

Horizontal Federalism

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The U.S. Constitution allocates sovereign power 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 who must peaceably coexist. Both vertical and horizontal federalism are fundamental elements of American government. Yet most scholarship about “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.¹ This broad approach presumes that distinct strands of vertical federalism doctrine comprise a single coherent field of study in which analysis of one subsidiary issue 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 myriad components.² Judicial regulation of interstate activity similarly lacks the broad perspective necessary to reveal constitutional values animating and connecting strands of doctrine, leading to jurisprudence that is often unprincipled, unsatisfying, and unstable.

This Article weaves threads of horizontal federalism into a more coherent pattern by illuminating a constitutional structure for interstate relations that has been hidden in plain sight for more than two centuries. The structure has two basic elements. First, the Constitution creates a recipe for chaos by allowing states to wield substantial regulatory power, deeming each of them equal in status, and then setting them loose to pursue parochial interests in interactions with each other and each other’s citizens. Sporadic or simmering interstate conflict is inevitable under this arrangement, posing a constant threat to national stability. Second, the Constitution recognizes the likelihood and costs of interstate friction and creates numerous mechanisms to deter, mitigate, and resolve it. Commentators often overlook connections between these mechanisms because they derive from clauses scattered throughout the Constitution and regulate ostensibly distinct problems, including: interstate commerce, personal jurisdiction, extraterritorial legislation, choice of law, federal subject-matter jurisdiction, interstate compacts, federal common law, the privileges and immunities of state citizenship, tax apportionment, and various other important subjects. A systemic approach to these problems reveals

¹ For some of the many examples of broad approaches to vertical federalism, see 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”).

² For examples of efforts to link subsets of horizontal federalism, see 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); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1021-292 (3d ed. 2000) (discussing “Union-Preserving Aspects of Federalism”).

common elements and values that can help explain, assess, and improve judicial enforcement of constitutional norms governing interstate activity.

I propose a systemic approach to horizontal federalism in three steps. Each step is a bridge to the next, but each also makes a distinct contribution to the literature on constitutional federalism. Part I focuses on how interstate friction arises, Part II on how the Constitution regulates it, and Part III on how courts implement that regulatory framework.

Part I makes two points. First, it demonstrates that the Constitution enables interstate friction by allocating power to coequal states in the aggregate without explaining how the existence of each state constrains the power of the others. States thus have significant latitude to exercise power in a manner that limits the ability of their counterparts to exercise that same power, or to pursue other legitimate interests. Second, Part I reveals the underappreciated scope of horizontal federalism problems by considering the many forms in which interstate conflict can manifest, ranging from private civil disputes infused with federalist overtones to outright civil war. The analysis groups these seemingly unrelated instances of state action into eight categories, revealing thematic connections that help explain the constitutional approaches to interstate friction discussed in Parts II and III.

Part II analyzes the Constitution holistically to identify the clauses that regulate horizontal federalism and consider how these fragments fit together. This approach seeks to reveal a coherent field of law lurking amidst components usually viewed in isolation. Systemic analysis identifies five distinct methods that the Constitution uses to regulate interstate activity: creating codependence among states by stripping them of powers that could instigate or escalate conflicts, creating mechanisms to promote coordination between states and institutions to resolve disputes, imposing first-in-time rules to resolve competing claims of authority, empowering individuals to enforce rights that promote horizontal stability, and enabling federal legislation and federal common law to avoid or mitigate interstate conflict. Revealing these methods offers a richer understanding of federalism and enables Part III's fresh reassessment of judicial doctrines governing interstate activity.

Part III shifts focus from constitutional text to constitutional common law by suggesting a model for analyzing and critiquing ostensibly unrelated lines of precedent addressing horizontal federalism. This approach illustrates that doctrines implementing the texts discussed in Part II rely on a varying combination of four basic concepts: capacity, constraint, centralization, and comity. Identifying these concepts – and documenting how the Court often vacillates between them within a particular line of precedent or prioritizes one concept for questionable reasons –illuminates sources of incoherence or instability within horizontal federalism jurisprudence. The model thus provides a foundation for future scholarship reevaluating vast swaths of constantly evolving law.

I. HORIZONTAL FEDERALISM AND INTERSTATE FRICTION

The fifty states possess equal status and authority, yet each cannot exercise the full scope of its power without either encroaching upon the others' independence, frustrating the others' legitimate interests, or imposing undesirable burdens on the others'

citizens. If the states were independent nations, then these problems would be resolved – if at all – by custom, treaty, or force. But in a federal system, the Constitution supplants international law and military power as a means of interstate coordination. The existence of multiple states within a single Union must somehow constrain the power of each, and yet the Constitution is surprisingly vague about how those limits operate. That, in a nutshell, is the problem of horizontal federalism. This Part explains the problem in more detail by defining horizontal federalism, explaining the structural features of the Constitution that make the problem intractable, and illustrating how the problem manifests in numerous contexts. Parts II and III then demonstrate how the Constitution and judicial precedent interpreting it attempt to cope with the potential interstate tension and instability that is inherent in the Constitution’s design.

A. Definition and Scope of Horizontal Federalism

“Federalism” is a surprisingly amorphous concept given its importance and ubiquity within discourse about American 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 constitutional commitments.³ Fully defining federalism in the context of American government is beyond the scope of 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” between federal and state governments.⁴ From a normative perspective, federalism is an ideal that favors “diffusion” of power from national to relatively local government units.⁵ This norm is helpful in considering how to allocate power between national and local tiers of government, but has little to say about the allocation of power among competing local actors that each have a plausible entitlement to regulate local entities or activity. From a descriptive perspective, federalism is a shorthand moniker for a complex set of political, legal, and economic

³ Younger v. Harris, 401 U.S. 37, 44 (1970); see also Alden v. Maine, 527 U.S. 706, 748 (1999); La. Power & Light Co. v. Thibodaux, 360 U.S. 25, 28 (1959); People v. O’Neill, 359 U.S. 1, 9 (1959).

⁴ I define state governments as “sovereign” to highlight their substantial independence and significant reservoir of authority, but do not take a position on precisely what level 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). Thus, labeling states as “sovereign” does not determine the scope of their authority and merely begs the question of what sovereignty means in a system that divides 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). For my purposes, the semantic label for state power is immaterial. Whatever power states have, each has it in equal amounts and wields it subject to some federal oversight, which leads to the coordination problems that this Article addresses. For similar reasons, I 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 prerequisite for analysis of appropriate outcomes.

⁵ SHAPIRO, *supra* note 1, at 11 (distinguishing federalism from nationalism).

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 example, the prospect that political negotiations will resolve intergovernmental disputes might be relevant in determining the scope of legal constraints on the disputing entities.⁶ Nevertheless, it is still helpful to consider federalism on a more granular level. Here, I focus primarily on legal federalism, especially on how the existence of multiple states constrains the power of each when dealing with the others.

Legal federalism has two distinct dimensions: the federal government must interact with the states, and states must interact with each other. Federal/state interactions are hierarchical under the Supremacy Clause,⁷ and are 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 does not exist in Supreme Court decisions,⁸ but provides a helpful framework for conceptualizing recurring doctrinal problems related to divided sovereignty.

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 sovereignty. The essential question is how to decide where particular types of power “belong.” Analysts can assess the concept of belonging through various prisms, such as political accountability, economic efficiency, constitutional text, constitutional structure, and original understanding, among many others. These questions about vertical power-sharing are important, but elide an equally important dynamic of horizontal power-sharing. 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, “local” regulations may overlap or cause ripples in other states, which can create interstate conflict or tension.

The foregoing analysis suggests a rough definition of horizontal federalism as encompassing the set of constitutional mechanisms for preventing or mitigating friction between states arising from attempts by: (1) multiple states to exercise concurrent power

⁶ See *Garcia v. Metro. Transp. Auth.*, 469 U.S. 528, 550-54 (1985).

⁷ U.S. CONST. art. VI, cl. 2.

⁸ The Supreme Court has issued 557 opinions using the word “federalism,” but only one using “vertical federalism” and none using “horizontal federalism.” (These counts are based on searches of Westlaw’s SCT database on March 20, 2008.)

over the same entity or activity, or (2) one state to regulate in a manner that affects out-of-state interests or undermines interstate equality. The range of potential conflict-inducing behavior is vast, and discussed in more detail in Section C below.⁹

For convenience I refer to disputes implicating horizontal federalism as disputes between states, but this is shorthand for disputes that implicate state interests (or certain individual equality rights),¹⁰ even if the nominal parties are private or if states are otherwise competing indirectly. 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 a constitutionally protected interest that arises from the equivalent and overlapping powers of multiple states.¹¹

Although I distinguish horizontal federalism from vertical federalism, a complete analytical separation is impossible because constitutional provisions governing vertical federal-state interactions are tools for regulating horizontal state-state interactions. First, federal institutions play a coordinating role in the exercise of concurrent state power. This role is evident, for example, in constitutional provisions authorizing congressional oversight over interstate compacts and vesting federal jurisdiction (and a related power to create federal common law) in interstate disputes.¹² Second, some grants of exclusive or preemptive power to the federal government serve both a vertical allocation function and a horizontal conflict avoidance function.¹³ For example, Congress' 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

⁹ 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 that arise in dealing with foreign actors warrant carving them out for separate study and focusing instead on constitutional regulation of a closed state/federal system.

¹⁰ 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 II.D, although the two can blur, *see infra* pp. 47-48.

¹¹ For discussion of how nominally private disputes can generate interstate friction, *see infra* pp. 15, 26-28, 32-33.

¹² *See infra* pp. 24-28, 37-38.

