. Just as a mathematician cannot comprehend the properties of a triangle without understanding both its horizontal base and its vertical median, a constitutional scholar cannot understand the complexities of federalism without at least partially disaggregating its structural components of state-state and federal-state relationships.<sup>36</sup>

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words of the Commerce Clause . . . reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.").

32. See U.S. CONST. art. I, §§ 8, 10.

33. See *id.* § 6.

34. Separation of powers doctrine adds a third dimension to the puzzle. The existence of fifty states risks excessive diffusion of power, the existence of a national government remedies diffusion at the risk of excessive centralization, and the separation of national powers remedies centralization with diffusion.

35. The interweaving of federalism's distinct dimensions is a byproduct of the Union's novel design, which James Madison elegantly showed to be "neither a national nor a federal Constitution, but a composition of both." THE FEDERALIST NO. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

36. Further disaggregation (and geometric complexity) is possible if one expands the model of federalism beyond constitutional parameters to include international and local actors. At an international level, the federal government is a participant in a system of nations and supranational institutions that can constrain national discretion. At a local level, the fifty states encompass quasi-autonomous units that interact with each other, with states, and with the federal government. People, activity, and ideas can easily permeate

## C. STRUCTURAL FOUNDATIONS OF HORIZONTAL FEDERALISM

Analyzing horizontal federalism requires understanding the structural features of the Constitution that make interstate conflicts difficult to resolve. The basic problem is that the Constitution does not create a preference rule for prioritizing competing state interests analogous to the Supremacy Clause, which aids in resolving vertical disputes. In a vertical federal-state dispute, a conclusion that federal power exists resolves the question of whether that power trumps a countervailing assertion of state power: the federal power is supreme. In contrast, in a horizontal state-state dispute, a conclusion that states possess a particular regulatory power does not determine which state(s) can exercise that power in a given context. There is no transsubstantive preference rule for resolving state-state conflicts,<sup>37</sup> and thus the relevant law exists as an accumulation of context-sensitive doctrines implementing commands scattered throughout the Constitution.<sup>38</sup>

Instead of offering clear preference rules to facilitate allocating power between states, the Constitution contains two

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local, state, and national boundaries, and thus the many dimensions of federalism cannot exist in isolation. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1576 (2006) (“[L]aws (like people) migrate, and seepage is everywhere.”). For a discussion of how substate actors fit into the framework of federalism, see David J. Barron, *A Localist Critique of the New Federalism*, 51 DUKE L.J. 377, 378–79 (2001) (“The ability of each locality to make effective decisions on its own is inevitably shaped by its relation to other cities and states, by its relation to broader, private market forces, and, most importantly, by the way the central power structures these relations, even when central governmental power appears to be dormant.”).

37. The presence of a transsubstantive preference rule for vertical disputes and absence of an equivalent rule for horizontal disputes may be due to the relative complexities of drafting such rules. Writing a rule stating that in vertical disputes the federal government always wins regardless of context is much easier than writing a rule attempting to prioritize competing state claims when each state has a plausible justification for protecting its interests. Such a rule would likely be either prohibitively long or intolerably vague.

38. For example, a dispute implicating competing interests of multiple states in regulating a regional market might raise questions about which states could exercise judicial power over market participants, which states could apply their laws to particular transactions, whether any state exceeded the scope of its regulatory power by interfering with extraterritorial aspects of the market, and whether any state excessively slanted its regulations to favor local interests. These questions would implicate the Due Process, Full Faith and Credit, Commerce, Privileges and Immunities, and Equal Protection Clauses, and would trigger distinct doctrinal inquiries looking variously at the location where conduct occurred, the citizenship of relevant actors, the parties' expectations, and the national, state, and individual interests at stake.

structural features that render such allocation more difficult. First, states are equal in status, which complicates prioritizing competing interests. Second, the Constitution defines state power in the aggregate rather than individually, which complicates efforts to define limits on state authority.

### 1. Coequality

Long-established constitutional doctrine holds that all states exist on an “equal footing” and are “equal in power, dignity, and authority.”<sup>39</sup> This sweeping conclusion contradicts the Constitution’s drafting history<sup>40</sup> and is in tension with some of the Constitution’s text.<sup>41</sup> Nevertheless, the equality norm may have some implicit textual foundation in the Constitution’s vision of a “Union.”<sup>42</sup> The norm also is consistent with the equality of state representation in the Senate, which is so integral to the Constitution’s design that it is immune from amendment

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39. *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *see also Underwriters Nat’l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass’n*, 455 U.S. 691, 704 (1982) (noting “the structure of our Nation as a union of States, each possessing equal sovereign powers”); *Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (“One cardinal rule, underlying all the relations of the States to each other, is that of equality of right. Each state stands on the same level with all the rest.”).

40. The Constitutional Convention explicitly and overwhelmingly rejected (by a 9-2 vote) including language in what is now Article IV, Section 3 that would have required admission of new states “on the same terms” as existing states, subject only to conditions regarding extant state debt. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 454 (Max Farrand ed., 1937) [hereinafter Farrand]. At least one delegate thought the provision was “inconvenient,” and another felt that “equality” was fine for “existing” states, but not for new states. *Id.* This view may have been short-sighted in light of the jealousy and tension that inequality among states would have created if the Supreme Court endorsed it. Indeed, in a counterintuitive way, the framers’ hostility toward equality for new states illustrates the necessity of structural mechanisms to prevent interstate friction. If even the framers—who were dedicated to national unity and acutely aware of the need for existing states to respect one another—were nevertheless willing to disadvantage new states, one can assume that less nationally inclined state leaders would go to much greater lengths to promote parochial interests unless restrained from doing so.

41. The Constitution contemplates some inequality among states by granting relatively populous states greater representation in the House and electoral college, and does not explicitly forbid imposing status-diminishing conditions on entities seeking to join the Union as new states. *See* U.S. CONST. art. II, § 1 (electoral college); *id.* art. IV, § 3 (admission of new states); *id.* amend. XIV, § 2 (representation in House); *see also Metzger, supra* note 2, at 1499 (noting congressional power under Article I to impose conditions on aspiring states).

42. U.S. CONST. pmb.; *id.* art. IV, § 3.



without each affected state's consent.<sup>43</sup> Even if the Constitution's text did not require equality, deeming states to be equals is a sensible baseline absent plausible metrics of hierarchy. Prioritizing states based on minutia (such as date of joining the Union) seems pointless, and prioritizing based on population or resources would reduce to the maxim that "the strong do what they can and the weak suffer what they must,"<sup>44</sup> which is inconsistent with the spirit of a Constitution written in the wake of revolution against an imperial power.<sup>45</sup>

The coequality of states frustrates efforts to cope with horizontal federalism. Each state has an equivalently strong claim to exercise collectively held powers absent a context-specific restraint. Each state likewise has an equivalently strong claim to operate without interference from the others. When state regulatory claims conflict, or when one state's assertion of a right infringes another state's asserted immunity, the fact that states are "equal" merely articulates the problem rather than suggesting a solution. Prioritizing one state's interest over another's would require an argument that rules intrinsic to the particular power at issue determine how to allocate that power when more than one state has an interest in its exercise. This observation leads to a second structural problem in the Constitution: there is no clearly discernible basis for assessing how the Constitution allocates most powers among the states because the text grants power en masse to the states as a whole.

## 2. Aggregate Power

The Constitution is very detailed in explaining what the federal government can do and what states cannot do, but is relatively spare in defining how the existence of multiple states

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43. See *id.* art. V ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."); see also Metzger, *supra* note 2, at 1518 (citing equality in the Senate as one of several potential justifications for the equal footing doctrine).

44. THUCYDIDES, THE PELOPONNESIAN WAR 351 (T.E. Wick ed., Modern Library 1982).

45. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (noting importance of ensuring formal settlements of interstate disputes rather than tolerating triumph of "large and powerful" states over "small and weak" states). Aside from its ideological appeal, equality also provided practical benefits to small states who were reluctant to subsidize larger states, feared how larger states would wield power, and sought to mitigate dilution of their authority and dispersion of their tax base upon the Union's westward expansion. See CATHY D. MATSON & PETER S. ONUF, A UNION OF INTERESTS: POLITICAL AND ECONOMIC THOUGHT IN REVOLUTIONARY AMERICA 54-57 (1990).

possessing equivalent powers limits the scope of those powers. The Tenth Amendment provides that “the States respectively” may exercise powers not delegated to the federal government (and not expressly precluded elsewhere in the text).<sup>46</sup> But the text offers no guidance about what to do when “the States respectively” do not respect each other. Article IV partially fills the void with coordination rules that specify how states should react to each other’s statutes, judgments, and extradition requests, and how each state should interact with the others’ citizens, but these provisions have limited scope and effect and are subject to exceptions that give states flexibility to antagonize each other.<sup>47</sup> The Constitution thus confirms that states in the aggregate possess a bundle of powers—such as police power, taxing power, and adjudicative power—without explaining how the existence of multiple states affects the exercise of particular powers by any one of them.

The aggregate power problem is evident in the imprecision of the “spheres” model that courts historically used to explain the structure of U.S. federalism, and that seems to resurface periodically as courts muddle through difficult questions.<sup>48</sup> The model posits that the federal and state governments occupy separate “spheres” of authority, with each type of government independent within its own sphere.<sup>49</sup> This vision of federal-

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46. U.S. CONST. amend. X.

47. See *id.* art. IV, § 1 (Full Faith and Credit Clause); *id.* § 2 (Privileges and Immunities, Extradition, and Fugitive Slave Clauses); *infra* Part III.

48. See Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 142–67 (2001) (analyzing past efforts to draw sharp doctrinal lines across indeterminate constitutional boundaries, and noting disagreement about whether modern decisions revive the historical approach).

49. See, e.g., *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522 (1981) (noting “separate spheres of governmental authority preserved in our federalist system”); *White v. Hart*, 80 U.S. (13 Wall.) 646, 650 (1871) (“The government of the Nation and the government of the States are each alike absolute and independent of each other in their respective spheres of action.”); *Collector v. Day*, 78 U.S. (11 Wall.) 113, 124 (1870) (“The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres.”); *United States v. Lopez*, 514 U.S. 549, 577 (1995) (Kennedy, J., concurring) (noting “boundaries between the spheres of federal and state authority”); *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O’Connor, J., dissenting) (noting “historic spheres of state sovereignty”). An alternative vision of horizontal federalism explained that states are “sovereign within their respective boundaries, save that portion of power which they have granted to the federal government, and foreign to each other for all but federal purposes.” *Rhode Island*, 37 U.S. at 720. These models are hopelessly unrea-

ism—apparently borrowed from James Madison<sup>50</sup>—neatly tracks the Tenth Amendment, and therefore shares its imprecision. From a vertical perspective, commentators now recognize that the model ignores the “inevitable overlap” of federal and state authority.<sup>51</sup> But there is a less-noticed flaw from a horizontal perspective: the model ignores the fifty sub-spheres within the state sphere, and fails to explain how the Constitution regulates the friction between these mini-spheres when they inevitably collide. Thus, whether federal and state powers are exclusive or concurrent, there is still a separate problem of defining regulatory boundaries between the states. A more nuanced account of federalism is therefore necessary to determine limits on state power.

## II. TYPOLOGY OF CONSTITUTIONALLY SIGNIFICANT INTERSTATE FRICTION

The combination of coequality and aggregate power absent a transsubstantive preference rule creates conditions ripe for interstate friction. Some antagonism from pursuit of mutually inconsistent interests is inevitable, even if shared preferences and regional political and economic pressures provide counter-vailing incentives for states to cooperate.<sup>52</sup>

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listic: as Part II explains, the idea that border lines on a map provide an easily enforceable starting and stopping point for each state’s regulatory power does not recognize the multijurisdictional dimensions of many regulatory problems and the ease with which regulatory ripples can flow across state lines. The stilted formality of the spheres model is evident in the infamous *Dred Scott* decision, in which at least two Justices simplified the complex question of whether the movement of a slave from a slave state to a free state and then back to a slave state affected his status as a slave by asserting that only the state where a person happened to be at the moment could determine his status. See *Scott v. Sandford*, 60 U.S. (19 How.) 393, 460 (1856) (Nelson, J., concurring) (“Every State or nation possesses an exclusive sovereignty and jurisdiction within her own territory; and, her laws affect and bind all property and persons residing within it. . . . And it is equally true, that no State or nation can affect or bind property out of its territory, or persons not residing within it. . . . This is the necessary result of the independence of distinct and separate sovereignties.”); *id.* at 469 (Grier, J., concurring) (noting agreement with Justice Nelson’s concurrence).

50. See THE FEDERALIST NO. 39 (James Madison), *supra* note 35, at 245 (“[L]ocal or municipal authorities . . . [are] no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.”).

51. Young, *supra* note 48, at 139.

52. See *infra* note 108. Even if states are well-intentioned and inclined to cooperate, transaction costs and strategic behavior can prevent interjurisdictional negotiations from producing efficient outcomes. See ROBERT COOTER,

The Constitution's drafters were well aware of the potential for interstate mischief and discord. Each had lived through a tumultuous period under the Articles of Confederation in which states pursued conflicting self-interests at their collective expense.<sup>53</sup> Supporters of the Constitution bluntly warned of states' propensity to undermine and antagonize each other and the attendant threat of "frequent and violent contests."<sup>54</sup> These dire predictions may have exaggerated the risk of interstate conflict to justify supplanting the Confederation with a new Union,<sup>55</sup> but they clearly reflected contemporary anxiety about the prospects for peace and stability absent restraints on interstate jostling.<sup>56</sup> Eighteenth-century leaders presumably

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THE STRATEGIC CONSTITUTION 103–25 (2000).

53. See *infra* text accompanying notes 131–34. The framers presumably also recognized that failure of the supposedly "perpetual" union, ARTICLES OF CONFEDERATION art. XIII, after less than a decade signaled a need for more robust mechanisms to integrate adventuresome states. Cf. THE FEDERALIST NO. 40 (James Madison), *supra* note 35, at 248, 252 (defining mandate of the Convention in part as "preservation of the union" through "correcting the errors" in the Articles).

54. THE FEDERALIST NO. 6 (Alexander Hamilton), *supra* note 35, at 54; see also *id.* ("To look for a continuation of harmony between a number of independent, unconnected sovereignties situated in the same neighborhood would be to disregard the uniform course of human events . . ."); *id.* NO. 5, at 51 (John Jay) (contending that, absent Union, states "would always be either involved in disputes and war, or live in the constant apprehension of them"); *id.* NO. 45, at 288 (James Madison) (arguing that Union was "essential to [the people's] security against contentions and wars among the different States").

55. See MERRILL JENSEN, THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789, at 339 (1950) ("[S]upporters of centralized power used the few discriminatory [trade] laws as an argument for a new government, but they ignored other laws which disproved their case."); *id.* at 345 ("The truth, as always, lay somewhere between the extremes of political propaganda."); JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETATIVE HISTORY OF THE CONTINENTAL CONGRESS 333 (1979) (noting disagreement among historians about the extent to which systemic "chaos" was a reasonable fear in 1787). A related paradox of pro-union political rhetoric was that it envisioned states as sufficiently strong to generate plausible fears of violence, but sufficiently weak to acquiesce in a reduction of their authority. See PETER S. ONUF, THE ORIGINS OF THE FEDERAL REPUBLIC: JURISDICTIONAL CONTROVERSIES IN THE UNITED STATES 1775-1787, at 5 (1983) ("Fears of imminent anarchy and bloodshed were vitally important in creating a climate favorable to constitutional reform. . . . The very fact that such fears were unfounded demonstrated the defective and diminutive character of early American state power that permitted the institution of a stronger central government.").

56. See, e.g., 2 Farrand, *supra* note 40, at 642–43 (statement of Benjamin Franklin) ("I think [the new Constitution] will astonish our enemies, who are waiting with confidence to hear that our councils are confounded like those of the Builders of Babel; and that our States are on the point of separation, only

could not have imagined the complete range of mischief that states could cause as innovations in manufacturing, transportation, and communication integrated physically distinct communities and markets. But their basic insight that unchecked interstate maneuvering could create destabilizing friction has been proven valid in myriad contexts over the intervening 220 years.

Part II briefly outlines the diverse types of interstate friction that coequality and aggregate power enable. The goal is not to create a comprehensive account of all the ways in which states can antagonize each other. The point instead is to illustrate that state conduct relevant to horizontal federalism takes diverse forms that transcend traditional categories for thinking about constitutional restraints on state power. Mapping the precise contours of these categories is less important than highlighting their numerosity, variety, and seepage across doctrinal boundaries. This observation suggests a need for the broad perspective on constitutional text and jurisprudence that Parts III and IV propose.

#### A. METHODOLOGY FOR CONSTRUCTING CATEGORIES

This Part focuses on themes uniting discrete forms of state action rather than on trying to pigeonhole state behavior into

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to meet hereafter for the purpose of cutting one another's throats."); THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 35, at 60–66 (presenting five distinct scenarios by which interstate warfare could arise); DAVID C. HENDRICKSON, PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 9–10 (2003) (discussing Founding-era apprehensions about interstate conflict). The framers were also well aware of the zeal with which partisans could pursue and potentially escalate interstate grievances. This was a generation, after all, that had fought a war against its King and frequently participated in volatile and radical political discourse. See BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (discussing heated rhetoric and general culture of suspicion and ferment during the revolutionary era); ONUF, *supra* note 55 (discussing Founding-era struggles by states to restrain local political movements that resisted state authority within putative state borders); GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 229–43 (1992) (noting potentially destabilizing intellectual trends toward egalitarianism, individualism, anti-intellectualism, and sectionalism); cf. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 367 (J.P. Mayer ed., George Lawrence trans., Anchor Books 1969) (1850) (observing that “patriotism” in the early nineteenth century centered on state rather than national affiliations). Even if disunited states could avoid conflict by successfully deterring each other from aggression, federalists were concerned that the mechanism of deterrence—a strong executive with a large army—would threaten individual liberty. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 486–89 (1991).

categories defined by constitutional text—such as behavior burdening interstate commerce, behavior infringing privileges and immunities of state citizens, and the like. Approaching state action atextually reveals that practical threats to horizontal stability and doctrinal solutions do not neatly overlap: some categories of conduct implicate multiple doctrines, and some doctrines address multiple categories of conduct. Parts III and IV develop this observation to show how constitutional provisions governing horizontal federalism can function as an integrated system capable of adapting to the wide range of problems requiring constitutional solutions.

The typology in this part also avoids formal distinctions that might invite a jurisprudence of labels keyed to tangential attributes of state action. Alternative rubrics could distinguish state regulations based on criteria such as form (e.g., taxes vs. safety standards), the regulated field (social vs. economic, civil vs. criminal, tort vs. contract, etc.), attitude to other states (aggressive vs. indifferent), identity of the regulator (judicial vs. legislative), and identity of the regulated entities (private vs. public). These factors can obscure connections between types of state action that raise similar theoretical problems but transcend formal boundaries. The categories below therefore draw functional lines that isolate salient themes, albeit at the risk of some overlap and indeterminacy that brighter lines would avoid.

The categories that I define encompass sources of interstate friction that raise *potential* threats to constitutional values, but that would not necessarily fail constitutional scrutiny. Friction-inducing behavior can be tolerable, or even desirable, for three reasons. First, some interstate jostling might be sufficiently minor to obviate judicial review in favor of relying on political and market mechanisms to contain disputes.<sup>57</sup> Horizontal federalism in this respect is no different than any other area of constitutional law in which courts must draw lines between material and immaterial impairments of constitutional values.<sup>58</sup> Second, some diversity between state regulatory approaches is an inevitable consequence of federalism and one of

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57. See *infra* note 108 (discussing state incentives to cooperate).

58. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 36–37 (2004) (O'Connor, J., concurring in the judgment) (distinguishing between “slight” constitutional harms and actions that are not “constitutional violations at all”); Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175, 1177 (1996) (considering how constitutional law should distinguish between “direct” and “incidental” burdens on rights).

its oft-presumed virtues.<sup>59</sup> Even direct competition between states can produce efficient outcomes<sup>60</sup> and enhance the democratic process.<sup>61</sup> Constitutional challenges to such state action may therefore inappropriately squelch innovation or inject the judiciary into disputes that courts are poorly equipped to handle.<sup>62</sup> Finally, the significance of friction is relative, such that antagonizing some states by discriminating against their interests can—if done under federal supervision—avoid even greater friction or advance a more significant national interest.<sup>63</sup>

Whatever the appropriate scope of interstate friction might be, understanding different potential manifestations of friction can help in analyzing how the Constitution deters and contains it. The typology below therefore considers the most troubling categories of friction-inducing behavior to give a flavor of the problems that the constitutional texts discussed in Part III must confront.

## B. SOURCES OF INTERSTATE FRICTION

### 1. Dominion

Destabilizing conflict can occur when one state attempts to assert sovereign power over another's territory or officers. For example, at least eleven interstate border disputes existed during the Founding era,<sup>64</sup> creating simmering tension over the

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59. Justice Brandeis famously articulated a variant of this theory when he observed that “[i]t 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.” *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Of course, the “without risk to the rest of the country” caveat begs the question of when federalism concerns limit a state’s leeway to experiment.

60. See *infra* note 108.

61. See Mark D. Rosen, “Hard” or “Soft” Pluralism?: *Positive, Normative, and Institutional Considerations of States’ Extraterritorial Powers*, 51 ST. LOUIS U. L.J. 713, 749 (2007) (discussing how interstate policy diversity enhances opportunities for individual participation in politics).

62. See Michael E. Smith, *State Discriminations Against Interstate Commerce*, 74 CAL. L. REV. 1203, 1211 (1986) (“Another type of doctrine testing the limits of judicial competence would require the courts to assess . . . whether the overall economic benefits and burdens of a regulation favor local inhabitants against outsiders. Even expert economists might find themselves hard put to make this determination.”).

63. For a comprehensive discussion and defense of federally authorized discrimination, see Metzger, *supra* note 2.

64. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 724 (1838). Border disputes were relatively common in the Founding era in part because the technology for delineating state boundaries was primitive. See *Virginia v.*

limits of each state's power and a significant risk of armed conflict between rival militias.<sup>65</sup> Politically contentious border disputes continue to arise even in the modern era.<sup>66</sup> Other potential examples of attempted dominion would include efforts by one state to assert civil jurisdiction over another state or its instrumentalities, issue writs of habeas corpus to officers of another state, or make formal demands upon other states (e.g., for the extradition of fugitives or return of escaped slaves).

Grouping these potential sources of interstate conflict highlights how the Constitution and case law interpreting it use a mix of approaches to address similar problems. On the one hand, the Constitution mitigates friction from interstate disagreements over the scope of territorial authority by creating a federal forum and federal common law for resolving boundary disputes.<sup>67</sup> Yet on the other it tolerates forcing a state or its officers to accede to jurisdiction in another state's courts,<sup>68</sup> where they may be subject to potentially onerous remedies.<sup>69</sup> Like-

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Tennessee, 148 U.S. 503, 516 (1893) (noting that state border was marked by trees with hatchet indentations).

65. See THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 35, at 61 (fearing settlement of border disputes by "the sword"); JENSEN, *supra* note 55, at 330–31, 335–36, 342–44 (noting violent border disputes early in the Confederation era as well as successful efforts at conciliation).

66. For example, in the past decade New Jersey litigated against New York regarding sovereignty over Ellis Island, and against Delaware regarding the right to regulate construction on the Delaware River. See *New Jersey v. Delaware*, 128 S. Ct. 1410, 1415–16 (2008) (holding that New Jersey lacked authority to construct a liquefied natural gas unloading terminal that would have extended from the New Jersey shoreline into Delaware territory); *New Jersey v. New York*, 523 U.S. 767, 771 (1998) (holding that New Jersey had sovereign power over portions of Ellis Island created by landfill).