¹³ 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 constraint on state action. For example, in *Abelman v. Booth*, 62 U.S. 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 by immunizing supreme federal actors from interference from inferior state actors. *See id.* at 514-20. However, there is also an additional undercurrent of horizontal federalism, as 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, although 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.

creates a possibility of excessive friction.¹⁴ Likewise, Congress' constitutional power 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,¹⁵ 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.¹⁶

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.¹⁷ One therefore cannot fully understand either of the two dimensions of federalism in isolation. However, even though horizontal and vertical federalism are not mutually exclusive, distinguishing them is still analytically useful: a mathematician cannot comprehend the properties of a triangle without understanding both its horizontal base and its vertical median, and likewise a constitutional scholar cannot understand the complexities of federalism without at least partially disaggregating its structural components of state-state and federal-state relationships.¹⁸

B. Structural Foundations of Horizontal Federalism

Analyzing horizontal federalism jurisprudence 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 in the aggregate 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,¹⁹ and thus

¹⁴ See *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979) ("The few simple 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.").

¹⁵ See U.S. CONST. art. I, §§ 8, 10.

¹⁶ See *id.* at art. I, § 6.

¹⁷ 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 of power, and the separation of national powers remedies centralization with diffusion.

¹⁸ The interweaving of distinct dimensions of federalism 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).

¹⁹ 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

the relevant law exists as an accumulation of context-sensitive doctrines implementing commands scattered throughout the Constitution.²⁰

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

Coequality

Long-established constitutional doctrine holds that all states exist on an “equal footing” and are “equal in power, dignity, and authority.”²¹ The textual basis for this sweeping conclusion is debatable.²² However, the norm of equality seems implicit in the concept of a “Union,”²³ as well as in the equality of state representation in the Senate, which is so integral to the Constitution’s design that it is immune from amendment

much easier that writing a rule attempting to explain how 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.

²⁰ 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 Clause, the Full Faith and Credit Clause, the Commerce Clause, the Privileges and Immunities Clause, and the Equal Protection Clause, 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.

²¹ *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.”).

²² 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.* at art. IV, § 3 (admission of new states); *id.* at 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). Moreover, the Constitutional Convention explicitly and overwhelming 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 constrained from doing so.

²³ U.S. CONST. pmbl.; *id.* at art. IV, § 3.

without each affected state's consent.²⁴ Equality is also 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 weak suffer what they must,"²⁵ which does not seem consistent with the spirit of a Constitution written in the wake of revolution against an imperial power.²⁶

The coequality of states frustrates efforts to cope with horizontal federalism. When states collectively possess a particular type of power, each state has an equivalently strong claim to exercise that power absent some context-specific constraint. Likewise, each state 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 claim 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 readily discernible basis for assessing how the Constitution allocates most powers among the states because the text grants power en masse to the states as whole.

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 possessing equivalent powers constrains 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), but offers no guidance about what to do when "the States respectively" do not respect each other.²⁷ Article IV partially fills the void by specifying how states should react to each other's statutes, judgments, and extradition requests, and how each state should deal with the others' citizens, but these provisions have limited scope and effect.²⁸ The Constitution thus vests the states in the aggregate with an aggregate bundle of powers without explaining how the existence of multiple states affects the exercise of particular powers by any one of them.

²⁴ See *id.* at art. V ("no 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).

²⁵ THUCYDIDES, *THE PELOPONNESIAN WAR* 351 (T.E. Wick ed., Modern Library 1982).

²⁶ 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).

²⁷ U.S. CONST. amend. X.

²⁸ See *id.* at art. IV, § 1; *infra* Part II.

The aggregate power problem is evident in the imprecision of the “spheres” model that courts historically used to explain the structure of American federalism, and that seems to resurface periodically as courts muddle through difficult questions.²⁹ The model posits that the federal and state governments occupy separate “spheres” of authority, with each type of government independent within its own sphere.³⁰ This vision of federalism – apparently borrowed from James Madison³¹ – 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.³² 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 describe limits on state power.

C. Constitutionally Significant Sources of Interstate Friction

The combination of coequality and aggregate power absent a transsubstantive preference rule creates conditions ripe for interstate friction. Some antagonism from

²⁹ 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).

³⁰ 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. This model is hopelessly unrealistic: as noted in Section C, 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 ‘border lines’ 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. 393, 460 (1856) (Nelson, J., concurring, joined by Grier, J.) (“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.”).

³¹ See THE FEDERALIST NO. 39, *supra* note 18, at 245 (James Madison) (states are “no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere”).

³² See Young, *supra* note 29, at 139.

pursuit of mutually inconsistent interests is inevitable, even if shared interests and regional political and economic pressures provide countervailing incentives for states to cooperate.³³ 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.³⁴ Supporters of the Constitution were blunt in warning of the propensity of states to undermine and antagonize each other and the attendant threat of “frequent and violent contests,”³⁵ although these dire predictions may have exaggerated the scope of interstate conflict to justify supplanting the Confederacy with a new Union.³⁶ Eighteenth-century leaders presumably 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 proven valid in myriad contexts over the intervening 220 years.

This section briefly outlines the diverse types of interstate friction that coequality and aggregate power enable. The methodology here is intentionally atextual. Rather than trying to pigeonhole state behavior into doctrinally appropriate categories – e.g.,

³³ See *infra* note 76. Cf. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 367 (J.P. Mayer ed., George Lawrence trans., Harper & Row 1969) (1850) (observing that “patriotism” in the early eighteenth century centered on state rather than national affiliations).

³⁴ See *infra* p. 22. 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, *supra* note 18, at 248, 252 (James Madison) (defining mandate of the Convention in part as “preservation of the union” through “correcting the errors” in the Articles).

³⁵ THE FEDERALIST NO. 6, *supra* note 18, at 54 (Alexander Hamilton); 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”); THE FEDERALIST NO. 5, *supra* note 18, 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”); THE FEDERALIST NO. 45, *supra* note 18, at 288 (James Madison) (arguing that Union was “essential to [the people’s] security against contentions and wars among the different States”); James Madison, *Vices of the Political System of the United States* (Apr. 1787), in 9 THE PAPERS OF JAMES MADISON 345-46 (William T. Hutchinson et al. eds., 1967) (discussing “Trespasses of the States on the Rights of Each Other,” including protectionist tariffs, as one of several justifications for a Constitutional Convention). The Framers were also well aware of the zeal with which partisans could pursue grievances; this was a generation, after all, that had fought a war against its King, and counted among its leaders radicals who accented their abstract point about imperial power to favor British importers by dressing up as Indians, seizing a ship, and dumping its cargo of tea into Boston Harbor. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992) (discussing heated rhetoric and general culture of suspicion and ferment during the revolutionary era); GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 229-43 (1992) (noting potentially destabilizing intellectual trends toward egalitarianism, individualism, anti-intellectualism, and sectionalism).

³⁶ See MERRILL JENSEN, *THE NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, at 339 (1965) (“supporters 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).

behavior affecting interstate commerce, behavior affecting privileges and immunities of state citizens, etc. – I focus on themes uniting discrete behaviors into categories of state action. This approach illustrates 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 II and III then develop this observation and show how ostensibly unrelated provisions of the Constitution that govern (or could govern) horizontal federalism function as an integrated system spanning numerous textual provisions and lines of precedent.

Identifying the most troubling categories of friction-inducing behavior is sufficient to give a flavor of the problems that the constitutional texts discussed in Part II must confront. Of course, not every incident of interstate friction is worthy of constitutional scrutiny. Some competition between states is efficient, while even inefficient competition and jostling might be so minor as to obviate constitutional review in favor of relying on political and market mechanisms to contain disputes.³⁷ In addition, the significance of friction is relative, such that antagonizing some states by discriminating against their interests – if done under federal supervision – can avoid even greater friction or advance a more significant national interest.³⁸ Whatever the tolerable scope of interstate friction might be, understanding different potential manifestations of friction can help in analyzing how the Constitution deters and contains it.

Dominion

Destabilizing conflict can occur when one state attempts to assert sovereign power over another's officers or territory. For example, at least eleven interstate border disputes existed during the Founding era,³⁹ creating simmering tension over the limits of each state's power and a significant risk of armed conflict between rival militias.⁴⁰ Less dramatic potential examples of attempted dominion would include efforts by one state to assert civil jurisdiction over another state, issue writs of habeas corpus to another state, enjoin other states, 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 direct state-state disputes over the scope of territorial authority by creating a federal forum and federal common law for resolving them,⁴¹ and yet on the other it tolerates forcing one state to accede to jurisdiction in another's courts.⁴² Likewise, the

³⁷ See *infra* note 76.

³⁸ For a comprehensive discussion and defense of federally authorized discrimination, see Metzger, *supra* note 2.

³⁹ 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. Tennessee*, 148 U.S. 503, 516 (1893) (noting that state border was marked by trees with hatchet indentations).

⁴⁰ See JENSEN, *supra* note 36, at 330-31, 335-36, 342-44 (noting violent border disputes early in the Confederacy as well as successful efforts at conciliation); THE FEDERALIST NO. 7, *supra* note 18, at 61 (Alexander Hamilton) (fearing settlement of border disputes by “the sword”).

⁴¹ See *infra* pp. 25-26, 37-38.

⁴² See *Nevada v. Hall*, 440 U.S. 410 (1979).

Constitution explicitly compels states to respect each other's extradition demands while apparently allowing them to ignore each other's habeas demands.⁴³ Each of these mechanisms for coping with friction might be defensible, but it is interesting to note in anticipation of Parts II and III how a single basic problem – direct assertions of power by one state over another – implicates diverse doctrines and methods that might each open the others to reevaluation.

Havens

A constant threat to interstate harmony is that one state will tolerate or encourage behavior that others find offensive, and would prefer not to respect. The 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 their newfound 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,⁴⁴ a few states allow same-sex marriages or civil unions that most states prohibit,⁴⁵ and before the Civil War northern and southern states differed over the propriety of slavery and disposition of slaves who crossed state lines.⁴⁶ Here again the Constitution adopts distinct approaches to similar problems: the text includes a general default rule requiring states to respect each other's judicial decrees (which include divorces),⁴⁷ authorizes federal legislation to supplant that default rule (which Congress used in an attempt to limit recognition of same-sex marriages),⁴⁸ and contained an explicit pro-southern preference rule for the disposition of "fugitive slaves."⁴⁹ The

⁴³ Compare U.S. CONST. art. IV, § 2 (Extradition Clause), with *Abelman v. Booth*, 62 U.S. 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) (state may issue habeas writs directed at officers of another state operating within the issuing state's territory).