67. See *infra* notes 151, 227.

68. See *Nevada v. Hall*, 440 U.S. 410, 426–27 (1979) (rejecting state's sovereign immunity defense); *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 850 N.E.2d 1140, 1142 (N.Y. 2006) (rejecting state agency's personal jurisdiction defense); *Hansen v. Scott*, 2002 ND 101, 645 N.W.2d 223, 225 (N.D. 2002) (rejecting state officers' personal jurisdiction defense).

69. A state court's exercise of jurisdiction over another state or its officers raises an interesting question about what remedies the forum state may provide. Damages are clearly appropriate. See *Hall*, 440 U.S. at 413, 427 (affirming California court's \$1,150,000 judgment against Nevada). In contrast, the Supreme Court has not determined whether the Constitution limits the equitable remedies that state courts may impose on foreign officers in actions arising under the forum state's law. Such remedies could be troubling if, for example, the forum state enjoined foreign officers from implementing policies required by foreign statutes. Federal courts clearly may compel state officers to disregard state law in favor of federal law, and state courts clearly may compel *their own state's* officers to disregard forum law in favor of federal law, but the authority of state courts to compel *another state's* officers to disregard



wise, the Constitution explicitly compels states to respect each other's extradition demands, but apparently allows them to ignore each other's habeas demands.<sup>70</sup> Each of these mechanisms for coping with acts of dominion might be defensible, but it is interesting to note in anticipation of Parts III and IV how a single basic problem—direct assertions of power by one state over another—implicates diverse doctrines and regulatory methods that might each open the others to reevaluation.<sup>71</sup>

## 2. Havens

A constant threat to interstate harmony is that one state will become a haven for behavior that other states seek to restrain. This problem has three variants: an outlier permissive state can frustrate a restrictive majority, a permissive majority can frustrate a restrictive outlier, and restrictive states can in rare instances frustrate permissive states.

First, an outlier permissive state can become a magnet for citizens of relatively restrictive states, creating tension when those citizens fail to return, or return seeking to import new-

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foreign law in favor of forum law is unsettled. *See Ex parte Young*, 209 U.S. 123, 168 (1908) (discussing federal judicial authority to issue injunctions against state officers); *Gen. Oil Co. v. Crain*, 209 U.S. 211, 226 (1908) (discussing state judicial obligation to issue injunctions against local officers). A related problem—with an additional vertical federalism wrinkle—arises in the rare instances when state courts must consider whether to apply *federal* law rather than *forum* law against officers or instrumentalities of another state. *See Carrigan v. Cal. Horse Racing Bd.*, 802 P.2d 813, 817 (Wash. Ct. App. 1991) (noting that “principles of comity” would allow a state court to “decline jurisdiction over another state” in an action seeking remedies under 42 U.S.C. § 1983).

70. *Compare* U.S. CONST. art. IV, § 2 (Extradition Clause), *with* *Abelman v. Booth*, 62 U.S. (21 How.) 506, 516 (1858) (stating in dicta that a Wisconsin court would lack authority to issue a writ of habeas corpus against a custodian in Michigan). *But cf.* *Robb v. Connolly*, 111 U.S. 624, 639 (1884) (holding that a state may issue habeas writs directed at officers of another state operating within the issuing state's territory).

71. A rare permutation of the dominion problem arises when two states by mutual agreement or federal statute exercise concurrent jurisdiction over the same territory, such as a river that provides a common boundary. Shared authority may create tension over optimal policy, although often conduct would clearly be sanctionable in either state. *Compare* *People v. Pitt*, 435 N.E.2d 801, 803–04 (Ill. App. Ct. 1982) (holding that Illinois had jurisdiction over an armed assault on a bridge spanning the Mississippi River between Illinois and Missouri regardless of whether the assault occurred on Illinois' side of the bridge), *with* *State v. Alexander*, 259 S.W.2d 677, 679 (Ark. 1959) (holding that Arkansas did not have jurisdiction over an act violating Arkansas fishing regulations that occurred on Tennessee's side of the Mississippi River because the defendants complied with Tennessee law).

found rights. For example, there is a long history of some entrepreneurial states frustrating the restrictive divorce policies of others by using the prospect of easy divorces to lure visitors,<sup>72</sup> a few states allow same-sex marriages or civil unions that most states prohibit,<sup>73</sup> and before the Civil War northern and southern states differed over the propriety of slavery and disposition of slaves who crossed state lines.<sup>74</sup> Here again the Constitution adopts distinct approaches to similar problems:

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72. See generally NELSON M. BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962) (discussing competition between states for divorce filings and efforts by states to invalidate foreign divorces).

73. See *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (recognizing same-sex marriage); *Kerrigan v. Comm'r of Public Health*, 289 Conn. 135 (2008) (same); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (same); N.H. REV. STAT. ANN. §§ 457-A:1 to 457-A:8 (West Supp. 2007) (recognizing same-sex civil unions); N.J. STAT. ANN. §§ 37:1-28 to 37:1-36 (West Supp. 2007) (same); VT. STAT. ANN. tit. 15, §§ 1201-1207 (West 2002) (same); CAL. FAM. CODE §§ 297-297.5 (West 2004 & Supp. 2008) (recognizing same-sex domestic partnerships); ME. REV. STAT. ANN. tit. 22, § 2710 (West Supp. 2007) (same). States that do not allow same-sex marriages have taken conflicting approaches to dealing with potential havens problems. At least one state (New York) decided to recognize same-sex marriages that were valid in the states that performed them, while thirteen others attempted to avoid the need for such recognition by trying to convince the California Supreme Court to stay its decision finding a right of same-sex couples to marry. See Memorandum from David Nocenti, Counsel to the Governor of N.Y. to All Agency Counsel (May 14, 2008) (“[I]t is now timely to conduct a review of your agency’s policy statements and regulations, and those statutes whose construction is vested in your agency, to ensure that terms such as ‘spouse,’ ‘husband’ and ‘wife’ are construed in a manner that encompasses legal same-sex marriages, unless some other provision of law would bar your ability to do so.”) (on file with author); Docket Sheet, *In re Marriage Cases*, No. S147999 (Cal. 2008) (May 29, 2008, June 2, 2008, and June 4, 2008), available at [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc\\_id=447693&doc\\_no=S147999](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=447693&doc_no=S147999) (noting filings by Alaska, Colorado, Florida, Idaho, Michigan, Missouri, Nebraska, Pennsylvania, South Carolina, Texas, South Dakota, Utah, and Virginia).

74. In addition to well-known tension arising from southern efforts to capture fugitive slaves, see *infra* note 187, two relatively subtle types of interstate problems were particularly vexing. First, if a slaveholder traveling with a slave temporarily crossed into free territory, could the forum state liberate the slave, or was it obligated to respect the property laws of the traveler’s domicile? Second, if a slave obtained a judgment from a northern state that liberated her, were courts in southern states obligated to enforce that judgment (for example, by allowing the freed slave to inherit property under a will probated in a southern court)? For a discussion of how these and similar choice of law and comity problems created interstate friction before the Civil War, see PAUL FINKELMAN, *SLAVERY, FEDERALISM, AND COMITY* (1981). Cf. ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* 87-99 (1975) (discussing theoretical foundations of judicial reasoning about choice of law in cases involving slavery).

the text includes a general default rule requiring states to respect each other's "public Acts, Records, and judicial Proceedings" (which include divorces),<sup>75</sup> authorizes federal legislation to supplant that default rule (which Congress invoked in an attempt to limit recognition of same-sex marriages),<sup>76</sup> and contained an explicit pro-southern preference rule for the disposition of "fugitive slaves."<sup>77</sup> Congress also has discretion to regulate havens that involve the export of tangible items (as opposed to intangible rights) from an outlier permissive forum. For example, in the late nineteenth century Louisiana authorized a lottery, to the annoyance of other states with anti-gambling policies whose citizens purchased Louisiana's tickets on a nationwide black market.<sup>78</sup> Individual states' attempts to squelch Louisiana's lottery were largely ineffective, but federal legislation solved the problem by prohibiting interstate transportation of lottery tickets.<sup>79</sup>

Second, a havens problem can arise when a permissive majority of states provide a haven for refugees from a restrictive outlier. The prospect of what Mark Rosen calls "travel evasion"<sup>80</sup> would frustrate efforts by the outlier to enforce its policies and could therefore chill innovations that are prone to circumvention through geographic mobility. For example, suppose that a state concerned about the dangers of alcohol abuse by young adults tried to address the problem by adopting a relatively high minimum drinking age. If other states retained

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75. U.S. CONST. art. IV, § 1.

76. *See id.*; Defense of Marriage Act of 1996, 28 U.S.C. § 1738C (2000). For an argument that Congress's effort to address the potential havens problem was unconstitutional, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

77. U.S. CONST. art. IV, § 2.

78. *See* Ronald J. Rychlack, *Lotteries, Revenues and Social Costs: A Historical Examination of State-Sponsored Gambling*, 34 B.C. L. REV. 11, 38-42 (1992).

79. *See id.* at 42-44.

80. Rosen, *supra* note 2, at 856; *see also* Rosen, *supra* note 61, at 745-47 (postulating a future in which abortion is legal in some states but not in others, and considering whether a state that prohibits abortions should also have authority to prohibit its citizens from obtaining abortions in other states). What Rosen calls "evasion," Seth Kreimer characterizes as seeking "sanctuary." Seth F. Kreimer, *Federalism and Freedom*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 66, 71-72 (2001). This distinct emphasis highlights two competing interests that influence assessment of havens: the state's interest in enforcing restraints on local citizens and the individual's interest in enforcing the potentially broader rights of national citizenship.

their lower minimums, consumers could circumvent the restrictive state's policy by traveling across state lines. Worse, inducing consumers to travel—often by car—to obtain alcohol increases the risk that they will drive back after consuming it, which would put more intoxicated drivers on the road for longer distances and thus exacerbate one of the side effects of alcohol abuse that the restrictive state was trying to address. Some types of restrictive state policies thus require national uniformity to avoid evasion through havens, which can in part explain the existence of federal power to preempt state law or to provide incentives for states to adopt national standards.<sup>81</sup>

Finally, restrictive states can in rare instances be havens for citizens of permissive states seeking to flee the correlative obligations of liberty. For example, the identity of the haven state in the context of same-sex marriages can depend on one's characterization of the underlying marriage. If same-sex marriages are inherently suspect, then permissive states that allow such marriages are havens for citizens of restrictive states. But if same-sex marriages warrant respect, then restrictive states are havens for citizens of permissive states who seek to evade their marriage obligations by relocating and obtaining de facto annulments.<sup>82</sup>

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81. See *South Dakota v. Dole*, 483 U.S. 203, 208–09 (1987) (affirming congressional power under the Spending Clause to condition highway funding on state adoption of a specified minimum drinking age). If national legislation is not feasible or is insufficient to prevent travel evasion, then states arguably have some authority to protect their interests by regulating extraterritorial conduct that facilitates evasion of restrictive in-state laws and causes in-state harms. In the drinking-age example above, states concerned that local drivers will consume alcohol in more tolerant jurisdictions could impose statutory or common law penalties on out-of-state vendors who cause intoxication that leads to in-state injuries. See *Bernhard v. Harrah's Club*, 546 P.2d 719, 720, 727 (Cal. 1976) (holding that California negligence law applied to a Nevada entity that served alcohol to intoxicated California residents who later caused injuries in California), *partially superseded by statute*, CAL. BUS. & PROF. CODE § 25602(c) (West 2008). *But see* *West Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 681 (Minn. 1983) (holding that Minnesota lacked personal jurisdiction over a tavern in Wisconsin that caused the intoxication and subsequent injury in Minnesota of an eighteen-year-old Minnesota resident who had traveled to evade Minnesota's minimum drinking age of nineteen); *Dunaway v. Fellous*, 842 S.W.2d 166, 167 (Mo. Ct. App. 1992) (refusing to enforce an Illinois dram shop statute against a tavern in Missouri that sold alcohol to an intoxicated person who later caused injuries in Illinois).

82. See Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1 (2005) (contending that states should not assist foreign citizens attempting to circumvent marriage obligations). A similar problem could in theory arise if a state with relatively restrictive rules regarding capacity to contract (e.g., for

### 3. Exclusions

A corollary to the havens problem occurs when states decide to ban conduct that others allow. These exclusions can cause friction if the practical effect is to force actors with a nationwide presence to comply with the most restrictive state laws in order to do business in any state. For example, imagine that State A is a large market for widgets and imposes costly product safety standards that exceed what other states consider appropriate. Widget manufacturers might decide that it is easier to comply with State A's standards nationwide than to manufacture separate lines of widgets for different markets. This decision could lead to higher widget prices in states that would prefer the less-safe cheaper widgets, in effect allowing one state to frustrate the others' regulatory goals. Recent examples of this phenomenon include New York City's regulation of transfats in foods,<sup>83</sup> and California's and Texas's standards for school textbooks.<sup>84</sup> There is no clear constitutional restraint on exclusions that indirectly frustrate regulatory objectives in other states,<sup>85</sup> leaving the problem to political resolution or federal preemption.<sup>86</sup>

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minors or the mentally disabled) declined to bind newly arrived citizens to preexisting contracts that would have been enforceable in their prior domiciles. *But cf.* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS §§ 187–88, 198 (1971) (suggesting implicitly that a party's post-contracting change in residence to a state with no prior relationship with the transaction should not affect the contract's validity).

83. See Christopher Grimes, *Ban on Trans Fats Seals New York's Tough Reputation*, FIN. TIMES (London), Dec. 9, 2006, at 7 (noting possibility that national restaurant chains and food producers would adopt New York's standard nationwide).

84. See DIANE RAVITCH, THE LANGUAGE POLICE 98–104 (2003) (noting that publishers tailor textbooks to state-imposed content guidelines in larger markets, which homogenizes textbooks nationwide).

85. The Commerce Clause might apply if the exclusion directly burdens interstate commerce. For example, one of several factors that the Supreme Court considered in invoking the Commerce Clause to invalidate a state statute limiting the length of interstate trains was a concern that railroads would “conform to the lowest train limit restriction of any of the states through which its trains pass,” which would increase costs and threaten safety in other states forced to contend with a larger number of smaller trains. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 773 (1945). However, exclusions in the transportation context raise unique concerns because they obstruct inherently mobile activity through an interstate channel. Extraterritorial effects of exclusions in other contexts will likely be less direct and thus less likely to constitute a prohibited burden on commerce.

Alternatively, the Due Process Clause might constrain a state's ability to use its local police powers as a tool for inducing regulated entities to alter their extraterritorial conduct in a manner that “infring[es] on the policy choic-

## 4. Favoritism

States have an incentive to favor local interests over out-of-state interests, which can lead to friction with other states concerned about the mistreatment of their citizens or the competitive disadvantage of their businesses.<sup>87</sup> Even seemingly innocuous regulations, such as limits on shellfish harvesting in local waters by out-of-state citizens, have led to armed standoffs between state agents and a spate of Supreme Court decisions.<sup>88</sup> Aside from this *lex lobster*, states have made numerous attempts to privilege local interests by, for example, taxing out-of-state citizens arriving at local ports,<sup>89</sup> using health “quarantine” laws to bar imports from other states,<sup>90</sup> shielding local

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es of other States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996). The quoted dicta from *Gore*, however, is probably limited to cases where states use the threat of punitive “sanctions” to induce extraterritorial conduct, *id.*, rather than when states ban in-state conduct and hope that market forces will translate the local exclusion into a national norm.

86. An analogous process of “leverag[ing] standards upward” can occur in the international system, where stringent regulations in one of several interconnected markets can lead foreign participants to comply with local standards even outside the local jurisdiction. Gregory Shaffer, *Globalization and Social Protection: The Impact of EU and International Rules in the Ratcheting Up of U.S. Privacy Standards*, 25 *YALE J. INT’L L.* 1, 5 (2000); *see id.* at 78 (“[I]t will be pragmatically difficult for businesses to employ two sets of data privacy practices, one for EU residents (providing for greater privacy protection) and one for U.S. residents (providing for less).”).

87. Alexander Hamilton warned, with typical hyperbole, that parochial “distinctions, preferences, and exclusions . . . would beget discontent,” leading to “outrages,” and then to “reprisals and wars.” *THE FEDERALIST NO. 7* (Alexander Hamilton), *supra* note 35, at 62–63; *see also* 3 Farrand, *supra* note 40, at 478 (statement of James Madison) (noting Confederation-era concern about “injustice among the States” arising from parochial “abuse” of power over regional trade).

88. *See* *New Hampshire v. Maine*, 426 U.S. 363, 364 n.1 (1976) (observing that dispute between Maine and New Hampshire over regulation of lobster fishing in boundary waters threatened to become violent prior to litigation); *Louisiana v. Mississippi*, 202 U.S. 1, 35 (1906) (noting “danger of an armed conflict” between state police forces competing to regulate oyster beds); *Wharton v. Wise*, 153 U.S. 155 (1894) (affirming denial of a habeas petition by a Maryland resident jailed for harvesting oysters in Virginia); *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457 (1873) (affirming judgment for the plaintiff in a civil action by a New York resident challenging the seizure of his ship by a New Jersey sheriff enforcing limits on clam harvesting in New Jersey waters). Other aquatic creatures have created similar controversy. *See* *Hughes v. Oklahoma*, 441 U.S. 322 (1979) (reversing criminal conviction of a Texas resident who violated an Oklahoma statute by attempting to export minnows from Oklahoma to Texas).

89. *See* *Smith v. Turner*, 48 U.S. (7 How.) 283, 409 (1849) (invalidating the tax under the Commerce Clause).

90. *Louisiana v. Texas*, 176 U.S. 1, 3 (1900) (dismissing challenge to qua-

debtors from foreign judgments,<sup>91</sup> and using local residency as a factor in discriminating between businesses competing in local markets.<sup>92</sup> More subtle examples of favoritism include taxes that fall disproportionately on visitors from out-of-state (such as hotel patrons and car renters),<sup>93</sup> efforts to neutralize the competitive advantage of out-of-state producers who enjoy a lower cost structure than in-state producers,<sup>94</sup> and regulations couched in “public health and safety” terms but tailored to benefit local manufacturers at the expense of importers.<sup>95</sup> The nominal victim of such biased or protectionist legislation is usually a private actor rather than another state (although state economies can suffer depending on the magnitude of aggregate private injuries), but the harm exists only because the multistate structure of the Union divides sovereign power in a way that creates opportunities for discrimination. Challenges to state laws that discriminate against foreign entities thus illustrate how private claims, often framed in terms of individual equality rights, have a role in implementing the Constitution’s framework for horizontal federalism.<sup>96</sup> More generally, the Constitution’s hostility to parochial favoritism helps create a sense of national identity, which in turn avoids creating en-

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rantime on jurisdictional grounds).

91. See *President & Dirs. of the Bank of Ala. v. Dalton*, 50 U.S. (9 How.) 522, 527–29 (1850) (enforcing Mississippi statute that provided a shorter limitations period for actions to enforce out-of-state judgments than for actions to enforce in-state judgments). Preferences for local debtors also create a havens problem by giving debtors incentives to flee to states that provide safe harbor. See *id.* at 527 (noting that the challenged statute “invites to the State and protects absconding debtors from other States”).

92. See *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 878 (1985) (invalidating an Alabama tax that tried to create a “home team” advantage by taxing out-of-state insurers more heavily than in-state insurers).

93. See Jesse H. Choper & Tung Yin, *State Taxation and the Dormant Commerce Clause: The Object-Measure Approach*, 1998 SUP. CT. REV. 193, 227 (discussing possible Commerce Clause challenges to state statutes “exporting” tax burdens onto nonresident transients).

94. See *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 193–94 (1994) (citing examples of creatively unconstitutional efforts by states to offset importers’ cost advantages with price controls, taxes, and subsidies).

95. *Granholm v. Heald*, 544 U.S. 460, 492 (2005) (invalidating state statutes discriminating against shipments of wine to in-state consumers from out-of-state producers); see also *id.* at 473 (noting that state regulation of interstate wine shipments created “an ongoing, low-level trade war”).

96. For further discussion of how the Constitution uses rights as an adjunct to more traditional structural constraints on horizontal power, see *infra* Part III.D.

trenched regionally-defined factions that would undermine national stability.<sup>97</sup>

### 5. Externalities

Interstate friction can arise when one state pursues otherwise lawful objectives that have negative effects in other states. For instance, air and water pollution from industrial activity span “natural rather than political boundaries,”<sup>98</sup> potentially allowing one state to experience the benefits of economic activity while externalizing the costs to neighbors. There is obviously no “Externalities Clause” in the Constitution, leaving this problem to legal resolution, if at all, through a hodgepodge of me-

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97. Friedrich Hayek noted the basic theoretical problem with intrasystemic parochial economic policies on the eve of World War II, although he was not specifically referring to the United States:

[E]conomic frontiers create communities of interest on a regional basis and of a most intimate character: they bring it about that all conflicts of interests tend to become conflicts between the same groups of people, instead of conflicts between groups of constantly varying composition . . . . [I]t is clearly in the interest of unity of the larger whole that these groupings should not be permanent and, more particularly, that the various communities of interest should overlap territorially and never become lastingly identified with the inhabitants of a particular region.

Friedrich A. Hayek, *Economic Conditions of Inter-State Federalism*, 5 NEW COMMONWEALTH Q. 131, 133–34 (1939), reprinted in FRIEDRICH A. HAYEK, *INDIVIDUALISM AND ECONOMIC ORDER* 255, 257–58 (1948). This observation is slightly in tension with James Madison’s willingness to tolerate state-based factions within a republic, see THE FEDERALIST NO. 10 (James Madison), *supra* note 35, at 84, although the tension dissipates if one recognizes that Hayek and Madison were pursuing distinct inquiries. Hayek was attempting to explain how regional factions could frustrate the ability of federations to preserve peace among their members, while Madison was attempting to allay fears that regional factions would undermine individual liberty. The two positions can be harmonized by positing that conflicts between regional factions are useful to ensure the absence of a dominant majority capable of oppressing a minority, but that the composition of each region, and intensity of each region’s interest, should vary by subject to avoid creating self-reinforcing dyads of conflict. Cf. EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE 86 (2007) (noting “pragmatic” effect of “kaleidoscopic” shifts in interstate alliances over time).

98. *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 24 (1951) (rejecting challenge to an interstate compact regulating sewage discharge into the Ohio River); see also *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238–39 (1907) (noting that a copper factory in Tennessee spewed “sulphurous acid gas” into Georgia, damaging forests and crops); *Missouri v. Illinois*, 200 U.S. 496, 517–18 (1906) (noting that an Illinois law allowing Chicago to dump sewage into a local river sent “fifteen hundred tons of poisonous filth daily” downstream toward Missouri, and was the type of act that in an international context “might lead to war”).



thods, such as statutory or dormant federal preemption, interstate compacts, and diversity litigation.<sup>99</sup>

The inverse of state action creating negative externalities is free-riding by states on the positive externalities of investments in infrastructure and human capital by other states. For example, a heavily subsidized public university in one state benefits neighboring states whose citizens attend it. Horizontal federalism doctrines recognize this problem by allowing public universities to charge higher tuition to out-of-state students, contrary to the general norm prohibiting states from discriminating based on state residence.<sup>100</sup> However, the Constitution does not create any mechanism for one state to compel another to share the costs of mutually beneficial projects, although Article IV's compacts process facilitates politically expedient voluntary burden sharing.<sup>101</sup>

## 6. Rogues

Observers of contemporary interstate relations might take for granted the mutual respect that states exhibit toward each other and their general restraint from overtly hostile interactions. But such respect and restraint was far from assured during the Founding era, when the possibility of rogue or maverick behavior was a significant threat to interstate harmony.<sup>102</sup> For instance, there was a risk that states would ignore each other's civil judgments,<sup>103</sup> threaten each other militarily,<sup>104</sup> or refuse to

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99. For a discussion of how externalities flowing from state regulation of national markets have led to federalization of areas traditionally subject to state control, see Issacharoff & Sharkey, *supra* note 2, at 1368–98.