⁴⁴ 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).

⁴⁵ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (recognizing same-sex marriage); CONN. GEN. STAT. §§ 46b-38aa to 46b-38pp (recognizing same-sex civil unions); N.H. REV. STAT. ANN. §§ 457-A:1 to 457-A:8 (same); N.J. STAT. ANN. §§ 37:1-28 to 37:1-36 (same); VT. STAT. ANN. tit. 15, §§ 1201-1207 (same); CAL. FAM. CODE §§ 297-297.5 (recognizing same-sex domestic partnerships); ME. REV. STAT. ANN. tit. 22, § 2710 (same).

⁴⁶ In addition to relatively well-known tension arising from southern efforts to recapture fugitive slaves, see *infra* note 149, 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).

⁴⁷ See U.S. CONST. art. IV, § 1.

⁴⁸ See *id.*; 28 U.S.C. § 1738C (2000) (Defense of Marriage Act).

⁴⁹ U.S. CONST. art. IV, § 2.

havens problem can also apply when the haven state is part of a permissive majority attracting refugees from a restrictive outlier. The prospect of “travel evasion”⁵⁰ would frustrate efforts by the outlier to enforce its policies and could chill innovations that are prone to circumvention.⁵¹

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 would 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 trans fats in foods,⁵² and California's and Texas' standards for school textbooks.⁵³ As with externalities, there is no clear constitutional constraint on exclusions that indirectly frustrate regulatory objectives in other states,⁵⁴ leaving the problem to political resolution or federal preemption.

⁵⁰ Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 856 (2002).

⁵¹ 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 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. *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).

⁵² *See* Christopher Grimes, *Ban on Trans Fats Seals New York's Tough Reputation*, FIN. TIMES, Dec. 9, 2006, at 7 (noting possibility that national restaurant chains and food producers would adopt New York's standard nationwide).

⁵³ *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).

⁵⁴ 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, 774 (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 choices of other States.” *BMW of N.*

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.⁵⁵ 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.⁵⁶ 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,⁵⁷ using health “quarantine” laws to bar imports from other states,⁵⁸ and shielding local debtors from foreign judgments.⁵⁹ More subtle examples of favoritism include using local residency as a factor in discriminating between businesses competing in local markets,⁶⁰ taxes that fall disproportionately on visitors from out-of-state (such as hotel patrons and car renters),⁶¹ efforts to neutralize the competitive advantage of out-of-state producers with a lower cost structure than in-state producers,⁶² and regulations couched in “public

Am., Inc. v. Gore, 517 U.S. 559, 572 (1996). However, the quoted dicta from *Gore* probably is 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.

⁵⁵ 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, *supra* note 18, at 62-63 (Alexander Hamilton); *see also* 3 FARRAND, *supra* note 22, at 478 (statement by James Madison noting Confederation-era concern about “injustice among the States” arising from parochial “abuse” of power over regional trade).

⁵⁶ *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, 34 (1906) (noting “danger of armed conflict” between state police forces competing to regulate oyster beds); Wharton v. Wise, 153 U.S. 155 (1894) (affirming denial of habeas petition by Maryland resident jailed for harvesting oysters in Virginia); Thompson v. Whitman, 85 U.S. 457 (1873) (affirming judgment for plaintiff in civil action by New York resident challenging 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 Texas resident who violated an Oklahoma statute by attempting to export minnows from Oklahoma to Texas).

⁵⁷ *See* Smith v. Turner, 48 U.S. 283 (1849) (invalidating tax under the Commerce Clause).

⁵⁸ Louisiana v. Texas, 176 U.S. 1 (1900) (dismissing challenge to quarantine on jurisdictional grounds).

⁵⁹ *See* President & Dirs. of the Bank of the State of Ala. v. Dalton, 50 U.S. 522, 527 (1850) (enforcing Mississippi statute that provided limitations period for actions to enforce out-of-state judgments that was shorter than the period for enforcing 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 challenged statute “invites to the State and protects absconding debtors from other States”).

⁶⁰ *See* Metro. Life Ins. Co. v. Ward, 470 U.S. 869, 878 (1985) (invalidating Alabama tax that tried to create a “home team” advantage by taxing out-of-state insurers more heavily than in-state insurers).

⁶¹ *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 statutes “exporting” tax burdens onto non-resident transients).

⁶² *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).

health and safety” terms but tailored to benefit local manufacturers at the expense of importers.⁶³ The nominal victim of such biased or protectionist legislation is usually a private actor rather than another state, 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 rights, have a role in implementing the Constitution’s framework for horizontal federalism.⁶⁴ More generally, the Constitution’s hostility to parochial favoritism helps create a sense of national identity, which in turn avoids creating entrenched regionally-defined factions that would undermine national stability.⁶⁵

Externalities

Interstate friction can arise when one state pursues otherwise lawful objectives that have negative effects in other states. For example, air and water pollution from industrial activity span “natural rather than political boundaries,”⁶⁶ potentially allowing one state to experience the benefits of economic activity while externalizing the costs to neighbors. Similar problems might arise when management (or mismanagement) of a

⁶³ 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”).

⁶⁴ For further discussion of how the Constitution uses rights as an adjunct to more traditional structural constraints on horizontal power, *see infra* Part II.D.

⁶⁵ Friedrich von Hayek noted the basic theoretical problem with intra-systemic 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. von Hayek, *Economic Conditions of Inter-State Federalism*, 5 NEW COMMONWEALTH Q. 131, 133-34 (1939). This observation is slightly in tension with James Madison’s willingness to tolerate state-based factions within a republic, *see* THE FEDERALIST NO. 10, *supra* note 18, at 84 (James Madison), although the tension dissipates if one recognizes that von Hayek and Madison were pursuing distinct inquiries. Von 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 from issue to issue 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).

⁶⁶ *State ex rel. Dyer v. Sims*, 341 U.S. 22, 24 (1951) (rejecting challenge to interstate compact regulating sewage discharge into the Ohio River); *see also Missouri v. Illinois*, 200 U.S. 496, 517-18 (1906) (noting that Illinois law allowing Chicago to dump sewage into a local river sent “1,500 tons of poisonous filth daily” downstream toward Missouri, and was the type of act that in an international context “might lead to war”); *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907) (noting that copper factory in Tennessee spewed “sulphurous acid gas” into Georgia, causing “damage on a considerable scale” to forests and crops).

local economy has ripple effects on workers, consumers, and suppliers in neighboring states. There is obviously no “Externalities Clause” in the Constitution, leaving this problem to legal resolution, if at all, through a hodgepodge of methods, such as statutory or dormant federal preemption, interstate compacts, and diversity litigation.⁶⁷

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.⁶⁸ However, the Constitution does not create any mechanism for one state to compel another to share the costs of mutually beneficial projects, although it is often politically expedient for states to do so voluntarily, occasionally via Article IV’s compacts process.⁶⁹

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.⁷⁰ For example, there was a risk that states would ignore each other’s civil judgments,⁷¹ threaten each other militarily,⁷² or refuse to come to each other’s assistance.⁷³ The Constitution’s Full Faith and Credit Clause and constraints on

⁶⁷ 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.

⁶⁸ 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).

⁶⁹ See, e.g., New York-New Jersey Port Authority Compact, ch. 77, 42 Stat. 174 (1921) (enabling shared administration of regional transportation infrastructure).

⁷⁰ 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, *supra* note 18, at 251 (James Madison). 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 22, at 244-47 (letter from New York delegates to New York governor); 2 FARRAND, *supra* note 22, at 641 (official tally of final vote to approve Constitution, showing absence of Rhode Island and New York).

⁷¹ See, e.g., *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); *Hilton v. Guyot*, 159 U.S. 113, 181 (1895) (noting that before the Revolutionary War colonial courts could question the merits of each others’ judgments); *M’Elmoyle v. Cohen*, 38 U.S. 312, 325 (1839) (noting “uncertainty” during colonial era about whether out-of-state judgments were enforceable).

⁷² See *supra* note 40; *infra* note 114.

⁷³ See KEITH L. DOUGHERTY, COLLECTIVE ACTION UNDER THE ARTICLES OF CONFEDERATION 103-28 (2001) (discussing refusal of some states to assist in suppressing Shay’s Rebellion in Massachusetts).

state militias help – in very different ways – to avoid such friction,⁷⁴ illustrating the mutually reinforcing effect of distinct structural elements of horizontal federalism.⁷⁵

Competition

A more subtle form of rogue behavior can arise in the seemingly benign arena of interstate economic competition.⁷⁶ For example, states can attempt to poach each other's tax base and engines of employment and growth by offering relocation incentives to businesses⁷⁷ or individuals,⁷⁸ or by diluting public welfare regulations to make themselves more hospitable to regulated entities.⁷⁹ Such "races to the bottom" can harm all the competing states as each seeks to outdo the others' concessions or face capital

⁷⁴ See *infra* pp. 20-21, 29.

⁷⁵ In contrast, the Eleventh Amendment impedes resolution of interstate debt cases, illustrating that constitutional provisions sometimes work at cross-purposes. See *infra* pp. 28-29.

⁷⁶ The motive for such 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 Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1989-90 (1997) ("While states still compete with one another, their relations are characterized by a large degree of what international relations 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." (citation omitted)). For general discussions of interstate competition, see JOSEPH F. ZIMMERMAN, *INTERSTATE RELATIONS: THE NEGLECTED DIMENSION OF FEDERALISM* (1996); *COMPETITION AMONG STATES AND LOCAL GOVERNMENTS* (Daphne A. Kenyon & John Kincaid eds., 1991); THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990).

⁷⁷ See, e.g., Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 380 (1996) (discussing "interstate 'bidding wars'" through tax incentives).

⁷⁸ See, e.g., PURCELL, *supra* note 65, at 87 (noting attempted "population grab" by Wisconsin, which sent a "commissioner of immigration" to New York City in the hope of luring new residents).