100. See *Vlandis v. Kline*, 412 U.S. 441, 452–53 (1973) (recognizing legitimacy of differential tuition rates while invalidating a flawed implementation of such rates).

101. See, e.g., New York-New Jersey Port Authority Compact, ch. 77, 42 Stat. 174 (1921) (enabling shared administration of regional transportation infrastructure).

102. The mutual mistrust was sufficiently deep that the framers disregarded their mandate to submit the Constitution for unanimous approval from all thirteen states in favor of requiring ratification from only nine, which avoided shackling the majority to the “perverseness or corruption” of a holdout state. THE FEDERALIST NO. 40 (James Madison), *supra* note 35, at 251. This fear of holdouts was plausible given that Rhode Island did not send any delegates to the Constitutional Convention, and two of New York's three delegates departed in protest while the Convention was in session. See 3 Farrand, *supra* note 40, at 244–47 (letter from New York delegates to New York governor); 2 *id.* at 641 (official tally of final vote to approve Constitution, showing absence of Rhode Island and New York).

103. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 181 (1895) (noting that before

come to each other's assistance.<sup>105</sup> The Constitution's Full Faith and Credit Clause and restraints on state militias help—in very different ways—to avoid such friction,<sup>106</sup> illustrating the mutually reinforcing effect of distinct structural elements of horizontal federalism.<sup>107</sup>

## 7. Competition

A more subtle form of rogue behavior can arise in the arena of interstate economic competition. The extent to which states compete and the efficiency of rules that competition produces are open and context-sensitive questions.<sup>108</sup> However, some forms of horizontal competition clearly create at least a risk of undermining state or national interests. For example, states can attempt to poach each other's tax base and engines of employment and growth by offering relocation incentives to businesses<sup>109</sup> or individuals,<sup>110</sup> or by diluting public welfare

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the Revolutionary War colonial courts could question the merits of each others' judgments); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 325 (1839) (noting "uncertainty" during colonial era about whether out-of-state judgments were enforceable); *James v. Allen*, 1 U.S. 188 (Pa. Ct. Com. Pl. 1786) (refusing to respect order from a New Jersey court discharging a debt, and upholding imprisonment of the debtor in a Pennsylvania jail).

104. See *supra* note 65; *infra* note 151.

105. See KEITH L. DOUGHERTY, *COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION* 103–28 (2001) (discussing refusal of some states to assist in suppressing Shays' Rebellion in Massachusetts).

106. See *infra* text accompanying notes 125, 129, 176–78.

107. In contrast, the Eleventh Amendment impedes resolution of interstate debt cases, illustrating that constitutional provisions sometimes work at cross-purposes. See *infra* text accompanying notes 170–75.

108. The motive for interstate competition is debatable. Many conventional accounts of state behavior posit that governments are inherently prone to self-aggrandizement that leads to competition, but recent scholarship suggests a more nuanced approach that focuses on how politically accountable state leaders respond to constituent preferences, which sometimes but not always favor competitive policies. See Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 944–50 (2005). Even when states compete, market forces can produce efficient outcomes and political forces can provide countervailing incentives to cooperate or negotiate that mitigate the potential for disputes to escalate. See Kramer, *supra* note 76, at 1989–90 (“While states still compete with one another, their relations are characterized by a large degree of what international theorists call ‘diffuse reciprocity,’ a generalized commitment in which self-interested calculations of expected utility are replaced by a general willingness to let things play out in the long run.”). For general discussions of interstate competition, see THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990); JOSEPH F. ZIMMERMAN, *INTERSTATE RELATIONS* (1996); *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* (Daphne A. Kenyon & John Kincaid eds., 1991).

109. See, e.g., Peter D. Enrich, *Saving the States from Themselves: Com-*

regulations to make themselves more hospitable to regulated entities.<sup>111</sup> Such “races to the bottom” can harm all the competing states as each seeks to outdo the others’ concessions or face capital flight as a result of inaction.<sup>112</sup> If all states matched each other’s policies, then all would be worse off and none better off; businesses would have no reason to relocate, and thus no state would gain residents but each would lose the potential benefit of foregone regulations or taxes. The state behavior underlying this competition seems to involve precisely the sort of decisionmaking about local activity that “independent” states are free to pursue, subject only to federal preemption if Con-

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*merce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 380 (1996) (discussing “interstate ‘bidding wars’” through tax incentives). The Supreme Court recently considered a Commerce Clause challenge to an Ohio tax incentive designed to encourage an Ohio manufacturer to expand its operations in Ohio rather than in Michigan, but decided the case on standing grounds without reaching the merits. See *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 338 (2006).

110. See, e.g., PURCELL, *supra* note 97, at 87 (noting attempted “population grab” by Wisconsin, which sent a “commissioner of immigration” to New York City in hope of luring new residents).

111. See, e.g., Richard B. Stewart, *Pyramids of Sacrifice?: Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1212 (1977) (“If each locality reasons in the same way, all will adopt lower standards of environmental quality than they would prefer if there were some binding mechanism that enabled them simultaneously to enact higher standards, thus eliminating the threatened loss of industry or development.”); Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775 (2002) (concluding that state competition for corporate charters tends to privilege manager interests over shareholder interests); Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 MINN. L. REV. 1110, 1121 (2008) (discussing “race-to-the-bottom” in state usury laws). *But see* Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 727–35 (2002) (arguing that government inefficiency and political constraints limit competition among states for corporate charters). Competition can also distort judicial as well as legislative policy. See Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179 (2007) (contending that competition for cases between English courts tilted the common law toward favoring plaintiffs). Another relevant potential manifestation of interstate competition is the formation of cartels comprised of states seeking to obtain an advantage over nonmembers. See *infra* text accompanying notes 135–46 (discussing role of the Compact Clause in ensuring federal oversight of potential cartels).

112. *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1233–35 (1992) (discussing theoretical models of state regulatory and tax behavior that are inconsistent with the race-to-the-bottom theory).

gress concludes that a uniform or minimum regulatory baseline is appropriate. Yet the friction-inducing ripples that competition can produce suggest that at least some instances of aggressive state self-promotion could be seen as akin to more obviously suspect conduct. Whether this observation translates into a constitutional prohibition is questionable,<sup>113</sup> but the broader point remains that a systemic approach to horizontal federalism can highlight troubling aspects of state activity that might seem less objectionable when viewed in isolation.

## 8. Overreaching

A final category of friction-inducing state behavior that is similar to, but not as aggressive as, the “dominion” and “rogue” categories involves efforts to extend the effective reach of state authority beyond a state’s borders. For example, states have attempted to regulate out-of-state conduct by locally chartered corporations,<sup>114</sup> to tax out-of-state property,<sup>115</sup> to exercise civil and criminal jurisdiction over nonresidents with tenuous local connections,<sup>116</sup> to control the disposition of land located in other states,<sup>117</sup> to forbid other states from adjudicating certain civil

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113. Among the problems that judicial enforcement of horizontal constraints on competition would encounter are the lack of a clear constitutional standard, the absence of an objective metric for determining whether competition produced suboptimal rather than efficient levels of taxation or regulation, and the risk that states would circumvent limits on competition in one corner of the market by competing in a different corner. *See id.* at 1247 (noting that federal limits on state competition over environmental standards would lead states “to respond by competing over another variable”).

114. *See* *FTC v. Travelers Health Ass’n*, 362 U.S. 293, 295–96 (1960) (discussing a Nebraska statute that purported to regulate the content of communications that local insurers could have with insureds in other states).

115. *See* *Frick v. Pennsylvania*, 268 U.S. 473, 477–79 (1925) (holding that the Due Process Clause barred Pennsylvania from imposing transfer tax on art in New York owned by the estate of a deceased Pennsylvania domiciliary).

116. *See* *Rush v. Savchuk*, 444 U.S. 320 (1980) (invalidating effort by Minnesota to use the local presence of defendant’s automobile insurer as a basis for asserting civil jurisdiction over the defendant, who was an Indiana resident without Minnesota contacts); *Hageseth v. Superior Court*, 59 Cal. Rptr. 3d 385, 388 (App. 2007) (holding that California had jurisdiction to prosecute defendant for practicing medicine without a license because he transmitted a drug prescription to a California resident via an international website, a Florida contractor, and a Mississippi pharmacy, even though he “was at all material times located in Colorado and never directly communicated with anyone in California”).

117. *See* *Clarke v. Clarke*, 178 U.S. 186, 195 (1900) (holding that a South Carolina court could not alter title to land in Connecticut).

actions,<sup>118</sup> to regulate anticompetitive behavior in other states,<sup>119</sup> and to punish extraterritorial conduct by local actors that was legal in the state where it occurred.<sup>120</sup> Judicial efforts to distinguish appropriate reaching out from inappropriate overreaching have led to many of the vague and much-criticized horizontal federalism doctrines discussed in Parts III and IV.<sup>121</sup> The doctrinal instability illustrates the conceptual failure of the “spheres” model of federalism noted above. When fifty coequal sub-spheres share power provided in the aggregate to regulate activities that span physical boundaries, there is no simple way to define the powers of each while respecting the prerogatives of the others.

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The foregoing examples illustrate that interstate friction can arise from a range of behavior that transcends traditional categories for thinking about law and lawmaking. Friction can emanate from decisions by a state’s executive, legislative, or

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118. See *Tenn. Coal, Iron & R.R. Co. v. George*, 233 U.S. 354, 361 (1914) (holding that a Georgia court could enforce a right under an Alabama statute, even though the statute purported to limit enforcement to Alabama courts); *cf. Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U.S. 55, 70–71 (1909) (allowing Texas court to ignore a New Mexico statute that required all common law suits for personal injuries sustained in New Mexico to be tried in New Mexico courts). New Mexico was a territory rather than a state at the time of *Sowers*, but the Court did not consider that difference material. See *id.* at 64–66.

119. See *Heath Consultants, Inc. v. Precision Instruments, Inc.*, 527 N.W.2d 596, 606 (Neb. 1995) (“While there is no showing that any of the conduct about which [the claimant] complains occurred within the territorial limits of this state, the record nonetheless inferentially establishes that the tying arrangement affected end users of [the defendant’s] equipment in Nebraska by denying them the advantage of parts sold in a freely competitive market.”).

120. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 (1996) (reversing award of punitive damages that punished “lawful conduct in other states”); *Nielson v. Oregon*, 212 U.S. 315, 321 (1909) (reversing a criminal conviction in Oregon of a Washington resident who fished on the Washington side of the Columbia River using a type of net permitted on the Washington side but prohibited on the Oregon side); *State v. Mueller*, 171 N.W.2d 414, 415 (Wis. 1969) (permitting criminal prosecution in Wisconsin of a Wisconsin resident subject to a Wisconsin child-support order who violated a Wisconsin statute that required permission from a Wisconsin court before entering a marriage in Illinois).

121. For an illuminating discussion of doctrine distinguishing overreaching from appropriate reaching, see Seth F. Kreimer, *Lines in the Sand: The Importance of Borders in American Federalism*, 150 U. PA. L. REV. 973 (2002) (responding to Rosen, *supra* note 2); Rosen, *supra* note 61 (in part responding to Kreimer).

judicial branches, and such decisions can implicate civil, criminal, and administrative law. The ensuing disputes can involve a mix of private citizens, state instrumentalities, or states themselves, and can escalate into legal battles in adjudicative fora, rhetorical battles in political fora, or military battles in fora such as Gettysburg and Antietam.

The diversity of potential threats to interstate harmony coupled with the problems of coequality and aggregate power suggest that no one constitutional clause or doctrine can coordinate all aspects of horizontal federalism. The problem is too sprawling and too ingrained into the Constitution's structure to permit a simple solution. The rest of the Article builds on that intuition by revealing (in Part III) horizontal federalism provisions scattered throughout the Constitution's text, and explaining (in Part IV) how discordant doctrinal strands share common purposes and methods.

### III. CONSTITUTIONAL METHODS FOR ADDRESSING INTERSTATE FRICTION

The Constitution still flourishes 220 years after its adoption, which suggests that it contains features that mitigate the risk of interstate conflict and friction—albeit imperfectly, as the Civil War attests. This Part will explore those features, demonstrating how seemingly unrelated constitutional provisions comprise a system for regulating horizontal federalism. Part IV then builds on this observation to propose a model for thinking about horizontal federalism that can rationalize and reshape jurisprudence that is chronically undertheorized and unstable.

The analytical approach in this Part mirrors the approach in Part II by considering ostensibly distinct phenomena from the perspective of horizontal federalism in order to expose hidden connections. The effect is akin to viewing a landscape through tinted lenses: distorting the spectrum illuminates patterns that might otherwise blend into the background. Part II analyzed categories of behavior that could generate interstate friction, while this Part analyzes categories of methods for coping with such friction. These inquiries demonstrate the rich variety of problems that threaten horizontal federalism, the rich variety of solutions that the Constitution provides, and the potential for thinking about these solutions as part of an integrated field of law permeating the Constitution's text rather than as distinct silos of doctrine.

Proposing a thematic outline of the Constitution from the perspective of horizontal federalism is a different enterprise than interpreting each subsidiary clause. Definitive conclusions about so many distinct aspects of the Constitution would require more comprehensive analysis than one article can provide. Rather, this Part is a first pass over the fragmented landscape of horizontal federalism. The methodology is designed to demonstrate that mapping the terrain is not only possible, but rewarding. The point is not to provide an originalist explanation of what the founding generation understood the Constitution to mean, a textualist account of what the Constitution must mean, or a normative assessment of what the Constitution should mean. The goal instead is to offer a plausible account of values and methods that the Constitution could be deemed to support if read systemically from the perspective of horizontal federalism, and to suggest how that perspective enables a fresh reassessment of doctrines that clearly need improvement.<sup>122</sup> This structural analysis lays a foundation for further scholarship incorporating originalist, textualist, or normative methods in the context of specific fact patterns and doctrines.<sup>123</sup>

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122. Positing an underlying coherence to the Constitution's treatment of horizontal federalism does not suggest a specific intent or plan. To the contrary, the relevant constitutional law contains three sets of layers that could not possibly be part of a single grand design: (1) original text that reflects compromises between competing visions of federalism; (2) multiple amendments that altered the balance of state and federal power (notably the Tenth, Eleventh, and Fourteenth); and (3) a gloss of evolving normative commitments and textual understandings that generations of interpreters have imposed. Coherence thus emerges from an iterative process, much as renovations and additions to a home over decades can both preserve and alter its character. *Cf.* Walter Dean Burnham, *Constitutional Moments and Punctuated Equilibria: A Political Scientist Confronts Bruce Ackerman's We The People*, 108 YALE L.J. 2237, 2249 (1999) (discussing efforts to model the "dialectics of continuity and change in our constitutional order").

123. Analyzing the Constitution's structure to find clues about its meaning is an established interpretive method and is especially common in the related context of vertical federalism. *See, e.g.*, Printz v. United States, 521 U.S. 898, 918 (1997) ("We turn next to consideration of the structure of the Constitution, to see if we can discern among its 'essential postulate[s],' a principle that controls the present cases." (citation omitted)); Vicki C. Jackson, *Cook v. Gralike: Easy Cases and Structural Reasoning*, 2001 SUP. CT. REV. 299, 299 (noting that in "cases involving questions of federalism" the Supreme Court has relied on "basic principles it believes immanent in the structure of the United States as a federal union"); *cf.* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 795 (1999) (observing that many methods of constitutional interpretation, including some forms of historical, doctrinal, and textual analysis, "aspire to holism"). The technique has limits, of course, because prescriptive inferences

Examining the Constitution for evidence of how it addresses potential interstate friction reveals five distinct methods spanning numerous textual provisions. Each could merit an entire article. My goal, however, is not to analyze each method comprehensively, but rather to make the broader point that distinct methods exist, whatever their precise contours might be. The existence of these methods suggests the possibility for a more coherent approach to horizontal federalism doctrine, as discussed in Part IV.

#### A. CODEPENDENCE AND DISABLEMENT

The structural counterpart to interstate coequality is interstate codependence. The equal status of states frustrates efforts to resolve disputes between them, but the dependence of states on each other—and on national institutions that are fruits of their cooperation—creates incentives for conciliation and removes or disables instruments of potential conflict escalation. For example, states cannot print money to finance self-aggrandizement,<sup>124</sup> must share with the federal government control over militias that might threaten neighbors,<sup>125</sup> rely on

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from structure “can radiate . . . in a number of ideological directions, depending on who is doing the inferring,” Vince Blasi, *Creativity and Legitimacy in Constitutional Law*, 80 YALE L.J. 176, 183 (1970), and the passage of time alters the significance of past structural commitments, see Lawrence Lessig, *Erie-Effects of Volume 110: An Essay on Context in Interpretive Theory*, 110 HARV. L. REV. 1785, 1801 (1997) (discussing “meaning’s vulnerability to changes in context.”). A complete normative account of horizontal federalism therefore requires more than merely weaving together disparate strands of constitutional text to reveal a broader structure. The analysis here is thus the first rather than only step in reaching a conclusion about the Constitution’s meaning.

124. See U.S. CONST. art. I, § 10. States can raise money through taxation and borrowing, but historically the ability to print money enabled states to finance militarization that the tax base and debt markets could not sustain, and states’ subsequent refusal to honor that money was a source of “violent opposition” from creditors. JENSEN, *supra* note 55, at 303 (discussing Confederation-era repudiation of revolutionary war debts); see also THE FEDERALIST NO. 44 (James Madison), *supra* note 35, at 282 (justifying federal power over currency in part by expressing fear of “animosities . . . among the states” arising from states’ manipulation of exchange values).

125. See U.S. CONST. art. I, § 8; Daniel H. Deudney, *The Philadelphia System: Sovereignty, Arms Control, and Balance of Power in the American States-Union Circa 1787-1861*, 49 INT’L ORG. 191, 201 (1995) (“Unrestrained by the Union, state militias were perceived to be an instrument of potential interstate conflict, but within the Union they could play a vital role of counterbalancing power centralized in the union government . . .”). Many Convention delegates held senior positions in the Continental Army during the Revolution and had become frustrated by unreliable state militias, which may in part ex-



jointly-supplied national military forces for protection,<sup>126</sup> have no formal apparatus for conducting foreign relations,<sup>127</sup> and have only a limited ability to regulate regional trade.<sup>128</sup> Each must also at least partially subordinate its own preferences and parochial interests to the greater interest of interstate harmony by respecting other states' laws and not discriminating against other states' citizens.<sup>129</sup> States in the federal system are thus

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plain why the Constitution provides for federal oversight and coordination. See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, at 9-13, 77 (1975) (discussing military experience of leading federalists).

126. See U.S. CONST. art. I, § 8.

127. The national government appoints and receives ambassadors, *id.* art. II, §§ 2-3, negotiates and approves treaties, *id.* art. II, § 2, declares war and issues letters of marque and reprisal, *id.* art. I, § 8, regulates foreign commerce, *id.*, enforces international law, *id.*, and battles pirates, *id.* The federalization of foreign affairs enables the nation to speak with a single voice on the international stage and avoids the interstate friction that might arise if individual states could align themselves with competing sides in a foreign conflict. See *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840) (plurality opinion) ("It was one of the main objects of the Constitution to make us, so far as regarded our foreign relations, one people, and one nation . . ."); *id.* at 578 (noting "mischief" that might arise if states had discretion to provide different levels of comity to competing foreign countries seeking extradition of fugitives). However, state and local governments still have some capacity to roil international waters by, for example, refusing to enforce foreign judgments, incorporating foreign legal norms into local law, or exporting legal innovations abroad. See *Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (holding that the Constitution permits states to refuse to enforce foreign judgments); Resnik, *supra* note 36, at 1626 (discussing "state courts as ports of entry for transnational rights" and "the intake of transnational rights through city councils, state legislatures, mayors, and national organizations of local officials").

128. See U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause); *id.* art. I, § 10, cl. 2 (Imposts and Duties Clause); *id.* (Duty of Tonnage Clause). Conceptualizing the Commerce Clause as an aspect of constitutional restraints on state power rather than solely as a grant of federal power suggests that horizontal federalism principles may in part justify the seemingly atextual Dormant Commerce Clause doctrine that some observers view as merely "an unjustified judicial invention." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring).

129. See U.S. CONST. art. IV, §§ 1-2 (Full Faith and Credit and Privileges and Immunities Clauses); Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2511 (1999) ("Full Faith and Credit determines when parties must be accorded the rights granted by *foreign* law; Privileges and Immunities when they must be accorded rights granted by *forum* law."). Both clauses were designed to avoid friction that might arise from local favoritism and to "fuse into one Nation a collection of independent, sovereign States." *Toomer v. Witsell*, 334 U.S. 385, 395 (1948). States also may have reciprocally obligated themselves to maintain an unspecified level of internal tranquility and republican virtue. See U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . ."); Metzger, *supra* note 2, at 1498 (treating

economically, militarily, and politically hobbled compared to traditional nation-states. This incapacity denies states convenient means to escalate disputes and creates incentives to cooperate in order to continue receiving the protection and stability that union provides.<sup>130</sup>

The extensive codependence between states is a defining feature of the Constitution and was far from inevitable. Although some sacrifice of independence is inherent in any cooperative enterprise, it is easy to imagine an alliance of states that preserves far more power for each to create mischief. A stark example was the Confederation that preceded the Union, in which states harboring mutual “animosities and enmities”<sup>131</sup> asserted their independence by retaining their own monetary systems, erecting barriers to regional trade, and controlling their own militias.<sup>132</sup> Supporters of the Constitution apparently viewed the Confederation as inadequate in part because state independence was too intoxicating, leading states to pursue their own self-interest to the point of creating systemic friction that left them collectively worse off.<sup>133</sup> The Constitution’s fra-

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the Guarantee Clause as relevant to “interstate relations”).

130. From a game theory perspective, pursuing codependence was a sensible strategy for states if they lacked mutual trust and feared that unilateral attempts at comity would leave them vulnerable to defection by other states. Mutual disablement from independent action inhibited defection and thus sent a credible signal of states’ commitment to cooperation. *Cf.* Thomas C. Schelling, *THE STRATEGY OF CONFLICT* 22 (1960) (noting potential value in bargaining of a party’s “voluntary but irreversible sacrifice of freedom of choice”).

131. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 117 (1940).

132. *See, e.g.*, JAMES MADISON, *Vices of the Political System of the United States*, in 9 *THE PAPERS OF JAMES MADISON* 345–49 (Robert A. Rutland et al. eds., 1975) (discussing “Trespasses of the States on the Rights of Each Other,” including protectionist tariffs, as one of several justifications for a Constitutional Convention); KOHN, *supra* note 125, at 77 (noting that the framers believed that federal control over state militias was necessary to “prevent a state from evading or checkmating the national will”); MATSON & ONUF, *supra* note 45, at 72–73 (noting interstate disputes over regional trade); Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 *KY. L.J.* 37, 60–66 (2005) (collecting examples of protectionist tariffs).

133. *See* MATSON & ONUF, *supra* note 45, at 50 (“In pursuit of their interests, the states appeared willing to jeopardize the common cause and subvert the Union . . . [through] hostile competition for relative advantage . . . .”); *supra* text accompanying notes 53–56. An alternative possibility is that the states and a significant number of their citizens were reasonably satisfied with the Confederate-era level of comity, and that the contrary perception was a myth orchestrated by a loose collection of groups—such as holders of state

mers and ratifiers responded by lashing states to the mast of Union and codependence. Today we take for granted that they did so, but the fact that they did reveals a foundational constitutional method for coping with interstate friction.<sup>134</sup>

## B. COOPERATION AND DISPUTE RESOLUTION

A second set of constitutional provisions prevents or mitigates interstate friction by creating institutions and procedures to facilitate peaceful resolution of disputes. These provisions demonstrate the framers' awareness that while conflict between diverse coequal states is inevitable, escalation of such conflict is avoidable.

The Constitution uses two distinct mechanisms to prevent interstate sparks from flaring into fires. First, the "interstate negotiation clauses"—my term for the Compacts and State Treaty Clauses in Article I, Section 10—enable peaceful settlement of disputes while minimizing the chance that settlement terms will create further conflicts. Second, the "interstate jurisdiction clauses"—my term for a cluster of clauses in Article III—provide a neutral forum for disputes implicating state interests that might otherwise fester or terminate in ways that incite further controversy. The combined effect of these clauses is to contain interstate conflicts before they metastasize beyond control.

### 1. Interstate Negotiation Clauses

The interstate negotiation clauses stabilize horizontal federalism in three distinct ways: by permitting some interstate

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debt, manufacturers, and merchants—interested in creating a national economy. *See* JENSEN, *supra* note 55, at 344–45. Whatever the precise mix of motives leading states to doubt the wisdom of continued independence, the fact remains that states eventually surrendered substantial autonomy. This surrender had the effect of making interstate conflicts more difficult to instigate and escalate.

134. Another example of an alliance that creates a federal system while preserving substantial member independence is the European Union. Like the U.S., the E.U. has legislative bodies, executive agencies, and its own courts, and the federal-level governments in each wield substantial power over regional commerce. Many E.U. members also share a common currency and contribute to a supranational military force (under the aegis of NATO rather than the E.U.). Yet the national members of the E.U. retain far more attributes of sovereignty than the state members of the U.S., including their own national militaries and foreign ministries, and have a far greater potential to antagonize each other than do U.S. states. For a general discussion of the E.U.'s structure, see CLIVE ARCHER, *THE EUROPEAN UNION* 33–58, 73–79, 119–28 (2008).

agreements, forbidding others, and reserving a supervising role for Congress. First, the Compact Clause permits states to resolve their differences by “Agreement or Compact,” subject to congressional approval.<sup>135</sup> The importance of enabling negotiated agreements is evident from the range of potentially volatile disputes that compacts have resolved, including disagreements about the location of state borders, disposition of scarce natural resources, allocation of tax revenues, and regulation of regional transportation and economic activity.<sup>136</sup> Second, the State Treaty Clause prohibits any “Treaty, Alliance, or Confederation” between states.<sup>137</sup> The precise meaning of this clause has been “lost” to time because the semantic distinction between a permissible “compact” or “agreement” and an impermissible “treaty” or “confederation” has no modern resonance.<sup>138</sup> Whatever its exact meaning, the clause’s rationale seems to be that some types of formal commitments between states to aggregate their power are intolerable because they pose a severe threat to state equality (as well as federal supremacy).<sup>139</sup> The wisdom of the clause becomes apparent if one imagines the instability that would have arisen before 1860 if the Constitution permitted—or forced Congress into the position of rejecting—a “Confederation of Southern States” or “Alliance of Free States” that might have hastened a civil war.<sup>140</sup> Finally,

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135. U.S. CONST. art. I, § 10, cl. 3.

136. See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 3–4 nn.14–18 (1997). Compacts might also promote interstate harmony in a second way, by creating institutions (such as administrative agencies) that enable prolonged interstate cooperation. However, there is no reliable evidence establishing whether the conflicts that prolonged cooperation avoids are more or less significant than the conflicts that prolonged interaction incites.

137. U.S. CONST. art. I, § 10, cl. 1.

138. *U.S. Steel Corp. v. Multistate Tax Comm’n*, 434 U.S. 452, 461–62 (1978) (“[T]he Framers used the words ‘treaty,’ ‘compact,’ and ‘agreement’ as terms of art, for which no explanation was required and with which we are unfamiliar.” (footnote omitted)); see also *id.* at 460–64 (discussing origins and early interpretations of the State Treaty Clause). The often useful *Federalist Papers* are frustratingly unhelpful here, asserting that the State Treaty Clause serves “reasons which need no explanation.” THE FEDERALIST NO. 44 (James Madison), *supra* note 35, at 281.

139. The clause also bars treaties, alliances, and confederations between states and foreign nations. Such arrangements could threaten federal supremacy in the field of foreign relations and cause interstate friction if states joined with competing sides in a foreign conflict. See THE FEDERALIST NO. 7 (Alexander Hamilton), *supra* note 35, at 65 (warning that states might become “entangled in all the pernicious labyrinths of European politics and wars”).

140. Of course, the Confederacy eventually formed despite Article I’s prohi-

the requirement that Congress approve interstate compacts helps ensure that states do not use the right to negotiate as an opportunity to externalize costs on non-negotiating states or to form cartels that would undermine interstate relations.

My contention that Congress's role in approving interstate compacts is an aspect of horizontal federalism calls into question modern Supreme Court doctrine and helps uncover a lost strand of Compact Clause jurisprudence. The prevailing interpretation of the Compact Clause presumes that negotiated arrangements between states constitute "Agreements or Compacts" requiring congressional approval only when the agreements potentially destabilize vertical federalism.<sup>141</sup> This interpretation posits that congressional intervention is necessary solely to ensure a "proper balance between federal and state power" that respects "federal supremacy."<sup>142</sup> However, a fresh look at the Constitution's structure from the perspective of horizontal federalism illuminates an alternative (and complementary) role for Congress in mitigating interstate friction. Scholars who have studied specific compacts have noted a tendency of negotiating states to externalize harms on outsider states and "exploit" the leverage over other states that joint action creates.<sup>143</sup> The Supreme Court likewise recognized as early

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bition, illustrating that structural restraints on state action can go only so far in the face of intense state opposition.

141. One might reasonably wonder why congressional approval is not required for *all* negotiated arrangements between states given the seemingly broad reach of "Agreement" in Article I, Section 10. However, the Supreme Court has disclaimed a literal reading of "Agreement" to avoid crippling routine interstate interactions. See *U.S. Steel Corp.*, 434 U.S. at 459 ("the Clause could not be read literally"); *id.* at 469 ("[N]ot all agreements between States are subject to the strictures of the Compact Clause.").

142. *Id.* at 460, 471; see also *Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 175–76 (1985); *New Hampshire v. Maine*, 426 U.S. 363, 369–70 (1976); *Virginia v. Tennessee*, 148 U.S. 503, 518 (1893) (noting possibility that compacts might "tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States"). The *U.S. Steel Corp.* Court concluded that a challenged compact did not require congressional approval because it did not undermine federal supremacy. See 434 U.S. at 472–77. The Court also considered the factual possibility that the compact "impair[ed] the sovereign rights of nonmember States," but rejected that assertion and thus never considered whether, if true, a threat to nonmember states would require congressional approval. *Id.* at 477.

143. Michael S. Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285, 293 (2003); see also Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution: A Study in Interstate Adjustments*, 34 YALE L.J. 685, 695 (1925) (stating that compacts affect "interests of states other than those parties to the agreement"). These observations are subjective

as 1838 that states might use compacts not only to undermine the federal government, but also to impose costs on other states excluded from the agreement.<sup>144</sup> By 1854, the Court went so far as to state in dicta that the Compact Clause “is obviously intended to guard the rights and interests of the other States, and to prevent any compact or agreement between any two States, which might affect injuriously the interest of the others.”<sup>145</sup> But by 1893, concerns about horizontal federalism had yielded to a postbellum emphasis on federal supremacy, without any explanation of why interstate friction was no longer relevant.<sup>146</sup> A holistic approach to horizontal federalism suggests that the Supreme Court’s pre-1893 insights provide a more appropriately nuanced account of the national interests at stake in compact formulation, and that modern doctrine focused on federal supremacy is needlessly myopic.

## 2. Interstate Jurisdiction Clauses

When negotiation fails to resolve an interstate dispute, adjudication is often preferable to allowing the conflict to simmer or escalate beyond mere rhetoric. However, adjudication could do more harm than good if the parties perceive the forum as biased or illegitimate, such that its judgments go unenforced or incite further animosity and discord. The Constitution addresses this problem by authorizing federal courts to hear cases implicating horizontal federalism concerns, in the apparent belief that an order from a federal court is more likely to preserve interstate harmony than an order from a court in a state with an interest in the dispute’s outcome.

Adopting a horizontal perspective can add a new dimension to recurring debates about the proper scope of federal judicial power. Five of the nine heads of jurisdiction in Article III can be understood as part of the constitutional structure of horizontal federalism: the State Controversies Clause, the Diversity

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because there is no aggregate empirical data about the horizontal effects of compacts.

144. See *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 726 (1838) (stating that congressional review prevents “derangement” of “federal relations with the other states of the Union, and the federal government”).

145. *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1854). The two dissenters in *U.S. Steel Corp.* reached a similar conclusion. See 434 U.S. at 494 (White, J., dissenting) (“[E]ncroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority. . .”).

146. See *Virginia*, 148 U.S. at 518.

Clause, the Land Grants Clause, the Admiralty Clause, and the Out-of-State Citizen Clause.<sup>147</sup> These jurisdictional grants are also an aspect of vertical federalism because they define the scope of federal authority broadly at the expense of state authority, but the horizontal consequences of such vertical expansion can help determine whether the expansion is justified.

The clause authorizing federal jurisdiction over “Controversies between two or more States”<sup>148</sup> promotes horizontal federalism in at least three ways.<sup>149</sup> First, federal jurisdiction has a peace-keeping effect, especially if one assumes that an interstate dispute that resists political resolution is probably sufficiently sensitive to generate friction and the risk of escalation.<sup>150</sup> The Supreme Court has thus long understood its jurisdictional role as arising from “universal conviction of its necessity, in order to preserve harmony among the confederated states.”<sup>151</sup> Second, the clause arguably enables states to

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147. U.S. CONST. art. III, § 2. Early precursors to Article III discussed at the Constitutional Convention were more explicit in linking jurisdiction to horizontal and vertical stability by granting federal courts power over “questions which may involve the national peace and harmony.” 1 Farrand, *supra* note 40, at 22 (text of the Virginia Plan); *see also id.* at 238 (statement by Edmund Randolph emphasizing “the difficulty in establishing the powers of the judiciary” and the need “to preserve the harmony of states and that of the citizens thereof”); 2 *id.* at 39 (reporting unanimous approval of resolution stating “[t]hat the jurisdiction of the national Judiciary shall extend to cases arising under laws passed by the general Legislature, and to such other questions as involve the National peace and harmony”).

148. U.S. CONST. art. III, § 2, cl. 1. The Constitution authorizes original jurisdiction in the Supreme Court, *id.* art. III, § 2, cl. 2, and Congress has made the Court’s jurisdiction exclusive, *see* 28 U.S.C. § 1251(a) (2000).

149. The Clause also can be considered an aspect of vertical federalism that ensures state compliance with federal obligations. *See* James E. Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555 (1994) (arguing that original jurisdiction in state-party cases was intended to circumvent practical limits on judicial enforcement of federal rights caused by state immunity doctrines and the possibility that inferior federal tribunals would not be available).

150. *Cf.* THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 35, at 477 (noting that jurisdiction would address “bickering and animosities” between states). The sensitivity of a horizontal dispute can create vertical tension when the federal government leaps into it, which may partially explain why the Supreme Court is cautious about using its equitable powers. *See* Connecticut v. Massachusetts, 282 U.S. 660, 669 (1931) (“[T]his Court will not exert its extraordinary power to control the conduct of one State at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence.”).

151. Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 728 (1838); *see also* Kansas v. Colorado, 206 U.S. 46, 97 (1907) (noting that jurisdiction is an alternative to use of “force” by states). The risk of friction and need for neutral

file federal *parens patriae* actions against other states on behalf of their citizens, which can extinguish sources of friction by remedying private injuries and consolidating burdensome private litigation that might otherwise be a lingering source of interstate tension.<sup>152</sup> The Supreme Court has vacillated about whether states have standing to file such actions.<sup>153</sup> However, the Court has not expressly considered the standing question in the broader context of horizontal federalism discussed here, which might add another dimension of support. Finally, federal jurisdiction complements the Compact Clause, and is thus part of a broader structural web regulating horizontal federalism, because the existence of a forum for adjudicating interstate disputes creates the prospect of definitive resolution and thus an incentive to negotiate in its shadow.<sup>154</sup>

Analyzing the Diversity Clause, which authorizes federal jurisdiction over controversies “between citizens of different states,”<sup>155</sup> as an aspect of horizontal federalism offers a novel perspective on perennial debates about the clause’s utility. Commentators generally view diversity jurisdiction through a vertical federalism prism. They defend the clause, if at all, on the ground that it promotes federal interests by protecting out-

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resolution was especially acute in border disputes, which accounted for all six of the cases that arose under the interstate dispute resolution mechanism in the Articles of Confederation. The Court recognized the importance of “peaceful procedure” in such disputes to prevent “prolonged and harassing conflicts.” *Virginia v. Tennessee*, 148 U.S. 503, 504 (1893); *see also* ARTICLES OF CONFEDERATION art. IX, § 2 (“[Congress] shall also be the last resort on appeal in all disputes and differences . . . between two or more states concerning boundary, jurisdiction or any other cause whatever . . . .”); Robert Granville Caldwell, *The Settlement of Inter-State Disputes*, 14 AM. J. INT’L L. 38, 53–54 (1920) (discussing border disputes under Article IX); *cf.* *Oklahoma v. Texas*, 258 U.S. 574, 580 (1922) (noting possibility of “armed conflicts” between state militias over a border region rich in natural resources).

152. Of course, the *parens patriae* suit could itself create friction, which may explain why the Constitution also enables individuals to enforce some structural rights without state assistance. *See infra* Part III.D.

153. *Compare* *Pennsylvania v. New Jersey*, 426 U.S. 660, 666 (1976) (state lacks standing to aggregate “collectivity of private suits” against allegedly discriminatory taxes), *and* *Louisiana v. Texas*, 176 U.S. 1, 22 (1900) (“[I]n order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another.”), *with* *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (standing exists to protect “health and comfort” of citizens), *and* *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (standing exists to prevent “substantial economic injury”).

154. *See Rhode Island*, 37 U.S. at 726 (observing that the “resort to judicial power” may “persuad[e]” states to enter compacts).

155. U.S. CONST. art. III, § 2, cl. 1.



of-state citizens (who are also U.S. citizens entitled to vertical protection)<sup>156</sup> from local bias, facilitating the orderly functioning of national markets that might otherwise suffer interference from parochial state courts, easing collection of interstate debts, and creating a mechanism for sharing ideas and best practices between state and federal judicial systems.<sup>157</sup> Yet concurrent federal jurisdiction over private interstate disputes serves an additional goal of promoting horizontal stability when the dispute implicates state interests, such that a neutral forum mitigates interstate friction during the litigation and in efforts to enforce the judgment.<sup>158</sup> The prospect of private diversity suits entangling state actors or provoking intense state reactions may seem remote today. But the concern was more pressing in the Founding era, when some diversity actions involved claims by out-of-state residents against state officers enforcing state law,<sup>159</sup> or addressed matters that were sufficiently significant to excite state interest.<sup>160</sup> Even today, commercial

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156. See *id.* amend. XIV, § 1.

157. For discussion of the competing positions and arguments, see RICHARD H. FALLON, JR., DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1454–56, 1498–503 (5th ed. 2003); see also Robert L. Jones, *Finishing a Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U. L. REV. 997, 1003 (2007) (contending that federalization of interstate litigation may have occurred in part due to hostility toward “unrestrained democracy” evident in the behavior of state juries).

158. The fact that diversity jurisdiction is concurrent rather than exclusive limits its effectiveness as a tool for managing interstate friction because litigation decisions by the parties about where to file and whether to remove can allow tension to fester in state court. However, if a case is sufficiently important to generate substantial interstate friction, at least one of the parties will likely have an incentive to escape from the courts of an interested state by filing an original action in federal court or filing a notice of removal. That incentive helps to preserve the diversity statute's role in mitigating interstate friction, but raises a different problem—the removal statute might not allow removal. See 28 U.S.C. § 1441(b) (2000) (barring removal in diversity actions if a defendant is a citizen of the forum state). Any future reexamination of diversity jurisdiction from a horizontal federalism perspective must therefore reexamine removal as well.

159. See Michael G. Collins, *Before Lochner—Diversity Jurisdiction and the Development of General Constitutional Law*, 74 TUL. L. REV. 1263 (2000) (discussing diversity suits involving interpretation of state constitutions); Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 91–99 (1997) (discussing diversity suits against state officers).

160. See 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 557 (Jonathan Elliot ed., 2d ed. 1836) (reporting John Marshall's statement at the Virginia ratifying convention that “refusal of justice” by state courts to out-of-state residents in private

disputes involving nationwide conduct can implicate sensitive and conflicting regulatory interests of multiple states. These conflicting interests may partially explain Congress's recent decision to expand the scope of diversity jurisdiction in class actions.<sup>161</sup> The contribution of diversity jurisdiction to horizontal stability may or may not be worth the burdens that diversity cases impose on federal courts and the costs of denying state courts an opportunity to adjudicate private disputes.<sup>162</sup> Nevertheless, analyzing diversity jurisdiction from a horizontal rather than a vertical federalism perspective provides additional grist for discussion about the proper scope of federal judicial power.

Three other provisions of Article III can also be understood as part of the constitutional structure of horizontal federalism. First, the clause granting federal jurisdiction over controversies "between Citizens of the same State claiming Lands under Grants of different States"<sup>163</sup> was an important aspect of interstate conflict-avoidance because these ostensibly private disputes could lead to formal judicial determinations of state borders.<sup>164</sup> An "impartial tribunal" was essential in such cases because "a state tribunal might not stand indifferent in a controversy where the claims of its own sovereign were in conflict with those of another sovereign."<sup>165</sup>

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suits could lead to "disputes between the states."); 2 Farrand, *supra* note 40, at 147 (reprinting an early draft of the Constitution that included the Diversity Clause as a subset of a section granting jurisdiction over "such other cases, as the national legislature may assign, involving the national peace and harmony"); THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 35, at 477 (noting that the Diversity Clause was one of several that were "essential to the peace of the Union").

161. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4–5, 119 Stat. 4, 9–13 (codified in scattered sections of 28 U.S.C.); Issacharoff & Sharkey, *supra* note 2, at 1416 (contending that expansion of federal jurisdiction reflected concern about "opportunistic state-court oversight of the national market").

162. See sources cited *supra* note 157.

163. U.S. CONST. art. III, § 2, cl. 1. Congress vested this jurisdiction in the first Judiciary Act. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 80 (codified as amended at 28 U.S.C. § 1354 (2000)).

164. See *Moore v. McGuire*, 205 U.S. 214 (1907) (determining boundary between Arkansas and Mississippi); *St. Louis v. Rutz*, 138 U.S. 226 (1891) (determining boundary between Illinois and Missouri); *Handly's Lessee v. Anthony*, 18 U.S. (5 Wheat.) 374 (1820) (determining boundary between Ohio and Indiana).

165. *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 322 (1815).

Second, admiralty jurisdiction, which is sensibly considered an aspect of vertical federalism,<sup>166</sup> is also an aspect of horizontal federalism. Disputes that arise in boundary waters or navigable interstate waters can involve competing claims of sovereignty by different states or conflicting claims to property by owners or crews from different states. These disputes can have ripple effects on interstate relationships, and in fact were contentious during the Founding era.<sup>167</sup> A federal forum can thus serve the same conflict-avoidance role in admiralty cases as in diversity cases.

Finally, the clause granting jurisdiction over suits “between a State and Citizens of another State”<sup>168</sup> attempted to provide a federal forum to address potentially delicate matters that might generate friction—including “war and bloodshed”<sup>169</sup>—in the hands of state courts. However, the prospect of successful federal litigation by out-of-state creditors seeking to collect Confederation-era debts from nearly insolvent states was so inimical to state interests that the Eleventh Amendment partially<sup>170</sup> repealed this head of jurisdiction in

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166. Admiralty law has several characteristics that trigger federal interests. It can apply in areas that are not clearly part of any state (such as boundary and coastal waters), it implicates foreign relations and international law (for example, in prize cases), it governs a labor force that is inherently mobile, and it applies to a channel of interstate and international commerce. For a discussion of the Admiralty Clause’s origins, see Jonathan M. Gutoff, *Original Understandings and the Private Law Origins of the Federal Admiralty Jurisdiction: A Reply to Professor Casto*, 30 J. MAR. L. & COMM. 361 (1999).

167. For example, state admiralty courts during the Confederation era often ignored each other’s decrees, favored local vessels, and tolerated outright “plunder[]” of vessels from other states. Wythe Holt, “*To Establish Justice*”: *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1429.

168. U.S. CONST. art. III, § 2, cl.1.

169. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 468 (1793) (Cushing, J.).

170. Jurisdiction still exists over suits *by* rather than *against* states, which allows adjudication to serve as an “alternative to force.” *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907) (“When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi*-sovereign interests . . .”). However, jurisdiction does not extend to an ill-defined set of regulatory enforcement efforts by states that the Supreme Court terms “penal” (in contrast to “civil”). *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289 (1888), *overruled in part on other grounds by Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935). This jurisdictional gap can undermine interstate harmony by allowing out-of-state residents to violate local regulations, default on judgments obligating them to pay fines for such violations, and then claim jurisdictional immunity from actions in federal court seeking

1795.<sup>171</sup> Critiques of the Eleventh Amendment and of the line of precedent expanding state immunity from diversity cases to federal question cases<sup>172</sup> typically frame the problem as an aspect of vertical federalism: immunity carves an area of state autonomy from federal oversight and thus shields states from being held accountable under federal law.<sup>173</sup> But viewing the Eleventh Amendment and its doctrinal progeny from the perspective of horizontal federalism reveals an additional cost: they relegate potentially volatile cases to state courts that might exacerbate interstate friction,<sup>174</sup> contrary to five provisions of Article III that attempt to federalize such disputes.<sup>175</sup>

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to enforce the judgments. *See id.* at 299–300 (finding lack of original jurisdiction in suit by Wisconsin seeking to enforce a fine against a Louisiana insurer that had ignored Wisconsin statutes governing conduct of insurance business in Wisconsin). A state harboring the defaulting entity could open its courts to collection efforts as a matter of comity, but the Full Faith and Credit Clause does not compel the state to provide a forum. *See id.* at 291–92; *cf. Milwaukee County*, 296 U.S. at 279 (“We intimate no opinion whether a suit upon a judgment for an obligation created by a penal law, in the international sense . . . is within the jurisdiction of the federal District Courts, or whether full faith and credit must be given to such a judgment even though a suit for the penalty before reduced to judgment could not be maintained outside of the state where imposed.”).

171. *See Petty v. Tenn.-Mo. Bridge Comm’n*, 359 U.S. 275, 276 n.1 (1959) (noting that opposition to federal jurisdiction framed in the rhetoric of state sovereignty cloaked a desire to avoid suits on defaulted debts); James E. Pfander, *History and State Suability: An “Explanatory” Account of the Eleventh Amendment*, 83 CORNELL L. REV. 1269, 1324–28 (1998) (contending that states feared being forced to pay debts that: (1) predated the Constitution; (2) were denominated in depreciated currency but potentially payable in more valuable specie; (3) were not judicially enforceable at the time incurred; and (4) fell outside the post-constitutional system for federal assumption of states’ Revolutionary War obligations). A similarly aggressive attempt by states to avoid honoring bonds financing the Civil War provoked further expansion of states’ immunity from suit at the end of Reconstruction. *See JOHN V. ORTH, THE JUDICIAL POWER OF THE UNITED STATES: THE ELEVENTH AMENDMENT IN AMERICAN HISTORY* 58–89 (1987).

172. *See Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

173. *See, e.g., Amar, supra* note 1, at 1484–92.

174. States can exacerbate potential friction by immunizing themselves in their own courts from at least some federal claims, *see Alden v. Maine*, 527 U.S. 706, 711–13 (1999), but may still be amenable to suit in the courts of other states, *see Nevada v. Hall*, 440 U.S. 410, 426–27 (1979).