⁷⁹ 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). *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). Under some circumstances, competition can 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 potential manifestation of interstate competition is the formation of cartels comprised of states seeking to obtain an advantage over non-members. See *infra* pp. 23-24 (discussing role of the Compact Clause in ensuring federal oversight of potential cartels).

flight as a result of inaction.⁸⁰ If all states match 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 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 Congress concludes that a uniform or minimum regulatory baseline is appropriate. Yet the friction-inducing ripple effects that competition can produce in other states 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,⁸¹ 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.

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,⁸² to tax out-of-state property,⁸³ to exercise jurisdiction over non-residents with tenuous local connections,⁸⁴ to control the disposition of land located in other states,⁸⁵ to forbid other states from adjudicating certain civil actions,⁸⁶ and to punish extraterritorial conduct by local actors that was legal in the state where it occurred.⁸⁷ Judicial efforts to constrain

⁸⁰ 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, 1233-34 (1992) (discussing theoretical models of state regulatory and tax behavior that are inconsistent with the race-to-the-bottom theory).

⁸¹ 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").

⁸² See *FTC v. Travelers Health Ass'n*, 362 U.S. 293, 295-96 (1960) (discussing Nebraska statute that purported to regulate the content of communications that local insurers could have with insureds in other states).

⁸³ See *Frick v. Pennsylvania*, 268 U.S. 473 (1925) (holding that Due Process Clause barred Pennsylvania from imposing transfer tax on art in New York owned by the estate of a deceased Pennsylvania domiciliary).

⁸⁴ 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 jurisdiction over the defendant, even though the defendant was an Indiana resident without Minnesota contacts).

⁸⁵ See *Clarke v. Clarke*, 178 U.S. 186 (1900) (holding that a South Carolina court could not assign rights to land in Connecticut).

⁸⁶ See *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, 213 U.S. 55, 70-71 (1909) (allowing Texas court to ignore New Mexico statute that required all 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.

⁸⁷ 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").

such overreaching have led to many of the vague and much-criticized horizontal federalism doctrines discussed in Parts II and III. 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, there is no clear way to define the boundaries of each while respecting the boundaries of the others.

* * *

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 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 have the potential to 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 illuminating (in Part II) horizontal federalism provisions scattered throughout the Constitution’s text, and explaining (in Part III) how ostensibly distinct doctrinal strands share common purposes and methods.

II. CONSTITUTIONAL METHODS FOR ADDRESSING INTERSTATE FRICTION

The Constitution still flourishes 220 years after its adoption, suggesting 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, noting how seemingly unrelated constitutional provisions can be understood as comprising a unified and coherent system for regulating horizontal federalism and thereby preventing or containing interstate friction. Part III 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 I by considering seemingly distinct phenomena from the perspective of horizontal federalism in order to reveal hidden connections. The effect is akin to viewing a landscape through tinted lenses: the distorted perspective helps to illuminate patterns that might otherwise blend into the background. Part I analyzed categories of behavior that could generate interstate friction, while this Part analyzes categories of methods for coping with such friction. Taken together, 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.

By proposing a thematic outline of the Constitution from the perspective of horizontal federalism I do not mean to suggest that my characterizations of specific

clauses are definitive. Such sweeping 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 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. This structural analysis thus lays a foundation for further scholarship incorporating originalist, textualist, or normative methods in the context of specific fact patterns and doctrines.⁸⁸

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 III.

A. Codependence

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 instruments of potential conflict escalation. For example, states cannot print money to finance self-aggrandizement,⁸⁹ must share with the federal government control over militias that

⁸⁸ 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 S. CT. REV. 299, 299 (noting that in “cases involving questions of federalism” the Supreme Court has increasingly 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, 175 (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 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, and thus the analysis here is the first rather than the only or final step in reaching a conclusion about the Constitution’s meaning.

⁸⁹ *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

might threaten neighbors,⁹⁰ rely on jointly-supplied national military forces for protection,⁹¹ have no apparatus for conducting foreign relations,⁹² and have only a limited ability to regulate regional trade.⁹³ Each is also obliged to 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.⁹⁴ American states are thus economically, militarily, and politically hobbled compared to traditional nation-states. This incapacity denies states the means to escalate disputes and creates incentives to cooperate in order to continue receiving the protection and stability that union provides.⁹⁵

markets could not sustain, and states' subsequent refusal to honor that money was a source of "violent opposition" from creditors. JENSEN, *supra* note 36, at 303 (discussing Confederation-era repudiation of revolutionary war debts); *see also* THE FEDERALIST NO. 44, *supra* note 18, at 282 (James Madison) (justifying federal power over currency in part by expressing fear of "animosities . . . among the states" arising from states' manipulation of exchange values).

⁹⁰ *See* U.S. CONST. art. I, § 8; Daniel H. Duedney, *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 explain 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).

⁹¹ *See* U.S. CONST. art. I, § 8.

⁹² The national government appoints and receives ambassadors, *id.* at art. II, §§ 2-3, negotiates and approves treaties, *id.* at art. II, § 2, declares war and issues letters of marque and reprisal, *id.* at art. I, § 8, regulates foreign commerce, *id.*, enforces international law, *id.*, and battles pirates, *id.* In addition to allowing the nation to speak with a single voice on the international stage, the federalization of foreign affairs 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) (Taney, C.J.) ("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).

⁹³ *See* U.S. CONST. art. I, § 8 (Commerce Clause); *id.* at art. I, § 10 (Imposts and Duties Clause); *id.* (Duty of Tonnage Clause). Situating the Commerce Clause in the context of other clauses disabling state power rather than in the context of clauses granting federal power, *see infra* Part II.E, helps to illustrate that dormant preemption of state law is a structural feature of horizontal federalism, and thus helps to explain the constitutional foundation for a seemingly atextual doctrine that many observers do not believe exists. *See* *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 312 (1997) (Scalia, J., concurring) ("the so-called 'negative' Commerce Clause is an unjustified judicial invention, not to be expanded beyond its existing domain").

⁹⁴ *See* U.S. CONST. art. IV, §§ 1-2; Kermit Roosevelt III, *The Myth of 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).

⁹⁵ From a game theory perspective, codependence was a sensible strategy for states to pursue if they lacked mutual trust and feared that unilateral attempts at comity would leave them vulnerable to defection by other states. Disabling themselves from acting independently made defection more difficult, and thus created a stronger foundation for cooperation.

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”⁹⁶ asserted their independence by retaining their own monetary systems, erecting barriers to regional trade, and controlling their own militias.⁹⁷ 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.⁹⁸ As a result, the states restricted their autonomy by lashing themselves to the mast of Union and codependence.⁹⁹ 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.¹⁰⁰

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 prevents interstate sparks from flaring into fires using two distinct mechanisms. 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 ensuring that settlement terms do not create further conflicts. Second, the ‘interstate jurisdiction clauses’ – my term for a cluster of clauses in Article III –

⁹⁶ MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION 1774-1781*, at 117 (1940).

⁹⁷ See, e.g., KOHN, *supra* note 90, 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 26, at 72-76 (discussing 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. 60-66 (2006) (collecting examples of protectionist tariffs).

⁹⁸ See *supra* p. 10; MATSON & ONUF, *supra* note 26, 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.”).

⁹⁹ 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 debt, manufacturers, and merchants – with an interest in creating a national economy. See JENSEN, *supra* note 36, at 344-45. Whatever the precise mix of motives leading states to doubt the wisdom of continued independence, the fact remains that states surrendered substantial autonomy, which had the effect of making interstate conflicts more difficult to instigate and escalate.

¹⁰⁰ 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 a legislature, a chief executive, 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.

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.

Interstate Negotiation Clauses

The interstate negotiation clauses stabilize horizontal federalism in three distinct ways: by permitting some interstate 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. 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, competition over scarce natural resources, allocation of tax revenues, and the regulation of regional transportation and economic activity.¹⁰¹ Second, the State Treaty Clause prohibits any “Treaty, Alliance, or Confederation” between states. 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.¹⁰² However, whatever its precise meaning, the rationale for the clause 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).¹⁰³ The wisdom of the clause becomes apparent if one imagines the likely 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.” Finally, 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’ role in approving interstate compacts is an aspect of horizontal federalism calls into question modern Supreme Court doctrine and helps illuminate 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

¹⁰¹ 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) (collecting examples of compacts). 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.

¹⁰² U.S. Steel Corp. v. Multistate Tax Comm’n, 434 U.S. 452, 463 (1978); 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, *supra* note 18, at 281 (James Madison).

¹⁰³ The clause also bars treaties, alliances, and confederations between states and foreign nations, which threaten federal supremacy in the field of foreign relations and could cause interstate friction if states joined with competing sides in a foreign conflict. See THE FEDERALIST NO. 7, *supra* note 18, at 65 (Alexander Hamilton) (warning that states might become “entangled in all the pernicious labyrinths of European politics and wars”).

potentially destabilize vertical federalism.¹⁰⁴ This interpretation presumes that congressional intervention is necessary only to ensure a “proper balance between federal and state power” that respects “federal supremacy.”¹⁰⁵ 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.¹⁰⁶ The Supreme Court likewise recognized as early 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.¹⁰⁷ 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.”¹⁰⁸ 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.¹⁰⁹ 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.

Interstate Jurisdiction Clauses

When negotiation fails to resolve an interstate dispute, adjudication is often preferable to allowing the conflict to fester or escalate beyond mere rhetoric. However,

¹⁰⁴ 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 (“not all agreements between States are subject to the strictures of the Compact Clause”).

¹⁰⁵ *Id.* at 460, 471; *see also* *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”); *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976). 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 non-member states would provide a basis for requiring congressional approval. *Id.* at 477.

¹⁰⁶ 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 because there is no aggregate empirical data about the horizontal effects of compacts.

¹⁰⁷ *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”).

¹⁰⁸ *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) (“encroachments upon non-compact States are as seriously to be guarded against as encroachments upon the federal authority”).

¹⁰⁹ *See Virginia*, 148 U.S. at 518.

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 garner respect and 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 Clause, the Land Grants Clause, the Admiralty Clause, and the Out-of-State Citizen Clause.¹¹⁰ These jurisdictional grants are also an aspect of vertical federalism because they expand the scope of federal authority 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”¹¹¹ promotes horizontal federalism in at least three ways, although it also can be considered an aspect of vertical federalism that ensures state compliance with federal obligations.¹¹² 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.¹¹³ The Supreme Court has thus long understood its jurisdictional role as arising from “universal conviction of its necessity, in order to produce harmony among the confederated states.”¹¹⁴ Second, the

¹¹⁰ U.S. CONST. art. III, § 2, cl. 3, 5-8. 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 22, at 22 (text of the Virginia Plan); *see also id.* at 238 (statement by Edmund Randolph of “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 FARRAND, *supra* note 22, 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”).

¹¹¹ U.S. CONST. art. III, § 2, cl. 5. The Constitution authorizes original jurisdiction in the Supreme Court, *id.* at art. III, § 2, para. 2, and Congress has made the Court's jurisdiction exclusive, *see* 28 U.S.C. § 1251(a) (2000).

¹¹² *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).

¹¹³ *Cf.* THE FEDERALIST NO. 80, *supra* note 18, at 477 (Alexander Hamilton) (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 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.”).

¹¹⁴ *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 728 (1838); *see also Kansas v. Colorado*, 206 U.S. 46, 97 (1907) (jurisdiction is an alternative to use of “force” by states). The risk of friction and need for neutral 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

clause arguably enables states to 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.¹¹⁵ The Supreme Court has vacillated about whether states have standing to file such actions.¹¹⁶ 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.¹¹⁷

Analyzing the Diversity Clause, which authorizes federal jurisdiction over controversies “between citizens of different states,”¹¹⁸ 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 justify the clause, if at all, because it promotes federal interests by protecting out-of-state citizens (who are also U.S. citizens)¹¹⁹ 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.¹²⁰ Yet concurrent federal jurisdiction over interstate disputes serves an additional goal of promoting

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 boundaries, jurisdiction, or any other cause whatever”); Robert G. 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 conflict” between state militias over border region rich in natural resources).

¹¹⁵ 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 II.D.

¹¹⁶ *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”).

¹¹⁷ *See Rhode Island*, 37 U.S. at 726 (observing that the “resort to judicial power” may “persuad[e]” states to enter compacts”).

¹¹⁸ U.S. CONST. art. III, § 2, cl. 7.

¹¹⁹ *See id.* at amend. XIV, § 1, cl. 1.

¹²⁰ 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).

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.¹²¹ The prospect of private diversity suits entangling state actors or provoking intense state reactions may seem remote today, but was very real in the Founding era, when many diversity actions involved suits by out-of-state residents against state officers enforcing state law,¹²² or addressed matters that were sufficiently significant to excite state interest.¹²³ Even today, commercial disputes involving nationwide conduct can implicate sensitive and conflicting regulatory interests of multiple states, which may partially explain Congress' recent decision to expand the scope of diversity jurisdiction in class actions.¹²⁴ This 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.¹²⁵ 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”¹²⁶ was a vital aspect of interstate conflict-avoidance because these ostensibly private disputes could lead to formal judicial determinations of state

¹²¹ 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, it seems reasonable to assume that if a case is sufficiently important to generate substantial interstate friction, at least one of the parties will have an incentive to escape from the courts of an interested state by 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.

¹²² *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).

¹²³ *See* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 557 (Jonathan Elliot ed., Washington 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 suits could lead to “disputes between the states.”); 2 FARRAND, *supra* note 22, at 147 (reprinting 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, *supra* note 18, at 477 (Alexander Hamilton) (noting that the Diversity Clause was one of several that were “essential to the peace of the Union”).

¹²⁴ *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4-5, 119 Stat. 4, 9-13; Issacharoff & Sharkey, *supra* note 2, at 1416 (contending that expansion of federal jurisdiction reflected concern about “opportunistic state-court oversight of the national market”).

¹²⁵ *See* sources cited *supra* at note 120.

¹²⁶ U.S. CONST. art. III, § 2, cl. 8. Congress vested this jurisdiction in the first judiciary act. *See* Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 80. It remains vested at 28 U.S.C. § 1354 (2000).

borders.¹²⁷ 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.”¹²⁸ Second, admiralty jurisdiction, which is sensibly considered an aspect of vertical federalism,¹²⁹ 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.¹³⁰ 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”¹³¹ attempted to provide a federal forum to address delicate matters that might generate friction – including “war and bloodshed”¹³² – in the hands of state courts. However, the prospect of successful federal litigation by out-of-state creditors seeking to collect Confederate-era debts from nearly insolvent states was so inimical to state interests that the Eleventh Amendment in 1795 partially¹³³ repealed this head of jurisdiction.¹³⁴ Critiques of the Amendment and of the line of precedent

¹²⁷ 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).

¹²⁸ *Town of Pawlet v. Clark*, 13 U.S. (9 Cranch) 292, 323 (1815).

¹²⁹ 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 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. MARITIME L. & COMMERCE 361 (1999).

¹³⁰ 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 Hoyt, *To “Establish Justice”: Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1428-30.

¹³¹ U.S. CONST. art. III, § 2, cl. 6.

¹³² *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 468 (1793) (opinion of Cushing, J.).

¹³³ 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). 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 federal actions seeking to enforce the judgments. See *id.* at 299-300 (finding lack of original jurisdiction in suit by Wisconsin seeking to enforce fine against 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.

¹³⁴ 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 bonds); James E. Pfander, *History and State Suability: An Explanatory Account of the Eleventh*

expanding state immunity from diversity cases to federal question cases¹³⁵ typically frame the problem as an aspect of vertical federalism: immunity carves out an area of state autonomy from federal oversight at the expense of state accountability under federal law.¹³⁶ But viewing the Amendment and its progeny from the perspective of horizontal federalism reveals an additional cost: they relegate potentially volatile cases to state courts that might exacerbate interstate friction,¹³⁷ contrary to four provisions of Article III that attempt to federalize such disputes.¹³⁸

In sum, while courts and commentators typically view the Constitution's interstate negotiation and jurisdiction clauses as aspects of vertical federalism, they can also be helpfully understood as a method for regulating horizontal federalism.

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 deserves 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 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 stoke passions and lead to lingering resentment in the losing state.

First-in-time rules are evident in several constitutional provisions. First, the Full Faith and Credit Clause requires states to enforce final judgments rendered in other states,

Amendment, 83 CORNELL L. REV. 1269, 1324-28 (1998) (contending that states feared being forced to pay debts that: (1) pre-dated 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).

¹³⁵ See *Hans v. Louisiana*, 134 U.S. 1, 10 (1890).

¹³⁶ See, e.g., Amar, *supra* note 1, at 1484-92.

¹³⁷ 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 (1999), but may still be amenable to suit in the courts of other states, see *Nevada v. Hall*, 440 U.S. 410 (1979).

¹³⁸ 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 authority 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 mantle of state dignity rings hollow. For a broader critique of the dignity theory, see Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003).

subject to narrow exceptions allowing the enforcing state to apply its own law of remedies,¹³⁹ or to challenge the rendering state’s jurisdiction over the parties or subject.¹⁴⁰ This rule can create friction 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.¹⁴¹

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,¹⁴²

¹³⁹ See *Anglo-Am. Provision Co. v. Davis Prot. Co.*, 191 U.S. 373 (1903) (state need not provide a remedy in enforcement action between non-residents); *M’Elmoyle v. Cohen*, 38 U.S. 312, 327-28 (1839) (state can apply its own statute of limitations to bar enforcement of foreign judgments).

¹⁴⁰ 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*, 370 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, 709 (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) JUDGMENTS § 12, cmts. a-d (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 courts. See *Kolb v. Feuerstein*, 308 U.S. 433, 438-39 (1940) (allowing collateral attack on state judgment rendered on subject within exclusive jurisdiction of federal bankruptcy court). 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 distinct methods of regulating interstate friction, including: federal legislative power to preempt state law on matters of multistate concern (see *supra* Part II.E), federal judicial power to provide a neutral forum for resolving disputes implicating competing state interests (see *supra* Part II.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.

¹⁴¹ 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 seeks certiorari 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. 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 the 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).

¹⁴² U.S. CONST. art. IV, § 2. The clause applies only when a fugitive “was in fact within the demanding state at the time when the alleged crime was committed.” *Hyatt v. New York ex rel. Corkren*, 188 U.S. 691, 719 (1903).

which in a temporal sense was the state with the first relevant contact.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵

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.¹⁴⁶ The modern relevance of the clause is limited by its odious brutality, its repeal,¹⁴⁷ and the unique position of slavery as a “peculiar institution” that operated beyond generally applicable rule-of-law norms. 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,¹⁴⁸ it did not achieve that goal. Implementing the clause created volatile interstate friction that contributed to the Civil War.¹⁴⁹ 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.¹⁵⁰

¹⁴³ 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” (U.S. CONST. art IV, § 2) and because a factual inquiry into the defendant’s whereabouts before and after the crime seems needlessly tangential. *Cf. id.* at art. III, § 2 & amend. VI (requiring venue and vicinage for federal criminal trials in state where the crime was “committed”).

¹⁴⁴ 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 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”).

¹⁴⁵ *See Milliken v. Meyer*, 311 U.S. 457, 463-64 (1940). The ‘fugitive’ 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.

¹⁴⁶ U.S. CONST. art IV, § 2.

¹⁴⁷ *Id.* at amend. XIII.

¹⁴⁸ *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 return of fugitive 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 46, 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”).

¹⁴⁹ 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 Uses of A Pro-Slavery Decision*, 25 *CIV. WAR HIST.* 5, 22-35 (1979).