175. Adopting a horizontal federalism perspective also helps deflate the Supreme Court’s theory that “[t]he preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.” *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002). This Article’s structural analysis of the Constitution illustrates the framers’ deep unease about the potential of states to act mischievously, and the framers’ systemic effort to cabin state discretion and hobble state authori-

## C. FIRST-IN-TIME RULES

Another constitutional method for mitigating interstate friction is the creation of first-in-time rules for determining which of two competing states should receive deference in particular situations. The rules apply in similar circumstances: two states assert an entitlement to exercise power over the same person or matter, the claimed entitlements are mutually exclusive, the conflict should not be allowed to fester, and so the Constitution provides that prior entitlements trump subsequent claims. This approach is remarkably pragmatic from a conflict-avoidance perspective when compared to alternative methods. A second-in-time rule would cause friction by encouraging entities to seek haven in other states from undesired local regulation, while an approach that assessed the merits or relative intensity of each state's claim would likely prolong dispute resolution, stoke passions, and lead to lingering resentment in the losing state.

First-in-time rules are evident in three constitutional provisions. First, the Full Faith and Credit Clause requires states to enforce final judgments rendered in other states, subject to narrow exceptions allowing the enforcing state to apply its own law of remedies,<sup>176</sup> or to challenge the rendering state's jurisdiction over the parties or subject.<sup>177</sup> This rule can create fric-

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ty in matters that transcended state borders. Thus, even if one believes that some state independence from federal oversight is desirable, the Supreme Court's effort to cloak a constitutional structure of distrust and disablement of states with a majestic mantel of state dignity rings hollow. For a broader critique of the dignity theory, see Judith Resnik & Julie Chi-hye Suk, *Adding In-sult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

176. See *Anglo-Am. Provision Co. v. Davis Provision Co.*, 191 U.S. 373, 373-74 (1903) (holding that a state need not provide a remedy in an enforcement action between nonresidents); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327-28 (1839) (holding that a state can apply its own statute of limitations to bar enforcement of foreign judgments).

177. Collateral attacks on jurisdiction are appropriate only when the objecting party did not have an opportunity to "fully and fairly" litigate the challenge in the rendering court. *Durfee v. Duke*, 375 U.S. 106, 111 (1963); see also *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982) ("A party cannot escape the requirements of full faith and credit and *res judicata* by asserting its own failure to raise matters clearly within the scope of a prior proceeding."). This limit on collateral attacks attempts to balance the inconsistent goals of limiting state power and ensuring finality of judgments. See RESTATEMENT (SECOND) OF JUDGMENTS § 12 cmts. a-d (1982) (discussing competing concerns). An exception (of undetermined breadth) to this rule allows collateral attacks on state judgments that violate a federal statute stripping subject-matter jurisdiction from state

tion if the basis for the rendering state's decision is inconsistent with the preferences of the enforcing state, but can be understood as part of a structural choice in the Constitution to favor a content-neutral preference rule over case-by-case review of each state's competing interests.<sup>178</sup>

Second, the Extradition Clause creates a first-in-time rule for obtaining custody over fugitives by prioritizing the interests of the state from which the fugitive fled,<sup>179</sup> which in a temporal

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courts. See *Kolb v. Feuerstein*, 308 U.S. 433, 438–39 (1940) (allowing collateral attack on a state judgment rendered on a subject within the exclusive jurisdiction of federal bankruptcy courts). Although *Kolb's* limit on state overreaching invokes the rhetoric of vertical federalism, see *id.* at 439 (extolling “the supreme law of the land”), the opinion's preference for federal bankruptcy adjudication also illustrates the concurrent operation of several methods for regulating interstate friction, including: federal legislative power to preempt state law on matters of multistate concern, see *supra* Part III.E, federal judicial power to provide a neutral forum for resolving disputes implicating competing state interests, see *supra* Part III.B, and first-in-time rules that are strict, but not so strict that they invite excessive mischief by state courts seeking to expand their authority.

178. The first-in-time rule for enforcing foreign judgments can lead to awkward results when the second-in-time court fails to follow the rule and thus creates inconsistent judgments vying for supremacy. For example, imagine that *A* sues *B* in State 1 and wins, then *B* sues *A* in State 2 about the same matter, but the State 2 court refuses to give preclusive effect to the first-in-time State 1 judgment and instead enters judgment for *B*. Further assume that *A* does everything possible in State 2 to pursue its preclusion defense, and then unsuccessfully petitions for review of the final State 2 judgment in the U.S. Supreme Court. If *B* then seeks to enforce the State 2 judgment in State 3, the court in State 3 would face a dilemma: the State 2 judgment would be “wrong” because it violated the Full Faith and Credit Clause by not respecting the prior State 1 judgment, and yet the State 2 judgment would itself be a prior judgment (from the perspective of State 3) that should receive Full Faith and Credit regardless of its merit. The Supreme Court has traditionally applied a last-in-time rule to inconsistent judgments that might require State 3 to enforce the State 2 judgment. See *Treinius v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939). This rule would foster interstate friction by tolerating State 2's disregard of State 1 (and making State 3 an accomplice), and would undermine finality by augmenting *B's* incentive to file the State 2 action. A first-in-time rule would also create friction and undermine finality by forcing State 3 to undermine State 2 and encouraging *A* to relitigate its preclusion defense, but would at least make the best of a bad situation by penalizing—and perhaps deterring, rather than rewarding—State 2's denial of Full Faith and Credit to the State 1 judgment. For a similar critique of the last-in-time approach to inconsistent judgments in the context of the preceding hypothetical, see Ruth B. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 831–32 (1969).

179. U.S. CONST. art. IV, § 2, cl. 2. The Clause applies only when a fugitive “was in fact within the demanding State when the alleged crime was committed.” *Hyatt v. New York ex rel. Corkren*, 188 U.S. 691, 719 (1903).

sense was the state with the first relevant contact.<sup>180</sup> The clause is important only in cases where the asylum state does not want to deliver the fugitive—for example, because of the person’s connection to the asylum state, or a belief that what the fugitive did was not wrong or that rendition would be unfair. The clause thus reflects a policy-neutral preference rule for resolving interstate conflicts.<sup>181</sup> A similar rule governs personal jurisdiction over “fugitives” in civil cases by allowing out-of-state service of process against domiciliaries who temporarily leave their home state.<sup>182</sup>

Finally, the Fugitive Slave Clause adopted the first-in-time approach by requiring a person’s status as a slave in one state to follow that person into the territory of a free state, such that the person could be forcibly returned to bondage.<sup>183</sup> The modern relevance of the clause is limited by its odious brutality, its repeal,<sup>184</sup> and the position of slavery as a “peculiar institution” that operated beyond generally applicable constitutional and common law norms.<sup>185</sup> The clause also sent mixed messages about horizontal federalism because even though it was designed to forestall “perpetual strife between the different states” that would arise if the North were a haven for southern slaves,<sup>186</sup> it did not achieve that goal. Implementing the clause

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180. The asylum state might arguably have the first relevant contact if the fugitive resided there, departed to commit a crime in the demanding state, and then returned. However, the logical starting point for constitutional analysis seems to be the time of the crime both because that is the event that triggers “Jurisdiction” and because a factual inquiry into the defendant’s whereabouts before the crime seems needlessly tangential. U.S. CONST. art IV, § 2, cl. 2; *cf. id.* art. III, § 2, cl. 3 (“Trial shall be held in the State where said Crimes shall have been committed”); *id.* amend. VI (requiring venue and vicinage for federal criminal trials in the state where the crime was “committed”).

181. Decisions interpreting the Extradition Clause reject states’ efforts to invoke local public policy as an excuse for ignoring an otherwise applicable duty of comity. *See* *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 154 (1998) (holding that duty to extradite trumped state constitutional provision protecting fugitives’ right “of seeking and obtaining safety” (citation omitted)).

182. *See* *Milliken v. Meyer*, 311 U.S. 457, 463–64 (1940). The defendant is not obligated to answer the summons, but would risk a default judgment that would then be enforceable under the Full Faith and Credit Clause in the new state of residence. *See id.* at 462.

183. U.S. CONST. art IV, § 2, cl. 3.

184. *Id.* amend. XIII.

185. *See generally* Paul Finkelman, *The Centrality of the Peculiar Institution in American Legal Development*, 68 CHI.-KENT L. REV. 1009 (1993) (reviewing literature about the contortion of U.S. law to accommodate slavery).

186. *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842); *see also* *Moore v. Illinois*, 55 U.S. (14 How.) 13, 18 (1852) (arguing that returning fugi-

created volatile interstate friction that contributed to the Civil War.<sup>187</sup> Nevertheless, the clause is worth noting because it continues a pattern found elsewhere in the Constitution of attempting to contain the friction-inducing consequences of interstate mobility by prioritizing the state with the first relevant regulatory contacts.<sup>188</sup>

#### D. INDIVIDUAL EMPOWERMENT

A less obviously structural but nevertheless critical component of horizontal federalism is the Constitution's creation of individual rights tied to the multistate character of the Union and its empowerment of private citizens to enforce those rights in federal<sup>189</sup> or state<sup>190</sup> courts. A defining feature of these "hori-

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tive slaves from the North to the South would prevent "border feuds" and "breaches of the peace, violent assaults, riots, and murder"). *But cf.* COVER, *supra* note 74, at 192 (noting that judicial rhetoric envisioning the Fugitive Slave Clause as essential to interstate harmony was in part "a reading of the problems of the present backward into history").

187. Northern states and citizens resented having to return fugitives to bondage, and southern states and citizens resented the various artifices that northern courts adopted to avoid rendition. This simmering animosity periodically flared into skirmishes, and was part of the build-up to war. *See* THOMAS D. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY LAWS OF THE NORTH, 1780-1861* (1974); Paul Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 *CIV. WAR HIST.* 5, 22–35 (1979).

188. The Fugitive Slave Clause differs from the other first-in-time clauses because it takes sides in a particular substantive dispute by favoring the interests of slave states over free states. In contrast, the Extradition and Full Faith and Credit Clauses are relatively neutral on substantive questions because policies and principles underlying a state's preferences will vary from case to case. This neutrality may in part explain why the latter two clauses still exist while the former was repealed, as a textual commitment to one side (especially a horrid one) of a heated interstate dispute cannot survive the disfavored side's accumulation of sufficient supermajority power to invoke the Article V amendment process.

189. Enforcement in federal court is available under federal question jurisdiction, *see* U.S. CONST. art. III, § 2, cl. 1, which Congress vested (with some exceptions) at the appellate level in 1789 and at the original level in 1875. *See* Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73; Act of Mar. 3, 1875, ch. 132, § 1, 18 Stat. 470. A federal forum was necessary because "[n]o man of sense" would expect states to "scrupulously" observe constraints on their power absent some means of federal enforcement. THE FEDERALIST NO. 80 (Alexander Hamilton), *supra* note 35, at 475. State immunity from suit in federal court complicates enforcement when state actors are necessary parties to an action enforcing federal rights, although exceptions exist that facilitate jurisdiction. *See Ex parte Young*, 209 U.S. 123, 159–60 (1908) (exception for original suits against state officers seeking prospective relief); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407–10 (1821) (exception for appellate jurisdiction).

190. The Supremacy Clause generally obligates state courts to adjudicate



horizontal rights” is that they shield individuals from adverse effects of the friction-inducing behavior noted in Part II—such as favoritism and overreaching—that are an inevitable consequence of divided sovereignty, coequality, and aggregate state power. Examples of horizontal rights that litigants may raise as claims or defenses include: freedom under Article IV’s Privileges and Immunities Clause from state action discriminating on the basis of state citizenship,<sup>191</sup> the right under the Fourteenth Amendment’s Privileges or Immunities Clause to travel across state borders for the purpose of resettling,<sup>192</sup> the liberty interest under the Due Process Clause in avoiding personal jurisdiction in a state where the person lacks sufficient contacts,<sup>193</sup> and the right under an ill-defined constellation of clauses to be free from the extraterritorial operation of state laws.<sup>194</sup> The Double Jeopardy<sup>195</sup> and Contracts<sup>196</sup> Clauses also arguably create rights with a horizontal dimension. Other provisions of the Constitution that are not typically understood as

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federal constitutional claims and defenses and to provide federal statutory remedies. *See* *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

191. *See, e.g.,* *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998) (invalidating state statute that barred nonresidents from receiving a tax deduction available to residents); *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (prohibiting state from admitting qualified residents to the bar on motion while requiring nonresidents to take an exam). The Equal Protection Clause of the Fourteenth Amendment likewise limits discrimination based on state residency, but the standard of review is deferential because state residency is not a suspect classification. *See* *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 657 (1981) (applying rational basis review to uphold a “retaliatory” tax that calculated local rates based on the rates in a taxpayer’s home state).

192. *See* *Saenz v. Roe*, 526 U.S. 489, 502–03 (1999). This right would be less important if states were merely administrative units of a single sovereign, although the right would still protect against draconian constraints on internal movement.

193. *See* *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) (“The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.”).

194. *See infra* text accompanying notes 312–14.

195. *See infra* text accompanying notes 285–93 (discussing constitutional constraints on successive criminal prosecutions by multiple states).

196. *See* U.S. CONST. art. I, § 10, cl. 1 (“No State shall . . . pass any . . . Law impairing the Obligation of Contracts.”); Michael W. McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 284 (1988) (discussing evidence that “[t]he principal motivating factor” for preventing states from impairing contracts “was the effect of such laws on citizens of other states, on commerce throughout the country, and even on peaceful relations among the states”).

creating “rights” (such as the Dormant Commerce Clause) are privately enforceable,<sup>197</sup> further cementing a role for individual citizens in the maintenance of constitutional order.

Private enforcement of individual rights helps stabilize horizontal federalism in at least five respects. First, allowing individuals to protect themselves from the pitfalls of divided sovereignty imposes litigation costs on overly aggressive states that might deter abuses, avoiding interstate friction before it occurs. Second, by making unilateral overreaching more difficult, individual rights may push states toward cooperative solutions to multistate problems.<sup>198</sup> Third, the availability of self-help obviates intervention by states on behalf of their citizens in disputes involving action by other states, which reduces the possibility of escalating isolated squabbles into direct interstate conflicts.<sup>199</sup> Fourth, private enforcement of rights against discrimination based on place or duration of residency avoids creating a class of “stateless” citizens who upon leaving one state lack the protection of another, which might make them a source of political tension between states vying to exclude them.<sup>200</sup> Finally, requiring states to treat each others’ citizens

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197. See *Dennis v. Higgins*, 498 U.S. 439, 446–48 (1991) (holding that 42 U.S.C. § 1983 provides remedies for violations of “rights” under the Dormant Commerce Clause).

198. For example, suppose that two states share a common border, that each state emits various forms of pollution that cross the border, and that each state receives economic benefits from the pollution-creating activity. One can imagine that each state may seek to limit pollution emanating from the other while tolerating pollution emanating from itself. If horizontal rights preclude each state from enforcing its regulatory preferences on polluting entities in the other state, then the two states may have an additional incentive to cooperate on establishing mutually agreeable restraints on emissions. (This hypothetical scenario assumes for the sake of simplicity that federal statutes do not preclude cooperation by preempting state environmental law.)

199. Some states nevertheless choose to inject themselves into disputes involving their citizens, even on seemingly minor issues such as regulation of duck hunting. See *Minnesota ex rel. Hatch v. Hoeven*, 331 F. Supp. 2d 1074 (D.N.D. 2004) (deciding a suit by Minnesota, later joined by individual plaintiffs, against North Dakota’s Governor under the Privileges and Immunities and Commerce Clauses, challenging residency requirements for hunting licenses).

200. A similar problem exists in the international system, albeit with more severe consequences. Stateless persons in the U.S. federal system would still enjoy the protection of national citizenship, but stateless persons in the international system lack any nationality and are therefore more vulnerable to predation. See David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 264–70 (2006) (discussing burdens on stateless populations in the international system); *id.* at 275 (“The presence of large numbers of stateless persons in a given region can often produce regional in-

approximately as well as they treat their own helps establish a national identity that might override or mitigate regional parochialism.<sup>201</sup>

#### E. FEDERAL OVERSIGHT AND PREEMPTION

The final constitutional method for managing horizontal federalism is authorization of federal regulation in circumstances where state action could lead to excessive friction.<sup>202</sup> This approach makes national power both a vaccine and an antidote against interstate conflict, allowing Congress and the federal judiciary to avoid friction before it occurs and to contain it before it flares beyond control. Vertical constraints on horizontal power can take four forms: authorizing federal field preemption, permitting limited federal preemption, enabling Congress to regulate interstate relationships directly, and empowering federal courts to create federal common law governing interstate disputes.

##### 1. Federal Legislation

First, the mirror image of denying states broad categories of powers through “codependence and disablement”<sup>203</sup> is vesting these powers in Congress. This allocation of power may or may not be sensible as a matter of purely vertical federalism—i.e., powers might not “belong” at the national rather than regional level at a particular time.<sup>204</sup> However, there is a clear horizon-

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stability.”).

201. See Laycock, *supra* note 2, at 264 (“It is critical to the Union that we continue to think of ourselves as a single people . . .”).

202. The Constitution’s use of vertical federalism as a tool for addressing horizontal friction had its roots in the Virginia Plan that Edmund Randolph introduced only four days after the Convention convened. See 1 Farrand, *supra* note 40, at 20. The plan’s sixth element stated that Congress should have power “to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.” *Id.* at 21 (emphasis added). The Convention endorsed this concept two days later “with[ou]t[] debate or dissent.” *Id.* at 54. The grant of federal legislative power in aid of “[h]armony” survived through the early work of the Committee of Detail in July, 2 *id.* at 131–32, but eventually disappeared in favor of a more precise enumeration of congressional power, see *id.* at 181–82. James Madison later contended that the Virginia Plan contemplated this transition from generality to specificity, and that the harmony clause was merely a “descriptive phrase[]” subject to refinement into its “proper shape & specification.” 3 *id.* at 526–27.

203. *Supra* Part III.A.

204. For a discussion of how allocation of authority in a federal system is an iterative process, see Judith Resnik, *Afterword: Federalism’s Options*, 14

tal justification for excluding states from regulating in areas where conflicting state laws could lead to interstate friction. For example, Congress's power to create "uniform laws on the subject of bankruptcies"<sup>205</sup> can be understood in part as a reaction to Confederation-era parochialism by states that shielded local debtors from out-of-state creditors and imprisoned debtors despite discharge judgments from out-of-state courts.<sup>206</sup> Likewise, Congress's power to enact a "uniform Rule of Naturalization"<sup>207</sup> was in part a reaction to "mischievous" disparities between state citizenship standards that allowed states to undermine each other's immigration policies.<sup>208</sup>

Second, the Necessary and Proper and Supremacy Clauses combine to give Congress authority to displace state law in areas where federal and state power overlap. This issue-by-issue preemption power enables Congress to wield its authority less bluntly than when occupying an entire field (such as bankruptcy), while still preserving flexibility to intervene when

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YALE L. & POL'Y REV. 465, 473 (1996) ("State' and 'federal' interests are not fixed sets but are interactive and interdependent conceptions that vary over time. . . . [W]hat today appears to be or is claimed to be 'local' or 'national' may in another decade be the opposite or may have moved into other spheres, be they denominated 'local,' 'international,' or 'private.'" (footnotes omitted)).

205. U.S. CONST. art. I, § 8, cl. 4.

206. See *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006) ("Foremost on the minds of those who adopted the Clause were the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State."); BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 182–83* (2002) (noting that during the Constitutional Convention the topic of bankruptcy first arose in the context of state recognition of out-of-state insolvency regimes); 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1102 (1833) (discussing state preferences for local debtors). The Bankruptcy Clause also may have helped resolve an interstate havens problem by removing incentives for debtors in one state to hide assets in another. See *THE FEDERALIST NO. 42* (James Madison), *supra* note 35, at 271 ("The power of establishing uniform laws of bankruptcy . . . will prevent so many frauds where the parties or their property may lie or be removed into different states . . .").

207. U.S. CONST. art. I, § 8, cl. 4.

208. STORY, *supra* note 206, § 1098. The problem arose because the Articles (and subsequently the Constitution) required each state to respect the others' citizenship determinations. An alien could thus circumvent strict citizenship standards by first obtaining citizenship in a state with lax standards and then moving to the stricter state, in effect creating both a havens and externalities problem. See *THE FEDERALIST NO. 42* (James Madison), *supra* note 35, at 270. Of course, the Naturalization Clause also addresses much deeper questions about the integration of state politics into a national community. See generally JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 248–86 (1978).

state regulation of a particular subject threatens excessive friction by, for example, creating externalities,<sup>209</sup> excessive competition,<sup>210</sup> or havens.<sup>211</sup> Federal preemption may of course be sensible from a purely vertical perspective if national regulation is the optimal solution to a particular problem even when interstate friction is mild, but fears of horizontal instability can supply an added justification for national action.<sup>212</sup> Alternatively, in some circumstances local regulation free from federal intrusion might be optimal but for the states' propensity to overreach, which would require Congress to weigh the benefits of state autonomy against the costs of its abuse.<sup>213</sup> Concerns about horizontal federalism are thus an important, although generally overlooked,<sup>214</sup> factor in assessing the proper operation of vertical federalism in the ordinary grind of the federal legislative and rulemaking process.

Third, the Constitution empowers Congress to manage interstate relationships directly, which creates a federal mechanism for balancing competing state interests and intervening to avoid conflict (or sometimes to create it). For example, Congress's power to withhold approval of proposed interstate compacts provides leverage to shape interstate negotiations,<sup>215</sup> its

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209. See, e.g., 42 U.S.C. §§ 7401–671 (2000) (creating nationwide clean air standards).

210. See, e.g., 29 U.S.C. §§ 201–19 (2000) (creating minimum labor standards immune from dilution through interstate competition).

211. See, e.g., 18 U.S.C. § 228 (2000) (facilitating recovery of child support from parents who flee their obligations).

212. Even when horizontal conflict justifies national action, strategic behavior by state constituencies seeking to preserve competitive advantages may defeat national legislation. See Susan Rose-Ackerman, *Does Federalism Matter? Political Choice in a Federal Republic*, 89 J. POL. ECON. 152, 162–63 (1981) (“Individuals may vote against the extension of a state law to the nation as a whole even though they would favor the law in a system with only one government. They may wish to extend a state law to all citizens although they would oppose the law in a unitary system.”).

213. For a discussion of whether current preemption doctrine adequately forces Congress to confront the policy choices that preemption raises, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 2–4 (2007) (advocating a presumption against giving federal statutes preemptive effect absent a clear statement of preemption).

214. For a notable exception, see Issacharoff & Sharkey, *supra* note 2, at 1431 (discussing preemption as a response to interstate “predation”).

215. See Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. JOHN'S L. REV. 1, 18 (1985) (“Congressional involvement in compact negotiations has resulted from both state solicitation and congressional imposition.”); Edward T.

power to create incentives under the Spending Clause can nudge states away from idiosyncratic policies,<sup>216</sup> its power to admit new states to the Union can affect the interests of existing states (which was a significant source of conflict before the Civil War),<sup>217</sup> and its power under the first-in-time rules to establish procedures for compliance can ensure smooth implementation.<sup>218</sup> Congress might also have authority to waive states' comity obligations in circumstances where forcing states to recognize competing positions would create friction. However, limits on this authority would be necessary to avoid undermining the equal status of states with outlier policies and the individual interests of state citizens who rely on those policies.<sup>219</sup>

Although congressional power over interstate relations fits within the constitutional framework of avoiding interstate friction and maintaining state equality, it also can achieve the opposite effect. Power to address subjects of interstate dispute enables Congress to declare (or purport to declare) a winner by endorsing and nationalizing one of the competing positions. For

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Swaine, *Does Federalism Constrain the Treaty Power?*, 103 COLUM. L. REV. 403, 504–05 (2003) (“[I]t would appear that Congress is permitted to stipulate in advance all the compact’s significant terms . . .”).