¹⁵⁰ 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

D. Individual Empowerment

An often overlooked 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 federal¹⁵¹ or state¹⁵² court. A defining feature of these "horizontal rights" is that they shield individuals from adverse effects of the friction-inducing behavior noted in Part I – 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 or duration of residency,¹⁵³ the right under the Fourteenth Amendment's Privileges and Immunities Clause to travel across state borders for the purpose of resettling,¹⁵⁴ the liberty interest under the Due Process Clause in avoiding personal jurisdiction in a state where the person lacks sufficient contacts,¹⁵⁵ and the right under an ill-defined constellation of clauses to be free from the extraterritorial operation of state laws.¹⁵⁶ Other horizontal federalism provisions of the Constitution that are not typically understood as creating "rights" (such as the

Extradition and Full Faith and Credit Clauses are relatively neutral on substantive questions because policies and principles underlying a state's demand for or resistance to comity will vary from case to case. This 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 an interstate dispute cannot survive the disfavored side's accumulation of super-majority power.

¹⁵¹ 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, § 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, *supra* note 18, at 475 (Alexander Hamilton). State immunity from suit in federal court complicates enforcement when state actors are necessary parties to a suit to enforce federal rights, although exceptions exist that facilitate jurisdiction. *See* *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 407-10 (1821) (exception for appellate jurisdiction); *Ex Parte Young*, 209 U.S. 123, 159-60 (1908) (exception for original suits against state officers seeking prospective relief).

¹⁵² The Supremacy Clause generally obligates state courts to adjudicate federal constitutional claims and defenses and to provide applicable statutory remedies. *See* *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

¹⁵³ *See, e.g.,* *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287 (1998) (invalidating state statute that barred non-residents from receiving a tax deduction available to residents); *Supreme Court of Va. v. Friedman*, 487 U.S. 59 (1988) (barring state from admitting qualified residents to the bar on motion while requiring non-residents 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, 656 (1981) (applying rational basis review to uphold a "retaliatory" tax that calculated local rates based on the rates in a taxpayer's home state).

¹⁵⁴ *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.

¹⁵⁵ *See* *Ins. Corp. of Ir., Ltd. 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.").

¹⁵⁶ *See infra* p. 52.

Dormant Commerce Clause) are also privately enforceable,¹⁵⁷ further cementing a role for individual citizens in the maintenance of constitutional order.

Private enforcement of individual rights is a stabilizing component of horizontal federalism in at least four 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, 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.¹⁵⁸ Third, 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. Finally, requiring states to treat each others’ citizens approximately as well as they treat their own helps establish a national identity that might override or mitigate regional parochialism.¹⁵⁹

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.¹⁶⁰ 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.

¹⁵⁷ See *Dennis v. Higgins*, 498 U.S. 439, 447-48 (1991) (holding that 42 U.S.C. § 1983 provides remedies for violations of “rights” under the Dormant Commerce Clause).

¹⁵⁸ 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) (suit by Minnesota, later joined by individual plaintiffs, against North Dakota Governor under Privileges and Immunities and Commerce Clauses challenging residency requirements for hunting licenses).

¹⁵⁹ See Laycock, *supra* note 2, at 264 (contending that “[i]t is critical to the Union that we continue to think of ourselves as a single people”).

¹⁶⁰ 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. The Plan’s sixth element stated that Congress should have power “to legislate in all cases in which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.” 1 FARRAND, *supra* note 22, 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 “harmony” survived through the early work of the Committee of Detail in July, 2 FARRAND, *supra* note 22, 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 FARRAND, *supra* note 22, at 526-27.

First, the mirror image of denying states broad categories of powers (as discussed in the “codependence” section)¹⁶¹ is vesting these powers in Congress. Whatever merit this allocation of power may have as a matter of purely vertical federalism – i.e., whether these powers in some sense “belong” at the national rather than regional level – there is a clear horizontal justification for excluding states from regulating in areas where conflicting state laws could lead to interstate friction. For example, Congress’ power to create “uniform laws on the subject of bankruptcies”¹⁶² 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.¹⁶³ Likewise, Congress’ power to enact a “uniform Rule of Naturalization”¹⁶⁴ was in part a reaction to “mischievous” disparities between state citizenship standards that allowed states to undermine each other’s immigration policies.¹⁶⁵

Second, the Necessary and Proper and Supremacy Clauses combine to give Congress authority to preempt or displace state law in areas where federal and state power overlaps. 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 state regulation of a particular subject threatens excessive friction by, for example, creating externalities,¹⁶⁶ excessive competition,¹⁶⁷ or havens.¹⁶⁸ 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 does not exist, but fears of horizontal instability can supply an added justification for national action. Concerns about horizontal federalism are thus

¹⁶¹ See *supra* Part II.A.

¹⁶² U.S. CONST. art. I, § 8, cl. 4.

¹⁶³ 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.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1102 (1833) (discussing state preferences for local debtors); BRUCE 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). 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, *supra* note 18, at 271 (James Madison) (noting “frauds where the parties or their property may lie or be removed into different states”).

¹⁶⁴ U.S. CONST. art. I, § 8, cl. 4.

¹⁶⁵ STORY, *supra* note 163, at § 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, *supra* note 18, at 270 (James Madison). Of course, the Naturalization Clause also addresses much deeper questions about the integration of state polities into a national community. See *generally* JAMES H. KETTNER, THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608-1870 (1978).

¹⁶⁶ See 42 U.S.C. §§ 7401-7671 (2000) (creating nationwide clean air standards).

¹⁶⁷ See 29 U.S.C. §§ 201-219 (2000) (creating minimum labor standards immune from dilution through interstate competition).

¹⁶⁸ See 18 U.S.C. § 228 (2000) (facilitating recovery of child support from parents who flee their obligations).

an important, although generally overlooked,¹⁶⁹ 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' veto power over proposed interstate compacts provides leverage in interstate negotiations,¹⁷⁰ its power to create incentives under the Spending Clause can nudge states away from idiosyncratic policies,¹⁷¹ 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),¹⁷² and its power under the first-in-time rules to establish procedures for compliance can mitigate potential friction.¹⁷³ Congress might also have authority to waive states' comity obligations in circumstances where forcing states to recognize competing positions would create friction, although limits on this authority would be necessary to avoid undermining the equal status of states with outlier policies and the interests of state citizens who rely on those policies.¹⁷⁴

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 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,¹⁷⁵ the Fugitive Slave Acts prioritized

¹⁶⁹ For a notable exception, see Issacharoff & Sharkey, *supra* note 2, at 1431 (discussing preemption as a response to interstate "predation").

¹⁷⁰ See *supra* pp. 23-24.

¹⁷¹ U.S. CONST. art. I, § 8. Congress' power to induce state action with incentives is a potential counter-example to the general constitutional theme of promoting interstate harmony through federal intervention because it can put a majority of states in the "no lose" position of forcing the minority to conform or face a competitive disadvantage. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 120 (2001) (discussing how the "political safeguards of federalism" can fail to protect states from congressional action orchestrated by rival state factions). For 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).

¹⁷² 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 26, 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 G. 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).

¹⁷³ See U.S. CONST. art. IV, § 1 (Congress may regulate "Effect" of state law under Full Faith and Credit clause); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 615-16 (1842) (noting congressional power under the Fugitive Slave Clause); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 104-05 (1861) (noting congressional power under the Extradition Clause).

¹⁷⁴ See *infra* note 179 & p. 36.

¹⁷⁵ See 28 U.S.C. § 1738C (2000).

southern interests in capturing fugitive slaves over northern interests in freeing them (or at least in not being instruments of their continued servitude),¹⁷⁶ and numerous federal statutes waive constraints on state authority to regulate specific areas of commerce that spill across their borders.¹⁷⁷ 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,¹⁷⁸ while a competing position views state equality as a structural constraint on federal power that elevates non-discrimination from a constitutional default to a constitutional requirement.¹⁷⁹

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 I have significant extraterritorial effects, such that congressional silence would not be non-discrimination, 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, and thus the possibility that a federal statute may create friction is a factor weighing against Congress’ power to enact it.¹⁸⁰ The structure of horizontal federalism thus both necessitates and constrains congressional power to prioritize competing state interests, although the contours of those constraints are fuzzy and require further development.

¹⁷⁶ 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,” 9 Stat. 462 (1850).

¹⁷⁷ See Metzger, *supra* note 2, at 1472 n.9 (collecting examples).

¹⁷⁸ *Id.* 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 1490-92 & n.81 (discussing competing positions).

¹⁷⁹ See, e.g., Thomas B. Colby, *Revitalizing the Forgotten Uniformity Constraint on the Commerce Power*, 91 VA. L. REV. 249, 256 (2005) (identifying uniformity principle that precludes 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 (Congress lacks power to “legislate away the minimum requirements of mutual respect and recognition”).

¹⁸⁰ 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.* at art. IV, § 3 (precluding congressional majority from creating new states from the territory of existing states); *id.* at art. I, § 9 (precluding congressional majority from favoring one state’s ports). Moreover, protecting equality is an inherently countermajoritarian enterprise. Equality matters most when someone tries to deny it, and efforts to deny it are most likely with majority support. See Baker & Young, *supra* note 171, 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.

Finally, the power of federal courts to create federal common law can be understood in part as an aspect of horizontal federalism. The rationale here is similar to the rationale for the interstate jurisdiction clauses.¹⁸¹ 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 I, 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. Not surprisingly, federal common law applies in precisely these scenarios, such as border disputes (dominion cases),¹⁸² actions involving interstate pollution or the downstream effects of upstream water uses (externality cases),¹⁸³ and disputes over intangible property with multistate contacts (overreaching cases).¹⁸⁴ The constitutional foundation for this judge-made law is debatable. There is no explicit text that courts can purport to be interpreting,¹⁸⁵ and thus separation of powers principles counsel that substantive federal law should emanate from Congress rather than the judiciary.¹⁸⁶ 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. Absent congressional regulation, federal courts become the lawmaker of last resort and must fill the regulatory void rather than allow interstate conflicts to fester.¹⁸⁷

¹⁸¹ See *supra* Part II.B.