216. U.S. CONST. art. I, § 8, cl. 1. Congress’s power to induce state action with incentives is a potential counterexample to the general constitutional theme of promoting interstate harmony through federal intervention because incentives can put a majority of states in the “no lose” position of forcing the minority to conform or face a competitive disadvantage. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 79, 120 (2001) (discussing how the “political safeguards of federalism” can fail to protect states from congressional action orchestrated by rival state factions). For an analysis of incentives under the Spending Clause from a vertical rather than horizontal perspective, see David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544, 2571–79 (2005).

217. See, e.g., ROBERT W. LARSON, *NEW MEXICO’S QUEST FOR STATEHOOD 1846–1912*, at 13–24 (1968) (discussing North-South conflicts over slavery and border disputes with Texas that thwarted New Mexico’s attempts to join the Union in the late 1840s and early 1850s); MATSON & ONUF, *supra* note 45, at 60 (“The admission of new states inevitably would alter the balance of power in the union.”); 7 STATE PAPERS OF VERMONT: NEW YORK LAND PATENTS 1688–1786, at 13 (Mary Greene Nye ed., 1947) (noting “constant ferment” and “more or less open rebellion” in border regions arising from Vermont’s disputes with New York and New Hampshire prior to its admission as a state in 1791).

218. See U.S. CONST. art. IV, § 1 (Congress may regulate “Effect” of state law under the Full Faith and Credit clause); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 99, 104–05 (1860) (noting congressional power under the Extradition Clause); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615–16 (1842) (noting congressional power under the Fugitive Slave Clause).

219. See *infra* text accompanying notes 223–26.

example, the Defense of Marriage Act prioritized the desire of some states to ban same-sex marriages over other states' potential interests in having such marriages recognized,<sup>220</sup> the Fugitive Slave Acts prioritized southern interests in capturing fugitive slaves over northern interests in freeing them (or at least in not being instruments of their continued servitude),<sup>221</sup> and numerous federal statutes waive restraints on state authority to regulate specific areas of commerce that spill across their borders.<sup>222</sup> The constitutionality of these congressionally sanctioned forms of discrimination has divided scholars. Gillian Metzger has proposed that Congress can define the "national interest" to tolerate situational inequality between states subject to constraining individual rights,<sup>223</sup> while a competing position views state equality as a structural constraint on federal power that elevates nondiscrimination from a constitutional default to a constitutional requirement.<sup>224</sup>

The analysis in this Article suggests that competing arguments about the scope of congressional power to authorize discrimination are incomplete. Broad opposition to congressional discrimination undervalues the fact that the categories of state action discussed in Part II have significant extraterritorial ef-

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220. See 28 U.S.C. § 1738C (2000).

221. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302; An Act to Amend, and Supplementary to, the Act Entitled "An Act Respecting Fugitives from Justice, and Persons Escaping from the Service of Their Masters," ch. 60, 9 Stat. 462 (1850).

222. See Metzger, *supra* note 2, at 1472 & n.9 (collecting examples). Another divisive but unavoidable form of "discrimination" occurs when Congress favors particular states with federal largesse in the form of federal institutions, infrastructure, or earmarks. For example, states frequently compete for the economic and social benefits that flow from attracting and retaining military bases. See generally ANN MARKUSEN ET AL., *THE RISE OF THE GUNBELT: THE MILITARY REMAPPING OF INDUSTRIAL AMERICA* (1991); DAVID S. SORENSON, *SHUTTING DOWN THE COLD WAR: THE POLITICS OF MILITARY BASE CLOSURE* (1998).

223. See Metzger, *supra* note 2, at 1475 & n.16. There is no consensus about the nature of the rights that constrain federal power. Some scholars would deem equality rights under Article IV's Privileges and Immunities Clause to trump federal power, while Metzger focuses more narrowly on rights under the Fourteenth Amendment. See *id.* at 1475 n.16, 1490–92, 1490 n.81 (discussing competing positions).

224. See, e.g., Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 255–56 (2005) (identifying uniformity principle that may preclude Congress from using its power over commerce to "regulate along state lines and treat the same object differently in different states"); Kramer, *supra* note 76, at 2006 (contending that Congress lacks power to "legislate away the minimum requirements of mutual respect and recognition").

fects. Congressional silence would thus not be nondiscrimination, but rather a form of acquiescence to aggressive state behavior that threatens to undermine interstate harmony. In contrast, broad tolerance of congressional discrimination undervalues the fact that congressional power over interstate relations exists in part as a method of avoiding interstate friction. The possibility that a federal statute may create friction could thus be a factor weighing against Congress's power to enact it.<sup>225</sup> The structure of horizontal federalism may therefore both necessitate and restrain congressional power to organize competing state interests, although the contours of those constraints are fuzzy and require further development.

## 2. Federal Common Law

The power of federal courts to create federal common law can be understood in part as an aspect of horizontal federalism. The rationale justifying federal power here is similar to the rationale for the interstate jurisdiction clauses.<sup>226</sup> Some interstate or private disputes can involve such sensitive state interests that resolution in a state forum or under state law could trigger resentment or further conflict. This tension might be especially intense, as noted in Part II, when states attempt to exercise dominion over other states, to externalize costs onto other states, or to overreach their borders by regulating activity in other states. Federal common law applies in precisely these

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225. Metzger contends that state representation in Congress validates discrimination by ensuring a national consensus, *see Metzger, supra* note 2, at 1484, which implies that interstate friction should not be cause for concern if the states collectively endorse it through their representatives. However, several constitutional provisions can be read as establishing structural protection of even minority state interests, such that national consensus is not a complete defense to federal legislation that might otherwise create a legitimate state grievance. *See* U.S. CONST. art. V (insulating state equality in the Senate from the Article V amendment process); *id.* art. IV, § 3, cl. 1 (precluding congressional majority from creating new states from the territory of existing states); *id.* art. I, § 9, cl. 6 (precluding congressional majority from favoring one state's ports). Moreover, protecting equality is an inherently countermajoritarian enterprise because the most potent threats to equality are likely to have majority support. *See Baker & Young, supra* note 216, at 110 ("[T]he federal political process threatens state autonomy insofar as that process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences."). Courts considering congressional findings about the propriety of discrimination should therefore temper their deference with skepticism depending on the nature of the collusion against minority states.

226. *See supra* Part III.B.



scenarios, such as border disputes (dominion cases),<sup>227</sup> actions involving interstate pollution or the downstream effects of upstream water uses (externality cases),<sup>228</sup> and disputes about intangible property with multistate contacts (overreaching cases).<sup>229</sup>

The constitutional foundation for this judge-made law is debatable. There is no explicit text that courts can purport to be interpreting,<sup>230</sup> and thus separation of powers principles counsel that substantive federal law should emanate from Congress rather than the judiciary.<sup>231</sup> However, this Article's systemic approach to horizontal federalism suggests that a form of structural preemption might justify judicial action. Concerns about interstate friction may strip states of their power to regulate certain sensitive interstate disputes, converting coequality into codependence and requiring reliance on shared institutions to resolve conflicts.<sup>232</sup> Absent congressional regulation, federal

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227. See *Cissna v. Tennessee*, 246 U.S. 289, 291, 296 (1918) (discussing "the law of interstate boundaries" as applied to suit by state challenging private citizen's title to land in border region).

228. See *Illinois v. Milwaukee*, 406 U.S. 91, 102–03 (1972) ("When we deal with air and water in their ambient or interstate aspects, there is a federal common law . . ."); *New Jersey v. New York*, 283 U.S. 336, 342 (1931) ("New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated."). Congress has preempted aspects of federal common law governing water pollution. See *Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

229. See *Texas v. New Jersey*, 379 U.S. 674, 677 (1965) ("Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.").

230. In contrast, judge-made rules anchored to specific constitutional provisions—such as limits on state power to interfere with interstate commerce—are not the same species of federal common law discussed here because there is a textual basis both for the courts' authority to act and, more tenuously, for the content of the courts' decisions. See Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 14, 17 (1975). This distinction between lawmaking and interpretation splits fine theoretical hairs, but illustrates how the judiciary has multiple roles within the structure of horizontal federalism, even if each role raises concerns about justification and legitimacy. See *id.* at 31 (noting that constitutional interpretation and common lawmaking differ in "degree" rather than kind).

231. See Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 792 (1989).

232. The textual basis for judicial authority to fill the void left by structural preemption of state law and congressional inaction would presumably be

courts injected into the dispute by the interstate jurisdiction clauses become the lawmaker of last resort and must fill the regulatory void rather than allow interstate conflicts to linger and escalate.<sup>233</sup> Separation of powers concerns that weigh

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the grant of “judicial Power” to federal courts in Section 1 of Article III. Lawmaking is an exercise of “power,” and thus can be valid only if that power is contained within the “judicial Power.” The jurisdiction clauses in Section 2 of Article III would then limit the scope of judicial lawmaking power to enumerated areas over which federal courts have cognizance. However, relying on Article III to justify federal courts’ common law-making power leads to an additional complication when federal common law is used to preempt state law in state courts, where jurisdiction is not a function of Article III. The best justification for applying federal common law in state courts may be that structural preemption bars state courts from applying state law and thus, as a matter of choice of law under the Supremacy Clause, state courts must borrow federal law, which absent congressional action would be federal common law. Although this argument seems to solve the federal-common-law-in-state-courts problem, it does lead to an anomaly. If an issue arises in state court on which state law is structurally preempted but for which federal courts have not yet created federal common law, the state court presumably would need to develop the federal common law rule itself. Yet the state court’s power to create federal law would not have any apparent foundation in the Constitution because Article III, the presumed source of federal common law making power, clearly does not grant any power to state courts. *See* U.S. CONST. art. III, § 1 (vesting judicial power only in the Supreme Court and courts created by Congress). The anomaly perhaps is avoidable through the fiction that state courts would not be “creating” federal common law so much as “predicting” what federal common law would be if the Supreme Court were to confront the issue, just as federal courts applying state law attempt to predict how the state’s highest court would rule. *See* *Comm’r v. Bosch*, 387 U.S. 456, 465 (1967) (“[T]he underlying substantive rule involved is based on state law and the State’s highest court is the best authority on its own law. If there be no decision by that court then federal authorities must apply what they find to be the state law after giving ‘proper regard’ to relevant rulings of other courts of the State. In this respect, it may be said to be, in effect, sitting as a state court.”). For a general discussion of state judicial power to create federal law that is not linked to interstate relations cases, see Anthony J. Bellia, Jr., *State Courts and the Making of Federal Common Law*, 153 U. PA. L. REV. 825 (2005).

233. Other scholars have used different analytical approaches to reach a similar conclusion about the legitimacy of federal common law. *See* Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1322–23 (1996) (federal common law “implement[s] the constitutional equality of the states” and applies to interstate disputes due to the states’ lack of “legislative competence”); Alfred Hill, *The Law-Making Power of the Federal Courts: Constitutional Preemption*, 67 COLUM. L. REV. 1024, 1031 (1967) (federal common law applies because “state competence is excluded by necessary implication from the constitutional grant of jurisdiction”); Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 631 (2006) (federal common law avoids states “stack[ing] the deck to favor themselves”). Aspects of federal common law in admiralty cases involving interstate waters might have a similar justification, *see supra* text accompanying notes 166–67, but other forms of federal common law lacking a nexus with horizontal federalism would still require a separate defense that is

against judicial lawmaking are thus in tension with horizontal federalism concerns that favor providing a federal rule of decision for interstate disputes in cases where Congress has not acted.<sup>234</sup>

Recognizing the important role of federal common law within the framework of horizontal federalism raises interesting questions about how far the judiciary's power should extend. Intriguing possibilities include creating a federal common law of interstate venue to police overreaching by state courts,<sup>235</sup>

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beyond the scope of this Article.

234. Framing judicial power to create federal common law in terms of a need to avoid interstate friction raises an interesting question about the *Erie* doctrine, which requires federal courts to apply state substantive law in diversity cases. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). If one accepts that concerns about interstate friction helped justify federal jurisdiction over diversity actions, see *supra* text accompanying notes 155–62, then arguably those same concerns favor applying federal law, at least when applicable state law has a parochial slant that might instigate friction. The *Erie* decision never considered this possibility (which prior precedent justifying general federal common law had not relied upon), and thus never explained why federal courts could displace state law in some disputes implicating a federal interest in avoiding interstate conflict, but not in diversity cases. Accordingly, there is a plausible argument that considering federal common law from a horizontal federalism perspective reveals a hole in *Erie's* reasoning. However, that hole is probably inconsequential for two reasons. First, the Supremacy Clause requires that federal common law, unlike the “general law” of the pre-*Erie* regime, 304 U.S. at 75, apply even in state courts, which would mean that a federal common law of diversity analogous to the federal common law of interstate conflicts would displace a large volume of state law in routine interstate litigation. While Congress might have authority to displace state law in diversity cases if there were a sufficient nexus to Article I powers, it is difficult to believe that the Constitution silently confers such broad preemption authority on federal courts. Second, even if one accepts a theoretical power of federal courts to create federal common law in diversity cases involving potential interstate friction, the nature of the federal interest in the substance of most diversity cases is minor compared to the interest in cases involving, for example, state borders and water rights. The *Erie* doctrine could thus be rejustified as creating a sound policy disclaiming federal preemption as a matter of prudence rather than constitutional infirmity.

235. Federal courts have claimed power to create common law venue rules for diversity actions in federal court but have not made those rules mandatory in state court. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) (affirming dismissal of diversity action on forum non conveniens grounds despite existence of proper venue under the applicable federal statute); cf. *Am. Dredging Co. v. Miller*, 510 U.S. 443, 443 (1994) (holding that state court need not apply federal forum non conveniens doctrine in admiralty action). Scholars have suggested that these federal common law venue rules should bind state courts in cases implicating *foreign* relations, but have not extended that insight to *interstate* relations. See Mark D. Greenberg, *The Appropriate Source of Law for Forum Non Conveniens Decisions in International Cases: A Proposal for the Development of Federal Common Law*, 4 INT'L TAX & BUS. LAW. 155, 187–96

allowing federal courts to craft choice of law rules for friction-generating disputes with multistate contacts (rather than tolerating state rules that might excessively favor local interests),<sup>236</sup> and treating states' claims to immunity from suit in federal question cases with horizontal dimensions as a matter of common law rather than constitutional entitlement.<sup>237</sup> These

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(1986); Andreas F. Lowenfeld, *Nationalizing International Law*, 36 COLUM. J. TRANSNAT'L L. 121, 136–38 (1997). Treating venue as a question of federal common law binding on state courts would avoid potential *Erie* problems that arise when state and federal venue rules differ in diversity actions, but would raise separation of powers and federalism concerns that arise whenever federal courts displace state law. See Allan R. Stein, *Erie and Court Access*, 100 YALE L.J. 1935, 1974–76 (1991) (discussing application of *Erie* to state forum non conveniens doctrine); sources cited *supra* note 233 (discussing federal common law in interstate relations cases).

236. Common law choice of law rules could take two forms: rules that apply in federal actions but not in state actions, or rules that preempt state law even in state courts. The federal-only approach is less intrusive on state interests but would promote vertical forum shopping by allowing forum choice to determine the applicable law, while the preemption approach would mitigate forum shopping but would entail significantly more aggressive assertion of federal power. For a general discussion of whether federal common law choice of law rules are sensible, see William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 23 (1963) (advocating federal common law in federal actions because states should not have discretion to determine when local law will “yield to” or “prevail over” the laws of “competing” states); Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 GEO. L.J. 1, 20–21 (1991) (preferring federal statutory rather than common law choice of law rules); Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 515 (1954) (“The Rules of Decision Act says that ‘the laws of the several states’ are to be followed only ‘in cases where they apply.’ The federal courts are in a peculiarly disinterested position to make a just determination as to which state’s laws ought to apply where this is disputed.”); Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1867 (2006) (suggesting that federal subject-matter jurisdiction over class actions implicating “nationwide economic activity” may justify imposing federal choice of law rules); Laycock, *supra* note 2, at 282 (advocating preemptive federal common law in part because “[c]hoice-of-law rules . . . resolve conflicts between states, and neither state’s attempt to resolve such a conflict unilaterally has any claim to legitimacy”); Daniel J. Meltzer, *The Judiciary’s Bicentennial*, 56 U. CHI. L. REV. 423, 438 (1989) (noting that creating uniform federal choice of law rules might require both congressional action and federal judicial “leadership” in the “exposition” of statutory standards).

237. This idea is an extension of Vicki Jackson’s insight that immunity can be understood as a form of federal common law governing remedies. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 6 (1988). My twist is that the content of this common law might vary depending on the extent to which relegating a dispute between a state and an out-of-state citizen to state court—or to no court—would generate interstate friction and thus be inconsistent with the federal forum

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possible innovations may or may not be sensible on their own merits. But viewing them together and in the broader context of horizontal federalism can add a new dimension to analysis of the federal common law of interstate relations, and warrants further research.

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Identifying the Constitution's distinct methods of regulating horizontal federalism illuminates a systemic approach that transcends traditional doctrinal categories. Specific provisions scattered throughout the text and ostensibly focused on discrete subjects are means to a larger end. These provisions range from vague (the Full Faith and Credit Clause), to mystifying (the Privileges and Immunities Clause), to ethereal (the Dormant Commerce Clause). Understanding these seemingly inscrutable texts requires considering how they fit within the framework of horizontal federalism, which is possible only if one realizes that such a framework exists. The analysis in this Part reveals the framework, which leads to the development in Part IV of a model for explaining and critiquing its jurisprudential components.

#### IV. A MODEL OF JUDICIAL APPROACHES TO HORIZONTAL FEDERALISM

The preceding Parts established that interstate friction is a systemic problem for which the Constitution provides a systemic response. This insight helps frame the structure of horizontal federalism, but cannot itself determine the validity of any particular assertion of state power. Resolving specific cases requires a process of constitutional translation and refinement: structure yields to text, text succumbs to interpretation, interpretation spawns doctrine, and doctrine enables courts to resolve specific cases and controversies by converting factual inputs into legal outputs. This Part therefore considers whether thinking about horizontal federalism as a field, as Parts I-III suggest, can help to explain and improve the doctrines that courts use to manage interstate activity. Section A defines a

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norm underlying the interstate jurisdiction clauses. Another possibility is that entire categories of federal claims could be exempt from the common law of immunity. For example, if a federal claim against a state invokes one of the "horizontal rights" discussed in Part III.D, the common law of remedies might deem state immunity fundamentally inconsistent with the nature of the right.

model for framing judicial arguments, and Section B explores the model's implications.

Systemic analysis of horizontal federalism jurisprudence faces two daunting obstacles. First, the Supreme Court has never viewed horizontal federalism as a field, and thus there is little overt connection between its various components. The constitutional landscape of horizontal federalism consists of scattered silos of doctrine built on foundations in particular clauses and keyed to particular fact patterns, without an obvious common architecture. Developing broadly applicable insight therefore requires thinking abstractly about whether a unifying blueprint underlies these seemingly idiosyncratic silos.

Second, a comprehensive approach to horizontal federalism requires assessing dozens of doctrines, which is beyond the scope of a single article. However, it is possible to create a model for thinking about these myriad doctrines that future scholarship can adapt to concrete situations. Such a model can uncover common elements of distinct rules, identify sources of much-derided doctrinal incoherence, and suggest pathways for reform.

#### A. HORIZONTAL FEDERALISM JURISPRUDENCE

The model covers cases in which a claim or defense challenges a state's authority to regulate due to aspects of horizontal federalism discussed in Parts I–III.<sup>238</sup> The basic premise is that challenges can be conceptualized as taking one or more of only four forms: that something inherent in the Constitution's vision of state sovereignty limits the regulating state's *capacity* to act, that a constitutional right or immunity *constrains* the state's otherwise extant capacity, that *centralization* of power in the national government limits state authority, and that states with capacity to act free from constraint and central control must yield on *comity* grounds to the relatively more significant interests of another state. All horizontal federalism doctrines rely upon or reject (often implicitly or unconsciously) at least one of these forms of argument.<sup>239</sup> These arguments blur

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238. For a discussion of horizontally-based challenges to *federal* regulatory power, see Metzger, *supra* note 2.

239. This characterization is both an empirical statement based on reading countless judicial opinions and a practical observation based on how I have defined the model, which is designed to encompass (at a high level of abstraction) all plausible arguments for why the Constitution might prevent a state

at the margins,<sup>240</sup> but the basic distinctions remain analytically useful.

### 1. Capacity

The horizontal fragmentation of sovereignty over U.S. territory raises a question about whether a particular state is “sovereign enough” to do whatever it is trying to do—i.e., whether it has the capacity to act.<sup>241</sup> When capacity is questionable, as in the overreaching scenarios discussed in Part II, the scope of state authority may hinge on inferences from the constitutional structure discussed in Part III.

Arguments based on state capacity recur in horizontal federalism jurisprudence and illustrate how slogans and fictions can shape constitutional law. Invocations of capacity tend to rely on three ideas: states have extensive and potentially exclusive power over entities and activities physically within their territory,<sup>242</sup> states may regulate based on the local effects of foreign conduct,<sup>243</sup> and states may regulate *domiciliaries* even outside their territory.<sup>244</sup>

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from taking a particular action.

240. For example, an interstate compact that limits a signatory’s authority can be seen as either waiving the state’s capacity to regulate or constraining that authority through enforceable contract rights. Likewise, dormant federal preemption of state commercial regulations is a limit on capacity, a form of centralization, and a source of rights protecting interstate actors from discrimination.

241. For a discussion of how “sovereignty” is an ambiguous label with context-sensitive meanings, see *supra* note 9.

242. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877); *Laycock*, *supra* note 2, at 316 (“The allocation of authority among the states is territorial.”). For an extensive critique of arguments that states may regulate only and exclusively within their territory, see *Rosen*, *supra* note 2.

243. See *Calder v. Jones*, 465 U.S. 783, 789 (1984) (“Jurisdiction over [the civil defendants] is therefore proper in California based on the ‘effects’ of their Florida conduct in California.”) (citation omitted); MODEL PENAL CODE § 1.03(1)(a) (2001) (authorizing criminal jurisdiction, with some exceptions, in the state where the “result” of a criminal act occurs); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 9 cmt. f (1971) (“The local law of a state may also usually be applied to determine whether a person is liable for the effects within its territory of an act done by him elsewhere.”).

244. See, e.g., *Curry v. McCannless*, 307 U.S. 357, 366 (1939) (upholding state’s power to tax intangible property that a local domiciliary held outside its territory). *But see* *Treichler v. Wisconsin*, 338 U.S. 251, 256–57 (1949) (rejecting a state’s power to tax land that a local domiciliary held in another state’s territory); cf. Richard H. Fallon, Jr., *If Roe Were Overruled: Abortion and the Constitution in a Post-Roe World*, 51 ST. LOUIS U. L.J. 611, 629–30 (2007) (“In [civil] cases . . . the Supreme Court has said repeatedly that an important consideration in assessing whether a state can apply its laws to out-of-

There are at least two tensions in this constellation of ideas. First, if states have capacity to regulate local activity with foreign effects and foreign activity with local effects, then states have overlapping capacity that undermines any claim of exclusivity and frustrates efforts to achieve local uniformity. Second, when a domiciliary of one state acts in the territory of another, both states may have inconsistent interests in regulating the activity. The unstoppable force of one state's capacity can collide with the immovable object of the other's capacity, yielding doctrine steeped in formality but shallow in reason. For example, the Supreme Court has held that states have exclusive control over the disposition of local land that limits the authority of other states to transfer title to that land even between domiciliaries of the other state,<sup>245</sup> that states can enforce their own criminal laws within their borders but need not enforce the criminal laws of other states even against the other state's domiciliaries within the enforcing state's territory,<sup>246</sup> and that states lack authority to dissolve marriages unless at least one spouse is a local domiciliary even if both nondomiciliary spouses are present in a state's territory and consent to adjudication.<sup>247</sup> These holdings may or may not have made

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state events is whether one of its citizens was involved.”). The domicile and effects strands of capacity arguments can blur. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 n.5 (1987) (“A State . . . may apply at least some laws to a person outside its territory on the basis that he is a citizen, resident, or domiciliary of the State. Cases that have upheld such exercises of jurisdiction, however, have generally involved acts or omissions that also had effect within the State.”).