¹⁸² See *Cissna v. Tennessee*, 246 U.S. 289, 296 (1918) (discussing “the law of interstate boundaries” as applied to suit by state challenging private citizen’s title to land in border region).

¹⁸³ See *Illinois v. Milwaukee*, 406 U.S. 91, 103 (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.”).

¹⁸⁴ 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.”).

¹⁸⁵ In contrast, judge-made rules that are at least partially 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. 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 Henry P. Monaghan, *Forward: Constitutional Common Law*, 89 HARV. L. REV. 1, 31 (1975) (noting that constitutional interpretation and common lawmaking differ in “degree” rather than kind).

¹⁸⁶ See Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretative Process: An “Institutionalist” Perspective*, 83 NW. L. REV. 761, 792 (1989).

¹⁸⁷ Other scholars have reached a similar conclusion about the legitimacy of federal common law in interstate cases using different analytical approaches. 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, 1076 (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. L. REV. 585, 631 (2006) (federal

Separation of powers concerns about federal legislative/judicial relations are thus tied to distinct concerns about horizontal relationships between states.¹⁸⁸

Recognizing the important role of federal common law within the larger 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,¹⁸⁹ 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),¹⁹⁰

common law avoids states "stack[ing] the deck in favor of themselves"). Aspects of federal common law in admiralty cases involving interstate waters might have a similar justification, *see supra* text accompanying notes 129-130, but other forms of federal common law lacking a nexus with horizontal federalism would still require a separate defense that is beyond the scope of this Article.

¹⁸⁸ 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* pp. 26-27, then arguably those same concerns favor applying federal law, at least in circumstances when applicable state law has a parochial slant that might instigate friction. The *Erie* decision never considered this possibility (which prior precedent 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, while interesting, 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 huge 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 interstate commerce, it is difficult to believe that the Constitution silently confers such broad preemption powers on federal courts. Second, even if one accepts a theoretical power of federal courts to create 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, and thus the *Erie* doctrine could be rejustified as creating a sound policy disclaiming federal preemption as a matter of prudence rather than constitutional infirmity.

¹⁸⁹ 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 Co. 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 (1994) (holding that state court need not apply federal *forum non conveniens* doctrine in admiralty actions). Scholars have suggested that these 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, 187-196 (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 venue rules differ in state and federal diversity actions, but would raise the standard 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 187 (discussing federal common law in interstate relations cases).

¹⁹⁰ This common law 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

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.¹⁹¹ These 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.

* * *

Identifying the distinct methods by which the Constitution regulates horizontal federalism reveals 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 that framework, which leads to the development in Part III of a model for explaining and critiquing jurisprudence implementing these methods.

III. A MODEL OF JUDICIAL APPROACHES TO HORIZONTAL FEDERALISM

Thus far, this Article has established that interstate friction is a systemic problem for which the Constitution provides a systemic response. This insight is useful in framing the structure of horizontal federalism, but cannot itself determine the validity of any

law, while the preemption approach would mitigate forum shopping but would entail a significantly more aggressive assertion of federal power. For a general discussion of whether federal common law choice of law rules could be 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 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).

¹⁹¹ 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 (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 norm underlying the interstate jurisdiction clauses. Another possibility is that entire categories of federal claims could be immune from the common law of immunity. For example, if a federal claim against a state invokes one of the “horizontal rights” discussed in Part II.D, the common law of remedies might deem state immunity fundamentally inconsistent with the nature of the right.

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 and II suggest, can help to explain and improve the doctrines that courts use to manage interstate activity. Section A defines a model for framing judicial arguments, and Section B explores the model's implications.

A systemic approach to the jurisprudence of horizontal federalism 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 reveal 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 and II.¹⁹² 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.¹⁹³ These arguments blur at the margins,¹⁹⁴ but the basic distinctions remain analytically useful.

¹⁹² For discussion of horizontally-based challenges to *federal* regulatory power, see Metzger, *supra* note 2.

¹⁹³ 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 some level of abstraction) all plausible arguments for why the Constitution might prevent a state from taking a particular action.

¹⁹⁴ 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 power is a limit on capacity, a form of centralization, and a source of rights protecting interstate actors from discrimination.

Capacity

In cases with interstate dimensions, the horizontal fragmentation of sovereignty over U.S. territory raises a question about whether a particular state is ‘sovereign enough’ to do what it is trying to do – i.e., whether it has the capacity to act.¹⁹⁵ When capacity is questionable, as in the overreaching scenarios discussed in Part I, the scope of state authority may hinge on inferences from the constitutional structure discussed in Part II.

Arguments based on state capacity are a recurring element in horizontal federalism jurisprudence and an interesting illustration of how slogans and fictions can shape constitutional law. Invocations of capacity tend to rely on two concepts: that states have extensive and exclusive power over entities and activities physically or constructively within their *territory*,¹⁹⁶ and that states may regulate *domiciliaries* even outside their territory.¹⁹⁷ An obvious flaw in this framework is that when a domiciliary of one state acts in the territory of another, both states have interests in regulating the activity. The unstoppable force of one state’s capacity collides with the immovable object of the other’s capacity, yielding doctrine steeped in formality and shallow in reason. For example, courts have 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 that other state,¹⁹⁸ 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,¹⁹⁹ and that states lack authority to dissolve marriages absent at least one spouse’s local domicile even if both nondomiciliary spouses are present in a state’s territory and consent to adjudication.²⁰⁰ These rules may or may not make sense in their particular contexts, but

¹⁹⁵ For discussion of how “sovereignty” is an ambiguous label with context-sensitive meanings, see *supra* note 4.

¹⁹⁶ See, e.g., *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877).

¹⁹⁷ See, e.g., *Curry v. McCannless*, 307 U.S. 357, 366 (1939) (upholding power of state to tax intangible property held outside its territory by a local domiciliary). *But see* *Treichler v. Wisconsin*, 338 U.S. 251, 256-57 (1949) (rejecting power of state to tax land held by a local domiciliary in another state’s territory).

¹⁹⁸ 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 a decision by a state court erroneously exercising jurisdiction over foreign land is now 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).

¹⁹⁹ See *supra* note 133, *infra* note 230, and *tba.*

²⁰⁰ See *Andrews v. Andrews*, 188 U.S. 14, 38 (1903) (holding that 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 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 Full Faith and Credit Clause did not

for present purposes the problem is that the rules are thinly theorized and often rely on sweeping assertions about “the essential nature”²⁰¹ of state power and “constitutional barriers by which all the states are restricted within the orbits of their lawful authority.”²⁰² This rhetoric does not accommodate the practical realities of regulating activity that sprawls across multiple state territories and involves domiciliaries of multiple states, suggesting a need for more nuance and refinement. Thinking broadly about capacity across the different contexts where it is relevant can be a first step to developing a more subtle account of state authority.

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, as 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),²⁰³ arguments framed in the language of rights resonate differently than arguments framed in the language of power.²⁰⁴ 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.²⁰⁵ 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, there are critical practical differences between them. For example, regulated entities can by consent or conduct waive constraints on state power but cannot expand a state’s capacity,²⁰⁶ and the availability of some

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).

²⁰¹ *Andrews*, 188 U.S. at 34.

²⁰² *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).

²⁰³ 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 Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEG. STUD. 725, 730-35 (1998).

²⁰⁴ 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).

²⁰⁵ 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.

²⁰⁶ 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).

constraint arguments can depend on whether the claimant is a person or a corporation.²⁰⁷ 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 I, and invokes the individual empowerment method of constitutional regulation discussed in Part II. For example, the Supreme Court has recognized a liberty interest that constrains personal jurisdiction,²⁰⁸ an expectation interest that constrains choice of law,²⁰⁹ and a right to avoid discrimination based on the existence or duration of state residency.²¹⁰

Centralization

A third line of argument tracks the codependence and federal oversight methods discussed in Part II by invoking federal power to limit state power. The argument has three flavors: 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.²¹¹ The arguments resemble the capacity arguments discussed above, but warrant separate treatment because of their vertical orientation. 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.²¹² Moreover, 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.

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 II resolve this problem 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.²¹³ Likewise, when two states each have subject-matter and personal jurisdiction over a dispute, the state that first produces a judgment can bind the other under the Full Faith

²⁰⁷ See *Paul v. Virginia*, 75 U.S. 168, 177 (1868) (holding that corporations are not “citizens” under Article IV’s Privileges and Immunities Clause).

²⁰⁸ See *infra* note 224.

²⁰⁹ See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 822 (1985).

²¹⁰ See *supra* notes 60, 153.

²¹¹ See *supra* Part II.E.

²¹² For discussion of how horizontal and vertical federalism blur, which complicates drawing neat lines between capacity and centralization arguments, see *supra* pp. 5-6.

²¹³ See *supra* pp. 30-31.

and Credit Clause even if the first state's judgment is clearly wrong on the merits.²¹⁴ But when the Constitution does not provide a clear preference rule, courts must decide whether to create one. For example, in the competition, exclusion, havens, and overreaching scenarios discussed in Part I, competing state regulatory interests could lead a court to require one state to yield to another by inferring a principle of comity²¹⁵ from the structure of horizontal federalism in Part II.

A fascinating aspect of horizontal federalism jurisprudence is that comity rules generally do not exist. The Supreme Court has cited 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.²¹⁶ For example, the rule in both personal jurisdiction 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.²¹⁷ 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.²¹⁸

The dearth of comity rules merits further study. A constitutional common law of comity, if applied with a light touch, would arguably help avoid interstate friction and

²¹⁴ See, e.g., *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (holding that Mississippi courts were obligated to enforce a judgment from Missouri that 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). 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.

²¹⁵ 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. Thus, while the idea of 'mandatory comity' may seem a contradiction in terms, it may be a fitting contradiction for the unusual contours of the United States' multi-dimensional federalism.

²¹⁶ 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 capacity and constraint. See *United Bldg. & Constr. Trades Council v. 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) ("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.

²¹⁷ See *Franchise Tax Bd. v. Hyatt*, 583 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).

²¹⁸ See, e.g., *State Tax Comm'n v. Aldrich*, 316 U.S. 174, 178-79 (1942).

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,²¹⁹ or refraining from aggressive assertions of authority. 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. Congressionally-imposed comity rules might therefore be superior to judicially-imposed rules in at least some categories of cases. 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.

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, comity, and centralization 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.

²¹⁹ For example, courts in some states avoid unnecessary conflicts with other states by presuming that statutes do not apply extraterritorially. *See 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.”); *Union Underwear Co. v. Barnhart*, 50 S.W.3d 188, 190 (Ky. 2001) (noting “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”); *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.”). 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.” (internal quotations and citations omitted)).

Assessing Doctrinal Foundations

Justifying or rejecting an interpretation of the Constitution using capacity, constraint, centralization, or comity arguments (alone or in combination) 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 explicit in judicial opinions because courts do not always recognize the range of available choices.²²⁰ 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 sensibilities of the interpreter. Nevertheless, whatever the best fit may be, one cannot find it without consciously looking for it.

Accordingly, 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,²²¹ to a capacity approach founded in due process,²²² to a constraint approach speckled with capacity arguments,²²³ and then to solely (or nominally) a constraint approach.²²⁴ Having

²²⁰ See *infra* pp. 48-51 (discussing judicial imprecision in framing arguments about horizontal federalism).

²²¹ See *D’Arcy v. Ketchum*, 52 U.S. 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 defense, 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., *Boswell’s Lessee v. Otis*, 50 U.S. 336, 350 (1850) (dicta framing the doctrine in terms of constraints on state power for the “security of absent parties”); *Harris v. Hardeman*, 55 U.S. 334, 339 (1852) (noting that judgment rendered without personal jurisdiction is “void”).

²²² 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 Due Process Clause). Justice Field, the author of *Pennoyer*, in an earlier opinion made the same point about limits on state capacity to serve process extraterritorially without relying on the Due Process Clause. See *Galpin v. Page*, 85 U.S. 350, 367-69 (1873).

²²³ See *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (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) (state forum must be “reasonable, in the context of our federal system of government”); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (stating that personal jurisdiction doctrine prevents states from “reaching out beyond the limits imposed on them by their status as coequal sovereigns in a federal system”).

²²⁴ See *Ins. Corp. of Ir., Ltd. 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.”).

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 criminal act.²²⁵ 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.²²⁶ 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's rationale is that "crime is an offense against the sovereignty of government" and thus states with "separate and independent sources of power and authority" each have capacity to prosecute crimes with a local nexus.²²⁷ 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."²²⁸ This reasoning entirely overlooks the question of constraint, which one might frame as: does the Double Jeopardy Clause, as incorporated against the states by the Due Process Clause, create a structural right limiting the burdens that interstate conflict or collusion may impose on individuals? 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, such as limits on taxation of the same property or income by multiple states,²²⁹ the right of "repose" underlying the Full Faith

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

²²⁶ See 474 U.S. at 87-88.

²²⁷ *Id.* at 88-89. Both states arguably had jurisdiction over the crime because the victim was kidnapped in Alabama and murdered in Georgia. See *id.* at 84.

²²⁸ *Id.* at 92-93. The dissenting Justices' response was not entirely clear, and might have benefited from following the model in Part III.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 sovereign 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.

²²⁹ 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 50% of a business' income, but they cannot each tax 75%. 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.

and Credit Clause’s doctrine of interjurisdictional preclusion in civil disputes,²³⁰ and the Framers’ use of the Bankruptcy Clause to preclude one state from imprisoning persons for debts that another state had discharged.²³¹ These analogies, coupled with a general norm against double jeopardy,²³² suggest that the Court’s reasoning 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.²³³

Identifying Doctrinal Imprecision

A disciplined approach to horizontal federalism can reveal 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 one case or across a line

²³⁰ *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 463 (1982) (interpreting 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, 669 (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 analogue to the Full Faith and Credit Clause, such that both clauses together create a comprehensive first-in-time regime for civil and criminal actions?

²³¹ *See supra* note 163.

²³² *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).

²³³ 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’ enforcement power even if in the process it prohibits conduct which is not itself unconstitutional.”). Congress therefore arguably could 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.

of related cases.²³⁴ 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 v. Gore*²³⁵ is an interesting example of how imprecise reasoning can lead to confusion. The Court in *Gore* reversed an Alabama court's "grossly excessive" \$2,000,000 punitive damages award punishing BMW for allowing a dealer to sell a car without disclosing shipping damage that had required repainting.²³⁶ Alabama clearly had authority to punish the fraudulent sale in Alabama,²³⁷ but had gone further: the jury calculated the award in part by multiplying compensatory damages by 969, which was the number of times BMW had failed to disclose similar damage to cars that it sold in other states.²³⁸ 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.²³⁹ 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.²⁴⁰

The Court held that the extraterritorial sales could not be a multiplier in the damages calculation,²⁴¹ but without clearly explaining 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.²⁴²

²³⁴ 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 II to the manifestations of interstate friction discussed in Part I. 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) (noting that "courts' early resolutions of legal issues can become locked-in and resistant to change").

²³⁵ 517 U.S. 559 (1996).

²³⁶ *Id.* at 562.

²³⁷ *See id.* at 569-70.

²³⁸ *See id.* at 564, 567.

²³⁹ *See id.* at 577-78.

²⁴⁰ 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 567-68. However, the Court apparently was skeptical about whether the state appellate decision fully excised the award's extraterritorial components. *See id.* at 567 n.11 (noting that the state Supreme Court's reasoning should have led to an award of only \$56,000).

²⁴¹ *See id.* at 573-74. Incongruously, 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, and reduce to a curious form of constitutional mathematics in which out-of-state conduct cannot *multiply* damage awards, but can *add* to them.

²⁴² *See id.* at 570-71 & n.16.

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.²⁴³ Even if applying Alabama law to a Mississippi sale were deemed unconstitutional, the rationale would probably be "unfair surprise" to BMW,²⁴⁴ 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.²⁴⁵ 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."²⁴⁶ 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

²⁴³ For example, the Court allowed Minnesota law to govern automobile insurance policies issued in Wisconsin to a Wisconsin resident who died crashing into other Wisconsin residents 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 did 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 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"); RESTATEMENT (SECOND) CONFLICT OF LAWS §§ 145(2)(c), 148(1) (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).

²⁴⁴ *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 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).

²⁴⁵ *See Gore*, 517 U.S. at 573 & n.19.

²⁴⁶ *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).

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.²⁴⁷

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 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 invocation 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 negligently 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 (constraint), its consistency with other state's preferences (comity), or its effect on commerce (centralization). The simplest explanation for the holding is probably that BMW had a legitimate expectation in avoiding punishment for conduct that it reasonably believed to be legal at the time the conduct occurred, and that this expectation constrained Alabama's power. But this 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.

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 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 and II, can facilitate this systemic analysis by revealing 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

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

comity arguments could help determine whether courts should heed calls from scholars to combine or converge inquiries into adjudicative and legislative jurisdiction.²⁴⁸ Likewise, a similar approach might be helpful in unraveling 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.²⁴⁹

The model is also useful for dealing with clusters of fact patterns that raise constitutional concerns without clearly implicating any particular constitutional text. For example, 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.²⁵⁰ 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.²⁵¹ Regan concluded that restraints on extraterritoriality are atextual and rooted in constitutional structure, but did not explain how to weave wisps of structure into judicially enforceable standards.²⁵² The model in this Article suggests one possible approach to filling the textual void by identifying methods of constitutional regulation and forms of constitutional argument that can help translate constitutional structure into constitutional 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,²⁵³ using the Full Faith and Credit Clause to supplant the Due Process Clause in limiting personal jurisdiction,²⁵⁴ and using various formulas to reallocate the

²⁴⁸ See Harold G. Maier & Thomas R. McCoy, *A Unifying Theory for Judicial Jurisdiction and Choice of Law*, 39 AM. J. COMP. L. 249 (1991).

²⁴⁹ See Gerald L. Neuman, *Territorial Discrimination, Equal Protection, and Self-Determination*, 135 U. PA. L. REV. 261, 382 (1987) (discussing both intra- and inter-state 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”).

²⁵⁰ 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, 1887-1895 (1987).

²⁵¹ See, e.g., 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).

²⁵² See Regan, *supra* note 250, at 1885.

²⁵³ See Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425 (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 (2003).

²⁵⁴ 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).

relative weights of clauses that govern choice of law.²⁵⁵ 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 reallocates problems among clauses without resolving deeper structural concerns. The analysis in this Article demonstrates that the many fragments of 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. Variations in language among clauses are an important source of guidance to courts, but sliding problems from silo to silo will not to 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 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. It is tempting when studying discrete legal subjects to think of doctrinal evolution as a function of factors unique to that subject, such that each strand of doctrine has some intrinsic content that animates its development and differentiates it from other strands. However, that view is not realistic when all doctrines derive their content from an adjudicative process overseen by a single institution – 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 tend to ebb and flow through horizontal federalism jurisprudence in a discernable temporal pattern that may help to explain seemingly anomalous doctrinal changes.²⁵⁶ The model thus creates a framework for analyzing the evolution of horizontal federalism within and across distinct eras.

IV. CONCLUSION

Removing horizontal federalism from the shadow of its vertical counterpart reveals an array of problems central to the configuration of American 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 enable refinement

²⁵⁵ See Roosevelt, *supra* note 94, at 2527-33 (discussing relative roles of Full Faith and Credit and Privileges and Immunities Clauses); 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 (1984); Brainard Currie, *The Constitution and the Transitory Cause of Action*, 73 HARV. L. REV. 36, 62-66 (1959) (discussing relative roles of Equal Protection and Full Faith and Credit Clauses).

²⁵⁶ 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). Of course, imprecision in reasoning might still lead to tension even between contemporaneous decisions. 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., Inc.*, 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.”).

or reconsideration of dozens of ostensibly distinct doctrines, and suggest an alternative perspective and new directions for scholarship about the legal consequences of interstate activity.