245. *See* *Clarke v. Clarke*, 178 U.S. 186, 193 (1900) (holding that a South Carolina probate court lacked authority to transfer land in Connecticut from a South Carolinian estate to a South Carolinian heir). Although the Court concluded that states lacked capacity to transfer out-of-state land directly, it held that states could exercise equitable power over the land's owner to force a conveyance. *See id.* The case thus draws a formal distinction between a state's capacity to regulate extraterritorial land and a state's capacity to compel extraterritorial conduct by its domiciliaries. Evolution of preclusion doctrine has limited *Clarke's* practical effect, as now a decision by a state court erroneously exercising jurisdiction over foreign land is enforceable in the foreign court for the sake of finality. *See* *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 705 n.11, 706 n.13 (1982).

246. *See supra* note 170; *infra* note 290.

247. *See* *Andrews v. Andrews*, 188 U.S. 14, 37–38 (1903) (holding that a Massachusetts statute barring domiciliaries from leaving the state to obtain a divorce stripped a South Dakota court of jurisdiction to order the divorce even though both spouses were present for the South Dakota litigation). In contrast, capacity to *grant* rather than *dissolve* marriages is a function of the couple's presence rather than domicile in the state. *See* Brian H. Bix, *State Interests in Marriage, Interstate Recognition, and Choice of Law*, 38 CREIGHTON



sense in their particular contexts, but for present purposes the holdings are thinly theorized and often rely on sweeping assertions about “the essential nature”<sup>248</sup> of state power and “constitutional barriers by which all the States are restricted within the orbits of their lawful authority . . . .”<sup>249</sup> This rhetoric does not accommodate the practical realities of regulating activity that sprawls across multiple state territories, has far-reaching effects, and involves domiciliaries of multiple states. More nuance and refinement is therefore necessary. Thinking broadly about capacity across the different contexts where it is relevant can be a productive step toward developing a more subtle account of state authority.

## 2. Constraint

A second form of argument applies when a state has sufficient capacity to regulate interstate activity, but a right or immunity constrains that power in particular circumstances. The distinction between *lack of capacity* and *constrained capacity* can appear technical because any assertion in the form “State X lacks power to regulate activity Y” can be restated as “actors engaging in activity Y have a right not be regulated by state X.” Despite this equivalence (at least at a high level of abstraction),<sup>250</sup> arguments framed in the language of rights resonate

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L. REV. 337, 341 n.16 (2005). Domicile was also a foundation for a state’s authority to probate wills. See *Burbank v. Ernst*, 232 U.S. 162, 163–64 (1914) (holding that the Full Faith and Credit Clause did not require a Louisiana court to enforce a will recognized by a Texas probate court if the decedent, who had died in Texas, was domiciled in Louisiana at the time of death). The *Burbank* decision is no longer an accurate reflection of Full Faith and Credit law, see *supra* note 177, but a diluted version of its emphasis on domicile as a prerequisite to probate jurisdiction animates modern law governing multistate estates. See UNIF. PROBATE CODE art. IV gen. cmt. (amended 2008), 8 U.L.A. pt. II, at 311 (1998) (“The recognition provisions contained in Article IV and the various provisions of Article III which relate to administration of estates of non-residents are designed to coerce respect for domiciliary procedures and administrative acts to the extent possible.”).

248. *Andrews*, 188 U.S. at 34; see also *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (noting “inherent limits” of state power).

249. *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) (holding that Missouri law could not govern action in New York to modify an insurance policy that had been purchased and delivered in Missouri). Modern opinions quote this rhetoric approvingly. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 n.16 (1996).

250. The equivalence is ingrained in the Constitution’s origins, as the framers created rights in part to limit government power and thus imbued them with structural undertones. See Richard H. Pildes, *Why Rights Are Not*

differently than arguments framed in the language of power.<sup>251</sup> The distinction may be especially sensible in the context of horizontal federalism, in which the scope of state power and countervailing rights often hinges on the interests of four sets of actors: the regulated entity, the regulating state, other affected states, and the federal government in its role as a monitor of interstate relations. In contrast, more typical invocations of rights often involve only two actors: the regulation's enforcer and subject.<sup>252</sup> The broader sprawl of horizontal federalism cases complicates assessment of power and rights, such that nuances in framing arguments could influence the weight of each actor's competing interests. Moreover, even if capacity and constraint arguments are theoretically connected, critical practical differences distinguish them. For example, regulated entities can by consent or conduct waive constraints on state power but cannot expand a state's capacity,<sup>253</sup> the extent to which a state must justify its actions can differ for capacity and constraint arguments even in otherwise identical cases,<sup>254</sup> and the

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*Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL. STUD. 725, 730–36 (1998).

251. See, e.g., Lea Brilmayer, *Rights, Fairness, and Choice of Law*, 98 YALE L.J. 1277, 1278 (1989) ("Choosing to talk in terms of rights rather than policies or interests represents a fundamental jurisprudential commitment which is reflected in the way that concrete problems are resolved. Rights arise primarily in deontological ethical theories while policies and interests are instrumental or consequentialist."); Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993) (discussing and critiquing the right/power distinction).

252. Third- and fourth-party interests also occasionally exist, such as listener interests in free speech cases, and federal interests in providing and enforcing remedies for violations of federal rights.

253. This is why, for example, a court's lack of personal jurisdiction is waivable while a court's lack of subject-matter jurisdiction is not. See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583–84 (1999) (contrasting the two forms of jurisdiction).

254. For example, two Supreme Court decisions written less than one year apart adopted distinct standards for analyzing capacity- and constraint-based challenges to municipal regulations requiring a threshold percentage of workers on municipally-funded projects to live within the municipality. Compare *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 205–06, 214–15 (1983) (holding that regulation survived Commerce Clause challenge because the municipality was acting in its capacity as a "market participant" rather than as a regulator), with *United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220–21 (1984) (holding that municipality's "market participant" status did not immunize it from an Article IV Privileges and Immunities Clause challenge claiming that the residency requirement burdened protected rights). The different outcomes owe in part to the different ambits of the Commerce and Privileges and Immunities Clauses: one governs only regulation of commerce, while the other extends to even nonregulatory

availability of some constraint arguments can depend on whether the claimant is a person or a corporation.<sup>255</sup> Distinguishing capacity and constraint theories can therefore help in assessing a disputed claim's foundation in text, history, and policy, in determining the outer limits to which the claim can extend, and in weighing the claim against competing claims.

Many horizontal federalism doctrines rely on the concept of constraint by recognizing "rights" that defeat otherwise valid assertions of state authority. The argument applies most often in the favoritism and overreaching categories discussed in Part II, and invokes the individual empowerment method of constitutional regulation discussed in Part III. For example, the Supreme Court has recognized a liberty interest that constrains personal jurisdiction,<sup>256</sup> an expectation interest that constrains choice of law,<sup>257</sup> and a right to avoid discrimination based on the existence or duration of state residency.<sup>258</sup>

### 3. Centralization

A third line of argument tracks the codependence and federal oversight methods discussed in Part III by invoking federal power to limit state power. Centralization arguments appear primarily in one of three forms: states lack power absent congressional authorization (such as a statute waiving the Dormant Commerce Clause), states possess power until Congress removes it (as in statutory preemption cases), or state power is a function of federal common law.<sup>259</sup> A fourth flavor of centralization argument has a separation of powers rather than federalism accent. This permutation manifests when courts decline to invalidate questionable state action that Congress has neither authorized nor condemned, but is institutionally better equipped to assess.<sup>260</sup> Judicial deference to legislative compe-

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burdens on individual interests "of fundamental concern." *United Building*, 465 U.S. at 220.

255. See *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 177 (1868) (holding that corporations are not "citizens" under Article IV's Privileges and Immunities Clause).

256. See *infra* note 284.

257. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

258. See *supra* notes 92, 191.

259. See *supra* Part III.E.

260. See *Dep't of Revenue v. Davis*, 128 S. Ct. 1801, 1817 (2008) (declining to consider a Dormant Commerce Clause claim in part because "the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary").

tence has the effect of making state power an acceptable default unless and until Congress intervenes.<sup>261</sup>

Centralization arguments resemble the capacity arguments discussed above, but warrant separate treatment for at least three reasons. First, capacity arguments depend on assumptions about the allocation of power among states, while centralization arguments depend on assumptions about the allocation of power between states and the federal government.<sup>262</sup> Second, a state's lack of capacity to regulate is permanently disabling absent a constitutional amendment, while limits on state power due to centralization can evolve in tandem with federal statutory and common law. Finally, capacity arguments focus on the *content* of rules limiting state power, while centralization arguments often focus on *who decides* what the rules should be: federal courts (via the interstate jurisdiction clauses and federal common law), Congress (via preemption and oversight), or the states themselves (via the Compact Clause).

#### 4. Comity

The most intriguing—and least used—form of argument is relevant when two or more states each have capacity to act free from constraint and central control. The first-in-time rules discussed in Part III resolve allocation problems in cases where they apply. For example, when two states both have the capacity to regulate a fugitive free from any constraining right of the fugitive, the Extradition Clause enforces the prior claim.<sup>263</sup> Likewise, when two states each have subject-matter and personal jurisdiction in a dispute, the state that first produces a judgment can bind the other under the Full Faith and Credit Clause even if the first state's judgment is clearly wrong on the merits.<sup>264</sup> But when the Constitution does not provide a clear

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261. Separation of powers concerns complicate federalism by exposing tension between four of the constitutional mechanisms for policing interstate relations discussed in Part III. The individual empowerment, federal common law, and interstate jurisdiction mechanisms presume a strong judicial role in regulating horizontal federalism, while the legislative preemption mechanism assumes a strong legislative role. These mechanisms are normally *complements*, but in rare instances separation of powers concerns render them *alternatives*. See *Davis*, 128 S. Ct. at 1817.

262. For discussion of how horizontal and vertical federalism blur, which complicates drawing neat lines between capacity and centralization arguments, see *supra* Part I.B.

263. See *supra* text accompanying notes 183–88.

264. See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230, 237–38 (1908) (holding that Mississippi courts were obligated to enforce a judgment from Missouri that

preference rule, courts must decide whether to create one. For instance, in the competition, exclusion, havens, and overreaching scenarios discussed in Part II, competing state regulatory interests could lead a court to require one state to yield to another by inferring a comity principle from the structure of horizontal federalism in Part III. Although “comity” often connotes a voluntary act of courtesy, I use the term here as a proxy for mutual respect, and suggest that the Constitution might require a threshold level of respect between states in at least some circumstances. While the idea of mandatory comity may seem like a contradiction in terms, it may be a fitting contradiction for the unusual contours of the United States’ multi-dimensional federalism.

A fascinating aspect of horizontal federalism jurisprudence is that comity rules generally do not exist. The Supreme Court cites interstate comity as an ideal, but not as a judicially enforceable mechanism for denying state power in circumstances where capacity exists free from constraint and central control.<sup>265</sup> For example, the constitutional rule in both personal ju-

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itself enforced a contract made in Mississippi despite the fact that a Mississippi statute voided the contract). The first-in-time rule creates a mandatory form of comity that subordinates state policy preferences to systemic concerns about interstate harmony and finality of judgments. *See Estin v. Estin*, 334 U.S. 541, 545–46 (1948). *But cf. supra* note 178 (noting that if a state incorrectly refuses to obey the first-in-time rule and enters a judgment inconsistent with another state’s prior judgment, the second judgment may qualify for preclusive effect in other states under a last-in-time rule). Federal law provides standards for proving the existence of the prior judgment, *see* 28 U.S.C. § 1738 (2000), and thus the comity rule includes a centralization component.

265. *See Nevada v. Hall*, 440 U.S. 410, 425–26 (1979) (“In the past, this Court has presumed that the States intended to adopt policies of broad comity toward one another. But this presumption reflected an understanding of state policy, rather than a constitutional command.”). Comity concerns also sometimes influence judicial assessments of constraint. *See United Bldg. & Constr. Trades Council v. Mayor of Camden*, 465 U.S. 208, 220 (1984) (desire to achieve “comity” and “interstate harmony” helps explain scope of Privileges and Immunities Clause). Comity arguments are more prevalent in the vertical federalism context, where comity occasionally justifies deferring to states even when federal capacity to act exists free from constraint. *See Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 (1987) (stating that “comity between the States and the National Government” requires federal equitable restraint in civil litigation implicating various “important” state interests); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 508 (1985) (O’Connor, J., concurring) (noting that “comity” concerns help justify federal abstention when federal constitutional claims are “entwined with the interpretation of state law”). This vertical comity is easier to justify than horizontal comity, which would be constitutionally compelled rather than prudential, and would involve imposing restraints on states rather than exercising self-restraint.

risdiction and choice of law doctrine is that one state's relatively strong claim to provide a forum or apply its law is not a ground for rejecting another state's weaker claim.<sup>266</sup> Likewise, the Court has allowed multiple states to tax the same intangible property rather than trying to allocate taxing authority to a single state with the strongest regulatory interest.<sup>267</sup>

The dearth of comity rules merits further study. A constitutional common law of comity, if applied with a light touch, could arguably help avoid interstate friction and thereby address concerns animating the constitutional structure of horizontal federalism. Mandatory comity rules might also lead states to avoid conflict by strengthening their existing voluntary comity rules,<sup>268</sup> or refraining from aggressive assertions of authority that would trigger judicial intervention. However, comity rules would be highly subjective and therefore difficult to predict *ex ante* and to apply *ex post*. They may also exacerbate rather than ameliorate systemic friction by undermining interstate coequality, sacrificing federal neutrality, and inflating minor skirmishes into higher stakes battles that would generate broadly applicable precedents about the weight of

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266. See *Franchise Tax Bd. v. Hyatt*, 538 U.S. 488, 499 (2003) ("Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause."); *Calder v. Jones*, 465 U.S. 783, 788 (1984) (personal jurisdiction is appropriate in "any State" with sufficient "minimum contacts" to the dispute).

267. See, e.g., *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 178–79 (1942).

268. For example, courts in some states avoid unnecessary conflicts with other states by presuming that the forum state's statutes do not apply extraterritorially. See *N. Alaska Salmon Co. v. Pillsbury*, 162 P. 93, 94 (Cal. 1916) ("Although a state may have the power to legislate concerning the rights and obligations of its citizens with regard to transactions occurring beyond its boundaries, the presumption is that it did not intend to give its statutes any extraterritorial effect."); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) (noting the "well-established presumption against extraterritorial operation of statutes" that "helps to protect against unintended clashes of the laws of the Commonwealth with the laws of our sister states"); *Coca-Cola Co. v. Harmar Bottling Co.*, 218 S.W.3d 671, 682 (Tex. 2006) ("[A] statute will not be given extraterritorial effect by implication but only when such intent is clear."). Federal courts apply the same presumption when interpreting federal statutes and could consider extending the presumption to state statutes as a form of federal common law designed to promote interstate harmony. See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States. . . . [This canon of construction] serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." (citations omitted)).

competing state interests. Congress might therefore be in a better position than courts to balance the political and economic factors that comity rules would need to consider. Whatever the merit of comity rules, it is still interesting to note their rarity relative to arguments about capacity, constraint, and centralization. Future scholarship might therefore consider whether any particular horizontal federalism doctrines would benefit from comity rules, and whether judicial or legislative lawmaking would be a superior method of regulation.<sup>269</sup>

Another interesting and unexplored aspect of comity concerns the extent to which a state's acquiescence to potentially unconstitutional conduct by another state validates the conduct. The Court's most recent horizontal federalism decision seems to invoke this vision of waivable comity obligations, albeit with minimal analysis. In *Department of Revenue v. Davis*, the Court reviewed a Kentucky statute that taxed bonds from out-of-state municipal issuers while not taxing bonds from in-state municipal issuers.<sup>270</sup> The statute enabled Kentucky to insulate domestic issuers (including the state itself) from foreign competition in local capital markets, and thus seemed to be a suspicious hybrid of the competition and favoritism phenomena discussed in Part II.<sup>271</sup> The Court nevertheless upheld the statute based on technical nuances of Commerce Clause doctrine.<sup>272</sup> For present purposes, the relevant aspect of the holding is the Court's repeated statement that forty states imposed differential taxes similar to Kentucky's, and that all forty-nine other states filed an amicus curiae brief endorsing Kentucky's position.<sup>273</sup> The Court never claimed to rely on this unanimous state sentiment, but clearly thought that unanimity was an important factor warranting relatively deferential scrutiny of Kentucky's statute.<sup>274</sup>

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269. For an argument that comity and reciprocity theories should not displace a preference for forum law in conflicts analysis, see Louise Weinberg, *Against Comity*, 80 GEO. L.J. 53 (1991).

270. 128 S. Ct. 1801 (2008).

271. See *supra* notes 87–97, 108–13 and accompanying text.

272. See *Davis*, 128 S. Ct. at 1811 (holding that a state performing a “traditional government function” such as bond issuance “does not have to treat itself as being ‘substantially similar’ to other bond issuers in the market,” and can thus favor itself without engaging in “discrimination”).

273. See *id.* at 1811, 1815, 1817.

274. See *id.* at 1817 (“[T]he unanimous desire of the States to preserve the tax feature is a far cry from the private protectionism that has driven the development of the dormant Commerce Clause.”).

The Court's deference to Kentucky raises at least three questions that the Court never asked, and that are ripe for further scholarship. First, is comity important for its own sake (such that discriminating against foreign states is undesirable even if the other states do not object), or is comity important only when a dispute crosses some threshold of contentiousness? The answer may depend on the purpose of a particular limit on state autonomy. If the purpose is to protect other states, then the views of other states should matter. But if the purpose is to protect investors, then unanimity among the foxes ought not prejudice the hens.<sup>275</sup> Second, if state unanimity is important, does it follow that non-unanimity is also important—such that the Court would have ratcheted up the level of scrutiny if a state had complained about Kentucky's statute? If the answer is yes, then the holding in *Davis* is flimsy because shifting political winds or economic theories could erode unanimity by leading a state to decide that it would like to compete in foreign markets on a level playing field. If the answer is no, then the decision in *Davis* would raise questions about how much leeway states have to use the tools of sovereign regulatory power (here, the power to tax) to antagonize each other.<sup>276</sup> Finally, is the fact that most states adopt the same discriminatory law evidence that the law is not objectionable, or that the law has spawned a trade war requiring judicial intervention? The Court in *Davis* seemed to take the status quo of reciprocal discrimination for granted.<sup>277</sup> But if the reciprocity arose as a form of retaliation,<sup>278</sup> then the fact that states are now comfortable in the

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275. Emphasizing the potential role of investor interests in evaluating comity arguments is not equivalent to invoking the concept of constraint because the argument would not be that investors in out-of-state bonds have a right to the same favorable tax treatment as investors in local bonds. Instead, the argument would be that comity obligations bar differential taxation based on the origin of commodities because such taxes impose undesirable limits on consumer choice that are inconsistent with the ideal of creating a national market. Congress could protect consumer choice by preempting discriminatory state statutes, but the comity argument—if valid—would bar states from discriminating even absent Congressional intervention.

276. Collusive tolerance by states of a discriminatory taxing regime that at least one state challenged would also raise concerns underlying the potential Compact Clause requirement that Congress approve interstate agreements that threaten interstate equality. See *supra* Part III.B.

277. The Court explained that the first statute imposing differential taxes on municipal bonds appeared in 1919 and that forty-one states now have similar statutes, but did not explain why differential taxation became ubiquitous. See *Davis*, 128 S. Ct. at 1806–07.

278. See Brian D. Galle & Ethan Yale, *Can Discriminatory Taxation of*



protectionist market they created does not necessarily mean that this market should persist (although there would still be a question of whether any reform should come from Congress rather than the courts).<sup>279</sup> The Court's tentative suggestion in *Davis* that aggregate state sentiment may be relevant in the constitutional calculus of horizontal federalism thus raises questions about the meaning and importance of comity that warrant further research.

## B. PRACTICAL IMPLICATIONS OF THE MODEL

Using the model as a prism for refracting horizontal federalism doctrine helps illuminate sources of incoherence and instability, as well as potential routes to reform. The insight that accrues from treating horizontal federalism as a field and searching for patterns of argument can also situate academic literature about specific doctrines in a broader context, providing an alternate justification for existing critiques. Three brief examples illustrate the model's utility, and suggest avenues for further scholarship. First, the model can help assess the soundness of any particular doctrine's foundation by focusing on the consequences of choices between capacity, constraint, centralization, and comity arguments. Second, the model encourages precision in identifying the arguments that animate decisions, which can help identify fuzzy reasoning and poorly theorized analysis. Finally, by grouping all horizontal federalism doctrines within a single framework, the model can reveal potentially unjustified methodological inconsistencies between rules that serve similar purposes, and can suggest ways of integrating rules that should operate in harmony.

### 1. Assessing Doctrinal Foundations

Justifying or rejecting an interpretation of the Constitution using capacity, constraint, centralization, or comity arguments requires courts to reach two distinct conclusions: that the chosen form of argument is appropriate to the context in which it appears, and that alternative arguments are less appropriate. Unfortunately, these conclusions are often implicit rather than

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*Municipal Bonds Be Justified?*, 117 TAX NOTES 153, 157–58 (2007) (contending that “tit-for-tat” retaliation may explain why most states adopted discriminatory tax exemptions).

<sup>279</sup> *Cf. Davis*, 128 S. Ct. at 1817–19 (discussing relative institutional competence to police markets in the context of whether the Kentucky statute imposed an excessive burden on interstate commerce).

explicit in judicial opinions because courts do not always recognize the range of available choices.<sup>280</sup> But even when a court clearly prioritizes one form of argument over another, critics can question whether that argument is the best fit for a particular problem. Visions of what constitutes an appropriate fit will of course vary with the context and the interpreter's sensibilities. Nevertheless, whatever the best fit may be, one is unlikely to find it without consciously looking for it.

A model of horizontal federalism jurisprudence that identifies and distinguishes potential lines of argument can create value by forcing judges to confront difficult choices about doctrinal foundations. When a past choice no longer makes sense, a new animating principle can move the doctrine in new directions. *Stare decisis* may limit judicial flexibility to uproot established lines of reasoning, but the instability and incoherence of many horizontal federalism doctrines makes them relatively amenable to reevaluation. For example, over the past 150 years personal jurisdiction doctrine has vacillated from a capacity approach founded on customary international law,<sup>281</sup> to a capacity approach founded in due process,<sup>282</sup> to a constraint approach speckled with capacity arguments,<sup>283</sup> and then to solely

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280. See *infra* text accompanying notes 294–308 (discussing judicial imprecision in framing arguments about horizontal federalism).

281. See *D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165, 176 (1850) (holding that statute implementing Full Faith and Credit Clause did not “overthrow” “the international law as it existed among the States in 1790 . . . that a judgment rendered in one State, assuming to bind the person of a citizen of another, was void within the foreign State, when the defendant had not been served with process or voluntarily made defence, because neither the legislative jurisdiction, nor that of courts of justice, had binding force”). Other opinions from the same era were less clear about the foundation of personal jurisdiction doctrine. See, e.g., *Harris v. Hardeman*, 55 U.S. (14 How.) 334, 339 (1852) (noting that judgment rendered without personal jurisdiction is “void”); *Boswell's Lessee v. Otis*, 50 U.S. (9 How.) 336, 350 (1850) (framing the doctrine in terms of constraints on state power for the “security of absent parties”).

282. See *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877) (“[E]very State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . [But] no State can exercise direct jurisdiction and authority over persons or property without its territory.”); *id.* at 733 (invoking the Due Process Clause, even though the Fourteenth Amendment had not yet been ratified at the time of the underlying conduct). Justice Field, the author of *Pennoyer*, made the same point in an earlier opinion about limits on state capacity to serve process extraterritorially without relying on the Due Process Clause. See *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 367–69 (1873).

283. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (holding that jurisdiction hinges on fairness to the defendant and the nexus between the action and the forum); *Quill Corp. v. North Dakota*, 504 U.S. 298, 307 (1992) (holding that a state forum must be “reasonable, in the context of our

(or nominally) a constraint approach.<sup>284</sup> Having bounced haphazardly to its current resting point, the doctrine should not be immune from further reform if analysis suggests that its present foundations are not satisfactory.

An example illustrates how reevaluating doctrinal foundations could alter the contours of horizontal federalism jurisprudence. Consider *Heath v. Alabama*, in which the Supreme Court held that the Double Jeopardy Clause did not bar Alabama from prosecuting—and seeking to execute—a person who was already serving a life sentence in Georgia for the same set of criminal acts (the murder in Georgia of a person kidnapped from Alabama).<sup>285</sup> The Court assumed that the second prosecution would have violated the Double Jeopardy Clause if Georgia had initiated it, and thus the sole question was whether the clause allowed one state to pursue charges that were barred in another.<sup>286</sup>

The *Heath* opinion is striking because it relies entirely on capacity and comity theories, and yet ignores the arguably more important question of constraint. The decision hinges on the Court's perception of "crime as an offense against the sovereignty of government," such that states with "separate and independent sources of power and authority" each have capacity to prosecute crimes with a local nexus.<sup>287</sup> Neither state need yield to the other because requiring a "race to the courthouse" (i.e., a first-in-time rule) or a "balancing of interests" (i.e., a comity rule) would be an affront to the "prerogatives of sovereignty."<sup>288</sup> This reasoning entirely overlooks the question of

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federal system of Government"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (stating that personal jurisdiction doctrine prevents states from "reach[ing] out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

284. See *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("The personal jurisdiction requirement . . . represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty.").

285. 474 U.S. 82 (1985). Alabama eventually executed Heath. See *Alabama Executes Man Who Arranged His Wife's Murder*, N.Y. TIMES, Mar. 21, 1992, at 10L.

286. See 474 U.S. at 87–88.

287. *Id.* at 88–89.

288. *Id.* at 92–93. The dissenting Justices' response was not entirely clear and might have benefited from following the model in Part IV.A. The dissent seemed to challenge Alabama's capacity to prosecute by giving minimal weight to its sovereign interests, but also suggested that the phrase "same offense" in the Double Jeopardy Clause might apply to the underlying murder and thus create a right against successive prosecutions that trumped Alabama's sove-

constraint, which one might frame as: does the Double Jeopardy Clause, as incorporated against the states by the Due Process Clause, create a right limiting the burdens that interstate conflict or collusion may impose on criminal defendants? Framing the question in this way makes the Court's holding more troubling by inviting analogies to other aspects of horizontal federalism that express greater concern for burdens on individuals. Relevant analogies include limits on taxation of the same property or income by multiple states,<sup>289</sup> the right of "repose" underlying the Full Faith and Credit Clause's doctrine of interjurisdictional preclusion in civil disputes,<sup>290</sup> and the framers' use of the Bankruptcy Clause to preclude one state from imprisoning persons for debts that another state had discharged.<sup>291</sup> These analogies, coupled with a general norm against double jeopardy,<sup>292</sup> suggest that the Court's reasoning

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reign interests. *Id.* at 98–101 (Marshall, J., dissenting). The dissent also relied on the alternative argument that collusion between Georgia and Alabama triggered a rule preventing two states "from combining to do together what each could not constitutionally do on its own." *Id.* at 102.

289. The Due Process Clause tolerates taxation of the same income stream by multiple states, but spares taxpayers from excessive duplication by requiring states to apportion the income among themselves. *See Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 436–37 (1980). For example, two states can each tax twenty percent of a business' income, but they cannot each tax seventy-five percent. The doctrine thus recognizes the potential for interstate competition or collusion to create constitutionally intolerable burdens that require a remedy, which is an insight missing from *Heath*. The analogy between double taxation and double jeopardy is imperfect because taxes are cumulative while the duplicative portions of sentences (but not trials) are concurrent. However, the general point remains that the imposition of a burden by one state may be a reason to question the ability of a second state to impose a duplicative burden on the same person arising from the same conduct.

290. *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 463 (1982) (interpreting a statute implementing the Full Faith and Credit Clause). Preclusion does not apply in criminal cases due to states' perceived incapacity to apply their "penal" laws extraterritorially. *See Huntington v. Attrill*, 146 U.S. 657, 668–69 (1892). The exclusion of criminal cases from the Full Faith and Credit Clause arguably supports *Heath's* holding because it suggests by negative implication that judgments in criminal cases should not bind other states. However, that observation begs a question that the Court never asked: is the Double Jeopardy Clause a criminal law analog to the Full Faith and Credit Clause, such that both clauses together create a comprehensive first-in-time regime for civil and criminal actions?

291. *See supra* note 206.

292. *See Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy Law After Rodney King*, 95 COLUM. L. REV. 1, 5–6, 27 (1995) (challenging *Heath* based on arguments about the meaning and historical origins of the Double Jeopardy Clause independent from structural arguments about horizontal federalism). The individual right underlying the Double Jeopardy Clause might

was too thin to support its conclusion. Capacity to regulate free from limits based on comity is a necessary condition for states to impose criminal punishment, but is insufficient to justify prosecution if the Constitution constrains state power in order to insulate federal citizens from interstate maneuvering. Thus, whatever the outcome of *Heath* should have been, thinking systematically about horizontal federalism and modeling judicial arguments about state power can reveal hidden dimensions of problems and suggest alternative approaches to constitutional questions.<sup>293</sup>

## 2. Identifying Doctrinal Imprecision

A disciplined approach to horizontal federalism can expose a lack of discipline in judicial reasoning. One need not expect all opinions to fit neatly into the model. But at a minimum it should be possible to read an opinion in light of the model and determine the basic elements of the court's reasoning and the role of each element in the court's conclusion. This precision is often missing, however, as courts either do not rely on any particular line of argument, or rely on a jumble of arguments in

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also manifest in successive prosecutions by different states in the form of limits on the second state's jurisdiction over the defendant. See Anthony J. Colangelo, *Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory*, 86 WASH. U. L. REV. (forthcoming 2008). This jurisdictional approach would not have altered the result in *Heath*, however, because Alabama's courts had authority to adjudicate on any plausible theory of jurisdiction: both the defendant and the victim were Alabama residents, and the crime began with a kidnapping in Alabama. See *Heath*, 474 U.S. at 83–84.

293. Another interesting question about successive interstate prosecutions that did not arise in *Heath* is whether a centralization argument might apply. Section Five of the Fourteenth Amendment enables Congress to enforce provisions of the Bill of Rights—including the Double Jeopardy Clause—incorporated by the Due Process Clause, and even to extend federal protection slightly beyond a right's limits. See *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (“Legislation which deters or remedies constitutional violations can fall within the sweep of Congress’s enforcement power even if in the process it prohibits conduct which is not itself unconstitutional . . .”). Congress arguably could invoke this remedial power to enact an ‘interstate criminal comity’ statute that would govern cases such as *Heath*. If Congress has such power, an alternative justification for *Heath*'s holding might be that courts should refrain from circumscribing state authority on horizontal federalism grounds in circumstances where a more politically accountable branch could address the problem. The persuasiveness of this argument would depend on: (1) whether the Double Jeopardy Clause creates self-executing constraints on state power that courts should enforce regardless of congressional silence; and, if not, (2) whether the Clause is sufficiently broad to permit Congress to legislate a comity rule; and, if so, (3) whether legislative power warrants judicial restraint in adopting common law remedies for violations of constitutional rights.

one case or across a line of related cases.<sup>294</sup> The capacity, constraint, centralization, and comity model can therefore help to sort out confused reasoning and suggest alternative approaches.

The Supreme Court's opinion in *BMW of North America, Inc. v. Gore*<sup>295</sup> illustrates how imprecise reasoning can lead to confusion. The Court in *Gore* reversed an Alabama court's "grossly excessive" two million dollar punitive damages award punishing BMW for allowing an Alabama dealer to sell a car without disclosing shipping damage that had required repainting.<sup>296</sup> Alabama clearly had authority to punish the fraudulent sale in Alabama,<sup>297</sup> but had gone further: the jury calculated the award in part by multiplying compensatory damages by 969, which was the number of transactions in which BMW had failed to disclose similar damage to cars sold in other states.<sup>298</sup> Alabama thus punished BMW for extraterritorial conduct. The 969 sales were apparently legal in the states where they occurred because those states did not require disclosure of the relatively minor damage covered in the plaintiff's suit.<sup>299</sup> The Court therefore had to determine whether the extraterritorial sales were relevant to calculating punitive damages before it could determine if the amount was excessive.<sup>300</sup>

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294. One possible explanation for fuzzy analysis in opinions is that precedent obscures the choices that confront courts trying to apply the malleable constitutional methods discussed in Part III to the manifestations of interstate friction discussed in Part II. Each silo of horizontal federalism doctrine is an accretion of layers built on past decisions that committed recurring fact patterns to the domain of particular constitutional clauses and derivative rules. New cases might move a doctrine in slightly new directions to account for novel facts or heightened insight, but not quite far enough to pull the doctrine off its foundation. Over many years, the aggregate effect of subtle innovations might cause the old foundation to no longer support the new infrastructure, and yet the foundation may persist from inertia. The historical origins of a doctrine can thus control its future development even if changed circumstances challenge earlier commitments. See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 605 (2001) ("[C]ourts' early resolutions of legal issues can become locked-in and resistant to change.").

295. 517 U.S. 559 (1996).

296. *Id.* at 562–63.

297. See *id.* at 568–70.

298. See *id.* at 564, 567.

299. See *id.* at 577–78.

300. The question was arguably moot because the Alabama Supreme Court had affirmed the award (after a remittitur) based solely on BMW's in-state sales. See *id.* at 566–67. However, the U.S. Supreme Court apparently was skeptical about whether the state appellate decision fully excised the award's

The Court held that the extraterritorial sales could not be a multiplier in the damages calculation,<sup>301</sup> but did not clearly explain why. The Court first seemed to deny Alabama's capacity to regulate car sales beyond its borders, citing nineteenth and early twentieth century precedents rooted in the territorial approach to state power.<sup>302</sup> Yet the capacity problem is more subtle than the Court's cursory statement suggests. For example, if Mr. Gore had left Alabama to purchase the car from BMW in Mississippi, received the misleading disclosures in Mississippi, and then driven the car back to Alabama and there discovered the fraud and experienced the injury, the Court's lax choice of law jurisprudence might permit Alabama to apply its tort law to the extraterritorial sale.<sup>303</sup> Even if applying Alabama law to a Mississippi sale were deemed unconstitutional, the rationale would probably be "unfair surprise" to BMW,<sup>304</sup>

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extraterritorial components. *See id.* at 567 n.11 (noting that considering solely in-state sales should have led to an award of only \$56,000).

301. *See id.* at 573–74. The Court also held that Alabama could attempt to use the out-of-state sales as evidence that BMW's conduct was reprehensible and thus worthy of "strong medicine" to "cure the defendant's disrespect for the law." *Id.* at 576–77. These positions are difficult to reconcile, reducing to a curious form of constitutional mathematics in which out-of-state conduct cannot *multiply* damage awards, but can *add* to them.

302. *See id.* at 570–71, 570 n.16.

303. For example, the Court allowed Minnesota law to govern an automobile insurance policy issued in Wisconsin to a Wisconsin resident who died after other Wisconsin residents crashed into a motorcycle that he was riding in Wisconsin. *See Allstate Ins. Co. v. Hague*, 449 U.S. 302, 305, 313–19 (1981) (plurality opinion). Minnesota's sole contacts were that: (1) the decedent had worked in Minnesota (although he was not driving to or from Minnesota at the time of the accident) and thus his death depleted the local work force; (2) the defendant conducted business in Minnesota (although none connected to the accident); and (3) the insured's widow moved to Minnesota after the accident and became the representative of the insured's estate. *See id.* at 313–19. If these vaporous contacts are sufficiently "significant" to satisfy constitutional scrutiny, *id.* at 320, then applying Alabama law to a suit by a defrauded resident and local worker against a car distributor that does business in the state would likewise seem constitutional, even if all other relevant contacts were in Mississippi. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 145(2)(c), 148(1) (1971) (preferring to apply the fraud rules of the place where the misrepresentation and transaction occurred, but recognizing that the law of the victim's domicile might also apply); Laycock, *supra* note 2, at 258 ("*Hague* may mean that there are no limits whatever on a state's power to apply its own law to benefit a resident litigant.").

304. *Hague*, 449 U.S. at 318 n.24 (plurality opinion); *cf.* *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding that the Due Process Clause protects a car dealer's reasonable expectation that it will not be subject to personal jurisdiction in distant states where purchasers take their cars).

which is more a problem of BMW's rights (constraint) than Alabama's territorial authority (capacity). Perhaps unsatisfied with its invocation of capacity, the Court moved (primarily in a footnote) to an argument based on constraint by noting that punishing a defendant for legal conduct violates due process.<sup>305</sup> The Court also invoked centralization by implying that "burdens on the interstate market for automobiles" might violate the Commerce Clause, and invoked comity by suggesting that Alabama was obliged to "respect the interests of other States."<sup>306</sup> But the Court did not develop any of its observations or purport to rely on any particular one of them.

The lack of a clear rationale for excluding extraterritorial sales from the punitive damages calculation led to a remarkably muddled summary of the holding. The Court stated that:

We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States. . . . [B]y attempting to alter BMW's nationwide policy, Alabama would be infringing on the policy choices of other States. To avoid such encroachment, the economic penalties that a State such as Alabama inflicts on those who transgress its laws . . . must be supported by the State's interest in protecting its own consumers and its own economy. Alabama may insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.<sup>307</sup>

This summary raises three sets of troubling questions that the Court does not appear to have considered. First, if other states' "policy choices" are consistent with the forum's, then can the forum regulate extraterritorially? If so, how would that extraterritorial regulation square with the Court's invocation of limited state capacity, and if not, what was the point of mentioning conflicting policies? Second, if there is evidence that a defendant's extraterritorial conduct has an "impact on [the forum] or its residents," then can the forum punish the conduct despite its legality in the states where it occurred? If so, how would punishing legal conduct square with the Court's invoca-

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305. See *Gore*, 517 U.S. at 572–73, 573 n.19.

306. *Id.* at 571. The Court did not explain why "respect" was important in this context, while irrelevant in other contexts. See *W. & S. Life Ins. Co. v. State Bd. of Equalization*, 451 U.S. 648, 671 (1981) (holding that states have a legitimate interest in using "retaliatory" taxes to induce other states to alter their tax codes).

307. 517 U.S. at 572–73. The dissenting Justices did not critique this aspect of the majority's reasoning because they deemed it to be dicta. See *id.* at 604 (Scalia, J., dissenting); *id.* at 610 (Ginsburg, J., dissenting).



tion of constraint, and if not, what was the significance of mentioning local impacts? Finally, if a forum lacks “intent” to undermine other states’ policies but does so recklessly or gently as an incident to local regulation, will the forum’s conduct survive constitutional scrutiny? If so, how would not respecting other states square with the Court’s invocation of comity, and if not, what was the point of mentioning intent?

A lower court trying to decipher *Gore* thus has little guidance about what precisely was wrong with Alabama’s consideration of extraterritorial sales. The defect could have been the conduct’s extraterritorial location (capacity), its legality in the places where it occurred (constraint), its effect on commerce (centralization), or its inconsistency with other state’s preferences (comity). The simplest explanation for the holding—beyond the Court’s general hostility to punitive damages<sup>308</sup>—is probably that BMW had a legitimate expectation of avoiding punishment for conduct that it reasonably believed to be legal at the time that it acted, and that this expectation constrained Alabama’s power.<sup>309</sup> But this rationale is not obvious from the opinion, which raises more questions than it answers. The *Gore* decision thus illustrates the confusion that can arise when courts blur distinct forms of argument into sweeping conclusions about the scope of state power in cases implicating horizontal federalism.

### 3. Improving Doctrinal Coordination

Conceptualizing horizontal federalism as a field highlights the similar functions that many subsidiary doctrines promote. The greater the similarity, the more one might wonder whether

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308. For post-*Gore* decisions vacating punitive damages awards on various grounds, see *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2626–34 (2008) (award was excessive under federal maritime law); *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063–65 (2007) (award impermissibly accounted for harm to nonparties); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418–29 (2003) (award was excessive under Due Process Clause); *Barnes v. Gorman*, 536 U.S. 181, 189 (2002) (controlling statutes did not authorize punitive damages); *cf. Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 443 (2001) (vacating Court of Appeals decision affirming punitive damages award and remanding for reconsideration of excessiveness). *But cf. Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999) (holding that punitive damages might be available in Title VII case depending on facts adduced on remand).

309. *Cf. Campbell*, 538 U.S. at 421 (citing *Gore* for the proposition that “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred”).

analytical approaches to each doctrine should be consistent, or at least work in tandem. Moreover, recognizing that distinct doctrines serve similar purposes raises the possibility that each is merely a fragment of what the governing law should be for any particular situation, such that redefining fact patterns at a higher level of abstraction could unite distinct doctrinal strands. The model discussed in this Part, coupled with the analysis in Parts I-III, can facilitate this systemic analysis by exposing the complete range of arguments applicable to a given problem and allowing observers to ask if current law considers those arguments in an integrated and coherent manner. For example, considering the extent to which personal jurisdiction and choice of law doctrines do or should similarly employ capacity, constraint, centralization, and comity arguments could help determine whether courts should heed calls from scholars to combine or converge inquiries into adjudicative and legislative jurisdiction.<sup>310</sup> Likewise, a holistic approach might help unravel the tangled web of opinions that address “discriminatory” state laws under, variously, the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause.<sup>311</sup>

The model is also useful for dealing with clusters of fact patterns that raise constitutional concerns without clearly implicating any particular constitutional text. For instance, Donald Regan has shown that judicial efforts to explain when state statutes can govern extraterritorial conduct flounder because none of the potentially applicable constitutional clauses—Due Process, Commerce, Full Faith and Credit, and Privileges and Immunities—provide a satisfactory analytical framework.<sup>312</sup> The permissible extraterritorial scope of statutes governing taxation, criminal law, corporate regulation, consumer protection, and a host of other regulatory objectives thus depends on a morass of inconsistent and often unstable precedent.<sup>313</sup> Regan concluded that restraints on extraterrito-

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310. See Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991).

311. See Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 382 (1987) (discussing both intra- and interstate discrimination based on residence, and noting that “[t]he absence of a self-conscious approach to these problems has left the courts to resolve individual cases without a consistent backdrop”).

312. See Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865, 1887–95 (1987).

313. See *id.*; see also *MeadWestvaco v. Ill. Dep’t of Revenue*, 128 S. Ct. 1498, 1505 (2008) (stating that two different Constitutional provisions—the

riality are atextual and rooted in constitutional structure,<sup>314</sup> which raises a question about how to weave wisps of structure into judicially enforceable standards. The model in this Article suggests one possible approach to filling the textual void by identifying methods of constitutional regulation and forms of argument that can help translate constitutional structure into workable rules. The translation process would obviously be subjective, but holds the promise of greater consistency and rigor than attempting to squeeze cases into the ill-fitting pigeonholes of contemporary doctrine.

In addition to helping when no text seems applicable, the model can help when too many texts seem applicable. A recurring theme in academic literature is that the Supreme Court can make its decisions more coherent by shifting the textual foundations for particular doctrines. For example, scholars have proposed using the Privileges and Immunities Clause to supplant the Commerce Clause in limiting states' power to regulate regional markets,<sup>315</sup> using the Full Faith and Credit Clause to supplant the Due Process Clause in limiting personal jurisdiction,<sup>316</sup> and using various formulas to reallocate the relative weights of clauses that govern choice of law.<sup>317</sup> These proposals individually may have merit, but collectively create a risk that courts will employ a constitutional shell game in which interpretative sleight of hand reassigns problems among clauses without resolving deeper structural concerns. The analysis in this Article demonstrates that the many fragments of

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Due Process and Commerce Clauses—provide “distinct but parallel” rules that “subsume[]” the same “broad inquiry”); Walter Hellerstein, *State Taxation of Interstate Business: Perspective on Two Centuries of Constitutional Adjudication*, 41 TAX LAW. 37 (1987) (noting twists and turns in the Court's efforts to define the boundaries of state taxing authority).

314. See Regan, *supra* note 312, at 1885.

315. See Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 446–55 (1982). *But see* Brannon P. Denning, *Why the Privileges and Immunities Clause of Article IV Cannot Replace the Dormant Commerce Clause Doctrine*, 88 MINN. L. REV. 384, 388 (2003).

316. See Robert H. Abrams & Paul R. Diamond, *Toward a Constitutional Framework for the Control of State Court Jurisdiction*, 69 MINN. L. REV. 75, 87–89 (1984).

317. See Lea Brilmayer, *Credit Due Judgments and Credit Due Laws: The Respective Roles of Due Process and Full Faith and Credit in the Interstate Context*, 70 IOWA L. REV. 95, 95–97 (1984); Brainerd Currie, *The Constitution and the “Transitory” Cause of Action*, 73 HARV. L. REV. 36, 62–66 (1959) (examining roles of the Equal Protection and Full Faith and Credit Clauses); Roosevelt, *supra* note 129, at 2527–33 (discussing relative roles of the Full Faith and Credit and Privileges and Immunities Clauses).

constitutional text governing interstate activity are manifestations of an underlying structure. Each clause is a foundation for silos of doctrine formed by the accretion of common law decisions, but focusing on the silos obscures the landscape connecting them. Semantic variations among clauses give important guidance to courts, but sliding problems from silo to silo will not be a satisfying source of doctrinal insight if one does not also learn something about their common architecture. Thinking about capacity, constraint, centralization, and comity can thus clarify debates about the textual foundation for particular doctrines by creating a metric for evaluating how each clause might differ from the others and which clause provides the most appropriate fit for a particular problem.

Finally, the model may be useful for tracking how forms of argument flutter in and out of fashion across different lines of precedent over time. Studying discrete legal subjects tempts observers to consider doctrinal evolution as a function of factors unique to that subject. From this perspective, each strand of doctrine seems to have intrinsic content that animates its development and differentiates it from other strands. However, such an isolated view is not realistic when all doctrines derive their content from an adjudicative process with a single institutional overseer—the Supreme Court. Some spill-over in style and approach is inevitable when the same nine Justices confront distinct doctrinal problems roughly contemporaneously. Accordingly, it would not be surprising if capacity, constraint, centralization, and comity arguments occasionally ebb and flow through horizontal federalism jurisprudence in a discernable temporal pattern that may help to explain seemingly anomalous doctrinal changes.<sup>318</sup> Of course, imprecision in reasoning might still lead to tension even between contemporaneous decisions.<sup>319</sup> The model thus creates a framework for analyzing the evolution of horizontal federalism doctrines within and across distinct eras.

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318. See, e.g., *Quill Corp. v. North Dakota*, 504 U.S. 298, 307–08 (1992) (relying on recent developments in personal jurisdiction doctrine to refine rules governing state taxation of extraterritorial activity).

319. Compare *id.* at 307 (“we have abandoned more formalistic tests” of state power that focused on a regulated entity’s “presence’ within a state”), with *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (“[A] statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority . . .”).

## CONCLUSION

Removing horizontal federalism from the shadow of its vertical counterpart reveals connections between an array of problems central to the configuration of U.S. government. Thinking about these problems systemically helps to identify the structural origins of interstate friction, the distinct scenarios in which such friction manifests, the interrelated methods that the Constitution uses to address friction, and the dynamics of jurisprudence that implements these methods. Insights from this broad approach can help to redesign dozens of ostensibly distinct doctrines and suggest new directions for scholarship about the regulation of interstate activity.